[J-58-2012] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 605 CAP
	:
Appellee	: Appeal from the Order of the Bucks
	: County Court of Common Pleas at No.
	: CP-09-CR-0001136-2008, dated October
v.	: 22, 2008
	:
	:
ALFONSO SANCHEZ,	:
	:
Appellant	: ARGUED: May 8, 2012

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: DECEMBER 17, 2013**

I join the Majority Opinion. I write separately for two reasons: (1) to address further appellant's argument that his waiver of several claims of trial court error may be overcome by virtue of this Court's statutory review of death sentences for passion, prejudice and arbitrariness ("PPA"); and in particular, to suggest that PPA review be revisited by the General Assembly; and (2) to note the record representations made by appellant's federal counsel, associated with the Federal Community Defender's Office (the "FCDO"), regarding its role in representing capital defendants in state court proceedings.

I.

As recounted by the Majority, appellant attempts to litigate four separate waived claims by invoking this Court's statutory review of the death penalty, as follows:

> **Issue 10:** that this Court must vacate appellant's sentence because it was the product of passion, prejudice, and other arbitrary factors because the trial court failed: to ensure that all jurors were life-qualified to serve; to prevent or address the jurors' exposure to the prosecution's improper bolstering of Jessica Carmona's testimony during the guilt phase, to inadmissible evidence of appellant's prior criminal conduct, and to inappropriate behavior by two detectives in court.

See Appellant's Brief at 77-87. Appellant frames his claims as implicating trial court error, even if a claim was neither preserved nor presented timely to the trial court so that it could rule, much less commit error. Notably, in its opinion, the trial court addressed the merits of appellant's various claims, without recognizing the Commonwealth's waiver arguments, or other record waivers.

With respect to issue 10, the Commonwealth appears not to recognize that the claim in its entirety, as presented -- *i.e.*, as an attempt to reinstate relaxed waiver review of claims under the aegis of statutory review in capital cases -- is not available on direct appeal for such run-of-the-mill issues which obviously could have been joined at trial, but were not. Rather, the Commonwealth addresses the four claims individually, arguing that two of them -- regarding the prosecution's comments vis-à-vis Carmona and the detectives' allegedly improper behavior -- were waived by failure to object contemporaneously.

In his reply brief, appellant argues that he is entitled to substantive review of these waived claims because they supposedly establish that his death sentence -- imposed in a case where he murdered two people with gunshots to the head, and shot and wounded a third person (a defenseless woman who was lying on the floor protecting her child) -- was the result of passion, prejudice, or other arbitrary factors. Appellant's Reply Brief at 6-7 (citing 42 Pa.C.S. § 9711(h)(3)). In so arguing, appellant urges the Court to reconsider its decisions in Commonwealth v. Chambers, 980 A.2d 35 (Pa. 2009) and Commonwealth v. May, 31 A.3d 668 (Pa. 2011), decisions which

appellant's counsel ignored in appellant's principal brief. Appellant is essentially arguing that this Court should reestablish relaxed waiver on direct capital appeal.

The Majority correctly declines the invitation to overrule the decisions in Chambers and May, noting that we have determined that statutory penalty review does not operate to preserve waived claims. Majority Slip Op. at 39, citing Commonwealth v. VanDivner, 983 A.2d 1199, 1205 (Pa. 2009). Parenthetically, I note that a majority of the Court recently reaffirmed this very point in Commonwealth v. Padilla, --- A.3d ----, --- (Pa. 2013), 2013 WL 5848693 at *26.

To the Majority's discussion, I add the following. Appellant raises a point in support of relaxed waiver that may not have been squarely posed in the prior cases. He argues that restricting statutory review to preserved claims and declining to review defaulted claims under the aegis of statutory PPA review "render[s] this Court's Section 9711(h)(3) statutory duty a nullity." According to appellant, because he could obtain "substantive review of any claim that has been preserved below on its own merit, review for the influence of passion and prejudice would only duplicate what has already be [sic] done." Appellant's Reply Brief at 7. In my view, this argument is mistaken for multiple reasons. First, although the statutory standard is vague, nothing in the statute purports to excuse issue preservation, particularly with respect to the sort of garden variety issues posed here. The proper counter to appellant's expansive construction is that his theory would make "nullities" of Pa.R.A.P. 302 (requiring issue preservation below), the PCRA (the presumptive repository for collateral claims not raised at trial), Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002) (enforcing the PCRA by requiring deferral of ineffectiveness claims to PCRA review), Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003) (prospectively eliminating the relaxed waiver doctrine in direct capital appeals), and Strickland v. Washington, 466 U.S. 668 (1984) (establishing core

concept of assessing ineffectiveness claims under the law in existence when the case was tried).

Second, in point of fact, appellant's "nullity" argument fails because the Court has invoked the statutory standard to support a grant of penalty relief upon a preserved claim. See Commonwealth v. Boczkowski, 846 A.2d 75 (Pa. 2004) (Commonwealth's unilateral decision contrary to existing court order to extradite appellant to North Carolina to be tried for prior murder, upon which sole aggravator introduced at Pennsylvania trial and related certification of appellant as death-eligible were premised, introduced arbitrary factor into appellant's sentencing). The penalty phase claim at issue in Boczkowski was preserved at trial, and statutory review was not used to subvert issue preservation principles (and to secure a more favorable level and standard of review for the defendant), or to avoid having to litigate a defaulted claim through the guise of ineffective assistance of counsel and a fully developed factual record. Rather, this Court cited to the statutory review factors only to assess the merits of the preserved issue. 846 A.2d at 100-01.

Third, appellant's proposed construction of statutory review would eviscerate the issue preservation principles of the PCRA because his reading rests on the premise that run-of-the-mill claims, such as those pursued here, implicate statutory PPA review. Appellant offers no legal authority to support that premise.[1]

Finally, to the extent appellant purports to address the purpose of PPA review under Section 9711(h)(3), it may be past time to consider both the fundamental purpose

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[1] The better teaching in this area is from Freeman, which recognized that there may be a "particular claim … of such primary constitutional magnitude that it should be reached on appeal" notwithstanding its waiver below. 827 A.2d at 402. The complaints comprising appellant's Issue 10 hardly qualify.

of PPA review as originally conceived by the General Assembly, and its surviving purpose, given developments in death penalty review since that time. There is an obvious counterargument to appellant's position that the statute means that defendants may raise any defaulted claim on appeal so long as they quote the statute. Since the provision was adopted in 1978, *see* Act 141 of Sept. 13, 1978, Pub. Law 756, there has been a considerable evolution -- or, more accurately, a revolution -- in death penalty practice and review that has emerged from the U.S. Supreme Court's decisional law. It is more than likely that the PPA review paradigm was adopted as a defensive measure at a time when no state could predict with certainty the sort of death penalty regime -- if any -- that might be approved by the U.S. Supreme Court.

PPA review appears to represent a short-form expression of some of the concerns that had led the High Court, in its fractured decision in Furman v. Georgia, 408 U.S. 238 (1972) (*per curiam*), to hold "that the imposition and carrying out of the death penalty in the[three] cases [then before the Court] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Id. at 239. Indeed, for the Justices whose view prevailed, a common concern was that the discretion reposed by the legislative branch in judges and juries to impose a sentence of death allowed for selective, arbitrary, or prejudiced administration of the penalty. Id. at 255 (Douglas, J., concurring); see also id. at 293-95 (Brennan, J., concurring) ("our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death"; "[t]he probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment"); id. at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique

penalty to be so wantonly and so freakishly imposed."); id. at 310-11 (White, J., concurring) ("In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. . . . Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment."); id. at 364-66 (Marshall, J., concurring) (because of untrammeled jury discretion, "capital punishment is imposed discriminatorily against certain identifiable classes of people": the poor, the ignorant, the under privileged, minorities, and men). Accord id. at 397 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting) ("The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past."); Gregg v. Georgia, 428 U.S. 153, 206 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily.").

Furman effectively suspended capital punishment in the U.S., leading state legislatures to scramble to devise new capital sentencing regimes. See Commonwealth v. Moody, 382 A.2d 442, 444-45 & n.9 (Pa. 1977) (Furman "in effect invalidated Pennsylvania's prior death-penalty statute," Act of June 24, 1939, Pub. Law 872, § 701, as amended); Commonwealth v. McKenna, 383 A.2d 174, 178 n.8 (Pa. 1978) ("The Furman decision evoked a wide legislative reaction throughout the United States, with some thirty-five states adopting new death penalty statutes. The remedial legislation

invariably took one of two forms."). Furman was a strange new rule indeed, generating a broad mandate to restrict state power in capital cases without offering any governing rationale. Accord Furman, 408 U.S. at 403 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting) ("Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress."). States that determined to pursue the traditional power to seek the ultimate penalty for the most serious of crimes were left to become legal archaeologists, searching among the various expressions for clues as to what would satisfy the cobbled-together views of a majority of five High Court justices.

Subsequently, in 1976, the High Court considered the attempts of five different states to reinstitute capital punishment in a way that addressed the concerns expressed in the various opinions in Furman; three statutes were approved (Georgia, Florida, and Texas) and two disapproved (North Carolina and Louisiana). See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida; 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). As in Furman, the cases generated multiple expressions from the several Justices.

The three statutes that were approved included standards developed for the Model Penal Code. See, e.g., Gregg v. Georgia, 428 U.S. at 193-95 & n.44 (quoting Am. Legal Institute, Model Penal Code § 210.6 (Proposed Official Draft 1962)).[2] The

[2] The American Law Institute has withdrawn Section 210.6 of the Model Penal Code effective October 23, 2009. See Model Penal Code § 210.6.

standards developed by the drafters of the Model Penal Code implicated the weighing of enumerated aggravating and mitigating circumstances in a bifurcated penalty phase proceeding. The Gregg Opinion of Justices Stewart, Powell, and Stevens explained that:

> While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

Id. at 193-95 (opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted). In contrast, the Texas and Louisiana statutes, which the High Court disapproved, narrowed the categories of crimes for which the death penalty could be imposed but made the penalty mandatory; this approach had been predicted by the dissenting Justices in Furman. See Furman, 408 U.S. at 400 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting) ("Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed."); see, e.g., Roberts v. Louisiana, 428 U.S. at 334-35 (opinion of Stewart, Powell, and Stevens, JJ.). In a later case, addressing Nevada's death penalty statute, the U.S. Supreme Court summarized the effect of the High Court's decisions on the development of capital punishment legislation by states:

> Nevada's adoption of a mandatory-sentencing scheme represented one of the two responses of various

> States to the Furman decision. Although every State had abandoned mandatory capital-sentencing procedures prior to Furman because they had proved unsatisfactory, some States, including Nevada, enacted mandatory statutes after Furman. Those States read the several opinions supporting the judgment in Furman as a signal that mandatory-sentencing procedures would avoid the arbitrary and capricious pitfalls of unguided discretionary procedures. Other States, however, maintained individualized sentencing, but narrowed the category of offenses to which the penalty could be applied, bifurcated the trial to provide a separate sentencing proceeding, and provided guidance to the sentencing authority about how to determine the appropriateness of the death penalty in a particular case. The Court on prior occasions has recognized these differing responses to Furman and the uncertain state of capital-punishment law following that decision.
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> The Court's opinions in 1976 addressing the constitutionality of five post-Furman state statutes did much to clarify what standards must be met to render a capital-punishment statute facially constitutional. In explaining why the guided-discretion statutes of Georgia, Florida, and Texas were facially valid, but the mandatory statutes of North Carolina and Louisiana were not, the Court relied to a significant degree on the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case. The principal opinions in these cases established that in capital cases, "it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."

Sumner v. Shuman, 483 U.S. 66, 71-72 (1987) (internal citations omitted). The focus of the High Court in addressing the prejudice and arbitrariness concerns of the Furman concurrences was on cabining the discretion exercised by the factfinder at the penalty phase. Enhanced appellate procedures were also noted with approval: "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory

scheme provides for automatic appeal of all death sentences to the State's Supreme Court." Gregg, 428 U.S. at 198 (opinion of Stewart, Powell, and Stevens, JJ.); see also Proffitt, 428 U.S. at 250-51.

The Georgia scheme approved by the Court also included a provision obliging the reviewing State Supreme Court to conduct PPA review. While noting the inclusion of the PPA provision in the statute (along with aggravator sufficiency review and proportionality review), the High Court did not discuss PPA review specifically or separately. Gregg, 428 U.S. at 198, 205-06 (opinion of Stewart, Powell, and Stevens, JJ.); see id. at 223 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring). Notably, the **absence** of PPA review did not render the Florida death penalty statute unconstitutional:

> The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. The [Florida] law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is ma[de] possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to "(guarantee) that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great."

Proffitt, 428 U.S. at 250-51 (internal citations omitted); accord Jurek, 428 U.S. at 276 ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not

violate the Constitution."). The Model Penal Code also did not suggest appellate review procedures such as PPA review.

Presumably, statutory schemes such as the current one in Pennsylvania include PPA review because Gregg approved a statute containing such a paradigm. Prior to Gregg, the Pennsylvania General Assembly had adopted a "new" statutory scheme in 1974, intended to address the fractured concerns in Furman. See Moody, 382 A.2d at 445 & n.10 (citing Act 46 of Mar. 26, 1974, Pub. Law 213, 18 Pa.C.S. § 1311).[3] But, in 1977, in light of Gregg and its companion cases, the Moody Court held the 1974 scheme unconstitutional because it enumerated mitigators rather than permitting the sentencing authority to consider all mitigating evidence relevant to the defendant's character and record. Id. at 447, 449-50. Accordingly, in 1978, the General Assembly once again amended the death penalty sentencing scheme. See Act 141 of Sept. 13, 1978, Pub. Law 756 (18 Pa.C.S. § 1311). This amended provision was renumbered in 1980 and placed in the Judicial Code. See 42 Pa.C.S. § 9711.

Although the death penalty statute has since been amended again, Pennsylvania's sentencing scheme retains the general approach adopted in 1978. Pennsylvania's scheme -- like that approved by the U.S. Supreme Court in Gregg -- provided for a weighing of aggravating and mitigating circumstances by the sentencing authority; reposed an automatic appeal in the Pennsylvania Supreme Court; and directed that appellate review includes the mandate that: "The Supreme Court shall

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[3] The General Assembly had also adopted a stop-gap measure in 1972, which simply re-authorized the death penalty in Pennsylvania by providing: "a person who has been convicted of murder of the first degree shall be sentenced to death or to a term of life imprisonment." The Pennsylvania Supreme Court held the provision constitutionally infirm. The Court viewed the provision as "an abbreviated form of the unconstitutional Act of 1939 which it replaced, and more procedurally defective because of the abbreviation," because it allowed the sentencing authority "unbridled discretion" to determine the propriety of the death penalty. McKenna, 383 A.2d at 178 & n.8.

affirm the sentence of death unless it determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor." See 42 Pa.C.S. § 9711(h)(3). In 1982, the Supreme Court of Pennsylvania approved the legislative scheme enacted in 1978. See Commonwealth v. Zettlemoyer, 454 A.2d 937, 960-61 (Pa. 1982). Notably, while the Zettlemoyer Court recognized the importance of adequate appellate review of death sentences, the Court emphasized that the High Court had never said in Gregg, or elsewhere, that any particular type of review, including PPA review, is required. "It is true, as appellant and *amici* point out, that the elaborate administrative procedures provided by statute in Georgia to facilitate and expedite appellate review by the Supreme Court of Georgia were well received by the United States Supreme Court in Gregg v. Georgia, supra. The suggestion that such mechanisms are constitutionally required, however, flies in the face of the latter Court's explicit pronouncement in Proffitt v. Florida, supra." 454 A.2d at 960-61.[4]

In the years since Gregg, the High Court has continued to be active in adjusting capital review, to the point where there is no logical place for the PPA review Georgia inserted into its post-Furman death penalty statute in the hope of addressing the varied concerns in Furman. The vagaries of court-conducted PPA review to eliminate "freakish" impositions of the death penalty have been supplanted by specific review

[4] Indeed, the Georgia scheme approved in Gregg provided for proportionality review, and Pennsylvania's 1978 death penalty procedures included a similar provision. Proportionality review, like PPA review, represented a predictive judgment of what might be required to satisfy the Eighth Amendment. In fact, however, the High Court has required neither form of review. The proportionality review provision was repealed by the General Assembly in 1997. See Act 28 of June 25, 1997, Pub. Law 293, § 1 (repealing 42 Pa.C.S. § 9711(h)(3)(iii), which "required reversal of a sentence of death that was 'excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.'"); see, e.g., Commonwealth v. Laird, 988 A.2d 618, 647 (Pa. 2010).

schemata emerging from Court decisions narrowing the availability of the death penalty, and directly addressing Furman's concerns regarding unbridled capital sentencers returning a death verdict on the basis of "passion, prejudice or arbitrariness." That decisional law has, among many other restrictions, mandated consideration of expansive mitigating circumstances, while limiting aggravators to specifically authorized factors; required an uneven weighing of mitigators versus aggravators (slanted in favor of the defendant); and excluded certain defendants from the ultimate penalty (*e.g.*, non-murderers; murderers under the age of 18; murderers who are mentally retarded). I briefly described certain of the developments in my concurrence in Commonwealth v. Gibson, 951 A.2d 1110 (Pa. 2008):

> Soon after re-authorizing the separate States to provide for capital punishment in the 1970s, the U.S. Supreme Court innovated what amounts to a "kitchen sink" rule concerning mitigation evidence in capital trials, and imposed that new rule upon the States. For reasons which are now primarily of academic or historical interest, Supreme Court case decisions have left us with a regime where those States that adopted capital punishment: (1) must require proof of specific aggravating circumstances to distinguish among first-degree murderers in order to limit capital punishment to those who are "the worst of the worst," and (2) must not categorically preclude capital defendants from introducing, and factfinders from considering, any evidence in mitigation relating to the defendant's character or record (a very broad category) and the circumstances of the crime. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (adopting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)). For a thorough and illuminating description of the development of the mitigation evidence requirement imposed on the States -- what Justice Clarence Thomas has called "[t]he mitigating branch of our death penalty jurisprudence" -- see Justice Thomas's concurring opinion in Graham v. Collins, 506 U.S. 461, 479-92 (1993) (Thomas, J., concurring). The Pennsylvania General Assembly has

adopted a conforming death penalty statute that follows the federal judicial command, with a series of enumerated aggravating and mitigating circumstances, including a "catchall" mitigator. 42 Pa.C.S. § 9711.

The resulting High Court-dictated penalty paradigm involves "weighing" what seem to be competing considerations, but in fact capital sentencing is twice heavily slanted in favor of a non-death verdict. First, not all first-degree murderers are eligible for the death penalty: in Pennsylvania, the Commonwealth has to prove, beyond a reasonable doubt, a specific statutory aggravator or aggravators. Second, even if the Commonwealth proves the defendant's exceptionality among his brethren of first-degree murderers, the defendant is guaranteed an opportunity for the jury -- and all it takes is one juror -- to spare him from death for reasons having to do with mitigation.[3] The High Court's decisional law in the wake of this paradigm has been subjected to constant "tinkering" (Justice Harry Blackmun's famous coda)[4] or "annual improvisation" (Justice Scalia)[5] resulting in new or retooled rules -- concerning who is eligible, level of proof, how the jury is to weigh the proof, what the jury is to be told, requirements of juror unanimity versus individual juror nullification, and so on. This reality, combined with the delays and multiple levels of exacting review, has further complicated capital jurisprudence.

[3] Justice Antonin Scalia has described the two-part paradigm as follows:

> [O]ver the years since 1972 this Court has attached to the imposition of the death penalty two quite incompatible sets of commands: The sentencer's discretion to impose death must be closely confined, see Furman v. Georgia, 408 U.S. 238 (1972) (*per curiam*), but the sentencer's discretion **not** to impose death (to extend mercy) must be unlimited, see Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion). These commands were invented without benefit of any textual or historical support. . . .

Callins v. Collins, 510 U.S. 1141, 1141-42 (1994) (Scalia, J., concurring).

[4] Callins, 510 U.S. at 1145 (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").

[5] See Morgan v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (adverting to "the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence").

951 A.2d at 1148-49 (Castille, C.J., joined by McCaffery, J., concurring).

Given the volatility in the U.S. Supreme Court's decisional law affecting capital punishment, there is some peril in implementing the latest new rules from the High Court. An erroneous interpretation of what the High Court intends by a new decision or a mis-prediction of what the High Court will require next can lead to a state decisional ruling or legislation that becomes a cancerous fixture, a constitutionalization of an error. See, e.g., Commonwealth v. Mouzon, 53 A.3d 738, 742-43 (Pa. 2012) (addressing unsuccessful efforts to predict federal constitutional development regarding burden of proof respecting self-defense claims); Commonwealth v. Wilson, 2013 WL 2303534 (Pa. 2013) (General Assembly enacted statute that requires reasonable suspicion in searches of parolees in response to mis-prediction in Commonwealth v. Pickron, 634 A.2d 1093 (Pa. 1993) that U.S. Supreme Court would interpret Fourth Amendment in that manner). The more prudent approach is to implement the federal command up to its limits, but no farther. See Commonwealth v. Sanchez, 36 A.3d 24 (Pa. 2011); accord Commonwealth v. Cunningham, --- A.3d ----, 2013 WL 5814388 at *5 (Pa. 2013) (citing Sanchez) ("state judges who may be circumspect about evolving normative pronouncements of five of nine Justices -- which forcefully are rejected by four others -- may be reluctant to apply those standards more broadly than is absolutely required"); id.

at *9 (Castille, C.J., concurring); Commonwealth v. Weiss, --- A.3d ----, 2013 WL 5848710 at *35 (Pa. 2013) (Castille, C.J., concurring). Federal review is always available to correct errors in implementation.

These realities inform a proper understanding of what was intended by PPA review, and what role it should play now. The General Assembly in the 1970s evidently was intent upon reinstituting the prospect of capital punishment in Pennsylvania, adopting three separate review schemes in the wake of Furman and its progeny. In that volatile era, it made sense to track a statute that withstood an Eighth Amendment challenge in the High Court; why bait the bear? But in the 37 years since Gregg was decided, the High Court's decisional pronouncements have channeled and narrowed the instances in which death may be pursued, how penalty-relevant evidence may be considered by a factfinder, and procedurally how the death sentence may be imposed at trial and survive appellate scrutiny. PPA review was designed to reduce the risk of an arbitrary or "freakish" sentence of death; pre-Furman juries with unbridled discretion had been free to indulge their passions and prejudices, including racial prejudice. The jurisprudence beginning with Gregg has done with specifics what PPA review sought to accomplish with a vague command; those cases have established rules and procedures that severely restrict the potentiality for a sentence of death to conform with Eighth Amendment requirements, and yet still pose a circumstance where the sentence was a result of "passion, prejudice or arbitrariness," requiring correction in advance of post-conviction review. To be sure, I still support the exception to direct appeal waiver left open in Freeman, respecting defaulted claims of primary constitutional magnitude. But, PPA review is not required to reach those claims, and it should not be employed to reinvigorate defaulted claims that bear no resemblance to the primary constitutional infirmities that led to Furman. In short, statutory PPA review is not a nullity, as appellant

says; the intervening decisional law has made it a redundancy. The extensive statutory and decisional restrictions governing the penalty phase of trial, and the ensuing appeal, ensure a robust PPA review just by reaching preserved claims. The PCRA then acts as a second and separate PPA safeguard. The General Assembly may want to revisit PPA review and eliminate the redundancy, as it did when it eliminated proportionality review. Pending legislative reconsideration, the proper way to engage PPA review is per the approach in Boczkowski.[5]

Returning to the defaults at issue in this appeal, I recognize that the Commonwealth fails to pursue some obvious waivers, and as noted, the trial court simply proceeded to the merits. In instances where the Commonwealth, which stands

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[5] Recognition of the federalism-related aspects of the development of Pennsylvania law, as reflected in the history of PPA review, remains timely. Contemporary state courts and state legislatures have had to consider the impact of recent High Court decisions on the administration of criminal justice in a number of areas. Examples include the effect upon the law of evidence resulting from the interpretation of the Confrontation Clause in Crawford v. Washington, 541 U.S. 36 (2004) and the uneven decisions following Crawford; the implementation of broad new rules in capital cases, such as the exemption from the death penalty for the subjectively-defined category of mental retardation, see Atkins v. Virginia, 536 U.S. 304 (2002), or the new procedural requirements for juvenile murderers with uncertain retroactive effect, see Miller v. Alabama, 132 S.Ct. 2455 (2012); and the realignment in *habeas corpus* law of expectations regarding counsel performance during state collateral review, see Martinez v. Ryan, 132 S.Ct. 1309 (2012), and state procedural default rules, see Trevino v. Thaler, 133 S.Ct. 1911 (2013). The common denominator in these cases affecting the practical administration of criminal justice within the States is that the U.S. Supreme Court has frequently laid down a broad new constitutional rule, a new refinement, or a new directive, whose consequences in practical implementation (*e.g.*, Atkins) or effect upon state processes (*e.g.*, Martinez and Trevino), in application to new factual scenarios (*e.g.*, Crawford), or in retroactive application (*e.g.*, Miller), is not at all clear. Courts and legislatures should be mindful of the peril in prediction, and should be sensitive to the distinct issues of state law arising in the wake of volatile innovations in federal constitutional law. See, generally, Cunningham, -- A.3d ----, 2013 WL 5814388 (Castille, C.J., concurring).

to benefit from the default at issue, does not pursue a default argument -- has "waived the waiver" -- I have no fixed objection to proceeding to the merits if that is the most efficient manner of disposition. I do so because the Commonwealth's own default should shield the Court from a later claim in federal court that the Court is selectively reinstituting relaxed waiver, and thereby applying a state procedural default rule unevenly. See Commonwealth v. Paddy, 15 A.3d 431, 472 (Pa. 2011) (Castille, C.J., concurring); Commonwealth v. Spotz, 18 A.3d 244, 343-44 (Pa. 2011) (Castille, C.J., joined by McCaffery, J., concurring). Nevertheless, I would expressly reject appellant's attempt at instituting a relaxed waiver as-of-right regime.

II.

I have written previously to address the actions of the FCDO while representing capital defendants in Pennsylvania state courts. As recounted by the Majority, appellant's trial counsel here did not file either post-verdict motions or a direct appeal from the judgment of sentence. In November 2009, the FCDO filed a PCRA petition in state court on appellant's behalf, seeking to reinstate his appeal rights *nunc pro tunc*. The PCRA court granted the petition and the FCDO filed a notice of appeal. The FCDO also filed a motion for appointment of new counsel, which the trial court did not address. Instead, the trial court ordered appellant to file a Rule 1925(b) statement of issues complained of on appeal. See Pa.R.A.P. 1925(b).

The FCDO renewed its application for appointment of new counsel by motion with this Court, averring that "institutional limitations" prohibited the FCDO from representing appellant on direct appeal. Counsel also claimed that appellant signed a "limited retainer agreement," which narrowly circumscribed the FCDO's obligation to the filing of a PCRA petition seeking to restore appellant's direct appeal rights. Finally, the

FCDO alleged that it was not prepared to pursue the direct appeal because it had no documents related to the trial, including evidence used at trial or transcripts.

This Court issued a *per curiam* order remanding the matter to the trial court. Our remand order directed the trial court "to ascertain the basis for, and the legitimacy of, counsel's assertions that they are not authorized to continue as appellant's counsel in a direct appeal, as well as to consider Pa.R.P.C. 6.2 and Explanatory Comment (relating to the appointment of counsel)." Commonwealth v. Sanchez, 989 A.2d 1290 (Pa. 2010) (*per curiam*). The trial court held a hearing and, subsequently, appointed the FCDO to represent appellant on direct appeal.

At the hearing, Rebecca Blaskey, the First Assistant to the Federal Defender, explained the FCDO's authority to represent appellant as follows:

> Ms. Blaskey: Your honor, the Federal Community Defender Office is not authorized or permitted to expend federal funds in state court proceedings except under very limited circumstance [sic], and arguably, a direct appeal proceeding such as this one would not qualify. So as the Federal Community Defender, Your Honor, we are not able to accept appointment in Mr. Sanchez's cases [sic].
>
> The Court: What is the authorization for the Federal Community Defender's Office? What is their scope of representation?
>
> Ms. Blaskey: Your Honor, we represent persons -- as the Capital Habeas Unit, we represent death sentenced prisoners in [18 U.S.C. §] 2254 proceedings in Federal Court, some ancillary proceedings in State Court, and we also present [sic] some [18 U.S.C. §] 2255 Federal prisoners. We are funded by a grant from the Administrative Office of the United States Courts in Washington D.C., and as such, it [sic] cannot expend federal money in state court proceedings except under limited authorized circumstances.
>
> The Court: You may continue.

> Ms. Blaskey: Thank you, Your Honor.
>
> One of the things that I had explained to Your Honor was that, previously, was that the Defender Association of Philadelphia, which is our umbrella organization, has as part of its entity the Pennsylvania Capital Representation Project, which is a non-profit project that does not use federal funds, and if Your Honor would like to appoint our lawyers, what we would request is that Your Honor appoint the Pennsylvania Capital Representation Project rather than the Federal Community Defender.
>
> The Court: Are the lawyers one and the same for both?
>
> Ms. Blaskey: They are, Your Honor.
>
> The Court: And what is the funding of the Pennsylvania Capital Representation Project?
>
> Ms. Blaskey: Your Honor, that is a non-profit 501-C3, and it's funded by private donations and grants.
>
> The Court: And accepting your statement as an officer of the court, they are authorized to represent capital defendants in state court proceedings?
>
> Ms. Blaskey: Yes, Your Honor.
>
> Primarily, as the name implies, we represent capital defendants in post-conviction proceedings. Since this is a direct appeal proceeding, if Your Honor were to appoint us, we could accept that as the Pennsylvania Capital Representation Project.

Petition to Withdraw as Counsel / Appointment of New Counsel Hearing, 6/21/2010, at 3-5. Thus, in spite of the FCDO's initial protestations, FCDO counsel indicated to the trial court that it could be appointed in this matter, so long as it did not use federal funds, and was appointed under the name "the Pennsylvania Capital Representation Project."

The Commonwealth did not oppose the appointment. The FCDO then asked that it not be held responsible for "costs such as transcripts" because it was a non-profit entity.

Notably, in the subsequent appeal filed in this Court, the briefs were submitted, not under the rubric of the Pennsylvania Capital Representation Project, but per the "Federal Community Defender Office for the Eastern District of Pennsylvania, Capital Habeas Unit." The question remains, then, whether federal funds have been improperly deployed to support this venture.