[J-25-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 513 CAP
	:	
Appellee	:	Appeal from the Judgments of Sentence
	:	of Death entered May 12, 2001, and the
	:	Judgment of Sentence entered September
v.	:	6, 2001 (post-sentence motions denied on
	:	December 29, 2005), in the Court of
	:	Common Pleas of Allegheny County at
RICHARD BAUMHAMMERS,	:	Nos. CC 200014712, 200014713, and
	:	200014714
Appellant	:	
	:	
	:	ARGUED: March 5, 2008

OPINION

MR. JUSTICE McCAFFERY **DECIDED: November 20, 2008**

This is a capital direct appeal from judgments of sentence imposed by the Court of Common Pleas of Allegheny County on May 12 and September 6, 2001. Because we conclude that the issues raised by Appellant are without merit, we affirm the judgments of sentence.

On April 28, 2000, during a crime spree lasting approximately two hours, Appellant, Richard Baumhammers, shot and killed Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao Pak Pham, and Garry Lee. He also seriously wounded Sandip Patel, pointed his loaded pistol at George Thomas II, set fire to Mrs. Gordon's house by using an incendiary device, desecrated one synagogue by defacing it with red spray paint and shooting bullets into it,

and desecrated a second synagogue by shooting bullets into it. Appellant was arrested on the day of the crime spree and was found to have in his possession a .357 caliber handgun, spent .357 caliber shell casings, live .357 caliber ammunition, two Molotov cocktails, a can of red spray paint, and a roadmap. Appellant was charged with five counts of homicide, one count of attempted homicide, one count of aggravated assault, one count of simple assault, one count of recklessly endangering another person, eight counts of ethnic intimidation, two counts of institutional vandalism, two counts of criminal mischief, three counts of arson, and one count of carrying a firearm without a license. At the time of the filings of the criminal informations, the Commonwealth gave Appellant notice of its intention to seek the death penalty and of the aggravating circumstances supporting the death penalty on which it intended to rely.

Following a competency hearing held on May 9, 2000, the trial court determined that Appellant was mentally incompetent and ordered his transfer to a state hospital for treatment. Following a subsequent competency hearing held on September 15, 2000, the trial court determined that treatment had rendered Appellant competent to stand trial. A jury trial on the charges was thereafter held from April 27 to May 9, 2001. During trial, Appellant did not dispute that he had shot the victims; rather, he presented evidence that he had done so while suffering from a mental disease. The jury rejected Appellant's insanity defense and returned a verdict of guilty on the five counts of first-degree murder and on all of the remaining charges.

From May 10 to May 11, 2001, the penalty phase of the trial was held. The Commonwealth presented two aggravating circumstances pursuant to 42 Pa.C.S. § 9711(d)(7) and (11).[1] Appellant presented five mitigating circumstances pursuant to 42

[1] The two aggravating circumstances were as follows: "(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;" and "(11) The defendant has been convicted of another murder (continued…)

Pa.C.S. § 9711(e)(1), (2), (3), (5), and (8).[2] The jury found that the Commonwealth had proven the two aggravating circumstances, and that Appellant had proven three of the five mitigating circumstances. However, the jury also determined that the aggravating circumstances outweighed the mitigating circumstances and returned sentences of death as mandated by law. See 42 Pa.C.S. § 9711(c)(iv) (providing in relevant part that the verdict must be a sentence of death if the jury unanimously finds one or more aggravating circumstances that outweigh any mitigating circumstances). Sentencing on the non-capital offenses, as well as the formal imposition of the death sentences was deferred pending the preparation of a pre-sentence report. On September 6, 2001, the sentencing court formally imposed the five sentences of death and further imposed a total term of imprisonment on the non-homicide convictions of 112½ to 225 years. On December 29, 2005, the court denied Appellant's post-sentence motions, and Appellant filed the instant direct appeal wherein he raises sixteen issues for this Court's review, which we shall address following our mandatory review of the sufficiency of the evidence for the first-degree murder convictions.

(…continued)
committed in any jurisdiction and committed either before or at the same time of the offense at issue." 42 Pa.C.S. § 9711(d)(7) and (11).

[2] The five mitigating circumstances were as follows: "(1) The defendant has no significant history of prior criminal convictions;" "(2) The defendant was under the influence of extreme mental or emotional disturbance;" "(3) 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;" "(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person;" and "(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(1), (2), (3), (5), and (8).

I. Sufficiency of the Evidence

In all death penalty direct appeals, whether or not the appellant specifically raises the issue, this Court reviews the evidence to ensure that it is sufficient to support the conviction or convictions of first-degree murder. Commonwealth v. Blakeney, 946 A.2d 645, 651 n.3 (Pa. 2008).

> Evidence presented at trial is sufficient when, viewed in the light most favorable to the Commonwealth as verdict winner, the evidence and all reasonable inferences derived therefrom are sufficient to establish all elements of the offense beyond a reasonable doubt. In the case of first-degree murder, a person is guilty when the Commonwealth proves that: (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill. An intentional killing is a killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing. The Commonwealth may prove that a killing was intentional solely through circumstantial evidence. The finder of fact may infer that the defendant had the specific intent to kill the victim based on the defendant's use of a deadly weapon upon a vital part of the victim's body.

Id. at 651-52 (citations and quotation marks omitted).

Further, in reviewing whether the evidence was sufficient to support the first-degree murder conviction or convictions, the entire trial record should be evaluated and all evidence received considered. Commonwealth v. Cousar, 928 A.2d 1025, 1032-33 (Pa. 2007), cert. denied, 128 S.Ct. 2429 (2008). In addition, we note that "the trier of fact, while passing upon the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence." Id. at 1033.

Here, Appellant has not raised an issue regarding the sufficiency of the evidence; however, our independent review compels the conclusion that the evidence adduced at trial overwhelmingly supports Appellant's convictions for first-degree murder. The evidence established that at approximately 1:40 p.m. on April 28, 2000, Mt. Lebanon firefighters

responded to an activated fire alarm set off at the Gordon residence at 788 Elm Spring Road, Mt. Lebanon. The responding firefighters, and police officers who later arrived at the scene, discovered at this residence the body of Anita Gordon, an Orthodox Jew, who had been shot multiple times in the chest, abdomen, and both hands, and who exhibited no signs of life. An incendiary device known as a Molotov cocktail was also discovered as having been thrown and ignited in a first-floor bedroom of the Gordon residence. During the discovery of the violence perpetrated at the Gordon residence, police began to receive reports regarding other nearby acts of violence, specifically, shootings occurring at the Beth El Synagogue, 1.3 miles from the Gordon residence, and at the Scott Towne Center, a strip mall less than one mile from the synagogue. These reports identified the shooter as a white male driving a black Jeep.

While these reports were coming in, Officer Mary Susan Joyce was interviewing neighbors of Anita Gordon. Officer Joyce was questioning Inese Baumhammers, Appellant's mother, when Officer Joyce received a radio dispatch that the vehicle used in the reported shootings was a black Jeep registered to an individual named Baumhammers. Officer Joyce asked Ms. Baumhammers if she owned a black Jeep. Ms. Baumhammers replied that she did and that her son, Appellant herein, was then using the vehicle.

With respect to the first of two synagogue incidents, Susan Finder, a worshipper at Beth El Synagogue, testified that sometime after 1:20 p.m. on April 28, 2000, she was leaving the parking lot of the synagogue when she observed a black Jeep pull into the lot. Finder was able to identify Appellant as the driver of the Jeep. Dennis Wisniewski testified that on the day of the incident he was stopped at a red light three car lengths from the synagogue when he heard a bang and turned to see a man matching Appellant's description discharging five or six pistol rounds into the synagogue. Wisniewski testified that he then observed the shooter walk casually back to a black Jeep Cherokee. Philip Balk, a member of the synagogue, testified that at approximately 2:00 p.m., he arrived at

the scene to observe that windows had been broken out and that a swastika and the word "Jew" had been spray-painted in red paint on the building. Detective Edward Adams of the Allegheny County Police testified that when he arrived at the synagogue at approximately 2:50 p.m., he observed the broken glass and the desecration with the red spray paint. He also observed two bullet holes in some of the glass and bullet fragments in the synagogue's vestibule.

Regarding the shooting at the Scott Towne Center, Joseph Lanuka testified that at approximately 1:30 p.m. on April 28, 2000, he dropped off Anil Thakur at the India Grocery, an establishment in the shopping mall. Lanuka told Thakur that he would be back in fifteen minutes to pick him up. When Lanuka returned, he saw police entering the grocery store and Thakur's grocery bag lying on the ground. Lanuka went into the store and saw Thakur lying on the ground with three or four bullet holes in his chest. He also saw a man lying behind the counter, who was identified at trial as Sandip Patel. Thakur died from his wounds and Patel was paralyzed from his neck down as a result of the gunshots he had received. Also regarding this incident, John McClusky testified that at approximately 1:45 p.m., he heard a noise, which he ascertained were gunshots, and observed Appellant pointing a gun at an individual who ran past Appellant into the grocery store. Appellant turned and followed the man into the store; McClusky then heard three more gunshots. Appellant left the establishment, made eye contact with McClusky, and then walked slowly, calmly, and collectedly toward a lower area of the mall parking lot. McClusky then observed Appellant drive away in a normal fashion in a black Jeep Cherokee. Jennifer Lynn Fowler also testified that she witnessed the events described by McClusky.

A second synagogue incident occurred that afternoon at the Ahavath Achim Synagogue in Carnegie, approximately 2.1 miles from the Scott Towne Center. Carole Swed testified that at approximately 2:00 p.m. she was stopped at a traffic light across the street from the synagogue. Swed heard two loud pops and turned to observe Appellant,

with a calm demeanor, standing outside of the synagogue. She observed him fire several shots into the synagogue, then get into a black Jeep and drive away. Swed was able to record the license plate number of the Jeep, and she promptly provided this information to the police, whom she immediately called. Detective Edward Fisher of the Allegheny County Police testified that when he arrived at the synagogue, he observed five bullet holes in the structure, including one in a flyer advertising a meeting of Holocaust survivors that was scheduled at the synagogue.

David Tucker testified that between 2:15 and 2:30 p.m. on April 28, 2000, he was the lone diner at the Ya-Fei Chinese Restaurant in the Robinson Towne Center, a strip mall located approximately ten minutes away by car from the Ahavath Achim Synagogue. In the restaurant at the time was Ji-Ye Sun, the restaurant manager, and Thao Pak Pham, a delivery person. During this period, Appellant walked into the restaurant carrying a briefcase. Appellant and Pham had a verbal exchange, and then Tucker saw Pham begin to run. Tucker testified that Appellant pulled a pistol from his case and shot Pham in the back as he was running past Tucker. Sun was shot in the chest. Although paramedics arrived quickly at the establishment, both Pham and Sun died from their gunshot wounds.

George Lester Thomas II testified that at approximately 2:40 p.m., he met his best friend, Garry Lee, at the C.S. Kim Karate Studio, located in the Center Stage Shopping Center, which was not a far distance from the Robinson Towne Center. Both men were warming up in the studio when Appellant entered and pointed a handgun at Thomas. Appellant did not shoot but turned the gun in the direction of Lee, who was standing next to Thomas. Appellant shot Lee twice in the chest and then calmly walked away as Thomas ran to the back of the studio in an effort to summon help. However, Lee died from his gunshot wounds. Thomas is white; Lee was black.

Diane Wenzig, the owner of a pizza shop two doors away from the karate studio, testified that she observed Appellant walk into the karate studio with a gun in one hand and

a briefcase in the other. After hearing the gunshots, Wenzig instructed her son to call 911. Wenzig observed Appellant get into a black Jeep Cherokee, whose license plate number she recorded and provided to the police.

Following the report of this incident, Officer John Fratangeli of the City of Aliquippa Police Department was instructed to station himself on the Aliquippa-Ambridge Bridge along Route 51 so that he could intercept Appellant.[3] Officer Fratangeli testified that at approximately 3:10 p.m., he observed Appellant's black Jeep Cherokee turn onto the bridge. Appellant was not driving erratically; in fact, he was driving within the speed limit and using proper turn signals. Officer Fratangeli followed Appellant's vehicle, and when assisting units arrived, he initiated a traffic stop, two blocks from another synagogue. Appellant was arrested and his .357 caliber pistol was found in a soft-sided briefcase in the Jeep. A criminologist with the Allegheny County Coroner's Office testified that forensic tests confirmed that the bullets recovered from the bodies of Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao Pak Pam, and Garry Lee had all been discharged from Appellant's weapon.

At trial, the Commonwealth also introduced the testimony of Appellant's cellmates at different correctional facilities. Bobby Jo Eckles testified that Appellant told him that he had "shot a nigger" and that Appellant made other derogatory comments regarding blacks and Jews. David Brazell testified that Appellant told him that he had killed Anita Gordon "to make a statement" and that he had desecrated the Beth El Synagogue because that was where Mrs. Gordon had worshipped. Other fellow inmates testified that Appellant spoke of his anti-immigration and pro-segregation views, his desire to start a white supremacist party, and his hatred for all "ethnic" people.

The foregoing evidence was amply sufficient to permit the jury to conclude, beyond a reasonable doubt, that Appellant intentionally, deliberately, and with premeditation killed

[3] Aliquippa neighbors Center Township, where the karate studio is located.

Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao Pak Pam, and Garry Lee. Each of these victims was unlawfully killed; Appellant committed the killings; and the mere fact that Appellant shot four of the victims in the chest, sometimes several times, was sufficient to permit the jury to find a specific intent to kill. Additional evidence of Appellant's specific intent to kill included (1) the statements he later made indicating his desire to "make a statement" by his shooting of Mrs. Gordon; (2) his disparagement of the ethnicities of the victims; and (3) his violent desecration of synagogues.

Having determined that the evidence overwhelmingly supports his first-degree murder convictions, we now turn to Appellant's claims.

II. Relaxed Waiver Rule

Although Appellant does not concede that any issue in this appeal was not timely raised and preserved below, he has anticipated, correctly, that the Commonwealth argues that many of his issues were not preserved and are thus waived. In anticipation of the Commonwealth's argument that certain of his issues are waived, Appellant contends that we should address the merits of such issues under the "relaxed waiver rule." Appellant acknowledges that we abrogated the relaxed waiver rule in Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), well prior to his 2006 appeal. However, because his case was tried before Freeman's effective date, Appellant contends that it "makes sense" that he should reap the advantages of the rule because his trial counsel **might** have anticipated its application on appeal. Appellant's Brief at 20. Further, Appellant contends that all of his issues, save one, were "raised below" in his post-sentence motions, even if not during trial or on pre-trial motions.[4] Finally, Appellant asks that we invoke our discretion to review waived claims and, in particular, consider that his claims rise to the level of "primary constitutional magnitude." Id. at 21.

[4] Counsel on post-sentence motions was different from trial counsel.

Prior to Freeman, this Court would address, **in its discretion**, issues in capital appeals not preserved below pursuant to a practice we referred to as the relaxed waiver rule. See, e.g., Freeman, supra at 400 (citing to several capital cases where we reviewed otherwise waived issues under the relaxed waiver rule). However, in Freeman, we abolished this rule, holding

> that, as a general rule on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable. Such claims may be pursued under the [Post Conviction Relief Act (PCRA)], as claims sounding in trial counsel's ineffectiveness or, if applicable, a statutory exception to the PCRA's waiver provision. This general rule … reaffirms this Court's general approach to the requirements of issue preservation. …[A]n assumption has arisen that all waived claims are available for review in the first instance on direct appeal. The general rule shall now be that they are not. In adopting the new rule, we do not foreclose the possibility that a capital appellant may be able to describe why a particular waived claim is of such primary constitutional magnitude that it should be reached on appeal. Indeed, nothing … shall … call[] into question the bedrock principles … concerning the necessity of reaching fundamental and plainly meritorious constitutional issues irrespective, even, of the litigation preferences of the parties. Consistently with our [practice], however, we leave the specific articulation of any future exception to the actual case or controversy in which that "rare" claim arises.

Id. at 402.

Further, we made our new "rule" prospective, holding that the relaxed waiver rule would continue to apply only to those capital cases then briefed or in the process of being briefed. Id. at 403. Because we held that our **new** rule would apply to those cases in which the appellant's brief had not yet been filed in this Court and was not due for thirty days or more after the May 30, 2003 filing date of Freeman, all cases where the appellant's brief was due to be filed after June 28, 2003, or had not been filed by that date, were subject to our **new** rule. Id.; see also Cousar, supra at 1043.

In the instant case, Appellant was tried for capital murder prior to the effective date of the new rule set forth in Freeman. However, Appellant filed his notice of appeal on February 28, 2006, well after the effective date of the new rule established in Freeman. Therefore, the relaxed waiver rule clearly does not apply to Appellant's issues, even though Appellant's trial occurred prior to the effective date of the new rule. See Commonwealth v. Moore, 937 A.2d 1062, 1066 (Pa. 2007) (holding that Freeman barred application of the relaxed waiver rule where the appellant was convicted in 1999, prior to Freeman, but the appeal was filed after the effective date of the new rule set forth in Freeman); and Cousar, supra at 1043 (holding that Freeman barred application of the relaxed waiver rule where the appellant was convicted in 2001, prior to Freeman, but the appeal was filed after the effective date of the new rule set forth in Freeman). Therefore, Appellant's "waived claims may be considered, if at all, only as components of a challenge to trial counsel's stewardship." Moore, supra at 1066.

Moreover, the specific reasons asserted by Appellant for applying the relaxed waiver rule here are easily rejected. Appellant first argues that the relaxed waiver rule should be applied because trial counsel would have anticipated its application on appeal. However, "this Court has long emphasized that the relaxed waiver rule did not exist to permit capital defendants and their counsel to deliberately avoid raising contemporaneous objections." Freeman, supra at 403.

Appellant next argues that those objections not contemporaneously raised below were nevertheless "raised in the lower court" by virtue of having been set forth in post-sentence motions. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Appellant has failed to show that Rule 302(a) has ever been interpreted as meaning that issues may be raised **at any time** during the lower court proceedings in order to preserve them. Rather, it is axiomatic that issues are preserved when objections are made timely to the error or offense. See

Commonwealth v. May, 887 A.2d 750, 761 (Pa. 2005) (holding that an "absence of contemporaneous objections renders" an appellant's claims waived); and Commonwealth v. Bruce, 916 A.2d 657, 671 (Pa.Super. 2007), appeal denied, 932 A.2d 74 (Pa. 2007) (holding that a "failure to offer a timely and specific objection results in waiver of" the claim). Therefore, we shall consider any issue waived where Appellant failed to assert a timely objection.

Finally, Appellant argues that we should review even waived claims if they rise to the level of "primary constitutional magnitude." Indeed, in Freeman, we specifically reserved the practice of "reaching fundamental and plainly meritorious constitutional issues irrespective, even, of the litigation preferences of the parties." Freeman, supra at 402. However, with respect to what are his "fundamental and plainly meritorious constitutional issues," Appellant references only his arguments concerning whether sentencing a mentally ill person to death and whether lethal injection constitutes cruel and unusual punishment. Appellant's Brief at 21-22; see discussion infra with respect to these issues. As shall be discussed infra, we do not agree that Appellant has raised any "fundamental and plainly meritorious constitutional issues." We therefore proceed to address Appellant's properly preserved substantive issues from both the guilt phase and sentencing phase of trial.

III. Change of Venue or Venire

Appellant argues that the trial court erred by not sua sponte ordering either a change of venue or an out-of-county venire panel despite the fact that trial counsel **specifically opposed** a change of venue or a change of the venire panel to persons outside of the county. Moreover, Appellant makes this argument despite the additional fact that the trial court, after conducting an evidentiary hearing on the issue of pre-trial publicity that included testimony given by an investigator hired by the court, granted Appellant's **specific request** to have the matter tried within Allegheny County with an Allegheny County jury.

As the facts make plain, this case was one of the most notorious in the history of Allegheny County, and was extensively covered by the media.[5] Not only was there significant pre-trial local news coverage of the events of April 28, 2000, but there was also coverage concerning the impact the crimes had on Sandip Patel, who was paralyzed, and on the survivors of those who had been killed. Many news stories also concerned the state of Appellant's mental health.

Anticipating that there could be difficulties in selecting an impartial jury in such an atmosphere, the trial court conducted a "testing of the venire" hearing on February 21, 2001. That hearing established that 102 of 107 potential jurors responded that they had read about, heard and seen on TV, or otherwise had personal knowledge of the events of April 28, 2000. Seventy-five of the 102 knowledgeable potential jurors indicated that they could not be fair and impartial if selected to serve on Appellant's jury. On March 15, 2001, the court conducted a second testing of the venire hearing at which a private investigator, hired by the court to examine local news coverage of the case, testified in detail as to the extent of local news coverage of the case. This second potential jury pool reflected knowledge and attitudes similar in proportion to that of the potential jury pool of the first hearing.

The evidence set forth at the hearings gave the trial court misgivings about selecting a jury panel from Allegheny County. Trial Court Opinion, dated March 26, 2001, at 21. However, at the March 15, 2001 hearing, Appellant specifically objected to a change in venire and specifically requested that the jury be selected from the citizens of Allegheny

[5] The trial court found that between April 28, 2000, and March 3 or 4, 2001, 535 local newspaper accounts concerning the killings and related subjects appeared. Further, the court also found that during this same period, 584 accounts concerning the event were aired on four local television stations. Many of these accounts "contained prejudicial and highly inflammatory information about [Appellant] and his alleged crimes." Trial Court Opinion, dated March 26, 2001, at 5-6.

County, explaining that his trial strategy would be best served by having a local jury. Despite its concerns, the trial court acceded to Appellant's request, noting that not to do so would simply provide Appellant with an appeal issue for which a new trial would be requested. Id. Nevertheless, the trial court held another pre-trial hearing on April 11, 2001, at which the trial judge conducted a colloquy with Appellant, who unequivocally stated to the court that he understood the ramifications of selecting a jury from Allegheny County, but supported his counsel's decision to oppose a change of venire. It should be noted that Appellant is a former, non-practicing attorney.

Appellant now argues, as he did in post-trial motions, that the trial court erred by (1) failing to sua sponte deny Appellant's objection to a change in venire; and (2) denying Appellant's **post-trial** request to hold an evidentiary hearing to consider the fairness of the trial as viewed through the testimony of Appellant's proffered expert witness. Dr. Edward Bronstein, a professor of political science, would have purportedly testified on behalf of Appellant that it was the professor's "strong opinion that the media coverage of the case raised the most serious concerns about the fair trial rights of [Appellant]." Appellant's Brief at 26.

However, Appellant is now arguing that the trial court **erred by granting** Appellant's direct objection to any change in venue or the venire panel, an objection lodged in pursuit of a particular trial strategy devised by Appellant. At the very least, Appellant must be considered to have waived his argument, as he clearly did not raise a timely objection to the trial court's refusal to order a change in venire. Thus, despite Appellant's argument that the trial court should have **sua sponte** ordered a change in venire, Appellant is essentially arguing that the court erred by sustaining Appellant's own objection. Thus, his argument must be deemed waived. Because Appellant's primary argument is waived, his subsidiary

argument that the trial court erred by refusing to conduct a post-sentence motion to take testimony from Dr. Bronstein is without merit.[6]

We note further that in rejecting Appellant's post-sentence argument on this issue, the trial court specifically determined "that the record of the jury selection process established that it was possible to select a jury untainted by prejudicial pre-trial publicity. Such a jury was, in fact, selected in this matter." Trial Court Opinion, dated December 29, 2005, at 5. Here, Appellant utterly fails to dispute this determination by identifying any evidence in the record establishing or indicating that the jury **actually selected in this case** was biased or tainted by pre-trial publicity. Therefore, even if Appellant had not waived his argument, we would find no basis for relief.

In a similar vein, it is significant to note, as our now-Chief Justice has observed, that "[t]he trial judge is not an advocate, but a neutral arbiter interposed between the parties and their advocates… . With certain rare exceptions … the trial judge is not duty-bound to raise additional arguments on behalf of one party or another such that, if and when the judge fails to do so, he has 'erred.'" Commonwealth v. Overby, 809 A.2d 295, 316 (Pa. 2002) (Castille, J., dissenting); see also Commonwealth v. Pachipko, 677 A.2d 1247, 1249 (Pa.Super. 1996) (noting that it is "clearly inappropriate" for a trial judge to raise an issue on behalf of a party and act as an advocate for that party). This observation simply mirrors that made by the United States Supreme Court, which determined:

> In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.

[6] Moreover, Appellant fails to explain how Dr. Bronstein's evidence would have been substantially different from that adduced by the trial court during its pre-trial change of venire hearings.

Dennis v. United States, 384 U.S. 855, 875 (1966) (quoted with approval in Commonwealth v. Edwards, 637 A.2d 259, 261 (Pa. 1993)). Indeed, in Edwards, we announced that it would be in the future **per se reversible error** if a judge instructs the jury concerning a defendant's right not to testify when the defendant has requested that no such instruction be given. Edwards, supra at 261. Similarly, it was not the place of the trial judge here to direct Appellant to pursue a different trial strategy when Appellant's chosen trial strategy was not violative of the law or our rules of procedure. In light of the above, we cannot determine that the trial court erred by sustaining Appellant's objection to a change in venue or venire.

IV. Striking of Three Jurors from the Venire Panel

Appellant argues that he is entitled to a new capital sentencing hearing because the Commonwealth's pre-trial striking from the jury panel of three "otherwise qualified jurors," who had expressed their opposition to the death penalty, allegedly resulted in the empanelling of a jury partial to the Commonwealth's request for the death sentence. Appellant's Brief at 28. Appellant notes that the United States Supreme Court has held that "a challenge for cause cannot be sustained based merely upon a venire person's voicing of general objections to the death penalty or expression of conscientious or religious scruples against its imposition." Witherspoon v. Illinois, 391 U.S. 510, 521-22 (1968); see also Commonwealth v. Uderra, 862 A.2d 74, 81 (Pa. 2004) (quoting Witherspoon).

However, the record plainly shows that Appellant failed to timely object to the Commonwealth's challenges for cause to the three prospective jurors identified by Appellant as "otherwise qualified."[7] An appellant waives any issue concerning the striking

[7] With respect to one potential juror, Edward Startari, Appellant's counsel did question the Commonwealth's challenge to this potential juror by stating, "This is cause?" The court responded to this question by stating, "Yes. No question about it." Notes of Testimony Jury Selection, 4/21/01, at 689. However, Appellant did not place an objection on the record to the Commonwealth's challenge to Startari. See id.

of a venire person when he or she fails to object to a challenge for cause, even when the issue is "of constitutional dimension." Commonwealth v. Peterkin, 513 A.2d 373, 378 (Pa. 1986); see also Commonwealth v. Lewis, 567 A.2d 1376, 1381 (Pa. 1989) (holding that a failure to preserve an objection to the exclusion of a potential juror for cause results in waiver of the issue, even under the relaxed waiver rule); Commonwealth v. Szuchon, 484 A.2d 1365, 1379-80 (Pa. 1984) (holding that even when prospective jurors are excluded for simply voicing a general opposition to or discomfort with the death penalty, defense counsel's failure to object to the striking for cause of such prospective jurors results in waiver of the issue). Accordingly, we conclude that this issue is waived.

V. Search of Appellant's House and Seizure of his Personal Items

Appellant contends that the police violated his rights under the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania Constitution by conducting a search of his house and effecting a seizure of personal items. Although the search was made pursuant to a search warrant as well as with the consent of Appellant's parents, Appellant argues that (1) the warrant allowing for a broad search for material was overbroad and not based on probable cause that such material was contraband or evidence of a crime; and (2) the consent for the search was invalid. Among the items seized from Appellant's house was his desktop computer. Pursuant to a subsequently issued warrant, the police examined the file contents of the computer, which revealed evidence of Appellant's racist and anti-immigrant philosophies. That evidence was later used by the Commonwealth at trial.

However, Appellant never filed a motion to suppress the evidence he now claims was impermissibly seized by the police. Pennsylvania Rule of Criminal Procedure 581 addresses the right of a criminal defendant to move to suppress evidence alleged to have been obtained in violation of his or her rights, and sets forth the procedure attendant to the disposition of a suppression motion. Rule 581(D) requires that a suppression motion state

with specificity and particularity the evidence sought to be suppressed. Rule 581(B) provides: "If timely motion [for suppression of evidence] is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived."

This Court has consistently affirmed the principle that a defendant waives the ground of suppressibility as a basis for opposition to the Commonwealth's introduction of evidence when he or she fails to file a suppression motion pursuant to our rules of criminal procedure. See, e.g., Commonwealth v. Simmons, 394 A.2d 431, 435 (Pa. 1978) (holding that the specificity requirement of the suppression rule is mandatory, and therefore the failure to object to specific evidence in a suppression motion results in waiver of any argument that such evidence should have been suppressed); Commonwealth v. Williams, 311 A.2d 920, 921 (Pa. 1973) (holding that any objection to the introduction of evidence on constitutional grounds is waived in the absence of the filing of a suppression motion pursuant to the applicable rule of criminal procedure). Accordingly, we determine that Appellant has also waived his claim that the evidence seized from his house should have been suppressed.

VI. Recording of Telephone Conversation

At trial, the Commonwealth introduced into evidence a recording of a telephone conversation made March 2, 2001, at the Allegheny County Jail between Appellant, then an inmate of the jail, and his parents, during which the parents appeared to accuse Appellant of being a racist. The Commonwealth's psychiatric expert in some part relied upon this recording in forming his opinion that Appellant had acted from racist motives rather than from a mental illness. Appellant had moved to suppress the evidence of the telephone conversation pre-trial, arguing that it violated Section 5704(14) of the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act), 18 Pa.C.S. § 5704(14), because there had purportedly been no written notification that the conversation would be

recorded.[8] Appellant also argued that Section 5704(14) of the Wiretap Act was violated a second time when the contents of the recorded conversation were divulged to a detective and the Commonwealth's psychiatric expert.

In denying the suppression motion, the court found that the evidence established that inmates generally receive notice in two ways that their outgoing telephone conversations are recorded: (1) through written notice in the prison handbook; and (2) through a computer-generated message on the telephone itself that is audible to both the inmate and the party on the other end of the conversation. Further, the court found that evidence adduced at the hearing established that Appellant and his parents were **actually aware** that their telephone conversations were being recorded. Indeed, during the March 2, 2001 conversation, Appellant's father warned Appellant that the conversation was being recorded by prison authorities. Finally, the court determined that the contents of the conversation were properly divulged pursuant to the Wiretap Act's directive that contents of

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[8] Section 5704(14)(i)(A) provides:

> It shall not be unlawful and no prior court approval shall be required under this chapter for:
>
> (14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record, monitor or divulge any telephone calls from or to an inmate in a facility under the following conditions:
>
> (i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any telephone calls from or to an inmate in a county correctional facility as provided for by this paragraph:
>
> (A) Before the implementation of this paragraph, all inmates of the facility **shall be notified in writing** that, as of the effective date of this paragraph, their telephone conversations may be intercepted, recorded, monitored or divulged.

18 Pa.C.S. §5704(14)(i)(A) (emphasis added).

recorded conversations may be divulged in connection with "the prosecution or investigation of any crime." 18 Pa.C.S. § 5704(14)(i)(C).[9] Accordingly, the court determined that the Wiretap Act had not been violated because Appellant had received prior written and aural notice--and had actual notice as well--that his telephone conversations were being recorded by prison personnel, and because the contents of the conversation were divulged in conformance with the statute.

Post-trial, Appellant's new counsel, after reviewing a copy of the prison handbook, determined that the handbook did not actually contain written notice that prison telephone conversations are recorded, as had been found factually by the suppression court. Appellant's new counsel also obtained an affidavit from the head of operations at the jail when Appellant was incarcerated there, who confirmed that the prison handbook did not contain written notice to inmates regarding the interception and recording of their telephone conversations. Based on this information, Appellant argued in post-trial motions, as he is arguing now before us, that the telephone conversation at issue was made in violation of Section 5704(14)(i)(A) of the Wiretap Act, as that section requires **written**, not other, notice. The trial court rejected this argument, noting that the fact that Appellant **actually knew** that his conversation was being recorded controlled the disposition of the issue. Further, the court determined that Section 5704(14)(i)(A) of the Wiretap Act did not require written notice to every inmate individually, but only prior written notice to the existing inmates before a correctional facility could implement a program of intercepting and recording

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[9] Section 5704(14)(i)(C) of the Wiretap Act provides:

> (C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

18 Pa.C.S. § 5704(14)(i)(C).

inmate telephone conversations. This determination was based on the court's reading of the subparagraph relied on by Appellant for his argument, to wit, "**Before the implementation of this paragraph**, all inmates of the facility shall be notified in writing that, **as of the effective date of this paragraph**, their telephone conversations may be intercepted, recorded, monitored or divulged." 18 Pa.C.S. §5704(14)(i)(A) (emphasis added).[10]

Appellant now renews his arguments to this Court, contending that it was irrelevant that he was under actual notice that his telephone conversation was being intercepted and recorded, when the statute required that he receive prior written notice.[11] In making this argument, Appellant relies upon our case law holding that the requirements of the Wiretap Act must be strictly adhered to and that a defendant need not establish prejudice prior to obtaining relief. See, e.g., Commonwealth v. Hashem, 584 A.2d 1378, 1381-82 (Pa. 1991) (applying a completely different section of the Wiretap Act, namely Section 5718, pertaining to disclosure to the defendant of court-authorized intercepts). We cannot agree with the conclusions Appellant reaches.

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[10] The trial court further determined that the record showed that all participants in the telephone conversation at issue, i.e., Appellant, his mother, and his father, by their knowledge that their conversation was being recorded, **consented** to the interception and recording of the conversation. Section 5704(4) of the Wiretap Act provides that it shall not be unlawful for a person to intercept a communication "where all parties to the communication have given prior consent to such interception." 18 Pa.C.S. § 5704(4). However, federal case law has held, under the Federal Wiretap Act, that inmate knowledge that telephone conversations may be intercepted and recorded **and consent** to such action are not equivalent. See, e.g., United States v. Daniels, 902 F.2d 1238, 1244-45 (7th Cir. 1990). Because of our disposition of this issue, we need not determine whether the trial court's alternative grounds for denying Appellant relief has merit.

[11] Appellant does not cite to any evidence that the Commonwealth **by purposeful design** misrepresented to the suppression court that which appears not to be true, to wit, that the prison handbook contains written notification that inmate telephone conversations could be intercepted and recorded.

Appellant is certainly correct that because the Wiretap Act infringes upon the constitutional right to privacy, its provisions are strictly construed. See Kopko v. Miller, 892 A.2d 766, 772 (Pa. 2006). However, this principle does not compel a reviewing court to abandon all recognition of the facts before it or to ignore the principle that statutes are not to be construed in a manner that would yield an absurd result. See 1 Pa.C.S. § 1922(1) (providing that in ascertaining the intent of the General Assembly in the enactment of a statute, it is presumed that the General Assembly did not intend a result that is absurd or unreasonable). Simply stated, there is no basis to conclude that the privacy rights of Appellant or his parents were infringed when their March 2, 2001 telephone conversation was recorded. These individuals were actually aware that their telephone conversation was being or could be intercepted and recorded by prison authorities. Written notice to Appellant, assuming he never received any, would not have afforded him any greater protection of his right to privacy or that of his parents than the actual notice they possessed at the time of the conversation. Therefore, on this basis alone, Appellant's argument is wholly without merit.

Finally, there is no basis for Appellant's supplemental argument that Section 5704(14)(i)(C) of the Wiretap Act was violated when the contents of the telephone conversation at issue were divulged to an investigating detective and to the Commonwealth's psychiatric expert. Section 5704(14)(i)(C) provides:

> (C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

18 Pa.C.S. § 5704(14)(i)(C).

Appellant avers that Section 5704(14)(i)(C) is ambiguously written and should be interpreted in a manner that permits disclosure only "to safeguard the orderly operation of

the facility." However, a plain reading of this section refutes this contention. This section provides that a recording of a telephone conversation involving an inmate may be divulged under **any** of three instances: (1) only as is necessary to safeguard the orderly operation of the facility; (2) pursuant to a court order; or (3) in the prosecution or investigation of any crime. The March 2, 2001 conversation was divulged pursuant to the third circumstance. Appellant has failed to cite to any authority that would compel a result where a properly intercepted and recorded conversation is prohibited from being used in the prosecution or investigation of any crime. Therefore, we conclude that the trial court correctly determined that no violation of Section 5704(14)(i)(C) occurred.

VII. Cross-Examination of Dr. Merikangas

Prior to trial, Appellant's counsel consulted with forensic psychiatrist, Robert Wettstein, M.D., who on several occasions had interviewed Appellant after his crime spree. Appellant ultimately decided not to call Dr. Wettstein to testify, but instead relied principally upon the expert testimony of another psychiatric expert, James R. Merikangas, M.D., in support of his insanity defense. Dr. Merikangas had **not** consulted with Dr. Wettstein in arriving at his conclusions. At a pre-trial hearing, the trial court ruled that Dr. Wettstein's notes could not be examined or used by the Commonwealth because they consisted of attorney-client and attorney work-product protected documents. Indeed, it appears that the Commonwealth never obtained Dr. Wettstein's notes, records, or report. However, at trial and over Appellant's objection, the trial court permitted the Commonwealth to cross-examine Dr. Merikangas concerning his failure to consult with Dr. Wettstein. Appellant specifically identifies the following testimony as prejudicial:

> Q. [Commonwealth]: He [Dr. Wettstein] interviewed [Appellant], didn't he?
>
> A. [Dr. Merikangas]: If you say so.
>
> Q. Well, what if [Appellant] on that date would have said that

he wasn't hearing voices, I just hate blacks, wouldn't that be important for you to know?

A. If that were the case. I don't know what happened.

Q. Well, that's right, you don't know because you didn't talk to Wettstein, isn't that right?

Notes of Testimony ("N.T.") Trial, 5/4/01, at 1500. It is important to note that Appellant does not argue that by this questioning, the Commonwealth divulged the contents of Dr. Wettstein's report or notes. Rather, Appellant argues that the Commonwealth's questions "suggested that, like the prosecution's expert, Dr. Welner, Dr. Wettstein believed that [Appellant] was a malingerer and a racist." Appellant's Brief at 48.

In overruling Appellant's objection to the Commonwealth's questions pertaining to Dr. Wettstein, the trial court determined that such questioning did not violate the court's pre-trial ruling prohibiting the Commonwealth's acquisition and use of Dr. Wettstein's report or invade the area of confidential exchanges between Appellant and Dr. Wettstein. Rather, the court determined that the questioning was relevant both to the issue of Dr. Merikangas's possible bias and the foundation for his opinion. The issue of potential bias related to previously disclosed evidence that Appellant had stated to a cellmate that he had two psychiatric experts, and that he had chosen the one that was more favorable to his case while rejecting the other. The issue of the foundation for Dr. Merikangas's opinions pertained to the degree to which this witness had explored records and psychiatric evaluations of other psychiatric professionals in order to obtain a more complete picture of Appellant's mental state. The court determined that the Commonwealth could explore these issues without delving into the substance of Dr. Wettstein's reports and records. N.T. Trial, 5/4/01, at 1496.

Appellant now argues that the information the Commonwealth was attempting to elicit from Dr. Merikangas concerned confidential communications that took place between

Appellant and Dr. Wettstein, and for this reason is protected by (1) work-product and (2) attorney-client privileges, and (3) the Sixth Amendment right to effective assistance of counsel. We shall examine Appellant's theories and apply them to the facts seriatim.

(1) The work-product doctrine was adopted by this Court and placed into practical effect in Pa.R.Crim.P. 573(G), which reads as follows:

> [Pre-trial d]isclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

See Commonwealth v. Kennedy, 876 A.2d 939, 946 (Pa. 2005) (explaining that the general work-product doctrine as recognized by United States Supreme Court case law was adopted by this Court in the context of pre-trial discovery in criminal matters and delineated in Pa.R.Crim.P. 573(G)).

Further, the rules of criminal procedure pertaining to pre-trial discovery generally protect the work-product of agents hired by defense attorneys. Id. at 946-47. See Pa.R.Crim.P. 573(C)(1)(a) (providing that upon the Commonwealth's filing of a motion for pre-trial discovery, the trial court may order the defendant, subject to his or her right to be free from compulsory self-incrimination, to divulge reports or test results that the defendant intends to introduce into evidence or which were prepared by a witness whom the defendant intends to call to testify at trial).[12] Pa.R.Crim.P. 573(C) does not require the defendant to disclose reports prepared by a witness whom he or she does not intend to produce at trial.

[12] At the time of Appellant's 2001 trial, these provisions were found at Pa.R.Crim.P. 573(C)(2)(a)(i).

In Kennedy, supra, we extended the principles of the work-product doctrine from the realm of pre-trial discovery to the course of the trial itself, specifically holding

> that a practical application of the work-product doctrine to trial in criminal proceedings prevents the Commonwealth from calling as a witness an agent who[m] the defense hired in preparation for trial but decided not to call as a witness at trial[,] or to use the materials prepared by the agent as evidence at trial, unless the Commonwealth can show a substantial need for such testimony and an inability to obtain the substantial equivalent of such testimony without undue hardship. Consequently, absent these showings, a trial court may not compel such testimony.

Id. at 948-49 (footnote omitted).

In the case sub judice, the Commonwealth never obtained any reports or notes of Dr. Wettstein, nor did the Commonwealth call Dr. Wettstein to testify. Therefore, the work-product protections that this Court has extended to defendants by rule of criminal procedure or case law were not violated. The mere questioning of one expert witness as to whether his failure to consult with another witness who was not called afforded a full view upon which to base an expert opinion does not implicate the work-product doctrine as defined and applied by this Court.

(2) Appellant's arguments concerning alleged violations of attorney-client privileges and his right to effective assistance of counsel appear to be two sides of the same coin. A criminal defendant is protected by the benefits of an attorney-client privilege; also, he or she is constitutionally entitled to effective assistance of counsel. Commonwealth v. Chmiel, 738 A.2d 406, 422-23 (Pa. 1999). Our Superior Court, based on federal case law, has determined that the attorney-client privilege in criminal matters extends to communications made between the defendant and an agent hired by the defendant's attorney to provide legal assistance. Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa.Super. 1995). The court stated, "This privilege protects those disclosures that are necessary to obtain

informed legal advice which might not have been made absent the privilege. This privilege *only* applies where the [defendant's] ultimate goal is legal advice." Id. (citing In re Grand Jury Matter, 147 F.R.D. 82, 84 (E.D.Pa.1992); emphasis in original).

Notably, Appellant does not suggest or argue how the Commonwealth obtained and then divulged to the jury any legal advice given by Dr. Wettstein as an agent for Appellant's attorney. Again, the Commonwealth never obtained any reports or notes of Dr. Wettstein, nor did the Commonwealth call Dr. Wettstein to testify, nor did the Commonwealth introduce evidence of Dr. Wettstein's advice to Appellant, if he gave any, through any other witness. There is no basis for the claim that Appellant's attorney-client protections were violated by the Commonwealth's cross-examination of Dr. Merikangas.

(3) With regard to a criminal defendant's right to effective assistance of counsel within the context of the issue Appellant raises herein, the Third Circuit Court of Appeals has stated:

> The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.

United States v. Alvarez, 519 F.2d 1036, 1046-47 (3d Cir. 1975).

The Alvarez court also couched its concern over such disclosures in terms that related to violation of the attorney-client privilege. Indeed, Alvarez has been interpreted as

reading a broad attorney-client privilege into the Sixth Amendment requirement of effective counsel. See Noggle v. Marshall, 706 F.2d 1408, 1413 (6th Cir. 1983); see also State v. Mingo, 77 N.J. 576, 587, 392 A.2d 590, 595-96 (1978) (finding a similarity between the attorney-client privilege and the Sixth Amendment right to effective assistance of counsel, and holding that reliance upon the confidentiality of an expert's advice is a critical aspect of a defense attorney's ability to consult with and advise his or her client).[13] Hence, Appellant's arguments concerning alleged violations of attorney-client privileges and his constitutional right to effective assistance of counsel are essentially the same.

As with our determination that the Commonwealth's cross-examination of Dr. Merikangas did not offend Appellant's right to attorney-client privileges, for the same reasons, Appellant's argument invoking the Sixth Amendment right to effective counsel would not have any merit even if we were to decide the question of when such right is implicated, which we decline to do at this time. The record is clear that the Commonwealth did not have access to Dr. Wettstein's notes or reports, did not introduce them into evidence, and did not call Dr. Wettstein to testify. Thus, nothing of record indicates any interference with Appellant's counsel's right or ability to rely upon the confidential communications of an expert retained but not called to testify. Accordingly, Appellant's Sixth Amendment argument lacks the factual predicate the case law he cites in support of his argument would require for establishing relief. Therefore, we determine that none of the theories Appellant has advanced in support of this issue has merit.

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[13] However, other courts have disputed that there is a constitutional implication when the prosecution calls as a witness a psychiatric expert consulted by the defendant, and have further refused to recognize a link between the attorney-client privilege and the Sixth Amendment right to effective assistance of counsel. See, e.g., Noggle, supra at 1413-15 (and cases cited therein); and People v. Speizer, 316 Ill.App.3d 75, 87-88, 735 N.E.2d 1017, 1025-26 (2000) (and cases cited therein, rejecting the Alvarez Sixth Amendment analysis).

VIII. Cross-Examination of Dr. Merikangas as Due Process Violation

Appellant next argues that the Commonwealth violated Appellant's due process rights when the Commonwealth posed the following question to Dr. Merikangas on cross-examination: "Well, what if [Appellant] on that date would have said that he wasn't hearing voices, I just hate blacks, wouldn't that be important for you to know?" N.T. Trial, 5/4/01, at 1500. Appellant contends that this question violates his due process rights because the question lacked a good faith basis in the evidence, citing Commonwealth v. Smith, 861 A.2d 892, 896 (Pa. 2004). In Smith, we reversed a death sentence and remanded for a new penalty hearing because the prosecutor, during the penalty phase of trial, referenced the fact that the appellant had been convicted of assaulting a fellow prisoner with a weapon in order to establish that the appellant posed a danger to the prison population. However, no competent evidence had been introduced at trial establishing the fact of this conviction. We determined that an examination of the record revealed that the error was not harmless.[14] Here, Appellant argues that he is entitled to a new trial on guilt because the prosecutor's question assumed a fact not in evidence, to wit, that Appellant had told Dr. Wettstein that he did not have hallucinations but merely hated blacks.

At the very most, the Commonwealth's cross-examination of Dr. Merikangas may have suggested, by this one question, that Dr. Wettstein, like Dr. Welner, had determined that Appellant had killed the victims because of his racist views rather than while suffering from a mental disease sufficient to rise to the level of insanity. Thus, the Commonwealth's question arguably assumed a fact not in evidence. However, Appellant never objected to the question, except to the extent that he had previously objected to the Commonwealth's

[14] We observe that although the appellant in Smith did not object to the prosecutor's remark, we determined that the issue could be reviewed under the relaxed waiver doctrine as the case preceded the effective date of the Freeman abolition of that doctrine. Smith, supra at 896 n.2.

general line of questioning that referenced Dr. Wettstein, which objection was based on the trial court's pre-trial ruling that the Commonwealth could not have access to Dr. Wettstein's report or records. Appellant never lodged an objection specifically to the question at issue, nor did he lodge one on the grounds that the Commonwealth's questions assumed a fact not in evidence or were violative of Appellant's due process rights. Accordingly, we determine that this issue is waived. See May, supra at 761 (holding that the absence of a specific contemporaneous objection renders the appellant's claim waived).

IX. Denial of Right to Present Mitigating Evidence

Appellant next argues that his right to present mitigating evidence was improperly curtailed by the trial court. At a penalty hearing, a capital defendant may present relevant evidence in mitigation. 42 Pa.C.S. § 9711(a)(2); May, supra at 765. Evidence is relevant to mitigation if it is probative of any of the enumerated mitigating circumstances set forth at 42 Pa.C.S. § 9711(e). Although Appellant presented evidence to the jury regarding five mitigating circumstances, his present argument concerns only the mitigating circumstances described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the influence of extreme mental or emotional disturbance, and (e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. With respect to the argument Appellant now raises, we note that "[t]he admissibility of evidence, including evidence proffered at the penalty phase of a capital trial, is within the discretion of the trial court, and such rulings will form no basis for appellate relief absent an abuse of discretion." Commonwealth v. Mitchell, 902 A.2d 430, 459 (Pa. 2006).

Appellant's argument has two components. In the first, Appellant contends that the trial court abused its discretion by refusing to allow sentencing phase testimony by Christine Martone, M.D., the chief psychiatrist at the Allegheny County Behavior Clinic, an arm of the Allegheny County Court of Common Pleas. In the second, Appellant contends

that the court abused its discretion by precluding the publication to the jury of mitigating evidence in the form of a redacted portion of the March 2, 2001 recorded telephone conversation between Appellant and his parents, during which the parents expressed their opinion that Appellant's criminal actions stemmed from his mental illness.

(A) Dr. Martone

Dr. Martone's responsibilities to the court of common pleas require that she evaluate defendants for competency and for dispositional recommendations after a finding of guilt. In her official capacity, Dr. Martone examined Appellant five times after the shootings, the first time being on May 2, 2000, only four days after the shootings occurred. It was Dr. Martone who initially determined that Appellant was not competent to stand trial.

During the guilt phase of trial, the trial court denied, on conflict of interest grounds, Appellant's request that Dr. Martone testify regarding Appellant's alleged insanity.[15] However, the court did allow Appellant to question Dr. Martone concerning her psychiatric examination and findings. Appellant's questions to Dr. Martone concerned her examination of Appellant on two occasions in May 2000. Dr. Martone testified that, based on those examinations, she had diagnosed Appellant with schizophrenia of the paranoid type and had determined that he suffered from auditory hallucinations.

At the penalty phase of trial, Appellant sought to present similar and/or additional testimony from Dr. Martone[16] to address the mitigating factors described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the influence of extreme mental

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[15] We note that at a sidebar conference, Dr. Martone represented to the court that she never examined Appellant for insanity, but only for competence to stand trial. N.T. Trial, 5/5/01, at 1760.

[16] Appellant's argument fails to set forth the substance of the testimony he had hoped to elicit from Dr. Martone or how such testimony would have been different from that given by Dr. Martone during the guilt phase of trial. As shall be discussed later in the text, this is a significant omission.

or emotional disturbance, and 42 Pa.C.S. § 9711(e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, the court refused Appellant's request because it determined that allowing Dr. Martone, a court employee, to testify for either Appellant or the Commonwealth at this point of the trial would represent a conflict of interest between the court's neutrality and the interests of the litigants. Additionally, the court was further concerned that if other inmates became aware that Dr. Martone could be called to testify, they would be reluctant to speak openly to her. The court also noted that Dr. Martone had not examined Appellant for sanity, but rather only for competence to stand trial, and that Appellant had at his disposal several psychiatric expert witnesses who had testified for Appellant during the guilt phase of trial and who would be available to testify during the penalty phase of trial. Moreover, the court ruled that Appellant **could** read Dr. Martone's guilt-phase testimony to the jury during the penalty phase and could present argument based on that testimony. N.T. Trial, 5/9/01, at 2748-51.[17]

Appellant now argues that the court abused its discretion by refusing to permit Dr. Martone to testify at the penalty phase of trial. First, Appellant contends that the ruling violated a local rule of criminal procedure, All.C.R.Crim.P. 300.31, which provided:[18]

> In the trial of any homicide case, after a verdict of Murder of the First Degree is recorded and the court proceeds to the determination of whether a sentence of life imprisonment or the death penalty should be duly imposed, as required by 42 Pa.C.S. § 9711, the court may, upon application of the

[17] The court also opined on the record that it believed that it had initially erred by allowing Dr. Martone to testify during the guilt phase of trial and was "not going to repeat [this] error." N.T. Trial, 5/9/01, at 2752.

[18] On July 27, 2007, All.C.R.Crim.P. 300.31 was rescinded.

> defense, permit the calling of Behavior Clinic representatives in mitigation.

Second, Appellant refutes the reasoning that Dr. Martone's testimony would have represented a conflict of interest because Dr. Martone had already testified during the guilt phase of Appellant's trial. Additionally, Appellant contends that the court's fear that defendants would be less likely to speak with Behavior Clinic psychiatrists if they knew that these individuals might later testify, is unfounded if such testimony would be beneficial to the defendants, as purportedly Dr. Martone's testimony would have been for Appellant. Appellant also notes that Dr. Martone had testified in 1995 at the penalty phase of one other capital defendant tried in the Allegheny County Court of Common Pleas, as evidenced by our discussion in Commonwealth v. Fears, 836 A.2d 52, 72-74 (Pa. 2003).[19]

Third, although Appellant acknowledges that during the penalty phase of his trial he presented the testimony of two other psychiatric experts for support of the mitigating factors about which he wanted Dr. Martone to testify, he contends that Dr. Martone's testimony would not have been cumulative of this testimony. Appellant contends that Dr. Martone's testimony would have carried greater credibility with the jury than Appellant's hired witnesses because she would have been purportedly viewed by the jury as a "neutral" witness. Moreover, unlike Appellant's other experts, Dr. Martone examined Appellant near-immediately after the shootings. Additionally, Appellant alleges that his testifying experts were not familiar with the "standards" of the mitigating factors set forth at 42 Pa.C.S. § 9711(e)(2) and (3), even though they testified that in their professional opinions, Appellant met those standards. See Appellant's Brief at 59. We shall address these three arguments seriatim.

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[19] However, it is not clear from Fears what the circumstances were surrounding Dr. Martone's testimony during that proceeding, i.e., whether the defendant had no other witness to testify regarding all of the matters about which Dr. Martone testified in that case.

First, as is plain from its words, now-repealed Allegheny County Criminal Rule 300.31 placed the determination as to whether a Behavior Clinic representative would testify upon a defense application within the sound discretion of the trial court; the rule did not mandate that the court grant all requests made under the rule. Therefore, there is no violation of the rule absent a showing of an abuse of discretion. Moreover, Appellant never cited this rule to the court as a basis for his argument that Dr. Martone should testify; Appellant is raising this theory for the first time on appeal. See N.T. Trial, 5/9/01, at 2746-52.

Second, Appellant's argument concerning the trial court's stated reasoning for not allowing Dr. Martone to testify does not compel the conclusion that the trial court abused its discretion; in fact, it compels the opposite conclusion. In Commonwealth v. Widmer, 744 A.2d 745 (Pa. 2000), we reiterated the well-known definition of "abuse of discretion" as follows:

> The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Id. at 753.

Here, Appellant does not establish that the court's reasoning was based on prejudice, personal motivations, or capricious or arbitrary actions; rather, Appellant simply disagrees with the court's reasoning. The record plainly shows that the court had serious and reasonable concerns with allowing any litigant to call Dr. Martone to testify, given her

position with the court and her ongoing, critical duties, which could be jeopardized should she be subject to being called as a witness without sufficient cause. Further, the record shows that the court took into consideration the fact that Appellant had at least three other witnesses qualified to testify as to the same mitigating circumstances for which Appellant wished to call Dr. Martone. Finally, the court observed that the jury already had the benefit of Dr. Martone's testimony, and that Appellant would be free to publish to the jury, during the penalty phase, the substance of that testimony. Thus, there is no basis in the record to conclude that the court's determination that Dr. Martone should not testify in the penalty phase, based on a potential conflict of interest, was based on partiality, prejudice, bias, or ill will.[20]

Finally, Appellant's argument that Dr. Martone's testimony would not have been cumulative of that of his two psychiatric experts who testified during the penalty phase of trial is not persuasive. Notably, Appellant does not indicate how Dr. Martone's testimony would have differed significantly from that of his other witnesses, or indeed from that testimony Dr. Martone had already given the jury during the trial phase and which was available for re-publishing to the jury during the penalty phase. Rather, the differences Appellant cites to involve two other aspects: (1) the fact that Dr. Martone had actually examined Appellant near-immediately after the crimes in May 2000, unlike his other two witnesses; and (2) Dr. Martone would have been considered by the jury as a "neutral" witness instead of one biased because of being hired by the defense or, in the case of Matcheri S. Keshavan, M.D., by being Appellant's regular treating psychiatrist.

With respect to the fact that Dr. Martone had examined Appellant in May 2000, we note that the testimony Dr. Martone had already given to the jury involved precisely her

[20] We also note that Appellant did not address the Commonwealth's argument that it would be fundamentally unreasonable to accept Appellant's position that Dr. Martone should be available to testify **only** when her testimony is beneficial to a defendant.

examination of Appellant in May 2000, and her findings from those examinations. Appellant does not explain how Dr. Martone would have presented anything new had she been allowed to testify during the penalty phase. Indeed, the record establishes that during the penalty phase, Appellant presented only truncated versions of the testimony of his expert psychiatric witnesses, Drs. Keshevan and Merikangas, because their guilt-phase testimony was incorporated by reference at the penalty phase. See N.T. Trial, 5/10/01, at 2924-25 and 2944. Moreover, Appellant had the opportunity to call to testify, but chose not to do so, Laszlo Petras, M.D., a hospital staff and Beaver County Jail psychiatrist, who had actually evaluated Appellant **on the day of the murders**, and who had testified for Appellant during the guilt phase of trial.

With respect to Dr. Martone's neutrality, it is only speculative that the jury might have considered her a more persuasive witness, particularly as her examination of Appellant was limited to no more than five encounters and was expressly confined to the question of whether Appellant was competent to stand trial. By contrast, Dr. Keshavan had treated Appellant for mental illness for seven years prior to the shootings. Both Dr. Keshavan and Dr. Merikangas described the severity of Appellant's mental illness and the potentially exacerbating effect on his mental illness of Appellant's not taking his medications, which Appellant posited, with some evidence, was the case at the time of the crime spree.

Further, with the witnesses he presented at the penalty phase, Appellant **carried** his burden of proving to the jury the mitigating circumstance described at 42 Pa.C.S. § 9711(e)(2) , concerning whether the defendant was under the influence of extreme mental or emotional disturbance. Thus, the absence of Dr. Martone's testimony regarding this mitigating factor did not result in prejudice to Appellant. In addition, the alleged "bias" of Drs. Keshavan and Merikangas and the fact that they did not examine Appellant close to the time of the crimes proved no impediment to Appellant in proving this mitigating circumstance.

Appellant did not prove the mitigating circumstance described at 42 Pa.C.S. § 9711(e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Appellant contends that Dr. Martone's testimony "would have helped establish this" mitigating factor. Appellant's Brief at 59. However, Appellant sets forth absolutely no basis for this conclusion. Again, Appellant does not indicate what testimony Dr. Martone would have provided to help establish the subsection (e)(3) mitigating factor. Further, Appellant does not indicate how Dr. Martone would have helped achieve Appellant's goal of establishing this mitigating factor when she had examined Appellant only to determine competency to stand trial, not for a general assessment of sanity.

There is no questioning the importance of a capital defendant's right to present mitigating evidence at the penalty phase of trial. However, in light of the above discussion, we must conclude that the trial court did not abuse its discretion by denying Appellant's request to present the testimony of Dr. Martone.

(B) March 2, 2001 Telephone Conversation

Appellant argues that the court abused its discretion by precluding the publication to the penalty-phase jury of the portion of the March 2, 2001 recorded telephone conversation between Appellant and his parents where the parents apparently expressed their opinion that Appellant's acts had been caused by mental illness (for convenience, this portion of the telephone conversation shall hereafter be referred to as "the mental illness discussion"). The genesis of this argument lies in the trial court's allowing the prosecution, during the rebuttal portion of the guilt phase of trial, to publish to the jury a redacted portion of the March 2, 2001 recorded telephone conversation that contained the accusation by Appellant's parents that Appellant was a racist. The parents' accusation was based on Commonwealth evidence, by this point shared with the defense, that while in prison, Appellant had autographed for another inmate newspaper or magazine articles on

controversial racial issues and had made racist remarks in conversation with this inmate. The Commonwealth sought publication of the redacted portion of the March 2, 2001 telephone conversation to corroborate the truth of the inmate's testimony regarding these events based on Appellant's admission on the tape that he had engaged in this conduct. Additionally, the Commonwealth sought to bolster its case that Appellant had committed the crimes because of his racism and not because of insanity, based on Appellant's failure to deny his parents' charge that he was a racist. The trial court redacted the telephone conversation to conform, at least in substantial part, with Appellant's specific objections to publishing other portions of the conversation to the jury.[21] N.T. Trial, 5/8/01, at 2455, 2460, 2500.

During the penalty phase, the trial court denied Appellant's request to publish to the jury the mental illness discussion, which had not been previously disclosed to the jury. The basis for the trial court's ruling was that the mental illness discussion constituted inadmissible hearsay, as Appellant was attempting to use this evidence, constituting prior **consistent** statements, to prove the truth of the matter asserted.[22] (Appellant's parents testified during the penalty phase, and expressed their opinion that their son was mentally ill and had acted under the influence of this illness.) However, the court did permit Appellant to use the transcript of the mental illness discussion to refresh the recollection of Appellant's father, during the father's penalty-phase testimony.

In arguing that the court abused its discretion by its ruling, Appellant fails to address the basis for the court's determination. Rather, Appellant contends that the mental illness

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[21] These unpublished portions of the conversation involved discussion of the death penalty and Appellant's legal counsel. N.T. Trial, 5/8/01, at 2455, 2460.

[22] By contrast, the trial court permitted the redacted portion of the telephone conversation during the guilt phase of trial pursuant to Pa.R.E. 803(25), as admissions by a party opponent, a hearsay exception. N.T. Trial, 5/8/01, at 2466, 2479-80.

discussion should have been entered into evidence pursuant to Pa.R.E. 106. Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction **at that time** of any other part or any other writing or recorded statement which ought in fairness to be considered **contemporaneously** with it.

Pa.R.E. 106 (emphasis added).

As can be seen from a plain reading of Rule 106, Appellant's argument has no merit. Appellant is not arguing that the court abused its discretion by failing to allow the mental illness discussion to be read to the jury **at the time** the Commonwealth published to the jury the redacted portion of the March 2, 2001 telephone conversation **during the guilt phase of trial**. Rather, Appellant is arguing that the trial court abused its discretion by refusing to allow the publication of the mental illness discussion at the penalty phase of trial, a point in time well removed from the time of the publication of the material that Appellant now argues requires consideration. Accordingly, Rule 106 is not implicated at all. In addition, Appellant makes no argument as to how the mental illness discussion would have helped him establish the mitigating factor described at 42 Pa.C.S. § 9711(e)(3).

Finally, we note that the trial court's ruling was correct. In general, prior consistent statements, as they constitute hearsay, are admissible under only very limited circumstances. Pennsylvania Rule of Evidence 613(c) provides:

> (c) **Evidence of prior consistent statement of witness.** Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:

> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

Pa.R.E. 613(c).

The comment to this rule relevantly provides that "under Pa.R.E. 613(c), a prior consistent statement is always received for rehabilitation purposes only and not as substantive evidence." See Commonwealth v. Counterman, 719 A.2d 284, 301 (Pa. 1998) (stating: "As a general rule, a prior consistent statement is hearsay, and its admissibility is dependent upon an allegation of corrupt motive or recent fabrication. Additionally, such statements have been admitted in response to an allegation of faulty memory.") (citations omitted). Here, Appellant does not argue that the mental illness discussion should have been published to the jury to rehabilitate the same testimony given by Appellant's parents during the penalty phase of trial.

For all of the above reasons, Appellant's argument regarding the mental illness discussion is wholly without merit.

X. Evidence of Parole Ineligibility (Simmons Charge)

In his next argument, Appellant contends that "[s]ince the **evidence** raised an inference of [Appellant's] future dangerousness, the [trial] court's failure to permit the defense to introduce evidence of [Appellant's] parole ineligibility, and the likelihood of commutation and to instruct the jury that Pennsylvania law does not permit a defendant convicted of first-degree murder to be released on parole violated [Appellant's (1)] due process and [(2)] Eighth Amendment rights." Appellant's Brief at 64; emphasis added.

Appellant first contends that the trial court erred by failing to give the jury what is referred to as a Simmons instruction, i.e., that a life sentence means life imprisonment

without the possibility of parole. We have described the Simmons instruction, and our law regarding when a criminal defendant is eligible for relief with respect to same, as follows:

> In Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality), a plurality of the United States Supreme Court would have held that, if a prosecutor argues a capital defendant's future dangerousness at a sentencing trial, the defendant may request and should be granted a jury instruction that a penalty of life in prison will render the defendant ineligible for parole. Id. at 170, 114 S.Ct. at 2197. This Court has held that a Simmons instruction is mandated only if two events occur: (1) the prosecutor must place the defendant's future dangerousness in issue; and (2) the defendant must have requested that the trial court issue the instruction. Commonwealth v. Dougherty, 580 Pa. 183, 860 A.2d 31, 37 (2004), cert. denied, 546 U.S. 835, 126 S.Ct. 63, 163 L.Ed.2d 89 (2005); Commonwealth v. Jones, 571 Pa. 112, 811 A.2d 994, 1004 (2002) (citing Commonwealth v. Spotz, 563 Pa. 269, 759 A.2d 1280, 1291 (2000), cert. denied, 534 U.S. 1104, 122 S.Ct. 902, 151 L.Ed.2d 871 (2002)). **The failure to issue a Simmons charge is no basis for relief where *these* circumstances are not met.** Jones, 811 A.2d at 1004.

Commonwealth v. Carson, 913 A.2d 220, 273 (Pa. 2006), cert. denied, 128 S.Ct. 384 (2007) (emphasis added).

As can be gleaned from the manner in which Appellant raises his argument, he does not allege that **the prosecution** had raised the issue of future dangerousness to the jury. Rather, he argues that the issue was brought forth to the jury by the nature of **the** general **evidence itself**. Specifically, he contends that the extensive evidence concerning his mental illness given by eight mental health experts (seven of whom had testified on behalf of Appellant) had established the issue of future dangerousness in the minds of the jury. With respect to the evidence given by the Commonwealth's mental health witness, Dr. Welner, Appellant notes that this witness opined that Appellant suffers from a personality disorder shared with perhaps 70% of the criminal population that is characterized by "a

pattern of rule breaking and lying," and that Appellant in particular has demonstrated a "lifetime pattern of irresponsibility." See Appellant's Brief at 70. Appellant also notes the extensive evidence introduced at trial that highlighted his racist views.

However, the evidence Appellant cites does not specifically indicate "a tendency to **prove dangerousness in the future**." Kelly v. South Carolina, 534 U.S. 246, 254 (2002) (emphasis added).[23] For example, in Kelly, a case decided after Appellant's trial, the United States Supreme Court determined that a Simmons instruction was required where the prosecutor (1) adduced testimony that the defendant, following his arrest, created a shank while in prison and had made an escape attempt that included a plan to lure a female guard into his cell to be used as a hostage; (2) adduced testimony from a psychologist that the defendant was a sadist as a child and had developed an inclination to kill anyone "who rubbed him the wrong way;" (3) argued to the jury that the defendant was dangerous and unpredictable while referring to him as "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid;" and (4) opined to the jury that "murderers will be murderers[, and the defendant] is the cold-blooded one right over there." Id. at 248-50. By contrast, in the case sub judice, the Commonwealth did not present evidence establishing Appellant's

[23] Kelly affirmed and further clarified the United States Supreme Court's holding in Simmons. The Court held that a Simmons instruction, when requested by the defense, is required by due process when the jury hears evidence of a defendant's propensity for violence such that it would reasonably "conclude that [the defendant] presents a risks of violent behavior whether locked up or free, and whether free as a fugitive or a parolee." Kelly, supra at 253-54. Thus, while Simmons determined that due process concerns are implicated when the prosecutor argues future dangerousness, Kelly appears to hold that relevant due process concerns may be triggered when the **evidence** establishes future dangerousness. See Kelly, supra at 260 (Rehnquist, C.J., dissenting). However, the majority opinion in Kelly was based on the prosecutor's evidence **and** argument. See Kelly, supra at 253 ("the evidence and argument … [show] that future dangerousness was … an issue in this case") (citation and quotation marks omitted). Thus, by its evidence and argument, the prosecution in Kelly placed the issue of future dangerousness before the jury.

future dangerous propensities. The evidence Appellant cites is not even remotely similar in character to the evidence in Kelly. Essentially, the evidence Appellant cites indicates only that he will continue to suffer from his mental disorders, making him, according to Dr. Welner, a liar, a rule-breaker, and irresponsible. This is not evidence of future dangerousness, or evidence of a "demonstrated propensity for violence," triggering the need for a Simmons instruction. See Kelly, supra at 253. Additionally, the Commonwealth did not raise the issue of future dangerousness by its argument to the jury, nor does Appellant contend that it did.[24]

More importantly, Appellant never specifically requested a Simmons instruction. Rather, he asked the trial court to allow him to publish to the jury an affidavit by Nelson R. Zullinger, Secretary of the Board of Pardons, which purportedly averred that since September 13, 1978, only one person sentenced to life imprisonment in the Commonwealth has ever had a sentence commuted or been granted clemency or a pardon. Appellant's Brief at 67. The trial court denied Appellant's request, holding that such evidence should not come in unless the Commonwealth raised the issue of future dangerousness. However, a request to introduce such evidence is not the equivalent of asking the court to provide a specific instruction to the jury pursuant to Simmons.

Accordingly, Appellant has failed to meet either of the two requirements for obtaining relief on the issue of whether a jury should be instructed as to parole ineligibility, set forth, inter alia, in Carson, supra at 273. That is, Appellant has failed to show that the Commonwealth had placed the issue of future dangerousness before the jury and that he had requested a Simmons charge. Therefore, Appellant is not entitled to any relief under his due process claim. Carson, supra at 273.

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[24] Our independent review of the Commonwealth's closing argument establishes that the Commonwealth did not raise the issue of future dangerousness. See N.T. Trial, 5/11/01, at 3079-88.

In the second prong of his argument, Appellant contends that he was entitled to introduce into evidence the affidavit of Mr. Zullinger pursuant to Appellant's rights under the Eighth Amendment to the United States Constitution. Appellant acknowledges that the United States Supreme Court has never ruled that the Eighth Amendment requires a parole ineligibility instruction and the admission of evidence regarding same at every capital sentencing in states prohibiting release on parole on a life sentence, nor has this Court ever made a parole ineligibility instruction mandatory in capital cases. Notwithstanding, Appellant contends that Kelly, supra, which was decided after Appellant's trial and sentencing, affords him a basis for relief because that case purportedly "acknowledged that a capital defendant's future dangerousness always will be a foremost consideration for jurors." Appellant's Brief at 75.

However, in this case, Appellant has failed to point to any evidence that specifically indicates his future dangerousness, and, quite significantly, Appellant failed to request either a Simmons instruction or a jury instruction pursuant to the Eighth Amendment. Thus, no relief is due. See Carson, supra at 272-74 (rejecting the appellant's similar Eighth Amendment argument where the prosecution had not raised the issue of future dangerousness).

XI. Victim Impact Evidence

Appellant argues that because the victim impact evidence presented at the penalty phase was "unduly prejudicial," his due process rights under the Fourteenth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution were violated. Appellant acknowledges that in Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that victim impact evidence introduced in a capital sentencing hearing did not violate the Eighth Amendment of the United States Constitution. In fact, Appellant notes that Payne expressly recognized that evidence showing "a quick glimpse of the life [the defendant] chose to extinguish," was not a per se violation of the

Eighth Amendment. Payne, supra at 825, 830 (O'Connor, J. concurring, quoting Mills v. Maryland, 486 U.S. 367 (1988)). However, Appellant notes that the separate opinions of the Justices in Payne recognized a limit on the use of victim impact evidence. Specifically, where victim impact evidence is unduly inflammatory, several Justices noted that inclusion of such evidence might entitle a defendant to relief under the Due Process Clause of the Fourteenth Amendment. See id. at 831 (O'Connor, J. concurring).

Here, Appellant argues that the evidence adduced from fourteen victims of Appellant's crimes at the sentencing phase of trial crossed the threshold from being "a quick glimpse of the life [the defendant] chose to extinguish" to being unduly inflammatory and prejudicial. Appellant highlights the following evidence: (1) Bang Gho, Thao Pak Pham's wife, describing how their six-year-old son kept asking when his father would return home and how she and her son arrived at the crime scene before her husband's body had been removed; (2) two of Anita Gordon's daughters describing the devastating impact Mrs. Gordon's death had had on their father and grandmother, and how the latter had to be moved to a nursing home because Mrs. Gordon was no longer available to care for her; (3) a friend of the Gordons describing the intense pain the family suffered; (4) individuals familiar with Anil Thakur describing the financial effect that the victim's death had on his parents in India, who no longer receive the financial assistance the victim had provided; (5) Ji-Ye Sun's 70-year-old father describing how his wife had cried so much that she required surgery to save her sight, and his own feelings of having "lost everything;" and (6) Mr. Sun's wife, Jun Sun, describing how, after her husband's death, she was unable to eat, drink, or sleep but experienced pain and a sense that her "brain is empty." Appellant's Brief at 77-78. Appellant avers that the prejudicial impact of this evidence on the jury outweighed its probative value.

There are myriad problems with Appellant's argument. The first and most significant is that Appellant never made timely and specific objections to the evidence. Appellant had

filed a pre-penalty phase motion in limine to exclude **all** victim impact evidence on the grounds that, because such evidence did not pertain to any statutory aggravating circumstance, the admission of the evidence was unconstitutional. The court denied the motion, noting that the United States Supreme Court had ruled that such evidence was permissible, citing Payne. However, the court indicated that Appellant could request from the Commonwealth an offer of proof as to each witness and could lodge an objection particular to that witness if appropriate. Appellant never objected to any of the Commonwealth's fourteen victim impact witnesses.[25] Because Appellant failed to object to the evidence on the grounds that he now raises, his issue is waived. Pa.R.A.P. 302(a).

However, it must also be emphasized that "Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding," including victim impact evidence. Commonwealth v. Eichinger, 915 A.2d 1122, 1139 (Pa. 2007), cert. denied, 128 S.Ct. 211 (2007). Indeed, victim impact evidence is statutorily admissible in the penalty phase of capital cases pursuant to Section 9711(a)(2) of the Sentencing Code, 42 Pa.C.S. § 9711(a)(2). "Victim impact testimony is permissible when the Commonwealth establishes that the victim's death had an impact on the victim's family as opposed to presenting mere generalizations of the effect of the death on the community at large. Once this threshold has been met, the trial court has discretion over the testimony admitted." Eichinger, supra at 1139-40; see also Commonwealth v. Williams, 854 A.2d 440, 446 (Pa. 2004). Testimony that is "a personal account" describing the "devastating impact the murders had on" the surviving families is wholly appropriate and admissible at the sentencing phase of a capital case. Eichinger, supra at 1140.

[25] Notably, Appellant did object to the introduction of a photograph during the testimony of Jun Sun. The court sustained the objection.

Here, the specific evidence that Appellant challenges is in the same mold as that determined to be appropriate in Eichinger and Williams. The evidence challenged by Appellant consists of personal accounts describing the devastating impact the murders had on the surviving family members. Moreover, the number of witnesses called to testify was not disproportionate to the number of Appellant's victims. Thus, there is patently no basis for the conclusion that the trial court abused its discretion by admitting such evidence, even if Appellant had not waived the issue.

XII. Victim Impact Evidence as Causing the Death Sentence to be based on Caprice and Vague Factors

In this argument, Appellant concedes that the trial court **correctly** charged the jury in accordance with this Court's case law regarding victim impact evidence. However, Appellant "argues" that the admission and consideration of victim impact evidence interjects an unconstitutionally vague and capricious factor into a jury deliberation process that must determine whether statutory aggravating factors outweigh mitigating factors. Appellant concedes that there is no Pennsylvania authority supporting his argument;[26] however, he raises this claim for the purpose of "preserv[ing] it for federal review." Appellant's Brief at 80.

Appellant did not object to the jury charge relating to this issue. Accordingly, Appellant's issue is waived. Pa.R.A.P. 302(a). Moreover, Appellant does not even appear to be asking this Court for relief with respect to this issue. See Appellant's Brief at 79-81. Certainly, none is warranted.

XIII. Dr. Welner's "Damning Hearsay"

Appellant argues that his rights under the Sixth Amendment Confrontation Clause were violated when the Commonwealth's psychiatric expert witness, Dr. Welner, testified

[26] However, Appellant does cite to dissenting opinions in Commonwealth v. Means, 773 A.2d 143 (Pa. 2001).

regarding statements made to him by individuals who did not testify at trial. These individuals included a psychologist who had briefly treated Appellant in 1994; high school and law school classmates; Appellant's sister; Appellant's ex-girlfriend; and Appellant's accountant. See Appellant's Reply Brief at 15-17 (listing these individuals as those at issue). Dr. Welner purportedly used the information provided by these individuals in arriving at his conclusion that although Appellant suffered from several psychiatric disorders, Appellant's crimes were not caused by a psychotic illness.

In support of his argument, Appellant cites Crawford v. Washington, 541 U.S. 36 (2004), which held that the Confrontation Clause of the Sixth Amendment prohibits the use of **testimonial** hearsay obtained by police officers against a criminal defendant, even if such hearsay is reliable, unless the defendant has the opportunity to cross-examine the out-of-court declarant. In so doing, the Court announced a new interpretation of the Confrontation Clause, overruling its earlier holding in Ohio v. Roberts, 448 U.S. 56 (1980). Crawford, supra at 54. Appellant acknowledges that he had failed to object to Dr. Welner's use of information obtained from these individuals. However, he argues that because Crawford was decided after his trial and sentencing, which trial occurred when the relaxed waiver rule of Freeman was still in effect, he should not now be penalized for failing to anticipate Crawford's changing the law.

Appellant's contention that he should not be penalized for failing to have preserved his objections to the challenged evidence is baseless. "It is settled that, in order for a new rule of law to apply retroactively to a case pending on direct appeal, the issue had to be preserved at all stages of adjudication up to and including the direct appeal." Commonwealth v. Jones, 811 A.2d 994, 1005 (Pa. 2002) (quoting Commonwealth v. Tilley,

780 A.2d 649, 652 (Pa. 2001) (quotation marks omitted)).[27] Here, Appellant failed to timely object to the now-challenged evidence. Moreover, although Crawford signaled a change in the law, Appellant fails to indicate how this change was material to his failure to have preserved the issue for review. In Crawford, the Court overruled its previous position that testimonial hearsay did not violate the Confrontation Clause if such evidence bore an "adequate indicia of reliability" by either falling within a "firmly rooted hearsay exception" or having "particularized guarantees of trustworthiness." Crawford, supra at 40 (quoting Roberts, supra at 66). Crawford holds that now testimonial hearsay obtained by police is inadmissible unless the defendant had the opportunity to cross-examine the out-of-court declarant. Id. at 51-53.

Here, Appellant did not challenge, as he could have, the purported hearsay statements made during Dr. Welner's testimony on the grounds that they did not bear adequate indicia of reliability by either falling within firmly rooted hearsay exceptions or having particularized guarantees of trustworthiness, or on any other grounds. If Appellant was troubled by the purported hearsay testimony given by Dr. Welner, he did not need support from the specific legal principles later announced in Crawford to pursue his objections. Thus, there is no question that Appellant has waived this issue.[28]

XIV. Lethal Injection as Cruel and Unusual Punishment

Appellant argues that the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution prohibit lethal injection because this penalty

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[27] Indeed, the Superior Court has applied this basic legal principle to specifically hold that in order for Crawford to be applied retroactively, the appellant would have had to preserve his or her objections to the challenged evidence. Commonwealth v. Gray, 867 A.2d 560, 574 (Pa.Super. 2005).

[28] We would also note that the purported hearsay of Dr. Welner's testimony is not "testimonial" hearsay as contemplated by the Court in Crawford. Thus, Crawford is inapplicable in any event.

constitutes cruel and unusual punishment. Appellant contends that there is "mounting evidence" that prisoners experience "excruciating pain" during execution by lethal injection, particularly since it is believed that potassium chloride, one of the three drugs used, causes a burning sensation as it courses through the body. Appellant's Brief at 83. Appellant argues that until Pennsylvania investigates whether its three-drug execution protocol is humane, the procedure should be declared a cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution.

However, the only issues before us are whether Appellant's conviction is valid and whether his death sentences were properly imposed. Our inquiry does not extend to the statutory manner by which the death sentence will be imposed, if it is imposed at all. Until a death warrant has been issued for Appellant, we need not determine the issue of whether the **then**-form of execution, whatever it might be, comports with the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution.

In Commonwealth v. Terry, 521 A.2d 398 (Pa. 1987), this Court was confronted with a claim that the defendant's death sentence should be vacated because there was then no existing statutory authority for the death penalty. We dismissed the claim, holding: "Only the sentence of death is before us. Since no death warrant has been issued, the question of the method of execution is not properly before us. We will consider this issue if and when it is properly before us." Id. at 412. Similarly, because the issue of the means of execution is not properly before us, we will dismiss Appellant's argument without prejudice to his right to raise it at a more appropriate time.[29]

[29] We note that the United States Supreme Court has recently ruled that Kentucky's three-drug protocol of lethal injection, one of the drugs being potassium chloride, is not cruel and unusual punishment under the Eighth Amendment. Baze v. Rees, 128 S.Ct. 1520 (U.S. 2008).

XV. Imposition of the Death Penalty on a Mentally Ill Person

Appellant argues that the Eighth Amendment prohibits the imposition of the death penalty on a mentally ill person.[30] Appellant cites Atkins v. Virginia, 536 U.S. 304 (2002), for the proposition that the imposition of a death sentence on mentally retarded individuals violates evolving standards of decency embodied in the Eighth Amendment's Cruel and Unusual Punishment Clause. Appellant argues that Atkins should be extended to individuals such as himself, who had been described at trial by all psychiatric expert witnesses as suffering from mental illnesses.

However, as Appellant acknowledges, this Court has rejected a substantially similar argument in Commonwealth v. Faulkner, 595 A.2d 28, 38 (Pa. 1991). In Faulkner, we stated:

> Appellant's last argument on this subject is that the death penalty statute violates the Eighth Amendment to the United States Constitution by permitting the jury to impose the death penalty when they have found, as a mitigating circumstance, that the defendant was mentally ill. Appellant argues that an automatic life sentence should be imposed--and not the death penalty--when the jury finds mental illness as a mitigating circumstance. In Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986), this Court stated that a finding of substantial mental impairment under 42 Pa.C.S. § 9711(e)(3) does not bar a death penalty imposed by the jury:
>
> > Our legislature could have provided that a finding of substantial impairment precludes imposition of the death sentence[;] however, it did not do so. Instead, it determined that this factor was to be weighed by the jury along with all the other factors and that it is within the province of the

[30] Appellant's very brief argument does not specifically state whether he is arguing that a person who has committed first-degree murder while mentally ill should not be executed or whether a person who is mentally ill at the time of execution should not be executed. We infer from Appellant's discussion of relevant case law that he is arguing the former.

> jury to determine how much weight it should be accorded.
>
> Fahy, 512 Pa. at 317, 516 A.2d at 698-99. We believe this rationale is equally applicable when the jury finds as a mitigating factor that a defendant suffered from "a degree of mental illness."

Id. at 38.

Appellant has failed to advance a compelling argument that would lead us to alter our holdings in Faulkner and Fahy. Appellant mentions that evolving standards of decency should prompt a reassessment of these decisions. However, Appellant does not engage in any analysis as to why this should be the case. Accordingly, we conclude that Appellant's argument is without merit.

XVI. Vienna Convention

Appellant contends that his rights under the Vienna Convention on Consular Relations (the "Convention"), 21 U.S.T. 77, T.I.A.S. No. 6820, were violated. Appellant, an American citizen raised and educated in the United States, apparently holds dual citizenship with Latvia, a signatory, as is the United States, to the Convention. The preamble to the Convention provides that its purpose is to "contribute to the development of friendly relations among nations." 21 U.S.T. at 79; see also Medellin v. Texas, 128 S.Ct. 1346, 1353 (U.S. 2008). In pursuit of that end, Article 36 of the Convention was drafted to "facilitat[e] the exercise of consular functions." Art. 36(1), 21 U.S.T. at 100. This article provides that if a person detained by a **foreign** country "'**so requests**, the competent authorities of the **receiving** State shall, without delay, inform the consular post of the **sending** State' of such detention, and 'inform the [detainee] of his righ[t]' **to request assistance from the consul of his own state**." Medellin, supra at 1353 (quoting Art. 36(1)(b)) (emphasis added). Appellant complains that he was not informed of his "rights" under Article 36(1)(b). Appellant's Brief at 86.

The absurdities of Appellant's argument are manifold. Appellant was not detained by a foreign country but by authorities in his own country and state. Appellant was not "sent" by Latvia to be "received" by the United States; he is not a foreign national. Not only is Appellant a United States citizen, he was also trained as a lawyer in the United States. He was represented by counsel at all stages who spoke the same language as Appellant, came from the same American culture as Appellant, and engaged in legal procedures undoubtedly familiar to Appellant from his legal training. Perhaps Appellant believes that he would have had a better trial result had he been represented at trial by a Latvian attorney or afforded advice by the Latvian Consulate. If so, he has not indicated how his defense was prejudiced by this omission. Moreover, Appellant never requested that the Latvian Consulate be notified.[31]

Appellant argues that the decisions of the International Court of Justice ("ICJ") prohibit the execution of a **foreign national** where the provisions of the Convention have not been followed, specifically citing the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 12 (March 31, 2004) ("Avena"). Aside from the fact that Appellant is not a foreign national, the United States Supreme Court recently ruled that ICJ judgments, and specifically Avena, are not binding on our domestic law because none of the relevant treaty sources establishes binding domestic law in the absence of implementing legislation, and no such legislation has been enacted. Medellin, supra at 1360-65. In other words, the Convention is not "self-executing." See id. at 1365-66.

In short, there is absolutely no merit to this argument.

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[31] It does not appear that Appellant is represented by Latvian counsel on appeal, and Appellant made no averment that he ever consulted with the Latvian consulate to better understand his post-trial rights, despite his knowledge of the Convention.

XVII. Ineffective Assistance of Counsel

Appellant's last argument details alleged instances where he was given ineffective assistance of trial counsel.[32] "Claims of trial counsel ineffectiveness are generally deferred to post-conviction review so that they might be properly developed on a full and complete evidentiary record." Cousar, supra at 1043 (citing Commonwealth v. Grant, 813 A.2d 726, 736-37 (Pa. 2002)). Appellant makes no legal argument as to why his ineffectiveness claims should not be deferred until post-conviction review.[33] Accordingly, we conclude that Appellant's ineffectiveness claims must be deferred to post-conviction proceedings, as contemplated by the rule set forth in Grant, if Appellant chooses to pursue them.

XVIII. Statutory Review

Having concluded that Appellant's convictions were proper and that none of his claims of error entitles him to relief, we must affirm each death sentence unless we find that: (i) the sentence was the product of passion, prejudice, or any other arbitrary factor; or (ii) the evidence fails to support the finding of at least one aggravating circumstance. See 42 Pa.C.S. § 9711(h)(3); Cousar, supra at 1044. Upon careful review of the record, we are persuaded that Appellant's death sentences were not the product of passion, prejudice, or any other arbitrary factor, but rather resulted from properly introduced evidence that

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[32] Specifically, Appellant alleges that trial counsel was ineffective for having failed to (1) request a change of venue or venire; (2) object to the removal of prospective jurors Mock and Hawthorne; (3) move to suppress the evidence obtained pursuant to the April 28, 2000 search of Appellant's house; and (4) object to and seek a hearing regarding his "forced drugging" and request a jury instruction regarding the reasons for his "apparent stupor" during trial. See Appellant's Brief at 86-92.

[33] Indicating that a petition for post-conviction review will likely be filed, Appellant contends that we will have to review these ineffectiveness issues anyway, so we may as well review them now. Aside from our general disinclination to act based on prognostications of the future, we see no reason to circumvent the rule in Grant, as it was cogently based on the premise that a review of ineffectiveness claims is generally best made upon a full factual record developed by a post-conviction court.

Appellant intentionally and deliberately shot to death Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao Pak Pham, and Garry Lee. We also conclude that the evidence was sufficient to support the two aggravating factors found by the jury in relation to the killings. There is no doubt that "[i]n the commission of the offense [Appellant] knowingly created a grave risk of death to another person in addition to the victim of the offense." 42 Pa.C.S. § 9711(d)(7). When Appellant shot Ji-Ye Sun and Thao Pak Pham, he created a grave risk of death to David Tucker, who was present in the restaurant when Appellant opened fire multiple times on his victims. In fact, Pham was shot just two to three feet away from Tucker as he was running past Tucker, who was trying to "dodge" the danger that was unfolding before him. N.T. Trial, 4/30/01, at 433-35. When Appellant shot Garry Lee, he created a grave risk of death to George Lester Thomas II, who was present in the karate studio when Lee was shot quite near to him, and in fact, Appellant had first pointed his weapon at Thomas. Further, there is no doubt that "[t]he defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the same time of the offense at issue." 42 Pa.C.S. § 9711(d)(11). Here, Appellant was convicted of five murders, all of which were committed during the two-hour homicidal rampage that occurred on April 28, 2000.

For the foregoing reasons, we affirm the verdicts and sentences of death. The Prothonotary of this Court is directed to transmit the complete record of this case to the Governor of Pennsylvania in accordance with Section 9711(i) of the Sentencing Code, 42 Pa.C.S. § 9711(i).

Mr. Chief Justice Castille and Messrs. Justice Eakin and Baer join the Opinion.

Mr. Justice Saylor files a Concurring Opinion.

Madame Justice Todd files a Concurring Opinion.