

[J-75-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

| | | |
|-------------------------------|---|--|
| COMMONWEALTH OF PENNSYLVANIA, | : | No. 95 MAP 2001 |
| Appellee | : | |
| | : | Appeal from the Order of the Superior |
| | : | Court entered November 15, 2000, at No. |
| v. | : | 375 EDA 2000, affirming the judgment |
| | : | entered December 8, 1999 of the Court of |
| | : | Common Pleas, Monroe County, at |
| RICHARD DEMARCO, | : | Criminal Action No. 192-1999 |
| Appellant | : | |
| | : | SUBMITTED: May 14, 2002 |

CONCURRING OPINION

MR. JUSTICE EAKIN

Decided: October 23, 2002

I agree with the proposition that the statute trumps the "three pronged test," and that the defense was entitled to the instruction, despite contrary language in the caselaw. While defendant never testified, the evidence included his prior testimony of threats, making the duress instruction appropriate, and I therefore concur in the reversal of the prior decision. However, I cannot agree with the broad statements of what is and is not relevant and admissible evidence as concerns this defense.

The test involves (1) a person of reasonable firmness, (2) in the accused's circumstance. I believe the language used by my colleagues elevates the accused's subjective mental firmness into the equation; this is not part of the statute, comments from the 1960 tentative draft of the Model Penal Code notwithstanding. These broad strokes open the way for "experts" to offer hindsight opinions about what a defendant could and could not resist, which is the ultimate issue for the jury. Considerations of retardation and such may be relevant in a given case, but they are not determinative of this appeal; I would let them for another day when they are squarely presented.