Materials Accompanying John Hinckley, Jr. Trial

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United States District Court, W.D. Pennsylvania.

UNITED STATES of America
v.
Frederick H. BANKS, Defendant.

Criminal No. 2:15-cr-00168
|
Signed 12/12/2017

Attorneys and Law Firms

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MEMORANDUM ORDER REGARDING COMPETENCY, SELF-REPRESENTATION, BOND/ CONDITIONS OF RELEASE, AND SETTING DATE FOR FILING PRETRIAL MOTIONS

Mark R. Hornak, United States District Judge

***1** Pending before the Court for disposition are three (3) issues—whether the Defendant is competent to stand trial on the criminal charges against him, whether he is competent to waive his right to counsel and represent himself at that criminal trial, and whether his now-renewed motion to be released on bond pending that trial should be granted. For the reasons that follow, the Court finds and concludes that the Defendant is competent to stand trial on the charges against him, that the Defendants is not competent to waive his right to counsel and represent himself at that trial, and that the Defendant is a clear and present danger to the community and others in it and is a flight risk, that no conditions or combination of conditions of release will mitigate such risks, and therefore bond and conditions of release will be denied.

A. Background

The applicable charging document is the Superseding Indictment. ECF No. 96. It charges the Defendant in seven (7) counts. The first alleges a violation of 18 U.S.C §§ 2261A(2) and 2, asserting that the Defendant used various facilities of interstate commerce, including computer and telephonic communication, to intentionally harm a retired FBI agent in Florida, Timothy Pivnichny, who was an investigator in the earlier federal criminal prosecution of the Defendant. Among other things, it is alleged that the Defendant made harassing calls to Pivnichny, and perhaps more seriously, that the Defendant made postings on Craigslist that suggested Pivnichny and/or his spouse were open and available to all comers online for illicit sexual activity, listing personally identifying and location information for Pivnichny's home. Counts Two through Five charge wire fraud in violation of 18 U.S.C. §§ 1343 and 2, related to interlocking schemes allegedly carried out by the Defendant to fraudulently gain the money and property of others in relation to the FOREX.COM international exchange system by submitting phony registration information for himself and then using those registrations to execute bogus trades that would drop money into bank accounts that he had set up. All in, that charged conduct involved millions of dollars in phony deposits/attempted withdrawals by the Defendant. Notably, it appears that the Defendant included in certain statements his facially baseless assertions that he had annual income of more than $36 million and a net worth in excess of $98 million. Count Six charges that he appropriated the personally identifying information of another person to carry out the fraud charged at Count Five. Count Seven charges that in violation of 18 U.S.C. § 1001(a)(3), the Defendant engaged in fraud on this Court when he filed an entirely unauthorized federal habeas corpus petition on behalf of a prisoner held in the Allegheny County (PA) Jail, who was charged with murdering her own children by drowning them. *See* 15-cv-153-AJS (W.D. Pa.). Among other things set out in the core of that petition was that the state prisoner named in that petition had fallen victim to a form of CIA-directed mind control known as "Telepathic Behavior Modification." ECF No. 125. The Defendant has pled not guilty to all charges.

B. Professional Evaluations

***2** Here is how we got to this point. Early on, the Defendant's appointed lawyer suggested to the Court that there was reasonable cause to conclude that the Defendant was not competent to stand trial and to assist in his own defense, as set out at 18 U.S.C. § 4241. The Court agreed, based on its own consideration of the filings of record personally made by

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the Defendant and the Court's extensive personal observations of the Defendant. In the Court's estimation, the Defendant appeared to be materially detached from reality, wholly inappropriate in his conduct, communications and general affect, and consumed, for reasons which to this day remain inexplicable, with the notion that the then-pending (and subsequently superseded) federal criminal charges should all be dismissed because in the Defendant's estimation, the above noted former FBI Agent had set him up in an earlier federal prosecution which long ago became final. On top of that was the Defendant's fixation with the same CIA-induced "voice to skull" telepathic communication referenced above in the case of his allegedly fraudulent habeas petition. Of note, subsequently the Defendant has stated on the record under oath that he has no (zero) factual basis for making that assertion.

In prior proceedings in this Court, the Defendant has been found competent to stand trial and to represent himself. But in prior proceedings at our Court of Appeals when those prior convictions went up on appeal, the Defendant's argued that he was not competent to be tried or to represent himself even though he had in fact stated that he was competent in such regards at the trial court. *See United States v. Banks*, 572 F. App'x 162 (3d Cir. 2014). As a result, given the Defendant's history of personally changing his positions as to his competency, the reality that the Defendant has been professionally evaluated on several occasions, and in response to the issues being raised anew here, this Court ordered a renewed evaluation by board-certified forensic psychiatrist Robert Wettstein, M.D. At the end of that process, Dr. Wettstein concluded that the Defendant suffered from a mental defect or disease, namely that he was psychotic and delusional, and was subject to various forms of delusional and psychotic episodes, ECF No. 75 at 6, but that he could understand the nature and consequences of the charges then pending against him, ECF No. 75 at 9, and could assist his lawyer in his own defense. As to the former opinion, Dr. Wettstein was unequivocal. As to whether the Defendant could competently waive his right to counsel and then represent himself, Dr. Wettstein was far more equivocal, concluding that the Defendant probably could, but that it was a much closer call, and that the decision on that point was much more in the Court's discretion. ECF No. 75 at 10.

Thereafter, the Defendant persisted in personally filing a flurry of docket items, including claims against Pope Francis, Hillary Clinton, Donald Trump (then a private citizen), President Obama, the Secretary of the Interior, and the Administrative Office of the U.S. Courts. The allegations in those filings were facially bizarre and appeared to be unrelated to the charges against the Defendant, the proceedings in this Court, or any form of fundamental reality. Given Dr. Wettstein's diagnoses of psychosis and delusions (including paranoia and the possibility of auditory hallucinations), and the volume, content, and facial irrationality of those filings, the Court directed that all subsequent filings by the Defendant be delivered up to Dr. Wettstein for his consideration. ECF No. 49. Dr. Wettstein then filed a supplemental report which did not alter his findings. ECF No. 108.

Based on the Court's assessment of the situation, and the express invitation of Dr. Wettstein that it would be up to the Court to determine whether there was sufficient space, legally speaking, between the Defendant's diagnoses and conduct and the necessary intervals of cognency to permit him to stand trial and to waive counsel and represent himself, the Court concluded that a second professional opinion was necessary to protect both the rights of the Defendant and the integrity of the judicial process. The Court committed the Defendant to the custody of the Attorney General for the requisite period of time for a further evaluation, to be conducted at the Federal Correctional/Medical Center at Butner, North Carolina ("Butner"). ECF No. 206. That evaluation was completed, and forensic psychologist Dr. Heather Ross opined that the Defendant was so continuously delusional that he was not competent to stand trial, nor to waive his right to counsel and represent himself. ECF No. 159, at 15, 19. That led to the statutory period of restorative treatment at Butner, which then occurred.

***3** At the conclusion of that period, the Warden at Butner filed a certification that the professional staff at Butner, specifically Dr. Allisa Marquez, yet another forensic psychologist, had concluded not only that the Defendant had been restored to competency, but that he had never been incompetent as that term is used at 18 U.S.C. § 4241, in that he did not then suffer from, and in her estimation never had been suffering from, any mental disease or defect but was instead afflicted with a chronic narcissistic and paranoid personality disorder, which would cause him to act out of a disproportionate sense of self grandeur but would not make him incompetent. ECF No. 294. When asked directly about that conclusion by the Court, Dr. Marquez agreed that in essence, the Defendant had been acting all along, could control his thinking and conduct if he chose to, and that his statements and actions, no matter how bizarre and detached

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from reality they appeared, were in his complete control, he was in control of his perceptions and actions, and in short, he had been faking such conduct and always had been. ECF No. 294, at 20, ECF No. 343, at 81–82. [1]

C. The Record Before the Court

The Court has repeatedly solicited the position of both the United States and the Defendant's appointed counsel as to the issues of competency. They have each uniformly and consistently expressed their observation that the Defendant is neither competent to stand trial, nor to waive counsel and represent himself at any such trial. ECF No. 351, at 2; ECF No. 359, at 4. Early on, defense counsel had even reserved the position of asserting an insanity defense on the Defendant's behalf. The principal basis for the positions taken by both trial counsel was that the Defendant has irrationally stuck to his allegiance to the existence of CIA-generated "voice to skull" technology in circumstances in which it would not appear to have anything to do with any possible defense to the seven (7) counts in the Superseding Indictment, nor would its existence be a legally effective avoidance of those charges. [2] Further, counsel also have asserted that the Defendant's incompetency is best demonstrated by his refusal to consider a plea agreement with the Government by which he would be sentenced to "time served" and would thereby walk away from further custody. [3]

The Court has personally and extensively observed the Defendant in multiple hearings, [4] including competency hearings at which the Defendant has been present either in person or by video from the Butner facility and at which Drs. Wettstein, Ross, and Marquez have testified. The Defendant has been in Court for multiple bond hearings and other proceedings. The Court has by fair estimate personally observed the Defendant for in excess of ten (10) hours. While in Court, the Defendant has been permitted by the Court to make repeated statements to the Court under oath. On top of those statements, the Defendant has at every session engaged in self-generated monologues and at times diatribes as against the Court and that on-going process. And notwithstanding warnings and admonitions from the Court, he has chosen to do so in ways that could arguably be self-incriminating as to the charges now pending against him. The Court has seen the Defendant in person on repeated occasions over an extended period of time, and has personally interacted with him both live and in person and over the excellent video link to Butner when the Defendant was there and he participated in that fashion in competency proceedings. The long and the short of it is that this Court has personally observed the Defendant a lot.

***4** But there is more to consider, much more. Since the core issue before the Court centers on the Defendant's competence to understand the nature and consequences of the charges against him, and coupled with that his competency to waive his right to counsel and defend himself, the Court believes that it is duty-bound to consider all of the expressions of the Defendant's own interactions with the federal legal system as they might reflect on those issues. And the Defendant has done just about all that one could possibly do to make that assessment as complicated and extended as might be possible. ECF No. 414. Here's how.

Notwithstanding that the Defendant has been represented by highly experienced legal counsel from the earliest moments in this case, and notwithstanding this Court's repeated admonitions to the Defendant that the Court would consider filings going to the substance of this case only from such counsel, and notwithstanding that this Court has repeatedly entered Orders dismissing Defendant's self-filed motions/petitions/missives without prejudice to their being refiled by counsel, here is what the Defendant has done.

Between the filing of the initial criminal charges and the first competency hearing on January 4, 2016, the Defendant made 20 ECF filings with an additional 7 ECF entries based on his letters and phone calls to the Court and others (such as the President, the Marshal and federal prosecutors). Between the first and second competency hearings, he added 45 formal ECF filings and generated another 13 related entries by his contacts with the Court and others related to his claims. From the second competency hearing to the third competency hearing he added 42 formal ECF filings, with an additional 19 related ECF filings due to his letters and phone calls. Then, notwithstanding the Court's repeated referrals of each of his filings to the then-engaged examining professional, and the Defendant personally hearing Dr. Marquez state that it was her assessment he was essentially faking all of his assertions and was in complete control of his conduct and decisions, he has made 83 formal ECF filings since that hearing on May 1, 2017, to December 10, 2017, coupled with 37 ECF filings based on his letters and phone calls. That all totals 190 formal ECF filings, coupled with ECF notations of 76 other communications with the Court, leading to 266 ECF entries out of the 499 on the docket (and much of the differential

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between those totals is related to this Court's entry of Orders addressing and denying without prejudice those ECF filings by the Defendant).

Over that same period of time, the Defendant has made many of his same assertions in cases he has taken to our Court of Appeals at its docket numbers 17-2727, 17-2614, 17-2590, 17-2544, 17-2198, 17-1017, 16-4433, 16-4203, 16-4182, 16-3933, 16-3794, 16-3091, 16-2453, 15-3787 and 15-3518. And those cases are only the ones this Court could easily identify as being directly related to this case. They do not include the more than one hundred other appeal matters he has filed in that Court in various proceedings over the years. All in, it appears that he has instituted more than 450 matters in the federal courts in the Circuit. He has also litigated prodigiously in the other regional Circuits, with 26 cases in the First Circuit, 28 in the Second, 58 in the Fourth, 139 in the Fifth, 51 in the Sixth, 19 in the Seventh, 57 in the Eighth, 83 in the Ninth, 36 in the Tenth, 56 in the Eleventh, and 43 in the District of Columbia. All in, he has more than 1,000 federal proceedings to his name. [5]

***5** Simply as an example of all that, the Defendant, using a fictitious organization that he created called "Hamilton Brown LLP" [6] has filed proceedings related to these very charges in the federal trial courts in Montana, Massachusetts, Northern Iowa, Nevada, Middle Georgia, Delaware, New Mexico, Arizona, Minnesota, Nebraska, Middle Tennessee, Connecticut, Eastern Kentucky, Southern Indiana, Colorado, Eastern Texas, Hawaii, Northern Texas, Idaho, Southern Florida, Eastern North Carolina, Southern West Virginia, and South Dakota. ECF No. 420. He has also referenced in filings in this Court nearly one hundred civil filings in this and in other Courts that appear to relate his assertions regarding "voice to skull" technology in conjunction with his prior criminal convictions in this Court. ECF Nos. 121-1, 126-1.

While this Court has not intricately reviewed all of the Defendant's filings in all of those federal cases, nor does it believe that it is required to, it has believed it necessary to consider all of the Defendant's filings in this case on this docket, as they are a plain insight into the Defendant's competency status. While it has taken this Court some considerable time to get to the bottom of this situation, the Defendant's own conduct has driven the extensiveness of that examination.

As noted above, those filings on this criminal case docket number in the hundreds, but a sampling of them includes the following:

- ECF No. 311, a request for a subpoena to Ivanka Trump and Steve Bannon relative to President Trump being under FISA Court-ordered surveillance;

- ECF No. 45-1, including a lawsuit against the New York City Police Department/a plethora of deceased Judges of the U.S. Court of Appeals for the Second Circuit/ all of the Judges of the U.S. District Court for the Southern District of New York/most of the Members of the U.S. House and Senate relating to the death of Eric Garner in New York City, a lawsuit against various federal officials seeking $180 million based on Defendant's status as a warlock, and a lawsuit against Senator Robert Casey and his staff seeking the return of property from the Defendant's prior criminal cases, also filed under the handle "Hamilton Brown"; and an Order at 15-cv-1400 in this Court, relating to a civil action filed by the Defendant against Pope Francis and in which the Defendant has been declared a vexatious litigant;

- ECF No. 78, entitled "Pearls Before Swine," designating himself as "Aloysuis Puppyham" and visually depicting court personnel as clowns, pigs and laughing mice;

- ECF No. 193, a filing relative to his claims against the Walt Disney Co. relative to the death a youngster from Nebraska who was attacked and killed by an alligator at Disney World; [7]

- ECF No. 176, a letter granting Defendant a full pardon signed by "Raven Sky" as President of the "United Tribes";

- ECF No. 364, a request for subpoenas for the CIA and the FISA Court relative to the role of "voice to skull" technology in the Defendant's prior criminal cases;

- ECF No. 37, Complaint naming as defendants all of the federal judges of the District of Columbia, and Senators Mitch McConnell and Lindsay Graham re: claims against Agent Pivnichny;

- ECF No. 474, the Defendant's personal "counterproposal" to a plea agreement from the Government in this case;

- ECF No. 352, a letter to a Greek citizen, making reference to the songs of Don Henley and a "billion dollar" claim

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that the Defendant will pursue on behalf of Ivanka Trump;

- ECF No. 90, entitled "Constitutional Heathens" depicting Court personnel in drawings, including of a rat;

- ECF No. 354, relating to Defendant's efforts to recover $1 trillion for the keeping of records about him on White House grounds, also seeking a judgment in this Court in those regards for $20 million;

***6** - ECF No. 374, a filing alleging that the prosecution now before the Court had its genesis in the Defendant's filing of claims in the federal court in Hawaii;

- ECF No. 407, a motion for sanctions against the Government based on the doctrine of "Black Magik";

- ECF No. 410, correspondence with another litigious filer who claims to have filed 12,000+ court cases, advising that that filer will now "start pumping out" similar filings on the Defendant's behalf;

- ECF No. 418, a self-generated "press release" from the Defendant regarding his efforts to get FISA materials relative to his prior convictions;

- ECF No. 435, entitled "American Horror Story," which is a general narrative regarding the Defendant's prior criminal convictions;

- ECF No. 436, a news article referencing civic action in Richmond, California, banning space weapons;

- ECF No. 437, the Defendant's proposed amended plea agreement;

- ECF No. 444, a pleading based on a large, hand-drawn picture of Dr. Marquez by the Defendant;

- ECF No. 445, a pleading centered on a large, hand-drawn picture of Kurt Cobain and the grunge band *Nirvana*, seeking relief as against the CIA;

- ECF No. 455, Defendant's support for bond on the basis that the music performed by his band "Vampire Nation" was non-violent.

D. The Question of Competency to Stand Trial

The questions before this Court are whether the Defendant presently suffers from a mental disease or defect that would prevent him from understanding the nature and consequences of the charges against him and to assist his lawyer in the defense of those charges. Based on the Court's consideration of all of the record material now before the Court, the Court accepts the assessments and conclusions of Drs. Wettstein and Ross that the Defendant suffers from psychosis and delusional ideations that go beyond personality-driven inflated self-grandeur and are a mental disease or defect. The Defendant's expressions of his beliefs and views of the world do not appear to be matters within his control or ability to control given their extensive persistence that, he in fact does not "turn them on and off," and the fact that they have continued unabated no matter how often the Court has advised the Defendant personally that they are both complicating and delaying the ultimate determination of his competency and therefore the disposition of these charges. And over the long sweep of this case, they have persistently involved the Defendant's asserting claims related to these charges (and the prior charges against him) against parties as varied as the U.S. House of Representatives, a dozen or so dead Second Circuit Judges, the Walt Disney Company, Donald Trump (as President and a private citizen), Ivanka Trump, Barack Obama, various judicial officers in this Court and around the country, and on and on and on. Based on the depth, persistence, repetition, and content of those assertions, the Court cannot accept the conclusion of Dr. Marquez that this is merely the result of a personality disorder that the Defendant is fully capable of controlling and which he has chosen not to. Instead, the record before the Court (including the Court's personal observations) reveals that the Defendant appears wholly incapable of controlling his thinking and actions in those regards. [8]

***7** But, at the same time, the Court concurs with the conclusion of Dr. Wettstein that the Defendant is able to understand the nature of these charges against him. In the numerous hearings at which the Court has personally observed the Defendant, he plainly understands the role of each participant in a federal criminal prosecution. While he repeatedly gets his conclusions all wrong, he appears to have a very general knowledge of the federal "Guidelines Sentencing" system. ECF Nos. 290, 438, 439. [9] The Defendant has extended personal experience with the federal criminal justice system based on the prior prosecutions against him, both as to the merits of such criminal charges, and then subsequent supervised release proceedings and merits appeals in our Circuit. He appears to the Court to have

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a reasonable working knowledge of how the federal court system works, but for reasons noted below, he appears to the Court to be wholly detached from any sense of reality as to what those legal processes can accomplish. But as to that last point, that is what he has a lawyer for. The Court concludes that the Defendant is able to actually communicate with his lawyer if he chooses to, and that is he can state and hear in a cogent fashion ideas and principles central to this case. The Court concludes that the Defendant can understand the Court and his lawyer, whether or not he is willing to accept what is told to him, and that he can communicate ideas to his lawyer, whether or not they can be accomplished within the legal process. While he does not agree that he can ever be criminally liable on the pending charges (seemingly and mainly based on his belief that he was "set up" on the prior charges), he appears to understand them and is more than willing to engage in reasonably cogent but extensive and mostly pointless debates about them. ECF No. 419, at 85–98. Combined together, the Court accepts the conclusions of Drs. Wettstein and Ross that the Defendant suffers from a mental disease or defect of psychosis and delusional paranoia, but also accepts the conclusion that the Defendant is competent to be tried.

E. The Question of Competency to Waive the Right to Counsel

That brings us to the second question, which is the Defendant's repeatedly asserted desire to waive representation by counsel and represent himself in the trial of these charges. Both the Supreme Court and our Court of Appeals have stated that ordinarily, if a defendant is competent to be tried, that means as a matter of course that such a defendant is competent to represent himself. But both Courts have also recognized the particularly apt position that a trial court is in to assess such matters, *United States v. Banks*, 572 F. App'x at 164, and that there can be a narrow class of cases in which that parallel conclusion does not hold. *Indiana v. Edwards*, 554 U.S. 164, 175–76 (2008); *United States v. Banks*, 572 F. App'x at 163–64; *see also United States v. Glover*, No. 16-4183, 2017 WL 5664676, at *1–2 (4th Cir. Nov. 27, 2017) (approving revocation of *pro se* status of criminal defendant based on volume and content of voluminous, meritless case filings); *Jordan v. Hepp*, 831 F.3d 837, 844 (7th Cir. 2016); *United States v. Lewis*, 612 Fed. App'x 172, 176 (4th Cir. 2015); *Holland v. Florida*, 775 F.3d 1294, 1313 (11th Cir. 2014). This is just such a case.

What the content and volume of the Defendant's filings demonstrate to this Court is that the Defendant is so detached from the reality as to what can and cannot be accomplished by legal processes that he has sought to assert in the context of a federal criminal trial that he has not knowingly and voluntarily waived his right to be represented by counsel in the defense of these serious criminal charges, and is not capable of doing so. In the Court's estimation, while the Defendant can understand the charges against him, and what can happen to him if he is convicted of them, and that he can assist his lawyer as that lawyer pulls the levers of justice on his behalf in the course of a criminal trial, the Court also concludes that he has no competence to make the decision to give up his right to be represented by a lawyer in that trial and related proceedings in any knowing way. This Court concludes that given the Defendant's persistent detachment from a realistic understanding of what can and cannot be accomplished in the legal system as expressed not only by those filings, but by his recitations in open court in the multiple hearings that this Court has conducted, he cannot knowingly and voluntarily give up his right to counsel, and has not done so here.

***8** To be sure and to be clear, this goes beyond any judicial observation that the Defendant, with "standby counsel" or not, would be unable to competently personally navigate the complex and complicated shoals of a federal criminal defense. He cannot. Rather, it is a finding and conclusion that beyond that, the Defendant has no reality-based understanding of what can be accomplished by legal filings and positions he might personally take in his own defense in federal court. This is exemplified by his unrelenting focus in this case on his perceived facts of the investigation of the prior criminal convictions on the federal criminal charges against him, which have long ago become final and conclusive, [10] coupled with his unrelenting and persistent focus on CIA-managed "voice to skull" technology, a construct as to which he admits he has no factual basis to conclude was ever applied to him, ECF Nos. 111 at 141, 343 at 86–87, and which even if it were, would not be a defense to the charges now pending against him, nor an avoidance of legal liability in regard to them. [11]

And this is also not simply a finding that the Defendant representing himself at trial would generate a wholly ineffective circus of bizarre behavior (although based on his filings and his conduct, it almost certainly would be), or that he would be better represented by a lawyer but is a conclusion that his statements and conduct have demonstrated

to this Court beyond all doubt that his perceptions about what can be accomplished by him in the defense of his case, and his perceptive ability to even attempt to personally accomplish a defense, is no mere volitional choice, as might be extrapolated from Dr. Marquez's opinion. Particularly given the magnitude of the baseless and immaterial content of his filings particularly since the competency hearing at which she testified, the Defendant has no capacity to make any knowing waiver of his right to counsel, as he has no ability to understand what proceedings might be required of him personally as he engaged in self-representation, or to make any necessary legal arguments with any rational basis. ECF No. 159 at 17 (Dr. Ross' opinion that no matter the facts, Defendant will not back off of his CIA "voice to skull" claims). Whatever his capacity might be to regulate his own thinking and behavior in such regards might be theoretically, the record before this Court demonstrates that he has no "self-governor" as to such matters, [12] and simply will not, and importantly cannot, modulate his actions when it comes to presenting matters of legal consequence on his own behalf in a court of law. ECF No. 159 at 18 (describing purely delusional defense strategy)

And, no matter the extensiveness of any conversation or colloquy that this Court has had, or could further have, with the Defendant pursuant to the direction in *United States v. Peppers*, 302 F.3d 120 (3d Cir. 2002), (and this Court has had those conversations extensively and thoroughly), in the Court's estimation the Defendant's mental state (resulting from the mental disease and defects that Drs. Wettstein and Ross diagnosed) is such that he not only cannot, but is not capable of, understanding what it means to give up his right to a lawyer and take on his own criminal defense representation. ECF No. 111 at 126–49. [13] His self-inflated sense of his own abilities, based not on only a personality disorder, but a fundamental mental impairment, puts him in the position of not being capable of sufficiently separating fact from his own delusions so as to make a knowing decision to go it alone at trial. *See* ECF No. 159 at 17 (Defendant will seek $500 million in damages for the electronic harassment of which he has no factual basis). In the Court's estimation, the Defendant's mental state prevents him from knowingly and voluntarily giving up his right to be represented by a lawyer. [14]

F. Defendant's Request for Bond

***9** As to the renewed [15] motion for bond, ECF No. 350, it will be denied. The Defendant has repeatedly demonstrated his ability and willingness to create turmoil to the material and serious personal and economic detriment of others. At the detention hearing before the Magistrate Judge, the record detailed the content of the Craigslist posting attributable to the Defendant aimed at inducing strangers to reach out to retired FBI Agent Pivnichny and his wife at their home in Florida for the purpose of engaging in graphic and explicit sexual conduct. ECF No. 141 at 5. That led to calls to the Agent in response to that advertisement. ECF No. 141 at 6. That record also revealed that the Defendant made wholly unauthorized wire transfers from the bank account of a lawyer in Pittsburgh (for whom the Defendant had previously worked) into an account of the Defendant, ECF No. 141 at 9, and was engaged in using the Internet to defraud a condominium owner in Florida. *Id.* at 12–15. The record also reveals that he has used the Internet to threaten others in connection with the foreclosure sale of his housing in Pittsburgh. *Id.* at 17.

Defendant's amended bond motion reveals that he will not make a commitment to abide by any release conditions of the Court, ECF No. 350 at 2, and when Defendant's counsel expanded on that position at the hearing conducted by this Court, after receiving direction from the Defendant in such regards, that position remained in force, with defense counsel in effect suggesting to the Court that it in essence should "give it a try" and we could see if the Defendant would change his course of conduct toward those he seemingly defines as his enemies by 180 degrees. ECF No. 419 at 36. In the Court's estimation, nothing in the Bail Reform Act, nor its attendant case law, suggests that this Court should experiment in that way with the safety of others or of the community. Further, notwithstanding that he has advanced no legitimate basis to travel outside this District, Defendant's unwillingness to commit to obeying conditions of release would mean that he could go to Florida, where Agent Pivnichny now lives. The Defendant won't agree to abide by any meaningful Internet restrictions, even though that is how he committed the crimes that led to his earlier criminal convictions, and that is the means by which he allegedly committed the crimes charged in six (6) of the pending charges against him. He has no current tangible residential or family connection to this judicial district. ECF No. 419 at 33. The docket and the record reflect that he has advised this Court that he will file 700 cases against it in the federal courts if he does not get his way, ECF No. 402, and the Court notes that he appears to have very recently cooked up a phony involuntary bankruptcy case against FBI Agent Sean Langford, the case agent in this

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prosecution. No. 17-211-JAD (Bankr. Ct., W.D. Pa. 2017). He recently did the same thing as to his own lawyer. *In re Roe*, No. 17-206-JAD, 2017 WL 3448011 (W.D. Pa. Aug. 10, 2017). He has a persistent history and record of violating the terms of supervised release. [16] ECF No. 347. [17]

***10** The prolific federal filings noted above demonstrate that the Defendant is more than willing and capable of carrying out any of his threats of on-line and other harm to others, that there is probable cause based on the charging documents that he has done so here, he has shown his desire to come up with ways to get to Florida when his only stated connection to that locale is the family residence of the target of his alleged retaliatory ardor, Agent Pivnichny, [18] and he has carried out that campaign of retaliation in the Bankruptcy Court of our District as to yet another FBI case agent. There is clear and convincing evidence in the record that the Defendant has been focused on Agent Pivnichny and has now added Agent Langford to his target list, that he has recently republished on the public docket in this Court Pivnichny's personally identifying information and in doing so, republished the Craigslist advertisement that he allegedly generated to steer sexual thrill seekers to the Pivnichny family and residence, ECF No. 416 at 56, and that he will use the legal process here and in many if not all of the other ninety-three (93) federal judicial districts to carry out his campaign of revenge against Pivnichny and anyone else he perceives to be in his way. The Defendant poses a clear threat of economic and related tangible harm to others, [19] and of flight from this District, and no conditions or combination of conditions will secure him from flight, nor protect others and the community, and in the Court's estimation, the United States has demonstrated such by clear and convincing evidence. [20] *United States v. Delker*, 757 F.2d 1390, 1393 (3d Cir. 1985) (threats of harm beyond physical violence are a basis for the denial of bond). The Defendant's renewed Motion for Bond and Conditions of Release, ECF No. 350, will be denied.

G. Conclusions

Based on these findings and conclusions, and as set forth in this Order, the Court concludes that Defendant is competent to stand trial, is not competent to waive his right to counsel, and will not be granted bond and conditions of release. In light of the extreme complexity presented by the representations of the Defendant, all pretrial motions on behalf of the Defendant shall be filed on or before February 16, 2018. Any such motions on behalf of the Defendant shall be filed by counsel only. Any filed by the Defendant himself will be dismissed without further warning or notice. When counsel for the Defendant concludes that he has filed all such motions, he shall file a notice to that effect on the docket. At that point, an omnibus response from the United States shall be filed not later than thirty (30) days from the filing of the above notice. The Defendant may file any reply thereto within fourteen (14) days thereafter. The Court will then by further Order set any necessary hearing as it takes such matters under advisement.

It is further ORDERED that the extension of time caused by this continuance from the date of this Order until February 16, 2018 be deemed excludable delay under the Speedy Trial Act 18 U.S.C. § 3161 et seq. Specifically, the Court finds that the ends of justice served by the granting of such extension outweigh the best interests of the public and the defendant to a speedy trial, 18 U.S.C. § 3161(a)(7)(A). Failure to grant such extension would deny counsel for the defendant the reasonable time necessary for effective preparation, taking into account the exercise of due diligence, the time for the preparation of pretrial motions shall be excluded.

All Citations

Not Reported in Fed. Supp., 2017 WL 11344124

Footnotes

1 There is authority for the proposition that even if the Defendant's condition is characterized as a personality disorder, for purposes of 18 U.S.C. § 4142, he can nonetheless be incompetent on such grounds. *United States v. DeShazer*, 554 F.3d 1281, 1286 (10th Cir. 2009); *United States v. Vazquez*, No. 00-cr-803, 2002 WL 31769703 (S.D.N.Y. Dec. 10, 2002).

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2 Our Court of Appeals has also noted that the Defendant has no evidence that he was ever exposed to any such technology. *United States v. Banks*, 693 F. App'x 119 (3d Cir. 2017) (citing *Banks v. An Unknown Named Number of Federal Judges and United States Covert Gov't Agents*, 562 F. App'x 133, 134 (3d Cir. 2014)).

3 The Court considered on the record whether it was necessary to appoint separate counsel to assert on Defendant's behalf his competency. Based on the Court's extensive and "deep dive" examination and consideration of the voluminous record before the Court, including the vigorous examinations of Drs. Wettstein, Ross and Marquez conducted by Defendant's lawyer (examinations facially consistent with Defendant's self-expressed positions), the Court concludes that Defendant's counsel has more than adequately and legally-sufficiently represented the Defendant's interests in these regards while also fulfilling his professional duty of candor to the Court.

4 Competency hearings were held on December 30, 2015 (Wettstein) (ECF No. 111), September 29, 2016 (Ross) (ECF No. 225), and April 28, 2017 (Marquez) (ECF No. 343).

5 *See* ECF No. 72, in which the Defendant has been designated a vexatious litigant by another member of this Court.

6 At various times, the Defendant has litigated in the federal courts using various names, including Vampire Nation, Frederik Von Hamilton and Frederick Hamilton Banks.

7 The Defendant believes that there is some sort of connection between the tragic death of the toddler in the jaws of that alligator and the shooting rampage at the "Pulse" nightclub in Orlando, Florida. ECF No. 343 at 98--99.

8 Dr. Marquez opined that a truly mentally-ill, delusional person, that is one with a mental disease or defect manifesting delusional thinking, is someone where "everything, everything in their daily life is focused toward, towards proving their delusions." ECF No. 343, at 74. In the Court's estimation, an examination of the record created by the Defendant, particularly since the Marquez competency hearing, profoundly demonstrates the Defendant's unending focus on Agent Pivnichny, his prior convictions, and his fascination with "voice to skull" technology, as to which he admits he has no facts supporting its application to him. Dr. Marquez testified that a delusional person can never "turn it off." ECF No. 343, at 75. The record here is that this Defendant has yet to "turn it off" at least in regard as to anything having to do with the legal system, the federal courts, these or prior charges, and his tangential connections to them of a wide-range of external events, including tragedies in Orlando, President Trump and his family, the Pope and the like. He has not in any way, shape, or form, given them up or modulated his conduct, contrary to Dr. Marquez's observations at Butner. ECF No. 343, at 104–07.

9 What the Defendant gets fundamentally wrong is his assumption that time that he served in regard to prior convictions/supervised release violations would be credited as to any sentence that he might serve if convicted on these pending charges. ECF No. 438, at 1. He also assumes that he would be entitled to a significant downward variance based on the application of the statutory sentencing factors, and assumes that he would be able to re-enroll in the Bureau of Prisons' Residential Drug Treatment Program, successfully complete it, and receive a twelve-month sentence reduction as a result. There is of course no record basis to make any such conclusions, and many of the Defendant's arguments are directly contrary to the provisions of the Sentencing Reform Act and the Guidelines Manual.

10 *United States v. Banks*, 300 F. App'x 145, 147 (3d Cir. 2008). And, even if "his facts" were true as to what went on when that prior investigation occurred, they would not serve as any defense or justification for the charged conduct in this pending prosecution.

11 His counsel agrees that those matters would be no defense to the charges now pending against the Defendant. ECF No. 359 at 7. And the Defendant admits that this case is not a vehicle for him to prove the existence of such technology, notwithstanding that it has been front and center in the great bulk of his filings. ECF No. 343 at 93.

12 *See* ECF No. 419 at 24–25, when contrary to the Court's admonition, he engages in what might be fairly characterized self-incriminatory commentary.

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13 The Court performed the formal *Peppers* colloquy at the competency hearing at which Dr. Wettstein testified. Thereafter, the Court has constantly examined and reassessed the relationship between the factors considered in the *Peppers* colloquy and the Defendant's statements and positions, and has considered them cumulatively in making its findings and conclusions here.

14 The Defendant's appointed counsel has stated that he holds this very same conclusion. ECF No. 116.

15 *See* prior ruling at ECF No. 129 at 4.

16 And at the April 2017 competency hearing which featured the testimony of Dr. Marquez, she testified that while at Burner, the Defendant had internal prison charges preferred against him for using the personal identification number of another prisoner to send that prisoner's money to a bank account in New Jersey and to have the Defendant receive that money back to his benefit. ECF No. 351 at 2 (citing testimony of Dr. Marquez at ECF No. 343 at 27.)

17 Which summarizes that record from criminal prosecutions in this District at docket numbers 03-cr-245 and 04-cr-176, and noting that the Defendant was thrown out of the community confinement center in this District when his supervised release was revoked and he was to be confined there. At No. 03-cr-245, the Defendant was convicted of federal mail fraud, copyright infringement, money laundering, forgery in connection with an investment and witness tampering. Then was sent back to federal prison based on eight (8) counts of mail fraud. *See* ECF Nos. 674, 676 at 03-cr-245 and ECF Nos. 715, 824 at 04-cr-176. *See also, United States v. Banks*, 618 F. App'x 82 (3d Cir. 2015); *United States v. Vampire Nation*, 451 F. 3d 189, 192 (3d Cir. 2006).

18 *See also Banks v. Pivnichny*, No. 15-700, 2015 WL 3938595 (W.D. Pa. June 25, 2015).

19 At this juncture, the Court need not and therefore does not make any finding that the Defendant poses a specific threat of harm to United States Magistrate Judge Cynthia Reed Eddy, who as a practicing lawyer represented Meredith Bondi, who is the object of many of the Defendant's protestations as to Agent Pivnichny's investigation relative to his prior criminal conviction. His threats as to the FBI agents noted above, the record basis to conclude that he has used the Internet and other means of communications to steal money from the bank account of a Pittsburgh lawyer, to engage in a bogus transaction relative to a condo in Florida, to steal money from the account of a fellow prisoner at Butner, and to now file a phony involuntary bankruptcy proceeding as against the FBI case agent in this case is more than enough to demonstrate by clear and convincing evidence that he poses a very real danger of very real harm to others and to the community, and all of that, coupled with his prior record of persistent supervised release violations demonstrates to the Court that he would be a profound flight risk. The record before the Court demonstrates that he will not follow any rules other than his own, and that no conditions or combination of conditions would secure his conduct on attendance.

20 The Magistrate Judge so concluded when he held the original bond hearing, and the more robust record now before the Court only amplifies the factual and legal basis for those findings and conclusions.

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599 Pa. 1
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Richard Scott BAUMHAMMERS, Appellant.

Argued March 5, 2008.
|
Decided Nov. 20, 2008.

Synopsis
Background: Defendant was convicted following jury trial in the Court of Common Pleas, Criminal Division, Allegheny County, Nos. CP–02–CR–0014712–2000, CP–02–CR–0014713–2000, and CP–02–CR–0014714–2000 Jeffrey A. Manning, J., of offenses including five counts of first-degree murder and was sentenced to death. Defendant filed capital direct appeal.

Holdings: The Supreme Court, No. 513 CAP, McCaffery, J., held that:

murder convictions were supported by evidence;

State Supreme Court decision abrogating the "relaxed waiver rule" applied to defendant's appeal;

trial court did not err in sustaining defendant's objection to a change in venue or venire panel;

alleged violation of notice provisions in Wiretap Act did not require suppression of telephone conversation between defendant and his parents;

cross-examination of defendant's expert witness concerning his failure to consult with another potential expert whom defendant decided not to call in support of insanity defense did not implicate work-product doctrine or violate attorney-client protections or right to effective assistance of counsel;

trial court did not abuse its discretion in refusing to allow chief psychiatrist at behavior clinic arm of common pleas court to testify at sentencing phase about two asserted mitigating factors;

Commonwealth did not raise issue of future dangerousness so as to require an instruction that a life sentence meant life imprisonment without possibility of parole;

personal accounts describing impact that murders had on surviving family members was admissible at sentencing phase; and

death sentences were not the product of passion, prejudice, or any other arbitrary factor, and evidence supported aggravating circumstances.

Affirmed.

Saylor, J., filed a concurring opinion.

Todd, J., filed a concurring opinion.

Attorneys and Law Firms

****66** Francesco Lino Nepa, Michael Wayne Streily, Pitttsburgh, Allegheny County District Attorney's Office, Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania.

****67** Thomas Farrell, for Richard Scott Baumhammers.

Before: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, MCCAFFERY, JJ.

13** ***OPINION

Justice McCAFFERY.

This is a capital direct appeal from judgments of sentence imposed by the Court of Common Pleas of Allegheny County on May 12 and September 6, 2001. Because we conclude that the issues raised by Appellant are without merit, we affirm the judgments of sentence.

On April 28, 2000, during a crime spree lasting approximately two hours, Appellant, Richard Baumhammers, shot and killed Anita Gordon, Anil Thakur, Ji–Ye Sun, Thao Pak Pham, and Garry Lee. He also seriously wounded Sandip Patel, pointed his loaded pistol at George Thomas II, set fire to Mrs. Gordon's house by using an incendiary device, desecrated one synagogue by defacing it with red spray paint and shooting bullets into it, and desecrated a second synagogue by shooting bullets into it. Appellant was arrested on the day of the crime

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spree and was found to have in his possession a .357 caliber handgun, spent .357 caliber shell casings, live .357 caliber ammunition, two Molotov cocktails, a can of red spray paint, ***14** and a roadmap. Appellant was charged with five counts of homicide, one count of attempted homicide, one count of aggravated assault, one count of simple assault, one count of recklessly endangering another person, eight counts of ethnic intimidation, two counts of institutional vandalism, two counts of criminal mischief, three counts of arson, and one count of carrying a firearm without a license. At the time of the filings of the criminal informations, the Commonwealth gave Appellant notice of its intention to seek the death penalty and of the aggravating circumstances supporting the death penalty on which it intended to rely.

Following a competency hearing held on May 9, 2000, the trial court determined that Appellant was mentally incompetent and ordered his transfer to a state hospital for treatment. Following a subsequent competency hearing held on September 15, 2000, the trial court determined that treatment had rendered Appellant competent to stand trial. A jury trial on the charges was thereafter held from April 27 to May 9, 2001. During trial, Appellant did not dispute that he had shot the victims; rather, he presented evidence that he had done so while suffering from a mental disease. The jury rejected Appellant's insanity defense and returned a verdict of guilty on the five counts of first-degree murder and on all of the remaining charges.

From May 10 to May 11, 2001, the penalty phase of the trial was held. The Commonwealth presented two aggravating circumstances pursuant to 42 Pa.C.S. § 9711(d)(7) and (11).[1] Appellant presented five mitigating circumstances pursuant to 42 Pa.C.S. § 9711(e)(1), (2), (3), (5), and (8).[2] The jury found ***15** that the Commonwealth ****68** had proven the two aggravating circumstances, and that Appellant had proven three of the five mitigating circumstances. However, the jury also determined that the aggravating circumstances outweighed the mitigating circumstances and returned sentences of death as mandated by law. *See* 42 Pa.C.S. § 9711(c)(iv) (providing in relevant part that the verdict must be a sentence of death if the jury unanimously finds one or more aggravating circumstances that outweigh any mitigating circumstances). Sentencing on the non-capital offenses, as well as the formal imposition of the death sentences was deferred pending the preparation of a pre-sentence report. On September 6, 2001, the sentencing court formally imposed the five sentences of death and further imposed a total term of imprisonment on the non-homicide convictions of 112 ½ to 225 years. On December 29, 2005, the court denied Appellant's post-sentence motions, and Appellant filed the instant direct appeal wherein he raises sixteen issues for this Court's review, which we shall address following our mandatory review of the sufficiency of the evidence for the first-degree murder convictions.

I. Sufficiency of the Evidence

In all death penalty direct appeals, whether or not the appellant specifically raises the issue, this Court reviews the evidence to ensure that it is sufficient to support the conviction or convictions of first-degree murder. *Commonwealth v. Blakeney,* 596 Pa. 510, 946 A.2d 645, 651 n. 3 (2008).

> Evidence presented at trial is sufficient when, viewed in the light most favorable to the Commonwealth as verdict winner, the evidence and all reasonable inferences derived therefrom are sufficient to establish all elements of the offense beyond a reasonable doubt. In the case of first-degree murder, a person is guilty when the Commonwealth ***16** proves that: (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill. An intentional killing is a killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing. The Commonwealth may prove that a killing was intentional solely through circumstantial evidence. The finder of fact may infer that the defendant had the specific intent to kill the victim based on the defendant's use of a deadly weapon upon a vital part of the victim's body.

Id. at 651–52 (citations and quotation marks omitted).

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Further, in reviewing whether the evidence was sufficient to support the first-degree murder conviction or convictions, the entire trial record should be evaluated and all evidence received considered. *Commonwealth v. Cousar,* 593 Pa. 204, 928 A.2d 1025, 1032–33 (2007), *cert. denied,* 553 U.S. 1035, 128 S.Ct. 2429, 171 L.Ed.2d 235 (2008). In addition, we note that "the trier of fact, while passing upon the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence." *Id.* at 1033.

****69** Here, Appellant has not raised an issue regarding the sufficiency of the evidence; however, our independent review compels the conclusion that the evidence adduced at trial overwhelmingly supports Appellant's convictions for first-degree murder. The evidence established that at approximately 1:40 p.m. on April 28, 2000, Mt. Lebanon firefighters responded to an activated fire alarm set off at the Gordon residence at 788 Elm Spring Road, Mt. Lebanon. The responding firefighters, and police officers who later arrived at the scene, discovered at this residence the body of Anita Gordon, an Orthodox Jew, who had been shot multiple times in the chest, abdomen, and both hands, and who exhibited no signs of life. An incendiary device known as a Molotov cocktail was also discovered as having been thrown and ignited in a first-floor bedroom of the Gordon residence. During the discovery of the violence perpetrated at the Gordon residence, police began to receive reports regarding other nearby acts of violence, ***17** specifically, shootings occurring at the Beth El Synagogue, 1.3 miles from the Gordon residence, and at the Scott Towne Center, a strip mall less than one mile from the synagogue. These reports identified the shooter as a white male driving a black Jeep.

While these reports were coming in, Officer Mary Susan Joyce was interviewing neighbors of Anita Gordon. Officer Joyce was questioning Inese Baumhammers, Appellant's mother, when Officer Joyce received a radio dispatch that the vehicle used in the reported shootings was a black Jeep registered to an individual named Baumhammers. Officer Joyce asked Ms. Baumhammers if she owned a black Jeep. Ms. Baumhammers replied that she did and that her son, Appellant herein, was then using the vehicle.

With respect to the first of two synagogue incidents, Susan Finder, a worshipper at Beth El Synagogue, testified that sometime after 1:20 p.m. on April 28, 2000, she was leaving the parking lot of the synagogue when she observed a black Jeep pull into the lot. Finder was able to identify Appellant as the driver of the Jeep. Dennis Wisniewski testified that on the day of the incident he was stopped at a red light three car lengths from the synagogue when he heard a bang and turned to see a man matching Appellant's description discharging five or six pistol rounds into the synagogue. Wisniewski testified that he then observed the shooter walk casually back to a black Jeep Cherokee. Philip Balk, a member of the synagogue, testified that at approximately 2:00 p.m., he arrived at the scene to observe that windows had been broken out and that a swastika and the word "Jew" had been spray-painted in red paint on the building. Detective Edward Adams of the Allegheny County Police testified that when he arrived at the synagogue at approximately 2:50 p.m., he observed the broken glass and the desecration with the red spray paint. He also observed two bullet holes in some of the glass and bullet fragments in the synagogue's vestibule.

Regarding the shooting at the Scott Towne Center, Joseph Lanuka testified that at approximately 1:30 p.m. on April 28, 2000, he dropped off Anil Thakur at the India Grocery, an ***18** establishment in the shopping mall. Lanuka told Thakur that he would be back in fifteen minutes to pick him up. When Lanuka returned, he saw police entering the grocery store and Thakur's grocery bag lying on the ground. Lanuka went into the store and saw Thakur lying on the ground with three or four bullet holes in his chest. He also saw a man lying behind the counter, who was identified at trial as Sandip Patel. Thakur died from his wounds and Patel was paralyzed ****70** from his neck down as a result of the gunshots he had received. Also regarding this incident, John McClusky testified that at approximately 1:45 p.m., he heard a noise, which he ascertained were gunshots, and observed Appellant pointing a gun at an individual who ran past Appellant into the grocery store. Appellant turned and followed the man into the store; McClusky then heard three more gunshots. Appellant left the establishment, made eye contact with McClusky, and then walked slowly, calmly, and collectedly toward a lower area of the mall parking lot. McClusky then observed Appellant drive away in a normal fashion in a black Jeep Cherokee. Jennifer Lynn Fowler also testified that she witnessed the events described by McClusky.

A second synagogue incident occurred that afternoon at the Ahavath Achim Synagogue in Carnegie, approximately 2.1 miles from the Scott Towne Center. Carole Swed testified that at approximately 2:00 p.m. she was stopped at a traffic light across the street from the synagogue. Swed heard two loud pops and turned to observe Appellant, with a calm demeanor, standing outside of the synagogue. She observed him fire several shots into the synagogue, then get into a

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black Jeep and drive away. Swed was able to record the license plate number of the Jeep, and she promptly provided this information to the police, whom she immediately called. Detective Edward Fisher of the Allegheny County Police testified that when he arrived at the synagogue, he observed five bullet holes in the structure, including one in a flyer advertising a meeting of Holocaust survivors that was scheduled at the synagogue.

***19** David Tucker testified that between 2:15 and 2:30 p.m. on April 28, 2000, he was the lone diner at the Ya–Fei Chinese Restaurant in the Robinson Towne Center, a strip mall located approximately ten minutes away by car from the Ahavath Achim Synagogue. In the restaurant at the time was Ji–Ye Sun, the restaurant manager, and Thao Pak Pham, a delivery person. During this period, Appellant walked into the restaurant carrying a briefcase. Appellant and Pham had a verbal exchange, and then Tucker saw Pham begin to run. Tucker testified that Appellant pulled a pistol from his case and shot Pham in the back as he was running past Tucker. Sun was shot in the chest. Although paramedics arrived quickly at the establishment, both Pham and Sun died from their gunshot wounds.

George Lester Thomas II testified that at approximately 2:40 p.m., he met his best friend, Garry Lee, at the C.S. Kim Karate Studio, located in the Center Stage Shopping Center, which was not a far distance from the Robinson Towne Center. Both men were warming up in the studio when Appellant entered and pointed a handgun at Thomas. Appellant did not shoot but turned the gun in the direction of Lee, who was standing next to Thomas. Appellant shot Lee twice in the chest and then calmly walked away as Thomas ran to the back of the studio in an effort to summon help. However, Lee died from his gunshot wounds. Thomas is white; Lee was black.

Diane Wenzig, the owner of a pizza shop two doors away from the karate studio, testified that she observed Appellant walk into the karate studio with a gun in one hand and a briefcase in the other. After hearing the gunshots, Wenzig instructed her son to call 911. Wenzig observed Appellant get into a black Jeep Cherokee, whose license plate number she recorded and provided to the police.

Following the report of this incident, Officer John Fratangeli of the City of Aliquippa Police Department was instructed to station himself on the Aliquippa–Ambridge Bridge along ***20** Route 51 so that he ****71** could intercept Appellant. [3] Officer Fratangeli testified that at approximately 3:10 p.m., he observed Appellant's black Jeep Cherokee turn onto the bridge. Appellant was not driving erratically; in fact, he was driving within the speed limit and using proper turn signals. Officer Fratangeli followed Appellant's vehicle, and when assisting units arrived, he initiated a traffic stop, two blocks from another synagogue. Appellant was arrested and his .357 caliber pistol was found in a soft-sided briefcase in the Jeep. A criminologist with the Allegheny County Coroner's Office testified that forensic tests confirmed that the bullets recovered from the bodies of Anita Gordon, Anil Thakur, Ji–Ye Sun, Thao Pak Pam, and Garry Lee had all been discharged from Appellant's weapon.

At trial, the Commonwealth also introduced the testimony of Appellant's cellmates at different correctional facilities. Bobby Jo Eckles testified that Appellant told him that he had "shot a nigger" and that Appellant made other derogatory comments regarding blacks and Jews. David Brazell testified that Appellant told him that he had killed Anita Gordon "to make a statement" and that he had desecrated the Beth El Synagogue because that was where Mrs. Gordon had worshipped. Other fellow inmates testified that Appellant spoke of his anti-immigration and pro-segregation views, his desire to start a white supremacist party, and his hatred for all "ethnic" people.

The foregoing evidence was amply sufficient to permit the jury to conclude, beyond a reasonable doubt, that Appellant intentionally, deliberately, and with premeditation killed Anita Gordon, Anil Thakur, Ji–Ye Sun, Thao Pak Pam, and Garry Lee. Each of these victims was unlawfully killed; Appellant committed the killings; and the mere fact that Appellant shot four of the victims in the chest, sometimes several times, was sufficient to permit the jury to find a specific intent to kill. Additional evidence of Appellant's specific intent to kill included (1) the statements he later made ***21** indicating his desire to "make a statement" by his shooting of Mrs. Gordon; (2) his disparagement of the ethnicities of the victims; and (3) his violent desecration of synagogues.

Having determined that the evidence overwhelmingly supports his first-degree murder convictions, we now turn to Appellant's claims.

II. Relaxed Waiver Rule

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Although Appellant does not concede that any issue in this appeal was not timely raised and preserved below, he has anticipated, correctly, that the Commonwealth argues that many of his issues were not preserved and are thus waived. In anticipation of the Commonwealth's argument that certain of his issues are waived, Appellant contends that we should address the merits of such issues under the "relaxed waiver rule." Appellant acknowledges that we abrogated the relaxed waiver rule in *Commonwealth v. Freeman,* 573 Pa. 532, 827 A.2d 385 (2003), well prior to his 2006 appeal. However, because his case was tried before *Freeman's* effective date, Appellant contends that it "makes sense" that he should reap the advantages of the rule because his trial counsel **might** have anticipated its application on appeal. Appellant's Brief at 20. Further, Appellant contends that all of his issues, save one, were "raised below" in his post-sentence motions, even if not during trial or on pre-trial motions. [4] Finally, Appellant asks that we invoke our discretion to review waived claims and, in particular, consider ****72** that his claims rise to the level of "primary constitutional magnitude." *Id.* at 21.

Prior to *Freeman,* this Court would address, **in its discretion,** issues in capital appeals not preserved below pursuant to a practice we referred to as the relaxed waiver rule. *See, e.g., Freeman, supra* at 400 (citing to several capital cases where we reviewed otherwise waived issues under the relaxed waiver rule). However, in *Freeman,* we abolished this rule, holding

> that, as a general rule on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable. Such claims may be pursued ***22** under the [Post Conviction Relief Act (PCRA)], as claims sounding in trial counsel's ineffectiveness or, if applicable, a statutory exception to the PCRA's waiver provision. This general rule ... reaffirms this Court's general approach to the requirements of issue preservation.... [A]n assumption has arisen that all waived claims are available for review in the first instance on direct appeal. The general rule shall now be that they are not. In adopting the new rule, we do not foreclose the possibility that a capital appellant may be able to describe why a particular waived claim is of such primary constitutional magnitude that it should be reached on appeal. Indeed, nothing ... shall ... call[ ] into question the bedrock principles ... concerning the necessity of reaching fundamental and plainly meritorious constitutional issues irrespective, even, of the litigation preferences of the parties. Consistently with our [practice], however, we leave the specific articulation of any future exception to the actual case or controversy in which that "rare" claim arises.

Id. at 402.

Further, we made our new "rule" prospective, holding that the relaxed waiver rule would continue to apply only to those capital cases then briefed or in the process of being briefed. *Id.* at 403. Because we held that our **new** rule would apply to those cases in which the appellant's brief had not yet been filed in this Court and was not due for thirty days or more after the May 30, 2003 filing date of *Freeman,* all cases where the appellant's brief was due to be filed after June 28, 2003, or had not been filed by that date, were subject to our **new** rule. *Id.; see also Cousar, supra* at 1043.

In the instant case, Appellant was tried for capital murder prior to the effective date of the new rule set forth in *Freeman.* However, Appellant filed his notice of appeal on February 28, 2006, well after the effective date of the new rule established in *Freeman.* Therefore, the relaxed waiver rule clearly does not apply to Appellant's issues, even though Appellant's trial occurred prior to the effective date of the new rule. *See Commonwealth v. Moore,* 594 Pa. 619, 937 A.2d 1062, 1066 (2007) (holding that *Freeman* barred application of ***23** the relaxed waiver rule where the appellant was convicted in 1999, prior to *Freeman,* but the appeal was filed after the effective date of the new rule set forth in *Freeman*); and *Cousar, supra* at 1043 (holding that *Freeman* barred application of the relaxed waiver rule where the appellant was convicted in 2001, prior to *Freeman,* but the appeal was filed

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after the effective date of the new rule set forth in *Freeman*). Therefore, Appellant's "waived claims may be considered, if at all, only as components of a challenge to trial counsel's stewardship." *Moore, supra* at 1066.

Moreover, the specific reasons asserted by Appellant for applying the relaxed waiver rule here are easily rejected. Appellant ****73** first argues that the relaxed waiver rule should be applied because trial counsel would have anticipated its application on appeal. However, "this Court has long emphasized that the relaxed waiver rule did not exist to permit capital defendants and their counsel to deliberately avoid raising contemporaneous objections." *Freeman, supra* at 403.

Appellant next argues that those objections not contemporaneously raised below were nevertheless "raised in the lower court" by virtue of having been set forth in post-sentence motions. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Appellant has failed to show that Rule 302(a) has ever been interpreted as meaning that issues may be raised **at any time** during the lower court proceedings in order to preserve them. Rather, it is axiomatic that issues are preserved when objections are made timely to the error or offense. *See Commonwealth v. May,* 584 Pa. 640, 887 A.2d 750, 761 (2005) (holding that an "absence of contemporaneous objections renders" an appellant's claims waived); and *Commonwealth v. Bruce,* 207 Pa.Super. 4, 916 A.2d 657, 671 (2007), *appeal denied,* 593 Pa. 754, 932 A.2d 74 (2007) (holding that a "failure to offer a timely and specific objection results in waiver of" the claim). Therefore, we shall consider any issue waived where Appellant failed to assert a timely objection.

***24** Finally, Appellant argues that we should review even waived claims if they rise to the level of "primary constitutional magnitude." Indeed, in *Freeman,* we specifically reserved the practice of "reaching fundamental and plainly meritorious constitutional issues irrespective, even, of the litigation preferences of the parties." *Freeman, supra* at 402. However, with respect to what are his "fundamental and plainly meritorious constitutional issues," Appellant references only his arguments concerning whether sentencing a mentally ill person to death and whether lethal injection constitutes cruel and unusual punishment. Appellant's Brief at 21–22; *see* discussion *infra* with respect to these issues. As shall be discussed *infra,* we do not agree that Appellant has raised any "fundamental and plainly meritorious constitutional issues." We therefore proceed to address Appellant's properly preserved substantive issues from both the guilt phase and sentencing phase of trial.

III. Change of Venue or Venire

Appellant argues that the trial court erred by not *sua sponte* ordering either a change of venue or an out-of-county venire panel despite the fact that trial counsel **specifically opposed** a change of venue or a change of the venire panel to persons outside of the county. Moreover, Appellant makes this argument despite the additional fact that the trial court, after conducting an evidentiary hearing on the issue of pre-trial publicity that included testimony given by an investigator hired by the court, granted Appellant's **specific request** to have the matter tried within Allegheny County with an Allegheny County jury.

As the facts make plain, this case was one of the most notorious in the history of Allegheny County, and was extensively covered by the media. [5] Not only was ****74** there significant pre-trial local news coverage of the events of April 28, 2000, ***25** but there was also coverage concerning the impact the crimes had on Sandip Patel, who was paralyzed, and on the survivors of those who had been killed. Many news stories also concerned the state of Appellant's mental health.

Anticipating that there could be difficulties in selecting an impartial jury in such an atmosphere, the trial court conducted a "testing of the venire" hearing on February 21, 2001. That hearing established that 102 of 107 potential jurors responded that they had read about, heard and seen on TV, or otherwise had personal knowledge of the events of April 28, 2000. Seventy-five of the 102 knowledgeable potential jurors indicated that they could not be fair and impartial if selected to serve on Appellant's jury. On March 15, 2001, the court conducted a second testing of the venire hearing at which a private investigator, hired by the court to examine local news coverage of the case, testified in detail as to the extent of local news coverage of the case. This second potential jury pool reflected knowledge and attitudes similar in proportion to that of the potential jury pool of the first hearing.

The evidence set forth at the hearings gave the trial court misgivings about selecting a jury panel from Allegheny County. Trial Court Opinion, dated March 26, 2001, at 21. However, at the March 15, 2001 hearing, Appellant

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specifically objected to a change in venire and specifically requested that the jury be selected from the citizens of Allegheny County, explaining that his trial strategy would be best served by having a local jury. Despite its concerns, the trial court acceded to Appellant's request, noting that not to do so would simply provide Appellant with an appeal issue for which a new trial would be requested. *Id.* Nevertheless, the trial court held another pre-trial hearing on April 11, 2001, at which the trial judge conducted a colloquy with Appellant, who unequivocally stated to the court that he understood the ramifications of selecting a jury from Allegheny County, but supported his counsel's decision to oppose a change of venire. It should be noted that Appellant is a former, non-practicing attorney.

Appellant now argues, as he did in post-trial motions, that the trial court erred by (1) failing to *sua sponte* deny Appellant's ***26** objection to a change in venire; and (2) denying Appellant's **post-trial** request to hold an evidentiary hearing to consider the fairness of the trial as viewed through the testimony of Appellant's proffered expert witness. Dr. Edward Bronstein, a professor of political science, would have purportedly testified on behalf of Appellant that it was the professor's "strong opinion that the media coverage of the case raised the most serious concerns about the fair trial rights of [Appellant]." Appellant's Brief at 26.

However, Appellant is now arguing that the trial court **erred by granting** Appellant's direct objection to any change in venue or the venire panel, an objection lodged in pursuit of a particular trial strategy devised by Appellant. At the very least, Appellant must be considered to have waived his argument, as he clearly did not raise a timely objection to the trial court's refusal to order a change in venire. Thus, despite Appellant's argument that the trial court should have ***sua sponte*** ordered a change in venire, Appellant is essentially arguing that the court erred by sustaining Appellant's own objection. Thus, his argument must be deemed waived. Because Appellant's primary argument ****75** is waived, his subsidiary argument that the trial court erred by refusing to conduct a post-sentence motion to take testimony from Dr. Bronstein is without merit. [6]

We note further that in rejecting Appellant's post-sentence argument on this issue, the trial court specifically determined "that the record of the jury selection process established that it was possible to select a jury untainted by prejudicial pre-trial publicity. Such a jury was, in fact, selected in this matter." Trial Court Opinion, dated December 29, 2005, at 5. Here, Appellant utterly fails to dispute this determination by identifying any evidence in the record establishing or indicating that the jury **actually selected in this case** was biased or tainted by pre-trial publicity. Therefore, even if ***27** Appellant had not waived his argument, we would find no basis for relief.

In a similar vein, it is significant to note, as our now-Chief Justice has observed, that "[t]he trial judge is not an advocate, but a neutral arbiter interposed between the parties and their advocates.... With certain rare exceptions ... the trial judge is not duty-bound to raise additional arguments on behalf of one party or another such that, if and when the judge fails to do so, he has 'erred.' " *Commonwealth v. Overby,* 570 Pa. 328, 809 A.2d 295, 316 (2002) (Castille, J., dissenting); *see also* *Commonwealth v. Pachipko,* 450 Pa.Super. 677, 677 A.2d 1247, 1249 (1996) (noting that it is "clearly inappropriate" for a trial judge to raise an issue on behalf of a party and act as an advocate for that party). This observation simply mirrors that made by the United States Supreme Court, which determined:

> In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.

Dennis v. United States, 384 U.S. 855, 875, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966) (quoted with approval in *Commonwealth v. Edwards,* 535 Pa. 575, 637 A.2d 259, 261 (1993)). Indeed, in *Edwards,* we announced that it would be in the future ***per se*** **reversible error** if a judge instructs the jury concerning a defendant's right not to testify when the defendant has requested that no such instruction be given. *Edwards, supra* at 261. Similarly, it was not the place of the trial judge here to direct Appellant to pursue a different trial strategy when Appellant's chosen trial strategy was not violative of the law or our rules of procedure. In light of the above, we cannot determine that the trial court erred by sustaining Appellant's objection to a change in venue or venire.

IV. Striking of Three Jurors from the Venire Panel

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Appellant argues that he is entitled to a new capital sentencing hearing because the Commonwealth's pre-trial striking from the jury panel of three "otherwise qualified jurors," who had expressed their opposition to the death ***28** penalty, allegedly resulted in the empanelling of a jury partial to the Commonwealth's request for the death sentence. Appellant's Brief at 28. Appellant notes that the United States Supreme Court has held that "a challenge for cause cannot be sustained based merely upon a venire person's voicing of general objections to the death penalty or expression of conscientious or religious scruples against its imposition." ****76** *Witherspoon v. Illinois,* 391 U.S. 510, 521–22, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *see also* *Commonwealth v. Uderra,* 580 Pa. 492, 862 A.2d 74, 81 (2004) (quoting *Witherspoon*).

However, the record plainly shows that Appellant failed to timely object to the Commonwealth's challenges for cause to the three prospective jurors identified by Appellant as "otherwise qualified."[7] An appellant waives any issue concerning the striking of a venire person when he or she fails to object to a challenge for cause, even when the issue is "of constitutional dimension." *Commonwealth v. Peterkin,* 511 Pa. 299, 513 A.2d 373, 378 (1986); *see also* *Commonwealth v. Lewis,* 523 Pa. 466, 567 A.2d 1376, 1381 (1989) (holding that a failure to preserve an objection to the exclusion of a potential juror for cause results in waiver of the issue, even under the relaxed waiver rule); *Commonwealth v. Szuchon,* 506 Pa. 228, 484 A.2d 1365, 1379–80 (1984) (holding that even when prospective jurors are excluded for simply voicing a general opposition to or discomfort with the death penalty, defense counsel's failure to object to the striking for cause of such prospective jurors results in waiver of the issue). Accordingly, we conclude that this issue is waived.

V. Search of Appellant's House and Seizure of his Personal Items

Appellant contends that the police violated his rights under the Fourth Amendment of the United States Constitution and ***29** Article I, § 8 of the Pennsylvania Constitution by conducting a search of his house and effecting a seizure of personal items. Although the search was made pursuant to a search warrant as well as with the consent of Appellant's parents, Appellant argues that (1) the warrant allowing for a broad search for material was overbroad and not based on probable cause that such material was contraband or evidence of a crime; and (2) the consent for the search was invalid. Among the items seized from Appellant's house was his desktop computer. Pursuant to a subsequently issued warrant, the police examined the file contents of the computer, which revealed evidence of Appellant's racist and anti-immigrant philosophies. That evidence was later used by the Commonwealth at trial.

However, Appellant never filed a motion to suppress the evidence he now claims was impermissibly seized by the police. Pennsylvania Rule of Criminal Procedure 581 addresses the right of a criminal defendant to move to suppress evidence alleged to have been obtained in violation of his or her rights, and sets forth the procedure attendant to the disposition of a suppression motion. Rule 581(D) requires that a suppression motion state with specificity and particularity the evidence sought to be suppressed. Rule 581(B) provides: "If timely motion [for suppression of evidence] is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived."

This Court has consistently affirmed the principle that a defendant waives the ground of suppressibility as a basis for opposition to the Commonwealth's introduction of evidence when he or she fails to file a suppression motion pursuant to our rules of criminal procedure. *See, e.g.,* ****77** *Commonwealth v. Simmons,* 482 Pa. 496, 394 A.2d 431, 435 (1978) (holding that the specificity requirement of the suppression rule is mandatory, and therefore the failure to object to specific evidence in a suppression motion results in waiver of any argument that such evidence should have been suppressed); *Commonwealth v. Williams,* 454 Pa. 261, 311 A.2d 920, 921 (1973) (holding that any objection to the introduction of evidence on constitutional grounds is waived in the absence of the filing of a suppression ***30** motion pursuant to the applicable rule of criminal procedure). Accordingly, we determine that Appellant has also waived his claim that the evidence seized from his house should have been suppressed.

VI. Recording of Telephone Conversation

At trial, the Commonwealth introduced into evidence a recording of a telephone conversation made March 2, 2001, at the Allegheny County Jail between Appellant, then an inmate

of the jail, and his parents, during which the parents appeared to accuse Appellant of being a racist. The Commonwealth's psychiatric expert in some part relied upon this recording in forming his opinion that Appellant had acted from racist motives rather than from a mental illness. Appellant had moved to suppress the evidence of the telephone conversation pre-trial, arguing that it violated Section 5704(14) of the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act), 18 Pa.C.S. § 5704(14), because there had purportedly been no written notification that the conversation would be recorded. [8] Appellant also argued that Section 5704(14) of the Wiretap Act was violated a second time when the contents of the recorded conversation were divulged to a detective and the Commonwealth's psychiatric expert.

In denying the suppression motion, the court found that the evidence established that inmates generally receive notice in two ways that their outgoing telephone conversations are ***31** recorded: (1) through written notice in the prison handbook; and (2) through a computer-generated message on the telephone itself that is audible to both the inmate and the party on the other end of the conversation. Further, the court found that evidence adduced at the hearing established that Appellant and his parents were **actually aware** that their telephone conversations were being recorded. Indeed, during the March 2, 2001 conversation, Appellant's father warned Appellant that the conversation was being recorded by prison authorities. Finally, the court determined that the contents of the conversation were properly divulged pursuant to the Wiretap Act's directive that contents of recorded conversations may be divulged in connection with "the prosecution or investigation of any crime." ****78** 18 Pa.C.S. § 5704(14)(i)(C). [9] Accordingly, the court determined that the Wiretap Act had not been violated because Appellant had received prior written and aural notice—and had actual notice as well—that his telephone conversations were being recorded by prison personnel, and because the contents of the conversation were divulged in conformance with the statute.

Post-trial, Appellant's new counsel, after reviewing a copy of the prison handbook, determined that the handbook did not actually contain written notice that prison telephone conversations are recorded, as had been found factually by the suppression court. Appellant's new counsel also obtained an affidavit from the head of operations at the jail when Appellant was incarcerated there, who confirmed that the prison handbook did not contain written notice to inmates regarding the interception and recording of their telephone conversations. Based on this information, Appellant argued in post-trial motions, as he is arguing now before us, that the telephone conversation at issue was made in violation of Section 5704(14)(i)(A) of the Wiretap Act, as that section requires ***32** **written,** not other, notice. The trial court rejected this argument, noting that the fact that Appellant **actually knew** that his conversation was being recorded controlled the disposition of the issue. Further, the court determined that Section 5704(14)(i)(A) of the Wiretap Act did not require written notice to every inmate individually, but only prior written notice to the existing inmates before a correctional facility could implement a program of intercepting and recording inmate telephone conversations. This determination was based on the court's reading of the subparagraph relied on by Appellant for his argument, to wit, "**Before the implementation of this paragraph,** all inmates of the facility shall be notified in writing that, **as of the effective date of this paragraph,** their telephone conversations may be intercepted, recorded, monitored or divulged." 18 Pa.C.S. § 5704(14)(i)(A) (emphasis added). [10]

Appellant now renews his arguments to this Court, contending that it was irrelevant that he was under actual notice that his telephone conversation was being intercepted and recorded, when the statute required that he receive prior written notice. [11] In making this argument, Appellant ****79** relies upon our case law holding that the requirements of the Wiretap Act must be strictly adhered to and that a defendant ***33** need not establish prejudice prior to obtaining relief. *See, e.g., Commonwealth v. Hashem,* 526 Pa. 199, 584 A.2d 1378, 1381–82 (1991) (applying a completely different section of the Wiretap Act, namely Section 5718, pertaining to disclosure to the defendant of court-authorized intercepts). We cannot agree with the conclusions Appellant reaches.

Appellant is certainly correct that because the Wiretap Act infringes upon the constitutional right to privacy, its provisions are strictly construed. *See Kopko v. Miller,* 586 Pa. 170, 892 A.2d 766, 772 (2006). However, this principle does not compel a reviewing court to abandon all recognition of the facts before it or to ignore the principle that statutes are not to be construed in a manner that would yield an absurd result. *See* 1 Pa.C.S. § 1922(1)

(providing that in ascertaining the intent of the General Assembly in the enactment of a statute, it is presumed that the General Assembly did not intend a result that is absurd or unreasonable). Simply stated, there is no basis to conclude that the privacy rights of Appellant or his parents were infringed when their March 2, 2001 telephone conversation was recorded. These individuals were actually aware that their telephone conversation was being or could be intercepted and recorded by prison authorities. Written notice to Appellant, assuming he never received any, would not have afforded him any greater protection of his right to privacy or that of his parents than the actual notice they possessed at the time of the conversation. Therefore, on this basis alone, Appellant's argument is wholly without merit.

Finally, there is no basis for Appellant's supplemental argument that Section 5704(14)(i)(C) of the Wiretap Act was violated when the contents of the telephone conversation at issue were divulged to an investigating detective and to the Commonwealth's psychiatric expert. Section 5704(14)(i)(C) provides:

> (C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a ***34** court order or in the prosecution or investigation of any crime.

18 Pa.C.S. § 5704(14)(i)(C).

Appellant avers that Section 5704(14)(i)(C) is ambiguously written and should be interpreted in a manner that permits disclosure only "to safeguard the orderly operation of the facility." However, a plain reading of this section refutes this contention. This section provides that a recording of a telephone conversation involving an inmate may be divulged under **any** of three instances: (1) only as is necessary to safeguard the orderly operation of the facility; (2) pursuant to a court order; or (3) in the prosecution or investigation of any crime. The March 2, 2001 conversation was divulged pursuant to the third circumstance. Appellant has failed to cite to any authority that would compel a result where a properly intercepted and recorded conversation is prohibited from being used in the prosecution or investigation of any crime. Therefore, we conclude that the trial court correctly determined that no violation of Section 5704(14)(i)(C) occurred.

VII. Cross–Examination of Dr. Merikangas

Prior to trial, Appellant's counsel consulted with forensic psychiatrist, Robert Wettstein, M.D., who on several occasions had interviewed Appellant after his crime spree. Appellant ultimately decided not to ****80** call Dr. Wettstein to testify, but instead relied principally upon the expert testimony of another psychiatric expert, James R. Merikangas, M.D., in support of his insanity defense. Dr. Merikangas had **not** consulted with Dr. Wettstein in arriving at his conclusions. At a pre-trial hearing, the trial court ruled that Dr. Wettstein's notes could not be examined or used by the Commonwealth because they consisted of attorney-client and attorney work-product protected documents. Indeed, it appears that the Commonwealth never obtained Dr. Wettstein's notes, records, or report. However, at trial and over Appellant's objection, the trial court permitted the Commonwealth to cross-examine Dr. Merikangas concerning his failure to consult with Dr. Wettstein. ***35** Appellant specifically identifies the following testimony as prejudicial:

> Q. [Commonwealth]: He [Dr. Wettstein] interviewed [Appellant], didn't he?
>
> A. [Dr. Merikangas]: If you say so.
>
> Q. Well, what if [Appellant] on that date would have said that he wasn't hearing voices, I just hate blacks, wouldn't that be important for you to know?
>
> A. If that were the case. I don't know what happened.
>
> Q. Well, that's right, you don't know because you didn't talk to Wettstein, isn't that right?

Notes of Testimony ("N.T.") Trial, 5/4/01, at 1500. It is important to note that Appellant does not argue that by this questioning, the Commonwealth divulged the contents of Dr. Wettstein's report or notes. Rather, Appellant argues that the Commonwealth's questions "suggested that, like the prosecution's expert, Dr. Welner, Dr. Wettstein believed that [Appellant] was a malingerer and a racist." Appellant's Brief at 48.

In overruling Appellant's objection to the Commonwealth's questions pertaining to Dr. Wettstein, the trial court determined that such questioning did not violate the court's pre-trial ruling prohibiting the Commonwealth's acquisition and use of Dr. Wettstein's report or invade the area of confidential exchanges between Appellant and Dr. Wettstein. Rather, the court determined that the questioning was relevant both to the issue of Dr. Merikangas's possible bias and the foundation for his opinion. The issue of potential bias related to previously disclosed evidence that Appellant had stated to a cellmate that he had two psychiatric experts, and that he had chosen the one that was more favorable to his case while rejecting the other. The issue of the foundation for Dr. Merikangas's opinions pertained to the degree to which this witness had explored records and psychiatric evaluations of other psychiatric professionals in order to obtain a more complete picture of Appellant's mental state. The court determined that the Commonwealth could explore these issues without delving into ***36** the substance of Dr. Wettstein's reports and records. N.T. Trial, 5/4/01, at 1496.

Appellant now argues that the information the Commonwealth was attempting to elicit from Dr. Merikangas concerned confidential communications that took place between Appellant and Dr. Wettstein, and for this reason is protected by (1) work-product and (2) attorney-client privileges, and (3) the Sixth Amendment right to effective assistance of counsel. We shall examine Appellant's theories and apply them to the facts *seriatim.*

(1) The work-product doctrine was adopted by this Court and placed into practical effect in Pa.R.Crim.P. 573(G), which reads as follows:

> [Pre-trial d]isclosure shall not be required of legal research or of records, ****81** correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

See *Commonwealth v. Kennedy,* 583 Pa. 208, 876 A.2d 939, 946 (2005) (explaining that the general work-product doctrine as recognized by United States Supreme Court case law was adopted by this Court in the context of pre-trial discovery in criminal matters and delineated in Pa.R.Crim.P. 573(G)).

Further, the rules of criminal procedure pertaining to pre-trial discovery generally protect the work-product of agents hired by defense attorneys. *Id.* at 946–47. *See* Pa.R.Crim.P. 573(C)(1)(a) (providing that upon the Commonwealth's filing of a motion for pre-trial discovery, the trial court may order the defendant, subject to his or her right to be free from compulsory self-incrimination, to divulge reports or test results that the defendant intends to introduce into evidence or which were prepared by a witness whom the defendant intends to call to testify at trial). [12] Pa.R.Crim.P. 573(C) does not require the defendant to disclose reports prepared by a witness whom he or she does not intend to produce at trial.

***37** In *Kennedy, supra,* we extended the principles of the work-product doctrine from the realm of pre-trial discovery to the course of the trial itself, specifically holding

> that a practical application of the work-product doctrine to trial in criminal proceedings prevents the Commonwealth from calling as a witness an agent who[m] the defense hired in preparation for trial but decided not to call as a witness at trial[,] or to use the materials prepared by the agent as evidence at trial, unless the Commonwealth can show a substantial need for such testimony and an inability to obtain the substantial equivalent of such testimony without undue hardship. Consequently, absent these showings, a trial court may not compel such testimony.

Id. at 948–49 (footnote omitted).

In the case *sub judice,* the Commonwealth never obtained any reports or notes of Dr. Wettstein, nor did the Commonwealth call Dr. Wettstein to testify. Therefore, the work-product protections that this Court has extended to defendants by rule

of criminal procedure or case law were not violated. The mere questioning of one expert witness as to whether his failure to consult with another witness who was not called afforded a full view upon which to base an expert opinion does not implicate the work-product doctrine as defined and applied by this Court.

(2) Appellant's arguments concerning alleged violations of attorney-client privileges and his right to effective assistance of counsel appear to be two sides of the same coin. A criminal defendant is protected by the benefits of an attorney-client privilege; also, he or she is constitutionally entitled to effective assistance of counsel. *Commonwealth v. Chmiel,* 558 Pa. 478, 738 A.2d 406, 422–23 (1999). Our Superior Court, based on federal case law, has determined that the attorney-client privilege in criminal matters extends to communications made between the defendant and an agent hired by the defendant's attorney to provide legal assistance. *Commonwealth v. Noll,* 443 Pa.Super. 602, 662 A.2d 1123, 1126 (1995). The court stated, ****82** "This privilege protects those disclosures ***38** that are necessary to obtain informed legal advice which might not have been made absent the privilege. This privilege *only* applies where the [defendant's] ultimate goal is legal advice." *Id.* (citing *In re Grand Jury Matter,* 147 F.R.D. 82, 84 (E.D.Pa.1992); emphasis in original).

Notably, Appellant does not suggest or argue how the Commonwealth obtained and then divulged to the jury any legal advice given by Dr. Wettstein as an agent for Appellant's attorney. Again, the Commonwealth never obtained any reports or notes of Dr. Wettstein, nor did the Commonwealth call Dr. Wettstein to testify, nor did the Commonwealth introduce evidence of Dr. Wettstein's advice to Appellant, if he gave any, through any other witness. There is no basis for the claim that Appellant's attorney-client protections were violated by the Commonwealth's cross-examination of Dr. Merikangas.

(3) With regard to a criminal defendant's right to effective assistance of counsel within the context of the issue Appellant raises herein, the Third Circuit Court of Appeals has stated:

> The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.

United States v. Alvarez, 519 F.2d 1036, 1046–47 (3d Cir.1975).

The *Alvarez* court also couched its concern over such disclosures in terms that related to violation of the attorney-client ***39** privilege. Indeed, *Alvarez* has been interpreted as reading a broad attorney-client privilege into the Sixth Amendment requirement of effective counsel. *See* *Noggle v. Marshall,* 706 F.2d 1408, 1413 (6th Cir.1983); *see also* *State v. Mingo,* 77 N.J. 576, 587, 392 A.2d 590, 595–96 (1978) (finding a similarity between the attorney-client privilege and the Sixth Amendment right to effective assistance of counsel, and holding that reliance upon the confidentiality of an expert's advice is a critical aspect of a defense attorney's ability to consult with and advise his or her client). [13] Hence, Appellant's arguments concerning alleged violations of attorney-client privileges and his constitutional right to effective assistance of counsel are essentially the same.

As with our determination that the Commonwealth's cross-examination of Dr. Merikangas did not offend Appellant's ****83** right to attorney-client privileges, for the same reasons, Appellant's argument invoking the Sixth Amendment right to

effective counsel would not have any merit even if we were to decide the question of when such right is implicated, which we decline to do at this time. The record is clear that the Commonwealth did not have access to Dr. Wettstein's notes or reports, did not introduce them into evidence, and did not call Dr. Wettstein to testify. Thus, nothing of record indicates any interference with Appellant's counsel's right or ability to rely upon the confidential communications of an expert retained but not called to testify. Accordingly, Appellant's Sixth Amendment argument lacks the factual predicate the case law he cites in support of his argument would require for establishing relief. Therefore, we determine that none of the theories Appellant has advanced in support of this issue has merit.

*40 VIII. Cross–Examination of Dr. Merikangas as Due Process Violation

Appellant next argues that the Commonwealth violated Appellant's due process rights when the Commonwealth posed the following question to Dr. Merikangas on cross-examination: "Well, what if [Appellant] on that date would have said that he wasn't hearing voices, I just hate blacks, wouldn't that be important for you to know?" N.T. Trial, 5/4/01, at 1500. Appellant contends that this question violates his due process rights because the question lacked a good faith basis in the evidence, citing *Commonwealth v. Smith,* 580 Pa. 392, 861 A.2d 892, 896 (2004). In *Smith,* we reversed a death sentence and remanded for a new penalty hearing because the prosecutor, during the penalty phase of trial, referenced the fact that the appellant had been convicted of assaulting a fellow prisoner with a weapon in order to establish that the appellant posed a danger to the prison population. However, no competent evidence had been introduced at trial establishing the fact of this conviction. We determined that an examination of the record revealed that the error was not harmless.[14] Here, Appellant argues that he is entitled to a new trial on guilt because the prosecutor's question assumed a fact not in evidence, to wit, that Appellant had told Dr. Wettstein that he did not have hallucinations but merely hated blacks.

At the very most, the Commonwealth's cross-examination of Dr. Merikangas may have suggested, by this one question, that Dr. Wettstein, like Dr. Welner, had determined that Appellant had killed the victims because of his racist views rather than while suffering from a mental disease sufficient to rise to the level of insanity. Thus, the Commonwealth's question arguably assumed a fact not in evidence. However, Appellant never objected to the question, except to the extent that he had previously objected to the Commonwealth's general line of questioning that referenced Dr. Wettstein, which *41 objection was based on the trial court's pre-trial ruling that the Commonwealth could not have access to Dr. Wettstein's report or records. Appellant never lodged an objection specifically to the question at issue, nor did he lodge one on the grounds that the Commonwealth's questions assumed a fact not in evidence or were violative of Appellant's due process rights. Accordingly, we determine that this issue is **84 waived. *See May, supra* at 761 (holding that the absence of a specific contemporaneous objection renders the appellant's claim waived).

IX. Denial of Right to Present Mitigating Evidence

Appellant next argues that his right to present mitigating evidence was improperly curtailed by the trial court. At a penalty hearing, a capital defendant may present relevant evidence in mitigation. 42 Pa.C.S. § 9711(a)(2); *May, supra* at 765. Evidence is relevant to mitigation if it is probative of any of the enumerated mitigating circumstances set forth at 42 Pa.C.S. § 9711(e). Although Appellant presented evidence to the jury regarding five mitigating circumstances, his present argument concerns only the mitigating circumstances described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the influence of extreme mental or emotional disturbance, and (e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. With respect to the argument Appellant now raises, we note that "[t]he admissibility of evidence, including evidence proffered at the penalty phase of a capital trial, is within the discretion of the trial court, and such rulings will form no basis for appellate relief absent an abuse of discretion." *Commonwealth v. Mitchell,* 588 Pa. 19, 902 A.2d 430, 459 (2006).

Appellant's argument has two components. In the first, Appellant contends that the trial court abused its discretion by refusing to allow sentencing phase testimony by Christine Martone, M.D., the chief psychiatrist at the Allegheny County Behavior Clinic, an arm of the Allegheny County Court of *42 Common Pleas. In the second, Appellant contends that

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the court abused its discretion by precluding the publication to the jury of mitigating evidence in the form of a redacted portion of the March 2, 2001 recorded telephone conversation between Appellant and his parents, during which the parents expressed their opinion that Appellant's criminal actions stemmed from his mental illness.

(A) Dr. Martone

Dr. Martone's responsibilities to the court of common pleas require that she evaluate defendants for competency and for dispositional recommendations after a finding of guilt. In her official capacity, Dr. Martone examined Appellant five times after the shootings, the first time being on May 2, 2000, only four days after the shootings occurred. It was Dr. Martone who initially determined that Appellant was not competent to stand trial.

During the guilt phase of trial, the trial court denied, on conflict of interest grounds, Appellant's request that Dr. Martone testify regarding Appellant's alleged insanity. [15] However, the court did allow Appellant to question Dr. Martone concerning her psychiatric examination and findings. Appellant's questions to Dr. Martone concerned her examination of Appellant on two occasions in May 2000. Dr. Martone testified that, based on those examinations, she had diagnosed Appellant with schizophrenia of the paranoid type and had determined that he suffered from auditory hallucinations.

At the penalty phase of trial, Appellant sought to present similar and/or additional ****85** testimony from Dr. Martone [16] to address the mitigating factors described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the ***43** influence of extreme mental or emotional disturbance, and 42 Pa.C.S. § 9711(e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, the court refused Appellant's request because it determined that allowing Dr. Martone, a court employee, to testify for either Appellant or the Commonwealth at this point of the trial would represent a conflict of interest between the court's neutrality and the interests of the litigants. Additionally, the court was further concerned that if other inmates became aware that Dr. Martone could be called to testify, they would be reluctant to speak openly to her. The court also noted that Dr. Martone had not examined Appellant for sanity, but rather only for competence to stand trial, and that Appellant had at his disposal several psychiatric expert witnesses who had testified for Appellant during the guilt phase of trial and who would be available to testify during the penalty phase of trial. Moreover, the court ruled that Appellant **could** read Dr. Martone's guilt-phase testimony to the jury during the penalty phase and could present argument based on that testimony. N.T. Trial, 5/9/01, at 2748–51. [17]

Appellant now argues that the court abused its discretion by refusing to permit Dr. Martone to testify at the penalty phase of trial. First, Appellant contends that the ruling violated a local rule of criminal procedure, All.C.R.Crim.P. 300.31, which provided: [18]

> In the trial of any homicide case, after a verdict of Murder of the First Degree is recorded and the court proceeds to the determination of whether a sentence of life imprisonment or the death penalty should be duly imposed, as required by 42 Pa.C.S. § 9711, the court may, upon application of the defense, permit the calling of Behavior Clinic representatives in mitigation.

***44** Second, Appellant refutes the reasoning that Dr. Martone's testimony would have represented a conflict of interest because Dr. Martone had already testified during the guilt phase of Appellant's trial. Additionally, Appellant contends that the court's fear that defendants would be less likely to speak with Behavior Clinic psychiatrists if they knew that these individuals might later testify, is unfounded if such testimony would be beneficial to the defendants, as purportedly Dr. Martone's testimony would have been for Appellant. Appellant also notes that Dr. Martone had testified in 1995 at the penalty phase of one other capital defendant tried in the Allegheny County Court of Common Pleas, as evidenced by our discussion in *Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52, 72–74 (2003). [19]

****86** Third, although Appellant acknowledges that during the penalty phase of his trial he presented the testimony of two other psychiatric experts for support of the mitigating factors about which he wanted Dr. Martone to testify, he contends that Dr. Martone's testimony would not have been cumulative of this testimony. Appellant contends that Dr. Martone's testimony would have carried greater credibility with the jury than Appellant's hired witnesses because she would have been purportedly viewed by the jury as a "neutral" witness.

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Moreover, unlike Appellant's other experts, Dr. Martone examined Appellant near-immediately after the shootings. Additionally, Appellant alleges that his testifying experts were not familiar with the "standards" of the mitigating factors set forth at 42 Pa.C.S. § 9711(e)(2) and (3), even though they testified that in their professional opinions, Appellant met those standards. *See* Appellant's Brief at 59. We shall address these three arguments *seriatim*.

First, as is plain from its words, now-repealed Allegheny County Criminal Rule 300.31 placed the determination as to whether a Behavior Clinic representative would testify ***45** upon a defense application within the sound discretion of the trial court; the rule did not mandate that the court grant all requests made under the rule. Therefore, there is no violation of the rule absent a showing of an abuse of discretion. Moreover, Appellant never cited this rule to the court as a basis for his argument that Dr. Martone should testify; Appellant is raising this theory for the first time on appeal. *See* N.T. Trial, 5/9/01, at 2746–52.

Second, Appellant's argument concerning the trial court's stated reasoning for not allowing Dr. Martone to testify does not compel the conclusion that the trial court abused its discretion; in fact, it compels the opposite conclusion. In *Commonwealth v. Widmer,* 560 Pa. 308, 744 A.2d 745 (2000), we reiterated the well-known definition of "abuse of discretion" as follows:

> The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Id. at 753.

Here, Appellant does not establish that the court's reasoning was based on prejudice, personal motivations, or capricious or arbitrary actions; rather, Appellant simply disagrees with the court's reasoning. The record plainly shows that the court had serious and reasonable concerns with allowing any litigant to call Dr. Martone to testify, given her position with the court and her ongoing, critical duties, which could be jeopardized should she be subject to being called as a witness without sufficient cause. Further, the record shows that the court took into consideration the fact that Appellant had at least ***46** three other witnesses qualified to testify as to the same mitigating circumstances for which Appellant wished to call Dr. Martone. Finally, the court observed that the jury already had the benefit of Dr. Martone's testimony, and that Appellant would be free to publish to the jury, during the penalty phase, the substance of that testimony. ****87** Thus, there is no basis in the record to conclude that the court's determination that Dr. Martone should not testify in the penalty phase, based on a potential conflict of interest, was based on partiality, prejudice, bias, or ill will. [20]

Finally, Appellant's argument that Dr. Martone's testimony would not have been cumulative of that of his two psychiatric experts who testified during the penalty phase of trial is not persuasive. Notably, Appellant does not indicate how Dr. Martone's testimony would have differed significantly from that of his other witnesses, or indeed from that testimony Dr. Martone had already given the jury during the trial phase and which was available for re-publishing to the jury during the penalty phase. Rather, the differences Appellant cites to involve two other aspects: (1) the fact that Dr. Martone had actually examined Appellant near-immediately after the crimes in May 2000, unlike his other two witnesses; and (2) Dr. Martone would have been considered by the jury as a "neutral" witness instead of one biased because of being hired by the defense or, in the case of Matcheri S. Keshavan, M.D., by being Appellant's regular treating psychiatrist.

With respect to the fact that Dr. Martone had examined Appellant in May 2000, we note that the testimony Dr. Martone had already given to the jury involved precisely her examination of Appellant in May 2000, and her findings

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from those examinations. Appellant does not explain how Dr. Martone would have presented anything new had she been allowed to testify during the penalty phase. Indeed, the record establishes that during the penalty phase, Appellant ***47** presented only truncated versions of the testimony of his expert psychiatric witnesses, Drs. Keshevan and Merikangas, because their guilt-phase testimony was incorporated by reference at the penalty phase. *See* N.T. Trial, 5/10/01, at 2924–25 and 2944. Moreover, Appellant had the opportunity to call to testify, but chose not to do so, Laszlo Petras, M.D., a hospital staff and Beaver County Jail psychiatrist, who had actually evaluated Appellant **on the day of the murders,** and who had testified for Appellant during the guilt phase of trial.

With respect to Dr. Martone's neutrality, it is only speculative that the jury might have considered her a more persuasive witness, particularly as her examination of Appellant was limited to no more than five encounters and was expressly confined to the question of whether Appellant was competent to stand trial. By contrast, Dr. Keshavan had treated Appellant for mental illness for seven years prior to the shootings. Both Dr. Keshavan and Dr. Merikangas described the severity of Appellant's mental illness and the potentially exacerbating effect on his mental illness of Appellant's not taking his medications, which Appellant posited, with some evidence, was the case at the time of the crime spree.

Further, with the witnesses he presented at the penalty phase, Appellant **carried** his burden of proving to the jury the mitigating circumstance described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the influence of extreme mental or emotional disturbance. Thus, the absence of Dr. Martone's testimony regarding this mitigating factor did not result in prejudice to Appellant. In addition, the alleged "bias" of Drs. Keshavan and Merikangas and the fact that they did not examine Appellant close to the ****88** time of the crimes proved no impediment to Appellant in proving this mitigating circumstance.

Appellant did not prove the mitigating circumstance described at 42 Pa.C.S. § 9711(e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Appellant contends that Dr. Martone's testimony "would have helped establish this" mitigating factor. ***48** Appellant's Brief at 59. However, Appellant sets forth absolutely no basis for this conclusion. Again, Appellant does not indicate what testimony Dr. Martone would have provided to help establish the subsection (e)(3) mitigating factor. Further, Appellant does not indicate how Dr. Martone would have helped achieve Appellant's goal of establishing this mitigating factor when she had examined Appellant only to determine competency to stand trial, not for a general assessment of sanity.

There is no questioning the importance of a capital defendant's right to present mitigating evidence at the penalty phase of trial. However, in light of the above discussion, we must conclude that the trial court did not abuse its discretion by denying Appellant's request to present the testimony of Dr. Martone.

(B) March 2, 2001 Telephone Conversation

Appellant argues that the court abused its discretion by precluding the publication to the penalty-phase jury of the portion of the March 2, 2001 recorded telephone conversation between Appellant and his parents where the parents apparently expressed their opinion that Appellant's acts had been caused by mental illness (for convenience, this portion of the telephone conversation shall hereafter be referred to as "the mental illness discussion"). The genesis of this argument lies in the trial court's allowing the prosecution, during the rebuttal portion of the guilt phase of trial, to publish to the jury a redacted portion of the March 2, 2001 recorded telephone conversation that contained the accusation by Appellant's parents that Appellant was a racist. The parents' accusation was based on Commonwealth evidence, by this point shared with the defense, that while in prison, Appellant had autographed for another inmate newspaper or magazine articles on controversial racial issues and had made racist remarks in conversation with this inmate. The Commonwealth sought publication of the redacted portion of the March 2, 2001 telephone conversation to corroborate the truth of the inmate's testimony regarding these events based on Appellant's admission on the ***49** tape that he had engaged in this conduct. Additionally, the Commonwealth sought to bolster its case that Appellant had committed the crimes because of his racism and not because of insanity, based on Appellant's failure to deny his parents' charge that he was a racist. The trial court redacted the telephone conversation to conform, at least in substantial part, with Appellant's specific objections to publishing other portions of the conversation to the jury.[21] N.T. Trial, 5/8/01, at 2455, 2460, 2500.

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During the penalty phase, the trial court denied Appellant's request to publish to the jury the mental illness discussion, which had not been previously disclosed to the jury. The basis for the trial court's ruling was that the mental illness discussion constituted inadmissible hearsay, as Appellant was attempting to use this evidence, ****89** constituting prior **consistent** statements, to prove the truth of the matter asserted.[22] (Appellant's parents testified during the penalty phase, and expressed their opinion that their son was mentally ill and had acted under the influence of this illness.) However, the court did permit Appellant to use the transcript of the mental illness discussion to refresh the recollection of Appellant's father, during the father's penalty-phase testimony.

In arguing that the court abused its discretion by its ruling, Appellant fails to address the basis for the court's determination. Rather, Appellant contends that the mental illness discussion should have been entered into evidence pursuant to Pa.R.E. 106. Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction **at that time** of any other part or any other ***50** writing or recorded statement which ought in fairness to be considered **contemporaneously** with it.

Pa.R.E. 106 (emphasis added).

As can be seen from a plain reading of Rule 106, Appellant's argument has no merit. Appellant is not arguing that the court abused its discretion by failing to allow the mental illness discussion to be read to the jury **at the time** the Commonwealth published to the jury the redacted portion of the March 2, 2001 telephone conversation **during the guilt phase of trial.** Rather, Appellant is arguing that the trial court abused its discretion by refusing to allow the publication of the mental illness discussion at the penalty phase of trial, a point in time well removed from the time of the publication of the material that Appellant now argues requires consideration. Accordingly, Rule 106 is not implicated at all. In addition, Appellant makes no argument as to how the mental illness discussion would have helped him establish the mitigating factor described at 42 Pa.C.S. § 9711(e)(3).

Finally, we note that the trial court's ruling was correct. In general, prior consistent statements, as they constitute hearsay, are admissible under only very limited circumstances. Pennsylvania Rule of Evidence 613(c) provides:

> (c) **Evidence of prior consistent statement of witness.** Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

Pa.R.E. 613(c).

The comment to this rule relevantly provides that "under Pa.R.E. 613(c), a prior consistent statement is always received ***51** for rehabilitation purposes only and not as substantive evidence." *See* *Commonwealth v. Counterman,* 553 Pa. 370, 719 A.2d 284, 301 (1998) (stating: "As a general rule, a prior consistent statement is hearsay, and its admissibility is dependent upon an allegation of corrupt motive or recent fabrication. Additionally, such ****90** statements have been admitted in response to an allegation of faulty memory.") (citations omitted). Here, Appellant does not argue that the mental illness discussion should have been published to the jury to rehabilitate the same testimony given by Appellant's parents during the penalty phase of trial.

For all of the above reasons, Appellant's argument regarding the mental illness discussion is wholly without merit.

X. Evidence of Parole Ineligibility (*Simmons* Charge)

In his next argument, Appellant contends that "[s]ince the evidence raised an inference of [Appellant's] future dangerousness, the [trial] court's failure to permit the defense

to introduce evidence of [Appellant's] parole ineligibility, and the likelihood of commutation and to instruct the jury that Pennsylvania law does not permit a defendant convicted of first-degree murder to be released on parole violated [Appellant's (1)] due process and [(2)] Eighth Amendment rights." Appellant's Brief at 64; emphasis added.

Appellant first contends that the trial court erred by failing to give the jury what is referred to as a *Simmons* instruction, *i.e.,* that a life sentence means life imprisonment without the possibility of parole. We have described the *Simmons* instruction, and our law regarding when a criminal defendant is eligible for relief with respect to same, as follows:

> In *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality), a plurality of the United States Supreme Court would have held that, if a prosecutor argues a capital defendant's future dangerousness at a sentencing trial, the defendant may request and should be granted a jury instruction that a penalty of life in prison will render the defendant ineligible for parole. *Id.* at 170, 114 S.Ct. at 2197. This Court has held that a *Simmons* ***52** instruction is mandated only if two events occur: (1) the prosecutor must place the defendant's future dangerousness in issue; and (2) the defendant must have requested that the trial court issue the instruction. *Commonwealth v. Dougherty,* 580 Pa. 183, 860 A.2d 31, 37 (2004), *cert. denied,* 546 U.S. 835, 126 S.Ct. 63, 163 L.Ed.2d 89 (2005); *Commonwealth v. Jones,* 571 Pa. 112, 811 A.2d 994, 1004 (2002) (citing *Commonwealth v. Spotz,* 563 Pa. 269, 759 A.2d 1280, 1291 (2000), *cert. denied,* 534 U.S. 1104, 122 S.Ct. 902, 151 L.Ed.2d 871 (2002)). The failure to issue a *Simmons* charge is no basis for relief where *these* circumstances are not met. *Jones,* 811 A.2d at 1004.
>
> *Commonwealth v. Carson,* 590 Pa. 501, 913 A.2d 220, 273 (2006), *cert. denied,* 552 U.S. 954, 128 S.Ct. 384, 169 L.Ed.2d 270 (2007) (emphasis added).

As can be gleaned from the manner in which Appellant raises his argument, he does not allege that **the prosecution** had raised the issue of future dangerousness to the jury. Rather, he argues that the issue was brought forth to the jury by the nature of **the** general **evidence itself.** Specifically, he contends that the extensive evidence concerning his mental illness given by eight mental health experts (seven of whom had testified on behalf of Appellant) had established the issue of future dangerousness in the minds of the jury. With respect to the evidence given by the Commonwealth's mental health witness, Dr. Welner, Appellant notes that this witness opined that Appellant suffers from a personality disorder shared with perhaps 70% of the criminal population that is characterized by "a pattern of rule breaking and lying," and that Appellant in particular ****91** has demonstrated a "lifetime pattern of irresponsibility." *See* Appellant's Brief at 70. Appellant also notes the extensive evidence introduced at trial that highlighted his racist views.

However, the evidence Appellant cites does not specifically indicate "a tendency to **prove dangerousness in the future.**" ***53** *Kelly v. South Carolina,* 534 U.S. 246, 254, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002) (emphasis added).[23] For example, in *Kelly,* a case decided after Appellant's trial, the United States Supreme Court determined that a *Simmons* instruction was required where the prosecutor (1) adduced testimony that the defendant, following his arrest, created a shank while in prison and had made an escape attempt that included a plan to lure a female guard into his cell to be used as a hostage; (2) adduced testimony from a psychologist that the defendant was a sadist as a child and had developed an inclination to kill anyone "who rubbed him the wrong way;" (3) argued to the jury that the defendant was dangerous and unpredictable while referring to him as "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid;" and (4) opined to the jury that "murderers will be murderers[, and the defendant] is the cold-blooded one right over there." *Id.* at 248–50, 122 S.Ct. 726. By contrast, in the case *sub judice,* the Commonwealth did not present evidence establishing Appellant's future dangerous propensities. The

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evidence Appellant cites is not even remotely similar in character to the evidence in *Kelly.* Essentially, the evidence Appellant cites indicates only that he will continue to suffer from his mental disorders, making him, according to Dr. Welner, a liar, a rule-breaker, and irresponsible. This is not evidence of future dangerousness, or evidence of a "demonstrated propensity for violence," triggering the need for a *Simmons* instruction. *See* *Kelly, supra* at 253, 122 S.Ct. 726. ***54** Additionally, the Commonwealth did not raise the issue of future dangerousness by its argument to the jury, nor does Appellant contend that it did. [24]

More importantly, Appellant never specifically requested a *Simmons* instruction. Rather, he asked the trial court to allow him to publish to the jury an affidavit by Nelson R. Zullinger, Secretary of the Board of Pardons, which purportedly averred that since September 13, 1978, only one person sentenced to life imprisonment in the Commonwealth has ever had a sentence commuted or been granted clemency or a pardon. Appellant's Brief at 67. The trial court denied Appellant's request, holding that such evidence should not come in unless the Commonwealth raised ****92** the issue of future dangerousness. However, a request to introduce such evidence is not the equivalent of asking the court to provide a specific instruction to the jury pursuant to *Simmons.*

Accordingly, Appellant has failed to meet either of the two requirements for obtaining relief on the issue of whether a jury should be instructed as to parole ineligibility, set forth, *inter alia,* in *Carson, supra* at 273. That is, Appellant has failed to show that the Commonwealth had placed the issue of future dangerousness before the jury and that he had requested a *Simmons* charge. Therefore, Appellant is not entitled to any relief under his due process claim. *Carson, supra* at 273.

In the second prong of his argument, Appellant contends that he was entitled to introduce into evidence the affidavit of Mr. Zullinger pursuant to Appellant's rights under the Eighth Amendment to the United States Constitution. Appellant acknowledges that the United States Supreme Court has never ruled that the Eighth Amendment requires a parole ineligibility instruction and the admission of evidence regarding same at every capital sentencing in states prohibiting release on parole on a life sentence, nor has this Court ever made a parole ineligibility instruction mandatory in capital cases. Notwithstanding, Appellant contends that *Kelly, supra,* ***55** which was decided after Appellant's trial and sentencing, affords him a basis for relief because that case purportedly "acknowledged that a capital defendant's future dangerousness always will be a foremost consideration for jurors." Appellant's Brief at 75.

However, in this case, Appellant has failed to point to any evidence that specifically indicates his future dangerousness, and, quite significantly, Appellant failed to request either a *Simmons* instruction or a jury instruction pursuant to the Eighth Amendment. Thus, no relief is due. *See Carson, supra* at 272–74 (rejecting the appellant's similar Eighth Amendment argument where the prosecution had not raised the issue of future dangerousness).

XI. Victim Impact Evidence

Appellant argues that because the victim impact evidence presented at the penalty phase was "unduly prejudicial," his due process rights under the Fourteenth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution were violated. Appellant acknowledges that in *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that victim impact evidence introduced in a capital sentencing hearing did not violate the Eighth Amendment of the United States Constitution. In fact, Appellant notes that *Payne* expressly recognized that evidence showing "a quick glimpse of the life [the defendant] chose to extinguish," was not a *per se* violation of the Eighth Amendment. *Payne, supra* at 825, 830, 111 S.Ct. 2597 (O'Connor, J., concurring, quoting *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)). However, Appellant notes that the separate opinions of the Justices in *Payne* recognized a limit on the use of victim impact evidence. Specifically, where victim impact evidence is unduly inflammatory, several Justices noted that inclusion of such evidence might entitle a defendant to relief under the Due Process Clause of the Fourteenth Amendment. *See* *id.* at 831, 111 S.Ct. 2597 (O'Connor, J., concurring).

***56** Here, Appellant argues that the evidence adduced from fourteen victims of Appellant's crimes at the sentencing phase of trial crossed the threshold from being "a quick glimpse of the life [the defendant] chose to extinguish" to being unduly inflammatory ****93** and prejudicial. Appellant highlights the following evidence: (1) Bang Gho, Thao Pak Pham's wife, describing how their six-year-old son kept asking when

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his father would return home and how she and her son arrived at the crime scene before her husband's body had been removed; (2) two of Anita Gordon's daughters describing the devastating impact Mrs. Gordon's death had had on their father and grandmother, and how the latter had to be moved to a nursing home because Mrs. Gordon was no longer available to care for her; (3) a friend of the Gordons describing the intense pain the family suffered; (4) individuals familiar with Anil Thakur describing the financial effect that the victim's death had on his parents in India, who no longer receive the financial assistance the victim had provided; (5) Ji–Ye Sun's 70–year–old father describing how his wife had cried so much that she required surgery to save her sight, and his own feelings of having "lost everything;" and (6) Mr. Sun's wife, Jun Sun, describing how, after her husband's death, she was unable to eat, drink, or sleep but experienced pain and a sense that her "brain is empty." Appellant's Brief at 77–78. Appellant avers that the prejudicial impact of this evidence on the jury outweighed its probative value.

There are myriad problems with Appellant's argument. The first and most significant is that Appellant never made timely and specific objections to the evidence. Appellant had filed a pre-penalty phase motion *in limine* to exclude **all** victim impact evidence on the grounds that, because such evidence did not pertain to any statutory aggravating circumstance, the admission of the evidence was unconstitutional. The court denied the motion, noting that the United States Supreme Court had ruled that such evidence was permissible, citing *Payne.* However, the court indicated that Appellant could request from the Commonwealth an offer of proof as to each witness and could lodge an objection particular to that ***57** witness if appropriate. Appellant never objected to any of the Commonwealth's fourteen victim impact witnesses. [25] Because Appellant failed to object to the evidence on the grounds that he now raises, his issue is waived. Pa.R.A.P. 302(a).

However, it must also be emphasized that "Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding," including victim impact evidence. *Commonwealth v. Eichinger,* 591 Pa. 1, 915 A.2d 1122, 1139 (2007), *cert. denied,* 552 U.S. 894, 128 S.Ct. 211, 169 L.Ed.2d 158 (2007). Indeed, victim impact evidence is statutorily admissible in the penalty phase of capital cases pursuant to Section 9711(a)(2) of the Sentencing Code, 42 Pa.C.S. § 9711(a)(2). "Victim impact testimony is permissible when the Commonwealth establishes that the victim's death had an impact on the victim's family as opposed to presenting mere generalizations of the effect of the death on the community at large. Once this threshold has been met, the trial court has discretion over the testimony admitted." *Eichinger, supra* at 1139–40; *see also* *Commonwealth v. Williams,* 578 Pa. 504, 854 A.2d 440, 446 (2004). Testimony that is "a personal account" describing the "devastating impact the murders had on" the surviving families is wholly appropriate and admissible at the sentencing phase of a capital case. *Eichinger, supra* at 1140.

****94** Here, the specific evidence that Appellant challenges is in the same mold as that determined to be appropriate in *Eichinger* and *Williams.* The evidence challenged by Appellant consists of personal accounts describing the devastating impact the murders had on the surviving family members. Moreover, the number of witnesses called to testify was not disproportionate to the number of Appellant's victims. Thus, there is patently no basis for the conclusion that the trial court abused its discretion by admitting such evidence, even if Appellant had not waived the issue.

***58 XII. Victim Impact Evidence as Causing the Death Sentence to be based on Caprice and Vague Factors**

In this argument, Appellant concedes that the trial court **correctly** charged the jury in accordance with this Court's case law regarding victim impact evidence. However, Appellant "argues" that the admission and consideration of victim impact evidence interjects an unconstitutionally vague and capricious factor into a jury deliberation process that must determine whether statutory aggravating factors outweigh mitigating factors. Appellant concedes that there is no Pennsylvania authority supporting his argument; [26] however, he raises this claim for the purpose of "preserv[ing] it for federal review." Appellant's Brief at 80.

Appellant did not object to the jury charge relating to this issue. Accordingly, Appellant's issue is waived. Pa.R.A.P. 302(a). Moreover, Appellant does not even appear to be asking this Court for relief with respect to this issue. *See* Appellant's Brief at 79–81. Certainly, none is warranted.

XIII. Dr. Welner's "Damning Hearsay"

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Appellant argues that his rights under the Sixth Amendment Confrontation Clause were violated when the Commonwealth's psychiatric expert witness, Dr. Welner, testified regarding statements made to him by individuals who did not testify at trial. These individuals included a psychologist who had briefly treated Appellant in 1994; high school and law school classmates; Appellant's sister; Appellant's ex-girlfriend; and Appellant's accountant. *See* Appellant's Reply Brief at 15–17 (listing these individuals as those at issue). Dr. Welner purportedly used the information provided by these individuals in arriving at his conclusion that although Appellant suffered from several psychiatric disorders, Appellant's crimes were not caused by a psychotic illness.

In support of his argument, Appellant cites ***59** *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which held that the Confrontation Clause of the Sixth Amendment prohibits the use of **testimonial** hearsay obtained by police officers against a criminal defendant, even if such hearsay is reliable, unless the defendant has the opportunity to cross-examine the out-of-court declarant. In so doing, the Court announced a new interpretation of the Confrontation Clause, overruling its earlier holding in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). *Crawford, supra* at 54, 124 S.Ct. 1354 Appellant acknowledges that he had failed to object to Dr. Welner's use of information obtained from these individuals. However, he argues that because *Crawford* was decided after his trial and sentencing, which trial occurred ****95** when the relaxed waiver rule of *Freeman* was still in effect, he should not now be penalized for failing to anticipate *Crawford's* changing the law.

Appellant's contention that he should not be penalized for failing to have preserved his objections to the challenged evidence is baseless. "It is settled that, in order for a new rule of law to apply retroactively to a case pending on direct appeal, the issue had to be preserved at all stages of adjudication up to and including the direct appeal." *Commonwealth v. Jones,* 571 Pa. 112, 811 A.2d 994, 1005 (2002) (quoting *Commonwealth v. Tilley,* 566 Pa. 312, 780 A.2d 649, 652 (2001) (quotation marks omitted)).[27] Here, Appellant failed to timely object to the now-challenged evidence. Moreover, although *Crawford* signaled a change in the law, Appellant fails to indicate how this change was material to his failure to have preserved the issue for review. In *Crawford,* the Court overruled its previous position that testimonial hearsay did not violate the Confrontation Clause if such evidence bore an "adequate indicia of reliability" by either falling within a "firmly rooted hearsay exception" or having "particularized guarantees of trustworthiness." *Crawford, supra* at 40, 124 S.Ct. 1354 (quoting *Roberts, supra* at 66, 100 S.Ct. 2531). ***60** *Crawford* holds that now testimonial hearsay obtained by police is inadmissible unless the defendant had the opportunity to cross-examine the out-of-court declarant. *Id.* at 51–53, 124 S.Ct. 1354.

Here, Appellant did not challenge, as he could have, the purported hearsay statements made during Dr. Welner's testimony on the grounds that they did not bear adequate indicia of reliability by either falling within firmly rooted hearsay exceptions or having particularized guarantees of trustworthiness, or on any other grounds. If Appellant was troubled by the purported hearsay testimony given by Dr. Welner, he did not need support from the specific legal principles later announced in *Crawford* to pursue his objections. Thus, there is no question that Appellant has waived this issue.[28]

XIV. Lethal Injection as Cruel and Unusual Punishment

Appellant argues that the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution prohibit lethal injection because this penalty constitutes cruel and unusual punishment. Appellant contends that there is "mounting evidence" that prisoners experience "excruciating pain" during execution by lethal injection, particularly since it is believed that potassium chloride, one of the three drugs used, causes a burning sensation as it courses through the body. Appellant's Brief at 83. Appellant argues that until Pennsylvania investigates whether its three-drug execution protocol is humane, the procedure should be declared a cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution.

However, the only issues before us are whether Appellant's conviction is valid and whether his death sentences were properly ****96** imposed. Our inquiry does not extend to the statutory ***61** manner by which the death sentence will be imposed, if it is imposed at all. Until a death warrant has been issued for Appellant, we need not determine the

issue of whether the **then**-form of execution, whatever it might be, comports with the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution.

In *Commonwealth v. Terry,* 513 Pa. 381, 521 A.2d 398 (1987), this Court was confronted with a claim that the defendant's death sentence should be vacated because there was then no existing statutory authority for the death penalty. We dismissed the claim, holding: "Only the sentence of death is before us. Since no death warrant has been issued, the question of the method of execution is not properly before us. We will consider this issue if and when it is properly before us." *Id.* at 412. Similarly, because the issue of the means of execution is not properly before us, we will dismiss Appellant's argument without prejudice to his right to raise it at a more appropriate time. [29]

XV. Imposition of the Death Penalty on a Mentally Ill Person

Appellant argues that the Eighth Amendment prohibits the imposition of the death penalty on a mentally ill person. [30] Appellant cites *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), for the proposition that the imposition of a death sentence on mentally retarded individuals violates evolving standards of decency embodied in the Eighth Amendment's Cruel and Unusual Punishment Clause. Appellant argues that *Atkins* should be extended to individuals ***62** such as himself, who had been described at trial by all psychiatric expert witnesses as suffering from mental illnesses.

However, as Appellant acknowledges, this Court has rejected a substantially similar argument in *Commonwealth v. Faulkner,* 528 Pa. 57, 595 A.2d 28, 38 (1991). In *Faulkner,* we stated:

> Appellant's last argument on this subject is that the death penalty statute violates the Eighth Amendment to the United States Constitution by permitting the jury to impose the death penalty when they have found, as a mitigating circumstance, that the defendant was mentally ill. Appellant argues that an automatic life sentence should be imposed-and not the death penalty-when the jury finds mental illness as a mitigating circumstance. In *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986), this Court stated that a finding of substantial mental impairment under 42 Pa.C.S. § 9711(e)(3) does not bar a death penalty imposed by the jury:
>
> > Our legislature could have provided that a finding of substantial impairment precludes imposition of the death sentence[;] however, it did not do so. Instead, it determined that this factor was to be weighed by the jury along with all the other factors and that it is within the province of the jury to determine how much weight it should be accorded.
>
> ****97** *Fahy,* 512 Pa. at 317, 516 A.2d at 698–99. We believe this rationale is equally applicable when the jury finds as a mitigating factor that a defendant suffered from "a degree of mental illness."
>
> *Id.* at 38.

Appellant has failed to advance a compelling argument that would lead us to alter our holdings in *Faulkner* and *Fahy.* Appellant mentions that evolving standards of decency should prompt a reassessment of these decisions. However, Appellant does not engage in any analysis as to why this should be ***63** the case. Accordingly, we conclude that Appellant's argument is without merit.

XVI. Vienna Convention

Appellant contends that his rights under the Vienna Convention on Consular Relations (the "Convention"), 21 U.S.T. 77, T.I.A.S. No. 6820, were violated. Appellant, an American citizen raised and educated in the United States, apparently holds dual citizenship with Latvia, a signatory, as is the United States, to the Convention. The preamble to the Convention provides that its purpose is to "contribute to the development of friendly relations among nations." 21 U.S.T. at 79; *see also* *Medellin v. Texas,* 552U.S. 491, ——, 128 S.Ct. 1346, 1353, 170 L.Ed.2d 190 (U.S.2008). In pursuit of that end, Article 36 of the Convention was drafted to "facilitat[e] the exercise of consular functions." Art. 36(1), 21 U.S.T. at 100. This article provides that if a person detained by a **foreign** country " '**so requests,** the competent authorities of the **receiving** State shall, without delay, inform the consular post of the **sending** State' of such detention, and 'inform the [detainee] of his righ[t]' **to request assistance from the**

consul of his own state." *Medellin, supra* at 1353 (quoting Art. 36(1)(b)) (emphasis added). Appellant complains that he was not informed of his "rights" under Article 36(1)(b). Appellant's Brief at 86.

The absurdities of Appellant's argument are manifold. Appellant was not detained by a foreign country but by authorities in his own country and state. Appellant was not "sent" by Latvia to be "received" by the United States; he is not a foreign national. Not only is Appellant a United States citizen, he was also trained as a lawyer in the United States. He was represented by counsel at all stages who spoke the same language as Appellant, came from the same American culture as Appellant, and engaged in legal procedures undoubtedly familiar to Appellant from his legal training. Perhaps Appellant believes that he would have had a better trial result had he been represented at trial by a Latvian attorney or afforded advice by the Latvian Consulate. If so, he has not ***64** indicated how his defense was prejudiced by this omission. Moreover, Appellant never requested that the Latvian Consulate be notified. [31]

Appellant argues that the decisions of the International Court of Justice ("ICJ") prohibit the execution of a **foreign national** where the provisions of the Convention have not been followed, specifically citing the *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States*), 2004 I.C.J. 12 (March 31, 2004) ("*Avena* "). Aside from the fact that Appellant is not a foreign national, the United States Supreme Court recently ruled that ICJ judgments, and specifically *Avena,* are not binding on our domestic law because none of the relevant treaty sources establishes binding domestic law in the absence ****98** of implementing legislation, and no such legislation has been enacted. *Medellin, supra* at 1360–65. In other words, the Convention is not "self-executing." *See id.* at 1365–66.

In short, there is absolutely no merit to this argument.

XVII. Ineffective Assistance of Counsel

Appellant's last argument details alleged instances where he was given ineffective assistance of trial counsel. [32] "Claims of trial counsel ineffectiveness are generally deferred to post-conviction review so that they might be properly developed on a full and complete evidentiary record." *Cousar, supra* at 1043 (citing *Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726, 736–37 (2002)). Appellant makes no legal argument as to why his ineffectiveness claims should not be deferred ***65** until post-conviction review. [33] Accordingly, we conclude that Appellant's ineffectiveness claims must be deferred to post-conviction proceedings, as contemplated by the rule set forth in *Grant,* if Appellant chooses to pursue them.

XVIII. Statutory Review

Having concluded that Appellant's convictions were proper and that none of his claims of error entitles him to relief, we must affirm each death sentence unless we find that: (i) the sentence was the product of passion, prejudice, or any other arbitrary factor; or (ii) the evidence fails to support the finding of at least one aggravating circumstance. *See* 42 Pa.C.S. § 9711(h)(3); *Cousar, supra* at 1044. Upon careful review of the record, we are persuaded that Appellant's death sentences were not the product of passion, prejudice, or any other arbitrary factor, but rather resulted from properly introduced evidence that Appellant intentionally and deliberately shot to death Anita Gordon, Anil Thakur, Ji–Ye Sun, Thao Pak Pham, and Garry Lee. We also conclude that the evidence was sufficient to support the two aggravating factors found by the jury in relation to the killings. There is no doubt that "[i]n the commission of the offense [Appellant] knowingly created a grave risk of death to another person in addition to the victim of the offense." 42 Pa.C.S. § 9711(d)(7). When Appellant shot Ji–Ye Sun and Thao Pak Pham, he created a grave risk of death to David Tucker, who was present in the restaurant when Appellant opened fire multiple times on his victims. In fact, Pham was shot just two to three feet away from Tucker as he was running past Tucker, who was trying to "dodge" the danger that was unfolding before him. N.T. Trial, 4/30/01, at 433–35. When Appellant shot Garry Lee, he created a grave risk of death to George Lester Thomas II, ***66** who was present in the karate studio when Lee was shot quite near to him, and in fact, Appellant had ****99** first pointed his weapon at Thomas. Further, there is no doubt that "[t]he defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the same time of the offense at issue." 42 Pa.C.S. § 9711(d)(11). Here, Appellant was convicted of five murders, all of which were committed during the two-hour homicidal rampage that occurred on April 28, 2000.

For the foregoing reasons, we affirm the verdicts and sentences of death. The Prothonotary of this Court is directed to transmit the complete record of this case to the Governor of Pennsylvania in accordance with Section 9711(i) of the Sentencing Code, 42 Pa.C.S. § 9711(i).

Chief Justice CASTILLE and MESSRS. Justice EAKIN and BAER join the Opinion.

Justice SAYLOR files a Concurring Opinion.

Justice TODD files a Concurring Opinion.

Justice SAYLOR, Concurring.
I join Parts I through V and XIII through XVIII of the majority opinion, concur in the result with regard to Parts VI through XII, and write to the following.

As to Issue VI, concerning the interception of Appellant's telephone conversations in the asserted absence of written notice, Appellant presents a plain-meaning interpretation of a statute which plainly requires written notice. [1] Further, Appellant ***67** relies on decisions of this Court establishing that exceptions to the prohibition against wiretapping must be strictly construed, *see* *Boettger v. Miklich,* 534 Pa. 581, 585–86, 633 A.2d 1146, 1148 (1993), as well as this Court's admonition that: "No violations of *any* provisions of the Act will be countenanced[.]" *Commonwealth v. Hashem,* 526 Pa. 199, 206, 584 A.2d 1378, 1382 (1991) (emphasis in original). In light the clear terms of the statute, *Boettger,* and *Hashem,* I cannot support the majority's characterization of Appellant's argument as being wholly without merit, based on the mere assessment that provision of the written notice required by the Legislature would not have advanced the privacy interests involved. *See* Majority Opinion, at 33, 960 A.2d at 79. Rather, it seems to me that the majority's approach represents a departure from the requirement of strict construction and/or a form of prejudice assessment, as was previously prohibited. *See* *Hashem,* 526 Pa. at 205, 584 A.2d at 1381 ("We must likewise specifically reject the Superior Court's holding that before relief can be granted in this type of claim the Defendant must bear the burden of showing how the failure to comply with the Act prejudiced him."). [2]

****100** Nevertheless, I believe the Commonwealth appropriately relies on the principles governing review of suppression-court ***68** rulings, which center the appellate court review on the record of the suppression hearing. *See, e.g., Commonwealth v. Eichinger,* 591 Pa. 1, 22, 915 A.2d 1122, 1134 (2007). Here, even if inmates were not in fact informed via the institution handbook of the practice of recording calls, the evidence presented to the suppression court indicated otherwise. *See* N.T. at 571–573 (reflecting the testimony of a jail official to the effect that inmates were "[f]irst of all, and most foremost" notified through a posted inmate handbook of the practice of recording telephone calls). The two items of contrary evidence upon which Appellant now relies (the handbook itself and an affidavit of a jail employee) were not brought onto the record of the suppression hearing, but apparently were obtained by Appellant's counsel after sentencing. As the Commonwealth explains, however, such items are not appropriately considered in this Court's direct review of the suppression court's ruling, as they were not before the court at that time. Accordingly, although Appellant may have claims of deficient stewardship to assert during post-conviction proceedings, I do not believe that his argument in this direct appeal is cognizable on the terms on which it is presented. [3]

With regard to Issue VII, I agree with the majority that the contested testimony did not violate attorney-client or work-product privileges. *See* Majority Opinion, at 36–37, 960 A.2d at 81. Nevertheless, I also agree with Appellant that there was a significant possibility that the evidence of Dr. Merikangas' failure to consult with Dr. Wettstein could have had a prejudicial impact outside the limited purpose for which it was ***69** admitted, namely, to test the scope of Dr. Merikangas' review. *See* N.T. at 1496. In this regard, however, I find it significant that Appellant did not request a limiting instruction to mitigate the possibility of prejudice. *Cf.* *Commonwealth v. Moore,* 594 Pa. 619, 639–40, 937 A.2d 1062, 1074 (2007) (explaining that potential prejudice may be mitigated by a limiting instruction and deferring any analysis of a trial counsel's performance in failing to request such an instruction to post-conviction review).

As to issue IX, the asserted denial of the right to present mitigating evidence in the form of testimony from Dr. Martone, the ****101** majority indicates that Appellant failed to set forth the substance of the testimony he hoped to elicit from Dr. Martone or how such testimony would have been different from that given by Dr. Martone during the guilt

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phase of trial. *See* Majority Opinion, at 42–43 n. 16, 960 A.2d at 85 n. 16. Appellant, however, does explain:

> the defense proffered that Dr. Martone would have testified that [Appellant] was under the influence of extreme mental and emotional disturbance at the time she saw him in May 2000 and at the time of the commission of the offense. Further, she would have testified that [Appellant's] capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Brief for Appellant at 56–57. In light of the general proffer going specifically to two statutory mitigating factors, I view this issue as a closer one than the majority, particularly in light of the constitutional norms requiring liberal admission of mitigating evidence. *See, e.g.,* *Tennard v. Dretke,* 542 U.S. 274, 285, 124 S.Ct. 2562, 2570, 159 L.Ed.2d 384 (2004). I agree with the majority, however, that if Dr. Martone's testimony was to be cumulative of that of other defense experts, in the sense that it would not materially add to the weight of the evidence favoring the finding of one or more mitigating circumstances, the trial court's decision to exclude the testimony should be sustained. At least in the absence of a developed record concerning the specifics of what Dr. Martone's testimony would have been, and a fact finder's assessment regarding ***70** the degree of potential impact, there appears to me to be insufficient basis to question the trial court's judgment as to cumulativeness. Notably, in this regard, Appellant did not raise this claim in his post-sentence motions or request a hearing on the matter to develop a factual record.

As to the claim challenging the admission of victim impact evidence (Issue XI), the prosecutor's indication that one facet of the evidence "cannot be written with such detail and emotion as it unfolded in this case" encapsulates the difficulty with this type of evidence and highlights the need for careful control by the trial courts.[4] N.T. at 3080. Given the number of witnesses presented and the passionate character of many of the statements, I find this to be a close case in terms of whether the trial court exceeded its discretion in this regard. I also recognize, however, that the Constitution does not foreclose evidence of the harm caused by the defendant in capital sentencing proceedings, *see* *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), and Appellant caused an immeasurable amount of harm. Thus, although I agree with the majority that no relief is due here, given that we are seeing fairly wide differences across cases in terms of the degree of control exercised by the trial courts over the development of victim impact evidence, I believe that the Court would be well advised to consider exercising its rulemaking function to impose some structural limitations.

Justice TODD, Concurring.

I join in the thorough and thoughtful majority opinion except for the issues raised herein, as I agree with the majority's conclusion that Appellant Richard Baumhammers is entitled to no relief, as to either his conviction or his sentence of death. I write separately because my reasoning ****102** differs from the majority's as to several of the issues Baumhammers raises.

***71** First, as to Baumhammers' argument that the Commonwealth violated the Wiretap Act in recording his telephone conversations with his parents while he was incarcerated awaiting trial, I agree with the result reached by Justice McCaffery, but on narrower grounds. *See* Majority Op. at 28–30, 960 A.2d at 76–80. I would explicitly adopt the parsing of the relevant statute by the trial judge, the Honorable Jeffery A. Manning: that a written notification to inmates is necessary only upon *a facility's implementation* of a policy of wiretapping inmate phone calls. Trial Ct. Op., 12/29/05, at 14; *see* 18 Pa.C.S.A. § 5704(14)(i)(A). Accordingly, I conclude Baumhammers was not entitled to written notification, and the aural notification he was provided was adequate to satisfy the statutory requirements. *See* *Chimenti v. Pa. Dep't of Corrections,* 720 A.2d 205 (Pa.Cmwlth.1998) (concluding in *dicta* Section 5704 requires written notice when that section is implemented).

Next, on several of the issues Baumhammers raises, I would begin and end with waiver. First, Baumhammers asserts the trial court erred in not granting him a change of venue or venire; his trial counsel, however, specifically opposed either suggestion when raised by the trial court. *See* Majority Op. at 23–29, 960 A.2d at 73–76. Accordingly, this argument is waived for purposes of direct appeal. Second, Baumhammers asserts the trial court erred in not excluding particular victim impact evidence, *see* Majority Op. at 54–58, 960 A.2d at 92–94; however, his trial counsel did not

specifically object to the introduction of testimony from any of the particular victims. Accordingly, this argument is also waived for purposes of direct appeal. Third, Baumhammers asserts that his rights under the Confrontation Clause, in light of *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), were violated when Dr. Michael Welner testified about conversations regarding Baumhammers which Dr. Welner had with a variety of non-testifying individuals. *See* Majority Op. at 58–60, 960 A.2d at 94–96. Again, Baumhammers' trial counsel did not object at trial, and so this argument is waived for purposes of direct appeal. Nevertheless, in each of these instances, the majority continues on to address the merits of the waived ***72** claims. Consistent with *Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726, 736–37 (2002), any discussion of the underlying legal support—or lack thereof—for these arguments beyond a finding of waiver is *dicta,* and is better conducted, if necessary, on collateral appeal. With limited exception, under *Grant,* we foreclose a prisoner on direct appeal from recasting waived claims in terms of counsel's ineffectiveness, requiring such appellant to defer such claims until collateral appeal, no matter how potentially meritorious. As a corollary, we ought similarly to resist discussion of the merits of such claims on direct appeal, as our discussion could prejudice the collateral appeal courts' proper consideration of the relevant issues.

Finally, I address Baumhammers' claim that his execution is barred by the Eighth Amendment's preclusion of cruel and unusual punishment because he is afflicted with a serious mental illness. I agree with Justice McCaffery that Baumhammers' claim fails, *see* Majority Op. at 61–64, 960 A.2d at 96–98, but write separately to express my grave concern about the issue. [1]

****103** Initially, it is clear Baumhammers merits no sympathy. As the majority summarizes in detail, Majority Op. at 13–23, 960 A.2d at 67–72, he committed vicious hate crimes, targeting people of African–American, Asian, and Jewish descent. He defaced synagogues, targeted businesses and places of worship catering to members of particular ethnic groups, killed five people, and paralyzed one. Our streets are safer because he is no longer on them.

However, distinct from the question of whether Baumhammers is dangerous or evil is the question of whether he may, consistent with the Eighth Amendment, be subjected to capital punishment. Baumhammers argues he may not be executed based on *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), wherein the United States Supreme ***73** Court held that prisoners who, at the time they committed their crimes, suffered from mental retardation could not be executed for those crimes. He avers that individuals with serious mental illnesses are so similar to the mentally retarded that *Atkins* requires a similar *per se* ban on their execution. He argues it is constitutionally inadequate merely to permit the mentally ill to argue their mental illness constitutes a mitigating factor at sentencing, as is presently allowed. [2]

The evidence that Baumhammers suffers from a serious mental illness is ample. Uncontroverted evidence indicates he was institutionalized in 1993 and 1999 for severe mental illness; was unable to hold a steady job because of his mental illness; hallucinated at his admission to the Georgia state bar that individuals were harassing him and calling him names; believed the FBI, CIA, and Mossad were trying to kill him; and refused to take out the garbage, asserting that when he did so people shot at him with lasers. He unsuccessfully attempted treatment with an alphabet of psychotropic medications, including Anafranil, Ativan, Cogentin, Haldol, Inderal, Luvox, Norphronin, Paxil, Prozac, Risperdol, Seroquel, Trilafon, Zoloft, and Zyprexa. Shortly after the crime, Baumhammers was diagnosed by Dr. Christine Martone with paranoid schizophrenia and auditory hallucinations. *See* Majority Op. at 42, 960 A.2d at 84. Psychiatric witnesses including Dr. Welner, the Commonwealth's expert, testified that Baumhammers suffered from persecutory delusions (Dr. James Merikangas, N.T. 9/4/01, at 1431; Dr. Philip Ninan, *id.* at 1544; Dr. Edward Friedman, *id.* at 1587; Dr. Matcheri Keshavan, N.T. 9/5/01, at 1636; Dr. Welner, N.T. 9/6/01, at 1936); paranoid schizophrenia (Dr. Martone, *id.* at 1791, 1799; Dr. Laszlo Petras, *id.* at 1866); and schizo-affective disorder and depression (Dr. Soroya Radfar, N.T. 9/5/01, at 1739–41). Moreover, the Commonwealth concedes in its brief Baumhammers was delusional. Brief for the Commonwealth at 84. Consequently, ***74** sufficient evidence was presented at trial to demonstrate Baumhammers' serious mental illness.

Our legal system struggles with how to fairly allocate criminal liability and criminal punishment to individuals whose mental illness leaves them with diminished capacity for moral decision-making. Some defendants, we recognize, are so impaired in this regard that to assign any criminal liability to them would be inequitable. In those cases, the law requires a verdict of not guilty by reason of insanity. *See* 18 Pa.C.S.A. § 315. Other defendants are ****104** less impaired but still impaired enough that the opprobrium of a conviction

should be mitigated by a recognition of their condition. In those cases, the law requires a verdict of guilty but mentally ill. *See* 18 Pa.C.S.A. § 314.[3] Within this latter category, Baumhammers now suggests a further refinement: certain mental illnesses which are so impairing to every person afflicted with them that such a person cannot be culpable enough to merit capital punishment (though, as in *Atkins* and *Roper,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), a life sentence without the possibility of parole would remain constitutionally permissible).

As the Majority notes, there is controlling precedent from our Court on this issue. *Commonwealth v. Faulkner,* 528 Pa. 57, 75–76, 595 A.2d 28, 38 (1991). In *Faulkner,* we held that the Eighth Amendment did not preclude the execution of prisoners who were mentally ill at the time of the crime. However, the great principle of *stare decisis* is less powerful in the Eighth Amendment context, since the "national consensus" the Eighth Amendment requires is by definition temporally situated. *See Atkins,* 536 U.S. at 311, 122 S.Ct. 2242 ("A claim that punishment is excessive is not judged by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that *currently* prevail" (italics supplied)); ***75** *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (noting that the Eighth Amendment is governed by "the evolving standards of decency that mark the progress of a maturing society"). In *Atkins,* the Supreme Court overturned a 13–year–old precedent, *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (holding that the Eighth Amendment does not bar the execution of prisoners who were mentally retarded at the time they committed their offenses). In *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the Court held the execution of prisoners who were under 18 at the time of their crimes was barred by the Eighth Amendment. In so doing, the Court overturned a 16–year–old precedent, *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (holding that the Eighth Amendment does not bar the execution of prisoners who were under 18 years of age at the time they committed their offenses). Both decisions were based on changes in the factors which, taken together, determine the existence of a national consensus. Accordingly, I believe we may re-examine *Faulkner* in light of contemporary standards to effectuate the protections afforded by our national charter.

A group of offenders may be excluded from capital punishment under the Eighth Amendment only if a national consensus barring the execution of such offenders exists. The United States Supreme Court has set out four indicia to consider in determining the existence of such a consensus: (1) legislation enacted by the country's legislatures, including whether there is a pattern of movement towards precluding the execution of members of a particular group; (2) the decisions of sentencing juries, appellate courts, and governors about whether to execute defendants in that group; (3) where appropriate, other indicia of national and international opinion; and (4) the court's own judgment. *See Roper,* 543 U.S. at 563–65, 125 S.Ct. 1183 (2005). In such cases, though capital ****105** punishment usually must be "sensible to the uniqueness of the individual," *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and "tailored to his personal responsibility and moral guilt," *Enmund v. Florida,* 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), a national consensus may develop which holds that an immutable characteristic ***76** of the defendant so affects his individual responsibility and moral guilt that it precludes finding his "consciousness [is] materially more 'depraved' than that of any person guilty of murder," as is required for capital punishment to be lawful. *See Godfrey v. Georgia,* 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In such circumstances, our high Court holds that a defendant's execution is barred.

Under the United States Supreme Court's Eighth Amendment jurisprudence, I agree that Baumhammers cannot meet the *Atkins*/*Roper* test on the basis of the record before us. While there is some disagreement within our high Court, it is reasonably clear that an offender seeking to satisfy the first factor of *Atkins* and *Roper,* which focuses on legislative action, must show, at least, that a majority of jurisdictions bar the execution of members of his group and the "direction of change" is consistent and in favor of barring the execution of members of his group. *See Atkins,* 536 U.S. at 315, 122 S.Ct. 2242. To satisfy the second factor, he must additionally show that juries impose capital punishment on members of his group exceedingly rarely. *See Roper,* 543 U.S. at 563–65, 125 S.Ct. 1183; *Thompson v. Oklahoma,* 487 U.S. 815, 833, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality) (concluding that where only five offenders under the age of 16 had been among the 1,400 defendants sentenced to death

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nationwide between 1982 and 1986, their sentences had been "cruel and unusual in the same way that being struck by lightning is cruel and unusual"). Critically, Baumhammers does not attempt to demonstrate any of these propositions apply to paranoid schizophrenics, and he has not introduced any evidence which would suggest the existence of such a national consensus.

Moreover, Baumhammers conceded at oral argument that the factors laid out in *Atkins* and *Roper* are not present here. In his brief, he provided only a cursory argument that *Atkins* should apply directly to the seriously mentally ill without any evidence demonstrating legislative action against the execution of seriously mentally ill defendants,[4] diminished imposition of ***77** the death penalty on seriously mentally ill defendants,[5] support from national and international opinion, or guidance for the exercise of this Court's independent judgment.[6] Accordingly, in this case, I join ****106** Justice McCaffery's conclusion on the issue.

Nonetheless, I concur with the opinions expressed by Justice Evelyn Lundberg–Stratton of the Ohio Supreme Court, that the similarities between individuals with severe mental illness and those with mental retardation or juvenile status are strong enough to justify serious consideration by the country's legislatures. *See* *Ketterer,* 111 Ohio St.3d 70, 855 N.E.2d 48, 81–87 (2006) (Lundberg–Stratton, J., concurring). As Justice Lundberg–Stratton emphasized, as with mentally retarded defendants, it is not clear that either purpose of capital punishment—retribution or deterrence—is served by imposing that punishment on defendants who are severely mentally ill at the time of their crimes. *Id.* at 85, 855 N.E.2d 48; *see also* *State v. Nelson,* 173 N.J. 417, 803 A.2d 1, 47 (2002) (Zazzali, J., concurring); *Corcoran v. State,* 774 N.E.2d 495, 502 (Ind.2002) (Rucker, J., dissenting).

***78** In both *Atkins* and *Roper,* the Supreme Court described in some detail the characteristics which rendered members of the group in question constitutionally exempt from capital punishment—the mentally retarded and juveniles, respectively. Justice Stevens noted that mentally retarded offenders:

> [F]requently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Atkins, 536 U.S. at 318, 122 S.Ct. 2242 (footnotes omitted). Accordingly, Justice Stevens concluded, "the lesser culpability of the mentally retarded offender surely does not merit" a punishment reserved for the most culpable adult offenders. *Id.* at 319, 122 S.Ct. 2242.

In *Roper,* Justice Kennedy emphasized three primary differences between adolescents and adults: first, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"; second, the fact that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and finally, the fact that "the character of a juvenile is not as well formed as that of an adult." *Roper,* 543 U.S. at 569–570, 125 S.Ct. 1183.

Serious mental illnesses have similar effects. *See* Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness,* 33 N.M. L.Rev. 293 (2003) (arguing the effects of mental retardation and serious mental illness are so similar as to eliminate a rational basis for distinguishing between the ***79** two categories of defendants); *see, e.g.,* National Institute of Mental ****107** Health, *Schizophrenia,* available at http://www.nimh.nih. gov/health/publications/schizophrenia/complete-publication.shtml (noting that schizophrenics struggle to absorb and interpret information and make decisions based on that information).

An individual with a serious mental illness may be just as seriously impaired in his ability to "understand and process information" as an individual with a diminished IQ or an individual who has not yet reached the age of legal majority. Moreover, while mental illness is no more an unavoidable cause of criminal conduct than mental retardation or being a juvenile, its manifestations—such as the delusions that accompany paranoid schizophrenia—hamper a sufferer's ability to "engage in logical reasoning," and the disconnect between a paranoid schizophrenic's basic understanding of the world around him and that of an individual not similarly afflicted will make it difficult for the schizophrenic to understand others' reactions. *Compare Atkins, supra* (holding that similar characteristics of the mentally retarded made them categorically ineligible for capital punishment). [7]

Moreover, several national organizations have taken positions against the execution of the severely mentally ill. *See* ***80** *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty,* 54 Cath. U.L.Rev. 1115, § 2 (2005); Public Policy Platform of the National Alliance on Mental Illness, §§ 9.7.1.1, 9.7.1.2 (8th Ed.2006); Mental Health America, *Position Statement 54: The Death Penalty and People with Mental Illnesses,* available at ht tp:// www.nmha. org/go/position-statements/54. [8]

However, despite my grave concerns, I decline to go beyond what *Atkins* and *Roper* require on the record in this case. Accordingly, as did Justice Lundberg–Stratton, I request that our legislature consider the issue, summon and question scientific experts (which an appellate court may not do), and consider whether the national consensus and our statutory law are in line with the demands of the Eighth Amendment and of fundamental fairness, considering the best scientific evidence of the impact of severe mental illnesses on individual ****108** culpability. [9]

All Citations

599 Pa. 1, 960 A.2d 59

Footnotes

1 The two aggravating circumstances were as follows: "(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;" and "(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the same time of the offense at issue." 42 Pa.C.S. § 9711(d)(7) and (11).

2 The five mitigating circumstances were as follows: "(1) The defendant has no significant history of prior criminal convictions;" "(2) The defendant was under the influence of extreme mental or emotional disturbance;" "(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" "(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person;" and "(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(1), (2), (3), (5), and (8).

3 Aliquippa neighbors Center Township, where the karate studio is located.

4 Counsel on post-sentence motions was different from trial counsel.

5 The trial court found that between April 28, 2000, and March 3 or 4, 2001, 535 local newspaper accounts concerning the killings and related subjects appeared. Further, the court also found that during this same period, 584 accounts concerning the event were aired on four local television stations. Many of these accounts "contained prejudicial and highly inflammatory information about [Appellant] and his alleged crimes." Trial Court Opinion, dated March 26, 2001, at 5–6.

6 Moreover, Appellant fails to explain how Dr. Bronstein's evidence would have been substantially different from that adduced by the trial court during its pre-trial change of venire hearings.

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7 With respect to one potential juror, Edward Startari, Appellant's counsel did question the Commonwealth's challenge to this potential juror by stating, “This is cause?” The court responded to this question by stating, “Yes. No question about it.” Notes of Testimony Jury Selection, 4/21/01, at 689. However, Appellant did not place an objection on the record to the Commonwealth's challenge to Startari. *See id.*

8 Section 5704(14)(i)(A) provides:

> It shall not be unlawful and no prior court approval shall be required under this chapter for:
> (14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record, monitor or divulge any telephone calls from or to an inmate in a facility under the following conditions:
> (i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any telephone calls from or to an inmate in a county correctional facility as provided for by this paragraph:
> (A) Before the implementation of this paragraph, all inmates of the facility **shall be notified in writing** that, as of the effective date of this paragraph, their telephone conversations may be intercepted, recorded, monitored or divulged.

18 Pa.C.S. § 5704(14)(i)(A) (emphasis added).

9 Section 5704(14)(i)(C) of the Wiretap Act provides:

> (C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

18 Pa.C.S. § 5704(14)(i)(C).

10 The trial court further determined that the record showed that all participants in the telephone conversation at issue, *i.e.,* Appellant, his mother, and his father, by their knowledge that their conversation was being recorded, **consented** to the interception and recording of the conversation. Section 5704(4) of the Wiretap Act provides that it shall not be unlawful for a person to intercept a communication “where all parties to the communication have given prior consent to such interception.” 18 Pa.C.S. § 5704(4). However, federal case law has held, under the Federal Wiretap Act, that inmate knowledge that telephone conversations may be intercepted and recorded **and consent** to such action are not equivalent. *See, e.g., United States v. Daniels,* 902 F.2d 1238, 1244–45 (7th Cir.1990). Because of our disposition of this issue, we need not determine whether the trial court's alternative grounds for denying Appellant relief has merit.

11 Appellant does not cite to any evidence that the Commonwealth **by purposeful design** misrepresented to the suppression court that which appears not to be true, to wit, that the prison handbook contains written notification that inmate telephone conversations could be intercepted and recorded.

12 At the time of Appellant's 2001 trial, these provisions were found at Pa.R.Crim.P. 573(C)(2)(a)(i).

13 However, other courts have disputed that there is a constitutional implication when the prosecution calls as a witness a psychiatric expert consulted by the defendant, and have further refused to recognize a link between the attorney-client privilege and the Sixth Amendment right to effective assistance of counsel. *See, e.g., Noggle, supra* at 1413–15 (and cases cited therein); and *People v. Spiezer,* 316 Ill.App.3d 75, 87–88, 249 Ill.Dec. 192, 735 N.E.2d 1017, 1025–26 (2000) (and cases cited therein, rejecting the *Alvarez* Sixth Amendment analysis).

14 We observe that although the appellant in *Smith* did not object to the prosecutor's remark, we determined that the issue could be reviewed under the relaxed waiver doctrine as the case preceded the effective date of the *Freeman* abolition of that doctrine. *Smith, supra* at 896 n. 2.

15 We note that at a sidebar conference, Dr. Martone represented to the court that she never examined Appellant for insanity, but only for competence to stand trial. N.T. Trial, 5/5/01, at 1760.

16 Appellant's argument fails to set forth the substance of the testimony he had hoped to elicit from Dr. Martone or how such testimony would have been different from that given by Dr. Martone during the guilt phase of trial. As shall be discussed later in the text, this is a significant omission.

17 The court also opined on the record that it believed that it had initially erred by allowing Dr. Martone to testify during the guilt phase of trial and was "not going to repeat [this] error." N.T. Trial, 5/9/01, at 2752.

18 On July 27, 2007, All.C.R.Crim.P. 300.31 was rescinded.

19 However, it is not clear from *Fears* what the circumstances were surrounding Dr. Martone's testimony during that proceeding, *i.e.,* whether the defendant had no other witness to testify regarding all of the matters about which Dr. Martone testified in that case.

20 We also note that Appellant did not address the Commonwealth's argument that it would be fundamentally unreasonable to accept Appellant's position that Dr. Martone should be available to testify **only** when her testimony is beneficial to a defendant.

21 These unpublished portions of the conversation involved discussion of the death penalty and Appellant's legal counsel. N.T. Trial, 5/8/01, at 2455, 2460.

22 By contrast, the trial court permitted the redacted portion of the telephone conversation during the guilt phase of trial pursuant to Pa.R.E. 803(25), as admissions by a party opponent, a hearsay exception. N.T. Trial, 5/8/01, at 2466, 2479–80.

23 *Kelly* affirmed and further clarified the United States Supreme Court's holding in *Simmons.* The Court held that a *Simmons* instruction, when requested by the defense, is required by due process when the jury hears evidence of a defendant's propensity for violence such that it would reasonably "conclude that [the defendant] presents a risks of violent behavior whether locked up or free, and whether free as a fugitive or a parolee." *Kelly, supra* at 253–54, 122 S.Ct. 726. Thus, while *Simmons* determined that due process concerns are implicated when the prosecutor argues future dangerousness, *Kelly* appears to hold that relevant due process concerns may be triggered when the **evidence** establishes future dangerousness. *See Kelly, supra* at 260, 122 S.Ct. 726 (Rehnquist, C.J., dissenting). However, the majority opinion in *Kelly* was based on the prosecutor's evidence **and** argument. *See Kelly, supra* at 253, 122 S.Ct. 726 ("the evidence and argument ... [show] that future dangerousness was ... an issue in this case") (citation and quotation marks omitted). Thus, by its evidence and argument, the prosecution in *Kelly* placed the issue of future dangerousness before the jury.

24 Our independent review of the Commonwealth's closing argument establishes that the Commonwealth did not raise the issue of future dangerousness. *See* N.T. Trial, 5/11/01, at 3079–88.

25 Notably, Appellant did object to the introduction of a photograph during the testimony of Jun Sun. The court sustained the objection.

26 However, Appellant does cite to dissenting opinions in *Commonwealth v. Means,* 565 Pa. 309, 773 A.2d 143 (2001).

27 Indeed, the Superior Court has applied this basic legal principle to specifically hold that in order for *Crawford* to be applied retroactively, the appellant would have had to preserve his or her objections to the challenged evidence. *Commonwealth v. Gray,* 867 A.2d 560, 574 (Pa.Super.2005).

28 We would also note that the purported hearsay of Dr. Welner's testimony is not "testimonial" hearsay as contemplated by the Court in *Crawford.* Thus, *Crawford* is inapplicable in any event.

29 We note that the United States Supreme Court has recently ruled that Kentucky's three-drug protocol of lethal injection, one of the drugs being potassium chloride, is not cruel and unusual punishment under the Eighth Amendment. *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).

30 Appellant's very brief argument does not specifically state whether he is arguing that a person who has committed first-degree murder while mentally ill should not be executed or whether a person who is mentally ill at the time of execution should not be executed. We infer from Appellant's discussion of relevant case law that he is arguing the former.

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31 It does not appear that Appellant is represented by Latvian counsel on appeal, and Appellant made no averment that he ever consulted with the Latvian consulate to better understand his post-trial rights, despite his knowledge of the Convention.

32 Specifically, Appellant alleges that trial counsel was ineffective for having failed to (1) request a change of venue or venire; (2) object to the removal of prospective jurors Mock and Hawthorne; (3) move to suppress the evidence obtained pursuant to the April 28, 2000 search of Appellant's house; and (4) object to and seek a hearing regarding his "forced drugging" and request a jury instruction regarding the reasons for his "apparent stupor" during trial. *See* Appellant's Brief at 86–92.

33 Indicating that a petition for post-conviction review will likely be filed, Appellant contends that we will have to review these ineffectiveness issues anyway, so we may as well review them now. Aside from our general disinclination to act based on prognostications of the future, we see no reason to circumvent the rule in *Grant,* as it was cogently based on the premise that a review of ineffectiveness claims is generally best made upon a full factual record developed by a post-conviction court.

1 The trial court construed the statute to require one-time written notice to existing inmates only upon implementation of the overall practice of recording calls. *See Commonwealth v. Baumhammers,* Nos. 200014712 *et al., slip op.* at 14 (C.P. Allegheny Dec. 29, 2005) ("The Court does not read this paragraph as requiring that written notice be provided to every inmate upon their admission to the facility."). Neither the Commonwealth nor the majority, however, advocates such a construction. Furthermore, although the statute does appear to be ambiguous in the relevant regard, applying the Court's practice of strictly construing in favor of the privacy interests which are intended to be safeguarded, as referenced below, I agree with the conclusion that the relevant statutory notice is to be provided to each inmate.

2 While the majority correctly observes that the provision of the Act under review in *Hashem* appeared in a separate section of the statute, the *Hashem* Court repeatedly indicated that its approach applied more broadly to the Wiretap Act as a whole, and the majority does not explain how the application of a strict-enforcement approach to one portion of the statute is to be reconciled with its more pragmatic approach to another.

The Commonwealth predicates its argument that a plain-meaning application of the legislative mandate for written notice would be absurd upon an example involving the uselessness of providing written notice to blind or illiterate inmates. *See* Brief for Appellee at 42. This does not seem to me to furnish a reason for the judiciary to retool the statute, however, as such inmates may (and should) obtain assistance from prison officials or others in reading written materials made available to them. Moreover, it seems axiomatic that exceptional circumstances should not be taken to eviscerate clearly stated rules of general application in non-exceptional circumstances.

3 In his reply brief, Appellant attempts to recast his argument, in the alternative, as a due process challenge. *See* Reply Brief of Appellant at 12 ("Since the Commonwealth as a prosecuting entity knew that [the jail official's] testimony was false, and there is a reasonable likelihood that had the prosecution revealed the truth about the handbook, the tapes would have been suppressed, Due Process requires a new trial."). However, arguments first raised before an appellate court in a reply brief are not properly considered. *See* *Commonwealth v. Wharton,* 571 Pa. 85, 105, 811 A.2d 978, 990 (2002). The present circumstances demonstrate good reason for this practice, since Appellant's argument addresses the extent of the prosecutor's knowledge, an inherently factual matter which has not been developed upon an evidentiary record at this juncture.

4 It is well established that the application of the death penalty is to be based on reasoned moral judgment, *see* *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989), as opposed to passion or emotion.

1 I recognize we lack detailed advocacy on the issue, as Baumhammers argues only that "the *Atkins* decision should and will be extended to individuals, like him, who are mentally ill." Brief for Appellant at 85. Moreover, I note Baumhammers raises no claims under Article I, Section 13 of the Pennsylvania Constitution. However, I am convinced this recurring issue deserves further consideration by legislators and jurists.

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2 Pennsylvania follows the Model Penal Code in allowing mental illness to be argued in mitigation. 42 Pa.C.S.A. § 9711(e)(2); MPC § 210.6(4)(b).

3 We recently noted the difficult distinctions between defendants who are not guilty by reason of insanity and those who are guilty but mentally ill. *Commonwealth v. Rabold,* 597 Pa. 344, 951 A.2d 329 (2008).

4 Research has revealed only one state, Connecticut, which has imposed such a restriction. *See* Conn. Gen.Stat. Ann. § 53a–46a(h).

5 To the extent data is available, it may be read to indicate the percentage of mentally ill defendants on death row is increasing, not decreasing. *See* National Mental Health Association, Death Penalty & People with Mental Illnesses (2006), http://www1.nmha.org/position/death Penalty/deathpenalty.cfm. This data is not conclusive, since NMHA does not explicitly state whether it is studying only offenders who were mentally ill at the time of the crime or including offenders who become mentally ill on death row. It is beyond cavil that a prisoner who is suffering from a severe mental illness that makes him unable to understand the reasons he is being put to death may not be executed. *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (noting that prohibition dates to medieval English common law); *Panetti v. Quarterman,* 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

6 Federal courts have consistently declined to extend *Atkins* to the mentally ill. *See, e.g., In re Neville,* 440 F.3d 220, 221 (5th Cir.2006) (citing *In re Woods,* 155 Fed.Appx. 132, 136 (5th Cir.2005)); *Joshua v. Adams,* 231 Fed.Appx. 592, 593 (9th Cir.2007); *Green v. Quarterman,* 2008 WL 442356 (S.D.Tx.2008). Our neighboring state courts, too, have concluded *Atkins* does not apply to the seriously mentally ill. *State v. Ketterer,* 111 Ohio St.3d 70, 855 N.E.2d 48 (2006); *Matheney v. State,* 833 N.E.2d 454 (Ind.2005) (holding that permitting a defendant to argue mental illness constitutes a mitigating factor at his penalty phase hearing provides adequate protection).

7 An independent judicial examination of the culpability of individuals with serious mental illnesses, and the constitutional propriety of their execution for crimes as indubitably heinous as Baumhammers', is well within the traditional parameters of the Eighth Amendment. *See* *Coker v. Georgia,* 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) ("the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment"); *Roper,* 543 U.S. at 565, 125 S.Ct. 1183 (interpreting *Coker* to require the Court to independently consider the appropriateness of executing members of a particular group). This factor does not subordinate the democratic will to the mere "*feelings* and *intuitions* of a majority of the Justices" on a particular court, *Atkins,* 536 U.S. at 348, 122 S.Ct. 2242 (Scalia, J., dissenting) (italics in original), but requires that judges make a reasoned attempt to interpret and apply that Amendment's prohibition on "cruel" punishments. Not to make such an attempt would be to abdicate our proper judicial role. *See* *id.* at 349, 122 S.Ct. 2242 (noting that certain punishments, "such as the rack and the thumbscrew," are always-and-everywhere cruel and so precluded by the Eighth Amendment).

8 The views of such organizations may evidence a "broader social and professional consensus" that the execution of members of a certain group is unacceptable. *See* *Atkins,* 536 U.S. at 316 n. 21, 122 S.Ct. 2242 (citing the positions of, *inter alia,* the American Psychiatric Association and American Catholic Conference that the execution of the mentally retarded is cruel and unusual).

9 Naturally, such an analysis will also require consideration of Article I, § 13 of the Pennsylvania Constitution.

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625 Pa. 354
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Richard Scott BAUMHAMMERS, Appellant.

Submitted on Briefs Feb. 19, 2013.
|
Decided May 27, 2014.

Synopsis
Background: After his first-degree murder conviction and death sentence were affirmed on direct appeal, 599 Pa. 1, 960 A.2d 59, defendant petitioned for postconviction relief. The Court of Common Pleas, Criminal Division, Allegheny County, Nos. CP–02–CR–0014712–2000, CP–02–CR–0014713–2000 and CP–02–CR–0014714–2000, Jeffrey A. Manning, J., denied petition. Defendant appealed.

Holdings: The Supreme Court, No. 640 CAP, Saylor, J., held that:

mental health expert's published contradictory statements after trial indicating that defendant did in fact suffer from schizophrenia did not amount to newly-discovered evidence supporting defendant's insanity defense;

trial counsel's failure to hire a mental health expert to advise as to how best to cross-examine Commonwealth's psychiatric expert was not ineffective assistance;

trial court was not required to grant defendant additional time to prepare for testimony of Commonwealth's mental health expert;

trial counsel's failure to present a mitigation expert was not ineffective assistance;

guilty-but-mentally-ill verdict was unavailable as a matter of law;

lone surviving mass shooting victim's paralysis was not an exceptional circumstance requiring his testimony to be presented via videotape; and

trial court had no authority to override defendant's state constitutional right to be tried by a jury drawn from "the vicinage" in question.

Affirmed.

Attorneys and Law Firms

****713** Caroline Roberto, Esq., for Richard Scott Baumhammers.

Francesco Lino Nepa, Esq., Ronald Michael Wabby Jr., Esq., Allegheny County District Attorney's Office, Amy Zapp, Esq., PA Office of Attorney General, for Commonwealth of Pennsylvania.

BEFORE: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, MCCAFFERY, STEVENS, JJ.

OPINION

Justice SAYLOR.

***363** This is a capital post-conviction appeal.

The underlying facts are set forth in this Court's opinion resolving Appellant's direct appeal. *See* *Commonwealth v. Baumhammers,* 599 Pa. 1, 960 A.2d 59 (2008). Briefly, on April 28, 2000, Richard Baumhammers (Appellant) went on a two-hour crime spree in Allegheny and Beaver Counties in which he shot six individuals with a firearm. Appellant first shot to death a Jewish neighbor and set her house on fire. He then drove to public places such as a Chinese restaurant and an Indian grocery store, where he shot five additional persons, all racial or ethnic minorities. Four of these additional victims died of their wounds; the fifth was paralyzed from the neck down. During the crime spree, Appellant also damaged two synagogues by spray-painting swastikas and the word "Jew" onto one of them, and shooting bullets into both. *See* *id.* at 13–21, 960 A.2d at 67–71. Appellant was charged with five counts of first-degree murder and related offenses, and the matter proceeded to trial from April 27th to May 9th of 2001. The jury found Appellant guilty on all charges. At the conclusion of the penalty phase, the jury determined that the aggravating circumstances outweighed any mitigation and set the penalty ****714** at death for all five murders.[1] ***364** APPELLANT'S POST-sentence motions were denied, and

this Court affirmed the judgments of sentence. *See id.* at 66, 960 A.2d at 99.

Appellant filed a counseled, amended petition under Pennsylvania's Post Conviction Relief Act, 42 Pa.C.S. §§ 9541–9546 ("PCRA"), raising nineteen claims. The PCRA court, per Judge Manning (who was also the trial judge), scheduled a hearing on four of the claims and noted its intent to dismiss the remaining fifteen claims without a hearing. A three-day hearing was held in September 2011, at which numerous witnesses testified. The court ultimately denied relief. After Appellant appealed and filed a concise statement of errors complained of on appeal, *see* Pa.R.A.P. 1925(b), the PCRA court issued an opinion addressing each of the alleged errors and concluding that it had properly denied relief. *See Commonwealth v. Baumhammers,* CC Nos. 2000–14712–14714, *slip op.* (C.P. Allegheny June 29, 2012) ("PCRA Court Opinion").

The statutory framework governing our review is well settled. To be eligible for relief, a PCRA petitioner must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more of the circumstances enumerated in Section 9543(a)(2) of the PCRA, and that the allegation of error has not been previously litigated or waived. *See, e.g., Commonwealth v. Sneed,* 616 Pa. 1, 16–17 & n. 13, 45 A.3d 1096, 1105 & n. 13 (2012). For present purposes, the circumstances that would warrant relief are a constitutional violation, or ineffective assistance of counsel, which so undermined the reliability of the truth determining process that no reliable adjudication of guilt or innocence could have taken place. *See id.;* 42 Pa.C.S. § 9543(a)(2). Details of the trial and post-conviction proceedings are discussed below as necessary in connection with specific claims. ***365** We note that, because Appellant's direct appeal was filed after this Court's decision in *Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726 (2002), any claims that rest on an allegation of ineffective assistance of trial counsel need not be layered to address appellate counsel's stewardship. *See, e.g., Commonwealth v. McGill,* 574 Pa. 574, 589, 832 A.2d 1014, 1023 (2003).

I. Claims Decided Based on an Evidentiary Record

For the claims on which a hearing was held, we consider whether the PCRA court's findings are supported by the record and free of legal error. *See Commonwealth v. Rega,* 620 Pa. 640, 662–64, 70 A.3d 777, 790 (2013).

A. Post-trial statements of the Commonwealth's forensic psychiatrist

Appellant first contends that his constitutional rights to due process and to be free of cruel and unusual punishment were violated when the Commonwealth's expert testified in the guilt phase that Appellant ****715** did not have schizophrenia. To address this argument, it is helpful to review certain aspects of the trial and PCRA testimony.

At trial, Appellant offered an insanity defense. He presented the testimony of several treating psychiatrists as fact witnesses, and of forensic psychiatrist Dr. James Merikangas as an expert witness. Dr. Merikangas testified that, on the day of the crime, Appellant may have been suffering from paranoid schizophrenia and, although he understood the nature and quality of his actions, he did not know that what he was doing was legally or morally wrong. *See* 18 Pa.C.S. § 315 (setting forth Pennsylvania's insanity defense in terms of the defendant's failure to understand the nature and quality of his conduct or that it "was wrong"). Dr. Merikangas's testimony supported the defense theory that Appellant was suffering from hallucinations in which he believed the FBI was harassing him and causing him physical pain through the use of lasers and poisons, and promised to stop doing so if he would kill ethnic and racial minorities. Dr. Merikangas elaborated that Appellant thought the FBI wanted to discredit his nascent ***366** "Free Market" political party and, to that end, directed him to conduct a "right-wing hit." The expert witness opined that Appellant understood that it is ordinarily wrong to kill others, but he believed his conduct was legally and morally justified because he was obeying a government order.

In its rebuttal case, the Commonwealth adduced the testimony of forensic psychiatrist Dr. Michael Welner. Based on a records review involving 230 sources and many hours of interviews with Appellant, Dr. Welner produced a lengthy report. He testified consistent with the report, disputing Dr. Merikangas's conclusions and opining that Appellant was not schizophrenic, he understood the nature and quality of his actions, and he knew his actions were wrong. Dr. Welner disbelieved Appellant's claims of hallucinations, attributing such assertions to after-the-fact malingering. He concluded instead that Appellant acted based on hatred toward non-European immigrants and other minorities. The witness indicated that, although

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Appellant met the criteria for narcissistic personality disorder, possible antisocial personality disorder, and delusional disorder of a persecutorial type, delusions are different from hallucinations,[2] and moreover, the delusional facet of Appellant's personality had largely receded during the months leading up to the killings. Dr. Welner testified that his conclusion regarding Appellant's hatred-based motive for the killings was supported by Appellant's desecration of the two synagogues, as well as trial testimony and information he gathered for his report suggesting that Appellant had: angrily threatened two Pakistani restaurant patrons in a Pittsburgh suburb in August 1999, telling them to leave America or they would die; stricken a woman with his fist while traveling in France two months later because he thought she was Jewish; visited white-supremacist websites prior to the day in question; and made anti-minority and white-supremacist statements ***367** to fellow inmates shortly after his arrest and while awaiting trial.

Six years after the trial, when a massacre occurred at Virginia Polytechnic Institute (Virginia Tech), Dr. Welner was working ****716** as a paid consultant for ABC News. In that capacity, he was interviewed about the Virginia Tech shootings and, in passing, made reference to Appellant's case. Dr. Welner also made comments to other media organizations as well as an educational institution between 2007 and 2011, in which he mentioned Appellant's case. In at least three of these comments or interviews, Dr. Welner stated that Appellant suffered from schizophrenia, albeit his actions were motivated by ethnic hatred separate and apart from his schizophrenia.

This suggestion was, of course, inconsistent with Dr. Welner's trial testimony in which he rejected a schizophrenia diagnosis for Appellant. Appellant viewed the inconsistency as material because, in Appellant's view, a schizophrenia diagnosis would have supported his insanity defense better than the personality disorders Dr. Welner described at trial. Thus, at the PCRA hearing, Appellant presented the testimony of forensic psychiatrist Dr. Phillip Resnick concerning the effect if, hypothetically, Dr. Welner had testified at trial that Appellant suffered from schizophrenia. Dr. Resnick testified that: (a) if Dr. Welner had diagnosed Appellant with schizophrenia, the diagnoses of narcissistic personality disorder and possible antisocial personality disorders would have been difficult to support; and (b) a schizophrenia diagnosis would have explained, in terms of a disease of the brain—as opposed to mere personality traits—certain items that may have cast Appellant in a negative light before the jury, such as Appellant's alleged: grandiosity; inappropriate affect (e.g., smiling) at the time of his arrest; lack of empathy; lack of remorse; aloofness; argumentativeness; and inability to maintain steady employment. *See* N.T., Sept. 12, 2011, at 15–24.

Appellant also called Dr. Welner as a PCRA witness and questioned him about the inconsistency between his trial testimony and his subsequent media comments. Dr. Welner preliminarily agreed that schizophrenia is the "most extreme ***368** manifestation of paranoia," N.T., Sept. 13, 2011, at 190, and acknowledged that, in the media, he had indicated that Appellant suffered from schizophrenia at the time of the shootings. He observed, however, that his role as a media consultant is "very different from" his role as a forensic psychiatrist, *id.* at 191, because media outlets are not primarily concerned with specific diagnoses or legal issues, but with broader public implications and the public's sense of vulnerability in the wake of a mass shooting.

As for the particular statements regarding Appellant having schizophrenia, Dr. Welner: clarified that such assertions stemmed from having erroneously recollected Appellant's diagnosis, *see, e.g., id.* at 213 ("I remembered my diagnosis incorrectly."), 237 ("I thought I remembered [Appellant's diagnosis], I remembered it incorrectly."); observed that all such statements were made at least six years after trial and that he had not reviewed his report or any other materials regarding Appellant's case in the interim, *see id.* at 208; and pointed out that he had been involved in analyzing a number of other mass shootings in which a schizophrenia diagnosis had been present, thus possibly explaining why he might have become confused and incorrectly stated that Appellant also had schizophrenia. *See id.* at 213–14. Dr. Welner testified, as well, that, to the extent any of his misstatements regarding Appellant suffering from schizophrenia remained available on the ABC News website, he had taken steps to rectify them. Finally, Dr. Welner stated that he stood by his trial testimony and the specific diagnoses he articulated at that time, which excluded schizophrenia. *See id.* at 232–34. The PCRA court ultimately credited Dr. ****717** Welner's explanation that he had simply made a mistake when speaking with the media and other organizations many years after the trial, and pointed out that Appellant offered no evidence to contradict such explanation. *See* PCRA Court Opinion, *slip op.* at 37–38.

Appellant now argues that it is "unreasonable to believe," and "difficult to accept," that Dr. Welner could have misspoken as a media consultant, Brief for Appellant at 16, 18, since

he was being paid to fill an important role within a news ***369** organization. Appellant proffers that this is especially so because Dr. Welner was able to remember other details of Appellant's case, most notably the names of the victims, during these same media interviews. On this basis, Appellant argues that Dr. Welner's trial testimony was so unreliable as to render the guilt and penalty verdicts reached by the jury constitutionally infirm under the Due Process Clause and Eighth Amendment. *See* Brief for Appellant at 19. Finally, Appellant reasons that Dr. Welner's post-trial statements in the media constitute newly discovered evidence entitling him to a new trial. *See id.* at 19–20. *See generally* 42 Pa.C.S. § 9543(a)(2)(vi) (allowing for relief where a PCRA petitioner demonstrates that the conviction or sentence resulted from the unavailability of exculpatory evidence that has become available and would have changed the outcome if it had been introduced).

Because the PCRA court heard Dr. Welner's responses and observed his demeanor, it was in the best position to determine whether his testimony was credible. *See* *Commonwealth v. Weiss,* 565 Pa. 504, 518, 776 A.2d 958, 966 (2001). Such determination is "to be accorded great deference," *Commonwealth v. Dennis,* 609 Pa. 442, 457, 17 A.3d 297, 305 (2011), and indeed, is binding on this Court if supported by the record. *See* *Commonwealth v. Williams,* 619 Pa. 219, 240–41, 61 A.3d 979, 992 (2013); *see also* *Commonwealth v. White,* 557 Pa. 408, 421, 734 A.2d 374, 381 (1999) ("[T]here is no justification for an appellate court, relying solely upon a cold record, to review the fact-finder's first-hand credibility determinations.").

Here, it is undisputed that Dr. Welner's out-of-court statements were made at least six years after the trial and without the benefit of having reviewed any materials connected with the case since the trial. It is also uncontested that, upon being alerted to the inconsistency with his trial testimony, Dr. Welner took action to ensure that any news articles still appearing online were corrected so that they no longer reflected that Appellant had schizophrenia. Although Dr. Welner was able to remember the names of Appellant's victims, it ***370** does not necessarily follow that he must also have remembered Appellant's diagnosis, and moreover, Dr. Welner explained that he makes a particular effort to remember victims' names "because in my experience they become faceless people." N.T., Sept. 13, 2011, at 236. Thus, we have no grounds to disturb the PCRA court's decision to credit Dr. Welner's testimony to the effect that his post-trial characterization of Appellant as suffering from schizophrenia was a mistake. That decision is supported by the record, and as such, we are bound by it. Accordingly, Dr. Welner's now-disavowed out-of-court statements cannot form the basis of a meritorious constitutional claim. [3]

****718 B. Lack of a critique of Dr. Welner's testimony**

In his next claim Appellant contends that the defense efforts to counter Dr. Welner's trial testimony amounted to ineffective assistance of counsel. As explained, Dr. Welner testified as a psychiatric expert for the prosecution, and Dr. Merikangas testified as a psychiatric expert for the defense. The two experts disagreed over whether Appellant was legally sane at the time of the shootings, and over whether Appellant was suffering from schizophrenia. Dr. Merikangas stated that such a diagnosis was possible and that Appellant was insane, and Dr. Welner rejected both propositions. Additionally, and as discussed, Dr. Welner discounted the concept that Appellant's conduct stemmed from psychotic delusions regarding supposed persecution or harassment by the federal government, and instead attributed Appellant's actions to his antipathy toward ethnic and racial minorities.

During the PCRA proceedings, Appellant retained Dr. Richard Dudley, a clinical and forensic psychiatrist, to evaluate Dr. Welner's methodology and determine whether he could have ***371** advised trial counsel on how best to cross-examine Dr. Welner and rebut his testimony, possibly by advancing a defense surrebuttal case. Dr. Dudley issued a report and provided testimony at the PCRA hearing, concluding that Dr. Welner's methodology was flawed. He faulted Dr. Welner, most notably, for not fully exploring the impact that Appellant's delusions had on his life and his ability to function. *See* N.T., Sept. 12, 2011, at 48.

Dr. Dudley gave as an example the fact that Appellant had placed personal ads and utilized female escort services in the days before the crime, but he denied having done this during the videotaped interviews Dr. Welner conducted with Appellant as part of his clinical examination. At trial, Dr. Welner suggested that, because Appellant had placed the ads and contacted the escort services using his real name, and had invited strangers from those services into his home, his persecutory delusions were not sufficiently pervasive to indicate schizophrenia during the timeframe involved, since his actions showed that he was not overly guarded and did not suspect the individuals of being government agents. *See* N.T. Apr. 27–May 9, 2001 ("N.T., Trial"), at 1994–

95. Dr. Dudley, who reviewed the videotapes, criticized Dr. Welner's conclusion in this regard because, during his clinical examination, Dr. Welner did not respond to Appellant's denials by confronting him with information suggesting such denials were false, thus foreclosing any investigation into the relationship between Appellant's actions and his "disordered thought process." N.T., Sept. 12, 2011, at 52–53. Dr. Dudley referred to other examples of a similar nature, in each case stating that Dr. Welner had failed to fully "explore" the issue with Appellant.

Ultimately, Dr. Dudley opined that, in view of such omissions, Dr. Welner's diagnoses lacked adequate support, albeit Dr. Dudley disclaimed any intent to: express an opinion as to whether Dr. Welner's diagnoses of Appellant's psychotic or personality disorders were right or wrong; render an independent psychiatric diagnosis; or determine whether Appellant was legally sane at the time of the crimes. *See id.* at 68, 85–86. Instead, Dr. Dudley described his role as limited to ***372** critiquing Dr. ****719** Welner's " methodology ... in the range of activities that are part of the forensic examination...." *Id.* at 68–69. Finally, Dr. Dudley noted that, if he had been retained by the defense in 2001, he would have advised counsel on how to develop a more probing cross-examination along the lines of the above, and he would also have been available to testify concerning the flaws he discerned in Dr. Welner's forensic evaluation and overall methodology. *See id.* at 55–58.

Appellant maintains that trial counsel was ineffective for failing to hire an expert such as Dr. Dudley to perform the functions described above, most notably, advise the defense as to how best to cross-examine Dr. Welner, and testify in surrebuttal that Dr. Welner's methodology was flawed. Appellant suggests that counsel must have been aware of the need for such an expert because he complained to the court on more than one occasion that he had insufficient time to review Dr. Welner's lengthy expert report. *See* Brief for Appellant at 22.

To prevail on this claim, Appellant must plead and prove by a preponderance of the evidence that his conviction was the result of ineffective assistance of counsel that, under the circumstances, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. *See* 42 Pa.C.S. § 9543(a)(2)(ii). The test is substantively the same as the performance-and-prejudice standard set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), although this Court has divided the performance component into sub-parts dealing with arguable merit and reasonable strategy. Appellant must therefore show that: the underlying legal claim has arguable merit; counsel had no reasonable basis for his act or omission; and Appellant suffered prejudice as a result. *See* *Commonwealth v. Pierce,* 515 Pa. 153, 158–60, 527 A.2d 973, 975–76 (1987). Because all three "*Pierce* factors" must be demonstrated, the claim fails if any one of them is not proved. *See Commonwealth v. Busanet,* 618 Pa. 1, 18, 54 A.3d 35, 45 (2012).

***373** Although Dr. Dudley's input might have aided the defense at trial, his function would have been limited to advice and impeachment, rather than rebuttal. He criticized Dr. Welner's methodology, but he did not offer a substantive opinion in rebuttal to the one rendered by Dr. Welner. Thus, to the extent Appellant advances that counsel's stewardship was deficient for failing to call a rebuttal witness, the PCRA record does not support the premise that such witness was available or that counsel was aware of, or had a duty to know of, the witness. *See generally* *Commonwealth v. Weiss,* ——Pa. ——, ——, 81 A.3d 767, 804 (2013) (noting that, to establish ineffectiveness for failing to call an expert witness, an appellant must demonstrate, among other things, that the expert witness existed and was available). Even if one assumes that Dr. Dudley was available to act as an advisor or an impeachment witness at trial, this Court's precedent precludes a finding of arguable merit on that basis alone.[4] Rather, the central issue is whether defense counsel's cross- ****720** examination of the prosecution witness was effective, *see* *Chmiel,* 612 Pa. at 388, 30 A.3d at 1143, bearing in mind that its purpose is to subject the state's expert testimony to meaningful adversarial testing. *See* *Maryland v. Craig,* 497 U.S. 836, 846, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990). *See generally* *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065 (observing that counsel has a duty to bring skill and knowledge to bear so as to render the trial a "reliable adversarial testing process"). To make such an evaluation, it may be helpful to review counsel's cross-examination in the context of the trial as a whole. *See* *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065 (explaining that the performance inquiry in any case where counsel's assistance ***374** is challenged is whether it "was reasonable considering all the circumstances").

At trial, the defense called numerous treating psychiatrists as fact witnesses to describe Appellant's significant mental infirmities. These included Dr. Christine Martone, the chief psychiatrist of the Allegheny County Behavior Clinic, who stated that she had examined Appellant four and six days after the crimes for competency purposes, and diagnosed him with paranoid schizophrenia, *see* N.T., Trial, at 1791, and Dr. Soroya Radfar, a treating psychiatrist who testified that Appellant was an in-patient under her care in Pittsburgh's Saint Clair Hospital for eleven days in May 1999, having been brought to the emergency room by his father. Dr. Radfar diagnosed Appellant as suffering from a schizoaffective disorder involving delusions, *see id.* at 1736–40, and recounted that, upon entry to the hospital: Appellant was having strong hallucinations; his delusions were fixed and diversified; and on a one-to-ten scale, with ten being the most extreme, he was a ten as compared to all other delusional patients she had examined. Further, Dr. Merikangas, testifying as an expert, gave a detailed recitation of Appellant's psychiatric history, noting that Appellant was subject to psychotic delusions as a result of a physical brain disease, and opining to a reasonable degree of medical certainty that on the day in question he was legally insane.

Although Dr. Welner testified that Appellant was legally sane, counsel extensively cross-examined Dr. Welner. During such cross-examination, counsel brought to light that Dr. Welner: neither treated Appellant nor performed a physical evaluation to rule out a physical cause for Appellant's psychiatric illnesses, but rather, relied on information from other doctors, *see* N.T., Trial, at 2116, 2133, 2136; agreed that Appellant met the criteria for delusional disorder of a persecutorial type, *see id.* at 2110; and agreed, as well, that persecutory delusions can be the cause of violent behavior in a patient, as reflected in two prominent psychiatry reference books, *see id.* at 2120.

***375** At the PCRA hearing, moreover, guilt-phase counsel, William Difenderfer, Esq., articulated reasonable grounds for not calling an additional expert witness or hiring an expert in an advisory capacity. Counsel testified that he and Dr. Merikangas prepared extensively for the cross-examination of Dr. Welner, *see* N.T., Sept. 14, 2011, at 271, and that he was satisfied with both the preparation and the actual cross-examination. *See id.* at 282. When asked why he did not call a surrebuttal witness to criticize Dr. Welner's methodology, counsel stated his belief that such a witness was unnecessary given the responses he was able to elicit when cross-examining Dr. Welner, together with the strength of the defense case. *See id.* at 272–73. In this latter regard, counsel noted that Dr. Merikangas' testimony concerning Appellant's mental condition was "complemented" by the evidence given by Dr. Martone, ****721** who, being employed by the court, would be seen by the jury as impartial. *See* N.T., Sept. 14, 2011, at 275.[5] Finally, counsel explained that he was concerned about "what another expert would do to this jury," since the jurors had already "heard from numerous psychiatric experts, and it was extremely apparent that we took issue with Dr. Welner's testimony." N.T., Sept. 14, 2011, at 273; *see also id.* at 283 ("[W]e can talk now about psychiatrists and doctors, but I think what's missed is there's 12 lay people hearing this case.").

In light of these factors, we agree with the PCRA court that Appellant has not demonstrated that counsel's stewardship, as it relates to impeaching or rebutting Dr. Welner, was constitutionally deficient. *See* PCRA Court Opinion, *slip op.* at 41. To the contrary, when viewed against the backdrop of the evidence marshaled during the defense case, and in the context of the trial as a whole, there is ample support for the PCRA court's determination that counsel used reasonable ***376** professional skill and subjected Dr. Welner's testimony to meaningful adversarial testing. Accordingly, Appellant is not entitled to relief on this claim.

C. Insufficient time to review Dr. Welner's report

In a one-page argument, Appellant next maintains that his rights under the Due Process Clause and the Eighth Amendment were violated when the trial court denied counsel's requests for additional time to review Dr. Welner's 89–page report. He states that, with additional preparation time, counsel could have offered testimony along the lines of that given by Dr. Dudley at the PCRA hearing, and that, instead, the "evidence supporting the prosecution's theory met a rushed and incoherent adversarial challenge and the jury accepted [Dr.] Welner's testimony." Brief for Appellant at 24. Appellant also faults appellate counsel for failing to raise this issue on direct appeal.

Due to the late arrival of the Welner report, counsel requested extra preparation time on several occasions, including at the conclusion of jury selection. At that juncture, the trial court noted that, because the jury had already been selected and would have to remain idle during any delay, the court was only willing to give counsel one extra day. In fact, trial started on April 27, 2001, three days after jury selection concluded.

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Depending on the nature of the materials in question, three days may not have appeared to provide sufficient preparation time to the defense team. Still, Dr. Welner did not testify until twelve days after trial commenced—after the prosecution and defense had each presented their case-in-chief. [6] Importantly, ***377** as well, during the ****722** PCRA proceedings trial counsel affirmed that his ability to cross-examine Dr. Welner was not ultimately impaired by the late delivery of the Welner report. To the contrary, he testified that he was

> very satisfied with what our cross-examination and preparation was with Dr. Welner. If I would see something glaring today that ... could have been developed if the [c]ourt would have given us another week or another month or another day, I'm not seeing it. So ... I totally stand by the cross-examination of Dr. Welner.
>
> N.T., Sept. 14, 2011, at 282–83.

This testimony was implicitly credited by the PCRA court, as that tribunal relied on it in rejecting the claim. *See* PCRA Court Opinion, *slip op.* at 42; *cf. Commonwealth v. King,* 618 Pa. 405, 418 n. 4, 57 A.3d 607, 615 n. 4 (2012) (inferring that the PCRA court found a particular witness to be credible where it relied heavily upon that witness's testimony). It is also confirmed by our own review of trial counsel's extensive cross-examination of Dr. Welner, as discussed above.

In post-conviction collateral proceedings, the defendant bears the burden to plead and prove eligibility for relief. *See* 42 Pa.C.S. § 9543(a). In view of the lack of evidence supporting the present constitutional claim, and trial counsel's PCRA testimony suggesting that the defense was not hindered in its ability to cross-examine Dr. Welner, Appellant has failed to carry that burden. Therefore, this claim does not entitle him to a new trial. [7]

D. Lack of mitigation expert

Next, Appellant claims that he was denied effective counsel in the penalty phase because no mitigation expert was retained to analyze his parents' experiences during World War ***378** II and explain how those experiences affected the way they responded to his mental illness. Appellant's theory is that, by investigating the deprivations and traumas his parents suffered during the war, an expert could have given the jury a better understanding of why his parents were willing to support him financially, including providing him with money, cars, and travel expenses, notwithstanding that Appellant never sought or obtained full-time employment. Appellant suggests that this would have added important context to his overall family history, and would have painted his parents in a sympathetic light rather than leaving the jury with the impression that they were merely indulgent.

Appellant's penalty phase case was extensive. [8] Most relevant to the present claim, Appellant's parents testified at length in the penalty phase. They described for the jury their family history, as ****723** well as their experiences with Appellant from the time of his birth. The family history related by Mr. and Mrs. Baumhammers reflected that they were both born in Latvia in the mid–1930s, although they did not meet until after their families had immigrated to the United States. They were young children in Latvia during World War II when the nation was occupied, first by the Soviet Union, then by Nazi Germany, and then again by the Soviet Union. Because of arrests, executions, property seizures, and deportations to Siberia of entire Latvian families under the Soviet occupation, ten percent of the population was displaced, and Appellant's parents' families fled the country in 1944 and traveled to Germany, hoping to "surrender" to the American forces at the conclusion of the war. N.T., Trial, at 3007. They were ultimately successful in this, although they had to endure ***379** multiple hardships in the interim. For example, Appellant's mother survived the Allied firebombing of Dresden, Germany in February 1945, and both parents' families lived for approximately five years in refugee camps after the war—where employment was scarce—before resettling in the United States. *See* N.T., Trial, at 2892–99 (testimony of Appellant's father, Andrejs Baumhammers); *id.* at 3006–08 (testimony of Appellant's mother, Inese Baumhammers).

This family history served as background information, whereas the primary focus of the parents' testimony pertained to their experiences dealing with their mentally ill son, his delusional thought processes spanning seven years, and their efforts to obtain treatment to remedy the problem or at least mitigate the symptoms. This latter testimony additionally, and very graphically, described Appellant's substantially deteriorating mental state during the years 1993–2000, leading up to the murders.

In support of the present claim, Appellant retained Leslie Lebowitz, Ph.D., a clinical psychologist specializing in psychological trauma, to interview Appellant's parents, produce a report, and testify at the PCRA hearing concerning the impact of the parents' wartime experiences on their raising of Appellant. *See* N.T., Sept. 12, 2011, at 93 ("I was asked to

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evaluate the issue of whether or not there was a significant trauma history present in [Appellant's] family of origin, and, if so, to opine as to whether or not that had any influence on the family dynamics or on their response to [Appellant's] mental illness."). At the hearing, she testified about the parents' difficult childhood experiences during the war and their eventual migration to the United States, as well as the increasingly acute mental health problems from which Appellant suffered as he grew into adulthood.

We acknowledge that the hardships delineated by Dr. Lebowitz at the post-conviction stage, in terms of Mr. and Mrs. Baumhammers' experiences during World War II and their later anguish and struggles in dealing with a mentally-ill son, are very unfortunate. The fact remains, however, that Dr. Lebowitz's testimony was substantially duplicative of the evidence ***380** brought forth at trial. *Accord* PCRA Court Opinion, *slip op.* at 43–44 ("It is really difficult to discern from her testimony what exactly Dr. Lebowitz could have added that was not already presented."). As noted, Appellant's parents had recounted at trial their World War II experiences, albeit in a somewhat more abbreviated fashion. [9] Further, the jury heard a comprehensive ****724** description of Appellant's behaviors, mental illnesses, and personality disorders through, *inter alia,* the testimony of a series of treating physicians and the reading of Mrs. Baumhammers' diary.

Appellant submits, however, that counsel's "basic failure" was in not hiring a mitigation specialist, and points to *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), as providing an example of ineffective assistance which occurred when penalty phase counsel "failed to engage a 'forensic social worker' to generate a 'social history.' " Brief for Appellant at 34 (quoting *Wiggins,* 539 U.S. at 524, 123 S.Ct. at 2537). Nevertheless, this Court has expressed that "the same [penalty-phase] investigation will not be required in every case," since counsel must have wide latitude in making tactical decisions. *Commonwealth v. Philistin,* 617 Pa. 358, 402, 53 A.3d 1, 26 (2012) (citing *Cullen v. Pinholster,* —— U.S. ——, ——, 131 S.Ct. 1388, 1406–07, 179 L.Ed.2d 557 (2011)); *see also* *Cullen,* —— U.S. at ——, 131 S.Ct. at 1407 ("It is rare that constitutionally competent representation will require any one technique or approach." (internal quotation marks and brackets omitted)).

Additionally, this case is readily distinguishable from *Wiggins.* In *Wiggins,* the defendant had suffered continuing egregious abuse as a child, including abuse at the hands of his biological mother and numerous foster parents. His counsel failed to investigate his life history and introduced no evidence of it, opting instead to rely solely on Wiggins' lack of a criminal history, notwithstanding that his penalty-phase counsel ***381** had previously told the jurors they would hear evidence of Wiggins' difficult childhood. Here, by contrast, counsel presented substantial testimony regarding Appellant's parents' childhoods and the hardships they met with during World War II, as well as detailed accounts of Appellant's mental infirmities that persisted over at least a seven-year period.

There is no *per se* requirement that, in all capital cases, counsel must employ a separate mitigation specialist regardless of the other mitigating evidence that is brought forth. *See generally* *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064 (clarifying that, beyond the general command that counsel's representation meet an objective standard of reasonableness, "[m]ore specific guidelines are not appropriate"). Thus, we disagree with Appellant's argument that, in the circumstances presented here, penalty phase counsel had a professional obligation to engage a psychologist such as Dr. Lebowitz to present a social history of the Baumhammers family to the jury.

It also bears noting that, to the degree Dr. Lebowitz discussed or analyzed the motivations and actions of Appellant's family, her testimony focused almost exclusively on Mr. and Mrs. Baumhammers rather than Appellant. [10] What was missing from Dr. Lebowitz's presentation was any explanation of how Appellant's parents' wartime experiences could have provided mitigation relative to Appellant himself, or the murders of which he was convicted. According to the record, Appellant was born in the United States in 1965 and was raised in a middle- or upper-middle-class family in which his parents were dentists and his sister became ****725** a successful radiologist. He did not experience any of the wartime hardships that his parents did. Appellant's parents paid for him to ***382** attend law school, and he eventually became a licensed attorney. Appellant's parents also arranged for him to receive psychiatric treatment upon the manifestation of his symptoms and made efforts to ensure the treatment continued as necessary. For her part, Dr. Lebowitz only interviewed Appellant briefly and did not include a section on Appellant in her report. *See* N.T., Sept. 13, 2011, at 161–63.

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In his advocacy to this Court, moreover, Appellant does not identify any aspect of Dr. Lebowitz's report or testimony that directly links his parents' experiences with anything that could be considered mitigating above and beyond what the jury heard at trial. Appellant's lack of specificity in this regard is illustrated by the highly generalized nature of the passage from Dr. Lebowitz's testimony that he has chosen to highlight as a demonstration of how his family history allegedly affected him:

> [I]f you want to understand the family, you have to understand all the players in the family. If you want to understand a child in the family, you need to understand who their parents are and what the historical, cultural and personal context is of the people who make up that family, and particularly when there's trauma, or really under any circumstances, the histories of all the players matter, and they explain things about why people do what they do.

Id. at 135, *quoted* in Brief for Appellant at 31, *and in* Reply Brief for Appellant at 3. Although statements such as these may be true as far as they go, they do not purport to elucidate, for the benefit of the fact-finder, how the family's overall social and generational history supports mitigation in the circumstances. Additionally, our own review of the PCRA record does not reveal any more particularized way in which Dr. Lebowitz connected Appellant's family history with potential substantive mitigation.

A PCRA petitioner cannot succeed on a claim that counsel was ineffective for failing to call a witness if the witness's testimony would not have materially aided him. In such a case, the underlying-merit and prejudice prongs of the *Pierce* test logically overlap. To show prejudice, the petitioner ***383** must demonstrate that there is a reasonable probability that, but for counsel's allegedly unprofessional conduct, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See* *Commonwealth v. Gibson,* 597 Pa. 402, 418, 951 A.2d 1110, 1120 (2008). Presently, Appellant's substantive argument concerning prejudice is limited to a single paragraph in which, without citation to the record, he suggests that: the Commonwealth portrayed his upbringing as "spoiled" and "privileged;" this had an adverse impact on his mitigation case; and Dr. Lebowitz could have provided a "mental health explanation" for why his parents treated him the way they did. Brief for Appellant at 36. Appellant also references a supposed " connection between [his] parents' trauma history and [his] burgeoning mental illness," Brief for Appellant at 36, but he does not state what that connection is. He also alludes to the concept that Dr. Lebowitz's testimony could have weakened any suggestion by the Commonwealth that Appellant was more blameworthy because he was an indulged and spoiled child and adult, *see id.* at 36–37, but, again, he does not explain how that impression could have been refuted. *See also id.* (alluding, without further explanation, to "how the parents' trauma impacted Appellant's mental health" (emphasis removed)).

****726** These are material deficiencies because the only mitigating circumstance to which Dr. Lebowitz's testimony could have pertained was the catch-all mitigator, which is expressly defined in terms of the "character and record *of the defendant* and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8) (emphasis added). Even if we were to assume, for instance, that Dr. Lebowitz could have convinced the jury that the parents' actions in indulging Appellant's wishes to maintain a comfortable lifestyle without having to engage in gainful employment stemmed, not from poor parenting skills, but from the psychological implications of their wartime experiences, this would only tend to mitigate the blameworthiness (if any) of the parents' behavior, and not Appellant's. Nor do we believe that the jurors' weighing of the aggravators and ***384** mitigators would have been materially altered on the basis of Dr. Lebowitz's assertions, since the weighing process is limited, by definition, to aggravating and mitigating circumstances that were actually found. *See* 42 Pa.C.S. § 9711(c)(iv).

In light of the above, because Appellant has not adequately explained how Dr. Lebowitz's testimony would have been helpful, counsel cannot be deemed ineffective for failing to present such testimony. Likewise, even if we assumed, *arguendo,* that Appellant could somehow establish the first two prongs of the *Pierce* test for ineffective assistance of counsel, he has failed to demonstrate prejudice. Therefore, for this additional reason, Appellant's claim necessarily fails. *See generally* *Commonwealth v. Walker,* 613 Pa. 601, 611–12, 36 A.3d 1, 7 (2011) (noting that an ineffectiveness claim may be

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denied upon showing that any one of the three prongs is not satisfied).

II. Claims Dismissed Summarily

On August 11, 2011, the PCRA court entered an order noting its intent to dismiss without a hearing the remaining PCRA claims, that is, those other than the ones for which a hearing was held. *See* Docket Entry 146. *See generally Commonwealth v. Albrecht,* 606 Pa. 64, 67, 994 A.2d 1091, 1093 (2010) ("The PCRA court need not hold a hearing on every issue appellant raises, as a hearing is only required on 'genuine issues of material fact.' " (quoting *Commonwealth v. Clark,* 599 Pa. 204, 212, 961 A.2d 80, 85 (2008), and Pa.R.Crim.P. 909(B))). At a status conference that day, the court stated that the PCRA petition "fails to establish the[r]e are genuine issues concerning any material facts as to those claims, and the [c]ourt concludes that [Appellant] is not entitled to post-conviction collateral relief on those claims." N.T., Aug. 11, 2011, at 17. [11]

***385** To obtain reversal of a PCRA court's summary dismissal of a petition, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief. *See Commonwealth v. Paddy,* 609 Pa. 272, 291–92, 15 A.3d 431, 442 (2011) (quoting *Commonwealth v. D'Amato,* 579 Pa. 490, 513, 856 A.2d 806, 820 (2004)). The controlling factor in this regard is the status of the substantive assertions in the petition. *See D'Amato,* 579 Pa. at 513, 856 A.2d at 820. Thus, as to ineffectiveness claims in particular, if the record reflects that the underlying issue is of no arguable merit or no prejudice resulted, no evidentiary ****727** hearing is required. *See Commonwealth v. Pirela,* 556 Pa. 32, 54, 726 A.2d 1026, 1037 (1999). For each such claim, we review the PCRA court's action for an abuse of discretion, *see Commonwealth v. Simpson,* 620 Pa. 60, 73, 66 A.3d 253, 261 (2013) (citing *Commonwealth v. Collins,* 585 Pa. 45, 70, 888 A.2d 564, 579 (2005)); *Commonwealth v. Keaton,* 615 Pa. 675, 748, 45 A.3d 1050, 1094 (2012); *Commonwealth v. Hutchinson,* 611 Pa. 280, 354, 25 A.3d 277, 320 (2011), taking into account the degree of specificity required of the PCRA court. *See Commonwealth v. Williams,* 566 Pa. 553, 569, 782 A.2d 517, 527 (2001). Thus, for example, where the court's pre-dismissal notice fails to give sufficiently specific notice to the petitioner as to its reason for its intended dismissal, a remand is appropriate to correct the error. *See id.*

With these guidelines for appellate review, we proceed to address each of the remaining claims Appellant raises in his brief.

A. Lack of guilty-but-mentally-ill instruction

Appellant argues that his guilt-phase attorney was ineffective for failing to request a jury instruction that he could be found guilty but mentally ill. He states that, since he offered an insanity defense, he was entitled to such an instruction based on a provision of the Crimes Code that states:

> A person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found "guilty but mentally ill" at trial if the trier of facts finds, ***386** beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

18 Pa.C.S. § 314(a). [12] Appellant submits that if the jury had found him guilty but mentally ill, it would also have been forced to conclude that he had established the mitigating circumstance that his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." 42 Pa.C.S. § 9711(e)(3). Appellant reasons that, due to ineffectiveness in the guilt phase, he suffered prejudice in the penalty phase since the jury did not find the proffered (e)(3) mitigator. *See supra* note 1.

While we do not deny that guilt-phase ineffectiveness can, under some circumstances, result in sentencing-phase prejudice, the difficulty with Appellant's claim is that this Court held as early as the late 1980s that a guilty-but-mentally-ill verdict is unavailable as a matter of law in the guilt phase of a capital case. In *Commonwealth v. Young,* 524 Pa. 373, 572 A.2d 1217 (1990), the Court first articulated its rationale, explaining that such a verdict:

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> reflects a penological concern that should be considered in determining the appropriate sanction for the offense. In the usual situation the judge is entrusted with determining the appropriate sentence, and the jury's function is confined to determining the guilt of the accused. The verdict providing for "guilty but mentally ill" represents an exception to this general rule. By rendering ****728** this judgment, the jury is permitted to advise the sentencing judge to consider the fact of mental illness in the exercise of his sentencing ***387** decision. Capital cases are unique in that the jury and not the judge sets the penalty in such cases. The consideration of a possible verdict of guilty but mentally ill is a matter that would appropriately be rendered by a jury in a capital case during the sentencing phase as opposed to the guilt [ ] phase. We permit the jury to rule upon this penological concern during the guilt phase in all other cases simply because they have no opportunity for input in the sentencing phase. That consideration is not present in capital cases.

Id. at 392–93, 572 A.2d at 1227. Although Appellant is correct in observing that the above limitation is not reflected in the statutory text, the reasoning in *Young* was reaffirmed on multiple occasions in the years prior to Appellant's trial. *See, e.g., Commonwealth v. Faulkner,* 528 Pa. 57, 72, 595 A.2d 28, 36 (1991); *Commonwealth v. Hughes,* 536 Pa. 355, 376–77, 639 A.2d 763, 773–74 (1994); *Commonwealth v. Williams,* 557 Pa. 207, 250, 732 A.2d 1167, 1190 (1999) ("In a capital case, an assertion of 'guilty but mentally ill' is properly considered only in the penalty phase of trial and is subsumed within the mitigating circumstances set forth at Section 9711(e)(2) and (e)(3)[.]").

Appellant candidly recognizes this, *see* Brief for Appellant at 40 (describing the limitation on the guilty-but-mentally-ill verdict as having become "enshrined in Pennsylvania decisional law"), but argues that counsel's stewardship was nonetheless deficient because counsel failed to argue for a change in the law based on Section 314(a)'s plain language. In this latter regard, Appellant references *Commonwealth v. Lassiter,* 554 Pa. 586, 722 A.2d 657 (1998), a case in which this Court determined that defense counsel was at fault because he failed to inform the defendant that the Commonwealth's only alleged aggravating circumstance—that the crime was committed in the perpetration of a felony, *see* 42 Pa.C.S. 9711(d)(6)—could not be found for accomplices such as herself. This failure on counsel's part led Ms. Lassiter to plead guilty to second-degree murder to avoid the death penalty, when she was ineligible for the death penalty in the first instance. *See* ***388** *Lassiter,* 554 Pa. at 595, 722 A.2d at 662. [13] *Lassiter,* however, is distinguishable because no "enshrined," contrary interpretation of the scope of the (d)(6) aggravating factor existed at the time Ms. Lassiter pled guilty. Thus, the case did not involve a finding that the attorney was ineffective for failing to argue for a change in settled law, but rather, for failing to recognize the statute's limited application based on its plain text. In the present matter, however, Appellant is suggesting that his counsel erred by failing to argue for a change in settled law.

Appellant disagrees that *Lassiter* is distinguishable on these grounds, and suggests that *Commonwealth v. Williams,* 524 Pa. 218, 570 A.2d 75 (1990), embodied a holding contrary to *Lassiter. See* Brief for Appellant at 41. *Williams,* however, involved a killing where the defendant and a confederate took turns striking the victim in the head with a tire iron or a socket wrench until the victim died, and the Court described the pair as "co-murderers" and "co-brutalizers." *Id.* at 222 n. 6, 233, 570 A.2d at 77 n. 6, 83. There was no indication in *Williams* that the defendant was merely an accomplice, and the issue of whether Section 9711(d)(6)'s scope subsumes ****729** accomplices was not expressly addressed by the Court. As well, *Lassiter* makes no mention of *Williams,* much less purports to overrule it. [14]

Trial counsel's performance is evaluated under the standards in effect at the time of trial. *See Commonwealth v. Spotz,* 616 Pa. 164, 261, 47 A.3d 63, 122 (2012); *cf.*

Commonwealth v. Bennett, 618 Pa. 553, 580, 57 A.3d 1185, 1201 (2012) ("[C]ounsel will not be faulted for failing to predict a change in ***389** the law."). As a logical corollary, counsel cannot be held ineffective for failing to request a jury instruction that was affirmatively prohibited by Pennsylvania law at the time of trial. *See* *Commonwealth v. Fletcher,* 604 Pa. 493, 560–61, 986 A.2d 759, 801 (2009); *cf.* *Commonwealth v. Hughes,* 581 Pa. 274, 355, 865 A.2d 761, 810 (2004) (noting counsel cannot be deemed ineffective for failing to object to an instruction that was legally required at the time of trial). Here, as explained, a guilt-phase jury instruction under Section 314(a) of the Crimes Code was unavailable at the time of Appellant's trial (as indeed it still is). That being the case, counsel cannot have been ineffective for not requesting one.

B. Lack of life-with-mental-health-treatment instruction

In his next claim, Appellant again references Section 314 of the Crimes Code, but this time in relation to the sentencing-phase jury charge. His contention is two-fold. First, he maintains that counsel was ineffective for failing to request that the trial court inform the jurors that they could return "a life sentence *with* mental health treatment," Brief for Appellant at 44 (emphasis in original), as an alternative to the two sentences permitted by the capital sentencing statute. *See* 42 Pa.C.S. § 9711(a)(1) (providing that "the jury shall determine whether the defendant shall be sentenced to death or life imprisonment"). Second, and relatedly, Appellant avers that counsel was ineffective for failing to request the jury be informed that he would be eligible for mental health treatment if he were sentenced to life imprisonment. *See* Brief for Appellant at 46.

The Commonwealth argues that this claim is waived because it does not appear among the claims raised in the PCRA petition.[15] Appellant does not deny this but reasons that the claim is nonetheless preserved because it is "related to the previous claim," Reply Brief for Appellant at 12, and moreover, it was discussed in a pleading responsive to the Commonwealth's ***390** answer to the PCRA petition. *See* Petitioner's Response to the Commonwealth's Answer, Docket Entry 139, at 9–12.[16] Appellant views this responsive pleading as having "clarified his claim regarding entitlement to the [guilty but ****730** mentally ill] instruction." Reply Brief for Appellant at 13. Appellant also submits that the claim is preserved because it was raised in his Concise Statement of Errors Complained of on Appeal, *see id.* at 14, and because his counsel made a generalized statement near the conclusion of the evidentiary hearing that none of the claims in the PCRA petition were being waived. *See id.* at 13 (quoting N.T., Sept. 14, 2011, at 308).

Claim IX of the PCRA petition, on which the present issue is based, is entitled, "Petitioner Was Denied His Rights To Due Process And Effective Assistance Of Counsel, And Under Pennsylvania Law, When The Jury Was Not Instructed That It Could Find Petitioner Guilty But Mentally Ill." PCRA Petition at 44. The body of the claim pertains exclusively to the guilt phase and the alleged harm that ensued from counsel's failure to request a guilty-but-mentally-ill charge. *See id.* at 44–46, ¶¶ 83–88. No issue is raised in the petition with regard to what the jury should have been told in the sentencing phase relative to the availability of psychiatric treatment for mentally ill individuals sentenced to life imprisonment, and there is no contention that an instruction should have been provided informing the jurors that they could return a sentence of "life imprisonment with mental health treatment." Thus, Appellant's present distinct contentions regarding the sentencing-phase jury instructions are more than mere "clarifications" of the original claim, as Appellant suggests. Rather, they amount to additional substantive claims that would have had to appear in the PCRA petition, or an authorized amendment thereto, to be preserved. *See* Pa.R.Crim.P. 902(B) ("Each ground relied upon in support of the relief requested shall be stated in the [PCRA] petition. Failure to ***391** state such a ground in the petition shall preclude the defendant from raising that ground in any proceeding for post-conviction collateral relief."); *see also* *Commonwealth v. Rainey,* 593 Pa. 67, 86, 928 A.2d 215, 226 (2007) (noting that issues not raised in a PCRA petition are waived and cannot be considered for the first time on appeal).

Our criminal procedural rules reflect that the PCRA judge "may grant leave to amend ... a petition for post-conviction collateral relief at any time," and that amendment "shall be freely allowed to achieve substantial justice." Pa.R.Crim.P. 905(A); *see* *Commonwealth v. Williams,* 573 Pa. 613, 633, 828 A.2d 981, 993 (2003) (noting that the criminal procedural rules contemplate a "liberal amendment" policy for PCRA petitions). Nevertheless, it is clear from the rule's text that leave to amend must be sought and obtained, and hence, amendments are not "self-authorizing." *Commonwealth v. Porter,* 613 Pa. 510, 523, 35 A.3d 4, 12 (2012). Thus, for

example, a petitioner may not "simply 'amend' a pending petition with a supplemental pleading." *Id.* Rather, Rule 905 "explicitly states that amendment is permitted only by direction or leave of the PCRA Court." *Id.* at 523–24, 35 A.3d at 12; *see also* *Williams,* 573 Pa. at 625, 828 A.2d at 988 (indicating that the PCRA court retains discretion whether or not to grant a motion to amend a post-conviction petition). It follows that petitioners may not automatically "amend" their PCRA petitions via responsive pleadings.

Here, Appellant never sought leave to amend his PCRA petition to insert a new claim relating to what the jury should have been told in the sentencing phase with regard to mental health treatment for individuals who are sentenced to life in prison. Nor can this new contention reasonably be construed as subsumed ****731** within the prior one, which, as explained, relates only to the guilt-phase jury instructions on the possibility of returning a guilty-but-mentally-ill verdict. Additionally, the PCRA court did not treat Appellant's responsive pleading as a request for leave to amend; the record contains no discussion of such a request and the court did not address ***392** this new substantive contention in its opinion disposing of Appellant's PCRA claims. Finally, Appellant's counsel's generalized assertion near the end of the evidentiary hearing that Appellant was not waiving any of the claims in the petition for which no evidentiary hearing was held is insufficient to have constituted a request to amend the petition, or otherwise to have complied with the rules regarding amendment as explained above. *See generally* *Williams,* 566 Pa. at 569, 782 A.2d at 527 (stating that, upon receipt of a notice that the PCRA court intends to dismiss claims, "counsel must undertake a careful review of the pleadings and other materials to ensure that a sufficient offer has been made to warrant merits review"). Nor could such assertion have expanded the substantive scope of the claim to include an allegation that the penalty-phase jury instructions were defective.

Therefore, since the present claim was not raised in Appellant's PCRA petition, and no request was made to amend the petition to include it, it is waived. Finally, waiver cannot be avoided solely by reference to Appellant's Concise Statement of Matters Complained of on Appeal, as such a statement, which is provided after the notice of appeal has already been filed, cannot operate to add new substantive claims that were not included in the PCRA petition itself. *See generally* *Commonwealth v. Williams,* 900 A.2d 906, 909 (Pa.Super.2006).

C. Involuntary medication during trial

Appellant next maintains that he was forcibly medicated during trial in violation of his constitutional rights, and that his trial counsel was ineffective for failing to litigate and enforce those rights.[17] After Appellant was arrested on April 28, 2000, he was examined by psychiatrist Dr. Laszlo Petras at the Beaver County Jail. During the following week, Appellant was also examined on two occasions by Dr. Martone, *see supra* note 5, who ultimately concluded that he was incompetent to ***393** stand trial. *See* N.T., May 9, 2000, at 4. *See generally* 50 P.S. § 7402(a) (providing that a defendant is incompetent to stand trial if he is unable to understand the nature or object of the proceedings against him, or to participate and assist in his defense); *Commonwealth v. Sanchez,* 589 Pa. 43, 56, 907 A.2d 477, 484 (2006). Accordingly, Appellant was sent to Mayview State Hospital, *see* *Baumhammers,* 599 Pa. at 14, 960 A.2d at 67, where Dr. Petras was his treating physician. Several months later, in September 2000, a competency hearing was held at which Dr. Petras testified. The doctor indicated that Appellant had regained competency due to a treatment regimen that included Zyprexa, an antipsychotic drug. *See* N.T., Sept. 15, 2000, at 12. Based on this testimony, the trial court ruled that Appellant had become competent to stand trial. *See* *id.* at 32.

Thereafter, Appellant was present at a pre-trial motions hearing held on April 11, 2001, one week before jury selection began. During the course of the hearing, ****732** the judge asked Appellant directly if he was taking medication. Appellant answered, "I am taking Zyprexa medication." N.T., Apr. 11, 2001, at 167–68.

Appellant argues that he was involuntarily medicated during trial and that this violated his rights pursuant to *Riggins v. Nevada,* 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992).[18] ***394** He states that he suffered prejudice because the medication had an adverse impact on his alertness and demeanor during trial. Appellant suggests that he is therefore entitled to a new trial. Barring such relief, Appellant contends that he is entitled to a remand for an evidentiary hearing on the issue. *See* Brief for Appellant at 52; Reply Brief for Appellant at 18. In its Rule 1925(a) opinion, the PCRA court concluded that nothing in the record established that Appellant was forcibly medicated during his trial. *See* PCRA Court Opinion, *slip op.* at 30. Appellant reasons that this

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conclusion was erroneous because the record indicates that he was, in fact, involuntarily medicated, as reflected by the testimony provided by Dr. Petras at the September 2000 competency hearing.

According to that testimony, Appellant remained in close contact with his attorney during the months he was at Mayview. Upon admission, Appellant was initially hesitant to participate in psychological testing, but after consulting with his lawyer, he agreed to cooperate. *See* N.T., Sept. 15, 2000, at 12–13. In addition, and most relevant to this claim, Appellant refused to take more than four milligrams of the antipsychotic drug Trilafon—the medication Appellant was initially given at Mayview before being switched to Zyprexa—because he believed that four milligrams was sufficient for his needs and he disliked the drug's side effects. Thus, when given a higher dosage, Appellant would take four milligrams and spit the rest out. *See id.* at 13, 15. Dr. Petras described that, upon observing this behavior, he told Appellant "that if his ***395** condition would deteriorate to a certain point we might have to force the medication against ****733** his will." *Id.* at 13. The doctor stated that, after again consulting his lawyer, Appellant began voluntarily taking the medication. *See id.*

Appellant derives from this passage that he was "threatened that if he did not take the medication, that he would be subject to forcible administration of it," Brief for Appellant at 50–51, and urges that "such threats cannot possibly constitute a knowing, intelligent, and voluntary waiver" of his constitutional rights. *Id.* at 51. He maintains that trial counsel was ineffective for failing to request "hearings and findings" on whether he was being forced to take medication and whether such action was appropriate in view of the medication's alleged side-effects. *Id.* at 54.

We find Appellant's suggestion that the above testimony regarding Trilafon, given in September 2000, evidences that the administration of a different drug (Zyprexa) was accomplished involuntarily at trial more than seven months later, to be highly attenuated. [19] Dr. Petras never implied that the drug had been forcibly administered or that Appellant's condition worsened to the point where he would have to be medicated against his will. Additionally, and contrary to Appellant's argument, Dr. Petras noted that Zyprexa was substituted for Trilafon because it was just as effective but did not give rise to the side-effects that Appellant found objectionable. As such, Zyprexa was more palatable to Appellant. *See id.* at 15, 17; *see also* N.T., Trial, at 1821–22 (reflecting Dr. Petras's testimony that "I switched him to Zyprexa because the side-effect profile" was "favorabl[e] compared to Trilafon"). Furthermore, Dr. Petras clarified during trial that, although Appellant would have preferred not to take medication while at Mayview, he had nonetheless agreed to take a low dose of Trilafon, which was inadequate for his needs; thereafter, instead of forcing a higher dosage on Appellant, the hospital switched Appellant to Zyprexa. *See* N.T., Trial, at 1822–23. Accordingly, ***396** Dr. Petras's trial testimony reflects that Mayview never reached the juncture where it had to pursue involuntary medication in response to a decline in Appellant's condition.

We note, as well, that Appellant did not provide any indication that his taking of Zyprexa was involuntary. At the pre-trial motions hearing in April 2001 (approximately two weeks before trial started), Appellant said, simply, "I am taking" the medication. Although Appellant stresses that two trial witnesses testified that his appearance at trial was different from his appearance on the day of the incident, this testimony does not purport to suggest whether the administration of the drug was voluntary or involuntary. Thus, there is nothing in the record that affirmatively indicates Appellant was forcibly medicated at the time of trial. *See generally Powell v. Kelly,* 531 F.Supp.2d 695, 728 (E.D.Va.2008) (observing that no *Riggins* violation occurs where a defendant is medicated pursuant to a doctor's directive and does not refuse the medication); *Basso v. State,* 2003 WL 1702283, *3 (Tex.Crim.App.2003) ("[I]n order for the *Riggins* test to apply, the record must affirmatively reflect that the defendant was forcibly medicated." (internal quotation marks omitted)); *Ex Parte Thomas,* 906 S.W.2d 22, 24 (Tex.Crim.App.1995) ("The threshold question [is] whether applicant was forcibly medicated.").

In *Hughes,* this Court faced a similar claim together with a similar lack of factual ****734** support or development in the record or pleadings. Following a competency hearing, the prosecutor requested that Hughes remain on his medication, and this was the sole basis on which Hughes argued that his medication was involuntarily administered. Further, Hughes had been taking the drug for several months and the record contained no indication that he asked that the medication be discontinued. As well, Hughes did not assert that he advised counsel of a desire to stop taking the medication. This Court concluded that, "[a]bsent an offer from Appellant explaining why the maintenance of his medication was involuntary, we will not assume that counsel was ineffective for failing to object." *Hughes,* 581 Pa. at 311–12, 865 A.2d at 783

(citing *Commonwealth* ***397** *v. O'Donnell,* 559 Pa. 320, 341, 740 A.2d 198, 210 (1999)).

We find the present case to be comparable. Here, in arguing that his medication was involuntarily administered, Appellant relies solely on Dr. Petras's remark that if a certain circumstance were to arise Appellant might have to be forced to take Trilafon. Although this remark arguably hints at the possibility of forcible medication in a way that the *Hughes* prosecutor's request did not, there is no indication that the condition referenced by Dr. Petras ever arose, and further, Appellant was changed to a different medication because it lacked Trilafon's adverse side-effects (which constituted the underlying reason Appellant objected to taking Trilafon in the first instance). Notably, Appellant had been voluntarily taking medications for many years prior to the killings, as he and his family had known since 1993 that he had psychiatric problems, and he had obtained medical treatment accordingly. Finally, and as noted, there is no information in the record suggesting that Appellant ever asked to be taken off Zyprexa.

In light of the above, we find that Appellant's claim rests on grounds that are as speculative as those forwarded by Hughes. As in *Hughes,* therefore, and in light of the lack of record support for the allegation of involuntariness, the PCRA court acted within its discretion in dismissing this claim without a hearing. *See generally Commonwealth v. Clark,* 599 Pa. 204, 228, 961 A.2d 80, 94 (2008) (where a PCRA petition's assertions were speculative and the petitioner offered no evidence in support of a factual claim, concluding that his "assertion simply failed to raise an issue of material fact"); *Commonwealth v. Abdul–Salaam,* 571 Pa. 219, 230, 812 A.2d 497, 503 (2002); *Commonwealth v. Scott,* 561 Pa. 617, 627–28 & n. 8, 752 A.2d 871, 877 & n. 8 (2000). [20]

***398 D. *Caldwell* violation**

Appellant's next contention is that his penalty-phase counsel was ineffective for failing to object to a portion of the trial court's jury charge that, according to Appellant, violated his Eighth–Amendment rights by diminishing the jury's sense of personal responsibility for the death verdicts. [21]

****735** In *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the jury imposed the death penalty after the prosecutor stated that "your decision is not the final decision" because it "is automatically reviewable by the [state] Supreme Court." *Id.* at 325–26, 105 S.Ct. at 2638. For its part, the trial court "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them." *Id.* at 339, 105 S.Ct. at 2645. The Supreme Court vacated the sentence, concluding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29, 105 S.Ct. at 2639. That circumstance was found to violate the Eighth Amendment in particular because such minimization of the jury's role was viewed as incompatible with the Amendment's requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. *See id.* at 333, 105 S.Ct. at 2641–42.

This Court faced a similar situation in *Commonwealth v. Jasper,* 558 Pa. 281, 737 A.2d 196 (1999), albeit based on remarks by the court rather than the prosecutor. In that ***399** matter, the trial judge had instructed the jury that it was not the final arbiter of the sentence, stating:

> Somewhere down the line, if you do impose the death penalty, the case will be reviewed thoroughly. And after thorough review the death penalty may be carried out. I won't go into all the various reviews that we have. That shouldn't concern you at this point.

Id. at 282, 737 A.2d at 196. Based on *Caldwell,* the *Jasper* Court vacated the sentence, noting that the "plain import of the [trial] court's remarks is that although the jury may impose the death penalty, it may not be carried out, thus removing from the jury the responsibility for imposing the death penalty." *Id.* at 282, 737 A.2d at 196. The Court continued that the "central idea is that when remarks about the appellate process minimize the jury's sense of responsibility for the verdict of death, the sentence of death must be reversed." *Id.* at 284, 737 A.2d at 197.

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In the present case, Appellant challenges certain remarks made by the Commonwealth, as well as penalty-phase jury instructions, on similar grounds. To understand these remarks and instructions in context, it is helpful to set forth defense counsel's statements to the jury as well.

During the penalty phase, defense counsel emphasized in his opening statement that the jurors would "carry [their sentencing decision] to their graves," and that it would be impossible to "come back" in three or five years and change the sentence if they had regrets upon hearing in the media that Appellant was about to be executed. Counsel added that "[t]he question is, do you need to kill him" and suggested that, although killing a mentally ill person might have been normative during the Middle Ages, we have "progressed beyond those days." *See* N.T., Trial, at 2783, 2790.

At the conclusion of the penalty-phase, the prosecuting attorney, in his summation, responded to the above advocacy as follows:

> You are not here to reflect on social policy.... You are here to evaluate the evidence ... and apply the law.... The ***400** notion that [defense counsel] suggested ****736** to you that you are killing [Mr.] Baumhammers is simply wrong, misleading and pandering to the sensibilities not present in this case, not part of the evidence and not part of the law. Continue to do your job in this phase as you did in the earlier phase.

Id. at 3081.

Defense counsel then largely repeated what he had expressed in his opening statement, again emphasizing that Appellant was mentally ill, that the jurors could not return later and change their minds, and that the Commonwealth was attempting to persuade the jury to "yield to revenge" and to "kill him." *Id.* at 3101.

After the jury recessed, the Commonwealth objected to portions of the defense opening and closing arguments and requested curative instructions. One of the aspects to which the Commonwealth objected was the concept that the jury itself was going to "kill" Appellant. *See id.* at 3108. Accordingly, the trial court instructed the jury as follows:

> You are not to consider matters such as revenge or sympathy and you are not to allow counsel's emotional appeals to you to sway your decision in that regard. *You, performing your task as jurors, do not bear personal responsibility with regard to the death of Mr. Baumhammers* .... Your duty here is to fairly and impartially decide these matters and to render a sentencing verdict consistent with the law as I am going to give it to you now.... [Y]our sentence will depend on what you find upon aggravating and mitigating circumstances.... *Remember that your verdict is not merely a recommendation. It actually fixes the punishment of death or life in prison* .... I direct you to find the facts, to apply the law as I have given you to the facts and to act in accordance with your solemn oath that you have taken[.]

Id. at 3110–12 (emphasis added).

In assessing these comments and instructions, we observe that neither the court nor the prosecutor referred to the appellate review process, or otherwise suggested that the jury's verdict would be subject to review or correction by ***401** other authorities. This materially distinguishes the present case from *Caldwell, Jasper,* and the other decisions referenced by Appellant, *see* Brief for Appellant at 57 (citing, *inter alia*, *Riley v. Taylor,* 277 F.3d 261 (3d Cir.2001) (*en banc*)), all of which dealt with the possibility that the jury might return a death verdict upon believing that a separate legal entity would make the final decision as to its appropriateness. *See* *Commonwealth v. Baker,* 511 Pa. 1, 21–25, 511 A.2d 777, 788–90 (1986) (summarizing the constitutionally problematic aspects of drawing the jury's attention to appellate review, as catalogued in *Caldwell*); *cf.* *Adams v. Wainwright,* 804 F.2d 1526, 1530 (11th Cir. 1986) (finding a *Caldwell* violation where the trial court advised the jury, contrary to state law, that

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it only filled an advisory role in determining the defendant's sentence), *rev'd on other grounds sub nom* *Dugger v. Adams,* 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). In this respect, *Baker* explained that references to appellate review are especially problematic because, among other things, they tempt the jury to believe that only if it returns a sentence of death will "respected legal authorities" be called upon to review the case. *Baker,* 511 Pa. at 24, 511 A.2d at 789; *accord* *Caldwell,* 472 U.S. at 333, 105 S.Ct. at 2642. Nothing in the present record gives rise to this type of difficulty.

Furthermore, and relatedly, the question resolved in *Caldwell* was expressly framed in terms of whether the jury had ****737** been misled with regard to its responsibility for determining the appropriateness of the sentence itself. *See* *Romano v. Oklahoma,* 512 U.S. 1, 9, 114 S.Ct. 2004, 2010, 129 L.Ed.2d 1 (1994) (explaining that *Caldwell* prohibits prosecutorial comments that "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should *for the sentencing decision* " (emphasis added)). As such, *Caldwell* did not directly address a situation like the present one, where the jurors are told they are not responsible for the defendant's actual death but are solely responsible for the death sentence.

Still, we find the first emphasized sentence in the above jury charge to be less than ideal under *Caldwell* and ***402** *Jasper,* as it at least approaches the type of instruction that has been disapproved. Thus, we caution that common pleas courts should be scrupulous not to provide instructions that may appear to diminish a capital jury's responsibility with regard to the death of the defendant. With that said, however, we also recognize that this portion of the instruction was aimed at counterweighing the emotional appeal of Appellant's penalty phase counsel. *Cf.* *People v. Fierro,* 1 Cal.4th 173, 3 Cal.Rptr.2d 426, 821 P.2d 1302, 1340 (1991) ("In admonishing the jurors not to 'feel guilty' or 'personally responsible,' the prosecutor was merely suggesting ... that the moral blame for the crimes and their consequences rests with defendant, not with the jurors"), *disapproved on other grounds by* *People v. Letner,* 50 Cal.4th 99, 112 Cal.Rptr.3d 746, 235 P.3d 62 (2010). Furthermore, when read as a whole, the overall instruction clearly conveyed to the jurors that they *were* solely responsible for the sentence, as reflected in the second emphasized sentence in the above passage. *See* *Commonwealth v. Keaton,* 556 Pa. 442, 472, 729 A.2d 529, 545 (1999) (noting that the jury charge must be considered as a whole); *Commonwealth v. Abu–Jamal,* 521 Pa. 188, 209, 555 A.2d 846, 856 (1989) (addressing a *Caldwell* claim upon review of the sentencing hearing record "in its entirety").

In light of the above, and applying a similar analysis to the prosecutor's remarks, we conclude that neither those remarks nor the court's jury instructions as a whole raise the types of concerns animating *Caldwell* and its progeny. In particular, they were unlikely to have substantially undermined the jurors' sense of responsibility to determine the appropriate sentencing verdict—either by reference to appellate review, or by downplaying the jury's role as merely advisory in nature. Accordingly, as we find no constitutional error, the issue underlying Appellant's present claim of ineffective assistance lacks arguable merit.

E. Multiple-murder aggravator

Pennsylvania's capital sentencing statute lists as an aggravating circumstance that the defendant "has been convicted ***403** of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue." 42 Pa.C.S. § 9711(d)(11) (the "multiple-murder aggravator"). The jury found this aggravator as to all five murders. Appellant submits that his penalty-phase attorney was ineffective for failing to challenge this factor on Eighth–Amendment vagueness grounds. [22]

****738** The difficulty with Appellant's argument—as the PCRA court pointed out, *see* PCRA Court Opinion, *slip op.* at 24–25—is that this Court has held that the multiple-murders aggravator is not unconstitutionally vague under the Eighth Amendment. *See* *Commonwealth v. Fletcher,* 580 Pa. 403, 861 A.2d 898 (2004). The *Fletcher* Court noted, preliminarily, that "to survive an Eighth Amendment challenge 'an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " *Id.* at 428, 861 A.2d at 912 (indirectly quoting *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983)). The Court reasoned that, "[a]s worded, this aggravating circumstance clearly narrows the class of persons eligible for the death penalty by excluding

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those individuals who have not been convicted of another murder." *Id.* at 428, 861 A.2d at 913.[23]

***404** Still, Appellant posits that "[a]n aggravating circumstance that is vague on its face can be cured by a narrowing construction issued by the highest court in the jurisdiction," and criticizes the PCRA court for failing to notice that *Fletcher* was decided after his trial, meaning that "there was no such narrowing construction" at that time. Brief for Appellant at 61. The argument is unavailing, as *Fletcher* did not provide a narrowing construction. Rather, *Fletcher* held that the aggravator satisfies Eighth Amendment requirements. Thus, the *Fletcher* Court rendered a determination as to the constitutional validity of the aggravator as it existed at the time of Appellant's trial. In this regard, we note that there was no legislative change to the multiple-murder aggravator between the time of trial and the date *Fletcher* was decided, and that the text of the aggravator was recited word-for-word in the penalty-phase jury instruction, *see* N.T., Trial, at 3114, meaning that *Fletcher* affirmed the validity of the aggravating circumstance that was found by Appellant's sentencing jury.

Appellant nonetheless submits that the word "convicted" was vague because that ****739** word can and should be construed to mean "sentenced." Appellant maintains that caselaw establishes that the strict legal meaning of "conviction" requires a sentence to have been imposed. Notably, this is not a vagueness challenge, but an assertion that counsel was ineffective for failing to pursue a limiting construction whereby the multiple-murder aggravator can only pertain if the defendant ***405** has already been sentenced, on a prior occasion, for a different murder. *See* Brief for Appellant at 61–62.

This may be a novel claim in the specific context of the (d)(11) aggravator. More than three decades ago, however, this Court rejected an identical argument relative to the meaning of "convicted" in the context of the (d)(10) aggravating circumstance—a closely-related aggravator that refers, in relevant part, to a defendant's having "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[.]" 42 Pa.C.S. § 9711(d)(10). In *Commonwealth v. Travaglia,* 502 Pa. 474, 467 A.2d 288 (1983), the Court observed that, although the argument that "convicted" should be read to signify "sentenced" may have had superficial appeal, it failed upon closer scrutiny. The Court stated that the "clear import" of the portion of the (d)(10) aggravator quoted above "is to classify the commission of multiple serious crimes as one of the bases upon which a jury might rest a decision that the crime of which the defendant stands convicted ... merits the extreme penalty of death." *Id.* at 496, 467 A.2d at 299; *accord* *Commonwealth v. Cross,* 508 Pa. 322, 339, 496 A.2d 1144, 1153 (1985). The Court continued by focusing particular attention on the phase, "or at the time of the offense at issue," explaining that such language

> highlights the incongruity of the construction urged by the Appellants. *By including offenses committed contemporaneously with the offense in issue, the legislature clearly indicated its intention that the term "convicted" not require final imposition of sentence, but cover determinations of guilt as well.* Given the practical operation of the criminal justice system, a contemporaneous offense would either be tried together with the "offense at issue" or severed and tried separately. In the former situation, it would be impossible for sentencing to have occurred prior to the jury's consideration of sentence on the "offense at issue"; in the latter, the vagaries of scheduling and conducting separate trials of a single defendant, within certain time limits ***406** and amidst the ordinary operation of a court calendar, would make it virtually impossible. At best, such factors would render it completely arbitrary [under the interpretation advanced] whether a contemporaneous offense would qualify as an aggravating circumstance under subsection (d)(10).

Travaglia, 502 Pa. at 496–97, 467 A.2d at 299 (emphasis added).

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This reasoning applies equally to the same phrase ("or at the time of the offense at issue") as it appears in subsection (d)(11), *see generally Commonwealth v. Beasley,* 505 Pa. 279, 287, 479 A.2d 460, 464 (1984) (in the context of a similar challenge to the (d)(9) aggravator, citing *Travaglia* and suggesting that the General Assembly can be presumed to have intended the same meaning for "conviction" across all subsections of 42 Pa.C.S. § 9711(d)); *Commonwealth ex rel. McClenachan v. Reading,* 336 Pa. 165, 169, 6 A.2d 776, 778 (1939) ("In interpreting a statute using the word 'conviction' the court has held that the strict legal meaning must be applied *except where the intention* ****740** *of the legislature is obviously to the contrary.*" (emphasis added)), as the trial court would likely have recognized if counsel had made the argument presently advanced by Appellant. Accordingly, as Appellant's underlying issue lacks arguable merit, he is not entitled to relief on his ineffective-assistance claim.

F. Death qualification

Next, Appellant contends that counsel was ineffective during *voir dire* for not attempting to rehabilitate three prospective jurors who were excused for cause based on expressed reservations about imposing the death penalty.

The Supreme Court held in a case predating *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), that the death penalty "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced ***407** general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois,* 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968); *see Commonwealth v. Uderra,* 580 Pa. 492, 504, 862 A.2d 74, 81 (2004). That was at a time when the jury was invested with unlimited discretion in its choice of sentence. Because sentencing juries could no longer exercise such discretion after *Furman* and *Gregg,* the Court eventually clarified that an individual may be excused for cause whenever his views on capital punishment " would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (adopting the standard set forth in *Adams v. Texas,* 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)). This is because a defendant's Sixth Amendment right to an impartial jury "drawn from a venire that has not been tilted in favor of capital punishment" must be balanced against the Commonwealth's " strong interest" in seating jurors "who are able to apply capital punishment within the framework state law prescribes." *Uttecht v. Brown,* 551 U.S. 1, 9, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007). Additionally, "in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." *Id.* Therefore, the decision whether to disqualify a juror for cause lies within the sound discretion of the trial court and error will not be found absent an abuse of discretion. *See Commonwealth v. Stevens,* 559 Pa. 171, 197, 739 A.2d 507, 521 (1999) (citing *Commonwealth v. Colson,* 507 Pa. 440, 454, 490 A.2d 811, 818 (1985)).

Presently, the trial court conducted jury selection by interviewing a number of venirepersons as a group, and then holding follow-up interviews with certain individuals. The first juror that Appellant argues should have been rehabilitated was Juror No. 51. During the initial group interview, Juror No. 51 raised her hand when the judge asked if anyone's ***408** ability to be fair and impartial would be affected by the Commonwealth's decision to seek the death penalty in this case. During her individual interview by the court and counsel for both sides, Juror No. 51 stated that she believes in the death penalty, "but I don't know how I feel about my sitting in judgment on that." In response to further questioning on whether she could follow the law and return a sentence of death in an appropriate case, the juror stated, "That I'm not sure about." Defense counsel ****741** explained the process regarding the weighing of aggravating and mitigating factors, and noted that the court would instruct her that, if the former outweighed the latter, she would have to return a death sentence. When counsel asked if she would be able to do so, she replied: "I could follow the Judge's instructions. But I'm not sure that I want to do that. I'm not sure that I want to be put in that position, to have to do that." N.T., Apr. 18–24, 2001 ("N.T., Jury Selection"), at 351–54. The Commonwealth moved to exclude the juror for cause, and the trial court granted the motion. No objection was lodged by defense counsel.

The second juror that Appellant states should have been rehabilitated was Juror No. 36. When he was interviewed

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individually, the Commonwealth reminded him it might request the death penalty depending on the outcome of the guilt phase, and asked if he had any moral, philosophical, or personal opposition to capital punishment. The juror responded, "I would not want to be responsible for that." On follow-up questioning, he stated, "I would not want to carry [imposition of the death penalty] for the rest of my life." He later added, "What I tried to say was I did not want to be responsible for the rest of my life of making that decision. It would be a personal thing with me. I can make the decision, but I don't want the responsibility hanging over me forever." N.T., Jury Selection, at 687–88. He was excused for cause, and counsel did not object.

The final juror at issue was Juror No. 61. She indicated that, based on her Christian religion, "the death penalty is not for myself to decide." Subsequently, she expressed that she would be able to "vote one way or another," but added that ***409** she would impose a higher burden on the Commonwealth where the death penalty was at issue. When the Commonwealth asked if she could impose the death penalty in a situation where she thought it was warranted, she answered, "That's a hard question to answer." N.T., Jury Selection, at 1053–54. As with Jurors 51 and 36, the court granted the Commonwealth's motion to exclude for cause, and defense counsel did not object.

Appellant submits that the failure to object to the exclusions for cause, and to attempt to rehabilitate these jurors, amounted to ineffective assistance of counsel. We disagree.

"A juror's bias need not be proven with unmistakable clarity." *Commonwealth v. Morales,* 549 Pa. 400, 417, 701 A.2d 516, 525 (1997) (citing *Witt,* 469 U.S. at 425, 105 S.Ct. at 852–53).[24] Although Juror No. 51 stated nominally that she "believed in" the death penalty, her answers included repeated equivocation as to ****742** whether she could personally impose it in any given case, since she did not wish to have to decide whether another person should live or die. Jurors 36 and 61 exhibited similar uncertainty, as can be seen from their answers above. This type of tentativeness during the death-qualification process has been held sufficient to justify the exclusion for cause in several prior cases. *See* *Commonwealth* ***410** *v. Carson,* 590 Pa. 501, 573, 913 A.2d 220, 262 (2006) (citing cases). In *Commonwealth v. Fisher,* 545 Pa. 233, 681 A.2d 130 (1996), for example, the Court found no error in the exclusion of a juror who did not "feel comfortable having to make a decision about someone else's life" and who " always" doubts whether imposing the death penalty is correct. *Id.* at 249, 681 A.2d at 137. Likewise, in *Morales,* the Court approved the trial court's actions in excluding a juror who stated, "I'm not certain that I could judge someone fair enough to give them the death penalty." *Morales,* 549 Pa. at 418, 701 A.2d at 525. Additionally, in *Commonwealth v. Lewis,* 523 Pa. 466, 567 A.2d 1376 (1989), the Court affirmed exclusions where one venireperson stated she "would have great difficulty" voting for the death penalty, and another indicated that she "might not be able to vote for it" due to her religious beliefs. *Id.* at 475, 567 A.2d at 1380; *see also* *Commonwealth v. Hardcastle,* 519 Pa. 236, 256–57, 546 A.2d 1101, 1111 (1988) (concluding that juror's answer that he did not know whether he could impose the death penalty provided the trial court with an adequate basis to excuse the juror for cause over defense counsel's objection).

As developed above, all three prospective jurors gave answers which demonstrated similar levels of equivocation. Whether or not these answers would have been sufficient to support exclusion for cause under *Witherspoon* in the pre-*Gregg/Furman* era, the standard that now controls (as stated in *Witt*) is more permissive, in part because of the channeling function accomplished via specific factual questions such as whether certain aggravating circumstances are present. *See* *Witt,* 469 U.S. at 422, 105 S.Ct. at 851. Further, because the Supreme Court articulated the test in the disjunctive, it is sufficient if the trial court believes that a prospective juror's beliefs and apprehensions would "substantially impair" (as opposed to "prevent") the performance of his duties as a juror in accordance with his instructions and his oath. *Accord* *Commonwealth v. Holland,* 518 Pa. 405, 416–17, 543 A.2d 1068, 1073 (1988), *overruled on other grounds by* *Commonwealth v. Freeman,* 573 Pa. 532, 574, 827 A.2d 385, 410 (2003). ***411** The types of equivocal answers and serious apprehensions about imposing the death penalty and having to live with that decision for the rest of their lives, as reflected in the answers given above by the three venirepersons at issue, are adequate, in our view, to support a conclusion by the trial court that the *Witt* standard was satisfied—particularly in light of the deference accorded to the common pleas court in these types of decisions. *See supra* note 24. Further, counsel is presumed to have rendered reasonably effective assistance as required by *Strickand, see*

Gibson, 597 Pa. at 417 n. 7, 951 A.2d at 1118 n. 7, and there is nothing in the record or briefs that demonstrates that such presumption has been overcome.

G. Guilt-phase victim testimony

The next assertion of trial counsel's ineffectiveness arises from the fact that the only one of Appellant's shooting victims to survive, Sandip Patel, testified during the guilt phase concerning the facts of the shooting. *See* N.T., Trial, at 330–35. Appellant's claim does not concern the content ****743** of Mr. Patel's testimony, but the condition he was in when he testified.

Mr. Patel was paralyzed from the neck down when Appellant shot him, severing his spinal cord. Appellant alleges that Mr. Patel appeared before the jury in a wheelchair and used breathing tubes to help him answer questions, all of which inflamed the jury's passions and deprived Appellant of a fair sentencing hearing, since the guilt-phase testimony was incorporated into the sentencing phase. Appellant's specific argument is that guilt-phase counsel should have sought a ruling from the court requiring Mr. Patel's testimony to be presented via videotape, so that the jury would not have seen him in person. In this regard, Appellant maintains that counsel should have drawn the court's attention to criminal procedural rule 500, which Appellant interprets broadly as "permit[ting] the presentation of a witness through video deposition when doing so would be in the interests of justice and due to exceptional circumstances." Brief for Appellant at 65.

***412** Rule 500, entitled, "Preservation of Testimony After Institution of Criminal Proceedings," provides:

> At any time after the institution of a criminal proceedings, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved.

Pa.R.Crim.P. 500(a)(1). Although Mr. Patel was not unavailable for trial, Appellant argues that his "shocking and heart wrenching" condition amounted to "exceptional circumstances" for purposes of the rule, so that presenting his testimony by videotape would have been in the interests of justice. Brief for Appellant at 65.

While Rule 500 suggests that, even apart from witness unavailability, there may be "exceptional circumstances" where the interests of justice require some form of action, that action is limited to the preservation of a witness's testimony for use in later proceedings. The Rule simply does not address an asserted need to alter the manner in which an available witness testifies at trial. This limitation in the Rule's scope is confirmed by its official commentary, which states that the "rule is intended to provide the means by which testimony may be preserved for use at a subsequent stage in the criminal proceedings." Pa.R.Crim.P. 500, Official Cmt. Thus, although Mr. Patel's circumstances may have been exceptional in one sense, they were not exceptional in the sense contemplated by the Rule, since they did not require that his testimony be preserved for later use. *Cf. Commonwealth v. Rizzo,* 556 Pa. 10, 16, 726 A.2d 378, 381 (1999) ("It is not exceptional [for purposes of the Rule] that witnesses refuse to testify in the manner which the Commonwealth might wish."). *See generally* PCRA Court Opinion, *slip op.* at 29 (concluding that Appellant had not offered any basis to conclude "that allowing a victim of a crime to testify in person about the actual crime is somehow too prejudicial if the victim has visible evidence of the harm done"). Accordingly, Appellant's ***413** ineffectiveness claim is based on a misreading of Rule 500.

H. Failure to move to suppress physical evidence

In an argument spanning less than a single page, Appellant claims that counsel was ineffective for failing to seek suppression of certain evidence. Notably, Appellant does not indicate in his brief what the evidence was or how he believes its introduction at trial undermines confidence ****744** in the outcome of the proceedings. Nevertheless, Appellant does refer to this Court's disposition of his direct appeal, in which the Court noted that the police seized his computer, which contained files "reveal[ing] evidence of Appellant's racist and anti-immigrant philosophies." *Baumhammers,* 599 Pa. at 29, 960 A.2d at 76. Appellant also presently refers to the trial court's opinion denying post-sentence motions, which lists the items in general terms as a "computer and some documents

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found in his room," *Commonwealth v. Baumhammers,* CC Nos. 2000–14712–14714, *Opinion Disposing of Post–Sentence Motions, slip op.* at 10 (C.P. Allegheny Dec. 29, 2005) ("Opinion on Post–Sentence Motions"), *reprinted in* Brief for Appellant at C–10, which in turn is mirrored by the PCRA petition's allegations. *See* Amended Petition at 64, ¶ 117. Thus, for purposes of this claim we will assume the items in question entailed Appellant's computer (together with its internal files), which was located in his room, as well as other unspecified documents found in his room.

As explained, however, Appellant has not provided this Court with any developed advocacy on this issue. Therefore, "the issue must be deemed waived in this Court." *Commonwealth v. D'Amato,* 579 Pa. 490, 504, 856 A.2d 806, 814 (2004).

I. Failure to request or accept change of venire or venue

Appellant's next contention is that counsel was ineffective for failing to accept the trial court's offer of a change of venue, or a change of venire whereby jurors would be brought in from a different county to hear the evidence and decide the case. *See* Brief for Appellant at 67–68.

***414** At a pre-trial hearing on March 21, 2001, the trial court noted that the case had generated a significant amount of publicity, including numerous stories in the news media, and that the court was prepared to grant any defense request for a change of venire. Counsel preemptively objected to any such change that the court might order *sua sponte,* expressing his view that the case should be tried by a properly-vetted Allegheny County jury. Counsel indicated that his position in this regard was based on "defense tactical reasons," N.T., Mar. 21, 2001, at 4–5, which included counsel's view that an Allegheny County jury would be more receptive to the proffered insanity defense than would a jury drawn from a more rural county. *See Commonwealth v. Baumhammers,* CC Nos. 2000–14712–14714, *Findings of Fact, Opinion and Order,* at 14 (C.P. Allegheny March 26, 2001), *quoted in* Amended Petition, at 77, ¶ 144; *see also* Opinion on Post–Sentence Motions, *slip op.* at 6, *reprinted in* Brief for Appellant at C–6 (finding reasonable counsel's estimation that jurors from more rural counties would be more "conservative" and, as such, would be less likely to find Appellant not guilty by reason of insanity). Notably, in this regard, there was no suggestion of mistaken identity, and Appellant's only chance for an acquittal was via his proffered insanity defense.

Three weeks later, the topic of a possible change of venire or venue was revisited at another pre-trial hearing. On this occasion, the trial court conducted a colloquy with Appellant in which it reminded Appellant—who, as noted, was a licensed attorney—that he retained the final decision over how to plead, how to "proceed," and whether to testify. N.T., Apr. 11, 2001, at 171. The court additionally explained that it had found that a substantial amount of prejudicial pretrial publicity had occurred concerning Appellant's case. The court noted, in this respect, that it had held hearings on the nature and extent of pretrial ****745** publicity, and that it had twice conducted a test of potential jurors and determined that three quarters of them had formed an opinion concerning Appellant's guilt. Thus, the court informed Appellant that he was entitled to a change of venire. *See id.* at 170.

***415** During the colloquy, Appellant confirmed unequivocally that: he understood the nature of the prejudicial pretrial publicity and other factors described by the court; he understood all of his rights, including the right to a jury free from the effects of pretrial publicity; he was not under threat or compulsion; and no promises were made to induce him to waive any right to a change in venire or venue. Further, Appellant testified that he understood that, by waiving his right to request a change of venue or venire, he was also waiving his ability to contend in post-trial motions or on appeal that he was denied a fair trial because the jury was unfairly prejudiced by pretrial publicity. Nonetheless, Appellant assured the court that it was not only his attorneys' decision that he be tried by an Allegheny County jury, but that it was his personal decision as well. *See* N.T., Apr. 11, 2001, at 169–73. The trial court found Appellant's waiver to be knowing, intelligent and voluntary. *See* Opinion on Post–Sentence Motions, *slip op.* at 5, *reprinted in* Brief for Appellant at C–5.

Notwithstanding these assurances, Appellant did, in fact, argue in post-sentence motions and on direct appeal that he was denied a fair trial by the court's failure to order a change of venue or venire *sua sponte* over his objection. In light of the objection lodged by counsel to such a change, this Court found the claim waived. [25] Hence, Appellant now seeks relief through an ineffectiveness overlay.

Appellant's approach in this regard is undermined by the fact that he does not challenge the quality of his waiver which, as noted, the trial court found to be adequate. Our own review likewise reflects that the waiver colloquy was extensive

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***416** in that the court warned Appellant thoroughly of the possible pitfalls of proceeding with an Allegheny County jury, and that Appellant's responses were coherent. Because a defendant has a constitutionally-guaranteed, "inviolate" right to be tried by a jury drawn from "the vicinage" in question, PA. CONST. art. I, §§ 6, 9; *see* *William Goldman Theatres, Inc. v. Dana,* 405 Pa. 83, 93–95, 173 A.2d 59, 64–65 (1961),[26] the trial court was precluded by our state charter from overriding Appellant's personal decision, as he expressed it to the satisfaction of that tribunal, to be tried by an Allegheny County jury.

Under the circumstances—where Appellant had the right to a change in venue or venire based on the trial court's findings, and additionally had a constitutional right to be tried by an Allegheny County jury—this case is directly analogous to those dealing with waivers of counsel. In such ****746** instances, the defendant has the right to representation by counsel, and also the right to forego such representation upon a valid waiver. *See* *Commonwealth v. El,* 602 Pa. 126, 134, 977 A.2d 1158, 1162 (2009). Therefore, this Court's decision in *Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326 (1995), which dealt with a waiver of counsel, is instructive. In *Starr,* the Court held that the trial court committed reversible error by denying the defendant's assertion of his constitutional right to represent himself. *See* *id.* at 580–90, 664 A.2d at 1334–39. Likewise, and as noted, it would have been reversible error for the trial court to override Appellant's assertion of his constitutional right to be tried by a jury of the vicinage. *Accord* Opinion on Post–Sentence Motions, *slip op.* at 7, *reprinted in* Brief for Appellant at C–7 ("This Court is satisfied that it no more had the power to overrule [Appellant's] constitutional right to be tried by jury of his vicinage, than it had to overrule a defendant's right to self-representation in *Starr.*"). In sum, then, since Appellant waived his rights in this regard, he cannot now obtain relief premised upon a claim that his counsel was ineffective for failing to request such a change.

***417 J. Cumulative error**

Finally, Appellant indicates that he is entitled to relief based on the cumulative effect of the errors he identifies above. However, nothing in Appellant's presentation, individually or cumulatively, convinces us that he is entitled to relief.

The order of the PCRA court is affirmed.

Chief Justice CASTILLE and Justices EAKIN, BAER, TODD, McCAFFERY and STEVENS join the opinion.

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Footnotes

1 The jury found the grave-risk-of-death and multiple-murder aggravators as to some of the murders, *see* 42 Pa.C.S. § 9711(d)(7), (11), and only the multiple-murder aggravator as to others. In each case, at least one juror found that Appellant had no significant history of prior criminal convictions, *see* *id.* § 9711(e)(1), that he was under the influence of extreme mental or emotional disturbance, *see* *id.* § 9711(e)(2), and that the "catch-all" mitigator applied, *see* *id.,* § 9711(e)(8) (referencing any other evidence of mitigation concerning the defendant's character and record and the circumstances of his offense). The defense unsuccessfully proffered mitigating factors pertaining to a substantially impaired capacity to appreciate the criminality of one's conduct or conform one's conduct to the law's requirements, and extreme duress (although not such duress as to constitute a defense to prosecution). *See* *id.* § 9711(e)(3) and (5), respectively.

2 Dr. Welner explained that delusions are fixed, false beliefs, whereas hallucinations are sensory in nature and can include perceiving non-existent sights, sounds, and smells. Dr. Welner agreed that Appellant had had delusions, prominent at one time, that the FBI was harassing him, and that he had written letters to the Pennsylvania Attorney General and a United States Senator requesting help with the imagined harassment.

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3 This conclusion also precludes Appellant's after-discovered evidence contention. Even if we assume, *arguendo,* that the out-of-court statements were exculpatory, Dr. Welner has now disowned them, and hence, their only potential use at trial would be to impeach his credibility. *See* *Commonwealth v. D'Amato,* 579 Pa. 490, 519, 856 A.2d 806, 823 (2004) (reciting that, to obtain relief on a newly-discovered-evidence claim, a PCRA petitioner must establish, *inter alia,* that the evidence would not be used solely to impeach credibility).

4 *See* *Commonwealth v. Chmiel,* 612 Pa. 333, 387–88, 30 A.3d 1111, 1143 (2011) ("[T]rial counsel will not be deemed ineffective for failing to call a medical, forensic, or scientific expert merely to critically evaluate expert testimony that was presented by the prosecution."); *accord* *Commonwealth v. Elliott,* —— Pa. ——, ——, 80 A.3d 415, 437 (2013); *Commonwealth v. Marinelli,* 570 Pa. 622, 644, 810 A.2d 1257, 1269 (2002); *Commonwealth v. Copenhefer,* 553 Pa. 285, 308 n. 12, 719 A.2d 242, 254 n. 12 (1998); *Commonwealth v. Smith,* 544 Pa. 219, 238, 675 A.2d 1221, 1230 (1996).

5 As noted, Dr. Martone, to be precise, worked for the Allegheny County Behavior Clinic, which in turn performs psychological and psychiatric work for the trial court relative to competency and sentencing. *See* N.T., Trial, at 1790; *Baumhammers,* 599 Pa. at 42, 960 A.2d at 84. The trial court allowed limited testimony from Dr. Martone during the defense case in the interests of justice, on the basis of necessity. It observed, however, that ordinarily her testimony would have been precluded on conflict-of-interest grounds. *See* N.T., Trial, at 2748–49.

6 As for Appellant's assertion that the jury accepted Dr. Welner's testimony, this is not certain. Although the jurors rejected Appellant's insanity defense, they did not have to accept Dr. Welner's testimony to do so, as it is possible they simply concluded that the defense failed to prove insanity in the first instance. *See* 18 Pa.C.S. § 315(a) (allocating the burden to the defendant to prove insanity); N.T., Trial, at 2687 (reflecting the court's jury charge that the law presumes all persons to be sane and the defendant must prove otherwise); *see also id.* at 2665 (containing the court's instruction that the jurors are "not bound to accept an opinion from an expert merely because it is the testimony of someone having special skill or knowledge").

7 Because the underlying contention lacks arguable merit, Appellant's derivative claim of appellate counsel's ineffectiveness necessarily fails. *See* *Commonwealth v. Roney,* —— Pa. ——, ——, 79 A.3d 595, 623 (2013).

8 For example, Drs. Keshevan and Merikangas testified in support of the extreme-mental-or-emotional-disturbance mitigator, 42 Pa.C.S. § 9711(e)(2); *see* N.T., Trial, at 2929 (Dr. Keshevan), 2946 (Dr. Merikangas); *see also supra* note 1, and Dr. Merikangas separately testified that two other mitigating factors were present—namely, that Appellant's capacity to understand the criminality of his conduct or conform his conduct to the law's requirements was substantially impaired, *see* 42 Pa.C.S. § 9711(e)(2), and that he acted under extreme duress, *see* 42 Pa.C.S. § 9711(e)(5); N.T., Trial, at 2946–47. The penalty-phase defense case also included testimony from numerous prison guards who all agreed Appellant was a model prisoner.

9 Dr. Lebowitz added various details to give a fuller picture of the severe nature of those experiences, most notably with regard to persistent hunger and insecurity, and Mrs. Baumhammers' extreme fear as a young girl during the Dresden bombing.

10 For instance, Dr. Lebowitz suggested that what might have seemed to the jury like indulgence on the part of Mrs. Baumhammers could also be explained by understanding that one ramification of the terror she experienced during the war was that she was subject to a "hyperreactivity that makes it difficult to maintain perspective." N.T., Sept. 13, 2011, at 127; *see also id.* at 134 (suggesting that parents with a history of trauma are more susceptible to manipulation by a mentally ill child).

11 Once the court furnished this notice, it was required to give Appellant at least 20 days to respond and cure any perceived deficiencies. *See* *Commonwealth v. Rivera,* 619 Pa. 464, 465–66, 65 A.3d 290, 291 (2013)

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(*per curiam*); Pa.R.Crim.P. 909(B)(2)(b). The petition was ultimately dismissed on September 23, 2011, more than 20 days later.

12 The statute defines "mentally ill" as "[o]ne who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." 18 Pa.C.S. § 314(c)(1). This largely tracks the language of the (e)(3) mitigator, which applies when "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." 42 Pa.C.S. § 9711(e)(3).

13 The relevant portion of the lead opinion in *Lassiter* represented the views of six Justices, although the opinion was a plurality in other respects.

14 In *Commonwealth v. Spotz,* 587 Pa. 1, 896 A.2d 1191 (2006), the Court cited several cases in which the jury found the (d)(6) aggravator relative to an individual who claimed, on appellate review, to have been an accomplice. *See id.* at 82 n. 39, 896 A.2d at 1239 n. 39. Notably, many of those cases involved a distinct issue, namely, whether accomplice liability for first-degree murder is appropriate in view of the requirement that the perpetrator have a specific intent to kill. More to the point, none of the cited cases involved an express holding that the (d)(6) aggravator's scope included accomplices.

15 As to this claim, we use "PCRA petition" instead of "amended petition" to avoid confusion, since the issue involves whether the amended PCRA petition was further amended, as discussed below.

16 Although denominated as an "Answer" to the PCRA petition, *see* Docket Entry 138 at 1, the Commonwealth's filing comprised a motion to dismiss the petition. *See id.* at 111.

17 Appellant appears to proffer the underlying constitutional argument as a separate substantive basis for relief. As that argument is waived, only the derivative ineffectiveness claim is cognizable. *See* 42 Pa.C.S. § 9543(a)(3); *Commonwealth v. Gibson,* 597 Pa. 402, 429, 951 A.2d 1110, 1126 (2008).

18 In *Riggins,* the defendant offered an insanity defense to a murder charge and was treated with an antipsychotic drug. He moved to suspend administration of the drug until the end of trial, arguing that its continued administration would prevent him from showing the jury his true mental state. After the motion was summarily denied, the case proceeded to a jury trial at which Riggins testified. Riggins was convicted and sentenced to death. Based on *Washington v. Harper,* 494 U.S. 210, 221–22, 110 S.Ct. 1028, 1036, 108 L.Ed.2d 178 (1990) (recognizing that an individual has a protected liberty interest in avoiding unwanted administration of antipsychotic drugs), the Supreme Court held that the administration of the drug over Riggins' objection implicated his due process rights and could only be justified if the state established an overriding need for it—such as by showing that treatment with the drug was medically appropriate and, considering less intrusive alternatives, was necessary to protect Riggins' health or safety or the safety of others, or to obtain an adjudication of Riggins' guilt or innocence. *See Riggins,* 504 U.S. at 135, 112 S.Ct. at 1815; *see also Commonwealth v. Sam,* 597 Pa. 523, 538 n. 11, 952 A.2d 565, 573 n. 11 (2008) (discussing *Riggins*); *Hughes,* 581 Pa. at 311, 865 A.2d at 783 (summarizing *Riggins*' holding).
Based on *Harper* and *Riggins,* the Supreme Court eventually articulated a four-part test for the permissibility of involuntary medication in *Sell v. United States,* 539 U.S. 166, 181, 123 S.Ct. 2174, 2185, 156 L.Ed.2d 197 (2003). *See Sam,* 597 Pa. at 537–38, 952 A.2d at 573; *Commonwealth v. Watson,* 597 Pa. 483, 506–07, 952 A.2d 541, 554–55 (2008) (reciting the four-part test). To the degree that standard may be construed as more stringent than the one set forth in *Riggins,* it is inapposite because *Sell* was decided after Appellant's trial. *See King,* 618 Pa. at 423, 57 A.3d at 618 ("[C]ounsel's performance [is] judged by the prevailing professional standards in existence at the time of trial."). In any event, we find that no genuine issue has been raised that Appellant was subjected to involuntary medication, as discussed below.

19 The record reflects that Appellant was medicated with Zyprexa, rather than Trilafon, not only at the pre-trial hearing on April 11, 2001, but also during trial. *See, e.g.,* N.T., Trial, at 1397.

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20 To the degree Appellant's brief may be viewed as forwarding a substantively distinct claim that counsel was ineffective for failing to ensure Appellant was competent to be tried, *see* Brief for Appellant at 53 (citing *Drope v. Missouri,* 420 U.S. 162, 175, 95 S.Ct. 896, 905, 43 L.Ed.2d 103 (1975)), that contention was not advanced before the PCRA court. *See* Pa.R.A.P. 302(a) (prohibiting the raising of issues for the first time on appeal).

21 This and other issues, as stated in Appellant's brief, also reference Article I, Section 13 of the Pennsylvania Constitution, which prohibits "cruel punishments." In each instance, however, the argument section does not develop the state-constitutional argument in any meaningful fashion. Thus, we will only apply Eighth Amendment law in each such instance. *See* *Commonwealth v. Batts,* 620 Pa. 115, 136–37, 66 A.3d 286, 299 (2013) (noting that Article 1, Section 13 is construed as coterminous with the Eighth Amendment absent a persuasive analysis to the contrary in accordance with *Commonwealth v. Edmunds,* 526 Pa. 374, 586 A.2d 887 (1991)).

22 In *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the Supreme Court distinguished the void-for-vagueness doctrines as they arise under the Due Process Clause and the Eighth Amendment:

> Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.... Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them ... with the kind of open-ended discretion which was held invalid in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Cartwright, 486 U.S. at 361, 108 S.Ct. at 1857–58.

23 This also distinguishes the (d)(11) aggravator from those at issue in the two Supreme Court cases on which Appellant relies, namely, *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Godfrey* rejected application of a Georgia statute that listed as an aggravating factor that the offense was "outrageously or wantonly vile, horrible and inhuman," where the jury was given no guidance concerning the meaning of those terms. The Court explained that, left uninstructed, many lay jurors would consider all murders outrageously or wantonly vile, horrible and inhuman. *See* *id.* at 428–29, 100 S.Ct. at 1765. The Court in *Cartwright* reached the same conclusion with regard to the phrase, "especially heinous, atrocious, or cruel" (at least absent some limiting construction) since, again, "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.' " *Cartwright,* 486 U.S. at 364, 108 S.Ct. at 1859. By contrast, the multiple-murder aggravator implicates a more objective factual circumstance and, as such, is not as susceptible to arbitrary application.

24 In *Witt*, the Supreme Court clarified that the governing standard, whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath:

> does not require that a juror's bias be proved with unmistakable clarity. This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a

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> prospective juror would be unable to faithfully and impartially apply the law. [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424–25, 105 S.Ct. at 852–53.

25 This Court added that, "in rejecting Appellant's post-sentence argument on this issue, the trial court specifically determined that the record of the jury selection process established that it was possible to select a jury untainted by prejudicial pre-trial publicity" and that "[s]uch a jury was, in fact, selected in this matter." *Baumhammers,* 599 Pa. at 26–27, 960 A.2d at 75 (internal quotation marks and citation omitted). Although Appellant's current argument fails to cast doubt upon the trial court's or this Court's post-trial assessment in this regard, we need not reach the issue of actual prejudice in light of our holding that Appellant's waiver forecloses relief in the circumstances.

26 Although *William Goldman Theatres* was decided before certain constitutional amendments were adopted in 1967 and 1968, the relevant language contained in Sections 6 and 9 of Article I has not changed.

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374 Pa.Super. 549
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania
v.
James J. TRILL, Appellant.

Argued Sept. 21, 1987.
|
Filed May 12, 1988.
|
Reargument Denied July 8, 1988.

Synopsis
Defendant was found guilty by jury in the Common Pleas, Delaware County, Criminal Nos. 127-84, 541-84, Semeraro, J., of robbery, simple assault, terroristic threats and theft by receiving stolen property, and he appealed. The Superior Court, No. 00226 Philadelphia 1987, Cirillo, President Judge, held that: (1) defendant was not denied his right to a speedy trial; (2) defendant could be found guilty of theft by receiving stolen property and guilty but mentally ill on other charges; (3) evidence sustained finding that defendant was not insane; (4) defendant was not entitled to voir dire jurors on their views concerning the insanity defense; (5) trial court's instructions did not require reversal; and (6) statute authorizing verdict of guilty but mentally ill does not violate due process for equal protection guarantees.

Affirmed.

Beck, J., filed a concurring opinion.

West Headnotes (25)

[1] **Criminal Law** Defendant unavailable

Exclusion from speedy trial computation of time period of unavailability of defendant for trial was not contingent upon defendant's expressed waiver. Rules Crim.Proc., Rule 1100(d)(3)(i), 42 Pa.C.S.A.

1 Cases that cite this headnote

[2] **Criminal Law** Illness or incompetency of defendant; determination of competency

Commonwealth was entitled to exclusion from speedy trial computation of continuance granted to defendant for psychiatric evaluation. Rules Crim.Proc., Rule 1100(d)(3)(i), 42 Pa.C.S.A.

1 Cases that cite this headnote

[3] **Criminal Law** Illness or incompetency of defendant; determination of competency

Order declaring defendant incompetent to stand trial vitiated effect of prior order extending the period for bringing defendant to trial for period of 90 days after the date he was declared competent to stand trial, even if he was found to be competent by hospital authorities at a time between the two orders. Rules Crim.Proc., Rule 1100, 42 Pa.C.S.A.

[4] **Criminal Law** Illness or incompetency of defendant; determination of competency

Delay in bringing defendant to trial attributable to his incompetency to stand trial was excludable for speedy trial purposes. Rules Crim.Proc., Rule 1100, 42 Pa.C.S.A.

1 Cases that cite this headnote

[5] **Criminal Law** Computation

For purposes of the speedy trial rule, trial commenced on the day on which judge heard motion which had been reserved for the time of trial. Rules Crim.Proc., Rule 1100, 42 Pa.C.S.A.

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[6] **Criminal Law** Inconsistent findings

Fact that defendant was found guilty but mentally ill on all but one charge did not require that he be found guilty but mentally ill, rather than guilty, on remaining charge, even though all of the offenses occurred on the same day.

9 Cases that cite this headnote

[7] **Criminal Law** Inconsistent findings

Inconsistent verdicts are proper so long as the evidence is sufficient to support the convictions which the jury has returned.

7 Cases that cite this headnote

[8] **Criminal Law** Insanity or Other Incapacity
Receiving Stolen Goods Weight and sufficiency in general

Finding that defendant was guilty of receiving stolen property and not mentally ill was supported by evidence that he possessed several items belonging to another when he was arrested, that those items had been stolen from the other person earlier in the day, and that the owner had never given defendant permission to seize the items.

[9] **Criminal Law** Insanity or Other Incapacity

Finding of defendant's sanity at time of commission of offenses was supported by testimony of prosecution expert and lay witnesses.

[10] **Jury** Personal opinions and conscientious scruples

Defendant was not entitled to voir dire jury panel regarding jurors' opinions of the insanity defense or possible prejudice against its use.

1 Cases that cite this headnote

[11] **Criminal Law** Cross-examination and redirect examination

Use of defendant's discharge summary from state hospital during cross-examination of defense psychiatrist was permissible, despite hearsay objection based on lack of testimony from custodian who prepared the report, where the psychiatrist indicated that he had relied on the discharge summary in formulating his opinion.

2 Cases that cite this headnote

[12] **Criminal Law** Construction and Effect of Charge as a Whole

Scope of appellate review of jury charge for reversible and prejudicial error requires that the charge be evaluated and considered as a whole; general effect of the jury charge controls because error will not be predicated upon isolated excerpts from the charge.

2 Cases that cite this headnote

[13] **Criminal Law** Instructions in general

Trial court's deviation from express language of statutory instruction or technical inaccuracies in

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jury instruction which nevertheless adequately, accurately, and clearly express the law to the jury will not mandate reversal.

3 Cases that cite this headnote

[14] **Criminal Law**🔑Sufficiency in general
Criminal Law🔑Matters of law in general

Trial court misstated instructions by stating that a person is legally insane if he does not know the nature and quality of his act, he does not know what he is doing is wrong and by stating that, "when defendant is found guilty by reason of legal insanity, he may be subject to an immediate court proceeding to determine whether he should be committed to mental facility"; first charge should have been "* * * if he does know the nature and quality of his act" and second charge should have been "when defendant is found not guilty."

3 Cases that cite this headnote

[15] **Criminal Law**🔑Defenses

Trial court's misstatements in instructions on insanity were not prejudicial where trial court repeated the instructions correctly to the jury numerous times throughout the charge.

4 Cases that cite this headnote

[16] **Criminal Law**🔑Defenses

Trial court's instruction that, if defendant is found not guilty by reason of insanity, he "may" be subject to an immediate court proceeding was not prejudicial despite defendant's contention that the statement should have told the jury that, if found not guilty by reason of insanity, defendant "will" be subject to an immediate court proceeding to determine whether he should be committed.

1 Cases that cite this headnote

[17] **Criminal Law**🔑Insanity
Criminal Law🔑Special issues and defenses
Criminal Law🔑Instructions to jury

Jury must be charged on guilty but mentally ill verdict whenever the insanity defense is set forth, and defendant may not waive the instruction. 18 Pa.C.S.A. § 314.

7 Cases that cite this headnote

[18] **Constitutional Law**🔑Presumptions and Construction as to Constitutionality

Reviewing court is obliged to exercise every reasonable attempt to vindicate constitutionality of a statute and uphold its provisions.

8 Cases that cite this headnote

[19] **Constitutional Law**🔑Statutes and other written regulations and rules

Commonwealth is not required to treat all citizens exactly alike and differential treatment of citizens is permissible where the actions are based on criteria which are reasonably related to the purpose of the legislative enactment and facts exist justifying the disparate treatment. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

[20] **Constitutional Law**🔑Disposition after verdict or other determination; prisons
Criminal Law🔑Insanity

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Statute providing for verdict of guilty but mentally ill does not violate equal protection guarantees. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

2 Cases that cite this headnote

[21] **Constitutional Law**Disposition after verdict or other determination; prisons

For equal protection analysis, statute authorizing verdict of guilty but mentally ill does not implicate either a suspect class or a fundamental right. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2.

1 Cases that cite this headnote

[22] **Criminal Law**Insanity

Statute authorizing verdict of guilty but mentally ill is not unconstitutionally vague on theory that it fails to articulate the appropriate burden of proof to be assessed. 18 Pa.C.S.A. § 314; U.S.C.A. Const.Amend. 14.

[23] **Criminal Law**Degree of proof

Under statute providing for verdict of guilty but mentally ill, fact finder must determine if Commonwealth has proven that the accused is guilty of every element of offense charged beyond a reasonable doubt, must then determine whether the accused has proven the defense of insanity by preponderance of the evidence and, if Commonwealth has met its burden but accused has not met his burden, must determine whether the facts established beyond a reasonable doubt that the accused was mentally ill. 18 Pa.C.S.A. §§ 314, 315(a).

21 Cases that cite this headnote

[24] **Constitutional Law**Insanity or mental illness
Criminal Law Insanity

Statute authorizing verdict of guilty but mentally ill does not violate due process guarantees on theory that the statutory definitions of mentally ill and legal insanity promote a distinction without a substantive difference which results in the jury arriving at a compromised verdict. 18 Pa.C.S.A. § 314.

9 Cases that cite this headnote

[25] **Constitutional Law**Unanimity

"Compromise verdict" occurs when several members of a jury panel abandon their beliefs to settle upon a common ground with their fellow jurors; when such a compromise does occur, the defendant has not been found guilty beyond a reasonable doubt by all the members of the jury and he has been denied due process of law. U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

Attorneys and Law Firms

****1108 *554** Nicholas J. Caniglia, Wayne, for appellant.

Sandra L. Elias, Deputy Dist. Atty., Media, for Com., appellee.

Before CIRILLO, President Judge, and BECK and TAMILIA, JJ.

Opinion

CIRILLO, President Judge.

This is an appeal from a judgment of sentence entered in

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the Court of Common Pleas of Delaware County following James J. Trill's conviction for robbery, simple assault, terroristic threats, and theft by receiving stolen property. We affirm.

The charges against Trill arose out of an incident that occurred at the Riddle Ale House, Middletown Township, Delaware County, on the evening of January 8, 1984. At approximately 7:30 p.m. Trill entered the restaurant and walked behind the bar counter. He then tapped the bartender, John Naughton, on the shoulder and requested a "take out" order of beer. Mr. Naughton informed Trill that Riddle Ale House did not provide take out service for its customers, and he further explained that restaurant policy prohibited patrons from being behind the bar counter. Consequently, Mr. Naughton asked Trill to return to the area in ***555** front of the bar. Trill ignored this request and opened his overcoat to display what appeared to be a rifle. He then stated: "[T]his is a sawed-off shotgun, open that [cash register] drawer and give me the money or I'll blow your f———— brains out." Mr. Naughton indicated that he could not open the cash register drawer without the manager's assistance. Thwarted in his attempt to obtain the cash from Naughton, Trill began to search the dining room area of the restaurant, hoping to locate the manager. While Trill was gone, Naughton found his manager in the back ****1109** room of the building, and told him to summon the police.

Trill exited the building without obtaining any cash and was immediately observed by State Police Trooper Joseph Karlin, who had arrived at the scene in less than thirty seconds after receiving the call. Trill was standing in the restaurant parking lot, beside a station wagon. Upon noticing the arrival of the police, Mr. Naughton vaulted out into the parking lot and struck Trill, exclaiming "That's the guy!" The police officers apprehended and arrested Trill and confiscated a toy rifle that he had allegedly represented as authentic during the attempted robbery. The rifle was clearly visible to the officers through the open door of the automobile where Trill was standing. A search of Trill incident to his arrest disclosed the presence of a gold watch, a man's wedding band, a gold cigarette lighter with the inscription "Don," and medication with the name Donald Pritchett on the label. Police later discovered that these items had been stolen from Donald Pritchett's car earlier in the day. Trill was then taken into custody and detained pending trial.

A jury trial was held in the Court of Common Pleas of Delaware County before the Honorable Anthony R. Semeraro. Although Trill interposed a defense of insanity, the jury found him guilty but mentally ill on the charges of robbery, 18 Pa.C.S. § 3701, simple assault, *id.* § 2701, and terroristic threats, *id.* § 2706. He was found guilty of the charge of theft by receiving stolen property, *id.* § 3925. The trial court denied post-trial motions. This appeal followed.

***556** Trill advances the following seven issues for our review: (1) whether the charges against him should have been dismissed by the trial court pursuant to Rule 1100 of the Pennsylvania Rules of Criminal Procedure; (2) whether Trill's conviction of theft by receiving stolen property must be vacated since it is inconsistent with the verdict of guilty but mentally ill; (3) whether the evidence was sufficient to sustain the finding that Trill was not insane; (4) whether the trial court denied Trill a fair and impartial jury trial by failing to grant his requested questions for voir dire; (5) whether the trial court improperly permitted the admission of hearsay testimony regarding the physician's report of his sanity; (6) whether the trial court improperly instructed the jury on the charge of legal insanity; and (7) whether Pennsylvania's guilty but mentally ill statutory scheme, 18 Pa.C.S. § 314, violates Trill's constitutionally protected equal protection and due process rights.

Trill initially contends that the trial court should have dismissed the charges lodged against him because of the Commonwealth's alleged failure to comply with Rule 1100 of Pennsylvania's Rules of Criminal Procedure. Rule 1100 provides, in pertinent part:

> (a)(2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed.
>
> ---
>
> (c)(1) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial.
>
> ---
>
> (2) A copy of such motion shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon.

Pa.R.Crim.P. 1100(a)(2), (c)(1), (2).

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Rule 1100 "serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) ***557** the protection of society." *Commonwealth v. Brocklehurst,* 491 Pa. 151, 153-154, 420 A.2d 385, 387 (1980); *Commonwealth v. Simms,* 509 Pa. 11, 500 A.2d 801 (1985). Bearing this in mind, our supreme court has offered the following standard for reviewing Rule 1100 claims:

> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule 1100 ****1110** must be construed in a manner consistent with society's right to punish and deter crime.... [C]ourts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well. Strained and illogical judicial construction adds nothing to our search for justice, but only serves to expand the already bloated arsenal of the unscrupulous criminal determined to manipulate the system.

Commonwealth v. Genovese, 493 Pa. 65, 72, 425 A.2d 367, 370-71 (1981). Further, "[t]he administrative mandate of Rule 1100 certainly was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth." 493 Pa. at 70, 425 A.2d at 370. It is with these precepts in mind that we consider Trill's Rule 1100 claim.

The first criminal complaint against Trill, Information 127-84, was filed on January 9, 1984; the second complaint, Information 541-84, was filed on January 19, 1984. Therefore, pursuant to Rule 1100, the trials should have commenced on or before July 10 and July 19, 1984, respectively. Any delay beyond the 180-day speedy trial period must be either excluded from the computation of the period under Rule 1100(d), or justified by an order granting an extension pursuant to Rule 1100(c). *Commonwealth v. Snyder,* 280 Pa.Super. 127, 421 A.2d 438 (1980).

[1] [2] Rule 1100 excludes from the computation of the 180-day time frame any period of delay that results from "the unavailability of the defendant or his attorney." Pa.R.Crim.P. 1100(d)(3)(i). In the case at bar, the Commonwealth ***558** is entitled to several exclusions because of Trill's unavailability for trial. Trill requested a continuance of the preliminary hearing to allow the appointment of conflict counsel from January 17 to February 7, 1984, a period of time encompassing twenty-one days. This excludable time was not contingent upon Trill's express waiver. See Pa.R.Crim.P. 1100(d)(3)(ii). Consequently, we exclude this twenty-one days in our Rule 1100 computation. Additionally, Trill was granted a continuance for psychiatric evaluation from April 30 to May 14, 1984. The Commonwealth is also entitled to the exclusion of these fifteen days, bringing the total amount of excludable days as a result of Trill's unavailability at this early stage to thirty-six days.

Under Rule 1100, the Commonwealth is entitled to apply to the trial court for an order extending the time for commencement of the trial. Pa.R.Crim.P. 1100(c)(1). On June 25, 1984, the Commonwealth properly filed a Rule 1100 extension petition which resulted in the grant of an extension on both informations for ninety days from the date that Trill was declared competent to stand trial. The order stated: "the time for commencement of trial is extended for a period of ninety (90) days after the date when Defendant is declared competent to stand trial by the appropriate medical authorities at Haverford State Hospital." In light of the extension, our inquiry turns to a determination of whether Judge Surrick's extension order was properly followed.

[3] Trill claims that he was declared competent to stand trial by the authorities at Haverford State Hospital on September 25, 1984; however we note that on that same day Trill "walked off" the grounds at Haverford State Hospital and was arrested on new robbery, stolen car, and resisting arrest charges. After his arrest and recapture, the trial court reassessed Trill's competence to stand trial. The result of the inquiry was an order, dated November 23, 1984, adjudicating Trill incompetent to stand trial. Thus, even if we were to consider September 25, 1984 as the threshold date for the commencement of the ninety-day ***559** period, the trial court's November 23, 1984 order declaring Trill incompetent to stand trial vitiated the effect of Judge Surrick's order. Two months later, on January 28, 1985, the court entered another order declaring that Trill remained incompetent to stand trial. As a result, the Commonwealth petitioned for another Rule 1100 extension, which the trial court granted on February 1, 1985. Time for trial was extended to "no later

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than 90 days from **1111 the date upon which the defendant is found by the court to be competent to stand trial."

[4] [5] It was not until August 15, 1985 that the trial court declared Trill competent to stand trial. Since the delay from November 23, 1984 to August 15, 1985 was attributable to Trill by reason of his incompetency, this period is excludable from our Rule 1100 computations. *Commonwealth v. Armstead,* 359 Pa.Super. 88, 518 A.2d 579 (1986). After the August 15, 1985 finding of competency, the Commonwealth had until November 13, 1985 to bring Trill to trial. For Rule 1100 purposes, the trial commenced on November 12, 1985, when Judge Semeraro heard motions which had been reserved for the time of trial. *See* *Jones v. Commonwealth,* 495 Pa. 490, 434 A.2d 1197 (1981); *Commonwealth v. Bond,* 350 Pa.Super. 341, 504 A.2d 869 (1986). Having determined that Trill's trial commenced before November 13, 1985, we conclude that the Commonwealth properly brought him to trial within the time limitations imposed by Rule 1100. Accordingly, we dismiss his Rule 1100 claim as meritless.

[6] Trill next contends that the jury's guilty verdict on the charge of theft by receiving stolen property must be vacated because of its inconsistency with the verdict of guilty but mentally ill on the remaining charges. Since the offenses in both informations occurred on the same day, Trill proclaims that it logically follows that he should have been found guilty but mentally ill on the theft charge also. We disagree.

*560 [7] It is now axiomatic that consistency in criminal verdicts is not required. In addressing an appeal involving allegedly inconsistent verdicts, our supreme court has stated:

> [E]ven if it were assumed that the two verdicts were logically inconsistent, such inconsistency alone could not be grounds for a new trial or for reversal. "It has long been the rule in Pennsylvania and in the federal courts that consistency in a verdict in a criminal case in not necessary."

Commonwealth v. Gravely, 486 Pa. 194, 205, 404 A.2d 1296, 1301 (1979) (plurality opinion) (citations omitted); *see also* *Commonwealth v. Maute,* 336 Pa.Super. 394, 485 A.2d 1138 (1984). Inconsistent verdicts are proper so long as the evidence is sufficient to support the convictions that the jury has returned. *Commonwealth v. Graves,* 310 Pa.Super. 184, 456 A.2d 561 (1983).

[8] The Commonwealth's evidence surrounding the theft by receiving stolen property charge was completely dissimilar from the evidence involved in the charges stemming from the incident at the Riddle Ale House. The theft by receiving stolen property charge was based primarily upon circumstantial evidence. When Trill was arrested, he possessed several items that belonged to Donald Pritchett. Pritchett had these items stolen from him earlier in the day, and had never known Trill or given him permission to seize the items. From the evidence adduced at trial, the finders of fact were unwilling to conclude that these facts established beyond a reasonable doubt that Trill was mentally ill at the time of the commission of the theft. The jurors were, however, willing to conclude that the evidence established beyond a reasonable doubt that Trill had committed the crime of theft by receiving stolen property. Consequently, the jury rendered a guilty verdict. We will not disturb this finding. It is well settled that a jury is free to believe all, some, or none of the evidence proffered at trial. *Commonwealth v. Claypool,* 508 Pa. 198, 495 A.2d 176 (1985). Accordingly, we reject Trill's assertion that the *561 theft by receiving stolen property conviction must be vacated as being inconsistent with the finding of guilty but mentally ill.

Trill next asserts that the evidence was insufficient as a matter of law to sustain the finding that he was not insane at the time of the commission of his charged crimes. He maintains that the expert testimony introduced by both the prosecution and the defense strongly supports an insanity finding. Consequently, he alleges that such testimony should have been sufficient **1112 to convince a rational trier of fact that he was in fact insane.

The test for reviewing a sufficiency of the evidence claim on appeal from a conviction is:

> whether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt.... The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.... Moreover, in applying the above test, the entire trial record must be

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> evaluated and all evidence actually received must be considered.... Finally, the trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Griscavage, 512 Pa. 540, 543, 517 A.2d 1256, 1257 (1986) (citation omitted).

[9] Trill asks us to examine the testimony of Perry Berman, M.D., who testified on behalf of Trill, and compare it with that of Kenneth A. Kool, M.D., who testified for the prosecution. He claims that such an examination will yield an indisputable finding of insanity. We have examined all of the evidence involving Trill's mental state in the light most favorable to the Commonwealth. Drawing all reasonable inferences from that evidence, we have concluded that it was sufficient as a matter of law to sustain the finding of sanity. While it is true that the psychiatric testimony ***562** concerning Trill's emotional status was conflicting, it was nonetheless within the jury's province to determine which account was more credible. In similar cases, we have stated:

> [W]hile psychiatric testimony is of probative value, it is within the province of the jury to determine the credibility and weight of such evidence.... Indeed, evidence on a defendant's mental condition can just as credibly come from the testimony of lay witnesses concerning the defendant's actions, conversations and statements at the time of the [crime] from which the jury could find that he knew what he was doing when he [committed the crime] and knew it was wrong.

Commonwealth v. Ruth, 309 Pa.Super. 458, 462, 455 A.2d 700, 702 (1983). In the instant case, several lay persons testified in conjunction with the psychiatric testimony. Mr. Naughton, Mr. Duke, State Police Troopers Kalin and Brown, and defense witness Mr. Sebold all testified in regard to Trill's apparent mental orientation. From that evidence it was reasonable for the fact finder to conclude beyond a reasonable doubt that Trill knew the nature and quality of his actions, or that he knew what he was doing was wrong. Having found that the evidence was sufficient to sustain the finding that Trill was legally sane at the time of the commission of the acts in the Riddle Ale House, we dismiss his allegation of error as meritless.

Trill's next claim of alleged trial error involves the propriety of Judge Semeraro's denial of his requested questions for voir dire. Trill avers that he was effectively denied a fair and impartial trial by not having been allowed to question prospective jurors about their personal feelings and inclinations regarding various aspects of the insanity defense.

[10] In *Commonwealth v. Merrick,* 338 Pa.Super. 495, 488 A.2d 1 (1985), we reviewed the standard that our appellate courts utilize when addressing voir dire issues:

> We start our analysis with the general principle that the purpose of the voir dire system is to ensure the impanelling ***563** of a fair, competent, impartial, and unprejudiced jury. To this end, the scope of a voir dire examination is within the sound discretion of the trial court; absent palpable error, we will not disturb a court's decision. Questions on voir dire should be tailored so as to "disclose lack of qualification and whether the juror has formed a fixed opinion as to the accused's guilt or innocence." However, questions which are "designed to disclose ****1113** what a juror's present impression or opinion may be or what his attitude or decision will likely be under certain facts which may be developed in the trial of the case" should not be permitted.

338 Pa.Super. at 500-01, 488 A.2d at 3 (citations omitted). It is now settled law in Pennsylvania that a trial court's refusal to permit the accused to question prospective jurors on voir dire about the juror's views of the insanity defense or their potential prejudice against the defense will not constitute palpable error warranting a reversal. *Commonwealth v. Biebighauser,* 450 Pa. 336, 300 A.2d 70 (1973); *Commonwealth v. Hathaway,* 347 Pa.Super. 134, 500 A.2d 443 (1985). Applying this well established case law, we find that Judge Semeraro committed no palpable error in refusing to allow Trill to question the Delaware County jury panel regarding their opinions of the insanity defense or possible prejudice against its use. Such questions would have gone beyond the permissible scope and purposes of voir dire. Further, aside from the above-cited authorities which conclusively refute Trill's claim of error, we note that the trial court did make the following query:

> Ladies and gentlemen, is there any member of this panel who has such a fixed opinion about the defense of legal insanity at the time an offense is committed that he or she, if selected, could not hear all the evidence with an open mind and deliberate to a fair and honest verdict? If so, please signify by raising your hand. Let the record show there are none.

We believe that this line of questioning adequately and properly allayed the possibility of jury prejudice and partiality ***564** that Trill asserts on appeal. Consequently, we dismiss this claim.

Trill also contends that the trial court improperly permitted the admission of various portions of his discharge summary from Haverford State Hospital during the cross-examination of defense psychiatrist Dr. Perry Berman. Since neither the custodian who prepared the report nor a representative of Haverford State Hospital testified at trial, Trill asserts that the document was impermissible hearsay evidence and constitutes reversible error. We cannot agree.

[11] Underlying the hearsay rule is the tenet of law that an out-of-court statement offered for a purpose apart from the truth of its contents, or to explain a course of conduct, is not hearsay. *Commonwealth v. Belmonte,* 349 Pa.Super. 1, 502 A.2d 1241 (1985). Dr. Berman's testimony indicated that he had relied on a "set of discharge summaries" in forming his professional opinion. On cross-examination, the Commonwealth's attorney sought to clarify this statement and ascertain the grounds upon which Dr. Berman had based his evaluation. Under our supreme court's holding in *Commonwealth v. Thomas,* 444 Pa. 436, 282 A.2d 693 (1971), a medical witness is permitted to express opinion testimony on medical matters based, in part, upon reports of others which are not in evidence, but upon which the expert relied. Here, the trial court reasonably concluded, from the somewhat conflicting testimony of Dr. Berman, that he had relied on the discharge summary in formulating his opinion. Consequently, we believe that the testimony admitted into evidence in no way violated those protections springing from the hearsay rule.

Trill next claims that the trial court misread the jury instructions regarding legal insanity and thereby generated confusion and disruption for the orderly deliberation of Trill's verdict. Specifically, Trill directs our attention toward three incidents wherein Judge Semeraro allegedly misstated the law. First, Trill objects to the insanity charge which stated:

> ***565** [A] person is legally insane if at the time of committing an alleged crime, he is laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he is doing, or if he does *not* know the nature and quality of the act, he does not know that what he is doing is wrong [emphasis added].

Trill complains that the word "not" should have been omitted in accordance with ****1114** 18 Pa.C.S. § 315(b), and the Pennsylvania Suggested Standard Jury Instructions. The second allegation of error surrounds the allegedly improper reading of the following instruction: "I will tell you, however, that when a defendant is found *guilty* by reason of legal insanity, he may be subject to an immediate court proceeding to decide whether he should be committed to a mental treatment facility [emphasis added]." Trill asserts that the instruction should have read "*not* guilty by reason of legal insanity." Last, Trill complains that the following instruction was also improper: "I will tell you, however, that when a defendant is found not guilty by reason of insanity, he *may* be subject to an immediate court proceeding to decide whether he chould [sic] be committed to a mental treatment facility [emphasis added]." Trill insists that the case of *Commonwealth v. Mulgrew,* 475 Pa. 271, 380 A.2d 349 (1977), mandates that the court recite that "[the defendant] *will* be subject to an immediate court proceeding."

[12] [13] The scope of appellate review of a jury charge for reversible and prejudicial error requires that the charge be evaluated and considered as a whole. *Commonwealth v. Banks,* 513 Pa. 318, 521 A.2d 1 (1987); *Commonwealth v. Sweger,* 351 Pa.Super. 188, 505 A.2d 331 (1986). The general effect of the jury charge controls because error will not be predicated upon isolated excerpts from the charge. *Commonwealth v. Stanton,* 316 Pa.Super. 397, 463 A.2d 19 (1983). Further, a trial court's deviation from the express language of the statutory instruction or a technical inaccuracy in the jury instruction which nevertheless adequately, accurately, and clearly expresses

the law to the jury will not mandate reversal. ***566** *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700 (1984), *cert. denied,* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1985); *Commonwealth v. Buehl,* 510 Pa. 363, 508 A.2d 1167 (1986).

[14] [15] We agree with Trill that the trial court did in fact misstate the charge by inserting the word "not" in the first instance, and omitting it in the second. However, reading the charge as a whole, and considering that the trial court repeated the instructions correctly to the jury numerous times throughout the charge, we find no prejudicial error. Judge Semeraro's charge encompasses more than thirty-one transcribed pages of colloquy, involving lengthy discussions of complex areas of the law. It would be fatuous to require a trial judge to perform such a lengthy charge flawlessly on each attempt.

[16] We also find Trill's distinction between "may" and "will" in the third allegation of error to be specious. Here, Judge Semeraro read the insanity instruction as it appears in the Pennsylvania Suggested Standard Jury Instructions on the Insanity Defense. *See Pennsylvania Suggested Standard Jury Instructions-Criminal* § 5.01A (Revised Instruction Subcommittee Draft, Feb. 2, 1978). The instruction advocated by our supreme court in *Mulgrew,* which Trill cites as controlling, has been incorporated into the Pennsylvania Suggested Standard Jury Instructions. *Commonwealth v. Belmonte,* 349 Pa.Super. 1, 502 A.2d 1241 (1986). Accordingly, we cannot agree that this instruction was so erroneous as to constitute reversible or prejudicial error.

Trill's final claim of error surrounding the jury charge involves the assertion that the instruction of guilty but mentally ill is not mandatory, and may be waived by the defendant. He avows that by providing the jurors with the option to choose the guilty but mentally ill verdict without his consent, the court has effectively undercut his ability to present a successful insanity defense.

[17] A common-sense reading of the Pennsylvania statutory scheme belies this allegation. Section 314 provides ***567** that when a person offers a defense of insanity, *he may be found guilty but mentally ill* if the trier of fact finds beyond a reasonable doubt that the person is guilty of an offense, was mentally ill at the time of the commission of the offense, and was not legally insane at the time of the commission of the offense. 18 Pa.C.S. § 314(a) (emphasis added). From the plain language ****1115** of the statute, it logically follows that the jury *must* be charged on the guilty but mentally ill verdict whenever the insanity defense is set forth. One could not be found guilty but mentally ill, as the legislature has directed, if such a verdict is not made known to the jury panel. Bolstering this supposition are the comments of Dickinson School of Law professor Arthur Murphy, reporter to the Criminal Instructions Subcommittee of the Pennsylvania Supreme Court's Committee for Proposed Standard Jury Instructions. Professor Murphy advocates the use of the following instruction:

> Because the defendant has asserted an insanity defense, *you will have to consider four possible verdicts.* In addition to "guilty" and "not guilty" which are available verdicts in a criminal case, you will have to think about the special alternatives of "not guilty by reason of insanity" and of "guilty but mentally ill."

Murphy, *Legally Insane or Guilty but Mentally Ill: A Suggested Jury Instruction,* 88 Dick.L.Rev. 344, 347 (1984) (emphasis added). This instruction was approved by the Subcommittee and will eventually be added to the Committee's manual of suggested criminal charges. In light of the foregoing, we find that the trial court properly charged the jury on the verdict of guilty but mentally ill.

Trill's last issue controverts the viability of Pennsylvania's guilty but mentally ill statute, 18 Pa.C.S. § 314. Trill mounts an impelling challenge to the statutory scheme implemented by our legislature; however, we conclude that his laudable effort has fallen short of its goal. The overwhelming authority generated by our sister states, many of which have been grappling with this exact issue in their appellate courts for more than a decade, coupled with our ***568** own analysis, dissuades us from invalidating a statutory scheme which we conclusively deduce passes constitutional muster.

Section 314 of our Crimes Code provides as follows:

> (a) General rule.-A person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found "guilty but mentally ill" at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.
>
> (b) Plea of guilty but mentally ill.-A person who waives his right to trial may plead guilty but mentally ill. No plea of guilty but mentally ill may be accepted by the trial judge until he has examined all reports prepared pursuant to the Rules of Criminal Procedure, has held a hearing on the sole issue of the defendant's mental illness at which either party may present evidence and is satisfied that the defendant was mentally ill at the time of the offense to which the plea is entered. If the

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> trial judge refuses to accept a plea of guilty but mentally ill, the defendant shall be permitted to withdraw his plea. A defendant whose plea is not accepted by the court shall be entitled to a jury trial, except that if a defendant subsequently waives his right to a jury trial, the judge who presided at the hearing on mental illness shall not preside at the trial.
>
> (c) Definitions.-For the purposes of this section and 42 Pa.C.S. § 9727 (relating to disposition of persons found guilty but mentally ill):
>
> (1) "Mentally ill." One who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
>
> (2) "Legal insanity." At the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, ***569** if he did know it, that he did not know he was doing what was wrong.
>
> (d) Common Law M'Naghten's Rule preserved.-Nothing in this section shall be deemed to repeal or otherwise abrogate the common law defense of insanity (M'Naghten's Rule) in effect in this Commonwealth ****1116** on the effective date of this section.

18 Pa.C.S. § 314. Analyzing this legislative enactment in light of well-settled constitutional principles, we must consider several basic tenets of statutory construction. A recognized maxim in Pennsylvania dictates that a strong presumption of constitutionality attaches to acts of the General Assembly, and a heavy burden of persuasion falls on any party seeking to rebut that presumption. *Consumer Party v. Commonwealth,* 510 Pa. 158, 507 A.2d 323 (1986); 1 Pa.C.S. § 1922(3); *id.* § 1921(a).

[18] Reiterating this aphorism of the law, our supreme court has stated:

> The strong presumption of constitutionality enjoyed by acts of the General Assembly and the heavy burden of persuasion on the party challenging an act have been so often stated as to now be axiomatic. Legislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of a finding of constitutionality.

Pennsylvania Liquor Control Board v. The Spa Athletic Club, 506 Pa. 364, 370, 485 A.2d 732, 735 (1984). A reviewing court is obliged to exercise every reasonable attempt to vindicate the constitutionality of a statute and uphold its provisions. *Tracey v. Chester County Tax Claim Bureau,* 507 Pa. 288, 489 A.2d 1334 (1985); *James v. Southeastern Pa. Trans. Auth.,* 505 Pa. 137, 477 A.2d 1302 (1984). It is with these precepts in mind that we must evaluate Trill's challenges to section 314.

Trill's objection to the constitutionality of section 314 presents an unprecedented legal argument in our Pennsylvania appellate courts. Since we have not previously adjudicated the issues that appellant espouses before us today, ***570** we consider it elucidating to undertake a cursory review of the growth and implementation of the guilty but mentally ill verdict and its intended purposes.

The guilty but mentally ill verdict was first interposed into American jurisprudence by the Michigan legislature in early 1975. *See* Mich.Comp.Laws Ann. §§ 768.36, 768.29, 330.2050(1) (West Supp.1986); *see also* Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded In Its Own Right and Successfully Preserved The Traditional Role Of The Insanity Defense,* 55 U.Cin.L.Rev. 943, 987 (1987). This legislation propagated as a result of public outcry over the Michigan Supreme Court's holding in *People v. McQuillan,* 392 Mich. 511, 221 N.W.2d 569 (1974). In *McQuillan* the court had struck down Michigan's automatic commitment statutes applicable to insanity acquittees in order to bring the proceeding within civil commitment standards. A concomitant result of this ruling was the release of numerous mentally ill patients from treatment facilities into the community. Several of these individuals subsequently perpetrated highly publicized, reprehensible crimes. *See* Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis,* 53 J. Urban L. 471, 482-83 (1976); Robey, *Guilty But Mentally Ill,* 6 Bull.Am.A. Psychiatry 374, 374-75 (1979). Less than a year later, the Michigan lawmakers became pioneers in fashioning a statutory scheme designed to avert the scenario described above.

The Michigan law-making body pursued several important goals in adopting the verdict of guilty but mentally ill. As a matter of policy, the lawmakers sought

to dissuade criminal defense attorneys from attempting to overutilize the insanity defense. Legislative research indicated that the use and exploitation of the insanity defense had resulted in outcomes inconsistent with its intended purposes. Consequently, the Michigan parliamentarians sought to provide jurors with an alternative or middle-ground verdict to the traditional "guilty," "not guilty," and "not guilty by reason of insanity." In so doing, they hoped to thereby reduce the ***571** incidence of insanity acquittals, which had reached alarming proportions.

Additionally, the legislative body envisioned the new verdict as one which would protect society by incarcerating mentally disturbed, dangerous accusees who might otherwise be found not guilty by reason of ****1117** insanity and subsequently released into the community. In conjunction with internment, the Michigan lawmakers aspired to implement a systematic program of psychiatric evaluation and treatment. Through this program it was hoped that the detainees would receive the therapy which they required concurrent with serving their mandated sentence. *See* Mickenberg, *supra,* at 988.

At first, law-making bodies throughout the country were reluctant to follow Michigan's novel statutory scheme. Most states emphatically maintained a "wait and see" attitude, hoping that Michigan's experiment would provide guidance for the implementation of their own guilty but mentally ill statutes. Between 1975 and 1982, only Indiana joined Michigan in putting into effect guilty but mentally ill legislation. *See* Ind.Code Ann. §§ 35-36-1-1 to 35-36-2-5 (Burns 1985 & Supp.1986). Indiana's legislation, like Michigan's, was spawned largely in response to a highly publicized violent crime wherein the defendant utilized the insanity defense, was adjudged not guilty by reason of insanity, and was subsequently released into the community. *See* *State v. Judy,* 275 Ind. 145, 416 N.E.2d 95 (1981). It was not until the 1982 acquittal of John W. Hinckley, Jr. for the March 30, 1981 assassination attempt of President Ronald Reagan that state lawmakers began to rapidly adopt guilty but mentally ill statutes for their respective states. *See* *United States v. Hinckley,* 672 F.2d 115 (D.C.Cir.1982); *see also* Kennelly & Dull, *Guilty But Mentally Ill: A New Verdict for South Dakota,* 30 S.D.L.Rev. 515, 515 (1985). Responding to the public disdain for the alleged inequity of permitting "responsible" defendants to escape punishment for their crimes, or treatment for their disease, states' assemblies hurried to enact provisions permitting the verdict ***572** of guilty but mentally ill. Through the implementation of this verdict, jurors could effectively condemn a mentally ill defendant to incarceration for his or her deviant criminal actions while recognizing that those actions were the product of a mental aberration or illness requiring ongoing psychological therapy and treatment. *See* McGraw, Farthing-Capowich, Kailitz, *The Guilty But Mentally Ill Plea and Verdict: Current State of the Knowledge,* 30 Vill.L.Rev. 117, 125 (1985).

Since *Hinckley,* nine other states have joined Michigan and Indiana in adopting guilty but mentally ill statutes, modelled in large part after Michigan's statutory scheme. *See* Alaska Stat. §§ 12.47.020(c), 12.47.030, 12.47.050 (Supp.1982); Del.Code Ann. tit. 11, § 401(b) (1979 & Supp.1982); Ga.Code Ann. § 17-7-131 (1981 & Supp.1986); Ill.Ann.Stat. ch. 38 paras. 6-2 to 6-4, 115-2 (Smith-Hurd Supp.1986); Ky.Rev.Stat.Ann. §§ 504.060(5), 504.120, 504.130 (Michie/Bobbs-Merrill 1985 & Supp.1986); N.M.Stat.Ann. §§ 31-9-3, 31-9-4, (1984); 18 Pa.Cons.Stat.Ann. § 314 (Purdon 1983); S.D.Codified Laws Ann. §§ 22-1-2(22), 23A-26-3, -23, -14 (1979 & Supp.1986); Utah Code Ann. §§ 77-13-1, 77-35-11, 77-35-21, 77-35-21.5 (1982 & Supp.1986). Maryland has instituted the guilty but mentally ill verdict through judicial decision. *See* *Pouncey v. State,* 297 Md. 264, 465 A.2d 475 (1983); *see also* Mickenberg, *supra,* at 950 n. 31 and accompanying text.

The assimilation of the guilty but mentally ill verdict into American jurisprudence has promulgated a host of constitutional challenges to its conceptual basis. Specifically, defense attorneys have mounted challenges to its viability predicated upon state and federal constitutional precepts of due process, *see* *Caldwell v. State,* 257 Ga. 10, 354 S.E.2d 124 (1987); *People v. Fierer,* 151 Ill.App.3d 649, 503 N.E.2d 594 (1987); *People v. Furman,* 158 Mich.App. 302, 404 N.W.2d 246 (1987); *People v. Ramsey,* 422 Mich. 500, 375 N.W.2d 297 (1985); *People v. DeWit,* 123 Ill.App.3d 723, 463 N.E.2d 742 (1984); *People v. Kaeding,* 98 Ill.2d 237, 456 N.E.2d 11 (1983); equal protection, *see* ***573** *People v. Carter,* 135 Ill.App.3d 403, 90 Ill.Dec. 212, 481 N.E.2d 1012 (1985); *Taylor v. State,* 440 N.E.2d 1109 (Ind.1982); *People v. Sorna,* 88 Mich.App. 351, 276 N.W.2d 892 (1979); *People v. Darwall,* 82 Mich.App. 652, 267 N.W.2d 472 (1978); *People v. Sharif,* 87 Mich.App. 196, 274 N.W.2d 17 (1978); the restraint on cruel and unusual punishment, *see* ****1118** *People v. McLeod,* 407 Mich. 632, 288 N.W.2d 909 (1980); and, the prohibition on ex post facto laws, *see* *Kirkland v. State,* 166 Ga.App. 478, 304 S.E.2d 561 (1983); *People v. Marshall,* 114 Ill.App.3d 217, 448 N.E.2d 969 (1983). Regardless of vigorous attempts by advocates

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to dislodge the verdict, the highest courts in Georgia, Illinois, Indiana, and Michigan have all undeniably upheld the constitutionality of their respective guilty but mentally ill statutes. *See* *Worthy v. State,* 253 Ga. 661, 324 S.E.2d 431 (1985) (upholding Georgia's guilty but mentally ill statute, Ga.Code Ann. § 17-7-131, under due process and equal protection claims); *People v. Kaeding,* 98 Ill.2d 237, 456 N.E.2d 11 (1983) (upholding Illinois's guilty but mentally ill legislation, Ill.Ann.Stat. ch. 38 paras. 6-2 to 6-4, under an equal protection attack); *Taylor v. State,* 440 N.E.2d 1109 (Ind.1982) (upholding Indiana's guilty but mentally ill verdict, Ind.Code Ann. §§ 35-36-1-1 to 35-36-2-5, under an equal protection challenge); *People v. McLeod,* 407 Mich. 632, 288 N.W.2d 909 (1980) (upholding Michigan's guilty but mentally ill statutory scheme, Mich.Comp.Laws Ann. §§ 768.36, 768.29, 330.2050(1), under due process, equal protection, and cruel and unusual punishment challenges). Our research indicates that none of the appellate courts in the twelve states that utilize the guilty but mentally ill verdict have struck down guilty but mentally ill legislation as unconstitutional.

Pennsylvania's guilty but mentally ill legislation was signed into law by Governor Dick Thornburgh on December 15, 1982. *See Legislative History of Senate Bills,* General Index, S.B. 171 at A-23 (1982); *see also* Angel, "*Guilty But Mentally Ill Debuts,*" 6 Pa.L.J.-Rep. 1, 10 (March 14, 1983). A review of the available legislative history of Senate Bill 171 provides scanty insight into the legislative purpose in enacting the verdict. Ironically, the primary debate surrounding ***574** the bill did not deal with the substantive aspects of the act. Instead, the legislators hotly debated funding for the act, wrangling with the issue of whether the Commonwealth, or the counties, should bear the burden of the treatment of those offenders found guilty but mentally ill. *See* Pa.Legislative Journal, House, 1627-45 (Sept. 21, 1982). There was, however, some discussion of the substantive implications of the bill. One of these discussions, initiated by Representative Levin of Philadelphia County, surrounded the definitions of "insanity" and "guilty but mentally ill" under the proposed bill. Representative Levin stated as follows:

> [T]he definition of "insanity" and the definition of "guilty but mentally ill" are in fact the same.... [U]nder the two definitions, could anyone who is found not guilty by reason of insanity under the M'Naghten defense not also fit under the "guilty but mentally ill" definition? ... [T]he point is very simple. Anyone who is found not guilty because of insanity fits under the other definition. The bill is fatally flawed by an attempt to rush it through here, and it should be soundly defeated.

Id. at 2131-32, 2132 (Nov. 29, 1982). House Representative Jeffrey E. Piccola of Dauphin County countered his colleague's challenge to the legislation by stating:

> [L]et me address the point raised by Mr. Levin that the definitions are the same. Mr. Levin [in his own discussion of the bill] indicated that they are in fact different. I suggest they are more than just slightly different, that they are significantly different ... [A]n individual who would be found guilty but mentally ill by the definitions found in the bill would have mental conditions less severe than those necessary to be found innocent by reason of insanity. The definitions speak for themselves in that regard.... Those who are less mentally afflicted and attempt to use the insanity defense may attempt to confuse a jury or a finder of fact and convince them that they are innocent by reason of insanity. The finding ***575** permitted under this legislation gives the finder of fact the ability to find such an individual guilty but also provide him with the necessary mental health treatment necessary to treat their illness. The culpability of that individual is spelled out in the definitions found under ****1119** the bill, and I do not believe it presents any conflict problem that [Representative Levin] is suggesting.

Id.

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Aside from the parliamentarians' debate over the funding of the Act and disagreement as to the substantive implications of the definition of "insanity" and "guilty but mentally ill," one concept is readily ascertainable from a review of the Act's legislative history: the legislation was clearly promulgated in response to the events surrounding the presidential assassination attempt, and subsequent acquittal, of John W. Hinckley, Jr. Marina Angel, Professor of Criminal Law at Temple University Law School, declared: "It is clear that the wave of public outrage following the Hinckley acquittal by reason of insanity led to [Pennsylvania's guilty but mentally ill] legislation." Angel, *supra,* at 10. In discussions of the bill on the House floor, Minority Whip James J. Manderino conceded that public pressure was a motivating force in fabricating the new law: "[T]he essence of this bill is born out of something that has not occurred in great measure in this Commonwealth but out of something that happened in the assassination attempt on the President. That really is the impetus, I think, for this kind of legislation." Pa. Legislative Journal, House, at 1627-45, 1630 (Sept. 21, 1982). Indeed, the Hinckley acquittal and surrounding debate generated a feeling that the common-law insanity standard was permitting culpable defendants to slip through the cracks of the criminal justice system and escape retribution. Succumbing to this national sentiment, our legislature joined the various other states who had enacted guilty but mentally ill legislation with the hope that the verdict would alleviate the incidence of insanity ***576** acquittals.[1] Bolstering this supposition are the comments of Representative Piccola who reiterated:

> The verdict of acquittal in the Hinckley case over the summer raised a defect or deficiency in the law brought to our attention, that being that when the defense of insanity is raised, the burden of proof falls upon the prosecution to prove beyond a reasonable doubt that the defendant was not insane. After review of Pennsylvania law, it appears that we are in the same position as the law in the federal jurisdiction of Washington, D.C. This [bill] will establish by statute that when a criminal defendant raises the insanity defense, the burden would fall upon that defendant to prove by a preponderance of the evidence that he or she is legally insane.

Id. at 1627-45, 1632 (Sept. 21, 1982). Continuing his comments in support of passage of the bill, Representative Piccola concluded:

> If you are interested in discouraging the use of the insanity defense and to reform the use of that defense so that the burden of establishing that defense falls upon the defendant, then you will vote for this [bill].... This is the very best that can be done under the circumstances ...

Pa.Legislative Journal, House, at 2131-33, 2132 (Nov. 29, 1982). Regardless of the criticisms that were levied against passage of the bill by a few individuals, Senate Bill 171 passed the House vote easily on September 21, 1982 by a vote of 182 to ten, with four House members abstaining and three members excused. *See id.* at 1627-45, 1644 (Sept. 21, 1982).

Although a review of our General Assembly's debate and discussion of the guilty but mentally ill legislation is helpful for achieving an understanding of its purposes, we must be wary of the manner in which we view the above referenced discussions. Former Chief Justice Warren, in *United* ***577** *States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), indicated the proper method of ascertaining legislative intent:

> When the issue is simply the interpretation of legislation, the court will look to statements by legislators for guidance as to the purpose of the legislation, because ****1120** the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading [the legislature's] purpose. It is entirely a different matter when we are asked to void a statute that is ... constitutional on its face, on the basis of what fewer than a handful of [legislators] said about it.... [I]t is unwise to void legislation which [a lawmaking body] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

391 U.S. at 383-84, 88 S.Ct. at 1682-83. We heed the comments of former Chief Justice Warren and limit our judicial inquiry into the guilty but mentally ill legislation

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to the facial validity of the statute. *See* Comment, *supra,* at 489.

The legislative history of Senate Bill 171 unearths several basic concepts fundamental to our constitutional analysis of Pennsylvania's guilty but mentally ill verdict. First, we conclude that the guilty but mentally ill verdict is merely the statutory articulation of our legislature's desire to allow the finder of fact to hold responsible those mentally ill defendants who deviate from the laws of this Commonwealth, while at the same time providing them with the humane psychiatric treatment for their mental infirmities. This noble purpose emanated from two unfavorable scenarios. In the first scenario, a mentally ill defendant who is unable to meet the burden of the M'Naghten insanity standard would logically be found either guilty or not guilty. If found guilty, that person could be condemned to serve a period of incarceration for his crime. One does not need to possess a medical degree with a specialty in psychiatry to realize that incarceration of a mentally ill defendant ***578** without structured psychiatric care will likely exacerbate the manifestations of his mental illness. In the second scenario, a mentally ill defendant who commits a violent crime and is adjudged to be insane under the M'Naghten standard could subsequently be released from structured psychiatric treatment into the community. Experience has shown that some chronically mentally ill patients decompensate rapidly without the structured environment, therapy, and medication that they receive in treatment facilities. Consequently, those individuals who are prone to commit violent crimes when their illness intensifies would likely revert to their prior antisocial behavior. Our legislature took these eventualities into consideration when formulating Pennsylvania's guilty but mentally ill statutory scheme and implemented a new verdict which would provide incarceration and treatment of afflicted mentally ill offenders, coupled with the protection of society from dangerously violent persons suffering from the oppression of mental illness.

The second obvious purport of the legislature was to discourage the use of the insanity defense and reform the burdens of proof required of aggrieved defendants. As experience in both Michigan case law and *Hinckley* showed, utilization of the verdict had reached alarming proportions, particularly in light of the prosecution's overwhelming burden of proving the defendant's sanity beyond a reasonable doubt. Consequently, our lawmaking body rationally sought to avert the problems encountered by other jurisdictions under the traditional "guilty," "not guilty," and "not guilty by reason of insanity" verdicts.

Lastly, we observe that our lawmakers promulgated 18 Pa.C.S. § 314 in response to the intense public pressure that surfaced in the wake of *Hinckley.* To the general public, it appeared to be incomprehensible that a man who had carefully planned to fatally injure the President, and had made an attempt to carry through with this contemptuous act, could possibly escape penal retribution for his crime. We surmise that immeasurable public contempt for the manner ***579** in which mentally ill offenders were treated in the criminal justice system was certainly a catalyst for the promotion of the new verdict. Our lawmakers responded to their constituents' grievances by statutorily enacting a verdict which had been time-tested and successful in other American jurisdictions.

As mentioned previously, many of the challenges to the guilty but mentally ill ****1121** verdict have been grounded in equal protection claims. The most frequent argument used by beleaguered defendants is that guilty but mentally ill statutes create irrational classifications leading to discrimination against defendants found guilty but mentally ill. For example, in *People v. Darwall,* 82 Mich.App. 652, 267 N.W.2d 472 (1978), the accused, Darrel O. Darwall, pleaded insanity but was found guilty but mentally ill of both murder in the second degree and assault with the intent to commit murder. Upon being sentenced to life imprisonment, Darwall challenged Michigan's guilty but mentally ill statutory scheme by claiming that it was discriminatory to subject mentally ill defendants pleading insanity to the risk of guilty but mentally ill verdicts when similar defendants could possibly escape guilty but mentally ill verdicts by merely pleading "not guilty." The Michigan appellate court rejected Darwall's contentions and stated:

> The equal protection clause demands only that the government not impose differences in treatment on persons similarly situated except on the basis of some reasonable differentiation fairly related to the object of the law.... The state's interest in protecting society from insane defendants who exhibit dangerous tendencies and in securing proper treatment for such persons suffering from mental illness certainly bear [sic] a reasonable relation to this statute's provision for two special verdict types indicating the jury's findings as to insanity and mental illness. The law passes muster if its

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> classification is reasonably related to the legislative purpose.

82 Mich.App. at 661, 267 N.W.2d at 476 (citations omitted). Since the Michigan statutory scheme was found to be ***580** reasonably related to its legislative purpose, Darwall's equal protection claim was dismissed as meritless.

In *People v. McLeod,* 407 Mich. 632, 288 N.W.2d 909 (1980), the Michigan Supreme Court was confronted with an equally untenable equal protection attack on Michigan's guilty but mentally ill statute. Here, Joseph McLeod was charged with arson and subsequently interposed a defense of insanity. The trial court found McLeod guilty of arson but mentally ill. McLeod appealed, maintaining that several provisions of the guilty but mentally ill statute infringed upon his fundamental rights and that it could be sustained only if it satisfied a compelling state interest. The court rejected his proposed standard and stated:

> [W]e construe this argument as a challenge to the legislative classification of guilty persons who are mentally ill vis-a-vis guilty persons who are not. The classification of "mentally ill" in this context has none of the indicia of a suspect class. Because neither a suspect class nor a fundamental right is involved in this classification, it will be upheld in the face of an equal protection challenge under both our federal and state constitutions if it rationally furthers the object of the legislation.

407 Mich. at 663, 288 N.W.2d at 919 (footnotes and citations omitted). Further, the court proclaimed:

> [A] guilty but mentally ill defendant has no right to the exercise of unfettered liberty. Such a defendant has been found guilty beyond a reasonable doubt in a judicial proceeding providing the full panoply of rights and protections guaranteed to the criminally accused under both our federal and state constitutions. Such a defendant's liberty may be constitutionally circumscribed by the state.

Id. As the Michigan appellate court found in *Darwall,* the legislative purpose in creating the novel guilty but mentally ill verdict rationally furthered the legislative objective of providing supervised mental health treatment and care to guilty but mentally ill defendants. Consequently, the statute passed constitutional muster and the Michigan Supreme Court found no violation of equal protection.

***581** Trill propounds his equal protection challenge by contending that no reasonable basis exists for mandating the incarceration of defendants found guilty but mentally ill whereas defendants found not guilty by reason of insanity are exculpated. Trill contends that it is irrational that a defendant found mentally ill should be held criminally ****1122** responsible for his acts while a person adjudged "legally insane" is exonerated. This identical issue was raised under Michigan's guilty but mentally ill statute in *People v. Sorna,* 88 Mich.App. 351, 276 N.W.2d 892 (1979). In *Sorna,* the defendant, Jules V. Sorna, was arrested and charged with armed robbery. Sorna defended his criminal charges with a plea of insanity. A jury trial was held wherein he was found "guilty but mentally ill." He appealed, alleging that since the statutory definitions of mental illness and legal insanity are based on substantially similar behavioral characteristics, it is irrational to consider a defendant found mentally ill criminally responsible for his acts while excusing one adjudged legally insane.

Here, the court first reviewed the standard upon which to evaluate the challenged legislation: "Where a state discovers a need to make experimental classifications 'in a practical and troublesome area,' the reviewing court need only 'inquire ... whether the challenged distinction rationally furthers some legitimate, articulated state purpose.' " 88 Mich.App. at 360, 276 N.W.2d at 896 (quoting *McGinnis v. Royster,* 410 U.S. 263, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973)). Continuing its analysis, the court reiterated the elements necessary to absolve defendants of liability under Michigan law and deduced as follows:

> The legislature, in formulating the [guilty but mentally ill verdict] has established an intermediate category to

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deal with situations where a defendant's mental illness does not deprive him of substantial capacity sufficient to satisfy the insanity test but does warrant treatment in addition to incarceration. The fact that these distinctions may not appear clear-cut does not warrant a finding of no ***582** rational basis to make them. As the United States Supreme Court has observed:

> "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." *United States v. Royster, supra,* 410 U.S. at 270 [93 S.Ct. at 1059].

88 Mich.App. at 360-61, 276 N.W.2d at 896. In so holding, the *Sorna* court concluded that conceptual and definitional differences between the categories of guilty but mentally ill and not guilty by reason of insanity were sufficiently clear to pass the equal protection challenge proffered by the appellant.

[19] The equal protection clauses of the fourteenth amendment of the United States Constitution and article I, section 2 of the Pennsylvania Constitution require the state to afford its citizens equal protection of the laws. "The Equal Protection Clause prohibits differences in treatment of similarly situated persons based upon a constitutionally suspect standard (race or religion) or other classifications lacking in rational justification." *Commonwealth v. Stinnett,* 356 Pa.Super. 83, 93, 514 A.2d 154, 159 (1986) (citations omitted). However, the Commonwealth of Pennsylvania is not required to treat all citizens exactly alike. Differential treatment of citizens is permissible where the actions are based on criteria which are reasonably related to the purpose of a legislative enactment and facts exist justifying the disparate treatment. *See In re Estate of Cavill,* 459 Pa. 411, 415, 329 A.2d 503, 505 (1974); *Commonwealth v. Bottchenbaugh,* 306 Pa.Super. 406, 411-12, 452 A.2d 789, 791-92 (1982).

[20] In analyzing allegations of equal protection violations, the United States Supreme Court "look[s], in essence, to three things: the character of the classification in question; the individual interest affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein,* 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1974). Following this analysis, ***583** we must first determine the character of the classifications that our legislature has created.

Pennsylvania's guilty but mentally ill statute conceivably creates two classes of individuals: a class of defendants who have committed a crime and are adjudged guilty of the crime but mentally ill, and a class of individuals who have committed a crime but are exculpated as a result of insanity. ****1123** In the first instance, the legislature has determined that persons classified as guilty but mentally ill either lack the capacity to appreciate the wrongfulness of their conduct or are unable to conform their conduct to the requirements of the law. However, the General Assembly determined that this classification of individuals is capable of possessing the requisite mens rea for the attachment of criminal responsibility. In other words, those individuals who have been found guilty but mentally ill are both "sick" *and* "bad" (i.e., criminally responsible). On the other hand, defendants who have been adjudged insane are defined as laboring under a defect of reason so grave as not to have known the nature and quality of the acts they were doing, or if they did know the nature and quality of the acts, they were unable to comprehend that what they were doing was wrong. In this classification, the legislature found that such individuals were incapable of forming the intent necessary to impose criminal liability. Stated more simply, these individuals are "sick," but not "bad." Given the differing nature of the mental disabilities potentially involved with individuals considered "mentally ill" and one adjudged "legally insane," our lawmakers rationally formed each classification and determined that the former class should be treated and punished for their conduct, and the latter should be treated but not incarcerated. *See* Oler, *Pennsylvania Criminal Law: Defendant's Mental State* § 8.4 "Consequences of guilty but mentally ill verdict or plea" (1986).

[21] Under the second prong of the inquiry articulated in *Dunn,* we are obliged to determine the individual interest affected by the classification in order to ascertain the ***584** proper equal protection standard to apply. In *James v. Southeastern Pa. Trans. Auth.,* 505 Pa. 137, 477 A.2d 1302 (1984), the Pennsylvania Supreme Court summarized the following standards applicable in equal protection cases:

> Under a typical fourteenth amendment analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review. The first type-classifications implicating neither suspect classes nor fundamental rights-will be sustained if it meets a "rational basis" test. *Singer v. Sheppard,*

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> [464 Pa. 387, 346 A.2d 897 (1975)]. In the second type of cases, [sic] where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Finally, in the third type of case[ ], if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review. *U.S. Dept. of Agriculture v. Murry,* 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767, 775 (1973) (concurring opinion of Mr. Justice Marshall), citing *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). There are, in summary, three standards of review applicable to an equal protection case, and the applicability of one rather than another will depend upon the type of right which is affected by the classification.

505 Pa. at 145, 477 A.2d at 1305-06. We conclude, as did the *Sorna, Darwall,* and *McLeod* courts, that the two legislative classifications created by the guilty but mentally ill verdict implicate neither suspect classes nor fundamental rights. In either classification, the accused has been found to have committed a crime "beyond a reasonable doubt in a judicial proceeding providing the full panoply of rights and protections guaranteed to the criminally accused under both our federal and state constitutions." *McLeod,* 407 Mich. at 662, 288 N.W.2d at 919. Upon this finding, the defendant ***585** loses his right to many of the personal freedoms which he previously enjoyed. Without the presence of either a fundamental right or a suspect class, we conclude that the individual interests involved in the instant appeal warrant the utilization of the "rational basis" test.

****1124** Under the rational basis test, in order for 18 Pa.C.S.A. § 314 to pass constitutional muster on equal protection grounds, the classification drawn by the statute "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the legislation so that all persons similarly circumstanced shall be treated alike." *Commonwealth v. Irving,* 347 Pa.Super. 349, 354, 500 A.2d 868, 871 (1985), (citing *Stottlemyer v. Stottlemyer,* 458 Pa. 503, 513, 329 A.2d 892, 897 (1974)). As mentioned earlier in our opinion, the legislative enactment of the guilty but mentally ill verdict was merely the statutory articulation of our legislature's desire to allow the finder of fact to hold responsible those mentally ill defendants who deviate from the laws of this Commonwealth, while at the same time providing them with the humane psychiatric treatment for their mental infirmities. Our legislature perceived a problem with the disposition of mentally ill defendants under the traditional "guilty," "not guilty," and "not guilty by reason of insanity" verdicts. Consequently, they adopted the verdict of guilty but mentally ill with the intention of correcting this shortcoming of the criminal justice system. Concomitantly, they hoped to limit the number of persons, who, in the eyes of the legislature, were improperly being relieved of all criminal responsibility through utilization of the insanity verdict. There is nothing impermissible about such a purpose. It is well within the power of Pennsylvania's lawmaking body to attempt to cure what it perceives to be a defect in the law. We believe that this carefully drafted legislation certainly bears a rational relationship to meeting the goals articulated above. Additionally, the inclusion of treatment provisions for guilty but mentally ill defendants rationally furthers the legitimate, articulated state purpose of providing for the health and welfare of all Pennsylvania citizens, ***586** including those who are adjudicated mentally ill and the public which is indirectly benefitted by having such individuals treated. We commend our lawmakers for their laudable effort to provide treatment for accusees who suffer from the disabling effects of mental illness. As Eli Todd observed as early as the nineteenth century: "Mental disease [is] an illness that stands in the catalogue of human suffering with a sad preeminence of claim over all the others upon our commiseration but which, in truth, has received the smallest share of our assistance." Todd, *Report of the Superintendent, Hartford Retreat for the Insane* 17 (1824).

We also note that a guilty but mentally ill convictee is provided mental health treatment pursuant to 42 Pa.C.S. § 9727(b), and the insanity acquittee is accorded similar treatment pursuant to the Mental Health Procedures Act, 50 P.S. §§ 7101-7503. Thus, both classes of defendants are treated equally under our laws. Inasmuch as both classes of individuals receive mental

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health treatment geared to their individual needs, the statute cannot be seen as establishing "invidious discrimination" which would be violative of either our state or federal constitutions. *See* *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980). Consequently, we find no merit in Trill's claim that 18 Pa.C.S. § 314 is unconstitutional under either state or federal standards of equal protection. *See* Comment, *Guilty But Mentally Ill: A Verdict of Guilty But Mentally Ill is Constitutional, and the Associated Treatment Provisions Do Not Deprive a Defendant of Equal Protection,* 62 U.Det.L.Rev. 715, 727-28 (1985).

Trill also mounts a constitutional challenge to 18 Pa.C.S.A. § 314 under due process auspices. Here, he argues that the guilty but mentally ill statute is unconstitutionally vague and invites arbitrary convictions, confuses the jury, and leads to improper compromise verdicts. Trill proclaims that by failing to set forth clear guidelines for the courts and juries, the statute denied him due process.

***587** This exact claim was presented to the Michigan Supreme Court in *People v. Ramsey,* 422 Mich. 500, 375 N.W.2d 297 (1985). *Ramsey* was a consolidated appeal from the findings of "guilty but mentally ill" against defendants Bruce Ramsey and ****1125** Gary Boyd. Ramsey had been charged with first-degree murder for the strangulation and stabbing of his wife. At trial, he raised the defense of insanity, insisting that he believed that he was exorcising a demon from his wife by stabbing her and that she would return to life once the demon was removed. Ramsey was ultimately found guilty of second-degree murder but mentally ill at a bench trial. Boyd had been charged with armed robbery and assault with intent to commit robbery. The events leading to his arrest emanated from an incident at the home of Boyd's former paramour, Ruby Hughes. While visiting, Boyd suddenly, and without provocation, grabbed Ms. Hughes around the neck, held a knife to her throat, and demanded money. He then assaulted several other women in her apartment building and fled. Boyd was found guilty of all counts charged, but mentally ill.

Both individuals maintained that Michigan's guilty but mentally ill verdict denied them due process of the law under state and federal constitutional standards. However, each defendant advanced subtly different averments. Ramsey argued that the danger of jury compromise due to the existence of the guilty but mentally ill verdict caused him to waive his right to a jury trial, amounting to a denial of due process of the law. Boyd contended that submission of the guilty but mentally ill verdict to the jury encouraged a finding of guilty but mentally ill rather than not guilty by reason of insanity and therefore denied him due process.

The Michigan Supreme Court found neither argument persuasive and rejected appellants' constitutional challenge. Addressing appellants' contentions, the court proclaimed: "To a certain extent, we must agree that the inclusion of the [guilty but mentally ill] verdict complicates a trial and creates a greater opportunity for confusion.... But the fact that an extra step is added to the inquiry hardly makes ***588** the inquiry beyond a jury's competence." 422 Mich. at 513, 375 N.W.2d at 301. The court then examined Michigan's definitions of "mental illness" and "insanity" and concluded as follows:

> We conclude that the Legislature has created a clear distinction between mental illness and insanity. Of course, in particular cases, this distinction may be very subtle and difficult for the jury to apply. But, it is no more subtle or difficult than the distinction between the intent to do great bodily harm and the intent to kill, a distinction we allow juries to make which often determines whether a defendant is guilty of first- or second-degree murder. In short, we cannot say that the legislative distinctions between mental illness and insanity deny the right to a fair trial.

422 Mich. at 514, 375 N.W.2d at 302. The court also addressed Ramsey's and Boyd's complaints that the inclusion of the guilty but mentally ill verdict infringed on their rights to a fair trial by creating an unjustifiable risk of a compromise verdict. Here, the court surmised:

> The point ... is not that the possibility of jury compromise requires a conviction to be reversed. That possibility is present in every case. To the contrary, our decisions [in prior cases discussing juror compromise] were based on the reality that compromise does

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> occur, and therefore, the boundaries within which it occurs must be legally and factually supportable.... Since there is no ... error identified in the present cases which, in light of the possibility of compromise, could have prejudiced defendants, we must reject their claims.... To hold otherwise would require us to presume a jury compromise in every case where more than one verdict or charge is submitted to the jury.

422 Mich. at 515-16, 375 N.W.2d at 303 (footnote omitted). Thus, the Michigan Supreme Court refused to strike down as unconstitutional the verdict that had withstood ten years of judicial scrutiny in the Michigan courts.

***589** In *People v. DeWit,* 123 Ill.App.3d 723, 79 Ill.Dec. 188, 463 N.E.2d 742 (1984), an Illinois appellate court was confronted with the same constitutional challenge that was involved in *Ramsey.* The appellant, Paul DeWit, was found guilty but mentally ill of ****1126** murder. Upon being sentenced to serve a twenty-two-year sentence, he appealed asserting the unconstitutionality of Illinois's guilty but mentally ill verdict. Like the appellants in *Ramsey* and Trill in the instant case, DeWit contended that the guilty but mentally ill verdict promoted jury confusion and encouraged the finding of guilty but mentally ill as a compromise verdict. Responding to appellant's assertions, the court first established the standard by which to analyze DeWit's claim:

> It is well established that to survive a challenge of denial of due process a statute may not be so vague that men of common intelligence must necessarily guess at its meaning.... A statute must also provide sufficiently definite standards for law enforcement officials and triers of fact so that its application does not depend merely on their private conceptions.

123 Ill.App.3d at 735-36, 463 N.E.2d at 750 (citations omitted). Examination of the Illinois statute by the court revealed that its requirements were set forth in clear and simple language. Since the statute actually had the effect of clarifying the distinction between the verdicts of not guilty by reason of insanity and guilty but mentally ill, the court found the definitions provided sufficiently meaningful standards for the jury to make the required findings, and thus did not constitute a violation of DeWit's constitutionally guaranteed right of due process. Further, addressing DeWit's contention that the verdict was unconstitutional because it provides a "compromise" or "middle ground" for juries to accept, the court stated as follows: "We are not persuaded that the possibility of a compromise verdict is a constitutional infirmity where the jury still must make a determination in the first instance between whether a defendant is guilty or legally insane based upon the evidence at trial." *Id.* Consequently, DeWit's challenge to the ***590** constitutionality of the guilty but mentally ill verdict utilizing these arguments failed.

[22] In considering Trill's due process challenge to 18 Pa.C.S. § 314, we must bear in mind the principles supporting the guarantee of due process of the law. In *Commonwealth v. Burt,* 490 Pa. 173, 415 A.2d 89 (1980), our supreme court stated: "It is a fundamental principle of due process that a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness." 490 Pa. at 177, 415 A.2d at 91 (quotations and citations omitted); *see also* *Commonwealth v. Barnhart,* 345 Pa.Super. 10, 497 A.2d 616 (1985). Indeed, the measuring stick by which the courts determine whether a statute is so vague as to offend due process was set forth by the Supreme Court in *Papachristou v. Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1971). Justice Douglas indicated that a statute will be struck down as void for vagueness where it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." 405 U.S. at 162, 92 S.Ct. at 843. The Supreme Court explained the rationales underlying the vagueness principle in *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) wherein the Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so

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> that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to ***591** policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment ****1127** freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the the forbidden areas were clearly marked."

408 U.S. at 108-09, 92 S.Ct. at 2298-99 (footnotes omitted). At the same time, however, "The fact that [the legislature] might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague." *United States v. Powell,* 423 U.S. 87, 90, 96 S.Ct. 316, 319, 46 L.Ed.2d 228 (1975); *see also Commonwealth v. Burt,* 490 Pa. 173, 177-78, 415 A.2d 89, 92 (1980). We begin our analysis of Trill's due process claim by first looking to the express language of the statute. Trill directs our attention to two aspects of the statutory language which are allegedly unclear and vague. First, he maintains that section 314 is deficient in that it fails to articulate the appropriate burden of proof to be assessed when the verdict is utilized. Essentially, he contends that it is unclear whether the standard of proof beyond a reasonable doubt applies only to the part of the statute relating to guilt, or if it also applies to all elements of the crime. We are unable to agree that the language regarding the burden of proof is so ambiguous or confusing as to deny Trill due process. Section 314 of the Crimes Code provides:

> (a) General rule.-A person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found "guilty but mentally ill" at trial if the trier of facts finds, *beyond a reasonable doubt,* that the person is *guilty of an offense,* was *mentally ill* at the time of the commission of the offense and was *not legally insane* at the time of the commission of the offense.

***592** 18 Pa.C.S. § 314(a) (emphasis added). Section 315, dealing with the insanity defense, provides:

> (a) General Rule.-The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when *the actor proves by a preponderance of evidence* that the actor was legally insane at the time of the commission of the offense.

Id. § 315(a) (emphasis added). Under a plain reading of the guilty but mentally ill statutory scheme, we think it is abundantly clear that its language adequately guides the fact finder in the appropriate examination for the finding of guilty but mentally ill.

[23] Several steps of inquiry logically follow from the legislature's express language. First, the fact finder is called upon to determine if the Commonwealth has proven that the actor is guilty of every element of the offense charged beyond a reasonable doubt. The Commonwealth needed to prove that Trill was guilty beyond a reasonable doubt of each element of robbery, simple assault, and terroristic threats. If the Commonwealth fulfills its burden of proof, which it did in this instance, the fact finder then moves to the second step of the probe.

The second step calls for a determination of whether the accused has proven the defense of insanity by a preponderance of the evidence. If he was able to succeed in proving by a preponderance of evidence that he was insane at the time of the commission of the offense, then he must be acquitted. However, if the accused was unable to fulfill his burden of proving insanity, which the jury determined to be the case here, then the fact finder moves to the third level of scrutiny.

The third level of examination calls for the fact finder to ascertain whether the facts establish beyond a reasonable doubt that the accused was mentally ill. If the fact finder establishes that the accused meets the statutory definition, the verdict must be guilty but mentally ill. In the case at bar, the Delaware County jury panel found that Trill did in ***593** fact possess a mental disease or defect and lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct ****1128** to the requirements of the law. Consequently, the jury rendered

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a verdict of guilty but mentally ill. If it had found that the evidence did not support the finding of mental illness, then the verdict would have been merely guilty.

We believe that the statutory scheme enacted by the legislature provides ample notice to persons of ordinary intelligence of the potential verdict of guilty but mentally ill, and of the burdens of proof associated with the verdict. Consequently, we reject Trill's contention that the language of the statute is unclear and vague. Additionally, we note that if confusion existed among the jurors concerning the burdens of proof attached to the verdict of guilty but mentally ill, it was dispelled by Judge Semeraro's aptly articulated jury charge.

[24] The second aspect of 18 Pa.C.S. § 314 which Trill challenges as being unclear and vague is the statutory definitions of "mentally ill" and "legal insanity." Trill asserts that the definitions promote a distinction without a substantive difference in meaning. As a result, he believes that the confoundment generated by the allegedly confusing and vague definitions makes it likely that a jury would pick the compromise verdict of guilty but mentally ill. We cannot agree.

Our General Assembly provided the following two definitions for purposes of implementing the guilty but mentally ill verdict:

> (1) "Mentally ill." One who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
>
> (2) "Legal insanity." At the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did ***594** know it, that he did not know he was doing what was wrong.

18 Pa.C.S. § 314(c)(1)(2). We agree with Trill that the application of these definitional standards to a particular defendant may be difficult. *See* Comment, *The Guilty But Mentally Ill Verdict and Due Process,* 92 Yale L.J. 475, 489 (1983). Indeed, the concepts of mental illness and insanity are closely interwoven. One commentator has noted:

> Mental illness and insanity are qualitatively separate concepts. The two definitions do, however overlap. All individuals who are legally insane are also mentally ill. But the converse of the statement, that all persons who are mentally ill are also insane, is false. The difference is not quantitative. In other words, an extremely mentally ill individual may not be legally insane. A high degree of mental illness does not destroy mens rea. The difference is qualitative. Insanity definitions are attempts to isolate the element of mens rea that may be present in some illnesses but not in others. Because the two concepts involve qualitatively separate elements, they are not likely to cause undue confusion to juries.

See Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis,* 53 J.Urban L. 471, 488 (1976). However, the inherent difficulty in distinguishing between the two verdicts does not *ipso facto* render the definitions and subsequent verdicts invalid. In this instance the legislature has chosen to institute definitional standards for conduct that even the most learned experts in psychiatry are unable to agree upon: the requisite amount of mental impairment needed to impose criminal liability. Dr. Lawrence Kolb, a noted psychiatrist, has stated:

> The concepts of mind held by psychiatry and by the law are so disparate that it is difficult for the two professions to agree as to responsibility for behavior, especially criminal behavior. According to the concept held by law, the mind is dominated by reason and full will, and behavior results from a consciously determined intent. The law ***595** does recognize partial responsibility, although to the psychiatrist responsibility does not have definable boundaries and degrees. Law confines its exploration of behavior to conscious data and assumes that a disorder of the cognitive faculty (knowledge) ****1129** is the only

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> basis for the determination of responsibility for behavior termed criminal. Psychiatry, on the other hand, assumes that mental processes are controlled by both conscious and unconscious factors, the latter playing a very important part; that behavior is an expression of the personality as a whole as determined by a multiplicity of complex factors, including the unconscious effect of early experiences, later pressures, and emotional needs.

Kolb, *Modern Clinical Psychiatry* 664 (1973). As we recently stated in *Commonwealth v. Cain,* 349 Pa.Super. 500, 503 A.2d 959 (1986):

> [T]he possible shades of difference between theoretical mental perfection and theoretical total absence of mind are not two or five or a dozen-but infinity. At what point in this unperceptible shading from one extreme to the other does the dividing line between sanity and insanity appear? As ably said in a case involving testamentary capacity:
>
> > There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of his property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.

349 Pa.Super. at 516, 503 A.2d at 967 (citations omitted). A great deal of progress has been made in the understanding of human mental processes in the last decade. However, regardless of the painstaking efforts to analyze and comprehend mental illness, the medical community remains unable to pinpoint the cognitive impulses that control aberrant ***596** behavior. Dr. Sigmund Freud envisioned the inevitable struggle that all disciplines would encounter in attempting to reduce the study of the mind to a science. He stated: "We must recollect that all our provisional ideas in psychology will [hopefully] some day be based on an organic substructure. This makes it probable that special substances and special chemical processes could [someday] control the operation [of the brain]." Jones, *The Life and Work of Sigmund Freud* 173 (1961). To date, medical science has been unsuccessful in reducing all of the causes and symptoms of mental illness to an exact science. Consequently, much of what is written and prescribed for mentally disturbed individuals is subject to argument and debate. Such is the case when a lawmaking body attempts to define terms such as mental illness and insanity.

Our legislature settled upon what they believed to be the most comprehensive legal definitions available to describe the terms "mentally ill" and "legal insanity" and incorporated them into Pennsylvania's guilty but mentally ill statutory scheme. The definition of "legal insanity" derived from the well-engrained common-law M'Naghten standard for insanity, whereas the definition of "mentally ill" emanated from the American Law Institute's insanity standard. *See* ALI Model Penal Code § 4.01(1) (Proposed Official Draft 1962). By transposing the ALI definition into one for mental illness, the legislature accomplished what they believed to be a logical corollary to the M'Naghten rule. We will not second guess the rectitude of this choice. Through the study of the Michigan statutory scheme and subsequent developments in the guilty but mentally ill verdict, our lawmaking body arrived upon a set of definitions that they hoped would reduce the determination of a defendant's mental state to a workable formula. *See* Comment, *Guilty But Mentally Ill, A Reasonable Compromise for Pennsylvania,* 85 Dick.L.Rev. 289, 311-12 (1981). In essence, they utilized what their research and experience proved to be the "state of the art" in definitive language. Although we believe that it is virtually impossible to fabricate exact definitions for such amorphous concepts as "mental illness" ***597** and "legal insanity," we nonetheless conclude that our legislature has succeeded in implementing definitions which provide sufficient clarity and distinction to provide guidance for the fact finder. As Representative Piccola stated in ****1130** the legislative discussions of the new statutory scheme, "This is the very best that can be done under the circumstances." Pa.Legislative Journal, House, at 2131-33, 2132 (Nov. 29, 1982). Consequently, we are unable to find that the definitions of "mental illness" and "legal insanity" are so vague and confusing that they rise to the level of violating Trill's constitutionally guaranteed right of due process.

[25] Finally, Trill asserts that the existence of the guilty but mentally ill verdict improperly promotes jury compromise. Generally, the law does not approve or contemplate compromise verdicts. Juries are generally expected to reach verdicts without compromise, and when such compromise does occur, the result should be invalidated. 23A C.J.S. Juries, Compromise Verdicts § 1374 (1974). A compromise verdict occurs when several members of a jury panel abandon their beliefs to settle

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upon a common ground with their fellow jurors. This scenario may occur in the interest of agreement among all panel members. When such a compromise does occur, the defendant has not been found guilty beyond a reasonable doubt by all members of the jury, and he has been denied due process of the law. There is no constitutional infirmity, however, when jurors change their mind during deliberations. Indeed, one of the most celebrated works in American cinematography involves a scenario in which one juror convinces eleven other individuals to accede to his position. *See Twelve Angry Men* (Sergel, Sherman L., Director, Dramatic Publishing Co. 1955).

Trill does not articulate exactly how the guilty but mentally ill verdict led to a compromise in his criminal conviction. We surmise that Trill is suggesting that given the choice between the verdicts of not guilty by reason of insanity and guilty but mentally ill, the jurors chose the latter because of the alleged similarity and confusion between ***598** the two verdicts. We find this supposition to be entirely too speculative, and that it presupposes that jury compromise occurs in every case where more than one verdict or charge is submitted to the jury. If Trill believed that the jury improperly arrived at a compromise verdict, he was free to poll the jurors. Absent any specific facts supporting this contention, we cannot find that Trill was denied due process.

For the forgoing reasons, we conclude that Trill has failed to overcome the strong presumption of constitutionality which attaches to acts of the General Assembly. In his challenge to the guilty but mentally ill statutory scheme, Trill was unable to demonstrate that 18 Pa.C.S. § 314 clearly, palpably, and plainly violates either our state or federal constitution. Accordingly, we affirm the judgment of sentence entered by the trial court.

Judgment affirmed.

BECK, J., files a concurring opinion.

BECK, Judge, concurring:

I join in the majority's discussion and resolution of Trill's first six challenges to his sentence. I also agree with the majority that Pennsylvania's guilty but mentally ill statute, 18 Pa.Cons.Stat.Ann. § 314 (Purdon 1987) is constitutional. However, I disagree with the majority's analysis of the constitutionality of that statute.

Trill first claims that his due process rights were violated because the definitions of "mentally ill" and "legally insane" overlap. He asserts that the defendant who falls within the definitional overlap is exposed to the risk that the jury will arbitrarily categorize him as "mentally ill" rather than "legally insane." The consequences of such a categorization are significant. If a defendant is found to be guilty but mentally ill, he is subject to the full range of criminal penalties applicable to someone found simply guilty. The legally insane defendant, on the other hand, is immune from the punishments of the criminal law, and will ***599** be released from state custody unless he is determined to be currently dangerous to himself or to others.[1]

****1131** Trill claims that the definitions of "mentally ill" and "legally insane" overlap in the case of the defendant whose mental problems prevent him from comprehending the wrongfulness of his conduct. "Mentally ill" for purposes of application of the guilty but mentally ill verdict is defined as follows:

> "Mentally ill." One who as a result of mental disease or defect, lacks *substantial capacity* either *to appreciate the wrongfulness of his conduct* or to conform his conduct to the requirements of the law. (emphasis added)

18 Pa.Cons.Stat.Ann. § 314(c)(1) (Purdon 1983).

Legal insanity constituting a defense to a crime is defined as follows:

> [T]he phrase "legally insane" means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that *he did not know that what he was doing was wrong.*
>
> (emphasis added)

18 Pa.Cons.Stat.Ann. § 315(b) (Purdon 1983). Trill argues that there is no meaningful difference between "one who .. lacks substantial capacity ... to appreciate the wrongfulness of his conduct" (mentally ill) and "[one who] did not know that what he was doing was wrong" (legally insane). Therefore, he claims, the jury could not make a reasoned distinction between the two categories,

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and their finding that the defendant was "guilty but mentally ill" instead of "legally insane" was merely arbitrary.

***600** I agree that the statutory definitions of "mentally ill" and "legally insane" are somewhat similar. Both include a person whose understanding of the wrongfulness of his conduct is impaired. Closer examination, however, yields the conclusion that the two definitions refer to differing degrees of impaired understanding. They are therefore sufficiently different to withstand attack on the ground that the jury cannot make a principled application of the statutory definitions.

"Mentally ill" and "legally insane," while both referring to conditions of mental disturbance, describe two distinct points along the continuum of mental conditions. The difference between the two conditions is aptly explained in the suggested standard jury instructions on the guilty but mentally ill verdict, which have been approved by this court:

> [The] definitions [of mentally ill and legally insane] differ ... with regard to the incapacitating effect necessary for legal insanity on the one hand or mental illness on the other. Legal insanity requires that the defendant be *incapable* either of knowing what judging its wrongfulness. Mental illness requires only that the defendant lack *capacity* either to appreciate the what he is doing or to obey the law. Loosely speaking, mental illness is the broader term. It covers a greater range of abnormal conditions than legal insanity.[2]

Commonwealth v. Cain, 349 Pa.Super. 500, 517-18, 503 A.2d 959, 967 (1986) (emphasis in original).

The difference between mental illness and legal insanity with regard to comprehension of the wrongfulness of one's conduct is a matter of the *degree* of one's impairment. The mentally ill defendant in a murder case may exhibit only a limited understanding that killing is generally agreed to be wrong; the legally insane person has no idea whatsoever that killing is considered to be wrong. I find this distinction to be sufficient to permit a jury to differentiate between mental illness and legal insanity, and therefore would uphold ***601** the constitutionality of the guilty but mentally ill verdict.

****1132** Trill claims a second due process infirmity. He asserts that by allowing the judge to instruct the jury on the possible verdict of guilty but mentally ill when a defendant raises the legal insanity defense violates due process. Trill contends that the statute, by its operation, forces a defendant to raise a defense (mental illnesses)[3] which he or she does not wish to raise and undercuts the defendant's ability to present a successful legal insanity defense. Trill asserts that the addition of the instruction on the guilty but mentally ill verdict to the legal insanity instruction gives the jury a chance to return a compromise verdict. The statute does not improperly give to the jury an opportunity to return a irrational or arbitrary compromise verdict, as Trill suggests. Here, the jury must make an initial determination of guilt, or innocence, or insanity based upon the evidence at trial before considering whether to return a guilty but mentally ill verdict. Thus, there is no danger that the jury would be confounded by an irrelevant instruction which would lead to an irrational conviction not based on the evidence. *See Commonwealth v. Williams,* 490 Pa. 187, 191, 415 A.2d 403, 404 (1980).

The appellant makes a due process attack in that a defendant may be forced by the operation of the statute to plead guilty but mentally ill as a consequence of his pleading not guilty by reason of legal insanity when his intention was to limit his plea to not guilty by reason of insanity. The appellant asserts the defendant is forced to undermine his own insanity defense. I disagree.

In the first place, it must be noted that in a plea of not guilty by reason by insanity the defendant acknowledges ***602** guilt. With the defendant's guilt acknowledged a jury has three options where a defendant has pled legal insanity. It can find the defendant legally insane, it can find him guilty but mentally ill or it can find him simply guilty. If the jury rejects the plea of legal insanity, the jury is then given the opportunity to determine more precisely the nature of the defendant's guilt i.e. guilty but mentally or simply guilty. It is much the same as in the usual criminal case where a jury rejects defendant's plea of not guilty, it finds the defendant guilty. In a situation where the jury rejects the not guilty by reason of insanity, it finds the defendant simply guilty or under this special circumstance it can find the defendant guilty but mentally ill. I see no due process infirmity in giving the jury this latitude.

However, where the defendant pleads legal insanity due process considerations as well as the statutory scheme require that the jury be instructed on the step by step analysis by which they must proceed. First the jury must be instructed to determine if the defendant has proven by

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the preponderance of the evidence that he is legally insane. If the defendant is successful in so proving, the matter is ended because the defendant has successfully asserted the "not guilty by reason of insanity defense."

If the defendant fails to prove that he or she is legally insane, it is only then that the jury considers whether the defendant is guilty but mentally ill or simply guilty.

It is important to note that in considering whether to find the defendant guilty but mentally ill or simply guilty, the jury is considering types of guilt, not the questions of innocence or valid defenses. At this point, the label "but mentally ill" may be attached for sentencing, not guilt determination, purposes. Therefore, the defendant is not at all forced to undermine his own insanity defense.

Finally, Trill claims that the statute is unconstitutionally vague in that it fails to articulate the appropriate standard to be applied under the guilty but mentally ill statute. A plain reading of the statute demonstrates that three elements ***603** must be proven *beyond a reasonable doubt:* 1) that ****1133** the defendant is guilty; 2) that the defendant was mentally ill at the commission of the offense; and, 3) that the defendant was not legally insane at the commission of the offense. The statute is not vague but highly specific. All three elements must be proven by the Commonwealth beyond a reasonable doubt. As to element of guilt, the defendant acknowledges his guilt in the plea of legal insanity. No further burden is placed on the Commonwealth. As to the third element; i.e. legal insanity, I conclude the majority correctly interprets the requirement. The question of legal insanity is resolved at the point when the jury finds that the defendant failed to prove legal insanity. At that juncture, the fact is conclusively established that the defendant is not legally insane.

Lastly, the Commonwealth must prove that the defendant is mentally ill beyond a reasonable doubt. This requirement, while constitutionally firm, presents a practical problem in its operation. The defendant's guilt has already been established. Therefore, the Commonwealth, would have little, if any, incentive to prove that the defendant was mentally ill at the time of the crime. Thus, this requirement undermines the statute by rendering rare its actual use.

Furthermore, I believe that the beyond a reasonable doubt requirement is ill-advised for another reason. As a matter of public policy, the standard should be set lower to ensure that defendants requiring treatment for mental illness while serving a sentence receive treatment. It must be borne in mind that guilty but mentally ill does not necessarily entitle a defendant to a more lenient sentence than a defendant who is simply guilty. The sentence stemming from the guilty but mentally ill verdict is a signal that the defendant must be afforded treatment. Proof of mental illness *beyond a reasonable doubt* is too strict a standard to impose as a condition of the defendant's receiving treatment.

All Citations

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Footnotes

[1] Representative Piccola, one of the sponsors of Senate Bill 171, indicated that his research disclosed sixteen insanity acquittals in 1979, seventeen acquittals in 1980, and twenty in 1981. *See Pa. Legislative Journal, House,* at 1627-45, 1642 (Sept. 21, 1982).

[1] An insanity acquitee can be involuntarily committed to a mental institution on the grounds that he poses a "clear and present danger of harm to others or to himself," 50 Pa.Cons.Stat.Ann. § 7301(a) (Purdon Supp.1987), or that "(1) the conduct that led to the criminal proceedings occurred; and (2) that there is a reasonable probability that it will occur again." *Commonwealth v. Helms,* 352 Pa.Super. 65, 73, 506 A.2d 1384, 1388 (1986).

[2] These instructions were in fact given in the case sub judice.

[3] It is not correct to refer to the statutory provision of guilty but mentally ill as a defense. An analysis of the statute leads to the conclusion that defendants pleading under it are pleading guilty but notifying the Commonwealth that they are mentally ill and therefore in need of treatment. If the defendant is found guilty but mentally ill, the Commonwealth must make provision for treatment in sentencing the defendant.

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Symposium

Lawyering for the Mentally Ill
The Honorable Bradford H. Charles[a1]

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PENNSYLVANIA'S DEFINITIONS OF INSANITY AND MENTAL ILLNESS: A DISTINCTION WITH A DIFFERENCE?

Throughout the history of human civilization, systems of justice have struggled with the concept of accountability for criminal conduct by the mentally ill. That struggle continues in America today. Courts and juries wrestle with acts committed by the mentally ill that sometimes have horrifying consequences for victims and communities. These decisions are made even more difficult because of the obtuse legal standards by which terms such as "insanity" and "guilty but mentally ill" are defined. Ultimately, juries are left to make "ends-oriented" decisions based upon their innate sense of what is just. Whether this is bad or good depends on the eye of the beholder.

I. History of Insanity Defense

In 1843, Daniel M'Naughten attempted to assassinate the Prime Minister of Great Britain. In the sensational trial that followed, M'Naughten raised insanity as his defense. The judge instructed the jury that their decision was "whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act."[1] On this question, M'Naughten was acquitted. Public outrage ensued. At the insistence of Queen Victoria and the House of Lords, a group of judges were appointed to create a stricter definition of legal insanity.

The so-called "M'Naughten Rule" defined legal insanity as a delusion so powerful that the person affected was "incapable of appreciating his surroundings." Under the M'Naughten Rule, the defendant was required to show that his delusions robbed him of his ability to understand his actions or that his delusions deprived him of the ability to appreciate their wrongfulness.[2] The practical effect of ***266** M'Naughten was to make the insanity defense far more difficult to establish.

Most American jurisdictions, including Pennsylvania, adopted the M'Naughten Rule.[3] M'Naughten remained the standard definition for insanity in America until the early 1900's. At that point, some legal scholars and mental health experts advocated for a more expansive definition of insanity. As a result, some courts began to employ a test that became known as the "irresistible impulse test."

The "irresistible impulse test" excuses a defendant from responsibility "if he or she suffers from a mental condition that creates overwhelming compulsions urging her to commit illegal acts."[4] This test was adopted in only a few states.[5] It began to fall out of favor during the latter half of the twentieth century. In 1956, an Indiana University Law Professor wrote:

> The lawyer pondering the attacks of the psychiatrist critics might also consider the meaningful case of irresistible impulse. He would discover that only a short time ago that concept was emphatically presented as an

> example of the "uniform" opinion of psychiatrists on criminal responsibility; and yet today "irresistible impulse" is rejected by most psychiatrists as unsound![6]

In 1954, a third definition of legal insanity was created by the United States Court of Appeals of the District of Columbia. This definition has come to be known by the name of the case that spawned it, Durham v. United States.[7] The so-called "Durham test" provides that a person is legally insane "if his unlawful act was the product of a mental disease or mental defect."[8] This was, by far, the most generous definition of insanity. Probably as a result, relatively few jurisdictions adopted the Durham test.

Recognizing the need for a more uniform definition of insanity, the American Law Institute sought to create a test that was a compromise between the strict M'Naughten standard and the more liberal irresistible impulse and Durham standards. What resulted from the model penal code process was a standard that provides that a defendant is not responsible for his conduct "if at the time of such ***267** conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of conduct or to conform his conduct to the requirements of the law."[9] Most American jurisdictions adopted the Model Penal Code definition of insanity.[10] Even the District of Columbia has abandoned its Durham rule in favor of the Model Penal Code approach.[11]

II. Guilty but Mentally Ill

Most jurisdictions seemed satisfied with the Model Penal Code approach until the mid-1970s. In 1975, the Michigan Supreme Court decided a case that caused the release of many individuals who had been found not guilty by reason of insanity.[12] One serial murderer promptly bludgeoned a woman to death and a serial rapist committed two additional rapes within weeks after his release.[13] The public outcry in Michigan was as caustic as it was universal.[14] In response to this outcry, the Michigan legislature created America's first "guilty but mentally ill" statute.[15]

Until 1982, only Indiana promulgated a statute similar to the one introduced in Michigan, as constitutional challenges to the "guilty but mentally ill" scheme abounded.[16] On May 4, 1982, an event occurred that changed everything. On that date, **John Hinkley** was acquitted of the attempted assassination of President Ronald W. Reagan based upon his claim of insanity. A firestorm of apoplectic criticism swept the country.[17] In relatively short order, states began re-evaluating their insanity defenses.

Numerous legislative initiatives were introduced to abolish the insanity defense. Several states passed such legislation.[18] This was viewed by many as an "overreaction" to the Hinkley verdict. The American Bar Association commented that:

> This approach [to abolish the insanity defense] has been proposed in several bills in Congress and adopted in Montana, Idaho and Utah. The ABA has rejected it out of hand. Such a jarring reversal of hundreds of years of moral and legal history would constitute an unfortunate and ***268** unwarranted overreaction to the Hinkley verdict.[19] In the end, very few states were successful in eliminating insanity as a defense.[20]

A much more common approach was the creation by states of "guilty but mentally ill" statutes. These statues sought to "offer juries an attractive alternative to the Not Guilty By Reason of Insanity Verdict, and thereby prevent the early release of dangerous insanity aquittees."[21] Today, twenty-two states, including Pennsylvania, employ the guilty but mentally ill standard.[22]

Pennsylvania's guilty but mentally ill legislation was signed into law on December 15, 1982. The Pennsylvania House of Representatives made no attempt to hide the fact that the Hinkley acquittal represented the "impetus" for the guilty but mentally ill legislation.[23] There were very few dissenting voices and the legislation passed by an overwhelming margin.

*269 III. Pennsylvania Law

Pennsylvania's statutory definitions of legal insanity and guilty but mentally ill are as follows:

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> (1) "Mentally ill." One who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

> (2) "Legal insanity." At the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.[24] The only recognizable difference between the above definitions is that an insane person is "unable" to know right from wrong, while the "mentally ill" person "lacks substantial capacity" to know right from wrong. The psychiatric community has been conspicuously silent as to the difference between "unable" and "lacks substantial capacity." However, the Standard Pennsylvania Jury Instructions do attempt to draw a distinction by requiring that a judge instruct the jury as follows:

> (8) Comparing the definitions of "legal insanity" and "mental illness" we can see that they both require a mental disease or defect which is something more than faulty character, personality, temperament or social adjustment. Their definitions differ, however, with regard to the incapacitating effect necessary for legal insanity on the one hand or mental illness on the other. Legal insanity requires that the defendant be incapable either of knowing what he is doing or of judging its wrongfulness. Mental illness requires only that the defendant lack substantial capacity either to appreciate the wrongfulness of what he is doing or to obey the law. Loosely speaking, mental illness is the broader term. It covers a greater range of abnormal conditions than legal insanity.[25]

Notwithstanding the above, the most important concept of Pennsylvania's insanity law is the requirement that a judge tell a jury what will happen as a result of their verdict. This requirement emanated from a Pennsylvania Supreme Court decision in 1977.[26] The Supreme Court held "that explaining the consequences of acquittal by reason of insanity to a jury will assist the jury in properly determining the guilt or innocence of a defendant."[27] In so doing, the Court adopted the reasoning of the Supreme Judicial Court of Massachusetts:

> If jurors can be entrusted with responsibility for a defendant's life and liberty in such cases as this, they are entitled to know what protection ***270** they and their fellow citizens will have if they conscientiously apply the law to the evidence and arrive at a verdict of not guilty by reason of insanity - a verdict which necessarily requires the chilling determination that the defendant is an insane killer not legally responsible for his acts.[28] As a result of this Supreme Court decision, each jury deciding the issue of insanity versus mental health is told that the difference between insanity and guilty but mentally ill is that the insane defendant will go free following his mental health treatment, while a guilty but mentally ill defendant will serve a prison sentence following the end of his mental health treatment.[29]

IV. Practical Application of Insanity and Guilty but Mentally Ill Standards

Several practical realities make it especially difficult to deal with cases where the insanity defense is raised:

> (1) Contrary to public belief, the insanity defense is very rare. A 1991 study of eight states revealed that the insanity defense is raised in less than one percent of all criminal cases filed.[30] Due to the rarity of this defense, nothing about it can be called "routine" .

> (2) The terms "insanity" and "guilty but mentally ill" are legal, not medical, terms. Nowhere in the Diagnostic Manual of Psychiatry will one find a medical definition of either term.[31]

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> (3) Cases where the insanity defense is raised are, almost inevitably, serious cases involving significant harm to the victim and the community. These cases typically are high profile in nature. These high stakes intensify pressure on both the court and the jury.

It is within this difficult milieu that juries are asked to decide whether a defendant is legally insane or guilty but mentally ill. Invariably, these cases will involve several days of testimony. In most instances, the jury will have heard from at least two psychiatrists who describe medical diagnoses using terms different than "insanity" and "mental illness." In some cases, these psychiatrists may not even render an opinion on the "ultimate issue" of whether a defendant is insane. In fact, ***271** the American Psychiatric Association (APA) has recommended that its members "should not answer questions on what lawyers call 'ultimate issues' - i.e., whether the defendant meets the legal test for insanity. Rather, the APA believes the psychiatrists' role in the legal process should be restricted to giving medically based testimony on the defendant's alleged illness."[32]

It is precisely these problems that have caused some to recommend that insanity defenses be taken out of the justice system and placed in the hands of "mental health courts" comprised of mental health professionals.[33] Pennsylvania's appellate courts have long rejected such proposals. In 1968, the Pennsylvania Supreme Court stated that courts "cannot abdicate to the psychiatrist the task of determining criminal responsibility in law."[34] Thus, the ultimate responsibility to wrestle with concepts of insanity and mental illness rests with the courts and not with the psychiatric community.

Both judges and juries face a Herculean task in distinguishing the difference between the legal definitions of insanity and mental illness.[35] To be sure, juries undoubtedly recognize that the distinction is one of degree. However, where should the line be drawn? To be insane, must one be catatonic or consistently delusional? What about an individual who is temporarily psychotic after failing to take medication? What about someone who has a mental illness aggravated by the heat of passion? These are some of the many questions for which there are no universally correct legal answers.

Within an unusually scholarly opinion that reads like a law review article, the Pennsylvania Superior Court cut to the heart of the issue by boldly recognizing that the real distinction between the insane and mentally ill is the distinction between merely "sick" and "sick and bad."[36] Most lay jurors will intuitively recognize that a "sick" person needs treatment and that a "bad" person needs punishment. By using simplistic words such as "sick" and "bad," the Superior Court hit the nail on the head in terms of how juries view this issue. Quite simply, the average juror will focus upon whether a defendant is a good person overwhelmed by his "sickness" or whether he is a "bad" person whose acts were aggravated by a "sickness."

Any criminal trial judge who has attempted to explain the legal definitions of insanity and mental illness can relate the quizzical looks given by juries when the legal definitions are read to them. Almost by magic, these quizzical looks disappear and the proverbial "light bulb comes on" when the judge explains the import of their verdict. Suddenly, jurors understand that they are being asked to ***272** decide whether the Defendant should go free or face incarceration once his mental health treatment ends. In the parlance of the Superior Court, juries decide whether a "sick" person is also "bad" enough to warrant the punishment of jail.

For obvious reasons, no one other than a juror can say exactly what occurs inside a jury deliberation room. However, it would be safe to wager that jurors spend more time talking about where the defendant should end up after his treatment than they do talking about whether he was "unable" or "lacked substantial capacity" to know right from wrong. Even the president-elect of the APA concludes that: "[J]uries tend to actually not be applying the objective terms of the insanity standard when they are making these decisions. They are using their common-sense notion of who should be punished."[37]

In Pennsylvania, the distinction between the definition of mental illness and insanity is merely semantic. In practice, juries undoubtedly use a "rough justice" type of approach in determining whether the defendant should be released or go to jail following his mental health treatment. Is this bad? That depends on one's viewpoint. The idealist might say that a jury should focus only upon whether the defendant lacks substantial capacity or was incapable of knowing right from wrong. The pragmatist might say that the ends-oriented analysis encouraged by Pennsylvania law allows a jury to do justice by examining the severity of the mental illness, the severity of the criminal act, the impact on the victim and society, and the necessity of accountability given all the circumstances presented. Ultimately, whether the pragmatist or the idealist is right is an issue that will be determined by the people of Pennsylvania and their elected representatives. So long as the system is perceived as fair, the current ends-oriented approach will survive - at least until the next M'Naughten or Hinkley case comes

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along.

Footnotes

a1 Bradford H. Charles is a Pennsylvania State Trial Judge for the 52nd Judicial District of Lebanon County. Prior to his election to the bench in 1999, Charles served as the District Attorney of Lebanon County. As District Attorney, Charles prosecuted numerous cases where the insanity defense was raised. He was a featured lecturer at the 1999 Pennsylvania District Attorneys Association Conference on the topic of mental health defenses. Since his election to the bench, Judge Charles has presided over several cases where the insanity defense has been raised. Judge Charles would like to thank his law clerk, Troy Mouer, for volunteering his time to complete research assistance necessary to complete this article.

1 Cynthia G. Hawkins-Leon, "Literature as Law:" The History of the Insanity Plea and a Fictional Application Within the Law and Literature Canon, 72 Temp. L. Rev. 381, 391 (Summer 1999).

2 M'Naughten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

3 Pennsylvania adopted M'Naughten in Commonwealth v. Mosler, 4 Pa. 264 (Pa. 1846).

4 Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929).

5 As far as can be determined, the "irresistible impulse test" was adopted only in 13 states. See Burgess v. State, 339 So.2d 121 (Ala. Crim. App. 1976); Pope v. State, 478 P.2d 801 (Alaska 1970); State v. Bendig, 728 P.2d 240 (Ariz. 1986); State v. Wilson, 700 A.2d 633 (Conn. 1997); Aizupitis v. State, 699 A.2d 1092 (Del. 1997); D.C. v. Peters, 527 A.2d 1269 (D.C. 1987); People v. Carpenter, 142 N.W.2d 11 (Ill. 1957); State v. Arthur, 160 N.W.2d 470, 475 (Iowa 1968)(rejecting the irresistible impulse test except where "it so operates upon a diseased mind so as to destroy the comprehension of consequences"); Jewell v. Commonwealth, 549 S.W.2d 807 (Ky. 1977); People v. Carpenter, 627 N.W.2d 276 (Mich. 2001); State v. Herrara, 845 P.2d 359 (Utah 1995)(reluctant to embrace any one test, including a combination of M'Naughten and the irresistible impulse test, as the constitutional minimum requirement); State v. Goyet, 132 A.2d 623 (Vt. 1957); Reilly v. State, 496 P.2d 899 (Wy. 1972).

6 Jerome Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761, 762 (May, 1956).

7 Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

8 Id. at 874-75.

9 Model Penal Code § 4.01 (ALI 1985).

10 See Michelle Migdal Gee, Modern Status of Test of Criminal Responsibility - State Cases, 9 A.L.R. 4th 526 (1981).

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11 Bauwner v. United States, 471 F.2d 969 (D.C. Cir. 1972).

12 See People v. McQuillan, 221 N.W.2d 569 (1974).

13 Bradley D. McGraw, Daina Farthing-Capowich & Ingo Keilitz, The "Guilty But Mentally Ill" Plea and Verdict: Current State of the Knowledge, 30 Vill. L. Rev. 117, 124-25 (1985).

14 Id.

15 See Mich. Comp. Laws § 768.36 et seq. (2002).

16 See e.g. Taylor v. State, 440 N.E.2d 1109 (Ind. 1982); People v. McLeod, 288 N.W.2d 909 (Mich. 1980); People v. Darwall, 267 N.W.2d 472 (Mich.App. 1978). Despite the numerous constitutional attacks on the Guilty But Mentally Ill concept, "[t]o date, no case has been found in which an appellate court has held a Guilty But Mentally Ill statute to be unconstitutional." See Debra T. Landis, Guilty But Mentall Ill Statutes, Validity and Construction, 71 A.L.R. 4th 702 (1989).

17 The near "lynch mob" mentality of the American people is chronicled in Robinson, The Insanity Defense: Does It Serve Justice? Does It Protect The Public? 71 Ill. B.J. 306, 309 (1983).

18 McGraw, Farthing-Capowich & Keilitz, supra n. 13, at 124-5.

19 American Bar Association, Standing Committee on Association Standards for Criminal Justice, Report to House Delegates, August, 1984, Standard 7-6.1, Commentary at page 327.

20 See e.g. Finger v. State of Nevada, 27 P.3d 66 (Nev. 2001). In Finger, the Nevada Supreme Court responded to a legislative attempt to abolish the insanity defense. The Nevada Supreme Court noted that the concept of criminal mens rea is a fundamental component of constitutional due process. Accordingly, "because legal insanity is a corollary of mens rea, the mental state that imposes criminal responsibility upon an individual, that legal insanity is a fundamental principal under the due process clause." Id. at 80. Based upon this rational, the Nevada Supreme Court held: "The legislature cannot abolish the concept of legal insanity." Id. at 86.

21 McGraw, et al, supra n. 13, at 121; see also Rita J. Simon, The Jury & the Defense of Insanity (Transaction Pub. 1967)(reporting that jurors criticize the insanity verdict because they wanted to afford the offender with both treatment and punishment).

22 See Williams v. State, 710 So.2d 1276 (Ala. Crim. App. 1996); Burcina v. City of Ketchikan, 902 P.2d 817 (Alaska 1995); State v. Heartfield, 998 P.2d 1080 (Ariz. App. 2000); In re Durham, 797 A.2d 26 (Del. 2002); Boswell v. State, 572 S.E. 2d 565 (Ga. 2002); People v. Bellmyer, 771 N.E. 2d 391 (Ill. 2002); Smith v. State, 770 N.E. 2d 818 (Ind. 2002); Commonwealth v. Durham, 57 S.W. 3d 829 (Ky. 2001); Taylor v. Commissioner of Mental Health & Mental Retardation, 481 A.2d 139 (Me. 1984); Ford v. Ford, 512 A.2d 389 (Md. App. 1986);

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People v. Jackson, 633 N.W. 2d 825 (Mich. 2001); O'Guinn v. State, 59 P.3d 488 (Nev. 2002); State v. Fekete, 901 P.2d 708 (N.M. 1995); Bismarck v. Nassif, 449 N.W. 2d 789 (N.D. 1989); State v. Amini, 963 P.2d 65 (Ore. 1998); Commonwealth v. Marshall, 812 A.2d 539 (Pa. 2002); In re Allen, 568 S.E. 2d 354 (S.C. 2002); State v. Anderson, 604 N.W.2d 482 (S.D. 2000); State v. Stacy, 601 S.W. 2d 696 (Tenn. 1980); State v. Herrera, 895 P.2d 359 (Utah 1995); State v. Wheaton, 850 P.2d 507 (Wash. 1993); State v. Lockhart, 542 S.E. 2d 443 (W.V. 2000).

[23] See Pa. H. J. 166th Leg., 1630 (1982). See also Commonwealth v. Trill, 543 A.2d 1106, 1119 (Pa. Super. 1988)(citing its review of the legislative history, the Superior Court stated, "The legislation was clearly promulgated in response to the events surrounding the presidential assassination attempt, and subsequent acquittal of **John** W. **Hinkley**, Jr."). The Superior Court in Commonwealth v. Trill went on to quote a representative who referenced the assassination attempt and stated, "[the assassination attempt] really is the impetus, I think, for this type of legislation." Id. at 1119 (citing Pennsylvania Legislative Journal, House, at pages 1627-45, 1630) (September 21, 1982).

[24] 18 Pa. Cons. Stat. Ann. § 314 (West 2002).

[25] Pa. Suggested Standard Criminal Jury Instructions, § 5.01A (PBI 1995).

[26] Commonwealth v. Mulgrew, 380 A.2d 349 (Pa. 1977).

[27] Id. at 352.

[28] Commonwealth v. Mutina, 322 N.E.2d 294, 301 (1975).

[29] See Pa. Suggested Standard Criminal Jury Instructions at § 5.01A .

[30] American Psychiatric Association, The Insanity Defense http:// www.psych.org/public_info/insanity.cfm (accessed Apr. 3, 2003)(citing L.A. Callahan, H.J. Steadman, M.A. McGreevy & P.C. Robbins, The Volume & Characteristics of Insanity Pleas: An Eight-State Study, 19 Bull. Am. Acad. Psych. and Law 331 (1991)); see also Natl. Commn. on the Insanity Defense, Myths and Realities: A Report of the National Commission on the Insanity Defense (Natl. Mental Health Assn. 1983).

[31] All mental health diagnoses are made using criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders - Fourth Addition (DSM-IV) that is published by the American Psychiatric Association. This manual is 886 pages in length and discusses diagnostic criteria for every conceivable mental illness, ranging from schizophrenia to claustrophobia. Nowhere in this manual are the legal terms "insanity" and "guilty but mentally ill" defined. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. Am. Psych. Assn. 1994).

[32] American Psychiatric Association, The Insanity Defense, http:// www.psych.org/public_info/insanity.cfm (accessed Apr. 3, 2003).

[33] See Randy McNutt, Court for Mentally Ill Offenders Advocated, Cincinnati Enquirer (Nov. 10, 1999)(available at

http:// enquirer.com/editions/1999/11/10/loc_court_for_mentally.html); see also Commonwealth v. Woodhouse, 164 A.2d 98, 104 (Pa. 1960)(mentioning reformers who claimed that it was "thoroughly illogical to entrust the determination of the issue of insanity to laymen.").

34 Commonwealth v. Weinstein, 274 A.2d 182 (Pa. 1971)(overruled on other grounds by Commonwealth v. Walzack, 360 A.2d 914 (Pa. 1976)).

35 "The vague definitions of the GBMI [Guilty but Mentally Ill] law make it difficult to identify mental illness reliably and consistently. Ambiguous and open-minded definitions fail to provide the coherent direction wanted when imposing criminal sanctions." Roger George Frey, The Guilty But Mentally Ill Verdict and Due Process, 92 Yale L.J. 475, 489 (1983).

36 Commonwealth v. Trill, 543 A.2d 1106, 1123 (Pa. Super. 1988).

37 Emilie Lounsberry & Susan FitzGerald, Why the Insanity Defense Failed Yates, The Philadelphia Inquirer (Mar. 14, 2002)(available at www.philly.com/ mld/inquirer/2856557.html)(quoting Paul Appelbaum, a professor and chairman of psychiatry at the University of Massachusetts Medical School and president-elect of the American Psychiatric Association).

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RESPONSIBLY IRRESPONSIBLE?: AN ANALYSIS OF THE MEDICALLY NONCOMPLIANT OFFENDER'S FEDERAL INSANITY DEFENSE

TABLE OF CONTENTS

***34 INTRODUCTION**

It is rush hour in Boston and a young girl boards a busy commuter train.[1] Shortly after, a strange man boards the same train and stands uncomfortably close to the girl.[2] As the train rolls on, the man begins inappropriately touching the girl, eventually moving his hand to her thigh.[3] The girl pushes the man away, gets off the train at the next stop and reports the incident to a nearby police officer.[4] Police officers shortly thereafter find and arrest the man responsible.[5]

Assume that this man had a few beers past his limit at happy hour and could not recall the incident due to his intoxication. In most states, there would be no legal difficulty finding this man guilty of a crime despite his inebriated condition.[6]

Now assume that instead of being drunk, the perpetrator had schizophrenia.[7] While normally able to suppress his symptoms by using antipsychotic medication,[8] he recently chose to stop taking this medication.[9] When he touched his victim, he suffered delusions causing him to believe that she welcomed his advances.[10] At trial, he raises the insanity defense.[11] Should this man still be convicted? This Note will argue that, in federal court, this man's insanity defense should not be rejected simply because he stopped taking his medication.

It is axiomatic in criminal law that a defendant cannot create the circumstances of his own defense.[12] Application of this truism has precluded defendants from raising a variety of legal defenses in criminal ***35** cases,[13] with some commentators going so far as to argue that this principle should apply equally to all such defenses.[14] However, courts have been hesitant to extend its application to the insanity defense, with some courts implying that the philosophical basis of the insanity defense precludes any inquiry into how insanity came about.[15] As a result, no court has yet rejected a defendant's insanity defense based solely on his medication noncompliance.

This may soon change. Psychiatrists argue that pharmacological developments over the past three decades give psychiatric patients unprecedented control over their symptoms.[16] Nevertheless, treatment compliance among those suffering from schizophrenia has not improved proportionately.[17] Recent studies also find that psychiatric patients who use antipsychotic and mood stabilizing medication commit violent crimes less frequently than those who do not take such medication.[18] Moreover, several recent high-profile tragedies--such as the school shooting at Sandy Hook--have involved mentally ill perpetrators, thus reinforcing the widely held belief that the mentally ill can be dangerous.[19] Calls for mental health reform are widespread and have been answered in the political sphere.[20] Against this backdrop, some have argued that a mentally ill criminal defendant's decision to not take medication is a moral choice that should preclude that defendant from raising the insanity defense.[21]

This was exactly the issue in *Commonwealth v. Shin*,[22] in which a schizophrenic man failed to take his medication and subsequently groped a girl on the subway.[23] The prosecution argued that the ***36** defendant's medication noncompliance should be evaluated using a framework designed to determine whether a defendant's drug or alcohol use that exacerbated a preexisting mental illness should preclude his insanity defense.[24] The trial court agreed that this framework should apply to medication noncompliance cases, and correspondingly found the defendant guilty.[25] While the appeals court ultimately reversed,[26] its reasoning left open the possibility for future attacks on the insanity defense.[27] More importantly, the appeals court implied that it may have been the first court to ever confront this issue.[28] As such, *Shin* may impact courts outside of Massachusetts, as other courts will lack binding precedent on this novel issue.

In particular, federal courts may look to *Shin* when attempting to resolve the effect of medication noncompliance on a

defendant's insanity defense.[29] Federal doctrine precludes a defendant from successfully proving his insanity when voluntary intoxication has played any role in causing his mental condition.[30] However, federal circuit courts have not yet determined whether this doctrine should apply to strictly medically noncompliant offenders.[31] Given the inevitability of such a challenge,[32] courts will examine non-binding precedent in order to determine how to address this issue. When they do, *Shin* will not serve as a satisfactory model to resolve this issue.[33] Thus, this Note will focus on the federal system.

This Note will argue that the federal judiciary should not consider a defendant's failure to take prescription medication when evaluating that defendant's insanity defense unless the legislature specifically amends the statute governing the insanity defense.[34] Section I.A will demonstrate that *Shin* failed to fully justify, as a matter of law, that the medically noncompliant offender should always have the ability to raise ***37** the insanity defense.[35] Section I.B will discuss the analogous federal doctrine.[36] Section I.C will describe how proposed scholarly solutions would have courts evaluate the medically noncompliant defendant's insanity defense.[37] Part II will show that *Shin*'s reasoning failed to preclude the application of these proposed scholarly solutions in a way that is contrary to *Shin*'s holding, and may be used in federal courts to preclude a medically non-compliant defendant's insanity defense.[38] Part III will demonstrate how that result would be contrary to a doctrinally sound understanding of the federal insanity defense.[39] Part IV will argue that judicially altering the insanity defense so that the medically noncompliant offender cannot raise it would be an inappropriate use of federal judicial power because federal courts cannot engage this issue without exceeding their institutional competency and violating the principle of separation of powers.[40] Part V will propose that federal courts should not consider a defendant's failure to take prescription medication when evaluating his insanity defense unless Congress addresses this issue.[41]

I. THE DOCTRINAL BACKGROUND

A. *The* Berry-DiPadova *Analysis as Applied in* Commonwealth v. Shin

As one of the first cases in the country to address this issue, *Commonwealth v. Shin* will serve as this Note's starting point to evaluate how federal courts should analyze the medically noncompliant defendant's insanity defense.[42]

At the core of *Shin* was the *Berry-DiPadova* framework.[43] *Berry-DiPadova* is a doctrine designed to adjudicate the guilt of offenders who were mentally ill but were considered legally insane only because their illness was exacerbated by their voluntary consumption of drugs or alcohol.[44] As its name implies, this analysis was developed in ***38** *Commonwealth v. Berry*[45] and *Commonwealth v. DiPadova*,[46] both of which involved defendants who were mentally ill, had ingested intoxicants, killed people shortly thereafter,[47] and raised insanity defenses at their trials.[48]

The issue in *Berry* was whether the trial court properly instructed the jury on how to consider the defendant's intoxication in evaluating his insanity defense.[49] In Massachusetts, a defendant who raises the insanity defense must be found not guilty by reason of insanity unless the Commonwealth proves beyond a reasonable doubt that the defendant did not suffer from a mental disease or defect that caused him to lack substantial capacity to appreciate the wrongfulness of his conduct or conform his actions to the requirements of law.[50] While the jury was properly instructed on this standard, the appeals court noted that the jury instructions failed to address the defendant who was rendered insane only due to the interaction of drugs or alcohol with his mental illness.[51] The court thus sought to create a jury instruction to clarify when a defendant could raise the insanity defense after having voluntarily consumed drugs or alcohol.[52]

***39** In response, the court crafted the following framework: if a defendant was legally insane solely because of his voluntary consumption of drugs or alcohol, then the jury should reject his insanity defense.[53] By contrast, if the defendant was legally insane before consuming alcohol or drugs, then the jury should find him not guilty by reason of insanity even if his illness was exacerbated by drugs or alcohol.[54] The court held that this would also be the outcome if the defendant had an active or latent mental disease that did not cause insanity on its own, but due to the voluntary consumption of drugs or alcohol, was activated or intensified to the extent that it caused such lack of capacity.[55] However, the court added a caveat to this last category; if the defendant knew or had reason to know that consuming drugs or alcohol would render him legally insane through the activation of a latent mental disease or intensification of an active one, then the jury should reject his insanity defense.[56]

The following year, the *DiPadova* court emphasized the importance of the defendant's knowledge of the effects that drugs or

alcohol would have on his mental illness when applying the *Berry* instruction.[57] The court noted that this issue was unclear after *Berry* because the evidence in that case did not address the defendant's knowledge about the effect that drugs or alcohol would have on his mental illness.[58] Thus, the court clarified this aspect by stating that an otherwise insane defendant who voluntarily consumed drugs or alcohol prior to his criminal conduct could be found guilty only if (1) prior to consuming drugs or alcohol, the defendant had capacity to appreciate the wrongfulness of his conduct; (2) the drugs or alcohol intensified an active disease or activated a latent disease, in turn causing a lack of capacity; and (3) the defendant knew or should have known that drugs or alcohol would have that effect on his illness.[59]

Less than five years after *DiPadova*, prosecutors sought to extend this doctrine to the medically noncompliant offender in *Shin*.[60] There, the defendant was accused of assault and battery for groping a girl of fourteen years of age or older while riding the subway on January 20, ***40** 2011.[61] The defendant was diagnosed with schizophrenia in 2005 and had been hospitalized six times between 2005 and 2009 as a result.[62] While the defendant had been prescribed antipsychotic medication, an expert at trial testified that the defendant was not taking his medication for some time before the incident, and was consequently experiencing symptoms of schizophrenia.[63] These symptoms included an impaired ability to perceive reality, which may have caused the defendant to believe that his victim was welcoming his advances.[64] The expert concluded that as a result of these symptoms, the defendant could not appreciate the wrongfulness of his actions or conform his conduct to the requirements of law at the time of his offense.[65]

The prosecution urged the court to extend the *Berry-DiPadova* analysis to this case--and reject the defendant's insanity defense--because the defendant's insanity resulted from his failure to take prescription antipsychotic medication.[66] While the trial court agreed with the prosecution, the appeals court refused this argument, and stated that a defendant's failure to take antipsychotic medication should not alter the availability or outcome of his insanity defense.[67]

While the appeals court sought to preclude *Berry-DiPadova's* application to medication noncompliance cases as a matter of law,[68] the discussion that followed in fact weakened this holding.[69] In that discussion, the court listed several reasons to distinguish medication noncompliance from the interaction of intoxication with mental illness.[70] First, the court noted that psychiatric patients fail to take medication for a variety of reasons, and that unlike the ingestion of drugs or alcohol, such reasons are frequently not blameworthy.[71] ***41** Additionally, the court noted that different medications require different amounts of time to take effect, and determining when a defendant stopped taking his medication and what his mental state was at that time would thus be difficult.[72] The court additionally asserted that the *Berry- DiPadova* analysis is inappropriate for medication noncompliance cases because, unlike alcohol and substance abuse, failure to take medication does not cause mental illness, but rather leads to the manifestation of symptoms arising from a preexisting mental illness.[73] Finally, the court argued that using the *Berry-DiPadova* framework in the case of a medically noncompliant defendant cannot be confined to a logical stopping point, and thus could be used to justify finding any defendant guilty if that defendant previously took medication and later stopped.[74] As will be discussed, this reasoning fails to fully justify the holding.[75]

After arguing that the *Berry-DiPadova* analysis should not apply, the court nevertheless cursorily applied the analysis to show that the defendant was not at fault for his own noncompliance, and thus could be acquitted due to his insanity even if the doctrine applied.[76] The court justified this by opining that the defendant may not have been sane even when he was compliant with his medication.[77] Additionally, no evidence had established that the defendant was ever compliant with his medication between his most recent hospital release in 2009 and his arrest in 2011.[78] Finally, the court noted that Mr. Shin may have been unable to obtain his medication due to insurance problems.[79] Thus, the court concluded that the defendant would not have been precluded from a successful insanity defense even if *Berry-DiPadova* applied because his failure to take medication either did not result in his insanity or was not voluntary.[80]

***42** While not binding on federal courts, the analysis discussed above is relevant to federal doctrine due to a lack of federal precedent, as well as similarities between the federal and Massachusetts insanity defenses.

B. *The Federal Insanity Defense*

In comparison to the *Berry-DiPadova* analysis, the federal system is even stricter in precluding voluntarily intoxicated, mentally ill defendants from being found not guilty by reason of insanity. To justify an insanity verdict in a federal case, a defendant must prove by clear and convincing evidence that at the time of the offense, he was unable to appreciate the nature and quality or the wrongfulness of his acts due to a severe mental disease or defect.[81] Federal courts have long held that

voluntary intoxication cannot be the cause of the mental disease or defect required for a successful insanity defense, nor can the defense be successful if the defendant is insane due, in any part, to the interaction of such intoxication with a preexisting mental illness.[82]

These stringent requirements are based on the "rule," as stated in prior cases, that a mental disease or defect for the purposes of the insanity defense must be brought about by circumstances outside of the actor's control.[83] Though the federal insanity defense has changed in formulation over the years,[84] this "rule" is applicable to the present ***43** insanity defense in many circuits, including the Second,[85] Third,[86] and Ninth.[87]

Insofar as the federal insanity defense is currently governed by statute, federal courts have also deferred to legislative intent to prohibit the insanity defense when voluntary intoxication partially causes the defendant's mental state. In *United States v. Garcia*, the Second Circuit noted that Congress enacted the Insanity Defense Reform Act of 1984[88] (IDRA) to narrow the definition of insanity in response to "public concern" arising from the acquittal of John W. Hinckley, Jr.--the man who attempted to assassinate President Ronald Reagan.[89] Additionally, the Second and Ninth Circuits noted that in enacting the IDRA, the Senate Judiciary Committee expressly noted its intention to preserve the doctrine that excluded mental states arising from voluntary intoxication from constituting legal insanity.[90] Because Congress meant to narrow the definition and scope of the insanity defense and also exclude ***44** voluntary intoxication from giving rise to a successful insanity defense, courts have held that Congress must also have intended to prohibit an insanity acquittal when the defendant's mental state was caused by the interaction of voluntary intoxication with a preexisting mental disease or defect.[91] Thus, unless the defendant was insane prior to taking drugs or alcohol, federal courts refuse to allow an insanity acquittal when the defendant's mental state was caused in any part by voluntary intoxication.[92]

Federal circuits have yet to address whether this rule is applicable to a medically noncompliant defendant. However, the Tenth Circuit had the opportunity to consider a closely related issue: whether a defendant should be entitled to an insanity verdict when the defendant was experiencing withdrawal symptoms after failing to take prescription medication.[93] In *United States v. Fisher*, the defendant was an ex-convict who was prescribed Klonopin[94] to treat his anxiety disorder.[95] However, the defendant had not been taking this medication for some time before he illegally possessed a shotgun.[96] At trial, the defendant presented evidence that he was insane at the time of his conduct due to Klonopin withdrawal.[97] The trial court instructed the jury that if the jury found the defendant insane due to his voluntary failure to take prescription medication, and that he knew that such failure would bring about his condition, then they should reject his insanity defense.[98]

On appeal, the government sought to have the jury instruction affirmed based on the principle that the defendant may not raise the ***45** insanity defense when insanity is caused in any part by drugs.[99] The defendant-appellant warned that because this case dealt with a failure to take drugs, such a ruling would be relevant to future defendants with schizophrenia who failed to take prescription medication.[100] However, the Tenth Circuit dodged this issue, and instead affirmed based on the "overwhelming evidence" that the defendant's withdrawal was not severe enough to constitute insanity.[101] Thus, there is no federal precedent instructing courts how to evaluate the medically noncompliant defendant's insanity defense.

While there is a dearth of case law indicating how federal courts should handle this issue, scholars have proposed a number of solutions for courts to consider.

C. *Proposed Scholarly Solutions*

Some argue that failure to inquire into the source of the medically noncompliant offender's symptoms[102] does not accord with "moral intuition"[103]--or a person's intuitive feelings based on internalized ***46** social norms of what acts should be deemed criminal. While scholars have proposed several solutions to align the law with these moral intuitions,[104] courts are most likely to adopt the proposal that medication noncompliance should be analyzed similarly to how courts analyze voluntary intoxication.[105] The following discussion outlines the doctrinal underpinnings of this approach.

A voluntarily intoxicated defendant may be found guilty through the imputation of mens rea.[106] Mens rea is generally defined as the state of mind that must accompany a criminal act for the defendant to be convicted of a crime.[107] When mens rea is imputed, it is transferred from an earlier time, at which a defendant possessed a culpable state of mind, to the time of the criminal conduct, when the defendant lacked such a mental state. For example, due to his intoxication, a person who is "black-out" drunk may not be able to form an intention to commit a crime at the time of his criminal conduct, and thus may

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lack the mens rea necessary to convict him of a crime.[108] However, courts and legislatures view the very act of voluntarily becoming intoxicated as a reckless one.[109] As such, the recklessness associated with becoming intoxicated is imputed to the later time at which the defendant cannot form any culpable mental state.[110] In so doing, the prosecution is provided with the mens rea that is necessary to convict the defendant.[111]

Likewise, the insanity defense also concerns the culpability of the ***47** defendant's mental state at the time of his conduct.[112] Proponents of the imputation of mens rea for the medically noncompliant offender equate the insane defendant's lack of responsible agency at the time of a crime with the voluntarily intoxicated defendant's lack of consciousness with respect to a mental state that must accompany a material element of a crime. This facilitates the conclusion that, just as with voluntary intoxication, the prosecution should be able to impute a culpable mental state from an earlier point at which the defendant made an immoral choice--here, the decision not to take his medication.[113]

Under the imputation described above, a defendant could still be acquitted on insanity grounds if he did not have a culpable mental state regarding his noncompliance. For example, if a defendant truly did not realize that he would become insane when he stopped taking his medication, then he would not be acting recklessly when he failed to take his medication, and his insanity defense could still prove successful.[114] By contrast, a defendant's insanity defense would fail if he understood that not taking his medication could lead to insanity, and nevertheless disregarded this risk.[115] By allowing the defendant in the former example to go free while enabling the defendant's conviction in the latter example, this approach appears to comport with "moral intuitions"[116] in a way that prohibiting inquiry into the source of insanity does not.

Shin did not adopt this approach, and instead sought to prohibit the factfinder from considering the defendant's medical noncompliance when evaluating his insanity defense.[117] However, the court's reasoning in fact only justifies prohibiting the imputation of mens rea with a defendant who would have been acquitted under the *Berry-DiPadova* analysis anyway.

II. *SHIN'S* INADEQUATE REASONING

Chief among the court's reasons for not applying *Berry-DiPadova* in *Shin* was that, unlike drug or alcohol consumption, the mentally ill ***48** fail to take medication for a variety of reasons, many of which are not culpable.[118] The court made a point of noting that this was likely the case with Mr. Shin himself, who may have had difficulty obtaining his medication due to insurance complications.[119] However, this issue can be remedied by allowing for an insanity acquittal when the noncompliance is involuntary or otherwise performed without a sufficiently culpable state of mind. *Berry-DiPadova* in fact already provides for this by allowing for an insanity acquittal in cases when the intoxication is involuntary, or when the defendant did not know or have reason to know of the effect that the drugs or alcohol would have on his mental illness.[120] Even the stricter rule applied by federal courts distinguishes based upon voluntary and involuntary intoxication, and thus could potentially exclude those like Mr. Shin, whose reason for noncompliance may have been beyond his control.[121] Stated otherwise, if a defendant was not responsible for his treatment relapse, then even under *Berry-DiPadova* or the scholarly approach discussed above, he could be entitled to an insanity acquittal.[122]

The court also contended that *Berry-DiPadova* should not apply to Mr. Shin because it would be difficult to determine when a defendant stopped taking his medication and what his mental state was at that time.[123] However, it is unlikely that a fact-finder would have more difficulty determining the prior mental state of a medically noncompliant offender than that of a voluntarily intoxicated defendant. Even assuming there is a difference, the prior mental state and efficacy of a defendant's treatment may be able to be proven through expert testimony. The efficacy of psychiatric medications,[124] their side ***49** effects,[125] and common reasons for medication noncompliance among the mentally ill[126] are issues that have generated a great deal of research.[127] Additionally, when a defendant takes antipsychotic medication, that patient often undergoes additional diagnostic tests and procedures after his initial treatment is prescribed.[128] This will create a "paper trail" which could allow a defendant to introduce evidence regarding the effectiveness of his treatment.[129] Thus, just as a forensic psychiatrist might use prior treatment evaluations and specialized knowledge to evaluate the effects of alcohol on a defendant's mental illness, that psychiatrist could use similar methods to determine whether an antipsychotic medication was effectively treating a patient's symptoms and why that patient might have stopped taking the medication.

Additionally, the court attempted to distinguish between medication noncompliance and voluntary intoxication by arguing that medication noncompliance, unlike voluntary intoxication, does not cause mental disease or defect.[130] However, this misstates the role of intoxication in *Berry-DiPadova*. That doctrine is aimed at determining whether a defendant should be

found legally insane when an active ***50** mental illness is intensified or exacerbated by drugs or alcohol.[131] By contrast, the analysis prohibits a defendant's successful insanity defense whenever the illness is caused solely by alcohol.[132] Thus, *Berry-DiPadova* already distinguished instances in which a defendant's insanity was caused by alcohol from instances in which alcohol instead intensified or exacerbated that illness. By distinguishing medication noncompliance on this ground, the court inaccurately described the issue addressed by *Berry-DiPadova*.

Finally, the court noted that the Commonwealth's argument, when taken to its extreme, has no logical stopping point.[133] In other words, the court believed that it had no principled way to distinguish the defendant who brought on a schizophrenic episode by failing to take his medication last week from one who stopped taking his medication twenty years ago. While it may in fact be difficult to decide how far back the court should look before it no longer considers noncompliance relevant to an offense, this time-framing issue is not unique to medication noncompliance. For example, this issue frequently arises regarding the requirement that the defendant's conduct be voluntary.[134] This issue can be philosophically daunting to resolve, such that it may be impossible to determine beforehand when courts will apply a broad time frame and when they will apply a narrow time frame.[135] However, in practice, courts rarely have difficulty selecting a time frame which they believe is not too remote as to no longer have a just bearing on the ***51** defendant's culpability.[136] Thus, despite conceptual difficulties, courts and juries are well-equipped to handle this time-framing issue.

Shin's reasoning thus leaves a lot to be desired in setting out the categorical rule that the court sought to adopt. This might require future Massachusetts courts to consider whether *Shin's* reasoning was limited to its facts or if it should indeed be read as implementing a distinction as a matter of law between medication noncompliance and mental illness that is exacerbated by the voluntary use of drugs or alcohol. However, as one of the first courts to squarely address[137] this issue, *Shin* may have broader implications than its immediate impact in binding Massachusetts courts. This issue has rarely been addressed, and is thus likely to be an issue of first impression wherever it next arises. Just as the Massachusetts appeals court sought guidance in other state and federal decisions,[138] other courts may look to *Shin* as they encounter this issue.

Instead of relying on *Shin* and other proposed scholarly solutions, future courts should first clarify the role that mens rea doctrine plays in evaluating the medically noncompliant offender's insanity defense.

III. DOCTRINAL CONFUSION

As stated, precluding the medically noncompliant offender from successfully raising the insanity defense relies on the transference of mens rea from the time of noncompliance to the time of the criminal conduct.[139] Proponents of this view argue that this imputation is consistent with the law's treatment of the epileptic or voluntarily intoxicated driver who passes out at the wheel of his car, driving it into a victim and killing him.[140] However, any analogy between those scenarios and the medically noncompliant defendant relies on doctrinal confusion between the distinction of mens rea in the sense of a mental state that must accompany a material element of a crime, and mens rea ***52** in the sense of the general moral agency that a defendant is required to possess in order to be held responsible for his actions. For the sake of brevity, the former will be referred to as special mens rea,[141] whereas the latter will be referred to as general mens rea.[142] While the imputation of the former--as in the cases of epileptic and voluntarily intoxicated drivers--is founded in settled doctrine,[143] imputation of the latter--which would be necessary to preclude a medically noncompliant offender from a successful insanity defense--is unprecedented.[144] Thus, such an approach should be rejected by courts as a departure from settled doctrine.

Both the epileptic and voluntarily intoxicated driver scenarios represent the imputation of special mens rea. For example, if either an epileptic or intoxicated driver passed out at the wheel of his car and ran down and killed a pedestrian, then the driver would probably be charged with manslaughter.[145] A conviction under the federal manslaughter statute requires a showing that the defendant recklessly caused the death of a human being.[146] In that case, the special mens rea required by a charge of manslaughter would be recklessness, because in order to convict the defendant, the prosecution would have to prove that the defendant was reckless in relation to the material element of causing death.

Now assume that the driver of the vehicle passed out at the wheel because he was an epileptic who failed to take his medication and chose to drive.[147] Such epileptic person likely knew that if he failed to take his medication, he would be at a greater risk of suffering an epileptic seizure, and that if he drove a car and subsequently suffered a seizure, ***53** he would place other motorists and pedestrians at a greater risk of injury or death.[148] Nevertheless, he chose to drive his car while off of his medication, suffered a seizure, and ran down a pedestrian. The problem with proving recklessness at the time of this

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offense is that the driver was unconscious, and therefore incapable of forming any mental state. However, the defendant was nevertheless reckless when he decided to drive his car after failing to take his medication because at that time, he consciously disregarded the risk of causing injury. Thus, by transferring this recklessness from an earlier point, the government can still prove a prima facie case.[149] Similarly, when a defendant disregards a substantial and unjustifiable risk that he might drive after becoming intoxicated, then his recklessness can be imputed from that earlier time point even if he blacked out and thus could not in fact form a reckless mental state while driving.[150]

By contrast, the defendant who raises the insanity defense does not claim that he could not or did not form mens rea with regard to a specific element, but instead argues that he lacked general mens rea.[151] This is a logically distinct concept from special mens rea, and presents different doctrinal issues.[152] For example, if instead of being epileptic or intoxicated, the driver from earlier were in the midst of a schizophrenic episode and intentionally drove his car into his victim because he believed that doing so would impress a young Jodie Foster,[153] there would be no doubt that he was not only reckless as to causing death, but ***54** in fact intended to cause death at the time of the offense.[154] Despite the special mens rea requirement being satisfied, this defendant would still be able to raise the insanity defense on the grounds that he lacked general mens rea.[155]

There may still be compelling policy justifications to preclude the medically noncompliant offender's insanity defense. For example, developments in antipsychotic medication over the past few decades have given patients effective treatment and unprecedented control over their symptoms, making the choice to exhibit symptoms a moral one.[156] Nevertheless, any such legal development cannot be disguised as a simple application of settled doctrine. Instead, this shift should be recognized as a departure from existing doctrine. Insofar as this new rule would be motivated by policy concerns, the judiciary is not the appropriate body to adopt such a rule. Instead, the legislature is the more appropriate political branch to promulgate this doctrinal shift.

IV. FEDERAL JUDICIAL POWER AND THE INSANITY DEFENSE

As stated, altering the federal insanity with respect to the medically noncompliant offender represents a policy decision and not an application of settled law.[157] The federal legislature--and not the judiciary--is the more appropriate branch to enact this change.[158] This is due to the constitutional doctrine of "separation of powers," previously expressed legislative intent regarding the insanity defense, and the legislature's comparative competency to fashion a rule ***55** reflecting "moral intuitions."

A. *Separation of Powers and Clear Legislative Intent*

Prior to the IDRA's enactment, the federal insanity defense was governed by case law.[159] Before Hinckley was found not guilty by reason of insanity for attempting to assassinate President Reagan,[160] most federal circuits applied the American Legal Institute's standard of insanity.[161] However, Congress responded to Hinckley's acquittal by enacting the IDRA,[162] which restricted the insanity defense's availability by removing the volitional prong of the insanity defense,[163] requiring the mental disease or defect to be severe,[164] and shifting the burden to the defendant to demonstrate his insanity by clear and convincing evidence.[165] In essence, the legislature responded to public ***56** dissatisfaction with the judicially established insanity test by statutorily abrogating it.[166]

However, in a report, the Senate Judiciary Committee noted its intention to maintain the doctrine prohibiting insanity from being a defense when the mental disease or defect is brought about by voluntary intoxication.[167] The Second Circuit interpreted this statement as unambiguous approval[168] of the doctrine precluding the insanity defense when the defendant is voluntarily intoxicated, even when a mental disease or defect is partly to blame for the resulting insanity.[169] However, unlike the broad formulations of this doctrine found in earlier cases,[170] the Senate Judiciary Committee discussed this doctrine only as it related to the voluntary consumption of drugs or alcohol.[171] Thus, while it was previously plausible to read broad statements of this doctrine as relevant to the medically noncompliant offender,[172] the Senate Judiciary Committee's precise language reveals the narrow scope of this exception. Courts have since relied on these statements in interpreting the IDRA, thereby incorporating them into federal doctrine.[173]

By contrast, nothing in either the statute or the Senate Judiciary Report indicates that Congress meant to prohibit the defense for the ***57** medically noncompliant offender.[174] While congressional silence regarding medication noncompliance leaves

courts to fill in the gap, courts would be unreasonable to interpret this silence to mean that Congress would have intended to treat medication noncompliance and voluntary intoxication similarly when applying the IDRA. Congress frequently responds to drug and alcohol issues with criminal proscriptions, but does not typically do so for mental health issues. For example, Congress has made it a crime to manufacture, distribute, or possess various controlled substances[175] with the ultimate intention of curbing the use of such intoxicating substances.[176] By contrast, Congress has enacted mental hygiene legislation to combat medication noncompliance[177] but has not criminalized the refusal to take psychiatric medication.

There are several possible explanations as to why Congress addresses these issues differently. One explanation is simply that moral intuitions indicate that drug and alcohol consumption is more morally blameworthy than a failure to take prescription medicine.[178] This difference may also be explained by the Supreme Court's recognition that the Due Process Clause protects a liberty interest in refusing the forced administration of antipsychotic medication in various contexts.[179] Thus, a law attaching criminal penalties to the refusal to take medication could potentially raise substantive due process issues insofar as it criminalizes a defendant's exercise of his constitutionally protected liberty.[180] Whatever the reason, Congress has clearly addressed these issues differently in federal legislation.[181] Thus, treating the two issues ***58** identically when applying the IDRA would not only be outside of Congress's stated intent, but likely contradicts what Congress would have done had it expressly considered this issue.

In sum, the federal insanity defense is currently governed by statute.[182] This indicates that Congress intended to control the federal insanity defense.[183] Courts have acknowledge this by stating that the IDRA must be applied according to its plain language and the underlying congressional intent.[184] The Senate Judiciary Committee asserted its intention to preserve the doctrine prohibiting an insanity defense when the mental disease or defect is brought about in any part by voluntary intoxication,[185] but was silent on the issue of medication noncompliance.[186] It is also unreasonable to argue that Congress would have precluded the insanity defense in such a scenario if it had expressly considered the issue.[187] Thus, a judicial expansion of this exception would contradict congressional intent and would depart from ***59** the deference that the judiciary owes the legislature in a government of separated powers.[188]

In addition to constitutional concerns, prudence also dictates that Congress is more well-adapted than the courts to craft a rule addressing the effect of a defendant's medication noncompliance on his insanity defense.

B. *Practical Consequences and Institutional Competencies*

Judicial deference to Congress on this issue is justified by institutional competencies--namely, the legislature's comparative competency to account for empirical considerations and exercise greater flexibility when crafting rules.[189] One empirical factor that would be outside of the court's concern when drafting a new rule is the amount of potential cases that could be affected by such a rule. A defendant's prior use of antipsychotic medication is highly correlated with a finding of not guilty by reason of insanity[190]--in fact, nearly half of all successful insanity defenses involve defendants who previously used antipsychotic medication.[191] Given that these offenders were insane at the time of their conduct, many of these individuals likely stopped taking their medication before committing their crimes.[192] A rule precluding a defendant from successfully raising the insanity defense if he fails to ***60** take his medication thus has the potential to preclude the insanity defense for as many as half of those who would otherwise be able to successfully raise the defense.[193] The insanity defense is rarely raised, and even more rarely successful.[194] Thus, a doctrinal shift that may drastically limit the defense even further should not be made without first considering the full empirical extent of the change and whether it is warranted.

Additionally, courts are not adequately equipped to craft a rule accounting for the complexity of medication noncompliance. The judiciary often relies on traditional legal terminology when forming legal doctrine. For example, *Berry-DiPadova* conditioned the defendant's ability to raise the insanity defense on whether he knew or should have known of the effects of drugs or alcohol.[195] Use of these judicial heuristics may preclude the insanity defense when noncompliance occurs for other reasons that may not be blameworthy. For example, a schizophrenic man may stop taking his neuroleptic medication because it makes him severely depressed,[196] despite knowing that his schizophrenia would get worse if he stopped taking this medication. Some may consider this choice reasonable given the side effect. However, he could nevertheless be precluded from raising the insanity defense if the test focuses solely on whether he knew that he would exhibit psychotic symptoms if he stopped taking his medication.[197] Thus, the judiciary may not have the flexibility necessary to adequately address the nuanced issues inherent in medication noncompliance.

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***61** The rigidity of judicial law-making[198] reflects the fact that the court's role is to interpret and apply the law to the facts before it.[199] As such, any judge-made rule is necessarily limited by the doctrine being interpreted and the facts of the case.[200] Here, judges would be limited to interpreting whether mens rea could be imputed--as proposed by several scholars[201]--and thus would focus on whether the defendant was aware of the risks when he stopped taking his medication.[202] This would not take into account that the mentally ill fail to take their medication for a variety of reasons, including adverse side effects, lack of family and social support, and practical barriers such as lack of money.[203] Even if a case before the court implicated one of these factors, all of these factors cannot be expected to be present in a single case. Crafting a rule in response to one which adequately accounts for the others may be difficult in the judicial setting. Conversely, Congress has greater flexibility when crafting the law to tailor its policy to its findings of fact.[204] Thus, the latter body is better suited to deal with the complexities surrounding this issue and navigate this landscape in a way that reflects moral intuitions.

Finally, insofar as prohibiting the insanity defense in medication ***62** noncompliance cases reflects "our moral intuitions," the legislature-and not the federal judiciary--is the appropriate branch to transform these intuitions into law.

C. *"Moral Intuitions"*

As previously stated, some scholars have argued that it is intuitively unjust to acquit a defendant who is at fault for causing the conditions of his own defense, even if he is insane at the time of his crime.[205] At the core of this argument is the notion that the criminal law should reflect "moral intuitions" by attaching criminal penalties to behaviors that society deems immoral.[206] As proof that "moral intuitions" support the conviction of the medically noncompliant offender, proponents of this argument point to voluntary intoxication as an analogous situation.[207] Both situations involve a defendant voluntarily bringing about a state of mind--through either the ingestion of or abstinence from a mind altering substance--which would require the defendant's acquittal if it were not willfully induced.[208] More generally, both scenarios involve a defendant who may be culpable for creating the circumstances of his own defense.[209] Thus, if our moral intuitions cannot distinguish between the wrongfulness of voluntary intoxication and that of medication noncompliance, and these moral intuitions are the driving force behind attaching criminal penalties to conduct, then one who commits the latter should not be set free so long as one guilty of the former is criminally penalized.

However, even assuming that moral intuitions should influence federal criminal law,[210] and that those moral intuitions demand that the ***63** insanity defense not be available to the medically noncompliant offender,[211] the federal judiciary is not the proper governing body to mold the law to these moral intuitions. Article III of the United States Constitution was framed with the intention to insulate federal judges from being influenced by social pressures.[212] Insofar as these moral intuitions originate within society,[213] sensitivity to societal morality is crucial to properly converting these moral intuitions into law. By contrast, the institutional role of the federal judge is designed to shield that judge from the will of the people and their moral intuitions.[214] As a result, Article III judges are afforded numerous protections to preserve their institutional independence, including selection to life terms through presidential appointment instead of public election to time-limited terms.[215] This protection is intended to allow a judge to be guided by the law and render a judgment that might not accord with popular moral intuitions.[216]

Conversely, a judge who makes a policy-driven decision often faces the criticism that he is substituting his own individual preferences for the law, instead of interpreting and applying the law pursuant to his institutional role.[217] This is especially true of criminal law, in which ***64** offenses are statutorily defined in the federal system and all states.[218] Thus, if a federal judge prohibited a medically noncompliant defendant from raising the insanity defense based on moral intuitions, that judge would risk overstepping his institutional bounds and writing his own policy preferences into an area of law governed by Congress.

Instead, Congress is the proper body to enact these moral intuitions into criminal laws. As elected officials, congressmen are more attuned to their constituents' moral intuitions.[219] Failure to adhere to these intuitions could lead to backlash at the polls, as members of Congress must be elected.[220] In fact, Congress has already demonstrated sensitivity to moral judgments regarding the insanity defense when it passed the IDRA[221] amidst public dissatisfaction with John W. Hinckley Jr.'s insanity acquittal.[222] Thus, if the insanity defense is to be altered in medication noncompliance cases because of moral intuitions, Congress is the best suited branch to do so.

V. PROPOSAL

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Federal courts should hold that a defendant's failure to comply with psychiatric treatment is irrelevant when evaluating that defendant's ***65** insanity defense. Unlike situations in which the ingestion of drugs or alcohol exacerbated a defendant's mental illness, Congress did not consider medication noncompliance at all when it passed the IDRA.[223] Thus, precluding the insanity defense for the medically noncompliant offender would not be simple statutory interpretation, but would be judge-made law in an area that Congress governs by statute.[224] This would not only violate the separation of powers doctrine, but would also take the judiciary outside of its institutional competency by forcing it to craft a rule that it has neither the expertise nor flexibility to adequately create.[225] Finally, crafting such a rule would be motivated by moral intuitions more properly considered by Congress than by federal courts.[226]

In lieu of a statutory response, federal courts should simply rely on a traditional application of the insanity defense[227] and defer to the legislature for any future modifications of the defense.[228] When the insanity defense's traditional reasoning is applied to the medically noncompliant offender, medication noncompliance is irrelevant to an insanity defense's analysis.[229] This outcome reflects the traditional role of the judiciary in interpreting criminal law, which is to interpret and apply the law as it has been enacted by Congress.[230]

As shown by *Shin*,[231] it is difficult for courts to adequately distinguish between insanity enhanced by medication noncompliance and insanity enhanced by voluntary intoxication.[232] Any judicial foray into this issue claims a power for the judiciary which more properly belongs to the legislature,[233] even if the judiciary ultimately rejects the argument to prohibit the medically noncompliant offender's insanity defense.[234] Moreover, even in rejecting the argument that medication noncompliance should preclude a defendant from obtaining a "not guilty by reason of insanity" verdict, a court's reasoning through this ***66** issue is liable to create confusing statements, inconsistencies, and contradictions to be exploited in future cases.[235] In any event, the judicial ability to formulate a rule may not be nuanced enough to create a fair and readily applicable law to apply in all noncompliance cases.[236] Thus, considering the merits of this argument--even while ultimately denying its conclusion--may create the opportunity to undermine this outcome in later cases.[237]

Congress may see fit to treat the medically noncompliant offender differently in the future.[238] When that occurs, the congresspeople who enacted the law will be held politically responsible at the polls for effecting such a change.[239] These congresspeople would also be more likely than the federal judiciary to have sufficient information and flexibility to craft a nuanced response to this complicated issue.[240] Thus, the most appropriate response in light of the complexity of medication noncompliance and the constitutionally mandated principle of separation of powers is for federal courts to hold that the insanity defense applies without restriction in medication noncompliance cases because the federal judiciary is constitutionally incapable and pragmatically ill-equipped to create an exception to the insanity defense when the defendant fails to take his prescribed antipsychotic medication.

CONCLUSION

Serving as a federal judge is difficult enough without having to keep pace with a myriad of rapidly evolving scientific fields.[241] In particular, the treatment of psychiatric diseases has become an increasingly complicated field as treatment methods have changed and improved significantly over the past three decades.[242] A judicial foray into the similarities and differences between medication noncompliance and voluntary intoxication is liable to create more headaches than it ***67** cures.[243] Instead, federal judges should defer to Congress, which in theory has the expertise, flexibility, and moral authority to concoct a suitable remedy.[244] Whether this treatment may be prescribed in all states is beyond the scope of this Note--for example, this approach may not be suitable in jurisdictions in which the insanity defense is governed by case law instead of statute.[245] Nevertheless, by deferring to the legislature, at least federal courts will refrain from inducing a bout of doctrinal insanity.

Footnotes

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[1] This scenario is based on the facts of Commonwealth v. Shin, 16 N.E.3d 1122, 1123 (Mass. App. Ct. 2014).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 1123-24.

[6] In general, most jurisdictions do not allow intoxication caused by voluntarily drinking alcoholic beverages to serve as a defense for a "general intent" crime. *See* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

[7] J. STANLEY MCQUADE, MEDICAL INFORMATION SYSTEMS FOR LAWYERS § 5:64 (2d ed. 1993) (A person suffering from schizophrenia may experience delusions, illusions and hallucinations, and dissociation from his social environment.).

[8] *Shin*, 16 N.E.3d at 1125.

[9] *Id.* at 1125-26.

[10] *Id.*

[11] *Id.* at 1124.

[12] Robinson, *supra* note 6.

[13] *See id.* at 2-3.

[14] *See id.* at 24 (noting that every jurisdiction considers whether a defendant caused the conditions of his own defense to be relevant to at least certain defenses, and questioning why it should not be equally relevant in those jurisdictions to all defenses).

[15] State v. Maik, 287 A.2d 715, 722 (N.J. 1972) ("We think it compatible with the philosophical basis of M'Naghten to accept the fact of a schizophrenic episode without inquiry into its etiology.").

[16] Zachary D. Torry & Kenneth J. Weiss, *Medication Noncompliance and Criminal Responsibility: Is the Insanity*

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Defense Legitimate?, 40 J. PSYCHIATRY & L. 219, 221-22 (2012).

17 *Id.* at 222.

18 *See, e.g.*, Seena Fazel et al., *Antipsychotics, Mood Stabilisers, and Risk of Violent Crime*, 384 LANCET 1206, 1211 (2014) (finding a reduction in the rate of violent crime among mentally ill individuals who were taking antipsychotic and mood stabilizing medications as compared with those who were not).

19 *See, e.g.*, Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 240 (2015).

20 *Id.* (noting that in the aftermath of the Sandy Hook shooting, several states passed laws requiring mental health professionals to report those who they believed to be dangerous).

21 *See, e.g.*, Torry & Weiss, *supra* note 16, at 221 (stating that the insanity defense is designed to prevent the criminal punishment of those who are not blameworthy for their mental state).

22 16 N.E.3d 1122 (Mass. App. Ct. 2014).

23 *See supra* notes 1-10.

24 *Shin*, 16 N.E.3d at 1126-27.

25 *Id.* at 1126.

26 *Id.* at 1129.

27 *See infra* Part II.

28 *Shin*, 16 N.E.3d at 1128 ("Whether the *Berry-DiPadova* analysis is proper in a case such as this is a difficult question and one for which our cases--and those of other jurisdictions--provide little guidance.").

29 *See infra* Sections I.A-B.

30 *See infra* Section I.B.

31 The Tenth Circuit briefly considered the issue of whether the insanity defense should be available to a defendant who is insane only because he was suffering from withdrawal because he failed to take his prescription Klonopin--a benzodiazepine drug. United States v. Fisher, 278 F. App'x 810, 811, 813 (10th Cir. 2008). However, the court ultimately ruled on other grounds, and thus did not decide this issue. *Id.* at 813.

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32 *See supra* text accompanying notes 1621.

33 *See infra* Part II.

34 *See infra* Part V.

35 *See infra* Section I.A.

36 *See infra* Section I.B.

37 *See infra* Section I.C.

38 *See infra* Part II.

39 *See infra* Part III.

40 *See infra* Part IV.

41 *See infra* Part V.

42 Commonwealth v. Shin, 16 N.E.3d 1122, 1129 (Mass. App. Ct. 2014) (noting that there was "no guiding case law" upon which the trial judge could rely when deciding this issue).

43 *Id.* at 1127-28 (discussing the relevance of the *Berry-DiPadova* analysis to the medically noncompliant defendant).

44 *Id.* at 1127.

45 931 N.E.2d 972 (Mass. 2010).

46 951 N.E.2d 891 (Mass. 2011).

47 In *Berry*, the defendant was diagnosed with bipolar and schizoaffective disorders, and had consumed alcohol prior to repeatedly striking the victim in the head with a cinder block until he died. *Berry*, 931 N.E.2d at 974-77. In *DiPadova*, the defendant was diagnosed with bipolar disorder, posttraumatic stress disorder, and attention deficit hyperactivity disorder, and had consumed cocaine on the night that he killed his former landlord. *DiPadova*, 951 N.E.2d at 893-94.

48 *Berry*, 931 N.E.2d at 976; *DiPadova*, 951 N.E.2d at 895.

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49 *Berry*, 931 N.E.2d at 980. The court also noted that for the conviction to be reversed, an improper jury instruction would have had to have caused a "substantial likelihood of a miscarriage of justice" because the defendant did not object to the jury instruction at the trial level. *Id.*

50 *Id.* This standard was established in 1967 in Commonwealth v. McHoul, 226 N.E.2d 556, 557-58 (Mass. 1967).

51 *Berry*, 931 N.E.2d at 982-83.

52 The jury instruction proposed by the appeals court was as follows:
A defendant's lack of criminal responsibility cannot be solely the product of intoxication caused by her voluntary consumption of alcohol or another drug .... However, a defendant is not criminally responsible if you have a reasonable doubt as to whether, when the crime was committed, the defendant had a latent mental disease or defect that became activated by the voluntary consumption of drugs or alcohol, or an active mental disease or defect that became intensified by the voluntary consumption of drugs or alcohol, which activated or intensified mental disease or defect then caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law. If you have a reasonable doubt as to whether the defendant was criminally responsible, you shall find the defendant not guilty by reason of lack of criminal responsibility .... Where a defendant has an active mental disease or defect that caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law, the defendant's consumption of alcohol or another drug cannot preclude the defense of lack of criminal responsibility. *Id.* at 984 (citations omitted) (internal quotation marks omitted).

53 *See id.* at 983-84.

54 *See id.* at 984.

55 *See id.*

56 *See id.* at 984, n.9.

57 Commonwealth v. DiPadova, 951 N.E.2d 891, 901 (Mass. 2011).

58 *See id.* at 90001.

59 *See* *id.* at 900.

60 *See* Commonwealth v. Shin, 16 N.E.3d 1122 (Mass. App. Ct. 2014).

61 *Id.* at 1123.

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62 *Id.* at 1124.

63 *Id.* at 1126.

64 *Id.* at 1125-1126.

65 *Id.* at 1126.

66 *Id.* at 1127-1128.
[H]ere, the question is not whether the defendant knowingly and voluntarily consumed alcohol or drugs that exacerbated his inability to understand the wrongfulness of his behavior or undermined his capacity to conform his behavior to the requirements of the law, but whether his *failure* to take prescribed medication had those effects .... Whether the *Berry-DiPadova* analysis is proper in a case such as this is a difficult question[.]
Id. (emphasis retained).

67 *Id.* at 1128.

68 *See id.* ("*Berry* and *DiPadova* have no applicability in a circumstance where the allegation is that the defendant's lack of criminal responsibility arises only from a failure to take prescribed medication.").

69 *See id.* at 1127-29.

70 *See id.* at 1127-28.

71 *See id.*
[M]entally ill people fail to take prescribed medication for a myriad of reasons, including, for example, side effects that may be otherwise dangerous to their health .... In addition, some people are unable to obtain the appropriate medication because of lack of money or access to medical care, or problems with necessary paperwork such as may have occurred in this case.
Id. (citations omitted).

72 *Id.* at 1128.

73 *Id.* As will be discussed, this distinction is blatantly erroneous, because *Berry-DiPadova* already distinguishes between situations in which drugs and alcohol cause insanity from situations in which symptoms of a mental illness are exacerbated--though not directly caused by--drugs or alcohol. *See infra* Part II. Here, medication noncompliance is analogous to the latter situation because both scenarios involve a preexisting mental illness.

74 *Shin*, 16 N.E.3d at 1129.

75 *See infra* Part II.

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76 *Shin*, 16 N.E.3d at 1128-29.

77 *Id.* at 1129.

78 *Id.*

79 *Id.*

80 *See id.* at 1128-29.

81 *See* 18 U.S.C. § 17 (2012).

82 *See* Kane v. United States, 399 F.2d 730, 736 (9th Cir. 1968) ("[D]isability which [the defendant] does acquire from drinking liquor was within his own control and cannot be classified as a mental illness excusing criminal responsibility."); *see also* United States v. Burnim, 576 F.2d 236, 237 (9th Cir. 1978) ("In evaluating Burnim's mental state, the court was obliged to disregard whatever incapacitating effects were attributable to the voluntary ingestion of alcohol.").

83 *Kane*, 399 F.2d at 735 ("[T]he mental condition which produced such disability must have been brought about by circumstances beyond the control of the actor."); *Burnim*, 576 F.2d at 238 ("[M]ental disability, however defined, must have been brought about by circumstances beyond the control of the actor.").

84 When *Kane* was decided in 1968, the Ninth Circuit applied the M'Naghten test for insanity. *See Kane*, 399 F.2d at 735. The key inquiry under the M'Naghten standard is whether "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." Charles Fischette, Note, *Psychopathy and Responsibility*, 90 VA. L. REV. 1423, 1442 (2004) (citation omitted). Ten years later, *Burnim* applied a modified version of the American Law Institute's proposed standard for insanity. *Burnim*, 576 F.2d at 238. The current federal insanity defense, enacted as the Insanity Defense Reform Act of 1984, is codified at 18 U.S.C. § 17, and provides that: "It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense." 18 U.S.C. § 17(a) (2012). Additionally, "[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence." *Id.* § 17(b).

85 *See* United States v. Garcia, 94 F.3d 57, 62 (2d Cir. 1996) (stating that allowing a jury to consider the effect of voluntary drug or alcohol use on mental illness for an insanity defense would violate congressional intent to preclude availability of the insanity defense to defendants who lack capacity due to voluntary consumption of drugs or alcohol).

86 *See* United States v. Cuebas, 415 F. App'x 390, 396 (3d Cir. 2011) (rejecting the defendant's argument that he should be granted an insanity instruction when voluntary intoxication exacerbated an underlying mental illness).

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87 United States. v. Knott, 894 F.2d 1119, 1123 (9th Cir. 1990).
We hold that under the Insanity Defense Reform Act, the defendant's voluntary drug use or intoxication at the time of the crime may not be considered in combination with his mental disease or defect in determining whether the defendant was unable to appreciate the nature and quality or wrongfulness of his acts.
Id.

88 Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. § 17 (2012)).

89 *Garcia*, 94 F.3d at 61. A defense expert at trial stated that John W. Hinckley Jr. suffered from "process schizophrenia" at the time that he shot the President. Stuart Taylor Jr., *Shootings by Hinckley Laid to Schizophrenia*, N.Y. TIMES (May 15, 1982), http://www.nytimes.com/1982/05/15/us/shootings-by-hinckley-laid-to-schizophrenia.html. Hinckley was acquitted because he did not "appreciate" the "wrongfulness" of his conduct, as required for a criminal conviction in federal court at the time. Vincent J. Fuller, Symposium, United States v. John W. Hinckley Jr. *(1982)*, 33 LOY. L.A. L. REV. 699, 699700 (2000). Hinckley's counsel stated it was "quite apparent ... that [Hinckley] was mentally disturbed at the time of the 1981 shooting." *Id.* at 699. As evidence of Hinckley's detachment from reality, Hinckley's counsel referred to a letter that Hinckley wrote to actress Jodie Foster on the morning of the shooting. *Id.* at 700.

90 *Garcia*, 94 F.3d at 6162 ("Of significance to this case, Congress, speaking through the Senate Judiciary Committee, stated: 'The committee also intends that, as has been held under present case law interpretation, the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, does not constitute insanity or any other species of legally valid affirmative defense.'") (citation omitted); *Knott*, 894 F.33d at 112122 ("Although the issue we address here is not the validity of an insanity defense based on voluntary intoxication alone, we are instructed by Congress's statements about voluntary intoxication. Prior to the Act, a majority of courts followed the rule that the mental effects of voluntary intoxication did not excuse responsibility for a criminal act. The legislative history demonstrates Congress's intent to carry this rule forward.") (citation omitted).

91 *See* *Garcia*, 94 F.3d at 62.
The government responds that 'combining a mental disease or defect that is itself insufficient under the IDRA, with the impermissible consideration of voluntary substance abuse, to result in a valid defense of insanity under the IDRA, is wholly illogical. This would constitute nothing short of rewarding the voluntary abuse of drugs and alcohol in direct contradiction of the intent of Congress in passing the IDRA.' The caselaw on this issue, although limited, recognizes as much, and we agree. *Id.*; *Knott*, 894 F.2d at 1122 ("When we combine Congress's statements about voluntary intoxication with its clear intent to narrow the common law definition of insanity ... we are persuaded that voluntary intoxication combined with a mental disease will not support an insanity defense under the Act.") (citation omitted).

92 *See supra* note 91.

93 *See* United States v. Fisher, 278 F. App'x 810, 813 (10th Cir. 2008).

94 Klonopin is a benzodiazepine which is used to treat panic disorders and seizures. Lauren Connell Pavelka, *Klonopin (Clonazepam), in* 1 ENCYCLOPEDIA OF CHILD BEHAV. AND DEV. 855 (Sam Goldstein & Jack A. Naglieri eds., 2011).

95 *Fisher*, 278 F. App'x at 811.

96 *Id.* at 811-12.

97 *See id.* at 812.

98 *Id.* ("Over the defense's objection ... the district court also instructed the jury that Fisher could not claim insanity if his 'condition was produced by [his] voluntary failure to take a prescription drug or [his] voluntary failure to obtain a prescription renewal and ... that [he] knew that that failure would produce [his] condition.'").

99 *Id.* at 813.

100 *See* Brief for Appellant at 17-18, United States v. Fisher, 278 F. App'x 810 (10th Cir. 2008) (No. 07-6161).

101 *Fisher*, 278 F. App'x at 813.
We need not decide whether or when such a withdrawal will support an insanity defense, because even assuming that insanity can be raised on the basis of withdrawal and that the district court erred in giving its limiting instruction, there is overwhelming evidence that Fisher was not suffering from withdrawal so severe as to render him insane at the times he possessed Knight's shotgun.
Id. (citations omitted).

102 *See, e.g.*, State v. Maik, 287 A.2d 715, 722 (N.J. 1972) ("We think it compatible with the philosophical basis of M'Naghten to accept the fact of a schizophrenic episode without inquiry into its etiology.").

103 "Moral intuitions" here refers to the argument made by many scholars that acquitting a medically noncompliant defendant seems intuitively unfair when the defendant knew or should have known the consequences of failing to take his medication. *See* Edward W. Mitchell, *Culpability for Inducing Mental States: The Insanity Defense of Dr. Jekyll*, 32 J. AM. ACAD. PSYCHIATRY & L. 63, 63 (2004) ("That Dr. Jekyll should be found not guilty of criminal acts committed while in his altered persona seems to be intuitively unjust. Is he not culpable, at least, for inducing a state in which he might commit such terrible acts?"); *see also* Richard Sherlock, *Compliance and Responsibility: New Issues for the Insanity Defense*, 12 J. PSYCHIATRY & L. 483, 486 (1984).
[I]f the patient had knowingly and willfully stopped taking his medication and had then relapsed into a manic state, would we not want to hold him responsible for being in a manic state for the harms he commits while in that state? Is he not at least partially to blame for those harms?
Id. at 488 ("Surely [holding the defendant responsible] seems more in keeping with our common moral intuitions than does the result achieved by a strict application of the standards found in the ALI version of the insanity defense or in any of the recent proposals for revision."). One author has defined "ethical intuition" as "the unconscious recognition of the moral qualities of an action without a resort to reason." Eric C. Chaffee, *An Interdisciplinary Analysis of the Use of Ethical Intuition in Legal Compliance Decisionmaking for Business Entities*, 74 MD. L. REV. 497, 498 (2015); *see also* Mitchell, *supra* note 103, at 66.

104 *See* Mitchell, *supra* note 103, at 66 (arguing that a criminal proceeding should be separated into three stages: "(1) determining guilt or innocence to the charge; (2) determining whether the defendant was suffering from a [defect of mind] (e.g., mental disorder, intoxication, substance abuse); and (3) determining the defendant's level of culpability for that [defect of mind]."); *see also* Torry & Weiss, *supra* note 16, at 236-38 (arguing that medically noncompliant offenders should be prosecuted under reckless endangerment statutes for the purposes of using the criminal justice

system therapeutically).

105 *See supra* Section I.BC. This proposal is particularly strong because it is based on existing legal doctrine.

106 *See* Michael D. Slodov, *Criminal Responsibility and the Noncompliant Psychiatric Offender: Risking Madness*, 40 CASE W. RES. L. REV. 271, 288-89 (1989).

107 *Id.*

108 *See, e.g.*, United States v. Kenyon, 481 F.3d 1054, 1070 (8th Cir. 2007) ("A defendant charged with a specific intent crime is entitled to an intoxication instruction when 'the evidence would support a finding that [the defendant] was in fact intoxicated and that as a result there was a reasonable doubt that he lacked specific intent.'") (citation omitted).

109 *See* Robinson, *supra* note 6, at 15.

110 *See id.*

111 *See id.* Robinson notes, however, that only recklessness may be imputed to the defendant in this situation. *Id.* Thus, a defendant may only be convicted of an offense which requires that the defendant acted recklessly-- such as manslaughter--but may not be convicted of an offense in which the defendant must act with purpose or knowledge--such as murder. *Id.* at 14-15.

112 *See* Slodov, *supra* note 106, at 315 ("An examination of [the insane defendant's] *mens rea* at the time of the offense will most likely lead to an unsatisfying result. His delusional belief that he was making lemonade at the time he was killing the people would negate *mens rea*.").

113 *See id.* at 311-12. ("If, as in the epilepsy and intoxication contexts, we were to expand the time frame to include in our examination the events that led to [a noncompliant offender's] lack of capacity, we could choose to impose liability for his precedent conduct and focus on the risk taken, or subsequent conduct and focus on the harm done.").

114 *See id.* at 322-23.

115 *See id.* at 312-15.

116 *See* Mitchell, *supra* note 103, at 66.

117 *See supra* text accompanying notes 68-74.

118 Commonwealth v. Shin, 16 N.E.3d 1122, 1127-28 (Mass. App. Ct. 2014) (noting that mentally ill people sometimes fail to take medication for health reasons, financial reasons, or administrative reasons, and that these reasons make the

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choice to become noncompliant with medication categorically different from than choice to consume drugs or alcohol).

119 *Id.* at 390.

120 *See supra* text accompanying note 59.

121 *See* United States v. Garcia, 94 F.3d 57, 62 (2d Cir. 1996) (discussing only voluntary substance abuse and voluntary intoxication); *see also* United States v. Knott, 894 F.2d 1119, 1123 (9th Cir. 1990) ("We hold that under the Insanity Defense Reform Act, the defendant's *voluntary* drug use or intoxication at the time of the crime may not be considered in combination with his mental disease or defect in determining whether the defendant was unable to appreciate the nature and quality or wrongfulness of his acts.") (emphasis added). When intoxication is involuntary, courts typically find the *Burnim* exception to the insanity defense inapplicable. United States v. Henderson, 680 F.2d 659, 664 (9th Cir. 1982) ("Because the Government failed to introduce any evidence to rebut the evidence that Henderson's drinking was involuntary, the *Burnim* exception to the insanity defense is inapplicable.").

122 *See supra* text accompanying notes 112-118.

123 *Shin*, 16 N.E.3d at 1128 ("[S]ome medications work better than others, or take time to become effective, and the difficulty of discerning when, exactly, someone stopped taking medication and what his mental state was at that time would be challenging at best.").

124 *See, e.g.*, Jeffrey A. Lieberman et al., *Effectiveness of Antipsychotic Drugs in Patients with Chronic Schizophrenia*, 353 THE NEW ENGLAND J. OF MED. 1209 (2005) (analyzing the relative effectiveness and rates of discontinuation of second-generation antipsychotic drugs as compared to older agents in patients with chronic schizophrenia).

125 *See, e.g.*, B.A. Ellenbroek, *Treatment of Schizophrenia: A Clinical and Preclinical Evaluation of Neuroleptic Drugs*, 57 PHARMACOLOGY & THERAPEUTICS 1, 1831 (1993) (discussing the various adverse side effects of drugs which are widely used to treat schizophrenia).

126 *See, e.g.*, John L. Young et al., *Medication Adherence in Schizophrenia: A Forensic Review of Rates, Reasons, Treatments, and Prospects*, 27 J. AM. ACAD. PSYCHIATRY L. 426, 430-31 (1999) (describing risk factors which may lead to noncompliance, as well as methods for evaluating effectiveness of treatment in promoting compliance).

127 *See infra* notes 124-26.

128 The American Psychiatric Association's Practice Guidelines for the Treatment of Schizophrenia recommend ongoing monitoring and assessment even after a patient "has achieved an adequate therapeutic response with minimal side effects or toxicity with a particular medication regimen." AMERICAN PSYCHIATRIC ASSOCIATION, PRACTICE GUIDELINES FOR THE TREATMENT OF PSYCHIATRIC DISORDERS, 595-96 (2006). Such a patient "should be monitored while taking the same medication and dose for the next 6 months." *Id.* at 595. This monitoring can result in useful insight into how the medication affected the patient.

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129 Under Massachusetts law, a patient has the privilege to refuse to disclose any communication between him and his psychiatrist in any Court proceeding, and may also prevent others from disclosing such information. MASS.GEN.LAWS. 233 § 20B (2001). However, a patient may waive this privilege, and would thus be able to produce assessments indicating that his medication was not effective. *Id.*

130 Commonwealth v. Shin, 16 N.E.3d 1122, 1128 (Mass. App. Ct. 2014) ("'The *source* of the lack of substantial capacity [was] the critical factor in determining whether the defendant [was] criminally responsible' in those cases .... It strains that analysis considerably to apply it to a defendant such as this, because his mental illness is not *caused* by his failure to take medication, even though the medication might alleviate it somewhat or even entirely.") (citation omitted) (emphasis retained).

131 *See id.* at 1127 (noting that the *Berry-DiPadova* framework applies when a preexisting mental illness is exacerbated or intensified by voluntary intoxication.). Where insanity is produced solely by the voluntary consumption of drugs or alcohol and without any preexisting mental illness, then the defendant is precluded from raising the insanity defense.

132 *See* Commonwealth v. Berry, 931 N.E.2d 973, 984 (Mass. 2010) ("'A defendant's lack of criminal responsibility cannot be solely the product of intoxication caused by her voluntary consumption of alcohol or another drug.'") (citation omitted); *see also* Commonwealth v. Sheehan, 383 N.E.2d 1115, 1119 (Mass. 1978) ("If the defendant's lack of substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is solely the product of his voluntary consumption of drugs, he does not meet the McHoul test, even if he has a mental disease or defect.") (citation omitted).

133 *Shin*, 16 N.E.3d at 1129 (stating that when taken to its logical extreme, the argument advanced by Massachusetts in favor of finding a medically noncompliant defendant guilty "could be used to argue that every mentally ill defendant who had ever taken helpful medication in the past, but discontinued it, was criminally responsible ....").

134 *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 59394 (1981) ("Often, conduct is deemed involuntary (or determined) rather than freely willed (or intentional) because we do not consider the defendant's earlier decisions that may have put him in the position of apparent choicelessness. Conversely, conduct that could be viewed as freely willed or voluntary if we looked only at the precise moment of the criminal incident is sometimes deemed involuntary because we open up the time frame to look at prior events that seem to compel or determine the defendant's conduct at the time of the incident.").

135 For a discussion which illustrates the difficulty in reconciling cases in which a narrow time frame was used with cases in which a broad time frame was used, *see id.* at 604-05.

136 Kelman suggests that discussions of these philosophical time-framing issues do not frequently appear in legal opinions because time-framing is an "arational" and "unconscious interpretive construct." *See id.* at 593-94.

137 *See supra* note 47.

138 The court determined that there were little to no cases from outside of Massachusetts' jurisdiction that would help resolve these issues. *See Shin*, 16 N.E.3d at 1128 ("Whether the *Berry-DiPadova* analysis is proper in a case such as this is a difficult question and one for which our cases--*and those of other jurisdictions*--provide little guidance.") (emphasis added).

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139 *See* Part I.C.; *see also* Slodov, *supra* note 106, at 283 ("Responsibility may be imposed ... by imputing the mental state behind the precedent conduct to the subsequent offense.").

140 *See* Slodov, *supra* note 106, at 273 ("Ignoring factors that contribute to the existence of the mental illness, specifically noncompliance with treatment, is contrary ... to the judicial disposition of other self-induced incapacities like voluntary intoxication and epilepsy ....").

141 *See* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 8 (1984) ("'[S]pecial' mens rea [is] the specific mental state element that is part of the definition of the crime and thus part of the prosecution's prima facie case ....").

142 *Id.* at 8 ("'[G]eneral' mens rea ... [is the] lack of responsibility that might be produced in whole or in part by factors such as legal insanity, duress, or partial responsibility.").

143 *See infra* text accompanying notes 151-155.

144 *See infra* text accompanying notes 156-160.

145 *See, e.g.*, United States v. Semsak, 336 F.3d 1123, 1124 (9th Cir. 2003) (stating that a drunk driver that killed his victim after colliding with the victim's vehicle was charged with involuntary manslaughter).

146 The federal charge of involuntary manslaughter involves the unlawful killing of a human being, without malice, in the commission of a lawful act which might produce death "without due caution and circumspection." 18 U.S.C. § 1112 (2012). While not explicitly stated in the statute, federal courts generally require a showing of recklessness to convict a defendant of involuntary manslaughter. *See, e.g.*, United States. v. Garcia, 729 F.3d 1171, 1177 (9th Cir. 2013) (holding that involuntary manslaughter conviction under 18 U.S.C. § 1112 required showing of gross negligence, which court defined as "wanton or *reckless* disregard for human life.") (quotations omitted) (emphasis added).

147 This situation is factually similar to People v. Decina, 138 N.E.2d 799 (N.Y. 1956). There, the defendant had a history of epileptic seizures and blacked out while driving, after which his car hit and killed four schoolchildren. *Id.* at 800-03.

148 These, of course, could be a factual issue at trial, because the government would still have to prove that the defendant knew of and consciously disregarded a substantial and unjustifiable risk. *See id.* at 803-04.

149 *See* Slodov, *supra* note 106, at 292 ("The difficulty associated with finding *mens rea* associated with the subsequent conduct without looking back in time to the freely-chosen caused conduct is that at some levels of incapacity, no *mens rea* will be found with respect to the subsequent act.").

150 *See id.* at 293-94 ("If [the defendant] had been aware that a substantial and unjustifiable risk of harm existed and he chose to disregard those risks and become intoxicated, he would be appropriately held responsible for manslaughter."). Note that this imputation falsely equates a general recklessness with recklessness as to a particular material element. Nevertheless, the impropriety of this false equivalency is outside of the scope of this note.

151 *See* Morse, *supra* note 141, at 8 ("Courts and commentators consistently fall prey to confusing 'special' mens rea, the specific mental state element that is part of the definition of the crime and thus part of the prosecution's prima facie case, and 'general' mens rea, a generic term for lack of responsibility that might be produced in whole or in part by factors such as legal insanity, duress, or partial responsibility.").

152 *See id.* ("A defendant who lacks special mens rea is acquitted because his conduct fails to satisfy the state's definition of the offense, not because he lacks responsibility. The conduct of a defendant who lacks general mens rea almost always satisfies the elements of the prima facie case including special mens rea, but he is acquitted because he is not considered responsible for his conduct.").

153 John W. Hinckley Jr. may have attempted to assassinate President Reagan because he believed that it would impress actress Jodie Foster. *See* Taylor, *supra* note 89.

154 Such a defendant would be acting purposely insofar as it was his conscious objective to kill his victim, and he was aware that he was killing a human being. *See* MODEL PENAL CODE § 2.02. When a defendant's mental disease or defect negates special mens rea, the defendant is actually raising what is generally termed a diminished capacity defense. *See* Morse, *supra* note 141, at 5 7. That defense is surrounded by a host of controversy, with many commentators arguing that it is simply a failure of proof defense that should not be distinguished or treated differently from any other such defense. *See id.* Nevertheless, the effect that medication noncompliance would have on the diminished capacity defense is beyond of the scope of this Note.

155 This argument is actually diminished capacity, not insanity. *See* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 4748 (2007).

156 *See* Sherlock, *supra* note 103, at 485 ("Both in legal punishment and moral blame we have a deep-seated sense that it is wrong to punish people for either acts they did not know were wrong or that they could not prevent themselves from doing. In the last decade, however, developments in psychiatric medicine have rendered this seemingly uneventful conclusion increasingly questionable. The most significant of these developments is our increasing capacity to control the most severe forms of mental illness with appropriate pharmacological management.").

157 *See supra* Part III.

158 The features that a congressionally enacted law limiting the insanity defense should have is outside of this note. Moreover, such a law may be susceptible to constitutional challenge. *See infra* notes 186187 and accompanying text. However, the hypothetical constitutionality of such a law is outside of the scope of this note as well.

159 Joseph P. Liu, Note, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 COLUM. L. REV. 1223, 1231 (1993) ("Prior to 1984, there existed no uniform federal definition of criminal insanity. In the absence of a definitive declaration from either Congress or the Supreme Court, federal circuits enjoyed wide discretion in defining what constituted criminal insanity.").

160 Stuart Taylor Jr., *Hinkley [sic] Is Cleared but Is Held Insane in Reagan Attack*, N.Y. TIMES (June 22, 1982), http://www.nytimes.com/1982/06/22/us/hinkley-is-cleared-but-is-held-insane-in-reagan-attack.html?pagewanted=all.

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161 *See* Liu, *supra* note 159, at 1231.
In the absence of a definitive declaration from either Congress or the Supreme Court, federal circuits enjoyed wide discretion in defining what constituted criminal insanity. Many circuits eventually adopted the definition set forth in the ALI Model Penal Code, under which a defendant was not held criminally responsible if he lacked 'substantial capacity' either (1) to appreciate the criminality of his conduct (the 'cognitive' test) or (2) to conform his conduct to the requirement of law (the 'volitional' test).
Id.

162 18 U.S.C. § 17 (2012); *see also* United States v. Garcia, 94 F.3d 57, 61 (2d Cir. 1996) ("Congress enacted the IDRA, the first federal legislation on the insanity defense, largely in response to public concern over the acquittal of **John** W. **Hinkley** [sic], Jr. for the attempted assassination of President Reagan.").

163 S. REP. NO. 98225, at 225 (1984) ("The principal difference between the statement of the defense in S. 1762 and that presently employed in the federal courts is that the volitional portion of the cognitive-volitional test of the ALI Model Penal Code is eliminated.").

164 *Id.* at 229.
The provision that the mental disease or defect must be 'sever' [sic] was added to Section 20 as a committee amendment. As introduced in S. 829, the provision referred only to a 'mental disease or defect.' The concept of severity was added to emphasize that non-psychotic behavior disorders or neuroses such as an 'inadequate personality,' 'immature personality,' or a pattern of 'antisocial tendencies' do not constitute the defense.
Id.

165 *Id.* at 229 ("Significantly, the bill as reported shifts the burden of proof of the insanity defense to the defendant, who must demonstrate, by clear and convincing evidence, that his severe mental disease or defect caused him not to appreciate the nature and quality or wrongfulness of his acts.").

166 *See, e.g.*, Jay M. Zitter, Annotation, *Construction and Application of 18 U.S.C.A.i§ 17, Providing for Insanity Defense in Federal Criminal Prosecutions*, 118 A.L.R. FED. 265 (1994) (stating that Congress enacted the Insanity Defense Reform Act of 1984, which made the federal insanity defense more difficult to satisfy, as a response to the "public outcry and pressure surrounding the use of the insanity defense in the prosecution of John Hinckley for the attempted assassination of President Reagan.").

167 S. REP. NO. 98-225, at 229 (1984).

168 *See* United States v. Garcia, 94 F.3d 57, 62 (2d Cir. 1996) ("Statements of congressional intent are rarely so clear.").

169 *See* *id.* at 61-62.

170 *See* Kane v. United States, 399 F.2d 730, 73536 (9th Cir. 1968) ("[T]he mental condition which produced such disability must have been brought about by circumstances beyond the control of the actor."); *see also* United States v. Burnim, 576 F.2d 236, 238 (9th Cir. 1978) ("[M]ental disability, however defined, must have been brought

about by circumstances beyond the control of the actor.").

171 *See* S. REP. NO. 98-225, at 229 (1984).
The committee also intends that, as has been held under present case law interpretation, the *voluntary use of alcohol or drugs*, even if they render the defendant unable to appreciate the nature and quality of his acts, does not constitute insanity or any other species of legally valid affirmative defense.
Id. (emphasis added).

172 This is because early statements of the rule used broad phrasing that could be applicable to any situation in which the defendant's action or inaction somehow induced his insanity. *See, e.g.*, *Kane*, 399 F.2d at 73536.

173 *See* *Garcia*, 94 F.3d at 61-62 (relying on the statement in the Senate Judiciary Report to determine how to apply the IDRA standard).

174 *See* S. REP. NO. 98-225.

175 *See* 21 U.S.C. § 841(a)(1) (2012). Controlled substances under the act include, inter alia, heroin, cocaine, marijuana, and phenylcyclidine (PCP). *See* § 841(b)(1)(B). A defendant convicted under 21 U.S.C. § 841 may be sentenced to life in prison. *See* § 841(b).

176 *See, e.g.*, 21 U.S.C. § 801(2) (2012) (stating in the congressional findings supporting the Controlled Substances Act that the "improper *use* of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.") (emphasis added).

177 *See, e.g.*, 18 U.S.C. § 4243(g) (2012) (allowing the Attorney General to revoke an insanity acquitee's conditional discharge from a medical facility, and reinstate that noncompliant patient to a *medical facility*, for failure to adhere to a prescribed medication regimen).

178 *But see* Mitchell, *supra* note 103, at 64-65 (noting the similarity between a defendant who induces insanity by consuming an intoxicant and a defendant who induces insanity by failing to consume medication).

179 *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221 (1990) (recognizing that respondent had "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment").

180 Whether such a law would actually be unconstitutional is outside of the scope of this Note. However, the appellants in *United States v. Fisher* argued that such a law imposes an affirmative duty on defendants to take medication and thus violates a recognized liberty interest under the Due Process Clause. *See* Brief for Appellant (with attachments in scanned PDF form) at 17, United States v. Fisher, 278 F. App'x 810 (10th Cir. 2008) (No. 07-6161).

181 *See supra* notes 175-177 and accompanying text.

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182 *See* 18 U.S.C. § 17 (2012).

183 *See* S. REP. NO. 98-225, at 222 (1984).
Title IV of the bill amends various provisions of Title 18, U.S.C. and the Federal Rules of Criminal Procedure relating to the insanity defense and the procedures to be followed in federal courts with respect to offenders who are or have been suffering from a mental disease or defect. The legislation includes a definition of the insanity defense that will substantially narrow the definition, which has evolved from case law, presently applied in the federal system. Title IV also provides that the defendant shall have the burden of proving the insanity defense by clear and convincing evidence and prohibits expert opinion testimony on the ultimate legal issue of whether the defendant was insane.
Id.; *see also* United States v. Garcia, 94 F.3d 57, 61 (2d Cir. 1996).
Congress enacted the IDRA, the first federal legislation on the insanity defense, largely in response to public concern over the acquittal of **John** W. **Hinkley** [sic], Jr. for the attempted assassination of President Reagan. In enacting the IDRA, Congress made two substantial changes to the federal insanity defense. First, it narrowed the definition of insanity that had evolved from the caselaw. Second, it shifted to the defendant the burden of proving the insanity defense by clear and convincing evidence.
Id. (citation omitted).

184 *See* *Garcia*, 94 F.3d at 61 ("Because the charge is not covered expressly by the text of the Insanity Defense Reform Act of 1984 ('IDRA'), 18 U.S.C. § 17, in examining the charge for error, we are required to look to the congressional intent behind the IDRA and to existing caselaw.").

185 *See* S. REP. NO. 98-225, at 229 (1984)
The committee also intends that, as has been held under present case law interpretation, the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, does not constitute insanity or any other species of legally valid affirmative defense.
Id.

186 Neither the statute nor the Senate report mention what effect, if any, a defendant's failure to adhere to a treatment regime should have on the defense. *See generally* 18 U.S.C. § 17 (2012); S. REP. NO. 98-225.

187 *See supra* text accompanying notes 175-181.

188 *See* Craig W. Dallon, Note, *Interpreting Statutes Faithfully--Not Dynamically*, 1991 B.Y.U. L. REV. 1353, 1353 (1991) ("Our system of government anticipates that courts will construe and interpret statutes that legislative bodies enact.").

189 *See* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 8 (2009) ("In enacting a piece of legislation, a legislative body, generally through a committee, collects factual evidence relevant to the proposal. It then makes a policy judgment as to whether action is warranted in light of the facts.").

190 Richard Rogers et al., *A Study of Socio-Demographic Characteristics of Individuals Evaluated for Insanity*, 28 INT. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 3, 7-8 (1984) ("Four socio-demographic variables were found to be significantly associated with both clinical and subsequent legal decision. Of these, prior histories of schizophrenia and psychoactive medication were highly correlated (phi = .68) and were, as expected, associated with a finding of not guilty by reason of insanity.").

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191 *See id.* at 6. Of all factors that the study found relevant in predicting whether a not guilty by reason of insanity verdict would be reached, prior use of psychoactive medication was found to be tied with schizophrenia for the second highest correlation among defendants who successfully raised the defense. *See id.* at 8.

192 In addition to the intuitive conclusion that those who continued their treatment are less likely to exhibit psychotic symptoms, this is also probable given the high percentage of medication noncompliance among the entire population of patients prescribed antipsychotic medication. *See* Torry & Weiss, *supra* note 16, at 230-31 ("Over 50% of patients on antipsychotic medications exhibit full or partial nonadherence. Within 7 to 10 days of medication initiation, 25% stop taking the medication; 50% stop after 1 year; and 75% stop after 2 years. Only 33% of patients with mental illness reliably take medications as prescribed.") (citations omitted).

193 While it cannot be assumed that the defendant would be found guilty every time medication noncompliance is an issue, it could nevertheless affect the outcome of any case in which the defendant had at one point taken medication. This is especially true if the federal judiciary were to simply extend the doctrine expressed in *Garcia*, and prohibit a successful insanity defense whenever but for the defendant's noncompliance, he would have been sane. *See* United States v. Garcia, 94 F.3d 57, 62 (2d Cir. 1996) (holding that allowing jury to consider effect of voluntary drug or alcohol use on mental illness for insanity defense would violate congressional intent to preclude availability of insanity defense to defendants who lack capacity due to voluntary consumption of drugs or alcohol).

194 *See* Fradella, *supra* note 155, at 12 ("In fact, the insanity defense is used quite rarely. It is only raised in approximately 1% of all felony cases, and when invoked, the insanity defense is successful less than 25% of the time.").

195 *See* Commonwealth v. Shin, 16 N.E.3d 1122, 1127 (Mass. App. Ct. 2014) (noting that pursuant to *DiPadova*, juries are instructed that a defendant is "criminally responsible if he knew (or should have known) that the consumption would have the effect of intensifying or exacerbating his mental condition ....").

196 *See* Wayne S. Fenton et al., *Determinants of Medication Compliance in Schizophrenia: Empirical and Clinical Findings*, 23 SCHIZOPHRENIA BULL. 637, 641 (1997) ("Neuroleptic side effects that may be particularly unpleasant include sedation, anticholinergic effects, cognitive blunting, depression, sexual dysfunction, and extrapyramidal syndromes--dystonia, akinesia, Parkinsonian effects, akathisia, and tardive dyskinesia.").

197 *See Shin*, 16 N.E.2d at 1127.

198 *See* Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 620 (1961).

199 *See* Dallon, *supra* note 188, at 1353-54 ("The constitutional structure of our democratic system disapproves of any philosophy that invites calculated judicial lawmaking each time a statute is interpreted. Rather it calls upon the judiciary to interpret and apply the law to cases which come before it.").

200 *See* Traynor, *supra* note 198, at 620 ("Many forces constrain review within extremely narrow limits. The most immediate constraint is the controversy itself that calls for decision; even the unprecedented controversy automatically precludes any ambitious excursion beyond its own context.").

201 *See supra* Part I.C.

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202 *See* Slodov, *supra* note 106, at 283 ("Responsibility may be imposed ... by imputing the mental state behind the precedent conduct to the subsequent offense.").

203 *See* Fenton, *supra* note 196, at 642.

204 *See* Borgmann, *supra* note 189, at 8; *see also* Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 16-17 (1990).
The judicial process may only be commenced by a person intimately and currently engaged in a dispute in which that person stands to be tangibly and personally injured unless government intervenes. In direct contrast to the legislature, where the lawmakers themselves have the final authority formally to commence the lawmaking process, the judiciary is completely barred from doing so. Moreover, the mode and extent of judicial inquiry, as compared to that of the legislature, is at once severely constricted in latitude and exponentially more intrusive in depth. The court's universe is limited to one particular real-life dispute, and its world is made up only of facts relevant to the origin, implications, and resolution of a discrete conflict. Unlike the legislature, in a conflict of any importance the judiciary issues an opinion which, if it is 'worth its salt,' positions the case in the contextual, historical, and cultural dimensions making up the legal landscape.
Id.

205 *See, e.g.*, Mitchell, *supra* note 103, at 66 (noting that "[o]ur moral intuition" favors holding the medically noncompliant defendant "culpable for bringing about his murderous state").

206 For example, Paul H. Robinson states that a "widely-stated goal of criminal law theory is to create the set of rules that best implements our collective sense of justice" in discussing his theoretical framework for addressing all situations in which a defendant creates the circumstances of his own defense. Robinson, *supra* note 6, at 1.

207 *See* Slodov, *supra* note 106, at 273

208 *See id.* ("Ignoring factors that contribute to the existence of the mental illness, specifically noncompliance with treatment, is contrary not only to the judicial disposition of other self-induced incapacities like voluntary intoxication and epilepsy but also to the theories behind the insanity defense and the goals of the criminal law.") (citation omitted).

209 As already noted, the criminal law generally seeks to prohibit a defendant from raising a defense when that defendant is responsible for creating the conditions of that defense. *See generally* Robinson, *supra* note 6.

210 Whether the criminal law should embody community moral standards, or should instead embody less strict utilitarian principles, was famously the subject of "the Hart-Devlin debate." *See* Jeffrie G. Murphy, Symposium, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 74 (1995). Some scholars note that those who expounded the idea that the law should reflect community morals were the clear losers in that debate. *See* Alice Ristroph, Symposium, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1152 (2011). Nevertheless, resolving which legal philosophy should underlie the criminal law is outside of the scope of this Note.

211 *But see supra* text accompanying notes 174-179 (noting that Congress has previously treated voluntary intoxication as distinct from medication noncompliance).

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212 *See* U.S. CONST. art. III; Vicki C. Jackson, Conference, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 969 (2007) (noting that the founders intended Article III judges, to be "independent of popular passions and certain kinds of pressures from other branches of the government").

213 Robinson's reference to *"our collective* sense of justice" implies that the moral intuitions with which the criminal law should be concerned are held not just by a single individual, but by a broader social group. *See* Robinson, *supra* note 6, at 1 (emphasis added). Moreover, Murphy notes that Devlin--the primary proponent of legal moralism in the Hart-Devlin debate--was concerned with "violations of a *society's* shared morality" when speaking of the moral intuitions that should give rise to criminal penalties. *See* Murphy, *supra* note 210, at 76 (emphasis added).

214 *See* Jackson, *supra* note 212, at 969.

215 *Id.* at 967-69.

216 *Id.* at 969.
The harder question is what were judges to be independent to do? Some answers are: they were to be independent to judge according to law; they were to have the independence to *interpret* the law in order to render judgment; they were to protect minorities from popular passions that would violate their legal rights; and they were to check the other branches of government when they departed from the fundamental commitments set forth in the Constitution.
Id.

217 For example, the Warren Court was widely criticized by members of all three branches of the federal government--particularly regarding its judicial reformation of criminal procedure--for engaging in "judicial activism." *See* Charles J. Ogletree, Jr., Symposium, *Judicial Activism or Judicial Necessity: The D.C. District Court's Criminal Justice Legacy*, 90 GEO. L.J. 685, 691-94 (2002). One commentator criticized the Warren Court for being guided by a "simple moral compass" instead of reasoned legal arguments. *See id.* at 694.

218 *See* Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U. L.J. 1285, 1285 (2004).
The Supreme Court ... announced almost 200 years ago that there are no federal common law crimes. As a result of the nineteenth century codification movement, every American state has for decades accepted the notion of legislative supremacy in Criminal Law--the idea that legislators rather than judges should create and define criminal offenses.
Id.

219 *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) ("[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.").

220 Members of the House of Representatives are elected every two years. U.S. CONST. art. I, § 2. cl. 1. Members of the Senate are elected every six years. U.S. CONST. amend. XVII.

221 *See supra* notes 159-166 and accompanying text.

222 *See* Jay M. Zitter, *Construction and Application of 18 U.S.C.A. § 17, Providing for Insanity Defense in Federal Criminal Prosecutions*, 118 A.L.R. FED. 265 (1994).
As one of the responses to public pressure surrounding the use of the insanity defense in the prosecution of John Hinckley for the attempted assassination of President Reagan, Congress enacted the Insanity Defense Reform Act of

1984 (18 U.S.C.A. § 17), which toughened the standard for the application of the defense in federal cases. *Id.* A poll conducted by ABC shortly after John W. Hinckley Jr.'s trial in 1982 found that 76 percent of those polled believed that justice had not been done in his trial for the attempted assassination of President Ronald Reagan, which resulted in an insanity acquittal. Associated Press, *Hinkley [sic] Acquittal Brings Moves to Change Insanity Defense*, N.Y. TIMES (June 24, 1982), http://www.nytimes.com/1982/06/24/us/hinkley-acquittal-brings-moves-to-changeinsanity-defense.html.

223 *See supra* Section IV.A.

224 *See supra* Section IV.A.

225 *See supra* Section IV.B.

226 *See supra* Section IV.C.

227 *See supra* Part III.

228 *See supra* Part IV.

229 *See supra* Part III.

230 *See supra* Part IV.

231 *See supra* Part II.

232 *See supra* Part II.

233 *See supra* Part IV.

234 In other words, by considering and ultimately rejecting the relevance of the defendant's medication noncompliance to his insanity defense on the grounds that it is factually distinguishable from voluntary intoxication, the court implicitly grants that it could have ruled otherwise and instead chose not to. By instead deferring to the legislature based upon separation of powers principles, the court makes clear that only the legislature has the power to come to a contrary ruling.

235 *See supra* Part II and III.

236 *See supra* Section IV.B.

237 *See supra* Part II.

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238 Congress has already changed the federal insanity defense by enacting the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (2012), and is of course free to continue to do so through subsequent legislation. Whether Congress should enact such a rule, however, is beyond the scope of this Note.

239 *See supra* Section IV.C.

240 *See supra* Section IV.B.

241 As noted by Judge Koszinski, judicial scrutiny of scientific methods and expert testimony can be a "daunting" and "heady task" for federal judges. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1315-16 (9th Cir. 1995).

242 *See* Torry & Weiss, *supra* note 16, at 221-22.

243 *See supra* Part II.

244 *See supra* Part IV.

245 Massachusetts--the State in which *Shin* was decided--notably falls into this category. *See* Commonwealth v. Shin, 16 N.E.3d 1122, 1123, 1127 (Mass. App. Ct. 2014).

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Materials Accompanying Triangle Shirtwaist Factory Fire Trial

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Commonwealth v. Delbridge

Supreme Court of Pennsylvania

April 10, 2002, Argued ; September 25, 2003, Filed

No. 150 MAP 2001

Reporter
578 Pa. 641 *; 855 A.2d 27 **; 2003 Pa. LEXIS 1754 ***

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GERALD JOHN DELBRIDGE, Appellant

Prior History: [*1]** Appeal from the Order of the Superior Court of Pennsylvania dated March 8, 2001 at No. 1202 MDA 1999, *(771 A.2d 1 (Pa. Super. 2001))*affirming the Judgment of Sentence of the Court of Common Pleas of Luzerne County, dated June 25, 1999 at No. 2027-98.

Commonwealth v. Delbridge, 2001 PA Super 75, 771 A.2d 1, 2001 Pa. Super. LEXIS 276 (Pa. Super. Ct., 2001)

Disposition: Remanded for new competency hearing.

Core Terms

competency hearing, competency, memory, expert testimony, trial court, child witness, hearsay statement, credibility, interviews, questions, pre-trial, sexual abuse, allegations, reliability, assault, cases, exploration, asserts, sexual, implantation, witnesses, adult, cross-examination, sexual abuse of child, interview technique, communicate, assessing, touched, interrogation, recollection

Case Summary

Procedural Posture
Appellant sought review from an order of the Superior Court of Pennsylvania, which affirmed the trial court's conviction of him for sexual assault of his children. The trial court had found that the children were competent witnesses and had denied appellant the opportunity to present evidence that their testimony was tainted.

Overview

Appellant was charged with sexually abusing his children and he contested the children's testimonial competency due to their youth, taint from suggestive interviews, and their mother's paranoia. It was noted that appellant was physically excluded during the children's testimony at the competency hearing, which had been rescheduled to an earlier date, thereby precluding appellant from presenting his planned expert witness. The trial court had also found that use of an expert witness on the issue of taint was precluded. The children were found competent and appellant was convicted, which was affirmed on appeal. On further appeal, the court held that the trial court erred in not allowing appellant to explore the issue of taint at the competency hearing. Further, it was within the trial court's discretion to allow use of an expert if the circumstances of the case warranted it. The court held that evidence of taint was admissible during the competency hearing, which could include some of the details of the events reported by the children. Admissibility of hearsay statements of the children to third parties, pursuant to *42 Pa. Cons. Stat. Ann. § 5985.1*, awaited the taint determination.

Outcome
The court remanded the case for a new competency hearing.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Evidence > ... > Testimony > Competency > General Overview

HN1[] **Abuse of Discretion, Evidence**

An appellate court's standard of review of a trial court ruling on competency is for an abuse of discretion. This same standard also applies to related evidentiary rulings made by the trial court.

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > ... > Testimony > Competency > General Overview

HN2[] Examination of Witnesses, Child Witnesses

The core belief underlying the theory of taint is that a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy. Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.

Criminal Law & Procedure > ... > Sexual Assault > Corruption of a Minor > General Overview

Evidence > Types of Evidence > Testimony > General Overview

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair Identification Requirement

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > ... > Testimony > Competency > General Overview

HN3[] Sexual Assault, Corruption of a Minor

New Jersey courts have found that a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events. Taint is equally capable of corrupting the memory of a child witness during the investigation of an allegation of sexual abuse. Various factors for assessing accusations of sexual abuse made by children have been identified, however, the list is not exhaustive and the matter must be analyzed in the totality of the circumstances involved. The factors are: (1) the age of the victim, (2) circumstances of the questioning; (3) the victim's relationship with the interrogator; and (4) the type of questions asked.

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > Types of Evidence > Testimony > General Overview

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Criminal Law & Procedure > Preliminary Proceedings > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > General Overview

Criminal Law & Procedure > Trials > Witnesses > General Overview

Criminal Law & Procedure > Trials > Witnesses > Credibility

Evidence > ... > Testimony > Competency > General

Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > Admissibility > Expert Witnesses > Ultimate Issue

HN4[] Examination of Witnesses, Child Witnesses

In New Jersey, the defendant carries the initial burden of showing that some evidence exists to invoke a taint hearing on the issue of child witness competency. The burden then shifts to the prosecution to support the admissibility of the proffered statements by clear and convincing evidence. The clear and convincing standard balances the competing interests of safeguarding the defendant's right to a fair trial without imposing so severe a burden on the prosecution as to make it impossible to prove cases of child sexual abuse. By application of the clear and convincing standard, the burden on the prosecution is to establish that despite the presence of some suggestive or coercive techniques in the manner in which it was gathered, when considered in the totality of the circumstances, the proffered testimony is sufficiently free from contamination, thus outweighing the effects of taint. Although expert testimony is admissible on the propriety of the interrogation techniques used in New Jersey, it cannot extend to the ultimate issue of the credibility of the child witness. Even if the testimony is ultimately ruled admissible, expert testimony may be presented at trial to aid the jury by explaining the coercive or suggestive propensities of the interview techniques used.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Evidence > ... > Competency > Disability > Children

Evidence > ... > Testimony > Competency > General Overview

Evidence > ... > Competency > Disability > General Overview

Evidence > Types of Evidence > Testimony > General Overview

HN5[] Burdens of Proof, Defense

In Wyoming, once the competency of a child witness is called into question, Wyoming courts are required to make an independent pre-trial examination to determine competency. A child witness will be deemed competent if the trial court determines that the child meets the following five-part test: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it. The concept of taint is a legitimate inquiry within the scope of existing Wyoming law on competency, as a taint allegation speaks to whether the witness possessed a memory sufficient to retain an independent recollection of the occurrence. The burden is on the defendant to show some evidence that the child's statements were the product of suggestive or coercive interview techniques in order to warrant review of the taint issue within the context of a competency hearing.

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > ... > Testimony > Competency > General Overview

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

HN6[] Examination of Witnesses, Child Witnesses

Pretrial exploration of taint is necessary in those cases where there is some evidence that improper interview techniques, suggestive questioning, vilification of the accused and interviewer bias may have influenced a child witness to such a degree that the proffered testimony may be irreparably compromised. Taint is a legitimate question for examination in cases involving complaints of sexual abuse made by young children.

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > ... > Competency > Disability > Children

Evidence > ... > Testimony > Competency > General Overview

Evidence > ... > Competency > Disability > General Overview

Evidence > Types of Evidence > Testimony > General Overview

HN7[] Trials, Judicial Discretion

A decision on the necessity of a competency hearing is addressed to the discretion of the trial court. The general rule in Pennsylvania is that every person is presumed competent to be a witness. *Pa. R. Evid. 601(a)*. Despite the general presumption of competency, Pennsylvania presently requires an examination of child witnesses for competency. *Rule 601(b)*. The test for competency of immature witnesses is that there must be: (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that she is called to testify about and (3) a consciousness of the duty to speak the truth.

Evidence > ... > Competency > Disability > Children

Evidence > ... > Testimony > Competency > General Overview

Evidence > ... > Competency > Disability > General Overview

Evidence > Types of Evidence > Testimony > General Overview

HN8[] Disability, Children

The capacity of young children to testify has always been a concern as their immaturity can impact their ability to meet the minimal legal requirements of competency. A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the fact finder. An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Evidence > ... > Testimony > Competency > General Overview

HN9[] Preliminary Considerations, Venue

Competency proceedings in Pennsylvania require the trial court to determine if the child possesses an independent memory of an actual event. Accordingly, a competency hearing is the appropriate venue to explore allegations of taint.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Evidence > Burdens of Proof > Clear & Convincing Proof

Evidence > ... > Testimony > Competency > General Overview

HN10[] Burdens of Proof, Defense

Taint speaks to the second prong of the competency test: the mental capacity to observe the occurrence itself and the capacity of remembering what it is that the witness is called upon to testify about. In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question. During the hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Evidence > ... > Competency > Disability > Children

Evidence > ... > Testimony > Competency > General Overview

Evidence > ... > Competency > Disability > General

Overview

HN11 **Burdens of Proof, Defense**

Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption. As this standard prevails in cases where the witness's memory may have been corrupted by insanity, mental retardation or hypnosis, there is no reason to alter it in cases where the memory of the witness is allegedly compromised by tainted interview techniques. Further, as the burden in all other cases alleging incompetency is clear and convincing evidence, that existing legal requirement is applied for cases involving taint. The clear and convincing burden accepts that some suggestibility may occur in the gathering of evidence, while recognizing that when considering the totality of the circumstances, any possible taint is sufficiently attenuated to permit a finding of competency. Finally, as with all questions of competency, the resolution of a taint challenge to the competency of a child witness is a matter addressed to the discretion of the trial court.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Evidence > ... > Competency > Disability > Children

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

Evidence > ... > Testimony > Competency > General Overview

Evidence > ... > Competency > Disability > General Overview

HN12 **Sexual Assault, Abuse of Children**

When considering whether some evidence of taint has been presented as to the competency of a witness, courts look to the totality of the circumstances surrounding the revelation of the allegations of child sexual abuse.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Competency > General Overview

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > ... > Expert Witnesses > Credibility of Witnesses > Impeachment

HN13 **Admissibility, Expert Witnesses**

Expert testimony is admissible on the issue of witness competency.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Competency > General Overview

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN14 **Admissibility, Expert Witnesses**

The proper role of expert testimony is the edification of the factfinder on a question not commonly understood. Expert testimony is inadmissible on matters within the common knowledge and experience of the factfinder. Credibility is an issue uniquely entrusted to the common understanding of laypersons. The teaching of Dunkle is that expert testimony will not be permitted when it attempts in any way to reach the issue of credibility, and thereby usurp the function of the factfinder. A question of taint corrupting the actual memory of the witness speaks to competency, not credibility. It is not a question of whether the child is telling the truth, but rather whether the child's memory has been so infected by the implantation of distorted memories so as to make it difficult for the child to distinguish fact from fantasy. Accordingly, Dunkle is not dispositive of the question of the admissibility of expert testimony in a competency hearing regarding taint.

Evidence > Admissibility > Expert Witnesses

Criminal Law & Procedure > ... > Children & Minors > Child Abuse > Elements

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > ... > Testimony > Competency > General Overview

Evidence > Admissibility > Scientific Evidence > Psychiatric & Psychological Evidence

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN15 **Admissibility, Expert Witnesses**

A determination of a child witness's competency involving allegations of taint necessitates review of the manner in which a child's allegations of sexual abuse surfaced and were investigated. In some cases it is conceivable that resolution of this issue could be had through an examination of the factual context of the interview process. It is also conceivable that with certain children, given differences in age, experience, mental acuity and familial circumstances, and considering specifics of the allegations of abuse, and the circumstances surrounding the investigation itself, that expert testimony may be necessary. Further, it is possible that the phenomenon of taint may undergo revision or reconsideration in the relevant scientific, psychological or law enforcement communities that should be brought to the attention of the trial court. In Pennsylvania, expert testimony is admissible when a matter in issue is beyond the common knowledge of the factfinder: If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. *Pa. R. Evid. 702*.

Civil Procedure > Judicial Officers > Judges > General Overview

Evidence > ... > Testimony > Competency > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN16 **Judicial Officers, Judges**

In a competency hearing, a trial judge must determine the facts and reach a legal conclusion. It is thus the trial judge who must decide if expert testimony will advance a resolution of the question of competency on a case-by-case basis. Accordingly, each individual jurist must determine, subject to appropriate review, the decision of whether in any particular case alleging taint expert testimony would assist the court in understanding the evidence or determining a fact in issue during a competency hearing.

Evidence > ... > Testimony > Competency > General Overview

HN17 **Testimony, Competency**

A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth. A competency hearing is not an opportunity for extended discovery. There is no provision in the current caselaw requiring an examination of competency to extend to the details of the event at issue. However, an inquiry on the details of the event may be necessitated if there is some evidence that a witness has no recall of the event in question, or the witness's ability to recall the event has been corrupted.

Evidence > ... > Hearsay > Exceptions > Statements of Child Abuse

HN18 **Exceptions, Statements of Child Abuse**

The admissibility of hearsay statements made by child victims or witnesses to third parties is determined by assessing the particularized guarantees of trustworthiness surrounding the

circumstances under which the statements were uttered to the person who is testifying. *42 Pa. Cons. Stat. Ann. § 5985.1*.

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > ... > Hearsay > Exceptions > Statements of Child Abuse

HN19[] **Examination of Witnesses, Child Witnesses**

See *42 Pa. Cons. Stat. Ann. § 5985.1*.

Evidence > ... > Competency > Disability > Children

Evidence > ... > Competency > Disability > General Overview

Evidence > ... > Hearsay > Rule Components > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Testimony > Examination > General Overview

HN20[] **Disability, Children**

In many cases the accuracy of a hearsay statement must be determined without the opportunity to cross-examine the party that uttered the statement. However, where the party is available, and there exists a degree of uncertainty as to the reliability of the facts upon which the hearsay statements turn, it would be prudent to permit examination of the original speaker to test the accuracy of the hearsay statements.

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > Admissibility > Expert Witnesses > Kelly Frye Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > Criminal Proceedings

HN21[] **Trials, Judicial Discretion**

The admission of expert testimony is a matter addressed to the discretion of the trial court. The subject an expert will testify on must be sufficiently established to have gained general acceptance in the particular field to which it belongs (referring to the so-called "Frye standard").

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Exceptions > Statements of Child Abuse

HN22[] **Rule Components, Statements**

Under the statutory provision for the admission of hearsay statements made by minors regarding their own victimization, *42 Pa. Cons. Stat. Ann. § 5985.1*, a trial court must assess the relevancy of the statements and their reliability in accordance with the test enunciated in Idaho v. Wright. Although the test is not exclusive, the most obvious factors to be considered include the spontaneity of the statements, consistency in repetition, the mental state of the declarant, use of terms unexpected in children of that age and the lack of a motive to fabricate.

Judges: Mr. JUSTICE CAPPY. Mr. Justice Nigro files a dissenting opinion. Mr. Justice Eakin files a concurring and dissenting opinion.

Opinion by: CAPPY

Opinion

[*647] [30] MR. JUSTICE CAPPY**

This appeal raises the question of whether "taint", that is, the implantation of false memories or distortion of actual memories through improper and suggestive interview techniques, is a subject properly explored during a hearing testing the competency of a child witness in sexual abuse cases. Our grant of allocatur extends to the question of whether the trial court committed certain procedural errors regarding the conduct of the competency hearing itself, if those errors impacted the decision on competency, the trial court's rulings on the admissibility of expert testimony as to the reliability of the hearsay statements of the child witnesses, and the admissibility of the hearsay statements **[***2]** made by the child witnesses. Upon our consideration of these issues, and for the reasons set forth herein, we direct that the case be remanded for a new competency hearing.

Appellant, Gerald John Delbridge, was convicted of sexually assaulting his children between June 1, 1997 and January 14, 1998. The victims of the assault were A.D., born August 5, 1991, and her brother L.D., born September 3, 1993. The time frame of the assaults corresponds to the period when Appellant and his wife, Deborah Delbridge, were experiencing serious problems in their marriage. Although the Delbridge family was still residing in the same house, Appellant and Mrs. Delbridge were no longer sharing a bedroom. A.D. began sleeping with Appellant in the master bedroom while Mrs. Delbridge slept either on the couch or in L.D.'s bedroom. Throughout this time period Mrs. Delbridge became increasingly worried about A.D. as the child began exhibiting behavioral problems at home.

In January of 1998, Mrs. Delbridge received a telephone call from A.D.'s kindergarten teacher. A.D. has a speech impediment and is developmentally slow, however, the teacher reported regression in motor skills and academics along with **[***3]** aggressive behavior by A.D. towards her classmates. This information, coupled with her own concerns about A.D., **[*648]** prompted Mrs. Delbridge to arrange counseling sessions for A.D. with a psychologist, Linda Keck (at the time the sessions began Mrs. Keck was Ms. Colbert). About the same time A.D.'s behavioral problems were being addressed, Appellant was forced to vacate the family residence when Mrs. Delbridge obtained a Protection From Abuse Order on January 14, 1998. [1] See generally *23 Pa.C.S.A. § 6101 et seq.*

At some point in the spring of 1998 Mrs. Delbridge and the children left the family home and moved into a residential unit at Layfette Court in Hazelton, Pennsylvania. **[***4]** At the Layfette residence they were neighbors to Lisa Rodriguez and her two children, a girl and boy, each about the same age as A.D. and L.D. The children became playmates and A.D. was a regular visitor to the Rodriguez home.

[31]** On May 13, 1998, Mrs. Delbridge picked A.D. up after school. On the way home A.D. told Mrs. Delbridge "Daddy touched my 'tee-tee'". [2] **[***5]** Mrs. Delbridge did not explore the specifics of this statement, as she was concerned with allaying A.D.'s immediate fears that Mrs. Delbridge would be angry with her. Upon arriving home, A.D. went to the Rodriguez home where she repeated to Mrs. Rodriguez the statement that "Daddy touched my 'tee- tee.'" A.D. made similar statements to Mrs. Rodriguez on other occasions as well. While A.D. was with Mrs. Rodriguez, Mrs. Delbridge placed a call to Mrs. Keck, leaving her a message about A.D.'s revelation. A.D. had a therapy session with Mrs. Keck on May 18, 1998. At that session, when asked by Mrs. Keck to repeat what she had told her mother, A.D. responded "Daddy touched my 'tee-tee' and his friend touched me in the butt." [3]

[*649] The allegations of possible sexual assault were referred to the Pennsylvania State police. Trooper Peter Salerno conducted interviews of A.D. and her brother L.D. Trooper Zellner was present during the interviews conducted by Trooper Salerno with A.D. and L.D. A.D. told Trooper Salerno that she watched movies with Appellant, where people were naked and kissing. A.D. also told the Trooper that Appellant touched her "tee-tee" and her butt with his fingers. A.D. stated that she took showers with Appellant and that his "tee- tee" was hard. Initially L.D. denied that Appellant ever touched him other than spanking him on the butt. Eventually, L.D. told Trooper Salerno that he watched movies with Appellant where naked people were kissing, and that Appellant touched his "tee-tee" with a finger and stuck a finger in L.D.'s butt. Charges were filed against Appellant as to criminal conduct involving both children.

Prior to trial, Appellant **[***6]** filed motions contesting the testimonial competency of A.D. and L.D. Appellant asserted that given their youth, the children did not have the mental capacity to perceive the events at the time they occurred and accurately recall them. At the time of the assaults, the children were ages six and four; they were seven and five at the time of trial. Additionally, Appellant alleged that the children's memory of the events had been tainted by repeated and suggestive interviews. Finally, he alleged that the competency of the children was highly suspect as they were subject to abnormal influence by their mother who suffered from paranoia over her own sexual victimization as a child. (Pretrial Memorandum in Support of Motions to Determine Competency of Minor Witnesses and & Request For a Taint Hearing, Original Record at 23).

As evidentiary support for the allegations of taint, Appellant pointed to the following facts. First, in one of the hearsay statements attributed to A.D. by Mrs. Rodriguez, A.D. stated that when Appellant touched her "tee-tee" she could not tell anyone because she was still in diapers. Appellant asserts that

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[1] During the events that culminated in the Protection From Abuse Order, Mrs. Delbridge and the children became acquainted with State Trooper Stephen A. Zellner. The nature of the friendship between Trooper Zellner, A.D. and L.D. is discussed by Appellant in his allegations of error as developed infra.

[2] "Tee-tee" is the word A.D. and L.D. use when referring to a vagina or penis.

[3] Although A.D. frequently stated that a friend of Appellant also touched her in an inappropriate manner the record offers no further information as to this third person.

this statement creates the incredible inference that A.D. could **[***7]** recall events that occurred while she was an infant. **[*650]** Second, when Trooper Salerno conducted his interviews of A.D. and L.D., he was accompanied by Trooper Zellner in a blatant attempt to pressure the children as Trooper Zellner was well known to, and trusted by, A.D. and L.D. Appellant asserts that Trooper Zellner was designated as the guardian **[**32]** angel for the children and that the children were told he would protect them from Appellant, and that this was a deliberate ploy by the interviewers to vilify Appellant in the eyes of A.D. and L.D. Finally, Appellant claims that their mother influenced the children's allegations of abuse. According to Appellant, a family member had victimized Mrs. Delbridge during her own childhood and this victimization caused Mrs. Delbridge to be paranoid regarding sexual behavior. In support of this point, Appellant references a previous incident, on June 15, 1994, where Mrs. Delbridge took A.D. to Berks County Children and Youth Services reporting her concern that the child, who was two years old at the time, was acting out sexually. During the interview Mrs. Delbridge revealed that she had been the victim of sexual abuse as a child and that she could not **[***8]** distinguish sexually appropriate behavior in her own children. The counselor was concerned for Mrs. Delbridge and recommended that she seek counseling. A.D. made no statements to the counselor at that time. The investigation in Berks County concluded with a finding of no abuse on June 23, 1994.

In addition to the above arguments, Appellant planned to present expert testimony to support his allegations of incompetency and taint regarding the child witnesses. To that end, Appellant applied for a specific date for the hearing on the motion. The President Judge of Luzerne County, Judge Joseph M. Augello, granted the Motion for Specific Date, and the hearing was set for May 10, 1999. Appellant subpoenaed his out-of-town expert witness, Larry M. Davis, M.D., for May 10, 1999. The Honorable Ann H. Lokuta was scheduled to preside over the trial and all pre-trial motions. Despite the Order of Judge Augello setting a specific date for Motions, Judge Lokuta advanced argument on the pre- trial motions to **[*651]** May 3, 1999. [4] Argument was heard on May 3, 1999 regarding many of the pre-trial motions, and May 5th was set for the competency hearing. Judge Lokuta granted the Commonwealth's motion to preclude **[***9]** expert testimony on the competency of the children, and rejected Appellant's objection as to the alteration of the date set for the competency hearing.

[*10]** Before the competency hearing began, the Commonwealth moved to exclude Appellant from being physically present during the testimony of the children. Over objection of Appellant, the motion was granted. Appellant requested leave to cross- examine the children about the particulars of the allegations at issue. The trial court denied Appellant's request to examine the children as to the specific factual allegations of sexual abuse. The **[**33]** trial court also rejected Appellant's request to explore the nature of the interviews through which the children revealed the information regarding the sexual abuse claims. The trial court limited the competency hearing to questions examining the ability of the children to understand the difference between truth and non-truth, the general capacity to remember and the ability to communicate that memory.

In their testimony at the competency hearing, the children displayed some confusion in memory. A.D. had difficulty **[*652]** remembering the name of her school and which teacher she had in first grade as opposed to kindergarten. L.D. could not recall his address nor distinguish a town from a state. However, the children displayed an understanding of telling the **[***11]** truth and the consequences of not telling the truth: if they did not tell the truth they would be placed in "time out" and the judge would be "mad". Each child displayed an understanding of the distinction between reality and fantasy, identifying their favorite cartoons as not real. A.D. and L.D. each recalled a past event, such as a previous Christmas celebration or a birthday, and remembered a gift received or an activity that occurred. A.D. and L.D. each displayed an ability to communicate about a remembered event. At the conclusion of the hearing, the trial court found that the children were legally competent to testify.

The hearing on the admissibility of the hearsay statements commenced on May 10, 1999. Prior to taking testimony,

[4] It should be noted that Appellant and the District Attorney each filed several pre-trial motions. In addition to the motion involving competency and raising the issue of taint, Appellant filed discovery motions seeking the in-patient psychiatric records of A.D. from a hospitalization of the child in August of 1998. Appellant filed a motion seeking psychological examinations of each of the children and their mother. Appellant moved to sever the charges as to each child. A motion to compel a further Bill of Particulars was also presented. In addition, Appellant moved to preclude the introduction of any hearsay statements made by the children. Appellant was granted a hearing on the issues of competency and the admissibility of the hearsay statements; all other motions were denied. The District Attorney filed a motion seeking to preclude the expert testimony of Dr. Davis as to the competency of the minors, and a Motion in Limine to preclude introduction of any evidence regarding Mrs. Delbridge's prior history of sexual assault during her childhood, as well as the records pertaining to an interview at Berks County Children and Youth Services in 1994 wherein Mrs. Delbridge reported the possibility that A.D., then two years of age, was being sexually abused. The Commonwealth's motions were granted.

Appellant renewed his objection to the competency of the child witnesses. Appellant requested that the trial court reconsider its ruling and permit expert testimony on the question of competency. The trial court denied the motion for reconsideration. Appellant requested that his expert, Dr. Davis, be permitted to testify as to the reliability of the hearsay statements of the children. The court entertained voir dire of Dr. Davis to assess the admissibility **[***12]** of his proffered testimony. At the conclusion of voir dire, the trial court found that Appellant had failed to establish the validity and accuracy of the proposed field of expertise - assessing the reliability of hearsay statements by child sexual abuse victims - and that Dr. Davis could not be qualified as an expert in this proposed area of expertise. [5] The hearing continued with an examination of the persons who would testify as to the hearsay statements of the children. The court considered the context in which the various statements were made and the content of the statements. The trial court found that the hearsay statements **[*653]** made by A.D. and L.D. to Linda Keck, Lisa Rodriguez, Deborah Delbridge and Trooper Peter Salerno were admissible. [6]

[*13]** The matter then proceeded to trial before a jury. All the evidence against Appellant was testimonial, coming either in direct testimony from A.D. and L.D, or through hearsay statements the children made to various adults regarding **[**34]** the sexual assaults. Appellant was convicted of two counts each of Endangering the Welfare of Children, Corruption of Minors, Aggravated Indecent Assault and Indecent Assault. [7] **[***14]** The total term of incarceration imposed on all charges was 72 to 172 months. An appeal was perfected from the judgment of sentence and the Superior Court affirmed that judgment. This court granted allocatur primarily to consider whether taint is a legitimate avenue of exploration regarding the competency of a child witness. The grant of allocatur extended to related questions raised by Appellant within the context of the competency hearing itself and the rulings on the admissibility of the hearsay statements of the child witnesses. [8]

Appellant urges this court to recognize the concept of taint, and to permit examination of possible taint in a competency proceeding, as taint impacts the fitness of a child witness to testify about independent events. Appellant asserts that taint **[*654]** is a legitimate question when considering the competency of young children, as they are peculiarly susceptible to the implantation of false memories by biased interviewers and suggestions imposed by trusted authority figures. Appellant urges this court to permit the introduction of expert testimony on the question of taint. Appellant relies heavily upon the decision of *State v. Michaels, 136 N.J. 299, 642 A.2d 1372 (N.J. 1994)* to support his position. In particular, Appellant **[***15]** argues that there is significant evidence of taint in this case given the tender age of the children, the vilification of Appellant, the bias of the social and law enforcement interviewers and the unique circumstance of the mother's prior victimization and its effect upon the children. Appellant claims prejudice by the trial court's refusal to permit exploration of the question of taint in the competency hearing given the facts of this case.

Appellee, the Commonwealth, counters by asserting that the arguments raising the specter of taint are no more than an attempt by Appellant to introduce expert testimony challenging the credibility of the child witnesses. Relying upon *Commonwealth v. Dunkle, 529 Pa. 168, 602 A.2d 830 (Pa. 1992)*, the Commonwealth asserts that the proffered expert testimony was properly excluded, as it does not speak to a subject that required expert edification. Additionally, the Commonwealth asserts that there is no basis to find that the theory of taint has gained general acceptance within the relevant scientific and/or law enforcement communities. Finally, the Commonwealth argues that there is no evidence to support Appellant's allegation of **[***16]** taint in this case, and that the trial court did not abuse its discretion in finding A.D. and L.D. competent to testify.

In order to resolve the questions presented we must first

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[5] The trial court assessed the proffered expert opinion and the qualifications of the expert himself according to the test set forth in *Frye v. United States, 54 U.S. App. D.C. 46, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923)*.

[6] There was one additional witness, Quinten Thomas Novinger, M.D., a pediatrician who examined A.D. for physical signs of abuse. The Commonwealth sought to call Dr. Novinger regarding hearsay statements made by A.D. during the physical examination. Due to scheduling difficulties, a ruling on the admissibility of Dr. Novinger's testimony was delayed until trial. At that time, in an in camera hearing, the trial court found that Dr. Novinger could not testify to statements made by A.D. during his physical examination of the child, as those statements were intentionally elicited through leading questions put to A.D. by Dr. Novinger.

[7] These convictions correspond to the following Crimes Code sections: *18 Pa.C.S.A. §§ 4304, 6301(a), 3125(7) and 3126(a)(7)*, respectively.

[8] ***HN1***[↑] Our standard of review of a trial court ruling on competency is for an abuse of discretion. *Rosche v. McCoy, 397 Pa. 615, 156 A.2d 307 (Pa. 1959)*. This same standard also applies to the related evidentiary rulings made by the trial court, which are currently before us. *Commonwealth v. Wallace, 522 Pa. 297, 561 A.2d 719 (Pa. 1989)*.

decide if evidence of taint is admissible, if it is admissible, we must determine if a competency hearing is the appropriate venue for considering evidence of taint, and then finally, we must consider whether it is proper for the trial court to admit expert testimony on the question of taint.

Defining taint is a prerequisite to resolving these questions. ***HN2***[] The core belief underlying the theory of taint is that a **[**35]** child's **[*655]** memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy. See Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions*, in *Perspectives on Children's Testimony*, 208, 213 (Stephen J. Ceci et al. eds, 1989). Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of **[***17]** the child, rendering that child incompetent to testify. See, Julie Jablonski, *Assessing the Future of Taint Hearings*, 33 Suff. J. Trial & App. Adv., 49, 50 (1998).

As the questions presented here are of first impression in this Commonwealth, we turn to our sister states for amplification of the issue of the recognition of taint and the proceedings used to explore that concept. Although the question of taint has not been widely reviewed, several jurisdictions have found taint to be a relevant consideration in the pre-trial assessment of the admissibility of the testimony of child witnesses in cases of child sexual abuse claims. As referenced extensively by Appellant, the New Jersey Supreme Court undertook a thorough analysis of the concept of taint in its decision in *Michaels*. Other states, following the New Jersey lead, have found the idea of taint relevant in a pre- trial assessment of the admissibility of the proffered testimony of a child witness.See *Fischbach v. State, No. 245, 1995, 1996 Del. LEXIS 80 (Del. Mar. 15, 1996)* (court agreed that a suggestive interview of a sexual assault victim may cause the victim's memory to become tainted); **[***18]** *In the Matter of Zachary Sequin, No. 216602, 2000 Mich. App. LEXIS 648, (Mich. Ct. App. June 13, 2000), app. den. 617 N.W.2d 696 (Mich. 2000)* (taint was recognized as a legitimate concern within the context of an action by the state to terminate parental rights after allegations of sexual abuse by the father); *In the Matter of the Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 297 (Wash. 1998)*(the question of taint can be pursued at the time of the competency hearing for a child witness); *English v. State, 982 P.2d 139 (Wyo. 1999)* **[*656]** (taint could legitimately be explored in a competency hearing where some evidence of improper or suggestive interview techniques was presented).

Three jurisdictions have implicitly or explicitly rejected the idea of exploring taint when examining the admissibility of the proffered testimony of child witnesses. The Court of Appeals in Alaska has issued two opinions on the subject, rejecting defense requests to examine child witnesses for potential taint. See *Nelson v. State, No. A-6358, No. 4147, 1999 Alas. App. LEXIS 130 (Alaska Ct. App. Nov. 10, 1999)*(proffered expert testimony **[***19]** on taint would not satisfy the test for admissibility of scientific evidence under either the Frye or the less restrictive Daubert test); *Schumacher v. State, 11 P.3d 397 (Alaska Ct. App. 2000)*(denial of a pretrial hearing on taint does not offend due process). Kentucky and Ohio have also rejected defense requests to explore potential taint of a child witness. See *Pendleton v. Kentucky, 83 S.W.3d 522, 2002 Ky. LEXIS 113 (Ky. June 13, 2002)*(as the competency bar is so low, depending only on a child's level of development and the subject matter at hand, the court found no reason to explore taint); *State v. Olah, 146 Ohio App. 3d 586, 2001 Ohio 1641, 767 N.E.2d 755 (Ohio Ct. App. 2001)*(with no discussion as to the legal merits of the issue, the Court of Appeals of Ohio rejected a request for a taint hearing).

Finally, the State of New York has issued divergent trial court opinions on the **[**36]** issue. See *People v. Michael M., 162 Misc. 2d 803, 618 N.Y.S.2d 171 (N.Y. Sup. Ct. 1994)*(taint can be explored in the context of a motion to suppress); *People v. Jones, 185 Misc. 2d 899, 714 N.Y.S.2d 876 (N.Y. Sup. Ct. 2000)* **[***20]** (taint hearing denied, as it would create undue hardship upon the victim). [9]

[*21]** **[*657]** In our review of these decisions, we find the discussions of taint by the New Jersey and the Wyoming courts to be the most illuminating. The New Jersey Supreme Court rendered the most extensive decision on the concept of

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[9] In this case we are presented with a pre-trial request to explore the concept of taint, thus our review of caselaw from other jurisdictions focuses on cases where the question of taint was presented in a pre-trial motion. We do note that three other jurisdictions acknowledge the concept of taint and permit exploration of the issue, however they do so during trial. In Georgia and New Hampshire expert testimony on taint is admissible at trial, and the impact of taint on the reliability of the testimony is placed before the factfinder for resolution. See *Barlow v. State, 270 Ga. 54, 507 S.E.2d 416 (Ga. 1998)*; *State v. Sargent, 144 N.H. 103, 738 A.2d 351 (N.H. 1999)*. It should also be noted that in Georgia and New Hampshire the State is permitted to present expert testimony at trial on the child sexual abuse syndrome as a factor that would aid the factfinder in assessing the credibility of child sexual abuse victims. Maine also permits exploration of taint during trial. *State v. Ellis, 669 A.2d 752 (Me. 1996)*. Maine does not allow expert testimony on the issue, and restricts discussion of taint to legitimate avenues of cross-examination and argument where there is some record evidence to support the inquiry.

taint in *Michaels*. Michaels involved the conviction of a day care teacher on 115 counts involving various charges of sexual assault committed on twenty children in her charge at the Wee Care Day Nursery. On appeal, the court found evidence that the children's accusations were founded on unreliable perceptions or memories caused by improper investigative procedures and that admission of testimony premised upon those accusations could lead to an unfair trial. [10] *Id. at 1376*. In reaching this conclusion, the court acknowledged the problem of relying on scientific and psychological theories in the context of considering the susceptibility of children to manipulative interrogations. The court discussed the tension between the accepted legal standard that children as a class are not suspect witnesses, and the commonly held belief that children are peculiarly susceptible to undue influence. Id. The court reviewed the various treatises written **[***22]** and relied upon by the scientific and law enforcement communities regarding the susceptibility of children to coercive interview techniques, and reached its **[*658]** conclusion as to the concept of taint by judicial recognition. *Id. at 1378*. The Michaels court held:

> **[***23]** We therefore determine that ***HN3***[⬆] a sufficient consensus exists within the academic, profession, [sic] and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining **[**37]** the reliability of the statements and subsequent testimony concerning such events.
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> *Id. at 1379*.

In analyzing the concept of taint as it affects the admissibility of proffered testimony, the New Jersey Court looked at its existing caselaw on the issues of suggestive pre-trial identification techniques, and the admissibility of testimony based on hypnotically induced recollections. [11] As those cases illustrate, evidence may be deemed inadmissible because it was corrupted by the manner in which it was collected. The New Jersey court therefore concluded that taint was equally capable of corrupting the memory of a child witness during the investigation of an allegation of sexual abuse. The court identified various factors for assessing accusations of sexual abuse made by **[***24]** children, however, it cautioned that the list was not exhaustive and that the matter must be analyzed in the totality of the circumstances involved. The factors identified in Michaels, are: "(1) the age of the victim, (2) circumstances of the questioning; (3) the victim's relationship with the interrogator; and (4) the type of questions asked." *Id. at 1381*.

Having concluded that in the Michaels case some evidence of taint was present; the court remanded the case for a pre-trial hearing on taint and went on to address the contours of such a hearing. The court determined that ***HN4***[⬆] the defendant carries the initial burden of showing that some evidence exists to invoke a taint hearing. *Id. at 1383*. The burden then shifts to the prosecution to support the admissibility of the proffered **[*659]** statements by clear and convincing **[***25]** evidence. Id. The court selected the clear and convincing standard to balance the competing interests of safeguarding the defendant's right to a fair trial without imposing so severe a burden on the prosecution as to make it impossible to prove cases of child sexual abuse. *Id. at 1384*. By application of the clear and convincing standard, the court recognized that the burden on the prosecution is to establish that despite the presence of some suggestive or coercive techniques in the manner in which it was gathered, when considered in the totality of the circumstances, the proffered testimony is sufficiently free from contamination, thus outweighing the effects of taint. Id. Although expert testimony is admissible on the propriety of the interrogation techniques used, it cannot extend to the ultimate issue of the credibility of the child witness. *Id. at 1383*. The court also opined that even if the testimony is ultimately ruled admissible, expert testimony may be presented at trial to aid the jury by explaining the coercive or suggestive propensities of the interview techniques used. *Id. at 1384*.

The Wyoming Supreme Court found **[***26]** the reasoning of the Michaels decision persuasive as to the concept of taint, however it did not find that a separate pre-trial hearing addressing solely the issue of taint was necessary. *English v. State, 982 P.2d 139 (Wyo. 1999)*.

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[10] During the interviews with the children, the investigator revealed bias towards the defendant, referring to her as a bad person, and telling the children that she was in jail for doing bad things. The children who refused to reveal negative information were forced to continue the interview until the investigator received the answers he wanted. The investigator often conducted the interviews in an adversarial manner with the children and used peer pressure, by telling each child that all the other children had already told him about the bad things that happened. In addition to leading questions, the investigator prompted responses by demonstrating what he thought the defendant had done and then pressuring the children to agree. *642 A.2d at 1385*, Appendix.

[11] See *State v. Gookins, 135 N.J. 42, 637 A.2d 1255 (N.J. 1994)* and *State v. Hurd, 86 N.J. 525, 432 A.2d 86 (N.J. 1981)*.

The defendant in English was accused of taking indecent liberties with a minor. The defendant was a family friend who agreed to baby-sit for B.N.M., a five-year-old and her younger brother, on December 31, 1996 and January 2, 1997. On the first occasion, B.N.M.'s mother bathed the children and dressed B.N.M. in a blanket style sleeper before she left for the evening. **[**38]** Upon arriving home, the mother discovered B.N.M. sleeping in a tee shirt with no underwear. The child explained that she had removed the sleeper because she was hot. On the second occasion, a mutual friend of the defendant and B.N.M.'s mother stopped by the house while B.N.M. was in the defendant's care. This friend observed B.N.M. and the defendant naked in the bathtub. The friend shared his observation with B.N.M.'s mother the next day. The mother spoke **[*660]** to B.N.M. about the defendant and whether the defendant had touched her while he was baby-sitting. B.N.M. denied **[***27]** anything had happened. The mother continued to question the child, and, becoming desperate, she asked B.N.M. to trade secrets with her. Finally B.N.M. stated that the defendant had played with her "pee-pee". The mother, upset by the statements of B.N.M., became ill. The child then recanted. However, when the mother confronted the defendant in B.N.M.'s presence, the child repeated the statements of improper touching. An investigation of the incident was undertaken by authorities, which ultimately led to the defendant's conviction.

The defendant requested a pre-trial hearing on taint, relying on the decision in Michaels, and arguing that B.N.M.'s recollection of the events was unreliable given the suggestive and coercive interrogation by her mother. The trial court denied the request for a taint hearing. On appeal, the Wyoming Supreme Court considered the request for a separate pre-trial taint hearing by first examining the procedures for assessing the competency of a child witness under Wyoming law. *HN5*[] Once the competency of a child witness is called into question, Wyoming courts are required to make an independent pre- trial examination to determine competency. *982 P.2d at 145* . **[***28]** A child witness will be deemed competent if the trial court determines that the child meets the following five-part test:

(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Id. (citations omitted) (emphasis added).

The Wyoming court found that the concept of taint was a legitimate inquiry within the scope of existing Wyoming law on competency, as a taint allegation spoke to whether the witness possessed "a memory sufficient to retain an independent **[*661]** recollection of the occurrence." *Id. at 146*. As Wyoming law already provided an avenue to explore the question of taint, there was no reason to adopt the Michaels approach and require a separate taint hearing to assess the existence and impact of taint on the memory of a child witness. Id. However, the court did agree with the New **[***29]** Jersey approach to the extent that the burden is on the defendant to show some evidence that the child's statements were the product of suggestive or coercive interview techniques in order to warrant review of the taint issue within the context of a competency hearing. Id.

The Wyoming court concluded that a pre-trial competency hearing exploring the issue of taint was required in English as the defendant presented evidence that the allegations of abuse were not spontaneous, but rather had been cajoled from the five-year- old child by the mother's repeated, persistent, and leading questions. *Id. at 147*. There was no discussion regarding the admissibility of expert testimony at the competency hearing.

[39]** Having considered the various positions taken by our sister states on taint, we are persuaded by the courts that permit *HN6*[] pretrial exploration of taint, that such an avenue of examination is necessary in those cases where there is some evidence that improper interview techniques, suggestive questioning, vilification of the accused and interviewer bias may have influenced a child witness to such a degree that the proffered testimony may be irreparably compromised. **[***30]** Accordingly, we hold that taint is a legitimate question for examination in cases involving complaints of sexual abuse made by young children. [12]

[*662] The next question is whether a competency hearing is the appropriate venue to explore possible taint of a child witness. **[***31]** To date only New Jersey requires a separate pretrial hearing exclusively on taint. Other courts that allow

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[12] As no expert testimony on taint was admitted at the trial court level, we do not now render any opinion on the acceptance of taint within the relevant scientific or professional communities. Our decision rests upon a review of the opinions of our sister states and the obvious parallel between the admissibility of tainted testimony and other types of evidence obtained by improper investigative techniques. See *Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (Pa. 1981)*(examining the unreliability of testimony retrieved through hypnosis); *Commonwealth v. Cephas, 447 Pa. 500, 291 A.2d 106 (Pa. 1972)*(illegally obtained evidence is inadmissible unless the original taint is purged by sufficient attenuation).

exploration of taint have found the issue capable of examination within the context of existing legal procedures such as, a hearing probing the competency of the child witness or, within the context of a suppression hearing examining whether the evidence was obtained by improper techniques, and, finally, during the course of the trial itself. See In the Matter of A.E.P. and English v. Wyoming (taint can be examined in a competency hearing); People v. Michael M. (taint can be explored in a suppression hearing); Barlow v. State and State v. Sargent (taint can be examined at trial), supra.

Appellant asserts that a competency hearing is the logical stage in the proceeding to review a question of taint, as taint impacts the reliability of the actual memory of the child witness. Appellee argues that taint is merely a disguised attempt to attack credibility and a competency hearing is not the place for such an attack.

HN7[] A decision on the necessity of a competency hearing is addressed to the discretion of the trial court. *Commonwealth v. Washington, 554 Pa. 559, 722 A.2d 643, 646 (Pa. 1998)* **[***32]** . The general rule in Pennsylvania is that every person is presumed competent to be a witness. *Pa.R.E. 601(a)*. Despite the general presumption of competency, Pennsylvania presently requires an examination of child witnesses for competency. *Rosche, 156 A.2d at 310*; *Pa.R.E. 601(b)*. The test for competency of immature witnesses was set forth in Rosche:

There must be (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering **[*663]** *what it is* that she is called to testify about and (3) a consciousness of the duty to speak the truth.

Id. (emphasis in original). HN8[] The capacity of young children to testify has always been a concern as their immaturity can impact their ability to meet the minimal legal requirements of competency. Common experience informs us that children are, by their very essence, fanciful creatures who have difficulty distinguishing fantasy from reality; who when asked a question want **[**40]** to give the "right" answer, the answer that **[***33]** pleases the interrogator; who are subject to repeat ideas placed in their heads by others; and who have limited capacity for accurate memory.

A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. Rosche. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the fact finder. *Washington, 722 A.2d at 646*. An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation. See *Commonwealth v. Rolison, 473 Pa. 261, 374 A.2d 509 (Pa. 1977), cert. denied, 434 U.S. 871, 54 L. Ed. 2d 150, 98 S. Ct. 215 (1977)*(allegation that witness is insane will trigger competency hearing); *Commonwealth v. Anderson, 381 Pa. Super. 1, 552 A.2d 1064 (Pa. Super. 1988), appeal denied, 524 Pa. 616, 571 A.2d 379 (Pa. 1989)*(retarded adult subject to competency consideration); *Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (Pa. 1981)*(hypnotically induced testimony raises question of competency). **[***34]**

We find particularly influential the decision of the Wyoming Supreme Court in English that taint is a matter properly examined during a competency determination as it **[*664]** goes to the question of whether the child has the memory capacity to retain an independent recollection of the occurrence. *English, 982 P.2d at 145*. Similarly, HN9[] competency proceedings in Pennsylvania require the trial court to determine if the child possesses an independent memory of an actual event. Accordingly, we hold that a competency hearing is the appropriate venue to explore allegations of taint.

Having determined that taint is a proper subject for inquiry and that such an investigation should occur within a competency hearing, we take this opportunity to define some parameters for conducting a taint inquiry. HN10[] Taint speaks to the second prong of the competency test established in Rosche, "the mental capacity to observe the occurrence itself **[***35]** and the capacity of remembering *what it is* that [the witness] is called upon to testify about." *156 A.2d at 310*, (emphasis in original). In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question. During the hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. HN11[] Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption. *Rosche, at 309*. As this standard prevails in cases where the witness's memory may have been corrupted by insanity, mental retardation or hypnosis, we see no reason to alter it in cases where the memory of the witness is

allegedly compromised by tainted interview techniques. Further, as the burden in all other cases alleging incompetency is clear and convincing evidence, we will continue to apply that existing legal requirement for cases involving taint. See **[***36]** *Commonwealth v. R.P.S., 1999 PA Super 171, 737 A.2d 747 (Pa. Super. 1999)* (discussing the standard of review regarding rulings **[**41]** on competency). The clear and convincing burden accepts that some suggestibility may occur in the gathering of evidence, while recognizing that when considering the totality of the circumstances, any possible taint is sufficiently attenuated **[*665]** to permit a finding of competency. Finally, as with all questions of competency, the resolution of a taint challenge to the competency of a child witness is a matter addressed to the discretion of the trial court. *Washington, 722 A.2d at 646*.

Having found the issue of taint relevant to a competency determination, we need to consider if Appellant has made a sufficient showing of some evidence of taint to justify a new competency hearing. ***HN12***[⬆] When considering whether some evidence of taint has been presented we look to the totality of the circumstances surrounding the revelation of the allegations of child sexual abuse.

In this case, the children were ages six and four at the time of the alleged abuse. Their ability to recall and comprehend the events that allegedly occurred and then adequately **[***37]** communicate their memories of those events is suspect merely because of their tender years. Then there is the unusual fact that Mrs. Delbridge was herself the victim of child sexual abuse, and the possibility that her experiences may have influenced the course of the investigation. The potential for undue influence in this regard is heightened by reference to Mrs. Delbridge's prior allegations of suspected sexual abuse of A.D. when the child was two years old, allegations that were dismissed as unfounded. Mrs. Delbridge's influence over the children's actual memories of the events in question may also have been enhanced by the fact that she had sole custody of the children at the time the revelations as to abuse came to light. [13] Additionally, during the investigation of the current charges, the children were subject to repeated interviews by various adults in positions of authority: the state police, a psychologist, a social services employee, the district attorney and a pediatrician. The presence of Trooper Zellner during the interviews, not as an investigator, but allegedly as a guardian angel for the children, supports the inference that Appellant was vilified during the interview **[***38]** process. The only available records of the various **[*666]** interviews is through the notes taken by the adult interviewers as there were no contemporaneous video or audio recordings of the interviews. [14] We believe that Appellant has presented some evidence of taint to justify exploration of that issue at a competency hearing; thus, a remand for a new competency hearing is required. [15]

[*39]** As we are remanding for a new competency hearing, it is incumbent on this court to consider the admissibility of expert testimony upon remand. Appellant sought to introduce expert testimony on the phenomenon **[**42]** of taint and its impact upon the memory of a child witness. The trial court, relying on *Dunkle, supra*, denied this request, perceiving it as an attack on the credibility of the witnesses. The Superior Court recognized that ***HN13***[⬆] expert testimony is admissible on the issue of competency, however it affirmed the trial court's ruling in this instance, agreeing that the proposed expert testimony here was addressed to credibility, not competency, and pursuant to Dunkle would not be admissible. As the lower courts, and Appellee, rely upon Dunkle as authority for excluding expert testimony on taint, it is necessary to review the concerns addressed in that decision.

The defendant in Dunkle was charged with sexually assaulting his teenage stepdaughter in 1983. The victim did not report the assault until 1986. During the course of the defendant's jury trial there was testimony concerning the behavior of the victim between 1983 and 1986, and the delay in reporting the assault. **[***40]** The trial court permitted the jury to hear expert testimony regarding the "Child Sexual Abuse **[*667]** Syndrome" explaining the various behaviors exhibited by sexually abused children, and expert testimony on the reasons why an abused child would delay reporting an incident of abuse. The purpose of the expert testimony was to correlate the behavior of this victim, from 1983 to 1986, to the behavior typical of an abused child, and also to inform the

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[13] As noted supra Appellant and Mrs. Delbridge were separated, their relationship was strained as evidenced by the need for a Protection From Abuse Order removing Appellant from the family home.

[14] This court is not requiring video or audio recordation of interviews; we merely note that no such contemporaneous record of the interview sessions exist in this case.

[15] We realize that there are competing policy considerations inherent in assessing the propriety of a retrospective competency assessment. See generally *Harris Trust & Sav. Bank v. Otis Elevator Co., 297 Ill. App. 3d 383, 696 N.E.2d 697, 702, 231 Ill. Dec. 401 (Ill. App. 1998)* (noting, in relation to competency of witnesses, that "there are 'inherent difficulties' in attempting retrospective determination of mental competency even 'under the most favorable of circumstances'" (citations omitted)). We believe, however, that the better practice is to permit such an examination whenever a meaningful hearing can be conducted.

jury that child sexual abuse victims may not always report incidents of abuse promptly. On appeal this court reversed. We determined that the "Child Sexual Abuse Syndrome" had not gained sufficient acceptance in the psychiatric community to warrant admission as expert testimony, and that the testimony itself about the behavior patterns was so speculative that it did not constitute probative and relevant evidence. Id. at 834-35. As for the expert testimony on the question of why abused children delay in reporting, we found that expert testimony on this question was unnecessary as the issue was one within the common knowledge or experience of the average juror. Id. at 836.

The proffered expert testimony was rejected in Dunkle because **[***41]** it was offered to enhance the credibility of the victim by supplying authoritative opinions for the jury to rely on in assessing the behavior of the victim after the assault and the rationale for delayed reporting. The decision in Dunkle spoke to *HN14*[↑] the proper role of expert testimony, which is the edification of the factfinder on a question not commonly understood, and reiterated the long held principle that expert testimony is inadmissible on matters within the common knowledge and experience of the factfinder. Credibility is an issue uniquely entrusted to the common understanding of laypersons. The teaching of Dunkle is that expert testimony will not be permitted when it attempts in any way to reach the issue of credibility, and thereby usurp the function of the factfinder. As we have addressed supra, a question of taint corrupting the actual memory of the witness speaks to competency, not credibility. It is not a question of whether the child is telling the truth, but rather whether the child's memory has been so infected by the implantation of distorted memories so as to make it difficult for the child to distinguish fact from fantasy. **[*668]** Accordingly, *Dunkle* is not dispositive **[***42]** of the question of the admissibility of expert testimony in a competency hearing regarding taint.

Michaels is the only decision to extensively review the scientific, psychological and law enforcement theories behind the concept of taint. It is also the only court to clearly endorse the use of expert testimony in a pre-trial hearing on the issue of suggestive and coercive interview techniques **[**43]** and the impact of such techniques on young children. [16] **[***43]** The other jurisdictions that recognize taint and permit exploration of the issue offer little information about the role, if any, that expert testimony is to play in pre-trial hearings examining the impact of taint on the proffered testimony of a child witness. The discussions in English, A.E.P, Sequin, and Fischbach seem to conceptualize taint as a factual concern that could lead to the legal conclusion that a child's memory has been corrupted. [17]

HN15[↑] A determination of competency involving allegations of taint necessitates review of the manner in which the child's allegations of abuse surfaced and were investigated. In some cases it is conceivable that resolution of this issue could be had through an examination of the factual context of the interview process. It is also conceivable that with certain children, given differences in age, experience, mental acuity and familial circumstances, and considering specifics of the allegations of abuse, and the circumstances surrounding the investigation itself, that expert testimony may be necessary. Further, it is possible that the phenomenon of taint may undergo revision or reconsideration in the relevant scientific, psychological or law enforcement communities that should be brought to the attention of the trial court.

[*669] In Pennsylvania, expert testimony is admissible when a matter **[***44]** in issue is beyond the common knowledge of the factfinder:

If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. 702. *HN16*[↑] In a competency hearing, the trial judge must determine the facts and reach a legal conclusion. It is thus the trial judge who must decide if expert testimony will advance a resolution of the question of competency on a case-by-case basis. Accordingly, we will leave to each individual jurist, subject to appropriate review, the decision of whether in any particular case alleging taint expert testimony would assist the court in understanding the evidence or determining a fact in issue during a competency hearing. *R.P.S. 737 A.2d at 754*.

Beyond the question of taint and the related discussion of the contours of a competency hearing exploring that issue, our grant of allocatur in this case extended to certain procedural rulings at the initial **[***45]** hearing on competency and the pre-trial assessment of the admissibility of the hearsay statements A.D. and L.D. made to various adults. Appellant raised three specific procedural claims of error regarding the

[16] The discussion of whether or not taint as a scientific theory would satisfy Frye or Daubert that the Alaska court engaged in took place in a vacuum as no expert testimony had been presented in that case. *Nelson, supra*.

[17] We reiterate, that two of the jurisdictions that engage in review of taint issues during trial do permit expert testimony on that issue. See *Sargent* and *Barlow, supra*; contra Ellis.

conduct of the competency hearing itself, and alleges that the trial court's finding that the children were competent to testify was erroneous.

First, Appellant asserts prejudicial error by the trial court in moving the date of the competency hearing forward, thus interfering with Appellant's ability to present evidence as to incompetency. An extended discussion of this issue is unnecessary as the order of remand directing **[**44]** that a new competency hearing be convened renders it moot.

Second, Appellant argues that it was error to physically exclude him from the competency hearing. The Superior **[*670]** Court found this issue waived as Appellant failed to present any authority in support of his contention that the trial court erred in excluding him from the competency hearing. [18] In his brief to this court, Appellant offers no rebuttal to the finding of waiver and merely asserts that the prejudice caused by his exclusion is obvious. Given the absence of meaningful advocacy on this issue **[***46]** and the necessity of a remand for a new competency hearing, we believe it imprudent to engage in a discussion of this issue.

Third, Appellant asserts error by the trial court in excluding expert testimony on the question of taint. As set forth above, expert testimony on the issue of competency is admissible at the discretion of the trial court. The trial court's previous **[***47]** ruling excluding the proffered expert testimony was premised on its misinterpretation of *Dunkle*. Consistent with the discussion of this issue supra, upon remand it will be left to the discretion of the trial court to entertain the necessity of expert testimony on the possible impact of taint as to the competency of A.D. and L.D. in the instant case.

Additionally, Appellant asserts error by the trial court in concluding that A.D. and L.D. were competent to testify. Appellant argues that the trial court did not have a well-informed basis for reaching this conclusion given its ruling restricting the parameters of cross-examination of the child witnesses during the competency hearing. Specifically, Appellant claims that he should have been permitted to cross-examine A.D. and L.D. as to the details of the alleged assaults, the nature of the acts, and the time, place and manner in which they occurred, in order to test their memory of the events about which they were being called to testify. The Commonwealth responds that Appellant suffered no prejudice **[*671]** by the trial court's ruling in this regard as he was afforded ample opportunity to cross-examine the witnesses on the details of **[***48]** the allegations of abuse at trial. As this issue speaks to the broader question of the legitimate avenues of inquiry when testing the competency of child witnesses, and because further proceedings are necessary in this case, we will address the merits of this allegation of error.

Appellant takes the position that in testing the ability of a child to recall events that he or she is asked to testify on, the competency hearing must extend to an examination of the child witness on the details of the actual event at issue. Appellant maintains that this position is consistent with current Pennsylvania law on the purpose of a competency hearing involving minor witnesses. In support thereof, Appellant relies upon *Commonwealth v. Koehler, 558 Pa. 334, 737 A.2d 225 (Pa. 1999)*, *cert. denied, 531 U.S. 829, 148 L. Ed. 2d 41, 121 S. Ct. 79 (2000)*, *Commonwealth v. Bishop, 1999 PA Super 292, 742 A.2d 178 (Pa. Super. 1999)*, *appeal denied, 758 A.2d 1194 (Pa. 2000)*, *Commonwealth v. McMaster, 446 Pa. Super. 261, [**45] 666 A.2d 724 (Pa. Super. 1995)*, *Commonwealth v. Trimble, 419 Pa. Super. 108, 615 A.2d 48 (Pa. Super. 1992)* **[***49]** , and, *Anderson, supra.*

This body of caselaw cannot be read to directly support such a broad assertion. ***HN17***[⬆] A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth. McMaster. A competency hearing is not an opportunity for extended discovery. Thus, in responding to Appellant's broad assertion as to the scope of cross-examination at a competency hearing, we find that there is no provision in the current caselaw requiring an examination of competency to extend to the details of the event at issue.

However, an inquiry on the details of the event may be necessitated if there is some evidence that a witness has no recall of the event in question, or the witness's ability **[*672]** to recall the event has been corrupted. *R.P.S., supra.* In this case, Appellant presented some evidence that the ability of A.D. and L.D. to recall the events in question was affected by their extreme youth, and that **[***50]** their memory of the events may have been tainted by their mothers' influence upon them and the methods of interrogation by which the

[18] The trial court excluded Appellant from the competency hearing relying on *Kentucky v. Stincer, 482 U.S. 730, 96 L. Ed. 2d 631, 107 S. Ct. 2658 (1987)*. In that case, the United States Supreme Court found no *Confrontation Clause* violation where the defendant was excluded from the competency hearing as the defendant was present during the trial testimony of the two minor witnesses and had a full and fair opportunity to cross-examine them on the allegations at issue. As Appellant offers no argument as to the reasons underlying of the trial court ruling, we leave discussion of the legal merits of this question for another day.

information was obtained. As stated above, we find that Appellant met the necessary threshold to trigger an examination of possible taint, impacting the competency of A.D. and L.D. in this case. Although we do not agree with Appellant's broad claim that cross-examination in a competency hearing of a minor must always extend to questions on the details of the events at issue, we do agree that some inquiry into the details of the events as reported by A.D. and L.D. should have been permitted where they were relevant to ferreting out the possibility of taint. As a remand is in order on the issue of competency, we direct that cross-examination of A.D. and L.D. at that hearing be open to legitimate questions as to the details of the events, where the line of inquiry is supported by some evidence demonstrating the link between the actual questions and the alleged taint. We emphasize that such an inquiry cannot evolve into a fishing expedition and reiterate that the parameters of cross-examination on this question, are a matter left to the discretion of the **[***51]** trial court. *Washington, supra.*

The final issue before us concerns the hearsay statements A.D. and L.D. made to third parties, which were admitted pursuant to *42 Pa.C.S.A. § 5985.1*. [19] ***HN18***[↑] The admissibility of this type of hearsay is determined by assessing the particularized **[*673]** guarantees of trustworthiness surrounding the circumstances under which the statements were uttered to the person who is testifying. See *42 Pa.C.S.A. § 5985.1*. This issue is comprised of several subparts that we will address seriatim.

[*52]** **[**46]** Appellant first asserts error by the trial court in denying Appellant the opportunity to cross-examine A.D. and L.D. as to their respective recollections of the statements they made to various third parties. Appellant argues that cross-examination of A.D. and L.D. was necessary to test the accuracy of the statements themselves. ***HN20***[↑] In many cases the accuracy of a hearsay statement must be determined without the opportunity to cross- examine the party that uttered the statement. However, where the party is available, and there exists a degree of uncertainty as to the reliability of the facts upon which the hearsay statements turn, it would be prudent to permit examination of the original speaker to test the accuracy of the hearsay statements. Given the possibility of taint impacting the competency of the child witnesses in this case, should taint be shown upon remand, the trial court shall permit Appellant to cross-examine A.D. and L.D. to test the accuracy of the statements they made to third parties.

Appellant also claims that the trial court erred in excluding the proffered expert testimony on the question of reliability of the hearsay statements. At the onset of the pre- trial hearing **[***53]** on admissibility of the hearsay statements, Appellant tendered Dr. Davis as an expert witness on the reliability of hearsay statements made by child sexual abuse victims. Dr. Davis is board certified in psychiatry and neurology, a Diplomat for the American Board of Forensic Examiners, a Diplomat of the American Board of Forensic Medicine, and a Diplomat of the American Board of Clinical Sexology. After a thorough voir dire on his qualifications, the trial court found that Dr. Davis's proposed area of expertise was not sufficiently accepted in the relevant scientific community to permit acceptance of expert testimony thereon. Appellant offers a cursory argument on this point, merely stating that the trial court misapplied the Frye standard when assessing the proposed testimony of Dr. Davis as to the reliability of the hearsay statements, citing to **[*674]** the New Jersey decision in *State v. Krivacska, 341 N.J. Super. 1, 775 A.2d 6 (N.J. Super. Ct. App. Div. 2001)*, *cert. denied*, *535 U.S. 1012, 152 L. Ed. 2d 510, 122 S. Ct. 1594 (2002)*.

HN21[↑] The admission of expert testimony is a matter addressed to the discretion of the trial court. *Dunkle supra.* **[***54]** The subject an expert will testify on must be sufficiently established to have gained general acceptance in the particular field to which it belongs. Id. (referring to the so-called "Frye standard"). As stated by Dr. Davis, the subject of his proposed testimony was as follows:

I believe that I'm testifying on the quality of information received and transmitted by hearsay witnesses to this Court based on the competence of the alleged victim in reporting the events that occurred to him and her. . . . Reliability are [sic] factors that speak to the alleged victims' . . . accuracy and accuracy of the information that they are relating. . . . Reliability is the perception of that child's testimony by others . . . .

Notes of testimony, May 10, 1999 at pp. 171-174. Dr. Davis

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[19] *42 Pa.C.S.A. § 5985.1* provides in relevant part:

(a) ***HN19***[↑] **General rule.-**An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing physical abuse, indecent contact or any of the offenses enumerated in 18 Pa.C.S. Ch. 31 (relating to sexual offenses) performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal proceeding if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child . . .

(i) testifies at the proceeding . . . .

offered no literature, research or other scientific support for his proffered area of testimony. The voir dire revealed that Dr. Davis' primary clinical experience was in the field of treating adult sexual offenders and adults suffering sexual dysfunction. After examining the voir dire of Dr. Davis, we cannot conclude that the trial court abused its discretion in rejecting his proposed expert testimony. **[***55]** This conclusion is not altered by our review of the New Jersey decision in *Krivacska*. That case dealt with the application of the taint principles set forth in Michaels. The expert testimony referenced therein dealt exclusively with the **[**47]** issue of taint and not the reliability of the hearsay statements of the minor witnesses.

In his last allegation of error Appellant challenges the trial court's determination on the admissibility of all hearsay statements made by A.D. and L.D. to the various adult witnesses who testified at Appellant's trial. ***HN22***[] Under the statutory provision for the admission of hearsay statements made **[*675]** by minors regarding their own victimization, *42 Pa.C.S.A. § 5985.1*, a trial court must assess the relevancy of the statements and their reliability in accordance with the test enunciated in Idaho v. Wright, supra. Although the test is not exclusive, the most obvious factors to be considered include the spontaneity of the statements, consistency in repetition, the mental state of the declarant, use of terms unexpected in children of that age and the lack of a motive to fabricate. *Idaho v. Wright, 497 U.S. 805, 821-22, 111 L. Ed. 2d 638, 110 S. Ct. 3139*.

[*56]** Appellant asserts that given the evidence of taint the statements fail to meet the requirements for trustworthiness established in Idaho v. Wright. In making this argument Appellant focuses on the improper manner in which the children were interrogated about the abuse and the possibility that the memories of the children were distorted by the overlay of false memories. This assertion cannot adequately be assessed on the current record as Appellant was precluded from presenting any evidence of taint, and was estopped from arguing taint as a factor impacting the reliability of the hearsay statements at issue. Following remand, this court will be in a position to address the assertion that the reliability of the hearsay statements was impacted by taint. Accordingly, we hold disposition of this final issue until after the trial court reconsiders the competency question.

For the reasons stated herein, because we find that Appellant has presented some evidence that A.D. and L.D. may not have been competent to testify because of taint, we remand this matter for a new competency hearing in a manner consistent with this opinion. The trial court is directed to hold a new competency **[***57]** hearing and transmit an opinion on the impact, if any, of taint as to the competency of A.D. and L.D. to this court within 180 days of this order. Jurisdiction is retained.

Former Chief Justice Zappala did not participate in the decision of this case.

[*676] Mr. Justice Nigro files a dissenting opinion.

Mr. Justice Eakin files a concurring and dissenting opinion.

Dissent by: Eakin and Nigro

Dissent

[*679contd] **[*49contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN

I agree that any witness (child or not), tainted by the "implantation of false memories or distortion of actual memories through improper and suggestive interview techniques," may be incompetent. If there is a competency hearing because of the age of the witness, the logical time to explore taint, once there is a preliminary showing taint actually occurred, is at that hearing. However, I disagree that "taint" always goes to competency; I also take issue on the use of expert witnesses on what is really a credibility issue. Finally, I disagree that the "evidence" here justifies a hearing in the first place.

The word **[***58]** "taint" may be used as a verb, a noun, or an adjective. It may be used to refer to the process of tainting, or to the result of that process; in the context of child abuse, it may mean the investigation was tainted, which may or may not mean the witness **[**50]** was tainted. Unfortunately many of the cases do not make this distinction clear, which (with apologies) taints the analysis.

A tainted process may affect credibility, but it does not render the victim or witness tainted or incompetent unless it denies the ability to perceive, understand, or communicate truthfully. If a child has faced interview after interview, but remains steadfast, the child cannot be precluded from testifying simply because the investigation was deemed tainted. Legitimizing the notion that establishing some taint of process proves taint of the witness, and hence incompetence per se, we **[*680]** allow the total disqualification of witnesses whose

competence is in fact unaffected. Conversely, if the witness is not capable of perceiving, understanding, or communicating truthfully, it matters not if the reason is age, mental capacity, taint of process, or any other factor.

The true issue is whether the witness, not the **[***59]** process, is tainted to the point of being incompetent. I believe the existing procedure deals with this; once competence is properly at issue, the Commonwealth must prove the requisite elements of perception and understanding, and the challenging party may offer evidence to dispute that. Creating an additional burden of addressing taint as a separate notion simply muddies the waters with fashionable jargon; established legal procedures and concepts can address the claim. Taint may be an "emerging" notion, but it is nothing but a variation of traditionally recognized considerations; it does not require departure from traditional and tested principles for evaluating witnesses. [1]

[*60]** While the majority lets the need for expert testimony to the discretion of the trial court, it notes that this Court has not permitted juries in child abuse cases to hear expert testimony on reasons children delay reporting, or about post-assault behavior patterns. I must assume that expert opinions on taint are likewise to be inadmissible at trial; if expertise on taint is allowed at trial, then other expertise on the subject of credibility is also appropriate. Pretrial, if taint is a recognized subject for opinion evidence, then certainly areas such as Child Sexual Abuse Syndrome, as recognized a phenomenon as taint, must also be proper subjects of expert testimony. The admission of expert testimony is not determined by which side wishes to address the issue; the search for credibility or competence is only served by allowing, or disallowing, experts **[*681]** on all issues affecting testimony of abused children. As I believe this is really a credibility matter, I would opt to disallow opinion testimony on the point.

The factors the majority suggests comprise a threshold showing here are these: (1) the age of the children, which make their memories "suspect merely because of their tender **[***61]** years," Majority Opinion, at 20; (2) their mother was abused sexually as a child; (3) she had sole custody; (4) her prior report of sexual abuse, which was held "unfounded"; and (5) the presence of Trooper Zellner during interviews. I believe these factors simply do not establish anything approaching a tainted process, much less one that tainted this **[**51]** witness, and find no basis for further examination of the issue.

First, the age of the children has little to do with taint. Their age may be relevant, but if a child's ability to remember is "suspect" because of age, as the majority states, that is a far cry from suggesting a false memory has actually been implanted. Children are presumed to be competent, and the bar establishing that competence is low. See *Commonwealth v. Washington, 554 Pa. 559, 722 A.2d 643, 646 (Pa. 1998)* (citing *Rosche v. McCoy, 397 Pa. 615, 156 A.2d 307 (Pa. 1959))*. Age may allow a naive child to be more easily tainted than a cynical adult, but age has nothing to do with whether a person was tainted.

The majority next notes Mrs. Delbridge was sexually abused as a child, and had made a prior complaint that someone may **[***62]** have sexually abused AD when she was two years old. It appears we are to infer this is a potential case of crying wolf by the mother of the victim, but again no reason is given to suspect actual taint. Mrs. Delbridge may be understandably sensitive to signs of sexual abuse, but how does this suggest she did anything to implant false memories in her children? The majority suggests "her experiences may have influenced the course of the investigation," but every witness in every case from shoplifting to murder has experiences which affect (taint?) their involvement in an investigation. Even if she had run the investigation all by herself, the majority does not tell us why we should think a victim of **[*682]** sexual abuse will implant false memories of victimization in others. This is plain and simple innuendo, and borders on an offensive stereotyping of victims. It is not based on evidence, and is no reason to suspect taint.

The prior allegation of abuse was dismissed as unfounded, at a time when AD was two years old and incapable of testifying; that case was hardly capable of being "founded" absent physical injury. Mere dismissal, without more, does not suggest the report was fabricated; the **[***63]** causes of the report were behavioral changes of the child, which were established by persons other than Mrs. Delbridge. Rather than support a suspicion she tainted the child, this prior report actually belies fabrication or implantation of false memory. If this implies she cried wolf, there is equal independent evidence there really was a wolf.

The majority also notes Mrs. Delbridge's influence over the children may have been enhanced because she had sole custody of them when the abuse was uncovered. Again we are to infer this common fact of life-after-divorce somehow

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[1] The classic case demonstrating a tainted witness was the Triangle Shirtwaist case. There, cross-examination revealed that a key eyewitness had memorized her story of what happened, and on the stand was merely repeating the story, time after time, word for word. This was a question of credibility, though, not competence. The witness, though clearly tainted, was merely incredible, not incompetent. See *People v. Harris, et al., 74 Misc. 353, 134 N.Y.S. 409, 26 N.Y. Cr. 472 (NY County 1911)*.

implies she implanted specific memories of abuse in the minds of her children. Motive to dislike appellant is certainly understandable--witness the PFA Order--but a reason to dislike does not equal evidence there was action on that dislike, much less action of this nature. She was abused as a child, abused by appellant to the point of getting a PFA, protected her child by reporting prior behavioral changes that indicated abuse, won sole custody of the children - why does any of this lead to the suspicion she implanted false memories in the children?

The majority acknowledges appellant's claim that Trooper Zellner's **[***64]** presence at the interviews as a "guardian angel" supports the inference that appellant was vilified and the testimony tainted. Why this supports such a spurious inference, we are not told. At most, the record states Trooper Zellner told the child not to fear appellant, but does this support an inference appellant was "vilified"? Besides, the factual memories of the children, the very root of the allegations, necessarily preceded the trooper's involvement - even if Trooper Zellner had spoken ill of appellant, **[**52]** something not of **[*683]** record, does this show the children were tainted after the fact? There is no allegation their testimony changed after his appearance; the very complaint is that the process implanted memories in the children, but the memory preceded the trooper. Having a protector with them does not imply the protector acted improperly or suggestively, or that he vilified anyone. [2]

[*65]** In sum, there is not one fact that would logically suggest anyone did anything to taint these children. All of the listed factors are at most matters of credibility, reasons a skeptic might question the side denying taint, but they do nothing to affirmatively show there was taint in the first place. One is reminded of the rule of corpus delicti*;* there must be some independent evidence suggesting that a crime actually happened before the supporting credibility reasons allow the factfinder to believe and convict. Likewise, we cannot examine reasons to believe an allegation of tainting a witness until we have independent reason to believe that something approaching taint actually resulted. The factors cited are bootstrapping at its best, and I do not find the threshold met here.

Accordingly, I must respectfully dissent from the portion of the opinion of my colleagues which expresses a contrary view.

[2] It is ironic that the basis for the claim of taint is suggestive interviewing, yet the solution to the problem is another round of questioning which may extend to the incident itself, including cross-examination, which is questioning that, by definition, suggests answers.

[*676contd] **[*47contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

DISSENTING OPINION

MR. JUSTICE NIGRO

I respectfully dissent, as I disagree with the majority's conclusion that taint is a matter of competency, rather than credibility, and therefore disagree with the majority both that taint is properly addressed in a **[***66]** competency hearing and that it is a proper subject of expert testimony. [1]

[*67]** **[**48]** As the majority recognizes, this Court has stated that when determining whether a child under the age of fourteen is competent to testify, the trial court must consider whether the child has (1) "the capacity to communicate, including an ability to understand questions and to frame and express intelligent answers," (2) "the mental capacity to observe the occurrence itself and the capacity to remember what it is that she is called to testify about," and (3) "a consciousness of the duty to speak the truth." *Rosche v. McCoy, 397 Pa. 615, 156 A.2d 307, 310 (Pa. 1959)* (emphasis omitted). In essence, these questions are **[*677]** designed to

[1] It is well established that experts may not be called to testify regarding a witness's credibility. See, e.g., *Commonwealth v. Dunkle, 529 Pa. 168, 602 A.2d 830, 837 (Pa. 1992)* (trial court erred in admitting expert testimony as to why sexually abused children delay in reporting abuse and why sexually abused children may not remember details of the abuse because such testimony infringed on jury's right to determine credibility); *Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920, 921 (Pa. 1986)* (trial court erred in admitting expert testimony that young children lack the sexual knowledge to supply details about sexual encounters and therefore usually do not fabricate stories of sexual abuse because such testimony encroached on jury's province to determine credibility); see also *Commonwealth v. Balodis, 560 Pa. 567, 747 A.2d 341, 345 (Pa. 2000)* (finding merit in appellant's argument that trial counsel was ineffective for failing to object to expert testimony that sexually abused children delay in reporting abuse and reveal abuse in stages because such testimony improperly bolstered the victim's credibility); *Commonwealth v. Davis, 518 Pa. 77, 541 A.2d 315, 317 (Pa. 1988)* (trial counsel was ineffective under Seese for failing to object to expert testimony that children typically have had some sort of sexual experience in order to report abuse because such testimony assessed children's truthfulness). Cf. *Commonwealth v. Crawford, 553 Pa. 195, 718 A.2d 768, 773 (Pa. 1998)* (under Seese, trial court did not err in excluding expert testimony that questioned validity of a witness's supposed revived repressed memories because such testimony was intended to attack witness's credibility).

ascertain the child's overall ability to observe, remember, and convey information. See *Commonwealth v. Ware, 459 Pa. 334, 329 A.2d 258, 268 (Pa. 1974)* ("The core of the competency test is the ability to give a correct account of the matters which [the witness] has seen or heard." (internal quotation marks omitted)). Thus, in a competency hearing, the trial court traditionally asks the child such questions as "Do you know what it means to tell the truth?" and probes whether the child can, in general, recall and relate **[***68]** memories from the approximate time period at issue.

Under the majority's holding today, in child abuse cases involving allegations of taint, the scope of questions at a competency hearing will be expanded to cover "the totality of the circumstances surrounding the revelation of the allegations of child abuse." Slip Op. at 20. This will presumably include specific questions regarding the alleged abuse, the child's conversations with others regarding that abuse, and the extent to which the child's recollection of events may have changed as a result of those conversations. [2] **[***70]** According to the majority, such inquiries are analogous to those a court uses when probing the ability of a mentally ill or mentally retarded adult to retain an independent recollection of events. Slip Op. at 18-19 (citing *Commonwealth v. Rolison, 473 Pa. 261, 374 A.2d 509 (Pa. 1977)* (plurality); *Commonwealth v. Anderson, 381 Pa. Super. 1, 552 A.2d 1064 (Pa. Super. 1989)*). However, an allegedly "tainted" child, unlike a mentally ill or mentally retarded adult, does not suffer from a complex medical condition that renders her generally unable to process events, retain memories, **[***69]** or understand her responsibility as a witness. [3] See Wigmore, **[**49]** Evidence § 492, at 698 (Chadbourn rev. ed. 1979) ("The true **[*678]** reason for not admitting the testimony of a person [who is mentally ill] in any case is because his malady involves such a want or impairment of faculty that events are not correctly impressed on his mind, or are not retained in his memory, or that he does not understand his responsibility as a witness." (internal quotation marks omitted)). Rather, allegations of "taint" merely contend that improper interviewing techniques have marred select memories that a child would otherwise be capable of retaining and conveying. In my view, questioning regarding the effect of these external forces on a child's memory simply do not go to a child's competency to testify, but rather merely probes whether the child's supposed memory of an event should be believed. As such, I believe that the taint inquiry is more appropriately characterized as a classic question of credibility. See Black's Law Dictionary 374 (7th ed.) (defining credibility as "the quality that makes something (as a witness or some evidence) worthy of belief").

[*71]** In the instant case, the trial court properly explored at the competency hearing the children's capacity to retain and communicate memories, as well as their consciousness of the duty to speak the truth. Upon doing so, the court concluded that the children were competent to testify. In turn, at trial, the court permitted no expert testimony regarding taint, [4] but **[*679]** allowed Appellant's attorney to freely cross-examine the children regarding the accuracy of their memories, and the jury ultimately found the children's testimony to be credible. As this was, in my view, the appropriate way to deal with Appellant's allegations of taint, I would not, unlike the majority, remand for further proceedings regarding those allegations.

[*72]**

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[2] While not material to my analysis here, I feel compelled to note that requiring allegedly tainted children to recount their traumatic experiences of abuse not only at a preliminary hearing and trial, but also at this newly-formulated version of a competency hearing, seems to give little consideration to the additional trauma such testimony undoubtedly inflicts on young children.

[3] The majority also analogizes a "tainted" child to a hypnotized adult, and cites this Court's decision in *Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (Pa. 1981)*, for the proposition that hypnotically-induced testimony raises questions of competency. See Slip Op. at 19. However, the issue in Nazarovitch was not whether questions regarding the reliability of hypnotically-induced testimony were questions of competency or credibility, but rather, was whether hypnosis, in general, "is a reliable and trustworthy evidentiary device whereby memory can be sufficiently and adequately refreshed." *436 A.2d at 173*. In addressing this issue, the court employed a Frye analysis, see *Frye v. United States, 54 U.S. App. D.C. 46, 54 App. D.C. 46, 293 F. 1013 (D.C. 1923)*, and held only that absent additional proof that hypnotically-induced testimony was reliable, no such testimony would be admissible in the courts of this Commonwealth. Although the trial court in Nazarovitch apparently addressed the admissibility of the witness's testimony at a proceeding that it called a "competency" hearing, the opinion makes clear that the trial court scheduled the "competency" hearing in response to an indication by the defendant that he planned to attack the credibility of the hypnotized witness at trial. *Id. at 172*. Accordingly, unlike the majority, I do not read Nazarovitch to support a contention that questions regarding the reliability of hypnotically- induced testimony are necessarily questions of competency, rather than credibility.

[4] In this regard, I note that the record contains scant evidence as to the exact testimony Appellant's expert would have offered, except his own contention that he would testify to the "accuracy" or "reliability," rather than the "truthfulness" or "credibility," of the children's statements. R.R. at 258a (N.T., 5/10/1999, at 171-74).

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People v. Lee

Appellate Court of Illinois, Fifth District

June 26, 1989, Filed

No. 5-87-0786

Reporter
185 Ill. App. 3d 420 *; 541 N.E.2d 747 **; 1989 Ill. App. LEXIS 1014 ***; 133 Ill. Dec. 536 ****

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARGARET LEE, a/k/a Margaret Lee Garver, Defendant-Appellant

Prior History: [*1]** Appeal from the Circuit Court of Jackson County; the Hon. Stephen L. Spomer, Judge, presiding.

Disposition: Reversed and remanded.

Core Terms

night, trial counsel, cross-examination, apartment, opening statement, rug, tavern, talk, remember, lawn mower, morning, door, defense counsel, impeached, ineffectiveness, competency, gasoline, rights, lighter fluid, post-conviction, questions, words, paper towel, witnesses, upstairs, kitchen, guess, lit, ineffective assistance of counsel, opened

Case Summary

Procedural Posture
The defendant appealed her conviction for murder entered in the Circuit Court of Jackson County (Illinois). The defendant petitioned the court for review based on allegations of ineffective assistance of counsel.

Overview
The defendant was convicted of murder and appealed her case based upon ineffective assistance of counsel claims. On appeal, the court reversed her conviction. The court held that the cumulative effect of errors made by her trial counsel required reversal. The court found that trial counsel's actions in respect to the state's main witness, who had helped the defendant set fires that led to the murder, were highly deficient. The witness had been acquitted in federal court on the arson charge and received immunity as to his testimony in defendant's case. The witness was mentally retarded and had previously been examined by doctors as to his competency to testify and his propensity to be easily led. Trial counsel never inquired into the federal court trial, the witness's mental deficiencies, or the fact that he was easily led by others. Trial counsel's also failed to ask for a hearing on the witness's competency. trial counsel failed to secure the testimony of an important expert witness. Trial counsel's cross-examination of the state's witness only hurt the defendant. He did not prepare the defendant to testify and she was easily impeached on cross-examination.

Outcome
The court reversed the defendant's murder conviction and remanded the case.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Constitutional Law > ... > Fundamental Rights > Criminal Process > Compulsory Process

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Public Trial

HN1[] **Fundamental Rights, Criminal Process**

U.S. Const., amend. VI establishes that those charged with a criminal offense in this country are entitled to certain rights: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const., amend. VI.

Constitutional Law > Involuntary Servitude

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Compulsory Process

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN2[] Constitutional Law, Involuntary Servitude

The person charged must be brought to trial within the time prescribed by statute and in the proper venue and before an impartial jury, and has the right to have compulsory service issue or the right of confrontation.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

HN3[] Preclusion of Judgments, Res Judicata

The Post-Conviction Hearing Act (Act), Ill. Rev. Stat. 1987, ch. 38, par. 122 - 1 et seq., is not intended to be used as a means of obtaining further consideration of claims of denial of constitutional rights where a review of the issues raised has been held. Where an appeal is taken from a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented but were not are deemed waived. By its terms, the Post-Conviction Hearing Act affords only one opportunity to raise a constitutional claim: Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived. Ill. Rev. Stat. 1987, ch. 38, par. 122 - 3. A defendant is not precluded from raising, by way of a petition under the Post-Conviction Hearing Act, constitutional questions which depended upon facts not found in the record.

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

HN4[] Reviewability, Waiver

The waiver doctrine does not apply to issues raised in a post-conviction petition which stem from matters outside the record and which could not be brought on direct appeal.

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

HN5[] Right to Counsel, Effective Assistance of Counsel

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN6[] Right to Counsel, Effective Assistance of Counsel

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *U.S. Const. amend. VI*. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

HN7[] Right to Counsel, Effective Assistance of Counsel

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Civil Procedure > Judicial Officers > Judges > General Overview

Evidence > ... > Competency > Disability > Children

Criminal Law & Procedure > Trials > Examination of Witnesses > Child Witnesses

Evidence > ... > Testimony > Competency > General Overview

Evidence > ... > Competency > Disability > General Overview

Evidence > ... > Testimony > Competency > Judges

HN8[] Judicial Officers, Judges

The ability to recognize right from wrong is only one of the prerequisites of witness competency. In Illinois, every person who is 14 years old is presumed competent to testify. When a child under that age is called to testify, it is the duty of the trial judge to determine first whether the child is competent as a witness. To do this, the judge must hold a preliminary inquiry into the competency of the proffered witness by examining the child's intelligence, understanding, and moral sense. If testimony is to be permitted, the court's inquiry must, with reason, satisfy the judge that the witness is sufficiently mature (1) to receive correct impressions by his senses, (2) to recollect these impressions, (3) to understand questions and narrate answers intelligently, and (4) to appreciate the moral duty to tell the truth.

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

Evidence > ... > Testimony > Competency > General Overview

HN9[] Right to Counsel, Effective Assistance of Counsel

The failure to properly investigate a witness's prior mental difficulties and failure to request a hearing on the competency of that witness fall outside the wide range of professionally competent assistance.

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN10[] **Right to Counsel, Effective Assistance of Counsel**

Strickland requires a two-prong test: first, was there ineffective assistance of counsel, and second, has the defendant established that the errors were serious enough to deprive the defendant of a fair trial, "a trial whose result is reliable."

Evidence > ... > Exemptions > Prior Statements > General Overview

HN11[] **Exemptions, Prior Statements**

Prior consistent statements are generally inadmissible. An exception to the rule of inadmissibility may exist when the person proffering the witness is attempting to rebut an allegation of recent fabrication.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Inconsistent Statements

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > General Overview

HN12[] **Examination of Witnesses, Cross-Examination**

Impeachment by a prior inconsistent statement is one of the most effective means of cross-examination. It creates an impression in the fact finder's mind that carries over to the other testimony of the witness. Impeachment is the most dramatic trial technique in the lawyer's arsenal. Selectively used and effectively employed it can have a devastating effect at trial. Jurors appreciate effective impeachment. They enjoy seeing a witness "caught" changing his story.

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

HN13[] **Appeals, Reversible Error**

An accumulation of errors can require reversal when a single instance would not.

Counsel: Edward J. Kionka, of Murphysboro, Brocton Lockwood, of Marion, and William A. Schroeder, of Carbondale, for appellant.

Charles Grace, State's Attorney, of Murphysboro (Kenneth R. Boyle, Stephen E. Norris, and Ellen Eder Irish, all of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

Judges: JUSTICE CHAPMAN delivered the opinion of the court. HARRISON and RARICK, JJ., concur.

Opinion by: CHAPMAN

Opinion

[748]** **[*424]** **[****537]** "And now abideth faith, hope, charity, these three; but the greatest of these is **[****538]** **[**749]** charity." 1 Corinthians 13:13.

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." (Schaefer, *Federalism & State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956).)

Two quotes from two men skilled in the law, separated by 2,000 years, but together in their recognition that there is a relative order of importance in cherished values. The source and wisdom of Paul's words are beyond both the scope and the authority of this **[***2]** opinion. The source of Justice Schaefer's words is obviously the sixth amendment, and their wisdom is the very subject of this opinion.

The legal questions before this court are: was Margaret Lee denied the effective assistance of counsel, and, if so, does that denial require reversal of her conviction? The answer to both of those questions is yes.

HN1[] The sixth amendment establishes that those charged with a criminal offense in this country are entitled to certain rights:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S. Const., amend. VI.)

The importance of the last mentioned of these rights, "the assistance of counsel for his defence," has been recognized not only by Justice Schaefer, but by the United States Supreme Court. "In an adversary system **[***3]** of criminal justice, there is no right more essential than the right to the assistance of counsel." (*Lakeside v. Oregon (1978), 435 U.S. 333, 341, 55 L. Ed. 2d 319, 326, 98 S. Ct. 1091, 1096*.) More explicitly, "[the] right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in **[*425]** the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama (1932), 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64*. **[***4]**

Why is the right to counsel so crucial? Precisely because we operate under an adversary system of law. A person charged with a crime has the might and the resources of the government arrayed against her; the prosecutor has little duty and less inclination to advise ***HN2***[⬆] the person charged that she must be brought to trial within the time prescribed by statute and in the proper venue and before an impartial jury and so on. The lay defendant, who may have at least some rudimentary knowledge about her *Miranda* rights, generally has no knowledge whatsoever about the above-stated rights or about the right to have compulsory service issue or the right of confrontation. The sixth amendment rights are obviously not all of the constitutional safeguards enjoyed by an individual in our society, but the knowledge of those safeguards and, equally importantly, the knowledge of the means to insure that the person charged has the full benefit of them is peculiarly the knowledge of the lawyer. The right to counsel of an accused is as the right to see to the blind or the right to hear to the deaf. With counsel the accused should both see and hear all of her enumerated rights and enjoy their full **[***5]** protection; without counsel she has little chance of either seeing or hearing them, let alone **[****539]** **[**750]** enjoying their protection. This is not meant to be critical of the State for failing to fully inform all defendants of each and every right. In our adversarial system that is not the State's function; it is, however, the function, and duty, of counsel for the defense. This duty is the same whether counsel is appointed or retained (*Cuyler v. Sullivan (1980), 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708*; *People v. Corder (1982), 103 Ill. App. 3d 434, 431 N.E.2d 701*), and it cannot be fulfilled by merely ensuring that some lawyer is present or, as Justice Bazelon so succinctly put it, "the sixth amendment demands more than placing a warm body with a legal pedigree next to an indigent defendant." Bazelon, *The Realities of Gideon & Argersinger*, 64 Geo. **[*426]** L.J. 811, 819 (1976).

Is competent counsel so important solely because of the rights of the accused? He would be if that were the only service that he afforded, but in reality defense counsel plays a dual role. His first duty is to protect **[***6]** the rights and liberties of his individual client. Second, by adequately performing his first duty, he enables our judicial system to function and to maintain its integrity as an institution. It is not only the rights of the single individual that are protected by a vigorous and effective defense, it is also the rights of each member of our society, for as Macaulay noted: "[The] guilty are almost always the first to suffer those hardships which are afterward used as precedents against the innocent." (1 T. Macaulay, The History of England 440 (1885), quoted in *United States v. Barrett (7th Cir. 1974), 505 F.2d 1091, 1115* (Stevens, J., dissenting).) Or to refer to a slightly more modern source, "[the] fundamental nature of the right to counsel in the adversary system makes effective assistance an indispensable predicate to institutional integrity." Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 Harv. L. Rev. 752, 767 (1980).

With these basic but important principles in mind we will turn to an examination of the facts of this case which result in our conclusion **[***7]** that the conviction must be reversed.

During the early morning hours of Saturday, January 15, 1983, a fire destroyed an entire city block in Murphysboro, Illinois, and a resident of one of the apartments died of smoke inhalation. On October 13, 1983, Roger Lee "Bubba" Ellis and Margaret Lee were charged with murder in that, while committing arson, they caused the death of Mr. Wayman.

Mr. Ellis had been charged earlier by the Federal authorities with the crime of arson. He went to trial on that charge in late October 1983. Although he had given a confession in January 1983, he denied confessing at trial and he was acquitted. The State murder charge against him was subsequently dismissed on double jeopardy grounds. He was granted immunity from any possible charge of perjury and testified in Margaret Lee's

trial, which took place in January of 1986. Ellis testified that he had assisted Lee in starting the fire. She was convicted of murder and sentenced to 25 years in prison and a $ 2,500 fine. Her conviction was affirmed by an order of this court on direct appeal which was based on reasonable doubt grounds. She then filed a post-conviction petition which set forth as its sole **[***8]** basis the ineffective assistance of counsel. The trial court denied the petition and she appeals to this court.

[*427] As a preliminary matter the State contends that the defendant has waived the claim of ineffective assistance of counsel because she did not raise it either in her post-trial motion or on her direct appeal. We agree that ***HN3***[⬆] the Post-Conviction Hearing Act (Act) (Ill. Rev. Stat. 1987, ch. 38, par. 122 -- 1 *et seq*.) was not intended to be used as a means of obtaining further consideration of claims of denial of constitutional rights where a review of the issues raised has been held. (*People v. Weaver (1970), 45 Ill. 2d 136, 137, 256 N.E.2d 816, 817*.) Where an appeal is taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those issues that could have been presented but were not are deemed waived. (*People v. Rooney (1974), 16 Ill. App. 3d 901, 903, 307 N.E.2d 216, 218*.) By its terms, the Post-Conviction **[****540]** **[**751]** Hearing Act affords only one opportunity to raise a constitutional claim: "Any claim of substantial denial of constitutional rights **[***9]** not raised in the original or an amended petition is waived." (Ill. Rev. Stat. 1987, ch. 38, par. 122 -- 3.) We are of the opinion, however, that defendant is not precluded from raising, by way of a petition under the Post-Conviction Hearing Act, constitutional questions which depended upon facts not found in the record. To hold otherwise would render the Act ineffectual. *People v. Thomas (1967), 38 Ill. 2d 321, 322-23, 231 N.E.2d 436, 437*.

In the instant case, although defendant on direct appeal had available to her some instances of incompetence of her trial counsel based on matters in the record, defendant has suggested herein that there are examples of counsel's incompetence which were outside the trial record and hence were not readily apparent on direct appeal. It is these aspects of trial counsel's ineffectiveness which defendant sought to have the court review by way of her petition. ***HN4***[⬆] The waiver doctrine does not apply to issues raised in a post-conviction petition which stem from matters outside the record and which could not be brought on direct appeal. (*People v. Taylor (1988), 165 Ill. App. 3d 1016, 1019, 520 N.E.2d 907, 910*.) **[***10]** We conclude, therefore, that since the allegations contained in defendant's petition under the Act require an inquiry into certain matters outside the record, and since our decision in our order of July 2, 1987, was based only upon that record, the defendant's claim of ineffective assistance of counsel was not waived. In addition, to the extent that certain other matters could arguably have been raised on direct appeal, we conclude that fundamental fairness requires that we consider them in this case. *People v. Hamby (1965), 32 Ill. 2d 291, 205 N.E.2d 456*.

The leading case on ineffective assistance of counsel, *Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. **[*428]** 2052*, first cautions against hypercritical second-guessing:

> ***HN5***[⬆] "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. **[***11]** [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694-95, 104 S. Ct. at 2065*.)

Strickland then sets forth the appropriate standard for review.

> ***HN6***[⬆] "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. **[***12]** Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." (*Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064*.)

Or, in other words, ***HN7***[⬆] "[the] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

[**541]** **[**752]** been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068*.) Or stated slightly differently, "[when] a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland, 466 U.S. at 695, 80 L. **[*429]** Ed. 2d at 698, 104 S. Ct. at 2068-69*. **[***13]**

The Illinois Supreme Court adopted the *Strickland* test in *People v. Albanese (1984), 104 Ill. 2d 504, 473 N.E.2d 1246*, *cert. denied* (1985), *471 U.S. 1044, 85 L. Ed. 2d 335, 105 S. Ct. 2061*.

Before applying the *Strickland* standard to this case, we will set forth the pertinent factual background. In 1976, Charles Murphy and his wife, Marie, purchased a building in Murphysboro. Mr. Murphy operated a tavern, Murph's Place, on the ground floor and either lived in or rented out an upstairs apartment. In 1982, Mr. Murphy and his wife were divorced, and as a part of the divorce settlement his wife was to receive $ 26,000. Marie Murphy had worked in the tavern business during the marriage.

In 1982, Mr. Murphy and the defendant Margaret Lee began living together, at one point in an upstairs apartment and at the time of the fire in a house that she rented on Route 149 near Murphysboro. The defendant had no ownership interest in the building or tavern operation although she worked in the tavern on occasion.

Roger "Bubba" Ellis also worked part time in the tavern. He would come in in the morning to clean **[***14]** up and to ice the beer. He also occasionally waited on customers. While Mr. Ellis was apparently capable of taking orders and making change, it is clear that he is a young man with some severe disabilities. He has a significant speech impediment, and he is also mentally disabled.

In Mr. Ellis' Federal trial on the arson charge, the defense counsel called Dr. Cuneo. Dr. Cuneo holds a Ph.D. in clinical psychology, and his area of expertise is forensic clinical psychology. At the time of the trial he was the Director of Forensic Research at Chester Mental Health Center, which is the Illinois maximum security hospital, and he was also a consultant for the 20th Judicial Circuit. He did one to two evaluations a week, and the majority of times that he was called to testify, it was on the behalf of the prosecution. His testimony (again in the Federal court proceeding) disclosed that Mr. Ellis had a verbal IQ of 55, a performance IQ of 64, and a full-scale IQ range of 57, which placed him in the mildly mentally retarded range. He indicated that Mr. Ellis was functioning at the level of an eight- or nine-year-old child, that he could read at the second-grade level, and conduct math calculations **[***15]** at the 1.9-year level. He gave examples of his reading ability and testified that Mr. Ellis could not read words such as "was" or "then," and that while he could read words such as "him," "how," "heat," "open," "letter," and "jar," he could not read other words such as "deep," "even," "spell," or "awake." With regard to his mathematical ability, he again gave examples. When asked if you have **[*430]** three pennies and you spend one, how many do you have left, Mr. Ellis answered two. However, when asked what is three plus four, he answered eight. In the written part of the test which asked the participant to add one and one, or four minus one, or four times two, he could do none of the operations. Dr. Cuneo further testified that an individual with an IQ of 57 is functioning in the bottom one percentile of the nation intellectually, which means that his social and intellectual abilities will be impaired, his reasoning ability will be impaired, his judgment will be impaired, and he is likely to fall apart more readily under stress. Dr. Cuneo also indicated that Mr. Ellis was receiving social security disability benefits because of his retardation and that the social security **[***16]** agency had determined that he could not handle his own funds and therefore he had to have a payee.

In addition to Dr. Cuneo's own testing, he had reviewed tests performed on Mr. Ellis by other psychologists. In June **[****542]** **[**753]** 1977, his test results placed him in the mildly mentally retarded range. Dr. Boyd tested him twice in September of 1976. One result was an IQ of 64, which would place him in the mildly mentally retarded range. The other test result of Dr. Boyd was an IQ of 44, which would have put him in the moderately mentally retarded range. Dr. O'Donnell tested him in July of 1976 and his result was an IQ of 56. The only IQ test which was significantly higher than the above-repeated test results was that of Dr. Bohn and his test result was an 82. Dr. Cuneo explained that Dr. Bohn had used a Beta test, which is a screening test that is normally given to several people at a time. Consequently, it is not as accurate as the tests conducted by Dr. Cuneo and the other authorities, which are administered on an individual basis.

Finally, Dr. Cuneo testified that he did not examine Mr. Ellis to determine either his competency to stand trial or his sanity. His examination was for other **[***17]** reasons, and as a result of them, he determined that Mr. Ellis was retarded, was a person who was easily led, was a person who would confess to almost anything if enough pressure were applied, and finally, that he was a person who would act as if he were able to answer questions when he in fact did not know the answers. In this latter regard, Dr. Cuneo gave examples of asking Mr. Ellis whether he knew what such and such meant, to which Mr. Ellis would reply yes, but then if asked to explain what it

meant, the only thing that he could do was parrot back what he had been told by the examiner.

During the post-conviction hearing, Mr. Ellis testified that Wayne Saylor had fired him before the fire and that the firing had made him mad. At the same hearing Officer Curt Graff testified that Mr. Ellis **[*431]** had been charged with arson on approximately six occasions, one of which involved a fire he set because he was mad at a man who underpaid him. Defense counsel was able to lead Mr. Ellis to state that the State's Attorney had asked him to lie on the stand. (There is absolutely no indication that there was any truth to this statement.)

After the fire of January 15, 1983, Mr. Ellis **[***18]** was first contacted by Officer Curt Graff of the Murphysboro police department on January 26, 1983. He was interviewed at the police station, after being given his *Miranda* warnings, although he was neither a suspect nor under arrest at the time. At that interview Mr. Ellis gave several versions of his activities on the morning of the fire. His first statement denied any involvement at all. When that statement was challenged, he changed it and indicated that he and Bobby Greenwell, another employee of Murph's Place, had started the fire. When the police challenged that story, he changed it and said that he and an unknown man had agreed to meet in the upstairs apartment. When the police challenged the third version, he changed it again and gave a fourth story. In the fourth, and for the time being, final version, he stated that Margaret Lee had approached him in the tavern at 10:10 p.m. on the night of the 14th and asked him to meet her at 1:45 a.m. on the morning of the 15th at the corner of 13th and Walnut Streets in Murphysboro. This location is approximately two blocks from the tavern. He went on to say that the two of them went upstairs to an apartment over the tavern **[***19]** and that the apartment was secured by a padlock. She produced a key, unlocked the door, and they went into the Wayne Saylor apartment, where she began to spray lighter fluid and requested Mr. Ellis' assistance, which he gave. While they were starting the fire, the defendant said that she was doing it because she and Charles Murphy were always fighting. After the fire was started they left and locked the door behind them. They descended the stairs and went their separate ways. After he gave this statement, Mr. Ellis was neither charged nor detained. He was allowed to get on his bicycle and go home. He was not charged for another nine months.

This fourth version is the one ultimately testified to at trial. However, the initial testimony by Mr. Ellis at trial was the same as the first version that he gave to the police.

[**543]** **[**754]** "Q. Now, Mr. Ellis, I want to direct your attention back a couple of years to Friday, January 14, 1983. Let me ask you first, Bubba, do you remember the fire at Murph's Place?
A. Yes.
Q. Okay. I want to ask you about what you were doing, Bubba, the night before the fire. Okay?

[*432] A. Yes.
Q. Do you remember that night?
A. Yes.
* * *

Q. Did you see **[***20]** Margaret Lee that night?
A. Yes.
Q. And do you remember what she was doing?
A. Was on the bar.
Q. Did you talk to Margaret Lee that night, Bubba?
A. Yes.
Q. Bubba, did Margaret Lee ask you to do anything on Friday night, January 14, 1983?
A. No.
* * *
Q. And then where did you go, Bubba?
A. Went home.
Q. You went home?
A. Yeah.
Q. Okay. Did you ever go back downtown, Bubba? Downtown Murphysboro?
A. Not that I know of.
Q. Pardon?
A. Not that I know of.
Q. Did you go back to Murphy's Place that morning?
A. I talk to my lawyer.
Q. You want to talk to your lawyer?
A. Yeah."

After this testimony a recess was taken so that Mr. Ellis could talk to his attorney, Mr. Padish. Mr. Padish then informed the court that there were no self-incrimination problems, but that Mr. Ellis was confused by the rapidity of the questions and that if the State's Attorney would slow his questioning, Mr. Ellis' confusion would be rectified. The court, without objection, then stated that it would allow a certain amount of leading by the State's Attorney. Proceedings in front of the jury began anew and Mr. Clemons led Mr. Ellis through the fourth version of his story with no objection by defense counsel.

[*21]** The cross-examination of trial counsel is set forth in full in Appendix A to this opinion. While it is somewhat lengthy, we feel it should be set forth in its entirety in Appendix A since its ineffectiveness (and indeed its affirmative harmfulness to the defendant's case) is one of the

major points in defendant's challenge to her conviction.

The other major witness for the State was Mr. Chris Brindley, **[*433]** who had been a resident in another upstairs apartment since November 1982. Mr. Brindley testified that he heard a noise out in the hall at approximately 2 a.m. He placed it at that time because he had just finished setting several alarm clocks that he had purchased at an auction earlier in the evening. He testified that he looked out in the hall and saw a woman from the shoulders up who was wearing a red jacket and who was "fiddling" with the door to Wayne Saylor's apartment. He didn't know the woman's name, but he recognized her from seeing her in the tavern downstairs and/or with Charles Murphy. He went to bed within five minutes of seeing the woman and was awakened a few minutes later by the smell of smoke. He and his roommate escaped through their window. He subsequently **[***22]** picked the defendant out of a photo lineup of five women. Of the five women, the defendant was the only one who wore her hair up. Mr. Brindley also identified the defendant in the courtroom.

In addition to Mr. Ellis and Mr. Brindley, the State called several witnesses who testified that they saw Charles Murphy's two-tone station wagon parked near the tavern at 1:50 a.m. on the morning of the 15th and that the defendant often drove Mr. Murphy's car. To establish the arson element of the case, the State called Mr. Barney West. Defense counsel neither consulted **[****544]** **[**755]** with nor called to trial an expert witness on this issue. Other witnesses for the State dealt with the identification of photos, exhibits, cause of death, and impeachment of the defendant.

After the State rested, defense counsel made the following opening remarks:

> "THE COURT: * * * [Are] you ready?
>
> TRIAL COUNSEL: Yes, Your Honor. If it please the Court and Mr. Clemons, ladies and gentlemen of the jury, at the start of this trial I reserved opening statement until such time as the defendant was to place their case of record and I think the best statement to be made to this jury is by putting the defendant on the stand **[***23]** to give testimony and I'm going to call Margaret Lee."

Trial counsel immediately called the defendant as a witness. He hadn't decided to call her to the stand until that very day. Although he had discussed generally the areas he would be going into with her, he hadn't discussed her specific testimony with her before putting her on the stand. He had not shown her the handwritten statements she had given to the police some three years before the trial.

The defendant testified that she left the tavern with Charles Murphy at approximately 1:25 a.m., went to their home approximately **[*434]** five minutes away, and went to bed. She denied returning to town, meeting Roger Ellis, and starting the fire. The defendant was impeached on the contents of her earlier statement as to the time that she left (12:50 a.m. in the statement) and as to whether or not she and Charlie Murphy had gone to the Eagles earlier in the evening.

Defense counsel called two witnesses who testified that they had driven by the Murphy place at approximately 1:45 and had not seen his car near the place. He also introduced into evidence a red jacket that Mrs. Lee had been wearing the night of the fire.

At the **[***24]** hearing on defendant's post-conviction petition several witnesses testified and established the following facts. Trial counsel was licensed to practice in 1954. From 1954 to 1956 he worked for the Chicago-Burlington-Quincy Railroad as an accountant. From 1956 to 1964 he worked for Chicago Title examining titles and reviewing abstracts. From 1964 to the time of trial he was engaged in the general practice of law in Murphysboro. He estimated that as a private practitioner approximately 20% of his work, including one prior murder case, was in the criminal field and approximately 50% of his work involved examining for an abstract company and rendering opinions upon the insurability of titles.

Appellate counsel list a multitude of mistakes committed by trial counsel and urge that they require reversal either singly (as to some of them) or certainly as a cumulative matter when all are considered. We will examine those errors that we perceive as more serious in the immediately succeeding pages and treat others more briefly in the concluding pages of this opinion.

The first of the criticisms deals with the witness Roger Ellis, who was obviously one of the State's most important witnesses **[***25]** since he testified that he was with the defendant and saw her start the fire. Appellate counsel criticize trial counsel's treatment of Roger Ellis in several respects: (1) he failed to file a motion *in limine* or otherwise challenge the competency of Mr. Ellis to testify as a witness; (2) assuming such a motion had been unsuccessful in excluding Mr. Ellis as a witness entirely, the cross-examination of Mr. Ellis was not only ineffective in its failure to attack, but it was affirmatively harmful in bolstering his credibility; and (3) trial counsel failed to call Dr. Cuneo to establish, at a minimum, that Mr. Ellis was easily led and would repeat stories.

We agree with all three criticisms. Dr. Cuneo was called as a witness for the defense in Mr. Ellis' trial in Federal court, and his testimony has been outlined earlier in this opinion. That testimony was available to and had been reviewed by trial

counsel before the trial of **[*435]** Margaret Lee. Also available to him, but never obtained or reviewed by him, were the opinions of Dr. Wisenhunt in 1977 and Dr. Boyd in 1976, both of whom expressed the opinion that **[****545]** **[**756]** Roger Ellis was incompetent to stand trial at the time of their **[***26]** examinations. The opinion of Dr. Boyd was obtained in relation to an arson charge pending against Mr. Ellis at that time.

Why then did trial counsel not challenge the competency of Roger Ellis? Was there some possible detrimental effect to the defendant's case if such a challenge were made and rejected? The answer to the latter question was obviously negative and trial counsel so testified at the post-conviction hearing. He also gave his answer to the first question. It was that he knew Mr. Ellis from seeing him around town and that he felt Mr. Ellis knew the difference between right and wrong. Whether his feeling was correct or not, it is not the appropriate legal test to determine the competency of a witness to testify. (See E. Imwinkelried, Evidentiary Foundations 17 -- 28 (1980).) Basic textbooks on trial techniques are not the only source of authority as to witness competency. The law is clear that ***HN8***[↑] the ability to recognize right from wrong is only one of the prerequisites. (*People v. Sims (1969), 113 Ill. App. 2d 58, 251 N.E.2d 795*.) The *Sims* court discussed the appropriate standards in the following language (citations from the opinion **[***27]** are omitted):

> "In this state, every person who is fourteen years old is presumed competent to testify. [Citations.] When a child under that age is called to testify, it is the duty of the trial judge to determine first whether the child is competent as a witness. [Citations.] To do this, the judge must hold a preliminary inquiry into the competency of the proffered witness by examining the child's intelligence, understanding, and moral sense. [Citations.] If testimony is to be permitted, the court's inquiry must, with reason, satisfy the judge that the witness is sufficiently mature (1) to receive correct impressions by his senses, (2) to recollect these impressions, (3) to understand questions and narrate answers intelligently, and (4) to appreciate the moral duty to tell the truth (and comprehend the meaning of the oath)." *Sims, 113 Ill. App. 2d at 61, 251 N.E.2d at 796-97*.

As the above quote indicates, when a child under 14 is called to testify, the court should make a determination as to his competency. In this case Mr. Ellis' chronological age was obviously greater than 14, but mentally he was an eight- to nine-year-old child. If the **[***28]** court has the duty to make a determination, isn't it incumbent upon counsel to request a hearing on the issue? Isn't this particularly true in a case **[*436]** such as this when the status of the witness' mental development is known from prior trial testimony? The answer must be yes and this is true without consideration of the prior opinions of incompetency discussed above, which while not reviewed by trial counsel, could have been. It has been held that the failure to properly investigate prior mental problems of a defendant so as to intelligently determine his competency to stand trial and/or the feasibility of an insanity defense amounts to ineffective assistance of counsel. (*People v. Howard (1979), 74 Ill. App. 3d 138, 392 N.E.2d 775*; *People v. Murphy (1987), 160 Ill. App. 3d 781, 513 N.E.2d 904*.) In *People v. Howard* the defendant mentioned her prior problems for the first time at the second hearing on competency. At that time they were mentioned only briefly and in passing. After her conviction the probation officer obtained a discharge summary of her prior hospitalizations in preparing the presentence **[***29]** investigation report. The appellate court held that this information should have been obtained and considered by trial counsel and that his failure to do so constituted ineffective assistance. The fact that defendant in that case was to a great extent uncooperative with her counsel did not excuse his failure to investigate. In *People v. Murphy* the court held that the defendant's confinement at the Residential Treatment Unit of the Cook County Department of Corrections, coupled with other circumstances, required further investigation. The court in *Murphy* stated:

> "Defense counsel has a duty to make reasonable investigations or to make reasonable decisions that make particular investigations unnecessary [citing *Strickland*]. Moreover, counsel has an **[****546]** **[**757]** affirmative obligation to make further inquiry where facts known and available or with minimal diligence accessible to him raise a reasonable doubt of the defendant's mental condition; and, a defendant is denied the effective assistance of counsel where reasonable grounds exist to question his sanity or competency but defense counsel fails to explore the issue." *Murphy, 160 Ill. App. 3d at 789, 513 N.E.2d at 910*. **[***30]**

While both of the above cases dealt with the *defendant*, the importance of Mr. Ellis' testimony in this case suggests that the same standard should apply to counsel's investigation of his background. This is particularly true given the ease of procuring information in this case. Defendant's counsel on her post-conviction petition had no difficulty in obtaining the earlier evidence of Mr. Ellis' incompetency to stand trial, a situation which is similar to the probation officer's search in *People v. Howard*. More importantly, Dr. Cuneo testified in Federal court about the prior tests conducted on Mr. Ellis. These **[*437]** were obviously a part of Dr. Cuneo's file and were easily available to trial counsel. We therefore hold that

HN9[] the failure to properly investigate Mr. Ellis' prior mental difficulties and failure to request a hearing on the competency of Mr. Ellis fell "outside the wide range of professionally competent assistance." (Strickland v. Washington (1984), 466 U.S. 668, 690, 80 L. Ed. 2d 674, 695, 104 S. Ct. 2052, 2066.) We note that distinctions have been drawn between tactical decisions and misapprehensions of law. **[***31]** (See People v. Wright (1986), 111 Ill. 2d 18, 488 N.E.2d 973.) Trial counsel's misconception of Ellis' competency to testify was of the latter type.

Some writers contend that once a finding of ineffective counsel is made, reversal is mandated. (See, *e.g.*, Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. Pa. L. Rev. 1259 (1986); Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625 (1986).) The basis of their position is that our system of justice is based upon adversarial confrontation. In order to insure a fair result under that system, equally expert counsel would be the ideal. Recognizing that the ideal is impossible to attain in our real world, they argue that, at the minimum, competent counsel are absolutely necessary to provide a reliable result under the adversarial system. Therefore, they conclude that once ineffectiveness is established, the result is questionable and the case must be reversed.

The **[***32]** above conclusion, however, is not the one reached by the Supreme Court in *Strickland*. HN10[] *Strickland* requires a two-prong test: first, was there ineffective assistance of counsel, and second, has the defendant established that the errors were serious enough to deprive the defendant of a fair trial, "a trial whose result is reliable." Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064.

The State argues that the second prong of the *Strickland* test cannot be met on the Ellis competency issue for two reasons. First, the original trial judge implicitly found Mr. Ellis competent to testify. Second, the trial judge on the post-conviction hearing explicitly found Mr. Ellis to be a competent witness. To the first of these arguments we must respond that the failure of trial counsel to adequately investigate and to adequately present evidence of Mr. Ellis' condition to the original trial judge is one of the bases of this appeal. With regard to the second contention, we acknowledge Judge Spomer's finding of competency of Mr. Ellis on the post-conviction hearing and give due deference to it. In **[***33]** view of further errors of trial counsel we need not **[*438]** and do not decide whether Judge Spomer's decision was against the manifest weight of the evidence that was presented to him. We note that neither the original trial judge nor Judge Spomer conducted any specific inquiry into Mr. Ellis' competency. There may be future hearings on the competency of Mr. Ellis to testify in this case and we do not wish to **[****547]** **[**758]** influence the finding of the trial court in making that determination.

The failure to challenge Mr. Ellis' competency does not end our discussion of trial counsel's treatment of this witness. Another point raised by appellate counsel was his failure to call Dr. Cuneo to the stand. Trial counsel indicated that his failure to call him was not based upon a tactical decision as to the wisdom of calling Dr. Cuneo as a witness. In fact he testified that had Dr. Cuneo been available, he would have called him, because even though Dr. Cuneo would not have been beneficial on the competency issue, he felt that he would have been beneficial to defendant's case by giving the testimony that Mr. Ellis was easily led. Trial counsel did not call Dr. Cuneo because he had not contacted him **[***34]** in time, subpoenaed him in time, and paid his fee in time to ensure his presence at trial. He did not move for a continuance based upon Dr. Cuneo's unavailability. In view of the importance of Dr. Cuneo, we feel that the failure to call him also establishes ineffective assistance of counsel.

In turning to other claimed errors, we want to discuss in some detail the cross-examination of Mr. Ellis by trial counsel. It should be mentioned that, before beginning his cross-examination, trial counsel had at least three versions of the events of that evening given by Mr. Ellis which were inconsistent with what he had just testified to at trial. They were as follows:

(1) the first version he gave to the police in which he denied any involvement at all;

(2) the second version which he gave to the police in which he indicated that he and Bobby Greenwell had participated in setting the fire;

(3) the third version he gave to the police in which he indicated that some unknown person had directed him to set the fire.

In addition to these, the original versions given to the police and provable through Officer Graff, he had available to him the transcripts of the Federal court proceedings **[***35]** in which Mr. Ellis had denied all involvement. He also had potentially available to him the earlier trial testimony of Mr. Ellis on direct examination in which he had again denied any involvement. This took place just before the recess **[*439]** was taken and just before the State's Attorney was allowed to lead Mr. Ellis through the fourth version without any objection. Finally, he could have had Wayne Saylor testify to Mr. Ellis' denial of involvement, but trial counsel had never inquired of Mr. Saylor about that point. There is in the cross-

examination only one short segment dealing with all of these prior inconsistent statements. The beginning of the cross-examination consists of three questions and answers and it is not again touched upon in the 14 pages of cross-examination. In addition to the foregoing, trial counsel had apparently interviewed Mr. Ellis on repeated occasions and he had given differing stories on those occasions. There is again only one reference to any of the prior interviews and it is one question and one answer in which the following was stated:

"Q. Did you tell me you weren't there that night?
A. Yes."

In addition to the foregoing materials, **[***36]** all of which were available and could have been used much more extensively than the four question-and-answer utilization that was made of them, it is apparent from the hearing on the post-conviction petition that additional statements were easily obtainable from Mr. Ellis. Appellate counsel's investigator testified that he interviewed Mr. Ellis and that Mr. Ellis said that he had never testified that Margaret Lee set the fire, and that rather than she being the perpetrator, he thought it was Marie Murphy. That statement, which would obviously have been very beneficial to the defendant's case at the original trial, was never obtained by trial counsel nor did he make any record of any of the inconsistent interviews that he had with Mr. Ellis during his handling of the case which could have been used, if necessary, to impeach Mr. Ellis.

Impeachment of Mr. Ellis as to the happenings on the night or early morning hours in question was not the only fruitful **[****548]** **[**759]** source of cross-examination. Mr. Ellis had also been granted immunity by both the State and Federal authorities for any possible perjury charges that could be brought against him because his testimony in the State court was obviously **[***37]** diametrically opposed to the testimony he had previously given in the Federal court proceedings. The fact that this immunity had been granted was never brought out on cross-examination. Failure of trial counsel to use material that was available and/or to gather additional material to use in cross-examination of Mr. Ellis is another instance of ineffective assistance of counsel.

The failure of trial counsel to effectively attack either Mr. Ellis or his testimony is not the only instance of ineffective assistance that is exhibited in his cross-examination. The question of whether or not to **[*440]** cross-examine at all must be addressed in a manner similar to physicians' care of patients: "First, do no harm." In other words, if the cross-examination is not going to be helpful to a client's case, and if it may be harmful, then it is probably better not to indulge in it at all. There can be no question that Margaret Lee would have been better served by no cross-examination, when none at all is compared with the cross-examination actually conducted.

If one of the basic rules is to do no harm, another is "don't repeat the direct examination!"

> "This may be the most commonly violated **[***38]** maxim of good cross-examination. Many are the lawyers whose standard approach is to have the witness 'tell it again' in the invariably groundless hope that the witness' testimony will somehow fall apart during the second telling. This approach almost invariably fails. It has merit only in situations where the witness' testimony appears memorized, or where certain parts of the direct examination support your theory of the case." (T. Mauet, Fundamentals of Trial Techniques 242 (1980).)

This rule was repeatedly violated and it was not, as suggested by the State in oral argument, a situation where trial counsel was employing the technique utilized in the Triangle Shirtwaist Factory Fire. In that case, Max Steuer listened to the carefully rehearsed story of one of the survivors and then on cross-examination said, "Sophie, tell it again." She did, word-for-word. His next question was, "Tell it again, Sophie." Again she repeated it verbatim. Mr. Steuer then forcefully and successfully argued that the witness had been coached into spewing forth the story solicited by the prosecutor. (I. Younger, The Art of Cross-Examination (1976).) This exception to the rule was brilliantly used **[***39]** by Mr. Steuer, but this was not the technique employed by counsel in this case. His cross-examination of Mr. Ellis repeatedly asked the witness to recite facts harmful to his client's case. We set forth below a few of these instances; more will be found in the appendix.

"Q. Where was Marge at this time?
A. In the kitchen.
Q. She was in the kitchen then?
A. Yes.
* * *
Q. She lit the paper towels. What did she have to use to light the paper towels, do you know?
A. I guess some lighter fluid up in Wayne Saylor's apartment.
* * *

[*441] Q. Now you say that the key was on Charlie's key ring?
A. Yes.
Q. And Marge had Charlie's key ring?
A. Yes.
* * *
Q. Okay when you came up these stairs you stood here?
A. Yes.
Q. While Marge opened the door?

A. Yes.
Q. And when you came out she closed the door and you went down the stairs first?
A. Yes.
Q. And she parked the car in front of the Cairo Barbecue Sauce place?

[**549]** **[**760]** A. Yes.
* * *
Q. How many fires that night did Marge light, can you tell me?
A. I don't remember.
Q. When she lit them, how did she light them? Did she bend down and light them or throw paper towels on them or what?
* * *
Q. And she lit the fires up by the couch?

A. The patio. **[***40]**
Q. She lit the fire in the patio?
A. Yeah."

If the jury had had some question about Mr. Ellis' ability to recall and remember because of the fact that he had to be led through direct examination by the State's Attorney, they would have been waiting for the cross-examination to destroy a witness who had to be led so much on direct. Instead of an exam that destroyed, refuted, impeached or attacked Mr. Ellis' testimony in some way, it received from trial counsel questions that were designed to elicit responses that damaged his client's position. It is unbelievable that the foregoing questions could have been asked of this witness by *defense* counsel. The elicitation of harmful matters on cross-examination has been criticized by Illinois courts in the past. *People v. Nitti (1924), 312 Ill. 73, 143 N.E. 448*.

In addition to the recapitulation of harmful testimony outlined above, trial counsel repeatedly obtained an answer helpful to his client's case and then *led* the witness to recant the helpful answer. Only two of these instances will be set forth below; the first deals with the **[*442]** fact that he had recently been discharged or laid off **[***41]** by Mr. Charles Murphy; the second deals with Mr. Ellis stating that he first learned of the fire the next morning.

"Q. Did Charlie -- had Charlie laid you off by any chance?
A. Yes.
Q. Now, you say that Charlie rehired you, you were going to go back to work for him on Sunday? Or for the birthday celebration? Which?
A. I guess the birthday, I guess.
* * *
Q. Is that the first time that you learned about the fire?
A. Yes.
Q. Can you tell me what time of day that was that Bobby came in to tell you?
A. Seven o'clock in the morning.
* * *
Q. I'm a little confused, Bubba. You said you set the fire and then when I asked you if Bobby Worthen told you about the fire and that was the first time you learned of the fire, you said yes.
A. After the night.
Q. Pardon?
A. After the night in the morning at seven.
Q. That night?
A. Yeah. Me and Marge set it.
Q. You set it. But you first learned about the fire when Bobby Worthen told you about it, is that true?
A. Second time.
Q. That isn't what I asked you. I said -- you told me that when Bobby Worthen told you about the fire at seven o'clock in the morning that was the first time that you learned of the fire?
A. Yeah.

Q. You said that's **[***42]** right?
A. Yes.

Q. *Didn't you know of the fire before Bobby Worthen talked to you*
A. Yes." (Emphasis added.)

The final example that we will quote concerns trial counsel's proof of prior consistent statements by a witness adverse to his client's interests. Those questions and answers are set forth below.

"Q. Can you tell me approximately how many times the police **[*443]** officers have talked to you about this fire?
A. A lot of times.
Q. A lot of times. As many as ten?
A. Yeah.
Q. Or more?
A. About eleven or twelve.

[**550]** **[**761]** Q. Eleven or twelve times?
A. Yes.

Q. *And you sat and talked to them about this and told them basically this same story the twelve times*
A. Yes." (Emphasis added.)

It is clear that ***HN11***[] prior consistent statements are generally inadmissible. (*People v. Tidwell (1980), 88 Ill. App. 3d 808, 410 N.E.2d 1163*.) An exception to the rule of

inadmissibility may exist when the person proffering the witness is attempting to rebut an allegation of recent fabrication. (*People v. Thibudeaux (1981), 98 Ill. App. 3d 1105, 424 N.E.2d 1178*.) This court is aware of no case dealing with the proof of prior consistent **[***43]** statements on cross-examination. The lack of cases on this point is in all likelihood due to the fact that most lawyers are not interested in bolstering the credibility of a witness in cross-examination. While it may be that some witness in some case at some point in time may be so helpful to the cross-examiner that the cross-examiner would wish to bolster his credibility, that situation was not presented in this case.

From the excerpts of the cross-examination and from our comments regarding them, it should be apparent that we feel that the cross-examination conducted by trial counsel of the State's most crucial witness fell below the standards required of effective representation.

We now turn to the defense counsel's lack of opening statement, or ineffective opening statement, depending upon the characterization that may be given to it. The opening statement in its entirety has been set forth in this opinion. The first error that may have been made was reserving the opening statement until the close of the State's case. This has the obvious effect of allowing the prosecutor to make an opening statement and present all of his testimony prior to the jury being advised in any **[***44]** manner of the defense theory of the case. Assuming that there may have been some tactical reason to reserve opening statement until the close of the State's case (although this seems highly unlikely in view of the fact that defense counsel must have known that the State would follow essentially the same format that it followed in the Federal court proceedings, a copy of the **[*444]** transcript of which was in his possession), it is inexplicable that a more cogent opening statement was not made. This case does not present the situation where the relative lack of discovery in a criminal as opposed to a civil case might dictate a more reticent opening statement. This case had been essentially tried before when the case against Roger Ellis was tried in Federal court. The format of the presentation in both trials was essentially the same. Defense counsel therefore had a full and complete preview of the State's evidence, its order of presentation, the points it would stress, and the conclusions it would reach. He knew or should have known both the strengths and the weaknesses of the State's case and yet he failed to avail himself of the opportunity to comment upon them at the earliest **[***45]** point in the trial by reserving his opening statement until the end of the State's case. When he finally made his opening statement, he said nothing, informed the jury of nothing, and admitted at the hearing on the post-conviction petition that his opening statement did not advise the jury of his theory of the case.

Many commentators have stated that the opening statement is the single most important portion of a trial.

> "Since some studies show that approximately 80% of jurors decide who should win the case during the opening statements, the importance of the opening statement cannot be overstated. Clarity and logic are the goals; when you finish the opening, the jury should have a clear understanding of the case, your theory, and why you should win." Jossen, *Opening Statements: Win It In The Opening*, The Docket, The Newsletter of the National Institute for Trial Advocacy, Vol. 10, No. 2, Spring 1986, at 1.
>
> "The sincerity, candor and preparation that you show on opening argument can set the tone for the entire trial. No juror can escape liking one attorney more than another. A showing of ineptitude, uncertainty, **[****551]** **[**762]** lack of preparation, insincerity, or lack of identification **[***46]** with your client or his cause can cripple, if not destroy, your case at the outset. On the other hand, if you can establish a rapport with the jury, the entire trial may well be tipped in favor of your client. Opposing counsel will be saddled with the burden of overcoming the presumption of good faith you have created." Marshall, *The Telling Opening Statement*, Prac. Law., Oct. 1973, at 27, 28.
>
> "It is difficult to imagine a situation where a party, either plaintiff or defendant, would find it advantageous to waive making an opening statement. Remember that trials are conducted **[*445]** to see which viewpoint of a disputed set of the facts the jury will accept as true. Making an effective opening statement gives you a head start over your opponent. Take advantage of the opportunity." T. Mauet, Fundamentals of Trial Techniques 56(1980).

The State argues that the defendant's contention that trial counsel made no opening statement is factually incorrect since the record reveals that when called upon by the trial court to proceed he made some preliminary remarks which the State equates with an opening statement. To equate Mr. Hendricks' remarks with an opening statement is **[***47]** like equating the child's nursery rhyme Hickory Dickory Doc with The Death of the Hired Man by Robert Frost. The former is arguably entitled to the appellation of poem; it has words, it rhymes, it says something, although nothing particularly meaningful. The latter has earned a well deserved place in American literature; it introduces the participants, delves into their backgrounds, brings to life the never seen and soon-to-die Silas and culminates with the pronouncement of his death in five carefully chosen words. This contrast is

not meant to imply that every opening statement must be a work of art, but, given its recognized importance at trial, it must consist of something more than a few meaningless words to be entitled to the characterization of opening statement.

As has been indicated, the lack of an opening statement in this case is even more inexplicable when one realizes that trial counsel had the earlier Ellis trial for a preview of what was going to occur in the Margaret Lee trial. The importance of primacy, the tendency of people to believe most deeply that which they have first heard, obviously gives the prosecution a distinct advantage in a criminal case. (Colley, **[***48]** *The Opening Statement: Structure, Issues, Techniques*, Trial, Nov. 1982, at 53.) Reserving an opening statement in a case such as this and thus allowing the State the added advantage of reinforcing its opening statement with all of its evidence before the jury hears anything else, raises some question about the competency of counsel, but it *may* have been an appropriate tactical choice. (*People v. Greer (1980), 79 Ill. 2d 103, 402 N.E.2d 203*.) But to make such a reservation and then to make such a mockery of one of the most meaningful aspects of a trial is another example of ineffective assistance of counsel.

It should be noted that immediately after his introductory remarks trial counsel called the defendant to the stand. He hadn't decided to call her until that very day. He hadn't furnished her the statement she had given to police three years earlier. As a direct **[*446]** result of that act of incompetence she was impeached as to the time she left the tavern. The exact time that she left the tavern was of little consequence, but the fact that she was impeached is of grave consequence. ***HN12***[⬆] Impeachment by a prior inconsistent statement is **[***49]** one of the most effective means of cross-examination. It creates an impression in the fact finder's mind that carries over to the other testimony of the witness.

> "Impeachment is the most dramatic trial technique in the lawyer's arsenal. Selectively used and effectively employed it can have a devastating effect at trial. Jurors appreciate effective impeachment. They enjoy seeing a witness 'caught' changing his story." T. Mauet, Fundamentals of Trial Technique 234 (1980).

[**552]** **[**763]** While the jury is not advised of the significance of any other cross-examination technique, there is a specific instruction which is given on the effect of impeachment by prior inconsistent statement. (Illinois Pattern Jury Instructions, Criminal, No. 3.11 (2d ed. 1981).) In this trial Roger Ellis could have been the subject of extended impeachment. He was not. Margaret Lee would never have been impeached if her lawyer had only furnished her three-year-old statement to her. He did not.

In addition to not furnishing his client with her own statement, Mr. Hendricks admitted that he did not prepare her for her trial appearance other than a general discussion. He never went into the specific testimony that **[***50]** he would be eliciting from her before putting her on the stand. These are additional examples of ineffective assistance of counsel.

The errors we have discussed thus far in this opinion have all been instances of ineffective assistance of counsel. We do not hold that each instance of ineffectiveness would warrant reversal, although the errors in the cross-examination of Mr. Ellis alone, given his importance in the case, would certainly suggest the need for reversal. We recognize that ***HN13***[⬆] an accumulation of errors can require reversal when a single instance would not. *People v. Bell (1987), 152 Ill. App. 3d 1007, 505 N.E.2d 365*.

The ineffectiveness in this case is clear. What about its effect on the outcome? The easy answer to this question would be to state that Mr. Ellis, who had given a confession to the crime, was represented by a different lawyer and was acquitted. Therefore, the answer would continue, if Margaret Lee, who has never admitted guilt, had had the same quality of representation, she would have been acquitted also. This answer overlooks the testimony of Mr. Brindley, who identified **[*447]** Margaret Lee, but not Mr. Ellis and the **[***51]** additional evidence given against the defendant by the testimony of the witnesses who saw Mr. Murphy's car near the scene at approximately 2 a.m.

With regard to the automobile testimony, we point out that trial counsel made no serious challenge to the identity of the car (none of the witnesses identified it by license plate; all by appearance only). He did challenge the timing of the identification of the car by Mrs. Murphy by suggesting, but not proving, that the VFW, which she had left immediately before seeing the car, closed at 1 a.m. rather than 2 a.m. With regard to Mr. Brindley, defense counsel did not impeach him with his original statements to the police that: (1) the woman was 5 feet 6 inches tall (the defendant is 5 feet tall); and (2) the woman had *short* hair (the defendant's hair was worn in what is colloquially known as a "beehive"). These differences are significant. The failure to impeach Mr. Brindley is not of the magnitude of the failures committed in the cross-examination of Mr. Ellis, but the jury was deprived of the knowledge of their existence. That deprivation could only have damaged the defendant's position with the jury, and as has been stated: **[***52]**

> "[Juries] evaluate many subjective, as well as objective, factors that bear on determining witness-credibility, and may well have been influenced in ways that a court reviewing the cold, written record could not determine.

> An effective attorney, having properly investigated the case, may have been able to cross-examine the crucial prosecution witness in a manner that would have impacted on the witness' credibility and demeanor in ways the reviewing court could never ascertain." Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625, 642 (1986).

There are many other trial errors raised by appellate counsel, including the failure to call numerous witnesses and the ineffectiveness of trial counsel's closing argument. We will not lengthen this opinion by reciting them except to note that with regard to the closing arguments it is difficult to understand why trial counsel did not argue the obvious question as to why Margaret Lee or any potential arsonist would **[****553]** **[**764]** have enlisted the aid of Roger Ellis to commit the crime. We feel it is clear that not only was trial counsel's **[***53]** conduct ineffective, but that his ineffectiveness has brought about a result that cannot be relied on under the second prong of the *Strickland* test.

We are aware that trial judges are placed in a difficult position in deciding these matters on post-conviction petitions. They are **[*448]** forced to review cold records and engage in hindsight in judging the conduct of local attorneys who may do a credible job of representing their clients most of the time, but it is not the conduct of an attorney most of the time that must be judged in these cases, and concern for the attorney should not be the paramount concern. Instead, "[we] must come to realize that the issue in effectiveness of counsel cases is not the culpability of the lawyer but the constitutional right of the client." (Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 25 (1973).) We, as an appellate court, must also heed the warning of Justice Bazelon:

> "In warning that the sixth amendment guarantee of effective assistance of counsel is in danger of becoming a dead letter in the courts of our major urban jurisdictions, I have concentrated on the problem at the trial level, but **[***54]** the appellate courts must share the responsibility. One of the major reasons that the problem of ineffective assistance has remained hidden is the appellate courts' remarkable propensity to ignore the issue of ineffective assistance altogether and to paper over the cracks in the house that *Gideon* built." 42 V. Cin. L. Rev. at 20-21.

Responding to Justice Bazelon's call to refuse to "paper over the cracks in the house that *Gideon* built" is not without problems. We are aware that reversals create hardships for witnesses who must appear again and for prosecutors who must prepare and present them again, and for the courts and the jurors who must hear them. We are also aware, however, of the preeminent place that the right to an effective counsel plays in the protection of every individual accused of crime and the auxiliary role that such counsel play in insuring that the trials in our courts produce just results.

Therefore, we reverse and remand this case for a new trial.

Reversed and remanded.

Appendix

CROSS-EXAMINATION

Conducted by Mr. Hendricks

"Q. Bubba, what was Marge wearing that night?

A. I don't remember.

Q. You don't remember?

A. No.

[*449] Q. Now, in Federal court **[***55]** you said that Marge and you were not at Murph's Place that night, did you not?

A. Yes.

Q. Okay. And you also gave a statement to Mr. Graff concerning this, did you not?

A. Yes.

Q. In that statement do you remember saying that you were afraid that Marge would hit you in the head if you testified in Federal court other than the way you did?

A. No.

Q. Okay. Now, as I understand this, did you close the door behind you when you went into Wayne's apartment?

A. Yes.

Q. Did you latch the door when you went into Wayne's apartment?

A. No.

Q. You didn't? And you went in first?

A. Marge did.

Q. Marge did. But you walked up to the lawn mower?

A. Yeah.

Q. And you spilled the lawn mower? You turned it over?

A. Yes.

[**554]** **[**765]** Q. Did gas flow out of the lawn mower?

A. Yes.

Q. And then you went from the lawn mower to where? To the kitchen?

A. Yes.

Q. Where was Marge at this time?

A. In the kitchen.

Q. She was in the kitchen then?

A. Yes.

Q. Now, this rug that's up here, did you put gasoline on that too?

A. Yes.

Q. You did. And then you opened the rug and rolled it down?

A. No. Leave it rolled up.

Q. You left it rolled up?

A. Yes.

Q. Did you bring it down to this area of the room?

A. No.

Q. Did you light **[***56]** that rug?

A. Yes.

Q. You did? What did you light it with?

A. My lighter.

[*450] Q. Your lighter. What did Marge use to light?

A. The paper towels.

Q. She lit the paper towels. What did she have to use to light the paper towels, do you know?

A. I guess from some lighter fluid up in Wayne Saylor's apartment.

Q. I didn't understand you, Bubba.

A. I guess from lighter fluid.

Q. You think that she had a lighter too?

A. Yes.

MR. CLEMONS: I don't believe that's what he said, Your Honor.

Q. (By Mr. Hendricks) Lighter fluid? Is that what you said, lighter fluid?

A. Yeah.

Q. What did she use to light it with? A match?

A. Lighter.

Q. A lighter. Where was this -- you mentioned lighter fluid. Where was this lighter fluid at, do you know?

A. On the cabinet.

Q. On the cabinet. In the kitchen?

A. Yes.

Q. Did she go right to the lighter fluid and pick it up in the kitchen?

A. Yes.

Q. What did she do when she picked up the can of lighter fluid?

A. Walked to the drawer.

Q. Pardon?

A. Walked to the drawer.

Q. Walked in the door?

A. Drawer.

Q. Drawer. She looked in the drawer or opened the drawer or what?

A. Opened.

Q. Opened the drawer?

A. Yeah.

Q. Did she get something out of it?

A. Got **[***57]** a knife.

Q. She got a knife out?

A. Yeah.

Q. Then what did she do?

A. Cut the top of it.

Q. Now when you say top, are you talking about just a little spout **[*451]** or the top off the --

A. The whole top.

Q. The whole top?

A. Yeah.

Q. It wasn't just the plastic part, it was the whole top that came off?

A. The lighter fluid got a little spout.

Q. Yeah.

A. A plastic thing.

Q. Yeah.

A. Cut the plastic thing off.

Q. Cut the plastic off?

A. Yeah.

[**555]** **[**766]** Q. Now, you say that the key was on Charlie's key ring?

A. Yes.

Q. And Marge had Charlie's key ring?

A. Yes.

Q. Did you go into the tavern at all that night?

A. Yes.

Q. You went into the tavern with Marge?

A. No.

Q. No, I'm not talking about earlier in the evening. I'm talking about when you testified you came back and went up to the apartment. Did you go into the tavern first?

A. No.

Q. You didn't. And you set the fire in the kitchen?

A. Just one.

Q. Just one?

A. Yeah.

Q. Did you put it out?

A. Yes.

Q. Did you set any other fire there that night?

A. On the throw rug.

Q. On the throw rug. Did you put it out?

A. Yes.

Q. Did you put gasoline on that throw rug?

A. Yes.

Q. Where did you get the gasoline? From the lawn mower?

A. Yes.

Q. How much **[***58]** -- can you tell me about how much gasoline was there?

A. I don't remember.

[*452] Q. You don't remember?

A. No.

Q. Quite a bit or --

A. About a little bit.

Q. A little bit. Okay. Did you take the top off of the -- did you unscrew the gas cap?

A. Yeah.

Q. Did you leave the gas cap off of the lawn mower?

A. I put it back on.

Q. Did you carry the mower to the rug to put the gasoline on there?

A. No.

Q. How did you get the gasoline onto the rug?

A. Dump it out. It run down.

Q. You dumped the lawn mower -- you dumped the gasoline out and let the gasoline run to the rug?

A. Yeah.

Q. That would take quite a bit of gasoline, wouldn't it?

A. The lawn mower was right by the rug.

Q. Pardon?

A. The lawn mower was by the rug.

Q. Oh, you dumped it by the rug?

A. Yeah.

Q. In other words, you didn't turn it over here. You took the lawn mower up here and dumped it? If I'm going too fast for you, Bubba, you let me know. All right. Where did you turn the lawn mower over and get the gasoline out of it?

A. Okay. Here's the rug right here.

Q. Yes, sir.

A. This is the lawn mower right here.

Q. Right.

A. The lawn mower was by the rug.

Q. The lawn mower sits right by the rug?

A. Yeah. A long rug. **[***59]** Here's the couch here.

Q. Yes, sir.

A. The rug run down to the couch.

Q. Are you telling me that the floor was covered with the rug?

A. Like this.

[**556]** **[**767]** Q. Like this. Was the floor covered with a rug like this?

A. No. One bundle.

Q. Rolled up in a bundle.

A. Yeah.

[*453] Q. Did you unroll that bundle?

A. No. A long rug was down.

Q. That rug stretched -- it was rolled up all the way down to the lawn mower?

A. Long rug.

Q. Was it laying on its side or was it standing up?

A. Laying down.

Q. Laying down.

A. Yeah.

Q. Now, are you sure -- are you talking about this rug or was there a rug underlayment type thing? Do you know what a rug pad is?

A. Yes.

Q. You know, stuff you put under a rug, was that what was laying here?

A. Yes.

Q. Okay. It wasn't a rug, then, it was a padding?

A. Yes.

Q. Can you describe this padding to me? Do you know what it looked like?

A. Yes.

Q. Can you tell me what it looked like?

A. It was red.

Q. It was red.

A. Yes.

Q. Do you know what foam rubber is?

A. Yes.

Q. Was it foam rubber?

A. Yes.

Q. And you dumped the gasoline here and it ran on this rug here, or this thing that was laying down?

A. Yes.

Q. Now, how long -- you can go back and sit down. Did you turn **[***60]** on any lights in the apartment?

A. Just on the kitchen light.

Q. You turned on the kitchen light?

A. Yes.

Q. And then when you were leaving you turned them off again?

A. Yes.

Q. What was put on the couch?

A. I believe the bedspread.

Q. No. This is the couch here. Was anything put on there like paper towels or anything?

[*454] A. No.

Q. Nothing was put on there?

A. No.

MR. HENDRICKS: Excuse me a moment, Your Honor.

THE COURT: Very well.

Q. (By Mr. Hendricks) When you left you left first and went down the stairs?

A. Yes.

Q. Did you walk down the stairs, run down the stairs?

A. I walked down the steps.

Q. Pardon?

A. I walked down.

Q. Was there a lot of fire in the apartment when you left?

A. Yes.

Q. There was a lot of fire in it?

A. Yes.

Q. And Marge came up behind you?

A. Yes.

Q. Did you see her lock the door?

A. No.

Q. All right. When you went in who went in first?

A. Marge.

Q. Where were you standing when Marge opened the door?

A. Right by the door.

Q. You were -- you were standing here?

A. By the light.

Q. Pardon?

A. By the light.

Q. You were standing by the light?

[**557] [**768]** A. Yes.

Q. Out here in the hallway?

A. Yes.

Q. May I remove this please? Now, you looked at this exhibit here **[***61]** and do you recognize this as the second floor of Murph's Tavern, the way it's laid out?

A. Yes.

Q. You do?

A. Yes.

Q. Okay. When you came up these stairs you stood here?

A. Yes.

Q. While Marge opened the door?

A. Yes.

[*455] Q. And when you came out she closed the door and you went down the stairs first?

A. Yes.

Q. And she parked the car in front of the Cairo Barbeque Sauce place?

A. Yes.

Q. Do you know if there were any other cars on the street that night, Bubba?

A. One.

Q. What was that?

A. Doris Roberts's car.

Q. Where was it at?

A. Across the street.

Q. Doris Roberts's car was across the street?

A. Yes.

Q. Do you know what kind of car Doris Roberts has?

A. A red Chevrolet.

Q. A red Chevrolet?

A. Yes.

Q. Now, you said that you stayed at the Da-Nite until closing time.

A. Yes.

Q. What is the closing time of the Da-Nite?

A. Quarter to two.

Q. Quarter to two, not two?

A. Yes. Quarter to two.

Q. Okay. And had you been drinking that night?

A. Yes.

Q. Quite a bit?

A. Yes.

Q. And where, for the jury, in Murphysboro is the Da-Nite located?

A. On 14th Street.

Q. Yeah. Is it close to Murph's Tavern?

A. No.

Q. Is it in the north part of town, would you say?

A. North part of town.

Q. **[***62]** Is it more than a mile away?

A. About from Da-Nite twenty-two blocks.

Q. Twenty-two blocks?

A. Yes.

Q. Now, what time did you meet Marge Lee? Do you know what **[*456]** time it was when you met her?

A. Sure don't.

Q. Sometime after 1:45, before two o'clock?

A. Yes.

Q. After this fire the police officer talked to you on several occasions?

A. Yes.

Q. And in these conversations or questionings of the police officers, did they go over the details of this fire with you?

A. Yes.

Q. Did you talk to me last night?

A. Yes.

Q. What did you tell me?

A. I forgot now.

Q. Pardon?

A. I forgot.

Q. You forgot.

A. Yeah.

Q. Did you tell me you weren't there that night?

A. Yes.

[**558] [**769]** Q. Could you smell the gasoline in that room, Bubba?

A. Just a little bit.

Q. You could just smell a little bit?

A. Yeah.

Q. But you could smell it. Now, you are the one that dumped the lawn mower, right? It's pretty heavy.

A. Yeah.

Q. Did you take the lawn mower upstairs?

A. In fall of the year, in last part of October or first of November. Me and Wayne did.

Q. You and Wayne did?

A. Yes.

Q. Did you carry anything else up to Wayne's apartment for him?

A. Yes. Put the cabinets.

Q. The what?

A. Cabinets.

Q. Can you answer that **[***63]** one --

A. Put the cabinets.

Q. Cabinets.

A. Yeah. Put on the wall.

Q. Oh. Cabinets. Okay. When was that?

A. Two years back.

[*457] Q. Years back?

A. Yeah.

Q. Okay. Prior to -- after October were you ever in Wayne's apartment? After you put the lawn mower in Wayne's apartment had you returned to Wayne's apartment?

A. Yes.

Q. When?

A. With Wayne. When it's cold, bad weather, can't get home.

Q. When what? I can't quite understand you.

A. When it's cold and bad weather.

Q. Cold and bad weather?

A. Yes.

Q. You would go up to Wayne's apartment?

A. Yes. Me and Wayne does.

Q. That was just before the fire?

A. Been a lot of times.

Q. A lot of times. And the day of the fire were you working for Charlie?

A. For next day.

Q. You were going to work for him the next day?

A. Yeah.

Q. Did Charlie -- had Charlie laid you off by any chance?

A. Yes.

Q. When did he lay you off?

A. I don't remember.

Q. You don't remember. Was Charlie's birthday coming up?

A. Yeah.

Q. When was that, do you know?

A. January 16th.

Q. The 16th. Was there going to be a celebration for that?

A. Yes.

Q. Now, you say that Charlie rehired you, you were going to go back to work for him on Sunday? Or for the birthday **[***64]** celebration? Which?

A. I guess the birthday, I guess.

Q. Now, this income that you receive, is that Social Security?

A. Disability.

Q. Social Security disability?

A. Yes.

Q. Do you know what it's based on? Why you get it?

A. Unable to work.

Q. You're not able to work?

[*458] A. No.

Q. Do you know why you're not able to work?

A. Cause I can't talk right.

Q. You can't talk right. Now, you were in jail prior to your trial, were you not?

[**559]** **[**770]** A. Yes.

Q. And then when you were released from that trial you were in jail upstairs?

A. Yes.

Q. Did you talk to anybody upstairs about this?

A. No.

Q. You didn't talk to anybody at all upstairs?

A. Nobody.

Q. Did you ever go into that apartment alone?

A. Yeah.

Q. Where did you get the key?

A. Wayne.

Q. Wayne always give you the key?

A. Yeah.

Q. Now, Mr. Wayman lived up there, did he not?

A. Yeah.

Q. You know Mr. Wayman?

A. Yes.

Q. Did he have a dog?

A. Yes.

Q. When you would go upstairs to go into Wayne's apartment, did that dog bark?

A. Yes.

Q. Did he bark that night?

A. I don't know.

Q. You don't know. You don't remember the dog barking that night?

A. No.

Q. But other times when you went up that dog would bark?

A. Yes.

Q. Would he make fairly **[***65]** loud noise so you could hear him in the hall?

A. Yes.

Q. But you don't remember a dog barking that night?

A. No.

Q. What time does Murph's close, do you know?

A. I think midnight.

[*459] Q. Murph's closes every night at midnight -- I mean all the time at midnight?

A. Part time it's open to two.

Q. Pardon.

A. Open to two.

Q. Sometimes it's open till two?

A. Yeah.

Q. On the weekends is generally when it's open to two, right?

A. Yeah.

Q. Did this happen on a weekend?

A. Yes.

Q. Did Marge talk to you in the tavern that night?

A. Not that I know of.

Q. Not that you know of?

A. No.

Q. Well, then how come you went from Da-Nite to the City National Bank?

A. I don't know. No idea.

Q. Did you go there with the intention of meeting Marge Lee?

A. Someone told me.

Q. Who told you?

A. Someone. I can't think of his name.

Q. Can't think of their name?

A. No. Name is Richard.

Q. Richard?

A. Yeah.

Q. Where did he tell you this?

A. At Da-Nite. He's moved back to Chicago now.

Q. Oh, Richard's moved back to Chicago now?

A. Yeah.

Q. And he told you at the Da-Nite that you were to meet Marge Lee at the --

A. Thirteenth and Walnut.

Q. Thirteenth and Walnut?

A. Yeah.

Q. Do you remember telling Officer **[***66]** Graff that Marge Lee talked to you in Murph's Tavern by the refrigerator and told you to meet you here later?

A. I don't remember.

[**560]** **[**771]** Q. You don't remember saying that to Mr. Graff?

A. No.

Q. Okay. Do you remember Richard's last name?

[*460] A. Sure don't.

Q. Sure don't. You say you met him at the Da-Nite?

A. Yes. He's a bartender.

Q. Pardon?

A. He was the bartender.

Q. He was the bartender?

A. Yes.

Q. Oh. The bartender at the Da-Nite told you to meet Marge?

A. Yes.

Q. Now, when did he tell you this, Bubba? Just before you left the Da-Nite?

A. Yeah.

Q. That's when he told you to go down and meet Marge?

A. Yes.

Q. Who were you playing pool with that night? Do you know?

A. (No response.)

Q. Who were you playing pool with that night, do you remember?

A. I don't remember.

Q. Okay. Were you drinking at the Da-Nite also?

A. Who?

Q. Were you drinking at the Da-Nite?

A. Yes.

Q. What time did you leave Murph's Tavern that night? The first time. Before you went to the Da-Nite, what time did you leave the tavern?

A. About eight.

Q. About eight. Then you went directly to the Da-Nite?

A. Come back to Murph's Tavern come back to.

Q. You what?

A. I went in Murph's Tavern to get some egg **[***67]** cartons.

Q. Yeah. But you say you left Murph's Tavern at eight o'clock at night?

A. Yeah. Come back about nine.

Q. You came back about nine?

A. Yeah.

Q. When did you leave again?

A. About midnight.

Q. About midnight.

A. Yeah.

Q. And as I understand it, you received a ride from Murph's Tavern to the Da-Nite?

A. Yes.

[*461] Q. And two girls took you up there?

A. Yes.

Q. They didn't bring you back, did they?

A. No.

Q. You walked back?

A. Yes.

Q. Do you remember talking to Mr. Graff and him asking you why you went up to the apartment with Marge?

A. Well, Curt Graff -- Curt Graff told me -- point the finger at me one day.

Q. Curt Graff told you what?

A. Point his finger at me one day.

Q. He put the finger on you?

A. Yeah.

Q. What I asked you, Bubba, do you remember talking to Curt Graff and telling him why you went up to the apartment with

Marge Lee?

A. Get a piece of ass.

Q. Get a piece of ass. Okay. Now, where did the paper towels come from, Bubba?

A. Off of the wall.

Q. Off of the wall. How many fires that night did Marge light, can you tell me?

A. I don't remember.

Q. When she lit them how did she light them? Did she bend down and light them or throw paper towels on them or **[***68]** what?

[**561]** **[**772]** MR. CLEMONS: Your Honor, I believe he's been asked and answered this on cross examination.

THE COURT: It is proper cross examination. Your objection is overruled.

Q. (By Mr. Hendricks) You said she used a lighter?

A. Yes.

Q. All right. But did she use paper towels or did she light them by bending down?

A. I guess bend down. I guess.

Q. You guess. You don't recall. If I recall correctly, you said that you lit the fire as you were going out the door, is that right?

A. Yes.

Q. And she lit the fires up by the couch?

A. The patio.

Q. She lit the fire in the patio?

A. Yeah.

[*462] Q. Well, who lit the fire by the couch?

A. I did.

Q. You did. How did you light that fire? I know you had a lighter, but how did you light it? Did you bend down?

A. Yes.

Q. Can you give me an estimate of the length of time that you were in Wayne Saylor's apartment?

A. Been in Wayne Saylor's apartment a lot of times.

Q. I'm sorry. That night when you and Marge went into the apartment, how long did you stay in the apartment?

A. About fifteen, twenty minutes.

Q. Fifteen to twenty minutes. Were you quiet?

A. Yes.

Q. You weren't making any noise?

A. No.

Q. When you exited the apartment did the dog **[***69]** bark? When you came out of the [*sic*] apartment did the dog bark?

A. No.

Q. Was there a lot of smoke in the apartment?

A. Yes.

Q. Can you describe the smoke to me? Can you tell me what the smoke looked like?

A. It was blue.

Q. It was blue?

A. Yes.

Q. And you went home after the fire was set?

A. Yes.

Q. Did you ever go back to the scene of the fire that night?

A. No.

Q. When did you go back?

A. Next morning.

Q. Next morning. Did anybody tell you about the fire?

A. My next door neighbor.

Q. Your next door neighbor?

A. Yeah.

Q. Who is that?

A. Bobby Worthen.

Q. Bobby Worthen. He came over and told you about the fire?

A. Yes.

Q. Is that the first time you learned about the fire?

A. Yes.

Q. Can you tell me what time of day that was that Bobby came in **[*463]** to tell you?

A. Seven o'clock in the morning.

Q. Seven o'clock in the morning. Do you know what time it was when you got home that night?

A. Sure don't.

Q. You don't. Did you go right to bed?

A. Yes.

Q. Did you go down to Murph's Tavern tha [*sic*] morning?

A. Yes.

Q. I'm a little confused, Bubba. You said you set the fire and then when I asked you if Bobby Worthen told you about the **[****562]** **[**773]** fire and that was the first time you **[***70]** learned of the fire, you said yes.

A. After the night?

Q. Pardon?

A. After the night in the morning at seven.

Q. That night?

A. Yeah. Me and Marge set it.

Q. You set it. But you first learned about the fire when Bobby Worthen told you about it, is that true?

A. Second time.

Q. At the time?

A. Second time.

Q. Second time?

A. Yeah.

Q. That isn't what I asked you. I said -- you told me that when Bobby Worthen told you about the fire at seven o'clock in the morning, that was the first time that you learned of the fire?

A. Yeah.

Q. You said that's right.

A. Yes.

Q. Didn't you know of the fire before Bobby Worthen talked to you?

A. Yes.

Q. You did. Did you receive any money or anything from Marge Lee?

A. No.

Q. Can you tell me why you helped her with the fire?

MR. CLEMONS: Your Honor, I believe Mr. Hendricks has asked him that and he's answered. I would object.

THE COURT: Overruled. Overruled. You may answer if you understand the question, Mr. Ellis.

Q. (By Mr. Hendricks) Can you tell me why, if you helped set the **[*464]** fire, you helped set it?

A. I don't know.

Q. You don't know.

A. No.

Q. Did she give you any reason that she wanted to set the place on fire?

A. No.

Q. Can you **[***71]** tell me approximately how many times the police officers have talked to you about this fire?

A. A lot of times.

Q. A lot of times. As many as ten?

A. Yeah.

Q. Or more?

A. About eleven or twelve.

Q. Eleven or twelve times?

A. Yes.

Q. And you sat and talked to them about this and told them basically this same story the twelve times?

A. Yes.

Q. Now, where did these conversations take place? At the police department of your home? Where?

A. Down at the police station.

Q. Did you say the police department?

A. Yeah?

Q. Was the same police officer always present?

A. Yes.

Q. You've never been convicted of a felony, have you? Do you know what a felony is?

A. I don't know.

Q. Okay. This is a felony that we're talking about, arson or setting fires. That's a felony. Or anything that can send you to the penitentiary is a felony. You've never been convicted of anything that would send you to the penitentiary, have you?

A. No.

MR. HENDRICKS: I have no further questions, Your Honor.

THE COURT: Anything further of this witness, Mr. Clemons?

MR. CLEMONS: Yes, Your Honor. Thank you."

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Zeek v. Berghuis

United States District Court for the Western District of Michigan, Southern Division

July 29, 2013, Decided; July 29, 2013, Filed

Case No. 1:11-CV-1064

Reporter
2013 U.S. Dist. LEXIS 156980 *

HARVEY ZEEK, Petitioner, v. MARY BERGHUIS, Respondent.

Subsequent History: Adopted by, Writ of habeas corpus denied, Objection denied by, Certificate of appealability denied *Zeek v. Berghuis, 2013 U.S. Dist. LEXIS 156676 (W.D. Mich., Nov. 1, 2013)*

Prior History: *People of the Mich. v. Harvey Allen Zeek, 2010 Mich. App. LEXIS 2516 (Mich. Ct. App., Dec. 28, 2010)*

Core Terms

state court, sexual, cross-examination, child pornography, clearly established federal law, adjudicated, ineffective, recommends, assault, merits, deferential, assistance of counsel, deficient performance, undersigned

Counsel: **[*1]** Harvey Allen Zeek #673912, petitioner, Pro se, Muskegon Heights, MI.

For Mary Berghuis, Warden, respondent: John S. Pallas, MI Dept Attorney General (Appellate), Appellate Division, Lansing, MI.

Judges: ELLEN S. CARMODY, United States Magistrate Judge. Hon. Janet T. Neff.

Opinion by: ELLEN S. CARMODY

Opinion

REPORT AND RECOMMENDATION

This matter is before the Court on Zeek's petition for writ of habeas corpus. In accordance with *28 U.S.C. § 636(b)* authorizing United States Magistrate Judges to submit proposed findings of fact and recommendations for disposition of prisoner petitions, the undersigned recommends that Zeek's petition be **denied.**

BACKGROUND

As a result of events which occurred between 1999 and 2004, Petitioner was charged with one count of first degree criminal sexual conduct and one count of second degree criminal sexual conduct. (Trial Transcript, July 7, 2009, 11). Several individuals testified at Petitioner's jury trial. The relevant portions of their testimony are summarized below.

A.Z.

A.Z. is Petitioner's daughter. (Trial Transcript, July 7, 2009, 113-14). A.Z., who was 15 years of age at the time of Petitioner's trial, lived with Petitioner, in Michigan, when she was 6-8 years of age. (Tr. 113-15). **[*2]** A.Z.'s grandparents and her brother, T.Z., also lived with Petitioner. (Tr. 114-15, 132). When "no one was home," Petitioner would sexually assault A.Z. (Tr. 116-20, 130). Specifically, on more than ten different occasions, Petitioner compelled A.Z. to "suck on his penis or rub his penis." (Tr. 116-20, 130). Petitioner also touched A.Z. with "a finger between [her] vagina." (Tr. 116-20, 130).

Petitioner instructed A.Z. not to reveal their activities to others because if she did, he would "go away." (Tr. 121). While A.Z. lived with Petitioner she kept Petitioner's assaultive behavior secret because she "didn't want [Petitioner] to go away." (Tr. 121-22). A.Z. did not, at the time, realize that Petitioner's behavior toward her was wrong. (Tr. 122). When A.Z. was nine years of age she moved to Pittsburgh, Pennsylvania to live with her mother. (Tr. 114, 122). Approximately four years later, A.Z. informed her mother that Petitioner had sexually assaulted her. (Tr. 122). A.Z. subsequently reported Petitioner's activities to individuals at the Child Advocacy Center in Pittsburgh. (Tr. 125-26).

Linda Zeek

Linda Zeek is A.Z.'s mother. (Trial Transcript, July 8, 2009, 5-6). After divorcing Petitioner, **[*3]** Zeek joined the military. (Tr. 5-6). While Zeek served on active duty, A.Z. and T.Z. lived with Petitioner. (Tr. 6-7). After Zeek was discharged from active duty service, A.Z. "was very adamant" that she wanted to return to live with her mother. (Tr. 9). A number of years later, after reading certain court documents concerning Petitioner, A.Z. informed her mother that Petitioner had sexually assaulted her. (Tr. 10-13).

Rebecca MacArthur

As of the fall of 2007, MacArthur was employed by the Michigan State Police. (Trial Transcript, July 8, 2009, 19-22). At that time, MacArthur was participating in an investigation that indicated that child pornography was being distributed from Petitioner's residence. (Tr. 22-23). A subsequent search of Petitioner's computer revealed the presence of images of child pornography. (Tr. 23-28).

Bruce Morningstar

As of the fall of 2007, Morningstar was employed as a police officer participating on a child pornography task force. (Trial Transcript, July 8, 2009, 32-33). As part of this effort, Morningstar interviewed Petitioner on October 24, 2007. (Tr. 33). Petitioner acknowledged his interest in pornography, including child pornography, and acknowledged that **[*4]** he had "viewed [child pornography] images and exchanged [child pornography] images with other individuals that had the same interest." (Tr. 34, 37). Petitioner also acknowledged that he stored on his computer approximately 50 images of child pornography. (Tr. 37-39). Petitioner estimated that he had traded images of child pornography with others on approximately 140 occasions. (Tr. 40).

K.P.

In 2007, K.P. was eleven years old. (Trial Transcript, July 8, 2009, 46). K.P.'s mother was dating Petitioner and K.P., her mother, and her two younger sisters were living with Petitioner. (Tr. 46-47). On at least one occasion, Petitioner was viewing pornography on his computer and told K.P. that A.Z. "gave him blow jobs and stuff." (Tr. 48-49). Petitioner subsequently requested that K.P. "suck his dick and like give him blow jobs and stuff." (Tr. 49). Petitioner also requested that K.P. pose nude so that he could photograph her. (Tr. 50).

Melissa Peterson

Peterson was permitted to testify as an expert in the field of forensic interviewing and counseling. (Trial Transcript, July 8, 2009, 59-62). Peterson testified that it is not uncommon for victims of sexual assault to not immediately (or ever) report **[*5]** their abuse. (Tr. 63). According to Peterson, the younger the sexual assault victim and the closer the victim is to the assailant, the longer, generally, it will take for the victim to report the sexual abuse. (Tr. 63-65).

Brandon Mahoney

As of 2008, Mahoney was employed as a detective with the Whitehall Police Department. (Trial Transcript, July 8, 2009, 72). Following A.Z.'s accusations that she had been sexually assaulted by Petitioner, Mahoney interviewed Petitioner. (Tr. 72-74). Petitioner initially declined to speak with Mahoney, but subsequently acknowledged that he was "sexually attracted to juvenile females." (Tr. 74-77).

Following the presentation of evidence, the jury found Petitioner guilty of one count of first degree criminal sexual conduct and one count of second degree criminal sexual conduct. (Trial Transcript, July 8, 2009, 117-18). Petitioner was sentenced to serve concurrent sentences of 18-35 years and 54 months to 18 years. (Sentencing Transcript, August 3, 2009, 7). Petitioner appealed his conviction in the Michigan Court of Appeals, asserting the following claim:

> I. Defendant was denied effective assistance of counsel by ineffective cross-examination that bolstered **[*6]** the prosecutor's case against the Defendant.

The Michigan Court of Appeals affirmed Petitioner's conviction. *People v. Zeek, Case No. 294024, 2010 Mich. App. LEXIS 2516, Opinion (Mich. Ct. App., Dec. 28, 2010)*. Petitioner later moved in the Michigan Supreme Court for leave to appeal this determination. The court denied Petitioner's request, stating that "we are not persuaded that the questions presented should be reviewed by this Court." *People v. Zeek, 489 Mich. 936, 797 N.W.2d 627 (Mich., 2011)*. On October 5, 2011, Petitioner initiated the present action in which he asserts the following claim:

> I. Defendant was denied effective assistance of counsel by ineffective cross-examination that bolstered the prosecution's case against the Defendant.

STANDARD OF REVIEW

Zeek's petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), as it amended *28 U.S.C. § 2254*. The AEDPA amended the

substantive standards for granting habeas relief under the following provisions:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court **[*7]** proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The AEDPA has "modified" the role of the federal courts in habeas proceedings to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)*.

Pursuant to *§ 2254(d)(1)*, a decision is "contrary to" clearly established federal law when "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an opposite result." *Ayers v. Hudson, 623 F.3d 301, 307 (6th Cir. 2010)* (quoting *Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*).

Prior to *Williams*, the Sixth Circuit interpreted the "unreasonable application" clause **[*8]** of *§ 2254(d)(1)* as precluding habeas relief unless the state court's decision was "so clearly incorrect that it would not be debatable among reasonable jurists." *Gordon v. Kelly, 2000 U.S. App. LEXIS 1507, 2000 WL 145144 at *4 (6th Cir., February 1, 2000)*; *see also, Blanton v. Elo, 186 F.3d 712, 714-15 (6th Cir. 1999)*. The *Williams* Court rejected this standard, indicating that it improperly transformed the "unreasonable application" examination into a subjective inquiry turning on whether "at least one of the Nation's jurists has applied the relevant federal law in the same manner" as did the state court. *Williams, 529 U.S. at 409*.

In articulating the proper standard, the Court held that a writ may not issue simply because the reviewing court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams, 529 U.S. at 411*. Rather, the Court must also find the state court's application thereof to be *objectively* unreasonable. *Bell, 535 U.S. at 694*; *Williams, 529 U.S. at 409-12*. Accordingly, a state court unreasonably applies clearly established federal law if it "identifies the correct governing legal principle from the **[*9]** Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case" or if it "either unreasonably extends or unreasonably refuses to extend a legal principle from the Supreme Court precedent to a new context." *Ayers, 623 F.3d at 307*. Furthermore, review under *§ 2254(d)(1)* "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster, 131 S.Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011)*.

Pursuant to *28 U.S.C. § 2254(d)(2)*, when reviewing whether the decision of the state court was based on an unreasonable determination of the facts in light of the evidence presented, the "factual determination by [the] state courts are presumed correct absent clear and convincing evidence to the contrary." *Ayers, 623 F.3d at 308*. Accordingly, a decision "adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." While this standard is "demanding" it is "not insatiable." *Id.*

For a writ to issue pursuant to *§ 2254(d)(1)*, the Court must find a violation of clearly established **[*10]** federal law "as set forth by the Supreme Court at the time the state court rendered its decision." *Stewart v. Erwin, 503 F.3d 488, 493 (6th Cir. 2007)*. This definition of "clearly established federal law" includes "only the holdings of the Supreme Court, rather than its dicta." *Bailey v. Mitchell, 271 F.3d 652, 655 (6th Cir. 2001)*. Nevertheless, "the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart, 503 F.3d at 493*.

As previously noted, *§ 2254(d)* provides that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits" unless the petitioner can satisfy the requirements of either *§ 2254(d)(1)* or *§ 2254(d)(2)*. This provision, however, "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington v. Richter, 131 S.Ct. 770, 785, 178 L. Ed. 2d 624 (2011)*. Instead, when a federal claim has been presented to a state court and the state court has denied relief, "it may be presumed that the state court adjudicated the claim on the merits." *Id. at 784-85*. Where such is the case, the Court must apply the deferential **[*11]** standard of review articulated above, rather than some other less deferential standard.

The presumption that the state court "adjudicated [a] claim on the merits" may be overcome only "when there is reason to think some other explanation for the state court's decision is more likely." *Id.* If this presumption is overcome, however, the Court reviews the matter de novo. *See* Wiggins v. Smith, 539 U.S. 510, 533-35, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (reviewing habeas issue *de novo* where state courts had not reached the question); *see also*, Maples v. Stegall, 340 F.3d 433, 437 (6th Cir. 2003) (recognizing that *Wiggins* established *de novo* standard of review for any claim that was not addressed by the state courts).

ANALYSIS

Petitioner asserts a single issue in this matter, namely that he was deprived of the right to the effective assistance of counsel based on the manner in which his trial attorney conducted cross-examination of the prosecution's witnesses. Specifically, Petitioner asserts that his attorney "did not challenge the prosecution's witnesses," but instead questioned them in a manner that "helped the prosecution."

To establish ineffective assistance of counsel, Petitioner must show both deficient performance by **[*12]** his counsel and prejudice resulting therefrom. *See* Premo v. Moore, 131 S.Ct. 733, 739, 178 L. Ed. 2d 649 (2011) (quoting Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)). To establish deficient performance, Petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Premo, 131 S.Ct. at 739 (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A court considering a claim of ineffective assistance must apply a "strong presumption that counsel's representation was within the 'wide range' of reasonable professional assistance." Premo, 131 S.Ct. at 739 (quoting Strickland, 466 U.S. at 689). Petitioner's burden is to show that "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Premo, 131 S.Ct. at 739 (quoting Strickland, 466 U.S. at 687).

Petitioner must further establish that he suffered prejudice as a result of his attorney's allegedly deficient performance. Prejudice, in this context, has been defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Premo, 131 S.Ct. at 739 (quoting Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010)); **[*13]** *see also*, Mahdi v. Bagley, 522 F.3d 631, 636 (6th Cir. 2008). The issue is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Premo, 131 S.Ct. at 739 (quoting Strickland, 466 U.S. at 690). This is a heavy burden for Petitioner to meet, because he must establish that his counsel's performance was "so manifestly ineffective that defeat was snatched from the hands of probable victory." Jacobs v. Mohr, 265 F.3d 407, 418 (6th Cir. 2001).

As the Supreme Court has made clear, even when reviewing an ineffective assistance of counsel claim *de novo*, "the standard for judging counsel's representation is a most deferential one." Premo, 131 S.Ct. at 740. Likewise, the standard by which petitions for habeas relief are judged is "highly deferential." Thus, when reviewing, in the context of a habeas petition, whether a state court unreasonably applied the *Strickland* standard, review is "doubly" deferential. *Id.* (citations omitted). As the Supreme Court recently concluded:

> The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts **[*14]** must guard against the danger of equating reasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Id. (internal citations omitted).

Petitioner faults his trial counsel for eliciting on cross-examination testimony which arguably advanced the prosecution's case rather than his own. The Michigan Court of Appeals rejected Petitioner's claim that his counsel rendered deficient performance, finding instead that counsel employed the reasonable "trial strategy" of "attempt[ing] to create reasonable doubt for the jury by attempting to make the victim's story sound far-fetched and fabricated." People v. Zeek, Case No. 294024, Opinion at 2, 2010 Mich. App. LEXIS 2516 (Mich. Ct. App., Dec. 28, 2010). This particular strategy has been applied with great success as students of trial history are aware. *See, e.g.*, *The Triangle Shirtwaist Factory Fire*, available at http://law2.umkc.edu/faculty/projects/ftrials/triangle/trianglecount.html (last visited on July 17, 2013) (describing how defense counsel successfully **[*15]** discredited an important prosecution witness by eliciting on cross-examination a re-telling of the account the witness provided on direct examination); Harold Lee Schwab, *Cross-Examination of the Infant Witness: A Review of Lessons Learned from the Triangle Shirt Waist Fire Case and Related Trial Experiences*, NYSBA Trial Lawyers Section Digest, Fall 2006 at 3-9 (describing how counsel employed an identical strategy to discredit a child witness).

As is well recognized, an attorney's strategic decisions are

"virtually unchallengeable." *See* *United States v. Washington, 715 F.3d 975, 982 (6th Cir. 2013)* (quoting *Strickland, 466 U.S. at 690-91*). Given the overwhelming evidence of Petitioner's guilt, and the complete absence of evidence advancing Petitioner's cause or otherwise diminishing the State's case, counsel's strategy was not unreasonable.

Moreover, even if the Court assumes that counsel's cross-examination method constituted deficient performance, Petitioner cannot establish that he was prejudiced by such as the evidence against him was overwhelming. Also, as the Michigan Court of Appeals accurately observed, "[t]he cross-examination [a]bout which defendant complains was largely counsel's **[*16]** elicitation of testimony previously stated by the prosecution's witnesses on direct examination." *People v. Zeek, Case No. 294024, Opinion at 2, 2010 Mich. App. LEXIS 2516 (Mich. Ct. App., Dec. 28, 2010)*. As the court further observed, "[e]ven if counsel had not obtained this testimony during cross-examination, it was already in evidence." *Id.* Petitioner presented no evidence at trial and fails to offer in this proceeding any suggestion that there existed any evidence, or method of cross-examination, that would have advanced his cause or diminished the strength of the prosecution's case. Simply put, Petitioner cannot establish that but for his counsel's alleged shortcoming there exists any reasonable probability that the result of his trial would have been different.

The Michigan Court of Appeals rejected Petitioner's ineffective assistance of counsel claim. This determination was neither contrary to, nor involves an unreasonable application of, clearly established federal law. Furthermore, the court's decision was not based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, the undersigned recommends that this claim be denied.

CONCLUSION

For the reasons articulated herein, **[*17]** the undersigned concludes that Petitioner is not being confined in violation of the laws, Constitution, or treaties of the United States. Accordingly, the undersigned recommends that Zeek's petition for writ of habeas corpus be **denied.** The undersigned further recommends that a certificate of appealability be denied. *See* *Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*.

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within 14 days of the date of service of this notice. *28 U.S.C. § 636(b)(1)(C)*. Failure to file objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*.

Respectfully submitted,

/s/ Ellen S. Carmody

ELLEN S. CARMODY

United States Magistrate Judge

Date: July 29, 2013

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1. *ARTICLE: FROM TRIANGLE SHIRTWAIST TO WINDOWS ON THE WORLD: RESTAURANTS AS THE NEW SWEATSHOPS, 14 N.Y.U. J. Legis. & Pub. Pol'y 625*

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ARTICLE: FROM TRIANGLE SHIRTWAIST TO WINDOWS ON THE WORLD: RESTAURANTS AS THE NEW SWEATSHOPS

2011

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Text

[*625]

Introduction

Tragic though they are, workplace disasters can spark enormous strides in social reform. When more than one hundred women died in the now infamous ***fire*** at the ***Triangle Shirtwaist Factory*** in 1911, their deaths helped fuel a movement for labor law reform. The tragedy initiated the long march toward organized labor in the garment-manufacturing sector, which ultimately transformed many of America's most undesirable jobs into protected, unionized jobs. Although the tragedy was the necessary impetus for change, none of this change would have been possible without the efforts of the already-existing labor organizers who recognized their chance to take advantage of the national interest and sympathy created by the ***fire***. A tragedy like the ***Triangle Shirtwaist Factory fire*** "creates a climate uniquely conductive to social reform and legislation," but groups must still be prepared for the opportunity a disaster creates. [1] In the case of the ***Triangle Shirtwaist Factory fire***, organizers were able to seize on the opportunity to create **[*626]** change because they were already organizing in the years prior to the ***fire***. [2]

One hundred years after the ***Triangle Shirtwaist Factory fire***, the American manufacturing sector has all but disappeared. In its place, the service sector - particularly the restaurant industry, one of the nation's largest private sector employers - has grown exponentially. Less than .01% of all restaurant workers nationwide are unionized. With severely low wages, lack of benefits, and health and safety problems, the restaurant has become the modern day equivalent of the sweatshop.

When seventy-three restaurant workers died on September 11, 2001 at Windows on the World, the restaurant at the top of the World Trade Center, they epitomized the new restaurant sweatshop. While there are many differences between the ***Triangle Shirtwaist Factory fire*** and its aftermath and the tragedy at Windows on the World, there are also some similarities. Like the ***Triangle Shirtwaist Factory*** workers, the Windows on the World

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[1] Eric G. Behrens, Note, The ***Triangle Shirtwaist*** Company ***Fire*** of 1911: A Lesson in Legislative Manipulation, *62 Tex. L. Rev. 361, 372-73 (1983).*

[2] See *id. at 366-69.*

employees' deaths have not been in vain. Instead, their deaths have spawned a new national movement of restaurant workers seeking to transform their industry to set standards for a whole new economy.

In this article, I will argue that there is a reason apart from the mere fact of tragedy that enabled organizers, in both the garment and restaurant industries, to so successfully follow their respective tragedies with labor reform in the United States. The size and scope of the garment-manufacturing industry at the turn of the century, along with the wide notoriety of the terrible conditions in those sweatshops, uniquely enabled reformers to exploit the opportunity created by the ***Triangle Shirtwaist Factory*** and improve the situations for workers in all industries. Labor reform in one of New York City's largest and fastest-growing industries readily expanded into economy-wide reform. The manufacturing industry set the standards for 'sweatshop' conditions throughout the economy prior to the tragedy, and also created the opportunity for economy-wide reform in the wake of the ***fire***. The restaurant industry today occupies a similar place in the current American economy, and current restaurant worker organizations can therefore use the lessons of post-***Triangle Shirtwaist Factory fire*** reform to reform the restaurant industry and even the entire American workforce.

Of course, there are many differences between the ***Triangle Shirtwaist Factory fire*** and the tragedy at Windows on the World. The tragedy **[*627]** that occurred on September 11, 2001, came from outside of the restaurant, and affected more than just restaurant workers, while the ***Triangle Shirtwaist Factory fire*** emerged from hazards within the ***factory*** and impacted only the ***factory***'s workers. However, just as the ***Triangle Shirtwaist Factory fire*** highlighted tremendous challenges confronting the garment manufacturing industry at the turn of the twentieth century, the tragedy that befell the workers of Windows on the World similarly exposed the challenges confronting the restaurant industry.

Given the size and import of the two industries in their respective periods, these tragedies revealed challenges not only for the specific industry, but also for the entire national economy and workforce. Additionally, unlike the garment-making industry, the restaurant industry is inherently dangerous - with flames, knives, and hot kitchens. Furthermore, unlike garment workers in the early 1900s, restaurant workers work with the protection of several labor laws, such as the Fair Labor Standards Act, the Occupational Safety and Health Act, and the National Labor Relations Act. [3] Many of these laws are the result of the organizing that followed the ***Triangle Shirtwaist Factory fire***. However, research demonstrates that many regulations included in the Fair Labor Standards Act, such as overtime wages, minimum wage, and even non-payment of wages, are frequently violated, that basic health and safety measures are not followed, and that restaurant workers often do not have adequate recourse for injury and illness due to lack of health insurance. [4] I argue that the practical result of this poor enforcement is an industry that in many ways parallels the garment sweatshops of the nineteenth and early twentieth centuries, and one in which reform is greatly needed.

I.

The ***Triangle Shirtwaist Factory Fire*** and Subsequent Reforms

On March 25, 1911, a ***fire*** broke out on the seventh and eighth floors of an industrial building in Washington Square Park, Manhattan. This was the location of the ***Triangle*** Waist Company, [5] where **[*628]** several hundred workers - mostly young women - were packed into two floors for sweatshop garment manufacturing. [6] Started by a

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[3] See Fair Labor Standards Act of 1938, *29 U.S.C.§§201-219*; Occupational Safety and Health Act of 1970, *29 U.S.C.§§651-678*; National Labor Relations Act, *29 U.S.C.§§151-169*.

[4] See discussion infra at pp. 632-37 (describing studies of the restaurant industry conducted by the Restaurant Opportunities Centers United).

[5] David Von Drehle, ***Triangle***: The ***Fire*** that Changed America 116-19 (2003).

[6] Id. at 87, 117.

match or a cigarette butt tossed into a scrap bin, the ***fire*** spread rapidly, lasting only thirty minutes total. [7] There were heaps of cloth, wooden sewing tables, and hot, crowded rooms with closed doors - all of which contributed to the ***fire*** spreading so quickly. [8] One hundred and forty-six young people were either burned or jumped to their deaths as hundreds of onlookers watched in horror from the street. [9]

The garment-manufacturing industry in New York City doubled in size between the 1890s and the first decade of the twentieth century. [10] "By 1909, more people worked in the ***factories*** of Manhattan than in all the mills and plants of Massachusetts, and by far the largest number of them were making clothes." [11] A worker's typical day in a garment-manufacturing sweatshop ***factory*** included being trailed to the bathroom, shortchanged on pay, and mocked for any complaints. Supervisors shaved minutes off of the appointed lunchtime to force workers back to work sooner, and altered the clocks to extend the workday. [12] To complete the degrading treatment for the day, workers had to line up single file in front of the exit to be searched before leaving. [13]

The term "sweatshop" was meant literally; it referred to a dark tenement room where immigrants were "sweated," or worked, for long hours at low pay. [14] A survey from the 1890s indicated that workers worked an average of eighty-four hours per week. [15] One union leader described a ***factory*** as follows:

"The front room and kitchen were used as workrooms. The whole family would sleep in one dark bedroom. The sewing machines for the operators were near the windows of the front room. The basters would sit on stools near the walls, and in the center of the room, amid the dirt and dust, were heaped great piles of materials." [16]

[*629] In addition to these dehumanizing working conditions, the predominantly young immigrant female workers worked in the face of unhealthy and unsafe conditions. In the late 1800s, "accident rates expanded with the size of ***factories***, although employers had no legal responsibility to compensate workers for severe injury or even death. By the turn of the century some 30,000 workers were killed each year, and another quarter million were injured." [17] New York City newspaper articles printed just a few months before the ***fire*** reported that only one hundred of New York City's 11,000 garment-manufacturing firms were safe from ***fire***, as most ***factories*** had wooden staircases and not enough exits. [18] A contemporaneous study of these garment-manufacturing firms found that ninety-nine percent of them lacked adequate safety measures to guard against ***fire***. [19]

But workers, particularly women, organized against these sweatshop conditions long before the ***Triangle Shirtwaist Factory fire***. Many workers had been generally organizing throughout the 1800s, and female workers in

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[7] Id. at 119.

[8] Id. at 118-19, 164.

[9] Id. at 167.

[10] Id. at 15.

[11] Id.

[12] See id. at 7.

[13] See id.

[14] See id. at 38.

[15] See id.

[16] Id. at 41 (quoting union leader Bernard Weinstein).

[17] Faith Jaycox, The Progressive Era 33 (2005). These statistics represent country-wide accidents, not those specific to the garment industry.

[18] See Behrens, supra note 1, at 364.

[19] See id.

particular began increasing the intensity of their organizing efforts against exploitation in the growing garment-manufacturing sector of New York City at the turn of the twentieth century. [20] The garment workers at the ***Triangle*** Waist ***factory*** also initiated their own strikes, one in 1908 and another in 1909, complaining about the very conditions that later helped fuel the tragedy. [21] The ***Triangle*** Waist ***factory*** strike ultimately failed, and the police sided with the owners and their hired men. [22] But similar strikes in multiple New York City ***factories*** led to increasing unrest. [23]

In 1900, the International Ladies' Garment Workers Union (ILGWU) was formed, and grew to become one of the most powerful unions of its time. [24] The ILGWU organized in order to lobby for wage and hour laws, child labor laws, health and safety protections, and other improvements. The strike they organized in 1909 was one of the largest labor demonstrations ever conducted up to that point in American history, with 20,000 mostly female garment workers striking for **[*630]** several months. [25] However, like the ***Triangle*** workers' strike, even the larger ILGWU strike did not result in any legal reforms despite garnering a great deal of attention. [26]

The tragedy of the ***fire*** was all the more pronounced in light of the organizing that helped raise the profile of the challenges faced by garment workers in the years leading up to the ***fire***. The ***fire*** suddenly presented all of the issues raised by the organizing efforts of these young women to the American public and policymakers with incredible force. The ***fire*** shone a light on these issues at a time when public sympathy for garment workers was at its zenith.

After the ***fire***, the New York State Legislature created the new ***Factory*** Investigating Commission, and granted it exceptional discretion to investigate ***factory*** conditions statewide. [27] Indeed, "few governmental agencies anywhere had been granted more sweeping powers to investigate work conditions in private industry." [28] By the end of the investigation, the Commission had inspected more than 3,500 ***factories***. It also held public hearings in several cities in New York. [29] Between the inspections and hearings, the Commission visited "almost every ***factory*** town in the state." [30] In 1912, the Commission recommended thirty-two labor bills to the New York State Legislature, twenty-five of which passed. [31] The newly passed bills created new health and safety codes and restricted child labor. [32] For example, one ***fire***-safety bill required automatic sprinklers in high-rise buildings, ***fire***

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[20] See Jaycox, supra note 17, at 333-34.

[21] See Drehle, supra note 5, at 48-51.

[22] See Behrens, supra note 1, at 365.

[23] See Drehle, supra note 5, at 14-15.

[24] See Richard O. Boyer & Herbert M. Morais, Labor's Untold Story 187 (3rd ed. 1970).

[25] See id. at 187; Behrens, supra note 1, at 364-65.

[26] See Drehle, supra note 5, at 172.

[27] See Behrens, supra note 1, at 369; Drehle, supra note 5, at 212.

[28] Behrens, supra note 1, at 369 (quoting B. Severn, Frances Perkins: A Member of the Cabinet 45 (1976)).

[29] See id. at 369-70.

[30] Id. at 370 (quoting R. O'Connor, The First Hurrah 68-69 (1970)).

[31] See id. at 370-71.

[32] See id. at 371.

drills, and unlocked, outward-swinging doors. [33] Another bill shortened the workweek for women to fifty-four hours. [34]

The ***fire*** and resulting reforms had reverberations at the federal level as well. Among the crowd witnessing the ***fire*** was Frances Perkins, who served on the Commission. [35] After her work at the state level, Perkins was appointed by President Franklin Roosevelt as the first female Secretary of Labor in 1935, and served in that position **[*631]** "from the first day of the New Deal to Roosevelt's death." [36] The New Deal included the nation's first law granting workers the right to unionize - the National Labor Relations Act - and a national law to set wage and hour standards - the Fair Labor Standards Act. [37] These laws created organizing rights for all workers; in this way, the young women who organized for reforms in the ***factory*** and later died in the ***fire*** ultimately helped pave the way for labor reforms that still shape working conditions for the whole economy. [38] Years later, Perkins would say the New Deal began on the day the ***Triangle Shirtwaist Factory*** burned. [39]

The ***Triangle Shirtwaist Factory fire*** created a moment of opportunity for the labor movement to achieve much-needed reforms, and the labor movement seized that opportunity. According to Eric G. Behrens, "a disaster creates a climate uniquely conducive to social reform and legislation. In the immediate aftermath of major disasters, groups and individuals interested in reform are given unexpected opportunities to effect reforms that normally would take years to evolve." [40] Behrens claims that there is a natural resistance to change, and that disasters create a climate more favorable to change. However, he also argues that change can only occur if reformers are prepared to strategically seize upon the opportunity. In this analysis, he implies that groups must be prepared for the opportunity a disaster creates. In the case of the ***Triangle Shirtwaist Factory fire***, organizers were therefore able to seize the opportunity because they had been organizing in the years prior to the ***fire***. [41]

However, there is a second reason that organizers were able to so successfully capitalize upon the tragedy to create labor reform throughout the United States. The size and scope of the garment-manufacturing industry as one of the largest and fastest-growing segments of the economy at the turn of the century and the wide notoriety of the industry for sweatshop conditions made disaster in the garment industry uniquely utilizable as an opportunity to create reforms for workers in all industries. Since workers in one of the largest and fastest-growing industries were suffering, labor reforms that affected workers in all industries easily followed. In these ways, the manufacturing industry set the standards for "sweatshop" conditions throughout the economy **[*632]** prior to the tragedy and created the opportunity for economy-wide reform in its aftermath.

II.

Restaurant Opportunities Centers United: Restaurant Workers Today [42]

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[33] See Drehle, supra note 5, at 215.

[34] See Joan Walsh, Obama, the ***Triangle Fire***, and the Real Father of the New Deal, Salon (Mar. 25, 2011), *http://www.salon.com/news/opinion/joan* walsh/politics/2011/03/25/obama al smith and the ***triangle fire***.

[35] See id.

[36] Drehle, supra note 5, at 263.

[37] See Boyer & Morais, supra note 24, at 274.

[38] See Drehle, supra note 5, at 263.

[39] See Walsh, supra note 34.

[40] Behrens, supra note 1, at 372.

[41] See id. at 372-73.

[42] The information in this section is largely reprinted from the sources indicated.

With 165,000 workers in New York City and more than ten million workers nationwide, the restaurant industry is one of the largest and fastest-growing workforces in the nation. [43] Almost seventy-five percent of Americans eat out at least once per week, and Americans' percentage of income spent on food has increased twenty percent over the last twenty years. [44] The restaurant industry is thus important within the national economy not only in terms of the number of workers it employs and the amount of revenue it produces, but also because of its increasing visibility and presence in the American psyche.

I co-founded Restaurant Opportunities Centers United (ROC), a national restaurant workers' organization, in 2003 with Fekkak Mamdouh, a former Windows on the World employee. From 2003 until 2010, ROC conducted 4,323 surveys of restaurant workers and almost 300 interviews with restaurant employers in eight cities around the country. [45] ROC produced local reports in each of the eight locations, using data from more than 500 worker surveys, approximately thirty in-depth interviews with restaurant workers, and thirty in-depth interviews with restaurant employers in each region. The results of this primary research are supplemented in the reports by analysis of industry and government data, as well as a review of existing academic literature. The national summary included data weighted for position, industry segment, and local workforce size.

Both nationwide and in each of the eight regions studied by ROC United, the restaurant industry is growing. The industry includes more **[*633]** than ten million workers and 557,520 food service and drinking places nationwide that make significant contributions to the country's tourism, hospitality, and entertainment sectors, and to its economy as a whole. [46] In 2007, the restaurant industry - including fast food, family-style or franchise, and fine dining restaurants - garnered over $ 515 billion in sales revenue. [47]

Perhaps the industry's most important contribution to the nation's economy is the millions of job opportunities it provides. Nationally, restaurant employment growth outpaced that of the economy overall, particularly in the last decade. [48] The restaurant industry has proven very robust even during the recent economic recession. Nationally, the restaurant industry lost jobs at only forty percent of the rate that the overall economy lost jobs. [49] Moreover, while job recovery remained slow for the overall economy in 2010, the restaurant industry recovered at a faster pace. [50] According to the Bureau of Labor Statistics (BLS), by the end of 2010, the restaurant industry had almost returned to pre-recession employment numbers. [51]

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[43] See Rest. Opportunities Ctr. of N.Y.United & N.Y.C. Rest. Indus. Coal., Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry i (2011) [hereinafter Pervasive Inequality], available at http://rocunited.org/research-resources/reports/roc-ny-behind-the-kitchen-door/; Rest. Opportunities Ctr. United, Behind the Kitchen Door: A Multi-Site Study of the Restaurant Industry 2 (2011) [hereinafter Multi-Site Study], available at http://wp.rocunited.org/wp-content/uploads/2011/06/2011-Behind-the-Kitchen-Door-Multi-Site-Study.pdf.

[44] See Hayden Stewart et al., Econ. Research Serv., U.S. Dep't of agric., Econ. Info. Bulletin No. 19, Let's Eat Out: Americans Weigh Taste, Convenience, and Nutrition 5 (2006).

[45] ROC conducted surveys in New York, Chicago, Metro Detroit, Los Angeles, Maine, Miami, New Orleans, and Washington, D.C.

[46] See Multi-Site Study, supra note 43, at 2.

[47] See id.

[48] See id.

[49] See id.

[50] See id.

[51] See id.

The industry also provides employment opportunities for new immigrants. In New York City, almost seventy percent of restaurant workers are foreign-born. [52] Like the garment-manufacturing industry at the turn of the twentieth century, the restaurant industry includes a mix of immigrants, young workers, and other marginalized populations. Because it is primarily composed of marginalized populations, the restaurant industry is a prime candidate for the benefits of organizing.

ROC found that there are two potential roads to profitability in the restaurant industry: the "high road" and the "low road." Restaurant employers who take the high road are the source of the most desirable jobs in the industry - those that provide livable wages, access to health benefits, and advancement in the industry. [53] Taking the low road to profitability, however, means creating low-wage jobs with long hours and few benefits, as well as exposing employees to dangerous and often unlawful workplace conditions. [54] Research indicates that the majority of restaurant employers in each of the eight regions **[*634]** examined appear to be taking the low road, creating a predominantly low-wage industry in which violations of employment and health and safety laws are commonplace. [55] According to the BLS, the national median hourly wage for food preparation and service workers is only $ 8.89 (including tips), which means that half of all restaurant workers nationwide actually earn less than the federal poverty line for a family of three. [56]

Nearly nine out of ten (87.7%) restaurant workers surveyed reported that they do not have health insurance through their employers. [57] Earnings in the restaurant industry have also lagged behind that of the entire private sector. In terms of annual earnings, restaurant workers around the country on average made only $ 15,092 in 2009 compared to $ 45,155 for the private sector. [58] And unfortunately, despite the many gains that the labor reforms in the aftermath of the ***Triangle Shirtwaist Factory fire*** secured for workers, many restaurant workers in each of the local studies reported overtime and minimum wage violations, shaving of time, lack of lunch breaks, and much more. [59] They also reported a lack of health and safety training, and failure to implement other health and safety measures in restaurant workplaces. [60]

A New Orleans server with more than thirteen years experience in the industry told ROC:

"In some restaurants people are doing a lot of physical labor, like I work at a three story restaurant where I haul trash cans of ice up three flights 'cause during business you can't use the elevator… So there is this 'go, go, go!' type of attitude and people wind up doing crazy stuff like pulling things or slipping on the stairs. Broken glass, people getting their hands cut … . You know, you're in a fine dining restaurant with the crispy bread and the knife slides along the bread into your finger. I've seen that several times. Grease ***fires*** and burns in the kitchen, I've seen

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[52] See Pervasive Inequality, supra note 43, at 6.

[53] See Multi-Site Study, supra note 43, at 2.

[54] See id.

[55] See id.

[56] See id. The 2011 federal poverty level for a family of three in the 48 contiguous states is $ 18,530, whereas a worker earning $ 8.89 per hour, 40 hours per week, earns approximately $ 18,491 annually. See Annual Update of the HHS Poverty Guidelines, ***76 Fed. Reg. 3637, 3637-38*** (Jan. 20, 2011).

[57] See Multi-Site Study, supra note 43, at 2.

[58] See id. These figures are the average annual pay for all workers in the US private sector Eating and Drinking Places (NAICS 722) and the entire US private sector respectively. Quarterly Census of Employment and Wages, Bureau of Labor Statistics, available at www.bls.gov/data (last visited Oct. 7, 2011).

[59] See Multi-Site Study, supra note 43, at 2.

[60] See id.

a lot of those kinds of health concerns. And I think it's just, people are generally **[*635]** in a high-risk health situation. I have seen a lot of just not healthy stuff for the worker." [61]

In yet another parallel to the garment-manufacturing industry of the turn of the twentieth century, a restaurant is now one of the most hazardous places to work. In 2008, the U.S. Department of Labor found that the restaurant industry ranked third in total nonfatal occupational injuries and illnesses, with 227,600 cases of on-the-job accidents and injuries. [62]

ROC's survey data revealed an explanation for the industry's high rank in terms of occupational injury and illness. A majority of workers surveyed reported working in fast, demanding, and pressure-filled environments, which commonly do not employ or enforce regulations designed to ensure the health and safety of workers - sometimes in violation of the federal Occupational Safety and Health Act (OSHA). [63] OSHA guards against worker injuries and fatalities in the workplace by requiring employers to provide safe working conditions for their employees. [64]

Table 1: Health and Safety Violations Reported by RestaurantWorkers [65]

Violations	**Percent of Workers**
Unsafely hot in the kitchen	36.1%
Fire hazards in the restaurant	25.2%
Missing mats on the floor to prevent slipping	22.0%
Missing guards on cutting machines	21.1%
Done something that put own safety at risk	38.1%

A dishwasher in Detroit told ROC of a particularly dangerous incident. "I recall one time I had to throw out those long florescent bulbs, the ones you see here and I don't believe that was part of my job description. It seems like something that should have been handled by management 'cause I threw it out and it hit the side of the dumpster **[*636]** and it exploded and glass flew in my face. So I had bits of glass in my face." [66] Despite the prevalence of health and safety hazards in restaurant workplaces, 66.6% of all workers surveyed reported a lack of knowledge of workers compensation laws - many of which were passed in the aftermath of the ***Triangle Shirtwaist Factory fire*** - and a third of the workers told ROC they did not receive health and safety training from their employers. [67]

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[61] Rest. Opportunities Ctrs. United, Serving While Sick: High Risks & Low Benefits for the Nation's Restaurant Workforce, and Their Impact on the Consumer 5 (2010) [hereinafter Serving While Sick], available at http://wp.rocunited.org/wp-content/uploads/2011/06/ROC-Serving-While-Sick.pdf.

[62] See Press Release, U.S. Bureau of Labor Statistics, Workplace Injuries and Illnesses - 2008, 19 tbl. 4 (Oct. 29, 2009), available at http://stats.bls.gov/iif/oshwc/osh/os/osnr0032.pdf.

[63] See Serving While Sick, supra note 61.

[64] See Occupational Safety and Health Act of 1970, 29 U.S.C.§§651-678.

[65] Restaurant Opportunities Centers United & Local Restaurant Industry Coalitions survey data. Note: Data has been weighted by position, industry segment, and size of local workforce.

[66] See Serving While Sick, supra note 61.

[67] See id.

Table 2: Workplace Injuries Reported by Restaurant Workers [68]

Injuries	**Percent of Workers**
Burned while on the job	45.8%
Cut while on the job	49.0%
Slipped and injured while on the job	16.7%
Came into contact with toxic chemicals while on the job	24.5%
Have chronic pain caused or worsened by the job	20%

Like their counterparts working in the garment-manufacturing industry in the early twentieth century, restaurant workers face conditions of poverty wages, shaved hours, lack of lunch breaks, health and safety hazards, discrimination, and more - largely due to a lack of bargaining power. Fewer than one percent of all restaurant workers nationwide belong to a union. [69] Conversely, the National Restaurant Association boasts a local restaurant association in every state, and has played an influential role in local, state and federal policy fights on behalf of the restaurant industry. Representing about a third of all restaurants nationwide, the Association lobbies for what it believes to be in the best interest of its employer members - urging a low minimum wage, blocking attempts to get paid sick leave or mandatory health care for restaurant workers, and opposing the Employee Free Choice Act, a law initiated in 2007 by unions to facilitate unionization. [70]

[*637] Now, like the garment-manufacturing sector at the turn of the twentieth century, the restaurant industry is setting standards for working conditions economy-wide by lowering the floor for employment standards. In 2009, food service occupations were among the lowest paid occupations in America. [71] These occupations earned less than farm workers, childcare workers, and retail workers. [72] Also, over the last twenty years, the National Restaurant Association has served as a leading voice in several states and at the federal level to keep the minimum wage for tipped workers at $ 2.13, while the regular minimum wage continues to rise. [73] As a result, restaurant workers have the lowest minimum wage and include the three lowest-paid occupations in America, effectively dragging down wages for all other workers.

III.

Restaurant Workers and September 11th: A Modern Perspective

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[68] Restaurant Opportunities Centers United & Local Restaurant Industry Coalitions survey data. Note: Data has been weighted by position, industry segment, and isze of local workforce.

[69] See Interview with Paul Schwalb, UNITE HERE (June 27, 2011) (on file with author).

[70] See Employee Free Choice Act, H.R. 1409, 111th Cong. (1st Sess. 2009) (introduced by Rep. George Miller (D-CA)) (proposing to amend the National Labor Relations Act); Employee Free Choice Act, S. 560, 111th Cong. (1st Sess. 2009) (introduced by Senator Reid (D-Nev.) on behalf of Senator Kennedy (D-Mass.)); News Release, Nat'l Rest. Ass'n, National Restaurant Association Voices Strong Opposition to So-Called Employee Free Choice Act (June 20, 2007), available at *http://www.restaurant.org/pressroom/pressrelease/print/index.cfm?ID=1472*; Front Burner Issues Facing Restaurants, Nat'l Rest. Ass'n, *http://www.restaurant.org/advocacy/issues/(last* visited Aug. 31, 2011);.

[71] See Press Release, Bureau of Labor Statistics, Occupational Employment and Wages News Release (May 14, 2010), available at *http://www.bls.gov/news.release/archives/ocwage* 05142010.htm.

[72] See id.

[73] See Saru Jayaraman, Restaurant Workers Respond to NPR Piece on Tipping, ROC United (June 24, 2011), *http://rocunited.org/blog/2011/06/24/restaurant-workers-respond-to-npr-piece-of-tipping/*.

The International Ladies Garment Workers' Union (ILGWU) was a union of female workers that formed just a few years before the ***Triangle Shirtwaist Factory fire***, and grew rapidly in the years following the ***fire***. [74] Following a long tradition of union mergers and shifts, the ILGWU merged with another union to become the Union of Needletrades, Industrial, and Textile Employees (UNITE), and after the turn of the twenty-first century, UNITE merged with the Hotel Employees Restaurant Employees (HERE) union to become UNITE HERE. [75] Leaders of UNITE had lost membership with the decline of the garment-manufacturing sector in America, and saw HERE as a growing union in a growing sector; they, too, saw the hospitality sector now playing the pivotal role that garment manufacturing played at the turn of the century. [76] It also included the nation's few unionized **[*638]** restaurant workers in its membership. [77] While UNITE HERE has organized thousands of food service workers in recent years in hotels, casinos, stadiums and cafeterias, it has not focused its organizing activities on restaurants. [78]

In the absence of union organizing, several small workers' centers around the country engaged low-wage restaurant workers in standing up to their employers, including a committee of Latina/o restaurant workers that I initiated while working at another workers' center, the Workplace Project, on Long Island. [79] The committee was called Venceremos Empleados de Restaurants (VER). [80] VER represented several restaurant workers in reclaiming unpaid wages and tips on Long Island over a period of several years, but was never able to obtain real influence over the industry. Janice Fine's 2006 study of workers' centers across the United States reported a smattering of local workers' centers representing restaurant workers in an uncoordinated fashion in the last ten years. [81] But such disparate and small organizations did not have a unified voice at the national level, [82] leaving the National Restaurant Association as the only voice in Congress representing the restaurant industry.

Unfortunately, even among the few restaurant workers who were organized in unions, the low density of unionization in the industry has resulted in an inability to bargain for stronger contracts, as union restaurants compete as islands in a sea of non-union competitors. [83] Among this small group of unionized restaurant workers were the workers at Windows on the World, the restaurant at the top of the World Trade Center. The workers at Windows were a highly organized group who took action both with their union (UNITE HERE Local **[*639]** 100) and independently. [84] For example, after many months of seeking union assistance with a despotic manager, the

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[74] See generally Boyer & Morais, supra note 24, at 187.

[75] Unite Here Historical Timeline, UniteHere, http://www.unitehere.org/about/history.php (last visited Sept. 30, 2011).

[76] See Interview with Paul Schwalb, supra note 69.

[77] See Unite Here Historical Timeline, supra note 75.

[78] See Interview with Paul Schwalb, supra note 69.

[79] To learn more about the Workplace Project, see Workplace Project, http://www.workplaceprojectny.org (last visited Oct. 15, 2011).

[80] See Saru Jayaraman & Immanuel Ness, The New Urban Immigrant Workforce: Innovative Models for Labor Organizing 91 (New Press 2005). "Venceremos Empleados de Restaurants" means "Restaurant Workers will Win" in Spanish and "VER" is the verb "to see."

[81] See Janice Fine, Worker Centers: Organizing Communities at the Edge of the Dream 246-47 (ILR Press 2006).

[82] See id.

[83] See e.g., Interview with Paul Schwalb, supra note 69. UNITE HERE's Local 6, New York City's local hotel union, represents approximately 85% of New York City's boutique hotels, while UNITE HERE Local 100, New York City's food service local union, represents about 1% of the City's restaurant workers. A dishwasher in a hotel under a Local 6 contract earns approximately $ 18 per hour, while a dishwasher in a restaurant under a Local 100 contract earns about half of that amount.

[84] See generally Rinku Sen & Fekkak Mamdouh, The Accidental American 28 (Berrett-Koheler Publishers, Inc. 2008) (describing the organizing activities of the Windows workers).

Windows workers organized a wildcat strike on Thanksgiving Day of 1999, refusing to serve the restaurant's one thousand guests unless the manager was removed. The manager was almost immediately removed. [85]

On September 11, 2001, *seventy-three* workers died at Windows on the World in the World Trade Center. [86] When the plane hit the North Tower, these workers were either burned alive or jumped to their deaths from the 107th floor. Located above the floor where the plane hit the building, they immediately felt extreme heat rising in the restaurant. Some called their families. When the heat rose to an insufferable level, some opened the windows in the restaurant and began to jump, just as the ***Triangle*** Waist ***Factory*** workers had done. "As opposed to other World Trade Center victims, who perhaps worked in the accounting and law firms on other floors, Windows on the World victims were very low-wage workers," says Fekkak Mamdouh, co-founder and co-director of ROC. [87] "Mostly cooks and dishwashers, many earned about $ 200 per week. Their experience on September 11th was different than the workers on lower levels of the building because none survived - instead, they all knew they were going to die, and suffered a long, hot death or jumped to their death from the 107th floor." [88]

They were mostly immigrant workers who had earned low wages and consequently left their families with little or no savings. [89] Since the governmentally-funded September 11th Victim Compensation Fund [90] awarded money to families based on the victim's income and age - basically, a calculation of how much the worker would have earned had they lived out their life - Windows workers' families received far less in compensation than others. [91] The tragedy suddenly shone an international light on these workers. They had worked at the highest grossing restaurant in the United States, but had earned between $ 200 and $ 300 weekly, and had left their struggling families **[*640]** with little or nothing. [92] Donations began to pour into the union from all over the world. [93] The union set up a special fund to collect these donations, and asked one of the lead workers from Windows, Fekkak Mamdouh, and I to start ROC in the hopes of better supporting the workers who had lost their jobs in the aftermath of the tragedy.

IV.

Restaurant Opportunities Center (ROC)

ROC is now a national restaurant workers' organization that seeks to improve wages and working conditions for the nation's low-wage restaurant workforce. [94] With 8,000 low-wage restaurant worker members in eight locations, ROC is the only national workers' organization in the United States dedicated exclusively to the needs of restaurant workers. ROC engages in participatory research and policy work, responsible employer engagement, workplace justice campaigns, and membership and leadership development. ROC has become a powerful national vehicle for

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[85] See id. at 29.

[86] See id. at 2.

[87] See Interview with Fekkak Mamdouh, Co-Founder & Co-Director, Rest. Opportunities Ctrs. United (Aug. 18, 2011) (on file with author).

[88] See id.

[89] See id.

[90] Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, ***115 Stat. 230 (2001)*** (codified as amended at *49 U.S.C. § 40101*).

[91] See id.

[92] See Stephen Greenhouse, Windows on the World Workers Say Their Boss Didn't Do Enough, N.Y. Times, June 4, 2002, at B1.

[93] See Interview with Fekkak Mamdouh, supra note 87.

[94] See About Us, Rest. Opportunities Ctrs. United, *http://www.rocunited.org/about-us/* (last visited Sept. 2, 2011).

restaurant workers to lift their collective voice on issues affecting all low-wage workers, including the minimum wage, paid sick days, compliance with basic employment standards, and lack of health care.

After September 11th, ROC began simply helping the surviving Windows on the World workers get back on their feet, find new jobs, and obtain relief funds. [95] Very shortly after the tragedy, however, a unique moment arose. The owner of Windows on the World, David Emil, opened a new restaurant in Times Square and refused to hire many of his former employees from Windows on the World. Mamdouh and his colleagues believed that he feared that they would form a union in his new restaurant. [96] After promising to find them new jobs in the aftermath of the tragedy, Emil claimed that the Windows workers were not qualified to work at his new establishment. [97]

The Windows workers felt that this was a moral outrage and organized quickly to protest outside Emil's new restaurant. [98] This protest **[*641]** received prime publicity, landing on the front page of the Metro Section of the New York Times. [99] When Emil agreed to hire many of the workers who wished to work in his new restaurant, the victory was broadcast far and wide, and the new foundling restaurant workers' organization was thrown into the spotlight. [100] Hundreds of restaurant workers began seeking the organization's help to vindicate their rights on the job. Some arrived seeking training and placement in good restaurant jobs, others sought to develop their leadership and voice, while others simply wanted to provide support to their fellow restaurant workers.

Over the last ten years, ROC has grown into a national restaurant workers' organization with 8,000 members in eight states nationwide, and it continues to grow rapidly. [101] ROC engages in participatory research and worker-led policy work, high profile campaigns against exploitation in fine dining restaurant companies, and promotion of the 'high road' to profitability through partnerships with responsible employers, development of worker-owned restaurants, and significant job training and placement programs. [102] In less than ten years, ROC has:

. won over $ 5 million in misappropriated tips and wages and significant policy changes from high profile restaurant companies;

. partnered with more than fifty responsible restaurant owners to promote the 'high road' to profitability;

. trained more than 2,500 low-wage workers in living-wage job skills;

. opened cooperatively owned restaurants in Detroit and New York City;

. published fifteen reports on the industry;

. won a statewide minimum wage increase for tipped workers in New York State; and

. initiated other policy campaigns at the local, state, and federal level. [103]

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[95] See Saru Jayaraman, What's the Connection Between Labor Day and 9/11?, Rest. Opportunities Ctrs. United (Sept. 2, 2011), *http://rocunited.org/featured/what%E2%80%99s-the-connection-between-labor-day-and-911/*.

[96] See Sen & Mamdouh, supra note 84, at 77.

[97] See id.

[98] See Stephen Greenhouse, supra note 92.

[99] See id.

[100] See Sen & Mamdouh, supra note 84, at 78-79.

[101] See id.

[102] See id.

[103] See id.

In annual national meetings, our restaurant-worker members nationwide have consistently chosen the minimum wage and paid sick days as our federal policy priorities, both of which would impact all workers, not just restaurant workers. [104]

[*642]

V.

What the Future Holds

There are several lessons that can be learned from the successes achieved by organizers and advocates in the aftermath of the ***Triangle Shirtwaist Factory fire***. Publicly declaring that the lives of the immigrant women lost in the ***fire*** would not be lost in vain, women in the trade union movement mobilized thousands of immigrant workers and other unlikely allies such as wealthy society women in strikes and other actions to push for labor reforms. [105] They worked to educate state and, later, federal policymakers about the need for reform. [106] They did not narrowly define their demands to merely address the specific issues of the ***fire***; instead, they drew upon the notoriety of the incident to ultimately win labor reforms that impacted workers in all industries. [107]

As was true for the ***Triangle Factory*** workers, Mamdouh and many of his Windows on the World co-workers often pledge that they will not allow the deaths of their co-workers at Windows to have been in vain. "We have created ROC in the legacy of our brothers and sisters at Windows," Mamdouh said. "They were immigrant restaurant workers trying to support their families, and they shouldn't have died. Everything we're doing at ROC to improve the industry is in their memory." [108] They fight for reform in the restaurant industry in the name of their friends and colleagues to ensure that their legacy is the transformation of the restaurant industry into an industry that works for all. As the restaurant industry grows, it continues to present possibilities for organizing that can positively impact the economy as a whole. For example, ROC United is now working to raise both the regular and tipped minimum wage in 2012. Learning from the experience of the women who organized in the aftermath of the ***Triangle Shirtwaist Factory fire***, ROC is working to educate local, state and federal policymakers on the daily horrors restaurant workers face, and to reach out to all potential allies among consumers and donors to support these issues, which impact all workers. Raising the floor for America's lowest paid workers will raise standards for workers across the board.

In 2006, an editorialist in the Nation's Restaurant News wrote an editorial about ROC's efforts to win unpaid wages for workers in a **[*643]** fine-dining restaurant. [109] The editorialist accused ROC of exploiting September 11th to organize restaurant workers. [110] Referring specifically to ROC campaigns against high-profile restaurant companies, he claimed that ROC was using its September 11th origins to unionize the industry. [111] In fact, ROC's campaigns were not about unionization, but rather about reclaiming unpaid wages and fighting illegal discrimination. What ROC did was not very different from what labor reformers of the early twentieth century had so successfully

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[104] See Research & Policy, Rest. Opportunities Ctrs. United, http://rocunited.org/our-work/research-policy/ (last visited Sept. 5, 2011).

[105] See Drehle, supra note 5, at 66-68.

[106] See id.

[107] See id.

[108] See Interview with Fekkak Mamdouh, supra note 87.

[109] Richard Berman, Op-Ed., New York Group Uses 9/11 Ties to Push Its Agenda of Organizing Restaurant Industry, Nation's Rest. News, July 3, 2006, at 17.

[110] See id.

[111] See id.

done: use a disaster that shed light on deplorable labor conditions in a major sector of the economy to highlight the need for general reform. ROC continues to use key moments of crisis to shed light on the industry.

In the aftermath of Hurricane Katrina, workers reached out to ROC from New Orleans asking for help to develop a restaurant workers' organization in the aftermath of tragedy, as had been done in New York City. ROC-New Orleans was the first affiliate developed outside of New York City.

Like the ***Triangle Shirtwaist Factory fire***, September 11th and Hurricane Katrina both presented a chance to make something better out of a tragedy by achieving transformation in the restaurant industry. ROC was successful in seizing upon these opportunities not only because of previous organizing in the sector prior to the tragedies, but also because the size and scope of the industry, along with its important place in the American psyche, allowed us to use these moments to push for generalized reform, rather than reform in the restaurant industry alone.

2011 includes both the one hundredth anniversary of the ***Triangle Shirtwaist Factory fire*** and the tenth anniversary of September 11, 2001. Both commemorations provide us with a tremendous chance to understand the past and its challenges and seize the moment to improve the future for the well being of all low-wage workers in America.

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Cross-Examination of the Infant Witness: A Review of Lessons Learned From the Triangle Shirt Waist Fire Case and Related Trial Experiences

By Harold Lee Schwab

There is a hierarchy of risk in cross-examination depending upon who is the witness. Questioning an economist about his assumptions/projections will make almost any trial attorney look good. With proper preparation the cross of a technical expert can be challenging but rewarding. Cross-examination of a perjured witness when counsel is armed with a prior inconsistent statement or admission should always be successful. The cross of clergy and surviving spouses must be approached with caution and concern. Potential disaster looms large when cross-examining a catastrophically injured witness. But of all the categories of witnesses, children present the greatest challenge due to jurors' innate sympathies. Because of their tender years children are probably the most difficult to directly impeach. The need for delicacy, sensitivity, and possibly even a change in personality of defense counsel, is self-evident if the jury is not to be offended by the attorney's conduct. Aggressive cross-examination is unacceptable. However, a mere fatherly or motherly approach by the examiner will not suffice if nine-year-old Stephanie, who recounts events occurring six years earlier, is to be impeached. What to do? How to do it? For purposes of this analysis let us assume that there is no independent evidence available with which to confront the child. Impeachment must be predicated upon cross of the witness's story and nothing else. An impossible task? Possibly, but not necessarily. What follows may be of interest to trial counsel faced with the dilemma of cross-examining an infant witness.

One approach might be to have the child repeat what she said on direct. The goal would be for Stephanie, when repeating her story, to either omit a salient fact or at least partly change her version of the events. Even if the cross examiner is successful, the jury will empathize with the child and appropriate allowances will be made for mistakes, given the tender years of the witness. Worse still, simple repetition may violate one of the cardinal rules of cross-examination: never give a witness the opportunity to repeat his/her direct testimony. Repetition carries the inherent risk of solidifying as true in the mind of the jury those very facts which the examiner contests. As history has taught, even the big lie can be believed. Indeed, isn't one of the very reasons for the use of leading questions on cross-examination to prevent repetition?

I personally witnessed such a cross-examination debacle in 1969 while on trial in my first federal court case. During a recess I went across the hall to watch a portion of the well publicized trial of *United States vs. DeSapio* before Judge Harold R. Tyler Jr., in the Southern District, New York. Carmine DeSapio was the last leader of Tammany Hall, the infamous Democrats' committee which controlled New York City politics for generations. He was charged with having conspired with Henry Fried, the owner of a construction company, to bribe James Marcus, a New York City Commissioner, to withhold permits sought by Consolidated Edison until Con Edison agreed to award the construction contracts to Fried. The accused was represented by Maurice Edelbaum, a well known member of the New York criminal trial bar. A key factual issue was whether Fried, at the time of the well attended opening of his multi-million-dollar horse farm in upstate New York, had a personal conversation with DeSapio. A defense witness testified that he had assisted Fried, who was walking with a cane and suffering from gout, onto a school bus touring the property from 1:30 to 5:30 p.m. The thrust of this alibi defense was that Fried could not have had any conspiracy conversation with DeSapio at the horse farm. The prosecution in rebuttal called various witnesses, including in particular Sister Ann James, a student nurse at the Carmelite Sisters Home for the Aged and Infirm. She wore a nun's habit in court. Sister Ann James testified that she had seen "Mr. Fried" walking around the swimming pool without difficulty and that he was not on the bus in which she rode. Unbelievably, counsel for DeSapio in his cross-examination asked the Sister to repeat her story. Imagine—a nun unrelated to either prosecution or defense, repeating her testimony as to what she had observed that particular day! Counsel could no longer credibly argue that Sister Ann was mistaken. What she said was indeed gospel and what she saw and did not see was a fact. She convinced me and apparently the jury. Due at least in part to this failed cross-examination, DeSapio was convicted.

Although not heralded in the legal annals, this is a classic example of what not to do in cross-examination. I had hoped to listen and learn how to do it. Instead, the lesson learned was how not to do it. Although the cross-examination was of an adult, the same rule would appear to apply to children. By way of postscript, the government conclusively established in its post-trial motion that Sister Ann James was mistaken and that she had been referring to one Richard Fried, and not to Henry Fried!! Ironically, repetition had proven facts that were not correct. However, because of other compelling evidence the Second Circuit denied the motion for a new trial (435 F.2d 272).

Almost a century ago, Max Steuer was confronted with a comparable situation when faced with the apparently impossible task of defending Mssrs. Harris and Blanck, the owners of The Triangle Shirt Waist Factory, against charges of manslaughter. The company occupied the top three floors of a ten-story building at 23 Washington Place in New York City. The owners, dubbed "the shirt waist kings," operated the largest manufacturing business of ladies' blouses at the time. They employed approximately 400 young girls and women, mostly recent immigrants who spoke little English, to operate the sewing machines. On March 25, 1911, a fire began in discarded rags between the cutting tables and it quickly engulfed the upper floors. Panic set in for many. Those fortunate were able to escape down a narrow fire escape, an elevator before it stopped, the staircase before it became impassible, or from the roof to the adjacent New York University Law School building. However, 146 employees, mostly women, died because of burns, smoke inhalation, or jumping from upper floors to the street below. This was the greatest loss of life in New York City (exceeded as we know today only by September 11), and the public demanded justice. Although the Building Department came under attack, the owners were viewed as the primary culprits. Within weeks of the tragedy they were indicted for manslaughter.

The trial of *People v. Harris and Blanck* before Judge Thomas Crain began in December 1911 with Assistant District Attorney Charles Bostwick heading the prosecution. The defendants were represented by Max D. Steuer, reputedly a leading member of the New York Trial Bar. The prosecution focused its case on the death of Margaret Schwartz, a ninth floor victim. It was alleged that she could not escape because the exit door was locked in violation of the New York Labor Code. A key prosecution witness was Kate Alterman, who had been with Margaret when the two of them came out of the dressing room and found the ninth floor ablaze. Her principal testimony on direct examination follows:

> Q Margaret Schwartz was with you at this time?
>
> A At this time, yes, sir.
>
> Q Then where did you go?
>
> A Then I went to the toilet room, Margaret disappeared from me, and I wanted to go up Greene street side, but the whole door was in flames, so I went in hid myself in the toilet rooms and bent my face over the sink, and then ran to the Washington side elevator, but there was, a big crowd and, I couldn't pass through there. I noticed some one, a whole crowd around the door and I saw Bernstein, the manager's brother trying to open the door, and there was Margaret near him. Bernstein tried the door, he couldn't open it and then Margaret began to open the door. I take her on one side I pushed her on the side and I said, "Wait, I will open that door." I tried, pulled the handle in and out, all ways—and I couldn't open it. She pushed me on the other side, got hold of the handle and then she tried. And then I saw her bending down on her knees, and her hair was loose, and the trail of her dress was a little far from her, and then a big smoke came and I couldn't see I just know it was Margaret, and I said, "Margaret," and she didn't reply. I left Margaret, I turned my head on the side, and I noticed the trail of her dress and the ends of her hair begin to burn. Then I ran in, in small dressing room that was on the Washington side, there was a big crowd and I went out from there, stood in the center of the room, between the machines and between the examining tables. I noticed afterwards on the other side, near the Washington side windows, Bernstein, the manager's brother throwing around like a wildcat at the window, and he was chasing his head out of the window, and pull himself back. He wanted to jump, I suppose, but he was afraid. And then I saw the flames cover him. I noticed on the Greene street side someone else fell down on the floor and, the flames cover him. And then I stood in the center of the room, and I just turned my coat on the left side with the fur to my face, the lining on the outside, got hold of a bunch of dresses that was lying on the examining table not burned yet, covered my head and tried to run through the flames on the Greene street side. The whole door was a red curtain of fire. A young lady came and she began to pull me in the back of my dress and she wouldn't let me in. I kicked her with my foot and I don't know what became of her. I ran out through the Greene street side door, right through the flames on to the roof.
>
> Q When you were standing toward the middle of the floor had you a pocketbook with you?
>
> A Yes, sir, my pocketbook began to burn already, but I pressed it to my heart to extinguish the fire.
>
> Q And you put the fire out on your pocketbook?

A Yes, sir.

How does one cross-examine a Kate Alterman given the enormity of the tragedy? Steuer initially established that the witness came from Philadelphia to the trial, had been in New York for over two weeks waiting to testify, and had actually gone to the building with Bostwick and another member of the District Attorney's office. The inference of witness coaching was thereby made but more was required. Steuer asked Alterman to repeat her story not one time, which might enhance credibility, but rather three times, which established that the witness's version was essentially memorized from a script.

After more preliminaries, Steuer asked on cross:

Q Now tell us what you did when you heard the cry of fire.

A I went out from the dressing room, went to the Waverly side windows to look for fire escapes, I didn't find any and Margaret Schwartz was with me, afterwards she disappeared. I turned away to get to Greene Street side, but she disappeared, she disappeared from me. I went to the toilet rooms, I went out from the toilet rooms, bent my face over the sink, and then went to the Washington side to the door, trying to open the door, but there I saw Bernstein, the manager's brother, trying to open the door; but he couldn't. He left; and Margaret was there too, and she tried to open the door and she could not. I pushed her on a side. I tried to open the door, and I couldn't and then she pushed me on the side and she said, "I will open the door," and she tried to open the door. And then a big smoke came and Margaret Schwartz I saw bending down on her knees, her hair was loose and her dress was on the floor and a little far from her. And then she screamed at the top of her voice, "Open the door! Fire! I am lost, there is fire!" and I went away from Margaret. I left, stood in the middle of the room, went in the middle of the room, between the machines and examining tables, and then I went in I saw Bernstein, the manager's brother, throwing around the windows, putting his head from the window—he wanted to jump, I suppose but he was afraid—he drawed himself back, and then I saw the flames cover him. And some other man on the Greene Street side, the flames covered him, too. And then I turned my coat on the wrong side and put it on my head with the fur to my face, the lining on the outside, and I got hold of a bunch of dresses and covered up the top of my head. I just got ready to go and somebody came and began to chase me back, pulling my dress back, and I kicked her with the foot and she disappeared. I tried to make my escape. I had a pocketbook with me, and that pocketbook began to burn, I pressed it to my heart to extinguish the fire, and I made my escape right through the flames—the whole door was a flame right to the roof.

Q It looked like a wall of flame?

A Like a red curtain.

Q Now, there was something that you left out, I think, Miss Alterman. When Bernstein was jumping around, do you remember what that was like? Like a wildcat, wasn't it?

A Like a wildcat.

After more preliminaries, Steuer asked a second time:

Q Now could you tell us again what you did after that time?

A After going out from the dressing room?

Q Yes.

A I went out to the Waverly side windows to look for fire escapes. Margaret Schwartz was with me, and then Margaret disappeared. I called her to Greene street, she disappeared and I went into the toilet room, went out, bent my face over the sink, and then I wanted to go to the Washington side, to the elevator. I saw, there a big crowd, I couldn't push through. I saw around the Washington side door a whole lot of people standing, I pushed through and there I saw Bernstein, the manager's brother, trying to open the door; he could not and he left. Margaret Schwartz was there, she tried to open the door and she could not. I pushed Margaret on the side, and tried to open the door, I could not. And then Margaret pushed me on the side; and she tried to open the door. But smoke came and Margaret bent on her knees; her trail was a little far from her and her hair was loose, and I saw the ends of her dress and the ends of her hair begin to burn. I went into the small dressing room, there was a big crowd, and I tried—I stood there and I went out right away, pushed

through and went out and then I stood in the center of the room between the examining tables and the machines. Then I noticed the Washington side windows—Bernstein, the manager's brother, trying to jump from the window, he stuck his head out—he wanted to jump, I suppose, but he was afraid. Then he would draw himself back, then I saw the flames cover him. He jumped like a wildcat on the walls. And then I stood, took my coat, turning the fur to my head, the lining to the outside got a hold of a bunch of dresses that was lying on the table and covered my head, and I just wanted to go and some lady came she began to pull the back of my dress; I kicked her with the foot and I don't where she got to. And then I had a purse with me and that purse began to burn, I pressed it to my heart to extinguish the fire. The whole door was a flame, it was a red curtain of fire, and I went right on the roof.

Q You never spoke to anybody about what you were going to tell us when you came here, did you?

A No, sir.

Q You have got father and a mother and four sisters?

A Five sisters. I have a father, I have no mother—I have a stepmother.

Q And you never spoke to anybody else about it?

A No, sir.

Q They never asked you about it?

A They asked me and I told her once, and then they stopped me; they didn't want me to talk anymore about it.

Q You told them once and then they stopped you and you never talked about it again?

A I never did.

Q And you didn't study the words in which you would tell it?

A No, sir.

Steuer asked a third time:

Q Do you remember that you got out to the center of the floor—do you remember?

A I remember I got through the Greene Street side door.

Q You remember that you did get to the center of the floor, don't you?

A Between the machines and the examining tables, in the center.

Q Now tell us from there what you did; start at that point now instead of at the beginning.

A In the beginning I saw Bernstein on the Washington side, Bernstein's brother, throw around like a wildcat; he wanted to jump, I suppose, but he was afraid. And then he drawed himself back and the flames covered him up. And I took my coat, turned it on the wrong side with the fur to my face end the lining on the outside, got hold of a bunch of dresses from the examining table, covered up my head, and I wanted to run. And then a lady came and she began to pull my dress back, she wanted to pull me back, and I kicked her with my foot—I don't know where she got to. And I ran out through the Greene street side door, which was in flames; it was a red curtain of fire on that door to the roof.

Q You never studied those words did you?

A No, sir.

On redirect examination the witness endeavored to explain that she used the same language when repeating her story "Because he asked me the very same story over and over." The remarkable similarity of the versions strongly suggested, however, that Kate Alterman had been coached if not in fact programmed. Surely, "red curtain of fire" and "like a wildcat" were not words of her own choosing. Max Steuer had successfully impeached through continued repetition a most sympathetic witness who had survived a major tragedy. At the very least, her credibility after cross-examination was suspect. The defense subsequently called approximately 50 witnesses to testify and it therefore cannot be said that the cross-examination of Kate Alterman was the *sine qua non* of the jury verdict for the defendants, returned after only two hours of deliberation. However, it certainly assisted in the result since Kate Alterman was indeed a critical prosecution witness.

Many years ago I decided to use the Max Steuer approach in a Bronx trial before Justice Matthew Coppola. The case involved a child who had obtained a carpenter's stud gun from the superintendent's office of the defendant. As one might expect, the five-year-old infant, while

playing with the gun pulled the trigger and blinded himself in one eye. The principal negligence issue was whether the stud gun had been left out for children from the building to play with or whether it had been put away in a reasonably safe place. At the time of trial the infant, then 11 years of age, described on direct examination the salient events of the accident as if they had just occurred the day before and as if he was an adult with total recall. This presented an opportunity to emulate the cross-examination of Kate Alterman.

I approached the witness as would any understanding father, asked a few innocuous questions, and requested that the child repeat for the jury what happened. I was not disappointed. With the clarity of a tape recording the story was repeated verbatim. However, from this one-time repetition, it was possible that the jury did not yet appreciate the import of the cross-examination. To stop at that point would result in another "Sister Ann James" debacle. After wasting a few more innocuous questions, I asked the child to tell once again what took place. The memorized recitation was repeated word for word. Feeling reasonably certain but not 100% that the jury had the idea now that the testimony had been scripted, I asked a few more throwaway questions and requested that the child tell the jury one last time how the accident happened. For what was a fourth time (1 on direct and 3 on cross), the jury heard the exact same story.

The case changed from one of sympathy for the child who had sustained a major injury to one of highly questionable credibility regarding the details of the occurrence. Plaintiffs' counsel, Herman Glaser, referred to at that time as the "Dean" of the New York plaintiffs' bar, clearly sensed the effect of this cross-examination. The matter was settled almost immediately afterwards and even before the defense had presented its case.

Possibly the most ingenious cross-examination of young children took place in the medical malpractice case of *Levine v. Kent*, tried in Supreme Court, New York County (Index 124206/99) before Justice Martin Schoenfeld in February 2002. The twin girls, Avery and Betsy, had been born prematurely at about 26 weeks. They were in neonatal care for an extensive period, both underwent heart surgery, and one had laser eye surgery. It was claimed that they had cerebral palsy, as well as physical and developmental problems, but the defense maintained that they made a spectacular recovery, although diminutive in height, and were actually attending a mainstream public school. At the age of six, the girls were presented in court and gave brief testimony on direct examination. Query, how do you effectively cross-examine a six year old to demonstrate the extent of the recovery?

Defense counsel Peter Kopff opened up his black bag and introduced each child to five hand puppets, Chicken, Noodle, Shy Shelly, Alligator and Moose. He previously used the puppets when teaching children in Sunday School. Without objection from plaintiff's counsel and with the help of the puppets, he put the girls in a conversational mood to speak about their brothers, wearing knapsacks, going to restaurants, music, books, etc. The girls were articulate. From playing with the puppets they demonstrated good hand-eye coordination. The session for each child lasted 20 to 30 minutes, and with the aid of the puppets, the plaintiffs' claim of ongoing developmental problems was effectively destroyed. Justice Schoenfeld is reported to have said that the use of the puppets was "brilliant" and that defense counsel "got this very shy child to respond to his questions." Without doubt, the shirt-sleeved defense lawyer, sitting on the floor and conversing with the children through puppets, additionally served to establish a unique rapport with the jury, although the extent to which Chicken, Noodle, Shy Shelly, Alligator and Moose contributed to the malpractice defense verdict is uncertain.

The motivation for this article results not merely from the Triangle Shirt Waist Company cross-examination and the other cases referenced above, but also from the recent trial of *Torres v. New York City Housing Authority*, Supreme Court, Kings County (Index No. 40054/00) held in March 2006 before Justice Arthur Schack. I had planned to utilize the Triangle Shirt Waist Fire "tell it again" technique to cross-examine 9 ½ year-old Stephanie Torres, but almost unexpectedly another impeachment approach appeared possible and potentially even more devastating. The plaintiffs claimed that defendant had made repairs to the apartment stove but failed to reinstall the unit into a special floor-mounted bracket which would prevent the stove from tipping. A pot of beans boiling in water was on the stove. Query, did 3-year, 9-month old Stephanie pull the pot of beans off the stove onto herself, causing the disfiguring 3rd degree burns, or did the accident occur because the stove tipped over? The only witness to the accident was the child herself.

Stephanie testified on direct examination that she had gone into the kitchen and climbed up to get a glass of water from the sink. She then described how the accident happened:

> Q Well, when you were in the kitchen was there anything cooking on the stove?
>
> A Yes.
>
> Q What was cooking on the stove?
>
> A Beans and water.
>
> Q And do you remember where on the stove the beans and water were?
>
> A No.
>
> Q And can you tell what happened after you got your water?

A I opened the oven door and I sat on it and the beans fell.

The intention had been to cross-examine Stephanie by asking her to repeat her story three or four times in the "tell again what happened" tradition of Max Steuer. Her "one"-liner version appeared programmed and memorized. Multiple repetition would certainly prove the point. However, initially it was important to establish that there had been conversations (i.e., coaching) between mother and daughter. Whether Stephanie admitted to it or not was really irrelevant, since the suspicion of manipulation would be implanted in the mind of jury. Stephanie was therefore asked on cross the following questions and gave the following answers:

Q Now, did your mother ever speak to you, Stephanie, about how the accident happened?

A I don't know.

Q What did you say, Stephanie?

A I don't know.

It appeared certain from these two "I don't know" answers that Stephanie did not want to admit that her mother had spoken to her; that is, told her how the accident happened. What the transcript unfortunately does not reflect is the time lapse between the questions being asked on cross and Stephanie's answers. This was yet further proof of the child's desire not to tell an untruth. Accordingly, an immediate tactical decision was made to forgo asking Stephanie to repeat her story. Cross-examination would be even more effective if additional "No" and "I don't know" answers were obtained. The following took place next:

Q You don't know whether your mother ever asked you how the accident happened?

A No.

Q Did your mother ever ask you whether you sat on the oven door, Stephanie?

A I don't know.

Q You don't know? Did you ever tell your mother that you did not sit on the oven door, Stephanie?

A No.

Q No? Are you, sure of that, Stephanie?

A Yes.

Q Huh?

A Yes.

Q Okay. And Stephanie, you're recalling now what took place how many years ago?

A I don't know.

Although it seemed that the jury must already realize that Stephanie's story of the accident was memorized, a tactical decision was made at this point to press the matter further. Why not ask the child whether she had any conversations with her lawyer? Her answer, whether it be "yes" or "no," could only help the defense. At the very least it would emphasize, as in the questions about the mother, the potential involvement of another key person in the preparation of Stephanie for trial. In this case, however, the answer was even better than a simple "No" or "Yes."

Q Did you ever speak to Ms. Ball about how the accident happened, Stephanie?

(Pause.)

THE COURT: Do you know, Stephanie?

A (Shakes head.)

THE COURT: You have to say something.

A No.

Q Do you want to answer that question, Stephanie, or do you not want to answer that question?

A I don't know.

Q You don't know?

THE COURT: Okay.

Q When you climbed down from the sink, Stephanie, were you near the stove?

A Yes?

Mr. Schwab: I have no further questions.

It was additionally clear that Stephanie did not want to admit speaking to her attorney. Court personnel noted that Stephanie made the worst child witness seen in their many years of experience. There was no need to ask Stephanie to repeat her story in the Max Steuer tradition. Her essential disavowal of any conversations with her mother and attorney was even more effective than repetition, since it was tantamount to an admission that she had been programmed. The jury subsequently returned a unanimous verdict for the defense. Implicit in the verdict was the rejection of Stephanie's testimony.

Cross-examination is indeed an art and not a science. For every general rule on cross-examination there is usually either a corollary or an exception dependent upon a fact-specific situation. This article is certainly not intend-

ed to be either authoritative or definitive, given these verities about which every trial attorney is well aware. However, some of the approaches worthy of consideration in the cross-examination of infants, particularly when independent impeachment proofs do not exist, appear to be:

1. Ask the child whether he/she has had conversations about the accident with his/her parents. Did mother or father tell how the accident happened? Whatever the answer, it should direct the attention of the jury to the possibility of coaching and programming.
2. Ask the child whether she had conversations with his/her lawyer about how the accident happened.
3. Inquire whether the child was taken back to the scene of the accident.
4. Bring out the fact that the child is describing today what occurred many years ago.
5. Do not ask the child to repeat his/her story only one time since that single response will only serve to reinforce that version.
6. Consider asking the witness to repeat his/her story three or even more times to prove that it has been programmed and memorized.
7. Always remain flexible and be prepared to alter your planned cross-examination when an unexpected response or new situation develops.
8. Be ever cautious not to alienate the jury.
9. Be inventive—in the right case with the right issues, it might even be worthwhile to buy a puppet of your own.

It may be that the approach to be used in the cross-examination of infants will depend upon the particular testimony and issues involved as well as the personality of counsel and even that of the child. Nevertheless, the purpose of this article is to present for discussion and consideration possible approaches to cross-examination by referencing salient aspects of the Triangle Shirt Waist fire case and others personally known to this writer. There are lessons to be learned from almost every trial. It is hoped that in addition to being of general interest this article has served a useful purpose for those readers who are trial attorneys.

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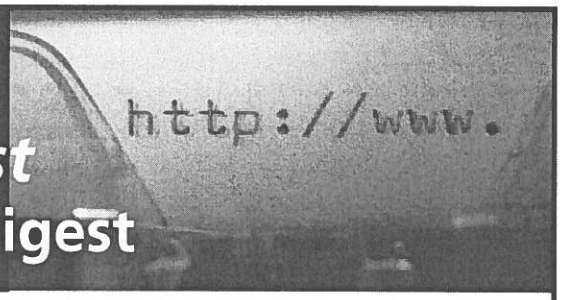

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1. *NOTE: The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation. , 62 Tex. L. Rev. 361*

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[*361] I. Introduction

From the windows of his classroom at the New York University School of Law, Professor Francis Aymar could see across a courtyard into the workrooms of the ***Triangle*** ***Shirtwaist*** Company, [1] a "loft" ***factory*** [2] that in 1910 occupied the top three floors of the ten-story Asch Building in Washington Square in New York City. [3] The professor's concern about the dangerous conditions that he observed in the ***factory*** intensified on November 26, 1910, when he read about a ***fire*** that killed twenty-five workers in a crowded ***factory*** just across the Hudson River in Newark, New Jersey. [4] Noting ***Fire*** Chief Edward Crocker's warning that a similar disaster could occur at any time in New York City, Professor Aymar wrote a letter to the city Building Department, and requested that it investigate and correct the conditions in the ***Triangle*** ***factory***. [5]

[+] The author extends his gratitude to Professor Bruce Mann, Washington University School of Law, for his guidance in this project.

[1] The ***Triangle*** company was the largest manufacturer of shirtwaists in the nation. L. STEIN, THE ***TRIANGLE*** ***FIRE*** 159 (1962). The ***shirtwaist***, also called a bodice, was a woman's blouse with a high, mannish collar, billowy sleeves and chest, and a tight, fitted waist. The garment became popular through Charles Dana Gibson's drawings in *Life* magazine of the "Gibson Girl," a beautiful and accomplished working woman. *See* C. NADEN, THE ***TRIANGLE*** ***SHIRTWAIST*** ***FIRE***, MARCH 25, 1911, at 12-13 (1971).

[2] The loft ***factory*** became so common that by 1906, there were 77 loft establishments on one Broadway block alone. H. ROCKEFELLER, THE ***TRIANGLE*** ***FIRE***, 1911: THE IMPACT OF A DISASTER ON NEW YORK CITY IN AN ERA OF REFORM 11 (1959) (unpublished manuscript available in Smith College Sophia Smith Collection). Loft ***factories*** occupied the uppermost floors of city buildings, where they had greater access to light and owners had more warning time to cover up hazards when inspectors arrived. *See* McFarlane, ***Fire*** *and the Skyscrapers,* 37 McCLURE'S MAG. 468, 469 (September 1911).

[3] L. STEIN, *supra* note 1, at 12.

[4] *See id.* at 27.

[5] *Id.*

The Department ignored Professor Aymar's request. On Saturday, March 25, 1911, minutes before more than 600 workers were to leave for the evening, a small ***fire*** began on the eighth floor of the ***Triangle factory***. [6] The flames reached bundles of material that hung from the tall workroom ceilings and then swept along a carpet of highly combustible lawn scraps that had accumulated on the wooden floor for **[*362]** two months. [7] Flames quickly spread through open windows to the top two floors, and within minutes the ***fire*** consumed the entire loft ***factory***. [8]

A crowd gathered as smoke began to billow from the Asch Building, but drew back when the first of sixty-two workers jumped from a height of one hundred feet to escape the flames. [9] Eighty-four more workers were crushed or burned to death when the ***factory***'s single ***fire*** escape collapsed. [10]

Indignation followed shock when the public learned how the ***factory***'s management had disregarded safety. The owners had bolted shut one of the two stair exits from the outside; [11] the other stair door opened inward [12] and was so narrow that only one person could pass through at a time. [13] The emergency water hose had rotted through and had no pressure. [14] The ***factory*** was overcrowded because the owners had circumvented a law that required fifty cubic feet of air space for every worker by building the ***factory***'s ceiling higher. [15] Finally, everything **[*363]** in the ***factory*** was combustible except the sewing machines, and even these were greased with oil. [16]

Even before the victims were buried, citizens began to protest the conditions in the ***Triangle*** building and the lack of basic safety standards in most of the state's other ***factories***. In response to the outcry, the state legislature formed

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[6] N.Y. Times, Mar. 26, 1911, at 1, col. 5.

[7] Louis Levy, a dealer in rags, collected the scrap accumulation about six times a year. On January 15, 1911, the last collection before the ***fire***, the scraps weighed 2,252 pounds. L. STEIN, *supra* note 1, at 33.

[8] Because the workers on the tenth floor had warning, only one worker on that floor died and only because she panicked and jumped from a window. Workers on the ninth floor, however, had no warning and were taken by surprise by the ***fire***. One half of the workers on that floor perished. *See* L. STEIN, *supra* note 1, at 31.

[9] Some authorities estimate that the distance was 110 feet. *See, e.g.,* M. JOSEPHSON & H. JOSEPHSON, AL SMITH: HERO OF THE CITIES 119 (1969). The workers who jumped hit the pavement with a force equalling 11,000 pounds. L. STEIN, *supra* note 1, at 17. Even though 35 pieces of ***fire***-fighting equipment arrived at the ***fire*** within minutes of the alarm, the equipment was useless. The bodies ripped through the safety nets, or pulled the nets to the ground, flipping the firemen into the air. The tallest ladder in the department reached only to the sixth floor of the Asch Building, a full one and one-half stories below the nearest victims. Falling bodies buried the water hoses and caused the horses that had drawn the ***fire*** equipment to panic. Some of the bodies hit with such force that they crashed through the pavement into an underlying basement. *See id.* at 17; *see also* Duchez, *The Murder of the Shirt Waist Markers in New York City,* 11 INT'L SOCIALIST REV. 666, 667-68 (1911).

[10] *See* L. STEIN, *supra* note 1, at 80; *see also* P. FONER, 3 HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 21 (1964).

[11] It is not clear why the door was locked. The owners maintained that it was bolted to prevent theft. *See* E. FLEXNER, CENTURY OF STRUGGLE 252 (rev. ed. 1975). The owners were accused, however, of bolting the door to keep out union organizers. *See id.; see also* S. KENNEDY, IF ALL WE DID WAS TO WEEP AT HOME 151 (1981) (asserting that restricting union access was at least a concurrent motive). In any event, the bolted door was responsible for a major proportion of the fatalities. *See* Wolman, *Labor in New York State,* in 10 HISTORY OF THE STATE OF NEW YORK 77 (A. Flick ed. 1937).

[12] L. STEIN, *supra* note 1, at 39, 119.

[13] *Id.* at 31, 93.

[14] *See* C. NADEN, *supra* note 1, at 26.

[15] *See* H. ROCKEFELLER, *supra* note 2, at 10-11 (The higher ceiling allowed workers to sit closer together and still come within the confines of the law.); *see also* L. STEIN, *supra* note 1, at 114, 161.

[16] *See* L. STEIN, *supra* note 1, at 52.

the New York State ***Factory*** Investigating Commission, [17] which ultimately found that most of New York's ***factories*** were unsafe. The state legislature acted on the Commission's findings by passing thirty-six unprecedentedly broad labor reform measures. [18]

This Note analyzes the climate of reform that develops in the wake of disasters like the ***Triangle fire***. During the time that opportunities for reform exist, organizations can bring about pioneering change or reform in a fraction of the time normally required to pass similar legislation. Part II of the Note examines the New York legislature's failure to respond to predisaster attempts to remedy ***factory*** hazards. Part II discusses the reformers' exploitation of the opportunities for reform following the ***Triangle fire*** and their successful efforts to reform the state's ***factory*** system. Part IV analyzes the reasons for the reformers' success in contrast with their failure only a few years earlier: first, it presents a three-part theory that explains how a disaster creates a favorable climate for reform; second, it reexamines the facts of the ***Triangle fire*** to prove the validity of the model and to illustrate its predictive capacity.

II. Before the ***Triangle Fire***: Reform Failure

The 1911 ***Triangle fire*** was not a random accident, but a herald of future, similar tragedies. The hazardous conditions that led to the ***fire*** were common in the garment industry. Many smaller ***fires*** had already occurred, and similar, more massive tragedies were certainly possible. [19] By 1911, half of the city's 500,000 workers worked above the seventh floor, [20] which was literally beyond the reach of the city ***fire*** department. The year before the ***Triangle*** disaster, ***Fire*** Chief Edward Croker warned that his department could fight ***fire*** only *up to* the seventh **[*364]** floor. [21] That statistic was especially ominous since the typical ***factory*** was a virtual firetrap. For example, four months before the ***Triangle fire***, city newspapers reported that only 100 of the city's 11,000 manufacturing firms were fireproof and that most had wooden staircases and too few exits. [22] Furthermore, a study of 1,243 manufacturers indicated that ninety-nine percent of the firms studied had inadequate safety precautions. [23]

The lack of incentives for employers to improve conditions in their buildings compounded these dangerous conditions. Even firms in highly hazardous industries could easily acquire insurance coverage, and most employers chose to insure against the cost of accidents rather than take the safety precautions that might have prevented the mishaps. [24] Other employers were indifferent to the dangerous conditions in their ***factories*** because they simply

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[17] *See* P. FONER, *supra* note 10, at 21 n.1; *The New York **Factory** Investigating Commission,* 27 THE SURVEY 1920 (1912); *see also* L. LEVINE, THE WOMEN'S GARMENT WORKERS: A HISTORY OF THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION 218 n.1 (1924).

[18] *See* L. STEIN, *supra* note 1, at 210. The New York legislature passed eight laws during the Commission's first year, twenty-five the second, and three the third.

[19] The ***Triangle factory*** itself had eight smaller ***fires*** on its premises between 1902 and 1911. *Id.* at 172; *see also id.* at 121 (noting that hundreds of ***factories*** were unsafe).

[20] *See id.* at 28-29 (about half of city's workers were employed above the seventh floor); Summer, *Facts Which Call for Action,* 27 THE SURVEY 1045, 1045 (1911) (of 45,199 workers surveyed, the vast majority were above the sixth floor).

[21] *See* L. STEIN, *supra* note 1, at 29.

[22] N. DYE, AS EQUALS AND SISTERS: FEMINISM, THE LABOR MOVEMENT, AND THE WOMEN'S TRADE UNION LEAGUE OF NEW YORK 144 (1980).

[23] L. STEIN, *supra* note 1, at 26. The defects the study found included the following: 14 shops with no ***fire*** escapes; 101 with defective drop ladders; 23 with locked shop doors during the day; 58 with poor lighting in the halls; and 78 with blocked access to ***fire*** escapes. Ninety-four percent of the ***factories*** studied had doors that opened inward. *Id.; see also* C. NADEN, *supra* note 1, at 18.

[24] *See* L. STEIN, *supra* note 1, at 173, 176.

did not care about their employees, many of whom were immigrants. [25] As in other industries, most of the ***Triangle*** employees had recently emigrated from Germany, Hungary, Italy, and Russia, and many barely understood English. [26] Some manufacturers looked on these workers as a mere source of greater output at lower wages and longer hours and felt no responsibility for their safety. [27]

In the face of these formidable obstacles, garment workers began to organize their industries to improve subhuman working conditions. Their first great strike attempt, the "uprising of the 20,000," began in September 1909, at the ***Triangle factory***. [28] For two months, the strikers endured taunts and assaults by company-hired thugs and prostitutes. [29] The police not only ignored these attacks, but often brutalized and arrested **[*365]** the strikers on the slightest pretext. [30] For their part, the courts almost invariably supported police action. [31] By the beginning of 1910, many of the protesting workers had been arrested, [32] and the rest were demoralized; the strike ended five months after it began. [33] The gains were marginal, and the strike, on the whole, was a failure. The ***Triangle*** company refused to grant any of the strikers' demands or even to recognize a union. [34]

Thus, workers and reformers realized that in spite of the effort that they put into the strike, they had failed to make meaningful progress. [35] The ***Triangle fire***, which occurred only a year after the strike ended, showed in particular how little the reformers had achieved. As one historian wrote, "The ***Triangle fire*** demoralized the [reformers], for the tragedy dramatized how little progress had been made in improving working women's conditions." [36]

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[25] *Id.* at 97.

[26] B. SEVERN, FRANCES PERKINS: A MEMBER OF THE CABINET 41 (1976).

[27] *See* H. ROCKEFELLER, *supra* note 2, at 6 (manufacturers welcomed workers willing to put in more hours at lower wages); *see also* L. STEIN, *supra* note 1, at 161 (company felt no responsibility for the females in its employ).

[28] It is estimated that 20,000 workers walked out of their shops. *See* J. KENNEALLY, WOMEN AND AMERICAN TRADE UNIONS 61 (1978).

[29] *See* H. ROCKEFELLER, *supra* note 2, at 53; *see also* L. LEVINE, *supra* note 17, at 151 (police showed a "'militant sympathy with the employers'" and harassed the picketers, as did company-hired prostitutes); R. SCHNEIDERMAN & L. GOLDWAITHE, ALL FOR ONE 97 (1967) (recalling attacks by thugs and prostitutes).

[30] *See* E. FLEXNER, *supra* note 11, at 251 (describing repeated police attacks and indiscriminate clubbings).

[31] *See* E. ELLIS, THE EPIC OF NEW YORK CITY 490 (1966) (noting that "police and courts sided with the ***Triangle*** owners"). One magistrate told a striker during sentencing that she was "on strike against God." The Women's Trade Union League sent a note to George Bernard Shaw, informing him of the comment; Shaw cabled back: "Delightful. Medieval America, always in the intimate personal confidence of the Almighty." L. STEIN, *supra* note 1, at 167.

[32] By January 2, 1910, police had arrested 771 picketers. Nineteen were sent to the workhouse, 248 were fined, and the remainder were held for trial or released. S. PERLMAN & P. TAFT, 4 HISTORY OF LABOR IN THE UNITED STATES 1896-1932, at 295 (1935).

[33] The strike ended on February 15, 1910. L. STEIN, *supra* note 1, at 157.

[34] *See id.* at 168 (***Triangle*** workers "had to go back without the recognition of the union and practically no conditions.").

[35] *See* N. DYE, *supra* note 22, at 144 (Newspaper surveys after the Newark ***fire*** revealed that the labor movement had "made little headway in improving conditions.").

[36] *Id.* at 96.

Disillusioned by the unsuccessful strike, the reformers turned to the state legislature to attain their ends. [37] Before the ***Triangle fire***, however, the reformers had met with little progress in achieving legislative reform, either at the city or state level. The City failed to provide adequate safety laws and did not enforce the few, deficient standards already in existence. [38] The Democratic majority in the New York Assembly refused to enact the very reform measures it had endorsed in a Democratic Party platform in the preceding election campaign. [39] In **[*366]** short, at least initially, there was no reason to believe that the reformers would be more successful in the legislature than they had been on the picket lines.

III. After the ***Fire***: Reform Success

A. Generating Public Support

Since their strike attempt and initial legislative efforts had failed, the reformers realized that they could force legislative action only by mobilizing public opinion in support of their cause. [40] But even more than gaining the actual support of the public, the reformers set out to convey the impression that they represented the electorate, [41] for so long as the legislature *believed* the reform efforts had wide public support, the reformers did not care whether the public actually supported them. [42] Since the reformers were already looking for opportunities to generate publicity, they were acutely aware of the reform potential that the ***Triangle fire*** presented in 1911.

At the same time, however, progressives realized that they might be unable to exploit the opportunity open to them. They were well acquainted with the fickleness of public opinion because of their experiences during the 1909 strike, when public sympathy for the picketers was initially strong, [43] but then dissipated quickly. Consequently, union leaders and reformers knew they would have to move quickly to exploit the favorable climate of public opinion. The reformers decided on the tactic of staging a mass meeting at the Metropolitan Opera House on April 2, one week after the ***fire***. [44] Union organizer Rose Schneiderman pathy for the dead was useless and that charitable relief was not a solution to the larger problem. Indeed, she criticized relief efforts on the ground that only legislative action would avenge the deaths and prevent another disaster. [45]

Following the meeting, the International Ladies' Garment Workers' Union attempted to procure the bodies of unidentified victims in **[*367]** order to hold a public funeral. When their initial attempt failed, the reformers organized a mass march to accompany the city's burial plans. City officials capitulated and released the bodies. Workers carried union banners before a crowd of 400,000 at the march and burial, which helped to link the tragedy

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[37] *See id.* at 144 (reformers began pushing "for legislative action rather than for new organizing efforts"); S. KENNEDY, *supra* note 11, at 154 (reformers began to see need for legislation to protect workers).

[38] *See* H. ROCKEFELLER, *supra* note 2, at 10; *see also* M. DUBOFSKY, WHEN WORKERS ORGANIZE: NEW YORK CITY IN THE PROGRESSIVE ERA 10 (1968) (legislation ineffective or unenforceable).

[39] *See* G. MARTIN, MADAM SECRETARY: FRANCES PERKINS 84 (1976). Alfred Smith told Frances Perkins, who was lobbying for a 54 hour work week bill that had been part of the Democratic platform in the preceding election, that party support was merely "for the front." Some of the larger contributors to the party would not tolerate such a cap on hours. *Id.*

[40] I. YELLOWITZ, LABOR AND THE PROGRESSIVE MOVEMENT IN NEW YORK STATE, 1897-1916, at 83 (1965).

[41] *Id.* at 86.

[42] *See id.* at 82.

[43] *See* S. PERLMAN & P. TAFT, *supra* note 32, at 295 ("The conduct of the police brought the girl strikers the sympathy of many who are normally indifferent to organized labor."); L. STEIN, *supra* note 1, at 167 ("The majority of the public sided with the girls."); I. YELLOWITZ, *supra* note 40, at 86 (strike roused lethargic public).

[44] *See* L. STEIN, *supra* note 1, at 141 (describing the arrangements before the meeting).

[45] *See* R. SCHNEIDERMAN & L. GOLDWAITHE, *supra* note 29, at 100-01.

with the legislative reform efforts. [46] Similarly, reformers draped a banner across Cooper's Union in New York City that listed the ***fire*** casualties along with the legend, "We demand for all women the right to protect themselves," [47] again inviting the public to associate the reform efforts with the calamitous events of the ***fire***.

Simultaneously, the progressives continued to lobby for legislation to remedy dangerous ***factory*** conditions. [48] At the April 2 public meeting, the audience passed a resolution calling for the creation of an investigative commission. The reformers presented the petition to New York Governor John Dix, [49] and at his suggestion also brought the petition to the legislature's two Democratic leaders, Alfred Smith and Robert Wagner. [50] The bill, which passed without opposition, formed the New York State ***Factory*** Investigating Commission (NYSFIC) on June 30, 1911. [51]

After the Commission began its investigation, reformers could not claim that the government was inactive, yet the Commission's first tangible findings were at least several months away. The intervening trial and acquittal [52] of the two ***Triangle*** company owners, however, sustained the public's attention during the lull in Commission activity and reenergized the effort to achieve reform. Paradoxically, the owners' acquittal boosted the progressive effort because it angered the reformers and the general public, thus strengthening support for remedial legislation. [53] If they had been convicted, "the furor might have died down **[*368]** and the reforms might not have been so extensive." [54] Another historian suggests that "'it is doubtful whether the social consequences of the ***Triangle*** ***fire*** would have been as far-reaching had Steuer [the defense attorney] lost his case.'" [55]

The ***factory*** owners, Max Blanck and Isaac Harris, were indicted on charges of first and second degree manslaughter for the death of a single ***fire*** victim, Margaret Schwartz. [56] The ensuing trial was sensational from its inception. On the second day of jury selection, a throng of 300 persons mobbed the defendants as they strode into the Criminal Court Building, shouted death threats and waved photographs of victims [57] and then pommeled the defendants and their attorney, Max Steuer, as they pushed into the courtroom. The following day, defense attorney

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[46] L. STEIN, *supra* note 1, at 136.

[47] *See* H. ROCKEFELLER, *supra* note 2, at 36.

[48] *See* L. STEIN, *supra* note 1, at 208 ("[T]he unions and public-spirited individuals . . . maintained a steady clamor for remedial legislation.").

[49] The Committee on Safety, composed of representatives from the meeting, presented the petition to the Governor. The committee members included Mary Dreier, Henry L. Stimson (who later resigned to serve as Secretary of War), Henry Morgenthau, Sr., and Anne Morgan. J. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 124-25; *see also* Elson, *Improved Labor Laws Result from Tragedy Fifty Years Ago,* 40 N.Y. STATE INDUS. BULL. 2, 5 (1961) (***factory*** bill produced largely as a result of the urging of the Committee on Safety).

[50] *See* M. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 125.

[51] *Id.* at 126; *see also* E. BRANDEIS, HISTORY OF LABOR IN THE UNITED STATE, 1896-1932, at 478 (1966) (noting that the Commission was a result of "widespread demand for government action").

[52] *See* N.Y. Times, Dec. 28, 1911, at 1, col. 3.

[53] *See* N. DYE, *supra* note 22, at 97 (reformers, frustrated at the acquittal, began to agitate for action); P. FONER, *supra* note 10, at 360 (workers' anger became potentially explosive after the trial).

[54] C. NADEN, *supra* note 1, at 45-46.

[55] L. STEIN, *supra* note 1, at 207 (quoting Richard B. Morris).

[56] *See* N.Y. Times, Apr. 19, 1911, at 10, col. 3; *id.,* Apr. 18, 1911, at 20, col. 3; *id.,* Apr. 12, 1911, at 1, col. 7.

[57] *Id.,* Dec. 6, 1911, at 24, col. 1.

Steuer requested and received two court guards for his clients, while a special squad of policemen patrolled the courtroom. [58]

During the trial itself, over 100 witnesses testified that the ***factory***'s stairway exit door was bolted shut from the outside. [59] Employees offered lurid accounts of how they escaped and told how their friends and relatives died, thus ensuring dramatic newspaper coverage to feed the public's daily appetite for the macabre. [60]

At the end of the trial, however, Justice Thomas Crain ensured that the jury would acquit the defendants by effectively directing its verdict. [61] In his charge to the jury, the judge said that in order to convict the defendants the jurors would have to find beyond a reasonable doubt that the door had been locked and that this situation must have caused Schwartz' death. Finally, the judge stated, "I think that in this case it is proper for me to charge that [Harris and Blanck] must have had personal knowledge of the fact that [the door] was locked." [62] After **[*369]** deliberating for less than two hours, the jurors returned a "not guilty" verdict.One juror announced to the press that he could barely rest for feeling that he had not fulfilled his "duty to the people" of convicting the owners, but that Justice Crain's charge left him no choice. [63]

The public reacted to the verdict with predictable anger, which gave new momentum to the reformers' legislative efforts in Albany. The press excoriated the prosecution for pressing the wrong charge [64] and attacked Justice Crain for favoring the defendants. [65] The reformers exploited the opportunities for publicity both during and after the trial. Progressives joined the mob of friends and relatives of victims who jeered at the defendants each day of the trial. Some of the more affluent progressives even gained admittance to the courtroom; Mrs. Belmont (who earlier had put up her family mansion as security for strikers' bail) supplied the press daily with caustic remarks during the trial. [66]

B. Victory in the Legislature

The publicity generated by the ***fire*** itself was sufficient to cause the creation of the ***factory*** investigating commission; [67] the trial preserved the momentum of the progressive effort until the Commission finally released its first report. The legislature granted the Commission unparalleled discretion to conduct its investigation into state ***factory*** conditions. Indeed, "few governmental agencies [anywhere] had been granted more sweeping powers to

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[58] *Id.,* Dec. 7, 1911, at 6, col. 3.

[59] *See* N. DYE, *supra* note 22, at 97; L. STEIN, *supra* note 1, at 179.

[60] *See, e.g.,* N.Y. Times, Dec. 13, 1911, at 20, col. 3 (witness describes how she survived by literally sliding down the elevator cable onto bodies). In perhaps the most famous incident during the trial, defense attorney Max Steuer destroyed the credibility of a key prosecution witness, Kate Alterman, by having her repeat superficially damaging testimony again and again. Alterman's account of coworker Margaret Schwartz' death was nearly verbatim with each retelling, and led observers to believe that she had been carefully coached by the prosecution. *See* A. STEUER, MAX STEUER: TRIAL LAWYER 108-09 (1950).

[61] *See* E. ELLIS, *supra* note 31, at 493 ("In effect, [Justice Crain] directed a verdict of acquittal.").

[62] N.Y. Times, Dec. 28, 1911, at 1, col. 3.

[63] *Id.,* Dec. 29, 1911, at 8, col. 6.

[64] *See id.,* Dec. 29, 1911, at 10, col. 4 (stating that the prosecution's failure to bring the correct charges made it impossible to convict the defendants and thus caused the miscarriage of justice).

[65] *See* H. ROCKEFELLER, *supra* note 2, at 17-18 (public doubted the impartiality of Justice Crain; newspapers commented on how he ignored certain damaging testimony in his charge to the jury).

[66] N.Y. Times, Dec. 22, 1911, at 7, col. 2.

[67] *See supra* note 17 and accompanying text.

investigate work conditions in private industry." [68] The Commission was empowered to investigate not only ***fire*** hazards but also any ***factory*** condition affecting workers' welfare in any city in the state and to subpoena witnesses to appear before it and to obtain evidence during the course of its inquiry. [69]

The broad powers granted to the Commission by the legislature were fully utilized in the course of the ensuing investigation. During the first year of its existence alone, the Commission inspected 1,836 **[*370]** ***factories*** throughout the state and heard testimony from 22 witnesses. [70] Eventually, the Commission inspected more than 3,500 ***factories*** [71] and held fourteen public sessions in several major cities, [72] thus reaching into "almost every ***factory*** town in the state." [73]

The first report of the Commission was submitted to the New York legislature on March 1, 1912. The report exercised the Commission's authority to propose legislation [74] by introducing eight bills in the legislature. [75] Each of the bills passed with little or no opposition, in part because they dealt with relatively uncontroversial reforms in ***fire*** prevention and child labor. [76] The reformers faced stiffer opposition when they pressed for passage of a bill that limited the maximum work week for women to fifty-four hours. [77] Even though the Commission did not officially sponsor the bill, Senator Smith and Assemblyman Wagner, who led the progressive side, were so closely identified with the Commission that the bill was perceived as a Commission-backed measure. [78] Still, the reformer's lobbying effort was barely sufficient to ensure the passage of the measure, which occurred only with the help of unusual political machinations. [79]

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[68] B. SEVERN, *supra* note 26, at 45.

[69] The text of the bill is set out in NEW YORK DEPARTMENT OF LABOR, 13 N.Y. LAB. BULL. 394-95 (1911).

[70] *See The New York* ***Factory*** *Investigating Commission,* 27 THE SURVEY 1920 (1912); *see also* NEW YORK STATE ***FACTORY*** INVESTIGATING COMMISSION, 1 FOURTH REPORT OF THE ***FACTORY*** INVESTIGATING COMMISSION 3 (1915) [hereinafter cited as FOURTH REPORT]; L. STEIN, *supra* note 1, at 209.

[71] C. NADEN, *supra* note 1, at 49.

[72] 1 FOURTH REPORT, *supra* note 70, at 2 (Commission held fourteen public meetings); M. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 128 (Commission held meetings in New York City, Troy, Schenectady, Syracuse, Utica, Rochester, and buffalo).

[73] R. O'CONNOR, THE FIRST HURRAH 68-69 (1970).

[74] *See* Elson, *supra* note 49, at 6.

[75] 1 FOURTH REPORT, *supra* note 70, at 3-4. On March 6, five days after the Commission presented its report to the legislature, the legislature extended its life for another year. *Id.* at 4. The legislature raised its budget to $ 60,000, five times more than its budget for the year before. 15 N.Y. LAB. BULL. 145 (1912).

[76] The eight bills dealt with registration of ***factories***, physical examinations for children who sought employment certificates, ***fire*** drills, automatic sprinklers, general ***fire*** prevention, the regulation of poisonous substances in nonworking areas, adequate hot and cold washing facilities, the employment of pregnant women, and the summary power of the Commissioner of Labor over unclean and unsanitary establishments. *See* 1 FOURTH REPORT, *supra* note 70, at 3-4; 15 N.Y. LAB. BULL. 157-62 (1912) (describing the legislation).

[77] *See* E. BRANDEIS, *supra* note 51, at 478.

[78] *Id.*

[79] *See* M. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 140 (bill passed "thanks to the powerful sponsorship of Smith and Wagner"); R. O'CONNOR, *supra* note 73, at 72 (describing how Smith "bulldozed" bills through the Assembly); R. SCHNEIDERMAN & L. GOLDWAITHE, *supra* note 29, at 102 (billion passed because of Perkins' "piloting").

During the following year, the Commission itself faced its first real difficulty from opposition legislators, but nevertheless achieved its greatest yields in reform legislation: [80] of the thirty-two bills it recommended, **[*371]** the legislature enacted twenty-five. [81] The most significant measure was a law reorganizing the state's entire Labor Department and Labor Code, but the legislature also made significant strides in the areas of hour limitations and restrictions on child labor. Much of the opposition to these laws came from upstate legislators, who represented farmers and canneries who opposed all labor hour restrictions because their work required exceptionally long hours during peak seasons. [82] The building trade unions also opposed the new hour limitations, which were *less* stringent than the forty-hour week that they had already won for their members, for fear that they would lead to a regression in their workers' conditions. [83] Moreover, real estate interests joined the upstate legislators in an effort to defeat a measured occupancy bill, [84] which would reduce landlords' returns. In each case, however, the opposition to the Commission bills failed.

After three years of brisk legislative activity, the momentum initiated by the ***fire*** and enhanced by the trial began to dissipate, and the Commission found an increasingly unenthusiastic reception for its recommendations. Only three of its bills passed in 1914. [85] The end of legislative activity, however, came after the Commission had already achieved remarkable changes in the law. The period following the ***Triangle fire*** is even now remembered as "'the golden era of remedial ***factory*** legislation'" [86] and has justly been called a "turning point" in social progress. [87] Frances Perkins noted, "The extent to which the legislation in New York marked a change in American political attitudes and policies toward social responsibility can scarcely be overrated." [88]

Despite the impasse in the legislature, the reformers were able to consolidate their earlier successes when state judges sustained newly **[*372]** enacted laws in court challenges. [89] Before the ***fire***, the courts had consistently invalidated certain progressive labor measures on the ground that they were unconstitutional. Only two days before the ***Triangle fire***, for instance, the state's highest court struck down a workmen's compensation act. [90] In the four

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[80] *See* I. YELLOWITZ, *supra* note 40, at 105.

[81] *See The New York* ***Factory*** *Bills,* 29 THE SURVEY 725, 725 (1913). The bills dealt with the following areas: Labor Department reorganization; penalties for violation of the Labor Law and Industrial Code; ***fire*** proof receptacles; ***fire*** alarm signal systems and ***fire*** drills; ***fire*** escapes and exits; occupancy limitations; child labor; maximum hours for women employed in canneries; housing conditions in labor camps maintained in connection with ***factories***; physical examinations of children employed in ***factories***; night work of women in ***factories***; cleanliness of ***factory*** buildings; ventilation; washing facilities; accident prevention and lighting of ***factories***; and employment of children in dangerous occupations. 1 FOURTH REPORT, *supra* note 70, at 6. The legislature again extended the Commission's life for one year. *Id.* at 7. The bills are set out in 15 N.Y. LAB. BULL. 266-80 (1913).

[82] *See* R. O'CONNOR, *supra* note 73, at 72-73.

[83] N.Y. Times, June 22, 1914, at 18, col. 4.

[84] *See* M. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 129-30.

[85] *See* L. STEIN, *supra* note 1, at 210.

[86] Elson, *supra* note 49, at 6.

[87] L. STEIN, *supra* note 1, at 209; *see also* B. SEVERN, *supra* note 26, at 48.

[88] *See* B. SEVERN, *supra* note 26, at 48.

[89] The Commission worried publicly whether the courts would sustain the bills upon passage. *See generally* N.Y. Times, Feb. 9, 1913, at 12, col. 1 (secretary on the Commission dodges question on how the courts will handle bills, after stating his confidence that the legislature would pass those same measures). The measures were sustained in court. *See* N.Y. Times, Apr. 28, 1914, at 7, col. 6; *id.,* Apr. 25, 1915, at 6, col. 4.

[90] *See* M. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 127.

years after the blaze, however, "one measure after another was to be passed, and upheld by the courts." [91] Indeed, "not one of the Wagner-Smith statutes was ruled unconstitutional," a record of judicial acquiescence that one historian characterizes as "remarkable." [92]

The entire period of the Commission's activites represented the culmination of the progressives' efforts to remedy ***factory*** hazards. [93] Although the foregoing section clearly illustrates that reformers were successful only after the ***fire***, the more general questions remain: what are the elements that are present after a disaster which create unique opportunities for legislative change?; and how do these conditions affect the behavior of citizens and legislators?

IV. The Effect of Disaster on Reform: A Model

A disaster creates a climate uniquely conducive to social reform and legislation. [94] In the immediate aftermath of major disasters, groups and individuals interested in reform are given unexpected opportunities to effect reforms that normally would take years to evolve. Societies in a predisaster state generally resist change, [95] preferring instead the predictability of the familiar. Before change can occur, reformers must overcome the normal resistance to reform by creating an **[*373]** environment that is favorable to their program. [96] Disasters produce such an environment. [97] History shows that they are frequently the cause of important social change. [98]

A disaster, however, only prepares the groundwork for change; [99] it does not guarantee progress and in some cases does not lead to change at all. [100] The potential for reform created by a disaster can be fulfilled only if the appropriate interest groups recognize and successfully use the opportunities available to them. [101] Before groups can exploit the postdisaster climate to direct change in order to accomplish their goals, they must understand the nature of the climate they seek to manipulate.

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[91] *Id.*

[92] *See* J. HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 9 (1968).

[93] *See* I. YELLOWITZ, *supra* note 40, at 95.

[94] *See* Prince, *Catastrophe and Social Change,* in STUDIES IN HISTORY, ECONOMICS, AND PUBLIC LAW 21, 23, 34, 142, 143 (1920) (discussing how society is thrown into turmoil after disaster; such flux necessary for social change); AFTERMATH: COMMUNITIES AFTER NATURAL DISASTERS 14, 89 (H. Friesema ed. 1979) (disaster may be the best thing that can happen to a community in the long run); *An Inquest into Why All the Roofs Fell In,* BUS. WK., Feb. 6, 1978, at 46 ("'catastrophes cause changes'").

[95] *See* B. TURNER, MAN-MADE DISASTERS 129 (1978) (society prefers consistency and predictability); *see also* Prince, *supra* note 94, at 19, 20, 120 (life tends to pass by without change until change becomes unavoidable); *cf.* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 78 (1970) (Scientists confronted with counterinstances of prevailing theory initially develop ad hoc modifications of theory rather than devise new analysis.).

[96] *See* B. TURNER, *supra* note 95, at 128 (environment must be congenial to goals before reformers can attain them).

[97] *See supra* sources cited note 94.

[98] *See generally* Prince, *supra* note 94, at 22-23, 108 (noting that disasters have resulted in America receiving its first rice crop, city planning on a modern scale, major disaster legislation, labor legislation, and important changes in seamen's laws).

[99] *Id.* at 145.

[100] *Id.* at 21, 146.

[101] *See id.* at 145 (disaster sets into motion factors that will ultimately lead to change, including the stimulus of leaders and "on-lookers").

Theoretical models can illustrate the nature of the postdisaster environment, the degree of change that it makes possible, and the way in which individuals and groups utilize the opportunities for reform to achieve progress. The three-part theoretical model that follows analyzes the social and legal conditions that are brought about by such disasters as the ***Triangle fire*** and looks to the aftermath of the ***fire*** to illustrate how these conditions play a key role in the enactment of legislation.

A. Disasters Are Deviations from an Ordered, Rational System; Society Responds by Attempting to Restore Order to Prevent Future Deviations

1. Calamitous Disruption and Tendency Toward Order. -- Individuals and society generally prefer order and rationality. [102] These conditions allow individuals to believe that they have some measure of control over their environment and encourage them to expect predictable developments consistent with their perception of how they have structured their society. [103] Before societies will abandon their usual preference for the familiar, a sufficiently dramatic event must occur that demonstrates the necessity for change.

[*374] Serious disasters always disturb and sometimes destroy the stability upon which societies depend. [104] The damage to the collective peace of mind and the reform process that ensues follow a three-step process. First, society suffers a "failure of the rational mode of thought and action which is being relief upon to control the world." [105] Individuals are confronted with unexpected disruptions of what they previously regarded as an ordered status quo; such events are inconsistent with both their view of a rational system [106] and their faith in their degree of control over their environment. [107] Since these individuals find that some of their assumptions concerning the structure of their environment are no longer supportable, they become uncertain about the validity of other, as yet undisturbed, assumptions. [108] Individuals suffer not only from the direct losses brought about by the disaster, but also the uncertainty that their assumptions may fail again, and that another tragic event might occur unexpectedly. [109]

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[102] B. TURNER, *supra* note 95, at 127.

[103] *See id.* at 7, 129 (control and understanding are central to man's view of his relationship with the world).

[104] Disaster "interrupts the . . . very social fabric of community life." Taylor, *Good News About Disaster,* PSYCHOLOGY TODAY, Oct. 1977, at 93, 97; *see also* R. HEWITT, FROM EARTH-QUAKE, ***FIRE*** AND FLOOD 33, 51 (1980); T. WALTHAM, CATASTROPHE: THE VIOLENT EARTH at i, 104 (1978). Conceptualist A. H. Barton explains the process as follows: While "the predisaster system operates smoothly," a disaster causes a sudden change in inputs to society and a corresponding change in public response. Gillespie & Perry, *An Integrated Systems and Expected Norm Approach to Mass Emergencies,* 1 MASS EMERGENCIES 303, 306 (1976).

[105] B. TURNER, *supra* note 95, at 5; *see also* R. HEWITT, *supra* note 104, at 185.

[106] *See* Wenger, *Community Response to Disaster: Functional and Structural Alterations,* in DISASTERS: THEORY AND RESEARCH 33 (E. Quarantelli ed. 1978) (disaster requires adjustments that are not consistent with system as it previously existed).

[107] *See* B. TURNER, *supra* note 95, at 5 (disaster suggests that there has been a failure of the processes by which man thought he controlled his environment).

[108] *See* Edwards, *TMI's Worst Casualty: Strees,* SCI. DIG., May 1980, at 74, 75 (massive study on stress after a mass evacuation); Taylor, *supra* note 104, at 94 (surveys reveal that "a substantial number of people exhibited signs of stress"); *see also* Harter, *Survival May Be Bad For Your Mental Health,* PSYCHOLOGY TODAY, Apr. 1978, at 21 ("People often survive disaster at a high emotional cost."); *cf.* T. KUHN, *supra* note 95, at 83 (in the face of anomaly resistant to scientific explanation, formerly standard solutions to solved problems are called into question).

[109] *See* Prince, *supra* note 94, at 48-49 (examining the anxiety and fear of recurrence that plagued the victims of the Halifax disaster, in which a munitions ship exploded in a harbor, destroying the surrounding city); *see also* Lifton, *Witnessing Survival,* 15 SOCIETY 40, 44 (1978).

Second, as a consequence of this shaken confidence, society attempts to repair its system to prevent future threats. Although the public generally resists change, it is receptive to change when stability appears to involve greater risks than reform. [110] Typically, individuals begin the process of repair by examining how their social structure could have been so flawed, and their assumptions concerning control **[*375]** and stability so misplaced. [111] To prevent similar disruptions in the future, they then determine what action is required to prevent a recurrence of disaster. [112]

Third, societies must finally make adjustments in their laws to reflect the sort of order that is necessary to prevent recurrence of disaster. [113] Thus, a society that normally resists change may come to welcome it in the wake of a disaster to prevent even greater, more undesirable, tragedies in the future.

2. Historical Operation of the Model. -- At the turn of the century, New York City typified a society that prefers stability to change. By 1909, however, some sort of change was virtually guaranteed. Immigrant garment workers made the women's clothing trade, nonexistent only fifty years earlier, the largest industry in New York State. [114] Most of the city's garment workers labored in large loft ***factories***. [115] In spite of these important social upheavals, the state made relatively few adjustments in its laws. Most of the problems associated with the rise of the garment industry were simply ignored by lawmakers. [116]

The ***Triangle fire*** exposed the gap between idealized and actual versions of the ordered social structure; it was an "awakening" experience for the state. [117] If before the tragedy people had generally assumed that they were in control of their system [118] and that their laws were adequate, they realized after the tragedy that ***factory***

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[110] *See* A. SUTTON & M. SUTTON, NATURE ON THE RAMPAGE 58, 297-98 (1973). "If something happens to make the normative structure inappropriate or partially inoperative, people will define a new and hence emergent structure, altering their behavior accordingly." Gillespie & Perry, *supra* note 104, at 308.

[111] *See* B. TURNER, *supra* note 95, at 91 (attempt to "discover how culturally approved precautions could have turned out to be so inadequate"); *cf.* T. KUHN, *supra* note 95, at 87 (research in modern physics in part attempts to localize and define "a still diffuse set of anomalies").

[112] *Id.* at 74. Once it is clear that adjustment is necessary, society may take a step as extreme as relocating to prevent recurrence. *See* T. WALTHAM, *supra* note 104, at 14 (society relocated twice in the same area before finally accepting that relocation elsewhere was necessary to prevent future disaster).

[113] B. TURNER, *supra* note 95, at 91 ("adjustments . . . need to be made to . . . laws and statutes").

[114] *See* H. ROCKEFELLER, *supra* note 2, at 48.

[115] L. STEIN, *supra* note 1, at 160.

[116] *See* E. BRANDEIS, *supra* note 51, at 637, 639 (describing how the amount spent for ***factory*** inspection in New York City actually decreased in the decade between 1899 and 1909); E. ELLIS, *supra* note 31, at 489 (noting that the laws were still wholly inadequate by time of the ***Triangle fire***).

[117] I. YELLOWITZ, *supra* note 40, at 127; *see also* H. ROCKEFELLER, *supra* note 2, at 11-12 (deaths required to "awaken" public).

[118] Even the inspectors who studied the Asch Building seemed to assume that nothing would happen. Even though the building had doors that opened inward, and had one less stairway than required by law, the Building Department, the ***Fire*** Department, the Department of Water Supply, Gas, and Electricity, and the Health Department all approved the building. *See* C. NADEN, *supra* note 1, at 16 (describing the variance between the Asch Building and existing laws); *see also* L. STEIN, *supra* note 1, at 120 (listing the departments that had inspected the building and approved it).

legislation **[*376]** had failed to address many industry-wide hazards. [119] The ***fire*** was the greatest industrial tragedy in the history of New York [120] and shocked the citizens of the state, [121] who then reacted to the disaster with emotional intensity [122] and indignation [123] -- the very response that is caused by the loss of confidence to control one's environment.

As the citizens and the officials of New York began the process of repairing the flaws that bred the tragedy, they examined how their social structure could have allowed the disaster to incubate unnoticed [124] and considered what factors led to the development of the disaster in the first place. [125] To repair the dissonance between the public's perception of the social structure and the reality of the social conditions as they then existed, the public sought to determine the extent to which its laws diverged from the actual social conditions and attempted to close the gap by improving social conditions in order to render future disruptions impossible.

The state continued the process of repair by writing into law the new assumptions it developed during the reevaluation process. First, the public realized that laws had to evolve to reflect society's new knowledge of how its system operated. [126] Second, it knew it had the capacity to ward off recurrences through legislation because of its knowledge that the ***Triangle fire*** itself could have been prevented by proper reforms. [127] Since 150 buildings in New York City alone were as dangerous as the ***Triangle factory*** had been, the need to rectify this danger appeared urgent. Thus, New York proceeded to ensure that no similar future disruption of the social structure would take place by **[*377]** enacting the plethora of legislation described earlier. [128]

B. Disagreement and Misinterpretation Precedes Disasters; Disasters Resolve Such Disagreement by Causing Fluidity of Opinion

1. Disagreement and Misinterpretation. -- As the first model shows, a disaster threatens the order and stability that society considers important. Consequently, individuals deny the existence of a disaster threat, or dismiss the threat

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[119] P. FONER, *supra* note 10, at 20 (New York City ***Fire*** Commissioner stated that ***fire*** escapes in several buildings were "absolutely inadequate and absolutely useless"); *see also* E. BRANDEIS, *supra* note 51, at 639 (Commission stated that "it is substantially conceded that the present system of ***factory*** inspection is totally inadequate").

[120] *See* M. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 120; C. NADEN, *supra* note 1, at 38.

[121] *See* I. YELLOWITZ, *supra* note 40, at 104.

[122] *See* H. ROCKEFELLER, *supra* note 2, at 2, 34-35 (public reacted with an "emotional intensity seldom known to New York City"); *see also* M. JOSEPHSON & H. JOSEPHSON, *supra* note 9, at 120 ("city was convulsed with emotion").

[123] *See Alarms Rung on* ***Triangle*** *Anniversary,* 33 THE SURVEY 665 (1915) (city overcome by a "wave of pitying indignation"); *see also* I. YELLOWITZ, *supra* note 40, at 104 (reformers pushed bill after "public indignation from the ***fire***").

[124] *See* L. STEIN, *supra* note 1, at 28 (examining the public's reaction after the ***fire*** and the public's attempt to determine why various warnings and safety precautions were ineffective).

[125] H. ROCKEFELLER, *supra* note 2, at 7 (first question asked was what factors led to the cause of the ***fire***); *see also* C. NADEN, *supra* note 1, at 5, 43, 47 (city demanded to know the causes and asked why disaster had occurred).

[126] *See* L. STEIN, *supra* note 1, at 139.

[127] *See* I. YELLOWITZ, *supra* note 40, at 86 (disasters most effective in producing reform when the public realizes that they were unnecessary; citing the ***Triangle fire*** as an example); *see also* L. STEIN, *supra* note 1, at 134.

[128] *See* I. YELLOWITZ, *supra* note 40, at 155 ("great rush in legislation" followed the ***Triangle fire***).

as too remote for serious consideration. [129] If, as is usually the case, people disagree about whether a disaster is imminent, individuals will typically ignore signals that suggest disaster and accept the reassurances of those who discount the risk. [130] This tendency to deny the existence of danger increases with the size of the threat, since individuals are especially reluctant to acknowledge the menaces that present the greatest threat to their society. [131] The general inclination to deny the possibility of disaster thereby ensures that society will not arrest the growing potential for tragedy.

Three factors explain this tendency to deny a likely, and even obvious, threat. First, people are inclined to repress painful ideas and find it easier to ignore threats than to undergo the difficult and uncertain process of readjusting their assumptions and revising their laws. [132] Second, the inchoate nature of a disaster threat facilitates rationalization by individuals who are already disinclined to acknowledge the possibility of a catastrophe. A disaster threat is typically an "Ill-structured problem," which even those who forecast the disaster cannot clearly define. [133] Consequently, individuals not only lack the concrete evidence necessary to dissuade them from their complacency, but also rely upon the poor definition of the problem as evidence that the forecasters' warnings are without substance. [134]

Third, individuals' perceptions of danger very according to their **[*378]** proximity to the danger signals. [135] Many individuals, and sometimes society as a whole, are in a poor position to correctly interpret evidence of an approaching disaster. Individuals are particularly unlikely to understand the significance of warning signals when the threatening disaster is not of the frequently recurring sort, but is instead a rare and wholly unexpected calamity. [136] It is only in hindsight that the patterns that should have suggested disaster become clear. [137] This problem of misinterpretation reduces the chance that a society will anticipate and correct the threat of a disaster, or defensively minimize the likelihood or impact of a natural holocaust, since the society does not appreciate the significance of warning signals until after the disaster occurs. [138]

2. Postdisaster Fluidity of Opinion. -- Predisaster conditions sharply contrast with the state of information and opinion following the disaster. The experience of the disaster shows the extent to which evidence of its imminent occurrence was misinterpreted [139] and tragically resolves disagreement on the significance of disaster signals.

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[129] *See* H. BUTLER, NATURE AT WAR 44, 125 (1979) (tendency to deny or to resist acknowledging the significance of threat); Bryn, *Disaster Brings Out the Best in People,* SCI. DIG., Aug. 1973, at 29, 30-31 (people tend to ignore signals of disaster); Withey, *Accommodation to Threat,* 1 MASS EMERGENCIES 125, 127 (1976) (tendency to deny threats unless inevitable).

[130] *See* B. TURNER, *supra* note 95, at 71-72 (society tends "to undervalue or ignore the conflicting diagnosis of a dangerous situation offered by other groups").

[131] *See id.* at 44 (denial becomes more pathological as threat comes nearer).

[132] *See id.* at 73 (tendency to deny danger results in "repression of painful ideas"); Withey, *supra* note 129, at 128 ("people tend to underestimate the probability of threatening events").

[133] *See* B. TURNER, *supra* note 95, at 71-72 ("ill defined problems" or "ill structured problem" discussed).

[134] *See id.* at 71-72.

[135] *Id.* at 152-53.

[136] *See id.* at 100. For example, individuals are more likely to respond quickly to a warning for a frequently occurring event such as a tornado in the central United States.

[137] *See id.* at 89, 125 (disaster reveals "the latent structure of the events of the incubation period").

[138] *See id.* at 42.

[139] *See id.* at 122 ("Often, this condition [of information-flow difficulties] is only ended by the occurrence of a widely noticed and widely recognized precipitating incident.").

The disaster creates a fluidity of opinion in which old views dissolve and then crystallize again with a heightened degree of consensus. [140] Through this fluidity, a society at least is able to recognize the existence of a problem and is capable of enacting long overdue reform legislation. [141]

After a disaster, hindsight provides a new source of information that enables individuals to see evidence that they had previously misinterpreted, overlooked, or ignored. The disaster itself is a kind of conclusion, a final incident in the chain of evidence, and silences predisaster speculation with postdisaster direction.

The disaster ends disagreement by rendering the point of prior contention moot. The occurrence of a major disaster is an event too **[*379]** obvious for individuals to ignore. [142] Since it is not possible for individuals to ignore the obvious or to deny any longer the causes of the tragedy, individuals suddenly see the problem in a new, more realistic light. This resolution of disagreement and misinterpretation removes the obstacles that normally prevent society from attaining consensus and leads to a new fluidity of opinion. Moreover, this consensus temporarily cuts across class lines; there is agreement at all levels of society. [143] With this fluidity, a new consensus becomes possible, and change becomes imperative: the public can ignore the disaster only by risking a recurrence that will disrupt social order again.

Fluidity develops also because problems that are abstract in the predisaster stage become concrete and comprehensible in the wake of a disaster. The threat of a disaster represents only an abstract problem, lacking urgency and immediacy, since it is beyond the experience of the public. Since society does not fully comprehend the import of a disaster threat in the predisaster state, it also fails to grasp the urgency of correcting the conditions that vent the threat and allows the problem to develop unchecked.

A disastrous event transforms the abstract problem of a potential crisis into a physical form; the abstraction becomes concrete. What was once a mere concept becomes a fact that is quantifiable and observable and that produces images which the public visualizes and retains. [144] Just as the abstraction becomes real, the need to remedy the conditions that gave rise to tragedy and that suggest the possibility of similar, future problems, also becomes real and urgent. [145]

3. Historical Operation of the Model. -- As the discussion above explains, New Yorkers denied or ignored the disaster threat before the ***fire***. The public tended toward apathy [146] and found it easier to ignore the threat than to

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[140] *See* Prince, *supra* note 94, at 18-21 (discussing the manner in which society achieves fluidity). "[The]he mass public arrives at the same conclusion . . . when some conspicuous and dramatic event . . . or when a sequence of events so infuse a large part of the population with the same beliefs and anticipations . . . ." M. EDELMAN, POLITICS AS SYMBOLIC ACTION 135 (1971).

[141] *See* Prince, *supra* note 94, at 142 (role of opinion fluidity in change). Barton theorizes that as society retires inputs from the disaster period and restores its predisaster inputs, the return to a predisaster state is incomplete; society *does* achieve an equilibrium, but it is a "different equilibrium" that hs resulted from response to disaster. Gillespie & Perry, *supra* note 104, at 306.

[142] *See* Wenger, *supra* note 106, at 40; *see also* B. TURNER, *supra* note 95, at 89 ("a burning building, or an explosion cannot be ignored").

[143] *See, e.g.,* Quarantelli & Dynes, *When Disaster Strikes It Isn't Much Like What You've Heard and Read About,* PSYCHOLOGY TODAY, Feb. 1972, at 67, 69; *Disaster Victims Do Not Turn to Looting,* SCI. NEWS LETTER, Apr. 15, 1961, at 223. With time, however, the unanimity begins to dissipate as the disaster becomes removed in time. *See* Bryn, *supra* note 129, at 32.

[144] Interview with F. Ray Marshall, former U.S. Secretary of Labor, in Austin, Texas (Mar. 9, 1982).

[145] *Id.*

[146] *See* I. YELLOWITZ, *supra* note 40, at 26, 86 (people tend to be apathetic during normal times).

change their assumptions and laws. [147] The fact that the NYSFIC required an extraordinary number of enactments simply **[*380]** to bring the state ***factory*** system to a *minimum* level of safety illustrates that the public allowed that system to become grossly out of date prior to 1911. The Commission laws do not represent progress in the sense of foresight, but the remedial efforts of a society that previously ignored the necessity of making adjustments to industrial growth. In addition, although the society was generally aware that ***factory*** conditions were a problem, it developed "false arguments and complacent rationales" to explain disaster signals and to discount the threat it faced. [148] The fact that the disaster problem was only *vaguely* understood by most of the public [149] made rationalization a relatively easy matter. For instance, Chief Croker's warning and Professor Aymar's protest were ineffective because they dealt with an abstract problem that the public and officials considered remote.

Finally, most people barely understood the problem because they perceived it in terms of their position in society. Even those few members of the upper classes who had some exposure to workers' conditions probably failed to comprehend the meanness of ***factory*** work. Not only was it difficult for individuals to attach importance to disaster signals when they had no exposure to the problem, [150] but absent such exposure, it was also often difficult for outsiders to even believe that working conditions behind the building facades were so poor. For instance, builders of the Asch Building, which housed the ***Triangle factory***, originally designed their structure for use as an office building rather than as a ***factory***. [151] From the outside, these loft ***factories*** often appeared to be handsome structures with decorative scrollwork. The embellished buildings contrasted sharply with descriptions of driven workers and poor conditions inside [152] and made it less likely that strangers to the industry would perceive the ***factory*** problem in the same way as workers. Even those who agreed that ***factory*** conditions were intolerably dangerous were unable to agree on a single, consistent interpretation of the disaster signals or on a program of action to diminish the likelihood of disaster. [153]

Disagreement and misinformed opinions ended abruptly with the 1911 disaster. Since the disaster was undeniably obvious, [154] it represented **[*381]** the conclusion that had previously been in dispute. The ***fire*** itself proved that the signals pointed toward a serious problem that demanded correction. The public clearly understood the problem after the ***fire***, [155] and at last realized the discrepancy between the idealized and acutal versions of how the ***factory*** system operated. [156] The hazards in ***factory*** buildings became a concrete problem, quantifiable in human lives. Photographs of disfigured victims and newspaper accounts of the ***fire*** permitted the public to visualize the consequences of avoiding reforms in its industries. Consequently, the ***fire*** concretely displaced the complacency and false arguments that previously characterized the public attitude. [157]

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147 *See* L. STEIN, *supra* note 1, at 26-27 (describing the various warnings that were ignored before the ***fire***).

148 *See* H. ROCKEFELLER, *supra* note 2, at 77.

149 *See id.* at 2, 11-12 (disaster converts the problem into understandable, human terms).

150 *See id.*

151 *See* L. STEIN, *supra* note 1, at 119-20.

152 McFarlane, *supra* note 2, at 468.

153 *See* H. ROCKEFELLER, *supra* note 2, at 61 ("But consumers and legislators did not agree over when and how these reforms would take place. Scientific data may be imdisputable, yet everyone interprets it differently.").

154 *Id.* at 4-5, 65 (problem stripped bare by obvious disaster).

155 *See* C. NADEN, *supra* note 1, at 5.

156 *See* H. ROCKEFELLER, *supra* note 2, at 21 (city realized that the laws were not adequate to protect lives).

157 *Id.* at 77.

The events immediately after the ***Triangle fire*** demonstrate the fluidity of public opinion and the extent to which it affected all strata of New York society. The mass meeting sponsored by the reformers was an enormous success. That so many people of such varied backgrounds displayed their unity behind the reform effort indicated that the reformers had broken down complacency across all class lines. [158]

This fluidity made reform possible. As noted earlier, the New York public was anxious about the possibility of a recurrence of the calamity.The individuals at the Metropolitan Opera House meeting believed that the only way to prevent recurrence was to maintain unanimity beyond the public meeting. [159] The group acted upon its belief by passing a resolution. [160] From this initial resolution, the idea for the New York State ***Factory*** Investigating Commission developed. [161]

C. Disasters Force Legislators to Respond by Enacting Reforms

1. Satisficing Response Prior to Disaster. -- Individuals expect their society to be orderly and rational, but typically prefer to leave the responsibility for maintaining this order to large organizations. [162] In particular, society holds its legislators accountable as the guardians of its ordered system. [163]

[*382] Legislators exercise their power in the predisaster periods in definite patterns. First, like the larger public, they tend to ignore disaster prevention until they receive some sort of stimulus. Poor definition of the potential problem, misinformation and ignorance, and the distant nature of possible disasters account for legislative inactivity prior to a disaster. [164] Second, even when a legislature acts preventively, it generally prefers acceptable rather than "maximizing" responses to problems. [165] A legislature or any decisionmaking body confronts a wide range of alternative courses of action on any given problem. [166] To the extent that decisionmakers have imperfect knowledge of the full range of alternatives and operate under political and practical constraints, however, they actually consider only a fraction of the alternatives available to them and decide on an approach based upon their perceptions of the likely outcome from pursuing each option. One writer has noted the effects of this process: "[T]he decision-maker is forced to settle for 'acceptable' or 'win' outcomes (if, indeed he is able to achieve these) rather than pursuing notions of *maximum* acceptability, or best *possible* win." [167]

Consequently, the legislature pursues a course of action that lies somewhere between an optimal response and what it perceives to be a wholly inadequate approach. By compromising the optimal response, however, the legislature allows the potential for disaster to persist.

2. Postdisaster Maximizing Response. -- Legislatures typically react in an intense, predictable fashion following disaster. One factor that accounts for the legislature's tendency to react strongly after catastrophe is the

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158 *See* L. STEIN, *supra* note 1, at 207 (committee at the opera house meeting "cut across party and class lines").

159 *See* H. ROCKEFELLER, *supra* note 2, at 41 (audience "recognized that only an effort on the part of the whole community would prevent another disaster").

160 *See id.* at 40-41.

161 *See supra* note 17.

162 *See* B. TURNER, *supra* note 95, at 7.

163 *See id.* at 130 ("Only a few individuals in key positions in society are expected to think intelligently and independently.").

164 *See id.* at 75.

165 *See id.* at 134 (analyzing decisionmakers' tendency toward satisficing rather than maximizing responses).

166 *See id.*

167 *Id.* (emphasis in original).

development of a new consensus on what constitutes an acceptable response to the possibility of future disasters. Not only do the public and the legislature realize that the latter's earlier "satisficing" or merely acceptable response was erroneous, but they also recognize that a "losing response" can be devastating. The problem of finding a new approach becomes pressing. [168]

External pressures hasten and influence the legislature's search for new alternatives. First, after a disaster the legislative judgment of what constituted an acceptable response appears glaringly wrong. Even if **[*383]** the legislature did as well as was practicable given the information that it previously possessed, a society armed with hindsight typically has difficulty understanding why a better approach was not obvious to the legislature. [169] As a result, the legislature searches for new alternatives with the knowledge that its past actions are already subject to criticism, whether justified or not. Second, if reformers or others predicted the catastrophe, their prescience underscores the legislature's blindness. Even if the public understands that it has the benefit of hindsight, the legislature still suffers in comparison with those who, drawing on the same available data, were nevertheless able to predict calamity accurately. Third, disasters are public events that have tremendous media appeal. [170] The legislature typically goes about its work under only a moderately watchful public eye. In the postdisaster period, however, news items related to the tragic event often receive sensational exposure, so that the legislative response becomes unusually well-publicized.

The legislature, conscious of the inordinate amount of public attention and criticism, typically reacts by searching for a "maximizing" response -- one that, among all the alternatives confronting the legislature, is *most* likely to accomplish the desired result of disaster avoidance. [171] The legislature seeks the "best possible win" level. [172] When public attention surrounding a disaster wanes, legislatures significantly reduce their efforts toward maximizing responses. [173]

New opportunities to achieve an optimal solution also spur the legislature toward a maximizing response. Because the problem is no longer poorly defined legislators are presented with a rare opportunity to effect a truly maximizing solution. [174] Immediately after the disaster, the amount of information defining the problem is at a peak, and the legislature is conscious of an increased number of alternatives and of the approaches that will most effectively remedy the now clearly defined problem. Of course, the legislature cannot know what flaws exist in its new maximizing response until the response is itself tested under **[*384]** stress, but it can at least reduce the danger of recurrence to the greatest extent possible. [175]

A maximizing response by the legislature is now possible not only because of its access to new information, but also because the problem is perceived by the public as urgent following a disaster. Consequently, the legislature

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[168] *See* Quarantelli & Dynes, *Community Conflict: Its Absence and Its Presence in Natural Disasters,* 1 MASS EMERGENCIES 139, 143 (1976) (urgency of disaster accelerates decisionmaking processes).

[169] *See id.* at 146.

[170] *See* AFTERMATH: COMMUNITIES AFTER NATURAL DISASTERS, *supra* note 94, at 11 (Dramatic "news accounts of death and destruction caused by natural disasters are etched in the minds of Americans."); *see also* J. CORNELL, THE GREAT INTERNATIONAL DISASTER BOOK 3 (1976) (tragic happenings are "perfect media events" since they are "easily grasped concepts comprehensible by all" and easily given to dramatic coverage).

[171] *See* B. TURNER, *supra* note 95, at 134.

[172] *See* Wenger, *supra* note 106, at 32.

[173] *See* H. ROCKEFELLER, *supra* note 2, at 3-4, 78 (impact of disaster subsides fairly quickly).

[174] *See* Wenger, *supra* note 106, at 40 (society can perceive and specify the now unambiguous problem; the remedy becomes apparent).

[175] *See* B. TURNER, *supra* note 95, at 134 (decisionmakers tend toward the "best possible win").

does not engage in protracted policy discussions and compromises [176] but instead acts in a relatively short time to prevent a recurrence and to reduce public criticism. [177] The legislature passes laws while public opinion is most aroused, the problem seems most serious, and the legislature is most apt to seek the maximizing response. In addition, since the problem is, for the first time, well defined, legislators can more easily reach consensus on the appropriate response [178] and can avoid the compromises that lead to simply acceptable responses. [179]

3. Historical Operation of the Model. -- Before the ***Triangle*** ***fire***, New Yorkers left the regulation of the state's ***factories*** to their government. [180] The immigrant population particularly expected to "be acted on, rather than to be active in political matters." [181] As the above analysis explains, New York legislators followed the predictable pattern of inactivity prior to the ***fire***. Indeed, the legislators permitted ***factory*** inspection to regress at a time when laws and law enforcement were already wholly inadequate. [182] The legislature diverged from the reform model to the extent that it did not even attempt to reach a merely acceptable response to the ***factory*** problem, much less a maximizing one. Even without relying on hindsight, it appears that the ***factory*** problem in New York was obvious and that the legislature did not strive for even a satisfactory solution to it.

The ***Triangle*** ***fire*** example closely converges with the analysis of reform, however, in the postdisaster stage. The legislature responded **[*385]** to public criticism of its predisaster satisficing approach by assuming a maximizing response in the postdisaster period. First, the legislature realized that its "acceptable" response was a complete failure. [183] More important, it realized that the public also found the predisaster approach inadequate. Consequently, the legislature became receptive to change in the postdisaster period because it wanted to convince the public that it was responsive to their demands and to reduce public criticism of its earlier approach to the problem. [184] Second, the legislature suffered from comparison with the reformers who correctly predicted the ***Triangle*** ***fire*** holocaust. Legislators came to believe that the newly credited reformers' views reflected the view of the electorate and thus adopted the progressives' maximizing solutions in response to the public mood. [185]

Third, the legislature tended toward a maximizing response because its actions were subject to an exceptionally high amount of publicity. Newspapers sought comments from numerous state and city officials, who expressed

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[176] *Id.*

[177] *See* Wenger, *supra* note 106, at 40 ("disaster problems are immediate and imperative").

[178] *See id.* at 32 (high levels of consensus on what is "desirous of pursuit" in post disaster period). "When problems are immediate and imperative, there is less likely to be conflict is solving them. This is especially true if, as in disaster situations, the necessary solutions are relatively apparent to all." Quarantelli & Dynes, *supra* note 168, at 142.

[179] *See* Wenger, *supra* note 106, at 40. "[T]he development of an emergency or disaster consensus places high priority on the activities which benefit the 'total' community and low priority to segmental 'selfish' interests." Quarantelli & Dynes, *supra* note 168, at 142.

[180] *See* H. ROCKEFELLER, *supra* note 2, at 26.

[181] *See id.* at 22.

[182] *See* E. BRANDEIS, *supra* note 51, at 639 (typical inspection time decreased).

[183] *See* S. KENNEDY, *supra* note 11, at 151.

[184] *See* E. BRANDEIS, *supra* note 51, at 478 (legislature was in a receptive mood); L. STEIN, *supra* note 1, at 113 (politicians anticipate public wrath and subsequently launch four separate investigations).

[185] *See* J. KENNEALLY, *supra* note 28, at 69 (state government adopts the reformers' recommendations that it had earlier ignored; more stringent than what legislators would have enacted themselves); *see also* I. YELLOWITZ, *supra* note 40, at 127 ("new mood in the electorate" important to politician).

shock at the ***fire*** and aligned themselves with the reformers. [186] Citizens made it clear that they expected the legislators to comprehensively address the state ***factory*** problem. After the opera house meeting, for example, the workers sent their resolution to state officials, calling upon them "to exercise to the utmost all their powers." [187] The legislature found it particularly difficult not to pursue the maximizing response in the face of strong public interest and heightened expectations. Consequently, the bill creating the ***factory*** investigation commission passed almost immediately, within the time period when the effect of the ***fire*** was most direct and the reform climate strongest. [188]

As the reform model suggests, the New York legislature was more concerned with improving its public image of being responsive and orderly than with achieving a true maximizing response. When public sentiment dissipated, the reformers lost the public support that earlier **[*386]** had enabled them to press reforms upon the legislature. One labor expert commented on the lost public support, noting, "The decline of the public's interest in reform produced a complete about-face by the legislature. The trade unions and social Progressives still demanded reform, but public opinion no longer sustained them." [189]

V. Conclusion

Even though the New York progressives ran out of time before they could convert all of their progressive ideas into legislation, their understanding of the potential for postdisaster reform enabled them to push through the laws that they successfully guided to passage between 1911 and 1915. Although the ***Triangle*** ***fire*** and its attendant events are important to study in themselves as significant phenomena of social and legal history, they provide a lesson for those who seek to pass or to defeat reform legislation proposed in light of current social conditions and structure. For, to understand that such disasters as the ***Triangle*** ***fire*** shake the public's confidence in its social structure, cause consensus of opinion, and encourage legislators to act in a maximizing, rather than a satisficing, manner, is to possess the knowledge upon which one can formulate strategies for legal and social reform. In this light, the ***Triangle*** ***fire*** and the theory that underlies legislative reform provide a lesson in legislative manipulation.

Of course, like the events it seeks to explain, the model, in part, depends upon fate. Those for or against legal or social reform must *predict* a disaster to fully derive the benefits of postdisaster credibility. Even if reform groups discover signals which suggest that a catastrophe may occur, the chances remain slim that the tragedy actually will occur. One disaster analyst notes that major disasters are amazing events because they depend upon a multitude of development timed so perfectly that it is surprising that they ever occur at all. [190] The impact of climactic events, of course, is due to their relative infrequency, but their consequential effects on legislation depend upon how well members of the legal and political community understand the specific opportunities wrought by such events. That such events take the community by surprise underscores the need to understand their impact on the legislative process. Louis Bromfield separates mankind into those who rise above hardship to rebuild and to progress and those who fail to adjust and let rebirth slip away. [191] While the community reacts in shock, those with **[*387]** foresight must quickly transcend their surprise in order to effectively direct postdisaster change and thereby to answer challenge with progress.

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[186] *See* C. NADEN, *supra* note 1, at 43 (officials all agree that tragedy was appalling); L. STEIN, *supra* note 1, at 112-15 (describing various officials' public statements after ***fire***).

[187] H. ROCKEFELLER, *supra* note 2, at 40.

[188] *See id.* at 3-4, 71 (discussing the relation of the reform climate to the type of legislation that becomes possible).

[189] I. YELLOWITZ, *supra* note 40, at 127.

[190] *See* Wenger, *supra* note 106, at 198.

[191] L. BROMFIELD, THE RAINS CAME: A NOVEL OF MODERN INDIA (1939).

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