Robert Brett Dunham
EXECUTIVE DIRECTOR

1015 18th St. NW,
Suite 704
Washington, DC 20036
(202) 289-2275
dpic@deathpenaltyinfo.org
www.deathpenaltyinfo.org

DEATH PENALTY INFORMATION CENTER

PENNSYLVANIA CAPITAL CASE SUMMARY OF GROUNDS FOR REVERSAL

(Philadelphia)

Compiled by
Robert Brett Dunham,
Executive Director

July 30, 2015

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Updated July 30, 2015

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

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

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

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

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

* The District Court held that the trial court improperly permitted the prosecution to admit into evidence the confession of a co-defendant – which named the defendant as participating in the murder – when the co-defendant did not testify and the redaction of the defendant's name and replacement with the word "blank" was insufficient to prevent the jury from concluding that "blank" meant the defendant.
* The Court further found that the prosecution committed a second violation of *Bruton* by repeatedly breaking redaction in closing argument, despite sustained objections and warnings from the trial court. It rejected the Pennsylvania Supreme Court's assertion that the trial court's instructions had cured the constitutional violation, holding that determination to be contrary to clearly established federal constitutional law. Instead, it held that, "in the context of four (4) references to Washington as the other man in Teagle's statement, two (2) motions for a mistrial, and at least three (3) 'curative' instructions by the trial judge, this is tantamount to the wizard telling Dorothy to pay no attention to the man behind the curtain."
* The Court also granted a new trial for the individual and cumulative effect of multiple *Brady* violations, including that Philadelphia prosecutors suppressed documents, later discovered by the defense in the police archive files, that contained descriptions of the robbers that did not march the defendant and that placed the gun used in the murder in the hands of a man who matched the description of the co-defendant.
* Philadelphia prosecutors also failed to disclose another document, obtained in federal habeas discovery 17 years later, that showed that, shortly after the crime, several witnesses had been shown a photographic array that contained the defendant's picture and did not identify him. The Court held that that had been revealed during federal discovery, was material when considered along with the other suppressed documents.
* Finally, the Court noted that, considered cumulatively, the *Bruton* and *Brady* claims violated due process and undermined confidence in the reliability of the verdict.

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

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

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

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

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

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

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

* Counsel's deficient performance was prejudicial where the jury had found two statutory mitigating circumstances concerning his mental state at the time of the offense but none unrelated to the offense and, "[h]ad the jury been fully informed of [the defendant's] emotional and psychological problems, childhood physical and sexual abuse, and the significance of his epilepsy," it could have found additional mitigation concerning his background and mental health and "may have struck a different balance between the aggravating factors and mitigating factors it found." "Expert testimony could have revealed evidence of Fahy's emotional and behavioral consequences of his organic brain damage; and post-traumatic stress caused by his abusive and troubled childhood. It could have corroborated Fahy's testimony about his mental illness and cognitive impairments.

Without the corroboration, the testimony of Fahy and his mother were the core of the penalty phase defense. The jury could not appreciate the true extent of Fahy's mental health impairments because counsel did not present the mental health records or an expert evaluation. Had the jury heard from an expert — or from anyone who could testify to Fahy's kindness or good character — 'there is a reasonable probability that at least one juror would have struck a different balance' at sentencing.*"*

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

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

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

10. Commonwealth v. White, No. CP-51-CR-0012991-2010, *Bench order* (Phila. C.P. May 19, 2014) (Phila., remand, post-sentence motions) (granting new sentencing hearing following remand for consideration of a single ineffectiveness issue limited to penalty phase counsel's failure to present to the jury evidence in support of the age mitigator, 42

Pa. C.S. § 9711(e)(4), which White had claimed was apparent from the face of the trial transcripts).

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

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

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

13. Commonwealth v. Bond, No. CP-51-CR-0502971-2004, *Bench Order* (Phila. C.P. Mar.18, 2014) (Phila., PCRA) (penalty-phase relief granted for ineffectiveness of penalty-phase counsel for failing to investigate and present mitigating evidence), *recon. denied* Apr. 29, 2014.

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

- Commonwealth v. Dougherty, No. 2674 EDA 2012 (Pa. Super. Dec. 30, 2013) (unpublished) (Phila., PCRA appeal) (new trial granted for counsel's ineffectiveness in failing to consult with or retain an expert in fire science to evaluate and rebut the prosecution's testimony that the fire that caused the death of the defendant's children was arson)
  * The record supported the PCRA court's determination that "[h]ad trial counsel relied on more than his tangential experiences with fire investigation, he would have been able effectively to challenge the science that, as trial counsel stated in his affidavit prior to his death, was 'the most significant item of evidence in the possession of the Commonwealth.' . . . Had trial counsel presented the evidence that was [admitted] at the PCRA hearing or simply become sufficiently versed in the science that was the fulcrum of the whole case against his client, he would have been able to challenge the conclusions that were the lynchpin to [the] charges against [Appellant]. 'Winging it' cannot be deemed a reasonable trial strategy."
  * The PCRA court erred in holding that the defendant did not suffer prejudice from counsel's unreasonable conduct because, "if counsel had retained either a consulting or testifying fire expert, he could have mounted a convincing challenge to the substance of the charges arrayed against his client. As the PCRA court noted, the scientific evidence proffered by Lt. Quinn was 'the fulcrum of the whole case' against Appellant, and Lt. Quinn's conclusions 'were the lynchpin' to the charges against Appellant. In a capital case such as the present matter at the time of trial, mounting a meaningful challenge to the scientific component of the Commonwealth's case should have been the top priority of any competent defense lawyer. . . . As Appellant's brief points out, '[t]rial counsel's failure to elicit [expert fire testimony] deprived [Appellant] of the opportunity to discredit entirely the testimony that was the sole basis for concluding that the fire was arson.' If the jury had received the testimony offered by Appellant's experts at the PCRA hearing and, as a result, had become convinced that Lt. Quinn's testimony was scientifically unreliable, then the jury would have had reasonable doubt about Appellant's guilt and would have been compelled to acquit him. Under these circumstances, our assessment of

the evidence introduced at Appellant's trial undermines our confidence in the outcome of that proceeding and reveals that no reliable adjudication of guilt or innocence took place."

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

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

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

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

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

17. Lambert v. Beard, No. 07-9005, 537 Fed. Appx. 78 (3d Cir. Sept. 20, 2013) (Phila., habeas appeal on remand from U.S. Supreme Court) (in case in which the prosecution "rested almost entirely on [this witness's] testimony, which he gave in exchange for an open guilty plea" to other unrelated crimes, and the only unimpeached portion of his testimony was his contention that he had consistently identified the same two individuals as having been involved in the killing, violation of Brady v. Maryland where the Philadelphia District Attorney's office suppressed several investigative documents, including a police activity sheet in which the witness had in fact identified a third

individual, not Lambert, as a perpetrator), *on remand from* Wetzel v. Lambert, 132 S. Ct. 1195 (U.S. Feb 21, 2012), which had reversed and remanded Lambert v. Beard, 633 F.3d 126 (3d Cir. Feb. 7, 2011).

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

* First, the Commonwealth violated Brady when it "failed to disclose numerous statements implicating three other men in the murder, none of whom had any relationship to [the defendant]"; the prosecution withheld six documents reflecting police interviews with at least three separate witnesses;
* These statements were material, in part, because they "contain[ed] internal markers of credibility," such as naming the victim's boyfriend, identifying the location of the fatal gunshot wound, and identifying as participants in the murder "three men who matched the eyewitness descriptions of the perpetrators more closely than [the defendant] did"; moreover, one of the statements also identified "a disinterested third party" who had also heard the phone conversation in which one of the potential suspects had confessed and who, therefore, "who could have lent additional credibility to [the] statement."
* The statements also were material because, even if inadmissible themselves, "disclosure to the defense would have undoubtedly led to investigation that could have proved vital to the defense"; in addition, "[t]he information could also have been used to impeach the adequacy of the police investigation."
* Second, the Commonwealth violated Brady when it "failed to turn over a receipt that showed the time [an eyewitness] picked up her welfare assistance payment" before boarding a bus on the day of the murder, "significantly altering her estimation of when she saw [the defendant] on the bus and thereby corroborating his alibi"; the police had independently obtained the welfare receipt and the witness left her copy with officers at the time they interviewed her.
* The welfare receipt was material because, at trial, the witness testified that she left work at 2:00 p.m., picked up her public assistance check after 3:00 p.m., ran other errands, and saw the defendant on the bus between 4:00 and 4:30 p.m., while the welfare receipt showed that she had picked up her check at "13:03" p.m., not "3:03"; given this fact, the witness actually would have seen the defendant on the bus between 2:00 and 2:30 p.m., corroborating, rather than rebutting his alibi, that he was on the bus coming home from a visit with his father at the time of the murder; in addition, it would have impeached her trial testimony that she had left work after 2:00 p.m. and the time at which she testified she had seen the defendant.
* The District Court held that "The state court's determination that the receipt was not 'exculpatory' was an unreasonable determination of the facts"; likewise, its finding

that there was "no evidence that the Commonwealth withheld the receipt from the defense" – when " just two paragraphs above this conclusion, [it] stated that 'the police came into possession' of the receipt when interviewing [the witness]" – was an unreasonable factual determination.

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

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

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

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

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

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

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

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

you find and as I explain it to you. . . . That's the law and it is not for any of us to consider 'life' or what it means."

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

* Prejudice established where, *inter alia*, the files from "the same criminal history which was testified to and used as an aggravator at sentencing" showed that court-ordered mental health evaluations had produced multiple mental health diagnoses, including "Schizhoid Personality Disorder, Mixed Character Disorder with strong passive-aggressive features, Paranoid Personality Disorder and Anti-social Personality Disorder," with a poor mental health prognosis; school records reflected that he "had a history of below-grade level performance despite his average intelligence and that he had difficulty with concentration and attention and suffered from strong feelings of inadequacy, anxiety, dependence, isolation and lack of acceptance"; that his mother was "over-protective" and "over-critical," resulting in "his over-dependence on her and his lack of independence and confidence as a consequence."

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

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

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

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

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

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

● Lark v. Beard, 2:01-cv-01252, 2012 WL 3089356 (E.D. Pa. July 30, 2012) (Philadelphia, habeas remand) (new trial granted under *Batson v. Kentucky* for prosecution's discriminatory exercise of peremptory challenges; on remand for step-3 analysis after prosecution failed to produce race-neutral reasons for striking three African-American jurors, court finds that prosecution discriminatorily struck five African-American jurors on the basis of race), *aff'd*, Lark v. Secretary, Pa. Dep't of Corrections, 566 Fed. Appx. 161 (3d Cir. May 6, 2014).

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

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

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

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

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

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

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

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

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

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

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

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

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

30. Abu-Jamal v. Secretary, Department of Corrections, 643 F.3d 370 (3d Cir. Apr. 26, 2011) (Philadelphia, habeas appeal, on remand from U.S. Supreme Court) (reconsidering claim that the jury instructions and verdict sheet used in the penalty-phase of trial violated *Mills*

v. Maryland in light of *Smith v. Spisak*, 558 U.S. 139 (2010) and determining that there was a *Mills* violation).

®● Lambert v. Beard, No. 07-9005, 633 F.3d 126 (3d Cir. Feb. 7, 2011) (Philadelphia, habeas appeal) (new trial granted for violation of *Brady v. Maryland* where only unimpeached portion of key prosecution witness's testimony was his contention that he had consistently identified the same two individuals as having been involved in the killing and the prosecution had suppressed a prior statement identifying a third person – not the defendant – as the killer), *rev'd and remanded*, Wetzel v. Lambert, 132 S. Ct. 1195 (U.S. Feb 21, 2012).

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

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

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

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

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

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

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

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

33. Wilson (Zachary) v. Beard, No. 06-9004, 589 F.3d 651 (3d Cir. Dec. 23, 2009) (affirming district court's grant of a new trial for violation of *Brady v. Maryland* when the prosecution had suppressed information that would have impeached three separate prosecution witnesses, including one witness's "prior crimen falsi conviction for impersonating a police officer"; a second witness's "history of mental health problems and psychiatric interventions, including but not limited to the fact that he was taken to the Emergency Health Services Center at Hahnemann Hospital by a detective from the prosecutor's office the day after he testified at Wilson's trial"; and the fact that the prosecuting police officer had a "history of providing [a third witness] with interest-free loans of undisclosed amounts during the time that [witness] acted as a police informant"), *aff'g*, No. 05-CV-2667, 2006 WL 2346277, 2006 U.S. Dist. LEXIS 56115 (E.D. Pa. Aug. 9, 2006).

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

34. Hardcastle v. Horn, No. 07-9007, 332 Fed. Appx. 764, 2009 WL 1683335, 2009 U.S. App. LEXIS 13026 (3d Cir. June 17, 2009) (Philadelphia, habeas appeal) (affirming District Court's grant of a new trial under *Batson v. Kentucky*; clear error standard of review continues to apply to factfindings of discrimination, despite age of the case; lower

court's finding that the prosecutor had discriminatorily exercised peremptory challenges to strike six black jurors on the basis of race was supported by the record and not clearly erroneous), *aff'g*, 521 F. Supp. 388 (E.D. Pa. 2007).

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

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

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

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

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

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

by, Beard v. Kindler, 558 U.S. 53 (U.S. Dec. 8, 2009), *relief reinstated*, 642 F.3d 398 (3d Cir. Apr. 29, 2011).

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

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

* Habeas court finds that "the paltry testimony at the penalty phase hearing . . . brooks no comparison" to and "was upgraded dramatically in quality and quantity" by "the vastly expanded testimony provided by friends and family members at the PCRA hearing." "Had [trial counsel] investigated Bond's background and mental health, they would have presented a starkly different picture of Bond to the jury at the penalty phase than the one they actually presented."

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

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

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

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

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

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

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

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

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

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

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

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

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

48. Commonwealth v. Pirela, No. 448 Cap. App. Dkt., 593 Pa. 312, 929 A.2d 629 (Pa. Aug. 20, 2007) (per curiam) (Philadelphia, PCRA appeal, *Atkins*) (affirming PCRA court's grant of relief under *Atkins* with a one sentence parenthetical citation to the proposition that "when Post Conviction Relief Act court findings are supported by substantial

evidence and legal conclusion is not clearly erroneous, determination petitioner is mentally retarded and cannot be executed is affirmed").

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

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

®● Lark v. Beard, 2:01-cv-01252, 495 F. Supp. 2d 488 (E.D. Pa. July 3, 2007) (Philadelphia, habeas) (new trial granted under *Batson v. Kentucky* for prosecution's discriminatory exercise of peremptory challenges when petitioner presented evidence of a *prima facie Batson* violation and the prosecutor was unable to produce any race-neutral reasons for his strikes of three African-American jurors), *rev'd & remanded*, Lark v. Secretary Pennsylvania Dept. of Corrections, 645 F.3d 596 (3d Cir. June 16, 2011), *relief reinstated*, Lark v. Beard, No. 2:01-cv-01252, 2012 WL 3089356 (E.D. Pa. July 30, 2012), *aff'd*, 566 Fed. Appx. 161 (3d Cir. May 6, 2014).

● Morris v. Beard, No. 01-3070, 2007 WL 1795689, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007) (Philadelphia, habeas) (death sentence reversed for ineffective assistance of counsel in penalty phase for failing to investigate and present available mitigating evidence; new sentencing hearing also granted under *Mills v. Maryland* where jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

* court relies upon 1989 ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases for national norm of professional conduct in effect at time of 1983 trial that "counsel had a duty to ensure that all reasonably available mitigating evidence is presented to the jury in the most effective possible way"; counsel's performance was deficient when he presented only petitioner and his mother in mitigation and elicited from his mother only the date of petitioner's birth; that he had been an psychiatric inpatient in January 1977; that he five brothers and a sister with whom he had no problems; that his father was killed one year prior to trial; that petitioner was the father of a child; and that his skin turned a bluish tint when he becomes agitated.

* the fact that counsel presented" some mitigating evidence" did not render his investigation and presentation reasonable when that evidence "bore little resemblance to

the picture of Morris's childhood and mental condition encompassed in the mitigating evidence that counsel failed to discover"

* counsel's deficient performance was prejudicial where a proper investigation of Morris's childhood and mental health would have disclosed petitioner's abuse and neglect at the hands of an alcoholic father; numerous childhood head injuries and severe headaches; a history of erratic behavior, learning disabilities, and mental and emotional disturbances; psychiatric hospitalizations and anti-psychotic medication; exposure to street fights and violence; and institutional records indicating cognitive impairments and possible brain damage.

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

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

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

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

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

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

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

- Wilson (Zachary) v. Beard, No. 05-CV-2667, 2006 WL 2346277, 2006 U.S. Dist. LEXIS 56115 (E.D. Pa. Aug. 9, 2006) (Philadelphia, habeas) (new trial granted on habeas summary judgment for violations of *Brady v. Maryland* that prevented the defense from impeaching three separate prosecution witnesses)
  * the prosecution violated *Brady* when it failed to disclose one of its witness' *crimen falsi* convictions for impersonating a police officer, and a psychological evaluation conducted in connection with one of these convictions; failed to disclose the psychiatric history of another of its witnesses; and withheld evidence that a third witness was a long-time informant for a corrupt police officer (later convicted of official misconduct in connection with another case), and that the informant had received interest-free loans from the officer;
  * the first witness (Edward Jackson) had been arrested six weeks before the murder for impersonating a police officer; the pre-sentence investigation report ordered in connection with that conviction revealed that the witness "had two prior arrests for impersonating a police officer, a juvenile record, an adult record of thirteen arrests and four convictions, and an out-of-state record of six arrests"; the PSI also reported that the witness had suffered a prior serious head injury that had resulted in headaches, blackouts, and occasional memory loss; the psychological evaluation described the witness as "a marginal historian" who had twice fractured his skull, had "weak" long- and short-term memory, and could not think in abstract terms, and who had a schizoid personality disorder, "dissociative tendencies," and "distorted perceptions of reality" in which he "tends to go overboard in . . . attach[ing] himself to Police activities";
  * the second witness (Jeffrey Rahming) testified against petitioner on the first day of trial and the next day was taken by police from the prosecutor's office to a local emergency room, where he was diagnosed with schizophrenia and referred for psychiatric placement; the hospital records for that treatment disclosed that the witness "has a history of mental illness" for which he had been treated with psychiatric medication "as recently as i months [sic] ago"; neither the emergency room visit nor the hospital records were disclosed to the defense; counsel testified that he would have requested Rahming's rap sheet, a prior mental health evaluation noted in the rap sheet, and the witness' presentence and probation reports had he been apprized of the mid-trial hospital visit. These records revealed that Rahming had a personality disorder, had a history of being prescribed anti-psychotic medication, which he might not have been taking at the time he allegedly witnessed the murder, that he was suspected of drug and alcohol abuse, and that had the demeanor of a "slightly retarded person";
  * the third witness (Lawrence Gainer) was a police informant who had received interest-free loans from Officer John Fleming during the time period in which Gainer had acted as Fleming's informant; Fleming testified at trial that he and Gainer had been friends for thirteen years and that Fleming had used him as an informant "on many occasions," but that he had never paid Gainer for information or given him anything. In the state post-conviction proceedings, Fleming testified to having given Gainer interest-free loans over the years.

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

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

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

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

®● Commonwealth v. Gibson (Ronald), Jan. Term 1991, No. 2809 (Phila. C.P. Apr. 26, 2006) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness "in failing to conduct any investigation at all regarding mitigating evidence" and for appellate counsel's ineffectiveness "for failing to investigate and pursue non-record based claims of trial counsel's ineffectiveness for purposes of direct appeal"), *rev'd & remanded*, No. 331 Cap. App. Dkt., 951 A.2d 1110 (Pa. July 24, 2008), *relief reinstated,* Jan. Term 1991, No. 2809 (Phila. C.P. July 17, 2009), *rev'd* No. 596 Cap. App. Dkt., 19 A.3d 512 (Pa. May 12, 2011)

* counsel's performance deficient where investigator "did no advance work whatsoever in preparation for the penalty phase"; "did not search for or collect documents relating to [the defendant's] family background and family history"; and had only "extremely limited" interaction before the penalty phase with those potential witnesses who happened to be in court when the penalty phase started;

* counsel also failed to investigate the defendant's drug use and its implications for mitigation; obtained no records except through the discovery process; "had little time to prepare for the case and . . . did not go to the prison where the defendant was incarcerated," but instead met with the defendant only "when he saw his client in the

courtroom" and did not learn of his client's alcoholism until *during* the trial; counsel "basically took a fee, did no preparation at all[,] and went to court";

* counsel's failures prejudicial where "even a cursory investigation . . . would have uncovered evidence of [defendant's] intoxication at the time of the crime, defendant's personal and family history of drug and alcohol abuse, and a dysfunctional family life"; serious interviews with family members would have disclosed defendant's "exposure to years of domestic violence and the subsequent abandonment by his father," after which his mother lived with a series of other men "who abused her in the home and exhibited violent behavior";
* penalty-phase evidence presented by the defense was "a sham effort to elicit positive character testimony from witnesses who would 'cry and beg the jury not to sentence Ronald to death'"; "[t]his shocking lack of preparation was so far below the standard of adequate representation as to render the concept of effective assistance of counsel virtually meaningless";
* appellate counsel was ineffective where he "presented certain ineffectiveness claims based upon the record on direct appeal, [but] failed to investigate and present non-record based claims"; "[g]iven the total lack of preparation for the penalty phase by trial counsel, which is blatantly obvious from the transcript of the penalty-phase hearing, . . . appellate counsel was obligated to pursue such non-record based claims";
* appellate counsel's stated belief that "his obligation . . . concerned review only for record-based claims" had no reasonable basis designed to effectuate his client's interests; this failure was prejudicial because "there is a reasonable probability that, but for appellate counsel's failure to investigate and present trial counsel's ineffectiveness on direct appeal, the outcome of the appeal would have been different"; "[t]he assertion of appellate counsel of the total, complete[,] and utter failure of trial counsel to perform any investigation for the penalty phase, in all likelihood, would have led to a different result on appeal."

- Bond v. Beard, No. 02-cv-08592-JF, 2006 WL 1117862, 2006 U.S. Dist. LEXIS 22814 (E.D. Pa. Apr. 24, 2006) (Philadelphia, habeas) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present available mitigating evidence where "if counsel had fulfilled their obligation of conducting a reasonable investigation, very significant evidence could have been presented to the jury in mitigation"; court also finds "cause for concern" with penalty-phase closing argument that "seem[ed] designed to create a lynch-mob mentality on the part of the jury" that "represents an unacceptable appeal to class prejudice, an 'us against them' approach to the case"), *aff'd*, Nos. 06-CV-9002 & 06-CV-9003, 539 F.3d 256 (3d Cir. Aug. 20, 2008)
  * counsels' performance deficient where counsel interviewed some of the defendant's family members prior to his trials and arranged for interview by psychologist, but did not obtain any of defendant's school or hospital records or provide any institutional records to the psychologist, asked the psychologist to provide advice on pre-trial mental health issues, not mitigation, and did not actually begin to prepare for the penalty phase until after the jury returned guilty verdict on first degree murder;

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

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

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

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

61. Commonwealth v. Collins (Ronald), Nos. 372 & 373 Cap. App. Dkt., 585 Pa. 45, 888 A.2d 564 (Pa. Dec. 27, 2005) (Philadelphia, PCRA appeal) (affirmed PCRA court's grant of penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mental health mitigating evidence; counsel's investigation was deficient where he failed to conduct a social history investigation, could not remember interviewing defendant or family about defendant's medical history, failed to inquire about head injury, and did not

obtain school records; failures were prejudicial where available medical records would have provided evidence of a serious head injury, which would have led expert to recommend neuropsychological testing, materially affected the expert's recommendations to counsel, and would have led to the presentation of mitigating evidence that the defendant had an extreme mental or emotional disturbance and significantly impaired capacity at the time of the offense).

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

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

64. Commonwealth v. Douglas, Aug. Term, 1981, Nos. 2326-27 & 2335 (Phila. C.P. Nov. 10, 2005) (Philadelphia, PCRA) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present mitigating evidence of dysfunctional family background, positive adjustment to prison, and possible brain damage)

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

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

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

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

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

® Commonwealth v. Hackett, Sept. Term, 1986, Nos. 3396-3400 (Phila. C.P. Oct. 5, 2005) (Philadelphia, successor PCRA) (new trial granted under *Batson v. Kentucky* based upon newly discovered evidence of racial discrimination in jury selection; that evidence

consisted of court finding in co-defendant's post-conviction proceedings in Commonwealth v. Spence, Sept. Term, 1986, Nos. 3391-3395 (Phila. C.P. March 22, 2004) that the prosecutor in their joint trial – who had prepared internal videotaped training program that explained how to discriminate in jury selection – had peremptorily stricken black jurors on the basis of race in this case), *rev'd*, No. 492 Cap. App. Dkt.,598 Pa. 350, 956 A.2d 978 (Pa. Sept. 26, 2008).

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

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

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

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

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

® Commonwealth v. Ligons, May Term, 1998, No 0086 (Phila. C.P., Crim. Div., June 23, 2005) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness in failing to investigate and present mitigating evidence from institutional records), *rev'd*, 601 Pa. 103, 971 A.2d 1125 (Pa. May 27, 2009).

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

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

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

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

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

* Court notes that "arguments advanced must be confined to the evidence and the legitimate inferences to be drawn therefrom" and arguments to "send a message" are outside the record of the case.

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

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

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

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

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

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

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

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

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

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

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

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

78. Commonwealth v. Graham, Aug. Term, 1987, Nos. 3948 *et seq.* (Phila. C.P. Dec. 18, 2003) (Philadelphia, PCRA/*Atkins*) (as a result of defendant's mental retardation, six

death sentence vacated under *Atkins v. Virginia* and six consecutive life sentence imposed).

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

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

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

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

be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.").

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

* trial counsel's performance was deficient in failing to investigate mitigating evidence and in presenting no mitigating evidence at all in the penalty phase; "counsel's failure to develop and present [mitigating] evidence was not a strategic decision [and] . . . . was without any reasonable basis . . . because counsel did no investigation despite th[e] availability of social history information at the time of trial";
* counsel was ineffective in part for attempting to argue in closing that the defendant's age (19) was mitigating, without having presented any actual evidence of his age; the prosecution objected to the argument and the trial court instructed the jury: "You are to disregard that. There was no evidence concerning Damon Jones' age that was presented at this hearing."
* court finds it "inexplicable and indefensible" that trial counsel failed to present mitigating evidence that defendant was age 19 at time of the offense;
* the court found that there was significant family background and mental health mitigating evidence available at the time of trial. The family background mitigation included "that the defendant was one of nine children born to seven different fathers; there was no father figure in the home and the men, who did live there for short periods of time, abused both the children and their mother; their mother was an alcoholic, who suffered from a mental illness, was unable to work, abused the children and, never offered them affection or support." Other mitigation included that the family lived in a housing project in an apartment that "was full of mice and rats and [a] neighborhood full of drug dealers and crime." The defendant "was left to fend for himself from a very early age, rarely went to school and began to show signs of mental illness at the age of line[; a]s he got older he began to experience rapid mood swings, auditory and visual hallucinations and difficulty staying in touch with reality."
* the court found that this evidence was mitigating under 42 Pa. C.S. § 9711(e)(8); it further found that mental health evidence based upon the psychological effects of the defendant's background and upbringing supported the statutorily enumerated mental health mitigating circumstance that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," 42 Pa. C.S. § 9711(e)(3).
* Based upon all of the evidence, the court held that "[t]here is a substantial likelihood that, had the mitigation evidence presented at the PCRA hearings been presented at trial, the outcome of the penalty hearing would have been different."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

●® Commonwealth v. Sneed, June Term, 1984, Nos. 674-676 (Phila. C.P. Jan. 4, 2002) (Philadelphia, PCRA) (new trial granted under *Batson v. Kentucky* as a result of prosecution's racial discrimination in jury selection; court also reached sentencing-stage issues and overturned death sentence for trial counsel's ineffectiveness in failing to investigate and present family background and mental health mitigating evidence), *aff'd in part (penalty relief) and rev'd in part (new trial) on procedural grounds*, 587 Pa. 318, 899 A.2d 1067 (Pa. June 19, 2006).

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

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

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

91. Peterkin v. Horn, 176 F. Supp. 2d 342 (E.D. Pa. Nov. 6, 2001) (Philadelphia, habeas corpus) (new trial for numerous instances of prosecutorial misconduct, Confrontation Clause violation, insufficiency of the properly admitted evidence to prove robbery (the underlying aggravating circumstance), and ineffectiveness of counsel for failing to object to a variety of errors; death sentence also overturned for various incidents of prosecutorial misconduct and for trial counsel's ineffectiveness for failing to investigate and present available mitigating evidence) (life plea accepted).
* new trial granted in part because the prosecution had improperly presented, and the trial court improperly admitted, prejudicial hearsay testimony
* trial prosecutor committed misconduct by improperly presenting evidence of uncharged crimes and then intentionally misused this evidence in his closing argument; when all of this improper testimony and argument was removed from the case, the District Court found that the remaining properly admitted evidence was insufficient to support the jury's guilty verdict on the accompanying robbery charge, without which there were no aggravating circumstances in the case, and the case could not have advanced to the penalty phase of trial

* prosecutor committed misconduct by introducing evidence of uncharged crimes and referring to these crimes in closing argument: prosecution introduced evidence that defendant was also known by another name and was registered to vote under both names, that defendant was receiving welfare payments at another address that was a vacant lot, and affirmatively argued to the jury that defendant had committed welfare fraud
* prosecution improperly commented on defendant's silence by stating that "the same man that gave the address to a vacant lot . . . to get Public Assistance . . . sits there today, calmly in a suit, passive and cool, protected by the laws of the Commonwealth, protected by the laws encompassed in the Bill of Rights. . . . Oh yes, he is passive here now but the destruction that he wreaked, or visited on two human beings in a civilized society, I hope we can't tolerate this."
* prosecutor committed misconduct by arguing beyond the admissible scope of the evidence: prosecutor argued hearsay testimony that had been admitted for the limited purpose of proving the witness' state of mind as substantive evidence of how the homicide occurred; state court determination of harmless error failed to take into account the cumulative effect of all improperly admitted evidence
* Confrontation Clause violated when the trial court improperly admitted the hearsay testimony of two different prosecution witnesses of the victim's alleged statements that defendant "was in the [gas] station attendant's booth with a gun and the dial to the safe": the prosecution asked one of the witnesses about these remarks three separate times during direct examination with only a single cautionary instruction, the prosecutor inaccurately referred to the statement as substantive evidence in both his opening statement and closing argument, and the prosecutor again presented the statement during the sentencing phase of the trial
* improperly admitted hearsay testimony that provided "circumstantial evidence going to show the motive for the crime" was not harmless when considered in connection with (1) other inadmissible testimony that another witness saw the defendant in possession of a gun other than the murder weapon two days before the murders took place, and (2) inflammatory prosecutorial argument exhorting the jury to "be as cold and ruthless as the appellant was when he murdered his victims"
* death sentence reversed for prosecutorial misconduct where prosecutor argued that "[m]ercy has no part in your deliberation" – "the suggestion that mercy is inappropriate is . . . a misrepresentation of the law [that] withdraws from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life" and "while the prosecutor may argue that mercy is not warranted by the facts of a certain case and the history of a particular defendant, when the prosecutor argues that it is mercy itself that is inappropriate, the jury is improperly told that the concept of mercy . . . [is] illegitimate"
* death sentence reversed for prosecutorial misconduct where prosecutor "improperly opined as to what the testimony of his best witnesses, the victims, would have been if they had lived"
* death sentence reversed for misconduct where prosecutor incorporated into the sentencing hearsay testimony that had been admitted at the guilt-stage in violation of the

Confrontation Clause of the Sixth Amendment, and presented substantive circumstantial argument of how the homicide occurred based upon hearsay testimony that had been admissible at trial only for the limited purpose of proving the witness' state of mind
* trial counsel ineffective for failing to object to those portions of the prosecutor's closing arguments that the district court found improper, and appellate counsel was ineffective for failing to raise those issues on direct appeal
* given insufficiency of evidence of robbery, court found evidence insufficient to support the aggravating circumstance that the defendant had committed the killing during the perpetration of a felony (the purported robbery)
* death sentence also overturned for trial counsel's ineffectiveness in failing to investigate and present available mitigating evidence

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

92. Commonwealth v. Rizzuto, 566 Pa. 40, 777 A.2d 1069 (Pa. Aug. 20, 2001) (Philadelphia, direct appeal) (death sentence overturned where jury failed to find mitigating circumstance 42 Pa. C.S. § 9711(e)(1), that "the defendant has no significant history of prior criminal convictions," after the prosecution had stipulated to the absence of prior convictions; the court reverses its prior decision in *Commonwealth v. Copenhefer* and holds that the Pennsylvania sentencing statute, 42 Pa. C.S. § 9711(c), requires the jury to find mitigating circumstances that have been established by stipulated facts and weigh these factors against the prosecution's aggravating circumstances before reaching any penalty-phase verdict could be reached on the penalty question) (resentenced to life).

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

®○ Hardcastle v. Horn, 2001 WL 722781, 2001 U.S. Dist. LEXIS 8556 (E.D. Pa. June 27, 2001) (Philadelphia, habeas corpus) (new trial granted under *Batson v. Kentucky* as a result of prosecution's racial discrimination in jury selection; court found that trial prosecutor had exercised peremptory challenges to intentionally discriminate against six African-American jurors; state court decision that *sua sponte* attributed race-neutral reasons to the strikes based upon the voir dire transcripts was an unreasonable application

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

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

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

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

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

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

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

95. Commonwealth v. Nieves, 560 Pa. 529, 746 A.2d 1102 (Pa. Feb. 17, 2000) (Philadelphia, Commonwealth's appeal from grant of post-trial motion) (new trial granted for guilt-stage ineffectiveness of counsel where defendant waived right to testify because of counsel's erroneous advice that prosecution would impeach his testimony with evidence of his prior record; prior convictions for firearms and drug trafficking offenses that did not involve dishonesty or false statements were not admissible as impeachment evidence) (acquitted on retrial).

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

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

mitigating evidence by counsel representing a capital defendant in a penalty phase hearing") (jury rejected the Commonwealth's sole aggravating circumstance and returned a unanimous life sentence in the resentencing hearing; PCRA challenge to conviction pending).

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

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

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

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

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

from ever hurting another woman again, to stop him from ever killing another woman again.").

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

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

102. Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516 (Pa. Sept. 17, 1997), *reargd. denied*, Nov. 13, 1997 (Philadelphia, successor PCRA) (death sentence reversed for ineffective assistance of penalty-phase counsel for failing to object to the prosecution's improper closing argument in which prosecutor argued that unless the jury sentenced the defendant to death, liberal judges would return him to streets; court holds that prosecutorial "reference to considerations outside the death penalty statute to argue for imposition of the death penalty" are improper; evidence of aggravating circumstances is "limited to those circumstances specified in [Pa. C.S. § 9711](d), . . . [which] contains no mention of defendants being released on parole"; "The prosecutor invited the jury to sentence this defendant to death in order to compensate for the alleged evils perpetrated by stereotypical liberal judges who routinely allow criminals to go free. The implicit argument is that if the jury does not take control of the case by imposing the death penalty, the liberal judges will intervene and somehow release the defendant. A second implicit argument is that imposing the death penalty in this case is a way to set the balance straight by compensating for the harm that has been done by the stereotypical liberal judges. Clearly such injustices, be they real or imagined, have nothing to do with this case, and the linking of a death sentence in this case with a perceived failing of the criminal justice system, dehors the record, was calculated to inflame the jury and might well have done so, thus constituting reversible error.") (jury unanimously resentenced to life; habeas pending on underlying conviction)

- Commonwealth v. Rolan, Feb. Term, 1984, Nos. 2893-2896, slip op. (Phila. C.P. March 5, 1997) (Philadelphia, PCRA) (death sentence reversed for ineffectiveness of counsel for

failing to investigate and present mitigating evidence of organic brain damage) (jury unanimously resentenced to life; new trial granted in habeas proceedings)

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

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

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

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

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

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

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

* prejudice determined by effect on a single juror: "as any one of the jurors that found the mitigating circumstance of age to exist could have compelled a sentence of life imprisonment on either murder conviction by simply determining that the mitigating circumstance outweighed the aggravating circumstance(s), we conclude that Appellant was prejudiced by trial counsel's failure to object. There exists a reasonable probability that the jury's weighing process may have yielded a different result."

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

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

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

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

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

112. Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (Pa. April 28, 1992) (Philadelphia, direct appeal) (counsel ineffective for failing to object to prejudicially deficient instruction on aggravating circumstance that "the offense was committed by means of torture" and for failing to "request a more specific instruction" that the torture aggravating circumstance requires the "specific intent to inflict unnecessary pain, or suffering or both pain and suffering in addition to the specific intent to kill") (resentenced to death).

113. Commonwealth v. Reid (Lloyd), CP-51-CR-0405461-1991 (date of reversal uncertain) (Philadelphia, post-verdict motions) (according to habeas decision, Reid v. Price, 2000

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

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

115. Commonwealth v. Murphy, 527 Pa. 309, 591 A.2d 278 (Pa. May 8, 1991) (Philadelphia, direct appeal) (defense counsel was ineffective in failing to impeach the credibility of two prosecution witnesses through cross-examination for bias based upon their juvenile probationary status; defense counsel "was abysmally ignorant of the law regarding the proper method of cross-examining a child witness who is on juvenile probation" and "erroneously sought to impeach the credibility of the witnesses on impermissible [crimen falsi] grounds while at the same time, due to ignorance, failed to impeach their credibility on legitimate grounds – to show bias of the witness based upon his or her juvenile probationary status"; counsel's deficient performance was not prejudicial with respect to one of the witnesses, whose probationary status had expired, but prejudicial with respect to second witness; Court could "perceive of no reasonable basis for counsel's failure to cross-examine [witness] on the basis of her then existing juvenile probation") (resentenced to death).

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

117. Commonwealth v. Green (William), 525 Pa. 424, 581 A.2d 544 (Pa. Sept. 19, 1990) (Philadelphia, direct appeal) (death sentence reversed for improper rebuttal of mitigating evidence of good prison conduct and cooperation with prison personnel with hearsay

testimony of deputy sheriff who transported inmates to courthouse that an inmate whose name he didn't know had told him that the defendant had a bad reputation for being cooperative and orderly in the cellblock; admission of this "blatantly unreliable" hearsay testimony was improper and violated state and federal constitutional rights to confrontation; admission of this evidence was prejudicial because it "may have led the jury into determining that no mitigating circumstances were present. Had the jury found a mitigating circumstance, it might have found that it outweighed the two aggravating circumstances found and returned a life sentence. Because of this error, we cannot know how the jury would have found and the sentence of death must be vacated").

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

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

120. Commonwealth v. Hall, 523 Pa. 75, 565 A.2d 144 (Pa. Oct. 19, 1989) (*Hall I*) (Philadelphia, direct appeal) (death sentence reversed when trial court permitted the prosecution to make "extremely prejudicial" suggestions in its closing penalty-phase statement to the effect that the defendant would kill again if he were released on parole; the Court also questioned admission of recanted statements by prosecutorial witnesses, and disapproved of trial court's decision to permit the jury to have copies of written and tape recorded versions of these statements during its deliberations) (resentenced to death, later reversed, and life sentence imposed)
* "the prosecutor made several references to the possibility that the defendant would kill again if not sentenced to death," including beseeching the jury to "Put [the] mad dog out of his misery before he kills someone else, kills somebody in prison, escapes and kills somebody" and saying "give him life, so he can get paroled one day and kill somebody else[?]";
* a prosecutor may not seek to impose death by implying that a capital defendant might be eligible for parole;

* the comments were not fair response because the "defense never argued or attempted to prove that the appellant would not kill again."
* "the prosecution's speculation as to what the appellant might do if paroled[ ] was extremely prejudicial where the jury was cognizant of the fact that the appellant was on parole at the time he committed the murders he was being sentenced for."

121. Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (Pa. March 6, 1989)), *rearg denied* April 18, 1989 (Philadelphia, direct appeal) (new trial granted under relaxed waiver rule on an issue of ineffective assistance of counsel that was presented to the Court by a jailhouse lawyer and that trial/appellate counsel failed to raise; counsel was ineffective for failing to request a cautionary instruction explaining the limited scope of prior crimes evidence that had been deemed admissible to prove motive; court also reaches three sentencing-stage issues so that the trial court would not repeat on retrial the instructional errors it made during the initial trial -- the trial court erred in instructing the jury that it had to be unanimous in finding any mitigating circumstances; that it should "add up" aggravating and mitigating circumstances, and impose death if it found "more" aggravating circumstances; and in failing to instruct the jury on the elements of rape, upon which the Commonwealth had sought to rely in attempting to establish the aggravating circumstance that the defendant had committed the killing during the perpetration of a felony, 42 Pa. C.S. § 9711(d)(6))
* new trial granted for ineffectiveness of trial counsel where counsel failed to request, and the trial court failed to independently provide, a cautionary instruction on the limited use of prior crimes evidence;
* while "highly prejudicial," "graphic," and "potentially emotional" testimony of a prior rape victim was admissible to prove "appellant's motive, intent and the absence of accident in the murder and other crimes against his second victim," the trial court nevertheless "erred in failing to accompany the evidence of the prior sexual assault with any cautionary or limiting instruction explaining the limited purposes for which the evidence was relevant and admissible";
* while appellate counsel, who was trial counsel below, neither raised the issue of the trial court's failure to provide limiting instructions, nor asserted his own ineffectiveness in failing to request such instructions, and therefore "[t]echnically, . . . this issue has been waived," the Court noted that it "has not been technical in applying our waiver rules in death penalty cases" and granted relief on the issue under the Court's relaxed waiver rule and its statutory obligation to independently review the record in capital cases;
* in penalty phase, the Court found that the trial court had improperly instructed the jury that "if you find . . . a mitigating circumstance, you will find that it must be unanimous" – requirement of jury unanimity violates *Mills v. Maryland*;
* trial court improperly allowed the Commonwealth to attempt to prove the aggravating circumstance that the defendant committed the killing during the perpetration of a felony, 42 Pa. C.S. § (d)(6) -- in this case rape – without instructing the jury on the elements of the underlying felony;

* trial court improperly instructed the jury that "If you find more aggravating circumstances than you find mitigating circumstances, then the penalty will be death" and "You will add up your findings either aggravating or mitigating and you will render the following sentencing verdict either death or life imprisonment" – court says this "flatly omit[ted] the mandated instruction" that the jury must weigh aggravating and mitigating circumstances to assess their quality, not merely count and quantify them.

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

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

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

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

125. Commonwealth v. Sims, 513 Pa. 366, 521 A.2d 391 (Pa. Feb. 17, 1987) (Philadelphia, direct appeal) (death penalty reversed for violation of right to confrontation where defendant was prevented from cross-examining former suspect, who had been granted immunity in exchange for his testimony, as to communications between that witness and the attorney who represented him during the time he was charged with the crime concerning the shooting; Court holds that the attorney-client communications are

privileged, but that the defendant was entitled to question the witness and have the witness invoke the privilege in front of the jury; "Particularly in cases where a defendant is exposed to the most extreme penalty, the right of cross-examination must not be curtailed.").

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

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

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

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

was used in second murder as in an attempted murder known to have been committed by the defendant was insufficient to establish that defendant was connected with second murder).

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

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

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

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

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

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

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

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

138. Commonwealth v. Washington, 488 Pa. 133, 411 A.2d 490 (Pa. Dec. 21, 1979) (Phila. direct review), *rearg. den*. Mar. 10, 1980 (capital nature of prosecution noted in

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

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

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

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

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

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

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

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

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

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

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