CASE NO._____

IN THE
Supreme Court of the United States

JOHN CHARLES EICHINGER,

Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Third Circuit

APPENDIX Volume II of II

Joseph W. Luby*
Katherine Thompson
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928–0520
joseph_luby@fd.org

*Counsel of record for Petitioner, John Charles Eichinger
Member of the Bar of the Supreme Court

Counsel for Petitioner, John Charles Eichinger

APPENDIX CONTENTS

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Volume II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN CHARLES EICHINGER,	:	
	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION NO. 07-4434
	:	CAPITAL HABEAS CASE
JOHN WETZEL, Commissioner,	:	
Pennsylvania Department of Corrections;	:	
ROBERT GILMORE, Superintendent of	:	
the State Correctional Institution at Greene;	:	
and MARK GARMAN, Superintendent of	:	
State Correctional Institution at Rockview,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this 27th day of March, 2019, upon consideration of the Motion to Alter or Amend Judgment filed by John Charles Eichinger (Docket Entry 121), **IT IS HEREBY ORDERED** that the Motion is **DENIED**.[1]

[1] Eichinger asserts three errors in the Court's Memorandum and Order denying his writ of habeas corpus and denying a certificate of appealability. None of his assertions are meritorious.

He first argues that we erred in making our AEDPA ruling on the Pennsylvania state courts' conclusion that he was not "in custody" when he confessed to his crimes because we "lent no relevance to the Third Circuit's opinion in United States v. Willaman, 437 F.3d 354 (3d Cir. 2006), which sets forth several factors to determine whether an interrogation is custodial." Motion at 4 (citing Docket Entry 118 at 54, n.22). Eichinger argues that we erred in holding that the Third Circuit decision was "irrelevant." Id. We did not hold that the Willaman decision was "irrelevant." We stated that it was not "binding on habeas review" since only "clearly established federal law, as determined by the United States Supreme Court" is binding under AEDPA. See 28 U.S.C. § 2254(d). We nonetheless discussed the Willaman factors in our consideration of the factual assertions Eichinger made in his "in custody" argument. (See Docket Entry 118 at 55-56.) His argument that we ignored the circumstances of the interrogation and the reality of the coercive circumstances is also meritless. We thoroughly reviewed the circumstances and found the state courts' determination that there was no coerciveness to be a reasonable application of Miranda. His assertion that we "dismissed the **circumstances** surrounding the subsequent confessions as 'legally immaterial,'" Motion at 7 (emphasis added), is also inaccurate. Finding that he was not

in custody, we held that "his **arguments** about his subsequent statements being tainted" were legally immaterial. (Docket Entry 118 at 57 (emphasis added).)

Eichinger next argues that we erred in concluding that he cited '"no authority . . . that would indicate that a violation of the standards of [the] psychiatric profession occurs when a psychiatrist offers an opinion without examining the subject of that opinion.'" Motion at 8 (quoting Docket Entry 118 at 77.) He argues that he offered the testimony of his own expert witnesses that the Commonwealth's expert, Dr. Michals, committed a violation of his profession's standards. Eichinger's argument misreads our conclusion, which may only be read as holding that he failed to present any **legal** authority to support his habeas argument. We held that the state courts' ineffectiveness adjudication was not unreasonable given that (1) he "cited no authority that such a violation could render testimony **inadmissible**" and (2) he conceded that counsel attempted to impeach the weight the jury should assign to the opinion of Commonwealth expert Dr. Michals on this very ground. (Docket Entry 118 at 77 (emphasis added). Admissibility of evidence and the constitutional effectiveness of counsel's performance in cross examining witnesses are legal issues for which legal authorities are appropriately cited, not the testimony of Eichinger's own experts that had been, we pause to note, found not credible by the PCRA Court. While he argues that trial counsel should have confronted Michals with his own prior testimony in other cases to establish his opinion was unethical under the standards that govern his field, this is the archetypical post hoc examination of attorney conduct that the Supreme Court warned against in Strickland v. Washington when it held that courts must be highly deferential to counsel's choices. 466 U.S. 668, 689-90 (1984). Eichinger also takes issue with our prejudice prong determination on this claim that, since the state courts presumptively correctly found that Eichinger suffered no mental health issue, he could not establish that trial counsels' alleged failure worked to his prejudice. He argues that the mental health finding related only to one of his other habeas claims. This is an incorrectly narrow interpretation of the record. The Pennsylvania Supreme Court specifically found that "the record supports the PCRA court's finding appellant suffered from no meaningful mental defect **at any time relevant to this case**." (Docket Entry 118 at 50 (quoting A177) (emphasis added).)

Eichinger's last claim of error is that, in our discussion of his claim that the trial court erred in including definitions of malice and premeditation in its jury instructions, we "arrived at the wrong answer because [we] asked the wrong question." Motion at 13. There was no error. We cited Estelle v. McGuire, 502 U.S. 62, 72 (1991) for the proposition that the trial court's instructions must be read in their entirety to determine whether an error so infected the entire trial that the resulting conviction violates due process. (Docket Entry 118 at 95-96.) We did **not** include in our quotation from Estelle the Supreme Court's next sentence stating, "[i]n addition, in reviewing an **ambiguous** instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Id. (emphasis added) (quoting Boyde v. California, 494 U.S. 370, 380 (1990).) We did not include the sentence because Eichinger did not argue the instruction was "ambiguous" and he did not cite Estelle or Boyde for this purpose. Rather, he argued the instruction mislead the jury into believing that the elements of first-degree murder count as aggravating factors. (See Docket Entry 66 at 184, Docket Entry 89 at 42.) Had he also argued that the instruction was ambiguous, our conclusion would not have been different. There is no reasonable likelihood that the jury misapplied the instruction in a way that violated the Constitution. First, the definitions were included in the preliminary instruction to tell the jury what had already occurred — a finding of guilt on premeditated first-degree murder. Second, there was nothing to suggest that the jury

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

considered them otherwise. Third, the court's final instruction listing the aggravating circumstances the jury was permitted to consider did not include malice, specific intent, or premeditation.

Because we find that Eichinger's arguments are meritless, we have no cause to reconsider our decision denying him a certificate of appealability.

COMMONWEALTH of Pennsylvania, Appellee

v.

John Charles EICHINGER, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 17, 2006.

Decided Feb. 20, 2007.

Background: Following a stipulated guilt-phase bench trial, defendant was convicted in the Court of Common Pleas, Montgomery County, No. 2785–05, William R. Carpenter, J., of four counts of first-degree murder, two counts of possession of an instrument of crime, and three counts of unsworn falsification to authorities. Three consecutive death sentences were subsequently imposed. Defendant appealed.

Holdings: The Supreme Court, No. 503 CAP, Cappy, C.J., held that:

(1) evidence was sufficient to support convictions;

(2) defendant was not in custody, and therefore not entitled to *Miranda* warnings, when he gave his first statement to police;

(3) Commonwealth established that defendant knowingly and voluntarily waived his *Miranda* rights;

(4) victim impact statements were admissible;

(5) evidence of defendant's confessions to police was admissible during penalty phase of trial;

(6) trial court acted within its discretion in admitting autopsy photographs during the penalty phase of trial;

(7) any statement made by defendant during the penalty phase of trial was subject to cross-examination; and

(8) Commonwealth was permitted to present three-year-old victim's murder as an aggravating circumstance.

Affirmed.

1. Criminal Law ⚿1159.2(10)

When the Commonwealth of Pennsylvania imposes a penalty of death, the Supreme Court will conduct an independent review of the sufficiency of the evidence.

2. Criminal Law ⚿1144.13(2.1, 5), 1159.2(7)

The standard for review of the sufficiency of the evidence is whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the factfinder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt.

3. Homicide ⚿540

In order to sustain a finding of first-degree murder, the evidence must establish the unlawful killing of a human being, that the defendant did the killing, and that the killing was done in an intentional, deliberate, and premeditated way. 18 Pa. C.S.A. § 2502(a).

4. Homicide ⚿541

Use of a deadly weapon on a vital part of a human body is sufficient to establish the specific intent to kill, for purposes of crime of first-degree murder. 18 Pa. C.S.A. § 2502(a).

5. Homicide ⚿1143, 1186

Evidence was sufficient to support convictions on three counts of first-degree murder; defendant repeatedly stabbed first victim in the abdomen with a knife during an argument, he next slashed the throat of victim's three-year-old daughter

who was in the room and witnessed the stabbing, and he then stabbed a third victim 35 times, and based on his own admissions there was no question that it was defendant who killed the victims, and that he did so with premeditated intent. 18 Pa.C.S.A. § 2502(a).

6. Action ⚿17

It is a basic principle of conflict of laws cases involving criminal matters that the question of jurisdiction and that of governing substantive law always receives the same answer; the governing law is always the law of the forum state, if the forum court has jurisdiction.

7. Courts ⚿4

Jurisdiction relates to a court's power to hear and decide a case.

8. Criminal Law ⚿394.5(1)

Pennsylvania had jurisdiction and could apply its law in determining whether trial court erred when it denied capital defendant's motion to suppress statements he gave to detectives in New Jersey, where the substantive crime of murder occurred in Pennsylvania. 18 Pa.C.S.A. § 102(a)(1).

9. Action ⚿17

Although it is not mandated, where more than one state has a substantial connection with the activity in question, the forum state may analyze the interests of all states involved and choose which state's law to apply.

10. Action ⚿17

Pennsylvania does not apply its law just because it has jurisdiction; rather, it has adopted a flexible choice of law rule which weighs the interests its sister-states may have in the transaction.

11. Action ⚿66

It is a fundamental principle of conflicts of laws that a court will use the procedural rules of its own state.

12. Action ⚿66

In determining choice of law issues, procedural rules are that which prescribe the methods of enforcing rights, while substantive law gives or defines the right.

13. Action ⚿17

Pennsylvania's choice of law rule, when there is a conflict between the substantive criminal laws of the Commonwealth and those of a sister-state, requires that the Supreme Court analyze the policies and interests underlying the rule of each state so that the policy of the jurisdiction most immediately concerned will be applied.

14. Criminal Law ⚿412.2(3)

No conflict existed between the substantive law of New Jersey and the law of Pennsylvania with regard to capital defendant's claim that trial court erred when it denied his motion to suppress statements he gave to detectives at store in New Jersey, and thus, the Supreme Court would apply the law of the Commonwealth; both states were required to effectuate the guarantee provided in the Fifth Amendment of the United States Constitution that, as a general rule, the prosecution may not use statements, whether inculpatory or exculpatory, stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel. U.S.C.A. Const.Amend. 5.

15. Criminal Law ⚿412.2(2)

A suspect in is custody, for purposes of *Miranda*, when he is deprived of his freedom of action in any significant way.

16. Criminal Law ⚿412.2(2)

Capital defendant was not in custody, and therefore not entitled to *Miranda* warnings, when he gave his first statement to detectives at store where he worked in New Jersey; defendant was invited to talk to police in an office in his place of employment, and the door remained open and he was free to speak to the police or not.

17. Criminal Law ⚿1134(3), 1158(4)

Supreme Court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct.

18. Criminal Law ⚿1134(2)

When reviewing the ruling of a suppression court, the Supreme Court must consider only the evidence of the prosecution and so much of the evidence of the defense as remains uncontradicted when read in the context of the record as a whole.

19. Criminal Law ⚿1134(3)

Where the record supports the findings of a suppression court, the Supreme Court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

20. Criminal Law ⚿412.2(2)

The test for determining whether a suspect is in custody, for purposes of *Miranda*, is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation.

21. Criminal Law ⚿412(4)

Since defendant was not in custody at the time of his initial conversation with detectives at store where he worked in New Jersey, that conversation could not serve to taint the later statements he made once he was in custody.

22. Criminal Law ⚿412.2(5)

Commonwealth established that capital defendant knowingly and voluntarily waived his *Miranda* rights prior to giving a statement to detectives as he was being transported from New Jersey to Pennsylvania to be arraigned; despite defendant's contention that his will was overborne, trial court found that when the officers reminded defendant of his rights, he agreed to speak with them, and he memorialized his statements in writing hours later, stating that he "didn't feel like hiding it anymore."

23. Criminal Law ⚿414

It is the Commonwealth's burden to establish whether a defendant knowingly and voluntarily waived his *Miranda* rights; in order to do so, the Commonwealth must demonstrate that the proper warnings were given, and that the accused manifested an understanding of these warnings.

24. Criminal Law ⚿394.6(5)

Capital defendant failed to establish, as a matter of fact, that there was any nexus between the state of New Jersey and the transaction at issue, and thus, the Supreme Court would apply the law of the Commonwealth with regard to defendant's claim that trial court erred when it denied his motion to suppress a statement he gave to detectives when they transported him from New Jersey to Pennsylvania; record demonstrated that defendant talked to the police during his ride from New Jersey to Pennsylvania, so it was possible that some of that conversation may have occurred physically in New Jersey, but the record was entirely devoid of any proof on this point.

25. Action ⚿17

The mere fact that two states are involved does not indicate that there is a conflict of laws problem; it is necessary to first inquire if there is, in fact, a conflict between the substantive laws of interested states.

26. Action ⚿17

It is axiomatic in the area of conflict of law, that in order for a state to have an interest in a particular matter, there must be some nexus between the state and the incident in question.

27. Constitutional Law ⚿251

The Due Process Clause prohibits a state from applying its substantive laws to a set of facts which have no substantial connection with the state. U.S.C.A. Const. Amend. 14.

28. Sentencing and Punishment ⚿1780(3)

Specific "presumption of life" jury instruction is not required during penalty phase of a capital case; an explanation of the deliberately disparate treatment of the aggravating and mitigating circumstances under the applicable standards of proof and a clear indication that life in prison is the sentence unless the Commonwealth meets its high burden is sufficient to convey the fact that life is presumed.

29. Criminal Law ⚿796

Supreme Court's standard of review for penalty phase jury instructions is the same as that which guides the Court in reviewing a jury charge during the guilt phase of a trial.

30. Criminal Law ⚿822(1)

In reviewing a challenge to a jury instruction, the entire charge is considered, not merely discrete portions thereof.

31. Criminal Law ⚿805(1)

With regard to jury instructions, the trial court is free to use its own expressions as long as the concepts at issue are clearly and accurately presented to the jury.

32. Criminal Law ⚿805(1)

It is the policy of the Supreme Court to give trial courts latitude and discretion in phrasing jury instructions.

33. Homicide ⚿1572

Life imprisonment is the default punishment for capital cases.

34. Sentencing and Punishment ⚿1763

Victim impact statements from victims' family members were admissible during penalty phase of defendant's capital case; testimony referred to the consequences and impact of the murders on the family.

35. Sentencing and Punishment ⚿1763

Victim impact testimony is permissible during the penalty phase of a capital case 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.

36. Criminal Law ⚿1141(2), 1147

When a court comes to a conclusion through the exercise of its discretion, there is a heavy burden to show that this discretion has been abused; it is not sufficient to persuade the appellate court that it might have reached a different conclusion, it is necessary to show an actual abuse of the discretionary power.

37. 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; absent an abuse of that discretion, the Supreme Court will not disturb the ruling of the trial court.

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

38. Sentencing and Punishment ⚿1765

Evidence of defendant's confessions to police was admissible during the penalty phase of his capital case; first statement admitted was defendant's false statement to the police concerning his whereabouts during the time of the murders, which was probative to illustrate the natural development of events surrounding the confessions, second statement described the triple homicide, third statement was a confession of a prior murder, and the last statement reiterated the events described in the previous two statements, with greater detail.

39. Sentencing and Punishment ⚿1756, 1771

The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt during the penalty phase of a capital case and, therefore, it must be permitted to present any and all additional evidence that may aid the jury in understanding the history and natural development of the events and offenses for which a defendant is being sentenced, as well as those for which he has been convicted, provided the evidentiary value of such evidence clearly outweighs the likelihood of inflaming the minds and passions of the jury.

40. Sentencing and Punishment ⚿1756

Evidence presented during the penalty phase of a capital case is not limited to only the evidence necessary to prove specific aggravating factors, but includes any evidence that may aid the jury's appreciation of the events in question.

41. Sentencing and Punishment ⚿1767

Trial court acted within its discretion in admitting autopsy photographs during the penalty phase of defendant's capital case, and any autopsy testimony that related to the photographs was also admissible as necessary to explain the history and natural development of the facts of the case; jury was empanelled only for the penalty phase after a stipulated bench trial, and therefore, did not hear any recitation of the facts during the guilt phase, and the trial judge engaged in the appropriate evaluation of each photograph to determine whether or not it was inflammatory.

42. Criminal Law ⚿438(6)

A photograph of a murder victim in a homicide trial is not per se inflammatory and the admissibility of these photographs is within the sound discretion of the trial court.

43. Criminal Law ⚿438(7)

A photograph of a murder victim in a homicide trial is admissible after application of a two-part test: the court must first determine if the photograph is inflammatory and then, if it is, the court must apply a balancing test to determine whether the photograph is of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jury.

44. Sentencing and Punishment ⚿1780(1)

Any statement made by defendant during the penalty phase of his capital case was subject to cross-examination.

45. Criminal Law ⚿1153(4)

The scope and the manner of cross-examination are within the sound discretion of the trial court and will not be overturned unless the court has abused that discretion.

46. Sentencing and Punishment ⚿1759

Commonwealth was not required to prove that three-year-old murder victim was competent to testify in a criminal prosecution before presenting the murder as an aggravating circumstance if "[t]he 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," during penalty phase of defendant's capital case. 42 Pa.C.S.A. § 9711(d)(5).

47. Sentencing and Punishment ⚿1682

Commonwealth was permitted to present three-year-old victim's murder as an aggravating circumstance during penalty phase of defendant's capital case; defendant's own report of the event made it clear that victim was a witness to a murder and that she died because she could speak his name. 42 Pa.C.S.A. § 9711(d)(5).

48. Sentencing and Punishment ⚿1752

Trial court has discretion over what aggravating factors are presented to the jury during the penalty phase of a capital case.

49. Sentencing and Punishment ⚿1777

Trial court will determine what particular aggravating circumstances should be submitted for the jury's consideration during the penalty phase of a capital case before the jury retires to consider a verdict.

50. Sentencing and Punishment ⚿1780(3)

Trial court was not required to list each non-statutory mitigating factor individually on the sentencing verdict slip in defendant's capital case. Rules Crim. Proc., Rule 808, 42 Pa.C.S.A.

51. Sentencing and Punishment ⚿1780(3)

Trial court's jury charge during penalty phase of defendant's capital case, with regard to mitigating factors for each murder, met constitutional muster; it properly incorporated each mitigating factor presented by defendant and further allowed the jury to consider any other mitigating factors it found beyond a preponderance of the evidence, and the charge also correctly instructed the jury in its duty to consider all of the mitigating factors and weigh each one according to its seriousness and importance.

52. Sentencing and Punishment ⚿1665, 1702

Any aspect of a capital defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death should be considered as a mitigating factor; further, any factors offered in mitigation must be given independent weight.

William Read McElroy, Norristown, for John Eichinger.

Bruce Lee Castor, Jr., Montgomery County District Attorney's Office, Amy Zapp, Harrisburg, Patricia Eileen Coonahan, Norristown, Montgomery County District Attorney's Office, for Commonwealth of Pennsylvania.

Before CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

OPINION

Chief Justice CAPPY.

This is a direct appeal from the imposition of three sentences of death [1]. On October 18, 2005 John Charles Eichinger waived his right to a jury and was tried in a stipulated bench trial for four counts of first-degree murder,[2] two counts of possession of an instrument of crime [3] and three counts of unsworn falsification to authorities [4] in relation to the murders of Jennifer Still, Heather Greaves, Lisa Greaves and Avery Johnson. He was convicted on all counts. A jury of his peers sentenced Eichinger to death. For the following reasons, we affirm the judgment of sentence.

The facts are not in dispute.[5] On the morning of March 25, 2005 Eichinger drove to the Greaves' residence. Eichinger told police that he intended to kill Heather Greaves unless she ended her relationship with her most recent boyfriend. To this end, Eichinger arranged to meet with Heather so that she would be expecting him at her house that day. Eichinger carried a large knife and a pair of rubber gloves in his waistband and concealed them under his sweat jacket.

Eichinger went into the house to speak with Heather. An argument ensued and Eichinger pulled out the knife and stabbed her repeatedly in the stomach. Eichinger admitted that he purposefully stabbed Heather in the stomach, because "[he] had heard in movies and books that it was easier to puncture organs there than through the chest, where it is more difficult because of hitting bone." Pre-trial Hearing 9/15/05, Commonwealth's Exhibit CS–11.

Avery, Heather's three-year-old daughter, was in the room and witnessed the stabbing. When Heather cried to Avery to call 911, Eichinger turned away from Heather and slashed Avery in the neck. Avery ran down the hallway before she fell. Eichinger followed her and came upon Lisa, Heather's sister coming out of the bathroom. Eichinger confessed to police, "I had to stab Lisa, too. I couldn't go to jail." Pre-trial Hearing 9/15/05, Commonwealth's Exhibit CS–6. Lisa tried to run back into the bathroom and shut the door, but Eichinger was able to overpower her. He stabbed Lisa repeatedly in the stomach.

Eichinger moved back towards the kitchen where Heather was dying, but not before he stabbed Avery once more, in the back. He stabbed her with such force that the blade came out her chest, and pinned her to the floor. Eichinger admitted to police that, "I couldn't even let the three-year old identify me. I had known her since she was born and she knew my name. She could speak my name." [6] Back in the kitchen, Eichinger stabbed Heather in the diaphragm and slit her throat.

1. 42 Pa.C.S. § 722(4) and § 9711(h)(1).

2. 18 Pa.C.S. § 2502(a).

3. 18 Pa.C.S. § 907.

4. 18 Pa.C.S. § 4904(a).

5. For the purpose of the guilt-phase bench trial, both parties stipulated to the evidence presented by the Commonwealth at the September 15, 2005 Pre–Trial Hearing. The evidence is preserved in the pre-trial notes of testimony. (Stipulated Bench Trial 10/18/05 p. 23).

6. Pre-trial Hearing 9/15/05, Commonwealth's Exhibit CS–11.

Eichinger went to the sink to wash his hands and noticed he was cut. He used one of the rubber gloves to prevent his blood from being left at the crime scene. Before leaving, Eichinger cut open Lisa's shirt to make it appear that she had been the target of the rampage in order to confuse the police. Heather and Lisa's father discovered the murders later that day. The police spoke to a neighbor who had witnessed Eichinger leaving the Greaves' home that morning.

Upon receiving this information, Detective Richard Nilsen, a Montgomery County Detective, along with Detective James Godby of the Upper Merion Police Department, went to the Somers Point, New Jersey Acme Food Market where Eichinger was employed. Eichinger agreed to be interviewed. After some discussion, and a false statement to the police, Eichinger confessed to the Greaves murders.

During the same conversation, Eichinger also confessed that he used the knife from the Greaves' murders to kill another woman, Jennifer Still, on July 6, 1999. Eichinger admitted to police that he killed Jennifer because she rejected him in order to stay with her fiancé. Eichinger described this murder:

> I had the knife in my hand. I turned away from her for a second and couldn't believe she was doing that to me. She got real close to me. I thought, 'You're ripping my heart out and now you're getting close to me.' She put her hand on my shoulder. I turned around and stabbed her in the stomach.
> * * *
> After I stabbed her the first time, she stepped back, but didn't fall. Her blood splattered out at me. I lunged at her. I just kept stabbing her.
> * * *
> I slit her throat as she slid down the wall. I let her body weight cut her throat against the knife.[7]

Eichinger saved his clothes from that day, and collected articles about the murder to serve as reminders. After using the knife to kill Jennifer in 1999, he stored it in a sheath in a cooler. Eichinger told police, "I had it in the cooler with the rubber gloves and the Scream mask. Every Halloween I put the mask, gloves, and knife on and handed out candy at the door." [8]

As a result of his confessions, Eichinger was arrested and later transported back to Montgomery County. In transit, Eichinger made another incriminating statement describing the triple-homicide as well as the earlier murder of Jennifer Still to the police. This statement was later memorialized in writing.

Eichinger filed an omnibus pre-trial motion seeking to suppress his statements to the police. This motion was denied. Eichinger and Detective Nilsen then testified at a pre-trial hearing on September 15, 2005. The trial judge found Detective Nilsen's testimony to be credible and found that all of the statements made by Eichinger to the police were admissible at trial. *See* Findings of Fact and Conclusions of Law, 9/16/05.

Eichinger waived his right to a jury in favor of a guilt-phase bench trial which was held on October 18, 2005. Eichinger did not contest the charges against him and offered no defense, rather he stipulated to the evidence offered by the Commonwealth at the September 15th Pre–

7. Pre-trial Hearing 9/15/05, Commonwealth's Exhibit CS–11.

8. *Id.*

Trial Hearing.[9] Eichinger was adjudicated guilty of all charges, and the Commonwealth sought the penalty of death for the murders of Heather Greaves, Lisa Greaves and Avery Johnson. The sentencing phase was tried before a jury beginning on November 1, 2005. Although he did not contest his guilt, Eichinger did contest the imposition of the death penalty. The jury found two aggravating factors in the death of Heather Greaves: that Eichinger had been convicted of another state offense for which a sentence of life imprisonment is imposable [10] and that Eichinger had been convicted of another murder which was committed before or at the time of the offense at issue.[11] The first aggravating factor related to the murder of Jennifer Still six years earlier. The second related to the murder of Lisa Greaves and Avery Johnson which was contemporaneous with the murder of Heather Greaves. The jury then found the same two aggravators for the murder of Lisa Greaves plus a third aggravating factor, that the victim was a witness to a murder and was killed to prevent her testimony in any criminal proceeding concerning the offense.[12] The jury also found the same three aggravating factors they found for Lisa Greaves for the murder of Avery Johnson, plus a fourth aggravating factor, that Avery Johnson was a child less than twelve years of age.[13] The jury determined that there was one mitigating factor for each of these three murders, namely that Eichinger was under the influence of extreme mental or emotional disturbance.[14] Finding that the weight of the aggravating factors was greater than the weight of the mitigating factor in each case, the jury returned a verdict of death for the murders of Heather, Lisa and Avery.

On December 12, 2005 the trial court imposed three consecutive death sentences for the murders of Heather and Lisa Greaves and Avery Johnson and one sentence of life imprisonment for the murder of Jennifer Still. The court additionally imposed two consecutive sentences of 2.5 to 5 years for possessing an instrument of crime and three consecutive sentences of 1 to 2 years for unsworn falsification. No post-sentence motions were filed. This appeal followed.

[1, 2] When the Commonwealth of Pennsylvania imposes a penalty of death, this court will conduct an independent review of the sufficiency of the evidence. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937, 942 n. 3 (1982), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). The standard for review of the sufficiency of the evidence is whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the factfinder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt. *Commonwealth v. Ockenhouse*, 562 Pa. 481, 756 A.2d 1130, 1135 (2000).

[3, 4] In order to sustain a finding of first-degree murder, the evidence must establish the unlawful killing of a human being, that the appellant did the killing and that the killing was done in an intentional, deliberate and premeditated way. *Commonwealth v. Mitchell*, 528 Pa. 546,

9. *See supra* n. 5.

10. 42 Pa.C.S. § 9711(d)(10).

11. 42 Pa.C.S. § 9711(d)(11).

12. 42 Pa.C.S. § 9711(d)(5).

13. 42 Pa.C.S. § 9711(d)(16).

14. 42 Pa.C.S. § 9711(e)(2).

599 A.2d 624, 626 (1991). The use of a deadly weapon on a vital part of a human body is sufficient to establish the specific intent to kill. *Commonwealth v. Walker,* 540 Pa. 80, 656 A.2d 90, 90(Pa.), *cert. denied,* 516 U.S. 854, 116 S.Ct. 156, 133 L.Ed.2d 100 (1995).

[5] Our review for sufficiency of the evidence is required of only the three murders for which Eichinger received the death penalty. The evidence presented at trial and the penalty phase hearings demonstrates that Eichinger stabbed Heather Greaves in the abdomen with a knife. He then slashed the throat of Avery Johnson who called for help. He then stabbed Lisa Greaves 35 times, returned to Avery to stab her in the back and finally stabbed Heather in the diaphragm and then slashed her throat. Based on his own admissions there is no question that it was Eichinger who killed the victims, and that he did so with premeditated intent. Eichinger further confirmed his actions and their deliberate nature in a 90–page–personal journal that he published to his brother from his prison cell. Viewed in the light most favorable to the Commonwealth, as verdict winner, we find these acts are sufficient beyond a reasonable doubt to establish murder of the first degree in each death.

Having resolved the sufficiency of the evidence inquiry, we now turn to the issues raised by Eichinger in his brief. In his first issue, Eichinger contends that the trial court erred when it denied his motion to suppress the statements that he gave to Montgomery County detectives at the Acme Food Market in New Jersey. Eichinger argues that he was subject to custodial interrogation without the benefit of *Miranda* warnings when the detectives first took him into the market office to question him.[15] He claims that the subsequent statements, after he had been *Mirandized,* were tainted by the previous statements made to the detective pursuant to *Missouri v. Seibert,* 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). The Court in *Seibert* held that *Miranda* warnings given mid-interrogation, after the defendant gave an unwarned confession, are ineffective and thus a confession repeated after warnings were properly given was inadmissible at trial. *Id.* at 616–17.

The Commonwealth contends that Eichinger was not in custody when the detectives first spoke with him. However, the Commonwealth avers that Eichinger was properly *Mirandized* at the moment he was actually taken into custody.

On this issue, the facts are not in dispute as Eichinger stipulated to Detective Nilsen's testimony.[16] The detective, accompanied by Detective Godby, went to the Somers Point Acme Food Market in New Jersey, where Eichinger worked. Eichinger agreed to talk to the detectives in an office on the second floor, where the detectives made it clear to him that he was not under arrest and remained free to leave. Eichinger then made a statement concerning his whereabouts that morning that the detectives knew to be false.

After Eichinger made this statement Detective Nilsen left the room and stood in the hall for a few moments. He then returned and suggested to Eichinger that he had just received information that the police would find DNA in the Greaves' driveway that would link Eichinger to the murders. Eichinger dropped his head, crying, and said, "I did it." In order to clarify, Detective Nilsen asked, "Do you

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

16. *See supra* n. 5. *See also* Commonwealth's Exhibits CS–4, and CS–6.

mean that you killed Lisa, Avery and Heather Greaves?" Eichinger said, "Yes."

At this point, Detective Nilsen read him his *Miranda* rights. Eichinger told Detective Nilsen that he understood his rights and that he was willing to voluntarily waive them. Eichinger then gave a signed written statement describing the murder of Heather, Lisa and Avery. As it happened, Detective Nilsen had worked on the Jennifer Still case six years earlier, and the similarity of the murders provoked him to ask Eichinger about Jennifer. The detective re-advised Eichinger of his *Miranda* rights and then Eichinger gave a signed statement confessing to her murder.

In determining whether to suppress the incriminating statements, the trial court applied New Jersey law, apparently of the view that New Jersey law controlled as that was where Eichinger made his statements. New Jersey law defines custodial interrogation as questioning by a law enforcement officer after a suspect has been deprived of his freedom of action in a significant way that implicates the requirement that *Miranda* warnings be given. *State v. Timmendequas,* 161 N.J. 515, 737 A.2d 55, 108 (1999). To evaluate whether or not a defendant has been deprived of freedom of action a court must consider the nature and degree of pressure applied to detain the suspect, the duration of the questioning, the physical surroundings and the language used by the police. *Id.* at 109.

Based on this analysis, the trial court found that Eichinger's first statement was not the product of custodial interrogation as he was not in custody. The questioning occurred in an office at Eichinger's familiar place of employment, not a police station, the door to the office remained open and Eichinger was clearly told he was free to leave. It was not until after he made this initial statement that Eichinger confessed to the Greaves murders. At this point, Eichinger was no longer free to leave and the detectives placed him in custody. The trial court determined that Detective Nilsen then properly read Eichinger his *Miranda* rights and that Eichinger understood these rights and voluntarily and intelligently waived them.

As a threshold matter, we must determine whether there is a conflict of laws question in this case, inasmuch as the trial court relied on New Jersey law to resolve this issue. Presumably, the trial court did so because Eichinger was placed into custody in New Jersey and it is from this transaction that the suppression issue arises. More specifically, therefore, we must determine whether Pennsylvania or New Jersey law governs the suppression issue.

[6–8] It is a basic principle of conflict of laws cases involving criminal matters that the "question of jurisdiction and that of governing substantive law always receives the same answer. The governing law is always the law of the forum state, if the forum court has jurisdiction." *Commonwealth v. Ohle,* 503 Pa. 566, 470 A.2d 61, 67–67 (1983) (citing Leflar, *Conflicts of Laws: Choice of Law in Criminal Cases,* 25 Case Western Res. L.Rev. 44, 47 (1974)). Jurisdiction relates to a court's power to hear and decide a case. *Ohle,* 470 A.2d at 67. This concept has its roots in territorial principles and the idea of sovereignty. Leflar, *supra* at 45. Although these conflict of laws concepts have evolved, the traditional theory would argue that the Commonwealth of Pennsylvania is an independent sovereign over persons within its territory and can brook no control of its citizens by a foreign sovereign, nor allow what occurs in its territorial boundaries to be punished by another. *Id.* (citing Levitt, *Jurisdiction over Crimes–*

II, 16 J.Crim. L. & Criminology 495, 509–10(1925). Pennsylvania has codified its jurisdiction over the matter under 18 Pa.C.S. § 102(a)(1) which provides for a conviction "under the laws of this Commonwealth" when "the conduct which is an element of the offense ... occurs within this Commonwealth." It is not in dispute that the substantive crime of murder occurred in Pennsylvania. As a result, Pennsylvania has jurisdiction and may apply its law.

[9, 10] Our inquiry could end there. However, although it is not mandated, where more than one state has a substantial connection with the activity in question, the forum state may analyze the interests of all states involved and choose which state's law to apply. *Ohle,* 470 A.2d at 68. In Pennsylvania, we do not apply our law just because we have jurisdiction. Rather, we have adopted a flexible choice of law rule which weighs the interests our sister-states may have in the transaction. *See Griffith v. United Air Lines,* 416 Pa. 1, 203 A.2d 796, 805 (1964). This concept was formally adopted for criminal cases in *Commonwealth v. Sanchez,* 552 Pa. 570, 716 A.2d 1221, 1224 (1998).

[11, 12] To start this analysis, we first note that procedural rules and substantive law require separate considerations. It is a fundamental principle of conflicts of laws that a court will use the procedural rules of its own state. "That is true in both civil and criminal cases, but especially in criminal cases as a sort of corollary to the local nature of substantive criminal law. Procedures in criminal cases are always those of the forum." Leflar, *American Conflicts Law,* Fourth Edition, § 116 (1977). Procedural rules are "that which prescribe the methods of enforcing rights." *Commonwealth v. Sanchez,* 716 A.2d at 1224. On the other hand, substantive law "gives or defines the right." *Id.*

In *Commonwealth v. Sanchez,* we held that an issue of search and seizure is substantive as it involves a strict question of constitutional law which concerns the fundamental right to be free from unreasonable searches and seizures. *Id.* Eichinger raises a constitutional question under the Fifth Amendment, which implicates his right to remain silent and his right to counsel, therefore, the issue must be addressed under the principles of conflict between substantive laws.

[13] As noted before, our choice of law rule when there is a conflict between the substantive criminal laws of this Commonwealth and those of a sister-state, requires that we analyze the policies and interests underlying the rule of each state so that the policy of the jurisdiction most immediately concerned will be applied. *Commonwealth v. Sanchez,* 552 Pa. 570, 716 A.2d 1221, 1223–24 (1998). But it remains implicit in this analysis that there be a conflict between the substantive law of New Jersey and the law of Pennsylvania.

[14, 15] In fact, no conflict exists. Both the Pennsylvania and New Jersey Courts must effectuate the guarantee provided in the Fifth Amendment of the United States Constitution that, as a general rule, the prosecution may not use statements, whether inculpatory or exculpatory, stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel. *Miranda,* 384 U.S. at 444, 86 S.Ct. 1602. A suspect in is custody when he is deprived of his freedom of action in any significant way. *Id.* at 445, 86 S.Ct. 1602.

In Pennsylvania, the test for determining whether a suspect is in custody is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or

movement is restricted. *Commonwealth. v. Chacko,* 500 Pa. 571, 459 A.2d 311, 314 (1983) (citing *Miranda,* 384 U.S. at 444, 86 S.Ct. 1602). Likewise, in New Jersey, a suspect is in custody where he has been deprived of freedom of action in a significant way. *Timmendequas,* 737 A.2d at 108 (citing *Miranda,* 384 U.S. at 444, 86 S.Ct. 1602). These rules align, as they both track *Miranda.* Neither the Constitution of Pennsylvania nor of New Jersey provides additional protection under this particular factual scenario. Thus, there is no actual conflict between the laws of Pennsylvania and New Jersey on this issue.[17] Any interest that New Jersey might have in this transaction is rendered moot by that lack of conflict. With no other interested state to consider, we will apply the law of the Commonwealth.

[16–19] Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. *Commonwealth v. Cortez,* 507 Pa. 529, 491 A.2d 111, 112 (1985), *cert. denied* 474 U.S. 950, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985). When reviewing the ruling of a suppression court, we must consider only the evidence of the prosecution and so much of the evidence of the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. *Cortez,* 491 A.2d at 112.

After careful review, we conclude that the record supports the findings of the trial court and that there was no legal error. Eichinger essentially argues that his second and third statements to the police, wherein he confessed to all four murders after waiving his *Miranda* rights, were tainted by the fact that he gave an initial statement without the benefit of hearing his *Miranda* rights. Eichinger admits in his brief that he was properly *Mirandized* before he gave the second and third statement, so his argument of taint is his sole means of relief. In order to prove that his later confessions were tainted by his initial statement, he must show that he was in custody, and therefore entitled to *Miranda* warnings, when he made the first statement.

[20, 21] The test for determining whether a suspect is in custody is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation. *Commonwealth. v. Chacko,* 500 Pa. 571, 459 A.2d 311, 314 (1983). We agree with the trial court that Eichinger was not in

17. This analysis is distinct from cases involving what has been referred to as a "false conflict." In a false conflict situation, it appears facially that the laws of two states directly conflict with one another. But deeper inquiry reveals that although one state has a conflicting law, the purposes behind that law demonstrates that the state does not in fact have an interest in the question. Courts have recognized that there are many factual situations where, although two jurisdictions have nominal contacts with the transaction, only one jurisdiction is truly concerned with the result. *See, e.g. Kuchinic v. McCrory,* 422 Pa. 620, 222 A.2d 897 (1966); *McSwain v. McSwain,* 420 Pa. 86, 215 A.2d 677 (1966); *Griffith v. United Air Lines,* 416 Pa. 1, 203 A.2d 796 (1964); *Grant v. McAuliffe,* 41 Cal.2d 859, 264 P.2d 944 (1953); *Babcock v. Jackson,* 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). Here, both states have some contact with the transaction, and, therefore, some interest, but there is no conflict between the laws or their underlying purposes.

custody when he gave his first statement to the police. Eichinger was invited to talk to police in an office in his place of employment. The door remained open and he was free to speak to the police or not. These circumstances make it clear that Eichinger's freedom of action or movement were unrestricted while he chose to talk with the police. He was not in custody at the time of the initial conversation and, therefore, that conversation could not serve to taint the later statements he made once he was in custody. Further, the fact that Eichinger was not in custody makes any reference to *Seibert* inapt as the defendant in that case *was* in custody at the time of her initial statement. Eichinger's claim fails.

[22] Eichinger next contends that the trial court erred when it denied his motion to suppress a statement he gave to the Montgomery County detectives when they transported him from New Jersey to Pennsylvania. This statement was later memorialized into a writing which Eichinger also argues should be suppressed.

The record reveals that Eichinger was incarcerated overnight in New Jersey.[18] Eichinger claims he was tormented by the other prisoners. He waived extradition the next morning and was released to the Montgomery County detectives for the ride back to Pennsylvania to be arraigned. Eichinger avers that, by this time, he had suffered from verbal abuse from fellow prisoners that led to sleep deprivation, and that he had been deprived of the benefit of counsel in court. Eichinger argues that his decision to confess after these events was not a voluntary decision but represented an "overbearing" of his will.[19] Eichinger submits that, because his will was overborne, the statements made while in transit to Pennsylvania should not have been admitted at trial.

The Commonwealth responds by highlighting the fact that the detectives warned Eichinger of his *Miranda* rights before they began to talk with him in the car. Eichinger stated that he understood those rights and was willing to give a voluntary statement. After his preliminary arraignment, Eichinger memorialized those statements in writing. At that time, Detective Nilsen became aware that Eichinger did not have his glasses and had Eichinger read from his extradition papers to ensure that Eichinger could, in fact, read the statements he signed. Before committing the statement to writing Eichinger was again advised of his rights and Eichinger again waived his rights, signing each page of the statement. He stated that he had not been coerced or threatened but rather, "I didn't feel like hiding it anymore." At no time on March 25, 26, or 28, 2005 did Eichinger ask to speak to a lawyer or ask to remain silent.

The trial court found that Eichinger did not assert his right to counsel and waived extradition. The court noted that the extradition hearing in New Jersey was not an adversarial judicial proceeding akin to any pre-trial proceedings that have occurred in Pennsylvania to which the Sixth Amendment right to counsel would attach. The trial court held that the oral statement and subsequent written statement were admissible at trial.

[23] Again, we hold that the record supports the findings of the trial court and that there was no legal error. It is the Commonwealth's burden to establish whether Eichinger knowingly and voluntarily waived his *Miranda* rights. *Commonwealth v. Hughes,* 521 Pa. 423, 555

18. Eichinger stipulated to the facts that follow. *See supra* n. 5.

19. Eichinger cites to *State v. Galloway,* 133 N.J. 631, 628 A.2d 735 (1992).

A.2d 1264, 1274 (1989). In order to do so, the Commonwealth must demonstrate that the proper warnings were given, and that the accused manifested an understanding of these warnings. *Id.* at 1274. The Commonwealth has met this burden. Despite his contention that his will was overborne, the trial court found that when the officers reminded Eichinger of his rights, he agreed to speak with them. Hours later, Eichinger memorialized his statements in writing, stating that he "didn't feel like hiding it anymore." The record demonstrates that Eichinger received the proper warnings and that his waiver was knowing, intelligent and voluntary. Therefore, his contention that his statement should be suppressed has no merit.

[24] Eichinger makes an additional claim that he was still physically in New Jersey when the detectives began to question him. He cites to *State v. Sanchez,* 129 N.J. 261, 609 A.2d 400 (1992), which holds that as a general rule in New Jersey, prosecutors or their representatives should not initiate a conversation with a defendant without the consent of defense counsel during the period after an indictment and before arraignment. Eichinger maintains that this is further reason to suppress the statement he made while on his way to Pennsylvania to be arraigned. The Commonwealth does not respond to this argument, but the trial court, although it cited to New Jersey law, found that New Jersey has no jurisdiction over the homicide charges and related offenses in Montgomery County, Pennsylvania, and that, therefore, *State v. Sanchez* does not apply.

[25] Once again, it appears that Eichinger has raised a potential conflict of laws issue. As our previous analysis demonstrates, the mere fact that two states are involved does not indicate that there is a conflict of laws problem. *See supra* p. ——. It is necessary to first inquire if there is, in fact, a conflict between the substantive laws of interested states. Here the key phrase is "interested states." In matter of substantive criminal law, as in the civil context, Pennsylvania seeks to apply the policy of the jurisdiction most immediately concerned with the outcome of the legal issue. In other words, the state that has the most interest in the question should have paramount control over the legal issues arising from a particular factual scenario. *Commonwealth v. Sanchez,* 716 A.2d at 1223–24.

[26, 27] In this regard, it is axiomatic in the area of conflict of law, that in order for a state to have an interest in a particular matter, there must be some nexus between the state and the incident in question. The Due Process Clause prohibits a state from applying its substantive laws to a set of facts which have no substantial connection with the state. Leflar, *supra* at 48. In the area of criminal law, this substantial connection has long been grounded in the concept of a state's sovereignty over its own territory, therefore requiring a physical connection between the state and the incident in question in order to invoke a state's interest in applying its law. *Id.* at 45. This territorial analysis has been greatly expanded to allow a state to apply its law when there are other types of substantial connections described by Leflar as "choice influencing" considerations, but there is no question that there must be a substantial connection to a forum before we will apply its laws.

Here there is no such nexus. The only possible connection to the State of New Jersey was Eichinger's physical presence there on March 25 through the 28th, 2005. The record demonstrates that Eichinger talked to the police during his ride from New Jersey to Pennsylvania, so logically we can postulate that it is possible that some of that conversation may have oc-

curred physically in New Jersey. But the record is entirely devoid of any proof on this point. Eichinger adopted the testimony presented by the Commonwealth at the Pre–Trial Hearing of September 15, 2005, but there was no mention during that hearing by the Commonwealth's witness, Detective Nilsen of exactly where they were when Eichinger made his statement. Although we will only consider the Commonwealth's evidence because of Eichinger's stipulation, it is notable that when Eichinger took the stand at the Pre–Trial Hearing, he also made no mention of his location when he made his statement. We have only a bald assertion in Eichinger's brief to this Court that the statement was made while Eichinger was still physically in New Jersey. This represents a failure of proof on Eichinger's part. He did not meet his burden to establish, as a matter of fact, that there was any nexus between the state of New Jersey and the transaction at issue. The Due Process Clause of the Federal Constitution requires not only a mere connection, but a substantial one in order to apply New Jersey law. As there is no connection of any sort established on the record, we need go no further in a conflict of law analysis, and we will apply the law of Pennsylvania.

Accordingly, any argument by Eichinger that the New Jersey case, *State v. Sanchez*, applies to the matter at hand must fail.

[28] Eichinger next maintains that the trial court erred when it failed to give a presumption of life instruction to the jury. Eichinger requested the following instruction:

> There is a presumption of life imprisonment in this case. Unless the prosecution proves beyond a reasonable doubt that the sentence should be death instead of life in prison, you must return a verdict of life in prison. This presumption of life imprisonment remains with Mr. Eichinger throughout these proceedings, unless the prosecution proves to your satisfaction beyond a reasonable doubt that Mr. Eichinger should be put to death instead of being sentenced to life in prison. Any decision by you that the prosecution has prove[n] an alleged statutory aggravating factor beyond a reasonable doubt, must be unanimous and each must be considered separately. The presumption in favor of life imprisonment shall be given effect by you until and unless it is overcome by the prosecution beyond a reasonable doubt.

Eichinger cites to *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (1983), in which this Court stated, "It may be acknowledged that in some sense there is a 'presumption of life'—this from the fact that the prosecution is limited to specific aggravating circumstances which must be proven beyond a reasonable doubt, while the defendant is permitted great latitude in demonstrating mitigating circumstances, and then by the lesser preponderance standard." *Id.* at 300–01. Eichinger frames his argument as a denial of due process by the trial court.

The Commonwealth maintains that the instructions that were given comported with the standard jury instructions and that there is no standard instruction for a presumption of life.

The trial court found Eichinger's proposed instruction to be redundant as the standard instructions provide that if the jury cannot agree that either there is one or more aggravating factors and no mitigating factor or that aggravating factors outweigh mitigating factors then "the only verdict you may return is a sentence of life imprisonment." Trial Court Opinion 03/03/06, p. 14. Moreover, the instructions specifically provide that if the jury could not unanimously agree, then a life sen-

tence would result. *Id.* From this language, the trial court concluded that Eichinger's proposed instruction was not necessary.

[29–31] Our standard of review for penalty phase jury instructions is the same as that which guides us in reviewing a jury charge during the guilt phase of a trial. In reviewing a challenge to a jury instruction the entire charge is considered, not merely discrete portions thereof. *Commonwealth v. Stokes,* 532 Pa. 242, 615 A.2d 704, 708 (1992). The trial court is free to use its own expressions as long as the concepts at issue are clearly and accurately presented to the jury. *Id.*

[32, 33] It is the policy of this Court to give our trial courts latitude and discretion in phrasing instructions. Further, *Travaglia's* discussion of a presumption of life is good law. The Commonwealth does bear a heavier burden to show aggravating factors beyond a reasonable doubt while we have consistently held that factors in mitigation need only be proven by a mere preponderance of the evidence. In this we recognize that life has intrinsic value and should not be taken by the state without good cause, proven to our highest standard, whereas life imprisonment remains our default punishment for capital cases.

Although acceptable, the words "presumption of life" are not explicitly required to honor this concept. An explanation of the deliberately disparate treatment of the aggravating and mitigating circumstances under the applicable standards of proof and a clear indication that life in prison is the sentence unless the Commonwealth meets its high burden is sufficient to convey the fact that life is presumed.

The court began its sentencing instruction to the jury as follows:

> Your sentence will depend upon what you find about aggravating and mitigating circumstances. The Sentencing Code defines aggravating and mitigating circumstances, and I'll explain more about that in a moment.
>
> First, however, you must understand that your verdict must be a sentence of death, if and only if, you unanimously find, that is all of you find, at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances that outweigh any mitigating circumstance or circumstances. If you do not all agree on one or the other of these findings, then the only verdict that you may return is a sentence of life imprisonment without parole.
>
> The Commonwealth must prove any aggravating circumstances beyond a reasonable doubt. This does not mean that the Commonwealth must prove the aggravating circumstance beyond all doubt or to a mathematical certainty.
>
> A reasonable doubt is the kind of doubt that would cause a reasonable and sensible person to hesitate before acting upon a matter of importance in his or her own affairs. A reasonable doubt must be a real doubt and may not be one that a juror imagines or makes up to avoid carrying out an unpleasant duty.
>
> By contrast, the defendant must prove any mitigating circumstances; however, the defendant only has to prove it by a preponderance of the evidence, that is by the greater weight of the evidence, which is a less demanding standard of proof than beyond a reasonable doubt. . . .
>
> * * *
>
> The different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives the defendant

> the full benefit of any mitigating circumstance or circumstances. It is closely related to the burden of proof required.[20]

The court went on to explain that if the jury could not come to a unanimous decision, the sentence would be life.

When we view the penalty phase jury instructions in their entirety, we find that the trial court's charge to the jury clearly and accurately explained the respective burdens of proof and the presumption of life to which Eichinger was entitled. *See Commonwealth v. Marinelli*, 910 A.2d 672, 682 (Pa.2006) (Opinion Announcing the Judgment of the Court).

[34] Eichinger next argues that the trial court incorrectly admitted a victim impact statement which resulted in a sentence of death that was impermissibly based on passion and prejudice. Eichinger relies on this Court's decision in *Commonwealth v. Singley*, 582 Pa. 5, 868 A.2d 403 (2005), wherein we held that "the trial court is vested with the discretion to regulate the presentation of victim impact evidence and 'relief is always available to correct those situations where unduly prejudicial information is introduced which renders the sentencing process fundamentally unfair.'" *Id.* at 414 (internal citations omitted). Eichinger broadly asserts that the victim impact statements introduced non-statutory facts and circumstances along with arbitrary and impermissible factors that did not relate to the elements of the aggravating circumstances. He does not elaborate as to what specific language he finds to be prejudicial.

The Commonwealth also cites to *Singley* to demonstrate that the victim impact statements at issue here were much like the statements approved by this Court in that case. As in *Singley*, the testimony in this case referred to the consequences of the three murders. The father and mother of Heather and Lisa, who were also Avery's grandparents, gave brief statements about their loss and the impact that the murders had on Avery's surviving sister, Melody.

The trial court relied on *Singley's* holding that it is proper to admit evidence concerning the victim and the impact of the victim's death on the family. *Id.* at 414 (citing *Commonwealth v. Williams*, 578 Pa. 504, 854 A.2d 440, 445 (2004)).

[35] In *Commonwealth v. Means*, 565 Pa. 309, 773 A.2d 143 (2001), this Court set out clear guidelines for victim impact statements in death cases. We held that Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding and that our sentencing scheme does not limit this evidence in the penalty phase to only the information necessary to establish aggravating and mitigating circumstances. *Id.* at 153. *See also* 42 Pa.C.S. § 9711(a)(2) and (c)(2). Further, we held that our trial judges are more than capable of overseeing the presentation of evidence so that overtly passionate, intentionally biased and inflammatory material is kept out of the courtroom. *Means*, 773 A.2d at 158.[21] 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

20. Trial by Jury, 11/03/05, pp. 45–58.

21. *Means* was an Opinion Announcing the Judgment of the Court. However, a majority of the Court agreed that trial courts should have substantial control over the manner in which victim impact testimony is presented to sentencing juries. See 773 A.2d at 160 (Saylor, J., concurring).

this threshold has been met, the trial court has discretion over the testimony admitted. *Id.* See also *Commonwealth v. Williams,* 578 Pa. 504, 854 A.2d 440, 446 (2004).

[36, 37] When a court comes to a conclusion through the exercise of its discretion, there is a heavy burden to show that this discretion has been abused. *Paden v. Baker Concrete Construction, Inc.,* 540 Pa. 409, 658 A.2d 341, 343 (1995). It is not sufficient to persuade the appellate court that it might have reached a different conclusion, it is necessary to show an actual abuse of the discretionary power. *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. *Id.* Absent an abuse of that discretion, we will not disturb the ruling of the trial court.

The record shows that Mr. Greaves testified to the close relationship he had with his two daughters and granddaughter. They shared a home together and Mr. Greaves talked about how his life has changed now that they are gone. Penalty Phase 11/2/05 pp. 199–208. Mrs. Greaves did not reside with the family, but she testified to the effect the murders had on Heather's surviving daughter, Melody. Penalty Phase 11/2/05 pp. 200–204.

This testimony was not a broad generalization about the effects of the deaths on the community. Instead, it was a personal account which demonstrated the devastating impact the murders had on this family. Accordingly, this testimony was appropriate under our holding in *Means,* and Eichinger's claim fails.

[38] Next, Eichinger contends that the trial court erred by permitting the use of all of his confessions during the penalty phase. He claims that the probative value of multiple confessions was outweighed by the unfair prejudice of repeated enumeration of his admissions after he already stood convicted. Eichinger argues that there is no evidentiary value in the Commonwealth's presentation of more than one of his cumulative confessions in order to prove aggravating factors. Pennsylvania Rule of Evidence 403 allows relevant evidence to be excluded if it is more prejudicial than probative. Eichinger maintains that the confessions were not relevant to any of the elements of the aggravating circumstances in the first place and that, further, their presentation to the jury necessarily had a prejudicial effect which resulted in a sentence based on passion and prejudice.

The Commonwealth maintains that this evidence was necessary to establish the facts of the murders and also to negate mitigating evidence presented by Eichinger concerning his mental state at the time of the crime.

The trial court relied on *Commonwealth v. Saranchak,* 544 Pa. 158, 675 A.2d 268 (1996), to admit the confessions. In *Saranchak,* this Court held that a capital sentencing hearing is not a sanitized procedure limited only to the evidence of aggravating circumstances. *Id.* at 275. The jury may evaluate the facts surrounding the murders. This allows the jury to understand the nature of the offense and the defendant's character. *Id.*

[39, 40] The trial court is correct. The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt and, therefore, it must be permitted to present any and all additional evidence that may aid the jury in understanding the history and natural development of the events and offenses for which a defendant is being sentenced, as well as

those for which he has been convicted, provided the evidentiary value of such evidence clearly outweighs the likelihood of inflaming the minds and passions of the jury. *Commonwealth v. Marshall*, 537 Pa. 336, 643 A.2d 1070, 1075 (1994). Contrary to Eichinger's assertion, the evidence presented is not limited to only the evidence necessary to prove specific aggravating factors, but includes any evidence that may aid the jury's appreciation of the events in question.

Our review of the record demonstrates that the Commonwealth used the confessions in accordance with these standards. The first statement admitted into evidence was Eichinger's false statement to the police concerning his whereabouts during the time of the murders of Heather, Lisa and Avery. This statement is probative to illustrate the natural development of events surrounding the confessions. The second statement describes the triple homicide. The third statement is a confession of the murder of Jennifer Still in 1999. The second and third statements are relevant to establish the facts of the murders.

The last statement reiterates the events described in the previous two statements, but it goes into greater detail concerning Eichinger's motives, the planning in which he engaged, including his decision to bring rubber gloves and the knife when he went to confront the women, the fact that he kept the knife he used to kill Jennifer and articles about the murder to remind him of his crime, the fact that he stabbed his victims in the stomach purposefully because he had heard that it was easier to puncture organs there than through the ribcage, and the actions he took to hide his crimes and turn police attention to other suspects. The Commonwealth used all of the available evidence to construct the story of the murders in a manner that clearly illuminated the circumstances for the jury without unfairly hammering home cumulative points.

Furthermore, the Commonwealth presented this overarching story to allow the jury to consider Eichinger's mental state and his thought process each time he decided to respond violently to rejection by stabbing the women who refused him. This was essential to the Commonwealth's case as Eichinger introduced expert psychiatric testimony in mitigation to suggest that he was mentally unstable and unable to conform his conduct to the requirements of the law. Woven together with excerpts from Eichinger's journal, the confessions demonstrate the strategies Eichinger used to mislead the police as to his culpability and demonstrate the fact that he knew that he had committed a crime after he murdered Jennifer Still, and yet he chose to hide and nurse his unhealthy emotions until six years later when he was ready to wield his knife again. This evidence served to shed light on the brutal nature of Eichinger's offense and on his character.

All of the foregoing was relevant to the Commonwealth's case under our rule in *Saranchak*. We find that the trial court properly allowed the jury to hear all of Eichinger's confessions in the manner set forth because the evidentiary value was high and the Commonwealth took care to present the evidence as was necessary to develop the history of the case and to challenge evidence offered in mitigation without attempting to inflame the minds and passions of the jury.

[41] In a similar vein, Eichinger submits that the trial court erred by permitting autopsy testimony during the penalty phase. Eichinger argues that although the autopsy report and photographs might be relevant to prove his specific intent to kill, that fact had already been proven during the guilt phase and the introduction of descriptions of the wounds and of photo-

graphs had no evidentiary value in proving aggravating factors, but instead could only serve to inflame the minds and passions of the jury. Eichinger relies on *Commonwealth v. Rivers,* 537 Pa. 394, 644 A.2d 710, 716 (1994), for the proposition that photographs proffered simply to create an atmosphere of prejudice against the defendant are inadmissible.

The Commonwealth again turns to *Saranchak* to affirm its right to introduce evidence of the history and natural development of the facts. The Commonwealth notes that this is especially true here as this jury was empanelled only for the penalty phase after a stipulated bench trial, and therefore, did not hear any recitation of the facts during the guilt phase. The trial court agreed with the Commonwealth's position.

[42, 43] We find that the trial court acted within its discretion to admit the autopsy evidence. A photograph of a murder victim in a homicide trial is not *per se* inflammatory and the admissibility of these photographs is within the sound discretion of the trial court. *Saranchak,* 675 A.2d at 275. A photograph is admissible after application of a two-part test. The court must first determine if the photograph is inflammatory and then, if it is, the court must apply a balancing test to determine whether the photograph is of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jury. *Commonwealth v. Marshall,* 537 Pa. 336, 643 A.2d 1070, 1075 (1994). Eichinger does not single out the admission of specific photographs to contest, but our review of the record shows that the trial judge did engage in the appropriate evaluation of each photograph to determine whether or not it was inflammatory. Notes of Testimony, ("N.T.") 11/1/05, pp. 70–75. The trial court did find several of the photographs to be inflammatory, but judged them to be of greater evidentiary value than of prejudicial concern.

The record shows that the court was careful to guard against prejudice. There was a photograph of Avery which showed a color close-up of her face. The Commonwealth sought its introduction because of a bruise on her forehead. The trial court recognized the probative value of the image, but ruled that the depiction was too inflammatory to be published to the jury unless the majority of Avery's face was in some way covered. The Commonwealth, however, assured the court that it sought only to refer to the photograph, not to publish it to the jury. This exchange demonstrates that the trial court acted appropriately in carefully exercising its discretion as to the photographs. Further, the trial court cautioned the jury that some of the photographs might be unpleasant, but that the jury should not let their emotions be stirred to the prejudice of the defendant, but rather that the jury should view the evidence rationally and fairly. N.T., 11/1/05, p. 76. There is no evidence, as Eichinger suggests, that the Commonwealth sought to enter these photographs merely to prejudice the jury. Rather, they served to inform the jury as to the nature of Eichinger's acts. Any autopsy testimony that related to these photographs was also clearly admissible under *Saranchak* as necessary to explain the history and natural development of the facts of the case. The evidentiary decisions of the trial court are sound as they conform to our precedent and, therefore, Eichinger's claim fails.

[44] Eichinger next argues that the trial court erred when it denied him a right to allocution during the penalty phase by threatening to cross-examine him. Eichinger claims he wanted to take the stand in order to express his remorse, but the

threat of cross-examination had a chilling effect which discouraged him from giving testimony. Eichinger claims that Pennsylvania Rule of Criminal Procedure 704(c)(1) clearly states that he has a right to allocution without cross-examination.[22] Alternatively, Eichinger argues that the trial court should have limited any cross-examination to the sincerity of his remorse under Pennsylvania Rule of Evidence 611(b) which generally limits the cross examination to the subject matter of the direct examination and matters affecting credibility. Eichinger claims that when the court denied his request to limit cross-examination, he was left with no choice but to say nothing at all, thereby depriving him of his most effective mitigating factor-remorse.

The Commonwealth responds by citing *Commonwealth v. Reyes*, 545 Pa. 374, 681 A.2d 724, 730–731 (1996), in which this Court held that no right to allocution exists in a capital murder case.

The trial court, likewise, relied on the holding in *Reyes*. Further, the trial court colloquied Eichinger on this issue to insure that he was informed of the "pros and cons" of his choice not to testify and to insure that he remained comfortable with that decision. N.T., 11/02/05, pp. 223–224.

[45] The scope and the manner of cross-examination are within the sound discretion of the trial court and will not be overturned unless the court has abused that discretion. *Commonwealth. v. Auker*, 545 Pa. 521, 681 A.2d 1305, 1317 (1996). Here, the trial court followed our precedent to rule that any statement made by Eichinger was subject to cross-examination. *Reyes*, 681 A.2d at 730–731 (citing *Commonwealth v. Abu–Jamal*, 521 Pa. 188, 555 A.2d 846, 858 (1989)). Eichinger was certainly entitled to take the stand and express his remorse. This would have been relevant evidence in mitigation under 42 Pa.C.S. § 9711(a)(2). We have held that the jury in a capital case may consider any aspect of a defendant's character that the defendant proffers as a basis for a sentence less than death. *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831, 851 (2003) (citing *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). But this is not a right unfettered. The jury must have the opportunity to assess the credibility of such evidence. *See Abu–Jamal*, 555 A.2d at 858. It is customary that a test of credibility be accomplished through cross-examination. *Id.* Therefore, as no right of allocution absent cross-examination exists, the trial court properly denied Eichinger's motion.

Eichinger's alternative argument that the trial court should have limited the scope of cross-examination likewise fails. The record demonstrates that Eichinger did not raise this alternative below. Further, if Eichinger had made the choice to testify, his counsel could have made an objection at the appropriate time if the Commonwealth sought to exceed the scope of cross-examination. *See*, Pa.R.E., 611(b). This claim merits no relief.

[46, 47] Eichinger then asserts that the trial court erred because it permitted the jury to consider 42 Pa.C.S. § 9711(d)(5) as an aggravating circumstance for the murder of Avery Johnson. Section 9711(d)(5) is an aggravating circumstance if "[t]he 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." Eiching-

22. Pa.R.Crim.P. 704(c)(1) states, "At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing."

er claims that because Avery was only three years old, the Commonwealth bears the burden to prove by a preponderance of the evidence that Avery would have been competent to testify in a criminal prosecution. As no evidence was offered to prove her competence, the Commonwealth should have been barred from offering the aggravating factor. Eichinger sets forth the test from *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), which requires the court to examine a young child for competency to insure that: (1) the witness is capable of expressing intelligent answers to questions; (2) the witness was capable of observing and remembering the event in question; and (3) the witness has an awareness of the duty to tell the truth. *Id.* at 39.

Eichinger asserts that the courts cannot presume that three-year-olds are competent to testify and therefore they are not the type of victims contemplated by Section 9711(d)(5), unless the Commonwealth can prove beyond a reasonable doubt that the victim would have met the test outlined in *Delbridge*.[23]

The Commonwealth cites *Commonwealth v. Marshall*, 571 Pa. 289, 812 A.2d 539, 542 (2002), wherein this Court upheld a capital murder conviction in which the jury found the aggravating factor under Section 9711(d)(5) and there was a two-year-old victim.[24]

The trial court considered Section 9711(d)(5) and ruled that the competence of the victim was not at issue; rather, the proper focus under the rule was the motivation of the defendant. The trial court considered the defendant's stated reason for killing Avery to determine that Section 9711(d)(5) was an appropriate aggravating factor to present to the jury.

[48, 49] The trial court has discretion over what aggravating factors are presented to the jury. *Commonwealth v. Buck*, 551 Pa. 184, 709 A.2d 892 (1998). The statutory provision under 42 Pa.C.S. § 9711(c)(1)(i) requires the trial court to instruct the jury to consider only aggravating circumstances for which there is some evidence. The case will be capital if the Commonwealth files a notice of at least one aggravating factor that is supported by any evidence. The trial court will determine what particular aggravating circumstances should be submitted for the jury's consideration before the jury retires to consider a verdict. *Buck*, 709 A.2d. at 896. We will not disturb this decision absent an abuse of discretion.

The trial court was correct to look to Eichinger's stated reasons for murdering Avery. In *Commonwealth v. Appel*, 517 Pa. 529, 539 A.2d 780, 784 n. 2 (1988), this Court held in reference to Section 9711(d)(5) that, "It is the fully formed intent ... to kill a potential witness that provides the animus upon which this particular aggravating circumstance rests," and that this intent must be demonstrated by "*direct* evidence." *Id.* (emphasis in original). The record in this case demonstrates that Eichinger told the police, "I can't even let the three-year-old identify me. I had known her since she was born and she knows my name. She could speak

23. Eichinger first claims that the appropriate standard is by a preponderance of the evidence, but upgrades the standard to beyond a reasonable doubt two paragraphs later. Brief for Appellant, p. 21.

24. We will not rely on *Marshall* as precedent for our analysis of the trial court's application of Section 9711(d)(5). A review of the direct appeal of *Commonwealth v. Marshall,* 537 Pa. 336, 643 A.2d 1070 (1994), not cited by the Commonwealth, demonstrates that the specific aggravating factor found in the death of the two-year-old was not under Section 9711(d)(5), but rather Section 9711(d)(10).

my name." [25] In his journal written in prison Eichinger describes the murder of Avery as follows:

> [Heather and I] struggled for a couple of minutes. Avery watching from behind me. I 'won' control of the knife and stabbed Heather. Then Avery said three words and I froze. Avery said, 'John killed Mommy.' I stopped. Heather at first said, 'Why?' and then looked at Avery and said, 'Avery call 911," then looked at me and said, 'She can do that, you know." I did not even think about that. I turned. I slashed Avery on the right side of the throat. Avery cried and put her hands to her neck and stood there as I turned back to Heather and stabbed her repeatedly. After a few seconds, Avery ran to the hallway again saying, "John killed Mommy." Heather was not dead, but I could not let Avery get Heather's cell phone.[26]

It is apparent from Eichinger's own words that he subjectively believed that Avery was capable of communicating his identity and his actions and that this belief motivated him to slash Avery's throat. Therefore, we will not disturb the lower court's ruling that allowed the Commonwealth to present Section 9711(d)(5) which creates an aggravating factor if the victim was a witness to a murder who was killed to prevent his or her testimony. Eichinger's report of the event makes it clear that Avery was a witness to murder and she died because she could speak his name.

[50, 51] Next, Eichinger contends that the trial court erred when it refused his request to list certain mitigating factors individually on the jury sheet pursuant to 42 Pa.C.S. § 9711(e)(8). Section 9711(e)(8), often referred to as the "catchall" mitagator, allows, "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." *Id.* Eichinger requested the mitigating instructions of 1) good work record; 2) average in school; 3) conformed to prison life; 4) cooperated with authorities; 5) absence of a father; and 6) an Eagle Scout. Although the trial court read each of these factors in its instructions to the jury, these individual factors were not listed separately on the jury sheet.

[52] Eichinger argues that the United States Supreme Court mandates that capital defendants be evaluated as uniquely individual human beings under the Eighth Amendment. *Lockett v. Ohio*, 438 U.S. 586, 604–605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This requires the sentencing jury to consider the possibility of "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death should be considered as a mitigating factor. *Lockett*, 438 U.S. at 604, 98 S.Ct. 2954. Further, any factors offered in mitigation must be given independent weight. *Id.* Eichinger then argues that any non-statutory factor offered in mitigation must reach the jury and it must be given equal weight to any of the statutory mitigating factors. But, the sentencing verdict slip used in Eichinger's case did not list each mitigator offered. It simply offered a "catchall" provision. Lumping these individual mitigating factors into one category on the verdict slip indicates to the jury

25. Pretrial Hearing, 9/15/05, CS–11, Exhibit A, p. 4.

26. Commonwealth's Exhibit CS–8. This recitation of the facts is consistent with Eichinger's confessions to the police.

that the non-statutory mitigating factors do not carry equal weight next to the statutory factors. Eichinger argues that under the Eighth Amendment, it is necessary that these factors be listed separately so they can be given appropriate weight.

The Commonwealth reproduces a copy of the Form for Jury Sentencing Verdict Slip provided by Pennsylvania Rule of Criminal Procedure 808 and asserts that the slip used in the present case was identical to the one required by the Rule.

The trial court also acknowledged that it used the slip mandated by Rule 808, citing *Commonwealth v. Miller,* 560 Pa. 500, 746 A.2d 592, 604 (2000), which held that a sentencing verdict form that did not specifically list mitigating evidence was proper when it was identical to the form mandated by the rule for death penalty cases.

Contrary to Eichinger's assertion, the holding of *Lockett* does not require that the verdict slip in capital cases list each non-statutory mitigating factor individually. *Lockett* was a plurality opinion. The viewpoint expressed in *Lockett* ripened into a holding of the United States Supreme Court in *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). *See Saffle v. Parks,* 494 U.S. 484, 490, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). We have held that *Lockett* and *Eddings* stand only for the proposition that a state may not bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. *Commonwealth v. King,* 554 Pa. 331, 721 A.2d 763, 776 (1998). Our statutory framework concerning the death penalty allows a defendant to present to the jury "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8). We have specifically held that we believe that the presentation of that mitigating factor to the jury as a part of the judge's charge satisfies the requirements of *Lockett. Commonwealth v. Lesko,* 509 Pa. 67, 501 A.2d 200, 207 (1985).

In the instant case the trial court charged the jury as to mitigating factors for each murder as follows:

> In this case, under the Sentencing Code, the following matters, if proven to your satisfaction by a preponderance of the evidence, can be mitigating circumstances [concerning Heather Greaves, Lisa Greaves, or Avery Johnson]: One, the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder. Two, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired at the time of the murder. Three, any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense; any other mitigating matter concerning the background, character and record of the defendant or the circumstances of his offense, such as, but not limited to, good work record; average in school; conform to prison life; cooperated with authorities; absence of his father; Eagle Scout; any other mitigating matter.... Please remember that the verdict slips are only a recording device. They do not supplant or replace my verbal instructions. You must follow my verbal instructions. As I told you earlier, you must unanimously agree on one of two general findings before you can sentence the defendant to death. They are a finding that there is at least one aggravating circumstance and no mitigating circumstance, or a finding that there are one or more aggravating circumstances that outweigh any mitigating circumstance or circumstances. In

deciding whether aggravating outweigh mitigating circumstances, do not simply count the number. Compare the seriousness and importance of the aggravating with the mitigating circumstances. If you all agree on either one of the two general findings, then you can and must sentence the defendant to death.[27]

The charge in this case, when read as a whole, meets constitutional muster. It properly incorporates each mitigating factor presented by Eichinger and further allowed the jury to consider any other mitigating factors it found beyond a preponderance of the evidence. The charge also correctly instructed the jury in its duty to consider all of the mitigating factors and weigh each one according to its seriousness and importance. Additionally, the trial court made it clear that the verdict slip was merely a recording device and that the jury was to take its instruction from the charge alone. Therefore, the charge meets the constitutional mandate of *Lockett*. It was not necessary that the non-statutory mitigators be listed separately on the verdict slip in order to meet this mandate. Eichinger has failed to prove that the trial court violated his constitutional rights and his claim must fail.

Finally, we have a duty to affirm the sentence of death unless it was a product of passion, prejudice, or any other arbitrary factor. 42 Pa.C.S. § 9711(h)(3)(i). We have engaged in a careful review of the trial record. This review leads us to conclude that the sentence of death was not a product of passion, prejudice, or any other arbitrary factor; rather, it was based upon the evidence admitted at trial. Further, this sentence complies with 42 Pa.C.S. § 9711(c)(1)(iv) which mandates a sentence of death when the factfinder finds one or more aggravating circumstances that outweigh any mitigating circumstances. Lastly, pursuant to 42 Pa.C.S. § 9711(h)(3)(ii), we find that the evidence was sufficient to support the aggravating circumstances the jury found when it imposed a sentence of death.

Accordingly, we affirm the verdict of first-degree murder and the sentence of death.[28]

Former Justice NEWMAN did not participate in the decision of this case.

Justice CASTILLE, SAYLOR, EAKIN and BAER and Justice BALDWIN join the opinion.

Gertrude R. SEVAST

v.

James KAKOURAS.

Appeal of Gail Sunday, James Sunday and Glenn Gubich, Garnishees.

No. 180 MAP 2004.

Supreme Court of Pennsylvania.

Argued April 13, 2005.

Decided Feb. 20, 2007.

Background: Real estate purchaser's judgment creditor brought garnishment action against vendors to recover purchaser's alleged right to restitution after de-

27. N.T., 11/03/05, pp. 47–56.

28. The Prothonotary of the Supreme Court is directed to transmit a full and complete record of the trial, sentencing hearing, imposition of sentence and the opinion and order of this Court to the Office of the Governor of Pennsylvania. 42 Pa.C.S. § 9711(i).

I incorporate such comments here by reference in further support of my position that, in various material respects, Appellant's petition should be addressed on a developed evidentiary record, consistent with applicable protocols and fundamental fairness. *See* Pa.R.Crim.P. 909(B).[2] I also believe that it is important to bear in mind that the prejudice assessment in a capital case is to be made in terms of whether there is a reasonable probability that Appellant's entire mitigation presentation on post-conviction review (to the extent that aspects would not be rejected on credibility grounds on a developed evidentiary record) may have made a difference to at least one of twelve jurors in his or her individualized weighing of aggravating versus mitigating circumstances. *See Wiggins v. Smith*, 539 U.S. 510, 537, 123 S.Ct. 2527, 2543, 156 L.Ed.2d 471 (2003); *Commonwealth v. Malloy*, 579 Pa. 425, 462, 856 A.2d 767, 789 (2004); *cf. Porter v. McCollum*, 558 U.S. 30, 44, 130 S.Ct. 447, 455–56, 175 L.Ed.2d 398 (2009) (*per curiam*) ("We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" (citation omitted; alteration in original)). Previously, I have spoken to the circumspection which should attend such an inquiry, particularly given the degree of deficient stewardship we have seen in many of these cases in Pennsylvania. *See Commonwealth v. Koehler*, 614 Pa. 159, 227–28, 36 A.3d 121, 162 (2012) (Saylor, J., concurring).

of these cases, including this one relative to the penalty phase at least, I maintain that such claims should be decided on a reasonably developed record." (citation omitted)); *Commonwealth v. Keaton*, 615 Pa. 675, 750–51, 45 A.3d 1050, 1095 (2012) (Saylor, J., concurring and dissenting) ("I continue to believe that the absence of an adequate factual foundation for consideration of capital post-conviction claims encourages unwarranted analytical shortcuts in the appellate review."); *Commonwealth v. Brown*, 582 Pa. 461, 524, 872 A.2d 1139, 1176 (2005) (Saylor, J., dissenting) ("It remains my position that, in circumstances (such as here) in which affidavits, declarations, or similar evidentiary proffers are presented to a PCRA court which, if believed, would bring the reliability of the death verdict into legitimate question, a post-conviction hearing and associated fact-finding are required."); *Commonwealth v. Hall*, 582 Pa. 526, 551–56, 872 A.2d 1177, 1192–95 (2005) (Saylor, J., dissenting).

2. I also reiterate, however, that I continue support judicious control, by our common pleas courts, of such hearings. *See Commonwealth v. Birdsong*, 611 Pa. 203, 269, 24 A.3d 319, 358 (2011) (Saylor, J., dissenting) (explaining that "[a]ppropriate time limitations may be set on presentations; irrelevant matters certainly may be excluded; reasonable interjections may be warranted; and the presumption in favor of the validity of a judgment of sentence is to be enforced"). My objection is to the obviation of such hearings where they are warranted on the face of the written submissions.

COMMONWEALTH of Pennsylvania, Appellee

v.

John EICHINGER, Appellant.

Supreme Court of Pennsylvania.

Submitted June 19, 2013.

Decided Dec. 31, 2014.

Background: Following affirmance, 591 Pa. 1, 915 A.2d 1122, of four first degree murder convictions and imposition of death penalty, defendant filed petition for post-

conviction relief. The Court of Common Pleas, Montgomery County, No. CP–46–CR–0002785–2005, William R. Carpenter, J., dismissed the petition, and defendant appealed.

Holdings: The Supreme Court, No. 657 CAP, Eakin, J., held that:

(1) defendant validly waived his rights to jury trial and to contest evidence at guilt phase;

(2) defendant opened door for prosecutor to argue future dangerousness at penalty phase;

(3) prosecutor did not make improper closing argument in penalty phase;

(4) commonwealth's psychiatric expert did not provide misleading testimony;

(5) defense counsel's failure to investigate defendant's mental health was reasonable trial strategy; and

(6) counsel conducted reasonable mitigation defense.

Affirmed.

Castille, C.J., filed a concurring opinion.

Saylor, J., filed a concurring opinion.

Stevens, J., filed a concurring opinion, in which Castille, C.J., joined.

1. Criminal Law ⚿1134.90, 1158.36

In general, an appellate court reviews a denial of postconviction relief to determine whether the findings of the trial court are supported by the record and free of legal error.

2. Criminal Law ⚿1158.36

On appeal of a denial of postconviction relief, the trial court's credibility findings are to be accorded great deference, and where supported by the record, such determinations are binding on the reviewing court.

3. Criminal Law ⚿1519(4), 1615

To establish ineffective assistance of counsel, a postconviction petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or omission; and (3) there is a reasonable probability that the result of the proceeding would have been different absent such error. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § 9543(a)(2)(ii).

4. Criminal Law ⚿1519(4)

If a postconviction petitioner fails to satisfy any prong of the ineffectiveness inquiry, a claim of ineffective assistance of counsel will be rejected. U.S.C.A. Const. Amend. 6; 42 Pa.C.S.A. § 9543(a)(2)(ii).

5. Criminal Law ⚿254.2

Jury ⚿29(6)

Defendant validly waived his rights to jury trial and to contest evidence at guilt phase of capital murder trial; during exhaustive colloquy, trial court explained, among other things, that waiver would result in defendant being found guilty of four counts of first degree murder and that defendant would be exposed to death penalty, and defendant stated that he understood the rights he was waiving and declined to ask further questions.

6. Jury ⚿29(6)

A jury trial waiver colloquy is a procedural device; it is not a constitutional end or a constitutional right.

7. Criminal Law ⚿254.2

A colloquy ensuring a knowing and voluntary decision is required any time a defendant stipulates to evidence that virtually assures his conviction because such a stipulation is functionally the same as a guilty plea.

8. Criminal Law ⚿273.1(4)

In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences; this determination is to be made by examining the totality of the circumstances surrounding the entry of the plea.

9. Criminal Law ⚿273.1(4)

Even though there is an omission or defect in a guilty plea colloquy, the plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

10. Criminal Law ⚿410.85

A defendant's mental state, including his mental health, is at the heart of the inquiry into voluntariness of a confession.

11. Sentencing and Punishment ⚿1760

Defendant at penalty phase of capital murder trial opened door for prosecutor to argue future dangerousness, where defendant presented testimony of a correctional counselor who stated that defendant conformed to correctional facility's regulations; prosecutor's argument, that expert testimony showed that defendant was likely to kill people when something bad happened in his life and asking how many more people would die at defendant's hand, was a fair response to defendant's argument regarding his status as a model prisoner.

12. Criminal Law ⚿2077

A prosecutor is free to present his argument with logical force and vigor so long as there is a reasonable basis in the record for the prosecutor's remarks.

13. Criminal Law ⚿2073

A prosecutor has great discretion during closing argument.

14. Criminal Law ⚿2094, 2103

A prosecutor must limit closing argument to the facts in evidence and legitimate inferences therefrom.

15. Criminal Law ⚿2073, 2077

A prosecutor must have reasonable latitude in fairly presenting a case to the jury, and must be free to present his or her closing arguments with logical force and vigor.

16. Criminal Law ⚿1171.1(2.1)

Comments by a prosecutor in closing argument constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in the jurors' minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict.

17. Criminal Law ⚿308
Sentencing and Punishment ⚿1780(2)

A prosecutor has more latitude in presenting argument at the penalty phase of a capital murder trial, since the presumption of innocence no longer applies.

18. Sentencing and Punishment ⚿1780(2)

Prosecutor's comments in closing argument at penalty phase of capital murder trial, that he had sworn oaths to represent the people protect the citizens of the country, did not improperly appeal to jury's emotions, but rather properly reminded jury of prosecutor's duties.

19. Sentencing and Punishment ⚿1780(2)

Prosecutor's comments in closing argument at penalty phase of capital murder

trial, that jury should consider that defendant acted maliciously, with a stone rock-hard heart, wickedness of disposition, evilness and a complete and utter indifference to the value of human life, did not improperly urge jury to consider non-statutory factors in aggravation, but were merely a review of evidence properly admitted into the record and were within permissible characterization of the facts proven by that evidence.

20. Criminal Law ⚿2077, 2094

A prosecutor does not engage in misconduct when his statements in closing argument are based on the evidence or made with oratorical flair.

21. Sentencing and Punishment ⚿1780(2)

Prosecutor's comments in closing argument at penalty phase of capital murder trial, characterizing defendant's mitigation evidence as "psycho-babble" and "nonsense," were not unfairly prejudicial, but instead properly urged jury to look on mitigation evidence with disfavor.

22. Sentencing and Punishment ⚿1780(2)

In making a closing argument at the penalty phase of a capital murder trial, a prosecutor may rebut mitigation evidence and may urge the jury to view such evidence with disfavor.

23. Sentencing and Punishment ⚿1780(2)

A prosecutor is allowed to argue that a sentencing jury in a capital case should show no mercy.

24. Sentencing and Punishment ⚿1769

Alleged violation of ethics rules of psychiatric profession, occurring when commonwealth's psychiatric expert witness opined on defendant's mental state at time of murders without revealing that expert had never personally examined defendant, did not render expert's opinion inadmissible at penalty phase of capital murder trial; fact that expert had not examined defendant went to weight of opinion, not admissibility.

25. Sentencing and Punishment ⚿1769

Commonwealth's psychiatric expert did not provide misleading testimony at penalty phase of capital murder trial by stating that extreme mental or emotional disturbance mitigator did not apply; although expert referred to a non-capital murder committed by defendant in stating that defendant had substantial capacity, entirety of expert's testimony on the topic made it reasonably clear that expert examined defendant's behavior in both the non-capital murder and subsequent capital murders in concluding that defendant had substantial capacity in all the murders. 42 Pa.C.S.A. § 9711(e)(2).

26. Sentencing and Punishment ⚿1780(3)

Trial court was not required to instruct jury at penalty phase of capital murder trial that life in prison was presumed to be the appropriate punishment for capital murder; trial court sufficiently explained how the jury was to come to a sentence of life imprisonment or death under the death penalty statute without using phrase "presumption of life."

27. Sentencing and Punishment ⚿1753, 1780(3)

At the penalty phase of a capital murder trial, although in some sense there is a "presumption of life" arising from the fact that the prosecution is limited to specific aggravating circumstances which must be proven beyond a reasonable doubt, while the defendant is permitted great latitude in demonstrating mitigating circumstances, and then by the lesser preponderance standard, a specific jury instruction con-

taining the words "presumption of life" is not required; an explanation of the deliberately disparate treatment of the aggravating and mitigating circumstances under the applicable standards of proof and a clear indication that life in prison is the sentence for capital murder unless the commonwealth meets its high burden is sufficient to convey the fact that life is presumed.

28. Sentencing and Punishment ⚿1780(3)

Jury instructions explaining legal meaning of "malice," "specific intent," and "premeditation" were not improperly confusing at penalty phase of capital murder trial; instructions were background information meant to orient the jury as it carried out its task, and trial court never stated that malice, specific intent, or premeditation were aggravators for the purpose of capital murder sentencing.

29. Sentencing and Punishment ⚿1780(3)

Jury instruction at penalty phase of capital murder trial, that governor and the Board of Pardons rarely commutes a sentence of life imprisonment were not improper; instruction was factually correct and could only be reasonably read as reassurance to the jury that defendant would not pose a threat to safety regardless of its choice.

30. Criminal Law ⚿805(1)

Suggested Standard Jury Instructions themselves are not binding and do not alter the discretion afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only.

31. Criminal Law ⚿1948

Counsel is not deemed ineffective for failing to object to a jury instruction given by the court where the instruction itself is justifiable or not otherwise improper. U.S.C.A. Const.Amend. 6.

32. Criminal Law ⚿1144.15

The law presumes the jury will follow the instructions of the court.

33. Criminal Law ⚿1614

Defendants are prohibited from using post-verdict statements of jurors as means to contest their conviction in a postconviction proceeding.

34. Criminal Law ⚿957(1)

Purpose of "no impeachment rule," precluding a juror from testifying about deliberations or any juror's mental processes concerning the verdict, is to prevent constant relitigation of matters decided by the jury. Rules of Evid., Rule 606(b)(1), 42 Pa.C.S.A.

35. Criminal Law ⚿1880

Although optimal representation is not required either by the constitution or common sense, effective representation of counsel is required under the Sixth Amendment. U.S.C.A. Const.Amend. 6.

36. Criminal Law ⚿1960

Defense counsel's failure to investigate defendant's mental health was reasonable trial strategy, and thus did not amount to ineffective assistance at penalty phase of capital murder trial; defendant's own statements militated against an insanity or diminished capacity defense because they explained defendant's purposeful intent behind the killings, ruining any possibility of claiming he did not understand the nature of his acts, or that he did not know they were wrong, and there was no indication of any mental condition that would have called defendant's competence to stand trial into question. U.S.C.A. Const.Amend. 6; 18 Pa.C.S.A. § 315(b).

37. Criminal Law ⚿1891

For purposes of the right to effective assistance of counsel, defense counsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

38. Criminal Law ⚿1891

Counsel's strategic choices made after less than a complete investigation are considered reasonable, for purposes of a claim of ineffective assistance, precisely to the extent that reasonable professional judgments support limitations on the investigation. U.S.C.A. Const.Amend. 6.

39. Criminal Law ⚿1891

Defense counsel's failure to conduct a more intensive investigation, in the absence of any indication that such investigation would develop more than was already known, is not ineffectiveness. U.S.C.A. Const.Amend. 6.

40. Criminal Law ⚿1960, 1961

Defense counsel conducted a reasonable investigation and put on a reasonable mitigation defense during penalty phase of capital murder trial, and thus defendant did not receive ineffective assistance of counsel; even though counsel did not hire a mitigation specialist, counsel compiled social history from defendant and his family, interviewed numerous potential lay witnesses, reviewed hundreds of pages of medical, school, counseling, and employment records, retained two mental-health experts to examine defendant and presented evidence supporting mitigating factors for lack of mental capacity, extreme emotional disturbance, and the catch-all mitigator. U.S.C.A. Const.Amend. 6; 42 Pa. C.S.A. § 9711.

41. Criminal Law ⚿1882

The reasonable basis prong of a claim of ineffective assistance of counsel does not question whether there were other more logical courses of action which counsel could have pursued; rather, the question is whether counsel's decisions had any reasonable basis. U.S.C.A. Const.Amend. 6.

42. Criminal Law ⚿1652

When there are no disputed factual issues, an evidentiary hearing is not required on a petition for postconviction relief. Rules Crim.Proc., Rule 909(B)(1, 2), 42 Pa.C.S.A.

43. Criminal Law ⚿1652

If an offer of proof supporting a petition for postconviction relief is insufficient to establish a prima facie case, or if the allegations in the petition are refuted by the existing record, an evidentiary hearing is unwarranted. Rules Crim.Proc., Rule 909(B)(1, 2), 42 Pa.C.S.A.

44. Criminal Law ⚿1129(1)

Defendant waived claim, on appeal of denial of postconviction relief, that postconviction court interfered with his right to adequately examine witnesses and present relevant testimony, where defendant's concise statement of matters complained of on appeal stated merely that postconviction court had denied his right to a full and fair postconviction proceeding by making adverse rulings on defendant's proposed witness questions and documentary evidence; postconviction hearings lasted for 22 days, filled well over one thousand pages of testimony transcript, and involved many evidentiary rulings, and no one could have identified what issues defendant was attempting to raise from reading defendant's concise statement. Rules App.Proc., Rule 1925(b), 42 Pa.C.S.A.

Hunter Stuart Labovitz, Esq., Defender Association of Philadelphia, Maria Kath-

erine Pulzetti, Esq., Federal Community Defender Office, Eastern District of PA, for John Eichinger.

Robert Martin Falin, Esq., Montgomery County District Attorney's Office, Amy Zapp, Esq., PA Office of Attorney General, for Commonwealth of Pennsylvania.

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

OPINION

Justice EAKIN.

Appellant, John Eichinger, appeals from the order denying him collateral relief from his criminal convictions and death sentences, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546. We affirm.

On March 25, 2005, appellant drove to the Montgomery County home of Heather Greaves, planning to murder her if she did not break up with her boyfriend. Appellant later told police he pre-arranged to meet with Heather so she would be expecting him at her house. He came armed with a concealed knife and a pair of rubber gloves.

Almost immediately after appellant arrived at Heather's residence, an argument broke out between them in the kitchen. As Heather turned to walk away, appellant pulled out the knife and stabbed her repeatedly in the stomach. Appellant later admitted he stabbed Heather in the stomach because he knew from movies and books it was easier to puncture organs that way than stabbing her in the chest, where he would hit bone.

Avery Johnson, Heather's three-year-old daughter, witnessed the stabbing. Heather called out to Avery to call 911. In an attempt to prevent the call, appellant slashed the child in the neck. Avery ran down the hallway and fell. Lisa Greaves, Heather's sister, stepped out of the bathroom. Appellant overpowered Lisa and stabbed her repeatedly to eliminate her as a witness. Appellant then turned back to Avery and stabbed her through the back, momentarily pinning her body to the floor. Appellant then returned to the kitchen, stabbed Heather in the diaphragm, and slit her throat.

While washing his hands in the sink, appellant noticed he was cut. He used one of his rubber gloves to prevent his blood from being left at the crime scene. Before leaving, appellant cut open Lisa's shirt to confuse police into thinking she had been the target of the killings. Appellant was spotted by a neighbor when he left the house. He subsequently drove to work.

Heather and Lisa's father found the three bodies later that day and notified the police. The police tracked appellant to his workplace at the Somers Point Acme market in New Jersey. Appellant agreed to be interviewed, and after a few initial false statements, confessed to the murders. During the same conversation, appellant also confessed to the July 6, 1999, murder of Jennifer Still, in which he used the same knife as in the Greaves/Johnson murders. In a written statement, appellant recalled killing Jennifer because she romantically rejected him, and described slitting her throat in graphic detail.

The police arrested appellant and kept him in a local jail in New Jersey over the weekend. The following Monday, police transported appellant back to Pennsylvania for arraignment. In transit, appellant made another incriminating statement describing the 1999 and 2005 murders. Later, while in jail awaiting trial, appellant wrote journal entries and letters in which he recorded graphic details of both incidents in his own hand.

Trial counsel was appointed [1] and filed an omnibus pre-trial motion to suppress appellant's numerous statements to the police, and to sever the trials for the 1999 and 2005 murders. Following a hearing, the trial court denied appellant's suppression motion, but deferred ruling on the severance claim.

Following the denial of the suppression motion, trial counsel began considering a remorse-based strategy. The plan called for appellant to stipulate to the evidence of both sets of murders at a bench trial, rather than plead guilty, thereby preserving his right to appeal the admission of his numerous confessions. Thereafter, trial counsel would put appellant on the stand and seek to ingratiate him with the penalty phase jury in order to avoid the death penalty.

The trial court granted appellant's previously deferred motion for severance. Jury selection for the separate trials began the same day. The following day, appellant withdrew his severance motion, and the trial court vacated its severance order by agreement of the parties. Appellant then waived his right to a guilt phase jury. *See* N.T. Trial, 10/18/05, at 3–7. Later the same day, appellant stipulated to the Commonwealth's evidence and was found guilty of four counts of first degree murder at a consolidated guilt phase bench trial. The Commonwealth sought the death penalty for all three of the 2005 murders; the trial court imposed a life sentence for the 1999 murder.

Following conviction, trial counsel filed numerous motions, including a request for a presumption of life instruction, preclusion of victim impact statements, a request for a life without parole instruction,[2] preclusion of the killing of a witness aggravator,[3] preclusion of the cross-examination of appellant, preclusion of the use of autopsy photos, and preclusion of the use of multiple confessions. *See* N.T. Pre-trial Motions, 10/31/05, at 3–16.

Following a three-day penalty phase hearing, the jury found at least two aggravating circumstances in the deaths of each victim. *See* N.T. Trial, 11/3/05, at 80–81. As to Heather, the jury found two aggravating circumstances: (1) appellant had been convicted for another offense for which a sentence of life is imposable, 42 Pa.C.S. § 9711(d)(10); and (2) appellant had committed another murder at the time of the offense, *id.*, § 9711(d)(11). As to Lisa, the jury found three aggravating circumstances: (1) appellant was convicted of another offense for which a sentence of life was imposable, *id.*, § 9711(d)(10); (2) appellant had committed another murder at the time of the current offense, *id.*, § 9711(d)(11); and (3) Lisa was a witness to a murder committed by appellant and was killed for the purpose of preventing her testimony in any criminal proceeding involving such offenses, *id.*, § 9711(d)(5). As to Avery, the jury found four aggravating circumstances: (1) appellant had been convicted of another offense for which a sentence of life imprisonment could have been imposed, *id.*, § 9711(d)(10); (2) appellant had been convicted of another murder that was committed before or at the time of the offense at issue, *id.*, § 9711(d)(11); (3) Avery was a witness to a murder and was killed to prevent her testimony in any criminal proceeding concerning the offense, *id.*, § 9711(d)(5); and (4) Avery was

1. Following the appointment of trial counsel, additional counsel was appointed to handle the guilt phase of each trial in the event of severance.

2. *See Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

3. *See* 42 Pa.C.S. § 9711(d)(5).

a child less than 12 years of age at the time of her murder, *id.*, § 9711(d)(16). The jury also determined each murder had one mitigating circumstance; appellant was under the influence of extreme mental or emotional disturbance at the time of the murders, caused by his father's recent Alzheimer's diagnosis. *See id.*, § 9711(e)(2). On those findings, the jury found the aggravating circumstances outweighed the mitigating circumstances, and returned three consecutive death sentences for the 2005 murders. This Court affirmed on direct appeal, *Commonwealth v. Eichinger,* 591 Pa. 1, 915 A.2d 1122 (2007), and the United States Supreme Court denied *certiorari, Eichinger v. Pennsylvania,* 552 U.S. 894, 128 S.Ct. 211, 169 L.Ed.2d 158 (2007).

Three weeks later, the Federal Community Defender Office (FCDO) filed a motion in the United States District Court for the Eastern District of Pennsylvania seeking appointment as federal habeas counsel in this case. Once appointed, the FCDO obtained a stay of the federal habeas proceeding. At about the same time, appellant filed a *pro se* PCRA petition in state court naming the FCDO as his counsel. The FCDO subsequently filed an amended petition on his behalf raising 27 claims of error, each with numerous sub-issues. The PCRA court held 22 days of evidentiary hearings. The FCDO presented testimony of prior counsel, appellant, five mental health experts, and 14 other witnesses. In rebuttal, the Commonwealth presented two mental health experts. Following final argument, the PCRA court dismissed appellant's petition in a 129–page opinion. PCRA Court Opinion, 7/25/12, at 129. Appellant presents 12 issues for this Court's review:

I. Was [a]ppellant denied a full and fair PCRA proceeding?

II. Was [a]ppellant denied effective assistance of counsel because trial counsel failed to investigate factual defenses, legal defenses, or whether [a]ppellant was able to make a knowing, intelligent and voluntary waiver prior to [a]ppellant's jury waiver and stipulated bench trial?

III. Did trial counsels' ineffective failure to investigate, prepare and develop the defense case in order to give [a]ppellant the benefit of counsels' full and careful advice result in [a]ppellant's uninformed agreement to a stipulated "trial" where he did not contest the charges and failed to present a defense?

IV. Was the trial court's colloquy securing [a]ppellant's waiver of his right to a jury trial and his right to contest the evidence against him constitutionally insufficient and were all prior counsel ineffective for failing to object to this colloquy?

V. Were the statements introduced against [a]ppellant at trial unconstitutionally obtained, should the evidence seized based on these statements have been suppressed, and were prior counsel ineffective for failing to investigate and litigate these claims?

VI. Was [a]ppellant denied effective assistance of counsel because trial counsel failed to investigate, develop and present substantial mitigating evidence?

VII. Did the prosecutor improperly inject future dangerousness into [a]ppellant's trial during cross[-]examination of [a]ppellant's mental health expert; and was [a]ppellant denied effective assistance of counsel because trial counsel failed to prevent this?

VIII. Was [a]ppellant denied effective assistance of counsel because trial counsel failed to effectively cross-examine Commonwealth witness Timothy Michals?

IX. Was the prosecutor's closing argument in the penalty phase grossly improper and was [a]ppellant denied effective assistance of counsel because trial counsel failed to object and raise these instances of improper argument, in violation of [a]ppellant's constitutional rights?

X. Did the penalty phase jury instructions deprive [a]ppellant of a constitutionally reliable sentence in multiple respects and did prior counsel ineffectively litigate these errors, in violation of [a]ppellant's constitutional rights?

XI. Are [a]ppellant's death sentences unconstitutional because the sentencing jury's ability to consider and give effect to the relevant mitigating evidence was impaired, violating his constitutional rights, and was [a]ppellant denied effective assistance of counsel because all prior counsel failed to raise this claim?

XII. Was [a]ppellant denied due process, reliable sentencing and effective assistance of counsel because of the cumulative prejudicial effect of all errors described in [appellant's b]rief?

Appellant's Brief, at 1–2.

[1, 2] "[A]s a general proposition, we review a denial of PCRA relief to determine whether the findings of the PCRA court are supported by the record and free of legal error." *Commonwealth v. Dennis,* 609 Pa. 442, 17 A.3d 297, 301 (2011) (citation omitted). A PCRA court's credibility findings are to be accorded great deference, and where supported by the record, such determinations are binding on a reviewing court. *Id.,* at 305 (citations omitted). Before addressing each of appellant's particular claims of error, we note that many of them rely on his assertion he suffers from cognitive impairment, incompetency, and mental illness. Much of the 22 days of evidentiary hearings on appellant's PCRA petition was dedicated to his mental health. The PCRA court listened to mental health experts from both sides and found none of appellant's evidence compelling. PCRA Court Opinion, 7/25/12, at 2–3. It further found appellant "was competent, did not suffer from any cognitive limitations and . . . was not brain damaged either at the time of the murders or at the time of trial." *Id.* Those findings are consistent with record testimony, and therefore binding on this Court.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

[3, 4] With the exception of issue I, which we save for last for ease of explanation, each of appellant's issues criticizes the effectiveness of his trial counsel. To obtain relief under the PCRA, the conviction or sentence must have resulted from one or more of the errors specifically enumerated in 42 Pa.C.S. § 9543(a)(2), including ineffective assistance of counsel. *Id.,* § 9543(a)(2)(ii). To establish ineffective assistance of counsel, a petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or omission; and (3) there is a reasonable probability that the result of the proceeding would have been different absent such error. *Commonwealth v. Chmiel,* 612 Pa. 333, 30 A.3d 1111, 1127 (2011) (employing ineffective assistance of counsel test from *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 975–76 (1987)).[4] If a petitioner fails to satisfy any prong of the ineffectiveness

4. *Pierce* reiterates the preexisting three-prong test for ineffective assistance of counsel in Pennsylvania and holds it to be consistent with the two-prong performance and prejudice test provided by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Pierce,* at 976–77.

inquiry, a claim of ineffective assistance of counsel will be rejected. *Commonwealth v. Sattazahn*, 597 Pa. 648, 952 A.2d 640, 653 (2008) (citation omitted). As explained in detail below, each of appellant's ineffective assistance claims fails on one or more of the elements of the *Pierce* test.

A. Ineffectiveness Based on Counsel's Failure to Contest Trial Error

Issues IV, V, VII, VIII, IX, X, and XI contest prior counsel's effectiveness in litigating supposed trial errors. As explained more thoroughly below, each of these claims fails on the first element of the *Pierce* test because there is no merit to the underlying claims—there was no actual error; therefore, counsel cannot be deemed ineffective for failing to contest it. *See Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 603 (2007) ("Counsel will not be deemed ineffective for failing to raise a meritless claim.").

Issue IV: Effectiveness of Appellant's Waiver of Rights to Jury Trial and to Contest Evidence

[5] Appellant waived his right to a guilt phase jury after thorough oral and written colloquies. N.T. Trial, 10/18/05, at 4–8. He orally affirmed he understood he had a right to a jury trial, the jury would be comprised of members of the community, he would participate in the selection of the jury, and in order to be convicted each member of the jury must be convinced of his guilt beyond a reasonable doubt. *Id.*, at 5–6. He also reviewed and signed a written jury waiver form, which reiterated the rights already explained to him. *Id.*, at 4–5. He repeatedly affirmed he understood the written form and the rights explained to him by the court, and that he had not suffered from any mental illness capable of impairing his ability to understand the proceedings. *Id.*, at 7.

Appellant argues the trial court's colloquy securing the waiver of his right to a guilt phase jury and his right to contest the evidence against him was constitutionally insufficient, and all prior counsel were ineffective for failing to object to it. Neither argument has merit.

Appellant concedes the jury waiver colloquy satisfied the Pennsylvania standard for a knowing, intelligent, and voluntary jury trial waiver. *See Commonwealth v. O'Donnell*, 559 Pa. 320, 740 A.2d 198, 208 (1999) (citation omitted) (essential ingredients of jury trial waiver colloquy are requirements that jury be chosen from members of community (jury of one's peers), that verdict be unanimous, and that accused be allowed to participate in selection of jury panel). However, he argues the Pennsylvania standard is insufficient to satisfy federal constitutional requirements because it does not ensure a criminal defendant's waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). He argues a jury finding each fact necessary to prove the elements of the crime charged, and to testify on his own behalf are both rights due to a criminal defendant. He therefore argues the trial court's colloquy securing his guilt phase jury waiver was constitutionally insufficient for failing to advise him concerning these additional rights.

[6] Appellant's argument fails at the outset because it is built upon the faulty premise a colloquy is constitutionally required to give effect to a defendant's jury trial waiver. Pennsylvania requires an on-the-record colloquy, *see* Pa.R.Crim.P. 620, but the rule is merely a prophylactic measure. "A [jury trial] waiver colloquy is a procedural device; it is not a constitutional end or a constitutional right." *Commonwealth v. Mallory*, 596 Pa. 172, 941 A.2d

686, 697 (2008) (internal quotations omitted). That which is not constitutionally required cannot be constitutionally defective.

[7–9] Appellant's argument that the colloquy was constitutionally insufficient to secure his decision to stipulate to the evidence is also meritless. A colloquy ensuring a knowing and voluntary decision is required any time a defendant stipulates to evidence that virtually assures his conviction because such a stipulation is functionally the same as a guilty plea. *See Commonwealth v. Davis,* 457 Pa. 194, 322 A.2d 103, 105 (1974).

> In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. Thus, even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

Commonwealth v. Yeomans, 24 A.3d 1044, 1047 (Pa.Super.2011) (quoting *Commonwealth v. Fluharty,* 429 Pa.Super. 213, 632 A.2d 312, 314–15 (1993)).

Guided by these principles, our review of the colloquy leads us to conclude it was more than sufficient to show appellant understood the nature of stipulating to the evidence and that doing so could expose him to the death penalty. The trial court thoroughly questioned appellant, walking him step-by-step through the procedure for a stipulated trial, and he testified he understood at every point along the way. N.T. Trial, 10/18/05, at 4–22. Specifically, appellant answered in the affirmative to the following questions from the trial court:

> I understand that you have authorized your attorneys to not contest [the] trial and offer no defense to the four charges of first-degree murder and related offenses. This means that you will not be confronting the witnesses against you, and you are giving up your right to cross-examine those witnesses and to otherwise seek to impeach their testimony. . . . Do you understand that?
>
> * * *
>
> This means that you will be exposed to the death penalty. That a penalty-phase only jury will be selected, and that jury will be told by your attorney that you did not contest and offered no defense to the first-degree murder charges in the guilty or not guilty proceedings. They will then argue these facts as mitigation. Do you understand this and agree to it?

Id., at 9–10. The trial court explained the law on murder, and appellant replied he understood the law as explained. *Id.,* at 11–15. The trial court asked appellant, "Now then, do you understand the charges that you are [faced with] today and the possible penalties?" Appellant replied that he did. *Id.,* at 15. The trial court, with the prosecutor's assistance, described the other crimes with which appellant was charged and their penalties. *Id.,* at 15–18. The trial court stated, "[A]ll the penalties could be imposed consecutively. Do you understand that?" *Id.,* at 18. Appellant responded he did. *Id.*

The trial court then asked:

> You understand that by waiving a jury trial and proceeding in accordance with the advice of your attorneys, that you will be found guilty beyond a reasonable doubt of four counts of first-degree mur-

der and related offenses. Do you understand that?

Id. Appellant replied he understood. *Id.* To be sure, the trial court asked him again, "You understand and agree to that?" *Id.* Appellant said yes again. *Id.*, at 19. The trial court then asked, "And you understand the consequences of your decision today?" *Id.* Appellant said yes. *Id.* The trial court then went through the procedure of the prospective capital sentencing hearing. *Id.* Appellant replied yes every time the court paused to ask if he understood what was explained. The trial court gave appellant an opportunity to ask questions; he declined. *Id.* Once the trial court finished its colloquy, trial counsel examined appellant on the record. Trial counsel asked whether appellant understood the juries would be dismissed, whether he and trial counsel had reviewed the rights implicated by the trial court's colloquy prior to coming to court, whether appellant had understood those rights, and whether he had any questions. *Id.*, at 20–21. Appellant replied yes to every question and declined to ask further questions. *Id.*

The trial court's colloquy was exhaustive. Appellant was not under the influence of an intoxicant or mental defect that inhibited his ability to meaningfully participate in, or understand the colloquy. *See id.*, at 7. There is no merit to the argument the process used to secure appellant's guilt phase jury waiver, or the process by which appellant elected to stipulate to the evidence, was constitutionally defective. Accordingly, counsel cannot be deemed ineffective regarding this issue. *See Washington*, at 603.

Issue V: Admission of Appellant's Statements

Appellant alleges the statements used against him at trial [5] were unconstitutionally obtained and counsel was ineffective for failing to contest the admission of his statements and all evidence obtained therefrom. First, appellant contends the police violated his Sixth Amendment right to an attorney when they took his March 28, 2005, confession in the absence of counsel after the prosecution against him had already commenced. Second, he argues his waiver of his right to remain silent was ineffective as to all of his confessions because his impaired mental health prevented it from being knowing, intelligent, and voluntary.

Appellant gave three written statements to police during their first interview at his workplace at the Somers Point Acme market in New Jersey on March 25–26, 2005. On the evening of March 25, after an initial interview in which appellant made a false statement, the police confronted him with the evidence against him, and he confessed. He was arrested and given *Miranda*[6] warnings, but continued to participate in the interview, eventually signing the two written inculpatory statements at issue. Because March 26 was a Saturday, the police decided not to transport appellant back to Pennsylvania over the weekend. Instead, sometime after the interview concluded in the early hours of March 26, they

5. The statements presented at trial included: (1) a 12 page statement given by [a]ppellant at the Somers Point Acme in New Jersey on March 25, 2005 [CS–4], (2) pages 13 through 20 of the Somers Point Acme statement made on March 25, 2005 [CS–6], (3) an 8 page statement given at the Somers Point Acme on March 26, 2005 [CS–7,] and (4) a 9 page statement given by [a]ppellant at the Upper Merion police department on March 28, 2005 [CS–11].
PCRA Court Opinion, 7/25/12, at 60 (footnote omitted).

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

brought appellant before a New Jersey magistrate as a fugitive from justice, and he was detained in a local prison in Atlantic County, New Jersey over the weekend. On the morning of March 28, 2005, appellant appeared before another local magistrate and waived extradition. The police then transported appellant back to Montgomery County, Pennsylvania, where he was set to appear at a preliminary arraignment. In transit, police reissued appellant his *Miranda* warnings and asked him additional questions. Appellant gave additional inculpatory statements in response to those questions, but police were not able to record those statements while in the moving car. On arrival in Pennsylvania, police took appellant immediately to his preliminary arraignment. Thereafter, they took appellant back to the police station for processing and fingerprinting. At that point, they typed up appellant's statements from the car, which he signed.

Appellant argues at least one of his three appearances before a judicial officer between March 26–28 caused his Sixth Amendment right to counsel to attach, and any statements elicited from him by the police thereafter were unconstitutionally obtained. Regardless of whether appellant's statements were unlawfully obtained, trial counsel was not ineffective for failing to raise those claims because trial counsel did, in fact, raise them. Although trial counsel never mentioned the words "Sixth Amendment," and used New Jersey case law because that is where appellant was detained, questioned, and appeared before the magistrate, counsel clearly argued at the suppression hearing that appellant's statements to the police during his transport to Pennsylvania should have been suppressed for violating his right to counsel. N.T. Pre-trial Motions, 9/15/05, at 92–94. Accordingly, this ineffectiveness claim fails.

Appellant's *Miranda* argument also lacks merit. On direct appeal, we decided the statements in question were voluntary and therefore admissible. *Eichinger*, at 1131–36. In his PCRA petition, appellant alleges counsel was ineffective for failing to contest the statements on mental health grounds. He avers these issues are distinct, and therefore this issue was not previously litigated.

[10] The issues are not distinct. A defendant's mental state, including his mental health, is at the heart of the voluntariness inquiry. *See Commonwealth v. DeJesus*, 567 Pa. 415, 787 A.2d 394, 403 (2001) (citation omitted) (test for determining voluntariness of confession and validity of waiver looks to totality of circumstances, including defendant's physical and psychological state). Since we have already decided the voluntariness of appellant's confession, we have also impliedly decided the impact his alleged mental health problems may have had on the voluntariness of his *Miranda* waiver.

Even if the distinction was valid, the argument lacks merit. As we discussed *supra*, the record supports the PCRA court's finding appellant suffered from no meaningful mental defect at any time relevant to this case. Therefore, that finding is binding on this Court. If appellant was not suffering from a mental defect, trial counsel could not have been ineffective for failing to contest the admissibility of his confessions on that basis.

Issues VII & IX: Prosecutorial Misconduct

[11] In issue VII, appellant argues the prosecutor engaged in misconduct during his questioning of Dr. Gillian Blair, a defense expert witness, and then used Dr. Blair's testimony to make an improper argument during his closing argument. He further argues trial counsel was ineffective

for failing to object to the misconduct and improper argument. During the penalty phase, Dr. Blair testified about tests she performed on appellant to diagnose his supposed psychological disorders. *See* N.T. Sentencing, 11/2/05, at 44–62. On cross-examination, the following exchange took place between the prosecutor and Dr. Blair:

> Q. On the last page of your report there is a sentence which reads, "He has poor coping skills and is susceptible to decompensation at times of heightened stress." In other words, when he's under stressful situations, bad stuff might happen.
>
> A. Right.
>
> Q. Including killing people, right?
>
> A. Well, certainly he has very poor coping skills, and when he is very, very stressed he will decompensate and will not be able to control his behavior.
>
> Q. Which might result in murdering people, right?
>
> A. Absolutely.
>
> Q. And you can't tell this jury what it is we should look for to make sure that he doesn't decompensate and kill someone else, can you?
>
> A. No.

Id., at 83. During his closing argument, the prosecutor made this comment:

> Do you remember when I cross-examined Dr. Gillian [sic]. She said that when the defendant is under stress, he might tend to decompensate. And I said, [t]hat means when when something bad happens in his life, he might kill people, right? And she said yes. And I said, [y]ou can't tell us what to look for so that we'll know when he is about to kill somebody in the future. You're right I can't.
>
> How many more people must die at this man's hands? Is it going to be a nurse [in] prison? A doctor? An inmate? A guard? A visitor? How many more people must die at this man's hands?

N.T. Sentencing, 11/3/05, at 24–25. Appellant argues this cross-examination of Dr. Blair and the closing argument derived from her responses constitute prosecutorial misconduct because they were misleading, irrelevant, and unfairly prejudicial. In support, appellant cites *Commonwealth v. Marrero,* 546 Pa. 596, 687 A.2d 1102, 1108 n. 19 (1996), for the proposition a death sentence cannot be based on future dangerousness because it is not a statutory aggravating circumstance.

In *Simmons,* a plurality of the United States Supreme Court held "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons,* at 156, 114 S.Ct. 2187. Future dangerousness is not an enumerated aggravating circumstance in Pennsylvania, *see* 42 Pa.C.S. § 9711(d), and, unlike the statutory aggravating circumstances, it may not be used by a jury as the sole reason for imposing a death sentence. *See Marrero,* at 1108 n. 19. While "[i]t is not *per se* error for a prosecutor to argue a defendant's future dangerousness," *Commonwealth v. Smith,* 606 Pa. 127, 995 A.2d 1143, 1163 (2010), where future dangerousness is at issue and a capital defendant requests a specific instruction that his first degree murder conviction precludes his eligibility for parole, it is a denial of due process to refuse that instruction, *see Commonwealth v. Chambers,* 546 Pa. 370, 685 A.2d 96, 106 (1996). Thus, a prosecutor is permitted to discuss a defendant's future dangerousness during rebuttal, after a defendant places his future conduct at issue.

Here, appellant injected his future dangerousness into the penalty phase through the testimony of a correctional counselor, who stated appellant conformed to the correctional facility's regulations. *See* N.T. Sentencing, 11/2/05, at 6. This testimony opened the door for the prosecution to explore appellant's conformance and was therefore a "fair response" to appellant's argument regarding his status as a model prisoner. *See Marrero,* at 1109; *see also People v. Brady,* 50 Cal.4th 547, 113 Cal. Rptr.3d 458, 236 P.3d 312, 342 (2010) ("The prosecutor's argument concerning defendant's dangerousness in prison was proper rebuttal of an expert witness's testimony about defendant's ability to function in a highly structured environment.").

[12] It is well established that "a prosecutor is free to present his argument with logical force and vigor so long as there is a reasonable basis in the record for the prosecutor's remarks." *Commonwealth v. Busanet,* 618 Pa. 1, 54 A.3d 35, 64 (2012) (citation omitted). This Court recently held a similar statement made during closing arguments was permissible. *See Commonwealth v. Cam Ly,* 602 Pa. 268, 980 A.2d 61, 93–95 (2009).[7] While we acknowledge the prosecution's statement here was a step beyond the statement in *Cam Ly,* this Court has set a high bar for reversal on grounds of prosecutorial misconduct where the trial court has issued appropriate instructions. Moreover, in light of the compelling aggravating circumstances and appellant's failure to present convincing mitigating evidence on post-conviction review, we conclude appellant is not entitled to relief on this claim.

In issue IX, appellant attacks several other arguments made by the prosecutor in his penalty phase opening statement and summation. However, none of the arguments appellant takes exception with were remotely objectionable.

[13–16] "A prosecutor has great discretion during closing argument; indeed, closing 'argument' is just that: argument." *Commonwealth v. Brown,* 911 A.2d 576, 580 (Pa.Super.2006). "[T]he prosecutor must limit his argument to the facts in evidence and legitimate inferences therefrom." *Commonwealth v. Gilman,* 470 Pa. 179, 368 A.2d 253, 257 (1977) (citation omitted). However, the prosecutor "must have reasonable latitude in [fairly] presenting [a] case [to the jury,] and must be free [to present] his [or her closing] arguments with logical force and vigor." *Commonwealth v. Johnson,* 516 Pa. 527, 533 A.2d 994, 996 (1987) (citation omitted) (internal quotations omitted). Therefore, "[c]omments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in the jurors' minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict." *Commonwealth v. Bryant,* 620 Pa. 218, 67 A.3d 716, 727 (2013) (internal markings and citations omitted).

[17] Appellant begins by arguing, without citation, "[t]he prosecutor's duty to avoid improper argument applies with particular force to the penalty phase of a capital case." Appellant's Brief, at 64. Actually, the law states quite the opposite: "A prosecutor has more latitude in pre-

7. The statement held to be permissible was made by a prosecutor during closing arguments:

> You . . . know the past history of Cam Ly and the fact that he has committed violent acts on a number of occasions in the past. Will you be satisfied with the sentence of life imprisonment? Or do you believe death is necessary . . . for the protection of all of us[?]

Id.

senting argument at the penalty phase since the presumption of innocence no longer applies." *Commonwealth v. Bridges*, 563 Pa. 1, 757 A.2d 859, 880 (2000) (citation omitted). Even if that were not the case, the arguments of which appellant complains were completely acceptable under the circumstances.

[18] First, appellant takes issue with the prosecutor emphasizing his role as a representative of the state and, claiming the prosecutor expressed his personal belief that seeking death was required by his oath of office. Specifically, appellant takes issue with the following remark:

> Members of the jury, for twenty years I have stood in courtrooms, this one and others, and asked jurors to do justice between the Commonwealth and someone who committed a foul crime, usually a murder. Every time I do that I am reminded of the awesome responsibility that is given to us by the people to represent them in cases of this sort. I do that and I do it willingly. When I became an Assistant District Attorney and then later as District Attorney, I put my hand on the Bible and swore I would protect the citizens of this country, and it is because I swore those oaths that I stand before you today.

N.T. Sentencing, 11/3/05, 7–8. Appellant argues such language wrapped the prosecutor in the cloak of state authority. However, he cites no authority for that proposition and fails to make a logical argument regarding how the comment was unfairly prejudicial. It is even less prejudicial in light of what was said next, which appellant declined to quote:

> But, members of the jury, I am not the only one here who took an oath. Each of you actually twice took an oath. Last week you swore that you would answer truthfully the questions that we put to you to determine whether you would be seated in one of those chairs. Do you remember that? ... Well, you know last week when a judge of the Court of Common Pleas of Montgomery County, in his robe, on the bench, and then the District Attorney of this county asked you if the law required you to impose the death penalty, you all said you would follow the law.

Id., at 8. Read together, these passages can only be characterized as the prosecutor reminding the jury of his duties and its obligation to sentence appellant according to the law, rather than emotion. Thus, when read in context, there is nothing objectionable about the comment.

[19] Next, appellant takes issue with the following language from the prosecutor's closing statement:

> Remember I told you in my opening to look at everything in this case through two prisms. Remember? The first that he is a malicious killer; hardness of heart, cruelty, wickedness, and that you should consider everything that is said knowing that as a fact. Make no mistake. There is no chance that an innocent man is seated there. No chance. And there is no chance that we are asking you to sentence an innocent man to death. He is a malicious killer and everything you heard has to be viewed knowing that as a fact.
>
> * * *
>
> Conscious, malicious, volitional decision to murder her. If I can't have her, no one can. He murdered these people maliciously; in other words, with a stone rock-hard heart, wickedness of disposition, evilness and a complete and utter indifference to the value of human life.

Id., at 15, 26. Appellant contends these arguments, along with the prosecutor's reading of passages from appellant's own journal in which he memorialized the mur-

ders, *id.,* at 21–24, urged the jury to find and weigh non-statutory aggravating factors such as maliciousness, wickedness, the victims' fear, the number of times each victim was stabbed, the manner in which each was stabbed, and his amusement about the crimes as recorded in his journal. He cites *Marrero* and *Commonwealth v. Fisher,* 545 Pa. 233, 681 A.2d 130, 146 (1996), for the proposition that Pennsylvania capital sentencing juries are not permitted to consider such non-statutory aggravating circumstance.

[20] Appellant's characterization of these comments as urging a finding of non-statutory aggravating factors is wholly irrational. "A prosecutor does not engage in misconduct when his statements are based on the evidence or made with oratorical flair." *Commonwealth v. Carson,* 590 Pa. 501, 913 A.2d 220, 237 (2006) (citing *Commonwealth v. Marshall,* 534 Pa. 488, 633 A.2d 1100, 1110 (1993)). The prosecutor's comments were merely a review of evidence properly admitted into the record and were within permissible characterization of the facts proven by that evidence.

[21] Next, appellant takes issue with the Commonwealth's numerous arguments offered to contradict his mitigation evidence. Specifically, he protests the following statements from the prosecutor's closing argument:

> [T]here is no mitigation in this case. There is no mitigation in this case.
>
> * * *
>
> And all of the psycho-babble you heard from the defense psychiatrists, that ought to a scream [sic] at your common sense and say, Hey, wait a minute, that's nonsense.... That is all nonsense and you should consider it as complete and utter nonsense.
>
> * * *
>
> Now, in addition to the psycho-babble the defense asked you to find as mitigation, the defense is asking you to consider that he is an Eagle Scout and that he managed to graduate from high school and that his father has a terrible disease, and I don't know, he loves his dog. I don't know what it is. Everybody, members of the jury, has things in their lives that they would rather were not there and everybody has things in their lives that they have done that are achievements. But that is not mitigation of sentence, members of the jury. That can't possibly be considered a reasonable thing to mitigate, that tends to make these killings less severe than they are. I suggest to you that that is the last vestige of the scoundrel. Well, I'm not such a bad guy because I love my mother and I graduated from high school and I worked for Acme. Come on. That is complete and utter nonsense and you should treat it as such.

N.T. Sentencing, 11/3/05, at 10, 12–3, 16. Appellant argues these comments offend rulings from the United States Supreme Court that any aspect of a defendant's character proffered as a basis for a sentence less than death should be considered as a mitigating factor, *see Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and that there need not be any nexus between a defendant's mitigation and the crime, *see Tennard v. Dretke,* 542 U.S. 274, 289, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

[22] Appellant grossly mischaracterizes the cited cases. Those cases hold evidence relevant to a defendant's character must be admitted in a capital sentencing if a defendant offers it. In no way do those cases 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 set-

tled "[a] prosecutor may rebut mitigation evidence in his arguments and may urge the jury to view such evidence with disfavor." *Chmiel,* at 1185. That is precisely what the prosecutor did with the comments about which appellant now complains.

[23] Last, appellant takes issue with the prosecutor's arguments against the jury having mercy on appellant, specifically, "He is already trying to create and manufacture some sympathy from you. The psychiatric evidence. That should really, really offend you." N.T. Sentencing, 11/3/05, at 10–11. Appellant argues the comment was improper because a sentencing jury must be free to consider mitigating evidence and show mercy to the defendant. He cites no authority in support of the argument, and in fact, it has no merit. A prosecutor is allowed to argue that a sentencing jury in a capital case should show no mercy. *See Chmiel,* at 1184.

There is no merit to any of appellant's critiques of the prosecution's closing statements. All the arguments appellant takes issue with were based on facts in evidence, and none were unfairly prejudicial. Since none of the arguments appellant highlights were objectionable, trial counsel cannot be deemed ineffective for failing to object. *See Washington,* at 603–04.

Issue VIII: Cross–Examination of Commonwealth Witness Dr. Timothy Michals

[24] Appellant argues trial counsel was ineffective for failing to contest several flaws in the expert psychiatric testimony of Commonwealth witness Dr. Timothy Michals. First, he argues Dr. Michals committed a violation of the ethics rules of the psychiatric profession by opining on appellant's mental state at the time of the murder without qualifying his comments by revealing he had never personally examined appellant. Appellant further argues Dr. Michals misinformed the jury as to what constitutes mitigating circumstances.

Appellant argues Dr. Michals was bound by the rules of the psychiatric profession before testifying regarding appellant's mental health. This argument fails on numerous levels. First, appellant cites no authority; he does not cite the ethics rule of the psychiatric profession Dr. Michals supposedly violated, and he cites no legal authority for the proposition that such a violation renders his testimony inadmissible. The reason appellant is unable to provide citation in support of his argument is because none exists. An extensive search of authority from all United States jurisdictions reveals none in support of the proposition a violation of the ethics rules for an expert witness's profession is objectionable. This Court is no authority on the ethical constraints of the psychiatric profession, so we cannot comment on Dr. Michals's supposed ethical violation. However, assuming such a violation did occur, it has no bearing on the admissibility of Dr. Michals testimony. That Dr. Michals had never personally examined appellant is a fact that may have legitimately degraded the weight of his testimony. Trial counsel recognized as much and cross-examined him on it. N.T. Sentencing, 11/2/05, at 175–76. In doing so, they satisfied their obligation to challenge his testimony.

[25] Appellant further argues Dr. Michals misled the jury as to what constitutes mitigation evidence. Appellant first complains Dr. Michals wrongly claimed the extreme mental or emotional disturbance mitigator, 42 Pa.C.S. § 9711(e)(2), did not apply because such distress was not present during the Jennifer Still homicide, the non-capital offense. Specifically, he takes

issue with the following testimony from Dr. Michals's direct examination:

> Q. Do you agree with Dr. Weiss that there are two mitigating factors shown by [appellant's] testing and analysis?
>
> A. I don't think there are any mitigating factors. Under extreme emotional distress, the first killing, he was able to postpone for 24 hours, then he acted. So he had an intent and plan. There was a reason for his postponing that first killing. I don't think that is a mitigating factor.

N.T. Sentencing, 11/2/05, at 174–75.

The argument lacks merit. Appellant has cherry-picked testimony to support a specious argument. Immediately after the testimony cited above, Dr. Michals continued:

> There are three deaths in the second charge, in which basically the first was the assault of the first victim, the second victim and third victim, and they were killed in reverse order. They were killed by slashing their throats, causing exsanguination, which is the cause of death there.
>
> I think my opinion, which I express with a reasonable degree of psychiatric certainty, is that he had substantial capacity. He knew what he was doing, and he just acted despite the knowledge that his actions were taking the lives of these three people.

Id., at 175. When Dr. Michals's response is read in its entirety, it is reasonably clear he was examining appellant's behavior in both sets of murders in order to conclude appellant had substantial capacity in both. That appellant had substantial capacity in the first murder was not necessarily relevant to the sentencing proceedings for the latter three, but it was not prejudicial either. The jury had already heard the trial court's opening instructions in which it was explicitly told its decision between death and life imprisonment only applied to the latter three murders and not to the murder of Jennifer Still. N.T. Sentencing, 11/1/05, at 16–17. Therefore, there is little chance the jury was confused by Dr. Michals's testimony. Even if there was confusion, it was cured when the trial court instructed the jury in accordance with the Pennsylvania capital sentencing statute, 42 Pa.C.S. § 9711(c), prior to closing statements, as discussed further below.

Appellant also argues Dr. Michals confused the jury by mistakenly claiming the mental-state mitigator outlined in 42 Pa. C.S. § 9711(e)(2)-(3) only pertains to a defendant's mental state at the time of his offense. Specifically, he takes issue with Dr. Michals's comment that, "the mitigating factors have to do with mental state at the time of the commission of the crime." N.T. Sentencing, 11/2/05, at 185.

Appellant's argument lacks merit for numerous reasons. First, Dr. Michals's statement was accurate—the two mitigating factors from Pennsylvania's death penalty statute dealing with a defendant's mental state pertain to his mental state at the time of the offense. *See* 42 Pa.C.S. § 9711(e)(2)-(3) [8]; *Commonwealth v. Rice,* 568 Pa. 182, 795 A.2d 340, 354–55 (2002) (citations omitted) (discussing extreme emotional distress mitigator); *Common-*

8. 42 Pa.C.S. § 9711(e) states, in relevant part:

> Mitigating circumstances shall include the following:
>
> * * *
>
> (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.

Id.

wealth v. Henry, 524 Pa. 135, 569 A.2d 929, 939–40 (1990) (discussing impaired-capacity mitigator). While the "catch-all" mitigator permits a defendant to introduce evidence of his good character throughout his life or any unique aspect of his crime to off-set evidence of one or more of the statutory aggravating circumstances, *see* 42 Pa.C.S. § 9711(e)(8), Dr. Michals's comment cannot reasonably be read as addressing the nuances of that mitigator. Read in the context of Dr. Michals's other responses to questions asked moments prior—language appellant conveniently omits—it is clear the comment was directed at the statutory mitigators dealing specifically with a defendant's mental state.

Appellant's argument also lacks merit because the trial court fully and accurately explained the process the jury was to use in determining whether to return death sentences during its jury instructions. If the jury was confused by Dr. Michals's comment, however unlikely that may be, the confusion was cured by the instructions issued in accordance with 42 Pa.C.S. § 9711(c), as discussed below.

Also, it is unlikely the jury relied on Dr. Michals's interpretations of the law, as the trial court had already instructed it, "Now, as the trial judge, it is *my* responsibility to decide all questions of law. .... You should consider all of my instructions taken together as a connected series, because [they] constitute the law which you are obligated by your oath to follow." N.T. Sentencing, 11/1/05, at 19–20 (emphasis added).

There is no merit to any of appellant's complaints about Dr. Michals's testimony. Therefore, trial counsel cannot be deemed ineffective for failing to make the objections appellant suggests. *See Washington,* at 603–04.

Issue X: Penalty Phase Jury Instructions

Appellant argues the penalty phase jury instructions were constitutionally deficient, and trial counsel was ineffective for failing to properly litigate challenges to the defects. At the outset, we note appellant fails to cite any legal authority for his various complaints about the jury instructions. Accordingly, his claims fail. *See* Pa.R.A.P. 2119.

[26, 27] Appellant first argues the jury instructions were improper for not including an instruction that life in prison is presumed to be the appropriate punishment for capital murder. He argues the jury instructions given "adopted a structural primacy for death over life[.]" Appellant's Brief, at 68. Appellant's argument is unreasonable.

> It may be acknowledged that in some sense there is a "presumption of life"—this from the fact that the prosecution is limited to specific aggravating circumstances which must be proven beyond a reasonable doubt, while the defendant is permitted great latitude in demonstrating mitigating circumstances, and then by the lesser preponderance standard.

Eichinger, at 1137 (quoting *Commonwealth v. Travaglia,* 502 Pa. 474, 467 A.2d 288, 300–01 (1983)). However, a specific jury instruction containing the words 'presumption of life' is not required. *Id.,* at 1138. "An explanation of the deliberately disparate treatment of the aggravating and mitigating circumstances under the applicable standards of proof and a clear indication that life in prison is the sentence unless the Commonwealth meets its high burden is sufficient to convey the fact that life is presumed." *Id.*

In this case, trial counsel asked for a jury instruction with the specific words "presumption of life." N.T. Pre-trial Motions, 10/31/05, at 3–5. The trial court

rejected that phrasing, *id.*, at 23–24, but issued numerous, redundant, and clear instructions adequately outlining the proper procedures and standards for the jury's choice between life and death. The trial court's opening instructions included the following:

> Now, in this sentencing trial evidence will be presented on the question of the sentence to be imposed, either death or life imprisonment. Counsel may present additional evidence and make further arguments, and then you will decide whether to sentence the defendant to death or life imprisonment without parole.
>
> Your sentence will depend on what you find about aggravating and mitigating circumstances. The sentencing code defines aggravating and mitigating circumstances, and I will explain these concepts to you in more detail later.
>
> Your verdict must be a sentence of death if you unanimously find, that is all of you find, at least one aggravating and no mitigating circumstance[s], or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances. If you do not all agree on one or the other of these findings, then the only verdict that you may return is a sentence of life imprisonment.

N.T. Sentencing, 11/1/05, at 17. The trial court reiterated and expanded upon those opening instructions when it charged the jury prior to its deliberation:

> First, ... you must understand that your verdict must be a sentence of death, if and only if, you unanimously find, that is all of you find, at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances that outweigh any mitigating circumstance or circumstances. If you do not all agree on one or the other of these findings, then the only verdict that you may return is a sentence of life imprisonment without parole.
>
> The Commonwealth must prove any aggravating circumstance beyond a reasonable doubt. This does not mean that the Commonwealth must prove the aggravating circumstance beyond all doubt or to a mathematical certainty.
>
> A reasonable doubt is the kind of doubt that would cause a reasonable and sensible person to hesitate before acting upon a matter of importance in his or her own affairs. A reasonable doubt must be a real doubt and may not be one that a juror imagines or makes up to avoid carrying out an unpleasant duty.
>
> By contrast, the defendant must prove any mitigating circumstance; however, the defendant only has to prove it by a preponderance of the evidence, that is, by the greater weight of the evidence, which is a less demanding standard of proof than beyond a reasonable doubt. Facts are proven by a preponderance of the evidence when the evidence shows that it is more likely than not that the facts are true.

N.T. Sentencing 11/3/05, at 45–47. The court then proceeded to discuss, in detail, the criteria for each aggravating and mitigating circumstance that could possibly have applied to each of the three victims, reiterating the beyond a reasonable doubt standard for each possible aggravator and the preponderance of the evidence standard for each possible mitigator. *Id.*, at 47–54. The court then gave a lengthy instruction on how the jury was to complete the verdict slip:

> As I told you earlier, you must unanimously agree on one of two general findings before you can sentence the defendant to death. They are a finding

that there is at least one aggravating circumstance and no mitigating circumstance, or a finding that there are one or more aggravating circumstances that outweigh any mitigating circumstance or circumstances.

In deciding whether aggravating outweigh mitigating circumstances, do not simply count the number. Compare the seriousness and importance of the aggravating with the mitigating circumstances. If you all agree on either one of the two general findings, then you can and must sentence the defendant to death.

When voting on the general findings, you are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular mitigating circumstance [as] present, despite what other jurors may believe. This is different from the general findings to reach your ultimate sentence of either life in prison or death.

The specific findings as to any particular aggravating circumstance must be unanimous. All of you must agree that the Commonwealth has proven it beyond a reasonable doubt. That is not true for any mitigating circumstance. Any circumstance that any juror considers to be mitigating may be considered by that juror in determining the proper sentence.

This different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives the defendant the full benefit of any mitigating circumstance or circumstances. It is closely related to the burden of proof requirement.

So remember, the Commonwealth must prove any aggravating circumstance beyond a reasonable doubt, while the defendant only has to prove any mitigating circumstance by a preponderance of the evidence.

Your final sentence, life imprisonment without parole, or death, must be unanimous. All of you must agree that the sentence should be life imprisonment or that the sentence should be death, because there is at least one aggravating circumstance and no mitigating circumstance, or because the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found by any juror.

Now, if you do not agree unanimously on the death sentence and on one of the two general findings that will support it, then you have two immediate options. You may either continue to discuss the case and deliberate the possibility of a death sentence; or, if you all agree to do so, you may stop deliberating and sentence [appellant] to life imprisonment.

If you come to a point where you have deliberated conscientiously and thoroughly and still cannot all agree either to sentence [appellant] to death or to stop and sentence him to life imprisonment, you would report that to me. If it seems to me that you are hopelessly deadlocked, it will be my duty to sentence [appellant] to life imprisonment.

Id., at 56–59. Appellant's contention the instructions created a "primacy for death over life" is plainly unreasonable. Appellant's Brief, at 68. The instructions effectively explained how the jury was to come to a sentence of life imprisonment or death under the death penalty statute. *See* 42 Pa.C.S. § 9711(c).

[28] Appellant next argues the trial court's preliminary jury instructions misled the jury because they informed the jury appellant had been convicted of first degree murder and described the elements of that offense, elaborating on the legal

meaning of "malice," "specific intent," and "premeditation." Specifically, he protests the following language from the trial court's opening instructions:

> First degree murder in Pennsylvania is described as follows: First degree murder is murder in which the killer has the specific intent to kill.
>
> The following three elements have been proven previously beyond a reasonable doubt: First, that the particular victim is dead. Second, that [appellant] killed her. And third, that [appellant] did so with the specific intent to kill and with malice.
>
> Now, a person who kills must act with malice to be guilty of any degree of murder, and malice is what separates murder from manslaughter.
>
> The word malice as I am using it has a special legal meaning. It does not mean simply hatred, spite or ill will. Malice is a shorthand way of referring to any of three different mental states that the law regards as being bad enough to make a killing murder. Thus, a killing is with malice if the killer acts with, first, an intent to kill; second, an intent to inflict serious bodily harm; or third, a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, indicating an unjustified disregard for the probability of death or great bodily harm, and an extreme indifference to the value of human life.
>
> Now, a person has the specific intent to kill if he has a fully formed intent to kill and is conscious of his own intention. As my earlier definition of malice indicates, a killing by a person who has the specific intent to kill is a killing with malice. Stated differently, a killing is with a specific intent to kill if it is willful, deliberate and premeditated, such as, but not limited to, by means of poison or by lying in wait.
>
> The specific intent to kill, including the premeditation needed for first degree murder, does not require planning or previous thought [f]or any particular length of time. It can occur quickly. All that is necessary is that there be time enough so that the defendant can and does fully form an intent to kill and is conscious of that intention.
>
> When deciding whether [appellant] had the specific intent to kill, the jury would consider all the evidence regarding his words and conduct and the attending circumstances that may show his state of mind. If the jury believed that [appellant] intentionally used a deadly weapon on a vital part of the victim's body, the jury may regard that as an item of circumstantial evidence from which they may, if they choose, infer [appellant] had the specific intent to kill.

N.T. Sentencing, 11/1/05, at 25–27. Appellant further argues the prosecutor improperly referred to those instructions during his opening and closing statements. Specifically, he takes issue with the following language from the prosecutor's summation:

> There are two things that I want you to keep in mind when every witness testifies and when every piece of evidence is presented, two things, two prisms I want you to view this case through and all of the evidence that comes from the stand. Number one, that [appellant] is a malicious killer. Malice. You heard what the judge said. Wickedness of disposition. Hardness of heart. Cruelty. An extreme indifference to the value of human life. Wickedness. Another word for wickedness is evilness.
>
> So bear in mind, number one, the defendant is a malicious killer.

Id., at 40. Appellant contends if the trial court's instructions and the prosecutor's comments are read together, a reasonable juror would understand malice, specific intent, and premeditation to be aggravating circumstances weighing in favor of a death sentence.

Appellant's reading of the trial court's and prosecutor's comments is unreasonable. Neither the trial court nor the prosecutor ever stated malice, specific intent, or premeditation were aggravators for the purpose of capital murder sentencing, nor could that rationally be inferred from the trial court's opening instructions or the prosecutor's arguments. The trial court's instructions are clearly background information meant to orient the jury as it carried out its task. The prosecutor's comments are argumentation well within the bounds of permissible oratory, as discussed above. Even if appellant's characterization of the cited language was reasonable, any confusion the jury may have had was corrected by the trial court's clear and complete instruction quoted above.

[29–31] Appellant argues the jury instructions misinformed the jury about the possibility of, and circumstances under which he might receive, a commutation of his sentence. He argues the trial court's statement, "I will tell you that the governor and the Board of Pardons rarely commutes a sentence of life imprisonment," N.T. Sentencing, 11/3/05, at 62, implied there was a chance he would eventually be released and pose a threat to public safety if the jury did not issue a death sentence. Appellant also argues the trial court's instructions were incomplete because they did not include language from "Pennsylvania's death penalty instructions" stating, in effect, the jury can assume the Governor and Board of Pardons will not commute the life sentence of a prisoner they believe to be dangerous. Appellant's Brief, at 70. As appellant concedes, the trial court's statement about the frequency of commuted life sentences was factually correct in that since 1997, two people with life sentences have had those sentences commuted to a term of years. Furthermore, it cannot reasonably be read to suggest danger to the public should the jury forgo a death sentence; quite the opposite, it is only reasonably read as reassurance to the jury appellant would not pose a threat to safety regardless of its choice. The language appellant claims was missing from the jury instruction is from Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502F. As the title implies, it is merely a suggestion, and the particular text to which appellant refers is further qualified as merely "optional" within that suggested instruction. The Suggested Standard Jury Instructions themselves are not binding and do not alter the discretion afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only. *See Commonwealth v. Simpson*, 620 Pa. 60, 66 A.3d 253, 274–75 (2013) (citations omitted). Furthermore, counsel is not deemed ineffective for failing to object to a jury instruction given by the court where the instruction itself is justifiable or not otherwise improper. *See Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 243 (2007). As none of appellant's complaints about the penalty phase jury instructions have any merit, trial counsel cannot be found ineffective. *See Washington*, at 603.

Issue XI: Sentencing Jury's Ability to Consider Mitigating Evidence

Appellant argues his death sentences are unconstitutional because the sentencing jury's ability to consider and give effect to the relevant mitigating evidence was impaired. Specifically, he asserts three empaneled jurors interpreted the court's instructions to mean they could not

consider mitigating circumstances if they found aggravating circumstances. He avers the misunderstanding precluded the jury from considering the mitigating circumstances surrounding his crimes in violation of the Eighth and Fourteenth Amendments to the United States Constitution, as interpreted in *Lockett*, and corresponding provisions of the Pennsylvania Constitution. Appellant also argues prior counsel were ineffective for failing to raise this issue.

There is no merit to this claim. First, as the PCRA court properly noted, appellant's averment the jury did not consider mitigating circumstances because of some supposed confusion surrounding the jury instructions is patently false. PCRA Court Opinion, 7/25/12, at 116. The jury must have considered the mitigating circumstances of appellant's crimes because it recorded its finding of a mitigating circumstance on the verdict slip. *See* Verdict Sheet, 11/3/05, at 3.

Next, *Lockett* is not controlling. The circumstance that offended the Eighth and Fourteenth Amendments in *Lockett* was a state capital sentencing scheme by which sentencers were *statutorily* prohibited from considering any aspect of a defendants character or record and any of the circumstances of the offense that the defendant proffered as a basis for a sentence less than death as mitigating circumstances. *See Lockett*, at 604–05, 98 S.Ct. 2954. Appellant does not argue the Pennsylvania capital sentencing procedures prevented the jury from considering evidence of mitigating circumstances; he simply asserts the jury misunderstood the jury instructions.

[32–34] Moreover, even if the jury misunderstood the instructions, appellant is not entitled to relief. As we have already discussed at length, the trial court's instructions in this case were more than adequate. "The law presumes the jury will follow the instructions of the court." *Commonwealth v. Drumheller*, 570 Pa. 117, 808 A.2d 893, 906 (2002) (citations omitted). The only evidence appellant offers to rebut this presumption is patently inadmissible. Defendants are prohibited from using post-verdict statements of jurors as means to contest their conviction in a post-conviction proceeding. *See Commonwealth v. Steele*, 599 Pa. 341, 961 A.2d 786, 808 (2008) (citation omitted). "During an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict." Pa.R.E. 606(b)(1). The court may not receive a juror's affidavit or evidence of a juror's statement on these matters either. *Id.; see Steele*, at 808. The purpose of this so-called "no impeachment rule" is to prevent constant relitigation of matters decided by the jury, such as the kind appellant seeks. *See Steele*, at 808 (quoting *Carter v. United States Steel Corporation*, 529 Pa. 409, 604 A.2d 1010, 1013 (1992)). For all the reasons stated, appellant's argument regarding the jury's ability to consider mitigating evidence is meritless, and counsel cannot be deemed ineffective for failing to raise that claim. *See Washington*, at 603.

B. Ineffectiveness Based on Counsel's Substandard Trial Performance

[35] Issues II, III, and VI contest some aspect of prior counsel's performance in the investigation and presentation of appellant's case. Although "optimal representation is not required either by the constitution or common sense[,]" effective representation is required under the Sixth Amendment. *Commonwealth v. Garrity*, 509 Pa. 46, 500 A.2d 1106, 1112 (1985)

(citing *Strickland*, at 687, 104 S.Ct. 2052). As explained more fully below, each of appellant's claims fail on one or more of the latter two elements of the *Pierce* test because a reasonable basis existed for counsel's act or omission, or there is no significant probability the result of the proceeding would have been different absent the error.

Issues II & III: Failure to Investigate Mental Health

[36] Appellant argues he was denied effective assistance of counsel because trial counsel failed to investigate his mental health before the withdrawal of his severance request and his acceptance of a stipulated bench trial, and failed to investigate the allegations against appellant before deciding not to present any factual or affirmative defenses in the guilt phase. Appellant's Brief, at 18–28. This argument fails because there was a reasonable basis for trial counsel to omit the investigation.

[37–39] Counsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary. *Commonwealth v. Cox*, 603 Pa. 223, 983 A.2d 666, 692 (2009) (citation omitted). Counsel's strategic choices made after less than a complete investigation are considered reasonable, on a claim of ineffective assistance, precisely to the extent that reasonable professional judgments support limitations on the investigation. *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 40 (2008) (citation omitted). Failure to conduct a more intensive investigation, in the absence of any indication that such investigation would develop more than was already known, is simply not ineffectiveness. *Commonwealth v. Pursell*, 555 Pa. 233, 724 A.2d 293, 306 (1999) (citation omitted).

Trial counsel's approach to the guilt phase of this case was entirely reasonable. Upon assuming appellant's representation, trial counsel were presented with overwhelming evidence of his guilt, including DNA evidence, confessions to police, and appellant's writings describing both incidents in detail. The inculpatory statements also militated against an insanity or diminished capacity defense because they explained appellant's purposeful intent behind the killings, ruining any possibility of claiming he did not understand the nature of his acts, or that he did not know they were wrong. *See* 18 Pa.C.S. § 315(b) [9] (codifying common law M'Naghten rule [10] as definition of legal insanity in Pennsylvania). Trial counsel tried to have the statements suppressed. However, as already discussed, the trial court properly determined they were admissible. Also, per the PCRA court's findings, there was no indication of any mental condition that would have called appellant's competence to stand trial into question. Therefore, trial counsel declining to investigate appellant's competence to stand trial or to pursue manifestly unmeritorious mental health de-

9. Stating, in pertinent part:
> ''[L]egally insane'' means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

Id.

10. *M'Naghten's Case,* 8 Eng. Rep. 718 (H.L. 1843) (to establish defense on ground of insanity, it must be clearly proved that, at time of committing of act, party accused was laboring under such defect of reason, from disease of mind, as not to know nature and quality of act he was doing; or if he did know it, that he did not know he was doing what was wrong).

fenses was a reasonable decision and did not constitute ineffective assistance.

Issue VI: Failure to Investigate and Present Mitigating Evidence

[40] Appellant argues he was denied effective assistance because trial counsel failed to adequately investigate, develop, and present evidence of mitigating factors that may have outweighed the aggravating circumstances of his crime, sparing him the death penalty. Specifically, appellant argues proper representation would have proven the existence of three mitigating circumstances: (1) his lack of capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired; (2) his extreme emotional disturbance at the time of the crime; and (3) the catch-all mitigator. Appellant argues trial counsel's representation at sentencing fell below professional norms because they failed to: (1) hire a mitigation specialist; (2) retain certain psychological experts; (3) obtain standard social history records, including educational and medical records, and thus failed to provide those to the mental health experts; (4) follow up on available leads; and (5) interview available lay witnesses.

[41] First, the Sixth Amendment guarantees the accused's right to effective assistance of counsel; it does not guarantee his right to a mitigation specialist. With regard to appellant's other suggested indicators of trial counsel's sub-standard performance, the reasonable basis prong of an ineffectiveness claim does "not question whether there were other more logical courses of action which counsel could have pursued; rather, . . . whether counsel's decisions had any reasonable basis." *Chmiel,* at 1160 (citation omitted).

Trial counsel conducted a reasonable investigation and put on a reasonable mitigation defense during the penalty phase. Their investigation included compiling a social history from appellant and his family, interviewing numerous potential lay witnesses, and reviewing hundreds of pages of medical, school, counseling, and employment records. They also retained two mental-health experts to examine appellant. From that investigation, trial counsel estimated they had a reasonable chance of success at proving the three mitigators appellant now asserts. At sentencing, trial counsel presented testimony from numerous lay witnesses and the two experts in support of those three mitigators. Nevertheless, the jury was only convinced of one mitigator—that appellant was under extreme emotional disturbance at the time of his capital crimes. There is a possibility, however improbable, trial counsel might have had more success had they paraded a team of psychological experts onto the stand during the penalty phase. However, reasonableness of an attorney's strategy may not be evaluated with the benefit of hindsight. All we must determine is whether the course of action chosen by trial counsel had some reasonable basis designed to effectuate the client's best interests; if so, the court will deem counsel effective. *Commonwealth v. Williams,* 587 Pa. 304, 899 A.2d 1060, 1063–64 (2006) (citations omitted). Therefore, this argument fails the second prong of the *Pierce* test.

Even if trial counsel's handling of the penalty phase had been objectively unreasonable, it did not prejudice appellant. Given the overwhelming evidence to the contrary, it is unlikely testimony from any number of expert witnesses would have caused the jury to find appellant did not appreciate the criminality of his conduct or have the capacity to conform his conduct to the law.

Furthermore, even now, with the benefit of hindsight and extensive additional inves-

tigation, appellant only musters arguments in support of three mitigators. With regard to the murder of Avery Johnson, the jury found four aggravating circumstances, two of which were multiple murders and the murder of a child. *See Commonwealth v. Koehler*, 614 Pa. 159, 36 A.3d 121, 151–52 (2012) (multiple murders and murder of child weigh heavy in aggravation). Even if trial counsel's performance in this case had been flawless, appellant almost certainly would still have received the death penalty. Therefore, appellant's argument also fails the third prong of the *Pierce* test.

C. Cumulative Effect of Ineffectiveness Claims

In his final issue, appellant argues he is entitled to relief from his conviction and sentence because of the prejudicial effect of all other errors he highlighted, even if he is not entitled to relief on any one of those errors. No number of failed ineffectiveness claims may collectively warrant relief if they fail to do so individually, except occasionally where the individual claims are all rejected solely for lack of prejudice. *See Busanet*, at 75 (citing *Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523, 532 (2009)). In this case each of appellant's individual ineffectiveness claims have been rejected for failing one or more of the first two prongs of the *Pierce* test; none has been rejected solely for lack of prejudice. Therefore, there is no basis for an accumulation claim.

REQUEST FOR REMAND DUE TO PROCEDURAL ERRORS BY THE PCRA COURT

Appellant argues he was denied full, fair, and reliable PCRA review because of numerous procedural errors by the PCRA court. Therefore, he requests a remand to correct the deficiencies. Such relief is not required.

A. PCRA Court's Denial of Hearing on Certain Issues

Appellant's first complaint concerning the PCRA proceedings is the denial of an evidentiary hearing on issues V, VIII, IX, and XI. He claims each of these issues involved a legitimate, material factual dispute requiring a hearing.

[42, 43] A PCRA court is only required to hold a hearing where the petition, or the Commonwealth's answer, raises an issue of material fact. Pa.R.Crim.P. 909(B)(1)-(2). When there are no disputed factual issues, an evidentiary hearing is not required. *Id.*; *Commonwealth v. Morris*, 546 Pa. 296, 684 A.2d 1037, 1042 (1996) (citation omitted). If a PCRA petitioner's offer of proof is insufficient to establish a *prima facie* case, or his allegations are refuted by the existing record, an evidentiary hearing is unwarranted. *See Commonwealth v. Hutchinson*, 611 Pa. 280, 25 A.3d 277, 320 (2011) (citation omitted); *Commonwealth v. Walker*, 613 Pa. 601, 36 A.3d 1, 17 (2011).

There was sufficient information in the record for the PCRA court to decide issues V, VIII, IX, and XI without a hearing. There was no issue of material fact in issue V because voluminous evidence of appellant's mental health was introduced during hearings on other issues, and appellant's Sixth Amendment right to counsel argument turned on a question of law. There was no issue of material fact in issue VIII because it was frivolous as a matter of law. There was no issue of material fact in issue IX because it pertains to closing statement comments by the prosecutor already captured in the record. There was no issue of material fact in issue XI because the jury statements proffered as the only evidence in support of the claim were inadmissible as a matter of law. Thus, the PCRA court

did not err by refusing a hearing on these issues.

B. Rulings at the PCRA Court Evidentiary Hearing

[44] Appellant argues the PCRA court interfered with his right to adequately examine witnesses and present relevant testimony during his PCRA hearing in a number of ways, which collectively prevented crucial fact development in support of his claims. These issues are waived because appellant did not state them with sufficient specificity in his Concise Statement of Matters Complained of on Appeal. *See* Pa.R.A.P. 1925(b)(4)(vii). In his concise statement, appellant raised the issue:

> Whether the PCRA Court erred in denying Petitioner/Appellant's right to a full and fair post-conviction proceeding by prohibiting Petitioner from fully developing the evidence in support of his claims as a result of the Court's adverse ruling on Petitioner's proposed witness questions and documentary evidence offered for admission.

Appellant's Rule 1925(b) Statement, 5/23/12, at 7. The PCRA court found that statement insufficient to put it on notice of appellant's specific complaints with its proceedings, and therefore determined this issue to be waived. PCRA Court Opinion, 7/25/12, at 128.

We agree. The language cited from appellant's Rule 1925(b) statement does not adequately outline the five discrete evidentiary issues he later raised in his brief to this Court. The PCRA hearings in this case lasted for 22 days, fill well over one thousand pages of testimony transcript, and involved many evidentiary rulings. No one, even the learned PCRA court, could have accurately honed in on the issues appellant attempts to raise in his brief from the issue statement quoted above.

In his reply brief, appellant cites *Tucker v. R.M. Tours,* 602 Pa. 147, 977 A.2d 1170, 1173 (2009), for the proposition an appellate court should order clarification of a Rule 1925(b) statement if the matters stated therein are not sufficiently clear. *Tucker* held it is within an appellate court's discretion to order clarification of an issue raised in a concise statement of matters complained about on appeal, but in no sense is the court required or even encouraged to do so. *See id.* Accordingly, all of the issues appellant raises about the quality of the PCRA proceedings in this case are meritless or waived.

It further appears that, as in *Chmiel, supra,* PCRA counsel in this case have raised numerous claims that, beyond lacking merit, are patently frivolous and deliberately incoherent. PCRA counsel's predictable tactics designed merely to impede the already deliberate wheels of justice have become intolerable, and we repeat our prior warning in clearer terms—the failure to curb further abuse may demand disciplinary action.

The order of the PCRA court is hereby affirmed. Jurisdiction relinquished.

Chief Justice CASTILLE, Justices BAER, TODD and STEVENS join the opinion.

Chief Justice CASTILLE files a concurring opinion.

Justice SAYLOR files a concurring opinion.

Justice STEVENS files a concurring opinion in which Chief Justice CASTILLE joins.

Chief Justice CASTILLE, concurring.

I join the Majority Opinion as well as the Concurring Opinion by Mr. Justice Stevens. I write separately because this

state capital case is another example of the consequences of federal taxpayer money being diverted to misuse, to fund the obstructionist agenda by appellant's counsel, the Federal Community Defender's Office ("FCDO").[1] There is no colorable question respecting appellant's guilt for the brutal murders of three women and a three-year-old infant. At the guilt phase of his bench trial, appellant did not offer a defense, did not contest the charges against him, and stipulated to the evidence. Thus, this is another matter where the claims on collateral review should have been limited. But, enter the self-appointing and well-financed FCDO, which burdened first the PCRA[2] court, and now this Court, with an avalanche of issues obviously seeking primarily to cause delay.

As explained by the Majority, the FCDO sought appointment by the U.S. District Court for the Eastern District of Pennsylvania three weeks after the U.S. Supreme Court denied *certiorari* on appellant's direct appeal, and was appointed to represent appellant for purposes of federal *habeas corpus* review. The FCDO then used the ruse of that appointment to enter its appearance in state court. The FCDO stalled the collateral review process by filing a 144–page amended PCRA petition nearly two years later, raising twenty-seven claims of error with numerous subissues. The PCRA court then conducted twenty-two days of hearings, during which the FCDO had two or three lawyers present each day, and presented no less than five mental health experts.

In response to the FCDO's scorched-earth attack upon appellant's trial counsel and the Commonwealth's final judgment, the PCRA court set aside its other cases and senior judges were enlisted to keep the court running. The PCRA court detailed the effect of the FCDO agenda in its opinion, which I memorialize here:

> If ever there were a criminal deserving of the death penalty it is John Charles Eichinger. His murders of three women and a three-year-old girl were carefully planned, executed and attempts to conceal the murders were employed. There is no doubt that Appellant is guilty of these killings. There is overwhelming evidence of his guilt, including multiple admissions to police, incriminating journal entries detailing the murders written in Appellant's own handwriting and DNA evidence.
>
> We recognize that all criminal defendants have the right to zealous advocacy at all stages of their criminal proceedings. A lawyer has a sacred duty to defend his or her client. Our codes of professional responsibility additionally call upon lawyers to serve as guardians of the law, to play a vital role in the preservation of society, and to adhere to the highest standards of ethical and moral conduct. Simply stated, we all are called upon to promote respect for the law, our profession, and to do public good. Consistent with these guiding principles, the tactics used in this case require the Court to speak with candor. This case has caused me to reasonably question where the line exists between a zealous defense and an agenda-driven litigation strategy, such as the budget-breaking resource-breaking strategy on display in this case. Here, the cost to the people and to the trial Court was very high. This Court had to devote

1. In the court below, appellant was represented by three FCDO lawyers: Michael Wiseman, Esquire, Hunter Labovitz, Esquire, and Maria K. Pulzetti, Esquire. The FCDO Briefs on appeal were prepared by Attorneys Labovitz and Pulzetti.

2. Post Conviction Relief Act, 42 Pa.C.S. §§ 9541–9546.

> twenty-two full and partial days to hearings. To carry out the daily business of this Court visiting Senior Judges were brought in. The District Attorney's capital litigation budget had to have been impacted. With seemingly unlimited access to funding, the Federal Defender came with two or three attorneys, and usually two assistants. They flew in witnesses from around the Country. Additionally, they raised overlapping issues, issues that were previously litigated, and issues that were contrary to Pennsylvania Supreme Court holdings or otherwise lacked merit.

Opinion, Carpenter, J., July 25, 2012, at 1–2.

The abuses did not end with the FCDO attack at the PCRA trial level. After the PCRA court denied relief, the FCDO filed an abusive Statement of Issues on Appeal, listing twenty-seven claims of error in a case in which there is no doubt that appellant was guilty and where the aggravators virtually ensured that any responsible jury would return a sentence of death.

The PCRA court again was required to set aside its caseload to prepare a 129–page opinion responding to the prolix, abusive claims, many of which were abjectly frivolous. For example, appellant falsely claimed that the appointment of trial counsel less than three weeks prior to trial amounted to a constructive denial of counsel. In forwarding his argument, appellant notably ignored the fact that counsel was appointed two days after his trial arraignment and six months prior to trial, and was fully prepared to litigate the guilt and penalty phases of the trial. Counsel believed, however, an additional lawyer would be helpful and asked the court to appoint another lawyer to aid him in litigating the case. The trial court granted the request. It is the appointment of the second lawyer that, the FCDO averred, amounted to a constructive denial of counsel. The PCRA court dismissed the claim noting that "[a]ppellant wasn't left without an attorney up until three weeks before trial, as [his] argument seems to suggest. Appellant was ably represented first by [trial counsel] and then by a team of competent trial counsel." *Id.* at 59. In a similar vein, appellant raised overlapping issues: for example he raised two separate issues challenging the same expert testimony. *Id.* at 72–79. Appellant also contended that his waiver of a jury was not knowing, but then separately argued, in the next issue, that he made an uninformed agreement to a bench trial. *Id.* at pp. 52–56. I offer these as but a few examples of the frivolous and duplicative issues pursued by the FCDO.

Not content to end the abuse with the PCRA court, the FCDO then fixed its attention on this Court. After filing a notice of appeal, the FCDO filed three requests for extensions of time to file its brief, and subsequently asked for an additional three-day extension (which was never granted), as well as a request to exceed briefing page limitations. Ultimately, a seventy-five page brief was filed late, raising a dozen principal claims, including thirty-one prolix footnotes in single-space type. Following the filing of the Commonwealth's response, the FCDO filed a reply brief, but only after being granted another extension of time. The FCDO then had the temerity to begin its argument on appeal with a claim that the PCRA court had denied appellant "full, fair and reliable PCRA review," an outrageous allegation given the time and resources the judiciary and the Commonwealth had to devote in the face of this federal attack—all in a case where guilt is not an issue.

As I have stated elsewhere, the FCDO's strategy has taken a substantial and unwarranted toll on the state trial level and

appellate courts. *See Commonwealth v. Spotz*, —— Pa. ——, 99 A.3d 866, 875 (2014) (Single Justice Opinion on Post–Decisional Motions by Castille, C.J.); *Commonwealth v. Spotz*, 610 Pa. 17, 18 A.3d 244, 329–30 (2011) (Castille, C.J., concurring); *Commonwealth v. Roney*, 622 Pa. 1, 79 A.3d 595, 644–46 (2013) (Castille, C.J., concurring), *cert. denied*, —— U.S. ——, 135 S.Ct. 56, 190 L.Ed.2d 56 (2014). Pennsylvania is not obliged to indulge the FCDO's obstructionist and unethical, continuing agenda. The time is past due to consider removing the organization from state capital matters.

Justice SAYLOR, concurring.

I concur in the result and offer the following comments organized according to the numerical conventions employed in the majority opinion.

Issues II & III

The majority deems lead trial counsel's approach in making very early selections of trial strategy,[1] leading to an unusual "stipulated bench trial" for the guilt phase, to be "entirely reasonable." Majority Opinion, at 847. I have substantial reservations in this regard.

First off, the case involves a capital defense attorney who was unfamiliar with the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the "ABA Guidelines"). *See* N.T., Feb. 8, 2011, at 29. This core resource, in its various permutations, has been in existence since 1989 and has been referenced by the Supreme Court of the United States as containing "guides to determining what is reasonable." *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 2536–37, 156 L.Ed.2d 471 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)).[2] Had counsel referenced those guidelines, he would have appreciated the following cautionary advice as encapsulated by the Supreme Court of the United States:

> [P]leading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit to the defendant. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.2, Commentary (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1045 (2003) ("If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights."). Pleading guilty not only relinquishes trial rights, it increases the likelihood that the State will introduce aggressive evidence of guilt during the sentencing phase, so that the gruesome details of the crime are fresh in the jurors' minds as they deliberate on the

1. *See, e.g.,* N.T., June 15, 2011, at 51–52 (reflecting trial counsel's accession that the strategy of conceding guilt and advancing contrition was "the strategy [he] formed from day one"); *id.* at 44 (reflecting counsel's comment that, as early as the preliminary hearing, his approach to the defense was "just fall on the sword, mea culpa, hope for the best, that they spare [Appellant's] life").

2. In reference to such guidelines, this Court's opinions tend to stress that the guidelines are not mandatory. *See, e.g., Commonwealth v. Sepulveda*, 618 Pa. 262, 294 n. 15, 55 A.3d 1108, 1127 n. 15 (2012). Nevertheless, they certainly present a comprehensive resource made readily available to capital defense counsel by a prominent national bar association upon careful study and reflection. As of the time of Appellant's trial, 2005, it seems inconceivable to me that a lawyer would undertake representation in a death-penalty case having no familiarity with these well-recognized guidelines.

> sentence. *See* [Gary] Goodpaster, [*The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,*] 58 N.Y.U.L. Rev. [299,] 331 [(1983)]. . . .

Florida v. Nixon, 543 U.S. 175, 191 n. 6, 125 S.Ct. 551, 562 n. 6, 160 L.Ed.2d 565 (2004).[3] It also seems to me to be highly questionable for the attorney to select a strategy centered on remorse, at a time when the client will not affirmatively acknowledge factual guilt relative to the crimes. *See* N.T., July 21, 2011, at 5, 13.

I have similar thoughts relative to Issue VI, which concerns counsel's stewardship at the penalty stage, in that I simply am far more circumspect about the representation afforded to Appellant at his capital trial than the majority. Thus, ultimately, my concurrence in the result rests more on the prejudice assessment than on the majority's various approvals of the attorneys' performance.

Issue IV

To the degree the majority holds that federal constitutional law does not require a colloquy related to waivers of core constitutional trial rights at a capital proceeding which are dispositive of guilt, *see* Majority Opinion, at 831–32, I find the decision to be in material tension with *Boykin v. Alabama*, 395 U.S. 238, 243–44, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequence.").[4] Although *Boykin* arose in the setting of a guilty plea, I fail to see that the "stipulated bench trial" which occurred here represented anything short of such a plea (functionally and in terms of the consequence-laden accessions involved). Accordingly, while I agree with the majority's alternative assessment that the actual colloquy was sufficient, *see* Majority Opinion, at 831–33, I distance myself from the suggestion that such colloquy had no independent significance under the United States Constitution.

Issue V

The majority opinion appears to suggest that the rejection, on direct appeal, of a record-based claim touching on the voluntariness of a confession obviates a challenge, on a developed post-conviction record, to trial counsel's failure to adduce mental-health evidence to establish a lack of voluntariness. *See* Majority Opinion, at 834. I find such reasoning to be out of sync with the governing review standards. *See, e.g., Commonwealth v. Collins*, 585 Pa. 45, 60–61, 888 A.2d 564, 573 (2005) (holding that an assertion of ineffective assistance of trial counsel raises a cognizable post-conviction issue, even if the underlying claim has been previously litigated). Indeed, I fail to see how a court, on direct appellate review, can "impliedly" adjudge a defendant's mental-health condition, Majority Opinion, at 834, without any factual record whatsoever relative to mental-health impairments first asserted on collateral review. On this claim, I support the result based on the alternative rationale centered on the post-conviction court's findings. *See id.*

3. While Appellant did not actually plead guilty, the procedure employed was tantamount to a plea in all respects material to the Supreme Court's analysis, above.

4. The majority's treatment appears to be limited to Appellant's claim as it relates to the waiver of his right to a jury trial. *See* Majority Opinion, at 831–32. Appellant's brief, however, also speaks to the broader sphere of constitutional rights which he waived, including his right to "contest the evidence against him." Brief for Appellant at 28.

Issue VI

Consistent with my assessment of trial counsel's performance in the guilt phase of trial, I regard the analysis of Appellant's claims that his trial attorney failed to adequately develop and present mitigating evidence at the penalty stage as being of a much more greatly mixed nature than does the majority. On the one hand, counsel did collect various social history records and ultimately did consider consultation with and engagement of mental-health professionals, as contrasted with the abysmal performance of numerous appointed Pennsylvania capital defense attorneys in the many cases we have seen in which these sorts of rudimentary preparatory measures were omitted. *See, e.g., Commonwealth v. King,* 618 Pa. 405, 448–57, 57 A.3d 607, 633–38 (2012) (Saylor, J., concurring specially). On the other hand, the lawyer was unfamiliar with the use of a mitigation specialist and the preparation of a social history, *see* N.T., Feb. 8, 2011, at 46–47; N.T., July 6, 2011, at 67, conventions addressed in the ABA Guidelines with which counsel also was unacquainted, *see* N.T., Feb. 8, 2011, at 29.

It also seems to me that counsel may have relegated an inordinate amount of responsibility to the mental-health professionals in terms of assessing mitigation. *See, e.g.,* N.T., Nov. 29, 2011, at 24–25 (reflecting counsel's indication that he simply delivered life-history records to the defense psychiatrist and left it up to the psychiatrist to determine what documents were relevant); *id.* at 134 (reflecting counsel's attestation to an approach that he was "just going to defer to whatever [the psychiatrist] suggested"); N.T., July 6, 2011, at 100 ("I just left it all in his hands."). This, of course, led the defense experts, on collateral review, to distinguish their relationship with trial counsel from other instances in which capital defense attorneys and the defense experts worked as a team, per the approach recommended in the ABA Guidelines. *See, e.g.,* N.T., Oct. 25, 2011, at 128–29 (reflecting testimony to such effect from the defense psychiatrist). Of additional concern is the "extremely compressed time frame" in which the psychiatrist was expected to operate, *id.* at 128, as trial counsel only first met with him a little over a month before the penalty proceeding, such that a report was not generated until just a few days before the penalty hearing. *See* N.T., Nov. 29, 2011, at 133; N.T., July 6, 2011, at 105.

Finally, counsel's pivotal dependence on Appellant's ability to testify credibly to remorse in the penalty hearing, *see, e.g.,* N.T., July 6, 2011, at 86, seems to me to have been misguided. Anyone reading this record, including the prosecutor's extensive references to Appellant's journal detailing the killings, *see, e.g.,* N.T., Nov. 3, 2005, at 19–20, will have a ready appreciation of the devastating cross-examination available to the Commonwealth, had Appellant been presented as a witness on his own behalf. Indeed, in light of such obvious avenues for cross-examination, trial counsel acknowledged that there was slim hope that Appellant would have been regarded by the jury as being sincere, had he testified to remorsefulness. *See* N.T., Oct. 24, 2011, at 69. Along these lines, counsel acknowledged, fatalistically, in the post-conviction proceedings that he thought "[h]earing it from [Appellant] was the best we were going to do." *Id.*

Again, I believe Pennsylvania capital defense attorneys should utilize all available resources to gain a better appreciation of alternatives before selecting a strategy with such large and obvious drawbacks. I also think that, in the hopes of setting a course for better performance in future cases, we should be careful about lending our approval to instances of stewardship

manifesting a less informed and deliberative character. Thus, again, my concurrence in the result rests entirely on the prejudice component.

Issues VII & IX

To the extent that the majority holds that a prosecutor should be permitted to discuss a defendant's future dangerousness only in rebuttal, where a defendant places his future conduct into issue in development of the mitigation case, *see* Majority Opinion, at 835–36, I agree. I also concur in the majority's judgment that Appellant would appear to have opened the door for the prosecution to explore the potential for consistency in Appellant's conformance. *Cf. People v. Brady,* 50 Cal.4th 547, 113 Cal.Rptr.3d 458, 236 P.3d 312, 342 (2010) ("The prosecutor's argument concerning defendant's dangerousness in prison was proper rebuttal of an expert witness's testimony about defendant's ability to function in a highly structured environment.").

While I believe that the prosecutor's actual arguments entreating the jury to return a death verdict to prevent future killings tested the appropriate limits for rebutting mitigation, this Court has set a very high bar for reversal on grounds of prosecutorial misconduct where the trial court has issued appropriate instructions; the aggravating circumstances in the present case were indeed compelling; and even on post-conviction review Appellant has failed to present a convincing case that the range of available mitigating evidence was such that the defense would have been able to do much better with more knowledgeable attorneys at the helm. Thus, while I maintain my position that the range of this Court's tolerance for "oratorical flair" in death-penalty cases should be narrower, and that prosecutors should confine their arguments more closely to the evidence and the law, *see, e.g., Commonwealth v. Spotz,* 616 Pa. 164, 276, 47 A.3d 63, 131 (2012) (Saylor, J., concurring), ultimately, I concur in the result affirming Appellant's judgment of sentence.

Justice STEVENS, concurring.

I join the Majority in its entirety. I write separately to emphasize my agreement with the Majority's admonishment to PCRA capital counsel, the Federal Community Defender Office, that the tactics employed in this case, which are designed to impede the already overburdened wheels of justice, cannot be tolerated.

Simply put, those who oppose the death penalty should address their concerns to the legislature. Using the court system as a way to delay, obstruct, and, thus, by implication invalidate a law passed by duly elected senators and representatives cannot be characterized as proper, zealous advocacy. That is to say, "the gravity of a capital case does not relieve counsel of their obligation under Rule 3.1 of the Rules of Professional Conduct not to raise frivolous claims." *Commonwealth v. Chmiel,* 612 Pa. 333, 468, 30 A.3d 1111, 1191 (2011) (citation and footnote omitted). If change is desired, the proper path of action is to lobby the legislature rather than to overwhelm our courts with such a systematic attack on the death penalty statute.

The record establishes that Appellant's crimes were particularly heinous. On March 25, 2005, Appellant planned the murder of Heather Groves, stabbed her repeatedly seeking to puncture her organs, stabbed and murdered Heather's three-year-old daughter, who had witnessed the stabbing of her mother, and then murdered Heather's sister, Lisa, to eliminate her as a witness. Not done yet, Appellant returned to Heather and stabbed her in the diaphragm and slit her throat, killing her.

As described by the well-reasoned Majority, Appellant received full representation and due process, resulting in court-appointed counsel litigating numerous pre-trial and post-trial motions, a three-day death penalty phase hearing, as well as this Court's examination of the proceedings, evidence, and sentence upon direct appeal. *See Commonwealth v. Eichinger,* 591 Pa. 1, 915 A.2d 1122 (2007), *cert. denied,* 552 U.S. 894, 128 S.Ct. 211, 169 L.Ed.2d 158 (2007).

However, thereafter, the record reflects PCRA capital counsel raised 27 claims of error, which can only be described as excessive, in the amended PCRA petition. This resulted in 22 days of PCRA court evidentiary hearings and a 129–page PCRA court opinion. PCRA capital counsel has continued with this strategy on appeal to this Court by presenting 12 issues for our consideration, many of which are frivolous arguments, "which is to say arguments that cannot conceivably persuade the court[.]" *Chmiel,* 612 Pa. at 468, 30 A.3d at 1190 (quotations and quotation marks omitted).

While an attorney may have an ethical obligation to be a zealous advocate, he has no duty to pester the courts with frivolous arguments. In fact, an attorney does his client a disservice by failing to winnow out the weaker arguments and focusing on central, key issues, upon which his client might be granted relief. Adding weaker, particularly frivolous arguments, dilutes the force of the stronger ones and makes it difficult for a court to focus on those issues which are deserving of attention, *i.e.,* those which are non-frivolous.

Common sense dictates that, when an attorney raises an excessive number of issues, as occurred in this PCRA case, the motivation for so doing is to paralyze the court system to further personal political views. It is not hard to discern that, in such cases, the strategy of PCRA capital counsel is not necessarily to put forth the best legal arguments upon which his client may be granted relief; but rather, the strategy is to keep, at all costs, his client from suffering the ultimate penalty proscribed by law. Such personal political viewpoints, manifested in such a manner as to cause disruption and paralysis, have no legitimate place in our court system.

Moreover, the public resources wasted by PCRA capital counsel's pursuit of numerous frivolous claims cannot be tolerated. Substantial investigative resources, police officers testifying in court, and judges, along with court personnel, devoting precious time to the rejection of excessive frivolous claims is a basis for imposing sanctions upon those attorneys who violate or ignore their obligations under our Rules of Professional Conduct. While federally-financed lawyers, such as those who represented Appellant as PCRA capital counsel in this case, have the duty, like any attorney, to raise and pursue viable claims, they must do so within the ethical limits which govern all Pennsylvania lawyers.

In the case *sub judice,* Appellant committed his brutal murders more than nine years from the date of this writing; however, and despite the fact that a jury made the agonizing decision to sentence Appellant under the death penalty laws, this case illustrates the administration of justice is more often than not paralyzed by what the Majority accurately calls "predictable tactics." Due, in part, to PCRA capital counsel's dysfunctional strategies, the families of the victims become yet another victim to Appellant's brutal crimes. As Chief Justice Castille eloquently stated in his Concurring Opinion in *Commonwealth v. Spotz,* 610 Pa. 17, 170, 18 A.3d 244, 335 (2011): "[T]his Court is not obliged to indulge political tactics that seek to dismantle or impede governing law.

The difference of death does not mean that any and all tactics in pursuit of the defeat of capital judgment are legitimate."

Chief Justice CASTILLE joins this concurring opinion.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Jose VARGAS, Appellant.

Superior Court of Pennsylvania.

Argued April 23, 2014.

Filed Dec. 31, 2014.

Background: Defendant was convicted in the Court of Common Pleas, Bucks County, No. CP–09–CR–0001895–2011, Finley, J., of possession of a controlled substance with intent to distribute, possession of a controlled substance, possession of drug paraphernalia, and criminal conspiracy. Defendant appealed.

Holdings: The Superior Court, No. 1415 EDA 2012, en banc, Olson, J., held that:

(1) evidence with regard to heroin found in hotel room was sufficient for convictions, and

(2) evidence with regard to heroin found in vehicle was sufficient for convictions.

Affirmed in part, vacated in part, and remanded.

Ford Elliott, P.J.E., Allen and Mundy, JJ., joined the opinion.

Ford Elliott, P.J.E., filed a concurring statement in which Panella, Donohue and Lazarus, JJ., joined.

Gantman, P.J. and Panella, J., concurred in the result.

Bender, P.J.E., filed a concurring and dissenting opinion in which Donohue and Lazarus, JJ., joined.

1. Criminal Law ⚿1144.13(2.1), 1159.2(7)

The standard for reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt. (Per Olson, J., with three Judges concurring and two Judges concurring in the result).

2. Criminal Law ⚿1159.2(1, 9)

On reviewing sufficiency of the evidence for conviction, Court of Appeals may not weigh the evidence and substitute its judgment for that of the factfinder. (Per Olson, J., with three Judges concurring and two Judges concurring in the result).

3. Criminal Law ⚿560

The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence in order for evidence to be sufficient for conviction. (Per Olson, J., with three Judges concurring and two Judges concurring in the result).

4. Criminal Law ⚿741(6)

Any doubts regarding a defendant's guilt may be resolved by the factfinder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact may be drawn from the combined circumstances. (Per Olson, J., with three Judges concurring and two Judges concurring in the result).

5. Criminal Law ⚿552(1)

The Commonwealth may sustain its burden of proving every element of the

OFFICE OF THE DISTRICT ATTORNEY

BRUCE L. CASTOR, JR.
DISTRICT ATTORNEY

RISA VETRI FERMAN
FIRST ASSISTANT DISTRICT ATTORNEY

OSCAR P. VANCE, JR.
CHIEF COUNTY DETECTIVE

ANNE C. METZ
OFFICE ADMINISTRATOR

COUNTY OF MONTGOMERY
COURT HOUSE
P.O. BOX 311
NORRISTOWN, PENNSYLVANIA
19404-0311

DISTRICT ATTORNEY'S OFFICE (610) 278-3090
DISTRICT ATTORNEY'S FAX (610) 278-3095
COUNTY DETECTIVE BUREAU (610) 278-3368

September 28, 2005

William R. McElroy, Esquire
101 E. Moreland Avenue
Hatboro, PA 19040-4732

RE: Commonwealth v. John Eichinger

Dear Mr. McElroy:

The Commonwealth has agreed to your Motion for Severance in the above case. As I have repeatedly argued to you, I consider the defendant's desire for severance to be a tactical mistake which will increase the probability that he will receive the death penalty. My reasoning follows.

The defendant, in my judgment, will be convicted of first degree murder in the killing of Jennifer Still. That conviction will serve as an additional aggravating factor for the death penalty should he then be convicted of the killings of Heather and Lisa Greaves and Avery Johnson. While the same is true if he were convicted of first degree murder of all four victims in one proceeding, a combined trial would eliminate the inevitable shock that the "Greaves/Johnson" jury would feel at sentencing upon learning that Eichinger had murdered someone else previously and already been convicted. I also do not believe that a sentencing jury will be harder on a defendant who does not contest his guilt for four versus three murders.

Additionally, in order to provide an incentive for the defendant to withdraw his Motion for Severance, the Commonwealth has offered to permit the jury to hear that he did not contest his guilt in the four murders. Normally, all that is admissible is the fact of conviction, not the lack of contesting. Thus the Commonwealth's offer would allow the

DEFENDANT'S EXHIBIT 2

defendant to increase his chance for receiving life in prison rather than the death sentence.

Despite these arguments, the defendant has persisted in his request for severance. It is certainly within his rights to do so. We are giving notice, however, of our intent to ask the court to colloquy the defendant to make certain that this is his informed decision and to eliminate, as much as possible, the likelihood that he will use the severance as an appellate issue.

Lastly, I am much concerned that you have not requested death penalty counsel, nor have you, to our knowledge, begun building a defense case should the defendant face a death penalty hearing. The court has agreed to meet with you *ex parte* to learn what you have done to prepare for such a hearing. We intend to ask the court to rule that your efforts have been adequate, or if inadequate, to order you to make the proper preparations.

It may well be that the defendant is behind the peculiar defense strategy in this case. If so, we consider it imperative that such be documented so the defendant cannot claim, while sitting on death row, that he was only doing what you told him to do. We have no objection to the defendant maximizing his chances of receiving the death penalty. We just want to make certain that he knows that is what he is doing by pursuing this course of action.

Very truly yours,

Bruce L. Castor, Jr.

cc: Hon. William R. Carpenter