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786 CAP

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

NO. 786 CAP

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

KENNETH HAIRSTON,
Appellant

BRIEF FOR APPELLANT

Appeal from the Order denying post-conviction relief entered August 27, 2019, at No. CP-02-CR-0009056-2001 in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, by the Honorable Jeffrey A. Manning, P.J.E.

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STATEMENT OF JURISDICTION

This Honorable Court has exclusive jurisdiction in this appeal from the denial of a Post-Conviction Relief Act (hereinafter "PCRA") petition in a capital case. *Commonwealth v. Montalvo,* 205 A.3d 274, 278 n. 1 (Pa. 2019); 42 Pa.C.S. § 9546(d); 42 Pa.C.S. § 722(4).

STATEMENT OF SCOPE OF REVIEW AND STANDARD OF REVIEW

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." *Commonwealth v. Edmiston*, 65 A.3d 339, 345 (Pa. 2013) (citation omitted).

This Honorable Court explained that the test for determining ineffective assistance of counsel is as follows:

> To obtain relief on a claim for ineffective assistance of counsel, Appellant must establish: (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her course of conduct; and (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. [Citation omitted.]

Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999).

Also, this Honorable Court defined the standard and scope of review for a violation of constitutional rights stating, "As this is an issue involving a constitutional right, it is a question of law; thus, our standard of review is *de novo*, and our scope of review is plenary." *Commonwealth v. Bullock,* 913 A.2d 207, 212 (Pa. 2006) (citation omitted)."

ORDER IN QUESTION

On August 27, 2019, the trial court issued the following Order of Court at No. CC 200109056:

ORDER OF COURT

AND NOW, this 26th day of Aug, 2019, it is ORDERED that for the reasons set forth in the Notice of Intention to Dismiss filed October 30, 2018, and the Supplemental Notice of Intention to Dismiss filed on June 19, 2019, the defendant's Post Conviction Relief Act Petition is DENIED. The defendant is advised of the following:

1. The defendant has the right to appeal this Court's denial of his PCRA petition to the Superior Court but must do so by filing a Notice of Appeal within thirty (30) days of the date of this Order;
2. The defendant is granted leave to proceed in forma pauperis on any appeal; and
3. The defendant remains entitled to court appointed counsel and current counsel shall continue to represent the defendant in any appeal

The Department of Court Records shall serve a copy of this Order upon the defendant, Kenneth Hairston, FA-9174, at SCI Greene, 175 Progress Drive, Waynesburg, Pennsylvania 15370, by certified mail, return receipt requested; upon counsel for the defendant, Thomas N. Farrell, Esquire, at 100 Ross Street, Suite 1, Pittsburgh, Pennsylvania 15219, by regular mail; and upon Rusheen R. Pettit, Esquire, Office of the District attorney of Allegheny County, by interoffice mail.

BY THE COURT:

/s/ Jeffrey R. Manning

(Appendix C; docket entry 123).

STATEMENT OF THE QUESTIONS INVOLVED

I. Whether the death penalty is violative of the Eighth Amendment of the United States Constitution as well as Article I, § 13 of the Pennsylvania Constitution?

(Answered in the negative by the trial court).

II. Whether the jury imposed a sentence of death in a manner that was violative of the process established in the statutory scheme by finding a non-statutory aggravating factor and, as such was unconstitutional and illegal?

(Answered in the negative by the trial court).

III. Whether trial counsel gave ineffective assistance for allowing the prosecutor and/or the judge to allow the jury to believe that Appellant should be executed based upon Chetia Hurtt's injuries and suffering?

(Answered in the negative by the trial court).

IV. Whether appellate counsel gave ineffective assistance for failing to raise the argument that the jury imposed a sentence of death in a

manner that was violative of the process established in the statutory scheme by finding a non-statutory aggravating factor?

(Answered in the negative by the trial court).

V. Whether trial counsel gave ineffective assistance for failing to object to the prosecutor's improper argument?

(Answered in the negative by the trial court).

VI. Whether trial counsel gave ineffective assistance for failing to object to the Commonwealth's expert testifying to the veracity of Appellant's statements?

(Answered in the negative by the trial court).

VII. Whether trial counsel gave ineffective assistance for failing to object to the Commonwealth's expert testifying to facts that were not in evidence and had no basis, namely that Appellant had been arrested as a juvenile?

(Answered in the negative by the trial court).

STATEMENT OF THE CASE

This is an appeal from the Order denying post-conviction relief entered August 27, 2019 at No. CP-02-CR-0009056-2001 in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, by the Honorable Jeffrey A. Manning, P.J.E.

A. Procedural History

Appellant, Kenneth Hairston (hereinafter "Appellant"), was charged by criminal information on August 2, 2001 at No. CC 20019056 in the Court of Common Pleas of Allegheny County with two (2) counts of criminal homicide (docket entry 3). The Commonwealth filed a notice of intention to seek the death penalty (docket entry 11). Later, the Commonwealth amended their notice to include a second aggravating factor (docket entry 17).

On September 10, 2001, Judge Manning appointed Michael DeRiso, Esquire to represent Appellant (docket entry 4).

On April 9, 2002, jury selection began with Judge Manning presiding (docket entry 18). Appellant was represented by Attorney DeRiso along with Robert Foreman, Esquire, of the Office of the Public Defender. Deputy District Attorney Mark Tranquilli presented the Commonwealth's position. On April 11, 2002, jury selection concluded.

Appellant's trial began on April 15, 2002. On April 17, 2002, the jury

found Appellant guilty of two (2) counts of first-degree murder. On April 18, 2002, Appellant proceeded to the penalty phase of his capital trial. The jury returned a verdict of death for the murder of Kathy Hairston finding as aggravating factors the following: 1) "the 4 felony convictions that have been placed into the record by stipulation" and 2) the murder of Sean Hairston. Mitigating factors were as follows: 1) when the defendant killed, he acted under mental or psychological disturbance, and 2) the defendant was a good neighbor to those in his community. The jury returned a verdict of death for the murder of Sean Hairston finding as aggravating factors the following: 1) "the 4 felony convictions that have been placed into the record by stipulation" and 2) the murder of Kathy Hairston. Mitigating factors were as follows: 1) when the defendant killed, he acted under mental or psychological disturbance, and 2) the defendant was a good neighbor to those in his community and 3) up to June 11, 2001 he was a good father to Sean (docket entry 23).

On July 11, 2002, Judge Manning formally imposed a sentence of death as to the two (2) counts of first-degree murder and issued an order imposing the death penalty on August 19, 2002 (docket entry 24 and 29).

Petitions for leave to withdraw as counsel were filed on July 31, 2002, August 2, 2002 and January 14, 2003 (docket entries 27, 28 and 32). Eventually Judge Manning appointed Kenneth A. Snarey, Esquire (docket entry 33 and 35).

Petitions to extend time to file post-sentencing motions were filed by Attorney Snarey (docket entries 34 and 42). On April 13, 2006, Judge Manning issued an order allowing post-sentencing motions to be filed by May 6, 2006 (docket entry 44). On May 8, 2006, Attorney Snarey filed post-sentencing motions (docket entry 45). The Commonwealth filed a written response (docket entry 51). On June 2, 2008, Judge Manning denied relief (52).

On June 6, 2008, Appellant filed a notice of appeal and a statement of errors (docket entry 53 and 54). The appeal was docketed at 566 CAP 2008. On December 28, 2009, this Honorable Supreme Court, per the Honorable Jane Cutler Greenspan, J., issued an opinion finding that all of the claims raised had been waived because post-sentencing motions were untimely filed (docket entry 65). By automatic review, this Honorable Court found the evidence to be sufficient and ruled that the sentence of death was valid pursuant to 42 Pa.C.S. § 9711(h)(3). The judgement of sentence was affirmed.

A petition for writ of certiorari was filed in the United States Supreme Court on March 19, 2010. Relief was denied on May 17, 2010. *Hairston v. Pennsylvania,* 516 U.S. 913 (2010).

On November 13, 2009, Appellant filed a *pro se* petition pursuant to the Post Conviction Relief Act (hereinafter "PCRA") (docket entry 60). Michael J. Healey, Esquire, was appointed to represent Appellant. On February 1, 2011,

Attorney Healey filed a timely PCRA petition requesting that the appellate rights be reinstated (docket entry 69). The Commonwealth filed an answer (docket entry 72). A reply was filed (docket entry 73). On November 15, 2011, Judge Manning issued an order reinstating Appellant's appeal rights *nunc pro tunc* (docket entry 74).

A timely appeal, *nunc pro tunc,* was effectuated to this Honorable Supreme at docket number 643 CAP 2011 (docket entry 76). Judge Manning issued an Opinion on July 13, 2012 (docket entry 85). Briefs were filed by the parties. The following issues were raised on appeal:

> 1. Did the Court of Common Pleas err by allowing the Commonwealth to enter specific and detailed evidence of the uncharged crime of felony arson in violation of the Defendant's Eight and Fourteenth Amendment rights under the United States Constitution and in violation of rules 403 and 404 of the Pennsylvania Rules of Evidence?
>
> 2. Did the Court of Common Pleas err having admitted the evidence of the uncharged crime of felony arson at trial, by failing to instruct the jury on the lesser included offense of second degree murder in violation of the Fourteenth Amendment to the United States Constitution where there was sufficient evidence of record to support a finding that the deaths in question took place during the commission of the felony arson?
>
> 3. Did the Court of Common Pleas err by allowing the Commonwealth to introduce highly detailed and specific evidence of a May 21, 2000 incident of attempted rape in order to establish motive for the instant crimes when such evidence was irrelevant to even

Commonwealth's theory of motive and was clearly more prejudicial than probative and was in violation of the Eight and Fourteenth Amendments to the United States Constitution and violation of rules 403 and 404 of the Pennsylvania Rules of Evidence?

4. Did the Court of Common Pleas err by allowing non-family members of the victims to give victim impact evidence in the penalty phase of this matter that was so prejudicial that it violated the Defendant's due process rights under the Fourteenth Amendment to the United States Constitution?

5. Did the Court of Common Pleas err by precluding the introduction of the Defendant's jail records during the penalty phase, records that could have shown that the Defendant's character was worthy of love and loyalty because the Defendant's wife visited him in jail on a regular basis during his incarceration for raping the wife's daughter in violation of the Eight and Fourteenth Amendments to the United States Constitution?

6. Did the Court of Common Pleas err by allowing the introduction of the Defendant's previous conviction for rape in the penalty phase even though the Commonwealth had not provided timely notice of their use of the rape conviction as an aggravating circumstance in violation of Pennsylvania Rule of Criminal Procedure Rule 352?

7. Did the Court of Common Pleas err when it allowed the introduction of irrelevant and truly collateral photographic evidence even though it had sustained an objection to the evidence's introduction in violation of the due process rights of the Defendant under the Fourteenth Amendment to the United States Constitution?

8. Did the Commonwealth engage in prosecutorial misconduct, which violated the Defendant's due process

> rights under the Fourteenth Amendment of the United States Constitution, by:
>
> > a. Making arguments to the jury about the interpretation of evidence during opening statement;
> > b. Leading witnesses on direct examination without court approval;
> > c. Fallaciously arguing in the penalty phase opening statement that the legislature limited the consideration of mitigating factors and impermissibly arguing that victim impact evidence is an aggravating factor for capital sentencing;
> > d. Eliciting knowingly false testimony from a law enforcement witness that law enforcement is unable to make an audio recording of a custodial interrogation without the consent of the Defendant; and
> > e. Eliciting testimony that the family decided that the it would donate the organs of Sean Hairston, a decedent of the homicide.

This Honorable Court issued an Opinion authored by the Honorable Max Baer, J., on January 21, 2014 addressing each of Appellant's eight (8) issues and affirming the judgment of sentence (docket entry 89). The Honorable Thomas G. Saylor, J., (now Chief Justice) issued a Concurring Opinion (docket entry 89).

A timely petition for certiorari was filed in the United States Supreme Court. Relief was denied on October 6, 2014. *Hairston v. Pennsylvania,* 574 U.S. 863 (2014).

Instant counsel was appointed on January 21, 2015 (docket entry 91). Appellant, through instant counsel, filed a timely PCRA petition and a motion to stay the execution (docket entry 92 and 93). Judge Manning issued an Order

staying the execution on February 9, 2015 (docket entry 94), and the following day, issued an Order granting leave to file an amended PCRA petition (docket entry 95).

Instant counsel filed a timely amended PCRA petition on January 30, 2017 (docket entry 104) and a motion for leave to file a brief in support (docket entry 105). The amended PCRA petition (docket entry 104) raised numerous issues and preserved the following issues that are now being raised upon this appeal: I (raised as issue 2), II (raised as issue 3), III (raised as issue 3 and 4) V (raised as issue 4), VI (raised as issue 7), and VII (raised as issue 8). Judge Manning issued an Order granting leave to file a brief in support (docket entry 106). Instant counsel filed a brief in support of the amended PCRA which supplemented the amended petition (docket entry 109) on August 30, 2017 addressing and preserving the following issues that have been raised upon this appeal: I (raised as issue 11), II (raised as issue 1), IV (raised as issue 2), V (raised as issue 4), VI (raised as issue 6), and VII (raised as issue 7). The Commonwealth filed an answer on May 30, 2018 addressing all of the claims that have been presented in this appeal (docket entry 116).

On October 30, 2018, Judge Manning issued a Notice of Intent to Dismiss addressing the claims that have been raised in this appeal (Appendix A; docket entry 117).

Instant counsel filed a response to the Notice of Intent to Dismiss and Motion for Leave to File an Amended PCRA Petition (docket entry 118). An amended PCRA on February 19, 2019 supplemented the prior pleadings by supplementing Argument I that has been presented in the instant pleading (docket entry 119). The Commonwealth filed an answer on May 24, 2019 addressing the merits of the supplemented claim raised (docket entry 121).

Judge Manning issued a Supplemental Notice of Intent to Dismiss addressing the supplemented claim (docket entry 122; Appendix B). On August 27, 2019, Judge Manning issued an Order denying Appellant's PCRA petition and indicated that the Notice of Intent to Dismiss from October 20, 2018 and Supplemental Notice of Intent to Dismiss set forth the reasons for denying the PCRA petition (docket entry 123; Appendix C).

Appellant filed a timely notice of appeal to this Honorable Court on September 25, 2019 (docket entry 124).[1] Judge Manning issued an Order requesting the record be transmitted to this Honorable Court on October 17, 2019 and indicated that the notices of intention to dismiss would act as the opinions

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[1] The notice of appeal clearly indicates that the case is a capital case and the appeal is to the Pennsylvania Supreme Court (docket entry 124), however the Allegheny County Department of Court Records erroneously sent the appeal to the Superior Court. The appeal was eventually transferred to this Honorable Court.

(docket entry 126; Appendix D).

A timely jurisdictional statement was filed with this Honorable Court on November 20, 2019 including sixteen (16) issues for review which encompass the claims raised in this pleading. On December 17, 2019, this Honorable Court issued an Order granting probable jurisdiction on Appellant's appeal.

This timely brief follows.

B. Factual History

The facts of the case were summarized from this Honorable Court's Opinion on December 28, 2009 as follows:

> On May 20, 2000, Appellant's stepdaughter, Chetia Hurtt, and her boyfriend, Jeffrey Johnson, returned to Hurtt's apartment from a movie to discover several voicemail messages left by Appellant, questioning where Hurtt was and when she would be home. Hurtt, 21, had known Appellant since he married her mother when Hurtt was five years old, and had lived under the same roof as Appellant, her mother (Katherine Hairston), Appellant's autistic son (Sean Hairston), and her grandmother (Goldie Hurtt), until Hurtt moved out approximately one month earlier. During Hurtt's adolescence, her relationship with Appellant deteriorated. Appellant prohibited Hurtt from socializing with males and frequently threatened that he would kill her and the rest of her family.
>
> Bothered by the phone messages that May evening, Hurtt asked Johnson to spend the night. The following morning, May 21, 2000, Appellant arrived at Hurtt's apartment with a handgun, which he was not licensed to carry. After being let into the apartment, Appellant instructed Hurtt to tell Johnson to leave. When Hurtt did not comply, Appellant threatened to kill Hurtt, Johnson, and himself, and stated that he would not go to jail. Despite Hurtt's protests that Johnson should stay-for fear of

what might happen should he leave-Johnson left the apartment. Appellant pointed the gun at Hurtt's face and said, "If you're going to be F'ing anybody, it's going to be me." N.T., 04/15/2002, at 52. Hurtt pleaded with Appellant not to hurt her, but he took her into the bedroom. Appellant removed his clothes and tried to remove Hurtt's clothes, but she resisted.

Meanwhile, Johnson stopped Sergeant William Gorman of the Pittsburgh Police Department and explained what was occurring. The police went to the apartment and announced their presence. Appellant pulled the ammunition clip out of the gun, threw it behind the door, and slid the gun underneath the bed. Hurtt escaped through the front door of the apartment. The police found a half-naked Appellant in the apartment. He claimed that he lived in the apartment with his daughter and came home to find her with Johnson. A Bryco-Arms 0.380 semi-automatic pistol was recovered from the bedroom. Appellant, yelling, "I can't go to jail," broke away from police as they were bringing him out of the apartment building. Appellant then jumped headfirst off a small roof to the ground fifteen-to-twenty feet below. Appellant got back on his feet and again began yelling, "I can't go to jail. I'm not going to jail." *Id.* at 91. As a result of these events, criminal charges were filed against Appellant.

One year later, in the morning hours of June 11, 2001, Appellant called the dispatcher at the school bus company that transported Sean Hairston, who was autistic, to school and requested that the bus not pick up Sean. Appellant spoke separately with two neighbors outside of his home that morning, each of whom noticed that Appellant smelled of alcohol and was very agitated. Appellant told both neighbors that he was upset about his stepdaughter's accusations, telling one neighbor that he would not go back to jail and that if he had to go to jail he "would probably do [him]self in." *Id.* at 102.

Shortly thereafter, thick black smoke was seen coming out of Appellant's home. Firefighters who reported to the scene found both the front and back doors locked and barricaded. Finally, the firefighters gained entry. They discovered that the

house was covered in garbage bags and debris. They retrieved Sean, who was lying underneath bags and debris, on the living room couch. His face and head were covered with a blanket. He was brought outside alive to paramedics. However, he died while being treated at the hospital after suffering two cardiac arrests. The injuries leading to his death were two or three incidents of blunt force trauma to his head.

Firefighters re-entered the house and found Appellant inside the kitchen, at the top of the basement stairwell. Appellant had several puncture wounds to his chest and a laceration on the right side of his neck. He was extremely combative with paramedics, and had to be restrained with handcuffs and stretcher straps, then ultimately paralytic drugs, before being transported to the hospital.

Firefighters also found Katherine in the kitchen. She was found with a hole in the side of her head, and was dead weight upon being brought out of the house. Toxicology screening showed no evidence of carbon monoxide or cyanide in her blood stream. Goldie Hurtt, who had previously suffered three strokes and a heart attack, was found incapacitated in an upstairs bedroom and was removed safely from the house.

In the kitchen, police found a large amount of blood in front of the refrigerator. Two knives were found in the kitchen. Sheets and bedding materials were found on the floors and counters. Four days after the fire, the Hairston family dog was found covered by debris in the basement and tied to a pole.

Police interviewed Appellant at the hospital where, because he was wearing an oxygen mask, he could communicate only by indicating simple yes or no responses. Appellant indicated that he knew who started the fire, that he killed his wife, and that his motivation for the killing and the fire were the impending charges against him. Appellant also indicated that those charges against him were untrue.

On June 19, 2001, police again interviewed Appellant. He gave both an oral and a taped statement. He explained that

he wrapped a ten-pound sledgehammer in a pillowcase and intentionally struck his wife with it from behind as she sat on their bed. He struck her a second time, then dragged her from their first-floor sleeping area into the kitchen. Appellant also confessed that, minutes later, he struck his son Sean with the sledgehammer twice. After hearing moans in the kitchen, he struck Katherine again with the weapon. Appellant stated that he left the house with the weapon, drove to a local bar, where he consumed two double-shots and two beers, then discarded the sledgehammer in a wooded area. Appellant then drove home and poured gasoline over the basement floor. According to Appellant, flames from the water heater ignited the gasoline before he was ready to ignite them. He then got a knife, stabbed himself twice in the chest, and then lay down next to his wife's body. Appellant went on to explain that he intentionally piled items throughout the house to ensure that the fire indeed killed everyone: "I just wanted to make sure that we were gone." Transcript of Appellant's taped interview, dated June 19, 2001, at 6. Appellant then revealed to police the location of the sledgehammer, which tested positive for blood.

(docket entry 65)

SUMMARY OF THE ARGUMENT

Appellant contends that a death sentence in Pennsylvania is unconstitutional pursuant to the Federal Constitution. More importantly, pursuant to an *Edmund's* analysis, it is now clear that the death penalty violates the Pennsylvania Constitution. The prior rulings to the contrary are now outdated and do not represent the present "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, infra.* This Honorable Court should formally abolish the death penalty.

Half of the states have the death penalty and half have halted or abolished it, which is more than when the last review occurred. The evolution of the death penalty, in recent years, has shown a trend towards its abolition. Most strikingly, all bordering states of Pennsylvania except Ohio have abolished the death penalty. As well, the world follows suit. About 70% of the world has abolished the death penalty, and almost all civilized nations have abolished it. Pennsylvania's capital punishment jurisprudence along with the process for carrying out an execution, has all but been eliminated. Governor Wolf has set a moratorium on death sentences since 2015; Pennsylvania has executed only three (3) people (all voluntarily) since 1976 and none since 1999. Most telling, Pennsylvania has no legal means of actually executing a prisoner if they wanted to. There are numerous identified unconscionable defects in the death penalty in

Pennsylvania's practices and procedures of capital punishment. The legislature is never going to act in fixing the problems. The combination of all these factors makes one believe that the death penalty has exceeded Pennsylvanians' standard of decency and a return to the death penalty is not in the foreseeable future. Frankly, no one is going to get involuntarily executed in Pennsylvania.

The verdict slips of death show that the jury found one aggravating factor to be "the 4 felony convictions that have been placed into the record by stipulation" (docket entry 23). The verdict slips do not reflect an aggravating factor that was statutorily approved. The question for the jury was whether Appellant had a **significant** history of felony convictions involving the use or threat of violence. 42 Pa.C.S. § 9711(d)(9). There was no unanimous decision as to whether Appellant had a significant history. This Honorable Court has repeatedly said that it declined to speculate as to the jury's intent and has refused to mold the death sentence verdict into that speculated intention. The verdict slips should be read to have found a non-statutory aggravating factor. The death sentence violates the United States Constitution, the Pennsylvania Constitution and Pennsylvania law.

Alternatively, trial counsel gave ineffective assistance for failing to object to the prosecutor's comments, trial court's instructions and the jury's verdict slips when counsel failed to argue that the jury was led to believe that the suffering

of Chetia Hurtt (not a homicide victim) was the aggravating factor in this case. Counsel failed to argue that the non-statutory aggravating factor could not be used as an aggravating factor. Counsel had no reasonable basis to object and there is a reasonable probability that the results would have been different.

Alternatively, appellate counsel gave ineffective assistance for failing to argue to this Honorable Court that the verdict slip did not say, and the jury did not find, that there was a **significant** history of felony convictions. Counsel had no reasonable strategy to fail to properly point this out and make a plausible argument that the sentence was not cabined in the law. Appellant was prejudiced.

The prosecutor asked the jury to sentence Appellant to death on behalf of Chetia Hurtt, who was not one of the victims in this case not based upon the law. The prosecutor's argument was totally improper. Counsel had no reasonable basis for failing to object and Appellant was prejudiced.

The Commonwealth's expert in the penalty phase improperly told the jury that Appellant was deceitful and that he could not believe anything Appellant said. Counsel had no reasonable basis to object to the testimony. Appellant was prejudiced by this statement.

The Commonwealth's expert in the penalty phase improperly testified that Appellant had been charged with a crime when he was a juvenile. Counsel had no reasonable basis for failing to object. Appellant was prejudiced.

ARGUMENT

I. THE DEATH PENALTY IS VIOLATIVE OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, § 13 OF THE PENNSYLVANIA CONSTITUTION.

This Honorable Court should now rule that the death penalty in Pennsylvania violates the Eighth Amendment of the United States Constitution. Moreover, this Honorable Court can rule that Article I, Section 13 of the Pennsylvania Constitution prohibits the death penalty in Pennsylvania. Appellant requests that this Honorable Court review this issue as it applies to today's standards.

This Honorable Supreme Court has said that an illegal sentence can never be waived. *Commonwealth v. DiMatteo,* 177 A.3d 182 (Pa. 2017). In *Commonwealth v. Batts*, 163 A.3d 410, 434-435 (Pa. 2017), this Honorable Court said the following:

> A challenge to the legality of a particular sentence may be reviewed by any court on direct appeal; it need not be preserved in the lower courts to be reviewable and may even be raised by an appellate court sua sponte. *Commonwealth v. Barnes*, 151 A.3d 121, 124 (Pa. 2016); *see also* [*Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718, 731 (2016)] (stating that because "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void[, i]t follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule") (citing *Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1880)).

> As we have previously explained, our decisions pertaining to questions of sentencing illegality "have not always been smooth," with "complexities" arising "from disagreement among the members of the Court concerning whether a particular claim implicates the legality of a sentence." *Commonwealth v. Spruill*, 622 Pa. 299, 80 A.3d 453, 460-61 (Pa. 2013). There is no dispute, however, that a claim challenging a sentencing court's legal authority to impose a particular sentence presents a question of sentencing legality. *See, e.g., Commonwealth v. Vasquez*, 560 Pa. 381, 744 A.2d 1280, 1282 (Pa. 2000) (question of "whether the trial court had the authority to impose a statutorily mandated fine" is a challenge to sentencing legality); *Commonwealth v. Shiffler*, 583 Pa. 478, 879 A.2d 185, 189 (Pa. 2005) (claim regarding the court's authority to impose a particular sentence implicates the legality of the sentence); *In re M.W.*, 555 Pa. 505, 725 A.2d 729, 731 (Pa. 1999) (same).

Id. See Commonwealth v. Yasipour, 957 A.2d 734, 740, n. 3 (Pa. Super. 2008) ("an appellant who challenges the constitutionality of his sentence of imprisonment on a claim that it violated his right to be free from cruel and unusual punishment raises a legality of sentencing claim since he is challenging the trial court's authority in imposing the sentence.")

In reviewing whether a provision of the Pennsylvania Constitution gives greater protection than the United States Constitution, this Honorable Court said the following:

> We find it important to set forth certain factors to be briefed and analyzed by litigants in each case hereafter implicating a provision of the Pennsylvania constitution. The decision of the United States Supreme Court in *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77

> L.Ed.2d 1201 (1983), now requires us to make a "plain statement" of the adequate and independent state grounds upon which we rely, in order to avoid any doubt that we have rested our decision squarely upon Pennsylvania jurisprudence. Accordingly, as a general rule it is important that litigants brief and analyze at least the following four factors:
>
> 1) text of the Pennsylvania constitutional provision;
>
> 2) history of the provision, including Pennsylvania case-law;
>
> 3) related case-law from other states;
>
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (footnotes omitted).

Presently, the United States Supreme Court has ruled that the death penalty is constitutional pursuant to the Eighth Amendment, and this Honorable Court has ruled that the death penalty is constitutional pursuant to Article I, Section 13. *Commonwealth v. Crews,* 717 A.2d 487, 489 (Pa. 1998) citing *Gregg v. Georgia,* 428 U.S. 153 (1978) and *Commonwealth v. Zettlemoyer,* 454 A.2d 937, 969 (Pa. 1982). Moreover, this Honorable Court has ruled that Article I, Section 13 is coextensive to the Eighth Amendment and gives no greater protection. *Commonwealth v. Zettlemoyer,* 454 A.2d at 967. *See Batts* 163 A.3d at 299 (the Pennsylvania Constitution does not require a broader approach to proportionality vis-à-vis juveniles than is reflected in prevailing United States Supreme Court

jurisprudence). *See Commonwealth v. Means,* 773 A.2d 143, 150-159 (Pa. 1997) (*Edmunds* analysis applied in ruling that victim impact testimony in capital case was constitutional under Article I § 13). *See also Commonwealth v. Cunningham,* 81 A.3d 1, 18 (Pa. 2013) (this Honorable Court addressing both a federal claim and Pennsylvania constitutional claim as to whether the decision in *Miller v. Alabama* should apply retroactively with Chief Justice Saylor's Opinion leaving open the ability for Pennsylvania constitutional law to apply *Miller* retroactively, while it was believed that federal law did not).

The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.* The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The Eighth Amendment is made applicable to the states by the Fourteenth Amendment. *Estelle v. Gamble,* 429 U.S. 97, 101 (1976).

Article I, Section 13 states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." *Id.* Article I, Section 9 of the Pennsylvania Constitution reads, in significant part, as follows:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, ... nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

Id. *See* 42 Pa.C.S. § 9711(h)(3)(i) ("The Supreme Court shall affirm the sentence of death unless it determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor").

The Supreme Court of the United States has explained the underlying concept of the Eighth Amendment stating, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Therefore, the standard that was determined and continues to guide Eighth Amendment jurisprudence is the "evolving standards of decency that mark the progress of a maturing society." *Id.*

The evolution of the Eighth Amendment jurisprudence has gradually been moving away from imposing the death penalty on individuals. It is best illustrated regarding juveniles and mentally challenged individuals. Starting with *Thompson v. Oklahoma,* 487 U.S. 815 (1988) (*plurality*), a plurality of the United States Supreme Court ruled that it was contrary to the Eighth Amendment to execute a defendant who was convicted of first-degree murder which occurred when he was fifteen (15) years of age. The Supreme Court of the United States

reasoned that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community." *Id.,* 487 U.S. at 830.

Eventually, this ruling was extended to juveniles under 18 years old in *Roper v. Simmons,* 543 U.S. 551 (2005). This ruling was based on several factors: national consensus against the death penalty, international opinion against the juvenile death penalty, and the characteristics juveniles and mental abilities. *Id.*

In *Graham v. Florida,* 560 U.S. 48 (2010), the United States Supreme Court prohibited the sentence of life without the possibility of parole for juveniles when "the defendant does not kill, intend to kill, or foresee that life will be taken." *Id.,* at page 14 citing *Enmund v. Florida,* 458 U.S. 782 (1982), *Tison v. Arizona,* 481 U.S. 137 (1987) *Coker v. Georgia,* 433 U.S. 584 (1977). Again, the Court reviewed a national community consensus and the international community to determine the standard of decency.

This decision was expounded in *Miller v. Alabama*, 567 U.S. 460 (2012), where the Court ruled that it was unconstitutional to give a mandatory sentence of life without the possibility of parole to any juvenile under the age of eighteen (18). The Court reasoned that children: 1) lack maturity and have an

underdeveloped sense of responsibility, 2) are more vulnerable to negative influences and outside pressures, and 3) do not have well-formed character and their traits are less fixed than adults. *Id.* The Court again reviewed the consensus of all the states.

In *Atkins v. Virginia,* 536 U.S. 304 (2002), the United States Supreme Court reversed *Penry v. Lynaugh,* 492 U.S. 302 (1989), and ruled that it was cruel and unusual punishment to execute mentally [challenged] persons. The Supreme Court left up to the states the definition of mentally challenged. *See also Commonwealth v. Sanchez,* 36 A.3d 24 (Pa. 2011) (incorporating *Atkins* into Pennsylvania law and creating a procedure for determining death-ineligibility after the legislature failed to act).

Understanding this evolution, the factors underlying what constitutes the "standards of decency" was explained in *Thompson.* "In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases." *Thompson,* 487 U.S. at 822. This includes what the international community has determined regarding capital punishment. *Id.* 487 U.S. at 830 n. 31 citing *Troup,* 356 U.S. at 102 and n. 35.

The current "standards of decency" do not support the continued use of the death penalty. A large amount of states has banned the imposition of the

death penalty in some form or another. Almost all civilized countries have banned the death penalty. Pennsylvania and federal case law have consistently shifted away from the imposition of capital punishment. Although this issue has been previously addressed in other years, it is clear that the death penalty is now unconstitutional when applying the law contemporaneously.

In *Commonwealth v. Zettlemoyer, supra,* this Honorable Court reviewed the history of Pennsylvania's law concerning the death penalty. This Court said, "[since 1794 until 1982] this Commonwealth has always operated under some legislative enactment setting the penalty for at least some first degree murders at death, except for brief periods caused by decisions of this Court." *Id.,* 464 A.2d at 968 (cases omitted).

Presently, there are only twenty-five (25) states that continue to permit the death penalty as a punishment. *Contrast Commonwealth v. Zettlemoyer,* 464 A.2d at 968 ("Moreover, the legislatures of 34 other states were quick to act in response to [*Furman v. Georgia,* 438 U.S. 238 (1972)] and have also concluded that capital punishment is appropriate for at least some crimes that result in the death of another person.") Of these states, only eleven (11) have actually carried out an execution within the past five (5) years. There are twenty-two (22) states that have abolished the death penalty, and three (3) states that have imposed a moratorium.

On March 23, 2020, the Governor of Colorado signed into law Colorado SB20-100, which repeals the death penalty as to all offenses committed on or after July 1, 2020. Colo. Rev. Stat. §16-11-901 (part 9) (2020). Furthermore, every northeastern state except Pennsylvania has abolished the death penalty. Except for Ohio, every state that borders Pennsylvania has stopped the use of the death penalty. Meanwhile, our last execution occurred over twenty (20) years ago in 1999. Moreover, Pennsylvania has, in effect, halted the death penalty, along with California and Oregon, by imposing a moratorium on the death penalty since 2015. In sum, one-half of the country has ended the death penalty along with Pennsylvania. California and Oregon being included.

The following is the list of the states that do not have the death penalty:

1. **Alaska**- repealed by Territorial Legislation in 1957 Ch. 132, SLA 1957.

2. **Connecticut**- *State v. Santiago*, 122 A.3d 1 (Ct. 2015) (death penalty unconstitutional under state constitution).

3. **Colorado**- Colo. Rev. Stat. §16-11-901 (part 9) (2020) (SB 20-100) (abolishing penalty of death for any crime on or after July 1, 2020).

4. **Delaware**- *Rauf v. State*, 145 A.3d 430 (De. 2016) citing *Hurst v. Florida,* ___ U.S. ___, 136 S.Ct. 616 (2016) (ruling that the State's death penalty statute, Del. Code. Ann. tit. 11 § 4209, was unconstitutional pursuant to the Sixth Amendment because the role of the judge

was significant in determining the aggravating factors and what sentence should be imposed).

5. **Hawaii**- never had death penalty after receiving statehood. *See* HRS § 756-656 (life sentence without possibility of parole for first-degree murder).

6. **Illinois**- 725 ILCS 5/119-1 (effective July 1, 2011) ("Death Penalty Abolished").

7. **Iowa**- Iowa Code § 690.5 (death penalty was repealed in 1965). *See* Iowa Code § 707.2(2) (first-degree murder is class "A" felony) Iowa Code § 902.1 (sentence is life imprisonment for class "A" Felony).

8. **Maine**- Public Laws, 1887, Chapter 133, Section 2 (abolished death penalty). *See* 17-A M.R.S. § 1251 (sentence for first-degree murder is a term of years not less than 25 years).

9. **Maryland**- 2013 Md. Laws, ch. 156 § 3. (changing death sentence to life without the possibility of parole). *See* Md.Crim.Law.Code § 2-304(a) (life imprisonment or life without the possibility of parole is penalty for first-degree murder).

10. **Massachusetts**- *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Ma. 1984) (death penalty statute found to be in violation of state constitution violating the defendant's rights to a jury trial and self-incrimination because it was not imposed if a defendant pleaded guilty). *See* ALM GL ch. 265, § 2(a) (penalty for first-degree murder committed by adult is life without the possibility of parole).

11. **Michigan**- Mich. Cons Art. IV § 46 ("No law shall be enacted providing for the penalty of death"). *See* Mich. Comp. Laws § 750.316 (life without the possibility of parole is punishment for first-degree murder).

12. **Minnesota-** Act of April 22, 1911, ch. 387, § 1, 1911 Minn. Laws 572, 572 (repealing death penalty as punishment). *See State v. Cox,* 884 N.W.2d 400, 418 n.3 (2016) (explaining history of first-degree murder in Minnesota).

13. **New Hampshire-** 2019, 42:1, effective May 30, 2019 (2019 NH H.B. 455) amending RSA 630-1 (capital murder penalty is life without the possibility of parole and death sentence is no longer an option).

14. **New Jersey-** L. 2007, c. 2004 effective December 17, 2007 (NJ S.B. 171 (2006)) (death penalty eliminated and replaced by life without the possibility of parole). NJ Stat. §2C:11-3.

15. **New Mexico-** Laws 2009, ch. 11, § 5 effective July 1, 2009. (2009 HB 285) (repealing N.M. Stat. Ann. § 31-20A-4, death penalty provisions, and replacing with N.M. Stat. Ann. § 31-18-14 making the penalties of capital felonies either life or life without the possibility of parole).

16. **New York-** *People v. LaValle*, 817 N.E.2d 341 (NY. 2004) (finding that NY CLS CPL § 400.27(10) was unconstitutional when the statute required the jury to be instructed that if they did not unanimously find that the defendant should receive life without parole or death, the judge would sentence the defendant to a minimum term of 20 to 25 years and a maximum term of life). New York has not amended NY CLS CPL § 400.27(10) or NY CLS Penal § 60.06 since *LaValle* decision; thus, New York has no valid death penalty.

17. **North Dakota-** N.D. Cent. Code, Title 12, Pt. VIII, Ch. 12-50 Note (death penalty repealed by S.L. 1973, ch. 116, 41 repealed section).

18. **Rhode Island-** *State v. Cline*, 397 A.2d 1309 (Ri. 1979) (citing cases) (mandatory death penalty without

considering mitigating factors violated Eighth Amendment). *See* P.L. 1984, ch. 221 § 1 (repealing death penalty). *See also* R.I. Gen. Laws Section 11-23-2 (present law requires life sentence for murder).

19. **Vermont**- 1981, No. 223 (Adj. Sess.) § (b) (amended 13 V.S.A. § 2303 to substitute language of death penalty with life).

20. **Washington**- *State v. Gregory*, 427 P.3d 621 (Wa. 2018) (death penalty unconstitutional under state constitution).

21. **West Virginia**- W. Va. Code § 61-11-2 (1984) ("Capital Punishment Abolished")

22. **Wisconsin**- 1853 Wis. Laws, ch. 103, ("An act to provide for the punishment of murder in the first degree, and to abolish the penalty of death.") Wis. Stat. §939.50(3) (sentence of life for Class A felony); Wis. Stat. §940.01(1) (first-degree murder is Class A felony).

In a comprehensive decision, the Connecticut Supreme Court ruled the Connecticut death penalty was unconstitutional pursuant to due process provisions of the Connecticut Constitution because it was cruel and unusual punishment. *State v. Santiago*, *supra*. The court said that the reasons for the departure from the imposition of the death penalty include that the penalty fails to comport with contemporary standards of decency and the death penalty is devoid of any penological justifications, *Id,* at 12, 31-55, 55-73. The court explained as follows:

> Accompanying this dramatic departure are a host of other important developments that have transpired

> over the past several years. Social scientists repeatedly have confirmed that the risk of capital punishment falls disproportionately on people of color and other disadvantaged groups. Meanwhile, nationally, the number of executions and the number of states that allow the death penalty continue to decline, and convicted capital felons in this state remain on death row for decades with every likelihood that they will not be executed for many years to come, if ever. Finally, it has become apparent that the dual federal constitutional requirements applicable to all capital sentencing schemes—namely, that the jury be provided with objective standards to guide its sentence, on the one hand, and that it be accorded unfettered discretion to impose a sentence of less than death, on the other—are fundamentally in conflict and inevitably open the door to impermissible racial and ethnic biases.

State v. Santiago, 122 A.3d at 13.

In Washington, their Supreme Court struck down the death penalty statute because it violated Article I, § 14 of the Washington Constitution that prohibited cruel and unusual punishment. *State v. Gregory*, *supra*. The court ruled that the prior case law that upheld the death penalty did not foreclose their ruling because Article I, § 14, like the Eighth Amendment, is not static. *Id.*, 427 P.3d at 632-633. The court said that the death penalty was imposed in an arbitrary and racially biased manner. *Id.*, 427 P.3d at 633-636. Moreover, the court ruled that the death penalty served no legitimate penological goals. *Id.*, 427 P.3d at 636-637. The court concluded that a proportionality review could not cure the defects of the imposition of the death penalty. *Id.*, 472 P.3d at 637.

These decisions from the Connecticut and Washington Supreme Courts are consistent with the issues underlying the Pennsylvania capital punishment system, as illustrated below.

Moreover, the Supreme Court of the United States has sought guidance by other countries in how they address capital punishment. The Supreme Court stated this generally and outlined several cases that used the international countries' positions to guide decisions in major cases. *See Roper v. Simmons*, 543 U.S. at 575-576 (gathering cases).

Currently, the majority of the nations across the world have abolished the death penalty, and almost every "First-World" country has abolished the death penalty. Roughly, 70% of the world, or as of 2018, 160 Member States of the United Nations have abolished or stopped using the death penalty. See "Death Penalty." United Nations Human Rights: Office of the High Commissioner. https://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx. Also, this growing trend was addressed by the High Commissioner of the United Nations stating, "[t]he death penalty has no place in the 21st century." *Id.* Some of the major countries that have abolished the death penalty for all crimes include France, Portugal, Italy, Belgium, Australia, Netherlands, United Kingdom, Mexico, Spain, and Germany. *Id.*

In Pennsylvania, the imposition of the death penalty has all but been

formally abolished. Governor Tom Wolf imposed a moratorium on the death penalty on February 13, 2015. Executive Order, Governor Tom Wolfe, (February 13, 2015) (https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration). The moratorium was as Governor Wolf explained, "in no way an expression of sympathy for the guilty on death row," *Id.* Rather, it is a chance to reexamine and fix "a flawed system that has been proven to be an endless cycle of court proceedings as well as ineffective, unjust, and expensive." *Id.*

This notion seems to suggest that returning to the death penalty is not likely in our foreseeable future. This notion was alluded to in *Commonwealth v. Williams*, where the issue was argued about how long the Governor can grant reprieve from an execution. The Court concluded:

> We conclude that at the time the reprieve power was adopted in the 1790 Constitution, the Governor's authority to issue a reprieve was not understood as being limited to granting reprieves with a specific end date or for a purpose relating only to the prisoner's unique circumstances, but rather encompassed any temporary postponement of sentence.

129 A.3d 1199, 1217 (Pa. 2015). There is no indication that Governor Wolf's reprieve is nearing an end as the moratorium has been in effect for the past five (5) years. As explained and addressed below, a joint commission report was issued. Governor Wolf said he will not stop the moratorium until the report was issued and "any recommendations contained therein are satisfactorily addressed." *Williams*, 129 A.3d at 1202.

Under Pennsylvania law, "[t]he death penalty shall be inflicted by injecting the convict with a continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with chemical paralytic agents approved by the department until death is pronounced by the coroner." 61 Pa.C.S. § 4304(a). The Department of Corrections has never promulgated a rule pursuant to the Commonwealth Documents Law, 42 P.S. §§1102-1602, 45 Pa.C.S. §§ 501-907, the Regulatory Review Act, 71 P.S. §§ 745.1-745.1-745.14, and/or the Commonwealth Attorneys Act, 71 P.S. §§ 732-101-732-506. As such, there are no valid rules to enforce § 4304(a). *Northwestern Youth Servs. v. Commonwealth Dep't of Pub. Welfare,* 66 A.3d 301, 310 (Pa. 2013). In *Northwestern Youth Servs.,* this Honorable Court said the following:

> Commonwealth agencies have no inherent power to make law or otherwise bind the public or regulated entities. Rather, an administrative agency may do so only in the fashion authorized by the General Assembly, which is, as a general rule, by way of recourse to procedures prescribed in the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys [citation omitted]. When an agency acts under the general rule and promulgates published regulations through the formal notice, comment, and review procedures prescribed in those enactments, its resulting pronouncements are accorded the force of law and are thus denominated "legislative rules."

Id.

In any event, Secretary John Wetzel, of the Department of

Corrections, has said that Pennsylvania does not have the drugs to perform a lethal injection pursuant to the statute and could not carry out an execution because the drugs approved are not available. Alexanderson, Christian. "Pennsylvania does not have the drugs to carry out executions; Corrections Secretary says." Penn Live. 5 Jan. 2019. https://www.pennlive.com/midstate/2015/06/pennsylvania_does_not_have_the.html. The reality, as everyone knows, is that there are no realistic chances of a person being involuntarily executed in Pennsylvania.

In 2011, Senate Resolution No. 6 directed the Joint State Government Commission ("JSGC") to establish a bipartisan task force and advisory committee to conduct a study of capital punishment in Pennsylvania and to report their findings and recommendations. Report at 217-22. The resolution explained that such a study and report were appropriate in light of a variety of problems afflicting Pennsylvania's capital punishment system. *Id.* at 217-18. The JSGC issued a Report (hereinafter "Report") on June 26, 2018 which identified unconscionable defects in Pennsylvania's practices and procedures of capital punishment.

The defects identified in the Report include that the Pennsylvania modern death penalty system has exonerated as innocent, after many years under sentence of death, twice as many death row prisoners as it has executed; that death sentences are primarily attributable, not to the defendant's unique culpability, but

to bad lawyering, geographical happenstance, racial disparities, and prosecutorial caprice; and that overall, "'the current state of Pennsylvania's capital jurisprudence is impaired.'" Report at 3 (quoting Thomas G. Saylor, *Death-Penalty Stewardship & the Current State of Pa. Capital Jurisprudence,* 23 Widener L.J. 1 (2013)). The Report concludes that, at minimum, substantial judicial, legislative, and executive branch reforms are required before Pennsylvania's capital punishment system could address those impairments. But such reforms, even if they are one day adopted, will be largely prospective and will have little if any ameliorative impact on the death sentence of Appellant.

The commission collected and analyzed data from the Administrative Office of Pennsylvania Courts, local county files including District Attorney's files, the Pennsylvania Commission on Sentencing, the Pennsylvania State University, the Pennsylvania Department of Health, and the Department of Corrections (hereinafter "DOC"), including the DOC's Bureau of Planning, Research and Statistics. *Id.* at 7 9, 19, 25, 28, 33, 56, 76, 82-83, 120, 124-125, 187, 190, 197, 243. The commission also studied pre-existing research and reporting.

The Report recounted that Pennsylvania has executed only three prisoners since 1976, and all three executions occurred during the 1990s with the agreement of the condemned prisoners. Report, 1-2. Since 1985, Pennsylvania

has issued 466 execution warrants. *Id.* at 2. Since 1978, at least 35 condemned inmates have died of natural causes on death row. *Id.* None have been involuntarily executed. *Id.*

The Report determined that capital punishment is significantly more expensive than life imprisonment. *Id.* at 3, 24, 35. It costs the DOC $15,010 (47 percent) more per year to house death-sentenced prisoners than life-sentenced prisoners in general population. *Id.* at 56. Prosecuting a case capitally adds about $2,000,000 in expense over the pendency of the case. *Id.* at 58.

To this point, Appellant's case is a prime example of needless expenditures and resources. Appellant was charged with the homicides ("homicide case") as well as a case concerning numerous sexual assault charges ("sex case"). Although the prosecutors that were handling the sex case wanted the homicide case to go first to resolve the sex case amicably after the homicide cases had concluded to spare the young victim from testifying, Mr. Tranquilli (the homicide prosecutor) chose to proceed with the sex case first in order to obtain the aggravating factor of a history of significant violent felony convictions (HT, 9/20/2001, at 7-8). This is the third time that Appellant has been before this Honorable Court and all of the issues raised today concern the penalty phase. At age 68 (date of birth June 17, 1951, *see* docket sheet), Appellant will continue to plod on to fight his sentence through the state and federal courts to end up dying of natural causes.

The Report revealed that, according to DOC records, 14 percent of currently condemned prisoners have an IQ of 75 or below and thus "could be constitutionally ineligible" for the death penalty, despite their sentences. *Id.* at 8; *see Atkins v. Virginia*, *supra*. This rate of low-IQ is "approximately triple" the rate in death row inmates than among the general population. Report at 8. Meanwhile, 4.1 percent of death row inmates, according to DOC, have an IQ of 70 or below. *Id.* Considering this data, the report recommended, *inter alia*, amending the Pennsylvania Rules of Criminal Procedure to require pretrial judicial determination of intellectual disability. *Id.* at 30.

The Report stated that, as of 2018, DOC "classified approximately one quarter of the inmates on death row with an active mental disorder" currently requiring psychiatric treatment and/or monitoring. *Id.* at 9. An additional 30 percent of death row inmates had a "recent (albeit not current) need for mental health treatment." *Id.* The former "active mental disorder" rate is roughly quintuple the rate in the general population, and the overall rate of current or recent mental health illness is roughly triple the rate in the general population. *See id.* This is yet another example of the arbitrary application of Pennsylvania's death penalty

The only three prisoners to be executed in the last half-century all "had psychiatric problems." *Id.* at 1-2 & n.8. To address these issues, the Report recommended "extending a version of guilty but mentally ill as a bar to imposition

of the death penalty," that would "allow a severely mentally ill murderer to be punished in the same way that an intellectually disabled murderer is." *Id.* at 9, 26, 31, 143. The Report recommended exempting from the death penalty any defendants with severe mental illness and/or who are incompetent to assist in their own defense. *Id.* at 132, 143. Regardless of any reforms going forward, these statistics demonstrate that Pennsylvania's death penalty has been disproportionately applied against people with low and impaired intellectual functioning since 1978.

The Report embraced the view that deterrence "studies should not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide." *Id.* at 16. "[T]here is no definitive proof whether capital punishment deters murder," the Report concluded. *Id.* at 168.

The Report indicated that, nationwide since 1973, 162 condemned prisoners have been exonerated as innocent; on average, these prisoners spent 11.3 years under a sentence of death until exoneration. *Id.* In Pennsylvania, 6 condemned prisoners have been exonerated as innocent, having spent an average of more than 9 years under sentence of death until exoneration. *Id.* at 16. "**The only certain way to eliminate the risk of condemning and executing a factually innocent person would be to eliminate the sentence and not execute any convict.**" *Id.* at 17, 28 (emphasis added). The Report approximated that there are

currently 7 innocent persons on Pennsylvania's death row. *Id.* at 173. While concluding that "[i]t is not possible to put adequate procedural protections in place to prevent the execution of an innocent person," *id.* at 171, the Report recommended changing Pennsylvania's executive clemency procedures to provide a more adequate safety net. *Id.* at 15, 27, 159-60.

The Report stated that, "[b]ecause the severely punitive alternative of life imprisonment without parole is available, the subcommittee on policy concludes that the death penalty is unnecessary, given the many objections to its use, the number of innocent persons wrongfully convicted and sentenced to death, and the effectiveness of the alternative." *Id.* at 17.

In Pennsylvania, the principal determinant of whether a defendant will be sentenced to death is typically not his blameworthiness but the county in which he commits his crime. The Report found a complete absence of uniform application of the death penalty based on the county where the crime occurred and recommended that statutory proportionality review should be adopted to address these disparities prospectively. Report at 4-5, 30. Some counties seek and obtain the death penalty frequently, while other counties never seek it. Indeed, Pennsylvania has the highest intrastate disparity of any state in the country. *Id.* at 67. In the two largest counties, Philadelphia and Allegheny, the disparity is particularly stark, as Philadelphia prosecutors have historically sought the death

penalty aggressively, while Allegheny County prosecutors have sharply limited its use. *Id.* at 67, 89. The study shows that there is no uniform standard in the application of the death penalty, and that whether the death penalty is sought and imposed is largely related to the location of the murder. "The largest and most proximate differences were among counties in death penalty outcomes." *Id.* at 24-25. "In a very real sense, a given defendant's chance of having the death penalty sought, retracted or imposed, depends upon where the defendant is prosecuted and tried." *Id.* at 90. Such geographical bias fails to serve any legitimate penological purpose and establishes an arbitrary basis for the imposition of death sentences for those persons currently on Pennsylvania's death row.

While the death penalty nationwide is characterized by geographical disparity among the states, as of 2010, Pennsylvania had the highest intrastate disparity between population and death penalty cases of any state nationally. *Id.* at 67. For instance, in a review based on the Commonwealth's 2015 inmate population, 33 out of Pennsylvania's 67 counties—about half—had not sentenced any defendants to death. *Id.* at 261. At the same time, nearly half of the inmates on death row came from a single county: Philadelphia. *Id.* at 67. And while Philadelphia County alone accounted for many of the inmates on death row, only eleven death row inmates were from Allegheny County. *Id.* The same review of the 2015 inmate population found a 1:2 ratio of death sentences to life sentences in

Columbia County, while neighboring Sullivan, Lycoming, and Montour Counties had no death sentences at all despite having 19 life sentences. *Id.* at 261. This geographical disparity is precisely the kind of "wanton[]" and "freakish[]" imposition of the death penalty that amounts to cruel and unusual punishment. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

The Report determined that "the likelihood of having the death penalty given does vary by race of victim." *Id.* at 5. The Report also found that black citizens are disproportionally charged with and convicted of first-degree murder compared to white citizens. *Id.* at 87. Although a lack of resources prevented the Report from definitively answering the question about racial bias and the death penalty, *id.* at 59, the Report endorsed an earlier report provided by the Pennsylvania Supreme Court Committee on Race and Gender Bias, which concluded that Pennsylvania's capital punishment system does "not operate in an evenhanded manner" and there is evidence of pervasive discrimination, particularly against African Americans. *Id.* at 65.

Therefore, the race of the victim is a determinative factor in whether a defendant in Pennsylvania will be sentenced to death. The Report concluded that when controlling for other legally relevant variables, defendants were less likely to receive the death penalty when the victim was black than when the victim was white. Report at 90.

Relatedly, the Report found that "the death qualification process systematically eliminates jurors who belong to certain social and demographic groups and can also change the way in which case facts are interpreted and discussed by a jury." *Id.* at 11 (quotations omitted). Death qualification skews jury composition "in ways that consistently disadvantage capital defendants." *Id.* at 26. The Report therefore recommended "enactment of a Racial Justice Act to statutorily allow death sentences to be challenged on a statistical basis," i.e., without necessarily establishing purposeful, conscious discrimination. *Id.* at 12, 31.

Pennsylvania prosecutors have broad discretion when it comes to the death penalty. They decide who should be arrested, what crimes to charge, whether to seek the death penalty, what aggravators to charge, what plea bargains to offer, and what pleas may be acceptable. There are no standards to guide any of this vast discretion. This discretion contributes to the arbitrary use of the death penalty among Pennsylvania counties. *Id.* at 74.

The Report suggests the creation of a committee to approve capital prosecutions, such as the Capital Case Committee, which the United States Attorney General's Office uses to review and approve capital prosecutions. *Id.* at 73-74. No such statewide committee currently exists or is required in Pennsylvania. The existence of such broad, unbridled prosecutorial discretion in the death penalty process has created an unreasonable risk of arbitrariness.

"There is no process for determining whether the crimes for which the defendants receive the death penalty differ from the crimes for which the defendants receive life imprisonment (without parole)." *Id.* at 25. The absence of any such process, which the Report recommended correcting, *see id.* at 66, leaves the Pennsylvania death penalty scheme without any safeguard or mechanism to protect against the arbitrary imposition of the death penalty.

Between 1973 and 2013, 188 death sentences were overturned in Pennsylvania in appellate or post-conviction proceedings. Report, at 173. Between 1978 and 2018, 150 persons sentenced to death in Pennsylvania had their convictions or sentences overturned based on ineffective lawyering. *Id.* at 17. In 93 of those 150 cases, state (68) or federal (25) courts concluded that defense counsel was ineffective for failing to investigate or present mitigation evidence at the capital sentencing phase, i.e., evidence justifying a life sentence was available but not presented to the jury. *See id.* Tellingly, 97 percent of defendants who have had their death sentences reversed have not had death re-imposed following the reversal. *Id.* In light of the fact that there have only been three executions during that same time period, the high appellate and post-conviction reversal rate and the low re-sentencing to death rate demonstrate that the imposition of a death sentence is an arbitrary event in Pennsylvania based not on culpability factors but on identifiable defects in the capital punishment system.

In light of these disturbing figures, the Report recommends "reinstating the practice of relaxed waiver on direct capital appeals as it was employed [by the Pennsylvania Supreme Court] in the 1980s and 1990s." *Id.*; *see also id.* at 13-14, 31, 154, 158. The Report further recommended judicial excusal of the notice of appeal requirement for capital appeals. *Id.* at 31,156, 158.

Pennsylvania lacks a standardized process for providing defense services to persons accused of capital crimes. The state provides no funding or resources, but leaves such issues to the counties. The Report concludes that the Commonwealth's lack of supervision, training, and support undermines those services, as borne out by the many appellate and post-conviction reversals based on the ineffectiveness of trial counsel. *Id.* at 183. Chief Justice Saylor has recognized that the quality of the defense representation provided to indigent capital defendants is a serious problem. *Id.* at 184-185. Although the Commonwealth requires minimum CLE and experience, there are no performance standards. While the ABA has published such guidelines, and they were endorsed by the Report, there is no statewide system to ensure that such guidelines can or will be met. *Id.* at 185-86. To address these deficiencies prospectively, the Report recommended the creation of a statewide defender office to provide representation to capital defendants at all stages of litigation. *Id.* at 31, 186. The lack of uniformity, supervision, or control among counties in the provision of defense services and

resources adds yet another element of arbitrariness to Pennsylvania's capital case process.

The type of representation a defendant receives also has an outsized impact on whether he or she is sentenced to death. For instance, "[w]hen privately-retained attorneys represented defendants, they 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. . . . 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 judicial districts" reviewed by researchers. *Id.* at 89 (internal quotation marks omitted). Moreover, 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. *Id.* Again, the role that these factors—untethered to the defendant's actual culpability—play in capital sentencing in Pennsylvania results in there being "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many." *Id.*

These problems are exacerbated in Pennsylvania because the statutory aggravating and mitigating circumstances fail to sufficiently channel decision makers' discretion. The Report recognizes that the number (18) and breadth of aggravating circumstances in Pennsylvania contributes to the risk of unfair and

arbitrary application by failing to adequately narrow the class of persons subject to the death penalty and include aggravators that can have a disproportionate effect against racial and ethnic minorities. *Id.* at 98. The Report ultimately found that twelve of Pennsylvania's eighteen statutory aggravating factors—under which hundreds of defendants have been sentenced to death—are overbroad and that six of these should be repealed altogether. *Id.* at 101-04. These overbroad aggravating factors have failed to channel the sentencer's discretion in the manner required under Article I, Section 13. Most current death row prisoners were sentenced to death based on one or more of the aggravators that the Report recommended eliminating or narrowing. As a whole, Pennsylvania's statute fails to adequately narrow the class of defendants subject to the death penalty, and thus, has resulted in its arbitrary application and imposition.

In contrast to aggravation, Pennsylvania's mitigating circumstances are overly restrictive and thus increase the risk of arbitrarily selecting the defendants who receive the death penalty. The Report recommended amending the statute to remove qualifying language in § 9711(e) (2), (3), and (5). *Id.* at 105. The Report also recommended that residual doubt be added as a statutory mitigator. *Id.* at 106-07.

The Report raises concerns about the ability of jurors to understand the jury instructions provided to them at a capital sentencing trial. *Id.* at 149-51.

The Report calls for more study, and the inclusion of linguists, social scientists, and psychologists to study the instructions and look for ways to better ensure that the law will be properly understood by jurors. *Id.* at 151.

The Report demonstrates that Pennsylvania's capital punishment system is broken and in need of significant reform or repair to meet constitutional requirements of reliability, fairness, and proportionality. The decision upon whom the death penalty is imposed is largely arbitrary, more dependent on where the crime occurs and the race of the people involved than on the nature of the crime and the offender. Other factors, including broad prosecutorial discretion, problems with defense representation, the absence of state-wide supervision or standards for defense counsel, the large number of broadly interpreted aggravating circumstances, the large number of appellate and post-conviction reversals, the absence of proportionality data and review, the over-inclusion of people with intellectual disabilities and mental illness including some who should be exempt from the death penalty, the conviction and sentencing of those who are innocent, and other systemic indicators of arbitrariness and unreliability all contribute to the system's failure to constitutionally impose death sentences. Quoting from a law review article by Pennsylvania's Chief Justice, the Report notes, "[w]e can start with the obvious – the current state of Pennsylvania's capital punishment system is impaired." Report at 3. The Report identifies numerous impairments which, when

considered as a whole, demonstrate that capital punishment in Pennsylvania is imposed in an arbitrary and capricious manner. Regardless of whether the impairments can be remedied (and the Report makes numerous recommendations in an effort to do so), the fact remains that the system, as implemented in the 1970s through today, failed to meet the constitutional standards required by the Pennsylvania Constitution.

Furthermore, the evolution of the death penalty, in recent years, has shown a trend towards its abolition. Half of the states have halted or abolished the death penalty. Most strikingly, all bordering states of Pennsylvania except Ohio have abolished the death penalty. As well, the world follows suit. About 70% of the world has abolished the death penalty, and almost all civilized nations have abolished it. Finally, Pennsylvania's capital punishment jurisprudence along with the process for carrying out an execution, has all but been eliminated. Governor Wolf has set a moratorium on death sentences since 2015; Pennsylvania has executed only three (3) people since 1976 and none since 1999. Most telling, Pennsylvania cannot purchase the drugs to carry out a lethal injection. The combination of all these factors makes one believe that the death penalty has exceeded Pennsylvanians' standard of decency, and a return to the death penalty is not in the foreseeable future. Frankly, everyone knows, that to be executed in this state, a criminal defendant has to seek execution and only after years of legal

embattlement will an execution be likely. Like *Atkins,* the legislature will not fix any of the problems with the death penalty.

For all the reasons stated, this Honorable Court should declare that, as applied to Pennsylvania's current death row prisoners, Pennsylvania's death penalty is unconstitutional pursuant to the Eighth Amendment, the Fourteenth Amendment, Article I, Section 13 and Article I, Section 9.

II. THE SENTENCES OF DEATH ARE ILLEGAL AND UNCONSTITUTIONAL BECAUSE THE VERDICT SLIP SHOWS THAT THE JURY FOUND A NON-STATUTORY AGGRAVATING FACTOR TO SUPPORT THE DEATH PENALTY.

As previously argued in Argument I, this Honorable Court has said that an illegal sentence can never be waived (*Commonwealth v. DiMatteo,* supra) and recently discussed what qualifies as an illegal sentence in the decision of *Commonwealth v. Batts*, 163 A.3d at 434-435.

As explained, the Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.* The Fourteenth Amendment in part says, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* The Eighth Amendment is made applicable to the states by the Fourteenth Amendment. *Estelle v. Gamble*, 429 U.S. at 101. Article I, Section 13 states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." As explained, in Argument I, this Honorable Court has ruled that Article I, Section 13 is coextensive to the Eighth Amendment and gives no greater protection. *Commonwealth v. Zettlemoyer,* 454 A.2d at 967.

Article I, Section 9, among other things, says, "nor can [the accused] be deprived of his life, liberty or property, unless by the judgment of his peers or

the law of the land." *See* 42 Pa.C.S. § 9711(h)(3) (emphasis added) ("The Supreme Court shall affirm the sentence of death unless it determines that: (i) the sentence of death was the product of passion, prejudice or **any other arbitrary factor**; or (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).")

In this case, the sentences were illegal and unconstitutional. The Commonwealth was permitted to amend their notice to seek the death penalty to include the following aggravating factor: Appellant's significant history of felony convictions involving the use or threat of violence. 42 Pa.C.S. § 9711(d)(9). However, that is not the aggravating factor that was found by the jury as demonstrated by the verdict slip.

At the trial, Chetia Hurtt testified as to how she was assaulted on May 21, 2000 by Appellant in her apartment (TT 33-73). In his opening of the penalty phase, the prosecutor talked about the abuse concerning Chetia Hurtt (TT4 17-18). The prosecutor commented in the following manner:

> Ladies and gentlemen, we are going to call upon Chetia Hurtt once more to take the witness stand to tell you about events that happened before May 21st of 2001 when the defendant came to her apartment and attempted to rape her at gunpoint.
>
> You're going to hear Chetia Hurtt testify in this phase, the penalty phase, about the ongoing abuse she suffered at the hands of Kenneth Hairston, abuse that was

unknown to her mother, her grandmother, her aunts and uncles and to her brother.

You're going to hear this evidence from her own mouth and you're going to hear this, ladies and gentlemen, and when you do, things are going to fall into place about evidence you heard in the first part of the trial and maybe some questions you may have had or some suspicions that you may have had from the first part of the case.

We're going to lay this all out on the table for you, and **it's going to be for you to decide whether what Chetia Hurtt went through and suffered at the hands of the defendant is significant** and what weight it should be afforded.

(TT4 17-18) (emphasis added).

The Commonwealth presented the testimony of Chetia Hurtt in the penalty phase concerning the assaultive behavior by Appellant that occurred before May 21, 2000 (TT4 29-51). The Commonwealth also presented Exhibits 78 and 79 in the following manner:

Commonwealth Exhibit No. 78 is a certified record from the Allegheny County Clerk of Courts noting that in complaint no. 2000009862, on December 14, 2001, the jury returned verdicts of guilty at Count 1, rape; Count 2, involuntary deviate sexual intercourse, for charges stemming between May 30, 1995 through May 21, of 2000.

Also, that the same jury returned guilty verdicts at Count 5, involuntary deviate sexual intercourse, for offenses committed at various dates between 1993 through May 29, 1995.

. . . .

> Commonwealth Exhibit 78 is likewise the certified copy from the Allegheny County Clerk of Courts bearing a photocopy of Your Honor's signature and a seal of that office that reflects that complaint no. 200008984, on the same date, December 14, 2001, the same jury entered a verdict of guilty at Count 2, criminal attempt rape, arising from the incidents previously testified to on May 21st of the year 2000.

(TT4 52-53). The sole purpose of these exhibits was to demonstrate that Appellant had a significant history of felony convictions involving the use or threat of violence.

The prosecutor said the following in his closing argument at the penalty phase:

> Ladies and gentlemen, I submit to you if you find in this deliberation process that what that girl went through is insignificant, if you find that that is not an aggravating circumstance, then, ladies and gentlemen, I've got to go back to the drawing board and sign up for another course in law school because I misread 12 good citizens.
>
> I submit to you that there is none among you that could sit and listen to that testimony and not be convinced beyond a reasonable doubt that what that girl went through was a significant aggravating circumstance.

(TT4 197-198). The prosecutor's argument was not that Appellant had a significant history of felony convictions involving the use or threat of violence but

rather the suffering of Chetia Hurtt by the hands of Appellant was an aggravating factor.

Later, in his argument, the prosecutor continued in the following manner;

> I want you to think about the pain that Chetia Hurtt went through that is captured on this Exhibit 81. And I want you to think about the guilt that she's going to have to live with for the rest of her life because finally she had the courage to speak up and talk about the abuse that she had suffered for years.
>
> And I want you to think about what she must be going through in her head, how she must be thinking, "I wish I would have said anything. Maybe my mother and brother would still be alive.

(TT4 207).

The trial court instructed the jury as to how to judge if Appellant had a significant history of felony convictions and how to accept Chetia Hurtt's testimony at the penalty phase. The trial court said the following:

> In this case, under the sentencing code, only the following matters, if proven to your satisfaction beyond a reasonable doubt, can be aggravating circumstances. There are two.
>
> One, that the defendant has a significant history of felony convictions involving the use or threat of violence to the person. In deciding whether the defendant has a significant history, the factors you should consider include the number of previous convictions, the nature of the previous crimes and their similarity to or relationship with the murders in this case.

> The fact that all the previous convictions were based on a single incident or transaction or series of transactions or occur at a single trial does not by itself prevent them from being a significant history of convictions.
>
> The four convictions upon which this aggravating circumstance is found have been placed in the record by the stipulation of the parties. They are a criminal attempt to commit rape on May 21, 2000; at least one act constituting rape that occurred sometime between May 30, 1995 and May 21, 2000, at least one act of involuntary deviate sexual intercourse that occurred sometime between May 30, 1995 and May 21, 2000; and at least one act of involuntary deviate sexual intercourse that occurred sometime between 1993 and May 29, 1995.
>
> Chetia Hurtt, the victim of those crimes, has testified to other allegations, to other offenses allegedly committed by the defendant that have not resulted in separate felony convictions.
>
> I have permitted this testimony for one reason and one reason alone. If you should find beyond a reasonable doubt that the four felonies that I have just listed establish this aggravating circumstance, you may then consider Ms. Hurtt's testimony for the sole purpose of deciding how much weight you give to this particular aggravating circumstance.

(TT4 229-230).

The jury did not find that Appellant had a **significant history** of felony convictions. It did not find the aggravating factor that was listed in 42 Pa.C.S. § 9711(d)(9) of the Commonwealth's amended notice. Rather, the jury

followed the argument of the prosecutor and found a different non-statutory reason to impose the death penalty at both counts 1 and 2, namely:

> the 4 felony convictions that have been placed into the record by stipulation.

Verdict slips at count 1 and 2 (docket entry 23).

This Honorable Supreme Court has stressed the importance of ensuring unambiguous jury determinations when it comes to aggravating and mitigating circumstances in death penalty sentencing in a string of cases. This Honorable Court said the following:

> The capital sentencing process implicates two discrete determinations; the first is eligibility, in which the statutory scheme narrows the class of persons who may be subject to the death penalty; the second is selection, at which point the sentencer decides whether a person who is eligible for the death penalty should receive such punishment. Aggravating circumstances provide the means of narrowing the class for purposes of eligibility and, under the Pennsylvania statute, along with mitigating circumstances and victim impact evidence, serve as the bases for the selection decision.

Commonwealth v. Hughes, 865 A.2d 761, 798 n. 41 (Pa. 2004) (citation omitted). *See also Tullaepa v. California,* 512 U.S. 967, 972 (1994) (citations omitted) ("As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. . . . . Second, the aggravating circumstance may not be unconstitutionally vague.")

In *Commonwealth v. May,* 656 A.2d 1335, 1344-1345 (Pa. 1995), May was found guilty of first-degree murder by a jury, and May was ultimately sentenced to death. The jury found an aggravating factor that May committed the killing during the perpetration of a felony, namely rape. On direct appeal, this Honorable Court ruled that May was never charged with rape and the victim was not raped, but there was an argument that May might have attempted to rape the victim. This Honorable Court explained as follows:

> We decline to speculate as to what the jury may have intended and refuse to attempt to "mold" the death sentence verdict to that intention, whatever it may be, since there is no evidence on the record as to the jury's intention other than it "found" that Appellant had committed the crime of rape. *Cf.* [*Commonwealth v. DeHart,* 650 A.2d 38 (Pa. 1994)] (where pre-printed verdict slip contained error, death sentence vacated notwithstanding proper instructions to jury). In this regard, we find the Commonwealth's argument that since the jury found that Appellant raped Kathy Fair, it necessarily found that Appellant **attempted** to rape her, to be specious. This type of "lesser included" analysis is inapplicable where the jury was not instructed as to the elements of rape, the Commonwealth did not argue that there was evidence of an actual rape, and the finding of rape could not be supported by sufficient evidence; under no circumstance could the jury have found in this case that Appellant committed the crime of rape. Since it was error for the jury to have determined that the aggravating circumstance existed based on a finding of rape, the aggravating circumstance is invalid.

Id.(emphasis in original). *See Commonwealth v. DeHart,* 650 A.2d 38, 49 (Pa. 1994), Concurring Opinion, Flaherty, J., ("At first blush one could be inclined to

view what was printed on the verdict slip [mitigating factor not mitigating factors] as a typographical or grammatical error and thus a "technicality" as it were, but further thought demonstrates quite to the contrary. True, the jury was orally instructed properly, but, as it deliberated whether the defendant should be put to death by the state, what was in hand was, in a material way, contrary to those instructions and clearly in error.") *C.f. Commonwealth v. Boczkowski*, 846 A.2d 75, 102 (Pa. 2004) ("By taking an unlawful action [by ignoring an order staying extradition and allowing North Carolina to obtain conviction of murder before Pennsylvania trial] which led to the creation of an aggravating circumstance that did not exist when the court had ruled on extradition, the Commonwealth introduced an element of arbitrariness into the death-eligibility process."). *See Commonwealth v. Holcomb,* 498 A.2d 833, 858-860 (Pa. 1985), (Dissenting Opinion, Nix, C.J.) (where verdict slip indicating aggravating circumstances does not reflect language of aggravating factors listed in statute, a new sentencing hearing should be granted). *C.f. Commonwealth v. Galvin,* 985 A.2d 783, 799-800 (Pa. 2009) (where the verdict slip did not specifically follow the language of the aggravating factors listed in the statute, no error occurred when trial court rejected the verdict slip and reinstructed the jury that they were required to find or reject only the statutory aggravating factors). *See Commonwealth v. Spotz,* 896 A.2d 1191, 1255-1256 (Pa. 2006) (Dissenting Opinion, Saylor, [now C..J.], (where

instruction coupled with jury slip indicated that jury found murder was committed during course of felony, a new sentencing hearing should be warranted because the verdict slip did not reflect statutory aggravator that the **defendant killed** [and not his conspirator] during the course of felony and counsel gave ineffective assistance for failing to object).

In *Commonwealth v. Copenhefer*, 587 A.2d 1353 (Pa. 1990), the parties stipulated to the fact that the defendant had no prior record. However, when the jury returned the verdict, it failed to list that mitigating factor on the verdict slip. *Id.* at 1358. The majority in *Copenhefer* decided that because the jury was charged correctly, the jury did consider the defendant's no prior record in deliberations despite not listing it on the verdict slip. *Id.* at 1360. The Honorable Ralph Cappy, J., wrote a dissenting opinion in which he emphasized the mandatory language of the statute and the need to follow that language. The dissenting opinion stated the following:

> I believe that the General Assembly intended just what it said in enacting § 9711(e)(1); namely, that a sentencing jury *must* consider the absence of a prior record as a mitigating circumstance where such an objective circumstance is present. Where the absence of a prior record is not in dispute, as in this case, the sentencing jury has no discretion whether or not to consider it as the General Assembly has made it clear that this circumstance is a *mandatory* subject for jury consideration. Indeed, it would be nonsensical to suppose that the General Assembly actually intended to vest the sentencing phase jury with the discretionary authority to

> find that a defendant *did* have a prior record when there was *no* evidence to that effect. This is especially true where the prosecution and the defense had in fact stipulated to the contrary.

Id., 587 A.2d at 1366-1367 (emphasis in the original).

This Honorable Supreme Court revisited this issue more than a decade later in *Commonwealth v. Rizzuto*, 777 A.2d 1069 (Pa. 2001). In *Rizzuto*, a decision before Appellant's trial, this Honorable Court reversed the decision in *Copenhefer* by a unanimous opinion. In adopting the dissenting opinion from *Copenhefer*, this Court said the following:

> Under the sentencing scheme in death penalty cases, the jury is required to find the existence of any mitigating circumstances that have been proven by a preponderance of the evidence. *Commonwealth v. Cox*, 556 Pa. 368, 728 A.2d 923 (Pa. 1999). 42 Pa.C.S. § 9711(e)(1) specifically states that "mitigating circumstances shall include the following: (1) the defendant has no significant history of prior criminal convictions." Consequently, where the absence of a prior record is not in dispute, as in this case, the sentencing jury has no discretion whether or not to find the existence of this fact as a mitigating factor. If we would grant the jury discretion to ignore stipulations of fact, we would be granting the right to arrive at a sentencing verdict in an arbitrary and capricious fashion. Such a conclusion would undercut the very purpose of the death penalty sentencing scheme as developed by our General Assembly. A sentence of death cannot be "the product of passion, prejudice or any other arbitrary factor."

Commonwealth v. Rizzuto, 777 A.2d 1069, 1089 (Pa. 2001).

This Court in *Copenhefer* suggested that by looking to extrinsic factors, the conclusion could be drawn that the jury did consider the mitigating factor regardless of it being listed on the verdict slip. In *Rizzuto*, this Honorable Court found that it should not look to extrinsic factors and admonished any assumption as to what the jury may have been considering absent the words of the verdict slip. By overturning *Copenhefer*, this Court placed a greater emphasis on the language of the verdict slip.

This Honorable Supreme Court reiterated that position most recently in *Commonwealth v. Knight*, 156 A.3d 239 (Pa. 2016). In *Knight*, the mitigating factor of "no significant history of prior criminal convictions" was clearly present, and although not stipulated to like in *Rizzuto*, it was presented through evidence, and conceded to by the prosecutor in closing argument. *Id.* at 245. Despite all of this, the jury still did not list "no significant history of prior criminal convictions" as a mitigating factor on the verdict slip. *Id.*

In *Knight*, this Honorable Court continued to enforce the significance of the jury verdict slip being specific when it comes to mitigating and aggravating factors by stating the following:

> We recognize the language in our cases regarding the jury's general role respecting the finding of aggravators and mitigators but, as the rationale of *Rizzuto* plainly reflects, this particular mitigating circumstance differs from more subjective (and more easily disputable) mitigators such as, for example, those implicating

> "extreme mental or emotional disturbance," 42 Pa.C.S. §9711(e)(2), mental capacity, 42 Pa.C.S. §9711(e)(3), or the catch-all, 42 Pa.C.S. §9711(e)(8). Also, there are instances where the (e)(1) mitigator may be invoked and the question of its existence is properly reposed in the jury, *e.g.*, if the defendant, in fact, has a prior criminal record and the question is its relative "significance." When the absence of a record is undisputed, the jury has no discretion but to find the objective circumstance, and specifically include it in any weighing of aggravators and mitigators. The parties and the trial court have a corresponding responsibility to ensure the statutory construct is honored and the process is not compromised by an arbitrary factor. **A required mitigating circumstance can no more be arbitrarily ignored than an aggravating circumstance can be arbitrarily created through unlawful action.** *See Commonwealth v. Boczkowski*, 846 A.2d at 102 ("By taking an unlawful action which led to the creation of an aggravating circumstance that did not [otherwise] exist ..., the Commonwealth introduced an element of arbitrariness;" Court therefore vacates death sentence and remands for imposition of life sentence).

Commonwealth v. Knight, 156 A.3d at 247-248 (emphasis added).

The Court in *Knight* also discussed the importance of *Copenhefer* being overturned. "The *Copenhefer* majority held no error occurred because it was apparent, from the jury charge and the verdict slip, the jury had considered Copenhefer's lack of a prior record in its deliberations, despite not finding the mitigatory." *Knight*, 156 A.3d at 246. The Court overturning *Copenhefer* in *Rizzuto* and emphasizing that ruling in *Knight* disallows a court to assume what the jury may or may not have considered when finding mitigating and aggravating

factors reflected in the verdict slip. Rather, the jury must follow the mandatory language of the statute and state the factors accurately on the verdict slip.

The present case only differs from *Knight* and *Rizzuto* in that Appellant's case involves the aggravating factor "a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. §9711(d)(9). According to the verdict slip, the jury did not find the statutory aggravating factor to exist. Instead the jury found a different, non-statutory reason to impose the death penalty at both counts 1 and 2, namely:

> the 4 felony convictions that have been placed into the record by stipulation.

Verdict slips at count 1 and 2 (docket entry 23).

This Honorable Court places a great emphasis upon adhering to the mandatory language of 42 Pa.C.S. §9711. *Commonwealth v. Knight, supra. See Commonwealth v. May,* 656 A.2d at 1344-1345 (citation omitted) ("We decline to speculate as to what the jury may have intended and refuse to attempt to 'mold' the death sentence verdict to that intention").

Appellant's counsel stipulated to the fact that Appellant had four prior felony convictions. Much like the absence of a prior record in *Rizzuto* and *Knight*, Appellant's prior record was not in dispute. Appellant's counsel stipulated to the prior record but did not stipulate that the record indicated a significant history (an aggravating factor). A significant history is something that cannot be stipulated to

and must be decided by the jury. *See Commonwealth v. Knight*, 156 A.3d at 245 (emphasis added) ("Appellant also contrasts his situation to one where a defendant in fact has a history of prior convictions; he concedes **the jury may then determine whether the conviction(s) comprise a significant history**.") However, "the 4 felony convictions that have been placed into the record by stipulation" is what the jury listed as an aggravating factor on the verdict slip (docket entry 23). The mandatory language of the statute requires that the entire jury find that a defendant has a "**significant history** of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. §9711(d)(9) (emphasis added). In this case, the jury sentenced Appellant to a non-statutory aggravating factor and, thus, introduced arbitrariness into the death penalty process. Indeed, it is unclear as to whether all twelve (12) jurors found that Appellant's record was a **significant** history of felony convictions.

Convictions for four felonies may or may not be considered a significant history, however we will never know what the jury's verdict was with respect to the statutory aggravating factor because they simply said what was already known, *i.e.* Appellant was convicted of four (4) felonies. The jury's oral verdict did not state at all what aggravating factors were found (TT4 251). The courts are not permitted to assume what the jury considered or what they meant. *Commonwealth v. Knight*, 156 A.3d at 246. *See Commonwealth v. May*, 656 A.2d

at 1344-1345 (citation omitted) ("We decline to speculate as to what the jury may have intended and refuse to attempt to "mold" the death sentence verdict to that intention[.]")

If the jury meant for the felonies to constitute an aggravating factor, the jury needed to adhere to the mandatory language and specifically state that Appellant had a significant history of felony convictions involving the use or threat of violence to the person.

The imposition of the death penalty by the jury in this case violated the Eighth Amendment, the Fourteenth Amendment, Article I, § 13 and Article I, § 9. *See also* 42 Pa.C.S. § 9711(h). The sentence of death should be vacated.

III. IN THE ALTERNATIVE, TRIAL COUNSEL GAVE INEFFECTIVE ASSISTANCE FOR ALLOWING THE PROSECUTOR AND/OR THE JUDGE TO ALLOW THE JURY TO BELIEVE THAT THE SEXUAL ABUSE AGAINST CHETIA HURTT WAS AN AGGRAVATING FACTOR.

In the alternative to Argument II, trial counsel gave ineffective assistance for allowing the prosecutor and/or the judge to allow the jury to believe that the sexual abuse against Chetia Hurtt was an aggravating factor. Argument II is adopted and incorporated into this Argument.

Appellant is entitled to relief pursuant to 42 Pa.C.S. §§ 9543(a)(2)(i) and 9543(a)(2)(ii). The three-prong test for a claim of ineffectiveness is well established. Appellant must show: 1) that the claim had arguable merit, 2) that counsel had no reasonable basis for his failure to act, and 3) actual prejudice, i.e., there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. *Commonwealth v. Douglas,* 645 A.2d 226, 230-231 (Pa. 1994); *Commonwealth v. Pierce,* 527 A.2d 973 (Pa. 1987). *See also Strickland v. Washington*, 566 U.S. 668 (1984) .

At the actual trial, Chetia Hurtt testified as to how she was assaulted on May 21, 2000 by Appellant in her apartment (TT 33-73). In his opening of the penalty phase, the prosecutor talked about the abuse concerning Chetia Hurtt (TT4 17-18). The prosecutor commented in the following manner:

> We're going to lay this all out on the table for you, and **it's going to be for you to decide whether what Chetia Hurtt went through and suffered at the hands of the defendant is significant** and what weight it should be afforded.

(TT4 17-18) (emphasis added).

The Commonwealth presented the testimony of Chetia Hurtt in the penalty phase concerning the assaultive behavior by Appellant that occurred before May 21, 2000 (TT4 29-51). The Commonwealth also presented Exhibits 78 and 79 to demonstrate four felony convictions (TT4 52-53). The sole purpose of these exhibits was to demonstrate that Appellant had a significant history of felony convictions involving the use or threat of violence.

The prosecutor said the following in his closing argument at the penalty phase:

> Ladies and gentlemen, I submit to you if you find in this deliberation process that **what that girl went through is insignificant,** if you find that **that is not an aggravating circumstance,** then, ladies and gentlemen, I've got to go back to the drawing board and sign up for another course in law school because I misread 12 good citizens.
>
> I submit to you that there is none among you that could sit and listen to that testimony and not be convinced beyond a reasonable doubt that **what that girl went through was a significant aggravating circumstance.**

(TT4 197-198) (emphasis added). The prosecutor's argument was not that Appellant had a history of felony convictions involving the use or threat of violence but rather the suffering of Chetia Hurtt by the hands of Appellant was an aggravating factor. Trial counsel never objected.

Later on, in his argument, the prosecutor continued in the following manner:

> I want you to think about the pain that Chetia Hurtt went through that is captured on this Exhibit 81. And I want you to think about the guilt that she's going to have to live with for the rest of her life because finally she had the courage to speak up and talk about the abuse that she had suffered for years.
>
> And I want you to think about what she must be going through in her head, how she must be thinking, "I wish I would have said anything. Maybe my mother and brother would still be alive.

(TT4 207). Counsel never objected.

The trial court instructed the jury as to how to judge if Appellant had a significant history of felony convictions and how to accept Chetia Hurtt's testimony at the penalty phase. The trial court said the following:

> I have permitted this testimony for one reason and one reason alone. **If you should find beyond a reasonable doubt that the four felonies that I have just listed establish this aggravating circumstance,** you may then consider Ms. Hurtt's testimony for the sole purpose of deciding how much weight you give to this particular aggravating circumstance.

(TT4 229-230) (emphasis added).

The jury did not find that Appellant had a **significant history** of felony convictions. It did not find the aggravating factor that was listed in § 9711(d)(9) to which the Commonwealth requested in its amended notice of intent to seek the death penalty. Rather the jury followed the argument of the prosecutor and found a different non-statutory reason to impose the death penalty at both counts 1 and 2, namely:

> the 4 felony convictions that have been placed into the record by stipulation.

Verdict slips at count 1 and 2 (docket entry 23). Trial counsel never looked at the verdict slip that was filled out by the jury and never objected to it.

This Honorable Supreme Court has stressed the importance of ensuring unambiguous jury determinations when it comes to aggravating and mitigating circumstances in death penalty sentencing in a string of cases. Argument I is adopted and fully incorporated into this argument.

In *Commonwealth v. DeHart,* 650 A.2d 38 (Pa. 1994) this Honorable Court found that counsel gave ineffective assistance for failing to object to a form verdict slip. The verdict slip read, in pertinent part, "we the jury have found unanimously one aggravating circumstance which outweighs any mitigating *circumstance.*" *Id.,* 650 A.2d at 48. This Honorable Court found that counsel should have objected to the verdict slip because it obviously limited the jury into

only one (1) mitigating factor and not mitigating factors (more than one). This Court rejected the Commonwealth's argument that no prejudice occurred because the jury was properly instructed by the trial court. This Honorable Court said it was long recognized that jurors would place more weight on written instructions (a written verdict slip). This Court went on to say the following:

> Moreover, there can be no meaningful appellate review of the weighing process to determine whether the death sentence was imposed in manner consistent with that intended by our legislature. "Under our death penalty statute, it is exclusively a jury question and within its sole province to determine how much weight should be accorded to any mitigating factor when balanced with other mitigating and aggravating circumstances in the case." *Commonwealth v. McCullum,* 529 Pa. 117, 131, 602 A.2d 313, 320 (1992).

Id., 650 A.2d at 49. This Honorable Court went on to say that it was "clear" that there could have been no reasonable basis for the trial counsel's failure to object to the verdict slip and it was "equally apparent" that DeHart was prejudiced. *Id.*

According to the verdict slip, the jury did not find the statutory aggravating factor. Instead the jury cited a non-statutory reason to impose the death penalty at both counts 1 and 2, namely:

> the 4 felony convictions that have been placed into the record by stipulation.

Verdict slips at count 1 and 2 (docket entry 23). *See Commonwealth v. May,* 656 A.2d at 1344-1345 (citation omitted) ("We decline to speculate as to what the jury

may have intended and refuse to attempt to 'mold' the death sentence verdict to that intention[.]") *See also Commonwealth v. DeHart, supra.*

Appellant's counsel stipulated to the fact that Appellant had four prior felony convictions. Much like the absence of a prior record in *Rizzuto* and *Knight*, Appellant's prior record was not in dispute. Appellant's counsel stipulated to the prior record but a prior record is not an aggravating factor. However, "the 4 felony convictions that have been placed into the record by stipulation" is what the jury listed as an aggravating factor on the verdict slip (docket entry 23). The mandatory language of the statute requires that the jury find that a defendant has a "**significant history** of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. §9711(d)(9). The jury cannot sentence a defendant to death merely because of a prior record of felony convictions. A significant history is something that cannot be stipulated to and must be decided by the jury. *See Commonwealth v. Knight*, 156 A.3d at 245 (emphasis added) ("Appellant also contrasts his situation to one where a defendant in fact has a history of prior convictions; he concedes **the jury may then determine whether the conviction(s) comprise a significant history**.") In this case, the jury sentenced Appellant to a non-statutory aggravating factor and, thus, introduced arbitrariness into the death penalty process. Indeed, it is unclear as to whether all twelve (12) jurors found that Appellant's record was a **significant** history of felony

convictions. Counsel never objected to the verdict slip or to the prosecutor's argument.

The jury did not specifically find that Appellant had a significant history but rather found something different, specifically how Chetia Hurtt was abused.

It is impossible to know whether or not the jury found that Appellant's four prior felonies constituted a significant history. The courts are not permitted to assume what the jury considered or what they meant. *Commonwealth v. DeHart,* 650 A.2d at 48-49; *Commonwealth v. May,* 656 A.2d at 1344-1345; *Commonwealth v. Knight,* 156 A.3d at 246. If the jury meant for the felonies to constitute an aggravating factor, the jury needed to specifically state that.

As explained in this argument, the claim has arguable merit. *See also* Argument II. Counsel had no reasonable basis to not review the verdict slip and to timely object. *See* Trial Counsel's Certification (docket entry 109, trial counsel's certification). There is a reasonable probability that had counsel objected the results would have been different. *Commonwealth v. DeHart,* 650 A.2d at 48-49. A new sentencing hearing is required.

IV. APPELLATE COUNSEL GAVE INEFFECTIVE ASSISTANCE FOR FAILING TO RAISE THE ARGUMENT THAT APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION AND PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT WHEN THE JURY IMPOSED A SENTENCE OF DEATH IN A MANNER THAT WAS VIOLATIVE OF THE PROCESS ESTABLISHED IN THE STATUTORY SCHEME BY FINDING A NON-STATUTORY AGGRAVATING FACTOR.

Appellate counsel gave ineffective assistance for failing to argue that Appellant's sentence of death violated the statutory scheme and was imposed based upon an arbitrary factor as argued in Arguments II and III. Appellate counsel gave ineffective assistance for failing to raise the issue to this Honorable Supreme Court. Arguments II and III are fully incorporated into the instant argument.

Appellant is entitled to relief pursuant to 42 Pa.C.S. §§ 9543(a)(2)(i) and 9543(a)(2)(ii). The three-prong test for a claim of ineffectiveness is well established. Appellant must show: 1) that the claim had arguable merit, 2) that counsel had no reasonable basis for his failure to act, and 3) actual prejudice, i.e., there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. *Commonwealth v. Douglas,* 645 A.2d at 230-231.

The texts of the Eighth Amendment, Fourteenth Amendment, Article I, Section 13 and Article I, Section 9 have been previously presented in both

Arguments II and III of this Brief and need not be repeated here. The statute concerning the sentencing procedure for death penalty review states, in pertinent part, the following:

> (3) The Supreme Court shall affirm the sentence of death unless it determines that:
>
> (i) the sentence of death was the product of passion, prejudice or **any other arbitrary factor**; or
>
> (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).

42 Pa.C.S. § 9711(h)(3) (emphasis added). The claim in this case has arguable merit because Appellant's sentence of death was founded upon an arbitrary factor as it did not follow the statutory scheme and, as such, was also unconstitutional.

"The parties and the trial court have a corresponding responsibility to ensure the statutory construct is honored and the process is not compromised by an arbitrary factor." *Commonwealth v. Knight*, 156 A.3d at 248. This Honorable Court described arbitrary factors in the following manner:

> An action or factor is arbitrary if it is **not cabined by law or principle**. *See, e.g. Black's Law Dictionary* 100 (Seventh Ed. 1999) (defining arbitrary as, inter alia: "1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. . . ."); *Merriam-Webster's Collegiate Dictionary* 59 (10th Ed. 2002) (defining arbitrary as, inter alia: "1: depending on individual discretion (as of a judge) and not fixed by law . . . 2a: not restrained or limited in the exercise of power: ruling by absolute authority . . . 3a: based on or

> determined by individual preference or convenience rather than by necessity or the intrinsic nature of something . . . .").

Commonwealth v. Boczkowski, 846 A.2d at 102 (emphasis added).

As expounded upon in Arguments II and III, Appellant's death sentence was predicated upon an aggravating factor that was not within the statutory scheme. The jury used "the 4 felony convictions that have been placed into the record by stipulation" as an aggravating factor (docket entry 23). The factor the jury listed on the verdict slip is not one cabined by law. The statute lists eighteen (18) different aggravating factors for a sentence of death, none of which are what the jury cited to in Appellant's case. *See* 42 Pa.C.S. § 9711(d). Therefore, by simply stating "the 4 felony convictions that have been placed into the record by stipulation," the jury relied upon an arbitrary factor to sentence Appellant to death, and counsel provided ineffective assistance for failing to properly articulate this issue to this Honorable Court. *See* Arguments I and II.

Attorney Snarey raised four (4) issues in the appeal that was docketed at 566 CAP 2008. This Honorable Court addressed by automatic review the sufficiency of the evidence and found that the sentence of death was also valid pursuant to their automatic review of 42 Pa.C.S. § 9711(h)(3). None of the claims brought forth the issue that the jury – per the jury slip – did not follow the statutory scheme. Appellant was sentenced to death based upon an arbitrary factor because

the jury slip did not reflect a valid aggravating factor. Appellant's second appeal to the Pennsylvania Supreme Court after his appellate rights were reinstated *nunc pro tunc*, also failed to raise this issue. Although this Honorable Supreme Court is mandated by 42 Pa.C.S. § 9711(h) to review the sentence of death, counsel had no reasonable basis for not bringing this specific issue directly to the Court's attention on the first appeal. *See* Certification of Appellate Counsel (docket entry 109, certification).

In reviewing Appellant's sentence of death and the aggravating factors, this Honorable Court stated the following with brevity:

> Further, our review of the record also reveals that a stipulation was entered at the penalty phase establishing that Appellant was convicted of: one count of rape and one count of involuntary deviate sexual intercourse (IDSI) for charges stemming between May 30, 1995 through May 21, 2000, N.T., 04/18/2002, at 52; an additional count of IDSI for offenses committed at various dates between 1993 and May 29, 1995, *id.*; and, attempted rape, arising from the May 21, 2000 incident, *id.* at 53. Thus, the record here also amply supports the jury's finding that Appellant had a significant history of violent felony convictions. *See* 42 Pa.C.S. § 9711(d)(9). Further, our review of the record does not indicate that the jury's verdict resulted from an improper factor.

Id. at 809-810. This Honorable Court did not discuss the issue of the ambiguous verdict slip and how the jury failed to follow the mandatory language of the statute. When reading this Honorable Court's opinion, it appears as if it examined the record to determine whether or not there was enough evidence to support the

aggravating factor of a significant history of violent felony convictions. It is agreed that this Honorable Court performed its review under the assumption that the jury actually found the aggravating factor. That assumption, which was not disputed by appellate counsel, should not have occurred. *See Commonwealth v. Collins,* 888 A.2d 564, 569-574 (Pa. 2005) (claims of ineffective assistance of counsel are distinct from claims addressed by appellate court on merits and, as such, are not previously litigated).

If appellate counsel properly argued the issue, this Honorable Court would have determined that the jury's listed factor was not cabined by law and Appellant was sentenced to death based upon an arbitrary factor. Appellant was prejudiced because had counsel properly raised this issue, a new sentencing hearing would have been ordered. *See Commonwealth v. Wesley*, 753 A.2d 204, 216 (Pa. 2000) (citations omitted) ("Where, as in the present case, we strike down one or more aggravating circumstances, but one or more aggravating circumstances are supported by sufficient evidence, and there is at least one mitigating circumstance, we must remand for a new sentencing hearing.")

In conclusion, the claim had arguable merit, (*see* Argument I and II) counsel had no reasonable basis for failing to hone the issue to this Honorable Court (*see* docket entry 109, certification of appellate counsel) and Appellant was prejudiced because there is a reasonable probability that the results of the appeal

would have been different. *Commonwealth v. Pierce, supra.* A new sentencing hearing is in order.

V. TRIAL COUNSEL GAVE INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER ARGUMENT.

Trial counsel gave ineffective assistance for failing to object to Deputy District Attorney Mark Tranquilli's improper argument. The prosecutor's argument concerning Chetia Hurtt's "pain" was improper for unduly prejudicing Appellant, and trial counsel gave ineffective assistance for failing to object to prosecutorial misconduct.

Appellant is entitled to relief pursuant to 42 Pa.C.S. §§ 9543(a)(2)(i) and 9543(a)(2)(ii). The three-prong test under which a claim of ineffectiveness is well established. Appellant must show: 1) that the claim had arguable merit, 2) that counsel had no reasonable basis for his failure to act, and 3) actual prejudice, i.e., there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. *Commonwealth v. Douglas,* 645 A.2d at 230-231.

This Honorable Court explained the law as follows:

> Generally, a prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict. Moreover, the prosecution, similar to the defense, is accorded reasonable latitude and may employ oratorical flair arguing its version of the case to the jury. The arguments advanced must, however, be based upon

> matters in evidence and/or upon any legitimate inferences that can be drawn therefrom. Finally, any allegedly improper prosecutorial comments must also be examined within the context of the conduct of defense counsel.

Commonwealth v. Henry, 706 A.2d 313, 329-330 (1998) quoting *Commonwealth v. Jones,* 683 A.2d 1181, 1199-1200 (1996) (citations omitted).

In *Commonwealth v. LaCava,* 666 A.2d 221, 236-237 (Pa. 1995), a prosecutor in arguing for the death penalty of the defendant who killed a police officer told the jury that the defendant was a drug dealer and drug dealers are leeches of society. This Honorable Court vacated the death sentence and remanded for a new hearing. This Honorable Court said the following:

> Our review of the prosecutor's statements challenged in this appeal leads us to the conclusion that the sole purpose of the prosecutor's comments was to attempt to turn the jury's sentencing of appellant into a plebiscite on drugs and drug dealers and their destructive effect on society. The prosecutor attempted to expand the jury's focus from the punishment of appellant on the basis of one aggravating circumstance (i.e., that appellant killed a police officer acting in the line of duty), to punishment of appellant on the basis of society's victimization at the hands of drug dealers. The essence of the prosecutor's argument was to convince the jury to sentence appellant to death as a form of retribution for the ills inflicted on society by those who sell drugs. The prosecutor prejudiced the jury by forming in their minds a fixed bias and hostility toward appellant with these highly prejudicial statements.

LaCava, 666 A.2d at 237.

It is the jury's role to "render a verdict based on the evidence, not based on the effect of that verdict." *Commonwealth v. Patton*, 985 A.2d 1283, 1288 (Pa. 2009). *C.f. Commonwealth v. Mikesell*, 381 A.2d 430, 434 (Pa. 1977) (Remarks that express sympathy for the victims are "wholly irrelevant to a determination of guilt" and "are highly inflammatory and prejudicial.")

Within the instant case, the prosecutor argued in the following manner:

> I want you to think about the pain that Chetia Hurtt went through that is captured on this Exhibit 81. And I want you to think about the guilt that she's going to have to live with for the rest of her life because finally she had the courage to speak up and talk about the abuse that she had suffered for years.

(TT4 207). Trial counsel gave ineffective assistance for failing to specifically object to the above statement which was totally improper.

The prosecutor diverted the jury's attention from determining the sentence of the defendant and instead focused his argument on inflaming the jury's passions and/or prejudices. *See LaCava.* Referring to the "pain" and "guilt" of Chetia Hurtt went beyond mere oratorical flair. The prosecutor in this case stepped outside the reasonable latitude of advocacy and argument, and the improper reference to Hurtt's pain and guilt prejudiced the jury in such a way that they could not have rendered a true sentence.

Trial counsel gave ineffective assistance by not objecting to the prosecutor's improper and prejudicial argument. The claim has arguable merit. Counsel had no reasonable basis for his actions. *See* Trial Counsel Certification (docket entry 109, certification). There is a reasonable probability that but for counsel's actions, the jury would not have been prejudiced against Appellant and focused on voting for relieving the victim's pain and there is a reasonable probability that the sentence would have been different. *Commonwealth v. Pierce, supra.*

VI. TRIAL COUNSEL GAVE INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO THE COMMONWEALTH'S EXPERT TESTIFYING TO THE VERACITY OF APPELLANT'S STATEMENTS.

Dr. Bruce Wright, as an expert, testified to the veracity of Appellant's statements which is contrary to what an expert is permitted to do (TT4 169). This was not testimony showing that Appellant may have been deceitful but rather was testimony that demonstrated an expert opinion that Appellant lied. Counsel gave ineffective assistance for failing to object to Dr. Wright's improper opinion testimony as to the veracity of Appellant's statements (See Pa.R.E. 608). The claim has arguable merit. Counsel had no reasonable basis for his actions. *See* Trial Counsel Certification (docket entry 109, certification). There is a reasonable probability that but for counsel's actions, the results would have been different.

This Honorable Supreme Court has found it reversible error to have an expert testify as to the credibility of witness (in this case, Appellant's statements). *Commonwealth v. Seese,* 517 A.2d 920, 922 (Pa. 1986) and *Commonwealth v. Crawford*, 718 A.2d 768, 772 (Pa. 1998).

Rule 608 of the Pennsylvania Rules of Evidence seems to be consistent with the argument that it is improper to ask questions of a witness whether the defendant was truthful or untruthful. Rule 608 reads as follows:

> (a) Reputation Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or

> untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Opinion testimony about the witness's character for truthfulness or untruthfulness is not admissible.
>
> (b) Specific Instances of Conduct. Except as provided in Rule 609 (relating to evidence of conviction of crime),
>
> > (1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,
> >
> > (2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

Id. Rule 608 seems to prohibit the precise action that occurred in the instant case.

Rule 403 of the Pennsylvania Rules of Evidence allows for the exclusion of evidence when "its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* Asking the question of whether the defendant was lying offers little or no probative value. Moreover, the answer does nothing but foist confusion, mislead the jury, and unfairly prejudice the defendant.

To determine the credibility of a witness is outside the scope of Rule 702(b) of the Pennsylvania Rules of Evidence (concerning expert testimony) as the ability to decide whether or not one is lying is one possessed by the average juror. This Honorable Supreme Court has said:

> The determination of the credibility of a witness is within the exclusive province of the jury.
>
> . . . .
>
> "It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of the credibility of a witness." [*Commonwealth v. Seese,* 517 A.2d 920, 922 (Pa. 1986)]. "Whether the expert's opinion is offered to attack or to enhance, it assumes the same impact - an 'unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess.'" *Commonwealth v. Spence,* 534 Pa. 233, 245, 627 A.2d 1176, 1182 (1993) (citation omitted).

Commonwealth v. Crawford, 718 A.2d at 772.

To allow an expert to testify as to the veracity of the defendant's statements usurps an important function of the jury and runs the risk of a jury giving too much weight to an expert's determination. *Commonwealth v. Seese*, 517 A.2d at 922. This Honorable Court discussed why jurors, and not experts should make determinations of credibility stating the following:

> Such testimony, admitted as evidence, would encourage jurors to shift their focus from determining the credibility of the particular witness who testified at trial, allowing them instead to defer to the so-called "expert" assessment of the truthfulness of the class of people of which the particular witness is a member. In addition, such

> testimony would imbue the opinions of "experts" with an unwarranted appearance of reliability upon a subject, veracity, which is not beyond the facility of the ordinary juror to assess.

Id. at 922. *See Commonwealth v. McClure,* 144 A.3d 970, 977 (Pa. Super. 2016) citing *Seese* and *Crawford* (reversible error occurred where a police officer and an employee of Children Youth and Services testified that they believed that McClure's explanation, as to how a child became sick and ultimately unconscious after attending a daycare center, was not truthful).

In *Commonwealth v. Grant*, 387 A.2d 841, 843-844 (Pa. 1978), the Commonwealth presented testimony of the head of the homicide division of the District Attorney's Office to explain the deals, if any, that certain witnesses would receive for their testimony at Grant's murder trial. This Honorable Court found that the Deputy District Attorney's testimony was improper when he testified that he believed that they were telling the truth. This Honorable Court analyzed that claim as being one of prosecutorial misconduct because the prosecutor vouched for the credibility of a witness. *Id.* This Court said the following:

> We believe that the alleged prejudicial comments must be evaluated with regard to the circumstances of each trial, including, but not limited to: the nature of the comment, the person to whom the alleged prejudicial comment was directed, the identity of the person making the comment, and if a witness, the importance of that witness' testimony to either the Commonwealth's or defense's case, and whether the court gave immediate

> cautionary instructions if it deemed the remark prejudicial.

Id., 387 A.2d at 844. *See also Commonwealth v. Yockey,* 158 A.3d 1246 (Pa. Super. 2017) (it was error to allow the cross-examination of a witness as to whether another witness falsely testified).

What this Honorable Court has deemed improper and to be reversible error is exactly what happened in the instant case. Dr. Wright, the Commonwealth's expert, gave his opinion as to whether or not statements by Appellant were credible. At the penalty phase of the trial, Dr. Wright testified in the following pertinent manner:

> Q. Sir, were you able to come to a conclusion about [Appellant's] auditory hallucination in light of the fact that he told you one thing and told Dr. Wettstein another and yet another version from the Mayview reports?
>
> A. My conclusion is that I had great difficulty believing anything he said to me because of the inconsistent nature of the history he gave me, as well as what I reviewed in those other records that you mentioned.

(TT4 168-169).

Dr. Wright's expert testimony in this regard was error. Counsel gave ineffective assistance for failing to object to Dr. Wright's improper opinion testimony as to the veracity of Appellant's statements. Pa.R.E. 608. The claim has arguable merit. *Commonwealth v. Crawford, supra*; *Commonwealth v. Seese,*

supra. Counsel had no reasonable basis for his actions. *See* Trial Counsel Certification (docket entry 109, certification of trial counsel). There is a reasonable probability that but for counsel's actions, the results would have been different. The mental state of Appellant was before the jury. Indeed, the jury found as a mitigating factor that "when the defendant killed he acted under mental or psychological disturbance[.]" Verdict Slips 1 and 2 (docket entry 23). The weight of this mitigating factor could have been diminished by Dr. Wright's improper testimony. Appellant is entitled to a new sentencing hearing.

VII. TRIAL COUNSEL GAVE INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO THE COMMONWEALTH'S EXPERT TESTIFYING TO FACTS THAT WERE NOT IN EVIDENCE AND HAD NO BASIS, NAMELY THAT APPELLANT HAD BEEN ARRESTED AS A JUVENILE.

During the penalty phase, Dr. Wright as an expert testified to facts that were not in evidence and there was no basis to these facts, namely that Appellant had been arrested as a juvenile for hit and run. The arrest was improperly presented. Counsel should have objected (TT4 171). The claim has arguable merit. Counsel had no reasonable basis for his actions. *See* Trial Counsel Certification (docket entry 109, certification). There is a reasonable probability that but for counsel's actions, the results would have been different. *Commonwealth v. Pierce, supra.* Relief should have been granted pursuant to 42 Pa.C.S. §§ 9543(a)(2)(i) and 9543(a)(2)(ii).

On Deputy District Attorney Mark Tranquilli's direct examination of Dr. Bruce Wright, the following occurred:

> Q. Doctor, in order for an individual to be diagnosed with an antisocial personality disorder, what are some of the criteria that would have to be satisfied in order to qualify?
>
> A. I agree with Dr. Wettstein when he said there had to be some behavior during adolescence. The history that Mr. Hairston gave I felt was unreliable. He denied any past history of illegal problems, but in reviewing the records, **I found out he was arrested at 17 years of age for a hit and run accident.** So we know there was some behavior during his adolescence.

(TT4 171).

"The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 401. Evidence of prior crimes or arrests is likely to prejudice a defendant and therefore this evidence is inadmissible to prove a person's propensity for crime. *Commonwealth v. Lark,* 543 A.2d 491 (Pa. 1988). Evidence of a prior arrest is permitted if the evidence's probative value outweighs the potential for unfair bias. *Commonwealth v. Dillon,* 925 A.2d 131, 141 (Pa. 2007) citing Pa.R.E. 404(b)(4). Pennsylvania Rule of Evidence 404(b) states the following:

> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.
>
> (3) Notice in a Criminal Case. In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.

Id.

This claim has merit because the Commonwealth's expert testified to facts not in evidence and improperly introduced evidence of a prior arrest. The law against introducing prior arrests to the jury is well-established and is in place to ensure that a defendant will not be prejudiced by having the jury hear of a prior arrest or by having the prosecution surprise the defense by mentioning the prior arrest. The exceptions pursuant to Pa.R.E. 404(b) were not applicable here. Moreover, as explained, "the probative value of the evidence did not outweigh its **potential** for unfair prejudice." Pa.R.E. 404(b)(2). The Commonwealth violated both of these principles and trial counsel should have objected.

Counsel had no reasonable basis for failing to object. *See* Trial Counsel Certificate (docket entry 109, certificate of trial counsel). Appellant was unduly prejudiced in the jury's eyes by improperly mentioning a prior arrest. There was a reasonable probability that the results would have been different, namely all jurors would not have voted for death. Appellant is entitled to a new sentencing hearing.

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

KENNETH HAIRSTON,

Defendant.

CRIMINAL DIVISION

CC No.: 200109056

NOTICE OF INTENTION TO DISMISS

Honorable Jeffrey A. Manning, P. J.
Court of Common Pleas of
Allegheny County
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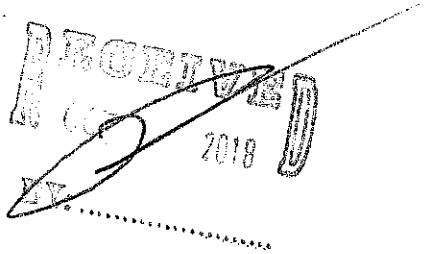


APPENDIX A

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

v. CC No. 200109056

KENNETH HAIRSTON,

Defendant.

NOTICE OF INTENTION TO DISMISS

AND NOW, this _____ day of _____, 2018, upon review of the Amended Petition and Post Conviction Collateral Relief, the brief filed in support thereof and the Commonwealth's Answer, the defendant is notified that the Court finds that there are no genuine issues concerning any material fact; that the defendant is not entitled to relief; that no purpose would be served by any further proceedings and that the Court will dismiss the defendant's Petition for the following reasons:

1. The claim that the defendant's right to due process was violated by the manner in which the jury completed the verdict slip is without merit as a matter of law. The fact that in identifying one of the aggravating factors found by the jury to have been proven beyond a reasonable the jury did not track the precise language of the aggravating factor provided for in the statute does not affect the validity of the verdict. Section I. A. 1. b) of the verdict slip properly identified the aggravating factor alleged, that "The defendant has a significant history of felony convictions involving the use or threat of violence to the person..." found at 42 Pa. C.S. § 9711 (d) (9). The jury then indicated at Section II. B. 2. that they found one or more aggravating circumstances and stated that the basis for that finding were the convictions offered into evidence in by stipulation.

Accordingly, the jury verdict was not based on a non-statutory aggravating factor but, rather, on the statutory aggravating factor provided for in section 9711 (d) (9). That finding was not arbitrary simply because the jury did not repeat the statutory language verbatim.

2. The claim that counsel was ineffective for not objecting to the jury's finding of a non-statutory aggravating factor is without merit as a matter of law because the claim that underlies this ineffectiveness claim is without merit a as matter for law for the reasons set forth in paragraph 1 above.

3. The claim that trial counsel was ineffective for eliciting testimony from Detective Logan regarding his opinion as to the defendants' credibility is without merit as a matter of law. The defense strategy regarding Detective Logan's testimony was apparent. Detective Logan claimed that the defendant told him, in a statement that was not recorded, that he intended to kill the victims but the defendant did not repeat that in the recorded statement and Detective Logan did not ask him about that in the recorded statement. Defense counsel cross-examined him on that discrepancy and then argued in his closing that the detectives' testimony was not credible because he failed to ask the defendant, during the taped interview, about his prior statement that he intended to kill the victims. The Court finds that this was a reasonable strategy to try to impeach Detective Logan's claim that the defendant stated that he intended to kill the victims, which was particularly damaging evidence. Accordingly, counsel was not ineffective for pursuing this line of questioning.

4. The claim that counsel was ineffective for not objecting to the prosecutor's reference in his closing argument to Chetia Hurtt's "pain" is without merit.

The prosecutor made that statement in the context of his argument to the jury that the aggravating circumstances outweighed the mitigating circumstances. It was entirely appropriate for the prosecutor to argue to the jury that they should consider the impact of the crime on Ms. Hurt, family member of the victims when weighing the factors. 42 Pa. C.S.A. § 9711 (a) (2) provides: "In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible." This Court instructed the jury that the evidence of the impact the defendants crimes had upon the family could "... only be used by you to weigh the aggravating factors against the mitigating factors." (TT IV, p. 232). A jury is presumed to follow the instruction given to it by the court. Commonwealth v. Baker, 614 A.2d 663, 672 (Pa. 1992). Counsel was not ineffective to for not objecting because the argument made by the prosecutor was entirely proper and the jury was appropriately instructed.

5. The next claim, that counsel was ineffective for not objecting to hearsay testimony from witness Henrietta Hardy during the penalty phase, is without merit. This testimony, if inadmissible, could not possibly have affected the jury's verdict. Ms. Hardy testified that she was aware that the defendant lived with another woman during a time he was separated from his wife, one of the victims in this matter, because she "heard rumors." While this is clearly hearsay, it is inconceivable in a case where the defendant has been convicted of bludgeoning his wife and young son to death with a sledgehammer, and where the aggravating circumstances include a significant history of felony crimes of violence against his daughter, that the fact that he lived with another woman while separated from his wife would have any impact of the jury's penalty phase verdict.

6. The claim that counsel was ineffective for failing to object to testimony from the Commonwealth's expert, Bruce Wright, M.D., regarding the defendants' veracity is without merit as the expert made that observation in the context of explaining the basis for his conclusion that the defendant's mental condition was antisocial personality disorder rather than the psychosis and depression that the defense expert, Robert Wettstein, M.D., diagnosed. Dr. Wright explained that one of the diagnostic criteria for antisocial personality disorder is deceitfulness. (TT IV, p. 70). In addition, he pointed out that the records from Mayview Hospital did not indicate that he suffered from auditory hallucinations. Dr. Wettstein opined that the defendant suffered from auditory hallucinations with a psychotic feature. Dr. Wright disagreed with that based, in part, on the inconsistency between what the defendant told him, what he told Dr. Wettstein and what was documented in the Mayview records. In this context, the statement by Dr. Wright regarding the veracity of the defendant's description of his symptoms was admissible as it was considered by the doctor in reaching forming his opinions.

7. Next, the defendant claims that counsel was ineffective for failing to object to Dr. Wright's reference to the defendant's juvenile arrest. This claim must fail because the fact of that arrest was considered by Dr. Wright in reaching his conclusions as the mental state of the defendant. The complaint that it was based on a fact not in evidence is without merit as Dr. Wright testified that he became aware of the arrest in reviewing the defendants' records. Both experts reviewed multiple records, few of which were actually offered into evidence. Moreover, to the extent that the reference was improper, the defendant could not possibly have been prejudiced by reference to an arrest as a juvenile. The jury was told of his multiple convictions for crime of violence

committed shortly before the murders. A vague reference to a juvenile arrest for an unnamed crime with no indication he was determined by a court to have been guilty of that unknown offense could not have prejudiced him.

8. The claim that counsel was ineffective for not objecting to the prosecutor's statement in his penalty phase closing regarding the defendant's depression is also meritless. Dr. Wright testified that although the defendant may have been depressed, "... he didn't have an extreme mental or emotional illness which would influence his ability to discern right from wrong or which would prohibit him from appreciating the nature of his actions." (TT IV, p. 176). The challenged portion of the prosecutor's argument was based on this testimony and argued that the defendant's depression was not so severe as to establish the mitigating factor that "... the defendant was under the influence of extreme mental or emotional disturbance." It was proper argument in that it was based on the evidence presented. Moreover, the jury clearly rejected this argument since they did find that the defendant proved that mitigating circumstance.

9. The defendant's claim that he was denied due process because the jury was not instructed that they had to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt will be dismissed because that instruction is contrary to well established law. In January of this year our Supreme Court held: "We next observe that this Court has previously rejected Appellant's claim that, pursuant to *Ring*, a trial court must instruct a jury that, to sentence a defendant to death, they must determine that the aggravators outweigh the mitigators beyond a reasonable a reasonable doubt. *E.g.*, Commonwealth v. Roney, 581 Pa. 587, 866 A.2d 351, 358–61

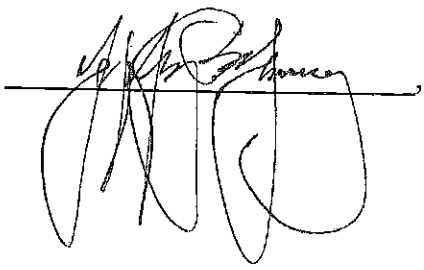
(2005); Commonwealth v. Sanchez, 623 Pa. 253, 82 A.3d 943, 985 (2013)." Commonwealth v. Wholaver. 177 A.2d 136, 172 (Pa. 2018).

10. In his tenth claim, the defendant contends that counsel was ineffective for not objecting to the jury being provided with redacted copies of the criminal information of each of the convictions that were offered by the Commonwealth in support of the 9711 (d) (9) aggravator because the redactions allowed the jury to speculate that the defendant had other convictions. The jury requested copies of Commonwealth Exhibits 78 and 79, the criminal informations. Those information included misdemeanor offenses that would not constitute "...felony convictions involving the use or threat of violence to the person." Accordingly, with the agreement of defense counsel, the prosecutor redacted any reference to those offenses. The jury was instructed that "...the four convictions upon which this aggravating circumstance is found have been placed in the record by the stipulation of the parties.). (TT IV, p. 229). The Court then listed the offenses and the dates they were committed. It was clearly conveyed to the jury that these offenses, and only these offenses, could be considered in their deliberations over whether this aggravating circumstance was proven. Moreover, when the redacted criminal informations were provided to the jury, they were again instructed to only consider the offenses that were the subject of the stipulation. (N.T. IV, p. 230). As the jury is presumed to have followed this Court's instructions, this claim is without merit and will be dismissed.

11. The defendants' final claim, that the death penalty is cruel and unusual punishment, is without merit. Both the Pennsylvania and the United States Supreme Court have rejected this claim repeatedly.

The Department of Court Records is ordered to serve a copy of this notice upon the defendant, by certified mail, return receipt requested, at *Smart Communications/PADOC, Kenneth Hairston-FA-9174, SCI Greene, P.O. Box 33028, St. Petersburg, FL 33733;* upon counsel for the defendant, Thomas N. Farrell, Esquire, at 100 Ross Street, Suite 1, Pittsburgh, Pennsylvania 15219, by regular mail; and upon Assistant District Attorney Rusheen R. Pettit, at the Office of the District Attorney of Allegheny County, by interoffice mail.

BY THE COURT:



_____, P.J.

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

KENNETH HAIRSTON,

Defendant.

CRIMINAL DIVISION

CC No. 200109056

SUPPLEMENTAL NOTICE OF INTENTION TO DISMISS

Hon. Jeffrey A. Manning, P.J.E.
Court of Common Pleas
Room 325 Courthouse
436 Grant Street
Pittsburgh, PA 15219

Copies to Counsel of Record:

For the Defendant:

Thomas N. Farrell, Esq.
Farrell & Associates
100 Ross Street, Suite 1
Pittsburgh, PA 15219

For the Commonwealth:

Rusheen R. Pettit, Esq.
Assistant District Attorney
Office of the District Attorney
401 County Courthouse
Pittsburgh, PA 15219

APPENDIX B

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

v. CC No. 200109056

KENNETH HAIRSTON,

Defendant.

SUPPLEMENTAL NOTICE OF INTENTION TO DISMISS

AND NOW, this 19th day of June, 2019, this Court notifies the defendant that the Court intends to dismiss his Amended Post Conviction Relief Act Petition. This Court set forth in the original Notice of Intention to Dismiss filed on October 30, 2018, the reasons why the claims raised therein were going to be dismissed. The defendant sought, and was granted, leave to file an Amended Petition. He did so on February 19, 2019, raising a single additional claim: That the imposition of the death penalty violates the 5th, 8th and 14th Amendments to the United States Constitution and the Constitution of the Commonwealth of Pennsylvania. He bases this claim on the Report of the Joint State Government Commission that was established to evaluate Pennsylvania law and practice in capital punishment matters. The Commonwealth filed a response on May 24, 2019. The Supreme Court of Pennsylvania, and the United States Supreme Court have repeatedly found Pennsylvania's death penalty statute in particular, and capital punishment, in general, constitutional. *See Commonwealth v. Perez,* 93 A.3d 829 (Pa. 2014); *Commonwealth v. Flor,* 998 A.2d 606 (Pa. 2010); *Baze v. Rees,* 553 U.S. 35 (2008). This Court is bound by that precedent. Based that and other precedent, the Court concludes that defendant's facial challenge to the constitutionality of the death penalty statute in Pennsylvania is without merit as a matter of law and must be dismissed.

The defendant is notified that he may respond to this proposed dismissal within thirty (30) days of the date this notice is served on him. The Department of Court Records shall serve a copy of this Notice upon the defendant, Kenneth Hairston, FA-9174, at SCI Greene, 175 Progress Drive, Waynesburg, Pennsylvania 15370, by certified mail, return receipt requested; upon counsel for the defendant, Thomas N. Farrell, Esquire, at 100 Ross Street, Suite 1, Pittsburgh, Pennsylvania 15219, by regular mail; and upon Rusheen R. Pettit, Esquire, Office of the District Attorney of Allegheny County, by interoffice mail.

91 7108 2133 3937 9454 4342

BY THE COURT:

By the Court

P.J.E.

defendant, Thomas N. Farrell, Esquire, at 100 Ross Street, Suite 1, Pittsburgh, Pennsylvania 15219, by regular mail; and upon Rusheen R. Pettit, Esquire, Office of the District Attorney of Allegheny County, by interoffice mail.

BY THE COURT:

By the Court

J.

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

ORIGINAL

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

v. CC No. 200109056

KENNETH HAIRSTON,

Defendant.

ORDER OF COURT

AND NOW, this 26TH day of Aug, 2019, it is ORDERED that for the reasons set forth in the Notice of Intention to Dismiss filed October 30, 2018, and the Supplemental Notice of Intention to Dismiss filed on June 19,2019, the defendant's Post Conviction Relief Act Petition is DENIED. The defendant is advised of the following:

1. The defendant has the right to appeal this Court's denial of his PCRA Petition to the Superior Court but must do so by filing a Notice of Appeal within thirty (30) days of the date of this Order;

2. The defendant is granted leave to proceed *in forma pauperis* on any appeal; and

3. The defendant remains entitled to court appointed counsel and current counsel shall continue to represent the defendant in any appeal

The Department of Court Records shall serve a copy of this Order upon the defendant, Kenneth Hairston, FA-9174, at SCI Greene, 175 Progress Drive, Waynesburg, Pennsylvania 15370, by certified mail, return receipt requested; upon counsel for the

APPENDIX C

IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

v. CC No. 200109056

KENNETH HAIRSTON,

Defendant.

ORDER OF COURT

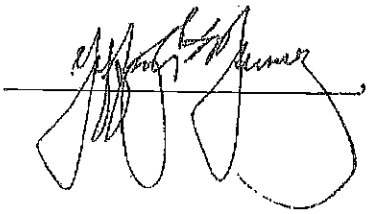
AND NOW this 16TH day of October, 2019, the Department of Court Records is ORDERED to forthwith transmit the record in this matter to the Supreme Court. The defendant has filed an appeal from this Court's August 27, 2019 Order denying his Post-Conviction Relief Act Petition. This Court set forth in the Memorandum Opinion and Notice of Intention to Dismiss filed October 10, 2018 and the Supplemental Notice of Intention Dismiss filed on June 19, 2019, the reasons for the dismissal of the defendant's PCRA Petition. That Notice satisfies the requirements of Pennsylvania Rule of Appellate Procedure 1925 that a Court to set forth the reasons for the Order from which an appeal is taken.

The Department of Court Records is ordered to serve a copy of this notice upon counsel for the defendant, Thomas N. Farrell, Esquire, at 100 Ross

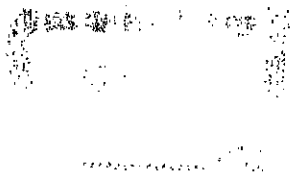
APPENDIX D

Street, Suite 1, Pittsburgh, Pennsylvania 15219, by regular mail; and upon Assistant District Attorney Rusheen R. Pettit, at the Office of the District Attorney of Allegheny County, by interoffice mail.

BY THE COURT:



_____, P.J.E.



CONCLUSION

WHEREFORE, Appellant respectfully requests that this Honorable Court vacate the two (2) death penalty sentences and impose sentences of life imprisonment. In the alternative, Appellant asks that this Honorable Court vacate the two (2) death penalty sentences and remand for a new sentencing hearing. As a further alternative, Appellant requests that this Honorable Court vacate the two (2) death penalty sentences and remand for an evidentiary hearing.

Respectfully submitted,

/s/ Thomas N. Farrell
THOMAS N. FARRELL, ESQUIRE
PA I.D. NO. 61969

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Because the Brief for Appellant exceeds 49 pages, I, the undersigned attorney of record hereby certify that the brief complies with the type-volume limitation pursuant to Pa.R.A.P. 2135(a)(4) and that the number of words in the brief is less than 22,500.

/s/ Thomas N. Farrell
THOMAS N. FARRELL, ESQUIRE

PROOF OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing Brief for Appellant on the persons in the manner below, which satisfies the requirements of Pa.R.A.P. 125 and the Administrative Orders of the Supreme Court of Pennsylvania:

Counsel for the Commonwealth:

Deputy District Attorney Michael W. Streily
Office of the District Attorney
401 County Courthouse
Pittsburgh, PA 15219

Deputy Attorney Ronald Eisenberg
Pennsylvania Office of Attorney General
1600 Arch Street
Philadelphia, PA 19103

Dated: May 8, 2020

/s/ Thomas N. Farrell
THOMAS N. FARRELL, ESQUIRE
PA. I.D. NO. 61969

CERTIFICATE OF COMPLIANCE

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.

Submitted by: Thomas N. Farrell, Esquire

Signature: /s/ Thomas N. Farrell
Name: Thomas N. Farrell, Esquire
Attorney No.: 61969