Received 9/28/2018 1:52:26 PM Supreme Court Eastern District

Filed 9/28/2018 1:52:00 PM Supreme Court Eastern District
103 EM 2018

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

KEVIN MARINELLI,	:	
Petitioner	:	CAPITAL CASE
v.	:	No. 103 EM 2018
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Respondent	:	

THE COMMONWEALTH OF PENNSYLVANIA'S ANSWER TO PETITION FOR EXTRAORDINARY RELIEF UNDER KING'S BENCH JURISDICTION

The Commonwealth of Pennsylvania ("the Commonwealth"), through undersigned counsel pursuant to Pa.R.A.P. 3309(b), hereby respectfully files this Answer to Petitioner Kevin Marinelli's ("Marinelli") Petition for Extraordinary Relief Under King's Bench Jurisdiction ("the petition"). For the following reasons, the Commonwealth requests that this Honorable Court deny the petition.

I. INTRODUCTION

Marinelli is asking this Court to forgo all judicial norms and standards and to flex its King's Bench muscle to end capital punishment in Pennsylvania – a major public policy determination -- based upon a document produced by the General Assembly's Joint State Government

Commission ("JSGC") in the shadows without providing the Court with any of the critically-relevant contextual information that would permit a meaningful evaluation of the document. Specifically, the Court is being asked to rely exclusively on the JSGC report on capital punishment to render a decision of enormous consequences without being informed of: (1) how and why the Commission's task force was established; (2) how and why the specific members of the task force were selected; (3) how and why the specific members of task force's advisory committee were selected; (4) what processes and methodologies were utilized by the task force to arrive at its conclusions and recommendations; (5) who actually wrote the report and what were that author's motivations, objectives, and marching orders; (6) whether the task force ever conducted a meaningful examination of the veracity and reliability of the vast number of sources of information that it relied upon and cited in its report; (7) why the task force chose to credit and rely upon some available information but not other available information; and (8) what quality controls were implemented, if any, to ensure that the ultimate product of the task force was worthy of the confidence, respect, and trust of the citizens of Pennsylvania.

In light of this startling absence of profoundly important information relating to the underlying procedures and substantive conclusions of the JSCG report, Marinelli's suggestion that this Court should rely on that nonjudicial document to overturn existing precedent and hold the death penalty unconstitutional is not only legally inappropriate and unprecedented but arguably dangerous. The notion that this Court would jettison the truth-determining function of the judicial branch and contract it out to an unregulated non-judicial political "commission" is shocking.

This Honorable Court should deny the petition and require Marinelli's claim to be litigated in the normal manner, starting with the PCRA court below, so that an evidentiary record can be developed, adversarial testing utilized, credibility determinations made, and a decision on the underlying claim is deferred until the requisite information necessary to resolve the factual and legal issues raised by the claim has been developed and considered in a manner consistent with fundamental notions of fairness and justice.

II. THE PETITION

Marinelli filed the petition in this Court on August 24, 2018. The petition asks this Court to invoke its King's Bench jurisdiction and take the

extraordinary action of removing from the Northumberland County Court of Common Pleas ("the PCRA court") and agreeing to review on the merits a recently-filed,[1] not-yet-litigated, and completely undeveloped PCRA claim which argues that Pennsylvania's "system of capital punishment" violates Article I, Section 13 of the Pennsylvania Constitution. Inherent in the claim is a request that this Court overturn its existing precedent stating that "the death penalty is not 'cruel punishment' within the provisions of Art. I, § 13 of the Pennsylvania Constitution" and that the rights secured by the Pennsylvania prohibition against "cruel punishments" are co-extensive with those secured by the Eighth and Fourteenth Amendments." *See Commonwealth v. Zettlemoyer*, 454 A.2d 937, 967 (Pa. 1982), *abrogated on other grounds*, 827 A.2d 385 (Pa. 2003). *See also Commonwealth v. Perez*, 933 A.3d 829, 844-845 (Pa. 2014) (death penalty sentencing statute does not violate either state or federal constitutions, which are construed co-extensively); *Commonwealth v. Baker*, 78 A.3d 1044 (Pa. 2013) (same); *Commonwealth v. Edwards*, 555 A.2d 818, 831-832 (Pa. 1989) (same); *Commonwealth v. Batts*, 66 A.3d 286, 298-299 (Pa. 2013) (refusing invitation to expand protection under

[1] Marinelli filed the PCRA claim at issue in the PCRA court on August 24, 2018, the same day that he filed the instant petition in this Court.

Article I, Section 13 beyond that provided in the Eighth Amendment in the context of punishment of juvenile murderers).

Marinelli urges this Court to bypass the normal judicial process that has been established and routinely employed for the examination of claims seeking collateral review of judgments of sentence filed pursuant to the PCRA statute,[2] which expressly encompasses claims that a judgment of sentence violates constitutional rights in a capital murder case. Marinelli's rationale for making this request is that: (1) the legal validity of Pennsylvania's death penalty is "of immense public importance;" (2) there are 150 individuals currently under sentences of death who are suffering the deleterious effects of delay in the resolution of their cases; (3) "a bipartisan legislative report" issued on June 25, 2018 and referred to as the "JSGC report" has identified "unconscionable defects" in Pennsylvania's system of capital punishment; and (4) it is imperative that this Court address the significance of the JSGC Report immediately.[3] In other words,

---

[2] 42 Pa.C.S.A. § 9541 *et seq.*

[3] Marinelli and the Commonwealth agree that the instant petition seeks the procedural relief of obtaining this Court's agreement to consider the merits of Marinelli's claim without prior development and consideration in the PCRA court. The parties also agree that briefing and oral argument should

Marinelli is asking this Court to use the JSGC report as a basis to eliminate the death penalty in our Commonwealth.

Marinelli's reference to the "system of capital punishment" is vague. The arguments underlying the petition fail to identify any particular statute, ordinance, or regulation as being violative of the Pennsylvania Constitution. Instead, they argue that a broad network of government activities and operations having a nexus to capital punishment collectively render the imposition of death sentences constitutionally infirm. These activities and operations range from the public funds expended on capital punishment, the manner in which prosecutors determine which first-degree murderers should be subjected to the death penalty, and the length of time death row inmates spend in prison to the ability of juries to be fair and impartial in the performance of their duties, the propriety of executing murders who are mentally ill but neither insane nor intellectually disabled, and the manner in which executions are carried out.

---

occur before Marinelli's claim is disposed of on the merits. For these reasons, the Commonwealth does not address herein its position on the substantive merits of Marinelli's underlying claim and respectfully requests that if the Court grants the petition, that it also permit the parties to address the issues raised via briefs and oral argument prior to any determination on the merits.

In essence, the petition is a request that this Court, without prior development in the lower courts, exercise its raw power to change public policy relating to the treatment of convicted first-degree murderers based upon a manifesto produced in the cauldron of political and ideological advocacy by a collection of individuals -- the majority of whom oppose capital punishment -- assembled by four Senators that articulates perceived reasons why anti-death penalty advocates believe the death penalty should be abolished.

III. THE RELEVANT FACTS

A. Marinelli's Judgment of Sentence

On May 18, 1995, Marinelli was convicted by a jury following a guilt phase trial of first-degree murder for the intentional, premeditated, and malicious killing of Conrad Dumchock in Northumberland County.[4] According to this Court:

> The evidence establishes that appellant broke into the victim's home…appellant beat and questioned the victim regarding the location of his money and guns; appellant shot the victim at close range in the head, with one shot into his open eye and the other between his eyes…

[4] Marinelli was also found guilty of robbery, conspiracy to commit robbery, burglary, theft by unlawful taking, receiving stolen property, and aggravated assault.

Commonwealth v. Kevin Marinelli, 690 A.2d 203, 211 (Pa. 1997), *cert. denied*, 523 U.S. 1024 (1998).

On May 19, 1995, a penalty phase trial was conducted. The jury found two aggravating circumstances: (1) Marinelli committed the killing while in the perpetration of a felony; and (2) Marinelli committed the offense by means of torture. The jury also found two mitigating circumstances: (1) Marinelli had no significant history of prior convictions; and (2) other evidence in mitigation concerning the character and record of Marinelli. The jury concluded that the aggravating circumstances outweighed the mitigating circumstances and returned a verdict of death.

On February 25, 1997, this Court affirmed the judgment of sentence on direct appeal. Marinelli thereafter filed a voluminous first counseled PCRA petition, which the PCRA court denied on March 30, 2004. This Court affirmed that determination on November 27, 2006. Governor Edward Rendell signed a death warrant for Marinelli on February 28, 2007, scheduling execution for April 26, 2007. A stay of execution was granted on March 6, 2007.

On August 10, 2007, Marinelli filed an extensive counseled petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, which was denied on November 26, 2012. Petitioner thereafter filed a motion to alter and amend the judgment, which has not been disposed of by the federal district court due to Marinelli's filing of additional PCRA claims in the state courts.

On April 25, 2013, Marinelli filed a second counseled PCRA petition. The PCRA court dismissed that petition for lack of jurisdiction on December 17, 2013. This Court affirmed that determination on September 24, 2014.

On November 30, 2015, Marinelli filed a third counseled PCRA petition which has not yet been disposed of. That petition, which was amended on October 5, 2016, seeks relief on the grounds alleged by Marinelli that this Honorable Court's determinations of Marinelli's prior PCRA appeals may have been tainted by bias. Marinelli specifically alleges that this Court's bias is manifested in email communications sent between members of this Court and employees of the Office of Attorney General during a specific period of time.

On August 24, 2018, Marinelli filed a counseled motion seeking leave to amend the third counseled PCRA petition. The amendment claims that Pennsylvania's "system of capital punishment" violates Article I, Section 13 of the Pennsylvania Constitution ("the death penalty claim"). On the same day, Marinelli filed in this Court the instant petition asking this Court to remove the just-filed death penalty claim from the PCRA court and to consider its merits without development in and disposition by the court below.

B. The Death Penalty Claim

Marinelli argues that there are "unconscionable defects in Pennsylvania's practices and procedures of capital punishment" that require the judicial branch of government to immediately: (1) overturn this Court's existing precedent governing the construction of Article I, Section 13 of the Pennsylvania Constitution in connection with capital punishment; and (2) declare that Marinelli's death sentence and other existing death sentences in Pennsylvania violate Article I, Section 13 of the Pennsylvania Constitution.

In support of his factual averments and legal arguments, Marinelli points to a June 2018 publication by the JSGC of the General Assembly of

the Commonwealth of Pennsylvania entitled "CAPITAL PUNISHMENT IN PENNSYLVANIA: The Report of the Task Force and Advisory Committee" ("the JSGC report").[5] The report purports to authoritatively address 17 aspects of the "system of capital punishment" in the Commonwealth: (1) cost; (2) bias and unfairness; (3) proportionality; (4) impact on and services for family members; (5) mental retardation; (6) mental illness; (7) juries; (8) state appeals and postconviction; (9) clemency; (10) penological intent; (11) innocence; (12) alternatives; (13) counsel; (14) secondary trauma; (15) length and conditions of confinement on death row; (16) lethal injection; and (17) public opinion.

On each of these topics, the JSGC report recites numerous "facts" upon which it bases conclusions and recommendations. Not surprisingly, given the composition of the group of individuals whom were chosen to participate in the JSCG review of capital punishment and the subjects they endeavored to investigate, these conclusions and recommendations judge Pennsylvania's existing "system of capital punishment" harshly, condemn

[5] A copy of the JSGC report is attached to Marinelli's petition as Exhibit A.

it in large measure, and *recommend a large-scale overhaul of the existing statutes that relate to the death penalty.*[6]

The apparent authors of the JSGC report are a "task force" and an "advisory committee." The former is composed of four members of the Pennsylvania Senate appointed by the President *pro tempore* and the Minority Leader of the Senate. The advisory committee is comprised of 30 individuals deemed by the JSGC to be "representatives from those groups most likely to make useful and insightful contributions." *See* Senate Resolution No. 6 (Session of 2011) at 2-3. It is unknown who had the privilege of determining which individuals would serve as advisors to the task force and precisely how those determinations were made. It is also unknown who had the privilege of determining the topics to be addressed, how those topics were selected and how they were addressed. The JSGC describes itself as "the primary and central non-partisan bicameral research and *policy development agency* for the General Assembly of Pennsylvania." *See* JSGC report at 2 (emphasis added). It is composed entirely of

---

[6] Notably, the report does not call for the abolishment of the death penalty and does not recommend that the judicial branch of government do anything.

members of the Pennsylvania House of Representatives and of the Pennsylvania Senate, i.e. elected state legislators.

IV. THE GOVERNING LAW

In the words of this Court:

> It is well-established that "[a]ll Pennsylvania courts derive power or authority, and the attendant jurisdiction over the subject matter, from the Constitution and the laws of the Commonwealth." *In re Bruno,* 101 A.3d at 659 (citing Pa. Const. art. V, § 2; 42 Pa.C.S. § 502). Article V, Section 2 of the Pennsylvania Constitution provides, in relevant part, that the Supreme Court "shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth." Pa. CONST. art. V, § 2(a). Section 2 further provides that the Supreme Court "shall have such jurisdiction as shall be provided by law." Id. at 2(c).
>
> In addition to providing for this Court's original and appellate jurisdiction, the General Assembly has recognized our King's Bench authority in Section 502 of the Judicial Code ("General powers of Supreme Court"), which states:
>
> > The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722. The Supreme Court shall also have and exercise the following powers:

> (1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law.
>
> (2) The powers vested in it by statute, including the provisions of this title.
>
> 42 Pa.C.S. § 502.

Commonwealth v. Williams, 129 A.3d 1199, 1205-1206 (Pa. 2015).

The Section 502 King's Bench authority is:

> generally invoked *to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law. In re Bruno*, 101 A.3d at 670. While such authority is exercised with extreme caution, the availability of the power is essential to a well-functioning judicial system. *Id.* The exercise of King's Bench authority is not limited by prescribed forms of procedure or to action upon writs of a particular nature; rather, the Court may employ any type of process necessary for the circumstances. *In re Franciscus*, 471 Pa. 53, 369 A.2d 1190, 1193 (1977) (citing *Petition of Squires & Constables Ass'n of Pa.*, 442 Pa. 502, 275 A.2d 657 (1971)). We may even exercise King's Bench powers over a matter where no dispute is pending in a lower court. *In re Assignment of Avellino*, 547 Pa. 385, 690 A.2d 1138, 1140 (1997). In exercising King's Bench authority, our "principal obligations are to *conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth*." *In re Bruno* at 675; *In re Franciscus*, 369 A.2d at 1194.

Williams, 129 A.3d at 1205-1206 (emphasis added).

Another statute provides this Court with similar but distinct authority. Section 726 of the Judicial Code provides, in pertinent part, that:

> Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth *involving an issue of immediate public importance*, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise *cause right and justice to be done.*

42 Pa.C.S.A. § 726 (emphasis added).

Although the Court's Section 726 extraordinary jurisdiction and its Section 502 King's Bench jurisdiction are similar, they are not the same. Section 726 enables the Court to assume plenary jurisdiction over a matter pending before a lower court or district justice *when that matter involves an issue of immediate public importance that requires intervention to ensure that right and justice prevail.* Section 502 allows the Court to exercise the "power of general superintendency over inferior tribunals even when no matter is pending before a lower court" *when resolution of an issue of public importance will prevent harm that will otherwise be caused by the delays inherent in the*

judicial process. See In re Dauphin County Fourth Investigating Grand Jury, 943 A.2d 929, 933 n.3 (Pa. 2007).[7]

V. DISCUSSION

A. Exercise by this Court of its King's Bench Authority to Consider and Dispose of Marinelli's Pending PCRA Claim on a Fast-Track Basis Without Development and Consideration by the Court Below is Unwarranted, Would Be Severely Detrimental to the Public Interest, and Would Undermine Principles of Truth and Fairness that are the Cornerstones of Our Judicial System.

Marinelli's contention that notions of fairness, probity, dignity, and integrity which underlie this Court's King's Bench authority compel the invocation of Section 502 jurisdiction is ironic because exercise of that power by the Court at this time will significantly undermine those sacred principles that reside at the heart of the judicial system. For the following reasons, the Commonwealth respectfully urges this Court not to exercise its

---

[7] Marinelli's petition invokes this Court's Section 502 King's Bench jurisdiction but not its Section 726 extraordinary jurisdiction. This seems counterintuitive given that the claim which Marinelli asks this Court to accept for review is currently pending in the PCRA court and Marinelli is arguing that the cause of justice requires immediate action by this Court. Presumably he has opted for King's Bench jurisdiction because he seeks not only a finding that his death sentence violates his constitutional rights, but also a finding that the entire *"system of capital punishment"* is violative of the Pennsylvania Constitution, requiring relief for every convicted murder currently sentenced to death.

King's Bench jurisdiction in this matter, but to instead allow the claim advanced by Marinelli to work its way through the normal, truth-seeking, fairness-ensuring channels of the judicial system, beginning in the PCRA court.

1. There is No Need for Immediate Review by this Court.

There is no need for immediate review of Marinelli's death penalty claim by this Court. As conceded by Marinelli, Governor Wolf has used his power of reprieve to effectively establish an *indefinite moratorium on executions of prisoners who have been sentenced to death* (8/24/18 Petition of Marinelli at 10) (given that this Court has upheld the validity of the Governor's reprieve scheme, "all executions in the Commonwealth are currently postponed until the JSGC Report's recommendations are satisfactorily addressed"). *See Commonwealth v. Williams*, 129 A.3d 1199 (Pa. 2015) (finding Governor's system of reprieves that places an indefinite halt on all executions to be within his constitutional authority). The power to end the moratorium resides exclusively with Governor Wolf, who has expressed his personal philosophical opposition to death sentences and who alone has the power to decide when the JSGC Report's

recommendations "are satisfactorily addressed." Governor Wolf has given no indication that he intends to alter his current stance on the subject.

In addition, as also conceded by Marinelli, the last time a death-sentenced prisoner was executed in accordance with the governing law was *July 6, 1999, almost 20 years ago*. Moreover, only three death-sentenced prisoners have been executed in Pennsylvania since the death penalty statute was re-enacted in 1978 following the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (8/24/18 Petition of Marinelli at 11).

In truth, *there is no functional death penalty in Pennsylvania at the present time.* It has been brought to a grinding halt. The reasons for this are many and complex and are the subject of intense, sincere, and often contentious debate between ethical jurists, prosecutors, criminal defense practitioners, and advocacy organizations throughout the Commonwealth. It has happened notwithstanding the fact that surveys show that a majority of Pennsylvanians (and Americans) continue to believe that the death penalty is a just and appropriate punishment for intentional murder. The bottom line is that *no prisoner currently sitting on death row is facing imminent*

execution. The practical reality is that each of them has a reprieve sitting in the Governor's pocket with his/her name on it.

Thus, the petition's argument that this Court must step in now to avert a crisis rings deeply hollow. Every prisoner on death row at this time is serving the functional equivalent of a life imprisonment sentence; he/she cannot be executed and must remain in prison. This is the precise punishment he/she would receive if this Court were to bypass the normal process, assume jurisdiction, and find Marinelli's claim to be meritorious. Consequently, no harm is caused by the delay attendant with permitting the parties to thoroughly and appropriately litigate Marinelli's claim in the PCRA court pursuant to the PCRA statute and other governing law as well as the Rules of Evidence and Rules of Criminal Procedure prior to commencement of any review by this Court.

Not only does proceeding in such a manner pose no threat to the fairness, probity, and integrity the of judicial process by which the death penalty claim is disposed, it significantly strengthens the validity and reliability of, as well as public confidence in, the ultimate disposition of the issue by: (1) permitting the development of a factual record regarding the process underlying and substantive conclusions announced by the JSGC

report upon which the courts can legitimately base a resolution of the parties' dispute; (2) submitting the voluminous "facts" announced and relied upon by the JSGC report to adversarial testing; and (3) obtaining witness credibility and evidentiary weight determinations from the PCRA court, which is uniquely situated and qualified to render them. *See infra.*

2. The Significance to the Public of the Death Penalty's Legal Validity Militates *Against* a Fast-Track Review and Disposition of Marinelli's Claim Because Such an Approach Would: (a) Prevent the Development of a Factual Record Upon Which the Courts Can Properly Base a Decision; (b) Prevent Adversarial Testing of the Probity and Reliability of the Averments Underlying Marinelli's Claim; and (c) Deprive this Court of the Benefits Inherent in Prior Development of the Issues in the Lower Court.

The Commonwealth agrees with Marinelli that the legal validity of the death penalty is of immense public importance. Indeed, as reflected in the JSGC report, a majority of Pennsylvanians (and Americans) continue to believe that capital punishment is an appropriate and just punishment for intentional murder. It is precisely for this reason that this Court should refuse to exercise its King's Bench power and instead permit the death penalty claim to be litigated in the ordinary course with initial

consideration and determination by the PCRA court. Development of the issues in the lower court is essential to ensure that right and justice prevail.

a. <u>A Factual Record Must Be Fairly Developed Which Addresses the Process and Methodologies Utilized by the JSGC and the Information it Did and Did Not Rely Upon to Render its Conclusions and Recommendations.</u>

First, *no factual record has yet been developed upon which this Court can base a decision on the merits of the underlying claim presented.* This Court has repeatedly stated that appellate courts do not consider matters not of record and are not factfinders. *See, e.g., Commonwealth v. Delgros*, 183 A.3d 352, 358 (Pa. 2018); *Commonwealth v. Spotz*, 870 A.2d 822, 836 (Pa. 2005); *Commonwealth v. Freeman*, 827 A.2d 385, 393-394 (Pa. 2003). "[T]he trial court is uniquely qualified to determine factual matters." *Morrison v. Com., Dept. of Public Welfare*, 646 A.2d 565, 571 (Pa. 1994); *Coker v. S.M. Flickinger Co., Inc.*, 625 A.2d 1181, 1187 (Pa. 1993); *see also Thompson v. City of Philadelphia*, 493 A.2d 669, 672-673 (Pa. 1985) (trial court stands on different plane than appellate court because its decision is aided by "on-the-scene evaluation of the evidence," while appellate court reviews only the cold record).

The verity, reliability, and value of the content of the JSGC report is dependent upon the precise process and methodologies utilized by the JSGC, task force members, advisory committee members, and subcommittees to produce the report. The report itself does not provide this information. More specifically, it does not indicate: (1) how and why the JSGC chose the task force members; (2) how and why the particular members of the advisory committee were chosen for appointment; (3) how the advisory committee performed its duties and what methodologies were utilized and why; (4) how and on what basis the subcommittees were formed and their members appointed; (5) what were the responsibilities of the task force's staff and what role did those individuals play in the formulation of the report; (6) how the conclusions and recommendations contained in the report were arrived at; (7) whether the task force undertook an examination of the veracity and reliability of the voluminous sources cited in the report; and (8) whether the final report was approved by the entirety of the task force and advisory committee, or only a portion thereof, and if the latter, identification of those in favor of and those opposed to the report.

Marinelli's suggestion that this Court can simply credit the facts articulated in the JSGC report – as if that entity's activities are a suitable substitute for the normal fact-finding process utilitized by fair and impartial courts -- is preposterous, self-serving, and inexplicable. The actual author or authors of the JSGC report – whomever they are (they are not identified in the report) -- do not have a monopoly on the truth and this Court cannot in good conscience assume on blind faith that the process and methodologies utilized by the JSGC were fair and impartial.

The facts relevant to Marinelli's death penalty claim are deeply disputed, as evidenced by the Pennsylvania District Attorneys Association's ("PDAA") Response to the JSGC Report published in June 2018 and attached hereto as Exhibit A ("the PDAA response"). The PDAA response effectively highlights significant factual omissions, material misrepresentations, flawed reasoning, and questionable methodologies contained in and utilized by the JSGC report which render it highly unreliable.

The most glaring example of this is the JSGC report's failure to give appropriate weight to and acknowledge the significance of the study *commissioned by the JSGC for its report* and directed by Professor John

Kramer of the Pennsylvania State University to determine whether there are disparities in the administration of the death penalty. A copy of this study is attached hereto as Exhibit B.

> This Study is a first-of-its kind data analysis in Pennsylvania. Ultimately, **it concluded that capital punishment in Pennsylvania is not disproportionately targeted against defendants of color**, finding that:
>
> - *No pattern of disparity to the disadvantage of Black or Hispanic defendants was found in prosecutorial decisions to seek and, if sought, to retract the death penalty.*
> - *No pattern of disparity to the disadvantage of Black defendants with White victims was found in prosecutorial decisions to seek or to retract the death penalty.*
> - *Cases with Black defendants and White victims were 10% less likely than other types of cases to see a death penalty filing.*
> - *Aggravating circumstances were filed in a larger percentage of cases involving White defendants than Black defendants.*
> - *Legally relevant factors are likely the primary factors that shape interpretations of blameworthiness and dangerousness that theoretically drive the punishment decisions examined.*
>
> The Study did find that the race of the victim might shape definitions of blame worthiness. The Study, however, noted that this difference *was not* in combination with the race or ethnicity of the defendant. Rather, the Study specifically stated, that "Black defendants with White victims were not more likely to receive the death penalty than defendants in other types of cases."

> For so long, those who have sought to abolish the death penalty have argued that the race of the defendant plays the critical role in decisions about who gets the death penalty. *This Study squarely discredits that theory,* employing facts instead of agenda-driven rhetoric. Yet it is given very little credence in the final Report. An even-handed examination of capital punishment in Pennsylvania would highlight and discuss these findings, particularly because they provide a data-driven conclusion proving the charge of facial disparities related to prosecutors' death penalty decisions untrue.

(Exhibit A at 4-5) (emphasis added) (footnotes omitted). The foregoing reveals the unreliability of the JSGC report as a fair and impartial fact-finding instrument.

A second illustration of the deeply flawed nature of the JSGC report is its abject failure to acknowledge, much less assess the significance of, the responsibility of the criminal defense bar – and in particular the Federal Community Defender's Office of Philadelpha ("FCDO") – for the judicial branch's current inability to dispose of death penalty challenges on a more timely basis. As noted by the former Chief Justice of this august body, the FCDO has, over the years, filed "prolix and abusive pleadings" and engaged in "ethically dubious strategies and activities in…Pennsylvania capital cases" in an end-justifies-the means scorched earth approach that is severely detrimental to the cause of justice. *See Commonwealth v. Spotz*, 18

A.3d 244, 330 (Pa. 2011) (Castille, C.J., concurring, joined by McCaffery, J.). A copy of the full *Spotz* Opinion is attached hereto as Exhibit C. *See also Commonwealth v. Spotz*, 99 A.3d 866 (Pa. 2014) (single Justice Opinion on post-decisional motions). Although highly unpleasant, former Chief Justice Castille's analysis in *Spotz* is firmly grounded in fact and truth and the JSGC's omission of *any* mention of these concerns on the part of many jurists and legal practitioners who deal with capital murder cases on a regular and ongoing basis reveals the unreliability of the JSGC report as a fair and impartial fact-finding instrument.

Other highly respected state and federal jurists have also given voice to the detrimental effect that the FCDO's strategies and tactics have on the judicial system's ability to dispose of challenges to death sentences in a fair and timely basis. By way of example, in the words of the Honorable William Carpenter of the Court of Common Pleas of Montgomery County:

> We recognize that all criminal defendants have the right to zealous advocacy at all stages of their criminal proceedings. A lawyer has a sacred duty to defend his or her client. Our codes of professional responsibility additionally call upon lawyers to serve as guardians of the law, to play a vital role in the preservation of society, and to adhere to the highest standards of ethical and moral conduct. Simply stated, we all are called upon to promote respect for the law, our profession, and to do public good. Consistent with these guiding

> principles, the tactics used in this case require the Court to speak with candor. **This case has caused me to reasonably question where the line exists between a zealous defense and an agenda-driven litigation strategy**, such as the budget-breaking resource-breaking strategy on display in this case. Here, the cost to the people and to the trial Court was very high. This Court had to devote twenty-two full and partial days to hearings. To carry out the daily business of this Court visiting Senior Judges were brought in. The District Attorney's capital litigation budget had to have been impacted. With seemingly unlimited access to funding, the Federal Defender came with two or three attorneys, and usually two assistants. They flew in witnesses from around the Country. Additionally, *they raised overlapping issues, issues that were previously litigated, and issues that were contrary to Pennsylvania Supreme Court holdings or otherwise lacked merit.*

See Commonwealth v. Eichinger, 108 A.3d 821, 851 (Pa. 2014) (Castille, C.J., concurring) (emphasis added).

In the words of the Honorable John E. Jones, III of the United States District Court for the Middle District of Pennsylvania, addressing FCDO conduct in capital murder federal habeas corpus proceedings:

> Nearly two decades have passed since Officer Willis Cole was murdered. Over nineteen years have elapsed since the trial that resulted in Abdul–Salaam's conviction. And yet this Memorandum and the Order that follows *will not end the legal maneuvering that seeks to overturn both his conviction and resulting sentence of death at the hands of a jury of his peers.*
>
> It was not until well after the founding of this nation that the federal writ of habeas corpus was extended to prisoners in state custody. But like a rolling freight train, the use of the Great Writ gathered speed in the ensuing decades. It was

adopted by the federal courts, codified by Congress, revised, and to some degree limited in certain respects. But the case at bar amply demonstrates that *there is something grievously amiss in both our laws and jurisprudence as they relate to federal habeas practice.* For while we admire zealous advocacy and deeply respect the mission and work of the attorneys who have represented Abdul-Salaam in this matter, **they are at bottom gaming a system and erecting roadblocks in aid of a singular goal—keeping Abdul-Salaam from being put to death.** The result has been the meandering and even bizarre course this case has followed.

Its time on our docket has spanned nearly all of our service as a federal judge—almost twelve years. We have given Abdul-Salaam every courtesy and due process, perhaps even beyond what the law affords. And yet for the family of Willis Cole, and indeed for Abdul-Salaam and his family as well, there has been no closure. Rather, *they have endured a legal process that is at times as inscrutable as it is incomprehensible.* Moreover, it will soon take another turn as the Third Circuit Court of Appeals reviews our determination.

It is right and proper to insure that criminal defendants are given fair and open trials that fully comport with the protections afforded to them in the Constitution. *But we fear that a process has evolved that in reality is based on the goal of perfection rather than constitutionality.* There are no perfect trials, and Abdul-Salaam's was no exception. However, at the end of the day, this Court is fully convinced that Abdul-Salaam was afforded a trial and sentencing that did not violate the Constitution of the United States in any single respect.

Abdul-Salaam v. Beard, 16 F.Supp.3d 420, 511 (M.D.Pa. 2014), *reversed in part on other grounds*, 895 F.3d 254 (3rd Cir. 2018) (emphasis added).

b. <u>This Court Will Benefit From Initial Review and Development in the PCRA Court.</u>

"The absence of a trial court opinion can pose a substantial impediment to meaningful and effective appellate review." *See, e.g., Commonwealth v. Spotz,* 870 A2d 822, 836 (Pa. 2005); *Commonwealth v. Lord,* 553 Pa. 415, 719 A.2d 306, 308 (1998). This is in part because trial courts, due to their position in the judicial system, have the unique opportunity to observe the demeanor of testifying witnesses and the manner in which they speak. For this reason, appellate courts defer to and rely upon trial courts for credibility and evidentiary weight determinations. *See Delgros,* 183 A.3d at 358; *Spotz,* 870 A2d at 836.

An honest and thoughtful comparison of the JSGC report and PDAA response reveals that there are profound factual disputes at play in connection with both the contents of the JSGC report and Marinelli's underlying claim. These can only be fairly addressed and disposed of via the conduct of an evidentiary hearing during which a full record can be developed pursuant to the governing criminal procedural rules and evidentiary rules with the PCRA court rendering the necessary credibility and weight of the evidence

determinations. *See S.M. Flickinger Co., Inc.*, 625 A.2d at 1187 (appellate courts defer to weight and credibility determinations of the trial courts).

c. Notions of Fundamental Fairness, Truth, and Judicial Integrity Require That the "Facts" Relied Upon by Marinelli and the JSGC Be Subjected to Adversarial Testing.

The best method for ensuring the trustworthiness of evidence relied upon by a court is to subject it to "rigorous testing in the context of an adversary proceeding before the trier of fact." *Commonwealth v. Robins*, 812 A.2d 514, 520 (Pa. 2002) (quoting *Maryland v. Craig*, 497 U.S. 836, 845-846 (1990) (addressing value of adversarial testing in the context of a defendant's constitutional right to confrontation of the witnesses against him).

Adversarial testing is the norm for fact-finding in Anglo-American criminal justice matters. *Id.* The judicial system relies on adversarial testing to produce just results. *See Commonwealth v. Lesko*, 15 A.3d 345, 383 (Pa. 2011); *Commonwealth v. D'Amato*, 856 A.2d 806, 822 (Pa. 2004). This is because it:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and *guarding against the lie* by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, *the 'greatest legal engine ever invented for the discovery of truth';* [and] (3) permits the [factfinder]…to observe the demeanor of the witness in making his statement, thus aiding the [factfinder] in *assessing his credibility.*

Maryland, 497 U.S. at 845-846" (emphasis added).

The JSGC report cites multiple hundreds of "facts" for its conclusions and recommendations, but *not a single one of them has been subjected to adversarial testing to ensure its verity and reliability.* The lack of witness testimony under oath subjected to cross-examination and credibility determinations by a judicial trier of fact, combined with the lack of documentary evidence that has satisfied governing evidentiary standards including authentication requirements and has been subjected to adversarial testing renders it entirely inappropriate for this Court to exercise its King's Bench jurisdiction in this matter. Any review by this Court under these circumstances would violate notions of fundamental fairness and raise serious doubts about this Court's commitment to its truth-seeking function and the integrity of our criminal justice system.

3. A Grant of Marinelli's Petition Would Create the Appearance of Partiality and Undermine Public Confidence in the Judicial System.

Actual and perceived impartiality of the courts is fundamental to the integrity and viability of our judicial system. *See Judicial Inquiry and Review Board of the Supreme Court of Pennsylvania v. Fink*, 532 A.2d 358, 367 (Pa. 1987). "Impartiality of courts lies at the heart of our system of justice; it is what makes the system work…" *Id.* As this Court is obviously aware, judges must avoid any conduct that gives the appearance of favoritism, prejudice, or bias for or against one party. *See Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1124 (Pa. 2000); *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 685 A.2d 994, 998 (Pa. 1996); *Downey v. Weston*, 301 A.2d 635, 642 (Pa. 1973); *see also* Code of Judicial Conduct, Canon 2(A) (directing judges to conduct themselves in manner that promotes public confidence in the integrity and impartiality of the judiciary).

In light of the following factors, the Commonwealth respectfully submits that this Court's grant of Marinelli's petition would create the appearance of partiality and undermine public confidence in the judicial system: (1) the JSGC report was born in a crucible of partisan politics and ideological agendas; (2) the process and methodologies utilized by the

JSGC are unknown; (3) many of the "facts" relied upon by the JSGC report are disputed, *see* Exhibit A; (4) the report contains significant factual omissions, material misrepresentations, flawed reasoning and employs questionable methodologies, *see* Exhibit A; (5) the Court lacks a factual record developed pursuant to judicial norms including full adversarial testing, application of the Rules of Criminal Procedure, and application of the Rules of Evidence; (6) the Court lacks an initial review and determination by the PCRA court which can provide this Court with valuable credibility and evidentiary weight determinations and insights into the dispute between the parties; (7) more than half of all Pennsylvanians support the imposition of the death penalty for intentional murder; (8) many believe that the process set in motion to produce the JSGC report was unfairly rigged so that a preconceived result would be obtained, namely condemnation of capital punishment in Pennsylvania that could be exploited by anti-death penalty advocates to advance their cause; and (9) there is no realistic prospect that any convicted first-degree murderer sentenced to death will be executed in the foreseeable future in light of Governor Wolf's ongoing "moratorium" and there is no need for this Court to take immediate action on the matter.

VI. CONCLUSION

For these reasons, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court deny Petitioner Kevin Marinelli's Petition for Extraordinary Relief Pursuant to 42 Pa.C.S.A. § 502.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

JAMES P. BARKER
Chief Deputy Attorney General

/s/*WILLIAM R. STOYCOS*
WILLIAM R. STOYCOS
Senior Deputy Attorney General
Appeals and Legal Services Section
Attorney ID 68468

PA Office of Attorney General
Appeals and Legal Services Section
Criminal Law Division
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1401

Date: September 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two (2) copies of the foregoing document upon the person and in the manner indicated below:

Service by electronic & UPS delivery, addressed as follows:

Helen Marino, Esquire
Stuart Lev, Esquire
Defenders Association of Philadelphia
Suite 540 West – The Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(Counsel for Daniel Crispell)

/s/WILLIAM R. STOYCOS
WILLIAM R. STOYCOS
Senior Deputy Attorney General
Attorney ID 68468

Office of Attorney General
Criminal Law Division
Appeals & Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1401

Date: September 26, 2018

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/*WILLIAM R. STOYCOS*
WILLIAM R. STOYCOS
Senior Deputy Attorney General
Appeals and Legal Services Section
Attorney ID 68468

Office of Attorney General
Criminal Law Division
Appeals and Legal Services Section
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1401

Date: September 26, 2018

Received 9/28/2018 1:52:26 PM Supreme Court Eastern District

Filed 9/28/2018 1:52:00 PM Supreme Court Eastern District
103 EM 2018

EXHIBIT A

Pennsylvania District Attorneys Association

Response to the Joint State Government Commission's Report on Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee

June 2018

I. OVERVIEW

Nearly seven years ago, the Pennsylvania Senate passed a Resolution tasking the Joint State Government Commission of the General Assembly with the responsibility of examining capital punishment in Pennsylvania. Individuals were selected as Advisory Committee Members and over the years worked to develop a report. The Advisory Committee was made up largely of death penalty opponents. The Senate Resolution also authorized the Justice Center for Research at Penn State University, in conjunction with the Interbranch Commission on Gender, Racial, and Ethnic Fairness, to collaborate on a study of the administration of the death penalty in Pennsylvania. Professor John Kramer led this study.

In October 2017, Professor Kramer and his team released their data-driven study, based on the examination of actual capital cases in Pennsylvania and concluded that capital punishment in Pennsylvania is not disproportionately targeted against defendants of color. Months later, on June 25, 2018, the Commission released its report, which was supposed to include, in part, the Kramer Study. This Report took many years to complete, but as we explain below failed in its task to be a full accounting of capital punishment in Pennsylvania.

No district attorney takes pleasure in pursuing a death penalty case. Decisions regarding capital punishment are made based on the facts of a case and the applicable law. Capital punishment is only sought in the most egregious and violent cases of first-degree murder.

While a majority of Pennsylvanians continues to support the death penalty, prosecutors recognize that not everyone agrees capital punishment should be part of the criminal justice system's approach to accountability and consequences. Because there are significant differences of opinion and a variety of views on the issue, any publicly funded report on the issue should be a fair and objective analysis for elected officials and those charged with public policy to consider.

Unfortunately, this Report is neither fair nor objective. Instead, this Report is long, convoluted, and inconclusive. It contains the usual litany of complaints that death penalty opponents make. The arguments are not new, and many of the sources cited have been cited time and time again. The occasional small update is just that—small and immaterial. In many areas, the Report renders no conclusion at all, only stating that the data is unclear or incomplete.

The Report also is notable for refusing to grapple with the hard questions that challenge prosecutors: What do you do with a defendant who intentionally targets and assassinates police officers? What do you do with a defendant who kills a grandmother and suffocates a baby in a suitcase for a few dollars? What do you do with a brutal serial killer that terrorizes communities?

This Report could have been much more than what it is. The contents of the Report surprisingly cover little new ground, given the length of time it took to put together and the resources available. What new ground it does cover is glossed over, which we suspect is because those findings do not fit the narrative that many of the Advisory Committee Members had hoped and expected would be revealed.

The most glaring example is the Report's singular commissioned Study directed by Professor John Kramer to determine whether there are disparities in the administration of the death penalty. This Study is a first-of-its kind data analysis in Pennsylvania. Ultimately, it concluded that capital punishment in Pennsylvania is not disproportionately targeted against defendants of color, finding that:

- No pattern of disparity to the disadvantage of Black or Hispanic defendants was found in prosecutorial decisions to seek and, if sought, to retract the death penalty.
- No pattern of disparity to the disadvantage of Black defendants with White victims was found in prosecutorial decisions to seek or to retract the death penalty.
- Cases with Black defendants and White victims were 10% less likely than other types of cases to see a death penalty filing.
- Aggravating circumstances were filed in a larger percentage of cases involving White defendants than Black defendants.
- Legally relevant factors are likely the primary factors that shape interpretations of blameworthiness and dangerousness that theoretically drive the punishment decisions examined.[1]

The Study did find that the race of the victim might shape definitions of blame worthiness. The Study, however, noted that this difference *was not* in combination with the race or ethnicity of the defendant. Rather, the Study specifically stated, that "Black defendants with White victims were not more likely to receive the death penalty than defendants in other types of cases."[2]

For so long, those who have sought to abolish the death penalty have argued that the race of the defendant plays the critical role in decisions about who gets the death penalty. This Study squarely discredits that theory, employing facts instead of agenda-

[1] John Kramer, et al., Capital Punishment Decisions in Pennsylvania: 2000-2010 Implications for Racial, Ethnic and
[2] *Id.* at 4.

driven rhetoric.[3] Yet it is given very little credence in the final Report. An even-handed examination of capital punishment in Pennsylvania would highlight and discuss these findings, particularly because they provide a data-driven conclusion proving the charges of racial disparities related to prosecutors' death penalty decisions untrue.

To the contrary, the Report minimizes and ultimately mischaracterizes the Kramer Study, despite the fact that this Study is instructional, informative and based on new data collection.

The study took many years to complete as Professor Kramer and his staff visited district attorneys' offices, looked at files, asked questions, interviewed prosecutors and defense attorneys, and ultimately put together a detailed, data-driven analysis. Yet the Report treats the Study much like an attorney would treat an unfavorable ruling that must be distinguished. It spends more time discussing older studies, in particular the Baldus study. The Baldus study was only about Philadelphia, used a less advanced form of data analysis, did not involve reviewing district attorney files, and relied on older cases from the 1980s and 1990s.[4] In another instance, the Report gives more credibility to a prior study while conceding that the same study lacked comprehensive data.

The Report is not supposed to be an advocacy piece, and its results are not supposed to be predetermined. But that is what this Report and its findings are. It is, at its very essence, a catalogue of the long-held opinions of death penalty opponents.

Opponents of the death penalty are entitled to their opinions, and we do not question the sincerity of their beliefs. Capital punishment is a difficult subject, and robust

[3] The conclusions from the Kramer Study also refute the need for a proportionality statute, which would have courts conduct analyses of racial bias in the imposition of the death penalty, a statute which the Report recommends—despite the fact that this is precisely what the Kramer Study did.

[4] *See* Kramer, Capital Punishment Decisions in Pennsylvania at 118.

discussions about it are warranted. Those discussions must include all perspectives, be civil and honest, and rely on factual data and information in drawing conclusions.

Unfortunately, for the reasons discussed above, we must question the legitimacy of the Report, and, therefore, its value. Its findings and conclusions are unreliable and biased. Masquerading as a thoughtful document, the Report at its core is a collection of rehashed, one-sided and at times misleading arguments that have been heard many times before from those committed to abolishing the death penalty.

This is especially true considering that, according to the Report, a majority of Pennsylvanians surveyed believe the death penalty is an appropriate sentencing option for first-degree murder, and an overwhelming number of crime victims whose offenders were under a sentence of death supported the death penalty.[5]

Given the Report's downplaying of extraordinarily important and, for some, unexpected conclusions, one should not really need to consider any additional portions of the Report, because its credibility and objectivity are suspect. Nonetheless, we are including responses to some of the larger points of discussion in the Report.

II. COP-KILLERS, BABY KILLERS, AND TORTURERS

Context matters. Cases where murderers have been sentenced to death are brutal and violent cases with real victims and devastated families. Consider four such examples:

Eric Frein: On September 12, 2014, Eric Frein targeted, shot and assassinated Corporal Byron Dickson and critically injured Trooper Alex Douglass with a .308 caliber rifle. He targeted these men because they were state troopers, and Frein wanted to start a

[5] A recent national poll showed support for the death penalty increased by 5 percent. *See* "Public Support for the Death Penalty Ticks Up," Pew Research Center, June 11, 2018. The Report, published two weeks after the PEW poll, failed to examine this report and spent a considerable amount of time examining PEW's prior survey.

revolution. Following his rampage, he evaded police and caused a 48-day manhunt, consisting ultimately of 1,000 officers. In doing so, he terrified communities until he was ultimately caught.

Richard Poplawski: On April 4, 2009, Pittsburgh Police responded to a domestic disturbance dispute between Poplawski and his mother. The two lived in the same house. When the first officer, Paul Sciullo, entered the house, Poplawski instantly shot him. Another officer, Stephen Mayhle, subsequently entered the house, and Poplawski shot him. At around the same time, Officer Eric Kelly had just completed his shift and had picked his daughter up from work. They heard the radio report followed by the sound of gunfire, which was only two blocks away from Officer Kelly's house. Officer Kelly dropped his daughter off at home and drove to the crime scene. Tragically, Poplawski shot the Officer before he could even get out of his car. Officer Kelly stumbled his way to behind the rear wheel of his car, fired his weapon, and Poplawski continued to fire at him. Poplawski then stood over Officer Sciullo, unsure if he was dead, and fired another shot into his neck. He then fired several shots into the prone body of Officer Mayhle, causing the Officer to twitch with each strike. Poplawski then fired upon an immobile Officer Kelly. Poplawski was eventually arrested (after he shot another Officer) and was treated at a nearby hospital for wounds he suffered. While there, he saw Officers guarding his room and exclaimed, "I should have killed more of you." Three brave Pittsburgh Police officers lost their lives that day.

Raghunandan Yandamuri: On October 22, 2012, Raghunandan Yandamuri broke into a neighbor's apartment in Montgomery County in a planned kidnapping for ransom plot in order to get money to pay his gambling debts. Inside the apartment were 10-month

old Saanvi Venna and her 61 year-old grandmother, Satyavathi. Yandamuri fatally stabbed Satyavathi, who was attempting to protect her granddaughter, and then kidnapped the baby for ransom. When the baby began to cry, he stuffed her mouth with a handkerchief and also wrapped a towel around her face to hold the handkerchief in place. He stuffed her into a suitcase, then left her at a basement gym, where she suffocated to death. According to the pathologist, the baby's death was painful.

Leeton Thomas: Thomas was convicted in 2017 in Lancaster County of the vengeful murder of Lisa Scheetz and her teenage daughter Hailey, who were witnesses in his sexual molestation case. Thomas wanted to silence the witnesses and victims. To accomplish this nefarious goal, he broke into the apartment belonging to the Scheetz family. He viciously, violently, and repeatedly stabbed Lisa and Hailey to death. He also stabbed Hailey's sister, who was injured and eventually testified against him for having killed her mother and sister. [6]

Are these the murderers who should receive the benefits of abolishing or diminishing the use of capital punishment? Are these the murderers who should have the satisfaction of knowing that they will never be executed so long as a moratorium is in place? Do we believe these murderers were erroneously convicted, victims of bias, deserving of mercy or even clemency? Or, can we all agree that these offenders are precisely the ones for whom capital punishment should apply?

[6] Consider also Kaboni Savage, who was sentenced to death in federal court in the Eastern District of Pennsylvania in 2013. Savage was a major drug kingpin in Philadelphia and killed or had killed 12 different individuals, 7 which he ordered from prison. In 2004, he firebombed the house of the mother of a witness who was scheduled to testify against him, killing 6 people, including children. Zane Memeger, who was the United States Attorney under President Obama and whose office prosecuted the case rightly said "[a]chieving justice sometimes requires us to ask the citizens on a jury to make the most difficult sentencing decision imaginable."

III. The Voices Of Victims Matter.

Families of homicide victims look to the criminal justice system for justice. What defines justice for individual victims, of course, differs. And as is true for the general population, victims may or may not support the death penalty. But the real option of capital punishment has been crucial for families throughout the exercise of that justice during the prosecution of the murderer of their loved one. None of us can really predict what we may want to occur following the intentional murder of a loved one. Much depends upon our fundamental beliefs, but so much also depends upon the circumstances, manner, and duration of the killing. While it is true that families rarely find "closure" from the trial, the sentence, or even the execution, capital punishment does fulfill the victims' need for justice, whether that be retribution, freedom from the fear that the murderer will once again kill another, or assurance that as an inmate living on death row, the murderer will not enjoy the freedoms of other inmates, even those sentenced to life imprisonment.

IV. Costs of Capital Cases Are Significantly Driven by Death Penalty Opponents. Eliminating the Death Penalty Will Not Reduce Costs To The Criminal Justice System, Will Deny Justice, Will Lead To Convicted Capital Murderers Living In Surprisingly Generous Conditions, And May Result In The Early Release of Convicted Capital Murderers.

The Report considers whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole.

Costs Should Never Deny Justice

The short answer to that question is that costs should never deny justice. When costs become the central focus of any reform in the criminal justice system, the results are decidedly contrary to protecting the public and doing right by victims of crime. Every criminal case has costs, from retail theft to rape, from DUI to child abuse, from bad checks to homicide. Nobody has suggested doing away with those criminal prosecutions. For these important reasons, we caution against consideration of costs as a salient factor in examining capital punishment in Pennsylvania.

We do, however, understand that there is a significant difference in cost. Prosecutors deal with important cases every day, but capital cases are on a different level. They involve defendants who are alleged to have committed a heinous first-degree murder—even more heinous than other first-degree murders, which are all disturbing, for which the death penalty is not sought. The capital cases often involve multiple murders and defendants with long histories of violent offenses. It is just and right that the necessary resources be devoted to these crimes. Likewise, the defendant's own life is also at stake, so he should have access to a capable defense with the resources it needs.

Existence of the Death Penalty Reduces Number of Trials

The existence of the death penalty may in many circumstances reduce the costs to the criminal justice system. Although counterintuitive at first blush, it is a fact that having a death penalty statute encourages some guilty defendants to plead guilty to first-degree murder and receive a life sentence. Without a death penalty statute, more cases would have gone to trial.

Consider the brutal torture and homicide of three-year-old Scotty McMillan. The defendant tortured his wife's two young children, age six and three. He and his wife beat Scotty to death using homemade weapons, like a whip, curtain rod, frying pan, and aluminum strip. The defendant pled guilty and agreed to life in prison in order to avoid the death penalty, which also spared the surviving six-year old victim from having to testify. Thus, in these cases, trial costs are avoided and justice is secured.

Death Penalty Opponents Have Played A Significant Role in Increasing Costs

We agree that the death penalty costs too much. Unfortunately, death penalty opponents have made sure it does. The seemingly endless appeals they often file—extraordinarily long appeals which often raise any possible claim, whether legitimate or not—purposefully clog the system and make appeals as expensive as possible.

Eliminating the death penalty because of costs rewards an inappropriate strategy. Instead, we should make capital punishment a less lengthy and costly process. These goals can be accomplished while still ensuring considerable appellate review. This is no theoretical argument. The voters of California recently approved a ballot initiative that will reduce the frivolous appeals and unnecessary costs of capital cases. Pennsylvania should consider the approach that the voters of California approved.

If the Death Penalty Were Abolished, Victims May Have to Worry That Murderers Will Someday be Paroled

There is another fallacy to the argument that eliminating the death penalty will reduce costs to the criminal justice system. Were the death penalty to be eliminated, we would not expect any meaningful cost reduction within the criminal justice system. We would expect many of those death penalty abolitionists to shift their attention to trying to eliminate life without parole sentences. Put another way, any costs savings resulting from

the limitation of the death penalty will likely go into appeals for life without parole sentences in Pennsylvania.

Indeed, there is a concerted effort to end life sentences in Pennsylvania (SB 942) with much social media and other outreach efforts used to promote the legislation, even labelling life without parole (LWOP) sentences as "death by incarceration." This phrase demonstrates that some believe that LWOP sentences are just as problematic as capital sentences. Indeed, the Sentencing Project, a prominent national sentencing reform group, concluded that "the increased prevalence of life sentences stands at odds with attempts to scale back mass incarceration."[7] The author of the article has also said "we cannot challenge mass incarceration without including reforms to sentences on the deep end of the punishment spectrum, and including in reforms those who have committed serious crimes in their past and are serving life."[8]

Were the Report to unequivocally state that LWOP sentences for first-degree murder must remain LWOP sentences and that legislation like SB 942 represents bad public policy, then any assurances that LWOP is a suitable alternative to capital punishment might be more meaningful. But the Report does not make such a recommendation.[9]

---

[7] Ashley Nellis, "Still Life: America's Increasing Use of Life and Long-Term Sentences," Sentencing Project, May, 2017, p. 29.

[8] Ashley Nellis, quoted in David J. Krajicek, "Prisons are Packed With 200,000 Dead End Lifers: Study," in The Crime Report, May 3, 2017.

[9] An en banc panel of the Pennsylvania Superior Court is considering whether life imprisonment for a person who murdered another individual when he was 18 constitutes cruel and unusual punishment (*Commonwealth v. Avis Lee,* No. 1891 WDA 2016). Further, on June 19, 2018, the Pennsylvania Supreme Court granted an appeal on a case in which the issue is whether a sentence of 50 years to life for a juvenile murderer constitutes a de facto life sentence (*Commonwealth v. Michael Felder*, 41 EAL 2018).

In short, should the death penalty be abolished, crime victims would have to reasonably worry that the person who murdered their loved one might someday be paroled or otherwise released.

Having The Death Penalty Helps Solve Homicides.

Having a death penalty literally helps law enforcement solve often brutal homicides. There are times when murderers will not cooperate with law enforcement unless they agree to remove the death penalty as an option. This was precisely the case recently in Bucks County. Just last year, two individuals killed four men there. For days, officials desperately tried to find the bodies of the victims, as their loved ones huddled, waiting and hoping for some break in the case. Although some of the bodies of the young men were being uncovered as the District Attorney was negotiating with one of the murderers for the recovery of all four buried young men, the break finally came when the District Attorney's Office agreed with him to not seek the death penalty if he revealed where he and his co-conspirator buried all four of the young men. He did, and all four victims were found. If there were no capital punishment in Pennsylvania, there is a very strong chance that not all four of those young men would have ever been found. Imagine the added pain and suffering of those family members had the bodies of their loved ones never been recovered.

V. The Federal Defenders Spend A Considerable Amount of Time And Money On Capital Appeals, And There Is No Accounting For The Vast Amounts Of Money They Spend.

It must be noted that the costs of capital cases are almost always purposefully inflated by the Federal Community Defender Office. It has a budget of over $20 million for

cases on Pennsylvania post-conviction review. A trial judge spoke eloquently of the dangers of such incomparable resources, coupled with an ideologically driven litigation strategy, as follows:

> If ever there were a criminal deserving of the death penalty it is John Charles Eichinger. His murders of three women and a three-year-old girl were carefully planned, executed and attempts to conceal the murders were employed. There is no doubt that Appellant is guilty of these killings. There is overwhelming evidence of his guilt, including multiple admissions to police, incriminating journal entries detailing the murders written in Appellant's own handwriting and DNA evidence.
>
> We recognize that all criminal defendants have the right to zealous advocacy at all stages of their criminal proceedings. A lawyer has a sacred duty to defend his or her client. Our codes of professional responsibility additionally call upon lawyers to serve as guardians of the law, to play a vital role in the preservation of society, and to adhere to the highest standards of ethical and moral conduct. Simply stated, we all are called upon to promote respect for the law, our profession, and to do public good. Consistent with these guiding principles, the tactics used in this case require the Court to speak with candor. This case has caused me to reasonably question where the line exists between a zealous defense and an agenda-driven litigation strategy, such as the budget-breaking resource-breaking strategy on display in this case. Here, the cost to the people and to the trial Court was very high. This Court had to devote twenty-two full and partial days to hearings. To carry out the daily business of this Court visiting Senior Judges were brought in. The District Attorney's capital litigation had to have been impacted. With seemingly unlimited access to funding, the Federal Defender came with two or three attorneys, and usually two assistants. They flew in witnesses from around the Country. Additionally, they raised overlapping issues, issues that were previously litigated, and issues that were contrary to Pennsylvania Supreme Court holdings or otherwise lacked merit.[10]

These extraordinary federal resources would be better served at the front-end—at trial—so that a defendant may be sure of having competent counsel in the first instance. This, perhaps, would reduce the subsequent post-conviction litigation that generally drags on for multiple decades.

---

[10] *Commonwealth v. Eichinger, 108 A.3d 821, 851-852*(Pa. 2014) (quoting Opinion, Carpenter, J., July 25, 2012, at 1-2).

Murderers Not Sentenced to Death Have Considerable Freedom in General Population

For many, even though capital punishment is rarely used in Pennsylvania, the fact that convicted capital offenders must serve their time on death row provides many survivor's families some peace of mind. Were the death penalty to be abolished, it is likely that these offenders, and those future murderers convicted of first-degree murder who would have been sentenced to death, would be assigned to general population. General population is nothing like death row. The conditions are far superior.

During a House Judiciary Committee hearing in 2016, we learned from Professor Robert Blecker of the New York Law School that the conditions of confinement for those sentenced to life in prison without parole are unexpectedly generous. According to Professor Blecker, those in general population at Graterford[11] can generally be out of their cells from 6:30 am to 9 pm, where they are working their jobs, in the day room (on the phone, playing cards, showering, or playing chess), they are not isolated or segregated, many can open their own cell doors when they want. Even after 9 p.m., when they are not allowed outside of their cells, they can watch cable television and leave their lights on in their own cell. They have access to the commissary, volleyball court, softball field, can buy ice cream and can smoke outside.[12]

If the death penalty is abolished, then it is likely that most capital murderers will be able to be in general population where they can play cards, chat on the phone, leave their cells when they want and be able to hang out with their fellow inmates for much of the day. Try explaining that to the families of those slaughtered by Eric Frein, Richard Poplawski,

[11] SCI Graterford is closing, and its replacement, SCI Phoenix is opening soon. Conditions are not likely different in any meaningful way.

[12] Testimony of Robert Blecker before House Judiciary Committee, June 11, 2015.

Raghunandan Yandamuri, and Leeton Thomas. They could well be playing cards in the recreation room, free to walk in and out of their cells when they feel like it. Is that justice?

VI. There are Significant Protections In Place To Ensure The Intellectually Disabled Are Not Subject To The Death Penalty. The Report's Suggestions To The Contrary Are Not Grounded In Fact Or Reality.

The Report presents arguments that there are insufficient procedural protections in place to assure that people with intellectual disabilities are not being sentenced to death. These arguments are misplaced and ignore well-established caselaw and procedure.

Consider that a defendant may raise a defense to the death penalty that he or she is intellectually disabled. He may establish it by showing by a preponderance of the evidence that he has limited intellectual functioning, significant adaptive limitations, and the onset of his subaverage intellectual functioning began before he turned 18-years-old. An IQ score is insufficient by itself to demonstrate an intellectual disability.

A defendant may also use evidence of limited intellectual functioning, which might fall short of intellectual disability, as a basis for three mitigating factors. First, he may show that he was under extreme mental or emotional disturbance. Second, he may also show that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Finally, he may use evidence of his limited intellectual functioning under the catch-all mitigating factor. These procedures adequately protect against the possibility of the execution of an individual with an intellectual disability.

The Report's Recommendation of Shifting Determinations of Intellectual Disabilities Away from a Jury Would Cause Delays, Increase Witness Intimidation, and Let Murderers Go Free.

The Report suggests that the determination of an intellectual disability be made prior to trial by a judge. The rationale is that this process would save money and judicial resources because the case could not proceed capitally if the defendant were found to have an intellectual disability.

This proposal is disconcerting and antithetical to victim protection. It will lead to more witness intimidation, extra delays, additional frivolous motions, added and unnecessary expense, and less justice.

Making this determination after trial seems to be more appropriate because if the defendant is convicted of a lesser degree of murder or acquitted, the intellectual disability issue need not be addressed at all.[13]

The recommendation by the Report to shift to a pre-trial determination would also be devastating to victims' families by creating numerous delays. The interruption of pre-trial proceedings to conduct a hearing on being intellectually disabled would be long and costly, making the living relatives of the slain victim the ones who truly suffer through the wait. These delays would cause them additional and unnecessary pain and suffering while they wait for the opportunity to seek justice and try to find closure for their murdered loved ones.

The pre-trial delays would result in additional cases of witness intimidation. During this unnecessarily prolonged process, while the victims' families and society wait for the

[13] Pa Rules of Criminal Procedure 840-845, promulgated in 2013, set forth the process for determining intellectual disability.

chance to seek justice, we are likely to see witnesses to the case subject to intimidation and threats by the killer and his or her cohorts. In the Commonwealth it is difficult enough to protect and provide assurances for witnesses in the standard delay of a homicide trial. Adding to the delay would, unfortunately, make witness intimidation far easier. The longer a trial goes on, the more opportunities there are to intimidate victims and witnesses.

Juries should decide the issue of intellectual disability. We have always placed our trust in a system where a jury acts as a fact-finder and has the ability to reach a fair and just verdict based on the evidence presented. When it comes to the death penalty, we give even more responsibility to the jury, relegating to the jurors the sentencing function, a function traditionally reserved for the judge. We trust juries to decide factual issues, especially those that concern the level of culpability of a criminal defendant. We trust juries to determine whether a defendant is insane. We trust juries to decide when a defendant is mentally ill. We trust juries to decide when a defendant is acting under duress, in self-defense, or in response to entrapment. In fact, we leave no decision regarding culpability in the hands of the judge alone.

A defendant's conduct during the commission of a crime is entirely relevant to determining whether he or she has an intellectual disability. It particularly makes sense to have the jury determine intellectual disability after the trial at the sentencing hearing, since the defendant's conduct during the commission of the crime may well bolster, or undermine, the defendant's claim of an intellectual disability. Factors that demonstrate culpability—such as planning a crime, covering a crime up, decision making, or complexity of a criminal conspiracy– are entirely relevant to addressing intellectual disability.

Shifting to a pre-trial determination would encourage criminal defense attorneys and defendants to file claims of intellectual disability even if no cognizable evidence exists. For them, there is no downside to filing such a claim, and there is no doubt they would be willing to exploit any measure possible to avoid the death penalty. To the citizens of the Commonwealth and victims of their crimes, however, filing such claims will be detrimental to public safety, for many of the reasons stated above. Law enforcement experience in capital litigation shows that claims are now filed without regard to their viability, in order to prevent appellate counsel from raising the failure to do so as evidence of ineffectiveness. Therefore, allowing claims of intellectual disability to be done pre-trial will greatly increase these filings as a way of preventing such ineffectiveness of counsel claims on appeal.

Pre-trial filings could permit defendants who have an intellectual disability to even escape prosecution for murder. If a defendant is found pre-trial to have an intellectual disability, the defense attorney could argue during the underlying murder trial that any statement the defendant gave to police was given involuntarily because the defendant is intellectually disabled. Defense counsel could also argue to the jury that it is simply impossible for the defendant to have engaged in any complicated crime or covering-up behavior because he, as a matter of law, has an intellectual disability. Such negative collateral consequences of a pre-trial finding of an intellectual disability can be avoided by making the determination post-trial.

VII. The Bulk Of The Report's Analysis About The Number Of Intellectually Disabled Death Row Inmates Is Misleading; In Fact, Much Of Its Analysis Has Been Rejected By Both The United States And Pennsylvania Supreme Courts.

In advancing its unsupported claims about the mental health of death row inmates, the Report comes very close to doing something that both the U.S. and Pennsylvania Supreme Courts have rejected: basing whether an inmate has an intellectual disability exclusively on IQ score. Indeed, Pennsylvania's Supreme Court this year held that, "a low IQ score is not, in and of itself, sufficient to support a classification of intellectually disabled" and it would "not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation."[14]

Despite this clear and recent caselaw, the Report posits that there could be as many as 14% of death row inmates who could be constitutionally ineligible for a death sentence because of an intellectual disability. This estimation is based solely on IQ score. While the Report acknowledges that these other factors must be considered, it nonetheless trumpets in a misleading fashion this conclusion as if it were meaningful and something more than speculation.

This kind of misleading policy analysis demonstrates that the Report is intended to persuade the reader to support abolishing the death penalty, rather than providing an accurate, non-misleading discussion about important issues. In short, the Report is trying to imply something that is really nothing, other than misleading.

The Report also arbitrarily raises the IQ score that it believes equals intellectual disability from 70 to 75. This advocacy tactic is misleading. As our Courts have concluded, an IQ score of 75 is in no way dispositive of intellectual disability. It is on the upper level of the margin of error of what could equate to an intellectual disability if and only if the other

[14] *See Commonwealth v. Van Divner*, 178 A.3d 108, 115-116 (Pa. 2018); *Commonwealth v. Miller*, 585 PA. 144, 155 (2005).

two factors are met. The United States Supreme Court would not find a convicted killer to have an intellectual disability based solely on his IQ score of 75. Instead, it conducted a rigorous review of whether the other two factors applied.[15]

Whether an offender suffers from an intellectual disability is an extraordinarily important issue in our judicial system and especially in capital cases. District Attorneys would never want to see someone with an intellectual disability executed. We recognize that there are sometimes disagreements on whether an individual suffers from such a disability, but the analysis on this put forth in the Report is highly subjective and based primarily on anti-death penalty bias by those opposed to the death penalty.

VIII. The Report's Suggestion That Courts Do Not Adequately Consider A Capital's Defendant's Competency After Sentencing Is Entirely Incorrect As A Matter Of Law And Practice.

The Report spends a significant amount of time concerned that current law does not protect the severely mentally ill who cannot appreciate the nature of their conduct, exercise rational judgment related to the offense, or conform their conduct to the law's requirements in connection with their crime.

What is clear is that the question of a capital defendant's mental illness severity is considered at all stages of a case.

The Report fails to seriously consider that even after sentencing the courts continue to consider a defendant's competency to be executed. Our Courts have made it abundantly clear that the Eighth Amendment requires a person subject to the death penalty to have both a factual understanding of the penalty and the reasons for it. Courts must determine

[15] *See Hall v. Florida*, 134 S.Ct. 1986 (2014).

whether the offender suffers from a mental illness which prevents him from factually or rationally understanding the reasons for the death penalty or its implications.[16]

There are additional protections because many restrictions work to ensure that the mental illness of a capital defendant is appropriately considered at all stages of a case including after sentencing and while awaiting execution. The Eighth Amendment also prohibits a State from carrying out a sentence of death upon a prisoner who is insane.[17] Capital defendants who plead an insanity defense at trial and are not successful may still argue that they are guilty but mentally ill during the penalty phase.[18]

All of this means that a capital defendant may raise an insanity defense at trial and if that defense fails, he may argue during the penalty phase that he is guilty but mentally ill.[19]

The Report also suggests that a new law similar to the existing "guilty but mentally ill" statute be enacted in order to better protect certain defendants even though our courts have already explained the shortcomings of this argument and why guilty-but-mentally ill is unavailable as a matter of law in the guilt phase of a capital case. Guilty but mentally ill reflects a penological concern that should be considered in determining the appropriate sanction for the offense. Guilty but mentally ill is an exception to the general rule that judges determine the sentence and the jury determines guilt. Guilty but mentally ill allows the jury to advise the court to consider the fact of mental illness in the exercise of the judge's sentencing decision. What is significant and unique in capital cases is that the jury and not the judge determines the penalty. Considering a verdict of guilty but mentally ill is, as our Courts have held, a matter that would appropriately be rendered by a jury in a

[16] *Hall v. Florida*, 134 S.Ct. 1986 (2014).
[17] *Ford v. Wainwright*, 477 U.S. 399, 409–410 (1986).
[18] 42 Pa.C.S. § 9711(e)(2) and (e)(3).
[19] *Commonwealth v. Baumhammers*, 92 A.3d 708, 727–28 (Pa. 2014).

capital case during the sentencing phase as opposed to the guilt phase. Juries are permitted to rule on 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.[20]

The Report Recommends Further Clogging and Slowing Capital Appeals

Despite the seemingly endless appeals by capital defendants, the often-frivolous claims they make, and the vast resources unleashed by the Federal Public Defenders, the Report suggests that Pennsylvania should have a standard of relaxed waiver in capital appeals. This suggestion flies in the face of logic.

As an initial matter, it is surprising that the Report does not take seriously the endless appeals that capital defendants often file. It is without question that for some defense attorneys, the goal is to slow the system down, utilize their resources (including the tens of millions of dollars of the Federal Defenders) to grind appeals to a halt, and make claim after claim after claim regardless of the merits –all because the goal is to do everything possible to avoid imposition of the death penalty.

The Pennsylvania Supreme Court's original prior practice of relaxed waiver was not intended to permit a capital defendant to bring any alleged error before the court. Relaxed waiver as a doctrine was intended to allow the resolution of "significant issues" if feasible and which were addressed in the official record. Our courts have written that counsel should not use relaxed waiver to place before the Court, "[a] litany of newly developed challenges not raised or objected to before the lower court." Unfortunately, this is exactly what did occur and could occur again under the Report's proposal to reinstate relaxed

[20] *Commonwealth v. Young*, 524 Pa. 373, 572 A.2d 1217 (1990); *Commonwealth. v. Baumhammers*, 625 Pa. 354, 385–89, 92 A.3d 708, 727–29 (2014).

waiver. A capital defendant should not be allowed to use relaxed waiver to raise for the first time on appeal every possible error. Indeed, this is one of the reasons the Court pulled back from relaxed wavier. As Pennsylvania's Supreme Court has stated, "[t]he relaxed waiver rule became common in direct capital appeals and has been employed to reach a wide variety of claims." "In practice, ... the [relaxed waiver] rule has become such a matter of routine that it is invoked to capture a myriad of claims, no matter how comparatively minor or routine."[21] Many alleged errors did not and would not rise to the appropriate level permitting review and/or would be without a sufficient factual basis in the record such that the court would be able to adequately understand and address their merits.[22]

Further, issues raised before the Supreme Court in the first instance deny a trial court the opportunity to present an opinion addressing the issues. This is especially of concern if the error is based on the facts of record as the trial court would be the only court to have heard live testimony and been in a position to consider the many factors at play in judging credibility.

The current practice which requires the Supreme Court on direct appeal and regardless of other issues raised by the defendant to conduct a sufficiency review of the evidence as well as a statutory review of the death sentence is appropriate. The right to raise allegations of error remains through the post-conviction practice permitting meaningful appellate review while limiting the unfounded practice of raising issues *carte blanche*. Justice for the deceased victim, the victim's family and society in general requires

[21] *Commonwealth v. Freeman*, 827 A.2d 385, 400-01 (Pa. 2003).

[22] In fact, relaxed waiver was a relatively old practice developed in the very first death penalty cases following *Furman v. Georgia*, 408 U.S. 238 (1972) because at that time, post-conviction death penalty practice was undeveloped. Now that we know that capital defendants will in fact receive multiple levels and decades of review, relaxed waiver is thoroughly unnecessary.

a balance in how our appellate practice is employed for capital defendants and that balance is properly struck through the current system.

IX. The Report's Analysis Of Whether Capital Defendants Receive Adequate Representation Ignores The Funding Provided By Federal Defenders, Fails To Conduct Any Meaningful Analysis Of Representative Cases, And Fails To Recommend That Ineffective Defense Attorneys Be Precluded From Representing Capital Defendants In The Future.

The Report relies on a previous study by the Joint State Government Commission that some indigent defense practitioners too often failed to meet professional standards and that the Commonwealth failed to provide adequate support for these attorneys. Consequently, according to the Report, the creation of a state capital defender office should be created.

This recommendation is problematic and, if adopted, would result in the wasteful and inefficient use of taxpayer dollars.

While there is no direct evidence that convicted capital murderers receive inadequate representation, we strongly believe that we should ensure that these defendants receive adequate representation. Our legal system functions properly when the accused are well represented. But the notion that we should establish a brand new capital defender's office is misguided.

Resources could more efficiently be spent to ensure that those already handling capital cases are appropriately compensated, such as increasing fees paid to court-appointed counsel. Whether providing such additional resources is necessary would be dependent upon analyzing the current schedule of fees that court-appointed counsel

receive. Money would be better spent to pay for attorneys directly rather than establishing a new state bureaucracy.

With that said, we must note that the appeals process for capital cases is rigorous. To conclude that our appellate courts would permit any capital defendant whose trial attorney rendered ineffective assistance of counsel to be executed is fiction. Capital cases are the most rigorously reviewed cases—reviewed by our Supreme Court on no less than two separate occasions and by our federal courts. The repeated reviews by our courts ensure that capital cases receive the detailed scrutiny they should receive. For anyone to suggest that conduct by trial counsel which is substandard would not be reviewed carefully by both state and federal appellate courts, as well as by the common pleas court on the initial PCRA, would be to ignore the reality of post-conviction capital case litigation in Pennsylvania.

Additionally, and as discussed above, entities like the Federal Defenders provide zealous and aggressive representation to their clients. In fact, we know that on some occasions the Federal Defenders assist trial counsel during capital cases. Therefore, any analysis of representation of capital defendants must include the time and efforts that the Federal Defenders provide.

We also must wonder why some of the money from the Federal Defenders—which has an available budget for Pennsylvania of more than $20 million of taxpayer dollars—could not be used during the trial stage. Put differently, there is extra money available, and that money rests with the Federal Defenders. To ask that additional taxpayer dollars be used at the trial level without first utilizing some of the money from the Federal Defenders represents fiscal irresponsibility. Therefore, we believe the Report should have concluded

or even meaningfully considered that with the considerable efforts and resources that the Federal Defenders expend in their appellate work on capital cases, they could use some of their funds to provide assistance on the front-end.[23]

Anyone concerned about unqualified attorneys representing capital defendants should support legislation or a change to the Rules of Criminal Procedure that any attorney found to have rendered ineffective assistance of counsel should be precluded from representing capital defendants for a specified period of time, during which that attorney should be required to successfully complete an appropriate remedial training in order to ensure that he or she provides legally acceptable representation in the future. We would expect some in the defense bar to object to this proposal. It is known that some defense attorneys "concede" on appeal that they did not provide adequate representation during the trial because their goal is to ensure that their client gets a new trial, even if it means "admitting" they provided ineffective assistance when in fact they provided a good defense. At present, there is no consequence for providing ineffective assistance. [24]

---

[23] While the funds for the Federal Defenders are supposed to be restricted to federal post-conviction petitions, the fact that the funds are used in state Post Conviction Relief Act petitions demonstrates that the funds could be available for use at the trial level.

[24] There is no question that the quality of capital representation by defense attorneys has improved. In fact, in 2004, the Pennsylvania Supreme Court established minimum qualification standards for all attorneys representing defendants in Pennsylvania who may be subject to the death penalty.[24] The cases examined in the Kramer Study were from 2000-2010. Therefore, a significant number of attorneys representing defendants in these cases were likely not subject to the new Supreme Court Rule. Additionally, the Study found that defendants represented by public defenders were less likely to have the death penalty filed against them. While the Study could not find a "clear indication" that the type of representation affects the decision, the Study did not preclude such a conclusion. Indeed, we are not sure how one could reasonably analyze whether there is a cause and effect relationship related to this issue. With regard to the finding that defendants represented by public defenders were 5-7% more likely to receive the death penalty, the Study does not conclude that the correlation between type of representation results in the causation of inadequate representation. It is not clear whether these were cases handled before the new Supreme Court rules regarding minimum qualification standards were put into place in 2004. Finally, 5-7% is not a particularly large percentage, meaning that examining the facts of each of these cases to determine why a particular defendant received the death penalty while another one did not is critically important.

X. The Report's Proposed Easing Of Clemency Requirements Fails To Reflect The Seriousness of Capital Murder Convictions And Is Instead Based On Its Conclusion That Not Enough Murderers Have Been Pardoned Or Received Clemency.

The Report is critical of the clemency process because in its view not enough murderers have been successful in getting their sentences reduced. Among other things, it considers the suggestions of removing the unanimity requirement for pardons. Decisions about whether to commute the sentence of a murderer on death row are extraordinarily serious. There are victims in each case; there is a jury finding of guilt and a sentence of death in each case. There are many appellate reviews, by both our state and appellate courts. Yet the Report wants to go further and make it easier for convicted murderers—the worst of the worst—to have their sentences commuted or to even be pardoned. Unanimity in these cases ensures that relief be granted in the cases where it is clear that relief is justified. Unanimity ensures that ambiguities are recognized, technical arguments are not exploited, and the opinions of victims' families have an impact.

Conclusion

This Report should find its way to the back of bookshelves of policymakers. Lacking credibility, it is little more than a catalogue of criticisms of death penalty opponents. Lacking balance, it fails to meaningfully and adequately consider the viewpoint of those who support or otherwise do not oppose capital punishment. Lacking fairness, it minimizes and mischaracterizes the results by the first-of-its-kind data analysis by

Professor John Kramer, which concluded that race does not play a critical role in the decision-making about who should get the death penalty.

This Report is an advocacy piece. We hope that those seeking a robust and considered analysis look elsewhere for guidance, including and especially those thinking about whether the death penalty moratorium in Pennsylvania should continue.

Final Note

Carol Lavery, former Victim Advocate for the Commonwealth of Pennsylvania and Pamela Grosh, Program Director, Victim Witness Services Office of the District Attorney of Lancaster County note their support of this response. Both were members of the Advisory Committee.

Received 9/28/2018 1:52:26 PM Supreme Court Eastern District

Filed 9/28/2018 1:52:00 PM Supreme Court Eastern District
103 EM 2018

EXHIBIT B

CAPITAL PUNISHMENT DECISIONS IN PENNSYLVANIA: 2000-2010
Implications for Racial, Ethnic and Other Disparate Impacts

Report Prepared For:

Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

September 2017

Report Prepared by:

John Kramer, Ph.D.
Penn State Department
of Sociology & Criminology

Jeffery Ulmer, Ph.D.
Penn State Department
of Sociology & Criminology

Gary Zajac, Ph.D.
Penn State
Justice Center for
Research

Acknowledgements

We want to thank the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness ("Interbranch Commission") for initiating this study and for providing a major part of the funding necessary to conduct the study. In particular, we want to thank Ms. Lisette McCormick, Executive Director of the Interbranch Commission, for her encouragement and support throughout this project. Second, we want to thank the Falk Foundation and particularly, the Foundation's former Executive Director, Ms. Kerry O'Donnell, for major financial support of the project.

In each of the 18 counties in the in-depth field part of our study, we must thank the many district attorneys, their staff, the Clerk of Courts, the Defenders Association of Philadelphia, and the many others who provided help and assistance in the process. In particular, we want to thank President Judge Joleen Kopriva, who provided access to the files and work space in Blair County to enable us to pretest our data-collection instrument. District Attorney Ed Marsico of Dauphin County also opened his files to our researchers, and along with his staff, devoted many hours to assisting us with our initial data collection.

This study also would not have been possible without tremendous assistance from Michael Light, Robert Hutchinson, Cody Warner, and Lily Hanrath. These graduate students managed to integrate data from the Administrative Office of Pennsylvania Courts ("AOPC"), the Pennsylvania Commission on Sentencing ("PCS"), and the Pennsylvania Department of Corrections ("DOC"), and to assist in the analysis of these data sets and the field data set.

Additionally, we thank the dedicated field data collectors who traveled to the 18 counties and who often worked in difficult conditions in limited work space, even in warehouses, where boxes of case files were stored. Todd Ciancarelli, Jordan Zvonkovich, Dana Chambers, Carol Newark, and Ed Hayes were persistent in their search for the details of each case and this often meant working in the offices of the District Attorneys and with the files of the Clerk of Courts, public defenders and their appellate units.

An important part of the data collection was the coding of the electronic dockets provided by the AOPC. Penn State graduate student Brandy Parker, and undergraduates Ryan Ivins and Carol Newark collected this information. Other major work on the AOPC docket data was done by Dana Chambers, Kim Graham, Arlene Rivera, Randy Assata, and David Percevejo.

In addition, we want to thank James Anderson at RAND, Eric Baumer at Penn State, and Robert Brame at the University of South Carolina for their very helpful comments on the draft of this report. Finally, we express special gratitude for the late Ray Paternoster of the University of Maryland, who gave us valuable help and consultation in designing the data-collection and analytical strategy for this study.

EXECUTIVE SUMMARY

Equity in the administration of justice is an overarching principle of the rule of law, yet, in Pennsylvania, where Blacks comprise less than 12% of the population, more than half of capital-sentenced offenders are Black. Thus, Blacks are highly disproportionately represented among those individuals who receive capital sentences in Pennsylvania, leading one to question whether this is the result of unwarranted disparity in the administration of the death penalty. Many studies around the country have looked at this question, but only Philadelphia's use of the death penalty has been the subject of study in Pennsylvania (Baldus, Woodworth, Zuckerman, and Weiner, 1997-98), the "Baldus study". Hence, our study breaks new ground by conducting the first statewide examination of potential death penalty case-processing in Pennsylvania.

A. Research Questions

Our primary research goal was to determine the impact, if any, a defendant's or a victim's race, ethnicity, or other social characteristics has on a prosecutor's decision to seek the death penalty; to retract it if sought; and the jury's or judge's decision to impose the death penalty. In addition, in previous studies (see, for example, Phillips 2009b), the type of defendant's legal representation has been found to affect death penalty case-processing, and we examine this issue as well.

It is important to note that time, resource, and data constraints did not permit us to measure possible bias at the beginning stages of the death penalty process – that is, the decision to stop, arrest, and charge a suspect in the first instance. At least one previous study (Levinson, 2009) has argued that implicit bias and pervasive stereotypes make discrimination and arbitrariness at these stages possible. Moreover, as discussed in more detail below, time and resource constraints also required us to limit our main analyses of disparity to only those cases that resulted in *convictions* for first-degree murder, noting that only those convicted of first-degree murder can receive the death penalty. We do however, present descriptive statistics on cases charged with any criminal homicide. These limitations must be kept in mind when reviewing the results set forth in this report, as we cannot say what disparities, if any, exist in the arrest and charging stages, or in cases that did not result in a first-degree murder conviction. These questions could be pursued in subsequent research.

B. Methods

We invested much time in research design and in compiling a strong and detailed data base. Ultimately, we decided to study murder cases initiated in the eleven-year period, 2000-2010, specifically case-processing decisions beginning with the prosecutors' charging decisions. We sought to identify each defendant charged with homicide and then follow them as they were processed through the criminal court system. We used three sources of statewide data. First, to identify all defendants arrested for homicide, we obtained data from the AOPC offender-based

tracking system (OBTS), which reports on all arrests and includes information on initial and final charge(s), conviction offense(s), and the age, race and gender of offenders as well as many other offender and case-processing variables. The data was further enhanced by reviewing each case through the web-based electronic docket system maintained by the AOPC. Second, we obtained the PCS data on the sentences imposed on defendants charged with homicide. The third statewide data source was provided by the DOC on all defendants convicted and sentenced to state prison. Merging these data sets allowed us to follow the sequence of decisions for cases from initial arrest and charging, to conviction or acquittal, and to sentencing and entry into the correctional system. Unfortunately, the data collected by the state agencies failed to provide crucial information on the offenses, such as the presence of one or more aggravating circumstances necessary for a murder to qualify as death-eligible. In addition, important information such as characteristics of the victim, the crime, and the type and quality of evidence were not available in the statewide data sets. Thus, while these data sets set the stage for a global view of homicide case-processing, they did not allow us to study, in detail, the capital case-processing decisions in which we were most interested.

We therefore built a model of the necessary data we wanted to collect, patterned after a well-known and high-quality study of the death penalty in Maryland by Paternoster and Brame (2008). We determined that the most complete single source of information was the District Attorney's office in each county, but time and financial limitations did not allow us to travel to each of the 67 counties to review files for each defendant accused of homicide in the Commonwealth during the period 2000-2010. While it was a difficult choice, we decided to limit our field data collection to offenders *convicted* of first-degree murder rather than all offenders, or a sample of offenders accused of homicide, and to the 18 counties with 10 or more first-degree murder convictions. However, since 87% of all first-degree murder convictions statewide in the subject time frame occurred in these counties, we believe these data provide a valuable and unprecedented empirical foundation for examining contemporary death penalty charging and sentencing in Pennsylvania.

C. Findings

The overview of our findings below represents conclusions based on our many multivariate analyses that controlled for (i.e., held constant) over 50 sets of legally relevant factors. These factors measure aggravating and mitigating circumstances, characteristics of the offense, victim behavior and relationship to defendant, issues raise by the defense, and evidence strength, as well as characteristics of the defendant.

- Prosecution
    - Black defendants were charged with, and convicted of, murder, and particularly of first-degree murder at higher rates than White defendants.

- Prosecutors filed notices of aggravating circumstances in 39% of first-degree murder convictions and sought the death penalty in 36% of the cases.
- In 47% of the cases in which a death penalty motion was filed, the motion was retracted.
- The most common aggravating circumstances filed by prosecutors were that defendants: (1) "knowingly created grave risk of death" (15.5%), and (2) "committed [murder] in perpetration of a felony" (15.2%).
- Black defendants had aggravating circumstances filed in 37% of the cases, while White defendants had aggravating circumstances filed in 43%.
- No pattern of disparity to the disadvantage of Black or Hispanic defendants was found in prosecutorial decisions to seek and, if sought, to retract the death penalty.
- No pattern of disparity to the disadvantage of Black defendants with White victims was found in prosecutorial decisions to seek or to retract the death penalty.
- Prosecutors were 21% more likely to seek the death penalty in cases involving Hispanic victims than in cases involving White or Black victims.

- Defense
  - 31% of cases in which the death penalty was sought and not retracted resulted in the imposition of the death penalty.
  - Counsel for defendants at the death penalty sentencing trials primarily argued two mitigating circumstances: (1) age of defendant, and (2) no significant history of prior crime.
  - In 24% of the death penalty sentencing trials, no mitigating circumstance was argued.
  - Prosecutors were 7-8% less likely to file a death penalty motion against a defendant represented by a public defender, but the type of representation did not impact the retraction of a death penalty motion.
  - Defendants represented by privately-retained attorneys were 4-5% less likely to receive the death penalty, while defendants represented by public defenders were 5-7% more likely to receive the death penalty.
- Sentence
  - Juries, rather than judges, made the sentencing decision in 70% of death penalty trials.
  - Juries were more likely to impose the death penalty than judges.
  - No pattern of disparity was found to the disadvantage of Black or Hispanic defendants, relative to White defendants, in decisions to impose the death penalty.
  - Black defendants with White victims were not more likely to receive the death penalty than defendants in other types of cases.

- Defendants *of any race* with White victims were 8% more likely to receive the death penalty, while defendants with Black victims were 6% less likely to receive the death penalty.

- County Impacts
  - Prosecutorial decisions to seek the death penalty varied substantially among counties. Allegheny County prosecutors sought the death penalty less often than prosecutors in the other 17 counties in the field study.
  - Prosecutors retracted filings to seek the death penalty far more often in Philadelphia than in the other 17 counties in the field study.
  - Defendants in Philadelphia and Allegheny County were less likely to receive the death penalty than in the other 16 counties in the field study.
  - Defendants of all races and ethnicities in Philadelphia were less likely to receive the death penalty, regardless of the race or ethnicity of the victims, than the other 17 counties in the field study.
  - Defendants of all races and ethnicities with White victims in Allegheny County were less likely to receive the death penalty than in the other 17 counties in the field study.
  - Prosecutors in Allegheny County and Philadelphia were less likely to seek the death penalty against defendants with public defenders than prosecutors in the other 16 counties in the field study.
  - Defendants with public defenders were much less likely to receive the death penalty in Philadelphia, than their counterparts in the other 17 counties in the field study.

D. Conclusion

Our findings indicate that, net of legally relevant factors, between-county differences, the race of a victim, and the type of representation afforded to a defendant play more important roles in shaping death penalty outcomes in Pennsylvania than do the race or ethnicity of the defendant. These differences in the application of the death sentence can be more acute one way or the other, depending upon which county is conducting the prosecution.

Differences among counties in death penalty outcomes were the most prominent differences found in our study. Just as the likelihood of the various death penalty outcomes are locally variable, so too are the effects of other important variables, such as race of defendant and victim, and defense attorney. A given defendant's chance of having the death penalty sought, retracted, or imposed depends a great deal on where that defendant is prosecuted and tried.

TABLE OF CONTENTS

LIST OF CHARTS

LIST OF TABLES

LIST OF FIGURES

Chapter I: The Administration of the Death Penalty in Pennsylvania

A. Background

According to the DOC,[1] as of December 1, 2016, there were two Asians (1.1%); seventeen Hispanics (9.7%); sixty-four Whites (36.6%) and ninety-two Blacks (52.6%) under sentence of death in Pennsylvania (see Chart 1 below). These proportions have changed little over time. By contrast, in 2015, Whites in Pennsylvania accounted for 77.4% of the overall state population, while the percentage of Blacks was 11.7%.[2] Hispanics accounted for 6.8% of Pennsylvania's population (see Chart 2 below). Thus, Blacks are highly overrepresented on Pennsylvania's death row relative to their proportion of the state population. If the number of Blacks under sentence of death were proportional to their presence in the population of Pennsylvania, there would be approximately 20 Blacks on death row. The actual number, 92, represents a more than four-fold overrepresentation. Our research challenge is to investigate this disproportionality in sentencing outcomes and develop an evidence-based explanation for it.

---

[1] Pennsylvania Department of Corrections, Persons Sentenced to Execution in Pennsylvania, December 1, 2016. Available at http://www.cor.pa.gov/General%20Information/Documents/Death%20Penalty/Current%20Execution%20list.pdf.

[2] U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/42000.html as of July 1, 2015. Checked December 23, 2016.

Chart 1: PA Dept. of Corrections Execution List

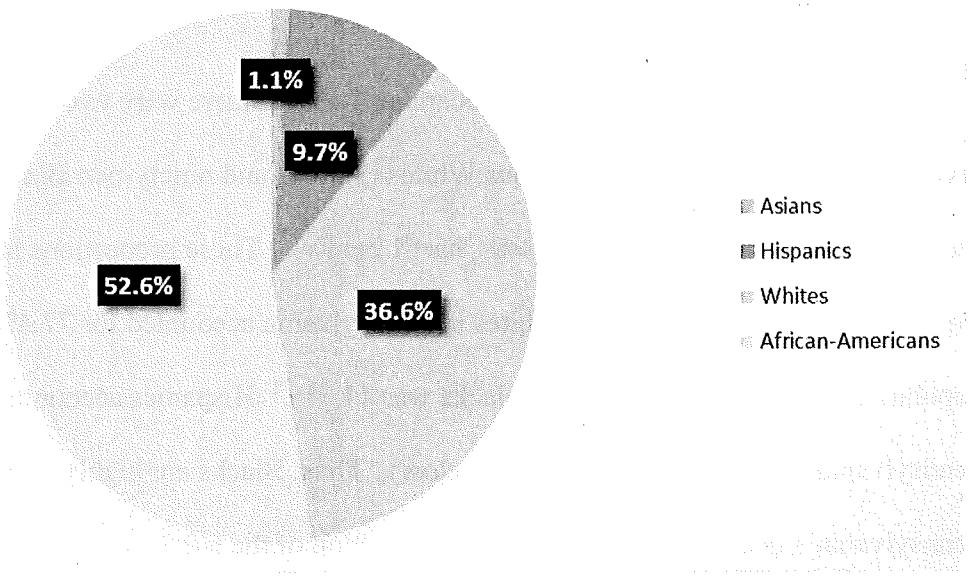
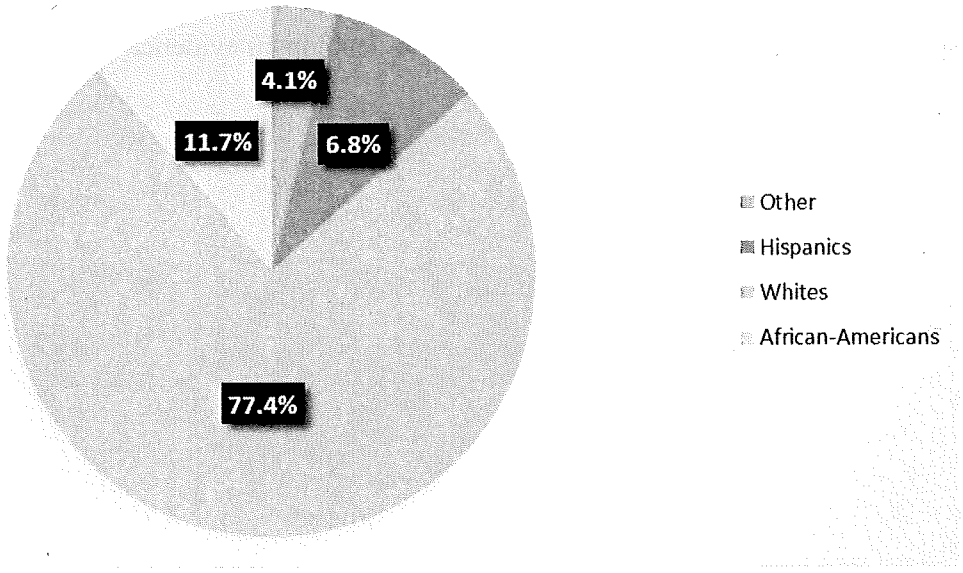


Chart 2: Pennsylvania Population



This report details how we developed a research design to study whether the disproportionality of Blacks on death row is a result of discretionary decision-making by prosecutors, judges and juries; by the severity of the homicide offenses with which Blacks are

charged and convicted; or by other factors. Other research studies indicate that Blacks are disproportionately involved in homicide overall, relative to Whites and Hispanics in the United States (LaFree, Baumer, and O'Brien, 2010). Further, the Pennsylvania Uniform Crime Reports for 2010, the last year of our data collection, indicate that of the 552 arrests for murder, 92% were male and 68% were Black, with almost 52% of those under the age of 25. Thus, suspects arrested for murder in Pennsylvania are generally young, Black, and male. While this data does not break out the figures for first-degree murder, the only death-eligible offense in Pennsylvania, it does indicate the disproportionality of young Black males arrested for murders and consequently, their greater eligibility for the death penalty.

B. Research Questions

With the disproportionality of Blacks sentenced to death, the key research issue was to determine whether this disproportionality resulted from racial bias in decision-making, or whether legally relevant factors, such as the severity of the offense, prior record, and other appropriate sentencing factors, accounted for this disproportionality. We also address whether the type of legal representation a defendant receives plays a substantial role in the imposition of the death penalty.

More specifically, given the pool of those charged with murder, we sought to determine:

1) After accounting for relevant legal factors that indicate death-eligibility, did a defendant's or victim's race, ethnicity, or other characteristics predict the prosecutor's decision to seek death for first-degree murder charges, or to subsequently retract a filing to seek the death penalty?

2) After accounting for relevant legal factors in each case, did a defendant's or victim's race, ethnicity, or other characteristics predict the sentencing decision (life without parole or death)?

3) After accounting for relevant legal factors in each case, how did death penalty outcomes differ across counties?

4) After accounting for relevant legal factors in each case, did death penalty outcomes differ according to the type of legal representation a defendant had?

C. *Furman v. Georgia*

In *Furman v. Georgia,* 408 U.S. 238, decided in 1972, the United States Supreme Court articulated its concerns with unwarranted disparity in the administration of capital punishment. *Furman* struck down the death penalty in the forty death penalty jurisdictions, finding that Furman had been deprived of his constitutional rights. Specifically, the majority of the Justices ruled that the sentence of death was not unconstitutional, but the procedures and application of the death penalty across the states were unconstitutional in allowing for bias in its application against the poor, uneducated, mentally disabled, and minorities. The message to the states was that they needed to develop and implement procedures to ensure that the application of the death penalty would not be discriminatory against offenders because of their status.

Ultimately, in 1976, in *Gregg v. Georgia,* 428 U.S. 153 (1976), the United States Supreme Court upheld the constitutionality of Georgia's death penalty statute. In response to *Furman*, Georgia's new death penalty statute bifurcated the trial in death penalty cases to include separate proceedings to determine guilt and to determine the sentence after consideration of mitigating and aggravating circumstances. As under Pennsylvania's current statute, Georgia required the jury to find beyond a reasonable doubt that the offender had violated one of

specified aggravating circumstances. The Court found that this system of administration of the death penalty contained protections against unfair applications that were at the root of the *Furman v. Georgia* decision in 1972. It remains unclear whether the procedures approved in *Gregg v. Georgia* - and used in Pennsylvania - have reduced or eliminated these unwarranted disparities.

D. Theoretical Framework – Focal Concerns Theory

Focal concerns theory is an influential framework in the social science literature on sentencing, and criminal justice decision-making generally (Steffensmeier, Ulmer and Kramer, 1998; Kramer and Ulmer, 2009; see review by Ulmer, 2012). It also has recently been applied to studying the effect of race on death penalty decision-making (Jennings, Richards, Smith, Bjerregaard and Fogel, 2014). Focal concerns theory holds that decisions regarding the processing of alleged and convicted offenders draw on three key ingredients, or focal concerns, from which to make decisions. Specifically, Steffensmeier, et al. (1998) argue that criminal justice actors assess the blameworthiness (culpability) and dangerousness of the defendant, as well as the practical implications of their processing decisions. In part, the focal concerns model was developed from qualitative research involving scores of interviews with judges, prosecutors, and defense attorneys, and in part, through statistical research on sentencing under Pennsylvania's sentencing guidelines (see Steffensmeier, et al., 1998; Ulmer, 1997; Kramer and Ulmer, 2009). The focal concerns perspective argues that both legal and extralegal considerations can affect the assessment of defendants and cases in terms of the three focal concerns. It also specifies that status-linked attributions and stereotypes can sometimes shape decision-makers' assessments of defendant blameworthiness, dangerousness/rehabilitative potential, and/or practical contingencies and constraints, although they likely do so secondarily

to legally relevant factors (Kramer and Ulmer, 2009). Furthermore, the influence of social statuses like race, for example, may depend on the defendant's gender, age, or offense; criminal history; and especially local contexts.

In addition, a major theme in research on sentencing more generally is that courts resemble "communities" based on participants' shared workplace, interdependent working relationships among key sponsoring agencies, such as the prosecutor's office, judges, the defense bar, and the court's relation to its larger socio-political environment (Eisenstein, Flemming and Nardulli, 1988; Ulmer, 1997). Local courts develop distinctive formal and informal case processing and sentencing norms (see Eisenstein, et al., 1988; Ulmer and Kramer, 1998; Ulmer, 2005).

This literature argues that the use of and reliance on focal concerns tend to characterize courts and criminal case-processing decisions generally, but the meaning, relative emphasis and priority, and situational interpretation of the focal concerns is shaped by local court culture. This raises the possibility that stereotypes and biases based on race/ethnicity or other extralegal defendant characteristics can influence the sentencing process, *depending on whether the larger social context fosters such stereotypes and biases* (Kramer and Ulmer, 2009, see especially Figure 1, p. 10). Research in social psychology and criminal justice shows that implicit racial bias can indeed operate in contemporary criminal justice decision-making, including arrests, prosecution, and sentencing (see reviews by Devine, 2001; Harris, 2007).

Prosecutorial decisions as to whether to seek the death penalty and the jury's decision whether to impose the death penalty certainly consider the culpability of the defendants and their potential dangerousness. It is less clear whether practical issues, such as avoiding the costs of trials and appeals, or ensuring convictions by accepting pleas to lesser offenses or lesser

penalties, are considered in such serious offenses as death-eligible cases. Importantly, this means that we expect capital decisions to be made in reliance on these focal concerns, as they are filtered through the lenses of local decision-makers and the court community (Eisenstein, et al., 1988) within which they function. Jennings, et al., summarizing non-death penalty research supportive of the focal concerns framework, state:

> ...young, Non-White males receive more severe sentences (Auerhahn, 2007; Spohn & Holleran, 2000) and are less likely to receive downward sentencing departures (Kramer & Ulmer, 2002) than defendants in other age/race dyads. In addition, research on victim attributes indicates that Non-White victims are perceived as partially responsible for their victimization given perceptions that crime and violence, in the form of victimization and offending, is normative in the lives of minorities (Baumer, et al., 2000).

Thus, the focal concerns theory highlights the complexity of decision-making, in that it indicates the importance of the characteristics of the offender, the victim, and the local normative culture within which decision-makers are elected or appointed. Each of these factors has been found to be important in processing potential death penalty cases, as we will highlight in the review of the literature below.

E. Prior Research

The focal concerns framework indicates the need to be sensitive to characteristics of the offender, the severity of the offense, characteristics of the victim and the local court culture. In fact, studies of potential death penalty cases have focused on the effect of the defendant's race, the victim's race, and interactions between defendant race and victim race, and their impact on the application of the death penalty. An early review of research on disparity in administration of the death penalty post-*Furman,* conducted by the General Accountability Office (1990), concluded that:

> The evidence for the influence of the race of defendant on death penalty outcomes was equivocal. Although more than half of the studies found that race of defendant influenced the likelihood of being charged with a capital crime or receiving the death

> penalty, the relationship between race of defendant and outcome varied across studies (U.S. General Accountability Office, 1990).

The GAO review, however, found that the race of the victim had a much stronger influence on outcome, concluding:

> In 82% of the studies, race-of-victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.

In the review of the literature that follows, we focus separately on the decision by prosecutors to file a motion to have the death penalty applied and on the decision by the judge or jury to impose the death penalty.

F. Prosecution Decisions: Seeking the Death Penalty

Race

Regarding the prosecutorial decision to move for the imposition of the death penalty, research has generally supported the notion that prosecutors are more likely to seek the death penalty in cases involving a White victim (Bowers and Pierce, 1980; Hindson, Potter and Radelet, 2006; Keil and Vito, 1995; Paternoster, Soltzman, Waldo, Chiricos, 1983; Paternoster, 1984; Paternoster, Brame, Bacon and Ditchfield, 2004; Radelet and Pierce, 1985; Songer and Unah, 2006; Williams, Demuth and Holcomb, 2007), and particularly when the defendant is Black and the victim was White (Keil and Vito, 1995; Lenza, Keys and Guess, 2005). For example, in their study of Missouri (1978-1996), Lenza, et al. (2005) found strong interactions between race-of-defendant and race-of-victim, with Black defendants who kill White victims five times more likely to be charged with capital murder than Black defendants who kill Black victims.

Not all research, however, finds prosecutors more likely to move for the death penalty when the victim is White. In their review of the federal processing study by Kentucky, Berk, Li and Hickman (2005), Vito, Higgens and Vito (2014) did not find prosecution decisions affected by the race of the victim. For example, Vito, et al.'s study of Kentucky death-eligible homicide cases from 2000-2010 (n=359) did not find that prosecutors were more likely to seek the death penalty when the defendant was Black and the victim was White. A very rigorous study by Unah (2011) found a sharp contrast to bias against minorities by prosecutors. Unah's study of North Carolina prosecutors' decisions to seek the death penalty (1993-1997) found that when prosecuting a case with a non-White defendant and a White victim, the prosecutor was 10% less likely to seek the death penalty than when a White defendant killed a White victim. Unah concluded "...racial disparity does not reside in the prosecutorial stage..." (Unah, 2011:13).

Plea Agreements

Another potentially important variable in prosecutorial processing of cases is whether the prosecutor agrees to a plea bargain. There has been only one study that we could locate that examined plea bargain acceptances. In their Kentucky study, Vito, et al. (2014) found that "...black offenders charged with killing a white victim were much less likely to benefit from a plea in a capital case" (p. 763).

Victim Social Class

An additional interesting study by Phillips (2009(a)) focused on the effect of socio-economic status of victims on the likelihood of prosecutors seeking the death penalty and its imposition. Phillips (2009(a)) used data from cases indicted for capital murder in Harris County, Texas from 1992-1999 (n = 504). He found that prosecutors were more likely to seek the death penalty, and the death penalty was more likely to be imposed, on defendants who were accused

of killing victims of higher socio-economic status. Unah's (2011) more detailed study of North Carolina examined defendant and victim education as his measure of social class. He found that defendant education did not affect the prosecutor's decision to move for the death penalty, but the victim's education was important, such that prosecutors were more likely to seek the death penalty when the victim had higher education. [3]

Size of Judicial District

Several studies found that the size of a judicial district is an important factor in the frequency with which the death penalty is sought, but these findings are contradictory across the studies. In their study in South Carolina, Songer and Unah (2006) found prosecutors in rural judicial districts were much more likely to seek the death penalty. But in stark contrast to this finding, Poveda (2006) found that prosecutors in smaller (i.e., generally rural) jurisdictions in Virginia were least likely to seek the death penalty. In Maryland, Paternoster and Brame (2008) studied the universe of first and second-degree murders examining whether the case was death eligible (at least one aggravating factor was present) and whether the facts established the offense was a first-degree murder. They found that prosecutors were much more likely to seek the death penalty in suburban counties than in inner cities. The important point for our purposes here is that there is empirical support for the proposition that prosecutorial decisions about the death penalty vary among courts and jurisdictions.

---

[3] The issue of defendant and victim gender has been found to be an important variable in the decision by prosecutors to seek the death penalty. Studies generally conclude that female defendants are less likely to be prosecuted for the death penalty (Jennings, et al., 2014). Moreover, studies (Vito, Higgins and Vito (2014); Lenza, et al., 2005; Williams, et al, 2007; and Royer, et al. 2014; Songer & Unah, 2006) have all found that offenses involving female victims are more likely to result in prosecution for the death penalty. For example, a recent study by Vito, et al. (2014) of death-eligible offenders in Kentucky from 2000-2010 found that prosecutors were 3.17 times more likely to seek the death penalty when the victim was female.

Type of Legal Representation

Unfortunately, death penalty research has generally failed to focus on the type of legal representation of defendants in the analysis of prosecutorial decisions. One exception is Phillips (2009(b)), in his study of Harris County, Texas. He found defendants who hired legal counsel, as opposed to having assigned counsel (there is no public defender system in Harris County), dramatically affected the outcomes of potential death penalty cases. Defendants with privately-retained counsel had a greater probability of obtaining a negotiated plea, compared to defendants with court-assigned counsel. Another is Unah (2011) who analyzed death penalty outcomes, examining whether the defense attorney was privately-retained or a public defender. He found that defendants with public defenders were 22% more likely to be prosecuted for the death penalty than defendants with privately-retained attorneys.

G. Death Penalty Sentences

Race

The primary research focus has been on which defendants receive capital sentences. A considerable body of research has found that Black defendants who are convicted of killing White victims are the most likely to receive the death penalty (Bowers and Pierce, 1980; Gross and Mauro, 1984; Holcomb, Williams and Demuth, 2004; Keil and Vito, 1995; Lenza, et al., 2005; Paternoster and Brame, 2008; Unah, 2011; Williams, Demuth and Holcomb, 2007). The re-analysis by Williams, et al. (2007) of the 1970's Georgia data compiled by Baldus and Woodworth (1990) found that cases involving Black male offenders with White victims were treated most severely, while Black offenders with Black victims were treated most leniently among the interactions of race-of-defendant and race-of-victim. In their very in-depth study of Maryland, Paternoster and Brame (2008) found defendants with White victims were six times

more likely to receive the death penalty. Unah's (2011) study in North Carolina found that cases with non-White defendants and White victims were 8% more likely to receive the death penalty, despite controls for aggravating and mitigating circumstances.

In contrast, other research has failed to find a race-of-defendant/race-of-victim effect. Specifically, research by Blankenship and Blevens (2001); and Jennings, et al. (2014) in North Carolina; and Baldus, Woodworth, Grosso, and Christ (2002-2003) in Nebraska did not find a Black defendant/White victim effect. The Jennings, et al. (2014) study has important analytical implications for our current study. That study analyzed North Carolina capital murder trials held between 1977 and 2009, using a propensity score matching approach (similar to what we use in our analysis as described later), and found results that conflicted with the findings of Unah (2011), who used somewhat different data sets and logistic regression analysis. While it is not certain whether the analytical strategy or the differences in the data sets resulted in contrasting outcomes, the use of stronger matching capability under propensity score matching may well be the key factor.[4]

[4] Research has also focused on gender. Jennings, et al. (2014), in their analysis of the North Carolina capital murder trials data between 1977 and 2009, found that female defendants were much less likely to receive the death penalty, even when matching cases. Additionally, in Unah's (2011) study of North Carolina death penalty decisions, cases involving female victims were significantly more likely to receive a death sentence, controlling for seriousness of the offense and aggravating and mitigating circumstances. Other studies (Lenza, et al., 2005); Holcomb, et al., 2004(a) have supported the Jennings study's findings. Using data from Georgia collected by Baldus and colleagues (1983), Holcomb, et al. (2004a); Williams et al. (2007) found that defendants convicted of killing White females were 14.5 times more likely to receive the death penalty than similarly situated offenders accused of killing Black males. Importantly, these researchers and research by Royer, et al. (2014) both found that the pronounced likelihood of accused killers of White females being sentenced to death was explained by the sexualized nature of the victimization surrounding such homicides.

Type of Legal Representation

There have long been concerns with the quality of legal representation in capital cases. Unfortunately, death penalty research to date has generally failed to include this variable in the analysis. However, Lenza, et al. (2005) examined types of legal representation and found that defendants represented by public defenders were more likely to receive the death penalty than defendants who had assigned or privately-retained counsel. Phillips (2009(b)) study of Harris County, Texas focused on the impact of type of legal representation, but Harris County did not have a public defender system, so the comparison was between privately-retained and court-assigned legal counsel. Phillips found that privately-retained legal counsel dramatically affected the outcomes of potential death penalty cases. Specifically, he found that defendants with privately-retained counsel had greater probability of an acquittal and they were more likely to obtain a negotiated plea. Ultimately, no defendant in his study who retained private counsel was given a death sentence.

Anderson and Heaton (2012) took advantage of naturally occurring random assignment of indigent clients to either public defenders or court-appointed private attorneys in Philadelphia to study the effect of type of representation on case outcomes. One in five indigent murder defendants are randomly assigned by the court to public defenders and the rest are assigned to court-appointed private attorneys. While this study does not include cases involving defendants who are represented by privately-retained attorneys, it does provide significant insights into the importance of type of counsel for indigent clients. Anderson and Heaton found that defendants with Philadelphia public defenders had a reduced conviction rate and significantly lower sentence severity compared with defendants represented by court-appointed attorneys. This study points to the potential significance of type of representation in our analysis.

H. Type of Analysis

Our review of previous research raises the question of what type of analysis is most appropriate for studying the research questions in this study. In their initial analysis using standard logistic regression, Paternoster and Brame (2008) found a victim/race effect in prosecutors' decisions to file death penalty motions. However, the analysis by Berk, et al. (2005) of these same data, using a newer statistical approach, did not find such a victim/race effect. Paternoster, et al. (2008) subsequently re-analyzed their own data using even more refined statistical models (propensity score weighting) and found that prosecutors were 2.3 times more likely to file death penalty motions in cases with White victims than with Black victims, thereby reconfirming their original findings. Earlier, we noted the re-analysis by Jennings, et al. (2014) of the North Carolina death penalty data, which used a propensity score matching approach. While the original North Carolina analysis used traditional logistic regression analysis and found a White victim effect, the re-analysis by Jennings, et al., using propensity score weighting/matching analysis, did not find such an effect.

In general, however, there is evidence that more rigorous methodologies, such as those we employ later in our study, tend to produce smaller estimates of effect sizes, suggesting that less rigorous methods are less able to rule out alternative explanations or to identify "true" effects (Mihalic and Elliott, 2015; Lattimore, MacKenzie, Zajac, Dawes, Arsenault and Tueller, 2016; Weisburd, Lum and Petrosino, 2001). This is to say that stronger methods may produce a more accurate picture of the relationship between variables in studies such as the current one. Consequently, we analyzed the data using both approaches to see whether the propensity weighting/matching approach provided a different view of the processing of death penalty cases.

I. Pennsylvania Research on the Death Penalty

Prior to this study, in Pennsylvania there was only one study of decision-making in the application of the death penalty and another study consisting of interviews with jurors in capital trials. Professor David Baldus and his colleagues (Baldus, Woodworth, Zuckerman, and Weiner, 1997-98) studied death penalty case-processing decisions from 1983-1993 in Philadelphia. In their sample of death penalty cases, they included all cases sentenced to death, 80% of those cases that went to a penalty trial but received a life sentence and 60% of the cases that were first-degree murder cases and they identified as being death eligible (one or more aggravating circumstances were present). They found that 40% of all cases they identified as death penalty-eligible did not proceed to a death penalty trial. Interestingly, they found that "...53% of the pleas are to life without the possibility of parole (first-degree murder), 18% are to second-degree murder, which is also without parole, and 29% are to third-degree murder, which offers the possibility of parole when the minimum is served" (Baldus, et al., 1997-98: 1646, footnote 12). Another interesting finding in the Baldus, et al. (1997-1998) study concerned cases in which the defendant waived a jury trial in favor of a trial by judge. Typically, while the prosecutor has the discretion to seat a penalty trial jury if the defendant is convicted of first-degree murder before the judge, prosecutors rarely do so. For those cases sentenced by a judge, the Baldus study reported that the risk of receiving the death penalty was much lower than in cases sentenced by a jury. The study (1647) found that four of 41 (9.75%) defendants sentenced by judges in sentencing trials received the death penalty, compared with 114 of 384 (29.7%) defendants who were sentenced by juries. Pennsylvania law requires only one juror to find that a mitigating circumstance applies. However, the Baldus study found that in 55% (63/114) of the jury-sentenced death penalty cases, the jury did not find any mitigating circumstances, thus resulting

in a mandatory death penalty if the jury finds an aggravating circumstance. If the jury finds mitigating and aggravating circumstances, it must determine whether the balance between mitigating and aggravating circumstance favors aggravation or mitigation. The Baldus study found that in 22% (51/231) of these kinds of balancing cases, the jury reached a decision to impose a death sentence.

The Baldus study also found that the race of the defendant is "...a substantial influence in the Philadelphia capital charging and sentencing system, particularly in jury penalty trials" (Baldus, et al., 1997-1998: 1714). Regarding race-of-victim, the study did not find a race-of-victim effect in the prosecution's decision to move for the death penalty, but did find that cases with Black victims were less likely to have the death penalty motion retracted. Regarding death penalty verdicts, the Baldus study concluded that if the victim is not Black, the jury is more likely not to find mitigation in the case and therefore, to sentence the defendant to death. Further, in their analyses, Baldus, et al. (1997-1998) examined the socio-economic status of victims and found that it affects both prosecutorial decisions and jury decisions, such that cases with low socio-economic status victims are less likely to be prosecuted for the death penalty and, if prosecuted for the death penalty, are less likely to receive the death penalty. These findings provide an important context for the current study and whether our examination of capital case-processing in 18 counties corroborates these findings.

The Baldus study finding that race-of-victim and race-of-defendant were particularly strong in jury decisions raises questions as to why this might have been the case. In a 2003 study of Pennsylvania capital cases, Professor Wanda Foglia, interviewed 74 jurors who participated in 27 death penalty trials. Forty-three of those interviewed were jurors in cases in which the defendants were sentenced to death, and 31 were jurors in cases where the defendants were

sentenced to life without parole. Foglia found that most of the jurors whom she interviewed misunderstood the law of capital sentencing. They often based their decisions on the erroneous assumption that the defendant would be released after a term of years if given a life sentence. They also failed to understand jury instructions regarding mitigation in their deliberations. Foglia found that jurors who assumed that defendants given a life sentence would serve 15 years or less in prison were much more likely to vote for the death penalty. While these findings were based on different cases than those included in the Baldus study, they do reinforce the notion that jurors' ignorance of the law could result in their reliance on their perceptions of the risk posed by the defendant and the defendant's culpability. Such perceptions may well drive jurors to focus on victim characteristics in their decisions, rather than the evidence before them.

J. An Overview of the Pennsylvania Death Penalty System

The Pennsylvania death sentencing system consists of a prosecutorial, defense, and judicial decision-making system in each of the state's 67 counties. Pennsylvania's homicide statute provides for three grades of murder: first-degree murder is defined as "an intentional killing" (18 Pa.C.S. § 2501(a)), with possible penalties of death or life without parole; second-degree murder is defined as "homicide ...when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony" (18 Pa.C.S. § 2502(b)), with a mandatory penalty of life without parole; and third-degree murder is defined as "...all other kinds of murder" and is graded as a first-degree felony, with a maximum penalty of 40 years.

In order to be classified as death-eligible under an offense that meets the statutory requirement that it was an "intentional killing", one of 18 aggravating circumstances listed in Title 42 § 9711(d), must be present and provable beyond a reasonable doubt. These circumstances are:

1. The victim was a firefighter, peace officer, public servant concerned in official detention, as defined in 18 Pa.C.S. §5121 (relating to escape); judge of any court in the Unified Judicial System; the Attorney General of Pennsylvania; a deputy attorney general; district attorney; assistant district attorney; member of the General Assembly; Governor; Lieutenant Governor; Auditor General; State Treasurer; State law enforcement official; local law enforcement official; Federal law enforcement official or a person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position.
2. The defendant paid or was paid by another person, or had contracted to pay or be paid by another person, or had conspired to pay or be paid by another person, for the killing of the victim.
3. The victim was being held by the defendant for ransom or reward, or as a shield or hostage.
4. The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.
5. The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.
6. The defendant committed a killing while in the perpetration of a felony.
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.
8. The offense was committed by means of torture.

9. The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
10. The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable, or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.
11. The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.
12. The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503, or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue.
13. The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.C.S. §306(c) (relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the Act of April 14, 1972 (P.L. 233, No.64), known as the Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of 18 Pa.C.S. §7508 (relating to drug trafficking sentencing and penalties).
14. At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of the Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. §306(c), and the

killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

15. At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. §306(c), and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.
16. The victim was a child under 12 years of age.
17. At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.
18. At the time of the killing, the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant.

The process can be divided into nine steps:

(1) Homicide occurs;

(2) Homicide recognized by authorities;

(3) Case investigated by law enforcement and facts discovered/generated;

(4) Homicide suspect identified and arrested;

(5) Prosecution charges first-degree murder;

(6) Prosecution indicts for first-, second-, or third-degree murder;[5]

(7) If indicted for first-degree murder, prosecution decides whether to seek death penalty;

(7) Prosecution and defense unable to reach plea agreement;

(8) Defendant convicted of murder at trial by judge or jury;

(9) If convicted of first-degree murder, and prosecution has filed a motion for the death penalty, the sentencing authority (either the jury or judge) must decide on whether defendant deserves death penalty on basis of finding either (a) existence of aggravating circumstances and no mitigating circumstances or (b) aggravating circumstances outweigh mitigating circumstances.

The following are the current mitigating circumstances that may be presented by the defense during the sentencing phase of the first-degree murder trial:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the murder.

(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.

(4) The age of the defendant at the time of the crime.

(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.

---

[5] Notice of Aggravating Circumstances has been required by order of the Supreme Court of Pennsylvania beginning in 1989.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

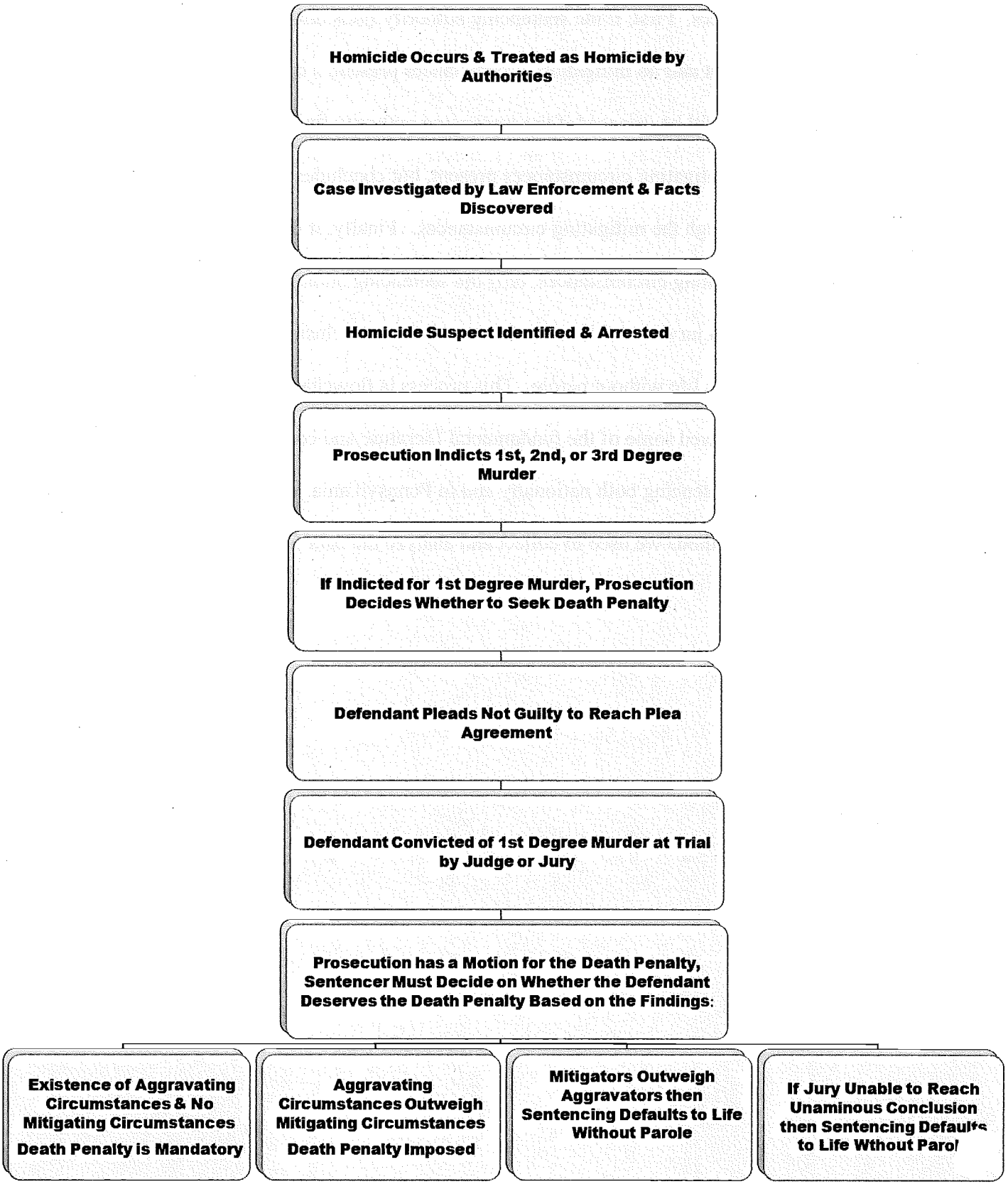
At each stage in the process, some attrition occurs and the universe of cases that could result in a death sentence narrows. By the end of the process, the number of individuals actually sentenced to death is a very small fraction of the number of people who commit a homicide. For this study, the focus is on those offenders who are potentially death-eligible because they have been convicted of first-degree murder. From among that class of offenders, some cases may have one or more aggravating circumstances, and prosecutors may file a motion to impose the death penalty on that basis. This sets in motion another series of decisions, including whether the prosecution will retract the motion for the death penalty and, if the motion is not retracted, whether the case will proceed to trial, and if convicted, whether the jury or judge will decide whether the death penalty is warranted.

The system contains numerous points at which discretion may be exercised by prosecutors, judges and juries to exclude individual death-eligible cases from the risk of a death sentence. This can result from the plea agreement process, in which prosecutors agree to reduce a first-degree murder indictment to a lesser murder charge, or to waive the death penalty as part of a plea agreement. It can also result from the court acquitting the defendant on the first-degree charge during the trial phase, or the judge or jury sentencing the defendant to life imprisonment in the penalty phase. Life without parole sentences can also result from a death sentence being reversed on appeal.

In the cases that advance to a jury penalty trial, a death sentence will be imposed in two different circumstances. First, if the sentencing authority finds one or more statutory aggravating circumstances present and no mitigating circumstances present, a death sentence is mandatory. A death sentence also will be imposed if the sentencing authority finds one or more aggravating circumstances and mitigating circumstances present, but concludes that the aggravating circumstances outweigh the mitigating circumstances. Finally, if the mitigating circumstances outweigh the aggravating circumstances, or if the sentencing authority finds no aggravating circumstances, or if a jury is unable to reach a unanimous conclusion (a "hung jury"), then sentencing defaults to life without parole. This process is flowcharted below in Chart 3.

Having reviewed some of the fundamental literature and contextual background on disparity in death sentencing both nationally and in Pennsylvania, we move next to a detailed discussion of the methods we used to collect and analyze the data for the current study.

Chart 3: Flow of Death Penalty Cases



Chapter II: Research Methods

To answer the research questions posed in Chapter I, we required extensive information on the offense, processing decisions, defendant characteristics, and victim characteristics. Specifically, we needed to be able to identify all offenders accused of homicide who were death-eligible by virtue of the fact that the offense qualified for first-degree murder, with at least one aggravating circumstance present. In addition, we needed information on potentially relevant factors that might be considered by the prosecution, judge, and jury in making the decision as to whether the appropriate punishment should be the death penalty. Building this data set was challenging and took several years to accomplish. Below, we first detail the need to identify a time frame for the study and then we review the data available from state agencies.

A. Time Period of Study

We faced three main considerations in determining an appropriate time frame for our study. First, the research questions focused on fairness and equity in the *current* administration of the death penalty, and therefore, it was imperative that we study the most current processing of potential death penalty cases possible at the time we began the study. Second, we needed a time period that provided a sufficient number of cases to allow for valid statistical analysis.

When we started planning the study in 2010-2011, we anticipated completing the study in late 2013. This meant that we needed to select an end date for the sample at least two years before the end of our data collection to allow for cases to reach the sentencing stage. Therefore, to capture the most recent cases possible, we selected 2010 as the end date for prosecution of homicide cases, so that the prosecution of the case would be completed well before the anticipated time period when we would be analyzing the data. As we later discovered, a few cases started in 2010 did not reach trial until late in 2014. Due to delays in data collection, however, we were able to see these cases through to sentencing.

A second, related issue we faced was to determine the case year in which to begin our sampling. A factor that helped us in this decision was a 1998 change in the law that raised the statutory maximum term of incarceration for third-degree murder from 20 to 40 years. Prior to this change, third-degree murder was a first-degree felony with a maximum sentence of 20 years. We discussed the potential impact of this change on case-processing with numerous county prosecutors, several of whom indicated that the change in the law had increased the possibility that prosecutors would accept guilty pleas to third-degree murder in cases charged as first- or second-degree murders. The prosecutors indicated that, prior to the change, they were very reluctant to accept a plea to third-degree murder with a maximum penalty of only 20 years, because this suggested that third-degree murder was equivalent to other felonies, such as robbery, aggravated assault and burglary of an occupied home. Thus, after factoring in the processing of cases with charges that were committed prior to the change in the sentencing law, we estimated that the year 2000 would be an appropriate year to start with, since by then, the new law would have applied to almost all cases being prosecuted. Thus, the sentencing change in 1998 was a watershed event that demarcated the contemporary status quo in capital sentencing practices in Pennsylvania, and therefore, served as a logical point in time to begin our analysis.

Another issue that influenced the decision regarding the appropriate time frame was the need for a sufficient number of cases to conduct a valid statistical analysis. To help us anticipate the number of cases in which the death penalty was imposed over the 2000-2010 time period, we asked the DOC for the number of offenders who had been incarcerated in their facilities in that eleven-year time period (2000-2010). The DOC indicated that 61 capital offenders had been incarcerated since the year 2000. In order to estimate the number of death penalty trials that took place during that period, we drew on the aforementioned Baldus study, which found that

approximately 25% of those for whom the death penalty was sought, received the death penalty. Assuming that such proportions were still applicable, we estimated that approximately 240 death penalty trials would have taken place during that period. We concluded that these were sufficient numbers on which to conduct our statistical analysis. Thus, we determined that the eleven-year time frame of 2000-2010 would provide a large enough pool of death-eligible offenders to result in a strong and reliable statistical analysis. While reaching back further in time to begin our case analysis would have yielded a larger number of cases, it also would have reduced the study's relevancy for contemporary capital sentencing practices, as discussed above.

B. Data Sources

Set forth below is our review of the secondary data sets that establish the basis for our field data collection effort. Based on our review of the DOC and PCS information, we estimated that approximately 60 offenders received the death sentence during this time frame, and another 1,200 offenders received a life sentence, with the vast majority of these life sentences imposed for first-degree murder. We concluded that these sample sizes would be statistically adequate to examine the decision to seek the death penalty, as well as the decision to sentence the defendant to death.

AOPC Data

The first significant challenge for the study at this stage was identifying sources of data on all death-eligible offenders across the Commonwealth. The only available statewide data set on offenders prosecuted in Pennsylvania's criminal justice system resides with the AOPC. The data compiled by the AOPC begins with police officers filing a Police Incident Report for all cases entering the court system. This data ultimately ends up in the Common Pleas Case Management System (CPCMS). The CPCMS includes demographic characteristics of the

defendant, the offense(s) the defendant is alleged to have committed, and the type of legal representation, as well as identifiers such as offense tracking number, state identification number, and the case docket number. The CPCMS data identifies all offenders alleged to have committed a homicide, including inchoate (attempted) offenses. Importantly, the data does not provide information that would have allowed us to identify death-eligible defendants that are central to this study.

This data set originates in each of 540 Magisterial District Courts, the 25 Philadelphia Municipal Courts, and the 12 Pittsburgh Municipal Courts. Due to the large amount of data being entered into the computer system by many different individuals at varying stages of the criminal justice process, it was necessary to verify the accuracy of the information whenever possible. The CPCMS data often has missing information on important variables, such as the defendant's race and the specific conviction offense. Despite these problems and concerns, we used this source of data to identify cases entering the criminal justice system and as the starting point for our study. We were fortunate that the AOPC was very helpful in providing the necessary data from its files, as absent that information, we would have not been able to conduct the study.

PCS Data

The PCS provides guidelines for all felony and misdemeanor sentences in the Commonwealth. However, it does not provide guidelines for sentences for either first- or second-degree murder offenses because the only sentencing decision in these cases is life in prison or death for first-degree murder convictions, and life in prison for second-degree murder convictions. During the implementation of the guidelines, the PCS did not request that courts submit guideline sentence forms for first- or second-degree murder. However, in the late 1990s,

the PCS decided that it was important to obtain this information and requested submission of guideline forms for those two degrees of murder. While PCS has no authority to enforce the submission of the forms, courts across the Commonwealth did submit information on these offenses during the 2000-2010 time frame we chose for our study. The data on convictions reported to the PCS enhanced the AOPC data by providing information on defendants' criminal history, as well validating the information contained in the AOPC data. However, the PCS data did not include information related to whether offenders were death-eligible as a consequence of the presence of at least one of the statutory aggravating circumstances, though it did provide criminal history, which speaks to one of the aggravating circumstances.

We obtained PSC data for sentences imposed during the period 2000 through 2014, which is the most recent data available to supplement and verify the AOPC data. The website for the full data compiled by the PCS on each sentenced defendant is available at: http://pcs.la.psu.edu/data/documentation/code-books/sentencing-data/sgs-web-data-code-book-2001-2011/view.

DOC Data

The DOC collects information on all offenders incarcerated for homicide. The data includes IQ, defendant psychological assessments, offense description provided by the offender, as well as demographic information that expanded our data on offenders. The DOC data also allowed for checking the accuracy of information from the AOPC and the PCS data files. In 2012, we requested and received this data from the DOC on all offenders incarcerated in the system for first-, second-, and third-degree murders during the period of 2000 through the date of the request. DOC provided the information on the 2400 cases in narrative form. During that summer, we created a coding form and codebook, and trained a team of coders to code each of

the cases into our data set. Because cases initiated in 2010 may not have resulted in convictions by 2012, we requested an update in May of 2014 on all new admissions, since the initial request and this information was entered into our data set during June of 2014. We subsequently requested another follow-up for additional cases in 2015.

C. Identifying Eligible Cases

One of the most challenging issues we faced in making our case-selection decision was due to Pennsylvania's practice of initiating homicide prosecutions by charging each defendant with general criminal homicide. This made it very difficult to distinguish "death-eligible" cases, which are central to our study, from those that are not death-eligible. This means that the particular class of cases we wished to study was embedded in a much larger pool of cases that could include any of the various degrees of murder or manslaughter. As a result, we determined that the simplest solution was to sample only cases with a first-degree murder *conviction*, as representative of cases that were potentially death-eligible. However, we had several concerns with limiting our sample to such cases. First, we knew that one decision for the prosecution is whether to negotiate a reduction from first-degree murder, to either second- or third-degree murder. To eliminate all lesser levels of murder would be to ignore the decision by the prosecution to accept a guilty plea to a lesser offense. There might be many reasons for reducing the initial first-degree murder charge, including evidentiary concerns or defendant cooperation in the prosecution of the case, among other possible justifications. If we were to eliminate this potentially critical filtering decision-point, we would reduce our opportunity to study the full range of decisions involved in processing cases from the time of the commission of the offense to a death verdict. A second issue was the overlap among the statutory grades of murder. Second-degree or felony murder is not eligible for the death penalty. However, if it is an

intentional killing during the course of a felony, then the defendant is considered to be death-eligible, since such a killing constitutes an aggravating circumstance under the statute.

The research challenge before us was to locate a sample of all defendants prosecuted during the 2000-2010 time period, whom prosecutors believed had committed a first-degree murder and might have been eligible for the death penalty. This meant that, to ensure that we included all potential death-eligible offenders in our base sample, we had to include all homicide cases that were initially charged under the general homicide statute during the time period of the study. We relied upon three data sets to assist us in identifying offenders targeted in our study. The key data source for identifying our sample was the AOPC, as it identifies all offenders charged with homicide. Rule 802 of the Rules of Criminal Procedure requires that the prosecutor file a notice of aggravating circumstances either at the time of arraignment or subsequent thereto if the prosecutor becomes aware of the existence of an aggravating circumstance after arraignment. Therefore, any individual prosecuted under the homicide statute is potentially death-eligible because at least one of the aggravating circumstances specified in 18 Pa.C.S. §9711 could be filed. The implications of this rule for our selection of cases was that it would be necessary for us to identify all potential homicide cases charged under the general homicide statute (18 Pa.C.S. §2502), and then follow the processing of those cases, including the filing of any aggravating circumstances, to determine whether or not they were first-degree murder cases and whether they were death-eligible.

The AOPC data identified a total of 4,274 criminal homicide cases. Tables 1-3 provide descriptive information on these cases, including the number of homicide charges and the number of convictions per case. As can be seen, the large majority of cases (90%) involved only one charge or count and one conviction, and of the cases charged with homicide, almost 30% did

not receive a homicide conviction, indicating that the prosecution for homicide was dropped or the defendant was found not guilty.

Table 1: Number of Homicide Charges/Counts and Convictions per Docket Case		
Number of Counts	**Frequency**	**Percent**
1	3,841	89.9
2	328	7.7
3	65	1.5
4 or more	39	.9
Number of Convictions	**Frequency**	**Percent**
0	1,260	29.5
1	2,776	65.0
2	186	4.4
3	36	.8
4 or more	15	.4

Table 2 shows the type of conviction outcomes received by the offenders who were convicted of homicide in the AOPC sample, for up to three homicide convictions. There were 1,115 docket cases with at least one first-degree murder *conviction*. Of those, 155 also had a second first-degree murder conviction, indicating that they were convicted of two counts of first-degree murder, and 38 had a third first-degree murder conviction. The data indicate that first- and third-degree murder convictions are the two most common outcomes, accounting for almost 79% of first convictions and higher percentages of second and third convictions. A total of 407

docket cases had at least one conviction for voluntary or involuntary homicide, other than first-, second-, or third-degree murder.

Table 2: Number and Type of Homicide Conviction Outcomes per Docket		
First Conviction		
Conviction Type	**Frequency**	**Percent**
First-Degree Murder	1,115	37.4
Second-Degree Murder	241	8.1
Third-Degree Murder	1,235	41.4
Lesser Homicide	392	13.1
Total	2,983	
Second Conviction		
Conviction Type	**Frequency**	**Percent**
First-Degree Murder	155	65.1
Second-Degree Murder	21	8.8
Third-Degree Murder	51	21.4
Lesser Homicide	11	4.6
Total	238	
Third Conviction		
Conviction Type	**Frequency**	**Percent**
First-Degree Murder	38	76.0
Second-Degree Murder	3	6.0
Third-Degree Murder	5	10.0

Lesser Homicide	4	8.0
Total	50	

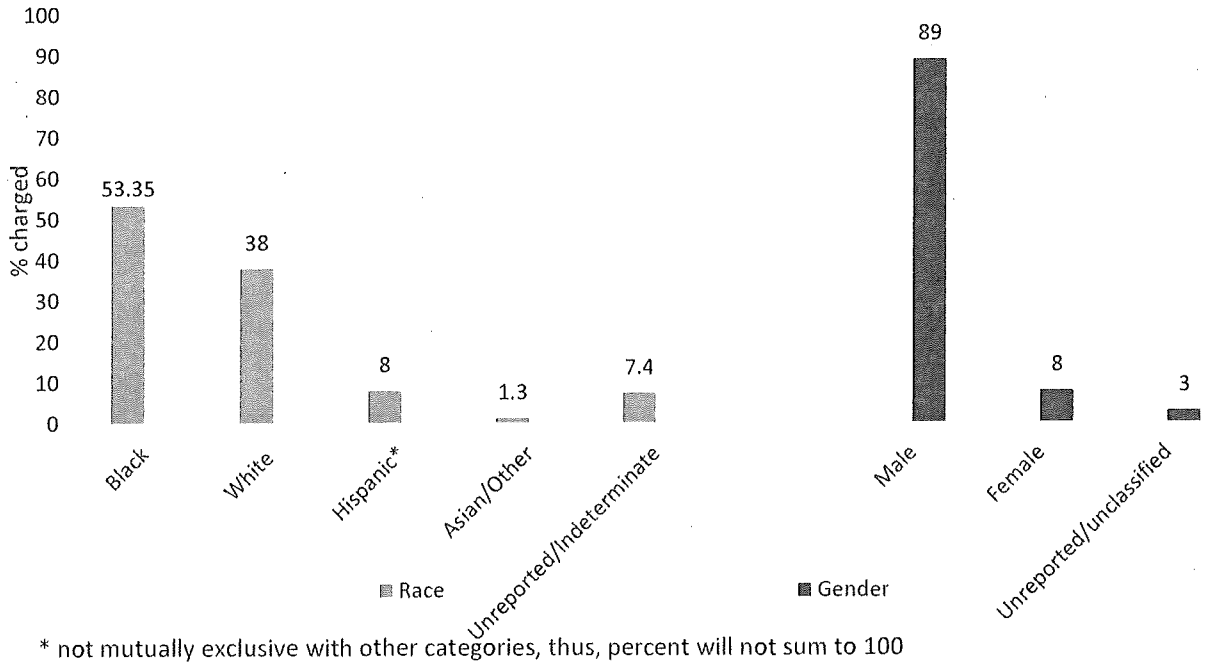
Table 3 shows the race/ethnicity and gender breakdown of all of the defendants charged with murder/criminal homicide. Black defendants comprise 53% of the cases, White defendants comprise 38%, and Hispanic defendants comprise 8%. In 2000, 10.8% of Pennsylvania's population was Black and 5.7% was Hispanic. Thus, the number of Black defendants charged with murder is highly disproportionate to their proportion of Pennsylvania's population. Further, the gender makeup is very disproportionately male. In turn, this means that the murder charge docket data from which we started our analysis was highly racially disproportionate, and overwhelmingly male.

Table 3: Race/Ethnicity and Gender of All Murder Charged Defendants (convicted and not convicted)

Race/Ethnicity	**Frequency**	**Percent**
Black	2,280	53.35
White	1,622	38.0
Hispanic*	341	8.0
Asian/Other	56	1.3
Unreported/Indeterminate	316	7.4
* Not mutually exclusive with other categories, thus, percent will not add up to 100.		
Gender	**Frequency**	**Percent**
Male	3,796	89
Female	352	8
Unreported/unclassified	126	3

Figure 1 shows these descriptive differences graphically. Appendix A contains a diagram of our sampling/data collection strategy in which we tracked cases with defendants charged with first-degree murder through the system.

Figure 1. Race/Ethnicity and Gender of All Murder Charged Defendants (convicted and not convicted)



* not mutually exclusive with other categories, thus, percent will not sum to 100

D. In-Depth Field Data Collection

Compiling the AOPC, PCS, and DOC data, coding the DOC data, and linking the three data sets provided a foundation for our study, but failed to provide the information necessary for an in-depth study of the decisions made in identifying death-eligible offenders and processing death-eligible individuals through the criminal justice system. Specifically, the statewide data systems lacked key information that other high-quality death penalty research, such as that conducted by University of Maryland Professor Ray Paternoster, had found important in his study of the application of the death penalty in Maryland. While considerable information like that collected in the Paternoster study was contained in the AOPC, PCS, and DOC data sets,

critical information was missing from the Pennsylvania data sets. In order to obtain that information, we traveled to the counties where the cases were prosecuted and collected it there. Professor Paternoster provided us with his codebook containing the full list of the variables and the codes for these variables that his team had collected in his study. When we compared what we could obtain from the available data sets in Pennsylvania with what was identified in the Paternoster codebook, it became clear that much of that information could only be obtained from local county files. Below is a list of the additional information that we needed to collect from the county files (See Appendix A for the field data collection variables):

- Defendant information
    - Employment status
    - Criminal history (for some offenders, PCS and DOC provided conviction history)
    - Substance abuse
    - Education
    - Additional charges
    - Potential aggravating circumstances
    - Aggravating circumstances identified by the prosecution
    - Aggravating circumstances charged by prosecution in requesting death penalty
    - Aggravating circumstances found at trial
- Victim information (Up to three victims)
    - Name, age, gender, and race/ethnicity of the victim
    - Relationship to defendant
    - Marital status
    - Dependent children

- Age of children
- Victim occupation
- Role of victim in offense (e.g., possible precipitation)
- Location of homicide
- How the victim was killed and whether the victim suffered multiple trauma, was tortured, was killed execution style, and other details of the offense that might influence the consideration for the death penalty

- Defendant's defense
  - Argued accident
  - Mistaken identity
  - Insanity
  - Witness credibility
  - Expert testimony by psychiatrist, psychologist, or other
- Strength of evidence
  - Physical evidence linking defendant to the crime
  - Physical evidence linking weapon to defendant
  - One or more eyewitnesses to the crime
  - Co-defendant who testified against defendant

We adapted Professor Paternoster's codebook into a draft data collection instrument appropriate for Pennsylvania. To test the instrument in the field, we contacted President Judge Joleen Kopriva of Blair County, requesting access to the County's files for homicide convictions. Judge Kopriva approved our request and provided the case files in a conference room at the Blair

County Courthouse for our review. Two of our principal investigators and two data collectors coded the files.

We learned much from this field testing, including the need to substantially revise our form and the draft codebook. The field testing also identified aspects of problems with the data collection that would require extensive training for our data collectors. Additionally, it gave us a reasonable estimate of the time it would generally take a data collector to code the data once we had the offense files. Based on this experience, we estimated that a coder with available files and a place to work could code, at most, five cases per day.

We then began to assess the number of cases we could afford to collect and the number of counties our financial resources would allow us to travel to, given the costs of travel, food, and lodging, and the considerable travel time that would be expended in traveling across the Commonwealth. We also recognized that materials might not always be made as readily available as they were in Blair County.

Based on the results of our test in Blair County, we were able to formulate a plan to determine the number of cases and counties we could afford to include in the study in the field. We ascertained that there were two ways we could improve the efficiency of our time and money in the field. First, we reduced the number of cases by narrowing the universe of defendants to those who were convicted of first-degree murder. We were able to do this with the AOPC charging data which, although it did not generally specify the level of homicide and never indicated whether the defendant was death-eligible, did provide information on the level of murder of which the defendant was convicted. By limiting the sample to those ultimately eligible for the death penalty due to the existence of an aggravating circumstance, we reduced the number of cases to review in the field from 4,274 to 1,115.

For the purposes of studying homicide case-processing more generally, this decision severely limited the generalizability of our study. In other words, for cases that did not result in first-degree murder convictions, we had only general data from the AOPC, PCS and DOC. For these cases, we did not have the very specific information involving the many variables that we had collected in the codebooks for cases with first-degree murder convictions. Moreover, for the cases that did not result in a conviction of any level of homicide, we now had only general AOPC data. However, since our primary charge was to study the application of the death penalty, rather than homicide case-processing more generally, we felt justified in focusing on first-degree murder convictions, since defendants with lesser homicide convictions cannot receive the death penalty. What we could not study was whether race or ethnicity influenced the decision-making associated with determining the degree of homicide to charge in the first place or determining whether to retract the motion to seek the death penalty in any case that did not result in a first-degree murder conviction.

Second, we decided to limit the travel time and cost by not collecting data in all 67 counties. After reviewing the data provided by AOPC, we determined that there were 18 counties that had ten or more first-degree murder convictions and that studying all of the first-degree murder convictions in these 18 counties would be the best strategy. The 18 counties were: Allegheny, Berks, Bucks, Chester, Dauphin, Delaware, Fayette, Lackawanna, Lancaster, Lehigh, Luzerne, Monroe, Montgomery, Northampton, Philadelphia, Washington, Westmoreland, and York. These sampling strategies allowed us to reduce travel time and costs, but still enabled the collection of detailed information on more than 80% of all first-degree murder convictions in the Commonwealth in our time frame. Further, these counties represented the state geographically, with the exception of the northwest. In addition, focusing on counties

with ten or more first-degree murder convictions enabled us to conduct meaningful comparisons among the counties.

In order to capture offenders who were death-eligible, we needed data on the presence of aggravating circumstances. This raised the question as to which files in the county would provide the best source of information on the defendant and his or her history, the details of the offense, the potential for aggravating circumstances,[6] and information regarding the evidence against the defendant. Based on discussions with those in the field and our experience with county records, we determined that the most detailed information was likely to be found in each county's District Attorney's files. Court files contain only the information presented in court, which would not include other information that the prosecutor might use in deciding on the level of murder to charge and, if potentially a first-degree murder offense, whether the defendant might be death-eligible. On the other hand, defense files would be located in a variety of offices, depending on the location of the attorney who represented the defendant. Thus, we attempted to gain access to District Attorneys' files in the 18 counties in our sample.

Before contacting the District Attorney in the first county chosen for our field study, we reviewed the AOPC public docket website for as much information as possible regarding the cases in that county. The dockets on the website provide a chronological review of major issues raised and decided during the processing of each case. Because this source provided important

[6] It should be noted that the initial notice of the presence of aggravating circumstances filed by a prosecutor does not necessarily mean that the defendant is actually death-eligible, as there is no standard of proof at this stage. The prosecutor may merely be preserving the option without regard to whether an aggravating circumstance can be proven beyond a reasonable doubt, which is the standard at sentencing. Moreover, notice can be used at this stage to impress the prosecutor's view of the seriousness of the offense and to use this threat as a pressure point to encourage a negotiated plea. Therefore, there are reasons to expect that a notice of aggravating circumstances significantly exaggerates the proportion of cases that would be death-eligible under scrutiny of a judge or jury post-conviction.

information not available in the data we received from the AOPC, we reviewed these dockets for all homicide charges/indictments we found in the AOPC data. We trained undergraduates at Penn State to conduct this data collection. The website docket sheets included demographic information on the defendant; the judge's name; the date of the offense and the imposition of the sentence; adjudication information on all charges; whether a motion for the death penalty and/or a notice of aggravating circumstances had been filed; any change of venue request and response; the type of defense counsel; any request for competency or psychological testing and response; information about the penalty trial; whether the defendant was sentenced by a judge or jury; the sentence; in the case of a penalty trial, the reason for the death or life sentence; and whether there was an appeal filed in the case. This data considerably enhanced the information we had collected on our largest sample of those initially charged with murder.

Following this first data collection effort, we began contacting counties by letter, indicating the purpose of the study and requesting permission to access the files regarding the case from the District Attorney's office. We also indicated the number of cases in our sample that we were interested in reviewing and the estimated time it would take to collect the information. The letter further indicated that one of the principal investigators would follow-up with a phone call, to review our request and answer any questions that they might have. We had no idea what the response would be and were pleasantly surprised at the level of cooperation and assistance we received from the District Attorneys we contacted over the course of the next two years of data collection. Certainly not all of them opened their files, but District Attorneys in 14 of the 18 counties in our field sample assisted us in gathering the information we needed. Ultimately, there were four counties (Chester, Westmoreland, Fayette, and Northampton) in which we were unable to obtain a response from the District Attorneys after numerous attempts

to contact them. Alternatively, we worked with the President Judge in Westmoreland County who brokered our access to the information in that county. In Fayette, Northampton, and Chester Counties, we searched the County Clerk's and court files and often contacted defense attorneys for information. Local newspaper coverage provided additional information. Thus, we were very pleased with the results of our search for information, even in the counties where the District Attorneys were uncooperative.

Philadelphia presented many special challenges that require a more detailed explanation. We identified 500 first-degree murder convictions in Philadelphia for the period 2000-2010, which meant that we needed two data coders in Philadelphia for approximately 10 weeks - a tremendous investment for the study. In September of 2013, we made our first request to Philadelphia District Attorney Seth Williams, which went unanswered. Subsequent phone calls were unsuccessful in eliciting a response, but ultimately, we were able to meet with representatives from the District Attorney's Office in February of 2014 to discuss our request for access to their files. In April of 2014, we received a letter rejecting our request from the First Assistant District Attorney. While we were disappointed by this turn of events, it did not deter us from searching for alternative methods of gathering data from Philadelphia. We reached out to the President Judge of the Philadelphia County Court of Common Pleas, Sheila Woods-Skipper, for assistance in our endeavor, and she arranged for the Philadelphia Clerk of Court's Office to provide the files we needed, as well as excellent work spaces for our coders. We began data collection in that office in the summer of 2014. In addition, we contacted the Defender Association of Philadelphia, a non-profit public defender organization which represented approximately 20% of the Philadelphia defendants in our sample. The Defender Association agreed to our review of their files and we started collecting data there in late July of 2014.

We also decided to make another attempt to gain access to the Philadelphia District Attorney's files and, in late August of 2014, we sent Mr. Williams another request for access to the files. In this request, we indicated that we were willing to reduce the length of time we would have to spend reviewing his office's files by reducing the sample years from 2000-2010 to 2005-2010. This reduced our sample size from 500 to approximately 250 cases (we ultimately collected information from 331 cases), while maintaining our focus on the most recent cases processed. We further advised that we needed information for only approximately 125 remaining cases. We were finally granted approval to search those files in late 2014, and data collection began in January 2015. Following another disruption during which the District Attorney's office advised our coders to cease their work and vacate the offices for several months, based on erroneous information, we finally completed data collection in the Philadelphia District Attorney's office in May of 2015, approximately 18 months after we first requested access to the District Attorney's office files.

The actual process of data collection in the county offices was very time-consuming. We primarily had to work with paper files, as very few of the files had been computerized. Instead, the files were contained in banker boxes, and in some cases, amounted to as many as 20 boxes per case. The organization of these files was largely idiosyncratic to the individual attorney or County Clerk's staff, and was not consistent even within a specific office. Moreover, we were searching for a different number of variables for each case, depending on what was missing after exhausting the data sets from the AOPC, PCS and DOC. Thus, for some cases, we had to search through a dozen boxes of randomly organized files to locate only a few variables (which were nonetheless critical to the coding of that case). The time to code these files varied from thirty minutes to several hours. As a result, the field data collection component was the most

demanding part of the overall data collection process, but was absolutely essential to constructing a complete data set. Finally, after searching all of these sources, we also reviewed local news reports and appellate documents to verify and to fill-in information we were unable to locate in the field.

E. Field Corrections to the Data

It should be noted that when we were in the field, we found some errors in the AOPC data's classification of murders. We provided District Attorney's offices with lists of the cases that the AOPC data indicated involved first-degree murder convictions. Often, we would receive responses indicating that some of the AOPC cases were incorrectly classified as either second- or third-degree, rather than first-degree murder cases. Occasionally, the District Attorney would identify first-degree murder cases that were not on the lists we provided. Finally, we that found that some defendants on the list were juveniles at the time of the murder and thus not death-eligible as a result of the 2005 United States Supreme Court decision in *Roper v. Simmons,* 542 U.S. 551 (2005).

Table 4 provides a list of our sample counties, the number of cases we originally identified as first-degree murder cases in the AOPC data and the final, accurate number of cases collected in the field for the study.

Table 4: Field Data Collection with Number of Cases Originally Identified as First-Degree Murder Cases and Number of Cases Collected in the Field

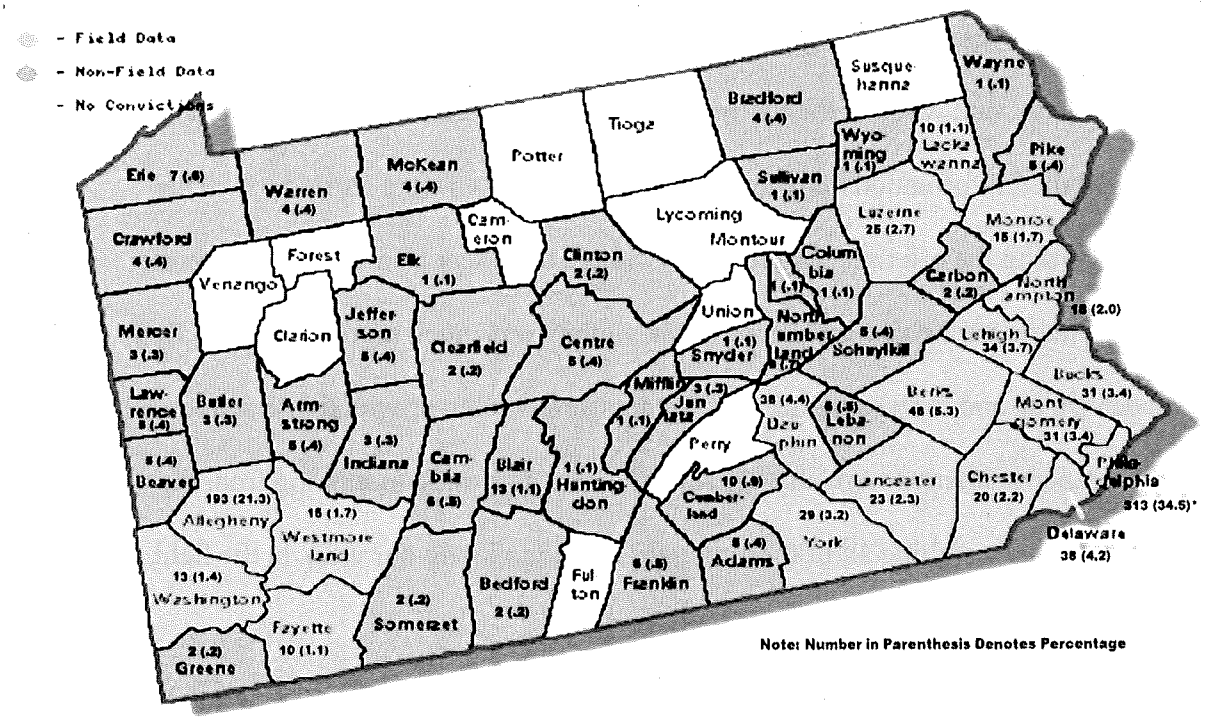
County	Initial Cases	Final Dataset
Allegheny	193 (21.3)	149 (16.9%)
Berks	48 (5.3)	38 (4.3%)
Bucks	31 (3.4)	24 (2.7%)

Table 4: Field Data Collection with Number of Cases Originally Identified as First-Degree Murder Cases and Number of Cases Collected in the Field		
County	**Initial Cases**	**Final Dataset**
Chester	20 (2.2)	15 (1.7%)
Dauphin	40 (4.4)	46 (5.2%)
Delaware	38 (4.2)	39 (4.4%)
Fayette	10 (1.1)	12 (1.4%)
Lackawanna	10 (1.1)	11 (1.3%)
Lancaster	23 (2.5)	34 (3.9%)
Lehigh	34 (3.7)	30 (3.4%)
Luzerne	25 (2.7)	22 (2.5%)
Monroe	15 (1.7)	17 (1.9%)
Montgomery	31 (3.4)	30 (3.4%)
Northampton	18 (2.0)	24 (2.7%)
Philadelphia	313 (34.5)*	331 (37.6%)
Washington	13 (1.4)	14 (1.6%)
Westmoreland	15 (1.7)	17 (1.9%)
York	29 (3.2)	27 (3.1%)
Total	906 (99.8)	880
* These cases were from the time period 2005-2010.		

We had anticipated that field data collection would take about 18 months, but due to the considerable delays obtaining access to files in some counties, locating cases in the field, and

travel delays, field data collection actually ended up lasting from September 2012 through April of 2015 (31 months).

1st Degree Murder Convictions in Field Data & Non-Field Data Counties



Source: dyimaps.net ©

F. Cleaning Data

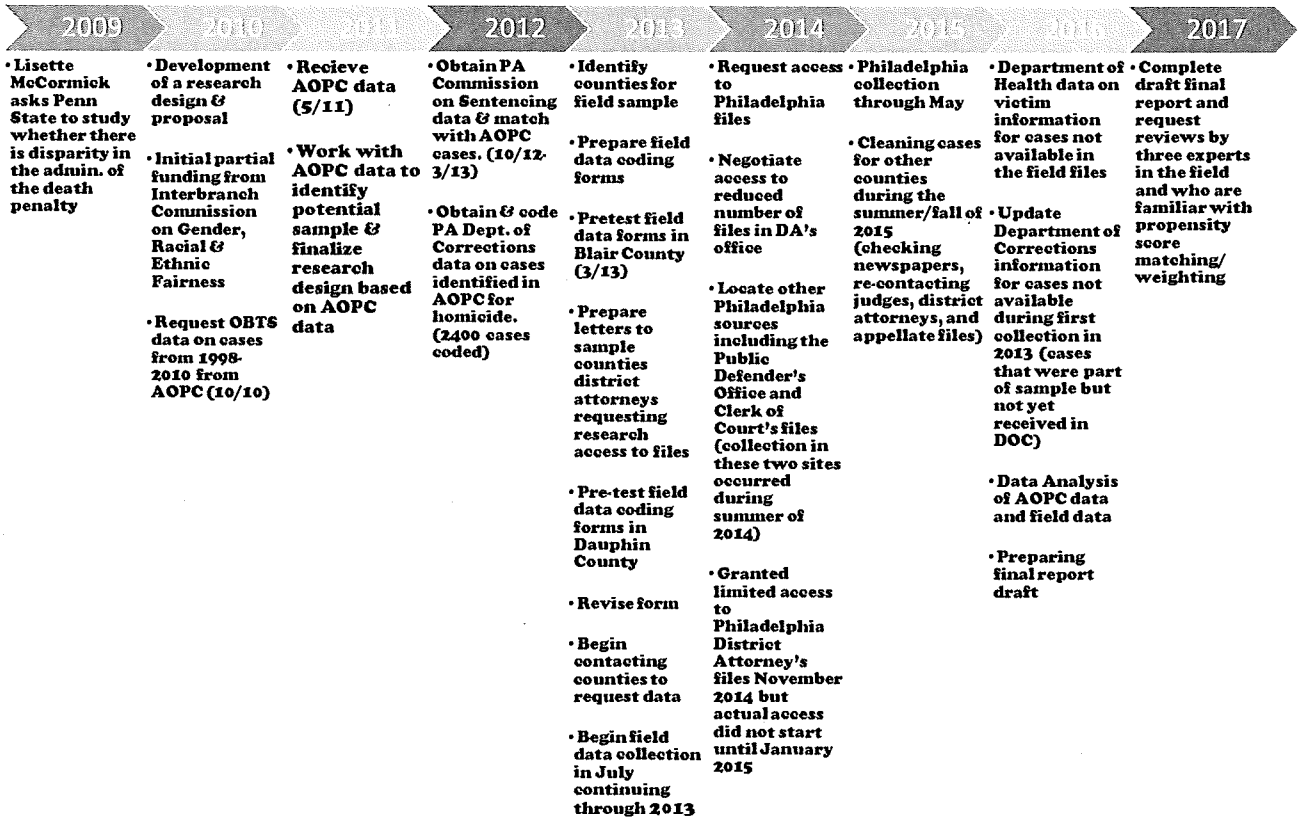
An important yet tedious component of the study required reviewing the AOPC, DOC, and PSC data sets and the field data set and identifying inconsistent or missing information. One set of variables that was crucial to the study was victim characteristics and the details of a victim's role in the offense. The research design limited the information regarding the victims to a maximum of three victims per case, and for each of the three victims, the design called for collecting the victims' names, ages, genders, ethnicities, races, marital status, relationship to the offender, dependents, and whether the victims precipitated the offense in any way. In addition, we collected detailed information on where and how the offenses were carried out. The information regarding the offenses was generally simple to collect from the police reports; however, information on the characteristics of the victims was much more difficult to find. If there had been a trial and sentencing hearing, the transcripts often provided information on the victim. Newspaper obituaries were also checked to locate information missing from the court files. However, after searching all of these sources and completing our work in the field, we found that we were still missing information for 81 victims.

To complete the collection of data on victims, we needed to gain access to the Pennsylvania Department of Health's death certificate information. The Pennsylvania Joint State Government Commission assisted us by submitting a request on our behalf that included the purpose of the study and the reason for the request. In response, we received an excel sheet with the race, ethnicity, gender, and date of birth of the deceased individuals. This process took several months to complete.

The next step in the cleaning process involved merging the data obtained from the files in the field with the data we had received from the AOPC, PCS, and DOC, and otherwise cleaning

the data in preparation for analysis. This consisted of removing duplicate cases, such as those in which a defendant committed multiple murders and was prosecuted under different docket numbers but part of the same criminal proceedings, and eliminating cases that did not qualify for the sample, such as cases in which the defendant was a juvenile at the time of the murder, and cases that did not actually involve a homicide (i.e., inchoate cases). We also had to identify missing or invalid data, and locate or correct it. For example, on occasion, we had identified a homicide from a review of a case file in the field but we did not have AOPC, PCS or DOC data to match it. In order to locate the missing information that would have been in the possession of these sources, we made additional DOC data requests and conducted internet searches of newspaper articles regarding the case and searches of dockets publicly available on the AOPC website. In June of 2016, we completed the data cleaning phase, and initiated the analysis phase of the study. This process is summarized in the timeline below in Chart 4.

Chart 4: TIMELINE OF CAPITAL PUNISHMENT DECISIONS IN PENNSYLVANIA: 2000-2010



Chapter III: Analytical Plan and Findings

Our analysis proceeds by presenting descriptive statistics from our field-collected data on major variables of interest: charges, case outcomes, and defendant race, ethnicity, and gender. Second, we present key cross-tabulations of case outcomes and characteristics by defendant race and ethnicity, as well as cross-tabulations of defendant race and ethnicity by victim race and ethnicity. In Appendix B, we present logistic regression models of three key decisions regarding the death penalty: the decision to seek the death penalty, the decision to retract a death penalty filing, and finally, the decision to impose the death penalty.

Our analysis culminates with propensity score analyses of the decision to seek the death penalty and the decision to impose the death penalty. Methods such as logistic regression are very useful, but can be vulnerable to omitted variable bias (i.e., cases being alike or different in ways that we cannot observe), risking the possibility that results might be spurious due to some unobserved factor connected to both of our predictors of interest (e.g., defendant race/ethnicity) and outcomes. Propensity score analysis is a widely accepted approach to address such omitted variable bias in research questions such as the ones we address here (that is, examining the effects of one or two predictors of interest while controlling for a large number of other observed and unobserved factors).

A. Descriptive Statistics: Field-Coded Data

Recall from Table 1 that of the 4,274 cases with criminal homicide charges statewide, 1,260 cases (about 30%) did not result in a conviction of any degree of homicide. In addition, as shown in Table 2, 62.6% of the homicide convictions are for a homicide graded less than first-degree murder. Thus, only a minority of cases in which the defendant is charged with or convicted of criminal homicide involve first-degree murder and exposure to the possibility of the death penalty. Unfortunately, our field data do not allow us to assess the processes (such as

acquittals or plea bargaining to lesser charges) by which some criminal homicide cases that are death-eligible result in first-degree murder convictions and other do not.

In our study, we focus on the detailed data collected from the 18 counties that encompass 87% of the first-degree murder *convictions* in the AOPC docket data, as described in Chapter II. Fuller descriptive statistics on the statewide AOPC data are presented in Appendix C. We first examine the conviction outcomes of these field cases, shown in Table 5. The majority of cases involve first-degree murder conviction by juries.

Table 5: Mode of Conviction, First-Degree Murder Convictions, Field Data

Outcome	Frequency	Percent
Guilty Plea	114	13
Convicted by Judge, First-Degree Murder	108	12
Convicted by Jury, First-Degree Murder	658	75

Table 6 lists the type of accompanying convictions, other than murder, in the field data cases. Most cases involved an additional felony conviction; notably, 128 cases had accompanying robbery charges, and 520 had other types of felonies.

Table 6: Type and Frequency of Conviction Accompanying First-Degree Murder Convictions

Type of Conviction	Frequency	Percent
Sex Offense	24	2.7
Robbery	128	14.6
Burglary	54	6.1
Any Felony	520	59.1
No Other Felony Convictions	155	18.0

Table 6: Type and Frequency of Conviction Accompanying First-Degree Murder Convictions		
Type of Conviction	**Frequency**	**Percent**
* Note: Percentages do not add up to 100 due to overlap between the conviction categories, which are not mutually exclusive.		

Next, for these field data cases, we examined the key outcomes related to the death penalty. Among the 880 first-degree murder convictions in our field data, prosecutors had filed notice of aggravating circumstances in 341 (38.8%) of them. Prosecutors actually *filed to seek* the death penalty in 313 of these 341 cases, or 35.6% of the 880 first-degree murder convictions in our field data. In the other 28 cases, there were filings of notices of aggravating circumstances, but prosecutors did not follow up by filing a notice to seek the death penalty. In 146 (46.7%) of these field data cases in which prosecutors filed a notice to seek the death penalty, however, they later *retracted* this filing. Then, of the 167 cases with defendants ultimately exposed to death at sentencing, 51 (30.5%) resulted in a death sentence. As a reminder, since we examined only *convictions* for first-degree murder, there were no cases in this analysis that resulted in an acquittal.

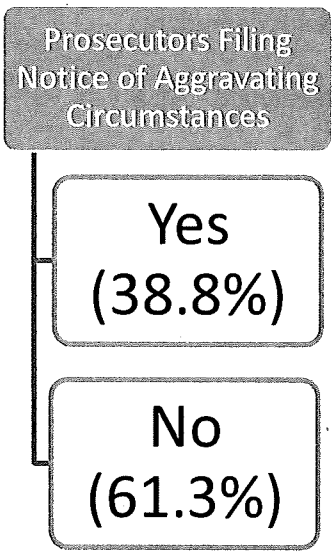
Table 7 lists the frequencies and percentages for these various outcomes relative to seeking and imposing the death penalty.

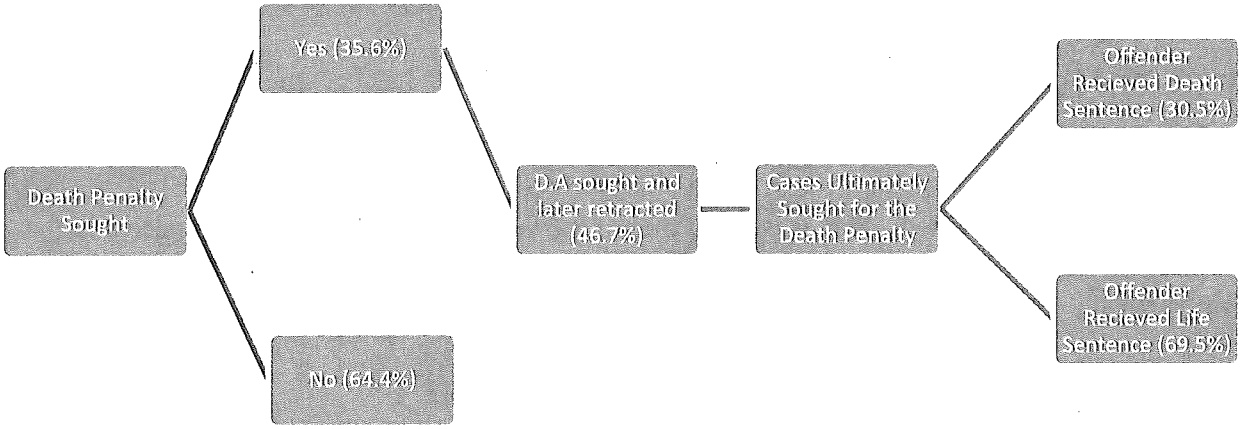
Table 7: Field Cases; Death Penalty Exposure and Sentences: a) Prosecutors Filing Notice of Aggravating Circumstances, b) Prosecutors Filing Notice to Seek the Death Penalty, c) Retracting Notice Seeking the Death Penalty, d) Death Penalty Imposed		
Aggravating Circumstance	**Frequency**	**Percent**
Yes	341	38.8
No	539	61.3
Death Penalty Sought		

Yes	313	35.6
No	567	64.4
Of 313 Cases Where Death Was Sought		
D.A. sought and later retracted	146	46.7
Of 167 Cases Ultimately Sought for the Death Penalty		
Offender Received Death Sentence	51	30.5
Offender Received Life Sentence	116	69.5

Figure 2 shows this flow of outcomes graphically.

Figure 2. Field Cases; Death Penalty Exposure and Sentences: a) Prosecutors Filing Notice of Aggravating Circumstances, b) Prosecutors Filing Notice to Seek the Death Penalty, c) Retracting Notice Seeking the Death Penalty, d) Death Penalty Imposed.





We also collected data on whether particular statutorily-defined aggravating circumstances were found to be present by prosecutors (whether they filed a motion to seek the death penalty or not, or retracted it or not) and whether the aggravating circumstances were found by the jury or judge at a penalty trial and entered on the sentencing form. Table 8 shows how often these aggravating circumstances were found to be present by prosecutors, and, if filed by prosecutors, how often they were found by the judge or jury.[7] The table also shows the frequency with which aggravating circumstances were found among the cases. Notably, many aggravating circumstances are quite rarely presented and even more rarely found. However, the aggravating circumstances, "Committed while in perpetration of a felony," "Defendant knowingly created grave risk of death to another," "Defendant has significant history of violent felony convictions," and "Defendant has been convicted of another murder" are presented more frequently than others (each aggravating circumstances is found in about 10% of cases or more).

[7] In our data collection, we coded aggravating circumstances two ways: 1) as filed by the prosecutor, and 2) as independently determined to be present by the data coders. Table 8 shows those aggravating circumstances that were filed by prosecutors. Our later propensity score analyses control for the aggravating circumstances as independently coded in the analyses of filing and retracting the death penalty, and as filed by the prosecutor in the analysis of the imposition of the death penalty.

This may not be surprising, as these appear to be more generic or widely applicable aggravating circumstances. Conversely, there were no aggravating circumstances filed for "[h]ijacking an aircraft", as this is typically a federal offense, and since the 1970s, has become an extremely rare occurrence. In addition, all of the aggravating circumstances are found by the court much less often than they are presented. This is equally true of the very frequently presented aggravating circumstances.

Table 8: Statutory Aggravating Circumstances: Filed by Prosecutors and Found at Trial by Jury/Judge: Frequency (percent of all field cases).

Aggravating Circumstances	Prosecutor Found	Jury/Judge Found
Victim was firefighter, peace officer	12 (1.4)	4 (.5)
Defendant paid for killing	3 (.3)	1 (.1)
Victim held for ransom, reward, or shield	3 (.3)	1 (.1)
Hijacking aircraft	0	0
Victim was prosecution witness	29 (3.3)	5 (.6)
Committed in perpetration of felony	134 (15.2)	23 (2.6)
Knowingly created grave risk of death	136 (15.5)	21 (2.4)
Offense committed by means of torture	48 (5.5)	11 (1.2)
Significant history of violent felonies	82 (9.3)	16 (1.8)
Defendant convicted of offense carrying life/death	39 (4.4)	8 (.9)
Defendant convicted of another murder	85 (9.7)	23 (2.6)
Defendant convicted of voluntary manslaughter	11 (1.3)	0
Defendant committed killing during drug felony	13 (1.5)	1 (.1)
Victim was associated with defendant in drug trafficking	23 (2.6)	2 (.2)

Victim was a nongovernment informant	4 (.5)	3 (.3)
Victim was under 12	27 (3.1)	6 (.7)
Victim was in third trimester or def. knew of pregnancy	8 (.9)	4 (.5)
Defendant was under PFA from victim	11 (1.3)	1 (.1)
Number of Aggravating Circumstances	**Prosecutor Found**	**Jury/Judge Found**
1	146 (17)	30 (3.4)
2	91 (10)	31 (3.5)
3	56 (6.4)	9 (1.0)
4	27 (3.0)	3 (.3)
5	15 (1.7)	0
6	0	0
7	2 (.2)	0
8	4 (.5)	0

Defense attorneys also offered a number of mitigating circumstances in the cases we examined. The statutorily-listed factors are set forth in Table 9, along with the frequency with which they were found by judge or jury. The two mitigating circumstances most frequently presented, and found, were "age of defendant" and "defendant had no significant history of prior crime." Again, as with aggravating circumstances, mitigating circumstances are found by the judge and juries much less frequently than they are presented by defense attorneys. Among the cases we examined, there were 167 death penalty trials, but we found mitigating circumstances presented in only 127 of these. In other words, in 40 of these cases, we found not one mitigating circumstance presented. We do not know if this is because there were no mitigating circumstances presented or that we could not find any record of the mitigating circumstances being presented.

Table 9: Mitigating Circumstances: Presented by Defense and Found by Jury/Judge: Frequency (percent of all field cases).		
Mitigating Circumstances	**Defense Presented**	**Jury/Judge Found**
No significant history of prior crime	51 (5.8)	22 (2.5)
Extreme mental or emotional disturbance	35 (4.0)	11 (1.3)
Subst. impaired capacity to appreciate criminality	35 (4.0)	7 (.8)
Age of defendant at time of crime	65 (7.4)	16 (1.8)
Acted under extreme duress or domination	13 (1.5)	3 (.3)
Victim was participant in defendant's conduct	0	0
Participation was relatively minor	6 (.7)	1 (.1)
Defendant act not sole proximate cause of death	1 (.1)	0
Number of Mitigating Circumstances*	**Defense Presented**	**Jury/Judge Found**
1	14 (1.6)	23 (2.6)
2	32 (3.6)	10 (1.4)
3	26 (3)	2 (.2)
4	16 (1.8)	2 (.2)
5	7 (.8)	1 (.1)
6	7 (.8)	0
7	6 (.7)	0
8 or more	19 (2.1)	0
* Statutory and other.		

In cases in which the death penalty is sought, the defendant is sentenced by a judge or a jury at a penalty phase trial. Table 10 shows the frequency with which these defendants are sentenced by a judge or a jury. Of the 167 cases in which the death penalty was sought by prosecutors, approximately 70% involved jury sentencings. Thus, when the death penalty hangs in the balance, the large majority of the defendants are sentenced by juries.

Table 10: Death Penalty Trial Cases Sentenced by Judge or Jury		
Cases Where Death is Sought		
Sentenced by	**Frequency**	**Percent**
Judge	50	29.94
Jury	117	70.1

The defendants in the field data cases utilized three different types of defense counsel: privately-retained attorneys, public defenders, and court-appointed attorneys. These are shown in Table 11. For the overall field sample and for the cases in which the death penalty was sought, the type of defense counsel is roughly evenly split among the three.

Table 11: Types of Defense Counsel		
All Field Data Cases		
Defense	**Frequency**	**Percent**
Privately-Retained	322	36.6
Public Defender	285	32.4
Court-Appointed	269	30.6
Cases Where Death is Sought (not retracted)		
Defense	**Frequency**	**Percent**
Privately-Retained	65	38.9
Public Defender	53	31.7
Court-Appointed	47	28.1

Finally, Table 12 shows the racial, ethnic and gender composition of the field data sample.[8] In terms of gender, as the overall statewide AOPC docket data indicates, the cases overwhelmingly involve male defendants. In terms of the race and ethnicity of the defendants, 67% of the field data defendants were Black, 24% White, and 7% Hispanic (note that the Hispanic category is not mutually exclusive to White or Black; a defendant can be White and Hispanic or Black and Hispanic).[9] The field data contain somewhat greater percentages of minority defendants, compared to the overall AOPC docket data (the AOPC docket data consist of 58% Black defendants, and 6% Hispanic defendants (see Appendix C). This difference is a by-product of the demography of our field data counties, which are among the larger and more diverse counties in the Commonwealth. The counties not contained in the field data are smaller, often rural, and tend to have predominantly White populations (both in terms of residents and murder defendants). But again, the counties not involved in the survey account for a very small percentage (13%) of overall first-degree murder convictions and an even smaller number of death sentences (8), and would add comparatively little probative value to the analysis contained in this report.

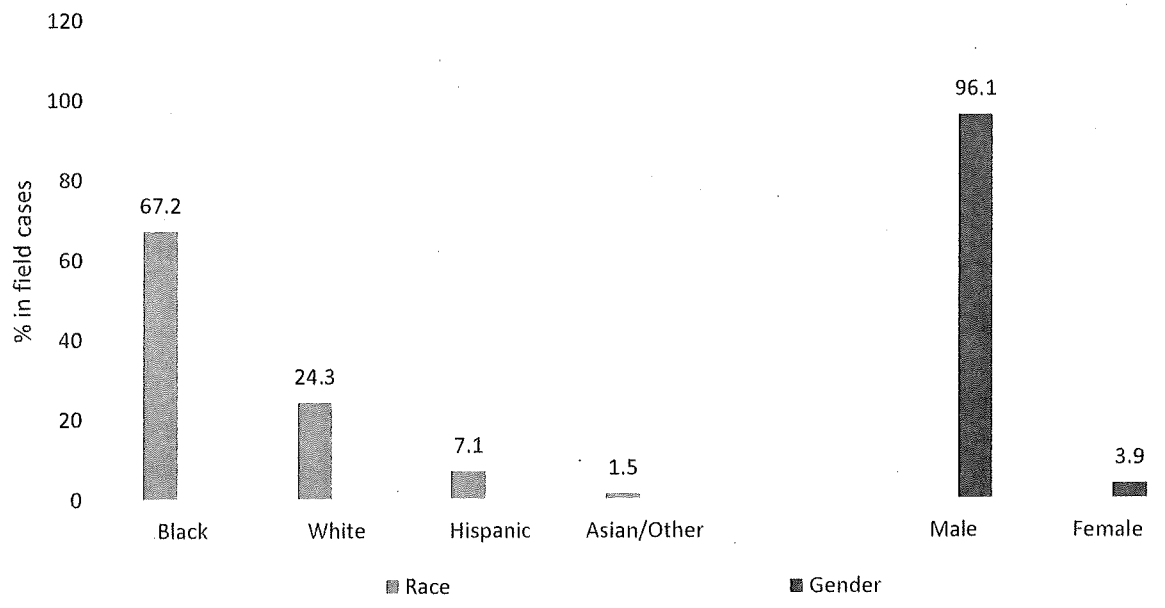
[8] Our coding of defendant race and ethnicity started with the race and ethnic categorizations found in the AOPC, PCS, and DOC data. We then cross–classified these race and ethnicity codings across the three data sets to identify any discrepancies. Codings of race and ethnicity were confirmed or corrected in the field data collection and cleaning.

[9] This coding follows the conventions of most sentencing data systems, such as the PCS and the United States Sentencing Commission, as well as the U.S. Census Bureau.

Table 12: Race/Ethnicity and Gender of Field Data Cases		
Race/Ethnicity	**Frequency**	**Percent**
Black	591	67.2
White	214	24.3
Hispanic	62	7.1
Asian/Other	13	1.5
Gender	**Frequency**	**Percent**
Male	846	96.1
Female	34	3.9

Figure 3 shows these descriptive differences graphically.

Figure 3. Race/Ethnicity and Gender of Field Data Cases



Our field data includes 34 female defendants convicted of first-degree murder, comprising about 4% of our data set. Of these 34 female defendants, prosecutors sought the death penalty against eight (about 24% of the female defendants). Of those eight females, the

death penalty filing was retracted for five. Thus, three females (8.8% of the 34 female defendants) were exposed to a death penalty trial. One of these three females received the death penalty. Put another way, one female defendant out of 34 female defendants (2.9%) in the data received the death penalty, and one death sentence out of 51 overall (1.9%) was imposed upon a female defendant. By comparison, 50 out of 846 (6%) males overall received the death penalty, and 50 out of the 164 males (31%) who faced a death penalty trial received the death penalty.

From these descriptive statistics, it appears that females are much less likely to be exposed to, or receive, the death penalty. While a broader examination of the role of gender in the processing and sentencing of murder cases would be valuable, we do not have adequate numbers of first-degree murder cases involving female defendants, and do not have adequate variation in death penalty outcomes among those females, to pursue the role of defendant gender further in our analyses. Thus, the subsequent analyses in this report do not focus on the gender of the defendant.[10]

In sum, the above tables present some basic descriptive parameters of interest for the field collected data. Next, we present some cross-tabulations involving key case outcomes and characteristics by the race/ethnicity of defendants. This will give us a picture of some bivariate relationships among race/ethnicity, case characteristics, and punishment outcomes.

B. Cross-tabulations and Bivariate Associations: Race and Ethnicity

We begin with cross-tabulations of race and ethnicity by the presence of different types of felony convictions that occurred concurrent with the first-degree murder conviction(s). Table 13 shows the concurrent felony convictions by race/ethnicity for the field data. Note that the

[10] In our multivariate analyses, we include the small numbers of female defendants, but do not include gender as a predictor or control variable. An alternative would be to omit the female defendants from the data set entirely, but we sought to retain as many of our field cases as possible.

conviction types do not add up to 880 (the total number of first-degree murder convictions in the field data) because the convictions are not mutually exclusive, that is, defendants may have more than one concurrent conviction type. A greater proportion (63%) of Black defendants had a concurrent felony conviction of any kind compared to White (49%) and Hispanic (58%) defendants. Also, White defendants in the field data (7.9%) had a smaller proportion of convictions for robbery, than Black (12.9%) or Hispanic (17.7%) defendants.

Table 13: Field Data—Types of Concurrent Convictions by Race/Ethnicity: Frequency (column percent).

	Race/Ethnicity				
Convictions	**White**	**Black**	**Hispanic ****	**Other**	**Total**
Sex offenses	4 (1.9)	11 (1.9)	0	1 (7.7)	16 (1.8)
Robbery	18 (7.9)	76 (12.9)	11 (17.7)	2 (15.4)	106 (12.1)
Burglary	9 (4.2)	31 (5.3)	9 (14.5)	2 (15.4)	51 (5.8)
Any Felony †	104 (49)	372 (63)	36 (58)	8 (62)	520 (59.1)
None	110 (51)	220 (37)	26 (42)	5 (38)	361 (100)
Total	214 (100)	591 (100)	62 (100)	13 (100)	

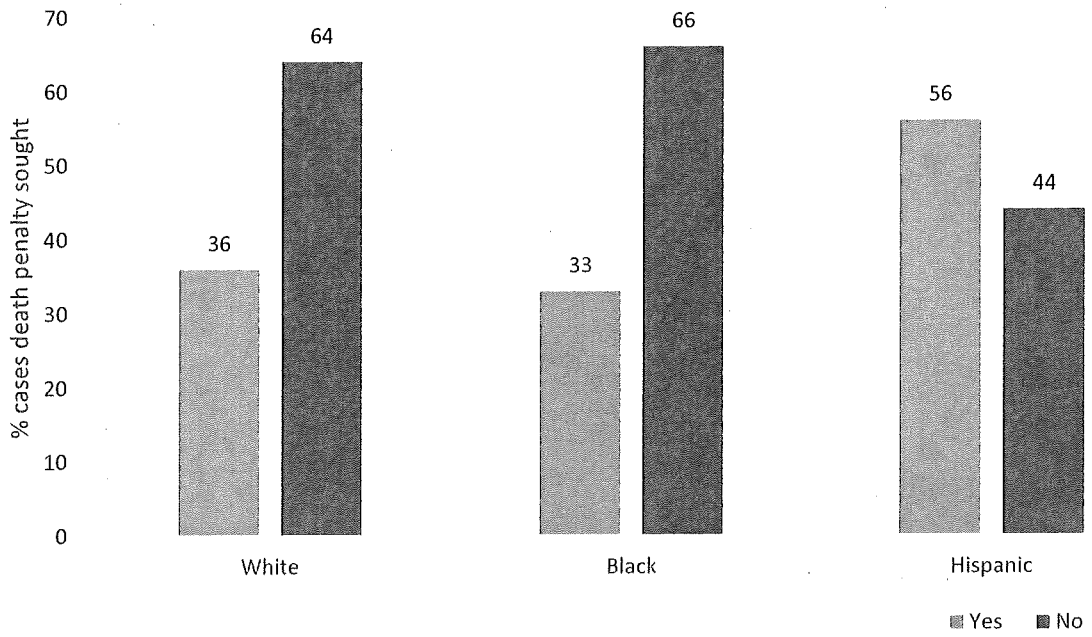
** Not mutually exclusive with White or Black.
† Conviction categories are not mutually exclusive.

Next, Table 14 presents the death penalty outcomes by race/ethnicity.

Table 14: Death Penalty Outcomes by Race/Ethnicity.†				
Death Penalty Sought (Column % in parentheses)				
	White	**Black**	**Hispanic**	**Total**
Yes	76 (36)	197 (33)	35 (56)	313
No	138 (64)	394 (66)	27 (44)	567
Of 313 Cases Where the Death Was Sought (Row % in parentheses)				
	White	**Black**	**Hispanic**	**Total**
D.A. sought and later retracted	27 (19)	97 (66)	19 (13)	146
Of 167 Case Ultimately Exposed to Death Penalty (Column % in parentheses)				
	White	**Black**	**Hispanic**	**Total**
Offender Received Death Sentence	19 (39)	25 (25)	6 (38)	51
Offender Received Life Sentence	30 (61)	75 (75)	10 (62)	116
† Other race/ethnicity not included. In this group, the death penalty was sought in five cases, retracted in three cases, and a death sentence was given in one case. The total number of death sentences in the field data was therefore 51.				

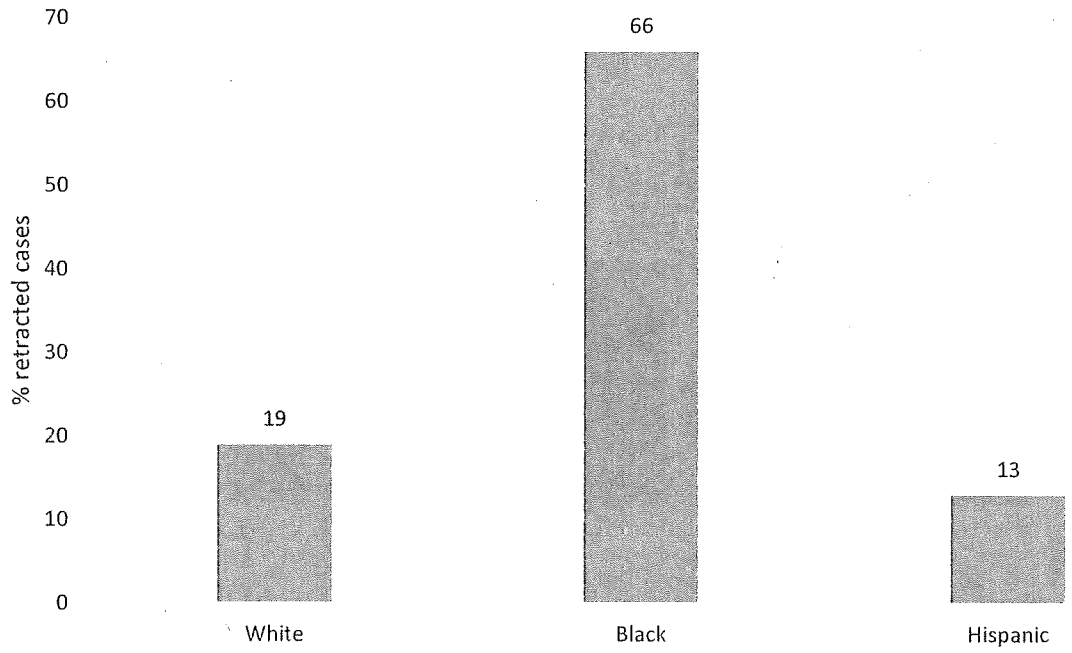
Table 14 presents several interesting features. First, of the 419 cases in which the statewide AOPC data indicated that the death penalty was sought (see Appendix C), we captured 313 (75%) in our field data, the majority of such cases statewide. In the field data, prosecutors filed death penalty motions against 36% of White defendants, 33% of Black defendants, and 56% of Hispanic defendants. Thus, within race/ethnic groups, nearly equal proportions of White and Black defendants had the death penalty sought against them, but a comparatively greater proportion of Hispanic defendants had the death penalty sought against them. Figure 4 shows these differences graphically.

Figure 4. Death Penalty Outcomes by Race/Ethnicity



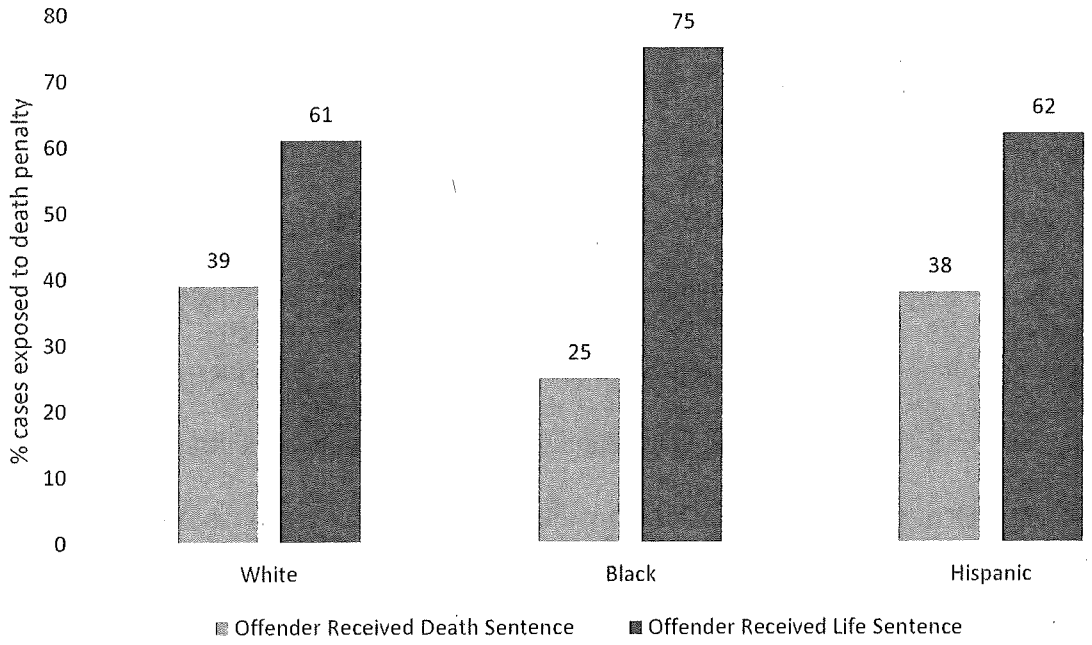
Similarly, among the cases in which prosecutors initially filed motions for the death penalty, we considered how often they retracted those filings. Within race/ethnic categories in the field data, among the 313 cases in which prosecutors initially filed death penalty motions, prosecutors retracted those filings in 36% (27/76) of cases with White defendants, 49% (97/197) of cases with Black defendants, and 54% (19/35) of cases with Hispanic defendants. Thus, a greater proportion of the cases in which the death penalty was retracted involved Black or Hispanic defendants, as opposed to White defendants. Figure 5 also shows these differences.

Figure 5. D.A. Sought and Later Retracted Death Penalty



Finally, we examined racial and ethnic disparities within the death sentencing decision. Within racial/ethnic categories in the field data, 39% of White defendants, 25% of Black defendants, and 38% of Hispanic defendants who faced the death penalty received it. It should also be recalled from our earlier descriptive statistics (in Chapter II and in Table 8) that greater absolute numbers and proportions of Black defendants are charged with and convicted of first-degree murder, and ultimately exposed to the death sentencing decision. This is true in the overall AOPC docket data (Appendix C) and in the field data. As mentioned earlier, our case sample at the start contained an already very racially disproportionate population of first-degree murder charges and convictions. Therefore, the numbers and percentages of those who receive the death penalty *overall* will also be racially disproportionate. But, the proportions of defendants *within race/ethnicity categories* reveal that proportionally more White defendants are exposed to and receive the death penalty, compared to the percentages of Black defendants exposed to and receiving the death penalty. Figure 6 shows these differences as a graph.

Figure 6. Cases Ultimately Exposed to the Death Penalty



We next examine the breakdown by race/ethnicity of the statutory aggravating circumstances filed by prosecutors and found by judges and juries. These data are set forth in Table 15. Several race/ethnic differences in this examination of aggravating circumstances are evident. 82% of those defendants for whom prosecutors found the aggravating circumstance, "victim was a firefighter or peace officer," to be present were Black. Black defendants accounted for 63% of cases in which the aggravating circumstance, "committed in perpetration of felony," was found to be present by prosecutors. Black defendants accounted for 69% of cases in which the aggravating circumstances, "knowingly created grave risk of death" or "defendant convicted of another murder," were found to be present by prosecutors. Finally, Black defendants accounted for 79% of cases in which the aggravating circumstance "significant history of violent felonies" was found to be present by prosecutors. White and Hispanic defendants were in the majority of cases where no aggravating circumstances were found by

prosecutors to be present. In addition, Black defendants had greater numbers of aggravating circumstances found to be present by prosecutors per case. For example, prosecutors filed notice of four or more aggravating circumstances against 37 Black defendants, compared to seven White defendants and three Hispanic defendants.

These patterns do not hold up at the penalty trial phase, when either a judge or a jury must find any aggravating circumstance beyond a reasonable doubt. As previously mentioned, aggravating circumstances are found far less often than they are filed. When they are, Black defendants do not dominate the percentages for the aggravating circumstances found by the judge or jury, as much as they do for those filed by the prosecutor. For example, 43% of those defendants for whom the aggravating circumstance, "committed in perpetration of felony", was found by a judge or jury were Black, whereas Black defendants comprised 63% of those defendants against whom prosecutors filed notices of that aggravating circumstance. Black defendants comprised 48% of defendants for whom the aggravating circumstance, "knowingly created grave risk of death", was found by a judge or jury to be present, as opposed to 69% of defendants against whom prosecutors filed notices of that aggravating circumstance. However, a substantial majority (63%) of the defendants for whom the aggravating circumstance, "significant history of violent felonies", was found by a judge or jury to be present were Black (although it should be noted they comprised 79% of the defendants against whom prosecutors had filed notices of that aggravating circumstance). When one examines the within-race proportions of defendants against whom prosecutors filed notices of any aggravating circumstance, however, 37% were Black and 43% were White.

Table 15: Statutory Aggravating Circumstances: Found Present by Prosecutors and Found at Trial by Jury/Judge. (Other race/ethnicity not shown).			
Presented by Prosecutors			
Aggravating Circumstances	**White**	**Black**	**Hispanic**
Victim was firefighter, peace officer	2	9	1
Defendant paid for killing	0	3	0
Victim held for ransom, reward, or shield	0	3	0
Hijacking aircraft	0	0	0
Victim was prosecution witness	5	21	3
Committed in perpetration of felony	30	83	19
Knowingly created grave risk of death	25	93	17
Offense committed by means of torture	18	25	2
Significant history of violent felonies	12	64	5
Defendant convicted of offense carrying life/death	12	25	2
Defendant convicted of another murder	20	59	6
Defendant convicted of voluntary manslaughter	0	10	1
Defendant committed killing during drug felony	3	8	2
Victim was associated with defendant in drug trafficking	1	19	3
Victim was a nongovernment informant	0	4	0
Victim was under 12	7	17	3

Victim was in third trimester or def. knew of pregnancy	1	7	0
Defendant was under PFA from victim	4	6	1
Number of Aggravating Circumstances	**White**	**Black**	**Hispanic**
1	39	86	18
2	26	56	8
3	11	37	8
4	6	17	3
5	1	14	0
6	0	0	0
7	0	2	0
8	0	4	0
Found by Judge/Jury			
Aggravating Circumstances	**White**	**Black**	**Hispanic**
Victim was firefighter, peace officer	2	1	1
Defendant paid for killing	0	1	0
Victim held for ransom, reward, or shield	0	1	0
Hijacking aircraft	0	0	0
Victim was prosecution witness	1	3	1
Committed in perpetration of felony	9	10	4
Knowingly created grave risk of death	7	10	4
Offense committed by means of torture	6	5	0
Significant history of violent felonies	5	10	1

Defendant convicted of offense carrying life/death	4	3	1
Defendant convicted of another murder	9	12	2
Defendant convicted of voluntary manslaughter	0	0	0
Defendant committed killing during drug felony	1	0	1
Victim was associated with defendant in drug trafficking	0	1	0
Victim was a nongovernment informant	0	3	0
Victim was under 12	3	2	1
Victim was in third trimester or def. knew of pregnancy	1	3	0
Defendant was under PFA from victim	1	0	0
Number of Aggravating Circumstances	**White**	**Black**	**Hispanic**
1	8	17	5
2	13	15	3
3	1	6	2
4	3	0	0
5	0	0	0
6	0	0	0
7	0	0	0
8	0	0	0

We next examine the breakdown of the statutorily-listed mitigating circumstances presented by defense attorneys and found at the penalty trial by the judge or jury, by defendant race/ethnicity. The non-specific mitigating circumstances, along with the statutorily-listed ones,

are reflected in the "number of mitigating circumstances" variable. These are shown in Table 16. The statutory mitigating circumstances that were filed tended to be distributed between White, Black, and, to a lesser extent, Hispanic defendants, more equally than the aggravating circumstances filed by prosecutors. Furthermore, Black defendants tend to have greater numbers of mitigating circumstances presented per case.

Table 16: Statutory Mitigating Circumstances: Presented by Defense and Found by Jury/Judge. (Other race/ethnicity not shown).

Presented by Defense

Mitigating Circumstances	**White**	**Black**	**Hispanic**
No significant history of prior crime	21	24	6
Extreme mental or emotional disturbance	15	15	5
Subst. impaired capacity to appreciate criminality	14	14	7
Age of defendant at time of crime	15	37	12
Acted under extreme duress or domination	7	4	2
Victim was participant in defendant's conduct	0	0	0
Participation was relatively minor	4	2	0
Defendant act not sole proximate cause of death	0	1	0
Number of Mitigating Circumstances (Statutory)	**White**	**Black**	**Hispanic**
1	3	10	1
2	6	23	3
3	6	13	7

4	5	11	0
5	3	2	2
6	3	4	0
7	2	3	1
8 or more	8	8	3

Found by Judge/Jury

Mitigating Circumstances	White	Black	Hispanic
No significant history of prior crime	12	8	2
Extreme mental or emotional disturbance	7	4	0
Subst. impaired capacity to appreciate criminality	0	5	2
Age of defendant at time of crime	4	9	3
Acted under extreme duress or domination	1	2	0
Victim was participant in defendant's conduct	0	0	0
Participation was relatively minor	1	0	0
Defendant act not sole proximate cause of death	0	0	0
Number of Mitigating Circumstances (Statutory)	**White**	**Black**	**Hispanic**
1	7	11	5
2	5	5	0
3	2	0	0
4	1	1	0
5	0	1	0
6	0	0	0

7	0	0	0
8 or more	0	0	0

A further potentially important pattern to examine is the type of defense counsel representing White, Black, and Hispanic defendants. This is shown in Table 17. In the field data, 35% of Black defendants were represented by privately-retained attorneys, and about 65% of them were represented by either public defenders or court-appointed attorneys. Among White defendants, 45% were represented by privately-retained attorneys, while 55% were represented by public defenders or court-appointed attorneys. Approximately 34% of Hispanic defendants were represented by privately-retained attorneys while 66% were represented by public defenders or court-appointed attorneys. In cases exposed to the death penalty, approximately 38% of White defendants were represented by privately-retained attorneys, compared to 30% of Black defendants and 29% of Hispanic defendants.

Table 17: Types of Defense Counsel by Race/Ethnicity

All Field Cases			
Defense	**White**	**Black**	**Hispanic**
Privately-Retained	97	205	21
Public Defender	77	175	29
Court-Appointed	40	211	12
Cases Where Death is Sought (not retracted)			
Defense	**White**	**Black**	**Hispanic**
Privately-Retained	23	38	5
Public Defender	13	32	8
Court-Appointed	13	30	3

Table 18 indicates the number of defendants who were sentenced by a judge or a jury, by race/ethnicity. Focusing specifically on those cases exposed to the death penalty, 55% of White defendants were sentenced by juries, compared to 62% of Black and 71% of Hispanic defendants. Thus, proportionally more White defendants (45%) facing the death penalty were sentenced by judges, compared to their Black (38%) and Hispanic (29%) counterparts.

Table 18: Sentenced by Judge or Jury by Race/Ethnicity			
Cases Where Death is Sought (not retracted)			
	White	**Black**	**Hispanic**
Judge	19	26	4
Jury	30	74	12

The final cross-tabulations we examine involve the race of defendants and the race of victims. The victim/defendant dyad has been found to be a consequential factor in death penalty disparity in previous research in Pennsylvania and other states (Baldus, 1997-98; Paternoster and Brame, 2008). First, Table 19 shows the race and gender of victims. The majority of defendants and the majority of victims (57% of first victims, 56% of second victims, and 54% of third victims) are Black. Most victims are also male, but the gender balance grows more equal among cases with second and third victims (this may be due to multiple victim murder cases involving domestic violence and related situations).

Table 19: Race/Ethnicity and Gender of Victims		
First Victim		
Race/Ethnicity	**Frequency**	**Percent**

White	273	31.0
Black	509	57.8
Hispanic	76	8.6
Other	15	1.7
Unreported/Indeterminate	7	.8
Gender	**Frequency**	**Percent**
Male	619	70.3
Female	257	29.2
Unreported/unclassified	4	.5
Second Victim (no second victim in 758 cases)		
Race/Ethnicity	**Frequency**	**Percent**
White	43	33.9
Black	71	55.9
Hispanic	10	7.9
Other	3	2.4
Gender	**Frequency**	**Percent**
Male	74	59.2
Female	51	40.8
Third Victim (no third victim in 856 cases)		
Race/Ethnicity	**Frequency**	**Percent**
White	11	39.3
Black	15	53.6
Hispanic	1	3.6

Other	1	3.6
Gender	**Frequency**	**Percent**
Male	14	50
Female	14	50

Table 20 shows the race of defendant by the race of victim.

Table 20: Race/Ethnicity of Defendant by Race/Ethnicity of Victim				
First Victim				
Defendant Race/Ethnicity	**Victim Race/Ethnicity**			
	White	**Black**	**Hispanic**	**Other**
White	166	31	15	2
Black	89	463	29	3
Hispanic	16	11	32	3
Other	2	4	0	7
Second Victim (no second victim in 758 cases)				
Defendant Race/Ethnicity	**Victim Race/Ethnicity**			
	White	**Black**	**Hispanic**	**Other**
White	21	3	4	0
Black	19	67	3	2
Hispanic	3	1	3	1
Other	0	0	0	0
Third Victim (no second victim in 856 cases)				
Defendant Race/Ethnicity	**Victim Race/Ethnicity**			
	White	**Black**	**Hispanic**	**Other**
White	6	1	0	1

Black	4	14	0	0
Hispanic	1	0	1	0
Other	0	0	0	0

Our final cross-tabulation, Table 21, shows the defendant/first victim, race/ethnicity dyads by death penalty outcomes.

Table 21: Death Penalty Outcomes by Defendant/First Victim Race/Ethnicity Dyad; Frequency (row percent)

	Death Penalty Sought	
	Yes	**No**
White def./White victim	57 (33)	112 (66)
White def./Black victim	14 (42)	19 (58)
White def./Hisp. victim	11 (61)	7 (39)
Black def./Black victim	137 (29)	330 (71)
Black def./White victim	44 (47)	50 (53)
Black def./Hisp. victim	19 (66)	10 (33)
Hisp. def./Hisp. victim	18 (56)	14 (44)
Hisp. def./White victim	13 (76)	4 (24)
Hisp def./Black victim	5 (42)	7 58)
	Death Penalty Retracted	
	Yes	**No**
White def./White victim	21 (37)	36 (63)
White def./Black victim	3 (21)	11 (79)
White def./Hisp. victim	3 (27)	8 (73)
Black def./Black victim	77 (56)	60 (44)
Black def./White victim	17 (39)	27 (61)
Black def./Hisp. victim	5 (26)	14 (74)
Hisp. def./Hisp. victim	9 (50)	9 (50)
Hisp. def./White victim	7 (54)	6 (46)

Hisp def./Black victim	2 (40)	3 (60)
	Death Penalty Received	
	Yes	**No**
White def./White victim	16 (44)	20 (56)
White def./Black victim	3 (27)	8 (73)
White def./Hisp. victim	2 (33)	6 (66)
Black def./Black victim	12 (20)	48 (80)
Black def./White victim	10 (37)	17 (63)
Black def./Hisp. victim	3 (21)	11 (79)
Hisp. def./Hisp. victim	2 (22)	7 (78)
Hisp. def./White victim	5 (83)	1 (17)
Hisp def./Black victim	0 (0)	3 (100)

In Table 21, note that the percentages of the different death penalty outcomes do vary by race-of-victim and by race-of-defendant. For example, from the percentages in Table 21, it appears that cases involving Black defendants and White victims have a greater probability of receiving the death penalty, compared to the average overall probability of receiving the death penalty for all cases. Figures 7-9 show these differences as a set of bar graphs.

Figure 7. Death Penalty Outcomes by Defendant/First Victim Race/Ethnicity Dyad Death Penalty Sought

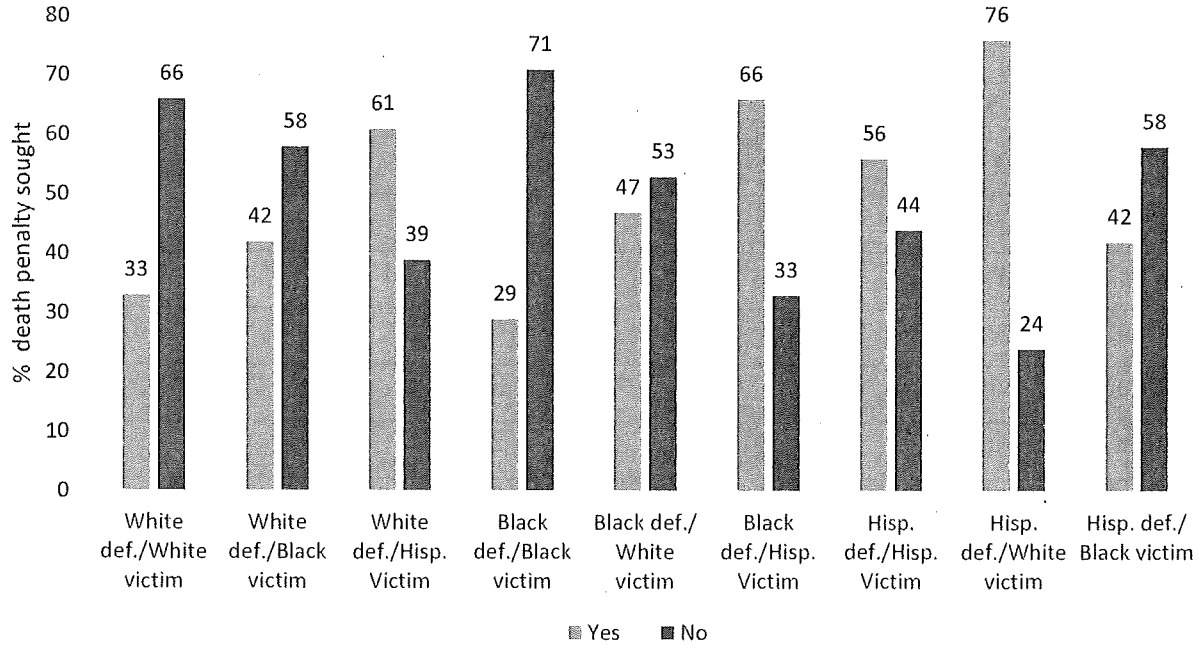


Figure 8. Death Penalty Outcomes by Defendant/First Victim Race/Ethnicity Dyad Death Penalty Retracted

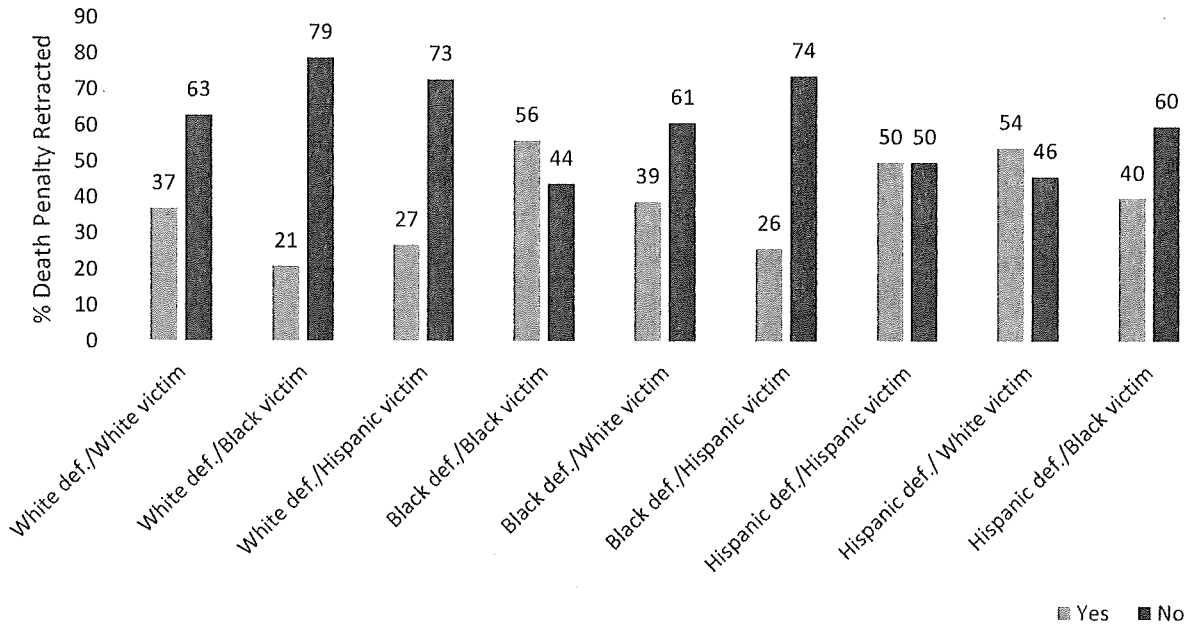
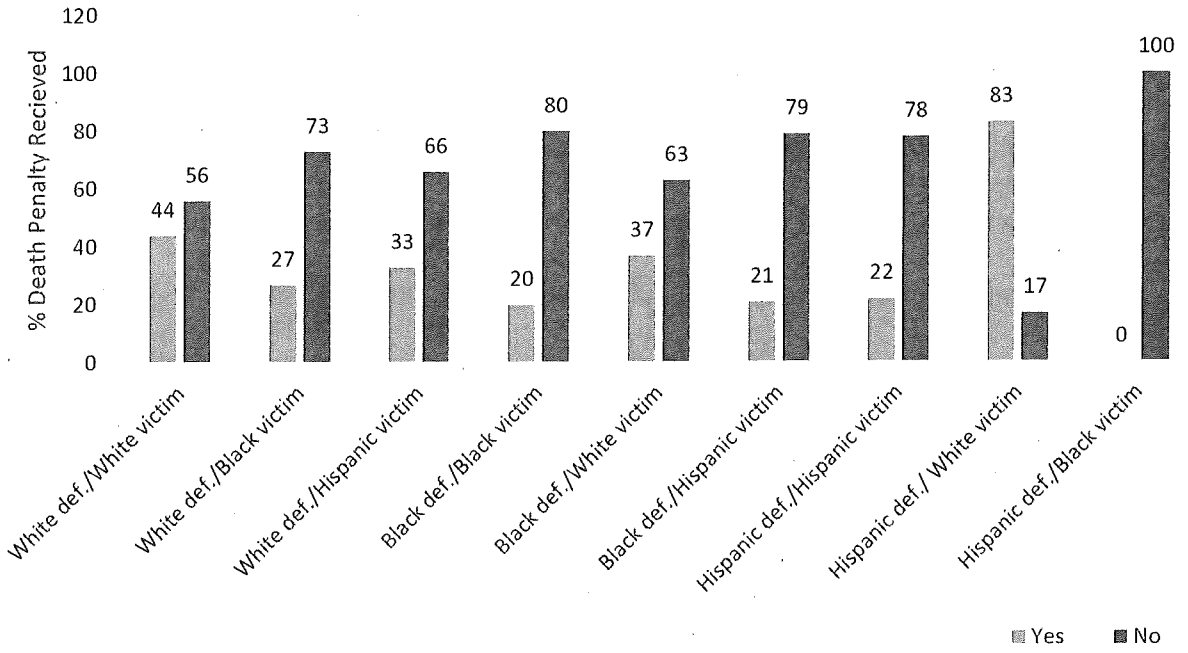


Figure 9. Death Penalty Outcomes by Defendant/First Victim Race/Ethnicity Dyad Death Penalty Received



These cross-tabulations, however, do not control for other factors that may influence the death penalty outcomes. In the next section, we examine if such race-of-victim and race-of-defendant differences persist when we control for the many legally relevant variables that influence the death penalty outcomes.

C. Multivariate Results: Propensity Score Weighting Comparisons

We next present the major results from our analyses using propensity score weighting models. Our dependent variables, or outcomes of interest, are: (1) whether prosecutors filed motions for the death penalty; (2) whether, if a motion for the death penalty was filed, that filing was later retracted by a prosecutor; and (3) whether defendants were sentenced to death. We also performed multivariate logistic regression analyses with our death penalty outcome variables. Logistic regression was used in the well-known Baldus studies (see review in Baldus, 1997-98). Our logistic regression analyses are shown in Appendix B.

Application of "Statistical Significance" to Findings

The concept of "statistical significance" is an issue to keep in mind throughout the discussion of our multivariate analyses. Typically, studies report statistical significance based on p-values (typically of .05 or less). This p-value corresponds to the probability that the size of effect observed in a model could be due to sampling error. Thus, with a conventionally accepted p-value of .05 (a value commonly employed in the sciences), an effect size that is "significant" at that level means that there is only a 5% probability that the observed relationship is a result of chance or random error. Thus, the relationship is said to be "significant", in that it is statistically robust (i.e. not a product of sampling error), although it may or may not be meaningful in terms of its policy relevance. In this study, statistical significance is not relevant in a strict sense, because our data are not a random sample, and in fact, are not really a sample at all. Instead, our field data comprise the *entire* number of first-degree murder convictions for our 18 sampled field counties for the years we examined (2000-2010, but 2005-2010 in Philadelphia). Furthermore, we are not using these counties to statistically generalize to the entire state. Instead, we refer to statistical significance levels throughout the analysis, but we use them merely as a *convention,* indicating, "if this were a random sample, this effect would be big enough to have only a 5% chance of being due to sampling error." We include significance levels here to err on the side of inclusion, and only as an aid in interpreting the magnitude of effects. But again, since our models are actually a population study rather than a sample (i.e. the models include *all* cases), any between-group differences we find are the *actual differences* in our population of first-degree murder convictions in the 18 counties, not an estimate based on a sample.

Table 22 below lists our control variables, or covariates, on which we balance cases in our propensity score models (we also use these same control variables in our logistic regression

analyses in Appendix B). Our goal is to make comparisons between our race/ethnicity categories and other variables of interest, while accounting for as many legally relevant case characteristics and case processing factors as possible within our data. These models, and the control variables they contain, will be our main models for our propensity score weighting analyses.

Table 22: Control Variables
Victim was a prosecution witness
Murder committed in perpetration of felony
Defendant knowingly created grave risk of death
Victim was tortured
Defendant convicted of other offense carrying life/death
Defendant convicted of another murder
Murder committed during drug felony
Defendant was associated with victim in drug trafficking
Victim was under 12
Number of Aggravating Circumstances Note: in filing and retraction models, we include the aggravating variables as independently field coded. In death sentence models, we include the aggravating variables as filed by the prosecutor.
No significant history of prior crime
Extreme mental or emotional disturbance
Subst. impaired capacity to appreciate criminality
Youthful age of defendant at time of crime
Number of mitigating circumstances presented by defense
Multiple victims
Concurrent sex offense conviction
Concurrent robbery conviction
Concurrent burglary conviction
Defense asked for psychiatric evaluation
Victim was a family member
Victim had children
Victim killed with knife
Victim killed with bare hands (reference: killed with gun)
Victim didn't resist
Victim was killed in an especially brutal manner
Defendant tried to hide victim's body
Victim killed execution style
Defendant ambushed victim

Table 22: Control Variables
Defendant age (years)
Privately-retained attorney
Court-appointed attorney (reference category: public defender)
Defense claimed killing was an accident
Defense claimed mistaken identity
Defense claimed witnesses not credible
Defense claimed killing not first-degree murder
Defendant admitted guilt
Defense presented psychiatric expert witness
Physical evidence present
Weapon linked to defendant
Eyewitness testified
Co-defendant testified against defendant
Defendant IQ between 71-90
Sentenced by Jury (in death penalty models only)
Allegheny County (in some models) (reference category: other field data counties).
Philadelphia County (in some models) (reference category: other field data counties).

D. Propensity Score Weighting Analysis

The well-known death penalty studies by Baldus (1997-98) and other earlier studies used logistic regression methods, which we also present in Appendix B. However, for estimating causal comparisons between groups, for example, Black or Hispanic versus White defendants, logistic regression has limitations. Statistical literature shows that logistic regression results can be biased under certain conditions (Apel and Sweeten, 2010; Austin, 2011). These conditions include: (1) situations where the comparison groups are very dissimilar on key confounding covariates (that is, the groups to be compared differ a great deal on key control variables), and (2) situations where selection bias might exist (that is, the treatment and control groups might have unequal likelihoods of being selected into the data, and/or exposed to the outcome of interest). Both of these conditions are a risk in the present study. Regarding the first condition,

for example, Black, White, and Hispanic defendants differ considerably in their averages or proportions on many of our control variables, such as aggravating circumstances, concurrent convictions, case characteristics, etc. In other words, we know that these groups are *imbalanced* on these control variables. Regarding the second condition, it is possible that there is race or ethnicity-related selection bias affecting the likelihood of being arrested, charged, and/or convicted of first-degree murder. We cannot directly assess whether such selection bias exists, but we can try to make cases as similar, or *balanced*, as possible on known covariates in the data. That is a major advantage of propensity score methods.

Propensity score methods attempt to replicate experimental design statistically, and thus, attempt to address such limitations as covariate imbalance, selection bias, and omitted variable bias (Apel and Sweeten, 2010; Li, Zaslavsky and Landrum, 2013). Propensity score weighting provides a more effective way than traditional logistic regression to make cases comparable, to "compare apples with apples and oranges with oranges," so to speak. Propensity score methods attempt to make "treatment" (the comparison category of interest, for example, Black defendants) and "control" groups (the group with which the treatment group is compared) similar or "balanced" on known covariates (control variables), and have similar error variance.[11] Typically, propensity score methods are also thought to be more effective than logistic regression at addressing omitted variable bias (when some unmeasured variable might bias or confound

[11] For documentation and a fuller explanations of propensity score analysis, see https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3144483/ For details on propensity score methods procedures in STATA, see http://blog.stata.com/2015/07/07/introduction-to-treatment-effects-in-stata-part-1/ and http://www.stata.com/manuals13/te.pdf (under "effects intro"). For a simple primer on propensity score weighting, see https://sociology.arizona.edu/sites/sociology.arizona.edu/files/u233/soc561_psa%20with%20teffects%20final.pdf

results). No statistical method can perfectly solve the problem of omitted variable bias, but propensity score methods have the advantage of making the treatment and control groups balanced on known and measured control variables, and also in their error variance (that is, the degree of prediction error). Propensity score methods may be the best approach to correct for these problems, short of an actual randomized control trial, which clearly would be impossible and, indeed, unethical, in the context of death penalty research.

Our analyses below were conducted with propensity score weighting.[12] This is the same method used in the study of disparity in Maryland's death penalty by Paternoster and Brame, (2008), and the study of the application of the federal death penalty by Schonlau (2006). Propensity score models estimate a logistic regression model to obtain a conditional probability (or propensity score) of a defendant being in a "treatment group" or category of comparison interest (being a Black or Hispanic defendant, for example), and then weighting cases which are not in this "treatment" category of interest by the inverse of their propensity scores. This effectively weights the "non-treatment" cases according to their similarity to the treated cases on the propensity score.

For example, if we were examining differences between Black defendants and defendants of other races in being sentenced to death, we would estimate a logistic regression model "predicting" the probability that a defendant is Black, using predictors of interest that we want to

---

[12] In our initial analyses, we also examined propensity score *matching* models. In propensity score matching, treatment and control cases are matched (rather than weighted) based on the degree of similarity of their propensity scores. This sometimes resulted in the loss of cases that did not match in a given analysis, and thus, resulted in not fully exploiting the dataset. Matching methods also often produced a problematic "balance", due to small numbers of matching cases. Our analyses actually produced superior balancing, and fully used all cases in the data, using propensity score weighting rather than matching. In our later supplemental analyses, we replicated all of the statistically significant effects presented below in propensity score matching analyses, and obtained substantively the same—or similar—effects.

control for, or *balance*, in comparing the Black and non-Black defendants in their likelihood of receiving the death penalty. This logistic regression would give us a propensity score for each case, and we would use that propensity score to weight the non-Black cases. This weighting makes non-Black defendant cases "count" a greater or lesser amount according to their similarity to Black defendant cases on the propensity score. Non-Black defendant cases that are more similar to Black defendant cases count more, while cases that are less similar count to a lesser degree. This weighting on the propensity score is a way to balance the comparison groups, or render them more similar and comparable, on the control variables.

The weighted cases are then used in a second model, which compares the Black and non-Black cases in their likelihood of receiving the death penalty. Since our study is not an experiment, and race/ethnicity (and other comparisons of interest) are not manipulable experimental conditions, this second model gives us an average controlled difference (ACD), rather than an average treatment effect (ATE) (see Li, et al., 2013 for this distinction). This ACD is the difference between comparable Black and non-Black defendants (for example) in their conditional probability of receiving the death penalty, net of any influence of confounding predictors accounted for by the propensity model (i.e., the control variables listed in Table 22 and included in the first model) (Li, et al., 2013). In other words, the ACD tells us the probability difference between the comparison groups when they are balanced, or made similar, on the confounding/control variables in the propensity score model. Balance statistics for each

of our comparisons in our tables appear in Appendix D.[13] It is this average controlled difference (ACD) on which we mainly focus in the findings below.[14]

Our propensity score models included all of the control variables listed above in Table 18. As before, our dependent variables, or outcomes of interest, are: (1) whether prosecutors filed motions for the death penalty; (2) whether, if a motion for the death penalty was filed, that filing was later retracted by a prosecutor; and (3) whether defendants were sentenced to death. In the tables below, each line represents a separate, different propensity score weighting model.

The first column in the tables, marked "Overall Model," shows the overall ACD for the group comparisons for all counties pooled together. These comparisons do not control for, or account for, county differences in any way. However, theory and prior research on the death penalty in particular, and sentencing in general, suggest that the probability of different outcomes likely varies among counties, and that the effects of race/ethnicity of defendant and victim might even differ among counties.[15] Therefore, we also include comparisons from logistic regression

---

[13] "Covariate balance" signifies that the means of the control variables, or covariates, for the comparison (or "treatment") and control groups are roughly the same. Rosenbaum and Rubin (1985) suggest the use of the standardized difference statistic to assess balance (see also, Paternoster and Brame, 2008: 984-985). A general rule of thumb for assessing this standardized difference statistic is that values between -.20 and .20 for covariates indicate acceptable balance.

[14] We conducted all propensity score weighting analyses using the "TEFFECTS" and "IPW" procedures in STATA statistical software, version 14.

[15] Since we have data on individual cases nested within counties, our data have a multilevel structure. The statistics literature does not provide definitive guidance on how to address multilevel data with propensity score methods, but various options exist (see Li, et al., 2013). According to Li, et al. (2013), researchers can either control for the nesting of cases within larger groupings (like counties) in producing the propensity score (i.e., as a variable in the propensity model), or incorporate the nested groupings (i.e., counties) in the second stage of a logistic regression model adjusted for the propensity score weighting. We chose the latter strategy in order to highlight, rather than simply control for, differences among counties. In supplemental models, we controlled for the county variables by including them in the propensity score model. Results

models of the death penalty outcomes--with dummy variables for Philadelphia and Allegheny County versus the other field counties as predictors--that are adjusted by the propensity score weighting from the models in the first column. In other words, to address differences among counties in the race/ethnic group comparisons, we estimate propensity weighting-adjusted logistic regressions that: (1) weight the cases according to their propensity scores that attempt to balance the race/ethnic groups on the covariates in Table 18, and (2) include the county variables as predictors of the odds of the various death penalty outcomes after propensity score weighting.

Thus, the second, third, and fourth columns of the tables that follow show the results from these propensity adjusted logistic regression models that take into account county differences. The ACDs are the differences between the race/ethnic groups when controlling for county differences between Allegheny County and Philadelphia on the one hand, and the other 16 counties in the field study on the other. The third and fourth columns again show the differences between Allegheny County and Philadelphia on the one hand, and the other 16 counties in the field study of a specific comparison group's odds of receiving an outcome, on the other. In other words, the county comparisons show how the death penalty outcomes for a given comparison group (say, White defendants or Black defendants) differ for Allegheny County versus the other 17 counties in the field study, and Philadelphia versus the other 17 counties in the field study. The county effects are expressed as *odds, rather than ACD*, because the county effects are entered as predictors in the logistic regression models that are first adjusted by propensity score weighting.

---

were substantively the same as those in the propensity weighting adjusted regressions that control for county in the tables we present.

In addition, in the "Overall Models" and in the "Controlling for County" models below, the p-value denotes whether that coefficient is significantly different from cases in the reference category, that is, the cases not in the category examined. In the county models, p-values denote whether the coefficient in question is significantly different from that effect in the reference set of counties, that is, the counties in the field study other than Philadelphia and Allegheny County.

Defendant and Victim Race/Ethnicity Comparisons

Table 23 below presents the results from a variety of propensity score weighting models of the decision to file a motion to seek the death penalty that make comparisons between the race/ethnicity of defendants, the race/ethnicity of victims,[16] and different combinations of race/ethnicity of defendant and race/ethnicity of victim. Some spaces in the table are blank because we did not have enough cases to conduct a viable analysis.[17]

[16] In the case of multiple murder victims, the victim race/ethnicity variable indicates whether any of the victims were White, Black, or Hispanic.

[17] In addition, the propensity weighted models for three of the comparisons were only partially successful in balancing the covariates (see Appendix D): the models for Hispanic defendants, White defendants with White victims, and Hispanic defendants with Hispanic victims had eight or more covariates that had standardized difference scores of greater than |.20|, meaning that the distribution of those covariates remained different between the comparison group. Also, in some models involving smaller numbers of cases receiving the death penalty outcome in question (i.e., death penalty retraction and especially receiving the death penalty), one or more specific covariates were omitted due to a lack of variation across the race/ethnic or other categories compared. In other words, some comparisons lacked a comparable number of cases on one or more specific variables, and these variables had to be omitted. Appendix D, which shows the balance statistics of the covariates for all models, also shows the specific variables included for each model.

Table 23: Death Penalty Filed (N = 880)								
	Overall Model		**Controlling for County**		**Allegheny**		**Philadelphia**	
	Avg. Controlled Difference	**p**	**Avg. Controlled Difference**	**p**	**Odds**	**p**	**Odds**	**p**
White Defendant	-.05	.36	-.07	.19	.20	.002	.39	.16
Black Defendant	.02	.61	.05	.08	.35	.001	.76	.17
Hispanic Defendant	-.06	.57	------	----	------- -	-----	------	----
White Victim	-.02	.52	-.04	.28	.20	.000	.58	.22
Black Victim	.01	.78	.06	.14	.29	.003	.57	.09
Hispanic Victim	.21	.001	-----	----	------- -	-----	------	-----
White Def./White Vic.	.08	.39	.08	.38	.26	.03	2.36	.37
White Def./Black Vic.	------	-----	------	----	------- -	-----	------	-----
White Def./Hispanic Vic.	------	-----	------	---- -	------- -	-----	------	------
Black Def./White Vic.	-.10	.06	-.07	.17	.21	.04	.77	.63
Black Def./Black Vic.	.02	.64	.07	.13	.30	.02	.57	.14
Black Def./Hispanic Vic.	------	-----	------	----	------- -	-----	------	-----
Hispanic Def./White Vic.	------	-----	------	----	------- -	-----	------	-----
Hispanic Def./Black Vic.	------	-----	------	----	------- -	-----	------	-----
Hispanic Def./Hisp. Vic.	-.09	.47	------	----	------- -	-----	------	-----

In general, the different comparison groups show relatively small differences in the likelihood a motion for the death penalty will be filed in those cases. For example, in the first

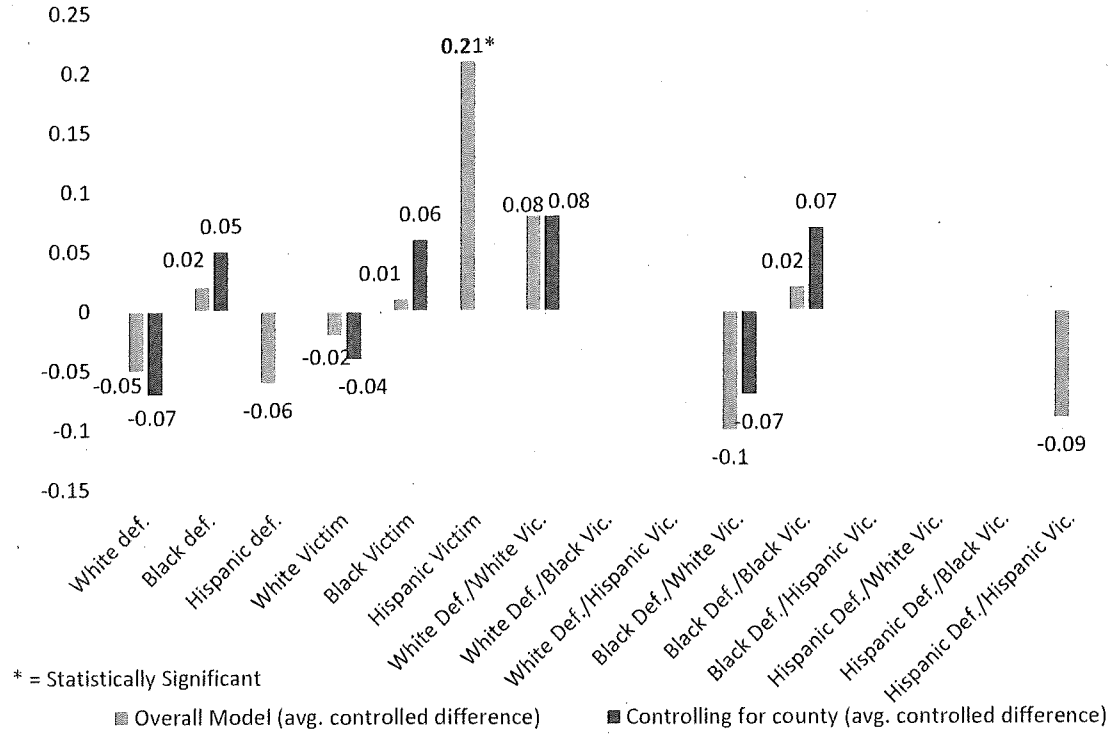
line of the table, White defendants are 5% less likely (ACD = -.05) to have a motion for the death penalty filed against them, a difference that would not be statistically significant if this was a random sample. Controlling for county differences, White defendants have a 7% smaller probability of having a motion for the death penalty filed against them. However, White defendants are significantly less likely to have a motion for the death penalty filed against them in Allegheny County, compared to the other 17 counties in the field study (Whites' odds of receiving a death penalty filing in Allegheny County are .20). In fact, each type of defendant, victim, and defendant/victim combination is significantly less likely to have a motion for the death penalty filed against them in Allegheny County, than in the other 17 counties. This coincides with the logistic regression results presented in Appendix B, where Allegheny County cases had considerably lower odds of having the death penalty filed than the other 17 counties in the field study.

The only comparison in the overall models of death penalty filing that is statistically significant was for cases with Hispanic victims. These cases had a 21% greater probability of having the death penalty filed.[18] Interestingly, Hispanic defendants had a 6% smaller probability of having the death penalty filed against them, and cases with Hispanic defendants and Hispanic victims have a 9% smaller probability. Thus, the Hispanic victim effect may be due to a greater likelihood of filing in cases where a non-Hispanic defendant killed a Hispanic victim. County-adjusted comparisons were not possible for any of the Hispanic defendant or victim comparisons, because there were insufficient numbers of such cases in many of the counties for analysis (in

[18] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is .16, p-value < .0001. Substantively, this is a similar result, in that cases with Hispanic victims are 16% more likely to have the death penalty filed, and the effect would be highly statistically significant.

fact, the Hispanic victim and defendant cases were clustered in Philadelphia and Allegheny County). Another notable effect was found in cases with Black defendants and White victims. These cases had a 10% smaller probability of death penalty filing than other cases, and the effect would almost reach statistical significance (.06 rather than .05), if such statistical significance was applicable to the cases in our analysis.[19] Figure 10 shows these between group differences graphically. In the graph, note that many of the differences (discussed above) are not statistically significant.

Figure 10. Death Penalty Filed



- No bars where there were not enough viable cases for comparison

[19] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is -.14, p-value < .0001. Substantively, this means that in the matching model, Black defendant/White victim cases are 14% less likely to have the death penalty filed, and the effect would be highly statistically significant.

The next table (Table 24) shows the results of propensity score weighting models for whether a motion for the death penalty was retracted. These models only include the 313 cases in which motions for the death penalty were filed (i.e., the death penalty filing cannot be retracted if it is not filed in the first place).

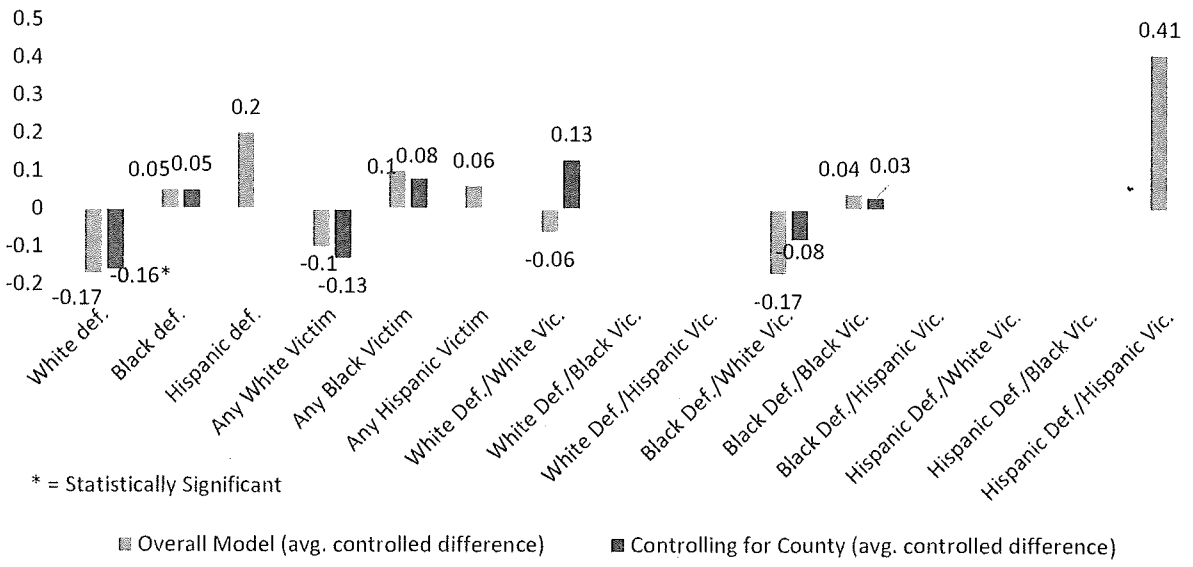
Table 24: Death Penalty Retracted (N = 313)

	Overall Model		Controlling for County		Allegheny		Philadelphia	
	Average Controlled Difference	p	Average Controlled Difference	p	Odds	p	Odds	p
White Def.	-.17	.16	-.16	.03	.54	.56	.19	.20
Black Def.	.05	.43	.05	.52	.82	.75	3.52	.0001
Hispanic Def.	.20	.49	------	-----	-------	-------	-------	-------
Any White Vic.	-.10	.37	-.13	.09	.79	.82	.22	.05
Any Black Vic.	.10	.14	.08	.25	.92	.90	4.39	.004
Any Hispanic Vic.	.06	.69	------	-----		-------	-------	-------
White Def./White Vic.	-.06	.80	.13	.06	.28	.23	< .01	.0001
White Def./Black Vic.	------	----	------	-----	-------	-------	-------	-------
White Def./Hispanic Vic.	------	----	------	-----	-------	-------	-------	-------
Black Def./White Vic.	-.17	.08	-.08	.27	.35	.402	6.49	.03
Black Def./Black Vic.	.04	.74	.03	.74	1.55	.615	4.90	.04
Black Def./Hispanic Vic.	------	----	------	-----	-------	-------	-------	-------
Hispanic Def./White Vic.	------	----	------	-----	-------	-------	-------	-------
Hispanic Def./Black Vic.	------	----	------	-----	-------	-------	-------	-------
Hispanic Def./Hispanic Vic.	.41	.55	------	-----	-------	-------	-------	-------

In these models, there are a number of notable effect sizes, but few of them would be statistically significant in a random sample.[20] For example, the ACD for Hispanic defendants indicated that Hispanic defendants are 20% more likely to have a death filing retracted, but the effect is not statistically significant (probably due to less statistical power for this comparison, since there are only 62 Hispanic defendants). Cases with Black defendants and White victims are 17% less likely to have a death filing retracted in the overall model, and this effect approaches standard statistical significance. In the models controlling for county differences, White defendants are 16% less likely to have a death filing retracted, and this effect would be statistically significant. Cases with White victims are 13% less likely to have a death filing retracted, when controlling for county differences, and this approaches statistical significance. White defendant/White victim cases are 6% more likely to have a death filing retracted, controlling for county, and this is nearly significant. Figure 11 shows these differences as a set of bar graphs.

[20] The covariate balance for several of the "death penalty retracted" comparisons was less than ideal; that is, the propensity weighted models were only partially successful in balancing the covariates. Most of these models had eight or more covariates that had standardized difference scores of greater than |.20|, meaning that the distribution of those covariates remained different between the groups (see Appendix D).

Figure 11. Death Penalty Retracted



- No bars where there were not enough viable cases for comparison

An important pattern, distinctive to Philadelphia, emerged in comparisons among counties in Table 24. In Philadelphia, cases with Black defendants, Black victims, and any defendant/victim combination involving Black individuals are very highly likely to have a death filing retracted. In contrast, cases with White defendants are comparatively much less likely to have a death filing retracted. These patterns would indicate statistically significant differences in retracting death penalty filings between Philadelphia County and the other 17 counties in the field data.

Next, Table 25 shows the results of propensity score weighting models examining the likelihood of receiving the death penalty.[21]

[21] In our death penalty propensity score models, we include all of the 880 field data cases, rather than just the 167 cases where the death penalty was filed and not retracted. This strategy follows the logic of the

Table 25: Sentenced to the Death Penalty (N = 880, full sample)								
	Overall Model		Controlling for County		Allegheny *		Philadelphia *	
	Average controlled difference	p	Average controlled difference	p	Odds	p	Odds	p
White Def.	.01	.54	.01	.70	.79	.72	.03	.001
Black Def.	-.03	.32	-.02	.38	1.10	.89	.19	.001
Hispanic Def.	-.02	.32	-------	-----	---------	-----	--------	-----
Any White Vic.	.08	.00 01	.06	.001	.25	.01	.18	.04
Any Black Vic.	-.06	.02	-.05	.04	2.27	.32	.51	.34
Any Hispanic Vic.	-.02	.09	-------	-----	---------	-----	--------	-----
White Def./White Vic.	.03	.26	.01	.35	.73	.66	.08	.02
White Def./Black Vic.	------	-----	------	------	-------	------	--------	--------
White Def./Hispanic Vic.	------	-----	------	------	-------	------	--------	--------
Black Def./White Vic.	.004	.86	-.001	.94	.25	.12	.12	.04
Black Def./Black Vic.	-.05	.06	-.05	.06	3.42	.21	.68	.63
Black Def./Hispanic Vic.	------	-----	------	------	-------	------	--------	-----
Hispanic Def./White Vic.	------	-----	------	------	-------	------	--------	--------
Hispanic Def./Black Vic.	------	-----	------	------	-------	------	--------	--------
Hispanic Def./Hispanic Vic.	------	-----	------	------	-------	------	--------	--------

In these comparisons, cases with White victims are 8% more likely to receive a death sentence in the overall model, and 6% more likely to receive it when controlling for county

Paternoster and Brame (2008) study, which examined death-eligible cases that could have gotten the death penalty. The propensity score weighting (or matching) procedure ensures that cases are comparable and covariates are balanced, whether a motion for the death penalty was filed or not. We replicated all these analyses with only the 167 cases where prosecutors filed notice to seek the death penalty and did not retract the filings. However, in these analyses, estimates become unstable/unreliable due to the low number of cases, and the comparison and control groups become difficult to balance on the covariates/control variables.

differences.[22] These effects would be highly statistically significant if this dataset were a sample. By contrast, cases in which the victims are Black are 6% less likely than other cases to receive the death penalty overall, and 5% less likely controlling for county differences.[23] Similarly, cases with Black defendants and Black victims are 5% less likely to receive the death penalty in both the overall and county-controlled model, and the effects approach conventional statistical significance (p- value = .06).[24] Thus, we see clear evidence of race-of-victim effects discussed earlier in the literature review.[25] Figure 12 shows these differences graphically.

---

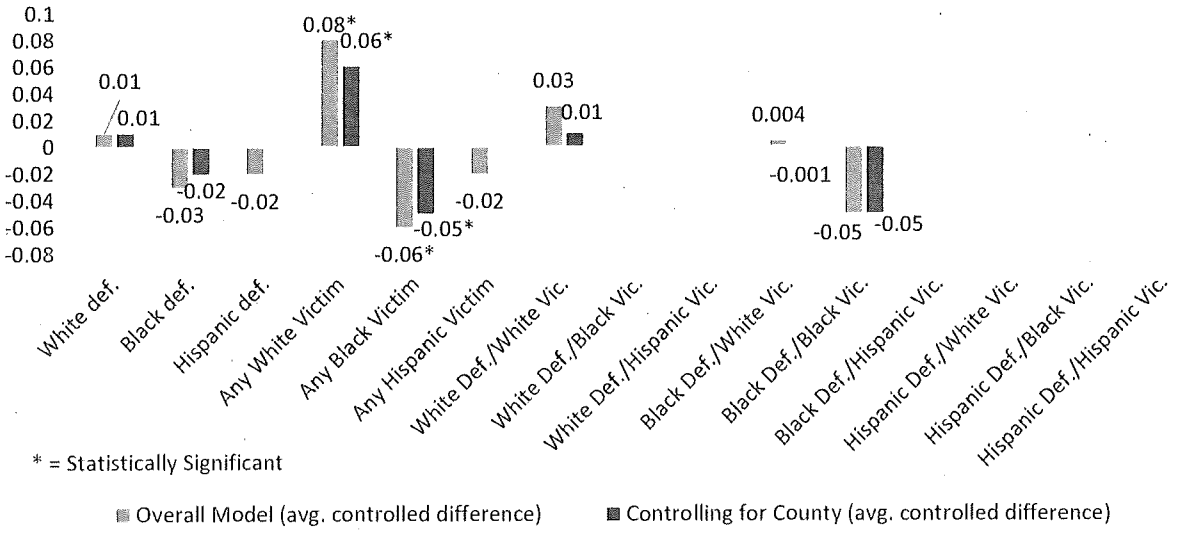
[22] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is .07, p-value < .0001. Substantively, this means that in the matching model White victim cases are 7% more likely to receive the death penalty, and the effect would be highly statistically significant.

[23] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is -.05, p-value = .02. Substantively, this means that in the matching model Black victim cases are 5% less likely to receive the death penalty, and the effect would be statistically significant.

[24] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is -.06, p-value < .0001. Substantively, this means that in the matching model Black defendant/Black victim cases are 6% less likely to receive the death penalty. Unlike in the propensity score weighting model, in the matching model, this effect would be highly statistically significant.

[25] The propensity weighted models for three of the comparisons had eight or more covariates that had standardized difference scores of greater than |.20|. These were: Hispanic defendants, Black victims, and Black defendants/Black victims. See Appendix D.

Figure 12. Sentenced to the Death Penalty



- No bars where there were not enough viable cases for comparison

Turning to the comparisons among counties, nearly all defendant types and defendant/ victim combinations are substantially less likely to receive the death penalty in Philadelphia, than in Allegheny County or the other 16 counties in the field study. This coincides with the logistic regression findings, in which defendants in Philadelphia cases had lower odds of receiving the death penalty. Additionally, the death penalty was notably less likely to be imposed in cases with White victims in Allegheny County (odds = .25) than in the other 17 counties in the field study.

Between-County Comparisons

Given the substantial county differences we have seen in the analyses so far, we examined propensity score weighting models, directly comparing Philadelphia and Allegheny County to the other 16 counties in the field study (the propensity score model contains all the

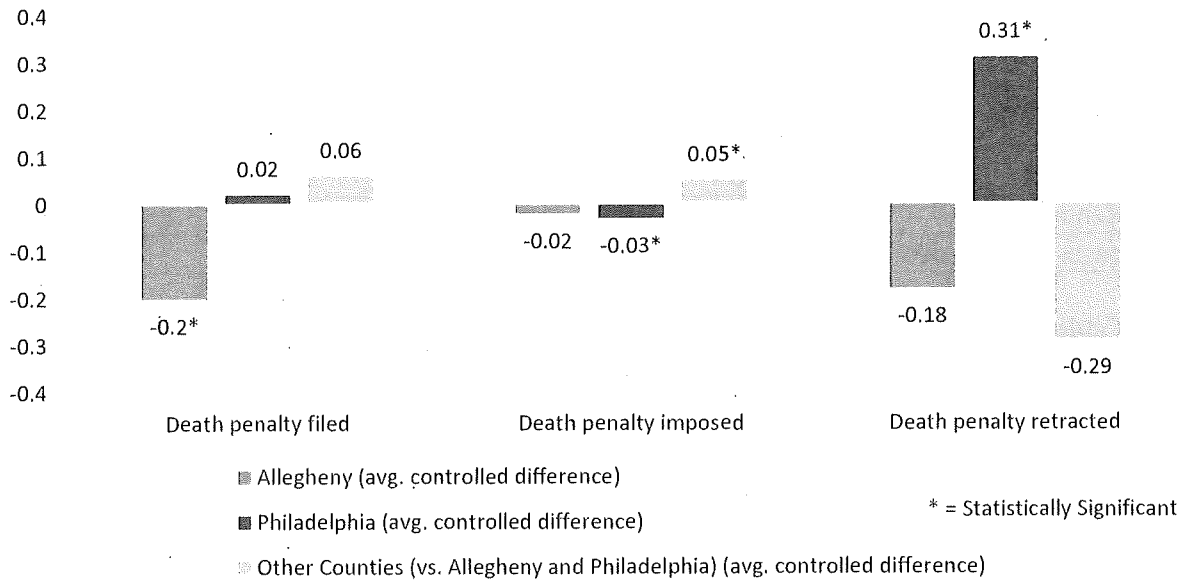
control variables from the list in Table 22, and the race-of-defendant and race-of-victim variables). Table 26 presents these models.

Table 26: County Comparisons: Philadelphia and Allegheny vs. Rest of Field Counties

	Allegheny		Philadelphia		Other Counties (vs. Allegheny and Philadelphia)	
	Average controlled difference	p	Average controlled difference	p	Average controlled difference	p
Death penalty filed (N=880)	-.20	.001	.02	.50	.06	.08
Death penalty imposed (N=880)	-.02	.42	-.03	.02	.05	.001
Death penalty retracted (N=313)	-.18	.59	.31	.001	-.29	.19

These models largely bear out the findings above. Prosecutors in Allegheny County are notably (20%) less likely than the rest of the counties, including Philadelphia, to file motions to seek the death penalty, even for cases that are highly similar/comparable on the variables in Table 22. In addition, Philadelphia defendants have a 3% smaller probability of being sentenced to death, an effect that seems small but would be statistically significant in a sample. By contrast, defendants in cases in the 16 counties other than Allegheny and Philadelphia have a 5% greater probability of being sentenced to death (compared to Allegheny and Philadelphia). Finally, cases in Philadelphia in which motions for the death penalty are filed are much more likely to have it retracted than in the rest of the counties: Philadelphia cases have a 31% greater probability of a death penalty filing being retracted. From Table 24, however, recall that in Philadelphia, motions filed for the death penalty in cases involving Black defendants and/or Black victims are much more likely to be retracted than in cases involving White defendants and/or White victims. The between-county differences are shown graphically in Figure 13.

Figure 13. County Comparison: Philadelphia and Allegheny vs. Rest of Field Counties



Defense Attorney, and Defense Attorney by Defendant Race/Ethnicity Comparisons

Next, we examined propensity score weighting models like the ones above, but this time, comparing death penalty outcomes by types of legal representation (the other control variables besides attorney type stay the same as in Table 22). We also investigated comparisons of type of legal representation by race/ethnicity of defendant. These comparisons are shown in Tables 27 and 28 below.

Table 27: Death Penalty Filed: Defense Attorney Comparisons (N = 880)

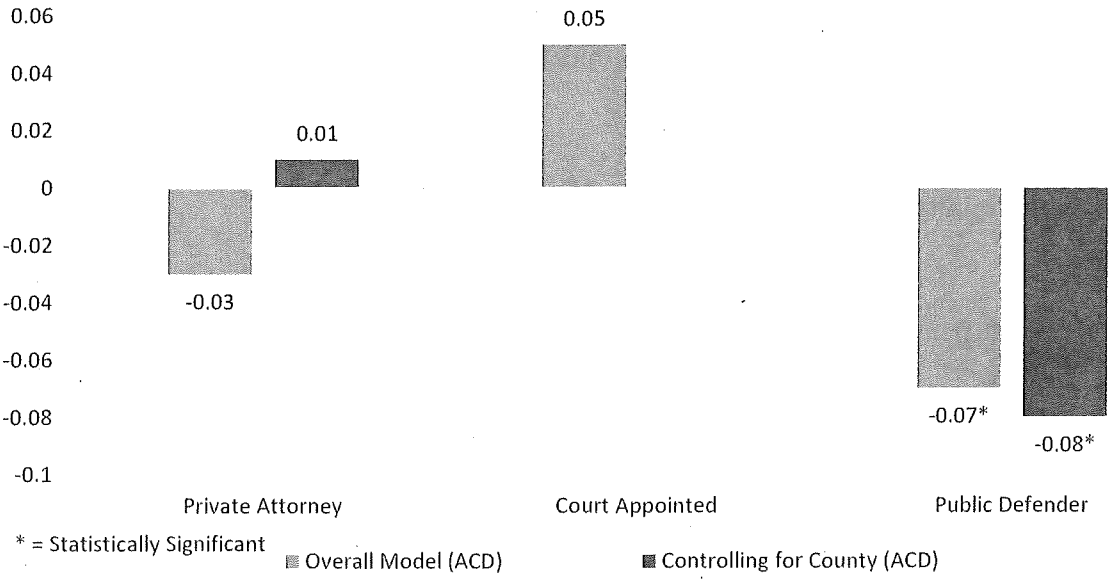
	Overall Model		Controlling for County		Allegheny		Philadelphia	
	ACD	p-value	ACD	p-value	Odds	p-value	Odds	p-value
Privately-Retained Attorney	-.03	.43	.01	.83	.49	.17	1.32	.45
Court-Appointed	.05	.18	----	----	----	----	----	----
Public Defender	-.07	.04	-.08	.02	.40	.02	.50	.04

Table 28: Death Penalty Retracted: Defense Attorney Comparisons (N = 313)								
	Overall Model		Controlling for County		Allegheny		Philadelphia	
	ACD	p-value	ACD	p-value	Odds	p-value	Odds	p-value
Privately-Retained Attorney	.07	.71	-.12	.152	21.3*	.01	.24	.10
Court-Appointed	.05	.50	----	----	----	----	----	----
Public Defender	-.02	.90	.05	.67	.27*	.18	3.86	.15
* Only 8 cases had the death penalty retracted in Allegheny County.								

In Table 27, defendants represented by public defenders are 7-8% less likely to have motions for the death penalty filed against them, depending on whether the model controls for county differences or not.[26] This is especially true in Allegheny County and Philadelphia, compared to the 16 other counties in the field study. Public defenders in these two large counties have significantly lower odds of having the death penalty filed against their clients than public defenders representing defendants in the other 16 counties in the field study. Figure 14 shows these defense attorney differences as a set of bar charts.

[26] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is -.08, p-value = .01. Substantively, this means that in the matching model, public defender cases have an 8% lesser probability of a death penalty filing, and the effect would be statistically significant.

Figure 14: Death Penalty Filed: Defense Attorney Comparisons

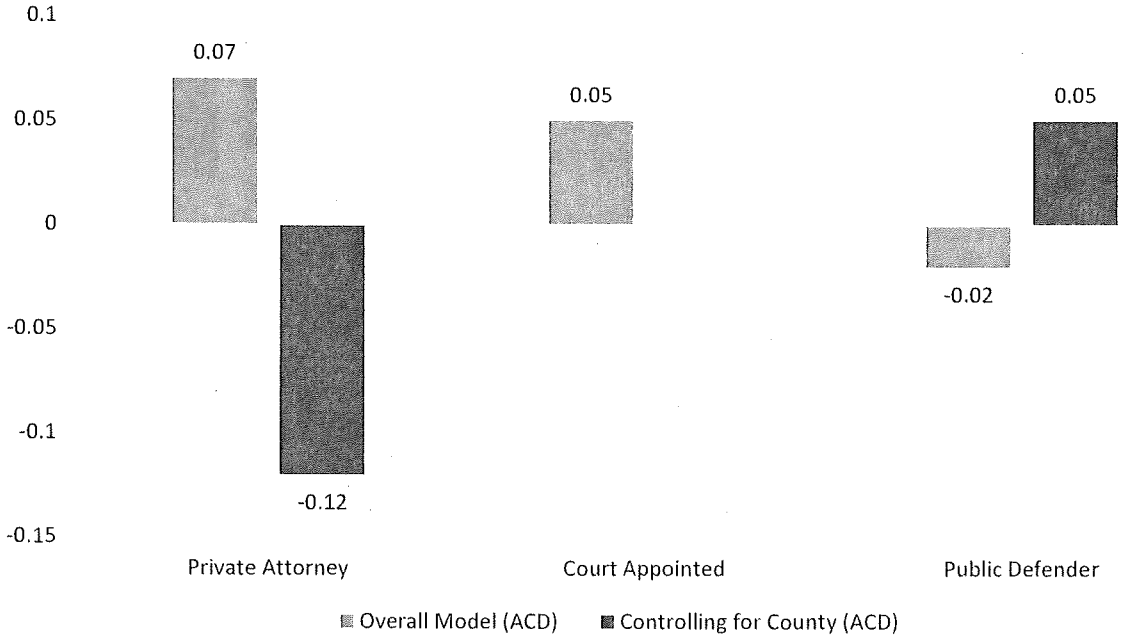


- No bars where there were not enough viable cases for comparison

In Table 28, when not controlling for differences among counties, defendants with privately-retained attorneys are 7% more likely overall to have a death penalty filing retracted than defendants with other types of legal representation,. However, when controlling for county differences, defendants with privately-retained attorneys are 12% less likely to have a death penalty filing retracted. Neither of these differences would be statistically significant in a random sample, however. Privately-retained attorneys in Allegheny County seem to have very high odds for having a death filing against their clients retracted, but this finding is unreliable due to the small number of cases (8) in Allegheny County in which a death penalty filing was retracted. By contrast, privately-retained attorneys in Philadelphia relative to the other counties have smaller odds of securing a death filing retraction for their clients (than court-appointed attorneys or public defenders), and this approaches conventional statistical significance (p-value = .10). Thus, to extent we can conclude anything from these county difference models of

retraction it is that the odds of securing the retraction of a death penalty filing relative to the type of legal representation afforded a defendant likely varies widely among counties. Figure 15 shows a bar chart of the attorney type differences in death penalty retraction.

Figure 15. Death Penalty Retracted: Defense Attorney Comparisons



- No bars where there were not enough viable cases for comparison

Table 29: Death Penalty Imposed: Defense Attorney Comparisons (N = 880)								
	Full Model		**Controlling for County**		**Allegheny**		**Philadelphia**	
	ACD	**p-value**	**ACD**	**p-value**	**Odds**	**p-value**	**Odds**	**p-value**
Privately-Retained Attorney	-.04	.01	-.05	.02	.11*	.03	.89	.91
Court-Appointed	-.02	.29	------	--------	-------	----------	------	---------
Public Defender	.07	.03	.05	.04	.50*	.29	.13	.003
* Only 7 cases received the death penalty in Allegheny County.								

Table 29 shows attorney-type comparisons for defendants receiving the death penalty. Defendants represented by privately-retained attorneys are 4% to 5% (depending on whether we control for county differences) less likely to have the death penalty imposed on them than defendants with other types of legal representation, and both effects would be statistically significant.[27] In contrast, defendants represented by public defenders are 7% more likely to receive the death penalty overall, and 5% more likely to do so when controlling for county differences.[28] The distinctiveness of these effects for particular counties is again evident. Specifically, defendants represented by Philadelphia public defenders have significantly smaller odds (.13 to 1) of receiving the death penalty, than their counterparts in other counties, a marked contrast with the other 17 counties in the field study. It is also important to remember that the large majority (81% or 214 of 263) of defendants with court-appointed attorneys are in Philadelphia, so the court-appointed attorney effects in the overall statewide models above are largely specific to Philadelphia.[29] This is why we could not include valid comparison models among counties for court-appointed attorneys in death penalty cases in Table 29 (or in Tables 27

---

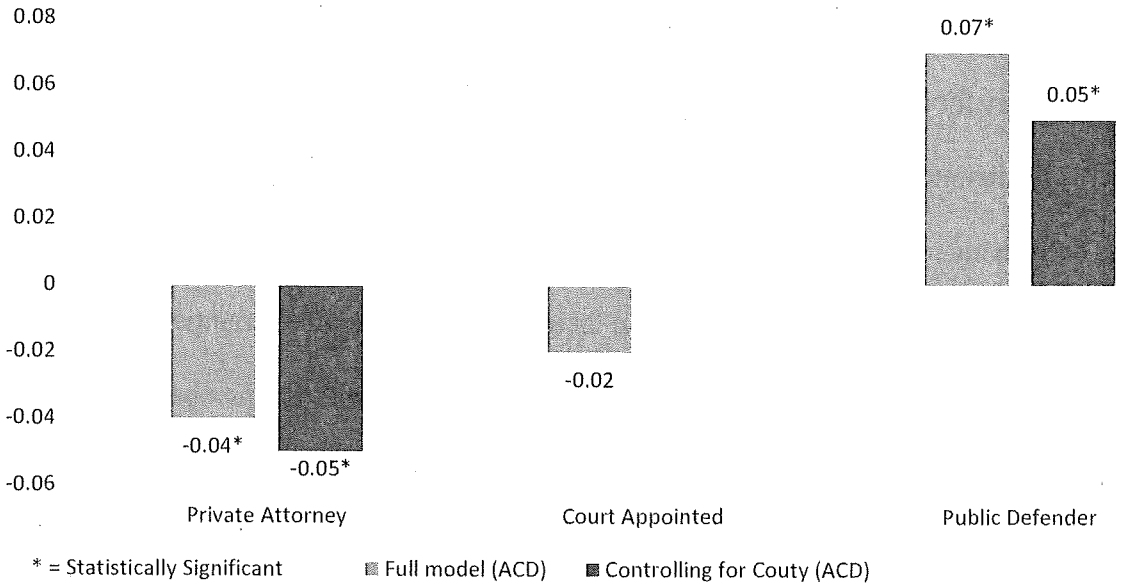
[27] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is -.03, p-value = .08. Substantively, this means that in the matching model, cases with private attorneys have a 3% lesser probability of receiving the death penalty, and the effect would only approach statistical significance (p-value of .05 or less).

[28] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is .03, p-value = .02. Substantively, this means that in the matching model, public defender cases have a 3% greater probability of receiving the death penalty, and the effect would be statistically significant.

[29] In Philadelphia, 214 of the defendants convicted of first-degree murder were represented by a court-appointed attorney. In 84 of these cases, prosecutors filed a motion to seek the death penalty, and 54 of these filings were retracted. Thirty of the defendants with court-appointed attorneys were tried before a jury and five received the death penalty.

and 28); there are too few cases with court-appointed attorneys in the other 17 counties to run the models. Figure 16 shows these differences graphically.

Figure 16. Death Penalty Imposed: Defense Attorney Comparisons



- No bars where there were not enough viable cases for comparison

We also examined propensity score weighting comparisons of the type of legal representation by race of the defendant. These models indicate the relative probabilities of the death penalty outcomes for defendants with specific attorney/race of defendant combinations. We could not perform these models with Hispanic defendants, however, due to the low numbers of death penalty cases with Hispanic defendants, per type of legal representation. As above, we cannot present any comparisons among counties for court-appointed attorneys in these cases since they are heavily concentrated in Philadelphia. In addition, we present ACD differences from the models controlling for county differences, but we do not present the county-specific

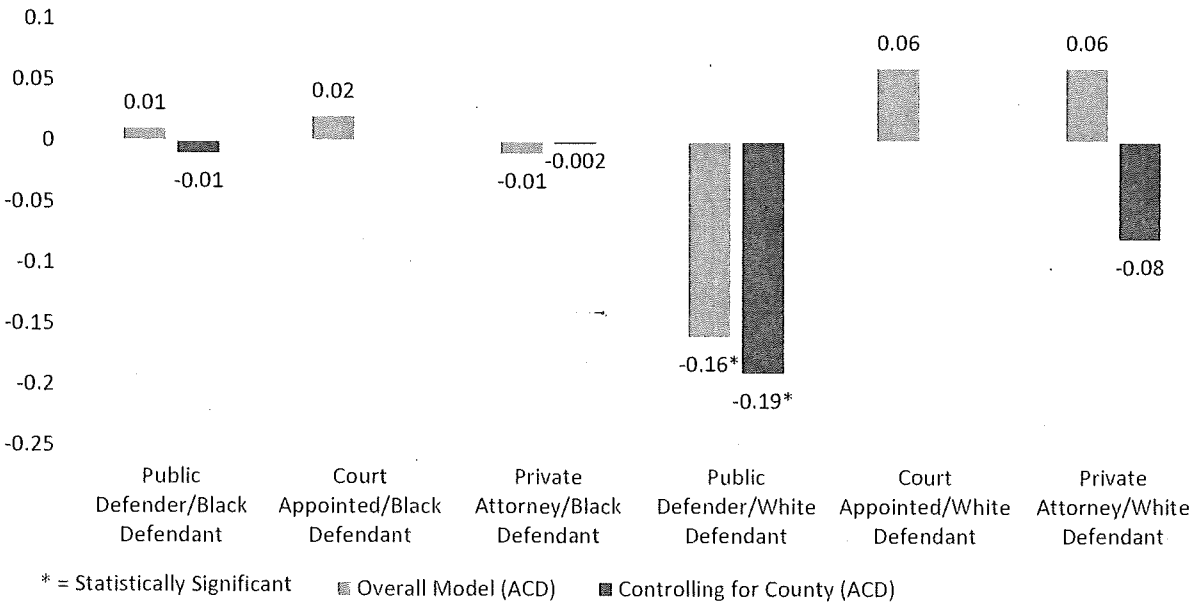
odds, because the low number of cases per specific comparison group, per county, render these county-specific odds unstable and misleading.

Table 30: Death Penalty Filed: Defense Attorney by Defendant Race/Ethnicity Comparisons (N = 880)								
	Overall Model		**Controlling for County**		**Allegheny**		**Philadelphia**	
	ACD	**p-value**	**ACD**	**p-value**	**Odds**	**p-value**	**Odds**	**p-value**
Public Defender/Black Defendant	.01	.93	-.01	.94	-----	-------	-----	--------
Court-Appointed/Black Defendant	.02	.63	------	---------	-------	---------	------	---------
Privately-Retained Attorney/Black Defendant	-.01	.91	-.002	.98	-----	-------	-----	------
Public Defender/White Defendant	-.16	.003	-.19	.000	-----	-----	-----	-----
Court-Appointed/White Defendant	.06	.48	------	---------	-------	---------	------	---------
Privately-Retained Attorney/White Defendant	.06	.53	-.08	.10	-----	----	-----	-----

One finding that is especially noteworthy in the comparisons in Table 30 is that White defendants represented by a public defender are 16% to 19% less likely to have the death penalty filed against them, depending on whether county differences are controlled.[30] Both effects would be highly statistically significant. Figure 17 shows these differences in death penalty filing for defense attorney/race combinations.

[30] When this comparison is examined with an identical propensity score *matching* model, the average controlled difference is -.15, p-value = .04. Substantively, this means that in the matching model, public defender cases with White defendants have a 15% lesser probability of a death penalty filing, and the effect would be statistically significant.

Figure 17. Death Penalty Filed: Defense Attorney by Defendant Race/Ethnicity Comparisons



- No bars where there were not enough viable cases for comparison

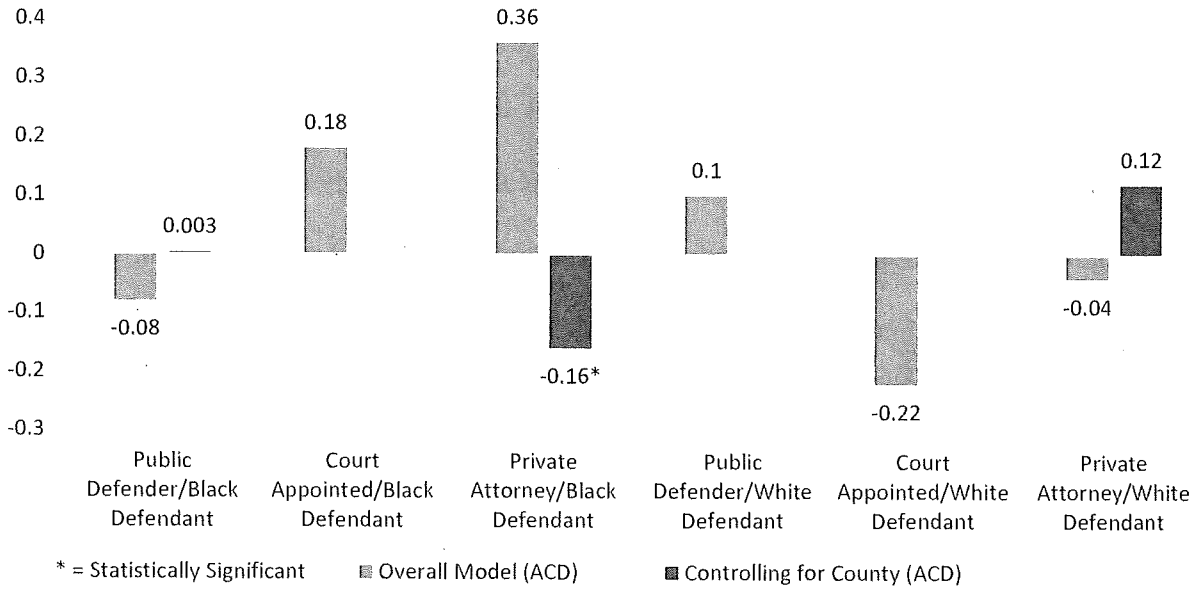
Table 31: Death Penalty Retracted: Defense Attorney by Defendant Race/Ethnicity Comparisons (N = 313)

	Overall Model		Controlling for County		Allegheny		Philadelphia	
	ACD	p-value	ACD	p-value	Odds	p-value	Odds	p-value
Public Defender/Black Defendant	-.08	.45	.003	.97	-----	------	-----	-------
Court-Appointed/Black Defendant	.18	.07	------	--------	-----	------	-----	-------
Privately-Retained Attorney/Black Defendant	.36	.14	-.16	.01	-----	------	-----	-------
Public Defender/White Defendant	.10	.89	------	--------	-----	------	-----	-------
Court-Appointed/White Defendant	-.22	.15	------	--------	-----	------	-----	-------

Privately-Retained Attorney/White Defendant	-.04	.78	.12	.19	-----	------	-----	-------

When we examined the retraction of death penalty filings as set forth in Table 31, Black defendants with court-appointed attorneys had an 18% greater probability of having the death penalty filing retracted, compared to defendants with other types of legal representation, which approaches statistical significance. In contrast, White defendants represented by court-appointed attorneys have a 22% lower probability of death penalty retraction, but this effect would not be statistically significant. Interestingly, Black defendants represented by privately-retained attorneys are 36% more likely to have a death filing retracted in the overall model (not statistically significant). But when we control for differences among counties, such cases have a 16% lower probability of retraction (an effect which would be statistically significant). The fact that this effect changes so significantly between the overall model and the county difference model suggests that the likelihood of the retraction of a death penalty filing in cases involving Black defendants with privately-retained attorneys varies a great deal among counties. There are also insufficient numbers of cases per county to obtain effects for White defendants with public defenders while controlling for county differences. Figure 17 shows these differences graphically.

Figure 18. Death Penalty Retracted: Defense Attorney by Defendant Race/Ethnicity



- No bars where there were not enough viable cases for comparison

We could not perform propensity score weighting models of whether receiving the death penalty was associated with the defendant race by type of attorney groupings, since there were too few cases per category, per death penalty outcome. However, we can present the following simple proportions by way of comparison:

- Court-Appointed Attorney/Black Defendant
    - Prosecutors sought the death penalty in 84 out of 211 (40%) cases involving Black defendants represented by court-appointed attorneys, and retracted it in 54 of them. In six out of the 30 (17%) remaining cases with Black defendants represented by court-appointed attorneys, the defendants who were exposed to the death penalty received it. Of the 51 death sentences imposed overall, five (9.8%)

involved Black defendants represented by court-appointed attorneys. Notably, all of these Black defendant/court-appointed attorney cases were in Philadelphia.

- Privately-Retained Attorney/Black Defendant
    - Prosecutors sought the death penalty in 57 out of 202 (28%) cases involving Black defendants represented by privately-retained attorneys, and retracted it in 20 of them. In six out of the 37 (16%) remaining cases with Black defendants represented by privately-retained attorneys, the defendants who were exposed to the death penalty received it. Of the 51 death sentences imposed overall, six (11.8%) involved Black defendants represented by privately-retained attorneys.
- Public Defender/Black Defendant
    - Prosecutors sought the death penalty in 55 out of 175 (31%) cases involving Black defendants represented by public defenders, and retracted it in 23 of those cases. In 13 out of 32 (41%) remaining cases with Black defendants represented by public defenders, the death penalty was imposed. Of the 51 death sentences imposed overall, 13 (25.5%) involved Black defendants represented by public defenders.
- Public Defender/White Defendant
    - Prosecutors sought the death penalty in 24 of 77 (31%) cases involving White defendants represented by public defenders, and retracted it in 11 of these cases. In nine of the 13 (69%) remaining cases with White defendants represented by public defenders, the death penalty was imposed. Of the 51 death sentences imposed overall, nine (17.7%) involved White defendants represented by public defenders.

- Privately-Retained Attorney/White Defendant
    - Prosecutors sought the death penalty in 31 of 96 (32%) cases involving White defendants represented by privately-retained attorneys, and retracted it in nine of these cases. Of the 22 remaining cases with White defendants represented by privately-retained attorneys, six (27%) received it. Of the 51 death sentences imposed overall, six (11.7%) involved White defendants represented by privately-retained attorneys.
- Court-Appointed Attorney/White Defendant
    - Prosecutors sought the death penalty in 20 of 40 (50%) cases involving White defendants represented by court-appointed attorneys, and retracted it in seven of these cases. In three out of the 13 (23%) remaining cases with White defendants represented by court-appointed attorneys, the defendants received it. Of the 51 death sentences imposed overall, three (5.9%) involved White defendants represented by court-appointed attorneys.

Chapter IV: Conclusion

Is the disproportionality of Black defendants sentenced to death in Pennsylvania a result of racial disparity in decision-making by prosecutors – either in their decision to file or retract a motion for the death penalty – or by juries or judges at the sentencing stage? Or, can this disproportionality be explained by legally relevant factors such as the severity of the offense, prior record, and other appropriate sentencing considerations? What role, if any, does the race or ethnicity of a victim play in predicting which defendants received the death penalty? Finally, does the type of legal representation afforded to a defendant have an impact on whether the death penalty is sought by a prosecutor or imposed by a judge or jury, and how do all these outcomes differ by county?

This study went beyond traditional death penalty research by creating a data set of first-degree murder convictions from 2000-2010, compiled in 18 of Pennsylvania's 67 counties. This data set represents 87% of all first-degree murder convictions during that time frame in the Commonwealth. We acquired general data from three statewide sources, and more accurate and detailed data from county District Attorney's offices in 14 of the 18 counties. We also obtained data from County Clerk's offices and the Defender Association of Philadelphia. From this data and other information described in this report, we have sought to determine the answers to the above questions.

A. Pennsylvania Case-Processing and Decision-Making Characteristics

Before turning our attention to the inquiries above, it might assist the reader to review some important characteristics of case-processing and decision-making in Pennsylvania's capital cases, as shown by our descriptive statistics.

- Black defendants are very disproportionately charged with and convicted of murder overall and first-degree murder particularly, relative to White defendants.

One of the important limitations of this study, however, is that we were not able to analyze the early stages of this process – the decision to detain, arrest, and charge a suspect. Consequently, we cannot comment on whether disparity, discrimination or arbitrariness played any role in the disproportionately large number of Black defendants charged with murder.

- First-degree murder victimization was largely intra-racial. The majority of Black defendants had Black victims, the majority of White defendants had White victims, and the majority of Hispanic defendant had Hispanic victims.
- Murder charges and convictions, especially for first-degree murder, overwhelmingly involve male defendants.
- The large majority of defendants in first-degree murder cases do not face the death penalty. Typically, either prosecutors do not seek the death penalty, or if it is sought, prosecutors often retract their filings.
    - Prosecutors filed notices of aggravating circumstances in 39% of first-degree murder cases, and sought the death penalty in 36% of the cases.
    - Prosecutors sought the death penalty in 92% of the cases in which they filed notices of aggravating circumstances.
    - Prosecutors retracted death penalty filings in 47% of cases in which they were filed.
    - Approximately 31% of defendants received the death penalty in cases in which the death penalty was sought and the filing was not retracted.

B. Comparisons to Baldus Study Findings

Our study's statistical analyses and measures are not the same as those used in the Baldus studies, but in comparison with their general findings, we found fewer cases overall, and fewer potentially death-eligible cases in particular, that resulted in exposure to a death penalty trial.

- The most common aggravating circumstances filed by prosecutors were "[defendant] knowingly created grave risk of death" (15.5%) and "[murder] committed in the perpetration of a felony" (15.2%). Overall, 39% of the cases had at least one aggravating circumstance filed. Far fewer aggravating circumstances were found by a judge or jury than were filed.
- Greater absolute numbers and overall percentages of defendants with aggravating circumstances filed against them were Black, due to the overall racial disproportionality of the first-degree murder cases we studied. But within racial groups, 37% of Black defendants had one or more aggravating circumstances filed, compared to 43% of White defendants.
- The most common mitigating circumstances presented by the defense were "age of defendant at time of crime" and "no significant history of prior crime." As with aggravating circumstances, mitigating circumstances were found by a judge or jury much less frequently than they were presented by defense attorneys, a finding that coincides somewhat with the Baldus, et al. (1997-1998) study. At least one mitigating circumstance was presented by the defense in 76% of death penalty sentencing trials. The fact that *no* mitigating circumstances were filed by the defense in nearly a quarter of cases raises some important questions about the effectiveness with which defense counsel pursued those cases, especially

considering that 42 Pa.C.S. §9711(e)(8) permits counsel to submit any evidence that he or she believes is mitigating. This evidence can be presented whether or not any of the statutory mitigating circumstances plausibly apply.

- Of the cases in which the death penalty was filed and not retracted, 70% of death penalty sentencing trials were decided by a jury, rather than a judge. Our descriptive and multivariate findings agree with the findings of Baldus, et al. (1997-1998): we found juries to be significantly more likely to impose the death penalty than judges (see Chapter 3 and Appendix B). Since we were not able to examine the actual jury process and dynamics in the current study, however, we cannot comment on why juries are more likely to impose a death sentence.

C. Effect of Death Penalty Filings on Guilty Pleas

In Appendix B, we described an interesting case-processing pattern. Note that in our logistic regression analyses, the variable "Defendant admitted guilt" was associated with increased odds of death penalty filing. It is very unlikely that this effect means that prosecutors are more likely to seek the death penalty against those who plead guilty. Rather, the causality in this effect is likely reversed—defendants are probably more likely to plead guilty once prosecutors seek the death penalty. When we treat pleading guilty to the first-degree murder charge as a dependent variable, a prosecutorial filing to seek the death penalty strongly increases the likelihood of a defendant pleading guilty. Pleading guilty, in turn, strongly increases the likelihood that the death penalty filing will be retracted. Specifically, a death penalty filing raises the odds of a guilty plea by 2.9; cases in which the death penalty is filed have nearly three times the odds of eventually resulting in a guilty plea to a first-degree murder charge. Pleading guilty to a first-degree murder charge is associated with 8.1 times greater odds of the death

penalty filing being retracted. This pattern is also reflected in the finding that the "Defendant admitted guilt" variable greatly increases the likelihood that the death penalty filing will be retracted. In the death penalty literature, this is commonly referenced as plea bargaining or plea negotiation; however, we have not referenced it as plea negotiation because while we assume that some, perhaps a vast majority, do represent negotiated pleas, we do not know that for a fact and are not comfortable labeling all the cases as negotiated pleas.

D. Race, Ethnicity, and the Prosecutorial Decision to Seek the Death Penalty

In Chapter I, we noted that, in general, the literature in numerous states, as well as the Baldus, et al. study in Philadelphia, has found that prosecutors are more likely to seek the death penalty in cases involving a White victim (see, for example, Baldus, et al., 1997-1998; GAO, 1990; Hindson, et al., 2006; Keil and Vito, 1995; Paternoster, et al., 1983; Paternoster, 1984; and Paternoster and Brame, 2008). Other researchers have found an interactive effect, such that Black defendants charged with killing White victims are particularly vulnerable to prosecution for the death penalty (see, for example, Keil and Vito, 1995 and Lenza, et al., 2005). But, as we noted, not all studies have found this pattern. Unah (2011) found that in North Carolina, during the same time frame that we study here, prosecutors were less likely to seek the death penalty when the defendant was a minority and the victim was White.

In contrast to the several other studies noted above, we do not find an overall pattern of disparity to the disadvantage of Black or Hispanic defendants in the decision to seek the death penalty, the decision to retract the death penalty once filed, or the decision to impose the death penalty. Furthermore, we do not find disparity in these decisions to the disadvantage of defendants in cases with Black defendants and White victims. In fact, in the overall model (Table 23), cases with Black defendants and White victims were 10% less likely than other types

of cases to see a death penalty filing, and this effect bordered on conventional statistical significance. We did uncover a Hispanic victim effect, such that cases with Hispanic victims are 21% more likely to have the prosecutor seek the death penalty. This effect was not specific to cases with Hispanic defendants and Hispanic victims, however, but characterized any cases with Hispanic victims, regardless of the race or ethnicity of the defendant.

The contrast with Baldus' study of capital case processing in Philadelphia for the period 1983-1993 is particularly important. There are several potential explanations for our differing findings. First, the data we collected are statewide, not just from Philadelphia, so direct comparisons are not applicable. Second, we used a more advanced form of data analysis (propensity score modeling), and some research has suggested that might make a substantial difference.[31] Third, our data were collected from District Attorneys' files, and access to these files may have provided us more in-depth information on prosecutors' case-processing decisions and the factors affecting them. Finally, prosecutorial and sentencing decisions may well have changed since the 1980s and 1990s, and this may be reflected in our findings.

E. Effect of Type of Legal Representation on Prosecutorial Decisions

Another important focus of our study was the impact of type of defendant legal representation on capital case-processing. As noted in Chapter I, research has generally not examined the impact the type of the defendant's legal representation may have on capital case-processing. Our analysis of this variable builds on Phillips' (2009) study of Harris County, Texas, which found that private attorney representation, compared to court-assigned counsel (no

[31] As we note later, however, our logistic regression findings are not drastically different from our propensity score modeling findings. For example, our logistic regression models find that cases with Hispanic victims have significantly greater odds of death penalty filings, and we find essentially no significant differences in death penalty filings for Black defendants or for Black defendants with White victims.

public defender system existed in Harris County at the time of Phillips' study), dramatically affected the likelihood of a negotiated plea. Specifically, the study found that defendants with privately-retained attorneys were much more likely to negotiate a plea with the prosecutor to avoid the death penalty. Another study of North Carolina case-processing by Unah (2011) found that defendants with public defenders were much more likely to be prosecuted for the death penalty. Pennsylvania has an extensive county-based public defender system which, in most counties, also includes the appointment of counsel by the court in cases involving conflicts with the public defender offices. In Philadelphia, in particular, court-appointed and privately-retained lawyers handle 80% of the death penalty caseload.

Overall, we find that defendants represented by public defenders are less likely than defendants with privately-retained or court-appointed attorneys to have the death penalty filed against them, but there is no clear indication that the type of representation affects the decision to retract the motion for the death penalty. Our findings are very different from Unah's in North Carolina, where defendants represented by public defenders were more likely to be prosecuted for the death penalty. Nor do our findings coincide with Phillips' (2009b) finding that privately-retained attorneys were more successful in negotiating pleas for their clients that did not include the death penalty.[32]

F. Effect of Type of Legal Representation on Decisions to Impose the Death Penalty

We also found notable differences in death penalty outcomes based on the type of legal representation afforded a defendant. Specifically, defendants with privately-retained attorneys

---

[32] As stated previously in our study, we characterize this decision as the retraction of the motion for the death penalty, rather than a negotiated plea because we believe it is inappropriate to suggest that all retractions are the result of negotiation. We assume that many are, but we certainly are aware of cases where a defendant pleads guilty without any promise from the prosecutor to retract the motion for the death penalty.

were 4% - 5% less likely to receive the death penalty, while defendants represented by public defenders were 5% - 7% more likely to receive the death penalty. There also may be differences connected to type of representation by race of defendant, but the results should be interpreted with caution, due to the small number of cases in those analyses. Notably, more White defendants than Black or Hispanic defendants had privately-retained attorneys, rather than public defenders or court-appointed attorneys. Our findings are consistent with Lenza, et al. (2005), who also found that defendants represented by public defenders were more likely to receive the death penalty, and Phillips (2009b) who found that defendants represented by privately-retained attorneys never received the death penalty. On the other hand, defendants represented by public defenders in Philadelphia were much less likely to receive the death penalty than defendants represented by public defenders in the other 17 counties in the field study. Our findings regarding the effectiveness of Philadelphia public defender's office (Defender Association of Philadelphia) as well as Anderson and Heaton's (2012) findings regarding that office suggest homicide defendants represented by that office seem to obtain relatively good outcomes.

There were substantial differences between counties in each of the death penalty outcomes we examined. Counties differed in terms of overall likelihood of a prosecutor filing or retracting a death penalty motion. For example, prosecutors in Allegheny County were much less likely to seek the death penalty than prosecutors in the other 17 counties in our field study. On the other hand, prosecutors in Philadelphia were much more likely to retract the death penalty than prosecutors in the other 17 counties in our field study (including Allegheny County). Counties also differed in the effects of defendant and victim race/ethnicity, and in the effects of type of legal representation, on prosecutor decisions. For example, prosecutors in Allegheny County and Philadelphia were less likely to seek the death penalty against defendants

represented by public defenders than prosecutors were in the other 16 counties in our field study. Indeed, differences among counties in death penalty outcomes and the effects of other variables on death penalty outcomes were the largest and most prominent differences found in our study.

Although we found that the two largest counties in the Commonwealth were relatively less likely to file for, and more likely to retract, the death penalty, compared to the other 16 counties in the data, we are skeptical that it is simply the size of the county that drives these differences. Furthermore, our selection of counties for our field study (only those with ten or more first-degree murder convictions) eliminated most counties that would be classified as rural. Therefore, we do not have data to contrast with the findings of Songer and Unah (2006), who found that rural judicial districts in South Carolina were much more likely to file for the death penalty, or with Poveda (2006) in Virginia who found that smaller (i.e., generally rural jurisdictions) were least likely to seek the death penalty, or with Paternoster and Brame (2008) who found that prosecutors in Maryland were much more likely to seek the death penalty in suburban counties than in large urban counties with inner cities.

G. Multivariate Analysis of the Race, Ethnicity and the Sentencing Decision

We did not find a pattern of disparity to the disadvantage of Black defendants or Hispanic defendants in the decisions of judges and juries to sentence these defendants – regardless of the race or ethnicity of their victims. That said, there were some notable differences in some death penalty sentences based on the race of the victim, though *not* in combination with the race/ethnicity of defendant. Cases with White victims were more likely (8%) to receive the death penalty, while cases with Black victims were less likely (-6%) to receive the death penalty, regardless of the race or ethnicity of the defendant.

Our finding of a race-of-victim effect at sentencing is consistent with much of the literature, but our finding that Black defendants with White victims were not at greater risk to receive the death penalty contrasts with this literature, including the Baldus, et al. (1997-1998) study of Philadelphia. Our findings are consistent with the research of Jennings, et al. (2014) on North Carolina that used propensity scoring as well, which did not find that Black defendants with White victims were more likely to receive the death penalty.

H. Summary

In Chapter I, we discussed the focal concerns perspective on criminal justice decision-making. This theory posits, for example, that prosecutors and judges assess the blameworthiness (culpability) and dangerousness of defendants (protection of the community), as well as the practical implications of their decisions. Further, both legal and extralegal considerations can affect the assessment of defendants and cases in terms of these three focal concerns, though legally relevant factors are generally more influential. Additionally, factors that affect considerations of blameworthiness, dangerousness/community protection, and practical considerations likely vary by social context and can be influenced by implicit bias against Black and Hispanic Defendants.

Our findings are largely consistent with the notion that legally relevant factors are likely the primary factors that shape interpretations of blameworthiness and dangerousness that theoretically drive the punishment decisions we examined. These legally relevant factors were represented by our study's many control variables (see Table 22), which measured aggravating and mitigating circumstances, characteristics of the offense, victim behavior and relationship to defendant, issues raised by the defense, and evidence strength. However, there is evidence consistent with the notion that the race of the victim might shape definitions of blameworthiness

or community protection in some death penalty decisions, or perhaps might influence decision-makers' considerations of practical constraints connected to cases.

We cannot assess definitively if this notion is true, nor can we assess exactly how race-of-victim might influence these focal concerns; qualitative evidence about prosecutors', judges', and juries' decision-making processes and considerations would be needed to do that. But the fact remains that we find the same significant race-of-victim effects across multiple analysis methods, even after accounting for a host of control variables.

Prosecutors were more likely to seek the death penalty for cases with Hispanic victims. Defendants of any race or ethnicity with Black victims, and Black defendants with Black victims, were less likely to receive the death penalty than defendants of any race or ethnicity with White victims and White defendants with White victims. These differences cannot be attributed to the many factors measures by our control variables listed in Table 22.

Furthermore, there is evidence that the type of legal representation afforded a defendant shaped death penalty outcomes. These differences might be related to the focal concern of practical implications and considerations. A number of practical factors might be at work behind these differences, such as: (1) a defendant's financial resources and his or her ability to afford a privately-retained attorney; (2) a privately-retained attorney's time and resources; (3) differing time and resources available to devote to capital cases among public defenders, court-appointed attorneys, and privately-retained attorneys; and (4) differences among privately-retained attorneys, public defenders, and court-appointed attorneys in experience, knowledge, skill set, and the ability of an attorney to spend the time it takes to build a rapport with the defendant that is vital to successful plea bargaining when the evidence may be overwhelming against the

defendant. These are speculations, however, and more research with different kinds of data would be necessary to investigate them.

Overall, our multivariate results were fairly robust in terms of the different modeling methods used. We observed many similarities between our logistic regression findings in Appendix B and our propensity score modeling findings, though there are some differences.[33] Furthermore, we also obtained highly similar results whether we used propensity score weighting or propensity score matching.

As mentioned, differences among counties in death penalty outcomes, and the effects of other variables on death penalty outcomes, were the largest and most prominent differences found in our study. In fact, this finding is consistent with a major theme in the social science literature on sentencing in general, which documents important differences among local courts in

---

[33] In terms of specific examples of effects that would be statistically significant, our logistic regression analyses and propensity score models both show: (1) defendants with Hispanic victims are more likely to have the death penalty filed against them; (2) Black defendants with Black victims and Black defendants with White victims are less likely to receive the death penalty than any defendants with White victims, and White defendants with White victims. In addition, our logistic regression models and propensity score models show very similar differences among counties in the death penalty outcomes. The general pattern of findings for the type of legal representation afforded a defendant is similar between methods, too. Both the logistic regression and propensity score models show defendants represented by public defenders to be less likely to have the death penalty filed against them than other defendants (this difference is especially pronounced between court-appointed attorneys and public defenders in the logistic regression models). Both the logistic regression and propensity score models show no clear, notable differences between types of legal representation in terms of death penalty filing retractions. Both the logistic regression and the propensity score models show that defendants represented by privately-retained attorneys are significantly less likely to receive the death penalty, compared to defendants represented by public defenders.

There are some differences between the logistic and propensity score models. The logistic models show Hispanic defendants to be marginally significantly more likely to have a death penalty filing against them, where the propensity score models shows a non-significant effect in which Hispanics are less likely to have a death penalty filing. The logistic models show Hispanic defendants to be significantly more likely to have a death penalty filing retracted, while the propensity score models show an effect in the same direction, but smaller and non-significant. Finally, the logistic regression models showed that Hispanic defendants with Hispanic victims were less likely to get the death penalty, but this comparison was not possible with the propensity score methods.

sentencing severity and in the effects of different variables like race and ethnicity (see the review by Ulmer, 2012). Our findings of county differences also are consistent with theories that view courts as communities with distinctive norms and practices, and distinctive interpretations of focal concerns of punishment. Just as the likelihood of the various death penalty outcomes are locally variable, so too are the effects of other important variables, such as race of defendant and victim, and defense attorney. *In a very real sense, a given defendant's chance of having the death penalty sought, retracted, or imposed depends on where that defendant is prosecuted and tried.* In many counties of Pennsylvania, the death penalty is simply not utilized at all. In others, it is sought frequently. If uniform prosecution and application of the death penalty under a common statewide framework of criminal law is a goal of Pennsylvania's criminal justice system, these findings raise questions about the administration of the death penalty in the Commonwealth.

References

Anderson, James M. and Paul Heaton. 2012. "How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes." *The Yale Law Journal*, 122: 154-217.

Apel, Robert and Gary Sweeten. 2010. "Propensity Score Matching in Criminology and Criminal Justice." Pp. 543-562 in *Handbook of Quantitative Criminology*, edited by Alex Piquero and David Weisburd. New York: Springer.

Austin, Peter. 2011. "An Introduction to Propensity Score Methods for Reducing the Effects of Confounding in Observational Studies." *Multivariate Behavior Research,* 46: 399-424.

Baldus, David, Charles D. Pulaski, and George Woodworth. 1983. "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience. *Journal of Criminal Law and Criminology*, 74:661-753.

Baldus, David, George Woodworth and Charles Pulaski, Jr. 1990. *Equal Justice and the Death Penalty.* Boston: Northeastern University Press.

Baldus, David C., George Woodworth, David Zuckerman, and Neil Alan Weiner. 1997-98. "Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia." *Cornell Law Review*: 1638-1770.

Baldus, David C., George Woodworth, Catherine M. Grosso, and Aaron M. Christ. 2002-2003. "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)." *Nebraska Law Review,* 81(2):486-756.

Berk, Richard A, Azusa Li, and Laura J. Hickman. 2005. "Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the state of Maryland." *Journal of Quantitative Criminology,* 21(4):365-390.

Blankenship, Michael B. and Kristie R. Blevins. 2001. "Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases." *The University of Memphis Law Review,* 31(4):823.

Bowers, William J., and Glenn L. Pierce. 1980. "Arbitrariness and Discrimination Under the Post-Furman Capital Statutes." *Crime and Delinquency,* 26(4):563-635.

Devine, Patricia G. 2001. "Implicit Prejudice and Stereotyping: How Automatic Are They?" *Journal of Personality and Social Psychology,* 81:757-759.

Eisenstein, James, Roy B. Flemming, and Peter F. Nardulli. 1988. *The Contours of Justice: Communities and Their Courts*. Boston: Little, Brown.

Foglia, Wanda D. 2003. "They Know Not What They Do: Unguided and Misguided Discretion in Pennsylvania Capital Cases." *Justice Quarterly,* 20:187-211.

General Accountability Office. 1990. *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*. Washington, D.C.: General Accountability Office.

Gross, Samuel R. and Robert Mauro. 1984. "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization." *Stanford Law Review,* 37(1):27-153.

Harris, David A. 2007. "The Importance of Research on Race and Policing: Making Race Salient to Individuals and Institutions Within Criminal Justice." *Criminology and Public Policy,* 6:5-24.

Hindson, Stephanie, Hillary Potter and Michael L. Radelet. 2006. "Race, Gender, Region and Death Sentencing in Colorado, 1980-1999." *University of Colorado Law Review, 77*:549.

Holcomb, Jefferson, Marian Williams, and Stephen Demuth. 2004. "White Female Victims and Death Penalty Disparity Research." *Justice Quarterly,* 21:877-902.

Jennings, Wesley. G., Tara N. Richards, M. Swayne Smith, Beth Bjerregaard, and Sondra J. Fogel. 2014. "A Critical Examination of the 'White Victim Effect' and Death Penalty Decision-Making from a Propensity Score Matching Approach: The North Carolina Experience." *Journal of Criminal Justice,* 42:384-398.

Keil, Thomas J. and Gennaro F. Vito. 1995. "Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes." *Justice Quarterly,* 19(4):633-672.

Kramer, John H. and Jeffery T. Ulmer. 2009. *Sentencing Guidelines: Lessons from Pennsylvania*. Boulder, CO: Lynne Rienner Publishers.

LaFree, Gary, Eric Baumer, and Robert O'Brien. 2010. "Still Separate and Unequal? A City Level Analysis of the Black-White Gap in Homicide Arrests Since 1960." *American Sociological Review,* 75(1):75-100.

Lattimore, Pamela K., Doris Layton MacKenzie, Gary Zajac, Debbie Dawes, Elaine Arsenault and Stephen Tueller. 2016. "Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain and Fair an Effective Supervision Strategy?" *Criminology and Public Policy*, 15(4): 1103-1142.

Lenza, M., D. Keys, & T. Guess. 2005. "The Prevailing Injustices in Application of the Missouri Death Penalty (1978 to 1996)." *Social Justice*, 32(2):151-166.

Levinson, Justin D. 2009. "Race, Death, and the Complicitous Mind." *DePaul Law Review*, 58(3): 599-644.

Li, Fan, Alan M. Zaslavsky, and Mary Beth Landrum. 2013. "Propensity Score Weighting with Multilevel Data." *Statistics in Medicine,* 32(19):3373-3387.

Mihalic, Sharon and Delbert S. Elliott. 2015. "Evidence-based Programs Registry: Blueprints for Healthy Youth Development." *Evaluation and Program Planning*, 48: 124-131.

Paternoster, Raymond. 1984. "Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Discrimination." *Law and Society Review*, 18(3):437-478.

Paternoster, Raymond and Robert Brame. 2008. "Reassessing Race Disparities in Maryland Capital Cases." *Criminology,* 46:971-1008.

Paternoster, Raymond, Robert Brame, Sarah Bacon, and Andrew Ditchfield. 2004. "Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999." *Margins: The University of Maryland Law Journal of Race, Religion, Gender, and Class,* 4:1-98.

Paternoster, Raymond, Linda Soltzman, Gordon P. Waldo, and Theordore G. Chiricos. 1983. "Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina." *Journal of Criminal Law and Criminology*, 74:701-731.

Phillips, Scott. 2009(a). "Status Disparities in the Capital of Capital Punishment." *Law and Society Review,* 43:807-837.

Phillips, Scott. 2009(b). "Legal Disparities in the Capital of Capital Punishment." *Journal of Criminal Law and Criminology,* 99(3):717-756.

Poveda, Tony G. 2006. "Geographic Location, Death Sentences and Executions in Post-Furman Virginia." *Punishment & Society,* 8(4):423-442.

Radelet, Michael L. and Pierce, Glenn L. 1985. "Race and Prosecutorial Discretion in Homicide Cases." *Law & Society Review,* 19:587-621.

Rosenbaum, Paul R. and Donald B. Rubin. 1985. "Constructing a Control Group Using Multivariate Matched Sampling Methods that Incorporate the Propensity Score." *The American Statistician*, 39(1): 33-38.

Royer, Caisa Elizabeth, Amelia Courtney Hritz, Valerie P. Hans, Theodore Wisenberg, Martin T. Wells, John H. Blume, and Sheri Lynn Johnson. 2014. *Victim gender and the death penalty. Cornell Law Faculty* Publications. Paper 838. http://scholarship.law.cornell.edu/facpub/838.

Schonlau, Matthias. 2006. "Charging Decisions in Death-Eligible Federal Cases (1995-2000): Arbitrariness, Capriciousness, and Regional Variation." Chapter 6: 95-129. In Stephen P. Klein, Richard A. Berk, and Laura J. Hickman. 2006. *Race and the Decision to Seek the Death Penalty in Federal Cases*. RAND: Santa Monica, CA.

Songer, Michael J. and Isaac Unah. 2006. "The Effects of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina." *South Carolina Law Review,* 58:161-210.

Steffensmeier, Darrell, Jeffrey Ulmer, and John Kramer. 1998. "The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male." *Criminology,* 36(4):763-797.

Ulmer, Jeffery T. 1997. "A Processual Order Approach to Studying Sentencing Guidelines: Contexts, Activities, and Consequences." *Applied Behavioral Science Review,* 5(1):81-100.

Ulmer, Jeffery T. 2005. "The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order." *Symbolic Interaction,* 28:255-79.

Ulmer, Jeffery T. 2012. "Recent Developments and New Directions in Sentencing Research." *Justice Quarterly,* 29(1):1-40.

Ulmer, Jeffery T. and John H. Kramer. 1998. "The Use and Transformation of Formal Decision Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies." *Social Problems,* 45(2):248-267.

Unah, Isaac. 2011. "Empirical Analysis of Race and the Process of Capital Punishment in North Carolina." *Michigan State Law Review,* 610-658.

Vito, Gennaro F., George E. Higgins and Anthony G. Vito. 2014. "Capital Sentencing in Kentucky, 2000-2010." *American Journal of Criminal Justice,* 39:753-770.

Weisburd, David, Cynthia M. Lum and Anthony Petrosino. 2001. "Does Research Design Affect Study Outcomes in Criminal Justice?" *Annals of the American Academy of the Political and Social Sciences*, 578: 50-70.

Williams, Marian, Stephen Demuth, and Jefferson Holcomb. 2007. "Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision-Making." *Criminology,* 45:865-892.

Appendix A: Data Collection Strategy and Instruments

Diagram of Tracking Schematic for Potential Death Eligible Offenders in Pennsylvania

Coding Tables For AOPC Docket Data

1. **#_ho_cts**: Number of homicide counts in indictment: Record number

2. **#_con_cts**: Number of homicides defendant convicted of. Record number

3. **conviction**: First Homicide
    1. Yes-1st degree murder
    2. Yes-2nd degree murder
    3. Yes-3rd degree murder*
    4. Yes-lesser homicide
    5. No homicide conviction

    If not 1 or 2 above do not code further

4. **conviction2:** Second Homicide
    1. Yes-1st degree murder
    2. Yes-2nd degree murder
    3. Yes-3rd degree murder
    4. Yes-Lesser homicide

5. **conviction3:** Third homicide
    1. Yes-1st degree murder
    2. Yes-2nd degree murder
    3. Yes-3rd degree murder
    4. Yes-Lesser homicide

6. **felony:** Was the defendant charged with a non-homicide felony in addition to homicide?
    0. No
    1. Yes

7. **felon_c:** Was defendant convicted of non-homicide felony? (Leave blank if no felony charge)
    0. No
    1. Yes
    9. Not applicable

8. **sex_off**: Was D charged with rape/sex off?
    0. No
    1. Yes

9. **sex_con:** D convicted of rape/sex offense? (Leave blank if no rape/sex offense charged)
    0. No
    1. Yes
    9. Not applicable

10. **robbery:** Was D charged with robbery?
    0. No
    1. Yes

11. **rob_convict:** Was D convicted of robbery? (Leave blank if no robbery charged)
    0. No
    1. Yes
    9. Not applicable

12. **burglary:** Was D charged with burglary?
    0. No
    1. Yes

13. burg_convict: Was D convicted of burglary? (Leave
    0. No
    1. Yes
    9. Not applicable

14. **dp_filed**: Did the prosecution file a motion for aggravation or death penalty notice?
    0. No (no indication in docket motion filed)
    1. Yes

15. **dp_retracted**: Was motion for DP retracted?
    0. No
    1. Yes
    9. Not applicable

16. **venue**: Was there a motion for a change of venue?
    0. No
    1. Yes

17. **venuech**: Was the motion granted? (No motion filed-leave blank)
    0. No
    1. Yes
    9. Not applicable

18. **compet**: Did defense request competency to stand trial assessment?
    0. No

1. Yes

19. **compet_g**: Was request for competency testing granted?
    0. No
    1. Yes
    9. Not applicable

20. **psych**: Defense ask for psychological testing?
    0. No
    1. Yes

21. **psych_g:** Request for psych testing granted?
    0. No
    1. Yes
    9. Not applicable

22. dp_dp: Did D file motion to drop DP?
    0. No
    1. Yes

23. **dp_sust**: Was motion by defense to drop DP sustained? (No motion, leave blank)
    0. No
    1. Yes
    9. Not applicable

24. **tr_date**: Date trial started or plea accepted (yymmdd)
    1. _____

25. **p_trial**: Was there a penalty trial?
    0. No
    1. Yes

26. **sent_by**: D sentenced by?
    1. Judge
    2. Jury

27. **senthear**: Was there a sentencing hearing?
    1. no
    2. yes

28. **sentence**:
    1. Life
    2. Death

29. **appeal:** Does the record indicate that the defendant appealed?
    1. no

2. yes

Field Data Codebook

IDENTIFICATION VARIABLES

#	VARIABLE	Var Label	Source	Code
1	Docket Number	Docket	AOPC	
2	OTN (Offender Tracking Number)	otn	AOPC	
3	SID (State Identification Number)	sid	AOPC	
4	Inmate Number	Inmate_no	DOC	

DEFENDANT CHARACTERISTICS

4	Defendant's last name	name_l	AOPC	
5	Defendant's First Name	name_f	AOPC	
6	Defendant's Middle Name	name_m	AOPC	
7	Defendant's date of birth	dob	AOPC	
	Defendant's age	age	AOPC	
	Defendant's gender (Table 13)	gender	AOPC	
	Defendant's race (Table 14)	race	AOPC	
	Defendant's marital status at arrest (Table 18)	marital_st		
	Did the defendant have any children? (Table20)	children		
	Defendant's employment status at offense? (Table 21)	emp		
	Did the defendant have a history of substance abuse?	substance		
	Did defendant have history of mental illness or emotional problems? (Table 27)	m_illness		
	Any evidence that D was physically or sexually abused as child? (Table 27)	sex_abuse		
	D's IQ	iq	DOC	

PROCESSING DECISIONS

	Trial Judge (PCS Code-Table __)	judgenm		
	Date of Offense (yymmdd)	Off-date	AOPC	
	Date Sentence Imposed	Sentence-date	AOPC	
	On original homicide charge, def. (Table 02)	mcharge1		

	On the second homicide charge, D. (Table 02)	mcharge2		
	On the third homicide charge, D. (Table 02)	mcharge3		
	Was def charged w/felony in addition to homicide?	felony		
	Was D convicted of felony?	felony_c		
	D charged with rape/sex off	sex_off		
	D convicted of rape/sex off	sex_convict		
	D charged with robbery?	robbery		
	D convicted of robbery?	rob_convict		
	D charged with burglary?	burglary		
	D convicted of burglary?	burg_convict		
	Trial County	tr_county		
	Did D request change of venue?	v_change		
	If venue request, granted?	v_granted		
	Notice of aggravating factors filed?	agg_filed		
	Motion for death penalty filed?	dp_filed		
	Was DP motion retracted?	dp_retracted		
	Did defense request competency to stand trial assessment?	compet		
	Was request for competency testing granted?	compet_g		
	Defense ask for psychological testing?	psych		
	Request for psych testing granted?	psych_g		
	Penalty trial	p_trial		
	Date penalty trial started (yymmdd)	pt_date		
	D sentenced by (Table 6)	sent_by		
	Status of defense counsel (Table 8)	counsel		
	Defendant's sentence (Table 9)	sentence		
	Direct appeal of case?	appeal		

AGGRAVATING FACTORS PRESENTED BY PROSECUTION

	Variable	Var Label	Source	Code
	V firefighter, peace officer etc.	p_v_officer		
	D paid or was paid for killing	p_v_paid		

	V was held for ransom or reward or as shield	P_v_ransom		
	Death occurred while engaged in hijacking aircraft	p_hijack		
	V was prosecution witness to felony or was killed to prevent testimony	p_v_witness		
	Crime committed while in perpetration of felony	p_felony		
	D knowingly created grave risk of death to another	P_d_risk		
	Offense committed by means of torture	p_torture		
	D has significant history felony convictions involving violence	p_d_felony		
	D convicted currently or before for offense punishable by life or death	p_death		
	D convicted of another murder	p_murder		
	D convicted of vol. manslaughter before or during offense	p_mansl		
	V was associated with D in drug trafficking	p_v_drug		
	V was or had been a nongovernment informant	p_v_inform		
	V was under 12	p_v_12		
	V was in 3rd trimester or D had knowledge of pregnancy	p_v_preg		
	At time of killing D was under PFA from V.	p_pfa		
	Number of aggravating factors	p_agg		

AGGRAVATING FACTORS FOUND BY JURY OR JUDGE

	Variable	Var Label	Source	Code
	V firefighter, peace officer etc.	sf_v_officer		
	D paid or was paid for killing	sf_d_paid		
	V was held for ransom or reward or as shield	sf_v_ransom		
	Death occurred while engaged in hijacking aircraft	sf_hijack		
	V was prosecution witness to felony or was killed to prevent testimony	sf_v_witness		

	Crime committed while in perpetration of felony	sf_felony		
	D knowingly created grave risk of death to another	sf_d_risk		
	Offense committed by means of torture	Sf_torture		
	D has significant history felony convictions involving violence	sf_d_felony		
	D convicted currently or before for offense punishable by life or death	sf_death		
	D convicted of another murder	sf_murder		
	D convicted of vol. manslaughter before or during offense	sf_mansl		
	V was associated with D in drug trafficking	sf_dfelony		
	V was or had been a nongovernment informant	Sf_v_inform		
	V was under 12	Sf_v_12		
	V was in 3rd trimester or D had knowledge of pregnancy	sf_v_preg		
	At time of killing D was under PFA from V.	sf_fpa		
	Number of aggravating factors	sf_agg		

STATUTORY MITIGATING FACTORS OFFERED BY DEFENSE

	Variable	Var Label	Source	Code
	D has no significant history of prior criminal convictions	d_noconvict		
	D was under influence of extreme mental or emotional disturbance	d_disturbed		
	Capacity of D to appreciate the criminality was substantially impaired	d_impaired		
	Age of D at time of offense	d_age		
	D acted under extreme duress or substantial domination of another	d_duress		
	V was participant in D's homicidal conduct or consented to homicidal acts	d_v_consent		
	D participation in homicide was relatively minor	d_minor		
	Act of D was not sole proximate cause of victim's death	d_notcause		

ADDITIONAL MITIGATING FACTORS OFFERED BY DEFENSE

	Other mitigating factors offered?	D_other		
	How many mitigating factors present by defense?	D_mit		

MITIGATING FACTORS FOUND BY JURY OR JUDGE

	Variable	Var Label	Source	Code
	D has no significant history of prior criminal convictions	j_noconvict		
	D was under influence of extreme mental or emotional disturbance	j_disturbed		
	Capacity of D to appreciate the criminality was substantially impaired	j_impaired		
	Age of D at time of offense	j_age		
	D acted under extreme duress or substantial domination of another	j_duress		
	V was participant in D's homicidal conduct or consented to homicidal acts	j_v_consent		
	D participation in homicide was relatively minor	j_minor		
	Act of D was not sole proximate cause of victim's death	j_notcause		

OTHER MITIGATING FACTORS FOUND BY JURY OR JUDGE

	Unlikely D will engage in further crime	j_future		
	D was under 21 at time of offense	j_u21		
	D is elderly (over 60)	j_old		
	D was unable to control his/her conduct because of alcohol or drugs	j_drugs		
	D was unable to control conduct because of mental or emotional illness	j_mental		
	D was under control or influence of another	j_influence		
	D's participation in crime was minor	j_minorp		
	D claims killing was accident	j_accident		
	D was physically abused as child	j_abuse		
	D was sexually abused as child	j_sexab		

	D's generally good character (a good father, son etc.)	j_character		
	D had trouble in school	j_school		
	D had trouble holding a job	j_work		
	Is there an indication of PTSD?	j_ptsd		
	D has a spouse or family	j_fam		
	D admitted crime	j_admit		
	D expressed remorse for crime	j_remorse		
	D has history of mental illness or emotional problems	j_mhist		
	D has history of drug or alcohol use/abuse	j_dhist		
	D has organic brain disorder causing violence or unable to control conduct	j_brain		
	D maintains innocence	j_innocent		
	D has no major criminal history	j_nohist		
	D has shown that can behave well in prison	j_behave		
	D aided or assisted victim	j_assist		
	D surrendered within 24 hours	j_surrend		
	D was not actual killer	j_notkiller		
	Other mitigating factors offered?	j_other		
	How many statutory mitigating factors found by jury or judge?	j_smit		
	How many additional mitigating factors were found?	J_addmit		
	If penalty trial, was sentence of death based on (Table 10)	pt_death		
	If penalty trial, was sentence of life based on: Table 12)	pt_life		
	If sentence as DP and no mitigating factors were found was this because (Table 11)	dp_nomit		

FIRST VICTIM'S INFORMATION

	Variable	Var Label	Source	Code
	1st Victims last name			
	1st Victims middle name			
	1st victims first name			
	1st victims age			
	1st victims gender (Table 12)			
	1st victims race (Table 13)			
	1st victim's relationship with defendant (Table 28)			

	1st victims marital status at time of crime (Table 18)			
	Did 1st victim have any children lived with, supported or saw regularly?			
	Did 1st victim have minor child (18 or under)			
	1st victim primary occupation at time of offense.			
	1st victim's occupational status score (Appendix)			
	Did 1st victim have a felony criminal record?			

CHARACTERISTIS OF HOMICIDE-FIRST VICTIM

	Variable	Var Label	Source	Code
	Where did the homicide occur? Table 29			
	County of 1st victim's homicide			
	Did D force his way into place of homicide?			
	What circumstances best describes D's role in killing. Table 30			
	How was 1st victim killed? Primary method Table 36			
	Other method, if any: Table 36			
	1st V suffered multiple trauma (shot & stabbed etc.)			
	1st V was tortured or mutilated before killing.			
	1st V was brutally clubbed, beaten, etc.			
	1st V was shot more than once.			
	1st V was killed "execution" style.			
	D tried to hide, conceal, dispose of body			
	D was lying in wait for 1st V			
	V was stabbed many times, had throat slashed.			
	Did D come to crime scene armed with weapon used to fill 1st V?			
	Other V was injured, but not killed by D.			

	V killed in front of family member or other person not involved in killing.			

DEFENDANT'S DEFENSE AND TESTIMONY

#	Variable	Var Label	Source	Code
	Had 'accident' as defense at the guilt phase or the plea	gp_acc		
	D had 'mistaken identity' as defense	mst_id		
	The defendant had 'insanity' at the guilt phase or the plea	gp_insane		
	The defendant argued that witnesses were not credible at the guilt phase or the plea	gp_nc		
	The defendant argued that the 'offense did not constitute1st degree murder at the guilt phase or the plea	gp_not1st		
	The defendant admitted guilt without defense at the guilt phase or the plea			
	Defense psychiatrist/psychologist/ social worker or expert witnesses presented testimony at the **guilt phase of the trial.**	gp_d_psyiat		
	Prosecution psychiatrist/psychologist or other expert witnesses presented testimony at **guilt phase of the trial.**	gp_p_psyiat		
	Defense psychiatrist/psychologist or other expert witnesses presented testimony at **penalty phase of the trial.**	pp_d_psyiat		

STRENGTH OF EVIDENCE

	There was physical evidence linking the defendant to the crime (forensic evidence – blood, semen, fingerprints, hairs…)	p_evi		
	Was there physical evidence linking the weapon to the defendant?	ev_weapon		
	There was one or more eyewitnesses to the event who testified	witness1		
	A co-defendant testified against the defendant	co_def		

Appendix B: Logistic Regression Models

This Appendix presents the results from our logistic regression analyses of our death penalty outcome dependent variables. Logistic regression models predict the log-odds of dichotomous outcomes (such as the decisions to seek/file or retract the death penalty, or sentence a defendant to the death penalty) with a set of predictor variables. These logistic regression models take the form:

$$Y_i = \alpha \cdot Demographics_i + \beta X_i + \varepsilon_i \qquad (1)$$

Here Y_i represents a 0-1 indicator variable (eg., measuring whether defendant i was sentenced to death, whether the death penalty was sought, or whether the death penalty was retracted) which is modeled as a function of indicators capturing his or her demographic characteristics, such as race and gender, ($Demographics_i$) and a set of other individual or case-level characteristics (X_i). X_i include variables measuring factors such as the number, age, or other characteristics of victims; defendant's prior criminal history; the number of aggravating/mitigating circumstances; the jurisdiction in which the defendant was prosecuted, and other factors (see below). Given that our data collection process provided information on a wider array of factors than can be reasonably included in one regression model such as (1), we will select covariates for inclusion in X_i based upon prior research and the ability of particular factors to predict case outcomes.

We first estimated logistic models that included statutory aggravators, statutorily named mitigating factors, select case characteristics, defense attorney type, and many defendant and victim social status characteristics. We call this the *status characteristics models*. The purpose of these models was to examine the effects of defendant status characteristics other than race or ethnicity, such as marital and parental status, employment, education, and military service, net of the influence of the control variables. In these models, marital status, whether defendants had

children or not, employment status, level of education, or prior military service did not significantly or substantively predict death penalty filing, retraction, or receiving a death sentence. Tables showing the results for the status characteristics models are shown at the end of this Appendix. We then estimated a second set of models with the *comparable case model* variables (See Table 18), which include a more detailed set of case characteristics and fewer defendant social status characteristics.

In all of the logistic regression models, we first included all predictor variables of interest that had adequate numbers of case for analysis, in what we call a "full model." Next, we removed predictor variables that were not statistically significant at a p. value of .20 (meaning that there would be a 20% chance of the effect being due to sampling error, if this dataset were a random population sample). These latter we refer to as "reduced models." We estimate these more parsimonious reduced models in order to examine the effects of statistically significant predictors in models that are not cluttered by extraneous variables.

Comparable Case Logistic Regression Models

The following tables present full and reduced logistic regression models of whether the death penalty was filed/sought by prosecutors, whether the death penalty filing was retracted if filed/sought, and whether defendants received the death penalty. The models also examine three sets of race/ethnicity comparison variables: 1) race/ethnicity of the defendant (Black, Hispanic, and White as the reference category to which the others are compared), 2) the race/ethnicity of the victim; and 3) race/ethnicity of the defendant by race/ethnicity of the victim. The first model, Table B1, below shows whether the death penalty was filed by race/ethnicity of defendant, and this model shows the effects of all the control variables. The second model, Table B2, shows the race/ethnicity of victim, and the third, Table B3, shows the race/ethnicity of the defendant by

race ethnicity of victim comparisons; the control variables are included in the model, but not shown in the table for the sake of parsimony.

Table B1: Death Penalty Filed—Logistic Regression				
	Full Model		**Reduced Model**	
(*White defendant is the reference category*)	**Odds**	**p-value**	**Odds**	**p-value**
Black Defendant	**1.30**	**.32**	**1.20**	**.45**
Hispanic Defendant	**2.11**	**.07**	**1.96**	**.09**
Victim was prosecution witness	2.07	.20	2.66	.04
Murder committed in perpetration of felony	1.31	.43	--	--
Defendant knowingly created grave risk of death	0.83	.56	--	--
Victim was tortured	.90	.82	--	--
Defendant convicted of other offense carrying life/death	0.35	.05	0.39	.05
Defendant convicted of another murder	1.53	.35	--	--
Murder committed during drug felony	0.50	.23	--	--
Defendant was associated with victim in drug trafficking	0.75	.45	--	--
Victim was under 12	3.72	.07	5.63	.004
Number of Aggravating Factors	1.99	.001	2.01	.0001
No significant history of prior crime	2.02	.30	--	--
Extreme mental or emotional disturbance	22.44	.01	24.16	.004
Subst. impaired capacity to appreciate criminality	0.65	.70	--	--
Youthful age of defendant at time of crime	12.02	.0001	17.56	.0001
Number of mitigating factors presented by defense	1.13	.48	--	--
Multiple victims	5.56	.0001	5.88	.0001
Concurrent sex offense conviction	2.01	.28	--	--
Concurrent robbery conviction	1.21	.54	--	--
Concurrent burglary conviction	1.35	.50	--	--
Defense asked for psychiatric evaluation	2.48	.0001	2.68	.0001
Victim was a family member	0.64	.32	--	--
Victim had children	0.81	.40	--	--
Victim killed with knife	1.32	.45	--	--
Victim killed with bare hands (reference: killed with gun)	1.51	.34	--	--
Victim didn't resist	.95	.85	--	--
Victim was killed in an especially brutal manner	1.50	.23	--	--
Defendant tried to hide victim's body	1.51	.21	--	--
Victim killed execution style	1.02	.92	--	--
Defendant ambushed victim	.99	.98	--	--
Defendant age (years)	1.02	.04	1.01	.08
Private attorney	1.29	.34	--	--
Court appointed attorney (reference: public defender)	2.23	.01	1.79	.02
Defendant claimed killing was an accident	.83	.76	--	--
Defendant claimed mistaken identity	0.75	.33	--	--

Table B1: Death Penalty Filed—Logistic Regression				
	Full Model		Reduced Model	
(*White defendant is the reference category*)	**Odds**	**p-value**	**Odds**	**p-value**
Defendant claimed witnesses not credible	1.23	.43	--	--
Defendant claimed killing not first-degree murder	0.90	.67	--	--
Defendant admitted guilt	2.04	.03	2.24	.004
Defendant presented psychiatric expert witness	0.64	.16	0.69	.20
Physical evidence present	0.66	.11	0.90	.62
Weapon linked to defendant	0.91	.70	--	--
Eye-witness testified	1.04	.88	--	--
Co-defendant testified against defendant	1.18	.62	--	--
Defendant IQ between 71-90	1.01	.95	--	--
Allegheny County	0.16	.000	0.18	.0001
Philadelphia County	0.62	.09	0.66	.11
-- Blank rows indicate that insufficient numbers of cases for analysis exist in these categories.				

Table B2: Death Penalty Filed—Logistic Regression: Race/Ethnicity of Victim (all control variables in above table included but not shown)				
	Full Model		Reduced Model *	
(*White victim is the reference category*)	**Odds**	**p-value**	**Odds**	**p-value**
Black Victim	1.05	.84	.85	.49
Hispanic Victim	2.19	.03	1.94	.06

Table B3: Death Penalty Filed—Logistic Regression: Defendant/Victim combinations (all control variables in above table included but not shown)				
	Full Model		Reduced Model *	
(*White defendant/White victim is the reference category*)	**Odds**	**p-value**	**Odds**	**p-value**
White Def./Black Vic.	.87	.80	.79	.67
White Def./Hispanic Vic.	--	--	--	--
Black Def./White Vic.	.89	.75	1.04	.91
Black Def./Black Vic.	.98	.96	.83	.43
Black Def./Hispanic Vic.	--	--	--	--
Hispanic Def./White Vic.	--	--	--	--
Hispanic Def./Black Vic.	--	--	--	--
Hispanic Def./Hispanic Vic.	2.11	.15	1.75	.24
-- Blank rows indicate that insufficient numbers of cases for analysis exist in these categories.				

In the first table, Hispanic defendants have greater odds of having the death penalty filed against them (Whites are the reference category). Hispanic defendants' death penalty filing odds are about double those of Whites', and the effect is marginally statistically significant. In the second table, Hispanic victim cases are also more likely to receive a death penalty filing, with these cases having nearly twice the odds of White victim cases of death penalty filing. In the third table, none of the defendant/victim categories' effects would be statistically significant. To the extent that notable differences exist here, Hispanic defendants with Hispanic victims show increased odds for death penalty filing (though not statistically significant). In other effects of interest in Table B1, there is a slight tendency for older defendants to have increased odds of death penalty filing. Also, cases with court appointed attorneys are more likely to see a death penalty filing relative to cases with public defenders, the reference category (odds = 2.23 in full model, 1.79 in reduced model). Notably, 80% of court appointed attorney cases are in Philadelphia. In addition, Allegheny County is much less likely to file the death penalty than the rest of the state, including Philadelphia (which is also less likely to file than the rest of the state, but not significantly so).

The next tables present models of the decision to retract the death penalty if it is filed. This model only includes those whom the death penalty was filed against (N = 313). The first table lists all control variables, and the second includes them in the model but does not show them for parsimony.

Table B4: Death Penalty Retracted—Logistic Regression				
	Full Model		**Reduced Model**	
(*White defendant is reference category*)	**Odds**	**P-Value**	**Odds**	**P-Value**
Black Defendant	**1.39**	**.49**	**1.16**	**.71**
Hispanic Defendant	**6.83**	**.02**	**5.14**	**.01**
Victim was prosecution witness	0.22	.06	0.29	.03

Table B4: Death Penalty Retracted—Logistic Regression				
	Full Model		Reduced Model	
(*White defendant is reference category*)	Odds	P-Value	Odds	P-Value
Murder committed in perpetration of felony	3.43	.03	2.73	.01
Defendant knowingly created grave risk of death	2.17	.13	1.29	.45
Victim was tortured	1.05	.94		
Defendant convicted of other offense carrying life/death	1.01	.99		
Defendant convicted of another murder	4.39	.03	2.55	.02
Murder committed during drug felony	1.24	.79		
Defendant was associated with victim in drug trafficking	0.82	.73		
Victim was under 12	1.25	.79		
Number of Aggravating Factors	0.77	.42		
No significant history of prior crime	--	--		
Extreme mental or emotional disturbance	0.16	.02	0.12	.002
Subst. impaired capacity to appreciate criminality	0.32	.30		
Youthful age of defendant at time of crime	0.02	.0001	0.01	.0001
Number of mitigating factors presented by defense	0.88	.47		
Multiple victims	1.05	.94		
Concurrent sex offense conviction	0.63	.61		
Concurrent robbery conviction	0.25	.01	0.27	.002
Concurrent burglary conviction	1.47	.58		
Defense asked for psychiatric evaluation	1.36	.45		
Victim was a family member	0.75	.69		
Victim had children	0.66	.34		
Victim killed with knife	2.23	.23		
Victim killed with bare hands (reference: killed with gun)	1.27	.73		
Victim didn't resist	1.16	.76		
Victim was killed in an especially brutal manner	1.72	.33		
Defendant tried to hide victim's body	1.18	.77		
Victim killed execution style	1.55	.31		
Defendant ambushed victim	0.47	.14	0.46	.07
Defendant age (years)	0.99	.93		
Private attorney	1.38	.54		
Court appointed attorney (reference: public defender)	1.52	.40		
Defendant claimed killing was an accident	0.43	.39		
Defendant claimed mistaken identity	0.74	.56		
Defendant claimed witnesses not credible	0.88	.76		
Defendant claimed killing not first-degree murder	0.92	.86		
Defendant admitted guilt	12.91	.0001	13.24	.0001
Defendant presented psychiatric expert witness	0.96	.93		

Table B4: Death Penalty Retracted—Logistic Regression				
	Full Model		Reduced Model	
(*White defendant is reference category*)	Odds	P-Value	Odds	P-Value
Physical evidence present	0.31	.01	0.32	.002
Weapon linked to defendant	1.20	.67		
Eye-witness testified	0.86	.75		
Co-defendant testified against defendant	1.75	.30		
Defendant IQ between 71-90	0.85	.68		
Allegheny County	1.70	.50		
Philadelphia County	5.48	.02	4.14	.0001

Table B5: Death Penalty Retracted—Logistic Regression: Race/Ethnicity of Victim (all control variables in above table included but not shown)				
	Full Model		Reduced Model *	
(*White victim is the reference category*)	Odds	p-value	Odds	p-value
Black Victim	1.56	.33	1.42	.34
Hispanic Victim	0.58	.30	0.56	.20

Table B6: Death Penalty Retracted—Logistic Regression, defendant/victim combinations (all control variables in above table included but not shown)				
	Full Model		Reduced Model	
(*White defendant/white victim is the reference category*)	Odds	P-Value	Odds	P-Value
White Def./Black Vic.	0.94	.95	0.96	.96
White Def./Hispanic Vic.	--	--	--	--
Black Def./White Vic.	1.14	.83	0.78	.60
Black Def./Black Vic.	2.36	.07	1.76	.13
Black Def./Hispanic Vic.	--	--	--	--
Hispanic Def./White Vic.	--	--	--	--
Hispanic Def./Black Vic.	--	--	--	--
Hispanic Def./Hispanic Vic.	5.31	.06	2.75	.17

As shown in the Table B4, in focusing on the effects that would be statistically significant, Hispanic defendants have much higher odds than other defendants of having a death

penalty filing retracted by prosecutors. In the Table B6, two defendant/victim combinations have marginally significant (in the full model) and notably higher odds of having the death penalty retracted: Black defendants with Black victims and Hispanic offenders with Hispanic victims. Thus, Hispanic defendants and cases with Hispanic defendants and victims are more likely to have the death penalty filed against them, but these cases also appear to be more likely to have the death penalty retracted if it is filed. Notably, Philadelphia is much more likely than the rest of the state (including Allegheny) to retract the death penalty once it is filed.

In supplemental models, an interesting case processing pattern emerges. Note that in Table B1, the variable "Defendant admitted guilt" results in increased odds of death penalty filing. It is very unlikely that this effect means that prosecutors are more likely to seek the death penalty against those who plead guilty. Rather, the causality in this effect is likely reversed—defendants are probably more likely to plead guilty once prosecutors seek the death penalty. When we treat pleading guilty to the first-degree murder charge as a dependent variable, a prosecutorial filing to seek the death penalty strongly increases the likelihood of a defendant pleading guilty. Pleading guilty, in turn, strongly increases the likelihood that the death penalty filing will be retracted. Specifically, a death penalty filing raises the odds of a guilty plea by 2.9; cases where the death penalty is filed have nearly three times of the odds of eventually pleading guilty to a first-degree murder charge. Then, pleading guilty to a first-degree murder charge is associated with 8.1 times greater odds of the death penalty filing being retracted. This pattern is also seen in the effects of the "Defendant admitted guilt" variable in Table B4, where it greatly increases the likelihood of retracting the death penalty (the bivariate correlation between the defendant admitted guilt variable and the guilty plea variable is .78).

The next tables present models of the decision to sentence a defendant to the death penalty. As with the propensity score models in the main report, the death penalty models below contain all 880 cases. The Table B7 lists all control variables, and the second includes them in the model but does not show them for parsimony.

Table B7: Sentenced to Death Penalty—Logistic Regression				
	Full Model		**Reduced Model**	
	Odds	**p-Value**	**Odds**	**p-Value**
Black Defendant	**0.29**	**.06**	**0.32**	**.02**
Hispanic Defendant	**0.35**	**.26**	**0.38**	**.21**
Victim was prosecution witness	0.94	.95		
Murder committed in perpetration of felony	0.67	.65		
Defendant knowingly created grave risk of death	3.18	.18	4.00	.01
Victim was tortured	3.26	.20	3.40	.07
Defendant convicted of other offense carrying life/death	0.84	.86		
Defendant convicted of another murder	13.71	.01	7.56	.0001
Murder committed during drug felony	0.11	.17	0.20	.22
Defendant was associated with victim in drug trafficking	0.15	.15	0.39	.37
Victim was under 12	0.39	.43		
Number of Aggravating Factors	1.45	.38		
No significant history of prior crime	0.69	.61		
Extreme mental or emotional disturbance	2.06	.35		
Subst. impaired capacity to appreciate criminality	0.70	.64		
Youthful age of defendant at time of crime	1.33	.67		
Number of mitigating factors presented by defense	0.94	.72		
Multiple victims	0.38	.34		
Concurrent sex offense conviction	7.00	.11	4.65	.10
Concurrent robbery conviction	1.01	.99		
Concurrent burglary conviction	1.27	.77		
Defense asked for psychiatric evaluation	0.70	.52		
Victim was a family member	2.83	.24		
Victim had children	0.48	.20	0.67	.41
Victim killed with knife	1.19	.83		
Victim killed with bare hands (reference: killed with gun)	1.33	.76		
Victim didn't resist	1.04	.94		
Victim was killed in an especially brutal manner	0.31	.11	0.32	.08
Defendant tried to hide victim's body	0.43	.25		
Victim killed execution style	0.41	.16	0.36	.05
Defendant ambushed victim	3.23	.08		
Defendant age (years)	1.01	.71		

Table B7: Sentenced to Death Penalty—Logistic Regression				
	Full Model		Reduced Model	
	Odds	p-Value	Odds	p-Value
Private attorney	0.16	.002	0.16	.0001
Court appointed attorney (reference: public defender)	0.71	.63		
Defendant claimed killing was an accident	0.74	.78		
Defendant claimed mistaken identity	0.59	.47		
Defendant claimed witnesses not credible	0.92	.90		
Defendant claimed killing not first-degree murder	2.48	.18	2.98	.01
Defendant admitted guilt	0.63	.60		
Defendant presented psychiatric expert witness	0.87	.85		
Physical evidence present	1.97	.24		
Weapon linked to defendant	0.93	.88		
Eye-witness testified	0.47	.20	0.42	.08
Co-defendant testified against defendant	2.35	.19	1.83	.26
Defendant IQ between 71-90	5.68	.002	3.89	.003
Sentenced by Jury	73.60	.0001	56.35	.0001
Allegheny County	0.40	.32		
Philadelphia County	0.17	.04	0.19	.01

Table B8: Sentenced to Death Penalty —Logistic Regression: Race/Ethnicity of Victim (all control variables in above table included but not shown)				
	Full Model		Reduced Model *	
(*White victim is the reference category*)	Odds	p-value	Odds	p-value
Black Victim	0.22	.002	0.25	.004
Hispanic Victim	0.63	.46	0.49	.24

Table B9: Sentenced to Death Penalty—Logistic Regression: Defendant/Victim combinations (all control variables in above table included but not shown)				
	Full Model		Reduced Model *	
(*White defendant/White victim is the reference category*)	Odds	p-value	Odds	p-value
White Def./Black Vic.	0.60	.67	0.50	.47
White Def./Hispanic Vic.	--	--	--	--
Black Def./White Vic.	0.73	.68	0.60	.42
Black Def./Black Vic.	0.20	.02	0.21	.004
Black Def./Hispanic Vic.	--	--	--	--
Hispanic Def./White Vic.	--	--	--	--

Table B9: Sentenced to Death Penalty—Logistic Regression: Defendant/Victim combinations (all control variables in above table included but not shown)				
	Full Model		Reduced Model *	
(*White defendant/White victim is the reference category*)	**Odds**	**p-value**	**Odds**	**p-value**
Hispanic Def./Black Vic.	--	--	--	--
Hispanic Def./Hispanic Vic.	0.09	.05	0.10	.03

Interestingly, in the Table B7, black and Hispanic defendants have lesser odds of receiving the death penalty relative to Whites. In the reduced model, black defendants have 68% lesser odds of receiving the death penalty than Whites (which would be statistically significant), and Hispanic defendants have 62% lesser odds. In addition, in Table B8, cases with Black victims are substantially less likely to receive the death penalty. In Table B9, cases with Black defendants and Black victims are much less likely to receive the death penalty, as are cases with Hispanic defendants and Hispanic victims, compared to cases with White defendants and White victims.

In other interesting findings in Table B7, cases with private attorneys are highly unlikely to receive the death penalty (odds .16 in both models). In addition, defendants with IQs between 71 and 90 have substantially increased odds of receiving the death penalty (5.68 in the full model, 3.89 in reduced model). Also, juries are very much more likely to give the death penalty than judges. Finally, Philadelphia is much less likely to give the death penalty than the rest of the counties in the field data.

Appendix C: State-Wide AOPC Data

First-degree Murder Convictions, Statewide

Our main focus here is on the 1,115 cases statewide with at least one first-degree murder conviction listed in the AOPC dockets, because these are the cases that are potentially exposed to the death penalty. The remainder of our discussion here of the descriptive statistics and later crosstabulations will concern these 1,115 cases.

Many of these first-degree murder convictions also have concurrent convictions for other serious offenses. Table C1 lists the frequency and type of concurrent convictions that accompany these docket cases. Note that the conviction types do not sum to 1,115, (the total number of AOPC docket first-degree murder convictions) because the convictions are not mutually exclusive. That is, defendants may have more than one concurrent conviction type.

Table C1: Type and Frequency of Convictions Accompanying First-degree Murder Convictions

Type of Conviction	Frequency	Percent
Sex Offenses	28	2.5
Robbery	131	12.0
Burglary	70	6.3
Any Felony	601	54.0
No Other Felony Convictions	514	46.1

* Note: Percentages do not sum to 100 due to overlap between the conviction categories, which are not mutually exclusive.

One of the case outcomes of key interest is whether prosecutors filed notice to seek the death penalty. Among the 1,115 first-degree murder cases in our statewide AOPC docket data, prosecutors sought the death penalty in 416 (or 37%) of them, and did not seek it in 699 (or 63 %) of the cases. Thus, in a little more than a third of these first-degree murder cases, prosecutors seek the death penalty. But, in 94 (or 23%) of the cases where District Attorney's Offices sought the death penalty, they later retracted this death notice. Furthermore, in 126 cases (29%),

defense attorneys moved that the death notice be dropped, and in 17 (4%) of these cases, the court upheld such defense motions. Thus, 305 docket cases eventually were exposed to/faced the death penalty at sentencing.[34] Then, of the 305 cases ultimately exposed to death at sentencing, 60 (19.7%) of the cases received a death sentence, while 245 did not. Cases not exposed to the death penalty at sentencing received life sentences, thus there were 1,073 life sentences in our AOPC docket data statewide. Table C2 lists the frequencies and percentages for these various outcomes relative to seeking and imposing the death penalty. This process is illustrated in Chart 5 below.

Table C2: Death Penalty Exposure and Sentences: a) Prosecutors Seeking and Retracting Notice for the Death Penalty, b) Defense Moving to Drop Death Penalty Notice, c) Defense Motion to Drop Death Penalty Sustained, d) Death Penalty Imposed.

Death Penalty Sought	Frequency	Percent
Yes	416	37
No	699	63
Of 416 Cases Where Death Was Sought		
D.A. sought and later retracted	94	23
Defense moved to drop	126	28.6
Court sustained defense move to drop	17	4
Of 305 Cases Ultimately Exposed to Death Penalty		
Offender Received Death Sentence	60	19.6
Offender Received Life Sentence	245	80.3

Finally, we give some descriptive statistics on the race/ethnicity and gender of the offenders in the 1,115 first-degree murder cases. Table C3 presents this race/ethnicity and gender breakdown. The majority of the docket cases involve black offenders, while about a third

[34] Note: our field data actually uncovered 313 cases where prosecutors sought the death penalty, and 146 cases where they retracted that filing. Apparent errors in the AOPC docket data account for these differences.

are White. About 6% of the cases involve Hispanic offenders, a category not mutually exclusive with being of Black or White race. The cases also overwhelmingly consist of male offenders.

Table C3: Race/Ethnicity and Gender of First-degree Murder Convicted Offenders		
Race/Ethnicity	**Frequency**	**Percent**
Black	686	61.5
White	379	34.0
Hispanic *	68	6.0
Asian/Other	25	2.2
Unreported/Indeterminate	25	2.2
Gender	**Frequency**	**Percent**
Male	1,029	92.3
Female	50	4.5
Unreported/unclassified	14	1.3
* Not mutually exclusive with other categories, thus, percent will not sum to 100.		

Table C4 shows the concurrent felony convictions by race/ethnicity for the statewide AOPC data. Note that the conviction types do not sum to 1,115, (the total number of AOPC docket first-degree murder convictions) because the convictions are not mutually exclusive. That is, defendants may have more than one concurrent conviction type. As Table C4 shows, greater percentages of African American and Hispanic defendants (and Other defendants) had concurrent felony convictions of some type compared to White defendants. African American defendants also had more concurrent robbery convictions than Whites, both in absolute numbers and proportionally.

Table C4: Types of Concurrent Convictions by Race/Ethnicity: Frequency (percent). Race/Ethnicity *					
Convictions	**White**	**African American**	**Hispanic ****	**Other**	**Total**
Sex offenses	15 (4)	12 (1.7)	1 (1.5)	1 (3.6)	28 (2.6)
Robbery	38 (10)	87 (12.7)	8 (11.8)	3 (12.0)	128 (12)
Burglary	28 (7.4)	37 (5.4)	6 (8.8)	3 (12)	68 (6.2)
Any Felony †	173 (45.6)	402 (58.6)	35 (51.5)	13 (52)	521 (46.1)
None	206 (54)	284 (57)	21 (31)	12 (48)	502 (100)

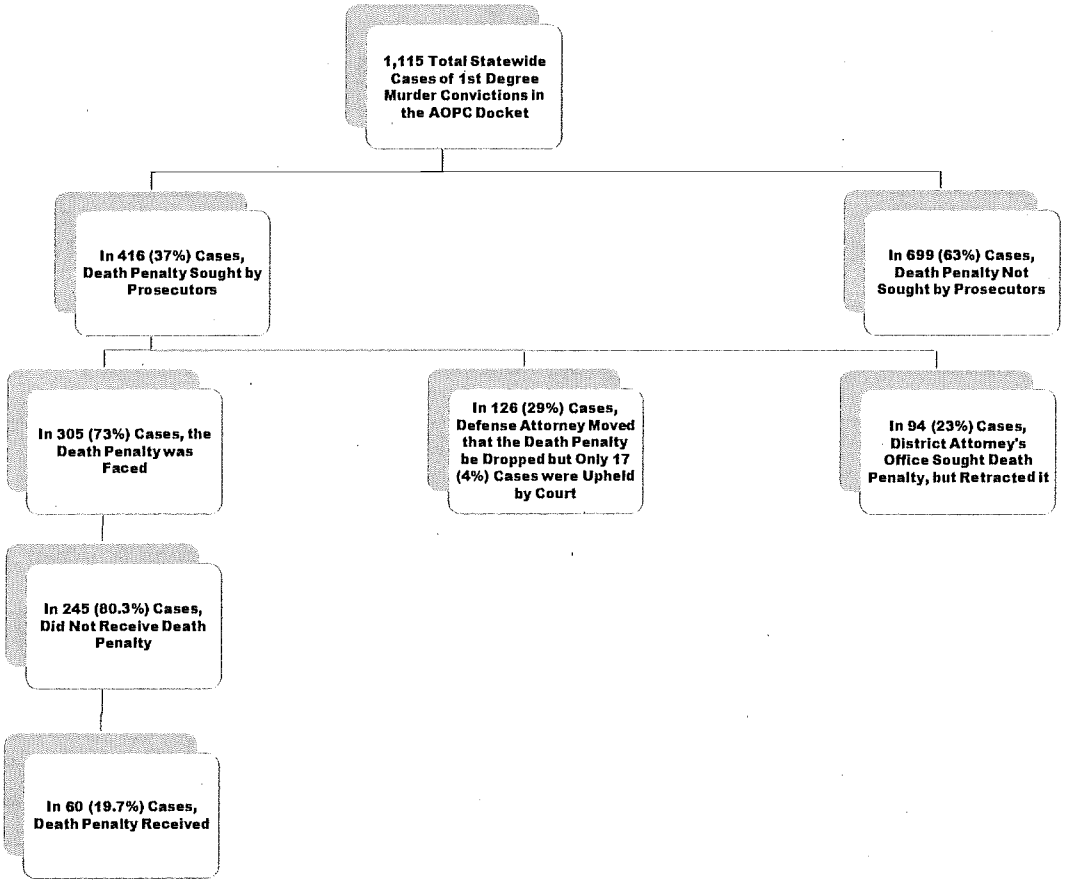
Total	379 (100)	686 (100)	68 (100)	25 (100)	
*25 unknown or indeterminate race **Not mutually exclusive with White or African American † Conviction categories are not mutually exclusive					

Finally, Table C5 shows the race/ethnic breakdown for the death penalty outcomes in the AOPC docket data. The death penalty was sought for 162 (43%) of the white defendants, 234 (34%) of the Black defendants, and 35 (51%) of the Hispanic defendants in the AOPC data. Of those, 31 White defendants had the death filing retracted or else the court sustained a move to drop the filing, compared to 75 Black defendants and 9 Hispanic defendants. Of the White defendants ultimately exposed to the death penalty, 32 (24%) received it, compared to 26 (16%) of the Black defendants exposed to the death penalty and 7 (26%) of the Hispanic defendants.

Table C5: Statewide AOPC Data—Death Penalty Outcomes by Race/Ethnicity.†

Death Penalty Sought	White	Black	Hisp
Yes	162	234	35
No	217	452	33
Of 416 Cases Where Death Was Sought			
D.A. sought and later retracted	27	63	7
Defense moved to drop	58	61	12
Court sustained defense move to drop	4	12	2
Of 305 Cases Ultimately Exposed to Death Penalty			
Offender Received Death Sentence	32	26	7
Offender Received Life Sentence	99	133	20
† Other race/ethnicity and unknown/indeterminate race not included. In these groups, the death penalty was sought in 23 cases, retracted in 2 cases, the court sustained a motion to drop in 1 case, and death sentence was given in 0 cases.			

Chart 5: AOPC Docket Death Penalty Case Flow



Appendix D: Balance Statistics for Propensity Score Weighting Models

Variable Names Key
p_v_witness3: Victim was a prosecution witness, as determined by field coders (the death penalty given analysis used the variable p_v_witness, indicating that prosecutors filed this aggravator)
p_v_felony3: Murder committed in perpetration of felony, as determined by field coders (the death penalty given analysis used the variable p_v_felony, indicating that prosecutors filed this aggravator)
p_d_risk3: Defendant knowingly created grave risk of death, as determined by field coders (the death penalty given analysis used the variable p_d_risk, indicating that prosecutors filed this aggravator)
p_torture3: Victim was tortured, as determined by field coders (the death penalty given analysis used the variable p_torture, indicating that prosecutors filed this aggravator)
p_death3: Defendant convicted of other offense carrying life/death, as determined by field coders (the death penalty given analysis used the variable p_death, indicating that prosecutors filed this aggravator)
p_murder3: Defendant convicted of another murder, as determined by field coders (the death penalty given analysis used the variable p_murder, indicating that prosecutors filed this aggravator)
p_drug3: Murder committed during drug felony, as determined by field coders (the death penalty given analysis used the variable p_drug, indicating that prosecutors filed this aggravator)
p_v_drug3: Defendant was associated with victim in drug trafficking, as determined by field coders (the death penalty given analysis used the variable p_v_drug, indicating that prosecutors filed this aggravator)
p_v_12_3: Victim was under 12, as determined by field coders (the death penalty given analysis used the variable p_v_12, indicating that prosecutors filed this aggravator)
p_agg3: Number of Aggravating Factors, as determined by field coders (the death penalty given analysis used the variable p_agg, indicating that prosecutors filed this number of aggravators)
d_noconvict: No significant history of prior crime
d_disturbed: Extreme mental or emotional disturbance
d_impaired: Subst. impaired capacity to appreciate criminality
d_age: Youthful age of defendant at time of crime
sum_other_mit: Number of mitigating factors presented by defense
MultiVictims: Multiple victims
sex_convict: Concurrent sex offense conviction
rob_convict0: Concurrent robbery conviction
burg_convict0: Concurrent burglary conviction
psych0: Defense asked for psychiatric evaluation
v1family: Victim was a family member
v1hadkids: Victim had children
v1knife: Victim killed with knife
v1barehands: Victim killed with bare hands (reference: killed with gun)
v_1h_resis: Victim didn't resist

v_1h_brutal: Victim was killed in an especially brutal manner
v_1h_hide: Defendant tried to hide victim's body
v_1h_execution: Victim killed execution style
v_1h_ambush: Defendant ambushed victim
age_mean: Defendant age (years)
private: Private attorney
courtappt: Court appointed attorney (reference category: public defender)
gp_acc: Defense claimed killing was an accident
mst_id: Defense claimed mistaken identity
gp_nc: Defense claimed witnesses not credible
gp_not1st: Defense claimed killing not first-degree murder
ad_guilt: Defendant admitted guilt
gp_d_psyiat: Defense presented psychiatric expert witness
p_evi: Physical evidence present
ev_weapon: Weapon linked to defendant
witness1: Eye-witness testified
co_def: Co-defendant testified against defendant
IQ71_90: Defendant IQ between 71-90
jurydum: Sentenced by Jury (in death penalty models only)
Allegheny: Allegheny County (in some models) (reference catetgory: other field data counties).
Phila: Philadelphia County (in some models) (reference catetgory: other field data counties).

Death Penalty Filed

Black Defendant

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	591	438.8
Control obs =	289	441.2

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0664755	.0481242	1.322324	1.241902
p_felony3	-.1238752	-.0850581	.8877891	.9268378
p_d_risk3	.2291952	-.0151327	1.2421	.9881193
p_torture3	-.1832379	-.0393642	.5917805	.9009259
p_death3	.0126817	.0558598	1.038995	1.213112
p_murder3	.1416699	.0501348	1.408372	1.125861
p_drug3	-.0390309	-.0117529	.8327859	.9445184
p_v_drug3	.132196	-.0795828	1.475853	.8095496
p_v_12_3	-.0320914	-.0747157	.8483264	.714934
p_agg3	.1032666	-.0553809	1.296933	1.010478
d_noconvict	-.2121011	-.0201559	.459177	.9233826
d_disturbed	-.207258	-.0087741	.3833384	.9602164
d_impaired	-.2298734	-.0018974	.3426104	.9905712
d_age	-.1266213	-.0253066	.6695204	.9217416
sum_other_mit	-.1689048	-.000114	.5271019	1.244001
MultiVictims	.0735593	.0222305	1.15906	1.046254
sex_convict	-.0347236	-.0642817	.818397	.7270522
rob_convict0	.0446726	-.0230519	1.093805	.9549959
burg_convict0	-.0685731	-.0786344	.7809889	.7647381
psych0	-.4820977	.0862686	.5999604	1.107646
v1family	-.4205996	.0691189	.2807934	1.225287
v1hadkids	-.3326324	.0423547	.7398354	1.042609
v1knife	-.3248484	.0263042	.4858501	1.059747
v1barehands	-.3193283	-.0025984	.3826041	.9922192
v_1h_resis	-.2645551	.0128673	.7443873	1.014696
v_1h_brutal	-.3270441	-.0062483	.5262178	.988003
v_1h_hide	-.2937962	.0640643	.5629029	1.138263
v_1h_execution	.136382	-.0043428	1.148309	.9955058
v_1h_ambush	.1930589	-.1006583	1.396006	.8638426
age_mean	-.474503	-.0212777	.5097537	.9545811
private	-.1516374	.0809795	.9248767	1.061906
courtappt	.3536017	-.0659697	1.428489	.9506346
gp_acc	-.1588063	-.0245723	.4363954	.8707951
mst_id	.5191287	-.0110811	1.396953	.9950634
gp_nc	.4354039	.0111966	.99653	.9993268
gp_not1st	-.2206824	.0499733	.8788083	1.034662
ad_guilt	-.3221352	-.0585868	.4834075	.8796391
gp_d_psyiat	-.3332907	.0321235	.5520586	1.063413
p_evi	-.3881651	.0450821	.9094012	1.019363
ev_weapon	-.264796	.0554979	.800011	1.048535
witness1	.5044653	-.0636877	.804708	1.041686
co_def	-.1146061	.0035631	.7773886	1.008532
IQ71_90	.3059414	-.0239473	1.358086	.9804403

Hispanic Defendant

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	62	504.4
Control obs =	818	375.6

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.100549	-.2504682	.6363044	.1774764
p_felony3	.3970399	.1024187	1.293721	1.092937
p_d_risk3	.1511086	-.0816569	1.129082	.9240939
p_torture3	-.0840032	-.044262	.7729704	.8710351
p_death3	-.1312722	-.1446938	.630181	.5813912
p_murder3	-.0923796	-.1268224	.8062131	.7171902
p_drug3	.1868712	-.0459048	2.130351	.7886495
p_v_drug3	.2177934	-.0451772	1.689577	.8739757
p_v_12_3	.077503	.0382116	1.464491	1.201147
p_agg3	.2342919	-.1601201	1.036946	.9718923
d_noconvict	.1573453	-.2207194	1.706873	.2914981
d_disturbed	.1868712	-.1574178	2.130351	.3678794
d_impaired	.3029301	-.1456614	3.075597	.4031298
d_age	.3888208	-.1767483	2.614976	.4756625
sum_other_mit	.1837172	-.1198293	1.417329	.3590223
MultiVictims	-.0613148	-.1247714	.8929922	.7556527
sex_convict	-.0812985	-.1264843	.5895066	.380457
rob_convict0	.1381566	.1428828	1.301997	1.281779
burg_convict0	.3020334	.1020492	2.423149	1.398115
psych0	.3835018	-.2247257	1.390483	.7011273
v1family	-.144362	.4805496	.6051962	2.531226
v1hadkids	.2997992	-.3745735	1.260781	.5488803
v1knife	.1302739	-.1742054	1.337813	.6059421
v1barehands	.1220269	-.1905018	1.4303	.4670127
v_1h_resis	.2332746	-.2781131	1.270446	.6287133
v_1h_brutal	-.2622205	-.4313022	.49632	.1928118
v_1h_hide	.1109171	-.1439746	1.253701	.7055127
v_1h_execution	.2747099	.2067209	1.22846	1.163202
v_1h_ambush	-.0738862	.558814	.8941532	1.609969
age_mean	-.3966596	-.0644728	.3027364	.3056816
private	-.0609796	-.2298515	.9776872	.8289967
courtappt	-.2788191	.577606	.7353754	1.142424
gp_acc	.1659544	-.1013219	2.151345	.5226051
mst_id	-.2333076	.4784434	.8707813	.9773765
gp_nc	-.1151105	.1376617	1.021151	.9595239
gp_not1st	.2368123	-.3865759	1.12657	.6446277
ad_guilt	.1843427	-.1512612	1.484199	.6492537
gp_d_psyiat	.0660084	.3349515	1.144388	1.582149
p_evi	.0572739	-.0335322	1.03395	.9857097
ev_weapon	.0790693	.1196379	1.086187	1.099967
witness1	-.100073	-.206084	1.06749	1.078684
co_def	.2853837	-.1963618	1.697916	.5740761
IQ71_90	.1202584	-.2233296	1.110286	.7731659

White Defendant

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	214	458.2
Control obs =	666	421.8

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.026774	-.0126919	.8975017	.947638
p_felony3	-.004635	.1253612	.998549	1.117382
p_d_risk3	-.3421306	.3002732	.6915795	1.153252
p_torture3	.2202053	-.06016	1.827775	.8446616
p_death3	.0276809	-.0675646	1.092913	.790977
p_murder3	-.1267078	.024975	.7341223	1.056611
p_drug3	-.0162926	.0711188	.9281007	1.369743
p_v_drug3	-.2615736	.2290013	.4092092	1.68184
p_v_12_3	.0235669	-.0493341	1.130189	.7579287
p_agg3	-.2124115	.2381849	.7160786	.9518425
d_noconvict	.2066383	-.0338154	2.063957	.8616744
d_disturbed	.184155	-.0198327	2.244834	.9046035
d_impaired	.157999	-.0430089	2.008545	.7928382
d_age	-.0191722	.1516073	.9416643	1.534451
sum_other_mit	.147386	.1080585	1.927745	1.123313
MultiVictims	-.0324306	.0506002	.9398786	1.100263
sex_convict	.0426712	.188383	1.276078	2.388739
rob_convict0	-.1104638	-.0129031	.7916964	.9733626
burg_convict0	-.0562602	.0439946	.8099062	1.170265
psych0	.4131729	-.090348	1.502211	.8906523
v1family	.5115982	-.1226079	4.068416	.6928277
v1hadkids	.2922242	.0474008	1.28655	1.040905
v1knife	.3406729	.0137795	2.032253	1.031253
v1barehands	.3068471	-.0504587	2.371268	.8613072
v_1h_resis	.1892796	.0366471	1.233438	1.043494
v_1h_brutal	.447417	.019645	2.225816	1.035475
v_1h_hide	.3012578	-.0530466	1.746639	.894284
v_1h_execution	-.25019	.105215	.7539491	1.099394
v_1h_ambush	-.2008414	.2528901	.698228	1.378331
age_mean	.6328382	.0295397	2.160951	.9551027
private	.2246572	-.2110141	1.106865	.8232355
courtappt	-.3606604	.1529211	.6757636	1.09524
gp_acc	.1346157	-.0214705	1.966517	.874719
mst_id	-.5458673	.0124546	.6611436	1.00567
gp_nc	-.4161234	.0836715	.9780945	.9886784
gp_not1st	.2222403	-.0002029	1.129945	.9996778
ad_guilt	.2673638	.0124405	1.780139	1.029425
gp_d_psyiat	.3502459	-.0460018	1.79317	.9124614
p_evi	.4756586	-.1068029	1.067228	.9505577
ev_weapon	.2828369	-.1472397	1.248103	.8697515
witness1	-.5482316	.1752967	1.192392	.8764531
co_def	.0185956	-.0821092	1.045747	.8093045
IQ71_90	-.4455915	.0650162	.5905766	1.053797

Any White Victim

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	282	401.9
Control obs =	598	478.1

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0368751	.0730889	1.162014	1.349328
p_felony3	.3653127	.0679412	1.37094	1.05671
p_d_risk3	-.2792524	-.0294505	.7609939	.9763038
p_torture3	.3130023	-.0226057	2.435669	.9453062
p_death3	.1471748	.0413344	1.562304	1.144904
p_murder3	.0325409	.0528734	1.078375	1.129376
p_drug3	.0720633	-.0355418	1.395044	.8536546
p_v_drug3	-.2611468	-.0838593	.426269	.7575402
p_v_12_3	-.0177697	.0428857	.9135454	1.240762
p_agg3	.1394075	.0411484	1.582281	1.259203
d_noconvict	.2220236	-.0069588	2.25165	.9765947
d_disturbed	.0969783	.0284717	1.560863	1.121621
d_impaired	.2153414	.0095722	2.699551	1.047254
d_age	.1376009	.0573853	1.543644	1.203118
sum_other_mit	.1811957	-.0127716	2.184286	.8864977
MultiVictims	.1574614	.0441624	1.348135	1.088119
sex_convict	.184306	.0590798	2.874786	1.368303
rob_convict0	.1724101	.0774603	1.394018	1.14513
burg_convict0	.349127	.0710753	3.540405	1.287393
psych0	.4351365	.012235	1.58748	1.012594
v1family	.433199	-.0162818	3.67328	.9559779
v1hadkids	.4990835	.0480082	1.526888	1.037382
v1knife	.4134134	.0452809	2.491608	1.092153
v1barehands	.3314571	.0312099	2.697806	1.094035
v_1h_resis	.4067002	.0591684	1.540921	1.062224
v_1h_brutal	.3298856	.054707	1.903711	1.10254
v_1h_hide	.3662673	.024898	2.02895	1.04865
v_1h_execution	-.1265398	-.0000657	.8800351	1.000325
v_1h_ambush	-.0794184	.0267138	.8785421	1.042768
age_mean	.5195403	.0092965	1.936853	1.069603
private	.2350817	.0840542	1.11923	1.048628
courtappt	-.3697987	-.0986663	.6844845	.9149658
gp_acc	.1659489	.0054707	2.372594	1.028072
mst_id	-.5302362	-.0585455	.7053755	.9661352
gp_nc	-.4890921	-.0483123	.9914266	1.000318
gp_not1st	.2497288	.0067086	1.153233	1.004494
ad_guilt	.3373312	.0840437	2.130614	1.187411
gp_d_psyiat	.3242805	.095527	1.777987	1.197732
p_evi	.7171222	.0705956	1.09937	1.013449
ev_weapon	.3250014	.0200778	1.303836	1.015351
witness1	-.5629571	-.0841205	1.255539	1.040077
co_def	.053277	.0335965	1.127386	1.079411
IQ71_90	-.4102859	-.1104326	.6445625	.8887893

Any Black Victim

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	516	454.1
Control obs =	364	425.9

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0344964	-.0695239	1.15173	.7526739
p_felony3	-.3993234	.0315802	.686096	1.027588
p_d_risk3	.194028	.0376273	1.189011	1.033827
p_torture3	-.3738879	.1506737	.3087594	1.442132
p_death3	-.0768798	-.0460441	.7865981	.8600933
p_murder3	.0872965	-.0111537	1.224718	.9739077
p_drug3	.011456	.0113441	1.054823	1.053281
p_v_drug3	.2033944	-.1055679	1.834187	.7539801
p_v_12_3	-.0406671	-.0914919	.8117924	.6490382
p_agg3	-.154498	-.0084579	.7344466	.8502807
d_noconvict	-.2501489	-.0555054	.3759306	.8091417
d_disturbed	-.1061401	-.080113	.6068319	.7400126
d_impaired	-.1970653	-.0340546	.3834252	.8483636
d_age	-.1426585	-.0649233	.6295709	.7946286
sum_other_mit	-.2279899	.0302379	.4041754	1.122452
MultiVictims	.0288182	.0026293	1.058039	1.005708
sex_convict	-.1678998	-.0329697	.3629155	.823061
rob_convict0	-.1974227	-.0495627	.6758753	.9059865
burg_convict0	-.2210372	-.073279	.4396124	.7533172
psych0	-.3912059	.1157926	.6317647	1.127269
v1family	-.3842674	.0142578	.2848556	1.043142
v1hadkids	-.4408541	.0526198	.6528274	1.046857
v1knife	-.376082	.0000397	.4067418	.9999343
v1barehands	-.402521	.0580502	.2558965	1.17921
v_1h_resis	-.453254	-.0089344	.589467	.9896002
v_1h_brutal	-.3804993	.0919293	.4491679	1.177866
v_1h_hide	-.4272593	.0994409	.4059136	1.202354
v_1h_execution	.1573175	-.046894	1.170075	.9512518
v_1h_ambush	.1364921	.0019949	1.25205	1.003243
age_mean	-.4929381	.0159009	.5325831	.9955434
private	-.1632254	-.0249283	.916501	.9836004
courtappt	.3365957	.1001524	1.367887	1.089917
gp_acc	-.2149099	-.0289825	.2937084	.8520011
mst_id	.576203	-.0090067	1.384271	.9951037
gp_nc	.4679615	-.0318447	.9654843	1.003688
gp_not1st	-.2332015	.0269586	.865278	1.013641
ad_guilt	-.390811	-.0702834	.385094	.8520225
gp_d_psyiat	-.3545882	-.0345344	.5100762	.9361487
p_evi	-.6025143	.0528291	.8440796	1.016706
ev_weapon	-.3091214	.111199	.759835	1.085451
witness1	.5361789	-.0313469	.7571689	1.013928
co_def	-.1129195	-.0205781	.7771112	.9538137
IQ71_90	.3351666	.0250045	1.374428	1.023168

Any Hispanic Victim

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	79	441.8
Control obs =	801	438.2

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.1456544	-.1930074	.491342	.3306582
p_felony3	.2706181	.1662375	1.235512	1.14052
p_d_risk3	.2034753	.0095903	1.157647	1.008078
p_torture3	.1900427	-.0849011	1.64913	.7570175
p_death3	.0404707	-.0782304	1.143919	.7640543
p_murder3	.0894649	.0129545	1.224369	1.029611
p_drug3	.0575593	-.0200882	1.306982	.9068997
p_v_drug3	.2331455	-.0482354	1.743704	.8679186
p_v_12_3	.0907934	-.0732723	1.548271	.6516264
p_agg3	.3177936	.0238127	.9747122	.900199
d_noconvict	.3073094	-.0021489	2.555393	.9918608
d_disturbed	.1178471	-.089122	1.663516	.614431
d_impaired	.1726246	-.0691814	2.034509	.6941066
d_age	.2764498	-.0451702	2.109014	.8567498
sum_other_mit	.2841835	-.0226098	2.011026	.6333007
MultiVictims	.1204572	.2104018	1.256387	1.401899
sex_convict	-.0133627	-.0832151	.9344615	.5656876
rob_convict0	.0949848	.0925254	1.208316	1.184962
burg_convict0	-.1912332	-.0807	.4111842	.7206484
psych0	.1585983	.0184231	1.195542	1.022225
v1family	-.2711144	.1725399	.3129725	1.557359
v1hadkids	.0752616	-.1059417	1.086338	.8840315
v1knife	-.1096663	.1153492	.760764	1.27428
v1barehands	.1285372	-.1190995	1.451376	.6512463
v_1h_resis	-.0010314	-.028747	1.010287	.9646014
v_1h_brutal	.1165521	-.1030267	1.264402	.7865111
v_1h_hide	.0376802	.0908461	1.091653	1.188981
v_1h_execution	.0501805	-.1341594	1.05918	.8583945
v_1h_ambush	-.0658332	.010188	.9044818	1.016224
age_mean	-.0812349	-.0837313	.6272526	.5270291
private	-.1141998	-.2119644	.9378807	.8441058
courtappt	-.0347782	.0715594	.9810442	1.055894
gp_acc	.1048119	.1812155	1.672976	2.164364
mst_id	-.2059031	-.0987149	.8899864	.9479604
gp_nc	.1270476	-.0807961	.9790566	1.005733
gp_not1st	.1663386	.0371585	1.101068	1.023106
ad_guilt	.1882672	-.1145117	1.493386	.7331834
gp_d_psyiat	.1381821	-.0331944	1.282723	.9365368
p_evi	-.0657296	-.1237694	.9835202	.9395572
ev_weapon	.0961853	-.0126944	1.096884	.9879759
witness1	.1260207	-.1095435	.9249358	1.053355
co_def	.1936844	.0438088	1.475067	1.099151
IQ71_90	.0036325	-.0324769	1.014723	.9709673

Black Def./White Vic.

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	94	429.0
Control obs =	786	451.0

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0612659	.364278	1.279175	2.783208
p_felony3	.5570429	.2548953	1.347635	1.191661
p_d_risk3	-.0423042	-.1477872	.9720899	.8577088
p_torture3	.3556253	.0142867	2.32362	1.04238
p_death3	.1470407	-.0385038	1.526134	.8827297
p_murder3	.1793115	.188069	1.447017	1.435505
p_drug3	.1702945	-.0547053	2.025216	.7522141
p_v_drug3	-.1251107	-.1816386	.682619	.5259929
p_v_12_3	-.0861659	-.0660613	.6118881	.6867257
p_agg3	.443293	-.1007266	2.319596	1.158158
d_noconvict	.1190148	-.0879733	1.519891	.6824064
d_disturbed	-.0469135	-.0630409	.7985879	.7192155
d_impaired	.1702945	-.012416	2.025216	.9414671
d_age	.1664678	-.1127498	1.630224	.6493246
sum_other_mit	.1755556	-.0282487	1.683238	.6952288
MultiVictims	.2744928	-.0762794	1.574034	.8484061
sex_convict	.2011517	-.029372	2.695762	.8362217
rob_convict0	.4522718	.0592718	1.956144	1.118781
burg_convict0	.3966146	.3303588	3.098923	2.39375
psych0	.1472596	-.0109287	1.181993	.9866055
v1family	-.1792375	-.0477078	.5204159	.8571355
v1hadkids	.2908645	.073512	1.257747	1.069782
v1knife	.1633722	.0044129	1.41995	1.010366
v1barehands	.2146617	-.0399658	1.788576	.8759901
v_1h_resis	.2991469	.0516508	1.330418	1.061218
v_1h_brutal	.09813	.0214211	1.222028	1.044838
v_1h_hide	.3042917	-.0054787	1.680132	.9889045
v_1h_execution	.088336	.3021499	1.091328	1.198276
v_1h_ambush	.1564214	-.0161244	1.260356	.9742533
age_mean	.0520012	-.1007671	.9252624	.8675959
private	.0638121	.255088	1.042498	1.073396
courtappt	-.0713944	-.1144331	.9457091	.8930819
gp_acc	.0638703	-.0186783	1.389369	.9014617
mst_id	-.2243139	-.0966276	.8764162	.9490058
gp_nc	-.1794411	.0738587	1.011117	.9834048
gp_not1st	.0158156	.0923158	1.019792	1.053274
ad_guilt	.2649227	-.0048001	1.705611	.9887775
gp_d_psyiat	.1097178	-.1341752	1.224924	.7382295
p_evi	.4516179	.0619612	1.017111	1.019047
ev_weapon	.0997239	.008433	1.097919	1.007928
witness1	-.2037417	.0689526	1.100662	.9549026
co_def	.171503	.0369953	1.420323	1.083538
IQ71_90	-.1717755	-.1089166	.8453712	.8961199

Black Def./Black Vic.

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	467	447.6
Control obs =	413	432.4

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0231936	-.079989	1.099219	.7190858
p_felony3	-.3864888	.0404323	.6799539	1.038575
p_d_risk3	.1570447	.0289563	1.145314	1.024962
p_torture3	-.3723088	.1721361	.2905023	1.51949
p_death3	-.0273815	-.0590669	.917441	.8281954
p_murder3	.0715516	-.0104963	1.178806	.976186
p_drug3	-.0597914	-.0252873	.7536873	.8847262
p_v_drug3	.1249258	-.0716343	1.424856	.8154957
p_v_12_3	-.0230766	-.0957888	.8879731	.6435768
p_agg3	-.1526735	-.0085048	.7649859	.8280009
d_noconvict	-.3115057	-.0968326	.2628652	.6698605
d_disturbed	-.1750788	-.1043377	.4200889	.6518205
d_impaired	-.2902141	-.0863575	.1942081	.6238604
d_age	-.2340051	-.0918027	.4510447	.7129051
sum_other_mit	-.2560266	.0870805	.363819	1.538861
MultiVictims	.0317959	-.0179627	1.064679	.9627547
sex_convict	-.1312687	-.0337699	.4519981	.8217073
rob_convict0	-.179765	-.0796531	.6951153	.8406183
burg_convict0	-.1822724	-.0619286	.5030559	.7801232
psych0	-.4557912	.125172	.5665588	1.142825
v1family	-.3187098	.0322731	.3488171	1.098851
v1hadkids	-.3978713	.0872315	.6648873	1.079265
v1knife	-.3341492	-.0367024	.4385125	.9240162
v1barehands	-.3900507	.1258109	.2480359	1.402906
v_1h_resis	-.3825934	-.0263961	.6256353	.9686098
v_1h_brutal	-.3542189	.1520745	.4612222	1.297048
v_1h_hide	-.4417951	.129062	.3714381	1.270343
v_1h_execution	.089857	-.064901	1.091082	.9303197
v_1h_ambush	.1461383	-.020568	1.26858	.9652506
age_mean	-.4343802	.0477277	.5427579	.9783808
private	-.169531	-.0208589	.9109384	.9848182
courtappt	.3453507	.0942843	1.359011	1.075446
gp_acc	-.1762378	-.0399247	.3652789	.7979647
mst_id	.5685388	-.0138328	1.324801	.9932644
gp_nc	.4101067	-.0310057	.9484339	1.001777
gp_not1st	-.2585051	.0948462	.8460908	1.055042
ad_guilt	-.3504937	-.1019666	.4129956	.7852871
gp_d_psyiat	-.396153	-.0391053	.4520508	.9246785
p_evi	-.5058599	.0649214	.8372075	1.022843
ev_weapon	-.2709071	.1475473	.7776758	1.114443
witness1	.4581896	-.0460182	.7658859	1.021823
co_def	-.2042382	-.0456533	.6277498	.8932731
IQ71_90	.342245	.0224448	1.363541	1.020868

White Def./White Vic.

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	169	433.5
Control obs =	711	446.5

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.0216014	.0343584	.9183034	1.146842
p_felony3	.0023002	.0959407	1.00684	1.089129
p_d_risk3	-.3844089	.1775728	.6399088	1.115248
p_torture3	.1379993	.0927637	1.468526	1.248114
p_death3	.0974062	-.0139126	1.340713	.9563042
p_murder3	-.0666871	.2929031	.8565414	1.654998
p_drug3	-.0677083	-.0938285	.7136371	.5994877
p_v_drug3	-.353826	.2213937	.2350346	1.653205
p_v_12_3	.0095409	-.0156328	1.054637	.9200535
p_agg3	-.2149491	.2520587	.7545408	.8420573
d_noconvict	.1761802	-.0551773	1.839622	.7909994
d_disturbed	.1131993	.0008492	1.648409	1.00409
d_impaired	.1446258	-.0307728	1.874191	.8533977
d_age	-.0423561	.3746207	.8710089	2.35745
sum_other_mit	.1422143	.2689664	2.101176	1.391358
MultiVictims	.0374093	.3628453	1.079847	1.642143
sex_convict	.098415	.2062984	1.708979	2.529437
rob_convict0	-.1431758	.0771842	.7309948	1.152197
burg_convict0	.0189721	.0551205	1.075813	1.215516
psych0	.4161936	-.024614	1.472749	.9720812
v1family	.6493615	-.0732027	5.113472	.8104833
v1hadkids	.4266098	.3299997	1.371547	1.196056
v1knife	.4177261	.1735243	2.253417	1.390149
v1barehands	.2990802	.0511184	2.25249	1.152412
v_1h_resis	.2359891	.1139528	1.281711	1.128655
v_1h_brutal	.4125619	.1437825	2.032292	1.262292
v_1h_hide	.2625647	.0729819	1.615583	1.144863
v_1h_execution	-.3074619	.1323479	.6881115	1.122393
v_1h_ambush	-.2558524	.2858431	.6142929	1.415727
age_mean	.7092225	.0094982	2.160248	1.059045
private	.2577063	-.1882048	1.111602	.8532485
courtappt	-.4650641	.107859	.5617302	1.075491
gp_acc	.2002351	-.008887	2.619228	.9487313
mst_id	-.6012984	-.07531	.5939964	.9581974
gp_nc	-.5287092	-.1070111	.9177303	.9953576
gp_not1st	.3003661	-.0371943	1.154115	.9749818
ad_guilt	.2559862	.2033278	1.715395	1.47782
gp_d_psyiat	.3698445	.02218	1.799951	1.043262
p_evi	.6430512	.0260155	.9950425	1.008696
ev_weapon	.3795347	.0004182	1.298888	1.000409
witness1	-.6402409	.0795895	1.145508	.9482171
co_def	-.1224839	-.0210828	.7437707	.9515199
IQ71_90	-.4759255	-.2094672	.5451588	.7861825

Hispanic Def./Hispanic Vic.

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	32	513.7
Control obs =	848	366.3

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_felony3	.0091244	.5626277	1.040422	1.234575
p_d_risk3	.2201855	-.3828175	1.182687	.5904439
p_torture3	-.2377742	-.1437557	.3918832	.6013088
p_death3	-.2134888	-.3956635	.4231806	.0271033
p_murder3	-.0995188	-.4600675	.8008977	.1010284
p_drug3	.2249072	-.2257162	2.412385	.1477463
p_v_drug3	.2791943	-.0228182	1.902598	.9359333
p_v_12_3	.1371214	-.0294169	1.892113	.8548662
p_agg3	.1346252	-.2521926	.9328806	.3983523
d_noconvict	.1398193	-.2913573	1.640422	.1223763
d_disturbed	.1065845	-.2299939	1.615278	.1449339
d_impaired	.3249433	-.1995914	3.201856	.227245
d_age	.2690748	-.2640718	2.067397	.2663443
sum_other_mit	.2778906	-.0038654	1.865035	.4643746
MultiVictims	.0211478	-.3894359	1.074468	.2841813
rob_convict0	-.0615459	-.0777387	.9032862	.8436964
psych0	.3733753	-.4078308	1.389588	.4533481
v1family	-.0767909	-.2163511	.797703	.413273
v1hadkids	.3605819	-.6101091	1.297984	.2633603
v1knife	.0178614	.064313	1.07484	1.151378
v1barehands	.2474529	-.18129	1.920553	.4883883
v_1h_resis	.0217446	-.0305827	1.058164	.9615388
v_1h_brutal	-.2618333	-.4161016	.497286	.2166059
v_1h_hide	.1332451	-.1376483	1.320654	.718242
v_1h_execution	-.0038981	-.5463215	1.027125	.3588525
v_1h_ambush	-.1775456	.4489484	.7331672	1.552412
age_mean	-.265151	-.2189173	.3601349	.187842
private	-.5055386	-.1063348	.5806943	.9302597
courtappt	-.128114	.3184299	.9073821	1.16834
gp_acc	.2664633	-.0914324	3.06159	.5587198
mst_id	-.1743378	.5798412	.9259361	.9227734
gp_nc	-.1418763	.375497	1.03366	.8168087
gp_not1st	.1975997	-.3994092	1.129428	.6293336
ad_guilt	.117833	-.1223627	1.329885	.7163242
gp_d_psyiat	.0902435	-.4172935	1.210109	.2575793
p_evi	-.0719007	-.5153129	.9986874	.6130744
ev_weapon	.1897624	-.6511358	1.184925	.248956
witness1	-.1679287	.1486141	1.10819	.8928104
co_def	-.0035293	-.3595248	1.022783	.2682976
IQ71_90	.42499	-.1560049	1.239842	.8466935

Death Penalty Retracted
Black Defendant

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	197	161.7
Control obs =	116	151.3

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.022426	.0348875	1.0589	1.111587
p_felony3	-.1725524	-.0504106	.9964222	.9946661
p_d_risk3	.289924	-.015864	1.179717	.9906856
p_torture3	-.2210308	.0475242	.6751831	1.085661
p_death3	.0709044	.0837358	1.137669	1.1989
p_murder3	.2356048	.1330044	1.298085	1.165752
p_drug3	-.0247735	-.0473914	.91915	.8545614
p_v_drug3	.245356	.0278174	1.763947	1.067832
p_v_12_3	-.0367313	.0564204	.8897957	1.206425
p_agg3	.2787147	.1528074	1.424557	1.477121
d_noconvict	-.2824919	-.0792553	.5846728	.8436706
d_disturbed	-.2712344	.0327868	.5117653	1.083272
d_impaired	-.3317032	-.0711415	.430421	.817338
d_age	-.1495703	-.1804432	.7967944	.7782495
sum_other_mit	-.2249082	-.0262372	.8075682	1.402057
MultiVictims	.1904722	.0879585	1.165614	1.090799
sex_convict	-.0999105	-.2467924	.6765815	.458305
rob_convict0	-.0056322	.0513817	.9886285	1.089766
burg_convict0	-.1941907	-.0471773	.5842518	.8587913
psych0	-.5427968	.040157	.8170041	1.019106
v1family	-.2162342	.0811195	.4522758	1.320347
v1hadkids	-.264786	-.0015027	.7804107	.9982929
v1knife	-.2756356	.0600153	.5211117	1.143992
v1barehands	-.1603391	-.0770319	.6933272	.8752437
v_1h_resis	-.1067629	.1238526	.8957108	1.142757
v_1h_brutal	-.2230899	-.1280511	.7247223	.8611428
v_1h_hide	-.1290862	.166496	.8182466	1.276126
v_1h_execution	.0767012	-.0479044	1.064846	.9564438
v_1h_ambush	.1486669	-.037698	1.289167	.9378149
age_mean	-.2675957	.0821769	.6145134	.9947941
private	-.244257	-.0301808	.8501381	.9742624
courtappt	.4195821	-.0624485	1.364701	.9728136
gp_acc	.0321237	.0227253	1.166024	1.122524
mst_id	.4738602	-.1260646	1.517629	.928246
gp_nc	.4412207	-.0702396	1.003701	1.003777
gp_not1st	-.0889572	.1546682	.9384213	1.132629
ad_guilt	-.3036522	.0036694	.6439349	1.005235
gp_d_psyiat	-.1839487	-.0017402	.7396996	.9966872
p_evi	-.2975526	-.0158462	.9906096	.9998115
ev_weapon	-.2837684	.0899119	.8090009	1.069317
witness1	.3958481	.0854615	.8752374	.982737
co_def	-.1561792	-.0056417	.7795637	.9895466
IQ71_90	.2690984	.0019131	1.313008	1.001086

White Defendant

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	76	168.5
Control obs =	237	144.5

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0829603	-.0904767	1.250955	.7534919
p_felony3	-.0051974	-.3147638	1.008808	.8629617
p_d_risk3	-.449893	.3665449	.7147472	1.037544
p_torture3	.2933339	-.0530764	1.619982	.8984578
p_death3	.0286945	-.1393943	1.062754	.7467075
p_murder3	-.1448005	.3444467	.8564279	1.238264
p_drug3	.0272257	-.17871	1.101953	.4610466
p_v_drug3	-.3008884	.4502023	.4606565	1.856956
p_v_12_3	.0579934	.003564	1.202309	1.010125
p_agg3	-.3175863	.0801277	.6961051	.622804
d_noconvict	.386699	-.1057113	1.938298	.7745872
d_disturbed	.2944401	-.1266257	1.962526	.7081366
d_impaired	.2605472	-.1320114	1.851739	.6912208
d_age	.0082197	.4913067	1.021916	1.474035
sum_other_mit	.2514591	.2583936	1.3599	.6678738
MultiVictims	-.0567454	.2987659	.9644894	1.145455
sex_convict	.1338655	.0441105	1.657806	1.192182
rob_convict0	-.0540548	-.3090899	.933322	.5238207
burg_convict0	-.127982	-.2491973	.6814327	.352141
psych0	.4323378	-.1917447	1.135392	.8675203
v1family	.2225219	-.0544053	2.147253	.7924838
v1hadkids	-.0048151	.421383	1.004217	1.234991
v1knife	.2174379	-.0629574	1.63278	.8466725
v1barehands	.0914984	.0259846	1.237395	1.057141
v_1h_resis	-.1448005	-.2650003	.8564279	.6861257
v_1h_brutal	.4783545	.0060064	1.794101	1.008131
v_1h_hide	.1047906	-.1026613	1.179821	.8334538
v_1h_execution	-.1262276	.4152608	.8981814	1.157376
v_1h_ambush	-.17982	.4151736	.7252337	1.59178
age_mean	.4723188	-.0147306	1.952555	1.247945
private	.2085359	-.1017053	1.143386	.9182937
courtappt	-.2593297	.2770754	.8271976	1.076804
gp_acc	-.0870453	-.1019622	.6397663	.5606603
mst_id	-.3170043	.3492423	.7541816	1.109196
gp_nc	-.2377276	.1771112	1.002746	.9485464
gp_not1st	-.0550916	-.3805325	.9691488	.6305081
ad_guilt	.2888081	.0267959	1.479366	1.041054
gp_d_psyiat	.1492177	-.0668959	1.274549	.8864384
p_evi	.3090441	-.2897921	.9896343	.8891583
ev_weapon	.2279147	-.1165992	1.178336	.9022465
witness1	-.3862175	.1220038	1.101637	.9274279
co_def	.0404934	-.2266931	1.076308	.6261234
IQ71_90	-.4147237	-.2862177	.6037575	.6908503

Hispanic Defendant

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	35	125.0
Control obs =	278	188.0

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.1726954	-.3033086	.5914584	.283558
p_felony3	.3861332	.0385771	.9282856	1.003642
p_d_risk3	.1751209	-.253476	1.09138	.8150556
p_torture3	-.1564507	.0454416	.7390766	1.083345
p_death3	-.2597837	-.1605192	.5627037	.7128129
p_murder3	-.269367	-.2598474	.7162204	.7000585
p_drug3	.0506811	-.1462698	1.203924	.5543584
p_v_drug3	.0176372	.0175276	1.064324	1.04152
p_v_12_3	.0237187	.1320372	1.103027	1.415696
p_agg3	-.0368604	-.2624167	.8674528	.8441221
d_noconvict	-.0230367	.0024289	.9792815	1.007491
d_disturbed	.1162512	.1087259	1.344224	1.286695
d_impaired	.3012827	-.0539523	1.935797	.8620589
d_age	.3125893	.0689126	1.498569	1.107374
sum_other_mit	.1100681	-.029661	1.034237	.6098008
MultiVictims	-.2354872	-.244014	.8124127	.7774916
sex_convict	-.1422621	-.2383199	.5248501	.2247981
rob_convict0	.1139688	.4171089	1.186705	1.406266
burg_convict0	.5100891	.110139	2.934565	1.338905
psych0	.3712941	.4956733	1.105175	1.00042
v1family	-.0168567	-.0303611	.9625695	.8939049
v1hadkids	.5644693	.046228	1.373105	1.049209
v1knife	.1822786	.1148965	1.513401	1.294622
v1barehands	.0710599	.0691868	1.200574	1.15965
v_1h_resis	.3763779	.1244501	1.333329	1.12083
v_1h_brutal	-.4813149	-.2835348	.3226502	.5668246
v_1h_hide	.0233972	.1974803	1.063593	1.284152
v_1h_execution	.0864221	-.0904289	1.095988	.9198927
v_1h_ambush	-.1183946	-.0776201	.8259563	.8725606
age_mean	-.3975965	-.3952824	.4088395	.3973675
private	.1578516	-.0319074	1.12441	.9793197
courtappt	-.5598218	-.1383032	.5323957	.9022363
gp_acc	.0996576	-.0359293	1.593627	.8386169
mst_id	-.5053454	-.3124468	.5477478	.714486
gp_nc	-.4159428	-.3381809	.9325509	.9310709
gp_not1st	.4140355	-.1786285	1.191644	.8507411
ad_guilt	.0834278	.1254064	1.155552	1.184861
gp_d_psyiat	.0602612	-.2351992	1.130322	.5976233
p_evi	.1496694	-.3223934	1.02246	.8688671
ev_weapon	.270421	-.0879496	1.199461	.9217839
witness1	-.0087472	-.2395219	1.029492	1.036201
co_def	.268925	.2222172	1.465374	1.333358
IQ71_90	.125676	.4035998	1.136074	1.209627

Any White Victim

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	116	160.2
Control obs =	197	152.8

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.068274	-.0223019	1.202878	.9318406
p_felony3	.4567303	-.0930755	.9706931	.985273
p_d_risk3	-.2021065	-.0686527	.8971883	.963537
p_torture3	.3639874	.0471333	1.896806	1.097809
p_death3	.0769341	-.1046217	1.152581	.7997829
p_murder3	-.0772343	-.0398829	.9248612	.9545013
p_drug3	.0760314	-.0216708	1.282659	.9316336
p_v_drug3	-.2892717	-.0656374	.5029516	.8492061
p_v_12_3	-.1169983	.2802936	.6854337	1.940228
p_agg3	.1811447	-.0755365	1.532486	1.159081
d_noconvict	.2824919	-.0012748	1.710358	.99692
d_disturbed	.0608045	.0363494	1.167593	1.088691
d_impaired	.2481005	.0935364	1.870262	1.270071
d_age	.1495703	.1503425	1.255029	1.263436
sum_other_mit	.2230396	.0402415	1.404522	.7547666
MultiVictims	.0747776	-.0156823	1.060648	.9860431
sex_convict	.266984	.0462274	2.917184	1.184417
rob_convict0	.235293	-.0379845	1.372185	.9399357
burg_convict0	.5007402	.0763897	4.500548	1.268146
psych0	.4231908	.2283865	1.18419	1.072134
v1family	.1092302	.0126586	1.490566	1.046078
v1hadkids	.4487567	.0606737	1.494699	1.057949
v1knife	.1942871	-.0054454	1.584672	.9870959
v1barehands	.038109	.2546417	1.095726	1.575221
v_1h_resis	.2891568	-.040257	1.32211	.9554099
v_1h_brutal	.1898094	.2776383	1.317702	1.383437
v_1h_hide	.0950197	-.1309507	1.161355	.7946294
v_1h_execution	-.0468524	-.003012	.964126	.9970456
v_1h_ambush	.0308626	.0122646	1.055684	1.0208
age_mean	.3049558	.0132598	1.648904	1.086836
private	.0998458	.1611395	1.074786	1.099583
courtappt	-.451384	-.111077	.7114516	.9323564
gp_acc	-.0321237	.3887505	.8576156	3.054782
mst_id	-.3767878	-.0788551	.729694	.9332965
gp_nc	-.4412207	-.1950218	.9963129	.9610955
gp_not1st	.0601777	.0848761	1.045635	1.056124
ad_guilt	.2367358	.0303892	1.414335	1.041714
gp_d_psyiat	.1492147	.2379808	1.279611	1.426892
p_evi	.5306297	.0273725	.9831649	1.001824
ev_weapon	.2543069	.0324203	1.211711	1.023337
witness1	-.3381316	.0422628	1.126178	.9802639
co_def	.0177013	.1839271	1.032734	1.318894
IQ71_90	-.2058239	-.0877144	.8171252	.9101178

Any Black Victim

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	156	162.5
Control obs =	157	150.5

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.066106	-.0362117	1.19555	.8970919
p_felony3	-.5344283	-.0186155	.9746148	1.000053
p_d_risk3	.2028295	-.0333459	1.106216	.974001
p_torture3	-.5139848	.1022786	.3452095	1.174172
p_death3	.0545664	-.0333275	1.105245	.932578
p_murder3	.3081648	.0099696	1.38236	1.011801
p_drug3	.0262049	-.0829698	1.089849	.7855704
p_v_drug3	.2827451	-.0196468	1.863398	.9540774
p_v_12_3	.0253721	-.0463164	1.082176	.8855982
p_agg3	-.0910303	-.0523158	.8637882	.8322164
d_noconvict	-.2672538	-.1654845	.5808764	.7178208
d_disturbed	-.0387253	-.1597124	.9068358	.713832
d_impaired	-.1853387	-.1538105	.612849	.6749544
d_age	-.0773302	-.1385886	.8871567	.7934829
sum_other_mit	-.2553762	.0717256	.718575	1.423761
MultiVictims	.2655401	.0600305	1.226729	1.061506
sex_convict	-.2536409	-.0455095	.3289771	.851559
rob_convict0	-.2949961	-.1111961	.6546058	.8379941
burg_convict0	-.2866447	-.132875	.4199151	.6390299
psych0	-.3548176	.0770021	.8358269	1.021463
v1family	-.1860066	-.0253584	.4869727	.9141101
v1hadkids	-.4173494	.0516249	.6496905	1.051486
v1knife	-.2390845	-.0231613	.5483386	.9530532
v1barehands	-.2333416	.1518052	.5706022	1.287211
v_1h_resis	-.4513559	-.0875418	.61441	.906665
v_1h_brutal	-.3351691	.0918648	.5945302	1.090938
v_1h_hide	-.2913235	.1945955	.6239854	1.267047
v_1h_execution	.1705898	-.0665475	1.155087	.9335107
v_1h_ambush	.0855938	-.0149645	1.152378	.9708476
age_mean	-.3642975	-.0191792	.7021752	1.08113
private	-.1582862	-.1256579	.8925967	.9122263
courtappt	.4554212	.2633625	1.331169	1.16811
gp_acc	.0012718	-.1181781	1.006195	.6296894
mst_id	.6283307	.079533	1.613201	1.080233
gp_nc	.535137	.0786658	.9472107	1.010237
gp_not1st	-.0629588	.1081623	.9569317	1.054176
ad_guilt	-.3876896	-.1417356	.5378595	.8041708
gp_d_psyiat	-.2995984	-.0816479	.5938259	.8757376
p_evi	-.5069697	-.080097	.9501313	1.011318
ev_weapon	-.2729587	.0617579	.7993562	1.029522
witness1	.3929926	-.0032573	.8423869	.9997959
co_def	-.0625702	-.0058935	.9032109	.9886839
IQ71_90	.2442963	-.015453	1.256548	.9844469

Any Hispanic Victim

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	48	159.8
Control obs =	265	153.2

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.2574197	-.3266343	.4168584	.2361078
p_felony3	.1243389	.2500114	1.012101	.9502177
p_d_risk3	.0876547	-.076773	1.056709	.9551046
p_torture3	.1989916	-.0774177	1.40237	.8570068
p_death3	-.1259392	-.1950002	.7893617	.6429046
p_murder3	-.057547	.1462648	.9558073	1.130538
p_drug3	.0432384	.0480461	1.167709	1.159404
p_v_drug3	.096514	-.0934418	1.232721	.8027323
p_v_12_3	.0148653	-.0939108	1.065159	.7208291
p_agg3	-.003408	.0232761	.7230825	.7060422
d_noconvict	.2416523	-.071074	1.530972	.8618492
d_disturbed	-.0169504	-.1769895	.9741799	.5769973
d_impaired	.0724494	-.0834314	1.216103	.7896127
d_age	.1572364	-.1033349	1.26574	.8395526
sum_other_mit	.2416236	-.0687157	1.328479	.6283976
MultiVictims	-.0787947	.2817624	.9531876	1.132071
sex_convict	-.0687601	-.1939742	.7607943	.3365781
rob_convict0	.1570721	.0506134	1.238357	1.068541
burg_convict0	-.2338468	-.0293313	.4439743	.9183667
psych0	.1374176	-.0542742	1.074363	.9695478
v1family	-.1000324	.2550681	.6767027	2.049591
v1hadkids	.0892452	-.0545431	1.104654	.942773
v1knife	-.0406257	.0297223	.9191187	1.07275
v1barehands	.0849138	-.1080048	1.226917	.7538989
v_1h_resis	-.001933	-.1256308	1.015389	.8608468
v_1h_brutal	.1380594	-.062251	1.227469	.906972
v_1h_hide	-.0125481	.0332652	.9973185	1.051381
v_1h_execution	-.0927326	-.1953653	.9340554	.8105547
v_1h_ambush	-.1143319	.2504699	.8279119	1.376177
age_mean	.0133176	-.0732799	.5303557	.3376904
private	.1560529	-.2541825	1.116788	.7686456
courtappt	-.157857	.2212847	.905809	1.084122
gp_acc	.0200035	.1128477	1.118815	1.611657
mst_id	-.269271	.0687833	.7890304	1.044449
gp_nc	.0908574	-.0716339	1.002682	1.001108
gp_not1st	.1479947	.0397055	1.109969	1.024727
ad_guilt	.0895178	-.1292813	1.156435	.7958138
gp_d_psyiat	.2640446	.0032969	1.478089	1.005258
p_evi	.0073517	.1663859	1.018106	.9870853
ev_weapon	.1539804	.0330809	1.131469	1.025311
witness1	.205505	.0533879	.9027444	.9747015
co_def	.0682892	.2866428	1.13134	1.412976
IQ71_90	-.164267	-.132387	.8527926	.8648032

Black Def/White Vic.

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	44	130.2
Control obs =	269	182.8

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.1275056	-.1986314	.6945379	.5040266
p_felony3	.4627166	.5171286	.8911632	.7831681
p_d_risk3	.0684454	-.0012085	1.050948	1.001583
p_torture3	.3768808	.2179015	1.749345	1.378548
p_death3	-.0120931	-.2143888	.9968516	.613228
p_murder3	.0030174	-.3223179	1.022629	.608543
p_drug3	.1623033	.0105736	1.644577	1.038799
p_v_drug3	-.2598201	-.3812922	.5116531	.2574326
p_v_12_3	-.2911817	-.2900145	.2786487	.2399898
p_agg3	.4666628	.0037598	2.014943	1.211698
d_noconvict	.0286057	.1319234	1.077383	1.261896
d_disturbed	-.1626858	.0755708	.6352321	1.194295
d_impaired	.1107727	.1581237	1.329602	1.420354
d_age	.0922192	.0632828	1.165248	1.102843
sum_other_mit	.1888962	.2184602	1.455851	1.442907
MultiVictims	.154811	-.2534699	1.125454	.7560845
sex_convict	.1665533	-.0573301	1.831904	.7831735
rob_convict0	.5094268	.2907926	1.654219	1.361099
burg_convict0	.3793619	.0507753	2.410167	1.152741
psych0	.0684454	.161207	1.050948	1.059975
v1family	-.2138405	-.287675	.3626504	.1407103
v1hadkids	.3257652	-.0395793	1.292209	.9601151
v1knife	.0749	.2360263	1.211662	1.565025
v1barehands	.1267845	-.1480984	1.337602	.6539974
v_1h_resis	.3430841	.3830754	1.317606	1.270636
v_1h_brutal	.0735213	.4364143	1.131658	1.482904
v_1h_hide	.1642098	.387315	1.28308	1.478701
v_1h_execution	-.0864369	.2569174	.941556	1.152024
v_1h_ambush	.1304776	-.0679987	1.241635	.8854322
age_mean	.010757	-.1485811	.7355138	.7261083
private	-.0915664	.1227693	.9480027	1.074791
courtappt	-.3252962	-.1567339	.7635091	.8911465
gp_acc	.0413156	-.108734	1.235792	.5396438
mst_id	-.3340785	.0630419	.726112	1.043059
gp_nc	-.37875	-.1574385	.9532282	.9915893
gp_not1st	.0133088	-.2315671	1.028868	.7948374
ad_guilt	.2061965	.1997689	1.336236	1.276235
gp_d_psyiat	.1402362	-.1707851	1.262938	.6998105
p_evi	.4357124	.0014473	.927017	1.002407
ev_weapon	.0686734	.1024027	1.073654	1.076351
witness1	-.1369945	.07552	1.065835	.9640824
co_def	-.0104001	.2902438	1.002177	1.42532
IQ71_90	-.0462118	.167792	.9748021	1.13504

Black Def/Black Vic.

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	137	166.1
Control obs =	176	146.9

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0617048	-.1239682	1.181687	.6825387
p_felony3	-.5072091	.0651883	.9472723	.9921084
p_d_risk3	.2114454	-.1377383	1.106357	.8944319
p_torture3	-.5355235	.3269217	.2982983	1.511467
p_death3	.1281614	-.0285558	1.263777	.9415954
p_murder3	.2558995	-.0572637	1.295106	.9323478
p_drug3	-.0532248	-.1384493	.8396546	.6570298
p_v_drug3	.2302915	-.067847	1.627495	.8489467
p_v_12_3	.0502426	-.0515534	1.170177	.8548141
p_agg3	-.0361987	-.0621073	.9201075	.7175727
d_noconvict	-.3601743	-.2521249	.4545942	.5282262
d_disturbed	-.1640739	-.1262202	.6510813	.7241109
d_impaired	-.37291	-.2212529	.3229712	.4892145
d_age	-.2225964	-.2233611	.6988589	.650872
sum_other_mit	-.3160243	.2773681	.6413661	1.708686
MultiVictims	.2437715	-.0430178	1.19783	.9560159
sex_convict	-.2024537	-.1711626	.4150228	.53038
rob_convict0	-.3015024	-.2191893	.6379983	.6608815
burg_convict0	-.2622458	-.180243	.4440064	.5201741
psych0	-.4423115	.2390027	.7786711	1.067179
v1family	-.1276407	-.0111487	.6131727	.9594005
v1hadkids	-.4211447	.2517143	.6297409	1.170901
v1knife	-.2394738	-.1196108	.5383074	.7499514
v1barehands	-.2283767	.4160816	.569514	1.681617
v_1h_resis	-.3652625	-.1694822	.6650282	.8122126
v_1h_brutal	-.3175797	.2807645	.6006575	1.219237
v_1h_hide	-.3129632	.4035688	.5896595	1.515266
v_1h_execution	.1395924	-.0798484	1.123652	.9078198
v_1h_ambush	.1018892	-.0832904	1.183479	.8380912
age_mean	-.2642087	.1928989	.7859361	1.120979
private	-.2654352	-.2222804	.8184317	.7891168
courtappt	.5388634	.3314056	1.356217	1.064478
gp_acc	.0500142	-.0370066	1.273836	.8230806
mst_id	.6402394	-.0878154	1.538929	.9257214
gp_nc	.4867376	-.171404	.9264025	.9622094
gp_not1st	-.2205021	.3384648	.8515472	1.159649
ad_guilt	-.3044693	-.2033008	.6096549	.7191497
gp_d_psyiat	-.405044	-.1593661	.4659466	.7274901
p_evi	-.4585013	.0772693	.932266	.9825643
ev_weapon	-.2808018	.3151287	.7863252	1.132019
witness1	.330666	-.1544588	.8557018	.9924604
co_def	-.181804	-.1452128	.7376399	.7328283
IQ71_90	.3194416	-.0969378	1.332788	.9040834

White Def/White Vic.

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	57	168.8
Control obs =	256	144.2

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.1577964	-.1393148	1.495959	.640051
p_felony3	.0912972	-.3865268	1.012618	.833915
p_d_risk3	-.3542545	.1459334	.7765108	1.047282
p_torture3	.1505245	.1366941	1.304928	1.243243
p_death3	.1505245	.1331348	1.304928	1.245164
p_murder3	-.0230779	.5140507	.9895707	1.264853
p_drug3	-.0155399	-.2257408	.9628335	.3538403
p_v_drug3	-.3424539	.3937373	.3834586	1.752293
p_v_12_3	.0346027	.3538893	1.126545	2.130213
p_agg3	-.1885128	.1638613	.7767652	.7071542
d_noconvict	.3525329	-.1648681	1.797462	.6716048
d_disturbed	.1800759	-.1415687	1.529851	.6704704
d_impaired	.2527708	-.1085415	1.793624	.7309349
d_age	-.0058591	.3898537	1.004686	1.476797
sum_other_mit	.2511123	.2302777	1.483079	.7074592
MultiVictims	.0727543	.4650668	1.067643	1.152275
sex_convict	.2378859	.0192129	2.322095	1.07605
rob_convict0	-.1178597	-.3706499	.8473975	.4527822
burg_convict0	-.0208859	-.2466164	.9549736	.3554268
psych0	.4542218	.0975128	1.112759	1.040365
v1family	.3399791	-.0267282	2.97471	.9000819
v1hadkids	.147397	.5801009	1.155015	1.259005
v1knife	.2137754	-.0699957	1.607363	.8280802
v1barehands	-.0615473	.3282182	.8730532	1.690131
v_1h_resis	-.1726235	-.0877601	.8266793	.9041581
v_1h_brutal	.3275662	.0529453	1.512027	1.076755
v_1h_hide	.0039786	.0703046	1.020238	1.103594
v_1h_execution	-.1169644	.2366302	.908939	1.146816
v_1h_ambush	-.1368959	.378904	.7903818	1.526425
age_mean	.5367345	-.0886084	2.365174	1.146485
private	.0924902	.0467762	1.07675	1.032835
courtappt	-.2892005	.1761184	.798261	1.066025
gp_acc	-.0209279	.1114908	.9144813	1.531854
mst_id	-.2816488	.1495145	.7790906	1.085235
gp_nc	-.2524298	-.0742489	.9973703	.9995763
gp_not1st	-.0509861	-.2969923	.9764464	.7193854
ad_guilt	.1907834	.1815337	1.311637	1.24957
gp_d_psyiat	.0978491	-.0589435	1.18392	.8989022
p_evi	.3411476	-.2949512	.9727804	.8901002
ev_weapon	.3216034	-.1890305	1.22471	.8176953
witness1	-.4116375	-.0540243	1.084365	1.021296
co_def	-.0878972	-.1515833	.871033	.7500271
IQ71_90	-.276306	-.3388175	.7349624	.6425271

Hispanic Def/Hispanic Vic.

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	18	239.3
Control obs =	295	73.7

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_felony3	-.0930323	-.8398038	1.042506	.4402181
p_d_risk3	.4977982	-.6390215	1.080621	.4216819
p_torture3	-.363216	-.4571965	.3933333	.2187359
p_v_drug3	.0854193	-.5076182	1.250433	.068407
p_agg3	-.0586832	-.8404015	.7866752	.1239576
d_noconvict	.047284	-.5103974	1.154872	.1062317
d_disturbed	.0083041	-.4116783	1.077686	.1206952
d_impaired	.3360489	-.3727386	2.057578	.1684793
d_age	.2053811	-.5007267	1.376497	.2326566
sum_other_mit	.2744342	-.2868584	1.344929	.1967041
MultiVictims	-.1024362	-.8158659	.9643551	.1437612
rob_convict0	.0206632	-.3410696	1.085944	.4930976
psych0	.4977982	1.15125	1.080621	.4976292
v1family	.1896487	-.2985042	1.919129	.1132567
v1hadkids	.3690644	-.7735877	1.328792	.0792959
v1knife	.1560224	-.4436279	1.475181	.0858191
v_1h_resis	.0145448	-.4679516	1.071107	.4237156
v_1h_brutal	-.4639501	1.554629	.333541	.9078441
v_1h_hide	.0788724	-.4776387	1.185905	.2606787
v_1h_execution	-.0664765	-.7176463	.9924068	.2115745
age_mean	-.1342323	-.9004343	.5067493	.2499686
private	-.5763157	1.126825	.4607236	.6550084
courtappt	-.1731829	-.9674972	.9195887	.0611124
gp_acc	.2945469	-.2297326	3.182387	.1142367
mst_id	-.5763157	-.6350126	.4607236	.3518041
gp_nc	-.5436212	-1.274774	.8519718	.1525915
gp_not1st	.2353247	-.7889045	1.180595	.1877256
ad_guilt	.0619819	1.732973	1.154675	.7674373
gp_d_psyiat	.1133471	-.50285	1.256106	.1854813
p_evi	.050106	.8791053	1.05797	.4958687
ev_weapon	.4064441	-.80133	1.252206	.1248365
witness1	-.1023615	-1.179163	1.092011	.4142292
co_def	-.0511198	1.646985	.9662433	.9566011
IQ71_90	.3384772	1.33916	1.288617	.6417211

Death Penalty Given
Black Defendant

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	591	440.3
Control obs =	289	439.7

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.0448328	.0669371	1.271009	1.5118
p_felony	-.0986578	.0544638	.8291737	1.114941
p_d_risk	.023777	.0142908	1.045104	1.029129
p_torture	-.156105	-.0003512	.5520746	.9987126
p_death	-.029475	.0609378	.8772968	1.352011
p_murder	.0336238	.1381235	1.095684	1.518481
p_drug	-.0305171	.0337875	.784009	1.383644
p_v_drug	.1222376	.0638104	2.275598	1.557407
p_v_12	-.0332865	.0353581	.8348481	1.224638
p_agg	.0330704	.080717	1.575596	1.478265
d_noconvict	-.2121011	-.003507	.459177	.985932
d_disturbed	-.207258	.0362977	.3833384	1.18754
d_impaired	-.2298734	-.0110082	.3426104	.9458845
d_age	-.1266213	-.0761343	.6695204	.7924037
sum_other_mit	-.1689048	.036162	.5271019	1.323971
MultiVictims	.0735593	.0860765	1.15906	1.21347
sex_convict	-.0347236	-.0468034	.818397	.788548
rob_convict0	.0446726	-.0781079	1.093805	.8631197
burg_convict0	-.0685731	.0200851	.7809889	1.08057
psych0	-.4820977	.0467116	.5999604	1.0548
v1family	-.4205996	.075239	.2807934	1.244934
v1hadkids	-.3326324	-.0025196	.7398354	.9976536
v1knife	-.3248484	.0383465	.4858501	1.088888
v1barehands	-.3193283	.0071465	.3826041	1.021209
v_1h_resis	-.2645551	.0099298	.7443873	1.011589
v_1h_brutal	-.3270441	.0073244	.5262178	1.014403
v_1h_hide	-.2937962	.0611694	.5629029	1.131078
v_1h_execution	.136382	.05248	1.148309	1.062107
v_1h_ambush	.1930589	-.0109027	1.396006	.9824452
age_mean	-.474503	.0083585	.5097537	.9588343
private	-.1516374	.1175231	.9248767	1.09704
courtappt	.3536017	-.0687887	1.428489	.9507489
gp_acc	-.1588063	-.0342209	.4363954	.8251068
mst_id	.5191287	-.0090264	1.396953	.9958193
gp_nc	.4354039	-.0504016	.99653	1.00609
gp_not1st	-.2206824	.0186057	.8788083	1.011279
ad_guilt	-.3221352	-.0077648	.4834075	.981104
gp_d_psyiat	-.3332907	.0583866	.5520586	1.11634
p_evi	-.3881651	.0475974	.9094012	1.02102
ev_weapon	-.264796	.0193641	.800011	1.016774
witness1	.5044653	-.0558322	.804708	1.034012
co_def	-.1146061	-.0062534	.7773886	.9852561
IQ71_90	.3059414	-.0416256	1.358086	.9680515
jurydum	-.1137182	-.030021	.8212954	.9523653

White Defendant

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	214	418.9
Control obs =	666	461.1

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	-.0745931	-.091135	.6589804	.5585345
p_felony	-.044893	-.0734814	.9176391	.8521798
p_d_risk	-.1430685	-.049913	.7452266	.9045997
p_torture	.159173	-.0422813	1.796605	.8578486
p_death	.0723759	-.0325546	1.365119	.85985
p_murder	-.014062	-.0858212	.9650424	.7784244
p_drug	-.0083173	-.0524231	.9375671	.6084396
p_v_drug	-.2094646	-.1912406	.1460742	.1122335
p_v_12	.015352	-.0394377	1.089704	.7887044
p_agg	-.1136842	-.149208	.5988391	.6170516
d_noconvict	.2066383	-.009362	2.063957	.9619544
d_disturbed	.184155	.022246	2.244834	1.106919
d_impaired	.157999	.0221306	2.008545	1.112852
d_age	-.0191722	-.0076282	.9416643	.9754384
sum_other_mit	.147386	.0249393	1.927745	.9968213
MultiVictims	-.0324306	-.0482285	.9398786	.9040692
sex_convict	.0426712	.142527	1.276078	1.957297
rob_convict0	-.1104638	.0740056	.7916964	1.153643
burg_convict0	-.0562602	-.0464644	.8099062	.8297181
psych0	.4131729	.0053632	1.502211	1.006228
v1family	.5115982	-.0764049	4.068416	.8090771
v1hadkids	.2922242	.0290286	1.28655	1.026541
v1knife	.3406729	.0705703	2.032253	1.164617
v1barehands	.3068471	.0073301	2.371268	1.02014
v_1h_resis	.1892796	.035188	1.233438	1.04261
v_1h_brutal	.447417	.0279835	2.225816	1.050237
v_1h_hide	.3012578	-.0112953	1.746639	.9778268
v_1h_execution	-.25019	-.0550043	.7539491	.9398423
v_1h_ambush	-.2008414	.0506118	.698228	1.083109
age_mean	.6328382	-.0076891	2.160951	1.008212
private	.2246572	-.1432128	1.106865	.8862755
courtappt	-.3606604	.0142124	.6757636	1.011003
gp_acc	.1346157	.0135758	1.966517	1.084469
mst_id	-.5458673	-.0369665	.6611436	.9802287
gp_nc	-.4161234	-.0135516	.9780945	1.000695
gp_not1st	.2222403	-.015524	1.129945	.9903203
ad_guilt	.2673638	.0385713	1.780139	1.092755
gp_d_psyiat	.3502459	.0020088	1.79317	1.003848
p_evi	.4756586	-.0248089	1.067228	.9903081
ev_weapon	.2828369	-.0720854	1.248103	.9385128
witness1	-.5482316	.0408016	1.192392	.976706
co_def	.0185956	-.019797	1.045747	.9535063
IQ71_90	-.4455915	-.0363269	.5905766	.9672646
jurydum	.0651457	-.0034119	1.122157	.9941628

Hispanic Defendant

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	62	490.7
Control obs =	818	389.3

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.0842782	-.1703872	1.518898	.2590351
p_felony	.4040719	-.0755611	1.785759	.8519267
p_d_risk	.318456	-.2033043	1.625141	.6125819
p_torture	-.1163952	-.0771872	.5971177	.7158166
p_death	-.0670126	-.2129539	.7338078	.2255854
p_murder	.0006643	-.2138196	1.017001	.4674365
p_drug	.1253874	-.1086409	2.38874	.2664029
p_v_drug	.1273311	-.0454402	1.959721	.7402221
p_v_12	.0981539	.022141	1.641328	1.121478
p_agg	.2375072	-.2840617	.8599457	.4538144
d_noconvict	.1573453	-.2392209	1.706873	.2328546
d_disturbed	.1868712	-.1818153	2.130351	.2793091
d_impaired	.3029301	-.146854	3.075597	.3904206
d_age	.3888208	-.1412821	2.614976	.5636106
sum_other_mit	.1837172	-.1697177	1.417329	.2970225
MultiVictims	-.0613148	-.2273768	.8929922	.5618512
sex_convict	-.0812985	-.1333952	.5895066	.3549976
rob_convict0	.1381566	-.0574386	1.301997	.8847507
burg_convict0	.3020334	-.0833505	2.423149	.705851
psych0	.3835018	-.2032502	1.390483	.7300237
v1family	-.144362	.3687178	.6051962	2.198036
v1hadkids	.2997992	-.357664	1.260781	.5684281
v1knife	.1302739	-.1423195	1.337813	.6756028
v1barehands	.1220269	-.1209383	1.4303	.6481794
v_1h_resis	.2332746	-.3815708	1.270446	.4874161
v_1h_brutal	-.2622205	-.3603513	.49632	.3061759
v_1h_hide	.1109171	-.1297299	1.253701	.7338333
v_1h_execution	.2747099	.1549391	1.22846	1.13041
v_1h_ambush	-.0738862	.430757	.8941532	1.541872
age_mean	-.3966596	-.1642923	.3027364	.2367099
private	-.0609796	-.1970342	.9776872	.8581564
courtappt	-.2788191	.492751	.7353754	1.165652
gp_acc	.1659544	-.0925326	2.151345	.5592997
mst_id	-.2333076	.5022324	.8707813	.9661255
gp_nc	-.1151105	.201506	1.021151	.9298488
gp_not1st	.2368123	-.3519906	1.12657	.6800107
ad_guilt	.1843427	-.1840786	1.484199	.5826533
gp_d_psyiat	.0660084	.1915819	1.144388	1.355067
p_evi	.0572739	-.1841082	1.03395	.8994972
ev_weapon	.0790693	-.0261502	1.086187	.9742304
witness1	-.100073	-.0738109	1.06749	1.03752
co_def	.2853837	-.1843474	1.697916	.5956935
IQ71_90	.1202584	-.1996821	1.110286	.7992165
jurydum	.2380111	-.1802318	1.436262	.6756103

Any White Victim

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	282	411.3
Control obs =	598	468.7

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.048713	.0195224	1.286416	1.116029
p_felony	.307517	.0779494	1.740958	1.142437
p_d_risk	.0630471	-.0311418	1.12752	.9430826
p_torture	.2664597	-.0613238	2.77175	.8050474
p_death	.200014	-.0076832	2.365263	.9675863
p_murder	.0993305	.0059322	1.303879	1.016987
p_drug	.2171128	.0728148	6.865162	2.028412
p_v_drug	-.0121806	-.0499018	.9313391	.6970198
p_v_12	-.0199061	-.0029083	.8976943	.9835887
p_agg	.2586851	-.0005261	1.982696	1.223134
d_noconvict	.2220236	.0502605	2.25165	1.201017
d_disturbed	.0969783	.0274078	1.560863	1.131818
d_impaired	.2153414	.0420296	2.699551	1.23997
d_age	.1376009	.0457395	1.543644	1.154969
sum_other_mit	.1811957	-.0148785	2.184286	.9810068
MultiVictims	.1574614	-.0143804	1.348135	.9716657
sex_convict	.184306	.0597389	2.874786	1.363725
rob_convict0	.1724101	.1448288	1.394018	1.276464
burg_convict0	.349127	.0864197	3.540405	1.367617
psych0	.4351365	.0123683	1.58748	1.01327
v1family	.433199	-.0304249	3.67328	.9204234
v1hadkids	.4990835	.0369714	1.526888	1.03043
v1knife	.4134134	.0242099	2.491608	1.050254
v1barehands	.3314571	.0176054	2.697806	1.051173
v_1h_resis	.4067002	.0546235	1.540921	1.058347
v_1h_brutal	.3298856	.0687548	1.903711	1.12771
v_1h_hide	.3662673	.0096578	2.02895	1.018849
v_1h_execution	-.1265398	-.0097946	.8800351	.9893762
v_1h_ambush	-.0794184	.0071108	.8785421	1.012069
age_mean	.5195403	.0193816	1.936853	1.091663
private	.2350817	.1020949	1.11923	1.059223
courtappt	-.3697987	-.096355	.6844845	.9188821
gp_acc	.1659489	.0063873	2.372594	1.034618
mst_id	-.5302362	-.0383798	.7053755	.9793714
gp_nc	-.4890921	-.0201633	.9914266	1.001026
gp_not1st	.2497288	.0021981	1.153233	1.001628
ad_guilt	.3373312	.0503602	2.130614	1.115255
gp_d_psyiat	.3242805	.081143	1.777987	1.169332
p_evi	.7171222	.0691963	1.09937	1.014978
ev_weapon	.3250014	.0624503	1.303836	1.048369
witness1	-.5629571	-.066679	1.255539	1.033228
co_def	.053277	.0410672	1.127386	1.096432
IQ71_90	-.4102859	-.0749023	.6445625	.9272995
jurydum	.2111449	.0246883	1.425504	1.044518

Covariate balance summary

Any Black Victim

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	516	479.0
Control obs =	364	401.0

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.0800269	-.0674238	1.543803	.6953402
p_felony	-.3802174	.3292249	.4797786	1.604427
p_d_risk	-.0096434	.0058289	.9809489	1.012329
p_torture	-.3964253	.4644814	.1559193	3.16322
p_death	-.1085841	-.1076405	.6187846	.6030525
p_murder	.0025211	-.0485605	1.006104	.8641028
p_drug	-.2042963	-.0798038	.1316366	.4464717
p_v_drug	.0752269	-.032088	1.59175	.8112232
p_v_12	-.0224546	-.0900111	.8846188	.6250593
p_agg	-.2188757	.1569297	.7515932	.9261408
d_noconvict	-.2501489	-.0647622	.3759306	.7541025
d_disturbed	-.1061401	-.0642234	.6068319	.7714645
d_impaired	-.1970653	-.0327854	.3834252	.8489426
d_age	-.1426585	-.0585671	.6295709	.8052986
sum_other_mit	-.2279899	.3509901	.4041754	1.874081
MultiVictims	.0288182	-.0471016	1.058039	.8916719
sex_convict	-.1678998	-.0811861	.3629155	.5935424
rob_convict0	-.1974227	-.1317448	.6758753	.761312
burg_convict0	-.2210372	-.0693751	.4396124	.76076
psych0	-.3912059	.280908	.6317647	1.263448
v1family	-.3842674	-.0295706	.2848556	.9118211
v1hadkids	-.4408541	.2473608	.6528274	1.171819
v1knife	-.376082	-.0756714	.4067418	.8428595
v1barehands	-.402521	.4084217	.2558965	2.352002
v_1h_resis	-.453254	-.1190645	.589467	.8586261
v_1h_brutal	-.3804993	.3182225	.4491679	1.584646
v_1h_hide	-.4272593	.376995	.4059136	1.719422
v_1h_execution	.1573175	-.0771873	1.170075	.9083397
v_1h_ambush	.1364921	-.0455675	1.25205	.9226206
age_mean	-.4929381	.1227321	.5325831	.9499143
private	-.1632254	-.0890839	.916501	.932511
courtappt	.3365957	.273941	1.367887	1.185352
gp_acc	-.2149099	-.0765245	.2937084	.621299
mst_id	.576203	-.0876619	1.384271	.9487222
gp_nc	.4679615	-.1502861	.9654843	1.000854
gp_not1st	-.2332015	.2076739	.865278	1.077907
ad_guilt	-.390811	-.1460721	.385094	.6930926
gp_d_psyiat	-.3545882	-.1046916	.5100762	.8024769
p_evi	-.6025143	.1889928	.8440796	1.039634
ev_weapon	-.3091214	.2506822	.759835	1.147784
witness1	.5361789	-.2166107	.7571689	1.069209
co_def	-.1129195	-.0697401	.7771112	.8465717
IQ71_90	.3351666	-.0332692	1.374428	.9634755
jurydum	-.2201349	.3169534	.681139	1.469535

Any Hispanic Victim

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	79	438.4
Control obs =	801	441.6

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_felony	.4080705	.0055356	1.805943	1.010595
p_d_risk	.1726899	.1074118	1.350548	1.201922
p_torture	.2822678	-.0092009	2.474809	.9647639
p_death	.0928744	-.0627442	1.475463	.7373408
p_murder	.22455	-.0995657	1.699918	.7371799
p_drug	.1622813	-.0306945	2.9975	.7724854
p_v_drug	-.0056657	-.0502247	.9777045	.7192944
p_v_12	.1119926	-.046396	1.743471	.7601309
p_agg	.3338853	-.0557671	.8043707	.5969696
d_noconvict	.3073094	-.0578308	2.555393	.7928119
d_disturbed	.1178471	-.0843993	1.663516	.6312882
d_impaired	.1726246	-.0347206	2.034509	.8414338
d_age	.2764498	-.0388216	2.109014	.8773206
sum_other_mit	.2841835	-.0217955	2.011026	.6894939
MultiVictims	.1204572	.2368682	1.256387	1.449547
sex_convict	-.0133627	-.0991341	.9344615	.4934518
rob_convict0	.0949848	.0219461	1.208316	1.043861
burg_convict0	-.1912332	-.040922	.4111842	.8540985
psych0	.1585983	.0646293	1.195542	1.075794
v1family	-.2711144	.2901169	.3129725	1.953371
v1hadkids	.0752616	-.1248483	1.086338	.8623315
v1knife	-.1096663	.1306599	.760764	1.311495
v1barehands	.1285372	-.1138357	1.451376	.6665188
v_1h_resis	-.0010314	-.1134898	1.010287	.8558612
v_1h_brutal	.1165521	-.1691929	1.264402	.6565145
v_1h_hide	.0376802	.1794087	1.091653	1.36619
v_1h_execution	.0501805	-.1918866	1.05918	.7921532
v_1h_ambush	-.0658332	-.0043964	.9044818	.992963
age_mean	-.0812349	-.0917534	.6272526	.4892037
private	-.1141998	-.3275312	.9378807	.7359246
courtappt	-.0347782	.0850931	.9810442	1.065726
gp_acc	.1048119	.1817169	1.672976	2.162426
mst_id	-.2059031	-.1316567	.8899864	.9262277
gp_nc	.1270476	-.0643131	.9790566	1.0056
gp_not1st	.1663386	.0033511	1.101068	1.002209
ad_guilt	.1882672	-.064921	1.493386	.8482155
gp_d_psyiat	.1381821	-.0851214	1.282723	.836008
p_evi	-.0657296	-.1191446	.9835202	.9431361
ev_weapon	.0961853	-.021708	1.096884	.9793997
witness1	.1260207	-.1022761	.9249358	1.050528
co_def	.1936844	.0653179	1.475067	1.147819
IQ71_90	.0036325	-.0525479	1.014723	.952303
jurydum	.295542	-.0890884	1.533289	.8421659

Black Def/White Vic.

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	94	428.3
Control obs =	786	451.7

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.0566336	.1970989	1.335547	2.273929
p_felony	.3750207	.1329805	1.757383	1.253119
p_d_risk	.2277846	-.0666749	1.45936	.8713885
p_torture	.3965913	.0078478	3.36582	1.030785
p_death	.2309857	-.0481513	2.380673	.792512
p_murder	.1806912	-.097653	1.557166	.7337377
p_drug	.2951964	.0137291	6.834076	1.129627
p_v_drug	.2089458	-.0465003	2.850625	.7213732
p_v_12	-.0653786	-.140247	.682613	.3545808
p_agg	.4772033	-.0047815	3.421388	1.194864
d_noconvict	.1190148	.1153809	1.519891	1.47666
d_disturbed	-.0469135	-.0911709	.7985879	.604233
d_impaired	.1702945	-.0398748	2.025216	.8147938
d_age	.1664678	.0560582	1.630224	1.193144
sum_other_mit	.1755556	-.0437886	1.683238	.7009888
MultiVictims	.2744928	-.0696568	1.574034	.8592224
sex_convict	.2011517	-.0188144	2.695762	.8989779
rob_convict0	.4522718	.0734658	1.956144	1.150544
burg_convict0	.3966146	.0350167	3.098923	1.13561
psych0	.1472596	-.050251	1.181993	.9374498
v1family	-.1792375	-.0956078	.5204159	.7206315
v1hadkids	.2908645	.0771863	1.257747	1.072642
v1knife	.1633722	-.0342966	1.41995	.9214986
v1barehands	.2146617	-.0802744	1.788576	.7580806
v_1h_resis	.2991469	.1236558	1.330418	1.138628
v_1h_brutal	.09813	.1190813	1.222028	1.247211
v_1h_hide	.3042917	.1010549	1.680132	1.204346
v_1h_execution	.088336	.2178765	1.091328	1.161617
v_1h_ambush	.1564214	-.0292394	1.260356	.9537183
age_mean	.0520012	-.0000153	.9252624	.939256
private	.0638121	.2273765	1.042498	1.072172
courtappt	-.0713944	-.0372516	.9457091	.9676852
gp_acc	.0638703	.0237053	1.389369	1.130667
mst_id	-.2243139	.020064	.8764162	1.00867
gp_nc	-.1794411	.0528695	1.011117	.9897873
gp_not1st	.0158156	-.0384619	1.019792	.9734787
ad_guilt	.2649227	.0383316	1.705611	1.089819
gp_d_psyiat	.1097178	-.1219805	1.224924	.7608903
p_evi	.4516179	.0396041	1.017111	1.013105
ev_weapon	.0997239	-.025934	1.097919	.9753527
witness1	-.2037417	.0213079	1.100662	.987218
co_def	.171503	.2521608	1.420323	1.558563
IQ71_90	-.1717755	-.0404162	.8453712	.9636884
jurydum	.2138819	-.0817908	1.394942	.8524433

Covariate balance summary

Black Def/Black Vic.

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	467	480.3
Control obs =	413	399.7

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.0929593	-.0685356	1.651471	.6854595
p_felony	-.3195767	.3889211	.529442	1.701232
p_d_risk	-.0651277	-.0135399	.8828191	.971082
p_torture	-.3890871	.4996287	.1387949	3.336776
p_death	-.0595004	-.0852951	.7676406	.6799859
p_murder	-.0324814	-.0279208	.914862	.922379
p_drug	-.1817112	-.1021055	.1644405	.303857
p_v_drug	.0515155	-.0150606	1.363788	.8925304
p_v_12	-.0086726	-.0943834	.9536025	.6092733
p_agg	-.1906987	.18612	.8529114	.9271111
d_noconvict	-.3115057	-.1316857	.2628652	.5425765
d_disturbed	-.1750788	-.1189189	.4200889	.5766948
d_impaired	-.2902141	-.129569	.1942081	.4590815
d_age	-.2340051	-.0698369	.4510447	.773166
sum_other_mit	-.2560266	.4086224	.363819	2.133643
MultiVictims	.0317959	-.0455273	1.064679	.8968492
sex_convict	-.1312687	-.0856258	.4519981	.5783267
rob_convict0	-.179765	-.1326477	.6951153	.7442759
burg_convict0	-.1822724	-.0675028	.5030559	.7611514
psych0	-.4557912	.3153264	.5665588	1.306461
v1family	-.3187098	-.0086757	.3488171	.973335
v1hadkids	-.3978713	.3002736	.6648873	1.210816
v1knife	-.3341492	-.1084601	.4385125	.7706719
v1barehands	-.3900507	.4614945	.2480359	2.508238
v_1h_resis	-.3825934	-.1639198	.6256353	.7967912
v_1h_brutal	-.3542189	.369946	.4612222	1.661081
v_1h_hide	-.4417951	.4099343	.3714381	1.789269
v_1h_execution	.089857	-.1052373	1.091082	.8764834
v_1h_ambush	.1461383	-.0583943	1.26858	.8975725
age_mean	-.4343802	.1689823	.5427579	.9340586
private	-.169531	-.1102238	.9109384	.9093358
courtappt	.3453507	.2961717	1.359011	1.168223
gp_acc	-.1762378	-.0878345	.3652789	.572442
mst_id	.5685388	-.0945874	1.324801	.9468957
gp_nc	.4101067	-.1715219	.9484339	.9886442
gp_not1st	-.2585051	.2553678	.8460908	1.102705
ad_guilt	-.3504937	-.1647069	.4129956	.6508164
gp_d_psyiat	-.396153	-.1042832	.4520508	.7957244
p_evi	-.5058599	.1941933	.8372075	1.041527
ev_weapon	-.2709071	.2994444	.7776758	1.181121
witness1	.4581896	-.2447889	.7658859	1.07648
co_def	-.2042382	-.0838841	.6277498	.8060012
IQ71_90	.342245	-.0782092	1.363541	.9193318
jurydum	-.2505467	.3482477	.6380442	1.49136

White Def/White Vic.

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	169	401.1
Control obs =	711	478.9

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	-.0237688	-.0642685	.8842556	.6788899
p_felony	.0054016	.0926216	1.01508	1.179645
p_d_risk	-.1288961	.0431911	.7676677	1.083128
p_torture	.0554878	.1282103	1.239139	1.49997
p_death	.1154899	-.0231032	1.615857	.89801
p_murder	.0166158	-.0080363	1.050763	.9784398
p_drug	.0294113	-.0424831	1.263116	.694523
p_v_12	-.0079042	-.0363547	.9618424	.8065002
p_agg	-.0870346	.0547269	.7027777	.8455772
d_noconvict	.1761802	-.0141615	1.839622	.9457856
d_disturbed	.1131993	.0577566	1.648409	1.283048
d_impaired	.1446258	.0631071	1.874191	1.321588
d_age	-.0423561	.0557992	.8710089	1.185311
sum_other_mit	.1422143	.0763712	2.101176	1.270097
MultiVictims	.0374093	.1181237	1.079847	1.231852
sex_convict	.098415	.2364166	1.708979	2.708241
rob_convict0	-.1431758	.2711296	.7309948	1.517476
burg_convict0	.0189721	-.0111875	1.075813	.9590486
psych0	.4161936	.2315985	1.472749	1.208404
v1family	.6493615	-.0321119	5.113472	.9175479
v1hadkids	.4266098	.1522225	1.371547	1.121516
v1knife	.4177261	.2126504	2.253417	1.476915
v1barehands	.2990802	.1473969	2.25249	1.445209
v_1h_resis	.2359891	.1249249	1.281711	1.137634
v_1h_brutal	.4125619	.2019703	2.032292	1.367804
v_1h_hide	.2625647	.0851118	1.615583	1.166579
v_1h_execution	-.3074619	-.1780878	.6881115	.796611
v_1h_ambush	-.2558524	-.0326925	.6142929	.9472412
age_mean	.7092225	.0634915	2.160248	1.085899
private	.2577063	-.0719864	1.111602	.9497289
courtappt	-.4650641	-.0329605	.5617302	.9727421
gp_acc	.2002351	.0152851	2.619228	1.092347
mst_id	-.6012984	-.2248296	.5939964	.8457551
gp_nc	-.5287092	-.2299484	.9177303	.9616655
gp_not1st	.3003661	-.0007447	1.154115	.9999699
ad_guilt	.2559862	.2079887	1.715395	1.506311
gp_d_psyiat	.3698445	.1068892	1.799951	1.193384
p_evi	.6430512	.1318978	.9950425	1.032426
ev_weapon	.3795347	.0184229	1.298888	1.015708
witness1	-.6402409	-.0998969	1.145508	1.046581
co_def	-.1224839	.0714332	.7437707	1.165719
IQ71_90	-.4759255	-.1976483	.5451588	.8023147
jurydum	.0874556	.0748949	1.164235	1.133764

Attorney Type: Death Penalty Filed

Private Attorney

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	322	446.4
Control obs =	558	433.6

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.1400201	-.0401815	1.753638	.8536577
p_felony3	-.0359546	.0391008	.9656547	1.037095
p_d_risk3	-.1512414	.0100703	.8735652	1.0085
p_torture3	.0786527	-.0475625	1.260088	.8563261
p_death3	.0850246	-.0002386	1.30137	.9991077
p_murder3	-.0733998	.1518272	.8433374	1.362264
p_drug3	-.1254533	-.0643213	.5268535	.7114282
p_v_drug3	-.1802683	.0338457	.5823977	1.095958
p_v_12_3	.0006125	-.0256584	1.004475	.8781634
p_agg3	-.1722533	.0962635	.7548847	1.110257
d_noconvict	.1483952	-.0225222	1.736706	.9160959
d_disturbed	-.0203272	-.0409239	.9090543	.8065576
d_impaired	.053988	-.0307661	1.286903	.8690628
d_age	.0775832	-.0393831	1.284087	.8801896
sum_other_mit	-.0956815	-.0745559	.4898394	.5063883
MultiVictims	-.0684687	.047138	.8722091	1.097739
sex_convict	.0933064	.0007517	1.707252	1.004335
rob_convict0	-.081955	.0020955	.8454317	1.004194
burg_convict0	.0847404	.0975408	1.357691	1.354311
psych0	.1226741	.0349064	1.157265	1.041521
v1family	-.0061733	-.0288291	.9825751	.9158068
v1hadkids	.1111686	-.0295527	1.117431	.970552
v1knife	.0237483	-.0104113	1.058467	.9755458
v1barehands	.0427673	-.0103136	1.142181	.9668113
v_1h_resis	.1409099	-.0649142	1.180355	.918663
v_1h_brutal	.0050795	-.0604607	1.01201	.8695938
v_1h_hide	.069802	-.061586	1.155055	.8692876
v_1h_execution	.1605743	-.0552608	1.160123	.9422193
v_1h_ambush	.1070222	-.0003336	1.183545	.9994066
age_mean	-.0442637	-.0040998	1.073417	.9351204
gp_acc	.1010568	-.0193027	1.702473	.9023584
mst_id	.2546328	-.0340239	1.100317	.9847234
gp_nc	.3806967	-.051144	.9081152	1.005532
gp_not1st	.0424452	.0305001	1.029051	1.020479
ad_guilt	-.0878788	.0200655	.807029	1.046926
gp_d_psyiat	.16275	-.0310265	1.35337	.9405938
p_evi	.1817846	-.0739663	1.061572	.9699626
ev_weapon	-.0535392	-.0420504	.9515527	.9594854
witness1	.1053017	-.0367332	.9375166	1.021387
co_def	.1783782	-.0320971	1.478287	.9284351
IQ71_90	-.1874995	-.0019472	.8413524	.9982941
FD_black	-.1478114	.0187131	1.108727	.9863981
FD_hispanic	-.0324765	.0019808	.8966849	1.005985
anywhite_v_dum	.2275697	.0423684	1.176145	1.030879

Court Appointed Attorney

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	269	442.9
Control obs =	611	437.1

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.1486583	-.0489312	.5082775	.809124
p_felony3	.0287526	.0117847	1.030805	1.011962
p_d_risk3	.2420841	.0248651	1.201187	1.020793
p_torture3	.0014139	.004657	1.00631	1.0138
p_death3	-.0218691	-.0185171	.9349339	.9424931
p_murder3	.0904732	-.0329127	1.224563	.924244
p_drug3	.2078719	-.0189698	2.57953	.914186
p_v_drug3	.3819493	-.0230563	2.720364	.9367269
p_v_12_3	-.1315569	-.045337	.4658223	.7782388
p_agg3	.2008649	-.0248514	1.242793	.9402453
d_noconvict	-.1869525	-.0667918	.441975	.756374
d_disturbed	-.2021742	-.0557493	.3047896	.7508913
d_impaired	-.076548	-.0902574	.6846015	.6164524
d_age	-.0178739	-.0966648	.9448683	.6945127
sum_other_mit	-.0252322	-.0002903	.950746	.9148891
MultiVictims	.0734547	-.0741115	1.154215	.8543178
sex_convict	-.1172569	-.0425184	.4636309	.7663224
rob_convict0	-.0171548	.0582023	.9678305	1.110278
burg_convict0	-.0804769	.059748	.7362216	1.214997
psych0	-.1339363	-.0433947	.8420942	.9467039
v1family	-.2785114	-.0202256	.3504118	.9388738
v1hadkids	-.2922158	-.0061307	.7077215	.993767
v1knife	-.2866416	.0133544	.450468	1.031402
v1barehands	-.1536473	.0673204	.5938424	1.214843
v_1h_resis	-.244015	.0259187	.7179242	1.031336
v_1h_brutal	-.0515133	-.0003059	.8975247	.99931
v_1h_hide	-.2207579	-.062093	.5997305	.8698854
v_1h_execution	.0459356	-.02398	1.04647	.9751221
v_1h_ambush	.1154287	.0772771	1.196625	1.123991
age_mean	-.2654852	.0624774	.6119139	1.225162
gp_acc	-.1875412	.0598928	.2816108	1.339777
mst_id	.2209728	.0502291	1.082907	1.020553
gp_nc	.090443	-.0124319	.9853498	1.001355
gp_not1st	-.120705	-.0044784	.919777	.9970529
ad_guilt	-.1285713	-.0398861	.7233068	.9065161
gp_d_psyiat	-.2935741	.0603917	.5198034	1.115187
p_evi	-.4311969	.0399835	.788293	1.013566
ev_weapon	-.2387828	.0212007	.77784	1.018845
witness1	.1271426	.0493361	.9227157	.9686961
co_def	-.1841664	-.0294809	.6355688	.9353774
IQ71_90	.2266054	-.0152895	1.192054	.9871653
FD_black	.36089	.057671	.7207736	.9543111
FD_hispanic	-.1532215	.0240169	.5684149	1.078847
anywhite_v_dum	-.3749028	-.0206356	.698077	.9837318

Public Defender

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	285	435.2
Control obs =	595	444.8

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.0375419	.0488758	.8570262	1.208895
p_felony3	.0113034	.0054626	1.013125	1.005457
p_d_risk3	-.0656275	.0455124	.9457005	1.037109
p_torture3	-.0814196	-.0125569	.7792192	.9633917
p_death3	-.0657483	-.05872	.8098581	.8146829
p_murder3	-.0047422	-.0043071	.9910118	.9898963
p_drug3	-.0920102	-.0349186	.6309542	.8411369
p_v_drug3	-.2240621	-.1128756	.493487	.697611
p_v_12_3	.1162994	.00049	1.788294	1.002513
p_agg3	-.0192332	.0008485	1.03987	1.052551
d_noconvict	.0106743	.0608425	1.042995	1.241594
d_disturbed	.1889245	.0232559	2.382193	1.121669
d_impaired	.0175026	.0456348	1.087327	1.223028
d_age	-.0615739	.0292291	.8147898	1.096784
sum_other_mit	.1137558	.0045804	1.952843	1.166449
MultiVictims	.0083434	-.0045533	1.018435	.9909192
sex_convict	.0072051	-.0295026	1.044507	.836505
rob_convict0	.0947343	.0119955	1.205681	1.023598
burg_convict0	-.0324911	.035806	.8879197	1.129354
psych0	-.0162374	-.0171772	.9820475	.9785307
v1family	.2272828	.0046943	1.945036	1.014786
v1hadkids	.1414098	.0119235	1.148064	1.012441
v1knife	.2004574	.0051214	1.568241	1.012643
v1barehands	.0994698	-.0057159	1.352873	.9825422
v_1h_resis	.0882284	-.0019811	1.111088	.9975757
v_1h_brutal	.0370761	.0057732	1.081679	1.012064
v_1h_hide	.1339969	.0140942	1.309721	1.029513
v_1h_execution	-.2322289	-.0183381	.7797687	.9822522
v_1h_ambush	-.2269672	-.0217809	.6702962	.9653701
age_mean	.2830078	.0025052	1.356996	1.101855
gp_acc	.0555922	.007739	1.339389	1.040116
mst_id	-.5289178	-.0323394	.7076855	.9847604
gp_nc	-.5045124	-.0270205	.9901436	1.003652
gp_not1st	.0746633	.0142504	1.049896	1.009013
ad_guilt	.2117266	.0004692	1.618222	1.001158
gp_d_psyiat	.0982074	.0058585	1.20209	1.011241
p_evi	.1938514	.0228202	1.062138	1.008332
ev_weapon	.2570306	.0328766	1.241884	1.030665
witness1	-.2365944	.0000254	1.129726	1.000035
co_def	-.0148565	-.0022067	.968651	.9952535
IQ71_90	-.0242847	-.0169284	.9808308	.9847886
FD_black	-.1797542	-.044937	1.12882	1.030059
FD_hispanic	.1724032	.0183704	1.747946	1.06048
anywhite_v_dum	.1067966	.0280737	1.08293	1.020699

Attorney Type: Death Penalty Retracted

Private Attorney

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	104	192.4
Control obs =	209	120.6

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.2163695	-.1524423	1.754458	.6237295
p_felony3	.3247247	.2663647	.9841394	.9179162
p_d_risk3	-.1352941	-.3741583	.9333981	.7138761
p_torture3	.1167652	-.2099626	1.235568	.5896364
p_death3	.2657281	-.2365671	1.585642	.5876563
p_murder3	-.1057442	.5096125	.8965379	1.322751
p_drug3	-.2137751	-.1424857	.4496679	.5746692
p_v_drug3	-.1408956	.7243688	.7329789	2.086583
p_v_12_3	.0876754	-.1444194	1.310913	.6026424
p_agg3	.0006173	.701203	.7106577	1.10958
d_noconvict	.399515	-.1745223	2.084634	.6378264
d_disturbed	.0321927	-.2044101	1.08904	.487039
d_impaired	.1820667	-.1016841	1.575848	.7538619
d_age	.273157	-.1630773	1.486908	.7202582
sum_other_mit	-.0356477	-.2145901	.6987457	.3747473
MultiVictims	.0135201	.3793957	1.015203	1.101311
sex_convict	.3636327	-.1925188	4.392461	.4541869
rob_convict0	.0603965	.4895049	1.091601	1.487638
burg_convict0	.1608274	.7118498	1.5547	2.584287
psych0	.1608866	.3528577	1.078545	1.060185
v1family	-.2140894	-.2307607	.3982029	.3023424
v1hadkids	.287621	-.2259803	1.298227	.7827299
v1knife	-.0899598	-.2063628	.8017565	.5259512
v1barehands	.1445011	-.1829818	1.388921	.5693278
v_1h_resis	.2470523	-.3152943	1.267169	.5992121
v_1h_brutal	.0733441	-.2681018	1.118421	.5533876
v_1h_hide	.1102475	-.284329	1.188014	.5066496
v_1h_execution	.436973	-.2660589	1.361939	.6861635
v_1h_ambush	.0022561	.1067443	1.00863	1.161731
age_mean	-.3130965	-.0384575	.6604904	.4313812
gp_acc	.0735032	-.1072481	1.420675	.5560406
mst_id	.1346207	-.0089572	1.09911	.9900106
gp_nc	.4920035	-.1252704	.8813946	.9732252
gp_not1st	.0941571	.403931	1.069802	1.143075
ad_guilt	-.09489	-.2890337	.8653133	.5971356
gp_d_psyiat	.2691733	-.2643341	1.532614	.56076
p_evi	.2162688	-.4278264	1.010039	.7708131
ev_weapon	-.0797791	-.4051177	.9396454	.6009282
witness1	.1539375	-.263865	.9330017	1.051658
co_def	.3485301	-.1312322	1.690939	.7617256
IQ71_90	-.3025436	-.0103377	.7269819	.9879035
FD_black	-.2505982	.3551964	1.125472	.7457736
FD_hispanic	.1057417	-.0491979	1.295187	.8875236
anywhite_v_dum	.1023718	.2860367	1.057827	1.023296

Court Appointed Attorney

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	111	146.1
Control obs =	202	166.9

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	-.2460092	-.0939111	.4734336	.7532035
p_felony3	-.2032722	.1482559	.9829524	1.000374
p_d_risk3	.1657964	.1240751	1.081145	1.052773
p_torture3	-.0411517	.1332522	.9302943	1.249588
p_death3	-.1577273	-.0376498	.7396834	.9298289
p_murder3	.0578298	-.0702284	1.064503	.922862
p_drug3	.245555	.0988222	2.20648	1.295501
p_v_drug3	.379231	.0684459	2.158638	1.124678
p_v_12_3	-.2677954	-.0832539	.3744361	.7452982
p_agg3	.0155106	.0411036	1.163933	1.314278
d_noconvict	-.4076319	-.0137658	.3735839	.9727676
d_disturbed	-.3950389	.0299593	.27582	1.072179
d_impaired	-.2236514	.0950394	.5290261	1.231939
d_age	-.1663925	-.0284732	.7643614	.9524462
sum_other_mit	-.0895633	.1383574	.9919283	1.100919
MultiVictims	-.0243716	-.0404963	.9854408	.9681596
sex_convict	-.1978203	-.1234712	.4093463	.5354203
rob_convict0	-.0946438	.0669474	.8758125	1.081278
burg_convict0	-.1123561	.0786842	.7208769	1.1965
psych0	-.2688478	.0042931	.8579932	1.002717
v1family	-.1675004	-.085137	.5073909	.6938905
v1hadkids	-.3859547	-.0857825	.6379101	.9031746
v1knife	-.3160264	.0373939	.4059968	1.094852
v1barehands	-.1524153	-.0369595	.6893596	.9112376
v_1h_resis	-.3645245	.0859102	.6475754	1.088491
v_1h_brutal	.0571942	.1540039	1.09222	1.251356
v_1h_hide	-.1916094	.0847609	.7270522	1.137511
v_1h_execution	-.0013494	.0269473	1.002956	1.029045
v_1h_ambush	.0993524	.0386812	1.178295	1.0544
age_mean	-.2265845	-.1873491	.5438185	.6114579
gp_acc	-.1744669	.0896929	.3775609	1.456566
mst_id	.3275516	.0222095	1.229908	1.015551
gp_nc	.0792226	-.1136275	.9946246	1.000169
gp_not1st	-.0959417	.0152624	.9359912	1.011573
ad_guilt	-.291165	.0505921	.6108992	1.076252
gp_d_psyiat	-.424869	-.0851015	.4190298	.8496624
p_evi	-.4855424	.0214119	.8927443	1.004933
ev_weapon	-.3338911	-.1000135	.733028	.9142625
witness1	-.0291452	.086682	1.01638	.9489657
co_def	-.2440046	.1919332	.6495637	1.279378
IQ71_90	.1741506	.0600218	1.168089	1.038617
FD_black	.4239222	.0639894	.7499052	.9554554
FD_hispanic	-.3543836	.0314393	.3415529	1.075996
anywhite_v_dum	-.4561147	-.0421359	.7290604	.9764162

Public Defender

	Raw	Weighted
Number of obs =	313	313.0
Treated obs =	96	164.2
Control obs =	217	148.8

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness3	.0244983	-.0866368	1.073845	.7642207
p_felony3	-.1178738	.0128544	.9951453	.9982109
p_d_risk3	-.0153802	-.0189128	.9981355	.9912354
p_torture3	-.0674073	-.1719399	.8859033	.7189154
p_death3	-.1093848	.2783022	.8152738	1.488366
p_murder3	.0645629	-.1433648	1.072978	.8323692
p_drug3	-.0617199	-.1036973	.8162693	.6961211
p_v_drug3	-.2887915	-.2175015	.4913892	.5778224
p_v_12_3	.1752944	.0643532	1.690854	1.20127
p_agg3	.015405	-.1124634	1.181878	.7513427
d_noconvict	-.0174622	-.128211	.9716923	.7442615
d_disturbed	.3410429	.0320818	2.243725	1.087166
d_impaired	.0423801	-.0872449	1.120142	.7923168
d_age	-.1041568	-.2279327	.8499388	.6385069
sum_other_mit	.1287148	-.1218901	1.44457	.5936852
MultiVictims	.0326596	.1496623	1.030713	1.092657
sex_convict	-.2338913	.2139316	.3188848	1.920479
rob_convict0	.0164034	-.042962	1.029071	.940962
burg_convict0	-.1006931	-.0039628	.7463618	.9897608
psych0	.0769172	-.1700598	1.042432	.8892927
v1family	.3481912	.0432199	3.524211	1.220045
v1hadkids	.1098254	.0827102	1.115807	1.087213
v1knife	.3080566	-.0091652	2.014467	.9754046
v1barehands	.0157581	.0137579	1.043212	1.032554
v_1h_resis	.1308539	-.0371408	1.142105	.9623891
v_1h_brutal	-.1659644	-.0922926	.7697806	.8590819
v_1h_hide	.0974441	-.1441469	1.166043	.7708454
v_1h_execution	-.4670033	-.1235959	.6002305	.8850557
v_1h_ambush	-.0979447	-.1930698	.8495865	.6800545
age_mean	.5181519	-.0954066	2.251978	1.421571
gp_acc	.0983595	-.0072339	1.590789	.9633276
mst_id	-.546166	-.1560584	.5795037	.8738788
gp_nc	-.6051282	-.2170909	.9269638	.9751723
gp_not1st	-.0064852	-.0119311	1.001298	.9910371
ad_guilt	.3982773	.1732013	1.718946	1.237143
gp_d_psyiat	.1462785	.1285587	1.270749	1.204299
p_evi	.2504395	-.1486168	1.005723	.9613893
ev_weapon	.3821074	.0835569	1.292849	1.063597
witness1	-.1210871	.1671982	1.052965	.887824
co_def	-.1095155	-.0464451	.8345978	.9273203
IQ71_90	.1010643	-.2304658	1.099367	.7660378
FD_black	-.1672476	-.1137672	1.088217	1.046987
FD_hispanic	.2381917	-.0541376	1.748678	.8799423
anywhite_v_dum	.3538589	.0238816	1.159049	1.010339

Covariate balance summary

Attorney Type: Death Penalty Given

Private Attorney

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	322	436.8
Control obs =	558	443.2

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.0375585	-.0481504	1.216257	.8111153
p_felony	-.0004332	.0372138	1.000477	1.066153
p_d_risk	-.0788583	-.0297126	.8579307	.9443522
p_torture	-.0560694	-.0583244	.7992541	.7727615
p_death	-.0796694	.0723585	.6931826	1.352542
p_murder	-.0518832	.0830103	.8668047	1.234833
p_drug	-.0742056	.0164376	.5251216	1.13676
p_v_drug	-.143777	.0564666	.3734851	1.364559
p_v_12	.0034125	-.0229831	1.020086	.8840806
p_agg	-.1385133	.0504744	.7233143	1.325124
d_noconvict	.1483952	-.0356985	1.736706	.872801
d_disturbed	-.0203272	-.0580184	.9090543	.7237231
d_impaired	.053988	-.0944275	1.286903	.6388104
d_age	.0775832	-.0483242	1.284087	.8553488
sum_other_mit	-.0956815	-.0711083	.4898394	.5487869
MultiVictims	-.0684687	.0452265	.8722091	1.091492
sex_convict	.0933064	.0002785	1.707252	1.001626
rob_convict0	-.081955	-.0083142	.8454317	.9837019
burg_convict0	.0847404	.0483607	1.357691	1.161837
psych0	.1226741	-.0056849	1.157265	.9933988
v1family	-.0061733	-.0125451	.9825751	.9625824
v1hadkids	.1111686	-.017704	1.117431	.9833063
v1knife	.0237483	.0283968	1.058467	1.06585
v1barehands	.0427673	-.0023618	1.142181	.9924552
v_1h_resis	.1409099	-.0495863	1.180355	.9391723
v_1h_brutal	.0050795	-.041477	1.01201	.9096343
v_1h_hide	.069802	-.0431767	1.155055	.9066346
v_1h_execution	.1605743	-.0266162	1.160123	.9722639
v_1h_ambush	.1070222	-.0106005	1.183545	.9834752
age_mean	-.0442637	-.0250149	1.073417	1.036064
gp_acc	.1010568	-.0209366	1.702473	.8953296
mst_id	.2546328	-.0101012	1.100317	.9959142
gp_nc	.3806967	-.0285917	.9081152	1.004461
gp_not1st	.0424452	.0175044	1.029051	1.011857
ad_guilt	-.0878788	.0450657	.807029	1.108286
gp_d_psyiat	.16275	-.0407443	1.35337	.9235378
p_evi	.1817846	-.0375584	1.061572	.9868829
ev_weapon	-.0535392	-.0348224	.9515527	.9664806
witness1	.1053017	-.003652	.9375166	1.002355
co_def	.1783782	-.0337238	1.478287	.9259792
IQ71_90	-.1874995	.0162931	.8413524	1.013851
FD_black	-.1478114	-.0242907	1.108727	1.016696
FD_hispanic	-.0324765	.0363318	.8966849	1.112188
anywhite_v_dum	.2275697	.0220769	1.176145	1.015453

Covariate balance summary

Court Appointed Attorney

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	269	441.9
Control obs =	611	438.1

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	-.057545	-.0526387	.7317207	.740216
p_felony	.0005749	-.0357245	1.003206	.9318648
p_d_risk	.1926729	-.045982	1.417423	.910511
p_torture	.0761576	-.0065097	1.340086	.975183
p_death	.0276883	-.0536408	1.131197	.7688128
p_murder	.0538556	-.0775436	1.157743	.7854376
p_drug	.084157	.0085305	1.92955	1.070782
p_v_drug	.2085027	.0080586	3.406538	1.055097
p_v_12	-.1799422	-.114077	.2928448	.457226
p_agg	.1081027	-.0855129	1.197449	.7932509
d_noconvict	-.1869525	-.0700883	.441975	.7507351
d_disturbed	-.2021742	-.0935968	.3047896	.593529
d_impaired	-.076548	-.0753994	.6846015	.6629191
d_age	-.0178739	-.0764745	.9448683	.7534082
sum_other_mit	-.0252322	-.0195038	.950746	.9068369
MultiVictims	.0734547	-.0483783	1.154215	.9025114
sex_convict	-.1172569	-.0531492	.4636309	.7121979
rob_convict0	-.0171548	.0646157	.9678305	1.126644
burg_convict0	-.0804769	.0819275	.7362216	1.303116
psych0	-.1339363	-.0555015	.8420942	.9297808
v1family	-.2785114	-.0295877	.3504118	.911255
v1hadkids	-.2922158	.0448822	.7077215	1.043278
v1knife	-.2866416	.0068933	.450468	1.016117
v1barehands	-.1536473	.0335577	.5938424	1.102982
v_1h_resis	-.244015	.0214173	.7179242	1.025719
v_1h_brutal	-.0515133	-.0192719	.8975247	.9588685
v_1h_hide	-.2207579	-.0988714	.5997305	.7992675
v_1h_execution	.0459356	-.0291955	1.04647	.9700378
v_1h_ambush	.1154287	.0562343	1.196625	1.087283
age_mean	-.2654852	.0358043	.6119139	1.04326
gp_acc	-.1875412	.0437249	.2816108	1.243228
mst_id	.2209728	.0312267	1.082907	1.012468
gp_nc	.090443	-.0341242	.9853498	1.004139
gp_not1st	-.120705	.0230953	.919777	1.014818
ad_guilt	-.1285713	-.0585311	.7233068	.8604209
gp_d_psyiat	-.2935741	.0431239	.5198034	1.082946
p_evi	-.4311969	.0322961	.788293	1.010923
ev_weapon	-.2387828	.0324226	.77784	1.029135
witness1	.1271426	.0899444	.9227157	.9400353
co_def	-.1841664	-.056061	.6355688	.8747571
IQ71_90	.2266054	-.0061026	1.192054	.9946718
FD_black	.36089	.0650296	.7207736	.9478062
FD_hispanic	-.1532215	-.0237735	.5684149	.9213486
anywhite_v_dum	-.3749028	.0386403	.698077	1.027572

Covariate balance summary

Public Defender

	Raw	Weighted
Number of obs =	880	880.0
Treated obs =	285	444.9
Control obs =	595	435.1

	Standardized differences		Variance ratio	
	Raw	Weighted	Raw	Weighted
p_v_witness	.0175085	.0931621	1.097228	1.54404
p_felony	-.0202334	.0297456	.9630303	1.057377
p_d_risk	-.1179013	.0333596	.7907457	1.064696
p_torture	-.0125028	.0600074	.9535533	1.242679
p_death	.0583479	-.0227338	1.29047	.8964745
p_murder	.0082575	.0379911	1.024647	1.108302
p_drug	-.0090899	.1133335	.9306072	2.09102
p_v_drug	-.0831804	-.038065	.5885996	.7874684
p_v_12	.1209312	.001185	1.898228	1.006971
p_agg	.029021	.0667433	1.133075	1.208264
d_noconvict	.0106743	.0755693	1.042995	1.304023
d_disturbed	.1889245	.013442	2.382193	1.070996
d_impaired	.0175026	.1434957	1.087327	1.762747
d_age	-.0615739	.086458	.8147898	1.296289
sum_other_mit	.1137558	.0035311	1.952843	1.113127
MultiVictims	.0083434	.0175178	1.018435	1.035339
sex_convict	.0072051	-.0394085	1.044507	.7819905
rob_convict0	.0947343	-.0113226	1.205681	.9777822
burg_convict0	-.0324911	.1330973	.8879197	1.503593
psych0	-.0162374	.0096298	.9820475	1.011668
v1family	.2272828	.0033886	1.945036	1.010864
v1hadkids	.1414098	.046522	1.148064	1.047251
v1knife	.2004574	-.0008666	1.568241	.9978754
v1barehands	.0994698	-.0222809	1.352873	.9309966
v_1h_resis	.0882284	.0160101	1.111088	1.019579
v_1h_brutal	.0370761	-.0133692	1.081679	.9721355
v_1h_hide	.1339969	.0221491	1.309721	1.046763
v_1h_execution	-.2322289	-.0361718	.7797687	.964493
v_1h_ambush	-.2269672	-.0168628	.6702962	.9730401
age_mean	.2830078	-.0022302	1.356996	1.050811
gp_acc	.0555922	-.0032719	1.339389	.9827109
mst_id	-.5289178	.0029138	.7076855	1.001187
gp_nc	-.5045124	.0117807	.9901436	.9978168
gp_not1st	.0746633	-.0013266	1.049896	.9990706
ad_guilt	.2117266	-.0124971	1.618222	.970329
gp_d_psyiat	.0982074	-.0136653	1.20209	.9736645
p_evi	.1938514	.0305944	1.062138	1.011057
ev_weapon	.2570306	.022558	1.241884	1.021069
witness1	-.2365944	.0184205	1.129726	.9888095
co_def	-.0148565	.0316486	.968651	1.070019
IQ71_90	-.0242847	-.0178335	.9808308	.9839243
FD_black	-.1797542	-.0639036	1.12882	1.040974
FD_hispanic	.1724032	.0579971	1.747946	1.196748
anywhite_v_dum	.1067966	.0698364	1.08293	1.047525

EXHIBIT C

Part: 1 of 3

Distinguished by Com. v. Richter, Pa.Super., July 9, 2014

Com. v. Spotz
Supreme Court of Pennsylvania | April 29, 2011 | 610 Pa. 17 | 18 A.3d 244 *(Approx. 120 pages)*
Original Image of 18 A.3d 244 (PDF)

610 Pa. 17
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Mark Newton SPOTZ, Appellant.

Submitted Nov. 17, 2009.
Decided April 29, 2011.

Synopsis

Background: Defendant was convicted following jury trial in the Court of Common Pleas, Cumberland County, Criminal Division, No. 95-794, George E. Hoffer, J., of first-degree murder, and he was sentenced to death. Defendant appealed. The Supreme Court, No. 202 Capital Appeal Docket, Castille, J., 563 Pa. 269, 759 A.2d 1280, affirmed. The Court of Common Pleas, Cumberland County, Criminal Division, No. CP–21–CR–0000794 –1995, Edgar B. Bayley, President Judge, denied defendant's petition for collateral relief. Defendant appealed.

Holdings: The Supreme Court, No. 576 CAP, McCaffery, J., held that:
1 failure to object to waiver of counsel colloquy was not ineffective assistance of counsel;
2 intoxication defense was not available;
3 attorney's prior representation of manslaughter victim did not create conflict of interest;
4 former inmate was not unavailable witness;
5 Commonwealth did not commit *Brady* violation;
6 prosecutor's statement that murder victim did not have any choices was not prosecutorial misconduct; and
7 any failure to present additional evidence concerning defendant's childhood was not ineffective assistance.

Affirmed.

Castille, C.J., concurred and filed opinion, in which McCaffery, J., joined and Orie Melvin, J., joined in part.

Saylor, J., joined in part, concurred in the result in part, and filed opinion.

West Headnotes (94)

Change View

1 **Criminal Law** Interlocutory, Collateral, and Supplementary Proceedings and Questions
In reviewing decision regarding petition for post-conviction relief, Supreme Court must determine whether the ruling of the Post-Conviction Relief Act (PCRA) court is supported by the record and is free of legal error. 42 Pa.C.S.A. § 9541 et seq.

61 Cases that cite this headnote

2 **Criminal Law** Review De Novo
Criminal Law Post-conviction relief
Post-Conviction Relief Act (PCRA) court's credibility determinations, when supported by the record, are binding on the Supreme Court; but, Court applies a de novo standard of review to the PCRA court's legal conclusions. 42 Pa.C.S.A. § 9541 et seq.

234 Cases that cite this headnote

3 **Criminal Law** Presumptions and burden of proof in general
Supreme Court begins its analysis of ineffectiveness claims with the presumption that counsel is effective. U.S.C.A. Const.Amend. 6.

7 Cases that cite this headnote

4 **Criminal Law** Deficient representation and prejudice
Criminal Law Degree of proof
To prevail on postconviction ineffective assistance of counsel claims, defendant must plead and prove, by a preponderance of the evidence, three elements: (1) the underlying legal claim has arguable merit, (2) counsel had no reasonable basis for his action or inaction, and (3) defendant suffered prejudice because of counsel's action or inaction. U.S.C.A. Const.Amend. 6.

61 Cases that cite this headnote

5 **Criminal Law** Strategy and tactics in general
With regard to prong of test for ineffective assistance of counsel of whether counsel had no reasonable basis for his action or inaction, Supreme Court will conclude that counsel's chosen strategy lacked a reasonable basis only if defendant proves that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. U.S.C.A. Const.Amend. 6.

51 Cases that cite this headnote

6 **Criminal Law** Prejudice in general
To establish prejudice as required under test for ineffective assistance of counsel, defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. U.S.C.A. Const.Amend. 6.

40 Cases that cite this headnote

7 **Criminal Law** Matters Already Adjudicated
Issue of whether it was error not to join either all of defendant's murder trials or his three capital murder trials was not cognizable under Post-Conviction Relief Act (PCRA), where it was previously litigated. **18** Pa.C.S.A. § 110; 42 Pa.C.S.A. §§ 9543(a)(3), 9544(a)(2).

8 **Criminal Law** Adequacy of Representation
A claim of ineffectiveness of counsel is distinct from the underlying claim of trial court error. U.S.C.A. Const.Amend. 6.

12 Cases that cite this headnote

9 **Double Jeopardy** Prohibition of Multiple Proceedings or Punishments
Constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. U.S.C.A. Const.Amend. 5.

1 Case that cites this headnote

10 **Double Jeopardy** Prohibition of Multiple Proceedings or Punishments
Protections against double jeopardy stem from the underlying premise that a defendant should not be twice tried or punished for the same offense. U.S.C.A. Const.Amend. 5.

11 **Constitutional Law** Severance
Double Jeopardy Multiple prosecutions
Mere fact that defendant was subjected to four trials for the independent killing of four human beings implicated neither double jeopardy nor due process concerns. U.S.C.A. Const.Amend. 5.

12 **Criminal Law** Points and authorities
Argument that defendant and his co-conspirator were similarly situated was unreviewable, where it was impossible to discern exactly what error defendant was alleging, argument was not developed factually or legally, and it was not supported with citations to relevant decisional or statutory law.

3 Cases that cite this headnote

13 **Criminal Law** In general; right to appear pro se
Criminal Law Capacity and requisites in general
A criminal defendant has a constitutional right, necessarily implied under the Sixth Amendment of the U.S. Constitution, to self-representation at trial; but, before a defendant will be permitted to proceed pro se, he or she must knowingly, voluntarily, and intelligently waive the right to counsel. U.S.C.A. Const.Amend. 6.

10 Cases that cite this headnote

14 **Criminal Law** Waiver of right to counsel
To ensure that a waiver of the right to counsel is knowing, voluntary, and intelligent, the trial court must conduct a probing colloquy, which is a searching and formal inquiry as to whether the defendant is aware both of the right to counsel and of the significance and consequences of waiving that right. U.S.C.A. Const.Amend. 6.

11 Cases that cite this headnote

15 **Criminal Law** Waiver of right to counsel
A colloquy of defendant concerning waiver of counsel is a procedural device; it is not a constitutional end or a constitutional right. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

16 **Estoppel** Waiver Distinguished
An on-the-record colloquy is a useful procedural tool whenever the waiver of any significant right is at issue, constitutional or otherwise, e.g., waiver of a trial, waiver of the right to counsel, waiver of the right to call witnesses, waiver of the right to cross-examine witnesses, waiver of rules-based speedy trial time limits, etc; but the colloquy does not share the same status as the right itself.

3 Cases that cite this headnote

17 **Criminal Law** Other particular miscellaneous issues
When a petitioner for post conviction relief claims ineffective assistance of counsel based on a failure to object to an allegedly defective waiver colloquy, petitioner cannot prevail merely by establishing that the waiver colloquy was indeed defective in some way; rather, petitioner must prove that, because of counsel's ineffectiveness, he waived the constitutional right at issue unknowingly or involuntarily, and that he was prejudiced. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

18 **Criminal Law** Other particular miscellaneous issues
To establish prejudice based on a failure to object to an allegedly defective waiver colloquy, the petitioner for post-conviction relief must demonstrate a reasonable probability that, but for counsel's ineffectiveness, he would not have waived the right at issue; in considering such a claim of ineffectiveness, the court considers the totality of the circumstances and the entire record, not just the colloquy itself. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

19 **Criminal Law** Other particular issues in death penalty cases
Sentencing and Punishment Counsel
Trial court conducted a thorough colloquy regarding defendant's desire to waive his right to counsel and proceed pro se in penalty

phase of capital murder trial, encompassing all of the required questions and safeguards, and, thus, trial counsel's failure to object to the colloquy was not ineffective assistance of counsel, where trial court asked defendant if he wanted to represent himself, at least at the first phase of his trial, including at jury selection, defendant understood his right to be represented by counsel and to have free counsel appointed for him, and was not under the influence of alcohol, drugs, or medication. U.S.C.A. Const.Amend. 6.

8 Cases that cite this headnote

20 **Criminal Law** Capacity and requisites in general
Inquiry into defendant's reason for wanting to waive his right to counsel is not required in order to establish that a waiver is voluntary, knowing, and intelligent; a court's disagreement with a defendant's reason for proceeding pro se does not constitute grounds for denial of this constitutional right. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

21 **Criminal Law** In general; right to appear pro se
A court may not substitute its own judgment for that of a defendant who knowingly, voluntarily, and intelligently waives his right to counsel. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

22 **Homicide** Intoxication
Intoxication defense was not available to defendant in capital murder trial, where defendant did not admit his criminal liability in the murder, maintained an innocence defense, and repeatedly and consistently attempted to divert blame for the murder onto others.

23 **Criminal Law** Defense counsel
Finding by Post-Conviction Relief Act (PCRA) court that defendant was competent to represent himself in capital murder trial was supported by the record, where defendant's attorney testified that defendant was lucid and rational, understood questions and responded to them, conducted himself accordingly in court, and defendant made an objection to a jury instruction that was correct and which attorney had not considered, and two of three psychiatrists retained by defendant concluded that he was competent to stand trial. U.S.C.A. Const.Amend. 6.

24 **Criminal Law** Mental competence in general
The focus of the competency standard for waiving the right to counsel is properly on the defendant's mental capacity, i.e., whether he or she has the ability to understand the proceedings. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

25 **Criminal Law** Determination; acquittal
Criminal Law Mental competence in general
If a court finds a defendant incapable of waiving the right to counsel, then the court must also conclude that the defendant is incapable of standing trial. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

26 **Criminal Law** Evidence
Defendant is presumed to be competent to stand trial; and, the burden is on the defendant to prove that he was incompetent.

1 Case that cites this headnote

27 **Criminal Law** Previous or concurrent representation of witness or other party
Prior representation by defendant's trial attorney of victim of voluntary manslaughter did not create conflict of interest in prosecution for capital murder, where representation had terminated five years before the capital murder, attorney zealously advocated on defendant's behalf, was unhampered by any alleged conflict of interest, and testified that he did not think that there was any conflict in pursuing an investigation or handling defendant's case in any way, and defendant provided no evidence to the contrary, just bald assertions and gross speculation. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

28 **Criminal Law** Post-conviction proceeding not a substitute for appeal
Issue of trial court's exclusion of witness who would have testified that another inmate confessed to the capital murder of which defendant was convicted was waived and not cognizable under the Post-Conviction Relief Act (PCRA), where defendant did not raise it on direct appeal. 42 Pa.C.S.A. §§ 9543(a)(3), 9544(b).

1 Case that cites this headnote

29 **Criminal Law** Counsel of defendant's choice or defendant pro se
Defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel. U.S.C.A. Const.Amend. 6.

30 **Criminal Law** Counsel of defendant's choice or defendant pro se
Claim of ineffective assistance of counsel during guilt phase of capital murder trial was precluded, where defendant did not withdraw his waiver of the right to counsel or change his mind about exercising his right to self-representation, but rather continued to prepare, direct, and present his own defense, including developing his own strategy, interviewing the witness,

and deciding whether or not to call the witnesses. U.S.C.A. Const.Amend. 6.

31 **Criminal Law** Particular cases
Former inmate who was alleged to have confessed to the capital murder of which defendant was convicted was not unavailable as required for admission of his statement under statement against interest exception to hearsay rule, where inmate was in the courtroom during capital murder trial, and defendant conferred privately with him and decided not to call him as a witness. Rules of Evid., Rule 804(b)(3), 42 Pa.C.S.A.

32 **Witnesses** Right to Impeach One's Own Witness
Under Mississippi common law, voucher rule prohibits a party from impeaching his own witness.

33 **Criminal Law** Post-conviction relief
Defendant's failure to present to the Post-Conviction Relief Act (PCRA) court allegation that the Commonwealth violated *Brady* by withholding evidence of former inmate's reliability and prior cooperation with the Commonwealth as an informant waived the *Brady* issue for appeal. Rules App.Proc., Rule 302(a), 42 Pa.C.S.A.

34 **Criminal Law** Constitutional obligations regarding disclosure
Under *Brady* and subsequent decisional law, a prosecutor has an obligation to disclose all exculpatory information material to the guilt or punishment of an accused, including evidence of an impeachment nature.

10 Cases that cite this headnote

35 **Criminal Law** Constitutional obligations regarding disclosure
To establish a *Brady* violation, an appellant must prove three elements: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it impeaches, (2) the evidence was suppressed by the prosecution, either willfully or inadvertently, and (3) prejudice ensued.

7 Cases that cite this headnote

36 **Criminal Law** Materiality and probable effect of information in general
For a *Brady* violation, the evidence at issue must have been material evidence that deprived the defendant of a fair trial.

9 Cases that cite this headnote

37 **Criminal Law** Materiality and probable effect of information in general
Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome.

9 Cases that cite this headnote

38 **Criminal Law** Diligence on part of accused; availability of information
Criminal Law Request for disclosure; procedure
The burden rests with the defendant to prove, by reference to the record, that evidence was withheld or suppressed by the prosecution; there is no *Brady* violation when the defendant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from non-governmental sources.

2 Cases that cite this headnote

39 **Criminal Law** Evidence incriminating others
Commonwealth did not commit *Brady* violation in prosecution for capital murder by failing to disclose testimony presented in a previous trial implicating former inmate, who defendant alleged was the actual killer of the victim he was convicted of killing, in a previous murder, where testimony was not exculpatory in the capital murder.

40 **Criminal Law** Particular statements, arguments, and comments
Defendant's failure to make contemporaneous objection during capital murder trial waived defendant's claims of prosecutorial misconduct.

41 **Criminal Law** Raising issues on appeal; briefs
Supreme Court would not have accepted any of defendant's waived claims of prosecutorial misconduct related to comments during closing argument in guilt phase of capital murder trial for review under the relaxed waiver doctrine, and, thus, direct appellate counsel was not ineffective in failing to raise waived claim of trial court error under relaxed waiver doctrine, where defendant's assertions of prosecutorial misconduct were unquestionably refuted and belied by the plain text of the prosecutor's comments, and defendant's claims were frivolous and ignored, not just as to the context of the comments, but the obvious plain meaning. U.S.C.A. Const.Amend. 6.

42 **Criminal Law** Points and authorities
Single sentence in defendant's brief regarding failure to raise under relaxed waiver doctrine issue of direct appellate counsel's failure to raise jury instructions issue did not constitute a developed, reasoned, supported, or even intelligible argument, and, thus, the issue was waived in appeal from denial of post-conviction relief.

3 Cases that cite this headnote

43 **Criminal Law** Affirmance of conviction
Issue of timing and content of the limiting instruction as to other crimes evidence was previously litigated in direct appeal from conviction for capital murder and, thus, not cognizable in Post-Conviction Relief Act (PCRA) proceeding. **18** Pa.C.S.A. § 110; 42 Pa.C.S.A. §§ 9543(a)(3), 9544(a)(2).

3 Cases that cite this headnote

44 **Criminal Law** Points and authorities
Argument that direct appellate counsel was ineffective in failing to raise a violation of defendant's state and federal constitutional rights regarding timing and content of the limiting instruction as to other crimes evidence, but rather relied only upon state decisional law, was waived for lack of development on appeal in Post-Conviction Relief Act (PCRA) proceeding, where defendant baldly asserted four times that the failure to provide an appropriate and/or immediate instruction to the jury violated his constitutional rights, set forth no constitutional argument relevant to either the federal or state Constitution, and did not otherwise explain or develop this issue. 42 Pa.C.S.A. § 9541 et seq.

2 Cases that cite this headnote

45 **Sentencing and Punishment** Other offenses, charges, or misconduct
Defendant's three prior homicide convictions were admissible in penalty phase of capital murder trial, where they had not been overturned. 42 Pa.C.S.A. § 9711(d)(9, 11).

46 **Sentencing and Punishment** Nature, degree, or seriousness of other offense
A collateral murder conviction is not divested of its character as an aggravating circumstance in penalty phase of capital murder trial merely because it remains at the appeal stage; only if the conviction is overturned on appeal could an error ensue.

47 **Sentencing and Punishment** Nature, degree, or seriousness of other offense
Trial court did not err in presuming that burglary was a per se a crime of violence for purposes of subsection that limits aggravating factors for penalty phase of capital murder trial. 42 Pa.C.S.A. § 9711(d)(9).

48 **Criminal Law** Argument and comments
Penalty phase counsel was not ineffective in failing to object to allegedly misleading statement by the prosecutor, which suggested the defendant's use or threat of violence during commission of prior burglaries, where it strained reason to suggest that the prosecutor's brief, vague, passing reference to a gun during his discussion of defendant's prior felony convictions could have so prejudiced the

jury that there was a reasonable probability that the outcome of the proceedings would have been different had counsel objected since defendant had a lengthy history of felony convictions, including voluntary manslaughter, murder, aggravated assault, and robbery. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

49 **Sentencing and Punishment** Killing while committing other offense or in course of criminal conduct
Verdict in guilt phase of capital murder trial that defendant was guilty of first-degree murder and not guilty verdict as to second-degree murder did not preclude a penalty phase finding that the killing was committed during the perpetration of a felony; by no logic could the jury's verdict be considered a finding that defendant did not commit the murder while perpetrating a felony, since jury was instructed that it could find defendant not guilty, guilty of first-degree murder, guilty of second-degree murder, or guilty of third-degree murder. 42 Pa.C.S.A. § 9711(d)(6).

1 Case that cites this headnote

50 **Criminal Law** Objections to argument or conduct of counsel
A claim of ineffective assistance grounded in counsel's failure to object to a prosecutor's comments may succeed when the petitioner demonstrates that the prosecutor's comments violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. U.S.C.A. Const.Amends. 5, 6.

1 Case that cites this headnote

51 **Constitutional Law** Prosecutor
To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial; the touchstone is the fairness of the trial, not the culpability of the prosecutor. U.S.C.A. Const.Amend. 6.

52 **Criminal Law** Comments on Evidence or Witnesses
Criminal Law Rebuttal Argument; Responsive Statements and Remarks
A prosecutor may make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments.

2 Cases that cite this headnote

53 **Criminal Law** Rebuttal Argument; Responsive Statements and Remarks
Even an otherwise improper comment by a prosecutor may be appropriate if it is in fair response to defense counsel's remarks.

2 Cases that cite this headnote

Criminal Law Arguments and conduct of counsel

54 Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made.

2 Cases that cite this headnote

55 **Sentencing and Punishment** Arguments and conduct of counsel

During closing argument in the penalty phase of a capital murder trial, a prosecutor must be afforded reasonable latitude, and permitted to employ oratorical flair when arguing in favor of the death penalty.

56 **Sentencing and Punishment** Arguments and conduct of counsel

It is not improper for the prosecutor during penalty phase of capital murder trial to urge the jury to view the defense's mitigation evidence with disfavor and thus to impose the death penalty.

1 Case that cites this headnote

57 **Criminal Law** Statements as to Facts, Comments, and Arguments

Not every unwise, intemperate, or improper remark made by a prosecutor mandates the grant of a new trial; reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict.

2 Cases that cite this headnote

58 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's comments during opening statement and closing argument in penalty phase of capital murder trial regarding his role and the role of the jury were not prosecutorial misconduct, where prosecutor made clear that the jury was the fact-finder and that its weighing of aggravating and mitigating factors would determine the sentence to be imposed under the law.

59 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's comments during cross-examination of defendant's clinical psychologist and closing argument in penalty phase of capital murder trial regarding defendant's mental health mitigation evidence, including that not everyone with attention deficit order commits murder and that defendant's personality inventory were invalid due to exaggeration tendencies, did not constitute prosecutorial misconduct.

60 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's brief mention during closing argument in penalty phase of capital murder trial regarding uninvoked statutory mitigation factors was not prosecutorial misconduct, where comment was brief, prosecutor also correctly informed the jury that its duty to weigh aggravating versus mitigating circumstances was not simply a matter of counting how many of each category applied, and trial court reiterated for the jury the relevant mitigating circumstances and then correctly and in detail informed the jury of the law with respect to its weighing of aggravating and mitigating factors.

2 Cases that cite this headnote

61 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's argument during closing argument of penalty phase of capital murder trial that jury had duty to follow the law, and had to make a choice, but that murder victim did not have any choices was not prosecutorial misconduct; prosecutor reminded the jury of its duty to follow the law.

1 Case that cites this headnote

62 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's statement during penalty phase of capital murder trial that county victim coordinator was present to testify that defendant was the same person who was convicted of another murder in another county was not prosecutorial misconduct, where defendant stipulated that the conviction in the other county was his.

63 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's statement during opening argument in penalty phase of capital murder trial regarding defendant's history of felony convictions involving the use or threat of violence to the person was not prosecutorial misconduct, although prosecutor failed to state that the aggravating circumstance required a significant history of felony convictions involving the use or threat of violence to the person, where prosecutor correctly listed the felonies that had been proffered to satisfy that subsection, trial court defined this aggravating circumstance precisely and correctly, and the sentencing verdict slip also bore the correct definition.

64 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's comment during closing argument in penalty phase of capital murder trial that defendant was almost 24 years old when the crime occurred and that he had a record of serious felony convictions going back to when he was a juvenile was not prosecutorial misconduct; information had been admitted into evidence, and accordingly, the prosecutor could properly comment on it and draw reasonable inferences from it.

65 **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's brief and vague statement about the contents of defendant's criminal record during closing argument in penalty phase of capital murder trial was not prosecutorial misconduct, where prosecutor immediately also stated that he went through all of the felony convictions.

66 **Sentencing and Punishment** Arguments and conduct of counsel

Sentencing and Punishment Harmless and reversible error

Prosecutor's misstatement during closing argument in penalty phase of capital murder trial that tie between aggravating and mitigating circumstances resulted in imposition of death penalty was not prejudicial, where the prosecutor previously stated the standard exactly, correctly, and completely and then made the misstatement when he reiterated that an imposition of the death penalty had to be unanimous and reminded the jurors that during voir dire they were asked if they would stand up for their opinion, and trial court correctly and repeatedly instructed the jury on the appropriate standard by which to weight aggravating and mitigating factors. 42 Pa.C.S.A. § 9711(c)(1)(iv).

67 **Sentencing and Punishment** Manner and effect of weighing or considering factors

Under the statutory standard, when the aggravating circumstances and mitigating circumstances are precisely balanced, i.e., in a tie, the proper sentence is life imprisonment, not death. 42 Pa.C.S.A. § 9711(c)(1)(iv).

1 Case that cites this headnote

68 **Sentencing and Punishment** Instructions

Jury instructions in penalty phase of capital murder trial regarding presumptive sentence clearly explained and provided the correct rationale for the disparate treatment of and the distinct standard of proof applicable to aggravating and mitigating circumstances, where trial court stated directly and indirectly that life imprisonment was the appropriate sentence unless the Commonwealth met its high burden of proof with regard to aggravating factors. 42 Pa.C.S.A. § 9711(d, e).

1 Case that cites this headnote

69 **Criminal Law** Affirmance of conviction

Issue of whether *Simmons* "life means life" instruction was warranted in penalty phase of capital murder trial was litigated on direct appeal, and, thus, was not cognizable under the Post-Conviction Relief Act (PCRA). 42 Pa.C.S.A. §§ 9543(a)(3), 9544(a)(2).

1 Case that cites this headnote

70 **Sentencing and Punishment** Instructions
Simmons "life means life" jury instruction was not warranted in penalty phase of capital murder trial, where defendant's future dangerousness had not been placed at issue.

3 Cases that cite this headnote

71 **Criminal Law** Offering instructions
Counsel will not be held ineffective for failing to request an instruction to which his client was not entitled. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

72 **Sentencing and Punishment** Instructions
Defendant's future dangerousness is not placed at issue so that *Simmons* "life means life" instruction is warranted merely because the prosecutor sets forth a capital defendant's history of prior violent offenses.

73 **Criminal Law** Points and authorities
Defendant's one-sentence, undeveloped assertions of Eighth Amendment violations and footnote lists of United States Supreme Court opinions, devoid of even a parenthetical explanation, much less any development of the relevance or significance of the listed opinions to the relief he sought, failed to provide any reviewable argument on appeal from denial of post-conviction relief. U.S.C.A. Const.Amend. 8.

1 Case that cites this headnote

74 **Sentencing and Punishment** Manner and effect of weighing or considering factors
Sentencing and Punishment Admissibility
Although, during the penalty phase of capital murder trial, evidence may be presented as to any matter that the trial court deems relevant and admissible on the question of the sentence to be imposed, capital juries are to weigh only the aggravating and mitigating circumstances enumerated in the statute governing sentencing for murder in the first degree convictions. 42 Pa.C.S.A. § 9711(a)(2).

75 **Criminal Law** Presentation of evidence in sentencing phase
Any failure of trial counsel to present additional evidence concerning defendant's childhood as mitigating factor in penalty phase of capital murder trial was not ineffective assistance of counsel, where attorney presented a picture of defendant's chaotic, dysfunctional family environment, in which his mentally ill mother and absent or abusive father figures could provide neither life's basic necessities nor love and emotional support to their children, a home atmosphere, not simply of neglect, but also of violence and abuse, and attorney presented 14 witnesses including

psychologist, defendant's grandmother, mother, and Children and Youth Services (CYS) administrator. U.S.C.A. Const.Amend. 6.

76 **Criminal Law** Adequacy of investigation of mitigating circumstances

Trial counsel in penalty phase of capital murder trial was not ineffective for failing to uncover details and instances of abuse that defendant and his family failed to disclose as mitigating factor. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

77 **Criminal Law** Adequacy of investigation of mitigating circumstances

Criminal Law Presentation of evidence in sentencing phase

Any failure of trial counsel to develop and present further evidence of defendant's drug and alcohol addiction and abuse as evidence of mitigating factor during penalty phase of capital murder trial was not ineffective assistance of counsel, where attorney presented testimony from psychologist that defendant suffered from polysubstance abuse, and testimony from defendant's wife that defendant had a problem with drugs, smoked marijuana, used LSD and crack, drank beer, and was very different when he was using drugs, and additional evidence would have been cumulative. U.S.C.A. Const.Amend. 6.

78 **Criminal Law** Adequacy of investigation of mitigating circumstances

Criminal Law Presentation of evidence in sentencing phase

Any failure of trial counsel to develop and present further evidence of lifelong history of violence perpetrated by defendant's brother against defendant and other family members as evidence of mitigating factor during penalty phase of capital murder trial was not ineffective assistance of counsel, where three witnesses testified regarding brother's abuse of defendant and/or the effect of brother's violence on defendant, including their mother, who testified that on the night during which defendant committed voluntary manslaughter of his brother, brother was in a rage, had threatened defendant, and stabbed him in the back twice, and she gave numerous chilling examples of brother's gratuitous childhood violence against defendant. U.S.C.A. Const.Amend. 6.

79 **Criminal Law** Adequacy of investigation of mitigating circumstances

Criminal Law Presentation of evidence in sentencing phase

Any failure of trial counsel to develop and present further evidence of his family's history of mental illness as evidence of mitigating factor during penalty phase of capital murder trial was not ineffective assistance of counsel, where attorney presented evidence including testimony from Children and Youth Services (CYS) administrator that defendant's mother had severe emotional problems, including a complete emotional breakdown for which she

received psychiatric care, long-term depression, and threats of suicide, defendant's brother exhibited uncontrollable behavior, anger and resentment, aggression, threats of self-harm, and defendant's brother was involuntarily committed. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § 9711(e)(2, 3).

80 **Criminal Law** Adequacy of investigation of mitigating circumstances
Criminal Law Presentation of evidence in sentencing phase
Failure of trial counsel to obtain and consider all available records and evidence of defendant's mental health problems as evidence of mitigation in penalty phase of capital murder trial, and the resulting failure of defendant's expert psychologist to review the records, was not prejudicial in penalty phase of capital murder trial, although psychologist's later review of the records resulted in modified diagnoses; modifications in psychologist's opinions were subtle, largely a matter of degree or emphasis, and nothing in the record suggested that the subtle modifications would have led the jury to give determinative weight to mitigating circumstances and spare defendant the death penalty. 42 Pa.C.S.A. § 9711(e)(2, 3).

81 **Criminal Law** Adequacy of investigation of mitigating circumstances
Criminal Law Presentation of evidence in sentencing phase
Failure of trial counsel to obtain or present reports of a mental health evaluation of defendant conducted by prison health care personnel was not ineffective assistance of counsel in penalty phase of capital murder trial, where there was no reasonable probability that the jury would have chosen not to sentence defendant to death based upon the speculative, and largely negative, assessments in the documents at issue. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

82 **Criminal Law** Preparation for trial
Criminal Law Introduction of and Objections to Evidence at Trial
Failure of trial counsel to obtain or present reports of mental health evaluations of defendant conducted by prison health care personnel was not ineffective assistance of counsel in guilt phase of capital murder trial as evidence in support of a diminished capacity defense or of defendant's incompetence to waive counsel, where documents provided absolutely no insight as to defendant's mental state at the time of the offense, nothing in the documents remotely implied that he did not have the mental capacity to understand the legal proceedings and was not competent to stand trial or to waive counsel, and one report was evidence to the contrary, noting that he exhibited a verbal IQ of 118, which placed him in the bright normal range of mental ability. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

83 **Criminal Law** Other particular issues
Failure of Department of Corrections to produce reports of mental health evaluations of defendant conducted by prison health care personnel was not a *Brady* violation, where documents were not material because they provided absolutely no insight as to defendant's mental state at the time of the offense, nothing in the documents remotely implied that he did not have the mental capacity to understand the legal proceedings and was not competent to stand trial or to waive counsel, and one report was evidence to the contrary, noting that he exhibited a verbal IQ of 118, which placed him in the bright normal range of mental ability.

84 **Criminal Law** Decision or order
Failure to timely raise penalty phase counsel's ineffectiveness in prosecution for capital murder for failing to proffer, as a mitigating circumstance, evidence that defendant's mental disorders, including Post-Traumatic Stress Disorder (PTSD), were amenable to treatment, and that appropriate treatment for his mental disorders was available to inmates serving a life sentence waived the issue, where matter was first raised in motion for reconsideration, which was filed nearly a month after the Post-Conviction Relief Act (PCRA) court had issued its opinion and order denying all of defendant's claims for relief. 42 Pa.C.S.A. § 9541 et seq.

1 Case that cites this headnote

85 **Criminal Law** Multiple particular grounds
When the failure of individual claims of ineffective assistance of counsel is grounded in lack of prejudice, then the cumulative prejudice from those individual claims may properly be assessed on appeal.

20 Cases that cite this headnote

86 **Criminal Law** Multiple particular grounds
Defendant's ineffective assistance of counsel claims that Supreme Court denied for lack of prejudice were independent factually and legally, with no reasonable and logical connection that would have caused the jury to assess them cumulatively, and, thus, there was no cumulative prejudice warranting relief.

7 Cases that cite this headnote

87 **Criminal Law** Post-conviction relief
Supreme Court reviews the denial of a discovery request in post-conviction proceedings for abuse of discretion.

1 Case that cites this headnote

88 **Criminal Law** Discovery and disclosure
Post-Conviction Relief Act (PCRA) court did not abuse its discretion by denying defendant's discovery motions related to Commonwealth's handling of a blood sample obtained from

defendant's right sneaker, where defendant failed to mention, much less discuss, DNA analysis and his stipulation to the resulting report, and his assertions of out-dated methods of analysis, destruction of the sample, bad faith on the part of the Commonwealth, and exculpatory nature of the evidence were barely explained and entirely unsupported. 42 Pa.C.S.A. § 9541 et seq.

89 **Criminal Law** In general; examination of victim or witness
Bald assertions, unaccompanied by any supporting evidence, do not constitute a showing of good cause for discovery motions.

90 **Criminal Law** Necessity
As an appellate court, Supreme Court is limited to considering only those facts that have been duly certified in the record on appeal.

4 Cases that cite this headnote

91 **Criminal Law** Transmission and Filing
Defendant's bald assertion of error in the transmission of the record to Supreme Court was entirely without merit and frivolous in the extreme.

92 **Criminal Law** Points and authorities
Defendant waived by making completely undeveloped and unreviewable argument that he was precluded in Post-Conviction Relief Act (PCRA) proceeding from preserving and developing the record because the PCRA court precluded his proffers of testimony throughout hearing, where defendant's brief listed, in a footnote, seven citations to the record where the PCRA court allegedly precluded counsel's proffer of testimony, and each citation to the record was accompanied only by a phrase, which purported to summarize the proffer precluded, but included no argument as to the court's alleged error. 42 Pa.C.S.A. § 9541 et seq.

141 Cases that cite this headnote

93 **Criminal Law** Points and authorities
Defendant's generalized assertions that he was precluded from presenting material and relevant evidence in support of his constitutional claims by the Post-Conviction Relief Act (PCRA) court's evidentiary rulings during the PCRA hearing were not reviewable and, thus, waived, where assertions were not arguments, much less reasoned and developed arguments supported with citations to relevant legal authority. 42 Pa.C.S.A. § 9541 et seq.

134 Cases that cite this headnote

94 **Criminal Law** Particular issues and cases
Defendant's request that was, in essence, to file a second, and untimely, Post-Conviction Relief Act (PCRA) petition, raising four more issues, at least two of which had already been addressed by

the PCRA court, had no basis in statutory or decisional law under which Supreme Court could grant the relief he requested and, thus, was frivolous. 42 Pa.C.S.A. § 9541 et seq.

1 Case that cites this headnote

Part: 1 of 3

Com. v. Spotz
Supreme Court of Pennsylvania. | April 29, 2011 | 610 Pa. 17 | 18 A.3d 244 *(Approx. 120 pages)*

Attorneys and Law Firms

***255** Robert Brett Dunham, David Lee Zuckerman, Michael Wiseman, Eric John Montroy, Defender Association of Philadelphia, Philadelphia, for Mark Newton Spotz.

Jaime M. Keating, Cumberland County District Attorney's Office, Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania.

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

OPINION

Justice McCAFFERY.

***38** Mark Newton Spotz ("Appellant") has appealed from the denial of his petition for collateral relief filed pursuant to the Post Conviction Relief Act[1] ("PCRA"), following his conviction for first-degree murder and the imposition of a sentence of death. We affirm.

While engaged in a three-day crime spree in early 1995, Appellant killed four people in four counties. He was tried ***256** separately for each homicide, and he was ultimately convicted of voluntary manslaughter in the death of his brother, Dustin Spotz, in Clearfield County, and of first-degree murder in the deaths of June Ohlinger, Penny Gunnet, and Betty Amstutz, in, respectively, Schuylkill, York, and Cumberland Counties. Although the Superior Court overturned Appellant's manslaughter conviction and granted him a new trial, this Court reversed and reinstated the conviction. *Commonwealth v. Spotz,* 582 Pa. 207, 870 A.2d 822 (2005) ("*Spotz IV*").[2] On direct appeal, this Court affirmed each of Appellant's first-degree ***39** murder convictions and sentences of death. See Commonwealth v. Spotz, 552 Pa. 499, 716 A.2d 580 (1998) (Schuylkill County case) ("*Spotz I*"); *Commonwealth v. Spotz,* 562 Pa. 498, 756 A.2d 1139 (2000) (York County case) ("*Spotz II*"); *Commonwealth v. Spotz,* 563 Pa. 269, 759 A.2d 1280 (2000) (Cumberland County case) ("*Spotz III*"). In addition, we affirmed the order of the PCRA court denying Appellant collateral relief from his Schuylkill County first-degree murder conviction.[3] *See Commonwealth v. Spotz,* 587 Pa. 1, 896 A.2d 1191 (2006) ("*Spotz V*").

Here, Appellant seeks review of the order of the PCRA court denying his petition for collateral relief from his conviction for the murder of Betty Amstutz in Cumberland County. Briefly, the circumstances of the case, as set forth by this Court on direct review and/or by the PCRA court, are as follows. On February 2, 1995, having already committed three homicides in the prior two days, Appellant abducted Ms. Amstutz in or near her Harrisburg home.

Holding her hostage, he directed her to cash two checks at two different banks, transactions that were filmed by security cameras. Appellant also used Ms. Amstutz's credit card to purchase items from a sporting goods store and to check into a Carlisle hotel. In the early evening, two witnesses observed a white male standing along a Carlisle road close to a parked car matching the description of Ms. Amstutz's vehicle. Later in the evening, Appellant and two other individuals, Charles Carothers, an acquaintance, and Michelle Rhinehart, the mother of Appellant's two children, smoked crack cocaine in the hotel room. Mr. Carothers subsequently left the hotel and drove Ms. Amstutz's car to the apartment of Ms. Rhinehart's sister.

The following morning, near the side of the road where witnesses had seen Ms. Amstutz's car, a worker discovered her body, which had sustained multiple gunshot wounds, and notified the authorities. Later in the morning, police stopped Ms. Amstutz's car, in which Ms. Rhinehart's sister and a ***40** friend were traveling to pick up Appellant and Ms. Rhinehart at the hotel. Police then surrounded Appellant's hotel room and apprehended him after a lengthy standoff.

A post-arrest search of the hotel room yielded the following: blood-stained jeans; a knife; credit cards issued in the name of Penny Gunnet, one of the previous murder victims; and an itemized accounting, written by Appellant, of the money he had stolen and his expenditures on crack cocaine and other items. Bullets recovered from Ms. Amstutz's body and from the location where her body was discovered ***257** matched a nine-millimeter semiautomatic pistol in Appellant's possession. Appellant's fingerprints were found on Ms. Amstutz's car, and blood on his shoe was consistent with that of Ms. Amstutz.

Appellant was tried by a jury for Ms. Amstutz's murder in May 1996. Appellant's 17–year–old sometime girlfriend, Christina Noland, testified for the Commonwealth regarding Appellant's actions and motivation in the two days prior to the abduction and murder of Ms. Amstutz. Two days before Ms. Amstutz's murder, Ms. Noland was with Appellant in his mother's home in Clearfield County when he shot and killed his brother, Dustin Spotz, during an argument. Appellant and Ms. Noland fled to Schuylkill County, where, in need of a vehicle, Appellant abducted June Ohlinger, stole her car, and murdered her. After a short trip to Delaware, Appellant and Ms. Noland returned to Pennsylvania, this time to York County, where Appellant abducted Penny Gunnet, stole her car, and murdered her. Appellant then went on to Cumberland County without Ms. Noland, where the abduction and murder of Ms. Amstutz took place. Other evidence admitted at trial showed that the bullets used to kill Ms. Amstutz, Dustin Spotz, Ms. Gunnet, and Ms. Ohlinger all matched Appellant's pistol.

During the guilt phase of trial, Appellant proceeded *pro se,* and he asserted an innocence defense, attempting to cast blame on those in his company on the day of the murder. After the jury found Appellant guilty of first-degree murder, Taylor Andrews, Esq., Chief Public Defender of Cumberland County, assumed the role of defense counsel for the penalty ***41** phase. After hearing testimony from numerous witnesses, the jury found three aggravating and two mitigating circumstances, determined that the former outweighed the latter, and accordingly imposed the death penalty. The aggravating circumstances were that Appellant had committed the killing while in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6); had a significant history of

violent felony convictions, § 9711(d)(9); and had been convicted of another murder, § 9711(d)(11). The mitigating circumstances were that Appellant had been neglected during his childhood and had a poor upbringing by his parents. 42 Pa.C.S. § 9711(e)(8). Following formal sentencing on June 17, 1996, Appellant filed a direct appeal to this Court, during which time he continued to be represented by Mr. Andrews. We affirmed the judgment of sentence on October 20, 2000, and the United States Supreme Court denied Appellant's petition for a writ of certiorari. *Spotz III,* 759 A.2d 1280, *cert. denied,* 534 U.S. 1104, 122 S.Ct. 902, 151 L.Ed.2d 871 (2002).

On December 4, 2002, Appellant filed a counseled "Petition for Habeas Corpus Relief Under Article I, Section 14 of the Pennsylvania Constitution And For Statutory Post–Conviction Relief Under The Post–Conviction Relief Act;" three supplemental petitions were filed in 2007.[4] The PCRA court conducted an evidentiary hearing over a period of six days, following which the issues were briefed and then orally argued. On June 26, 2008, the PCRA court filed a 63–page opinion and order denying all of Appellant's claims. Appellant appealed to this Court on July 25, 2008, via a filing entitled "Jurisdictional Statement," in which he sought "review of each and every part of the [PCRA court's June 26, 2008] Order." Jurisdictional Statement, filed 7/25/08, at 1. In Appellant's ***258** brief to this Court, he has raised twenty issues, many of which have multiple parts.[5]

*43 1 2 **259 Under the applicable standard of review, we must determine whether the ruling of the PCRA court is supported by the record and is free of legal error. *Commonwealth v. Marshall,* 596 Pa. 587, 947 A.2d 714, 719 (2008). The PCRA *44 court's credibility determinations, when supported by the record, are binding on this Court. *Commonwealth v. Johnson,* 600 Pa. 329, 966 A.2d 523, 532, 539 (2009). However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions. *Commonwealth v. Rios,* 591 Pa. 583, 920 A.2d 790, 810 (2007).

To prevail on a petition for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his or her conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2). These circumstances include a violation of the Pennsylvania or United States Constitution or ineffectiveness of counsel, either of which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i) and (ii). In addition, a petitioner must show that the claims of error have not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). An issue has been waived "if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post[-]conviction proceeding." 42 Pa.C.S. § 9544(b). An issue has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(2).

3 4 5 6 In many of Appellant's issues, he has alleged ineffective assistance of counsel.[6] We begin our analysis of ineffectiveness claims with the presumption that **260 counsel is effective. *Rios, supra* at 799. To prevail on his ineffectiveness claims, Appellant must plead and prove, by a preponderance of the evidence, three elements: (1) the underlying legal claim has *45 arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) Appellant suffered prejudice because of counsel's action or inaction. *Commonwealth v. Steele,* 599 Pa. 341, 961 A.2d 786, 796

(2008) (citing *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973 (1987)). With regard to the second, *i.e.,* the "reasonable basis" prong, we will conclude that counsel's chosen strategy lacked a reasonable basis only if Appellant proves that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Williams,* 587 Pa. 304, 899 A.2d 1060, 1064 (2006) (citation omitted). To establish the third, *i.e.,* the prejudice prong, Appellant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. *Commonwealth v. Dennis,* 597 Pa. 159, 950 A.2d 945, 954 (2008).

GUILT PHASE ISSUES

1. Consolidation of Trials

7 In his first issue, Appellant alleges that the failure to consolidate his homicide trials violated the compulsory joinder requirements of **18** Pa.C.S. § 110, as well as the constitutional protection against double jeopardy and guarantee of due process. Appellant asserts that he "was 'harassed' by four separate prosecutions in quick succession" in four counties, for offenses that arose out of the same criminal episode and thus should have been consolidated for trial. Appellant's Brief at 36. Appellant implies, without expressly so stating, that the relief he seeks is dismissal of the Cumberland County charges. Preliminarily, it is not entirely clear if Appellant is asserting that all four of his homicide trials should have been consolidated, or that only his three capital murder trials should have been consolidated. *Compare id.* at 2, Statement of Questions Presented (referring to the failure to consolidate his three capital murder trials) with *id.* at 35, Argument Section (discussing all four homicide trials and asserting that the "failure to consolidate these cases for trial" violated Section 110, double jeopardy protections, and due process guarantees).

***46** On direct appeal, as the PCRA court recognized, Appellant raised a similar, if not identical issue, *i.e.,* that the failure to consolidate his trials for all four homicides violated Section 110 and entitled him to dismissal of the Cumberland County charges. *Spotz III,* 759 A.2d at 1285; Opinion and Order of PCRA Court, dated 6/26/08 (hereinafter "PCRA Court Opinion"), at 25 (rejecting this claim as previously litigated). This Court determined on direct appeal that Appellant's first three killings were not part of the same criminal episode as the Cumberland County homicide, but rather were essentially independent, occurring in different counties and on different days, and generating four separate criminal investigations. We concluded that the killings were "logically connected primarily by the fact that [A]ppellant committed all four of them." *Spotz III, supra* at 1286. In sum, on direct appeal, we held that there was no merit to Appellant's claim of trial court error for failing to dismiss his Cumberland County charges based on violation of the compulsory joinder provision of Section 110. *Id.* at 1285–86.

Thus, Appellant's first PCRA claim has been previously litigated and is not cognizable under the PCRA. *See* 42 Pa.C.S. §§ 9543(a)(3) and 9544(a)(2). Whether Appellant in the instant appeal is actually ***261** referring to consolidation of only his three capital murder trials or to consolidation of all four homicide trials does not alter this holding. The rationale set forth in our holding on direct appeal applies equally to either claim of consolidation.[7] *See Spotz III, supra* at 1285–86.

9 10

*47 Also in Appellant's first issue, he asserts that counsel was ineffective for failing to raise constitutional claims, grounded in alleged violations of double jeopardy protections and due process, related to the failure to consolidate his trials.[8] As the United States Supreme Court has stated, "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense...." *United States v. DiFrancesco,* 449 U.S. 117, 127, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) (citation omitted). The high Court has also indicated that there are three separate constitutional protections encompassed in the guarantee against double jeopardy: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; ***48** and protection against multiple punishments for the same offense. *Schiro v. Farley,* 510 U.S. 222, 229, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) (citation omitted); *DiFrancesco, supra* at 129, 101 S.Ct. 426 (citation omitted). "These protections ****262** stem from the underlying premise that a defendant should not be twice tried or punished for the same offense." *Schiro, supra.*

11 12 Appellant killed four people in three days in four counties, generating four separate criminal homicide investigations. As we held on direct appeal, these "essentially independent" killings are "logically connected primarily by the fact that [A]ppellant committed all four of them." *Spotz III,* 759 A.2d at 1285–86. The mere fact that Appellant was subjected to four trials for the independent killing of four human beings implicates neither double jeopardy nor due process concerns. Appellant has developed no argument to the contrary, and, perhaps not surprisingly, has cited no authority that supports his assertions of constitutional violations. Counsel was not ineffective for failing to raise a meritless issue. All of Appellant's claims in his first issue are meritless.[9]

2. Waiver of Right to Counsel

Appellant's second issue is focused on his waiver of the right to counsel during the guilt phase of his trial. Appellant was represented by public defender Taylor Andrews for pre-trial proceedings, during the penalty phase of the trial, and on direct appeal; however, following a colloquy, the trial court granted Appellant's motion to represent himself during the guilt phase of his trial. Appellant now contends that his ***49** waiver of the right to counsel was not voluntary, knowing, or intelligent; that he was not competent to waive this right; and that Mr. Andrews was ineffective for failing to object to the trial court's allegedly inadequate colloquy, for declining to present a guilt-phase defense, for failing to investigate and develop an intoxication defense, for failing to investigate Appellant's competence to waive his right to counsel, and for failing to reveal an alleged conflict of interest related to counsel's prior representation of Appellant's brother and first homicide victim, Dustin Spotz. After considering all the evidence presented at the PCRA hearing, the PCRA court concluded that Appellant was competent; that his waiver of counsel was voluntary, knowing, and intelligent; and that counsel was not ineffective. *See* PCRA Court Opinion at 5–9. We agree.[10]

13 14 ****263** A criminal defendant has a constitutional right, necessarily implied under the Sixth Amendment of the U.S. Constitution, to self-representation at trial. *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, before a defendant will be permitted to proceed *pro se,* he or she must knowingly, voluntarily, and intelligently waive

the right to counsel. *Commonwealth v. Blakeney,* 596 Pa. 510, 946 A.2d 645, 655 (2008). To ensure that a waiver is knowing, voluntary, and intelligent, the trial court must conduct a "probing colloquy," which is a searching and formal ***50** inquiry as to whether the defendant is aware both of the right to counsel and of the significance and consequences of waiving that right. *Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326, 1335–36 (1995). More specifically, the court must determine the following:

> (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
>
> (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;
>
> (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
>
> (d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
>
> (e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and
>
> (f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.

Pa.R.Crim.P. 121(A)(2); *Blakeney, supra* at 655; *Starr, supra* at 1335.

15 16 Although our rules set forth specific requirements for a waiver colloquy, we have been careful to distinguish between a colloquy and the right that it was designed to protect, as follows:

> A waiver colloquy is a procedural device; it is not a constitutional end or a constitutional "right."... [A]n on-the-record colloquy is a useful procedural tool whenever the waiver of any significant right is at issue, constitutional or otherwise, *e.g.,* waiver of a trial, waiver of the right to ***51** counsel, waiver of the right to call witnesses, waiver of the right to cross-examine witnesses, waiver of rules-based speedy trial time limits, etc. But the colloquy does not share the same status as the right itself.

Commonwealth v. Mallory, 596 Pa. 172, 941 A.2d 686, 697 (2008) (applying the above principle in the context of waiver of the right to a jury trial).

17 **18** As *Mallory* made explicitly clear, when a petitioner claims ineffective assistance of counsel based on a failure to object to an allegedly defective waiver colloquy, the claim must be analyzed like any other ineffectiveness claim. *Id.* at 698. The petitioner cannot prevail merely by establishing that the waiver colloquy was indeed defective in some way. Rather, the petitioner must prove that, because of counsel's ineffectiveness,

he waived the constitutional right at issue unknowingly or involuntarily, and that he was prejudiced. To establish prejudice, the petitioner must demonstrate a reasonable probability ***264** that but for counsel's ineffectiveness, he would not have waived the right at issue. *Id.* at 698–704. In considering such a claim of ineffectiveness, the court considers the totality of the circumstances and the entire record, not just the colloquy itself. *Id.* at 698, 704.

19 Here, the record shows that the trial court conducted a colloquy that confirmed, *inter alia,* the following: Appellant wanted to represent himself, at least at the first phase of his trial, including at jury selection; Appellant understood his right to be represented by counsel and to have free counsel appointed for him; Appellant was not under the influence of alcohol, narcotics, or medications that would affect his decision; Appellant was not threatened, pressured, subjected to physical or psychological abuse, or promised anything to encourage him to waive his right to counsel; Appellant understood the elements of the offenses with which he was charged; Appellant knew the Commonwealth was seeking the death penalty; Appellant knew he would be bound by all the normal rules of procedure and evidence; Appellant recognized that there were certain dangers to proceeding *pro se,* dangers with ***52** which counsel would be familiar, including possible permanent loss of defenses and rights; Appellant understood that errors occurring during trial but not raised in timely manner could be lost permanently; Appellant understood the significance and consequences of a decision to waive counsel. *See* Notes of Testimony ("N.T.") Waiver Hearing, 5/2/96. Appellant repeatedly stated that he understood what the court was telling him, and he signed a written waiver at the end of the colloquy, which the court accepted. *Id.* at 22–23. After posing all of the questions required by Rule 121, the trial court determined that Appellant was knowingly, voluntarily, and intelligently waiving his right to counsel. In addition, the court appointed Mr. Andrews, who had been serving as Appellant's counsel and thus was familiar with his case, to serve in the role of stand-by counsel.

It is apparent from the record that, as the PCRA court concluded, the trial court conducted a thorough colloquy, encompassing all of the required questions and safeguards. Appellant's assertions to the contrary have no merit, and we will not hold counsel ineffective for failing to object to a thorough, complete, and proper colloquy. Furthermore, Appellant fails to address in any way the totality of the circumstances surrounding his waiver of counsel, as required under *Mallory.* Appellant does not establish that he was prejudiced, *i.e.,* that he would not have waived his right to counsel but for counsel's failure to object to the colloquy. [11]

Appellant next avers that his decision to waive counsel was not voluntary because it was necessitated by Mr. Andrews's refusal to prepare a guilt-phase defense, which effectively constituted abandonment of his client. Appellant's Brief at 12–15; N.T. PCRA Hearing, 5/11/07, at 84. More specifically, Appellant contends that counsel's failure to investigate and develop an intoxication defense left him no choice but to proceed *pro se.* Appellant's Brief at 14–15. The PCRA court ***53** rejected these claims, crediting Mr. Andrews's PCRA hearing testimony, which clearly belied Appellant's assertion that Mr. Andrews refused to present a defense at the guilt phase of trial. PCRA Court Opinion at 6. In addition, the PCRA court

held that an intoxication defense was not available to ***265** Appellant because he never admitted that he had killed Ms. Amstutz. *Id.* at 8–9.

20 21 The record supports the PCRA court's conclusions. At the PCRA hearing, Mr. Andrews testified that he had advised Appellant to plead guilty, advice that Appellant did not "appreciate[ ]." N.T. PCRA Hearing, 5/10/07, at 175. Mr. Andrews testified neither that he refused to represent Appellant at the guilt phase of his trial, nor that he declined to present a defense. During the guilt phase of trial, Mr. Andrews served as stand-by counsel, in which capacity he provided Appellant with legal advice on a range of issues. *Id.* at 175–76. Appellant's assertion that he had no choice but to represent himself because of abandonment by his counsel was supported only by his own self-serving testimony, which was rejected by the PCRA court. The PCRA court's determination has support in the record, and accordingly we will not disturb it. [12]

22 With regard to Appellant's more specific assertion that his waiver of the right to counsel was not voluntary ***54** because of counsel's failure to investigate and develop an intoxication defense, we reiterate that such a defense is available only to those capital defendants who admit their criminal liability in the murder, but contest their degree of guilt because of an inability to formulate the requisite intent. *See Commonwealth v. Gibson,* 597 Pa. 402, 951 A.2d 1110, 1131–32 (2008). As the PCRA court concluded, Appellant never admitted that he killed Ms. Amstutz, and thus an intoxication defense was not available to him. PCRA Court Opinion at 8.

Although Appellant avers that counsel's failure to investigate an intoxication defense caused his waiver of the right to counsel to be involuntary, Appellant certainly did not pursue any such defense during his *pro se* representation. Rather, throughout his trial, Appellant maintained an innocence defense, repeatedly and consistently attempting to divert blame for the murder of Ms. Amstutz onto others. He has continued to pursue this strategy in his collateral appeal, asserting that Charles Carothers was the killer. *See* Appellant's Brief at 28 ("[T]he jury never heard compelling evidence that Charles Carothers, by his own admission, was the one who killed Ms. Amstutz .... the evidence against Carothers was substantial ... The Carothers confession would have been highly exculpatory evidence at the guilt phase...."). Thus, even now Appellant still fails to admit that he killed Ms. Amstutz. There is absolutely no evidence in the record to suggest that but for counsel's alleged ineffectiveness in failing to investigate and develop an intoxication defense, Appellant would not have waived his right to counsel, and thus Appellant has ***266** not established that he was prejudiced by counsel's alleged failings.

23 In his next sub-claim in Issue 2, Appellant asserts that he was not competent to waive the right to counsel and that Mr. Andrews was ineffective for failing to investigate and raise the issue of Appellant's competency. Appellant's Brief at **18**–19. Appellant contends that his waiver was the product of mental disorders, specifically, "an active PTSD-related thought disorder" and personality disorders, which affected his capacity to waive his rights, and thus rendered his waiver ***55** of the right to counsel not knowing, not voluntary, and not intelligent. *Id.* at 15–17. After considering all of the evidence presented at the PCRA hearing, including the testimony of Mr. Andrews and psychiatrists called as expert witnesses, the PCRA court found that Appellant was competent to represent himself and that his waiver of

counsel was knowing, voluntary, and intelligent. PCRA Court Opinion at 8. Once again, the PCRA court's conclusion is supported by the record, as discussed *infra,* and we will not disturb it.

24 25 26 This Court has previously made clear that "the competency standard for waiving the right to counsel is precisely the same as the competency standard for standing trial, and is not a higher standard." *Commonwealth v. Puksar,* 597 Pa. 240, 951 A.2d 267, 288 (2008) (quoting *Starr,* 664 A.2d at 1339). We have formulated this standard as follows: "whether the defendant has the ability to consult with counsel with a reasonable degree of understanding and whether the defendant has a rational understanding of the nature of the proceedings." *Puksar, supra* at 288–89. The focus is properly on the defendant's mental capacity, *i.e.,* whether he or she has "the *ability* to understand the proceedings." *Starr, supra* at 1339 (citation omitted) (emphasis added in *Starr*). If a court finds a defendant incapable of waiving the right to counsel, then the court must also conclude that the defendant is incapable of standing trial.[13] *Id.* at 1339. Finally, it is ***56** important to recognize that a defendant is presumed to be competent to stand trial, and the burden is on the appellant to prove that he was incompetent. *Commonwealth v. Brown,* 582 Pa. 461, 872 A.2d 1139, 1156 (2005).

At the PCRA hearing, Mr. Andrews testified that, at the time of trial, he had no questions about Appellant's competency because he was lucid and rational, understood questions and responded to them, and conducted himself accordingly in court. N.T. PCRA Hearing, 5/11/07, at 40–41. Mr. Andrews also testified that, at one point in the proceedings, Appellant made an objection to one of the court's ***267** instructions, an objection Mr. Andrews had not considered, but one that was indeed correct. *Id.* at 41. Furthermore, sometime in 1995, prior to trial, Mr. Andrews had retained a psychologist to conduct an assessment of Appellant, and the psychologist's findings included the following: "For forensic purposes, [Appellant] is certainly competent to comprehend and respond to complex matters related to his legal situation. He is, therefore, intellectually competent to stand trial." Forensic Psychological Assessment of Appellant by Stephen A. Ragusea, Psy.D., assessment dates 11/20/95 and 12/12/95, at 7.

Appellant offered PCRA testimony as to this issue from two forensic psychiatrists, Robert A. Fox, Jr., M.D., and Neil Howard Blumberg, M.D. Dr. Fox, who conducted forensic evaluations of Appellant in 2000 and 2007, and reviewed portions of the record, opined that Appellant "was not capable of making rational decisions regarding his litigation in the trial." N.T. PCRA Hearing, 2/22/07, at 143. Dr. Blumberg, who interviewed Appellant three times in 2006, and reviewed background materials, including the trial and sentencing transcripts of all four of Appellant's trials, had a somewhat different opinion. When Dr. Blumberg was asked on direct examination by Appellant's PCRA counsel whether he had determined that Appellant "had any difficulty understanding the questions or the surroundings ... in the courtroom at the time [of trial]," Dr. Blumberg testified as follows: "I ***57** didn't find any evidence that he was impaired in that way, and frankly the disorders that he was suffering from at that time wouldn't preclude his being able to represent himself and ask direct questions and do cross[-]examination." N.T. PCRA Hearing, 1/18/07, at 44–45.

Thus, the PCRA court's rejection of Appellant's claim of incompetence and related claim of ineffective assistance is strongly supported by the record. The psychologist retained by Appellant before trial, as well as one of the psychiatrists retained by Appellant for PCRA proceedings, concluded that Appellant was able to stand trial. Mr. Andrews's own observations of Appellant's lucidity, rationality, comprehension, and conduct during the proceedings further support Appellant's capacity to have stood trial. There is no merit to Appellant's assertion that Mr. Andrews was ineffective for failing to investigate and raise the issue of Appellant's competency. In addition, we must note that Appellant's conduct during his self-representation, as revealed through the notes of testimony, belies any notion that Appellant was legally incompetent to stand trial. *See Commonwealth v. Uderra,* 580 Pa. 492, 862 A.2d 74, 88 (2004) (rejecting the appellant's contention that the trial court had erred in failing to order a competency hearing, because the proffered evidence was insufficient to bring his competency into question, particularly in light of his extensive assistance in his own defense, including his testimony during the penalty phase). Appellant is entitled to no relief on this claim.

27 In the final sub-claim of Issue 2, Appellant alleges that Mr. Andrews's prior representation of Dustin Spotz constituted an undisclosed conflict of interest because counsel's duty of loyalty to his deceased client precluded counsel from pursuing viable avenues of defense for Appellant. Appellant's Brief at 17–**18**. Appellant specifically cites information that counsel would have learned during his representation of Dustin regarding Dustin's mental illness and propensity for violence, including violence against Appellant. Appellant suggests that his counsel did not develop a diminished capacity defense nor present mitigating circumstances based on this ***58** information because of loyalty to Dustin. ****268** Thus, according to Appellant, counsel's failure to disclose this alleged conflict rendered Appellant's waiver of counsel not knowing and not intelligent, and also violated his Sixth Amendment right to counsel at the penalty phase of trial. Appellant's Brief at **18**.

As the PCRA court has pointed out, Appellant raised a similar issue when seeking PCRA relief from his Schuylkill County first-degree murder conviction. PCRA Court Opinion at 6–7; *Spotz V,* 896 A.2d at 1231–32. Mr. Andrews, as part of a tri-county coordinated defense effort on behalf of Appellant, was responsible for investigating and gathering Appellant's background information and institutional records. In *Spotz V,* Appellant asserted that his Schuylkill County trial counsel was ineffective for having relied on the work product of Mr. Andrews, because he was a "conflicted" counsel. *Id.* at 1231. We noted in *Spotz V* that Mr. Andrews's representation of Dustin had terminated in 1990, well before he was appointed to represent Appellant. *Id.* at 1232 & n. 33. We concluded that Appellant not only had failed to demonstrate that Mr. Andrews "actively represented conflicting interests," but also had "failed to show how Attorney Andrews'[s] previous representation of the now deceased Dustin adversely affected trial counsel's representation of [Appellant] in the present matter." *Id.* at 1232.

Similarly, in the instant case, the PCRA court found that Mr. Andrews's prior representation of Dustin affected neither Mr. Andrews's representation of Appellant nor Appellant's decision to represent himself. PCRA Court Opinion at 7. The PCRA court concluded there was no conflict of interest, and we agree.

We have recently reiterated that, to establish a conflict of interest, an appellant must show that "counsel actively represented conflicting interests [,] and the actual conflict adversely affected counsel's performance." *Commonwealth v. Small,* 602 Pa. 425, 980 A.2d 549, 563 (2009) (citing *Spotz V,* 896 A.2d at 1232); *see also Commonwealth v. Weiss,* 604 Pa. 573, 986 A.2d 808, 818 (2009) (rejecting the view that counsel's representation of a client continues until such time as the client's ***59** sentence expires, and requiring a petitioner who alleges a conflict of interest rooted in his counsel's obligation to a former client to establish that the conflict adversely affected counsel's performance). Here, Appellant has established neither that his counsel represented conflicting interests, nor that the alleged conflict adversely affected counsel's performance. In fact, Appellant's allegations of a conflict of interest are vague, entirely speculative, and contradicted by the evidence of record.

At the PCRA hearing, Mr. Andrews testified as follows:

> [I]t was important to show Dustin to have been the aggressor[,] and really the bad guy in Clearfield County[,] that had assaulted [Appellant] and set this chain of events in motion. And I was prepared to do so and didn't feel in any way inhibited from doing so from having previously represented Dustin.

N.T. PCRA Hearing, 5/10/07, at 135. Mr. Andrews also testified that he did not "recall having any privileged information from Dustin that presented a problem in pursuing information that was relevant in [Appellant's] case," and that he did not think there was any conflict in pursuing an investigation or handling Appellant's case in any way. *Id.* at 137. Appellant provides no evidence to the contrary, just bald assertions and gross speculation. As we concluded in *Spotz V, supra* at 1232, "the record reveals that [ ] Attorney Andrews zealously advocated on behalf of [Appellant] and [was] unhampered by any alleged conflict of interest created by Attorney ***269** Andrews'[s] prior representation of Dustin."

Thus, all of Appellant's claims of error in issue 2 lack merit, and no relief is warranted.

3. Exclusion of Witman Testimony

In Appellant's third issue, he contends that the trial court erred in barring the testimony of one Thomas Witman, and that Mr. Andrews was ineffective for failing to argue in favor of the admissibility of this testimony and for failing to raise the issue on direct appeal. The factual background to this ***60** issue is as follows. Evidence admitted at trial indicated that, on the day of Ms. Amstutz's murder, a man named Charles Carothers engaged in drug use with Appellant in the hotel room secured with Ms. Amstutz's credit card and also drove her car from the hotel. N.T. Trial, 5/13/96, at 797–801, 815–820. On April 3, 1996, Thomas Witman, who was in custody for an unrelated crime, made a statement to police to the effect that he had overheard Mr. Carothers admit to the murder of Ms. Amstutz. More specifically, Mr. Witman represented that, sometime between May and July of 1995, when he was in the Cumberland County prison, he had overheard a conversation between two other inmates, Mr. Carothers and someone named Vernon, who was subsequently identified as Vernon Robinson, in which Mr. Carothers admitted shooting Ms. Amstutz.[14] Statement of Thomas Witman, dated 4/3/96. The trial court refused to admit the testimony of Mr. Witman regarding

Mr. Carothers's statement, determining that it was hearsay to which no exception applied. Appellant argues that Mr. Witman's testimony was admissible both under the hearsay exception for a statement against interest and also pursuant to federal constitutional law as set forth in *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

At the PCRA hearing, both Mr. Witman and Mr. Robinson testified; however, Mr. Carothers, through his attorney, invoked his Fifth Amendment right against self-incrimination and did not appear. N.T. PCRA Hearing, 5/10/07, at 62. Mr. Witman testified that his 1996 statement to police concerning the overheard confession was accurate, and that he had attempted to contact the district attorney's office regarding the matter. *Id.* at 66–67, 73–75. Mr. Witman had an extensive ***61** record, including prior convictions for *crimen falsi,* and he acknowledged that he was cooperating with the police on other crimes of which he had knowledge because he wanted to help himself. *Id.* at 87. Vernon Robinson, the inmate to whom Mr. Carothers allegedly confessed, testified that he remembered a conversation with Mr. Carothers as follows:

> *Defense Counsel:* Do you remember what [Mr. Carothers] said about why he was in [prison]?
>
> *Mr. Robinson:* About him getting high with some guy riding around with a lady in the trunk.

* * *

> *Defense Counsel:* Did he say whether the lady was alive?
>
> ***270** *Mr. Robinson:* He basically said that she was alive when they put her in the trunk, you know what I'm saying, and later on he said that she was dead.

* * *

> *The Court:* Did he say anything more about [Appellant]?
>
> *Mr. Robinson:* Yeah. That pretty much he was going to let him fry for what he had done. That's when I ended the conversation....

* * *

> *Defense Counsel:* At some point did you talk to prison officials or guards about Mr. Carothers being in your cell?
>
> *Mr. Robinson:* Yes, I did. When we went to dinner and after we came back from dinner, this is when I found out that he was telling on [Appellant]. So I went to the guard at the time. .... [T]he next morning ... C.O. Durnin moved him out the cell.

Id. at 98–100. Mr. Robinson also testified that he would have testified at Appellant's trial if Appellant's counsel had asked him. *Id.* at 100–04.

28 Appellant's claim of trial court error in Issue 3 is both waived and not cognizable under the PCRA because it could have been raised on direct appeal. *See* 42 Pa.C.S. §§ 9543(a)(3) and 9544(b). With regard to the ineffective assistance claims in Issue 3, the PCRA court relied in part on ***62** this Court's decision in *Commonwealth v. Bryant,* 579 Pa. 119, 855 A.2d

726, 736–38 (2004), to hold that Appellant was precluded from raising any claims of ineffective assistance of counsel from the guilt phase of his trial because he had elected to exercise his right to self-representation during that period. PCRA Court Opinion at 12–14. The PCRA court also concluded that Appellant's claim of ineffective assistance of direct appeal counsel had no arguable merit because Mr. Witman's testimony concerning Mr. Carothers's alleged confession was properly excluded as hearsay. *Id.* at 14 –22. We agree with the PCRA court, and address these conclusions in more detail below.

29 In *Faretta v. California, supra,* the United States Supreme Court held that a defendant has a Sixth Amendment right to conduct his own defense; however, "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' " *Id.* at 834 n. 46, 95 S.Ct. 2525. Relying on *Faretta,* this Court has held that, when an appellant knowingly, voluntarily, and intelligently has chosen to exercise his right to self-representation, we will not consider any ineffective assistance claims that arose from the period of self-representation. *Bryant, supra* at 737; *see also Commonwealth v. Fletcher,* 586 Pa. 527, 896 A.2d 508, 522 n. 13 (2006) (*Fletcher II*) (explaining that the Court was applying the categorical approach of the *Bryant* majority "in refusing to consider any claims of ineffectiveness arising from a period of self-representation"); *Commonwealth v. Fletcher,* 604 Pa. 493, 986 A.2d 759, 774, 778 (2009) (*Fletcher III*) (refusing to revisit the holding of *Fletcher II,* and reiterating that a defendant who chooses to represent himself cannot obtain relief by raising his own ineffectiveness or that of standby counsel).

However, we have also recognized that a defendant may withdraw his waiver of the right to counsel. When the defendant in *Bryant* claimed, in the midst of his trial, to be unable to continue his self-representation because of a dental problem, the trial court held a colloquy with the defendant, during which he affirmed that, going forward, he wanted his ***63*** stand-by counsel to assume the role of trial counsel. *Id.* at 737–38. The trial court then permitted ****271*** the defendant to withdraw his waiver, and once again be represented by counsel. *Id.* at 738.

In the instant case, Appellant represented himself throughout the guilt phase of his trial. As discussed in Issue 2, after a thorough colloquy, the trial court determined that Appellant had knowingly, voluntarily, and intelligently waived his right to counsel, and, accordingly, the court permitted him to proceed *pro se.* Throughout the guilt phase of his trial, Appellant continued to call and question witnesses, raise objections, and otherwise serve as his own counsel; at no point during the guilt phase did Appellant seek to withdraw his waiver of the right to counsel or to cease his self-representation. Nonetheless, Appellant now attempts to avoid the application of *Bryant's* bright-line rule by arguing that, with respect to the particular matter of the admissibility of Mr. Witman's testimony, he permitted Mr. Andrews to represent him. However, our review of the record, as presented in detail below, does not support Appellant's assertion that he withdrew his waiver of the right to counsel or abandoned his exercise of the right to self-representation at this or any other point during the guilt phase of his trial.

When Appellant sought to call Mr. Witman to testify, Appellant himself—not Mr. Andrews, his standby counsel—made a proffer to the court, in the

absence of the jury, as to Mr. Witman's proposed testimony. N.T. Trial, 5/14/96, at 1222–25. The court then addressed Mr. Witman, whom the sheriff had brought to the courtroom, and, after determining that Mr. Witman wished to speak with counsel before he spoke to the court, secured an attorney for Mr. Witman. *Id.* at 1225–26. Later in the same session, after his discussion with counsel, Mr. Witman was again brought to the courtroom, and the Commonwealth objected to his proposed testimony as hearsay. *Id.* at 1283. In response, Appellant himself—again, not Mr. Andrews—argued that there had been testimony at trial as to the involvement of Mr. Carothers in the case. The court then asked Appellant if he was going to call Mr. Carothers as a ***64** witness, and Appellant himself answered "I certainly don't know what he could say or—what his statements say are nothing to help me." *Id.* at 1284. Following a discussion off the record between Appellant and Mr. Andrews, Appellant himself reiterated that he was not going to call Mr. Carothers. *Id.* at 1285. The court then indicated that it wanted additional time to consider the matter of Mr. Witman's proposed testimony. *Id.* at 1287.

At the end of the day-long session, the court stated that it was ready to entertain argument about the admissibility of Mr. Witman's testimony, and the court asked Appellant if he wanted to make that legal argument or if he would trust Mr. Andrews to do so. *Id.* at 1424–25. After conferring with Mr. Andrews, Appellant stated the following: "Mr. Andrews said that, has indicated that there is no argument to be made. Witman cannot be used unless ... Carothers would be an unavailable witness." *Id.* at 1425. The following dialogue then occurred:

The Court: Well, I am ready to entertain any argument.

[*Appellant*]: There is no argument to present.

The Court: You are telling me that if there is any argument to present, Mr. Andrews will present it instead of yourself? Is that it?

[*Appellant*]: That is fine.

The Court: All right.

[*Appellant*]: But Mr. Andrews indicated there is no argument. So if you find some, I guess that is fine, he can make it.

****272** *The Court:* I am looking at the whole issue.

Mr. Andrews: I think [Appellant] has said that he would agree to me speaking to this.

[*Appellant*]: Yeah, that is fine.

Mr. Andrews: I don't think—I hate to speak for the District Attorney, but we have exchanged cases, or at least they have given me their cases, and they are the same cases I had. I don't think there is a disagreement with the law. This statement could only be admitted if Mr. Carothers ***65** were unavailable. If he is unavailable, then there is a decision for the Court to make as to whether that renders the statement admissible.

The Court: Well, I think, for openers, you have to call Carothers.

[*Appellant*]: Call him as a witness?

The Court: Yes. Because ... he is available and can be brought up here to testify.

Mr. Andrews: In the absence of that, I think what [Appellant] is saying is accurate, I don't think there is an argument, a disagreement, a divergent point of view between the two tables.

* * *

The Court: At this point, you haven't done what I feel has to be done to get this statement in.

[*Appellant*]: I will.

The Court: So at this point—

[*Appellant*]: I will.

The Court:—you should know it is not going in. That could change, but that depends on the circumstances. All right. This part of the record is closed.

Id. at 1425–29.

Immediately following the above discussion, the court adjourned for the day. During proceedings the next morning, Appellant requested a break in order to speak with Mr. Carothers before calling him as a witness. The jury was escorted from the courtroom, and the following discussion transpired:

The Court: Did you have something you wanted to say, Mr. Andrews? Or who is running the show?

Mr. Andrews: I am going to sit down, Your Honor.

The Court: .... Did you [Appellant] want to say something to me now?

[*Appellant*]: I just ask for a few minutes to talk to my next witness before—I never talked to him. He was originally a Commonwealth witness.

***66** *The Court:* Oh, you understand that Carothers wants to speak to you, is that what you are saying?

[*Appellant*]: Yes, sir.

The Court: Is Mr. Carothers in the courtroom? Would you stand up so I can see you? You want to speak to [Appellant]?

Mr. Carothers: (Shook head negatively.)

The Court: He shakes his head no.

[*Appellant*]: I had the law clerk ask him—and she told me—if he was willing to speak to me. And she said yes. That is why I ask. I guess now he changed his mind.

The Court: Stand up again, Mr. Carothers. You are Charles Carothers?

Mr. Carothers: (Nodded affirmatively.)

The Court: Can you answer?

Mr. Carothers: Yeah.

The Court: Do you want to speak to [Appellant]?

Mr. Carothers: If he needs to talk to me or something.

The Court: Pardon me?

Mr. Carothers: If he needs to talk to me, I guess.

The Court: Do you want to talk to him?

****273** *Mr. Carothers:* If he needs to talk to me.

The Court: Can you give me a yes or a no?

Mr. Carothers: No.

The Court: What?

Mr. Carothers: No.

The Court: No. Is that your answer?

Mr. Carothers: Yeah.

The Court: All right. Now, where else are we going here, [Appellant]?

[*Appellant*]: I had asked to speak to him. He said if I want to speak to him, he will speak to me. He has no need to speak to me unless I have need to speak to him. And he said he will talk to me if I want him to. I want a chance to speak to him.

***67** *The Court:* Okay. Mr. Carothers, come on up.

N.T. Trial, 5/15/96, at 1501–03.

The sheriff then escorted Appellant and Mr. Carothers from the courtroom to allow Appellant the opportunity to consult with Mr. Carothers, and the court was in recess for approximately one-half hour. *Id.* at 1504. When all the parties were back in the courtroom, the following dialogue took place:

The Court: .... Where are we on this business, [Appellant]?

[*Appellant*]: The only thing left is to read in the transcripts of the witnesses that invoked their Fifth Amendment right, and the stipulation of Trooper Lander's—

The Court: You have had your opportunity to talk to Carothers, and you are not calling him, is that it?

[*Appellant*]: No, I will let it go.

The Court: All right. Then bring the jury down, and let's get these pieces of evidence read.

Id. at 1504.

30 The above excerpts of the notes of testimony make clear that Appellant did not withdraw his waiver of the right to counsel or change his mind about exercising his right to self-representation, but rather continued to prepare, direct, and present his own defense, including developing his own strategy, interviewing the witness, and deciding whether or not to call the witness.

Therefore, Appellant's claim of ineffective assistance of counsel during the guilt phase of his trial is precluded by the categorical rule promulgated by this Court in *Bryant*.

31 Also in Issue 3, Appellant contends that Mr. Andrews was ineffective for not claiming on direct appeal that the trial court had erred by denying admission of Mr. Witman's testimony as hearsay. Appellant argues that Mr. Witman's testimony was admissible under the hearsay exception for a statement against interest, which reads as follows:

> ***68** **(b) Hearsay Exceptions.** The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless ***274** corroborating circumstances clearly indicate the trustworthiness of the statement.

Pa.R.E. 804(b)(3).

Notably, by its unmistakably clear text, this hearsay exception requires not only that the statement be against interest, but also that there be corroborating circumstances clearly indicative of its trustworthiness, and that the declarant be unavailable. In the instant case, the trial court did not reach the issue of the trustworthiness of the statement in question because the declarant in the instant case, *i.e.,* Mr. Carothers, was **not** unavailable. *See* N.T. Trial, 5/14/96, at 1427. In fact, as presented *supra* in the excerpts of notes of testimony, on the last day of trial, Mr. Carothers was physically present in the courtroom. Appellant actively contemplated calling Mr. Carothers as a witness, but, after conferring privately with Mr. Carothers, Appellant told the court that he was not going to call Mr. Carothers to the witness stand. The trial court correctly concluded that Mr. Carothers was **not** unavailable, and accordingly, did not err in refusing to apply the hearsay exception for a statement against interest to Mr. Witman's proffered testimony. Because Appellant's underlying claim of trial court error has no merit, his claim of direct appeal ***69** counsel ineffectiveness for failing to raise the claim of alleged trial court error must fail.[15]

Appellant also contends that appellate counsel should have argued that the exclusion of Mr. Witman's proffered testimony was unconstitutional, based on *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In considering Appellant's contention, the PCRA court concluded that the factual distinctions between *Chambers* and the instant case were too numerous for *Chambers* to be controlling. PCRA Court Opinion at 21–22. We agree.

In *Chambers,* during the appellant's murder trial, he had sought to introduce testimony from three persons that an acquaintance, one Gable McDonald,

had confessed to them that he had committed the murder. The trial court refused to admit this testimony, determining that it was hearsay. *Id.* at 298–99, 93 S.Ct. 1038. However, the U.S. Supreme Court concluded that the testimony rejected by the trial court "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." *Id.* at 302, 93 S.Ct. 1038. Specifically, the following circumstances of McDonald's confession provided assurance of its reliability: McDonald had spontaneously made three verbal confessions to close acquaintances shortly after the murder, and he had sworn and signed a confession at the offices of the appellant's attorney. ***275 *70** *Id.* at 300, 93 S.Ct. 1038. The Supreme Court generally concluded as follows: "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302, 93 S.Ct. 1038.

Appellant attempts to rely on this general conclusion from *Chambers,* but it does not provide him relief in the instant case because the circumstances of *Chambers* bear little, if any, resemblance to his own circumstances. None of the assurances of trustworthiness concerning McDonald's confession in *Chambers* is present in Carothers's alleged confession in the instant case. Mr. Carothers's alleged jailhouse confession was overheard by one other individual, who was another inmate; it was not sworn and signed in counsel's office; and it was not repeated verbally to three acquaintances.

32 In addition, it must be noted that the high Court's reversal of the appellant's judgment of sentence in *Chambers* was not based solely on the trial court's exclusion of certain evidence as hearsay. Rather, it was the concurrent application of **two** state rules of evidence, not only the hearsay rule but also the voucher rule, [16] that had deprived the appellant of due process and rendered his trial unfair:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers [the appellant] of a fair trial.
> *Id.* at 302–03, 93 S.Ct. 1038.

The above considerations make clear that the United States Supreme Court ruling in *Chambers* was highly dependent upon the facts and circumstances of that case, in which an unusual convergence of two state rules of evidence resulted in ***71** an injustice of constitutional proportions. *Chambers* cannot generally be relied upon to support common, straightforward challenges to hearsay rulings that have correctly applied state criminal procedure. The facts and circumstances of *Chambers* are very different from those presented in the instant case, and, accordingly, *Chambers* provides Appellant no relief.

33 In the final part of Issue 3, Appellant asserts that the Commonwealth withheld exculpatory evidence, in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), concerning Mr. Carothers's involvement in another, unrelated murder more than two years earlier, for which he had not been prosecuted. [17] Appellant's assertion is frivolous.

34 35

Under *Brady* and subsequent decisional law, a prosecutor has an obligation to disclose all exculpatory information ****276** material to the guilt or punishment of an accused, including evidence of an impeachment nature. *See, e.g., Commonwealth v. Strong,* 563 Pa. 455, 761 A.2d 1167, 1171 & n. 5 (2000). To establish a *Brady* violation, an appellant must prove three elements:

> [1] the evidence [at issue] was favorable to the accused, either because it is exculpatory or because it impeaches; [2] the evidence was suppressed by the prosecution, either willfully or inadvertently; and [3] prejudice ensued.

Commonwealth v. Lambert, 584 Pa. 461, 884 A.2d 848, 854 (2005) (citation omitted).

36 37 The evidence at issue must have been "material evidence that deprived the defendant of a fair trial." *Commonwealth v. Johnson,* 572 Pa. 283, 815 A.2d 563, 573 (2002). ***72** "Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Kyles v. Whitley,* 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)); *see also Wood v. Bartholomew,* 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (*per curiam*) (holding that it was not reasonably likely that disclosure of the result of a key witness's polygraph examination, which was inadmissible under state law, would have resulted in a different outcome at trial). *Brady* sets forth a limited duty, not a general rule of discovery for criminal cases. *Lambert, supra* at 854 (citing *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) for the proposition that "there is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"); *Commonwealth v. Counterman,* 553 Pa. 370, 719 A.2d 284, 297 (1998).

38 The burden rests with the appellant to "prove, by reference to the record, that evidence was withheld or suppressed by the prosecution." *Commonwealth v. Porter,* 556 Pa. 301, 728 A.2d 890, 898 (1999). There is no *Brady* violation when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from non-governmental sources. *Lambert, supra* at 856; *Commonwealth v. Paddy,* 569 Pa. 47, 800 A.2d 294, 305 (2002).

Here, Appellant contends that the Commonwealth withheld evidence that, more than two years before Ms. Amstutz's murder, Mr. Carothers was implicated in, but never charged with, the murder of one Samuel Thompson. Another individual, Phillip Devenshire, was convicted of Mr. Thompson's murder in 1993, although three witnesses at Mr. Devenshire's trial, including the defendant himself, testified that Mr. Carothers was the shooter. Mr. Devenshire was convicted nearly three years before Appellant's trial, and Appellant provides no evidence that Mr. Thompson's murder was in any way related ***73** to Ms. Amstutz's murder. Nonetheless, Appellant asserts that the evidence implicating Mr. Carothers in Mr. Thompson's murder was probative to show Mr. Carothers's motive and intent, as well as his violent propensities, including his propensity to commit the murder of Ms. Amstutz. Appellant's Brief at 24–25. Remarkably, Appellant further asserts the following as to the

significance of the evidence implicating Mr. Carothers in Mr. Thompson's murder: "[T]he suppressed evidence was clearly exculpatory and highly material. The prior murder accusations showed Carothers was the likely shooter." *Id.* at 26.

****277** The PCRA court did not address the above allegations as a *Brady* issue. However, the PCRA court did find Appellant's suggestion that evidence as to Mr. Thompson's murder could have been admissible at Appellant's trial for the murder of Ms. Amstutz to be "totally without legal merit." Supplemental Opinion Pursuant to Pa.R.A.P. 1925 of the PCRA Court, dated 8/7/08, at 8.

39 We conclude that none of Appellant's allegations has any basis in fact or in law, and his assertion of a *Brady* violation is frivolous. First, the involvement of Mr. Carothers in the murder of Mr. Thompson is a matter of pure conjecture. Mr. Carothers was not arrested for, not charged with, not tried for, not convicted of the Thompson murder. The "evidence" that Mr. Carothers killed Mr. Thompson consists of some testimony presented at the trial of Mr. Devenshire. Three witnesses, one of whom was Mr. Devenshire himself, testified that Mr. Carothers was the shooter, but the jury must have concluded that the testimony was not credible, as it found Mr. Devenshire guilty of the first-degree murder of Mr. Thompson. Second, regardless of whether Mr. Carothers participated in Mr. Thompson's murder, it is simply unfounded, improper, and indeed outlandish to suggest, as Appellant does, that because Mr. Carothers committed one murder, he must also have committed a second, unrelated murder years later. There is literally no way that the evidence implicating Mr. Carothers in the murder of Mr. Thompson could possibly be exculpatory of Appellant for the murder of Ms. Amstutz. ***74** Finally, Appellant fails to suggest how the Commonwealth could have withheld, willfully or otherwise, testimony presented in a public trial. Appellant's *Brady* claim in Issue 3, like the other claims presented in this issue, is entirely meritless, and Appellant is entitled to no relief. [18]

4. Prosecutor Misconduct during Guilt Phase Closing Argument

In Issue 4, Appellant argues that several comments made by the prosecutor during the guilt phase closing argument destroyed the jury's objectivity and impartiality and, accordingly, deprived Appellant of a fair trial. Appellant also asserts that Mr. Andrews, in his role as stand-by counsel, was ineffective for neither objecting to these comments, nor advising Appellant, who was acting *pro se* during this time, to object. Finally, Appellant asserts that counsel was ineffective for failing to challenge the comments on direct appeal. *See* Appellant's Brief at 28–31.

40 The PCRA court held that all of Appellant's claims of prosecutorial misconduct were waived because he did not make a contemporaneous objection to the allegedly improper comments. In addition, the PCRA court held that no ineffective assistance of counsel claim derived from the guilt phase of trial was available to Appellant, because he had chosen to represent himself during that portion of the proceedings. PCRA Court Opinion at 22–23 (citing *Bryant,* 855 A.2d at 726, 737; *Fletcher* *****278 II,*** 896 A.2d at 522 n. 13). We agree with these conclusions of the PCRA court.

***75** For the same reasons as we discussed in Issue 3, Appellant is precluded from raising a claim of ineffective assistance of trial counsel arising from the guilt phase of his trial. *See* text *supra* (discussing *Bryant* and *Fletcher* in the

context of Issue 3); *see also Fletcher III,* 986 A.2d at 774 ("The law is clear that a defendant cannot allege his own ineffectiveness or that of standby counsel.") Because Appellant did not object to the prosecutor's comments, the issue was not preserved for direct appeal, but rather was waived. There is no merit to Appellant's claim that appellate counsel was ineffective for failing to raise, on direct appeal, a waived claim of trial court error related to the prosecutor's comments. *See, e.g., Commonwealth v. Freeman,* 573 Pa. 532, 827 A.2d 385, 397 (2003) (recognizing as "elementary [the principle] that issues not preserved for appellate review ... will not be considered by an appellate court") (citation omitted).

Appellant attempts to avoid these bars to merits review by invoking the direct capital appeal relaxed waiver doctrine, which was in effect at the time his direct appeal was decided. Under relaxed waiver, this Court retained the discretion to review issues in capital appeals that had not been properly preserved. *See Freeman, supra* at 393–403 (explaining the background of the relaxed waiver doctrine, and prospectively abrogating the doctrine on direct capital appeals). Appellant asserts that Mr. Andrews, in his role as appellate counsel, should have invoked the relaxed waiver doctrine to raise a challenge on direct appeal to the prosecutor's comments.

A similar issue has been raised before this Court on several occasions. In *Commonwealth v. Duffey,* 585 Pa. 493, 889 A.2d 56, 64 (2005), we refused to grant relief on a claim of appellate counsel ineffectiveness for failing to raise a waived claim of trial court error under the relaxed waiver doctrine, noting that this doctrine was discretionary, and thus there was no guarantee that we would have reviewed the issue. In *Fletcher III,* 986 A.2d at 775, 779, we declined to allow an appellant to invoke the relaxed waiver doctrine to obtain review of several issues he had waived during a period of *pro se* representation. To allow an appellant to obtain review under relaxed waiver of ***76** an issue that he waived as a *pro se* litigant would completely undermine the holdings of this Court in *Bryant* and *Fletcher II.* However, in *Commonwealth v. Williams,* 594 Pa. 366, 936 A.2d 12, 24–26 (2007), we held that direct appeal counsel **was** ineffective for failing to invoke relaxed waiver to secure review of a claim that implicated the appellant's actual innocence of a racketeering charge. *Id.* at 25–26. We recognized in *Williams, supra,* the difficulty faced by this Court in determining the likelihood that we would have reviewed a particular claim under relaxed waiver when we are faced with collateral claims that direct appeal counsel was ineffective in failing to invoke relaxed waiver. *Id.* at 25.

41 We have, however, no difficulty concluding in the instant case that we would not have accepted any of Appellant's waived claims of prosecutorial misconduct for review under the relaxed waiver doctrine. None of Appellant's claims implicates actual innocence; indeed, the claims are trivial, as they do not reflect any logical or reasonable reading of the prosecutor's comments. The challenged comments from the prosecutors closing argument are as follows.

First, Appellant asserts that the prosecutor demeaned Appellants rights to present a defense and to self-representation with the following comment:

> ****279** Because [Appellant] is an extremely controlling individual. And he wanted to come in here in front of you and show how

> smart he is, and how he can control things, and how he manipulates women, and then fool you.

N.T. Trial, 5/15/96, at 94 (Closing Argument) (quoted in Appellant's Brief at 28 & n. 24).

Second, Appellant asserts that the prosecutor improperly argued that the jurors had a duty to society and the victim to convict him, apparently based upon the following excerpt:

> The duty on you now is just to be fair. When you are being fair to him, you also have got to be fair to the people of this state, and to Betty Amstutz.

Id. at 91 (cited in Appellant's Brief at 29).

Third, Appellant asserts that the prosecutor improperly opined to the jury that it needed to decide *only* the identity of ***77** the perpetrator, and not the other elements of the crime, based apparently on the following comments:

> First degree murder has four elements. Betty Amstutz is dead. The Commonwealth has to prove that. And I don't think there is any doubt about it. Secondly, that that defendant is the one who killed her. Third, that that killing was with malice. That means that hardness of heart, cruelty, disposition. And, finally, that it was done with the specific intent to kill. I submit to you, whoever did this to a seventy year old woman had malice and specific intent. So we are down to one thing. Is that the guy that was pulling the trigger?
>
> You have got some special tools to use in this particular case. Because I have to show things that are state of mind.
>
> * * *
>
> I have got the burden of proof in this case. Got to prove each and every one of those four elements beyond a reasonable doubt.

Id. at 91, 93 (cited in Appellant's Brief at 29–30).

Fourth, Appellant asserts that the prosecutor improperly commented that the judge was *required* to give instructions as to second- and third-degree murder, based on the following:

> We are charging murder in the first degree. You are going to hear the Judge required to [sic] give you instructions about third degree murder and second degree murder. I will say that those are lesser crimes of first degree murder.

Id. at 91 (cited in Appellant's Brief at 30).

There is no question that, if appellate counsel had invoked the relaxed waiver doctrine in an attempt to obtain review of the above comments, we would have declined to grant such review. Appellant's assertions of prosecutorial misconduct are unquestionably refuted and belied by the plain text of the prosecutor's comments. Far from presenting any significant constitutional issues or implicating actual innocence, Appellant's claims are frivolous, ignoring not just the context of the ***78** comments, but the obvious

plain meaning. Appellant is not entitled to relief on any of his claims in Issue 4.[19]

***280 *79* **5. Jury Instruction as to Intent**

In Issue 5, Appellant challenges the following ***281** portion of the trial court's jury instruction, delivered at the close of the guilt phase: "If you believe that the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant had the specific intent to kill." N.T. Trial, 5/15/96, at 1562. Appellant asserts that this instruction diminished the Commonwealth's burden of proof and thereby violated due process because it "did not require the jury to find that [Appellant] *intended to* ***80** *aim* the gun at a vital part of the deceased's body."[20] Appellant's Brief at 31 (emphasis in original). Appellant further asserts that counsel was ineffective for failing to raise this issue in post-verdict briefing or on direct appeal.

42 Appellant again fails to acknowledge that, throughout the guilt phase of trial, he represented himself, and thus, as we have discussed in Issues 3 and 4 *supra,* no claim of ineffective assistance of trial counsel during the guilt phase is available to him. *See Bryant,* 855 A.2d at 738–39 (rejecting the appellant's claim of counsel ineffectiveness based on failure to request a cautionary instruction upon the introduction of "bad acts" evidence, because the appellant was representing himself when the complained-of evidence was introduced and he failed to object or to request a cautionary instruction). As we also discussed in Issue 4, because the issue was not preserved with a contemporaneous objection, it was waived; direct appeal counsel was not, and could not have been, ineffective for failing to raise a waived issue.[21] Appellant is entitled to no relief.

6. Prior Criminal Acts Evidence and Jury Instruction

43 In Issue 6, Appellant argues that the admission of evidence related to his other homicides in Clearfield, Schuylkill, and York counties without an "appropriate" and "immediate" cautionary instruction violated the Sixth, Eighth, and Fourteenth Amendments. Appellant's Brief at 32. On direct ***81** appeal, this Court held that the trial court did not err with respect to the timing or content of the limiting instruction as to other crimes evidence. *Spotz III,* 759 A.2d at 1286–87. Recognizing that Appellant's claim of trial court error in Issue 6 had been previously litigated and was therefore not cognizable under the PCRA, the PCRA court correctly held that Appellant was entitled to no relief on this issue. PCRA Court Opinion at 24.

44 However, as another sub-claim in Issue 6, Appellant further asserts that direct appeal counsel was ineffective in the manner in which he challenged the jury instruction. More specifically, Appellant argues that direct appeal counsel was ineffective because he failed to raise a violation of Appellant's state and federal constitutional ***282** rights, but rather relied only upon state decisional law. This is a distinct claim and one that has not been previously litigated. *See Commonwealth v. Collins,* 585 Pa. 45, 888 A.2d 564, 573 (2005) (holding that "a Sixth Amendment claim of ineffectiveness raises a distinct legal ground for purposes of state PCRA review under § 9544(a)(2) ... [and] a PCRA court should recognize ineffectiveness claims as distinct issues and review them under the three-prong ineffectiveness standard announced in [*Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973 (1987)]").

Although ineffective assistance of direct appeal counsel is a distinct claim, Appellant fails to develop and argue it as such. Other than baldly asserting four times that the failure to provide an appropriate and/or immediate instruction to the jury constituted a violation of his Sixth, Eighth, and Fourteenth Amendment rights, Appellant does not explain or develop this issue. *See* Appellant's Brief at 32–34. He sets forth **no** constitutional argument relevant to either the federal or state Constitution. Remarkably, although Appellant faults direct appeal counsel for, *inter alia,* "failing to cite to federal law," Appellant likewise fails to cite even a single federal case to support his bald assertion of federal constitutional violations. Nor does he offer the slightest explanation or elucidation of his claim of a state constitutional violation. A constitutional claim is not self-proving, and we will not attempt to ***82** divine an argument on Appellant's behalf. Appellant's claim of ineffective assistance of direct appeal counsel in Issue 6 is waived for lack of development. *See Commonwealth v. Steele,* 599 Pa. 341, 961 A.2d 786, 797 (2008) (stating that when an appellant fails "to set forth all three prongs of the ineffectiveness test and [to] meaningfully discuss them, he is not entitled to relief, and we are constrained to find such claims waived for lack of development").

PENALTY PHASE ISSUES

7. Jury Instruction on Aggravating and Mitigating Factors as Affecting "Terribleness"

Appellant's next four issues, *i.e.,* Issues 7–10, are related to various aspects of the aggravating and mitigating circumstances presented, or not presented, during the penalty phase of Appellant's trial. In Issue 7, Appellant challenges one sentence of the trial court's jury instruction generally explaining the concept of aggravating and mitigating circumstances.

> [A]ggravating circumstances are things about the killing or the killer which make first degree murder—which make a first degree murder case *more terrible* and deserving of the penalty; while mitigating circumstances are those things which make the case *less terrible* and less deserving of death.

N.T. Penalty Phase, 5/15/96, at 1619 (cited in Appellant's Brief at 73) (emphasis added).

Appellant contends that this instruction's focus on " 'terribleness' produced an arbitrary and capricious sentence based upon passion and prejudice [and that] the 'less terrible' instruction substantively impaired the jury's consideration of mitigating evidence." Appellant's Brief at 73. Appellant further asserts that counsel was ineffective for agreeing to the above portion of the instruction and for failing to raise the matter on direct appeal. *Id.* at 74.

The PCRA court points out that the challenged instruction was, at the time of trial in 1996, part of a Pennsylvania ***83** suggested standard criminal jury instruction.[22] ****283** PCRA Court Opinion at 57. Appellant acknowledges that this Court has repeatedly rejected challenges to this instruction, and that he is presenting it "to preserve it for future review." Appellant's Brief at 74.

As Appellant correctly notes, this Court has, indeed, consistently rejected challenges to inclusion of the concept of "terribleness" in the instruction regarding aggravating and mitigating circumstances. *See Commonwealth v. Washington,* 592 Pa. 698, 927 A.2d 586, 613–14 (2007) (rejecting the

appellant's assertion that the instruction improperly restricted the weight afforded mitigating factors that did not affect the "terribleness" of the offense); *Commonwealth v. Marinelli,* 589 Pa. 682, 910 A.2d 672, 687 (2006) (Opinion Announcing the Judgment of the Court) (rejecting the appellant's assertion that the description of circumstances as " 'more terrible or less terrible' diverted the focus of the jury's life or death deliberation from a reasoned determination as to the defendant's personal culpability to an amorphous and unguided consideration of how 'terrible' 'the case' was"); *Commonwealth v. Johnson,* 572 Pa. 283, 815 A.2d 563, 588 (2002) (concluding that the instructions "merely expressed to the jury, in laymen's terms, the purpose for the distinction between aggravating and mitigating circumstances in a capital penalty phase"); *Commonwealth v. Hawkins,* 567 Pa. 310, 787 A.2d 292, 308 (2001) (concluding that a jury instruction defining aggravating and mitigating circumstances, respectively, as "things that make first degree murder cases either more or less terrible" was not amorphous or unguided because instructions must be read in their entirety and because the court also gave detailed instructions as to each aggravating and mitigating circumstance); *Commonwealth v. Saranchak,* 544 Pa. 158, 675 A.2d 268, 276–77 (1996) (holding a jury instruction proper that defined aggravating and mitigating circumstances, respectively, as "things that make a first degree murder case more or less ***84** terrible," and noting that the instruction was in conformity with the Pennsylvania Suggested Standard Criminal Jury Instructions). Based on this Court's ample precedent, Appellant's claims in this issue are meritless.

8. Prior Homicide Convictions as Aggravating Factors

45 In Issue 8, Appellant asserts that, because his prior three homicide convictions, in Clearfield, Schuylkill, and York counties, respectively, were "invalid," they were improperly introduced during the penalty phase as evidence of the aggravating circumstances set forth in 42 Pa.C.S. § 9711(d)(9) and (d)(11), *i.e.,* respectively, a significant history of violent felony convictions, and prior conviction of another murder.[23] Appellant's Brief at 9–12. Appellant further asserts that counsel was ineffective in failing to challenge the admissibility of the prior convictions during the penalty phase of trial or on direct appeal. *Id.* at 12. There is no legal basis ****284** for Appellant's claim.[24]

46 This Court has expressly held that the term "conviction" means simply "found guilty" when used in the context of the aggravating circumstances set forth in 42 Pa.C.S. § 9711(d). ***85** *Commonwealth v. Morales,* 508 Pa. 51, 494 A.2d 367, 376 (1985) (citing *Commonwealth v. Beasley,* 505 Pa. 279, 479 A.2d 460, 464 (1984)). A collateral murder conviction is not divested of its character as an aggravating circumstance merely because it remains at the appeal stage. *Id.* at 376. Only if the conviction is overturned on appeal could an error ensue. *Id.; Beasley, supra* at 464.

Appellant was convicted of the first-degree murder of June Ohlinger, in Schuylkill County, and Penny Gunnet, in York County, and this Court affirmed Appellant's judgment of sentence of death in each case. *See Spotz I,* 716 A.2d at 593; *Spotz II,* 756 A.2d at 1165. This Court also denied Appellant's appeal of the denial of PCRA relief in the Schuylkill County case. *See Spotz V,* 896 A.2d at 1250. Although the Superior Court initially reversed Appellant's conviction for voluntary manslaughter in the death of Dustin Spotz in Clearfield County, this Court reinstated that conviction. *See Spotz IV,* 870 A.2d at 837. Thus, none of Appellant's convictions has been

overturned, and all were properly proffered and admitted as aggravating circumstances. Because there is no arguable merit to Appellant's underlying claim of error with regard to use of the convictions, counsel cannot be held ineffective for failing to object to their admission into evidence. Appellant's eighth issue is entirely lacking in merit.

9. Burglary Convictions as an Aggravating Factor

In Issue 9, Appellant claims that his three prior burglary convictions were improperly admitted as evidence to support the aggravating circumstance of "a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. § 9711(d)(9). Appellant reasons that, because his burglaries were "nonviolent," they could not be used to establish this aggravating circumstance. Additionally, Appellant asserts that counsel was ineffective for stipulating to the burglary convictions, rather than moving *in limine* to bar their introduction as an aggravating circumstance. Appellant's Brief at 75–79; N.T. Penalty Phase, 5/16/96, at 1629–33. As the PCRA court recognized in denying this claim, Appellant raised the same issue in his collateral appeal of his ***86** Schuylkill County first-degree murder conviction, and this Court rejected his arguments based on our precedent defining burglary as a crime of violence. *Spotz V,* 896 A.2d at 1240–41.

In one of those precedential cases, *Commonwealth v. Rolan,* 520 Pa. 1, 549 A.2d 553, 559 (1988), we stated that "burglary has always been and continues to be viewed as a crime involving the use or threat of violence to the person." Accordingly, we held that the defendant's prior burglary convictions had been properly admitted ***285** as evidence of a significant history of violent felony convictions pursuant to subsection 9711(d)(9). *Id.* at 558–59. In *Commonwealth v. Bracey,* 541 Pa. 322, 662 A.2d 1062, 1075 n. 15 (1995), we cited *Rolan, supra,* for the proposition that "[t]rial counsel was [ ] not ineffective in failing to object to the accurate instruction of the trial court that the crime of burglary is a crime of violence as a matter of law." More recently, in *Commonwealth v. Small,* 602 Pa. 425, 980 A.2d 549, 576 –77 (2009), we reiterated that burglary is a crime of violence, in which the element of non-privileged entry invites dangerous resistance. We rejected outright the *Small* appellant's contention that, because his **specific** burglaries did not involve violence, they could not be used to satisfy the subsection 9711(d)(9) aggravating factor.

47 Based on *Small, Bracey,* and *Rolan,* as well as *Spotz V,* we hold that the trial court did not err in presuming that burglary is *per se* a crime of violence for purposes of subsection 9711(d)(9). Because there is no arguable merit to Appellant's underlying claim of trial court error, his derivative claim of trial counsel ineffective assistance is entirely lacking in merit.[25, 26]

***87** 48 Also in Issue 9, Appellant contends that his penalty phase counsel was ineffective for failing to object to the following allegedly misleading statement by the prosecutor, which suggested the use or threat of violence during Appellant's commission of the burglaries:

> The second [aggravating circumstance] is significant history of felony convictions.... But we went through all of these. Two robbery convictions, Franklin County; one here, a conspiracy to commit robbery here; three burglaries, that is breaking into someone's house to commit another crime, or dwelling place to commit another crime. That is a significant history.

> The Judge will tell you that those crimes are felonies. And it is not just a record of felonies, it is significant history of felony convictions involving, what, the use or threat of force. *That means you take one of these [a gun] when you are doing it, where you are doing something* *****286*** *violent.* And they talk about burglary being *the type of case that brings you into conflict with other human beings.*

N.T. Penalty Phase, 5/17/96, at 154 (Closing Argument) (portions cited in Appellant's Brief at 77–78; emphasis added by Appellant).

Appellant argues that because his burglaries involved vacation cabins and no actual violence or threat to a person, the prosecutor's comment was false insofar as it suggested violence ****88*** and conflict between Appellant and the victims of the burglaries. Appellant contends that, when the prosecutor said " one of these" in the above excerpt, he was referring to a gun and was suggesting that Appellant's burglaries had been violent, armed confrontations. Appellant's Brief at 77–78. Appellant cites the following excerpts from the PCRA hearing where his counsel was examining Mr. Andrews, Appellant's penalty phase counsel:

> *PCRA Counsel:* Setting aside the question of—the specific question of whether or not the burglaries were violent or nonviolent, do you recall the Commonwealth's closing argument when they talk about the—that burglaries were the type of case that brings you into contact with other human beings, and the prosecutor at that point had picked up a gun that had been one of the exhibits?
>
> *Mr. Andrews:* I don't recall that.

N.T. PCRA Hearing, 5/10/07, at 217–**18**.

The Commonwealth's interpretation of the prosecutor's penalty phase statement is quite different. The Commonwealth contends that the prosecutor was not portraying Appellant's burglaries as involving armed conflict, but rather was describing Appellant's theft of a shotgun from one of the cabins that he burglarized. Commonwealth's Brief at 68–69. The Commonwealth admits that the prosecutor's reference to the gun in the above statement was an improper reference to evidence not of record, but argues that the isolated and vague reference to a gun could not have so prejudiced the jury that it would have been unable to weigh fairly the evidence presented. *Id.* at 69; *see Commonwealth v. Jones,* 546 Pa. 161, 683 A.2d 1181, 1203 (1996) ("[A]lthough it is improper to comment on evidence not of record, we cannot conclude that the isolated reference here made by the prosecutor ... was so pervasive or deliberate so that the unavoidable effect thereof was to prejudice the jury to the point that they could not fairly weigh the evidence presented.")

The PCRA court did not make any factual findings with regard to the matter, but rather concluded that the prosecutor's ****89*** remark was not so prejudicial as to make the jury incapable of rendering a true verdict. PCRA Court Opinion at 53–54. We conclude that the PCRA court's determination is supported by the record, and we will accordingly not disturb it.

Contrary to Appellant's assertions, it strains reason to suggest that the prosecutor's brief, vague, passing reference to a gun during his discussion of Appellant's prior felony convictions could have so prejudiced the jury that

there is a reasonable probability that the outcome of the proceedings would have been different had counsel objected. The prosecutor's reference to a gun must be considered in the broader context of Appellant's lengthy history of felony convictions. Specifically, the following felony convictions were presented to the jury to support the aggravating circumstances of a significant history of violent felony convictions, pursuant to subsection 9711 (d)(9): voluntary manslaughter and aggravated assault convictions, on September 27, 1995; two felony robbery convictions on, respectively, June 12, 1990, and July 3, 1990; conspiracy to commit felony robbery conviction, on June 12, ***287** 1990; and three felony burglary convictions, on April 3, 1990. N.T. Penalty Phase, 5/16/96, at 1623–24, 1629–32, 1635–37; N.T. Penalty Phase, 5/17/96, at 158 (Defense Closing Argument). In addition, Appellant's two prior first-degree murder convictions were presented to the jury as evidence of the aggravating factor set forth in subsection 9711(d)(11), conviction of another murder. N.T. Penalty Phase, 5/16/96, at 1639–42.

Given all of Appellant's prior violent felony convictions and his two prior first-degree murder convictions, we cannot conclude that the prosecutor's brief reference to a gun in the context of the burglaries was prejudicial. To prevail on this claim, Appellant would have to establish that the prosecutor's one brief mention of a gun in the context of the burglaries tipped the balance away from mitigation and in favor of aggravation in the jury's mind, resulting in the verdict of death. This is simply not a tenable position. Given Appellant's lengthy record of violent felonies and murders with ***90** firearms, we cannot ascribe overriding and determinative significance to one brief reference to a gun in one sentence by the prosecutor. Thus, Appellant has failed to establish that he was prejudiced, and he is not entitled to relief on his ineffective assistance of penalty phase counsel claim.

10. Aggravating Circumstance of Killing While in the Perpetration of a Felony

In Issue 10, Appellant argues that the jury's guilt-stage verdict of first-degree murder but not second-degree murder precluded the applicability of the aggravating factor of "a killing while in the perpetration of a felony." 42 Pa.C.S. § 9711(d)(6).[27] In other words, Appellant asserts that the jury's failure to find him guilty of second-degree murder precludes a penalty phase finding that the killing was committed during the perpetration of a felony. Appellant's Brief at 80–81. Appellant further asserts that counsel was ineffective for failing to raise this issue at trial, in post-trial motions, and on direct appeal. *Id.* at 82.

As the Commonwealth points out, Appellant's argument ignores the trial court's explicit instructions to the jury that it could find **one** of four possible verdicts: not guilty, guilty of first-degree murder, guilty of second-degree murder, or guilty of third-degree murder. N.T. Trial, 5/15/96, at 1559, 1566, 1568. In denying Appellant's claim, the PCRA court held that the jury's verdict of first-degree murder did not constitute or equate to a finding of not guilty of second-degree murder. PCRA Court Supplemental Opinion, dated 8/7/08, at 2. The PCRA court also cited *Commonwealth v. Walker,* 540 Pa. 80, 656 A.2d 90, 100–01 (1995), in which this Court rejected a constitutional challenge to the death penalty statute grounded in the identity of the definitions of the 9711(d)(6) aggravating circumstance and of felony murder, a non-capital offense.

***91**
49

We agree with the PCRA court and the Commonwealth. The jury found that Appellant was guilty of first-degree murder, an intentional killing. By no logic can the jury's verdict be considered a finding that Appellant did **not** commit the murder while perpetrating a felony, and thus was **not** guilty of second-degree murder. Appellant's assertions to the contrary are groundless; inconsistent with the law, *see Walker, supra;* and unsupported *****288*** by the record or the facts. Accordingly, there is no merit to Appellant's assertion that counsel was ineffective for failing to raise this issue.

11. Prosecutorial Comments during the Penalty Phase

Appellant challenges numerous comments made by the prosecutor during the penalty phase and contends that trial counsel was ineffective because he failed to object to each of these comments. The PCRA court denied relief. Although the PCRA court did not address individually each of the numerous challenges, it concluded that "[n]othing stated by the prosecutor was so prejudicial that the jury was incapable of rendering a true verdict." PCRA Court Opinion at 52, 54 (citing *Commonwealth v. Carson,* 590 Pa. 501, 913 A.2d 220, 242 (2006)). After careful review of the notes of testimony, including the prosecutor's entire opening statement and closing argument, we conclude that the PCRA court's conclusion is supported by the record, and we will not disturb it.

50 51 As we have recently reiterated, a claim of ineffective assistance grounded in counsel's failure to object to a prosecutor's comments "may succeed when the petitioner demonstrates that the prosecutor's [comments] violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process." *Commonwealth v. Cox,* 603 Pa. 223, 983 A.2d 666, 685 (2009) (quoting *Commonwealth v. Tedford,* 598 Pa. 639, 960 A.2d 1, 29 (2008)). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Cox, supra* at 685 (quoting *Greer v.* ****92*** *Miller,* 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987)). "The touchstone is the fairness of the trial, not the culpability of the prosecutor." *Id.*

52 53 54 55 56 A prosecutor may make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments. *Id.* at 687. Even an otherwise improper comment may be appropriate if it is in fair response to defense counsel's remarks. *Id.* Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made. *Id.* During closing argument in the penalty phase, a prosecutor must be afforded reasonable latitude, and permitted to employ oratorical flair when arguing in favor of the death penalty. *Commonwealth v. Stokes,* 576 Pa. 299, 839 A.2d 226, 231–32 (2003). It is not improper for the prosecutor to urge the jury to view the defense's mitigation evidence with disfavor and thus to impose the death penalty. *Id.* at 233.

57 Not every unwise, intemperate, or improper remark made by a prosecutor mandates the grant of a new trial:

> Reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such

> that the jurors could not weigh the evidence and render a true verdict.

Cox, supra at 687 (citation omitted); *see also Commonwealth v. Carson,* 590 Pa. 501, 913 A.2d 220, 242 (2006).

In the instant case, none of the prosecutor's comments so prejudiced the jury. Appellant has taken most of the challenged comments out of context, has misinterpreted their meaning, and/or has failed to consider directly relevant decisional law from this Court, as discussed below.

58 First, Appellant challenges several comments made by the prosecutor during *****289*** his opening statement or closing argument as to his role and the role of the jury, alleging that the comments diminished the jury's sense of responsibility for the decision to impose the death penalty:

> ****93*** *I am required by law to be in front of you.* I did ask each one of you when you were questioned about being a juror on the case if you could *promise me that in an appropriate case, you could vote for a death penalty.* I have to now ask each and every one of you to *live up to that oath, to be a juror.*
>
> And, remember, you are still the fact finders in this case. That is important. The sentence is set by the law. It is a very simple process.....
>
> I will just read it to you now again. You find the facts of aggravating and mitigating and weigh them, and then the law sets the sentence. The statutes of our Commonwealth, the laws of the people of this state. [sic] The verdict must be a sentence of death, must be, if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance; or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.
>
> * * *
>
> I am not going to say to you now that this is going to be any easy thing. But I look to each and every one of you, remember that *all of us in this society are governed by law.* I have read to you what the law stated. And *I ask you simply to remember your oath to follow that law.*

N.T. Penalty Phase, 5/16/96, at 121–22, 124 (Prosecutor's Opening Statement) (emphasis added to portions cited by Appellant in his Brief at 84).

> We are here because of certain things. *I have a duty as the elected prosecutor for the people of Cumberland County to present cases where the law says that the penalty should be death.*
>
> You, by I guess sheer chance of lot, got chosen to take on a *special duty to follow the law,* and now to decide the appropriate sentence for the willful, deliberate, and premeditated killing of Betty Amstutz.
>
> * * *
>
> ****94*** The law, again, says the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.

* * *

> Because if one of you says that the mitigation in this case outweighs the aggravating circumstances, it is life. But, again, that person would still have to say under the law, I have weighed these and that mitigation outweighs the aggravating circumstances.

N.T. Penalty Phase, 5/17/96, at 144–45 (Prosecutor's Closing Argument) (emphasis added to portions cited by Appellant in his Brief at 84).

Most egregiously, Appellant contends that the prosecutor argued to the jury that it "had a 'societal' responsibility to return a death verdict." Appellant's Brief at 84 (citing N.T. Penalty Phase, 5/16/96, at 124). This allegation constitutes a gross mischaracterization of the prosecutor's statements, *supra.* The only " 'societal' responsibility" implied by the prosecutor was to follow the law. Furthermore, we have previously concluded that there was no error where a prosecutor asked a jury to "live up to" the promise it made under oath to follow the law and to impose the death penalty in an appropriate case. ***290** *Carson,* 913 A.2d at 268–69; *Commonwealth v. Rollins,* 558 Pa. 532, 738 A.2d 435, 450 (1999). The fact that the prosecutor discussed the duty of the jurors to follow the law immediately after discussing his own duty constitutes "nothing more than a simple comparison." *Carson, supra* at 269. The prosecutor made clear that the jury was the fact-finder and that its weighing of aggravating and mitigating factors would determine the sentence to be imposed under the law.[28] Appellant's allegation that the prosecutor diminished the jury's ***95** sense of responsibility in the penalty phase is meritless, as it does not reflect any fair or reasonable interpretation of the prosecutor's own words.

59 In his second challenge to prosecutorial comments, Appellant focuses on the cross-examination of defense expert witness Dr. Stephen Ragusea, a clinical psychologist, and the prosecutor's closing argument regarding Dr. Ragusea's mitigation testimony. Appellant contends that the prosecutor improperly denigrated, distorted, and trivialized the mental health mitigating evidence offered by Dr. Ragusea. The relevant excerpts, in their proper context, are as follows:

> *Prosecutor:* Just take the devil's advocate view, this modeling approach then is what we are telling [Appellant] is, now, [Appellant], this isn't your fault, you have had all these problems, so you are really not responsible for killing Betty, right?
>
> *Dr. Stephen Ragusea:* No.

N.T. Penalty Phase, 5/17/96, at 1887–88.

> *Prosecutor:* I mean [Mark] Hinckley was diagnosed as a schizophrenic who was making a move to impress Jody Foster.
>
> *Dr. Stephen Ragusea:* Absolutely in that sense, Mark Hinckley was a much more mentally ill man than is [Appellant]. From the perspective of knowing right and wrong and understanding reality.
>
> *Prosecutor:* I am assuming these are from, what, the diagnostic manual?
>
> *Dr. Stephen Ragusea:* Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition.

Prosecutor: The fourth edition is apparently they [sic] are up to 995 point 5 disorders now?

Dr. Stephen Ragusea: That has always been there. That is just a categorical system.

Prosecutor: How many are there now?

Dr. Stephen Ragusea: I don't know.

Prosecutor: There is [sic] an awful lot of them, aren't there?

***96** *Dr. Stephen Ragusea:* A bunch.

Prosecutor: There is one, is there not, for—if you drink a lot of coffee, isn't there, something about being addict[ed] to caffeine?

Dr. Stephen Ragusea: It may be there. I don't know. I don't recall it. I have never used it. So I can't verify that for sure.

Prosecutor: It is true, is it not, sir, that you can go into that book [the DSM] and take almost any person in this room, and if you sat down there and went through with them and talked with them long enough, you would find one of those numbers that fits somebody, doesn't it?

****291** *Dr. Stephen Ragusea:* No. Not even remotely like that. Many of the people we see in our everyday practice don't meet the criteria for any diagnostic category. That is a real overstatement.

Prosecutor: When people are in trouble though, there always seems to be one that fits, isn't that true?

Dr. Stephen Ragusea: It is certainly common. But, again, the important point is that all these things have been consistent throughout [Appellant's] lifetime. None of them is unique or unusual. It parallels his entire life experience.

Id. at 1896–87 (emphasis added to portions cited by Appellant in his Brief at 85).

During his penalty phase closing, the prosecutor argued as follows regarding the testimony offered in mitigation:

Talk about the accounting for his capacity to appreciate criminality is because he has, what, attention deficit disorder? You say, well, you know, a lot of people have that. I think he even said seven percent of the population. Seven percent of the population don't end up doing what happened in this particular case.

The whole thing comes down to that Dustin is the big boogie man.

N.T. Penalty Phase, 5/17/96, at 148–49 (Prosecutor's Closing Argument) (emphasis added to portion cited by Appellant in his Brief at 86).

***97** Finally, we get to [mitigating factor] number eight: Other. I'm sure *Mr. Andrews, doing his job as he is required, is going to have a long list of things that we heard yesterday.*

* * *

> *I pointed it out back before, the computer suggested that this is an invalid profile due to exaggeration tendencies.* It is a psychological thing. It is not objective as it was made out to be.....
>
> Now, I submit to you, as the Doctor [Ragusea] admitted and Molly Muir admitted, they have a thousand cases in Children and Youth, does every one of those people grow up to be a killer? No. *Did the Doctor say that every time somebody gets in trouble their profile will probably fit into that diagnostic manual? Yeah.* And that certainly is [sic] everybody with attention disorder doesn't end up in a room like this.

Id. at 150–51 (emphasis added to portions cited by Appellant in his Brief at 85).

> So now that is the mitigation. *That is supposed to excuse this.*

Id. at 153 (emphasis added to portion cited by Appellant in his Brief at 86).

> *To accept that mitigation that has been presented to you—and think about it—he has got that for the rest of his life, anything he does from now on is mitigated because of his childhood. No responsibility to society. No responsibility to make some positive choices about don't take one of these and do that to an old woman.* You have got to weigh that.

Id. at 155 (emphasis added to portion cited by Appellant in his Brief at 86).

We have held that the prosecutor may rebut mitigation evidence in his arguments and may urge the jury to view such evidence with disfavor. *Carson, supra* at 271 (concluding that the following prosecutorial argument did not improperly prevent the jury from giving full effect to the appellant's mitigation evidence: "[A]ny argument to say that [the appellant] didn't have that opportunity [to climb out of poverty and make ***98*** something out of himself] is a slap in the face to any one of those children who managed to succeed, to have managed to climb out of the gutter and make something of themselves instead of putting a bullet through some 53–year–old man's head"); *Stokes, supra* at 233; *Rollins,* *****292*** *supra* at 449 (concluding that it was permissible for the prosecutor to disparage the mitigation evidence proffered by the appellant and to imply that it was of so little weight that it should not affect the verdict); *Commonwealth v. Duffey,* 519 Pa. 348, 548 A.2d 1178, 1189 (1988) (concluding that it was not improper for the prosecutor to comment on the appellant's childhood history of epileptic seizures when the appellant himself had introduced the evidence into the record as a mitigating circumstance). Based on these clear precedents, we conclude that Appellant's claim of improper denigration of his mental health mitigation evidence is meritless.[29]

60 In the third sub-issue of Issue 11, Appellant challenges the portion of the prosecutor's closing argument that mentioned the statutory mitigation factors not proffered by Appellant.

> Weigh that mitigation you heard yesterday against the aggravating circumstances we showed and against all of the evidence that was put in in the prior five days of trial. It is not a question of numbers. It is not a little checklist of like if there are eight mitigating and only three, well, it is obvious. It is a question of quality, that question of quality.

> *You go through these mitigating circumstances, there is [sic] eight listed in the statute.* And we will get to the last one, which basically is anything else you want to consider. I am sure Mr. Andrews is going to dwell on that at length. *But what are they?*

***99** N.T. Penalty Phase, 5/17/96, at 146–47 (Prosecutor's Closing Argument) (emphases represent portions cited and relied upon by Appellant in his Brief at 86–87).

The prosecutor then set forth, in the order in which they appear in the statute, the list of possible mitigating circumstances. *Id.* at 147–50. The prosecutor rebutted the four statutory mitigating circumstances that Appellant had proffered,[30] and also briefly mentioned three statutory circumstances that Appellant had not invoked. *Id.* On the sentencing verdict slip, only the mitigating circumstances proffered by Appellant were listed. The trial court, in its instructions to the jury, restated the proffered mitigation factors and clearly informed the jury how to consider them:

> In deciding whether aggravated [sic] outweigh mitigating circumstances, do not simply count their number. Compare the seriousness and importance of the aggravating with the mitigating [circumstances].
>
> * * *
>
> [Y]ou are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard ****293** a particular mitigating circumstance as present, despite what other jurors may believe.....
>
> This different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives a defendant the full benefit of any mitigating circumstances.

N.T. Penalty Phase, 5/17/96, at 1911–12 (Jury Instructions).

We cannot conclude that the prosecutor's brief mention of uninvoked statutory mitigation circumstances prejudiced Appellant, ***100** particularly since the prosecutor also correctly informed the jury that its duty to weigh aggravating versus mitigating circumstances was not simply a matter of counting how many of each category applied to Appellant. In addition, the trial court reiterated for the jury the relevant mitigating circumstances, and then correctly and in detail informed the jury of the law with respect to its weighing of aggravating and mitigating factors. We hold there is no reasonable possibility that the prosecutor's brief mention of uninvoked mitigators created such bias and hostility toward Appellant in the jurors' minds that they were unable to weigh the evidence and render a true verdict.

61 In Appellant's fourth sub-issue, he contends that the prosecutor improperly presented and argued non-statutory aggravating factors:

> It's always easy to *talk about the death penalty when you are out on the street* and you hear about all the polls and everything else. But fortunately there are few people like you or like me that ever get personally involved in it.
>
> * * *

> You, by I guess sheer chance of lot, got chosen to take on a *special duty to follow the law,* and now to *decide the appropriate sentence for the willful, deliberate, and premeditated killing of Betty Amstutz.*

* * *

> But it is a question of choices. You make a choice here today. The defendant made a choice on that February night.
>
> I guess the one person who didn't get any choices was Betty Amstutz. *She might have liked to sit in a room for the rest of her life and at least get to see her family, write poetry, and read books.* She isn't going to get that opportunity.

N.T. Penalty Phase, 5/17/96, at 144–45 (Closing Argument) (emphases represent the portions cited and relied upon by Appellant in his Brief at 87–88).

62 ***101** Appellant's allegation that the above excerpts constitute improper presentation of non-statutory aggravating factors is meritless. The trial court clearly instructed the jury as to the three aggravating circumstances proffered by the Commonwealth; the prosecutor's opening statement and closing argument, as well as the sentencing verdict slip, were consistent with and reinforced those instructions. In the excerpt above, the prosecutor reminded the jury of its duty to follow the law, and certainly did not suggest "unconstitutionally expand[ing] the death penalty to include the entire class of first degree murders." Appellant's Brief at 87.[31]

63 ****294** Fifth, Appellant contends that the prosecutor made a number of material misstatements of law and fact concerning aggravating circumstances. We address each contention in turn. Appellant argues that the prosecutor "erroneously defined the (d)(9) aggravating circumstance," merely referring to one page of the prosecutor's penalty phase opening argument. Appellant's Brief at 88. The (d)(9) circumstance is a significant history of felony convictions involving the use or threat of ***102** violence to the person. The only relevant portion of the page to which Appellant refers is as follows:

> The Commonwealth in this case is going to show you three aggravating circumstances. First of all, [the Commonwealth is] going to prove to you that that defendant had a significant history of felony convictions before he killed Betty Amstutz.
>
> You are going to hear evidence of three prior robbery convictions, a conviction for conspiracy to commit robbery, that he had three prior burglary convictions, that he was convicted of aggravated assault and involuntary manslaughter with regard to the death of his brother on the last two. That, under the law, I submit to you, is a significant history of prior felony convictions.

N.T. Penalty Phase, 5/16/96, at 123 (Opening Argument) (cited in Appellant's Brief at 88).

While the prosecutor failed to state in the above excerpt that the subsection 9711(d)(9) aggravating circumstance required a significant history of felony convictions involving the use or threat of *violence* to the person, he correctly listed the felonies that had been proffered to satisfy that subsection. In

addition, the trial court defined this aggravating circumstance precisely and correctly, *see* N.T. Penalty Phase, 5/16/96, at 1909; and the sentencing verdict slip also bore the correct definition. There is absolutely no evidence to suggest that the jury did not follow the trial court's instructions, did not understand the verdict slip, or was confused by the prosecutor's omission.

64 Next, Appellant asserts that the prosecutor "improperly sought to rebut the mitigation case by further misstating the gravity and relevance of Appellant's juvenile offenses." Appellant's Brief at 88. The excerpt below is apparently the basis for this assertion:

> Talk about the next possible mitigation, mitigating circumstance is the age of the defendant at the time of the crime. He was, what, two weeks short of his twenty-fourth birthday.
>
> ***103** And what had he shown to that particular time? He had a serious record of serious felony convictions at that point. Which started, even by his own exhibit, ****295** when he was a juvenile. Risking a catastrophe, a felony of the second degree.

N.T. Penalty Phase, 5/17/96, at 149 (Closing Argument) (cited in Appellant's Brief at 88).

The information summarized by the prosecutor in the above excerpt had been admitted into evidence, and accordingly, the prosecutor could properly comment on it and draw reasonable inferences from it. *See Carson,* 913 A.2d at 271 (concluding that the prosecutor properly referred to the appellant's unrealized opportunities for rehabilitation while in juvenile detention, because evidence of his offenses as a juvenile had been admitted into evidence at the penalty phase of trial).

65 Next, Appellant argues that the prosecutor improperly invited the jury to speculate as to what else was in his criminal record:

> The second [aggravating factor] is significant history of felony convictions. *I don't know if you get to see these upstairs because they have other things on that you shouldn't consider, because they are just records and they tell a big story.* But we went through all of these. Two robbery convictions, Franklin County; one here, a conspiracy to commit robbery here; three burglaries, that is breaking into someone's house to commit another crime, or dwelling place to commit another crime. That is a significant history.

N.T. Penalty Phase, 5/17/96, at 154 (Closing Argument) (emphasis represents the portion quoted in Appellant's Brief at 88).

The prosecutor's brief and vague statement about the contents of Appellant's criminal record is insignificant, particularly since the prosecutor immediately also states that "we went through all of these [felony convictions]." *See* excerpt *supra.*

Thus, none of the challenged statements in this sub-issue remotely reaches the level of prosecutorial misconduct.

***104** Appellant's sixth and final sub-issue in Issue 11 is that the prosecutor
66 misstated the applicable burden of persuasion with regard to the weighing of

aggravating and mitigating circumstances. The specific comment challenged by Appellant is presented below in its proper context:

> The law, again, says the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.
>
> Now, [defense counsel] will tell you that, well, a jury to give death has to unanimously decide, all twelve of you will have to check that block individually. And that is the question during voir dire when you were asked, will you stand up for your opinion, will you stick to your guns.
>
> Because if one of you says that the mitigation in this case outweighs the aggravating circumstances, it is life. But, again, that person *would still have to say under the law, I have weighed these and that mitigation outweighs the aggravating circumstances.*

N.T. Penalty Phase, 5/17/96, at 145 (Prosecutor's Closing Argument) (emphasis added to portion quoted by Appellant in his Brief at 88).

67 As Appellant correctly recognizes, the statutory standard for imposition of a death sentence is "one or more aggravating circumstances which outweigh any mitigating circumstances." 42 Pa.C.S. § 9711(c)(1)(iv); *see also Commonwealth v. Bardo,* 551 Pa. 140, 709 A.2d 871, 876 (1998) (stating that § 9711(c)(1)(iv) provides ****296*** that "if the jury finds that the aggravating circumstance(s) do not outweigh the mitigating circumstance(s), it must impose a life sentence") (emphasis omitted). Thus, under the statutory standard, when the aggravating circumstances and mitigating circumstances are precisely balanced, *i.e.,* in a "tie," the proper sentence is life imprisonment, not death.

However, the prosecutor stated that for the verdict to be a sentence of life imprisonment, one juror must conclude that ****105*** mitigating circumstances outweigh aggravating circumstances. *See* excerpt *supra.* Thus, under the prosecutor's formulation of the standard, when there is a tie between aggravating circumstances and mitigating circumstances, the sentence would be death—and this is contrary to the statute. Appellant's Brief at 88.

We decline to conclude that Appellant was prejudiced by the prosecutor's misstatement. Appellant fails to give any recognition to the fact that, in the first sentence of the above excerpt, where the prosecutor is telling the jury what the law requires, he states the standard exactly correctly and completely. The prosecutor then reiterates that an imposition of the death penalty must be unanimous and reminds the jurors that during *voir dire* they were asked if they would "stand up for [their] opinion." The challenged comment is made in this context, and while it is not strictly correct, we cannot conclude that it rendered the jurors unable to weigh the evidence and render a true verdict. *See Cox, supra* at 687.

It is noteworthy that the trial court correctly and repeatedly instructed the jury on the appropriate standard by which to weight aggravating and mitigating factors. *See* N.T. Penalty Phase, 5/17/96, at 1905, 1911, 1913–14. The trial court's clear instructions remove any possible confusion as to the appropriate standard. There is no evidence to suggest that the jury did not follow the trial court's detailed and clear instructions. *See Spotz V,* 896 A.2d

at 1224 ("The law presumes that the jury will follow the instructions of the court.") (citation omitted).

In sum, as we have discussed above, none of Appellant's claims of ineffective assistance of penalty phase counsel for failing to object to prosecutorial statements has any merit. Accordingly, Appellant is not entitled to any relief in Issue 11.

12. Jury Instructions as to the "Presumption of Life"

In Issue 12, Appellant argues that the trial court's penalty phase jury instructions erroneously required the jury to "reject death," thereby "unconstitutionally shift[ing] the sentencing-stage ***106** burden of persuasion from the Commonwealth to the defense, undermin[ing] the presumption of life afforded defendants in capital sentencing proceedings, and violat[ing] the Pennsylvania sentencing statute and the Sixth, Eighth, and Fourteenth Amendments." Appellant's Brief at 69. Appellant also asserts that counsel was ineffective for failing to object to the jury instructions. *Id.*

Appellant challenges specifically the portion of the court's instruction that directed the jury how to fill out the sentencing verdict slip. However, because, when reviewing a challenge to a jury instruction, we must consider the entire charge, not just selected portions thereof, *see Commonwealth v. Eichinger,* 591 Pa. 1, 915 A.2d 1122, 1138 (2007), we set forth much of the instruction in the paragraphs below:

> Your verdict must be a sentence of death if you unanimously find—that is if you all find—at least one aggravating circumstance and no mitigating circumstances.
>
> ***297** If you do not all agree on one or the other of these findings, then the only verdict that you may return is a sentence of life imprisonment.

N.T. Penalty Phase, 5/17/96, at 1905 (Jury Instructions).

The trial court then instructed the jury regarding the differing burdens of proof applicable to the Commonwealth and the defendant with regard to, respectively, aggravating and mitigating circumstances. The instruction continued with an explanation of each of the proffered aggravating circumstances and mitigating circumstances, and then continued as follows:

> As I told you earlier, you must agree unanimously on one of two general findings before you can sentence the defendant to death. [The general findings] are a finding that there is at least one aggravating circumstance and no mitigating circumstances, or a finding that there are one or more aggravating circumstances which outweigh any mitigating circumstances.
>
> * * *
>
> ***107** If you all agree on either one of the two general findings, then you can and must sentence the defendant to death.
>
> When voting on the general findings, you are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular mitigating circumstance as present, despite what other jurors may believe.....

> This different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives a defendant the full benefit of any mitigating circumstances.
>
> It is closely related to the burden of proof requirements. Remember, the Commonwealth must prove any aggravating circumstance beyond a reasonable doubt. While the defendant only has to prove any mitigating circumstance by a preponderance of the evidence. [sic]
>
> If you do not agree unanimously on a death sentence, and on one of the two general findings that would support it, then you have two immediate options.
>
> You may either continue to discuss the case and deliberate the possibility of a death sentence, or if all of you agree to do so, you may stop deliberating and sentence the defendant to life imprisonment.
>
> If you should come to a point where you have deliberated conscientiously and thoroughly, and still cannot all agree either to sentence the defendant to death or to stop deliberating and sentence him to life imprisonment, report that to me. If it seems to me that you are hopelessly deadlocked, it will be my duty to sentence the defendant to life imprisonment.
>
> I now ask you to pick up the verdict slip again. .... I shall now give you specific directions about how to complete this part of the verdict slip. Before you can sentence the defendant to death, you must all agree on a general finding in either B–1 on page three, or B–2, beginning on the top of page four.

* * *

> ***108** Remember, you can stop deliberating and sentence the defendant to life imprisonment only if you all agree to do so. .... [I]f your sentence is life imprisonment, you should check the finding either C–1 or C–2 which will explain why you are *rejecting the death penalty* and imposing a life sentence.
>
> If the reason for *rejecting the death penalty* is that one or more of you find no aggravating circumstances, check C– ***298** 1. If the reasons for *rejecting death* is that, although all of you agree on at least one aggravating circumstance, one or more of you find that mitigating circumstances are not outweighed by aggravating circumstances, then you would check C–2.

N.T. Penalty Phase, 5/17/96, at 1911–14 (Jury Instructions).

Appellant contends that, by repeatedly using the phrase "rejecting death," the trial court failed to make clear that life imprisonment was the appropriate sentence unless the Commonwealth met its high burden of persuasion that death should be imposed. Appellant's Brief at 70.

68 In rejecting Appellant's claim of error with respect to this instruction, the PCRA court cited *Commonwealth v. Eichinger, supra,* for the proposition that the words "presumption of life" were not mandatory in a capital penalty phase jury instruction. PCRA Court Opinion at 56. The PCRA court concluded that the trial court had adequately explained the deliberately disparate treatment of aggravating and mitigating circumstances, and had

made clear that life in prison is the appropriate sentence unless the Commonwealth has carried its high burden of proof. *Id.* We agree.

In *Commonwealth v. Travaglia,* 502 Pa. 474, 467 A.2d 288, 300 (1983), this Court acknowledged that, in some sense, a "presumption of life" is inherent in the capital sentencing statute. This "presumption" arises from the limited number of statutory aggravating circumstances, any one of which the Commonwealth must prove beyond a reasonable doubt, as compared to the wide latitude granted for mitigating circumstances, which the defendant need prove only by a preponderance ***109*** of the evidence. *Id.* In *Eichinger, supra* at 1137, the appellant relied on *Travaglia* to allege denial of due process by the trial court because it had declined to include an explicit "presumption of life" jury instruction. We recognized that "life has intrinsic value and should not be taken by the state without good cause, proven to our highest standard, whereas life imprisonment remains our default punishment for capital cases." *Id.* at 1138. However, consistent with this Court's policy to give trial courts latitude and discretion in the phrasing of jury instructions, we held that the words "presumption of life" were not explicitly required in penalty phase instructions. We clarified what *was* required in a proper instruction as follows:

> An explanation of the deliberately disparate treatment of the aggravating and mitigating circumstances under the applicable standards of proof and a clear indication that life in prison is the sentence unless the Commonwealth meets its high burden is sufficient to convey the fact that life is presumed.

Id.; accord, Commonwealth v. Lesko, —— Pa. ——, 15 **A.3d** 345 (2011).

Based on our review of the entire jury instruction, we conclude that the trial court here met this standard. The trial court clearly explained and provided the correct rationale for the disparate treatment of and the distinct standard of proof applicable to aggravating and mitigating circumstances. In addition, the trial court stated directly and indirectly that life imprisonment was the appropriate sentence unless the Commonwealth met its high burden of proof with regard to aggravating factors. In fact, the instruction here in its entirety was very similar to the one challenged in *Commonwealth v. Marinelli,* 589 Pa. 682, 910 A.2d 672, 682–84 (2006) (Opinion Announcing the Judgment of the Court), even to the point of using the phrase "rejecting the death penalty" or "rejecting death" three times. We concluded ***299*** that there was no merit to the *Marinelli* appellant's claim that the repeated use of the word "reject" rendered the instructions erroneous.[32] We ***110*** reach the same conclusion here, and accordingly hold that counsel was not ineffective for failing to object to the jury instructions.[33]

13. *Simmons* "Life Means Life" Instruction

69 Appellant contends that the trial court erred by failing to instruct the jury that, if Appellant were sentenced to life imprisonment, he would not be eligible for parole. In addition, he argues that penalty phase counsel was ineffective for failing to seek such an instruction, and that direct appeal counsel was ineffective in the way in which he litigated the matter on direct appeal.

In his direct appeal, Appellant grounded his claim of trial court error for failing to instruct the jury that "life means life" on *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality). *See Spotz III,*

759 A.2d at 1291. In *Simmons, supra* at 156, 114 S.Ct. 2187, a plurality of the United States Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." We subsequently explained that a *Simmons* instruction is triggered *only* when a defendant's future dangerousness has been placed at issue *and* the defense has requested an instruction that there is no parole from a sentence of life imprisonment in Pennsylvania. *Spotz III, supra* at 1291 & n. 14. In Appellant's direct appeal, we concluded that neither of these predicate requirements existed, and the "trial court did not err in failing to issue a charge [A]ppellant was not entitled ***111** to and did not request." *Id.* at 1291. Thus, the PCRA court properly denied Appellant's current claim of trial court error as previously litigated and not cognizable under the PCRA.[34] *See* PCRA Court Opinion at 48 (citing 42 Pa.C.S. §§ 9543(a)(3) and 9544(a)(2)).

70 71 In addition, the PCRA court correctly concluded that Appellant's claim of ineffective assistance of penalty phase counsel for failing to request a *Simmons* instruction must fail because Appellant's future dangerousness had not been placed at issue and thus he was not entitled to such an instruction. *Spotz III, supra* at 1291; PCRA Court Opinion at 49. Counsel ***300** will not be held ineffective for failing to request an instruction to which his client was not entitled.

With regard to appellate counsel, Appellant's claim of ineffectiveness is based on counsel's failure to argue on direct appeal that Appellant's future dangerousness was placed at issue by the introduction of evidence of his prior violent offenses, including three homicide and other felony convictions, and his juvenile record of crimes and detention.[35] Some of this evidence was presented at the penalty phase as support for aggravating circumstances, while certain evidence of other crimes, specifically the voluntary manslaughter and two first-degree murders committed during the three days prior to the murder of Ms. Amstutz, was also presented during the guilt phase of trial. Appellant further contends that the testimony ***112** of his mental health expert, Dr. Ragusea, supported a propensity for violence. The PCRA court rejected this claim, citing *Commonwealth v. May,* 551 Pa. 286, 710 A.2d 44 (1998), in which this Court held that a defendant's criminal record of violent felonies did not address future dangerousness. Relying on *May,* the PCRA court found no arguable merit to Appellant's underlying claim, and accordingly held that appellate counsel was not ineffective for failing to raise the argument on direct appeal. We will not disturb the PCRA court's ruling, as explained below.

In *May, supra* at 47, the appellant, like Appellant here, argued that, by raising the aggravating circumstance of a significant history of violent felony convictions, the prosecutor had injected the issue of the appellant's future dangerousness into the sentencing hearing, and therefore, the trial court had erred by failing to provide a *Simmons* instruction. We denied this claim, holding that a *Simmons* instruction was not required because the evidence proffered to support the appellant's history of violent felony convictions addressed only his past conduct, not his future dangerousness. *May, supra.*

We reached a similar conclusion more recently in *Commonwealth v. Chmiel,* 585 Pa. 547, 889 A.2d 501, 538 (2005), a triple first-degree murder case in which the Commonwealth's evidence to support the appellant's history of

prior violent felonies included the description of a violent rape. We held that the introduction of this evidence of the *Chmiel* defendant's past violent convictions did not implicate the issue of his future dangerousness. *Id.* at 538. Also in *Chmiel,* the appellant contended that his future dangerousness was implied by the prosecutor's comments concerning the circumstances of the triple murder and his characterization of the appellant's actions as "despicable" and "abysmal," revealing a "coldness of heart, the type of depravity that tells you that he deserves death." *Id.* at 537. We concluded that the challenged comments focused exclusively on the facts surrounding the murders of which the appellant had been convicted, and did not speculate about the appellant's inherent characteristics that implied future dangerousness. *Id.* at 538. Because the challenged ***113** comments, when taken in context, "were proper commentary on [the appellant's] crimes as an appropriate predicate for the death penalty," no relief was due. *Id.* at 537–38.

****301** Appellant submits that this Court's rulings in *Chmiel* and similar cases are erroneous as to the nature and sufficiency of evidence and prosecutorial argument that can establish future dangerousness for purposes of a *Simmons* instruction. Appellant's Brief at 64 & n. 80. Appellant relies primarily on *Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), a case in which the high Court reversed a state court's determinations that the appellant's future dangerousness had not been placed at issue and a *Simmons* instruction was not required. The high Court held that the state court had erred, not in its formulation of the legal issue, but rather "on the facts [because] the evidence and argument cited by the state court are flatly at odds with the view that 'future dangerousness was not an issue in this case.' " *Kelly, supra* at 252–53, 122 S.Ct. 726 (citation omitted).

The *Kelly* Court provided the following guidance as to how to evaluate evidence for purposes of a *Simmons* instruction:

> A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior....
>
> * * *
>
> Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms.

Kelly, supra at 253–54, 122 S.Ct. 726.

The evidence admitted during the sentencing phase of the trial in *Kelly* showed the following: the appellant had attempted an armed escape from prison, had formulated a plan to hold a female guard hostage, and had exhibited sadism at an early age, with an inclination to kill anyone who rubbed him the wrong way. *Id.* at 248–49, 122 S.Ct. 726. With regard to the ***114** prosecutor's opening and closing arguments, the high Court stated the following:

> The prosecutor accentuated the clear implication of future dangerousness raised by the evidence and placed the case within the four corners of *Simmons.* He had already expressed his hope that the jurors would "never

> in their lives again have to experience being some thirty feet away from such a person" as [the appellant].... [S]ince the jurors were unlikely to be spending any time in prison, they would end up 30 feet away from the likes of [the appellant] only if he got out of prison, as he might if parole were possible.....
>
> * * *
>
> And there was more. The state court to be sure considered the prosecutor's comparison of [the appellant] to a notorious serial killer, variously calling him a "dangerous" "bloody" "butcher."... Characterizations of butchery did go to retribution, but that did not make them any the less arguments that [the appellant] would be dangerous down the road. They complemented the prosecutor's submissions that [the appellant] was "more frightening than a serial killer," [ ] and that "murderers will be murderers." Thus was [the appellant's] jury, like its predecessor in *Simmons,* invited to infer "that petitioner is a vicious predator who would pose a continuing threat to the community."

Id. at 255–56, 122 S.Ct. 726 (internal citations omitted).

Based on the evidence admitted and the prosecutor's arguments from that evidence, the United States Supreme Court held that the *Kelly* appellant's future dangerousness had indeed been placed at issue. However, the *Kelly* Court was careful ****302*** to specify the limits of its ruling: "The only questions in this case are whether the evidence presented and the argument made at [the appellant's] trial placed future dangerousness at issue." *Id.* at 254 n. 4, 122 S.Ct. 726. No issue was raised in *Kelly* with respect to "a defendant's entitlement to instruction on a parole ineligibility law when the State's ****115*** evidence shows future dangerousness but the prosecutor does not argue it." *Id.*

In *Commonwealth v. Baumhammers,* 599 Pa. 1, 960 A.2d 59, 90–92 (2008), this Court applied the United States Supreme Court's constitutional directives in *Simmons* and *Kelly* to a case in which the jury had rejected the appellant's insanity defense and had sentenced him to death for the first-degree murder of five individuals. At trial, the Commonwealth had introduced evidence of the appellant's derogatory comments and actions toward blacks and Jews, his anti-immigration and pro-segregation views, his desire to start a white supremacist party, and his hatred for all "ethnic" people. *Id.* at 71. On direct appeal, the appellant claimed that the trial court had erred by failing to give a *Simmons* instruction, and he asserted that the issue of his future dangerousness had been brought before the jury by the proffered evidence, including not only the testimony as to his racist views, but also the extensive testimony concerning his mental illness and personality disorder, which, in the opinion of the Commonwealth's mental health witness, made him a liar, a rule-breaker, and an irresponsible person. *Id.* at 90–91. We denied this claim, concluding that the evidence cited by the appellant was not evidence of future dangerousness or of a demonstrated propensity for violence, and was "not even remotely similar in character to the evidence in *Kelly.*" *Id.* at 91.

In the instant case, Appellant's attempt to rely on *Kelly* is equally unavailing. Appellant raised a similar claim in his collateral appeal of his Schuylkill County first-degree murder conviction. *Spotz V,* 896 A.2d at 1242–46.[36] We affirmed the PCRA court's denial of that claim, citing, *inter alia, May, supra,*

and concluding that evidence of Appellant's significant history of violent felony convictions did not inject concerns over his future dangerousness into the proceedings. *Spotz V, ***116** supra* at 1242–43. In addition, we held that "*Kelly* would not apply to appellants like Spotz who were sentenced before it was decided, and trial counsel was not ineffective for failing to request a *Simmons* instruction based on the standard announced in that case." *Id.* at 1246; *see also Carson,* 913 A.2d at 273 n. 34 ("Trial counsel's conduct [ ] must be evaluated under the law prevailing at the time of trial which was the non-precedential plurality in *Simmons.*"). The same holding applies to the instant case, as Appellant's trial for the murder of Ms. Amstutz took place in 1996, well before *Kelly* was decided.

72 Furthermore, even if *Kelly* were to be held applicable to Appellant's appeal, he would not be entitled to relief because, pursuant to the United States Supreme Court's directives in *Kelly,* as we have interpreted them in *Baumhammers,* Appellant's future dangerousness was not placed at issue during the trial proceedings. Contrary to Appellant's assertions, future dangerousness is not placed at issue under *Simmons/Kelly* merely because the prosecutor sets forth a capital defendant's ****303** history of prior violent offenses, without graphic description of violence and without implying significance for future violent behavior. The prosecutor here did not use epithets suggestive of violence to describe Appellant, nor did he attempt to draw any conclusions about the implications of Appellant's previous offenses for his future behavior. With regard to Appellant's mental health, psychologist Dr. Ragusea testified that Appellant had "lots of antisocial features," "broke the law, broke the rules," "was perfectly content lying to get whatever he wanted," "[had] trouble being in contact with reality," "makes bad decisions," "does have mental illness[,] is an antisocial personality [, and] is not a nice guy." N.T. Penalty Phase, 5/16/96, at 1881, 1885, 1895. Dr. Ragusea's testimony did not imply that Appellant had a propensity for violence or was a risk for violent behavior. We reject Appellant's assertion, based on *Kelly,* that the evidence and Commonwealth argument presented at his trial placed his future dangerousness at issue, and accordingly we reject his ***117** claim of appellate counsel ineffectiveness for failing to raise these matters on direct appeal.[37]

Finally, in Issue 13, Appellant alleges ineffective assistance of direct appeal counsel for failing to identify and raise additional constitutional theories, independent of future dangerousness and legally distinct from *Simmons,* as grounds for requesting a parole ineligibility instruction. Appellant's Brief at 66. Appellant appears to seek a broad and general ruling ***118** from ****304** this Court that a parole ineligibility instruction is *always* required when the jury knows that a capital defendant committed the offense while on parole. Appellant baldly asserts, without benefit of accompanying argument or rationale, that the failure to provide such a jury instruction violates either the Eighth Amendment to the United States Constitution or due process, in the following ways: violates the Eighth Amendment because the jury was not permitted to consider all relevant mitigating evidence and was presented with a false choice of sentencing options; violates the Eighth Amendment bar against arbitrary and capricious sentencing; offends evolving standards of decency in violation of the Eighth Amendment; violates due process by imposing a death sentence on the basis of inaccurate, material information which the defendant had no opportunity to rebut; and violates the right to an impartial jury by skewing the weighing of aggravating and mitigating

circumstances. Appellant's Brief at 66–67. Appellant's "argument" for each of these alleged constitutional violations consists, in its entirety, of footnote lists of United States Supreme Court opinions, devoid of even a parenthetical explanation, much less any development of the relevance or significance of the listed opinions to the relief Appellant seeks. *See id.*

73 As we have previously stated, the United States Supreme Court has never ruled that the Eighth Amendment requires a parole ineligibility instruction, nor have we ever made a parole ineligibility instruction mandatory in capital cases. *Commonwealth v. Baumhammers,* 599 Pa. 1, 960 A.2d 59, 92 (2008); *see also Simmons,* 512 U.S. at 156, 162 n. 4, 114 S.Ct. 2187 (making clear that the Court's opinion was grounded in the Due Process Clause of the Fourteenth Amendment and specifically clarifying that the Court "express[ed] no opinion on the question whether the result [was] also compelled by the Eighth Amendment"). Here, Appellant's one-sentence, undeveloped assertions of Eighth Amendment violations ***119** fail to provide any reviewable argument or rationale for revisiting those precedential decisions.

Appellant's attempt to recast the lack of a *Simmons* instruction into an assertion of "inaccurate information" having been imparted to the jury likewise must fail. Appellant's Brief at 67. No inaccurate information, material or otherwise, was imparted to the jury by the mere fact that a *Simmons* instruction was not given, and Appellant's assertions to the contrary have no legal or factual basis.

74 Finally, Appellant's assertion that the lack of a parole ineligibility instruction skewed the weighing of aggravating and mitigating evidence and impaired the jury's ability to follow the law is entirely unsupported. The Commonwealth presented three statutory aggravating factors, and Appellant offered several mitigating factors, including the "catch-all" mitigator which includes "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8). Although, during the penalty phase, evidence may be presented as to any matter that the trial court deems relevant and admissible on the question of the sentence to be imposed, 42 Pa.C.S. § 9711(a)(2), "[c]apital juries are to weigh *only* the aggravating and mitigating circumstances enumerated in the statute." *Commonwealth v. Robinson,* 583 Pa. 358, 877 A.2d 433, 447 (2005) (emphasis added); *see also* 42 Pa.C.S. § 9711(c)(1)(iv). Appellant neither provides authority for his apparent view that a parole ineligibility instruction somehow implicates a mitigation factor, nor sets forth any support for his view that the jury here was unable to ***305** follow the law regarding its duty to weigh the statutory mitigating and aggravating factors that were proffered.

Because there is no arguable merit to any of Appellant's alternate theories, direct appeal counsel will not be held ineffective for failing to advance them. In sum, for all the reasons discussed above, Appellant is not entitled to relief on any of the numerous sub-issues he raised under Issue 13.

***120 14. Presentation of Mitigating Evidence**

In Issue 14, Appellant alleges that trial counsel was ineffective in failing to investigate, develop, and present mitigating evidence during the penalty phase. Specifically, Appellant contends that, because of counsel's ineffectiveness, the jury did not hear complete evidence of the following: (i)

the pervasive and extensive physical and sexual abuse to which Appellant had been subjected, as well as his family history of dysfunction and impairment; (ii) Appellant's history of drug and alcohol addiction and abuse; (iii) the extensive abuse and violence that Appellant had suffered at the hands of his brother Dustin; (iv) the mental health history of Appellant's family; and (v) Appellant's own mental health problems. Appellant alleges that counsel's investigation and presentation of the above mitigating circumstances were deficient under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and that he was therefore deprived of his Sixth Amendment right to counsel. We first summarize the relevant general legal principles, and then address each of Appellant's sub-issues below.

Appellant raised a similar claim in his collateral appeal of his Schuylkill County first-degree murder conviction. In denying this prior claim, we reiterated the following principles regarding counsel's duty to investigate evidence of a defendant's mitigating circumstances:

> It is well established that capital defense counsel has a duty to undertake reasonable investigations or to make reasonable decisions that render particular investigations unnecessary. In the context of the penalty phase, trial counsel has an obligation to conduct a thorough investigation of the defendant's background, particularly with respect to the preparation and presentation of mitigation evidence. [T]his obligation includes the duty of penalty phase counsel to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. The reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable ***121** attorney to conduct a further investigation. At the same time, counsel's obligations do not require an investigation into every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.

Spotz V, 896 A.2d at 1225 (internal quotation marks and citations omitted).

In addition, we have made clear the following:

> The reasonableness of counsel's investigation and preparation for the penalty phase, of course, often depends critically upon the information supplied by the defendant. Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family [that] is not provided to counsel.

Commonwealth v. Bond, 572 Pa. 588, 819 A.2d 33, 45–46 (2002) (internal citations omitted); *see also Commonwealth v. Bracey,* 568 Pa. 264, 795 A.2d 935, 944 (2001) (concluding that counsel could not be found ***306** ineffective for failing to present evidence of the appellant's history of abuse where appellant and his family failed to reveal such history during their consultations with counsel).

We have been careful to note that "different light falls upon counsel's performance depending upon whether [counsel] asked and was not told, or

[alternatively, whether counsel] did not ask and therefore was not told." *Commonwealth v. Basemore,* 560 Pa. 258, 744 A.2d 717, 735 (2000).

Appellant's first sub-issue in Issue 14 is that counsel was ineffective for failing to investigate and present sufficiently detailed and corroborating evidence of the pervasive sexual and physical abuse that Appellant had suffered, as well as his family history of dysfunction and impairment. Appellant's Brief at 44–48, 50–51. During the penalty phase, numerous family witnesses testified as to the chaotic, abusive, violent, deprived, and dysfunctional environment in which Appellant was raised; in addition, Dr. Ragusea, a psychologist expert witness who had conducted a psychological assessment of Appellant, reinforced much of this family testimony. *See* ***122** *infra* (describing testimony in more detail). Nonetheless, Appellant now contends that, if his physical and sexual abuse and his family history of dysfunction and mental illness had been addressed more extensively and presented in more detail, it would likely have swayed the jury toward mitigation. In support of his contention, Appellant cites, *inter alia,* the PCRA testimony of his maternal grandmother, Jean Redden, wherein she provided graphic detail of some incidents of sexual abuse inflicted upon Appellant.

The PCRA court recognized the extensive efforts that penalty phase counsel, Mr. Andrews, had taken with regard to mitigation, and determined that neither Appellant nor Ms. Redden had ever suggested to counsel the full extent of the family dysfunction or of the physical and sexual abuse to which she testified at the PCRA hearing. The PCRA court cited *Bracey, supra,* for the principle that counsel cannot be deemed ineffective for failing to present evidence of abuse that a defendant and his family failed to reveal to counsel. PCRA Opinion at 42–43. In addition, the PCRA court concluded that Ms. Redden's PCRA testimony differed from her penalty phase testimony only in "a matter of degree," and held that Appellant had failed to show how he was prejudiced by the jury's failure to learn of the entirety of the abuse to which Ms. Redden had testified at the PCRA hearing. We conclude that the record supports the PCRA court's conclusions, as discussed below.

At the PCRA hearing, Attorney Andrews testified as follows regarding the numerous investigative activities relevant to possible mitigation factors that he undertook on behalf of Appellant. The various attorneys for Appellant's three capital cases shared responsibilities for the investigation of his background for mitigation purposes. N.T. PCRA Hearing, 5/10/07, at 122. Attorney Andrews had responsibility for the investigation of Appellant's life story, and he hired, as assistants, a local investigator; a retired state trooper; and a forensic psychologist, Dr. Ragusea, who interviewed Appellant, reviewed numerous records, and prepared a forensic psychological assessment. *Id.* at 123; Forensic Psychological Assessment of Appellant by Stephen A. Ragusea, Psy.D., assessment ***123** dates 11/20/95 and 12/12/95. Attorney Andrews met with Appellant as soon as he was able to do so, conducting and recording two long interviews, which focused on Appellant's life story; with this information, counsel tried to construct Appellant's life chronology and looked for significant ****307** mitigation witnesses. N.T. PCRA Hearing, 5/ 10/07, at 129; and 5/11/07, at 26. Attorney Andrews also corresponded with Appellant on an on-going basis. N.T. PCRA Hearing, 5/11/07, at 26–27. In addition, Attorney Andrews sought institutional records. He obtained records from Appellant's elementary school, which led to a discussion with one of Appellant's teachers, and from Children and

Youth Services ("CYS"), which led to his procurement of mental health records. N.T. PCRA Hearing, 5/10/07, at 129–30, 138–42.

With regard to Ms. Redden, Attorney Andrews testified during the PCRA hearing that she was "actively participating" and "very helpful [and] anxious to help," in the investigation of mitigation factors. *Id.* at 159–60; N.T. PCRA Hearing, 5/11/07, at 38. Although he did not recall if she had told him that Appellant had been sexually abused, he understood her to be quite forthcoming and had no sense that she was withholding information. N.T. PCRA Hearing, 5/10/07, at 159–60; and 5/11/07, at 38–39. Attorney Andrews further testified that he had recorded a "pretty long" interview with Ms. Redden at her home and had spoken with her on other occasions; in addition, his investigator also spoke with her as necessary. N.T. PCRA Hearing, 5/11/07, at 38, 75, 77. Attorney Andrews's testimony concerning his interactions with Ms. Redden flatly contradicted Ms. Redden's testimony that counsel had not visited or conversed with her prior to her courtroom testimony. N.T. PCRA Hearing, 1/17/07, at 61.

During the penalty phase of Appellant's trial, Attorney Andrews presented fourteen witnesses and focused on Appellant's abysmal upbringing and its effects on his mental state. We summarize the most relevant portions of the penalty phase testimony in the next few paragraphs.

Appellant's maternal grandmother, Ms. Redden, testified regarding Appellant's chaotic upbringing, which was characterized ***124** by numerous relocations, in-state and out-of-state; periods of institutionalization at various children's homes and foster homes; a largely absent, often jailed biological father and two abusive step-fathers; and dilapidated living conditions. N.T. Penalty Phase, 5/16/96, at 1645–80 and 1743–53. When asked why she had not maintained custody of Appellant herself, she testified that "the mother and stepfather wanted the kids with them at certain times. It brought in assistance money." *Id.* at 1752. In addition, Ms. Redden testified as to the abuse she observed against Appellant, his brother, and mother at the hands of the children's step-fathers; in particular, she testified that the children had been whipped so severely that they could not sit down or go to school for three days. *Id.* at 1744–47.

Jean Newpher, Appellant's mother, also testified as to the household environment in which Appellant grew up. She testified that Appellant's first step-father, Bill Beish, "stopped associating" with Appellant and his brother Dustin after Mr. Beish's biological son died and Dustin was blamed. *Id.* at 1802–03. She testified that she and her sons were abused by Mr. Beish, who hit the children, locked them in their bedrooms after supper and through the night, and burned Dustin's hand with a book of matches. *Id.* at 1803–04. She also testified that Appellant's second step-father, Darrell Newpher, showed her young sons a marijuana cigarette and had them smoke it. *Id.* at 1809–10. She testified that Dustin had cut Appellant with a knife several times, *id.* at 1815–16, and gave the following further detail as to Dustin's childhood abuse of Appellant:

> *Defense Counsel Andrews:* Were there other times when there was violence between [Appellant and Dustin]?
>
> ****308** *Ms. Newpher:* Oh, yeah. Basically, [Appellant's] whole life Dustin was beating up on him, hurting him. When [Appellant] was—it was in 1974, ... [Appellant] was a little over three, almost four years old, and he

had rheumatic fever, and he was trying to slide down the step on—we lived in a two-story house, and he was trying to slide down the steps on his bottom. And Dustin kicked him down the steps.

***125** [Dustin] stabbed [Appellant] in the back with a pencil. He had stabbed him in the arm with pencils. He sat at the dinner table and would pick up his fork, and out of absolutely nowhere, jump up and reach across the table and nail [Appellant] in the back of the arm with a fork, or whatever part of his body he could attack him with, [sic] would poke him with something. Anything he had in his hands really. He used Chinese stars. He used broomsticks.

Defense Counsel Andrews: All right.

Ms. Newpher: [Dustin] pulled [Appellant] out of a tree the one time. Said—he moved the ladder so [Appellant] couldn't get down. [Appellant] was short. Dustin was tall. And [Appellant] couldn't reach the ground. And Dustin says, here, I'll help you, give me your hand. And he just yanked him right down out of the tree. And [Appellant] landed on his chest with the wind knocked out of him.

And it was just—another time he put [Appellant's] head under his arm, against his ribs, and rammed his head right into the wall in the living room, and put a great big hole in the wall, with [Appellant's] head. Another time he picked him up and he pile[-]drived him on the living room floor a couple times.

Id. at 1817–**18**.

Other family members were also called as defense witnesses. Lorraine Page, Appellant's great-aunt, testified that she and her husband adopted Appellant's half-sister Annette as a toddler. Ms. Page had decided to adopt the child after she visited the household and found the conditions deplorable, with no food and little supervision. *Id.* at 1753–58. Nancy Jo Dale, Appellant's cousin and babysitter, testified that conditions in the household were "disgusting," with little food and a poor environment. *Id.* at 1770–72. Carol Dale, Appellant's great-aunt, testified that, for a short time when Appellant was a young teenager and his mother did not want him, he lived with her and her family; however, the Dale family was unable to maintain Appellant in the household because of his behavioral problems. *Id.* at 1775 –82.

***126** Molly Muir, an administrator for Clearfield County CYS, testified as to the extensive involvement of that agency with Appellant's family, as revealed through agency records. According to agency reports that Ms. Muir read into the record, Ms. Newpher, Appellant's mother, was depressed and lonely; had severe emotional problems, including a complete emotional breakdown in 1975 and threats of suicide; and at one time, had invited two young men that she had met at a bar to stay with her in the trailer she shared with her children. The caseworker's report concluded that it seemed best to take seriously Ms. Newpher's suicide threats and the possibility of her being a danger to herself or her children. *Id.* at 1687–89, 1691. Ms. Newpher indicated that she had married the father of Appellant and Dustin because he had threatened her and her family. *Id.* at 1689–90. According to other agency reports, Ms. Newpher had had a brief and stormy marriage with her sons' father, did not want or love either of her sons, and did not look at

Appellant for two days after he was born. She recognized that both sons had severe behavioral problems, ***309** which she attempted to address by yelling at them. *Id.* at 1690–91. Ms. Newpher's second marriage, to Bill Beish, was also stormy. *Id.* at 1691. Based on continuing agency reports, Ms. Muir further testified to an incident in 1977 in which, because Ms. Newpher had said that she never wanted to see her sons again, a caseworker had picked up Appellant and his brother Dustin at school and had placed them in a children's home. *Id.* at 1693. Shortly thereafter, Ms. Newpher partially changed her mind, still wanting no contact with her sons, but forbidding adoption and instead wanting her mother to raise them. *Id.* at 1694–95. The children were released into the care of their grandmother, but subsequently they moved back into their mother's home. Then, in 1983, as a result of "severe family dysfunction," Appellant was admitted to the Children's Aid Society; Appellant claimed that he had been beaten and mentally abused at home, although he also stated that he missed his family and wanted to maintain some contact with them. *Id.* at 1700–01. Appellant was placed in several foster homes, but because of his severe *127 behavioral problems, the placements were short-term. Ms. Muir also testified as to CYS's involvement specifically with Appellant's brother Dustin Spotz. *Id.* at 1703–06, 1717–20, 1722–25. Dustin consistently made reports of abuse in the home, and he was involuntarily committed to hospital in 1982 after holding Appellant at knife-point. *Id.* at 1718, 1720.

Dr. David G. Thompson, a licensed psychologist at the Milton Hershey School, where Appellant and his brother Dustin were enrolled for a short time in 1984, testified that, during a pre-admission interview, Appellant reported a psychologically and physically abusive home life. *Id.* at 1784–88.

Psychologist Dr. Ragusea also testified during the penalty phase as to the deplorable environment in which Appellant had been raised, reinforcing the testimony of the family witnesses. Some excerpts of Dr. Ragusea's testimony are as follows:

> But let me go through some realities here. And that is that [Appellant] had an awful childhood and an awful adolescence.... he lived in something like twenty-three different places, he went to eleven different [ ] public schools and specialized schools before he finally dropped out in eleventh grade. He was abused. At the very least, we have evidence for physical abuse. He also contends he was sexually abused by his brother, by his stepfather, and by others. In addition to all of that, we know that he was neglected for long periods of time. We know that his mother vacillated back and forth, based upon the records, from saying I hate this child, take him away from me, I don't love him, I have never loved him, I don't ever want to see him again; to saying, all of you people in the Children's Services Agency are bad people screwing up my family, stay out of my life and I will take care of my kid. Bring him back to me.
>
> And so the kid went back and forth, back and forth, between his mother and something like a dozen different other people and institutions at various times.

N.T. Penalty Phase, 5/16/96, at 1871–72.

> [Appellant] was vulnerable from the beginning. From the very beginning, he was vulnerable to violent behavior due *128 to, one, a poor early environment, as we have already described,

> as you have heard about in this trial, neglect and abuse throughout his life.

Id. at 1877.

> Based upon my review of the records, what we have is an incident wherein [Appellant's] hand was held on a burner *****310*** of a stove. And his hand was severely burned on that stove.[38]
>
> And then what happened was Children's Services was brought in to investigate it. The children then said, no, that didn't happen. That isn't really what happened. This was some time later.

* * *

> That is common with children who have been abused. Then what happened was interviews were conducted later on with people who said they had spoken with the perpetrator of the abuse, and he had confirmed that he had indeed done it. So that is what I am looking at in terms of confirmatory evidence of severe abuse.

Id. at 1890–91 (footnote added).

> The difficulty in this situation was the kids [Appellant and Dustin] were never returned home because the situation had improved in the home. The kids were returned home because the mother wanted them there.
>
> And even though the Children's Services Agency knew that those horrible conditions continued to exist, the judge insisted on returning the kid[s] to the home. And that never should have been done. In fact, it was done against the advice of the Children's Service agencies. And that is a fact.

Id. at 1893.

75 76 By offering the extensive mitigation testimony summarized above, Attorney Andrews presented a picture of ****129*** Appellant's chaotic, dysfunctional family environment, in which his mentally ill mother and absent or abusive father figures could provide neither life's basic necessities nor love and emotional support to their children. In the testimony, a home atmosphere not simply of neglect, but also of violence and abuse was apparent. Despite the extensive evidence summarized above, Appellant argues that had his counsel presented even further details and more examples of abuse, of whatever nature, it is likely that the jury would have attributed determinative weight to mitigation circumstances and not imposed the death penalty. We agree with the PCRA court that Appellant's argument is unconvincing and ultimately unavailing. As he did in *Spotz V,* 896 A.2d at 1226–30, Appellant simply labors under the mistaken notion that if only the jury had more details and more data regarding his upbringing, it would not have returned a death sentence. In addition, we also agree with the PCRA court that Attorney Andrews cannot be held ineffective for failing to uncover details and instances of abuse that Appellant and his family failed to disclose.[39] Accordingly, Appellant's allegations of penalty phase counsel's ineffectiveness for failing to investigate and present sufficient evidence of abuse and family dysfunction and impairment have no merit.

77 In the second sub-issue under Issue 14, Appellant asserts that counsel was ineffective for failing to develop and present further evidence of

Appellant's drug and alcohol addiction and abuse. Although Dr. Ragusea testified that Appellant suffered from polysubstance abuse, Appellant now argues that counsel was ineffective for failing to present additional evidence of his ***311** drug use and addiction, including testimony from family members and other witnesses, CYS and child placement records, and court records of his prior offenses. Appellant's Brief at 49. The PCRA court rejected Appellant's claim, noting that Linda Spotz, Appellant's wife, testified that Appellant had a problem with drugs, smoked marijuana, used ***130** LSD and crack, drank beer, and was very different when he was using drugs. PCRA Court Opinion at 39; N.T. Penalty Phase, 5/16/96, at 1847–48.

We agree with the PCRA court that Appellant's claim has no merit. Dr. Ragusea testified that Appellant's diagnosis of polysubstance abuse meant that he had "abused a whole lot of different substances, marijuana, cocaine, hashish, alcohol, all those different things." N.T. Penalty Phase, 5/16/96, at 1879. Dr. Ragusea and Ms. Newpher, Appellant's mother, both testified that Appellant was introduced to marijuana at the age of seven by his step-father. *Id.* at 1809–10, 1877. Dr. Ragusea further testified that Appellant grew up in a home in which drugs were commonly used, bought, and sold. *Id.* at 1877.

Attorney Andrews was questioned by Appellant's counsel regarding this issue at the PCRA hearing, which we excerpt, in part, below:

> *Defense PCRA Counsel:* Mr. Andrews, you previously testified that ... you would have wanted to present evidence from lay witnesses that would support Dr. Ragusea's diagnoses. With respect to Dr. Ragusea's diagnosis of polysubstance abuse, would you have wanted to present as much evidence as was available of [Appellant's] history of drug abuse?
>
> *Mr. Andrews:* There's limits as to how much you would put on. I mean, once you believe a fact is established you don't just keep putting on more evidence that's cumulative in nature. I don't know that there was any dispute that [Appellant] had a history of substance abuse.

N.T. PCRA Hearing, 5/11/07, at **18**.

We will not conclude that Attorney Andrews was ineffective for failing to present additional, cumulative evidence of Appellant's drug use and addiction. *See Spotz V,* 896 A.2d at 1231 (holding that Appellant was not prejudiced in one of his other trials by the failure of counsel to present merely cumulative evidence).

***131** In his third sub-issue, Appellant contends that counsel was ineffective for failing to investigate, develop, and present evidence of the lifelong history of violence perpetrated by Dustin Spotz against Appellant and other family members, as revealed in Dustin's psychiatric records, CYS reports, and criminal history. Appellant's Brief at 51–52 & n. 65. Appellant argues that if the full extent of Dustin's violence and its effect on Appellant's mental state had been presented, the jury would have given mitigating circumstances more weight and not imposed the death penalty. Contrary to Appellant's assertions, the jury heard considerable evidence as to Dustin's abuse of and violence toward Appellant.

At least three witnesses testified in the penalty phase regarding Dustin's abuse of Appellant and/or the effect of Dustin's violence on Appellant. Ms. Newpher, Appellant's and Dustin's mother, testified in detail, with numerous

chilling examples, as to Dustin's gratuitous childhood violence against Appellant. *See* excerpts of notes of testimony, *supra*. In addition, during the guilt phase of trial, Ms. Newpher testified as to the events that took place in her home on the night of Dustin's death. N.T. Trial, 5/14/96, at 1170–1206. She testified that Dustin was in a rage, had threatened ***312** Appellant, and had stabbed him in the back with a steak knife and a butter knife. *Id.* at 1186. She further testified that Dustin had hurt both her and Appellant numerous times in the past, once stabbing Appellant in the hand so severely that stitches were required. *Id.* at 1228–29.

Molly Muir, the CYS administrator, also testified during the penalty phase as to Dustin's violent episodes, including one where he held Appellant at knife-point. N.T. Penalty Phase, 5/16/96 at 1720. In addition, Ms. Muir testified as follows regarding Appellant's relationship with Dustin and its effects on Appellant:

> [Appellant] was torn between his allegiance to his brother, Dustin, and his interest in his family.
>
> * * *
>
> ***132** [Appellant] also tended to be drawn in by Dustin's behaviors, being the follower and defender in this sibling relationship.
>
> * * *
>
> The last runaway [from a children's home] took place on October 24, 1983, when [Appellant] left with his roommate and brother.
>
> When Lynn Washburn and Bill Inglefritz were called to St. John's Lutheran Church to pick up the boys, it was necessary to restrain Dustin because of his aggressive behaviors.
>
> This is when [Appellant] most clearly displayed his difficulty in determining allegiance. He kept asking Bill to let Dustin go while [Dustin] was being restrained, but became upset with Dustin because he was telling [Appellant] to kick Lynn, who was pregnant, and, quote, kill the baby. [Appellant] pleaded with Dustin to stop saying such things, and eventually became so angry that he kicked Dustin in the side.
>
> During this whole incident, ... [Appellant] fluctuated between support and abhorrence of [Dustin's] behavior. It seemed that [Appellant] was losing his own identity and values because of his fear of letting [Dustin] down.

N.T. Penalty Phase, 5/16/96, at 1701–02; *see also id.* at 1706.

Dr. Ragusea suggested that Appellant had been sexually molested by his brother. N.T. Penalty Phase, 5/16/96, at 1872, 1886. In addition, Dr. Ragusea testified that during the fight that culminated in Dustin's death, Dustin stabbed Appellant in the back two times, leading Appellant to conclude that he was "in a fight to the death." *Id.* at 1878.

78 The testimony presented thus established that the relationship between Appellant and his brother Dustin was, from early childhood, volatile, violent, and abusive. Appellant's contention that counsel was ineffective for failing to offer yet additional evidence in the form of Dustin's psychiatric records, CYS reports, and criminal history, is meritless. Such evidence would have been

merely cumulative of the testimony presented with regard to the matter of Dustin's abuse of and violence toward Appellant.

133 79 In his fourth sub-issue of Issue 14, Appellant alleges that counsel was ineffective for failing to investigate Appellant's family history of mental illness, which, Appellant argues, not only was "independently mitigating," but also directly affected Appellant's "susceptibility for mental illness." Appellant's Brief at 50. Appellant cites in particular the various diagnoses of mental illness given to his biological father; mother, Ms. Newpher; and brother Dustin as "relevant and material to the jury's consideration of mitigation." *Id.* at 51.

Appellant ignores the substantial penalty phase evidence presented as to the family ****313*** history of mental illness. Molly Muir, the CYS administrator, testified that Ms. Newpher had severe emotional problems, including a complete emotional breakdown in 1975, for which she received psychiatric care; had experienced depression over a long period of time; and had threatened suicide. N.T. Penalty Phase, 5/16/96, at 1687–89, 91. Ms. Muir also testified as to Dustin's mental health problems, including his uncontrollable behavior, anger and resentment, aggression, and threats of self-harm. *Id.* at 1703–06, 1717–**18**; *see also supra,* excerpts of Ms. Muir's testimony. Dustin's violent behavior was well documented before the jury. The reports Ms. Muir read into the record indicated that Dustin asked the caseworkers to hit him instead of talking to him. *Id.* at 1705. On several occasions, Dustin had grabbed a sharp object and threatened to slit his wrist or hurt someone else, requiring crisis intervention and physical restraint. *Id.* at 1723–25. In addition, Dustin had been involuntarily committed to a hospital in 1982 on a crisis basis. *Id.* at 1719–20. Dr. Thompson, the director of psychological services at the Milton Hershey School, testified that Dustin was subjected to psychiatric evaluation and discharged from the school because of his aggressive, extremely difficult behavior. *Id.* at 1789–90. Dr. Ragusea testified that, at the time of Appellant's conception, his father was using "very heavy kinds of drugs," which research has suggested can affect the genetic material in sperm and result in offspring with neurological syndromes. *Id.* at 1875.

134 Appellant provides no argument as to how or why additional evidence as to his family history of mental illness would not have been merely cumulative. In addition, he provides no argument as to how or why additional evidence of his family history of mental illness could possibly have been determinative in the jury's balance of mitigating and aggravating factors. There is no merit to his assertion that Attorney Andrews was ineffective for failing to present such additional evidence.

80 Finally, in the fifth and last, and somewhat redundant, sub-issue of Issue 14, Appellant asserts that counsel was ineffective for failing to obtain and consider all available records and evidence of his mental health problems, which incorporated the effects of abuse, neglect, abandonment, drug addiction, and family history of mental illness. More specifically, Appellant asserts that, because his expert witness, Dr. Ragusea, did not have access to *all* of the records and information regarding Appellant's background,[40] Dr. Ragusea provided merely "a drop in an ocean of background and collateral data," and accordingly, presented a "materially inaccurate" picture of Appellant's life and mental health to the jury. Appellant's Brief at 52–53. Relying on the PCRA hearing testimony of two

psychiatrists, Dr. Neil Blumberg and Dr. Robert A. Fox, Jr., as well as Dr. Ragusea, Appellant argues that, had all the evidence relevant to his background and history been considered, "additional, more significant mental health diagnoses" would have been rendered. *Id.* at 54. These "more significant mental health diagnoses" would, Appellant argues, have tipped the balance in favor of mitigating circumstances during the jury's deliberations. *Id.* at 54–55.

The PCRA court denied relief. First, the PCRA court pointed out that, to the ****314*** extent the records challenged in this issue were allegedly incomplete and inadequate CYS institutional ****135*** records regarding Appellant and his immediate family, the matter had also been raised in the collateral appeal of Appellant's Schuylkill County first-degree murder conviction. *See Spotz V,* 896 A.2d at 1230–31. In *Spotz V,* this Court concluded that Appellant had not been prejudiced by the allegedly incomplete records, because any additional records would have been merely cumulative and redundant. *Id.* at 1231. Similarly, in the instant case, the PCRA court concluded that Appellant was not prejudiced by Dr. Ragusea's lack of access to all the records and other evidence relevant to Appellant's background. The PCRA court carefully compared the various mental health diagnoses that Appellant had received, both at the time of trial and for purposes of collateral review, when the additional records were brought forth. The PCRA court determined that the differences in the diagnoses were not prejudicial and would not have altered the outcome of the penalty phase, particularly in light of the substantial evidence supporting the three aggravating factors found. *See* PCRA Court Opinion at 45–46. The PCRA court's conclusions are supported by the record, and we will not disturb them, as explained below.

At the PCRA hearing, Dr. Ragusea explained in general terms the significance of the additional records and other evidence regarding Appellant's background as follows:

> [We now] have much more information in general both from [Appellant] and collateral sources about his condition and the condition of the family for many years, and as a result, there's a greater level of specificity that I didn't have [at trial].
>
> In addition, the information that is derived from all that more specific information is more profoundly disturbing and suggests more severe family dysfunction, more severe abuse, more severe inappropriate sexual activity.

N.T. PCRA Hearing, 1/**18**/07, at 142.

Thus, by Dr. Ragusea's own words, the additional records and information merely allowed him to be more specific about Appellant's condition and suggested a greater degree of dysfunction ****136*** and abuse; however, there is no indication from Dr. Ragusea's testimony that the additional records and information led to any substantially new insights or qualitative change in his opinions.

Dr. Ragusea then explained more specifically how he had modified his diagnoses of Appellant based on the additional records and information. At the time of trial, Dr. Ragusea testified that he had diagnosed Appellant with the following mental health disorders: attention deficit hyperactivity disorder; polysubstance abuse, involving marijuana, cocaine, hashish, alcohol; post-

traumatic stress disorder, from the trauma of Dustin's killing; and mixed personality disorder, with features of borderline personality, antisocial behavior, and schizotypal personality. PCRA Court Opinion at 34–35; N.T. Penalty Phase, 5/16/96, at 1877–81 and 83–84. After reviewing additional records and other evidence regarding Appellant's background at the request of PCRA counsel, Dr. Ragusea modified his diagnoses in two ways: (1) the old diagnosis of mixed personality disorder with features of borderline personality, antisocial behavior, and schizotypal personality was replaced with "a specific personality disorder, such as schizotypal personality disorder, simply because [there] now is some evidence that [Appellant] was hallucinating and delusional at various points and that that also occurred in family members." ***315** N.T. PCRA Hearing, 1/18/07, at 142; and (2) the old diagnosis of post-traumatic stress disorder was replaced with chronic posttraumatic stress disorder, of many years' duration, and induced, not just by Dustin's killing, but more generally by the violence and abuse Appellant had habitually suffered in his family life. *Id.* at 145–46.[41]

***137** While we do not minimize the potential significance of the revised diagnoses to trained psychologists or psychiatrists involved in mental health treatment, we can locate nothing in the record to suggest that the revisions would have been determinative in the deliberations of the jury. We agree with the PCRA court that Dr. Ragusea's revised diagnoses on collateral appeal constitute no prejudice to Appellant because he has not established that the revisions would have caused the jury to weigh differently the mitigating versus aggravating circumstances. *See* PCRA Court Opinion at 45.

Dr. Ragusea also testified both at trial and at the PCRA hearing as to the statutory mitigators, 42 Pa.C.S. §§ 9711(e)(2) and (e)(3). With regard to subsection (e)(2) ("The defendant was under the influence of extreme mental or emotional disturbance"), Dr. Ragusea testified at trial that Appellant met this mitigating circumstance. N.T. Penalty Phase, 5/16/96, at 1882. At the post-conviction hearing, Dr. Ragusea testified that, based on the additional information he had received, he could testify to this mitigating circumstance "with a much greater degree of certainty now because the emotional disturbance was far greater and far bigger than that was—that was related to that single incident with his brother. [Appellant's] level of emotional disturbance was broader, deeper, more severe than I had an appreciation for based upon the evidence that I had available to me at the time [of trial]." N.T. PCRA Hearing, 1/18/07, at 149–50.

With regard to subsection (e)(3) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"), Dr. Ragusea testified at trial as follows:

> *Dr. Ragusea:* I believe that [Appellant] could have conformed his conduct to the law if he chose to. I think, but I am not certain.
>
> ***138** And the reason for that has to do with the fact that [Appellant] told me that he did not commit these murders. And, therefore, anytime I asked him what was it like at the time of the murder, what were you thinking, he said, I was unconscious behind the driver, and I was lying in the back seat of the car. So, as far as I was concerned, I couldn't explore that area really at all. But, in general, my answer is I couldn't tell.

* * *

***316** *Defense Counsel:* Let me just get back to ... the ability to conform his conduct to the law, and you said you really don't have an opinion on that because he had always told you—he didn't give you enough information that you could make a determination?

Dr. Ragusea: That is correct.

Defense Counsel: If you assume as a hypothetical that [Appellant] committed this offense in the fashion that he is charged, are you able to say whether your findings on the first mitigating circumstance, about being subject to an extreme mental or emotional disturbance, would bear upon his ability to conform his conduct to the law?

Dr. Ragusea: Yes, it might have. It could have impacted him adequately so he would have trouble doing it.

N.T. Penalty Phase, 5/16/96, at 1882–84.

At the PCRA hearing, Dr. Ragusea testified regarding the subsection (e)(3) mitigator as follows:

Dr. Ragusea: The other issues involved include the fact that one of the things these additional records do is they show me that this then-young man was brought up in a home in which he was taught abhorrent behavioral standards. He was taught that violence, degradation, humiliation, life-threatening actions were all normal. It was part of every day family life.

Now, within that context, I don't know if he understood how wrong it was to do the things that he was doing within the framework of our sense of morality and our understanding of the law.

***139** *Defense Counsel:* So then let me refer you to the first clause of [mitigator (e)(3)], the capacity of the defendant to appreciate the criminality of his conduct,....

Based on what we know with the augmented records and the extent of[,] as you characterized[,] abuse and degradation and humiliation[,] and the fact that it continued throughout his entire life, can you today render an opinion to a reasonable degree of psychological certainty as to that first clause there?

Dr. Ragusea: Given that it is impossible for us to be inside somebody's head, there are limits to what we can conclude. But to the degree that psychologists can make such a determination, yes, within a reasonable degree of psychological certainty I can say that [Appellant] did not have the capacity to appreciate the criminality of his conduct.

N.T. PCRA Hearing, 1/**18**/07, at 152.

Appellant has failed to establish that it was prejudicial for the jury not to hear Dr. Ragusea's modified opinions regarding the two statutory mitigating factors of subsections 9711(e)(2) and (e)(3). The modifications in Dr. Ragusea's opinions are subtle, largely a matter of degree or emphasis. As with the revised mental health diagnoses, nothing in the record suggests that the subtle modifications in Dr. Ragusea's opinions as to the statutory

mitigators would have led the jury to give determinative weight to mitigating circumstances and thus spare Appellant the death penalty.

Because none of Appellant's multiple claims of ineffective assistance in issue 14 has any merit, Appellant is entitled to no relief.

15. Department of Corrections Mental Health Reports

81 In Issue 15, Appellant asserts a violation of *Brady v. Maryland* and ineffective assistance of counsel, both grounded in the failure of the Department of Corrections to provide two reports of a mental health evaluation of Appellant conducted ****317*** by prison health care personnel in January 1996. Appellant contends that one of these documents constituted mitigation ****140*** evidence because it indicated that he would adjust well to prison life; in addition, Appellant contends that the documents provided support for a "diminished capacity/emotional disturbance defense," as well as for a finding that Appellant was not competent to waive counsel. Appellant's Brief at 57–59.

The PCRA court made the following findings of fact with regard to this matter. *See* PCRA Court Opinion at 46. When defense counsel Andrews sought Appellant's mental health records from the Department of Corrections, the Department informed him that such records would not be released without a court order. *See* N.T. PCRA Hearing, 5/10/07, at 160–64; Letter to Mr. Andrews from Ben Livingood, Corrections Superintendent Assistant, dated 11/13/95 (Petitioner's Exhibit 82). Knowing that the Office of the Public Defender in York County was seeking the same records, Attorney Andrews deferred to that office. The Department of Corrections sent Appellant's psychological/psychiatric records, noting that they were compiled prior to his incarceration for murder, to the York County public defender on February 21, 1996.[42] These records, which dated from Appellant's 1990 incarceration for robbery, simple assault, burglary, and conspiracy, were forwarded from York County to Attorney Andrews on February 23, 1996. Subsequently, PCRA counsel discovered two additional documents, which summarized Appellant's mental health evaluation by prison personnel on January 31, 1996, but which apparently had not been sent to counsel.

The PCRA court concluded that counsel was not ineffective for not re-requesting Department of Correction records immediately before trial; in addition, the PCRA court noted that there was no evidence that Appellant had told counsel that he had been evaluated by prison mental health professionals. Finally, the PCRA court recognized that Appellant had raised, ****141*** and this Court had rejected, a similar issue in the collateral appeal of Appellant's first-degree murder conviction in Schuylkill County. PCRA Court Opinion at 47 (citing *Spotz V,* 896 A.2d at 1237). In *Spotz V,* we denied relief on this issue, based on the speculative nature of the documents' assessment of Appellant's future adjustment to prison life and on Appellant's failure to demonstrate prejudice. *Spotz V,* 896 A.2d at 1237. The same conclusion applies here, and thus we affirm the PCRA court's ruling on this issue.

We consider first the content of the two documents at issue. The first document is a psychological evaluation of Appellant, conducted by Franklin P. Ryan, Ph.D., the chief psychologist for the Department of Corrections, on January 31, 1996, which was a year after Appellant's crime spree and shortly before his murder trials. Psychological Evaluation, conducted by Dr. Ryan, dated 1/31/96 (Petitioner's Exhibit 84) (hereinafter "Ryan Report"). The

evaluation was apparently prompted by Appellant's complaints to prison personnel of decreased sleep, hallucinations, and depression. Psychiatry Department Referral Form, referred by Cynthia M. Crowell, dated 1/29/96 (Petitioner's Exhibit 34). The Ryan Report included, *inter alia,* the following findings: Appellant had a verbal ***318** IQ in the "bright normal range;" he had a "markedly deviant" Minnesota Multiphasic Personality Inventory profile; he described his family as "critical, quarrelsome, lacking in love, understand [ing] or support;" he was isolated, alienated, lonely, unhappy, generally obnoxious, and immature, and viewed himself as misunderstood and a failure; he had demonstrated aggression towards others and admitted to having impulses to do something harmful and shocking. Ryan Report at 1–2. The report also suggested the following "Diagnostic Impressions": (1) adjustment disorder with anxious mood; (2) personality disorder, severe, mixed, with features of passive-aggressive, passive dependent, narcissistic, antisocial; (3) polysubstance abuse/dependence, in remission; (4) problems with legal system. *Id.* at 2–3. Finally, under "Recommendations," the report stated the following: "[Appellant] eventually will adjust well to prison life. It provides him with a structure, ***142** limits, and guidelines. It will meet his dependency strivings, and won't tolerate his acts of aggression. He is bright and can be trained at a prison trade. During the next year, however, while his cases are being heard and decided, he must be held in closer custody for the safety of those around him." *Id.* at 3.

The second document, authored by Department of Corrections psychiatrist Frederick R. Maue, and also dated January 31, 1996, is extremely short and informal, comprising only a few hand-written notations. According to the notations, Dr. Maue saw Appellant, who claimed to have felt better after meeting with Dr. Ryan, slept well, and had fewer flashbacks and nightmares. Psychiatry Department Referral Form, completed by Frederick R. Maue, M.D., dated 1/31/96 (Petitioner's Exhibit 34) (hereinafter "Maue Notes"). The Maue Notes do not mention any diagnosis or potential for adjustment to prison life.[43]

For his argument as to the relevance of these documents to the penalty phase of trial, Appellant relies on *Skipper v. South Carolina,* 476 U.S. 1, 4, 7 & n. 2, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). In *Skipper,* the United States Supreme Court held that the state court had committed constitutional error by excluding, from a capital sentencing hearing, testimony proffered by the defendant regarding his good behavior in prison during the time between his arrest and trial. The high Court concluded that it was a "not undesirable element of criminal sentencing" for the jury to consider "a defendant's past conduct as indicative of his probable future behavior." ***143** *Id.* at 5, 106 S.Ct. 1669. Relying on its prior holding that a sentencing court "not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," the high Court concluded that "a defendant's disposition to make a well-behaved ***319** and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 4, 106 S.Ct. 1669 (quoting *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (emphasis in original)) and 7, respectively.

In the instant case, Appellant submits that his counsel was ineffective for not proffering, as mitigation evidence under *Skipper,* the projection in the Ryan Report that Appellant "eventually will adjust well to prison life." Ryan Report

at 3. Appellant has failed to establish that, had the Ryan Report and/or the Maue Notes been offered as additional mitigation evidence, there is a reasonable probability that the jury would have decided upon life imprisonment, not the death penalty. Appellant totally ignores the fact that the documents present a far from uniformly positive picture of his personal characteristics, interpersonal relations, and likely future conduct. Although Appellant had been imprisoned for nearly a year when the documents were written, they give little, if any, insight as to his conduct in and adjustment to prison during that time. While the Ryan Report does indeed speculate that Appellant "*eventually* will adjust well to prison life," it also mentions several times his aggressive tendencies toward others, and notes the need to maintain him in "closer custody for the safety of those around him" while his cases were being decided. Ryan Report at 3 (emphasis added). There is no reasonable probability that the jury would have chosen not to sentence Appellant to death based upon the speculative—and largely negative—assessments in the documents at issue. Accordingly, we will not hold counsel ineffective for failing to proffer these documents as mitigation evidence.

82 Furthermore, we will not hold counsel ineffective for failing to proffer these documents as guilt phase evidence in ***144*** support of a diminished capacity defense or of Appellant's incompetence to waive counsel. The documents provide absolutely no insight as to Appellant's mental state at the time of the offense, the only relevant time for a diminished capacity defense. *See Commonwealth v. Rainey,* 593 Pa. 67, 928 A.2d 215, 237 (2007) (requiring a defendant advancing a defense of diminished capacity based on mental defect to "establish [that he or she] had a mental defect at the time of [the] murder that affected his [or her] cognitive abilities of deliberation and premeditation necessary to formulate specific intent to kill."). Furthermore, nothing in the documents remotely implies that Appellant did not have the mental capacity to understand the legal proceedings, and thus was not competent to stand trial or to waive counsel. *See Starr,* 664 A.2d at 1339; *Puksar,* 951 A.2d at 288. In fact, the Ryan Report constitutes evidence to the contrary, noting that Appellant exhibited a verbal IQ of 118, which placed him in the bright normal range of mental ability. Thus, far from supporting a diminished capacity defense, the documents more logically support Appellant's competence to stand trial and waive counsel. Accordingly, there is no arguable merit to Appellant's assertions that counsel was ineffective for failing to offer these documents as evidence during the guilt phase of trial.

83 Finally, in Issue 15, Appellant asserts a violation of *Brady v. Maryland* grounded in the failure of the Department of Corrections to produce the documents at issue. Appellant neglects to accompany his assertion with any argument, but it is meritless on its face. To establish a *Brady* violation, an accused must prove, *inter alia,* that the evidence allegedly withheld ***320*** was "material evidence that deprived the defendant of a fair trial." *Commonwealth v. Johnson,* 572 Pa. 283, 815 A.2d 563, 573 (2002). "Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting ***145*** *Kyles v. Whitley,* 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). For the reasons discussed *supra,* neither the Ryan Report nor the Maue Notes

constitutes " material evidence." Appellant's assertions to the contrary are entirely meritless and he is entitled to no relief on his fifteenth issue.

16. Amenability to and Availability of Mental Health Treatment as a Mitigating Factor

In Issue 16, Appellant asserts that penalty phase counsel was ineffective for failing to proffer, as a mitigating circumstance, evidence that Appellant's mental disorders, including PTSD, were amenable to treatment, and that appropriate treatment for his mental disorders was available to inmates serving a life sentence. Appellant relies on the Department of Corrections mental health documents discussed *supra* in Issue 15 to support these assertions.[44] Furthermore, he contends that his amenability to and the availability of appropriate mental health treatment should have been considered as additional evidence supporting his favorable prognosis for adjustment to prison life. Appellant's Brief at 60–61.

84 Our review of the record reveals no indication that this matter was presented to the PCRA court in a timely enough fashion to preserve it for appeal, and Appellant fails to provide a citation to the record to establish the contrary. *See* Pa.R.App.P. 2117(c)(4) (requiring "specific reference to the places in the record where the matter appears ... as will show that the question was timely and properly raised below so as to preserve the question on appeal"); *see also* Pa.R.App.P. 2119(e). The matter was first raised in Appellant's motion for reconsideration, which was filed on July 21, 2008, nearly a month after the PCRA court had issued its opinion and order denying all of Appellant's claims for relief. There is ***146** also no indication from the record that the PCRA court addressed the matter. We conclude that the matter has been waived. *See* Pa.R.App.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.")

17. Cumulative Effects of Alleged Errors and Ineffective Assistance

Appellant next contends that the cumulative effect of the alleged errors and ineffective assistance warrants a grant of relief, summarily asserting "cumulative prejudice from the combination of court error, improper actions by the prosecution, and deficient performance by counsel at both the trial and appellate stages." Appellant's Brief at 92. Comprising only six sentences in total, this claim does not develop any specific, reasoned argument for cumulative prejudice. Appellant merely cites *Commonwealth v. Johnson,* 600 Pa. 329, 966 A.2d 523, 532 (2009), and ***321** *Commonwealth v. Sattazahn,* 597 Pa. 648, 952 A.2d 640, 670–71 (2008), for the principle that a claim of error based on cumulative prejudice may be viable. The PCRA court denied Appellant's claim of cumulative effect based on its findings that none of Appellant's individual claims warrant relief. PCRA Court Opinion at 25, 58.

85 We have often held that "no number of failed [ ] claims may collectively warrant relief if they fail to do so individually." *Johnson, supra* at 532 (quoting *Commonwealth v. Washington,* 592 Pa. 698, 927 A.2d 586, 617 (2007)). However, we have clarified that this principle applies to claims that fail because of lack of merit or arguable merit. *Sattazahn, supra* at 671. When the failure of individual claims is grounded in lack of prejudice, then the cumulative prejudice from those individual claims may properly be assessed. *Id.; Johnson, supra* at 532 (citing *Commonwealth v. Perry,* 537 Pa. 385, 644 A.2d 705, 709 (1994), for the principle that a new trial may be awarded due to cumulative prejudice accrued through multiple instances of trial counsel's ineffective representation).

***147** We have denied most of Appellant's claims based on lack of merit, and 86 there is no basis for a claim of cumulative error with regard to these claims. With regard to the few claims that we have denied based on lack of prejudice, *see* one sub-claim in Issue 9, two sub-claims in Issue 11, and Issue 15, we are satisfied that there is no cumulative prejudice warranting relief. These claims are independent factually and legally, with no reasonable and logical connection that would have caused the jury to assess them cumulatively.

PCRA PROCEEDING

18. DNA Testing of Blood Sample

In Issue **18**, Appellant asserts that the PCRA court erred by denying discovery related to the Commonwealth's handling of a blood sample obtained from Appellant's right sneaker. At trial, Appellant and the Commonwealth stipulated to a report by Cellmark Diagnostics, a DNA laboratory in Maryland that performed DNA analysis on the blood obtained from the sneaker, as well as on blood obtained from Appellant and his four victims. The DNA analysis excluded Appellant and the first three victims as sources of the blood; however, Betty Amstutz could not be excluded. N.T. Trial, 5/14/96, at 1133–35. Appellant now alleges that the Commonwealth did not employ an independent lab for analysis of the blood from the sneaker, but rather relied on a police lab, which used out-of-date and less reliable testing methods. Appellant further states that, when he sought to re-test the blood from the sneaker, he learned that it had been destroyed, and he alleges that the Commonwealth exercised bad faith in failing to preserve the sample.[45] Appellant's Brief at 92.

Appellant's motion for discovery related to these allegations was denied by the PCRA court based on failure to show good ***148** cause, particularly in light of the fact that he had stipulated to the DNA report from Cellmark Diagnostics. PCRA Court Opinion at 62. The PCRA court also concluded that no evidence had been offered during the PCRA proceedings to support the allegations ****322** that the entire sample had been consumed, or, if it had been consumed, that there had been any way to preserve a portion of the sample. In addition, the PCRA court concluded that there was no evidence of bad faith on the part of the Commonwealth, and no evidence that re-testing of the sample could possibly have exculpated Appellant. PCRA Court Supplemental Opinion, dated 8/7/08, at 5–6.

Discovery requests in the context of a PCRA petition in a death penalty case are addressed in Pennsylvania Rule of Criminal Procedure 902(E)(2), which provides as follows:

> (2) On the first counseled petition in a death penalty case, no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of good cause.

Pa.R.Crim.P. 902(E)(2).

87 We review the denial of a discovery request in post-conviction proceedings for abuse of discretion. *Commonwealth v. Bryant,* 579 Pa. 119, 855 A.2d 726, 749–50 (2004).

88 89 We agree with the PCRA court that Appellant has not come close to making a showing of good cause with respect to his discovery requests

related to the analysis of the blood obtained from the sneaker. Appellant fails to mention, much less discuss, Cellmark Diagnostics' DNA analysis and his stipulation to the resulting report. His assertions of out-dated methods of analysis, destruction of the sample, bad faith on the part of the Commonwealth, and exculpatory nature of the evidence are barely explained and entirely unsupported. Bald assertions, unaccompanied by any supporting evidence, do not constitute a showing of good cause, and we hold that the PCRA court did not abuse its discretion in denying Appellant's discovery motion. *See Bryant, supra* at 750 (stating that mere speculation as to possible errors or potentially ***149** exculpatory evidence does not constitute good cause under Rule 902(E)(2)).

19. PCRA Court Rulings

In Issue 19, Appellant raises numerous allegations of PCRA court error, including (1) failure to transmit the entire record to this Court for review; (2) preclusion of his proffers of testimony during the PCRA hearing, thereby allegedly preventing him from developing the record; (3) preclusion of much material and relevant evidence, particularly testimony that supported his constitutional claims, and (4) denial of his motion for reconsideration.[46] We address each sub-claim in turn.

In his first sub-claim, Appellant asserts that the PCRA court "transmitted only those PCRA exhibits that were admitted into evidence, but did not transmit other exhibits [that the PCRA court] ruled inadmissible, even though those exhibits relate to issues that are the subject of this appeal." Appellant's Brief at 94. Appellant contends that it was error for the PCRA court not to forward to this Court the nineteen exhibits **not** admitted into evidence.[47] Notably, Appellant does **not** ***150** specifically ****323** challenge the PCRA court's **rulings** with regard to the admissibility of any of the exhibits at issue, and he does not even explain how any of the exhibits are relevant or material to the issues raised in this appeal. He merely complains that the inadmissible exhibits were not sent to this Court.

90 91 It is the duty of the clerk of court to transmit to this Court the record on appeal, including the transcript and exhibits necessary for the determination of the appeal. Pa.R.A.P. 1931(a)(1), (c). As an appellate court, we are "limited to considering only those facts that have been duly certified in the record on appeal." *Commonwealth v. Williams,* 552 Pa. 451, 715 A.2d 1101, 1103 (1998). Appellant cites no authority for his implied assertion that inadmissible exhibits properly constitute part of the record on appeal. Furthermore, Appellant was free to challenge on appeal the PCRA court's evidentiary rulings with regard to the admissibility of any of the exhibits. He has not done so. Indeed, he has not set forth a single argument or citation to authority or legal principle to support the admissibility of any of the exhibits at issue. Appellant's bald assertion of error in the transmission of the record to this Court is entirely without merit. To remedy the non-existent problem in transmission of the record, Appellant seeks remand—to what end, we have no idea, as no explanation is offered. This sub-claim is frivolous in the extreme.

92 In his second sub-claim, which comprises three sentences and a footnote, Appellant asserts that he was precluded from preserving and developing the record because the PCRA court precluded his proffers of testimony throughout the PCRA hearing. Appellant's Brief at 94–95. During the hearing, the PCRA court made clear the reasons for its rulings with

regard to the proffers of testimony. Appellant could ***151*** certainly have challenged these rulings on appeal with proper argument and citations to relevant authority, but for whatever reason, he chose not to do so. Instead, Appellant merely lists, in a footnote, seven citations to the record where the PCRA court allegedly precluded counsel's proffer of testimony; each citation to the record is accompanied only by a phrase, which purports to summarize the proffer precluded, but which includes no argument as to the court's alleged error. *Id.* at n. 124. This sub-claim is completely undeveloped and unreviewable, and, accordingly, it is waived. [48]

152** **324* In his next sub-claim, Appellant similarly asserts that he was precluded from presenting material and relevant evidence in support of his constitutional claims by the PCRA court's evidentiary rulings during the hearing. As in the prior sub-claim, no argument and no citations to relevant authority accompany Appellant's bald assertions of PCRA court error. Appellant merely lists ten general ***325 areas in which he contends the PCRA court "precluded" evidence, and adds lengthy footnotes listing citations to the notes of testimony, with each cite accompanied by a parenthetical stating only a short summary ***153*** of the testimony " precluded." Appellant's Brief at 95–98. [49]

93

Examples are necessary to appreciate the manner in which Appellant has set forth this sub-claim. In the following paragraphs, two of the ten general areas of evidence listed by Appellant, and their accompanying footnotes, are reproduced verbatim:

> The PCRA Court precluded ...
>
> evidence regarding the Clearfield incident that counsel should have developed and presented at trial and during the penalty hearing that would have supported Appellant's mental state defenses for this incident and challenged the prosecution's aggravation;

Appellant's Brief at 95–96.

The footnote at the end of this claim is as follows:

> *See, e.g.,* PC 1/**18**/07, 57 (precluding expert testimony about the impact of the Clearfield incident on Appellant's pre-existing impairments; PC 2/22/07, 120–21 (precluding expert testimony about Appellant's mental state at the time of the Clearfield incident; the decedent's mental state; and the impact of the Clearfield incident on Appellant's pre-existing impairments).

Id. at 96 n. 127.

Similarly, another general area of evidence cited by Appellant is as follows:

> The PCRA Court precluded ...
>
> evidence of Dustin Spotz's history of violence and abuse both against Appellant and others that was relevant and material to both Appellant's mental state at, and following, ***154*** the incident in Clearfield County that counsel was constitutionally obligated to investigate and develop in support of guilt-phase mental state defenses; in order to challenge the prosecution's aggravation; and in support of penalty-phase mitigation and that counsel was obligated to present to his mental health expert in order

> to ensure that Appellant received competent, constitutionally required mental health assistance at trial and during the penalty hearing.

Appellant's Brief at 96–97.

The footnote at the end of this claim is as follows:

> *See, e.g.,* PC 1/17/07, 40 (counsel prevented from eliciting evidence of Dustin Spotz's rages); *id.* at 176, 181 (precluding Dr. Blumberg from testifying regarding Dustin Spotz's history); PC 1/**18**/07, 96–98 (precluding Dr. Fox from testifying regarding Dustin Spotz's history of sexual abuse and the impact that history had on corroborating Appellant's allegations that Dustin sexually abused him).

Id. at 97 n. 129.[50]

***326** We emphasize that the above paragraphs from Appellant's brief are only two examples of Appellant's ten areas of "evidence" and ten footnotes, which in total list 51 citations to the notes of testimony. In each of Appellant's areas of "evidence," the format is the same as the examples above, which constitute the **entirety** of Appellant's "argument." In no case does Appellant provide the slightest explanation or rationale to support his general claim that he was precluded from presenting evidence.

These are generalized assertions; they are not arguments, much less reasoned and developed arguments supported with citations to relevant legal authority. Appellant's assertions are not reviewable, and this sub-claim is waived for utter lack of development.[51]

***327 *157** In the fourth sub-claim of Issue 19, Appellant asserts that remand is required in order to permit him to amend his PCRA petition to include certain additional issues raised in his motion for reconsideration. The procedural background of this sub-claim is as follows. On June 26, 2008, the PCRA court filed an opinion and order denying all of Appellant's claims. On or about July 4, 2008, Appellant, acting *pro se,* sent a "Letter to the Court," in which he alleged ineffective assistance of PCRA counsel, sought to remove PCRA counsel and represent himself, requested rescission ***328** of the PCRA court's order denying his petition, and set forth several issues that he wanted the PCRA court to consider. These issues were the following: (1) Appellant's competency to waive counsel at the time of trial; (2) ineffective assistance of penalty phase counsel based on failure to elicit testimony that there was treatment available in prison for Appellant's psychiatric disorders, were he to be sentenced to a life term; (3) inconsistent verdict, grounded in the jury's finding of the subsection 9711(d)(6) aggravating circumstance (murder committed in the course of a felony), but not of second-degree murder; and (4) unnamed statutory deficiencies in the subsection 9711(d)(6) aggravating circumstance.

On July 21, 2008, Appellant's PCRA counsel filed a motion for reconsideration, seeking to vacate the PCRA court's order; requesting consideration or reconsideration of the four issues ***158** raised by Appellant in his *pro se* Letter to the Court; and stating that "to the extent that counsel failed to [present any issue of merit or any available evidence in support of a meritorious issue], those failures would have been ineffective." Motion for Reconsideration, filed 7/21/08, at 3. Notably, PCRA counsel did not unequivocally aver that they provided ineffective assistance with regard to

any specific matter, nor did they provide any insight as to the form that their potential ineffectiveness might have taken. Nonetheless, the motion for reconsideration averred that "[t]he appropriate remedy to enforce [Appellant's] right to effective assistance would be for [the PCRA court] to address the issues presented in [Appellant's *pro se*] 'Letter to the Court.' " *Id.* On July 25, 2008, days after filing his motion for reconsideration with the PCRA court, Appellant filed the instant counseled appeal to this Court.

There is no indication from the record that the PCRA court specifically addressed Appellant's motion for reconsideration. However, the PCRA court had already considered and rejected Appellant's claim that he was not competent to waive counsel at trial. *See* PCRA Court Opinion at 5–8; *see also* text, *supra* (discussion of Issue 2). In addition, the PCRA court, in a supplemental opinion, had considered and rejected Appellant's claim of an inconsistent verdict based on the jury's finding of both first-degree murder and the subsection 9711(d)(6) aggravating factor. *See* PCRA Court's Supplemental Opinion Pursuant to Pennsylvania Rule of Appellate Procedure 1925, dated 8/7/08, at 1–4; *see also* text, *supra* (discussion of Issue 10).

94 In this appeal, Appellant now seeks remand to "amend" his PCRA petition to include the issues raised in his Letter to the Court and motion for reconsideration, and to allow the PCRA court to consider or reconsider the merits of those issues. Appellant's Brief at 99. In essence, Appellant seeks to file a second—and untimely—PCRA petition, raising four more issues, at least two of which have already been addressed by the PCRA court. Appellant cites no provision in the PCRA or other statutory or decisional law—undoubtedly ***159*** because there is no such basis—upon which this Court can grant him the relief he seeks. *See Commonwealth v. Williams,* 566 Pa. 553, 782 A.2d 517, 524 (2001) (explaining that the practical effect of the legislative scheme of the PCRA as interpreted by this Court is to limit the opportunity for collateral relief in most cases to a single, counseled petition); *Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107, 112 (1988) (concluding that a second or any subsequent post-conviction request for relief "may be entertained only for the purpose of avoiding a demonstrated miscarriage of justice, which no civilized ***329*** society can tolerate"). [52]
APPELLANT'S FOURTH SUB-CLAIM IS Frivolous.

There is no merit to any of Appellant's numerous claims in Issue 19, and, accordingly, no relief is warranted.

20. Deductions from Appellant's Prison Account
In his final issue, Appellant contends that deductions by the Department of Corrections from his inmate account were ***160*** unlawful and unconstitutional because the trial court's sentencing order did not include an order directing him to pay the costs of prosecution. Appellant now agrees with the Commonwealth that this issue has been resolved and requires no further judicial consideration. *See Spotz v. Commonwealth,* 972 A.2d 125 (Pa.Cmwlth.2009); Appellant's Reply Brief at 21.

Having reviewed all of Appellant's issues and concluding that none has any merit, we affirm the order of the PCRA court denying Appellant's petition. [53]

Justice EAKIN did not participate in the consideration or decision of this case.

Chief Justice CASTILLE, Justices BAER, TODD, and ORIE MELVIN join the opinion.

Chief Justice CASTILLE files a concurring opinion, joined by Justice McCAFFERY and Part II of which Justice ORIE MELVIN joins.

Justice SAYLOR files a concurring opinion.

Chief Justice CASTILLE, concurring.
I join the Majority Opinion in its entirety. I write separately to note and address broader issues implicated by the role and performance of federal counsel in purely state court collateral proceedings in capital cases, such as this one.

Although the sources of the Federal Defender's funding are not entirely clear or easily ascertainable, the federal courts apparently play a central role in financing these activities in state court through the Administrative Office of Federal Courts.[1] ***330** To my knowledge, this policy has been determined and implemented without the consultation and involvement of this Court, or of any other Commonwealth authority. The federal courts—as well as other federal authorities and the ***161** Pennsylvania citizenry generally (who may not even be aware of this unusual federal activity in state courts)—may not be aware of just how global, strategic, and abusive these forays have become. The federal judicial policy has raised issues that should be known to the federal authorities financing and authorizing the incursions; to Pennsylvania's Senators and House members; and to the taxpayers who ultimately foot that bill. This is an appropriate case to highlight those issues.

I write to these global issues in this case because the cumulative effect of the Defender's strategy has taken a substantial and unwarranted toll on state courts; and also because the Defender has begun to complain, both in this Court and in federal court, about delays in state court decision-making, claiming that the delays violate various federal rights and even, in one intemperate federal pleading, asserting that this Court is indifferent to, and incapable of managing, its capital docket.[2] The pleadings do not disclose or focus upon the primary cause of the delays, which very often is the prolix and abusive pleadings filed by the Defender in their many cases, as well as the Defender's ethically dubious strategies and activities in other Pennsylvania capital cases—cases involving both initial and serial PCRA petitions—all of which bog down Pennsylvania courts. If the Defender is to be taken at its word respecting actionable delay and the Court's supposed incapacity, then it is time for this Court to take affirmative measures to address the most obvious causes of delay, which are well known to this Court, and which to a great extent involve the Defender. To that end, this Court should immediately eliminate its existing page-limitation briefing indulgence in capital PCRA matters, and should begin regulating the rampant briefing abuses found in briefs such as the improper one the Defender has filed in this case. I also believe it is time to take more seriously requests by the Commonwealth to order removal of the Defender in cases where, as is becoming distressingly frequent, their lawyers act ***162** inappropriately. There are other measures I would refer to our Rules Committees for suggested remedial measures in the face of the Defender's abuses, which I will discuss in Section II below.

-I-

I appreciate the Majority's yeoman effort in the face of the Defender's abusive appellate briefing, which brings me to my main point. This is not a federal case; a later, civil and collateral iteration of it may be federal if appellant ultimately pursues federal *habeas corpus* relief, at which point the federal district court will be free to appoint whichever counsel it pleases. But, there is no proper role of the federal courts at this point; and, it is not clear that the courts of this Commonwealth are obliged to suffer continued abuses by federal "volunteer" counsel paid by the federal courts. The capital PCRA petitioner, if indigent, is entitled under our Rules to the appointment of PCRA counsel, at state expense. But, the Defender has decided that federal tax dollars should be deployed to conduct appellant's state collateral attacks; and, the federal authorities who finance their state litigation strategy apparently approve the tactic. The resources the Defender was able to bring to ***331** bear in litigating this state collateral attack border on the perverse, and this fact, combined with the tactics employed, and the obvious global efforts of the Defender to obstruct capital punishment in Pennsylvania at all costs, strongly suggests that there is more at work here than non-political, professionally responsible, "zealous advocacy."

There are members of the private bar who continue to litigate capital PCRA appeals in our Court responsibly and effectively, proving (as if proof were needed) that abusive briefing is not a necessary component of competent and zealous advocacy. Capital PCRA appeals are inherently important—because the ultimate penalty is involved. They are time-consuming—because we permit longer briefs, the review encompasses lengthy capital trials, lengthy collateral pleadings, exhibits, and (oftentimes) hearings, and both the procedural and substantive law at issue may encompass an intersection ***163** of federal and state law. They are difficult—because, in virtually all of these cases, there are a few troublesome issues, of substance and procedure, which often divide the seven-member Court.

However, the inherent difficulties, and the inherent time commitment required, has been made needlessly more burdensome by the Defender's litigation strategy, which is conducted on multiple fronts. Few litigants, much less taxpayer-financed litigants, could afford to mount such strategic campaigns. This case presents a typical example of the myriad abuses of the Defender; but, there are examples of worse conduct I outline later. Indeed, I write in this case in part because of its typicality, as it raises the question of the propriety of the current, partisan federal role in Pennsylvania capital collateral proceedings.

The Defender "volunteered" itself here before direct review was completed: Robert Brett Dunham, Esquire, filed appellant's unsuccessful direct appeal *certiorari* petition in the U.S. Supreme Court. *See Spotz v. Pennsylvania,* 534 U.S. 1104, 122 S.Ct. 902, 151 L.Ed.2d 871 (2002). The Defender then initiated state collateral proceedings on December 4, 2002, by filing a 275 –page document in the Court of Common Pleas of Cumberland County, which the court properly construed as a PCRA petition. This petition, filed by Attorneys Dunham and Anne Saunders, also of the Federal Defender, encompassed 622 paragraphs, setting forth **18** primary claims, most of which included various sub-claims.[3] After the Defender's initial filings, the proceedings evidently were put on hold by agreement of the parties pending disposition of the PCRA appeal of appellant's manslaughter conviction in Clearfield County for killing his brother, a conviction that was ultimately

reinstated. ***164** On January 11, 2007, the Defender filed a supplemental PCRA petition, prepared by four attorneys: Dunham, Mary Hanssens, Michael Gonzales, and David L. Zuckerman. Five days later, Dunham filed yet another supplemental petition seeking to amend prior filings to add another new claim.

On January 17–**18**, 2007, the first two days of PCRA hearings were conducted. Dunham, Hanssens, and Zuckerman represented ***332** appellant. Among other witnesses, the Defender called a proffered expert in forensic psychiatry, a Defender investigator, two Defender "mitigation specialists," a proffered expert in clinical psychology, and a Clearfield County Children and Youth Services caseworker. On February 12, 2007, Dunham, Hanssens, Gonzales, and Zuckerman filed another supplemental petition asserting yet additional claims or arguments. On February 22–23, 2007, two more days of hearings were conducted, with Dunham, Zuckerman, and Gonzales representing appellant. Among other witnesses, the Defender presented another proffered expert in psychiatry. Another full-day hearing was held on May 10, 2007, where four lawyers—Dunham, Hanssens, Zuckerman, and Gonzales—appeared for appellant. The sixth and final full day of PCRA hearings was held on May 11, 2007, featuring Dunham, Zuckerman, and Gonzales.

On June 26, 2008, the PCRA court issued its order and opinion denying all of appellant's claims. Appellant's motion for reconsideration, filed by Dunham and Gonzales, was denied and appellant's notice of appeal followed in July 2008.

Of course, there is a federal constitutional right to counsel at trial, and I suppose the federal government could decide to help finance the states in providing such assistance to vindicate the right, to ensure fairer trials. But, the scope and resources deployed here, not to ensure a fair trial, but to try to prove that a presumptively competent trial lawyer was incompetent is simply perverse. This is a state collateral proceeding. The Defender devoted, at a minimum, five lawyers, an investigator, multiple mitigation specialists, and multiple experts to the project. It inundated the PCRA court with prolix pleadings, including trivial and frivolous claims intermixed ***165** with more serious issues; it deployed multiple lawyers at hearings, who then attempted to conduct multiple and redundant examinations.

The overwhelming majority of appellant's claims sound in ineffective assistance of counsel, implicating the Sixth Amendment and *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* claims involve not mere errors or mistakes at trial, but lapses of constitutional magnitude, a circumstance where it is as if the defendant did not have a lawyer at all. Proper examination of such claims requires deference to counsel, avoiding hindsight, recognizing the art in lawyering, and accepting that mere errors by counsel are not enough to prove prejudice. To warrant relief, a *Strickland* claim has to involve some kind of readily apparent, undeniable lapse by counsel of obvious and serious prejudicial effect. It is not a law school test of "spot the foregone objection." And, it takes a team of five federal lawyers and a supporting group of untold size comprising investigators and experts to prove the *Strickland* violation in this case?

> Laying aside the overtly obstructionist aspect of the Defender's performance here, the commitment of federal manpower alone is beyond remarkable, something one would expect in major litigation involving large law firms. It is perverse to think that the federal judiciary knowingly makes this sort of financial commitment in Pennsylvania capital cases at the collateral review level. The individual counties in Pennsylvania, which typically pursue capital murder prosecutions, lack the resources to provide this sort of representation at the main event—for the prosecution or the defense. And, equally perverse, the federal commitment of resources, on collateral review, is apparently partisan, assisting only capital defendants in attempting to undo their final state judgments.

Part: 2 of 3

Com. v. Spotz
Supreme Court of Pennsylvania. April 29, 2011 610 Pa. 17 18 A.3d 244 (Approx. 120 pages)

****333** The Defender's briefing in this Court is similarly abusive. The product of officers of the Court, it was not a good faith effort to abide by our already-lax briefing restrictions, and it borders on a contemptuous flouting of those Rules. The manner of briefing is designed to exhaust as much of this Court's time and resources as possible. The incentive for ***166** such conduct in capital cases is obvious: each day of delay the abuse generates is another delay of the day of eventual reckoning. But, this is not a legitimate justification for burdening the Court with abusive pleadings.

The "Initial Brief" bears the names of four Defenders: Dunham, Zuckerman, Gonzales, and Eric Montroy. The Brief runs exactly 100 pages. By Rule, principal briefs in this Court are limited to 70 pages; by custom, however, we have routinely indulged 100–page principal briefs in capital cases. The Rules of Appellate Procedure dictate that the brief "shall" include a Statement of the Case, Pa.R.A.P. 2111(a)(5); and that the Statement "shall" contain, *inter alia,* "A closely condensed chronological statement, in narrative form, of all of the facts which are necessary to be known in order to determine the points in controversy, with an appropriate reference in each instance to the place in the record where the evidence substantiating the fact relied upon may be found." Pa.R.A.P. 2117. The purpose and importance of the requirement is obvious to any lawyer who has drafted an appellate brief.

The Defender deliberately omitted a Statement of the Case, so that it could raise more claims and thereby evade the 100–page briefing limit. In an endnote to a truncated one-page procedural summary that it inaccurately calls the "Statement of Facts," the Defender says: "Because of the number, and fact-intensive nature, of the claims presented in this appeal, and so as to both preserve all issues and keep this brief to a reasonable size"—seriously, the Defender says this—"the facts material to the individual claims are set forth in connection with the discussion of each claim." Initial Brief of Appellant at 4 n. 1. Our briefing rules are not bizarre Pennsylvania procedural requirements. Notably, the Federal Rules of Appellate Procedure limit principal briefs to (a) a mere 30 pages, or (b) 14,000 words, or (c) no more than 1,300 lines of text if the brief employs a "monospaced face." Headings, footnotes, and quotations count toward the word and line limitations. FED. R.APP. P. 32(a)(7). The Federal Rules also mandate that the Appellant's Brief "must contain" both a statement of the case (addressing procedural matters) and a ***167** "statement of facts relevant to the issues submitted for review with appropriate references to the record." FED. R.APP. P. 28(a)(6), (7).

In a case where the appellant files a maximum brief, as here, this particular deliberate violation both hampers the Court's review and burdens the Court with however many additional claims the Defender squeezes into the pages it has improperly gained by the violation. And, squeeze the Defender did.

The Brief pretends to raise "only" 20 issues, which would be burdensome enough. But, within those twenty claims are multitudes of additional claims or sub-claims. My conservative count of the total number of distinct "claims" presented in the Defender's Brief, including both derivative and subsidiary allegations, exceeds 70. How does the Defender manage to "litigate" 70 claims in a 100–page brief? It employs a number of additional tricks.

For example, in 100 pages of Brief, the Defender includes no less than 136 single-spaced footnotes, many of extreme length, and then routinely advances distinct substantive arguments in those footnotes. *See, e.g.,* Initial Brief of Appellant, nn. 15, ***334* 18**, 20–29, 32–33, 37–39, 43–51, 53, 59, 61–70, 72–77, 79–85, 94–95, 103, 107–**18**, 123–25, 127–34. The Defender also seizes more briefing space by single-spacing, and not indenting, its Statement of Questions Presented, making them virtually unreadable in the process. *See, e.g., id.* at 2 (containing 40 single-spaced lines of text running margin to margin). Another common Defender abuse, immediately recognizable to those of us charged with attempting to read their Briefs, is to list distinct claims or sub-claims by single-spaced bullet point in text, essentially doubling the number of points to be made. To make the abuse worse, these bullet points often simply declare the sub-claims without development or legal support; other times, the Defender will append footnotes, which may contain factual support or substantive argument, or may provide no meaningful development or explanation of the relevance of bald citations. *See, e.g., id.* at 29–30 & nn. 27–29; 47–48 & nn. 53–57; 53; 64–65 & nn. 82–83; 66–67 & nn. 86–92; 71–72 & nn. 96–101; 75–76; 83; 95–98 & nn. 125–34. The ***168** time-consuming burden is then placed on the Court to attempt to decipher the arguments. Query: does the Defender do this in federal district court? In the U.S. Supreme Court? Or is the federal abuse reserved for state courts?

For a particularly egregious example—and, it is but a single example—of this abusive briefing, take Issue # 19, third sub-argument. The "argument" consists of a declaration that the PCRA court erred in "Precluding Appellant from Presenting Material Evidence" during the six days of collateral review hearings the court held. What follows are ten, single-spaced bullet point claims spanning over two pages of the Brief, all accompanied by footnotes, and none accompanied by legal citation or developed argument. The Majority gives a sense of just how frivolous these single-spaced claims are, discussing some examples. *See* Majority Slip Op. at 119–24 & nn. 46–50.

This is not a good faith effort by officers of the Court to abide by perfectly reasonable briefing restrictions. What is next: framing the entire argument section of the brief as a giant single-spaced footnote? What legitimate purpose explains such briefing tactics? And, is it appropriate, given principles of federalism, for the federal courts to finance abusive litigation in state courts that places such a burden on this Court?

A capital defendant, like any litigant, has the right to raise and pursue viable claims. And, of course, capital cases are different. This Court's commitment to affording more than sufficient opportunity to raise colorable, non-frivolous claims is reflected in the fact that this Court, to date, has permitted capital appellants to file briefs that are 43% longer than other litigants' briefs—both on direct appeal and on PCRA appeal. The Brief here is a thorough and deliberate abuse of that indulgence. Moreover, as the Majority correctly points out, many of appellant's claims here are frivolous as stated, oftentimes

unsupported by recourse to case law or the record. *See also* Majority Slip Op. at 125 n. 50 ("Appellant is attempting to compensate for a lack of overall merit with an overwhelming number of assertions of error."). Other claims are obviously makeweight: for example, as if every other word ***169** out of a trial prosecutor's mouth both violates due process, and represents a test of the constitutional competence of trial counsel.

There is no legitimate, ethical, good faith basis for this obstreperous briefing. The Defender's lawyers, who are officers of this Court, have no right to jam as many undeveloped and frivolous claims into their ****335** briefs as possible, employing footnotes and single-spaced blocking to sabotage briefing restrictions, in pursuit of an agenda that maximizes the burden on this Court's resources and time, so as to create delay. If this Court had the time, I would recommend striking the Brief and ordering a professional, appropriate brief; but that would only delay the matter, and I will suggest we address the problem by specifically altering our briefing rules.

It did not have to come to this. The provision of federally-financed lawyers for state capital PCRA petitioners appears benign on its face and welcome; it spares Pennsylvania taxpayers the direct expense of state-appointed counsel. But, that veneer ignores the reality of the time lost and the expenses generated in the face of the resources and litigation agenda of the Defender. Capital cases, like criminal cases generally, are highly individualized. Each case is invariably about one defendant and one primary capital crime; and the defense lawyer has a duty of zealous advocacy in advancing his client's cause, within the ethical limits that govern all Pennsylvania lawyers, whether they are paid by the federal government or not. But, the Defender has the resources and the luxury to pursue a more global agenda, and its conduct to date strongly suggests that, if it once engaged in mere legitimate zealous defense of particular clients, it has progressed to the zealous pursuit of what is difficult to view as anything but a political cause: to impede and sabotage the death penalty in Pennsylvania. It is not difficult to understand the motivation: indeed, there are persons of good faith and integrity who sincerely oppose capital punishment and are willing to contribute their time and talents to its defeat, whether by one stroke politically, or incrementally, case by case.

But, this is not the political realm, lawyers must act ethically, and obstructionist tactics and agendas in litigation are ***170** inappropriate. Assuming the courts of Pennsylvania must abide the participation of the Defender at all in purely state collateral proceedings, it is only because they are officers of **this** Court. Whether lawyer death penalty abolitionists like it or not, the people of Pennsylvania, like the people of 33 other states and the nation as a whole, have spoken on capital punishment, and the death penalty is lawful; this Court is not obliged to indulge political tactics that seek to dismantle or impede governing law. The difference of death does not mean that any and all tactics in pursuit of the defeat of a capital judgment are legitimate.

I am sure our federal judicial brethren are unaware of the extent of the abuses, nor can they fully appreciate the effect of these abuses, so I will attempt to illustrate. The Defender strategy, as revealed in this case, attempts to overwhelm the state courts with volumes of claims and pleadings, many simply frivolous, a strategy which burdens prosecutors and can shut down a trial court for weeks. It is also a strategy which requires this

Court to devote an increasing portion of its docket and time to consideration and decision of the Defender's cases. Our Court, like the U.S. Supreme Court and unlike the Third Circuit, is the highest court in its jurisdiction. Like the U.S. Supreme Court, we have finite manpower, and one of our most important functions is determining which cases on our discretionary dockets warrant review. Like the U.S. Supreme Court, we do not have the resources to grant review in every case: we look for cases posing new questions, close questions, questions affecting a wide range of cases, questions which have divided courts, cases posing supervisory questions, cases with apparent egregious errors, etc. Also like the U.S. ***336** Supreme Court, the cases we accept typically pose a very limited number of discrete issues. But, unlike the High Court, we also have a capital appeal docket, which governs multiple rounds of intensive direct review. We have no statutory discretion over the capital docket, and, **so far,** it has been the capital appellant who determines the number and types of claims we will review.

***171** Our Opinions in first petition capital PCRA cases where the Defender participated are far and away the most time-consuming of the cases on our appeal docket. Certainly, they generate many of our longest opinions. Take this case, where the Slip Opinion exceeds 125 pages, as the Court painstakingly slogs through the pleadings below, the record, and the morass that is the Defender's brief. *See also, e.g., Commonwealth v. Lesko,* —— Pa. ——, 15 **A.3d** 345 (2011). As a very conservative estimate, it is fair to say that the practical consequence of the expenditure of resources necessary to decide a typical Defender appeal in these cases is to render this Court unable to accept and review about five discretionary appeals. As a result, for example, this Court rarely accepts review of cases (via direct appeal or PCRA) where convicted murderers are sentenced to life in prison, without possibility of parole. Though those sentences are not as "different" as death, they are certainly different from criminal cases where the defendant has the prospect of release; and they are of importance to the defendants serving them.

Of course, the objection will be that all claims must be raised in a capital case. But, that simply is not so, and particularly on collateral review. Abusive briefing does not increase the chance of prevailing; what it increases is the delay in briefing (both sides, in capital cases, require multiple extensions of time to file briefs) and in decision-making. Moreover, the notion that all of the claims in these abusive briefs are colorable is a canard. Many are deliberately undeveloped. Consider, also, the theoretical last stage of collateral review of state capital convictions, which is the defendant's federal *habeas* appeal to the federal Circuit Court. How many federal issues in those cases ultimately qualify under the certificate of appealability requirements attending federal *habeas* review? *See* 28 U.S.C. § 2253 (state prisoners cannot appeal final orders unless a certificate of appealability issues; "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."). The bulk of the issues raised in the PCRA petitions in this case, and renewed in this appeal, are ***172** pure makeweight, designed only to bog the state courts down and induce delay.

Does it comport with principles of federalism for lawyers financed by the federal courts to so affect a state Supreme Court's docket? Does it comport with principles of federalism for the federal courts to finance a group to enter state capital cases at will and pursue an agenda that inundates the PCRA

courts and this Court with abusive pleadings and frivolous claims, with the apparent ultimate aim of attempting to **bypass** the state courts?

These questions are not theoretical. In a number of recent instances involving pending cases with typically prolix briefing by the Defender, capital PCRA defendants have complained in this Court or in federal court about the delay in the decisions of their PCRA appeals, complaining that this Court has not dropped all other business to decide their cases in a time-frame acceptable to them. *See, e.g., Commonwealth v. Dougherty,* 585 CAP (Motion to Reactivate *Habeas* Proceedings filed in federal district court, premised upon this ***337** Court's failure to decide appeal within eleven months); *Commonwealth v. Hutchinson,* 517 CAP (Motion to Expedite filed in this Court, consisting of boilerplate assertion that delay in decision violates various federal rights, none of which address circumstance at issue); *Commonwealth v. Douglas,* 495 CAP (alleging, without supporting documentation, recent diagnosis of potentially fatal cancer, and arguing that diagnosis warrants preferential expedition of decision). Notably, none of the motions mention the length of the Defender's briefs in the appeals, or the number of prolix claims, or the complexity of the proceedings and maneuverings below, or the overall and collective burden the Defender has imposed on this Court.

The federal motion in *Dougherty* is revealing. In *Dougherty,* the capital appellant is represented by four lawyers: two from the Defender (Robert Dunham and Renee Edelman) and two "*pro bono*" partners from the law firm Ballard Spahr (David Fryman and Shannon Farmer). The subject of the Motion is the alleged lassitude of this Court in disposing of the pending PCRA appeal, but the Defender and Ballard did not ***173** favor this Court with a copy of the Motion.[4] The federal motion, dated November 9, 2010, states that this Court "refused" to expedite appellant's appeal, inaccurately represents the time that had then passed, and declares that "no action" had been taken on the case. In fact, counsel have no idea what actions have been undertaken by this Court in its deliberations. The Defender and Ballard then go on to attack this Court's entire handling of its capital docket. The Defender and Ballard contemptuously declare that, "Based on the Pennsylvania Supreme Court's track record of deciding capital appeals, [appellant's] opportunity for any substantive state court review of his case is still years away." The Defender and Ballard then declare that they face "continued inordinate delay before a state court that has proven itself incapable of managing its capital docket," later accusing the Court of "leaving [the appeal] to languish" and falsely alleging that it has been held "in suspense." The Defender and Ballard declare that "judicial delays in the determination of initial PCRA appeals have become routine." The Defender and Ballard then complain of the undecided "active" cases on our docket, making no attempt to account for: the record and briefing status of cases; whether there have been remands; whether they are serial PCRA petition appeals (appeals, frequently time-barred and frivolous, most often filed by the Defender, which generate automatic delay in the disposition of pending federal *habeas* petitions); and the role of individual circumstances—such as delays requested by or chargeable to the Defender itself. The aim of the federal motion, of course, is to convince the federal *habeas* court to forgive the Defender's clients the necessity of exhausting their claims in state court, so that they may proceed *de novo* in the court system that finances them.

These are grievous accusations made by members of the bar of this Court. If these accusations were true, and if candor were part of the Defender armamentarium, the federal pleading ***174** would have stated that "the Defender has succeeded in causing such delay in the decision of capital cases that [fill in the outrage]. We have succeeded in exhausting the state courts; so now, please forgive us the federal *habeas* exhaustion requirement." ****338** But, the accusations are not true; indeed, they are beyond disingenuous.[5] And the Defender knows it. ***175** Whatever the response of the federal courts to such unethical conduct, it will not be fashioned with a first-hand awareness of the burden that ****339** their decision to finance defense-side collateral capital litigation has imposed on Pennsylvania's courts. Does it comport with principles of federalism to finance lawyers who pursue an agenda in state court designed to bottle up the state courts? Does it comport with federalism when those lawyers undertake an agenda designed to maximize the power of federal courts to ignore state court decisions, or to authorize bypassing state courts?

Notably, with respect to the specific issue of delay in the decision of capital PCRA appeals, the local federal Circuit Court must have some sense of the difficulty. In its Motion to Lodge the Defender's federal pleading in *Dougherty,* the Commonwealth notes the substantial delay in the resolution of numerous appeals involving various state capital defendants. *See, e.g., Abu–Jamal v. Horn,* 520 F.3d 272 (3d Cir.2008) (initial *habeas* appeal filed in Third Circuit in December 2001; final order issued by Third Circuit in March 2008; on petition by Commonwealth, U.S. Supreme Court granted *certiorari* ***176** and remanded to Third Circuit in January 2010; on April 26, 2011, Third Circuit issued opinion reinstating its previous order affirming district court's grant of *habeas* penalty phase relief on a claim involving *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)).[6] And those appeals, of course, are limited to but a few substantive issues. Furthermore, I suspect the Federal Defender is more circumspect, and less contemptuous, when it appears before the Third Circuit.

I say none of this lightly. The Defender, as I have outlined, pursues a complex and legally questionable global strategy in Pennsylvania capital cases. But, just as the Defender stares at this Court, we have no choice but to stare back at it. And, this case is merely a typical case of Defender abuses. We have had circumstances where the conduct of the Defender is not even this benign.

On multiple occasions, the Defender has taken unauthorized appeals in capital PCRA matters against its former clients' wishes. *See Commonwealth v. Ali,* 10 **A.3d** 282, 290 (Pa.2010); *Commonwealth v. Saranchak,* 570 Pa. 521, 810 A.2d 1197, 1198 (2002). *Accord Commonwealth v. Sam,* 597 Pa. 523, 952 A.2d 565 (2008) (noting that Robert Dunham initiated PCRA proceeding by filing PCRA without authorization from petitioner, claiming he was doing so on petitioner's "behalf"). Each such unauthorized appeal, of course, exhausts the time and resources of the Commonwealth and the state judiciary. The Defender has employed the same strategy involving unauthorized litigation in at least one reported federal *habeas* case involving a Pennsylvania capital defendant. *See Michael v. Horn,* 459 F.3d 411 (3d Cir.2006). As Judge Greenberg explained, in concurrence:

> It is highly significant, indeed remarkable, with respect to the tenuous nature of these proceedings, that Michael [the capital defendant] did not

> decide to take an appeal in this case in the first place and, in fact, this case never should ***177*** have reached this court. Thus, the actual question before us is whether a defendant may cause an appeal filed in his name without his authority by someone else to be dismissed. In this case, the Capital *Habeas Corpus* Unit of the Defender Association of Philadelphia, without Michael's authorization, filed the appeal from the district court's order of March 10, 2004, granting Michael's motion to dismiss the *habeas* corpus petition. ***340*** Thus, this case truly is extraordinary because the Capital *Habeas Corpus* Unit filed this unauthorized appeal in the name of an appellant whom the district court had found to be competent, from an order that the appellant had sought and obtained and from which, quite naturally, he did not want to appeal.
>
> Moreover, there is yet another extraordinary fact about this appeal. The Capital *Habeas Corpus* Unit filed the appeal even though the district court in its March 10, 2004 order dismissing the petition for *habeas corpus* also dismissed the Capital *Habeas Corpus* Unit and all its attorneys as counsel for Michael, *Michael v. Horn,* 2004 WL 438678, at *24 (M.D.Pa. Mar. 10, 2004), and neither we nor the district court ever has stayed that order. Accordingly, the Capital *Habeas Corpus* Unit acted without authority when it filed this appeal in an attempt to frustrate Michael's wishes. The reality of the situation could not be clearer. The Capital *Habeas Corpus* Unit, rather than representing Michael, its supposed client, was representing itself and advancing its own agenda when it filed this appeal.

459 F.3d at 421–22 (Greenberg, J., concurring) (italics added; footnote omitted).[7]

In other instances, the Defender's conduct has been so inexplicable (inexplicable when measured by professional ethical ***178*** standards), that the Commonwealth has moved for the Defender's removal, colorably suggesting that the Defender's strategy is aimed not at fairly raising and exhausting federal claims in state court, but at positioning the case in such a way that Pennsylvania courts would deem them defaulted, while laying the groundwork to attempt to proceed *de novo* in federal court. For example, in *Commonwealth v. Bracey,* 604 Pa. 459, 986 A.2d 128 (2009), the Defender, per Billy Nolas, Esquire, filed a serial PCRA petition, asserting a claim under the then-new decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In litigating the claim below, the Defender argued that the petitioner had a constitutional right for the *Atkins* claim to be decided by a jury. The PCRA court, per the Honorable C. Darnell Jones, II, scheduled an *Atkins* bench hearing, but shortly before that could take place, the Defender wrote to the court asserting that if the court declined to put the serial collateral claim before a jury, the Defender and Bracey would refuse to participate in a bench hearing, but instead would rely on the evidence of record—evidence that was not produced with an eye toward the requirements of *Atkins.*

The PCRA court ultimately held that the Defender's refusal to present any relevant evidence in support of Bracey's *Atkins* claim rendered it meritless and that fact, in turn, rendered the request for a jury trial moot. On appeal to this Court, the Defender, predictably enough, argued that if we rejected the request for a collateral attack *Atkins* jury, the case should be remanded for the bench hearing the PCRA judge offered him, but which the Defender had refused. The Commonwealth responded with a critique of the Defender's

gamesmanship. Our summary of the ***341** Commonwealth's description of the tactic was as follows:

> As to the question of mandate ... the Commonwealth requests a remand for a bench determination of *Atkins* mental retardation.... The Commonwealth asserts that any other result might ultimately reward appellant's federal counsel for their gamesmanship, which the Commonwealth submits was a strategy to bypass the state courts on the ***179** substantive *Atkins* question. Thus, the Commonwealth avers that refusing to remand the matter would reward appellant's "contumacy by enabling him to raise the claim anew in a federal *habeas* petition, without the burden of fact-finding by the state courts." Brief of the Commonwealth at 17. The Commonwealth argues that appellant's stated rationale for refusing to introduce relevant evidence before the PCRA judge of his supposed mental retardation—a professed fear of thereby waiving his claim of an existing "right" to a jury determination—is "nonsense," since appellant made an objection before the PCRA court, which the court specifically noted that the objection preserved the jury question for this Court's review. The Commonwealth hypothesizes that such a facially risky position suggests that appellant and his counsel have their strategic sights set on *de novo habeas corpus* review in the local federal courts, which appellant's federal lawyers view as a more sympathetic forum in capital matters. Luring this Court into finding the *Atkins* claim waived, the Commonwealth argues, "would offer them their best long-term prospect for relief," since "if no *Atkins* hearing is held in state court, defense counsel will argue on *habeas* review that defendant is entitled to such a hearing in federal court. And, since it has been decades since the federal courts have upheld a sentence of death with respect to any Philadelphia prisoner who did not consent to be executed, they will find themselves in a remarkably favorable forum for that argument." *See* Brief of the Commonwealth at 19–20. The Commonwealth argues that this Court should reject this illegitimate strategy, and order a bench hearing on the mental retardation claim.

Bracey, 986 A.2d at 137–38 (italics added; footnote omitted).

This Court ultimately sustained the PCRA court's unassailable finding that there was no constitutional right to a collateral attack *Atkins* jury. Like the Commonwealth, we recognized the Defender's gambit for what it was, describing the refusal to participate in the *Atkins* hearing it had requested as lacking any legitimate justification. We noted that the Defender's disagreement with the PCRA court's ruling that the ***180** *Atkins* claim was properly for the court, and not a jury, to decide, "was not a legitimate ground to refuse to abide by the ruling and decline thereafter to present evidence, as if a matter of this import invites some game of capital 'chicken.' " *Id.* at 138. We added that:

> The presumptive outcome of appellant's refusal to present his *Atkins* case would be that the *Atkins* claim would fail on the merits—the very result that occurred here. Most parties do not risk defeat of the merits of their claims with these sorts of manipulations. But this Court recognizes that the calculations by experienced federal capital counsel are more sophisticated. *See Commonwealth v. Steele,* 599 Pa. 341, 961 A.2d 786, 836–38 (2008) (Castille, C.J., joined by McCaffery, J., concurring). The ... Defender's position below was obviously risky and tenuous: both the

> notion that appellant would somehow waive the claim of a right to a jury, or would somehow be prejudiced by presentation ***342** of his case to a judicial factfinder, as well as the substantive claim of an *Atkins* jury trial "right" of constitutional import which, as we explain below, finds no support in any existing, governing authority. Indeed, this is so much the case that it lends some credence to the Commonwealth's position that the strategy below was designed to ensure that no state court judge would pass upon the merits of the *Atkins* claim (or if it did, it would only be after the substantial delay occasioned by an incomplete record and appeal to this Court, seeking remand).
>
> Notably, however, the Commonwealth has not pressed a waiver argument here, or even set forth an argument that appellant's *Atkins* claim fails on the merits.... Instead, it suggests that this Court overlook this logical conclusion and remand this matter so that a bench *Atkins* hearing can be held, thus ensuring that the state court serves its primary role as the initial forum for constitutional claims, and avoiding the initial federal determination of *Atkins* that appellant seems to prefer.
>
> If the defense strategy and obduracy were all we had here, we might be inclined to deny remand. After all, ***181** salutary Pennsylvania procedural doctrine should not be defeated by attorney manipulations or even by concerns with subsequent federal *habeas corpus* review.... Unfortunately, the PCRA court did not take this bull by the horns, and did not put appellant to the appropriate, explicit choice.... In these circumstances, we will not hold that appellant has waived any entitlement to an *Atkins* remand for the bench evidentiary hearing he refused below. Our holding in this regard should not be read as approval of the defense tactics below; rather, it should serve as a caution to PCRA courts in capital cases to be aware of the potential manipulations that may be forwarded in these high stakes cases, and to take clear control of the proceedings before them.

Id. at 139–40.

A more recent case where the assigned Defender's conduct, rather than the merits of the client's cause, became the focus of the appeal is *Commonwealth v. Hill,* —— Pa. ——, 16 **A.3d** 484 (2011). The capital PCRA appellant in that case was also represented by Nolas, and was awarded a new penalty hearing in the trial court, but was denied guilt phase relief. She appealed, but the Defender inexplicably failed to file a Rule 1925(b) statement as ordered by the PCRA court. The Defender then filed a brief in this Court raising no less than fifteen principal guilt-phase claims.

The Commonwealth preliminarily argued that, by his conduct, and under settled law concerning Rule 1925, Nolas had defaulted Hill's claims and was *per se* ineffective. Recognizing that Nolas's default may have been strategic, however, the Commonwealth did not argue for affirmance, but instead urged the Court to remove the Defender and remand to appoint new counsel to comply with the Rule 1925 directive. The Commonwealth also argued that the Defender's conduct raised serious questions concerning the proper use of federal tax dollars because, while the Federal Defender is funded by the Administrative Office of Federal Courts, they routinely appear in state court appeals at a time when state and municipal services are being curtailed because of budget ***182** shortfalls in the current economic recession. In that light, the Commonwealth suggested that this Court exercise its supervisory

authority over the practice of law in Pennsylvania and require the Defender to address these concerns before ***343*** being permitted to proceed in Pennsylvania appeals. *Id.* at ——.

The Defender replied that it had substantially complied with Rule 1925 because Nolas had assured the PCRA court in a series of *ex parte* communications of the issues he intended to raise. The Defender did not acknowledge or discuss the governing cases under Rule 1925, instead focusing on Hill's alleged "right" to have Nolas continue to represent her. The Defender also argued that, to the extent Nolas's conduct had impeded this Court's review, a remand (and attendant delay) was appropriate.

On the particular point of the Commonwealth's argument concerning removal of the Defender, we recounted the Defender's argument as follows:

> Appellant also asserts that the Federal Defender is the counsel of her choice and its removal would be contrary to what she claims is a "right" to taxpayer-financed counsel of her choice. Appellant contends that the Federal Defender has protected her interests and advocated ably on her behalf, and that given its experience and competence in Pennsylvania state death penalty proceedings, it should be permitted to continue to represent her in Pennsylvania courts. Finally, with respect to the Commonwealth's concerns regarding the federal funding sources for the Federal Defender's forays into state court, appellant asserts that the Federal Defender is in full compliance with applicable federal administrative rules and regulations and has a separate source of funding to support its elective excursions into state court. Appellant does not attach or cite those rules and regulations.

Id. at ——.

Ultimately, this Court held that, under our settled jurisprudence, we could not grant the Commonwealth's request to remove counsel and remand the matter; instead, the Defender's ***183*** default had waived Hill's issues. *Id.* at ——. We also noted that:

> [I]n considering the Commonwealth's request to recalibrate our Rule 1925(b) jurisprudence, we are mindful of the significant potential for resulting mischief in capital cases. Delay can be an end in itself for some capital defendants. *See, e.g., Commonwealth v. Sam,* 597 Pa. 523, 952 A.2d 565, 577 (2008), *cert. denied,* —— U.S. ——, 130 S.Ct. 50, 175 L.Ed.2d 42 (2009). Manufacturing the requested exception would serve as an invitation to delay-minded counsel to deliberately flout the Rule, knowing that it would trigger the time-consuming process of remand, appointment of new counsel, filing a Rule 1925(b) statement, and preparation of a lower court opinion.

Id. Since all claims were waived and there was no basis to remand, there was no need for the Court to pass upon the Commonwealth's request to order the removal of the Defender, or its broader concern with federal judicial funding for these questionable endeavors.

A competent appellate lawyer without a global agenda, intent on having his client's issues actually heard on appeal, would **never** deliberately ignore a Rule 1925 order. But, the Defender is financed and positioned to strategize differently and globally. In Pennsylvania capital cases, the Defender routinely argues in federal *habeas* court that various Pennsylvania procedural default rules are arbitrarily applied, and therefore should be ignored. The reward, if the federal court accepts the argument, is *de novo* federal review, unimpeded by state court findings, and unimpeded by the federal *habeas* standard of review requiring deference to state court decisions. The result of this perverse system of incentives for professional capital counsel ****344*** who ping-pong back and forth between state and federal courts, and who have seemingly inexhaustible federal resources and ample cases to choose from, is an opportunity and incentive to feign that they do not know how to comply with state procedural rules, *see Steele,* 961 A.2d at 834–38 (Castille, C.J., joined by McCaffery, J., concurring); and in the process attempt to generate "uneven" ****184*** procedural default rulings by the state courts. Then, counsel will proceed to argue in federal court that the particular default rule should be ignored in **all** cases. The state response, faced with continuing federal criticism that our procedural rules have too much discretionary flexibility to be considered legitimate expressions of state sovereignty, is to adopt less flexible rules. *Commonwealth v. Gibson,* 597 Pa. 402, 951 A.2d 1110, 1150 (2008) (Castille, C.J., joined by McCaffery, J., concurring) ("The threat of dismissive federal responses to flexible state procedural rules can lead to state legislatures and courts adopting ever-more inflexible rules.").

But, for those with the luxury to pursue a global agenda, this refinement does not end the incentive to create disruption in state court; it just requires a shift in strategy. Faced with a clear, simple, and known rule such as Appellate Rule 1925, counsel can ratchet up the stakes by deliberately engaging in the most overt of defaults, daring the state court to apply its "inflexible" Rule. If the state devises an exception, the Defender will then proceed to federal court, in all cases involving Rule 1925 waivers and say; "Aha, they do not always follow the default; you may ignore it and consider my claims *de novo.*"

Recently, and thankfully, the U.S. Supreme Court has issued unanimous decisions in cases which operate to reduce the incentive for counsel such as the Defender to pursue this ploy. As I explained in my recent concurrence in *Commonwealth v. Paddy,* —— Pa. ——, 15 **A.3d** 431, 439 n. 1 (2011):

> Significantly, since *Steele* was decided, the U.S. Supreme Court has issued unanimous decisions in two federal *habeas corpus* cases involving state prisoners, including *Beard v. Kindler,* 558 U.S. ——, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009), a Pennsylvania capital case, which should significantly diminish the incentive for counsel to try to sow inconsistencies and confusion in state court procedural rulings, in an effort to lay the groundwork for a later federal *habeas* claim that state court procedural defaults should not be honored. "In a recent decision, *Beard v. Kindler,* 558 U.S. ——, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009), this Court clarified that a ****185*** state procedural bar may count as an adequate and independent ground for denying a federal *habeas* petition even if the state court had discretion to reach the merits despite the default." *Walker v. Martin,* —— U.S. ——, ——, 131 S.Ct. 1120, 1125, 179 L.Ed.2d 62 (2011). The *Walker* decision built upon and significantly expanded *Kindler,*

> making it clear that a state procedural default rule need not be invoked in every case in order for the rule to be deemed adequate.

These corrective decisions came too late to spare this Court the time and energy that was expended in cases like *Steele, Hill,* and *Paddy.*

The Defender has also burdened this Court with improper appeals in serial capital PCRA appeals, thereby building in delay in cases which should be proceeding to resolution in federal court. For example, in *Commonwealth v. Abdul–Salaam,* 606 Pa. 214, 996 A.2d 482 (2010), a case, like *Bracey,* involving the murderer of a police officer, the defendant had already litigated ***345** his direct appeal and two PCRA appeals and was currently litigating a federal *habeas* petition. The Defender then filed a facially untimely, third PCRA petition, but deceptively labeled it, leading to the lower court taking no action. The Defender attempted a procedural maneuver, filing a "*Praecipe* for Entry of Adverse Order Pursuant to Pennsylvania Rule of Appellate Procedure 301 D & E" and a contemporaneous Notice of Appeal (from the *praecipe*) to this Court. These pleadings feigned outrage with the PCRA court's "inexplicable delay" and "inaction" with regard to Abdul–Salaam's disguised claims. The maneuver was improper and disingenuous: no adverse order had ever been issued (as the Defender well knew) that could be formally "entered;" the contemporaneous notice of appeal denied the PCRA court of jurisdiction to issue and enter any such order; and the Defender never made a request for a ruling before filing its improper snap judgment.

This Court quashed the bogus Defender appeal, deeming it improper because the PCRA court had no opportunity to address the merits and issue a final and appealable order; we ***186** recognized that "the Appellant's *praecipe* and appeal are not remotely supported by the terms of the rule he invoked, or the facts of this case. There was no basis or justification for this transparent procedural maneuver." *Id.* at 485–88. More to the point, we added:

> This Court is not naïve. We do not discount the possibility that appellant's misleading characterization of his serial PCRA petition was designed to create confusion, and to set the stage for the very maneuvering and inherent delay that followed. It is also not lost upon this Court that appellant's maneuvering purported to deprive the court below of jurisdiction at the very moment he first forwarded his supposed complaint about the matter not being decided promptly. Although appellant cited [Appellate] Rule 301(d), he obviously had no intention of permitting the court or the Commonwealth to address his supposed concern, since he took his "appeal" immediately. Appellant's maneuvering has succeeded in building-in a year's delay in the disposition of his serial PCRA petition. We do not condone the tactic.

Id. at 488. The decision in *Abdul–Salaam* required more time and effort, expended by this Commonwealth's highest Court, occasioned by deceptive, unprofessional, and frivolous conduct by the Defender.

Another dubious appeal in a case involving a serial PCRA petition is currently pending before the Court in *Commonwealth v. Porter,* 557 CAP. Following submission of that case on the briefs, we directed the parties to file

supplemental briefs because there was an obvious jurisdictional issue. Our order reads as follows:

> AND NOW, this 13th day of October, 2010, it appearing that a colorable issue of jurisdiction is implicated in this appeal, which has not been addressed by the parties, the parties are directed to file supplemental briefs addressing the following:
>
> Whether the lower court's order dismissing appellant's present serial PCRA claim under *Brady v. Maryland,* 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), without also disposing of appellant's long-pending serial PCRA claim ***187** under *Atkins v. Virginia,* 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335] (2002), was an appealable final order? In briefing the jurisdictional question, the parties should address these necessarily included points:
>
> (a) whether a PCRA petitioner may "amend" a pending serial petition to add an entirely new serial claim;
>
> ****346** (b) whether, instead, a new serial claim comprises a new and separate petition under the terms of the PCRA;
>
> (c) whether a PCRA court has authority to pass upon a new serial claim where a prior PCRA petition has been held in stasis; and
>
> (d) whether a serial PCRA petition may properly be held in stasis to allow for federal review of different claims already litigated in state court.

The Defender, per Billy Nolas, has responded that the lower court's order was not an appealable final order. And yet, the Defender took the appeal. But, what is more remarkable is the record in *Porter,* which reveals the federal/state logjam the Defender's litigation strategy has created in that case. At the September 25, 2007 hearing on appellant's 2006 *Brady* "amendment" petition, Nolas stated that the PCRA court was holding appellant's 2002 *Atkins* serial petition "in abeyance," awaiting the outcome of the federal *habeas* cross-appeals by Porter and the Commonwealth, which were pending in the Third Circuit. *Commonwealth v. Porter,* N.T., 9/25/07, at 12. The following exchange occurred among the court, Nolas, and the assistant district attorney ("ADA"), after the court announced its intention to dismiss the new *Brady* petition:

> Court: I am denying the PCRA petition on the grounds that it is not timely and it does not meet the requirements for *Brady* material.... Are there any other reasons?
>
> Nolas: This is a separate issue before the Court pertaining to *Atkins* [ ] in our submission that [appellant] has mental retardation.
>
> Court: I didn't deal with that.
>
> * * *
>
> ***188** Nolas: That's before the Court. If you don't deny that today, what's wrong with taking [Mr. Gentile's] deposition [in furtherance of the *Brady* claim]?
>
> Court: The two don't mix together....

* * *

Court: Is that issue [*Atkins*] before the Third Circuit?

Nolas: It is not before the Third Circuit.

Court: So that's squarely with me?

Nolas: Yes, Your Honor. I know Your Honor held it in abeyance because the Third Circuit reversed the death sentence and the Commonwealth is appealing that and [appellant is] appealing the denial of relief of the guilt phase from the Third Circuit. So I think the reasoning before was holding in [ ] abeyance to see what the Third [C]ircuit would do because if there's no death sentence then there's no point in us doing an *Atkins*.

Court: So there is no death sentence. All it is is an appeal?

ADA: Yeah, exactly. So I was going to suggest that you send 907[8] notice [dismissing without a hearing] just on the after discovered evidence slash *Brady* claim. And we'll specify that that's the claim that you are denying today and then we'll leave in abeyance to the *Atkins* to hear from the Third Circuit.

Court: Let me see if I understand this. The Third Circuit has already taken the death penalty off the table.

Nolas: No, Your Honor. The District Court granted relief to [appellant] on an instructional error in the penalty phase. The Commonwealth appealed that to the Third Circuit. That appeal is pending [sic] the Third Circuit ****347*** along with an appeal from us arguing [other issues].

Court: So the death penalty is still on the table?

Nolas: It's still on the [t]able potentially, yes.

* * *

ADA: I misspoke.

****189*** Nolas: And that's why we asked Your Honor to look at the *Atkins* issue.

Court: It appears that from what I read he won on the death penalty issue.

Nolas: He just won a new penalty phase from the District Court which is subject to the Commonwealth's appeal and may be subject to resentencing down the road. They didn't take the death penalty off the table.

Court: When will that issue be resolved?

ADA: They are waiting for us.

Nolas: They were waiting for Your Honor to decide on the [new *Brady*] issue....

Court: Okay. That's all. They [the Third Circuit] are not counting on me to deal with the *Atkins* issue? [Both counsel respond in the negative.]

Court: So I just need to do a 907 with respect to the *Brady* claim and timeliness issue surrounding the [filing].

Nolas: And I think I have to object to that because that's strange. You have a proceeding before the Court with two claims that are being raised. And I guess with a 907 notice we'd restate our objections and file a notice of appeal and then you have no jurisdiction, so it's a non-process.

Court: What are you suggesting I do?

Nolas: I suggest you let us do [Mr. Gentile's] deposition [*i.e.*, drag out the disposition of the time-barred *Brady* claim].

Court: We are beyond that. What are you suggesting that I do, rule on *Atkins* ?

Nolas: I don't think you can rule on *Atkins*. I don't know I haven't seen that process before, so I think I have to object.

N.T., 9/25/07, at 12–15 (emphasis supplied).

Nolas's argument respecting the PCRA court's power to ***190** decide was straight out of "Catch–22."[9] He argued that the PCRA court: (a) could not dismiss the serial *Brady* claim (a new PCRA claim that led Nolas to secure a federal stay of the *habeas* appeals pending in the Third Circuit) without also ruling on the pending *Atkins* petition; and (b) could not rule on the *Atkins* claim, because the court somehow lacked authority to do so, and Nolas would have to object. So, according to Nolas, the PCRA court could act on neither "claim," and counsel had already succeeded in having the federal *habeas* appeals held **until** the PCRA court acted on the *Brady* claim. Then, Nolas appealed the non-final order. This Defender strategy assured a *de facto,* perpetual stay of execution.

It bears mentioning that the argument advanced by Nolas that the PCRA court in *Porter* lacked power to rule on *Atkins* was frivolous. There is no basis in the PCRA or any other governing rules or law to hold serial PCRA petitions in abeyance; and there most certainly is no basis in law to hold a PCRA petition in stasis merely to permit the petitioner to seek federal *habeas* relief. Likewise, Nolas's earlier argument that there was "no point" in deciding the serial *Atkins* issue until the Third Circuit decided other, already-exhausted, non- ***348** *Atkins* claims is baseless. The appeals before the Third Circuit in *Porter* will not eliminate the *Atkins* claim. If the district court's grant of relief on a perceived penalty phase instructional error is reversed, Porter's death sentence will stand. If the determination is affirmed, the Commonwealth is free to seek the death penalty in a new proceeding. Either way, it is a capital case and the *Atkins* issue must be decided.

Not once, by the way, did Nolas forward the Defender's new-found concern with delay while ensuring delay in both judicial systems in *Porter*, instead telling each court it could not act. The very same group—the Defender—engaged in these shenanigans in *Porter* and then forwarded the "court can't manage its docket" complaint in *Dougherty*. These are the sorts of abuses that keep us from addressing all of the Defender's over-maximum briefs simultaneously in their other cases, and rendering decisions according to their schedule.

***191** But, there is more. Another case cited by the Defender in the *Dougherty* federal pleading as an example of this Court's incapacity is *Commonwealth v. Banks,* Nos. 461, 505, and 578 CAP, which also prominently features Billy Nolas. *Banks* concerns narrow issues of competency to be executed, and is a case in this Court's plenary jurisdiction. This Court is well familiar with the record in *Banks.* Nolas's strategic maneuverings in *Banks,* including but not limited to forwarding unauthorized motions before our masters to impede the Commonwealth's expert's examinations of Banks, caused numerous, lengthy periods of delay; and in addition, required this Court to step in on multiple occasions and assure that the fair hearing we had ordered would be held, consistent with our directive. *Commonwealth v. Banks,* 596 Pa. 297, 943 A.2d 230, 239 (2007) (*per curiam*) ("[W]ith the exception of scheduling and logistical matters, the trial court is not to be diverted by tangential motions and assertions by counsel: **this** Court retains jurisdiction over such matters. The trial court is to act expeditiously in conducting the rehearing."); *Commonwealth v. Banks,* 603 Pa. 435, 984 A.2d 937 (2009) (*per curiam*) ("AND NOW, this 10th day of December 2009, the Motion for Notice of Evaluations by Commonwealth Experts [filed by Nolas] is DENIED. The Commonwealth's mental health evaluations and the competency hearing ordered by this Court are to be conducted as expeditiously as possible. No extraneous delays shall be permitted."). To put an end to the abuse, we finally directed that: "This matter, involving a necessary hearing to pass upon a single important issue, and remanded for an expeditious determination, once again has inexplicably been delayed. The significant delay has continued to hamper this Court's ultimate disposition regarding petitioner's competency to be executed, a question over which we continue to retain plenary jurisdiction.... Any motion or argument from either party, that seeks or would occasion further delay, is to be made directly to this Court; and the pendency of any such motion is not to be forwarded, referenced, or accepted as a ground for delaying the proceedings below." *Commonwealth v. Banks,* 605 Pa. 322, 989 A.2d 881, 882–83 (2010) (*per curiam*).

***192** The foregoing is but a sampling. Much of this Court's time has been taken up with the Defender's strategic diversions. The Defender obviously has no fixed position on delay. When delay advances their global litigation strategy, they do their best to grind state courts to a halt, as with their prolix pleadings and abusive briefing in this case, and their more extreme conduct and/or misconduct in cases like ***349** *Banks, Abdul–Salaam,* and *Bracey.* When faux outrage about the delays their overall strategy necessarily induces serves their purpose, they forward that claim, accusing Pennsylvania courts of incompetence or laziness, their argument unencumbered by concerns for accuracy, honesty, and candor.

This is what federal judicial financing of the Defender's state court litigation strategy has wrought in Pennsylvania. When the families of murder victims, and other concerned citizens, ask why there is no effective death penalty in Pennsylvania, the dirty secret answer is: ask the federal court. And if the federal court fails to reply, you may want to ask your U.S. Senators and Representatives.

–II–

Given the Defender's recent rolling out of the back-end of its global litigation strategy—claiming that the decisional delays that their abusive tactics necessarily induce give rise to some right to preferential decisional time-

frames and/or a right to immediate *de novo* review in federal court—it is time for this Court to take formal measures to ensure quicker decisions in capital PCRA appeals. To curb the rampant abuses in this case and other cases, I would:

(1) Direct the Supreme Court Prothonotary to immediately reinstate a briefing limit of 70 pages in capital PCRA appeals, with no exceptions absent: (a) a showing of extraordinary circumstances; and (b) the explicit concurrence of the Commonwealth.

(2) Direct the Supreme Court Prothonotary to amend briefing notices to advise parties that: (a) substantive arguments and sub-arguments are not to be set forth in footnotes or ***193*** other compressed texts, such as block quotes or single-spaced bullet points, since such practices facilitate violation of the restrictions on the length of briefs; and (b) arguments set forth in such fashion will not be considered. I would also refer the matter to the Appellate Procedural Rules Committee to recommend changes to our Rules to curb these abuses, including: (a) limitations on the number of words in a brief, such as are found in the Federal Rules, and (b) required certification from counsel that the brief is compliant.

(3) Make referrals to the Criminal Procedural Rules Committee and the Appellate Procedural Rules Committee to consider measures that will lead to the more efficient disposition of capital PCRA appeals including, but not limited to: (a) whether procedural rules can and should be adopted to provide for the operation of unitary review as envisioned by the General Assembly in the Capital Unitary Review Act ("CURA"), 42 Pa.C.S. §§ 9570–9579, consistent with the concerns outlined in *In re Suspension of Capital Unitary Review Act,* 554 Pa. 625, 722 A.2d 676 (1999) (explaining suspension of CURA); (b) whether it is possible and advisable to adopt a limited issue certification process in capital PCRA appeals, similar to the provision in the federal *habeas corpus* statute, *see* 28 U.S.C. § 2253, which should curtail the pursuit of frivolous and implausible claims, without impeding the federal *habeas* exhaustion requirement. *See In Re: Exhaustion of State Remedies in Criminal and Post–Conviction Relief Cases,* No. 218 Judicial Administration Docket No. 1 (*per curiam*) (May 9, 2000); and (c) whether the current role of volunteer federal counsel is appropriate, and whether such counsel may properly be precluded from participation in state collateral proceedings.

Justice McCAFFERY joins this opinion and Justice ORIE MELVIN joins Part II of this opinion.

***350** Justice SAYLOR, concurring.

I join Sections 6, 7, 8, 10, 12, 14, 17, **18**, and 20 of the majority opinion, concur in the result with regard to the ***194*** balance of the opinion, and offer the following comments arranged in conformity with the designated sections of the majority opinion.

Guilt Phase

2. Waiver of Right to Counsel

As to the waiver of right to counsel, a main thrust of Appellant's claim is that his counsel failed to conduct an adequate guilt-phase investigation and, therefore, left him with a Hobson's choice of proceeding with unprepared counsel or representing himself. *See* Brief for Appellant at 13–15.

At the outset, on review of this record, it appears to me that the attorney put a great deal of time, effort, and thought into the representation of his client, particularly with regard to the penalty phase. *See* Majority Opinion, at 306–11. It seems equally clear, however, that he conducted a very limited guilt-phase investigation. For example, the following interchanges with the attorney occurred in the post-conviction proceedings:

> Q. [B]ased upon the Commonwealth's discovery, you did not conduct an independent investigation?
>
> A. I think there's some truth to that, yes.
>
> * * *
>
> Q. You said that you considered the evidence of the Commonwealth to advise the defendant to plead guilty. Is that all you considered in giving your advice to Mr. Spotz?
>
> A. No.
>
> Q. What else did you consider in giving that?
>
> A. I though he was an unpersuasive witness.
>
> * * *
>
> Q. [D]o you recall why or why not you may have [decided against representing Appellant at trial through separate attorneys at the guilt and penalty phases of trial]?
>
> A. Because I think the major effort, frankly, was at the penalty phase.
>
> * * *
>
> ***195** Q. When it came time for—when you were in the pretrial stage, did there come a time in which you indicated to Mr. Spotz what defense you wanted to present at the guilt phase?
>
> A. No. My counsel to Mr. Spotz was to plead guilty, not to put forward a defense at the guilt phase. It was not a position that he appreciated.
>
> Q. Was it after that that he indicated that he wanted to represent himself?
>
> A. Yes.

N.T., May 10, 2007, at 230; N.T., May 11, 2007, at 31; *id.* at 28–29; N.T., May 10, 2007, at 175.

Moreover, counsel confirmed that there was no investigation relative to an intoxication/diminished capacity defense and, had there been evidence of drug intoxication, such an investigation should have been pursued. *See* N.T., May 10, 2007, at 229. The attorney's decision not to pursue the line of inquiry was in tension with his testimony that he understood that Appellant's extensive drug use on the day of his Cumberland County offenses was well established. *See* N.T., May 11, 2007, at 20.

Counsel's explanation for foregoing a guilt-phase investigation into the possibility of diminished culpability was:

> ***351** I guess I was persuaded by the Commonwealth's evidence of Mr. Spotz's behavior starting in Harrisburg with the apparent abduction and withdrawal of money from a bank, the driving of a car from there to Carlisle, the shopping at a sporting goods store. In all of that, I was not receiving any information of impairment.
>
> * * *
>
> You asked me yesterday whether I pursued an intoxication defense, ... and I did not. So either as a defense or in mitigation the fact that he was flying high on drugs on the day of the event, I did not put that forward.
>
> I'm not certain that that would have a mitigating effect to the jury, and I'm not certain insofar as the question you asked me yesterday that being high on cocaine has the same ***196** intoxication effect as to be an intoxication defense. I suspect that's why that was not investigated at the guilt phase.

N.T., May 10, 2007, at 230; N.T., May 11, 2007, at 20.

I appreciate that—in light of the multiple murders committed during Appellant's crime spree, as well as the brutal calculation apparent in the kidnapping and killing of Ms. Amstutz—the attorney's task relative to both guilt and penalty was daunting. Nevertheless, given the limited options and the strong evidence of contemporaneous drug use, it does seem to me that the possibility of an intoxication defense should have been investigated. While I agree with counsel's reservations about the likelihood that a jury would consider voluntary intoxication as reducing Appellant's culpability in the circumstances, counsel very plainly was faced with a limited range of options in any event.

I join the majority's holding on this point, primarily because I agree that Appellant has not established that a further investigation concerning the degree of his intoxication would have impacted his own decision-making as to his waiver. *See* Majority Opinion, at 264–66.

I also believe counsel should have investigated the allegations regarding Charles Carothers' potential involvement in the killing of Ms. Amstutz. *See* Majority Opinion, at 268–70 (setting out the background and allegations relative to Carothers' involvement with Appellant in the relevant time frame). I am persuaded, however, that counsel's assessment that the hearsay evidence produced from fellow prisoners implicating Carothers in the killing was not sufficiently trustworthy to warrant admissibility. *See* N.T., May 10, 2007, at 230–39. Furthermore, it would appear to me that, much like the evidence of voluntary intoxication, the evidence of Carothers' involvement was a two-edged sword in any event. For example, one of the prisoners testified on post-conviction that, before she was killed, Ms. Amstutz had been placed in the trunk of her car while Appellant and Carothers were "riding around" and "getting high." *See id.* at 98. These were appalling details which the jurors did not hear but ***197** could very well have encountered had the prisoners testimony been admitted into evidence at trial. Moreover, the other prisoner's accounts were internally inconsistent in material respects. For instance, while in some accounts the prisoner implied that Carothers said Appellant was incapacitated when Ms. Amstutz was killed, in another he had said he "heard Carothers saying how he and Spotz pulled [Ms. Amstutz] out of the car and dumped her along the side of the road[.]" ***352** *Id.* at 32 (quoting the prisoner's statement dated April 3, 1996).

In light of Appellant's involvement in two previous calculated killings of female victims whose vehicles he had also seized within the past two days, it seems to me to be very unlikely that jurors would have believed that it would have been his intention to ever release Ms. Amstutz.

Finally, I respectfully disagree with the majority to the degree it suggests that a defendant's reasons for exercising a right to self-representation are irrelevant in a waiver colloquy. *See* Majority Opinion, at 265 n. 12. The *Starr* decision, cited by the majority, strongly confirms that a trial court may not substitute its own judgment for that of the defendant. *See Commonwealth v. Starr,* 541 Pa. 564, 583–85, 664 A.2d 1326, 1336–37 (1995). I do not read *Starr,* however, as preventing the court from probing the defendant's reasons to evaluate the rationality of the decision and to determine, for example, whether some dereliction on the part of counsel has contributed to it. *Cf. James v. Brigano,* 470 F.3d 636, 644 (6th Cir.2006) (explaining that "the choice between unprepared counsel and self-representation is no choice at all"); *United States v. Silkwood,* 893 F.2d 245, 248 (10th Cir.1989) (establishing a rule prevailing in the Tenth Circuit that, "[f]or the waiver to be voluntary, the trial court must inquire into the reasons for the defendant's dissatisfaction with his counsel to ensure that the defendant is not exercising a choice between incompetent or unprepared counsel and appearing *pro se* "). While I am aware of no federal constitutional requirement that a court inquire into a defendant's reasons, *accord United States v. Robinson,* 913 F.2d 712, 716 (9th Cir.1990), I see no reason to dissuade such inquiry.

***198* 4. Prosecutor Misconduct During Guilt Phase Closing Argument**

I differ with the majority's decision that Appellant's claims in this category are "trivial" and "frivolous." Majority Opinion, at 278, 279. In particular, understanding the prosecutor's justifiable frustration with Appellant's performance in his self-representation, I do not believe it was proper for him to relate such performance to Appellant's crimes or to personalize the matter with the jury by asserting an attempt on the part of a *pro se* litigant to "fool you." N.T., May 15, 1996, at 94. I also differ with the majority's speculation that "[t]here is no question that, if appellate counsel had invoked the relaxed waiver doctrine in an attempt to obtain review of the above comments, we would have declined to grant such review." Majority Opinion, at 279. In this regard, I do not believe, in the relevant time period, the Court was widely exercising its discretion to deny relaxed-waiver review on direct review in capital cases.

In the end, however, in light of the trial court's instructions concerning the remarks of counsel, and although I would disapprove some of the prosecutor's comments, I find that Appellant has not established that they "had the unavoidable effect of undermining the neutrality of the jury so as to preclude the rendering of a true verdict." *Commonwealth v. Kennedy,* 598 Pa. 621, 634, 959 A.2d 916, 923–24 (2008) (setting forth the prevailing standard of review relative to claims of prosecutorial misconduct).

6. Prior Criminal Acts Evidence and Jury Instructions

As noted, I join the majority's reasoning and disposition on this claim. I would only add that I strongly agree with the wide majority of other jurisdictions which have concluded that a contemporaneous instruction on the limited use of prior-bad-acts evidence is the preferred practice. *See, e.g., ***353* *Lesko v. Owens,* 881 F.2d 44, 56 (3d Cir.1989); *United States v. Cuch,* 842 F.2d

1173, 1177 (10th Cir.1988); *People v. Heard,* 187 Ill.2d 36, 240 Ill.Dec. 577, 718 N.E.2d 58, 72 (1999); ***199** *People v. Abernathy,* 402 Ill.App.3d 736, 341 Ill.Dec. 737, 931 N.E.2d 345, 361 (2010); *State v. Angoy,* 329 N.J.Super. 79, 746 A.2d 1046, 1052–53 (App.Div.2000) (" [A] prompt delivery of limiting instructions, either before, simultaneously with, or immediately after, the admission of other crimes evidence is preferable, and-unless there is some compelling reason to do otherwise-should be standard procedure followed by trial courts in all cases."); *cf. Lott v. State,* 98 P.3d 318, 335 (Okla.Crim.App.2004) (indicating that a trial court "must issue contemporaneous and final limiting instructions").

Penalty Phase

9. Burglary Convictions as an Aggravating Factor

I support the majority's holding on this question, as I have in and since *Commonwealth v. King,* 554 Pa. 331, 369–70, 721 A.2d 763, 782–83 (1998), based on precedent. I note only that Appellant's references to the substantially more lenient approach reflected in the two-strikes sentencing law, *see* Majority Opinion, at 285 n. 25, demonstrate that this Court does not always apply a narrowing construction to aggravating circumstances in death-penalty cases. *Cf. Commonwealth v. Mitchell,* 588 Pa. 19, 84, 902 A.2d 430, 469 (2006) (Saylor, J., concurring) ("I believe that an unnecessarily broad construction of provisions of the death penalty statute renders the statute vulnerable to constitutional attack.").

11. Prosecutorial Comments During the Penalty Phase

Although I support the PCRA court's conclusion that "[n]othing stated by the prosecutor was so prejudicial that the jury was incapable of rendering a true verdict," *Commonwealth v. Spotz,* CP–21–CR–0794–1995, *slip op.* at 54 (C.P. Cumberland, June 26, 2008), I have reservations about the majority's categorical dismissal of Appellant's concerns here. While it is true that this Court has indicated that it is permissible for a prosecutor to "disparage" mitigation evidence proffered by a defendant, *see* Majority Opinion, at 291 –92, certainly a prosecutor may not deny there is some mitigating effect of the circumstances the Legislature expressly has denominated as mitigating, nor may he ***200** inject unfair prejudice into the proceedings. Thus, as with many other issues, assessment of these types of claims involves matters of degree and not mere categorization. Notably, moreover, some other jurisdictions have taken a more restrictive approach to overt denigration of a mitigation case. *See, e.g., Williamson v. State,* 994 So.2d 1000, 1014 (Fla.2008) (highlighting that the Florida high court has "long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument"). To the degree we continue to see prosecutorial arguments implying that no weight should be afforded by jurors to statutorily-prescribed mitigators and/or approaching the boundaries of fairness, it seems to me advisable to consider a similar approach.

13. *Simmons* "Life Means Life" Instruction

I support the majority's holding on this claim solely in light of this Court's holding that *Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), is to be applied only prospectively. *See Spotz,* 587 Pa. at 92–93, 896 A.2d at 1245–46. I specifically disassociate myself from the

dictum concerning *Kelly's* application to this pre-*Kelly* case, *see* Majority Opinion, ***354** at 302–03, with which I have material differences.

Finally, in light of the assertions in Mr. Chief Justice Castille's concurrence, some of which I have previously supported, I believe that a referral to our lawyer disciplinary apparatus is warranted. This would permit the named attorneys to respond, and it would provide a foundation for the imposition of any appropriate sanctions.

All Citations

610 Pa. 17, 18 A.3d 244

Footnotes

1 42 Pa.C.S. §§ 9541–46.

2 We dismissed Appellant's claims of ineffective assistance of counsel in his manslaughter conviction without prejudice to his right to pursue those claims under the PCRA. *Commonwealth v. Spotz,* 582 Pa. 207, 870 A.2d 822, 837 (2005) ("*Spotz IV*").

3 Appellant's appeal from the denial of collateral relief from his murder conviction in York County is pending in this Court.

4 Appellant represents that, in mid–2003, the instant PCRA proceedings were held in suspense pending this Court's decision in the appeal of his Clearfield County manslaughter conviction. *See* Appellant's Brief at 3.

5 The issues, reproduced verbatim but reordered for ease of disposition, are as follows:

> 1. Did the failure to consolidate Appellant's three capital trials violate double jeopardy and due process when the Commonwealth was afforded a third opportunity to take Appellant's life; did the determination that the facts were the same for purposes of admitting other crimes evidence but different for purposes of multiple trials violate due process; did the inconsistent resolution of Appellant's and Christina Noland's claims under **18** Pa.C.S. § 110 violate equal protection; was the resulting prosecution arbitrary and capricious under the Eighth Amendment; and was counsel ineffective in failing to litigate these claims or in the manner in which the claims were litigated in the trial court and on appeal?
>
> 2. Was Appellant incompetent to waive his right to counsel at trial, and was that waiver invalid because it was not knowing, intelligent, and voluntary?
>
> 3. Was Appellant denied a full and fair opportunity to present a defense because of trial court error, ineffective assistance of counsel, and suppression of exculpatory evidence and was prior counsel ineffective in failing to litigate this claim?
>
> 4. Did the trial prosecutor make improper comments and arguments at trial that, individually and collectively, entitle

Appellant to a new trial and was prior counsel ineffective in failing to object at trial and raise the issues in post-trial motions and on appeal?

5. Was the trial court's instruction that the jury could draw an inference of intent to kill from the use of a deadly weapon against a vital portion of the deceased's body unconstitutional when the court failed to require that the jury conclude that the defendant had intended to hit a vital part of the deceased's body; and was prior counsel ineffective in failing to raise and litigate this claim?

6. Did the presentation of extensive evidence of Appellant's prior criminal acts, the trial court's failure to provide an advance cautionary instruction, and its subsequent provision of an instruction that stressed the value of the "other crimes" evidence that had been admitted violate Pennsylvania law and the Sixth, Eighth, and Fourteenth Amendments, and was counsel ineffective in raising this issue solely as a matter of state law and in the manner he presented that claim at trial and on appeal?

7. Did the trial court's instructions improperly describe the nature and use of aggravating and mitigating factors and was prior counsel ineffective in failing to raise this issue at trial and on appeal?

8. Should Appellant's convictions and death sentence be reversed because the prosecution presented extensive unreliable evidence in guilt and sentencing relating to the circumstances of his invalid convictions for manslaughter, aggravated assault, and murder in three other counties?

9. Was the aggravating circumstance that the defendant had a significant history of felony convictions involving the use or threat of violence to the person unconstitutionally applied in this case; did the prosecution falsely imply based upon facts not of record that Appellant's burglary convictions involved the use of a gun in circumstances that put him in conflict with burglary victims; was prior counsel ineffective in failing to challenge the (d)(9) aggravating circumstance as applied, to move pretrial to preclude or limit the evidence and argument in support of this circumstance, and for failing to litigate these issues on appeal?

10. Did the jury's guilt-stage verdict rejecting a finding that the murder occurred during the commission of a felony preclude the application of the (d)(6) aggravating circumstance that Appellant committed the killing during the perpetration of a felony?

11. Must Appellant's death penalty be reversed because of numerous improper prosecutorial comments during the penalty phase?

12. Did the trial court's instructions to the jury that it must reject the death penalty before it could impose a life sentence, and the erroneous arguments of both counsel that a life sentence required mitigating circumstances to outweigh aggravating circumstances, improperly shift the penalty-phase burden of persuasion and violated the sentencing-stage presumption of life; was prior counsel ineffective in failing to litigate this issue at trial and on appeal?

13. Must Appellant's death sentence be reversed because the trial court failed to instruct the jury that he would be ineligible for parole if sentenced to life; was prior counsel ineffective at trial for failing to seek a life without parole instruction and on appeal for failing to raise this issue under all available theories?

14. Was trial counsel ineffective in failing to investigate, develop, and present reasonably available mitigating evidence, failing to obtain and employ available institutional records, adequately interview available witnesses, and fully present the mitigating evidence that was available from the witnesses he did present?

15. Did the Commonwealth's failure to produce Department of Corrections mental health records material to guilt, mitigation, and the determination of the validity of Appellant's waiver of counsel violate *Brady v. Maryland,* and was counsel ineffective for failing to independently obtain these records, provide them to a mental health expert, present them as part of a mental health defense in mitigation, and to seek a competency evaluation?

16. Was counsel ineffective for failing to investigate and present mitigating evidence that Appellant's mental health disorders were treatable in prison?

17. Is Appellant entitled to relief from his conviction and sentence because of the cumulative effects of the individual errors in this case?

18. Did the Commonwealth violate due process in consuming an entire blood sample that could have exculpated Appellant; and did the PCRA court err in denying discovery?

19. Was Appellant denied full and fair review in the PCRA court; did the PCRA court improperly limit the record and prevent Appellant from presenting or proffering material facts?

20. Were monies improperly deducted from Appellant's prison account?

Appellant's Brief at 1–3.

6 Appellant's direct appeal was decided in October 2000, at which time the prevailing law required that a petitioner raise claims of

trial counsel ineffectiveness upon obtaining new counsel. *See Commonwealth v. Hubbard,* 472 Pa. 259, 372 A.2d 687 (1977), *overruled by Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726 (2002). The record indicates that Appellant acted *pro se* during the guilt phase of his trial, and was represented by public defender Taylor Andrews during the penalty phase as well as on direct appeal. This PCRA petition thus constitutes the first opportunity for Appellant to raise claims of ineffectiveness of trial or direct appeal counsel.

7 We further note that Appellant has previously raised very similar claims in connection with his other murder convictions, and we have consistently rejected those claims as well. In his direct appeal of his York County conviction for the first-degree murder of Penny Gunnet, Appellant argued that his trial should have been consolidated with his prior two trials for the voluntary manslaughter of his brother and for the first-degree murder of June Ohlinger, respectively in Clearfield County and Schuylkill County. Based on the compulsory joinder provision of **18** Pa.C.S. § 110, Appellant asserted that the trial court erred by denying his motion to quash the charges against him. *Commonwealth v. Spotz,* 562 Pa. 498, 756 A.2d 1139, 1157–59 (2000) ("*Spotz II* "). We rejected this claim, relying on the same factual and legal rationale as in the instant case. *Compare id.* and *Commonwealth v. Spotz,* 563 Pa. 269, 759 A.2d 1280, 1285–86 (2000) ("*Spotz III* ").

> Similarly, in his petition for collateral relief from his Schuylkill County conviction for the first-degree murder of June Ohlinger, Appellant asserted that his trial should have been consolidated with his trial for voluntary manslaughter in Clearfield County, and that counsel was ineffective for failing to preserve the issue. *Commonwealth v. Spotz,* 587 Pa. 1, 896 A.2d 1191, 1207–11 (2006) ("*Spotz V* "). We concluded that the Clearfield County and Schuylkill County homicides were not part of the same criminal episode, so there was no arguable merit to Appellant's underlying claim of error. *Id.* at 1210. We further noted that our rationale in the York County and Cumberland County cases was instructive to the Schuylkill County case. *Id.*
>
> Thus, the instant PCRA constitutes the fourth time that Appellant has raised some permutation of the issue of consolidation of his multiple homicide trials. We have consistently rejected these claims, concluding that Appellant's four killings, however they might be cataloged, grouped, or arranged, were not part of a single criminal episode.

8 The PCRA court did not address this sub-claim, but rather made only a generalized conclusion that Issue 1 had been previously litigated. *See* PCRA Court Opinion at 25. We reiterate here that a claim of ineffectiveness of counsel is distinct from the underlying claim of trial court error. *Commonwealth v. Collins,* 585 Pa. 45, 888 A.2d 564, 573 (2005) (holding that "a Sixth Amendment claim of ineffectiveness raises a distinct legal ground for purposes of state PCRA review under § 9544(a)(2) ... [and] a

PCRA court should recognize ineffectiveness claims as distinct issues and review them under the three-prong ineffectiveness standard announced in [*Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973 (1987)]"). Thus, although Appellant's claim of trial court error for failing to consolidate his trials has been previously litigated, his claim of ineffective assistance of counsel in litigating this underlying claim has not.

9 Appellant has also alleged a third constitutional violation, grounded in equal protection and based on the state's prosecution of Appellant's co-conspirator, Christina Noland. Appellant asserts, without benefit of supporting argument, that he and Ms. Noland were "similarly situated," although he was tried for the killing of four individuals, and she was tried for conspiracy and was a cooperating government witness at his trial. This sub-claim has not been developed factually or legally, and it is not supported with citations to relevant decisional or statutory law. In fact, it is impossible to discern exactly what error Appellant is alleging here. The sub-claim is unreviewable, and it is waived for lack of development.

10 This Court has held that the question of a defendant's competency to stand trial is an exception to the waiver rule on direct appeal. *See, e.g., Commonwealth v. Brown,* 582 Pa. 461, 872 A.2d 1139 (2005) (plurality) (providing citations). However, application of this principle in the context of the PCRA has been more divisive. In *Brown's* plurality opinion, authored by then-Chief Justice Cappy, we held that the exception did apply in the context of the PCRA. *Id.* at 1155–56 ("[T]he failure to raise on direct appeal a claim that the appellant was incompetent at the time of trial does not constitute a waiver of that claim for purposes of the PCRA.)" In a concurring and dissenting opinion, Justice Nigro specifically noted his agreement with this principle. Thus, a majority of the Court has agreed that competency claims are not subject to the waiver provision of the PCRA. *But see, id.* at 1158 (Castille, J., concurring) (disagreeing with this principle as a judicial relaxed waiver rule inconsistent with the plain text of the PCRA); *see also Commonwealth v. Santiago,* 579 Pa. 46, 855 A.2d 682 (2004) (Castille, J., concurring) (same).

11 With respect to the totality of the circumstances, we note that Appellant had already represented himself at his second capital murder trial, for the killing of Penny Gunnet in York County. *See Spotz II,* 756 A.2d at 1149.

12 As another part of this sub-claim, Appellant asserts that the trial court should have inquired into Appellant's reason for wanting to waive his right to counsel. Such questioning is certainly not required in order to establish that a waiver is voluntary, knowing, and intelligent. In fact, a court's disagreement with a defendant's reason for proceeding *pro se* does not constitute grounds for denial of this constitutional right. *See Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326, 1336–37 (1995) (concluding that a trial court erred when it refused to permit a defendant to represent himself, based partially on the defendant's failure to

provide what the court considered to be an adequate reason for seeking to waive his constitutional right to counsel). Consideration of a defendant's best interests, *e.g.*, by evaluating his reasons for exercising his right to self-representation, is simply irrelevant to an assessment of whether a waiver of the right to counsel has been made knowingly, voluntarily, and intelligently. A court may not substitute its own judgment for that of a defendant who knowingly, voluntarily, and intelligently waives his right to counsel.

13 In *Indiana v. Edwards,* 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), the United States Supreme Court considered whether there was a legally meaningful distinction between competency to stand trial and competency to represent oneself at trial. The high Court held that "the Constitution *permits* States to insist upon representation by counsel for those competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.* at 178, 128 S.Ct. at 2388 (emphasis added). In *Edwards,* the defendant, who suffered from schizophrenia, sought to represent himself, but the trial court refused this request, concluding that he was competent to stand trial but not competent to defend himself. The high Court held that the Constitution did not require the trial court to allow the *Edwards* defendant to represent himself at trial.

This Court has not addressed *Edwards* or its implications for established state law as delineated in *Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326, 1334–39 (1995). In the instant case, Appellant has not cited or attempted to rely on *Edwards* for his competency argument. Thus, the *Edwards* distinction is not relevant to this case.

14 Specifically, the statement represented that Mr. Witman overheard Mr. Carothers say the following: "I am going to let the white mother f——take it—let him fry;" and "I shot the old bitch in the head, but you might as well let him take it." Mr. Witman then stated that he did not remember if Mr. Carothers had said "head" or not. In his statement, Mr. Witman also claimed that he had overheard Mr. Carothers say that he and Appellant had pulled Ms. Amstutz out of the car and dumped her along the side of the road. Statement of Thomas Witman, dated 4/3/96.

15 The PCRA court, in the interest of judicial economy, addressed the admissibility of Mr. Witman's proffered testimony in the event that Mr. Carothers was determined to be unavailable. Citing *Commonwealth v. Robins,* 571 Pa. 248, 812 A.2d 514 (2002) and focusing on the question of reliability, the PCRA court concluded that the circumstances surrounding the making of the statement did not clearly indicate its trustworthiness. Therefore, even if Mr. Carothers were unavailable, Witman's proffered testimony as to Mr. Carothers's alleged confession was not admissible under the hearsay exception for statements against interest. PCRA Court Opinion at 15–20.

> We have no disagreement with the PCRA court's analysis. We simply conclude that it is not necessary to reach the question of the trustworthiness of Mr. Carothers's alleged confession because Carothers was not unavailable, and hence, regardless of how many indicia of reliability were or were not extant, the statement was not admissible under the hearsay exception for statements against interest.

16 Under Mississippi's common law "voucher rule," a party may not impeach his own witness. *See Chambers, supra* at 295, 93 S.Ct. 1038.

17 Appellant also alleges that the Commonwealth violated *Brady* by withholding evidence of Mr. Witman's reliability and prior cooperation with the Commonwealth as an informant. We see no indication that this issue was presented to the PCRA court, and Appellant has failed to direct us to any portion of the record that would show otherwise. Therefore, this issue has been waived. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.")

> We also fail to see how the Commonwealth's opinion of Mr. Witman's reliability can be *Brady* material, not least because it is neither material nor exculpatory.

18 Appellant tacks on an ineffective assistance of counsel claim to his *Brady* claim, asserting only that counsel's performance was deficient "to the extent that counsel could have obtained this evidence despite the prosecution's suppression." Appellant's Brief at 26. As we have discussed in the text, *supra,* any claims of ineffective assistance of counsel during the guilt phase of trial are precluded by *Commonwealth v. Bryant,* 579 Pa. 119, 855 A.2d 726, 736–38 (2004), because Appellant was acting *pro se.* Furthermore, because Appellant's underlying *Brady* claim is frivolous, there can be no arguable merit to any ineffectiveness claim grounded in counsel's failure to seek the alleged *Brady* material, whether at trial or on direct appeal.

19 In addition to challenging the above-quoted four comments from the prosecutor's guilt phase closing argument, Appellant also challenges one aspect of the prosecutor's cross-examination of Dr. Stephen Anthony Ragusea, a clinical psychologist who testified on Appellant's behalf in the penalty phase.

> During direct examination, Dr. Ragusea opined that Appellant has made bad decisions throughout his lifetime. N.T. Penalty Phase, 5/17/96, at 1885. As an example of Appellant's poor decision-making, Dr. Ragusea cited Appellant's decision to represent himself at trial, as follows:
>
> > The most recent bad decision, not as terrible as some of them, is, of course, representing himself at trial, which is a pretty preposterous thing to do.
>
> *Id.* at 1885–86

Subsequently, on cross-examination, the prosecutor questioned Dr. Ragusea as to his interpretation of the significance of Appellant's self-representation:

> *Prosecutor:* And you talk about some of these things about [sic] you indicate, well, gee, it is pretty preposterous that he would represent himself. Now, he is of average intelligence, right?
>
> *Dr. Ragusea:* Yes.
>
> *Prosecutor:* First case you were at he had a lawyer, correct?
>
> *Dr. Ragusea:* Yes.
>
> *Prosecutor:* He didn't win?
>
> *Dr. Ragusea:* That is correct.
>
> *Prosecutor:* Okay. Now, suppose you put in a few other factors that I pose to you of an average intelligence, [sic] who has been through the system, who now sees that if he represents himself he can have a lot more visitors in prison, he can be in front of the jury and talk and question and everything else, *but not have to testify, or be subject to cross-examination,* if you add those factors in, that could be a pretty smart decision, couldn't it?
>
> *Dr. Ragusea:* I don't think.
>
> *Prosecutor:* No?
>
> *Dr. Ragusea:* I don't think you would represent yourself in this case. I don't think your assistant would represent himself in this case. I don't think the Judge would. I think you would all be wise enough and think clearly enough to know that it is better to put it in someone else's hands.

Id. at 1889–90 (emphasis added to indicate the phrase cited and relied upon by Appellant; *see* Appellant's Brief at 29).

This is the context in which the eleven-word phrase challenged by Appellant appears. Based on those eleven words, taken out of context, Appellant asserts that penalty phase counsel was ineffective for failing to object because the words "demeaned [Appellant's] right to present a defense, his right to self-representation, and his privilege against self-incrimination," implicating his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Appellant's Brief at 29.

We see no indication that this issue was raised before the PCRA court. It is not included in Appellant's PCRA petition or supplemental petitions or even in his statement of questions on appeal to this Court. The PCRA court does not address the issue in its comprehensive opinions. Appellant has failed to provide any citation to the record where this issue is raised. The issue is waived. *See* Pa.R.A.P. 302(a).

Further, the issue is entirely meritless. Dr. Ragusea, a **defense** witness—not a Commonwealth witness—initially raised the matter of Appellant's choice to represent himself as an example of his bad decision-making. On cross-examination, the Commonwealth was entitled to question Dr. Ragusea concerning his interpretation of the significance of Appellant's decision to represent himself and to offer an alternative view, *i.e.,* that Appellant, who had represented himself in a previous trial and thus had experience with the judicial system, had made an informed and strategic decision. Although the Fifth Amendment affords protection against compulsory self-incrimination, "where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege." *United States v. Robinson,* 485 U.S. 25, 32, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988); *see also Commonwealth v. Trivigno,* 561 Pa. 232, 750 A.2d 243, 248 –49 (2000) (citing *Robinson's* "fair response" doctrine in concluding that the prosecutor's request to the jury to "decide the case based on the evidence that came from that chair up there" was not improper). Here, a defense witness opened the line of inquiry as to the significance of Appellant's self-representation, and the prosecution properly responded.

Finally, we cannot see any way that the above comment could have "demeaned [Appellant's] right to present a defense, his right to self-representation, and his privilege against self-incrimination." Appellant's Brief at 29. The guilt phase of trial was over, Appellant's period of self-representation was over, and the jury had found him guilty of first-degree murder. The only question remaining was the penalty to be imposed. Appellant fails to suggest how the prosecutor's question could possibly have "demeaned" his right to present a defense to the death penalty or to any other right. There is no merit to this claim.

20 This issue is waived. *See* text *infra.* However, we cannot fail to note that Appellant's underlying contention directly conflicts with the law in this Commonwealth. As we have stated, "the critical inquiry is the *use* of a deadly weapon on a vital part of the body, not the intentional aiming of the weapon at a vital part of the body." *Commonwealth v. Washington,* 592 Pa. 698, 927 A.2d 586, 607 (2007) (emphasis in original).

21 Appellant also appears to be asserting some version of relaxed waiver with the following sentence in Issue 5: "Nor was this constitutional error waived by virtue of the failure to preserve it at trial. *Freeman,* 827 A.2d at 400." Appellant's Brief at 32. We stress that this one sentence is the **entirety** of Appellant's argument against waiver of this issue. This one sentence does not constitute a developed, reasoned, supported, or even intelligible argument. The matter is waived for lack of development.

22

The PCRA court further indicates that the instruction was modified in 2005 to eliminate use of the word "terrible" for purposes of clarity and accuracy, and also out of fear of the prejudicial nature of this term. PCRA Court Opinion at 57.

23 Appellant's Clearfield County voluntary manslaughter and aggravated assault convictions were introduced pursuant to subsection 9711(d)(9), a significant history of violent felony convictions. Appellant's first-degree murder convictions in Schuylkill and York Counties were introduced pursuant to subsection 9711(d)(11), conviction of another murder, which was committed prior to or at the time of the offense at issue. N.T. Penalty Phase, 5/16/96, at 1635–36, 1639, 1641–42; 5/17/96, at 154–55, 158 (Closing Argument).

24 As Appellant acknowledges, he raised a similar claim, invoking only his prior Clearfield County voluntary manslaughter conviction, in his collateral appeal of his Schuylkill County murder conviction. *Spotz V,* 896 A.2d at 1224–25. We held that Appellant's voluntary manslaughter conviction was properly considered by the jury in finding the aggravating circumstance set forth in 42 Pa.C.S. § 9711(d)(12), conviction of voluntary manslaughter, committed either prior to or at the time of the offense at issue.

Appellant submits that he has presented the claim here "to preserve it for possible federal habeas review and so as not to waive it in the event that one or more of these convictions are later overturned." Appellant's Brief at 9–10.

25 Appellant insists that because his burglaries involved "unoccupied vacation cabins," they were "self-evidently non-violent." Appellant's Brief at 78 n. 109, 79. To support this view, Appellant attempts to rely on 42 Pa.C.S. § 9714, in which the General Assembly determined that burglary is a crime of violence for purposes of Pennsylvania's two-strikes sentencing law only if a person is present at the time of the offense. Appellant's reliance on Section 9714 affords him no relief.

The General Assembly has indeed deemed burglary as a crime of violence for purposes of two and three strikes mandatory punishment **only** when the burglary is "of a structure adapted for overnight accommodation in which at the time of the offense any person is present." *Commonwealth v. Small,* 602 Pa. 425, 980 A.2d 549, 580 (2009) (Castille, C.J., concurring) (quoting 42 Pa.C.S. § 9714(g)). However, as Chief Justice Castille has explained, the General Assembly is free to define burglary or any other offense differently for different purposes. The fact that the General Assembly has limited the applicability of burglary for setting punishment under the two-strikes/three-strikes scenario does not alter established law regarding the use of burglary convictions to support the subsection 9711(d)(9) aggravator. *Id.*

26 Also in Issue 9, in one sentence containing no explication, Appellant claims that the aggravating circumstance of subsection

9711(d)(9) is unconstitutionally vague and overbroad as applied in this case, because the trial court failed to instruct the jury as to the definition of three elements, *i.e.*, "significant history," "use or threat of violence," and "the person." Appellant's Brief at 75. Appellant raised exactly the same issue in *Spotz V,* 896 A.2d at 1240. We rejected his claim in *Spotz V,* and we do so again here on the same grounds.

27 First-degree murder is "an intentional killing." Second-degree murder is a killing "committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." **18** Pa.C.S. §§ 2502(a) and (b), respectively.

28 Toward the end of its instructions to the jury, the trial court also made this point in no uncertain terms:

> Remember that your verdict is not merely a recommendation. It actually fixes the punishment at death or life imprisonment.

N.T. Penalty Phase, 5/17/96, at 1915 (Jury Instructions).

29 Also as part of this sub-issue, Appellant again contends that the prosecutor improperly commented on Appellant's exercise of his right to self-representation and his right not to testify. Appellant raised the same claim in Issue 4, and we have addressed the claim in that issue. *See supra* n. 19.

30 The four mitigating circumstances that Appellant proffered were the following: he was under the influence of extreme mental or emotional disturbance, 42 Pa.C.S. §§ 9711(e)(2); he had an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to law, 42 Pa.C.S. §§ 9711(e)(3); he was relatively young, just under 24 years of age, 42 Pa.C.S. §§ 9711 (e)(4); and, pursuant to the catch-all mitigator, 42 Pa.C.S. §§ 9711(e)(8), he was "neglected during his childhood," was "physically abused," had a "poor upbringing by his parents," and "could have been helpful to others." Sentencing Verdict Slip, dated May 17, 1996, at 2.

31 Also in this sub-claim, Appellant alleges that the prosecutor "made sure the jury knew that the York County Victim Coordinator, Jane Riese, was present to testify for the prosecution." Appellant's Brief at 88. This one-sentence sub-claim is unexplained and simply incomprehensible.

> Ms. Riese was in the courtroom to identify Appellant as the convicted defendant in the York County murder of Penny Gunnet. Because Appellant stipulated that he was the defendant in that case, Ms. Riese did not take the stand, as the following notes of testimony reveal:
>
> > *Defense Counsel:* We will stipulate that the Mark Spotz identified in that [York County] record is the Mark Spotz that is the defendant in this proceeding.

> *Court:* Who is here on that one, Mr. Ebert [prosecutor]? Another one of your detectives?
>
> *Prosecutor:* Jane Riese. I spell that R-i-e-s-e. She was present at the time of the conviction, is the York County Victim Coordinator.
>
> *Court:* All right. That has been stipulated to that [Appellant] is one in [sic] the same for the murder conviction, first degree, of Penny Gunnet. So, ma'am, you may be excused if you wish.

N.T. Penalty Phase, 5/16/96, at 1642.

Appellant fails to offer any argument or rationale as to how this exchange could possibly constitute prosecutorial misconduct. His claim is nothing short of nonsense.

32 *Marinelli* was an Opinion Announcing the Judgment of the Court, authored by Justice Newman and joined by Justices Eakin and Baldwin. Justice Saylor joined the majority's holding and reasoning with regard to the issue of penalty phase jury instructions. *Marinelli, supra* at 690 (Saylor, J., concurring). Chief Justice Cappy, joined by Justice Baer, concurred, raising an issue of waiver. *Id.* at 689–90 (Cappy, C.J., concurring). Justice Castille concurred in the result without a separate writing.

33 We note that the jury instructions delivered here closely followed the Pennsylvania Suggested Standard Criminal Jury Instructions §§ 15.2502(F), (H). The language specifically challenged by Appellant, *i.e.*, "rejecting the death penalty," is suggested by the Subcommittee Note accompanying § 15.2502(H).

34 The United States Supreme Court has clarified that a capital defendant's ineligibility for parole may be imparted to the jury either by the trial court's instruction or by arguments of counsel. *Shafer v. South Carolina,* 532 U.S. 36, 39, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001). Here, while defense counsel did argue to the jury that its guilty verdict meant that Appellant would die in prison, counsel never explicitly informed the jury that a life sentence would render Appellant ineligible for parole. *See* N.T. Penalty Phase, 5/17/96, at 157, 182.

35 In our opinion resolving Appellant's direct appeal, we stated that "Appellant concedes both that the Commonwealth did not argue future dangerousness and that he never requested a *Simmons* charge." *Spotz III,* 759 A.2d at 1291; *see also* Appellant's Brief at 69 (acknowledging that, on direct appeal, Appellant's counsel conceded the absence of the two predicates for a *Simmons* instruction, but arguing that had he raised the issue in "appropriate terms," a new sentencing proceeding should have been granted).

36 *Spotz V* was a plurality decision, authored by Justice Newman and joined by Justice Baer. There were three concurring opinions and one concurring and dissenting opinion, and Justice Eakin did not participate in the case. On the *Simmons* issue, Chief Justice

Cappy and Justice Baldwin joined the Court, generating a majority on this issue.

37 Appellant suggests that several other pieces of evidence, in addition to his criminal history and his mental health, support his assertion that his future dangerousness was placed at issue. The first of these other pieces of evidence is a bit of the testimony of a *defense witness* who had served for a very brief time in 1985 as Appellant's foster parent. The witness offered a lay opinion related to her conclusion that Appellant was an extremely difficult child.

> Witness: He ... was never given the opportunities, in my opinion, to develop a conscience. He has no conscience.

N.T. Penalty Phase, 5/16/96, at 1735 (direct examination).

> Prosecutor: And you just found him to have no conscience?
>
> Witness: That is correct. He stated he didn't.

Id. at 1736 (cross-examination).

Second, Appellant cites testimony of his wife that some of the poems he had written had violent-sounding names, specifically, "Media Blood Lust" and "Voices Roared through Lying Lips." N.T. Penalty Phase, 5/16/96, at 1851.

The prosecutor did not even mention these excerpts of testimony in his statements to the jury. There is no obvious relevance of this testimony to future dangerousness, and it certainly does not support the issuance of a *Simmons* instruction, even under *Kelly*.

Third, as additional evidence that allegedly placed Appellant's future dangerousness at issue, Appellant cites "[e]vidence that Appellant had been aware of his parole status at the time of the murder and thought that it was possible that he eventually could be released if sentenced to life." Appellant's Brief at 65. The specific evidence cited by Appellant to support this assertion is the testimony of Scott Miller, a state trooper who interviewed Appellant shortly after his arrest. Trooper Miller testified that Appellant stated the following to a police officer also conducting the interview: "[D]o you think I will have to do life, plus the remaining years on my parole." N.T. Trial, 5/13/96, at 982. Appellant objected to the witness's statement regarding parole as prejudicial, out of the presence of the jury, and the court then instructed the jury to disregard the reference to parole. *Id.* at 982–87.

It is far from clear that this testimony implies that Appellant thought he might eventually be released if sentenced to life imprisonment. Furthermore, Appellant presents no argument as to why his speculations to a state trooper, posed well before trial had even started, as to the sentence he might receive, should support the issuance of a *Simmons* instruction. This

sort of "advocacy" neither credits counsel nor benefits his client.

38 There is some confusion in the record as to whose hand—Appellant's, Dustin's, or both—a stepfather burned, apparently as punishment.

* * *

39 At the PCRA hearing, Dr. Ragusea testified that Appellant gave an indication that there was sexual abuse in his family, but "he grossly understated it." N.T. PCRA Hearing, 1/**18**/07, at 138.

40 The allegedly incomplete or absent records, information, and evidence cited by Appellant includes the following: testimony of Ms. Redden as to abuse suffered by Appellant, discussed *supra* in text; criminal, institutional, and hospital records of Dustin Spotz, *see* Appellant's Brief at 45 n. 51, 47, 50–51 n. 63; CYS and other institutional records regarding Appellant and his family members, *see id.* at 47–49

41 The two psychiatrist expert witnesses offered by the defense at the PCRA hearing also concluded that Appellant suffered from chronic and severe post-traumatic stress disorder, as well as polysubstance abuse. One, Dr. Fox, also diagnosed Appellant with obsessive compulsive disorder.

Although, like Dr. Ragusea, both psychiatrists also diagnosed Appellant with a personality disorder, they differed with regard to the type. Dr. Fox's diagnosis was borderline personality disorder, but Dr. Blumberg's diagnosis was personality disorder not otherwise specified, with features from dependent, schizotypal, borderline, and antisocial personality disorders. PCRA Court Opinion at 41 n. 26; N.T. PCRA Hearing, 2/22/07, at 76; and 1/**18**/07, at 10–11, 17, 26. Dr. Blumberg clarified that personality disorder not otherwise specified is simply the newer term for mixed personality disorder. N.T. PCRA Hearing, 1/**18**/07, at 10. Thus, it would appear that the type of personality disorder diagnosed by Dr. Blumberg for purposes of collateral appeal is very similar to the type *first* diagnosed by Dr. Ragusea, *i.e.,* at the time of trial.

42 The PCRA court found that the Department of Corrections sent Appellant's psychological/psychiatric records to the York County Office of the Public Defender in November 1995; however, the court's findings in this regard are not consistent with the exhibits of record. The exhibits show that the records at issue were sent on February 21, 1996. *See* Petitioner's Exhibit 83. This discrepancy is not relevant to our resolution of the matter.

43 Appellant also asserts that the Ryan Report and Maue Notes "corroborated testimony concerning sexual abuse and neglect," "described Appellant's personality features consistent with those expected in a person who suffered extreme physical and sexual abuse, neglect, and a severely dysfunctional upbringing," "demonstrat[ed] that Appellant was suffering from a serious

PTSD-related mental and emotional disorder in the days immediately following [the killing of his brother Dustin]," and "establish [ed] that Appellant was actively suffering from PTSD at and around the time of trial." Appellant's Brief at 57–59.

These assertions do not accurately reflect the content of the documents at issue. Post-traumatic stress disorder (PTSD) is not included among the "Diagnostic Impressions" of the Ryan Report. In fact, neither the Ryan Report nor the Maue Notes even mentions PTSD.

44 Appellant asserts that the Maue Notes and the DOC Psychiatry Department Referral Form "evidenc[e] symptoms of Appellant's Posttraumatic Stress Disorder." Appellant's Brief at 60. However, there is no mention of PTSD in these writings, only Appellant's self-reported symptoms of decreased sleep, hallucination, and depression. Furthermore, PTSD is not included in the "Diagnostic Impressions" of the Ryan Report.

45 It appears that Donald Bloser, Jr., a forensic scientist employed by the Pennsylvania State Police Crime Laboratory, initially extracted and then did some preliminary testing of the blood stain on the sneaker. After this testing established that the blood did not belong to Appellant, Mr. Bloser recommended that the sample be forwarded to Cellmark Diagnostics for DNA analysis. N.T. Trial, 1/13/96, at 1012.

46 In another sub-claim of Issue 19, Appellant reasserts exactly the same issue already addressed and rejected in Issue **18**. Appellant's Brief at 95; *see* text, *supra*.

47 There were approximately 90 defense exhibits in total presented to the PCRA court, of which the Commonwealth objected to 21. N.T. PCRA Hearing, 5/11/07, at 102.

We note that one of the exhibits allegedly not transmitted, *i.e.*, Exhibit 39, is in fact included in the record transmitted to this Court and was apparently admitted by the PCRA court. *See* N.T. PCRA Hearing, 5/11/07, at 108, 115–16. The exhibit is identified by Appellant as "Schuylkill PCRA Hrg. Exh. P–10, handwritten note from Schuylkill prosecutor's file." Appellant's Brief at 94 n. 123. It was described in the notes of testimony as a handwritten note from the file of the Schuylkill County District Attorney. N.T. PCRA Hearing, 5/11/07, at 107–08. The note, in its entirety, reads as follows:

10/6/95

Re: Noland

atty Cammarano [Noland's counsel] won't be here on the 18th for Plea Negos.

won't be able to meet w/ her parents until the 20th

Appellant's Exhibit 39.

Christina Noland, who pled guilty to several charges in connection with Appellant's first three killings but was not charged in the instant Cumberland County crimes, testified against Appellant at trial. *See* N.T. Trial, 5/10/96, at 261–406. Appellant provides absolutely no insight as to the conceivable relevance or materiality of this note, which apparently concerns the scheduling of Ms. Noland's Schuylkill County plea negotiations, to his instant appeal.

48 To illustrate the undeveloped nature of Appellant's contentions in this sub-claim, two examples are set forth below, each of which includes the excerpt of the PCRA notes of testimony cited by Appellant and his accompanying but unexplained assertion as to that excerpt. With regard to the first example, Appellant asserts only that the PCRA court "preclud[ed] proffer on the relevance of expert testimony regarding Dustin Spotz's sexual abuse." Appellant's Brief at 94 n. 124.

> *Defense Counsel:* Doctor, in the ... records related to Dustin [Spotz], there is a reference that Dustin propositioned another boy asking him to have oral sex. Is that consistent with the conduct of a child who has been sexually abused and is reenacting that abuse?
>
> *Commonwealth:* Objection.
>
> *PCRA Court:* Sustained.
>
> *Defense Counsel:* What would the significance of an event like this be?
>
> *Commonwealth:* Objection.
>
> *PCRA Court:* Sustained. Move on to your client.
>
> *Defense Counsel:* Your Honor—
>
> *PCRA Court:* I have made the ruling. You are hammering in the same thing from 50 different angles. Get me information that I have not heard that is relevant.
>
> *Defense Counsel:* Your Honor–I would just ... offer a proffer.
>
> *PCRA Court:* No. I don't want to hear a proffer. You are ahead of the game.

N.T. PCRA Hearing, 1/17/07, at 181–82 (cited in Appellant's Brief at 94 n. 124).

It is clear from the notes of testimony reproduced above that the PCRA court denied admission of the proffered testimony based on relevance and cumulative effect. Appellant has set forth absolutely no argument that the PCRA court's ruling was erroneous.

With regard to the second example, Appellant asserts only that the PCRA court "preclud[ed] proffer of expected expert

testimony regarding Appellant's state of mind at the time" of the killing of his brother. Appellant's Brief at 94–95 n. 124.

> *Defense Counsel:* Doctor [Blumberg], I would now like to turn your attention to the Clearfield County incident where Dustin attacks [Appellant], [Appellant] kills Dustin. First of all, was [Appellant]—how aware was [Appellant] of Dustin's violent propensities?
>
> *Dr. Blumberg:* Intimately aware. He had been assaulted by him on numerous occasions. He had been threatened by him on numerous occasions. He had been stabbed by him, you know, on one prior occasion in which he was actually stabbed with a knife and significantly injured by him on, again, other occasions with sharp objects, and he was well aware of Dustin's explosive violent nature.
>
> *Defense Counsel:* When Dustin stabs [Appellant] and there are two knife stabs and threatens—well, first of all, who did Dustin threaten?
>
> *Commonwealth:* Objection, Your Honor.
>
> *PCRA Court:* How is all this relevant? [Appellant] was convicted of what?
>
> *Defense Counsel:* [Voluntary] Manslaughter.

* * *

> *PCRA Court:* How is this relevant?
>
> *Defense Counsel:* Because there was no mental health evidence that was presented in that case at all, and in terms of rebutting the seriousness of the manslaughter conviction as an aggravating circumstance, Dr. Blumberg is going to give his opinion that—well, Your Honor, may I approach? I don't want to say—
>
> *PCRA Court:* You may not approach. I am going to sustain the objection. I have heard enough. It is not relevant in this case.
>
> *Defense Counsel:* I'm sorry?
>
> *PCRA Court:* We are not getting into the—we know what [Appellant] was guilty of in that case, voluntary manslaughter. It has been determined. Now, how that case was tried and what the circumstances were and what was admitted is not relevant in this case, and I will not allow it period.

N.T. PCRA Hearing, 1/**18**/07, at 34–36 (cited in Appellant's Brief at 94–95 n. 124).

It is clear from the above excerpt that the PCRA court sustained the Commonwealth's objection based on relevance and the finality of a prior conviction. Again, as in the first

example, Appellant has set forth absolutely no argument that the PCRA court's ruling was erroneous.

As summarized in the text, *supra,* Appellant's generalized assertion that the PCRA court's rulings, such as in the above examples, denied him "the chance to develop a record, in violation of his constitutional rights to meaningful post-conviction review" does not constitute a reasoned argument amenable to review.

49 One of the ten general areas concerns testimony regarding the circumstances of Ms. Noland's prosecution and guilty plea. Appellant contends that this testimony was relevant and material to his *Brady* claim. Appellant's Brief at 97. Appellant raises two *Brady* claims in this appeal, which we have rejected, *supra,* in the text. One concerns evidence as to the involvement of Mr. Carothers in a prior murder, and the other concerns mental health reports from the Department of Corrections. *See* text, *supra,* Issues 3 and 15, respectively. Appellant provides absolutely no suggestion as to how the circumstances of Ms. Noland's prosecution and guilty plea could possibly be relevant and material to either of these *Brady* claims.

50 The second citation to the notes of testimony in this excerpt of Appellant's brief is in error. Dr. Fox testified on February 22, 2007, not on January **18**, 2007.

51 We cannot fail to note that Appellant's parenthetical phrases after his citations to notes of testimony in this issue do not even consistently and accurately describe the circumstances of the excerpt. For example, Appellant contends that, in the following excerpt, the PCRA court precluded "expert testimony regarding the impact of Appellant's foster-care experience on his emotional, psychological, and mental stability." Appellant's Brief at 96 n. 128. A review of the excerpt shows that Appellant has incorrectly characterized the PCRA court's action.

Defense Counsel: If it was devastating—it was the most emotionally devastating day for the caseworkers, what would it have been like for those two young children [Appellant and Dustin Spotz]?

Dr. Blumberg: Well—

Commonwealth: Objection, assuming facts not in evidence.

PCRA Court: What, being told that they weren't going home with their parents? Is that what the question is?

Defense Counsel: Yes.

PCRA Court: Are or are not?

Defense Counsel: Are not going home.

PCRA Court: Sustained. I did not come from the moon. Come on. There are no 12 people sitting over here. Get me the facts that I need to resolve the issues on.

Defense Counsel: Your Honor, this could have been told to the jury.

PCRA Court: Sustained. Next question.

Defense Counsel: Doctor [Blumberg], what kind of effect would this type of experience have on [Appellant's] emotional development?

Dr. Blumberg: Very damaging. Again, this is not just an implied or indirect abandonment but a definite rejection from the parent that they don't want the child. It's kind of hard to think of anything in terms of an emotional damage that could be more damaging.

Defense Counsel: Would that effect be compounded with each additional instance of parental abandonment?

Dr. Blumberg: Yes, it would certainly be cumulative.

N.T. PCRA Hearing, 1/17/07, at 159–60.

Dr. Blumberg then continued to answer several other questions regarding the effect on Appellant of his foster care placements and abandonment by his mother. Contrary to Appellant's assertion, the PCRA court did not preclude testimony as to the effects of his foster care experiences on his emotional and psychological health.

In a second example, Appellant asserts that, in the following excerpt of his grandmother's examination, defense "counsel was prevented from eliciting evidence of Dustin Spotz's rages." Appellant's Brief at 97 n. 129. Again, Appellant has misstated the import of the excerpt.

Defense Counsel: .... [Appellant's] relationship with his brother, Dustin. Could you describe—was there a difference between the way Dustin responded to the abuse at home and the way [Appellant] responded to the abuse?

Ms. Redden: When [Appellant] was abused, he was very passive. He did not fight back. He took it and was quiet about it. Dustin, on the other hand, when he was abused, he returned abuse. He would fight with these stepfathers.

And their relationship to each other, the two boys—Dustin already had his growth spurt. [Appellant] was small. Dustin was tall and of course stronger than [Appellant], and they would start wrestling. Usually Dustin would initiate, let's wrestle.

Defense Counsel: .... Would it go beyond wrestling?

Ms. Redden: Yes, yes. He would hurt [Appellant]. He said he didn't do it intentionally, but once he would get started these violent rages Dustin described that—

Defense Counsel: Your Honor, I'm going—

Ms. Redden: —he had a different world inside him.

PCRA Court: Next question.

Defense Counsel: Did you observe any of these occurrences?

Ms. Redden: Oh, yes, yes. The time that I intervened was when I was watching them. .... I saw where Dustin was really getting rough with [Appellant].....

And finally he was twisting [Appellant] all different directions..... and [Appellant's] saying, Dustin, you're hurting me.....

* * *

Defense Counsel: As they got older ... did this situation improve or get worse?

Ms. Redden: As Dustin got older, his bipolar, manic depressive condition worsened, and of course he became more violent, although [Appellant] was growing too and he could defend himself a little bit more, but Dustin at that time as he got older he was not just wrestling for fun. He would get these violent spells.

N.T. PCRA Hearing, 1/17/07, at 39–41.

Contrary to Appellant's assertions, the PCRA court did not preclude defense counsel from eliciting testimony by Appellant's grandmother as to Dustin's violent outbursts, particularly as they were directed against Appellant.

Appellant further asserts that he was precluded from eliciting testimony that "the social services system failed [him]." Appellant's Brief at 97 n. 130. This is entirely false, as the following excerpts of testimony show:

Defense Counsel: I want to turn now to the many placements that [Appellant] underwent as a child. My specific question [is] can you form an opinion as to whether Child and Youth Services and other agencies, governmental agencies responsible to insure the well-being of children in this Commonwealth, functioned as well as they could have?

Dr. Ragusea: The answer is they functioned far worse than that. This was—in all the years I've worked with these agencies, I've never seen a worse example of society—individuals that were given the affirmative action to protect children [—] fail. I've never seen a worse example of a group of individuals who were assigned the task of saving children from pain and suffering fail as badly as this. That's the answer to that question.

Defense Counsel: Were there sufficient red flags for those—for the authority to do something, to remove these children from the home?

> *Dr. Ragusea:* Many. Again, you know, various points of severity wasn't [sic] known, but there was enough information that these children should never have been brought back to their home.
>
> *Defense Counsel:* And was it one specific instance or were there multiple?
>
> *Dr. Ragusea:* No, it was multiple instances. And based upon the record that I looked at, the kids were brought back to the home more because their mother wanted them there at various points, and they were sent out of the home because their mother didn't want them at various points.
>
> *Defense Counsel:* And even reviewing the Child Service records, the minimal ones, even from there there's enough indication that the system failed?
>
> *Commonwealth:* Objection, asked and answered.
>
> *Court:* Sustained. He answered your question before.

N.T. PCRA Hearing, 1/**18**/07, at 168–70.

Thus, Appellant's assertion that he was precluded from eliciting testimony that the social services system failed him is completely belied by the record. The Commonwealth's objection, and the sustaining of that objection, were grounded in the cumulative nature of the continuing testimony, nothing more.

The sheer number of undeveloped challenges in this sub-claim, and the above excerpts, which are non-exhaustive examples of Appellant's misinterpretation of the record, suggest that Appellant is attempting to compensate for a lack of overall merit with an overwhelming number of assertions of error.

52 In addition, Appellant also appears to assert, albeit vaguely, that PCRA counsel were ineffective.

> [ ] Appellant's counsel filed a Motion for Reconsideration that, in part, requested that the [PCRA] court permit counsel to amend to include those claims [*i.e.,* claims raised in Appellant's *pro se* Letter to Court]. Counsel specifically noted that they had no intent or strategic basis for failing to raise these issues and that, to the extent counsel failed to raise issues, counsel was ineffective.

Appellant's Brief at 99.

Other than a few citations to authority for the principle that a person seeking post-conviction relief is entitled to assistance of counsel, the sentences above constitute the entirety of Appellant's "argument" for his apparent assertion that PCRA counsel was ineffective.

> We first note that the Defender Association of Philadelphia, Capital Habeas Corpus Unit, has represented Appellant throughout the PCRA proceedings and this appeal. To the extent that Appellant's PCRA attorneys are asserting their own ineffectiveness, such an assertion violates the general rule that counsel cannot argue his or her own ineffectiveness. *See Commonwealth v. Ciptak,* 542 Pa. 112, 665 A.2d 1161, 1161–62 (1995) ("As a general rule, a public defender may not argue the ineffectiveness of another member of the same public defender's office since appellate counsel, in essence, is deemed to have asserted a claim of her or her own ineffectiveness.")
>
> However, because it is impossible to determine exactly what Appellant is arguing from his brief, vague, and qualified assertions, we conclude that the matter is unreviewable and waived for lack of development.

53 The Prothonotary of the Supreme Court is directed to transmit a complete record of this case to the Governor in accordance with 42 Pa.C.S. § 9711(i).

1 *See Commonwealth v. Hill,* —— Pa. ——, 16 **A.3d** 484, 488–89, 489–90 (Pa.2011).

2 *See Dougherty v. Beard,* No. 09–CV–902 (Petitioner's Motion to Reactivate *Habeas* Proceedings), lodged on this Court's docket in *Commonwealth v. Dougherty,* 585 CAP.

3 The Defender has also volunteered itself in appellant's two other capital PCRA cases, arising from the separate murders that appellant committed in Schuylkill and York counties in 1995, which are pending on collateral review. Appellant's petition in this case listed 19 claims the Defender raised in appellant's Schuylkill County PCRA petition, and 33 claims the Defender raised in appellant's York County PCRA petition. In both cases, as here, the claims entail various sub-claims as well as allegations of counsel ineffectiveness at all levels. Appellant's PCRA Petition, 12/4/02, at 28–39.

4 The Motion was forwarded by the Commonwealth via a Post–Submission Communication, seeking to lodge the Motion, with the Commonwealth noting that this Court should be made aware of the accusations. We granted the Commonwealth's Motion.

5 Two examples of Defender delay in cases the Defender calls "active" and "pending" and "languishing" due to this Court's supposed incapability are illustrative of the abusiveness of the federal motion filed in *Dougherty. Commonwealth v. Clayton,* 573 CAP, involves a serial PCRA petition filed in 2004. That matter was not briefed and submitted to the Court until March 29, 2011. Before filing the underlying serial petition, the Defender had successfully moved to have Clayton's federal *habeas* petition held in abeyance so he could ping-pong back to state court to pursue serial claims. State relief was denied in June of 2008 because the serial petition was untimely; yet, the Defender

appealed. Thereafter, the matter was delayed because the Defender failed to discharge its duty as appellant to ensure the forwarding of the record. It was only after the Commonwealth filed a Motion to Dismiss in March of 2010 that the logjam broke, and the Defender, in response to the Motion, requested that a briefing schedule issue. The Defender obviously knew these facts when it filed its federal motion in *Dougherty.*

> The defendant, and then the Defender, also caused the bulk of the delay in *Commonwealth v. Ali,* 437 CAP, as detailed in our recent opinion deciding that case. *See* 10 **A.3d** 282, 290 (Pa.2010). The PCRA petitioner in *Ali* sought to represent himself, and we remanded for a hearing on the issue. The Defender opposed its client's wishes every step of the way, which included claiming that Ali must be incompetent if he did not want its services, filing an interlocutory appeal, attempting to add new collateral claims in violation of the limited remand order, and then filing an unauthorized appeal after the PCRA court granted Ali's request to represent himself. It is debatable whether all of these procedural maneuvers were legitimate; what is not debatable is that it was the defendant's request, and the Defender's ensuing maneuvers, not judicial indifference, that delayed the case.

In the text below, I discuss three other cases on the Defender/Ballard list of "languishing cases" resulting from this Court's "incapability" of managing its capital docket: *Commonwealth v. Hill,* 521 CAP (decided); *Commonwealth v. Porter* (pending); and *Commonwealth v. Banks* (pending). In all three cases, the strategic conduct of the Defender was the primary cause of delay.

Furthermore, this case, which involves abusive Defender briefing requiring a dispositional opinion in excess of 125 pages, is on the Defender/Ballard list.

In addition, eight other capital appeals on the Defender/Ballard list were decided by published opinions of this Court between December 30, 2010 and April 28, 2011: *Commonwealth v. Ali* (PCRA appeal impeded by Defender as discussed above; 57–page slip opinion); *Commonwealth v. Dennis,* 491 CAP (PCRA appeal following remand, a fact not accounted for in federal motion and calculation of "delays"); *Commonwealth v. Briggs* (direct appeal necessitating 76–page slip opinion); *Commonwealth v. Lesko,* 518–520 CAP (PCRA cross-appeals; 93–page **Defender** brief on Lesko's appeal raising 22 principal claims and innumerable sub-claims, including in 68 footnotes allowing brief to violate page limitation; 91–page Defender brief as appellee; necessitating 104–page slip opinion); *Commonwealth v. Hill* (PCRA appeal; **Defender** representation and conduct the primary issue); *Commonwealth v. Paddy,* 478 CAP (PCRA appeal; 99–page **Defender** principal brief raising 17 primary claims; necessitating 57–page slip opinion); and *Commonwealth v. Smith,* 591 CAP (PCRA appeal following remand, 71–page **Defender** brief raising 11 principal claims,

despite fact that case was limited to guilt phase issues; necessitating 62–page slip opinion). Decisions in another two capital cases on the Defender/Ballard list are being issued contemporaneously with the decision in this case: *Commonwealth v. Dougherty* itself; and *Commonwealth v. Houser,* 541 CAP.

In addition, two other cases involving time-barred, serial PCRA petitions were decided by this Court via *per curiam* affirmance: *Commonwealth v. Fisher,* 607 CAP (third PCRA petition; Defender brief); and *Commonwealth v. Bridges,* 609 CAP.

These capital cases—largely courtesy of the Defender—represent a small part of the workload of this Court. Such is the supposed lassitude of our approach to our capital docket.

6 The Commonwealth may still seek rehearing *en banc* or petition the U.S. Supreme Court for *certiorari* review of the Third Circuit's recent decision.

7 *Commonwealth v. Lambert,* 584 Pa. 461, 884 A.2d 848 (2005), involving a non-Defender client, details a distinct form of unauthorized Defender (mis)conduct. *See id.* at 853 (noting finding of supervising judge of criminal division of Philadelphia Court of Common Pleas, who concluded that Defender illegally abused subpoena power to circumvent PCRA discovery rules and obtain archived police files in approximately 25 capital cases, including Lambert's, leading to disciplinary referral).

8 Pa.R.Crim.P. 907.

9 *See* JOSEPH HELLER, CATCH–22 (1961).

End of Document