

FEDERAL CRIMINAL DEFENSE TRAINING

March 26, 2019

“Ethical Dilemmas Confronting Defense Lawyers When Representing the Mentally Challenged or Difficult Client”

By

Attorney Al Flora, Jr.

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February 7, 2019

PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT

**Adopted by Order of the Supreme Court of Pennsylvania dated October 16, 1987
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to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impracticable. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2, 1.4, 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Comment:

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should

or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment:

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[6] It is Disciplinary Board policy that allegations of excessive fees charged are initially referred to Fee Dispute Committees for resolution.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;

(3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to secure legal advice about the lawyer's compliance with these Rules; or

(6) to effectuate the sale of a law practice consistent with Rule 1.17; or

(7) to detect and resolve conflicts of interest from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Comment:

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this

information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[5] A lawyer has duties of disclosure to a tribunal under Rule 3.3(a) that may entail disclosure of information relating to the representation. Rule 1.6(b) recognizes the paramount nature of this obligation.

Authorized Disclosure

[6] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Detection of Conflicts of Interests

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends or learn that the client has caused serious harm to another person. However, to the extent that a lawyer is required or permitted to disclose a client's purposes or conduct, the client may be inhibited from revealing facts that would enable the lawyer effectively to represent the client. Generally, the public interest is better served if full disclosure by clients to their lawyers is encouraged rather than inhibited. With limited exceptions, information relating to the representation must be kept confidential by a lawyer, as stated in paragraph (a).

[8] Where human life is threatened, the client is or has been engaged in criminal or fraudulent conduct, or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question.

[9] Several situations must be distinguished:

[10] First, a lawyer may foresee certain death or serious bodily harm to another person. Paragraph (c)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person

who drinks the water will contract a life-threatening or debilitating disease and that the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[11] Second, paragraph (c)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime that is reasonably certain to result in substantial injury to the financial or property interests of another. Disclosure is permitted under paragraph (c)(2) only where the lawyer reasonably believes that such threatened action is a crime; the lawyer may not substitute his or her own sense of wrongdoing for that of society at large as reflected in the applicable criminal laws. The client can, of course, prevent such disclosure by refraining from the wrongful conduct.

[12] Third, a lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). To avoid assisting a client's criminal or fraudulent conduct, the lawyer may have to reveal information relating to the representation. Rule 1.6(c)(3) permits doing so.

[13] Fourth, a lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. In such a situation, the lawyer did not violate Rule 1.2(d). However, if the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate and overriding interest in being able to rectify the consequences of such conduct. Rule 1.6(c)(3) gives the lawyer professional discretion to reveal information relating to the representation to the extent necessary to accomplish rectification.

[14] Fifth, where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[15] Sixth, a lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[16] Seventh, a lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[17] Eighth, it is recognized that the due diligence associated with the sale of a law practice authorized under Rule 1.17 may necessitate the limited disclosure of certain otherwise confidential information. Paragraph (c)(6) permits such disclosure. However, as stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having a need to know it, and to obtain appropriate arrangements minimizing the risk of disclosure.

[18] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4.

[19] Paragraph (c)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the

purchase of a law practice. See Rule 1.17, Comment [4]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[20] Any information disclosed pursuant to paragraph (c)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (c)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (c)(7). Paragraph (c)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [6], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[21] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4.

[22] Paragraph (c) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[23] Paragraph (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (c). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[24] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Acting Competently to Preserve Confidentiality

[25] Pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[26] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[27] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lobbyists

[28] A lawyer who acts as a lobbyist on behalf of a client may disclose information relating to the representation in order to comply with any legal obligation imposed on the lawyer-lobbyist by the Legislature, the Executive Branch or an agency of the Commonwealth, or a local government unit which are consistent with the Rules of Professional Conduct. Such disclosure is explicitly authorized to carry out the representation. The Disciplinary Board of the Supreme Court shall retain jurisdiction over any violation of this Rule.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[4] While a lawyer may report professional misconduct at any time, the lawyer must report misconduct upon acquiring actual knowledge of misconduct. The discretionary reporting of misconduct should not be undertaken for purposes of tactical advantage over another lawyer, to punish or inconvenience another for a personal or professional slight, or to harass another lawyer.

[5] A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[6] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[7] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and to the public. The Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

[8] In addition to reporting a violation of another lawyer, a lawyer is required by the Pennsylvania Rules of Disciplinary Enforcement to self-report in certain circumstances. Pa.R.D.E. 214(a) provides that an attorney convicted of a crime shall report the fact of that conviction within 20 days to the Office of Disciplinary Counsel. For purposes of that rule, the term "crime" means an offense that is punishable by imprisonment in the jurisdiction of conviction, whether or not a sentence of imprisonment is actually imposed. It does not include parking violations or summary offenses, both traffic and non-traffic, unless a term of imprisonment is actually imposed.

[9] Likewise, Pa.R.D.E. 216(e) requires an attorney who has been transferred to disability inactive status or disciplined in another court or by any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or by a federal administrative agency or a military tribunal, by suspension, disbarment, or revocation of license or pro hac vice admission, or who has resigned from the bar or otherwise relinquished his or her license to practice while under disciplinary investigation in another jurisdiction, to report the fact of that transfer, suspension, disbarment, revocation or resignation to the Secretary of the Board within 20 days after the date of the order, judgment or directive imposing or confirming the discipline or transfer to disability inactive status.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

June 30, 2017

Defense Function

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Criminal Justice Section Standards

Defense Function

DEFENSE FUNCTION

PART I.

GENERAL STANDARDS

Standard 4- 1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

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Standard 4- 1.2 The Function of Defense Counsel

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

Standard 4- 3.6 Prompt Action to Protect the Accused

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

Standard 4- 3.8 Duty to Keep Client Informed

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

PART III

LAWYER-CLIENT RELATIONSHIP

Standard 4-3.1 Establishing and Maintaining An Effective Client Relationship

(a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances, and explain what the client can do to help preserve confidentiality.

(b) At an early stage, counsel should discuss with the client the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused. An engagement letter as described in Standard 4-3.5 should also be provided.

(c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel's obligations to the client, including maintaining a normal attorney-client relationship in so far as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client's best interest.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(e) Defense counsel should ensure that space is available and adequate for confidential client consultations.

(f) Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.

Standard 4-3.3 Interviewing the Client

(a) In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This includes assuring the client of confidentiality, establishing trust, explaining the posture of the matter, discussing fees if applicable, and inquiring about the client's objectives for the representation. Counsel may also discuss available evidentiary materials with the client, seek information from the client as to the facts and other potential sources of information, and ask what the client's immediate objectives and needs are and how to fulfill them.

(b) Counsel should interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once. Defense counsel should make every reasonable effort to meet in person with the client. Consultation with the client regarding available options, immediately necessary decisions, and next steps, should be a part of every meeting.

(c) As early as practicable in the representation, defense counsel should also discuss:

(i) and share with the client evidentiary materials relevant to the matter (consistent with the terms of any applicable protective order), and determine in depth the client's view of the facts and other relevant facts known to the client;

(ii) the likely length and course of the pending proceedings;

(iii) potential sources of helpful information, evidence, and investigation;

(iv) the client's wishes regarding, and the likelihood of and steps necessary to gain, release or reduction of supervisory conditions;

(v) likely legal options such as motions, trial, and potential negotiated dispositions;

(vi) the range of potential outcomes and alternatives, and if convicted, possible punishments;

(vii) if appropriate, the possibility and potential costs and benefits of a negotiated disposition, including one that might include cooperation with the government; and

(viii) relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter.

(d) When asking the client for information and discussing possible options and strategies with the client, defense counsel should not seek to induce the client to make factual responses that are not true. Defense counsel should encourage candid disclosure by the client to counsel and not seek to maintain a calculated ignorance.

PART IV.

INVESTIGATION AND PREPARATION

Standard 4- 4.1 Duty to Investigate

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

Standard 4- 5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.



November 20, 2014

FORMAL OPINION 2014-500

ETHICS ISSUES RELATED TO EARLY ACCOUNTABILITY PROGRAM

I. INQUIRY

May a prosecutor propose, at an early, critical stage of criminal proceedings, that a defendant accept a favorable disposition of the defendant's case through a plea agreement or deferred adjudication, conditioned upon foregoing the opportunity for defense counsel to receive discovery and to conduct an adequate investigation of the law and facts and conditioned upon the client waiving important constitutional, statutory and/or procedural rights? If not accepted by the client under these circumstances, the favorable disposition will in all likelihood not be available at a later time in the criminal process. May a criminal defense lawyer ethically recommend acceptance of such a proposal?

The issue arises under a program in a county called "Early Accountability Program" ("EAP"), which operates as follows: either shortly before or at a preliminary hearing, a defendant is identified by the Assistant District Attorney ("ADA") as a candidate for the program because the charges are relatively minor and/or the defendant does not have a serious prior record; the ADA offers a lenient sentence or an Accelerated Rehabilitative Disposition ("ARD") (for first time offenders)¹ to resolve the case at

¹ The ARD program is not a conviction but rather a deferred adjudication of the charges. Defendants who are placed into the program, upon recommendation of the District Attorney and approval of the court, are subject to conditions such as may be imposed after a conviction of a crime, namely, probation, payment of restitution and court costs, reasonable charges relating to the administration of the program and such other conditions as agreed to between the parties. The program cannot exceed two years and the defendant must waive his constitutional and statutory right to a speedy trial. Upon successful completion, the defendant can obtain a dismissal of the charges and expungement. If the defendant violates the conditions of the program, he can be terminated from the program and the District Attorney can proceed on the charges as provided by law.

the preliminary hearing. The offer of early disposition must be accepted by the defendant at the preliminary hearing stage or it is withdrawn. As a condition of the EAP program, the defendant must waive his rights to: a preliminary hearing, Presentment of an Information and Arraignment, Pre-trial Discovery and Bill of Particulars,² file Omnibus Pre-trial Motions for Relief and raise affirmative defenses including Mental Infirmity or Alibi and have the benefit of a pre-sentence investigation report. The client must sign a Waiver of Rights relinquishing these rights. The attorney is required to affirm that the Waiver of Rights has been reviewed with the defendant and that counsel believes "that said waiver is voluntary, knowing and intelligent."

If the defendant accepts the plea or deferred adjudication offer, s/he waives her/his right to a preliminary hearing and immediately appears before a Common Pleas Court Judge to enter a plea of guilty, or admits the facts for entry into an ARD program. The Judge conducts a colloquy, both orally and in writing, with the defendant prior to an adjudication of guilt or placement into the ARD program. During this colloquy, the defendant again waives certain constitutional, statutory and/or procedural rights, including discovery. The court often asks if the attorney believes that the client's plea or admission is knowing, intelligent and voluntary. Apparently, the plea or ARD will not be accepted by the Court unless the attorney answers in the affirmative. The client is immediately sentenced, without the benefit of a pre-sentence investigation report, or placed into the ARD program.

If the defendant rejects the offer, in most cases he is no longer eligible for ARD or a more lenient disposition. If the defendant is either convicted at trial or decides to plead guilty at a later stage in the proceedings, s/he is subject to a harsher penalty and/or fewer sentencing alternatives than offered in the EAP.

While in some but not all cases discovery is now being provided, defense counsel report that it is not always complete, and they have no meaningful opportunity to review it, investigate any issues which may be raised, perform any research, familiarize themselves with their clients, or take other steps which would normally be taken in defense of a criminal case. While the early disposition offer is purportedly for a lesser sentence or deferred adjudication than would result after a trial or negotiations later in the criminal process, defense counsel are required to evaluate the early disposition offer before having a reasonable opportunity to explore with their clients all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction. This

² Apparently, after issuance of our Informal Opinion at No. 2014-26, the practice was changed to provide for discovery at a preliminary hearing, but if it is not provided, the defendant must request a continuance so that discovery could be provided at the next hearing, which delay would not be included in his speedy trial time credits.

would include securing information in the possession of the prosecution and law enforcement.

The issues raised are whether by advising a client to agree to the EAP a defense lawyer violates any ethical responsibilities and whether a prosecutor violates his ethical responsibilities through the administration of this program. For the reasons stated below such actions preclude a lawyer from complying with the PA RPC and/or compel a lawyer to violate them.

II. THE RULES OF PROFESSIONAL CONDUCT

Applicable Rules of Professional Conduct ("RPC" or "Rule") include, in relevant part:

Rule 1.0 Terminology

(e) "Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. ... In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; ... and

(4) each affected client gives informed consent.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor...

Rule 4.3 Dealing with Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

III. ANALYSIS

In the opinion of this Committee, the EAP prevents a criminal defense lawyer from complying with these rules and/or compels a lawyer to violate them. By conditioning favorable treatment of a defendant upon the waiver of important rights, a prosecutor violates Rules of Professional Conduct directly as well as through the actions of another.

A. The Defense Lawyer

A bedrock principle of the administration of justice is that a defendant charged with a crime is entitled to effective and competent representation by counsel. This principle imposes upon a defense lawyer the duty to perform required defense functions³, including conducting a "prompt investigation of the circumstance of the case and explor[ing] all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." An independent investigation by defense counsel, while necessary, is inadequate for determining whether a defendant should accept a plea offer. A defense lawyer needs to know the information the prosecutor is relying upon. Any investigation should include efforts to obtain information in the possession of the prosecution regardless of the accused's admissions to defense counsel of guilt or stated desire to plead guilty. Indeed, it is difficult to imagine how a defense lawyer can comply with the requirements to obtain informed consent from the client, which "denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct," when the lawyer does not have the full information that a prudent practitioner would wish to have prior to advising a client to agree to a plea or deferred adjudication.

The coercive nature of this program is perhaps best demonstrated by a comment under a Power Point (prepared for a previous version of this program) captioned "Keys to Success": "You rejected EAP and now you are being sentenced? I wouldn't want to be you." It has been reported that if defense counsel raises any concerns about the process, the attorney is deemed "not a team player," and counsel or counsel's clients are subject to less favorable treatment by the court and the District Attorney's Office. In fact, it has been reported that opposition to this program has affected employment interests of criminal defense counsel.

In providing competent representation, a defense lawyer has an obligation to explore the possibility of an early, favorable disposition of the case. However, s/he should not, under any circumstances, recommend to a defendant the acceptance of a plea offer, deferred adjudication and waiver of rights until s/he conducts and com-

³ The duty of defense counsel to investigate is a professional norm set forth under the ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., 1993 American Bar Association, Defense Function, Standards 4-4.1 and 4-6.1; ~~see also~~ Performance Guidelines for Criminal Defense Representation, Guidelines 4.1 and 4.2, 1995 National Legal Aid and Defenders Association (NLADA); see also, ~~1995 NLADA~~ 287 U.S. 45, 58 (1932) (Sixth Amendment right to counsel entails counsel's duty to conduct a "prompt and thorough-going investigation").

pletes an appropriate investigation of the case, including an analysis of the law and evidence.⁴

The perceived “minor nature” of the charges does not in any way mitigate the importance of a full opportunity to inform the client of the full consequences of entering a plea, which include a criminal record and potential instant incarceration. Moreover, an adjudication or deferred adjudication of guilt poses significant collateral consequences for a defendant. Applications for employment, educational opportunities, scholarships and public assistance in the client’s potential future can be seriously affected by the requirement to truthfully disclose such outcomes and cannot be reasonably assessed in a foreshortened timeframe, and with inadequate details.

Where discovery is limited or absent, or there is insufficient opportunity to review and investigate the discovery, a lawyer cannot competently assess these matters. The attorney is not able to apply “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation” as required by Rule 1.1. ~~§ 1101~~ A RPC 1.1, Comment [5]:

Competent handling of particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

A defense lawyer who advises a client to accept or reject a plea or deferred adjudication under these circumstances is subjecting himself to potential allegations of ineffective assistance of counsel⁵, a finding of which may constitute grounds for disciplinary charges based on violation of Rule 1.1.⁶

⁴ ~~§ 1101~~ ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., 1993 American Bar Association; Defense Function, Disposition Without Trial, Standard 4-6.1 Duty to Explore Disposition Without Trial.

⁵ Ineffective Assistance of Counsel claims arise post-conviction and are reviewed under a two-part analysis: whether counsel’s performance was reasonable as measured against prevailing professional performance standards, and if deficient, whether the deficient performance affected the fundamental fairness of the proceeding. ~~§ 1101~~ ~~§ 1101~~ 466 U.S. 668 (1984). While the ABA and NLADA performance standards are not absolutes, they can be used in assessing whether defense counsel was ineffective under ~~§ 1101~~ ~~§ 1101~~ 45 U.S. 374 (2005); ~~§ 1101~~ ~~§ 1101~~ 539 U.S. 510 (2003); ~~§ 1101~~ ~~§ 1101~~ 529 U.S. 362 (2000).

⁶ The Pennsylvania Association of Criminal Defense Lawyers previously notified the courts of its position that the EAP, in a previous but essentially identical incarnation,

Nor is the lawyer able to act with diligence as mandated by Rule 1.3, and as explicated by Comment [1] to that Rule:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.

Not only can the lawyer not provide competent and diligent representation, s/he cannot explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, secure the client's informed consent to whether to enter a plea or accept a deferred adjudication, or comply with other duties of communication. Participation in this process causes the lawyer to violate Rules 1.2 and 1.4. By assisting the system to circumvent important rights of the client, the lawyer also engages in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d).

Moreover, because of the personal pressure being applied to defense counsel, the attorney's personal interests in retaining employment and the favor of the court conflict with the attorney's duty of fidelity to the client, and there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer, in violation of Rule 1.7. Under these circumstances, no lawyer could hold a reasonable belief that the lawyer will be able to provide competent and diligent representation to the affected client, and informed consent to the conflict cannot be obtained. The personal interest conflict is analogous to that identified in Formal Opinion 2014-100, addressing Conflicts Of Interest And Other Misconduct Related To Waivers Of Claims For Ineffective Assistance Of Counsel, where this Committee opined that:

... under PA RPC 1.7(a)(2), a criminal defense lawyer has a personal interest conflict in recommending acceptance of a plea agreement that limits the client's ability to bring an IAC claim at any time following the defendant's plea of guilty pursuant to a negotiated plea agreement. As between the criminal defense lawyer and the client, such a conflict is a nonconsentable conflict because the lawyer involved cannot reasonably conclude, given his or her personal interest, that the lawyer will be able to provide

infringes defendants' constitutional rights as well as violating counsel's ethical obligations.  letter dated February 20, 2013, from then-President of PACDL Barbara A. Zemlock, Esquire.

competent and diligent representation, and therefore, cannot properly seek the client's consent to proceed. ... Further, because a malpractice claim is the functional equivalent of an IAC claim when waived in a guilty plea, PA RPC 1.8(h)(1) prohibits a criminal defense lawyer from limiting his own liability unless the client is being independently represented in the matter.

The EAP requires that the defense lawyer affirm that the Waiver of Rights has been reviewed with the defendant and that counsel believes "that said waiver is voluntary, knowing and intelligent," when in fact defense counsel knows that in most cases the waiver is executed only because of concern about the potentially worse consequences of not waiving rather than based upon the full information which would make the waiver knowing and intelligent. Defense counsel is thus thrust into the position of making a false statement of material fact to a tribunal, in violation of Rule 3.3(a)(1) and engaging in dishonest conduct, in violation of Rule 8.4(c), which thereby violates Rule 8.4(d). Comment [3] to Rule 3.3 explains:

[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

Where a defense lawyer recommends such a waiver to a client and conducts no investigation under these circumstances, the defense lawyer provides no actual assistance and only nominally represents the defendant. This is akin to non-representation. This distinguishes this activity from limited scope representation, as contemplated by RPC 1.2(c), where the lawyer believes that competent representation may be provided within the constraints set by the circumstances. ~~RPC~~RPC 1.2, Cmt. [7].

B. The Prosecutor

In assessing the role of the prosecutor in the administration of the EAP program, Prosecutors are not only advocates for the Commonwealth but also ministers of justice, which role carries with it the duty to insure that a defendant is afforded procedural and constitutional safeguards. RPC 3.8, Cmt. [1]. It is well recognized that it is the duty of a prosecutor to seek justice and not merely convict. The prosecutor's duty is guided by standards of professional conduct as defined by ethical codes in the jurisdiction and the law.⁷ Rule 3.8(d) requires a prosecutor to make timely disclosures to the defense of exculpatory, favorable and mitigating evidence which can be used at trial or sentencing.⁸

⁷ ~~ABA~~ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., 1993, American Bar Association, Prosecution Function, Standard 3-1.2(b),(c),(e) The Function of the Prosecutor.

If a prosecutor requires the waiver of discovery as a condition of a plea or deferred adjudication, he is intentionally evading his legal and ethical duty to disclose evidence favorable to an accused that is material to either guilt or punishment. Such conduct violates Rule 3.8(d). The prosecutor is also abdicating his responsibility as a minister of justice by not according the defendant procedural justice. This failure in responsibility occurs because the prosecutor, under the EAP program, is requiring a defendant to waive his right to exculpatory, favorable and mitigating evidence in the prosecutor's possession as a condition for a plea or deferred adjudication.

Again, the analysis of Formal Opinion 2014-11 applies to these circumstances:

The Committee further concludes that a prosecutor has an ethical duty not to attempt to limit IAC claims because any effort to limit such claims is tantamount to engaging in conduct that is prejudicial to the administration of justice, which is prohibited under PA RPC 8.4(d). Finally, because a criminal defense lawyer is ethically precluded from advising a client to enter into a plea agreement requiring the client to waive the right to file a post-conviction claim asserting IAC at any time in the future, a prosecutor is prohibited from requiring such a waiver in a plea agreement under PA RPC 8.4(a), which prohibits a lawyer from inducing or assisting another lawyer to violate the Pennsylvania Rules of Professional Conduct. [fn. omitted].

Moreover, by engaging in the coercive practice which requires defense counsel to violate his/her own duties under the Rules, a prosecutor knowingly assists or induces defense counsel to violate the Rules, in violation of RPC 8.4(a). This course of conduct also constitutes conduct prejudicial to the administration of justice, in violation of RPC 8.4(d).

Considerable concern also arises with respect to the prosecutorial function where the defendant is proceeding ~~FORN FOR~~ A ~~FORN FOR~~ defendant would have little or no understanding of the importance of his procedural right of discovery; and even if he had

⁸ This ethical rule is also consistent with Pa. R. Crim. P. 573(B) requiring mandatory disclosure by the prosecutor, upon request by the defendant, of any evidence favorable to the defendant that is material either to guilt or punishment and in the possession or control of the prosecutor. ~~FORN FOR~~ ABA Standard for Criminal Justice: Prosecution Function, Standard 3-3.11(a): "prosecutor should not intentionally fail to make timely disclosure to the defense...of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."

some understanding, the prosecution threat of facing increased penalties, including incarceration, if he does not accept EAP and its conditions, negates any voluntary waiver of such procedural rights. ~~§§§~~RPC 3.8, Cmt. [2], which states, “prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons.” Also implicated in such communications is RPC 4.3, which limits permissible communications with unrepresented persons to advice to secure counsel. In particular, where a prosecutor is communicating with a ~~§§§§~~ defendant who has to make the choice between accepting the offer and securing counsel, the prosecutor must make certain to avoid giving advice other than the advice to secure counsel, as the prosecutor would know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the Commonwealth.

IV. CONCLUSION

For these reasons the Committee concludes that for a defense lawyer to advise clients concerning to participate in the EAP will entail violating the Rules of Professional Conduct. Additionally, a prosecutor who conditions a defendant’s entry into the EAP on the waiver of certain procedural rights, including the right to discovery and to conduct a reasonable investigation into the facts and circumstances of the offense and penalties, violates the Rules of Professional Conduct both by violation of the prosecutor’s duties under the Rules and by violating the Rules through the conduct of another.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.

18 USCS § 4241

Current through PL 115-405, approved 12/21/18 with a gap of PL 115-334

United States Code Service - Titles 1 through 54 > TITLE 18. CRIMES AND CRIMINAL PROCEDURE > PART III. PRISONS AND PRISONERS > CHAPTER 313. OFFENDERS WITH MENTAL DISEASE OR DEFECT

§ 4241. Determination of mental competency to stand trial or to undergo postrelease proceedings

(a) Motion to determine competency of defendant. At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c) [18 USCS § 4247(b) and (c)].

(c) Hearing. The hearing shall be conducted pursuant to the provisions of section 4247(d) [18 USCS § 4247(d)].

(d) Determination and disposition. If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in

18 USCS § 4241

the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2)for an additional reasonable period of time until--

(A)his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B)the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248 [18 USCS §§ 4246 and 4248].

(e)Discharge. When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d) [18 USCS § 4247(d)], to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227 [18 USCS §§ 3141 et seq. and 3551 et seq.].

(f)Admissibility of finding of competency. A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

History

18 USCS § 4241

(June 25, 1948, ch 645, § 1, 62 Stat. 855; Oct. 12, 1984, P.L. 98-473, Title II, Ch IV, § 403(a), 98 Stat. 2057; July 27, 2006, P.L. 109-248, Title III, § 302(2), 120 Stat. 619.)

Prior law and revision:

Based on *title 18, U.S.C., 1940 ed.*, § 876 (May 13, 1930, ch. 254, § 6, *46 Stat. 271*).

Changes were made in phraseology and surplusage omitted.

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Commonwealth v. Banks

Supreme Court of Pennsylvania

October 20, 1986, Argued ; February 13, 1987, Decided

No. 162 E.D. Appeal Dkt. 1985

Reporter

513 Pa. 318 *; 521 A . 2d 1 **; 1987 Pa. LEXIS 623 ***

COMMONWEALTH of Pennsylvania,
Appellee, v. George Emil BANKS,
Appellant

Case Summary

Subsequent

History: [***1]

Reargument Denied May 28, 1987.

Prior History: Appeal from the Judgments of Sentence Entered by a Jury on June 21, 1983 and from the Order of the Court Entered On October 17, 1985 Denying Appellants Post-Verdict Motions Entered by the Court of Common Pleas of Luzerne County at Nos. 1290, 1506, 1507, 1508, 1519A-1519H, 1520 and 1524.

Procedural Posture

Appellant challenged the decision of the Court of Common Pleas of Luzerne County (Pennsylvania), which convicted appellant of 12 counts of first-degree murder, third-degree murder, attempted murder, aggravated assault, recklessly endangering another person, robbery, and theft of a motor vehicle. Appellant received 12 sentences of death and appellant's post-verdict motions for a new trial and/or in arrest of judgment were denied.

Core Terms

kill, insanity, photographs, sentence, murder, conspiracy, witnesses, death sentence, competency, shot, proceedings, defense counsel, competent to stand trial, introduce, mental disease, trial judge, psychiatric, corpses, disturbed, paranoid, shooting, criminally responsible, lower court, trial court, cross-examination, incompetency, convicted, emotional, motive, sanity

Overview

Appellant received 12 sentences of death after appellant was convicted, by a jury, of 12 counts of first-degree murder, one count of third-degree murder, attempted murder, aggravated assault, recklessly endangering another person, robbery, and theft of a motor vehicle. The court affirmed the judgment, holding that it had no difficulty in finding the evidence sufficient to sustain appellant's convictions beyond a reasonable doubt. The court held that

513 Pa. 318, *318; 521 A.2d 1, **1; 1987 Pa. LEXIS 623, ***1

there was overwhelming evidence that appellant premeditated, planned, and specifically intended to kill. The court rejected appellant's contention that the lower court erred in ruling that appellant was competent to stand trial, holding that the court's personal assessment and determination of appellant's competency were fully supported by the record. The court rejected appellant's contention that the jury's sentencing verdict was against the weight of the evidence, holding that the jury performed its function and acted well within the authority placed upon it in determining that the overwhelming evidence regarding both the aggravating and mitigating circumstances.

Outcome

The court affirmed the convictions of appellant for 12 counts of first-degree murder, third-degree murder, attempted murder, aggravated assault, recklessly endangering another person, robbery, and theft of a motor vehicle and the 12 sentences of death because the evidence was sufficient to sustain appellant's convictions beyond a reasonable doubt and the jury did not abuse its discretion in imposing 12 sentences of death.

LexisNexis® Headnotes

Criminal Law &

Procedure > Defenses > Insanity > Insanity Defense

Criminal Law &

Procedure > Defenses > Insanity > General Overview

HN1 Insanity, Insanity Defense

The M'Naghten rule, despite repeated challenges, remains the test for determining legal sanity and criminal responsibility in the Commonwealth of Pennsylvania. Under M'Naghten, a defendant is legally insane, and absolved of criminal responsibility, if at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong. Or as it is sometimes stated in the streamlined version, an accused is criminally responsible, and not legally insane, unless at the time of committing the act, due to a defect of reason or disease of the mind, the accused (1) did not know the nature and quality of the act or (2) did not know that the act was wrong.

Criminal Law &

Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law &

Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law &

513 Pa. 318, *318; 521 A. 2d 1, **1; 1987 Pa. LEXIS 623, ***1

Procedure > ... > Murder > First-Degree Murder > Penalties

Criminal Law &
Procedure > Sentencing > Imposition of Sentence > Evidence

Evidence > Weight & Sufficiency

HN2 [⚡] Appeals, Capital Punishment

In all appeals involving a judgment of sentence of death, the reviewing court reviews the record to determine whether the evidence is sufficient to sustain the conviction(s) for murder of the first degree.

Criminal Law &
Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law &
Procedure > ... > Homicide, Manslaughter &
Murder > Murder > General Overview

Criminal Law &
Procedure > ... > Murder > First-Degree Murder > General Overview

HN3 [⚡] First-Degree Murder, Elements

A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing. 18 Pa. Cons. Stat. Ann. § 2502(a).

Criminal Law &

Procedure > Trials > Defendant's Rights > Right to Due Process

HN4 [⚡] Defendant's Rights, Right to Due Process

A person is incompetent to stand trial where he is substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense. Due process considerations also come into play when the competency of the accused is in question. It is well established that the test to be applied in determining the legal sufficiency of a defendant's mental capacity to stand trial is his ability to comprehend his position as one accused of murder and to cooperate with his counsel in making a rational defense. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings against him. Otherwise, the proceedings would lack due process.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Criminal Law &
Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Competency to Stand Trial

513 Pa. 318, *318; 521 A. 2d 1, **1; 1987 Pa. LEXIS 623, ***1

Evidence > Burdens of Proof > Clear
& Convincing Proof

**HN5[↓] Judges, Discretionary
Powers**

The person asserting incompetency has the burden of proving incompetency by clear and convincing evidence, and the determination of competency rests in the sound discretion of the trial judge which will not be disturbed absent a clear abuse of discretion.

Criminal Law &
Procedure > Preliminary
Proceedings > Pretrial Motions &
Procedures > Competency to Stand
Trial

**HN6[↓] Pretrial Motions &
Procedures, Competency to Stand
Trial**

Lack of cooperation and the failure to heed counsel's advice and/or the failure to agree with counsel's strategy are certainly not to be equated with and do not establish legal incompetency. The issue is the defendant's ability to cooperate and not whether he is actually cooperating. Indeed there is a factual and legal distinction between inability to assist and being unwilling to assist.

Criminal Law &
Procedure > Defenses > Insanity > B
urdens of Proof

Criminal Law &
Procedure > Defenses > Insanity > In
sanity Defense

HN7[↓] Insanity, Burdens of Proof

Certainly neither social maladjustment, nor lack of self control, nor impulsiveness, nor psycho-neurosis, nor emotional instability, nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal conception of that term.

Criminal Law &
Procedure > Defenses > Insanity > In
sanity Defense

Criminal Law &
Procedure > Defenses > Insanity > G
eneral Overview

HN8[↓] Insanity, Insanity Defense

To the eye of reason, every murderer may seem a madman, but in the eye of the law he is still responsible. To constitute a sufficient defense on the ground of insanity there must be an entire destruction of freedom of the will.

Criminal Law &
Procedure > Defenses > Insanity > B
urdens of Proof

Evidence > Burdens of Proof > Proof
Beyond Reasonable Doubt

Criminal Law &
Procedure > Trials > Burdens of

513 Pa. 318, *318; 521 A. 2d 1, **1; 1987 Pa. LEXIS 623, ***1

Proof > Prosecution

HN9[⚡] Insanity, Burdens of Proof

Where there is sufficient evidence to raise the issue of sanity, the burden of proof is on the commonwealth to establish the defendant's sanity beyond a reasonable doubt.

Civil Procedure > Judicial
Officers > Judges > Discretionary
Powers

Evidence > Admissibility > Scientific
Evidence > Crime Scenes

Civil Procedure > Judicial
Officers > Judges > General
Overview

Criminal Law &
Procedure > Trials > Judicial
Discretion

Evidence > Admissibility > Demonstrative
Evidence

Evidence > Types of
Evidence > Demonstrative
Evidence > Photographs

HN10[⚡] Judges, Discretionary Powers

The admission into evidence of photographs depicting the corpse of the homicide victim or the location and scene of the crime lies within the sound discretion of the trial judge. A photograph which is judged not inflammatory is admissible if it is

relevant and can assist the jury in understanding the facts. A gruesome or potentially inflammatory photograph is admissible if it is of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes &
Wrongs

HN11[⚡] Conduct Evidence, Prior Acts, Crimes & Wrongs

Evidence of prior crimes and/or acts of violence are inadmissible merely to show the defendant's propensity for violence or bad character. However, evidence of prior crimes and violent acts may be admissible in special circumstances where it is relevant for some other legitimate purpose and not merely to show the defendant's propensity for committing crimes.

Criminal Law &
Procedure > ... > Standards of
Review > Abuse of
Discretion > General Overview

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes &
Wrongs

HN12[⚡] Standards of Review, Abuse of Discretion

The general rule prohibiting the admission of evidence of prior crimes

513 Pa. 318, *318; 521 A. 2d 1, **1; 1987 Pa. LEXIS 623, ***1

nevertheless allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. This list of "special circumstances" is not exclusive, the court will recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury. Such evidentiary issues are addressed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.

Criminal Law &
Procedure > Sentencing > Appeals >
Capital Punishment

Criminal Law &
Procedure > Sentencing > Appeals >
General Overview

Criminal Law &
Procedure > Sentencing > Capital
Punishment > General Overview

Criminal Law &
Procedure > Sentencing > Proportion

ality

Criminal Law &
Procedure > Appeals > Remand &
Remittitur

Criminal Law &
Procedure > Appeals > Right to
Appeal > Defendants

HN13 **Appeals, Capital Punishment**

The standard of review of a judgment of sentence of death is established by 42 Pa. Cons. Stat. Ann. § 9711(h), which provides that a sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules. In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence. The Supreme Court shall affirm the sentence of death unless it determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or, (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

Criminal Law &

513 Pa. 318, *318; 521 A. 2d 1, **1; 1987 Pa. LEXIS 623, ***1

Procedure > ... > Standards of
Review > Abuse of
Discretion > Evidence

Criminal Law &
Procedure > Sentencing > Capital
Punishment > Mitigating
Circumstances

Criminal Law &
Procedure > Sentencing > Imposition
of Sentence > Evidence

Criminal Law &
Procedure > ... > Standards of
Review > Abuse of
Discretion > General Overview

HN14 Abuse of Discretion, Evidence

Under the legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances.

Criminal Law &
Procedure > Sentencing > Appeals >
Capital Punishment

Criminal Law &
Procedure > Sentencing > Capital
Punishment > General Overview

Criminal Law &
Procedure > Sentencing > Capital
Punishment > Cruel & Unusual
Punishment

HN15 Appeals, Capital Punishment

A jury finding of substantial mental impairment under 42 Pa. Cons. Stat. Ann. § 9711(e)(3) does not bar the death penalty imposed by the jury.

Counsel: Basil G. Russin, Al Flora, Jr., Wilkes-Barre, for appellant.

Robert J. Gillespie, Jr., Dist. Atty., Joseph C. Giebus, Asst. Dist. Atty., Wilkes-Barre, Marion E. MacIntyre, Deputy Atty. Gen., Harrisburg, for appellee.

Judges: Nix, C.J., and Larsen, Flaherty, McDermott, Hutchinson, Zappala and Papadakos, JJ. McDermott, J., concurs in the result. Nix, C.J., filed a dissenting opinion in which Zappala, J., joined.

Opinion by: LARSEN

Opinion

[*323] [3] OPINION OF THE COURT**

In the early morning hours of September 25, 1982, George Emil Banks, appellant, went on a rampage in and near the City of Wilkes-Barre in Luzerne County. In the space of about one hour, appellant shot fourteen people with a Colt AR-15 semi-automatic rifle, killing thirteen and wounding one. All but one of the dead were the women and children who made up appellant's extended family;

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the [***2] other two victims were strangers (one survived) who were in the wrong place at the wrong time.

[*324] Following a lengthy jury trial before the Honorable Patrick J. Toole in the Court of Common Pleas of Luzerne County (with a jury selected in Allegheny County), appellant was convicted on June 21, 1983 on twelve counts of murder of the first degree. He was also convicted of murder of the third degree, attempted murder, aggravated assault, recklessly endangering another person, robbery and theft of a motor vehicle. The next day, June 22, 1983, in a separate sentencing proceeding before the same jury, appellant received twelve sentences of death. On October 17, 1985, the Court of Common Pleas of Luzerne County, per Judge Toole, denied appellant's post-verdict motions for a new trial and/or in arrest of judgment. Appellant was formally sentenced on November 22, 1985, ¹ [***3] [**4] and he now appeals his convictions and judgments of sentence. ² We affirm.

The extensive trial record in this case, viewed in the light most favorable to the

¹ In addition to the twelve sentences of death, which were made "consecutive," appellant received consecutive sentences of imprisonment of ten to twenty years on the conviction for murder of the third degree, five to ten years on the conviction for attempted murder, and ten to twenty years on the conviction for robbery. The remaining convictions were deemed to have merged for sentencing purposes.

² This Court has direct appellate jurisdiction over such appeals. 42 Pa.C.S.A. §§ 722(4) and 9711(h)(1); Pa.R.A.P. Rule 702(b).

Commonwealth as verdict winner, discloses the following. On the evening of September 24, 1982, appellant attended a birthday party for one Stanley O'Brien at the Galbraith family residence in Wilkes-Barre. Appellant arrived at the party in the vicinity of 9:00-9:30 p.m., accompanied by two of the victims, Dorothy Lyons and Regina Clemens, each appellant's girlfriend. Also present at the party was another victim, Susan Yuhas, Mrs. Clemens' sister and also a girlfriend of appellant. While at the party appellant drank some beer, played darts and conversed with numerous guests. Shortly after 9:30 p.m., appellant exchanged "T-shirts" with Sharon Gomb, as each admired or joked about the sayings printed on each other's shirt. Appellant's T-shirt read: "Kill Them All And Let [*325] God Sort It Out." ³ Appellant's companions, Ms. Lyons and Ms. Clemens, appeared to become upset with [***4] this exchange of shirts. Numerous guests and hosts at the party observed appellant drink some beer, but testified that his speech and movements were "normal" and coordinated and that he did not appear to be intoxicated.

Appellant and Regina Clemens left the party in the vicinity of 10:30 p.m. Between 12:00-1:00 a.m. on September 25, 1982, appellant called the Galbraith house and spoke with Dorothy Lyons.

³ Ms. Gomb, who changed her shirt in a separate room with a companion actually exchanging the shirts, was wearing a shirt which read: "I Have A Drinking Problem - I Can't Get Enough."

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After she hung up the phone, she was very upset and crying, and she asked her nephew, David Galbraith, to get appellant's rifle for her. The rifle, a Colt AR-15, had been kept at the Galbraith house for several weeks. Ms. Lyons took the rifle, which was established by ballistics and other evidence as the murder weapon, and left the party after 1:00 a.m. in a car, accompanied by Susan Yuhas.

Kenneth Scott knew appellant and [***5] he testified that he saw him in the parking lot of the Sherman Hills Apartments at approximately 1:15 a.m. Appellant was carrying a garbage bag containing several small boxes. Ms. Lyons had an apartment in the Sherman Hills Apartments in Wilkes-Barre and had stored boxes of ammunition there for appellant. (Small boxes of ammunition were found in the house where appellant eventually surrendered to police.) When Mr. Scott called to appellant and walked toward him, appellant told Mr. Scott that he ought to be careful yelling at people like that, he could get himself shot. The two spoke briefly and appellant seemed to be upset, although his speech was understandable and "normal," as was his walking.

At approximately 2:00 a.m., a group of four teenagers had left a friend's house on Schoolhouse Lane in Wilkes-Barre and were walking to their car when they heard a series of gunshots which seemed to be coming from 28 [***6] Schoolhouse Lane (appellant's home).

The four were Raymond Hall, James Olson, Tommy Demellier and Molly McBride. At this time, appellant came out from the back of the house walking toward the group when Raymond Hall, recognizing appellant, stated "I know you." [***6] Appellant responded "Yeah, you're not going to live to tell anybody about this," and he aimed the AR-15 at Mr. Hall and shot him fatally. He then turned toward James Olson and shot him. Mr. Olson, although seriously wounded, survived to testify at trial. Thomas Demellier knocked Ms. McBride to the ground, seeking cover. Appellant, holding the rifle, dressed in green army fatigues with an ammunition bandolier around his chest and shoulders, backed away from them.

Later that morning, eight women and children were found shot to death at appellant's home at 28 Schoolhouse Lane. Most had been shot through the head at close [***5] range. The dead were: Susan Yuhas (age: twenty-three), and her two children to appellant, Bowendy Banks (age: four) and Mauritania Banks (age: one) who resided with appellant; Dorothy Lyons (age: twenty-nine), and her two children, Foraroude Banks (age: one) and Nancy Lyons (not appellant's daughter; age: eleven) who sometimes resided with appellant; Regina Clemens (age: twenty-nine) and her daughter to appellant, Montanzima Banks (age: six), who had resided at 28 Schoolhouse Lane until about two weeks before the shooting.

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Joseph Yench had been drinking [***7] at a nearby lounge, the Cabaret, until about 2:10 a.m. on September 25, 1982. He was seated in his car when appellant walked up to him, pointed the rifle at his head, and told him to "move over or I'll blow your f___ing head off." Mr. Yench moved over, appellant got behind the wheel and he told Mr. Yench to be quiet, he didn't want any more trouble because he had just "killed his two children." Appellant asked Mr. Yench if he wanted to get out, then he stopped the car, allowed him to get out, and told him that he would leave the car where it could be found. The car was found later that day, with an unopened bottle of gin and a bullet cartridge in the car.

[*327] At 2:30 a.m., shots were heard at the Heather Highlands Trailer Park in nearby Jenkins Township. Residents of the trailer park called the police when they heard the shots and then a male voice shouting "That's what you get for f___ing with me. You f___ with me some more, I'll come back and kill the rest of you." When police officers arrived, they found Angelo Vital and Keith Mazzillo, alive and unharmed, outside the Mazzillo trailer. They also found the bodies of Sharon Mazzillo (age: twenty-four), a former girlfriend [***8] of appellant's, and their son, Kissmayu Banks (age: five), as well as Sharon's mother, Alice Mazzillo (age: forty-seven) and Scott Mazzillo (age: seven), Sharon's nephew. Angelo Vital and his brother, Keith Mazzillo,

witnessed the horrifying events at the trailer, and they testified at trial.

Angelo Vital, ten years of age at the time of trial, testified that appellant came into the trailer and said "I shot some of my family, now I'm going to shoot some of yours." Appellant then shot Kissmayu who had been asleep on the couch. Sharon and Alice Mazzillo tried to push appellant out of the trailer, and Alice then went into the back room to use the telephone, with Angelo following his mother. Angelo heard another shot and looked out to see appellant chasing Scott Mazzillo, saying "You called my son a nigger." Appellant then shot Scott Mazzillo, kicked him and hit him with the rifle. Appellant turned and fired one shot at Alice Mazzillo as she tried to call the police, striking her in the face and killing her, then left, telling Angelo "I'll get you next time."

Keith Mazzillo, thirteen years of age at the time of trial, testified to the same effect. He heard [***9] appellant state "I heard you call my son a little nigger," and saw him choke, kick, hit and shoot Scott Mazzillo. He did not see appellant shoot the others. Sharon Mazzillo's body was found outside the trailer, where Keith had heard her arguing with appellant. Both Angelo Vital and Keith Mazzillo identified the AR-15, introduced into evidence at trial, as the weapon appellant used that morning.

[*328] At about 6:00 a.m., appellant arrived at his mother's house. His

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mother, Mrs. Mary Yelland, told the police that appellant stated "I killed them. I killed them all." Mrs. Yelland called appellant's house and spoke with a police officer. Appellant got on the telephone with Luzerne County Detective James Zardecki and asked how his kids were. Detective Zardecki told him the children were hospitalized and seriously hurt, but appellant responded "You're lying. I killed them. I know they're dead Just tell me I killed them and I'll kill myself." After a minute or two of Detective Zardecki trying to convince appellant that his children were alive, and repeated statements by appellant that he knew they were dead, the line went dead. **[**6]** Detective Zardecki had no **[***10]** trouble understanding appellant who was responsive and spoke in a "normal" tone.

After this call, appellant told his mother to drive him to his friend's (Jacob Whitt's) house at 24 Monroe Street in Wilkes-Barre. On their way there, their vehicle was involved in a traffic accident. Appellant stated he was going to kill the other driver, but his mother convinced him not to, and the two drove away. When they arrived at Monroe Street, appellant went into the house, telling his mother he would never see her again. He then went inside and prepared himself for a siege.

Mrs. Yelland returned to her home where, a short time later, police officers came believing appellant was there. Mrs. Yelland informed them appellant

was at 24 Monroe Street. Police officers then surrounded the house by about 7:00 a.m.

Between 7:30-8:00 a.m., Mrs. Geraldine Whitt called her son Jacob's home to talk with him, and appellant answered the telephone. They recognized each other's voices. Mrs. Whitt asked appellant what he was doing there, and he replied "I killed them all. They're all dead. I killed my whole family I barricaded myself in Jake's house and I came here to die." He also told Mrs. **[***11]** Whitt that it was too late to pray for him now, "but you can pray for my soul." **[*329]** Mrs. Whitt had no trouble understanding appellant, who sounded calm and coherent.

Telephone communications were established by police officers with appellant. Various civilians and police officers spoke with appellant, trying to convince him that his children were alive and in need of blood, and that he should therefore give himself up. Police arranged to have a radio broadcast played to corroborate the ruse that appellant's children were alive. While he persisted to tell people that they were lying because he knew he killed his children who he did not want "to grow up in a white racist world," eventually he gave himself up, at 11:15 a.m., after speaking with Mr. Robert Brunson, an acquaintance of appellant. Appellant told Officer Donald Smith he would have to break the window to hand the gun out, which he did, and he asked the officer not to shoot him. After

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handing out the AR-15 with a "banana" ammunition clip attached and two additional clips, he came out of the house with his hands above his head, as he had been instructed. Neither Officer Smith nor Mr. Brunson, nor any of those who [***12] spoke with appellant that morning, had any difficulty understanding appellant, who was calm and responsive to questions and instructions. Most of the witnesses testified that appellant did not appear to be intoxicated, although there was some evidence that he had an odor of alcohol about him.

Appellant was taken to the Wilkes-Barre police station and advised of his constitutional rights by Detective Patrick Curly. He told police officers there that he knew they had been lying to him about the children being alive. He further stated to Detective William Maguire that "he wished he was dead, because he stated that the State was going to kill him, anyway, in the electric chair."

The Commonwealth also introduced evidence from various witnesses to show appellant's apparent motive for his rampage. This evidence supported the inference that appellant was disturbed about losing control over his extended family. Regina Clemens had moved out of appellant's residence about two weeks before the shooting spree, and [*330] was planning to move to Florida to get away from appellant. In the week before the murders, appellant was seen slapping and hitting Susan Yuhas,

Regina Clemens' sister, [***13] stating "You're just like your sister Gina. You're going to leave just like her."

Appellant's mental condition at the time of the shootings was a major issue at trial, and the expert opinions of the psychiatric witnesses for the defense were diametrically opposed to the opinions of the Commonwealth's expert psychiatric witnesses. Defense counsel, the Luzerne County Public Defender and two assistant public defenders, presented numerous lay witnesses and three psychiatrists in an attempt to establish [**7] that appellant was legally insane under HN1 the *M'Naghten* rule, which despite repeated challenges remains the test for determining legal sanity and criminal responsibility in this Commonwealth. *Commonwealth v. Oblek*, 496 Pa. 519, 437 A.2d 1162 (1981). Under *M'Naghten*, a defendant is legally insane, and absolved of criminal responsibility, if "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong." *Commonwealth v. Roberts*, 496 Pa. 428, 434, 437 A.2d 948 (1981), [***14] quoting *The Queen v. M'Naghten*, 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843). Or as it is sometimes stated in the streamlined version, "an accused is criminally responsible [and not legally insane]

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unless at the time of committing the act, due to a defect of reason or disease of the mind, the accused (1) did not know the nature and quality of the act or (2) did not know that the act was wrong." Commonwealth v. Tempest, 496 Pa. 436, 440, 437 A.2d 952 (1981) (citations omitted).

In addition to the insanity defense, counsel also presented the defense of diminished capacity, Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976), attempting to reduce appellant's degree of guilt by showing that, because of his mental condition and intoxication due to consumption of [*331] alcohol (beer and gin) and pills (Dilantin), he was unable to form the specific intent to commit murder of the first degree. There was evidence that appellant drank beer at the Galbraith's party, and several witnesses detected an odor of alcohol about him the following morning. Additionally, appellant had told lay witnesses and psychiatrists that he had been drinking gin for several days prior to and [*332] including September 25, 1982 and that, after he left the birthday party, he went home and took some pills (Dilantin) which he washed down with gin, and then passed out.

As to the insanity defense, lay and psychiatric witnesses for the defense presented a profile of a disturbed and paranoid man. Appellant, a prison guard at the state correctional institution in Camp Hill, was forty years of age at the time of the murders. He grew up

taunted and tormented by both blacks and whites as he was the son of a black father and a white mother. Appellant was constantly called "half-breed," "zebra," and other derogatory names, as was his brother. Through the years, he developed a persecution complex and became obsessed with the paranoid delusion that there were soon to be international race wars and uprisings. In fact, he had written a chapter of a novel, featuring himself and his sons, dealing with survival in the aftermath of a race war. He prepared himself for the race wars by purchasing weapons, planting food along escape trails in the woods and reading the standard "survivalist" fare such as *Soldier of Fortune* magazine. At various times, he had spoken of killing himself, of killing [*333] people at a shopping mall, and of killing his children rather than see them brought up as he had been in a racist society.

The defense called three psychiatrists as experts. All three agreed, essentially, that appellant had been, before, during and after the murders, suffering from a severe mental defect, paranoid psychosis with paranoid delusions. All also agreed that, when dealing in the area of appellant's paranoid delusions concerning racism and race wars, appellant was completely obsessed and singularly focused, but that all other aspects of his personality, including his cognitive [*334] functioning, were "normal" and intact. (Appellant had a high I.Q., over

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120, and was described as being in the upper five percent of the population based on intelligence.)

Dr. Anthony J. Turchetti, a forensic psychiatrist who was appointed by the lower court in October, 1982, to examine and evaluate appellant, stated that in his opinion, appellant was, on September 25, 1982 (the date of the killings), actively suffering from psychosis paranoia which affected his thoughts, discretion and judgment and "because of this, I don't think he was capable of distinguishing right from wrong at [***17] that [**8] time." ⁴ Dr. DeWitt Weatherly and Dr. Michael K. Spodak also testified as expert witnesses for the defense. Drs. Weatherly and Spodak, both forensic psychiatrists licensed to practice their specialty in Maryland but not in Pennsylvania, ⁵ each testified that, in his opinion, appellant did not, as a result of his paranoid psychosis, understand the nature and quality of his criminal acts on September 25, 1982 and was unable to distinguish between right and wrong with respect to those acts.

⁴ Dr. Turchetti had examined appellant on eight occasions in October, 1982 and once in February, 1983. His opinion was based "almost solely" on what appellant told him during these examinations. Dr. Turchetti's opinion was seriously discredited by the prosecutor on cross-examination.

⁵ Neither Dr. Weatherly nor Dr. Spodak had previously been an expert witness in a case dealing with insanity under the Pennsylvania M'Naghten standards. Maryland uses, according to these psychiatrists, the more "liberal" American Law Institute standards, namely that an actor is not criminally responsible for his acts where at the time of committing the act, as a result of mental disease or defect, he lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

[***18] Appellant also took the stand himself, against the advice of counsel, to offer a "partial" defense of a conspiracy against him. This theory will be discussed more fully in discussing appellant's competency to stand trial, but essentially was that appellant was the victim of a racist conspiracy involving, among others, police officers, the Mayor of Wilkes-Barre, the District Attorney's office and the judge. Appellant admitted shooting most of the victims, but claimed that Detective Curly shot and killed two of the [*333] victims and that Detective Curly and others had moved the corpses, altered their features, "doctored" their wounds and concealed or destroyed evidence, all as a part of a racist conspiracy.

In rebuttal, the Commonwealth introduced lay and expert testimony to establish appellant's sanity. Dr. Park E. Dietz and Dr. Robert L. Sadoff, both of whom are forensic psychiatrists licensed to practice their specialty in Pennsylvania, ⁶ testified for the Commonwealth. Both psychiatrists reviewed previous psychiatric evaluations of appellant, observed him in court at trial and on previous occasions, examined appellant, reviewed numerous documents and letters, and examined [***19] the extensive testimony of witnesses and statements of people who had been in

⁶ Dr. Turchetti testified on cross-examination that Dr. Sadoff, the only expert who was board certified as a forensic psychiatrist by the American Board of Forensic Psychiatrists and a frequent publisher of articles and books in the field, was one of the leading psychiatrists in the country.

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contact with appellant on September 24-25, 1982.

While Drs. Dietz and Sadoff basically agreed with the diagnosis of the defense psychiatrists that appellant suffered from a serious mental defect, paranoia psychosis, which did not otherwise impair his personality, intelligence and cognitive functioning, they did not agree with their expert opinions. Each testified that, in his opinion, appellant was able to know and understand the nature and quality of his acts, to distinguish between right and wrong, and to form the specific intent to murder. Each doctor also seriously questioned the bases for the defense psychiatrists' opposite conclusions.

[***20] Significant factors in forming their opinion that appellant knew the nature and quality of his acts and knew his acts were wrong included appellant's behavior and repeated acknowledgements that he knew he had killed his family and children, his threats to kill at least several of the victims before he actually shot them, his threats to return to kill Angelo Vital and Keith Mazzillo, and many other indications that he knew and understood [*334] that what he did was wrong.⁷ There were also numerous indications of premeditation and planning, including appellant's telephone call to Dorothy Lyons to get the [**9] AR-15 for him,

⁷ These indications included his belief that he would probably get the electric chair for his deeds, his barricading himself at 24 Monroe Street and his telling Mrs. Whitt to "pray for his soul."

and his driving to the Sherman Hills Apartments to get the ammunition.

The jury rejected appellant's defenses and, after deliberating for about five hours, with one request for clarification [***21] as to the degrees of homicide, returned its verdicts on June 21, 1983, finding appellant guilty of murder of the first degree on twelve counts, murder of the third degree for the killing of Raymond Hall, attempted murder of James Olson, and on the remaining counts of assault, robbery and theft.

The following day, a sentencing proceeding was conducted before the same jury, pursuant to the Sentencing Code. 42 Pa.C.S.A. § 9711(a). The Commonwealth sought the death penalty on each conviction for murder of the first degree on three aggravating circumstances under section 9711(d), namely that appellant knowingly created a grave risk of death to other persons (d)(7), that appellant had a significant history of felony convictions involving violence (d)(8), and that appellant had been convicted of another offense committed at the time of the offenses at issue for which a sentence of life imprisonment or death was imposable (d)(10). Appellant presented three mitigating circumstances under section 9711(e), namely that appellant was under the influence of extreme mental or emotional disturbance (e)(2), the capacity of appellant to appreciate the criminality of his conduct or to conform his [***22] conduct to the requirements

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of the law was substantially impaired (e)(3), and "any other evidence of mitigation concerning the character and record of defendant and the circumstances of his offense" (e)(8). After deliberating for almost six hours, the jury returned twelve sentences of death based on its finding of one aggravating circumstance ((d)(10)-other offenses for which death sentence was imposable) which outweighed the [*335] one mitigating circumstance it found ((e)(2)-extreme mental or emotional disturbance). 42 Pa.C.S.A. § 9711(c)(iv).

From the foregoing, we have no difficulty in finding the evidence sufficient to sustain appellant's convictions beyond a reasonable doubt.⁸ [*24] As we have seen, there was overwhelming evidence that appellant premeditated, planned and specifically intended to kill his family members.⁹ And, there was abundant evidence, both from lay witnesses and the Commonwealth's expert and well-qualified psychiatric witnesses, to support the jury's finding that appellant was legally sane and criminally

⁸ As HN2 [↑] in all appeals involving a judgment of sentence of death, this Court will review the record to determine whether the evidence is sufficient to sustain the conviction(s) for murder of the first degree, even though the appellant has not specifically challenged the sufficiency of the evidence. Commonwealth v. Zettlemoyer, 500 Pa. 16, 26 n. 3, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), reh'g denied, 463 U.S. 1236, 104 S.Ct. 31, 77 L.Ed.2d 1452 (1983).

⁹ HN3 [↑] "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S.A. § 2502(a).

responsible for his acts of September 25, 1982 under *M'Naghten*, and that he possessed the capacity to form the specific intent to kill. See [*23] Commonwealth v. Zettlemoyer, *supra* note 8 at 500 Pa. 27-39 (evidence that appellant Zettlemoyer had a "schizoid personality with paranoid features" was insufficient to establish defense of diminished capacity); Commonwealth v. Weinstein, 499 Pa. 106, 114, 451 A.2d 1344, 1347 (1982) (psychiatric testimony under *Walzack*/diminished capacity is irrelevant unless "it speaks to mental disorders affecting the cognitive functions [of deliberation and premeditation] necessary to formulate a specific intent"); Commonwealth v. Tempest, *supra* (although mother, who drowned her son and then went downstairs to watch game shows on television until her husband came home was mentally ill, she was nevertheless legally sane under *M'Naghten*, as evidenced by her statements made during and after the drowning); Commonwealth v. Zlatovich, 440 Pa. 388, 269 A.2d 469 (1970) (mother who shot her four children rather than see her children taken from her by her husband was legally [*336] sane under *M'Naghten*; lay testimony alone was sufficient to rebut the [*10] opinion of three defense psychiatrists that mother was insane).

We turn now to appellant's specific assignments of error. Appellant first and principal claim is that the lower court erred in finding him to be

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competent to stand trial. On February 28, 1983, pursuant to defense counsels' application under section 402-403 of the Mental Health Procedures Act of 1976, Act of July 9, 1976, P.L. 817, No. 143, 50 P.S. §§ 7402-7403 (supp. 1986), a preliminary competency hearing was held at which the court scheduled a full evidentiary hearing. The reason for defense counsels' concern over appellant's competency was his stubborn insistence on pursuing his "conspiracy" theory, i.e., that the police officers, the Mayor of Wilkes-Barre, the District Attorney's office and perhaps the court were conspiring against him in concealing and altering evidence, shooting some of the victims, rearranging some of the corpses and covering up some of their wounds, and obstructing his attempts to expose the "conspiracy." He viewed his trial as a [***25] means of "taking the mask off the devil."

The first pre-trial competency hearing was held on March 14, 1983, at which much lay testimony was introduced, as well as the expert opinions of Dr. Michael Spodak (for the defense) and Dr. Robert Sadoff (for the Commonwealth). The lower court allowed broad latitude to both sides to explore appellant's competency. Again, the psychiatric opinions were diametrically opposed. Dr. Spodak testified that, while appellant's cognitive functions and intelligence were reasonably unimpaired, his paranoid delusions of the conspiracy were so

strong that he would be substantially unable to understand the nature and object of his proceedings or to participate and assist in his defense. (The Mental Health Act provides that a person shall be deemed incompetent to stand trial if he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense" 50 P.S. § 7402(a)) Dr. Sadoff, on the other hand, testified unequivocally [***37] that appellant was able to follow the advice of counsel and to participate and assist in the defense, although he might choose not to. He also testified [***26] that, in his opinion, appellant fully understood the nature and object of the pending criminal proceedings as a trial to determine his guilt or innocence and sentence if found guilty, even though he choose to use the proceedings to advance his own agenda and to expose the "conspiracy" to the public. On March 18, 1983, the court issued an order declaring appellant was "not substantially unable to understand the nature or object of the proceedings against him, or to participate and assist in his defense," and he directed appellant to stand trial.

At the request of defense counsel, a second pre-trial competency hearing was held on May 6, 1983, with Dr. Sadoff again testifying for the Commonwealth and Dr. DeWitt Weatherly for the defense. Dr. Weatherly stated that, in his opinion, because of appellant's obsessive and

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paranoid preoccupation with this perceived conspiracy, he would be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense. On cross-examination, however, Dr. Weatherly conceded that appellant did not have a loss of cognitive function, that he knew he was in a court of law for a competency hearing, [***27] that he was charged with thirteen counts of homicide and other offenses for which the penalty could be execution, that he knew what the functions of the various "players" in the criminal judicial system were, that he understood the insanity defense and that he would not be executed if he was found not guilty by reason of insanity, and that he knew he could cooperate with counsel in presenting that defense or he could refuse to cooperate. The crux of Dr. Weatherly's and defense counsels' position that appellant was incompetent to stand trial was that, despite appellant's cognitive awareness and intellectual capacity, he wanted to use the criminal trial to "go through some sort of sensational, explosive proceeding to reveal his story and . . . wake up the community, arouse the community, precipitate [**11] a race war, revolution." In summary, [*338] Dr. Sadoff testified for the Commonwealth that his opinion had not changed, and that appellant remained competent to stand trial despite his obsession with a conspiracy and his choice to use the trial as a forum for his personal agenda.

Appellant testified at this proceeding, and verified his obsessive, conspiracy delusion as well [***28] as his cognitive abilities to converse, respond to questions appropriately and to understand the nature and object of the proceedings. (For example, when asked by the District Attorney on cross-examination whether he shot Raymond Hall, appellant refused to answer the question "under the Fifth Amendment, whatever that is.") From the bench, the court again declared appellant competent to stand trial.

On May 13, 1983, there was a hearing on the Commonwealth's petition to order a psychiatric evaluation of appellant, with appellant present. Appellant's responsiveness to the court's questions and his overall alertness was apparent at this proceeding.¹⁰ He asked pertinent

¹⁰ For example, the following exchange took place:

DEFENDANT: One thing I'd like to say, sir, if I could?

THE COURT: Sure.

DEFENDANT: I'm willing to cooperate fully with the District Attorney and Dr. Sadoff [in allowing a psychiatric examination], but I would be more inclined to do so after this business with the -- what do you call it? Now, I thoroughly understand everything you said, but I was hoping that perhaps it could be maybe postponed until after we get this business with the exhumation settled, once and for all.

THE COURT: Well, Mr. Banks, I don't control the exhumation application.

DEFENDANT: I understand.

THE COURT: That's in the hands of another judge.

You also understand that we're leaving on Sunday, and so, while I am anxious to move things along, I certainly don't want to prejudice you in any way. That's why I've warned you and I warn you again:

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questions about [*339] the scope of the privilege against self-incrimination, and about the timing of a petition to exhume the bodies of the victims that his attorneys had filed at his insistence (against their judgment). Appellant believed that exhumation would verify his conspiracy theory and show that the victims' corpses had been tampered with before photographs had been taken of the crime scene.

***29] On May 20, 1983, defense counsel filed another petition seeking a competency examination, but did not offer any additional evidence of incompetency. Counsel also filed a petition to withdraw as counsel. The court denied these petitions, the gravamen of which was described in Judge Toole's excellent opinion in support of denial of post-verdict motions, as follows:

Essentially, counsel contend that because of Banks' contention that the trial was part of a conspiracy, because he would not agree to a defense of insanity, because he was not consistent, because he did not heed the advice of his counsel or follow their proposed strategy, and

because he was not always rational as they deemed or desired it, that this was clear evidence that he was incompetent to stand trial.

Slip op. at 13.

Defense counsel also made three motions for a competency determination, during trial, all of which were denied summarily by the lower court. Two of these requests were predicated on a diagnosis by the Commonwealth's expert witness, Dr. Dietz, that appellant was paranoid and delusional, and upon counsels' belief that this condition rendered appellant incompetent to stand trial. The most ***30] vigorous request for a competency determination came prior to appellant's taking the stand against the advice [*12] of counsel. A lengthy colloquy preceded appellant's testifying during which he demonstrated his understanding of the proceedings, that he did not have to testify, of the effect that his testifying would have on his right to remain silent and that [*340] he would be bound by the same rules of evidence as would anyone else. N.T. June 16, 1983 at 1638-47.

What most concerned counsel was their belief that appellant intended to introduce photographs of some of the corpses, which he believed would prove his conspiracy theory to the jury. Obviously, counsel was concerned about the prejudicial effect that introduction of such photographs might have on the jury, and about the likelihood that the Commonwealth would introduce

Please remember -- everything you say -- and I'm sure your attorneys have told you this, time and time again --

DEFENDANT: I'm thoroughly aware of it, yes, sir.

THE COURT: Anything you say that is in any way incriminating, I suggest to you that in your particular position, anything you say may be incriminating.

DEFENDANT: That don't matter to me. All I want to do is get it over with. As far as I'm concerned, you know, I'm dead, anyway.

Notes of Testimony (N.T.), May 13, 1983 at 13-14.

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additional photographs of the corpses to disprove appellant's theory. (In fact, this is what occurred at trial, with a comprehensive and appropriate cautionary instruction given by the court at the time the photographs were introduced. *Id.*)

Prior to trial, on May 9, 1983, a suppression hearing was held at which the court ruled that the Commonwealth [***31] would not be permitted to introduce any photographs of the corpses. At this hearing, appellant informed the court that he wished to use some of the photographs to prove that the corpses had been tampered with. The court advised appellant that introduction of the photographs might be prejudicial and that if he did introduce some of the photographs at trial, the Commonwealth might then be able to introduce additional photographs. Appellant indicated that he understood, but that he planned to do so anyway.

Appellant now claims that the lower court erred in ruling that he was competent to stand trial. We do not agree.

As noted, HN4 [¶] a person is incompetent to stand trial where he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. § 7402(a). Due process considerations also come into play when the competency of the accused is in question. As this Court

stated in Commonwealth v. Martinez, 498 Pa. 387, 391, 446 A.2d 899, 901 (1982):

It is well established that:

[*341] "the test to be applied in determining the legal sufficiency of [a defendant's] mental capacity to stand [***32] trial . . . is . . . his ability to comprehend his position as one accused of murder and to cooperate with his counsel in making a rational defense. See Commonwealth v. Moon [383 Pa. 18, 117 A.2d 96 (1955)], and Commonwealth ex rel. Hilberry v. Maroney [417 Pa. 534, 544, 207 A.2d 794, 799 (1965)]. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as factual understanding of the proceedings against him. See Dusky v. United States, 362 U.S. 402 [80 S.Ct. 788, 4 L.Ed.2d 824] (1960). Otherwise, the proceedings would lack due process: Bishop v. United States, 350 U.S. 961 [76 S.Ct. 440, 100 L.Ed. 835] (1956)."

Commonwealth ex rel. Hilberry v. Maroney, 424 Pa. 493, 495, 227 A.2d 159, 160 (1967).

Equally well established is that HN5 [¶] the person asserting incompetency has the burden of proving incompetency by

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clear and convincing evidence, 50 P.S. § 7403(a), ¹¹ and that the determination of competency rests in the sound discretion of the trial judge which will not be disturbed absent a clear abuse of discretion. Commonwealth [***33] v. Martinez, supra; Commonwealth v. Ware, 459 Pa. 334, 356, 329 A.2d 258, 269 (1974); Commonwealth v. Hart, 501 Pa. 174, 177, 460 A.2d 745 (1983); Commonwealth v. Davis, 459 Pa. 575, 330 A.2d 847 (1975).

As we have seen in the preceding recitation of facts, the lower court gave broad latitude and every opportunity to defense [**13] counsel to establish appellant's incompetency to stand trial. In ruling that appellant was competent, the court had ample evidence, from lay witnesses and from expert psychiatric witnesses, upon which to base its determination. Moreover, the court also had many opportunities [*342] to personally observe appellant not only at his competency hearings and at trial, but also during hearings and arguments on several pre-trial motions.

The [***34] court stated in its opinion denying appellant's post-trial motions:

As the trial Judge, I would also note at this time I had the opportunity to observe Banks' demeanor and participation during the course of the proceedings, and I found nothing to

indicate or cast any doubt on his competency to stand trial. His behavior, demeanor and presentations throughout these proceedings corroborated rather than contradicted the finding of competency.

Slip op. at 15, n. 2. At one point during trial, appellant decided to personally cross-examine Coroner Joseph M. Shaver and to use the photographs of some of the corpses in conducting his cross-examination. Prior to conducting the colloquy with appellant preceding appellant's testimony in his own defense, the court responded to defense counsels' concerns for appellant's competency, stating: "Again, the Court is satisfied, and I'm more satisfied as I watch him every day in court, of his competency Even his demeanor, his questioning, in my opinion, establish competency again." N.T., June 8, 1983 at 454. The court's personal assessment and determination of appellant's competency were fully supported by the record, and it was [***35] well within the court's discretion, therefore, to rule that appellant had not met his burden of demonstrating, by clear and convincing evidence, that he was substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense.

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¹¹Prior to passage of the Mental Health Act of 1976, the burden was upon the party asserting incompetency to prove it by a preponderance of the evidence. Commonwealth v. Kennedy, 451 Pa. 483, 487, 305 A.2d 890, 892 (1973).

¹²Indeed, there was adequate support on the record for the trial court's determination of competency even under the pre-Mental Health Act of 1976 standard of "preponderance of the

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Nevertheless, appellate counsel would have us reverse the lower court's determination of competency because appellant "advanced an irrational and absurd defense" which was "diametrically opposite to the insanity defense raised by defense counsel," because in "no instance could the [*343] Defendant follow counsel's advice on any of the substantive issues; i.e., Fifth Amendment rights, insanity, specific intent, diminished capacity, and the introduction of prejudicial photos . . .," and because he did [***36] not understand the nature of the proceedings against him but, rather, viewed them as a "means to uncover the conspiracy against him -- to unmask the devil." Brief for Appellant at 31-33. We disagree.

As the lower court correctly stated:

HN6 [🔍]

Lack of cooperation and the failure to heed counsel's advice and/or the failure to agree with counsel's strategy are certainly not to be equated with and do not establish legal incompetency. *The issue is the Defendant's ability to cooperate and not whether he is actually cooperating. Indeed, as the trial Judge noted, there is a factual and legal distinction between inability to assist and being unwilling to assist.* Defense counsel also contend that Banks' belief that a conspiracy existed against him and that he was

going to "unmask the devil" establishes his incompetency. It may well be that Banks actually believed that such a conspiracy existed and that the trial was necessary to establish that fact. On the other hand, Banks may have feigned such a belief in hopes of actually promoting the defense of insanity being raised by his counsel which, on the other hand, he indicated he did not desire to assert. *Whatever Banks' intent or strategy [***37] was or whether it comported with his counsel's desires or plans -- does not change the fact that he was "legally competent" to stand trial.*

Slip op. at 13-14 (emphasis added).

Appellant clearly demonstrated his *ability* to participate and assist in his defense [**14] and his understanding of the nature and object of the proceedings. While presentation of his conspiracy theory was against counsels' advice, his bizarre "defense" did not, as counsel suggests, conflict with his defense of insanity. In fact, his "conspiracy" theory and presentation at trial dovetailed quite nicely with the opinions of the expert psychiatric witnesses for the defense, [*344] who testified that appellant's obsessive and paranoid delusions about racism and race wars prevented him from understanding the nature and quality of his acts and from knowing that his acts were wrong.

Finally, while it does, indeed, appear that appellant viewed his trial as an

evidence." See note 11, *supra*.

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opportunity to prove his perceived conspiracy to the jury and to the world, there is ample evidence of record to support the court's determination that appellant understood that he was on trial on thirteen counts of homicide, that he [***38] could be sentenced to death if convicted, that he would not be sentenced to death if found not guilty by reason of insanity, that he understood the role and functions of the prosecutors, defense attorneys and judge, and that he was able to assist and participate in his defense even though he chose not to cooperate with counsel nor to heed their advice.

For the foregoing reasons, we hold that the lower court did not err in its determination that appellant was competent to stand trial.

Appellant next argues that the court erred in its instructions to the jury on sanity. Appellant's brief states:

Consideration being given to the inadequacies of *M'Naghten* in Pennsylvania, [the trial] Court produced its own definition of insanity by (1) recognizing that to be insane, the Defendant must be 'completely or totally unable to understand the nature and quality of his act or completely or totally unable to distinguish between right and wrong' [N.T., Trial Volume VI, p. 2223]; (2) that knowledge of the nature and quality of the act relates merely to a cognitive awareness of the physical act and its

consequences; [N.T., Trial Volume VI, pp. 2224-25]; and (3) that 'wrong' [***39] means 'legally or morally' with morality reflecting 'societal standards and not those of a particular individual.' [N.T., Trial Volume VI, p. 2225]. In defining *M'Naghten* with consideration being given to the Commonwealth's burden of proof, the Court charged as follows:

[*345] '[I]n view of what I have said regarding the legal test of insanity and the Commonwealth's burden of proof, you cannot find the Defendant guilty unless you are satisfied beyond a reasonable doubt that at the time of the acts involved, that is, the killings, the attempted murder and the robbery, either the Defendant had no mental disease or defect, or, if he did have a mental disease or defect, that he was not, as a result of such disease or defect, incapable of knowing what he was doing and of judging that it was wrong to do so. That is the test.' [N.T., Trial Volume VI, p. 2226].

An exception to the Court's charge on insanity was taken by Defense Counsel. [N.T., Trial Volume VI, pp. 2237-38].

Brief for Appellant at 38-39.

On appeal, the court's instructions to the jury must be viewed in their entirety and considered as a whole. Commonwealth v. Zettlemoyer,

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supra [***40] at 500 Pa. 38, 454 A.2d 937; Commonwealth v. Tolassi, 489 Pa. 41, 413 A.2d 1003 (1980). So viewed, we find that the court's instructions fully and adequately delineated the law in this Commonwealth as to legal insanity/criminal responsibility. (The court's entire charge to the jury on the issue of insanity is set forth *infra* as an Appendix to this opinion.)

Appellant's principle challenge to the court's instructions asserts that, under *M'Naghten*, "knowledge" of the nature and quality of the act must entail more than a "cognitive awareness that an act is being committed;" rather, it must also encompass "a rational appreciation as well of all the social and emotional implications involved in the act and a mental capacity to [**15] measure and foresee the consequences of the violent conduct." Brief for Appellant at 37, 41. We agree with the Commonwealth that this position amounts to an indictment of the *M'Naghten* standard, and either misperceives the nature of the *M'Naghten* test or seeks to fundamentally alter it. This we shall not do. In Commonwealth v. Tempest, supra, we stated that the *M'Naghten* test can and does embrace those mentally disturbed [***41] in the [*346] category of those criminally responsible, 496 Pa. at 441, 437 A.2d 952, and is not intended to separate the emotionally disturbed from the emotionally healthy. Commonwealth v. Demmitt, 456 Pa. 475, 481, 321 A.2d 627 (1974). And as we said explicitly in

Commonwealth v. Neill, 362 Pa. 507, 514, 67 A.2d 276, 280 (1949):

HN7 [¶] Certainly neither social maladjustment, nor lack of selfcontrol, nor impulsiveness, nor psycho-neurosis, nor emotional instability, nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal conception of that term.

For the Commonwealth to meet its burden of demonstrating that a defendant is legally sane, ¹³ it most certainly does not have to demonstrate that he or she has a "rational appreciation as well of all the social and emotional implications" or the ability "to measure and foresee the consequences" of the act. As this Court stated long ago in adopting the *M'Naghten* test in this Commonwealth, HN8 [¶] "to the eye of reason, every murderer may seem a madman, but in the eye of the law he is still responsible [T]o constitute a sufficient defense on this ground there must be an entire [***42] destruction of freedom of the will" Commonwealth v. Mosler, 4 Pa. 264, 268 (1849). Contrary to appellant's position, legal sanity is *not* demonstrated by a murderer's appreciation of the social and emotional

¹³ HN9 [¶] Where there is sufficient evidence to raise the issue of sanity, the burden of proof is on the Commonwealth to establish the defendant's sanity beyond a reasonable doubt. Commonwealth v. Scarborough, 491 Pa. 300, 305, 421 A.2d 147 (1980).

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implications of the killing nor by his ability to measure and foresee all of the consequences of that act, but rather is demonstrated by the murderer's knowledge that he or she has killed and the knowledge that it was wrong. Commonwealth v. Tempest, supra; Commonwealth v. Zlatovich, supra; Commonwealth v. Demmitt, supra; Commonwealth v. Metzler, 499 Pa. 122, 123-24, 451 A.2d 1352 (1982).

Appellant challenges the portion of the court's charge which instructs the jury that "you cannot find the [*347] Defendant guilty unless you are satisfied [***43] beyond a reasonable doubt that . . . either the Defendant had no mental disease or defect, or, if he did . . . that he was *not* . . . *incapable of knowing* what he was doing and of judging that it was wrong to do so." Appellant contends that charging the jury that the Commonwealth must prove he was "not incapable of knowing" was erroneous, that the proper phraseology under *M'Naghten* is that the Commonwealth must prove the actor was "able to know," and that this "variation" on *M'Naghten* "ingeniously shifted the burden to the defense to prove insanity" as the "Defendant must be 'able to understand' and not, 'not unable.'" Brief for Appellant at 39-40. We perceive little, if any, significance to the court's use of the phrase "not incapable" as opposed to "able," and we are satisfied that the court's comprehensive instructions to the jury, read in their entirety (see Appendix),

adequately and accurately conveyed to the jury the law in this Commonwealth regarding legal insanity/criminal responsibility under *M'Naghten*, notwithstanding appellant's quibbles with certain isolated portions of that charge.

Before we leave the subject of appellant's mental condition, we wish [***44] to make it clear that we are aware that appellant suffers and has suffered from a mental defect that contributed to his bizarre behavior both in the courtroom and on September 25, 1982, when thirteen innocent persons were murdered by his hand. His behavior was inexplicable, and his thought-processes [**16] remain difficult to comprehend. However, the incomprehensibility, the bizarreness of someone's behavior, is not, nor can it be, determinative of his legal sanity or competency to stand trial. A hallmark of society is holding its members accountable for their conduct. In rejecting appellant Weinstein's request that we recognize irresistible impulses as diminishing an actor's ability to form the specific intent to kill, we stated in *Commonwealth v. Weinstein, supra* at 499 Pa. 116, 451 A.2d 1344:

[*348] The law, in its effort to shape a rational social policy, grounded in the broadly shared assumptions of the individuals who make up society, cannot admit that acts an individual carefully plans and carries out to advance his own desire, when he knows those acts will result in the

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death of another human being, will not be punished simply because of the intensity or **[***45]** strangeness of that desire. Such an admission proceeds imperceptibly to the absurd result that the more strange and brutal the act the more likely the actor is to be relieved of its criminal consequences. Along the psychoanalytic continuum the outrageous proves the innocence. In an oddly circular fashion the act establishes its cause as mental illness and the mental illness determines the act. Such analysis may be medically useful. It is not legally useful.

Appellant next contends that the court committed prejudicial error when it permitted the Commonwealth to introduce highly inflammatory photographs of the victims. As previously discussed, the court initially ruled at a suppression hearing on May 13, 1983, that the Commonwealth would not be permitted to introduce photographs of the murder victims. At this hearing, appellant explained to the court why he believed the photographs would be helpful to establish his conspiracy theory. The court cautioned appellant and advised him of the potential prejudice that could result if the photographs were introduced, and further advised him that the remaining photographs might become admissible at trial if he pursued his conspiracy **[***46]** theory. Appellant indicated, and the court found, that he

understood the court's advice and the consequences of his tactics.

At trial, appellant did present his conspiracy defense and used some of the photographs of the victims in personally cross-examining Coroner Shavers. An extensive colloquy was conducted in which appellant was readvised of the consequences of his actions and, again, appellant demonstrated his understanding of the court's advice and of the consequences of his strategy. N.T. June 7-8, 1983, at 445-63.

[*349] In rebuttal, the Commonwealth recalled the three pathologists who had previously testified and introduced thirty-eight additional photographs of the corpses, over objection by defense counsel. The court gave a cautionary instruction to the jury concerning the photographs, explaining the limited purposes of the photographs and admonishing the jury not to "become emotional" and to "disregard any inflammatory influence that they may have upon you or that you may feel" N.T. June 18, 1983 at 1946.

Under these unusual circumstances, we see no error in admitting the photographs of the corpses to rebut appellant's defense of conspiracy. We recently **[***47]** stated in Commonwealth v. Garcia, 505 Pa. 304, 313, 479 A.2d 473 (1984):

HN10 [f]

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The admission into evidence of photographs depicting the corpse of the homicide victim or the location and scene of the crime lies within the sound discretion of the trial judge A photograph which is judged not inflammatory is admissible if "it is relevant and can assist the jury in understanding the facts." A gruesome or potentially inflammatory photograph is admissible if it is of "such essential evidentiary value that [its] need clearly outweighs the likelihood of inflaming the minds and passions of the jurors." (Citations omitted.)

It is clear that the photographs of the crime victims in this case were of essential evidentiary value to refute appellant's conspiracy theory, and that the court did not **[**17]** err, therefore, in permitting the photographs to be introduced in rebuttal by the Commonwealth.

Appellant also asserts that the court erred in several instances in introducing evidence of his prior criminal record and of prior acts of violence which he claims, unduly prejudiced him. It is, of course, true that **HN11** evidence of prior crimes and/or acts of violence are inadmissible **[***48]** merely to show the defendant's propensity for violence or bad character. Commonwealth v. Morris, 493 Pa. 164, 175, 425 A.2d 715 (1981). However, evidence of prior crimes and violent acts may be admissible in special circumstances

where it is relevant for some other legitimate purpose and not merely **[*350]** to show the defendant's propensity for committing crimes. Commonwealth v. Claypool 508 Pa. 198, 204, 494 A.2d 1392 (1985).

Accordingly, **HN12** the general rule prohibiting the admission of evidence of prior crimes nevertheless

allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.

Commonwealth v. Morris, *supra* at 493 Pa. 175, 425 A.2d 715. This list of "special circumstances" is **[***49]** not exclusive, and this Court has demonstrated it will recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury. Commonwealth v. Claypool, *supra* (evidence of defendant's prior criminal activity is admissible where defendant makes statement about such activity in

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order to threaten and intimidate victim and where force or threat of force is element of crime for which defendant is being prosecuted). Such evidentiary issues are addressed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Id.* With these principles to guide us, we review appellant's specific assignments of error.

Appellant contends that the court erred in permitting the Commonwealth to cross-examine Dr. DeWitt Weatherly regarding appellant's previous 1962 conviction and incarceration for armed robbery, assault with intent to kill and other related offenses. Dr. Weatherly testified for the defense regarding appellant's mental condition. As part of appellant's history which he narrated to the jury, Dr. Weatherly stated: "So he returned to the Wilkes-Barre [*351] area [***50] in January, 1961. He remained occupationally unsuccessful. Essentially, during the sixties, there were no jobs that one might characterize as fulltime, decent jobs." N.T. June 14, 1983 at 1320. In denying appellant's post-verdict motions, the lower court stated:

The Commonwealth contends that the testimony of the doctor was false and misleading in that it gave the impression that during the 60's Banks [appellant] was making efforts to secure a full time decent job but he was occupationally unsuccessful. As noted in Bank's brief, "the fact of the matter was that [Banks] was

incarcerated during the 1960s and defense did not want to bring this fact before the jury." To allow the jury to infer from the testimony that Banks was leading a normal life during this period would have been unfair to the Commonwealth. Allowing the Commonwealth to cross-examine as to the facts relied upon by the witness in forming his psychiatric opinion was certainly well within the discretion of the trial Judge. We are satisfied that the trial Court properly permitted the Commonwealth to elicit testimony of Bank's incarceration to rebut the impression that he was leading a normal life during the [***51] 60's. Certainly, the testimony was not elicited in any attempt to establish Banks' predisposition to commit [**18] the crimes charged or to impugn his character.

Slip op. at 10-11. The court instructed the jury at the time that this evidence was to be considered only for the "very limited purpose; that is, for the purpose of assisting you in determining the mental state of the defendant . . . on September 25, 1982" and cautioned the jury that it was not to infer guilt in the instant case because of his prior record. N.T. June 14, 1983 at 1380. Similar instructions were repeated during the court's charge to the jury. N.T. June 21, 1983 at 2196. Under these circumstances, we agree with the lower court that the cross-examination of Dr. Weatherly concerning appellant's prior criminal

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record and incarceration was admissible for the limited purpose of assisting the jury in assessing the witness' credibility on a crucial and hotly contested issue.

[*352] The Commonwealth also elicited rebuttal testimony from the Director of the Domestic Violence Service Center regarding Regina Clemens, who had received shelter at the Center from September 4-7, 1982. The director [***52] testified that Ms. Clemens intended to reside with her brother when she left the Center, which contradicted appellant's own testimony that Ms. Clemens intended to return and live with him. This testimony was of essential evidentiary value to the Commonwealth in establishing appellant's apparent motive for his rampage on September 15, 1982 and that he had the specific intent to kill. Thus, the court did not err in admitting this testimony even though, as appellant suggests, it contained the implication that Regina Clemens was a prior victim of appellant's violence which caused her to seek help at the shelter.

Similarly, the court did not err in allowing a neighbor to testify in its case-in-chief that he observed appellant slapping Susan Yuhas in the week preceding the murders and overheard him state "You're just like your sister Gina. You're going to leave just like her." This testimony supported the Commonwealth's motive theory, and the court did not err in allowing it to be

introduced.¹⁴

[***53] [*353] Appellant also asserts that the court erred in refusing his request for a mistrial when Detective William Maguire testified that appellant had stated to him he had "some dealings" with the Wilkes-Barre Police Department in the past.¹⁵ N.T. June 9, 1983 at 775. This assertion is without merit. Detective Maguire's passing reference to "some dealings" that appellant may have had with the Wilkes-Barre police in the past did not necessarily or by reasonable implication

¹⁴ In its opinion denying appellant's post-verdict motions, the court stated:

We are satisfied that the testimony in question was relevant to the question of motive. It was one of a number of incidents indicating or establishing Banks' desire to secure and/or retain control over his family and his apparent lack of ability to do so. We reject Banks' contention that the claim of motive was conjectural and frail and failed to connect Banks' prior outburst of violent anger against Yuhas to the subsequent killings involved in this case. Such arguments go to the weight of the evidence and not to its admissibility. One cannot always expect to find logical or rational connections between incidents. Why someone would kill 13 people is not easily explained and where evidence, such as this, may well shed light on the reason or purpose and is so closely connected in time, it should not be rejected merely because of some potential prejudice to the Defendant. Considering the nature of the accusations in this case and the facts and circumstances presented, any weighing of the admission of this testimony on the scales of justice falls heavily on the side of the Commonwealth. Accordingly, we find no abuse of discretion in its admission.

Slip op. at 9.

¹⁵ Detective Maguire testified as to appellant's arrest and statements appellant had made at the police station. In the course of his direct testimony, he stated: "He made statements concerning the Wilkes-Barre Police. He said he thought the Wilkes-Barre Police was a nice police department; they weren't racists. He had some dealings with them in the past and" Defense counsel moved for a mistrial, which was denied. N.T. June 9, 1983 at 775.

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infer that he had a prior criminal record with that police department, particularly given appellant's occupation as a prison guard at the state correctional institution at Camp Hill. See Commonwealth v. Carpenter, 511 Pa. 429 at 435-438, 515 A.2d 531 [**19] at 534-35 (1986) and cases cited therein.

[***54] Appellant challenges his twelve sentences of death imposed by the jury on several grounds. ¹⁶ Our HN13 [¶] standard of review of a judgment of sentence of death is established by the Sentencing Code, 42 Pa.C.S.A. § 9711(h), which provides:

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

[*354] (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support

the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

[***55] The evidence overwhelmingly supports the finding of an aggravating circumstance, since appellant was convicted on twelve counts of murder of the first degree committed at the time of the offenses in issue, each of which carried a sentence of either death or life imprisonment. 42 Pa.C.S.A. § 9711(d)(10). Appellant maintains, however, that the jury's sentencing verdict was against the weight of the evidence and abused its discretion in failing to give "due consideration" to the mitigating circumstances presented. This contention is patently without merit. HN14 [¶] "Under our legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances" Commonwealth v. Fahy, 512 Pa. 298, 317, 516 A.2d 689 (1986). The jury performed its exclusive function and acted well within the authority placed upon it by the legislature in determining that the overwhelming evidence regarding the aggravating circumstance before it outweighed the mitigating

¹⁶ Appellant's final contention of trial error is that the court erred in denying his petition for exhumation of the victims' corpses. There is no merit to appellant's contention as the court acted well within its discretion in denying this petition. See Commonwealth v. Kivlin, 267 Pa.Super. 270, 406 A.2d 799 (1979), allocatur denied January 30, 1980.

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circumstances it found.

Appellant asserts that the prosecutor made improper remarks during closing arguments at the sentencing phase [***56] which require that we vacate the sentences of death and remand for the imposition of life sentences. These remarks were: an incorrect suggestion that the *M'Naghten* standard was applicable in determining appellant's mental illness as a mitigating circumstance, which suggestion was objected to and corrected by the trial court; and a remark, made in response to closing remarks of defense counsel, [*355] that appellant "did it by showing no sympathy or mercy to his victims, and I ask that you show him no sympathy, that you show him no mercy." N.T. June 21, 1983 at 2311. The latter remark was also objected to, with the objection sustained by the trial court. The prosecutor's misstatement regarding appellant's mental condition and emotional state in consideration of mitigating circumstances was promptly corrected and the jury was accurately charged by the trial court, and appellant was not prejudiced thereby. The prosecutor's remarks regarding no mercy or sympathy were within the oratorical license and impassioned argument that this Court has consistently allowed during the sentencing phase, particularly where prompted by remarks of defense counsel. See *Commonwealth v. Whitney* [***57], 511 Pa. 232, 512 A.2d 1152 (1986), and cases cited

therein. Accordingly, we find no basis in [**20] the prosecutor's closing arguments for disturbing the jury's sentences of death, nor do we find those sentences to have been otherwise "the product of passion, prejudice or any other arbitrary factor."

The final argument advanced by appellant is that the death penalty constitutes cruel and unusual punishment in this case "as it befalls upon an individual, who, at the time of commission of the crime, was severely mentally ill." Brief for Appellant at 56. We do not agree. Sufficient evidence of record established that appellant was legally sane when he committed the mass slayings and competent to stand trial, and we see no reason why the jury's finding that he had acted under extreme mental or emotional disturbance would render imposition of the death penalty cruel and unusual punishment. This Court recently addressed a similar argument in *Commonwealth v. Fahy, supra*, 512 Pa. at 316-317, 516 A.2d 689, wherein we stated:

After oral argument, permission was given and supplemental briefs were filed by both parties concerning an inquiry made by this Court during oral argument. [***58] The issue underlying this inquiry is whether a finding by the jury in mitigation under 42 Pa.C.S. § 9711(e)(3) -- substantial impairment -- precludes imposition of the death penalty, [*356] notwithstanding the jury's

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determination that the three aggravating circumstances present outweighed the two factors found in mitigation. We conclude that it does not.

Our review of the death penalty statute, the record and the nature of the common law bar to execution of the death warrant where the condemned prisoner becomes incompetent after conviction convinces us that HN15 [¶] a jury finding of substantial mental impairment under § 9711(e)(3) does not bar the death penalty imposed by the jury, and that the common law rule has no application here since Appellant is not incompetent.

Appellant was ruled competent to stand trial and for sentencing, and there is nothing in the record to suggest that Appellant is incompetent and should not be executed Under our legislative scheme, it is exclusively a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances in the case. Our legislature could have provided [***59] that a finding of substantial impairment precludes imposition of the death sentence, however, it did not do so. Instead, it determined that this factor was to be weighed by the jury along with all the other factors and that it is within the province of the jury to determine how

much weight it should be accorded. We find no basis upon which to disturb the verdict and sentence of the jury.

Lastly, we are required to review the penalties imposed in "similar cases" to determine whether the sentence of death is excessive or disproportionate to those imposed in such similar cases. Frankly, we have found no "similar cases" to this, a multiple homicide where appellant coldly massacred thirteen people, including the women and children of his extended family. Nevertheless, we have reviewed other cases wherein the jury has found the same aggravating circumstance found by the jury in the instant [*357] case, and find no excessiveness or disproportionality to the sentences imposed in such other cases.¹⁷

[***60] For the foregoing reasons, we affirm the appellant's convictions and his judgments of sentence.¹⁸

[**21] APPENDIX

¹⁷ We have reviewed the data and information pertaining to similar cases that has been compiled by the Administrative Office of Pennsylvania Courts pursuant to this Court's directive in *Commonwealth v. Frey*, 504 Pa. 428, 443, 475 A.2d 700, 707-08 (1984), cert. denied 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984).

¹⁸ The prothonotary of the Eastern District is hereby directed to transmit a full and complete copy of all of the records and transcripts of the trial, sentencing and appeal of this case to the Governor, as required by 42 Pa.C.S.A. § 9711(i). Transmittal of this record to the Governor does not, however, "remove the case from the jurisdiction of the courts or prevent further action by the courts." *Commonwealth v. Travaglia*, 502 Pa. 474, 505-06 n. 5, 467 A.2d 288 (1983), cert. denied, 467 U.S. 1256, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984).

513 Pa. 318, *357; 521 A. 2d 1, **21; 1987 Pa. LEXIS 623, ***60

CHARGE OF THE COURT -- INSANITY

BY THE COURT:

In addition, you are instructed that when insanity is asserted as a defense, absence of motive is an appropriate consideration or factor to be employed in the determination of the issue of the defendant's insanity. Just as the presence of motive may be a relevant consideration in determining guilt, [***61] the absence of motive is a relevant consideration for you in determining whether the defendant was insane at the time he committed the acts complained of. It is entirely for you to determine what weight should be given the evidence concerning motive, on each of these issues.

Now, ladies and gentlemen, I have defined for you the offenses and some of the general principles of law that apply to the fifteen Informations and the twenty charges before you in this case. The Court has prepared and will furnish you with a verdict form for each Information, which [*358] form will indicate the charge, a brief summary of what the charge is, and an indication of the possible verdicts.

In this case, one of the possible verdicts is not guilty by reason of insanity. If a defendant was legally insane at the time he committed an act, then the law excuses that act, even if it would otherwise constitute murder. And in such a case, the defendant should be

found not guilty by reason of insanity.

In this case, the defendant has asserted the defense of insanity. He has asserted that defense to each of the charges, to all of the charges involved in this case. I want you to know that the fact [***62] that the defendant asserts the defense does not mean that he has the burden of proving that he is insane. Indeed, when a defense of insanity is raised, as in this case, in addition to proving all of the elements I have outlined for each offense beyond a reasonable doubt, the Commonwealth is also required to prove the defendant's criminal responsibility beyond a reasonable doubt. That is, the Commonwealth must prove beyond a reasonable doubt that the defendant was not insane at the time of the alleged crime.

The term "insanity" has a very special meaning in the criminal law. As you know now from the evidence, there are a number of tests or standards employed in different states for determining sanity, or, stated otherwise, for determining if a person is legally insane. Pennsylvania employs what is known as the *M'Naghten* test, while, as you heard, for instance, the State of Maryland employs a modified version of the American Law Institute standard. In addition to these two tests, there are other tests, such as the irresistible-impulse test. In this state, we have rejected all other tests and standards and we employ only one, and that is the *M'Naghten* test.

513 Pa. 318, *358; 521 A.2d 1, **21; 1987 Pa. LEXIS 623, ***62

I think everyone [***63] would agree that the acts involved in this case were not the product of a sound mind. The defendant in this case suffered from paranoia, but I hasten to add that mental disease or defect alone does not and cannot absolve a defendant from criminal responsibility.

[*359] The *M'Naghten* test employed in this Commonwealth is a legal test. It is not a medical or theological test. Accordingly, the terms of the test are legal and the definition of those terms is a matter of law upon which you must follow my instructions. Our courts have declared, on many occasions, that neither social maladjustment nor lack of self-control, nor impulsiveness, nor psychoneurosis, nor emotional instability, nor all of such conditions combined constitute insanity within the criminal conception of that term. Abnormal conditions which medical science might regard as mental illness do not necessarily [**22] amount to what the law regards as insanity, in this state.

The legal test or definition of "insanity" in the Commonwealth of Pennsylvania is this:

A person is insane if, at the time of committing an act, he is, as a result of mental disease or defect, unable to understand the nature and quality [***64] of his act or to distinguish between right and wrong with respect to that act.

Stated more simply, a person is insane

if, at the time of committing an act, he is, as a result of mental disease or defect, either incapable of knowing what he is doing, or, if he does know what he is doing, is incapable of judging that it is wrong to do so.

The term "mental disease or defect" in this test means a disease or infirmity of the mind, as distinguished, for example, from a mere fault of character, temperament or social adjustment.

I would also advise you that under the Pennsylvania test for insanity, a defendant either understands the nature and quality of his acts or he does not. He is either able to distinguish between right and wrong or he is not. The test in Pennsylvania, unlike Maryland, where they absolve a defendant who lacks substantial capacity, recognizes no degree of incapacity. To be legally insane, the defendant must be completely or totally unable to understand the nature and quality of his act, or completely and totally unable to distinguish between right and wrong.

[*360] You should also know and remember that Pennsylvania rejects any defense that a defendant felt [***65] compelled or couldn't stop himself from committing the acts or acted as a result of an irresistible impulse to kill. Any such defense cannot be accepted and cannot be the basis for a finding of insanity, in this Commonwealth or in this case. If insanity is to be the basis for a verdict of not guilty by reason of insanity, it must be legal insanity under

513 Pa. 318, *360; 521 A. 2d 1, **22; 1987 Pa. LEXIS 623, ***65

the test as I have outlined it for you.

Did George Banks suffer from a mental disease or defect on the morning of September 25, 1982? Did George Banks know what he was doing on that morning? And if he did know what he was doing, was he capable of judging, at that time, that it was wrong to do so?

Your first inquiry must be to determine whether or not the defendant suffered from a mental disease or defect on that date. If you decide that he did, you will then consider what is often referred to as the two-pronged test of *M'Naghten*.

The first element of the test is knowledge, in the sense of awareness of the nature and quality of the act. It encompasses the ability of an accused to comprehend what he is doing. The words "know the nature" refer to the ability of a person to be aware of the physical characteristics of his act. [***66] If the accused knew that he was doing the act, shooting, the true character of his activity, then he knew the nature of his acts.

Knowledge of the quality of the act refers to the ability to comprehend its harmfulness. This is sometimes described as knowledge of the consequences of the act. If the accused understood that shooting would cause serious bodily injury and possibly death, he understood the quality of his acts.

The second element of the test is that the defendant be incapable of

distinguishing between right and wrong with respect to that act. That is, he was incapable of judging that it was wrong to do so.

[*361] An individual is unable to tell right from wrong with reference to the particular act charged if, at the time of the commission of the offense, he is unable to tell that his act is one which he ought not to do. If the accused knew his act was wrong, either legally or morally, then he cannot be excused for his crime, on this part of the test for insanity.

Morality here would reflect societal standards and not those of a particular individual.

An accused's knowledge that an act is illegal will permit the inference of knowledge that the act is wrong, [***67] according to [**23] generally accepted moral standards of a community.

In determining the question of insanity, you should consider all the evidence, including the testimony of witnesses regarding the acts, words, conversations, behavior and appearance of the defendant before, at, and close to the time of the alleged crime, as well as the testimony of the expert witnesses and testimony of the witnesses concerning the defendant's general mental condition.

The critical time when insanity must exist in order to be a defense is at the time when the alleged criminal act was

513 Pa. 318, *361; 521 A.2d 1, **23; 1987 Pa. LEXIS 623, ***67

committed. You have heard the evidence concerning the defendant, beginning many years prior to and at the time of and close to the acts, as well as some evidence concerning events and occurrences after the offenses involved. Although you may consider evidence of the defendant's mental condition before and after the time the offenses were committed, you may consider it only to help you decide or determine his sanity and state of mind at the time of the alleged crimes.

In view of what I have said regarding the legal test of insanity and the Commonwealth's burden of proof, you cannot find the defendant guilty unless [***68] you are satisfied beyond a reasonable doubt that at the time of the acts involved, that is, the killings, the attempted murder and the robbery, either the defendant had no mental disease or defect, or, if he did have a mental disease or defect, that he was not, as a result of such disease or defect, incapable of [*362] knowing what he was doing and of judging that it was wrong to do so. That is the test.

Dissent by: NIX

Dissent

NIX, Chief Justice, dissenting.

Although I have serious problems with the trial court's determination that the appellant had the mental competence to stand trial, my dissent from the majority opinion is based on another ground. In

my view the trial court, by allowing appellant to put before the jury the gruesome photographs of the infant victims' bullet-torn bodies, permitted him to convert the system of criminal justice into an instrument for his self-destruction.

The appellant's court-appointed lawyers had advised him not to take the witness stand; yet, he elected to disregard their advice. Although the appellant had every right to give testimony in his own behalf, he went beyond that. The appellant took it upon himself to introduce in evidence, for the [***69] purpose of trying to establish a preposterous theory of a conspiracy against him, photographs of the dead victims. Those pictures were so horrible and evocative, so inflammatory in their nature, that the trial court had previously ruled them inadmissible. The judgment as to which exhibits will be introduced into evidence is a function to be performed by a competent trial counsel. See Commonwealth v. Bell, 442 Pa. 566, 276 A.2d 834 (1971). The conclusion is therefore inescapable that when the appellant on his own, over the strenuous opposition of his counsel, put the photographs before the jury, he was acting as his own attorney and was representing himself. He had, at that point, superseded appointed trial counsel as to the stewardship of the case.

It is true that the United States Supreme Court, in Farett v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562

513 Pa. 318, *362; 521 A. 2d 1, **23; 1987 Pa. LEXIS 623, ***69

(1975), held that a criminal defendant has a constitutional right to represent himself. The Court, however, cautioned that, "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the [***70] dangers and disadvantages [*363] of self-representation, so that the record will establish that 'he knows what he was doing and his choice is made with eyes open.'" *Id.* at 835, 95 S.Ct. at 2541 (emphasis added). The Court also observed that a defendant's right to act as his own lawyer was not a license to abuse the dignity of the judicial process. *Id.* at 834 n. 46, 95 S.Ct. at 2541 n. 46.

The record in the instant case clearly portrays the appellant as a person suffering [**24] from a severe mental disorder, if not at the time of the crime itself, then certainly during the trial. The truth of that conclusion is made even more compelling by the absurdity of his conspiracy theory and his proposal to establish it with exhibits which could do nothing but prejudice his case. Despite the trial court's finding that the appellant was competent to stand trial, his paranoiac utterances and ramblings before the judge should have left no doubt in the mind of the court as to his inability to undertake any part of his representation.¹

¹ Prior to appellant's taking the witness stand and introducing the photographs, a colloquy took place between him and the trial judge. During that exchange the appellant made remarks

[***71] Other jurisdictions have considered the issue of the power or even the duty of a trial judge to prevent a criminal defendant from representing himself in certain circumstances. For example, in *People v. Burson*, 11 Ill.2d 360, 143 [*364] N.E.2d 239 (1957), the Supreme Court of Illinois was confronted with the problem of self-representation by a defendant whose sanity was seriously in doubt. The Court concluded that even if the defendant was sane at the time of trial, his right to represent himself was subject to the constant duty of the court to protect the judicial process from inadequate and improper conduct of the defense. The Court further held that such a duty included the broad discretion to supersede the defendant's conduct of his own defense.

Along similar lines was the thinking of

such as: "I can show that there is a conspiracy against me. I can prove it with material fact, right here in this courtroom today This is the only shot I got to pull the mask off the face of the Devil, and I intend to do it I sat up here, sir, for eight days and listened to nothing but hypocrisy, lies and corruption and coerced and perjured testimony. I don't see where I can hurt myself I don't have a chance anywhere in this nation . . . this trial is a farce I've been bullied enough." Following the last remark, the trial judge stated that he would not tolerate "testimony" of that kind. T.T. 1639-1642.

In response to the court's rebuke the appellant replied: "Well, then, I'll take my best shot and go with what I got. Can I get my photographs and stuff?" The judge answered, "you certainly may." T.T. 1642. At that point, defense counsel asked the court to determine again the appellant's mental competency, stressing the utter absurdity of the conspiracy theory. The trial judge denied the motion, and in doing so said: "It may well be that he believes that. It may well be, as they say, part of his delusion. If that is so, it doesn't seem to me you're hurt." T.T. 1643. This last statement addressed the concern of defense counsel that the conspiracy theory would make them "look like a bunch of monkeys."

513 Pa. 318, *364; 521 A. 2d 1, **24; 1987 Pa. LEXIS 623, ***71

the Supreme Court of Washington in the case of State v. Kolocotronis, 73 Wash.2d 92, 436 P.2d 774 (1968). There, that Court stated the following: "Even though a defendant demands his constitutional right to act as his own counsel, if the court determines that he does not have . . . adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional [***72] right to due process of law, [are] disregarded if the court permits him to so act in a criminal case." Id. at 97-100, 436 P.2d at 779-80.

As I read the record in this case the trial court, in allowing the appellant to introduce the photographic exhibits, gave no consideration to his questionable mental state at the time. Even assuming the validity of the initial judgment of the court that appellant was competent to stand trial, that judgment did not relieve the court of the responsibility of assuring that the proceedings were in accordance with a fair trial. Moreover, the United States Supreme Court in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), in a unanimous per curiam opinion stated:

Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his

constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in [*365] which the accused -- whose life or liberty [***73] is at stake -- is without counsel. This *protecting duty* imposes the serious and [**25] weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' Johnson v. Zerbst, 304 US 458, 465 [58 S.Ct. 1019, 1023, 82 L.Ed. 1461]; Carnley v. Cochran, 369 US 506 [82 S.Ct. 884, 8 L.Ed.2d 70].

Id. at 150, 86 S.Ct. at 1320 (emphasis added).

Although counsel for the defense were physically present, the court permitted Banks to waive the assistance of counsel when appellant was permitted to introduce this evidence and to make these highly prejudicial comments over the strenuous objection of both defense counsel. Such an action in my judgment constitutes a waiver of counsel without the court's exercising its "protecting duty."

For the reasons set forth herein, I am constrained to conclude that the trial judge, in allowing the defendant to introduce the prejudicially inflammatory pictures, did not perform his constitutional protecting duty of attempting to ensure that the waiver of

513 Pa. 318, *365; 521 A.2d 1, **25; 1987 Pa. LEXIS 623, ***73

counsel was intelligently and knowingly made. As a consequence, this record reflects that a mockery was made of justice. judgments of sentence.

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*****74]** This action is justified by the Commonwealth by suggesting that this bizarre conduct was merely a stratagem by Banks to convince the jury he was insane. It is quite true that one can feign insanity by acting in a bizarre manner. However, it is equally true that one mentally disturbed is quite likely to act in a bizarre manner. The court should have sought expert medical assistance in determining in this instance which was the case. Such a request was made by defense counsel and refused by the court.

As former Chief Justice Burger observed in his dissenting opinion in *Faretta v. California*, the trial judge is "charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." 422 U.S. at 839, 95 S.Ct. at 2543. That goal, according to Chief Justice Burger, "is ill-served, and the integrity of and public confidence in the system are undermined, **[*366]** when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel." *Id.* Going further, Chief Justice Burger said, "[t]he damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the *****75]** 'freedom to go to jail under his own banner.'" *Id.*

I therefore dissent and would vacate the

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Commonwealth v. Banks

Supreme Court of Pennsylvania

November 1, 1994, SUBMITTED ; March 27, 1995, DECIDED

No. 60 Capital Appeal Dkt.

Reporter

540 Pa. 143 *; 656 A.2d 467 **; 1995 Pa. LEXIS 197 ***

COMMONWEALTH OF
PENNSYLVANIA, Appellee v. GEORGE
BANKS, Appellant

Prior History: [***1] Appeal from the Order of the Court of Common Pleas of Luzerne County denying post-conviction relief entered at Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982.

Disposition: Affirmed.

Core Terms

trial court, sentence, mitigating circumstances, issues, unanimity, instructions, post-conviction, direct appeal, jurors, aggravating circumstances, photographs, waived, death sentence, alleged error, proceedings, contends, provides, notice, appellant's claim, procedures, convicted, litigated, murder, death penalty case, slips, proportionality review, instant matter, death penalty, circumstances, deficiencies

Case Summary

Procedural Posture

Defendant appealed from a decision by

the Court of Common Pleas of Luzerne County (Pennsylvania) that denied defendant's petition for post-conviction relief.

Overview

Defendant was convicted and sentenced to death for twelve counts of first-degree murder, third-degree murder, attempted murder, aggravated assault, recklessly endangering another person, robbery, and theft of a motor vehicle. The court affirmed the convictions and judgments of sentence. Defendant filed a petition for post-conviction relief that was denied. Defendant appealed from the decision. Defendant contended that the jury instructions, jury poll, and verdict slip employed during the penalty phase improperly suggested to the jury that its findings as to mitigating circumstances had to be unanimous. The court found no error as to the jury instructions, jury poll, and verdict slip, holding that the jury was not given the mistaken impression that unanimity was required. Defendant next contended that he was denied due process of law because the trial court never gave the requisite notice of its intent to dismiss

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defendant's petition. However, where the issues raised in a petition involved no disputed factual issues, a hearing was not necessary. Finally, the trial court did not err in finding defendant competent to represent himself. The decision was affirmed.

Outcome

The decision that denied defendant's petition for post-conviction relief was affirmed. There was no error as to the jury instructions, jury poll, and verdict slip employed during the penalty phase because they did not suggest to the jury that its findings as to mitigating circumstances had to be unanimous.

LexisNexis® Headnotes

Criminal Law &
Procedure > Postconviction
Proceedings > Motions for New Trial

HN1[⚡] Postconviction Proceedings, Motions for New Trial

To be eligible for post-conviction relief, an appellant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa. Cons. Stat. § 9543(a)(2) and that his issues have not been previously litigated.

Criminal Law &

Procedure > Postconviction
Proceedings > Motions for New Trial

HN2[⚡] Postconviction Proceedings, Motions for New Trial

An issue is deemed finally litigated for purposes of post-conviction relief if the highest appellate court in which the petitioner can have a review as a matter of right rules on the merits of the issue. 42 Pa. Cons. Stat. § 9544(a)(2).

Criminal Law &
Procedure > ... > Reviewability > Waiver > General Overview

Criminal Law &
Procedure > Postconviction
Proceedings > Motions for New Trial

HN3[⚡] Reviewability, Waiver

If the allegations of error have not been finally litigated, appellant must also demonstrate that those allegations of error have not been waived or that, if waived, either the conditions listed in 42 Pa. Cons. Stat. § 9543(a)(3)(ii) or (iii) are met. An issue is deemed waived if the petitioner fails to raise it and if it could be raised before the trial, at the trial, or on appeal. 42 Pa. Cons. Stat. § 9544(b).

Criminal Law &
Procedure > Counsel > Effective
Assistance of Counsel > Trials

HN4[⚡] Effective Assistance of

540 Pa. 143, *143; 656 A.2d 467, **467; 1995 Pa. LEXIS 197, ***1

Counsel, Trials

Appellant must demonstrate that the failure to litigate an issue prior to, or during trial, or on direct appeal could not result from any reasonable tactical decision of counsel. 42 Pa. Cons. Stat. § 9543(a)(4).

Criminal Law &
Procedure > Sentencing > Capital
Punishment > Mitigating
Circumstances

Criminal Law &
Procedure > ... > Jury
Instructions > Particular
Instructions > General Overview

Criminal Law &
Procedure > ... > Jury
Instructions > Particular
Instructions > Unanimity

Criminal Law &
Procedure > Trials > Jury
Instructions > Requests to Charge

Criminal Law &
Procedure > Trials > Verdicts > Unan
imity

HN5[↓] Capital Punishment, Mitigating Circumstances

So long as proper instructions are given by the trial court, there is no requirement that the court specifically charge the jury that it need not be unanimous in finding mitigating circumstances.

Criminal Law &
Procedure > Postconviction
Proceedings > Motions for New Trial

HN6[↓] Postconviction Proceedings, Motions for New Trial

Where the issues raised in a petition involve no disputed factual issues, a hearing is clearly not necessary and a resolution without such a hearing does not violate the rules.

Criminal Law &
Procedure > ... > Standards of
Review > Abuse of
Discretion > General Overview

Criminal Law &
Procedure > Counsel > Right to Self-
Representation

HN7[↓] Standards of Review, Abuse of Discretion

A defendant has a constitutional right to present his own defense at trial. A defendant may also be permitted to act as co-counsel even though he has counsel available, but that determination lies within the sound discretion of the trial court.

Judges: MR. JUSTICE CAPPY. Mr. Chief Justice Nix files a concurring opinion. Mr. Justice Montemuro is sitting by designation.

Opinion by: CAPPY

540 Pa. 143, *143; 656 A.2d 467, **467; 1995 Pa. LEXIS 197, ***1

Opinion

[**468] [*147] OPINION

MR. JUSTICE CAPPY

DECIDED: March 27, 1995

This is a direct appeal from an Order of the trial court denying post-conviction relief in a death penalty case. ¹ For the following reasons, we affirm the Order of the trial court.

On June 22, 1983, Appellant, George Banks, was convicted by a jury of twelve counts of murder of the first degree. He was also convicted of one count of murder of **[**469]** the third degree, attempted murder, aggravated assault, recklessly endangering another person, robbery and theft of a motor **[***2]** vehicle. ² **[***3]** Following a penalty hearing, appellant was sentenced to death on each of the twelve counts of first degree murder. ³

¹ 42 Pa.C.S. § 9546(d) provides that a final order disposing of a defendant's post-conviction petition shall be directly appealable to this Court in a death penalty case. See also, 42 Pa.C.S. § 722.

² During the early morning of September 25, 1982, Appellant shot fourteen (14) people with a Colt AR-15 semi-automatic rifle, killing thirteen (13) and wounding one. The entire rampage lasted no more than one hour. The majority of the victims were women with whom appellant had been involved as well as the children borne of those relationships. A more detailed account of the facts surrounding appellant's convictions is set forth in this Court's decision on direct appeal from the judgments of sentence of death. See *Commonwealth v. Banks*, 513 Pa. 318, 521 A.2d 1 (1987).

³ In addition to the twelve sentences of death, Appellant was sentenced to consecutive terms of ten to twenty years for the third degree murder conviction, five to ten years for the attempted murder conviction and ten to twenty for the robbery

On direct appeal, this Court affirmed the convictions and judgments of sentence. *Commonwealth v. Banks*, 513 Pa. 318, 521 A.2d 1 (1987), cert. denied, 484 U.S. 873, 108 S. Ct. 211, 98 L. Ed. 2d **[*148]** 162 (1987). In February, 1989, appellant filed the instant petition for post-conviction relief. The trial court denied that collateral relief petition on September 8, 1993. ⁴

HN1 To be eligible for PCRA relief, Appellant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in *section 9543(a)(2)* and that his issues have not been previously litigated. ⁵ **[***5]** **HN2** An issue is

conviction.

⁴ Although Appellant purportedly filed his petition under the Post Conviction Hearing Act ("PCHA"), we note that the same was filed after the effective date of the new Post Conviction Relief Act ("PCRA"). As such, Appellant's collateral relief petition must be reviewed under the standards set forth in the PCRA and not those of PCHA. 42 Pa.C.S. § 9542.

⁵ *Section 9543* of the PCRA provides, in pertinent part:

(a) General rule.-To be eligible for relief under this subchapter, a person must plead and prove by a preponderance of the evidence all of the following:

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the

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deemed finally litigated for purposes of the PCRA if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 [*149] Pa.C.S. § 9544(a)(2). HN3[7] **[***4]** If the allegations of error have not been finally litigated, Appellant must also demonstrate that those allegations of error have not been waived or that, if waived, either the conditions listed in section 9543(a)(3)(ii) or (iii) are met. ⁶ 42 Pa.C.S. § 9543(a)(3). An issue is deemed waived "if the petitioner failed to raise it and if it could **[**470]** have been raised before the trial, at the trial, [or] on appeal..." 42 Pa.C.S. § 9544(b). Finally, HN4[7] Appellant must

demonstrate that the failure to litigate the issue prior to, or during trial, or on direct appeal could not have resulted from any reasonable tactical decision of counsel. 42 Pa.C.S. § 9543(a)(4).⁷

[*6]** Appellant first contends that the jury instructions, jury poll and the verdict slip employed during the penalty phase suggested to the jury that its findings as to mitigating circumstances must be unanimous and as such violated the United States Supreme Court's mandate in Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). Appellant argues further that in order to comply with Mills, a trial court should be required to specifically instruct the jury that unanimity is not required as to findings of mitigating circumstances. Both of these contentions are without merit.

[*150] In Mills, the United States Supreme Court vacated the sentence of death and remanded for further proceedings, finding that the jury instructions and the verdict slip employed during the penalty phase of Mills' trial created a substantial risk that the jurors would be misled to believe that unless each of them agreed as to

circumstances make it likely that the inducement caused an individual to plead guilty.

(iv) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) A violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a State prisoner.

(vi) The imposition of a sentence greater than the lawful maximum.

(vii) A proceeding in a tribunal without jurisdiction.

⁶ Section 9543(a)(3) provides:

That the allegation of error has not been previously litigated and one of the following applies:

- (i) The allegation of error has not been waived;
- (ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.
- (iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.

⁷ The Commonwealth contends that all of the issues raised in Appellant's post-conviction petition are waived for failure to raise those issues on direct appeal. While we agree that some of the issues presented could have been raised on direct appeal and thus, could be deemed waived under the PCRA, we will nevertheless address all of Appellant's claims since the trial court addressed all of those claims and since it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver. Commonwealth v. DeHart, 539 Pa. 5, 650 A.2d 38 (1994).

540 Pa. 143, *150; 656 A.2d 467, **470; 1995 Pa. LEXIS 197, ***6

the existence of a particular mitigating circumstance, that mitigating circumstance could not be considered in rendering its sentence. In so holding, the Court in Mills emphasized that the sentencer must be [***7] permitted to consider all mitigating evidence. Id. at 384, 108 S. Ct. at 1870, 100 L. Ed. 2d at 400. Neither the jury instructions, the jury poll nor the verdict slips in the instant matter contained language which would violate the dictates of Mills.

During the penalty phase of the trial, the trial court instructed the jury as follows:

The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

The verdict must be a sentence of life imprisonment in all other cases.

(N.T. June 20, 1983, Vol. VI, p. 2315). This instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate Mills. Commonwealth v Hackett, 534 Pa. 210, 627 A.2d 719 (1993); [***8] Commonwealth v. Marshall, 534 Pa.

488, 633 A.2d 1100 (1993); Commonwealth v. O'Shea, 523 Pa. 384, 567 A.2d 1023 (1989), cert. denied, 498 U.S. 881, 111 S. Ct. 225, 112 L. Ed. 2d 180 (1990). Accordingly, appellant's claim with respect to the instruction is without merit.

Similarly, Appellant's claim with respect to the verdict slips is also without merit. The form of verdict slip employed [***151] in the instant matter was virtually identical to that considered by this Court in Commonwealth v. Frey, 520 Pa. 338, 554 A.2d 27 (1989), cert. denied, 494 U.S. 1038, 110 S. Ct. 1500, 108 L. Ed. 2d 635 (1990), and determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances. As such, Appellant's claim that the verdict slip form submitted to the jury in the instant matter impermissibly suggested to the jury that it must find mitigating circumstances by unanimous vote is unfounded.

Nor do the answers provided [***9] by the individual jurors during the poll suggest in any manner that they believed unanimity was required in finding mitigating circumstances. In response to defense counsel's request for a jury poll, the trial court in the instant matter stated as follows:

[**471] Ladies and gentlemen, counsel has asked for a poll. You will recall that simply means you will be called upon to rise and respond whether your verdict was, in each of

540 Pa. 143, *151; 656 A.2d 467, **471; 1995 Pa. LEXIS 197, ***9

the twelve cases, life or death.

The Foreman has indicated, as has been publicly read, that the decision of death was based upon your finding one or more aggravating circumstances which outweighs any mitigating circumstance. He further indicated that the aggravating circumstance was No. 3; the mitigating circumstance was No. 1.

I will call upon each of you individually. I will ask you to rise and indicate whether your verdict in each case, what it was, and whether or not you agreed with the statement made by the Foreman that you found one aggravating circumstance as noted, one mitigating circumstance as noted, and that the aggravating circumstance outweighed the mitigating.

(N.T. p. 2332). The trial court then asked Juror No. 1 what her verdict was with respect [***10] to the first of the twelve death penalty convictions to which she responded "Death." In response to the court's further questions, Juror No. 1 responded that her verdict was based on her finding of one or more aggravating circumstances that outweighed any mitigating [*152] circumstances; that the aggravating circumstance found by her was "No. 3," (referring to the sequential order of those circumstances as listed on the actual verdict slips); and that she found mitigating circumstance "No. 1." ⁸ The

⁸ The particular aggravating circumstance was 42 Pa.C.S. §

trial court then proceeded to ask Juror No. 1 what her sentence was with respect to each of the remaining eleven death penalty cases to which she responded "death" and whether her sentence of death thereon was based upon the same criteria as the first matter to which she responded in the affirmative. The trial court then polled the remaining jurors, asking each of them whether their sentence of death was based on the same criteria. It appears to be Appellant's contention that since the jurors were not specifically polled on each mitigating circumstance presented but not checked on the verdict slip, an inference may be drawn that the jurors were impermissibly prohibited from considering all relevant [***11] mitigating factors. We do not agree. Appellant cites this Court's decision in Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1989), in support of his position. Young, however, is distinguishable.

In Young, the verdict sheet contained explicit instructions that the mitigating circumstances be unanimously found and, upon questioning from the trial court, the foreman therein stated that the jury had [***12] "unanimously"

9711(d)(10), the defendant has been convicted of another Federal or State offense committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. The particular mitigating circumstance referred to by Juror No. 1 was 42 Pa.C.S. § 9711(e)(2), the defendant was under the influence of extreme mental or emotional disturbance.

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found two particular mitigating circumstances but had not come to any conclusion with respect to a third mitigating circumstance. This Court there held that although a proper jury instruction had been given by the trial judge, the incorrect verdict sheet together with the jury foreman's response demanded that the matter be remanded for resentencing since it could not be determined whether the jury disregarded the proper instructions as a result of the improper verdict sheet. In the instant matter, [*153] the jury was never provided with either an incorrect instruction or incorrect verdict slip. As discussed above, both the verbal instructions given by the court as well as the instructions printed on the verdict slips were correct and not impermissibly suggestive of a unanimity requirement with respect to mitigating circumstances. Nor is there anything in the trial court's questions nor the jurors' responses during the polling that would indicate that they believed they had to find mitigating circumstances unanimously. In sum, neither the instructions of the court nor the printed instructions on the verdict slips nor the questions and responses of the court and jury during polling, [***13] standing alone or viewed in total, infer a requirement of unanimity [**472] which would violate the dictates of Mills.

Moreover, we do not agree with Appellant that a specific charge explicitly informing the jury that it need not find mitigating circumstances by

unanimous vote is required. Our decision in Commonwealth v. Hackett, supra, makes clear that HN5 [↑] so long as proper instructions are given by the trial court, there is no requirement that the court specifically charge the jury that it need not be unanimous in finding mitigating circumstances. Hackett, 534 Pa. at 222-223, 627 A.2d at 725.⁹

[***14] Accordingly, for all these reasons, Appellant's claim that his sentencing procedures violated Mills was properly denied by the PCRA court.

Appellant next contends that the sentencing procedures in effect at the time of his sentencing were ambiguous and not uniformly applied in Pennsylvania, and thus violative of the *Eighth and Fourteenth Amendments of the United States Constitution*. Appellant premises his argument on a report of the Pennsylvania Criminal Procedural Rules Committee which [***154] allegedly delineated several procedural flaws with respect to the death penalty together with the fact that subsequent to his sentencing, Rule 358A of the Pennsylvania Rules of Criminal Procedure was adopted. Appellant seems to contend that the adoption of Rule 358A, although

⁹ Appellant seems to imply that the adoption of Pa.R.Crim.P. 358A, which became effective July 1, 1989, evinces the impropriety of not specifically instructing the jury on the issue of unanimity as to mitigating circumstances. As this Court recently noted in Commonwealth v. Tilley 528 Pa. 125, 143 n. 11, 595 A.2d 575, 583 n. 11 (1991), the purpose of Rule 358A is simply to provide statewide uniform sentencing verdict slips in death penalty cases and in no way suggests that the prior procedures employed in Pennsylvania were improper.

540 Pa. 143, *154; 656 A.2d 467, **472; 1995 Pa. LEXIS 197, ***14

occurring after the imposition of his sentences, somehow evinces that the procedures in place at the time he was sentenced were constitutionally deficient.¹⁰

[***15] While Appellant sets forth five specific alleged deficiencies, he fails to argue that any one or more of those alleged deficiencies actually occurred in his case. Instead, he seems to simply be arguing that because the Criminal Procedure Rules Committee believed these issues to be worthy of concern, then any death penalty sentence imposed prior to the amendments in 1989 is not constitutionally sound. This argument is ludicrous. Section 9543(a)(2) of the PCRA clearly provides that in order to obtain post-conviction relief, a defendant is required to plead and prove that his conviction or sentence resulted from one or more of the errors or defects enumerated in the Act. Clearly, Appellant has not met this burden. Moreover, as noted in footnote 6, *supra*, this Court in Commonwealth v. Tilley noted that the adoption of Rule 358A of the Rules of Criminal Procedure does not suggest the procedure employed prior thereto was

constitutionally deficient. Finally, the fact that the Rules Committee may have determined that supplemental rules needed to be implemented, does not, alone, establish that the prior rules and procedures were unconstitutional. Accordingly, Appellant was properly [***16] denied post-conviction relief on this issue.

Appellant next contends that he was denied due process of the law by the trial court's alleged failure to follow Pa. [*155] R.Crim.P. 1507 and 1508.¹¹

¹¹ Rule 1507 provides:

(a) The judge shall promptly review the motion, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the motion and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 10 days of the date of the notice. The judge thereafter shall either order the motion dismissed, or grant leave to file an amended motion, or direct that the proceedings continue.

(b) A motion for post-conviction collateral relief may be granted without a hearing when the motion and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

(c) The judge may dispose of only part of a motion without a hearing by ordering dismissal of or granting relief on only some of the issues raised, while ordering a hearing on other issues.

(d) When the motion is dismissed without a hearing, the judge:

(1) shall issue an order to that effect and shall state in the order the grounds on which the case was determined; and

(2) shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken.

Rule 1508 provides:

(a) Except as provided in Rule 1507, the judge shall order a hearing on all material issues of fact raised by the motion and

¹⁰ Appellant contends that the PCRA court failed to address this issue thereby hampering our appellate review of the issue. The Commonwealth submits, however, that the issue was addressed by the PCRA court exactly in the manner in which Appellant raised and briefed the same below. In pertinent part, the court below concluded that the adoption of Rule 358A did not render the procedures employed prior thereto improper. Even assuming the court did not address Appellant's precise argument, our review thereof is not affected insofar as his claim relates solely to an issue of law and not one dependent upon missing facts as Appellant seems to suggest.

540 Pa. 143, *155; 656 A.2d 467, **472; 1995 Pa. LEXIS 197, ***16

More specifically, Appellant [**473] argues [*156] that the trial court never gave the requisite notice of its intent to dismiss the petition nor did it afford Appellant an opportunity to respond to the court's apparent intent to dismiss. Appellant's contention is, again, unfounded.

[***17] The clear intent behind Rules 1507 and 1508 was to assure that an evidentiary hearing be held on a post-conviction petition where there are factual issues to be resolved. HN6 [↑] Where, however, the issues raised in a petition involve no disputed factual

answer, if any. The judge may deny a hearing on a specific issue of fact when a full and fair evidentiary hearing upon that issue was held at trial or at any proceeding before or after trial. The judge shall schedule the hearing for a time that will afford the parties a reasonable opportunity for investigation and preparation, and shall enter such interim orders as may be necessary in the interests of justice.

(b) The judge, on motion or request, shall postpone or continue a hearing to provide either party a reasonable opportunity, if one did not exist previously, for investigation and preparation regarding any new issue of fact raised in an amended motion or amended answer.

(c) The judge shall permit the defendant to appear in person at the hearing and shall provide the defendant an opportunity to have counsel.

(d) Upon the conclusion of the hearing the judge shall:

(1) determine all material issues raised by the motion, if any;

(2) issue an order denying relief or granting a specific form of relief and stating the grounds on which the case was determined, and issue any supplementary orders appropriate to the proper disposition of the case; and

(3) state on the record, or issue and serve upon the parties, findings of fact and conclusions of law on all material issues.

(e) If the judge disposes of the case in open court at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the motion and of the time within which the appeal must be taken. If the case is taken under advisement, the judge shall advise the defendant of the right to appeal by certified mail, return receipt requested.

issues, a hearing thereon is clearly not necessary and a resolution thereof without such a hearing does not violate the rules. Further, under Rule 1507(a), notice of a court's intention to dismiss is required only where the trial court, after review of the petition, any answer by the Commonwealth thereto, and any other matters of record, determines that a hearing is not necessary, that the petitioner is not entitled to post-conviction relief and that no further proceedings are necessary. Unequivocally, the purpose of such notice is to afford the petitioner an opportunity to respond as to why dismissal would be inappropriate. Here, however, the trial court, upon review of the petition and answer thereto, was not required to provide notice as it simply was not its intention to then dismiss the petition. While it is true that the trial court did not hold an evidentiary hearing on this matter, it appears that both Appellant and the Commonwealth [***18] agreed that the issues presented involved no factual disputes but only issues of law.¹² Appellant does not dispute that he had notice of the trial court's intention not to hold an evidentiary hearing. [*157] Surely, had he disagreed with the court's conclusion in this respect, he

¹² By Order dated December 4, 1992, the trial court scheduled oral argument on the petition, noting that it found that the petition raised no material issues of fact. It appears from the record that briefs by both Appellant and the Commonwealth had been filed prior to the date of this Order. It also appears, that following the entry of this December 4, 1992 Order, the parties agreed to submit the issues on briefs rather than proceed to oral argument.

540 Pa. 143, *157; 656 A.2d 467, **473; 1995 Pa. LEXIS 197, ***18

would have responded in an appropriate manner. Indeed, nowhere does he argue that there are [*474] issues of fact that must be determined. In sum, the trial court's manner of disposition of Appellant's Post-Conviction Petition did not violate Rules 1507 and 1508.

Next, Appellant contends that our [***19] proportionality review as provided for in 42 Pa.C.S. § 9711(h)(3)(iii) and as conducted pursuant to this Court's decision in Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984), cert. denied 469 U.S. 963, 105 S. Ct. 360, 83 L. Ed. 2d 296 (1984), denied him procedural due process under the *Fourteenth Amendment to the United States Constitution*. It is Appellant's contention that because a defendant is not provided any opportunity to contest the accuracy of the information being gathered by the Administrative Office of Pennsylvania Courts ("AOPC") and relied upon by this Court in carrying out its statutorily mandated proportionality review, he is denied due process. This due process claim is premised upon Appellant's argument that because the proportionality review impacts upon sentencing, it is a critical stage of the criminal proceedings to which due process rights of confrontation and cross-examination attach. Appellant's claim is without merit for several reasons.

First, as the trial court accurately noted, proportionality review is not an adversarial part of the trial or

sentencing [***20] procedures in a death penalty case. Indeed, it is not even a sentencing proceeding at all. Rather, it is an appellate process designed to assure that a sentence of death imposed in a particular case is not disproportionate to the penalty imposed in similar cases. Moreover, a similar claim has previously been rejected by this Court in Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986), cert. denied, 483 U.S. 1010, 107 S. Ct. 3241, 97 L. Ed. 2d 746 (1987), remanded on other grounds, 539 Pa. 5, 650 A.2d 38 (1994). There, we stated:

Appellant next argues that the death penalty statute is defective in that it provides the defense with no funds or [*158] administrative assistance to determine if the proportionality review required pursuant to 42 Pa.C.S. § 9711(h)(3)(iii) is adequately performed. Appellant's concern with the manner in which this Court reviews the proportionality of sentences in capital cases is unwarranted. In Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700, cert. denied, 469 U.S. 963, 105 S. Ct. 360, 83 L. Ed. 2d 296 (1984), [***21] we ordered the performance of an ongoing comprehensive study of all cases in which the defendant was convicted of first degree murder since the effective date of the present death penalty statute. For each such case, information has been compiled concerning the age, race and sex of

540 Pa. 143, *158; 656 A.2d 467, **474; 1995 Pa. LEXIS 197, ***21

the defendant and the victim, whether the death penalty was sought, the aggravating and mitigating circumstances presented and the evidence relating thereto, the sentence imposed, related charges and the disposition thereof, and data concerning any co-defendants. This study entitled "Pennsylvania Death Penalty Study," is maintained by the Administrative Office of Pennsylvania Courts and is made available by that office free of charge. Thus there is no barrier to access to the information upon which this Court bases its decision as to proportionality. Absent some definitive criticism of the adequacy and/or the accuracy of the information supplied by this source, the instant argument is without merit.

512 Pa. at 259-260, 516 A.2d at 669. Appellant, similar to the defendant in DeHart, has failed to point to any actual deficiencies and/or inaccuracies in the relevant information supplied by the AOPC. [***22] Moreover, Appellant makes no claim that he requested and was denied access to the information compiled by the AOPC or that he was in any manner precluded from conducting his own investigation as to the accuracy of that information. As such, Appellant is not entitled to post-conviction relief as to this issue.

Finally, Appellant contends that the trial court abused its discretion in permitting Appellant to testify and cross-examine certain witnesses and thereby denied

Appellant effective assistance [*159] of counsel. While somewhat convoluted, the crux of Appellant's argument is that the trial court erred in permitting him to assist in his own defense.

During the guilt phase of trial, counsel for Appellant informed the court that Appellant wished to testify against the advice [**475] of counsel. Accordingly, the trial court conducted an extensive colloquy explaining in great detail the rights Appellant would be foregoing if he testified and most importantly, the prejudicial effect his own admission of evidence may have on his case. During the colloquy it was clear that Appellant wished to present his theory of conspiracy ¹³ and that in so doing he intended to introduce photographs of some of the [***23] corpses thereby opening the door for the Commonwealth to introduce additional photographs previously deemed to be inadmissible as too prejudicial. ¹⁴ The trial court explained to Appellant that it previously ruled similar photographs inadmissible so as to prevent Appellant from being prejudiced thereby and that if Appellant, himself, chose to admit photographs of the victims, he would likely suffer

¹³ As this Court noted in our opinion on direct appeal in this matter, Appellant believed that the police officers, the Mayor of Wilkes-Barre, the District Attorney's office and perhaps the court were conspiring against him by concealing and altering evidence, shooting some of the victims, rearranging some of the corpses and covering up some of their wounds, and obstructing Appellant's attempts to expose the "conspiracy." See Commonwealth v. Banks, 513 Pa. at 336, 521 A.2d at 10.

¹⁴ During a pre-trial suppression hearing, the trial court ruled that the Commonwealth would not be permitted to introduce photographs of the corpses.

540 Pa. 143, *159; 656 A.2d 467, **475; 1995 Pa. LEXIS 197, ***23

prejudice as a result thereof. Appellant indicated his clear understanding of the trial court's instructions as well as the consequences of his acknowledged strategy. Accordingly, the trial court permitted him to testify. Appellant now contends that the trial court's ruling was in error and that the effect of that ruling was to deprive his counsel of actual control over the proceedings and thus, deny him "his right to effective assistance of counsel." (Brief of Appellant, p. 24). While disguised as a claim of ineffectiveness, we discern no such claim in Appellant's [*160] argument.¹⁵ No where does Appellant contend that his trial counsel were ineffective; rather he argues that the trial court, by its ruling, denied him effective assistance of counsel. In essence, what Appellant here argues is [***24] that the admission of the gruesome photographs and the cross-examination of witnesses during which Appellant used some of those photographs was so prejudicial that the court should not have permitted same, irrespective of Appellant's unwavering insistence on admitting those photographs and cross-examining those witnesses.

[***25] The issue of the admission of the photographs was raised by Appellant on direct appeal and addressed by this Court in its prior opinion in this matter. Commonwealth

¹⁵ At page 22 of his brief, Appellant complains that the trial court incorrectly addressed a "competency" claim rather than an ineffective assistance of counsel claim.

v. Banks, 513 Pa. at 348-349, 521 A.2d at 16-17. As such, that issue has been finally litigated and Appellant is not entitled to PCRA relief thereon. 42 Pa.C.S. § 9544(2). However, again, given the serious nature of the matters before us, we will proceed to address Appellant's claim.

The law is clear that HN7(f) a defendant has a constitutional right to present his own defense at trial. Commonwealth v. Bryant, 524 Pa. 564, 574 A.2d 590 (1990). A defendant may also be permitted to act as co-counsel even though he has counsel available, but that determination lies within the sound discretion of the trial court. Commonwealth v. Colson, 507 Pa. 440, 490 A.2d 811 (1985), cert. denied, 476 U.S. 1140, 106 S. Ct. 2245, 90 L. Ed. 2d 692 (1986). Based upon our review of the record, we are satisfied that the trial court here did not abuse its [***26] discretion in permitting appellant to assist in his defense. First, our review of the record reveals that Appellant knowingly and intelligently waived his right against self-incrimination. The record demonstrates that Appellant was fully informed and indicated his understanding of the risks inherent in his participation in his own defense. In addition, this Court previously reviewed the competency determinations of the trial court, including those rendered at the [*161] time Appellant chose to testify, and concluded that lower court did not err in finding Appellant competent. Commonwealth v. Banks,

540 Pa. 143, *161; 656 A.2d 467, **475; 1995 Pa. LEXIS 197, ***26

513 Pa. at 336-344, 521 A.2d at 10-14.

Appellant's final claim was, thus, properly denied by the trial court.

[**476] For all the foregoing reasons, the order of the Court of Common Pleas of Luzerne County is affirmed.¹⁶

Mr. Chief Justice Nix files a concurring [***27] opinion.

Mr. Justice Montemuro is sitting by designation.

Concur by: NIX

Concur

CONCURRING OPINION

NIX, C.J.

DECIDED: March 27, 1995

On direct appeal, I dissented on the basis that the trial judge failed to ensure that Banks made a knowing and intelligent waiver of his right to counsel by permitting him to introduce prejudicially inflammatory pictures. I continue to adhere to this view; however, I am constrained to recognize that this issue has been finally litigated and is not subject to collateral attack in its present posture. See 42 Pa.C.S. § 9544(2).

End of Document

¹⁶ The Prothonotary of the Supreme Court is directed to transmit the complete record in this case to the Governor. 42 Pa.C.S. § 9711(i).

 Caution
As of: March 5, 2019 10:49 PM Z

United States v. Zaki

United States District Court for the Eastern District of Michigan, Southern Division

October 30, 2014, Decided; October 30, 2014, Filed

Case No: 14-20281

Reporter

2014 U.S. Dist. LEXIS 154064 *; 2014 WL 5499383

United States of America, Plaintiff, v.
Scott Zaki, Defendant.

Subsequent History: Motion granted
by United States v. Zaki, 2015 U.S. Dist.
LEXIS 27350 (E.D. Mich., Mar. 6,
2015)

Later proceeding at United States v.
Zaki, 2016 U.S. Dist. LEXIS 78946 (
E.D. Mich., June 17, 2016)

Later proceeding at United States v.
Zaki, 2017 U.S. Dist. LEXIS 82715 (
E.D. Mich., May 31, 2017)

Prior History: Zaki v. United States,
2014 U.S. Dist. LEXIS 121684 (E.D.
Mich., Sept. 2, 2014)

Core Terms

competency, says, reasonable cause,
Indictment, pre-**trial**, **stand trial**,
proceedings, Recusal, Notice,
competency determination, mental
competence, best interest, motions,
psychological evaluation,
representations, incompetent, questions

Counsel: [*1] For Austin Pellerito,
Defendant: Joseph R. Arnone, LEAD

ATTORNEY, Arnone Law Offices,
PLLC, Mt. Clemens, MI; Nicholas J.
Vendittelli, LEAD ATTORNEY,
Dearborn, MI.

For Christine Welsh, Defendant: David
Griem, Detroit, MI.

For Anthony Swan, Defendant: Richard
H. Morgan, Jr., Law Office of Richard H.
Morgan Jr, Pontiac, MI.

For Joseph Harries, Defendant: Michael
S. Friedman, LEAD ATTORNEY,
Birmingham, MI.

For Jake Manikas, Defendant: Joseph
A. Niskar, LEAD ATTORNEY,
Farmington, MI.

For Jacob Silcott, Defendant: Lawrence
B. Shulman, LEAD ATTORNEY, Flood
Law PLLC, Royal Oak, MI.

For David Donahue, Defendant: Joseph
R. Arnone, LEAD ATTORNEY, Arnone
Law Offices, PLLC, Mt. Clemens, MI.

For Scott Zaki, Defendant: Federal
Defender, LEAD ATTORNEY, Federal
Defender Office, Detroit, MI; Sanford A.
Schulman, LEAD ATTORNEY, Detroit,
MI.

For Victor Roy Trebnik, Defendant:

Sanford Plotkin, LEAD ATTORNEY,
Sanford Plotkin, P.C., Detroit, MI.

For United States of America, Plaintiff:
Brandon M. Bolling, LEAD ATTORNEY,
United States Attorney's Office, General
Crimes Unit, Detroit, MI.

Judges: Honorable Victoria A. Roberts,
United States District Judge.

Opinion by: Victoria A. Roberts

Opinion

ORDER

I. Introduction

According to the indictment filed [*2] by the Government, Defendant Zaki involved himself in an Eastern District of Michigan drug distribution organization. Lately, Mr. Zaki has filed numerous papers with the Court. On October 16, 2014, the Court Clerk received Zaki's request for three audio transcripts and two typed transcripts. Zaki amended this request to correct the date for one of the transcripts. On October 20, 2014, Zaki filed a "Notice of Decision to Remove Counsel [and] Proceed without an Attorney." On the same day, he filed a "Motion for the Recusal of Judge Victoria A. Roberts." Then, on October 21, 2014, Zaki filed a "Motion to Object to and Dismiss Indictment Without Prejudice."

The Court held an on the record pre-

trial conference on October 27, 2014. At that time, the Government made an oral Motion for a Competency Evaluation.

The Court makes the following rulings: (1) Notice to Remove Counsel Sanford A. Schulman is **GRANTED**; (2) request for transcripts is **GRANTED**; (3) Motion to Proceed without an Attorney and Motion to Object to and Dismiss Indictment Without Prejudice are held in **ABEYANCE** pending a competency determination; (4) Motion for the Recusal of Judge Victoria A. Roberts is **DENIED**; (5) Stipulated Order [*3] for Competency Evaluation filed August 4, 2014, is **SUPERSEDED** by this Order; and (6) Government motion for a competency evaluation is **GRANTED**.

II. Background

On July 28, 2014, Zaki's attorney, Sanford A. Schulman, filed a motion for a psychological evaluation under 18 U.S.C. §4241 and §4247. In support of the motion, Schulman said Zaki has: (1) demonstrated an understanding of the nature of the charges but may lack capacity to assist defense; (2) expressed significant anxiety and experiences symptoms associated with post traumatic stress disorder; (3) agreed to participate in a psychological evaluation; (4) engaged in erratic and unpredictable conduct; and (5) given legal instructions regarding motions that may not be in his best interest.

Schulman was specific that his motion was not based on Zaki's inability to understand the nature of the proceedings. He also said the motion was not notice of an insanity defense. Rather, he requested the psychological evaluation for the limited purpose of determining whether Zaki is competent to assist in his own defense.

Shortly after the motion was filed, the parties submitted a Stipulated Order for Competency Evaluation. The Order states that the Court found Zaki's [*4] health, the circumstances of the offense, his general appearance, and his in court behavior warrant an evaluation. The Court ordered Zaki evaluated for competency at the facility where he is detained.

In his Second Motion for Pre-Trial Conference and Status Conference, Schulman says he met with Zaki who appeared to agree to participate in a psychiatric exam. However, when Dr. Jeffrey Wendt attempted to conduct an evaluation, Zaki refused to participate. Dr. Wendt did not prepare a report or recommendation.

Schulman says Zaki instructed him not to file pre-trial motions. Further, Zaki instructed him not to engage in pre-trial plea negotiations or proffers. Schulman believes Zaki's conduct may not be in his best interest.

In his "Notice of Decision to Remove Counsel [and] Proceed without an Attorney," Zaki says he wants Schulman removed because Schulman

violated his *Sixth Amendment* rights by improperly and ineffectively advising him. Zaki says Schulman filed a motion for a competency evaluation which Zaki did not request. He says there is no factual basis for a competency evaluation and it is against his best interest. Zaki wants to represent himself.

Mr. Schulman is Zaki's second attorney. Zaki's first [*5] attorney, Thomas W. Jakuc, withdrew from representation because of a total breakdown in the attorney-client relationship.

At the recent conference on the record, the Court heard additional comments from Zaki on his pending motions.

III. Discussion

A. Motion for Recusal

Under 28 U.S.C. 455, a federal judge is required to disqualify in any proceeding where impartiality might reasonably be questioned, or in other situations involving personal bias, prejudice, or a conflict of interest. 28 U.S.C. §455(a) and (b)(1); *Gargallo v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 961 F.2d 1577, *5 1992 WL 99456 (6th Cir. May 12, 1992). The standard for recusal is whether a reasonable person, knowing all the circumstances, would consider the judge impartial. *United States v. Hurst*, 951 F.2d 1490, 1503 (6th Cir. 1991).

As grounds for the motion, Zaki says Judge Roberts "clearly sides herself with the prosecution." Zaki says the Judge spoke "for the prosecution" at the July 24, 2014 status conference, when she said "Well I'm sure we'll have some motions to file in response..." Zaki says this comment was made after defense counsel's statement that a motion would be filed by Monday.

The Court has not reviewed a transcript from that hearing, but if the Court used the term "we," it was meant generally. The Court does not believe impartiality may be reasonably questioned based on one word.

Secondly, Zaki says the [*6] Court filed the Stipulated Order for Competency Evaluation without his knowledge. Zaki says the grounds for the motion (mental health, circumstances of the offense, general appearance, and in court behavior) are improper. Zaki says basing the determination on his general appearance is discrimination and amounts to profiling. Zaki says his appearance, verbal communications, language skills, and behavior since his arrest do not indicate a mental deficiency or inability to comprehend the alleged crime of January 7, 2014, the circumstances of the investigation, the indictment, or any inability to properly defend or assist in his defense. Zaki says the competency evaluation is a deliberate attempt to hamper his defense and delay his right to trial within seventy days under the Speedy Trial Act, 18 U.S.C.A. §§ 3161-3174.

Since Zaki denies that he agreed to a competency evaluation, and he requests Schulman's removal, this Order supercedes the Stipulated Order. The Court finds independent grounds warrant a psychological evaluation and competency hearing for Mr. Zaki.

Third, Zaki says Judge Roberts interrupted him in mid sentence during the July 24, 2014 status conference to explain to him the potential risks of self-representation. [*7] Zaki says Judge Roberts asked him questions regarding his education, understanding of criminal law, and the court system. Zaki says the questions about his competency would be better characterized as "testing" his competency.

The Court did interrupt Zaki during the July 24, 2014 status conference. The Court had just removed Thomas W. Jakuc as Zaki's attorney. The Court stopped Zaki from speaking because he was then not represented by counsel, and the Court was considering whether to appoint new counsel or standby counsel. The Court was concerned that Zaki might make incriminating statements. The Court's hesitation does not demonstrate impartiality or bias.

Fourth, Zaki says he obtained information from a July 8, 2014 phone call with the Federal Defender Office which suggested Judge Roberts requested Schulman to represent Zaki. Zaki says this information leads him to conclude that there is an "off the record" or personal relationship between Judge

Roberts and Mr. Schulman.

The Court had nothing to do with the appointment of Mr. Schulman. Schulman is a member of a panel of attorneys who have made themselves available to represent indigent defendants in criminal cases. The Federal Defender [*8] Office has a process for selecting these attorneys; the Court was not involved. Any contrary information that Zaki received was misinformation.

Finally, Zaki says Judge Roberts is biased. Zaki alleges Judge Roberts violated the judicial code of conduct by being "completely ignorant and detached from her duty as a judicial officer." Zaki says Judge Roberts violated his constitutional rights by entering an order for a competency evaluation.

Zaki seems to believe a conspiracy surrounded the entry of the order. He says Judge Roberts joined "the prosecution and the attorney she hand picked." However, Judge Roberts merely entered an order stipulated to by the parties, both represented by counsel.

Zaki provides no evidentiary support for his allegations of bias or impropriety; his Motion for the Recusal of Judge Victoria A. Roberts is **DENIED**.

B. Competency Evaluation

The conviction of a person while he is

legally incompetent is unconstitutional. Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). A motion to determine competency may be raised at any time after commencement of prosecution and prior to sentencing. 18 U.S.C.A. §4241(a). The motion may be raised by the defendant, the Government's attorney, or by the Court itself [*9] on its own motion. *Id.* The Court shall grant the motion, or order such hearing on its own, "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." *Id.* The test is disjunctive, and a defendant is incompetent if he or she is unable to perform either function. Determination of Mental Competency, 1A Fed. Prac. & Proc. Crim. §208, n.13 (4th ed.).

There is no precise definition of reasonable cause in this context, but the Supreme Court held that "any significant doubt as to the defendant's competency requires a psychiatric or psychological competency evaluation." United States v. Parks, 198 F.3d 248 1999 WL 1045558 (6th Cir. Nov. 11, 1999) citing Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). "The determination of reasonable cause is left in large part to the discretion of the district court."

Harper v. Parker, 177 F.3d 567, 571 (6th Cir. 1999).

The district judge may hold a hearing on the initial motion to determine if reasonable cause exists. *Determination of Mental Competency*, at 2. However, the statute does not require a hearing. U.S. v. Jackson, 179 F. Appx 921, 933 2006 WL 1208077 (6th Cir. May 4, 2006). The text of § 4241 contains no requirement that reasonable cause be satisfied by certain proof; representations by counsel have been held [*10] sufficient. *Id.*

Courts consider several factors when making this reasonable cause determination. In *United States v. Jackson*, the Sixth Circuit affirmed the magistrate judge's reasonable cause determination based on such factors as: (1) a motion by defense counsel for determination of mental competency to stand trial; (2) representations by counsel that the motion was based on personal observations of defendant and conversations with defendant's mother and social worker; (3) representations by counsel that defendant had recently undergone evaluation and testing for mental illness; and (4) representations by counsel that defendant is currently taking medications consistent with a diagnoses of mental illness. *Id.*

The bar for incompetency is high. United States v. Miller, 531 F.3d 340, 350 (6th Cir. 2008). "It does not follow that because a person is mentally ill he is not competent to stand trial." *Id.* at

349 (finding that reasonable cause did not exist when defendant demonstrated that he could consult with his attorney and that he understood the nature of the proceedings); United States v. Black, 465 F. Appx 510, 513 2012 WL 695631 (6th Cir. Mar. 5, 2012) (insufficient evidence in the record for competency hearing when none of defendant's attorneys expressed doubt regarding his competence, the psychologist who examined Black found [*11] that he was competent to stand trial, and the record reflects that defendant, although showing signs of paranoia, understood the proceedings and was able to participate actively in his own defense).

Lawyers have a professional duty to question competency if they have a good faith doubt as to the defendant's competence. U.S. v. Jackson, 179 F.Appx at 933. The Sixth Circuit stated that decisions construing section 4241 "hold that once a motion is made pursuant to it, unless the motion is frivolous or is not made in good faith, the district judge must appoint a psychiatrist to examine the accused." *Id.* Even if the defendant requests an examination, the court has an independent obligation to determine reasonable cause before ordering an examination. U.S. v. Davis, 93 F.3d 1286, 1290 (6th Cir. 1996).

At the pre-trial conference held on October 27, 2014, AUSA Bolling made an oral motion for the Government, requesting a competency determination under both prongs of

§4241(a). AUSA Bolling says the Government is unsure whether Zaki is able to understand the nature and consequences of the proceedings against him or able to assist properly in his defense. Attorney Bolling based the motion on his own observations of Zaki as well as legal arguments in handwritten motions Zaki filed. Attorney Bolling [*12] says the Government is prepared to offer a plea agreement to Zaki, and he questions whether Zaki has the ability to act in his own best interests and comprehend the substance of a plea agreement.

The Court finds the Government's motion is not frivolous and that it was made in good faith.

Additionally, some of Zaki's instructions to his attorney are concerning. Zaki instructed counsel not to file pre-trial motions or engage in pre-trial plea negotiations or proffers. The Court does not know whether these are sound decisions by Zaki; or, whether they spring from a mental disease or defect which inhibits his ability to properly assist in his defense. But the Court does agree with counsel that these instructions may be adverse to Zaki's best interests.

The Court has also observed Zaki during court proceedings. Zaki's behavior suggests that while he is a bright young man, he demonstrates an inability or unwillingness to listen. At the October 27, 2014 hearing, Zaki constantly interrupted anyone who

spoke, resisted rulings made by the Court, and turned to spectators in the Court to ask for their names and contact information. Further, Zaki seems to believe quite strongly that a conspiracy exists [*13] between the Court, Mr. Schulman, and the Government.

Based on its own observations, representations by attorneys, and the record as a whole, the Court finds reasonable cause to believe that Zaki may suffer from a mental disease or defect which renders him mentally incompetent to the extent that he may be unable to: (1) understand the nature and consequences of the proceedings against him; and (2) properly assist in his defense. An evidentiary hearing is unnecessary; there is sufficient evidence as outlined to support reasonable cause for Mr. Zaki to submit to a competency evaluation. Zaki's constitutional right to due process mandates an adequate process to determine his ability to stand trial.

The Court **GRANTS** the government's oral motion for a competency evaluation. Zaki must submit to a psychiatric or psychological examination by Jeffrey Wendt, PH.D., Forensic Psychologist, P.O. Box 26262, Lansing, Michigan, in the facility where Zaki is held. Dr. Wendt must file a report with the Court. Thereafter, the Court will hold a hearing to determine whether Zaki is able to stand trial and whether he is competent to proceed without an attorney. The hearing must be conducted according to the [*14]

provisions of §4247(d):

At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

Following the hearing, the Court will make a determination as to Zaki's competency. 18 U.S.C.A. §4241(d).

C. Motion to Remove Counsel and Proceed Without an Attorney

1. Notice Removing Counsel

It is clear that there has been a breakdown in communication between Mr. Zaki and Mr. Schulman. Accordingly, Zaki's Notice of Decision to Remove Counsel Sanford A. Schulman is **GRANTED**.

2. Motion to Proceed Without an Attorney

A defendant's waiver of his right to counsel must be knowingly and

intelligently made. United States v. McDowell, 814 F.2d 245, 248 (6th Cir. 1987). The Sixth Circuit also recognizes that the "degree of competency required to waive counsel is 'vaguely higher' than the competency required to stand trial." Id. at 250. When there is reason for a court to doubt competency, the court should make a competency determination [*15] before finding the waiver of the Defendant's right to counsel is valid. United States v. Abdulmutallab, 739 F.3d 891, 903 (6th Cir. 2014) (court did not err in refusing to conduct a competency hearing prior to allowing defendant to proceed *pro se* when neither the defendant's behavior in courtroom nor standby counsel's motion for a competency examination raised sufficient doubt as to competency).

It is unclear whether Zaki has the ability to knowingly and intelligently waive his right to counsel. Depending on further inquiry, Zaki may be deemed able to represent himself. Zaki's Motion to Proceed without an Attorney is held in **ABEYANCE** pending a competency determination.

D. Motion to Dismiss Indictment

Zaki filed a Motion to Object to and Dismiss Indictment Without Prejudice. The Government has not had an opportunity to respond. This motion is held in **ABEYANCE** pending a competency determination.

E. Transcript Request

On October 12, 2014, Zaki filed a request for audio and typed transcripts for July 3, 2014 and July 24, 2014. He also requested an audio transcript for June 19, 2014. Zaki amended this request to correct one of the dates.

At the October 27th hearing, the Court provided Zaki with a copy of the form and written instructions on how to request [*16] transcripts. The Court informed Zaki that during his hearings a court reporter was present and, therefore, no audio transcripts are available. Zaki's request for Transcripts is **GRANTED**.

F. Speedy Trial Act

In his Motion for Recusal, Zaki raises a concern that the competency evaluation is an attempt to delay his right to a trial within seventy days.

The Speedy Trial Act, 18 U.S.C.A. §§ 3161-3174, provides a seventy day period from arraignment until commencement of trial. A number of exclusions are set forth in §3161(h). These periods of delay are excluded in the seventy day calculation:

- (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
- (C) delay resulting from any

interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

One of these exclusions is any delay resulting from any proceeding - including any examinations - to determine mental [*17] competency. §3161(h)(1)(A). Accordingly, the time between the filing of the Motion for Psychological Evaluation and the Stipulated Order is excluded delay. The clock remained stopped when the Stipulated Order was filed. This Order for a psychological examination and competency hearing supercedes the Stipulated Order and any additional delay falls within the statutory exclusion.

The fact that Zaki now says he never agreed to a psychological examination does not affect his rights under the Speedy Trial Act. A defendant cannot "rely on an alleged disagreement with his attorney regarding the efficacy of a mental competency exam, which is ultimately conducted in his best interest, to later challenge his indictment under the Speedy Trial Act on the basis of delays caused by the competency examination." United States v. Murphy, 241 F.3d 447, 455 (6th Cir. 2001).

In *Murphy*, the Sixth Circuit says every court that has decided the issue has held that §4247(b) does not limit the time period for a competency examination with respect to time calculations. *Id.* at 456. See, *United States v. Noone*, 913 F.2d 20, 25-27 (1st Cir. 1990) (exclusion of time begins when the motion to determine competency is filed and ends when competency is determined); *United States v. Vasquez*, 918 F.2d 329, 333 (2nd Cir. 1990) (ten month delay between motion for psychiatric exam and date court received competency report is [*18] excludable).

Since the Court believes further inquiry is necessary to determine Zaki's competence to stand trial, such evaluation does not violate Zaki's rights under the Speedy Trial Act.

IV. Conclusion

The Court makes the following rulings: (1) Notice to Remove Counsel Sanford A. Schulman is **GRANTED**; (2) request for transcripts is **GRANTED**; (3) Motion to Proceed without an Attorney and Motion to Object to and Dismiss Indictment Without Prejudice are held in **ABEYANCE** pending the competency determination; (4) Motion for the Recusal of Judge Victoria A. Roberts is **DENIED**; (5) Stipulated Order for Competency Evaluation filed August 4, 2014 is **SUPERSEDED** by this Order; and (6) Government motion for a competency evaluation is **GRANTED**.

IT IS ORDERED.

/s/ Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: October 30, 2014

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As of: March 5, 2019 10:18 PM Z

Riggins v. Nevada

Supreme Court of the United States

January 15, 1992, Argued ; May 18, 1992, Decided

No. 90-8466

Reporter

504 U.S. 127 *; 112 S. Ct. 1810 **; 118 L. Ed. 2d 479 ***; 1992 U.S. LEXIS 2701 ****; 60 U.S.L.W. 4374; 92 Cal. Daily Op. Service 4236; 92 Daily Journal DAR 6670; 6 Fla. L. Weekly Fed. S 237

DAVID RIGGINS, PETITIONER v.
NEVADA

Prior History: [****1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA.

Disposition: 107 Nev. 178, 808 P. 2d 535, reversed and remanded.

Core Terms

medication, drugs, antipsychotic, side effect, demeanor, fair trial, Psychiatric, incompetent, appearance, unwanted, courts, liberty interest, involuntary, reversal, trial court, deprived, antipsychotic medication, psychiatrist, rights, proceedings, detainees, patient, cases, involuntary medication, due process, milligrams, avoiding, sentence, inmate, dose

Case Summary

Procedural Posture

Defendant sought certiorari review of the judgment of the Supreme Court of Nevada, which affirmed his murder and

robbery convictions although defendant was involuntarily under the influence of an antipsychotic drug during trial.

Overview

Following arrest, defendant was placed on an antipsychotic drug. Defendant was found competent to stand trial, although one psychiatrist testified that he was not competent. Defendant filed a motion to be taken off the drug until after trial, and the trial court denied the motion without explaining its rationale. Defendant was convicted of murder and robbery, and the state supreme court affirmed his convictions. The U.S. Supreme Court reversed, holding that once defendant filed a motion to terminate administration of antipsychotic medication, the State became obligated to establish the need for the drug and the medical appropriateness of the drug. The Court found that the trial court erred by allowing administration of the drug to continue without making any determination of the need for this course or any findings about reasonable alternatives. The Court also found that it was possible that the side effects had

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an impact upon defendant's outward appearance, the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel. Thus, defendant's *U.S. Const. amends. VI and XIV* rights were violated.

Outcome

The Court reversed defendant's convictions and remanded as the Nevada courts failed to make sufficient findings to support forced administration of an antipsychotic drug during defendant's trial.

LexisNexis® Headnotes

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

HN1[⚡] Prisoner Rights, Medical Treatment

A prisoner's interest in avoiding involuntary administration of antipsychotic drugs is protected under the *Fourteenth Amendment's Due Process Clause*. The forcible injection of medication into a nonconsenting

person's body represents a substantial interference with that person's liberty.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Public Health & Welfare Law > Healthcare > Mental Health Services > Treatment

HN2[⚡] Constitutional Law, Substantive Due Process

Due process allows a mentally ill inmate to be treated involuntarily with antipsychotic drugs where there is a determination that the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN3[⚡] Constitutional Law, Substantive Due Process

Forcing antipsychotic drugs on a convicted prisoner is impermissible

504 U.S. 127, *127; 112 S. Ct. 1810, **1810; 118 L. Ed. 2d 479, ***479; 1992 U.S. LEXIS 2701, ****1

absent a finding of overriding justification and a determination of medical appropriateness. The *Fourteenth Amendment* affords at least as much protection to persons the State detains for trial.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Criminal Law & Procedure > Trials > Prison Attire & Restraints

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN4[↓] Prisoner Rights, Medical Treatment

Like the consequences of compelling a defendant to wear prison clothing, or of binding and gagging an accused during trial, the precise consequences of forcing antipsychotic medication upon a defendant during trial cannot be shown from a trial transcript.

Lawyers' Edition Display

Decision

Nevada court's judgment upholding conviction reversed and remanded, where defendant claimed that forced administration of antipsychotic drug during trial violated rights under *Sixth* and *Fourteenth Amendments*.

Summary

After being taken into custody on a homicide charge, a defendant complained to a psychiatrist about hearing voices in his head and having trouble sleeping. The psychiatrist prescribed an antipsychotic drug, with which the defendant had been successfully treated in the past, and an antiepileptic drug. Following a determination by the District Court of Clark County, Nevada, that the defendant was competent to stand trial, the defense moved for an order suspending administration of both drugs until the end of the defendant's trial, on the grounds that (1) continued administration of these drugs infringed on his freedom; (2) the effect on his demeanor and mental state during trial would deny him due process; and (3) because he intended to offer an insanity defense at trial, he had a right to show jurors his true mental state. The District Court held an evidentiary hearing at which one psychiatrist testified that taking the defendant off the medication would not render him incompetent to stand trial or noticeably alter his behavior; another psychiatrist concurred as to competence and stated that the effects of the antipsychotic drug would not be noticeable to jurors if medication continued; a third psychiatrist expressed the view that the antipsychotic drug made the defendant calmer and more relaxed, that an excessive dose would cause drowsiness, and that the defendant's behavior if taken off the

504 U.S. 127, *127; 112 S. Ct. 1810, **1810; 118 L. Ed. 2d 479, ***479; 1992 U.S. LEXIS 2701, ****1

drug was unpredictable; and a fourth psychiatrist maintained that the defendant was incompetent to stand trial, and would likely regress into manifest psychosis and become very difficult to manage if taken off the antipsychotic drug. The District Court denied the motion to terminate medication in a one-page order which gave no indication of the court's rationale. At the close of a trial in which the defendant presented expert testimony about the effect of the antipsychotic drug on his demeanor, the jury found the defendant guilty of murder and robbery and sentenced him to death. In affirming the conviction and sentence, the Supreme Court of Nevada held that (1) the expert testimony at trial was sufficient to inform the jury of the effects of the antipsychotic drug on the defendant's demeanor and testimony; and (2) thus, while the defendant's demeanor was relevant to his insanity defense, the denial of his motion to terminate medication was neither an abuse of discretion nor a violation of the defendant's trial rights (808 P2d 535).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and White, Blackmun, Stevens, and Souter, JJ., it was held that reversal was required because the state courts had failed to make findings sufficient to justify the forced administration of the drug to the defendant during his trial--

given that the trial court had made no determination concerning the need for the drug or its medical appropriateness and had made no findings about reasonable alternatives--and this error may have violated the defendant's rights under the *Federal Constitution's Sixth and Fourteenth Amendments*, including his right to a full and fair trial and his due process liberty interest in freedom from unwanted antipsychotic drugs, since (1) it was possible that potential drug side effects testified to by experts at the hearing on the defendant's motion impacted not only his outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel; (2) efforts to prove or disprove actual prejudice from the record before the Supreme Court would be futile, and guesses whether the outcome of the trial might have been different if the motion had been granted would be purely speculative; (3) even though the defendant was allowed at trial to present expert testimony about the effect of the drug on his demeanor, an unacceptable risk of trial prejudice remained; and (4) as the record contained no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, there was no basis for saying that the substantial probability of trial prejudice in the case at hand was justified.

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Kennedy, J., concurred in the judgment, expressing the view that (1) absent an extraordinary showing by the state, the due process clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering an accused competent for trial in most cases; and (2) it is doubtful that such a showing can be made given the present understanding of the properties of these drugs.

Thomas, J., joined in part (except as to point 3 below) by Scalia, J., dissented, expressing the view that (1) the defendant's inability to introduce evidence of his mental condition by appearing at trial in an unmedicated state did not render his trial fundamentally unfair; (2) it could not be concluded that the defendant had had less than a full and fair trial merely because of the possibility that the antipsychotic drug had side effects, where the defendant had no claim of legal incompetence and had failed to allege specific facts to support a claim that he could not participate effectively in his defense; (3) the defendant could not complain about a deprivation of his liberty interest in avoiding unwanted medication, because (a) the record contained no finding of fact with respect to his claim that the medication was involuntary, (b) he did not raise this claim below, and (c) the Supreme Court had granted certiorari to determine whether forced medication during trial violated the right to a full and fair trial,

not whether the state courts had made the necessary findings to support forced medication; and (4) the precedent establishing such a liberty interest involved a civil action for damages and injunctive relief, and ought not to be expanded to include the remedy of reversing a criminal conviction.

Headnotes

APPEAL §1677 > CONSTITUTIONAL LAW §854 > CRIMINAL LAW §46 > due process -- fair trial -- forced medication of defendant -- reversal -- remand -- insufficient findings -- > Headnote:
[LEdHN\[1A\]\[↓\]](#) [1A][LEdHN\[1B\]\[↓\]](#)
[\[1B\]LEdHN\[1C\]\[↓\]](#) [1C][LEdHN\[1D\]\[↓\]](#)
 [1D]

The United States Supreme Court will reverse and remand a judgment by a state's highest court upholding a homicide defendant's conviction and death sentence--where an antipsychotic drug, with which the defendant previously had been treated successfully, was prescribed for the defendant during pretrial detention after he complained of hearing voices in his head and having sleep problems, but the defendant unsuccessfully moved the state trial court to terminate administration of the drug during trial so that it would not affect his demeanor and mental state at the trial, in which he intended to present an insanity defense--because the state courts failed to make findings sufficient to

504 U.S. 127, *127; 112 S. Ct. 1810, **1810; 118 L. Ed. 2d 479, ***479; 1992 U.S. LEXIS 2701, ****1

justify the forced administration of the drug to the defendant during trial, given that the trial court made no determination concerning the need for the drug or its medical appropriateness and made no findings about reasonable alternatives, and this error may have violated the defendant's rights under the *Federal Constitution's Sixth and Fourteenth Amendments*, including his right to a full and fair trial and his due process liberty interest in freedom from unwanted antipsychotic drugs, since (1) it is possible that potential drug side effects testified to by experts at a hearing on the defendant's motion--which side effects included making the defendant "uptight," drowsy, or confused--impacted not only his outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel; (2) efforts to prove or disprove actual prejudice from the record before the Supreme Court would be futile, and guesses whether the outcome of the trial might have been different if the motion had been granted would be purely speculative; (3) the fact that the defendant was allowed at trial to present expert testimony about the effect of the drug on his demeanor does nothing to cure the possibility that the substance of his testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of the drug, and an unacceptable risk of

trial prejudice remains; and (4) as the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, there is no basis for saying that the substantial probability of trial prejudice in the case at hand was justified. (Thomas and Scalia, JJ., dissented from this holding.)

APPEAL §806.5 > criminal case -- findings by state court -- Supreme Court review --
> Headnote:

LEdHN[2][1] [2]

The United States Supreme Court, in reviewing on certiorari a decision by a state's highest court that the state did not violate the rights of a homicide defendant by forcing him to take an antipsychotic drug during trial, will adhere to the state court's understanding that the medication was involuntary and forced, given (1) the parties' position that once the state trial court denied the defendant's motion to terminate the medication, subsequent administration of the drug was involuntary, and (2) the absence of any record evidence to the contrary. (Thomas, J., dissented from this holding.)

APPEAL §1289 > presumption --

504 U.S. 127, *127; 112 S. Ct. 1810, **1810; 118 L. Ed. 2d 479, ***479; 1992 U.S. LEXIS 2701, ****1

medication -- > Headnote:

LEdHN[3][↓] [3]

The United States Supreme Court, in reviewing on certiorari a decision by a state's highest court that the state did not violate the rights of a homicide defendant by forcing him to take an antipsychotic drug during trial, will presume that administration of the drug was medically appropriate, where, although **defense** counsel stressed that the defendant had received a very high dose of the drug, at no point did counsel suggest to the state courts that administration of the drug was medically improper treatment for his **client**.

CONSTITUTIONAL LAW §853 > due process -- prisoner -- drug treatment -- > Headnote:

LEdHN[5][↓] [5]

Forcing antipsychotic drugs on a convicted state prisoner is impermissible, under the due process clause of the *Federal Constitution's Fourteenth Amendment*, absent a finding of overriding justification and a determination of medical appropriateness.

APPEAL §431 > failure to **raise** issue -- in state's highest court -- in petition for certiorari -- > Headnote:

LEdHN[4][↓] [4]

The United States Supreme Court, in reviewing on certiorari a decision by a state's highest court that the state did not violate the rights of a homicide defendant by forcing him to take an antipsychotic drug during trial, will not address the defendant's claim under the *Federal Constitution's Eighth Amendment* that administration of the drug denied him an opportunity to show jurors his true mental condition at his sentencing hearing, because that argument was presented neither to the state court nor in the defendant's petition for certiorari.

CONSTITUTIONAL LAW §854 > due process -- criminal defendant -- involuntary drug treatment -- > Headnote:

LEdHN[6][↓] [6]

Forcing antipsychotic drugs on persons the state detains for trial is impermissible, under the due process clause of the *Federal Constitution's Fourteenth Amendment*, absent a finding of overriding justification and a determination of medical appropriateness; thus, once a state homicide defendant--for whom an antipsychotic drug with which he previously had been treated successfully was prescribed during pretrial detention after he complained of hearing voices in his head and having sleep problems--moves to terminate administration of antipsychotic

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medication until the end of his trial so that it will not affect his demeanor and mental state at trial, the prosecution becomes obligated to establish the need for the drug and its medical appropriateness. (Thomas and Scalia, JJ., dissented in part from this holding.)

CONSTITUTIONAL LAW §854 > due process -- criminal defendant -- involuntary drug treatment -- > Headnote:

LEdHN[7][↓] [7]

A state can satisfy the due process clause of the *Federal Constitution's Fourteenth Amendment*, with regard to the denial of a homicide defendant's motion to terminate administration of antipsychotic medication until the end of the trial so that it will not affect the defendant's demeanor and mental state at trial, if the prosecution demonstrates, and the state trial court finds, that treatment with antipsychotic medication is medically appropriate and, considering less intrusive alternatives, essential for the sake of the defendant's safety or the safety of others.

CRIMINAL LAW §46 > rights of accused -- prejudice -- > Headnote:

LEdHN[8][↓] [8]

Prejudice during a criminal trial to the rights of a defendant can sometimes be justified by an essential state interest.

Syllabus

When petitioner Riggins, while awaiting a Nevada trial on murder and robbery charges, complained of hearing voices and having sleep problems, a psychiatrist prescribed the antipsychotic drug Mellaril. After he was found competent to stand trial, Riggins made a motion to suspend the Mellaril's administration until after his trial, arguing that its use infringed upon his freedom, that its effect on his demeanor and mental state during trial would deny him due process, and that he had the right to show jurors his true mental state when he offered an insanity defense. After hearing the testimony of doctors who had examined Riggins, the trial court denied the motion with a one-page order giving no indication of its rationale. At Riggins' trial, he presented his insanity defense [****2] and testified, was convicted, and was sentenced to death. In affirming, the State Supreme Court held, *inter alia*, that expert testimony presented at trial was sufficient to inform the jury of the Mellaril's effect on Riggins' demeanor and testimony.

Held: The forced administration of antipsychotic medication during Riggins' trial violated rights guaranteed by the *Sixth* and *Fourteenth Amendments*. Pp. 133-138.

(a) The record narrowly defines the issues in this case. Administration of Mellaril was involuntary once Riggins'

504 U.S. 127, *127; 112 S. Ct. 1810, **1810; 118 L. Ed. 2d 479, ***479; 1992 U.S. LEXIS 2701, ****2

motion to terminate its use was denied, but its administration was medically appropriate. In addition, Riggins' *Eighth Amendment* argument that the drug's administration denied him the opportunity to show jurors his true mental condition at the sentencing hearing was not raised below or in the petition for certiorari and, thus, will not be considered by this Court. P. 133.

(b) A pretrial detainee has an interest in avoiding involuntary administration of antipsychotic drugs that is protected under the Due Process Clause. Cf. Washington v. Harper, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028; Bell v. Wolfish, 441 U.S. 520, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861. Once Riggins moved to terminate his treatment, [****3] the State became obligated to establish both the need for Mellaril and its medical appropriateness. Cf. Harper, supra, at 227. Due process certainly would have been satisfied had the State shown that the treatment was medically appropriate and, considering less intrusive alternatives, essential for Riggins' own safety or the safety of others. The State also might have been able to justify the treatment, if medically appropriate, by showing that an adjudication of guilt or innocence could not be obtained by using less intrusive means. However, the trial court allowed the drug's administration to continue without making any determination of the need for this course or any findings about reasonable alternatives, and it failed to acknowledge Riggins' liberty

interest in freedom from antipsychotic drugs. Pp. 133-137.

(c) There is a strong possibility that the trial court's error impaired Riggins' constitutionally protected trial rights. Efforts to prove or disprove actual prejudice from the record before this Court would be futile, and guesses as to the trial's outcome had Riggins' motion been granted would be speculative. While the precise consequences of forcing Mellaril upon [****4] him cannot be shown from a trial transcript, the testimony of doctors who examined Riggins establishes the strong possibility that his defense was impaired. Mellaril's side effects may have impacted not only his outward appearance, but also his testimony's content, his ability to follow the proceedings, or the substance of his communication with counsel. Thus, even if the expert testimony presented at trial allowed jurors to assess Riggins' demeanor fairly, an unacceptable risk remained that forced medication compromised his trial rights. Pp. 137-138.

(d) While trial prejudice can sometimes be justified by an essential state interest, the record here contains no finding to support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy. P. 138.

Counsel: Mace J. Yampolsky argued the cause for petitioner. With him on the

504 U.S. 127, *127; 112 S. Ct. 1810, **1810; 118 L. Ed. 2d 479, ***479; 1992 U.S. LEXIS 2701, ****4

briefs were Jay Topkis, Neal H. Klausner, and Steven C. Herzog.

James Tufteland argued the cause for respondent. With him on the brief was Rex Bell. *

Judges: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, post, p. 138. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined except as to Part II-A, post, p. 146.

Opinion by: O'CONNOR

Opinion

[*129] [***485] [**1812] JUSTICE O'CONNOR delivered the opinion of [****5] the Court.

LEdHN[1A][¶] [1A]Petitioner David Riggins challenges his murder and robbery convictions on the ground that the State of Nevada unconstitutionally

*Briefs of amici curiae urging reversal were filed for the Coalition for Fundamental Rights of Equality of Ex-patients by Peter Margulies, Herbert Semmel, and Patrick Reilly; for the National Association of Criminal Defense Lawyers by David M. Eldridge; and for Nevada Attorneys for Criminal Justice by Kevin M. Kelly.

Briefs of amici curiae were filed for the State of Louisiana et al. by William J. Guste, Jr., Attorney General of Louisiana, and M. Patricia Jones and Kathleen E. Petersen, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: Charles M. Oberly III of Delaware and Michael E. Carpenter of Maine; and for the American Psychiatric Association by Richard G. Taranto and Joel I. Klein.

forced an antipsychotic drug upon him during trial. Because the Nevada courts failed to make findings sufficient to support forced administration of the drug, we reverse.

I

During the early hours of November 20, 1987, Paul Wade was found dead in his Las Vegas apartment. An autopsy revealed that Wade died [***486] from multiple stab wounds, including wounds to the head, chest, and back. David Riggins was arrested for the killing 45 hours later.

A few days after being taken into custody, Riggins told Dr. R. Edward Quass, a private psychiatrist who treated patients at the Clark County Jail, about hearing voices in his head and having trouble sleeping. Riggins informed Dr. Quass that he had been successfully treated with Mellaril in the past. Mellaril is the trade name for thioridazine, an antipsychotic drug. After this consultation, Dr. Quass prescribed Mellaril at a level of 100 milligrams per day. Because Riggins continued to complain of voices and sleep problems in the following months, Dr. Quass gradually increased the Mellaril prescription to 800 milligrams [****6] per day. Riggins also received a prescription for Dilantin, an antiepileptic drug.

In January 1988, Riggins successfully moved for a determination of his competence to stand trial. App. 6. Three [*130] court-appointed psychiatrists

504 U.S. 127, *130; 112 S. Ct. 1810, **1812; 118 L. Ed. 2d 479, ***486; 1992 U.S. LEXIS 2701, ****6

performed examinations during February and March, while Riggins was taking 450 milligrams of Mellaril daily. Dr. William O'Gorman, a psychiatrist who had treated Riggins for anxiety in 1982, and Dr. Franklin Master concluded that Riggins was competent to stand trial. The third psychiatrist, Dr. Jack Jurasky, found that Riggins was incompetent. The Clark County District Court determined that Riggins was legally sane and competent to stand trial, *id.*, at 13, so preparations for trial went forward.

In early June, the defense moved the District Court for an order suspending administration of Mellaril and Dilantin until the end of Riggins' trial. *Id.*, at 20. Relying on both the *Fourteenth Amendment* and the Nevada Constitution, Riggins argued that continued administration of these drugs infringed upon his freedom and that the drugs' effect on his demeanor and mental state during trial would deny him due process. Riggins also asserted that, because he would offer [****7] an insanity defense at trial, he had a right to show jurors his "true mental state." *Id.*, at 22. In response, the State noted that Nevada law prohibits the trial of incompetent persons, see *Nev. Rev. Stat. § 178.400* (1989), and [**1813] argued that the court therefore had authority to compel Riggins to take medication necessary to ensure his competence. App. 31-32.

On July 14, 1988, the District Court held an evidentiary hearing on Riggins'

motion. At the hearing, Dr. Master "guessed" that taking Riggins off medication would not noticeably alter his behavior or render him incompetent to stand trial. Record 412. Dr. Quass testified that, in his opinion, Riggins would be competent to stand trial even without the administration of Mellaril, but that the effects of Mellaril would not be noticeable to jurors if medication continued. *Id.*, at 443-445. Finally, Dr. O'Gorman told the court that Mellaril made the defendant calmer and more relaxed [*131] but that an excessive dose would cause drowsiness. *Id.*, at 464-466. Dr. O'Gorman was unable to predict how Riggins might behave if taken off antipsychotic medication, yet he questioned the need to give Riggins the high dose he was receiving. *Id.*, [****8] at 474-476. The court also had before it a written report in which Dr. Jurasky held to his earlier view that Riggins was incompetent to stand trial and predicted [***487] that if taken off Mellaril the defendant "would most likely regress to a manifest psychosis and become extremely difficult to manage." App. 19.

The District Court denied Riggins' motion to terminate medication with a one-page order that gave no indication of the court's rationale. *Id.*, at 49. Riggins continued to receive 800 milligrams of Mellaril each day through the completion of his trial the following November.

At trial, Riggins presented an insanity defense and testified on his own behalf.

504 U.S. 127, *131; 112 S. Ct. 1810, **1813; 118 L. Ed. 2d 479, ***487; 1992 U.S. LEXIS 2701, ****8

He indicated that on the night of Wade's death he used cocaine before going to Wade's apartment. Riggins admitted fighting with Wade, but claimed that Wade was trying to kill him and that voices in his head said that killing Wade would be justifiable homicide. A jury found Riggins guilty of murder with use of a deadly weapon and robbery with use of a deadly weapon. After a penalty hearing, the same jury set the murder sentence at death.

Riggins presented several claims to the Nevada Supreme Court, among them that forced administration [****9] of Mellaril denied him the ability to assist in his own defense and prejudicially affected his attitude, appearance, and demeanor at trial. This prejudice was not justified, Riggins said in his opening brief, because the State neither demonstrated a need to administer Mellaril nor explored alternatives to giving him 800 milligrams of the drug each day. Record 1020. Riggins amplified this claim in his reply brief, objecting that the State intruded upon his constitutionally protected liberty [*132] interest in freedom from antipsychotic drugs without considering less intrusive options. Riggins argued:

"In United States v. Bryant, 670 F. Supp. 840, 843 (Minn. 1987)[,] the court, in reference to medicating prisoners against their will, stated that 'courts have recognized a protectable liberty interest . . . in the freedom to avoid unwanted medication with such drugs.' The

court in so stating cited Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984)[,] which addressed the issue of medicating pre-trial detainees and stated that 'less restrictive alternatives, such as segregation or the use of less controversial drugs like tranquilizers or sedatives, should be ruled out before resorting to [****10] antipsychotic drugs.' In the case at bar, no less restrictive alternatives were utilized, considered or even proposed." Record 1070-1071 (emphasis in original).

The Nevada Supreme Court affirmed Riggins' convictions and death sentence. 107 Nev. 178, 808 P.2d 535 (1991). With respect to administration of Mellaril, the court held that expert testimony presented at trial "was sufficient to inform the jury of the effect of the Mellaril on Riggins' demeanor and testimony." Id., at 181, 808 P.2d at 538. Thus, although Riggins' demeanor was relevant to his insanity defense, the court held that denial [**1814] of the defense's motion to terminate medication was neither an abuse of discretion nor a violation of Riggins' trial rights. In a concurring opinion, Justice Rose suggested that the District Court should have determined whether administration of Mellaril during trial was "absolutely necessary" by ordering a pretrial suspension of medication. Id., at 185, 808 P.2d at 540 (concurring opinion). Justice Springer dissented, arguing that antipsychotic drugs may never [***488] be forced on a criminal

504 U.S. 127, *132; 112 S. Ct. 1810, **1814; 118 L. Ed. 2d 479, ***488; 1992 U.S. LEXIS 2701, ****10

defendant solely to allow prosecution. *Id.*, at 186, 808 P.2d at 541.

[****11] We granted certiorari, 502 U.S. 807 (1991), to decide whether forced administration of antipsychotic medication [*133] during trial violated rights guaranteed by the *Sixth* and *Fourteenth Amendments*.

II

LEdHN[2][7] [2]The record in this case narrowly defines the issues before us. The parties have indicated that once the District Court denied Riggins' motion to terminate use of Mellaril, subsequent administration of the drug was involuntary. See, e. g., Brief for Petitioner 6 (medication was "forced"); Brief for Respondent 14, 22, 28 (describing medication as "unwanted," "over objection," and "compelled"). This understanding accords with the determination of the Nevada Supreme Court. See *107 Nev. at 181; 808 P.2d at 537* (describing medication as "involuntary" and "forced"). Given the parties' positions on this point and the absence of any record evidence to the contrary, we adhere to the understanding of the State Supreme Court.

LEdHN[3][7] [3]We also presume that administration of Mellaril was medically appropriate. Although defense counsel stressed that Riggins received a very high dose of the drug, at no point did he suggest to the Nevada courts that administration of Mellaril was medically

[****12] improper treatment for his client.

LEdHN[4][7] [4]Finally, the record is dispositive with respect to Riggins' *Eighth Amendment* claim that administration of Mellaril denied him an opportunity to show jurors his true mental condition at the sentencing hearing. Because this argument was presented neither to the Nevada Supreme Court nor in Riggins' petition for certiorari, we do not address it here.

LEdHN[1B][7] [1B]With these considerations in mind, we turn to Riggins' core contention that involuntary administration of Mellaril denied him "a full and fair trial." Pet. for Cert. i. Our discussion in *Washington v. Harper*, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990), provides useful background for evaluating this claim. In *Harper*, a prison inmate alleged that the State of Washington and various individuals violated his right to due process by giving him Mellaril and other antipsychotic drugs against his will. Although the inmate did not prevail, we agreed that [*134] HN1[7] his interest in avoiding involuntary administration of antipsychotic drugs was protected under the *Fourteenth Amendment's Due Process Clause*. "The forcible injection of medication into a nonconsenting person's body," we said, "represents a substantial interference with that [****13] person's liberty." *Id.*, at 229. In the case of antipsychotic drugs like Mellaril, that interference is particularly severe:

504 U.S. 127, *134; 112 S. Ct. 1810, **1814; 118 L. Ed. 2d 479, ***488; 1992 U.S. LEXIS 2701, ****13

"The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary [***489] spasm of the upper body, tongue, throat, or eyes. The trial court found that it may be treated and reversed within a few minutes through use of the medication Cogentin. Other side effects include akathisia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a [**1815] relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face. . . . [****14] The proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%. According to the American Psychiatric Association, studies of the condition indicate that 60% of tardive dyskinesia is mild or minimal in effect, and about 10% may be

characterized as severe." *Id.*, at 229-230 (citations omitted).

Taking account of the unique circumstances of penal confinement, however, we determined that HN2 due process allows a [*135] mentally ill inmate to be treated involuntarily with antipsychotic drugs where there is a determination that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.*, at 227.

LEdHN [5] [5] LEdHN [6] [6] Under *Harper*, HN3 forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The *Fourteenth Amendment* affords at least as much protection to persons the State detains for trial. See *Bell v. Wolfish*, 441 U.S. 520, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) ("Pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted [****15] prisoners"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987) ("Prison regulations . . . are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). Thus, once Riggins moved to terminate administration of antipsychotic medication, the State became obligated

504 U.S. 127, *135; 112 S. Ct. 1810, **1815; 118 L. Ed. 2d 479, ***489; 1992 U.S. LEXIS 2701, ****15

to establish the need for Mellaril and the medical appropriateness of the drug.

LEdHN/7/ [7] Although we have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings, Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. See *Harper, supra, at 225-226*; cf. *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979) (Due Process Clause allows civil commitment of individuals shown by clear and convincing evidence to be mentally ill and dangerous). Similarly, the State might have been able to justify medically appropriate, [****16] involuntary treatment with the drug by establishing that it could not obtain [***490] an adjudication of Riggins' guilt or innocence by using less intrusive means. See *Illinois v. Allen*, 397 U.S. 337, 347, 25 L. Ed. 2d 353, 90 S. Ct. 1057 [*136] (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace"). We note that during the July 14 hearing Riggins did not contend that he had the right to be tried without Mellaril

if its discontinuation rendered him incompetent. See Record 424-425, 496, 500. The question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us.

LEdHN/1C/ [1C] Contrary to the dissent's understanding, we do not "adopt a standard of strict scrutiny." *Post*, at 156. We have no occasion to finally prescribe such substantive standards as mentioned above, since the District Court allowed administration of Mellaril to continue without making any determination of the need for this course or any findings [**1816] about reasonable alternatives. The court's laconic order denying Riggins' motion did not adopt the [****17] State's view, which was that continued administration of Mellaril was required to ensure that the defendant could be tried; in fact, the hearing testimony casts considerable doubt on that argument. See *supra, at 130-131*. Nor did the order indicate a finding that safety considerations or other compelling concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs.

Were we to divine the District Court's logic from the hearing transcript, we would have to conclude that the court simply weighed the risk that the **defense** would be prejudiced by changes in Riggins' outward appearance against the chance that Riggins would become incompetent if taken off Mellaril, and struck the

504 U.S. 127, *136; 112 S. Ct. 1810, **1816; 118 L. Ed. 2d 479, ***490; 1992 U.S. LEXIS 2701, ****17

balance in favor of involuntary medication. See Record 502 ("That he was nervous and so forth . . . can all be brought out [through expert testimony]. And when you start weighing the consequences of taking him off his medication and possibly have him revert into an incompetent situation, I don't think that that is a good experiment").

[*137] The court did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs.

This error may well have impaired the constitutionally [****18] protected trial rights Riggins invokes. At the hearing to consider terminating medication, Dr. O'Gorman suggested that the dosage administered to Riggins was within the toxic range, id., at 483, and could make him "uptight," id., at 484. Dr. Master testified that a patient taking 800 milligrams of Mellaril each day might suffer from drowsiness or confusion. Id., at 416. Cf. Brief for American Psychiatric Association as *Amicus Curiae* 10-11 ("In extreme cases, the sedationlike effect [of antipsychotic medication] may be severe enough (akinesia) to affect thought processes"). It is clearly possible that such side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel.

Efforts to prove or disprove actual [***491] prejudice from the record

before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded [****19] differently if he had not been given Mellaril. See *post*, at 149-150. HN4 Like the consequences of compelling a defendant to wear prison clothing, see Estelle v. Williams, 425 U.S. 501, 504-505, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976), or of binding and gagging an accused during trial, see Allen, supra, at 344, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. What the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril.

We also are persuaded that allowing Riggins to present expert testimony about the effect of Mellaril on his demeanor [*138] did nothing to cure the possibility that the substance of his own testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of Mellaril. Even if (as the dissent argues, *post*, at 147-149) the Nevada Supreme Court was right that expert testimony allowed jurors to assess Riggins' demeanor fairly, an unacceptable risk of prejudice

504 U.S. 127, *138; 112 S. Ct. 1810, **1816; 118 L. Ed. 2d 479, ***491; 1992 U.S. LEXIS 2701, ****19

remained. See 107 Nev. at 181, 808 P.2d at 537-538.

LEdHN[1D][¶] [1D]LEdHN[8][¶] [8]To be sure, trial prejudice can sometimes [****20] be justified by an essential state interest. See Holbrook v. Flynn, 475 U.S. 560, 568-569, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986); Allen, supra, at 344 (binding and gagging the accused permissible only in extreme situations [**1817] where it is the "fairest and most reasonable way" to control a disruptive defendant); see also Williams, supra, at 505 (compelling defendants to wear prison clothing at trial furthers no essential state policy). Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, however, we have no basis for saying that the substantial probability of trial prejudice in this case was justified.

The judgment of the Nevada Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Concur by: KENNEDY

Concur

JUSTICE KENNEDY, concurring in the judgment.

The medical and pharmacological data

in the *amicus* briefs and other sources indicate that involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial. In the case before us, there was no hearing or well-developed [****21] record on the point, and the whole subject of treating incompetence to stand trial by drug medication is somewhat new to the law, if not to medicine. On the sparse record before us, we cannot [***492] give full consideration to the issue. I file this separate opinion, however, to express [*139] my view that absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial, and to express doubt that the showing can be made in most cases, given our present understanding of the properties of these drugs.

At the outset, I express full agreement with the Court's conclusion that one who was medicated against his will in order to stand trial may challenge his conviction. When the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence. See Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) (suppression by the

504 U.S. 127, *139; 112 S. Ct. 1810, **1817; 118 L. Ed. 2d 479, ***492; 1992 U.S. LEXIS 2701, ****21

prosecution of material evidence favorable to the accused violates due process); Arizona v. [****22] Youngblood, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988) (bad-faith failure to preserve potentially useful evidence constitutes a due process violation). I cannot accept the premise of JUSTICE THOMAS' dissent that the involuntary medication order comprises some separate procedure, unrelated to the trial and foreclosed from inquiry or review in the criminal proceeding itself. To the contrary, the allegations pertain to the State's interference with the trial. Thus, review in the criminal proceeding is appropriate.

I also agree with the majority that the State has a legitimate interest in attempting to restore the competence of otherwise incompetent defendants. Its interest derives from the State's right to bring an accused to trial and from our holding in Pate v. Robinson, 383 U.S. 375, 378, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966), that conviction of an incompetent defendant violates due process. Unless a defendant is competent, the State cannot put him on trial. Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, [*140] the rights to summon, to confront, and to cross-examine witnesses, and the right to [****23] testify on one's own behalf or to remain

silent without penalty for doing so. Drope v. Missouri, 420 U.S. 162, 171-172, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975). Although the majority is correct that this case does not require us to address the question whether a defendant may waive his right to be tried while competent, in my view a general rule permitting waiver would not withstand scrutiny under the Due Process Clause, given our holdings in Pate and Drope. A defendant's waiver of the right to be tried while competent would [**1818] cast doubt on his exercise or waiver of all subsequent rights and privileges through the whole course of the trial.

The question is whether the State's interest in conducting the trial allows it to ensure the defendant's competence by involuntary medication, assuming of course there is a sound medical basis for the treatment. The Court's opinion will require further proceedings on remand, but there seems to be little discussion about what is to be considered. The Court's failure to address [***493] these issues is understandable in some respects, for it was not the subject of briefing or argument; but to underscore my reservations about the propriety of involuntary [****24] medication for the purpose of rendering the defendant competent, and to explain what I think ought to be express qualifications of the Court's opinion, some discussion of the point is required.

This is not a case like Washington v.

504 U.S. 127, *140; 112 S. Ct. 1810, **1818; 118 L. Ed. 2d 479, ***493; 1992 U.S. LEXIS 2701, ****24

Harper, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990), in which the purpose of the involuntary medication was to ensure that the incarcerated person ceased to be a physical danger to himself or others. The inquiry in that context is both objective and manageable. Here the purpose of the medication is not merely to treat a person with grave psychiatric disorders and enable that person to function and behave in a way not dangerous to himself or others, but rather to render the person competent to stand trial. It is the last part of the State's objective, medicating the person for the purpose of bringing him to trial, that causes most [*141] serious concern. If the only question were whether some bare level of functional competence can be induced, that would be a grave matter in itself, but here there are even more far reaching concerns. The avowed purpose of the medication is not functional competence, but competence to stand trial. In my view elementary protections against state [****25] intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the State can make that showing. Indeed, the inquiry itself is elusive, for it assumes some baseline of normality that experts may have some

difficulty in establishing for a particular defendant, if they can establish it at all. These uncertainties serve to underscore the difficult terrain the State must traverse when it enters this domain.

To make these concerns concrete, the effects of antipsychotic drugs must be addressed. First introduced in the 1950's, antipsychotic drugs such as Mellaril have wide acceptance in the psychiatric community as an effective treatment for psychotic thought disorders. See American Psychiatric Press Textbook of Psychiatry 770-774 (J. Talbott, R. Hales, & S. Yodofsky eds. 1988) (Textbook of Psychiatry); Brief for American Psychiatric Association as *Amicus Curiae* 6-7. The medications restore normal thought processes [****26] by clearing hallucinations and delusions. Textbook of Psychiatry 774. See also Brief for American Psychiatric Association as *Amicus Curiae* 9 ("The mental health produced by antipsychotic medication is no different from, no more inauthentic or alien to the patient than, the physical health produced by other medications, such as penicillin for pneumonia"). For many patients, no effective alternative exists for treatment of their illnesses. *Id.*, at 7, and n. 3.

[*142] Although these drugs have changed the lives of psychiatric patients, they can have unwanted side effects. We documented some of the more serious side effects in Washington v. Harper, supra, at 229-230, and they are mentioned again in the majority [***494] opinion. More relevant to this

504 U.S. 127, *142; 112 S. Ct. 1810, **1818; 118 L. Ed. 2d 479, ***494; 1992 U.S. LEXIS 2701, ****26

case are side effects that, it appears, can compromise the right of a medicated criminal defendant to receive a fair trial. The drugs can prejudice the accused in two [****1819**] principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel.

It is a fundamental assumption of the adversary system that the trier of fact observes the accused [******27**] throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. Taylor v. United States, 414 U.S. 17, 19, 38 L. Ed. 2d 174, 94 S. Ct. 194 (1973) (*per curiam*). At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights. See Coy v. Iowa, 487 U.S. 1012, 1016-1020, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988) (emphasizing the importance of

the face-to-face encounter between the accused and the accuser).

The side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulates the evidence in this [******28**] way. The defendant may be restless and unable to sit still. Brief for American Psychiatric Association as *Amicus Curiae* 10. The drugs can induce [***143**] a condition called parkinsonism, which, like Parkinson's disease, is characterized by tremor of the limbs, diminished range of facial expression, or slowed functions, such as speech. *Ibid.* Some of the side effects are more subtle. Antipsychotic drugs such as Mellaril can have a "sedationlike effect" that in severe cases may affect thought processes. *Ibid.* At trial, Dr. Jurasky testified that Mellaril has "a tranquilizer effect." Record 752. See also *ibid.* ("If you are dealing with someone very sick then you may prescribe up to 800 milligrams which is the dose he had been taking which is very, very high. I mean you can tranquilize an elephant with 800 milligrams"). Dr. Jurasky listed the following side effects of large doses of Mellaril: "Drowsiness, constipation, perhaps lack of alertness, changes in blood pressure. . . . Depression of the psychomotor functions. If you take a lot of it you become stoned for all practical purposes and can barely function." *Id.*, at 753.

These potential side effects would be

504 U.S. 127, *143; 112 S. Ct. 1810, **1819; 118 L. Ed. 2d 479, ***494; 1992 U.S. LEXIS 2701, ****28

disturbing for any patient; but when [****29] the patient is a criminal defendant who is going to stand trial, the documented probability of side effects seems to me to render involuntary administration of the drugs by prosecuting officials unacceptable absent a showing by the State that the side effects will not alter the defendant's reactions or diminish his capacity to assist counsel. As the American Psychiatric Association points out:

[***495] "By administering medication, the State may be creating a prejudicial negative demeanor in the defendant -- making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive. . . . That such effects may be subtle does not make them any less real or potentially influential." Brief for American Psychiatric Association as *Amicus Curiae* 13.

As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react [*144] and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and [****30] his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse

may carry great weight and, perhaps, be determinative [**1820] of whether the offender lives or dies. See Geimer & Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 51-53 (1987-1988).

Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. Massiah v. United States, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964); Geders v. United States, 425 U.S. 80, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976) (trial court order directing defendant not to consult with his lawyer during an overnight recess held to deprive him of the effective assistance of counsel). The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf. The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. The State interferes with this [****31] relation when it administers a drug to dull cognition. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 42 ("The chemical flattening of a person's will can also lead to the defendant's loss of self-determination undermining the desire for self-preservation which is necessary to

504 U.S. 127, *144; 112 S. Ct. 1810, **1820; 118 L. Ed. 2d 479, ***495; 1992 U.S. LEXIS 2701, ****31

engage the defendant in his own defense in preparation for his trial").

It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system. *In re Oliver*, 333 U.S. 257, 273, 92 L. Ed. 682, 68 S. Ct. 499 (1948). We have found the right implicit as well in the Compulsory [*145] Process Clause of the Sixth Amendment. *Rock v. Arkansas*, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987). In *Rock*, we held that a state rule excluding all testimony aided or refreshed by hypnosis violated the defendant's constitutional right to take the stand in her own defense. We observed that barring the testimony would contradict not only the right of the accused to conduct her own defense, but also her right to make this defense in person: "It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the [***496] witnesses [****32] against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" *Id.*, at 52, quoting *Faretta v. California*, 422 U.S. 806, 819, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). We gave further recognition to the right of the accused to testify in his or her own words, and noted that this in turn was related to the *Fifth Amendment* choice to speak "in the unfettered exercise of his own will." *Rock*, *supra*, at 53. In my view medication of the type here prescribed

may be for the very purpose of imposing constraints on the defendant's own will, and for that reason its legitimacy is put in grave doubt.

If the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment, if appropriate, unless the defendant becomes competent through other means. If the defendant cannot be tried without his behavior and demeanor being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process. The state of our knowledge of antipsychotic drugs and their side effects is evolving and may one day produce effective drugs that [****33] have only minimal side effects. Until that day comes, we can permit their use only when the State can show that involuntary treatment does not cause alterations raising the concerns enumerated in this separate opinion.

With these observations, I concur in the judgment reversing the conviction.

Dissent by: THOMAS

Dissent

[*146] [**1821] JUSTICE THOMAS, with whom JUSTICE SCALIA joins except as to Part II-A, dissenting.

Petitioner David Edward Riggins killed Paul William Wade by stabbing him 32

504 U.S. 127, *146; 112 S. Ct. 1810, **1821; 118 L. Ed. 2d 479, ***496; 1992 U.S. LEXIS 2701, ****33

times with a knife. He then took cash, drugs, and other items from Wade's home. A Nevada jury convicted Riggins of first-degree murder and robbery with a deadly weapon and sentenced him to death. The Nevada Supreme Court affirmed. 107 Nev. 178, 808 P.2d 535 (1991). This Court reverses the conviction, holding that Nevada unconstitutionally deprived Riggins of his liberty interest in avoiding unwanted medication by compelling him to take an antipsychotic drug. I respectfully dissent.

The Court's opinion, in my view, conflates two distinct questions: whether Riggins had a full and fair criminal trial and whether Nevada improperly forced Riggins to take medication. In this criminal case, Riggins is asking, and may ask, only for the [****34] reversal of his conviction and sentence. He is not seeking, and may not seek, an injunction to terminate his medical treatment or damages for an infringement of his personal rights. I agree with the positions of the majority and concurring opinions in the Nevada Supreme Court: Even if the State truly forced Riggins to take medication, and even if this medication deprived Riggins of a protected liberty interest in a manner actionable in a different legal proceeding, Riggins nonetheless had the fundamentally fair criminal trial required by the Constitution. I therefore would affirm his conviction.

[***497] I

Riggins contended in the Nevada Supreme Court that he did not have a "full and fair" trial for two reasons, the first relating to exclusion of evidence of his mental condition and the second concerning his ability to assist in his defense. Record 1018. To the extent that Riggins' arguments below involved federal constitutional issues, I believe that the Nevada Supreme Court correctly rejected them.

[*147] A

Riggins first argued that the trial court improperly prevented him from presenting relevant evidence of his demeanor. As the Court notes, Riggins suffers from a mental illness and raised insanity [****35] as a defense at trial. When Riggins killed Wade, he was not using any antipsychotic medication. During his trial, however, Riggins was taking large doses of the antipsychotic drug Mellaril. Riggins believed that this drug would make his appearance at trial different from his appearance when he attacked Wade and that this difference might cause the jury to misjudge his sanity. To show his mental condition as it existed at the time of the crime, Riggins requested permission to appear before the jury in an unmedicated state. App. 20-24, 42-47. The trial court denied the request, and the Nevada Supreme Court affirmed.

This Court has no power to decide questions concerning the admissibility of evidence under Nevada law. Estelle v. McGuire, 502 U.S. 62, 67-68, 116 L.

504 U.S. 127, *147; 112 S. Ct. 1810, **1821; 118 L. Ed. 2d 479, ***497; 1992 U.S. LEXIS 2701, ****35

Ed. 2d 385, 112 S. Ct. 475 (1991). We therefore may conduct only a limited review of a Nevada court's decision to exclude a particular form of demeanor evidence. Except in cases involving a violation of a specific constitutional provision such as the *Confrontation Clause*, see, e. g., *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), this Court may not reverse a state "trial judge's action in the admission of evidence" unless the evidentiary ruling "so [****36] infuse[s] the trial with unfairness as to deny due process of law." *Lisenba v. California*, 314 U.S. 219, 228, 86 L. Ed. 166, 62 S. Ct. 280 (1941). See also *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 74 L. Ed. 2d 646, 103 S. Ct. 843 (1983); *Burgett v. Texas*, 389 U.S. 109, 113-114, 19 L. Ed. 2d 319, 88 S. Ct. 258 (1967). In this case, I see no basis for concluding that Riggins had less than a full and fair trial.

The Court declines to decide whether Mellaril actually affected Riggins' appearance. [**1822] On the basis of some pretrial psychiatric testimony it speculates only that Riggins might have looked less uptight, drowsy, or confused if he had not taken the drug. *Ante*, at 137. Other evidence casts doubt [**148] on this possibility. At least one psychiatrist believed that a jury would not "be able to notice whether or not [Riggins] was on Mellaril as compared to the period of the time when he was not medicated by that drug." Record 445. Yet, even if Mellaril noticeably

affected Riggins' demeanor, the Court fails to explain why the medication's effects rendered Riggins' trial fundamentally unfair.

The trial court offered Riggins the opportunity to prove his mental condition as it existed at the time of the crime through testimony instead of his appearance in court [****37] in an [***498] unmedicated condition. Riggins took advantage of this offer by explaining to the jury the history of his mental health, his usage of Mellaril, and the possible effects of Mellaril on his demeanor. *Id.*, at 739-740. Riggins also called Dr. Jack A. Jurasky, a psychiatrist, who testified about Riggins' condition after his arrest and his likely mental state at the time of the crime. *Id.*, at 747-748. Dr. Jurasky also explained Riggins' use of Mellaril and how it might be affecting him. *Id.*, at 752-753, 760-761.

The Nevada Supreme Court concluded that this "testimony was sufficient to inform the jury of the effect of the Mellaril on Riggins' demeanor and testimony." 107 Nev. at 181, 808 P.2d at 538. Its analysis comports with that of other state courts that also have held that expert testimony may suffice to clarify the effects of an antipsychotic drug on a defendant's apparent demeanor. See *State v. Law*, 270 S.C. 664, 673, 244 S.E.2d 302, 306 (1978); *State v. Jojola*, 89 N.M. 489, 493, 553 P.2d 1296, 1300 (1976). Cf. *In re Pray*, 133 Vt. 253, 257-258, 336 A.2d 174, 177 (1975) (reversing a conviction

504 U.S. 127, *148; 112 S. Ct. 1810, **1822; 118 L. Ed. 2d 479, ***498; 1992 U.S. LEXIS 2701, ****37

because no expert testimony explained how [****38] antipsychotic medicine affected the defendant's appearance). Having reviewed the record as a whole, I see no reason to disturb the conclusion of the Nevada Supreme Court. On the facts of this case, Riggins' inability to introduce evidence of his mental condition as he desired did not render his trial fundamentally unfair. See *Rock v. Arkansas*, 483 U.S. 44, 55, 97 L. Ed. 2d 37, 107 S. Ct. 2704, [*149] n. 11 (1987); *id.*, at 64-65 (REHNQUIST, C. J., dissenting).

B

Riggins also argued in the Nevada Supreme Court, although not in his briefs to this Court, that he did not have a "full and fair" trial because Mellaril had side effects that interfered with his ability to participate in his defense. Record 1018. He alleged, in particular, that the drug tended to limit his powers of perception. The Court accepts this contention, stating: "It is clearly *possible* that such side effects had an impact upon . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Ante*, at 137 (emphasis added). I disagree. We cannot conclude that Riggins had less than a full and fair trial merely because of the possibility that Mellaril [****39] had side effects.

All criminal defendants have a right to a full and fair trial, and a violation of this right may occur if a State tries a

defendant who lacks a certain ability to comprehend or participate in the proceedings. We have said that "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," *Spencer v. Texas*, 385 U.S. 554, 563-564, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967), and have made clear that "conviction of an accused person while he is legally incompetent violates due process," *Pate v. Robinson*, 383 U.S. 375, 378, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966).

Riggins has no claim of legal incompetence in this case. The trial court specifically found him competent while he was taking Mellaril under a statute requiring him to [**1823] have "sufficient mentality to be able to understand the nature of the criminal charges against him, and . . . [***499] to aid and assist his counsel in the defense interposed upon the trial." *Nev. Rev. Stat. § 178.400(2)* (1989). Riggins does not assert that due process imposes a higher standard.

The record does not reveal any other form of unfairness relating to the purported side effects of Mellaril. Riggins has failed to allege specific facts to support his claim that he [*150] could [****40] not participate effectively in his defense. He has not stated how he would have directed his counsel to examine or cross-examine witnesses differently. He has not identified any testimony or instructions that he did not understand. The record, moreover, does not even support his

504 U.S. 127, *150; 112 S. Ct. 1810, **1823; 118 L. Ed. 2d 479, ***499; 1992 U.S. LEXIS 2701, ****40

assertion that Mellaril made him worse off. As Justice Rose noted in his concurring opinion below: "Two psychiatrists who had prescribed Mellaril for Riggins, Dr. Quass and Dr. O'Gorman, testified that they believed it was helpful to him. Additional psychiatric testimony established that Mellaril may have increased Riggins' cognitive ability" 107 Nev. at 185, 808 P.2d at 540. See also State v. Hayes, 118 N.H. 458, 461, 389 A.2d 1379, 1381 (1978) (holding a defendant's perception adequate because "all the expert evidence supported the conclusion that the medication had a beneficial effect on the defendant's ability to function").¹ Riggins' competence, moreover, tends to confirm that he had a fair trial. See State v. Jojola, supra, at 492, 553 P.2d at 1299 (presuming, absent other evidence, that the side effects of an antipsychotic drug did not render a competent defendant [****41] unable to participate fully in his trial). I thus see no basis for reversing the Nevada Supreme Court.

II

Riggins also argues for reversal on the basis of our holding in Washington v. Harper, 494 U.S. 210, 221, 108 L. Ed.

¹ We previously have noted that "psychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses, particularly schizophrenia." Washington v. Harper, 494 U.S. 210, 226, n. 9, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (quoting Brief for American Psychiatric Association et al. as *Amici Curiae*, O. T. 1989, No. 88-599, pp. 10-11).

2d 178, 110 S. Ct. 1028 (1990), that the Due Process Clause protects a substantive "liberty interest" in avoiding unwanted medication. Riggins asserts that Nevada unconstitutionally deprived him of this liberty interest by forcing him to take Mellaril. The Court agrees, ruling [**151] that "the Nevada courts failed to make findings sufficient to support forced administration of the drug" in this case. *Ante*, at 129. I consider reversal on this [****42] basis improper.

A

Riggins may not complain about a deprivation of the liberty interest that we recognized in *Harper* because the record does not support his version of the facts. Shortly after his arrest, as the Court notes, Riggins told a psychiatrist at his jail that he was hearing voices and could not sleep. The psychiatrist prescribed Mellaril. When the prescription did not eliminate the problem, Riggins sought further treatment and the psychiatrist increased the dosage. Riggins thus began taking the drug voluntarily. *Ante*, at 129.

[**500] The Court concludes that the medication became involuntary when the trial court denied Riggins' motion for permission not to take the drug during the trial. *Ante*, at 133. I disagree. Although the court denied Riggins' motion, it did not order him to take any medication.² Moreover, even though

² Riggins' counsel confirmed this interpretation of the order at oral argument:

"QUESTION: . . . Did the court ever go further than saying I

504 U.S. 127, *151; 112 S. Ct. 1810, **1824; 118 L. Ed. 2d 479, ***500; 1992 U.S. LEXIS 2701, ****42

[**1824] Riggins *alleges* that the *state physicians* forced him to take the medication after the court's order, the record contains no finding of fact with respect to this allegation. The Court admits that it merely assumes that the physicians drugged him, and attempts to justify its assumption by observing that the Nevada Supreme Court also assumed that [****43] involuntary medication occurred. *Ibid.* The Nevada Supreme Court, however, may have made its assumption for the purpose of argument; the assumption, in its view, did [*152] not change the result of the case. The Court cannot make the same assumption if it requires reversal of Riggins' conviction.

Riggins also cannot complain about a violation of *Harper* because he did not argue below for reversal of his conviction on the ground that Nevada had deprived him of a liberty interest. Riggins consistently maintained in the [****44] Nevada courts that he did not have a "full and fair trial" because the medication deprived him of the opportunity to present his demeanor to the jury and to participate in his *defense*. App. 20-24 (trial court motion); *id.*, at 42-47 (trial court reply); Record 1018-1021 (appellate brief); *id.*, at 1068-

1071 (appellate reply brief). As counsel for Nevada put it at oral argument: "The way this issue was initially presented to the trial court was really a question of trial strategy. There was never an indication in this case that Mr. Riggins was a Harper-type defendant who did not want to be medicated." Tr. of Oral Arg. 23.³

[****45] Because the claims that Riggins *raised* below have no merit, Riggins has altered his theory of the case. The Court, therefore, should not condemn the Nevada courts because they "did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs." *Ante*, at 137. The Nevada courts had no reason to consider an argument that Riggins did not make. We have said quite recently that "in reviewing the judgments of state courts under the jurisdictional grant of 28 U. S. C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' [*153] claims that [***501] were not *raised* or addressed below." *Yee v. Escondido*, 503 U.S. 519, 533, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992). Although "we have expressed

will not order the State to stop administering the medication? . . . It simply said . . . I won't intervene and enjoin the administration of this medication[.]

"MR. YAMPOLSKY: Yes . . .

"QUESTION: So if [Riggins] had then said, well, I'm not going to take it, he wouldn't be in violation of the court order? . . .

"Mr. YAMPOLSKY: Apparently not." Tr. of Oral Arg. 10.

³ Riggins noted in his reply brief before the Nevada Supreme Court that the courts in *United States v. Bryant*, 670 F. Supp. 840, 843 (Minn. 1987), and *Bee v. Greaves*, 744 F.2d 1387 (CA10 1984), had recognized a personal liberty interest in avoiding unwanted medication. Record 1070-1071. Yet, Riggins never asked for reversal because of a deprivation of this interest. He argued for reversal in that brief only on grounds that the medication "violated [his] right to a 'full and fair' trial because it denied him the ability to assist in his *defense*, and prejudiced his demeanor, attitude, and appearance to the jury." *Id.*, at 1068.

504 U.S. 127, *153; 112 S. Ct. 1810, **1824; 118 L. Ed. 2d 479, ***501; 1992 U.S. LEXIS 2701, ****45

inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts," *ibid.*, the Court does not attempt to justify its departure here.

Finally, we did not grant certiorari to determine whether the Nevada courts had made the findings required by *Harper* to support forced administration of a drug. We took this case to decide "whether forced medication during trial violates a defendant's constitutional right to a full [****46] and fair trial." Pet. for Cert. The Court declines to answer this question one way or the other, stating only that a violation of *Harper* "may well have impaired the constitutionally protected trial rights Riggins invokes." *Ante*, at 137. As we have stated, "we ordinarily do not consider questions outside those presented in the petition for certiorari." *Yee v. Escondido*, *supra*, at 535. I believe that we should refuse to consider Riggins' *Harper* argument.

B

The *Harper* issue, in any event, does not warrant reversal of Riggins' conviction. The Court correctly states that Riggins, as a detainee awaiting trial, had at least the same [**1825] liberty interest in avoiding unwanted medication that the inmate had in *Harper*. This case, however, differs from *Harper* in a very significant respect. When the inmate in *Harper* complained that physicians were drugging him against his will, he sought damages and

an injunction against future medication in a civil action under 42 U. S. C. § 1983. See 494 U.S. at 217. Although Riggins also complains of forced medication, he is seeking a reversal of his criminal conviction. I would not expand *Harper* to [****47] include this remedy.

We have held that plaintiffs may receive civil remedies for all manner of constitutional violations under § 1983. See [**154] Dennis v. Higgins, 498 U.S. 439, 443-451, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991). This Court, however, has reversed criminal convictions only on the basis of two kinds of constitutional deprivations: those "which occur during the presentation of the case" to the trier of fact, and those which cause a "structural defect affecting the framework" of the trial. Arizona v. Fulminante, 499 U.S. 279, 307, 310, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991). The Court does not reveal why it considers a deprivation of a liberty interest in avoiding unwanted medication to fall into either category of reversible error. Even if Nevada failed to make the findings necessary to support forced administration of Mellaril, this failure, without more, would not constitute a trial error or a flaw in the trial mechanism. See 107 Nev. at 185, 808 P.2d at 540 (Rose, J., concurring). Although Riggins might be entitled to other remedies, he has no right to have his conviction reversed.⁴

⁴A State, however, might violate a defendant's due process

504 U.S. 127, *155; 112 S. Ct. 1810, **1825; 118 L. Ed. 2d 479, ***501; 1992 U.S. LEXIS 2701, ****47

[*155] [****48] [***502] We applied a similar analysis in Estelle v. Williams, 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976). In that case, a prisoner challenged his conviction on grounds that the State had required him to wear prison garb before the jury. In reviewing the challenge, we did not ask whether the State had violated some personal right of the defendant to select his attire. Instead, we considered only whether the prison clothing had denied him a "fair trial" by making his appearance less favorable to the jury. Id., at 503. Although we ultimately declined to reach the merits because the prisoner had waived the issue at trial, id., at 512, we observed that lower courts had held that "a showing of actual prejudice must be made by a defendant seeking to have his conviction overturned on this

ground," id., at 504, n. 1. In my view, just as the validity of the conviction in Estelle v. Williams would depend on whether the prisoner had a fair trial, so does the validity of Riggins' conviction.

The need for requiring actual unfairness in this case (either in the form of a structural defect or an error in the presentation of evidence) becomes apparent when one considers how the Court might apply its [****49] decision to other cases. A State could violate Harper by forcibly administering any kind of medication [**1826] to a criminal defendant. Yet, the Court surely would not reverse a criminal conviction for a Harper violation involving medications such as penicillin or aspirin. Perhaps Mellaril, in general, has a greater likelihood of affecting a person's appearance and powers of perceptions than these substances. As noted above, however, we have no indication in this case, considering the record as a whole, that Mellaril unfairly prejudiced Riggins.

I do not mean in any way to undervalue the importance of a person's liberty interest in avoiding forced medication or to suggest that States may drug detainees at their whim. Under Harper, detainees have an interest in avoiding unwanted medication that the States must respect. In appropriate instances, detainees may seek damages or injunctions [*156] against further medication in civil actions either under § 1983, as in Harper, or under state law. Yet, when this Court reviews a state-

right to a fundamentally fair trial if its administration of medication were to *diminish* substantially the defendant's mental faculties during the trial, even if he were not thereby rendered incompetent. See 3 E. Coke, Institutes *34 (1797) ("If felons come in judgement to answer, . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"); Resolutions of the Judges upon the Case of the Regicides, Kelyng's Report of Divers Cases in Pleas of the Crown 10 (1708) (Old Bailey 1660) ("It was resolved that when Prisoners come to the Bar to be tryed, their Irons ought to be taken off, so that they be not in any Torture while they make their defense, be their Crime never so great"), reprinted in 5 How. St. Tr. 971, 979-980 (1816); Trial of Christopher Layer, 16 How. St. Tr. 94, 100 (1812) [K. B. 1722] ("The authority is that [the defendant] is not to be 'in vinculis' during his trial, but should be so far free, that he should have the use of his reason, and all advantages to clear his innocence"); see also State v. Williams, 18 Wash. 47, 49-51, 50 P. 580, 581 (1897) ("The condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties") (quoting State v. Kring, 64 Mo. 591 (1877)). Riggins has not made (much less proved) any such allegation in this Court; indeed, the record indicates that Riggins' mental capacity was *enhanced* by his administration of Mellaril.

504 U.S. 127, *156; 112 S. Ct. 1810, **1826; 118 L. Ed. 2d 479, ***502; 1992 U.S. LEXIS 2701, ****49

court criminal conviction of a defendant who has taken medication, it cannot undo any violation that already [***503] has occurred or punish those responsible. It [****50] may determine only whether the defendant received a proper trial, free of the kinds of reversible errors that we have recognized. Because Riggins had a full and fair trial in this case, I would affirm the Nevada Supreme Court.

C

For the foregoing reasons, I find it unnecessary to address the precise standards governing the forced administration of drugs to persons such as Riggins. Whether or not Nevada violated these standards, I would affirm Riggins' conviction. I note, however, that the Court's discussion of these standards poses troubling questions. Although the Court purports to rely on *Washington v. Harper*, the standards that it applies in this case differ in several respects.

The Court today, for instance, appears to adopt a standard of strict scrutiny. It specifically faults the trial court for failing to find either that the "continued administration of Mellaril was *required* to ensure that the defendant could be tried," *ante*, at 136 (emphasis added), or that "other *compelling* concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs," *ibid.* (emphasis added). We specifically rejected this high standard of review in *Harper*. [****51] In that case, the

Washington Supreme Court had held that state physicians could not administer medication to a prisoner without showing that it "was both necessary and effective for furthering a compelling state interest." *494 U.S. at 218*. We reversed, holding that the state court "erred in refusing to apply the standard of reasonableness." *Id., at 223*.

The Court today also departs from *Harper* when it says that the Nevada Supreme Court erred by not "considering [*157] less intrusive alternatives." *Ante*, at 135. The Court presumably believes that Nevada could have treated Riggins with smaller doses of Mellaril or with other kinds of therapies. In *Harper*, however, we imposed no such requirement. In fact, we specifically ruled that "the alternative means proffered by [the prisoner] for accommodating his interest in rejecting the forced administration of antipsychotic drugs do not demonstrate the invalidity of the State's policy." *494 U.S. at 226*.

This case differs from *Harper* because it involves a pretrial detainee and not a convicted prisoner. The standards for forcibly medicating inmates well may differ from those for persons awaiting trial. The Court, however, does not rely [****52] on this distinction in departing from *Harper*; instead, it purports to be applying *Harper* to detainees. *Ante*, at 135. Either the Court is seeking to change the *Harper* standards or it is adopting different standards for

504 U.S. 127, *157; 112 S. Ct. 1810, **1826; 118 L. Ed. 2d 479, ***503; 1992 U.S. LEXIS 2701, ****52

detainees without stating its reasons. I cannot accept either interpretation of the Court's opinion. For all of these reasons, I respectfully dissent.

Right of state prison authorities to administer neuroleptic or antipsychotic drugs to prisoner without his or her consent--state cases. 75 ALR4th 1124.

References

21A Am Jur 2d, Criminal Law 646-651

8 Federal Procedure, L Ed, Criminal Procedure 22:331-22:336

40 Am Jur Proof of Facts 2d 171, Defendant's **Competency** to Stand Trial

7 Am Jur Trials 477, Homicide; 27 Am Jur Trials 1, Representing the Mentally Disabled Criminal Defendant

USCS, *Constitution, Amendments 6, 14*

L Ed Digest, Appeal 1677, 1692.1; Constitutional Law 854; Criminal Law 46

L Ed Index, Drugs and Narcotics; Fair and Impartial Proceeding; Incompetent or Insane Persons; Mental Capacity or Condition

Index to Annotations, Appeal and Error; Drugs and Narcotics; Due Process; Fair and Impartial [******53**] Trial; Incompetent and Insane Persons; Mental Condition or Capacity

Annotation References:

Supreme Court's view as to concept of "liberty" under *due process clauses of Fifth and Fourteenth Amendments*. 47 L Ed 2d 975.

What issues will the Supreme Court consider, though not, or not properly, **raised** by the parties. 42 L Ed 2d 946.

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adult. 9 ALR3d 1391.

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 Caution
As of: March 5, 2019 10:30 PM Z

Sell v. United States

Supreme Court of the United States

March 3, 2003, Argued ; June 16, 2003, Decided

No. 02-5664

Reporter

539 U.S. 166 *; 123 S. Ct. 2174 **; 156 L. Ed. 2d 197 ***; 2003 U.S. LEXIS 4594 ****; 71 U.S.L.W. 4456; 2003 Cal. Daily Op. Service 5131; 2003 Daily Journal DAR 6512; 188 A.L.R. Fed. 679; 16 Fla. L. Weekly Fed. S 359

CHARLES THOMAS SELL, Petitioner v.
UNITED STATES

appropriate, proceedings, prison,
sentence, courts, cases, antipsychotic
medication, interlocutory appeal,
authorization, involuntarily, confinement,
pretrial, charges, patient

Notice: [**1]**

Subsequent History: On remand at,
Remanded by *United States v. Sell*, 343
F.3d 950, 2003 U.S. App. LEXIS 26859
(8th Cir., Sept. 2, 2003)

Case Summary

Prior History: ON WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.

Procedural Posture

Certiorari was granted to the United States Court of Appeals for the Eighth Circuit to review a judgment permitting the government to administer antipsychotic drugs involuntarily to **defendant** in order to render **defendant competent to stand trial** for a serious, but nonviolent, crime.

United States v. Sell, 282 F.3d 560,
2002 U.S. App. LEXIS 3582 (8th Cir.
Mo., 2002)

Disposition: Vacated and remanded.

Overview

Both the appellate court and the district court approved **forced medication** solely in order to render **defendant competent to stand trial**. The United States Supreme Court assumed that **defendant** was not dangerous. Based on that hypothetical assumption, the United States Supreme Court found that the appellate court was wrong to approve **forced medication** solely to

Core Terms

medication, drugs, antipsychotic,
district court, **competent to stand trial**,
court of appeals, competence, grounds,
orders, side effect, psychiatrist,
intrusive, inmate, final judgment,
unreviewable, involuntary, medically

539 U.S. 166, *166; 123 S. Ct. 2174, **2174; 156 L. Ed. 2d 197, ***197; 2003 U.S. LEXIS 4594, ****1

render **defendant competent to stand trial**. The experts focused mainly on the dangerousness issue to the exclusion of other important issues such as **trial**-related side effects and risks that could have helped determine whether **forced medication** was warranted on **trial** competence grounds alone. As a result, there was not enough information to know whether the side effects of the antipsychotic **medication** were likely to undermine the fairness of the **trial** in **defendant's** case.

Outcome

The judgment was vacated and remanded. The government was allowed to pursue its request for **forced medication** on grounds related to the danger **defendant** posed to himself and others.

LexisNexis® Headnotes

Civil
Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

Civil
Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

HN1[↓] Appellate Jurisdiction, Final Judgment Rule

The jurisdictional statute, 28 U.S.C.S. § 1291, authorizes federal courts of appeals to review final decisions of the

district courts.

Civil
Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

HN2[↓] Appellate Jurisdiction, Final Judgment Rule

The term "final decision" in 28 U.S.C.S. § 1291 normally refers to a final judgment, such as a judgment of guilt, that terminates a criminal proceeding.

Civil
Procedure > Appeals > Appellate
Jurisdiction > Collateral Order
Doctrine

HN3[↓] Appellate Jurisdiction, Collateral Order Doctrine

A preliminary or interim decision is appealable as a collateral order when it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.

Constitutional Law > Substantive
Due Process > Privacy > General
Overview

Criminal Law & Procedure > Search
& Seizure > Expectation of Privacy

HN4[↓] Substantive Due Process,

539 U.S. 166, *166; 123 S. Ct. 2174, **2174; 156 L. Ed. 2d 197, ***197; 2003 U.S. LEXIS 4594, ****1

Privacy

A compelled surgical intrusion into an individual's body implicates expectations of privacy and security of great magnitude.

Constitutional
Law > ... > Fundamental
Rights > Procedural Due
Process > Scope of Protection

HN5[↓] Procedural Due Process, Scope of Protection

Pursuant to *U.S. Const. amend. V*, the federal government may not deprive any person of liberty without due process of law.

Constitutional Law > Substantive
Due Process > Scope

Public Health & Welfare
Law > Healthcare > Mental Health
Services > Treatment

HN6[↓] Constitutional Law, Substantive Due Process

An individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs.

Constitutional Law > Substantive
Due Process > Scope

HN7[↓] Constitutional Law,

Substantive Due Process

An individual has a constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs, an interest that only an essential or overriding state interest might overcome.

Criminal Law &
Procedure > **Trials** > **Defendant's**
Rights > Right to Fair **Trial**

HN8[↓] Defendant's Rights, Right to Fair Trial

Antipsychotic drugs might have side effects that would interfere with a **defendant's** ability to receive a fair **trial**.

Criminal Law &
Procedure > **Trials** > **Defendant's**
Rights > Right to Fair **Trial**

HN9[↓] Defendant's Rights, Right to Fair Trial

Forced medication is likely justified only where a state shows that drugs would not significantly affect a **defendant's** behavior and demeanor.

Constitutional Law > Substantive
Due Process > Scope

Criminal Law &
Procedure > Defenses > Insanity > General Overview

539 U.S. 166, *166; 123 S. Ct. 2174, **2174; 156 L. Ed. 2d 197, ***197; 2003 U.S. LEXIS 4594, ****1

Criminal Law &
 Procedure > Preliminary
 Proceedings > Pretrial Motions &
 Procedures > **Competency to Stand Trial**

Criminal Law &
 Procedure > **Trials** > **Defendant's**
 Rights > Right to Fair **Trial**

HN10[↓] Constitutional Law, Substantive Due Process

The Constitution permits the government involuntarily to administer antipsychotic drugs to a mentally ill **defendant** facing serious criminal charges in order to render that **defendant competent to stand trial**, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the **trial**, and **taking** account of less intrusive alternatives, is necessary significantly to further important governmental **trial**-related interests.

Constitutional Law > Substantive Due Process > Scope

Criminal Law &
 Procedure > Preliminary
 Proceedings > Pretrial Motions &
 Procedures > **Competency to Stand Trial**

HN11[↓] Constitutional Law, Substantive Due Process

In order to permit involuntary

administration of drugs solely for **trial** competence purposes a court must first find that important governmental interests are at stake. The government's interest in bringing to **trial** an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the government seeks to protect through application of the criminal law the basic human need for security. Courts, however, must consider the facts of the individual case in evaluating the government's interest in prosecution. Special circumstances may lessen the importance of that interest.

Constitutional
 Law > ... > Fundamental
 Rights > Criminal Process > Speedy **Trial**

HN12[↓] Criminal Process, Speedy Trial

The government has a substantial interest in timely prosecution.

Criminal Law &
 Procedure > Sentencing > Credits

Criminal Law &
 Procedure > **Trials** > **Defendant's**
 Rights > Right to Fair **Trial**

HN13[↓] Sentencing, Credits

The government has a constitutionally

539 U.S. 166, *166; 123 S. Ct. 2174, **2174; 156 L. Ed. 2d 197, ***197; 2003 U.S. LEXIS 4594, ****1

essential interest in assuring that a defendant's trial is a fair one.

Criminal Law &
Procedure > Preliminary
Proceedings > Pretrial Motions &
Procedures > Competency to Stand Trial

Criminal Law &
Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN14[↓] Pretrial Motions & Procedures, Competency to Stand Trial

In order to permit involuntary administration of drugs solely for trial competence purposes a court must conclude that involuntary medication will significantly further two concomitant state interests. It must find that administration of the drugs is substantially likely to render a defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair.

Constitutional Law > Substantive Due Process > Scope

Criminal Law &
Procedure > Preliminary

Proceedings > Pretrial Motions &
Procedures > Competency to Stand Trial

Criminal Law &
Procedure > Defenses > Insanity > General Overview

Criminal Law &
Procedure > Defenses > Insanity > Insanity Defense

HN15[↓] Constitutional Law, Substantive Due Process

In order to permit involuntary administration of drugs solely for trial competence purposes, a court must conclude that involuntary medication is necessary to further the two concomitant state interests that administration of the drugs is substantially likely to render the defendant competent to stand trial and that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. The court must also find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. And the court must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods.

539 U.S. 166, *166; 123 S. Ct. 2174, **2174; 156 L. Ed. 2d 197, ***197; 2003 U.S. LEXIS 4594, ****1

Constitutional Law > Substantive
Due Process > Scope

Criminal Law &
Procedure > Preliminary
Proceedings > Pretrial Motions &
Procedures > **Competency to Stand
Trial**

HN16[⚡] Constitutional Law, Substantive Due Process

In order to permit involuntary administration of drugs solely for **trial** competence purposes, a court must conclude that administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

Constitutional Law > Substantive
Due Process > Scope

Healthcare Law > Medical
Treatment > Failures & Refusals to
Treat > General Overview

HN17[⚡] Constitutional Law, Substantive Due Process

Courts, in civil proceedings, may authorize involuntary **medication** where a patient's failure to accept treatment threatens injury to the patient or others. **28 C.F.R. § 549.43 (2002).**

Criminal Law &
Procedure > Preliminary
Proceedings > Pretrial Motions &
Procedures > **Competency to Stand
Trial**

HN18[⚡] Pretrial Motions & Procedures, Competency to Stand Trial

A court, asked to approve **forced** administration of drugs for purposes of rendering a **defendant competent to stand trial**, should ordinarily determine whether the government seeks, or has first sought, permission for **forced** administration of drugs on other Harper-type grounds; and, if not, why not.

Criminal Law &
Procedure > Preliminary
Proceedings > Pretrial Motions &
Procedures > **Competency to Stand
Trial**

HN19[⚡] Pretrial Motions & Procedures, Competency to Stand Trial

Whether a particular drug will tend to sedate a **defendant**, interfere with communication with counsel, prevent rapid reaction to **trial** developments, or diminish the ability to express emotions are matters important in determining the permissibility of **medication** to restore competence, but not necessarily relevant when dangerousness is primarily at issue.

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Criminal Law &
Procedure > Sentencing > Credits

Public Health & Welfare
Law > Healthcare > Mental Health
Services > Treatment

HN20[↓] Sentencing, Credits

A **defendant** ordinarily receives credit toward a sentence for time served. 18 U.S.C.S. § 3585(b).

Lawyers' Edition Display

Decision

[***197] Federal Constitution held, under some circumstances, to permit government to administer antipsychotic drugs to mentally ill **defendant** against **defendant's** will in order to render **defendant competent to stand trial**.

Summary

In 1997, a federal criminal **defendant** with a long history of mental illness was initially found **competent to stand trial** for alleged fraud and was released on bail. However, his bail was subsequently revoked because his condition had worsened. In 1998, the **defendant** asked for a reconsideration of his competence. After being examined at a medical center for federal prisoners, the **defendant** was found incompetent to **stand trial** and was hospitalized at the center for a determination as to whether he would attain the capacity to allow his **trial** to proceed.

While at the center, the **defendant** refused to **take** antipsychotic **medication**, but a psychiatrist at the center held a hearing and authorized involuntary administration of the drugs in question. A federal Bureau of Prisons official upheld this decision. In 2000, a United States Magistrate Judge issued an order authorizing **forced** administration of the drugs, on the grounds that (1) the **defendant** was a danger to himself and others, (2) **medication** was the only way to render him less dangerous, (3) any serious side effects could be ameliorated, (4) the benefits to the **defendant** outweighed the risks, and (5) the drugs were substantially likely to return the **defendant** to competence.

The United States District Court for the Eastern District of Missouri, in affirming the Magistrate Judge's order, concluded that (1) the Magistrate Judge's finding of dangerousness was "clearly erroneous"; but (2) **medication** was (a) the only viable hope of rendering the **defendant** **competent to stand** [***198] **trial**, and (b) necessary to serve the government's interest in obtaining an adjudication of his guilt or innocence.

The United States Court of Appeals for the Eighth Circuit, in affirming, reasoned that although the evidence did not support a finding of dangerousness, (1) the government had an essential interest in bringing the **defendant** to **trial** on fraud charges, (2) the treatment was medically appropriate, and (3) medical evidence indicated a

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reasonable probability that the defendant would fairly be able to participate in his trial (282 F3d 560).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Breyer, J., joined by Rehnquist, Ch. J., and Stevens, Kennedy, Souter, and Ginsburg, JJ., it was held that:

(1) The Court of Appeals had jurisdiction to decide the defendant's appeal of the District Court's judgment--and the Supreme Court, on certiorari, consequently had jurisdiction over the case at hand--because the District Court's judgment was an immediately appealable collateral order for purposes of 28 USCS § 1291.

(2) The Federal Constitution permits the government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if a court concludes that (a) important governmental interests are at stake, such as interests in (i) bringing the defendant to trial, (ii) timely prosecution, or (iii) assuring that the defendant's trial is a fair one; (b) involuntary medication (i) will significantly further such government interests, and (ii) is necessary to further such interests; and (c) administration of the drugs is medically appropriate.

(3) In the case at hand, the Court of Appeals erred in approving the forced

administration of antipsychotic drugs to the defendant solely to render the defendant competent to stand trial, for among other matters, (a) the record of the hearing before the Magistrate Judge showed that the experts who testified at the hearing had focused mainly on the dangerousness issue rather than on the trial-competence issue, and (b) the Supreme Court, on certiorari, had to assume that the defendant was not dangerous.

Scalia, J., joined by O'Connor and Thomas, JJ., dissenting, expressed the view that (1) the District Court's order was neither a "final decision" under § 1291 nor part of the class of specified interlocutory orders in 28 USCS § 1292, and (2) the Supreme Court thus lacked jurisdiction over the case at hand.

Headnotes

[***199]

LEdHN[1A][↓] [1A]LEdHN[1B][↓]
[1B]LEdHN[1C][↓] [1C]LEdHN[1D][↓]
[1D]LEdHN[1E][↓] [1E]

The Federal Constitution permits the government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if a court concludes that:

(1) Important governmental interests are at stake, such as interests in (a) bringing the defendant to trial, (b)

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timely prosecution, or (c) assuring that the defendant's trial is a fair one. However, in evaluating the government's interest in prosecution, courts must consider the facts of the individual case, as special circumstances may lessen the importance of that interest.

(2) Involuntary medication will significantly further such government interests. The court must find that administration of the drugs is (a) substantially likely to render the defendant competent to stand trial; and (b) substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair.

(3) Involuntary medication is necessary to further such interests. The court must (a) find that any alternative and less intrusive treatments are unlikely to achieve substantially the same results, and (b) consider less intrusive means for administering the drugs—for example, a court order to the defendant backed by the contempt power—before considering more intrusive methods.

(4) Administration of the drugs is medically appropriate, that is, in the defendant's best medical interest in light of the defendant's medical condition. The specific kinds of drugs at issue may possibly matter here as elsewhere.

[***200]

LEdHN[2A][↓] [2A]LEdHN[2B][↓]
[2B]LEdHN[2C][↓] [2C]LEdHN[2D][↓]
[2D]LEdHN[2E][↓] [2E]LEdHN[2F][↓]
[2F]

A Federal Court of Appeals erred in approving the forced administration of antipsychotic drugs to a federal criminal defendant solely to render the defendant competent to stand trial for fraud, where:

(1) A United States Magistrate Judge, in issuing an order authorizing the forced administration of such drugs, had concluded that forced medication was the only way to render the defendant not dangerous and also competent to stand trial.

(2) The record of the hearing before the Magistrate Judge showed that the experts who testified at the hearing (a) focused mainly upon the dangerousness issue; (b) did not pose important questions—for example, questions about trial-related side effects and risks—the answers to which could have helped determine whether forced medication was warranted on trial-competence grounds alone; (c) conceded that the proposed medications had "significant" side effects and that there had to be a "cost benefit analysis"; and (d) primarily took into account the defendant's dangerousness, not the need to bring the defendant to trial, in making "cost-benefit" judgments.

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(3) A Federal District Court, although affirming the Magistrate Judge's order, concluded that the Magistrate Judge's finding of dangerousness had been clearly erroneous.

(4) The Court of Appeals, in affirming in turn, agreed that the evidence did not support a finding of dangerousness.

(5) On certiorari to review the Court of Appeals' judgment, the United States Supreme Court (a) had to assume that the defendant was not dangerous, and (b) could not tell whether the side effects of antipsychotic medication were likely to undermine the fairness of a trial in the defendant's case.

(6) The lower courts had not considered that (a) the defendant had already been confined for a long period of time at a medical center for federal prisoners, and (b) the defendant's refusal to take antipsychotic drugs might result in further lengthy confinement.

LEdHN/3A/1 [3A]LEdHN/3B/1
[3B]LEdHN/3C/1 [3C]

With respect to a Federal District Court's judgment affirming a Federal Magistrate Judge's pretrial order that required a criminal defendant involuntarily to receive antipsychotic medication in order to render that defendant competent to stand trial, a Federal Court of Appeals had

jurisdiction to decide the defendant's appeal of the District Court's judgment--and the United States Supreme Court, on certiorari, consequently had jurisdiction to decide whether such involuntary medication would violate the defendant's federal constitutional rights--because the District Court's judgment was an appealable collateral order for purposes of 28 USCS § 1291, as:

(1) The order conclusively determined the disputed question, namely, whether the defendant had a legal right to avoid forced medication.

(2) The order resolved an important issue, for involuntary medical treatment raised questions of clear constitutional importance.

(3) The basic issue--whether the defendant had to undergo medication against his will--was completely separate from (a) the merits of the action, that is, whether the defendant was guilty or innocent of the crimes charged; and (b) questions concerning trial procedures.

(4) The issue was effectively unreviewable on appeal from a final judgment, for (a) by the time of trial, the defendant would have undergone forced medication, which was the very harm that he had sought to avoid; and (b) the defendant would not have been able to undo that harm even if he were acquitted.

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(Scalia, O'Connor, and Thomas, JJ., crime against property.
dissented from this holding.)

[***201]

LEdHN[7A][1] [7A]LEdHN[7B][1] [7B]

LEdHN[4][1] [4]

The law normally requires a criminal defendant to wait until the end of the trial to obtain appellate review of a pretrial order.

LEdHN[5A][1] [5A]LEdHN[5B][1] [5B]

For purposes of 28 USCS § 1291, which authorizes Federal Courts of Appeals to review final decisions of the Federal District Courts, the term "final decision" normally refers to a final judgment, such as a judgment of guilt that terminates a criminal proceeding. However, a preliminary or interim decision is appealable under § 1291 as a "collateral order" when that decision (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.

LEdHN[6][1] [6]

The government has an important interest in bringing to trial an individual accused of a serious crime, regardless of whether the offense is a serious crime against the person or a serious

For purposes of determining whether the government's interest in bringing a criminal defendant to trial supports the defendant's involuntary medication in order to render the defendant competent to stand trial, the potential for the defendant's future confinement in an institution for the mentally ill--in the event of the defendant's failure to take drugs voluntarily--affects, but does not totally undermine, the strength of the need for prosecution, as such confinement reduces the likelihood of the defendant's committing future crimes. Likewise, the possibility that the defendant has already been confined for a significant amount of time--for which the defendant would ordinarily receive credit toward any sentence ultimately imposed--moderates, but does not eliminate, the importance of the governmental interest in prosecution.

LEdHN[8][1] [8]

With respect to a criminal defendant's forced medication, a court need not consider whether to allow such medication for the purpose of rendering the defendant competent to stand trial, if such medication is warranted for a different purpose, such

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as purposes related to (1) the defendant's dangerousness, or (2) the defendant's own interests where refusal to take drugs puts the defendant's health gravely at risk. Consequently, a court that has been asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial should ordinarily determine (1) whether the government seeks--or has first sought--permission for forced administration of drugs on such other grounds; and (2) if not, why not.

LEdHN[9][↓] [9]

On certiorari to review a Federal Court of Appeals' judgment as to whether the Federal Constitution permitted the forced administration of antipsychotic drugs to render a federal criminal defendant competent to stand trial, the United States Supreme Court assumed that the Court of Appeals was correct in concluding that a previous finding that the defendant was a danger to himself and others had been clearly erroneous, where that particular matter was not contested by the government or argued by the parties.

LEdHN[10][↓] [10]

In determining the permissibility of involuntary medication to restore a criminal defendant's competence to

stand trial, some important matters are whether a particular drug will tend to (1) sedate a defendant, (2) interfere with communication with counsel, (3) prevent rapid reaction to trial developments, or (4) diminish the ability to express emotions. However, these matters are not necessarily relevant when the defendant's dangerousness, rather than trial competence, is primarily at issue.

[***202]

LEdHN[11][↓] [11]

On remand from a United States Supreme Court decision vacating a Federal Court of Appeals' judgment which had approved the forced administration of antipsychotic drugs to a federal criminal defendant solely to render the defendant competent to stand trial, the government was permitted to pursue the request for forced medication on other grounds, including grounds related to the danger that the defendant might pose to himself or others. Also, because the defendant's medical condition might have changed over time, it was appropriate for the government to pursue such a request on the basis of current circumstances.

Syllabus

A Federal Magistrate Judge (Magistrate) initially found petitioner Sell, who has a long history of mental

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illness, competent to stand trial for fraud and released him on bail, but later revoked bail because Sell's condition had worsened. Sell subsequently asked the Magistrate to reconsider [***203] his competence to stand trial for fraud and attempted murder. The Magistrate had him examined at a United States Medical Center for Federal Prisoners (Medical Center), found him mentally incompetent to stand trial, and ordered his hospitalization to determine whether he would attain the capacity to allow his trial to proceed. While there, [****2] Sell refused the staff's recommendation to take antipsychotic medication. Medical Center authorities decided to allow involuntary medication, which Sell challenged in court. The Magistrate authorized forced administration of antipsychotic drugs, finding that Sell was a danger to himself and others, that medication was the only way to render him less dangerous, that any serious side effects could be ameliorated, that the benefits to Sell outweighed the risks, and that the drugs were substantially likely to return Sell to competence. In affirming, the District Court found the Magistrate's dangerousness finding clearly erroneous but concluded that medication was the only viable hope of rendering Sell competent to stand trial and was necessary to serve the Government's interest in obtaining an adjudication of his guilt or innocence. The Eighth Circuit affirmed. Focusing solely on the fraud charges, it found that

the Government had an essential interest in bringing Sell to trial, that the treatment was medically appropriate, and that the medical evidence indicated a reasonable probability that Sell would fairly be able to participate in his trial.

Held:

1. The Eighth Circuit had [****3] jurisdiction to hear the appeal. The District Court's pretrial order was an appealable "collateral order" within the exceptions to the rule that only final judgments are appealable. The order conclusively determines the disputed question whether Sell has a legal right to avoid forced medication. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454. It also resolves an important issue, for involuntary medical treatment raises questions of clear constitutional importance. Ibid. And the issue is effectively unreviewable on appeal from a final judgment, *ibid.*, since, by the time of trial, Sell will have undergone forced medication--the very harm that he seeks to avoid and which cannot be undone by an acquittal.

2. Under the framework of Washington v. Harper, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028, and Riggins v. Nevada, 504 U.S. 127, 118 L. Ed. 2d 479, 112 S. Ct. 1810, the Constitution permits the Government involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate,

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is substantially unlikely to have side effects that may undermine the trial's fairness, [****4] and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

(a) This standard will permit forced medication solely for trial competence purposes in certain instances. But these instances may be rare, because the standard says or fairly implies the following: First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. However, courts must consider each case's facts in evaluating this interest because [***204] special circumstances may lessen its importance, e.g., a defendant's refusal to take drugs may mean lengthy confinement in an institution, which would diminish the risks of freeing without punishment one who has committed a serious crime. In addition to its substantial interest in timely prosecution, the Government has a concomitant interest in assuring a defendant a fair trial. Second, the court must conclude that forced medication will *significantly further* those concomitant state interests. It must find that medication is substantially likely to render the defendant [****5] competent to stand trial and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a

defense. Third, the court must conclude that involuntary medication is *necessary* to further those interests and find that alternative, less intrusive treatments are unlikely to achieve substantially the same results. Fourth, the court must conclude that administering the drugs is *medically appropriate*.

(b) The court applying these standards is trying to determine whether forced medication is necessary to further the Government's interest in rendering the defendant competent to stand trial. If a court authorizes medication on an alternative ground, such as dangerousness, the need to consider authorization on trial competence grounds will likely disappear. There are often strong reasons for a court to consider alternative grounds first. For one thing, the inquiry into whether medication is permissible to render an individual nondangerous is usually more objective and manageable than the inquiry into whether medication is permissible to render a defendant competent. For another, courts typically [****6] address involuntary medical treatment as a civil matter. If a court decides that medication cannot be authorized on alternative grounds, its findings will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes.

3. The Eighth Circuit erred in approving forced medication solely to render Sell competent to stand trial. Because that

539 U.S. 166, *166; 123 S. Ct. 2174, **2174; 156 L. Ed. 2d 197, ***204; 2003 U.S. LEXIS 4594, ****6

court and the District Court held the Magistrate's dangerousness finding clearly erroneous, this Court assumes that Sell was not dangerous. And on that hypothetical assumption, the Eighth Circuit erred in reaching its conclusion. For one thing, the Magistrate did not find **forced medication** legally justified on **trial** competence grounds alone. Moreover, the experts at the Magistrate's hearing focused mainly on dangerousness. The failure to focus on **trial** competence could well have mattered, for this Court cannot tell whether the **medication**'s side effects were likely to undermine the fairness of Sell's **trial**, a question not necessarily relevant when dangerousness is primarily at issue. Finally, the lower courts did not consider that Sell has been confined at the Medical [****7] Center for a long time, and that his refusal to be medicated might result in further lengthy confinement. Those factors, the first because a **defendant** may receive credit toward a sentence for time served and the second because it reduces the likelihood of the **defendant's** committing future crimes, moderate the importance of the governmental interest in prosecution. The Government may pursue its **forced medication** request on the [***205] grounds discussed in this Court's opinion but should do so based on current circumstances, since Sell's condition may have changed over time.

282 F.3d 560, vacated and remanded.

Counsel: Barry A. Short argued the

cause for petitioner.

Michael R. Dreeben argued the cause for respondent.

Judges: Breyer, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, Kennedy, Souter, and Ginsburg, JJ., joined. Scalia, J., filed a dissenting opinion, in which O'Connor and Thomas, JJ., joined.

Opinion by: BREYER

Opinion

[**2178] Justice Breyer delivered the opinion of the Court.

[*169] LEdHN[1A][✎] [1A] LEdHN[2A][✎] [2A] The question presented is whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal **defendant**—in order to render that **defendant competent to stand trial** for serious, but nonviolent, crimes. We conclude that [****8] the Constitution allows the Government to administer those drugs, even against the **defendant's** will, in limited circumstances, *i.e.*, upon satisfaction of conditions that we shall describe. Because the Court of Appeals did not find [**2179] that the requisite circumstances existed in this case, we vacate its judgment.

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539 U.S. 166, *169; 123 S. Ct. 2174, **2179; 156 L. Ed. 2d 197, ***205; 2003 U.S. LEXIS 4594, ****8

A

Petitioner Charles Sell, once a practicing dentist, has a long and unfortunate history of mental illness. In September 1982, after telling doctors that the gold he used for fillings had been contaminated by communists, Sell was hospitalized, treated with antipsychotic medication, and subsequently discharged. App. 146. In June 1984, Sell called the police to say that a leopard was outside his office boarding a bus, and he then asked the police to shoot him. *Id.*, at 148; Forensic Report, p 1 (June 20, 1997). Sell [*170] was again hospitalized and subsequently released. On various occasions, he complained that public officials, for example, a State Governor and a police chief, were trying to kill him. *Id.*, at 4. In April 1997, he told law enforcement personnel that he "spoke to God last night," and that "God told me every [Federal Bureau of Investigation] person I kill, [****9] a soul will be saved." *Id.*, at 1.

In May 1997, the Government charged Sell with submitting fictitious insurance claims for payment. See 18 U.S.C. § 1035(a)(2) [18 USCS § 1035(a)(2)]. A Federal Magistrate Judge (Magistrate), after ordering a psychiatric examination, found Sell "currently competent," but noted that Sell might experience "a psychotic episode" in the future. App. 321. The judge released Sell on bail. A grand jury later produced a superseding indictment charging Sell and his wife with 56 counts of mail fraud, 6 counts of

Medicaid fraud, and 1 count of money laundering. *Id.*, at 12-22.

In early 1998, the Government claimed that Sell had sought to intimidate a witness. The Magistrate held a bail revocation hearing. Sell's behavior at his initial appearance was, in the judge's words, "totally out of control," involving "screaming and shouting," the use of "personal insults" and "racial epithets," and spitting "in the judge's face." *Id.*, at 322. A psychiatrist reported that Sell could not sleep because he expected [***206] the FBI to "come busting through the door," and concluded that Sell's condition had worsened. *Ibid.* After considering that report and other [****10] testimony, the Magistrate revoked Sell's bail.

In April 1998, the grand jury issued a new indictment charging Sell with attempting to murder the FBI agent who had arrested him and a former employee who planned to testify against him in the fraud case. *Id.*, at 23-29. The attempted murder and fraud cases were joined for trial.

In early 1999, Sell asked the Magistrate to reconsider his competence to stand trial. The Magistrate sent Sell to the [*171] United States Medical Center for Federal Prisoners at Springfield, Missouri, for examination. Subsequently the Magistrate found that Sell was "mentally incompetent to stand trial." *Id.*, at 323. He ordered Sell to "be hospitalized for treatment" at the Medical Center for up to four

539 U.S. 166, *171; 123 S. Ct. 2174, **2179; 156 L. Ed. 2d 197, ***206; 2003 U.S. LEXIS 4594, ****10

months, "to determine whether there was a substantial probability that [Sell] would attain the capacity to allow his trial to proceed." *Ibid.*

Two months later, Medical Center staff recommended that Sell take antipsychotic medication. Sell refused to do so. The staff sought permission to administer the medication against Sell's will. That effort is the subject of the present proceedings.

B

We here review the last of five hierarchically ordered lower court [****11] and Medical Center determinations. First, in June 1999, Medical Center staff sought permission from institutional authorities to administer antipsychotic drugs to Sell involuntarily. A reviewing psychiatrist held a hearing and considered Sell's prior history; Sell's current persecutory beliefs (for example, that Government officials were trying to suppress his knowledge about events in Waco, Texas, and had sent him [**2180] to Alaska to silence him); staff medical opinions (for example, that "Sell's symptoms point to a diagnosis of Delusional Disorder but . . . there well may be an underlying Schizophrenic Process"); staff medical concerns (for example, about "the persistence of Dr. Sell's belief that the Courts, FBI, and federal government in general are against him"); an outside medical expert's opinion (that Sell suffered only from delusional disorder, which, in that

expert's view, "medication rarely helps"); and Sell's own views, as well as those of other laypersons who know him (to the effect that he did not suffer from a serious mental illness). *Id.*, at 147-150.

The reviewing psychiatrist then authorized involuntary administration of the drugs, both (1) because Sell was "mentally [****12] [*172] ill and dangerous, and medication is necessary to treat the mental illness," and (2) so that Sell would "become competent for trial." *Id.*, at 145. The reviewing psychiatrist added that he considered Sell "dangerous based on threats and delusions if outside, but not necessarily inside prison" and that Sell was "able to function" in prison in the "open population." *Id.*, at 144.

Second, the Medical Center administratively reviewed the determination of its reviewing psychiatrist. A Bureau of Prisons official considered the evidence that had been presented at the initial hearing, referred to Sell's delusions, noted differences of professional opinion as to proper classification and treatment, and [***207] concluded that antipsychotic medication represents the medical intervention "most likely" to "ameliorate" Sell's symptoms; that other "less restrictive interventions" are "unlikely" to work; and that Sell's "pervasive belief" that he was "being targeted for nefarious actions by various governmental . . . parties," along with the "current charges of conspiracy to

539 U.S. 166, *172; 123 S. Ct. 2174, **2180; 156 L. Ed. 2d 197, ***207; 2003 U.S. LEXIS 4594, ****12

commit murder," made Sell "a potential risk to the safety of one or more others in the community." *Id.*, at 154-155. The reviewing [****13] official "upheld" the "hearing officer's decision that [Sell] would benefit from the utilization of anti-psychotic medication." *Id.*, at 157.

Third, in July 1999, Sell filed a court motion contesting the Medical Center's right involuntarily to administer antipsychotic drugs. In September 1999, the Federal Magistrate who had ordered Sell sent to the Medical Center held a hearing. The evidence introduced at the hearing for the most part replicated the evidence introduced at the administrative hearing, with two exceptions. First, the witnesses explored the question of the medication's effectiveness more thoroughly. Second, Medical Center doctors testified about an incident that took place at the Medical Center after the administrative proceedings were completed. In July 1999, Sell had approached one of the Medical Center's nurses, suggested [*173] that he was in love with her, criticized her for having nothing to do with him, and, when told that his behavior was inappropriate, added "'I can't help it.'" *Id.*, at 168-170, 325. He subsequently made remarks or acted in ways indicating that this kind of conduct would continue. The Medical Center doctors testified that, given Sell's [****14] prior behavior, diagnosis, and current beliefs, boundary-breaching incidents of this sort were not harmless and, when coupled with Sell's inability

or unwillingness to desist, indicated that he was a safety risk even within the institution. They added that he had been moved to a locked cell.

In August 2000, the Magistrate found that "the government has made a substantial and very strong showing that Dr. Sell is a danger to himself and others at the institution in which he is currently incarcerated"; that "the government has shown that anti-psychotic medication is the only way to render him less dangerous"; that newer drugs and/or changing drugs will "ameliorate" any "serious side effects"; that "the benefits to Dr. Sell . . . far outweigh any risks"; and that "there is a substantial probability that" the drugs will [**2181] "return" Sell "to competency." *Id.*, at 333-334. The Magistrate concluded that "the government has shown in as strong a manner as possible, that anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial." *Id.*, at 335. The Magistrate issued an order authorizing the involuntary administration of antipsychotic drugs [****15] to Sell, *id.*, at 331, but stayed that order to allow Sell to appeal the matter to the Federal District Court, *id.*, at 337.

Fourth, the District Court reviewed the record and, in April 2001, issued an opinion. The court addressed the Magistrate's finding "that defendant presents a danger to himself or others sufficient" to warrant involuntary

539 U.S. 166, *173; 123 S. Ct. 2174, **2181; 156 L. Ed. 2d 197, ***207; 2003 U.S. LEXIS 4594, ****15

administration of antipsychotic drugs. *Id.*, at 349. After noting that Sell subsequently had "been returned to an open ward," the District Court held the Magistrate's [***208] "dangerousness" [*174] finding "clearly erroneous." *Id.*, at 349, and n 5. The court limited its determination to Sell's "dangerousness *at this time* to himself and to those around him *in his institutional context*." *Id.*, at 349 (emphasis in original).

Nonetheless, the District Court *affirmed* the Magistrate's order permitting Sell's involuntary medication. The court wrote that "anti-psychotic drugs are medically appropriate," that "they represent the only viable hope of rendering defendant competent to stand trial," and that "administration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of defendant's [****16] guilt or innocence of numerous and serious charges" (including fraud and attempted murder). *Id.*, at 354. The court added that it was "premature" to consider whether "the effects of medication might prejudice [Sell's] defense at trial." *Id.*, at 351, 352. The Government and Sell both appealed.

Fifth, in March 2002, a divided panel of the Court of Appeals affirmed the District Court's judgment. 282 F.3d 560 (CA8). The majority affirmed the District Court's determination that Sell was not dangerous. The majority noted that, according to the District Court, Sell's behavior at the Medical Center

"amounted at most to an 'inappropriate familiarity and even infatuation' with a nurse." *Id.*, at 565. The Court of Appeals agreed, "upon review," that "the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center." *Ibid.*

The Court of Appeals also affirmed the District Court's order requiring medication in order to render Sell competent to stand trial. Focusing solely on the serious fraud charges, the panel majority concluded that the "government has an essential interest in bringing a defendant to trial." [****17] *Id.*, at 568. It added that the District Court "correctly concluded that there were no less intrusive means." *Ibid.* After reviewing the conflicting views of the experts, *id.*, at 568-571, the panel majority found antipsychotic drug treatment "medically [****175] appropriate" for Sell, *id.*, at 571. It added that the "medical evidence presented indicated a reasonable probability that Sell will fairly be able to participate in his trial." *Id.*, at 572. One member of the panel dissented primarily on the ground that the fraud and money laundering charges were "not serious enough to warrant the forced medication of the defendant." *Id.*, at 574 (opinion of Bye, J.).

We granted certiorari to determine whether the Eighth Circuit "erred in rejecting" Sell's argument that "allowing the government to administer antipsychotic medication against his will solely to render him competent to

539 U.S. 166, *175; 123 S. Ct. 2174, **2181; 156 L. Ed. 2d 197, ***208; 2003 U.S. LEXIS 4594, ****17

stand trial for non-violent offenses," Brief for Petitioner i, violated the Constitution--in effect by improperly depriving Sell of an important "liberty" that the Constitution guarantees, *Amdt.* 5.

II

LEdHN/3A/ [3A] We first examine whether the Eighth [****18] Circuit had jurisdiction to decide Sell's appeal.

[**2182] The District Court's judgment, from which Sell had appealed, was a pretrial order. That judgment affirmed a Magistrate's order requiring Sell involuntarily to receive medication. The Magistrate entered that order pursuant [***209] to an earlier delegation from the District Court of legal authority to conduct pretrial proceedings. App. 340; see 28 U.S.C. § 636(b)(1)(A) [28 USCS § 636(b)(1)(A)]. The order embodied legal conclusions related to the Medical Center's administrative efforts to medicate Sell; these efforts grew out of Sell's provisional commitment; and that provisional commitment took place pursuant to an earlier Magistrate's order seeking a medical determination about Sell's future competence to stand trial. Cf. *Riggins v. Nevada*, 504 U.S. 127, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992) (reviewing, as part of criminal proceeding, trial court's denial of defendant's motion to discontinue medication); *Stack v. Boyle*, 342 U.S. 1, 6-7, 96 L. Ed. 3, 72 S. Ct. 1 (1951) (district court's denial of defendant's motion to reduce bail is part of criminal proceeding and is not reviewable in

separate habeas action).

LEdHN/4/ [4] LEdHN/5A/ [5A] [*176] How was it possible for Sell to appeal from such [****19] an order? The law normally requires a defendant to wait until the end of the trial to obtain appellate review of a pretrial order. HN1/ The relevant jurisdictional statute, 28 USC § 1291 [28 USCS § 1291], authorizes federal courts of appeals to review "final decisions of the district courts." (Emphasis added.) And HN2/ the term "final decision" normally refers to a final judgment, such as a judgment of guilt, that terminates a criminal proceeding.

LEdHN/3B/ [3B] LEdHN/5B/ [5B] Nonetheless, there are exceptions to this rule. The Court has held that HN3/ a preliminary or interim decision is appealable as a "collateral order" when it (1) "conclusively determin[e]s the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978). And this District Court order does appear to fall within the "collateral order" exception.

LEdHN/3C/ [3C] The order (1) "conclusively determin[e]s the disputed question," namely, whether Sell has a legal right to avoid forced medication. *Ibid.* The order also (2) "resolve[s] an important issue," for, as this Court's

539 U.S. 166, *176; 123 S. Ct. 2174, **2182; 156 L. Ed. 2d 197, ***209; 2003 U.S. LEXIS 4594, ****19

cases [****20] make clear, involuntary medical treatment raises questions of clear constitutional importance. *Ibid.* See Winston v. Lee, 470 U.S. 753, 759, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985) HN4 [¶] ("[a] compelled surgical intrusion into an individual's body . . . implicates expectations of privacy and security" of great magnitude); see also Riggins, *supra*, 504 U.S. at 133-134, 118 L. Ed. 2d 479, 112 S. Ct. 1810; Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278-279, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990); Washington v. Harper, 494 U.S. 210, 221-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990). At the same time, the basic issue--whether Sell must undergo medication against his will--is "completely separate from the merits of the action," i.e., whether Sell is guilty or innocent of the crimes charged. Coopers & Lybrand, 437 U.S., at 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454. The issue is wholly separate as well from questions concerning trial procedures. Finally, the issue is (3) "effectively unreviewable on appeal from a final judgment." *Ibid.* By the time of trial Sell will have undergone [*177] forced medication--the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which [****21] he [***210] might obtain review. Cf. Stack, *supra*, 342 U.S. 1 at 6-7, 96 L. Ed. 3, 72 S. Ct. 1 (permitting appeal of order setting high bail as "collateral order"). These considerations, particularly those

involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent. See *post*, at 156 L. Ed. 2d, at 219, 123 S. Ct. 2174 (opinion of Scalia, J.).

We add that the question presented here, whether Sell has a legal right to avoid forced medication, perhaps in part [**2183] because medication may make a trial unfair, differs from the question whether forced medication did make a trial unfair. The first question focuses upon the right to avoid administration of the drugs. What may happen at trial is relevant, but only as a prediction. See *infra*, at 156 L. Ed. 2d, at 212. The second question focuses upon the right to a fair trial. It asks what *did* happen as a result of having administered the medication. An ordinary appeal comes too late for a defendant to enforce the first right; an ordinary appeal permits vindication of the second.

We conclude that the District Court order from which Sell appealed was an appealable "collateral order." The Eighth Circuit [****22] had jurisdiction to hear the appeal. And we consequently have jurisdiction to decide the question presented, whether involuntary medication violates Sell's constitutional rights.

III

We turn now to the basic question

539 U.S. 166, *177; 123 S. Ct. 2174, **2183; 156 L. Ed. 2d 197, ***210; 2003 U.S. LEXIS 4594, ****22

presented: Does **forced** administration of antipsychotic drugs to render Sell **competent to stand trial** unconstitutionally deprive him of his "liberty" to reject medical treatment? *U.S. Const., Amdt. 5 (HN5[¶])* Federal Government may not "deprive" any person of "liberty . . . without due process of law"). Two prior precedents, [*178] *Harper, supra* 494 U.S. 210, and *Riggins, supra* 504 U.S. 127, set forth the framework for determining the legal answer.

In *Harper*, this Court recognized that *HN6[¶]* an individual has a "significant" constitutionally protected "liberty interest" in "avoiding the unwanted administration of antipsychotic drugs." 494 U.S. at 221, 108 L. Ed. 2d 178, 110 S. Ct. 1028. The Court considered a state law authorizing **forced** administration of those drugs "to inmates who are . . . gravely disabled or represent a significant danger to themselves or others." *Id.*, at 226, 108 L. Ed. 2d 178, 110 S. Ct. 1028. The State had established "by a medical finding" that Harper, a mentally ill prison inmate, had "a mental disorder . . . [****23] . . . which is likely to cause harm if not treated." *Id.*, at 222, 108 L. Ed. 2d 178, 110 S. Ct. 1028. The treatment decision had been made "by a psychiatrist," it had been approved by "a reviewing psychiatrist," and it "ordered" **medication** only because that was "in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Ibid.*

The Court found that the State's interest in administering **medication** was "legitimate" and "important," *id.*, at 225, 108 L. Ed. 2d 178, 110 S. Ct. 1028; and it held that "the *Due Process Clause* permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.*, at 227, 108 L. Ed. 2d 178, 110 S. Ct. 1028. The Court [***211] concluded that, in the circumstances, the state law authorizing involuntary treatment amounted to a constitutionally permissible "accommodation between an inmate's liberty interest in avoiding the **forced** administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or [****24] others." *Id.*, at 236, 108 L. Ed. 2d 178, 110 S. Ct. 1028.

In *Riggins*, the Court repeated that *HN7[¶]* an individual has a constitutionally protected liberty "interest in avoiding involuntary administration of antipsychotic drugs"--an interest [*179] that only an "essential" or "overriding" state interest might overcome. 504 U.S. at 134, 135, 118 L. Ed. 2d 479, 112 S. Ct. 1810. The Court suggested that, in principle, **forced medication** in order to render a **defendant competent to stand trial** for murder was constitutionally permissible. The Court, citing *Harper*, noted that the State

539 U.S. 166, *179; 123 S. Ct. 2174, **2183; 156 L. Ed. 2d 197, ***211; 2003 U.S. LEXIS 4594, ****24

"would have satisfied due process if the prosecution had demonstrated . . . that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' *own safety or the safety of others.*" 504 U.S. at 135, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (emphasis added). And it said that the [****2184**] State "similarly . . . might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence" of the murder charge "by using less intrusive means." *Ibid.* (emphasis added). Because the trial court had permitted [******25**] forced medication of Riggins without taking account of his "liberty interest," with a consequent possibility of trial prejudice, the Court reversed Riggins' conviction and remanded for further proceedings. Id., 504 U.S. 127 at 137-138, 118 L. Ed. 2d 479, 112 S. Ct. 1810. Justice Kennedy, concurring in the judgment, emphasized that HN8 antipsychotic drugs might have side effects that would interfere with the defendant's ability to receive a fair trial. Id., at 145, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (finding HN9 forced medication likely justified only where State shows drugs would not significantly affect defendant's "behavior and demeanor").

LEdHN[1B] [1B] These two cases, *Harper* and *Riggins*, indicate that HN10 the Constitution permits the

Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially [****2185**] unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

HN11 [**¶**] [***180**] This standard will permit involuntary administration of drugs [******26**] solely for trial competence purposes in certain instances. But those instances may be rare. That is because the standard says or fairly implies the following:

LEdHN[1C] [**¶**] [1C] LEdHN[6] [**¶**] [6] First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the [*****212**] person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security. See *Riggins, supra*, 504 U.S. 127 at 135-136, 118 L. Ed. 2d 479, 112 S. Ct. 1810 ("Power to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace" (quoting *Illinois v. Allen*, 397 U.S. 337, 347, 25 L. Ed. 2d 353, 90 S. Ct. 1057

539 U.S. 166, *180; 123 S. Ct. 2174, **2185; 156 L. Ed. 2d 197, ***212; 2003 U.S. LEXIS 4594, ****26

(1970) (Brennan, J., concurring))).

LEdHN[1D][↑] [1D] LEdHN[7A][↑] [7A] Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest. The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill--and that would diminish [****27] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. We do not mean to suggest that civil commitment is a substitute for a criminal trial. HN12[↑] The Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U.S.C. § 3585(b) [18 USCS § 3585(b)]). Moreover, HN13[↑] the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.

[*181] LEdHN[1E][↑] [1E] Second, HN14[↑] the court must conclude that

involuntary medication will significantly further those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration [****28] of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. See Riggins, supra, 504 U.S. at 142-145, 118 L Ed 2d 479, 112 S Ct 1810 (Kennedy, J., concurring in judgment).

HN15[↑] Third, the court must conclude that involuntary medication is necessary to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. Cf. Brief for American Psychological Association as *Amicus Curiae* 10-14 (nondrug therapies may be effective in restoring psychotic defendants to competence); but cf. Brief for American Psychiatric Association et al. as *Amici Curiae* 13-22 (alternative treatments for psychosis commonly not as effective as medication). And the court must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods.

HN16[↑] Fourth, as we have said, the court must conclude that administration of the drugs is medically appropriate,

539 U.S. 166, *181; 123 S. Ct. 2174, **2185; 156 L. Ed. 2d 197, ***212; 2003 U.S. LEXIS 4594, ****28

i.e., in the patient's best medical interest [****29] in light of his medical condition. The specific kinds of drugs at [***213] issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

LEdHN[8][↑] [8] We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant competent to stand trial. A court need not consider whether to allow forced medication for that kind of purpose, [*182] if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. 494 U.S., at 225-226, 108 L Ed 2d 178, 110 S Ct 1028. There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question.

For one thing, the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more "objective [****30] and manageable" than the inquiry into whether medication is permissible to

render a defendant competent. Riggins, 504 U.S., at 140, 118 L Ed 2d 479, 112 S Ct 1810 (Kennedy, J., concurring in judgment). The medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's potentially dangerous behavior (or to avoid serious harm to the patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.

For another thing, courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, *Harper*-type grounds. Every State provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication – when in the best interests of a patient who lacks the mental competence to make such a decision. *E.g., Ala. Code §§ 26-2A-102(a), 26-2A-105, 26-2A-108* (Michie 1992); *Alaska Stat. §§ 13.26.105(a), 13.26.116(b)* (2002); *Ariz. Rev. Stat. Ann. §§ 14-5303, 14-5312* (West 1995); [****31] *Ark. Code Ann. §§ 28-65-205, 28-65-301* (1987). And HN17[↑] courts, in civil proceedings, may authorize involuntary medication where the patient's failure to accept treatment threatens injury to the patient or others. See, *e.g., 28 CFR § 549.43 (2002)*; cf. 18 USC § 4246 [18 USCS § 4246].

539 U.S. 166, *183; 123 S. Ct. 2174, **2185; 156 L. Ed. 2d 197, ***213; 2003 U.S. LEXIS 4594, ****31

[*183] If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear. Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes. At the least, they will facilitate direct medical and legal focus upon such questions as: Why is it medically appropriate forcibly to administer antipsychotic drugs to an individual who (1) is *not* dangerous and (2) is competent to make up his own mind about treatment? [***214] Can bringing such an individual to trial alone justify in whole (or at least in significant part) administration of a drug that may have adverse side effects, including side effects that may to some extent impair [****32] a defense at trial? We consequently believe that HN18 a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not.

When a court must nonetheless reach the trial competence question, the factors discussed above, supra, at 156 L Ed 2d, at 211-213, should help it

make the ultimate constitutionally required judgment. Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it? See Harper, supra, at 494 U.S. 210 at 221-223, 108 L Ed 2d 178, 110 S Ct 1028; Riggins, supra, 504 U.S. 127 at 134-135, 118 L Ed 2d 479, 112 S Ct 1810.

IV

LEdHN[2B] [2B] The Medical Center and the Magistrate in this case, applying standards roughly comparable to those set forth here and in *Harper*, approved forced medication substantially, if not primarily, upon grounds of Sell's dangerousness to others. [*184] But the District Court and [****33] the Eighth Circuit took a different approach. The District Court found "clearly erroneous" the Magistrate's conclusion regarding dangerousness, and the Court of Appeals agreed. Both courts approved forced medication solely in order to render Sell competent to stand trial.

LEdHN[9] [9] We shall assume that the Court of Appeals' conclusion about Sell's dangerousness was correct. But we make that assumption *only* because the Government did not contest, and the parties have not argued, that particular matter. If anything, the record before

539 U.S. 166, *184; 123 S. Ct. 2174, **2186; 156 L. Ed. 2d 197, ***214; 2003 U.S. LEXIS 4594, ****33

us, described in Part I, suggests the contrary.

LEdHN[2C][7] [2C] The Court of Appeals apparently agreed with the District Court that "Sell's inappropriate behavior . . . amounted at most to an 'inappropriate familiarity and even infatuation' with a nurse." 282 F.3d at 565. That being so, it also agreed that "the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center." *Ibid*. The Court of Appeals, however, did not discuss the potential differences (described by a psychiatrist testifying before the Magistrate) between ordinary "over-familiarity" and the same conduct engaged in persistently by a patient with Sell's [****34] behavioral history and mental illness. Nor did it explain why those differences should be minimized in light of the fact that the testifying psychiatrists concluded that Sell was dangerous, while Sell's own expert denied, not Sell's dangerousness, but the efficacy of the drugs proposed for treatment.

The District Court's opinion, while more thorough, places weight upon the Medical Center's decision, taken after the Magistrate's hearing, to return Sell to the general prison population. It does not explain whether that return reflected an improvement in Sell's condition or [***215] whether the Medical Center saw it as permanent rather than temporary. Cf. Harper, 494 U.S., at 227, and *n* 10, 108 L Ed 2d 178, 110 S Ct 1028 (indicating that physical [***185]

restraints and seclusion [***2187] often not acceptable substitutes for medication).

Regardless, as we have said, we must assume that Sell was not dangerous. And on that hypothetical assumption, we find that the Court of Appeals was wrong to approve forced medication solely to render Sell competent to stand trial. For one thing, the Magistrate's opinion makes clear that he did *not* find forced medication legally justified on trial competence grounds alone. Rather, the Magistrate [****35] concluded that Sell was dangerous, and he wrote that forced medication was "the only way to render the defendant not dangerous and competent to stand trial." App. 335 (emphasis added).

Moreover, the record of the hearing before the Magistrate shows that the experts themselves focused mainly upon the dangerousness issue. Consequently the experts did not pose important questions--questions, for example, about trial-related side effects and risks--the answers to which could have helped determine whether forced medication was warranted on trial competence grounds alone. Rather, the Medical Center's experts conceded that their proposed medications had "significant" side effects and that "there has to be a cost benefit analysis." *Id.*, at 185 (testimony of Dr. DeMier); 494 U.S. 210 at 236 (testimony of Dr. Wolfson). And in making their "cost-benefit" judgments, they primarily took into

539 U.S. 166, *185; 123 S. Ct. 2174, **2187; 156 L. Ed. 2d 197, ***215; 2003 U.S. LEXIS 4594, ****35

account Sell's dangerousness, not the need to bring him to trial. V

LEdHN[2D][↑] [2D] LEdHN[10][↑] [10] The failure to focus upon trial competence could well have mattered. HN19[↑] Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish [***36] the ability to express emotions are matters important in determining the permissibility of medication to restore competence, Riggins, 504 U.S. 127 at 142-145, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (Kennedy, J., concurring in judgment), but not necessarily relevant when dangerousness is primarily at issue. We cannot tell whether [*186] the side effects of antipsychotic medication were likely to undermine the fairness of a trial in Sell's case.

LEdHN[2E][↑] [2E] LEdHN[7B][↑] [7B] Finally, the lower courts did not consider that Sell has already been confined at the Medical Center for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement. Those factors, the first because HN20[↑] a defendant ordinarily receives credit toward a sentence for time served, 18 U.S.C. § 3585(b) [18 USCS § 3585(b)], and the second because it reduces the likelihood of the defendant's committing future crimes, moderate--though they do not eliminate--the importance of the governmental interest in prosecution. See *supra*, at 156 L. Ed. 2d, at 212.

LEdHN[2F][↑] [2F] LEdHN[11][↑] [11] For these reasons, we believe that the present orders authorizing forced administration of anti-psychotic drugs cannot stand. The Government may pursue its request for forced medication [****37] on the grounds discussed in this opinion, including grounds related to the danger Sell poses to himself or others. Since Sell's medical condition may have [***216] changed over time, the Government should do so on the basis of current circumstances.

The judgment of the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

it is so ordered.

Dissent by: SCALIA

Dissent

Justice **Scalia**, with whom Justice **O'Connor** and Justice **Thomas** join, dissenting.

The District Court never entered a final judgment in this case, which should have led the Court of Appeals to wonder whether it had any business entertaining petitioner's appeal. Instead, without so much as acknowledging that Congress has limited court-of-appeals jurisdiction to "appeals from all *final decisions* of the

539 U.S. 166, *186; 123 S. Ct. 2174, **2137; 156 L. Ed. 2d 197, ***216; 2003 U.S. LEXIS 4594, ****37

district courts of the United States," 28 USC § 1291 [28 USCS § 1291] (emphasis added), and appeals from certain specified interlocutory orders, [*2188] see § 1292, the Court of Appeals [*187] proceeded to the merits of Sell's interlocutory appeal. 282 F.3d 560 (2002). Perhaps this failure to discuss jurisdiction was attributable to the United States' refusal to contest the point [****38] there (as it has refused here, see Brief for United States 10, n 5), or to the panel's unexpressed agreement with the conclusion reached by other Courts of Appeals, that pretrial forced-medication orders are appealable under the "collateral order doctrine," see, e.g., United States v. Morgan, 193 F.3d 252, 258-259 (CA4 1999); United States v. Brandon, 158 F.3d 947, 950-951 (CA6 1998). But this Court's cases do not authorize appeal from the District Court's April 4, 2001, order, which was neither a "final decision" under § 1291 nor part of the class of specified interlocutory orders in § 1292. We therefore lack jurisdiction, and I would vacate the Court of Appeals' decision and remand with instructions to dismiss.

I

After petitioner's indictment, a Magistrate Judge found that petitioner was incompetent to stand trial because he was unable to understand the nature and consequences of the proceedings against him and to assist in his defense. As required by 18 U.S.C. § 4241(d) [18 USCS § 4241(d)], the Magistrate Judge

committed petitioner to the custody of the Attorney General, and petitioner was hospitalized to determine whether [****39] there was a substantial probability that in the foreseeable future he would attain the capacity to stand trial. On June 9, 1999, a reviewing psychiatrist determined, after a § 549.43 administrative hearing ¹, that petitioner should be required to take [*188] antipsychotic medication, finding the medication necessary to render petitioner competent for trial and medically appropriate to treat his mental illness. Petitioner's administrative [***217] appeal from that decision ² was denied with a written statement of reasons.

[****40] At that point the Government possessed the requisite authority to administer forced medication. Petitioner responded, not by appealing to the courts the § 549.43 administrative determination, see 5 USC § 702 [5 USCS § 702], but by moving in the District Court overseeing his criminal prosecution for a *hearing* regarding the

¹ 28 CFR § 549.43 (2002) provides the standards and procedures used to determine whether a person in the custody of the Attorney General may be involuntarily medicated. Before that can be done, a reviewing psychiatrist must determine that it is "necessary in order to attempt to make the inmate competent for trial or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison," § 549.43(a)(5).

² § 549.43(a)(6) provides: "The inmate . . . may submit an appeal to the institution mental health division administrator regarding the decision within 24 hours of the decision and . . . the administrator shall review the decision within 24 hours of the inmate's appeal."

539 U.S. 166, *188; 123 S. Ct. 2174, **2188; 156 L. Ed. 2d 197, ***217; 2003 U.S. LEXIS 4594, ****40

appropriateness of his medication. A Magistrate Judge granted the motion and held a hearing. The Government then requested from the Magistrate Judge an order authorizing the involuntary medication of petitioner, which the Magistrate Judge entered.³ On April 4, 2001, the District Court affirmed this Magistrate Judge's order, and it is from *this* order that petitioner appealed to the Eighth Circuit.

[**2189] [****41] II

A

Petitioner and the United States maintain that 28 USC § 1291 [28 USCS § 1291], which permits the courts of appeals to review "all [*189] final decisions of the district courts of the United States" (emphasis added), allowed the Court of Appeals to review the District Court's April 4, 2001 order. We have described § 1291, however, as a "final judgment rule," Flanagan v. United States, 465 U.S. 259, 263, 79 L. Ed. 2d 288, 104 S. Ct. 1051 (1984), which "in a criminal case . . . prohibits appellate review until conviction and

³ It is not apparent why this order was necessary, since the Government had already received authorization to medicate petitioner pursuant to § 549.43. If the Magistrate Judge had denied the Government's motion (or if this Court were to reverse the Magistrate Judge's order) the Bureau of Prisons' administrative decision ordering petitioner's forcible medication would remain in place. Which is to suggest that, in addition to the jurisdictional defect of interlocutoriness to which my opinion is addressed, there may be no jurisdiction because, at the time this suit was filed, petitioner failed to meet the "remediability" requirement of Article III standing. See Steel Co. v. Citizens for Better Environment, 523 U.S. 93, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998). The Court of Appeals should address this jurisdictional issue on remand.

imposition of sentence," *ibid.* (emphasis added). See also Abney v. United States, 431 U.S. 651, 656-657, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977). We have invented⁴ a narrow exception to this statutory command: the so-called "collateral order" doctrine, which permits appeal of district court orders that (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) are "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978). But the District Court's April 4, 2001, order fails to satisfy the third requirement [****42] of this test.

Our decision in Riggins v. Nevada, 504 U.S. 127, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992), demonstrates that the District Court's April 4, 2001, order is reviewable on appeal from conviction and sentence. The defendant in Riggins had been involuntarily medicated while a pretrial detainee, and he argued, on appeal from his murder conviction, that the [***218] State of Nevada had contravened the substantive-due-process standards set forth in Washington v. Harper, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990). Rather than holding that review of this claim was not possible on appeal from a criminal conviction, the Riggins Court held that forced medication of a

⁴ I use the term "invented" advisedly. The statutory text provides no basis.

539 U.S. 166, *189; 123 S. Ct. 2174, **2189; 156 L. Ed. 2d 197, ***218; 2003 U.S. LEXIS 4594, ****42

criminal defendant that fails to comply with *Harper* creates an unacceptable risk of trial error and entitles the defendant to automatic vacatur of his conviction. 504 U.S. at 135-138, 118 L. Ed. 2d 479, 112 S. Ct. 1810. The Court is therefore wrong to say that "an ordinary appeal comes too late [****43] for a defendant to enforce" this right, ante, at 156 L. Ed. 2d, at 210, and appellate review of any substantive-due-process challenge to the District Court's [*190] April 4, 2001, order must wait until after conviction and sentence have been imposed.⁵

It is true that, if petitioner must wait until final judgment to appeal, he will not receive the type of remedy he would prefer--a predeprivation injunction rather than the postdeprivation vacatur of conviction provided by *Riggins*. But that ground for interlocutory appeal is emphatically rejected [****44] by our cases. See, e.g., *Flanagan, supra* 465 U.S. 259 (disallowing interlocutory appeal of an order disqualifying defense counsel); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 73 L. Ed. 2d 754, 102 S. Ct. 3081 (1982) (*per curiam*) (disallowing interlocutory appeal of an order denying motion to dismiss

indictment on grounds of prosecutorial vindictiveness); *Carroll v. United States*, 354 U.S. 394, 1 L. Ed. 2d 1442, 77 S. Ct. 1332 (1957) (disallowing interlocutory appeal of an order denying motion to suppress evidence).

We have until today interpreted the collateral-order exception to § 1291 "with the utmost strictness" in criminal cases. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799, 103 L. Ed. 2d 879, 109 S. Ct. 1494 (1989) (emphasis added). In [**2190] the 54 years since we invented the exception, see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), we have found only three types of prejudgment orders in criminal cases appealable: denials of motions to reduce bail, *Stack v. Boyle*, 342 U.S. 1, 96 L. Ed. 3, 72 S. Ct. 1 (1951), denials of motions to dismiss on double-jeopardy grounds, *Abney, supra* 431 U.S. 651, and denials of motions to dismiss under the [****45] *Speech or Debate Clause*, *Helstoski v. Meanor*, 442 U.S. 500, 61 L. Ed. 2d 30, 99 S. Ct. 2445 (1979). The first of these exceptions was justified on the ground that the denial of a motion to reduce bail becomes moot (and thus effectively unreviewable) on appeal [*191] from conviction. See *Flanagan, supra*, 465 U.S. at 266, 79 L. Ed. 2d 288, 104 S. Ct. 1051. As *Riggins* demonstrates, that is not the case here. The interlocutory appeals in *Abney* and *Helstoski* were justified on the ground that it was appropriate to interrupt the

⁵To be sure, the order here is unreviewable after final judgment if the defendant is acquitted. But the "unreviewability" leg of our collateral-order doctrine--which, as it is framed, requires that the interlocutory order be "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978) (emphasis added)--is not satisfied by the possibility that the aggrieved party will have no occasion to appeal.

539 U.S. 166, *191; 123 S. Ct. 2174, **2190; 156 L. Ed. 2d 197, ***218; 2003 U.S. LEXIS 4594, ****45

trial when the precise right asserted was the *right not to be tried*. See Abney, *supra*, 431 U.S. at 660-661, 52 L Ed 2d 651, 97 S Ct 2034; Helstoski, [***219] *supra*, 442 U.S. at 507-508, 61 L Ed 2d 30, 99 S Ct 2445. Petitioner does not assert a right not to be tried, but a right not to be *medicated*.

B

Today's narrow holding will allow criminal defendants in petitioner's position to engage in opportunistic behavior. They can, for example, voluntarily take their medication until halfway through trial, then abruptly refuse and demand an interlocutory appeal from the order that medication continue on a compulsory basis. This sort of concern for the disruption of criminal proceedings--strangely missing from the Court's discussion today--is what has led us to [****46] state many times that we interpret the collateral-order exception narrowly in criminal cases. See Midland Asphalt Corp., *supra*, 489 U.S. 794 at 799, 103 L Ed 2d 879, 109 S Ct 1494; Flanagan, 465 U.S., at 264, 79 L Ed 2d 288, 104 S Ct 1051.

But the adverse effects of today's narrow holding are as nothing compared to the adverse effects of the new rule of law that underlies the holding. The Court's opinion announces that appellate jurisdiction is proper because review after conviction and sentence will come only after "Sell will have undergone forced

medication--the very harm that he seeks to avoid." Ante, at 156 L Ed 2d, at 209. This analysis effects a breathtaking expansion of appellate jurisdiction over interlocutory orders. If it is applied faithfully (and some appellate panels will be eager to apply it faithfully), any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional (or perhaps even statutory?) rights may immediately appeal. He is empowered to hold up the trial for months by claiming that review after final judgment "would come too late" to prevent the violation. A trial-court order requiring the defendant [*192] to wear an electronic bracelet could be attacked [****47] as an immediate infringement of the constitutional right to "bodily integrity"; an order refusing to allow the defendant to wear a T-shirt that says "Black Power" in front of the jury could be attacked as an immediate violation of *First Amendment* rights; and an order compelling testimony could be attacked as an immediate denial *Fifth Amendment* rights. All these orders would be immediately appealable. Flanagan and Carroll, which held that appellate review of orders that might infringe a defendant's constitutionally protected rights *still* had to wait until final judgment, are seemingly overruled. The narrow gate of entry to the collateral-order doctrine--hitherto traversable by only (1) orders unreviewable on appeal from judgment and (2) orders denying an asserted right

539 U.S. 166, *192; 123 S. Ct. 2174, **2190; 156 L. Ed. 2d 197, ***219; 2003 U.S. LEXIS 4594, ****47

not to be tried—has been generously widened.

The Court dismisses these concerns in a single sentence immediately following its assertion that the order here meets the three *Cohen*-exception requirements of (1) conclusively determining the disputed question (correct); (2) resolving an important issue separate from the merits of the [*2191] action (correct); and (3) being unreviewable on appeal (quite plainly [****48] incorrect). That sentence reads as follows: "These considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent." *Ante*, at [***220] 156 L. Ed. 2d, at 210. That is a brand new consideration put forward in rebuttal, not at all discussed in the body of the Court's analysis, which relies on the ground that (contrary to my contention) this order is *not reviewable on appeal*. The Court's last-minute addition must mean that it is revising the *Cohen* test, to dispense with the third requirement (unreviewable on appeal) *only when the important separate issue in question involves a "severe intrusion" and hence an "important constitutional issue."* Of course I welcome this narrowing of a misguided revision—but I still [*193] would not favor the revision, not only because it is a novelty with no basis in our prior opinions, but also because of the uncertainty, and the obvious

opportunity for gamesmanship, that the revision-as-narrowed produces. If, however, I did make this more limited addition to the textually unsupported *Cohen* doctrine, I would at least do so in an [****49] undisguised fashion.

* * *

Petitioner could have obtained pretrial review of the § 549.43 medication order by filing suit under the *Administrative Procedure Act*, 5 U.S.C. § 551 *et. seq.* [5 USCS §§ 551 *et seq.*], or even by filing a *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), action, which is available to federal pretrial detainees challenging the conditions of their confinement, see, e.g., *Lyons v. U.S. Marshals*, 840 F.2d 202 (CA3 1987). In such a suit, he could have obtained immediate appellate review of denial of relief.⁶ But if he chooses to challenge his forced medication in the context of a criminal trial, he must abide by the limitations attached to such a challenge—which prevent him from stopping the proceedings in their tracks. Petitioner's mistaken litigation strategy, and this Court's desire to decide an interesting constitutional issue, do not justify a disregard of the limits that Congress has imposed on courts of appeals' (and our own) jurisdiction. We should vacate the judgment here, and remand the

⁶ Petitioner points out that there are disadvantages to such an approach—for example, lack of constitutional entitlement to appointed counsel in a *Bivens* action. That does not entitle him or us to disregard the limits on appellate jurisdiction.

539 U.S. 166, *193; 123 S. Ct. 2174, **2191; 156 L. Ed. 2d 197, ***220; 2003 U.S. LEXIS 4594, ****49

case to the [****50] Court of Appeals with instructions to dismiss.

References

4 Am Jur 2d, Appellate Review §§ 113, 231; 21 Am Jur 2d, Criminal Law § 118; 53 Am Jur 2d, Mentally Impaired Persons §§ 113, 119

28 USCS § 1291

L Ed Digest, Criminal Law § 53

L Ed Index, Drugs and Narcotics;
Incompetent or Insane Persons

Annotation References

Supreme Court's views as to validity, under due process clause of Federal Constitution's *Fourteenth Amendment*, of state provisions concerning accused's **competence to stand trial**.
120 L Ed 2d 1037.

What constitutes "collateral order" which is immediately appealable under 28 *USCS § 1291*--Supreme Court cases.
99 L Ed 2d 991.

Competency to stand trial of criminal **defendant** diagnosed as "schizophrenic"--modern federal cases.
63 ALR Fed 696.

Right of state prison authorities to administer neuroleptic or antipsychotic drugs to prisoner without his or her consent--state cases. 75 ALR4th 1124.

[****51] Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency. 16 ALR3d 714.

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A Neutral
As of: March 5, 2019 8:06 PM Z

In re Schofield

Supreme Court of Pennsylvania
Argued April 12, 1949 ; May 23, 1949
No Number in Original

Reporter

362 Pa. 201 *; 66 A.2d 675 **; 1949 Pa. LEXIS 402 ***

Schofield Discipline **Case**

Prior History: [***1] Original jurisdiction. No. 221, Miscellaneous Docket No. 9, in the matter of Lemuel B. Schofield. Respondent ordered to appear for public reprimand and censure at the bar of the Supreme Court.

Proceeding upon petition of Attorney General for **disciplinary action against** respondent as a member of the Bar of the Supreme Court for professional misconduct while acting as counsel for a defendant in the trial of a **criminal case**.

Disposition: It is ordered that this reprimand be published in the official records of this Court in the state reports as supplementary to the adjudication filed by this Court in this **case** on May 23, 1949.

Core Terms

contempt, trial judge, **cases**, ex parte, witnesses, Sessions, affront, Disbarment, fidelity, general verdict, remarks, juries, rights, professional misconduct, character witness, attorney

general, circumstances, misbehavior, persistence, convention, courtroom, jurists, replied, Canon

Case Summary

Procedural Posture

Petitioner attorney general brought an **action against** respondent attorney for professional misconduct while acting as counsel for a defendant in the trial of a **criminal case**.

Overview

After a trial judge had denied the attorney's request to call witnesses, the attorney acted in such a way as to get the information before the jury, which the trial judge had ruled should not have been received. The court held that whether the attorney thought that the trial judge erred in excluding the witnesses was immaterial. The court held that Pa. R. Civ. P. 205 provided that the canons of ethics of the American Bar Association were standards of conduct for attorneys of the court. The court held that the canons provide, among other rules, that a **lawyer** should not offer evidence,

362 Pa. 201, *201; 66 A.2d 675, **675; 1949 Pa. LEXIS 402, ***1

which he knows the court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. The court concluded that the attorney was guilty of professional misconduct in proceeding in defiance of the decision of the trial judge under the circumstances. The court held that the attorney's insubordination constituted violation of his oath of office requiring punishment. The court ordered that the attorney appear for public reprimand and censure.

Outcome

The court ordered, in favor of the attorney general, a reprimand of the attorney to have been published in the official records of the court in the state reports as supplementary to the adjudication filed by the court.

LexisNexis® Headnotes

Governments > Courts > Court
Personnel

Legal

Ethics > Sanctions > Disbarments

Administrative Law > Judicial
Review > Reviewability > Factual
Determinations

Civil

Procedure > Appeals > Appellate
Jurisdiction > State Court Review

Legal

Ethics > Sanctions > Disciplinary
Proceedings > Hearings

Legal

Ethics > Sanctions > Suspensions

HN1 [↓] Courts, Court Personnel

The Supreme Court of Pennsylvania (Court) has the power to disbar, suspend, or otherwise appropriately discipline members of its bar; attorneys are officers of the court admitted to office on taking the statutory oath, to behave "with all good fidelity" to the court as well as to the client. When the pleadings disclose no dispute of material fact, it is unnecessary to refer the record to the Board of Governance (Board) to aid the court by finding facts and making recommendations. In any case the final disposition is by the Court. The Board's function is to determine, assuming the findings of the hearing masters to be correct, whether the recommendation of the masters to the Court are warranted. The judicial review is at the Court's hands, not by the Board.

Civil Procedure > Judicial
Officers > Judges > General
Overview

Governments > Courts > Judges

Legal Ethics > Professional

362 Pa. 201, *201; 66 A.2d 675, **675; 1949 Pa. LEXIS 402, ***1

Conduct > Tribunals

HN2 [⚡] **Judicial Officers, Judges**

The bar have great liberty and high privileges in the assertion of their clients' rights as they view them, but on the other hand they have equal obligations as officers in the administration of justice, and no duty is more fundamental, more unremitting or more imperative than that of respectful subordination to the court. The foundation of liberty under our system of government is respect for the law as officially pronounced. The counsel in any case may or may not be an able or more learned lawyer than the judge, and it may tax his patience and his temper to submit to rulings which he regards as incorrect, but discipline and self-restraint are as necessary to the orderly administration of justice as they are to the effectiveness of an army. The decisions of the judge must be obeyed because he is the tribunal appointed to decide, and the bar should at all times be the foremost in rendering respectful submission.

Civil Procedure > Judicial
Officers > Judges > General
Overview

Legal Ethics > Professional
Conduct > Tribunals

HN3 [⚡] **Judicial Officers, Judges**

The judge alone has the duty of ruling on the admission of evidence; counsel's

fidelity to the court requires respectful submission to the ruling; evasion is misconduct. Proper judicial procedure would be impossible if counsel and not the judge were permitted to determine the conduct of a trial. For error in the ruling, counsel had the right to review on appeal. Ex parte revision by defiance of the ruling cannot be tolerated.

Civil Procedure > Judicial
Officers > Judges > General
Overview

Evidence > ... > Judicial Intervention
in Trials > Comments by
Judges > General Overview

Civil
Procedure > Attorneys > General
Overview

Legal Ethics > Professional
Conduct > Tribunals

HN4 [⚡] **Judicial Officers, Judges**

Pa. R. Civ. P. 205 provides that the canons of ethics of the American Bar Association as from time to time existing, shall be and become standards of conduct for attorneys of the court. While those canons are declaratory of standards theretofore prevailing in Pennsylvania, their formal incorporation into the rules of civil procedure shows their importance. They provide, among other rules that a lawyer should not offer evidence, which he knows the court should reject, in order to get the same before the jury by argument for its

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admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

Criminal Law &

Procedure > Postconviction
Proceedings > Imprisonment

Governments > Courts > Court
Personnel

Legal
Ethics > Sanctions > Disbarments

Civil
Procedure > Sanctions > Contempt >
General Overview

Civil Rights Law > Protection of
Rights > Prisoner Rights > Discipline

Legal Ethics > Sanctions > General
Overview

HN5[↓] Postconviction Proceedings, Imprisonment

The power of the court to punish summarily for contempt, by find and imprisonment, is one thing, and its power to strike an attorney from the roll is another and distinct thing, though the misconduct for which an attorney may be disbarred, may in some instances, involve a contempt of court. On a rule to show cause why an attorney should not be punished for contempt the court

cannot disbar the attorney for alleged misbehavior in his office of attorney, they are separate and distinct offenses. The fact that professional misconduct may also be a contempt does not bring disciplinary proceedings within the rule that one court will not punish for contempt of another tribunal. A contempt proceeding for misbehavior in court is designed to vindicate the authority of the court; on the other hand the object of a disciplinary proceeding is to deal with the fitness of the court's officer to continue in that office, to preserve and protect the court and the public from the official ministrations of persons unfit or unworthy to hold such office.

Civil Procedure > ... > Subject Matter
Jurisdiction > Jurisdiction Over
Actions > General Overview

Legal Ethics > Sanctions > General
Overview

Civil
Procedure > ... > Jurisdiction > Subje
ct Matter Jurisdiction > General
Overview

HN6[↓] Subject Matter Jurisdiction, Jurisdiction Over Actions

An appellate court may take original jurisdiction of a charge of professional misconduct by its officer in a trial court or before a judge.

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Civil Procedure > Judicial
Officers > Judges > General
Overview

Criminal Law & Procedure > Juries
& Jurors > Province of Court &
Jury > General Overview

Civil Procedure > Trials > Jury
Trials > Province of Court & Jury

HN7 [⬇] **Judicial Officers, Judges**

Juries are not judges of the law.

Civil Procedure > Trials > Jury
Trials > Province of Court & Jury

Criminal Law & Procedure > Juries
& Jurors > Province of Court &
Jury > General Overview

HN8 [⬇] **Jury Trials, Province of Court & Jury**

What the jury is to determine is, "the law and the facts as in other cases," that is, the law as given to them by the court, and the facts as shown by the evidence. They are bound to take the law from the court; but, so taking it, they have the right to apply it to the facts as they may find them to be proved, and to announce the result of the whole, by a general verdict of guilty or not guilty.

Counsel: *John G. Buchanan*, Special Counsel, with him *Emory R. Kyle* and *T. McKeen Chidsey*, Attorney General, for petitioner.

Robert T. McCracken, with him *George G. Chandler*, *C. Brewster Rhoads*, *Marvin Comisky*, *W. Bradley Ward* and *Thomas D. McBride*, for respondent.

Judges: Before MAXEY, C.J., DREW, LINN, STERN, PATTERSON, STEARNE and JONES, JJ.

Opinion by: LINN

Opinion

[*203] [677] OPINION BY MR. JUSTICE LINN**

The Attorney General of the Commonwealth filed a petition praying that Lemuel B. Schofield, a member of the bar of this Court, be required **[***2]** to show cause why he should not be disciplined for professional misconduct while representing the defendant in the Quarter Sessions of Philadelphia, in the trial of indictments Nos. 517 and 589 October Sessions, 1948, charging violation of the Magistrates' Court Act of June 15, 1937, P.L. 1743, 42 PS Cum. Supp. 1101 et seq. A rule was granted. The **[*204]** respondent appeared and answered on the merits. As there was no dispute of material fact, the case was heard on petition and answer. We have considered all the points presented in the briefs and in oral argument but shall refer only to those deemed essential to the proper disposition of the rule.

1. Jurisdiction. There is no doubt of

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HN1 [¶] the power ¹ of this Court to disbar, suspend or otherwise appropriately discipline members of its bar; they are officers of the court admitted to office on taking the statutory oath, ² inter alia, to behave "with all good fidelity" to the court as well as to the client. When, as *in* this *case*, the pleadings disclose no dispute of material fact, it is unnecessary to refer the record to the Board of Governance to aid the Court by finding facts and making recommendations. *In* any *case* the final [***3] disposition is by this Court: see our Rule 17(g), (h) and (i). *In Klensin v. Board of Governance of the Pennsylvania Bar*, 312 Pa. 564, 575, 168 A. 474, 478 (1933), we said, "[The Board's] function is to determine, assuming the findings of the hearing masters to be correct, whether the recommendation of the masters to us are warranted. The judicial [*205] review is at our hands, not by the

Board." See also *In Re Disbarment Proceedings*, 321 Pa. 81, 101, 184 A. 59, 68 (1936). We therefore reject respondent's submission that the petition and answer be referred to our Board of Governance.

[***4] 2. Violation of Oath of Office. *In* considering the Attorney General's charge that respondent violated his oath of office, it is necessary to refer briefly to the trial *in* the Quarter Sessions *in* which the challenged conduct occurred. The indictments charged violation by the indicted magistrate of the Magistrates' Court Act of June 15, 1937, P.L. 1743, 42 PS 1101, et seq.: (1) by granting continuances without stating *in* his docket a reason therefor as required by section 14 of the Act and (2) by reviewing, altering, modifying or remitting any sentence of fine or imprisonment or by altering any official decision *in* any *case* heard by him except *in* the presence of and with the written approval of the prosecutor as required by Section 43(a) of the Act. It was the second trial, the jury having disagreed on the first. The presiding judge and counsel for both sides were therefore familiar with the elements of the *case* and the probable course to be taken at the trial.

During the trial, the courtroom being crowded, respondent requested that seats [**678] be made available for character witnesses he proposed to call. The prosecution objected, at side-bar, to the relevance of character [***5] evidence and the entry into the

¹The power has been exercised *in* the United States and England from the earliest times. *Anonymous*, 6 Mod. 187, 87 Eng. Rep. 942 (1705); *Ex Parte Brounsall*, 2 Cowper 829, 98 Eng. Rep. 1385 (1778); *The People against Smith*, 3 Caines (N.Y.) 221 (1805); *Leigh's Case*, 1 Munford (Va.) 468 (1810); *Austin's Appeal*, 5 Rawle 191 (1835); *Matter of Mills*, 1 Mich. 392 (1850); *People v. Turner*, 1 Cal. 143 (1850); *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637 (1880); *Sherwood's Investigation*, 259 Pa. 254, 103 A. 42 (1918); *Hurst's Case*, 317 Pa. 217, 176 A. 427 (1935); *Montgomery County Bar Ass'n v. Rinalducci*, 329 Pa. 296, 197 A. 924 (1938).

²Act of April 14, 1834, P.L. 333, section 69, 17 PS 1603. Chief Justice SHARSWOOD *in* his lectures on Professional Ethics, page 10, states that this oath seems to have been first prescribed by the Act of Assembly August 22, 1752, 1 Sm. L. 218, (5 Statutes at Large 161, 178, Chapter 398); it appeared *in* the Act of March 30, 1722-23, Volume III, Statutes at Large 367, 379, Chapter 270, which was repealed and replaced by the Act of 1752.

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courtroom of "a whole crowd" of witnesses if such evidence would be excluded. The judge sustained the objection stating "[I] direct that counsel shall not call these witnesses." Respondent objected to the ruling and asked "leave to call the witnesses in the presence of the jury" and make an offer to prove good reputation in their presence. The judge again ruled, "The request of counsel for the defendant is denied, and he is directed not to call the names of these witnesses, or to call them to the stand." In spite [*206] of that admonition, the following then occurred in the presence of the jury: "MR. SCHOFIELD: [addressing the crowded courtroom said] The character witnesses who were asked to be here by the defendant are excused. Thank you all very much for coming. Thank you, Judge Bonnelly; thank you, Judge McDevitt; thank you, Judge --

"MR. ELDREDGE: If your Honor please, I think your Honor made a direction to Mr. Schofield.

"MR. SCHOFIELD: Well, if your Honor please, we have here in this courtroom three jurists, and if I can't say thank you for a Judge who has left the bench to come here for the support of a defendant, then I don't [***6] know the duties of a lawyer, sir, and I simply express my gratitude to all these prominent citizens and jurists of Philadelphia who have come in here to lend their aid to this defendant.

"THE COURT: Major, I regard your

remarks as an affront to the Court. ³

"MR. SCHOFIELD: I am sorry if your Honor regards it as an affront. It wasn't intended as an affront. Thank you, gentlemen, very much. Shall we resume, sir?

THE COURT: Yes."

This "affront to the court," as it was characterized by the judge, was an act of insubordination; it was a violation of the respondent's duty to behave "with good fidelity" to the court; it was an unworthy effort to get before the jury a fact or facts which the learned trial judge had ruled should not be received. Respondent's persistence to get before the jury as character witnesses the names of persons holding high office after the court ordered him not to do so was [***7] disrespectful and inexcusable. [*207] He had no right to say, after the court had ruled, "... We have here in this courtroom three jurists and if I can't say thank you for a judge who has left the bench to come here for the support of a defendant, then I don't know the duties of a lawyer, sir, and I simply express my gratitude to all these prominent citizens and jurists of Philadelphia who have come in here to lend their aid to this defendant." The effect was not cured by his statement "I am sorry if your Honor regards it as an

³ The presiding judge instructed the stenographer that he was misquoted in the first draft of the transcript and directed it be corrected to read "Sir, I regard your remarks as a grave affront to the court." For present purposes it is immaterial which version be accepted.

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affront. It wasn't intended as an affront." But he again repeated the offense by his next statement, addressed to the same witnesses, "Thank you, gentlemen, very much." There is no ambiguity about his statements. He understood the court's ruling, the manifest scope of which was that he should not bring to the attention of the jury the names of the witnesses. It is difficult to avoid the conclusion that respondent intentionally violated the express ruling of the court in its most essential implication. In such circumstances, disavowal has been considered of little avail where but one interpretation is possible. ⁴ Nor can the possible effect of the [***8] offense be excused by respondent's submission, in his Answer to the Attorney General's petition, in this court, that the trial judge's exclusion of character witnesses was erroneous, a point not for decision in this proceeding.

[**679] For fifty years the legal profession has had the benefit of Justice MITCHELL'S well known statement in *Scouten's Appeal*, 186 Pa. 270, 279, 40 A. 481 (1898), HN2[*] "The bar have great liberty and high privileges in the assertion of their clients' rights as they view them, but on the other hand they have equal obligations as officers in the administration of justice, and no duty is

⁴ In re Woolley, 11 Bush (74 Ky.) 95, 109-10 (1875); In re Chadwick, 109 Mich. 588, 604, 67 N.W. 1071, 1077 (1896); People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528 (1872); In re Matter of Sturoc, 48 N.H. 428, 97 Am. Dec. 626 (1869).

more fundamental, [*208] more unremitting or more imperative than that of respectful subordination to the court. The foundation of liberty under our system of government is respect for the law as officially pronounced. The counsel in any case may or may not be an abler or more learned lawyer than the judge, [***9] and it may tax his patience and his temper to submit to rulings which he regards as incorrect, but discipline and self-restraint are as necessary to the orderly administration of justice as they are to the effectiveness of an army. The decisions of the judge must be obeyed because he is the tribunal appointed to decide, and the bar should at all times be the foremost in rendering respectful submission." See remarks of Justice BLACK in *Williamson's Case*, 26 Pa. 9, 21, 67 Am. Dec. 374 (1855); *Fisher v. Pace*, 336 U.S. 155, 69 S. Ct. 425, 93 L. Ed. 435; *U.S. v. United Mine Workers*, 330 U.S. 258, 291, et seq., 67 S. Ct. 677, 91 L. Ed. 884 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450, 31 S. Ct. 492, 55 L. Ed. 797 (1911); *Howat et al. v. Kansas*, 258 U.S. 181, 189-90, 42 S. Ct. 277, 66 L. Ed. 550 (1922). It is immaterial, in disposing of the case now before us, whether respondent thought the learned trial judge erred in excluding ⁵ the character witnesses. The court not only

⁵ The learned judge said, "In my view, as this is a case not involving evil or corrupt intent, character evidence is irrelevant and immaterial to any issue in the case, and for that reason I sustain the objection to the offer, and direct that counsel shall not call these witnesses."

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had the power to rule on the objection interposed by the Commonwealth but it was the court's duty to decide. The case is therefore not like cases that have been referred to [***10] in argument, in which attachment for contempt was denied for disregard of orders which the court had no power to make; see for example, Com. v. Sage, 160 Pa. 399, 28 A. 863 (1894); Com. v. Perkins, 124 Pa. 36, 48, 16 A. 525 (1889); Rose Child Dependency Case, 161 Pa. Superior Ct. 204, [*209] 54 A. 2d 297 (1947); In Matter of Rossiter, 84 Pa. Superior Ct. 193 (1924). HN3[*] The judge alone has the duty of ruling on the admission of evidence; counsel's fidelity to the court requires respectful submission to the ruling; evasion is misconduct. Proper judicial procedure would be impossible if counsel and not the judge were permitted to determine the conduct of a trial. For error in the ruling, counsel had the right to review on appeal. Ex parte revision by defiance of the ruling cannot be tolerated.

3. Our Rules of Civil Procedure. Respondent's duty also required him to observe [***11] and comply with the Rules of Civil Procedure adopted by this Court pursuant to the Act of June 21, 1937, P.L. 1982, section 1, 17 PS 61. These rules have the force of statute and we must assume respondent's familiarity with them. HN4[*] Rule 205 provides, "The canons⁶ of ethics of the

⁶ Attention was called to these canons in Re Disbarment Proceedings, 321 Pa. 81, 95, 184 A. 59, 65 (1935), and in

American Bar Association as from time to time existing, shall be and become standards of conduct for attorneys of the court...." While those canons are declaratory of standards theretofore prevailing in this Commonwealth, their formal incorporation into our rules of civil procedure shows their importance. They provide, among other rules: "A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks [**680] or statements intended to influence the jury or bystanders.

[***12] "These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the [*210] lawyer, with the duty of aiding in the administration of justice." ⁷

Illustrations of punishment for professional misconduct of the same general character are common. In Baur v. Betz, 1 How. Pr. N.S. (N.Y.) 344 (1885), an order of court directed an attorney to disclose the whereabouts of his client to opposing counsel to enable service of a copy of an injunction. The

Goldberg's Case, 321 Pa. 109, 110, 184 A. 74, 75 (1936). Also see remarks of Judge SOPER, in re Ades, 6 Fed. Supp. (D.C. Md.), 467 (1934).

⁷ Canon 22 of the Canons of Ethics of the American Bar Association.

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responsive disclosure of his client's whereabouts was misleading. At page 347 the court said, "As an officer of the court he was bound to deal with it in all respects without reserve, and to obey its orders implicitly unless appealed from and reversed on appeal." The court held that costs and expenses were properly imposed on the attorney and his client.

In State v. Minnesota v. Leftwich, 41 Minn. 42, 44, 42 N.W. 598, 599 (1889), the court ruled that certain questions were improper. Counsel persisted in "making offers substantially similar to those made" and excluded, with the apparent intent of evading the [***13] court's rulings "or with some other than a *bona fide* purpose to fairly present the cause of his client." After warning he was held in contempt which was affirmed on appeal. The Supreme Court of Minnesota said, "A counsel trying the cause of his client has, of course, rights as the representative of a suitor and as an officer of the court which must be respected; but those rights can never extend to disregarding or disobeying the rulings and orders of the court. If that were permitted the trial of a cause might become a mere farce. If he thinks a ruling against him is erroneous, he can do his duty to and save the rights of his client by taking an exception. That is the only orderly and proper way to avoid the effect of an erroneous ruling. To permit the counsel, [*211] after the court has decided that a question or a particular

course of examination is improper, to persist in renewing substantially the same question, or in continuing that course, would incur the danger of the trial becoming a contest of endurance between the court endeavoring to prevent a course of examination that it deemed improper and the counsel endeavoring to follow such a course, notwithstanding [***14] the ruling of the court. A counsel who would intentionally attempt such a mode of conducting a trial, especially after being warned by the court to desist, and that it would consider persistence in it a contempt, would undoubtedly be guilty of a contempt.... The relator, having presented the question of his right to follow that course, and got a ruling upon it, ought, if he deemed the ruling erroneous, to have taken his exception, and afterwards conformed to the course indicated by the ruling. He had no right to attempt to evade it. As to that it is immaterial whether the ruling was or was not erroneous."

In Territory v. Clancy et al., 7 N.M. 580, 37 P. 1108 (1894) an attorney was suspended for 12 months and imprisoned for 30 days for advising his client to disregard an order of the court which he thought was not binding.

In re Gluck, 243 N.Y.S. 334, 299 App. Div. 490 (1930) an attorney was disbarred for, inter alia, deliberately disobeying a stay order of the court. The court said, at page 344, "In his capacity as an officer of the court, respondent has proven himself

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incapable of a proper appreciation of his duty to uphold the mandate of the court, and, on the [***15] contrary, has demonstrated that he considers such mandate a proper subject for contemptuous treatment."

In Russell v. French, 67 Iowa 102, 24 N.W. 741 (1885) after a dispute between counsel as to whether a witness had already answered a question propounded and objected to, the trial judge ruled that the objection was sustained. The attorney then stated in loud tones [*212] and insulting manner, "She has not answered the question." The court said, "When the court made the ruling it did, whether right or wrong, the plaintiff should either have submitted thereto, taken an exception, and had the error, if it was [**681] one, corrected on appeal, or in respectful language and manner addressed the court and asked to have the ruling reconsidered; but if the court declined to hear him, the plaintiff should have acquiesced therein. The time for argument is before the decision. Counsel then have the right to insist on being heard. When a decision has been made, the time for argument has passed, unless permission of the court is asked and obtained.... If the plaintiff believed the statement made by the court to be incorrect, and he deemed it material for the interest of his [***16] client to have it corrected, and the decision changed, he should, in respectful language, have called attention to what he deemed to be the

mistake. It is quite apparent that he did not do this, but that, at least, he sprang to his feet and, in unequivocal language, directly contradicted what the court said." The punishment for contempt was reversed on procedural grounds.

In Rubin v. State, 192 Wis. 1, 211 N.W. 926 (1927) after the court excluded a question, a colloquy between the court and counsel followed during which counsel excepted to the ruling. Immediately thereafter counsel, looking in the direction of the jury, "under guise of an exception" said "I take exception to this undue interference with my cross-examination." In sustaining punishment for contempt, the court held that the remarks were unjustified and improper, saying, "when the court rules upon questions before it, it is the duty of counsel to respectfully acquiesce in such rulings."

In Re Mindes, 88 N.J.L. 117, 95 A. 743 (1915), counsel was held in contempt for disobeying the court's ruling and persisting in disobeying it. When the court ruled and expressed a desire to hear no further argument, " [***17] [*213] it was the appellant's duty to accept the ruling of the court as final, and if he desired to challenge its legal correctness to do so by an appeal..." See also Holman v. State, 105 Ind. 513, 5 N.E. 556 (1886); Mahoney v. State, 33 Ind. App. 655, 72 N.E. 151, 104 Am. St. Rep. 276 (1904); Dodge v. State, 140 Ind. 284, 39 N.E. 745 (1895); People ex rel. Chanler v.

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Newburger, 98 App. Div. 92, 90 N.Y.S. 740 (1904). Compare People ex rel. Bernstein v. LaFetra, 171 App. Div. 269, 157 N.Y.S. 386 (1916); Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237 (1917); In re Shortridge, 5 Cal. App. 371, 90 Pac. 478 (1907).⁸

[***18] We must therefore conclude that respondent was guilty of professional misconduct in proceeding in defiance of the decision of the learned trial judge in the circumstances stated.

4. Not a Contempt Proceeding. We may refer briefly to respondent's submission that for misconduct during the trial he was subject to punishment for contempt and that the trial judge did not proceed against him, and that, for some reason which has not been made clear to us, respondent should not now be punished for misbehavior in office. We are considering respondent's violation of his oath of office -- to "behave [himself] in the [*214] office of attorney, within this court, according to the best of [his] ability, and with all good

⁸ In this connection, it may not be without interest to refer to a local incident in the Philadelphia courts: In Re James H. Heverlein, 32 Legal Intelligencer (Phila.) 188 (1875) counsel, inter alia, upon the court's refusal to adjourn to enable him to prepare a reply to commonwealth's counsel said, "Then, if you will not give me time, I will not speak unless my legal rights are sustained." Judge BRIGGS for the court of Quarter Sessions said, "If the respondent had conceived that his client was aggrieved by the rulings of the court, instead of losing his temper he should have submitted to the rulings, and, after the trial, reviewed them upon motion for a new trial or in the Supreme Court. He should have steadily kept before him that it was the duty of the court to decide every question raised by the learned counsel on either side, according to the court's best judgment of the law...."

fidelity, as well to the court as to the client;..." We are not considering whether the trial judge in the Quarter Sessions might have tried him for contempt. The present disciplinary proceeding is for a different offense, as courts have recognized: HN5 [¶] "The power of the court to punish summarily for contempt, by fine and imprisonment, is one thing, and its power to strike an attorney from the roll [*682] is another and distinct thing, though the misconduct for [***19] which an attorney may be disbarred, may in some instances, involve a contempt of court." Beene v. State, 22 Ark. 149, 151 (1860); In re Adriaans, 17 App. Cas. (D.C.) 39 (1900); In re Pryor, 18 Kans. 72, 26 Am. Rep. 747 (1877). In Ex Parte Bradley, 7 Wall 364, 19 L. Ed. 214 (1868) it was held that on a rule to show cause why an attorney should not be punished for contempt the court cannot disbar the respondent for alleged misbehavior in his office of attorney -- that they are separate and distinct offenses. Ex Parte Robinson, 19 Wall 505, 22 L. Ed. 205 (1873). Our own cases recognize the distinction: Sherwood's investigation, 259 Pa. 254, 258, 103 A. 42 (1918); Hurst's Case, 317 Pa. 217, 176 A. 427 (1935).

The fact that professional misconduct may also be a contempt does not bring disciplinary proceedings within the rule that one court will not punish for contempt of another tribunal.⁹ The

⁹ HN6 [¶] An appellate court may take original jurisdiction of a

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respondent is not now charged with contempt of court but with misbehavior in his office of attorney. The non-action of the trial judge does not require this Court to dismiss the Attorney General's [*215] complaint. A contempt proceeding for misbehavior [***20] in court is designed to vindicate the authority of the court; on the other hand the object of a disciplinary proceeding is to deal with the fitness of the court's officer to continue in that office, to preserve and protect the court and the public from the official ministration of persons unfit or unworthy to hold such office. Chernoff's Case, 344 Pa. 527, 26 A. 2d 335 (1942); Moyerman's Case, 312 Pa. 555, 167 A. 579 (1933); Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380 (1927); Barach's Case, 279 Pa. 89, 123 A. 727 (1924); In re Oliensis, 26 Pa. Dist. 853 (1917); Ex Parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1882); 7 C.J.S., Attorney and Client, Section 28. Compare Stone v. Board of Governance, 312 Pa. 576, 168 A. 473 (1933). It is because this distinction is well recognized that we find it unnecessary to discuss that part of the record stating what followed immediately after the retirement of the jury to deliberate upon its verdict. It appears that the deputy attorney general then called attention to the trial

charge of professional misconduct by its officer in a trial court or before a judge: In re Whitehead, 28 Ch. Div. 614 (1885); People v. Green, 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351 (1883); Ex Parte Brown, 1 How. (Miss.) 303 (1836); In re Thatcher, 80 Ohio St. 492, 89 N.E. 39 (1909); In re O, 73 Wisc. 602, 621 (1889).

judge's reference to respondent's "affront to the court" on the day before; that respondent replied at some length [***21] and suggested "that inasmuch as this case is not over and may require further action on the part of defense counsel, especially if the jury would want any further instructions, that any further proceedings along those lines should naturally be postponed until after the verdict in this case. If, however, Your Honor thinks otherwise, I shall be glad to proceed." The learned trial judge replied, "Gentlemen, I will give this matter consideration." On the same day the jury returned a verdict of not guilty. The Attorney General, in his petition to this Court alleges that on the day following the verdict, his deputy presented, ex parte, to the trial judge in chambers a "Memorandum for the Court Concerning the Attorney General's Motion to Have Lemuel B. Schofield, Esquire, adjudged in Contempt." He avers that after [*216] reading the paper the judge replied "that he believed his power to take any action had expired with the recording of the verdict of 'Not Guilty' and that he could not take any action in the matter." He also avers that the judge authorized him to express the judge's view of the matter to the Supreme Court. In his answer the respondent replied that he was not advised [***22] of the proceeding so taken in the court below and challenged their efficacy for any purpose in the present case. In the circumstances, we have not given them any effect in coming to our conclusion

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on the main question.

5. Duty of the Jury in Criminal Trials. We come now to the other serious charge made against the respondent, [**683] which, briefly stated, is that, in his speeches to the jury, he said that the members of the jury were judges of the law as well as the facts and, accordingly, had the right to disregard the trial judge's instructions on the law, and made numerous statements challenging the law as stated and interpreted by the presiding judge. In this court, counsel for the parties differed as to the meaning of respondent's opening and closing speeches [***23] to the jury and also, if we understand them correctly, as to the law defining the duty of the jury in criminal cases and particularly in this case as urged by respondent. In finding respondent guilty of breach of his obligation to the court and misbehavior in office, we have not taken into account this charge based on his speeches to the jury. We do this because it is apparent from respondent's answer that he was under some misapprehension of the present authority of Kane v. Commonwealth, 89 Pa. 522 (1879). We have, however, considered the general rule and now intend, in the words of Justice MITCHELL in his concurring opinion in Commonwealth v. McManus, 143 Pa. 64 (1891), at page 86, to "put an end once for all to a doctrine that [we] regard as unsound in every point of view, historical, logical, or technical,"

these speeches are in the record. There is no [*217] dispute of fact as to what respondent said; it is the duty of this court to determine the effect of the words in the circumstances. As we understand them, they convict the respondent of attempting to persuade the jury that they had the right to disregard the trial judge's instructions on the law. While [***24] much has been written on this subject ¹⁰ we have found no better statement of the rule that HN7 juries are not judges of the law than Justice MITCHELL'S in the McManus case from which we quote: "The notion is of modern growth, and arises undoubtedly from a perversion of the history and results of the celebrated contest over the right to return a general verdict, especially in cases of libel, which ended in Fox's Bill, 32 Geo. III, c. 60.

[***25] "In the early days of jury trials, issues that went to the country were usually simple, and were probably

¹⁰ See Dennis: *Maryland's Antique Constitutional Thorn*, 92 U. of P. Law Rev. 34 (1943); Thayer: *Preliminary Treatise*, Chap. 5, p. 183 et seq.; Howe: *Juries as Judges of Criminal Law*, 52 Harv. Law Rev. 582 (1939); *Spart v. U.S.*, 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1894); *State v. Croteau*, 23 Vt. 14 (1849) overruled in State v. Burpee, 65 Vt. 1, 25 A. 964 (1892); *Com. v. Castellana*, 277 Pa. 117, 121 A. 50 (1923); *Com. v. Bryson*, 276 Pa. 566, 120 A. 552 (1923); *Com. v. Bednorki*, 264 Pa. 124, 107 A. 666 (1919); *Com. v. New*, 142 Pa. Superior Ct. 358, 16 A. 2d 437 (1940); *Com. v. Fahey*, 113 Pa. Superior Ct. 598, 173 A. 854 (1934); *Com. v. Long*, 100 Pa. Superior Ct. 150 (1930); *Com. v. Goldberg*, 4 Pa. Superior Ct. 142 (1897); Note, 22 Canadian Bar Review 167 (1944). The Maryland Constitutional Provision that in criminal cases the jury shall be the judges of law as well as of fact is the subject of a debate reported in 39 Maryland State Bar Association Transactions, p. 71 (1934); see also Henderson: *The Jury as Judges of Law and Fact in Maryland*, 52 Maryland State Bar Transactions 184 (1947).

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submitted to the jury without much separation of law and fact by the judge, and in that sense juries decided the law. But the distinction between questions of law and fact, and the tribunals for their decision respectively, lies at the foundation of our jurisdictional system, and there was no time when it did not exist. The rule, *ad questionem* [*218] *facti non respondent* *judices*, *ad questionem juris non respondent iuratores*, was an ancient maxim in the days of Coke: Coke Litt., 155a; 8 Rep. 155a; 9 Rep. 13a;..." After referring at some length to the debates in the convention in which our constitution of 1790 was adopted, he continued: "It is impossible to read these various steps in the formulation of our fundamental law, without seeing that there was never at any time the intention to make or to consider juries as in any sense judges of the law. No such possible construction seems to have been apprehended until suggested by McKean, [in the convention] and the practically unanimous vote on his motion to add 'under the direction of the court as in other [*684] [***26] cases,' shows the feeling of the convention on this subject. McKean was at that time one of the foremost personages of the commonwealth, perhaps its best trained lawyer. He had studied in the Temple, and was familiar with the details of the legal controversy between Buller and Mansfield, on the one side, and Erskine, on the other, before Fox took it up as a matter of politics; and he knew, as Lewis and

Wilson and Ross and Sitgreaves and Addison and Findley and other leaders of the convention knew, that the contest was not for any control by the jury as judges of the law, even Junius hardly ventured to put his denunciations of Mansfield in that form, but for the right of applying the law to the facts and pronouncing the result by a general verdict. And such was the understanding of the convention, as it was of parliament two years later, and such the natural meaning of the language on which they finally settled to express their purpose. It puts beyond question the right to return a general verdict, nothing more. To cut the sentence in two, and say the jury are 'to determine the law,' is not only to pervert the meaning, but to nullify the other command that they are [***27] to determine 'under the direction of the court.' What they are HN8[↑] to determine is, 'the law and the facts as in other cases,' [*219] that is, the law as given to them by the court, and the facts as shown by the evidence. They are bound to take the law from the court; but, so taking it, they have the right to apply it to the facts as they may find them to be proved, and to announce the result of the whole, by a general verdict of guilty or not guilty. Any other construction would be totally at variance with the fundamental principles of our system of jurisprudence and with our settled and uncontested practice. It has never been claimed that the jury are to determine what evidence is admissible, or what

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witnesses competent; yet, if they are judges of the law, they should decide these often most important law points in a case." At page 93 he said, "Whether the distinction between power and right be shadowy and unsubstantial in practice, or not, it is clear and vital, and I must repudiate such a confusion of logical as well as moral ideas. A jury may disregard the evidence, but no judge has ever said it had the legal right to do so; and if the disregard is of the weight of the evidence [***28] favorable to the prisoner, the court sets aside the verdict without hesitation; and even this court, though it does not pass upon the weight of evidence, does examine its sufficiency and may on that ground reverse without a new venire. [citing cases] * * * * And in Commonwealth v. Sherry, an indictment for murder growing out of the riots of 1844, removed by certiorari from the Quarter Sessions of Philadelphia and tried in the Nisi Prius in April, 1845, Justice ROGERS charged the jury as follows: 'You are, it is true, judges in a criminal case in one sense of both law and fact; for your verdict as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution.... The popular impression is that this power... arises from a right on the jury's part to decide the law as well as the facts, according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law that no man can [*220] twice be put in jeopardy for the same offence....

It is important for you to keep this distinction in mind, remembering that, while you have the physical power by an acquittal to discharge [***29] a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. The sanctity of your conclusions, in case of an acquittal, arises, not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offence, a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the attorney general.... You will see, from these considerations, the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court, and the facts to the jury. My duty is therefore to charge you, that while you will in this case form your own judgment of the facts, you will receive the law as [**685] it is given to you by the court.' Wharton on Homicide, App., 721. To the same effect, though less explicitly developed, are the rulings by SERGEANT, J., of this court in Commonwealth v. Van Sickle, Brightly, 73; and by GIBSON, C.J., in Commonwealth v. Harman, 4 Pa. 269. * * * * The idea of a difference in the rights and functions of juries in civil and criminal cases, as to the determination [***30] of the law, arose from a misconception of the controversy over the right to give a general verdict, and was an error for which there is no respectable English authority, and

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which the best American authorities have overwhelmingly disapproved." The language used by Chief Justice SHARSWOOD in the opinion in Kane v. Commonwealth, 89 Pa. 522 (1879) was, as Justice MITCHELL observed, "less guarded than was usual with that eminent jurist" and was based on State v. Croteau, 23 Vt. 14 (1849), a decision overruled in State v. Burpee, 65 Vt. 1, 25 A. 964 (1892). We all agree in disapproving the erroneous expressions on this subject in Kane v. Commonwealth. [*221] Counsel may not argue to the jury that in exercising their power to render a general verdict they have the right to ignore the instructions on the law given by the trial judge and if such argument is made, it is the duty of the trial judge promptly to stop it.

6. Conduct During Trial. The 17th Canon of Professional Ethics provides, inter alia, that "all personalities between counsel should be scrupulously avoided?" Counsel on both sides during the trial in the Quarter Sessions violated the rule. In [*31] the circumstances of this case we shall not attempt to say who was the aggressor or otherwise to fix the blame. The learned trial judge's admonition addressed to both should have been sufficient warning: "Mr. Eldredge and Mr. Schofield you are both officers of the court." We impose no penalty on this charge against respondent.

7. We are unanimous in our conclusion that respondent's insubordination,

described above, constituted violation of his oath of office requiring punishment. The rule must therefore be made absolute. It is therefore ordered that respondent, Lemuel B. Schofield, appear for public reprimand and censure at the bar of this Court at the opening of its session on June 24, 1949.

REPRIMAND ADMINISTERED BY THE SUPREME COURT OF PENNSYLVANIA

MR. CHIEF JUSTICE MAXEY, June 24, 1949:

Lemuel B. Schofield: The Attorney General of Pennsylvania, the State's highest law officer, charged you in this Court with violating the oath which you took upon your admission to the bar of this Court "to behave yourself in the office of attorney with all good fidelity to the court". Your answer to this charge we adjudged to be insufficient.

The charge was a grave one and it merited [*32] and received the unanimous condemnation of this Court for [*222] your conduct set a pernicious example. We decided and declared that your "insubordination constituted a violation of your oath of office and required punishment". We ordered that you be publicly reprimanded and condemned at the bar of this Court.

We trust this case will be the last of its kind which this Court will ever have to act upon. Pennsylvania lawyers

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possess a well-earned reputation not only for ability but also for that decorum which is the hallmark of character. The members of this Court are pleased to bear witness that nearly all of the members of our bar contribute substantially to that priceless reputation. Any lawyer deficient in fidelity to the court is equally deficient in fidelity to the bar, for the bar is jealous of its good repute and vigilant in preserving it.

It is ordered that this reprimand be published in the official records of this Court in the state reports as supplementary to the adjudication filed by this Court in this case on May 23, 1949.

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