Robert Brett Dunham
EXECUTIVE DIRECTOR

1701 K Street, N.W.
Suite 205
Washington, D.C. 20006
(202) 289-2275
dpic@deathpenaltyinfo.org
www.deathpenaltyinfo.org

DEATH PENALTY INFORMATION CENTER

PENNSYLVANIA CAPITAL CASE SUMMARY OF GROUNDS FOR REVERSAL

Compiled by
Robert Brett Dunham,
Executive Director

February 15, 2018

Board of Directors
Anthony Amsterdam, David J. Bradford, David Bruck, Deborah W. Denno, James W. Ellis, Phoebe C. Ellsworth, Brandon L. Garrett, George H. Kendall, John R. MacArthur, Diann Rust-Tierney, Cassandra Stubbs, Ronald J. Tabak

Robert Brett Dunham
EXECUTIVE DIRECTOR

1701 K Street, N.W.
Suite 205
Washington, D.C. 20006
(202) 289-2275
dpic@deathpenaltyinfo.org
www.deathpenaltyinfo.org

DEATH PENALTY INFORMATION CENTER

PENNSYLVANIA CAPITAL CASE
SUMMARY OF GROUNDS FOR REVERSAL

Compiled by
Robert Brett Dunham
Updated February 15, 2018

1. Commonwealth v. VanDivner, No. 696 Cap. App. Dkt. (Pa. Feb.5, 2018) (Fayette, PCRA) finding defendant "is intellectually disabled, and, thus, ineligible for the death penalty under *Atkins v. Virginia*," vacating his death sentence, and directing that he be resentenced to life without parole pending the outcome of the appeal of his guilt issues, and transferring the remaining appeal issues to the Superior Court for noncapital disposition).

2. Commonwealth v. DeJesus, No CP-51-CR-1103501-1997 (Phila. C.P. Jan. 8, 2018) (*DeJesus II*) (Phila., PCRA remand) (following reversal of relief on intellectual disability claim, Philadelphia District Attorney's office stipulates to penalty-phase relief).

3. Commonwealth v. DeJesus, No. CP-51-CR-1103511-1997 (Phila. C.P. Jan. 8, 2018) (*DeJesus III*) (Phila., PCRA) (stipulated penalty-phase relief, per resolution of intellectual disability claim in No CP-51-CR-1103501-1997).

4. Commonwealth v. Johnson (Roderick), No. 713 Cap. App. Dkt. (Pa. Dec. 19, 2017) (Berks, successor PCRA) (affirming trial court's grant of new trial as a result of the Commonwealth's suppression of police reports of five different incidents involving a key government witness, in violation of *Brady v. Maryland*).
   * The court rejects the prosecution's argument that the suppressed documents could not be material because they were not independently admissible as evidence at trial, holding that "substantive admissibility of impeachment evidence, *vel non*, is not dispositive of a *Brady* claim. ... Documents like the police reports at issue here—which would not have been admissible as substantive evidence at Johnson's trial—may nevertheless contain information that can be used to impeach a witness."
   * The court describes the withheld police reports as "textbook impeachment evidence" that "suggest that [the witness,] Robles sought to curry favor with the police in the face of ongoing criminal investigations and mounting evidence of his own criminal conduct."

* The suppressed documents were material because "Robles was the linchpin to the Commonwealth's case against Johnson [and c]ompetent counsel could have used the information in the police reports to cross-examine Robles and to weaken his credibility by exposing his bias and interest in cooperating with the Reading Police Department. A thorough cross-examination would have revealed that Robles hoped to receive favorable treatment from the authorities in exchange for providing information."
* "[T]he first police report revealed that Robles had responded to the investigation into his criminal activity by providing information regarding an unsolved murder; ultimately, Robles was not charged in connection with the incident under investigation. Evidence that Robles had provided information to the police out of his own self-interest might have cast doubt upon the veracity of Robles' testimony against Johnson. The police reports further evidenced Robles' motive to cooperate with the police in order to discern the status of investigations into his own crimes."
* "The withheld evidence also revealed instances where Robles had lied or deceived the police when it was in his interest to do so .... In addition, the withheld evidence revealed that Robles had a motive to eliminate rival drug dealers such as Johnson's affiliates."
* "The withheld police reports also would have permitted defense counsel to establish for the jury Robles' motive to lie to further his ongoing collaboration with the Reading Police Department. Evidence that Robles benefited from his relationship with the police by being able to engage in drug sales without fear of repercussions would have suggested that Robles was motivated to provide testimony helpful to the prosecution in this case."
* Robles' criminal conduct, and his willingness to provide information implicating other individuals in criminal activity, likely would have elevated the importance of the letter that Robles sent to Detective Cabrera offering 'to do anything' to get out of jail by demonstrating that Robles was motivated to provide information to the police to serve his own interests."
* The court rejects the prosecution's claim that the suppressed information was truly insignificant" in light of the other evidence of Johnson's guilt, noting that "Robles' testimony was the only evidence linking Johnson to the .[murder weapon], and that gun was the only physical evidence linking Johnson to the ... murders."

5. Bridges v. Secretary, Penna. Department of Corrections, Nos. 13-9001 & 13-9002 (3d Cir. Sept. 1, 2017) (Berks, habeas) (affirming district court grant of a new trial for suppression of police reports of five separate incidents involving the prosecution's key witness, in violation of *Brady v. Maryland*), *aff'g*, 941 F. Supp. 2d 584 (E.D. Pa. 2013)
* The court finds that the suppressed police reports "are impeaching as to [prosecution witness] Robles and therefore favorable to Bridges. The reports indicate that Robles was associated with numerous shooting incidents in the time period leading up to Bridges's trial and that the police were aware of allegations that Robles was a drug dealer. However, despite many run-ins with police, Robles was never arrested or charged with respect to any of these incidents. These facts arguably suggest that the police looked the other way with respect to Robles's criminal conduct so that they could obtain information from Robles. In short, this evidence could have been used to impeach Robles because it provided a basis to question whether Robles was motivated to testify in favor of the prosecution to ensure that the police did not pursue criminal charges against him."

* The court also finds that the suppressed reports were material, noting that "If Bridges had been able to confront Robles and perhaps certain police witnesses with evidence of these numerous interactions between Robles and the police in which Robles avoided prosecution, the jury could have reasonably inferred that Robles had a special relationship with the police that motivated him to testify at trial in favor of the Commonwealth. ... .In short, these reports provided a basis to cross-examine Robles about bias toward the police, and by extension the Commonwealth, which could have undermined his credibility. Because his testimony was central to the first degree murder charge, and a showing of bias may have weakened it, the absence of evidence showing this bias resulted in a verdict that is not 'worthy of confidence.'"
* The reports also were materials because, " if Bridges had been able to present evidence of Robles's potential bias, it could have undermined the Commonwealth's closing argument, which repeatedly characterized Robles as a disinterested witness. Without the suppressed police reports, Bridges lacked several tools to challenge the Commonwealth's depiction of Robles as disinterested and credible, and there is a reasonable probability that the result of the proceeding concerning at least the first degree murder charge could have been different if the reports had not been suppressed."
* The court finds that the suppressed reports were material whether or not they were independently admissible because materiality "focuses on the benefits of disclosure to the defense, not admissibility. ... Here, the suppressed police reports may have been useful to show Robles's bias. Moreover, the suppressed police reports identified individuals who apparently had information about Robles's criminal conduct and his relationship with the police and thus the reports may have led to the discovery of admissible evidence."
* The court also rejected the prosecution's argument that the police reports were not material because they did not lead to the arrest of the witness, saying that it "misses the point" and "is irrelevant. The question is whether these incidents affected Robles's state of mind such that it could have motivated him to testify in favor of the Commonwealth."

6. Commonwealth v. Williams (Terrance), Nos. 668 & 669 Cap. App. Dkt. (Pa. Aug. 22, 2017) (per curiam) (Philadelphia, successor PCRA) (following remand from U.S. Supreme Court, affirming the grant of penalty-phase relief by the Philadelphia Court of Common Pleas for the prosecution's failure to disclose multiple items of evidence that would have been material to the jury's determination of sentence) (2-2 vote, with three justices not participating, affirmed lower court's decision by operation of law).

7. Commonwealth v. Montalvo, No. CP-67-CR-0003183-1998 (York C.P. May 22, 2017) (York, PCRA) (Geroff, J.) (death sentence overturned for a combination of ineffective representation, court error, and prosecutorial misconduct)
* The PCRA court ruled that counsel had been ineffective in failing to investigate and present available mitigating evidence.
* The court further found that trial court had improperly denied Montalvo's request for funds to hire a mental-health expert and counsel had failed to develop evidence relating to Montalvo's emotional disturbance at the time of the offense.
* The death sentence also was overturned as a result of the prosecution's "pervasive" statements to the jury that their sentencing determination was merely a "recommendation," the trial court's erroneous instructions, which reinforced that

misrepresentation, and defense counsel's ineffectiveness in failing to object and to request an accurate instruction.

8. Commonwealth v. Briggs, No. CP-08-CR-0000348-2004 (Bradford C.P. Apr. 3, 2017) (Bradford, PCRA) (stipulated grant of penalty relief for ineffective assistance of penalty-phase counsel).

9. Commonwealth v. Natividad, Nos. CP-51-CR-0400131-1997, CP-51- CR-0703121-1997 (Phila. C.P. Dec. 21, 2016) (Philadelphia, PCRA) (Geroff, J.) (death sentence reversed on grounds that 42 Pa. C.S. § 9711(d)(9) aggravating circumstance, that the defendant had a significant history of felony convictions involving the use or threat of violence, is unconstitutionally vague under *United States v. Johnson* and *Welch v. United States*).

10. Commonwealth v. Knight, No. 702 Cap. App. Dkt., ___ A.3d. ___, 2016 WL 6873044 (Pa. Nov. 22, 2016) (Westmoreland, direct appeal) (death sentence reversed when jury failed to find uncontroverted mitigating circumstance, 42 Pa. C.S. § 9711(e)(1), that the defendant had no significant history of prior criminal convictions).
    * Despite undisputed fact that Knight had no prior felony or misdemeanor convictions, the trial prosecutor refused to stipulate to the mitigating circumstance, and after the prosecutor had admitted in closing that the defense had proven (e)(1)—"I expect [the defense] will argue, rightfully so, that he has no significant history of criminal convictions. And that is true."—the court failed to direct the jury to find the mitigating circumstance, and the jury failed to find (e)(1) as a mitigating circumstance.
    * The Court, citing its unanimous decision in Commonwealth v. Rizzuto, 777 A.2d 1069 (Pa. 2001) adopting Justice Cappy's dissent in Commonwealth v. Copenhefer, 587 A.2d 1353 (Pa. 1991), said "[w]hen 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 jury's failure to find the "indisputable objective fact" that Knight had no prior convictions resulted in "an arbitrary failure to honor a statutory mandate," and constituted reversible error.

11. Commonwealth v. Meadows, CP-46-CR-0001869-1990 (Mtgy C.P. Oct. 14, 2016) (Montgomery, PCRA) (stipulated vacation of sentence; per agreement, resentenced to life without parole).

12. Miller (Dennis) v. Beard, 2:10-cv-03469-MSG (E.D. Pa. Oct. 5, 2016) (Chester, habeas) (death sentence reversed on grounds that defendant's waiver of the right to a penalty-phase jury was not knowing or intelligent, in violation of due process; rape conviction also overturned).

13. Gorby v. Wetzel, No. 2:12-cv-1170 (W.D. Pa. Sept. 28, 2016) (Washington, habeas) (new trial granted for counsel's ineffectiveness in failing to investigate and present evidence in support of a diminished capacity defense).

14. Dennis v. Secretary, Pennsylvania Department of Corrections, No. 13-9003, 2016 U.S. App. Lexis 15434 (3d Cir. Aug. 23, 2016) (en banc) (Philadelphia, habeas appeal) (reversing prior panel decision and affirming the district court's grant of a new trial based

upon multiple violations of *Brady v. Maryland*), aff'g, 966 F. Supp. 2d 489 (E.D. Pa. Aug. 21, 2013).

15. Commonwealth v. Walter, No. CP-18-CR-0000179-2003 (Clinton C.P. Aug. 16, 2016) (Clinton County, PCRA) (stipulated grant of penalty relief; per agreement, Walter withdrew remaining PCRA claims and waived her appeal rights in exchange for being sentenced to life imprisonment without parole).

- Williams v. Pennsylvania, 136 S. Ct. 1899 (U.S. June 9, 2016) (Phila., successor PCRA) (vacated Pennsylvania Supreme Court decision that had reversed Philadelphia Court of Common Pleas ruling granting Williams penalty-phase relief and remanding for a new appeal on grounds that Chief Justice Castille's participation in the appeal violated due process).
  * As District Attorney, Ronald Castille personally approved seeking the death penalty against Terry Williams.
  * During his death warrant in 2015, Williams' co-defendant came forward and disclosed that the prosecuting attorney had directed him not to mention that the victim had a prior history of sexually abusing Williams and to falsely testify that the murder had occurred during the commission of a robbery, creating an aggravating circumstance in the case. The PCRA court ordered that the prosecutor's files be produced in camera and discovered that the Commonwealth had suppressed other information indicating that the prosecutor and police were aware of other instances in which the victim had sexually abused teenage boys. The court upheld Williams' conviction but overturned his death sentence for violations of Brady v. Maryland and for presenting false argument that the victim had been a good Samaritan who had simply offered the defendant a ride home.
  * Later, as Chief Justice of the Pennsylvania Supreme Court, Justice Castille denied a motion to recuse himself, participated in deciding the Philadelphia District Attorney's appeal of the Williams PCRA opinion, and authored a concurring opinion criticizing defense counsel's litigation practices and the trial judge for permitting discovery of the prosecution's file.
  * The Court further held that an unconstitutional failure to recuse constitutes a structural error that is "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive of the outcome of the appeal, and remanded for a new appeal.

16. Moore v. Secretary, Pennsylvania Department of Corrections, No. 14-4042 (3d Cir. Feb. 22, 2016) (Luzerne, habeas appeal) (affirming the district court's grant of a new trial based upon trial counsel's ineffectiveness in failing to investigate and present evidence of innocence, including the testimony of an admitted participant in the robbery in which the murder occurred who had testified in his own trial that Moore was neither present nor involved in the crime; the case had previously been remanded to the district court to consider multiple *Brady* violations, but because of the ineffectiveness ruling, the district court found it unnecessary to address the *Brady* issues), *aff'g*, Moore v. Beard, No. 1:05–CV–0828, 42 F. Supp. 3d 624 (M.D. Pa. Aug. 26, 2014).

17. Commonwealth v. Crispell, No. CP-17-CR-62-1990 (Clearfield C.P. Jan. 12, 2016) (Clearfield, PCRA) (death sentence reversed as a result of ineffective assistance of counsel in failing to adequately investigate and present available mitigating evidence).

18. Commonwealth v. Solano, Nos. 686 & 687 Cap. App. Dkt. (Pa. Dec. 21, 2015) (Lehigh, PCRA appeal) (affirming the PCRA court's prior grant of penalty relief for ineffective assistance of counsel in failing to investigate and present available mitigating evidence).

19. Saranchak v. Secretary, Pa. Dep't of Corr., No. 12-9002, 802 F.3d 579 (3d Cir. Sept. 14, 2015) (Schuylkill, habeas appeal) (Court affirms district court's denial of degree-of-guilt claim but reverses the district court's denial of penalty-phase relief, holding that counsel's failure to investigate Saranchak's mental-health history based upon an independent expert's determination that Saranchak was competent to stand trial was ineffective where the competency report raised major red flags about Saranchak's overall mental health; and there was a reasonable probability of a different penalty-phase outcome had counsel presented available mental health mitigating evidence).

- Commonwealth v. Johnson (Roderick), No. 118-1997 (Berks C.P. July 6, 2015) (Berks, PCRA remand) (new trial for cumulative effect of multiple violations of *Brady v. Maryland*), *aff'd*, No. 713 Cap. App. Dkt. (Pa. Dec. 19, 2017)
  * The PCRA Court held that the prosecution had improperly "suppressed evidence [that] was favorable to the Defendant because it could have been used to impeach" the Commonwealth's key witness, George Robles, at trial. This included police reports from four different incidents involving shots fired in which Robles was implicated, but not charged, and a fifth incident in which he was not charged despite having been identified as having pulled a gun on and threatened two people.
  * The court found that "[t]he volume of Mr. Robles' interactions with the Reading Police Department is clearly relevant to his bias and desire to assist the police and the Commonwealth to avoid interference with his own activities" and the evidence was "particularly important in light of defense counsel's attempt at trial to introduce evidence of Mr. Robles' interest."
  * The court "emphasize[d] that the prosecuting attorney had knowledge of the criminal investigation of Mr. Robles within the months leading to Defendant's trial" and found that "Defense counsel was clearly hampered by the inability to impeach Mr. Robles without evidence of his interactions with the police."
  * The court found the *Brady* violation to be prejudicial because "Armed with the suppressed evidence at trial, defense counsel's cross examination of Mr. Robles, an important Commonwealth witness, would have been very different. The suppressed evidence illustrates that Mr. Robles was involved in five (5) serious police investigations in less than three (3) years. There is clear evidence that during these investigations the police learned that Mr. Robles was involved in drug transactions. On at least one (1) prior occasion, Mr. Robles, when confronted with police questioning, offered to supply information about an unsolved murder. This information had a direct bearing on Mr. Robles' desire to testify against Defendant and was unavailable to Defendant for impeachment purposes at trial."

20. Commonwealth v. Bracey, No. 693 Cap. App. Dkt. (Pa. June 16, 2015) (Phila., successor *Atkins* PCRA, appeal following remand) (court affirms lower court determination that defendant has Intellectual Disability and accordingly is ineligible for the death penalty under *Atkins v. Virginia*).

21. Commonwealth v. Elliott, No. CP-51-CR-0410911-1994 (Phila. C.P. May 1, 2015) (Phila., PCRA remand) (death sentence reversed by stipulation and life sentence imposed).

22. Commonwealth v. Johnson (Kareem), No. CP-51-CR-1300424-2006 (Phila. C.P. Apr. 22, 2015) (Phila., PCRA) (stipulated new trial based upon ineffectiveness of trial counsel; pursuant to the stipulation accepted by the PCRA court, "All parties agree that Petitioner is entitled to the grant of a new trial based on ineffective assistance of counsel at the guilty-innocence phase of trial as set forth in Petitioner's Amended PCRA Petition – Claim IV. Accordingly, and in consideration of this Agreement, Petitioner agrees to withdraw all other claims in his Amended Petition including claims alleging prosecutorial misconduct of District Attorney Michael Barry").

23. Commonwealth v. Edwards, Nos. CP-26-0000838-2002 (Fayette C.P. Mar. 25, 2015) (Fayette, PCRA) (court finds that defendant has Intellectual Disability and accordingly is ineligible for the death penalty under *Atkins v. Virginia*; death sentence vacated and life sentence imposed).

24. Crawley v. Horn, No. 99-CV-5919 (E.D. Pa. Feb. 17, 2015) (Phila., habeas) (death sentenced reversed by stipulation "as to the claim that counsel at sentencing was ineffective").

25. Washington (Anthony) v. Beard, No. 07-CV-3462 (E.D. Pa. Jan. 16, 2015) (Phila., habeas) (new trial granted as a result of multiple violations of *Brady v. Maryland* and *Bruton v. United States*)

* The District Court held that the trial court improperly permitted the prosecution to admit into evidence the confession of a co-defendant – which named the defendant as participating in the murder – when the co-defendant did not testify and the redaction of the defendant's name and replacement with the word "blank" was insufficient to prevent the jury from concluding that "blank" meant the defendant.
* The Court further found that the prosecution committed a second violation of *Bruton* by repeatedly breaking redaction in closing argument, despite sustained objections and warnings from the trial court. It rejected the Pennsylvania Supreme Court's assertion that the trial court's instructions had cured the constitutional violation, holding that determination to be contrary to clearly established federal constitutional law. Instead, it held that, "in the context of four (4) references to Washington as the other man in Teagle's statement, two (2) motions for a mistrial, and at least three (3) 'curative' instructions by the trial judge, this is tantamount to the wizard telling Dorothy to pay no attention to the man behind the curtain."
* The Court also granted a new trial for the individual and cumulative effect of multiple *Brady* violations, including that Philadelphia prosecutors suppressed documents, later discovered by the defense in the police archive files, that contained descriptions of

the robbers that did not march the defendant and that placed the gun used in the murder in the hands of a man who matched the description of the co-defendant.

* Philadelphia prosecutors also failed to disclose another document, obtained in federal habeas discovery 17 years later, that showed that, shortly after the crime, several witnesses had been shown a photographic array that contained the defendant's picture and did not identify him. The Court held that that had been revealed during federal discovery, was material when considered along with the other suppressed documents.

* Finally, the Court noted that, considered cumulatively, the *Bruton* and *Brady* claims violated due process and undermined confidence in the reliability of the verdict.

- Commonwealth v. White, No. CP-51-CR-0012991-2010, *Bench order* (Phila. C.P. May 19, 2014) (Phila., pre-trial motions on resentencing hearing) (court quashes sole aggravating circumstance, 42 Pa. C.S. § 9711(d)(5), finding the evidence insufficient to establish that "the victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant," and denies permission to amend aggravating circumstances to include 42 Pa. C.S. § 9711(d)(15), that, the victim wasa nongovernmental informant and had been killed in retaliation for his activities as an informant; life sentence imposed).

26. Commonwealth v. Bardo, Nos. 650 & 651 Cap. App. Dkt., 2014 WL 7150707 (Pa. Dec. 16, 2014) (Luzerne, PCRA appeal) (affirmance by an equally divided court on counsel's ineffectiveness for failing to investigate and present mitigating evidence).

27. Commonwealth v. Cousar, No. CP-51-CR-1300424-2006 (Phila. C.P. Nov. 20, 2014) (Phila., PCRA) (stipulation to penalty-phase counsel's ineffectiveness for his "failure to investigate, develop and present mitigating evidence").

28. Commonwealth v. Pelzer, No. 632 Cap. App. Dkt. (Pa. Oct. 30, 2014) (Phila., PCRA appeal) (affirming PCRA court's grant of penalty relief for counsel's ineffectiveness in failing to investigate and present mitigating evidence).

29. Hall (Darrick) v. Beard, 2:05-cv-02523, 2014 WL 5364827, — F. Supp. 3d — (E.D. Pa. Oct. 22, 2014) (Chester, habeas) (granting new sentencing hearing for counsel's ineffectiveness in failing to investigate and present mitigating evidence relating to "his abusive childhood, illnesses and injuries normally associated with developmental and cognitive delays, and his ability to adjust to a structured environment").

30. Commonwealth v. Dougherty, No. 176 EAL 2014 (Pa. Oct. 2, 2014) (Phila., PCRA appeal) (court denied Commonwealth's application for allowance of appeal; Superior Court's grant of a new trial in this formerly capital case stands).

31. Commonwealth v. Tharp, No. 637 Cap. App. Dkt., 101 A.3d 736 (Pa. Sept. 24, 2014) (Wash., PCRA appeal) (granting new sentencing hearing for counsel's ineffectiveness in failing to investigate and present readily available mitigating evidence documenting the defendant's brain damage, her mental health disorders, low I.Q., childhood abuse, domestic abuse by former boyfriends, and favorable pre-trial prison adjustment).

32. Commonwealth v. Galvin, No. CP-06-CR-0002572-2006 (Berks C.P. Sept. 15, 2014) (Berks, PCRA) (granting new trial for juror misconduct where "jurors were exposed to extraneous influences in both the guilt and penalty phases of Defendant's trial[,] . . . includ[ing] information regarding Defendant's criminal history – specifically, that he had been acquitted of murder in a previous case. Some jurors also learned that Defendant had been accused of assaulting a Deputy Sheriff during his first trial")

* The Court held that, "in direct contravention of th[e] Court's instructions," one of the jurors had conducted internet research to learn why an out-of-county jury was being empaneled and had told at least one other juror early in the guilt phase of trial that the defendant "had committed a [previous] murder and 'gotten away with it'" and also had assaulted a law enforcement officer during his previous trial.

* The PCRA court held that the exposure of at least two jurors to prejudicial extraneous information violated the "fundamental tenet of the American legal system that a jury must evaluate a case only on the evidence before it."

- Moore v. Beard, No. 1:05–CV–0828, 42 F. Supp. 3d 624 (M.D. Pa. Aug. 26, 2014) (Luzerne, habeas remand) (granting new trial after remand from Third Circuit decision finding that Moore had presented a *prima facie* showing of counsel's ineffectiveness in failing to investigate and present alibi evidence and impeach key prosecution witness based upon conditions of the witness's plea deal), *aff'd*, No. 14-4042 (3d Cir. Feb. 22, 2016).

  * The Court holds that counsel's failure to interview Brad Jones, an alleged participant in the robbery and murder whose statements to police never implicated Moore and whose testimony at his own trial contradicted the version of events presented in Moore's trial, was ineffective: "It is patently unreasonable for defense counsel to fail to introduce evidence that contradicts a key prosecution witness's testimony. Attorney Yeager's concession that the defense failed to properly and thoroughly interview Jones – a potentially critical exculpatory witness who would have squarely contradicted testimony of the key Commonwealth witness – establishes that counsel's decision not to call Jones is not the kind of strategic choice entitled to Strickland deference."

  * The failure to call Jones was prejudicial where the prosecution witnesses claimed that Jones and Petitioner were participants in the robbery and homicide, but Jones had "consistently maintain[ed] that he and Moore were not involved in the . . . robbery and homicide" and "the story as told by Jones, in large part, completely contradict[ed] the version given by [the prosecution witnesses] at Moore's trial." Jones denied that he had traveled to Wilkes-Barre from Philadelphia as a passenger or driver in a car with the prosecution's key witness (co-defendant Scott) and Petitioner. He testified that he met Scott and a man named "Karim" at a club in Wilkes-Barre, where Scott had said that he and Karim were in need of a "place to lay" because Scott had just shot someone. Jones said Karim's actual name was "Emmet Burgis," contradicting prosecution witnesses who testified that Moore was Karim. Scott also had testified that Jones and Moore had been involved in the robbery and that Moore had been the shooter. Jones' trial testimony also contradicted Scott's testimony that Jones had masterminded the robbery, directed the participants to the animal hospital that they robbed, and had waited in the parked car outside while Scott and Moore entered the animal hospital. Jones contradicted Scott's testimony that Jones had driven Moore's car from the scene of the crime to another witness's apartment, testifying instead that he had offered to take Scott and Karim to the

witness's apartment and that the three had driven there in Scott's car. Jones' testimony also would have corroborated the testimony offered by a defense witness that Scott had admitted to being the shooter, that Jones had not been present at the robbery, and that he was "absolutely sure" that Moore was not the person who had been taken to the witness's house after the robbery.

* The Court also held that counsel had been ineffective in failing to impeach Scott based on his deals with state and federal prosecutors and his prior convictions. It noted that "when a witness has motivation to lie and to offer testimony favorable to the prosecution in exchange for favorable treatment, that fact 'establishes the potential bias that would [constitute] compelling impeachment evidence' because such information would benefit a jury assessing the witness's reliability. Grant v. Lockett, 709 F.3d 224, 236 (3d Cir. 2003)." Counsel could have had no strategic basis for failing to impeach Scott on the grounds that his plea to third-degree murder avoided both a possible death penalty and a life sentence, particularly where counsel did attempt to impeach Scott on the term of years to which he had agreed.

33. Fahy v. Horn, No. 99-5086, 2014 WL 4209551 (E.D. Pa. Aug. 26, 2014) (Phila., habeas remand) (granting new sentencing hearing as a result of "(1) ineffective assistance of trial counsel for failing to develop and present available and compelling mitigating evidence and for suggesting Fahy would likely be released on parole; and (2) [an] erroneous jury charge that prevented the jury from considering non-statutory mitigating evidence").

* Counsel's performance was deficient where he knew that the defendant had been "physically and sexually abused as a child, suffered head injuries in an automobile accident, experienced hallucinations and seizures, and made numerous suicide attempts" and that the defendant had received mental health evaluations in connection with his prior convictions but nevertheless failed to contact any of the defendant's 14 surviving siblings to substantiate the assertions of the defendant and his mother that he had been abused by his father and one of his brothers, failed to review the prior court mental health evaluations, failed to consult any mental health expert "to discuss the meaning of [the defendant's] organic brain damage, epilepsy, psychotropic medications, history of abuse and neglect, or suicide attempts," and called only the defendant and his mother as mitigation witnesses.

* The state court finding that counsel had strategically decided not to retain a mental health expert to avoid eliciting damaging evidence on cross-examination was an unreasonable determination of fact "in light of testimony on the record from trial counsel": "rather than permitting [testimony] and evaluating proffered evidence," "[t]he trial court [substituted its] own view of what was appropriate." In fact, the "[u]ncontested testimony reveal[ed that] trial counsel did not even consider retaining a mental health expert to evaluate [the defendant's] psychiatric condition," "failed to investigate numerous red flags [of mental illness] and ignored 'pertinent avenues for investigation of which he should have been aware' [citation omitted]," did not contact any of the defendant's siblings to substantiate the allegations of abuse by the defendant's father and one of his brothers, and "failed to investigate [the defendant's] own account of his mental illness, epilepsy, and brain damage, his psychiatric commitment for suicidal behavior, and [prior court] competency evaluations."

* Counsel's deficient performance was prejudicial where the jury had found two statutory mitigating circumstances concerning his mental state at the time of the offense

but none unrelated to the offense and, "[h]ad the jury been fully informed of [the defendant's] emotional and psychological problems, childhood physical and sexual abuse, and the significance of his epilepsy," it could have found additional mitigation concerning his background and mental health and "may have struck a different balance between the aggravating factors and mitigating factors it found." "Expert testimony could have revealed evidence of Fahy's emotional and behavioral consequences of his organic brain damage; and post-traumatic stress caused by his abusive and troubled childhood. It could have corroborated Fahy's testimony about his mental illness and cognitive impairments. Without the corroboration, the testimony of Fahy and his mother were the core of the penalty phase defense. The jury could not appreciate the true extent of Fahy's mental health impairments because counsel did not present the mental health records or an expert evaluation. Had the jury heard from an expert — or from anyone who could testify to Fahy's kindness or good character — 'there is a reasonable probability that at least one juror would have struck a different balance' at sentencing.*"*

* Counsel was ineffective during the sentencing phase for erroneously suggesting Fahy could be released on parole, provoking a response from the prosecutor that Fahy would likely be released and commit violent acts unless sentenced to death. Counsel argued that the defendant was "essentially a kind, decent individual who went astray; . . . a decent human being, a human being who probably, if you grant him his life, if he ever does get out of jail, he won't get out until he's a very old man." The prosecution responded by arguing: "(1) 'Are we going to let [Fahy] graduate from prison the way he graduated from being a child rapist into a child killer?'; (2) 'How many more people does he have to kill?'; and (3) 'Nor, would he ever give a damn for anyone else if he got out of prison and did it again.'"

* Counsel's argument constituted deficient performance: "[B]y mentioning the potential for future release, [counsel] indirectly suggested a life sentence would not necessarily mean life," as a result of which "the jury was misinformed about defendant's prospect for parole if not sentenced to death. . . . Defense counsel directly suggested that Fahy might eventually be released from prison and provoked the prosecutor to reference Fahy's future dangerousness three times. . . . No reasonable strategy can justify trial counsel's opening the door to arguments about future dangerousness."

* The trial court's instructions unconstitutionally prevented the jury from considering and giving effect to relevant mitigating evidence relating to the defendant's background where the trial court twice told the jury that it could consider a range of statutorily enumerated mitigating circumstances but both times omitted reference to non-statutory mitigating evidence relating to the defendant's background and upbringing. The habeas court found this omission "particularly troublesome in this case [because] Fahy's mitigation evidence consisted of testimony from himself and his mother[, a]lmost the entire testimony pertained to Fahy's character and upbringing, . . . [and d]uring his closing argument, defense counsel relied heavily upon the testimony about Fahy's character and upbringing." The habeas court found it "reasonably probable that one juror would have been sympathetic to Fahy's mitigating evidence and might have imposed a sentence of life imprisonment had the court properly charged regarding the mitigating evidence," particularly where the jury had already "found two mitigating factors . . . which were both relevant to his commission of the offense rather than his character and upbringing."

34. Commonwealth v. May (Freeman), No. CP-38-CR-0000071-1990 (Leb. C.P. July 2, 2014) (May III) (Lebanon, PCRA) (stipulated vacation of death sentence).

35. Commonwealth v. White, No. CP-51-CR-0012991-2010, *Bench order* (Phila. C.P. May 19, 2014) (Phila., remand, post-sentence motions) (granting new sentencing hearing following remand for consideration of a single ineffectiveness issue limited to penalty phase counsel's failure to present to the jury evidence in support of the age mitigator, 42 Pa. C.S. § 9711(e)(4), which White had claimed was apparent from the face of the trial transcripts).

36. Commonwealth v. Miller (Kenneth), No. CP-51-CR-0902382-1998, Bench order (Phila. C.P. May 13, 2014) (Phila., PCRA) (order granting motion to vacate death sentence, and resentencing defendant to two concurrent life sentences).

37. Lark v. Secretary, Pennsylvania Department of Corrections, No. 12-cv-9003, 566 Fed. Appx. 161 (3d Cir. May 6, 2014) (Phila., habeas appeal) (affirming grant of a new trial under *Batson v. Kentucky* where the District Court had determined that the Philadelphia District Attorney's office had discriminatorily exercised its peremptory challenges to strike five black prospective jurors because of their race; "[w]e cannot conclude that the [district] court's conclusion that at least one of the Commonwealth's peremptory strikes was racially motivated is clearly erroneous"), *aff'g*, 2012 WL 3089356 (E.D. Pa. July 30, 2012).

38. Commonwealth v. Bracey, No. CP-51-CR-0632821-1991, *Opinion in Support of Order* (Phila. C.P. Apr. 7, 2014) (Phila., *Atkins* PCRA) (court finds "(i) that petitioner's intellectual functioning is 'limited' or 'subaverage' as demonstrated by an IQ of 74, (ii) that petitioner possesses 'major deficiencies' in adaptive behavior, and (iii) that petitioner's intellectual functioning and adaptive deficits originated prior to his eighteenth birthday" and accordingly is ineligible for the death penalty under *Atkins v. Virginia*)
    * in finding subaverage intellectual functioning, court excludes prorated IQ scores from partial IQ tests, and an IQ test in which the petitioner was unable to produce evidence that it was a full-scale intelligence test; the court credited three full-scale intelligence tests, a WISC-R administered in 1977, a WAIS-R administered in 1996, and a WAIS-IV administered in 2011, with scores ranging from 69 to 78, and "found that petitioner's IQ is 74, placing him within the range of mild mental retardation"
    * the court "found that petitioner was majorly deficient in adaptive behavior as demonstrated by significant limitations in (1) communication, (2) functional academics, (3) self-direction, (4) social/interpersonal skills, and (5) leisure";
    * the court "found that petitioner proved that mild mental retardation originated prior to age 18," indicating that "[a] substantial portion of the testimony supporting petitioner's adaptive deficits concerned his behavior before the age of 18" and "credited [a forensic neuropsychologist's] conclusion that petitione''s adaptive deficits 'were clearly evident and documented prior to age 18.'"

39. Commonwealth v. Bond, No. CP-51-CR-0502971-2004, *Bench Order* (Phila. C.P. Mar.18, 2014) (Phila., PCRA) (penalty-phase relief granted for ineffectiveness of

penalty-phase counsel for failing to investigate and present mitigating evidence), *recon. denied* Apr. 29, 2014.

- Commonwealth v. Bracey, No. CP-51-CR-0632821-1991, *Order* (Phila. C.P. Jan. 10, 2014) (Phila., *Atkins* PCRA) ("WHEREAS Edward Bracey (hereafter, petitioner established that his intellectual functioning is 'limited' or 'subaverage,' as demonstrated by his Intelligence Quotient (IQ) of 74; WHEREAS petitioner established that he possesses 'major deficiencies' in adaptive behavior, as demonstrated by his significant limitations in, at least, (1) communication, (2) functional academics, (3) self-direction and (4) social/interpersonal skills; WHEREAS petitioner established that the age of onset was prior to his 18th birthday, petitioner is 'mentally retarded' as defined by our Supreme Court in Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005) and its progeny. As the Eighth Amendment places a substantive restriction on the Commonwealth of Pennsylvania's power to take petitioner's life, it is ORDERED AND DECREED that petitioner's sentence of death is hereby vacated.")

- Commonwealth v. Dougherty, No. 2674 EDA 2012 (Pa. Super. Dec. 30, 2013) (unpublished) (Phila., PCRA appeal) (new trial granted for counsel's ineffectiveness in failing to consult with or retain an expert in fire science to evaluate and rebut the prosecution's testimony that the fire that caused the death of the defendant's children was arson)

  * The record supported the PCRA court's determination that "[h]ad trial counsel relied on more than his tangential experiences with fire investigation, he would have been able effectively to challenge the science that, as trial counsel stated in his affidavit prior to his death, was 'the most significant item of evidence in the possession of the Commonwealth.' . . . Had trial counsel presented the evidence that was [admitted] at the PCRA hearing or simply become sufficiently versed in the science that was the fulcrum of the whole case against his client, he would have been able to challenge the conclusions that were the lynchpin to [the] charges against [Appellant]. 'Winging it' cannot be deemed a reasonable trial strategy."
  * The PCRA court erred in holding that the defendant did not suffer prejudice from counsel's unreasonable conduct because, "if counsel had retained either a consulting or testifying fire expert, he could have mounted a convincing challenge to the substance of the charges arrayed against his client. As the PCRA court noted, the scientific evidence proffered by Lt. Quinn was 'the fulcrum of the whole case' against Appellant, and Lt. Quinn's conclusions 'were the lynchpin' to the charges against Appellant. In a capital case such as the present matter at the time of trial, mounting a meaningful challenge to the scientific component of the Commonwealth's case should have been the top priority of any competent defense lawyer. . . . As Appellant's brief points out, '[t]rial counsel's failure to elicit [expert fire testimony] deprived [Appellant] of the opportunity to discredit entirely the testimony that was the sole basis for concluding that the fire was arson.' If the jury had received the testimony offered by Appellant's experts at the PCRA hearing and, as a result, had become convinced that Lt. Quinn's testimony was scientifically unreliable, then the jury would have had reasonable doubt about Appellant's guilt and would have been compelled to acquit him. Under these circumstances, our assessment of the evidence introduced at Appellant's trial undermines our confidence in the outcome of

that proceeding and reveals that no reliable adjudication of guilt or innocence took place."

40. Commonwealth v. Williams (Christopher), Nos. CP-5 l-CR-0417523-1992, 0417792-1992 & 0418063-1992 (Phila. C.P. Dec. 30, 2013) (Philadelphia, PCRA remand) (new trial granted for counsel's ineffectiveness in failing to investigate the medical and forensic evidence, consult with and retain crime scene and forensic pathologist experts, and present expert testimony or properly cross-examine the Commonwealth's experts to rebut the prosecution's theory of the case and to impeach the testimony of the co-operating co-defendant – who had received favorable treatment for his testimony – by demonstrating that the co-operator's "eyewitness" testimony was false and contradicted by the physical evidence)

* the failure to present the evidence was prejudicial because the incentivized state witness had falsely testified that he saw the defendant shoot one of the victims in the face at point blank range while the victim helplessly looked at the gun, when the physical evidence actually demonstrated that none of the decedents had been shot in that manner; the blood spatter and blood pattern evidence on the

* the physical evidence also flatly contradicted the incentivized cooperator's testimony that two of the victims had been shot to death in a van and their bodies thrown from the van while it was still moving – a crime scene expert could have shown that all three victims had been shot at the location at which their bodies were found and that the location in which they were found was inconsistent with their bodies having been thrown from a moving vehicle driving down the street; a forensic pathologist could have shown that the absence of scrapes or abrasions to the decedents' bodies, or tears or scuffs to their clothing contradicted the contention that the bodies had been thrown from a moving vehicle.

41. Commonwealth v. Murray, No. 658 Cap. App. Dkt., 83 A.3d 137 (Pa. Dec. 27, 2013) (Montgomery, direct appeal) (death sentence imposed for murder of a pregnant woman reversed where jury was improperly informed that the defendant was also eligible for the death penalty for killing the unborn child and it returned death verdicts for both killings; the trial court had previously vacated the death sentence imposed for killing the fetus)

* Pennsylvania law does not authorize the death penalty for killing a fetus, and both the trial court's instruction to the jury that Murray faced the death penalty for killing the unborn child and the parties' arguments for and against sentencing Murray to death for that killing were wrong as a matter of law.

* The death sentence imposed for the death of the pregnant woman violated Caldwell v. Mississippi, 472 U.S. 320 (1985), and Mills v. Maryland, 486 U.S. 367 (1988) because the jury was "explicitly misinformed" as to its authority to impose death for the killing of the fetus and "we cannot be certain that this erroneous instruction did not play a role in the jury's consideration of the death penalty" for the killing of the expectant mother.

* Finding it "shocking" that "the murder of Pennington's unborn child was submitted to the jury as a death-eligible offense . . . and calls into question the validity of the penalty phase as a whole," the Court holds that the second death sentence imposed for killing Pennington was also "the product of passion, prejudice or . . . other arbitrary factor" in violation of 42 Pa. C.S. § 9711(h)(3)(i).

42. Commonwealth v. Ly, No. CP-51-CR-1125561-1986 (Phila. C.P. Dec. 12, 2013) (Phila., PCRA) (stipulated vacation of death sentence in exchange for waiving remaining guilt appeals; sentence of life without possibility of parole imposed).

○ Commonwealth v. Wright, No. 655 Cap. App. Dkt., 78 A.3d 1070 (Pa. Oct. 30, 2013) (Blair, PCRA appeal) (affirming PCRA court's determination that the defendant was incompetent to waive his PCRA rights, including his right to counsel), *aff'g*, No. 98 CR 1980 (Blair C.P. May 29, 2012).

43. Commonwealth v. Overby (Lamont), No. CP-51-CR-1006081-1996 (Phila. C.P. Oct. 18, 2013) (Phila., PCRA) (stipulated vacation of death sentence; sentence of life without possibility of parole imposed).

44. Lambert v. Beard, No. 07-9005, 537 Fed. Appx. 78 (3d Cir. Sept. 20, 2013) (Phila., habeas appeal on remand from U.S. Supreme Court) (in case in which the prosecution "rested almost entirely on [this witness's] testimony, which he gave in exchange for an open guilty plea" to other unrelated crimes, and the only unimpeached portion of his testimony was his contention that he had consistently identified the same two individuals as having been involved in the killing, violation of Brady v. Maryland where the Philadelphia District Attorney's office suppressed several investigative documents, including a police activity sheet in which the witness had in fact identified a third individual, not Lambert, as a perpetrator), *on remand from* Wetzel v. Lambert, 132 S. Ct. 1195 (U.S. Feb 21, 2012), which had reversed and remanded Lambert v. Beard, 633 F.3d 126 (3d Cir. Feb. 7, 2011).

45. Commonwealth v. Ramtahal, No. CP-09-CR-0006389-2008 (Bucks C.P. Sept. 19, 2013) (Bucks, PCRA, stipulated penalty relief).

● Dennis v. Wetzel, No. 11-1660, 966 F. Supp. 2d 489 (E.D. Pa. Aug. 21, 2013) (E.D. Pa. Aug. 21, 2013) (Phila., habeas) (new trial granted for multiple violations of Brady v. Maryland, where the Philadelphia District Attorney's office improperly withheld exculpatory and impeachment evidence; "[w]hile each piece of withheld evidence is, on its own, sufficiently prejudicial to entitle Dennis to a new trial, there can be no question that the cumulative effect of the Commonwealth's Brady violations abridged Dennis' constitutional right to due process of law"), *aff'd*, No. 13-9003, 2016 U.S. App. Lexis 15434 (3d Cir. Aug. 23, 2016) (en banc)

* First, the Commonwealth violated Brady when it "failed to disclose numerous statements implicating three other men in the murder, none of whom had any relationship to [the defendant]"; the prosecution withheld six documents reflecting police interviews with at least three separate witnesses;

* These statements were material, in part, because they "contain[ed] internal markers of credibility," such as naming the victim's boyfriend, identifying the location of the fatal gunshot wound, and identifying as participants in the murder "three men who matched the eyewitness descriptions of the perpetrators more closely than [the defendant] did"; moreover, one of the statements also identified "a disinterested third party" who had also heard the phone conversation in which one of the potential suspects had

confessed and who, therefore, "who could have lent additional credibility to [the] statement."

* The statements also were material because, even if inadmissible themselves, "disclosure to the defense would have undoubtedly led to investigation that could have proved vital to the defense"; in addition, "[t]he information could also have been used to impeach the adequacy of the police investigation."

* Second, the Commonwealth violated Brady when it "failed to turn over a receipt that showed the time [an eyewitness] picked up her welfare assistance payment" before boarding a bus on the day of the murder, "significantly altering her estimation of when she saw [the defendant] on the bus and thereby corroborating his alibi"; the police had independently obtained the welfare receipt and the witness left her copy with officers at the time they interviewed her.

* The welfare receipt was material because, at trial, the witness testified that she left work at 2:00 p.m., picked up her public assistance check after 3:00 p.m., ran other errands, and saw the defendant on the bus between 4:00 and 4:30 p.m., while the welfare receipt showed that she had picked up her check at "13:03" p.m., not "3:03"; given this fact, the witness actually would have seen the defendant on the bus between 2:00 and 2:30 p.m., corroborating, rather than rebutting his alibi, that he was on the bus coming home from a visit with his father at the time of the murder; in addition, it would have impeached her trial testimony that she had left work after 2:00 p.m. and the time at which she testified she had seen the defendant.

* The District Court held that "The state court's determination that the receipt was not 'exculpatory' was an unreasonable determination of the facts"; likewise, its finding that there was "no evidence that the Commonwealth withheld the receipt from the defense" – when " just two paragraphs above this conclusion, [it] stated that 'the police came into possession' of the receipt when interviewing [the witness]" – was an unreasonable factual determination.

* Further, the state court "misconstrued the facts" when it stated that the witness's "corrected testimony 'would not have supported Appellant's alibi, because the murder occurred at 1:50 p.m., forty minutes earlier than [the witness's] earliest estimate," when the witness's "earliest estimate" of when she saw the defendant was actually 2 p.m., and the bus schedule indicated that the bus would have reached the stop at which the defendant said he boarded it at 1:56 p.m..

* The court holds that the Philadelphia District Attorney's "brazen argument" that there was insufficient evidence that this receipt was suppressed because the receipt wa not in its file of the case "borders on bad faith" where the Commonwealth itself had admitted "that the entire homicide file . . . went missing" prior to the direct appeal briefing and the state supreme court had already held on direct appeal that the police had obtained a copy of the receipt.

* Third, the Commonwealth violated Brady when it "failed to disclose a police activity sheet suggesting that . . . a crucial eyewitness had said that she recognized the shooter from her high school."

46. Commonwealth v. D'Amato, No. CP-51-CR-1219941-1981 (Phila. C.P. June 13, 2013) (Phila, PCRA successor) (stipulated vacation of death sentence and resentenced to life without parole).

47. Kelvin Morris, No. CP-51-CR-0704091-1982 (Phila. C.P. June 7, 2013) (Phila., negotiated plea) (with federal evidentiary hearing pending on whether Morris suffered prejudice from trial counsel's conflict of interest, conviction for first-degree murder and death sentence vacated and plea accepted to third-degree murder and related lesser charges; released for time served).

48. Commonwealth v. Champney, Nos. 574 & 575 Cap. App. Dkt., 65 A.3d 386 (Pa. Apr. 24, 2013) (per curiam) (Schuylkill, PCRA appeal) (new trial affirmed by equally divided court on counsel's ineffectiveness in failing to move to suppress statements given by defendant in violation of his *Miranda* rights, when police had initiated questioning and obtained *Miranda* waivers after defendant had invoked right to counsel)

- Bridges v. Beard, 2:06-cv-00268-AB, 941 F. Supp. 2d 584 (E.D. Pa. Apr. 23, 2013) (Berks, habeas) (new trial granted for violations of *Brady v. Maryland*; death sentence reversed for ineffective assistance of counsel in failing to investigate and present available mitigating evidence), *aff'd*, Bridges v. Secretary, Penna. Department of Corrections, Nos. 13-9001 & 13-9002 (3d Cir. Sept. 1, 2017).

49. Commonwealth v. Williams (Connie), No. 611 Cap. App. Dkt., 61 A.3d 979 (Pa. Jan. 23, 2013) (Allegheny, PCRA appeal, *Atkins*) (affirming PCRA court determination that, as a result of defendant's mental retardation, death sentence must be vacated under *Atkins v. Virginia* and a life sentence imposed), *aff'g*, Nos. 2000-01876 & 2000-02869 (Allegheny C.P. , Crim. Div., Apr. 15, 2010).

50. Judge v. Beard, No. 02–CV–6798, 2012 WL 5960643 (E.D. Pa. Nov. 29, 2012) (Philadelphia, habeas) (penalty-phase relief granted for counsel's ineffectiveness in failing to investigate and present available mitigating evidence and failing to object to an erroneous jury instruction concerning the meaning of a life sentence)

* Counsel ineffective in penalty phase when, after the jury asked the court to "define 'life' in terms of parole or will he be incarcerated for life?," counsel failed to request an instruction that the defendant "was not eligible for parole under state law and that 'life meant life'" under Pennsylvania law.

* Counsel ineffective for failing to object to the court's erroneous answer to that question that "[Y]ou are not to decide this sentencing phase based on how long he is going to spend in jail or what life imprisonment means. I have given you the law. The Legislature has set out certain aggravating and mitigating factors for you to consider. You must make your decision based on what aggravating and what mitigating circumstances you find and as I explain it to you. . . . That's the law and it is not for any of us to consider 'life' or what it means."

* Counsel also was ineffective in the penalty phase for failing to investigate his client's background and mental health history and the aggravating circumstances the Commonwealth was relying upon at trial. Those failures to investigate and the presentation of a single mitigation witness – his client's mother – whose testimony was "confined to the fact that Petitioner was a good son and a good father to his young daughter," constituted deficient performance;

* Prejudice established where, *inter alia*, the files from "the same criminal history which was testified to and used as an aggravator at sentencing" showed that court-

ordered mental health evaluations had produced multiple mental health diagnoses, including "Schizhoid Personality Disorder, Mixed Character Disorder with strong passive-aggressive features, Paranoid Personality Disorder and Anti-social Personality Disorder," with a poor mental health prognosis; school records reflected that he "had a history of below-grade level performance despite his average intelligence and that he had difficulty with concentration and attention and suffered from strong feelings of inadequacy, anxiety, dependence, isolation and lack of acceptance"; that his mother was "over-protective" and "over-critical," resulting in "his over-dependence on her and his lack of independence and confidence as a consequence."

* Prejudice also shown where lay witnesses also would have testified to an "almost life-long history of isolation and loneliness, moodiness, and irrational and peculiar behavior."; his difficulties in school "from a young age, both academically and socially," including "the teasing and harassment he suffered as a result of his small stature"; and his "odd nature, extreme immaturity and abnormal dependence on his mother and . . . that he had no relationship with his biological father while his adoptive step-father, who drank heavily, took no interest in him and was not involved with his life."

* On claim of counsel's ineffectiveness for failing to raise a *Batson* challenge, granting evidentiary hearing limited to having the prosecutor "explain why he elected to peremptorily strike [certain] known African-American and female jurors."

®● Commonwealth v. Williams (Terrance), No. CP-51-CR-0823621-1984 (Phila. C.P. Nov. 27, 2012) (Philadelphia, successor PCRA) (opinion in support of September 28, 2012 grant of relief), *rev'd*, No. 668 Cap. App. Dkt. (Dec. 15, 2014).

○● Commonwealth v. Williams (Terrance), No. CP-51-CR-0823621-1984 (Phila. C.P. Sept. 28, 2012) (Philadelphia, successor PCRA) (penalty-phase relief granted for violation of *Brady v. Maryland* where prosecution suppressed multiple pieces of evidence suggesting that the victim had a sexual attraction to teenage boys, had previously been suspected of acts of sexual molestation, had prior instances of driving teenage boys to locations in which he had sex with them in exchange for money, and that there likely had been a sexual relationship between the victim and the 18-year-old defendant; after suppressing this evidence, the prosecution had argued that the defendant had brutally murdered the victim "for no other reason but that a kind man offered him a ride home").

51. Commonwealth v. Diggs, No. CP-51-CR-0709781-2002 (Phila. C.P. Aug. 14, 2012) (Philadelphia, PCRA) (stipulated penalty relief – no substantive grounds included in the stipulation).

® Commonwealth v. Hackett, No. CP-51-CR-0933912-1986, *Opinion* (Phila. C.P. Aug. 8, 2012) (Philadelphia, successive PCRA, *Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed), *rev'd*, 2014 WL 4064039 (Pa. Aug. 18, 2014).

● Lark v. Beard, 2:01-cv-01252, 2012 WL 3089356 (E.D. Pa. July 30, 2012) (Philadelphia, habeas remand) (new trial granted under *Batson v. Kentucky* for prosecution's discriminatory exercise of peremptory challenges; on remand for step-3 analysis after prosecution failed to produce race-neutral reasons for striking three African-American

jurors, court finds that prosecution discriminatorily struck five African-American jurors on the basis of race), *aff'd*, Lark v. Secretary, Pa. Dep't of Corrections, 566 Fed. Appx. 161 (3d Cir. May 6, 2014).

52. Commonwealth v. McGill, No. CP-51-CR-0339201-1990 (Phila. C.P. July 13, 2012) (Philadelphia, PCRA) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

●® Commonwealth v. Hackett, No. CP-51-CR-0933912-1986, *Bench order* (Phila. C.P. June 28, 2012) ("The Court finds after reviewing the testimony and submitted briefs that Petitioner has met, by a preponderance of the evidence, the threshold definition of mental retardaton as defined by the Pennsylvania Supreme Court in *Miller*.").

53. Commonwealth v. Keaton, No. 418 Cap. App. Dkt., 45 A.3d 1050 (Pa. May 30, 2012) (Philadelphia, PCRA appeal), *aff'g* March Term, 1993, No. 1925, *slip op.* (Phila. C.P. March 10, 2003) (death sentence reversed for ineffective assistance of penalty-phase counsel in failing to investigate and present available family background and mental health mitigating evidence).

○● Commonwealth v. Wright, No. 98 CR 1980 (Blair C.P. May 29, 2012) (Blair, PCRA) (incompetent to waive PCRA rights), *aff'd*, No. 655 Cap. App. Dkt., 78 A.3d 1070 (Pa. Oct. 30, 2013).

○ Commonwealth v. Fletcher, No. 626 Cap. App. Dkt., 43 A.3d 1289 (Pa. May 11, 2012) (per curiam) (granting the parties' *Joint Motion for Remand for Re–Sentencing* and remanding "for resentencing consistent with the parties' agreement" (life sentence to be imposed in exchange for waiving guilt appeals))

54. Commonwealth v. Weiss, No. CP-32-CR-218-199 (Ind. C.P. Mar. 19, 2012) (Indiana, PCRA remand) (penalty-phase counsel "were ineffective for failing to investigate and present mitigation evidence ranging from facts about his family history to medical, prison, and schooling records to expert testimony that may have cast doubt on his ability to control himself the night of the murder")

* Counsel's penalty-phase performance deficient where he "entered the case on a volunteer basis and without any prior experience working on a death penalty case.[, and] was nonetheless assigned to the penalty phase of the trial, where his inexperience quickly became apparent." Counsel could not recall whether he ever met with his client in preparation for the penalty phase; "did not hire an investigator or seek to retain a mitigation specialist; did not interview any family members other than Weiss's son, whom he thought he had talked with the day before the penalty hearing began; and made no attempt to gain access to his client's school, medical, or prior criminal records or to hire a psychological expert" until two weeks before the penalty phase.

* Counsel ineffectively prepared and presented mental health evidence: clinical psychologist had examined defendant only once, fifteen days before testifying, "without having spoken with others who knew Weiss, and having reviewed a very limited number of records." As a result, he erroneously "portrayed a man with a generally unremarkable social and medical history who was able to understand his actions and conform his

conduct to the requirements of the law," lacked a foundation from which to offer testimony to a reasonable degree of certainly concerning brain damage, and "could only speculate about how possible brain damage[ ] may have adversely affected Weiss and how alcohol consumption may have exacerbated the effects of that hypothetical brain damage." Furthermore, the doctor had been retained to assess only mitigating aspects of Weiss's psychology, amd so was unable to testify as to the defendant's favorable prospects for "function[ing] well in prison."

* Prejudice established because mitigating evidence was reasonably available, "includ[ing] testimony from family members . . . about his traumatic upbringing, the generally dysfunctional family dynamic, and the changes they witnessed in his conduct and personality following his 1996 motor vehicle accident," plus "myriad educational, social, and medical records from which an expert could have ascertained with a reasonable degree of scientific and psychological certainty that Weiss, on the night of the murder, suffered from frontal lobe brain injury that had a disinhibiting effect exacerbated by his consumption of alcohol; that he was nonetheless unable to appreciate the consequences of his actions, including further ingestion of alcohol; and that a person with his condition would indeed benefit from a structured environment." As well as establishing unenumerated mitigating circumstances under 42 Pa. C.S. § 9711(e)(8), this evidence would have supported finding the statutory mitigating circumstances that, at the time of the offense, the defendant was suffering from an extreme mental or emotional disturbance, (e)(2), and that his capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was substantially impaired, (e)(3).

- Commonwealth v. Dougherty, July Term, 1999, No. 0537 (Phila. C.P. Feb. 7, 2012) (Philadelphia, PCRA remand) (stipulated penalty relief: Commonwealth "agree[s] not to contest defendant's request for a new penalty hearing based upon ineffective assistance of trial counsel at the penalty hearing for failure to investigate and present certain mitigation evidence")

55. Commonwealth v. Rice, Nos. 9609-0623 1/1 & 9609-0624 1/1 (Phila. C.P. Jan. 27, 2012) (Philadelphia, PCRA) (stipulated penalty relief and imposition of life sentence)

- Moore v. Secretary, Pa. Dept. of Corrections, 457 Fed. Appx. 170 (3d Cir. Jan. 9, 2012) (Luzerne, habeas appeal) (finding *prima facie* violations of *Strickland* for counsel's ineffectiveness in failing to impeach one witness and failing to present another as an alibi witness and of *Brady* for suppressing exculpatory evidence, and remanding for evidentiary hearing)

* On *Brady* claim, Court states that "[w]here, as here, a petitioner diligently attempted to develop the factual basis of a claim in state court, see § 2254(e)(2), an evidentiary hearing is available if the evidence, as alleged, states a *prima facie* claim entitling the petitioner to habeas relief." Here, Moore sought and was denied an evidentiary hearing in state court and "proffers evidence which, if true, would state a *prima facie Brady* claim entitling him to habeas relief."

* The Court noted that "Moore alleged – and provided sworn affidavits in support of his allegations – that the prosecutors and FBI pressured and intimidated two critical witnesses (Ricardo Scott and Juanita Lancaster) into giving perjured testimony implicating Moore in the robbery, and intimidated Rush, an alibi witness, from testifying.

This is hallmark *Brady* material: not only would the defense have been able to undermine the credibility of Scott and Lancaster, but would also have been able to present testimony to corroborate Moore's alibi."

* Materiality was further demonstrated because "[i]n conjunction with [another witness's] shaky testimony, this would have gone a long ways towards neutralizing the prosecution's case."

* On *Strickland* claim, "[c]ounsel's failure to introduce evidence that contradicts a key witness's trial testimony is patently unreasonable"; counsel's performance unreasonable in failing to impeach one eyewitness with a "prior FBI statement [that] would have contradicted her subsequent trial testimony" and failing to present the testimony of a second eyewitness whose affidavit indicated that "he would have testified that [another person], and not Moore, was the shooter at the . . . robbery, which would have directly contradicted the prosecution's key witnesses."

* *Prima facie Strickland* violation for failing to investigate and present potential alibi witness where counsel knew, based on statements made by other witnesses, that the witness had been present at the residence after one of the robberies and had ridden in the vehicle with the robbers, which allegedly included Moore, but, counter to the allegedly false information contained in her FBI statement had indicated that she did not know any of the robbers and had never been introduced to anyone using Moore's Muslim name.

- Commonwealth v. Bardo, No. 2778 of 1992 (Luzerne C.P. Dec. 30, 2011) (Luzerne, PCRA) (penalty-phase counsel ineffective for failing to investigate and present available mitigating evidence).

56. Commonwealth v. Solano, No. 1114 of 2002, No. CP-39-CR-0001114-2002 (Lehigh C.P. Dec. 30, 2011) (Lehigh, PCRA) (penalty-phase counsel ineffective for failing to investigate and present available mitigating evidence).

57. Blystone v. Horn, Nos. 05-9002 & 05-9003, 664 F.3d 397, 81 Fed. R. Serv. 3d 370 (3d Cir. Dec. 22, 2011) (Fayette, habeas appeal) (affirming grant of new sentencing hearing as a result of counsel's ineffectiveness for failing to investigate and present mental health mitigating evidence and mitigating evidence present in competency evaluation ordered by the court and in available institutional records that counsel failed to obtain), *aff'g*, No. 99-CV-490, 2005 U.S. Dist. LEXIS 40922 (W.D. Pa. Mar. 31, 2005).

* competency evaluation requested by the defense was not mitigation evaluation, and counsel's failure to follow up on "red flags" of brain damage, including, *inter alia*, "high energy level and strong need for immediate gratification" was deficient performance.

* counsel failed to obtain military records showing, *inter alia*, that Blystone had hospitalization for "an injury near his right eyebrow" and prison medical records "indicat[ing] that Blystone saw medical personnel frequently [over a three-year period], with complaints of fainting, headaches, and vision problems"; the post-conviction psychiatrist "testified that these physical symptoms are indicative of organic brain damage."

* prison records also showed Blystone's positive institutional judgment and work record while incarcerated

* in post-conviction, Blystone "presented expert mental health testimony to establish . . .that he suffered from serious untreated brain damage and psychiatric disorders, all of which were aggravated by a history of poly-substance abuse."
* The defense post-conviction neuropsychologist "diagnosed Blystone, to a reasonable degree of medical certainty, with organic brain damage. She stated that physical indicia supporting a diagnosis of brain damage were present from Blystone's infancy: he was a frail baby that did not eat much and suffered from chronic high fever and seizures. The diagnosis of brain damage was further supported by Blystone's early malnutrition, abnormal sleep patterns, irritability, and hyperactivity as a young child. [The neuropsychologist] also diagnosed Blystone with bipolar disorder. She explained that this disorder is characterized by major depressive episodes – exemplified by Blystone's habit of sleeping in the closet, his withdrawn behavior, and his self-mutilation – alternating with periods of marked agitation – exemplified by Blystone's bouts of insomnia, frequent exaggerated stories, and abuse of drugs and alcohol. {The neuropsychologist] further diagnosed Blystone with borderline personality disorder, which is typified by unstable relationships, mood fluctuations, and severe agitation. Finally, [she] diagnosed Blystone with poly-substance abuse, which she believed exacerbated his other disorders.
* The defense post-conviction psychiatrist "diagnosed Blystone with borderline personality disorder, bipolar mood disorder, and organic personality disorder caused by physical injury to the brain.
* The psychiatrist "testified that he believed Blystone's brain damage was caused by the serious head injury he sustained at age four. Whether the damage was present at birth, as opined by [the neuropsychologist], or caused by early childhood head trauma, both experts agreed that it was irreversibly present after age four.

58. Thomas v. Beard, 2:00-cv-00803 (E.D. Pa. Dec. 20, 2011) (Philadelphia, habeas, remand) (uncontested conditional grant of penalty relief for penalty-phase ineffectiveness of counsel, following initial record-based grant of relief and remand from Third Circuit for evidentiary hearing).

59. Commonwealth v. Reyes, No 1388-93 (Del. C.P. Dec. 8, 2011) (Reyes II) (Delaware, PCRA) (death sentence reversed for ineffectiveness of appointed re-sentencing counsel for failing to read the post-conviction record of the case and present mitigating evidence that had been part of the basis for reversing the case in the initial post-conviction proceedings).

○ Commonwealth v. Walter, No. CP-18-CR-0000179-2003 (Clinton C.P. Nov. 21, 2011) (Clinton, PCRA) (granting new direct appeal as a result of counsel's ineffectiveness for failing to preserve appellate rights).

60. Steele v. Beard, 2:09-cv-00626, 830 F. Supp. 2d 49 (W.D. Pa. Nov. 16, 2011) (Washington, habeas) (exercising *de* novo review following inadequate state-court waiver bar, new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

○ Commonwealth v. Hairston, CC No. 200109056 (Allegheny C.P. Nov. 15, 2011) (Allegheny, PCRA) (restoration of right to direct appeal as a result fo counsel's ineffectiveness for failing to preserve appellate rights).

61. Commonwealth v. Spell, 611 Pa. 584, 28 A.3d 1274 (Pa. Oct. 7, 2011) (Lawrence, direct appeal) (death sentence vacated and life sentence imposed when the evidence was insufficient to prove torture, the sole aggravating circumstance advanced by the prosecution in the case)

* prosecution failed to prove the duration of the attack it claimed had constituted torture; while it was "possible the attack took hours, but it [was] equally possible it was complete in short order. . . . The Commonwealth's burden is not to prove what could have been – it must prove what actually was";

* prosecution presented no evidence that the victim was conscious when the defendant inflicted the wounds alleged to constitute torture; "[w]hile the jury is not obligated to conclude the first potentially fatal injury resulted in immediate death, it is clear that 'whether the victim was conscious when the wounds were received is one of the factors in determining whether the torture aggravator applies" (internal quotations omitted);

* prosecution presented "no testimony or evidence regarding the order of injuries"; because there was no evidence as to when in the series of blows the victim lost consciousness or died, or whether she was conscious or alive during the attack, it was possible she did not die until the end, but equally possible that she died at the outset; "[a]s the Commonwealth cannot establish which is true, there was insufficient evidence for the jury to determine the victim was conscious during the attack."

* "We are mindful that the Commonwealth's theories about the torturous nature of the crime are not inconsistent with the facts, but theories are not the equivalent of proof. There is insufficient evidence from the manner of death to indicate appellant sought to torture the victim. Neither is there actual evidence regarding the duration of appellant's attack, the order of the blows, or at what point in the attack the victim died. As such, there is insufficient evidence to support the aggravating circumstance of torture."

● Commonwealth v. Pelzer, No. CP-51-CR-1031752-1988 (Phila. C.P. Aug. 26, 2011) (Philadelphia, PCRA remand) (order granting new sentencing hearing as a result of ineffective assistance of counsel at the penalty phase), *aff'd*, No. 634 Cap. App. Dkt.

® Commonwealth v. Daniels, No. CP-51-CR-1031751-1988 (Phila. C.P. Aug. 26, 2011) (Philadelphia, PCRA remand) (order granting new sentencing hearing as a result of ineffective assistance of counsel at the penalty phase), *rev'd*, No. 632 Cap. App. Dkt. (Oct. 30, 2014).

62. Lewis v. Horn, No. 00-CV-0802 (E.D. Pa. July 26, 2011) (Philadelphia, habeas remand) (stipulated penalty relief: " upon consideration of Petitioner's application for a writ of habeas corpus . . . and the Respondents' notification that they have determined not to contest the grant of conditional relief as to Petitioner's sentence of death, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus is conditionally GRANTED AS UNCONTESTED as to Petitioner's sentence of death").

63. Commonwealth v. Howard, No. CP-51-CR-0304271-1988 (Phila. C.P. June 10, 2011) (Philadelphia, PCRA) (stipulation to penalty-phase relief).

○ Commonwealth v. Dougherty, No. 585 Cap. App. Dkt., 610 Pa. 207, 18 A.3d 1095 (Pa. Apr. 29, 2011) (Philadelphia, PCRA appeal) (per curiam) (reversing denial of PCRA relief; granting motion to recuse PCRA court; and remanding for appointment of new PCRA judge to decide PCRA petition).

64. Kindler v. Horn, No. 03-9011, 642 F.3d 398 (3d Cir. Apr. 29, 2011) (Philadelphia, habeas appeal, on remand from U.S. Supreme Court) (reaffirming grant of penalty relief on claims that the jury instructions and verdict sheet used in the penalty-phase of trial violated *Mills v. Maryland* and that penalty-phase counsel was ineffective for failing to investigate and present available mitigating evidence; retroactive application of fugitive forfeiture rule by Pennsylvania's state courts to bar consideration of Kindler's claims was not adequate to foreclose merits review in federal habeas proceedings).

65. Abu-Jamal v. Secretary, Department of Corrections, 643 F.3d 370 (3d Cir. Apr. 26, 2011) (Philadelphia, habeas appeal, on remand from U.S. Supreme Court) (reconsidering claim that the jury instructions and verdict sheet used in the penalty-phase of trial violated *Mills v. Maryland* in light of *Smith v. Spisak*, 558 U.S. 139 (2010) and determining that there was a *Mills* violation).

66. Breakiron v. Horn,, No. 08–9003, 642 F.3d 126 (3d Cir. Apr. 18, 2011) (Fayette, habeas appeal) (new trial granted on robbery charge that constituted the sole aggravating circumstance in the case; district court had granted new trial on the first-degree murder charge)

* failure to disclose impeachment information relating to jailhouse informant was material to robbery conviction as well as homicide conviction and both should have been reversed;

* counsel, whose strategy was to defend robbery charges by admitting theft, but challenging element that the theft occurred during the commission of the attack upon the decedent, was ineffective in failing to seek a lesser-included theft instruction, leaving the jury an all-or-nothing choice to acquit despite knowledge of the theft or convict of robbery;

* counsel was ineffective for failing to move to excuse jurors who had been exposed to the comment of another juror that Breakiron had a history of committing robberies.

67. Chester v. Horn, No. 99-CV-4111, 2011 WL 710468, 2011 WL 710470 (E.D. Pa. Feb. 28, 2011) (Bucks, habeas) (new trial granted on 1st degree murder charges per *Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005)).

®● Lambert v. Beard, No. 07-9005, 633 F.3d 126 (3d Cir. Feb. 7, 2011) (Philadelphia, habeas appeal) (new trial granted for violation of *Brady v. Maryland* where only unimpeached portion of key prosecution witness's testimony was his contention that he had consistently identified the same two individuals as having been involved in the

killing and the prosecution had suppressed a prior statement identifying a third person – not the defendant – as the killer), *rev'd and remanded*, Wetzel v. Lambert, 132 S. Ct. 1195 (U.S. Feb 21, 2012).

68. Commonwealth v. Fletcher (Lester), No. CP-51-CR-0709931-2001 (Phila. C.P. Feb. 7, 2011) (Philadelphia, PCRA) ("with the agreement of the Commonwealth, it is ORDERED that relief be granted to Petitioner as to [his claim of] ineffective assistance of counsel for failure to investigate, develop and present mitigating evidence at his penalty hearing").

- Lambert v. Beard, No. 07-9005, 626 F.3d 186 (3d Cir. Nov. 23, 2010) (Philadelphia, habeas appeal) (granting penalty-phase relief for violation of *Mills v. Maryland* where jury instruction and verdict slip created reasonable likelihood that the jury believed it must unanimously agree to the existence of a mitigating circumstance before it consider that circumstance as a basis to spare the defendant's life; court indicated that it will later issue an opinion as to whether guilt relief should be granted)

69. Commonwealth v. Sanchez (Ramon), No. 3652 of 2001 (Lehigh C.P. Nov. 16, 2010) (Lehigh, PCRA) (stipulated vacation of conviction for first-degree murder and reduction of conviction to third-degree murder, with aggregate term of twenty-five (25) to fifty (50) years imprisonment on all charges)

- Commonwealth v. Holston, No. CP-22-CR-0005167-2009 (Dauphin C.P Aug. 27, 2010) (Dauphin, pretrial) (quashed sole aggravating circumstance, 42 Pa .C.S. § 9711(d)(14), that "the killing resulted from or was related to [or] promote[d] the defendant's [drug] activities")
  * Evidence insufficient for the case to proceed capitally where the sole evidence the Commonwealth presented at the preliminary hearing in support of its sole aggravating circumstance was that the victim had met with Holston to purchase marijuana. There was no testimony at the preliminary hearing that the murder had been intended to further the defendant's alleged drug-dealing activities.
  * The court rejected the Commonwealth's argument that the "execution style" nature of the murder was an implicit statement to everyone on the street that the defendant was not a drug dealer to be trifled with, and so the killing was related to his drug activities.

- Commonwealth v. Hardcastle, June Term, 1982, Nos. 3288-3293 (Phila. C.P. Aug. 19, 2010) (Philadelphia, trial court) (death penalty barred on retrial after federal court finding that the Commonwealth had engaged in intentional racial discrimination in jury selection in the defendant's first trial in 1982; as a result of extensive delays caused by the Commonwealth's protracted appeals of several lower court findings of discrimination, important mitigating witnesses had died and mitigating evidence was no longer available to the defendant; under these circumstances, it would violate substantive due process to permit the Commonwealth to seek death on retrial).

70. Commonwealth v. Martin, Nos. 441, 442, & 443 Cap. App. Dkt., 607 Pa. 165, 5 A.3d 177 (Pa. Aug. 17, 2010) (Lebanon, PCRA appeal) (affirming trial court holding that trial

counsel was ineffective for failing to investigate and present available mitigating evidence)

* counsel's performance was deficient in limiting his mitigation investigation to interviewing the defendant, his parents, and his brother's fiancé, and guards from the Lebanon County Correctional Facility was deficient; counsel failed to contact any of the professionals or institutions who had rendered substance abuse and/or mental health treatment to the defendant, "even though Martin's mother specifically gave counsel a list of names and addresses of such professionals, along with the dates on which they provided treatment to Martin";

* counsel's performance was deficient in presenting only one mitigation witness – the defendant's mother – whose testimony was limited to defendant's age (21), 42 Pa. C.S. § 9711(e)(4), and "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense," 42 Pa. C.S. § 9711(e)(8);

* PCRA court's finding of deficient performance was supported by the record, which revealed that counsel could have presented mental health records and testimony that "established that, as early as age fifteen and continuing until after the murder . . . , Martin suffered from Chronic Post Traumatic Stress Disorder (PTSD) and Depression, due to the repeated sexual molestations by his uncle," that he had been prescribed psychiatric mediation for these disorders, that the treating physicians would have testified to these facts if intervierwed by counsel and called as witnesses at trial, and that asmental health testimony could have been presented that, as a result of "sexual advances the male victim made to Martin immediately prior to the murder," Martin was under the influence of extreme mental or emotional disturbance at the time of the murder and his capacity to conform his conduct to the requirements of the law was substantially impaired, 42 Pa. C.S. §§ 9711(e)(2) & (e)(3);

* Court rejects prosecution argument that counsel's failure to present mental health mitigating evidence was simply following the defendant's directive not to make his mental condition an issue, holding that the record supported the PCRA court's finding that while the defendant did not want to talk about his psychiatric condition with counsel, he never directed counsel not to investigate;

* Court rejects prosecution argument that counsel reasonably declined to present mental health testimony because he believed Lebanon County juries would consider it "one step above witchcraft" and because he believed that "a mother's love might be able to save Brad Martin''s life" and mental health testimony would dilute that testimony, holding that the record supported the PCRA court's determination that counsel's limited investigation into mental health issues "was the result of lack of attention rather than reasoned strategic judgment," where trial counsel was ignorant of Martin's particular mental health diagnosis or treatment until the day before the penalty hearing; when Martin's mother, herself, ,retrieved the records after discovering that trial counsel had never contacted Martin's doctors;

* "trial counsel's strategy of not presenting mental health mitigation evidence was unreasonable as a matter of law . . . where: (1) trial counsel is specifically alerted to mental health records that existed at the time of Martin's penalty hearing; (2) such records established that Martin had been diagnosed and treated for major mental disorders before, during, and after the time of the murder; (3) the mental disorders arose from the sexual abuse Martin suffered by his uncle; (4) the instant murder occurred after Goodman propositioned Martin for sex; and, (5) the mental health mitigation evidence

would have supported two additional mitigating factors not considered by the jury (namely, Sections 9711(e)(2) and (e)(3))";

* PCRA court's finding of prejudice was supported by the law and the record: "prejudice is demonstrated when it is probable that at least one juror would have accepted at least one mitigating circumstance and found that it outweighed the aggravating circumstance found"; here, the jury found no mitigation at all at trial and "both the volume and quality of th[e] mitigating evidence [that could have been presented was] significant" and "explicitly supported two mitigating circumstances not pursued by the defense, i.e., that Martin was under the influence of extreme mental or emotional disturbance at the time of the murder pursuant to 42 Pa.C.S. § 9711(e)(2); and that Martin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense, id. at § 9711(e)(3). Further, Martin's specific mental ailments of PTSD and depression arose from the repeated sexual abuse by his uncle, and the instant murder occurred after the male victim propositioned Martin for sex."

71. Commonwealth v. King, No. CP-38-CR-10898-1993 (Leb. C.P. July 23, 2010) (Lebanon, PCRA) (penalty-phase counsel "rendered ineffective assistance by failing to present any mitigating evidence whatsoever and by failing to investigate and present the readily available evidence of King's history of post-traumatic stress disorder, sexual abuse, child abuse, domestic violence, depression, and drug abuse")

* counsel's performance deficient when she did not begin to prepare for the penalty phase of trial until "sometime after closing arguments" and "admit[ted] that she spent only 1.4 hours on preparing for the . . . penalty phase"; counsel – a family law practitioner who had never tried a homicide and had only one previous criminal trial – did not know how capital sentencing proceeded and"postponed preparing for the sentencing phase until she learned that the sentencing phase would start right after the verdict";

* counsel "never sought school, employment, or criminal justice records" because "she did not think it would be relevant to develop a defense to the murder" and "did not reach out to or contact any witnesses to seek their attendance at the penalty phase"

* counsel failed to investigate and present available mitigating witnesses and evidence of abuse, including a former prosecutor who had prosecuted King's mother in a case in which the mother had "raked a broken beer bottle across King's forehead"; King's stepfather and neighbors, who testified to additional incidents of violence directed at King when her mother was drinking;

* counsel failed to investigate available mental health mitigating evidence, including evidence that she satisfied the diagnostic criteria for post-traumatic stress disorder, depression, polysubstance abuse, an eating disorder, and a personality disorder with borderline and dependent features," which collectively constituted an extreme mental or emotional disturbance at the time of the offense, significantly impaired her judgment, and significantly impaired her capacity to conform her conduct to the requirements of the law;

* prejudice found because "highly compelling mitigating evidence [was] available for presentation to the jury if only counsel had conducted a sentencing phase investigation . . . , we are satisfied that there is a reasonable probability that at least one juror would have struck a different balance and voted not to impose the death penalty."

72. Rollins v. Horn, 2010 WL 2676385, 386 Fed. Appx. 267 (3d Cir. July 7, 2010) (Philadelphia, habeas appeal) (penalty-phase counsel ineffective for failing to investigate and present available mitigating evidence), *aff'g,* No. 2:00-CV-01288-JCJ, 2005 WL 1806504, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. July 29, 2005)

* counsel's performance deficient when "Rollins' attorney did not begin to prepare mitigation evidence until 4:30 p.m. on the day before the penalty proceeding commenced, did not attempt to speak with Rollins' sister who had been present throughout the trial, and did not otherwise seek '[i]nformation concerning [Rollins'] background, education, employment record, mental and emotional stability, family relationships, and the like'" (quoting Bobby v. Van Hook, 558 U.S. 4, 7-8 (2009))

* court finds "a reasonable probability that the result of the sentencing proceeding would have been different if the jury had heard the evidence that was presented at the PCRA proceeding . . . [, including] accounts of abuse and tragedy in Rollins' childhood, as well as expert opinions about Rollins' mental deficiencies"; .considering the unpresented evidence, "'there is a reasonable probability that, but for counsel's unprofessional errors ...' one juror [would have] voted to impose a sentence of life imprisonment rather than the death penalty" (quoting Bond v. Beard, 539 F.3d 256, 285 (3d Cir. 2008)

* court holds that the state court denial of the penalty-phase ineffectiveness claim was an unreasonable application of Strickland v. Washington.

®● Commonwealth v. Elliott, April Term, 1994, Nos. 1091-1095 (Phila. C.P. May 28, 2010) (Philadelphia, PCRA remand) (new trial granted for admission of improper rebuttal testimony by the medical examiner and for ineffective assistance of counsel arising out of counsel's limited contact with client prior to trial), *rev'd*, 80 A.3d 415 (Pa. Nov. 21, 2013).

73. Commonwealth v. Smith (Wayne), No. 436 Cap. App. Dkt., 606 Pa. 127, 995 A.2d 1143 (Pa. May 27, 2010) (Delaware, PCRA appeal) (penalty-phase counsel ineffective for failing to investigate and present available mitigating evidence).

● Commonwealth v. Williams (Connie), Nos. 2000-01876 & 2000-02869 (Allegheny C.P. , Crim. Div., Apr. 15, 2010) (Allegheny, PCRA, *Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed), *aff'd*, No. 611 Cap. App. Dkt., 61 A.3d 979 (Pa. Jan. 23, 2013).

74. Wilson (Zachary) v. Beard, No. 06-9004, 589 F.3d 651 (3d Cir. Dec. 23, 2009) (affirming district court's grant of a new trial for violation of *Brady v. Maryland* when the prosecution had suppressed information that would have impeached three separate prosecution witnesses, including one witness's "prior crimen falsi conviction for impersonating a police officer"; a second witness's "history of mental health problems and psychiatric interventions, including but not limited to the fact that he was taken to the Emergency Health Services Center at Hahnemann Hospital by a detective from the prosecutor's office the day after he testified at Wilson's trial"; and the fact that the prosecuting police officer had a "history of providing [a third witness] with interest-free loans of undisclosed amounts during the time that [witness] acted as a police informant"),

aff'g, No. 05-CV-2667, 2006 WL 2346277, 2006 U.S. Dist. LEXIS 56115 (E.D. Pa. Aug. 9, 2006).

○ Commonwealth v. Sanchez (Alfonso), No. CP-09-CR-0001136-2008 (Bucks C.P. Dec. 8, 2009) (Bucks, PCRA) (*nunc pro tunc* restoration of right to direct appeal as a result of counsel's ineffectiveness for failing to preserve appellate rights)

® Commonwealth v. Burno, No. CP-39-CR-0003637-2003 (Lehigh C.P. Sept. 30, 2009) (Lehigh, post-sentence motions) (new trial granted for prosecutorial misconduct and ineffective assistance of counsel where prosecutor argued, without objection by defense, that evidence of prior bad acts, which were admissible for other limited purposes, reflected the defendant's bad character and argued that the defendant's actions in this case were "in conformity" with those bad acts; prosecutor also improperly personally vouched for some of the prosecution's evidence), *rev'd*, No. 599 Cap. App. Dkt., 46 EAP 2009, 2014 WL 2722758 (Pa. June 6, 2014)

* "[B]y repeatedly interjecting into her closing argument the claim that Defendant was not a 'good family man' on the basis of other 'bad acts,' the prosecutor overreached and introduced impermissible considerations into the jury's fair and impartial evaluation of the evidence in this matter. As a consequence, the jury was left to infer that because Defendant had engaged in other wrongs at other times, he was a bad man and likely acted 'in conformity' with his previous misdeeds when he participated in the killings . . . ."

* The court found "[s]imilarly troubling . . . the prosecutor's apparent personal vouching for the credibility of certain evidence in urging the jury to disregard Defendant's explanation of events, particularly when she stated that '[t]he coward shot him while he was down on the ground. I know that. Fact.'" The Court found that "the prosecution's argument ventured onto prohibited terrain as an improper expression of 'a personal belief as to the defendant's guilt or innocence' and an unwarranted personal assessment of Defendant's credibility," in violation of the ABA Standards for Criminal Justice, The Prosecution Function § 5.8.

* Counsel ineffective for failing to object to these arguments, in spite of clear violation; court finds "no rational basis to explain the failure to object to the prosecutor's improper argument."

75. Simmons v. Beard, No. 05-9001, 581 F.3d 158 (3d Cir. Sept. 11, 2009) (Cambria, habeas appeal) (affirming district court's grant of a new trial for the cumulative effect of multiple instances of the prosecution withholding exculpatory evidence: "the picture of what Simmons's trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened [and t]he two key witnesses presented by the state would have been substantially less credible"), *aff'g*, 356 F. Supp. 2d 548 (W.D. Pa. Feb. 22, 2005).

76. Commonwealth v. Johnson (Raymond), No 3849/99 (Berks C.P., Crim. Div. Aug. 14, 2009) (Berks, PCRA, remand, new trial) (reinstating guilt relief and accepting *nolo contendre* plea to third degree murder), following partial reversal and remand, 600 Pa. 329, 966 A.2d 523 (Pa. Mar. 18, 2009) (partial reversal and remand)

® Commonwealth v. Gibson (Ronald), Jan. Term 1991, No. 2809 (Phila. C.P. July 17, 2009) (Philadelphia, PCRA remand) (following remand from Supreme Court nof Pennsylvania to determine issue of prejudice from trial counsel's deficient performance in failing to investigate and present available mitigating evidence, PCRA court finds prejudice), *reinstating penalty relief,* Jan. Term 1991, No. 2809 (Phila. C.P. Apr. 26, 2006), following reversal and remand at No. 331 Cap. App. Dkt., 597 Pa. 402, 951 A.2d 1110 (Pa. July 24, 2008), *rev'd* No. 596 Cap. App. Dkt., 610 Pa. 332, 19 A.3d 512 (Pa. May 12, 2011).

77. Albrecht v. Beard, No. 2:99-cv-99-1479, 636 F. Supp. 2d 468 (E.D. Pa. July 14, 2009) (Bucks, habeas remand) (reversing death sentence for ineffective assistance of appellate counsel in failing to object to jury instructions that created the false impression that the jury had to unanimously agree to the existence of a mitigating circumstance before jurors could consider that circumstance in their sentencing deliberations).

78. Hardcastle v. Horn, No. 07-9007, 332 Fed. Appx. 764, 2009 WL 1683335, 2009 U.S. App. LEXIS 13026 (3d Cir. June 17, 2009) (Philadelphia, habeas appeal) (affirming District Court's grant of a new trial under *Batson v. Kentucky*; clear error standard of review continues to apply to factfindings of discrimination, despite age of the case; lower court's finding that the prosecutor had discriminatorily exercised peremptory challenges to strike six black jurors on the basis of race was supported by the record and not clearly erroneous), *aff'g*, 521 F. Supp. 388 (E.D. Pa. 2007).

79. Commonwealth v. Smith (James), No. CP-51-CR-0717891-1983, July Term, 1983, No. 1789 (Phila. C.P. June 16, 2009) (Philadelphia, PCRA) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

80. Santiago v. Beard, No. 04-1669 (W.D. Pa. June 2, 2009) (Allegheny, habeas) (Santiago II) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence; agreement that defendant is to be resentenced to life imprisonment).

81. Commonwealth v. Freeman, Oct. Term, 1996, Nos. 886 (Phila. C.P. May 29, 2009) (Philadelphia, PCRA) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence and plea agreement to double life sentence; resentenced to life).

82. Commonwealth v. Washington (Vinson), No. 352 Cap. App. Dkt. (Pa. Mar. 20, 2009) (Philadelphia, PCRA remand) (granting Joint Motion to Remand to Implement Stipulation by the Parties, approving stipulated penalty relief).

83. Commonwealth v. Washington (Vinson), No. 353 Cap. App. Dkt. (Pa. Mar. 20, 2009) (Philadelphia, PCRA remand) (granting Joint Motion to Remand to Implement Stipulation by the Parties, approving stipulated penalty relief).

● Judge v. Beard, No. 02-CV-6798, 611 F. Supp. 2d 415 (E.D. Pa. Mar. 13, 2009) (Philadelphia, habeas) (granting motion for partial summary judgment for penalty-phase relief for violation of *Mills v. Maryland* where jury instruction and verdict slip created reasonable likelihood that the jury believed it must unanimously agree to the existence of a mitigating circumstance before it consider that circumstance as a basis to spare the defendant's life; trial counsel was ineffective for failing to object to the instruction because – even though *Mills* had yet to be decided – the issue was already "percolating" in the courts; appellate counsel was ineffective for failing to raise the issue on direct appeal, after *Mills* had already been decided).

84. Commonwealth v. Marrero, Nos. 645 A & B of 1994 (Erie C.P. Jan. 8, 2009) (Erie, PCRA, *Atkins*) (based upon Commonwealth's concession that defendant has mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

● Breakiron v. Horn, 2:00-cv-00300-NBF, 2008 WL 4779296 (W.D. Pa. September 24, 2008) (Fayette, habeas) (new trial granted for violation of *Brady v. Maryland* where "the prosecution withheld favorable evidence that could have been used to impeach the testimony of an important prosecution witness" upon whom the "the prosecution relied . . . to support its case of first degree murder and to challenge Breakiron's defense that he was guilty of a lesser degree of murder"; court finds that "the withheld evidence resulted in a first degree murder conviction that is unworthy of confidence"), *denial of new trial on robbery charge rev'd*, 642 F.3d 126 (3d Cir. Apr. 18, 2011).

●®○ Commonwealth v. Banks, Nos. 1290, 1506, *et seq.* of 1982 (Luz. C.P. Sep. 8, 2008) (Luzerne, PCRA hearing following remand, competency to be executed) (incompetent to be executed),[1] *rev'd and remanded*, No. 578 Cap. App. Dkt. (Pa. Aug. 27, 2009), *new finding of incompetency* (Luz. C.P. May 17, 2010).

●® Kindler v. Horn, Nos. 03-9010 & 03-9011, 542 F.3d (3d Cir. Sep. 3, 2008) (Philadelphia, habeas appeal) (affirming district court's grant of penalty-phase habeas relief under *Mills v. Maryland* and extensive Third Circuit precedent where jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance; reversing district court's denial of relief for penalty-phase ineffectiveness assistance of counsel in failing to investigate and present mitigating evidence relating to defendant's mental and emotional disturbance, brain damage, and history of abuse and neglect), *aff'g in part and rev'g in part*, 291 F. Supp. 2d 323 (E.D. Pa. Sept. 22, 2003), *cert. granted*, Beard v. Kindler, *vacated and remanded by*, Beard v. Kindler, 558 U.S. 53 (U.S. Dec. 8, 2009), *relief reinstated*, 642 F.3d 398 (3d Cir. Apr. 29, 2011).

[1] The lower court opinion had reinstated the prior finding of incompetency to be executed at Commonwealth v. Banks, Nos. 1290, 1506, *et seq.* of 1982 (Luz. C.P. Feb. 27, 2006) after that finding had been *rev'd & remanded*, 596 Pa. 297, 943 A.2d 230 (Pa. Dec. 28, 2007).

85. Bond v. Beard, Nos. 06-CV-9002 & 06-CV-9003, 539 F.3d 256 (3d Cir. Aug. 20, 2008) (Philadelphia, habeas appeal) (defense counsel, who "waited until the eve of the penalty phase to begin their preparations," ineffective for failing to investigate and present substantial mitigating evidence), *aff'g*, No. 02-cv-08592-JF, 2006 WL 1117862, 2006 U.S. Dist. LEXIS 22814 (E.D. Pa. Apr. 24, 2006).

* Counsel's deficient performance included a failure to "inquire meaningfully into Bond's childhood and mental health"; to "obtain readily available school records portraying a much troubled youth"; to "seek medical records or conduct a meaningful inquiry into Bond's family life"; and "to give their consulting expert sufficient information to evaluate Bond accurately." Counsel's conduct not excused by the fact that neither Bond nor his family members volunteered background mitigating information: "Neither Bond nor his family had a duty to instruct counsel how to perform such a basic element of competent representation as the inquiry into a defendant's background."
* Counsel's deficient investigation violated the prevailing norms of professional conduct as set forth in Guideline 11.4.1 of the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases.
* Pennsylvania Supreme Court's application of Strickland to hold that counsel performed adequately was objectively unreasonable and "rest[ed] in part on the unreasonable factual determination that trial counsel began meaningful preparations for the penalty phase at a point prior to the eve of the penalty phase . . . [where t]he record includes no evidence to that end."
* State court determination that counsel made "strategic" decision to limit presentation of mitigating evidence objectively unreasonable "when they failed to seek rudimentary background information about Bond."
* Prejudice established where counsel who obtained "school and medical records, and followed up by appropriate consultations with experts . . . could have presented substantial expert evidence" in support of statutory mitigating circumstances that Bond was under the influence of an extreme emotional or mental disturbance at the time of the offense and had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, as well as unenumerated mitigating circumstances "of the abuse and neglect Bond suffered during his childhood."
* State court fact-finding that prosecution had "thoroughly refuted" the defense expert testimony rested upon an unreasonable factual determination where close review of the state court record revealed "no such refutation"; prosecution neuropsychologist challenged ultimate conclusion that Bond suffered from organic brain damage, but "did not contest the testimony of experts and family members indicating that Bond suffered from psychological problems"; "did not discuss [the psychiatric] testimony, including [the] PTSD diagnosis"; and "the Commonwealth introduced no evidence contradicting [the] PTSD diagnosis."
* Habeas court finds that "the paltry testimony at the penalty phase hearing . . . brooks no comparison" to and "was upgraded dramatically in quality and quantity" by "the vastly expanded testimony provided by friends and family members at the PCRA hearing." "Had [trial counsel] investigated Bond's background and mental health, they would have presented a starkly different picture of Bond to the jury at the penalty phase than the one they actually presented."

86. Commonwealth v. Sattazahn, Nos. 509-11 Cap. App. Dkt., 597 Pa. 648, 952 A.2d 640 (Pa. July 24, 2008) (Berks, PCRA appeal) (penalty phase counsel ineffective for failing to investigate and present mitigating evidence relating to the defendant's background, upbringing, and mental health, including mental health diagnoses and "extreme evidence of chronic brain damage"), *aff'g*, No. 2194-89, 2006 Pa. Dist. & Cnty. Dec. LEXIS 104 (Berks C.P., Crim. Div., June 23, 2006).

* Court affirms lower court determination that "the record was replete with 'red flags' of brain damage that indicated the need for neuropsychological evaluations" and that, "[i]n light of the extensive medical and scientific evidence presented in the PCRA petition, and subsequent testimony at hearings regarding [Appellee's] neglectful parenting, social isolation and impaired social development, significant educational impairments and learning disabilities, odd risk-taking behaviors, organic brain damage, mental illness and other potential statutory mitigators, we find that [Appellee's] counsel, . . . failed to fulfill his obligation to explore all avenues that might lead to mitigating circumstances."

* Penalty-phase deficient performance related to brain damage included counsel's failure to investigate and present "evidence of [Sattazahn's] markedly poor performance in school, including his demonstration of poor attention and concentration; difficulty functioning; poor grades and ranking in the bottom ten percent of his classes; repeating of three grades (kindergarten, second, and seventh grades); eventual placement in a special class; disengagement from ordinary social activities; and departure from school at age seventeen, while in the ninth grade. The defense neuropsychologist and psychiatrist testified that the record "reflected a long history of learning disabilities and abnormal social development, thus presenting many 'red flags' suggesting cognitive impairment or organic brain defect.." Both experts testified that Sattazahn suffered from brain impairments, including cognitive disorder; moderate to severe attention deficit hyperactivity disorder; chronic brain dysfunction; Aspergers syndrome or an Aspergers-like condition; and pervasive developmental and schizotypal personality disorders.

* "[T]he neuropsychologist explained that: [Appellee's] overall brain dysfunction is significant enough to have major impacts on his ability to function and how he comports himself within the community, and ... such impacts [and] effects from this brain damage [are] of great significance [in] understanding this person's behavior and how he functions in life."

* Both doctors explained the impact of the brain damage "in terms of impaired impulse control, susceptibility to influence of others, and disorganized behavior in times of stress. Both also related their findings to the mitigating circumstances entailing severe mental or emotional disturbance and lack of capacity to understand the criminality of conduct and conform one's behavior to requirements of the law."

87. Commonwealth v. Miller, No. 460 Cap. App. Dkt., 597 Pa. 333, 951 A.2d 322 (Pa. July 23, 2008) (Dauphin, *Atkins* PCRA appeal) (affirming lower court's determination that defendant's death sentence must be reversed because of his mental retardation; PCRA court did not abuse discretion is refusing to recuse herself based upon comments she made at the time of trial that her awareness of facts not of record would prevent her from being fair *to the defendant* if she were required to serve as factfinder on issue of guilt or

innocence), *aff'g*, Nos. 2775 & 2787 C.D. 1992 (Dauph. C.P., Crim. Div., Aug. 24, 2007).

- Commonwealth v. Washington (Vinson), March Term, 1994, Nos. 1032-1037 (Phila. C.P., Crim. Div., July 15, 2008) (Philadelphia, PCRA remand) (following remand for evidentiary hearing, Commonwealth stipulates to penalty-phase relief).

- Commonwealth v. Washington (Vinson), March Term, 1994, No. 1044 (Phila. C.P., Crim. Div., July 15, 2008) (Philadelphia, PCRA remand) (following remand for evidentiary hearing, Commonwealth stipulates to penalty-phase relief).

88. Commonwealth v. Williams (Kenneth), Nos. 430, 431 Cap. App. Dkt., 597 Pa. 109, 950 A.2d 294 (Pa. June 17, 2008) (Lehigh, PCRA remand) (penalty-phase relief for ineffectiveness of all prior counsel in failing to adequately present claims of trial counsel's ineffectiveness for failing to investigate and present mental health mitigating evidence), *aff'g*, No. CR-981-1984 (Lehigh C.P. Oct. 17, 2006).

- Commonwealth v. Champney, No. CR-1243-1998 (Schuylkill C.P. June 3, 2008) (Schuylkill, PCRA) (new trial granted for combination of multiple instances of counsel's ineffectiveness, the failure to suppress a statement obtained in violation of the defendant's *Miranda* rights, and a *Brady* violation, and improper prosecutorial comment on the defendant's right to remain silent; the death sentence vacated under Commonwealth v. McNeil 545 Pa. 42, 679 A.2d 1253 (1996) because of counsel's ineffectiveness in failing to object to the presentation of victim-impact evidence for an offense that pre-dated the legislative amendment permitting consideration of such evidence)
  * counsel was ineffective when she moved to suppress statements given by defendant on the meritless grounds that the statements were involuntary but failed to suppress under *Miranda* when police had initiated questioning and obtained *Miranda* waivers after defendant had invoked right to counsel;
  * the prosecution violated *Brady* when it failed to disclose that it had changed its position regarding a witness's parole from having vehemently opposed the witness's first parole application on the grounds that he was a suspect in the murder to not opposing his second application after that witness had promised to cooperate with the investigation of defendant; the nondisclosure was particularly misleading because the Commonwealth had elicited testimony from the witness that the prosecution had opposed his first parole application, but presented no testimony regarding its position on the second parole request;
  * counsel was ineffective in failing to subpoena that witness's parole file even though a police report that had been turned over to counsel contained a reference to the witness's offer to help the prosecution if it did not oppose his second parole application, and in failing to impeach the witness with this information;
  * counsel was ineffective for also failing to impeach that witness with police reports stating that the witness "seemed to be . . . on a fishing expedition" for information about the case;
  * counsel was ineffective for failing to obtain the assistance of a forensics expert who could have testified based upon the location of the wound and blood spatter

evidence that the shooting could not have occurred as described by that same witness, supposedly based upon a confession to him from the defendant; if the shot had been fired from the location described by that witness, the victim's body would have been lying with his head in the opposite direction; the obvious implication was that the witness was lying about the defendant's supposed confession;

* counsel was ineffective for failing to object to the prosecution's impermissible comment on the defendant's post-arrest silence in response to questioning by the police;

* the court finds that "the Commonwealth's evidence against [the defendant] would have been substantially weakened" but for the deficiencies in counsel's representation at trial, that each of trial counsel's guilt-stage failures involved issues that were critical to the prosecution's case, and that each created a reasonable probability that the outcome of the trial would have been different.

○ Commonwealth v. Fuentes-Flores, 5 Pa. D. & C. 5th 50, 2008 WL 4491525 (Lanc. C.P. May 1, 2008) (Lancaster, pretrial) (quashed sole aggravating circumstance, 42 Pa .C.S. § 9711(d)(7), because murder by stabbing did not place neighbors in grave risk of death; subsequent arson to cover up the murder did not occur "in the commission of" the murder).

89. Commonwealth v. Ramos, Jan. Term, 1999, No. 0089 (Phila. C.P. Apr. 17, 2008) (Philadelphia, PCRA) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence and agreement not to seek capital resentencing; resentenced to life)

® Morris v. Beard, No. 01-3070 (E.D. Pa. Apr. 7, 2008) (Philadelphia, habeas) (new trial granted under Cuyler v. Sullivan, 446 U.S. 335 (1980) for trial counsel's actual conflict of interest when counsel represented Petitioner's brother in a civil case seeking monetary damages at the same time that he was defending Petitioner in this capital case, even though the brother had been identified by several witnesses as the perpetrator and identification had been the primary contested issue at trial), *rev'd and remanded for evidentiary hearing to determine whether petitioner suffered prejudice from the conflict*, 633 F.3d 185 (3d Cir. Jan. 26, 2011), time-served plea negotiated to third-degree murder.

90. Commonwealth v. Carson, Feb. Term, 1994, Nos. 2837-2840, May Term, 1994, Nos. 1841-1848 (Phila. C.P. Apr. 1, 2008) (Philadelphia, PCRA remand) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

●® Abu-Jamal v. Horn, Nos. 01-9014, 02-9001, 520 F.3d 272 (3d Cir. Mar. 27, 2008) (Philadelphia, habeas appeal) (affirming District Court's grant of a new sentencing hearing under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *aff'g,* 2001 WL 1609690, 2001 U.S. Dist. LEXIS 20812 (E.D. Pa. Dec. 18, 2001), *vacated and remanded*, 130 S. Ct. 1134 (U.S. Jan. 19, 2010), *relief reinstated*, 643 F.3d 370 (3d Cir. Apr. 26, 2011).

91. Holland v. Horn, No. 01-9002, 519 F.3d 107 (3d Cir. March 6, 2008) (Philadelphia, habeas appeal) (adopting reasoning of the District Court granting a new sentencing hearing as a result of counsel's ineffectiveness in failing to obtain the appointment of a mental health expert and present available mental health mitigating evidence, and for a violation of due process resulting from the denial of the denial of the right to present expert mental health testimony under *Ake v. Oklahoma*), *aff'g,* 150 F. Supp. 2d 706 (E.D. Pa. Apr. 25, 2001).

92. Commonwealth v. Rainey, Apr. Term, 1990, Nos. 1967-1972 (Phila. C.P. Mar. 3, 2008) (Philadelphia, PCRA) (stipulated penalty-phase relief).

93. Commonwealth v. Whitney, Nov. Term, 1981, Nos. 1416-1429 (Phila. C.P. Jan. 16, 2008) (Philadelphia, PCRA, *Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

94. Commonwealth v. Hanible, April Term, 1999, No. 0902 (Phila. C.P. Jan. 8, 2008) (Philadelphia, PCRA) (stipulated penalty-phase relief).

®● Saranchak v. Beard, No. 1:CV-05-0317, 538 F. Supp. 2d 847 (M.D. Pa. Jan. 4, 2008) (M.D. Pa. Jan. 4, 2008) (Schuylkill, habeas) (new trial for counsel's ineffectiveness in failing to investigate and present diminished capacity defense and in failing to move to suppress statements made to police and a Children & Youth Services worker in violation of Miranda v. Arizona), *rev'd* Saranchak v. Beard, 616 F.3d 292 (3d Cir. Aug. 3, 2010), *penalty relief granted*, No. 12-9002, 802 F.3d 579 (3d Cir. Sept. 14, 2015).

* counsel's performance at trial was deficient in failing to investigate available evidence of petitioner's psychiatric impairments and chronic alcoholism and for failing to present mental health evidence that could have reduced the degree of guilt from first-degree murder to third-degree murder; prejudice was proven because there was a reasonable probability that had counsel presented this evidence, the court would have found that petitioner lacked the specific intent to kill and convicted petitioner of the lesser charge of third-degree murder

* trial counsel also was ineffective for failing to suppress separate statements to police and to a Children & Youth Service worker that were obtained in violation of petitioner's Miranda rights; state court's finding that police continued to interrogate petitioner after he had invoked his right to counsel was supported by the record and would not be disturbed;

* state court unreasonably determined that petitioner had waived that issue by agreeing to plead guilty to murder generally and proceeding to a degree of guilt hearing – in Pennsylvania, "pleading guilty generally to a murder indictment . . . does not thereby waive [a defendant's] right to object to the admission of improper evidence which will bear on the degree of guilt and the punishment to be imposed"; counsel's misunderstanding of the law – evidenced by his erroneous belief that petitioner's desire to proceed to a degree of guilt hearing waived any objection to the admissibility of the improperly obtained statements – did not constitute "a reasonable basis for failing to seek suppression of improper evidence at the degree of guilt phase";

* "In light of Attorney Watkins' clear misunderstanding of the law regarding a general guilty plea, the court concludes that Attorney Watkins' decision to withdraw the

suppression motion based on Saranchak's desire to plead guilty to criminal homicide generally and to proceed to a degree of guilt hearing falls below the objective standard of reasonableness" and the state court determination that counsel's performance was not deficient was an unreasonable application of clearly established federal constitutional law;

* Counsel's performance also was deficient in failing to suppress incriminating statements he made CYS caseworker, while in police custody, without having been advised of his Miranda rights and without to his attorney, in violation of his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to legal representation;

* When CYS caseworker who visited petitioner in prison – ostensibly to to discuss custody issues relating to petitioner's children – asked him open-ended questions about the offense and testified against him in the guilt and penalty phases of trial, she "became . . . a state agent "recounting unwarned statements made in a postarrest custodial setting"; in that setting, the questioning constituted interrogation and violated Miranda.

95. Commonwealth v. Cooper (Willie), No. 462 Cap. App. Dkt., 596 Pa. 119, 941 A.2d 655 (Pa. Dec. 28, 2007) (Philadelphia, direct appeal) (affirming trial court's reversal of death sentence for ineffective assistance of penalty-phase counsel who improperly injected biblical argument into the case and urged the jury that the biblical admonition of "an eye for an eye" was limited to cases involving the killing of a pregnant woman, but his client had killed a pregnant woman), *aff'g*, Aug. Term, 2002, No. 840 1/1 (Phila. C.P. June 14, 2004).

- Hardcastle v. Horn, No. 98-CV-3028, 521 F. Supp. 2d 388 (E.D. Pa. Oct. 19, 2007) (Philadelphia, habeas remand) (new trial granted for violation of *Batson v. Kentucky* where prosecutor exercised 13 of 15 peremptory challenges against minority jurors, struck 12 of 14 black jurors and the only Hispanic juror to survive challenges for cause, and the jury ultimately empaneled consisted of 11 white jurors, one black juror and two white alternates, and the prosecution's explanations for six of the strikes against black jurors were found to be pretextual), *aff'd*, No. 07-9007, 332 Fed. Appx. 764, 2009 WL 1683335, 2009 U.S. App. LEXIS 13026 (3d Cir. June 17, 2009).

96. Baker (Lee) v. Horn, No. 96-CV-0037 (E.D. Pa. Sept. 6, 2007) (Philadelphia, habeas) (stipulated grant of a new trial on all charges without admission of any particular constitutional error), non-capital retrial.

- Commonwealth v. Miller, Nos. 2775 & 2787 C.D. 1992 (Dauph. C.P., Crim. Div., Aug. 24, 2007) (Dauphin, PCRA remand, *Atkins*) (as a result of defendant's mental retardation, death sentences vacated under *Atkins v. Virginia* and consecutive life sentences imposed).

97. Commonwealth v. Pirela, No. 448 Cap. App. Dkt., 593 Pa. 312, 929 A.2d 629 (Pa. Aug. 20, 2007) (per curiam) (Philadelphia, PCRA appeal, *Atkins*) (affirming PCRA court's grant of relief under *Atkins* with a one sentence parenthetical citation to the proposition that "when Post Conviction Relief Act court findings are supported by substantial evidence and legal conclusion is not clearly erroneous, determination petitioner is mentally retarded and cannot be executed is affirmed").

®● Commonwealth v. DeJesus, Nov. Term, 1997, No. 350 1/1 (Phila. C.P. Aug. 10, 2007) (Philadelphia, PCRA, *Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed), *rev'd & remanded for further proceedings*, Nos. 546, 547 Cap. App. Dkt., 58 A.3d 62 (Pa. Dec. 14, 2012), relief granted, Commonwealth v. DeJesus, No CP-51-CR-1103501-1997 (Phila. C.P. Jan. 8, 2018).

98. Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. Aug. 3, 2007) (Philadelphia, PCRA remand) (stipulated relief for direct appeal counsel's ineffectiveness in failing to investigate and present claim that trial counsel was ineffective in failing to investigate and present available mitigating evidence; appellate counsel's affidavit indicated that he believed he was limited to raising record-based claims on appeal).

® Commonwealth v. Weiss, No. 218 Crim 1997 (Ind. C.P. July 31, 2007) (Indiana, PCRA) (new trial granted for "overwhelming" violation of *Brady v. Maryland* when prosecution withheld from the defense impeachment information relating to the testimony of three prison informants, as well as for court ruling denying a defense motion to permit trial counsel to withdraw from the case because of an actual conflict of interest arising out of counsel's simultaneous representation of one of these informants), *rev'd on conflict of interest and remanded for further factfinding on prejudice on Brady claim*, No. 543 Cap. App. Dkt., 604 Pa. 573, 986 A.2d 808 (Pa. Dec. 29, 2009)

* court finds it "crystal clear" that the prosecution "failed to disclose information to the petitioner's attorney to aid him" in the defense and "find[s] the Commonwealth's conduct outrageous";

* court states that "[f]or [the trial prosecutor] to testify at the PCRA hearing in this matter that in his opinion credibility of the Commonwealth's key witnesses that identified the defendant Ronald Weiss in this matter was not really an important issue is beyond belief";

* the PCRA court held that defense counsel's representation of both the defendant and a prosecution witness at the time of the trial "obviously was an actual conflict" of interest, and found it "most disturbing" that the trial court denied the defense petition to be removed from the case because of this conflict without conducting a hearing or making any record regarding the defense request.

99. Wallace v. Price, Nos. 03-9002 & 03-9003, 243 Fed. Appx. 710, 2007 WL 1954047, 2007 U.S. App. LEXIS 16095 (3d Cir. July 6, 2007) (Washington, habeas appeal) (non-precedential) (revised opinion affirming in all respects District Court judgment granting new trial for violation of Confrontation Clause and due process right to present a defense where trial court refused to permit defense to present statement by Commonwealth's star witness confessing that he, and not Wallace, had shot the victim, or to cross-examine that witness with this statement).

®● Lark v. Beard, 2:01-cv-01252, 495 F. Supp. 2d 488 (E.D. Pa. July 3, 2007) (Philadelphia, habeas) (new trial granted under *Batson v. Kentucky* for prosecution's discriminatory exercise of peremptory challenges when petitioner presented evidence of a

prima facie Batson violation and the prosecutor was unable to produce any race-neutral reasons for his strikes of three African-American jurors), *rev'd & remanded*, Lark v. Secretary Pennsylvania Dept. of Corrections, 645 F.3d 596 (3d Cir. June 16, 2011), *relief reinstated*, Lark v. Beard, No. 2:01-cv-01252, 2012 WL 3089356 (E.D. Pa. July 30, 2012), *aff'd*, 566 Fed. Appx. 161 (3d Cir. May 6, 2014).

100. Commonwealth v. Gibson (Jerome), Nos. 378, 380, 467 Cap. App. Dkt., 592 Pa. 411, 925 A.2d 167 (Pa. June 26, 2007), *aff'g* Commonwealth v. Gibson (Jerome), Nos. 5119, 5119-001/1994 (Bucks C.P., Crim. Div. Nov. 26, 2004) (Bucks, PCRA *Atkins* appeal) (affirming lower court's determination that as a result of defendant's mental retardation, death sentence must be vacated under *Atkins v. Virginia*) (resentenced to life).
* court holds that for death penalty purposes, "the standards set forth in the DSM-IV and by the AAMR are appropriate measures" of mental retardation;
* court recognizes that it is "possible to diagnose mental retardation in individuals with IQ scores between 71 and 75, if they have significant deficits in adaptive behavior"
* where various experts had testified that the defendant's IQ was within the 70 to 75 range, the defendant had been evaluated with a formal assessment instrument called the Adaptive Behavior Assessment System and clinical evaluations that showed adaptive deficits that met the DSM/AAMR diagnostic criteria, and evidence showed onset prior to age 18, the lower court's finding of mental retardation was supported by the record.

- Morris v. Beard, No. 01-3070, 2007 WL 1795689, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007) (Philadelphia, habeas) (death sentence reversed for ineffective assistance of counsel in penalty phase for failing to investigate and present available mitigating evidence; new sentencing hearing also granted under *Mills v. Maryland* where jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).
  * court relies upon 1989 ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases for national norm of professional conduct in effect at time of 1983 trial that "counsel had a duty to ensure that all reasonably available mitigating evidence is presented to the jury in the most effective possible way"; counsel's performance was deficient when he presented only petitioner and his mother in mitigation and elicited from his mother only the date of petitioner's birth; that he had been an psychiatric inpatient in January 1977; that he five brothers and a sister with whom he had no problems; that his father was killed one year prior to trial; that petitioner was the father of a child; and that his skin turned a bluish tint when he becomes agitated.
  * the fact that counsel presented" some mitigating evidence" did not render his investigation and presentation reasonable when that evidence "bore little resemblance to the picture of Morris's childhood and mental condition encompassed in the mitigating evidence that counsel failed to discover"
  * counsel's deficient performance was prejudicial where a proper investigation of Morris's childhood and mental health would have disclosed petitioner's abuse and neglect at the hands of an alcoholic father; numerous childhood head injuries and severe headaches; a history of erratic behavior, learning disabilities, and mental and emotional disturbances; psychiatric hospitalizations and anti-psychotic medication; exposure to

street fights and violence; and institutional records indicating cognitive impairments and possible brain damage.

* counsel was ineffective for presenting an inadequate and harmful closing argument that was six sentences long, failed to challenge any of the Commonwealth's aggravating circumstances, and failed to argue for any of the mitigating circumstances counsel had presented; "trial counsel's decision not to reference any mitigating factors in his closing argument at the penalty phase, coupled with his lack of investigation, preparation, and presentation of mitigating evidence, is . . . incomprehensible."

- Wallace v. Price, Nos. 03-9002 & 03-9003, 243 Fed. Appx. 710, 2007 WL 1732559 , 2007 U.S. App. LEXIS 16096 (3d Cir. June 18, 2007) (*Wallace II*) (Washington, habeas corpus appeal) (non-precedential) (affirming in all respects District Court judgment granting new trial for violation of Confrontation Clause and due process right to present a defense where trial court refused to permit defense to present statement by Commonwealth's star witness confessing that he, and not Wallace, had shot the victim, or to cross-examine that witness with this statement), *aff'g* Wallace v. Price, 265 F. Supp. 2d 545 (W.D. Pa. Mar. 31, 2003), *vacated and substitute opinion issued*, 243 Fed. Appx. 710, 2007 WL 1954047, 2007 U.S. App. LEXIS 16095 (3d Cir. July 6, 2007).

101. Commonwealth v. Tilley, Dec. Term, 1985, Nos. 1078-82 (Phila. C.P. April 30, 2007) (Philadelphia, PCRA) (stipulated penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mitigating evidence).

- Commonwealth v. Wholaver, No. CP-22-CR-0000692-2003 (Dauphin C.P. Mar. 21, 2007) (Dauphin, PCRA) (*nunc pro tunc* restoration of right to direct appeal as a result of counsel's ineffectiveness for failing to preserve appellate rights)

®● Commonwealth v. Johnson (Raymond), No 3849/99 (Berks C.P., Crim. Div. Mar. 9, 2007) (Berks, PCRA) (new trial granted for ineffective assistance of counsel, including counsel's ineffectiveness for failing to investigate and interview eyewitnesses based upon the police discovery and failure to investigate defendant's alibi defense, which resulted in counsel's presenting an alibi for the wrong day; death sentence reversed for counsel's ineffectiveness in failing to investigate and present mitigating evidence), *guilt relief rev'd & remanded for additional factfinding*, 600 Pa. 329, 966 A.2d 523 (Pa. Mar. 18, 2009).

* counsel's trial ineffectiveness included failing to investigate and present witnesses who testified in the post-conviction proceedings that they were three feet from the shooting and that the defendant did not shoot the victim;

* counsel ineffective for failing to properly investigate and prepare alibi witnesses, where the witnesses both testified that the night was Wednesday, June 18, and the shooting had occurred on Tuesday, June 18), and other available alibi witnesses were not presented; one alibi witness testified in post-conviction that defense counsel never spoke with her except in court and the defense counsel testified he didn't like the witness; the court determined that counsel either should have properly prepared the witnesses or not put on an alibi defense;

* the court found that counsel's failure to present an opening statement in a capital case was further evidence of deficient preparation, although not in itself sufficient proof of ineffectiveness;

* counsel's penalty-phase ineffectiveness included a failure to present *any* available teachers, siblings, or mental health experts in mitigation.

102. Commonwealth v. Gribble, Dec. Term, 1992, No. 2081-92 (Phila. C.P., Crim. Div., Mar. 8, 2007) (Philadelphia, PCRA remand) (death sentence vacated for counsel's ineffectiveness and court error in waiving the defendant's personal right to a penalty-phase jury trial based upon a defective waiver colloquy).

103. Commonwealth v. Markman, No. 371 Cap. App. Dkt., 591 Pa. 249, 916 A.2d 586 (Pa. Feb. 21, 2007) (Cumberland, direct review) (new trial granted for separate Sixth Amendment violations of the Confrontation Clause and right to present a defense)
* Confrontation Clause and *Bruton v. United States* violated by the admission of the non-testifying codefendant's audiotaped confession, which the jury would have understood as implicating the defendant in the homicide;
* the attempted redaction of references to the defendant in the audiotape were deficient where references to "Beth" or "Markman" were removed through over-dubbing by a distinct, second voice speaking the phrase "the other person," and the deficiencies in the attempted redaction were compounded when the court informed the jury that the tape had been altered in this manner;
* the Sixth Amendment right to present a defense under *Crane v. Kentucky* was violated when the trial court refused a defense request to instruct the jury on the defense of duress, although such a defense was sufficiently supported by the evidence.

104. Commonwealth v. Thomas (LeRoy) a/k/a John Wayne, Dec. Term, 1994, No. 700 (Phila. C.P. Jan. 11, 2007) (Philadelphia, PCRA) (stipulated penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mitigating evidence).

105. Marshall (Jerry, Jr.) v. Beard, No. 03-CV-795 (E.D. Pa. Jan. 10, 2007) (Philadelphia, habeas) (stipulation to grant of penalty-phase relief on petitioner's claim of penalty-phase ineffectiveness for failing to investigate and present mitigating evidence).

- Lark v. Beard, 2:01-cv-01252 (E.D. Pa. Oct.. 25, 2006) (Philadelphia, habeas) (stipulation to grant of penalty-phase relief on petitioner's claim of penalty-phase ineffectiveness for failing to investigate and present mitigating evidence).

- Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 3, 2006) (Lehigh, PCRA remand) (post-trial and direct appeal counsel ineffective for failing to properly present issue of sentencing-stage counsel's predicate ineffectiveness in failing to investigate and present mitigating evidence of defendant's traumatic childhood and mental health issues arising, *inter alia*, out of his post-traumatic stress disorder), *aff'd*, Nos. 430, 431, 950 A.2d 294 (Pa. June 17, 2008).
  * Ineffectiveness included counsel's failures to provide the post-verdict and appeal courts with affidavits and supporting materials that would have permitted evidentiary development and appellate review of this issue;
  * Post-trial and direct appeal counsel also ineffective for failing to preserve and raise record-based claim that the trial court improperly prevented the defense from

presenting expert mental health mitigation testimony relating to the defendant's lack of future dangerousness if incarcerated;

* Opinion incorporated by reference the PCRA court's prior determination in Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 17, 2003) that trial counsel had provided ineffective assistance with respect to these issues.

106. Crews v. Horn, 3:98-CV- 1464 (M.D. Pa. Aug. 28, 2006) (Perry, habeas) (stipulated grant of penalty-phase relief on claim that penalty-phase counsel was ineffective for failing to investigate and present available mitigating evidence) (resentenced to two life sentences).

107. Commonwealth v. Clark, Dec. Term, 1993, Nos. 4115-19 (Phila. C.P. August 25, 2006), (Philadelphia, PCRA) (court issues *Opinion Sur Pa.R.A.P. 1925(a)* in support of its 2003 bench order reversing death sentence for sentencing-stage counsel's ineffectiveness "for failing to conduct any investigation regarding potential mitigating circumstances, including Clark's impaired mental health and his deprived childhood").

- Wilson (Zachary) v. Beard, No. 05-CV-2667, 2006 WL 2346277, 2006 U.S. Dist. LEXIS 56115 (E.D. Pa. Aug. 9, 2006) (Philadelphia, habeas) (new trial granted on habeas summary judgment for violations of *Brady v. Maryland* that prevented the defense from impeaching three separate prosecution witnesses)

  * the prosecution violated *Brady* when it failed to disclose one of its witness' *crimen falsi* convictions for impersonating a police officer, and a psychological evaluation conducted in connection with one of these convictions; failed to disclose the psychiatric history of another of its witnesses; and withheld evidence that a third witness was a long-time informant for a corrupt police officer (later convicted of official misconduct in connection with another case), and that the informant had received interest-free loans from the officer;

  * the first witness (Edward Jackson) had been arrested six weeks before the murder for impersonating a police officer; the pre-sentence investigation report ordered in connection with that conviction revealed that the witness "had two prior arrests for impersonating a police officer, a juvenile record, an adult record of thirteen arrests and four convictions, and an out-of-state record of six arrests"; the PSI also reported that the witness had suffered a prior serious head injury that had resulted in headaches, blackouts, and occasional memory loss; the psychological evaluation described the witness as "a marginal historian" who had twice fractured his skull, had "weak" long- and short-term memory, and could not think in abstract terms, and who had a schizoid personality disorder, "dissociative tendencies," and "distorted perceptions of reality" in which he "tends to go overboard in . . . attach[ing] himself to Police activities";

  * the second witness (Jeffrey Rahming) testified against petitioner on the first day of trial and the next day was taken by police from the prosecutor's office to a local emergency room, where he was diagnosed with schizophrenia and referred for psychiatric placement; the hospital records for that treatment disclosed that the witness "has a history of mental illness" for which he had been treated with psychiatric medication "as recently as i months [sic] ago"; neither the emergency room visit nor the hospital records were disclosed to the defense; counsel testified that he would have requested Rahming's rap sheet, a prior mental health evaluation noted in the rap sheet,

and the witness' presentence and probation reports had he been apprized of the mid-trial hospital visit. These records revealed that Rahming had a personality disorder, had a history of being prescribed anti-psychotic medication, which he might not have been taking at the time he allegedly witnessed the murder, that he was suspected of drug and alcohol abuse, and that had the demeanor of a "slightly retarded person";

* the third witness (Lawrence Gainer) was a police informant who had received interest-free loans from Officer John Fleming during the time period in which Gainer had acted as Fleming's informant; Fleming testified at trial that he and Gainer had been friends for thirteen years and that Fleming had used him as an informant "on many occasions," but that he had never paid Gainer for information or given him anything. In the state post-conviction proceedings, Fleming testified to having given Gainer interest-free loans over the years.

®● Lewis v. Horn, No. 00-CV-802, 2006 WL 2338409, 2006 U.S. Dist. LEXIS 55998 (E.D. Pa. Aug. 9, 2006) (Philadelphia, habeas) (death penalty reversed for penalty-phase counsel's ineffectiveness in failing to investigate and present available mitigating evidence concerning petitioner's mental illness, psychosis, and personality disorder; possible borderline retardation; brain damage; emotional impairments, and history of physical, sexual, and emotional abuse as a child. Counsel's numerous failures to present mitigating evidence included, *inter alia*, evidence that Petitioner's mother drank terpentine while pregnant; Petitioner's behavioral changes resulting from massive head injury sustained when father slammed Petitioner's head against bathtub when Petitioner was a young child; and episodes in which Petitioner tore up his room with a knife in what he believed was a fight with Satan)), *rev'd and remanded*, 581 F.3d 92 (3d Cir. Sept. 14, 2009), *relief reinstated by stipulation* July 26, 2011 and resentenced to life May 9, 2012.

® Commonwealth v. Lesko, No. 681 C 1980 (Westm. C.P. Aug. 7, 2006) (Westmoreland, PCRA) (new trial granted for violation of Petitioner's right to testify at trial and for multiple violations of *Brady v. Maryland*; death sentence reversed on multiple grounds relating to counsel's failure to investigate and present mental health and social history mitigating evidence and for *Brady* violations), *rev'd*, 15 A.3d 345 (Pa. Feb. 24, 2011).

* At trial, counsel told the court that he had reasons for not wanting Petitioner to testify but that he was "not sure whether my client is going to follow my advice." After being told to discuss this with Petitioner, counsel advised the Court that his client "told me he does wish to take the witness stand in his own behalf [but] he will follow my advice reluctantly" and not testify. In the post-conviction proceedings, Petitioner acknowledged both that he wanted to testify and that counsel had advised him against testifying, but was unaware that he "had the absolute right to testify" and only learned that he would not be testifying when the defense closed without presenting him as a witness.

* The Court found a violation of Petitioner's right to testify when his co-counsel was colloquied extensively on whether he waived his right – including specific questioning on whether he was making that decision voluntarily and without coercion, yet no colloquy was conducted concerning Petitioner's waiver and nothing in the trial court record established that he personally chose to give up the right to testify. The Court found that in the absence of any evidence that Petitioner intended to waive his right to testify and in the special circumstances in which counsel had indicated that Petition

actually wanted to testify, counsel's closing the defense case without requesting an on-the-record waiver was ineffective.

* The Court also found a violation of *Brady v. Maryland* from the combined effects of the prosecution's failure to produce several records that could have impeached Commonwealth witnesses. First, the prosecution presented the testimony of a witness (Daniel Keith Montgomery) who testified to being present when the co-defendant admitted to having "shot a cop" and Petitioner responded by saying, "I wanted to," and then laughed. However, the prosecution failed to disclose a prior state police report in which that witness had previously said "I don't know anything about the cop getting shot," and said nothing about any alleged statement by Petitioner that he wanted to shoot the officer. The prosecution also failed to provide the defense with a copy of a written agreement not to prosecute Montgomery for robberies that he had committed, and defense counsel never impeached Montgomery during cross-examination with evidence of this agreement. Third, the prosecution never disclosed entries in the juvenile court file of its witness Richard Rutherford that indicated that Rutherford had received favorable treatment in anticipation of his testimony at trial.

* The court reasoned that since testimony from Montgomery and Rutherford provided the only evidence of specific intent to kill – without which Petitioner could not be convicted of first degree murder – and that the Montgomery agreement and the Rutherford files provided impeachment material in addition to that already available to the defense at trial, "[q]uestioning their motivation for testifying [based on the withheld information] would have further whittled away at the inconsistent statements that each of them made in various proceedings and in statements concerning to what the Petitioner's evidenced intent was." The court found materiality both with respect to Petitioner's 1981 trial and 1995 re-sentencing hearing, and granted both a new trial and a new sentencing.

* The court also granted penalty relief on numerous other grounds. Related to the *Brady* violations, it held that counsel was ineffective in failing to impeach Montgomery's testimony at the 1995 re-sentencing with prior inconsistent testimony from his testimony in the first trial. During the 1995 re-sentencing trial, Montgomery testified that he had participated with Travaglia in numerous robberies that had occurred prior to 1981. However, in the 1981 trial, Montgomery had denied that he participated in robberies with the defendants. The court viewed this failure in conjunction with the other failures to impeach based upon prior inconsistent statements, and determined that it resulted in "a reasonable probability that the outcome of the proceedings – that the jury found the Petitioner to have the requisite intent – would have been different, but for these errors." Accordingly, the Petitioner is entitled to a new sentencing hearing.

* The Court also granted relief on numerous grounds relating to the failure to investigate and present a wide range of available mitigating evidence. These included: (1) a violation of *Ake v. Oklahoma* when trial counsel was aware of need for neuropsychologist but instead retained a clinical psychologist who could not conduct tests for brain damage; (2) counsel's ineffectiveness in hiring psychologist on the eve of trial and failing to provide him extensive social service records that materially altered his diagnosis; and (3) counsel's ineffectiveness in failing to investigate "vivid" evidence of "medical neglect, educational neglect, social services neglect, and the recognition that the Petitioner needed psychological treatment at an early age" and overwhelming evidence of "cumulative acts of neglect and abuse" that were "seemingly endless and relentless."

* The court found counsel deficient for failing to present available social service records chronicling Petitioner's hellish upbringing and its psychological consequences, for failing to present live testimony from social service workers, for failing to fully present psychological expert testimony, for failing to obtain the assistance of a neuropsychologist and present available evidence of brain damage, for failing to present mitigation testimony from a number of family members and neighbors, for failing to present mitigating evidence in the 1995 re-sentencing that had been presented in the original 1981 sentencing hearing, and for failing to elicit the full range of mitigating evidence that was available from the witnesses he did present.

108. Commonwealth v. Hutchinson, Apr. Term, 1998, No. 0858 (Phila. C.P., Crim. Div., July 25, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief)

109. Commonwealth v. Williams (Craig), May Term, 1987, Nos. 2563-2565 (Phila. C.P., Crim. Div., July 11, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief)

® Stevens v. Horn, Nos. 04-9011 & 04-9013, 187 Fed. Appx. 205, 2006 WL 1876652, 2006 U.S. App. LEXIS 17043 (3d Cir. July 7, 2006) (Beaver, habeas appeal), *aff'g*, 319 F. Supp. 2d 592 (W.D. Pa. May 26, 2004) (death sentence reversed for violation of *Witherspoon v. Illinois* when juror improperly excused for caused for generalized views against the death penalty; although the juror indicated that he opposed the death penalty, neither the prosecution nor the court inquired whether he could set aside his personal views and follow the law and the court's instructions; accordingly, the prosecution failed to meet its burden of proving that the juror's views constituted a significant impairment of his ability to follow the law), *judgment vacated*, 551 U.S. 1111 (U.S. June 11, 2007).

● Commonwealth v. Sattazahn, No. 2194-89, 2006 Pa. Dist. & Cnty. Dec. LEXIS 104 (Berks C.P., Crim. Div., June 23, 2006) (Berks, PCRA) (death sentence reversed for trial counsel's ineffectiveness in failing to investigate and present available mitigating evidence, including "his background and his very significant organic brain impairment").
* court finds "Defendant's counsel was ineffective in failing to interview family and other lay witnesses who were readily identifiable and reasonably available to testify; for presenting only pages of direct testimony in Defendant's case for life; for failing to obtain available institutional records; for failing to conduct any investigation into Defendant's psychiatric condition and mental impairments, despite obvious signs of brain damage that clearly pointed to the need to obtain the assistance of mental health experts."

* Court holds that "Defendant's counsel failed to adequately investigate substantial mitigating factors, even though the record was replete with 'red flags' of brain damage that indicated the need for neuropshyschological [sic] evaluations. In light of the extensive medical and scientific evidence presented in the PCRA petition and subsequent testimony at hearings regarding Defendant's neglectful parenting, social isolation and impaired social development, significant educational impairments and learning disabilities, odd risk-taking behaviors, organic brain damage, mental illness and other potential statutory mitigators, we find that Defendant's counsel, notwithstanding his late entry into the case, failed to fulfill his obligation to explore all avenues that might lead to mitigating circumstances."

* Prejudice established because the "substantial and available mitigation evidence [that] was not presented at trial . . . was reasonably likely to have persuaded one or more jurors to find a mitigating circumstance that had not been presented."

- Commonwealth v. Gorby, No. 385 Cap. App. Dkt., 589 Pa. 364, 909 A.2d 775 (Pa. June 20, 2006) (Washington, PCRA appeal) (death sentence reversed for trial counsel's ineffectiveness in failing to investigate, develop, and present life history and mental-health mitigating evidence, including evidence of childhood abuse and neglect; and a cognitive disorder diminishing, *inter alia,* defendant's reasoning, judgment, and impulse control; counsel's performance deficient for failing to interview readily available life-history witnesses, obtain medical and social history records, and explore mental-health issues that were apparent from the circumstances of the offense and the defendant's background; counsel also ineffective for failing to adequately develop a mitigation claim relating to the defendant's intoxication; and for failing to request an instruction explaining the relevance under 42 Pa. C.S. § 9711(e)(8) of the limited evidence that counsel did present; direct appeal counsel was ineffective for failing to present any claim of trial counsel penalty-phase ineffectiveness).

110. Commonwealth v. Sneed, No. 366 Cap. App. Dkt., 587 Pa. 318, 899 A.2d 1067 (Pa. June 19, 2006) (Philadelphia, PCRA appeal) (trial counsel ineffective for failing to investigate and present social history and mental health mitigating evidence; grant of new trial on *Batson* claim reversed on procedural grounds), *aff'g in part and reversing in part* Commonwealth v. Sneed, June Term, 1984, Nos. 674-676 (Phila. C.P. Jan. 4, 2002).

111. Commonwealth v. May (Freeman), No. 415 Cap. App. Dkt., 587 Pa. 184, 898 A.2d 559 (Pa. May 25, 2006) (May II) (Lebanon, PCRA appeal) (death sentence reversed for trial/appellate counsel's ineffectiveness in failing to challenge trial court's ruling sustaining prosecution's objection to the relevance and admissibility of mitigating evidence that defendant's father physically and sexually abused him, and forced him to watch his father physically and sexually abuse his sisters and mother)
* trial court agreed with prosecution's argument that the use of the conjunctive "and" in 42 Pa. C.S. § 9711(e)(8), permitting defense to present "any other evidence of mitigation concerning the character *and* record of the defendant and the circumstances of his offense" "limited the admissible mitigation evidence to that which addressed both character and record"; trial court improperly sustained the objection, finding the proffered child abuse evidence irrelevant to defendant's record;
* court reverses, stating "[n]ot only is such evidence relevant, its presence is a necessary component of a fair and complete sentencing proceeding. We hold that the failure of trial counsel to object to such an egregious mistake by the trial court constitutes ineffective assistance of counsel from which May suffered prejudice."

®● Commonwealth v. Gibson (Ronald), Jan. Term 1991, No. 2809 (Phila. C.P. Apr. 26, 2006) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness "in failing to conduct any investigation at all regarding mitigating evidence" and for appellate counsel's ineffectiveness "for failing to investigate and pursue non-record based claims of trial counsel's ineffectiveness for purposes of direct appeal"), *rev'd & remanded*, No. 331 Cap. App. Dkt., 951 A.2d 1110 (Pa. July 24, 2008), *relief reinstated,*

Jan. Term 1991, No. 2809 (Phila. C.P. July 17, 2009), *rev'd* No. 596 Cap. App. Dkt., 19 A.3d 512 (Pa. May 12, 2011)

* counsel's performance deficient where investigator "did no advance work whatsoever in preparation for the penalty phase"; "did not search for or collect documents relating to [the defendant's] family background and family history"; and had only "extremely limited" interaction before the penalty phase with those potential witnesses who happened to be in court when the penalty phase started;
* counsel also failed to investigate the defendant's drug use and its implications for mitigation; obtained no records except through the discovery process; "had little time to prepare for the case and . . . did not go to the prison where the defendant was incarcerated," but instead met with the defendant only "when he saw his client in the courtroom" and did not learn of his client's alcoholism until *during* the trial; counsel "basically took a fee, did no preparation at all[,] and went to court";
* counsel's failures prejudicial where "even a cursory investigation . . . would have uncovered evidence of [defendant's] intoxication at the time of the crime, defendant's personal and family history of drug and alcohol abuse, and a dysfunctional family life"; serious interviews with family members would have disclosed defendant's "exposure to years of domestic violence and the subsequent abandonment by his father," after which his mother lived with a series of other men "who abused her in the home and exhibited violent behavior";
* penalty-phase evidence presented by the defense was "a sham effort to elicit positive character testimony from witnesses who would 'cry and beg the jury not to sentence Ronald to death'"; "[t]his shocking lack of preparation was so far below the standard of adequate representation as to render the concept of effective assistance of counsel virtually meaningless";
* appellate counsel was ineffective where he "presented certain ineffectiveness claims based upon the record on direct appeal, [but] failed to investigate and present non-record based claims"; "[g]iven the total lack of preparation for the penalty phase by trial counsel, which is blatantly obvious from the transcript of the penalty-phase hearing, . . . appellate counsel was obligated to pursue such non-record based claims";
* appellate counsel's stated belief that "his obligation . . . concerned review only for record-based claims" had no reasonable basis designed to effectuate his client's interests; this failure was prejudicial because "there is a reasonable probability that, but for appellate counsel's failure to investigate and present trial counsel's ineffectiveness on direct appeal, the outcome of the appeal would have been different"; "[t]he assertion of appellate counsel of the total, complete[,] and utter failure of trial counsel to perform any investigation for the penalty phase, in all likelihood, would have led to a different result on appeal."

- Bond v. Beard, No. 02-cv-08592-JF, 2006 WL 1117862, 2006 U.S. Dist. LEXIS 22814 (E.D. Pa. Apr. 24, 2006) (Philadelphia, habeas) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present available mitigating evidence where "if counsel had fulfilled their obligation of conducting a reasonable investigation, very significant evidence could have been presented to the jury in mitigation"; court also finds "cause for concern" with penalty-phase closing argument that "seem[ed] designed to create a lynch-mob mentality on the part of the jury" that "represents an unacceptable

appeal to class prejudice, an 'us against them' approach to the case"), *aff'd*, Nos. 06-CV-9002 & 06-CV-9003, 539 F.3d 256 (3d Cir. Aug. 20, 2008)

* counsels' performance deficient where counsel interviewed some of the defendant's family members prior to his trials and arranged for interview by psychologist, but did not obtain any of defendant's school or hospital records or provide any institutional records to the psychologist, asked the psychologist to provide advice on pre-trial mental health issues, not mitigation, and did not actually begin to prepare for the penalty phase until after the jury returned guilty verdict on first degree murder;
* counsels' performance prejudicial where they haphazardly presented testimony of mother, sister, and other family members in attempt to elicit evidence of difficult childhood, general good-naturedness, devastation from loss of stepfather, and disappointment in failing GED exam but never learned and did not present evidence "deplorable upbringing," including that "[h]e was abandoned by his father at a very early age, was frequently absent from school because he had no shoes or warm clothing to wear, was physically beaten by siblings at the behest of his mother, who was an alcoholic and largely bereft of maternal instincts";
* prejudice also included failure to obtain school records that indicated, *inter alia*, that "he was, at best, borderline retarded, and suffered from learning disabilities and other psychological problems"; counsel also failed to present medical records showing that. while a teenager, the defendant "was struck in the head with a metal jack-handle, and suffered severe injuries" that required hospitalization for nine days and resulted in permanent brain damage;
* available mental health evidence also included that petitioner had Post-Traumatic Stress Syndrome and "organic brain damage [that] substantially impaired his ability to conform his conduct to the requirements of law";
* counsel also ineffective for "operating under the assumption that sympathy for the defendant's plight could be accepted by the jury as a reason for choosing a life sentence," whereas sympathy was not an independent mitigating circumstance and "could be considered only to the extent that it arises from the evidence of other, authorized mitigating circumstances."

112. Rolan v. Vaughn, 445 F.3d 671 (3d Cir. Apr. 18, 2006) (Philadelphia, habeas appeal) (new trial granted for counsel's ineffectiveness in failing to investigate and present evidence supporting guilt-stage claim of self-defense; state court decision was based upon an unreasonable appellate determination of fact, not supported by the record, that self-defense witness purportedly would not have been willing to testify for the defense at the time of trial), *aff'g*, No. 01-CV-81, 2004 WL 2297407, 2004 U.S. Dist. LEXIS 20554 (E.D. Pa. Oct. 13, 2004).

113. Commonwealth v. McCrae, Feb. Term, 1999, No. 0452 (Phila. C.P., Crim. Div. Apr. 13, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief) (resentenced to life).

114. Commonwealth v. Kemp, Apr. Term, 1997, No. 0009 (Phila. C.P., Crim. Div. Apr. 13, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief) (resentenced to life).

115. Commonwealth v. Rucci, Nos. 2164 of 1990 (Wash. C.P., Crim. Div., Apr. 12, 2006) (Washington, PCRA) (death sentence reversed for counsel's ineffectiveness in failing to

investigate and present available mental health mitigating evidence, including a history of childhood seizures and convulsions, multiple head traumas, and brain injuries identifiable from medical records and that collectively resulted in organic brain damage affecting the portions of the brain responsible for impulse control and inhibition; and for failing to obtain and present "school records, home environment (abuse) and social history" mitigating evidence) (resentenced to life).

- Commonwealth v. Sattazahn, No. 2194-89, *Order Granting PCRA Relief* (Berks C.P., Crim. Div., March 31, 2006) (Berks, PCRA) (death sentence reversed for counsel's ineffectiveness in failing to adequately investigate and present mitigating evidence).

○®● Commonwealth v. Banks, Nos. 1290, 1506, *et seq.* of 1982 (Luz. C.P. Feb. 27, 2006) (Luzerne, PCRA hearing on competency to be executed) (court finds defendant mentally incompetent to be executed), *vacated and remanded*, No. 461 Cap. App. Dkt., 596 Pa. 297, 943 A.2d 230 (Pa. Dec. 28, 2007), *reaff'd*, Nos. 1290, 1506, *et seq.* of 1982 (Luz. C.P. Sep. 8, 2008), *rev'd and remanded*, No. 578 Cap. App. Dkt. (Pa. Aug. 27, 2009), *new finding of incompetency* (Luz. C.P. May 2010).

116. Commonwealth v. Collins (Ronald), Nos. 372 & 373 Cap. App. Dkt., 585 Pa. 45, 888 A.2d 564 (Pa. Dec. 27, 2005) (Philadelphia, PCRA appeal) (affirmed PCRA court's grant of penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mental health mitigating evidence; counsel's investigation was deficient where he failed to conduct a social history investigation, could not remember interviewing defendant or family about defendant's medical history, failed to inquire about head injury, and did not obtain school records; failures were prejudicial where available medical records would have provided evidence of a serious head injury, which would have led expert to recommend neuropsychological testing, materially affected the expert's recommendations to counsel, and would have led to the presentation of mitigating evidence that the defendant had an extreme mental or emotional disturbance and significantly impaired capacity at the time of the offense).

117. Commonwealth v. Johnson (William), Sept. Term, 1991, Nos. 3613, 3616-3618 (Phila. C.P. Dec. 12, 2005) (Philadelphia, PCRA) (stipulated penalty-phase relief).

118. Commonwealth v. Hill, May Term, 1991, Nos. 0041-45, 1839-1841(Phila. C.P. Dec. 5, 2005) (Philadelphia, PCRA) (stipulated penalty-phase relief).

119. Commonwealth v. Zook, No. 293 Cap. App. Dkt., 585 Pa. 11, 887 A.2d 1218 (Pa. Nov. 28, 2005) (Lancaster, PCRA appeal) (death sentence reversed for penalty-phase ineffectiveness of counsel arising out of counsel's failure to investigate and present mitigating evidence of violent personality change caused by a serious head injury, and failure to provide mental health expert with the available hospital and prison records that documented both the fact of the head injury and the details of the defendant's personality change) (resentenced to life following prosecution decision to waive death).

120. Commonwealth v. Douglas, Aug. Term, 1981, Nos. 2326-27 & 2335 (Phila. C.P. Nov. 10, 2005) (Philadelphia, PCRA) (death sentence reversed for counsel's ineffectiveness in

failing to investigate and present mitigating evidence of dysfunctional family background, positive adjustment to prison, and possible brain damage)

* Court finds that trial counsel "did not begin preparation for the penalty phase of petitioner's trial until after a guilty verdict was returned, leaving him only one day to investigate, secure witnesses, and properly interview those witnesses who were confirmed to testify at the penalty phase. Leaving the preparation to the last minute rendered [counsel] unable to realistically fulfill his constitutional duty as effective counsel to petitioner."

* Counsel's presentation of two mental health experts "without interviewing them prior to their testimony cannot be reasonably considered effective assistance of counsel."

* Court finds prejudice because "[i]n light of the fact that the jury found no mitigating circumstances, we conclude that if evidence of petitioner's dysfunctional family life, possible brain damage, and positive adjustment to prison[] had been presented, at least one juror would have found mitigating factors that outweighed the aggravating factors."

* Court holds that under *Strickland* "trial counsel's last-minute preparation for the sentencing hearing and failure to investigate mitigating evidence resulted in deficient performance."

○ Wilson v. Beard, 426 F.3d 653 (3d Cir. Oct. 13, 2005) (Philadelphia, habeas appeal) (finding habeas petition timely filed and affirming the District Court's grant of a new trial under *Batson v. Kentucky* in a capital trial that resulted in a life verdict that was used as an aggravating circumstance in a separate homicide prosecution that resulted in a death verdict).

® Commonwealth v. Hackett, Sept. Term, 1986, Nos. 3396-3400 (Phila. C.P. Oct. 5, 2005) (Philadelphia, successor PCRA) (new trial granted under *Batson v. Kentucky* based upon newly discovered evidence of racial discrimination in jury selection; that evidence consisted of court finding in co-defendant's post-conviction proceedings in Commonwealth v. Spence, Sept. Term, 1986, Nos. 3391-3395 (Phila. C.P. March 22, 2004) that the prosecutor in their joint trial – who had prepared internal videotaped training program that explained how to discriminate in jury selection – had peremptorily stricken black jurors on the basis of race in this case), *rev'd*, No. 492 Cap. App. Dkt.,598 Pa. 350, 956 A.2d 978 (Pa. Sept. 26, 2008).

121. Commonwealth v. Lee (Percy), May Term, 1986, Nos. 8605-1163, 1164, 1166 & 1168 (Phila. C.P. Sept. 21, 2005) (Philadelphia, PCRA remand/*Roper*) (death sentence imposed upon defendant who was age seventeen at time of offense vacated under *Roper v. Simmons* and life sentence imposed).

122. Cross v. Price, No. 95-614, 2005 WL 2106559, 2005 U.S. Dist. LEXIS 18510 (W.D. Pa. Aug. 30, 2005) (Beaver, habeas) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to request a curative instruction that Pennsylvania's life sentence carries no possibility of parole after the defendant told the sentencing jury that he would be eligible for parole from a life sentence after twenty years and, after serving back time on another offense, could be released to "get on with [his] life" after thirty-five years; counsel also ineffective for the predicate failure to properly prepare defendant for

his penalty-phase testimony so as to avoid this "highly prejudicial" misstatement of state law).

®● Thomas (Brian) v. Beard, No. 2:00-cv-00803-LP, 388 F. Supp. 2d 489 (E.D. Pa. Aug. 19, 2005) (Philadelphia, habeas) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present mental health mitigating evidence, including evidence of prior suicide attempts, pre-existing "repeated diagnoses of paranoid schizophrenia and an inability to control aggressive impulses," and personal background information; counsel also ineffective for providing a "grossly deficient" closing argument that "was, at best, incoherent"; petitioner's purported waiver of mitigation was invalid because it was not informed, where trial counsel had failed to conduct the predicate investigation necessary to explain to petitioner what mitigating evidence was available to him and neither trial counsel nor the court had adequately explained to him the nature of mitigating evidence in the penalty phase of a capital trial), *rev'd & remanded*, 570 F.3d 105 (3d Cir. July 1, 2009).

123. Baker (Lee) v. Horn, No. 2:96-CV-00037-AB, 383 F. Supp. 2d 720 (E.D. Pa. Aug. 15, 2005) (Philadelphia, habeas) (new trial granted because guilt-stage jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed the specific intent to kill by permitting the jury to transfer the intent of his co-defendant; trial counsel was ineffective for failing to object to the erroneous instruction).

● Rollins v. Horn, No. 2:00-CV-01288-JCJ, 2005 WL 1806504, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. July 29, 2005) (Philadelphia, habeas) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to investigate and present a range of mitigating evidence relating to the defendant's personal background and family history, child abuse, psychiatric diagnoses, and brain damage; new sentencing hearing also granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer* and *Banks v. Horn* where jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

124. Laird v. Horn, 414 F.3d 419 (3d Cir. July 19, 2005) (Bucks, habeas appeal) (new trial granted because guilt-stage jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed the specific intent to kill by permitting the jury to transfer the intent of his co-defendant), *cert. denied*, 546 U.S. 1146 (U.S. Jan. 17, 2006).

125. Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., June 29, 2005) (Philadelphia, PCRA) (new trial granted for ineffectiveness of counsel in failing to investigate and present a diminished capacity, voluntary intoxication, or heat of passion defense to reduce the degree of murder; Commonwealth had conceded entitlement to penalty-phase relief).

® Commonwealth v. Ligons, May Term, 1998, No 0086 (Phila. C.P., Crim. Div., June 23, 2005) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness

in failing to investigate and present mitigating evidence from institutional records), *rev'd*, 601 Pa. 103, 971 A.2d 1125 (Pa. May 27, 2009).

126. Rompilla v. Beard, 545 U.S. 374 (U.S. June 20, 2005) (Lehigh, habeas certiorari) (death sentence reversed for trial counsel's ineffectiveness in failing to review file of prior conviction that prosecution indicated it would rely upon in proving aggravating circumstance that the defendant had a significant history of prior convictions involving the use or threat of violence; no reasonable lawyer would fail to review file prosecution had indicated it would use as proof of its case and failure was prejudicial because it contained reference to broad range of mitigating evidence that counsel had failed to develop through other investigative efforts, including abusive childhood, alcoholism, mental retardation, fetal alcohol syndrome, possible schizophrenia, and red flags of brain damage, as well as leads to other institutional records containing additional mitigating evidence) (negotiated life plea).

127. Rivers v. Horn, No. 02-1600 (E.D. Pa. May 10, 2005) (Philadelphia, habeas) (stipulated grant of penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence) (plea to life sentence).

128. Bronshtein v. Horn, Nos. 01-9004 & 01-9005, 404 F.3d 700 (3d Cir. Apr. 14, 2005) (Montgomery, habeas appeal) (death sentence reversed under *Simmons v. South Carolina* when court refused to instruct the jury as to parole ineligibility from a life sentence after the evidence and argument placed the defendant's future dangerousness in issue), *aff'g penalty-phase relief & rev'g guilt-phase relief in* 2001 WL 767593, 2001 U.S. Dist. LEXIS 9310 (E.D. Pa. July 5, 2001), *cert. denied*, No. 05-346, 546 U.S. 1208 (U.S. Feb. 21, 2006) and No. 05-7539, 546 U.S. 1209 (U.S. Feb. 21, 2006).

- Blystone v. Horn, No. 99-CV-490, 2005 U.S. Dist. LEXIS 40922 (W.D. Pa. Mar. 31, 2005) (Fayette, habeas) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to investigate and present multiple categories of mitigating evidence; state court's determination that defendant had waived right to present mitigating evidence was an unreasonable application of federal constitutional law on multiple grounds)
  * The court held that counsel was ineffective for failing to investigate and obtain a range of mental health mitigating evidence; this included a failure to investigate and obtain institutional records; failing to recognize "red flags" of brain damage and mental illness in the one competency evaluation that was performed; being ignorant of the law governing the right to the assistance of mental health experts, and consequently failing to seek the appointment of mental health experts;
  * The court rejects the state court's holding that the expert testimony could not be credited because the experts did not evaluate the defendant until more than ten years after the trial; habeas court finds that had counsel obtained the assistance of mental health experts, those experts would have testified as did petitioner's state post-conviction experts that petitioner had brain damage and various mental health diagnoses, and would have concluded that petitioner was under extreme mental and emotional disturbance at the time of the offense and that his capacity to conform his conduct was significantly impaired;

* The court further finds that counsel was ineffective for failing to obtain petitioner's prior prison records, which contained evidence of favorable prison adjustment and lack of future dangerousness if sentenced to life.
* On the waiver question, the court held that petitioner did not adopt a strategy of acquittal or death, but that his statement to counsel that he did not want life imprisonment meant only that he wanted to present a defense to first degree murder; the court further held that what it described as petitioner "purported waiver" of mitigation was not knowing, intelligent, and voluntary because petitioner could not have knowingly waived the presentation of mitigation that counsel had neither investigated nor advised petitioner was available to be presented; moreover, petitioner's direction to counsel at the start of the penalty phase that he did not want his family to testify to beg for his life did not absolve counsel of the predicate duty to have conducted a thorough mitigation investigation and did not waive presentation of the mitigating evidence such an investigation would have uncovered.

129. Commonwealth v. Hughes (Kevin), Jan. Term, 1980, Nos. 1688-1690 & 1692 (Phila. C.P. Mar. 21, 2005) (Philadelphia, PCRA remand/*Roper*) (death sentence imposed upon defendant who was age sixteen years, eleven months, and 24 days at time of offense vacated under *Roper v. Simmons* and life sentence imposed).

- Simmons v. Beard, No. 02-CV-161 J, 356 F. Supp. 2d 548 (W.D. Pa. Feb. 22, 2005) (Cambria, habeas) (new trial granted under *Brady v. Maryland* where habeas court "find[s] a consistent pattern of prosecutorial misconduct in the nature of withholding favorable evidence that could have been used to substantially impeach the testimony of the most pivotal prosecution witnesses," along with "additional suppressed evidence [that] could have been used to further weaken the prosecution's case"), *aff'd*, 2009 WL 2902251, 2009 U.S. App. LEXIS 20289 (3d Cir. Sept. 11, 2009)
  * The court found that the prosecution "denied [the defendant] a fair trial by concealing evidence from the defense that raised serious questions concerning the credibility of the two key witnesses who formed the foundation of the prosecution's case as well as physical evidence that would have further buttressed his claim of innocence. These failures were neither inadvertent nor isolated. Rather, the evidence reveals that the prosecution was well aware of its obligation to disclose and yet engaged in a deliberate pattern of concealment."

130. Commonwealth v. Collins (Rodney), Aug. Term, 1992, Nos. 1588-1590 (Phila. C.P. Feb. 16, 2005) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present available mitigating evidence).

131. Jacobs v. Horn, No. 01-9000, 395 F.3d 92 (3d Cir. Jan 20, 2005) (York, habeas appeal, new trial) (counsel ineffective for presenting diminished capacity defense without investigating and presenting available evidence of the defendant's mental retardation, brain damage, and schizoid personality disorder; that as a child he was a witness to and victim of abuse and neglect; that he suffered from drug and alcohol abuse; that he had serious cognitive and emotional impairments; and that as a result of all these factors he may have lacked the capacity to formulate the specific intent to kill), *cert. denied*, 546 U.S. 962 (U.S. Oct. 17, 2005).

® Commonwealth v. Small, No. 2844 CA 1995 (York C.P., Crim. Div., Dec. 16, 2004) (York, PCRA, new trial) (trial counsel was ineffective in failing to interview and make reasonable efforts to locate and present two material witnesses who would have testified that a key prosecution witness had confessed to killing the victim; counsel was ineffective and suffered from a conflict of interest when, as a result of his prior representation of a prosecution witness, he was aware that the witness had made a contemporaneous statement to the police that had not linked the defendant to the offense, but because he obtained that information confidentially, did not cross-examine the witness about his failure to contemporaneously implicate the defendant; counsel also was ineffective in failing to assert the marital privilege to bar the prosecution from eliciting testimony of a highly damaging alleged admission by the defendant to his wife), *rev'd*, 602 Pa. 425, 980 A.2d 549 (Pa. Oct. 5, 2009).

- Commonwealth v. Gibson (Jerome), Nos. 5119, 5119-001/1994 (Bucks C.P., Crim. Div. Nov. 26, 2004) (Bucks, PCRA remand/*Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

- Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., Nov. 23, 2004) (Philadelphia, PCRA) (stipulated relief for ineffective assistance of counsel in failing to investigate and present available mitigating evidence).

® Commonwealth v. Duffey, No. 84 CR 176 (Lack. C.P. Nov. 18, 2004) (remand from PCRA appeal) (appellate counsel ineffective for failing to raise on direct appeal claim that prosecutor and prosecution's mental health expert impermissible commented on the defendant's post-*Miranda* silence to rebut a mental health mitigation defense), *rev'd* , 585 Pa. 493, 889 A.2d 56 (Pa. Dec. 28, 2005).

132. Commonwealth v. Smith (Lawrence), No. 390 Cap. App. Dkt., 580 Pa. 392, 861 A.2d 892 (Pa. Nov. 17, 2004) (Philadelphia, direct appeal) (death sentence reversed under relaxed waiver rule where prosecutor improperly attempted to impeach the testimony of the defense mental health expert by making reference to prejudicial facts that were not part of the record)
* the prosecution attempted to impeach the defense expert testimony that the defendant would not pose a future danger in prison by stating that the defendant had been convicted of assaulting another prisoner with a weapon; while the prosecution psychiatrist, Dr. John S. O'Brien, had testified that the defendant had been convicted of this prison assault, the prison records introduced at trial show only that the defendant was *charged* with assaulting an inmate, not that he was convicted, and the prosecution expert had no personal knowledge of any such conviction;
* the Commonwealth failed to meet its burden of proving the error harmless and could not do so because "[t]he reference to Appellants alleged conviction for assaulting another prisoner was a powerful rebuttal of the opinion Appellant's expert offered in mitigation that Appellant posed no risk to the prison population" and "the jury ultimately failed to find any mitigating circumstance."
(re-sentenced to two life sentences)

133. Commonwealth v. DeJesus, No. 286 Cap. App. Dkt., 580 Pa. 303, 860 A.2d 102 (Pa. Oct. 21, 2004) (Philadelphia, direct appeal) (death sentence reversed where "prosecutor ignored enumerated statutory mitigating/aggravating factors and undermined the jury's ability to render a fair verdict when he urged the jury to 'send a message' by sentencing appellant to death"; Court adopts *per se* rule of reversal where prosecutor argues outside of the death penalty statute to use the death penalty to "send a message")
* prosecutor argued: "He has shown you again and again that he hurts people because he likes to and he want to, and he has earned the right to be on death row. When you think of the death penalty, there are messages to be sent. There's a message on the street saying, look at that, he got death, you see that, honey, that's why you live by the rules, so you don't end up like that. Because they're in these bad neighborhoods. . . . You also send a message in prisons. When you peep in that bus and talk and whisper, you can say, death penalty. Maybe you've got just one inmate sitting there going, well, he got death, this is serious, I don't want to end up like that. Maybe your penalty you'll save one guy, to scare him straight."
* Court notes that "arguments advanced must be confined to the evidence and the legitimate inferences to be drawn therefrom" and arguments to "send a message" are outside the record of the case.

- Commonwealth v. Moore, Nos. 316, 317 Cap. App. Dkt., 580 Pa. 279, 860 A.2d 88 (Pa. Oct. 21, 2004) (Luzerne, PCRA appeal) (death sentenced overturned on claim of layered ineffectiveness of counsel; appellate counsel was ineffective for failing to properly litigating claim of trial counsel's predicate ineffectiveness for failing to investigate and present available mitigating evidence)
* trial counsel failed to interview defendant's mother, explain to her the nature of the penalty phase and the significance of her potential testimony, or to subpoena her attendance for the penalty phase; failed to subpoena Moore's sister, and although she was present at trial, did not approach her until a recess during the guilt phase on the final day of trial, and never told her either that she might be needed to testify or that the penalty phase would start the next day; subpoenaed Moore's ex-wife for alibi testimony that she refused to present at the guilt phase, but never spoke with her about the penalty phase, at which she would have been willing to testify.
* the Court approvingly cited the PCRA court's observations that counsel could have "presented [mitigating evidence] during the penalty phase which would have established for consideration by the jury, that Moore's life was traumatic, abusive, neglectful, cruel, and harmful to his emotional development. The record established Moore was abused by his alcoholic father, he witnessed his mother receive beatings and when he attempted to protect his mother as a young child, he himself was beaten. He witnessed his father slash his mother's throat and after this event he lived in fear and became withdrawn. Testimony also revealed Moore was neglected and he had various physical ailments that were not cared for. It was evident from the testimony presented that Moore's childhood was one of constant trauma, fear, and terror. Clearly, this [c]ourt finds this type of evidence constitutes mitigating evidence and further finds it should have been presented to the jury and not having done so was prejudicial to Moore. Obviously, this is the type of evidence that demonstrates a reasonable probability that a different result could have occurred at Moore's capital penalty phase trial."

(life sentence imposed after prosecution declines to seek death on resentencing; habeas pending on underlying conviction)

- Rolan v. Vaughn, No. 01-CV-81, 2004 WL 2297407, 2004 U.S. Dist. LEXIS 20554 (E.D. Pa. Oct. 13, 2004) (Philadelphia, habeas) (new trial granted for trial counsel's ineffectiveness in failing to interview and present eyewitness in support of claim of self-defense; this failure was prejudicial because the unpresented eyewitness would have contradicted several critical portions of the testimony of the Commonwealth's lead witness, whose credibility was already suspect because he was related to the victim and had been offered a deal by the prosecution; defendant's claim of self-defense was further supported jury mitigation finding at his capital resentencing hearing, where this evidence had been presented, that the defendant had acted under extreme duress), *aff'd*, 445 F.3d 671 (3d Cir. Apr. 18, 2006).

134. Commonwealth v. Malloy, No. 311 Cap. App. Dkt., 579 Pa. 425, 856 A.2d 767 (Pa. Sept. 1, 2004) (York, direct appeal) (new sentencing hearing for ineffective assistance of counsel where trial counsel failed to request the assistance of a second lawyer or ask for a mitigation investigator; met with his client only twice before trial for a combined total of four hours, including travel time to and from the prison; did not ask him questions about his background or conduct any mitigation investigation into his background; and failed to present reasonably available mitigating evidence including his client's history of abuse, placement in foster care, and institutionalization as a teen) (resentenced to life after non-unanimous jury verdict).

- Commonwealth v. Duffey, No. 324 Cap. App. Dkt., 579 Pa. 186, 855 A.2d 764 (Pa. Aug. 18, 2004) (Lackawanna, PCRA appeal) (remand to post-conviction court to determine counsel's ineffectiveness for prosecution's impermissible comment on post-*Miranda* silence to rebut a mental health mitigation defense, in violation of due process and Fifth Amendment, per *Doyle v. Ohio*, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986))
  * penalty-phase testimony of prosecution psychiatrist that defendant's "voluntary decision" not to answer certain questions posed by the doctor during a psychiatric evaluation indicated capacity to choose to conform his conduct to the law constituted impermissible comment on post-arrest silence where doctor had advised the defendant at the time of the evaluation that "[y]our rights permit you to refuse to answer any questions you might choose to[;] so if something comes up that you don't want to respond to, that's your perfect right and that doesn't necessarily draw any particular inferences or not";
  * prosecutor's reference to that testimony in closing argument amounted to additional impermissible comment on post-arrest silence;
  * because underlying issue technically waived by trial counsel's failure to raise it, issue presented through lens of ineffective assistance of counsel
  * Court finds ineffectiveness claim "arguably meritorious" and finds counsel's failure to object or to raise the issue to be prejudicial; case remanded for factual determination as to whether counsel had reasonable strategic basis for failing to present the issue.

135. Commonwealth v. Fisher (Jonathan), No. 4631-99 (Mtgy. C.P. Aug. 6, 2004) (Montgomery, PCRA) (stipulated penalty phase relief for counsel's ineffectiveness in

failing to investigate and present mitigating evidence; resentenced to life, with agreement to permit continuation of guilt-stage appeals).

- Commonwealth v. Cooper, Aug. Term, 2002, No. 840 1/1 (Phila. C.P. June 14, 2004) (Philadelphia, post-trial motions) (death sentence overturned for penalty-phase ineffectiveness of counsel).

136. Commonwealth v. Thompson (Andre), Feb. Term, 1993, Nos. 2193-2200 (Phila. C.P. June 1, 2004) (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to investigate and present alibi defense and in failing to investigate and challenge questionable eyewitness identification) (plea to third-degree murder; resentenced to term of 19-40 years).

●® Stevens v. Horn, No. 99-CV-1918, 319 F. Supp. 2d 592 (W.D. Pa. May 26, 2004) (Beaver, habeas) (new sentencing hearing granted under *Witherspoon v. Illinois* and *Szuchon v. Horn* when the trial court improperly excluded for cause a prospective juror who had expressed generalized opposition to the death penalty but had not been asked whether he could set aside that belief and follow the court's instructions), *aff'd*, , Nos. 04-9011 & 04-9013 (3d Cir. July 7, 2006), *judgment vacated*, 551 U.S. 1111 (U.S. June 11, 2007).

137. Commonwealth v. Thompson (Louis), Nos. 3607-3612, April Term 1990 (Phila. C.P. May 21, 2004) (Philadelphia, PCRA) (stipulation to vacation of death sentence in exchange for waiver of guilt-phase appeals; life sentence entered).

- Commonwealth v. Pirela, Jan. Term, 1983, No. 2143 (Phila. C.P. Apr. 30, 2004) (Philadelphia, successor PCRA/*Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

® Albrecht v. Horn, No. Civ. A. 99-1479, 314 F. Supp. 2d 451 (E.D. Pa. Apr. 21, 2004) (Bucks, habeas) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Banks v. Horn*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *rev'd & remanded*, 471 F.3d 435 (3d Cir. Nov. 2006).

138. Commonwealth v. Walker, May Term, 1991, Nos. 2770-2776, bench order (Phila. C.P. Apr. 21, 2004) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

○ Wilson (Zachary) v. Beard, No. 02-CV-374, 314 F. Supp. 2d 434 (E.D. Pa. Apr. 19, 2004) (Philadelphia, habeas) (homicide convictions that were used as evidence of aggravating circumstances in capital case that resulted in death sentence vacated and new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race; district court finds that videotape establishes both *prima facie* case of *Batson* violation and potential race-

neutral explanations, but finds that with unavailability of voir dire transcripts and prosecutor's admission that he did not remember the basis for his strikes, the Commonwealth failed to prove that he had a mixed motive other than race for striking at least nine African-American jurors while empaneling a jury of ten whites and two African Americans).

139. Commonwealth v. Boczkowski, No. 285 Cap. App. Dkt., 577 Pa. 421, 846 A.2d 75 (Pa. March 23, 2004) (Allegheny, direct appeal) (death sentence vacated and life sentence imposed when prosecution obtained murder conviction that was the sole aggravating circumstance in this case by extraditing defendant to face prosecution in North Carolina in violation of court order staying extradition until completion of Pennsylvania murder prosecution; court finds that defendant's death sentence was "the product of passion, prejudice or any other arbitrary factor" under 42 Pa. C.S. § 9711(h)(3)(1) and quashes the aggravating circumstance).
* Court reads 42 Pa. C.S. § 9711(h)(2) as statutorily conferring upon the Court "inherent power to correct errors" in capital sentencing proceedings;
* Court determines that prosecutor's unilateral authorization of extradition in face of court order staying extradition pending completion of Pennsylvania proceedings "was clearly arbitrary" and "usurped the role of the tribunal assigned, in our system of separated powers, to determine whether the stay should be lifted";
* Court holds that "in addition to violating an existing court order, the trial prosecutor's unauthorized conduct ultimately created the basis for the Commonwealth to newly certify appellant as death-eligible, and to convert what had been a non-capital prosecution into a capital one. By taking an unlawful action 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. In such a circumstance, we are constrained to hold that this sentence of death, which depended upon that circumstance, was the improper product of an arbitrary factor."

140. Commonwealth v. Spence, Sept. Term, 1986, Nos. 3391-3395 (Phila. C.P. March 22, 2004) (Philadelphia, PCRA, new trial) (new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race) (resentenced to a term of 22-1/2 to 45 years).

- Commonwealth v. Martin, No. 93-10899 (Leb. C.P. March 4, 2004) (Lebanon, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mental health mitigating evidence, including record of diagnosis of chronic post-traumatic stress disorder arising out of sexual abuse by uncle that mother had obtained from mental health provider and provided to counsel prior to the penalty phase; investigation of institutional records would have disclosed that treatment facility in which defendant had been an in-patient for more than two years had been shut down by Commonwealth of Virginia for abusing patients, and that abuse experienced by defendant in this facility was an additional cause of his PTSD; mental health evaluation would have revealed that defendant suffered from depression as well from PTSD, had significant impairments in his capacity to conform his conduct to the requirements of

law, and had committed the offense while under an extreme mental or emotional disturbance).

® Commonwealth v. Fletcher (Anthony), March Term, 1992, Nos. 6001-04 (Phila. C.P. Feb. 26, 2004) (Philadelphia, PCRA, new trial) (new trial granted for ineffectiveness of trial counsel in failing to impeach testimony of substitute witness from medical examiner's office with testimony of medical examiner who actually performed the autopsy in the case, where evidence from the examining pathologist was consistent with the defendant's contention that shooting occurred during struggle over the gun; evidence established that District Attorney's office had lobbied to replace medical examiner as witness because of its perception that he was insufficiently pro-prosecution), *rev'd*, Nos. 438, 446 Cap. App. Dkt., 586 Pa. 527, 896 A.2d 508 (Pa. Apr. 21, 2006).

141. Holloway v. Horn, 355 F.3d 707 (3d Cir. Jan. 22, 2004) (Philadelphia, habeas appeal, new trial) (new trial granted under *Batson v. Kentucky* when prosecutor engaged in pattern of striking black jurors and failed to provide genuine race-neutral explanation; proffered explanation that stricken juror was not just black, but male and about defendant's age held pretextual where three white jurors who were empaneled -- two male and one female -- were approximately the defendant's age, as were four other white jurors whom the prosecution had accepted; Pennsylvania court's requirement that the defense establish the race of all jurors was contrary to federal law) (entered plea to third-degree murder on resentencing, released on parole).

142. Commonwealth v. Brooks, No. 369 Cap. App. Dkt., 576 Pa. 332, 839 A.2d 245 (Pa. Dec. 30, 2003) (Philadelphia, direct appeal, new trial) (new trial granted for ineffectiveness of counsel in failing to prepare for trial where appointed counsel never met with defendant prior to trial and sole contact was a single pretrial telephone conversation of less than ½-hour; court says trial counsel *per se* ineffective for failing to meet with a capital client before trial) (resented to death).

143. Commonwealth v. Graham, Aug. Term, 1987, Nos. 3948 *et seq.* (Phila. C.P. Dec. 18, 2003) (Philadelphia, PCRA/*Atkins*) (as a result of defendant's mental retardation, six death sentence vacated under *Atkins v. Virginia* and six consecutive life sentence imposed).

144. Commonwealth v. Boxley, No. 322 Cap. App. Dkt., 575 Pa. 611, 838 A.2d 608 (Pa. Dec. 17, 2003) (Berks, direct appeal) (death sentence overturned on state law grounds for trial court's refusal to permit the defense to conduct individual voir on juror's attitudes about the death penalty) (resentenced to death).

145. Commonwealth v. Griffin, No. 1655-84 (Del. C.P., Crim. Div. Dec. 16, 2003) (Delaware, PCRA) (negotiated settlement for life sentence based upon information leading to the successful prosecution of person who ordered the killing in this case).

146. Commonwealth v. Thomaston, Apr. Term, 1995, No. 5413 (Philadelphia, post-verdict) (death sentence vacated and life sentence imposed, with Commonwealth reserving right to capitally retry if conviction overturned on appeal)

147. Commonwealth v. Gease, No. 902 of 1994 (Del. C.P. Nov. 14, 2003) (Delaware, PCRA) (stipulation to penalty-phase relief for ineffectiveness of trial counsel in failing to investigate and present mitigating evidence; negotiated life sentence).

● Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 17, 2003) (Lehigh, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence of defendant's "mental problems," including diagnoses of post-traumatic stress disorder, depression, adjustment disorder, and dysthemic disorder; while there was a factual dispute as to the PTSD diagnosis, "it is reasonably probable that the [other diagnoses] would have been sufficient to present a mitigating factor, even if the jury did not credit the diagnosis of PTSD"; penalty-phase relief also granted when trial court improperly prevented defense psychologist from presenting relevant mitigating evidence in the form of expert mental health testimony that the defendant would not pose a future danger if he received a life sentence; court also holds that defendant was denied the proportionality review that was mandated at the time of his appeal when the Lehigh County court erroneously informed the Administrative Office of Pennsylvania Courts that Williams' jury had found one aggravating circumstance and no mitigating circumstances – sentencing jury had in fact found one mitigating circumstance; PCRA court ordered clerk to provide correct information to AOPC to permit new proportionality review, if necessary), *rev'd and remanded*, Nos. 430, 431 Cap. App. Dkt., *slip order* (Pa. June 19, 2006) (per curiam), *relief reinstated* Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 17, 2003), *aff'd*, Nos. 430, 431, 597 Pa. 109, 950 A.2d 294 (Pa. June 17, 2008).

®● Kindler v. Horn, 291 F. Supp. 2d 323 (E.D. Pa. Sept. 22, 2003) (Philadelphia, habeas) (new sentencing hearing granted for prosecutorial misconduct and under *Mills v. Maryland* as interpreted by *Banks v. Horn*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance; "blatant" prosecutorial misconduct found in sentencing phase where prosecutor improperly vouched for death penalty by stating that he would "argue and present both of the sides" with respect to co-defendant "but I felt from the outset here that I would let you know that the urging [for death] would be done based on the evidence would be against [defendant]"; "By contrasting Petitioner with his co-defendant and arguing in favor of the death penalty as to him alone, it further appears that the goal of the prosecutor was to use Mr. Kindler as a 'sacrificial lamb' in order to secure at least one death penalty conviction."), *aff'd in part and rev'd in part*, Nos. 03-9010 & 03-9011, 542 F.3d 70 (3d Cir. Sep. 3, 2008) (reversing portion of grant of relief involving prosecutorial misconduct; reversing denial of relief for penalty-phase ineffectiveness of counsel), *vacated and remanded by* Beard v. Kindler, 558 U.S. 53 (U.S. Dec. 8, 2009).

148. Commonwealth v. Cuevas, No. 363 Cap. App. Dkt., 574 Pa. 409, 832 A.2d 388 (Pa. Sept. 24, 2003) (Monroe, direct appeal) (new sentencing hearing granted for insufficiency of the evidence of 42 Pa. C.S. § 9711(d)(14); subsection (d)(14) requires not merely a showing of involvement, association, or competition in the drug trade, it "require[s] the killing be intended to promote appellant's drug activity"; evidence that "appellant was a

buyer, not a seller, and . . . had an altercation relating to $20 he may have owed [victim]" was insufficient because "there was no evidence appellant stood to benefit in future drug activity by killing the source of his drugs") (on remand, prosecution dropped death penalty).

149. Commonwealth v. Yarris, No. 690/82 (Del. C.P. Sept. 3, 2003) (Delaware, successor PCRA/DNA exoneration) (new trial granted following joint petition for post-conviction relief based upon DNA evidence excluding Mr. Yarris as source of semen, blood, and skin-cell DNA in this rape-murder; semen and skin-cell DNA was from same person, and it was neither Mr. Yarris nor the victim's husband) (prosecution dropped charges; defendant released from prison).

® Fahy v. Horn, No. 99-CV-5086, 2003 WL 22017231, 2003 U.S. Dist. LEXIS 14742 (E.D. Pa. Aug. 26, 2003) (Philadelphia, habeas) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Banks v. Horn*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance; *Mills* did not announce new rule of law and therefore may be retroactively applied in this case), *rev'd and remanded*, 516 F.3d 169 (3d Cir. Jan. 24, 2008), *relief granted on remand*, 2014 WL 4209551 (E.D. Pa. Aug. 26, 2014).

○ Judge v. Canada, Communication No. 829/1998, CCPR/C/78/D/829/1998 (U.N.H.R.C.) (Aug. 13, 2003) (Philadelphia, United Nations Human Rights Committee) (Deportation from Canada to the United States of an escaped defendant who had been sentenced to death without ensuring that the sentence would not be carried out violated Article 6, ¶¶ 1 & 2 of the International Covenant on Civil and Political Rights, establishing the right to life as an international human right (Art. 6, ¶ 1) and limitations on the use of the death penalty (Art. 6, ¶ 2). "For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdictions if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.").

●® Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. July 31, 2003), opinion in support of order of March 13, 2003 (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence), *rev'd and remanded*, 590 Pa. 202, 912 A.2d 268 (Pa. Dec. 29, 2006), stipulated penalty-phase relief on remand, Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. Aug. 3, 2007).

* trial counsel's performance was deficient in failing to investigate mitigating evidence and in presenting no mitigating evidence at all in the penalty phase; "counsel's failure to develop and present [mitigating] evidence was not a strategic decision [and] . . . was without any reasonable basis . . . because counsel did no investigation despite th[e] availability of social history information at the time of trial";

* counsel was ineffective in part for attempting to argue in closing that the defendant's age (19) was mitigating, without having presented any actual evidence of his

age; the prosecution objected to the argument and the trial court instructed the jury: "You are to disregard that. There was no evidence concerning Damon Jones' age that was presented at this hearing."

* court finds it "inexplicable and indefensible" that trial counsel failed to present mitigating evidence that defendant was age 19 at time of the offense;

* the court found that there was significant family background and mental health mitigating evidence available at the time of trial. The family background mitigation included "that the defendant was one of nine children born to seven different fathers; there was no father figure in the home and the men, who did live there for short periods of time, abused both the children and their mother; their mother was an alcoholic, who suffered from a mental illness, was unable to work, abused the children and, never offered them affection or support." Other mitigation included that the family lived in a housing project in an apartment that "was full of mice and rats and [a] neighborhood full of drug dealers and crime." The defendant "was left to fend for himself from a very early age, rarely went to school and began to show signs of mental illness at the age of line[; a]s he got older he began to experience rapid mood swings, auditory and visual hallucinations and difficulty staying in touch with reality."

* the court found that this evidence was mitigating under 42 Pa. C.S. § 9711(e)(8); it further found that mental health evidence based upon the psychological effects of the defendant's background and upbringing supported the statutorily enumerated mental health mitigating circumstance that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," 42 Pa. C.S. § 9711(e)(3).

* Based upon all of the evidence, the court held that "[t]here is a substantial likelihood that, had the mitigation evidence presented at the PCRA hearings been presented at trial, the outcome of the penalty hearing would have been different."

150. Commonwealth v. Scott, No. 1739-98 (Mtgy. C.P.) (June 30, 2003) (Montgomery, PCRA/*Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

151. Porter v. Horn, 276 F. Supp. 2d 278 (E.D. Pa. June 26, 2003) (Philadelphia, habeas) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Banks v. Horn*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

® Commonwealth v. Williams (Christopher), Apr. Term, 1992, Nos. 1770-96 & 1825-46 (Phila. C.P. June 2, 2003) (Philadelphia, PCRA) (corrupt organization's conviction overturned because state statute applies only to criminal use of otherwise legitimate economic enterprise, not to a defendant's alleged involvement in an illegal drug enterprise; new trial granted on capital homicide charges as a result of the highly prejudicial impact of evidence of bad acts and other crimes that were improperly admitted in support of the invalid RICO charges and were otherwise inadmissible in a capital homicide prosecution), *rev'd*, 594 Pa. 366, 936 A.2d 12 (Pa. Nov. 26, 2007).

152. Commonwealth v. Ockenhouse, No. 1664/1998 (Lehigh C.P. Apr. 16, 2003) (Lehigh, PCRA) (stipulated vacation of death sentence; plea to life sentence).

- Wallace v. Price, 265 F. Supp. 2d 545 (W.D. Pa. Mar. 31, 2003) (*Wallace II*) (Washington, habeas corpus - adopting magistrate's report and recommendation) (new trial granted for violation of Confrontation Clause and due process right to present a defense where trial court refused to permit defense to present statement by Commonwealth's star witness confessing that he, and not Wallace, had shot the victim, or to cross-examine that witness with this statement).

- Commonwealth v. Clark, Dec. Term, 1993, Nos. 4115-19 (Phila. C.P. March 17, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

●® Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. March 13, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence), *rev'd and remanded*, 590 Pa. 202, 912 A.2d 268 (Pa. Dec. 29, 2006), stipulated penalty-phase relief on remand, Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. Aug. 3, 2007).

153. Commonwealth v. Cook, Aug. Term, 1987, No. 2651 2/2 (Phila. C.P. March 13, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

- Commonwealth v. Keaton, March Term, 1993, No. 1925 (Phila. C.P. March 10, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

●® Commonwealth v. Pelzer, Oct. Term, 1988, Nos. 3200, 3199, 3197, 3194 & 3205 (Phila. C.P. Jan. 29, 2003), bench order (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to adequately challenge the testimony of the Commonwealth's forensic pathologist and for failing to object under *Commonwealth v. Huffman* to an erroneous instruction on accomplice and conspiracy liability) (co-defendant of Henry Daniels), *rev'd*, Nos. 413, 414 Cap. App. Dkt., 600 Pa. 1, 963 A.2d 409 (Pa. Jan. 23, 2009), penalty-phase relief granted on remand, No. CP-51-CR-1031752-1988 (Phila. C.P. Aug. 26, 2011).

® Commonwealth v. Daniels, Oct. Term, 1988, Nos. 3175, 3178, 3181-82, 3187 & 3189 (Phila. C.P. Jan. 29, 2003), bench order (Phila. C.P. Jan. 29, 2003) (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to adequately challenge the testimony of the Commonwealth's forensic pathologist and for failing to object under *Commonwealth v. Huffman* to an erroneous instruction on accomplice and conspiracy liability) (co-defendant of Kevin Pelzer), *rev'd*, Nos. 410, 411 Cap. App. Dkt., 600 Pa. 1, 963 A.2d 409 (Pa. Jan. 23, 2009).

154. Commonwealth v. Wilson (Harold), July Term, 1988, Nos. 3267-3273 (Phila. C.P. Jan. 17, 2003) (*Wilson II*), bench order (Philadelphia, PCRA remand) (new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race, presented pretextual race-neutral explanations for those strikes, and accepted white jurors whose characteristics were similar to blacks jurors whom he had stricken) (acquitted of all charges on retrial).

® Banks v. Horn, 316 F.3d 228 (3d Cir. Jan. 14, 2003) (*Banks II*) (Luzerne, habeas corpus remand) (the *Mills v. Maryland* constitutional prohibition against requiring jurors to unanimously find a mitigating circumstance before considering that circumstance as a basis to spare the defendant's life did not announce a new rule of law; reinstating prior Circuit Court merits holding that granted petitioner a new sentencing hearing because Pennsylvania Supreme Court decision denying *Mills* relief was contrary to or an unreasonable application of clearly established constitutional law), *rev'd* 542 U.S. 406 (U.S. June 24, 2004).

155. Commonwealth v. Proctor, No. 1985-759 (Crawford C.P. Dec. 30, 2002) (Crawford, successor PCRA) (penalty-phase relief under *Brady v. Maryland* for Commonwealth's failure to disclose five separate items of evidence that were material to the jury's consideration of aggravating and mitigating evidence, including a knife found outside the murder scene shortly after the murder that was a potential murder weapon; the coroner's provisional report that there may have been two murder weapons, including a knife; a police drawing of a bloody shoe print found on the carpet near the victim that was several inches smaller than the defendant's shoe size; and statements made by the defendant's girlfriend and codefendant before the murder that the eventual victim might have to be killed so that he could not identify her and made afterwards that she had killed someone) (entered plea to life).

156. Commonwealth v. Harvey, No. 267 Cap. App. Dkt., 571 Pa. 533, 812 A.2d 1190 (Pa. Dec. 20, 2002) (Philadelphia, direct appeal) (juvenile defendant's death sentence overturned where sentencer found the "drug killing" aggravating circumstance despite the prosecution's failure to prove an essential element of that aggravator, that the defendant killed the victim to promote his activities in selling drugs; mere fact that killing occurred as part of dispute over drugs does not establish element of 42 Pa. C.S. § 9711(d)(14) that killing must be intended to *promote* defendant's illegal drug activity) (life sentence).

® Commonwealth v. Miller, Nos. 2775 & 2787 C.D. 1992, 64 Pa. D. & C. 4th 46, 2003 Pa. Dist. & Cnty. Dec. LEXIS 189 (Dauph. C.P., Crim. Div. Dec. 18, 2002) (Dauphin, successor PCRA) (PCRA court finds that record "clearly establishes" defendant's mental retardation, vacates death sentences under *Atkins v. Virginia*, and imposes two life sentences), *rev'd and remanded for evidentiary hearing*, 585 Pa. 144, 888 A.2d 624 (Pa. Dec. 27, 2005).

® Copenhefer v. Horn, No. 99-5E (W.D. Pa. Dec. 9, 2002) (Erie, habeas corpus) (adopting magistrate's report; death sentence reversed where prosecution had stipulated to the

defendant's lack of criminal record but jury failed to find mitigating circumstance that the defendant had no significant history of convictions; jury's failure to give mitigating effect to a proven mitigating circumstance violated the fundamental Eighth Amendment requirement that a capital sentencer may not refuse to consider and give mitigating effect to relevant mitigating evidence), *rev'd*, 696 F.3d 377 (3d Cir. Sept. 27, 2012).

157. Commonwealth v. Ford, No. 248 Cap. App. Dkt., 570 Pa. 378, 809 A.2d 325 (Pa. Oct. 24, 2002) (Philadelphia, PCRA appeal) (death sentence reversed as a result of trial counsel's ineffectiveness for failing to investigate and present mitigating evidence, including defendant's history of abuse, mental illness, and dysfunction; first time the Pennsylvania Supreme Court has granted post-conviction relief for failure to present mitigating evidence), *cert. denied*, 540 U.S. 1150 (U.S. Jan. 20, 2004) (stipulation to life sentence on remand for resentencing).

158. Commonwealth v. Overby (Michael), No. 244 Cap. App. Dkt., 570 Pa. 328, 809 A.2d 295 (Pa. Oct. 24, 2002) (Philadelphia, direct appeal) (new trial granted under *Bruton v. United States* for Confrontation Clause violation where out-of-court statement by non-testifying co-defendant was redacted to indicate that "X" strangled victim, where jury could reasonably infer that "X" referred to the defendant and the statement provided the only direct evidence of the defendant's participation in the crime).

- Wallace v. Price, No. 2:99-CV-231, 2002 WL 31180963, 2002 U.S. Dist. LEXIS 19973 (W.D. Pa. Oct. 1, 2002) (*Wallace II*) (Washington, habeas corpus - magistrate's report and recommendation) (see above).

159. Commonwealth v. Chambers (Karl), 570 Pa. 3, 807 A.2d 872 (Pa. Sept. 26, 2002) (*Chambers II*) (York, PCRA appeal) (death sentence reversed under *Mills v. Maryland* where trial court instructed the jury that "all of you must at least find one mitigating circumstance" before the jury could weigh mitigating evidence against aggravating evidence; "while a single juror in this Commonwealth can prevent a death sentence, a single juror can never compel a death sentence"; trial counsel ineffective for failing to object to this erroneous instruction) (life sentence imposed per *Atkins v. Virginia* prior to sentencing retrial).

160. Commonwealth v. Karenbauer, No. 642 of 1995 (Lawr. C.P. Sept. 23, 2002) (Lawrence, PCRA/*Atkins*) (PCRA court accepts agreement of counsel that defendant is mentally retarded, vacates death sentence under *Atkins v. Virginia*, and imposes life sentence; defendant permitted to proceed with post-conviction challenges to conviction. The defense had presented expert testimony at trial that defendant was moderately mentally retarded; prosecution accepted evidence of retardation, but argued that Karenbauer was only *mildly* mentally retarded; jury found mild mental retardation as a mitigating circumstance).

161. Commonwealth v. Harris, Sept. Term, 1992, No. 342-352 (Phila. C.P. Sept. 12, 2002), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence) (stipulation to life sentence on resentencing).

●® Copenhefer v. Horn, No. 99-5E (W.D. Pa. Aug. 15, 2002) (Erie, habeas corpus - magistrate's report and recommendation) (see above).

162. Faulkner v. Horn, No. 99 - 5986 (E.D. Pa. July 9, 2002), stipulation and order (Montgomery, habeas corpus, new trial) (district court approves parties' stipulation to grant habeas relief to facilitate negotiated plea agreement under *Atkins v. Virginia*; relief granted on petitioner's claims that, as a combined result of trial error and trial counsel's failure to investigate defendant's history of mental illness -- including institutional diagnosis of paranoid schizophrenia -- defendant was prevented from presenting a voluntary manslaughter defense to first degree murder and psychiatric testimony that would have supported that defense) (life plea accepted).

163. Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. July 1, 2002) (York, habeas corpus appeal) (Circuit panel unanimously holds that trial counsel was ineffective for failing to object to the trial court's prejudicially inaccurate response to the jury's inquiry as to whether it could "recommend life imprisonment with a guarantee of no parole"; although a defendant who is sentenced to life imprisonment is statutorily ineligible for parole under Pennsylvania law, defense counsel failed to object or to request a clarifying instruction after the trial court instead responded "no, absolutely not. . . . And the question of parole is absolutely irrelevant. I hope you understand that.") (life plea accepted).

164. Commonwealth v. Craver, No. 1902-93 (Del. C.P., Crim. Div. June 21, 2002) (Delaware, PCRA) (death sentence overturned as a result of trial counsel's ineffectiveness for failing to investigate and present mental health mitigating evidence, including an extensive history of mental health problems and prior institutionalizations that included military records documenting Craver's discharge from the service because of psychiatric problems, and court records and testimony from a 1978 prosecution for an assault in Ohio in which he was found not guilty by reason of insanity) (life plea accepted).

165. Commonwealth v. Thomas, Feb. Term, 1994, Nos. 991-992 (Phila. C.P. May 31, 2002), bench order (Philadelphia, PCRA) (new trial ordered where police and prosecutorial misconduct denied defendant a fair trial; court stated from the bench: "if the jury knew what I knew about the case, and knew what I knew about [the officer in question] or what everybody knows now, no way, in my opinion, would they not find a reasonable doubt in this case") (defendant died during pendency of Commonwealth appeal). Claims included:
* a failure to disclose a pattern of misconduct by a corrupt police officer later convicted of other charges of official misconduct;
* police intimidated eyewitnesses who had exculpatory information, suppressing information that eyewitnesses had identified other suspects and excluded the defendant as participating in the killing;
* the corrupt officer procured false testimony, later recanted, from two "eyewitnesses";
* the prosecution failed to disclose that its "star" prosecution witnesses were provided financial and housing assistance.

166. Commonwealth v. Lloyd, No. 312 Cap. App. Dkt. (Pa. May 29, 2002) (Philadelphia, direct appeal) (granting Commonwealth's motion to remand for new sentencing hearing based upon concession that significant history aggravating circumstance, 42 Pa. C.S. § 9711(d)(9), had improperly submitted to jury and improperly found where defendant had only one prior qualifying conviction) (resentenced to life).

- Commonwealth v. Gibson (Jerome), Nos. 5119, 5119-001/1994 (Bucks C.P., Crim. Div. May 22, 2002) (Bucks, PCRA) (death sentence overturned as a result of counsel's ineffectiveness for failing to investigate and present mitigating evidence of petitioner's brain damage; PCRA court rejects defense counsel's explanation of his failure to obtain brain scan to reveal organic brain damage "because that was very expensive" as constituting deficient performance, writing that "Obviously, when addressing the imposition of a death penalty, expense cannot be a factor") (appeal remanded to Court of Common Pleas under *Atkins* for determination of mental retardation).

167. Henry v. Horn, 218 F. Supp. 2d 671 (E.D. Pa. May 16, 2002) (Northampton, habeas corpus) (habeas court grants petitioner's motion for summary judgment under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer* that jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance) (on remand, negotiated life sentence imposed).

- Commonwealth v. Collins (Ronald), May Term, 1992, Nos. 2253-2256, June Term, Nos. 1477-1486 (Phila. C.P. Mar. 7, 2002) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence of family physical and psychological abuse, neglect, and abandonment; near-fatal head injury and brain damage; placement in special education; and mental and emotional disturbance), *aff'd*, 585 Pa. 45, 888 A.2d 564 (Pa. Dec. 27, 2005).

168. Commonwealth v. McNair, Dec. Term, 1987, No. 2459-2463 (Phila. C.P. Feb. 19, 2002) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present available family background and mental health mitigating evidence) (life plea accepted).

169. Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. Feb 1, 2002) (Erie, habeas corpus) (habeas court grants new sentencing hearing for trial counsel's ineffectiveness for failing to investigate, develop, and present what the court describes as "overwhelming amounts of mitigating evidence" concerning petitioner's childhood abuse and neglect, psychological problems, mental deficiencies, and general good character; trial court's instruction on torture aggravating circumstance, defining torture as a murder committed in a manner that is "especially heinous, atrocious, or cruel, manifesting exceptional depravity" was unconstitutionally vague and overbroad, in violation of *Godfrey v. Georgia* and the Eighth Amendment) (negotiated life plea).

- ® Commonwealth v. Sneed, June Term, 1984, Nos. 674-676 (Phila. C.P. Jan. 4, 2002) (Philadelphia, PCRA) (new trial granted under *Batson v. Kentucky* as a result of prosecution's racial discrimination in jury selection; court also reached sentencing-stage

issues and overturned death sentence for trial counsel's ineffectiveness in failing to investigate and present family background and mental health mitigating evidence), *aff'd in part (penalty relief) and rev'd in part (new trial) on procedural grounds*, 587 Pa. 318, 899 A.2d 1067 (Pa. June 19, 2006).

○ Commonwealth v. Hodges, 2002 Pa. Super. 1, 789 A.2d 764 (Pa. Super. Jan. 3, 2002) (Philadelphia, appeal from judgment of sentence) (guilty plea vacated where fifteen-year-old defendant entered into guilty plea to avoid death penalty, but under *Thompson v. Oklahoma* death penalty could not have been imposed on defendant who was younger than age sixteen at the time of the offense).

170. Commonwealth v. Basemore, March Term, 1987, Nos. 1762, 1763, 1764, 1765 (Phila. C.P. Dec. 19, 2001) (Philadelphia, PCRA) (new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race; PCRA court found that the jury selection practices "manifested a conscious pattern of discrimination and denied defendant equal protection of the law. . . . From the evidence before it, this Court is convinced that the trial prosecutor in this case engaged in a pattern of discriminating during voir dire. The record indicates a conscious strategy to exclude African-American jurors.") (jury retrial; resentenced to life by operation of law following failure to reach unanimous sentencing verdict).

® Abu-Jamal v. Horn, 2001 WL 1609690, 2001 U.S. Dist. LEXIS 20812 (E.D. Pa. Dec. 18, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *aff'd*, 520 F.3d 272 (3d Cir. Mar. 27, 2008), *vacated and remanded*, 130 S. Ct. 1134 (U.S. Jan. 19, 2010), *relief reinstated*, 2011 WL 1549231 (3d Cir. Apr. 26, 2011).

171. Szuchon v. Lehman, 273 F.3d 299 (3d Cir. Nov 20, 2001) (Erie, habeas corpus appeal) (new sentencing hearing under *Witherspoon v. Witt* where trial court's excusal of juror for sentencing-stage bias, based upon statement that juror did not believe in capital punishment, was not supported by the evidence; prosecution never inquired whether juror could set aside generalized opposition to death penalty and follow the law, and thus failed to meet its burden of proving that the juror's ability to follow the law was substantially impaired) (jury resentencing; resentenced to life by operation of law following jury's failure to reach a unanimous sentencing verdict).

172. Peterkin v. Horn, 176 F. Supp. 2d 342 (E.D. Pa. Nov. 6, 2001) (Philadelphia, habeas corpus) (new trial for numerous instances of prosecutorial misconduct, Confrontation Clause violation, insufficiency of the properly admitted evidence to prove robbery (the underlying aggravating circumstance), and ineffectiveness of counsel for failing to object to a variety of errors; death sentence also overturned for various incidents of

prosecutorial misconduct and for trial counsel's ineffectiveness for failing to investigate and present available mitigating evidence) (life plea accepted).
* new trial granted in part because the prosecution had improperly presented, and the trial court improperly admitted, prejudicial hearsay testimony
* trial prosecutor committed misconduct by improperly presenting evidence of uncharged crimes and then intentionally misused this evidence in his closing argument; when all of this improper testimony and argument was removed from the case, the District Court found that the remaining properly admitted evidence was insufficient to support the jury's guilty verdict on the accompanying robbery charge, without which there were no aggravating circumstances in the case, and the case could not have advanced to the penalty phase of trial
* prosecutor committed misconduct by introducing evidence of uncharged crimes and referring to these crimes in closing argument: prosecution introduced evidence that defendant was also known by another name and was registered to vote under both names, that defendant was receiving welfare payments at another address that was a vacant lot, and affirmatively argued to the jury that defendant had committed welfare fraud
* prosecution improperly commented on defendant's silence by stating that "the same man that gave the address to a vacant lot . . . to get Public Assistance . . . sits there today, calmly in a suit, passive and cool, protected by the laws of the Commonwealth, protected by the laws encompassed in the Bill of Rights. . . . Oh yes, he is passive here now but the destruction that he wreaked, or visited on two human beings in a civilized society, I hope we can't tolerate this."
* prosecutor committed misconduct by arguing beyond the admissible scope of the evidence: prosecutor argued hearsay testimony that had been admitted for the limited purpose of proving the witness' state of mind as substantive evidence of how the homicide occurred; state court determination of harmless error failed to take into account the cumulative effect of all improperly admitted evidence
* Confrontation Clause violated when the trial court improperly admitted the hearsay testimony of two different prosecution witnesses of the victim's alleged statements that defendant "was in the [gas] station attendant's booth with a gun and the dial to the safe": the prosecution asked one of the witnesses about these remarks three separate times during direct examination with only a single cautionary instruction, the prosecutor inaccurately referred to the statement as substantive evidence in both his opening statement and closing argument, and the prosecutor again presented the statement during the sentencing phase of the trial
* improperly admitted hearsay testimony that provided "circumstantial evidence going to show the motive for the crime" was not harmless when considered in connection with (1) other inadmissible testimony that another witness saw the defendant in possession of a gun other than the murder weapon two days before the murders took place, and (2) inflammatory prosecutorial argument exhorting the jury to "be as cold and ruthless as the appellant was when he murdered his victims"
* death sentence reversed for prosecutorial misconduct where prosecutor argued that "[m]ercy has no part in your deliberation" – "the suggestion that mercy is inappropriate is . . . a misrepresentation of the law [that] withdraws from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life" and "while the prosecutor may argue that mercy is not warranted by the facts of a certain case and the history of a particular defendant, when the prosecutor argues that it is mercy itself

that is inappropriate, the jury is improperly told that the concept of mercy . . . [is] illegitimate"
* death sentence reversed for prosecutorial misconduct where prosecutor "improperly opined as to what the testimony of his best witnesses, the victims, would have been if they had lived"
* death sentence reversed for misconduct where prosecutor incorporated into the sentencing hearsay testimony that had been admitted at the guilt-stage in violation of the Confrontation Clause of the Sixth Amendment, and presented substantive circumstantial argument of how the homicide occurred based upon hearsay testimony that had been admissible at trial only for the limited purpose of proving the witness' state of mind
* trial counsel ineffective for failing to object to those portions of the prosecutor's closing arguments that the district court found improper, and appellate counsel was ineffective for failing to raise those issues on direct appeal
* given insufficiency of evidence of robbery, court found evidence insufficient to support the aggravating circumstance that the defendant had committed the killing during the perpetration of a felony (the purported robbery)
* death sentence also overturned for trial counsel's ineffectiveness in failing to investigate and present available mitigating evidence

® Banks v. Horn, 271 F.3d 527 (3d Cir. Oct. 31, 2001) (*Banks I*) (Luzerne, habeas corpus appeal), *reh'g denied*, Dec. 11, 2001 (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; state court decision unreasonably applied *Mills*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *rev'd and remanded*, Horn v. Banks, 536 U.S. 266 (U.S. June 17, 2002), *aff'd on remand*, 316 F.3d 228 (3d Cir. Jan. 14, 2003) (*Banks II*), *rev'd* 542 U.S. 406 (U.S. June 24, 2004).

173. Commonwealth v. Stallworth, 566 Pa. 349, 781 A.2d 110 (Pa. Oct. 4, 2001) (Lancaster, direct appeal) (death sentence reversed where, under required strict construction of aggravating circumstances, Commonwealth failed to prove all elements of protection from abuse aggravating circumstance beyond a reasonable doubt; prosecution failed to prove element that defendant had notice of court order that related to his behavior toward the victim -- the evidence showed that defendant was aware that victim had obtained some type of court order against him, but at most showed that he believed it was a custody order restricting his right to see his daughter; "because Appellant was never served with notice of the PFA order, which had only been issued fewer than twenty-four hours before the killing, and because he did not have anecdotal knowledge of the existence of an order 'restricting in any way his behavior towards the victim,' he was not 'subject to' such an order for purposes of the aggravating circumstance set forth at 9711(d)(18)") (resentenced to life).

174. Commonwealth v. Begley, 566 Pa. 239, 780 A.2d 605 (Pa. Sept. 26, 2001) (York, direct appeal) (death sentence reversed under *Mills v. Maryland* where instructions concerning sentencing verdict slip told jury it must unanimously agree to existence of any mitigating circumstance before considering that circumstance in its sentencing determination; although the verdict slip itself correctly "directed the jury to list and consider the

mitigating circumstance(s) that any one or more of them found," the trial court erroneously instructed: "You will remember I called upon you to weigh the aggravating versus the mitigating circumstance. . . . The mitigating circumstances found by you unanimously are or is. Two [if], the mitigating circumstance is not outweighed by the aggravating circumstance, then you go on to provide what you found unanimously to be the mitigating circumstance or circumstances and the aggravating circumstance unanimously found."; Court states that this instruction "created a reasonable likelihood that the jurors concluded that they needed to unanimously agree that a mitigating circumstance existed in order to consider that mitigating circumstance") (jury resentencing; resentenced to life).

175. Jermyn v. Horn, 266 F.3d 257 (3d Cir. Sept. 21, 2001) (Cumberland, habeas corpus appeal) (Circuit Court reverses death sentence as a result of trial counsel's ineffectiveness in failing to investigate and present mitigating evidence of extreme child abuse and neglect, the psychological implications of that abuse, and the victim's failure to protect the defendant from the abuse; court finds Pennsylvania Supreme Court's denial of relief an unreasonable application of *Strickland v. Washington*, and determines that "there is a reasonable probability that the presentation of the specific and disturbing evidence of childhood abuse and neglect as a mitigating factor would have convinced one juror to find the mitigating factors to outweigh the single aggravating factor the Commonwealth relied upon"), *reh'g denied* Jan. 4, 2002, *aff'g*, 1998 WL 754567, 1998 U.S. Dist. LEXIS 16939 (M.D. Pa. Oct. 27, 1998) (resentenced to life).

- Laird v. Horn, 159 F. Supp. 2d 58 (E.D. Pa. Sept. 5, 2001) (Bucks, habeas corpus) (new trial granted because of failure to provide specific intent instruction; death penalty overturned on numerous grounds), *aff'd*, 414 F.3d 419 (3d Cir. July 19, 2005)
  * new trial granted because guilt-stage jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed the specific intent to kill by permitting the jury to transfer the intent of his co-defendant;
  * death sentence overturned on numerous grounds, including trial counsel's gross ineffectiveness in failing to investigate and present mitigating evidence of Mr. Laird's childhood, personal background, brain damage, and mental health that the court described as "too extensive to recount in its entirety";
  * new sentencing mandated because court's acquiescence in sheriff's decision to shackle defendant during penalty phase, which forced him to wear shackles and handcuffs in front of the jury, violated due process and the defendant's right to a fair and reliable capital sentencing hearing;
  * new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer* because jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance;
  * death sentence also reversed because the prosecutor's statement in closing that the defendants had "shed not one tear, not one tear. They have not shown one drop of remorse for what they have done, not now. Even now. Even now. . ." constituted impermissible comment on the defendant's exercise of his right not to testify.

* Court finds that "the language used by the prosecutor was of such a character that the jury would necessarily consider it to be a comment on the defendant's failure to testify at sentencing and apologize for his crime"; while the defendant's demeanor may be a relevant factors at sentencing, "the comments in this case were not mere comments on petitioner's demeanor"
* While the improper comments, in isolation, did not "so infect[ ] the trial that petitioner was denied due process," they "contributed to the fundamental unfairness of petitioner's sentencing hearing" when considered together with the other penalty phase errors.

- Holloway v. Horn, 161 F. Supp. 2d 452 (E.D. Pa. Aug 27, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted as a result of trial counsel's ineffectiveness for failing to investigate and present mitigating evidence, including denial of right to present expert mental health testimony under *Ake v. Oklahoma*), *denial of guilt-stage relief rev'd*, 355 F.3d 707 (3d Cir. Jan. 22, 2004), *cert. denied*, 543 U.S. 976 (U.S. Nov. 1, 2004).

176. Commonwealth v. Counterman, No. 2500 of 1988 (Lehigh C.P. Aug. 27, 2001) (Lehigh, PCRA) (new trial granted on multiple grounds; death penalty vacated for sentencing counsel's ineffectiveness for failing to investigate and present mitigating evidence) (pled to lesser charges and released).
* new trial granted for combination of police and prosecutorial suppression of exculpatory evidence by police and prosecutors
* the *Brady* violation consisted in part of on-going police and prosecutorial suppression in this arson-murder cases of the fact that the defendant's son (who was killed in the fire) had a history of starting fires and that prosecutors had initially suppressed and then whited-out a portion of the original statement given by petitioner's mentally retarded wife that she had awakened Counterman to tell him that the house was on fire -- after the police and prosecution had denied during PCRA proceedings that they had any information on the son's fire starting, the defense found *in the police files* a statement from Children & Youth Services concerning the son's history of fire setting;
* PCRA court writes: "[T]he District Attorney is a constitutional officer and is charged to act under the highest ethical duty. He acts not just as an advocate for one side. His is the responsibility to disclose freely and willingly any evidence favorable to the Defendant and to prosecute vigorously to a fair and just disposition."
* new trial also granted as a result of trial counsel's ineffective assistance for failing to investigate this exculpatory evidence;
* new trial granted for counsel's ineffectiveness in failing to investigate and present available character evidence at trial;
* court also reached sentencing-stage issues and overturned death sentence on the grounds that defense counsel had been ineffective in failing to investigate and present available mitigating evidence.

177. Commonwealth v. Rizzuto, 566 Pa. 40, 777 A.2d 1069 (Pa. Aug. 20, 2001) (Philadelphia, direct appeal) (death sentence overturned where jury failed to find mitigating circumstance 42 Pa. C.S. § 9711(e)(1), that "the defendant has no significant history of prior criminal convictions," after the prosecution had stipulated to the absence of prior convictions; the court reverses its prior decision in *Commonwealth v. Copenhefer* and holds that the Pennsylvania sentencing statute, 42 Pa. C.S. § 9711(c), requires the jury to

find mitigating circumstances that have been established by stipulated facts and weigh these factors against the prosecution's aggravating circumstances before reaching any penalty-phase verdict could be reached on the penalty question) (resentenced to life).

® Hackett v. Price, 212 F. Supp. 2d 382 (E.D. Pa. Aug. 8, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance; fact that jury found no mitigation did not mean that every juror had rejected every mitigating circumstance, only that the jury did not unanimously agree as to the presence of any particular circumstance), *rev'd*, 381 F.3d 281 (3d Cir. Aug. 26, 2004).

●® Bronshtein v. Horn, 2001 WL 767593, 2001 U.S. Dist. LEXIS 9310 (E.D. Pa. July 5, 2001) (Montgomery, habeas corpus) (new trial granted because jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed the specific intent to kill by permitting the jury to transfer the intent of his co-defendant; the court also granted a new sentencing hearing on multiple grounds), *penalty-phase relief aff'd, guilt-phase relief rev'd*, Nos. 01-9004 & 01-9005 (3d Cir. Apr. 14, 2005), *cert. denied*, No. 05-346, 546 U.S. 1208 (U.S. Feb. 21, 2006) and No. 05-7539, 546 U.S. 1209 (U.S. Feb. 21, 2006).
* death sentence reversed under *Simmons v. South Carolina* because the trial court had improperly failed to instruct the jury that its life sentence carried with it no possibility of parole after the prosecution had injected the issue of future dangerousness: court finds cross-examination of mental health expert on negative character traits, reference to repeated anti-social acts by petitioner, commenting on the supposed "snowball effect" of untreated anti-social conduct, and comment about petitioner's supposed inability to "play by the rules in a civilized society" were "unquestionably designed to evoke in a reasonable juror's mind the potential danger he would pose to society in the event of his release on parole"
* new sentencing hearing also required because the trial court failed to instruct the jury on all the elements of aggravating circumstance 42 Pa. C.S. § 9711(d)(6), that "the defendant had committed the killing during the perpetration of a felony": the jury was never told that Pennsylvania law limited the murder-during-another-felony aggravating circumstance to defendants who actually committed the killing, *Commonwealth v. Lassiter*, and the jury's mitigation finding by a preponderance of the evidence that Bronshtein might not have been the shooter precluded a finding beyond a reasonable doubt that he had been the shooter
* court finds that in a weighing state such as Pennsylvania, the jury's consideration of an invalid aggravating circumstance is Eighth Amendment error

178. Commonwealth v. Reyes, No 1388-93 (Del. C.P. July 2, 2001) (Reyes I) (Delaware, PCRA) (new sentencing hearing for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

®○ Hardcastle v. Horn, 2001 WL 722781, 2001 U.S. Dist. LEXIS 8556 (E.D. Pa. June 27, 2001) (Philadelphia, habeas corpus) (new trial granted under *Batson v. Kentucky* as a

result of prosecution's racial discrimination in jury selection; court found that trial prosecutor had exercised peremptory challenges to intentionally discriminate against six African-American jurors; state court decision that *sua sponte* attributed race-neutral reasons to the strikes based upon the voir dire transcripts was an unreasonable application of *Batson*, which requires that the prosecution provide actual, not apparent, reasons for each strike; state supreme court decision also involved an unreasonable determination of fact where court created race-neutral explanation for striking juror who was actually white and failed to provide any explanation for strikes of two black jurors), *vacated in part and remanded by* 368 F.3d 246 (3d Cir. May 11, 2004), *cert. denied*, 543 U.S. 1081 (U.S. Jan. 10, 2005), *relief granted on remand*, 521 F. Supp. 2d 388 (E.D. Pa. Oct. 19, 2007) (Philadelphia, habeas, new trial), *aff'd*, No. 07-9007, 332 Fed. Appx. 764, 2009 WL 1683335, 2009 U.S. App. LEXIS 13026 (3d Cir. June 17, 2009).

179. Commonwealth v. Jones (James), Oct. Term, 1980, Nos. 2486, 2487, 2491 (Phila. C.P. June 12, 2001) (*Jones II*) (Philadelphia, PCRA) (new sentencing hearing for ineffective assistance of counsel for failing to investigate and present family background, brain damage, and mental health mitigating evidence; presentation of defense psychiatrist at sentencing who had never been provided any background records or even interviewed the defendant violated the right to mental health assistance in the preparation and presentation of the defense at sentencing).

180. Appel v. Horn, 250 F.3d 203 (3d Cir. May 3, 2001) (Northampton, habeas corpus appeal) (new trial granted for constructive denial of counsel under *United States v. Cronic* where state courts mischaracterized and adjudicated claim as a legally distinct claim of ineffective assistance of stand-by counsel under *Strickland v. Washington*; defendant had been denied right to counsel in pre-trial competency proceedings where court scheduled hearing to determine whether defendant was competent to waive right to appointed counsel after defendant had indicated that he wanted to represent himself, plead guilty, and accept death penalty; appointed counsel failed to obtain any mental health records or interview available lay witnesses, which would have disclosed defendant's history of psychotic mental illness, and failed to present any case at all at the competency proceeding, effectively denying Appel counsel at this critical stage of trial) (pled to life sentence).

- Holland v. Horn, 150 F. Supp. 2d 706 (E.D. Pa. Apr. 25, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted as a result of trial counsel's ineffectiveness for failing to investigate and present mitigating evidence, including denial of right to present expert mental health testimony under *Ake v. Oklahoma*).

®● Commonwealth v. Gribble, December Term, 1992, Nos. 2081-2092 (Phila. C.P. Mar. 22, 2001) (Philadelphia, PCRA) (death sentence reversed on the same grounds as co-defendant, Kelley O'Donnell, for invalid waiver of the right to a capital sentencing jury), *vacated and remanded* 580 Pa. 647, 863 A.2d 455 (Pa. Dec. 21, 2004), *relief restored on remand* (Phila. C.P. Mar. 8, 2007).

- Jacobs v. Horn, 129 F. Supp. 2d 390 (M.D. Pa. Feb. 20, 2001) (York, habeas corpus) (new sentencing hearing granted as a result of trial counsel's ineffectiveness for failing to

investigate and present extensive mitigating evidence including extreme mental and emotional disturbance, mental retardation, brain damage, schizoid personality disorder, dysthymia, serious childhood abuse, trauma, and neglect, and history of alcohol and drug abuse), *denial of new trial rev'd*, 395 F.3d 92 (3d Cir. Jan 20, 2005), *cert. denied*, 546 U.S. 962 (U.S. Oct. 17, 2005).

® Commonwealth v. Speight, October Term, 1992, Nos. 3627-3636 (Phila. C.P. Dec. 12, 2000), bench order (PCRA), *withdrawn on reconsideration* (Apr. 3, 2001).

181. Commonwealth v. Strong, 563 Pa. 455, 761 A.2d 1167 (Pa. Nov. 28, 2000) (Luzerne, PCRA appeal) (granting new trial under *Brady v. Maryland* where prosecutors withheld evidence relating to a deal with its star witness in exchange for his testimony against Strong; Pennsylvania Supreme Court holds that *Brady* evidence favorable to the accused "is not confined to evidence that reflects upon the culpability of the defendant [but] also includes evidence of an impeachment nature that is material to the case against the accused"; this "any implication, promise or understanding that the government would extend leniency in exchange for a witness' testimony").

○ Commonwealth v. Crawford, No. 1480 of 2000 (Luz. C.P. Nov. 21, 2000) (Luzerne, pre-trial) (applying Thompson v. Oklahoma to quash capital prosecution on grounds that defendant could not be subject to the death penalty for an offense he committed while only fifteen years old).

182. Commonwealth v. Kimbell, 563 Pa. 256, 759 A.2d 1273 (Pa. Oct. 19, 2000) (Lawrence, direct appeal) (new trial granted where trial court violated defendant's right to present a defense by refusing to permit defense counsel to cross-examine defense witness on prior statement she had given to state police: the defense witness told state police that she had been on the telephone with one of the murder victims (the witness' daughter) shortly before the time of the murder and that the victim told her that she had to get off the telephone because the victim's husband had just pulled into the driveway; however, witness' in-court testimony had failed to identify who had pulled into the driveway; refusal to permit cross-examination prevented the defense from rebutting the husband's assertion that he was elsewhere at the time of the murders and from offering explanation for the presence of the blood of second victim (the husband's daughter) on the husband's hand, despite husband's denial that he had touched daughter's body) (acquitted on retrial).

● Commonwealth v. Moore, No. 22 of 1983, slip op. (Luzerne C.P. Sept. 22, 2000) (Luzerne, PCRA) (new sentencing hearing granted as a result of trial counsel's failure to act as an advocate during sentencing; defense counsel failed to interview *any* mitigation witnesses and failed to investigate or present any mitigating evidence; counsel's deficient closing argument included telling the sentencing jury that the defendant was from Philadelphia and rhetorically asking them "what more do you need to know?").[2]

[2] This was the same lawyer whom the Pennsylvania Supreme Court had previously found to be ineffective in *Commonwealth v. Brian Smith*, 544 Pa. 219, 675 A.2d 1221 (1996), for

®● Rompilla v. Horn, 2000 WL 964750, 2000 U.S. Dist. LEXIS 9620 (E.D. Pa. July 11, 2000) (Lehigh, habeas corpus) (new sentencing hearing granted for trial counsel's ineffectiveness in failing to investigate institutional records and provide to mental health experts school, medical, court and prison records that would have established petitioner's hospitalization at age two, assignment to special education, and mental retardation or borderline retardation, all of which would have been important to the diagnoses of defense mental health experts; counsel also ineffective for failing to develop and present any mitigating evidence about Petitioner's abusive childhood, alcoholism, mental retardation, or possible organic brain damage), *rev'd*, 355 F.3d 233 (3d Cir. Jan. 13, 2004), *cert. granted*, 542 U.S. 966 (U.S. Sept. 28, 2004), *penalty-phase relief granted*, 545 U.S. 374 (U.S. June 20, 2005).

● Commonwealth v. Jones (James), Oct. Term, 1980, Nos. 2486, 2487, 2491 (Phila. C.P. June 21, 2000) (Philadelphia, PCRA) (*Jones I*, record-based claims) (death sentence vacated because it was based upon an aggravating circumstance that was neither charged nor argued to the jury; trial court had ruled that Commonwealth could not prove grave risk aggravating circumstance and so barred sentencing-phase evidence and argument on this aggravating circumstance; prior to deliberations, court instructed the jury that it could consider only the two aggravating circumstances for which the prosecution had presented evidence and argument, but provided jury with verdict slip that identified all statutory aggravating and mitigating circumstances; jury found grave risk aggravating circumstance in addition to the two aggravating circumstances for which evidence and argument had been presented; neither trial, post-verdict, or series of direct appeal counsel had ever looked at jury's verdict slip).

183. Commonwealth v. Bolden, No. 205 Cap. App. Dkt., 562 Pa. 94, 753 A.2d 793 (Pa. June 20, 2000) (Allegheny, direct appeal) (reversing death sentence where trial court erred in instructing the jury that it could find (d)(7) aggravating circumstance – that the defendant knowingly created a grave risk of death to another person in addition to the victim of the murder -- where evidence failed to establish elements that (1) "the other person(s) must be "in close proximity" to the decedent "at the time" of the murder, and (2) "due to that proximity [those persons] are in jeopardy of suffering real harm": here, defendant was already in store at time second shooting victim arrived at the store, "the Commonwealth presented no evidence that [second person shot] was nearby or within the zone of danger when [homicide victim] was killed," and "[p]resumably, [murder victim] was already dead when [second person shot] entered the store"; jury finding of grave risk aggravating circumstance not supported by the evidence) (resentenced to life).

184. Commonwealth v. Wesley, No. 221 Cap. App. Dkt., 562 Pa. 7, 753 A.2d 204 (Pa. June 19, 2000) (Allegheny, direct appeal) (death sentence vacated where prosecution failed to provide notice of intent to pursue torture aggravating circumstance until after jury had returned guilt verdict, despite contention that aggravating circumstance was mistakenly omitted from original notice of aggravating circumstance because of scrivener's error;

---

failing to investigate mental health mitigation that was so obvious that the trial jury found "mental state" as a mitigating circumstance just by observing the defendant's demeanor at trial.

prosecution was aware of arguable presence of aggravating circumstance prior to arraignment and was required to provide notice at that time; appropriate remedy was reversal of death sentence and remand for new sentencing hearing that limited evidence in aggravation to the aggravating circumstances contained in the original notice and excluded consideration of torture aggravator) (resentenced to life).

- Szuchon v. Lehman, No. 94-195-E (W.D. Pa. Apr. 12, 2000) (adopting magistrate's report) (Erie, habeas) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; state court decision unreasonably applied *Mills*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *claim rev'd on grounds of procedural default, result aff'd on other grounds*, 273 F.3d 299 (3d Cir. Nov. 20, 2001) (jury resentenced to life).

185. Commonwealth v. Young (Richard), No. 120 Cap. App. Dkt., 561 Pa. 34, 748 A.2d 166 (Pa. Mar. 24, 2000) (Lackawanna, direct appeal – reconsideration of denial of guilt-stage relief) (new trial for violation of *Bruton v. United States* and *Lilly v. Virginia*: statements of non-testifying accomplices that inculpated the defendant more than the accomplice do not qualify as exception to the hearsay doctrine; hearsay evidence implicating defendant in capital crime not harmless beyond a reasonable doubt – "[i]t is difficult to imagine any evidence more prejudicial to a defendant than that which identifies the defendant as a perpetrator of a capital crime," evidence was not "merely cumulative" of untainted evidence, and the untainted evidence was not uncontested; death sentence previously overturned for improper presentation of testimony from several witnesses concerning the effect of the death of the victim on remaining family members; victim-impact testimony *per se* inadmissible in offenses committed prior to the December 1995 effective date of statutory amendments permitting such evidence) (capital charges dropped).

186. Commonwealth v. Trivigno, No. 228 Cap. App. Dkt., 561 Pa. 232, 750 A.2d 243 (Pa. Mar. 24, 2000) (Philadelphia, direct appeal) (court finds that prosecution's penalty-phase closing, that the defendant's significant history of prior felony convictions was a "weather vane" to the "future" and "a determinant of where . . . he's going, not just where he's been," implicated future dangerousness; three Justices would have overturned death sentence under *Simmons v. South Carolina* because trial court failed to provide a life without possibility of parole instruction after the prosecution argued future dangerousness; three other Justices would have overturned death sentence on the grounds that arguing future dangerousness is *per se* impermissible because future dangerous is not a statutory aggravating circumstance and therefore is not a legitimate sentencing consideration) (resentenced to life).

187. Commonwealth v. Nieves, 560 Pa. 529, 746 A.2d 1102 (Pa. Feb. 17, 2000) (Philadelphia, Commonwealth's appeal from grant of post-trial motion) (new trial granted for guilt-stage ineffectiveness of counsel where defendant waived right to testify because of counsel's erroneous advice that prosecution would impeach his testimony with evidence of his prior record; prior convictions for firearms and drug trafficking offenses that did

not involve dishonesty or false statements were not admissible as impeachment evidence) (acquitted on retrial).

- Commonwealth v. Martorano/Daidone, 559 Pa. 533, 741 A.2d 1221 (Pa. Nov. 10, 1999), *rearg. denied*, Dec. 27, 1999 (Philadelphia, pretrial double jeopardy motion) (reprosecution barred on double jeopardy grounds under Article I, Section 10 of the state constitution because of prosecutorial misconduct where "the prosecutor acted in bad faith throughout the trial, consistently making reference to evidence that the trial court had ruled inadmissible, continually defying the trial court's rulings on objections, and . . . repeatedly insisting that there was fingerprint evidence linking Appellees to the crime when the prosecutor knew for a fact that no such evidence existed."; misconduct also included "disparaging the integrity of the trial court in front of the jury"; where prosecutorial misconduct "evinces the prosecutor's intent to deprive Appellees of a fair trial; to ignore the bounds of legitimate advocacy; in short, to win a conviction by any means necessary . . . [it] is precisely the kind of prosecutorial overreaching to which double jeopardy protection applies").

188. Commonwealth v. O'Donnell, 559 Pa. 320, 740 A.2d 198 (Pa. Oct. 28, 1999) (Philadelphia, direct appeal) (new sentencing hearing granted where trial court conducted inadequate colloquy to determine whether defendant's waiver of the right to jury sentencing was knowing, voluntary, and intelligent; right to jury was personal to defendant and could not be waived on her behalf by counsel; court also expresses "serious doubts regarding counsel's effectiveness during the penalty phase of Appellant's trial" where "entire defense presentation during the penalty phase took only four pages to transcribe" – "it is difficult to disagree with Appellant that a defense which amasses only four pages of transcript simply does not reflect adequate preparation or development of mitigating evidence by counsel representing a capital defendant in a penalty phase hearing") (jury rejected the Commonwealth's sole aggravating circumstance and returned a unanimous life sentence in the resentencing hearing; PCRA challenge to conviction pending).

189. Commonwealth v. Chmiel, 558 Pa. 478, 738 A.2d 406 (Pa. Aug. 19, 1999) (*Chmiel II*) (Lackawanna, direct appeal) (new trial granted where court admitted against defendant testimony from prior counsel in ineffectiveness hearing in which counsel claimed defendant had incriminated himself in the homicide; use of prior counsel's testimony was improper, even if it would otherwise survive hearsay challenge because prosecution's use of privileged attorney-client communications would violate defendant's right to counsel and his constitutional privilege against self-incrimination) (resentenced to death).

- Commonwealth v. Wilson (Harold), July Term, 1988, Nos. 3267-3273 (Phila. C.P. Aug. 19, 1999), bench order (*Wilson I*) (Philadelphia, PCRA) (new sentencing hearing granted for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence) (new trial granted following remand of defendant's appeal from denial of guilt-stage relief, acquitted of all charges on retrial).

190. Commonwealth v. Jasper, 558 Pa. 281, 737 A.2d 196 (Pa. July 21, 1999) (*Jasper II*) (Philadelphia, direct appeal) (death sentence overturned under *Caldwell v. Mississippi*; in sole issue addressed by the majority) (died in prison)
* Trial court told jury: "Somewhere down the line, if you do impose the death penalty, the case will be reviewed thoroughly. And after thorough review the death penalty may be carried out." Court held this statement improperly minimized the jury's sense of responsibility for imposing a death sentence, in violation of *Caldwell.*
* Justice Zappala also would have reversed for prosecutorial misconduct because the "prosecutor attempted to expand the jury's focus from the punishment of appellant on the basis of aggravating circumstances to broader policies regarding prison conditions in a manner calculated to inspire resentment"; prosecutor made "patently false" statements about prison conditions" that "had absolutely no support in the record"; "Comments such as 'I don't [even] have cable,' and '[in prison] [y]ou go to college. It's free. You don't pay tuition. No loans,' are designed to do nothing more than provoke the jurors into characterizing the sentencing options as whether to sentence the defendant to death or provide him for life with amenities that even law-abiding citizens may not enjoy."

191. Commonwealth v. Edwards, Nos. 84 -- CR 529, 996 (Lack. C.P. June 16, 1999) (Lackawanna, PCRA) (stipulated plea to life accepted)

- Appel v. Horn, 1999 WL 323805, 1999 U.S. Dist. LEXIS 7530 (E.D. Pa. May 21, 1999) (Northampton, habeas corpus) (see description above), *aff'd*, 250 F.3d 203 (3d Cir. May 3, 2001) (resentenced to life).

192. Commonwealth v. Mikell, 556 Pa. 509, 729 A.2d 566 (Pa. April 23, 1999) (Philadelphia, direct appeal) (new trial granted for ineffective assistance of counsel for failure to request alibi instruction) (resentenced to life).

193. Commonwealth v. Moran, Nov. Term, 1981, Nos. 3091 & 3092 (Phila. C.P. 1999) (Jan. 25, 1999) (Philadelphia, PCRA) (conviction overturned for counsel's ineffectiveness in failing to communicate plea offer to defendant) (negotiated plea to life accepted, to be served in federal prison in witness protection program).

- Commonwealth v. Young (Richard), 1999 WL 24540, 1999 Pa. LEXIS 139 (Pa. Jan. 22, 1999) (Lackawanna, direct appeal) (see description above concerning victim-impact evidence), *new trial granted on reconsideration*, 561 Pa. 34, 748 A.2d 166 (Pa. Mar. 24, 2000) (capital charges dropped on retrial).

194. Commonwealth v. Chandler, 554 Pa. 401, 721 A.2d 1040 (Pa. Nov. 23, 1998) (Philadelphia, direct appeal) (death sentence reversed under *Simmons v. South Carolina* when trial court refused a defense request for a life without parole instruction after the prosecutor had injected the issue of the defendant's future dangerousness; prosecution had argued "Frankly, ladies and gentlemen, life imprisonment in this case is simply not enough. I am asking you, with your verdict today, to stop Kevin Chandler, to stop him from ever hurting another woman again, to stop him from ever killing another woman again.").

195. Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. Nov. 10, 1998) (Cambria, habeas corpus) (new trial granted for denial of right to independent mental health expert at trial; death sentence also overturned for numerous instances of counsel's ineffectiveness) (plea to life accepted)
* counsel ineffective at penalty phase of trial for failing to investigate and present evidence of the defendant's long history of mental illness, including paranoid schizophrenia that had been documented through four separate institutionalizations that had been successfully obtained by one of the prosecutors in the case and had been presided over by the trial judge; counsel was unaware of how to present mitigating evidence within institutional records he had at his disposal, and as a result, the evidence was ruled inadmissible;
* counsel also was ineffective for failing to object to the prosecutions arguments that Christy was the "Great Manipulator" and was feigning mental illness to obtain a life sentence, as well as to the prosecutor's improper argument that Christy would pose a future danger to society if he were not sentenced to death;
counsel was ineffective for presenting a character witness in the penalty phase whom he knew would testify on cross-examination that Christy had allegedly stated his intention to kill anyone who might witness a murder that he committed;
* counsel ineffective for prejudicially misinforming the sentencing jury during his penalty-phase closing argument that it had to unanimously agree to a sentence of life imprisonment before Christy could receive a life sentence.

- Jermyn v. Horn, 1998 WL 754567, 1998 U.S. Dist. LEXIS 16939 (M.D. Pa. Oct. 27, 1998) (Cumberland, habeas corpus) (death sentence reversed on multiple grounds including penalty-phase ineffectiveness of counsel, improper prosecutorial argument, and instructional error), *aff'd*, 266 F.3d 257 (3d Cir. Sept. 21, 2001) (capital reprosecution declined)
* Court found that trial counsel was ineffective in failing to investigate and present mitigating evidence relating to the extreme child abuse Petitioner suffered at the hands of his father, including being whipped with a cat o'nine tails, being suspended in the attic, and being leashed and made to eat out of a dog dish;
* The trial court also found that the prosecution's penalty-phase argument and the court's jury instructions violated the Eighth Amendment by improperly telling the jury that it should weigh the aggravating evidence in the case against each mitigating circumstance individually, rather than against the totality of the mitigating circumstances;
* The court also finds that jury instructions and the penalty-phase verdict slip are "on all fours" with *Frey v. Fulcomer* and grants relief under *Mills v. Maryland* because the instructions and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before it could consider and give mitigating effect to that circumstance.

196. Commonwealth v. Bradley (Jerard), 552 Pa. 492, 715 A.2d 1121 (Pa. Aug. 7, 1998), *rearg. denied*, Sept. 30, 1998 (Lycoming, direct appeal) (conviction and death sentence reversed for invalid withdrawal of prior guilty plea to third-degree murder; trial counsel, citing an adversarial relationship with his client, improperly followed client's expressed wishes and filed their client's motion to withdraw his guilty plea to third degree without

advising Bradley of the potential consequences of withdrawing his plea, including possibility that he could be convicted of first degree murder and sentenced to death).

197. Commonwealth v. Brown (Kenneth), 551 Pa. 465, 711 A.2d 444 (Pa. April 15, 1998) (Philadelphia, direct appeal) (death sentence reversed for prosecutorial misconduct where prosecutor employed biblical argument as a basis for death) (resentenced to death).

198. Commonwealth v. Bryant (Robert), No. CC 8407686A (Allegheny C.P. Mar. 24, 1998) (PCRA) (death sentence reversed for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

199. Frey v. Fulcomer, 132 F.3d 916 (3d Cir. Dec. 30, 1997) (Lancaster, habeas corpus appeal) (death sentence reversed under *Mills v. Maryland*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *cert. denied*, 524 U.S. 911 (June 1, 1998) (plea to life accepted).

- Commonwealth v. Jones (Darryl), 1997 WL 1433805, 35 Phila. Co. Rptr. 124 (Phila. C.P. Dec. 10, 1997) (Phila., quashing aggravation) (referencing order of 10/7/96 instructing the jury "not to commence death penalty deliberations and to impose a sentence of life imprisonment"; court finds "The sole aggravating circumstance upon which [death] was based was pursuant to 42 Pa. C.S.A. §9711(d)(7) which provides that the defendant in the commission of the offense knowingly created a grave risk of death to another person in addition to the victim of the offense. However, during the entire course of this trial, not one iota of evidence was presented which would support the factual conclusion that there was any danger to anyone other than the deceased when the defendant fired his two fatal gunshots.")

200. Smith (Clifford) v. Horn, 120 F.3d 400 (3d Cir. July 24, 1997), *cert. denied*, 522 U.S. 1109 (Feb. 23, 1998) (Bucks, habeas corpus appeal) (new trial granted as a result of defective specific intent instruction, which permitted jury to convict the defendant based upon the co-defendant's intent to kill and thereby relieved the prosecution of its burden of proving beyond a reasonable doubt that the defendant himself possessed the specific intent to kill) (bench retrial, resentenced to life).

201. Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516 (Pa. Sept. 17, 1997), *rearg. denied*, Nov. 13, 1997 (Philadelphia, successor PCRA) (death sentence reversed for ineffective assistance of penalty-phase counsel for failing to object to the prosecution's improper closing argument in which prosecutor argued that unless the jury sentenced the defendant to death, liberal judges would return him to streets; court holds that prosecutorial "reference to considerations outside the death penalty statute to argue for imposition of the death penalty" are improper; evidence of aggravating circumstances is "limited to those circumstances specified in [Pa. C.S. § 9711](d), . . . [which] contains no mention of defendants being released on parole"; "The prosecutor invited the jury to sentence this defendant to death in order to compensate for the alleged evils perpetrated by stereotypical liberal judges who routinely allow criminals to go free. The implicit

argument is that if the jury does not take control of the case by imposing the death penalty, the liberal judges will intervene and somehow release the defendant. A second implicit argument is that imposing the death penalty in this case is a way to set the balance straight by compensating for the harm that has been done by the stereotypical liberal judges. Clearly such injustices, be they real or imagined, have nothing to do with this case, and the linking of a death sentence in this case with a perceived failing of the criminal justice system, dehors the record, was calculated to inflame the jury and might well have done so, thus constituting reversible error.") (jury unanimously resentenced to life; habeas pending on underlying conviction)

- Commonwealth v. Rolan, Feb. Term, 1984, Nos. 2893-2896, slip op. (Phila. C.P. March 5, 1997) (Philadelphia, PCRA) (death sentence reversed for ineffectiveness of counsel for failing to investigate and present mitigating evidence of organic brain damage) (jury unanimously resentenced to life; new trial granted in habeas proceedings)

202. Buehl v. Vaughn, 1996 WL 752959, 1996 U.S. Dist. LEXIS 19509 (E.D. Pa. Dec. 31, 1996), *aff'd*, 166 F.3d 163 (3d Cir. Jan. 20, 1999), *cert. dismissed*, 527 U.S. 1050 (U.S. June 25, 1999) (Montgomery, habeas corpus) (trial counsel ineffective for adopting an unreasonable trial strategy to focus only on the guilt-determining phase of the trial to the exclusion of any preparation for the penalty phase; counsel further ineffective for failing to investigate and present mitigating evidence in the penalty phase of trial) (plea to life entered on resentencing)
* counsel ineffective for asserting in his opening statement in the guilt phase of the trial that this case " is first degree murder or nothing" and that whoever committed the murders should be put to death;
* counsel ineffective for failing to object to the impaneling of a juror who stated she would "go by Moses law" and impose the death penalty if the defendant were found guilty "because it was written in the Bible . . . that when a person is wrong you have to stone to death";
* counsel ineffective for presenting a perfunctory argument for life in the penalty-phase closing that did not even address the small about of mitigating evidence that was before the jury;
* counsel rendered ineffective assistance in failing to investigate and present mitigating evidence; counsel unreasonably failed to obtain assistance of mental health expert – although counsel testified that he wanted to consult a psychiatrist, he did not do so because funds were not available from client's mother to pay one and the court denied funds because counsel was retained; the failure to retain a psychiatrist notwithstanding, counsel was ineffective in failing to investigate his client's background, including that he was a "longterm abuser of Methamphetamine" and had borderline personality disorder.

203. Travaglia v. Morgan, No. 90-1469 (W.D. Pa. Nov. 7, 1996) (Westmoreland, habeas corpus) (adopting magistrate's report) (resentencing hearing pending)

204. Commonwealth v. Terry, No. 1563-79, slip op. (Mtgy. C.P. Oct. 22, 1996) (*Terry II*) (Montgomery, PCRA) (death sentence reversed for ineffectiveness of counsel for failure to present family witnesses who testified to Mr. Terry's history of mental illness and bizarre behavior and for failing to present evidence that prison doctors had found Mr.

Terry to be psychotic within days both before and after the offense) (jury resentencing; life sentence imposed by operation of law when jury failed to reach unanimous sentencing verdict).

- Commonwealth v. Daidone/Martorano, 453 Pa. Super. 550, 684 A.2d 179 (Pa. Oct. 21, 1996), *rearg denied* Jan. 3, 1997, *aff'd*, 559 Pa. 533, 741 A.2d 1221 (Pa. Nov. 10, 1999), *rearg. denied*, Dec. 27, 1999 (Philadelphia, pretrial double jeopardy motion).

- Commonwealth v. Logan, Feb. Term, 1981, Nos. 966, 968 (Phila. C.P. August 18, 1996) (Philadelphia, stay proceedings) (court finds defendant mentally incompetent to be executed).

205. Commonwealth v. Auker, 545 Pa. 521, 681 A.2d 1305 (Pa. July 31, 1996), *rearg denied* Nov. 1, 1996 (Northumberland, direct appeal) (death sentence reversed for insufficiency of the evidence to establish the aggravating circumstance that the offense was committed by means of torture, 42 Pa. C.S. § 9711(d)(8); subsection (d)(8) requires not merely an intent to kill, but "an intent to cause pain and suffering in addition to the intent to kill"; "[n]either the efficacy of the means employed by a defendant to murder his victim nor the immediacy of death is in itself determinative of the question whether the offense was committed by means of torture. There must be an indication that the killer was not satisfied with the killing alone"; "[t]he evidence did not demonstrate that appellant possessed more than the intent to kill or that he was not satisfied with the killing alone" where the defendant had forcibly placed the victim into his car and later into its trunk; transported her to a secluded wooded area; inflicted seven to ten stab wounds upon her; and left her to die).

206. Commonwealth v. Fisher (Robert), 545 Pa. 233, 681 A.2d 130 (Pa. June 25, 1996), *rearg. denied* Sept. 6, 1996 (*Fisher II*) (Montgomery, direct appeal) (death sentence overturned for improper admission of victim-impact evidence in the penalty-phase of trial; under required strict construction of capital-sentencing statute, court holds that prior to 1995 amendment to death-penalty statute, victim impact evidence and argument "is not a legitimate factor on which a sentence of death can be based") (resentenced to death).

207. Commonwealth v. McNeil, 545 Pa. 42, 679 A.2d 1253 (Pa. June 25, 1996), *cert. denied*, 523 U.S. 1010 (March 9, 1998) (Philadelphia, direct appeal) (death sentence overturned for counsel's ineffectiveness in failing to object to admission of victim-impact evidence in the penalty-phase of trial) (resentenced to life).

208. Commonwealth v. Smith (Brian), 544 Pa. 219, 675 A.2d 1221 (Pa. May 22, 1996), *cert. denied*, 519 U.S. 1153 (Feb. 27, 1997) (Luzerne, direct appeal) (penalty-phase counsel ineffective for failing to investigate and present mental health mitigating evidence even after he had been alerted by family that the defendant suffered from mental problems; defendant's mental problems were so obvious that the jury found mental state as mitigating factor simply from its observations of the defendant at trial, without any presentation of mental health mitigating evidence; prejudice established because jury might have imposed a life sentence had it heard evidence of defendant's mental condition) (resentenced to life).

- Smith (Clifford) v. Horn, 1996 WL 172047, 1996 U.S. Dist. LEXIS 4573 (E.D. Pa. Feb. 22, 1996) (Bucks, habeas corpus) (death sentence reversed under *Caldwell v. Mississippi* where prosecutor inaccurately argued that if the jury returned a death sentence, unnamed bureaucrats in Harrisburg could some day release the defendant on parole), 120 F.3d 400 (3d Cir. July 24, 1997) (granting new trial), *cert. denied*, 522 U.S. 1109 (Feb. 23, 1998) (resentenced to life).
  * Court holds that "it is constitutionally impermissible for either a prosecutor or a court to mislead a jury about its responsibility for determining whether a person should be executed by giving it inaccurate information about its role in the process or about the role of an appellate court, the Governor, or a parole or pardons board";
  * prosecutor improperly responded to defense counsel's argument that Smith "will be executed if death is your verdict," by stating "[n]o one knows for sure. We don't know if that eventually will occur. . . . Someday – and it won't be tomorrow, no matter what your decision is, and it will be years from now – but, someday conceivably people sitting in Harrisburg, who didn't sit here, could look at a bunch of papers and say 'We'll let him out; he's done enough time; it's time for parole.' That could happen too."
  * "In sum, the jury was left with the critical misunderstanding that if it sentenced Smith to life he might be released on parole so as to pose a future danger to society. The prosecutor's summation, as noted, also left the jury with the inaccurate misconception that it did not have the ultimate responsibility for a death penalty decision because unidentified bureaucrats on the parole board might override any death penalty decision. Both were improper goads for a death sentence. Together, these statements undermined the jury's deliberative process and unconstitutionally tainted the jury's death sentence." The error was not harmless "[b]ecause this court cannot say that the prosecutor's comments 'had no effect on the sentencing decision.'"

209. Commonwealth v. Paolello, 542 Pa. 47, 665 A.2d 439 (Pa. Sept. 22, 1995) (Erie, direct appeal) (evidence insufficient to support the sole aggravating circumstance that the defendant knowingly created grave risk of death to another person in addition to the murder victim) (life sentence imposed).

210. Commonwealth v. LaCava, 542 Pa. 160, 666 A.2d 221 (Pa. Sept. 19, 1995) (Philadelphia, direct appeal) (death sentence overturned for counsel's ineffectiveness in failing to object to prosecutorial misconduct; prosecution improperly attempted to expand the jury's focus from aggravating circumstances to consideration of society's victimization at the hands of drug dealers) (life sentence imposed).

211. Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326 (Pa. Aug. 29, 1995) (Allegheny, direct review) (new trial granted for violation of defendant's right to self-representation when Common Pleas Court judge found defendant competent to stand trial and to waive right to counsel and second judge, who ultimately presided at trial, revoked the defendant's right to self-representation and ordered public defender to assume control of defense at trial and sentencing; a defendant who is legally competent to stand trial is legally competent to insist on self-representation).

212. Ferber v. City of Philadelphia, 661 A.2d 470 (Pa. Cmwlth. 1995), *rearg. denied* Aug. 11, 1995, *appeal denied*, 544 Pa. 615, 674 A.2d 1077 (Pa. Mar. 12, 1996) (citations to civil damages suit) (obtained wrongful prosecution settlement from City of Philadelphia).

213. Commonwealth v. May, 540 Pa. 237, 656 A.2d 1335 (Pa. Apr. 4, 1995), *rearg. denied* May 17, 1995 (May I) (Lebanon, direct appeal) (death sentence overturned because evidence was insufficient to support aggravating circumstance that defendant committed the murder during the perpetration of the felony of rape where jury was not instructed as to elements of rape and insufficient evidence was presented to support a finding of rape; although Court did not specifically address counsel's ineffectiveness, relief granted under direct appeal relaxed waiver rule after prior counsel had technically waived this meritorious claim) (resentenced to death).

214. Commonwealth v. DeHart, 539 Pa. 5, 650 A.2d 38 (Pa. Nov. 22, 1994) (Huntingdon, PCRA appeal) (Huntingdon, PCRA appeal) (death sentence overturned for counsel's ineffectiveness in failing to object to trial court's submission to the jury of penalty-phase verdict slip that incorrectly permitted jury to weigh sole aggravating circumstance against each mitigating circumstance individually, rather than cumulatively considering mitigating evidence; although Court did not specifically address appellate and PCRA counsel's ineffectiveness, relief granted under PCRA relaxed waiver rule after all prior counsel had technically waived the claim by failing to raise it at trial, on direct appeal, or in the trial court stages of the PCRA process) (unanimously resentenced to life).

215. Commonwealth v. Williams (Antoine), 539 Pa. 61, 650 A.2d 420 (Pa. Nov. 18, 1994) (Berks, direct appeal) (death sentence overturned because prosecution's untimely addition of aggravating circumstance two days into jury selection denied defendant sufficient notice and opportunity to prepare a defense).

- Ferber v. City of Philadelphia, 28 Phila. Co. Rptr. 269 (Phila. C.P. Oct. 4, 1994) (civil suit by innocent death-row inmate, discussing Commonwealth misconduct in framing him for murder).

216. Commonwealth v. Blount, 538 Pa. 156, 647 A.2d 199 (Pa. Aug. 24, 1994) (Philadelphia, direct appeal) (death sentence reversed where trial court responded to a jury question concerning the evaluation of aggravating and mitigating circumstances by instructing the jury that, if they were not unanimous as to the existence of a mitigating circumstance, "you must take that [lack of unanimity] into consideration when you are weighing whether the mitigating [sic] outweigh the aggravating"; counsel was ineffective for failing to object to this instruction)
* this improper instruction "had the unavoidable effect of telling the jury that the weight to be accorded to mitigating circumstances was governed by the number of jurors that had found them to exist";
* trial counsel was ineffective for failing to object to this instruction, which was "extremely prejudicial because [the instruction] deprived him of the right to have each juror weigh and evaluate the various factors according to their individual conscience";
* prejudice determined by effect on a single juror: "as any one of the jurors that found the mitigating circumstance of age to exist could have compelled a sentence of life

imprisonment on either murder conviction by simply determining that the mitigating circumstance outweighed the aggravating circumstance(s), we conclude that Appellant was prejudiced by trial counsel's failure to object. There exists a reasonable probability that the jury's weighing process may have yielded a different result."

217. Commonwealth v. Perry, 537 Pa. 385, 644 A.2d 705 (Pa. July 1, 1994) (Philadelphia, direct appeal) (new trial granted for "inexcusably derelict representation by defense counsel")
* court-appointed trial counsel did not interview his client prior to trial; waited nine months after receiving court authorization retain an investigator and then did so only five days before the start of voir dire; did not instruct the investigator to seek eyewitnesses, but told him only to interview three specific character witnesses; failed to interview either of the two witnesses the investigator located, instructed his investigator him not to subpoena the witnesses, and failed to call them to testify at either the guilt or penalty phases of trial; and failed to move to suppress evidence, including an alleged eyewitness identification by a witness who was nearly blind
* Court found counsel's ineffectiveness at sentencing "even more striking" – counsel "admitted the incomprehensible fact that . . . four days before jury selection, he was unaware that [the case he was defending] was a capital case" and then, "when he belatedly learned that the Commonwealth was seeking the death penalty," counsel "did not request a continuance or other appropriate relief";
* Court summarizes as follows: "Thus, on the eve of trial, counsel was unaware that his client faced the death penalty, apparently considered it a routine case which in his view did not require an interview with his client, and could not prepare for a death penalty hearing since he did not know it was a capital case. Thus he did not interview the character witnesses discovered by his investigator, nor subpoena them to testify for his client. Finally, he presented a travesty of a case at the death penalty hearing," which consisted entirely of asking the defendant how much he had had to drink the night of the murder ("Approximately a fifth and a half of whiskey.") and what occurred between the defendant and the victim ("An argument and a fight.").
* Court holds: "It is not even arguable that counsel's failure to utilize his investigator for nine months until the eve of trial could have had any reasonable basis designed to effectuate his client's interest. The other allegations of ineffectiveness, fitting broadly under the rubric of failure to prepare for trial, are not even arguably reasonable tactics serving some broad strategic plan for the defense. Failure to prepare is not an example of forgoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel. It is not possible to provide a reasonable justification for appearing in front of a death penalty jury without thorough preparation."

218. Commonwealth v. Green (Samuel), 536 Pa. 599, 640 A.2d 1242 (Pa. Apr. 21, 1994) (Northampton, direct appeal) (new trial granted under *Brady v. Maryland* and Pennsylvania Rules of Criminal Procedure for Commonwealth's failure to disclose out-of-court statements made to a witness by an accomplice in which the accomplice claimed responsibility for the murder when defense had made general pretrial request for all favorable or exculpatory statements in the Commonwealth's possession; statements were "clearly relevant and material" both to the Commonwealth's guilt-phase theory of the

case that the defendant was the actual shooter and to issue of punishment; at penalty, "[i]t is beyond peradventure that the statements . . . would have provided the defense with strong evidence of mitigation" and rebutted Commonwealth's incorporated of guilt-phase evidence and circumstantial argument that defendant alone transported victim to secluded spot and shot him).

219. Commonwealth v. Mayhue, 536 Pa. 271, 639 A.2d 421 (Pa. Mar. 18, 1994) (Allegheny, direct appeal) (death sentence reversed and life sentence imposed where evidence was insufficient to support jury's finding of sole aggravating circumstance of contract killing).

220. Commonwealth v. Grier, 536 Pa. 204, 638 A.2d 965 (Pa. March 11, 1994) (Philadelphia, direct appeal) (new trial granted; companion case to *Commonwealth v. Huffman* (discussed immediately below)).

221. Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (Pa. March 11, 1994), *rearg denied* May 5, 1994 (Philadelphia, direct appeal) (new trial granted for trial court's "patently erroneous statement of the law" instructing the jury that a co-defendant could be vicariously criminally liable for first-degree murder; "To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to *his* state of mind; the requisite mental state must be proved beyond a reasonable doubt to be one *which the accomplice harbored and cannot depend upon proof of the intent to kill only in the principal*.").

222. Commonwealth v. Chmiel, 536 Pa. 244, 639 A.2d 9 (Pa. March 4, 1994) (*Chmiel I*) (Lackawanna, direct appeal) (new trial granted for trial counsel's ineffectiveness in failing to request a "corrupt and polluted source" instruction when evidence supported inference that the Commonwealth's star witness – the defendant's brother – was an accomplice) (resentenced to death).

223. Commonwealth v. Hall, 26 Phila. Co. Rptr. 621 (Phila. C.P. July 23, 1993) (*Hall II*) (post-verdict motions) (defense counsel was ineffective in capital retrial proceedings for failing to file presentence motion to bar the death penalty on the grounds that District Attorney's office had previously conceded penalty-phase error resulting from extensive prosecutorial misconduct and provided an affidavit from the former prosecutor that the office had agreed thereafter to consider the case a "life sentence case") (sentenced to life).

224. Commonwealth v. Hawkins, 534 Pa. 123, 626 A.2d 550 (Pa. June 7, 1993) (Montgomery, direct appeal) (new trial granted where trial court erred in allowing Commonwealth to introduce evidence of the defendant's prior murder conviction).

○ Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (Pa. Super. Apr. 20, 1993) (York, pretrial) (double jeopardy barred death penalty on retrial where jury had imposed life sentence in original trial; "the jury's sentence of life imprisonment at the first trial meant that the jury had 'already acquitted the defendant of whatever was necessary to impose the death sentence' [and so] the double jeopardy clause would forbid retrial of the

death penalty issue where the jury had acquitted the defendant of a death sentence"), *app. denied*, 645 A.2d 1317 (Pa. June 20, 1994), *cert. denied*, 513 U.S. 1060 (Dec. 12, 1994).

225. Lesko v. Lehman, No. 86-1238, 1992 WL 717815 (W.D. Pa. Feb. 20, 1992) (Westmoreland, habeas), *on remand from grant of relief in* Lesko v. Lehman, 925 F.2d 1527 (3d Cir. Feb. 11, 1991) (resentenced to death).

226. Commonwealth v. Young (Joseph), 524 Pa. 373, 572 A.2d 1217 (Pa. March 29, 1992) (Montgomery, direct appeal) (death sentence overturned under *Mills v. Maryland* where verdict slip indicated that "We, the jury, unanimously find that the defendant has proven the following mitigating circumstances by a preponderance of the evidence" and jury indicated during polling that it found some mitigating circumstances unanimously and could not reach a decision on others).

○ Commonwealth v. Smith (Jay), 532 Pa. 177, 615 A.2d 321 (Pa. Sept. 18, 1992) (Dauphin, pretrial double jeopardy motion) (reprosecution barred; released from all charges).

227. Commonwealth v. Bryant (James), 531 Pa. 147, 611 A.2d 703 (Pa. June 17, 1992) (*Bryant II*), *rearg. denied*, Sept. 23, 1992 (Philadelphia, direct appeal) (new trial granted when trial court improperly permitted prosecution, over the defense's objection, to introduce evidence of a prior crime for which the defendant had been convicted, after having vacating the defendant's first conviction and death sentence when the trial judge had improperly admitted evidence of a different prior crime; court holds that admission of this evidence violated a "longstanding" principle in Pennsylvania "that evidence of a distinct crime, except under special circumstances, is inadmissible against a defendant who is being tried for another crime because the commission of one crime is not proof of the commission of another, and the effect of such evidence is to create prejudice against the defendant in the jury's mind"; prosecution failed to establish "common scheme or logical connection between the two crimes so that one would naturally conclude that the same individual was responsible for both crimes").

228. Commonwealth v. Burgos, 530 Pa. 473, 610 A.2d 11 (Pa. May 18, 1992), *rearg. denied*, June 19, 1992 (Monroe, direct appeal) (death sentence reversed where "aggravating circumstance of killing for hire should not have been submitted to the jury because the Commonwealth failed to prove essential elements of 42 Pa. C.S. § 9711(d)(2) beyond a reasonable doubt")
* contract killing aggravating circumstance – that "the defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim" not established when prosecution simply presented evidence that defendant killed his wife in order to obtain the proceeds of an insurance policy he purchased on her life shortly before her death; 42 Pa. C. S. § 9711(d)(2) "is limited to instances when a person pays or is paid to kill or contracts to kill another person based upon being paid or making payments."

229. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (Pa. April 28, 1992) (Philadelphia, direct appeal) (counsel ineffective for failing to object to prejudicially deficient instruction on aggravating circumstance that "the offense was committed by

means of torture" and for failing to "request a more specific instruction" that the torture aggravating circumstance requires the "specific intent to inflict unnecessary pain, or suffering or both pain and suffering in addition to the specific intent to kill") (resentenced to death).

230. Commonwealth v. Reid (Lloyd), CP-51-CR-0405461-1991 (date of reversal uncertain) (Philadelphia, post-verdict motions) (according to habeas decision, Reid v. Price, 2000 WL 992609 (E.D. Pa. July 17, 2000), "On November 14, 1991, Reid was convicted in the Court of Common Pleas of Philadelphia County of first degree murder, robbery and possessing an instrument of crime [and] was sentenced to death by the jury following a penalty hearing. On post-verdict motions, the trial court judge vacated the death sentence and imposed life imprisonment.").

231. Commonwealth v. Santiago, 528 Pa. 516, 599 A.2d 200 (Pa. Nov. 14, 1991) (Allegheny, direct appeal) (Santiago I) (new trial granted under *Miranda v. Arizona* for violation of Fifth Amendment right to counsel where police detectives initiated interrogation of defendant concerning another offense without the presence of counsel, after the defendant had invoked his right to counsel in this case) (resentenced to death).

.○ Commonwealth v. Wheaton, 13 Pa. D. & C.4th 146, 1991 WL 473878 (Potter C.P. Nov. 14, 1991) (Potter, pretrial) (quashed sole aggravating circumstance, 42 Pa .C.S. § 9711(d)(7), because the killing of the victim did not place a second intended victim at grave risk of death where that surviving victim was shot several minutes later in a different location within the house).

232. Commonwealth v. Chambers (Karl), 528 Pa. 558, 599 A.2d 630 (Pa. Nov. 4, 1991), *rearg. denied*, Jan. 7, 1992 (*Chambers I*) (York, direct appeal) (death sentence reversed for prosecutorial misconduct where prosecutor urged death based upon impermissible biblical argument; statement "that Bible says 'and the murderer shall be put to death'" was reversible error) (resentenced to death).

233. Commonwealth v. Lewis, 528 Pa. 440, 598 A.2d 975 (Pa. Oct. 31, 1991) (Philadelphia, direct appeal) (trial court's failure to provide requested "no-adverse inference" instruction after defendant chose not to testify is reversible error under Article I, Section 9 of Pennsylvania Constitution).

234. Commonwealth v. Fisher (Robert), 527 Pa. 345, 591 A.2d 710 (Pa. May 21, 1991) (*Fisher I*) (Montgomery, direct appeal) (new trial granted where prosecution had informed at least one juror who was ultimately impaneled that the defendant had been convicted of federal charges of conspiring to violate the civil rights of a federal witness, and the federal conviction was subsequently reversed and the charges dropped) (resentenced to death).

235. Commonwealth v. Murphy, 527 Pa. 309, 591 A.2d 278 (Pa. May 8, 1991) (Philadelphia, direct appeal) (defense counsel was ineffective in failing to impeach the credibility of two prosecution witnesses through cross-examination for bias based upon their juvenile probationary status; defense counsel "was abysmally ignorant of the law regarding the

proper method of cross-examining a child witness who is on juvenile probation" and "erroneously sought to impeach the credibility of the witnesses on impermissible [crimen falsi] grounds while at the same time, due to ignorance, failed to impeach their credibility on legitimate grounds – to show bias of the witness based upon his or her juvenile probationary status"; counsel's deficient performance was not prejudicial with respect to one of the witnesses, whose probationary status had expired, but prejudicial with respect to second witness; Court could "perceive of no reasonable basis for counsel's failure to cross-examine [witness] on the basis of her then existing juvenile probation") (resentenced to death).

236. Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705 (Pa. March 13, 1991) (*Jasper I*) (Philadelphia, direct appeal) (resentenced to death) (death sentence overturned under the *Mills v. Maryland* proscription against requiring juror unanimity in finding mitigating circumstances where jury posed question – "Do we all have to agree whether a circumstance is true or not true?" – and the trial court responded affirmatively)
* Court recognizes that the jury's question was ambiguous as to whether it meant aggravating circumstances, mitigating circumstances, or both, but because "nothing on the record clarifies the confusion . . . it appears that the jury could have been misled into believing that a unanimous verdict was required in order to conclude a mitigating circumstance existed."
* Court grants relief without proof of particular jurors' thoughts, writing "[s]ince we cannot interrogate each juror as to his/her belief . . . , we have no alternative but to conclude that the Appellant may have been prejudiced."

- Lesko v. Lehman, 925 F.2d 1527 (3d Cir. Feb. 11, 1991) (death sentence reversed for cumulative prejudicial effect of prosecution's impermissible comment on his failure to express remorse, which violated his fifth amendment privilege against self-incrimination, and its inflammatory "appeal to vengeance" in sentencing), *reh'g & reh'g en banc denied*, March 11, 1991 (Westmoreland, habeas corpus appeal), *cert. denied*, 502 U.S. 898 (Oct. 7, 1991).
* Court notes that "[b]ecause of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices"
* Fifth Amendment privilege against self-incrimination (per *Griffin v. California*, 380 U.S. 609 (1965)) applies in penalty phase of capital trial and was violated by prosecutor's comments about his failure to express remorse
* a defendant does not waive his right against self-incrimination by testifying at the penalty-phase of trial where that testimony is limited to mitigating evidence "of a biographical nature," is "wholly collateral to the charges against him," and does not implicate the circumstances of the offense
* "the prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned" the victims
* the prosecution's appeal to vengeance was improperly "directed to passion and prejudice rather than to an understanding of the facts and of the law"
* the prosecutor improperly told the jury that it "had a 'duty' to even the 'score,' which stood at 'John Lesko and Michael Travaglia two, Society nothing'"

* the "even the score" comment improperly "invited the jury to impose the death sentence not only for [this case], but also for [a prior] murder . . . to which Lesko had already pled guilty, and for which he would be separately sentenced," in violation of the Double Jeopardy Clause of the Fifth Amendment; moreover, the jury not only had no "duty" to impose death for the prior murder, it "had no authority to impose the death penalty" for that prior offense
* while the comments on vengeance, considered in isolation, were not sufficiently prejudicial to require relief, the cumulative effect of those comments and the improper comment on silence were not harmless and required reversal of petitioner's death sentence.

237. Commonwealth v. Bricker, 525 Pa. 362, 581 A.2d 147 (Pa. Sept. 21, 1990) (*Bricker II*) (Allegheny, direct appeal) (new trial granted where trial court refused to give requested "corrupt and polluted source" accomplice instruction; court also erroneously submitted to the jury the plea agreements of the prosecution witnesses, which contained a provision requiring the witnesses to testify truthfully against the defendant that impermissibly bolstered their testimony).

238. Commonwealth v. Green (William), 525 Pa. 424, 581 A.2d 544 (Pa. Sept. 19, 1990) (Philadelphia, direct appeal) (death sentence reversed for improper rebuttal of mitigating evidence of good prison conduct and cooperation with prison personnel with hearsay testimony of deputy sheriff who transported inmates to courthouse that an inmate whose name he didn't know had told him that the defendant had a bad reputation for being cooperative and orderly in the cellblock; admission of this "blatantly unreliable" hearsay testimony was improper and violated state and federal constitutional rights to confrontation; admission of this evidence was prejudicial because it "may have led the jury into determining that no mitigating circumstances were present. Had the jury found a mitigating circumstance, it might have found that it outweighed the two aggravating circumstances found and returned a life sentence. Because of this error, we cannot know how the jury would have found and the sentence of death must be vacated").

239. Commonwealth v. Bannerman, 525 Pa. 264, 579 A.2d 1295 (Pa. Sept. 19, 1990) (per curiam), *rearg. denied*, Nov. 16, 1990 (Philadelphia, direct appeal) (new trial granted for trial court's refusal to instruct the jury at the guilt stage of trial pursuant to Pennsylvania's Suggested Standard Jury Instructions § 3.06(3) that "Evidence of good character may by itself raise a reasonable doubt as to guilt and justify a verdict of not guilty").

240. Commonwealth v. Smith (Jay), 523 Pa. 577, 568 A.2d 600 (Pa. Dec. 22, 1989) (Dauphin, direct appeal) (new trial granted where court permitted several individuals who were "close friends or paramours" of suspected co-perpetrator to testify to the contents of damaging accusations the co-perpetrator had made to them concerning the defendant's alleged activities in connection with the murders of the three victims; hearsay evidence was improperly admitted and "the Commonwealth conceded that the contents of the statements were fabrications designed to portray Smith as a vicious, depraved killer in an effort to cast blame upon Smith for these murders") (reprosecution later barred on double

jeopardy grounds as a result of extensive prosecutorial misconduct that spanned from pretrial throughout the course of the appeal).

241. Commonwealth v. Marshall (Jerome), 523 Pa. 556, 568 A.2d 590 (Pa. Dec. 22, 1989) (Philadelphia, direct appeal) (death sentence for murder of two-year-old child reversed where jury found two mitigating circumstances but evidence was insufficient for jury to find that defendant had killed the baby to prevent her from testifying against him; aggravating circumstance 42 Pa. C.S. § 9711(d)(5) "requires a showing of a fully formed intent on the part of the defendant prior to the event to kill a potential witness and that this factor provides the animus upon which this particular aggravating circumstance rests"; evidence "cannot support such a finding" where "[t]here was no direct or circumstantial evidence to establish the [defendant's] intent" at the time of the murder and the only evidence presented "was that in response to [the baby's] cries for her mother, [the defendant] killed her").

242. Commonwealth v. Hall, 523 Pa. 75, 565 A.2d 144 (Pa. Oct. 19, 1989) (*Hall I*) (Philadelphia, direct appeal) (death sentence reversed when trial court permitted the prosecution to make "extremely prejudicial" suggestions in its closing penalty-phase statement to the effect that the defendant would kill again if he were released on parole; the Court also questioned admission of recanted statements by prosecutorial witnesses, and disapproved of trial court's decision to permit the jury to have copies of written and tape recorded versions of these statements during its deliberations) (resentenced to death, later reversed, and life sentence imposed)
* "the prosecutor made several references to the possibility that the defendant would kill again if not sentenced to death," including beseeching the jury to "Put [the] mad dog out of his misery before he kills someone else, kills somebody in prison, escapes and kills somebody" and saying "give him life, so he can get paroled one day and kill somebody else[?]";
* a prosecutor may not seek to impose death by implying that a capital defendant might be eligible for parole;
* the comments were not fair response because the "defense never argued or attempted to prove that the appellant would not kill again."
* "the prosecution's speculation as to what the appellant might do if paroled[ ] was extremely prejudicial where the jury was cognizant of the fact that the appellant was on parole at the time he committed the murders he was being sentenced for."

243. Commonwealth v. Brode, 523 Pa. 20, 564 A.2d 1254 (Pa. Oct. 20, 1989) (Lebanon, direct appeal) (court unanimously finds evidence insufficient to support sole aggravating circumstance that murder was committed by means of torture, 42 Pa. C.S. § 9711(d)(8), and imposes life sentence; Commonwealth argued that the defendant intended to torture the victim – his wife – out of sexual frustration, and argued that the defendant had deliberately shot the victim in the elbow and the abdomen before killing her with two shots to the chest; sole evidence of torture was that a pornographic magazine had been found in the defendant's car; the element that an offense was committed by means of torture "cannot be made out simply by showing that the victim suffered pain before dying") (life sentence imposed as a matter of law).

244. Commonwealth v. Williams (Ronald), 522 Pa. 287, 561 A.2d 714 (Pa. July 5, 1989) (Butler, direct appeal) (death sentence overturned where evidence indicated that the jury had been exposed during the penalty phase to "extraneous and improper information" concerning the prior criminal activity of the defendant and his brother, including rumors of two pending murder charges against his brother in another jurisdiction and "general allegations of criminal misconduct" by the defendant).

245. Commonwealth v. Karabin, 521 Pa. 543, 559 A.2d 19 (Pa. March 6, 1989), *rearg denied* June 19, 1989 (Dauphin, direct appeal) (death sentence overturned and life sentence imposed because evidence of single prior homicide was insufficient to support sole aggravating circumstance that the defendant had a significant history of prior convictions involving the use or threat of violence to the person; court holds that use of guilty plea that was later vacated to establish second "prior conviction" was invalid, and subsequent conviction for that offense did not render the error harmless).

246. Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (Pa. March 6, 1989)), *rearg denied* April 18, 1989 (Philadelphia, direct appeal) (new trial granted under relaxed waiver rule on an issue of ineffective assistance of counsel that was presented to the Court by a jailhouse lawyer and that trial/appellate counsel failed to raise; counsel was ineffective for failing to request a cautionary instruction explaining the limited scope of prior crimes evidence that had been deemed admissible to prove motive; court also reaches three sentencing-stage issues so that the trial court would not repeat on retrial the instructional errors it made during the initial trial -- the trial court erred in instructing the jury that it had to be unanimous in finding any mitigating circumstances; that it should "add up" aggravating and mitigating circumstances, and impose death if it found "more" aggravating circumstances; and in failing to instruct the jury on the elements of rape, upon which the Commonwealth had sought to rely in attempting to establish the aggravating circumstance that the defendant had committed the killing during the perpetration of a felony, 42 Pa. C.S. § 9711(d)(6))
* new trial granted for ineffectiveness of trial counsel where counsel failed to request, and the trial court failed to independently provide, a cautionary instruction on the limited use of prior crimes evidence;
* while "highly prejudicial," "graphic," and "potentially emotional" testimony of a prior rape victim was admissible to prove "appellant's motive, intent and the absence of accident in the murder and other crimes against his second victim," the trial court nevertheless "erred in failing to accompany the evidence of the prior sexual assault with any cautionary or limiting instruction explaining the limited purposes for which the evidence was relevant and admissible";
* while appellate counsel, who was trial counsel below, neither raised the issue of the trial court's failure to provide limiting instructions, nor asserted his own ineffectiveness in failing to request such instructions, and therefore "[t]echnically, . . . this issue has been waived," the Court noted that it "has not been technical in applying our waiver rules in death penalty cases" and granted relief on the issue under the Court's relaxed waiver rule and its statutory obligation to independently review the record in capital cases;
* in penalty phase, the Court found that the trial court had improperly instructed the jury that "if you find . . . a mitigating circumstance, you will find that it must be unanimous" – requirement of jury unanimity violates *Mills v. Maryland*;

* trial court improperly allowed the Commonwealth to attempt to prove the aggravating circumstance that the defendant committed the killing during the perpetration of a felony, 42 Pa. C.S. § (d)(6) -- in this case rape – without instructing the jury on the elements of the underlying felony;
* trial court improperly instructed the jury that "If you find more aggravating circumstances than you find mitigating circumstances, then the penalty will be death" and "You will add up your findings either aggravating or mitigating and you will render the following sentencing verdict either death or life imprisonment" – court says this "flatly omit[ted] the mandated instruction" that the jury must weigh aggravating and mitigating circumstances to assess their quality, not merely count and quantify them.

247. Commonwealth v. Zook, 520 Pa. 210, 553 A.2d 920 (Pa. Feb. 2, 1989), *rearg. denied* Apr. 13, 1989 (Lancaster, direct appeal) (new trial granted under *Miranda v. Arizona* where prosecution presented police testimony concerning statements allegedly made by defendant during questioning after he had asked to make a phone call to his mother so she could get him a lawyer) (resentenced to death).

248. Commonwealth v. Gibbs, 520 Pa. 151, 553 A.2d 409 (Pa. Feb. 2, 1989), *rearg. denied* Apr. 13, 1989 (Pike, direct appeal) (new trial granted under *Miranda v. Arizona* where state trooper misleadingly induced defendant into continuing questioning without presence of an attorney).

249. Commonwealth v. Jones (Thomas), 520 Pa. 68, 550 A.2d 536 (Pa. Nov. 23, 1988) (per curiam) (Philadelphia, application for extraordinary relief) (remanding to the trial court to vacate the sentence of death and to impose a sentence of life imprisonment based on the trial court's "finding of ineffective assistance of trial counsel during the penalty stage" on grounds unspecified in the Supreme Court opinion).

250. Commonwealth v. Wheeler, 518 Pa. 103, 541 A.2d 730 (Pa. April 21, 1988), *rearg. denied* June 10, 1988 (Bucks, direct appeal) (death sentence vacated where evidence was insufficient to sustain the sole aggravating circumstance found by the jury; evidence that the defendant had a single prior conviction for third-degree murder was insufficient to establish a "significant history of felony convictions" under 42 Pa. C.S. § 9711(d)(9)).

® Commonwealth v. Beasley, No. 3099 PHL 1986, 377 Pa. Super. 648, 541 A.2d 1148 (Table) (Pa. Super. Feb. 9, 1988) (unpublished) (violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), when prosecutor argued: "The same law, the very same law that I was held and restricted and guided by in order to put my evidence on . . . will provide this particular defendant with merit, with numerous, with almost endless appeals to all levels in the court system in this case" and "when, can you remember was the last-to let you know now about the appeals, when, can you remember was the last person who was executed in Pennsylvania? When?"), *rev'd*, 524 Pa. 34, 568 A.2d 1235 (Pa. Jan. 26, 1990).

251. Commonwealth v. Caldwell, 516 Pa. 441, 532 A.2d 813 (Pa. Oct. 16, 1987) (Allegheny, direct appeal) (death sentence vacated where evidence was insufficient to establish two of the aggravating circumstances found by the jury; statement in defendant's confession that

he had killed the victims because of his concern that they could later identify the five youths who had broken into their house was insufficient to establish 42 Pa. C.S. § 9711(d)(5); this aggravating circumstance requires that "the victim was a prosecution witness who was killed to prevent his testimony in a pending grand jury or criminal proceeding" and "no grand jury or criminal proceeding involving an offense to which either of the victims was a prosecution witness was pending at the time the murders were committed"; the evidence also was insufficient to establish that the offense was committed by means of torture under 42 Pa. C.S. § 9711(d)(8) because, while the evidence was sufficient to show that the defendant deliberately killed the victims, it did not show that he "specifically intended to cause pain and suffering [in addition to the killing] or was not satisfied with the killings alone").

252. Commonwealth v. Lee, 516 Pa. 305, 532 A.2d 406 (Pa. Oct. 15, 1987) (Philadelphia, direct appeal) (death sentence vacated because medical examiner's testimony established that the murder occurred before noon on September 13, 1978, when second chamber of state legislature overrode governor's veto of death penalty statute and statute formally became law).

253. Commonwealth v. Bryant (James), 515 Pa. 473, 530 A.2d 83 (Pa. Aug. 25, 1987) (*Bryant I*) (Philadelphia, direct appeal) (new trial granted where trial court improperly permitted the Commonwealth, over defense objection, to introduce evidence of a prior crime for which the defendant had been convicted, where "direct evidence of the identification of [the] perpetrator was non-existent" and "the factual scenario of the two crimes did not present sufficient significant similarities as to constitute a common scheme").

- Commonwealth v. Karabin, 362 Pa. Super. 300, 524 A.2d 516 (Pa. Super. April 14, 1987) (Dauphin, Commonwealth's appeal), *affirmed*, 521 Pa. 543, 559 A.2d 19 (Pa. March 6, 1989), *rearg denied* June 19, 1989 (death sentence vacated where evidence jury finding of aggravating circumstance that the defendant had a significant history of felony convictions, 42 Pa. C.S. § 9711(d)(9), was invalid one of two convictions used to establish the aggravating circumstance was later reversed).

254. Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (Pa. April 3, 1987), *rearg. denied* June 23, 1987 (Erie, direct appeal) (death sentence reversed because trial court's instruction on torture aggravating circumstance was prejudicially deficient; court instructed only that "there is an aggravating circumstance, and that is that the offense was committed by means of torture," without instructing on the element of specific intent to inflict pain and suffering beyond that necessary to kill; trial counsel was ineffective in failing to timely object to the defective charge).

255. Commonwealth v. Aulisio, 514 Pa. 84, 522 A.2d 1075 (Pa. March 19, 1987), *rearg. denied* June 2, 1987 (Lackawanna, direct appeal) (reversing kidnapping conviction and (d)(6) aggravating circumstance – that the defendant committed the killing during the perpetration of a felony – for insufficiency of the evidence of kidnapping by confinement; element of confinement not established beyond a reasonable doubt simply because murders occurred in a bedroom closet area; evidence also insufficient to prove

kidnapping by removal; elements of offense such as removal, force, threat, deception, and lack of parental consent not established beyond a reasonable doubt where children's mother observed defendant take children into adjacent house to get out of the rain, children had played in the house on other occasions, and mother testified there was nothing unusual or suspicious about manner in which defendant took children inside).

256. Commonwealth v. Williams (Raymond), 514 Pa. 62, 522 A.2d 1058 (Pa. March 17, 1987) (Butler, direct appeal) (17-year-old defendant's death sentence overturned where "half of the [jury] panel heard that [the defendant] was wanted on other murder charges prior to the [penalty-phase] verdict"; "The General Assembly has specified what aggravating circumstances the fact-finder may consider in deliberating on a death penalty, 42 Pa. C.S.A. § 9711(d), and pending murder charges from another jurisdiction is not one of the permissible considerations. Because the death penalty may have been the product of this extra-evidentiary information, we cannot uphold the judgment of sentence."; jurors are competent to testify as to extraneous influences but incompetent to testify concerning the effects of these improper influences) (remanded for imposition of life sentence).

257. Commonwealth v. Sims, 513 Pa. 366, 521 A.2d 391 (Pa. Feb. 17, 1987) (Philadelphia, direct appeal) (death penalty reversed for violation of right to confrontation where defendant was prevented from cross-examining former suspect, who had been granted immunity in exchange for his testimony, as to communications between that witness and the attorney who represented him during the time he was charged with the crime concerning the shooting; Court holds that the attorney-client communications are privileged, but that the defendant was entitled to question the witness and have the witness invoke the privilege in front of the jury; "Particularly in cases where a defendant is exposed to the most extreme penalty, the right of cross-examination must not be curtailed.").

258. Commonwealth v. Bryant, CC 84-07-686A (Allegheny C.P. Sept. 5, 1986) (Allegheny, post-verdict motions) (granting a new trial in a capital case because exhibits that went out with jury contained improper prejudicial information).

259. Commonwealth v. Baker (Lawrence), 511 Pa. 1, 511 A.2d 777 (Pa. June 23, 1986) (Philadelphia, direct appeal) (death sentence reversed under *Caldwell v. Mississippi* and Article I, Section 13 of Pennsylvania Constitution as a result of argument that suggested that ultimate responsibility for whether the defendant lived or died rested in the appellate courts; prosecutor argued in 1981 trial that "The last person that was executed in this state was Elmo Smith and his crime was in 1959 . . . . He was the last person that was executed in 1963. You get an appeal after appeal after appeal, if you think the Supreme Court is going to let anybody get executed until they're absolutely sure that that man has a fair trial make no mistake about that. I'm not going to go any further. I just want you to understand that once you leave, that this man is not going to have the switch pulled in a matter of hours. That just doesn't happen. It goes on and on and on. I'm not going to sit here and tell you what the system is all about." Then, at the end of his summation, he reiterated: " but just understand this, no matter what your decision is, ladies and gentlemen, it will be and I can assure you as much as I am standing here right now, there

will be considerable time and considerable appeals to be before any kind of finality occurs in this particular action.").

* court applies relaxed waiver rule to address issue and grant relief notwithstanding trial counsel's failure to object to the argument, and so finds it unnecessary to specifically rule on claim that trial counsel was ineffective in not objecting.

260. Commonwealth v. Frederick, 508 Pa. 527, 498 A.2d 1322 (Pa. Oct. 4, 1985) (McKean, direct appeal) (death penalty vacated where evidence was insufficient to establish aggravating circumstance of "a significant history of felony convictions involving the use of threat or violence to the person," 42 Pa. C.S. § 9711(d)(9); "significant history" requires at least two convictions and the only evidence presented in this case was a single prior conviction for voluntary manslaughter).

261. Commonwealth v. Goins, 508 Pa. 270, 495 A.2d 527 (Pa. July 11, 1985) (Philadelphia, direct appeal) (death penalty vacated where evidence was insufficient to establish aggravating circumstance of "a significant history of felony convictions involving the use of threat or violence to the person," 42 Pa. C.S. § 9711(d)(9); "significant history" requires at least two convictions and the only evidence of prior convictions was a stipulation that the defendant had a single prior conviction for what was then graded as second-degree murder, and was the present equivalent of third degree murder).

262. Commonwealth v. Colson, 507 Pa. 440, 490 A.2d 811 (Pa. Apr. 4, 1985) (Bucks, direct appeal) (death sentence vacated and life sentence imposed under *Commonwealth v. Story*, 497 Pa. 273, 440 A.2d 488 (1981), where homicide for which death sentence was imposed predated enactment of death penalty statute), *cert. denied*, 476 U.S. 1140 (May 27, 1986).

263. Commonwealth v. Bricker, 506 Pa. 571, 487 A.2d 346 (Pa. Feb. 13, 1985) (*Bricker I*) (Allegheny, direct appeal) (capital conviction reversed for ineffective assistance of counsel for failing to object to pattern of prosecutorial misconduct, including prosecutor's statement to defense witness to look the jury in the eye, reference in closing to defense witness trying to nail the Commonwealth to the wall, and prosecutor's suggestion that the defense used its right of discovery to fabricate testimony) (resentenced to death).

264. Commonwealth v. Floyd (Calvin), 506 Pa. 85, 484 A.2d 365 (Pa. Nov. 20, 1984) (Philadelphia, direct appeal) (death sentence reversed for prosecutorial misconduct where prosecutor argued that defendant, who had previously escaped, could be released on parole and might kill again, including possibly killing one of the jurors – it is improper for "prosecutor to importune a jury to base a death sentence upon the chance that a defendant might receive parole").

265. Commonwealth v. Clayton, 506 Pa. 24, 483 A.2d 1345 (Pa. Nov. 20, 1984) (plurality opinion) (Philadelphia, direct appeal) (new trial granted where evidence of second murder was improperly admitted in prosecution of defendant for first murder; fact that same gun was used in second murder as in an attempted murder known to have been

committed by the defendant was insufficient to establish that defendant was connected with second murder).

266. Commonwealth v. Crenshaw, 504 Pa. 33, 470 A.2d 451 (Pa. Dec. 29, 1983) (Philadelphia, direct appeal) (death penalty reversed per *Commonwealth v. Story* – death penalty statute enacted on September 13, 1978, was improperly applied to defendant's trial for offenses committed in 1976).

267. Commonwealth v. Smith (Donald), 502 Pa. 600, 467 A.2d 1120 (Pa. Nov. 3, 1983) (Fayette, direct appeal) (new trial granted where trial court prevented defense counsel from cross-examining key prosecution witness concerning her admission to having committed a similar robbery-homicide that the defendant – who was incarcerated at the time – could not have committed; trial counsel's concession to the trial court's erroneous determination that the evidence was not relevant as impeachment in this similar robbery-killing was ineffective)
* the court holds that questioning the female witness concerning a separate robbery-murder that she had admitted to committing without the assistance of a male co-perpetrator "could have established both her inclination and capacity to commit such a crime with the assistance of a female companion and without the aid of a male partner" and that "the striking similarities between the two crimes would have supported appellant's contention that the [prosecution's two female witnesses] committed the . . . killing without his knowledge, aid or assistance";
* the court draws a distinction between impermissible use of the prior robbery-murder admission as "merely a general assault upon the veracity of the witness by showing prior criminal behavior of that witness" and permissible use of that evidence to "significantly undermine[ ] the truthfulness of the version of the facts presented by [the prosecution witness] in the trial in this case";
* the court holds that counsel's "failure . . . to recognize the full potential of this line of inquiry and to urge its allowance on proper grounds constitutes ineffective representation which standing alone would require an award of a new trial."

- Commonwealth v. Karabin, No. No. 890 CD of 1979 (Dauphin C.P. July 19, 1983) (Dauphin, post-trial motions), *affirmed*, 362 Pa. Super. 300, 524 A.2d 516 (Pa. Super. April 14, 1987), *affirmed*, 521 Pa. 543, 559 A.2d 19 (Pa. March 6, 1989), *rearg denied* June 19, 1989

268. Commonwealth v. Terry, 501 Pa. 626, 462 A.2d 676 (Pa. July 11, 1983) (Montgomery, direct appeal) (*Terry I*) (new trial granted where court permitted, over defense objection, the jury to review during its deliberations a written version of the defendant's confession that had been edited by police to emphasize culpable aspects of the killing but which omitted various delusional statements of this paranoid schizophrenic defendant and undermined his affirmative defense of diminished capacity) (resentenced to death).

269. Commonwealth v. Williams (Timothy), 501 Pa. 292, 461 A.2d 593 (March 22, 1983) (per curiam) (direct appeal, Allegheny County) (affirming trial court order holding 1978 death penalty statute inapplicable to trial for 1977 offense).

270. Commonwealth v. Geschwendt, 500 Pa. 120, 454 A.2d 991 (Pa. Dec. 31, 1982), rearg. den. Feb 4, 1983 (post-verdict, Bucks) (noting that trial court in Nos. 939-944 of 1976 (Bucks C.P.) had reduced jury's death sentence to life imprisonment pursuant to intervening decision in *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

- Commonwealth v. Williams (Timothy), No. CC8108905 (Allegheny C.P. June 1, 1982) (Allegheny, trial court order)

271. Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (Pa. Feb. 3, 1983) (direct appeal, Washington County) (*Wallace I*) (new trial granted under *Brady v. Maryland*, 373 U.S. 83 (1963), for prosecution's suppression of exculpatory evidence relating to its chief witness, and for eliciting testimony it knew, or should have known, was false) (resentenced to death).
* the witness falsely testified that he had been in prison continually since his arrest sixteen months before the trial, when – with the knowledge of the prosecuting state trooper in this case – he had in fact been released to work as an undercover agent for three months during this period, and in response to a direct question from the Court during the pre-trial hearing as to whether the witness was a law-enforcement agent, the First Assistant District Attorney told the Court in the presence of the prosecuting trooper that the witness "is not a law-enforcement agent and never has been, your Honor";
* the witness falsely testified that he had pled guilty to "everything he had ever done" when, in fact, he faced trial for eleven counts of burglary at the time of his testimony and did not plead guilty for more than one month after the defendant's trial and received a term of ten years probation;
* the witness falsely testified that his plea discussions involved a sentencing recommendation of five to ten years imprisonment for pending charges when in fact the Assistant District Attorney on that case had mentioned a term of four to eight years and the witness ultimately received a ten year term of probation concurrent to the sentence he received on the "assorted burglary" charges.

272. Commonwealth v. Truesdale, 502 Pa. 94, 465 A.2d 606 (Pa. Sept. 15, 1983) (Philadelphia, direct appeal) (*Truesdale II*) (death penalty reversed per *Commonwealth v. Story* – death penalty statute enacted on September 13, 1978, was improperly applied to defendant's trial for a homicide committed in 1975).

273. Commonwealth v. Story, 497 Pa. 273, 440 A.2d 488 (Pa. Dec. 28, 1981), *rearg. denied* Feb. 5, 1982 (Allegheny, direct appeal) (*Story II*) (application of Pennsylvania death penalty statute enacted on September 13, 1978 to homicide committed in 1974 violated due process and equal protection; capital defendant who had initially been tried and sentenced to death under Pennsylvania's unconstitutional 1974 death penalty statute could be subjected only to the punishment constitutionally authorized under that statute, which was life imprisonment).

274. Commonwealth v. Robinson (Tyrone), 496 Pa. 421, 437 A.2d 945 (Pa. Dec. 17, 1981) (Philadelphia, post-verdict) (noting that death penalty reversed by trial court in March Term, 1977, Nos. 82, 83 & 85 (Phila. C.P.) per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

275. Commonwealth v. Johnson (Jeffrey), 496 Pa. 546, 437 A.2d 1175 (Pa. Dec. 17, 1981) (Philadelphia, post-verdict) (noting that death penalty reversed by trial court in Aug. Term, 1976, Nos. 1204-06 (Phila. C.P.) per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

276. Commonwealth v. Patterson, 488 Pa. 227, 412 A.2d 481 (Pa. Mar. 20, 1980) (Philadelphia, direct appeal) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

277. Commonwealth v. Daugherty, Nos. 892 and 1011 of 1976 (Blair C.P., Crim. Div., Jan. 4, 1980) (Blair, post-verdict) (jury's death sentence reduced to life imprisonment pursuant to intervening decision in *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

278. Commonwealth v. Cole, 274 Pa. Super. 106, 417 A.2d 1276 (Pa. Super. Dec. 28, 1979) (Philadelphia, post-trial) (noting that death penalty reversed by trial court in March Term, 1977, Nos. 82, 83 & 85 (Phila. C.P.) per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

279. Commonwealth v. Crowson, 488 Pa. 537, 412 A.2d 1363 (Pa. Dec. 21, 1979) (Philadelphia, direct review) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

280. Commonwealth v. Edwards, 488 Pa. 139, 411 A.2d 493 (Pa. Dec. 21, 1979) (Philadelphia, direct review) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

281. Commonwealth v. Washington, 488 Pa. 133, 411 A.2d 490 (Pa. Dec. 21, 1979) (Phila. direct review), *rearg. den*. Mar. 10, 1980 (capital nature of prosecution noted in Commonwealth v. Washington, 492 Pa. 572, 424 A.2d 1340 (1981), appeal following remand) (new trial granted when investigator for district attorney testified at trial that the defendant was a "[s]entenced prisoner[ ]" who had been serving time for other offenses in a federal prison in Kansas when he was taken into custody by Pennsylvania officers; Court states "the fact that he was serving a sentence in Leavenworth Penitentiary was of no concern and had no relevancy. It is established, beyond argument, that a testimonial reference indicating to the jury that the accused has been engaged in other criminal activity, denies the accused a fair trial and requires a retrial")

282. Commonwealth v. Evans, 488 Pa. 38, 410 A.2d 1213 (Pa. Dec. 21, 1979) (Philadelphia, direct review) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)), *rearg. den.* Feb. 4, 1980

283. Commonwealth v. Fountain, 485 Pa. 383, 402 A.2d 1014 (Pa. July 5, 1979) (Dauphin, direct review) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

284. Commonwealth v. Sutton, 485 Pa. 365, 402 A.2d 1005 (Pa. July 5, 1979) (per curiam) (Philadelphia, direct review) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

285. Commonwealth v. Rogers, 485 Pa. 132, 401 A.2d 329 (Pa. May 1, 1979) (Cambria, post-verdict) (noting that trial court, with acquiescence of district attorney imposed life sentence despite jury death verdict in Nos. C-152(a), (b), & C-157, 1977 (Cambria C.P.) per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

286. Commonwealth v. Myers, 481 Pa. 217, 392 A.2d 685 (Pa. Oct. 5, 1978) (York, direct review) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

287. Commonwealth v. Davis, 479 Pa. 274, 388 A.2d 324 (Pa. June 29, 1978) (York, direct review) (death penalty reversed per *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977)).

288. Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (Pa. Jan. 26, 1978), *rearg. denied* March 3, 1978 (Bradford, direct appeal)

289. Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (Pa. Jan. 26, 1978) (Allegheny, direct appeal) (*Story I*) (new trial granted where the prosecution improperly presented and the trial court improperly admitted victim-impact evidence concerning the victim's family life and professional reputation).

290. Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (Pa. Nov. 30, 1977) (Philadelphia, direct appeal) (a death penalty imposed under an unconstitutional statute – the 1974 death penalty amendments – cannot stand), *cert. denied*, 438 U.S. 914 (July 3, 1978).

291. Commonwealth v. Truesdale, July Term, 1976, Nos. 131-136 (Phila. C.P. July 5, 1977) (Philadelphia, post-trial motions) (*Truesdale I*) (reversal for prosecutorial misconduct), *app. denied*, 485 Pa. 206, 401 A.2d 366 (May 21, 1979) (resentenced to death, resentencing reversed).

292. Commonwealth v. Martin, 465 Pa. 134, 348 A.2d 391 (Nov. 26, 1975) (Washington, direct review) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)), *cert. denied*, 428 U.S. 923 (July 6, 1976).

○ Commonwealth v. Smith, 461 Pa. 336, 336 A.2d 313 (Pa. Apr. 17, 1975) (Phila., PCHA) (right to appeal violated where petitioner had not been advised of his direct appeal rights and trial counsel had "indicated that an appeal would not have been advisable because if a retrial were granted, appellant would be faced with a possibility of the death sentence"; under *Commonwealth v. Littlejohn*, defendant – who had received a life sentence at trial – could not be subject to death on retrial).

293. Commonwealth v. Dobrolenski, 460 Pa. 630, 334 A.2d 268 (Pa. Mar. 18, 1975) (Delaware, direct review) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)), *aff'g*, 61 Del. Co. 251, March Term, 1972, Nos. 936 & 938 (Del. C.P. 1973).

294. Commonwealth v. Coyle, 460 Pa. 234, 332 A.2d 442 (Jan. 27, 1975) (per curiam) (Philadelphia, direct review, following remand on certiorari by United States Supreme Court in light of *Witherspoon v. Illinois*) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)), *cert. denied*, 423 U.S. 844 (Oct. 6, 1975).

295. Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 255 (July 2, 1973) (Philadelphia, direct review) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)).

296. Commonwealth v. Mount, 451 Pa. 582, 300 A.2d 764 (Jan. 19, 1973) (per curiam) (Philadelphia, direct review) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)).

297. Commonwealth v. Raymond, 451 Pa. 500, 304 A.2d 146 (May 4, 1973) (Philadelphia, PCHA appeal) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)).

298. Commonwealth v. Scoggins, 451 Pa. 472, 304 A.2d 102 (May 4, 1973) (Delaware, direct review) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)).

- Commonwealth v. Eugene Floyd, 451 Pa. 366, 304 A.2d 131 (Pa. May 4, 1973) (Philadelphia, PCHA appeal) (life defendant's withdrawal of post-trial motions not knowing and voluntary where defendant withdrew post-trial motions *in part* based upon erroneous fear of death on reprosecution; waiver constitutionally invalid where defense counsel had advised defendant of possible death sentence on retrial and trial court that had imposed mandatory life sentence after jury did not reach unanimous sentence told defendant that "information has come to me that the jury [had] stood eleven to one for the death penalty").

- Commonwealth v. Dobrolenski, 61 Del. Co. 251, March Term, 1972, Nos. 936 & 938 (Del. C.P. 1973) (post-trial reversal per *Furman*).

- Commonwealth v. Biebighauser, 450 Pa. 336, 300 A.2d 70 (Pa. Jan. 19, 1973) (Erie, PCHA) (noting that life-sentenced defendant who had shown, after a hearing, that he "failed to appeal his conviction because of fear of the imposition of the death penalty on retrial" was permitted to file post-trial motions *nunc pro tunc*).

299. Commonwealth v. Senk, 449 Pa. 626, 296 A.2d 526 (Nov. 17, 1972) (per curiam) (Columbia, direct review) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)).

300. Commonwealth v. Lopinson, 449 Pa. 33, 296 A.2d 524 (Oct. 14, 1972) (per curiam) (Philadelphia, direct review, following remand on certiorari by United States Supreme Court in light of *Witherspoon v. Illinois*) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)), *cert. denied*, 411 U.S. 986 (May 14, 1973).

301. Commonwealth v. Sharpe, 449 Pa. 35, 296 A.2d 519 (Oct. 4, 1972) (Philadelphia, direct review) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)).

302. Commonwealth v. Ross, 449 Pa. 103, 296 A.2d 629 (Oct. 4, 1972) (per curiam) (Allegheny, PCHA appeal) (death penalty reversed per *Furman v. Georgia*, 408 U.S. 238 (1972) and *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972)).

○ Commonwealth v. Santiago, 440 Pa. 543, 271 A.2d 216 (Pa. Nov. 12, 1970) (PCHA, Erie) (PCHA petition of life-sentenced defendant who alleged that he had withdrawn his post-trial motions and "decided not to appeal after being advised by counsel that he could get the death penalty after a second trial" remanded to the PCHA court with instructions to conduct evidentiary hearing and, "[i]f, after such hearing, it is found that appellant's allegations are correct and he did not intelligently waive his right of appeal, appellant must be granted the right to file post-trial motions, *nunc pro tunc*, and, if necessary, pursue an appeal from the judgment of sentence").

303. Phelan v. Brierly, 408 U.S. 939 (U.S. June 29, 1972), *reh'g denied* Oct. 10, 1972 (certiorari reversal per *Furman*).

304. Scoleri v. Pennsylvania, 408 U.S. 934 (U.S. June 29, 1972), *reh'g denied* Oct. 10, 1972 (*Scoleri III*) (certiorari reversal per *Furman*).

305. Commonwealth v. Bradley (George), 449 Pa. 19, 295 A.2d 842 (Pa. Sept. 7, 1972), *rearg. denied* Nov. 1, 1972 (Philadelphia, direct review) (declaring Pa. statute unconstitutional per *Furman v. Georgia*).

306. Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58 (Pa. Oct. 12, 1971), *rehearing denied*, Nov. 10, 1971 (Allegheny, direct review) (death penalty reversed under Split Verdict Act where prosecution presented evidence from six witnesses concerning an alleged kidnapping for which the defendant had not yet been tried: "In a capital case where a man's life is at stake, it is imperative that the death penalty be imposed only on the most reliable evidence. Prior convictions of record, and constitutionally valid admissions and confessions of other crimes meet this standard of reliability; piecemeal testimony about other crimes for which appellant has not yet been tried or convicted can never satisfy this standard.").

○ Commonwealth v. Wright, 444 Pa. 588, 282 A.2d 266 (Pa. Oct. 12, 1971) (Philadelphia, PCHA appeal, new trial) (guilty plea not knowing, intelligent, and voluntary where trial judge and appointed counsel incorrectly advised defendant, whose conviction of first-degree murder and life sentence had been reversed on appeal, that if he pled not

guilty and elected to stand trial jury could convict him of first-degree murder and return death sentence).

- Commonwealth v. Jackson, 443 Pa. 553, 279 A.2d 163 (Pa. July 15, 1971) (Allegheny, PCHA appeal) (right to appeal violated under *Commonwealth v. Littlejohn* where the main consideration underlying the defendant's involuntary waiver of direct appeal was his false belief that the could face the death penalty on retrial if he overturned his conviction).

307. Commonwealth v. Alvarado, 442 Pa. 516, 276 A.2d 526 (Pa. Apr 22, 1971) (Philadelphia, direct appeal) (sentenced modified to life where defendant pled guilty to rape and murder after prosecutor promised not to seek the death penalty and reasonably believed that the prosecution's promise included a commitment not to make any potentially damaging statements at time of sentencing; court finds that prosecution breached its promise after degree of guilt hearing resulted in conviction of first-degree murder by arguing prior to sentencing that the defendant had shown no remorse; because violation occurred after degree of guilt hearing, guilty plea would not be withdrawn, but the sentence would be modified to life imprisonment).

- Commonwealth v. Leamer, 440 Pa. 37, 269 A.2d 708 (Pa. Oct. 9, 1970) (Blair, PCHA appeal) (*Leamer II*) (right to appeal violated under *Commonwealth v. Littlejohn* where life defendant's withdrawal of motion for new trial was based upon fear of death on reprosecution; as a matter of law, waiver was not knowing and voluntary where defendant withdrew motion for new trial based upon fear of death on reprosecution after trial counsel had advised him that "the same judge who had earlier sentenced him to death, was unhappy with the leniency of his life sentence [on retrial] and would welcome another opportunity to impose the death penalty").

- Commonwealth v. Falcone, 440 Pa. 61, 269 A.2d 669 (Pa. Oct. 9, 1970) (Carbon, PCHA) (right to appeal violated under *Commonwealth v. Littlejohn* where court "cannot conclude that Falcone voluntarily, knowingly and understandingly waived his right to appeal"; waiver invalid because "[t]he uncontradicted testimony that the possibility of being subjected to the death penalty in the event a new trial was granted was a factor in Falcone's determination of whether to seek a new trial").

- Commonwealth ex rel Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (Pa. Jan. 30, 1970) (Philadelphia, state habeas corpus appeal) (life defendant's right to appeal restored where defendant withdrew post-verdict motions out of fear that he might receive the death penalty on retrial; court finds "it was violative of a defendant's constitutional rights to be placed in jeopardy of a death sentence in a second trial, once he has been found guilty of murder in the first degree and sentenced to life imprisonment"; withdrawal of post-verdict motions out of fear that defendant might receive the death penalty on retrial "cannot, as a matter of law, be a knowing and voluntary waiver of the right to appeal").

- Commonwealth v. Barnosky, 436 Pa. 59, 258 A.2d 512 (Pa. Nov. 11, 1969) (Cambria, PCHA) (noting correctness of PCHA court's restoration of right to direct appeal for life-sentenced defendant where "[i]t became apparent at the hearing held pursuant to that

petition that appellant's fear of possibly receiving the death penalty on retrial played a major role in his decision not to appeal his original conviction").

- Commonwealth v. Magee, 436 Pa. 57, 258 A.2d 627 (Pa. Nov. 11, 1969) (Erie, PCHA appeal) (life defendant's right to direct appeal restored *nunc pro tunc* where defendant failed to file direct appeal based upon fear of death on reprosecution; waiver of right to appeal was not knowing and voluntary where "the hearing judge found that appellant did not appeal because of his [erroneous] fear of the death penalty upon retrial, we must now grant him an appeal as though timely filed").

- Commonwealth v. Stewart, 435 Pa. 449, 257 A.2d 251 (Pa. Oct. 9, 1969) (Dauphin County, PCHA appeal) (life defendant's right to appeal violated under *Commonwealth v. Littlejohn* where defendant's withdrawal of motion for new trial was based upon fear of death on reprosecution; waiver of appeal not knowing and voluntary where defendant's trial lawyers advised him not to appeal conviction because they "were afraid he would get the death penalty upon retrial").

- Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (Pa. Jan. 24, 1969), *reh'g denied* March 21, 1969 (Philadelphia, PCHA appeal) (violation of double jeopardy and denial of appeal where failure to appeal based on threat of death on retrial).

308. Commonwealth v. Aljoe, 420 Pa. 198, 216 A.2d 50 (Pa. Jan. 4, 1966) (Clearfield, direct review)

309. Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (Pa. July 1, 1964) (Philadelphia, direct review) (*Scoleri II*)

310. United States *ex rel* Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. Oct. 10, 1962) (Philadelphia, habeas) (*Scoleri I*) (new trial granted for violation of due process when hearsay testimony presented by prosecution witness – without objection from the defense – that she had heard that defendant and another person had been in prison together; Pennsylvania procedure that permitted admission of prior unrelated convictions at trial, prior to verdict of guilt or innocence, for the sole for purpose of enabling the jury to determine sentence if it convicted of first degree murder violated due process), *reh'g denied* Dec. 11, 1962, *cert. denied*, 374 U.S. 828 (June 17, 1963)

311. Commonwealth v. Cater, 396 Pa. 172, 152 A.2d 259 (Pa. May 8, 1959), *reh'g denied* July 2, 1959 (Philadelphia, direct review) (reversing death penalties for two of three co-defendants where "the court en banc discussed the culpability of all three appellants together and in so doing inadvertently applied certain statements made in the confession of one of the appellants equally to the others"; record showed no evidence that two of the defendants in the felony murder procured the gun used in the killing "long before the holdup" or shared co-defendant's motive").
* Court adopts liberal standard on penalty-stage prejudice for relative culpability of codefendants: "[W]e cannot say that if the court had properly viewed the evidence it might not have reached a different conclusion as to the appropriate penalty. 'Where the scales are poised in such even balance with respect to the choice between life

imprisonment and the death penalty, and where the ultimate decision should depend upon fine, sound and discriminating judgment, each fact operates with telling effect, and no one can say, with confidence * * * that any particular fact is of no moment in reaching the final decision.' This is particularly true when sentences are being imposed upon more than one participant in a homicide. The distinctions in the evidence applicable to each of the defendants must be rigorously maintained and scrupulously evaluated. *In such a solemn and drastic proceeding there is no room for a scintilla of error*."

312. Commonwealth v. Green (Isaiah), 396 Pa. 137, 151 A.2d 241 (Pa. May 8, 1959) (Philadelphia, direct review) (death sentence reversed for 15-year-old defendant where sentencing court abused its discretion by failing to inquire into "evidence of the [defendant's] background . . . , his home environment, the economic circumstances under which he was raised, his scholastic record, in short, what was this boy, now a convicted murderer, really like prior to the commission of this crime")
* Court declares: "No more awesome duty nor solemn obligation comes within the province of a judge than the decision whether penalty of death or life imprisonment should be imposed . . . Both the criminal act and the criminal himself must be thoroughly, completely and exhaustively examined before a court can exercise a sound discretion in determining the appropriate penalty."

313. Commonwealth v. Leamer, No. 58, January Term, 1957 (Blair C.P. 1957) (Blair, habeas corpus) (*Leamer I*) (new trial granted because defendant found not competent to stand trial at the time he pleaded guilty).

314. Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96 (Pa. Oct. 4, 1955) (Warren, appeal from post-trial competency proceeding)

315. Commonwealth v. Martin, 379 Pa. 587, 109 A.2d 325 (Pa. Nov. 23, 1954) (Mercer, direct review) (new trial granted where trial judge denied defendant's request to poll jury; right to poll jury is so fundamental that no prejudice need be shown, and reversal mandated even though the record shows that "the trial was otherwise markedly free from error and the jury's verdict was fully warranted by the evidence").

316. Commonwealth v. Turner, 1 Pa. D. & C.2d 11 (Phila. O. & T. Sept. 23, 1953) (*Turner IV*) (Philadelphia, post-verdict) (new trial granted when district attorney commented, within the hearing of the jury, about the defendant's three prior convictions for the same offense; court deemed the remark so prejudicial that it could not be cured by any instruction admonishing the jury to disregard it).

317. Commonwealth v. Turner, 371 Pa. 417, 88 A.2d 915 (Pa. May 29, 1952) (*Turner III*) (Philadelphia, direct appeal) (new trial granted as a result of the trial court's denial of a defense motion to sequester police witnesses who – following reversal of the defendant's conviction because of a coerced confession – now testified that they had overheard the defendant confess to cell mates that he had committed the killing and they were the only witnesses testifying to this supposed confession; conviction also reversed because of trial court's refusal to permit defense to impeach alleged co-perpetrator with statements from his guilty plea proceedings in which district attorney had agreed to impose a life sentence

because of witness's assistance to police as an informant in other cases; the court also finds that the trial court erred in permitting the jury to consider as a basis for the death sentence facts relating to the killing of a second victim, where the defendant was not convicted for that killing)

318. Commonwealth v. James Johnson, 368 Pa. 139, 81 A.2d 569 (Pa. June 27, 1951) (Montgomery, direct review) (death penalty reversed for prosecutorial misconduct where prosecutor argued that there was a possibility that the defendant could be released in the future by the Board of Pardons; subject matter of possibility of parole is an inappropriate consideration for the sentencing jury and argument concerning the possibility of future release "is improper and is out of place in an address by a district attorney").

319. Commonwealth v. Turner, 367 Pa. 403, 80 A.2d 708 (Pa. May 23, 1951) (*Turner II*) (Philadelphia, direct appeal) (new trial granted for admission of preliminary hearing testimony admit guilt where that testimony was the product of the same coercion that rendered admission of his written confession reversible error in his first trial).

320. Commonwealth v. Chambers (Joseph), 367 Pa. 159, 79 A.2d 201 (Pa. March 21, 1951) (Philadelphia, direct review)

321. Johnson v. Pennsylvania, 340 U.S. 881 (U.S. Nov. 13, 1950) (Philadelphia, certiorari) (co-defendant of Aaron "Treetop" Turner; conviction vacated per *Turner v. Pennsylvania*, 338 U.S. 62 (1949)

322. Commonwealth v. Sheeler, 73 Pa. D. & C. 570 (Phila. O. & T. Oct. 2, 1950) (discussing post-trial reversal of death sentence for co-defendant George H. Bilger)

323. Turner v. Pennsylvania, 338 U.S. 62 (U.S. June 27, 1949) (*Turner I*), *mandate conformed to* Aug. 4, 1949 (Philadelphia, certiorari) (new trial granted as a result of the admission of a coerced confession obtained after more than twenty-four hours of interrogation over a four-day period in which the petitioner was not permitted to see friends or relatives, never informed of his right to remain silent until after he had confessed, and was denied a preliminary hearing for five days been until the coercive interrogation had produced a confession).

324. Commonwealth v. Jones, 355 Pa. 594, 50 A.2d 342 (Pa. Jan. 9, 1947) (Philadelphia, appeal from Court of Oyer and Terminer) (new trial granted in non-bifurcated capital proceedings where court permitted testimony of two detectives, over defense objection, that defendant had a record of prior arrests)

* Court states: "It is fundamental that no testimony is admissible unless it is relevant, i.e. unless it is of a nature to afford evidence tending to prove or to disprove the matters in issue. Even if it is definitely proved to a jury that a man has been arrested, of what probative value is that fact? Unless convicted, a man remains innocent and the law cannot in Justice cast a shadow on his character for a mere arrest. It could not help the jury to know what manner of man the accused was, because the mere fact of an arrest does not prove or disprove anything."

* The court grants a new trial, reasoning that "We are convinced that the admission of the testimony as to prior arrests was prejudicial to defendant, in that it may have materially influenced the jury in fixing the penalty at death, rather than at life imprisonment . . . ."

325. Commonwealth v. Johnson (Harry), 348 Pa. 349, 35 A.2d 312 (Pa. Jan. 3, 1944) (Philadelphia, direct review) (new trial granted for violation of defendant's state constitutional right to confront witnesses "face-to-face" where the *en banc* court sitting to adjudicate the defendant's degree of guilt and to impose sentence for a prison murder had received "a large amount" of oral and documentary information about the defendant's criminal record, including prior bad acts in prison, and at least one judge had indicated that this information was considered in determining the degree of guilt, as well as in imposing the death penalty).

326. Commonwealth v. Irelan, 341 Pa. 43, 17 A.2d 897 (Pa. Jan. 31, 1941) (Philadelphia, direct review) (judicially imposed death sentence held to constitute an abuse of discretion where defendant, a destitute mother of a child born out of wedlock to a man who had abandoned her and the child and who had previously been physically abused by her ex-husband, smothered her child; defendant earned an average of $6 per week, of which she spent $5 per week in child care; and prosecution stated during oral argument that it believed life imprisonment was the appropriate sentence).

327. Commonwealth v. Kluska, 333 Pa. 65, 3 A.2d 398 (Pa. Jan. 9, 1939) (Philadelphia, direct review) (new trial granted for multiple instructional errors concerning the defendant's intent to kill)
* the trial court improperly instructed the jury that the defendant had to prove by a preponderance of the evidence that the killing was accidental; error not cured by provision of separate instruction that the prosecution must prove guilt beyond a reasonable doubt;
* where the victim – the defendant's wife – died after having had acid thrown on her face, trial court erred in instructing the jury that when "one intentionally uses a deadly weapon upon a vital part of the body of another, there is a legal presumption of an intent to kill, which cannot be rebutted by the assailant's own testimony that he did not so intend" in absence of any determination that the defendant "knew or believed that, if thrown upon the face, its results would be likely to be those of a 'deadly weapon' used upon a vital part of the body";
* trial court further erred in charging the jury that it could take into consideration threats the defendant made against his mother-in-law, sisters-in-law, and neighbors a few hours later that "[he] will kill you all" as evidence of whether the defendant had deliberately thrown the acid and whether he had intended to kill his wife; if "the commission of a collateral offense is not admissible in evidence, then certainly the making of a threat to commit a collateral offense is not admissible"; "Defendant's alleged threat to kill all the people in his mother-in-law's house, even if seriously made, would not be probative of his intent in previously throwing acid in his wife's face";
* Defendant also challenged the court's definition of a reasonable doubt as "one 'of such substance as, arising in a matter of your own affairs, would cause you to hesitate and reconsider'; without holding that this instruction was error, the court indicated that

"the jury should be told either . . . that they should not condemn unless so convinced by the evidence that they would venture to act upon that conviction in matters of the highest importance to their own interests, or . . . that a reasonable doubt was one that would cause them to hesitate to act in any of the important affairs of their own lives."

328. Commonwealth v. Garramone, 307 Pa. 507, 161 A. 733, 89 A.L.R. 291 (Pa. May 26, 1932) (Philadelphia, direct review) (judicial imposition of death sentence immediately upon conviction and without supporting opinion vacated as abuse of discretion and modified to sentence of life imprisonment where court found that the murder did not warrant a death sentence)

* The defendant shot and killed the victim, described as a "pretty large man," after learning that the victim had instructed his four-year-old son to settle a children's dispute with the defendant's ten-year-old daughter by striking her with a stick; when the defendant's 18-year-old son approached the victim concerning this, the victim punched the boy in the face twice, knocking him unconscious, after which the defendant's wife attempted to attack the victim;

* The Court wrote: "It is clear that this was not an atrocious murder planned and committed in cold blood, or one committed in the perpetration of robbery or other grave crime, though, by saying that, we do not intend to enumerate all possible examples of the class that should receive sentence of death, or otherwise attempt to distinguish one class from the other; definition may come, as cases present themselves. This is the case of an industrious man without criminal record, whose character as a peaceful law-abiding citizen was testified to by a number of persons. After he returned from his day's work and found his wife and son in the condition described, he committed the crime under the resulting provocation, and in circumstances which, we think, place him within the legislative classification requiring the milder of the two possible sentences."

329. Commonwealth v. Palome, 263 Pa. 466, 106 A. 783 (Pa. Feb. 17, 1919) (Cambria, direct review) (new trial granted where, in case in which defendant presented evidence of self-defense, the trial court instructed the jury to "first determine whether he was guilty, and, if so, of what crime," and that only after having determined guilt to then "take up the defense in the case"; reversal required because no verdict should have been reached without prior consideration of the proffered defense, and "under the court's instruction, they may have found him guilty before they considered his defense").

○ Commonwealth v. Gibson (James), citation unknown (Allegheny) (press reports indicate death sentence was imposed in 1918, but reduced to life imprisonment for reasons unknown to the reporter some time between 1918 and 1921).

330. Commonwealth v. Corsino, 261 Pa. 593, 104 A. 739 (Pa. June 11, 1918) (Luzerne, direct review) (new trial granted when, without notice to defendant or his counsel, the assistant district attorney prepared a substitute copy of the indictment that the court provided to the jury during its deliberations)

* Court holds that "It is the inherent right of the prisoner in a capital case to be present at every stage of the proceedings from the arraignment to the rendition of the verdict. Neither court nor judge can take any step affecting his right in his absence. . . . When, during a trial, it becomes necessary to amend an indictment, or substitute a copy,

the application therefor should be made in open court in presence of the defendant and on notice to his counsel that all rights may be safeguarded."

* Violation of right to be present is not subject to harmless error analysis: "The right of the court to permit a copy to be filed in place of the original indictment is not the question. It may be that no harm was done defendant; the same might be said of answering questions propounded by jurors, giving them additional instructions or taking their verdict, and yet no one would urge that such could be done in the absence of defendant. The law so jealously guards the prisoner's rights, when on trial for life, that it will not tolerate any false step that might result to his prejudice, even when taken inadvertently as this undoubtedly was."

331. Commonwealth v. Marcinko, 242 Pa. 388, 89 A. 457 (Pa. Nov. 7, 1913) (Schuylkill, direct review) (new trial granted where the court informed the jury of its personal opinion that it did not believe there was evidence of provocation that would support a verdict of manslaughter and that the facts were either intentional murder or accident; although court was permitted to give a nonbinding instruction "express[ing] an opinion that there is nothing in the case to reduce the crime to manslaughter" when the instruction is supported by the evidence, it was a misstatement of the evidence that ignored the defendant's own testimony that the victim had struck him several times).

332. Commonwealth v. Simanowicz, 242 Pa. 402, 89 A. 562 (Pa. Nov. 7, 1913) (Schuylkill, direct review) (guilty plea vacated and death sentence overturned where trial court improperly charged the jury empaneled to determine the preliminary issue of sanity that the defendant had the burden of proving his insanity beyond a reasonable doubt; the Court further finds that the jury was improperly instructed that before it could find insanity from the evidence presented, it had to be persuaded beyond a reasonable doubt that the defendant suffered from hallucinations and delusions of a fixed and permanent character; the Court also invalidates the guilty plea entered on behalf of the defendant after he was improperly found sane, on the grounds that such a plea is not binding upon a person who is "not mentally competent to understand the proceedings in court, or to confer with [counsel] in relation to the charge of the indictment"; counsel could not waive an insane defendant's right to an appropriate determination of sanity).

○ Commonwealth v. Toth, 145 Pa. 308, 22 A. 157 (Pa. June 5, 1891) (per curiam opinion states in its entirety: "This case does not require discussion. The judgment is affirmed, and it is ordered that the record be remitted to the oyer and terminer for the purpose of execution) (the three Hungarian immigrants charged with the murder – Andrew Toth, Michael Sabol, and George S. Rusnok – were innocent; Governor Robert Emory Pattison commuted their death sentences to life in prison on February 25, 1892; after the actual killer, Steve Toth (unrelated to Andrew), gave what he thought was a death-bed confession in Hungary in 1911, Governor John Kinley Tener granted Andrew Toth a full pardon March 17, 1911; co-defendants Sabol and Rusnok had already died in prison).

333. Hamilton v. Commonwealth, 16 Pa. 129, 1851 WL 5754, 55 Am. Dec. 485, 4 Harris 129 (Pa. May 20, 1851) (Lancaster, special allocatur) (death sentence overturned for violation of defendant's right to allocatur; trial record contained "no entry that the prisoner was demanded whether he had any thing to say why sentence of death should not be

pronounced on him," which constitutes reversible error; the Court further noted the absence of competent evidence on the docket "to show even that the prisoner was present when he was sentenced") (judgment reversed and prisoner discharged).

334. Abernethy v. Commonwealth, 101 Pa. 322, 1882 WL 13524 (Pa. Oct. 16, 1882) (Allegheny, appeal from Court of Oyer and Terminer) (new trial granted when court prevented the defense from rebutting evidence that he had been sent to reform school and for excluding evidence of the victim's violent propensities in a potential case of self-defense)

* after prosecution elicited on cross-examination testimony from a defense character witness that the defendant had been sent to reform school, the court erred in preventing the defense from offering the testimony of his mother and another witness that the defendant "had been abandoned by his father" and had procured his own admission to reform school "for the purpose of securing his maintenance and education in the absence of support by his father or any means of her own by which to support him."

* the court also erred in preventing the defense from presenting evidence "that the deceased was a man of quarrelsome disposition" when the defendant and the deceased knew one another and the killing took place "in a sudden scuffle, in which there was evidence that the deceased made an assault on the defendant if he did not actually strike him"; the Court rules the evidence "admissible as evidence that the defendant may have considered himself as in some danger, and had resort to the weapon not to kill but disable his assailant."

335. Peiffer v. Commonwealth, 15 Pa. 468, 53 Am. Dec. 605, 3 Harris 468, 1850 WL 6020 (Pa. Dec. 1850) (Schuylkill) (appeal from Court of Oyer and Terminer) (new trial granted where jury was discharged for the evening prior to trial and brought back to hear the trial; "the instant a jury is discharged, the prisoner's life is no longer in their power").

336. Dunn v. Commonwealth, 6 Pa. 384, 6 Barr. 384, 1847 WL 4913 (Pa. Sept. 23, 1847) (Allegheny, direct review) (judgment and sentence reversed for violation of the defendant's right to be present at trial and sentencing; Court holds that the record did not contain sufficient evidence to establish that "the prisoner was present at the trial, particularly at the rendition of the verdict, nor when sentence of death was passed").