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Open Questions in Pennsylvania Criminal Law

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This article developed from a research assignment for students in the Criminal Defense Clinic of Duquesne Unitersity School of Law.[1] The issues treated herein do not exhaust the list of questions yet to be resolved by our courts; our attempt is to emphasize issues of importance to trial attorneys—both prosecution and defense.

The article was written in admiration of the courts that not only address open questions, but articulate cogent decisions. Our admiration is not restricted to justices and judges who appear to press for decisions favorable to the defense, because it is a mistake to dwell on whether a decision appears to favor the prosecution or defense—such appearances are often inaccurate. Those who dwell on mere results may miss the wisdom of the rationale or, and maybe more essential, the nature of the problem itself.

We proceed on a fundamental proposition: appellate courts should not only decide cases, but should announce principles to guide future proceedings. Presently in Pennsylvania, the appellate courts—supreme and superior—are closely divided on many important criminal issues. This article reviews the development and status of Pennsylvania law on nine of those issues.

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1. The Clinic involves students in actual trials. An experienced attorney receives appointments in indigent cases and two to three students are assigned to assist the attorney. The attorney is responsible for the actual conduct of the proceedings. The students are present during court and participate extensively in the drafting of documents and all trial preparation. Weekly panel discussions on selected topics by attorneys, judges, and others involved in the administration of criminal justice broaden the student's knowledge of the criminal court system.

LINE-UPS AND THE DEFENDANT'S RIGHT TO COUNSEL[2]

The United States Supreme Court has held that the defendant's appearance in a line-up at a "critical stage of prosecution" triggers the defendant's right to counsel.[3] There is confusion, however, as to what constitutes a critical stage of the prosecution. For example, in *Kirby v. Illinois,*[4] the Court decided that there is no right to counsel before prosecution commences. The Court, however, did not decide exactly when prosecution begins, since the *Kirby* line-up took place before indictment or formal charges. In *Commonwealth v. Richman,*[5] the Pennsylvania Supreme Court adopted a more protective rule: the defendant is entitled to counsel at a line-up anytime after he is arrested.

There is generally little confusion as to when the line-up is occurring: whenever a victim or witness attempts to identify the suspect among a group which includes the suspect and several nonsuspects. Other confrontations between a witness and the defendant, however, have been found to trigger a right to counsel. In *Commonwealth v. Taylor,*[6] potential witnesses were seated at the back of the courtroom just before the defendant was given a preliminary hearing. Six or seven other persons who were scheduled for hearings were brought in and, as each entered, the witnesses were asked if they could identify the person as the offender in their case. The defendant, Taylor, was identified by the witnesses. Although the defendant was represented by counsel, his attorney was not informed that an identification procedure was in process. The Pennsylvania Supreme Court held this to be line-up, requiring the assistance of counsel. Since counsel was unaware of the identification proceedings, his presence was immaterial.[7]

As they have expanded the concept of what constitutes a line-up, the Pennsylvania courts have also moved beyond any notion of only formal arrest as constituting an arrest triggering the right to counsel at line-up. An arrest is accomplished by any act indicating an intent

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2. Research assistance was provided by Kirk Holman.
3. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).
4. 406 U.S. 682 (1972).
5. 458 Pa. 167, 320 A.2d 351 (1974).
6. 472 Pa. 1, 370 A.2d 1197 (1977).
7. Under circumstances very similar to *Taylor,* the United States Supreme Court held that, for federal constitutional purposes, the right to counsel attaches at a preliminary hearing. Moore v. Illinois, 434 U.S. 220 (1977).

to take a person into custody and to subject him to the actual control and will of the officer.[8] Pennsylvania cases thus defining arrest, when coupled with *Richman,* appear to bar all confrontations between the victim or witness and the defendant without counsel, while the defendant is held in custody. However, *Commonwealth v. Ray,*[9] decided prior to *Richman,* held to the contrary. The Pennsylvania Supreme Court held that a defendant has no right to counsel while being "detained" for investigation shortly after the commission of a crime, even though potential witnesses were asked to identify him at the detention site. Since the status of limited detention, as contrasted with arrest, is itself an open question in Pennsylvania (*Ray* was decided by a closely-divided court), the exception may not survive the *Richman* decision. There are obvious advantages to law enforcers and potential advantages to defendants if the police have some leeway to allow witnesses to view the suspect at or near the scene of the crime shortly after the time of commission; such a "line-up" may avoid an unnecessary arrest for the defendant. However, if *Richman* qpplies to all such identifications, the cumbersome mechnaics of obtaining counsel may make a viewing shortly after the arrest an impossibility.

In *Richman,* no justice questioned the need for counsel at a line-up that occurred some four-and-one-half hours after arrest. Since there was no majority opinion, the opinion of each justice is crucial. Justices Pomeroy and Eagen, in separate opinions, indicated they would not require counsel for confrontations taking place within a short time after the crime is committed or for immediate on-the-scene identifications.

Nevertheless, identification shortly after the crime poses the same reliability problems that led the courts to require assistance of counsel in confrontations occurring after arrest. If counsel is required at any identification, counsel should arguably be required at all identifications. It remains to be seen what is meant by a "short period of time" after the commission of the crime or "immediate on-the-scene identifications" and whether these definitions will become important open questions.

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8. Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963); Commonwealth v. Sharpe, 449 Pa. 35, 296 A.2d 519 (1972).

9. 455 Pa. 45, 315 A.2d 634 (1973).

PROBABLE CAUSE—INFORMATION PROVIDED BY FIRST-TIME INFORMANTS[10]

In Pennsylvania, the authorities have had difficulties in obtaining valid warrants based on information supplied by first time informants. For example, in *Commonwealth v. Slater,*[11] a search warrant was issued on the basis of information provided by an unpaid informant who had not given information in the past. Even though the informant gave a sworn statement to the police, the warrant was struck down, and the superior court affirmed the decision of the lower court suppressing the evidence.[12]

The Constitutional Background

Searches, with or without a warrant, must be based upon probable cause. Where a search warrant has been issued, the probable cause must be stated in a supporting affidavit. The affidavit must satisfy the test established by the United States Supreme Court in *Aguilar v. Texas:*[12] is there sufficient information from which a neutral and detached magistrate can find probable cause? If all or part of the information has been furnished by an informant, the informant's information must satisfy the Supreme Court requirements as established in *Aguilar* and also the requirements of *Spinelli v. United States*[13] that the circumstances concerning the informant's credibility or the source of his information be disclosed, or that the informant's tip be corroborated. *Aguilar* and *Spinelli* have been interpreted by the Pennsylvania courts to require the affidavit to demonstrate that: 1) the informant is a reliable source of information; and 2) the informant had a reliable basis for this information.[14] In other words, the magistrate must have information demonstrating the past reliability of the informant and how the informant's information was obtained.

With first time informants, the first prong of the test poses unique problems. In *Commonwealth v. Falk,*[15] the superior court estab-

10. Research assistance was provided by Jolene Grubb.

11. 242 Pa. Super Ct. 255, 375 A.2d 1257 (1976).

12. 378 U.S. 108 (1964).

13. 393 U.S. 410 (1969).

14. Commonwealth v. Samuels, 235 Pa. Super Ct. 192, 340 A.2d 880 (1975); Commonwealth v. Wright, 212 Pa. Super. Ct. 259, 243 A.2d 213 (1968). *See also* Commonwealth v. Cummings, 416 Pa. 510, 207 A.2d 230 (1965).

15. 221 Pa. Super. Ct. 243, 290 A.2d 125 (1972).

lished a four factor standard derived from the United States Supreme Court decision in *Harris v. United States*[16] to be applied in determining the reliability or trustworthiness of an informant: 1) accurate information previously given; 2) corroboration of the informant's story by other sources; 3) personal and recent observations of the informant which result in a declaration against his interest; and 4) the reputation of the defendant with the police, if supported by prior evidence within the affiant's own knowledge.

Certainly, these factors provided sufficient guidance in the typical case. Strictly applied, however, the *Aguilar/Spinelli* standard would make it difficult to establish probable cause on the basis of a first-time informant. It should be noted that the federal cases—*Aguilar, Spinelli,* and *Harris*—did not intend these four factors to be the exclusive test of reliability and a close reading of *Harris* indicates that the United States Supreme Court favors a flexible balancing analysis of the particular facts of each case.[17]

Possible Solutions

In cases involving a first time informant the police might attempt to establish reliability by taking the informant to a magistrate and having him testify under oath. Where the witness has been sworn and the magistrate has an opportunity to observe, hear, and evaluate the witness, there should be no need for the substantiation that *Aguilar/Spinelli* and *Harris* require.[18] It appears, however, that the police did this in *Commonwealth v. Haberman*[19] and still the affidavit was rejected at the trial level.

The issue of an informant's reliability becomes a particular problem where the police have made a warrantless search or where a warrant has been obtained on the basis of information provided by an unnamed confidential source. Clearly, protections are necessary to prevent unconstitutional intrusions based on information provided by nameless, faceless sources. Nevertheless, it is doubtful whether the United States Supreme Court would apply the *Aguilar/Spinelli* requirements to information provided by an eye-

16. 403 U.S. 573 (1971).

17. *Id.* at 584-85.

18. It should be noted that first time witnesses frequently testify in court and such testimony can provide the basis for conviction.

19. Commonwealth v. Haberman is presently pending before the Pennsylvania Superior Court.

witness, bystander, or victim. In *United States v. Bell*,[20] an eyewitness to a bank robbery gave information which was used to establish probable cause for a search warrant. The Fifth Circuit said:

> We have discovered no case that extends [the *Spinelli*] requirement to the identified bystander or victim-eyewitness to a crime, and we now hold that so such requirement need be met . . . . Such observers are seldom involved with the miscreants or the crime. Eyewitnesses by definition are not passing along idle rumor, for they either have been the victims of the crime or have otherwise seen some portion of it. A "neutral and detached magistrate" could adequately assess the probative value of an eyewitnesses's information because, if it is reasonable and accepted as true, the magistrate must believe that it is based upon first-hand knowledge. Thus we conclude that *Aguilar* and *Spinelli* requirements are limited to the informant situation only.[21]

Various state and federal decisions have followed *Bell* and eliminated the necessity of specific allegations of credibility—credibility is inferred from their status as an eyewitness or victim.[22] *Harris* also suggests another approach: if a wealth of detail is provided under one prong of the *Aguilar/Spinelli* test, it should be permitted to spill over to bolster the other.[23]

Thus, it appears that the Pennsylvania Superior Court is applying the federal constitutional standards more rigidly than the federal courts. Assuming the importance of informants, particularly the citizen-volunteer, the *Aguilar/Spinelli* requirements should not be interpreted to exclude such sources if there are other sufficient indicia of reliability.

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20. 457 F.2d 1231 (5th Cir. 1972).

21. *Id.* at 1238-39.

22. United States v. Miley, 513 F.2d 1191, 1204 (2d Cir. 1975); United States v. Burke, 517 F.2d 377, 380 (2d Cir. 1975); Cundiff v. United States, 501 F.2d 188, 189-90 (8th Cir. 1974); United States v. McCoy, 478 F.2d 176, 179 (10th Cir.), *cert. denied*, 414 U.S. 828 (1973); United States v. Unger, 469 F.2d 1283, 1287 n.4 (7th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973); United States v. Walker, 294 A.2d 376, 377-78 (D.C. 1972); United States v. Mahler, 442 F.2d 1172, 1174-75 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971); McCreary v. Sigler, 406 F.2d 1264, 1269 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969); Brown v. State, 534 S.W.2d 213, 216 (Ark. 1976); People v. Glaubman, 175 Colo. 41, 485 P.2d 711, 717 (1971); State v. Paszek, 50 Wis. 2d 619, 629-31, 184 N.W.2d 836, 842-43 (1971).

23. *See also* United States v. Kemp, 421 F. Supp. 563 (W.D. Pa. 1976); United States v. Swihart, 554 F.2d 264 (6th Cir. 1977).

Change of Venue Based on Prejudicial Pretrial Publicity[24]

Many trial lawyers believe pretrial publicity vitally affects the outcome of trials; there is, however, a minimum of empirical evidence to support their instinct. Nevertheless, the Pennsylvania Supreme and Superior Courts have recently ruled that venue should be changed where there has been pervasive pretrial publicity.[25]

When the court is faced with the question of whether or not to grant a change of venue in a criminal proceeding, it must consider, among other factors, the balance between the right to a fair trial and the freedom of the press. Freedom of thought and discussion and the public's right to know are essential rights in a democratic society. The news media, therefore, must be given wide latitude in reporting material about criminal proceedings. On the other hand, the judicial process cannot allow news accounts to interfere with the administration of justice. Each defendant in a criminal prosecution is entitled to a fair trial, conducted solely in the courtroom and free of outside influence. As noted in *Sheppard v. Maxwell,*[26] "legal trials are not elections to be won through the use of the meeting hall, the radio, and the newspapers." It is the court which controls the trial, and the court must insure the fairness of such proceedings. Possibly, this explains the newly-emerging appellate support for changes of venue.

Dispositions of motions for change of venue have been held to be within the sound discretion of the trial judge. Despite the presence of what might be termed inflammatory and pervasive publicity, the tendency was to uphold lower court decisions denying changes of venue.[27]

In *Commonwealth v. Kichline,*[28] for example, the trial court noted that newspapers were "restrained in their coverage" and their reports were "primarily factual." The defendant was arrested for the robbery, kidnapping, and murder of a gas station attendant. He subsequently confessed to police, giving details of the crime. The confession was supplied to the press by an "unidentified" official,

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24. Research assistance was provided by Lou Krzemien.

25. Commonwealth v. Frazier, 471 Pa. 121, 369 A.2d 1224 (1977); Commonwealth v. Casper, 249 Pa. Super. Ct. 21, 375 A.2d 737 (1977), *rev'd,* 392 A.2d 287 (Pa. 1978).

26. 384 U.S. 333 (1966).

27. Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973); Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58 (1971); Commonwealth v. Kichline, 468 Pa. 265, 361 A.2d 282 (1976).

28. 468 Pa. 265, 361 A.2d 282 (1976).

and at least three news articles used appellant's confession as a basis to describe his movements during and after the crime. Defendant's criminal record and his prison furlough program were also referred to in several newspaper articles. The Pennsylvania Supreme Court, in upholding the denial of venue change, ruled: "Although pre-trial publicity of an alleged confession and of prior criminal offenses is prejudicial to a defendant, we cannot conclude that, in the circumstances of this case, such publicity was so 'inherently prejudicial' as to deny [the defendant] a fair trial."[29] The court was persuaded by the fact that the articles were published six months before trial and that the publicity had ceased after the defendant's preliminary arraignment.

More recently, in *Commonwealth v. Frazier,*[30] in a factual situation similar to *Kichline,* the court reached a contrary result. Frazier was convicted of first degree murder in the stabbing death of a young girl. After appellant's arrest, he gave a partial confession to police. The confession, appellant's prior criminal record, and the circumstances surrounding the crime were the subject of repeated news articles which (in contrast to *Kichline*) were not confined to factual accounts but were highly emotional.

The Supreme Court of Pennsylvania, in a opinion by Justice Manderino, reversed and remanded for a new trial, finding that there had been references to the defendant's prior criminal record and quotations of admissions of guilt allegedly made by him to the police and that news stories of the above facts had reached the homes of practically every potential juror in the county. In the court's opinion, the record failed to demonstrate that the effect created by this publicity had faded from the minds of the prospective jurors in the four-month period between the time of trial and the homicide. The court therefore concluded that the potential for prejudice remained great at the time of the request for change of venue and that the trial court abused its discretion in refusing the request.

Similarly, the superior court, in *Commonwealth v. Casper,*[31] noted various factors to be considered by the trial court in consider-

29. *Id.* at 275, 361 A.2d at 288.

30. 471 Pa. 121, 369 A.2d 1224 (1977).

31. 249 Pa. Super Ct. 21, 375 A.2d 737 (1977), *rev'd,* 392 A.2d 287 (Pa. 1978). *Casper* involved a prominent local political official whose conviction was reversed by the superior court with directions that venue be changed. The Pennsylvania Supreme Court reversed the superior court.

ing applications for change of venue, any one of which could require a venue change: 1) the extent of the pretrial publicity; 2) the nature of the pretrial publicity; 3) the nature of the community which was subject to the pretrial publicity and where the trial was scheduled to take place; and 4) the source or sources of the pretrial publicity, including the possibility of prosecutorial misconduct, in creating an atmosphere of hostility toward the accused.

These more recent decisions reflect a concession to the practical difficulties of trying to regulate news coverage. In the past, the Pennsylvania decisions have reflected a tendency to make the defense run the risk of the prejudice. There now seems to be a more realistic trend: in cases that have been the subjects of sensational reporting, trial courts, under the directives from the Pennsylvania appellate courts, more readily permit removal to another trial location. Changes of venue are inconvenient for the prosecution and defense, but if news reporting is unrestrained and regulation is legally impermissible, the best remedy is to remove the case from the area that has been inundated by pretrial publicity. In this way the courts can insure fairness while respecting the public's right to know of public proceedings.

Use of Prior Convictions for Impeachment of Defendants and Witnesses[32]

Most trial lawyers believe that successful impeachment of the defendant or a key witness can often determine the outcome of the trial; the admission or exclusion of evidence of a prior conviction of a defendant or witness may be the critical element in the jury's verdict. Thus, it is appropriate to consider, at least briefly, the Pennsylvania law on impeachment through the use of a prior criminal record.

Any witness, including the defendant, may be impeached through the introduction of only certain types of convictions: crimes involving dishonesty or false statements.[33] Once the court decides the crime falls into one of these two categories, it must then weigh the

32. Research assistance was provided by Michael J. McCaney, Jr.

33. Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 255 (1973); Commonwealth v. Kahley, 467 Pa. 272, 356 A.2d 745 (1976). Not all crimes reflect dishonesty or an inclination towards false statements; for example, crimes of violence such as murder or assault do not include such mental elements and are excluded.

prosecution's interest in having the prior convictions presented to the jury against the possible prejudicial effect to the witness. Among the factors to be considered by the court are the remoteness of the prior crime; the length of the witness' criminal record; the age and circumstances of the witness at the time of his conviction; and, when it is the defendant that is to be impeached, th extent to which the defense depends on the defendant's testimony. This two-tiered approach, gleaned from *Commonwealth v. Bighum*[34] and *Commonwealth v. Kahley*,[35] is favorably viewed by defense counsel, since it limits impeachment of a defendant. When the witness to be impeached is the defendant, the most critical consideration is the importance of allowing the jury to hear the defendant's story rather than know of his prior convictions. The trial judge, aware that the defendant will not take the stand if his prior convictions are to be admitted, will often exclude the evidence so that the jury can hear the defendant's story.

It seems that evidence of certain prior convictions is certainly relevant and appropriate for the jury to consider in determining the credibility of the witness. A former conviction, being an indicator of trustworthiness, may be decisive of a witness' credibility. Focusing our discussion only on the issue of relevancy of prior convictions, we believe that *any* conviction of a reasonably serious nature has probative value to the jury and should be admitted. That value is diminished where the charges result from criminal conduct many years prior or where the effect of such impeachment may be to needlessly expose the witness' past, but such considerations arise at the balancing level of analysis. The object in the first stage is to determine that the convictions have value for the purpose for which they are admissible—to determine credibility.

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34. 452 Pa. 554, 307 A.2d 255 (1973).

35. 467 Pa. 272, 356 A.2d 745 (1976). *See also* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). The Federal Rules of Evidence have a significantly different approach to permissible grounds for impeachment through use of prior convictions. Rule 609(a) classifies crimes that are admissible for impeachment in two categories: felonies without regard to the nature of the crime and crimes involving dishonesty and false statement without regard to the grade of the offense. Within the first category, felonies are admissible if the party offering the convictions can convince the court that knowledge of the crime will aid the jury's evaluation of the witness more than it will prejudice the *defendant*. Thus, the rule balances the importance of a witness—prosecution or defense—against the possibility that the jury's knowledge of that witness' prior criminal record will prejudice the defendant. Crimes of the second category are not subject to a similar balancing test; they are automatically admissible regardless of the potential prejudice to the defendant.

Pennsylvania has drawn a distinction, difficult to understand, between crimes which involve dishonesty or false statements (which are admissible) and those which are serious but do not include mental elements (which are inadmissible), in effect, holding that the former are relevant to credibility while the latter are not.[36] Starting with the proposition that the credibility of one who has been convicted of a crime involving dishonesty should be questioned, can it truly be said that one convicted of murder, rape, or aggravated assault is more worthy of belief?

The value of the *Bighum/Kahley* rule, if any, is that impeachment of the defendant is limited; but other witnesses are given similar protection without necessarily having the same need or justification. Impeachment of a defendant offers unique problems, because where the defendant is impeached through the use of a prior conviction, there is a risk that the jury will give that prior conviction an impact which it does not deserve legally nor logically. The jury may conclude that the defendant is a bad person who is prone to commit crime and convict him on that basis. Another shortcoming of the *Bigham/Kahley* rule is that it is a balancing test which may lead to somewhat haphazard results from case to case and judge to judge.

There is a more rational and consistent approach to impeachment through evidence of prior convictions. Where the defendant does not interject his criminal history into a trial, and where a prior criminal conviction is not an element of the offense and is inadmissible to show pattern, motive, identity, etc., there would seem to be no loss of any legitimate prosecution interest if the prior criminal record is excluded, since the defendant-witness suffers from the general disability of an interested witness—his testimony is viewed with reasonable suspicion. The convictions of defendants should be excluded because introducing a defendant's prior conviction to impeach him is likely to have an inflammatory effect against him. However, as to those who are not defendants, but simply witnesses, whether prosecution or defense, there seems to be no good reason to bar impeachment except to protect against a "smearing" effect,[37] for example, when convictions are minor or they have little or no probative value. Excluding the prior record only in these cases would: 1)

36. *See* Commonwealth v. Bighum, 452 Pa. 554, 566, 307 A.2d 255, 262 (1973).
37. *See, e.g.*, McIntosh v. Pittsburgh Rys., 432 Pa. 123, 247 A.2d 467 (1968).

recognize the general probative value of former convictions; 2) protect defendants against the extra-legal effects of former convictions; 3) protect other witnesses, both prosecution and defense, from impeachment on the basis of minor incidents or ancient history which have little or no probative value. Perhaps it is unlikely that there will be another upheaval in Pennsylvania law in this area, since *Bighum* is of recent vintage. An alternative, however, may be to interpret and apply the balancing test established by *Bighum* in such a way as to achieve similar results.

Involuntary Manslaughter—Necessity of Charging in Homicide Cases[38]

For years, our courts have wavered on whether a jury may consider a verdict of manslaughter where the indictment only charges murder. Although previously an open issue, it has been substantially resolved by recent decisions. Questions, however, remain.

Two distinct situations must be considered in analyzing the judge's responsibility in instructing the jury when the defendant is charged with murder only. If the evidence warrants the return of a manslaughter verdict, must the trial judge charge the jury that they may return such a verdict? Secondly, the courts have grappled with the question: is such a charge required where no evidence existed at the trial to support a manslaughter verdict? A long line of cases, culminating in *Commonwealth v. Jones*,[39] answered both questions in the affirmative, as they apply to voluntary manslaughter; *Jones* in effect held that the trial judge must charge the jury on voluntary manslaughter regardless of what the evidence indicates.

The law is not as clear when the focus shifts to involuntary manslaughter. In a series of four cases decided on October 7, 1977,[40] the Pennsylvania Supreme Court held that, upon request, a jury instruction on involuntary manslaughter is required in a homicide trial where the evidence would support such a verdict, notwithstanding that involuntary manslaughter was not charged in the indictment. The justices, however, did not agree on whether an invol-

38. Research assistance was provided by Claudia Creo Sharon.

39. 457 Pa. 563, 319 A.2d 142, *cert. denied*, 419 U.S. 1000 (1974).

40. Commonwealth v. Polimeni, 474 Pa. 430, 378 A.2d 1189 (1977); Commonwealth v. Garcia, 474 Pa. 449, 378 A.2d 1199 (1977); Commonwealth v. Ford, 474 Pa. 480, 378 A.2d 1215 (1977); Commonwealth v. Smith, 474 Pa. 559, 379 A.2d 96 (1977).

untary manslaughter charge is required where the evidence does not support this verdict.

A brief analysis of the separate opinions in *Commonwealth v. Polimeni*[41] illustrates each justice's position, in all four cases, on the question. Justice Pomeroy, writing the opinion of the court, joined by Chief Justice Eagen, thought there was no need to decide the issue, and expressly declined to do so, since in all four cases, *Commonwealth v. Polimeni, Commonwealth v. Garcia*,[42] *Commonwealth v. Ford*,[43] and *Commonwealth v. Smith*,[44] there was sufficient evidence to support a verdict of involuntary manslaughter.

Justice Roberts, joined by Justice O'Brien, concurred in the decision, stating that a jury instruction on involunatry manslaughter should be given in *every* criminal homicide trial, since, in his view, there is always evidence of involuntary manslaughter if there is sufficient evidence to support a murder conviction. Justice Manderino also filed a concurring opinion, stating that a jury instruction on involuntary manslaughter should be given in every homicide trial "whether or not there is any 'rational basis' in the mind of the trial judge for such a verdict."[45] He reasoned that it is solely the jury's prerogative to decide whether the evidence supports a verdict of involuntary manslaughter. Justice Nix, believing that the jury should be permitted to return verdicts only on the charges brought in the indictment, dissented from the decision and never reached the open question.[46]

Thus, three justices, Roberts, O'Brien, and Manderino, believe that an instruction on involuntary manslaughter should be permitted in *every* criminal homicide prosecution, while two justices, Eagen and Pomeroy, believe that the instruction should be given *at least* where the evidence presented at trial provides a rational basis for such a verdict. Each justice's position is consistent in all four cases.

Further analysis of the four cases discloses that five justices,

41. 474 Pa. 430, 378 A.2d 1189 (1977).
42. 474 Pa. 449, 378 A.2d 1199 (1977).
43. 474 Pa. 480, 378 A.2d 1215 (1977).
44. 474 Pa. 559, 379 A.2d 96 (1977).
45. 474 Pa. at 448, 378 A.2d at 1198.
46. Justice Nix dissented in *Polimeni* for the reasons stated in his dissent in Commonwealth v. Garcia, 474 Pa. 449, 471, 378 A.2d 1199, 1210 (1977). He disagrees with the plurality's continued application of the lesser included offense concept.

Eagen, O'Brien, Pomeroy, Roberts, and Manderino, agreed that involuntary manslaughter is a lesser included offense of criminal homicide and that a verdict of involuntary manslaughter is permissible whether or not charged in the indictment. This determination was based on a first-impression interpretation of the Pennsylvania Crimes Code's new definition of criminal homicide.[47] Justice Roberts, in his concurring opinion in *Garcia,* examined section 302(e) of the Crimes Code, which states: "When the law provides that negligence suffices to establish an element of an offense, such element also is established if the person acts intentionally or knowingly." Justice Roberts reasoned that since "an intentional or knowing killing also establishes a negligent killing, all criminal homicides necessarily include involuntary manslaughter as a constitutent offense," adding "[n]either the prosecution's theory of the case, nor the court's evaluation of the weight or credibility of the evidence, should deprive the jury of the information necessary to consider whether involuntary manslaughter has been committed."[48]

Justice Roberts relied on a deeply-rooted concept in our common law legal system: the broad powers of the jury to believe or disbelieve what it chooses and to accept evidence and contentions in whole or in part. Given the conflicting theories and evidence normally submitted by the prosecution and defense, it seems difficult to envision a situation where the power of the jury to pick and choose from the evidence could not lead to a broad range of verdicts.

An analysis of the decisions that culminated in the Pennsylvania rule—a charge on *voluntary* manslaughter is required in every criminal homicide prosecution, whether or not the evidence would support the verdict—indicates that this same rule should be applied to involuntary manslaughter charges. Before *Jones,* the jury could return a verdict of manslaughter; but the trial judge could refuse to instruct on it if he felt that such a verdict would be irrational.[49]

Commonwealth v. Jones eliminated this anomaly in the law. Prior to *Jones,* only irrational juries or juries which in effect disregarded a judge's charge could render a manslaughter verdict. Now,

47. 18 PA. CONS. STAT. ANN. §§ 2501-2504 (Purdon Supp. 1977-1978).

48. 474 Pa. at 464, 469, 378 A.2d at 1207-08, 1210 (citing 18 PA. CONS. STAT. ANN. § 302(e) (Purdon Supp. 1977-1978)).

49. Commonwealth v. Cannon, 453 Pa. 389, 396-97, 309 A.2d 384, 389 (1973); Commonwealth v. Davis, 449 Pa. 468, 297 A.2d 817 (1972); Commonwealth v. Kenney, 449 Pa. 562, 586-87, 297 A.2d 794, 797 (1972).

however, all juries are to be appraised of the possibility of a manslaughter verdict. Furthermore, in 1974, the Court of Appeals for the Third Circuit held in *United States ex rel. Matthews v. Johnson*[50] that it was a violation of due process for a trial judge to refuse to charge the jury on voluntary manslaughter even though the defendant was only charged with murder and the evidence did not support a manslaughter verdict. Since the jury's opportunity to return a verdict of voluntary manslaughter was solely dependent on the judge's subjective reaction, the court reasoned that the Pennsylvania procedure was unfair and arbitrary. "To deny appellee the possibility of a lesser restraint of liberty because of a practice which permits arbitrary trial court activity is offensive to those settled concepts of due process."[51]

The constitutional argument could apply to involuntary manslaughter cases as well; however, this ultimate question may never be reached. Given the rationale of the various justices, it appears that few, if any, cases will provide a factual basis where there is *no* evidence of involuntary manslaughter.

Changes in Law—Retroactivity or Prospective Application[52]

It is clear under the Third Circuit decision in *United States ex rel. Matthews v. Johnson,*[53] that as a matter of federal constitutional law, a defendant indicted for murder is entitled, upon request, to have the jury advised of its power to return a verdict of voluntary manslaughter, even where the evidence does not provide a basis for finding passion or legal provocation. Twice, by equally divided courts, the Pennsylvania Supreme Court ruled that this change applies prospectively only, that is, to cases tried after the date of the *Matthews* decision.[54]

Notwithstanding the sharp divisions in the court, it is doubtful that the *Matthews* decision will be applied retroactively; the nature

50. 503 F.2d 339 (3d Cir. 1974), *cert. denied,* 420 U.S. 952 (1975).

51. *Id.* at 345.

52. Research assistance was provided by James Norris.

53. 503 F.2d 339 (3d Cir. 1974), *cert. denied,* 420 U.S. 952 (1975). Shortly before the Third Circuit held that the failure to give the instruction violated due process, the Pennsylvania Supreme Court required that the instruction be given under its supervisory powers in Commonwealth v. Jones, 457 Pa. 563, 319 A.2d 142, *cert. denied,* 419 U.S. 1000 (1974).

54. Commonwealth v. Jones, 457 Pa. 563, 319 A.2d 142, *cert. denied,* 419 U.S. 1000 (1974); Commonwealth v. Cain, 471 Pa. 140, 369 A.2d 1234 (1977).

of the decision and the composition of the voting blocs weigh against reversal. Furthermore, the decision to apply *Matthews* only prospectively appears to have the sanction of the faderal court which initiated the change. The purpose of this section is to explore whether these cases indicate a trend to generally restrict the application of changes in criminal procedural law.

In *Matthews,* the Third Circuit Court of Appeals indicated that its ruling applied to cases in which a jury instruction for voluntary manslaughter was properly and timely requested and which, if the trials had been completed, were on direct appeal in the Pennsylvania courts as of the date of decision—August 15, 1974.[55] Thereafter, the Third Circuit held that its decision in *Matthews* would not be applied retroactively and stated that *Matthews* is inapplicable to pending, and/or future appeals from pre-*Matthews* murder verdicts.[56] The obvious change in the Third Circuit stance was influenced by the intervening decision of the United States Supreme Court in *Daniel v. Louisiana,*[57] concerning Louisiana's method of petit jury selection. In *Daniel,* the state procedures were struck down, but the Supreme Court only applied its decision prospectively; whether *Daniel* was to be applied retroactively was held by the Supreme Court to be a state matter. Thus, as a matter of state law, the Pennsylvania courts were free to apply *Matthews* retroactively. As noted, however, the Pennsylvania Supreme Court divided equally, refusing to give *Matthews* retroactive effect.

Courts generally look to three factors in deciding whether a decision is to be given retroactive or prospective application: the purpose to be served by the new standards; the extent of reliance by law enforcement authorities on the old standards; and the effect on the administration of justice in the retroactive application of the new standards.[58] The critical factor is the purpose of the change, and therefore retroactivity is normally accorded where the constitutional change implicates the truth-finding process of a trial as compared with procedural aspects.

Supporting the decision not to give *Matthews* retroactive effect, Justice Eagen, in *Commonwealth v. Cain,*[59] stated:

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55. 503 F.2d at 348-49.

56. United States *ex rel.* Cannon v. Johnson, 536 F.2d 1013, 1015 (3d Cir.), *cert. denied,* 429 U.S. 928 (1976).

57. 420 U.S. 31 (1975).

58. Commonwealth v. Cain, 471 Pa. 140, 369 A.2d 1234 (1977). *See also* United States v. Zirpolo, 450 F.2d 424, 431-433 (3d Cir. 1971).

59. 471 Pa. 140, 369 A.2d 1234 (1977).

> since the purpose of *Matthews* is not to enhance the truth-finding process, since considerable reliance by the Commonwealth is present, since a horrendous burden would be placed on the administration of justice were we to apply *Matthews* to cases on direct review, and since the Third Circuit has ruled *Matthews* need not be applied to collateral attacks and no distinction as to cases on direct appeal is justified, it is clear that federal constitutional considerations do not mandate the application of *Matthews* to cases on direct review.[60]

A good argument can be made, however, that *Matthews* does involve the truth-finding process. *Matthews* appears to decide that the prior rule unduly restricted the mercy-dispensing functions of the jury because there were no standards for the exercise of the trial court's discretion to give or withhold a charge on manslaughter. The jury's mercy dispensing function is closely related to the fact-finding or truth-finding process. Also, it is questionable whether a "horrendous burden" would be placed on the administration of justice if the benefits of the new rule were extended to the defendants with pending cases who sought retroactive application.

In a more recent case, *Commonwealth v. Ernst,*[61] an equally-divided court denied retroactive enforcement of *Commonwealth v. Rose*[62] and *Commonwealth v. Demmitt*[63] which established that a defendant did not have the burden of proving an insanity defense by a fair preponderance of the evidence. In *Ernst,* the jury was erroneously charged that the murder defendant had the burden of proving his insanity. The defendant's trial, however, took place before the announcement of *Rose* or *Demmitt.* Perhaps the justices who refused to remand for a new trial[64] were primarily influenced by the defendant's failure to object to the court's charge or to raise the issue before appeal. Such a rationale would be in accord with recent decisions.[65] However, certain language of Justice Pomeroy's opinion reflects a broader doctrine. First, Justice Pomeroy noted

60. *Id.* at 164, 369 A.2d at 1246.

61. 476 Pa. 102, 381 A.2d 1245 (1977).

62. 457 Pa. 380, 321 A.2d 880 (1974).

63. 456 Pa. 475, 321 A.2d 627 (1974).

64. Justice Pomeroy filed the opinion in support of affirmance and was joined by Chief Justice Eagen. Justice Nix concurred in result. Justices Roberts, O'Brien, and Manderino filed an opinion in support of reversal.

65. *See, e.g.,* Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974).

that the *Demmitt/Rose* decisions were founded upon state evidentiary law and that later decisions applying *Demmitt/Rose* retroactively were probably based on a mistaken notion that federal constitutional requirements were involved. Since several defendants whose trials took place prior to the announcements of *Demmitt* and *Rose* had received the benefits of these decisions in direct appeals, and since it would be inequitable to deny retroactivity to other similarly-situated defendants whose cases were also on direct appeal, Justice Pomeroy concluded that the defendant would have been entitled to a new trial if the issue had been properly preserved for appeal. More significantly, Justice Pomeroy noted: "The almost uniform practice of this Court has been to apply nonconstitutionally premised criminal law decisions in a nonretroactive manner."[66]

Thus, the questions are apparent. Constitutional holdings will or will not be applied retroactively depending upon various factors but primarily upon the relationship to the fact-finding process. In nonconstitutional holdings, however, several justices may deny retroactive application in any instance.

If a rule is changed or modified because it is offensive or defective, it seems unreasonable that all who are similarly-situated should not receive the benefits of the change, particularly where the prior precedent has been challenged in the lower court in accordance with applicable procedures. It seems equally inappropriate that the outcome of an important case should depend on the ability or luck of a particular defendant to get his or her case heard first. This has the appearance of reducing justice to a foot race to the appellate courts or to a lottery as to which cases can be heard and decided earliest.

Of course, some might applaud the discouragement of appeals—but through the process of appeals to the higher courts, laws are made, changed, and, presumably, improved. Can it seriously be argued that discouraging appeals for the sake of expediency is beneficial? This is a particular risk where the benefits of retroactivity are denied even to those who go to the effort and often great expense of raising the issues and having the change of law determined in their cases.

Much may depend upon whether the courts characterize their opinions as a "change" in law which justifies retroactive application or as an application of existing law. Certainly, the distinctions are

66. Commonwealth v. Ernst, 476 Pa. 102, 107, 381 A.2d 1245, 1247 (1977).

not clear and the differences seem too minute to serve as the base for important decisions; but, if a trend emerges to restrict retroactivity, such considerations will become critical.

Pennsylvania criminal law is in a stage of dramatic movement. The state of flux, however, does not justify denying relief to aggrieved individuals who specifically challenge the law throughout all court proceedings, including appeal to the highest court in the commonwealth. As a general proposition, retroactive application of new law should not be denied to those on direct appeal.

SENTENCING[67]

Traditionally, Pennsylvania trial judges have had virtually unlimited discretion within the statutory maximum and minimum to sentence convicted offenders. Under prevailing practice, judges examine the defendant's actions and prior record, and then impose a sentence, with or without the aid of a presentence report. Until recently, judges were neither required to justify the sentences they imposed nor record the reasons for their decision. Sentences have seldom been subject to review if they were within the maximum limits provided by law.

Unfettered discretion in sentencing has been criticized by the legal profession. Given the safeguards surrounding the determination of guilt or innocence—rules of evidence, procedure, effective appellate review—it seems incongruous that the sentencing process should be so unstructrued.

There are indications from a recent Pennsylvania Supreme Court decision, however, that more objective standards are about to be imposed on the sentencing process. In *Commonwealth v. Riggins,*[68] the accused was arrested with 1.9 ounces of marijuana and found guilty of possession with intent to deliver. The trial judge sentenced Riggins for a term of two to five years in prison without stating or recording any reasons for the sentence. Riggins appealed to the superior court, contending that his sentence was severe when compared with two others convicted of similar drug offenses. He also asked that the case be remanded so that the trial judge could explain his reasoning for the sentence. The actions of the trial judge

67. Research assistance was provided by Thomas Santone.
68. 474 Pa. 115, 377 A.2d 140 (1977).

were affirmed by the superior court.[69] On appeal to the Pennsylvania Supreme Court, the case was remanded, and the trial judge was ordered to record the reasons for the sentence he imposed.[70]

Possible Benefits of Requiring Stated Reasons for Sentences

The *Riggins* requirement of stated reasons for sentencing should improve the sentencing process. When sentencing, a judge can easily be swayed by irrelevant considerations, such as personal prejudice, causing him to impose more severe sentences than are warranted by the facts of the case.[71] A reasoned opinion by the trial judge will promote more thoughtful consideration of factors relevant to sentencing, as set out in the Sentencing Code.[72] Recorded reasons may develop meaningful sentencing criteria, such as aggravating and mitigating circumstances, for future decisions, and sentencing may become more uniform.

The requirement of a reason and statement by the trial judge will also encourage him to verify the information he relies on in presentence reports. In Pennsylvania, the sentencing judge has discretion to order a presentence report in any case. If incarceration of one year or more is possible under the applicable sentencing statute, the judge must order the report or record his reasons for dispensing with it. The report includes information regarding circumstances of the offense and the defendant's character sufficient to aid the court in determining sentence.[73] A sentence based on an inaccurate report could send the offender to jail for an unduly long period. For example, in *State v. Pohlabel,*[74] the defendant was sentenced to twenty-one to thirty-five years on the basis of an inaccurate presentence report. Since the reasons for the sentence were not recorded, the

69. Commonwealth v. Riggins, 232 Pa. Super. Ct. 32, 332 A.2d 521 (1974), *rev'd and remanded,* 474 Pa. 115, 377 A.2d 140 (1977).

70. In a separate opinion, Justice Manderino expressed his opinion that the defendant should be discharged because the sentence was already unduly severe. 474 Pa. at 139, 377 A.2d at 152.

71. *See, e.g.,* Commonwealth v. Kosta, 475 Pa. 85, 379 A.2d 884 (1977).

72. Commonwealth v. Riggins, 474 Pa. 115, 129, 377 A.2d 140, 147 (1977). *See also* Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 HARV. L. REV. 1281, 1292 (1952).

73. PA. R. CRIM. P. 1403. *See* Commonwealth v. Riggins, 474 Pa. 115, 129, 377 A.2d 140, 147 (1977). *See also* Berkowitz, *The Consititutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal,* 60 IOWA L. REV. 205 (1974) [hereinafter cited as *Constitutional Requirement*].

74. 61 N.J. Super Ct. 242, 160 A.2d 647 (1960).

defendant remained in jail for ten years before the parole board discovered that the sentence was unjust. If the judge verifies the information on which he bases the sentence he can insure that the sentence he imposes is just.

Commentators, as well as judges, believe that the criminal justice system is more successful at rehabilitating offenders when criminals understand the reasons for their confinement.[75] If a sentenced offender does not resent the system, but understands that his trial was fair and that his sentence is intended to rehabilitate him, there is a better chance for success.

It seems apparent, however, that *Riggins* signals something more; stated reasons would not be required if the supreme court did not intend to examine those reasons. It thus appears that more extensive review of the *reasonableness* of sentences is close at hand.

The Pennsylvania Crimes Code established sentencing alternatives and a priority system: 1) probation, 2) determination of guilt without penalties, 3) partial confinement, 4) total confinement, or 5) fine. The sentence chosen should call for a minimum amount of confinement consistent with the protection of public, the gravity of offense, and rehabilitative needs of the defendant.[76] As a minimum, sentencing judges should be required to specify why a particular sentencing alternative was selected and why the court concluded that the chosen alternative was the minimum required for the statute's purposes. In other words, through the process of appellate review, added meaning will be given to the statutory priorities.

Application of the Exclusionary Rules in Probation and Parole Revocation Proceedings[77]

Since the Pennsylvania Supreme Court held in *Commonwealth v. Kates*[78] that the *Miranda* exclusionary rule does not apply to a probation revocation hearing, this does not appear to be an open question. The court in *Kates* reasoned that the deterrent purpose of the *Miranda* exclusionary rule is adequately served by exclusion of the unlawfully seized evidence at the time of trial and no further beneficial effect would be achieved by exclusion at revocation proceedings.

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75. *See Constitutional Requirement, supra* note 73, at 208.
76. 18 Pa. Cons. Stat. Ann. § 1321 (Purdon Supp. 1977-1978).
77. Research assistance provided by Jeffrey Sagotsky.
78. 452 Pa. 102, 305 A.2d 701 (1973).

Federal courts have thus far agreed that the Constitution does not require *Miranda* to be extended to probation revocation hearings.[79]

In *Kates,* however, there were two vigorous dissents. Justice Roberts, in dissent, reasoned that the exclusionary rule should apply to probation revocation hearings, since, in practice, the revocation proceeding is used frequently as an alternative to prosecution for the underlying offense: " '[T]he fact that an independent prosecution and revocation under an old conviction are often interchangeable for a probationer suggests that abrogation of the exclusionary rule for probation revocation proceedings would seriously undermine the rule's effect as a deterrent.' "[80] This potential use of probation revocation is exemplified by two recent federal decisions: *United States v. Winsett*[81] and *United States v. Vandemark.*[82] In *Vandemark,* the defendant moved to suppress unlawfully seized evidence prior to trial, but before the motion could be heard, the government voluntarily dismissed the case. Soon thereafter, the defendant's probation officer moved to revoke probation. In *Winsett,* the situation was much the same. The information against the defendant was dismissed and the revocation proceedings initiated when the trial judge ruled that the evidence against the defendant was unlawfully seized and thus inadmissable.

In *Winsett,* the court, in permitting the illegally seized evidence to be used at the revocation proceeding, placed great reliance on the

79. United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975).

80. 452 Pa. at 123, 305 A.2d at 712 (citing United States v. Hill, 447 F.2d 817, 820 (7th Cir. 1971) (Fairchild, J., dissenting)). In Michaud v. State, 505 P.2d 1399 (Okla. 1973), the court held that evidence obtained in an unconstitutional search could not be used in the revocation of the defendant's suspended sentence. The holding was based on a state statute which provided that the suspended sentence of the defendant may not be revoked for any cause unless competent evidence is presented to the court. *See* OKLA. STAT. ANN. tit. 22, § 991b (West Supp. 1978-1979). Since the court had previously ruled that unconstitutionally obtained evidence was not competent, the *Michaud* court excluded the evidence. The court concluded that the exclusionary rule was a constitutional right rather than a mere rule of procedure. Furthermore, the court held that the purpose of the exclusionary rule is to deter unlawful police conduct; if the evidence from unlawful conduct was admissible at revocation proceedings, it would provide an incentive to disregard the constitutional rule.

Most federal and state courts have refused to follow the example of the Oklahoma court. *See* Bernhardt v. State, 288 So. 2d 490 (Fla. 1974); *In re* Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970); People v. Calais, 37 Cal. App. 3d 898, 112 Cal. Rptr. 685 (1974). In the many revocation cases denying the application of the exclusionary rule, no clear-cut rule has been voiced.

81. 518 F.2d 51 (9th Cir. 1975).

82. 522 F.2d 1019 (9th Cir. 1975).

fact that the arresting officers, border patrol agents, were unaware at the time of the search that the defendant was a probationer. In a footnote to the case, the court commented:

> [W]hen the police at the moment of search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissible in any criminal proceeding. The police have nothing to risk: If the motion to suppress in the criminal proceedings were denied, defendant would stand convicted of a new crime; and if the motion were granted, the defendant would still find himself behind bars due to revocation of probation. Thus, in such circumstances, extension of the exclusionary rule to the probation revocation proceeding may be necessary to effectuate Fourth Amendment safeguards.[83]

Similarly, other states have indicated that the exclusionary role might have at least limited application in revocation proceedings. In *People v. Atencio,*[84] while the Supreme Court of Colorado refused to exclude evidence in a revocation proceeding, the court stated that where the unlawful search and seizure is "such as to shock the conscience of the court, the court will not permit such conduct to be the basis of a state-imposed sanction."[85]

In *State v. Sears,*[86] the Supreme Court of Alaska reversed a decision to exclude illegally seized evidence from a revocation proceeding on the grounds that probation or parole revocation hearings are not part of the normal criminal process and, thus, did not have to conform to the rules of criminal procedure. The court balanced the needs of the probation system against the possible deterrence resulting from suppression in revocation proceedings, and concluded that any benefits which would flow from the application of the exclusionary rule would be outweighed by the needs of Alaska's probation system. However, the court held that the exclusionary rule would

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83. 518 F.2d 51, 54 n.5 (9th Cir. 1975).

84. 186 Colo. 76, 525 P.2d 461 (1974).

85. *Id.* at 79, 525 P.2d at 463.

86. 553 P.2d 907 (Alaska 1976). In *Sears,* the respondent was placed on probation after pleading guilty to a charge of accessory after the fact to burglary. While still on probation, respondent was indicted for possession of marijuana with the intent to distribute. During the trial for the narcotics violation, the court suppressed the evidence as being the product of an illegal search. At the subsequent probation revocation hearing, the court stated that the decision of the trial court was binding in the revocation proceeding.

be applied in two circumstances: first, if the police misconduct shocked the conscience of the court,[87] and second, if the lawless search and seizure was carried out with knowledge or reason to believe that the suspect was a probationer.

It is clear that as a matter of federal constitutional law, revocation proceedings do not require the full scope of rights due a defendant in a criminal proceeding.[88] Furthermore, the present United States Supreme Court seems bent on limiting *Miranda* specifically and the exclusionary rule generally.[89] Some legal scholars believe that the rule may be on its way to oblivion. In the light of this unmistakable trend, it seems foolhardy to envision any contrary movement.

However, the state courts are free to go and often do go beyond the minimum limits of federal constitutional protections.[90] Since Pennsylvania has increasingly demonstrated an inclination to grant protections beyond those required by the Federal Constitution, the Pennsylvania Supreme Court may abandon its *Kates* holding. Given the potential for abuse that exists where the prosecutor can elect to proceed in criminal court, where the constitutional protections apply, or in the probation/parole revocation proceedings, where they do not apply, some protections seem mandated. Even if the Pennsylvania Supreme Court is unwilling to turn away from the *Kates* holding, there is room for modification, as for example, where the arresting officers knew or should have known of the defendant's status as a parolee or probationer, or where the tactics of the officers are particularly offensive.

The Scope of the Brady Rule[91]

Introduction

In *Brady v. Maryland*,[92] the United States Supreme Court announced what has become known as the *Brady* rule: suppression by the prosecution of evidence favorable to the accused and requested

87. *See generally* Rochin v. California, 342 U.S. 165 (1952) (police conduct shocked conscience of court).

88. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

89. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974); Harris v. New York, 401 U.S. 222 (1971).

90. *See* Cooper v. California, 386 U.S. 58 (1967). *See, e.g.*, Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973).

91. Research assistance provided by Henry C. Berns.

92. 373 U.S. 83 (1963).

by the accused violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland* was a pronouncement of the minimum due process requirements under the United States Constitution. The Pennsylvania courts, however, are free to adopt broader rules as a matter of Pennsylvania constitutional or evidentiary law. Thus far the scope of the *Brady* rule in Pennsylvania has remained an open question, with *Commonwealth v. Royster*[93] being the most recent definitive case on the issue. In *Royster,* defense counsel subpoenaed a police investigation file at the conclusion of the prosecution's case. The prosecuting attorney represented to the trial court that he had disclosed all *Brady* exculpatory material to the defense. Over two dissents, the Pennsylvania Supreme Court held that there was no error in the trial court's failure to order production of the file or to make an *in camera* inspection.

This section will first track the development of the *Brady* rule in the federal courts and then follow the rule in progress in Pennsylvania courts.

The Development of the Brady Rule in Federal Courts

Justice Douglas, writing for the majority in *Brady,* built upon earlier decisions dealing with the use of false evidence by the prosecution. For example, *Mooney v. Holohan*[94] held that due process is offended when the prosecution knowingly uses false evidence to obtain a conviction. In *Napue v. Illinois,*[95] this view was extended to cover the situation where the false evidence was unsolicited by the prosecution, but not contradicted by the prosecution when entered. Both cases addressed situations where the prosecution manifested bad faith.

Brady, however, did not involve bad faith on the part of the prosecution; the prosecution simply withheld an extrajudicial exculpatory statement made by a co-defendant. The statement confirmed the defendant's contention that he had not personally committed the murder and, arguably, had significant bearing on the penalty. In eliminating the good faith/bad faith dichotomy, the Supreme Court focused on materiality of the undisclosed evidence

93. 472 Pa. 581, 372 A.2d 1194 (1977).
94. 294 U.S. 103 (1935).
95. 360 U.S. 264 (1959).

and whether any requests had been made by the defense. Because in *Brady* the suppressed evidence related only to the question of sentence as opposed to guilt, the case was remanded for a new trial only on the issue of sentence.[96]

Giles v. Maryland,[97] the first test of the *Brady* rule, proved to be inconclusive. The Maryland Court of Appeals refused to grant the defendants a new trial where the prosecution had suppressed favorable evidence. Notwithstanding their sharply differing views on the scope of the *Brady* rule, five Justices of the United States Supreme Court combined to remand the case to the Maryland Court of Appeals. There was, however, no majority for the pro-*Brady* rule. Four Justices remanded on the basis of the alleged bad faith of the prosecution, while Justice Fortas, in a concurring opinion, took the position that the prosecution must disclose all information known to it which may have an important effect on the outcome of the proceedings. Justice Harlan, joined in dissent by three other Justices, suggested that *Brady* extended *Mooney* and *Napue* only to the extent that the evidence may have had an effect on the outcome of the trial.

Moore v. Illinois[98] was another 5-4 decision in which the United States Supreme Court ruled that the withheld evidence was not material to guilt.[94] Writing for the majority, Justice Blackmun noted that the elements requiring application of the *Brady* rule are: 1) suppression by the prosecution after a request by the defense, 2) the evidence's favorable character for the defense, and 3) the materiality of the evidence. Justice Blackmun noted that the prosecution is not required to account to the defense for all police investigatory work on a case after a general request for all written statements.[99]

United States v. Agurs[100] is the most instructive of the post-*Brady* cases. Justice Stevens, writing for the majority, delineated three different situations where the *Brady* rule was applicable. First is the

96. In his dissenting opinion, Justice Harlan argued that if a statement was not admissible under state law on the issue of guilt, it was immaterial as to sentencing. 373 U.S. at 92-95.

97. 386 U.S. 66 (1967).

98. 408 U.S. 786 (1972).

99. The precendential value of this holding is diminished, since the Justices interpreted the facts of the case so differently. In his dissent, Justice Marshall argued that the state must disclose evidence which is clearly relevant and helpful to the defense. This would include evidence in the police file because the police are part of the prosecutorial team.

100. 427 U.S. 97 (1976).

Mooney situation, where the prosecution knows or should have known about the use of perjured testimony. In these situations, materiality is only a minimal consideration, not only because of the prosecutorial misconduct but because of the corruption of the truth-seeking function. The test of materiality is whether there is any "reasonable likelihood that the false testimony could have affected the judgment of the jury." Thus, in this situation, materiality can almost be presumed.

The second situation occurs where defense counsel asks for specific evidence prior to trial. Where such request is "specific and relevant," according to Justice Stevens, the failure by the prosecutor to make any response is seldom if ever excusable.

> Although there is, of course, no duty to provide defense counsel with unlimited disclosure of every thing known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.[101]

The third situation exists most commonly where defense counsel is unaware of the existence of exculpatory evidence in the possession of the prosecution, and a request is made for all *Brady* or exculpatory material, or no request is made at all. The *Agurs* Court suggested that there is no valid basis upon which to distinguish the "no request" from the "general request" situation, in that the same standards should be applied in either case. In this situation the materiality test demands that the undisclosed evidence be sufficient to create a reasonable doubt of guilt that did not otherwise exist.[102]

In his dissent in *Agurs*, Justice Marshall argued for a less burdensome definition of materiality in a category three situation. For Justice Marshall, it would be sufficient if the defendant demonstrated a significant chance that the withheld evidence, developed by skilled counsel, would have induced reasonable doubt in the minds of enough jurors to avoid conviction.[103]

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101. *Id.* at 104.
102. *Id.* at 112.
103. *Id.* at 119.

The Pennsylvania Cases

A review of the Pennsylvania cases indicates that while the *Brady* rule has been implemented, the Pennsylvania appellate courts have not been quick to reverse convictions for violations of *Brady,* nor have the factual issues provided much opportunity for elaborating upon the *Brady* rule. In *Lewis v. Lebanon Court of Common Pleas,*[104] one of the first cases presenting a *Brady* problem in Pennsylvania, an FBI agent had been listed as a prosecution witness. The efforts of the defense to interview the witness had been thwarted by an FBI policy prohibiting such interviews without the consent of the local district attorney, and consent was withheld. The Pennsylvania Supreme Court held that the prosecutor must not interfere in the pretrial interrogation. *Brady* and *Giles* were cited in support.

In *Commonwealth v. Powell*[105] and in *Commonwealth v. O'Searo,*[106] the Pennsylvania Supreme Court discussed and applied the guidelines for a meritorious *Brady* contention, as established by the United States Supreme Court in *Moore.*[107] In *O'Searo,* for example, the court refused to grant a new trial finding that the withheld evidence was not material.

In *Commonwealth v. Gee,*[103] the court held that truly "exculpatory evidence" as contrasted with merely "favorable evidence" must be turned over to the defense even absent specific request.[109] The court then differentiated between evidence which tends to establish innocence from that which is collateral or impeaching.

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104. 436 Pa. 296, 260 A.2d 184 (1969).

105. 449 Pa. 126, 295 A.2d 295 (1972).

106. 466 Pa. 224, 352 A.2d 30 (1976).

107. In *Powell,* the defendant contended that an eyewitness had been instructed to "forget" that she told the district attorney the defendant was not the person she observed fleeing the scene of the crime. After an evidentiary hearing it was determined that the defendant's contention was false. The court adopted the guidelines established by the United States Supreme Court in *Moore.* 449 Pa. at 129, 295 A.2d at 297. Also of interest is the court's cognizance of a recently released draft of ABA standards relative to the prosecutorial function. It specifically quotes § 311(a): "It is *unprofessional* conduct for a prosecutor to fail to disclose to the defense at the earliest opportunity evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment." *Id.* at 129, 295 A.2d at 297 (citing ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *The Prosecutorial Function,* §§ 3.11, 5.6(a) (Approved Draft 1971)).

108. 467 Pa. 123, 354 A.2d 875 (1976).

109. *Gee* also appears to recognize that *Brady* is applicable whether the request for evidence is made during or before trial.

Two aspects of the *Gee* decision deserve special mention. First, the standard—the evidence must have a "tendency" to establish innocence—is broader and more favorable to the defendant than the *Agurs* test. Second, the distinction between substantive evidence establishing innocence and collateral or impeaching evidence does not appear to be well-founded. Often, cases may hinge upon issues of credibility. *Giles* and *Moore* involved various items of evidence, including credibility items; there does not appear to be any distinction drawn. Moreover, category one cases—dealing with intentional or negligent use of perjured testimony—often deal with credibility items.[110]

In *Commonwealth v. Topa,*[111] only Justice Roberts, dissenting, dealt with the *Brady* issues. The majority reversed the conviction on the ground that voiceprint evidencce was inadmissible. Justice Roberts would have disposed of the case on the ground that the prosecution deliberately suppressed evidence. He suggested that even if suppressed evidence did not meet the test of materiality under *Agurs,* the state courts were free to accord broader rights than those mandated by the Federal Constitution.

Another line of cases has established the defendant's right, upon request, to pretrial statements of prosecution witnesses *after* the witnesses have testified for the prosecution. *Commonwealth v. Grayson*[112] is one of the more recent and significant cases dealing with this issue. In *Grayson,* the court stated: "Matters contained in a witness's statement may appear innocuous to some, but have great significance to counsel viewing the statements from the perspective of an advocate for the accused about to cross-examine a witness." In *Commonwealth v. Grimm,*[113] it was determined that a request for all pretrial statements extends to reports made by police officers who testify. In *Commonwealth v. Hamm,*[114] the court held that upon request at trial, the defense is entitled to examine prior statements by prosecution witnesses in their entirety, even though such statements may not relate to matters raised on direct examination. The court specifically stated that *in camera* review would not adequately insure the ability of the defense to cross-examine.

110. *See, e.g.,* Giglio v. United States, 405 U.S. 150 (1972).
111. 471 Pa. 223, 369 A.2d 1277 (1977).
112. 446 Pa. 427, 353 A.2d 428 (1976).
113. 249 Pa. Super. Ct. 441, 378 A.2d 377 (1977).
114. 474 Pa. 487, 378 A.2d 1219 (1977).

It should be noted that the cases dealing with prior statements of prosecution witnesses have several characteristics relevant to the *Brady* discussion: 1) the right to access is triggered by a defense request; 2) a request for the pretrial statements of a witness is a specific, narrow request which the prosecution should have little or no difficulty recognizing; 3) although such requests can deal with substantive grounds, the courts recognize that the primary utility of former statements is in connection with credibility; 4) the courts recognize that the defense attorney understands the defense best and *in camera* inspection by the court is a poor substitute for inspection by defense counsel.[115]

Guidelines for Future Development

A discussion of future developments of the *Brady* rule in Pennsylvania returns us to *Royster*. Justice O'Brien, writing for the majority, relied on *Agurs* and rule 310 of the Pennsylvania Rules of Criminal Procedure to determine that defense counsel did not have the right to examine the police investigation file. Justice Nix concurred because there was no showing of exculpatory evidence. Justice Roberts, dissenting, argued that, at the very least, the trial court should have made an *in camera* inspection. Also dissenting, Justice Manderino noted that under the *Grayson* and *Hamm* rulings, the defense was entitled to receive all statements of prosecution witnesses.[116]

The three category analysis of *Agurs* provides a suitable framework for analyzing *Royster*. It was not a category one case in that the prosecution did not capitalize on perjured testimony. Moreover, it is unlikely that the Pennsylvania courts will have significant difficulty in recognizing and dealing with such cases. Distinguishing category two cases from category three cases, however, is more difficult. One problem in *Royster* was determining whether the case fell into category two—specific request—or category three—no request or only a general request. It appears that a request for the police investigation file, without any additional showing of relevance or

115. *See* Commonwealth v. Hamm, 474 Pa. 487, 378 A.2d 1219 (1977). *See also* Alderman v. United States, 394 U.S. 165, 182 (1969).

116. Of course, if statements were demanded and not produced at the time of testimony, this was error. Commonwealth v. Grayson, 466 Pa. 427, 353 A.2d 428 (1976); Commonwealth v. Hamm, 474 Pa. 487, 378 A.2d 1219 (1977).

materiality, was correctly identified by the court as a general request falling under category three. The more critical issue facing the Pennsylvania courts is establishing the materiality requirements for category three cases as contrasted with category two cases. Under *Agurs,* in category three cases, after trial, the defense has a difficult burden of proving materiality; the burden is perhaps not as high under state law as the *Agurs* majority imposed as a matter of federal law, but even under Justice Marshall's dissenting view, a substantial obstacle would have to be hurdled.

There does not appear to be judicial support for unfettered access to prosecution files by the defense; unbounded access places people who have provided information to the authorities in danger of undue embarrassment or harm. On the other hand, information which is important to the defense should not be suppressed or withheld. When a public agency such as the police has developed witnesses or evidence critical to the defense, it is difficult to understand any rationale which would regard such witnesses or evidence as the property of the prosecution. Once evidence is developed and the defense has made a focused request for such evidence, only tradition dictates that the evidence not be shared.

Another consideration is the hampering effect on the administration of justice, the loss of finality of judicial proceedings, if convictions could be easily overturned on the basis of hindsight and post-trial ingenutiy. After a trial, it may be all too easy to speculate on what was or might have been important. It is expecting a great deal of prosecutors and even judges to anticipate and respond to defense needs, particularly where their attention has not been focused on such needs either with the assistance of a specific defense request or the obvious exculpatory nature of the evidence.

A serious obstacle to finality in judicial proceedings would indeed be created if unrealistic burdens are established. Part of the burden should fall on defense counsel who, after all, is most aware of the nature of defense. Also, the absence of a specific defense request before or during trial may indicate that the evidence lacked substantial value and its apparent value has been increased through post-trial ingenuity.

Of course, these burdens must be construed in their proper contexts. Just as the law should not place unrealistic demands on prosecutors, unrealistic demands should not be placed on defense counsel. Defense counsel is in a poor position to ask for the unknown. Thus, in all instances, it seems fair to inquire whether the prosecu-

tor realized or should have realized the importance of the evidence and made disclosures, and it also seems fair to inquire whether the defense did or should have made a specific request for disclosure.

Analysis of Category Two Cases

Through this analysis, category two cases are not difficult to resolve. Where the attention of a prosecuting attorney and/or the court have been focused on specific evidence by a defense request, placing the burden on the prosecution is entirely realistic. Either the prosecution has the evidence or it does not. If it does, the evidence should be produced, preferably to the defense, and at least to the court for examination.[117]

By way of analogy, the cases dealing with the statements of prosecution witnesses provide some guidance. Where there has been a focused request for *Brady* material before or during trial, doubts should be resolved in favor of production. Failure to produce in response to a focused request should be judged by the same standards used to determine whether there has been error in failing to provide the statements of prosecution witnesses; error should be reversible unless harmless.

Analysis of Category Three Cases

In *Agurs*, the majority noted that the constitutional obligation to produce evidence in category three cases is not measured by the moral culpability or the willfulness of the prosecutor. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[118] While this analysis may be appropriate for federal constitutional purposes, it seems incomplete for purposes of state evidentiary law.

There is agreement that the defendant's burden of proof of materiality should be higher where there has been no request or simply a general request. The interests in finality require as much. However, a test which requires the defense to demonstrate reasonable

117. It should be noted that court inspections have some value; certainly, they are better than nothing. But court inspections are not a satisfactory substitute for disclosure to the defense attorney who is better attuned to what is important to his case than is the court. *See* Commonwealth v. Hamm, 474 Pa. 487, 378 A.2d 1219 (1977); Alderman v. United States, 394 U.S. 165 (1969).

118. 427 U.S. at 110.

doubt before the prosecutor has a duty of voluntary disclosure permits suppression of a substantial range of important evidence. Earlier, we discussed the risk that, after trial, evidence could be upgraded in terms of materiality through hindsight and speculation. There is also the risk that crucial evidence, through hindsight and speculation, can be rationalized from "exculpatory evidence" to "merely favorable." The margins can be very then, and it is submitted that the conduct of the prosecutor is a proper, helpful, and even essential point of analysis.

In categories one and two, there is some focus on the conduct of the prosecutor. In category one, materiality is strictly defined to require reversal in most instances because the prosecutor has knowingly used perjured testimony. In category two, it was suggested that only a minimal showing of materiality is important because the prosecutor unreasonably failed to respond to a specific request. In both categories, there is inquiry as to the prosecutor's conduct. It is only in category three that no form of inquiry has yet been deemed appropriate.

Should the law permit the prosecution to affirmatively and intentionally conceal or suppress evidence which is important to the defense but which does not in itself establish reasonable doubt? Should the law permit the prosecution to ignore evidence of obvious importance to the defense? A line of similar questions can be developed. It seems clear that at some point the conduct of the prosecutor is an issue in category three cases just as it is in categories one and two.

Thus, category three cases should fall into two sub-classes: 1) those in which the prosecutor has acted in bad faith or negligently in failing to disclose important evidence; and 2) those in which there is no showing of bad faith or negligence. In the former, the harmless error test should control just as it should control in category two. In the latter, the "significant chance" test of Justice Marshall's dissent in *Agurs*, strikes the best balance.

There is merit in distinguishing category three cases where there has been a general request for disclosure. Depending on the circumstances, perhaps the trial court should be expected to do more than was done in *Royster*. It may be too broad to ask the court to look through the file for material favorable to the defense; however, a narrow, somewhat more specific request should have required the court to make such an examination.