No. 19-5998

In the

Supreme Court of the United States

ERIC MATTHEW FREIN,

Petitioner

v.

PENNSYLVANIA,

Respondent

On Petition for Writ of Certiorari
to the Supreme Court of
Pennsylvania

BRIEF FOR PENNSYLVANIA IN OPPOSITION

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QUESTIONS PRESENTED

This is a Capital Case

Whether the jurisdiction of this Court, as invoked by Petitioner under 28 U.S.C. 1251(a), is unavailable as the judgement below is a state court judgment in a state criminal proceeding, and not within this Court's original jurisdiction enumerated in Section 1251(a)?

Whether Petitioner's Sixth Amendment right to counsel had not yet attached, as the initiation of formal judicial proceedings had not yet begun?

Whether jurors are presumed to follow an instruction on how to consider victim impact evidence, when a jury finds aggravating circumstances but no mitigating circumstances, and therefore the evidence was not to be considered?

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In the Supreme Court of the United States

No. 19

ERIC MATTHEW FREIN, PETITIONER

v.

PENNSYLVANIA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

BRIEF FOR PENNSYLVANIA IN OPPOSITION

OPINION BELOW

The opinion of the Pennsylvania Supreme Court is published at *Commonwealth v. Eric Matthew Frein*, 206 A.3d 1049 (Pa. 2019).

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on April 26, 2019. The Pennsylvania Supreme Court denied re-argument on June 17, 2019. Petitioner seeks jurisdiction of this Court under 28 U.S.C. § 1251(a). (Pet. 1).

STATEMENT

Following a jury trial in the Pike County Court of Common Pleas before a jury selected from Chester County, petitioner was convicted of numerous state criminal offenses related to the shooting death of Pennsylvania State Police Corporal Bryon K. Dickson, II, and the shooting of Trooper Alex Douglass at the Blooming Grove Pennsylvania State Police barracks in Pike County, Pennsylvania on September 14, 2014. The same jury imposed a sentence of death upon petitioner for the crimes of murder in the first degree[1], first degree murder of a law enforcement officer[2]. In doing so the jury determined the existence of numerous aggravating circumstances and found no mitigating circumstances.

1. Corporal Benjamin Clark and two other members of the Pennsylvania State Police filed a criminal complaint and affidavit of probable cause seeking an arrest warrant for petitioner on the charges of ; murder of the first degree, 18 Pa. C.S.A. Section 2502(a), two counts of criminal attempt to commit murder of the First Degree, 18 Pa. C.S.A. Section 901(a), criminal homicide of a law enforcement officer, 18 Pa. C.S.A. Section 2507(a), criminal attempt to commit criminal homicide of a law enforcement officer, 18 Pa. C.S.A. Section 901(a), assault of law enforcement officer, 18 Pa. C.S.A. Section 2702.1(a), discharge of a firearm into an occupied structure, 18 Pa. C.S.A. Section 2707.1(a), possessing instruments of crime, 18 Pa. C.S.A. Section

[1] 18 Pa. C.S.A. §2502(a).
[2] 18 Pa. C.S.A. § 2507.

907(a) and recklessly endangering another person, 18 Pa. C.S.A. Section 2705 on September 16, 2014. The offenses related to the shooting and killing of Pennsylvania State Police Corporal Bryon K. Dickson, II, and the shooting of Pennsylvania State Police Trooper Alex Douglass on September 12, 2014 at the Pennsylvania State Police Barracks in Blooming Grove Township, Pike County. Magisterial District Judge Shannon L. Muir issued an arrest warrant on the same day.

After a large scale manhunt, Frein was captured on October 30, 2014, by a team of Deputy United States Marshalls and placed under arrest. *Frein*, 206 A.3d at 1060. Thereafter, petitioner was taken back to the Blooming Grove State Police Barracks and attended to by a medic for an injury on his face. *Id.* Shortly thereafter, members of the Pennsylvania State Police entered the interrogation room and advised petitioner of his *Miranda*[3] rights. *Id.* The troopers then began interrogating petitioner.

During the interrogation, an Attorney James Swetz telephoned the State Police[4] and advised that a member of petitioner's family had retained him and that he was travelling to the barracks to see petitioner. *Id.* at 1061. Ultimately, Attorney Swetz travelled to the Blooming Grove barracks where upon his arrival he was denied entry

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] The Pennsylvania Supreme Court Opinion indicates Attorney Swetz telephoned the Blooming Grove barracks. While the number Attorney Swetz called was the telephone number for the Blooming Grove barracks, the phone calls were being routed to the Honesdale State Police barracks as a result of the shooting incident at the Blooming Grove barracks.

to the barracks. *Id.* Attorney Swetz made a request to speak with undersigned counsel. *Id.* Undersigned counsel telephoned Attorney Swetz and advised him of the preliminary arraignment for petitioner that would take place the next day on October 31, 2014. *(N.T[5]. April 3, 2017 pages 44-8).* Attorney Swetz did not attend the preliminary arraignment citing that it was not a critical stage of a criminal prosecution in Pennsylvania. Attorney Swetz did not seek to have the preliminary arraignment continued so that he could be present. *Id.* Ultimately, Attorney Swetz never entered an appearance on behalf of petitioner.

On November 13, 2014, police filed an amended criminal complaint adding offenses of Terrorism under 18 Pa. C.S.A. Section 2717.

A Preliminary Hearing was held before Magisterial District Judge Shannon L. Muir on January 5, 2015, wherein all charges were held for trial.

A jury trial ultimately commenced in April of 2017. After petitioner was found guilty on the charges of first degree murder and first degree criminal homicide of a law enforcement officer, the trial proceeded to a sentencing hearing before the jury pursuant to 42 Pa. C.S.A. § 9711 (related to Sentencing procedure for murder of the first degree). *Frein,* 206 A.3d at 1054.

[5] Respondent will use the designation N.T. to refer to the notes of testimony in the proceedings below.

Pursuant to § 9711(a)(2), respondent called witnesses that included family members of Corporal Dickson and witnesses regarding evidence of who Corporal Dickson was as a person. *Id.* at 1072-4. Petitioner called witnesses in an attempt to establish mitigating circumstances. *Id.* at 1078.

In accord with § 9711(c)(2), the trial court instructed the jury regarding the evidence related to Corporal Dickson and the victim impact evidence provided by the testimony of the family of Corporal Dickson. *Id.* at 1074. The trial court specifically instructed the jury that the victim impact evidence was not to be considered an aggravating circumstance, and that the evidence was only to be used if the jury found at least one aggravating circumstance and at least one mitigating circumstance. *Id.* at 1075.

Ultimately, the jury found several statutory aggravating circumstances and no mitigating circumstances. *Id.* at 1077 & 9. The jury then imposed a sentence of death. *Id.* at 1079.

2. On direct appeal, the Pennsylvania Supreme Court affirmed the judgment of the death sentence imposed upon petitioner.

While, the Pennsylvania Supreme Court determined that the interrogating state troopers had violated petitioner's invoked right to remain silent under the Fifth Amendment of the Constitution, the Court held that such error was harmless beyond any reasonable doubt. *Id.* at 1070. In doing so, the Pennsylvania Supreme Court recognized the substantial physical evidence establishing petitioner's guilt of the

offenses. *Id.* at 1071. The Court found harmless error went "without any hesitation" in light of the overwhelming evidence and largely uncontested evidence of petitioner's guilt. *Id.* The Pennsylvania Supreme Court noted that in closing argument the prosecutor made only one reference to petitioner's statement "noting simply that [petitioner] stated the obvious about the recovered Jeep, the campsite and his involvement." *Id.* at 1071, n.22.

Given the conclusion of harmless error under the Fifth Amendment, U.S. Const. Amend. V, the Pennsylvania Supreme Court did not review the alleged error in admitting petitioner's statement under the Sixth Amendment, U.S. Const. Amend. VI. *Id.* at 1071.

3. Before the Pennsylvania Supreme Court, petitioner argued that the admission of the evidence regarding Corporal Dickson and the impact his death had upon his family violated the Due Process Clause under the Fourteenth Amendment, U.S. Const. Amend. XIV, and the Eight Amendment, U.S. Const. Amend. VIII, prohibition against cruel and unusual punishment. *Id.* at 1072.

The Pennsylvania Supreme Court considered and rejected petitioner's claim. *Id.* at 1072-6. The Pennsylvania Supreme Court, in rejecting petitioner's argument, noted that the trial court had properly instructed the jury regarding the use of the victim evidence under §9711(a) (2). *Id.* at 1075. Regarding their use of the victim impact evidence during deliberations, the trial court instructed the jury as follows:

> This evidence is subject to two special rules. First, you cannot regard it as an aggravating circumstance. Second if you find at least one aggravating circumstance and at least one mitigating circumstance, you may then consider the victim and family impact evidence when deciding whether the aggravating outweigh the mitigating circumstances.

Id.

The trial court specifically instructed the jury the victim impact evidence was not to be considered an aggravating circumstance. Additionally, based upon the presumption that jurors follow a court's instructions, the Pennsylvania Supreme Court concluded that petitioner had failed to establish he was prejudiced by the admission of victim impact evidence, since the jury found aggravating circumstances and no mitigating circumstances, as the jury was presumed to have not considered the victim evidence. *Frein,* 206 A.3d at 1075.

The Pennsylvania Supreme Court concluded that "despite the victim impact evidence presented, the predominant evidentiary consideration in this case was "the murder and attempted murder of two police officers," "for which 'the evidence of [petitioner's] guilt was pervasive and largely unchallenged" *Id.* at 1076, n.24.

Finally, the Pennsylvania Supreme Court conducted a statutorily mandated review of the entire record and held "that [petitioner's] death sentences were not the product of passion, prejudice, or any other arbitrary factor . . ." *Id.* at 1079.

Petitioner filed a petition for re-argument, which was denied by Court Order on June 17, 2019. Petitioner filed the instant petition for writ of certiorari on September 16, 2019.

ARGUMENT

Petitioner invokes 28 U.S.C. §1251(a), as this Court's jurisdiction to issue a Writ of Certiorari to the Pennsylvania Supreme Court to review that Court's judgment affirming the sentence of death imposed upon petitioner. (Pet. 1) Simply stated, petitioner invokes a jurisdictional statute of this Court that is entirely inapplicable to the instant case.

Section 1251(a) codifies this Court's original and exclusive jurisdiction of controversies between two or more states of the United States. The present case is a state criminal prosecution of an individual convicted of crimes defined by state law. Therefore, the invocation of jurisdiction by this Court by petitioner under 28 U.S.C. § 1251(a) is inapplicable, and the petition is properly denied.

1. The substance of the petition claims that the Pennsylvania Supreme Court, in declining to address petitioner's claim that the introduction of his statements to police violated the Sixth Amendment, contravened this Court's clear Sixth Amendment jurisprudence. (Pet. 5). In doing so, petitioner claims the Sixth Amendment violation was "structural error", which is not subject to a harmless error analysis. (Pet. 6).

Petitioner failed to assert the structural error claim, he now advances, before the Pennsylvania Supreme Court below. Rather, petitioner merely sought suppression of his statement and in his reply to respondent's harmless error argument, simply asserted that the error was not harmless. Thus, petitioner's Sixth Amendment claim is not properly before this Court, as it was not "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992).

2. Further, petitioner's argument relies on a misstatement of fact, namely that prior to the interrogation of petitioner, the Commonwealth filed a criminal information against him. (Pet. 5). In fact, police had filed a police criminal complaint and affidavit in support of the issuance of an arrest warrant. This distinction is central to the review of a claim of deprivation of counsel under the Sixth Amendment.

Under Pennsylvania law the filing of a police criminal complaint and affidavit in support of an arrest warrant is prior to any initial appearance of the individual before a judicial officer. *See* Pa. R. Crim. P. 502. The formal charging instrument under Pennsylvania Law is a criminal information pursuant to Pa. R. Crim. P. 560[6].

[6] In Pennsylvania, after a criminal complaint is filed pursuant to Pa. R. Crim. P. 502, a preliminary hearing is held before a magistrate to determine whether a *prima facie* cases exists to send the charges to a Court of Common Pleas, a court with jurisdiction over both felony and misdemeanor cases. *See* Pa. R. Crim. P. 543. An attorney for the Commonwealth may, but is not required, to appear at the preliminary hearing. *See* Pa. R. Crim. P. 542. If a case is held for court, the attorney for the Commonwealth then files the formal charges in a criminal information. *See* Pa. R. Crim. P. 560.

This Court has clearly determined that the Sixth Amendment right to counsel does not attach at the time that adversarial judicial proceedings have been initiated against a criminal defendant. *United States v. Gouveia*, 467 U.S. 180, 187-8 (1984) The Sixth Amendment right to counsel applies at the first appearance before a judicial officer where he is informed of the charges against him and his liberty restricted. *Rothergy v. Gillespie County, Texas*, 554 U.S. 191, 194 (2008). This understanding of Sixth Amendment jurisprudence therefore engulfs the understanding of this Court that the Sixth Amendment right to counsel attaches at the filing of a formal charge, preliminary hearing, indictment, information or arraignment. *Id.* (quoting *Gouveia*, 467 U.S. at 188).

This Court has already firmly decided that an individual subject to custodial interrogation prior to the commencement of adversarial judicial proceedings does not have to be informed that a family member has retained an attorney on his behalf. *Moran v. Burbine*, 475 U.S. 412, 432 (1986). Indeed, this Court stated: "[T]he possibility that the encounter, [an interrogation], may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel." *Id.*

Here, the facts clearly demonstrate petitioner's Sixth Amendment right to counsel had not been triggered at the time of the police interrogation, as police had obtained a warrant for petitioner's arrest and petitioner had yet to make his first appearance

before a judicial officer. Indeed, Attorney Swetz stated that a preliminary arraignment, which is the initial appearance before a judicial officer, was not a critical stage of criminal proceedings, and as such he did not even attend. *(N.T. April 3, 2017 pages 44-8).*

3. Moreover, counsel was afforded to petitioner at all proceedings following his preliminary arraignment, including his preliminary hearing, arraignment, pre-trial proceedings, trial and appeal before the Pennsylvania Supreme Court. As such, at no point was petitioner denied counsel at any critical stage of the prosecution where "structural error" might have occurred. Lastly, even if there were a violation of the Sixth Amendment right to counsel, the harmless error review still applies. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). Therefore, as the Pennsylvania Supreme Court concluded the admission of petitioner's statements were harmless, there is no compelling reason to grant the petition.

Based on the foregoing, this Court should not grant the petition as to petitioner's Sixth Amendment claim.

5. Petitioner's argument, regarding the introduction of evidence regarding the life of Corporal Dickson and the impact of his death upon his family, likewise does not present a compelling reason for the grant of a writ of certiorari.

As an initial consideration, the record does not reflect a specific objection to the description of the child birth of one of Corporal Dickson's sons raised by the dissenting

opinion of Justice Wecht. *(N.T. April 20, 2017 67-8)*. Despite petitioner's reliance upon the dissent, the majority opinion noted that this evidence was presumptively offered, as conceded by the dissent, to demonstrate Corporal Dickson was a committed and caring father. *Frein,* 206 A.3d.at 1073, n.23.

The argument by petitioner relating to the testimony regarding the childbirth of Corporal Dickson's son was noted but not a major point in his brief before the Pennsylvania Supreme Court. Pursuant to *Williams,* a matter not pressed or passed upon below is not a matter which is proper for the grant of a writ of certiorari. *Williams,* 504 U.S. 36, 41 (1992).

6. Regarding victim impact evidence, this Court has previously recognized:

> [T]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J. dissenting)). This Court thereafter, held that the Eight Amendment did not erect an impassable barrier to the admission of such evidence. *Id.* at 827.

The Court decision in *Payne* left the decision to permit the introduction of such evidence to the individual States. *Id.* In leaving the decision to permit such evidence,

this Court concluded "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* This Court did leave open the possibility that evidence introduced could be so unduly prejudicial that it would render the sentencing fundamentally unfair, and therefore, implicate the Due Process Clause of the Fourteenth Amendment as an avenue for relief. *Id.* at 825.

7. At the sentencing hearing, each of the members of Corporal Dickson's family who testified were within the definition of a victim in a homicide prosecution under Pennsylvania statute. *See* 18 P.S. § 11.103. Pennsylvania Law provides for the right of a victim, as defined above, to provide an oral statement "detailing the physical, psychological and economic effects of the crime on the victim and the victim's family." 18 P.S. §11.201. In accord with *Payne,* Pennsylvania specifically permits the introduction of both evidence regarding the victim as a unique person and the impact of the death of the individual upon his family in a sentencing hearing for murder in the first degree. 42 Pa. C.S.A. § 9711(a) (2).

The testimony related to the victim, Corporal Dickson, directly related to who he was as a human being, a husband, father, son, and as a member of the Pennsylvania State Police. This is exactly the type of evidence permitted by this Court's decision in *Payne.* Indeed, even the dissent conceded "that viewed item by item and in isolation, much of the victim impact evidence was relevant and admissible as such." *Frein,* 206 A.3d at 1095.

8. The Pennsylvania Supreme Court held the trial court properly instructed the jury that the evidence was not to be considered an aggravating factor. *Id.* at 1075. As a jury is presumed to follow a court's instructions, and the trial court properly instructed the jury, there is no compelling reason to grant the petition for writ of certiorari.

9. This Court has also previously determined when a harmless error analysis may be employed when a non-statutory aggravating factor is introduced into a death penalty sentencing proceeding. In doing so, this Court stated: "[a]n appellate court appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict . . ." *Jones v U.S.* , 527 U.S. 373, 402 (1999).

The majority opinion of the Pennsylvania Supreme Court decision found that the, despite the victim impact evidence presented, the predominant evidentiary consideration in this case was the murder and attempted murder of two police officers." *Id.* at 1076, n.24.

With the above finding by the Pennsylvania Supreme Court, which is essentially a finding of harmless error, there is no compelling reason to grant the petition, as the review would be that of the particular facts of this case and whether, if found inadmissible, whether the admissibility of the evidence was harmless error.

Respondent respectfully submits given the findings of the Pennsylvania Supreme Court this individual case would not be a vehicle for this court to provide any further guidance than this Court has already provided to state courts in death penalty cases.

CONCLUSION

For theses reasons, the Commonwealth of Pennsylvania, respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

The Commonwealth Court further erred in concluding that Sections 5707 and 5710 constitute unconstitutional delegations of legislative power. Accordingly, we reverse the Commonwealth Court order, and we remand for further proceedings consistent with this opinion.

Chief Justice Saylor and Justices Baer, Todd, Donohue, Dougherty and Mundy join the opinion.

COMMONWEALTH of Pennsylvania, Appellee

v.

Eric Matthew FREIN, Appellant

No. 745 CAP

Supreme Court of Pennsylvania.

Argued/Submitted: May 17, 2018

Decided: April 26, 2019

Background: Following denial of motion to suppress, defendant was convicted in the Court of Common Pleas, Pike County, Criminal Division at No. CP-52-CR-0000019-2015, Gregory H. Chelak, J., of first-degree murder, criminal homicide of law enforcement officer, and related offenses, and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, No. 745 CAP, Todd, J., held that:

(1) evidence was sufficient to support convictions for first-degree murder and first-degree criminal homicide of law enforcement officer;

(2) defendant clearly and unambiguously invoked his right to remain silent;

(3) defendant's question to police officers if they were fathers, followed by comment that "[t]here was a father that didn't come home," did not result in waiver of his right to remain silent;

(4) error in admission of defendant's statements to police, in violation of *Miranda*, was harmless;

(5) defendant was not prejudiced by trial court's admission of extensive victim impact evidence;

(6) admission of victim impact evidence did not implicate defendant's right to due process and prohibition against cruel and unusual punishment;

(7) defendant's proffered instruction regarding evidence that would constitute mitigating circumstance was adequately covered by instructions given;

(8) defendant was not entitled to relief from death sentences.

Affirmed.

Donohue, J., filed concurring opinion.

Wecht, J., filed opinion concurring in part and dissenting in part.

1. Criminal Law ⇐1134.71

In all capital direct appeals, the Supreme Court reviews the evidence to ensure that it is sufficient to support a first-degree murder conviction, even if no challenge to the sufficiency of the evidence is raised by the defendant.

2. Homicide ⇐908

On a charge for first-degree murder, the jury may infer the intent to kill based upon the defendant's use of a deadly weapon on a vital part of the victim's body. 18 Pa. Cons. Stat. Ann. § 2502(a), (d).

3. Criminal Law ⇐1134.17(3)

In reviewing whether the evidence was sufficient to support a conviction, the appellate court must evaluate the entire

trial record and consider all of the evidence.

4. Criminal Law ⇐552(1), 553

The Commonwealth may sustain its burden of proving a criminal charge by means of wholly circumstantial evidence, and 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.

5. Criminal Law ⇐1144.13(3)

In reviewing the sufficiency of the evidence to support a conviction, the evidence must be viewed in the light most favorable to Commonwealth as the verdict winner.

6. Homicide ⇐1184

Evidence was sufficient to support convictions for first-degree murder and first-degree criminal homicide of law enforcement officer, arising out of shooting death of Pennsylvania State Police corporal; bullets that killed corporal were fired from rifle that belonged to defendant, which was recovered from airplane hangar where defendant had been hiding following shooting, defendant's DNA was on rifle, search of defendant's laptop computer revealed Internet searches for possible targets in days that led up to shooting, including police barracks where corporal was shot, and response procedures for when officers are shot, and defendant wrote three notebook pages describing shooting, as well as notepad detailing his six-week effort to avoid capture. 18 Pa. Cons. Stat. Ann. § 2502(a), (d).

7. Criminal Law ⇐1134.17(2)

When reviewing the denial of a suppression motion, the appellate court reviews only the suppression hearing record, and not the evidence elicited at trial.

8. Criminal Law ⇐1134.49(4), 1158.12

Where the record supports the suppression court's factual findings, the appellate court is bound by those findings and may reverse only if the court's legal conclusions are erroneous.

9. Criminal Law ⇐411.84

If a person in police custody indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, under the Fifth Amendment, an interrogation must cease, and any statement taken after the person invokes this privilege cannot be other than the product of compulsion, subtle or otherwise. U.S. Const. Amend. 5.

10. Criminal Law ⇐411.85

If the individual in police custody states that he wants an attorney, the interrogation must cease until an attorney is present, and at that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

11. Criminal Law ⇐411.85

Under the Fifth Amendment, if an individual in police custody is unable to obtain an attorney, but indicates that he wants one before speaking to police, the police must respect the individual's decision to remain silent. U.S. Const. Amend. 5.

12. Criminal Law ⇐411.80, 411.86(3)

If a suspect in police custody makes a statement regarding the right to counsel that is ambiguous or equivocal, the police are not required to end the interrogation, nor are they required to ask questions designed to clarify whether the suspect is invoking his *Miranda* rights. U.S. Const. Amend. 5.

13. Criminal Law ⇐411.77, 411.80

There are not two different standards for determining when an accused has invoked *Miranda* right to remain silent and the *Miranda* right to counsel, as both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. U.S. Const. Amend. 5.

14. Criminal Law ⇐411.90

An accused may waive his *Miranda* rights.

15. Criminal Law ⇐411.85, 411.86(6)

When an accused invokes his Fifth Amendment right to remain silent, he is not subject to further interrogation by the authorities without the presence of counsel unless the accused himself initiates further communication, exchanges, or conversations with the police. U.S. Const. Amend. 5.

16. Criminal Law ⇐411.78

Defendant clearly and unambiguously invoked his right to remain silent when he informed police officers that he was not willing to answer officers' questions but would show them on map where rifle was buried in woods, when he refused to sign *Miranda* waiver form and repeatedly told officers that he did not want to answer any questions or give officers too much information until he spoke with lawyer, and officer's statement to defendant that "you don't want to answer questions about any crime, but you're willing to tell us where a rifle is buried," demonstrated that officers clearly understood defendant's statement as invocation of his right to remain silent. U.S. Const. Amend. 5.

17. Criminal Law ⇐411.86(6)

Defendant's question to police officers if they were fathers, followed by comment that "[t]here was a father that didn't come home," did not constitute re-initiation of interview with police resulting in waiver of his right to remain silent, after he had clearly and unambiguously invoked right; there was no break in interview, during which question and comment were made, after defendant invoked his right to remain silent, but instead, officers continued their questioning of defendant for more than three hours, simply redirecting subject of conversation whenever defendant indicated that he did not want to talk about his crimes or stated that he did not want to provide police with additional information without first speaking with attorney, officers did not remind defendant that he had right not to speak, and immediately after asking question and comment, defendant again told officers that he did not "want to get too far into it," because he would be going to trial, thereby reiterating his desire not to speak with officers about murder. U.S. Const. Amend. 5.

18. Criminal Law ⇐1169.12

Error in admission of defendant's recorded statements to police, which were made after defendant had clearly and unambiguously invoked his right to remain silent, in violation of *Miranda*, was harmless, in trial for first-degree murder, first-degree criminal homicide of law enforcement officer, and other crimes; admissible and uncontroverted physical evidence of guilt was overwhelming, such that admission of statements could not have contributed to verdict. U.S. Const. Amend. 5.

19. Criminal Law ⇐1169.12

A suppression court's error in failing to suppress statements by the accused in violation of *Miranda* will not require reversal if the Commonwealth can establish beyond a reasonable doubt that the error was harmless.

20. Criminal Law ⇐1169.12

Miranda violations are subject to the "harmless error" rule.

21. **Criminal Law** ⇐1169.1(1), 1169.2(1)

"Harmless error" exists if the Commonwealth proves that (1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

See publication Words and Phrases for other judicial constructions and definitions.

22. **Sentencing and Punishment** ⇐1789(9)

Defendant was not prejudiced by trial court's admission of extensive victim impact evidence, including photographs of police officer victim at various stages of family and professional career, and testimony from victim's widow, victim's family members, and fellow officers, in sentencing for capital murder and related offenses, even if evidence was unnecessarily excessive and some evidence, such as speech by attorney challenging new state troopers to emulate work ethic of different officer who had been fatally shot, did not concern victim officer personally or impact that victim's death had on his family, where trial court instructed jury that, if it found at least one aggravating circumstance and one mitigating circumstance, in weighing aggravating and mitigating circumstances, it had to consider evidence presented about victim and impact that his death had on family, and jury found multiple aggravating factors and zero mitigating factors, thus giving rise to presumption that jury did not consider victim impact evidence. 42 Pa. Cons. Stat. Ann. § 9711(a)(2).

23. **Sentencing and Punishment** ⇐1763

The Pennsylvania Sentencing Code permits the introduction of two types of victim impact evidence during the penalty phase of a capital trial: (1) evidence about the victim, and (2) evidence regarding the impact that the death of the victim has had on the victim's family. 42 Pa. Cons. Stat. Ann. § 9711(a)(2).

24. **Sentencing and Punishment** ⇐1763

The admission of victim impact evidence at penalty phase, like all evidence, is within the sound discretion of the trial court, which must balance evidentiary value against the potential dangers of unfairly prejudicing the accused, inflaming the passions of the jury, or confusing the jury. 42 Pa. Cons. Stat. Ann. § 9711(a)(2).

25. **Criminal Law** ⇐1141(2), 1153.1

An appellate court will reverse a trial court's decision regarding the admissibility of evidence only when the appellant sustains the heavy burden of establishing that the trial court has abused its discretion.

26. **Criminal Law** ⇐1147

An "abuse of discretion" will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

See publication Words and Phrases for other judicial constructions and definitions.

27. **Criminal Law** ⇐1144.15

A jury is presumed to follow the trial court's instructions on the law.

28. **Constitutional Law** ⇐4744(2)
Sentencing and Punishment ⇐1763

Extensive victim impact evidence, including photographs and video recordings

of police officer victim at various stages of family and professional career, and testimony from victim's widow, victim's family members, and fellow officers, pursuant to statute authorizing admission of evidence relating to victim and impact that victim's death had on his family did not implicate defendant's right to due process and prohibition against cruel and unusual punishment, in sentencing for capital murder and related offenses, even if evidence was unnecessarily excessive. U.S. Const. Amends. 8, 14; 42 Pa. Cons. Stat. Ann. § 9711(a)(2).

29. Sentencing and Punishment ⇐1780(3)

Proffered instruction that, to "establish a mitigating circumstance to which you should consider and give effect, the [d]efendant need not establish a nexus between the mitigating circumstance and the crime[,]" and that "the mitigating circumstance need not be a defense or an excuse for the crime," was adequately covered by instructions given, in sentencing for capital murder and related crimes; trial court described 29 specific "matters," which, if proven by preponderance of evidence, could constitute mitigating circumstances, it instructed jury that it was entirely proper for jury to consider sympathy or mercy as reason to impose life sentence as long as mercy or sympathy was tied to evidence that jury found to constitute mitigating circumstance, and it allowed jury to consider all evidence in mitigation. 42 Pa. Cons. Stat. Ann. § 9711(e)(8).

30. Sentencing and Punishment ⇐1789(5)

An appellate court reviews penalty-phase jury instructions in the same manner in which it reviews challenges to jury charges given during the guilt phase of trial; specifically, the court considers the charge in its entirety, rather than discrete portions of the instruction.

31. Criminal Law ⇐805(1)

When instructing the jury, trial courts are free to use their own expressions, so long as the concepts at issue are clearly and accurately presented to the jury.

32. Sentencing and Punishment ⇐1788(5)

The Supreme Court is required to conduct an independent review of a death sentence to determine (1) whether the sentence of death was the product of passion, prejudice, or any other arbitrary factor; or (2) if the evidence fails to support the finding of at least one statutory aggravating circumstance. 42 Pa. Cons. Stat. Ann. § 9711(d), (h).

33. Sentencing and Punishment ⇐1661

Defendant was not entitled to relief from death sentence for first-degree murder and criminal homicide of law enforcement officer, arising out of shooting death of state police corporal; sentence was not product of passion, prejudice, or other arbitrary factor, but was supported by overwhelming evidence that defendant fatally shot corporal with malice and specific intent to kill, jury found, beyond reasonable doubt, statutory aggravating circumstances that corporal was killed in performance of his duty, that offense was committed during perpetration of felony, that defendant knowingly created grave risk of danger to other persons, including other trooper whom defendant also shot and police barracks communications officer, and that defendant had been convicted of another state offense at time of murder for which sentence of life imprisonment or death was imposable, and because jury found no mitigating circumstances, death sentence was mandatory. 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv), (d)(1), (6), (7), (10), (h)(3).

Appeal from the Judgment of Sentence entered on April 27, 2017 in the Court of Common Pleas, Pike County, Criminal Division at No. CP-52-CR-0000019-2015. Gregory H. Chelak, Judge

William Ruzzo, Esq., William Ruzzo Attorney at Law, Kingston, Michael E. Weinstein, Esq., Weinstein & Zimmerman, Milford, for Eric Matthew Frein, Appellant.

Ronald Eisenberg, Esq., Pennsylvania Attorney General's Office, Raymond Jay Tonkin, Esq., Pike County District Attorney's Office, for Commonwealth of Pennsylvania, Appellee.

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE TODD

Eric Matthew Frein appeals the judgment of sentence of death imposed by the Pike County Court of Common Pleas following his convictions by a jury of first-degree murder,[1] first-degree criminal homicide of a law enforcement officer,[2] criminal attempt to commit first-degree murder and criminal homicide of a law enforcement officer,[3] assault of a law enforcement officer in the first degree,[4] terrorism,[5] weapons of mass destruction,[6] discharge of a firearm into an occupied structure,[7] possessing instruments of crime,[8] and recklessly endangering another person.[9] For the reasons that follow, we affirm Appellant's judgment of sentence.

At approximately 10:45 p.m. on Friday, September 12, 2014, shortly before completing his 3:00 p.m. to 11:00 p.m. shift, Pennsylvania State Police Corporal Bryon K. Dickson, II entered the Blooming Grove police barracks in Pike County through the public lobby and went into his office. After several minutes, he left his office and entered the communications room located near the front of the barracks and wished Nicole Palmer, a police communications operator who was just beginning her shift, a good night. Corporal Dickson then exited the communications room and walked through the lobby on his way out of the barracks. Palmer, who had answered a telephone call, heard a gunshot and looked out the communications room window, where she observed Corporal Dickson lying motionless on the concrete just outside the lobby doors. Palmer immediately entered the lobby, at which time she heard another gunshot. She opened the lobby doors and asked Corporal Dickson what had happened, and he mouthed the words "help me." N.T. Trial, 4/4/17, at 119. Palmer retreated into the lobby and attempted to call 911. She opened the lobby doors and again asked Corporal Dickson what had happened, and he stated, "I've been shot. Drag me inside." *Id.* at 121. Palmer then saw Police Communications Operator Christine Donahue in the communications room and instructed her to call 911.

Around that same time, Trooper Alex Douglass, who was scheduled to work the

1. 18 Pa.C.S. § 2502(a).
2. *Id.* § 2507(a).
3. *Id.* § 901(a).
4. *Id.* § 2702.1(a).
5. *Id.* § 2717.
6. *Id.* § 2716(a).
7. *Id.* § 2707.1(a).
8. *Id.* § 907(a).
9. *Id.* § 2705.

11:00 p.m. to 7:00 a.m. shift beginning that night, arrived at the Blooming Grove police barracks in a marked police vehicle along with three other state troopers. While the other troopers entered the barracks, Trooper Douglass took a gym bag to his personal vehicle in the parking lot. As he placed the bag in his car, he heard a loud noise. He looked towards the front of the barracks and observed Corporal Dickson lying on the ground. He drew his weapon and approached Corporal Dickson. As Trooper Douglass reached Trooper Dickson, Trooper Douglass was shot in the hip. Trooper Douglass successfully pushed his way into the barracks, where he attempted to crawl out of view. Eventually, two other troopers dragged Trooper Douglass from the lobby to the interior of the barracks. Trooper Douglass subsequently was transported to a nearby school, where a helicopter was waiting to take him to the hospital; he survived.[10]

In order to reach Corporal Dickson, other officers who were present in the barracks drove a patrol vehicle from the back of the barracks to the front. Utilizing ballistic shields, officers were able to drag Corporal Dickson into the barracks, where they began CPR and attempted to use an AED. Upon their arrival, EMS workers attended to Corporal Dickson for a short time, but their efforts were unsuccessful and he was pronounced dead. The autopsy of Corporal Dickson indicated that he suffered two gunshot wounds, one in his upper right chest, and a second in his shoulder. Each of the wounds was fatal.

With the identity and the whereabouts of the shooter still unknown, members of the Forensic Services Unit ("FSU") of the Pennsylvania State Police arrived at the Blooming Grove police barracks at approximately 2:00 a.m. on Saturday, September 13, 2014 to process the crime scene. They recovered, *inter alia*, three projectiles from the front of the barracks, including the two bullets that killed Corporal Dickson and the one that severely injured Trooper Douglass. In a wooded area across the street from the police barracks, the FSU recovered four empty .308 caliber rifle casings with the head stamp "AFF 88."[11] In this same wooded area, the FSU observed one tree that appeared to have been hit by a bullet, and another tree in which a bullet was lodged. Using a laser, the FSU determined that the projectiles found at the barracks and removed from the tree were fired from the area in the woods where the casings were found. N.T. Trial, 4/5/17, at 175-78.

On Sunday, September 14, 2014, a man walking his dog in the area discovered a green Jeep Cherokee Sport vehicle stuck in a retaining pond off Route 402, approximately 2 to 3 miles from the Blooming Grove police barracks. When he looked inside the Jeep, he observed an open gun case and various military supplies, and he notified the state police. During a search of the vehicle, the police recovered the following items: a registration card identifying the owners as E. Michael and Deborah L. Frein, Appellant's father and mother; an invoice and receipt for classes at North-

10. As a result of his injuries, Trooper Douglass underwent numerous surgeries. He testified at trial that he undergoes physical and aqua-therapy for 3 ½ hours a day, four days each week; he can no longer run; he experiences a tingling and/or burning sensation whenever he goes to the bathroom, as well as nausea-inducing pain; he treats with seven different doctors; and there is a possibility that he may need to have his lower leg amputated. N.T. Trial, 4/20/17, at 131-33.

11. "AFF" stands for Ammunition Factory Footscray, Footscray being a suburb of Melbourne, Australia, and "88" referring to the year in which the ammunition was produced, i.e., 1988. N.T. Trial, 4/13/17, at 136.

ampton County Community College with Appellant's name and home address; an expired Pennsylvania driver's license issued to Appellant; a tube of camouflage paint; a pack of Drina brand cigarettes; a small "mini mag" flashlight; a brown paper bag containing 5 packs of cigarettes; an empty water bottle; two cigarette butts, one of which later was determined to contain Appellant's DNA; and a wallet with a chain attached to a key ring. The wallet contained, *inter alia*, a current Pennsylvania driver's license issued to Appellant; Northampton Community College and East Stroudsburg University photo I.D. cards issued to Appellant; and a credit card and social security card with Appellant's name. On the floor in the back of the vehicle where the vehicle jack is located, police discovered two empty rifle casings with the head stamp "AFF 88." Police also recovered from the vehicle a faded black hooded sweatshirt; a shooting range permit issued to Appellant; a black rifle case; and a green military satchel with handwriting on the outside. Additionally, a search of the area around the retaining pond revealed an AK-47 rifle, which contained a magazine with 27 live rounds and one round in the chamber, partially hidden under a pile of leaves, in close proximity to a camouflage backpack. On top of the backpack were two magazines of ammunition.

On September 15, 2014, police conducted a search of the residence in which Appellant lived with his parents. In the garage, police discovered in a workbench drawer expended rounds of ammunition with the head stamp AFF 88. From Appellant's second floor bedroom, police recovered, *inter alia*, a variety of guns; magazines of ammunition; ammunition boxes; binoculars; a radio; a box and receipt for night vision goggles; a book titled Sniper Training and Employment; an IBM Think Pad; a pack of Drina brand cigarettes; a plastic bag containing lead piping and caps, materials used in making bombs; a yellow notepad with a handwritten list of survival supplies and types of ammunition; and a handwritten list of "Things to Do."[12] A massive manhunt for Appellant ensued.

On September 29, 2014, FBI Special Agent Matthew Fontaine, who was assisting in the search for Appellant, was advised there had been a cell phone "ping" in an area near Canadensis, Pennsylvania, that had not yet been cleared by members of the FBI Swat Team. Agent Fontaine ultimately discovered a campsite where there were various items covered in camouflage, including: clothing; a checkbook with Appellant's name; size 13 hiking boots (Appellant's size); .308 caliber ammunition stamped "AFF 88"; and two improvised explosive devices ("IEDs").[13] Near the campsite, in an area described as a bear cave, agents located a white trash bag containing, *inter alia*, empty water bottles. An agent removed one of the empty water bottles, labeled Nestle Pure Life, from the bag, but left the remainder of the bag intact in an effort to have the area appear undisturbed in case Appellant returned.

The following day, another agent returned to the same area and collected, *inter alia*, various food items; toiletries; clothing; camping gear; and a folding shovel. He also collected the aforementioned white trash bag, which contained three

12. The "Things to Do" list included, *inter alia*, the following tasks: "Clean Jeep; Inspect Cache; Repack, Re-assess equipment; Clean guns; Re-sight, affirm zero; Re-assess outfit (Green); Clean Room." Commonwealth Exhibit 187. It also contained a list of additional survival items and weaponry.

13. The IEDs were the basis for the charge of possessing instruments of mass destruction.

crumpled pages torn from a small spiral notebook. Those pages read as follows: [14]

> Made it to camp tues.
>
> Sept 16th
>
> Fri Sept 12th
>
> Got a shot around 11 pm and took it. He dropped and yelled. I was surprised at how quick I took a follow up shot on his head/neck area. He was still and quiet after. A lady was in the door way on her cell phone looking at him. Another cop approached the one I just shot. As he went to kneel I took a shot at him and jumped in the door. His legs were visible and still.
>
> . . . . .
>
> I ran back to the jeep. lots of cops were driving up and down 402. No attention was given to the woods.
>
> I made maybe half a mile from the GL road and hit a road block. I didn't expect one so soon. It was only 15-20 min. I did a K turn ¼ mile from them and pulled into a development I knew had unfinished acess road. no one gave chase.
>
> . . . . .
>
> Hearing helos I just used my marker lights missed the trail around a run off pool and drove strait into it.
>
> Disaster!
>
> Made half attemp to stash AK and ran. Spent all night tracking SW towards a stream that went under 84.

Commonwealth Exhibit Nos. 227-229.

Despite the involvement of the Pennsylvania, New York, New Jersey, Virginia, Maryland, and Connecticut State Police Departments, as well as local police departments, the FBI, the Bureau of Alcohol Tobacco and Firearms, Homeland Security, and the United States Marshals, Appellant remained at large until October 30, 2014, when a team of United States Marshals located him approximately 30 miles from his home, on abandoned resort property on which sat an old airplane hangar, and took him into custody. Shortly after being captured, Appellant asked one of the marshals, "Can I tell you where the guns are located inside the hangar?" N.T. Trial, 4/10/17, at 79. The marshal answered in the affirmative, and Appellant described the location of two rifles and one loaded pistol inside the hangar. Appellant also told the marshals that there was ammunition in the hangar. *Id.* at 84-85.

During a subsequent search of the airplane hangar, state police discovered the rifles, one of which was a Norinco semiautomatic rifle, and a pistol, as well as the following items: a scope; a notebook; a bayonet; a compass; camouflage mesh; a camouflage tarp; a radio receiver; pencils; a map of Route 402; notes; a miner's light; a brown sheet; green material; a gun cleaning kit; binoculars; a laptop computer; computer thumb drives; a solar panel power charging kit; maps; a magazine clip and bullets; ammunition; pipe; a flashlight; gloves; scissors; batteries; food; water; and toiletries. They also discovered several papers with handwritten sighting distances, calculations for different range settings based on distance, wind, bullet weight, and other conditions, and a hand-drawn map of the area of Route 402 in relation to the Blooming Grove barracks. Finally, the police recovered a small memo pad with a black cover allegedly detailing Appellant's activities following the shootings, which read as follows:

> Had to run. Jeep got stuck. ditched the Kalashnikov and went on foot.

14. We have quoted these handwritten notes, which are at times difficult to read and contain some grammatical and spelling errors, to the best of our ability and exactly as they appear in the record.

-tracked SW to stream that looked to go under 84.

+ Sept 13 Sat day 2

-Made the stream = Sun up. Got H_2O, Cl worked.

-Rained all day and cold.

-Made bridge on Egypt Rd. tried to wait for sundown but too cold.

-Got lost in development. kept moving S. crossed deep stream.

-took PL trail up to 84.

-too much activity to cross.

Could not find stream access.

+ Sept 14 Sun. day 3

-Slept all day in abandoned camper. Mattress and 2 blankets

-Crossed 84

-No activity so track to PL trail

-Got to high knob before too cold. Made small fire to dry things.

+ Sept 15 Mon. day 4

-tracked around high Knob.

-crossed Bushkill. camp fire again.

+ Sept 16 tues day 5

-stash was unmolested. Ate for first time in 3 days. Slept well.

+ Sept 17 Weds 6 days

-Moved deeper in. Built shelter, got cleaned up.

+ Sept 18 thurs 7 days

-turned cell on for 10-15 sec. Rang home twice to let them know I'm. still alive. Got a text indicating I am suspect.

-Helos & planes around that evening.

+ Sept 19 Fri. 8

-Patrol went by > 100 m, was not spotted. they seem stuck to trails.

+ 20 Sept Sat 9

-Found a news radio station finally. They called me a survivalist... HA! Catchy phrase I guess.

-200 police shelter in place for Pike and Barrett... shelter in place for protection from spooked cops.

+ Sept 21 Sun 10

-Shelter in place lifted.

-they found the kalashnikov.

+ Sept 22 Mon. 11

-Made it across Broadhead right under helos. Went in over my head test water. Could only move till 10ish before I had to stop and change out of wet clothes b/c it was 38°f.

+ Sept 23 tues 12

-Waited all day for clothes & boots to dry.

-First part went well. Second not so much, but I made it.

+ Sept 24 Weds 13

-Got a bath!

+ Sept 25 thurs 14

-Slept like a human first time in 2 weeks

-Got buckets to catch rain.

-Spent hour listening to music on laptop. Classical made me cry. Mr. Prime (?) made me laugh both much needed.

-Police activity still in canadensis

+ Sept 26 Fri - 15

-Shaved & did laundry.

+ Sept 27 Sat. 16

-they searched Buckhill Inn.

-Some noisy kids came by at 5pm. Were only in front room for few min then left.

+ Sept 28 Sun. 17

-Nothing

+ Sept 29 Mon 18

-Still 5 mile zone = Snowhill

-took a bath

-Gave rifle & pistol good cleaning

-No idea if scope is still zeroed after all this time.

+ 30 Sept tues 19

-Fasted all day except pipe tobacco & coffee.

-the found the stash.

-they think there are pipe bomb around...that is not the case but it should slow them down.

+ Oct 1 Weds 20

-1060 AM Phili claims there are 1000 searchers.

-A snooper came by = 3 pm just taking pictures in front part

-Helos close after dark. traveling not searching.

+ Oct 2 thurs 21

-Hunting closed in Barrett & Pike.

-2 cops fell from tree stand.

-Had to flown to hospital.

That is what the helos last night must have been for.

-About to head out on recon. nervous.

+ Oct 4 Sat 23

-Heading back. Heart broken. No respit. Recon went well but bad news... still too much activity. this massive search cannot last forever.

-Made it back in good time

+ Oct 5 Sun 24

-Slept through morning

-found a spigot & a cozy place to plug in laptop.

+ Oct 6 Mon. 25

-Search in 1 mile zone of Mill creek. Recon passed through there, dog might have caught my scent.

-they are bugging Justin now.

+ Oct 7 tues 26

-Got a bath

-Going to try fasting today.

-Only lasted till 9 pm too cold had to eat something hot.

+ Oct 8 weds 27

-Did laundry

+ Oct 9 thurs. 28

-Found case of chocolate finally! Hid it too well. Should add calories to my diet.

+ Oct 10 Fri 29

-No mention of me on morning news. No news is good news I hope.

+ Oct 11 Sat. 30

-30 days. A lot longer than I expected to last.

-lord Jesus Christ Son of God have mercy on me a sinner-[Indecipherable sentences]

I have never been camping for more than 3 days

+ Oct 12 Sun 31

-Got a bath. & shaved

+ Oct 13 Mon 32 Columbus day I think

-No news

+ Oct 14 tues 33

-No news

-Weekend house who spigot I have been using must have shut it off for winter. Now getting H_2O will be far more risky... or I could place trust in rain water.

+ Oct 15 Weds 34

-trick or treating and halloween parade cancelled in Barrett. It is surprising what the people are letting them get away with.

+ Oct 16 thurs 35

-A state senator is coming to review the investigating and manhunt. They are probably struggling to show examples of progress with so much tax payer $ spent.

+ Oct 17 Fri 36

-Got a bath & did laundry.

+ Oct 18 Sat 37

-Got on the internet. No luck yet contacting help. Read some articles, most of it bullshit. Cops seem to be chasing bears that house wives think are me.

-there is a coyote around here, or might be a coy-dog. I only see him out night. He calls out most nights = 11 pm.

+ Oct 19 Sun 38

-Gonna try to get food tomorrow night... Good chance I'll get caught doing so.

+ Oct 20 Mon. 39

Going for food tonight. I only have beans left. Shop lifting is probably less risky than breaking in some place. Wish I had stashed a pair of jeans. I could keep waiting to contact help, but there is little guarantee there.

-Its suppose to rain tonight into Fri. Found a case of canned hot chocolate with that & the beans I should hold till Fri.

Cops are searching around Swiftwater anyway.

+ 21 Oct Tues 40

-Another false sighting near Swiftwater

+ 22 Oct Weds 41

-Nothing

+ 23 Oct thurs 42

-Nothing

+ 24 Oct. Fri. 43

-Nothing

+ 25 Oct Sat. 44

-Found 2 packages of crackers now I have something to add to the beans again

+ 26 Oct Sun 45

-OJ— I broke into a place

was careful not to damage anything.

Just took some rice, ramen, oil & a bottle of Korean spirits. lord have mercy, Christ have mercy.

+ Oct 27 Mon. 46

-Nothing.

+ Oct 28 tues 47

-Nothing

+ Oct. 29 Weds 48

-took a 10 mile hike. Very little was accomplished. All wifi needs a code. And I don't have the tools to break into places without smashing glass.

Commonwealth Exhibits 328-344.

After being taken into custody on October 30th, Appellant was transported to the Blooming Grove police barracks, where he was placed in an interrogation room at approximately 8:23 p.m. A medic was brought in to attend to a cut on Appellant's face. Shortly thereafter, Pennsylvania Police Corporal Benjamin Clark and Trooper Michael Mulvey entered the interrogation room. Corporal Clark removed Appellant's handcuffs, offered him coffee and cigarettes, and made small talk with Appellant before reading him his *Miranda*[15] rights at approximately 8:36 p.m. When Corporal Clark asked Appellant if he wanted to waive those rights, Appellant asked if he could read the written waiver form. After reading the waiver form, Appellant refused to sign it, and told the officers that he was not willing to answer questions; however, he told them he would tell them the location of a rifle he had buried on wooded game lands near Route 447 because he did not want any children to find it.[16] The officers questioned Appellant about the buried rifle, and then asked if there was anything else that might cause harm to law enforcement or citizens if it was discovered. Appellant repeatedly assured the officers there was not. As we discuss in more detail below, the officers

15. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

16. At trial, Corporal Clark testified that, despite the use of metal detectors and dogs, police were unable to locate a buried rifle in the area identified by Appellant. N.T. Trial, 4/11/17, at 26.

then began to question Appellant about his activities over the last several weeks, about the publicity surrounding the crimes, and, most significantly, his motives for the crime. Although Appellant never offered any explanation for his actions, he made several statements during which he implicitly, if not expressly, admitted his guilt, including that he regretted his actions; that he acted alone; and that he didn't know why he did what he did. The entire interview, beginning from the time Appellant entered the interrogation room, lasted approximately four hours and was recorded on videotape.[17]

At approximately 8:48 p.m., while Appellant was in the process of being interviewed, Attorney James Swetz called the Blooming Grove barracks and advised the dispatcher that he had been retained by Appellant's family and that he was coming to the barracks to see Appellant. The dispatch provided Attorney Swetz with an alternate phone number, and, upon calling that number, Attorney Swetz was told that he would not be permitted to enter the barracks to see Appellant because Appellant had not requested counsel. N.T. Suppression Hearing, 4/3/17, at 41. Despite this information, Attorney Swetz went to the barracks, but was denied entry. He made another call to the barracks, and, shortly thereafter, two plainclothes troopers came out of the barracks and advised Attorney Swetz that the District Attorney, Ray Tonkin, would get back to him. Attorney Swetz eventually left the police barracks without seeing Appellant. Attorney Swetz subsequently received a call from District Attorney Tonkin at 1:13 a.m. the following morning.[18] At approximately 1:30 a.m. on the morning of October 31, 2014, Trooper Sean Doran was called to the Blooming Grove police barracks to collect a DNA sample from Appellant pursuant to a warrant.

On January 29, 2015, Attorneys Michael Weinstein and William Ruzzo were appointed to represent Appellant. On February 16, 2016, counsel filed a motion to suppress the statements Appellant made during his interview with Corporal Clark and Trooper Mulvey on October 30, 2014, on the basis that they were obtained in violation of his right to remain silent under *Miranda*, and in violation of his right to counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. Following a hearing, the trial court denied the motion. A jury trial commenced on April 5, 2017. Among the various witnesses presented by the Commonwealth, Corporal Joseph M. Gober, a member of the Pennsylvania State Police Firearms and Toolmarks Unit at the Bureau of Forensic Services, testified that he examined the four empty shell casings found in the woods across from the Blooming Grove barracks, the bullets found inside the barracks, and the bullet recovered from the tree in the woods across from the barracks, and determined that they were fired from the Norinco rifle that was recovered from inside the airplane hangar. N.T. Trial, 4/13/17, at 158-81. Corporal Gober further testified that the empty shell casings stamped "AFF 88" which were recovered from Appellant's jeep also were discharged from the Norinco rifle. *Id.* at 180.

Lauren Force, an expert in DNA analysis, testified that she examined DNA evi-

17. The videotape is 4 ½ hours long, and includes the search of Appellant's person and the inventory of his clothing after the interview was completed. There is no written transcript of the interview.

18. Neither the briefs, nor the trial transcripts, reveal the substance of this phone call.

dence obtained from several items collected during the search for, and capture of, Appellant, including the Nestle Pure Life water bottle discovered in the trash bag near the campsite; a cigarette butt and the black hooded sweatshirt found in the Jeep; and the Norinco rifle and the ammunition magazine recovered from the airplane hangar. She determined that the major component of DNA samples obtained from the aforementioned items matched the DNA of Appellant. *Id.* at 96-100.

Corporal Mark Gardner, an expert in document examination, testified that he compared known handwriting samples of Appellant with the handwriting on the three crumpled notebook pages that were found inside the white trash bag discovered by police in the bear cave near the campsite on September 30, 2014. Corporal Garner stated that, based on his analysis, he "could come to no other conclusion than the authorship was the same and that [Appellant] did write these questioned papers." N.T. Trial, 4/13/17, at 27. Additionally, Julia Barker, an expert in the chemical analysis of documents, testified that the three notebook pages found in the trash bag were "chemically indistinguishable" from the pages of the small memo pad with the black cover found in the airplane hangar. *Id.* at 46.

The Commonwealth also presented the testimony of retired Pennsylvania State Police Corporal Derek Fozard, who examined the laptop computer recovered from the airplane hangar. Corporal Fozard testified that forensic analysis of the laptop computer, the registered owner of which was Appellant, revealed internet searches for police departments in areas surrounding the state police barracks at Blooming Grove, conducted on September 9, 2014, three days before the shooting, N.T. Trial, 4/17/17, at 17, and internet searches concerning "officer down" calls that were conducted on September 12, 2014, prior to the time Corporal Dickson and Trooper Douglass were shot. *Id.* at 20-23. The forensic analysis also revealed internet searches for "Blooming Grove" on October 19, 2014; instructions on how to delete a Facebook page on October 27, 2014; and numerous searches for "Eric Frein" on October 28 and 29, 2014. *Id.* at 24. There was also evidence of an internet search for the name "Bryon Dickson" on October 29, 2014, as well as searches for "wanted poster Eric Frein" and "Eric Frein support" on the same day. *Id.* at 26-27. Finally, Corporal Fozard testified that, on September 12, 2014, there was a search of coordinates which corresponded to the location of the Blooming Grove barracks, and he found a document file dated October 6, 2014 that contained a letter written by Appellant to his parents.[19] *Id.* at 32-34, 61-62, 77.

In addition to the above evidence, the entire post-arrest videotaped interview of

19. The letter read, in part:

Dear Mom and Dad,

Our nation is far from what it was and what it should be. I have seen so many depressing changes made in my time that I cannot image what it must be like for you. There is so much wrong and on so many levels only passing through the crucible of another revolution can get us back the liberties we once had. I do not pretend to know what that revolution will look like or even if it would be successful.

Tension is high at the moment and the time seems right for a spark to ignite a fire in the hearts of men. What I have done has not been done before and it felt like it was worth a try.

* * *

I do not have a death wish but I know the odds. I tried my best to do this thing without getting identified, but if you are reading this then I was not successful. If I am still alive and free know that I will do my best to remain as such. And as time goes by, if circumstances change, if my spark hit good tinder, then I may be able to return one day. Commonwealth Exhibit 505.

Appellant by police was played for the jury and entered into evidence, over defense counsel's objection. On April 19, 2017, Appellant was convicted of the aforementioned charges.

At the penalty phase of Appellant's trial, the Commonwealth presented, *inter alia*, the testimony of 10 victim impact witnesses, including Corporal Dickson's wife, sister, mother, and father, and Trooper Douglass; 32 photographs of Corporal Dickson and his family; a video of Corporal Dickson and his family; and a video of Corporal Dickson's graduation from the Pennsylvania State Police Academy. The jury found several aggravating circumstances, including (1) the victim was a police officer killed in the performance of his duty, 42 Pa.C.S. § 9711(d)(1); (2) the offense was committed during the perpetration of other felonies, *id.* § 9711(d)(6); (3) Appellant knowingly created a grave risk of danger to other persons, *id.* § 9711(d)(7); and (4) Appellant "has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable," *id.* § 9711(d)(10). The jury found no mitigating circumstances, and returned a sentence of death.

In accordance with 42 Pa.C.S. § 9711(c)(1)(iv), which requires that a trial court impose a sentence of death where the jury finds aggravating, but no mitigating circumstances, on April 27, 2017, the trial court imposed, *inter alia*, two death sentences, one for first-degree murder, and one for first-degree murder of a law enforcement officer. Following the denial of his post-sentence motion, Appellant filed a notice of appeal, and the matter is now before this Court.

I. Sufficiency of the Evidence

[1] Although Appellant has not raised a claim regarding the sufficiency of the evidence, in all capital direct appeals, this Court reviews the evidence to ensure that it is sufficient to support a first-degree murder conviction. *Commonwealth v. Poplawski*, 634 Pa. 517, 130 A.3d 697, 709 (2015).

[2] First-degree murder is an intentional killing, *i.e.*, a "willful, deliberate and premeditated killing." 18 Pa.C.S. § 2502(a), (d). In order to prove first-degree murder, the Commonwealth must establish that: (1) a human being was killed; (2) the accused caused the death; and (3) the accused acted with malice and the specific intent to kill. *Id.* The jury may infer the intent to kill based upon the defendant's use of a deadly weapon on a vital part of the victim's body. *Poplawski*, 130 A.3d at 709.

[3–5] In reviewing whether the evidence was sufficient to support a first-degree murder conviction, we must evaluate the entire trial record and consider all of the evidence. *Id.* Further, we must bear in mind that the Commonwealth may sustain its burden by means of wholly circumstantial evidence, and "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.* (citation omitted). Finally, the evidence must be viewed in the light most favorable to Commonwealth as the verdict winner. *Id.* at 710.

[6] As detailed above, the Commonwealth presented at trial expert testimony that the bullets that fatally wounded Corporal Dickson were fired from a Norinco rifle which belonged to Appellant, and which was later recovered from the airplane hangar where Appellant had been hiding following the shooting; indeed, upon his capture, Appellant directed police to the location of the rifle. The expert testi-

mony also established that Appellant's DNA was on the Norinco rifle. The Commonwealth further introduced evidence that Appellant had conducted internet searches for possible targets, including the Blooming Grove police barracks, and response procedures for when officers are shot, in the days leading up to the shootings of Corporal Dickson and Trooper Douglass. Finally, the Commonwealth presented three notebook pages written by Appellant describing the shooting of Corporal Dickson, as well as a notepad detailing Appellant's six-week effort to avoid capture. In the case *sub judice*, the evidence presented by the Commonwealth, and the reasonable inferences deduced therefrom, clearly demonstrate that Appellant, acting with malice and the specific intent to kill, caused the death of Corporal Dickson, thus supporting the jury's verdict of first-degree murder.

In conjunction with the undisputed evidence that Corporal Dickson was a Pennsylvania State Police Officer, this same evidence also supports the jury's verdict of first-degree criminal homicide of a law enforcement officer.

II. Denial of Appellant's Motion to Suppress

[7, 8] In his first briefed issues, Appellant challenges the trial court's denial of his motion to suppress the statements made during his post-arrest videotaped interview with police on two separate grounds – a violation of his right to remain silent and a violation of his right to counsel. When reviewing the denial of a suppression motion, this Court reviews only the suppression hearing record, and not the evidence elicited at trial. *In the Interest of L.J.*, 622 Pa. 126, 79 A.3d 1073, 1085 (2013). Where the record supports the suppression court's factual findings, we are bound by those findings and may reverse only if the court's legal conclusions are erroneous. *Poplawski*, 130 A.3d at 711.

[9–11] To protect an individual's Fifth Amendment[20] privilege against self-incrimination, the United States Supreme Court has held that, before an individual in police custody may be interrogated, he must first be informed, in clear and unequivocal terms, that he has the right to remain silent, that anything he says can and will be used against him in court, and that he has the right to consult with counsel and to have counsel present during interrogation, and, if he is indigent, counsel will be appointed for him. *Miranda*, 384 U.S. at 467–69, 86 S.Ct. 1602. If an individual "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," and any statement taken after the person invokes his privilege "cannot be other than the product of compulsion, subtle or otherwise." *Id.* at 473-74, 86 S.Ct. 1602. Further, "if the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474, 86 S.Ct. 1602. If the individual is unable to obtain an attorney, but indicates that he wants one before speaking to police, the police must respect the individual's decision to remain silent. *Id.*

In *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the high Court explained that it is "[t]hrough the exercise of his option to terminate questioning" that an accused "can control the time at which questioning occurs, the sub-

20. The Fifth Amendment provides, in relevant part: "No person shall ... be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

jects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting." *Id.* at 103-04, 96 S.Ct. 321. Accordingly, the Court held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Id.* at 104, 96 S.Ct. 321.

[12] In *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the United States Supreme Court explained that, when invoking a right to counsel under *Miranda*, a suspect must do so unambiguously. *Id.* at 459, 114 S.Ct. 2350. If a suspect makes a statement regarding the right to counsel that is ambiguous or equivocal, the police are not required to end the interrogation, nor are they required to ask questions designed to clarify whether the suspect is invoking his *Miranda* rights. *Id.* at 461-62, 114 S.Ct. 2350. In *Davis*, the Court concluded that the suspect's statement, "Maybe I should talk to a lawyer," was not a request for counsel, and, therefore, law enforcement agents were not required to cease questioning. *Id.* at 462, 114 S.Ct. 2350.

[13] Subsequently, in *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010), the Supreme Court held that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*," as both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. *Id.* at 381, 130 S.Ct. 2250. In *Berghuis*, the suspect sat silent for the first two hours and 45 minutes of a 3-hour interrogation before he answered "yes" to a police officer's question as to whether the suspect prayed for God to forgive him for the shooting. The high Court held that, because the suspect did not state that he wanted to remain silent or that he did not want to talk with the police, he did not unambiguously invoke his right to remain silent. *Id.* at 382, 130 S.Ct. 2250.

[14] Of course, an accused may waive his *Miranda* rights. In *Edwards v. Arizona*, the high Court recognized that, "after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation." 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (citing, *inter alia*, *North Carolina v. Butler*, 441 U.S. 369, 372-76, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)). The Court cautioned, however, that "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards*, 451 U.S. at 482, 101 S.Ct. 1880.

[15] The *Edwards* Court further reiterated:

> [this] Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, *a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation* even if he has been advised of his rights. We further hold that an accused ... having expressed

> his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85, 101 S.Ct. 1880 (emphasis added, footnote omitted); *see also Commonwealth v. Keaton*, 615 Pa. 675, 45 A.3d 1050, 1067 (2012) (invocation of Fifth Amendment right to counsel shields arrestee from further interrogation until counsel is present, unless arrestee initiates further conversation with police). This same standard applies to an accused's invocation of the right to remain silent. *See Berghuis, supra.*

[16] With this background in mind, we address Appellant's claim that Corporal Clark and Trooper Mulvey failed to "scrupulously honor" his right to remain silent. Appellant's Brief at 18. Appellant emphasizes that, after being read his *Miranda* rights, and requesting permission to read the *Miranda* waiver form himself, he refused to sign the form waiving his rights. Appellant then told the officers that he did not wish to talk about any crimes, but that he would tell him where a rifle was buried in the woods, a statement that Corporal Clark acknowledged and repeated back to Appellant. Appellant contends that, once he invoked his right to remain silent, the officers were required to cease questioning him about matters beyond the location of the rifle in the woods, and that the additional questioning by the officers, which was designed to elicit information which Appellant had already indicated he did not wish to disclose, resulted in answers obtained by compulsion.

In response, the Commonwealth contends that the "facts here demonstrate Appellant did not assert his desire to refrain from speaking to the police. As such [Appellant] did not unambiguously assert his right to silence and chose to speak with police." Commonwealth's Brief at 33. The Commonwealth further argues that, "[e]ven if [Appellant] did initially invoke his right to silence on the criminal events he committed, it was [Appellant] who initiated conversation about Corporal Bryon Dickson, and thus the statements are admissible." *Id.* at 34.

Following our careful review of Appellant's post-arrest videotaped interview,[21] we have little difficulty in concluding that Appellant unambiguously asserted his right to remain silent, and, in fact, did so multiple times. The videotape began running at 8:15 p.m. At 8:35 p.m., almost immediately after Appellant was brought into the interview room, Corporal Clark asked him if there was "anything dangerous out in the world." Videotaped Interview, at 19 minutes. Appellant indicated that there were items in the airplane hangar and that there was a rifle in a gun case that was buried in the woods, and that he would show them the location of the buried rifle on a map. Corporal Clark then read Appellant his *Miranda* rights, and asked Appellant whether he wished to waive those rights. Appellant asked if he could read the waiver form himself, and, after doing so, refused to sign it. Appellant also told Corporal Clark that he was "*not willing to answer questions,*" but that he would tell them about the rifle buried in

21. As noted above, the interview was not transcribed. In addition, the videotape contains a military time stamp at the top the frame, which is often difficult to read. Accordingly, when quoting a statement from the interview, we will refer to its location on the tape by referencing the elapsed time from the beginning of the tape, i.e., Videotaped Interview, at 20 minutes.

the woods. *Id.* at 22 minutes (emphasis added). Corporal Clark repeated Appellant's assertion: "You don't want to answer questions about any crime, but you're willing to tell us where a rifle is buried," and Appellant responded "Yes." *Id.*

After discussing the location of the rifle, Corporal Clark and Trooper Mulvey asked Appellant if he had seen any newspapers or heard news reports, telling him that he was a "national figure" and "famous." *Id.* at 33 minutes. Appellant then inquired where he would be going, and Corporal Clark explained that he would be taken to the Pike County jail. At approximately 8:50 p.m., Appellant asked the officers "You're both fathers, right?" When Corporal Clark and Trooper Mulvey responded affirmatively, Appellant commented, "There was a father that didn't come home." *Id.* at 35 minutes. The officers asked Appellant if he knew how many children Corporal Dickson had, and Appellant asked how old the children were. Corporal Clark then asked Appellant "Did you not think about [Dickson's children] beforehand?" and Appellant said something inaudible. *Id.* at 38 minutes. Corporal Clark asked Appellant, "What's that?" and Appellant made another statement that is mostly inaudible, but for the clear articulation of the word "lawyer." *Id.* Appellant then stated: "*I don't want to get too far into it. We're gonna be going at it in court at some point.*" *Id.* (emphasis added). Corporal Clark responded, "Well, yeah, it is what it is." *Id.* Corporal Clark then stated that he wants to know "what happened out there and why," and remarked that "nobody's threatening you ... we're just having a conversation." *Id.* at 39 minutes. The officers told Appellant that he had the opportunity to "set [the record] straight," and encouraged him to not let the media "define" him. *Id.* Appellant then stated, "All I can say is I'm sorry." *Id.* at 40 minutes.

The conversation then turned to Appellant's political leanings, his parents, and his dog. The officers questioned Appellant as to how he had survived while he was on the run from police. The officers then asked if Appellant regretted his actions, and Appellant replied "yes." *Id.* at 1:04 minutes. As the officers pressed Appellant regarding his reasons for choosing the Blooming Grove barracks, Trooper Mulvey indicated that he was concerned for his own (Trooper Mulvey's) safety, and that is why it was so important for him to know the reasons behind Appellant's actions. Appellant was noncommittal, and tried to avoid answering, and then once again commented that he's going to be in court. *Id.* at 1:20 minutes. The officers responded that "It's your story to tell," and then told Appellant that his father was upset because Appellant's brother and half-sister had been questioned. *Id.* at 1:20-1:21 minutes. The officers continued to question Appellant, repeatedly asking him to confirm that he acted alone. Appellant repeatedly assured them that he did act alone, and then invoked his right not to speak to the officers without an attorney present, by stating, "*I don't want to give you all too much information until I talk to a lawyer.*" *Id.* at 1:25 minutes (emphasis added). However, the officers continued to question Appellant, telling him that, if he talked about the crime, it would be a weight off of him and that he owed Corporal Dickson's family an explanation. *Id.* at 2:42 minutes.

In our view, Appellant's statement that he was not willing to answer questions, but would tell the officers where a rifle was buried in the woods constituted a clear and unambiguous invocation of his right to remain silent. Moreover, the fact that Corporal Clark repeated Appellant's statement back to him, stating "you don't want to answer questions about any crime, but

you're willing to tell us where a rifle is buried," demonstrates that the officers clearly understood Appellant's statement as an invocation of his right to remain silent. Indeed, in *Commonwealth v. Lukach*, — Pa. —, 195 A.3d 176 (Pa. 2018), this Court held, *inter alia*, that the suspect unambiguously invoked his right to remain silent when stating: "I don't know just, I'm done talking. I don't have nothing to talk about," and that the interrogating officer clearly understood that the suspect was invoking his right to remain silent, as evidenced by the officer's reply: "You don't have to say anything, I told you that you could stop." *Id.* at 184 (quoting transcript).

[17] In suggesting, however, that the statements Appellant made during the videotaped interview were admissible at trial because, even if Appellant invoked his right to remain silent by initially stating he did not want to talk about any crimes, he subsequently initiated a conversation with the officers by asking them if they were fathers, and commenting that a father – Corporal Dickson – would not be going home, the Commonwealth relies on the United Supreme Court's decision in *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), and this Court's decision in *Commonwealth v. Hubble*, 509 Pa. 497, 504 A.2d 168 (1986) (plurality). *See* Commonwealth's Brief at 34-35. In *Bradshaw*, the police were investigating the death of a minor found in a wrecked vehicle. The defendant was taken to the police station for questioning and given his *Miranda* warnings. He admitted to providing the deceased with alcohol, but denied involvement in the traffic accident. He was placed under arrest and re-read his *Miranda* rights. When an officer subsequently suggested that the defendant was involved in the accident, the defendant denied his involvement and stated: "I do want an attorney before it goes very much further." 462 U.S. at 1041-42, 103 S.Ct. 2830. The officer immediately terminated the conversation. Later, as the defendant was being transferred to the county jail, he asked a police officer what would happen to him. The officer reminded the defendant that he had requested an attorney, and advised him that, if he wanted to speak, it needed to be at his "own free will." *Id.* at 1042, 103 S.Ct. 2830. The defendant said that he understood, and the officer suggested the defendant could help himself by taking a polygraph examination. The defendant took the test the following day, first signing a written waiver of his *Miranda* rights. When the examiner told the defendant he believed the defendant was not telling the truth, the defendant recanted his earlier story and admitted to being the driver of the vehicle at the time of the accident.

On appeal from his conviction of, *inter alia*, first-degree manslaughter, the defendant argued that his statement was obtained in violation of his Fifth Amendment rights. The high Court determined there was no violation of the *Edwards* rule because the defendant's question to the police officer as to what would happen to him "was not merely a necessary inquiry arising out of the incidents of the custodial relationship," but "could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood is apparent from the fact that he immediately reminded the accused that 'you do not have to talk to me,' and only after the accused told him that he 'understood' did they have a generalized conversation." *Id.* at 1046, 103 S.Ct. 2830.

In *Hubble*, the accused was interviewed by police on several occasions regarding a triple homicide. During one such occasion, Hubble and his wife voluntarily accompa-

nied police to the police station and Hubble signed a written waiver form and agreed to give a tape-recorded statement. His wife suggested he should first get a lawyer, and Hubble then stated that he wanted a lawyer. Hubble asked for permission to call Jack Felix, an attorney. A detective looked up the attorney's telephone number and permitted Hubble to dial the number. Upon learning Felix was not available, Hubble asked to call his probation officer. Hubble told his probation officer that he was being questioned and wanted an attorney, and asked whether the Public Defender's office would represent him. The probation officer told Hubble he was not sure whether the Public Defender would represent him because he had not yet been arrested, but suggested that he call the Public Defender's office. After ending the phone call with his probation officer, Hubble spoke for a short time with his wife, and again agreed to give a taped statement. The taped statement was not self-incriminating, but incriminated his brother. As the accused and his wife were leaving the police station, they asked to speak to each other privately. After doing so, the accused gave a second taped statement, this time incriminating himself. The following day, the accused telephoned the police and told them that everything he had said the previous day was a lie. However, upon returning to the police station, the accused admitted that his confession had been truthful and reiterated the same.

Prior to trial, the accused sought suppression of his statements, but the trial court denied his motion, and he was convicted of, *inter alia*, three counts of second-degree murder. On appeal, the Superior Court reversed, holding the accused "clearly and unequivocally invoked his right to counsel and after he had attempted, unsuccessfully, to reach counsel by telephone, he was questioned further" by the police. *Commonwealth v. Hubble*, 318 Pa.Super. 76, 464 A.2d 1236, 1243 (1983). The Superior Court determined that the fact that Hubble responded to police-initiated questioning after he was unable to reach an attorney did not establish a waiver of the right to counsel previously invoked, as it was not Hubble that initiated the further conversation. The Commonwealth appealed, and this Court reversed in a fractured opinion. Several Justices concluded that Hubble had not unambiguously invoked his right to counsel, and several further concluded that, even if Hubble had invoked his right to counsel, he subsequently waived that right by "initiat[ing] the events which lead [sic] to his inculpatory statement, since the prior interview had ended and appellee and Mrs. Hubble were in the process of leaving the barracks *when [Hubble] requested to stay* and talk with his wife privately." *Commonwealth v. Hubble*, 509 Pa. 497, 504 A.2d 168, 174 (1986) (emphasis original).

We reject the Commonwealth's suggestion that Appellant's question to Corporal Clark and Trooper Mulvey as to whether the officers were fathers, and Appellant's subsequent observation that "[t]here was a father that didn't come home," amounted to an initiation of further conversation with police as contemplated by *Edwards*. First, we note that, unlike *Bradshaw* and *Hubble*, in the instant case, there was *no break* in questioning once Appellant stated that he did not want to talk about the crimes, or, indeed, at any time during the interview. Rather, Corporal Clark and Trooper Mulvey continued their questioning of Appellant for more than three hours, simply redirecting the subject of the conversation whenever Appellant indicated that he did not want to talk about his crimes or stated that he did not want to provide the police with additional information without first speaking with a lawyer. Without a stop or a break in conversation, we fail to see how

there could be a subsequent *reinitiation* of conversation. Further, unlike the officer in *Bradshaw*, Corporal Clark and Trooper Mulvey did not remind Appellant that he had a right not to speak.

Moreover, even if we were to agree with the Commonwealth's assertion that Appellant's question regarding whether the officers were both fathers and Appellant's comment that there was a father that "didn't come home" could be interpreted as an initiation of further conversation, the Commonwealth fails to address the fact that *immediately after* making the two statements, Appellant again told the officers that he did not "want to get too far into it," because he would be going to trial, thereby reiterating his desire not to speak with the officers about the crime. Notwithstanding this reiteration by Appellant that he did not want to discuss the crime, the officers continued to question Appellant, as detailed above, and eventually, Appellant stated that he did not want to provide the officers with "*too much info until I talk to a lawyer.*" *Id.* at 1:25 minutes. However, the officers continued to question Appellant.

Based on our review of the videotaped interview, which clearly demonstrates that Appellant unambiguously invoked his right to remain silent on multiple occasions, and that the officers continued to question Appellant notwithstanding those invocations, we conclude that the trial court erred in denying Appellant's motion to suppress the statements he made to police during his post-arrest videotaped interview.

[18–20] A suppression court's error in failing to suppress statements by the accused, however, will not require reversal if the Commonwealth can establish beyond a reasonable doubt that the error was harmless. *Com. v. Baez*, 554 Pa. 66, 720 A.2d 711, 720 (1998). *Miranda* violations are subject to this harmless error rule. *Commonwealth v. Diaz*, 438 Pa. 356, 264 A.2d 592, 594 (1970) (*Miranda* violations "do not call for automatic reversal," but are subject to the harmless error rule). Indeed, in the case *sub judice*, the Commonwealth argues that any error by the trial court in failing to suppress Appellant's statements was harmless.

[21] Harmless error exists if the Commonwealth proves that (1) the error did not prejudice the defendant or the prejudice was *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. *Commonwealth v. Burno*, 638 Pa. 264, 154 A.3d 764, 787 (2017).

In the instant case, we have no hesitation in concluding that the trial court's error in refusing to suppress the statements made by Appellant in his post-arrest videotaped interview was harmless because the properly admitted and uncontradicted evidence of guilt was so overwhelming, and the prejudicial effect of the admission of Appellant's videotaped interview so insignificant by comparison, that its admission could not have contributed to the verdict. As recounted above, it was established at trial that the bullets that killed Corporal Dickson and wounded Trooper Douglass were fired from a Norinco rifle which belonged to Appellant, and which was later recovered from the airplane hangar where Appellant had been hiding following the shooting. Appellant himself directed the U.S. marshals to the location of the rifle at the time he was captured, and Appellant's DNA was on the rifle. The evidence also revealed

that Appellant had conducted internet searches for possible targets, including the Blooming Grove police barracks, and response procedures for when officers are shot, in the days leading up to the shootings. Finally, in the days following the shootings, police located a white trash bag at a campsite, and the trash bag contained an empty water bottle with Appellant's DNA, and three pages torn from a small spiral notebook which specifically described the shootings of Corporal Dickson and Trooper Douglass. A handwriting expert testified that the pages bore Appellant's handwriting, and an expert in document authentication testified that the pages appeared to come from a notebook found in the airplane hangar, which itself detailed Appellant's actions as a fugitive over a period of six weeks following the shootings.

In light of the substantial physical evidence establishing Appellant as the perpetrator of these crimes, we conclude that the trial court's error in denying Appellant's motion to suppress the statements he made in his videotaped interview was harmless, and, thus, that Appellant is not entitled to relief.[22]

As noted above, Appellant also maintains that the trial court committed an error of law and abused its discretion in refusing to suppress his statements to police during the videotaped interview because he was denied his right to counsel under the Fifth and Sixth Amendments to the United States Constitution, and was denied due process under the Fourteenth Amendment to the United States Constitution and Article 1, § 9 of the Pennsylvania Constitution. Specifically, Appellant avers that, at approximately 8:48 p.m., less than 15 minutes after the officers began their interview of Appellant, James Swetz, Esquire, began telephoning the Pennsylvania State Police to advise them he had been retained by the Frein family to "advise [Appellant] on his constitutional rights and wished to speak with [Appellant.]." Appellant's Brief at 24. Appellant contends that the failure of the police to inform him that Attorney Swetz was "present, willing and available" deprived him of his right to counsel. *Id.* Appellant further asserts that, in light of Attorney Swetz's familiar and distinguished reputation in the region, it is obvious that Appellant would have "at the very least, wanted to briefly consult with Attorney Swetz before continuing the interrogation if he were only informed that the attorney was present and available." *Id.* at 30-31.

We need not determine whether the trial court erred in refusing to suppress the statements Appellant made during the videotaped interview on the ground that Appellant was denied his right to counsel, as we have already determined that the trial court erred in failing to suppress those same statements because the police failed to honor Appellant's invocation of his right to remain silent. Moreover, as we have explained above, however, any error by the trial court in refusing to suppress Appellant's statement was harmless in light of the overwhelming, properly admitted, evidence establishing Appellant's guilt.

III. Challenge to Trial Court's Admission of Victim Impact Evidence

[22] Appellant next contends that the trial court erred in allowing the Commonwealth to introduce at the penalty phase of his trial victim impact evidence that "began [as] traditional impact [evidence], but

22. Indeed, in his closing argument, the prosecutor made a single reference to Appellant's post-arrest videotaped interview, noting simply that Appellant "state[d] the obvious" about the recovered Jeep, the campsite, and his involvement. N.T. Trial, 4/19/17, at 55.

... crossed the line and developed into emotionally charged, cumulative, and much more prejudicial than probative" testimony. Appellant's Brief at 39. Appellant argues that the evidence admitted by the trial court in the instant case was so "overpowering, emotional [and] highly prejudicial" that its admission violated his due process rights under the Fourteenth Amendment, and his Eighth Amendment right against cruel and unusual punishment. *Id.* at 42.

[23] The Pennsylvania Sentencing Code permits the introduction of two types of victim impact evidence during the penalty phase of a capital trial: (1) evidence about the victim; and (2) evidence regarding the impact that the death of the victim has had on the victim's family. 42 Pa.C.S. § 9711(a)(2); *Commonwealth v. Bryant*, 620 Pa. 218, 67 A.3d 716, 726 (2013); *see also Commonwealth v. Flor*, 606 Pa. 384, 998 A.2d 606, 634 (2010) ("[t]estimony 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.").

[24–26] The admission of victim impact evidence, like all evidence, is within the sound discretion of the trial court, "which must balance evidentiary value against the potential dangers of unfairly prejudicing the accused, inflaming the passions of the jury, or confusing the jury." *Bryant*, 67 A.3d at 726. This Court will reverse a trial court's decision regarding the admissibility of evidence only when the appellant sustains the "heavy burden" of establishing that the trial court has abused its discretion. *Id.* An abuse of discretion "will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Commonwealth v. Eichinger*, 591 Pa. 1, 915 A.2d 1122, 1140 (2007).

The Commonwealth's first penalty phase witness in the instant case was Tiffany Dickson, Corporal Dickson's widow. During the course of her testimony, the trial court admitted, without objection from defense counsel, a series of photographs (Exhibits 537 through 545). The photographs depicted Corporal Dickson in his Marine uniform, and Tiffany Dickson in uniform as a nursing student; Corporal Dickson at his graduation from the crime law justice program at Penn State; Tiffany Dickson at her graduation from nursing school; Corporal and Tiffany Dickson on their wedding day; Corporal and Tiffany Dickson on their honeymoon in Disney World; Corporal Dickson with his nephew; and Corporal Dickson following his graduation from the Pennsylvania State Police Academy. N.T. Trial, 4/20/17, at 73-75.

Thereafter, the Commonwealth sought to introduce a photograph of Corporal and Tiffany Dickson and their first son at the beach, at which point defense counsel objected on the ground that the evidence "has now gone far beyond victim impact." *Id.* at 76. The trial court overruled the objection, noting that, based on the evidence that had already been presented, it appeared there was a "chronological nature of what's being presented." *Id.* at 77. The court explained that, while it would not limit the number of photos introduced by the Commonwealth, the proffered photos should not be repetitive. *Id.* The trial court further advised that it intended to give each party "as much latitude as I can," and it advised the Commonwealth that it could proceed. *Id.* at 79. At this time, defense counsel stated, "Your Honor, as for the admission of these photos, I'm going to say I have no objection based on the Court's ruling." *Id.* The Common-

wealth then introduced Exhibits 546 through 553, which depicted Corporal and Tiffany Dickson after the birth of their second son;[23] Corporal Dickson and his first son holding Corporal Dickson's second son; Corporal Dickson with both of his sons "showing them how to play patty cake;" Corporal and Tiffany Dickson's sons in their homemade Halloween costumes; Corporal Dickson with his sons at the beach; Tiffany Dickson with her sons; Corporal Dickson teaching his first son how to use a fishing rod; and Corporal Dickson and his sons putting together a play set. *Id.* at 80-81.

The Commonwealth additionally sought the admission of photographs designated Exhibits 554 through 563, at which time defense counsel noted his "continuing objection based on [his] previous argument." *Id.* at 82. The trial court noted, but overruled, the objection, and the Commonwealth was permitted to introduce the photographs which depicted Corporal Dickson and his wife and sons after the ceremony at which he became Corporal; Corporal Dickson with two fellow troopers; Corporal Dickson with his second son during a vacation cruise; Corporal Dickson and his first son on that same cruise; Corporal Dickson's two sons on the cruise; Corporal Dickson's two sons dressed in their father's police hat and boots; Corporal and Tiffany Dickson at Christmas; Corporal Dickson with his brother and sister at Christmas; and Corporal and Tiffany Dickson and their sons at a family gathering on a large farm. *Id.* at 82-84. The Commonwealth also introduced photographs (Exhibits 564 through 566) of Tiffany Dickson and her first son in front of Corporal Dickson's casket; Tiffany Dickson in front of the casket; and Tiffany Dickson and her two children, with Corporal Dickson's uniform, taken on Mother's Day 2015. *Id.* at 96-97.

Finally, Tiffany Dickson testified that, following the death of Corporal Dickson,

23. Prior to the admission of the photographs, the prosecutor asked Tiffany Dickson to tell the jury about the birth of her second child, which she described as follows:

> Adam was due September 2008, but he was late. He was delivered in October 2008 and when I was pushing and pushing and everything was okay and then at five centimeters the cord prolapsed cut-off and started to bleed out, so we had to push the cord back up. Bryon was with me and I just said, "Oh, I'll be okay and I was going to the OR," and then we went to the OR and when they pulled me over from the cart to the table, the epidural pulled out, they didn't know that, so they started – they gave me a local anesthetic and they started to cut and I felt everything.
>
> So, then they said, "No, let's just sedate her," so they sedated me with some Diprivan and then intubated me to keep my airway open and then pulled him out at 5:15 he was born and at 10 o'clock I woke up and I saw the baby next to me and I said, "Oh my gosh thank gosh he made it and I said, we have to breast feed him, that's very important to latch immediately so that baby could get all the nutrients from the mom."
>
> The nurse goes, "Your husband breast fed him already. I said, "What? How he can't (sic) breastfeed him? He can't breast feed him." And she said, "No, you were sedated, we propped you up and he held the baby, he had him latch, so that was good."

N.T. Trial, at 67-68.

Justice Wecht opines that the above description was "impactful and powerful," "unduly prejudicial," "striking and graphic," and designed "only to inflame the passions of those called upon to decide between life and death." Concurring and Dissenting Opinion (Wecht, J.) at 1094. Though vivid, Tiffany Dickson's three-paragraph description of the birth of her son, in our view, was neither graphic, nor offered for the sole purpose of inflaming the passions of the jury. Rather, it was consistent with the type of thorough recollection of childbirth offered by many women when asked. Moreover, the testimony was presumptively offered, as Justice Wecht concedes, *see id.* at 1094, to demonstrate that Corporal Dickson was a committed and caring father.

their first son, age 7 when his father was killed, developed behavioral problems which included difficulty sleeping, bedwetting, self-biting, night terrors, anger issues, bullying at school, and expressing that he wanted to die. *Id.* at 91-92. He required medication and developed neurological problems. *Id.* at 91. Tiffany Dickson further stated that their second son, age 5 at the time of the shooting, is defiant and failing school. *Id.* at 93. She also testified that, since her husband's death, she feels sad, lonely, without support or protection, and that she has no identity other than as the widow of a slain officer. *Id.* at 95-97.

The Commonwealth then sought to introduce portions of a video from Corporal Dickson's graduation from the Pennsylvania State Police Academy. The portions of the video that were shown to the jury, which totaled approximately 15 minutes, included a speech by then Allegheny County Deputy District Attorney Mark Tranquilli; Corporal Dickson taking his oath of office; Corporal Dickson receiving his badge; and the State Police Call of Honor. *Id.* at 106-107. Defense counsel objected to the introduction of this evidence on the basis that it was cumulative of the numerous photographs previously introduced and was unduly prejudicial. *Id.* at 104-06. The trial court overruled the defense objection and admitted the videotape, reiterating that it was "going to try to give each side as much latitude as possible to present [its] case," and stating that it "view[ed] what's being presented in the category of the victim, victim impact." *Id.* at 108. The trial court indicated, however, that it would give the jury an appropriate instruction as to how to treat victim impact testimony.

Finally, the Commonwealth presented testimony from several of Corporal Dickson's colleagues, who testified regarding Corporal Dickson's strengths as a police officer, as well as the testimony of Corporal Dickson's sister, Stacy Hinkley; his father, Bryon Dickson; and his mother, Darla Dickson. During the testimony of Darla Dickson, the Commonwealth introduced a video of Corporal Dickson and his youngest son.

Without question, the victim impact evidence admitted by the trial court in the instant case was extensive, arguably unnecessarily so. Moreover, some of the evidence described above was not victim impact evidence at all. For example, as Justice Wecht observes, the substance of Attorney Tranquilli's speech, in which he challenged the new troopers to emulate the work ethic and bravery of Pennsylvania State Police Corporal Joseph Pokorny, who was fatally shot in 2005, did not concern Corporal Dickson personally, nor did it pertain to the impact Corporal Dickson's death had on his family.

Nevertheless, we are constrained to agree with the Commonwealth that, because the jury found several aggravating circumstances, but no mitigating factors, Appellant has failed to establish that he was prejudiced by the admission of the above-described testimony. In this regard, subsection 9711(c)(2) provides: "The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family."

Indeed, in accordance with subsection 9711(c)(2), the trial court instructed the jury as follows:

> In deciding whether aggravating or mitigating circumstances exist and whether aggravating outweigh mitigating circumstances, you should consider the evidence and arguments offered by

both the Commonwealth and the Defendant. This includes the evidence that you heard during the earlier trial to the extent that it bears upon the issues now before you. You have heard evidence about the victim, Bryon K. Dickson, II and about the impact of the victim's murder upon his family. I'm talking about the testimony presented by Tiffany Dickson, Sergeant Michael Walsh, Lieutenant Sean Jennings, Concetta Uckele, Retired Major John Dockerty, Sergeant Derek Fellsman, Stacy Hinkley, Bryan Dickson, and Darla Dickson.

This evidence is subject to two special rules. First, you cannot regard it as an aggravating circumstance. Second, *if you find at least one aggravating circumstance and at least one mitigating circumstance, you may then consider the victim and family impact evidence when deciding whether aggravating outweigh mitigating circumstances.* Each of you may give the victim and family impact evidence whatever weight, favorable or unfavorable to the Defendant, that you think it deserves. Your consideration of this evidence, however, must be limited to a rational inquiry into the culpability of the Defendant, not an emotional response to the evidence presented.

N.T. Trial, 4/26/17, at 162-63 (emphasis added).

[27] A jury is presumed to follow the trial court's instructions on the law. *Commonwealth v. Harris*, 572 Pa. 489, 817 A.2d 1033, 1053 (2002). Herein, the trial judge instructed the jury that it could not consider the victim impact testimony unless it found at least one aggravating circumstance and at least one mitigating circumstance. The jury did not find any mitigating circumstances, and, therefore, it must be presumed that the jury did not consider the Commonwealth's victim impact testimony in rendering its verdict. As such, we hold that Appellant has failed to establish a basis for relief. *See id.* (rejecting the appellant's challenge to the trial court's admission of victim impact testimony, *inter alia*, on the basis that the jury did not find any of the proffered mitigating circumstances, and, thus, failed to demonstrate prejudice).

[28] Notwithstanding the above, Appellant maintains that the victim impact evidence admitted by the trial court in the instant case "was so overwhelming that it amounted to an additional super aggravating circumstance," and was so "overpowering, emotional [and] highly prejudicial," that its admission violated his due process rights under the Fourteenth Amendment, and his Eighth Amendment right against cruel and unusual punishment. Appellant's Brief at 42. This Court addressed a similar argument in *Commonwealth v. Ballard*, 622 Pa. 177, 80 A.3d 380 (2013), wherein the appellant alleged that the quantity and tenor of the victim impact testimony admitted at his trial violated his right to due process and his right to be free from cruel and unusual punishment under both the Pennsylvania and U.S. Constitutions. Ballard pled guilty to four counts of first-degree murder, and, following a penalty phase hearing, the jury returned a sentence of death on each of the counts. On Count 1, the jury found two aggravators and one mitigator (extreme mental or emotional disturbance); on Count 2, the jury found one aggravator and no mitigators; and on Counts 3 and 4, the jury found two aggravators and no mitigators.

Like Appellant herein, Ballard argued, *inter alia*, that victim impact testimony can "become[ ] its own *de facto* aggravating factor," particularly because juries are not provided proper guidance as to how to consider such testimony against the statutory aggravating and mitigating factors.

Id. at 403. In rejecting Ballard's constitutional arguments, we first observed that, in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court declared that "a State may properly conclude that, for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant," especially given the state's interest in rebutting a defendant's mitigation evidence. *Id.* at 825, 111 S.Ct. 2597. In *Payne*, the high Court overruled its prior decision in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), which prohibited the introduction of victim impact testimony at a capital sentencing hearing on the ground that such testimony was irrelevant to the proceedings and created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 502-03, 107 S.Ct. 2529.

We further noted in *Ballard* that, subsequent to *Payne*, and beginning with our decision in *Commonwealth v. Means*, 565 Pa. 309, 773 A.2d 143 (2001) (Opinion Announcing Judgment of Court ("OAJC")), this Court has ruled that victim impact testimony admitted under Section 9711(a)(2) is constitutional. *See Means*, 773 A.2d at 154; *see also id.* at 159 (Saylor, J., concurring) (agreeing with conclusion in OAJC that amendment to death penalty statute allowing victim impact testimony is constitutional). The OAJC in *Means* stated:

> [V]ictim impact testimony is just one of the relevant factors the jury may consider when weighing the aggravating and mitigating circumstances it has found during its deliberations on sentence. The addition of victim impact testimony into the deliberative process is not such an arbitrary factor that its inclusion would preclude meaningful appellate review. We are satisfied that the trial judges of this Commonwealth can adequately prevent unduly prejudicial and inflammatory information from entering into the jury's deliberations in the guise of victim impact testimony.

Id. at 154.

Finally, we held in *Ballard* that the appellant's claims failed, as they involved "a full panoply of arguments we have considered and rejected in prior decisions," 80 A.3d at 404, including *Means*, 773 A.2d at 154 (rejecting argument that jury is not given proper direction in how to weigh victim impact testimony); *Eichinger*, 915 A.2d at 1139 (rejecting argument that victim impact testimony amounts to impermissible "non-statutory" aggravating factor); and *Commonwealth v. Williams*, 578 Pa. 504, 854 A.2d 440, 446 (2004) (rejecting arguments that testimony unconstitutionally focused jury on victim's life and amounted to "super aggravating factor"); *see also Harris*, 817 A.2d at 1053 (rejecting the appellant's argument that the admission of victim impact testimony is "violative of the due process, equal protection, and cruel and unusual punishment clauses" of the Pennsylvania and Federal Constitutions). Accordingly, we reject Appellant's claim that the trial court's admission of the victim impact evidence in the instant case violated his constitutional rights under the Eighth and Fourteenth Amendments.[24]

24. In his concurring and dissenting opinion, Justice Wecht credits Appellant's argument in part, concluding that the victim impact evidence "was so emotionally overpowering, and so extensive, that it necessarily inhibited the ability of this jury to fairly assess this case." Concurring and Dissenting Opinion (Wecht, J.) at 1095. While we believe that reasonable minds could disagree about the emotional weight of some of the challenged evidence, we

IV. Challenge to Trial Court's Jury Instruction on Mitigation

[29] In his final briefed issue, Appellant asserts that the trial court abused its discretion in denying his request for the following jury instruction:

> To establish a mitigating circumstance to which you should consider and give effect, the Defendant need not establish a nexus between the mitigating circumstance and the crime. In other words, the mitigating circumstance need not be a defense or an excuse for the crime. *Tennard v. Dretke*, 542 U.S. 274, 286 [124 S.Ct. 2562, 159 L.Ed.2d 384] (2004).

Appellant's Brief at 43. In *Tennard*, the high Court explained that a Texas capital sentencing scheme which required a nexus between a defendant's proffered mitigation evidence and the alleged crime was unconstitutional, and that a defendant is entitled to have the jury consider evidence which might serve as a basis for a sentence less than death. 542 U.S. at 285-87, 124 S.Ct. 2562.

[30, 31] This Court reviews penalty-phase jury instructions in the same manner in which it reviews challenges to jury charges given during the guilt phase of trial; specifically, we consider the charge in its entirety, rather than discrete portions of the instruction. *Eichinger*, 915 A.2d at 1138. In addition, trial courts are free to use their own expressions, so long as the concepts at issue are clearly and accurately presented to the jury. *Id.*

Preliminarily, and as the Commonwealth observes, the constitutionality of Pennsylvania's capital sentencing scheme, in contrast to the Texas sentencing scheme at issue in *Tennard*, has been upheld by the United States Supreme Court. Indeed, in *Blystone v. Pennsylvania*, the high Court stated:

> We think that the Pennsylvania death penalty statute satisfies the requirement that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating evidence. Section 9711 does not limit the types of mitigating evidence which may be considered, and subsection (e) provides a jury with a nonexclusive list of mitigating factors which may be taken into account – including a "catchall" category providing for the consideration of "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." *See* 42 Pa.Cons.Stat. § 9711(e)(8) (1988).

494 U.S. 299, 305, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990).

The trial court in the instant case described for the jury 29 specific "matters," which, "if proven to [the jury's] satisfaction by a preponderance of the evidence can be mitigating circumstances." N.T. Trial, 4/26/17, at 159-62.[25] The trial court further instructed the jury:

> cannot agree that, in the context of *this* case, the challenged evidence overpowered the jury's ability to determine if a death sentence was warranted. The instant case involved the meticulously-planned and premeditated murder and attempted murder of two police officers, for which the evidence of Appellant's guilt was pervasive and largely unchallenged. The jury was presented with proof of five aggravating factors, including the death of a police officer. While Justice Wecht opines that "it is impossible not to conclude that the victim impact evidence took on the predominant evidentiary 'role for the Commonwealth", *id.* at 1095, we conclude that, despite the victim impact evidence presented, the predominant evidentiary consideration in this case was the murder and attempted murder of two police officers.

25. The "matters" were described by the trial court as follows:

> 1. [Appellant] has no history of violent infractions at the Pike County Correctional Facility;

In making the decision whether or not to impose the death penalty upon Eric Frein it is entirely proper for you to consider sympathy or mercy as a reason to impose a life sentence subject to the following instructions.

This sympathy or mercy which you may wish to show Eric Frein must be founded upon any item or items of evidence any one or more of you find to be a mitigating circumstance. That is worth repeating. The sympathy or mercy which you may wish to show Eric Frein must be founded upon evidence any one or more of you find to be a mitigating circumstance.

Id. at 163.

Nevertheless, noting that, of the 29 mitigating circumstances proffered by the defense in his case, only two – Number 9 (Appellant's father taught and discussed firearms with him) and Number 10 (Appellant's father discussed anti-government and anti-police views with him) – "may have explained or could have implied a reason for causing" his commission of the crime, Appellant contends that the requested instruction was necessary "to temper an argument from the prosecution that [Appellant's] love for his parents and family has no connection to the offense." Appellant's Brief at 44-45. Appellant suggests that "at least one, and perhaps more than one [mitigating circumstance], would have been found if the mitigation instruction had been given." *Id.* at 46.

Initially, we note that Appellant does not support this particular claim with any cita-

2. Eugene Michael Frein had a prior problem with alcoholism;
3. [Appellant] was raised by a verbally abusive Father;
4. [Appellant] had a learning disability during his childhood;
5. [Appellant] could not read on his own until the 6th grade;
6. [Appellant] stuttered as a child;
7. [Appellant] was isolated from extended family members;
8. The parents of [Appellant] had marital problems during the time he lived in their home;
9. Eugene Michael Frein taught and discussed firearms with [Appellant];
10. Eugene Michael Frein discussed anti-government and anti-police views with [Appellant];
11. [Appellant] was proud of and looked up to his Father;
12. Debbie Frein was more concerned with her appearance than her children;
13. [Appellant] played video games;
14. Eugene Michael Frein discussed survival tactics with [Appellant];
15. Eugene Michael Frein was the owner of the sniper handbook located in [Appellant's] bedroom;
16. Eugene Michael Frein lied about his military service to [Appellant] and family members;
17. [Appellant] encouraged Warren Ahner to pursue his career interests;
18. [Appellant] loves his brother's children Addison and Timothy;
19. [Appellant] expressed remorse for his offenses and concern for the victim's family;
20. [Appellant] told the state police where an additional rifle could be located;
21. [Appellant] apologized to his own family in the video interview;
22. [Appellant] surrendered to the U.S. Marshalls without incident;
23. [Appellant] cooperated with the state police during the video interview;
24. [Appellant] worked at Camp Minci at the Firearm Instruction Station;
25. [Appellant] completed 92 college credits;
26. [Appellant] made Tiffany Frein feel like someone loved her;
27. [Appellant] was Tiffany Frein's protector;
28. There was little effective communication in the Frein household;
29. Any other evidence of mitigation concerning the character, background, and record of [Appellant] and circumstances of his offense.

N.T. Trial, 4/26/17, at 160-62.

tion to the record, and we are unable to locate any place in the record that corroborates Appellant's characterization of the Commonwealth's argument. Regardless, however, this Court has previously explained that *Tennard*:

> hold[s] evidence relevant to a defendant's character must be admitted in a capital sentencing if a defendant offers it. In no way [does the] case[ ] say the jury is required to give it any weight, or that the Commonwealth is not permitted to argue against it or produce contrary evidence. It is well settled "[a] prosecutor may rebut mitigation evidence in his arguments and may urge the jury to view such evidence with disfavor."

Commonwealth v. Eichinger, 631 Pa. 138, 108 A.3d 821, 838-39 (2014).

The trial court's instructions in the instant case were consistent with the high Court's decisions in *Tennard* and *Blystone*, as well as this Court's decision in *Eichinger*. Accordingly, we hold that Appellant is not entitled to relief.

V. Statutory Review of Death Sentence

[32] As a final matter, although Appellant does not raise the issue in his brief, this Court is required to conduct an independent review to determine (1) whether the sentence of death was the product of passion, prejudice, or any other arbitrary factor; or (2) if the evidence fails to support the finding of at least one aggravating circumstance listed in 42 Pa.C.S. § 9711(d). *See* 42 Pa.C.S. § 9711(h)(3) (requiring affirmance of the sentence of death unless this Court concludes either of these two factors are present); *Ballard*, 80 A.3d at 409-10.

[33] Following a thorough review of the entire record in this case, we hold that Appellant's sentences of death were not the product of passion, prejudice, or any other arbitrary factor, but, rather, were supported by the overwhelming evidence that Appellant fatally shot Corporal Dickson, a law enforcement officer, with malice and the specific intent to kill. Moreover, the Commonwealth proved the following aggravating factors beyond a reasonable doubt: (1) the victim was a police officer killed in the performance of his duty, 42 Pa.C.S. § 9711(d)(1); (2) the offense was committed during the perpetration of a felony, *id.* § 9711(d)(6);[26] (3) Appellant knowingly creating a grave risk of danger to other persons, including Trooper Douglass and Nicole Palmer, *id.* § 9711(d)(7); and (4) Appellant had been convicted of another state offense at the time of the offense at issue for which a sentence of life imprisonment or death was imposable, *id.* § 9711(d)(10). As the jury found no mitigating circumstances, Appellant's sentences comply with the statutory mandate for the imposition of a sentence of death where one or more aggravating circumstances and no mitigating circumstances are found. *See id.* § 9711(c)(1)(iv). Accordingly, there are no grounds upon which to vacate Appellant's sentences pursuant to 42 Pa.C.S. § 9711(h)(3), and, for all of the above reasons, we affirm Appellant's convictions and sentences of death.

Chief Justice Saylor and Justices Baer, Dougherty and Mundy join the opinion.

Justice Donohue files a concurring opinion.

Justice Wecht files a concurring and dissenting opinion.

26. The felony offenses included criminal attempt to commit first-degree murder; criminal attempt to commit murder of a law enforcement officer; assault of a law enforcement officer; terrorism; weapons of mass destruction; and discharge of a firearm into an occupied structure.

JUSTICE DONOHUE, Concurring

I join the Majority's opinion except with respect to its reasoning in connection with its disposition of Frein's challenge to the admission of victim impact evidence. In this regard, I find compelling Justice Wecht's contention that at some point, the quantum of admitted victim impact evidence may overwhelm any notions of fundamental fairness in the sentencing proceeding, resulting in a violation of the defendant's due process rights. Concurring and Dissenting Op. ("CDO") at 1092–93. I likewise agree with Justice Wecht that in such circumstances, we cannot (as does the Majority here) rely upon the general presumption that the jury followed the trial court's instructions not to consider any victim impact evidence until after it completed its inquiry concerning mitigating and aggravating circumstances. *Id.* at 1094–95. In some cases, the extent and nature of emotionally compelling victim impact testimony may overwhelm a jury's ability to rationally and reasonably evaluate the existence, or lack thereof, of particular mitigating and aggravating circumstances.

Despite these philosophical agreements with Justice Wecht's underlying premises, I must nevertheless concur in the result reached by the Majority; namely, to deny relief on Frein's victim impact evidence challenge. Section 9711(a)(2) of the Pennsylvania Sentencing Code defines victim impact evidence as "evidence concerning the victim and the impact that the death of the victim has had on the family of the victim." 42 Pa.C.S. § 9711(a)(2). This Court has ruled that, in accordance with section 9711(a)(2), it is "wholly appropriate and admissible at the sentencing phase of a capital case" for the Commonwealth to offer into evidence "personal account[s] describing the devastating impact the murder[ ] had on the surviving families." *Commonwealth v. Flor*, 606 Pa. 384, 998 A.2d 606, 634 (2010) (quoting *Commonwealth v. Baumhammers*, 599 Pa. 1, 960 A.2d 59, 93 (2008)); *see also Commonwealth v. Rega*, 593 Pa. 659, 933 A.2d 997, 1023 (2007) (affirming, under section 9711(a)(2), trial court's admission of victim impact testimony by the decedent's brother because it had been "offered to impress upon the jury the human effects of [the a]ppellant's crimes").

Importantly for present purposes, however, this Court has placed two significant limitations on the nature of victim impact testimony that may be admitted in the penalty phase of a capital trial. First, victim impact evidence may not consist of "mere generalizations of the effect of the death on the community at large." *Commonwealth v. Eichinger*, 591 Pa. 1, 915 A.2d 1122, 1139-40 (2007). Second, victim impact evidence must be about the impact of the victim's death on the family rather than general information about particular characteristics of the victim presented in a vacuum. *See Commonwealth v. Means*, 565 Pa. 309, 773 A.2d 143 158 (2001) ("Generalizations of the effect of the victim's death on the community at large, or information concerning the particular characteristics of the victim presented in a vacuum will not fall within the ambit of [section 9711(a)(2)]."); [1] *Commonwealth v. Singley*,

1. In *Commonwealth v. Hitcho*, 633 Pa. 51, 123 A.3d 731 (2015), the Court appeared to dispute the limitations on victim impact evidence outlined in *Means*, indicating that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." *Id.* at 761 (quoting *Flor*, 998 A.2d at 633). In my view, however, victim impact evidence must, by definition, be closely tied to the impact of the murder. General information of the victim's personal characteristics "presented in a vacuum," *Means*, 773 A.2d at 158, does not constitute "impact"

582 Pa. 5, 868 A.2d 403, 415 (2005) ("The cumulative effect of the testimony clearly demonstrates that the deaths had a profound effect on the respective families. The testimony was not generalized statements on the effect of deaths of Christine Rohrer and James Gilliam on the community, nor did it concern any of the victim's particular characteristics.").

With these limitations in mind, it is clear, as the Majority essentially concedes and Justice Wecht points out, that a substantial quantum of the "victim impact evidence" introduced by the Commonwealth in the penalty phase of Frein's trial was not proper victim impact evidence at all. Over the course of two days, the Commonwealth presented the testimony of ten witnesses, including Trooper Dickson's wife, mother, father and sister. While some of this testimony clearly related the impact of the murder on his family, much of it arguably did not. As described by Justice Wecht, one example would be the highly detailed testimony of Trooper Dickson's widow as to the couple's fertility struggles, her difficult pregnancy and complications associated with the birth of the couple's second child. *See* CDO at 1094. Four of Trooper Dickson's colleagues with the Pennsylvania State Police testified to their respect for him as a man and a fellow officer. N.T., 4/20/2017, at 99-103 (Sergeant Michael Walsh), 111-29 (Lieutenant Sean Jennings); N.T., 4/21/2017, at 12-20 (Major John Dougherty, retired), 20-39 (Sergeant Derek Felsman). They described for the jury letters of accommodation, awards and promotions he received, including instances in which he exemplified skill and bravery as a trooper. *See, e.g.*, N.T., 4/20/2017, at 114-16; N.T., 4/21/2017, at 14-19, 30-31. They also related their shared trials and tribulations with him during their time together at training classes and as young officers on the force. *See, e.g.*, N.T., 4/20/2017, at 101-03; N.T., 4/21/2017, at 21-29. Another witness related for the jury how Trooper Dickson had saved her life by preventing her from committing suicide in the immediate aftermath of her son accidentally shooting and killing her husband. N.T., 4/21/2017, at 9-12. Trooper Alex Douglass, who was shot by Frein during the events resulting in Trooper Dickson's murder, testified regarding his continuing medical complications from his severe injuries. N.T., 4/20/2017, at 131-35. Finally, there was the video of Trooper Dickson's cadet class graduation ceremony, including the speech by then-Deputy District Attorney Mark Tranquilli, as well-described by both the Majority and Justice Wecht, relating to the prior murder of another state trooper. N.T., 4/21/2017, at 80.

Critically, Frein (through his counsel) did not object to the introduction of any of this evidence on the grounds that it was inadmissible under the definition of victim impact evidence set forth in section 9711(a)(2), including the above-described limitations on such evidence as established by this Court (i.e., that the evidence reflected impact on the community in general or on particular characteristics of the victim unrelated to impact on the family). We cannot presume how the trial court here would have ruled on any of the statutorily-authorized objections that counsel could have made but did not, and I do not pretend to do so here. If the available evidentiary objections had been asserted and the trial court had granted some or most of them, we would have a very differ-

evidence at all. Moreover, section 9711(a)(2) expressly limits the type of impact that may be addressed in a penalty phrase proceeding to the impact of the murder on the victim's family, without any reference to impact on the community at large. 42 Pa.C.S. § 9711(a)(2).

ent, and considerably smaller, record before us now – which may or may not have supported Frein's due process claim. Alternatively, if the trial court had denied the statutory objections, Frein could have challenged these evidentiary rulings on appeal to this Court as grounds for a new penalty phase trial, while simultaneously presenting his due process constitutional arguments.

It is for this reason that I cannot agree with Justice Wecht's contention that Frein's failure to assert objections under section 9711(a)(2) is irrelevant to the due process claim he now asserts. It is axiomatic that in order to preserve a claim for appeal, a party must make a timely and specific objection at trial. *See, e.g., Commonwealth v. Hairston*, 624 Pa. 143, 84 A.3d 657, 672 (2014), *cert. denied*, —— U.S. ——, 135 S.Ct. 164, 190 L.Ed.2d 118 (2014) (finding challenge to admission of victim impact evidence waived for failure to object to its admission at trial); *Commonwealth v. Ballard*, 622 Pa. 177, 80 A.3d 380, 406 (2013), *cert. denied*, 573 U.S. 940, 134 S.Ct. 2842, 189 L.Ed.2d 824 (2014) ("[I]t was still incumbent upon appellant to object [to allegedly improper victim impact evidence] and to give the trial court the option of a corrective measure."); *Commonwealth v. Kennedy*, 598 Pa. 621, 959 A.2d 916, 922 (2008), *cert. denied*, 556 U.S. 1258, 129 S.Ct. 2433, 174 L.Ed.2d 229 (2009); *Commonwealth v. Powell*, 598 Pa. 224, 956 A.2d 406, 423 (Pa. 2008); *Commonwealth v. May*, 584 Pa. 640, 887 A.2d 750, 761 (Pa. 2005); Pa.R.A.P. 302. Even constitutional claims are waived if they are not raised before the trial court. *Kennedy*, 959 A.2d at 922 (finding Sixth Amendment issue waived where defendant failed to raise objection on this basis at trial). The penalty of waiver is the result for failing to object, even in capital appeals. *Hairston*, 84 A.3d at 672; *Ballard*, 80 A.3d at 406. In my view, then, a defendant cannot fail to object based upon statutorily available exceptions to the introduction of evidence and then demand a new trial on the grounds that the sheer quantum of evidence introduced against him violated his due process rights. To hold otherwise would permit a capital defendant, through counsel, to create for himself or herself the grounds for a new penalty phase trial without giving the trial court the ability to appropriately consider and exclude testimony. This is particularly true in a case like this one, where some of the evidence was plainly ripe for an objection that it violated the parameters of section 9711(a)(2). For example, neither Trooper Douglass' vivid testimony regarding his own injuries nor Attorney Tranquilli's graduation ceremony remarks appear to bear any clear relationship to the impact of Trooper Dickson's murder on his family.[2]

As this Court has often said, our trial courts must act as the gatekeepers for the introduction of victim impact evidence, which must of necessity include ensuring compliance with the statutory requirements. *See, e.g., Eichinger*, 915 A.2d at 1139 ("[O]ur trial judges are more than capable of overseeing the presentation of

2. Justice Wecht is of the mind that "[t]he constitutional and statutory claims are distinct. The viability of one is not dependent upon taking any action relative to the other." CDO at 1093 n.4. While I agree that the claims are distinct, I do not agree that one is not dependent on the other. The assertion of statutory objections is directly related to the viability of a due process claim based on the nature and quantity of the victim impact evidence admitted. *See id.* The viability of statutory objections, had they been made by Frein's counsel and ruled on by the trial court, could have affected the nature and quantity of victim impact evidence received by the jury, which, in turn, necessarily effects whether there is a viable due process claim.

evidence so that overtly passionate, intentionally biased and inflammatory material is kept out of the courtroom."). We have also observed, however, that "relief is always available to correct those situations where unduly prejudicial information is introduced which renders the sentencing process fundamentally unfair." *Means*, 773 A.2d at 150 (citing *Payne v. Tennessee*, 501 U.S. 808, 831, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (O'Connor, J., concurring)); *Commonwealth v. Williams*, 578 Pa. 504, 854 A.2d 440, 446 (2004). In either case, statutorily available objections must be made to provide the trial court with the opportunity to control, and correct, if need be, the admission of alleged victim impact evidence before the defendant may fairly challenge the trial court's failure in this regard. *Hairston*, 84 A.3d at 672; *Ballard*, 80 A.3d at 406. Frein, through his counsel, did not provide the trial court with the opportunity to do so here.[3]

For these reasons, I must concur in the result reached by the Majority to deny Frein a new penalty phase trial. In my view, given the record currently before us, consideration of a new penalty phase trial must await collateral review.

3. I find counsel's inaction critical because the failure to make the appropriate objections contributed to the prejudicial state of the record against Frein. Justice Wecht describes Frein's due process challenge as being based the nature and quantity of victim impact evidence admitted at trial. CDO at 1092–93. The problem with this premise is that some of this evidence, as described above and acknowledged by the Majority and Justice Wecht, *see* MO at 1074–75; CDO at 1094–95, plainly was not victim impact evidence as defined by statute. Thus, the wholesale consideration of all of the evidence received, even that which was statutorily inadmissible with no objection raised, provides a faulty foundation for a due process challenge based on the quality and quantity of victim impact evidence admitted. Frein's counsel objected to various items of evidence on the grounds that it was excessive and/or cumulative. *See* N.T., 4/20/2017, at 75-77, 81-82, 95, 105. The trial court denied these objections, indicating on at least one occasion that there is no "textbook amount" of permissible victim impact evidence. N.T., 4/21/2017, at 48. Even then, Frein's counsel failed to lodge statutory objections. I reiterate that had he done so, it is possible that we would have a different record before us. I am unwilling to undertake a due process analysis in this context, where the record contains evidence that plainly was not admissible as victim impact evidence, and this impermissible evidence contributes to the "quality and quantity" of evidence upon which the due process claim is based.

JUSTICE WECHT, Concurring and Dissenting

I join the learned Majority's fine opinion in all respects, save for Part III, and save for the Majority's ultimate disposition denying Eric Frein a new penalty phase hearing.

Relying principally upon the general presumption that jurors follow a trial judge's instructions, the Majority in Part III rejects Frein's claim that the victim impact evidence presented to the jury violated his constitutional right to due process of law.[1] The overwhelming victim impact evidence in this case—some of which was not victim impact evidence at all—exceeded constitutionally permissible limits. In view of the trial court's error in this regard, this Court is bound as a matter of constitutional law to vacate Frein's death sentence and to remand the case to the trial court for a new penalty phase. Thus, as to Part III and the Court's decision not to afford Frein a new sentencing hearing, I respectfully dissent.

* * *

Before delving into the issue of victim impact evidence, I am obliged to address

1. *See* Maj. Op. at 1074–75.

the viability of Frein's contention that Pennsylvania State Police ("PSP") personnel violated his constitutional rights when they failed to inform him, before he waived his *Miranda*[2] rights, either: (1) that his parents had retained an attorney to assist him after he was apprehended; or (2) that this attorney arrived at the PSP barracks during the initial stages of the interrogation and was nonetheless prevented from accessing him. The Majority appropriately declines to address this claim in light of its resolution of Frein's other suppression issue. *See id.* at 1071–72 ("[A]ny error by the trial court in refusing to suppress Appellant's statement was harmless in light of the overwhelming, properly admitted, evidence establishing Appellant's guilt.").

I join this aspect of the opinion. Principles of judicial restraint counsel that, in the ordinary course, this Court should not decide that which is not necessary to resolve a case. The prudential choice not to address the *Miranda* issue here should not be construed as any holding concerning the substantive viability of a similar challenge in future cases, nor as an endorsement of the actions undertaken by PSP personnel in this case. Those actions, which I detail immediately below, raise troubling and significant constitutional concerns that are not fully resolved or foreclosed by precedents of the Supreme Court of the United States or this Court.

On October 30, 2014, Frein's parents watched local television news coverage of Frein's arrest for the murder of PSP Corporal Bryon K. Dickson. When Frein appeared on the television screen, his parents noticed that he had sustained facial injuries. Concerned about both Frein's well-being and his legal rights, Frein's parents contacted Attorney James Swetz. Frein's parents retained Attorney Swetz and asked him to go to the PSP barracks where Frein was being held, in order to assess Frein's physical condition, to invoke Frein's right to counsel, and to discuss with Frein his right to remain silent.

At 8:48 p.m., Attorney Swetz phoned PSP dispatch and told the dispatcher that he was hired by Frein's family and that he intended to go to the barracks to intervene before PSP personnel began to interrogate Frein. The dispatcher responded by providing Attorney Swetz a relevant telephone number.

Attorney Swetz dialed that telephone number. A PSP trooper answered the call and told Attorney Swetz that he would not be granted entry into the barracks, that Frein was an adult who could make his own decisions, and that, up to that point in time, Frein had not requested a lawyer. Attorney Swetz replied emphatically, telling the trooper that he was invoking Frein's right to counsel, an invocation that he believed would serve to terminate or forestall the interrogation. The trooper responded by repeating that, if Attorney Swetz showed up at the barracks, he would not be permitted to enter the premises, let alone to see Frein.

Despite the warning, Attorney Swetz drove to the PSP barracks. While en route, Attorney Swetz received a call from someone at the barracks inquiring as to the time that he expected to arrive, as well as the make and model of his vehicle. When Attorney Swetz arrived, he encountered a multitude of PSP troopers, some in camouflage, standing outside of the barracks. Attorney Swetz approached the troopers and tried to explain that he was there to invoke Frein's *Miranda* rights. He again was told that he was not permitted to enter the building. He was directed to a parking spot on the side of the road.

2. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

While parked, Attorney Swetz attempted to reach Pike County District Attorney Ray Tonkin by telephone. A dispatcher answered the call and took Attorney Swetz' cell phone number. Minutes later, two plainclothes troopers approached Attorney Swetz in his car and told him that District Attorney Tonkin would return his call shortly. While Attorney Swetz waited, he telephoned Frein's father, who told Attorney Swetz that television news was covering a live press conference, at which it was being reported that Frein was not represented by counsel. At that point, Attorney Swetz became convinced that he was not going to be allowed into the barracks, so he drove home.

At 1:13 a.m., District Attorney Tonkin returned Attorney Swetz' earlier call. The purpose of the call was to inform Attorney Swetz that Frein was scheduled for an arraignment later that morning. District Attorney Tonkin also told Attorney Swetz that the Commonwealth would file a motion to move the arraignment from a local magisterial district judge's office to the Pike County Courthouse. Attorney Swetz informed District Attorney Tonkin that, due to a previously scheduled court appearance in another county, he would not be able to attend the arraignment. Attorney Swetz did not appear at the arraignment. Notably, however, in the Commonwealth's motion to change the venue of the preliminary arraignment, District Attorney Tonkin listed Attorney Swetz as Frein's counsel of record.

At no point did anyone tell Frein that his parents had retained Attorney Swetz to represent him during the interrogation, or that Attorney Swetz was present at the PSP barracks for that purpose. As well, no one told Corporal Clark, Trooper Mulvey, or ATF Agent Dressler, all of whom were involved in the interrogation of Frein, that Attorney Swetz was at the barracks or that Swetz had attempted to invoke Frein's right to counsel. Presently, Frein argues that, by failing to inform him of Attorney Swetz' presence at the barracks, and by preventing Swetz from accessing him, the Commonwealth and its agents violated Frein's Fifth, Sixth, and Fourteenth Amendment rights, as well as his rights under Article I, Section 9 of the Pennsylvania Constitution.

In *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986),[3] the

3. A brief note is in order regarding the short form of citation that I use when I refer to *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). According to *The Bluebook*, when using a short form citation, one should "avoid using the name of a geographical or government unit, a government official, or a common litigant." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.9(a)(i), at 116 (Columbia Law Rev. Ass'n et al. eds., 20th ed. 2015). At the time *Moran v. Burbine* was decided, John Moran was the Superintendent of the Rhode Island Department of Corrections, *i.e.*, a government official and, likely, a common litigant. Thus, in compliance with standard *Bluebook* format, when using the short form citation, I use *"Burbine"* rather than *"Moran."*

I note nonetheless that, with regard to *Moran v. Burbine*, courts generally have not opted to cite the case as *"Burbine."* For instance, in *Commonwealth v. Arroyo*, 555 Pa. 125, 723 A.2d 162 (1999), this Court elected to use *"Moran"* in its short form references to the case. Similarly, in several instances, Justices of the Supreme Court of the United States also referred to the case in short form as *"Moran."* *See, e.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 791, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009); *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 207, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008); *Missouri v. Seibert*, 542 U.S. 600, 625, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (O'Connor, J., dissenting); *McNeil v. Wisconsin*, 501 U.S. 171, 181, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). However, in *Berghuis v. Thompkins*, 560 U.S. 370, 382, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010), Justice Kennedy, writing for the majority, elected to use *"Burbine"* as the title for the short form citation. Like the *Berghuis* Court, I use *"Bur-*

Supreme Court of the United States held that similar actions by police officers did not offend either the Fifth or Sixth Amendments to the United States Constitution. Shortly after Burbine was arrested in Cranston, Rhode Island in connection with a burglary, police officers discovered information connecting him to a murder that occurred in Providence, Rhode Island. The arresting officers contacted officers from Providence and informed them of both their suspicion that Burbine had committed the murder and the fact that Burbine was in police custody. *Id.* at 416, 106 S.Ct. 1135. Three Providence police officers drove to where Burbine was being held, intent upon interrogating him about the murder. *Id.*

In the meantime, Burbine's sister, who was aware only of the burglary arrest, contacted the local public defender's office and sought legal representation for her brother. An attorney from that office called the police station in Cranston where Burbine was being detained and asked to talk with a detective. *Id.* at 417, 106 S.Ct. 1135. When an unidentified person answered, the attorney stated, among other things, that she would be acting as Burbine's attorney in the event that the police interrogated Burbine or placed him in a lineup. The unidentified person told the attorney that the police would neither interrogate Burbine that night, nor put him in a lineup. The person indicated that police officers had ceased their interactions with Burbine for the night. The person neither informed the attorney that Burbine was a suspect in a murder, nor that the Providence police had arrived in Cranston to interrogate Burbine about that murder. Burbine was not informed that his sister had arranged representation, nor that the attorney had contacted the police on his behalf. *Id.*

Despite the representations made to the public defender, the Providence police conducted a series of interviews with Burbine regarding the murder. Before each interview, the police provided Burbine with *Miranda* warnings. Each time, Burbine waived his constitutional rights by executing a written *Miranda* waiver form. At no point did Burbine change his mind, revoke his waiver, or ask for an attorney. *Id.* at 417-18, 106 S.Ct. 1135. Burbine confessed to the murder in three written statements, and he was charged accordingly. Before trial, he moved to suppress the statements on the basis that the police officers' actions violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. The case made its way to the United States Supreme Court, which granted *certiorari* to decide "whether a prearraignment confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him." *Id.* at 420, 106 S.Ct. 1135.

The Supreme Court rejected both of Burbine's primary constitutional claims. Regarding the Fifth Amendment privilege against self-incrimination, the Court first explained that nothing about the actual *Miranda* waiver rendered it invalid. Burbine was not subjected to deceptive or psychological pressures, nor was there any evidence of record to suggest that Burbine did not comprehend his rights or the impact of his decision to relinquish them. The Court then held that an otherwise valid waiver of one's *Miranda* rights is not invalidated by forces unknown to the person in custody. "Events occurring outside of the presence of the suspect and entirely

bine," as that usage aligns most closely with the applicable *Bluebook* rule.

unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422, 106 S.Ct. 1135. The Court acknowledged that "additional information would have been useful" to Burbine, but the Court had "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* In short, once it is established that the suspect knew, understood, and waived his applicable rights, including the prerogative to stop the interrogation by invoking one of those rights, "the [Fifth Amendment] analysis is complete and the waiver is valid as a matter of law." *Id.* at 422-43, 106 S.Ct. 1135.

The Supreme Court also rejected Burbine's Sixth Amendment challenge. The Court noted first that the right to counsel included within the *Miranda* warnings is not a substantive constitutional right, but instead is a procedural device created to provide an extra level of protection over a suspect's Fifth Amendment privilege against self-incrimination. *Id.* at 429, 106 S.Ct. 1135. The substantive Sixth Amendment right has no application at the investigative/interrogative stage of the criminal process. The right does not attach until the government's role shifts from "investigation to accusation." *Id.* at 430, 106 S.Ct. 1135. Because Burbine's three confessions occurred prior to the initiation of formal criminal proceedings, the Court found no Sixth Amendment right to be violated. *Id.* at 432, 106 S.Ct. 1135.

Although it foreclosed Burbine's claims based upon the Fifth and Sixth Amendments, the Court nonetheless acknowledged two other potential avenues for relief in such circumstances: (1) the Due Process Clause of the Fourteenth Amendment; and (2) decisions premised exclusively upon state constitutional law. *Id.* at 428, 432-33, 106 S.Ct. 1135. The Court briefly considered whether Burbine's due process rights were violated, but held that the specific facts of the case fell "short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." *Id.* at 433-34, 106 S.Ct. 1135. The Court expressly left open the possibility that "on facts more egregious than those presented here police deception might rise to the level of a due process violation." *Id.* at 433, 106 S.Ct. 1135.

A number of state supreme courts have accepted the *Burbine* Court's invitation to reconsider the issue as a matter of state constitutional law, with some concluding that such deceptive police behavior violates their respective state constitutions. *See, e.g., State v. Reed*, 133 N.J. 237, 627 A.2d 630, 646 (1993) (holding that "the failure of the police to inform defendant that an attorney was present and asking to speak with him violated defendant's State privilege against self-incrimination"); *State v. Stoddard*, 206 Conn. 157, 537 A.2d 446, 451-55 (1988) (holding that the Due Process Clause of the Connecticut Constitution imposes a duty upon police officers to act reasonably, diligently, and promptly to inform a suspect that an attorney presently is making efforts to offer legal assistance).

Our Court has addressed the question only once, in *Commonwealth v. Arroyo*, 555 Pa. 125, 723 A.2d 162 (1999). There, we did not resolve the issue in a manner that would preclude a future challenge. Quite the opposite. In *Arroyo*, police officers interviewed Arroyo regarding his suspected role in the death of his eight-month-old son. *Id.* at 164. The police provided Arroyo with a standard *Miranda* warnings form, which Arroyo understood and signed. Ar-

royo eventually admitted to punching his son in the chest and stomach several times. During the interrogation, an attorney retained by Arroyo's girlfriend called the police station and asked to speak with Arroyo, seeking specifically to ask Arroyo whether he desired the attorney's assistance during questioning. The police refused to put the attorney in contact with Arroyo and never informed Arroyo that the attorney had attempted to contact him. *Id.*

Arroyo challenged the police conduct under the Pennsylvania Constitution, asserting violations of his right against self-incrimination, his right to due process, and his right to counsel. Ultimately, this Court only addressed substantively (and extensively) Arroyo's right to counsel claim, holding that Pennsylvania's Article I, Section 9 right to counsel is coterminous with the Sixth Amendment right to counsel, and, therefore, provides no greater protection at the investigative/interrogatory stage of the criminal process. *Id.* at 170.

Arroyo's remaining constitutional claims did not receive detailed, substantive treatment. Rather, this Court rejected both claims essentially on procedural grounds. As to self-incrimination, this Court observed that Arroyo "pa[id] scant attention" to this argument in his brief. *Id.* at 166. This Court then criticized Arroyo for "utterly fail[ing] to take cognizance of the fact that this [C]ourt has repeatedly stated that ... the provision in Article I, § 9 which grants a privilege against self-incrimination tracks the protection afforded under the Fifth Amendment." *Id.* Essentially, this Court dismissed Arroyo's self-incrimination argument as substantively undeveloped, and for failing to provide an analysis under *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991), that might support any effort to distinguish our Constitution from its federal counterpart. Lacking such advocacy, this Court declined to deviate from the existing parallel jurisprudence under the United States Constitution. *Arroyo*, 723 A.2d at 167.

Arroyo's due process challenge met a similar fate. This Court explained that Arroyo's "references to a due process violation are hopelessly intertwined with his argument that his right to counsel was denied." *Id.* Accordingly, this Court refused to "separate it out and, in effect, raise an issue for him *sua sponte*." *Id.*

In the two decades since *Arroyo*, we have not had an opportunity to address substantively the questions that our decision left open. As I read *Arroyo*, this Court did not resolve with precedential finality whether the police action (or inaction) at issue in this line of cases violates a suspect's Pennsylvania constitutional privilege against self-incrimination. To be sure, the question superficially is governed by the general parallelism heretofore recognized between the applicable state and federal constitutional provisions. However, the coterminous nature of these provisions remains susceptible to a comprehensive *Edmunds* analysis, one that the *Arroyo* Court did not engage in substantively due to Arroyo's briefing inadequacies. Unless and until this Court undertakes an *Edmunds* review, I view the issue as ripe for reconsideration, particularly in light of *Burbine*'s invitation to state courts to consider the issue under the independent protections afforded by state constitutions.

Similarly, due process remains a viable avenue to test the constitutionality of this type of police conduct. We resolved Arroyo's due process claim with no more finality than his self-incrimination challenge, as Arroyo did not develop the claim in a meaningful way that would permit this Court to address it substantively. Additionally, in *Burbine*, the United States Supreme Court rejected a federal due pro-

cess challenge only as to the facts of that case, and expressly left open the possibility that other facts could give rise to such a challenge. *Burbine*, 475 U.S. at 432-33, 106 S.Ct. 1135.

From my perspective, a due process challenge could be particularly compelling. We have in the past explained that "[t]he due process inquiry, in its most general form, entails an assessment as to whether the challenged proceeding or conduct offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental and that defines the community's sense of fair play and decency." *Commonwealth v. Kratsas*, 564 Pa. 36, 764 A.2d 20, 27 (2001) (internal citations and alterations omitted). "Substantive due process is the esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice[.]" *Khan v. State Bd. of Auctioneer Exam'rs*, 577 Pa. 166, 842 A.2d 936, 946 (2004) (internal citation omitted).

Miranda warnings are not mandated by the text of any of the amendments contained in the Bill of Rights. Nonetheless, in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), the Supreme Court recognized that "*Miranda* announced a constitutional rule." *Id.* at 444, 120 S.Ct. 2326. A primary purpose of that rule is "to [e]nsure that the [suspect's] right against compulsory self-incrimination is protected." *New York v. Quarles*, 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (internal citation omitted). "The purpose of the *Miranda* warnings [ ] is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights." *Burbine*, 475 U.S. at 425, 106 S.Ct. 1135. One way in which the warnings attempt to mitigate the coercive atmosphere of police interrogation is by clearly informing the suspect that he or she has the right to an attorney to assist in the decision of whether to surrender the right not to incriminate himself or herself. Another is by permitting the suspect to stop the interrogation at any time to invoke the right to silence or to speak with an attorney.

It is difficult to square the right to counsel as afforded by *Miranda*, and the fundamental fairness required by due process, with the actions undertaken by PSP personnel in this case. It strikes me as starkly ironic that a suspect is (and must be) informed that he may have an attorney to help him make the decision of whether to cooperate with the police, yet need not be told that in fact an attorney has arrived on the premises seeking to do exactly that. Irony aside, a substantial question remains as to whether what happened at the PSP barracks in this case comports with any conception of fundamental fairness, let alone the robust one heretofore recognized in Pennsylvania. *See generally, Commonwealth v. Brown*, 617 Pa. 107, 52 A.3d 1139, 1162 (2012).

Here, Frein was informed that he had the right to consult an attorney before waiving his constitutional rights. What he did not know was that Attorney Swetz was at the barracks ready and willing to assist him but was prohibited from going inside the building. Before Frein waived his rights, no one told him that, although District Attorney Tonkin would recognize Attorney Swetz as Frein's counsel of record, agents of this Commonwealth would not allow that lawyer actually to fulfill the function envisioned for counsel in *Miranda*. Frein was advised that he could stop the interrogation at any time, but he did not know that, if he did so, there was an attorney on the premises, hired by his parents, ready and waiting to advise him. Due process mandates adherence to fair play and decency. I find it quite difficult to

believe that, under paradigms of criminal justice prevailing today, the police conduct surrounding Attorney Swetz and Frein's interrogation can be reconciled with substantive norms of fair play and decency. What the PSP personnel did in this case was actively prevent Frein from receiving that to which he constitutionally was entitled. There is nothing fair about that. The ends do not justify the means.

As I noted at the outset, the Majority declines to address these claims due to the posture of this particular case, and I join the Court's opinion in that regard. Nonetheless, I note that a challenge to such law enforcement tactics remains viable under the Pennsylvania Constitution. Neither *Burbine* nor *Arroyo* permanently foreclosed judicial review of such conduct. At the very least, five decades after *Miranda*, police action that prevents an attorney from accessing a client, particularly during the inherently coercive process of a custodial interrogation, should be consistently discouraged as a matter of law enforcement practice, even apart from the dubious constitutionality of such conduct.

* * *

I return now to Frein's challenge to the quantity and nature of the victim impact evidence proffered by the Commonwealth during the penalty phase of this case. Frein acknowledges that the Commonwealth's presentation began with "traditional victim impact" evidence, but asserts that it "soon crossed the line and developed into emotionally charged, cumulative, and much more prejudicial than probative" evidence, violating his constitutional right to "fairness and due process." Brief for Frein at 39. Presumably anticipating the application of the general presumption that a jury follows a trial court's instructions, Frein argues that "[e]xceptions to the assumption that juries hear and follow instructions do exist[,]" particularly when the evidence at issue is so "overpowering, emotional, [and] highly prejudicial" that the "practical and human limitations of the jury system cannot be ignored." *Id.* at 42. Frein insists that this is in fact such a case, one in which the presumption must yield to the unavoidable effect of the victim impact evidence. After close review, I am constrained to agree.

"Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding[.]" *Commonwealth v. Eichinger*, 591 Pa. 1, 915 A.2d 1122, 1139 (2007). This includes victim impact evidence. Victim impact evidence technically is irrelevant to any of the aggravating factors that the Commonwealth may seek to prove in support of a death sentence. *See Commonwealth v. Rios*, 591 Pa. 583, 920 A.2d 790, 807 (2007), *overruled on other grounds by Commonwealth v. Tharp*, 627 Pa. 673, 101 A.3d 736 (2014); 42 Pa.C.S. § 9711(d)(1-18). Nonetheless, courts have determined that the evidence is admissible at the penalty phase in capital cases, in part, to enable the jury to know and understand the "victim's uniqueness as an individual human being." *Payne v. Tennessee*, 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Commonwealth v. Flor*, 606 Pa. 384, 998 A.2d 606, 633 (2010).

Victim impact testimony often is raw and heartrending. It can stir passions in a way that is not generally permitted for a jury's consideration in our system of criminal justice due to the potential that the emotional impact of such testimony either can prejudice the jury or distract it from the issues that must be resolved in the particular case. Nevertheless, at the sentencing phase of a capital case, "a criminal defendant does not have the right to have all evidence presented against him at trial sanitized of anything that could cause ju-

rors to sympathize with the victim or his family." *Rios*, 920 A.2d at 807. "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." *Commonwealth v. Baumhammers*, 599 Pa. 1, 960 A.2d 59, 93 (2008) (internal citation omitted).

Victim impact evidence is defined by statute as "evidence concerning the victim and the impact that the death of the victim has had on the family[.]" 42 Pa.C.S. § 9711(a)(2). By its terms, the statute establishes two categories of evidence that fall within the definition: (1) evidence about the victim as an individual; and (2) evidence regarding how the victim's death impacted his or her family. *See Flor*, 998 A.2d at 634. Section 9711(a)(2) does not grant a prosecutor *carte blanche* authority to submit evidence about every person or place upon which the victim had an impact. "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*, 915 A.2d at 1139-40. Freed from such limits, the focus of capital sentencing hearings would be on the victim and not upon the aggravating and mitigating circumstances that the General Assembly has required jurors to weigh in order to decide whether to impose the death penalty upon the person convicted.

In *Payne*, the United States Supreme Court explained that victim impact evidence conveys to the jury that "the victim is an individual whose death represents a unique loss to society and in particular to his family." *Payne*, 501 U.S. at 825, 111 S.Ct. 2597 (internal citation omitted). Notably, our General Assembly chose not to adopt so broad an understanding of victim impact evidence when it enacted Section 9711(a)(2), a provision that does not encompass the societal impact resulting from the victim's death. On occasion, we have permitted, within the context of admissible victim impact evidence, statements that related to circumstances beyond the two statutory classes. For instance, in *Commonwealth v. Singley*, 582 Pa. 5, 868 A.2d 403 (2005), we considered as permissible victim impact evidence a statement that concerned the impact that the victim's death had at his job. The victim's fiancée explained that the victim's boss shut down the business for a few days after the victim's murder. The victim's boss also asked the fiancée to participate in an award ceremony recognizing the victim. *Id.* at 415. We explained that the victim's fiancée did not relay the information in a vacuum, but presented it in the context of the fiancée's involvement in the award ceremony and her family relationships after the victim's death. *Id.* We did not create—nor could we—an expansive exception to the statute that would permit evidence pertaining to a victim's impact on society, on his or her employer, or on anyone other than his or her family.

Before examining some of the victim impact evidence introduced to the jury in this case, it is important to recognize the juncture at which the jury receives such proof. The Commonwealth opens the evidentiary aspect of the capital sentencing hearing by offering evidence related to the proffered aggravating circumstances and to victim impact, if it so chooses, in its case-in-chief. However, because the sentencing phase of a death penalty trial principally entails proof and consideration of aggravating and mitigating circumstances, the role of victim impact evidence necessarily is secondary. That evidence can be used by the jury only after it determines

that at least one aggravating and at least one mitigating factor have been proven, such that the jury now is set to weigh those factors against one another. The jury is instructed that, if it finds no mitigating factors, it is not to consider the victim impact evidence at all.

The difficulty that this formula presents is patent and obvious. The jury hears and sees the emotionally compelling victim impact evidence *before* it decides whether (and which) aggravating and mitigating factors exist. The jury is told to ignore that victim impact evidence temporarily, an instruction that would challenge even the most austere and detached juror, until the jury completes its primary task. Where, as here, the victim impact evidence is extensive and overwhelming, ignoring that evidence, even momentarily, becomes even more challenging. Jurors hear and see intensely emotional evidence, but then are told that they cannot let that evidence influence their initial decisions as to the existence of aggravating and mitigating factors. But this is the regime created by our General Assembly. It is accordingly the sequence that the trial court directed the jury to follow in this case.. We must bear this evidentiary sequence and order of proof in mind when we consider whether a particular body of victim impact evidence improperly influenced a jury's decision. In my view, this statutorily-prescribed sequence has particular relevance to this particular case, a case in which, as I describe below, the victim impact evidence that the court admitted was overwhelming, to an unconstitutional degree.

Critically, Frein's claim is not premised upon whether any specific item of evidence may, or may not, have exceeded the statutory limitations. Rather, he seeks relief on constitutional grounds. More specifically, Frein contends that, both as to quantity and nature, the trial court's admission of the victim impact evidence was not only an error of law or an abuse of discretion, but, more importantly, a violation of his right to due process, a claim that the Supreme Court of the United States has recognized as viable. In *Payne*, the high Court held that "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" when victim impact evidence "is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair[.]" *Payne*, 501 U.S. at 825, 111 S.Ct. 2597. Having reviewed the record closely, I conclude that such circumstances are present here.

The Majority recognizes that the victim impact evidence proffered by the Commonwealth in this case was "extensive." Maj. Op. at 1072. But this characterization is an understatement. On April 20, 2017, the sentencing phase of Frein's trial commenced. In support of its proposed aggravating factors, the Commonwealth incorporated the entirety of the trial testimony into the sentencing record, a common (and judicially appreciated) effort that avoids duplicative and lengthy witness examinations during the Commonwealth's case-in-chief at the penalty phase. Then, the Commonwealth commenced presentation of its victim impact evidence. The Commonwealth's proof was not limited in scope or in duration. The Commonwealth introduced testimony from ten different witnesses, each of whom provided sensitive or passionate information for the jury to consider. The jury heard this testimony over the course of two days. The witnesses included Corporal Dickson's wife, sister, mother, and father. A number of Corporal Dickson's fellow PSP troopers also testified. The Commonwealth presented to the jury over thirty photographs showing Corporal Dickson at graduations, on vacations, and with his children and nephew, as well as a video of Corporal Dickson interacting with his family. The Commonwealth also

played for the jury a fifteen minute film of Corporal Dickson's graduation ceremony from the Pennsylvania State Police Academy, a film that included several speeches by law enforcement personnel.

The constitutional difficulty in this case arises not because some of this evidence may have exceeded Section 9711(a)(2)'s statutory limits.[4] The presentation was problematic because the amount and the substance of that evidence, taken as a whole, overwhelmingly infected the fairness of the sentencing proceeding, in violation of Frein's due process rights. As noted, the Commonwealth introduced over thirty photographs. Many of the photographs depicted Corporal Dickson at various points in his life and with members of his family. Other photographs did not.[5]

4. I disagree with Justice Donohue's suggestion that Frein cannot succeed on his due process claim because he did not object to some of the Commonwealth's evidence on statutory grounds. C.O. at 1081–83. The constitutional and statutory claims are distinct. The viability of one is not dependent upon taking any action relative to the other.

Frein's due process claim rests upon both the quantity and the quality of the evidence presented by the Commonwealth. As a general matter, the success of a constitutional claim does not depend upon statutory objections. Justice Donohue may be correct that Frein's best argument would have been that some of the evidence did not meet the statutory definition of victim impact evidence. *See* C.O. at 1082 n.2. That does not change the fact that objecting to the admissibility of evidence on statutory grounds is not a prerequisite to a due process claim. I am not aware of any precedent that requires a defendant to take such an action. The cases cited by Justice Donohue, *Commonwealth v. Eichenger*, 591 Pa. 1, 915 A.2d 1122 (2007), and *Commonwealth v. Means*, 565 Pa. 309, 773 A.2d 143 (2001), stand only for the general principle that a trial court is endowed with the authority and discretion to govern the admission of evidence, and that, even with regard to victim impact evidence, the court may exclude unduly prejudicial information. These cases do not require a defendant to object to potentially prejudicial material on statutory grounds before a constitutional challenge can ripen.

It may well be that, from Frein's perspective, the best course of action would have been to object on both constitutional and statutory grounds. However, whether tactical decision or blunder, Frein's counsel did not raise any statutory objections. Failure to do so does not defeat or extinguish an otherwise valid due process claim, nor does it render the record any less prejudicial for such purpose. The Commonwealth either violated Frein's due process rights, or it did not. That inquiry is a constitutional question, not a statutory one.

5. For example, the Commonwealth introduced photographs of Tiffany Dickson, Corporal Dickson's widow, in her nursing uniform as a student, at her nursing school graduation, and with her sons on the beach. These latter photographs do not concern the victim or the impact that his death had on his family. Rather, they served unavoidably to elicit human sympathy for Tiffany Dickson in any juror. There was also a photograph of the Dicksons on their honeymoon, which appears to have less to do with the impact of Corporal Dickson's death than it does to create a photographic, emotional history of the Dicksons' relationship.

The Commonwealth also introduced numerous photographs of Corporal Dickson's children. Those photographs depicted the following: Corporal Dickson and Tiffany Dickson with their elder son at the beach; Corporal Dickson and his eldest son holding his younger son shortly after his birth; Corporal Dickson teaching both children how to sing a children's song; the boys in Halloween costumes; the boys wearing Corporal Dickson's uniform; Corporal Dickson and his sons at the beach; Corporal Dickson teaching his eldest son to fish; Corporal Dickson assembling a play set with both boys; Corporal Dickson with his sons at the ceremony where he was promoted to Corporal; Corporal Dickson with his youngest son on a cruise ship; Corporal Dickson's oldest son in front of his casket; and Tiffany Dickson and both sons with Corporal Dickson's uniform on Mother's Day. Some of these photographs undeniably conveyed to the jury the fact that the children no longer had a father as a result of Frein's crime, normally a valid statutory purpose. Some of the photographs went further afield,

As I view the record, it is clear that the number and the nature of the photographs presented to the jury overwhelmed the statutory purpose of victim impact evidence and created instead a passionate and emotional impression that was difficult, if not impossible, for any juror to set aside, even after a trial court's instruction. It is no easy task that we ask jurors to perform in death penalty cases. They are required to hear all of the victim impact testimony, but then to ignore it until ascertaining whether any aggravating or mitigating circumstances have been established. Standing alone, many of these photographs constitute fair and admissible victim impact evidence, capable of measured consideration by a jury. In the aggregate, however, the photographs are overwhelming, and they contribute to my conclusion that the extent of the victim impact evidence created a very real possibility of unfair prejudice.

But let us set aside the emotionally powerful photographs for now, because there is more. And, from a due process perspective, it is these additional items that tip the matter quite far over the constitutional brink. These other aspects of the Commonwealth's victim impact evidence exceeded any reasonable bounds for such proof, and indeed did not constitute fair victim impact evidence at all. One of the most pronounced examples occurred during Tiffany Dickson's testimony. She described in detail for the jury the complications that she endured during the birth of the couple's second child. The description was impactful and powerful. In this context, it was also unduly prejudicial. The delivery-related complications led to Tiffany. Dickson being placed under anesthesia. When she awoke, she learned that Corporal Dickson had held his newborn son to her breast for feeding while she was unconscious. The obvious point of the testimony was to provide another example of Corporal Dickson performing a worthy act for his family, which, again, normally is not inadmissible or otherwise problematic for victim impact evidence purposes. However, the striking and graphic testimony concerning the child's delivery that preceded Corporal Dickson's involvement carried with it too great a potentiality to prejudice the emotions of average (indeed, any) jurors. Such testimony can serve only to inflame the passions of those called upon to decide between life and death.[6]

The Commonwealth also played the film of Corporal Dickson's graduation ceremony from the Pennsylvania State Police Academy, a ceremony that occurred in 2007.[7] This film, which I have reviewed closely, included a speech by Mark Tranquilli, Esquire, who was then a Deputy District Attorney and the chief homicide prosecutor for Allegheny County.[8] Attorney Tranquilli's speech was moving, articulate, and powerful. The speech also was

such as the children alone in Halloween costumes or wearing their father's trooper uniform.

6. I agree with the Majority that Tiffany Dickson's recollection of the delivery of her child was consistent with that which many women experience. I intend nothing here to downplay or disparage that experience. The Majority misses my point. My point is that, as the Majority puts it, the testimony was indeed "vivid," M.O. at 1073 n.23, and it was "vivid" to such a degree that I am not convinced that the jury was permitted to perform its weighty function according to the sober dictates of due process. This is particularly so in light of the fact that Tiffany Dickson's emotional testimony must be considered in conjunction with the rest of the Commonwealth's evidence.

7. *See* N.T., 4/21/2017, at 80-81, Exh. 574.

8. The Honorable Mark Tranquilli now serves as a Judge of the Court of Common Pleas of Allegheny County.

wholly irrelevant and exceptionally prejudicial here. The speech was not victim impact evidence at all. It was error for the trial court to allow the Commonwealth to play the speech for this jury. Extolling the virtues and values of law enforcement, Attorney Tranquilli commended the graduating PSP troopers for entering the "war ... between servants of light and the forces of darkness." Attorney Tranquilli then detailed the facts of an ambush murder of a PSP corporal by a drug dealer, a case that Attorney Tranquilli had recently, successfully prosecuted. Attorney Tranquilli used the story to highlight the bravery and valor displayed by the murdered PSP corporal, and he challenged the new graduates to be the same type of dedicated and courageous law enforcement officer. Considering that the instant case also involved the ambush murder of a law enforcement officer (indeed, a fellow PSP corporal), and that Attorney Tranquilli's 2007 speech did not concern Corporal Dickson or the impact that Corporal Dickson's subsequent death had on his family, the screening of the speech served only to arouse and inflame the emotions and passions of the jury.

It may be that, viewed item by item and in isolation, much of the victim impact evidence was relevant and admissible as such. But our inquiry does not end there. When considered together in light of the sentencing phase as a whole, the victim impact evidence was so emotionally overpowering, and so extensive, that it necessarily inhibited the ability of this jury fairly to assess this case. The effect of this evidence was transformative. The victim impact evidence no longer was secondary—an aid in the jury's ultimate deliberation. Instead, whether by the quantity of emotionally evocative photographs, the graphic childbirth description, the irrelevant, and inarguably prejudicial speech by Attorney Tranquilli, or a combination of all these things, it is impossible not to conclude that the victim impact evidence took on the predominant evidentiary role for the Commonwealth. It far exceeded, in quantity and quality, the inquiry concerning aggravating and mitigating circumstances upon which the death penalty decision principally (and statutorily) depends. The extent and nature of the victim impact evidence in this case displaced the calculus designed and prescribed by our death penalty statute and, indeed, rendered that statute's provisions functionally irrelevant.

At minimum, there existed a strong likelihood that the victim impact evidence was so extensive, and so emotionally charged, that it prejudiced the jury to the degree that the jurors were incapable fairly of assessing the existence of aggravating and mitigating factors. For this reason, I am compelled to disagree with the Majority's holding that the general presumption that juries follow a trial court's instructions sufficed to ensure that the jury here was not influenced by this overwhelming body of emotional evidence. A presumption of the kind that the Majority invokes serves as the starting point of the analysis; it is not the entirety of that analysis. The presumption is not irrebuttable, else there would be no limit to the Commonwealth's ability to present victim impact evidence, so long as the trial court provided the instruction. A litigant always can attempt to demonstrate that an instruction was incapable of curing any defect, and that the general presumption should not apply. In my view, this is one of the rare cases in which that occurred.

* * *

I would hold that the victim impact evidence was of such a quantity and character that, even considering the trial court's instruction to the jury, the resultant preju-

dice rendered the proceeding fundamentally unfair. *See Payne*, 501 U.S. at 825, 111 S.Ct. 2597. Our death penalty system requires the jury to hear victim impact evidence before determining whether aggravating and mitigating factors were established. Where, as here, the evidence was so prejudicial as to constitute a due process violation, the core deliberative process necessarily was tainted and the error in permitting such extensive evidence was not harmless. Frein is entitled to a remand for a new sentencing hearing. As the Majority holds otherwise, I respectfully dissent as to Part III of its opinion and as to the ultimate decision not to afford Frein a new sentencing hearing.

MELMARK, INC., Appellant

v.

Alexander SCHUTT, an Incapacitated Person, BY AND THROUGH Clarence E. SCHUTT and Barbara Rosenthal Schutt, his Legal Guardians, and Clarence E. Schutt and Barbara Rosenthal Schutt, Individually, Appellees

No. 78 MAP 2017

Supreme Court of Pennsylvania.

Argued: December 4, 2018

Decided: April 26, 2019

Background: Private nonprofit residential care facility for physically and developmentally disabled persons filed complaint to recover costs of providing care to adult resident against resident's parents, who resided in New Jersey, after New Jersey Department of Human Services, Division of Developmental Disabilities (NJ-DDD), which had funded resident's care after he reached age 21, rejected facility's fees and advised parents that it would cease paying for resident's care, under Pennsylvania filial support law, and under theories of quantum meruit and unjust enrichment. Following bench trial, the Court of Common Pleas, Delaware County, Civil Division, No. 13-1572, Christine Fizzano Cannon, J., determined that New Jersey filial law governed, and entered judgment for parents on all claims. Facility appealed. The Superior Court, No. 2253 EDA 2016, 169 A.3d 638, affirmed. Facility's petition for allowance of appeal was allowed.

Holdings: The Supreme Court, No. 78 MAP 2017, Saylor, C.J., held that:

(1) true conflict existed between Pennsylvania and New Jersey filial support laws, thus triggering need for choice of law analysis;

(2) Pennsylvania filial statute, and not New Jersey statute, controlled facility's claim against parents to recover costs of resident's care; and

(3) facility could recover costs of care provided to resident from parents under theory of quantum meruit.

Order of Superior Court reversed; remanded to Court of Common Pleas.

1. Domicile ⇐2

While a person can have only one domicile, he can be a resident of multiple places at the same time.

2. Action ⇐17

Courts conduct a choice-of-law analysis under the choice-of-law rules of the forum state.

3. Action ⇐17

When engaging in a "choice of law" analysis, Pennsylvania courts first consider whether a true conflict exists between the two states, because in some instances, the purported conflict is ultimately revealed to

APPENDIX B

KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 42 Pa.C.S.A. Judiciary and Judicial Procedure (Refs & Annos)
Part VIII. Criminal Proceedings
Chapter 97. Sentencing (Refs & Annos)
Subchapter B. Sentencing Authority

42 Pa.C.S.A. § 9711

§ 9711. Sentencing procedure for murder of the first degree

Currentness

(a) Procedure in jury trials.—

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible. Additionally, evidence may be presented as to any other matter that the court deems relevant and admissible on the question of the sentence to be imposed. Evidence shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e), and information concerning the victim and the impact that the death of the victim has had on the family of the victim. Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty pleas.—If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury as provided in subsection (a).

(c) Instructions to jury.--

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) The aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) The mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family. The court shall also instruct the jury on any other matter that may be just and proper under the circumstances.

(d) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(1) The victim was a firefighter, peace officer, public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), judge of any court in the unified judicial system, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General Assembly, Governor, Lieutenant Governor, Auditor General, State Treasurer, State law enforcement official, local law enforcement official, Federal law enforcement official or person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(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.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue.

(13) The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.C.S. § 306(c) (relating to liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act,[1] and punishable under the provisions of 18 Pa.C.S. § 7508 (relating to drug trafficking sentencing and penalties).

(14) At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

(15) At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

(16) The victim was a child under 12 years of age.

(17) At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.

(18) At the time of the killing the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant.

(e) Mitigating circumstances.--Mitigating circumstances shall include the following:

(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.

(4) The age of the defendant at the time of the crime.

(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.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) Sentencing verdict by the jury.--

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) Recording sentencing verdict.--Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) Review of death sentence.--

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or

(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).

(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

(i) Record of death sentence to Governor.--Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence, opinion and order by the Supreme Court within 30 days of one of the following, whichever occurs first:

(1) the expiration of the time period for filing a petition for writ of certiorari or extension thereof where neither has been filed;

(2) the denial of a petition for writ of certiorari; or

(3) the disposition of the appeal by the United States Supreme Court, if that court grants the petition for writ of certiorari.

Notice of this transmission shall contemporaneously be provided to the Secretary of Corrections.

(j) to (o) Repealed by 1998, June 18, P.L. 622, No. 80, effective in 60 days.

Credits

1974, March 26, P.L. 213, No. 46, § 3, imd. effective. Amended 1974, Dec. 30, P.L. 1052, No. 345, § 1, effective in 90 days; 1978, Sept. 13, P.L. 756, No. 141, imd. effective. Renumbered from 18 Pa.C.S.A. § 1311 and amended by 1980, Oct. 5, P.L. 693, No. 142, § 401(a), effective in 60 days. Amended 1986, July 7, P.L. 400, No. 87, § 1, effective in 60 days; 1988, Dec. 21, P.L. 1862, No. 179, § 2, imd. effective; 1989, Dec. 22, P.L. 727, No. 99, § 2, imd. effective; 1995, March 15, P.L. 966, No. 4 (Spec. Sess. No. 1), § 1, imd. effective; 1995, Oct. 11, P.L. 1064, No. 22 (Spec. Sess. No. 1), § 1, effective in 60 days; 1995, Nov. 17, P.L. 1117, No. 31 (Spec. Sess. No. 1), § 1, effective in 60 days; 1997, April 25, P.L. 84, No. 6, § 1, effective in 60 days; 1997, June 25, P.L. 293, No. 28, § 1, imd. effective. Affected 1998, June 18, P.L. 622, No. 80, § 9, effective in 60 days. Amended 1999, Oct. 12, P.L. 420, No. 38, § 1, effective in 60 days.

Notes of Decisions (1762)

Footnotes

1 35 P.S. § 780-101 et seq.

42 Pa.C.S.A. § 9711, PA ST 42 Pa.C.S.A. § 9711

Current through 2019 Regular Session Act 75. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX C

Purdon's Pennsylvania Statutes and Consolidated Statutes
Rules of Criminal Procedure (Refs & Annos)
Chapter 5. Pretrial Procedures in Court Cases (Refs & Annos)
Part B. Instituting Proceedings

Pa.R.Crim.P. Rule 502

Rule 502. Instituting Proceedings in Court Cases

Currentness

Criminal proceedings in court cases shall be instituted by:

(1) filing a written complaint; or

(2) an arrest without a warrant:

(a) when the offense is a murder, felony, or misdemeanor committed in the presence of the police officer making the arrest; or

(b) upon probable cause when the offense is a felony or murder; or

(c) upon probable cause when the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when such arrest without a warrant is specifically authorized by statute.

Comment: Criminal proceedings in court cases are instituted by 1) the filing of a complaint, followed by the issuance of a summons or arrest warrant; or by 2) a warrantless arrest, followed by the filing of a complaint. For the definition of "court case," see Rule 103.

If the defendant is held for court, the attorney for the Commonwealth submits an information to the court (see Rule 560). *See* Section 8931(d) of the Judicial Code, 42 Pa.C.S. § 8931(d).

There are only a few exceptions to this rule regarding the instituting of criminal proceedings in court cases. There are, for example, special proceedings involving a coroner or medical examiner. *See Commonwealth v. Lopinson*, 234 A.2d 552 (Pa. 1967), *vacated on other grounds sub nom. Lopinson v. Penn.*, 392 U.S. 647 (1968), and *Commonwealth v. Smouse*, 594 A.2d 666 (Pa.Super. 1991).

See Rules 556.11 and 556.13 for the procedures for the filing of a complaint following the issuance of an indictment.

Whenever a misdemeanor, felony, or murder is charged, even if the summary offense is also charged in the same complaint, the case should proceed as a court case under Chapter 5. *See Commonwealth v. Caufman*, 662 A.2d 1050 (Pa. 1995), and *Commonwealth v. Campana*, 304 A.2d 432 (Pa. 1973), vacated and remanded, 414 U.S. 808 (1973), on remand, 314 A.2d 854 (Pa. 1974). In judicial districts in which there is a traffic court established pursuant to 42 Pa.C.S. §§ 1301-1342, when a summary motor vehicle offense within the jurisdiction of the traffic court arises in the

same criminal episode as another summary offense or a misdemeanor, felony, or murder offense, see 42 Pa.C.S. § 1302 and *Commonwealth v. Masterson*, 418 A.2d 664 (Pa.Super. 1980).

Paragraph (2)(c) is intended to acknowledge those specific instances wherein the General Assembly has provided by statute for arrest without a warrant for a misdemeanor not committed in the presence of the arresting officer. It in no way attempts to modify the law of arrest where no specific statutory provision applies.

For institution of criminal proceedings in summary cases, see Rule 400.

Credits

Note: Original Rule 102(1), (2), and (3), adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 102 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 101, and made applicable to court cases only, September 18, 1973, effective January 1, 1974; *Comment* revised February 15, 1974, effective immediately; amended June 30, 1975, effective September 1, 1975; *Comment* amended January 4, 1979, effective January 9, 1979; paragraph (1) amended October 22, 1981, effective January 1, 1982; *Comment* revised July 12, 1985, effective January 1, 1986; January 1, 1986 effective date extended to July 1, 1986; *Comment* revised January 31, 1991, effective July 1, 1991; *Comment* revised August 12, 1993, effective September 1, 1993; amended August 9, 1994, effective January 1, 1995; *Comment* revised January 16, 1996, effective immediately; renumbered Rule 502 and amended March 1, 2000, effective April 1, 2001; amended March 9, 2006, effective September 1, 2006; *Comment* revised September 21, 2012, effective November 1, 2012; *Comment* revised November 27, 2018, effective March 1, 2019.

Notes of Decisions (19)

Rules Crim. Proc., Rule 502, 42 Pa.C.S.A., PA ST RCRP Rule 502
Current with amendments received through October 15, 2019.

End of Document

APPENDIX D

Purdon's Pennsylvania Statutes and Consolidated Statutes
Rules of Criminal Procedure (Refs & Annos)
Chapter 5. Pretrial Procedures in Court Cases (Refs & Annos)
Part D. Proceedings in Court Cases Before Issuing Authorities

Pa.R.Crim.P. Rule 542

Rule 542. Preliminary Hearing; Continuances

Currentness

(A) The attorney for the Commonwealth may appear at a preliminary hearing and:

(1) assume charge of the prosecution; and

(2) recommend to the issuing authority that the defendant be discharged or bound over to court according to law.

(B) When no attorney appears on behalf of the Commonwealth at a preliminary hearing, the affiant may be permitted to ask questions of any witness who testifies.

(C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may:

(1) be represented by counsel;

(2) cross-examine witnesses and inspect physical evidence offered against the defendant;

(3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;

(4) offer evidence on the defendant's own behalf, and testify; and

(5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

(D) At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it.

(E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

(F) In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, the issuing authority shall not proceed on the summary offense except as provided in Rule 543(F).

(G) Continuances

(1) The issuing authority may, for cause shown, grant a continuance and shall note on the transcript every continuance together with:

(a) the grounds for granting each continuance;

(b) the identity of the party requesting such continuance; and

(c) the new date, time, and place for the preliminary hearing, and the reasons that the particular date was chosen.

When the preliminary hearing is conducted in the court of common pleas, the judge shall record the party to which the period of delay caused by the continuance shall be attributed and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with Rule 600.

(2) The issuing authority shall give notice of the new date, time, and place for the preliminary hearing to the defendant, the defendant's attorney of record, if any, and the attorney for the Commonwealth.

(a) The notice shall be in writing.

(b) Notice shall be served on the defendant either in person or by first class mail.

(c) Notice shall be served on defendant's attorney of record and the attorney for the Commonwealth either by personal delivery, or by leaving a copy for or mailing a copy to the attorneys at the attorneys' offices.

Comment: As the judicial officer presiding at the preliminary hearing, the issuing authority controls the conduct of the preliminary hearing generally. When an attorney appears on behalf of the Commonwealth, the prosecution of the case is under the control of that attorney. When no attorney appears at the preliminary hearing on behalf of the Commonwealth, the issuing authority may ask questions of any witness who testifies, and the affiant may request the issuing authority to ask specific questions. In the appropriate circumstances, the issuing authority may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the issuing authority.

Paragraph (C)(3) is intended to make clear that the defendant may call witnesses at a preliminary hearing only to negate the existence of a *prima facie* case, and not merely for the purpose of discovering the Commonwealth's case. The modification changes the language of the rule interpreted by the Court in *Commonwealth v. Mullen*, 460 Pa. 336, 333 A.2d 755 (1975). This amendment was made to preserve the limited function of a preliminary hearing.

Paragraph (E) was amended in 2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. *But compare Commonwealth ex rel. Buchanan v. Verbonitz,* 525 Pa. 413, 581 A.2d 172 (Pa. 1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a prima facie case). *See also* Rule 1003 concerning preliminary hearings in Philadelphia Municipal Court.

If the case is held for court, the normal rules of evidence will apply at trial.

For the procedures when a defendant fails to appear for the preliminary hearing, see Rule 543(D).

In cases in which summary offenses are joined with misdemeanor, felony, or murder charges, pursuant to paragraph (F), during the preliminary hearing, the issuing authority is prohibited from proceeding on the summary offenses, or adjudicating or disposing of the summary offenses except as provided in Rule 543(F).

For the contents of the transcript, see Rule 135.

See Chapter 5 Part E for the procedures governing indicting grand juries. Under these rules, a case may be presented to the grand jury instead of proceeding to a preliminary hearing. *See* Rule 556.2.

Credits

Note: Former Rule 141, previously Rule 120, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970; revised January 31, 1970, effective May 1, 1970; renumbered Rule 141 and amended September 18, 1973, effective January 1, 1974; amended June 30, 1975, effective July 30, 1975; amended October 21, 1977, effective January 1, 1978; paragraph (D) amended April 26, 1979, effective July 1, 1979; amended February 13, 1998, effective July 1, 1998; rescinded October 8, 1999, effective January 1, 2000. Former Rule 142, previously Rule 124, adopted June 30, 1964, effective January 1, 1965, suspended effective May 1, 1970; present rule adopted January 31, 1970, effective May 1, 1970; renumbered Rule 142 September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; effective date extended to July 1, 1982; amended July 12, 1985, effective January 1, 1986, effective date extended to July 1, 1986; rescinded October 8, 1999, effective January 1, 2000. New Rule 141, combining former Rules 141 and 142, adopted October 8, 1999, effective January 1, 2000; renumbered Rule 542 and *Comment* revised March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended March 9, 2006, effective September 1, 2006; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended January 27, 2011, effective in 30 days [February 28, 2011]; amended June 21, 2012, effective in 180 days; amended October 1, 2012, effective July 1, 2013; amended April 25, 2013, effective June 1, 2013.

Notes of Decisions (15)

Rules Crim. Proc., Rule 542, 42 Pa.C.S.A., PA ST RCRP Rule 542
Current with amendments received through October 15, 2019.

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APPENDIX E

Purdon's Pennsylvania Statutes and Consolidated Statutes
Rules of Criminal Procedure (Refs & Annos)
Chapter 5. Pretrial Procedures in Court Cases (Refs & Annos)
Part D. Proceedings in Court Cases Before Issuing Authorities

Pa.R.Crim.P. Rule 543

Rule 543. Disposition of Case at Preliminary Hearing

Currentness

(A) At the conclusion of the preliminary hearing, the decision of the issuing authority shall be publicly pronounced.

(B) If the issuing authority finds that the Commonwealth has established a *prima facie* case that an offense has been committed and the defendant has committed it, the issuing authority shall hold the defendant for court on the offense(s) on which the Commonwealth established a *prima facie* case. If there is no offense for which a *prima facie* case has been established, the issuing authority shall discharge the defendant.

(C) When the defendant has appeared and has been held for court, the issuing authority shall:

(1) set bail as permitted by law if the defendant did not receive a preliminary arraignment; or

(2) continue the existing bail order, unless the issuing authority modifies the order as permitted by Rule 529(A);

(3) if the defendant has not submitted to the administrative processing and identification procedures as authorized by law, such as fingerprinting pursuant to Rule 510(C)(2), make compliance with these processing procedures a condition of bail; and

(4) advise the defendant that, if the defendant fails to appear without cause at any proceeding for which the defendant's presence is required, including the trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence.

(D) In any case in which the defendant fails to appear for the preliminary hearing:

(1) if the issuing authority finds that the defendant did not receive notice of the preliminary hearing by a summons served pursuant to Rule 511, a warrant of arrest shall be issued pursuant to Rule 509(2)(d).

(2) If the issuing authority finds that there was cause explaining the defendant's failure to appear, the issuing authority shall continue the preliminary hearing to a specific date and time, and shall give notice of the new date, time, and place as provided in Rule 542(G)(2). The issuing authority shall not issue a bench warrant.

(3) If the issuing authority finds that the defendant's absence is without cause and after notice, the absence shall be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority.

(a) In these cases, the issuing authority shall proceed with the case in the same manner as though the defendant were present.

(b) If the preliminary hearing is conducted and the case held for court, the issuing authority shall

(i) give the defendant notice by first class mail of the results of the preliminary hearing and that a bench warrant has been requested; and

(ii) pursuant to Rule 547, transmit the transcript to the clerk of courts with a request that a bench warrant be issued by the court of common pleas and, if the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2), with a notice to the court of common pleas of the defendant's noncompliance.

(c) If the preliminary hearing is conducted and the case is dismissed, the issuing authority shall give the defendant notice by first class mail of the results of the preliminary hearing.

(d) If a continuance is granted, the issuing authority shall give the parties notice of the new date, time, and place as provided in Rule 542(G)(2), and may issue a bench warrant. If a bench warrant is issued and the warrant remains unserved for the continuation of the preliminary hearing, the issuing authority shall vacate the bench warrant. The case shall proceed as provided in paragraphs (D)(3)(b) or (c).

(E) If the Commonwealth does not establish a *prima facie* case of the defendant's guilt, and no application for a continuance is made and there is no reason for a continuance, the issuing authority shall dismiss the complaint.

(F) In any case in which a summary offense is joined with misdemeanor, felony, or murder charges:

(1) If the Commonwealth establishes a *prima facie* case pursuant to paragraph (B), the issuing authority shall not adjudicate or dispose of the summary offenses, but shall forward the summary offenses to the court of common pleas with the charges held for court.

(2) If the Commonwealth does not establish a *prima facie* case pursuant to paragraph (B), upon the request of the Commonwealth, the issuing authority shall dispose of the summary offense as provided in Rule 454 (Trial In Summary Cases).

(3) If the Commonwealth withdraws all the misdemeanor, felony, and murder charges, the issuing authority shall dispose of the summary offense as provided in Rule 454 (Trial In Summary Cases).

(G) Except as provided in Rule 541(D), once a case is bound over to the court of common pleas, the case shall not be remanded to the issuing authority.

Comment: Paragraph (B) was amended in 2011 to clarify what is the current law in Pennsylvania that, based on the evidence presented by the Commonwealth at the preliminary hearing, the issuing authority may find that the Commonwealth has not made out a *prima facie* case as to the offense charged in the complaint but has made out a *prima facie* case as to a lesser offense of the offense charged. In this case, the issuing authority may hold the defendant for court on that lesser offense only. The issuing authority, however, may not *sua sponte* reduce the grading of any charge.

See Rule 1003 (Procedure In Non-Summary Municipal Court Cases) for the preliminary hearing procedures in Municipal Court, including reducing felony charges at the preliminary hearing in Philadelphia.

Paragraph (C) reflects the fact that a bail determination will already have been made at the preliminary arraignment, except in those cases in which, pursuant to a summons, the defendant's first appearance is at the preliminary hearing. *See* Rules 509 and 510.

Paragraph (C)(4) requires that the defendant be advised of the consequences of failing to appear for any court proceeding. *See* Rule 602 concerning a defendant's failure to appear for trial; see also *Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. 1997) ("[A] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent 'without cause.' ").

If the administrative processing and identification procedures as authorized by law, such as fingerprinting required by the Criminal History Record Information Act, 18 Pa.C.S. § 9112, that ordinarily occur following an arrest are not completed previously, when bail is set at the conclusion of the preliminary hearing, the issuing authority must order the defendant to submit to the administrative processing and identification procedures as a condition of bail. *See* Rule 527 for nonmonetary conditions of release on bail.

If a case initiated by summons is held for court after the preliminary hearing is conducted in the defendant's absence pursuant to paragraph (D)(2) and the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2), the issuing authority must include with the transmittal of the transcript a notice to the court of common pleas that the defendant has not complied with the fingerprint order. *See* Rule 547.

Nothing in this rule is intended to preclude judicial districts from providing written notice of the arraignment to the defendant at the conclusion of the preliminary hearing when a case is held for court. *See* Rule 571.

Paragraphs (D)(2) and (D)(3) were amended in 2013 changing the phrase "good cause" to "cause" in reference to whether the defendant's absence at the time of the preliminary hearing permits the preliminary hearing to proceed in the defendant's absence. This amendment is not intended as a change in the standard for making this determination. The change makes the language consistent with the language in Rule 602 describing the standard by which a defendant's absence is judged for the trial to proceed in the defendant's absence. In both situations, the standard is the same.

When a defendant fails to appear for the preliminary hearing, before proceeding with the case as provided in paragraph (D), the issuing authority must determine (1) whether the defendant received notice of the time, date, and place of the preliminary hearing either in person at a preliminary arraignment as provided in Rule 540(G)(2) or in a summons served as provided in Rule 511, and (2) whether the defendant had cause explaining the absence.

If the issuing authority determines that the defendant did not receive notice, the issuing authority must issue an arrest warrant as provided in Rule 509, and the case will proceed pursuant to Rules 516 or 517. *See* paragraph (D)(1).

If the issuing authority determines that there is cause explaining why the defendant failed to appear, the preliminary hearing must be continued and rescheduled for a date certain. *See* paragraph (D)(2). For the procedures when a preliminary hearing is continued, see Rule 542(G).

If the issuing authority determines that the defendant received service of the summons as defined in Rule 511 and has not provided cause explaining why he or she failed to appear, the defendant's absence constitutes a waiver of the defendant's right to be present for subsequent proceedings before the issuing authority. The duration of this waiver only extends through those proceedings that the defendant is absent.

When the defendant fails to appear after notice and without cause, paragraph (D)(3)(a) provides that the case is to proceed in the same manner as if the defendant were present. The issuing authority either would proceed with the preliminary hearing as provided in Rule 542(A), (B), (C) and Rule 543(A), (B), (C), and (D)(3)(b) or (c); or, if the issuing authority determines it necessary, continue the case to a date certain as provided in Rule 542(G); or, in the appropriate case, convene the preliminary hearing for the taking of testimony of the witnesses who are present, and then continue the remainder of the hearing until a date certain. When the case is continued, the issuing authority may issue a bench warrant as provided in paragraph (D)(3)(d), and must send the required notice of the new date to the defendant, thus providing the defendant with another opportunity to appear.

Paragraph (D)(3)(b)(ii) requires the issuing authority to include with the Rule 547 transmittal a request that the court of common pleas issue a bench warrant if the case is held for court.

In addition to the paragraph (D)(3)(b) notice requirements, the notice may include the date of the arraignment in common pleas court.

For purposes of modifying bail once bail has been set by a common pleas judge, see Rules 529 and 536.

See Rule 571 (Arraignment) for notice of arraignment requirements.

Rule 542(F) specifically prohibits an issuing authority at a preliminary hearing from proceeding on any summary offenses that are joined with misdemeanor, felony, or murder charges, except as provided in paragraph (F) of this rule. Paragraph (F) sets forth the procedures for the issuing authority to handle these summary offenses at the preliminary hearing. These procedures include the issuing authority (1) forwarding the summary offenses together with the misdemeanor, felony, or murder charges held for court to the court of common pleas, or (2) disposing of the summary offenses as provided in Rule 454 by accepting a guilty plea or conducting a trial whenever (a) the misdemeanor, felony, and murder charges are withdrawn, or (b) a *prima facie* case is not established at the preliminary hearing and the Commonwealth requests that the issuing authority proceed on the summary offenses.

Under paragraph (F)(2), in those cases in which the Commonwealth does not intend to refile the misdemeanor, felony, or murder charges, the Commonwealth may request that the issuing authority dispose of the summary offenses. In these cases, if all the parties are ready to proceed, the issuing authority should conduct the summary trial at that time. If the parties are not prepared to proceed with the summary trial, the issuing authority should grant a continuance and set the summary trial for a date and time certain.

In those cases in which a *prima facie* case is not established at the preliminary hearing, and the Commonwealth does not request that the issuing authority proceed on the summary offenses, the issuing authority should dismiss the complaint, and discharge the defendant unless there are outstanding detainers against the defendant that would prevent the defendant's release.

Paragraph (G) emphasizes the general rule that once a case has been bound over to the court of common pleas, the case is not permitted to be remanded to the issuing authority. There is a limited exception to the general rule in the situation in which the right to a previously waived preliminary hearing is reinstated and the parties agree, with the consent of the common pleas judge, that the preliminary hearing be held before the issuing authority. *See* Rule 541(D).

Nothing in this rule would preclude the refiling of one or more of the charges, as provided in these rules.

See Rule 313 for the disposition of any summary offenses joined with misdemeanor or felony charges when the defendant is accepted into an ARD program on the misdemeanor or felony charges.

Credits

Note: Original Rule 123, adopted June 30, 1964, effective January 1, 1965, suspended January 31, 1970, effective May 1, 1970. New Rule 123 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 143 September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; amended August 9, 1994, effective January 1, 1995; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; renumbered Rule 142 October 8, 1999, effective January 1, 2000; renumbered Rule 543 and amended March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended December 30, 2005, effective August 1, 2006; amended March 9, 2006, effective September 1, 2006; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended July 10, 2008, effective February 1, 2009; amended February 12, 2010, effective April 1, 2010; amended January 27, 2011, effective in 30 days; *Comment* revised July 31, 2012, effective November 1, 2012; amended October 1, 2012, effective July 1, 2013; amended May 2, 2013, effective June 1, 2013.

Notes of Decisions (23)

Rules Crim. Proc., Rule 543, 42 Pa.C.S.A., PA ST RCRP Rule 543
Current with amendments received through October 15, 2019.

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APPENDIX F

Purdon's Pennsylvania Statutes and Consolidated Statutes
Rules of Criminal Procedure (Refs & Annos)
Chapter 5. Pretrial Procedures in Court Cases (Refs & Annos)
Part F. Procedures Following a Case Held for Court (Refs & Annos)

Pa.R.Crim.P. Rule 560

Rule 560. Information: Filing, Contents, Function

Currentness

(A) After the defendant has been held for court following a preliminary hearing or an indictment, the attorney for the Commonwealth shall proceed by preparing an information and filing it with the court of common pleas.

(B) The information shall be signed by the attorney for the Commonwealth and shall be valid and sufficient in law if it contains:

(1) a caption showing that the prosecution is carried on in the name of and by the authority of the Commonwealth of Pennsylvania;

(2) the name of the defendant, or if the defendant is unknown, a description of the defendant as nearly as may be;

(3) the date when the offense is alleged to have been committed if the precise date is known, and the day of the week if it is an essential element of the offense charged, provided that if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient;

(4) the county where the offense is alleged to have been committed;

(5) a plain and concise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint;

(6) a concluding statement that "all of which is against the Act of Assembly and the peace and dignity of the Commonwealth"; and

(7) a certification that the information complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* regarding confidential information and documents.

(C) The information shall contain the official or customary citation of the statute and section thereof, or other provision of law that the defendant is alleged therein to have violated; but the omission of or error in such citation shall not affect the validity or sufficiency of the information.

(D) In all court cases tried on an information, the issues at trial shall be defined by such information.

Comment: The attorney for the Commonwealth may electronically prepare, sign, and transmit the information for filing.

Before an information is filed, the attorney for the Commonwealth may withdraw one or more of the charges by filing a notice of withdrawal with the clerk of courts. *See* Rule 561(A). Upon the filing of an information, any charge not listed on the information will be deemed withdrawn by the attorney for the Commonwealth. *See* Rule 561(B). After the information is filed, court approval is required before a *nolle prosequi* may be entered on a charge listed therein. *See* Rule 585.

In any case in which there are summary offenses joined with the misdemeanor, felony, or murder charges that are held for court, the attorney for the Commonwealth must include the summary offenses in the information. *See Commonwealth v. Hoffman*, 594 A.2d 772 (Pa. Super. 1991).

See Rule 113.1 regarding the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* and the requirements regarding filings and documents that contain confidential information.

When there is an omission or error of the type referred to in paragraph (C), the information should be amended pursuant to Rule 564.

See Rule 543(D) for the procedures when a defendant fails to appear for the preliminary hearing. When the preliminary hearing is held in the defendant's absence and the case is held for court, the attorney for the Commonwealth should proceed as provided in this rule.

See Chapter 5 Part E for the procedures governing indicting grand juries. As explained in the *Comment* to Rule 556.11, when the grand jury indicts the defendant, this is the functional equivalent to holding the defendant for court following a preliminary hearing.

Credits

Note: Rule 225 adopted February 15, 1974, effective immediately; *Comment* revised January 28, 1983, effective July 1, 1983; amended August 14, 1995, effective January 1, 1996; renumbered Rule 560 and amended March 1, 2000, effective April 1, 2001; *Comment* revised April 23, 2004, effective immediately; *Comment* revised August 24, 2004, effective August 1, 2005; *Comment* revised March 9, 2006, effective September 1, 2006; amended June 21, 2012, effective in 180 days; amended January 5, 2018, effective January 6, 2018; amended June 1, 2018, effective July 1, 2018.

Notes of Decisions (85)

Rules Crim. Proc., Rule 560, 42 Pa.C.S.A., PA ST RCRP Rule 560
Current with amendments received through October 15, 2019.

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Purdon's Pennsylvania Statutes and Consolidated Statutes
Rules of Criminal Procedure (Refs & Annos)
Chapter 5. Pretrial Procedures in Court Cases (Refs & Annos)
Part D. Proceedings in Court Cases Before Issuing Authorities

Pa.R.Crim.P. Rule 542

Rule 542. Preliminary Hearing; Continuances

Currentness

(A) The attorney for the Commonwealth may appear at a preliminary hearing and:

(1) assume charge of the prosecution; and

(2) recommend to the issuing authority that the defendant be discharged or bound over to court according to law.

(B) When no attorney appears on behalf of the Commonwealth at a preliminary hearing, the affiant may be permitted to ask questions of any witness who testifies.

(C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may:

(1) be represented by counsel;

(2) cross-examine witnesses and inspect physical evidence offered against the defendant;

(3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;

(4) offer evidence on the defendant's own behalf, and testify; and

(5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

(D) At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it.

(E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

(F) In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, the issuing authority shall not proceed on the summary offense except as provided in Rule 543(F).

(G) Continuances

(1) The issuing authority may, for cause shown, grant a continuance and shall note on the transcript every continuance together with:

(a) the grounds for granting each continuance;

(b) the identity of the party requesting such continuance; and

(c) the new date, time, and place for the preliminary hearing, and the reasons that the particular date was chosen.

When the preliminary hearing is conducted in the court of common pleas, the judge shall record the party to which the period of delay caused by the continuance shall be attributed and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with Rule 600.

(2) The issuing authority shall give notice of the new date, time, and place for the preliminary hearing to the defendant, the defendant's attorney of record, if any, and the attorney for the Commonwealth.

(a) The notice shall be in writing.

(b) Notice shall be served on the defendant either in person or by first class mail.

(c) Notice shall be served on defendant's attorney of record and the attorney for the Commonwealth either by personal delivery, or by leaving a copy for or mailing a copy to the attorneys at the attorneys' offices.

Comment: As the judicial officer presiding at the preliminary hearing, the issuing authority controls the conduct of the preliminary hearing generally. When an attorney appears on behalf of the Commonwealth, the prosecution of the case is under the control of that attorney. When no attorney appears at the preliminary hearing on behalf of the Commonwealth, the issuing authority may ask questions of any witness who testifies, and the affiant may request the issuing authority to ask specific questions. In the appropriate circumstances, the issuing authority may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the issuing authority.

Paragraph (C)(3) is intended to make clear that the defendant may call witnesses at a preliminary hearing only to negate the existence of a *prima facie* case, and not merely for the purpose of discovering the Commonwealth's case. The modification changes the language of the rule interpreted by the Court in *Commonwealth v. Mullen*, 460 Pa. 336, 333 A.2d 755 (1975). This amendment was made to preserve the limited function of a preliminary hearing.

Paragraph (E) was amended in 2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. *But compare Commonwealth ex rel. Buchanan v. Verbonitz,* 525 Pa. 413, 581 A.2d 172 (Pa. 1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a prima facie case). *See also* Rule 1003 concerning preliminary hearings in Philadelphia Municipal Court.

If the case is held for court, the normal rules of evidence will apply at trial.

For the procedures when a defendant fails to appear for the preliminary hearing, see Rule 543(D).

In cases in which summary offenses are joined with misdemeanor, felony, or murder charges, pursuant to paragraph (F), during the preliminary hearing, the issuing authority is prohibited from proceeding on the summary offenses, or adjudicating or disposing of the summary offenses except as provided in Rule 543(F).

For the contents of the transcript, see Rule 135.

See Chapter 5 Part E for the procedures governing indicting grand juries. Under these rules, a case may be presented to the grand jury instead of proceeding to a preliminary hearing. *See* Rule 556.2.

Credits

Note: Former Rule 141, previously Rule 120, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970; revised January 31, 1970, effective May 1, 1970; renumbered Rule 141 and amended September 18, 1973, effective January 1, 1974; amended June 30, 1975, effective July 30, 1975; amended October 21, 1977, effective January 1, 1978; paragraph (D) amended April 26, 1979, effective July 1, 1979; amended February 13, 1998, effective July 1, 1998; rescinded October 8, 1999, effective January 1, 2000. Former Rule 142, previously Rule 124, adopted June 30, 1964, effective January 1, 1965, suspended effective May 1, 1970; present rule adopted January 31, 1970, effective May 1, 1970; renumbered Rule 142 September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; effective date extended to July 1, 1982; amended July 12, 1985, effective January 1, 1986, effective date extended to July 1, 1986; rescinded October 8, 1999, effective January 1, 2000. New Rule 141, combining former Rules 141 and 142, adopted October 8, 1999, effective January 1, 2000; renumbered Rule 542 and *Comment* revised March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended March 9, 2006, effective September 1, 2006; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended January 27, 2011, effective in 30 days [February 28, 2011]; amended June 21, 2012, effective in 180 days; amended October 1, 2012, effective July 1, 2013; amended April 25, 2013, effective June 1, 2013.

Notes of Decisions (15)

Rules Crim. Proc., Rule 542, 42 Pa.C.S.A., PA ST RCRP Rule 542
Current with amendments received through October 15, 2019.

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