

A Publication of the Pennsylvania Association of Criminal Defense Lawyers December, 2006

Welcome to *LibertyWatch*. Katharine R. Allen covered the United States Supreme Court, the U.S. Court of Appeals for the Third Circuit, the Pennsylvania Supreme Court, and the Pennsylvania Superior and Commonwealth Courts for the month of November, 2006. We are necessarily selective in our coverage and no newsletter can substitute for diligent research and innovative analysis. The cases can be found in full at:

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UNITED STATES SUPREME COURT DECISIONS

Death Penalty â€” Forward Looking Mitigation Evidence

Ayers, Acting Warden v. Belmontes, 05-493. Opinion by Kennedy, J., concurring opinion by Scalia, J., dissenting opinion by Stevens, J., 11/13/06 .

During the penalty phase of respondentâ€™s capital murder trial, respondent introduced mitigating evidence to show,

inter alia , that he would lead a constructive life if incarcerated rather than executed, testifying that he had done so during a previous incarceration, while a Christian. Corroborating testimony of the same from chaplains and his Christian sponsors was also presented on respondentâ€™s behalf, and the partiesâ€™ closing arguments discussed this mitigating evidence and how the jury should consider it. The trial judge did not err when he told the jury to consider â€œ[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime,â€• an instruction known as â€œfactor (k)â€• under Californiaâ€™s then-applicable statutory scheme and it was error for the Ninth Circuit to reverse in part.

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT DECISIONS

Criminal Procedure â€” Sentencing

U.S. v. Lovett , No. 05-4171. Opinion by Smith, J., 11/06/06 .

The district court did not err by imposing a three-year period of supervised release following appellantâ€™s conviction for making a false statement to a federally licensed firearms dealer. The district court correctly classified defendantâ€™s offense as a Class C felony subject to a maximum of three years of supervised release. Further, because appellantâ€™s maximum term of supervised release was calculated based on the maximum term for which he could be sentenced, there was no *ex post facto* violation.

Criminal Procedure â€” Sentencing

U.S. v. Dees , Nos. 05-4949 â€” 05-4951. Opinion by Smith, J., 11/08/06 .

A district court has statutory authority to impose consecutive sentences upon revocation of concurrent terms of supervised release based upon the same violation conduct, and 18 U.S.C. Â§ 3583(e)(3) does not remove such discretion. Further, the district courtâ€™s decision to sentence appellant to the statutory maximum for each violation was not unreasonable in light of appellantâ€™s frequent and flagrant parole violations and the courtâ€™s articulation of its rationale.

Criminal Procedure – Evidence – Habeas Corpus – Sentencing

Albrecht v. Horn , Nos. 04-9005, 04-9006. Opinion by Cowan, J., 11/21/06 .

The district court grant of *habeas* relief in a death penalty murder case pursuant to *Mills v. Maryland* , 486 U.S. 367 (1988), due to an ambiguous jury instruction concerning whether mitigating circumstances had to be found unanimously, is vacated and remanded for consideration of remaining sentencing-phase issues, where: 1) a non-retroactivity defense was not waived by the Commonwealth; and 2) the Supreme Court’s decision in *Beard v. Banks* , 542 U.S. 406 (2004), held that *Mills* would not apply retroactively.

Evidence – Prior Consistent Statement – Casoni Standard

U.S. v. Frazier , No. 05-4428. Opinion by Smith, J., 11/22/06

Where, contrary to appellant’s assertions, the district court found that trial counsel implied that a prosecution police witness had fabricated testimony by which appellant was convicted of one count of possession of crack cocaine with intent to distribute, the district court did not err in using Federal Rule of Evidence 801(d)(1)(B) to except the officer’s prior consistent statement testimony used to rebut the inference of fabrication. The Court noted that while a reasonable finder of fact could have decided differently, the record supported the district court’s finding and no abuse of discretion occurred.

Criminal Procedure – Sentencing

U

.S. v. Lloyd , No. 05-4241. Opinion by Greenberg, J., 11/28/06 .

In an appeal limited to resentencing after remand in light of *U.S. v. Booker* , 543, U.S. 220 (2005), pursuant to which the sentencing guidelines are now advisory, the Court held that the district court did not err in considering the advisory sentencing guidelines, the district court gave sufficient reasons for not sentencing appellant below the guideline range, and further, the district court’s sentence was reasonable as appellant did not satisfy his burden in proving the 168-month sentence and five-year post-release supervision was unreasonable.

Judgment of conviction and sentence affirmed where: 1) the court did not err in applying *Booker* by relying on the 18 U.S.C. Â§ 3553(a) as a starting point for sentencing and by considering additional factors as well, 2) even assuming a Â§ 3553(c)(1) requirement, the court did not commit any error by providing concrete reasons for the sentence; and 3) Lloyd was unable to satisfy the burden of proving the sentence was unreasonable.

PENNSYLVANIA SUPREME COURT DECISIONS

Sentencing – Three Strikes Law

Cmwltth. v. Mcclintic , No. 37 EAP 2005. Opinion by Baer, J., dissenting opinion by Eakin, J., 11/22/06 .

The trial court erred in imposing two separate sentence enhancements of twenty-five to life for appellant’s two convictions, i.e. robbery and burglary, which occurred during the same criminal episode, namely robbing his neighbor’s home on two consecutive occasions. In so holding the Court revisited the *Shiffler* recidivist philosophy and the statutory language of Pa.C.S. Â§ 9714 and concluded that sentence

enhancement pursuant to the "three strikes law" reveals that the legislature intended to apply sentencing enhancement for all crimes rising from a criminal transaction, rather than for each individual crime of such transaction.

Sufficiency "Retaliation against Witness

Cmwlt. v. Ostrosky, No. WAP (2005). Opinion by Baer, J., dissenting opinion by Castille, J., 11/22/06 . Where appellant, who had been ordered to pay victim restitution from an earlier incident, incited a confrontation with the victim and threatened violence to his wife, evidence was insufficient as a matter of law to sustain a conviction for retaliation against a witness. In so holding, the Court noted that the plain language of the statute requires a showing that a person 1) cause harm, and 2) that such harm results from an unlawful act. In the instant case, appellant committed an unlawful act by threatening the victim's wife, however the "harm prong" was not met and conviction the could not be sustained.

Sufficiency "Aggravated Assault

Cmwlt. v. Matthew , No. 39 EAP (2005). Opinion by Eakin, J., dissenting opinion by Baldwin, J., 11/22/06 .

In upholding appellant's conviction for aggravated assault, the Court affirmed the totality of circumstance test as set forth in

Cmwlt. v. Alexander , 477 Pa. 190 (1978) to determine whether the "substantial step" prong of aggravated assault is met. In so finding, the Court determined that appellant had taken a substantial step toward inflicting serious bodily injury upon his victim by stating his intention to kill the victim and placing a loaded gun against the victim's throat.

Statutory Construction "PFA as Prior Conviction

Cmwlt. v. Bortz , No. 114 MAP (2005). Opinion by Cappy, J., 11/22/06 .

The Court unanimously held that a first time offender under the stalking statute 18 Pa. C.S. Â§ 2709.1 can be charged with a felony of the third degree because of a violation of a PFA order. The Court found that the plain language of the stalking statute enumerates violation of a protection order as a crime of violence.

PCRA "Ineffective Counsel "Age Mitigator " Jury Instruction, Simmons , Aggravating and Mitigating Circumstances " Proportionality Review

Cmwlt. v. Marinelli , No. 440 CAP (2005). Opinion by Newman, J., concurring opinions by Saylor, J. and Cappy, J., 11/27/06 .

The Court affirmed the PCRA court's finding that all eight issues raised in appellant's PCRA petition and held,

inter alia , (1) Although appellant correctly cites *Cmwlt. v. Rizzuto* , 777 A.2d 1069 (Pa.2001) for the proposition that mitigating circumstances stipulated to the jury (here appellant's age) must, by law, be considered as a mitigating factor, *Rizzuto* was not decided until six years after appellant's conviction and appellant's counsel could not be held ineffective for failing to predict the change in law; (2) the prosecution never argued that appellant would be a future threat to society and thus a *Simmons* instruction (life means life without parole) was not applicable to the case *sub judice* ; (3) counsel was not ineffective for advising appellant that if he took the stand he could be subject to cross-examination; and (4) explaining aggravating and mitigating circumstances in layman's terms of a

€œmore terribleâ€• or â€œless terribleâ€• is not reversible error.

PENNSYLVANIA SUPERIOR COURT DECISIONS

Statutory Construction â€” Possession of Child Pornography â€” Knowing Possession

Cmwlth. v. Diodoro , No. 1889 EDA (2005). Opinion by Klein, J., 11/2/06 .

In an issue of first impression in Pennsylvania , the Court held that viewing child pornography on the Internet without intentionally saving or downloading any of the images does not, by the terms of the statute (18 Pa.C.S. A. Â§ 6312) constitute â€œknowing possession of child pornography.â€• In so holding, the Court emphasized that it would be well within the power of the legislature to criminalize the act of viewing child pornography on a Web site without saving the image however, the current statutory language includes only â€œpossessionâ€• which can not be established absent evidence that the appellant knowingly downloaded or saved pornographic images to his hard drive or knew that his Web browser cached the images.

Criminal Procedure â€” Evidence â€” Sufficiency â€” Indecent Exposure, IDS

Cmwlth. v. Andrulewicz , Nos. 1251 â€” 1253 WDA (2005). Opinion by Stevens, J., 11/2/06 .

Where competent minor testimony indicated that appellant penetrated a minor victim, inappropriately caressed her and exposed himself to her, evidence was sufficient for the jury, sitting as fact finder, to find appellant guilty of sexual assault and indecent exposure. Further, where appellant exposed himself to a minor victim and asked her to perform oral sex on him, the Commonwealth presented sufficient evidence that appellant took a substantial step in committing involuntary deviate sexual intercourse. Further, there was no prejudice or error committed by the court in consolidating cases where the three cases were probative of appellantâ€™s common scheme.

Evidence â€” DSS Records â€” Sufficiency â€” Accomplice Liability

Cmwlth. v. Schoff , No. 1953 MDA (2004). Opinion by Gantman, J., 11/2/06 .

In appellantâ€™s trial for the collaborative murder of her husband, the trial properly allowed a DSS social workerâ€™s testimony under the business exception rule as to three prior and suspect child abuse allegations filed by appellant where (1) the social worker had personal knowledge of the general manner of preparation, use, storage, and source of information for DSS case files during a child abuse investigation, (2) the social worker adhered to DSS protocol in reviewing the case files (3) the records were prepared contemporaneously with the abuse investigations, (4) the records were not prepared in preparation for appellantâ€™s trial, and (5) the records were not offered to suggest motive or the truth of the allegations asserted. Further, evidence was sufficient to show accomplice liability where the Commonwealth established appellantâ€™s specific intent to kill her husband and that appellant actively participated in soliciting and aiding in the crime.

Restitution â€” Assault, 18 Pa.C.S.A. Â§ 1106

Cmwlth. v. Oree , No. 1890 MDA (2005). Opinion by Stevens, J., 11/3/06 .

Where evidence established that appellantâ€™s victim has an organic brain syndrome due to his head

trauma and the victim will require nursing home care indefinitely due to the injury which resulted from appellant attacking victim, the trial court did not err in imposing restitution for the loss which flowed from appellant's conduct. Further, the fact that the ordered amount, calculated per estimates of nursing home care, totaled more than one million dollars did not make the fine excessive or per se cruel and unusual punishment simply because it could take appellant a lifetime to pay.

Sentencing – Downward Departure

Cmw/lt. v. McIntosh , No. 952 EDA (2005). Opinion by Todd, J., concurring and dissenting opinion by Bender, J., 11/6/06 .

In overturning appellant's lenient sentence for a *nolo* plea to a single count of sexual assault the Court determined that the net effect of the sentence was to allow appellant, who had been initially charged with multiple counts of sexual impropriety, to avoid incarceration and to serve a period of house arrest followed by eight years of probation. The Court noted that had the trial court followed sentencing guideline recommendations, appellant's sentence should have fallen between 24 – 36 months within the mitigated range and appellant's sentence was, at best, a dramatic downward departure from the guidelines. However the trial court did not mention the guidelines until its 1925(a) statement and thus failed to place on the record, as required, its reasons for so departing. The Court held that the trial court erred in failing to consider the sentencing guidelines and abused its discretion in sentencing appellant.

Search & Seizure – Knock and Announce

Cmw/lt. v. Wagstaff , No. 2771 EDA (2005). Opinion by Popovich, J. 11/6/06 .

In affirming the trial court's grant of evidence suppression, the Court found the police executed a search warrant improperly by failing to wait long enough after knocking and announcing their presence before forcibly entering appellant's home. Here, the police knocked and announced their presence but did not announce their purpose or wait a reasonable amount of time before breaking in the home. Noting, Pa.R.Crim.P. 207, the Court held it was not error for the trial court to grant the motion to suppress in the absence of exigent circumstances excusing the police announcing their identity and purpose. In so holding the Court explicitly declined to accept the Commonwealth suggestion of an exigent circumstance exception where drugs are the subject of a search warrant.

Sufficiency – Aggravated Assault

Cmw/lt. v. Lewis , No. 2963 EDA (2005). Opinion by Orié Melvin, J., 11/8/06 .

Evidence sufficient for conviction of aggravated assault where testimony revealed appellant struck his girlfriend in anger at least three times, one time causing a gash, and only stopped his attack when he was told the police were on their way to his campsite and where further medical evidence revealed the victim was in a life-threatening state. Appellant's contention that the evidence was insufficient to show aggravated assault was without merit where injuries to the victim were extensive.

DUI – Constitutionality

Cmw/lt. v. Spease , No. 741 MDA (2006). Opinion by Tamilya, J., 11/13/06 .

Where appellant pleaded guilty to DUI, general impairment and DUI, highest rate (.257) then withdrew her plea, appellant's appeal of judgment of sentence is affirmed and constitutional arguments against 75 Pa.

C.S.A. Â§ 3802 rejected. The Court held, *inter alia* , (1) strict scrutiny of the statute is not relevant as driving is not a right and the rational basis test is applicable to appellant's due process and equal protection challenges; (2) appellant's over-breadth argument against the statute fails in the absence of any constitutional or common law right to the consumption of any quantity of alcohol before driving, (3) pursuant to reasoning in *Cmwlth. v. McCoy* , 895 A.2d 18 (2006) it is constitutionally permissible to require a person to monitor his or her conduct so as to ensure that he or she does not have a prohibited BAC at any time within two hours of driving; and that (4) there is no 6th Amendment right to counsel when a defendant is first requested to take a blood analysis; (5) and the new DUI statute is not void for vagueness.

PCRA Untimely Filing

Cmwlth. v. Wilson , No. 283 EDA. Opinion by Stevens, J., 11/13/06 .

Where appellant, who was convicted of, *inter alia* , murder and criminal conspiracy and sentenced in 1989 to an aggregate term of life in prison, filed a *pro se* PCRA petition in 1998 that was dismissed and filed the present petition in May of 2005, the trial court did not err in dismissing said petition for untimeliness. In so holding the Court concluded that appellant's petition is governed by the 1995 amendments to the PCRA which provides "any petition under this subchapter...shall be filed within 1 year of the date judgment becomes final. In appellant's case, final judgment was rendered September 9, 1997 . Therefore the deadline for a PCRA petition fell on September 9, 1998 , and the 2005 petition was untimely filed.

PCRA " Eligibility for Relief

Cmwlth. v. Hart , No. 2172 MDA (2005). Opinion by Ford Elliot, P.J., 11/13/06 .

Appellant was convicted of summary harassment, did not seek allowance of appeal and served his ninety-day sentence. Thereafter, appellant filed the instant PCRA petition which was dismissed for lack of jurisdiction. The Court held that failure to appoint appellate counsel is not reversible error where appellant has served a complete sentence and that the PCRA court properly dismissed appellant's petition as ineligible for relief where the petitioner has completed all incarceration, probation and parole as here.

PCRA Evidence " Prior Bad Acts; Extradition " Use Immunity " Jury " Sequestration, Voluntary Manslaughter and Date of Murder Instructions

Cmwlth. v. Einhorn , No. 3666 EDA (2002). Opinion by Panella, J., 11/14/06 .

In affirming appellant's conviction for the 1977 beating murder of his live-in girlfriend, the Court held that the trial court properly admitted excerpt testimony from appellant's diary in which he discussed violent acts against prior girlfriends. In so concluding the Court found that the diary hearsay was excepted in that it was introduced to demonstrate a common scheme of violence capable of supporting an inference of appellant's guilt. Further, the Court found that the jury was properly instructed thus negating abuse of discretion by the trial court. The Court refrained from ruling on the constitutionality of 42 Pa.C.S.A. Â§ 9543(c) (enacted in 1998 to address France's refusal to extradite appellant based on the French extradition court's rule that fugitives found guilty *in absentia* " as appellant in a prior conviction " should automatically receive a new trial) as the ultimate decision to extradite appellant was made in France and there was no authority to grant relief. In considering appellant's motion for a new trial based on the trial court's refusal to grant appellant's wife, an alleged exculpatory witness, immunity from prosecution for harboring a criminal, the Court noted appellant's mistaken reliance on the *Government of Virgin Islands v. Smith* 615 F.2d 964 (3d. Cir. 1980) rule which states that regardless of

petition from the Commonwealth a trial court must grant a witness immunity when: (1) the prosecutor is engaged in misconduct, or (2) the potential testimony is clearly exculpatory. The Court noted the case has no precedential value and then used the rule to deny appellant's motion, finding no misconduct and that the testimony was not clearly exculpatory. The Court also found the trial court's decision to preclude testimony from appellant's wife was not in error as the witness was not unavailable, rather that she was indeed capable of presenting testimony and chose not to. Lastly, the Court held the trial court committed no error in instructing the jury. In so finding, the Court dismissed appellant's claims that sequestration was not adequate because the jurors were allowed to go home to pack a suitcase and that the trial court should have instructed the jury on "heat of passion" voluntary manslaughter. Appellant, reasoned the Court, had pleaded not guilty, rendering the instruction invalid.

Evidence " Megan's Law " Tender Years Exception " Tainted Testimony

Cmwth. v. Cesar , No. 871 MDA (2005). Opinion by Stevens, J., 11/14/06 .

Where appellant was convicted of indecent assault and other sex crimes against his five-year-old daughter based on witness and corroborative testimony the conviction is affirmed. The Court held that although victim's answer to a number of questions at trial were "I forgot," her responses during the time and place of incident and her feelings and actions afterwards were sufficient basis for the trial court to find the victim available for purposes of trial and Pa.R.E. (804)(a)(3) was not applicable. Further, the Court held the admission of testimony of the victim, her mother and a DSS representative pursuant to the "tender years exception" did not violate the appellant's right to confront his accusers as the testimony was properly admitted through hearsay exception and that appellant had the opportunity to cross-examine at trial. The Court similarly rejected appellant's argument that the victim's testimony was tainted despite the fact that her mother and a child advocate rehearsed her testimony with the child. In so doing, the Court iterated that it did not find the evidence to be so clear and convincing as to constitute taint necessitating a finding that the court abused its discretion.

Evidence " Receipt of Stolen Property " Sufficiency

Cmwth. v. Marrero , No. 2388 EDA (2005). Opinion by Panella, J., 11/15/06 .

Rejecting appellant's reliance on *Cmwth. v. Henry*, 875 A.2d 302 (holding that evidence insufficient to convict for unauthorized use of auto where only fingerprints found), the Court found latent fingerprint evidence sufficient to convict appellant of receipt of stolen property, unauthorized use of an automobile, and criminal mischief. The Court opined that appellant's possession of the vehicle combined with the fact that appellant's fingerprints were found under the hood rather than in the passenger compartment of the appellant's car distinguishes the case from *Henry* in that there was no inference that appellant had been an innocent passenger. Further, the Court held that appellant's possession of the vehicle 48 hours after the vehicle was stolen serves to create a sustainable inference of guilty knowledge that the vehicle was stolen. Finally, in affirming the trial court's order of \$500 restitution, the Court concluded that because appellant testified that the vehicle was worth \$5,000 and that the insurance company had fully reimbursed him, the insurance company and victim suffered a combined loss of at least \$5,000 so the restitution award was proper. Yes, that's what it says.

Evidence " Sufficiency PWID " Conspiracy to Distribute " Burden of Proof

Cmwth. v. McCall, No. 2776 EDA (2005). Opinion by Stevens, J., 11/16/06 .

Affirming appellant's bench convictions for PWID and conspiracy to deliver a controlled substance the Court held that the totality of the evidence was sufficient to sustain the convictions. The Court ruled that even though appellant did not physically handle the drugs transacted, the fact that he was present during four drug transactions and appeared to be, according to undercover agents holding appellant and his co-conspirator under surveillance, keeping look-out for the co-conspirator. This, coupled with the \$1,508 cash in small denominations found on appellant's person after arrest was sufficient for a fact finder to infer the elements of conspiracy. Further, the Court reasoned, since a conspirator is liable for the criminal acts of his partner in crime, the evidence was sufficient to sustain the conviction for PWID as well.

PCRA's Probation's Pa.R.E. 609's Crimen falsi Evidence

Cmwth. v. Treadwell , No. 2077 WDA (2005). Opinion by Kelly, J., 11/16/06 .

The PCRA court did not err in dismissing appellant's ineffective counsel petition where counsel did not impeach an identification witness with *crimen falsi* evidence. The Court rejected appellant's argument that probation qualifies as confinement for the purposes of the ten-year time limit set forth in Pa.R.E. 609. Therefore, the Court held, because more than ten years had elapsed since the date of the witnesses conviction, and the witness was not confined but rather was placed on probation for his crimes, appellant's counsel could not have introduced evidence of the witness's 1991 *crimen falsi* and was therefore not ineffective. Further, trial counsel was not ineffective for failing to assert the exception to Rule 609 when the probative value of *crimen falsi* evidence outweighs its prejudicial effect as the prosecution had effectively and preemptively raised the issue by revealing the witness's convictions.

PCRA's Conviction in absentia's Untimeliness Waiver

Cmwth. v. Pollard , No. 3358 EDA (2005). Opinion by Gantman, J. 11/17/06 .

Where appellant was convicted, *in absentia* , of assault and other offenses in March of 2001, did not file an appeal and was apprehended and began serving his sentence on September 24, 2002 , appellant's July 2004, *pro se* , PCRA petition was properly dismissed for untimeliness where appellant failed to assert time-bar exceptions to his petition.

Sentencing's Mandatory Sentencing Provisions's Three Strikes Law

Cmwth. v. Leverette , No. 28 EDA (2006). Opinion by Popovich, J. 11/17/06 .

The trial court erred in sentencing appellant to concurrent terms of imprisonment of 25 to 50 years pursuant to the third time offender mandatory sentencing provisions where appellant had been sentenced pursuant to a guilty plea for two similar incidents that occurred on sequential days for similar incidents. Further, the sentencing for the two prior convictions occurred on the same day under the same docket number. Further appellant had not been afforded an opportunity to reform himself between the first and second convictions and must be considered a second time offender pursuant to 42 Pa.C.S.A. Â§ 9714. Note: See *Shiffler v. Cmwth.* , 583 Pa. 478 (2005).

Probation Revocation's Sentencing

Cmwth. v. MacGregor , No. 292 WDA (2006). Opinion by McEwen, P.J.E., 11/21/06 .

Where appellant served his full four-year prison term and had begun serving his five-year probation which was subsequently revoked pursuant to an alleged violation of "Special Conditions of Parole," evidence was insufficient for the trial court to revoke his probation and sentence him to an additional term of imprisonment. The Court found that the order of the Court constituted an error of law because the conditions which appellant was found to have violated were not conditions ever imposed by the sentencing court. Rather, the "Special Conditions of Parole" (here no contact with minors) was a form drafted by, signed by and issued by a parole agent. Consequently, the Court held, the record could not sustain revocation.

Criminal Procedure " PCRA " Evidentiary Hearing

Cmwlt. v. Larrazabal Diaz , No. 647 WDA (2006). Opinion by Todd, J., 11/22/06 .

Where appellant asserted in a PCRA petition that his guilty plea was based on two misunderstandings inadvertently perpetrated by his counsel and the court and that his trial counsel erroneously advised him about deportation and a guilty plea, appellant properly alleged factual issues to be resolved by an evidentiary hearing. The PCRA court's order dismissing appellant's PCRA petition without an evidentiary hearing was error.

Criminal Procedure " Sentencing " 18 Pa.C.S. Â§ 906

Cmwlt. v. Welch , No. 608 EDA (2006). Opinion by Johnson, J. 11/28/06 .

Where appellant plead guilty to attempted homicide and conspiracy to commit robbery and was subsequently sentenced by the trial court to consecutive sentences on each, the separate sentences did not violate Â§ 906 of the crimes code. Appellant admitted in his oral guilty plea that he had conspired to steal an ATV, was chased by the owner and then shot the owner. The Court concluded that the conspiracy was not designed to commit or culminate in the attempted murder and the crimes, were in fact, independent with their own separate factual basis. As such, the trial court did not violate Â§ 906's prohibition against multiple inchoate crimes of criminal attempt, *et al*, designed to commit the same crime.

PCRA " Ineffective Assistance - _Jury Instruction

Cmwlt. v. Derk , No. 1095 MDA (2005). Opinion by McCaffery, J., concurring opinion by Bowes, J., 11/30/06 .

The Court held the PCRA court in error when it granted appellant's petition for a new trial based on ineffective counsel grounds. Here, appellant had been convicted of first-degree murder in the brutal death of his girlfriend's 2-year-old son. Appellant was convicted, in part, with testimony rendered by the girlfriend who had also been charged in the death but negotiated a plea bargain in which she pleaded to lesser culpability. In his PCRA petition, appellant alleged counsel was ineffective, *inter alia* , for failing to request the trial court instruct the jury on the substantive value of the girlfriend's guilty plea. The PCRA court concluded that counsel's failure to request the instructions had not been harmless omission. In its opinion, the Court noted that appellant had exhausted his appeals, including the same ineffective arguments and his convictions had been affirmed. As such, the Court concluded, appellant's arguments could not be heard unless they raised issues separate and apart from the issue previously litigated on direct appeal. The Court held that appellant's claims were merely alternate theories of the same issue and therefore the PCRA grant of a new trial on previously litigated issues was in error.

PENNSYLVANIA COMMONWEALTH COURT DECISIONS

No criminal cases reported.

PACDL News and Announcements

Capital Cases

Mitigation Series - Youth

Friday, February 9, 2007

Radisson Hotel Valley Forge

1160 First Ave.

King of Prussia , PA

Defense counsel's most fundamental duty in the penalty phase of a capital case is to thoroughly investigate a defendant's background to discover mitigating evidence that could spare a defendant's life and evidence to rebut any aggravating evidence that may be introduced by the prosecution.

As part of its commitment to quality capital defense in this critical area of the law, PACDL is pleased to introduce its mitigation series. Over the next several months, PACDL will be presenting a series of programs, each of which will concentrate on one particular mitigating circumstance and how to investigate and present the full dimensions of that particular mitigating factor. Through experts, mitigation investigators, and experienced capital trial, appellate, and post-conviction counsel, PACDL will instruct on the scope of each mitigating factor; the panoply of evidence that may be presented in support of each particular mitigating factor; how to investigate these facts; and the use of experts in support of each mitigating factor.

The first program of this series will be introduced, with "Age" as the focus of the mitigation program. The morning session will consist of an update on developments in death penalty litigation and the import of recent death decisions. The afternoon session will consist of two tracks.

Track 1 will be designed for those individuals who are new to death penalty litigation or who need a "refresher" on the foundations of death penalty litigation.

Track 2 will focus on the mitigating factor of "Age." Both experts and experienced counsel will address the full and proper development of this mitigating factor. This program promises to be unique and will provide practical guidance to assist trial counsel in fully developing and presenting "Age" as a mitigating factor.

Tentative Schedule

Friday, February 9, 2007

8:00 a.m. Registration and Continental Breakfast

9:00 a.m. – 12:15 p.m. Update on Developments in Death Penalty Litigation

12:15 p.m. - 1:30 p.m. B Lunch on your own

PACDL General Membership and Board of Directors Meeting

Track 1

1:30 – 4:45 p.m. Foundations of Death Penalty Litigation

or

Track 2

1:30 – 4:45 p.m. Mitigation – Youth as a Mitigating Factor

4:45 p.m. Seminar Concludes

Faculty:

Jules Epstein, Widener University School of Law

Robert B. Dunham, Training Director, Philadelphia Defender Association,
Capital Habeas Unit

Anne Saunders, Capital Habeas Unit, Federal Public Defender's Office,
Middle District of Pennsylvania

Bernard L. Siegel, Philadelphia

and others to be announced

Registration Information

Capital Cases: Mitigation Series: Youth

Mail the completed Registration Form with payment no later than January 27, 2007 .

Only prepaid attendees are guaranteed seating. Door registrations are permitted only as space and material are available.

The address is: PACDL, 115 State Street , Harrisburg , PA 17101 .

Telephone 717-234-7403.

Fax 717-234-7462.

CANCELLATION POLICY - PACDL must guarantee payment for meals and materials in advance.

There will be no refunds after 1/31/07 .

If you cannot attend, a colleague may take your place or your materials will be mailed to you. Cancellations made prior to that date will be subject to a \$50 cancellation fee.

SCHOLARSHIPS - There are a limited number of partial scholarships available to assist with the seminar fee for PACDL members whose dues are current.

Hotel charges are not included.

To apply, mail the completed seminar registration form along with a letter requesting financial assistance to PACDL no later than January 25, 2007 .

Scholarship applications received after that date will not be considered.

LOCATION - The Radisson Hotel Valley Forge is located at 1160 First Ave. , King of Prussia , PA 19406 .

For overnight reservations call 610-337-2000 or 888-267-1500. PACDL has a block of rooms available for \$109 single or double/night, plus tax. Please call immediately and reserve your room. You must state you are with the Pa. Assoc. of Criminal Defense Lawyers to receive this rate.

Registration Form

Capital Cases: Mitigation Series: Youth - 2/9/07 - 6 Rule 801 Capital case training credit hours

G PACDL Members

\$275

G PACDL Public Defender Members

\$225

G PACDL Members in Practice Less than 5 Years

\$225

G Public Defenders

\$315

G All Other Criminal Defense Attorneys
\$375

10% Discount for groups of three or more from the same office

Please fill out the following portion as well:

_____ Desired Number of Credit Hours Reported to the CLE Board at \$1.50 per hour

\$ _____

(no discount on CLE reporting fees)

TOTAL REGISTRATION and CLE REPORTING FEES

\$ _____

Name _____ Attorney ID _____

Mailing Address _____

City _____ State _____ Zip _____

Phone Number _____ FAX _____

Please note any dietary needs or needs related to disabilities

Capital Cases: Mitigation Series: Youth has been approved for 6 Rule 801 Capital Case Training hours by the Continuing Legal Education Board of the Supreme Court of Pennsylvania.

Mark Your Calendar

2007 Joint Annual Meeting

(includes a repeat of *Capital Cases: Mitigation Series*)

Thursday, April 19, 2007 - Saturday, April 21, 2007

Harrisburg Hilton

Harrisburg , PA

Announcing a new service to our members!

The PACDL Membership Handbook entries, as you may know, are located in the "Members Only " section of our website, www.pacdl.org.

This is because several members did not want their information in the public domain.

Commencing in January 2007, we will list any member who desires it, on the public section of our website in a searchable database. This will allow members of the general public who are looking for a criminal defense lawyer in a particular area to find you.

You can list as much or as little information as you desire, i.e., if you do not want your e-mail in the public area but do want your phone and fax, you can just tell us so by returning the form below. If you do NOT want to be listed in public -- DO NOTHING.

We will only list those of you who tell us to do so.

Please FAX this page to PACDL at 717-234-7462 or send it in to the office at the above address:

Yes, I want to be listed in the public section of the website.

I would like you to list the following information about me (please fill in ONLY the information you want the general public to have)

Name:

Law Firm:

Address:

City & State

Zip:

County:

Telephone number:

Fax number:

e-mail:

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As one of three equal and independent branches of state government, Pennsylvania's Unified Judicial System's role is to preserve the rule of law and guarantee the rights and liberties of citizens. It does so by fairly resolving disputes brought before juries and judges as prescribed by law and by administering all aspects of the judicial process consistent with provisions of the Constitutions of the United States of America and the Commonwealth of Pennsylvania.

