PENNSYLVANIA BAR ASSOCIATION
JUDICIAL EVALUATION COMMISSION
PERSONAL DATA QUESTIONNAIRE FOR
RETENTION CANDIDATES

ACKNOWLEDGMENT AND AUTHORIZATION

As a candidate for the Pennsylvania Appellate Courts, I hereby acknowledge and authorize the procedures of the Pennsylvania Bar Association Judicial Evaluation Commission, including the following:

1. The Pennsylvania Bar Association Judicial Evaluation Commission will make this Questionnaire and my responses to it, available to the public.

2. The rating assigned to me by the Commission will be publicly announced and will be accompanied by an explanation of reasons for the rating.

3. Should I receive a Not Recommended rating, the Commission will endeavor to notify me prior to a public announcement. If I withdraw from the race, the unfavorable recommendation will not be announced.

4. The Pennsylvania Bar Association Judicial Evaluation Commission may change, during the course of my campaign for office, the original rating assigned to me for cause. Cause shall include a violation of the Judicial Campaign Advertising Guidelines. I acknowledge receipt of a copy of the Guidelines.

Ronald D. Castille
Type or print name

July 11, 2013
Date

Signature
PERSONAL DATA QUESTIONNAIRE

1. Write your full name.
   Ronald D. Castille

2. Date and place of birth:
   March 16, 1944
   Miami, Florida

3. Family status:
   a) Are you married? If so, state the date of marriage and your spouse's full name, including maiden name, if applicable:
      Married. Susan Kiefer Castille
   b) Since assuming your current judicial position, have you been divorced? If so, state the date, the number of the case and the court:
      Divorced.

4. Have you had any military service? If so,
   a) Provide dates, branch of service, rank of rate, serial number and present status:
      1st Lt. US Marine Corps (Retired). Disability Pension.
   b) Have you ever been rejected or released from any of the armed services for reasons other than honorable? If so, please provide details:
      Disability pension from combat wounds.

5. List each college and law school you attended, including dates of attendance, and the degrees awarded.
   Auburn University, Auburn, Alabama; B.Sci., 1966 grad.
   University of Virginia Law School; J.D.; 1971 grad.
   (U.S. Marine Corps 1966-68)

6. For the last five years or portion thereof during which you have held judicial office, please indicate:
   a) The percentage of your time devoted to:
      1. Civil: 100 %
      2. Criminal: 100 %
3. Other: 100%

4. Administrative responsibilities: 100%

b) Please identify ten (10) of the more significant opinions you have rendered and citations thereto if the cases were reported:

As a court of last resort, all opinions issued by the court are especially significant because they become the law. Therefore, I am enclosing the over 400 majority opinions published during my 19 1/2 years on the bench. Certain opinions of note are flagged.

7. Are you now an officer or director or otherwise actively engaged in the management of any business enterprise? If so, please provide details, including the name of the business enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service:

None

8. Since assuming your current judicial position, have you been arrested, charged with or convicted of violating any federal law or regulation, state law or regulation, or county or municipal law, regulation or ordinance? If so, please provide details. Do not include summary traffic offenses:

None

9. Are you under any ongoing federal, state or local investigation for possible violation of a criminal statute? If so, please provide particulars:

None

10. Since assuming your current judicial position, has a tax lien or other collection procedure been instituted against you by federal, state or local authorities? If so, please provide particulars:

None
11. Since assuming your current judicial position, have you been a party to or otherwise been involved in any other legal proceedings? If so, please provide particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Do include all legal proceedings in which you were a party in interest, a material witness, were named as co-conspirator or a co-respondent and any grand jury investigation in which you figured as a subject or in which you appeared as a witness:

None that I am aware of; although I am sure there have been many complaints before the Judicial Conduct Board, mostly by prisoners, disgruntled litigants, etc.

No charges/ethical violations ever lodged to my knowledge.

12. Since assuming your current judicial position, have you been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, please provide particulars:

See No. 11 above.

13. If you so desire, please list any honors, prizes, awards or other forms of recognition, which you have received (including any indication of academic distinction in college or law school).

See enclosed resume. Officer US Marine Corps;
Bronze Star w/ Combat "V"; Purple Heart Medal (2); Combat Infantry Badge; Vietnamese Cross of Gallantry.

14. In the space provided below, if desired, please provide any additional comments concerning your retention candidacy.

20 yrs. experience on Supreme Court; 5½ yrs as Chief Justice during the most difficult time economically and administratively.

15. Did you sign the PBA Judicial Campaign Advertising Guidelines? (Please return signed pledge with completed questionnaire.)

Yes
CERTIFICATION STATEMENT

The undersigned certifies that all of the statements made in this questionnaire are true, complete and correct to the best of his/her knowledge and belief and are made in good faith.

[Signature]

Type or print name

July 15, 2013

Date
<table>
<thead>
<tr>
<th>Date</th>
<th>Position and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>JAN 2008</td>
<td>Chief Justice of Pennsylvania</td>
</tr>
<tr>
<td></td>
<td>Assumed Office January 7, 2008</td>
</tr>
<tr>
<td>JAN 2004</td>
<td>Justice of the Supreme Court of Pennsylvania (2\textsuperscript{nd} Term)</td>
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<tr>
<td></td>
<td>Sworn in January 1, 2004</td>
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<tr>
<td>NOV 2003</td>
<td>Retention Election for a 2\textsuperscript{nd} 10-year Term on the Supreme Court of</td>
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<td>Pennsylvania</td>
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<td>JAN 1994</td>
<td>Justice of the Supreme Court of Pennsylvania</td>
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<td></td>
<td>Sworn in January 3, 1994</td>
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<tr>
<td>NOV 1993</td>
<td>Elected to a 10-Year Term on the Supreme Court of Pennsylvania</td>
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<tr>
<td>MAR 1993</td>
<td>Republican Candidate for Pennsylvania Supreme Court</td>
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<td>MAR 1991-MAR 1993</td>
<td>Reed Smith Shaw &amp; McClay, Litigation Department, Philadelphia, PA Office</td>
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<td>MAR 1991-MAY 1991</td>
<td>Republican Candidate for Mayor of the City of Philadelphia</td>
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<td>JAN 1986-MAR 1991</td>
<td>District Attorney of Philadelphia</td>
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<td>Twice-elected to a four-year term as District Attorney of the fifth largest city in</td>
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<td>the nation; Managed an office of over 225 attorneys, 80 county detectives and 150</td>
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<td>clerical and paralegal personnel, with an annual caseload of approximately 50,000</td>
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<td>adult and 10,000 juvenile criminal cases; Oversight of all aspects</td>
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of the criminal prosecution and appeals to Pennsylvania Commonwealth, Superior, and Supreme Courts; Handled all habeas corpus and collateral matters in Federal Court and appeals to the Federal Circuit Court and the Supreme Court of the United States; Handled child support enforcement, welfare fraud and unemployment fraud cases; Conducted major investigations and grand jury investigations involving municipal corruption, La Cosa Nostra, major drug rings and sophisticated consumer and commercial fraud and crimes; Instituted a strong working relationship with Federal prosecutors and investigative agencies to investigate and prosecute municipal corruption and high-level drug trafficking; as Legislative Chairman of the Pennsylvania District Attorneys Association, established major lobbying efforts that resulted in the enactment of major revisions of the Crimes Code, the Juvenile Justice Act, criminal procedure, and appellate procedure in Pennsylvania. As Vice-President and Legislative Chairman of the National District Attorney’s Association, worked with Congress to reform Federal criminal law and procedure; Managed a budget of over $18,000,000 annually, with additional $2,000,000 in Federal grants and funding and $3,000,000 in forfeited funds.

**AUG 1971-MAR 1985**

Deputy District Attorney, Pre-Trial Division;
Chief, Career Criminal Unit;
Assistant District Attorney
Philadelphia District Attorney’s Office

**MILITARY SERVICE**

Commissioned Officer
United States Marine Corps
(2nd Bn, 7th Rgt, 1st Mar Div)

Commissioned as a Lieutenant in the Marines in 1966; medically retired in June 1968 for severe wounds suffered in combat from enemy gunfire; served as rifle platoon commander in
Vietnam; received the Bronze Star with Combat "V" for bravery, two Purple Hearts, Cross of Gallantry, Presidential Unit Citation and Naval Unit Citation and Combat Action ribbon, Combat Infantry Badge.

**EDUCATION**

Law School: University of Virginia
School of Law 1971, Juris Doctor Degree
Raven Society; Vice-President, Class of 1971;
Legal Advisor, Honor Committee of UVA.

College: Auburn University, Bachelor of Science Degree (Economics) 1966
Student Council Senator At Large
Assoc. Editor, Auburn Plainsman
Phi Eta Sigma, Freshman Honor Soc.
Omicron Delta Kappa, Leadership,
Scholarship and Service

**SUPREME COURT COMMITTEES**

Liaison to First Judicial District 2007 - Judicial Council, 2003 -
Liaison, Committee on Rules of Evidence, 1998-2001
Liaison, Ad Hoc Committee on Evidence 1994-1998
Liaison, Criminal Procedural Rules Committee, 1994-2002
Liaison, Minor Court Rules Committee, 1994-2002
Liaison, Juvenile Court Procedural Rules Committee, 2001-2002
Liaison, Special Court Judges Association of Pa

**ORGANIZATIONS**

Board of Directors and Member, Conference of Chief Justices
American Bar Association Future of Legal Education Task Force
Board of Directors, National Alliance for Model State Drug Laws, 1993-present
Commissioner, President’s Commission on Model State Drug Laws, 1992-1993
Legislative Chairman, Pa District Attorneys Association, 1986-1991
Vice President and Legislative Chairman, National District Attorneys Association, 1986-1991
Board Member, Urban Coalition, 1988-1991
Executive Board Member, Criminal Justice Coordinating Commission, 1986-1991
Secretary and V.P., Philadelphia Vietnam Veterans Memorial Fund, 1983-present
Board of Directors, Philadelphia USO
Executive Committee and Vice Chair for District Operations, Cradle of Liberty Council, Boy Scouts of America 1986-2000
Board Member, Police Athletic League, 1986-1991
Chairman, Pennsylvania Anti-Crime Coalition for George Bush for President, 1988
Co-chairman, Pennsylvania Veterans for George Bush for President, 1988
Board of Directors, Pennsylvania Center for Adapted Sports, 1996-present

AWARDS
FOP Lodge No. 5, Man of the Year, 1986
Brehon Law Society, Distinguished Achievement Award 1986, 1994
Distinguished Public Service Award Pennsylvania County and State Detectives Association, 1987
Layman Award Pennsylvania Chiefs of Police Association, 1987
National Disabled American Veterans Outstanding Disabled Veteran of the Year, 1988
Pennsylvania Disabled American Veterans Outstanding Disabled Veteran of the Year,
1988
Institute for the Study of American Wars
“Spirit of America” Award, 1988
Caroline Earle White Award (Pa. SPCA), 1988
Pa Society of Sons of the Revolution, 1989
Philadelphia Veterans Memorial Fund
1st Annual Philadelphia Region Veterans
Service Award, 1990
National District Attorneys Association
President’s Award for Outstanding Service, 1991
Ancient Order of Hibernians Aloysius
McGonigal Humanitarian Award, 1995
John Peter Zenger Law Society
Distinguished Jurist Award, 1995
Marine Corps Law Enforcement Foundation
“Profiles in Courage” Award, 1997
Boy Scouts of America, Cradle of Liberty
Chapter, Silver Beaver Award for
Distinguished Service to Youth, 1997
Philadelphia Flag Day Association
Founders Award, 1998
Military Order of World Wars Patrick Henry
Award for Patriotic Achievement, 2000
Philadelphia Vietnam Veterans Memorial
Dedicated Service Award, 2000
Marine Corps Scholarship Foundation
Award 2002
Philadelphia District Attorneys Alumni
Association Raymond J. Harley Award, 2007
Philadelphia Brehon Law Society
Freedom and Justice Award, 2008
Lawyers’ Club of Philadelphia, 2010
Pennsylvania Bar Foundation/Pennsylvania
Bar Association Judge of the Year Award,
2011
Society of The Friendly Sons of St. Patrick
Distinguished Service Award, 2012
Pennsylvania Legal Aid Network (PLAN)
Excellence Award, 2011 and 2013
Philadelphia Bar Association William J.
Brennan Distinguished Jurist Award, 2013

...for Newman Development Group of Pottstown. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE This appeal presents a discrete issue of post-trial procedure governed by Rule 227:1 of the Pennsylvania Rules of...

Thierfelder v. Wolfert,

...Associates, P.A., Trevose, for David and Joanne Thierfelder. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY, JJ. OPINION Chief Justice CASTILLE The question presented in this case is one of first impression for this Court: whether a medical general practitioner who...

Pennsylvania State Ass'n of County Com'mrs v. Com.,

...General, Harrisburg, for Office of Attorney General. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE On July 26, 1996, this Court filed an opinion granting mandamus relief and ordering the General Assembly of the Commonwealth...

Com. v. Mouzon,
--- A.3d ----, 2012 WL 3570663, Pa., August 21, 2012 (NO. 9 EAP 2011)

...Mitchell S. Strutin, for Darrin Mouzon. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION/Chief Justice CASTILLE This appeal by the Commonwealth, the prevailing party at trial which was aggrieved by the Superior Court's grant of a...

Philadelphia Housing Authority v. American Federation of State, County and Mun. Employees, Dist. Council 33, Local 934,

...Amicus Curiae, Pennsylvania School Board Association. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION/Chief Justice CASTILLE FN* The matter was reassigned to this author. We granted review to determine whether a labor arbitration award, issued pursuant...

Mason-Dixon Resorts, L.P. v. Pennsylvania Gaming Control Bd.,

...Ingersoll, L.L.P., Philadelphia, for Woodlands Fayette, LLC. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE This is a direct appeal filed by Mason–Dixon Resorts, L.P. ("appellant"), from the decision of the Pennsylvania Gaming Control...

Com. v. Hansley,
47 A.3d 1180, 2012 WL 2899022, Pa., July 17, 2012 (NO. 3 MAP 2011)

8. C Office of Disciplinary Counsel v. Cappuccio,

"...Harrisburg, for Office of Disciplinary Counsel. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE This matter is before our Court following the issuance of a Report and Recommendation by the Disciplinary Board of the..."

9. H In re Stevenson,
40 A.3d 1212, 2012 WL 987786, Pa., March 26, 2012 (NO. 54 MAP 2010)

"...W. Gibson and Robert W. Mader. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE This Opinion addresses an Application for Relief in an Election Code matter, over which this Court retained limited jurisdiction following..."

10. H Com. v. Staton,
38 A.3d 785, 2012 WL 540561, Pa., February 21, 2012 (NO. 538 CAP)

"...Zapp, Harrisburg, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE This Court reviews the direct appeal of appellant Andre Staton from the sentence of death imposed on June 1, 2006..."

11. D Holt v. 2011 Legislative Reapportionment Com’n,

"...addressed via prospective guidance from the Court. Justice EAKIN and Justice ORIE MELVIN join this dissenting statement. OPINION Chief Justice CASTILLE Legislative redistricting “involves the basic rights of the citizens of Pennsylvania in the election of their state lawmakers.” 1 In...

12. H Com. v. Porter,

"...Zapp, Harrisburg, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. ORDER Chief Justice CASTILLE 1 FN1. This matter was reassigned to this author. AND NOW, this 19th day of January, 2012, upon review of...

13. H Com. v. Garzone,

"...John W. Morris for Louis Garzone. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE The issue in these consol-
idated appeals involves the construction of 16 P.S. § 7708, applicable to Pennsylvania counties of the...

14. Com. v. Sanchez,

    ...P. Kriner, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE We review the direct appeal of Abraham Sanchez, Jr. ("appellant") from the sentence of death imposed on March 30, 2009...

15. Samuel-Bassett v. Kia Motors America, Inc.,

    ...of Philadelphia and PA Association of Justice. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE 1 FN1. This matter was reassigned to this author. [1] Appellant, an automobile manufacturer who unsuccessfully defended a class action...

16. Com. v. Cooper,

    ...Jill Heilmann, for Michael Cooper. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY, JJ. OPINION OF THE COURT Chief Justice CASTILLE We consider the effect of a pro se notice of appeal forwarded to the Superior Court by a counseled criminal...

17. Com. v. Banks,

    ...Ruzzo, Kingston, for George E. Banks. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE The central issue in this case is whether George Banks is competent to be executed. 2 We hold that he...

18. United States Organizations for Bankruptcy Alternatives, Inc. v. Department of Banking,

    ...States Organizations for Bankruptcy Alternatives, Inc. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE We decide the cross-appeals of the Commonwealth Department of Banking and Glenn E. Moyer, in his capacity as the...

19. Com. v. Zortman,

    ...Attorney General, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE The issue in this appeal is whether an inoperable handgun may be considered a “firearm” for purposes of mandatory minimum...
20. Fross v. County of Allegheny,

...Court of Appeals for the Third Circuit. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE Upon certification by the U.S. Court of Appeals for the Third Circuit, we accepted for review the issue of whether...

21. Crozer Chester Medical Center v. Department of Labor and Industry, Bureau of Workers’ Compensation, Health Care Services Review Div.,

...and Industry, Bureau of Worker's Compensation. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE FN* This case was re-assigned to this author. In this direct appeal, we decide whether the Commonwealth Court should...


...Less & Feldman, P.C., Philadelphia, for Brokerage Concepts, Inc. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY, JJ. OPINION Chief Justice CASTILLE We consider whether Restatement (Second) of Torts § 772(a) applies in Pennsylvania to preclude an action for tortious interference...

23. In re Dauphin County Fourth Investigating Grand Jury,

...Office, Edward Michael Marsico, Jr., for respondent. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE This matter arises from proceedings that were undertaken during the course of an investigation into allegations of disclosures of protected...

24. In re Farnese,

...Department of State, for Pennsylvania Department of State. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE Appellants are unsuccessful objectors to the nomination petition of a candidate for office, who appeal the Commonwealth Court's decision to...

25. Com. v. Hill,

...Zapp, Harrisburg, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE Appellant Donetta Hill appeals from the Order of the Court of Common Pleas of Philadelphia County, dismissing the guilt-phase...


...Amy Zapp, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE FN* This case was reassigned to this author. In these consolidated capital post-conviction cross-appeals, the Commonwealth challenges the...


...Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE This is a pro se capital appeal from the Order of the Court of Common Pleas of Philadelphia County denying...


...Pennsylvania State System of Higher Educ., Intervenor. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE FN* This matter was re-assigned to this author. The Commonwealth Court's decision below reversed an order by appellant, the...


...the Attorney General, for Commonwealth of Pennsylvania. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE In this direct capital appeal, which has yet to be briefed, appellant Andre Staton's court-appointed counsel Thomas N. Farrell...


...Compensation Appeal Board. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION OF THE COURT Chief Justice CASTILLE This appeal presents us with an opportunity to consider whether an employer, seeking to change a claimant's workers' compensation disability...


...Law Department, for City of Philadelphia. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE Petitioners, the City of Philadelphia's Board of Revision of Taxes ("the BRT") and Charlesetta Meade, Robert N.C. Nix, III, Russell...


...PA, c/o Office of General Counsel. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE. This appeal of the trial court's order denying the motion of appellant Janssen Pharmaceutica, Inc. ("Janssen") to disqualify contingent fee...


...of Philadelphia Law Department, for City of Philadelphia. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE. FN** This matter was re-assigned to this author. In this appeal, we review the Commonwealth Court's Order reversing the...


...Attorney General, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE. Seifullah Abdul-Salaam ("appellant"), who is represented by the Federal Community Defender of the Eastern District of Pennsylvania, 1 PURPORTS...


...L.L.C., for amicus curiae Pennsylvania Ass'n for Justice. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY, JJ. OPINION Chief Justice CASTILLE. This Court granted allocatur to address the issue of whether a skier may maintain a negligence action against a ski...


...Messing & Feinberg, Philadelphia, for Christian Colavita. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY ORIE MELVIN, JJ. OPINION Chief Justice CASTILLE. FN* This case was reassigned to this author. The Commonwealth appeals from the published opinion and order of the Superior...


...Morris, Esq., for appellee, Justin Weigle. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE. The issue before this Court is whether, under Pennsylvania Rule of Criminal Procedure 560(B)(5), the Commonwealth properly may...


...and Dissenting Opinion, in which Justice Saylor joined. Justice Orie Melvin filed a Concurring and

Dissenting Opinion

OPINION Chief Justice CASTILLE The Judicial Conduct Board of Pennsylvania ("JCB") has filed a pleading styled as an "Application for Relief Pursuant to this...

39. H

Com. v. Bracey,

...Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE

In this appeal, this Court is asked to consider the constitutional necessity for a jury trial for purposes of an...

40. H

Council 13, American Federation of State, County and Mun. Employees, AFL-CIO ex rel. Fillman v. Rendell,

...Senators Jeffrey Piccola, John Gordner & Jane Earl. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE

We consider here whether the Commonwealth Court correctly declared that Article III, Section 24 of the Pennsylvania Constitution section 24...

41. C

PPL Generation, LLC v. Com., Dept. of Environmental Protection,

...LP and Allegheny Energy Supply Company, LLC. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE

This matter is before us on direct appeal from the order of the Commonwealth Court declaring 25 Pa.Code §§ 123...

42. H

Com. v. Rompilla,

...Natten, for Com. of Pennsylvania, Appellee. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE

This is an appeal from the judgment of sentence of life imprisonment imposed by the Court of Common Pleas of...

43. H

Com. v. Chambers,

...Office, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE

This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Philadelphia County...

44. H

Com. v. Santiago,

...Office, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE

In this case, court-appointed appellate counsel filed an Anders 1 brief and an accompanying petition to withdraw from representation...


...and Keystone Outdoor Advertising Co., Inc., appellees. BEFORE: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD and McCAFFREY, J.J. OPINION Chief Justice CASTILLE The questions presented in this appeal arose from the General Assembly's enactment of Section 17.1 of the First Class...


...Commonwealth of Pennsylvania, Appellee. CASTILLE, C.J., and SAYLOR, EAKIN, BAER, TODD, McCAFFREY and GREENSPAN, J.J. OPINION ON REARGUMENT Chief Justice CASTILLE On January 23, 2009, this Court affirmed appellant James W. VanDiver's conviction and judgment of sentence in this direct capital...


...for Pennsylvania Catholic Conference, appellee amicus curiae. BEFORE: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD and GREENSPAN, J.J. OPINION Chief Justice CASTILLE The single issue presented in the instant case is whether the civil courts of this Commonwealth have subject-matter jurisdiction...


...Green, Esq., for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., and SAYLOR, EAKIN, BAER, TODD and McCAFFREY, J.J. OPINION Chief Justice CASTILLE [1] In the instant appeal, the limited question presented for this Court's review is whether accessing and viewing child pornography...


...Office of Attorney General, for Pennsylvania Gaming Control Board. CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD McCAFFREY, J.J. OPINION Chief Justice CASTILLE Petitioner, Peter DePaul, has filed a verified petition in the nature of a complaint seeking declaratory judgment and injunctive relief...


...Stephanie Beechaum (21 WAP 2007) BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE “Controversies growing out of the assessment and collection of taxes are as old as civilization. To question the assessment, to...


...Association of Philadelphia, Philadelphia, for Raymond Johnson. BEFORE: CASTILLE SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE The Commonwealth appeals from the order of the Court of Common Pleas of Berks County (“PCRA court”) overturning the verdict...


...Com'n of City of Pittsburgh, respondent. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE Petitioners Riverlife Task Force, Randy Zotter, and Robert Blackwell (collectively, “Riverlife”) I filed a Petition for Review / Appeal (“Petition”) in...


...for the Com. of Pennsylvania, appellee. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE The order of the Superior Court is affirmed for the reasons ably set forth in the Superior Court opinion, which...


...Uniontown, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE This is appellant's direct appeal from the February 12, 2007 sentence of death imposed following his trial by jury before...


...Attorney's Office, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD and McCAFFERY, JJ. OPINION Chief Justice CASTILLE The question presented in this appeal is whether Section 2707.1 of the Crimes Code 18 Pa.C.S. § 2707.1...


...of Pennsylvania (no. 414 CAP). BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD MCCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE FN* This case was reassigned to this author. The Commonwealth appeals from the order of the Philadelphia County Court of...


...P.C., Reading, for Zoning Hearing Board. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD and MCCAFFERY, JJ. OPINION Chief Justice CASTILLE In this appeal, we consider a challenge to the substantive validity of a local zoning ordinance that prohibits signs from...


...amicus curiae Pennsylvania Medical Society. BEFORE: CAPPY, C.J., and CASTILLE SAYLOR EAKIN BAER BALDWIN and FITZGERALD, JJ. OPINION Chief Justice CASTILLE The primary issue in this appeal is whether a patient, seeking to prove a lack of informed consent claim in...


...for the Com. of PA, appellee. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD MCCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE FN* This matter was reassigned to this author. Appellant Donald Tedford appeals from the order of the Court of Common...


...Peter Carr, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD MCCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE FN* This case was reassigned to this author. The instant matter is before this Court on appellant's appeal from that...


...Attorney's Office, for Commonwealth of Pennsylvania. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD MCCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE This is a direct appeal from a sentence of death imposed by the Philadelphia County Court of Common Pleas on...


...News Network, LP, CBS Broadcasting, Inc., et al. BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER and MCCAFFERY, JJ. OPINION Chief Justice CASTILLE Pennsylvania's Shield Law, 42 Pa.C.S. § 5942, protects a newspaper's source of information from compelled disclosure. With the present appeal...

...Philadelphia, for City of Philadelphia. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD McCAFFERY and GREENSPAN, JJ. OPINION Chief Justice CASTILLE This appeal presents the following issues: (1) whether the City of Philadelphia has the authority to issue a license authorizing...


...for Jubelirer, Robert and Perzel, John. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD and McCAFFERY, JJ. OPINION Chief Justice CASTILLE Today we are asked to decide whether Article IV, Section 16 of the Pennsylvania Constitution Section 16 I permits the...


...District Attorney's Office, for Commonwealth of Pennsylvania. Mark S. Keenheel, Esq., Maplewood Mall Law Center, for Benjamin Greer. Chief Justice CASTILLE The question on appeal is whether the trial court abused its discretion in issuing Spencer 1 instructions—that is, instructions...


...Burns, Jr., Philadelphia District Attorney's Office, for Com. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE The instant matter is before this Court on appellant's appeal from that part of the order of the Court of...


...Office, Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania. CASTILLE, C.J., SAYLOR EAKIN BAER TODD McCAFFERY GREENSPAN, JJ. OPINION Chief Justice CASTILLE FN* This matter was reassigned to this author. The instant matter is a collateral capital appeal from the dismissal of...


...Esq., West Chester, for Herbert Watson. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD and McCAFFERY, JJ. OPINION Chief Justice CASTILLE Today we decide two appeals each presenting the identical issue of whether an inmate who is presently incompetent may be...


we decide two appeals that present the identical issue of whether an inmate who is presently incompetent may be...

71. ▲ Com. v. Pagan,
597 Pa. 69, 950 A.2d 270, 2008 WL 2420739, Pa., June 17, 2008 (NO. 445 CAP)

...Office, for the Com. of PA, appellee BEFORE: CASTILLE, C.J., SAYLOR EAKIN BAER TODD and McCAFFERY, JJ. OPINION Chief Justice CASTILLE FN* This matter was reassigned to this author. This is a direct appeal from the imposition of two sentences of...

72. □ Com. v. Blakeney,
596 Pa. 510, 946 A.2d 645, 2008 WL 1903800, Pa., May 01, 2008 (NO. 404 CAP)

...Attorney's Office, for Commonwealth of Pennsylvania. CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Chief Justice CASTILLE This is a direct appeal from a sentence of death imposed by the Dauphin County Court of Common Pleas on...

73. □ Philadelphia Entertainment and Development Partners, L.P. v. City Council for City of Philadelphia,
596 Pa. 422, 943 A.2d 955, 2008 WL 867462, Pa., April 02, 2008 (NO. 1 EM 2008)

...City Council for the City of Philadelphia. CASTILLE, C.J., and SAYLOR EAKIN BAER TODD, and McCAFFERY, JJ. OPINION Chief Justice CASTILLE Before us today is a Verified Petition for Review and an Application for Summary Relief and Expedited Briefing Schedule filed...

74. ▲ David Griffiths v. W.C.A.B. (Seven Stars Farm, Inc.),

...for amicus curiae Pennsylvania Defense Institute. BEFORE: CASTILLE, C.J., and SAYLOR EAKIN BAER TODD and McCAFFERY, JJ. OPINION Chief Justice CASTILLE This Court granted review to determine: (1) whether a van modified to make it wheelchair accessible for a workers' compensation...

75. □ McElheney v. W.C.A.B. (Kvaerner Philadelphia Shipyard),

...Steiner, Segal, Muller & Donan, Reading, for Daniel McElheney. CAPPY, C.J., CASTILLE SAYLOR EAKIN BAER BALDWIN FITZGERALD, JJ. OPINION Chief Justice CASTILLE The single issue before the Court is: when is an injured worker entitled to concurrent compensation under both the federal...

76. ▲ Com. v. Mallory,

...Esg., Philadelphia, for Hakim Lewis. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Chief Justice CASTILLE FN* This matter was reassigned to this author. Ricky Mallory, Braheem Lewis, and Hakim Lewis 1 (collectively "appellants") were tried...


...Christopher, Harrisburg, for William Valora, Jr. BEFORE: CAPPIE, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE We granted review in this healthcare subrogation matter to determine whether its resolution should be guided exclusively by the contractual...


...Lancaster, for Lancaster County Agricultural Preserve Board. BEFORE: CAPPIE, C.J., and CASTILLE SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE This appeal presents a question of first impression: whether, under the Open Space Lands Act, 32 P.S. § 5001 et...


...Bevevinio & Gilford, P.C., Tionesta, for Triumph Township. BEFORE: CAPPIE, C.J., and CASTILLE SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE This appeal presents questions regarding the effect of this Court's decision in Independent Oil and Gas Association v. Board of...


...Harrisburg, for Dept. of Auditor General and Jack Wagner CAPPIE, C.J., CASTILLE SAYLOR EAKIN BAER BALDWIN FITZGERALD, JJ. OPINION Justice CASTILLE The two issues presented in these cross-appeals are: (1) whether a taxpayer, Gene Stilp, has standing to seek, inter...


...for amicus curiae Office of Attorney General of Pennsylvania. BALDWIN CAPPIE BAER CASTILLE SAYLOR EAKIN FITZGERALD and SAYLOR, JJ. OPINION Justice CASTILLE This matter concerns the Dauphin County Fourth Investigating Grand Jury and is before us on an Application for review styled...


...Jr., Esq., Harrisburg, for Christopher Williams. BEFORE: CAPPIE, C.J., and CASTILLE SAYLOR EAKIN BAER BALDWIN and FITZGERALD, JJ. OPINION Justice CASTILLE In consolidated cross-appeals in this capital case, the Commonwealth appeals the May 29, 2003 order of the Court of...


...BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT Justice CASTILLE In the instant matter, this Court must determine whether there was sufficient basis to deny Ronald D'Alessandro's ("Appellee") application for...

84. Com. v. Russo,

...Jr., Esq., for Commonwealth of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE SAYLOR EAKIN BAER BALDWIN and FITZGERALD, JJ. OPINION Justice CASTILLE FN* This matter was reassigned to this author. We granted allowance of appeal in the instant case to determine whether...

85. Com. v. Davidson,

...Esq., Media, for Commonwealth of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE NI-GRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE In the case sub judice, we are asked to decide whether Section 6312(d) of the statute governing possession of...


...P.C., Philadelphia, for Upper Southampton Township. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE We granted review in this appeal from the Commonwealth Court to explore the question of whether the construction of billboards...

87. Com. v. Beasley,

...C.J., CASTILLE SAYLOR EAKIN BAER BALDWIN and FITZGERALD, JJ. OPINION IN SUPPORT OF DENIAL OF APPELLANT'S MOTION FOR RECUSAL Justice CASTILLE Appellant Leslie Charles X. Beasley, through his counsel, Billy H. Nolas, Esquire, of the Defender Association of Philadelphia, Capital Habeas...

88. Day v. Civil Service Com'n of Borough of Carlisle,

...Esq., Carlisle, for Thomas L. Day, Jr. BEFORE: CAPPY, C.J., and CASTILLE SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE The Civil Service Commission of the Borough of Carlisle ("Commission") and the Borough of Carlisle (collectively "appellants") seek a determination...

89. Coolspring Stone Supply, Inc. v. County of Fayette,

...for County Commissioners Association of Pennsylvania. Before: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE [1] The
issue in this case is whether real estate taxes may be imposed on leasehold interests in subsurface limestone...

90. H Com. v. Dillon,

...General, for Attorney General of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE
NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE Appellant
Thomas Dillon appeals from the Superior Court's order reversing the trial court's denial of the
Commonwealth's motion in limine...

91. H Com. v. Brown,

...Perri, Jr., Philadelphia, S. Philip Steinberg, for Terry Brown. CAPPY, C.J., CASTILLE NIGRO
NEWMAN SAYLOR EAKIN BAER, JJ. OPINION Justice CASTILLE [1] In Bruton v. United
States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the U.S. Supreme...

92. H Com. v. Reaves,

...Scott Rudenstein, Esq., for Gregory Reaves. BEFORE: CAPPY, C.J., and CASTILLE SAYLOR
EAKIN BAER BALDWIN and FITZGERALD, JJ. OPINION Justice CASTILLE 1 FN1. This
matter was reassigned to this author. The Commonwealth of Pennsylvania appeals by allowance from
a decision of...

93. C Burger v. School Bd. of McGuffey School Dist.,
WAP 2005)

...N. Helling, Harrisburg, for Pennsylvania Department of Education. Before: CAPPY, C.J., CAS-
TILLE SAYLOR EAKIN BAER BALDWIN FITZGERALD, JJ. OPINION Justice CASTILLE
This matter is before this Court on direct appeal because the trial judge found that Section 10–1080 of
the...

94. P Com. v. Sims,

...Roy Zipris, Philadelphia, for Chester Sims. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN
SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE This case presents the
question of whether a defendant may be convicted of an attempt crime where he had only...

95. C Pennsylvania State Troopers Ass'n v. Com., Gaming Control Bd.,

...Harrisburg, for amicus curiae PA State Police. BEFORE: CAPPY, C.J., and CASTILLE SAYLOR
EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE Petitioners, the Pennsylvania
State Troopers Association ("Troopers Association" or "Association"), have filed an Application for
Leave to File Original Process...


...curiae Pa. School Boards Association, Appellee. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE 1 This appeal involves the interplay of the "institution of purely public charity" real estate tax exemption permitted by Article...


...P.C., Pittsburgh, for Allegheny County Retirement Board. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER BALDWIN, JJ. OPINION Justice CASTILLE 1 The question we confront in this matter is whether appellant Robert E. Colville, the former District Attorney of Allegheny County...


...Jr., Esq., Morrisville, for James McGrory. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE 1 This appeal presents the narrow issue of whether appellant, the Department of Transportation (PennDOT), had independent authority under the Ignition...


...Langborne, for Tire Jockey Service, Inc. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE 1 Two inter-related questions are presented for review in the instant appeal: (1) Whether the Commonwealth Court erred by failing...


...for District Attorney of Philadelphia County. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE FN* This matter was reassigned to this author. This matter comes before this Court on a Petition for Certification of...


...District Attorney of Philadelphia, for appellee. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE 1 Appellant Andre Jones appeals from the Superior Court's order affirming the trial court's judgment of sentence for one count...


...McClure, Esq., Huntingdon, for George Goods. BEFORE: CAPPY, C.J., and CASTILLE 1

NEWMAN SAYLOR EAKIN BAER and BALDWIN , JJ. OPINION Justice CASTILLE The question presented on appeal is whether the Pennsylvania Board of Probation and Parole ("Board") properly deemed that a state...

103. Com. v. Meals,

...Brian Rader, Esq., York, for Daniel Meals. BEFORE: CAPPY , C.J., and CASTILLE NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE The issue on appeal is the proper role of an appellate court in reviewing a sentencing court's classification of a...

104. Com. v. Carson,

...Fetterman, Esq., for Commonwealth of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE This collateral capital matter is before this Court on appeal from the trial court's dismissal of appellant's petition for relief...

105. Popowsky v. Pennsylvania Public Utility Com'n,

...Philadelphia, for Pennsylvania-American Water Company. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE The issue on appeal is whether a demonstration of public need for water alone is sufficient to require a water...

106. Stilp v. Com.,

...Atty. Gen., intervenor-appellee in No. 9 MAP 2006. Before: CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE I. FACTS AND PROCEDURAL HISTORY - A - These matters are before this Court, upon exercise of plenary jurisdiction, 1 based upon...

107. Martin v. Com., Dept. of Trans., Bureau of Driver Licensing,

...Peter Wile, Harrisburg, for Bureau of Driver Licensing. BEFORE: CAPPY, C.J., CASTILLE NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This appeal arises from the suspension of appellant's operating privilege for refusing to undergo chemical testing pursuant to the Implied...

108. Com. v. Edwards,

...D. Vernon Amy Zapp, Harrisburg, for Com. BEFORE: CAPPY, C.J., CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE Appellant appeals from the judgment of sentence imposing a penalty of death for each of three first-degree murder convictions...

In re Adoption of J.E.F.,

...N.G.F., a minor (30 WAP 2005). BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE This appeal presents two basic and inter-related questions arising out of the desire of appellees, the aunt and uncle...


...McClanahan Paul Joseph Berks, for Andrea D. Wilkes, et al. CAPPY, C.J., CASTILLE NEWMAN SAYLOR EAKIN BAER, JJ. OPINION Justice CASTILLE The primary issue on appeal is whether appellees Andrea D. Wilkes, David H. Ehrenwerth, and Charles K. Clark, trustees of...

Town of McCandless v. McCandless Police Officers Ass'n,

...Harrisburg, for McCandless Police Officers Association. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE [1] [2] In this grievance arbitration appeal, this Court granted limited review to consider whether a pending grievance filed in...

Com. v. Rainey,

...had personally authorized or reviewed the challenged materials, and policies of district attorney's office did not authorize discriminatory practices. Justice CASTILLE ORDER AND NOW, this 7th day of July, 2006, upon review of Appellant's Motion for Recusal and the Commonwealth's Reply...

Pennsylvania Turnpike Com'n v. Com.,

...Esq., for Pennsylvania Labor Relations Board. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE In the case sub judice, we are asked to decide whether the Commonwealth Court was correct in holding that the...

Com. v. Sneed,

...Nolas, Esq., Philadelphia, for Willie Sneed. BEFORE: CAPPY, C.J., and CASTILLE NEWMAN SAYLOR EAKIN BAER and BALDWIN, JJ. OPINION Justice CASTILLE The instant matter is an appeal by the Commonwealth from the order of the Court of Common Pleas granting Willie...

Com. v. Conklin,
...amicus curiae Sexual Offender Assessment Board. BEFORE: CAPPY, C.J., and CASTILLE NIGRO, NEWMAN, SAYLOR, EAKIN, and BAER, JJ. OPINION Justice CASTILLE. Recently, in Commonwealth v. Dengler, 890 A.2d 372 (2005), this Court held that expert testimony proffered in a Megan's

116. In re Carroll,

...Jonathan Scott Comitz, Wilkes-Barre, for Dennis Garvey. BEFORE: CAPPY, C.J., CASTILLE NEWMAN, SAYLOR, EAKIN, and BAER, JJ. OPINION Justice CASTILLE. Appellant/candidate Timothy J. Carroll appeals from the order of the Commonwealth Court granting appellee/objector Dennis Garvey's petition to...


...for Citicorp North America, Inc., amicus curiae. BEFORE: CAPPY, C.J., CASTILLE NIGRO, NEWMAN, SAYLOR, EAKIN, and BAER, JJ. OPINION Justice CASTILLE. This is a direct appeal from a single-judge Commonwealth Court order that denied the petition of appellant Mawson & Mawson...

118. Chen v. Chen,

...03, n. 8, 893 A.2d at 90, n. 8 (commenting on the trial court's calculation of child support). Justice CASTILLE, Concurring. I concur in the result since I believe that Theresa Chen (“Daughter”) was not an intended beneficiary of her...

119. Snizaski v. W.C.A.B. (Rox Coal Co.),

...appellee. Richard C. Lengler, Harrisburg, for W.C.A.B., appellee. Before: CAPPY, C.J., CASTILLE NEWMAN, SAYLOR, EAKIN, and BAER, JJ. OPINION Justice CASTILLE. This appeal presents the question of whether the Workers' Compensation Judge (“WCJ”) erred in granting a claimant's penalty petition against...

120. Peters v. Costello,
586 Pa. 102, 891 A.2d 705, 2005 WL 3578115, Pa., December 30, 2005 (NO. 8 EAP 2004)

...Anthony Robert Giannone, Philadelphia, for Francesca Szypula. BEFORE: CAPPY, C.J., CASTILLE NIGRO, NEWMAN, SAYLOR, EAKIN, and BAER, JJ. OPINION Justice CASTILLE. This Court is called upon in this appeal to determine whether “non-biological grandparents” who stand in loco parentis to...

121. Com. v. Dengler,

...Rebecca Hobart, for Com. of PA, appellee. Before: CAPPY, C.J., CASTILLE NIGRO, NEWMAN, SAYLOR, EAKIN, and BAER, JJ. OPINION Justice CASTILLE. This appeal poses a discrete evidentiary issue of first impression arising out of the operation of Megan's Law II: 1...
122. Com. v. Infante,

...Peter Rosalsky, Philadelphia, for Jose Infante, appellee. BEFORE: CAPPY, C.J., CASTILLE
NEGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE The instant
matter is an appeal by the Commonwealth from an order of the Superior Court vacating appellee's
judgment of...

December 28, 2005 (NO. 55 MAP 2004)

...Board of School Directors of Susquenita School District. Before CAPPY, C.J., CASTILLE NEGRO
NEWMAN SAYLOR EAKIN BAER, JJ. OPINION Justice CASTILLE In this appeal, this Court
examines whether the job removal protections outlined in Section 10-1089(c) of the Public...

124. Com. v. Revere,

...Hugh J. Burns Peter Carr, Philadelphia, for Com. Before: CAPPY, C.J., CASTILLE NEWMAN
SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This Court granted limited review
to consider the propriety of the Superior Court's recognition of an exigent circumstances exception
to...

125. Com. v. Millner,

...Sheryl Stern Chernoff, Philadelphia, for Jason Millner, appellee. BEFORE: CAPPY, C.J., CASTILLE
NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This Court granted review to consider the Commonwealth's claim that the lower courts improperly ordered the
suppression of a firearm...

126. Com. v. May,

...Amy Zapp, Harrisburg, for the Com., appellee. BEFORE: CAPPY, C.J., CASTILLE NEGRO
NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This is a direct appeal
from two sentences of death imposed by the Lancaster County Court of Common Pleas. On...

127. Stanton v. Lackawanna Energy, Ltd.,

...Foley, Scranton, for Lackawanna Energy, Ltd., appellee. BEFORE: CAPPY, C.J., CASTILLE
NEGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This matter
involves a claim against Pennsylvania Power and Light Company ("PP & L"), initiated by Benjamin
and Elaine Stanton, the...

128. Com. v. Lambert,
584 Pa. 461, 884 A.2d 848, 2005 WL 2650080, Pa., October 18, 2005 (NO. 427CAP)

Burns, for the Com. of PA, appellee. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE Appellant James Lambert appeals from the order of the Court of Common Pleas dismissing his second petition for relief filed...


...Tucker, III, Pittsburgh, for Scott Township. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This appeal presents this Court with an opportunity to address what is required of a municipal authority pursuant to Section...


...Burns, Philadelphia, Jason Fetterman, for Com. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE This Court granted review in these cross-appeals to address two separate issues of statutory interpretation: (1) whether under the...


...Harrisburg, for Workers Compensation Appeal Board. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE In these three consolidated appeals, this Court is faced with the following question concerning the 1996 amendments to Section 309...


...of Labor and Industry, appellee amicus curiae. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE These cross-appeals raise two related issues: (1) whether Section 204(a) of the Pennsylvania Workers' Compensation Act (the "Act...


...Perrin, Philadelphia, for Commonwealth of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This matter is an automatic direct appeal from a sentence of death imposed by the Court of Common Pleas of...

...Thomas A. Bergstrom, Malvern, for Eli Karetney, Michael Asbell. Before: CAPPY, C.J., CASTILLE NEWMAN SAYLOR EAKIN BAER, JJ. OPINION Justice CASTILLE The primary issue in this appeal is whether the Commonwealth made out a prima facie case of risking a catastrophe...

135. Com v. $6,425.00 Seized From Esquinil, 583 Pa. 544, 880 A.2d 523, 2005 WL 1940298, Pa., August 15, 2005 (NO. 34 EAP 2004)

...Petrone, Esq., Philadelphia, for Robert Esquinil. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This appeal raises questions concerning the proper inferences available in a forfeiture case, as well as the proper standard for...


...McHugh, Esq., for John Harold Alexander. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This appeal raises questions regarding the application of the Ignition Interlock Devices Law (hereinafter, “Interlock Law”), 42 Pa.C.S. § 7001...


...Pittsburgh, for Pennsylvania District Attorneys Association. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This Court granted discretionary review to determine whether an autopsy report of a homicide victim, which a county's Coroner is...


...M. Sekula, Esq., for Commonwealth of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR and BAER, JJ. OPINION Justice CASTILLE This Court granted review of the order of the Superior Court vacating appellant's judgment of sentence and remanding the case...


...Esq., Pittsburgh, for Commonwealth of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This is a direct appeal from the sentence of death imposed by the Court of Common Pleas of Allegheny County...


...Langhorne, for Street Road Bar & Grille, Inc. BEFORE: CAPPY, C.J., and CASTILLE NIGRO SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This appeal presents two questions: (1) which party—the liquor license applicant or the Pennsylvania Liquor Control Board (“the Board...
141. H Com. v. Kyle,

...Gregory Scott Gardner, Williamsport, for Lynn E. Kyle. Before CAPPY, C.J., CASTILLE NIGRO
NEWMAN SAYLOR EAKIN BAER, JJ. OPINION Justice CASTILLE This Court granted discretionary
review to consider whether an individual is in custody for purposes of awarding credit toward a...

142. H Colpetzer v. W.C.A.B. (Standard Steel),
2003)

...PA Trial Lawyers Ass'n, appellee amicus curiae. Before: CAPPY, C.J., CASTILLE NIGRO
NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE In Hannaberry HVAC
v. Workers' Compensation Appeal Bd. (Snyder, Jr.), 575 Pa.66, 834 A.2d 524 (2003), this Court...

143. H Mullin v. Com., Dept. of Transp.,
2002)

...amicus curiae Pennsylvania Trial Lawyers Association. BEFORE: CAPPY, C.J., and CASTILLE
NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE This appeal
involves the interplay of the Transfer of State Highways Act ("Transfer Act"), 75 Pa.C.S. §§ 9201 08,
and...

144. H Com. v. Spotz,

...Paul Boas, Pittsburgh, for Mark N. Spotz. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN
SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE The dispositive issue in these
cross-appeals is whether the Superior Court erred in finding that trial counsel for appellee...

145. H Hutchison ex rel. Hutchison v. Luddy,

...for Pennsylvania Catholic Conference, Appellee Amicus Curiae. Before: CAPPY, C.J., CASTILLE
NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This is an
appeal from a Superior Court decision affirming in part and reversing in part the order of the...

146. H Com. v. DeJesus,

...for the Com. of PA, Appellee. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAY-
LOR EAKIN and BAER, JJ. OPINION Justice CASTILLE This is a direct appeal from the sentence
of death imposed by the Court of Common Pleas of Philadelphia County...

147. H Bill-Rite Contractors, Inc. v. The Architectural Studio,
2002)

...Nicholas Noel, Easton, for The Architectural Studio, appellee. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION Justice CASTILLE This appeal raises the first impression question of whether a building contractor may maintain a negligent misrepresentation claim against an...


...PA State Education Association BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN EAKIN and LAMB, JJ. OPINION OF THE COURT Justice CASTILLE This appeal arises from a declaratory judgment action challenging appellee Public School Employees' Retirement System's ("PSERS") interpretation of Section 8303...


...Nat. City Bank, appellee. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION OF THE COURT Justice CASTILLE This matter comes before this Court on a Petition for Certification of Questions of Law from the United States Court...


...Commonwealth of Pennsylvania, in 336 CAP. BEFORE: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE In these consolidated cross-appeals, appellant William Gribble appeals the denial, in part, of his petition for relief under the...


...Justice SAYLOR and Justice EAKIN would deny reconsideration per the considerations set forth in Rule of Appellate Procedure 2543. Justice CASTILLE Dissenting I respectfully dissent. Upon Application for Reconsideration, the Court today essentially reverses its position, memorialized in its September 17...


...K. Dakessian, for Com. of PA., appellee. BEFORE: ZAPPALA, C.J., CAPPY CASTILLE NIGRO NEWMAN SAYLOR EAKIN and EAKIN, JJ. OPINION Justice CASTILLE This is a direct appeal from a sentence of death imposed by the Philadelphia County Court of Common Pleas. Following...


...Dakessian, for the Com. of PA. Appellee. BEFORE: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE This is a direct appeal from sentences of death imposed by the Philadelphia County Court of Common Pleas. On October...

154. Sickierda v. Com., Dept. of Transp., Bureau of Driver Licensing,

...Wilmington, DE, for John W. Sickierda, appellee. Before: CAPPY, C.J., CASTILLE NIGRO
NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE This Court granted
review to determine whether a Pennsylvania-licensed driver who has been convicted of driving while
intoxicated in...

155. Allegheny County Sportsmen's League v. Rendell,

...Prevent Gun Violence, et al., appellee amici curiae. Before: CAPPY, C.J., CASTILLE NIGRO
NEWMAN SAYLOR and EAKIN, JJ. OPINION Justice CASTILLE This is an appeal from an en banc
decision of the Commonwealth Court which sustained appellees' (the Commonwealth's) preliminary
objection...

156. Shannoski v. PG Energy, Div. of Southern Union Co.,

...and L. McDonald, appellees. Before: ZAPPALA, C.J., CAPPY CASTILLE NIGRO NEWMAN
SAYLOR and EAKIN, JJ. OPINION OF THE COURT Justice CASTILLE This negligence action
arose in the wake of the flooding of Springbrook Creek in Luzerne County, which resulted when
Hurricane...

157. Com. v. Malloy,
579 Pa. 425, 856 A.2d 767, 2004 WL 1946291, Pa., September 01, 2004 (NO. 311 CAP)

...Zapp, Esq., for Commonwealth of Pennsylvania. BEFORE: CAPPY, C.J., and CASTILLE NIGRO
NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE On March 23, 2000, a
jury sitting before the Honorable John S. Kennedy of the Court of Common Pleas of...

158. Com. v. Bryant,

...Rebecca Denee Spangler Amy Zapp, Pittsburgh, for Com. Before CAPPY, C.J., CASTILLE,
NIGRO, NEWMAN, SAYLOR, EAKIN & BAER, JJ. OPINION Justice CASTILLE This is an
appeal from the partial denial of appellant's petition for relief under the Post Conviction Relief Act
("PCRA...

159. Com. v. Edmiston,

...Com. of PA, appellee. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR EAKIN
and BAER, JJ. OPINION OF THE COURT Justice CASTILLE Appellant appeals the denial of his
petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541...

160. Com. v. Cruz,

Philip Bladen, for Com. of PA, Appellee. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE In this appeal under the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S. § 9541 et seq. the issue is whether...

City of Philadelphia v. W.C.A.B. (Williams),

Mechanicsburg, Richard C. Lengler, Harrisburg, for W.C.A.B. Before CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE The issue before this Court is whether claimant/appellee Nadine Williams complied with the 120-day notice requirement of Section...

Pines v. Farrell,

R. Gottlieb, for City of Philadelphia. Before CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and BAER, JJ. OPINION Justice CASTILLE On October 31, 2003, this Court assumed plenary jurisdiction over this matter, pursuant to 42 Pa.C.S. § 726 The issue...

Com. v. Boczkowski,

...the Com., Appellee. Before ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION OF THE COURT Justice CASTILLE On May 5, 1999, a jury sitting before the Honorable David S. Cercone of the Court of Common Pleas of...

MCI WorldCom, Inc. v. Pennsylvania Public Utility Com'n,

Pennsylvania, Inc. (Bell Atlantic -PA, Inc.) Before: ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION Justice CASTILLE This is an appeal from an en banc decision of the Commonwealth Court that affirmed the order of the Pennsylvania...

In re Canvass of Absentee Ballots of November 4, 2003 General Election,

P. McCullough, for Allegheny County Dept. of Elections. Before: CAPPY, C.J., CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION Justice CASTILLE The issue on this appeal is whether non-disabled absentee voters may have third persons hand-deliver their ballots to...

Walker v. Eleby,

...of Philadelphia, appellee. Before: ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION OF THE COURT JUSTICE CASTILLE The issue on appeal is whether, under Section 8542(b)(7) of the Political Subdivision Tort Claims Act, 42 Pa.C.S...
167.  In re Nomination Papers of Lahr,

...of the Commonwealth Court is REVERSED. Opinion to Follow. Before CAPPY, C.J., CASTILLE
NIGRO, NEWMAN, SAYLOR, EAKIN, JJ. OPINION Justice CASTILLE This Opinion is filed in
support of this Court's unanimous per curiam order of October 29, 2003, which granted Lahr's...

168.  Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc., L.P.,

...S&R Restaurants, Wendy's of Greater Pgh., Jubilee Development. Before CAPPY, C.J., CASTILLE
NIGRO, NEWMAN, SAYLOR, LAMB, JJ. OPINION Justice CASTILLE The issue before this Court,
which is one of first impression, is whether claims arising out of a written construction...

169.  Behers v. Unemployment Compensation Bd. of Review,
2001, 53 WAP 2001)

...for appellee amicus curiae, AFL-CIO. Before: ZAPPALA, C.J., and CAPPY CASTILLE NIGRO
NEWMAN, SAYLOR, and EAKIN, JJ. OPINION JUSTICE CASTILLE The issue raised in this
appeal is whether the Commonwealth Court was correct in looking beyond the terms of a...

170.  Com., Dept. of Transp. v. Taylor,

...Richard Wile, for Gerald S. Taylor, appellee. Before CAPPY, C.J., and CASTILLE NIGRO
NEWMAN, SAYLOR, and EAKIN, JJ. OPINION JUSTICE CASTILLE The issue before this Court
is whether the statutory privilege set forth in § 3754(b) of the Motor Vehicle...

171.  Theodore v. Delaware Valley School Dist.,
86 MAP 2001, 85 MAP 2001)

...Theodore, et gl. Before: CAPPY, C.J., and CASTILLE NIGRO, NEWMAN, SAYLOR, EAKIN and
LAMB, JJ. OPINION OF THE COURT Justice CASTILLE In 1998, the Delaware Valley School
District (the "School District" or "District") adopted a policy which authorizes random, suspicionless
drug...

172.  Com. v. Huggins,

...PA. Lawrence A.J. Spegar, for appellee, Gary R. Huggins. Before: CAPPY CASTILLE NIGRO
NEWMAN, SAYLOR, and EAKIN, JJ. OPINION Justice CASTILLE The issue in this appeal is
whether a prima facie case of involuntary manslaughter was made where the Commonwealth
demonstrated...

173.  Com. v. Smith,

...D. Michael Fisher, Harrisburg, for Atty. Gen. of PA. Before: ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION Justice CASTILLE This case presents both state and federal search and seizure issues arising from a drug interdiction operation at a commercial...

174. Com. v. Bradley,

...Chardo, Harrisburg, for the Com. of PA., Appellee. Before: ZAPPALA, and CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION Justice CASTILLE This Court granted discretionary review in this criminal appeal to address whether appellant's two prior armed robbery convictions arose from...

175. Smailey v. Zoning Hearing Bd. of Middletown Tp.,

...Connie Cummings, Intervenors. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION OF THE COURT Justice CASTILLE In this zoning appeal, we consider questions arising from a local zoning board's determination that a long-standing home accounting...

176. Commonwealth v. Robinson,

...Appellee Pro Se. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION OF THE COURT Justice CASTILLE In the past several years, this Court has weighed in upon the validity of various theories devised to avoid the...

177. Hannaberry HVAC v. W.C.A.B. (Snyder, Jr.),

...Hannaberry HVAC, et al. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION OF THE COURT Justice CASTILLE This Court granted review to determine whether, in amending Section 309(d) of the Workers' Compensation Act ("Act"), see 77...

178. Criswell v. King,

...Werner, Lancaster, for David S. King. Before ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION Justice CASTILLE The issue on this appeal is whether in order to preserve a claim that a jury verdict is contrary to...

179. Com. v. Mockaitis,

...David M. Mockaitis. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN, and SAYLOR, JJ. OPINION OF THE COURT Justice CASTILLE This is a direct appeal from the decision of a three-judge panel of the Court of Common Pleas of...


...Commonwealth of PA. Before CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN AND LAMB, JJ. OPINION OF THE COURT Justice CASTILLE In 1997, the Pennsylvania General Assembly amended Section 6106 of the Uniform Firearms Act (codified in the Crimes Code at...


...for the Com. of PA, Appellee. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION JUSTICE CASTILLE On November 27, 2000, following a jury trial, appellant was convicted of two counts of first-degree murder, 1 one...


...of PA, Appellee. Before: FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT JUSTICE CASTILLE Before this Court is appellant's direct appeal from the sentence of death imposed by a jury on October 26, 1999...


...Before: ZAPPALA, C.J., AND CAPPY CASTILLE NIGRO NEWMAN SAYLOR AND EAKIN, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT Justice CASTILLE This Court granted discretionary review of this matter arising under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541...


...for the Com. of PA, Appellee. Before: ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION Justice CASTILLE Two questions are presented on this appeal: (1) the sufficiency of the evidence to prove the intent to inflict serious...


...Gary Coleman, Appellee. Before: ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION OF THE COURT Justice CASTILLE This case is before the Court following our remand for further consideration in light of our decision in Commonwealth v...


...Tristate Transport, Appellee. Before: FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT JUSTICE CASTILLE This Court granted allowance of appeal to determine whether the Workers' Compensation Judge ("WCJ")
in this case failed to adequately...


...Zapp, Harrisburg, for Commonwealth of Pennsylvania, Before CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE This is a direct appeal from the sentence of death imposed on appellant by the Court of Common Pleas of...


...for W.C.A.B., appellee. Before: ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION OF THE COURT JUSTICE CASTILLE This Court granted review in this case to address the effect of the payment of injured on duty ("IOD") benefits...


...Harrisburg, for the Com. of PA. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION JUSTICE CASTILLE On June 18, 1998, a jury sitting in the Court of Common Pleas of Philadelphia County convicted appellant of two...


...Harrisburg, for Appellee, Com. of PA. Before: FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION JUSTICE CASTILLE On October 1, 1998, a jury sitting in the Court of Common Pleas of Delaware County convicted appellant of first...


...of Business & Industry. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT Justice CASTILLE This appeal presents a tax issue of first impression for this Court: whether a Pennsylvania corporation's sales of goods to...


...Marshall, Philadelphia, for the Com., Appellee. Before: CAPPY, C.J., and CASTILLE NIGRO NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE This Court granted limited discretionary review of a pretrial suppression ruling to consider whether a warrantless telephone call police made...


appeal, we must determine the application of this Court's decision in Kachinski v. Workmen's Compensation Appeal...

194. Armbruster v. Horowitz,

...David Namey, Kingston, for David Horowitz. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION Justice CASTILLE The issue in this appeal is whether an appellate court may review a properly preserved weight of the evidence claim...

195. Com. v. Spetzer,

...Jon Anthony Spetzer. Before ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION OF THE COURT Justice CASTILLE The issue on appeal is whether the Superior Court erred in granting a new trial on grounds that trial counsel...

196. Prudential Property and Cas. Ins. Co. v. Colbert,
572 Pa. 82, 813 A.2d 747, 2002 WL 31906705, Pa., December 31, 2002 (NO. 8 WAP 2001)

...SAYLOR concurs in the result. Justice CASTILLE files a concurring and dissenting opinion in which Justice NEWMAN joins. 1018 Justice CASTILLE Concurring and Dissenting I concur in the majority's resolution of the first certified question that the restrictive definition of "insured...

197. Purple Orchid, Inc. v. Pennsylvania State Police,

...Francis X. O'Brien, for Liquor Control Board Before ZAPPALA, C.J., and CAPPY CASTILLE NIGRO SAYLOR and EAKIN, JJ. OPINION Justice CASTILLE The issue in this appeal is whether Section 4-493(10) of the Liquor Code, 47 P.S. § 4-493...

198. Com. v. Jones,
572 Pa. 343, 815 A.2d 598, 2002 WL 31925190, Pa., December 31, 2002 (NO. 227)

...Before ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and EAKIN, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT Justice CASTILLE This is an appeal from the denial of appellant's petition for relief under the Post Conviction Relief Act (PCRA), 42...

199. Com. v. Busanet,

...Dougherty, Norristown, for Commonwealth of PA. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION Justice CASTILLE On February 19, 1999, following a three-day capital jury trial, appellant was convicted of first-degree murder, 1 aggravated...

200. Pap's A.M. v. City of Erie,

...Fraas George M. Janoscko, Pittsburgh, for Allegheny County. Before ZAPPALA, C.J., and
CAPPY CASTILLE NIGRO SAYLOR and EAKING, JJ. Justice CASTILLE This matter is before
this Court upon remand following the United States Supreme Court’s reversal of our decision in
Pap’s...

201. Com. v. Jones,

...for Office of Atty. Gen., appellee. Before ZAPPALA, C.J., and CAPPY CASTILLE NIGRO
NEWMAN SAYLOR and EAKING, JJ. OPINION Justice CASTILLE This is an appeal from the
denial of appellant's petition for relief under the Post Conviction Relief Act (PCRA), 42...

202. Porreco v. Porreco,

...of my esteemed colleague in the dissent, I am constrained to join the concurrence offered by the
Chief Justice. Justice CASTILLE, concurring. I join the lead opinion, but write separately to em-
phasize that there is another issue, which the courts below...

203. Com. v. Wharton,

...of Atty. Gen. Before: ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN SAYLOR and
EAKING, JJ. OPINION OF THE COURT Justice CASTILLE Appellant appeals the trial court's denial
of relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 et...

204. Com. v. Harris,

...Lancaster, for the Com. of PA. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE
NIGRO NEWMAN and SAYLOR, JJ. OPINION Justice CASTILLE This is a direct appeal from the
sentence of death imposed on appellant by the Court of Common Pleas of...

205. Com. v. Haag,
570 Pa. 289, 809 A.2d 271, 2002 WL 31396434, Pa., October 24, 2002 (NO. 308 CAP.APP.)

...files a concurring opinion. Mr. Chief Justice ZAPPALA files a dissenting opinion in which Mr.
Justice NIGRO joins. 1018 Justice CASTILLE, Concurring. I join the majority opinion with the
exception of its suggestion that, if and when Randy Todd Haag regains...

206. Bowser v. Blom,

...Johannes V. Blom. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO
NEWMAN and SAYLOR, JJ. OPINION OF THE COURT Justice CASTILLE This Court granted
allowance of appeal in this domestic relations/support matter limited to a question of first impression:
the...

207. Com. v. Eller,

...Erie, for appellee, Com. of PA. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE
NIgro Newman and Saylor, JJ. OPINION Justice CASTILLE The issue on this appeal is
whether the Superior Court erred in applying Commonwealth v. Lantzky, 558 Pa. 214, 736...

208. Com. v. Bond,

...Commonwealth of PA. Before ZAPPALA, C.J., and CAPPY CASTILLE NIGRO NEWMAN
SAYLOR and EAKIN, JJ. OPINION OF THE COURT Justice CASTILLE This is an appeal from
the denial of appellant's petition for relief under the Post Conviction Relief Act (PCRA), 42...

209. Gmerek v. State Ethics Com’n,
2000, 55 MAP 2000)

...cross-motions for summary judgment and the motion for judgment on the pleadings. Justice CAPPY
joins in this opinion. Justice CASTILLE OPINION IN SUPPORT OF AFFIRMANCE Although the
points cogently made in Mr. Justice Saylor's Opinion in Support of Reversal have...

210. Montgomery v. Bazaz-Sehgal,

...for appellees, John and Marsha Montgomery. Before FLAHERTY, C.J., ZAPPALA CAPPY
CASTILLE and Saylor, JJ. OPINION OF THE COURT Justice CASTILLE In this appeal, this
Court reaffirms that the doctrine of informed consent, whether involving non-consensual surgery or a
lack...

211. Com. v. Fulton,

...J. Burns, Philadelphia, for Com., Appellee. Before CAPPY, C.J., and CASTILLE NIGRO
NEWMAN SAYLOR EAKIN and LAMB, JJ. OPINION Justice CASTILLE This Court granted
limited discretionary review to resolve two issues: 1) whether trial counsel was ineffective in failing to
present...

212. Com. v. Templin,

...Marianne Killinger, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE
NIgro Newman Saylor, JJ. OPINION OF THE COURT Justice CASTILLE This Court granted
discretionary pretrial review of a suppression ruling to determine and elucidate the proper
standard for evaluating a...

213. Navickas v. Unemployment Compensation Review Bd.,

...Mark Ecker, for Children's Hosp. Before: FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE
NIgro, and Saylor, JJ. OPINION OF THE COURT CASTILLE, Justice. In this unemployment
compensation matter, the Commonwealth Court determined that nurses "are held to a higher standard of care..."

214.  
Com. v. Lambert,  
787 A.2d 327, 2001 WL 1664207, Withdrawn for N.R.S. bound volume, Pa., December 31, 2001 (NO. 223)

...Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT Justice CASTILLE In this appeal from the denial of appellant's petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541...

215.  
Com. v. Lambert,  
368 Pa. 346, 797 A.2d 232, 2001 WL 1818003, Pa., December 31, 2001 (NO. 223)

...Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT Justice CASTILLE In this appeal from the denial of appellant's petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541...

216.  
C.B. ex rel. R.R.M. v. Com., Dept. of Public Welfare,  


217.  
Com. v. Wituszynski,  

...Streily, Pittsburgh, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN, and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. [1] The issue on appeal is whether a police officer had reasonable and articulable grounds to stop appellant's vehicle...

218.  
Sahutsky v. H.H. Knoebel Sons,  
566 Pa. 593, 782 A.2d 996, 2001 WL 1314434, Pa., October 26, 2001 (NO. 208 MAP 1999)

...Mychak Geckle & Welker, for Janice & Robert Sahutsky. Before FLAHERTY, C.J., ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION Justice CASTILLE This Court granted allocatur to consider the effect of appellees' failure to file a petition to open a judgment of...

219.  
Sphere Drake Ins. Co. v. Philadelphia Gas Works,  

...P. Carfagno, for Sphere Drake Ins. Co. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice: The issue on appeal is whether appellant Philadelphia Facilities Management Corporation ("PFMC"), a non-profit corpora-

tion incorporated by Philadelphia...


...Streily, Pittsburgh, for Commonwealth of Pennsylvania. Before FLAHERTY, C.J., ZAPPALA CAPPY CASTILLE NIGRO, and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue in the instant appeal is whether a dismissal of criminal charges is an appropriate sanction for the...


...Martin, for amicus—John L. Thompson. Before FLAHERTY, C.J., ZAPPALA CAPPY CASTILLE NIGRO and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice: Appellee John L. Thompson, who suffered work-related injuries while in the employ of appellant Craig Welding and Equipment...


...Jr., for Zoning Hearing Board of Hazel Tp. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN SAYLOR, JJ. OPINION CASTILLE, Justice. This Court granted allocatur to consider: (1) whether the authority granted to a school district under the Public School...


...Penneco Energy Corporation. Stanley Yorscz, Pittsburgh, for CNG Transmission. Before FLAHERTY, C.J., ZAPPALA CAPPY CASTILLE NIGRO NEWMAN SAYLOR, JJ. OPINION CASTILLE, Justice. This matter comes before this Court on a Petition for Certification of Questions of Law from the United States...


...C. Baldwin Iva C. Dougherty, for Com., Appellant. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN SAYLOR, JJ. OPINION CASTILLE, Justice. [1] This Court granted review to determine whether a criminal defendant who failed to file a direct appeal from...


...Marshall William G. Young, Philadelphia, for Com. Before: FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. This Court granted allowance of appeal in this matter to consider whether the redaction of a non-testifying co...

...B. John, Uniontown, for appellee, Charity Hughes. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. On January 29, 1992, appellee, Charity Hughes, a self-described intermediate level skier, traveled with her high school ski...


...Basile and Laura Clavin. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted allocatur to address questions concerning the scope and contours of agency relationships under Pennsylvania law. Specifically...


...Graci, for Office of the Atty. Gen. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Cumberland...


...Pro Se. Daniel G. Malcon, Pro Se. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. This matter comes before this Court pursuant to 42 Pa.C.S. § 722 (7) 1 to determine whether the Court...


...Nicole, Richard and Cheryl Althaus. Before FLAHERTY, C.J., and ZAPPALA CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue in this case is whether a therapist who treats a child for alleged parental sexual abuse owes...


...Zapp, Harrisburg, for Office of Atty. Gen. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of York...


CAPPY CASTILLE NIGRO NEWMAN , and SAYLOR, JJ. CASTILLE , Justice. Allowance of appeal was granted in this matter limited to the issue of whether a court may properly adjudge...


...Dist. Atty., Dist. Attorney's Office , for Com. Before FLAHERTY , C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE , Justice. [1] This Court granted review to determine whether Article I, Section 8, of the Pennsylvania Constitution categorically proscribe the...


...Office of the Dist. Atty., for Commonwealth. Before FLAHERTY , C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE , Justice. This Court granted allocatur in this matter to determine whether certain 1995 amendments to the Juvenile Act, 42 Pa.C.S. ...


...Chester, for Cat Fund. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE , Justice. These consolidated appeals present this Court with the novel issues of whether the Medical Professional Liability Catastrophe Loss Fund...


...appellees, Donna M. Meinsler. Before FLAHERTY , C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE , Justice, We granted allocatur to consider the question of whether the immunity provided by the Recreational Use of Land and...


...Graci, Harrisburg, for Commonwealth. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE , Justice. In January of 1993, a jury convicted appellant of first-degree murder 1 and possessing an instrument of crime...


...Board. James C. Schwartzman , for Lawrence D. Greenberg. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and SAYLOR, JJ. OPINION CASTILLE , Justice. This matter involves Lawrence Greenberg's Petition for Reinstatement to the bar of the Pennsylvania Su-

preme Court following his disbarment...

239. Com. v. Miller,
560 Pa. 500, 746 A.2d 592, 2000 WL 216641, Pa., February 24, 2000 (NO. 236 CAP. APP.)

...Office of Atty. Gen. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. In this appeal from the denial of appellant's petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S...

240. Martin Media v. Com., Dept. of Transp.,

...P. Kamin, for Martin Media. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The Pennsylvania Department of Transportation ("PennDOT") appeals from the decision of the Commonwealth Court holding that appellee, Martin Media...

241. Com. v. Lewis,

...for Attorney General's Office Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. Appellant appeals from the lower court's denial of his Post Conviction Relief Act (PCRA) petition claiming that the PCRA...

242. Com. v. Thomas,

...Graci, Harrisburg, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. Appellant appeals from the trial court's denial of his petition under the Post Conviction Relief Act ("PCRA") claiming that...

243. Com. v. Bango,
560 Pa. 84, 742 A.2d 1070, 1999 WL 1211886, Pa., December 20, 1999 (NO. 72 W.D. APPEAL 1997)

...McKenna, Harrisburg, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted review in this matter to determine whether the Superior Court erred in concluding that the trial...

244. Fish v. Behers,

...Fiffik, Pittsburgh, for Robert Behers. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The presumption of paternity and the theory of estoppel and their application are the issues before this Court in...

245. Com. v. Small,
559 Pa. 423, 741 A.2d 666, 1999 WL 991914, Pa., November 01, 1999 (NO. 187 CAP.APP.)

...Lou V. Erb, York, for the Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of York...

246. Mars Emergency Medical Services, Inc. v. Township of Adams,

...Butler, for Callery Borough. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. Appellant presents this Court with the questions of whether a municipality may, consistent with the Emergency Medical Services Act...

247. Com. v. Murphy,
559 Pa. 71, 739 A.2d 141, 1999 WL 979026, Pa., October 28, 1999 (NO. 169)

...Office of Atty. Gen. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. In this direct appeal of the denial of his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S. ...

248. Com. v. McCullum,

...Broman, Pittsburgh, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. In this appeal from the denial of appellant's petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S. ...

249. Com. v. Persichini,

...FLAHERTY files an opinion in support of reversal in which Justices ZAPPALA and CAPPY join. OPINION IN SUPPORT OF AFFIRMANCE CASTILLE, Justice. The issues raised in this appeal are whether the Commonwealth proved beyond a reasonable doubt the corpus delicti for...

250. Waugh v. W.C.A.B.,

...Harrisburg, for John Waugh. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted allocatur in the above-referenced matter in order to address whether an insurance company is entitled...

251. Com. v. Thompson,

...Harrisburg, for Office of the Attorney General. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. This is a direct

appeal from a sentence of death imposed by the Court of Common Pleas of Philadelphia...


...for Cynthia A. Varner. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted allocatur to consider whether the Commonwealth Court erred by determining that the Department of Public Welfare...


...for Com. John E. Gainer, for Ortiz. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. The issue before this Court is whether the Superior Court correctly held that an enclosed backyard of an apartment...


...Philadelphia, for Peter Falkowski. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue before this Court in these consolidated appeals is whether an appeal from the denial of unemployment compensation...


...for Commonwealth of Pennsylvania. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. Appellants challenge the constitutionality of a City of Philadelphia ordinance which authorizes the City to recognize only intervenor AFSCME...


...College, for Anthony Guy. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted allocatur in order to determine whether, in a negligence action, a trial court may inform the...


...W.C.A.B. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. On August 13, 1984, appellee George Lucey ("claimant") filed a claim petition seeking benefits due to injuries caused by...

258. Uniontown Area School Dist. v. Pennsylvania Labor Relations Bd. ex rel. Uniontown Area Educ. Ass'n,

...Uniontown Area School Dist. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. [1] The sole issue before this Court is whether the Public Employe Relations Act (PERA) 1 covers a union...

259. Com. v. O'Hannon,

...Philadelphia, for James O'Hannon. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. We granted allocatur in order to determine whether the prosecutor's questioning of appellee on cross-examination regarding appellee's threats...

260. Com. v. Allen,

...Cappisto Michael W. Streily, for Commonwealth. Before FLAHERTY, Jr., C.J., and ZAPPALA CAPPY CASTILLE NGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. The issue before this Court is whether a "miscarriage of justice" occurred which would warrant relief on a repetitive...

261. Housing Authority of County of Chester v. Pennsylvania State Civil Service Com'n,

...State Civil Service Com'n. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. [1] [2] This Court granted review of this matter in order to decide whether the Commonwealth Court erred by...

262. Connolly v. Com., Medical Professional Liability Catastrophe Loss Fund,

...Fund and Thomas Callahan. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue before this Court is whether the Medical Professional Liability Catastrophe Loss Fund (CAT Fund) has a duty...

263. In re D.M.,

...Philadelphia, for the Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This is an appeal from the Order of the Superior Court affirming the trial court's order adjudicating appellant delinquent...


...Kovach, Lancaster, for appellees. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. [1] This Court granted review in order to decide whether an employer seeking to terminate a claimant's workers' compensation...


...F. Povilaitis, Harrisburg, for PUC. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue on appeal is whether a utility company violates its duty to provide reasonable and adequate service as...


...Gongaware, Greensburg, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted review of this matter to determine whether the Superior Court erred in determining that the Commonwealth...


...Peter U. Hook, Uniontown, for the Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. This is a direct appeal from the order of the Court of Common Pleas of Fayette County denying appellant's...


...P. McCloskey, Washington, for Kimberly Ann Sakel. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION CASTILLE, Justice. The issue before this Court is whether counsel, during closing argument, may properly encourage the jury to draw adverse...


...an opinion in support of reversal in which Chief Justice FLAHERTY and Justice ZAPPALA join. OPINION IN SUPPORT OF AFFIRMANCE CASTILLE, Justice. The issue in this appeal is whether the 1988 version of the Maryland crime of driving while intoxicated ("DWI...
in after “Parole...
...Gen., for the Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Philadelphia...

278. Com. v. Baez,

...Graci, Atty. Gen., for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. Following a jury trial in the Lancaster County Court of Common Pleas, appellant was found guilty of first-degree...

279. Commonwealth v. Mumia Abu-Jamal a/k/a Wesley Cook,

...Mumia Abu-Jamal, a/k/a Wesley Cook, Appellant. No. 119 Capital Appeal Docket. Oct. 29, 1998. ORDER MR. JUSTICE CASTILLE AND NOW, this 29th day of October, 1998, it is hereby ordered that Appellant's Motion requesting my recusal in this...

280. Com. v. Abu-Jamal,

...C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION IN SUPPORT OF DENIAL OF APPELLANT'S MOTION FOR RECUSAL CASTILLE, Justice. On August 5, 1996, appellant filed an Application for Recusal requesting that I recuse myself from participating in the...

281. Com. v. Copenhhefer,

...Graci, Harrisburg, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. In this direct appeal from the denial of his petition filed pursuant to the Post Conviction Relief Act, 42...


...Pennsylvania Liquor Control Bd. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. Appellant raises two issues in this appeal: whether the Commonwealth Court applied the correct standard of review to the...

283. Donnelly v. Bauer,

...Philadelphia, for Hai Son Dinh. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue in these consolidated appeals is whether the Motor Vehicle Financial Responsibility Law ("MVFRL") requires that...

284. **Com. v. Edmondson,**

...Burt, Erie, for Herman Edmondson. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue before this Court in this criminal matter is whether the guilty verdicts rendered by the jury...

285. **Agnew v. Dupler,**

...Dupler and Tp. of Hellam. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. This direct appeal raises two issues under the Wiretapping and Electronic Surveillance Control Act ("Wiretap Act"), 18 Pa.C.S. §§...

286. **R/S Financial Corp. v. Kovalchick,**

...for Michael Kovalchick, et al. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue before this Court is whether the Superior Court exceeded its scope of review when it reconsidered the...

287. **Kituskie v. Corbman,**

...Garfinkle, Corbman, Greenberg and Jurikson, P.C. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE, and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted allocatur in this matter in order to address two issues. The first issue is whether the...

288. **Adams Sanitation Co., Inc. v. Com., Dept. of Environmental Protection,**

...Harrisburg, for Com., D.E.P. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue presented in this appeal is whether a party who leases a parcel of land and operates...

289. **Com. v. Sanchez,**

...C. Dougherty, Reading, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. In this case of first impression this Court is asked to determine whether Pennsylvania law or California law should...

290. **Sapp Roofing Co., Inc. v. Sheet Metal Workers' Intern. Ass'n, Local Union No. 12,**

...W. David Hall. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE, and NIGRO, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. The issue in

this appeal is whether the Right to Know Act, 65 P.S. § 66.2, which provides...


...Philadelphia, for Nationwide Ins. Co. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal is whether a person who has voluntarily elected to forego underinsured motorist coverage...


...for United Artists Realty, Co. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted allocatur in this matter in order to address two related issues. The first issue is whether...


...of Old York Road. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal is whether a plaintiff may appeal as of right from an order which dismissed...


...San Francisco, CA, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The issues presented in this appeal are: (1) whether the trial court improperly permitted the Commonwealth, over appellant's objection...


...F. Nelson for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO NEWMAN and SAYLOR, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue before this Court is whether appellant should be granted a new trial where the trial court refused...


...Catherine Marshall Peter J. Gardner, Philadelphia, for Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. We granted allocatur in this case to address whether a court can properly admit evidence in a rape trial...


CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal is whether a person who has selected the "limited tort" option for his automobile...


...Graci, Harrisburg, for Com., Office of Atty. Gen. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. In March of 1991, a jury found appellant guilty of first-degree murder 1 and sentenced him to death...


...for Motorists Mut. Ins. Co. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue before this Court is whether an insurance coverage dispute arising out of an automobile accident caused by...


...J.J. Prior Report: 451 Pa.Super. 648, 679 A.2d 845 ORDER PER CURIAM: Appeal dismissed as having been improvidently granted. CASTILLE and NEWMAN, JJ., dissent. 0 #2 2059...


...Jr., Philadelphia, for Com. Before FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. The issue before this Court is whether electronically intercepted conversations in a physician's office between the physician (appellant) and...


...David S. Hawkins, for WCAB. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. [1] This Court granted allocatur in this matter in order to address two issues. The first issue is whether...


...for Susan and Frederick Muntz. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal in these two matters is whether the National Traffic and Motor Vehicle Safety Act...


CAPPY and CASTILLE, JJ. OPINION OF THE COURT CASTILLE, Justice. [1] The sole issue in this case is whether the Due Process Clause of the Fourteenth Amendment to the...


...Philadelphia, for Northampton Convalescent Center. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal is whether the Commonwealth Court, in reversing the administrative adjudication and ordering the Commonwealth...


...for appellee. David Hawkings, Secretary, W.C.A.B. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue on appeal is whether a workers' compensation claimant who suffers a compensable injury before the effective date...


...Wayne, for Albert Rose, D.P.M. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue before this Court in these consolidated appeals is whether the doctrine of informed consent should be...


...for American Republic Ins. Co. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. This Court granted allocatur in this matter in order to address two issues. The first issue is whether the...


...Mascelli, Scranton, for P & R Welding. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal is whether the "gross method" or the "net method" should be utilized in calculating...


...Young, Somerset, for the Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue on appeal is whether appellant is entitled to relief under the Post Conviction Relief Act ("PCRA") 1...

...Graci, Harrisburg, for the Commonwealth. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue before this Court is whether appellant's waiver of all collateral or appellate proceedings is valid. We...


...Casenta, Jr. Robert A. Graci, Harrisburg, for Commonwealth. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. Following a jury trial, appellant was found guilty of first degree murder, 1 carrying a firearm without a license...


...Norristown, Robert A. Graci, Harrisburg, for the Com. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. On June 7, 1993, this Court reversed appellant's judgment of sentence of death in connection with the June 4...


...A.2d 1076 (1997) This matter is REMANDED to the trial court for further proceedings in accordance with this order. CASTILLE, J., dissents. 0 #2 2059...


...Diaz, Doylestown, Stephen B. Harris, Warrington, for Commonwealth. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. The sole issue raised on appeal is whether the victim in this case was “unconscious” within the meaning of...


...Board of Review. Darrell Callwood, Intervenor. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue on appeal in this matter is what factor or factors must be considered when determining whether an...
Shafer v. State Employees' Retirement Bd.,

...Strokov, Harrisburg, for Ronald G. Shafer. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue before this Court is whether a member of the State Employees' Retirement System ("SERS") who teaches at...

Allen v. Montgomery Hosp.,

...Walter Allen in No. 0037 E.D. Appeal Dkt. 1996. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. CASTILLE, Justice. OPINION OF THE COURT The sole issue on appeal is whether the immunity provisions of the Mental Health Procedures...

Stuski v. Lauer,

...is DENIED and the order of the Commonwealth Court is AFFIRMED. A written opinion will follow. OPINION OF THE COURT CASTILLE, Justice. On April 22, 1997, this Court issued a per curiam order denying appellant's pro se direct appeal and affirming...

Cherry v. City of Philadelphia,

...of Philadelphia. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. The issue in this matter is whether the trial court correctly granted the City of Philadelphia's preliminary objections thereby...

Pipkin v. Pennsylvania State Police,

...Barrett, Harrisburg, for PA State Police Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue on appeal is whether a probationary state trooper has a sufficient personal or property right in his...

Com. v. Williams,

...Connors, Media, for Eric Williams. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue on appeal is whether evidence seized from appellee's bedroom after a warrantless search by his parole officer...

Lewis v. United Hospitals, Inc.,

...Philadelphia, for Steven Munzer, M.D. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE
TILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal is whether the Superior Court erred in quashing appellants’ appeal from the trial court’s...


...Graci Office of Attorney General, for Commonwealth. Before NIX, C.J., and FLAHERTY CAPPY and CASTILLE, JJ. OPINION OF THE COURT CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Montgomery...


...Weiner, Philadelphia, for Commonwealth. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. Two issues are raised in this appeal. The first is whether an adjudication of delinquency in which the juvenile...


...Harrisburg, for Pennsylvania Liquor Control Board. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue before the Court in this case is whether the Commonwealth Court erred in dismissing appellant’s appeal for...


...the Com. Robert Graci, Harrisburg, for Office of Attorney General. Before FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Philadelphia...


...NIX Former C.J., and FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. Following a six (6) day jury trial, appellant was convicted of first degree murder, 1 burglary, 2 theft by...
...McCarthy, Pittsburgh, for Commonwealth. Before FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. Following a jury trial in the Allegheny County Court of Common Pleas, appellant was convicted of driving under the...

332. H Blackwell v. City of Philadelphia,

...Philadelphia, for Saidel, Rivera and Armbrister Before FLAHERTY ZAPPALA CAPPY and CASTILLE, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. The sole issue raised on appeal is whether a Philadelphia City Councilwoman's complaint alleging that the firing of her...

333. A Hoerner v. Com., Public School Employees' Retirement Bd.,

...School. Richard C. Snelbaker, Mechanicsburg, for Henry Hoerner. Before FLAHERTY ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The issues before this Court are (1) whether increases in a party's salary during his last year of employment...

334. H Matter of One Hundred or More Qualified Electors of Municipality of Clairton, County of Allegheny, Com.,

...John F. Cambest and Bonnie Brinneier, Pittsburgh, for Donald Desiderio. Before FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. The issue raised in this direct appeal is whether appellants have standing to contest the council seat of a...

335. H Thunberg v. Strause,

...Jon C. Lyons, Lancaster, for J. Thunberg. Before FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. The two related issues presented in this case are: (1) whether the trial court abused its discretion when it...

336. H Peters Creek Sanitary Authority v. Welch,

...R. Cooney, for Thomas, Janice and Mark Welch. Before FLAHERTY ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue on appeal is whether a trial court may strike an answer to a complaint as untimely...

337. A Adamski v. Miller,

...Insurance Company. Ronald C. Miller, Pro Se. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. This case involves an insurance coverage dispute over whether there was sufficient evidence at trial to establish that a...
338. C Werner v. Zazyczny,

...J. Goldband, Harrisburg, for Appellees. Before FLAHERTY, C.J., and ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. [1] Appellant, Daniel H. Werner, Jr., directly appeals the Commonwealth Court's dismissal of his Petition for Review which sought...

339. H Zerbe v. Unemployment Compensation Bd. of Review,

...C. Zerbe, Jr., Harrisburg, for Thomas C. Zerbe, Jr. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY and CASTILLE, JJ. OPINION CASTILLE, Justice. [1] The issue before this Court is whether an employee who occupies a position which is designated as a...

340. H Com. v. Killen,

...M. Dawson Douglas W. Ferguson, Meadville, for Appellee. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. The issue on appeal here is whether the trial court erroneously excluded certain provocative statements made by the complainant...

341. C Hill v. Pennsylvania Dept. of Environmental Protection,

...se. Calvin R. Koons, Harrisburg, for appellees. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. Appellant, Jeffrey D. Hill, filed an employment discrimination complaint against appellees in the Lycoming County Court of Common Pleas...

342. Com. v. Barud,

...Jr., West Chester, Amicus Curiae. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. The issue presented in this appeal is whether the newly enacted Driving Under the Influence statute, 75 Pa.C.S. §...

343. H Com. v. Jenner,

...C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. No. 72 M.D. Appeal Dkt. 1994. OPINION OF THE COURT CASTILLE, Justice. Each of the appellants in this matter was cited for a traffic violation for driving a motor vehicle on...

344. Machipongo Land and Coal Co., Inc. v. Com., Dept. of Environmental Resources,

...of Environmental Resources, etc. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE...
TILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue raised on reargument before this Court is whether the Commonwealth Court or the Clearfield County Court...


...Office of Atty. Gen., for Commonwealth. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY and CASTILLE, JJ. OPINION OF THE COURT CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Philadelphia...


...Robert Graci, Harrisburg, for Atty. Gen. Before NIX, C.J., and ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Philadelphia...


...Office, Harrisburg, for Appellee. Before NIX, C.J., and FLAHERTY-ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. Appellant pled guilty generally to two separate murders. Following a degree of guilt hearing, the trial court found appellant...


...Valoria L. Cheek Gas Commission, Philadelphia, for Appellee. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. The issue before this Court is whether the fixed annual $18,000,000 payment by the Philadelphia Gas Works ("PGW") to...


...General's Office, for the Commonwealth. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice: This is an automatic direct appeal from the judgment of sentence of death imposed on appellant, Hubert Michael, by...


...Emph. Edward A. McFarland, Pittsburgh, for Cerebral Palsy. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE, and NIGRO, JJ. OPINION CASTILLE, Justice. [1] The sole issue raised in this appeal is whether the Pennsylvania Workmen's Compensation Act ("Act") 1 permits a...
351. Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh,

...Jacqueline R. Morrow, Pittsburgh, for Appellee Zoning Bd. Before NIX, C.J., and FLAHERTY
ZAPPALA CAPPY CASTILLE and NIGRO, JJ. OPINION CASTILLE, Justice. Appellants raise
two related issues in this appeal. First, appellants contend that the Commonwealth Court exceeded its
scope of...

352. Com. v. Browdie,

...Michael W. Streily, for Commonwealth. Composition of the Court NIX, C.J., and FLAHERTY
ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. The issue
in this appeal is whether a trial court is required to charge the jury on voluntary manslaughter...

353. County of Allegheny v. Moon Tp. Mun. Authority,

...Solicitor, Pittsburgh, for Appellee. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CAS-
TILLE NIGRO and NEWMAN, JJ. OPINION OF THE COURT CASTILLE, Justice. We granted
review in this matter to determine whether appellant, Moon Township Municipal Authority ("Moon
Authority") has the power...

354. Com. v. Ahearn,

...Leber Dennis E. Boyle, Coulersport, for Commonwealth. Before NIX, C.J., and FLAHERTY
ZAPPALA CAPPY CASTILLE NIGRO and NEWMAN, JJ. OPINION CASTILLE, Justice. This
case presents the sole issue of whether the Commonwealth can remove a nolle prosequi and refile
criminal charges...

355. Degenhardt v. Dillon Co.,

...McDonough & Lucas, Pittsburgh, for appellee. Before NIX, C.J., and FLAHERTY ZAPPALA
CAPPY CASTILLE, and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice.
The sole issue in this matter is whether appellant was entitled to judgment notwithstanding the verdict
because the trial...

356. Konya v. District Attorney of Northampton County,

...for Preate. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEM-
URO, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice.
Two issues are raised in this appeal. The first issue is whether the Commonwealth Court properly
dismissed appellant's complaint...

357. Com. v. Robinson,

...for appellee. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MON-
TEMURO, J.J. Opinion Announcing the Judgment of the Court CASTILLE, Justice. Appellant claims he is entitled to a new trial because the trial court: (1) failed to give an adequate...

358. H Com. v. Jones,

...Robert A. Graci Attorney General's Office, for Com. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. Following a nine (9) day jury trial in which appellant was tried with co-defendants Samuel Brown and James...

359. H Com. v. Johnson,

...Attorney General's Office, for Com. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This is a direct appeal from a sentence of death 1 imposed by the Court of Common Pleas of...

360. C Com. v. Harris,

...Hugh J. Burns, Jr., Philadelphia, for Commonwealth. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. The issue in this appeal from the order of the Superior Court affirming the judgment of sentence of the...

361. H Martin v. Sun Pipe Line Co.,

...Willkes Barre, for Sun Pipeline. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This appeal concerns a dispute over whether an easement, which was granted to the Sun Pipe Line Company ("Sun...

362. A Com. v. LaCava,

...for Attorney General's Office Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This is an automatic direct appeal 1 from the judgments of sentence of death and concurrent and consecutive terms...

363. H Com. v. DeBlase,

...McNeil Killinger, Norristown, for Commonwealth. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This case presents the sole issue of whether the three year, eight month delay of appellant's trial during which...
364. Com. v. Starr,

...Attorney General, (For Attorney General). Before NIX, C.J., FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This is an automatic direct appeal to the Supreme Court from the judgment of sentence of death imposed upon...

365. American Airlines, Inc. v. Com., Bd. of Finance and Revenue,

...Appellee at No. 90. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. The primary issue raised in these consolidated appeals is whether food, non-alcoholic beverages and related non-food supplies...

366. Com. v. Miller,

...Harrisburg, for Attorney General's Office Before: NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This is a direct appeal from a sentence of death 1 imposed by the Court of Common Pleas of...

367. Krumbine v. Lebanon County Tax Claim Bureau,

...George E. Christianson, Lebanon, for appellee. Before NIX, C.J., FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This case presents the issue of whether the Real Estate Tax Sale Law (the "Tax Sale Law"), 72 P.S...

368. Com. v. Simmons,

...Atty., Gary Costlow, Asst. Dist. Atty., for appellee. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. Following a four (4) day jury trial, appellant was found guilty of first degree murder 1 and robbery 2...

369. Com. v. Runion,

...Sembrot, Harrisburg, for Com. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. We granted review in this matter to address whether the Department of Public Welfare may be considered a "victim..."

370. DeLellis v. Borough of Verona,

...Johnson, Pittsburgh, for appellees. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. The

sole issue raised in this appeal is whether subsection (ii) of Section 771 of the Police Pension Act...

371. ▲ Com. v. Williams,
541 Pa. 85, 660 A.2d 1316, 1995 WL 379870, Pa., June 20, 1995 (NO. 51)

...Robert A. Graci, for Atty. General's Office Before NIx, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. Following a three day jury trial, appellant was found guilty of first degree murder 1 and possession of an...

372. ▲ Com. v. Jones,

...recusal was thus not warranted. Code of Jud.Conduct, Canon 3 OPINION IN SUPPORT OF DENIAL OF APPELLANT'S MOTION FOR RECUSAL CASTILLE, Justice. On May 26, 1995, James Jones ("Petitioner") filed a Motion for Recusal requesting that I recuse myself from participating...

373. ▲ Com. v. Jackson,

...possession with intent to deliver. I would, therefore, affirm the Order of the Superior Court.
OPINION IN SUPPORT OF AFFIRMANCE CASTILLE, Justice. Following a bench trial, appellant was convicted of possession of a controlled substance 1 and possession of a controlled...

374. ▲ Malloy v. Boyertown Area School Bd.,

...Bell, for H. Malloy. Before NIx, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue presented in this case is whether a construction management contract for a public school construction project...

375. ▲ Rogers v. Lewis,

...James J. Auchinleck, Jr., Newtown, for A. Rogers. Before NIx, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE, and MONTEMURO, JJ. OPINION CASTILLE, Justice. Appellant appeals to this Court from the order of the Court of Common Pleas of Bucks County granting appellee's...

376. ▲ Com. v. Cull,

...Com. Before NIx, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. The two related issues raised in this appeal from the order of the Superior Court reversing the order of...

377. ▲ Com. v. Walker,
540 Pa. 80, 656 A.2d 90, 1995 WL 125897, Pa., March 23, 1995 (NO. 43)
...Harrisburg, for Atty. Gen. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This is an automatic direct appeal from the judgment of sentence of death imposed on appellant, Shawn Walker, following...

378. ▶ Com. v. Carter,

...Scott A. Bradley, Asst. Dist. Atty., for appellee. Before NIX, C.J., and FLAHERTY ZAPPALA CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. The sole issue before this Court is whether appellant’s trial counsel was ineffective for failing to correct an allegedly...

379. ▶ Commonwealth v. Zimmick,

...J. Uncapher, Asst. Dist. Atty., for appellee. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION CASTILLE, Justice. Appellant raises two issues on appeal to this Court from the judgment of the Superior Court affirming the judgment...

380. ▶ Machipongo Land and Coal Co., Inc. v. Com., Dept. of Environmental Resources,

...Mather, Harrisburg, for Com., D.E.R. Before NIX, C.J., and ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. This case raises several questions of jurisdiction over pre-enforcement challenges to regulations promulgated by the Environmental Quality Board...

381. ▶ Com. v. Rosario,

...Com. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION ANNOUNCING THE JUDGMENT OF THE COURT CASTILLE, Justice. The sole issue before this Court is whether appellant is entitled to an appeal as of right to the...

382. ▼ Com. v. Fahy,

...Atty. Gen., for appellee. Before NIX, C.J., and FLAHERTY ZAPPALA PAPADAKOS CAPPY CASTILLE and MONTEMURO, JJ. OPINION OF THE COURT CASTILLE, Justice. The sole issue raised in this direct appeal from the denial of the Appellant's petition filed pursuant to the...

No. 76 MAP 2006, No. 80 MAP 2006

SUPREME COURT OF PENNSYLVANIA

596 Pa. 62; 940 A.2d 1227; 2007 Pa. LEXIS 2958

March 26, 2007, Submitted

December 27, 2007, Decided

PRIOR HISTORY: [***1]
76 MAP 2006

Appeal from the Order of the Commonwealth Court, entered on April 24, 2006, at No. 513 MD 2005 sustained the preliminary objection filed by respondents and petitioners petition for review is dismissed. Trial Court Judge: Dan Pellegrini, Commonwealth Court Judge. Intermediate Court Judges: Bonnie Brigance Leadbetter, President Judge, James Gardner Colins, Bernard L. McGinley, Dan Pellegrini, Rochelle S. Friedman, Robert E. Simpson, JJ.
Appeal from the Order of the Commonwealth Court, entered on April 24, 2006, at No. 513 MD 2005 Dismissing Petitioner’s petition for review. Trial Court Judge: Dan Pellegrini, Commonwealth Court Judge. Intermediate Court Judges: Bonnie Brigance Leadbetter, President Judge, James Gardner Colins, Bernard L. McGinley, Dan Pellegrini, Rochelle S. Friedman, Robert E. Simpson, JJ.


COUNSEL: For Gene Stilp, Pro Se, APPELLANT: Pro Se

For Senators Jubelirer, Brightbill and Wenger, APPELLEE: Linda J. Shorey, Esq. , Kirkpatrick & Lockhart, Preston Gates Ellis, LLP

George A. Bibikos, Esq.

For General Assembly et al., APPELLEE: Thomas Walter Dymek, Esq.

For Department of Auditor General and Jack Wenger, APPELLEE: Robert Forman Teplitz, Esq.

JUDGES: MR. JUSTICE CASTILLE, CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ. MR. JUSTICE CASTILLE. Mr. Chief Justice Cappy, Mr. Justice Eakin, Madame Justice Baldwin and Mr. Justice Fitzgerald join the opinion. Mr. Justice Saylor files a concurring opinion in which Mr. Justice Baer joins.

OPINION BY: CASTILLE

OPINION

[*64] [**1228] MR. JUSTICE CASTILLE

The two issues presented in these cross-appeals are: (1) whether a taxpayer, Gene Stilp, has standing to seek, inter alia, a declaratory judgment that the Commonwealth’s Auditor General has the authority and duty to audit the financial accounts of the General Assembly (the legislators’ appeal); and (2) if the taxpayer does have standing to seek such relief, whether the Auditor General has the authority to audit the General Assembly’s financial accounts (Stilp’s appeal). The Commonwealth Court, sitting en banc, determined that Stilp had taxpayer standing to bring this action, but ultimately concluded that no constitutional or statutory authority existed to support a declaration that the Auditor General possesses the authority to audit [***2] the financial accounts of the General Assembly. For the following reasons,
we find that the Commonwealth Court erred regarding the question of standing. This finding, in turn, makes it unnecessary to pass upon Stilp's [*65] merits claim. Accordingly, we affirm the order below, but on standing grounds.

On October 11, 2005, Stilp, acting pro se, filed a petition for review in the Commonwealth Court seeking a declaratory judgment that the Auditor General has the authority to audit the General Assembly, and that the Legislative Audit Advisory Commission ("Commission") 1 was unconstitutionally created. Moreover, Stilp requested that the Court: (1) compel the Auditor General to audit the General Assembly; (2) compel the General Assembly's leadership and members of the Commission to cooperate with such an audit; (3) award him the costs of the lawsuit; and (4) grant him further equitable or declaratory relief as deemed necessary by the Court. Following the filing of preliminary objections by the governmental parties, 2 Stilp filed an amended petition for review [*1229] on November 29, 2005. 3 The governmental parties responded by filing amended preliminary objections arguing, inter alia, that: Stilp lacks [*33] standing to bring this action; an attempt by the Auditor General to audit the General Assembly would violate the doctrine of separation of powers; and the yearly audit conducted by the auditing firm retained by the Commission satisfies the constitutional auditing requirement set forth in Article VIII, Section 10 of the Pennsylvania Constitution. 4 [*66] The case was then submitted on the briefs without oral argument to the Commonwealth Court.

FOOTNOTES

1 The Commission is the body of the General Assembly created in 1970 to audit its financial accounts. 71 P.S. § 1189.2.

2 The governmental parties are split into three groups, with each group submitting separate pleadings throughout the course of this action. The first group is comprised of the General Assembly, the Commission, then-Speaker John M. Perzel, Senator Robert J. Mellow, Representative Samuel H. Smith, and Representative H. William DeWeese. The second group is comprised of Auditor General Jack Wagner and the Department of the Auditor General. Finally, the third group consists of now-former Senators Robert C. Jubelirer and David Brightbill, and Senator Noah Wenger.

3 Stilp's amended petition for review was essentially identical to the original [*44] petition, but did add the Commission as a party in this matter.

4 Article VIII, Section 10 was adopted in 1968 following the 1967-1968 Pennsylvania Constitutional Convention. The provision, entitled "Audit," provides in full:

HN1 The financial affairs of any entity funded or financially aided by the Commonwealth, and all departments, boards, commissions, agencies, instrumentalities, authorities and institutions of the Commonwealth, shall be subject to audits made in accordance with generally accepted auditing standards.
Any Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth shall not be charged with the function of auditing that transaction after its occurrence.

PA. CONST. art. VIII, § 10.

On April 24, 2006, the Commonwealth Court issued an en banc published opinion and order sustaining the collective preliminary objections and dismissing Stilp's petition. Stilp v. Commonwealth, 898 A.2d 36 (Pa. Cmwlth. 2006). The Commonwealth Court initially determined that Stilp possessed the requirements for taxpayer standing to bring this action, citing Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 507 A.2d 323 (Pa. 1986). The court [***5] ultimately concluded, however, that Stilp failed to provide either constitutional or statutory authority supporting the position that the Auditor General can, and must, audit the General Assembly. In addition, the court concluded that the separation of governmental powers doctrine prohibits such an audit.

In support of these conclusions, the Commonwealth Court relied heavily on an official opinion issued in 1966 by Edward Friedman, the Acting Attorney General of Pennsylvania at that time. Specifically, the opinion addressed a question posed to the Attorney General by the Auditor General at that time: whether the Department of the Auditor General had the authority to audit the appropriations for employees of all legislative departments. The Attorney General's opinion concluded that the Auditor General did not have that authority because there was no constitutional or statutory provision permitting such an audit. The opinion further concluded that such action by the Auditor General would violate the separation of powers doctrine:

A unilateral action such as an audit of any expenses of the offices of the General Assembly by the Auditor General would most certainly be an intrusion upon the [***6] prerogative of [*67] a coordinate branch of the State Government and the violation of that fundamental doctrine inherent in our form of government.


The Commonwealth Court correctly acknowledged that this opinion was forty years old and, more importantly, that it was issued before Article VIII, Section 10 of the Pennsylvania Constitution was adopted. The court noted, however, that the reasoning supporting the Attorney General's opinion is not contravened by Article VIII, Section 10 because the constitutional provision does not specify who is [**1230] to conduct the audits of the financial affairs of the Commonwealth's departments and, notably, "does not give any inherent power to the Auditor General to audit the General Assembly." Stilp, 898 A.2d at 41. Relying on the legislative history of Article VIII, Section 10, the Commonwealth Court determined that the delegates of the Constitutional Convention consciously decided to leave open the details of what party could audit the financial accounts of the General Assembly. Therefore, according to the court, the General Assembly properly filled that void by enacting 71 P.S. §§ 1189.1-1189.2.
Section 1189.1, [*47] entitled "Audits of affairs of the General Assembly, legislative agencies," explicitly states that the Commission is entrusted with the sole authority over the process of auditing the General Assembly's finances. Specifically, the statutory provision reads as follows:

The financial affairs of the General Assembly and its legislative service agencies shall be audited by a certified public accountant to be retained by the Legislative Audit Advisory Commission. At least one such audit shall be made each year; however, special audits may be made when they appear necessary in the judgment of the Legislative Audit Advisory Commission.

71 P.S. § 1189.1. Section 1189.2, entitled "Legislative Audit Advisory Commission," establishes the Commission, how its [*68] members are chosen, and its duties. The provision provides in full:

(a) There shall be an independent advisory commission, to be known as the Legislative Audit Advisory Commission, which shall consist of eight members, a majority and a minority member of the House of Representatives and two public members appointed by the Speaker of the House of Representatives, and a majority and a minority member of the Senate and two public members appointed [*48] by the President Pro Tempore of the Senate. The commission shall organize annually by electing from among themselves a chairman and a secretary.

(b) Except for the public members of the commission who shall receive a compensation of $ 100 for each day the commission shall meet, no other member of the commission shall receive any compensation but all members shall receive traveling and actual expenses incurred as members of the commission.

(c) The powers and duties of the commission shall be to:

(1) Examine the standards of audits performed under the provisions of section 10 of Article VIII, of the Constitution of Pennsylvania, and recommend measures for the improvement of pre-auditing and post-auditing of the financial affairs of the Commonwealth.

(2) Report annually recommendations and suggested legislation, if any, for the improvement of auditing in the Commonwealth, and particularly as it pertains to the Legislature.

71 P.S. § 1189.2.

Moreover, the Commonwealth Court acknowledged that Section 402 of the Fiscal Code charges the Auditor General with the responsibility of auditing the financial affairs of Commonwealth departments, with the exception of the Department of the Auditor General. [*49] The court, however, [*231] again [*69] relied on the Attorney General's official opinion of 1966, which concluded that Section 402 of the Fiscal Code did not empower the Auditor General to audit the accounts of the General Assembly, and thus dismissed the notion that Section 402 was controlling. The Commonwealth Court also emphasized that 71 P.S. §§ 1189.1-1189.2 grants sole authority over auditing the General Assembly to the Commission, in essence concluding that those statutory provisions trump
the Fiscal Code. 6

FOOTNOTES

5 Section 402 provides, in pertinent part:

HN4 Except as may otherwise be provided by law it shall be the duty of the Department of the Auditor General to make all audits of transactions after their occurrence, which may be necessary, in connection with the administration of the financial affairs of the government of this Commonwealth, with the exception of those of the Department of the Auditor General. It shall be the duty of the Governor to cause such audits to be made of the affairs of the Department of the Auditor General.

At least one audit shall be made each year of the affairs of every department, board, and commission of the executive branch of the government, and all collections [***10] made by departments, boards, or commissions, and the accounts of every State institution, shall be audited quarterly.

72 P.S. § 402.

6 It is not entirely clear that 71 P.S. §§ 1189.1-1189.2 conflicts with Section 402 of the Fiscal Code, specifically because the Fiscal Code speaks only of auditing the executive branch, not the legislative branch.

Judge Robert E. Simpson, Jr., authored a concurring and dissenting opinion. Judge Simpson agreed with the majority's conclusion that Stilp failed to set forth any legal basis for his position that the Auditor General can audit the General Assembly. The dissenting portion of Judge Simpson's responsive opinion, however, addressed Stilp's claim that a recent audit conducted by the accounting firm retained by the Commission was not performed in accordance with generally accepted auditing standards, as required by Article VIII, Section 10 of the Pennsylvania Constitution. 7 Noting that the posture [*70] of the case requires that all well-pled factual allegations and reasonably deduced inferences be accepted as true, Judge Simpson reluctantly surmised that the audit was not performed according to constitutional standards. Judge Simpson maintained, therefore, [***11] that Stilp stated a claim against the Commission and its representative member, Noah Wenger, and would allow the suit to continue against those parties only.

FOOTNOTES

7 It is unclear which fiscal year audit (2003 or 2004) Stilp contends was not conducted in accordance with generally accepted auditing standards. Both Stilp's pleadings and the Commonwealth Court opinion fail to definitively resolve this issue; however, the briefs filed by the governmental parties assert that the 2004 fiscal year audit is at issue. Stilp merely mentions that an article appearing in the Pittsburgh Tribune Review on August 24, 2005 reported that the accounting firm Ernst & Young had, at that time,
just performed an audit of the General Assembly. It appears that the Commission has retained Ernst & Young every year since 1971 to be the accounting firm that audits the General Assembly's financial accounts.

Following the Commonwealth Court's decision, Stilp filed this direct appeal challenging the lower court's merits determination of his claims. Former Senators Jubelirer and Brightbill and Senator Wenger (collectively, "the Senators") filed a cross-appeal, challenging the Commonwealth Court's preliminary determination [***12] that Stilp maintained taxpayer standing to bring this action. Both appeals were filed pursuant to 42 Pa.C.S. § 723(a) and Pa.R.A.P. 1101(a)(1). On March 26, 2007, this Court ordered both appeals submitted on the briefs without oral argument. We will first address the Senators' standing [***1232] claim because, if it is determined that Stilp does not have standing to seek the relief requested, we need not, and indeed cannot, address the merits of the substantive issues raised on Stilp's appeal. 9

FOOTNOTES

8 The Senators, of course, prevailed below. Stilp, however, does not argue that the Senators were not aggrieved by the decision on his standing, and thus he does not dispute the Senators' own standing to appeal. See Pa.R.A.P. 501 (any party aggrieved by an appealable order may appeal therefrom). In any event, the Senators' argument that Stilp lacked standing to initiate this lawsuit would be available to them in response to Stilp's appeal, as an alternative ground for affirming the Commonwealth Court's dismissal of Stilp's petition for review.

9 The applicable standard of review is well-settled:

HNS An appellate court should affirm an order of a trial court (here, the Commonwealth Court) sustaining preliminary [***13] objections in the nature of a demurrer where, when all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts are accepted as true, the plaintiff is not entitled to relief. The court need not, however, accept any of the complaint's conclusions of law or argumentative allegations.


The Senators argue that the Commonwealth Court erred in resolving the preliminary question of whether Stilp had taxpayer [*71] standing to bring the instant action. 10 The Senators additionally fault the Commonwealth Court for reaching this determination in a footnote without any substantive analysis. 11 Thus, the Senators argue, the Commonwealth Court should not even have proceeded to the merits.

FOOTNOTES
10 In the court below, the other two groups comprising the governmental parties -- i.e., (1) the General Assembly, the Commission, former Speaker Perzel, Senator Mellow, Representative Smith, and Representative DeWeese; and (2) Auditor General Jack Wagner and the Department of the Auditor General -- shared the Senators' position that Stilp lacks standing to bring this action. These two groups, however, did [***14] not join the cross-appeal.

11 The Commonwealth Court's analysis on the threshold taxpayer standing issue was not thorough or exacting as it did not apply the facts of this matter to the elements of the Biester test; rather, the court simply forwarded a conclusory determination of taxpayer standing after citing the required elements. The Commonwealth Court's entire discussion of this issue was the following:

All of the Respondents have preliminarily objected on the basis that Stilp lacks standing to bring this action either because he has failed to allege an interest which is substantial, direct and immediate or because he has not shown that he has suffered any injury. While the issue is close, we find for purposes of this appeal that Stilp has standing under Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 507 A.2d 323 (1986), which requires him to demonstrate that 1) the governmental action would otherwise go unchallenged; 2) those directly and immediately affected by the governmental action are not inclined to challenge it; 3) judicial relief is appropriate; 4) there is no redress through other channels; and 5) no other persons are better suited to assert the claim. See [***15] also In Re Milton Hershey, 867 A.2d 674 (Pa.Cmwlth.), petition for allowance of appeal granted, 586 Pa. 717, 889 A.2d 1219 (2005) (taxpayer need not suffer any pecuniary harm to have standing to sue in state court; relaxed application of substantial-direct-immediate test in William Penn). Consequently, the preliminary objections on this issue raised by all of the Respondents are denied.

Stilp, 898 A.2d at 39 n.7.

The Senators contend that in order for a party to avail itself of the taxpayer standing exception to traditional standing requirements, that party must initially allege an injury that he or she has suffered, and allege some causal connection between the action complained of and the alleged injury. Senators' Brief at 8 (citing Application of Biester, 487 Pa. 438, 409 A.2d 848, 851-52 (Pa. 1979) and [*72] Upper Bucks County Vocational-Technical Sch. Educ. Ass'n v. Upper Bucks County Vocational-Technical Sch. Joint Comm., 504 Pa. 418, 474 A.2d 1120, 1122 (Pa. 1984) ("A careful reading reveals that the exceptional cases referred to in Biester involve situations where there is some degree of causal connection between the action complained of and the injury alleged, although it is too small to ordinarily confer [***16] standing."). The Senators argue that Stilp has not forwarded any allegation of injury to himself, including any injury to his taxpayer funds. [**1233] Moreover, the Senators assert that Stilp failed to allege any causal connection between the Auditor General's refusal to audit the General Assembly and any alleged injury he may have suffered. Finally, the Senators maintain that Stilp's conclusory allegation in his amended petition that he has taxpayer standing is actually a conclusion of law and not an allegation of facts. 12
FOOTNOTES

12 Stilp's entire allegation concerning standing in his amended petition for review reads as follows:

Petitioner, as a taxpayer, brings forth this action which will likewise benefit the citizens of the Commonwealth by challenging action by the Respondents that has and will otherwise go unchallenged and therefore, judicial relief is appropriate and redress through other channels is unavailable.

Stilp's Amended Petition for Review at 2 P 5.

The Senators next argue that, even assuming Stilp satisfied the predicate requirements of cognizable injury and causal connection, he has not established the five factors necessary for taxpayer standing. Under Biester, a taxpayer has standing to challenge an act if: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim. Pittsburgh Palisades Park, LLC v. Commonwealth, 585 Pa. 196, 888 A.2d 655, 662 (Pa. 2005) (citing Consumer Party, 507 A.2d at 329). The Senators contend that it is conceivable that another Auditor General could interpret his or her authority differently and bring a similar action in the future. They further contend that the General Assembly is not benefited by the fact that the Auditor General does not audit it as it is audited yearly pursuant to 71 P.S. §§ 1189.1-1189.2. Moreover, the Senators maintain that judicial relief is not appropriate because this case presents a non-justiciable question under the separation of powers doctrine, and that Stilp has other channels for seeking redress, namely, the election process. Finally, the Senators argue that the current Auditor General, or a future Auditor General, unquestionably is better situated to bring an action challenging how the General Assembly is audited.

In response, Stilp confines his arguments to the five-factor taxpayer standing test announced in Biester. Stilp contends that absent his challenge, the Auditor General's refusal to audit the General Assembly would go unchallenged. He additionally declares that the current Auditor General and the General Assembly benefit from the current system of auditing, but he does not explain that assertion. Stilp argues that judicial relief is appropriate because this is a case of first impression. Furthermore, he feels that redress through other channels is functionally unavailable because the Auditor General refuses to disrupt the current auditing process of the General Assembly, and the General Assembly permits only the accounting firm chosen by the Commission to audit its financial records, an arrangement Stilp feels is unconstitutional. Lastly, in a political rather than a legal argument, Stilp intemperately declares that he is best suited to bring this action because he has experience in filing lawsuits against the General Assembly, and because he "is one of few active reformers who have the best interest of the people in mind as he challenges the corrupt status quo." Stilp's Brief at 8.
In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action. (1234) Pittsburgh Palisades, 888 A.2d at 659 (citing Bergdoll v. Kane, 557 Pa. 72, 731 A.2d 1261, 1268 (Pa. 1999)). Taxpayer standing is an exception to the traditional standing requirements that was first recognized by this Court in Biester. Recently, this Court noted the following regarding taxpayer standing:

While Biester curtailed the concept of standing based solely upon taxpayer status, it also recognized that one who was not "aggrieved" so as to satisfy standing requirements might nevertheless be granted standing as a taxpayer if certain preconditions were met.

This exception's relaxation of the general rules regarding standing and their requirement of a substantial, direct, and immediate interest in the challenge, is policy driven. This policy, as expressed in Biester, revolves around the concept of giving standing to enable the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. "Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts."

Pittsburgh Palisades, 888 A.2d at 661-62 (quoting Biester, 409 A.2d at 851 n.5).

In applying the Biester exception, it is clear that Stilp has not satisfied the five requirements necessary for taxpayer standing. For purposes of decision, we need only focus on the fifth factor. Certainly, the Auditor General, an elected official, is a far-better situated party to bring an action seeking a declaratory judgment that the Department of the Auditor General does, or does not, have the authority to audit the financial accounts of the General Assembly. The fact that Stilp has a different view of the Auditor General's authority, or the role of the office, does not make him better situated than the official. Nor do Stilp's self-serving assertions of his own status, and his gratuitous denigration of elected officials, make him an appropriate party to litigate any question concerning the duties attendant upon an elective office. The discretion to bring such an action lies with the current Auditor General, or a future Auditor General, but no other party. The proper recourse available to Stilp, or other persons similarly situated, is to ask the Auditor General to seek to audit the General Assembly. Beyond that, Stilp's remedy, like that of all citizens, is at the ballot box.

Our decision today is consistent with two recent cases applying the Biester exception. In Pittsburgh Palisades, 585 Pa. 196, 888 A.2d 655, potential applicants for a slot machine license challenged the constitutionality of a provision of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. § 1101 et seq., which required the Commonwealth to return license fees to license holders if certain delineated changes were made to the Gaming Control Board within five years after the issuance of licenses. This Court determined that the petitioners did not have taxpayer standing to challenge the constitutionality of the provision because they did not satisfy three of the Biester requirements, including the fifth factor. Concerning this factor, we determined that legislators who would be prevented from amending the statute would be better situated to raise a constitutional
challenge. Pittsburgh Palisades, 888 A.2d at 662. Similarly, in the instant case, the Auditor General plainly is best situated to seek a declaratory judgment concerning his authority to audit the General Assembly's financial accounts.

In Stilp v. Commonwealth, 588 Pa. 539, 905 A.2d 918 (Pa. 2006), we determined that the petitioner (the very same petitioner as in the case sub judice) had taxpayer standing to challenge the constitutionality of legislation that created specific formulas which resulted in increased salaries for certain government officials. We found that no other persons were better situated to raise a constitutional challenge because all those directly and immediately affected by the statute -- i.e., the members of the General Assembly -- were beneficially affected and, thus, not likely to bring a cause of action. Id. at 950-51. Again, here, as noted above, the Auditor General is clearly the more appropriate party to seek a declaratory judgment concerning whether he maintains the authority to audit the General Assembly.

For the foregoing reasons, we affirm the judgment of the Commonwealth Court, which dismissed Stilp's petition for review, but we do so on the ground that Stilp lacks taxpayer standing, which renders consideration of the merits unnecessary. Jurisdiction is relinquished.

[*76] Mr. Chief Justice Cappy, Mr. Justice Eakin, Madame Justice Baldwin and Mr. Justice Fitzgerald join the opinion.

Mr. Justice Saylor files a concurring opinion in which Mr. Justice Baer joins.

CONCUR BY: SAYLOR

CONCUR

CONCURRING OPINION

MR. JUSTICE SAYLOR

While I agree with the majority that the current or future Auditor General is, or will be, in a better position to pursue the specific declaratory relief sought by Appellant in this case, see Majority Opinion, slip op. at 13, I nonetheless hold a broader view of citizen-taxpayer standing than that expressed by my colleagues. In this regard, the majority is correct that this Court's opinion in Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979), has been interpreted as setting forth a five-part, conjunctive test for establishing whether taxpayer standing is permissible in a particular case. See Majority Opinion, slip op. at 11 (citing Pittsburgh Palisades Park, LLC v. Commonwealth, 585 Pa. 196, 207, 888 A.2d 655, 662 (2005); Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 170, 507 A.2d 323, 329 (1986)).

1 However, an examination of the Biester opinion reveals that it did not create the inflexible
paradigm implied by later decisions. In this regard, the Biester Court simply noted that taxpayer suits have been permitted by the courts out of a concern that judicial review might otherwise be unavailable, and then observed that this "will most often occur when those directly and immediately affected by the complained of expenditures are beneficially affected as opposed to adversely affected." See Biester, 487 Pa. at 445, 409 A.2d at 852. Significantly, however, the Court did not state that this scenario constituted a factual prerequisite for instituting a taxpayer [*77] suit. Similarly, the Biester Court merely indicated that, in examining whether taxpayer standing should be afforded in a given case, "[c]onsideration must be given to other factors such as, for example, the appropriateness of judicial relief, the availability of redress through other channels, or the existence of other persons better situated to assert the claim." Id., 487 Pa. at 446, 409 A.2d at 852 (internal quotation marks, citations, and emphases omitted). Again, however, the Court did not imply that all of these factors must be present in a taxpayer suit. Indeed, it is only in subsequent cases that a conjunctive [*75] test has been construed from this language. See, e.g., [*13236] Pittsburgh Palisades, 585 Pa. at 207, 888 A.2d at 662; Consumer Party of Pennsylvania, 510 Pa. at 170, 507 A.2d at 329. In my view, the earlier and less rigid standard announced in Biester presents a more appropriate means of effectuating the policy underlying the taxpayer exception to traditional standing requirements. See Biester, 487 Pa. at 445, 409 A.2d at 852; Faden v. Philadelphia Housing Authority, 424 Pa. 273, 278, 227 A.2d 619, 621-22 (1967) (stating that "the fundamental reason for granting [taxpayer] standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts."). For instance, use of this model would permit citizen-taxpayer challenges in situations such as that presented by the present controversy, where, although a government official might be better positioned to challenge a particular governmental action, he or she is unwilling to do so.

FOOTNOTES

1 This test provides that a taxpayer has standing to sue if: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter are beneficially affected and not inclined [*25] to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim. See Majority Opinion, slip op. at 11.

That being said, however, I agree with the Commonwealth Court majority that, although Appellant may have standing to pursue his present action, he has not demonstrated that the Auditor General has either a constitutional or statutory obligation to conduct an audit of the General Assembly. See Stilp v. Commonwealth, 898 A.2d 36, 42 (Pa. Cmwlth. 2006). In this regard, the Commonwealth Court majority has provided a well-reasoned and correct analysis of the issue. I therefore concur with my colleagues' decision to affirm the judgment of the Commonwealth Court.

Mr. Justice Baer joins this concurring opinion.
SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellees v. KIA MOTORS AMERICA, INC., Appellant; SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellees v. KIA MOTORS AMERICA, INC., Appellant; SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellees v. KIA MOTORS AMERICA, INC., Appellant


SUPREME COURT OF PENNSYLVANIA

613 Pa. 371; 34 A.3d 1; 2011 Pa. LEXIS 2896; 76 U.C.C. Rep. Serv. 2d (Callaghan) 384

April 15, 2009, Argued

December 2, 2011, Decided


For Product Liability Advisory Counsel, APPELLANT AMICUS CURIAE: James Michael Beck, Esq. ¶¶, Dechert LLP.

For Association of International Automobile Manufacturers, Inc. and Alliance of Auto. Man., APPELLANT AMICUS CURIAE: Emily Jane Lawrence, Esq. ¶¶, Morgan Lewis & Bockius, L.L.P. and Amy Keating and Alicia Downey ¶, Bingham McCutchen, LLP.


For Community Legal Services of Philadelphia and PA Association of Justice, APPELLEE AMICUS CURIAE: Michael J. Boni, Esq. ¶¶ and Joshua D. Snyder, Esq. ¶¶, Boni & Zack, LLC.

JUDGES: CASTILLE ¶, C.J., SAYLOR ¶, EAKIN ¶, BAER ¶, TODD ¶, McCAFFERY ¶, GREENSPAN ¶, JJ. Madame Justice Greenspan ¶ did not participate in the decision of this case. Messrs. Justice Eakin ¶ and Baer ¶, Madame Justice Todd ¶ and Mr. Justice McCaffery ¶ join the opinion. Mr. Justice Saylor ¶ files a dissenting opinion.

OPINION BY: CASTILLE ¶

OPINION

[*389] [**11] MR. CHIEF JUSTICE CASTILLE ¶
Appellant, an automobile manufacturer who unsuccessfully defended a class action lawsuit [*390] for breach of express warranty, appeals the Superior Court's decision to affirm the certification of the class by the trial court, and the amount of damages and litigation costs awarded to the class. Costs included a significant legal fee, entered pursuant to the Magnuson-Moss Warranty Improvement Act (the "MMWA"), 15 U.S.C. § 2310(d)(2). For the reasons that follow, we affirm in part and reverse in part, with reversal being limited to the lower courts' approval of an enhancement of class counsel's legal fee by application of a risk multiplier to the amount of the lodestar;2 and we remand to the trial court for adjustment of the attorneys' fee award in accordance with this Opinion.

Case History

Appellee Shamell Samuel-Bassett, on behalf of herself and others similarly situated (the "class"), filed this class action lawsuit in January 2001, in the Philadelphia Court of Common Pleas. Bassett alleged that, in October 1999, she purchased a model year 2000 Sephia from appellant Kia Motors America, [*390] Inc., ("KMA" or the "manufacturer") with an extended warranty of [*434] sixty months or 60,000 miles.3 The purchase contract included the manufacturer's standard warranty clause, which stated that: "[KMA] warrants that your new [Sephia] is free from defects in material and workmanship," subject to several terms and conditions.

According to the complaint, Bassett experienced malfunctioning of her Sephia's brakes within 17,000 miles of use, which manifested as an inability to stop the vehicle, increased stopping distances, unpredictable and violent brake pedal pressures, brake lockup and vibration, and general interference with control of the vehicle. She attributed these manifestations to a defect in the design of the Sephia's brake system causing inadequate heat dissipation, premature wear of the brake pads, and warping of
the rotors. KMA's authorized dealerships attempted five repairs on Bassett's vehicle between January and October 2000, replacing brake pads and rotors on four of five occasions. According to Bassett, she sought to rescind her purchase contract but KMA refused her demand. Bassett claimed that, although KMA was aware of the defect in the brake system, KMA failed to correct the defect and failed to honor the warranty by charging her for the required repairs and replacements. Further, Bassett alleged that the defect in the brake system's design was common to all model year 1995 to 2001 Sephias. She claimed that all members of the class experienced premature wear and malfunction of the brakes, needing repairs within the first 20,000 miles of purchase. According to the complaint, all repair attempts were ineffective, most were not covered by KMA under the warranty, and the members of the class incurred damages of a similar nature to Bassett's.

FOOTNOTES

4 The Sephia's brake system was designed as follows: the caliper -- a part fixed to the body of the car -- forced the brake pads to clamp against the rotor; the rotor was attached to the wheel of the vehicle and rotated along with the wheel. Braking occurred as a result of friction between the surface of the brake pads and the rotor. N.T., 7/15/04, at 147.

The complaint stated four causes of action: breach of express warranty, breach of implied warranty of merchantability, violation of the MMWA, and violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Bassett claimed that each member of the class was entitled to compensatory damages for out-of-pocket repair costs, loss of use costs, loss of resale value, funds for permanent repair of the vehicle, treble damages, and costs of litigation, including legal fees. Finally, Bassett requested an injunction compelling KMA to notify all class members of the potential danger for personal injury deriving from the Sephia's brake defect, and to provide free repair and replacement of the affected brake systems.

In February 2001, counsel for KMA filed a notice to remove the action to the U.S. District Court for the Eastern District of Pennsylvania, invoking that court's diversity jurisdiction. The parties then filed an amended complaint and answer with the federal court. Bassett's amended federal court complaint re-stated the allegations in her original state court complaint, and KMA answered denying all allegations and asserting forty-seven boilerplate affirmative defenses. The manufacturer sought dismissal of the amended complaint. In due course, the district court certified the class on all of Bassett's claims except her UTPCPL claim. See Samuel-Bassett v. Kia Motors Am., Inc., 212 F.R.D. 271 (E.D. Pa. 2002). KMA appealed and the U.S. Court of Appeals for the Third Circuit, which raised the issue of jurisdiction sua sponte, vacated the lower court's certification decision, and remanded for a determination of whether the parties met the amount in controversy required to establish diversity jurisdiction. See Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392 (3d Cir. 2004). In light of the Third Circuit's decision, the parties agreed that the jurisdictional requirement had not been satisfied and, on April 8, 2004, the district court remanded the case to the Philadelphia County Court of Common Pleas.
[*392] Following remand, in May 2004, Bassett filed her motion for class certification with the Philadelphia Court of Common Pleas. Bassett's motion for class certification filed in state court simply incorporated by reference the motion she originally filed in federal court. Compare Pa.R.C.P. Nos. 1702, 1708 with Fed.R.Civ.P. 23(a)-(b). In September 2004, the trial court granted Bassett's motion for class certification in part. The court certified [*397] the following class as to the breach of express warranty, breach of implied warranty of merchantability, and MMWA claims:

All residents of the Commonwealth of Pennsylvania who purchased or leased model year 1995-2001 Kia Sephia automobiles for personal, family or household purposes for a period of six years preceding the filing of the complaint in this action.

Certification Order, 9/17/04, at 1. Following discovery, the parties stipulated that KMA did not begin selling the Sephia in the United States until 1997. Bassett also conceded that the 2001 model Sephia had undergone substantial redesign that corrected the alleged brake defect. Consequently, the class was limited to purchasers of 1997 to 2000 Sephias. Class certification was denied as to the UTPCPL claim, and Bassett was permitted to proceed alone on that count. Bassett [*398] was designated class representative and her attorneys were appointed counsel for the class. Subsequently, KMA asked the trial court to certify the September 17, 2004, order granting class certification for interlocutory appeal, but its request was denied in November 2004.

Bassett notified the class of the action against KMA. The parties then filed various motions [*399] in limine and proposed findings of fact in anticipation of trial. In addition, KMA filed a motion to bifurcate, which the trial court denied. Tr. Ct. Order, 5/16/05. Subsequently, the parties proceeded to trial.

The trial took place between May 16 and May 27, 2005. At the conclusion of Bassett's case, KMA moved for compulsory nonsuit, but the court denied the motion. Notes of Testimony ("N.T."), 5/23/05, Vol. 5, at 55-60. KMA renewed its request for summary relief at the end of its case, moving for a directed [*393] verdict on the warranty and MMWA claims. After argument, KMA withdrew its request in part, and the trial court denied the remainder of the motion. 5 N.T., 5/25/05, Vol. 7, at 13-28. On May 27, 2005, the jury rendered a verdict in favor of the class on the claim for breach of express warranty and awarded damages in the amount of $600 per class member. The court molded the verdict to account for the 9,402 class members to which the parties had stipulated, and recorded a verdict of $5,641,200. Subsequently, the trial court denied the class's request for injunctive relief.

FOOTNOTES

5 After closing remarks, the parties stipulated that in the event the jury rendered a verdict in favor of the class [*399] on the breach of warranty and MMWA claims, Bassett's individual recovery would be trebled under the UTPCPL up to $10,000, without the necessity for separate proof. The parties also agreed that Bassett would not file a request for legal fees separate from the class. Stipulated Order (UTPCPL Claim), 5/25/05.
On June 10, 2005, KMA -- represented by new counsel -- filed a post-trial motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. See Pa.R.C.P. No. 227.1. On September 26, 2005, the trial court held a hearing on KMA's motion, at the end of which it directed the manufacturer to file an addendum indicating where issues raised in the motion had been preserved; KMA complied. The trial court issued no further order to dispose of the request for post-trial relief within 120 days of filing and, therefore, upon praecipe of the class, the prothonotary entered judgment on the molded jury verdict on October 25, 2005. See Pa.R.C.P. No. 227.4(1)(b). KMA appealed the judgment to the Superior Court and the class filed a cross-appeal.6 In December 2005, the trial court ordered the parties to file concise statements of matters complained of on appeal. Pa.R.A.P. 1925(b). [***10] Both parties complied with the trial court's order in a timely manner and the court issued its Rule 1925(a) opinion on December 29, 2006.

FOOTNOTES


[394] In parallel, on June 6, 2005, Bassett filed a motion for attorneys' fees. After several postponements, the trial court held a hearing on the motion on September 13, 2005. In January 2006, the court granted the motion and awarded class counsel $4,125,000 in fees, and $267,513 in costs and expenses of litigation. KMA separately appealed this order to the Superior Court in February 2006.


We granted allocatur and consolidated the appeals to address the following issues, as stated by KMA:

1. Whether, in an issue of first impression, the lower courts disregarded class action procedures and fundamental principles of Pennsylvania contract law by presuming that a class action could be pursued based solely on proof of breach of the named plaintiff's individual express limited warranty contract, as evidence of proof of breach as to all other limited warranty contracts for all the other members of the
2. Whether long-standing Supreme Court precedent requires reversal of the judgment improperly entered and affirmed in favor of all class members, in circumstances where the trial court accepted proof [*12] of breach of the named plaintiff's express limited warranty contract as proof of breach as to all limited warranty contacts as to all other [*395] members of the class, even where the only class-wide evidence was that the defendant had honored its express warranty?

3. Whether, in an issue of first impression, the trial court violated the defendant's due process rights by entering judgment for the entire range of class members without requiring proof of breach of all of their express limited warranty contracts?

4. Whether as a matter of first impression, an attorneys' fee award made pursuant to the [MMWA] cannot be entered after entry of judgment where: (i) the MMWA requires that fee awards be entered as "part of the judgment," and where (ii) Plaintiff voluntarily took judgment on the underlying verdict, and thus disposed of all claims (including the Plaintiff's unresolved claim for attorneys' fees) before the trial court entered the fee award?

5. Whether under Pa.R.A.P. 1701, a trial court lacks jurisdiction to enter a fee award after judgment has been entered and a notice of appeal has been filed?

6. Whether, as a matter of first impression, the courts of Pennsylvania are required to follow [***13] United States Supreme Court precedent regarding the interpretation of federal fee shifting statutes when interpreting the fee shifting provision of the MMWA, and, if so, whether the trial court's decision to add a $1 million "risk multiplier" bonus to the fee award violates controlling United States Supreme Court precedent?

Samuel-Bassett v. Kia Motors Am., Inc., 598 Pa. 104, 954 A.2d 565 (Pa. 2008); Samuel-Bassett v. Kia Motors Am., Inc., 598 Pa. 105, 954 A.2d 566 (Pa. 2008). 7 Sorn of the [***15] argumentative framing by KMA, we view these issues as raising five narrow and distinct questions that we will address individually: 1) whether the class was properly certified; 2) whether evidence [*396] was sufficient to support the jury's verdict and whether the verdict was against the weight of the evidence; 3) whether the jury's verdict was properly molded to account for the 9,402 members of the class; 4) whether the trial court had authority to award attorneys' fees after Bassett entered judgment on the class verdict; and 5) whether the risk multiplier was properly applied to an award of counsel fees under the MMWA. 8

FOOTNOTES

7 In their appellate briefs, both KMA and the class address issues 1 and 2 together, and also 4 and 5 together. We will address [***14] questions 4 and 5 together because they raise substantially the same issue. However, we will address issues 1 and 2 separately as they raise distinct issues, as will become apparent from our analysis, infra.
The record will be developed further infra, as necessary to resolve the issues on appeal.

I. Class Certification

KMA's first claim is that the trial court certified the class in error because Bassett failed to prove: that questions of law and fact were common to the class, that the common questions predominated over individual issues, that Bassett's claims were typical of the class claims, and that Bassett was an adequate class representative.

Class certification presents a mixed question of law and fact. Liss & Marion, P.C. v. Recordex Acquisition Corp., 603 Pa. 198, 983 A.2d 652, 663 (Pa. 2009) ("Liss"). The trial court is vested with broad discretion in deciding whether an action may be pursued on a class-wide basis and, where the court has considered the procedural requirements for class certification, an order granting class certification will not be disturbed on appeal unless the court abused its discretion in applying them. Id.; Kelly v. County of Allegheny, 519 Pa. 213, 546 A.2d 608, 610 (Pa. 1988). [***15] See also In re Community Bank of Northern Virginia, 622 F.3d 275, 290 (3d Cir. 2010). An abuse of discretion will be found if the certifying court's "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact;" the trial court must have "exercised unreasonlable judgment, or based its decision on ill will, bias, or prejudice." 622 F.3d at 290; In re E.F., 995 A.2d 326, 329, 606 Pa. 73 (Pa. 2010). See also Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp., 599 Pa. 568, 962 A.2d 653, 659 (Pa. 2009). The existence of evidence in the record that would support a result contrary to that reached by the [*397] certifying court does not demonstrate an abuse of discretion by that court. In re E.F., 995 A.2d at 329. In deciding whether class action procedural requirements were misapplied or "an incorrect legal standard [was] used in ruling on class certification," we review issues of law subject to plenary and de novo scrutiny. See Delaware County v. First Union Corp., 605 Pa. 547, 992 A.2d 112, 118 (Pa. 2010).

For the trial court, the question of whether a class should be certified entails a preliminary inquiry into the allegations of the putative class and its representative, [***16] whose purpose is to establish the identities of the parties to the class action. Pa.R.C.P. No. 1707 cmt. (certification process "is designed to decide who shall be the parties to the action and nothing more"). See generally Liss, 983 A.2d at 663; Bell v. Beneficial Consumer Disc. Co., 465 Pa. 225, 348 A.2d 734, 739 (Pa. 1975). As a practical matter, the trial court will decide whether certification is proper based on the parties' allegations in the complaint and answer, on depositions or admissions supporting these allegations, and any testimony offered at the class [***16] certification hearing. See Pa.R.C.P. No. 1707 cmt. The court may review the substantive elements of the case only "to envision the form that a trial on those issues would take." Hohider v. United Parcel Serv., 574 F.3d 169, 175-76 (3d Cir. 2009); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 165-68 (3d Cir. 2001); Debb v. Chrysler Corp., 2002 PA Super 326, 810 A.2d 137, 154 (Pa. Super. 2002) (perceived adequacy of underlying merits of a claim should not factor into certification decision). Any "consideration of merits issues at the class certification stage pertains only to that stage; the ultimate factfinder, whether judge or [***17] jury, must still reach its
own determination on these issues" at the liability stage. In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305, 320 n.22 (3d Cir. 2008). Even if the class is certified, before a decision on the merits, the certification order "may be revoked, altered or amended by the court on its own motion or on the motion of any party." Pa.R.C.P. No. 1710(d). See Janick v. Prudential Ins. Co., 305 Pa. Super. 120, 451 A.2d 451, 454-55 (Pa. Super. 1982) (court has extensive powers to protect [*398] absent class members and to ensure efficient conduct of class action).

Pursuant to Pennsylvania's civil procedure rules, the trial court may allow a representative to sue on behalf of a class if, the class is numerous ("numerosity"); there are questions of law or fact common to the class ("commonality"); the claims of the representative are typical of the class ("typicality"); the representative will fairly and adequately protect the interests of the class ("adequate representation"); and a class action is a fair and efficient method for adjudicating the parties' controversy, under criteria set forth in Rule 1708. Pa.R.C.P. No. 1702. Among the Rule 1708 criteria for determining whether the class [***18] action is a fair and efficient method of adjudication is "whether [the] common questions of law or fact predominate over any question affecting only individual members" ("predominance"). Pa.R.C.P. No. 1708(a)(1) (also listing six factors in addition to predominance). The class "is in the action until properly excluded" by, e.g., an order of court refusing certification or an order de-certifying the class. Pa.R.C.P. No. 1701(a) & cmt; Bell, 348 A.2d at 736 (same).

During certification proceedings, the proponent of the class bears the burden to establish that the Rule 1702 prerequisites were met. Kelly, 546 A.2d at 612. The burden is not heavy at the preliminary stage of the case. Clark v. Pfizer Inc., 2010 PA Super 6, 990 A.2d 17, 24 (Pa. Super. 2010). Indeed, evidence supporting a prima facie case "will suffice unless the class opponent comes forward with contrary evidence; if there is an actual conflict on an essential fact, the proponent bears the risk of non-persuasion." Id.; Debbs,810 A.2d at 153-54; Baldassari v. Suburban Cable TV Co., 2002 PA Super 275, 808 A.2d 184, 191 (Pa. Super. 2002), appeal denied, 573 Pa. 694, 825 A.2d 1259 (Pa. 2003); Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 501 A.2d 635, 637 (Pa. Super. 1985). It is essential [***19] that the proponent of the class establish requisite underlying facts sufficient to persuade the court that the Rule 1702 prerequisites were met. Kelly, 546 A.2d at 612.

[*399] The trial court prepared a certification memorandum dated September 17, 2004, explaining its class certification decision ("Certification Memo."), and addressing each disputed issue, of commonality, predominance, typicality, and adequacy of representation, as follows. First, respecting commonality, the trial court noted that the theory of liability of the putative class centered on KMA selling one vehicle "with a uniformly defective braking system that affected all drivers" and on KMA's unsuccessful [***17] attempts to remedy the defective vehicles in a similar manner, i.e., by replacing brake pads and rotors every few thousand miles. The court listed the common questions of law identified in the complaint, which included whether the Sephius possessed the brake system defect alleged; whether KMA lacked the means to repair the defect; whether the defect constituted breach of express and implied warranties and violation of the MMWA; and whether members of the class were entitled to actual damages and/or an injunction. The court [***20] found that sufficient evidence of record supported Bassett's allegations that KMA knew its Sephius vehicles required premature and
frequent replacement of brake pads and rotors. According to the court, with the evidence offered, 
Bassett met her burden of proof for class certification with regard to three claims: breach of express 
warranty, breach of implied warranty, and violation of the MMWA. Certification Memo., 9/17/04, at 7 
Janicik, supra).9 The trial court was also persuaded that common questions outweighed individual 
questions of law and fact, and rejected KMA's claims that the proposed class included owners of Sephias 
with several brake design models, and that individual driving habits, road conditions, and other causes 
could not be excluded as proximate causes for any harm suffered by the putative class members. See 
Pa.R.C.P. No. 1708(a)(1); Certification Memo., 9/17/04, at 7-8 (citing [*400] Weismer, supra; D'Amelio v. 
Blue Cross of Lehigh Valley, 347 Pa. Super. 441, 500 A.2d 1137 (Pa. Super. 1985)). Respecting the 
typicality requirement of Rule 1702, the court agreed with Bassett that her claims indeed were typical of 
Super. 393, 676 A.2d 1237, 1242 (Pa. Super. 1996)).

FOOTNOTES

9 The trial court denied class certification as to appellee's fourth count on the ground that reliance was 
an element of any UTPCPL claim and class-wide evidence was not apt to prove reliance. Certification 

Finally, with regard to the adequacy of representation prong, the trial court concluded that, contrary to 
KMA's arguments, Bassett did not have a conflict of interest in the maintenance of the class, and that 
her financial resources and legal representation were adequate. Specifically, the court rejected KMA's 
claim that Bassett was an inadequate representative because she had a conflict of interest arising from 
potential, not-yet-asserted Lemon Law and personal injury claims (resulting from a brake-related 
accident) that other class members did not share. The court concluded that, instead, Bassett's personal 
i injury made her "a more zealous advocate on behalf of the class." Certification Memo., 9/17/04, at 14- 
16 (citing Janicik, supra).

The trial court further addressed class certification [*22] issues in its Pa.R.A.P. 1925(a) opinion. In 
addition to incorporating by reference its September 2004 certification memorandum, the court stated 
that the evidence introduced at trial confirmed that a class action was the most appropriate means to 
present the class's claims, that class counsel was able to present the issues to the jury fully, and that the 
jury was able to decide all issues before them "sincerely, productively, appropriately and justly."
According to the court, separate trials on the 9,402 claims of the class members, claiming damages of 
only $600 each, would have placed a strain on the courts and effectively "seal[ed] shut" the doors to the 
courtroom in violation of the Pennsylvania Constitution. The effect would have [*18] been a windfall 
for KMA as numerous class members failed to bring their cases to trial. The court concluded that the 
class had met the Rule 1702 and 1708 prerequisites for class certification, and relied on its September 
2004 opinion for analysis of the individual certification issues.
On appeal to this Court, KMA argues that Bassett failed to establish that common questions of law and fact existed, that these common issues predominated over individual [***23] issues, that her experience was typical of the class, and that she was an adequate representative of the class.

A. Commonality and Predominance

KMA claims that Bassett did not meet either the commonality or the predominance prerequisites for certifying the class, raising the same arguments in support of both claims. According to KMA, the trial court certified the class on a record that contained proof of Bassett's "anecdotal" experience but no evidence that KMA had breached its express warranty with respect to all class members or that the class members sustained out-of-pocket costs as a result.10

FOOTNOTES

10 The jury found in favor of the class on the breach of express warranty and KMA's appeal addresses that claim only.

KMA states that to prove liability for breach of express warranty, Bassett had to submit evidence for each absent class member. KMA states that Bassett's evidence of her personal experience, expert testimony and internal documents regarding a defect present in all 1997-2000 Sephias, and warranty brake repair data were not probative to satisfy Bassett's burden of proof with regard to all the elements of a breach of warranty cause of action for the class. Without specifying whether [***24] it is addressing the certification hearing or the trial testimony, KMA attacks Bassett's evidence as not credible and not probative. Thus, KMA challenges the conclusion of Bassett's expert witness that the Sephias suffered from a common defect, on the basis that he personally inspected only two vehicles rather than all the vehicles in the class. According to KMA, warranty repair statistics did not cure any deficiencies in the expert's testimony regarding the existence of a defect and, instead, showed only that "KMA honored its express warranty" by routinely covering brake repairs to Sephia vehicles.

Moreover, KMA argues that reliance, manifestation, notice, and opportunity to cure are elements of proof in a breach of [*402] express warranty action, and that Bassett failed to prove them with respect to the class claims. According to KMA, Bassett was required to produce evidence that each absent class member was aware of and relied on KMA's express warranty, yet the record lacks any such proof respecting class members other than Bassett. KMA's Brief at 19-20 (citing Goodman v. PPG Indus., Inc., 2004 PA Super 151, 849 A.2d 1239, 1245-46 (Pa. Super. 2004), aff'd per curiam, 584 Pa. 537, 885 A.2d 982 (Pa. 2005) (buyers could [***25] not enforce warranty made by third party to seller)). KMA also argues that Bassett offered no evidence that each class member notified KMA of a covered defect, provided opportunity to cure, or that KMA failed or refused to cure the brake defect. Id. at 20-22 (citing 13 Pa.C.S. § 2607(c)(1) ("buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy")). KMA reiterates that simply proving the existence of a defect based on consumer expectations of brake pad longevity is
insufficient evidence that KMA breached its express, rather [**19] than an implied, warranty. Id. at 20-21 (citing Olson v. Ford Motor Co., 258 Ga. App. 848, 575 S.E.2d 743, 746 (Ga. Ct. App. 2002) (dealership not liable to plaintiff who refused to let dealership repair vehicle); Hasek v. DaimlerChrysler Corp., 319 Ill. App. 3d 780, 745 N.E.2d 627, 638, 253 Ill. Dec. 504 (Ill. App. Ct. 2001) (engine noise, without further indication of defect, is not enough to establish liability for breach of express warranty); Poli v. DaimlerChrysler Corp., 349 N.J. Super. 169, 793 A.2d 104, 110-11 (N.J. Super. Ct. Law Div. 2002) (buyer's breach of warranty claim did not accrue until manufacturer failed to perform repair within [***26] reasonable time)). Finally, KMA argues that Bassett failed to prove that each absent class member sustained damages caused by the defect, or any damages at all. Id. at 22-23 (citing Price v. Chevrolet Motor Div., 2000 PA Super 410, 765 A.2d 800 (Pa. Super. 2000) (buyer must prove that alleged defect is proximate cause of damages)). According to KMA, Bassett's damages were unique and she did not attempt to extrapolate her experience to the entire class or to prove individual damages. KMA insists that Bassett's evidence on damages was theoretical and focused on the cost of retrofitting all vehicles in the class. KMA concludes [*403] that Bassett failed to establish "the critical elements of any breach of express warranty claim" and, therefore, that the class was improperly certified "in the first instance."

Bassett responds first with a waiver argument. Bassett claims that KMA waived all certification issues by failing to object on the trial court record and distinguish express warranty issues from implied warranty issues for certification purposes. According to Bassett, KMA contested certification as to all claims, "hoping as a matter of strategy to obtain the same res judicata benefit it now claims for the implied [***27] warranty claim." Our review, however, reveals that KMA raised and preserved issues related to certification of the class with respect to all of Bassett's claims on behalf of the class. Therefore, KMA's claims related to the express warranty were not waived, even if they were not addressed separately from implied warranty claims, and regardless of KMA's strategy.11

FOOTNOTES

11 We also reject Bassett's additional arguments in the same vein. Thus, in her "Counter-statement of the case," Bassett asserts three claims that KMA either waived or is judicially estopped from challenging class certification on the merits because: (1) KMA implemented a free brake repair program limited to a subset of the class members and, therefore, admitted the existence of the class; (2) KMA admitted that certification was proper by filing a motion for "temporary" certification of a class in Leger v. Kia Motors America, Inc., No. CV-04-80522, a case pending in the District Court for the Middle District of Florida; and (3) KMA stipulated to class certification in Santiago v. Kia Motors America, Inc., No. 01 CC 01438 (Cal. Super. Ct. April 24, 2004), a 47-state class that did not include Pennsylvania. But, Bassett does [***28] not address or develop these assertions in the body of the brief. As a result, Bassett waived these claims. Purple Orchid, Inc. v. Pa. State Police, 572 Pa. 171, 813 A.2d 801, 804 (Pa. 2002) (HNGIssue included in "statement of questions" was waived by failure to address and develop in appellate brief).
On the merits, Bassett argues that consumer product warranty claims are recognized as "particularly suitable" for class litigation. Bassett's Brief at 14 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (predominance is "readily met" in certain cases alleging consumer fraud) and 15 U.S.C. § 2310(e) (establishing separate notice and opportunity to cure procedures for class actions)). According to Bassett, warranty data showing high [*404] percentage rates of covered brake repairs was prima facie proof that all 1997-2000 Sephias experienced a premature wear defect. Further, [**20] deposition testimony from KMA executives, KMA internal documents, and a "coupon" program, through which KMA offered free brake repairs to members of the class, showed that KMA recognized the 1997-2000 Sephias as suffering from a model-wide defect. Bassett states that KMA did not require individual inspections of each Sephia, [***29] nor inquiry into individual drivers' habits, as a prerequisite to qualify for its coupon program, proof that KMA discounted their role in revealing the causes of customer complaints. Bassett claims that KMA also did not limit the program to select iterations of the 1997-2000 Sephia models, in recognition that any modifications or "tweaks" of the brake system did not alter the basic defective design.

Bassett argues that she proved that each class vehicle manifested the defect by showing that the abnormal degradation of the brake pads and rotors was measurable. KMA's business records, i.e., warranty data and internal memoranda, showed that the defect was measured, tested, and ultimately recognized internally by KMA. Thus, Bassett asserts, warranty data supported the commonality and predominance allegations, regardless of whether the same data also showed that KMA complied with its warranty promises, a fact relevant to KMA's liability but not a factor for the court to consider for certification purposes.

According to Bassett, KMA did not object to or introduce evidence to rebut Bassett's commonality evidence. Bassett notes that KMA's appeal strategy is different from its trial argument: [***30] at trial, KMA sought to prove that a common defect did not exist but, on appeal, KMA is claiming that existence of a defect is irrelevant. Bassett emphasizes that, at trial, KMA "recognized" that it was replacing one set of defective brakes with another and, therefore, that warranty repairs did not restore the Sephias to a defect-free condition. But, Bassett adds, on appeal, implicit in the jury's verdict is a finding that commonality existed so there is no basis to overturn the certification decision.

[*405] Bassett also argues that common issues predominated over any individual issues. Common issues included whether KMA met its express promise to deliver vehicles free from defect; whether the Sephias had a braking system design defect; and whether the design defect manifested as abnormal or premature wear of the brakes. According to Bassett, these issues were essential to proving the warranty claims and were properly supported with generalized proof.

Next, Bassett responds to KMA's assertion that evidence of individual reliance is necessary to prove breach of warranty and is not amenable to generalized proof. According to Bassett, reliance is not an element of proof in a warranty action because [***31] the written warranty is an affirmation of fact and part of the basis of the bargain. Bassett's Brief at 29 (citing Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 171 F.3d 818, 825 & n.7 (3d Cir. 1999) (not all promises are warranties; to be a warranty, promise
must be part of basis of bargain and reliance may become factor in determining whether promise is part of basis of bargain]). Bassett states that the burden was, therefore, on KMA to prove that the written warranty was not part of the bargain and did not cover the defective condition of which class members complained. Id. (citing 13 Pa.C.S. § 2313 cmt. 3 (seller's affirmations of fact about goods during bargain become part of description, hence no particular reliance need be shown to weave them into agreement; rather, fact which takes affirmations out of agreement requires clear affirmative proof)). Here, according to Bassett, KMA did not offer any proof that class members disregarded [**21] the warranty and reliance was not an issue. Bassett states that the cases cited by KMA in support of a contrary legal conclusion are inapposite because they do not address the issue of reliance but merely whether express warranties existed in [***32] fact-specific circumstances. Id. at 30 (citing Goodman, supra).

Bassett also rejects KMA's arguments that each class member was required to provide individual notice of the common defect, opportunity to cure, and to establish failure to repair in order for the class to maintain suit. According to Bassett, [*406] KMA "received ample notice" that the Sephias' brakes were defective from consumer complaints, warranty claims, and internal records; thus, individual notice prior to suit was not required. Id. at 31-32 (citing In re Latex Gloves, 134 F. Supp.2d 415, 422 (E.D. Pa. 2001), vacated in part on diff. grounds, Whitson v. Safeskin Corp., 2001 WL 34649695 (E.D. Pa. Apr. 6, 2001) (whether buyer provided notice within reasonable time to seller via complaint, which was filed two years after discovery of injury, is issue for finder of fact)). Indeed, Bassett argues that the MMWA did not require notice to KMA on behalf of the class and an opportunity to cure until after certification of the class. Id. at 32 (citing 15 U.S.C. § 2310(e) (class of consumers may not proceed on breach of warranty claim except to establish representative capacity of named plaintiffs, unless warrantor "is afforded a reasonable [***33] opportunity to cure" failure to comply with warranty; named plaintiffs shall notify defendant that they are acting on behalf of class at that time)). Additionally, Bassett claims that she notified KMA of the class's claim in timely fashion, which led KMA's counsel to withdraw a motion for directed verdict after trial. See N.T., 5/25/05, Vol. 7, at 26-27.

Finally, Bassett responds to KMA's argument that her evidence of damages at trial was inadequate because individual out-of-pocket costs of repair were not demonstrated. Bassett states that KMA's current argument on this issue highlights the difference in posture at the time of class certification, when Bassett was asserting that the class action mechanism was appropriate, versus on appeal, when KMA is attacking a completed trial as improper. Bassett emphasizes that her expert's testimony at trial, and KMA's records, substantiated the request for per person damages, to which KMA had a full opportunity to object but did not. Furthermore, according to Bassett, the jury's award was supported by the evidence at trial.

In its reply brief, KMA reemphasizes that the existence of a common defect "is not the answer to the question of whether the [***34] class was properly certified" but merely a threshold fact. KMA also states that Bassett's arguments ignore evidence [*407] that among the 1997-2000 Sephias, KMA introduced thirteen separate design changes to the brakes and that not simply one automobile model was at issue.
Preliminarily, to better focus the dispute, we address the proper scope of our review of the trial court's decision to certify the class. **Scope of review refers to the confines within which an appellate court must conduct its examination.** . . . [or] to the matters (or "what") the appellate court is permitted to examine." Morrison v. Commonwealth, 538 Pa. 122, 646 A.2d 565, 570 (Pa. 1994); see generally Jeffrey P. Bauman, Standards of Review and Scopes of Review in Pennsylvania--Primer and Proposal, 39 DUQ. L. Rev. 513 (2001). Both parties here offer extensive argument about whether the trial court's decision to certify was proper in view of evidence offered during the liability phase of trial. But, as stated, a certification proceeding is a preliminary inquiry whose purpose is to establish who the parties to the class action are "and nothing more." Pa.R.C.P. No. 1707 cmt. Bassett was not required to prove KMA's liability at the certification stage and the trial court was prohibited from factoring the perceived adequacy of the underlying merits of the class's claims into the certification decision. Debbs, 810 A.2d at 154; see Hohider, 574 F.3d at 175-76.

An appellate court does not second-guess a trial court's discretionary "preliminary" decision to certify the class by considering subsequent case developments of which the trial court could not have been aware at the time of its decision. Thus, arguments regarding subsequent case developments, such as evidence revealed at the liability phase of trial or the jury's verdict, cannot prove an abuse of discretion at the certification stage. By the same token, a pre-trial class certification proceedings do not require a mini-trial; the court is not obligated to establish liability during the class certification phase. Pa.R.C.P. No. 1707 cmt.; Debbs, 810 A.2d at 154. See Hohider, 574 F.3d at 175-76. The practical consequence here is that we assess the first and second questions on appeal, class certification and sufficiency, separately. But, because the parties have helpfully addressed the issues together, we have parsed the briefs to separate the arguments relevant to each issue.

FOOTNOTES

12 Of course, the rules of civil procedure anticipate that evidence available after certification but before a decision on the merits may be considered by the trial court, and consequently by the appellate courts, in deciding whether revocation of the class certification is proper. Pa.R.C.P. No. 1710(d); see Basile v. H & R Block, Inc., 601 Pa. 392, 973 A.2d 417, 423 (Pa. 2009) (filing of decertification motion appropriate before decision on merits, if circumstances change following certification decision); Clark v. Pfizer Inc., 2010 PA Super 6, 990 A.2d 17, 29 (Pa. Super. 2010) (same). But, here, KMA's issues on appeal do not concern decertification and consideration of post-certification evidence is inappropriate.

For ease of discussion, we will address commonality and predominance together as the parties do, but we emphasize that the Rule 1702(2) commonality requirement and the Rule 1708(a)(1) predominance requirement are distinct prerequisites for class certification, both of which must be established by the class proponent.

To establish the commonality requirement, Bassett had to identify common questions of law and fact -- "a common source of liability." Weismer, 615 A.2d at 431. Simply contending that [***37] all
putative members of a class have a complaint is not sufficient if the complaints are disparate personal allegations arising from different circumstances and requiring different evidence, i.e., "one requiring less, the other requiring more, the one not indicative of the merits, the other appearing to approach the merits of individual cases." Allegheny County Hous. Auth. v. Berry, 338 Pa. Super. 338, 487 A.2d 995, 996-98 (Pa. Super. 1985) (commonality requirement not met with bare allegation that a number of plaintiffs had different verifiable complaints against same defendant); see Eisen v. Indep. Blue Cross, 2003 PA Super 438, 839 A.2d 369, 372 (Pa. Super. 2003) (same). Commonality may not be established if "various intervening and possibly superseding causes of damage" exist. Weismer, 615 A.2d at 431. The critical inquiry for the certifying court is whether the material facts and issues of law are substantially the same for all class members. Liss, 983 A.2d at 663. The court should be able to envision that the common issues could [*409] be tried such that "proof as to one claimant would be proof as to all" members of the class. Id.

[**23] HN12 Bassett was not required to prove that the claims of all class members were identical; the existence [***38] of distinguishing individual facts is not "fatal" to certification. Buynak v. Dep't of Transp., 833 A.2d 1159, 1163 (Pa. Cmwlth. 2003). The common questions of fact and law merely must predominate over individual questions. Pa.R.C.P. No. 1708(a)(1). The standard for showing predominance is more demanding than that for showing commonality, In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311, but is not so strict as to vitiate Pennsylvania's policy favoring certification of class actions. Eisen, 839 A.2d at 371.

HN13 The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., 521 U.S. at 623; see In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 310-11. Thus, a class consisting of members for whom most essential elements of its cause or causes of action may be proven through simultaneous class-wide evidence is better suited for class treatment than one consisting of individuals for whom resolution of such elements does not advance the interests of the entire class. See Liss, 983 A.2d at 666 ("[c]lass members may assert a single common complaint even if they have not all suffered actual injury; demonstrating [***39] that all class members are subject to the same harm will suffice"); Delaware County v. Mellon Fin. Corp., 914 A.2d 469, 475 (Pa. Cmwlth. 2007) (existence of separate questions "essential" to individual claims does not foreclose class certification) (quoting Weismer, 615 A.2d at 431); Cook v. Highland Water & Sewer Auth., 108 Pa. Commw. 222, 530 A.2d 499, 505 (Pa. Cmwlth. 1987) (internal citations omitted) ("Where a common source of liability can be clearly identified, varying amounts of damage among the plaintiffs will not preclude class certification. However, where there exist[] various intervening and possibly superseding causes of the damage, liability cannot be determined on a class-wide basis.")

[*410] Here, we do not discern any abuse of discretion in the pre-trial certification decision. The evidence available to the court at the time of certification supported the following findings of fact by the trial court. KMA sold the Sephia to U.S. consumers between 1997 and 2000. N.T., 7/15/04, at 10, 19. Although KMA made several changes to the design of the Sephia's brake system during those years, the modifications did not significantly alter the basic defective design. N.T., 7/15/04, at 86-87, 129; 7/16/04, [***40] Vol. 1, at 79-81. According to Bassett's expert, the brake systems of all 1997-2000
Sephias had a common design defect related to heat dissipation in the front brakes, which caused premature wear of the brake pads and rotors. N.T., 7/15/04, at 93, 100-01.13 Bassett showed U.S. consumer expectations and the KMA owner's manual to set the reasonable life expectancy of Sephia brake pads at 20,000 to 30,000 miles. Id. at 94-97. But, the Sephias' brake pads and, subsequently, rotors wore prematurely. See Motion for Class Certification, Exh. 2-D-1, K (KMA Technical Service Bulletins dated 1997-1999; Sephia Repair Tips (from Kia Technician Times, Apr. 1998)). Warranty data showed high claim rates related to the premature wear of [*24] brake pads and rotors for 1997-2000 Sephias, which indicated, according to Bassett's expert, "extra" or "abnormal" wear independent of factors like driver habits and the environment that normally contribute to brake component wear. 14 N.T., 7/15/04, at 98-99, 102, 104. Bassett also offered KMA internal memoranda and [*411] evidence of a free brake pad coupon program to confirm the existence of a system-wide brake defect and KMA's knowledge of the defect since 1998. Id. at 132; [*41] N.T., 07/16/04, Vol. 1, at 48-49 (quoting quality assurance report of June 8, 1999, in reference to premature brake wear and warping of rotors on the Sephia: "This is a well-known condition and needs to be corrected ASAP."); see also Motion for Class Certification, Exh. 2-D-1, K (KMA Technical Service Bulletins dated 1997-1999; Sephia Repair Tips (from Kia Technician Times, Apr. 1998)). Finally, warranty data, internal memoranda, and KMA's repeated attempts to make minor brake system modifications, as explained by expert testimony, supported the trial court's finding that KMA was unable to effectively repair the defect in the brake system. N.T., 7/15/04, at 88 (brake system defect was "chronic"). Thus, the trial court's findings of fact for the purposes of Bassett's class certification motion are supported by the record.

FOOTNOTES

13 The expert stated: "I don't believe that I have been provided with enough . . . material to ultimately put my finger on the exact reason why we can't or they can't evacuate the heat. What I am confident in saying is that, and within a reasonable degree of engineering certainty, is that this front brake system cannot evacuate the heat properly." N.T., 7/15/04, at [*42] 100.

14 Neil Barbalato, a KMA warranty department representative, reported in an affidavit that of 1997 Sephias, 55% had one or more warranty repairs, of 1998 Sephias, 83% had one or more warranty repairs, of 1999 Sephias, 70-71% had one or more warranty repairs, and of 2000 Sephias, 36% had one or more warranty repairs. Bassett's expert testified that the average claim rate of 61% was ten times higher than that of the Kia Sportage, another KMA vehicle. Notably, the claim rate did not include instances of brake repairs done by Sephia owners or for which Sephia owners paid out of pocket to Kia dealers or to private mechanics. N.T., 7/15/04, at 91-92, 97-98.

The findings of fact by the certifying court formed a sufficient basis to conclude that commonality was met, as the class's claims were based on "a common source of liability" and were susceptible to common proof. Liss, 983 A.2d at 663; Weismier, 615 A.2d at 431. KMA warranted Sephias to be "free from defects in material and workmanship." Bassett and the class asserted several causes of action on the basis of the common source of liability (i.e., the defective design of the brake system), including
breach of express and implied warranties, [***43] and violation of the MMWA. The trial court did not abuse its discretion in concluding that common questions of law and fact existed, such as whether the 1997-2000 Sephias had the common defect alleged, whether KMA had the ability to repair the defect, whether KMA breached the express and implied warranties, and whether KMA violated the MMWA. Based on the same evidence, the certifying court also did not abuse its discretion in concluding that common issues predominated over individual issues of liability.

KMA’s arguments on appeal do not prove an abuse of discretion by the trial court. First, the class here was not required to prove “reliance” in order to recover for [*412] breach of the express warranty.15 KMA now argues that, to recover, each class member had to prove individually that s/he read the warranty -- a clause of the purchase contract -- and relied on it in seeking brake repairs and, consequently, in bringing an action for failure to repair. But, it is undisputed that the express and [*25] implied warranties at issue existed and were terms in each class member’s sales contract. See KMA’s Warranty (“[KMA] warrants that your new [Sephia] is free from defects in material and workmanship [***44] . . . all components of your new [Sephia] are covered for 36 months or 36,000 miles, whichever comes first”); see Keller v. Volkswagen of America, Inc., 1999 PA Super 153, 733 A.2d 642, 644-45 (Pa. Super. 1999) (breach of warranty is an action for breach of contract). HN14 A written express warranty that is part of the sales contract is the seller’s promise which relates to goods, and it is part of the basis of the bargain. 13 Pa.C.S. § 2313(a)(1). This statement of law is not qualified by whether the buyer has read the warranty clause and relied on it in seeking its application. See id. General contract law supports this interpretation. “Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood.” Simeone v. Simeone, 525 Pa. 392, 581 A.2d 162, 165 (Pa. 1990); see Erie Ins. Exchange v. Baker, 601 Pa. 355, 972 A.2d 507, 511 (Pa. 2008) (plurality) (plaintiff’s failure to read contract not ground to nullify contract terms); Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (Pa. 1983) (same). To adopt KMA’s position would essentially require us to abandon this rule with respect to warranties. We decline to do so. Here, KMA cannot avoid its [*413] contractual responsibilities pursuant to the class member warranties, regardless of whether individual members read and fully understood the warranty provisions; therefore, to require class members to prove individual reliance on the written warranties is unnecessary. Accordingly, at the class [*413] certification stage, Bassett was not required to show that reliance lent itself to class-wide proof. See Liss, 983 A.2d at 665 (reliance is not element of cause of action for breach of contract).16

FOOTNOTES

15 Notably, during certification proceedings, KMA never argued that certification was inappropriate because Bassett and the class had to show “reliance.” Nevertheless, because the class fails to assert waiver on this ground, and the issue is one of law easily resolvable on the existing record, we will pass upon it.

16 In arguing that “reliance” is an element of proof in a warranty action, KMA relies primarily on the Superior Court’s decision in Goodman, 849 A.2d at 1245-46. In Goodman, consumers who purchased
windows and doors from a manufacturer sued the manufacturer's supplier of wood preservative for breach of express warranty. The written warranty was part of the contract between the manufacturer and [***46] the wood preservative supplier, and extended only to the manufacturer and not to the consumers/plaintiffs. The court dismissed the consumers’ breach of warranty claim on the ground that the wood preservative supplier had not warranted the product to the consumers; consumers had not relied on any of the supplier's representations in purchasing the windows from the manufacturer. Id. at 1246. Accord Dormont Mfg. Co. v. ITT Grinnell Corp., 323 Pa. Super. 17, 469 A.2d 1138, 1140 (Pa. Super. 1983) (express warranty not created by buyer's reliance on past sales). The question of whether reliance is required to create a warranty in the first place (the Goodman scenario) is distinct from the question of whether a warrantor may be liable for breach to a consumer who did not read the express warranty that is indisputably part of the written contract (present scenario). Therefore, Goodman is inapposite.

Second, the trial court did not abuse its discretion in concluding that the issue of proximate cause could be proven by common evidence. The court considered KMA's internal memoranda and expert testimony regarding the brake design defect, in conjunction with warranty claims data, which tended to prove that the brake [***47] design defect was the proximate cause of premature wear of brake pads and rotors with respect to the class claims. N.T., 7/15/04, at 88-91, 99-102. On appeal, KMA argues that commonality was not established because evidence of record proved that premature wear could also have other causes, such as environmental conditions, driver habits, or separate defects, id. at 120-23, 148. We reject KMA's implicit invitation to reweigh the evidence [***26] on appeal. Commonwealth v. Treiber, 582 Pa. 646, 874 A.2d 26, 30 (Pa. 2005). Whether causation could be established on a class-wise basis was an issue for the finder of fact -- the certifying court, in this case -- and contrary testimony in the record is insufficient for reversal on appeal. See Summers v. Certainteed Corp., 606 Pa. 294, 997 A.2d 1152, 1163-64 (Pa. 2010) (causation is question for finder of fact; plaintiff need not exclude every possible [***14] explanation so long as reasonable minds can conclude that defendant's conduct was proximate cause of harm by preponderance of evidence); Popowsky v. Pa. Pub. Utility Comm’n, 594 Pa. 583, 937 A.2d 1040, 1055 n.18 (Pa. 2007) (preponderance of evidence is akin to "more likely than not" inquiry); Restatement (Third) Of Torts, Products Liability § 3 cmt.d [***48] (1998) (if plaintiff can prove that most likely explanation of harm involves causal contribution of a product defect, fact that there may be other concurrent causes of harm does not preclude liability).

Third, we also reject KMA's claims that certification was an abuse of discretion because the record was devoid of evidence that class members provided notice of the defect and an opportunity to cure.17 Indeed, the record shows that KMA was on notice since late 1998 (more than two years before this action was filed) that Sephias, beginning with the 1997 model, had defective front brakes. See, e.g., KMA's Opposition to Class Certification, Exh. D2-32 (Tim McCurdy Inter-Office Memorandum to James Lee, 2/03/99; KMC Brake Quality Team Meeting Summary, 2/15/99). KMA had the opportunity [*415] (and sought) to repair the defect repeatedly but unsuccessfully during the 1997-2000 production years. On this record, we hold that the trial court did not abuse its discretion by concluding that the class would be able to prove notice and opportunity to cure through common evidence at trial.
FOOTNOTES

17 HN15 Pursuant to the Pennsylvania Commercial Code, notice of breach is required within "a reasonable time." 13 Pa.C.S. § 2607(c)(1). [***49] The purpose of providing notice is to defeat commercial bad faith and not to deprive the consumer of her remedy. 13 Pa.C.S. § 2607 cmt. 4. The statute, however, does not provide direction as to what constitutes reasonable notice in the context of a class action. Nor does the statute explicitly require the consumer to provide an opportunity to cure before filing suit for breach of warranty. In spite of KMA's allegations to the contrary, and evident from the caselaw on which KMA relies, the law of this Commonwealth is neither "well-settled" nor self-evident on these issues. KMA's Brief at 17-18, 21 (citing Beneficial Commercial Corp. v. Brueck, 23 Pa. D. & C.3d 34, 37 (Pa. Com. Pl. 1982) ("Brueck"); Perona v. Volkswagen of Am., Inc., 292 Ill. App. 3d 59, 684 N.E.2d 859, 225 Ill. Dec. 868 (Ill. App. 1st 1997); Zwiercan v. Gen. Motors Corp., 2002 Phila. Ct. Com. Pl. LEXIS 24, 2002 WL 1472335 at *3-4 (Phila. Com. Pl. 2002); Grant v. Bridgestone/Firestone, Inc., 57 Pa. D. & C.4th 72, 76-77 (Phila. Com. Pl. 2001)). But, without any development of the law it wishes us to follow or adopt, KMA insists that the record is void of any proof of notice and opportunity to cure. Bassett denies the allegation. Implicit in both parties' arguments is a presumption that some proof [***50] of these issues is necessary to establish a claim for breach of warranty. For the purposes of decision, we accept that presumption and reject KMA's contention that no evidence was present in the record. We offer no opinion as to whether KMA's iteration of the law is in fact correct.

As a final matter, KMA argues that common proof for individual class members of the related issues of defect manifestation and amount of damages, see Briehl v. Gen. Motors Corp., 172 F.3d 623, 627-28 (8th Cir. 1999), was not available and that the trial court's decision to certify the class was erroneous on this ground. According to KMA, testimony related to Bassett's repair history was insufficient to prove the damages of the other class members and the trial court should have found commonality lacking on this ground. [***27] KMA argues that Bassett "made no attempt to extrapolate her experience to those absent class members and offered no documentary or testimonial evidence to establish that any plaintiff class member other than she [sic] sustained any economic harm." KMA's Brief at 23.

At issue are two different considerations: whether the class could demonstrate the impact of the defective brakes on each member [***51] and whether the amount of damages for each class member was provable with common evidence. See Behrend v. Comcast Corp., 655 F.3d 182, 204-06 (3d Cir. 2011) ("At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188 (3d Cir. 2001) (ability to calculate amount of damages "does not absolve plaintiffs from the duty to prove each investor was harmed by the defendants' practice"); accord Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565, 51 S. Ct. 248, 75 L. Ed. 544 (1931) ("rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages
which are definitely attributable to the [*416] wrong and only uncertain in respect of their amount*). HN16 The impact of the defect on each class member implicates concepts of manifestation and causation. Impact may be proven with common evidence "so long as the common [***52] proof adequately demonstrates some damage to each individual." Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977), abrogated on other grounds by Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The question regarding the impact on each class member turns on the individual facts of a case "rather than upon a rule of law precluding common proof of fact of damage." Id. at 454-55; accord Summers, supra.

The design defect of which the class complained was susceptible to proof on a class-wide basis, and testimony showed that the inability of the Sephia brake system to exhaust heat manifested as premature wear of brake pads and rotors, accompanied by noise and inability to brake, symptoms of which Sephia owners complained. High warranty claims confirmed the impact of the defect on individual members of the class. The fact that the claims rates were not one hundred percent across all models was not dispositive of the issue of manifestation because, as KMA’s representative testified, only covered claims were included in the calculations of the warranty rate. Uncompensated claims were not. See N.T., 7/15/04, at 91-92, 97-98. KMA offered testimony that the decision whether to replace [*453] brake pads and rotors, wear-and-tear items generally not covered under the warranty, was at the discretion of KMA. Moreover, Bassett’s evidence supported the conclusion that, even where KMA replaced brake system components free of charge, the replacement parts were equally defective and required additional repairs, whose replacement at no cost to the Sephia owners would again be subject to KMA’s discretion. Notably, at the preliminary stage of trial, the class was pursuing several types of compensation, including out-of-pocket costs, diminished re-sale value of the vehicle, and retrofit costs. The record following the certification hearing contained sufficient evidence to support [*417] the trial court’s decision that all class members were affected by the defect and sustained some form of damages.

[**28] HN17 Regarding damage amounts or scope of individual relief, it has been well established that if a "common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." Weismer, 615 A.2d at 431; accord 6 Alba Conte & Herbert B. Newberg, Newberg On Class Actions § 18:27 (4th ed. 2002) (part of federal approach to class actions [***54] is "recognition that individual damages questions do not preclude [certification] when the issue of liability is common to the class.".). Indeed, as we have recently held, "demonstrating that all class members are subject to the same harm will suffice" for certification purposes. Liss, 983 A.2d at 666 (quoting Baldassari, 808 A.2d at 191 n.6); accord Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 361, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) ("Teamsters") (authorizing "additional proceedings after the liability phase of the trial to determine the scope of individual relief"); Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) (if "common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain"). The class here did not offer testimony of identical damages among members during certification proceedings and, in fact, acknowledged that individual class members paid varying out-of-pocket costs for brake repairs. N.T., 7/15/04, at 22-23.
KMA argued in opposition to certification — and renews the argument now, on appeal — that the individual nature of damages proves that the trial court abused its [***55] discretion in its finding of commonality and predominance. We disagree. As our previous analysis shows, Bassett and the class adduced sufficient evidence during certification proceedings to show a common source of liability. Any question regarding individual expenditures resulting from varying attempts to repair the defect was not a ground to reject the commonality found on other issues, to defeat the predominance of common issues and, ultimately, to deny certification of the class at the preliminary [*418] stages of trial. For these reasons, we discern no abuse of discretion by the trial court in concluding that Bassett met the prerequisites of commonality and predominance.

FOOTNOTES

18 Because Bassett and the class did not offer testimony regarding common damages during the class certification proceedings, any references to expert testimony on this topic in KMA's appellate brief (see KMA's Brief at 23) necessarily address the expert's testimony at trial, which, as discussed supra, is irrelevant to prove an abuse of discretion in pre-trial class certification.

In his dissent, Mr. Justice Saylor addresses damages and observes that class members had "plainly individualized experience[s] with out-of-pocket [***56] expenditures," which the trial court "glossed over" both at certification proceedings and at trial. Dissenting Slip. Op., at 13. Justice Saylor criticizes the trial court for failing to manage the class action proceedings fairly and efficiently to account for differences in out-of-pocket damages incurred by the individual class members. Id. at 10. "The looseness of the certification decision yielded ongoing controversy about how the certification was to operate and its impact on required substantive proofs" at trial. Id. at 5.

We do not discount the concern of our esteemed colleague. Respectfully, however, in our view, the concern has less power in the context of assessing the trial court's ruling on the commonality and predominance prerequisites for class certification (especially since claims proceedings that account for different damages [**29] among class members are not uncommon in class actions), and more power in the overall context of ensuring that the "class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708." Pa.R.C.P. No. 1702(5). HN18

Rule 1708 requires a certifying court to consider, among other factors, whether [***57] "the size of the class and the difficulties likely to be encountered in the management of the action as a class action." Pa.R.C.P. No. 1708(a)(2). We agree with Justice Saylor that the approach to the management of individualized damages matters was not addressed by the trial court properly at the outset, following certification of the class. This management misstep developed into an issue raised by KMA [*419] regarding the molding of the verdict, which will be discussed further infra.

But, we do not view the trial court's failure to devise a proper damages management plan during class certification proceedings — a failure that itself invited a distinct objection — as sufficient to render an
abuse of discretion its determination that "potential differences in individual damage claims based upon individual experiences and costs associated with attempts to repair the vehicle" do not "pose any serious management difficulty." Tr. Ct. Op., 9/21/04, at 18. HN15\textsuperscript{2} The question is rather whether the individual damages issues were especially difficult and burdensome on the trial court so as to factor against class certification. See Pa.R.C.P. No. 1708(a); accord Smilow, 323 F.3d at 40 n.8 (citing S.J.W. Moore, [*658] Moore's Federal Practice, § 23.46(2)(b), at 23-209 & n.17) (3d ed. 1997 & Supp. 2002)). KMA argued at the certification proceedings that the class should not be certified because individual claims proceedings on the issues of causation, manifestation, and damages would require the trial court "to preside over thousands of mini hearings, which would take years," and the class was therefore unmanageable. KMA's Supp. Memo. of Law in Opposition to Class Certification, 7/8/04, at 11. On appeal to this Court, KMA states that "the necessity for 9,401 [sic] individual post-verdict class proceedings in and of itself would have overwhelmingly established that class certification was improper in the first instance." KMA's Brief, at 30.

Setting aside KMA's failure to develop the claim in any meaningful fashion in its brief so as to allow for appellate review -- a sufficient basis in itself to reject the argument, Commonwealth v. Walter, 600 Pa. 392, 966 A.2d 560, 566 (Pa. 2009) -- KMA's claim also fails on the merits. First, contrary to KMA's arguments, only the issue of individual damages would have been subject to individualized proceedings. See also Teamsters, 431 U.S. at 361-62 (question of individual [*659] relief does not arise until defendant's liability has been proved and "force of that proof does not dissipate at the remedial stage of the trial"). Second, "[w]here damages issues [*420] are likely to require more individualized treatment, a judge has available a number of creative methods of managing questions of remedy in a manner that protects the defendant's rights while redressing harms to individual plaintiffs." Salvas v. Wal-Mart Stores, Inc, 452 Mass. 337, 893 N.E.2d 1187, 1212 (Mass. 2008) (citing 2 A. Conte & H.B. Newberg, Class Actions § 4.32, at 287-88 (4th ed. 2002) ("Newberg") (listing class action management techniques)). Among these are bifurcated trials for liability and damages and the use of special masters. Id. We are not persuaded that it is appropriate to adopt what amounts to a per se rule that the prospect of individualized variations in damages alone required ruling against certification. On the issue of damages, for purposes of [*30] certification, there is no compelling reason to believe that the damages could not have been calculated based on information received from class members regarding their individual experiences with their Sephias, e.g., at further class proceedings or by a [*660] special master. KMA does not offer any persuasive argument that management of the damages issue alone in this fashion, for the less than 10,000 class members, would be so unduly burdensome as to prevent class certification.

B. Typicality

Concerning typicality, Pa.R.C.P. No. 1702(3), KMA claims that Bassett's experience was "vastly different" from that of the other class members and required different treatment from other class members at trial. According to KMA, "unrebutted" evidence established that the Sephia's front brake system underwent continuous redesign between 1997 and 2000, that Bassett's vehicle was only one of "over thirteen" designs, and, as a result, that her experience was unrepresentative of the class. KMA
emphasizes that the model of Bassett's car, her repair history, and interaction with KMA were unique to her so that any claim of typicality should have been fruitless.

KMA argues that, as with the commonality and predominance prongs, the trial court considered evidence irrelevant to an express warranty claim like Bassett's, which evidence [*421] would have supported "at best" an uncertifiable Lemon Law violation. But, KMA states, Bassett failed to pursue her Lemon Law claim [***61] and her individual experience and individual proof were not probative of class-wide claims of express warranty. According to KMA, the class in this case lacked a representative whose experience was typical and should not have been certified.

Bassett responds that typicality was established. According to Bassett, her position on common issues of law and fact is sufficiently aligned with that of absent class members so that pursuit of her own interests would also advance those of the class. Bassett reiterates that she purchased a model year 2000 Sephia with the same warranty and same front brake defect as the absent class members. She states that the brake components were interchangeable between 1997-2000 Sephias and that she was "ideally suited" to present the class claims regarding the ineffectiveness of the design changes, because her vehicle was the latest model in the class. Bassett emphasizes that proof of her claims necessarily proved each class member's claims as well.19

FOOTNOTES

19 Bassett also asserts that KMA admitted that Bassett's claims are typical of the class by not challenging the class verdict with respect to the implied warranty claims. But, Bassett cites no legal authority -- [***62] for there is none -- in support of this position. See Basile, 973 A.2d at 421-22 ("party adversely affected by earlier rulings in a case is not required to file a protective cross-appeal if that same party ultimately wins a judgment in its favor") (emphasis omitted).

Rule 1702(3) states that HN20*[o]ne or more members of a class may sue . . . as representative parties on behalf of all members in a class action only if[ ] the claims . . . of the representative parties are typical of the claims or defenses of the class." Pa.R.C.P. No. 1702(3). HN21A challenge to the typicality requirement presumes that commonality has been established. The purpose of the typicality requirement is to ensure that "the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members." [***31] D'Amelio, 500 A.2d at 1146; Baldassari, 808 A.2d at 193. [*422] Typicality exists if the class representative's claims arise out of the same course of conduct and involve the same legal theories as those of other members of the putative class. Dunn v. Allegheny County Prop. Assessment Appeals & Review, 794 A.2d 416, 425 (Pa. Cmwlth. 2002). [***63] The requirement ensures that the legal theories of the representative and the class do not conflict, and that the interests of the absentee class members will be fairly represented. See id.; Georgine v. Amchem Prods., Inc., 83 F.3d 610, 632 (3d Cir. 1996). But, typicality does not require that the claims of the representative and the class be identical, and the requirement "may be met despite
the existence of factual distinctions between the claims of the named plaintiff and the claims of the proposed class." Keppley v. Sch. Dist. of Twin Valley, 866 A.2d 1165, 1174 (Pa. Cmwlth. 2005); Hassine v. Jeffes, 846 F.2d 169, 176-77 (3d Cir. 1988); Klusman v. Bucks County Court of Common Pleas, 128 Pa. Commw. 616, 564 A.2d 526, 531 (Pa. Cmwlth. 1989), aff'd per curiam, 524 Pa. 593, 574 A.2d 604 (Pa. 1990) (atypicality "must be clear and must be such that the interests of the class are placed in significant jeopardy").

Here, the trial court did not abuse its discretion in deciding that Bassett was a typical class member. Bassett and the class asserted the same claims for breach of express warranty, premised on similar facts and KMA conduct. During class certification proceedings, Bassett adduced evidence to support her averments [***64] that, like the other class members, she purchased a Sephia vehicle model year 1997-2000 and received the standard purchase contract and written warranty. Because of a design defect that affected the ability of the Sephias' front braking system to dissipate heat, Bassett's vehicle, like the other vehicles in the class, experienced premature wear of the brake pads and warping of the rotors. As with the other members of the class, KMA failed to effectively repair Bassett's vehicle free of charge in accordance with the written express warranty. Bassett's Complaint, at ¶¶ 15-21; N.T., 7/15/04, at 84-89, 99-106.

During certification proceedings, KMA emphasized testimony that not all 1997-2000 Sephias utilized the same brake pads [*423] or rotors because the brake system was constantly redesigned and Bassett's vehicle had one of thirteen designs available on 1997-2000 Sephias. N.T., 7/16/04, Vol. 1, at 8-23. Bassett's expert acknowledged the design changes, but testified that these changes were minor and that they did not eliminate the design defect which affected all Sephias in the class, including Bassett's vehicle. N.T., 7/15/04, at 102, 105. KMA also suggested that driver habits or environmental [***65] conditions were likely to cause premature brake wear and that, therefore, Bassett's experience could only be atypical of the class and insufficient to prove the brake defect allegations of the class. N.T., 7/15/04, at 120-23, 148. But, Bassett rebutted the suggestion by referring to KMA internal documents and her own expert's testimony, which traced the cause of premature wear of the Sephias' brakes to a design defect rather than to other factors. N.T., 7/16/04, Vol. 1, at 52-53 (referring to McCurdy documents). Bassett's expert also testified that wear rates on the 1997-2000 Sephias were abnormal even when accounting for factors such as driver habits and environmental conditions highlighted by KMA. N.T., 7/15/04, at 131. On this disputed evidence, the trial court was persuaded that Bassett's experience was typical of the class.

KMA's central position that the trial court's decision on this point "was contrary to the evidence," see KMA's Brief [**32] at 25, n.13, is not borne out by the record. Rather, as we have detailed, the evidence was disputed, creating an issue for the trial court to resolve. HN22 Where, as here, the evidentiary record supports the trial court's credibility determinations, [***66] we are bound to accept them. See In re R.I.T., 608 Pa. 9, 9 A.3d 1179, 1190 (Pa. 2010). The existence of facts in the record that would support a result contrary to that reached by the certifying court does not demonstrate an abuse of discretion by that court. See In re E.F., 995 A.2d at 329.
C. Adequacy of Representation

Finally, KMA states that it is also challenging the adequacy of Bassett's representation of the class. Pa.R.C.P. No. 1702(4). HN23\textsuperscript{2} Rule 1702(4) states that a representative party may [*424] sue on behalf of a class if, inter alia, the representative party "will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709." Id. Rule 1709 states that fairness and adequacy of representation is an inquiry into the adequacy of class counsel, into any conflict of interest that Bassett, as the representative party, may have in the maintenance of the class action, and into the financial resources secured by Bassett and intended "to assure that the interests of the class will not be harmed." Pa.R.C.P. No. 1709; Klusman, 564 A.2d at 531.

Here, KMA develops its adequacy of representation argument only as a subset of and in reference to whether Bassett's [***67] interests are typical or aligned with those of the class, and fails to develop any arguments that address the Rule 1709 criteria. See KMA's Brief at 25. This argument thus sounds more as a challenge to typicality rather than to the adequacy of representation prerequisite for certification. Therefore, any claim of trial court error or abuse of discretion regarding the adequacy of representation prerequisite is waived for failure to develop "in any meaningful fashion capable of review." Commonwealth v. Walter, 600 Pa. 392, 966 A.2d 560, 566 (Pa. 2009); see Purple Orchid, Inc. v. Pa. State Police, 572 Pa. 171, 813 A.2d 801, 804 (Pa. 2002) (HN24\textsuperscript{2} issue waived by failure to address and develop in appellate brief).

D. Conclusion

For the foregoing reasons, we conclude that the trial court did not abuse its discretion in certifying the class. Kelly, 546 A.2d at 610. The case properly proceeded to trial as a class action.

II. Sufficiency and Weight of Evidence

Intermingled with its issues of class certification, KMA raises questions of whether the evidence was sufficient to support the jury’s finding of liability for breach of express warranty, and of whether the jury’s verdict was against the weight of the evidence. KMA asks [***68] that we reverse the [*425] Superior Court’s decision and vacate the judgment in favor of the class.

KMA maintains that Bassett’s proof in support of her own claim against KMA was not probative of the other class members’ claims and the trial court erroneously allowed the jury to extrapolate from evidence of Bassett’s claim proof respecting the entire class. KMA again rests its argument on the premise that Bassett did not establish the commonality, typicality, adequacy of representation, and predominance prerequisites for class certification. According to KMA, the class also failed to prove all the elements of a breach of the express warranty claim and the Superior Court "improperly used [evidence of] the [jury]-rejected implied warranty claims to justify a class-wide breach of express warranty cause of action." KMA's Brief at 28.
Bassett responds that, at trial, she introduced class-wide common evidence which established that KMA breached its express warranty. According to Bassett, KMA did not object to the admission of the "common" evidence at trial and failed to argue against her offer of generalized proof. Bassett argues that, irrespective of KMA's argument on appeal, the jury credited her evidence and found KMA liable to the entire class. Bassett also recounts the evidence introduced at trial, specifically addressing the following elements of a breach of warranty: KMA's warranty or promise, KMA's failure to meet its promise, causation, notice to KMA and opportunity to cure, and the class members' damages. Although Bassett articulates her arguments with parallel references to the record from the trial and to the record created during class certification proceedings, she observes that there is "a material difference between pre-trial certification and post-trial reexamination" of a trial and argues that "the question after trial is whether generalized proof was fairly presented and confronted by the parties at trial." Bassett's Brief at 33.

In its Rule 1925(a) opinion, the trial court described the evidence introduced at trial and decided that it was sufficient to support the jury's verdict on Bassett's breach of express warranty claim. The court recounted that the off-record deposition [*426] of Tim McCurdy, KMA's Director of Technical Operations, and the testimony of Donald Pearce, KMA's Vice President of Parts and Service, and Bassett's expert indicated that all 1997-2000 Sephias [*470] had similarly designed brake systems with interchangeable components and all were equally affected by a systemic design problem. The court also noted internal documents which demonstrated that KMA was aware of the brake system problems as early as 1995 and tried unsuccessfully to convince parent-company KMC to remedy the problem. One document prepared for KMA vendors, for example, related the discrepancy between the high warranty claims rate for the Sephia (41.8%) versus the relatively low rate for KMA's Sportage (6.3%) during the 1997-1999 period. In addition, a field report from a Kia Parts Service Manager in May 1999 described the Sephias' defect as "a well-known condition [that] needs to be corrected ASAP," and a record of calls to KMA's technical assistance hotline documented complaints that "systemic design problems existed causing unreasonably early wear-out of brakes and rotors." The court also described evidence of KMA attempting to identify the brake problem with the aid of an independent engineering firm, and to remedy the defect by developing and introducing improved pads and rotors from different manufacturers. But, testing of the Sephias after KMC's brake pad and rotor [*471] improvements showed that the vehicles' brake system components continued to underperform. Subsequently, KMA offered a "Brake Coupon Program" to provide unconditional free repairs to Sephia owners who had had three or more brake repairs. Tr. Ct. Op., 12/29/06, at 10-22.

Finally, the court described KMA's sale of 1997-2000 Sephias to consumers with identical written warranties, which provided that KMA promised the "new Kia Vehicle [to be] free from defects in material and workmanship." KMA's warranty manual also included a maintenance schedule which recommended a first inspection of the brake system at 30,000 miles or 30 months for ordinary driving use, or 15,000 miles or 15 months for instances of severe driving conditions. Witnesses testified that, under ordinary use conditions, the Sephias did [*427] not meet consumer expectations for brake component life under either KMA or American consumer standards. The American consumer expectation was [*34] of a 20,000 miles effective life for brake pads but the Sephias were severely
underperforming at 3,000 miles on the earlier models and 9,400 for later models. According to the trial
court, evidence showed that KMA paid for some repairs and covered others [*72] as part of its
coupon program. Tr. Ct. Op., 12/29/06, at 22-32. In the trial court's view, the evidence was sufficient to
support the liability judgment in favor of the class; additionally, "the verdict was fully supported by the
weight of the evidence." Id. at 39. The Superior Court affirmed on the basis of the trial court's opinion.

Initially, we agree with Bassett that our examination of the trial court's pre-trial certification decision is
materially different from our examination of issues raised post-trial following the judgment in favor of
the class, including issues of evidentiary sufficiency and weight. Accord Behrend, 655 F.3d at 194-95
(court determined relevant geographic market solely for purposes of class certification and not binding
on merits). The action proceeded at trial on behalf of the entire class. The class action mechanism is
designed to permit a named individual to proceed to trial on behalf of the class, including herself, and to
try all of the class members' claims together to judgment. See Bell, supra; HN25Pa.R.C.P. No. 1715(c)
("judgment entered in an action certified as a class action shall be binding on all members of the
class [*73] except as otherwise directed by the court"). Accord Joel H. Bernstein & Ronna Kublanow,
Securities Arbitration 1993: Products, Procedures, and Causes of Action, 819 PLI/Corp 689, 703-05
The record reflects that, at trial, the parties proceeded on the premise that Bassett was introducing evidence
in support of all the class members' claims. Indeed, at no time did KMA file a motion to decertify the
class pursuant to Rule 1710. HN26Pa.R.C.P. No. 1710(d) [order certifying class may be revoked,
altered, or amended "before a decision on the merits"].

[*428] Once the jury rendered its decision, the trial court's certification of the class was no longer
revocable. Id. The only available avenue for KMA to obtain relief from the judgment based on post-
verdict arguments that evidence personal to Bassett was not probative of the class claims was to
challenge the sufficiency or weight of the evidence. And, indeed, KMA essentially appears to be
challenging the sufficiency and weight of the evidence, even if its claims are not so precisely
articulated.20 We address each claim.

FOOTNOTES

20 The record shows that KMA raised [*74] sufficiency and weight of the evidence issues in both its
post-trial motion and in its Rule 1925(b) statement. See KMA's Supplemental Motion for Post-Trial
Relief, 7/15/05, at ¶¶ 5; 2-3; KMA's Concise Statement of Matters Complained of on Appeal, 12/28/05,
at ¶ 2.

A. Sufficiency of the Evidence

HN27When reviewing a sufficiency of the evidence claim in a civil case (here, a breach of express
warranty action), an appellate court, viewing all the evidence and reasonable inferences therefrom in

HN28 To [***75] prevail on her breach of express warranty claim in this class action, Bassett had to establish that KMA breached or failed to meet its warranty promise with respect to the members of the class, that the breach was the proximate cause of the harm to the class members, and the amount of the ensuing damages. [*429] Price v. Chevrolet Motor Div., 2000 PA Super 410, 765 A.2d 800, 809 (Pa. Super. 2000). 21 Additionally, because the class members had already accepted tender, Bassett had to show that the class notified KMA of the breach within a reasonable time. 13 Pa.C.S. § 2607(c)(1).

FOOTNOTES

21 As discussed supra, HN29 a plaintiff in a breach of warranty claim is required to prove "reliance" only if there is a disputed issue regarding whether the promise allegedly breached was part of the basis of the bargain or a term of the contract. See, e.g., Goodman, 849 A.2d at 1246. Here, there is no question that KMA's written express warranty was a part of the standard sale contract that all class members received and, therefore, an inquiry into whether each class member relied on KMA's promise to deliver a defect-free vehicle and to repair or replace items covered by the warranty is unnecessary. See 13 Pa.C.S. § 2313(a)(1); Simeone, 581 A.2d at 165.

KMA's [***76] warranty, provided to all the members of the class, states that:

[KMA] warrants that [t]he new Kia Vehicle is free from defects in material or workmanship, subject to the following terms and conditions. An Authorized Kia Dealer will make the necessary repairs, using new or remanufactured parts, to correct any problem covered by this limited warranty without charge to you.

* * * *

The liability of [KMA] under this warranty is limited solely to the repair or replacement of parts defective in Kia-supplied material or workmanship by an Authorized Kia Dealer at its place of business . . . .

FOOTNOTES

22 In its "Statement of the case," KMA states that its liability was limited to the repair or replacement of defective parts and characterizes claims of the class members as claims for breach of express warranty "by refusing to replace parts during the warranty period." KMA’s Brief at 6. In response, Bassett disputes at length KMA’s description of the warranty and of the class claims, asserting that KMA’s warranty was not merely a "repair or replace warranty" but a [***77] "classic warranty." Bassett’s Brief at 14-21 (citing Nationwide Ins. Co. v. Gen. Motors Corp., 533 Pa. 423, 625 A.2d 1172 (Pa. 1993)). In Nationwide, the Court addressed the distinction between a "repair or replace" and a "classic" warranty in deciding when the applicable statute of limitations for a breach of warranty claim began to run. This issue is not before us and the distinction between the two types of warranties is irrelevant. Rather, pursuant to well-established contract interpretation principles, we look to the plain language of the warranty, which is clear and unambiguous, to identify KMA’s promise and any breach of that promise. See Greer v. City of Philadelphia, 568 Pa. 244, 795 A.2d 376, 380 (Pa. 2002).

[*430] At trial, the record shows that Bassett offered evidence (in the form of expert testimony from R. Scott King, testimony from KMA executives and other corporate designees, Tim McCurdy, Lee Sawyer, Donald Pearce, and Y.S. Sohn,23 and internal [***36] KMA memoranda) that the 1997-2000 Sephias were manufactured and sold with defective front brake systems. The brake systems were defective because the rotors' placement on the vehicles — or the design of the brake system — did not permit sufficient dispersal [***78] of heat generated during normal operation of the brakes, which caused premature wear of the brake pads and warping of the rotors. Once the lining on the brake pads wore down to the indicators and the rotors warped, the members of the class experienced noise and vibration when applying the brakes. KMA’s corporate designee Tim McCurdy and Bassett’s expert agreed that brake system components had to be replaced significantly in advance of when anticipated by KMA and by consumers. It was only in 2001, when a significant modification for that year’s model involving a re-design of the front brake rotor, a larger brake pad, and a repositioning of the axle, that the performance of the brake system improved to KMA and American market expectations. According to Bassett’s expert, high warranty claim rates for the 1997-2000 Sephias confirmed the existence of a common defect. See N.T., 5/19/05, Vol. 1, at 55, 60, 68-70, [*431] 95-116 (King testimony); N.T., 5/18/05, Vol. 1, at 80-81; 5/18/05, Vol. 2, at 15-16; 34-35, 41-42, 72-78 (McCurdy deposition); N.T., 5/23/05, Vol. 1, at 17, 20 (Sawyer deposition); N.T., 5/23/05, Vol. 1, at 42-43 (Pearce deposition); N.T., 5/23/05, Vol. 5. at 19-23 (Sohn deposition); [***79] Tim McCurdy Inter-Office Memorandum to James Lee, 2/03/99.

FOOTNOTES

23 McCurdy was KMA’s Director of Technical Operations, in charge of managing technical concerns and investigations, communicating with field technicians and dealers, and reporting to KMC. Sawyer was KMA’s Senior Vice-President of Fixed Operations, responsible for all aspects of parts and service, such as consumer affairs, warranty coverage, quality assurance, and service training. Pearce was KMA’s Vice-President of Service, and was responsible for product quality and technical operation support for the
field and retail organizations, warranty claim administration, and training activities. Finally, Sohn was KMC’s Manager of Chassis Division from 1996 to 2001, when he was promoted to deputy general manager at KMC. In his role as Manager of the Chassis Division, Sohn was responsible for vehicle parts design, review of parts testing, and design enhancements (including for brakes).

Further, KMA did not make effective necessary repairs free of charge. KMA’s warranty data, internal KMA documents, and King’s testimony regarding the nature of the brake system defect allowed the jury to conclude that simply replacing the pads and rotors [***80] on the 1997-2000 model year Sephias was an ineffective repair, which did not resolve the defective design problem that affected the vehicles. Indeed, only a “field fix” for vehicles already on the market, announced via a January 2002 Technical Service Bulletin, and a redesign of the brake system for new models (renamed the Spectra), successfully offered the necessary repair in late 2001. See KMA Technical Service Bulletin (chassis division), 1/02, Vol. 3 #8. Testimony from KMA’s corporate designees Donald Pearce and Michelle Cameron[24] also established that Sephia owners were responsible to pay for repairs out of pocket following the premature wear of brake system components, because brake pads and rotors were generally not covered under the warranty. N.T., 5/23/05, Vol. 1, at 30-33, 42-43, 54-55, 58-62 (Pearce deposition); N.T., 5/24/05, Vol. 1, at 39 (Cameron cross-examination), 64-77 (Pearce cross-examination).

FOOTNOTES

24 Cameron was a regional, and then national, Manager of KMA’s Consumer Affairs Department. She was responsible for developing and implementing policies and procedures for handling customer complaints.

Both Bassett’s expert and KMA executives attributed consumer complaints of [***81] noise, vibration, and early brake component wear to the brake system design. Bassett’s expert testified that none of the [***37] materials that he reviewed from KMA suggested that the widespread problem with the brakes on the Sephias was caused by individual driver habits such as “a heavy foot on the brake,” or road conditions, dirt, and dust. See N.T., 5/18/05, Vol. 2, at 41-43 (McCurdy deposition); N.T., [*432] 5/19/05, Vol. 1, at 107-10 (King testimony); N.T., 5/20/05, Vol. 1, at 46-52 (King re-direct), N.T., 5/23/05, Vol. 1, at 42-43 (Pearce deposition).

The record also contained evidence that, at least since late 1998 (more than two years before the class action was filed), KMA had notice that the brake system on the Sephias, beginning with the 1997 model, was performing under market expectations in terms of wear and required frequent repair and replacement. According to KMA executives, they became aware of the problem because of an increase in the sale of brake parts and warranty claim activity. KMA sought repeatedly to increase the performance of the brake system but failed until 2001, when a field fix was developed for in-use models concurrently with the re-design of front brake system on [***82] the new model in the Sephia line. In the meantime, class members experienced varying treatment in seeking replacement of brake pads and
rotors under the warranty. See Tim McCurdy Inter-Office Memorandum to James Lee, 2/03/99; KMC Brake Quality Team Meeting Summary, 2/15/99; N.T., 5/23/05, Vol. 1, at 16-18, 23-24 (Sawyer deposition); N.T., 5/18/05, Vol. 2, at 35 (McCurdy deposition). Finally, Bassett adduced sufficient evidence to prove that the members of the class suffered damages. Donald Pearce and Michelle Cameron testified that KMA dealerships offered some free repairs to promote good will for Sephia owners, as well as the brake coupon program in late 2001. But, according to the KMA witnesses, in general, the replacement of brake pads and rotors was not covered by the written warranty. As a result, KMA owners sustained out-of-pocket repair costs estimated by Bassett's expert at approximately $1,005 over the life of their Kia Sephia. On cross-examination, the expert stated that he derived the number not from Bassett's repair history data but by relying on data from KMA, and in particular on the Field Assurance and the Technical Assistance Center Incident reports, regarding the frequency [***83] of repairs over the life time of a Sephia. N.T., 5/19/05, Vol. 3, at 19-26 (King testimony); N.T., 5/20/05, Vol. 1, at 23 (King cross-examination); N.T., 5/23/05, Vol. 1, at 23-24 (Sawyer deposition); N.T., [*433] 5/23/05, Vol. 5, at 103; N.T., 5/24/05, Vol. 1, at 39 (Cameron cross-examination), 64-77 (Pearce cross-examination).25

FOOTNOTES

25 KMA alleges that Bassett's expert's testimony was not probative of the damages of each class member because it did "not reflect the proper measure of damages for breach of an express warranty, but, at best, addresses the measure of damages in an implied warranty claim," which the jury rejected. KMA's Brief at 23. But, KMA does not develop any law to support this argument and HN30 the Pennsylvania Commercial Code draws no distinction between damages for breach of express versus implied warranty. See 13 Pa.C.S. § 2714. KMA's claim, therefore, fails as stated.

KMA's primary defense strategy at trial was to undermine the class assertions that the Sephia brake system was defective and that any defect affected all the members of the class, by referencing the design changes and the fact that it is common to hear complaints regarding noise, vibration, and brake component wear. [***84] KMA executive Y.S. Sohn explained that the primary goal of designing brakes was safety and that brake component longevity was simply an issue of merchantability or competitiveness in the automobile market. According to Sohn, there was no stated or [**38] established target for brake pad longevity by which to measure a premature wear defect. N.T., 5/24/05, Vol. 6, at 17-34, 45-48 (Bowman testimony); N.T., 5/25/05, Vol. 2, at 10-29 (Sohn deposition).

KMA elicited testimony from Bassett's expert which confirmed that the rotors on Bassett's vehicle did not present a safety concern. The expert also agreed that other vehicle or driver-specific causes were possible for the symptoms exhibited by vehicles in the class; but, on re-direct, he concluded that KMA internal memoranda and warranty data persuaded him that they were not the proximate cause of the premature wear of brake system components experienced by the class members. Finally, although KMA asked the expert about whether he based his calculation of out-of-pocket repair costs for the class on
Bassett's experience and challenged the expert's qualifications in providing an opinion on damages, KMA did not object to the introduction of aggregate [***85] damages evidence on due process or other grounds, and did not introduce any evidence to rebut the class expert's damages testimony. N.T., 5/16/05, Vol. 1, at 44-50 (motions); N.T., 5/19/05, Vol. 3, at 49, [*434] 52-61 (King cross-examination); N.T., 5/20/05, Vol. 1, at 5-9, 23 (King cross-examination), 46-51 (King re-direct).

On appeal, KMA no longer presses the "no defect" theory it pursued at trial, and challenges instead whether sufficient evidence was introduced at trial to prove all the elements of a breach of warranty claim with respect to all the class members on the basis that the evidence described only Bassett's individual experience. Essentially, KMA questions whether Bassett established a breach of express warranty with respect to the entire class. See McElwee, 948 A.2d at 773.

Contrary to KMA's claims, the evidence of record was sufficient to establish all the elements of a breach of warranty claim by a preponderance of the evidence. See Mescanti, 956 A.2d at 1020. The evidence established that KMA made the same promise to all class members, 1997-2000 Sephia owners, to deliver a vehicle free of manufacturing defects and to correct free of cost any problem covered by the warranty. [***86] All vehicles in the class were sold with a defectively designed brake system causing premature wear of brake components that necessitated frequent replacement. KMA knew that the 1997-2000 Sephias were not performing up to the expectations of KMA and the American market, and that the transactions were troublesome well before this lawsuit was filed. Although KMA sometimes covered the repairs under the warranty or offered free repairs under other consumer satisfaction programs, members of the class also paid for repairs out-of-pocket. Testimony supported a verdict of up to $1,005 per class member for out-of-pocket costs over the life of a Kia Sephia. This evidence was sufficient to establish the breach of warranty claim with respect to the entire class. Price, 765 A.2d at 809. The trial court did not commit an error of law in sustaining the verdict and rejecting KMA's application for a judgment notwithstanding the verdict or for a new trial.

B. Weight of the Evidence

Next, KMA essentially contends that the jury's verdict in favor of the class was against the weight of the [*435] evidence because the record contained "nothing more than anecdotal testimony regarding [Bassett]'s personal experience, [***87] expert testimony regarding alleged 'defects' generally present in class vehicles and irrelevant KMA statistics..." KMA's Brief at 18 (emphasis in original, footnote omitted). KMA insists that the individual experiences and circumstances of the class members [***39] differed and were unsuitable for class-wide treatment, citing selected evidence. Moreover, KMA states the "only" class-wide evidence was "that KMA actually had performed under the warranty," and this proves that the class failed to establish a breach of express warranty. Id. at 27 (emphasis om]itted).26 The class responds that Bassett introduced evidence on behalf of herself and the class regarding all the necessary proof for a breach of express warranty.

FOOTNOTES
In its post-trial motion and Rule 1925(b) statement, KMA acknowledged that similar arguments went to the weight of the evidence. KMA's Supplemental Motion for Post-Trial Relief, 7/15/05, at ¶¶ 5; 2-3; KMA's Concise Statement of Matters Complained of on Appeal, 12/28/05, at ¶ 2.

Allegations that a motion for judgment notwithstanding the verdict or a new trial should have been granted because the verdict was against the weight of the evidence are addressed to the discretion of [*88] the trial court. Commonwealth v. Cousar, 593 Pa. 204, 928 A.2d 1025, 1035-36 (Pa. 2007). "An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." Id. The trial court awards a judgment notwithstanding the verdict or a new trial "only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion." Id. at 1036. Thus, the trial court's decision based on a weight of the evidence claim is among "the least assailable of its rulings." Id.

[*436] After examining the evidence in this case, we find meritless KMA's assertion that the jury improperly extrapolated to the class evidence personal to Bassett, and that this process resulted in a verdict that shocks one's sense of justice. Bassett, as the representative of the [*89] class, introduced evidence that addressed and tended to prove KMA's liability to each of the class members. KMA's assertion to the contrary is based on selected witness testimony and rests on claims of erroneous credibility determinations.

Witness credibility is an issue "solely for the jury to determine." Commonwealth v. Hawkins, 549 Pa. 352, 701 A.2d 492, 501 (Pa. 1997). The jury in this case had an opportunity to hear conflicting evidence regarding the existence of a common brake system design defect affecting the 1997-2000 model Sephias, of KMA's knowledge of the defect, of KMA's unsuccessful efforts to repair the defect, and of its policy to consider brake component repairs non-warranty items, only sometimes covering replacements and, consequently, causing Sephia owners out-of-pocket costs. Bassett presented evidence in support of claims for the entire class. Cf. Behrend, 655 F.3d at 203-04 (court's inquiry is whether class claims may be proven on class-wide basis using common proof). Based on this evidence, the jury found in favor of Bassett and the class on the breach of express warranty claim and awarded damages. We see no abuse of discretion in the trial court concluding that the verdict [*90] is not so contrary to the evidence as to shock one's sense of justice.

Whether the amount of damages awarded to each class member is against the weight of the evidence is a narrower and potentially more difficult question. [*40] Bassett's expert testified that each class member incurred identical costs of approximately $1,005. He calculated these costs based on: (1) a life expectancy for each Kia of 100,000 miles, (2) during which time, brake system components would be replaced approximately every 10,000 miles, half the distance that would have met KMA and industry
standards, (3) at the average cost of replacing brake components in Pennsylvania ($175 for replacing brake pads and resurfacing rotors, and [*437] $240 for replacing brake pads and replacing rotors). Bassett's expert estimated that each vehicle underwent five extra repairs in addition to wear-and-tear replacements of brake pads and rotors. This calculation, of course, does not account for factors such as: whether class members owned their vehicles for 100,000 miles, whether each class member experienced exactly five additional repairs, and whether any additional repairs were covered under the warranty. Indeed, warranty data introduced [***91] at trial reflected that KMA covered some of the brake component replacements under good will and brake coupon programs, which suggested that a number of the estimated repairs for the class did not in fact cause class members out-of-pocket expenses.

As Mr. Justice Saylor explains in his dissent, the class never attempted to account for variables in damages resulting from "markedly different experiences of personal expenditure to address Sephia brake problems." Dissenting Slip Op., at 4, 7 & n.7. The class expert testified to aggregate damages representing out-of-pocket costs that likely did not reflect the actual expenses of each or even most members of the class. As Justice Saylor points out, this evidentiary approach "blur[s] the substantive requirements of the law of damages." Id. at 13. The dissent emphasizes that court sanctioning of agreements to calculate damages in the aggregate as part of class action settlements involves different considerations from court approval of aggregate damages evidence proffered in the adversarial trial setting. See id. at 12 n.14 (citing City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972)). As Justice Saylor notes, HN33 notwithstanding the parties' [***92] consensual acceptance of rough justice does not distort the expectations, predictability, and fundamental fairness of our judicial system. See id. at 14.

On the other hand, we note that some jurisdictions have permitted the use of aggregate damages calculations in class actions. See, e.g., Scottsdale Mem'l Health Sys., Inc. v. Maricopa County, 224 Ariz. 125, 228 P.3d 117, 133 (Ariz. Ct. App. 2010) (rejecting claim that calculating damages based on statistical sampling is per se violation of due process); [*438] In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 197-99 (1st Cir. 2009) ("In re Pharm.") (rejecting due process challenge to aggregate damages and to expert's method of calculating those damages); Hilaq v. Estate of Marcos, 103 F.3d 767, 784-86 (9th Cir. 1996) (rejecting due process challenge to aggregate damages calculation based on sample claims); but see, e.g., McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231-33 (2d Cir. 2008) (aggregate recovery for class followed by individualized distribution violates due process); In re Fibreboard Corp., 893 F.2d 706, 711-12 (5th Cir. 1990) (aggregate damages extrapolated from damages of sample plaintiff violated Texas law requiring proof [***93] of causation and damages). In In re Pharm., the U.S. Court of Appeals for the First Circuit concluded that: "Aggregate computation of class monetary relief is lawful and proper. Courts have not required absolute precision as to damages." 582 F.3d at 197 (quoting 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10.5, [***41] at 483-86 (4th ed. 2002) ("Newberg")). Accord Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 124, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) (citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564, 51 S. Ct. 248, 75 L. Ed. 544 (1931)) ("[a]lthough the factfinder is not entitled to base a judgment on speculation or guesswork, the jury may make a just and reasonable estimate of the
damage based on relevant data, and render its verdict accordingly"). With specific respect to a due process challenge to such a computational model, the First Circuit stated: "Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis . . . . Just as an adverse decision against the class in the defendant's favor will be binding against the entire class in the aggregate [*494] without any rights of individual class members to litigate the common issues individually, so, too, an aggregate monetary liability award for the class will be binding on the defendant without offending due process." In re Pharm., 582 F.3d at 197-98 (quoting Newberg, supra).

Furthermore, as Justice Saylor notes, "some jurisdictions have accepted the use of statistical, surveying, and sampling techniques" in class [*439] actions to prove damages in the aggregate, while others have rejected the approach. See Dissenting Slip Op. at 9 n.10 (citing Laurens Walker, A Model Plan to Resolve Federal Class Action Cases by Jury Trial, 88 Va. L. Rev. 405, 415-20 (2002); 2 MCLAUGHLIN ON CLASS ACTIONS § 8:7 (6th ed. 2010)).

The question of whether testimony regarding aggregate damages is probative to calculate the amount of damages in a class action would be an issue of first impression for this Court. In this instance, Bassett's expert offered such testimony. Once the evidence was offered, KMA had the opportunity to object that it was incompetent to the task or violated KMA's right to due process (or other rights), to cross-examine the witness on the weakness of his methodology, or rebut the argument with [*95] evidence of its own; yet, the testimony of Bassett's expert went unchallenged in these respects.

Instead, as we read the record and KMA's brief, KMA proceeded both at trial and on appeal on the theory that Bassett introduced only evidence of her own damages and no evidence of damages to any other member of the class. But, this position misapprehends the record. As described, Bassett's expert specifically testified to his calculation of estimated damages for each member of the class, which in the aggregate produced the molded verdict.

Justice Saylor has well demonstrated that this testimony was subject to a colorable objection on the ground that it inaccurately or imprecisely captured the amount of damages for individual members of the class. But, at the appropriate time at trial, when any error in this regard could have been addressed or avoided, KMA did not challenge the expert's method of calculating damages in the aggregate on due process or any other grounds, and thus waived the argument. The dissent articulates a problematic issue regarding the proof and determination of individual damages differently, and certainly more cogently, than KMA did either at trial or on appeal. In light [*96] of existing jurisprudence that articulates a reasonable ground upon which to permit certain forms of aggregate damages evidence in class action litigation, and in light of the narrower nature of KMA's preserved challenge to [*440] the damages calculation here, we find no abuse of discretion in the rejection of this aspect of KMA's weight claim.27

FOOTNOTES

27 We emphasize the narrow nature of our holding in this regard. Given the limited nature of KMA's
preserved challenge, we need not, and therefore do not, express a definitive view on the questions of whether proving damages in the aggregate in a class action is "lawful and proper" in Pennsylvania, and of whether the methodology of Bassett's expert in estimating individual damages here was sound.

[**42] III. Molding of the Verdict

Next, KMA claims that the Superior Court erred in affirming the trial court's judgment of a molded verdict of $5,641,200. KMA makes two related but nonetheless distinct arguments. First, KMA contends that molding of the verdict was improper or in violation of its due process rights because it allowed each member of the class to recover $600, although no evidence of liability and amount of out-of-pocket costs was of record for any [***97] member of the class except Bassett. Essentially, the manufacturer re-asserts its prior arguments regarding the certification of the class and the sufficiency of evidence to prove a breach of the express warranty. See Jackson v. Virginia, 443 U.S. 307, 313-14, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (constitutional predicate of sufficiency claim is due process clause). Second, KMA states that molding of the verdict was improper because the trial court did not conduct claims proceedings per its pre-trial order of May 16, 2005 ("May 16th Order"), which disposed of KMA's motion to bifurcate the trial into proceedings on what KMA perceived as "common" versus "individual" issues. The May 16th Order stated:

AND NOW, this 16th day of May, 2005, upon consideration of the Motion to bifurcate of Defendant, Kia Motor [sic] America, Inc., it is hereby ORDERED that Defendant's Motion is DENIED. Each class member's entitlement to recover if plaintiff class prevails, shall be determined at claims proceedings.

Tr. Ct. Order, 5/16/05. According to KMA, in light of the May 16th Order, the trial court molded the verdict "without forewarning" and in violation of KMA's constitutional due process [*441] rights. Regarding its due process claim, KMA [***98] also insists that the improper certification of the class denied KMA the opportunity to present a defense as to each member of the class and have its merits fairly judged. KMA claims that the trial of the case as a class action improperly expanded the substantive rights of class members other than Bassett, who "were awarded damages for a harm they did not prove." KMA's Brief at 28-32.

Bassett and the class respond that KMA distorts the record. According to Bassett, the evidence was "crystal clear that this case was tried on a class basis and defended on a class basis." Bassett's Brief at 39. She states that the jury entered a verdict for the class and not for Bassett alone, as the jury questionnaire reflected. Question 5 on the jury questionnaire stated:

State the amount of damages if any, sustained by each [c]lass member:

* * * * *

b) For repair expenses, reasonably incurred, as a result of defendant's breach of warranty.
Jury Verdict Special Interrogatories, 5/27/05. After the jury awarded $600 per class member, the trial court merely realized the plain intent of the jury by multiplying the per person award by the stipulated number of class members, and arrived at the molded verdict. The trial court then entered judgment pursuant to Rule 1715(d), which required the court to specify who was bound by the judgment.

[***43] Bassett emphasizes that KMA waived any claim of error regarding the molding of the verdict by failing to raise a timely objection at trial. According to Bassett, the trial court's May 16th Order did not relieve KMA of the obligation to object when the trial court molded the verdict. Bassett [*442] regards as "dubious" KMA's position that it detrimentally relied on the May 16th Order to reserve its defenses until an evidentiary claims proceedings phase. Bassett points out that KMA failed to identify any defenses that it was allegedly prevented from asserting at trial. Bassett also reemphasizes that the nature of her proof and of the class proceedings was known or should have been known to KMA and its attorneys, who failed to object at any time to class-wide proof of damages, or to the jury questionnaire, or to the molding of the verdict. Thus, Bassett says, KMA's assignment of error via post-verdict motions and on appeal is untimely. Finally, Bassett offers her own due process and fairness arguments in support of maintaining the class and sustaining the verdict.29

FOOTNOTES

28 Bassett [****100] postulates that, in addressing claims proceedings in the May 16th Order, the trial court anticipated proceedings related to individual UTPCPL claims, election of remedies, or required affirmations of fact, which were then rendered moot by the evidence introduced at trial. But, the record contains no specific support for Bassett's assertions and we express no opinion regarding the trial court's purpose for referring to claims proceedings in its May 16th Order.

29 As a separate issue, Bassett also argues in a footnote that KMA waived all of its appellate arguments by failing to move for decertification before or after trial. Bassett's Brief at 48-49 n.27. In its reply brief, KMA responds that, pursuant to Rule 1710, a party may seek decertification at any stage, including on appeal, "before the final appeal is exhausted." According to KMA, a party is not required to file for decertification in order to preserve its arguments regarding class certification on appeal. KMA's Reply Brief at 10-11 & n.10. Both parties conflate two separate concepts: decertification by the trial court and appellate review of a trial court certification decision. Thus, HN34 only the trial court may decertify a class [****101] pursuant to Rule 1710(d), which, as a Rule of Civil Procedure, governs practice and procedure in the courts of common pleas. Practice and procedure in the appellate courts is governed by the Rules of Appellate Procedure. Pa.R.A.P. 103. Rule 1710(d) plainly states that a decertification decision is proper only "before a decision on the merits." Pa.R.C.P. No. 1710(d). But, filing a motion to decertify is optional and failure to move for decertification does not waive a party's claims of error on appeal regarding the trial court's initial certification decision. Appellate courts review a trial court decision under an abuse of discretion standard and may order the judgment vacated or reversed, on the basis that certification was erroneous, with the ultimate result that the class is decertified. See, e.g., Debbs, 810 A.2d at 164 (judgment vacated with direction for trial court to decertify the class). Here,
KMA's decision to forego filing a motion to decertify did not waive its claims of error regarding the initial certification of the class, the sufficiency and weight of the evidence to support the judgment, or the molding of the verdict.

In its reply brief, KMA asserts that its objection [***102] to the molded verdict was timely, because the first appropriate opportunity to object was in its motion for post-trial relief; the [*443] post-trial motion gave the trial court "every opportunity to correct its error." KMA's Reply Brief at 12 n.12. According to KMA, the jury questionnaire, which referenced damages of each class member, was consistent with the May 16th Order, which, according to KMA, required that "there would be claims proceedings in which each class member would have to prove entitlement to a recovery." Id. (emphasis in the original). Thus, the molding of the verdict created the inconsistency to which, KMA states, its timely objection was raised. Id.

In its Rule 1925(b) statement, KMA raised the molding of the verdict issue in [***44] terms similar to those in its appellate brief to this Court. Unfortunately, the trial court addressed the narrower (and somewhat different) issue of whether there was error in its denial of the motion to bifurcate the damages and liability phases of trial. The court concluded that bifurcation was not necessary because the risk of prejudice against the defendant, common, for example, in catastrophic personal injury cases, was not present here. Tr. Ct. [***103] Op., 12/29/06, at 39. The Superior Court agreed and affirmed the judgment on the molded verdict. The panel also added that the record contained sufficient evidence to support a verdict of $600 per class member (and indeed of up to $1,005). According to the court, "all class members were entitled to have good brakes on their cars that did not require repeated trips to the dealership for replacement to avoid brake failure." Super. Ct. Op., 10/24/07, at 3-4. We address each of KMA's related claims separately.

A. Class Certification Decision and Sufficiency of the Evidence

KMA argues that the molding of the verdict was improper because evidence as to Bassett's claim was not probative of the claims of other class members and, as a result, the class failed to carry its burden of proof at trial. The car manufacturer essentially incorporates and re-asserts its prior claims of trial court error regarding the sufficiency and weight of the evidence to justify the jury's verdict as the basis for its due process argument. We have already discussed at length and [*444] dismissed KMA's prior claims. Accordingly, we also reject this repetitive claim. Jackson, supra.

B. Effect of May 16th Order

KMA argues that [***104] the molding of the verdict was erroneous in light of the May 16th Order. In April 2005, KMA filed a motion to bifurcate, seeking separate trials on common issues from issues that it identified as individual, i.e., defect manifestation, notice and opportunity to cure, causation, and damages. According to KMA, its request was for a court order "confirming that issues of fact and law identified by KMA [t]herein [would] be adjudicated in future, class-member-specific proceedings, in the
event that [Bassett] prevail[ed] in the . . . common issue trial." See KMA's Motion to Bifurcate, 4/25/05, at 14, 19. The trial court denied the motion and stated that "class members' entitlement to recover[,] if plaintiff class prevails, shall be determined at class proceedings." Tr. Ct. Order, 5/16/05. Thereafter, the parties proceeded to trial and Bassett introduced evidence to prove the claims of all the members of the class.

On May 25 and 26, 2005, the trial court conferred in chambers with both parties regarding their requested jury instructions and the jury verdict sheet, and sought to provide prompt resolution to the parties' objections. The court described its jury instructions and jury questions [***105] in terms of amount "sustained by each class member," inter alia, "for repair expenses as a result of defendant's breach of warranty." The trial court asked if there were any objections to the questions on the jury verdict form as explained and KMA's counsel responded "No, Your Honor." N.T., 5/25/05, Vol. 7, at 70-73. Both the jury instructions and the verdict form reflected the discussion in chambers. Indeed, after providing a description of the damages requested by the class in its charge to the jury, the court explained: "[b]ecause you're rendering a verdict for each class member, I will take care of making sure that the Class members recover." At sidebar, immediately after the damages instruction, the court again asked attorneys for both parties if there were any objections [***45] to the charge and [***445] the attorneys responded in the negative. N.T., 5/26/05, Vol. 3, at 50-53. The court then released the jury for deliberations.

The questions on the verdict sheet, in relevant part and with the jury's answers, read:

**Question No. 1:**
Did [KMA] breach its express warranty on the cars purchased by the class?

X Yes  No

* * * *

**Question No. 5:**

State the amount of damages if any, sustained by each Class [***106] member: b) For repair expenses, reasonably incurred, as a result of [KMA]'s breach of warranty.

$600.00

Jury Verdict Special Interrogatories, 5/27/05; accord N.T., 5/27/05, Verdict, at 3-8.

After the trial court recorded the jury's answers to the questions on the verdict slip, the court multiplied the $600 damages award by the agreed-upon number of class members -- 9,402 -- and recorded a verdict of $5,641,200 on behalf of the class. After dismissing the jury, the court asked the parties if there was anything further they wished to address at that time. Counsel for KMA answered "No, Your Honor.
Thanks to the Court." The court concluded proceedings. N.T., 5/27/05, Verdict, at 4-8.

On appeal, KMA concedes that it raised an objection to the molding of the verdict premised on the May 16th Order for the first time in its post-trial motion, re-asserted it in its Rule 1925(b) statement, and argues that such an objection afforded the trial court sufficient opportunity to correct its error. In the Rule 1925(b) statement, KMA asserted that Bassett had consented to undertake post-verdict claims proceedings to determine each class member's entitlement to recover, yet the trial court "sua sponte and [***107] in derogation of its own order on bifurcation, transformed this bifurcated class action trial into a [***446] unitary verdict in favor of the class." The manufacturer also raised an alternate, facially contradictory, argument that "[t]he time for determining whether class members have claims against KMA is at trial, not 'at claims proceedings' following trial and verdict." KMA's Concise Statement of Matters Complained of on Appeal, ¶ 3. KMA had initially asserted the latter, but not the former, argument in its post-trial motion for a judgment notwithstanding the verdict. KMA's Motion for Post-Trial Relief, ¶ 9. On appeal, KMA insists that absent reversal and decertification of the class, KMA's due process rights will have been violated. KMA's Brief at 30-32; KMA's Reply Brief at 12 n.12.30

FOOTNOTES

30 In a brief footnote, KMA also states that "claims proceedings" referenced in the May 16th Order amounted to a concession by the trial court that the class was improperly certified. KMA's Brief at 30 n.18. KMA cites no legal support for its argument. Indeed, claims proceedings are a recognized, albeit not required, feature of determining damages post-verdict in class actions. See generally Allan Erbstein, From [***108] "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995 (2005).

We disagree with KMA that its objection, which it concedes was offered for the first time in a post-trial motion, was timely under the circumstances. HN35 Under prevailing Pennsylvania law, a timely objection is required to preserve an issue for appeal. Pa.R.C.P. No. 227.1(b)(1) & n.; Pa.R.A.P. 302; Straub v. Cherne Indus., 583 Pa. 608, 880 A.2d 561, 567 (Pa. 2005); Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114, 116-17 (Pa. 1974). Here, KMA failed to object to the verdict sheets when [***46] composed and offered to the jury, to the related jury charge, or, at the latest, contemporaneous with the actual molding of the verdict. As a result, the issue of whether the May 16th Order precluded the trial court from molding the verdict was waived.

The substance of the trial court's May 16th Order does not affect this conclusion. This Court's Straub decision is particularly instructive. In Straub, after the parties rested, the trial court discussed the verdict sheets with the parties and stated that it aimed to explain to the jury that the plaintiffs were forwarding two independent claims, and that the plaintiffs [*447] [***109] could win on one claim but lose on the other or vice versa. The parties agreed and the trial court issued its instruction. The jury returned a verdict in favor of the plaintiffs on one claim but not on the second. The defendant did not object to the jury questionnaire, the trial court's instructions, or the jury's verdict. Then, in post-trial motions, the
defendant sought a judgment notwithstanding the verdict on the ground that once the jury found that the product was not defective respecting the first claim, it should have found in its favor on all counts. The trial court did not rule on the post-verdict motions and entered judgment on the verdict; the Superior Court reversed and remanded. This Court, however, held that the Superior Court erred in rejecting the plaintiffs' waiver argument and reversed. We concluded that the defendant premised its claim of error "on the argument that the jury's verdict was incompatible with a principle of law." But, this alleged error should have been evident when the verdict sheets and the trial instructions were agreed upon and formulated. Yet, the defendant did not object to the verdict sheets, to the trial court's related instructions, or "to [***110] the verdict itself when it was rendered." By failing to object, the defendant had waived its claim. 880 A.2d at 567.

Here, we have a similar scenario. KMA argues that the molded verdict was incompatible with the May 16th Order, which it poses as the law of the case, and upon which it claims it relied to allegedly forego pursuit of undisclosed defenses to the class claims.31 Pursuant to Straub, however, this so-called reliance was not sufficient to excuse KMA's obligation to raise a timely objection when, in its view (as alleged now), the court acted contrary to the prior order. KMA should have objected [*448] contemporaneously to the jury questionnaire or, at the latest, contemporaneously to the actual molding of the verdict in order to give the trial court a contemporaneous opportunity to address the alleged error and to preserve the present issue for appeal. Indeed, HN36 the object of contemporaneous objection requirements respecting trial-related issues is to allow the court to take corrective measures and thereby to avert the time and expense of appeals or new trials. See Criswell v. King, 575 Pa. 34, 834 A.2d 505, 509-10 (Pa. 2003) (listing policy considerations behind contemporaneous objection requirement). [***111] KMA simply did not do that here. As a result, the manufacturer's claim of error in the molding of the verdict, premised upon [**47] a supposed inconsistency with the May 16th order, is waived for failure to record a contemporaneous objection.

FOOTNOTES

31 KMA's description of the claims proceedings mentioned in the May 16th Order is nebulous and, at times, suggests proceedings very expansive in scope, which would encompass individual trials of each class member's claims with respect to reliance, manifestation, notice and opportunity to cure, causation, and damages. But, the trial court denied KMA's motion to bifurcate, which had expressly requested separate trials on these "individual" issues. To interpret the May 16th Order as nonetheless permitting what it expressly denied and to credit KMA's purported reliance on it in either not asserting defenses or objecting is not tenable.

IV. Authority of Trial Court to Enter Counsel Fee Order

Next, KMA argues that the counsel fee award should be vacated because, when the award was issued, the trial court had been deprived of jurisdiction by KMA's appeal from the judgment on the verdict. According to KMA, Bassett entered judgment pursuant to Rule 227.4(1)(b) on [***112] October 25,
2005, while the attorney's fee petition of June 6, 2005, was still pending. See Pa.R.C.P. No. 227.4(1)(b) (upon party's praecipe, prohonotary to enter final judgment on jury's verdict if court does not dispose of all post-trial motions within one hundred twenty days after filing of first post-trial motion). The manufacturer appealed the judgment on October 28, 2005, and the trial court decided the fee petition on January 23, 2006, nearly three months later. According to KMA, the MMWA requires that the counsel "fee award be entered 'as part of' the underlying judgment." But, here, the trial court issued the fee award months after and, thus, it was not part of the final judgment entered. The manufacturer argues that, pursuant to Rule of Appellate Procedure 1701(a), the trial court no longer had jurisdiction to act on the petition for counsel fees once Bassett entered voluntary judgment on the verdict. Pa.R.A.P. 1701(a) ("Except as otherwise prescribed by these rules, after an appeal is taken . . . the trial court . . . . [*449] may no longer proceed further in the matter."). Thus, KMA asserts that the trial court's award of counsel fees should be vacated. See KMA's Brief at 34.32

FOOTNOTES

32 KMA [***113] cites two cases from our sister states in support of its claim. See KMA's Brief at 35 (Stenger v. LLC Corp., 819 N.E.2d 480 (Ind. App. 2004); Glandon v. Daimler Chrysler Corp., 142 S.W.3d 174 (Mo. App. 2004)). Notably, both cases are distinguishable. In Stenger, the parties settled the case and the court held that, as a result, plaintiff was not a "prevailing party" entitled to attorneys' fees under the MMWA unless the settlement agreement provided for fees. 819 N.E.2d at 484. In Glandon, the court of appeals quashed the plaintiff's appeal from the trial court's order denying a motion for attorneys' fees on the ground that such an application was not a cognizable after-trial motion following entry of a consent judgment. 142 S.W.3d at 178. Neither decision is persuasive nor do the cases inform our decision on the issue before us.

Bassett answers that the award of costs was proper. She recognizes that the MMWA is the statute authorizing legal fees here, but argues that matters of trial court jurisdiction and procedure related to the award of attorneys' fees are governed by Pennsylvania law and rules. According to Bassett, petitions for attorneys' fees are ancillary to the judgment on [***114] the merits and the trial court does not lose jurisdiction to decide them separately after an appeal on the merits is filed. Bassett's Brief at 49-50 (citing Old Forge Sch. Dist. v. Highmark Inc., 592 Pa. 307, 924 A.2d 1205 (Pa. 2007); Miller Elec. Co. v. DeWeese, 589 Pa. 167, 907 A.2d 1051 (Pa. 2006) ("Miller")). Bassett notes that the MMWA does not control trial and appellate jurisdiction in Pennsylvania. Indeed, Bassett claims that the U.S. Supreme Court has recognized that counsel fees may be awarded separately from the judgment on the verdict and later incorporated into the judgment. Id. at 51 (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)).

The trial court agreed with Bassett that the fee petition and award were timely. According to the court, issues regarding attorneys' fees and costs are collateral or ancillary to the merits and may be addressed by the trial court after an appeal has been filed. Entry of judgment and the [**48] appeal therefore did not divest the court of jurisdiction to decide Bassett's pending fee petition. Tr. Ct. Supp. Op. -- Findings
of Facts & [*450] Conclusions of Law, 11/14/07, ¶ 122 (citing Budinich, supra; Miller, supra; Rosen v. Rosen, 520 Pa. 19, 549 A.2d 561 (Pa. 1988)). The [*331]* Superior Court affirmed without further addressing this issue.

Rule 1701 provides that "except as otherwise prescribed by these rules, after an appeal is taken . . . the trial court . . . may no longer proceed further in the matter." Pa.R.A.P. 1701(a). But, after an appeal is taken, the trial court may take other action "ancillary to the appeal." Pa.R.A.P. 1701(b)(1). In Pennsylvania, the trial court's action on a petition for counsel fees has been deemed to be ancillary to the appeal from the judgment on the merits. Miller, 907 A.2d at 1057. Therefore, if the petition for counsel fees is timely filed, the trial court is empowered to act on it after an appeal was taken.

Pursuant to the MMWA, a consumer who prevails on a claim under that statute or on a claim for breach of warranty may recover "as part of the judgment" the reasonably incurred "amount of cost and expenses (including attorneys' fees based on actual time expended)." 15 U.S.C. § 2310(d)(2). In Budinich, the U.S. Supreme Court recognized that statutes and decisional law authorizing counsel fees are inconsistent in characterizing the fees as either costs or part of the merits judgment. 486 U.S. at 201. But, the Court noted [*416] that, as a general matter, "a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending the action." Id. at 200. The Court also stated that "[a]t common law, attorney's fees were regarded as an element of 'costs' awarded to the prevailing party, which are not generally treated as part of the merits judgment. Many federal statutes providing for attorney's fees continue to specify [*451] that they are to be taxed and collected as 'costs.'" Id. at 200-01 (citations omitted).

FOOTNOTES

Section 2310 conditions the award of costs on a consumer's success on the merits and places the task of awarding costs within the bailiwick of the court. Thus, as a practical matter, where the case is tried to a jury, the proceedings on attorneys' fees (with the court acting as factfinder) necessarily take place after and separately from the trial on the merits to a verdict.

As here, the statute at issue in Budinich provided that the "judgment" would "include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action." Id. at 197 [*117] (citing Colo. Rev. Stat. 8-4-114 (1986)). The prevailing plaintiff took judgment on the jury's verdict on March 26, 1984, and the defendant filed post-trial motions, which were denied May 14, 1984. The district court issued its final order concerning attorneys' fees on August 1, 1984. The defendant took its only appeal on August 19, 1984, as to all issues. The U.S. Supreme Court held that the appeal was untimely as to all issues except the attorneys' fees. According to the Court, the judgment on the merits was final and appealable on May 14, 1984, and its finality did "not turn upon the characterization of [attorneys'] fees by the statute or decisional law that authorizes them." Id. at 201. The High Court explained that HN41[*]the important value at stake in adopting this uniform interpretation of finality was
the "preservation of operational consistency and predictability" with respect to jurisdictional and procedural rules governing. Id. at 202.

Like the Colorado statute at issue in Budinich, the MMWA describes the same paradoxical characterization of attorneys' fees as both a "cost" of litigation and "as part of the judgment." 15 U.S.C. § 2310(d)(2). In the interpretation of the U.S. Supreme Court, similar statutory language conveyed no legislative intent to modify jurisdictional and procedural rules applicable to determine the finality of an order for purposes of appeal. Following the High Court's lead, we hold that the trial court's authority to proceed on the petition for attorneys' fees "does not turn" on the MMWA's characterization of those fees. We have no reason to believe that, if faced with this question, the High Court would decide otherwise. Council 13, Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Rendell, 604 Pa. 352, 986 A.2d 63, 77 (Pa. 2009) ("Council 13") (HN43 It is fundamental that by virtue of the Supremacy Clause, the State courts are bound by the decisions of the Supreme Court with respect to . . . federal law, and must adhere to extant Supreme Court jurisprudence.").

Similar to the U.S. Supreme Court, we have a strong interest in the preservation of consistency and predictability in the operation of our appellate process. Pennsylvania law is well established that a petition for attorneys' fees is an ancillary matter, which the trial court retains authority to decide after entry of judgment on the verdict. Here, there is no dispute that the application for attorneys' fees was timely when filed on June 6, 2005. Accordingly, the trial court was authorized to decide Bassett's application for attorneys' fees in January 2006, irrespective of KMA's appeal on October 28, 2005, from the judgment on the verdict dated October 25, 2005. We must reject KMA's request for relief from the fee award on this ground.34

FOOTNOTES

34 In reality, even if we were to adopt KMA's interpretation of the MMWA, we would still reject the manufacturer's prayer for relief. If attorneys' fees had to be awarded as part of the judgment, then the October 2005 judgment would have been interlocutory given that the counsel fees matter was still pending. This would require us to vacate the Superior Court's decision of October 2007 with directions to quash KMA's appeal. Moreover, because in its second appeal KMA challenged only the attorneys' fees, any other issues would have been waived. See Budinich, supra.

V. Counsel Fee Enhancement

Finally, KMA argues that the Superior Court erred in affirming the trial court's application of a "risk multiplier" to the attorneys' fees award under the MMWA. According to KMA, the U.S. Supreme Court "prohibited" risk multipliers in [***120] federal fee shifting cases and, because fees were awarded here pursuant to a federal statute -- the MMWA -- state courts are bound by that interpretation. KMA's Brief at 35-36 (citing City of Burlington v. Dague, 505 U.S. 557, 559, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992); U.S. CONST., Art. VI, Cl. 2). KMA states that the lower courts ignored Dague to rely on a distinguishable
Pennsylvania Superior Court case, Signora v. Liberty Travel, Inc., 2005 PA Super 366, 886 A.2d 284 (Pa. Super. 2005), in awarding the enhanced fee. KMA notes that in Signora, attorneys' fees were awarded pursuant to a Pennsylvania statute rather [*453] than a federal statute. And, citing the U.S. Supreme Court's opinion in Dague, the Signora panel observed that federal statutes do not permit enhancement for risk. Id. at 293 n.14. KMA posits that this Court is bound by U.S. Supreme Court precedent in this matter and should vacate the award of the enhanced fee as contravening that precedent.

[**50] Bassett responds that Pennsylvania law, not federal law, controls the award of the fee enhancement in this case for several reasons. First, she claims that the Dague decision was limited to the environmental statutes addressed by the High Court. Second, according to Bassett, calculation [***121] of attorneys' fees is a matter of exclusive state procedure, not of substantive law. Bassett's Brief at 52 (citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982); Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975); Arons v. New Jersey State Bd. of Educ., 842 F.2d 58 (3d Cir. 1988)). Consequently, in Bassett's view, federal fee-shifting provisions cannot override or displace state rules governing the award of attorneys' fees. Id. at 54 (citing Chin v. Chrysler LLC, 538 F.3d 272, 279-80 & n.5 (3d Cir. 2008)). She also insists that the MMWA does not preempt Pennsylvania law with regard to attorneys' fees and the application of the risk multiplier. Id. at 55 (citing 15 U.S.C. § 2311(b)(1)).

Finally, Bassett emphasizes that Pennsylvania has a strong public policy to fully compensate parties that incur attorneys' fees where a statute permits fee-shifting. Id. (quoting Solebury Twp. v. Dep't of Envtl. Prot., 593 Pa. 146, 928 A.2d 990, 1004 (Pa. 2007) ("federal standards that have not been incorporated into state statutes can only be supported to the extent that those standards are consistent with Pennsylvania public policy")). According to Bassett, the discretion of state [***122] courts to award attorneys' fees is broader than that of federal courts in purely federal cases and, as a result, state courts may adjust the lodestar. Id. at 55-56 (citing Signora, 886 A.2d at 293 & n.14; Skelton v. Gen. Motors Corp., 860 F.2d 250 (7th Cir. 1988); Krebs v. United Ref. Co. of Pennsylvania, 2006 PA Super 31, 893 A.2d 776 (Pa. Super. 2006); [*454] Croft v. P & W Foreign Car Serv., Inc., 383 Pa. Super. 435, 557 A.2d 18 (Pa. Super. 1989)). Bassett claims that to fulfill the consumer-friendly purposes of the MMWA's fee-shifting provision, accounting for the nature of the services, amount of time expended, results obtained, amounts recovered, and for the contingent nature of the fee arrangement, via the application of a risk multiplier, is integral. Id. at 58-61. Bassett asserts that Pennsylvania Rule of Civil Procedure 1716 reflects these considerations and controls the "discretionary determination of a 'reasonable' class fee by the Commonwealth's courts."35 Id. at 57 (citing Pa.R.C.P. No. 1716). Also, Bassett avers, the performance of class counsel in this class action met the "exceptional case" standard and an award of a fee enhancement therefore was appropriate. Id. at 62 (quoting Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 728, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987) [***123] ("Delaware Valley").

FOOTNOTES

35 Bassett adds that the attorneys' fee question before us is also controlled by 41 P.S. § 503. But, HN45
Title 41 relates to maximum interest rates in mortgage transactions and Section 503 is the attorneys' fees provision applicable in disputes between mortgage debtors and lenders. Section 503 is, therefore, inapplicable here.

In its reply brief, KMA briefly reiterates the arguments in its main appellate brief and adds that application of a risk multiplier is in plain conflict with the language of Section 2310 of the MMWA. According to KMA, the Dague decision applies to all federal fee-shifting statutes, including the MMWA.

The trial court agreed with Bassett that class counsel was entitled to an attorneys' fee award equal to a risk multiplier of 1.375 times the $3 million lodestar, for a total of $4.125 million.36 The court stated [**51] that it had discretion to adjust the lodestar upwards by applying a risk multiplier where class counsel had taken the case for a contingent fee. Tr. Ct. Op., 11/14/07, at 11 (citing Signora, supra). According to the court, whether a fee enhancement is appropriate requires consideration of several factors: that a contingent fee case is significantly [***124] riskier than an hourly fee case, what fee would attract competent counsel, and whether the prevailing class [*455] would have obtained representation absent the potential for a fee adjustment. The court emphasized that the Signora court approved the exercise of discretion to adjust the lodestar by reference to Rule 1716 but noted that other Superior Court panels used additional criteria. Id. at 11-12 (citing Logan v. Marks, 704 A.2d 671 (Super. Ct. 1997)). Against this legal background, the trial court concluded that a 1.375 risk multiplier was appropriate in view of the "extensive work, time, and effort devoted by both sides and specifically [Bassett's] lawyers..." Id. at 12. The Superior Court affirmed, quoting at length and without adding to the trial court's analysis of the risk multiplier issue.

FOOTNOTES

36 The court also included an award of $267,513.00 for costs and expenses of litigation. Tr. Ct. Op., 11/14/07, at 2.

Generally, where the award of attorneys' fees is authorized by statute, an appellate court reviews the propriety of the amount awarded by the trial court under an abuse of discretion standard. Solebury Twp., 928 A.2d at 997 n.8. We will not find an abuse of discretion in the [***125] award of counsel fees "merely because [we] might have reached a different conclusion." Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745, 752 (Pa. 1998). Rather, we require a showing of manifest unreasonableness, partiality, prejudice, bias, ill-will, or such lack of support in the law or record for the award to be clearly erroneous. Id. To the extent that the issue before us is a question of statutory interpretation, however, our scope of review is plenary and the standard of review is de novo. Solebury Twp., 928 A.2d at 997 n.8.

The authorizing statute here -- the MMWA -- is a federal statute. "The construction of a federal statute is a matter of federal law." Council 13, 986 A.2d at 80. Pursuant to federal rules of statutory
construction, the courts consider the particular statutory language, as well as the design of the statute and its purposes in determining the meaning of a federal statute. Id. (citing Crandon v. United States, 494 U.S. 152, 158, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990)). But, if the MMWA's language is clear, we should refrain from searching other sources in support of a contrary result. See [*456] Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 228, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning [*456] we deem more desirable."); Carter v. United States, 530 U.S. 255, 271, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000) (statutory interpretation "begins by examining the text . . . not by psychoanalyzing those who enacted it"); United States v. Gonzales, 520 U.S. 1, 6, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997) (where "[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history"); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("[i]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"). Accord Dooner v. DiDonato, 601 Pa. 209, 971 A.2d 1187, 1195 (Pa. 2009) ("The language used by [Congress] is the best indication of its intent.").

[**52] In relevant part, Section 2310 of the MMWA provides that:

HN48 If a consumer finally prevails . . . he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined [*447] by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

15 U.S.C. § 2310(d)(2) (emphasis added). Here, there is no dispute that the MMWA authorizes an award of attorneys' fees to prevailing consumers such as Bassett and the class. 15 U.S.C. § 2310(d)(2). The salient question is whether, in view of the authorizing statute, the trial court abused its discretion in factoring the class counsel's risk into its calculation of the final award of attorneys' fees.

HN49 On its face, Section 2310(d)(2) contains no language authorizing a mandatory contingency multiplier nor does it [*457] give the courts discretion to apply such a multiplier to supplement the actual fee. The provision explicitly states that attorneys' fees are to be "based on actual time expended," and does not provide for a discretionary fee enhancement. In practical terms, this means that the amount of attorneys' fees authorized by the MMWA is a factor of the actual hours expended and billed by the attorneys in the case -- that is, the lodestar. See [***128] Dague, 505 U.S. at 559 ("product of reasonable hours times reasonable rate is lodestar"); Stair v. Turtzo, Spry, Sbrocchi, Faul & Labarre, 564 Pa. 305, 768 A.2d 299, 308 n.8 (Pa. 2001) (same). Thus, Section 2310(d)(2) specifically addresses fee awards and permits only fee awards equal to the lodestar, with no mention, much less approval, of a contrary scheme of fee enhancement such as a contingency multiplier. The plain language of Section 2310(d)(2) is clear and unambiguous regarding attorneys' fees equaling the lodestar.37
FOOTNOTES

37 We are aware that in Skelton, 860 F.2d 250, the Seventh Circuit Court of Appeals rejected this plain language reading. The Skelton court held that contingency multipliers are available in cases where the parties settle a MMWA claim and create a class settlement/common fund from which the plaintiff-class has to pay its attorneys. The court also noted material differences in the policies that support applying contingency multipliers to an attorney fee awarded under the common fund/settlement agreement and to a fee awarded under a statutory fee-shifting provision. Then, in dicta, the court opined that contingency multipliers would be available in MMWA statutory fee cases in light of the U.S. Supreme Court’s plurality decision and Justice O’Connor’s concurrence in Delaware Valley, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585. The court also suggested that the plain language of the MMWA does not preclude application of a contingency multiplier which "multiplies the lodestar by a number representing the probability of loss [as the fee awarded would continue to be] based on the number of hours the attorneys worked." Skelton, 860 F.2d at 257. Notably, in Dague, the U.S. Supreme Court specifically discussed Delaware Valley and rejected contingency multipliers. In addition, the Seventh Circuit’s analysis was in dicta and is neither binding on this Court nor persuasive, as explained further infra.

Moreover, even assuming arguendo that Section 2310(d)(2) is subject to a construction contrary to its plain terms, HN50 U.S. Supreme Court precedent provides additional strong legal support for KMA’s position that the statute does not allow for a contingency multiplier in the present circumstances. [*458] Congress qualified the right of consumer-plaintiffs to recover costs and expenses, limiting recovery to those costs and expenses "reasonably incurred." See 15 U.S.C. § 2310(d)(2). Controlling case law from the court directs that the "reasonable hours times reasonable rate" lodestar is strongly presumed to be "reasonable" attorney fee. Dague, 505 U.S. at 562; see also Perdue v. Kenny A., 559 U.S. 542, 130 S. Ct. 1662, 1669, 176 L. Ed. 2d 494 (2010). The Dague Court further held that a contingency multiplier is generally incompatible with Congressional intent that only "reasonable" attorneys’ fees could be recovered under federal fee-shifting statutes. Dague, 505 U.S. at 562-67.38 The High Court made plain that its consideration extended to federal fee-shifting statutes in general and that the Court intended to speak broadly to provide general guidance. Dague clearly indicated that it intended its analysis of the contingency multiplier to extend to "all" federal fee-shifting statutes, as follows:

[The Clean Water Act and the Solid Waste Disposal Act] authorize a court to "award costs of litigation (including reasonable attorney ... fees)" to a "prevailing or substantially prevailing party." This language is similar to that of many other federal fee-shifting statutes, see, e.g., 42 U.S.C. §§ 1988, 2000e-5(k), 7604(d); our case law construing what is a reasonable fee applies uniformly to all of them.

505 U.S. at 561-62 (emphasis in original; internal citations omitted). HN51 The Supreme Court, of course, is the final word on federal statutory interpretation and our decisional mandate is to follow its
teachings. See Council 13, 986 A.2d at 77 ("It is fundamental that by virtue of the Supremacy Clause, the State courts are bound by the decisions of the Supreme Court with respect to . . . federal law, and must adhere to extant Supreme Court jurisprudence."). 39 Here, the lower courts failed to consider or apply the strong presumption in favor of equating the counsel fee with the lodestar; rather, the courts considered impermissible factors in enhancing the attorneys' fee award.

FOOTNOTES

38 Unlike the MMWA, which provides for calculation of reasonable attorney's fees "based on actual time expended," the statutes pursuant to which attorneys' fees were awarded in Dague and Perdue provided simply for the award of a "reasonable" attorney's fee as part of the costs. In Perdue, the Court clarified its Dague holding and explained that a fee determined by the lodestar method is strongly presumed reasonable but may be enhanced [***132] in very "rare" and "exceptional" circumstances, i.e., (1) "when the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during litigation;" (2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted;" and (3) in "extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees." Perdue, 559 U.S. at , 130 S.Ct. at 1674-75. Foremost, however, the High Court rejected the claim that "either the quality of an attorney's performance or the results obtained are [different] factors that may properly provide a basis for an enhancement," as these were already subsumed in the lodestar calculation. Id. at 1673-74. Moreover, we note, there has been no suggestion in this case that rare and exceptional circumstances justify application of a contingency multiplier.

39 In light of the Supremacy Clause, any reliance by the class on cases that allowed a contingency multiplier based on Pennsylvania law or decisions pre-dating Dague is unavailing. See Solebury Twp., 593 Pa. 146, 928 A.2d 990 (attorney fee award under Pennsylvania's [***133] Clean Streams Law, 35 P.S. § 691.307(b)); Krebs, 2006 PA Super 31, 893 A.2d 776 (attorney fee award under Pennsylvania's Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1305(f)); Signora, 2005 PA Super 366, 886 A.2d 284 (attorney fee award under Pennsylvania's Wage Payment and Collection Law, 43 P.S. § 260.9a(f)). See Croft, 383 Pa. Super. 435, 557 A.2d 18 (pre-dates Dague and does not address contingency multiplier but whether jury award in MMWA case acts as cap on attorney fee awards); Skelton, supra (pre-dates Dague and relies on a High Court opinion specifically rejected in Dague).

[***54] Bassett insists that the MMWA allows for enhancement of the attorneys' fee award beyond the lodestar by application of a risk multiplier. She claims essentially: (1) that Dague's holding was limited to the environmental statutes at issue in that case; (2) that the MMWA gives state courts discretion to award contingency multipliers available through state procedural rules; and (3) that Pennsylvania public policy supports the exercise of discretion in the application of a contingency multiplier to promote the pro-consumer purposes of the MMWA. 40 We must reject Bassett's arguments.

FOOTNOTES
Bassett's argument that Dague's holding must be deemed limited to the environmental statutes "at issue" there, the Solid Waste Disposal Act and the Clean Water Act, proceeds as follows. Section 2310(d)(2) of the MMWA is different from the fee-shifting provisions in Dague, Bassett argues, because it awards an "aggregate amount" of "expenses" in addition to costs as incurred by the consumer/plaintiff, which necessarily should include "contingent fees." Bassett's Brief at 54, 59-60. We recognize that the High Court concluded Dague by saying "we hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue" and, of course, the MMWA was not specifically at issue. Dague, 505 U.S. at 567 (emphasis added). Nevertheless, the Court's analysis made plain that its approach to reasonable fees under all such fee-shifting provisions was uniform. Id. at 561-62 (caselaw construing what is a reasonable fee "applies uniformly to all" federal fee-shifting statutes); accord Signora, 886 A.2d at 293 n.14 ("Enhancement for contingency is not permitted under federal fee shifting statutes.").

Writing for the Dague Court, Justice Antonin Scalia focused on whether a "reasonable" attorneys' fee award may include a contingency enhancement of the lodestar. The High Court concluded that HN52 the lodestar benefits from a "strong presumption" of reasonableness because it generally reflects the merits and difficulties of a case, i.e., the risk of loss. For an attorney who expected a premium over his hourly rates when he or she accepted a contingency fee case, the "lodestar enhancement [would] amount[] to double counting" the risk of loss and is unreasonable. 505 U.S. at 562-63. The Court also discussed various approaches to lodestar enhancement and decided that all the approaches suffered from similar infirmities: undesirable social costs (such as creating incentives to bring nonmeritorious claims and overcompensating cases with above-average chances of success), added incentives for burdensome satellite litigation over attorneys' fees, and inconsistency with the Court's general rejection of contingent fees. Id. at 563-66 (rejecting, inter alia, the Delaware Valley approach, see supra at n.2). Importantly, "reasonableness" of the attorneys' Fees is the linchpin under the MMWA just as it was under the statutes analyzed in Dague. Compare 15 U.S.C. § 2310(d)(2) (courts may award expenses, including attorneys' fees "reasonably incurred by the plaintiff") with 42 U.S.C. § 6972(e) (courts may award costs of litigation that include "reasonable attorney . . . fees") and 33 U.S.C. § 1365(d) (same). Bassett's argument regarding the limiting language notwithstanding, Dague plainly requires rejection of the non-textual contingency multiplier that the lower courts engrafted here onto the MMWA.

Bassett also insists that we limit the application of Dague to "federal-question cases pending only before the federal courts under exclusively federal statutes." Bassett's Brief at 54. According to Bassett, because the MMWA incorporates state law, it is "subject to state procedural rules and interpretations" and its variations regarding contract laws and counsel fee decisions. But, Bassett's description of the MMWA is inapt and her attempt to divorce the trial court's award of attorneys' fees here from the plain language of Section 2310 and controlling precedent is unavailing.
The MMWA is an act that provides, inter alia, federal standards governing contents of warranties and minimum standards for warranties. See, e.g., 15 U.S.C. §§ 2302, 2304, 2311(c). Failure to comply with the MMWA’s requirements or prohibitions constitutes an unfair method of competition, in violation of 15 U.S.C. § 45. See 15 U.S.C. § 2310(b). The MMWA does not create a cause of action for breach of warranty, but it also does not preempt a breach of warranty claim or, generally, "any right or remedy of any consumer under State law." See 15 U.S.C. § 2311(b)(1). According to Section 2310(d)(1) of the MMWA, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief" in federal or state court, pursuant to appropriate jurisdictional requirements. 15 U.S.C. §§ 2310(d)(1) (emphasis added); see 15 U.S.C. § 2310(a)(3), (d)(3), (e). Thus, claims for violation of the MMWA and breach of warranty are separate causes of action that may be joined when filing suit in state or federal court. If the consumer prevails on either cause of action, she is entitled to recover costs and expenses, as described in Section 2310(d)(2). Contrary to Bassett's assertions, HN54 we perceive no clear Congressional intent from the plain language or the statutory scheme of the MMWA that attorneys' fees would be calculated "subject to state procedural rules and interpretations." Accord Chin, 538 F.3d at 279-80 & n.5 (holding that for New Jersey procedural rule permitting counsel fees to apply, consumers must have asserted New Jersey cause of action authorizing fees). Indeed, because Section 2310(d)(2) of the MMWA is a provision of a federal statute, we are bound in our interpretation of that provision by decisions of the U.S. Supreme Court by virtue of the Supremacy Clause. Council 13, supra.

In the same vein, Bassett argues that the award of attorneys' fees is traditionally a matter of procedure governed by state law and procedure, specifically Pennsylvania Rule of Civil Procedure 1716.41 We recognize that the question of what in particular is substantive and what is procedural is not always clear. See Laudenberger, 436 A.2d at 155 (noting substantive effect of new procedural rule permitting pre-judgment interest). But that is not so in this instance where, given the interplay between the MMWA and Rule 1716, [*463] the effect of accepting Bassett's argument would be to import the rule for substantive purposes so as to undo the express terms of the federal statute.

FOOTNOTES

41 Bassett cites three cases in which federal courts yielded to the authority of state courts to regulate the practice of law in those states. See Middlesex County Ethics Comm., 457 U.S. at 432-35 (New Jersey state bar disciplinary proceedings warranted federal court deference); Goldfarb, 421 U.S. at 782-83 (minimum fee schedule published by county bar and enforced through prospect of professional discipline constituted "price-fixing" within meaning of federal act); Arons, 842 F.2d at 63 (New Jersey rule prohibiting non-attorney from receiving compensation for legal representation from client not preempted by federal act permitting lay representation in administrative hearing). Bassett perceives no distinction between the power to regulate the practice of law as a profession and the power to adopt rules of civil procedure, e.g., with regard to attorneys' fees. But, these two powers, in
Pennsylvania at least, are separate and distinguishable. See Pa. Const. Art 5, § 10(c) ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts" and "for admission to the bar and to practice law"). The cases cited by Bassett provide no support for the proposition for which they are cited, i.e., that attorneys' fees are "exclusively" governed by state law.

Bassett also looks to the MMWA's savings clause and concludes that Congress intended to preserve a consumerplaintiff's right under state law, which in Pennsylvania -- as Bassett would have it -- permits a contingency multiplier. Bassett's Brief at 55, 60-61 (citing HN57 15 U.S.C. § 2311(b)(1) ("Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.")). According to Bassett, the right to a contingency multiplier is vested and embodied in Pennsylvania procedural Rule 1716(S), which states, inter alia, that HN58[i]n all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things . . . whether the receipt of a fee was contingent on success." Even aside from Dague, we hold that the MMWA's savings clause is not applicable here and that no general "right" to a contingency multiplier exists in Pennsylvania.

HN59 Rule 1716 is a rule of procedure prescribed by this Court that [***141] does not purport to create any substantive right to a contingency multiplier in all cases. See Pa. Const. Art. V § 10(c) ("The Supreme Court shall have the power to prescribe general rules . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant."). Under Pennsylvania law, the contingency multiplier of Rule 1716 cannot be fairly construed as a "right or remedy" that was intended to be preserved under the MMWA's savings clause so as to undo the express substantive terms of the federal statute.

Finally, we must reject Bassett's claim that Pennsylvania's "strong public policy to justly compensate parties who incur attorney fees" and are entitled to attorneys' fees under fee-shifting provisions justifies an application of the contingency multiplier here. Bassett's Brief at 55 (citing Solebury Twp., 928 A.2d at 1004 (awarding attorney fee under Pennsylvania's [*464] Clean Streams Law, 35 P.S. § 691.307(b))). HN60 Pennsylvania generally adheres to the "American Rule," under [**57] which "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, [***142] or some other established exception." Trizechahn Gateway LLC v. Titus, 601 Pa. 637, 976 A.2d 474, 482-83 (Pa. 2009); see Ayleska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-70, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) (providing exhaustive discussion of American Rule and concluding that Congress and not courts may dispense with it and devise new rules to reallocate costs between litigants). According to this standard, what Bassett identifies as a "strong public policy" is not sufficient to overcome the presumption that the American Rule applies. There is nothing inherently unjust about limiting this form of compensation to actual costs.43 Moreover, like Congress, our General Assembly [*465] has created several exceptions to the American Rule extant in Pennsylvania -- via fee-shifting provisions -- that allow courts to award attorneys' fees as a remedy to well-defined parties. See 42 Pa.C.S. § 2503 (listing categories of litigants who may receive attorney fee
awards); Lucchino v. Commonwealth, 570 Pa. 277, 809 A.2d 264, 267-68 (Pa. 2002) (listing Pennsylvania statutes with fee-shifting provisions). We cannot torture our procedural rule to supplant the legislative prerogative.

FOOTNOTES

42 Bassett also cites Solebury Township for the proposition that "federal standards that have not been incorporate into state statutes can only be supported to the extent that those standards are consistent with Pennsylvania public policy." Bassett's Brief at 55. But, in Solebury Township, this Court addressed the question of whether townships in whose favor formal judgment had not been entered were entitled to counsel fees pursuant to Pennsylvania's Clean Streams Law, which provided that the Environmental Hearing Board "may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. § 691.307(b). The Board had relied on federal law awarding counsel fees to deny the townships' application for counsel fees, holding that the townships were not prevailing parties. We vacated the decision and held that the Board's restrictive application of the narrow federal criteria was not supported by the plain language of the fee-shifting provision of the Pennsylvania statute. Solebury Township is distinguishable because, at issue here is the interpretation of a federal, not a Pennsylvania statute, on which the High Court has final say pursuant to the [***144] Supremacy Clause.

43 Additionally, any easy dismissal of Dague on the ground that the MMWA operates to protect consumers cannot withstand scrutiny. The dual concerns regarding the economic feasibility of access to courts and attracting adequate representation existed and were addressed by the Supreme Court. The High Court rejected the contingency multiplier as a means to unduly reward attorneys. Dague, 505 U.S. at 563 (fee-shifting "statutes were not designed as a form of economic relief to improve the financial lot of lawyers"); see Stair, 768 A.2d at 306-07 (attorneys do not have an "exclusive interest" in statutory fee award). The purpose of the MMWA is fully served by applying the statute according to its plain terms and does not open the door to importing non-textual additional incentives and rewards.

HN6[Rule 1716's actual procedural purpose is as follows. With respect to authorized counsel fee awards under legislation, courts must weigh the considerations of Rule 1716 as a matter of procedure. See, e.g., Signora, supra. But, the procedural vehicle does not create the underlying entitlement. Here, the class requested attorneys' fees under a federal statute -- the MMWA. The plain language [***145] of the MMWA and the High Court's clear precedent provide no basis to trigger our procedural rule. Applying Dague to the federal statute at issue here by no means interferes with Congressional intent to preserve distinct state rights or remedies. Accordingly, we reverse the order below to the extent it provides for enhancement of the attorneys' fee award beyond the amount of the lodestar.

VI. Conclusion
For the foregoing reasons, we affirm in part and reverse in part the decisions of the Superior Court dated October 24, 2007, and February 8, 2008. Our reversal is limited to the lower courts' decision to permit application of a risk of loss multiplier to enhance the attorneys' fee award beyond the amount of the lodestar. We remand to the trial court for adjustment of the attorneys' fees in accordance with this Opinion. Jurisdiction is relinquished.

Madame Justice Greenspan did not participate in the decision of this case.

[*466] Messrs. Justice Eakin and Baer, Madame Justice Todd and Mr. Justice McCaffery join the opinion.

Mr. Justice Saylor files a dissenting opinion.

DISSENT BY: SAYLOR

DISSENT

[**58] DISSENTING OPINION

MR. JUSTICE SAYLOR

I agree with the majority's rationale as it concerns the attorney-fee matters but dissent [***146] relative to the class treatment as it was administered by the trial court.

I. Preface

Initially, the majority's overarching approach to this appeal appears to suggest liberality in favor of class certification. I have no objection, to the degree that this does -- as the majority indicates and our rules prescribe -- nothing more than indicate who the parties to the action will be. See Majority Opinion, slip op. at 10 (quoting Pa.R.C.P. No. 1707, cmt.).

The difficulty we are seeing in the cases, however, is that many proponents of class treatment believe the judiciary concomitantly should bring about substantive changes in the law favorable to consumer classes. It seems, more often than not, that such innovations are not being presented to our courts as the matters of substantive law they truly represent. Rather, they are being passed off as if they were merely part and parcel of the procedural aspects of class treatment.

My intention is not to advance or criticize any particular position advanced in the legitimate, ongoing policy debate concerning what the substantive law should be in the class setting. It may be that changes are desirable. My point is that substantive modifications require [***147] choices among competing
social policies, can have deep and wide-reaching social impact, and may implicate defendants' constitutional rights and entitlements.1 Furthermore, substantive changes in the [*467] law generally are most appropriate to legislative consideration. See Program Admin. Servs., Inc. v. Dauphin County Gen. Auth., 593 Pa. 184, 192, 928 A.2d 1013, 1017-18 (2007) (explaining that "it is the Legislature's chief function to set public policy and the courts' role to enforce that policy, subject to constitutional limitations").

Accordingly, and in the first instance, it is essential to recognize substantive accretions for what they are. Moreover, even assuming judicial lawmaking is appropriate to facilitate collectivized litigation, there can be no legitimate dispute that substantive changes are well beyond the contemplation of the class action provisions presently reposed in our Civil Procedural Rules. See Pa.R.C.P. Class Actions, Explanatory Comment 1977 ("Many desirable approaches to class action problems involve substantive rather than procedural solutions. . . . These are beyond the power of the Procedural Rules."). Therefore, if such alterations of law are to occur, they [***148] must be overtly presented, considered, and sanctioned as matters of substance.

In the present case, the phenomenon of substantive inroads riding the coattails of class action procedure is most vividly illustrated with regard to the damages question. To develop this, in light of the breadth and complexity of the underlying litigation, it is necessary first to lay some supporting groundwork. Upon review of this background, I will discuss how class members were relieved of the obligation to present necessary, fair, and sufficient [***59] proofs concerning an unarguably individualized form of damages they sought -- and the only form of damages they were awarded -- namely, "out of pocket paid repair costs." N.T., May 26, 2005, Vol. 4, at 51 (jury charge).

II. Background

FOOTNOTES

1 One commentator summarized one facet of the tremendous controversy which has arisen over the employment of the class action device as follows:

The academic literature examining this form of litigation has portrayed the class action at times as a savior, bringing about justice in an otherwise flawed system of individual adjudication, and other times as a villain, serving to artificially expand defendant liability and create a specialty [***149] practice for entrepreneurial plaintiffs' lawyers.


In assessing the damages question, it is important to understand that there simply was no evidence of class-wide commonality [*468] relative to numerous factors affecting out-of-pocket costs, including the
mileage of affected Sephias or the length of actual ownership by class members. Moreover, Appellees' own proofs established that many remedial measures were undertaken by KMA as warranty brake repairs at no cost to individual class members. See, e.g., N.T., May 19, 2005, Vol. 1, at 92, 96-97 (testimony of Appellees' automotive expert). Given such substantial variables, it seems plain that individual class members had markedly different experiences of personal expenditure to address Sephia brake problems. Certainly, Appellees never attempted to prove differently by accounting for the variables. Indeed, at various junctures throughout the pretrial and trial proceedings, class counsel conceded their presence and impact.3

FOOTNOTES

2 For the sake of readability, in the text above, I have identified only a few of the many, [***150] readily-discriminable variables differentiating out-of-pocket expenditures by class members. Here, I note only that there are many others. See, e.g., N.T., May 19, 2005, Vol. 3, at 18 (reflecting the testimony of Appellees' automotive expert that a "field fix" utilized by KMA had redressed the brake issue relative to some Sephia vehicles); compare N.T., May 19, 2005, Vol. 1, at 88 (containing the explanation of Appellees' expert that the named plaintiff's brake pads wore out at between 3,000 and 5,000 miles), with N.T., May 19, 2005, Vol. 3, at 22 (reflecting the same expert's testimony that other class members experienced brake pad life in the range of 10,000 miles).

3 For example, at the certification hearings, counsel for the named plaintiff (later class counsel) explained that, at times, "[t]he individuals had to pay for the repair. In other instances maybe [KMA] did cover it or did under goodwill." N.T., July 15, 2004, at 22-23; accord N.T., May 26, 2005, Vol. 4, at 57 (reflecting class counsel's comment in his closing remarks that "KMA did replace many, many defective pads and rotors for some people who owned Kia Sephias").

There is nothing unusual about the phenomenon that class [***151] actions encompass both common and individual questions. See generally Allan Erbstein, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 998-99 (2005) ("Factual distinctions at various levels of subtlety and materiality usually permeate the legal claims of putative class members, such that their collective claims raise both 'common' and 'individual' questions relevant to proving liability and damages." (footnote omitted)). As further developed below, the irregularities in this case pertain to the absence of a management approach which would fairly account for such material differences.

Rather than addressing individualized damages on conventional terms, as required under ordinary substantive law, class [*469] counsel repeatedly argued to the judge and the jury that -- on account of the small amounts involved and the nature of a class action -- there simply was no need for any sort of individualized assessments. See, e.g., N.T., May 26, 2005, Vol. 4, at 113-14. For its part, the trial court, at the certification stage, did not concretely address how individualized damages matters would be managed. Instead, the court rested its approval of [***152] class treatment entirely on conclusory

FOOTNOTES

4 Notably, from the outset, KMA argued to the court that individualized assessments were required. See, e.g., N.T., July 15, 2004, at 50-51 ("What happened with Ms. Bassett doesn't provide any information or proof for the remainder of the class. It must be done individually.").

The looseness of the certification decision yielded ongoing controversy about how the certification was to operate and its impact on required substantive proofs.5 At the pretrial stage, the uncertainties culminated in a surprising turn taken shortly before trial, during a discussion of KMA’s motion to bifurcate. At this juncture, after [***153] consistently rejecting the notion that individualized treatment of any issues was necessary, both class counsel and the trial court cryptically agreed that some sort of undefined claims process would be necessary. This dialogue proceeded as follows:

THE COURT: And [the] verdict will then set the upper limit of what [KMA] has to pay and then people will have to prove that they fit within whatever requirements qualify [*470] them to receive that upper limit, and if they had to pay twice or three times as much, it’s because of the defect, they’re out of luck, right?

[CLASS COUNSEL]: That’s correct.

THE COURT: Okay.

N.T., May 16, 2005, Vol. 1, at 60. Such consensus was then memorialized in the pretrial order, referenced by the majority, specifying that "][e]ach class member's entitlement to recover if plaintiff class prevails, shall be determined at claims proceedings." Majority Opinion, slip op. at 55 (quoting Samuel-Basset v. KMA Motors of Am., Inc., No. 2199 Jan. Term 2001 (Order of May 16, 2005)).6

FOOTNOTES

5 It is perhaps in light of the potential for misunderstandings of this kind ensuing from insufficiently reasoned class certification decisions that the federal appellate courts require of the district [***154] courts a "rigorous analysis" of the certification criteria. See Wal-Mart Stores, Inc. v. Dukes, U.S. , , 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (citations omitted).
This order appeared to embody a variant of the traditional strategy for addressing individual issues in class actions, i.e., bifurcation of the damages question. See 3 Newberg On Class Actions §9:59 (4th ed. 2002) ("After identifying common issues that would support class certification, and recognizing generally or specifically that individual issues would remain after common questions have been litigated, the chief judicial management tool for handling individual issues is to sever them for subsequent trial."). Nevertheless, as further developed below, the order did not alleviate the burgeoning incongruities and misunderstandings.

Despite this prescription for claims proceedings (which, conceptually, should have worked a major alteration in the path of the litigation), Appellees attempted at trial to quantify the out-of-pocket expenses incurred by absent class members via grossly generalized, hypothetical proof. In this regard, Appellees presented an "automotive expert" who indicated -- based on assumptions that each class member paid for all relevant brake repairs and drove his vehicle 100,000 miles -- all plaintiffs incurred $1,005 in damages. See N.T., May 19, 2005, Vol. 3, at 23-26. Two obvious deficiencies in the testimony were that: the first of the underlying assumptions was directly contrary to the record (not the least because it was well established that KMA already had paid for many of the repairs as warranty items, see supra note 3); and the second was in strong tension with common experience (since it seems highly unlikely that all of a class of 9,400 automobile owners would retain their vehicles for 100,000 miles).

FOOTNOTES

7 Both the hypothetical and the responsive testimony also simply ignore many other readily discernable variables impacting out-of-pocket expenditures by individual class members, which Appellees never attempted to discount. See supra note 2.

[*471] In response to defense criticisms of this evidence, class counsel, for his part, maintained before the jury that the class action procedural device alleviated his problems of substantive proof:

[Defense counsel] is a good guy, a good lawyer but this is a Class action and I think you have heard comments that distort Pennsylvania law with respect to how Class actions are handled. This is not a case of 10,000 individual claimants in which case we would have the burden of bringing in everybody including everybody's individual damages.

The whole notion of a Class action, why they exit [sic], is because if you can satisfy the court before it gets to the jury trial stage that the issues are common and the complaints of Ms. Samuel-Bassett are shared by all other members of the Class, then the court will certify by a judicial Order the action as a Class action and it may proceed to this trial.

Ladies and Gentlemen, this case was certified by the Philadelphia Court of Common Pleas as a Class
action. This court was satisfied after a hearing that the complaints that [sic] Ms. Samuel-Bassett were the complaints of the 10,000 members of the Class. But I don’t ask any of you to accept what I tell you; I ask that you listen to the instruction of the court on this issue. Listen to Judge Bernstein’s instruction. I believe he will tell you that proof and evidence that we present as to Ms. Samuel-Bassett should be considered by you as evidence for the entire Class. That’s important. That’s how Class actions work.


FOOTNOTES

8 Certainly, counsel’s comments in this regard were apt as to common issues. However, the remarks were not so qualified, and, as developed above, out-of-pocket damages cannot fairly be regarded as a common question.

Finally, contradicting its pretrial order providing for claims proceedings, the trial court instructed the jurors that there would be no subsequent proceedings to decide anything.9

FOOTNOTES

9 The court stated:

The amount that you award today must compensate the Class completely for all damage that you find has been proven, let me put it that way.

Because there’s no second day in court. Just like I said, we can’t handle 10,000 individual cases and just like I said maybe the amount in question is too small to warrant a whole blown trial for every individual claim; well, just like we in court want only one case if we can reasonably and justly do it; likewise, the defendant only wants one case against them [sic]. So you damages, your verdict is the only verdict in this claim for both sides. There’s no second day in court. Nobody can come back and say we forgot to bring this up or we discovered something tomorrow. Can’t be done. You the jury are the only judges [***158] of the facts. After you decide this case, this case is decided.


[*472] III. Discussion

In my view, the irregularities discussed above are manifestations of a core analytical problem, i.e., the failure to distinguish between the procedural class action device and substantive legal innovations being employed to facilitate them, including adjustments to the plaintiffs’ burden of proof. It could not be argued seriously that hypothetical testimony from an automotive expert -- [**62] based upon underlying assumptions that are unsupported by the record, false, counterintuitive, and/or substantially
under-representative of the range of actual variables affecting plaintiff costs -- could support an out-of-pocket damages verdict in any individual case. Plainly, therefore, the trial court's decision to permit Appellees to use just this sort of testimony to justify such a verdict for 9,400 people was incongruous with Pennsylvania substantive law governing damages.10

FOOTNOTES

10 Throughout this litigation, Appellees have repeatedly relied upon the federal district court's decision to certify a class action in their favor against KMA. See, e.g., Brief for Appellees at [***159] 3-4. Significantly, however, the district court's supporting opinion actually recognized the necessity of individualized damages assessments relative out-of-pocket expenditures from the outset. See Samuel-Bassett v. Kia Motors Am., Inc., 212 F.R.D. 271, 281 (E.D. Pa. 2002) (explaining that elements of damages, other than diminution in value, are "reliant upon 'the intangible, subjective differences of each class member's circumstances,' and would likely require additional hearings to determine given that some individuals have undoubtedly expended more monies and incurred higher parts and labor costs to repair their vehicles than others.")., vacated and remanded by 357 F.3d 392 (3d Cir. 2004); id. at 282 n.2 (indicating that "the individual questions at issue here largely concern the element of damages")

I note that, in some circumstances, some jurisdictions have accepted the use of statistical, surveying, and sampling techniques to fill this sort of evidentiary void. See generally Laurens Walker, A Model Plan to Resolve Federal Class Action Cases By Jury Trial, 88 VA. L. REV. 405, 415-20 (2002). Such techniques are not universally and uncritically accepted, however. See generally 2 McLaughlin [***160] On Class Actions §8:7 (6th ed. 2010) (collecting cases). Moreover, whatever the merits of these sorts statistical and/or scientific techniques for approximating individualized damages in a class action, nothing of the sort was attempted here. Rather, and again, Appellees' "automotive expert" offered an opinion based on a hypothetical entailing unproven, demonstrably erroneous, and under-inclusive assumptions.

[*473] The complexity of class action litigation, and the concomitant need for probing consideration of foundational questions concerning the appropriateness of full or partial class treatment, is apparent both from the many closely reasoned judicial opinions and the broad range of commentary on the subject. See, e.g., Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319-21 (5th Cir. 1998). A judicious class certification decision requires the trial court to distinguish between common questions and individual ones, and to approve a litigation plan for fair and efficient administration which will provide appropriate treatment for both issue categories.11 Where the [*474] [***63] proponent of class certification fails to lay the necessary groundwork, the correct judicial response is to deny the certification. [***161] See generally 2 McLaughlin On Class Actions §8:16 ("Certification is not permissible where it relies on a damages model under which gross or aggregate damages would be calculated and awarded without considering whether each class member had a valid claim, thereby risking that the defendant would be liable for damages that it was not proved to have caused, or that some class members would recover damages that do not correspond to the true value of their claims."). As fundamentally, where class
treatment is appropriate, the trial court must tailor class procedure to accommodate the governing substantive law, not the opposite.12

FOOTNOTES

11 This point is made by one commentator as follows:

when a plaintiff asks a court to certify her as a representative of absent class members seeking damages, the court may do so only if it has a feasible plan for resolving factual and legal disputes regarding each element and defense applicable to each class member's claim and for eventually entering judgment for or against each class member. There must either be an opportunity for the parties to litigate individual claims or defenses, or a reason to believe that such an opportunity is not necessary to reach a [***162] judgment that accurately values class members' claims. The existence of individualized issues of fact and law unique to the circumstances of particular class members thus does not necessarily preclude certification if the court has a plan for coping with individual factual and legal inquiries. In practice, however, certification will not be possible when there is no manageable way of reaching a final judgment that resolves all factual and legal disputes relevant to each class member's entitlement to relief under applicable substantive law, and when one or more parties is unwilling to settle voluntarily.

Erbsen, From "Predominance" to "Resolvability", 58 Vand. L. Rev. at 1049.

Parenthetically, the majority cites Professor Erbsen's substantial work for the proposition that claims proceedings are not required in class actions. See Majority Opinion, slip op. at 60-61 n. 30. While this may be true, the majority does not capture the author's overarching point that some fair mechanism for individualized treatment of individualized issues is required.

12 Professor Erbsen's article provides the following explanation for why particular care in class action certification and management is required [***163] to protect all parties' rights and interests:

The practical problems with certifying class actions despite dissimilarity among claims arise from the natural human instinct to simplify the inherently complex and to create order out of what appears chaotic. These instincts manifest in class actions in the form of procedural shortcuts to squeeze heterogeneous claims into a homogenous mold and thereby avoid the procedural difficulties that dissimilarity would create. . . . Likewise, aggregating distinct individual claims into a class obscures differences among class members in ways that engender substantive consequences.

Erbsen, From "Predominance" to "Resolvability", 58 Vand. L. Rev. at 1009-10.

In the present case, certification of a 9,400-person class action occurred without the predicate, closely-reasoned justification or any rational plan for the handling of individualized issues.13 Rather than redressing this fundamental misstep at any of several benchmark opportunities, Appellees continued to
invite the trial court and the jurors to treat the substantive [*475] law as if were shaped by the certification of a class. Unfortunately, to a large degree, the trial court accommodated Appellees' [***164] vision of aggregate litigation. Thus, for example, Appellees' expert was permitted to testify to fictionalized class-wide out-of-pocket expenses, which became the sole basis for the only damages awarded by the jury (other than to the named plaintiff).14

FOOTNOTES

13 Indeed, this baseline reality of this case was reflected in the following impromptu comment by class counsel during the trial proceedings: "I don't know how, in the context of this Class Action, or in any Class Action, at a trial you could prove the amount of damages actually incurred by everyone." N.T., May 26, 2005, Vol. 3, at 19.

14 Approximations and extrapolations are frequently the basis for class action settlements. See, e.g., City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1385 (S.D. N.Y. 1972) (explaining that an "evaluation of the proposed settlement . . . requires an amalgam of delicate balancing, gross approximations, and rough justice"), rev'd in part on other grounds, 495 F.2d 448 (2d Cir. 1974)). However, the settlement context, involving a consensual resolution of affairs, is far different from the adversarial trial setting. Indeed, it is the difficulties of proof facing plaintiffs, and the scale of potential liabilities [***165] faced by defendants should they go to trial, which often provide the incentives for consummation of settlements.

Again, it may well be that, as a matter of social policy, some or all of the techniques and philosophies pertaining to class action settlements should be transported into the trial context. My main point here is that, undisputably, the approval of the class action device as acceptable procedure did not accomplish such a substantive change in Pennsylvania. See supra Part I. Moreover, and again, in any such substantive decision making, separation of powers considerations and the constitutional interests of affected defendants obviously merit careful consideration. See id.

Professor's Erbsen's overview perspective is again illuminating:

"Ad hoc lawmaking" occurs in class actions when courts attempt to devise substantive and evidentiary shortcuts around management problems that dissimilarity imposes on the resolution of otherwise similar claims. For example, courts will . . . bend the rules of evidence and alter burdens of proof so that contested facts can be resolved on a common rather than individualized basis[,] . . . Nothing inherent in the class action device distorts substantive [***166] or evidentiary rules in this manner, but certification has that practical effect when judges try to manage the dissimilar aspects of class members' claims.

At one point, during the transient agreement of class counsel and the trial court to subsequent claims proceedings, they appear to have come to some realization of the scale of the distortion created by conflating the common and individualized issues. In the end, however, the latter were unceremoniously blended back into the collectivized treatment, apparently under the force of the driving class-action rubric. The result [*476] was a trial at which class members’ plainly individualized experience with out-of-pocket expenditures was simply glossed over. As developed above, however, such blurring of the substantive requirements of the law of damages is plainly outside the contemplation of our civil procedural rules. See supra Part I. Furthermore, I agree with KMA that the perversion of expressly limited procedural rules to accomplish unauthorized substantive objectives impacts upon a defendant’s due process rights. See Brief for KMA at 28-32. See generally Erbsen, [***167] From "Predominance" to "Resolvability", 58 Vand. L. Rev. at 1024 ("Class certification is . . . proper only if the court has a plan for eventually reaching an adjudicated or negotiated judgment that reflects the parties' rights under controlling law.").

I recognize that the record of this case creates the impression that purchasers of Sephias in the relevant time period sustained injury on account of a poor brake design and that the amount of the damages awarded to each individual class member appears to be modest. Thus, there may be a sense that the jury verdict in this case serves a “rough justice” and, as such, should not be disturbed. Result orientation in the law, however, yields its own set of perverse consequences, not the least of which is the silent dilution of the consistency, predictability, and fundamental fairness which are aspirations of the American judicial system. Cf. Erbsen, From "Predominance" to "Resolvability", 58 Vand. L. Rev. at 1037-39 (discussing the deleterious impact of ad hoc lawmaking in class action proceedings on democratic legitimacy and concluding that "[a]llowing courts to bend substantive rules to the procedural needs of particular cases is . . . inconsistent [***168] with the normal process of rulemaking and prone to prioritize the welfare of litigants over broader social welfare with undesirable distributive consequences").

Finally, Appellees forcefully contend that KMA’s attorneys did not do enough to bring their criticisms to the attention of the trial court, and the majority credits such argument. See Majority Opinion, slip op. at 53-54. My response is twofold. First, I do not believe the majority opinion in this [*477] case will be read as an error-review, issue-preservation decision.15 Rather, it [*65] will likely be advanced as supporting the proposition that Pennsylvania takes an unconventionally liberal approach to class certification and collectivized treatment of individualized issues in aggregate litigation. Second, the record is replete with objections on KMA’s part to: the class certification decision; the expert testimony upon which the hypothesized class-wide out-of-pocket expenses was based; and the trial court’s failure to require individualized proof for individualized claims. To me, this case should not turn on waiver.

FOOTNOTES

15 Responsively, the majority does say that its opinion is so confined, in relevant part. See Majority Opinion, slip op. at 54 n.27. [***169] Nevertheless, the majority decision sanctions the certification of a broad-scale class in circumstances in which there was no ostensible plan for appropriate treatment of
individualized issues, while at the same time cataloguing the incongruities, missteps, and (in my view) unfairness which resulted. While the majority places the onus upon defendants to provide some greater critique of class certification efforts, in my view, the need for individualized treatment of some elements of the plaintiffs' claims was obvious from the outset of this case (and KIA's objections were sufficient to identify the problem, in any event). Moreover, to prevent similar disorder in future class action cases, I believe the Court should take this opportunity to place the burden upon proponents of class treatment to advance an appropriate management plan.

In summary, left to my own devices, I would vacate the verdict and overturn the class certification order on its terms. I would also highlight the evaluative process which I believe should be required from the outset to shape the course of broad-scale, aggregate litigation likely to span the better part of a decade. I do not believe justice is served by [***170] insulating this verdict in reliance on the discretionary aspect of certification decisions, thus extending a liberality which yields trials where substantive requirements are subject to dilution and non-enforcement without substantive justification.
586 Pa. 102, *; 891 A.2d 705, **; 2005 Pa. LEXIS 3199, ***

TEDDY PETERS, Appellant v. DANIEL COSTELLO AND MARYANN COSTELLO, Appellees

No. 8 EAP 2004

SUPREME COURT OF PENNSYLVANIA

586 Pa. 102; 891 A.2d 705; 2005 Pa. LEXIS 3199

July 27, 2004, Submitted

December 30, 2005, Decided


JUDGES: MR. JUSTICE CASTILLE. CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ. Mr. Chief Justice Cappy, Mr. Justice Nigro, Madame Justice Newman and Mr. Justice Saylor join the opinion. Mr. Justice Baer files a concurring opinion. Mr. Justice Eakin files a dissenting opinion.

OPINION BY: CASTILLE

OPINION

[*104] [**706] MR. JUSTICE CASTILLE

This Court is called upon in this appeal to determine whether "non-biological grandparents" who stand in loco parentis to one of the parents of a child with respect to whom they seek grandparental visitation rights, and who otherwise qualify to seek partial custody/visitation, have standing to seek visitation
under the Grandparent Visitation Act, 23 Pa.C.S. § 5311-13 (the "Act"). Both the trial court and the Superior Court held that appellees, the putative grandparents in this case, were entitled to pursue visitation under the Act as a result of their in loco parentis relationship to the mother of the child. For the reasons that follow, [***2] this Court agrees that appellees had standing, and therefore, we affirm.

The pertinent facts are undisputed: Francesca Szypula is the mother of Felicity Szypula, the child at issue. In 1979, shortly after Francesca was born, appellee Maryann Costello began babysitting her. When Francesca was eleven months old, her biological mother died and her biological father, Francis Szypula, left her in the custody of appellees. Appellees are not related by blood or by marriage to Francesca. Francesca lived with appellees continuously from eleven [*105] months of age until age thirteen when she lived with her father for a period of eight months. At the conclusion of that eight-month period, Francesca returned to appellees, and appellees and Francesca's father entered into the following custody agreement:

WHEREAS, Plaintiff Francis J. Szypula ("Father") is the father of the minor child Francesca Marie Szypula born February 15, 1979;

WHEREAS, the biological mother of the child, Felicia Kay Forbes, died on [***707] January 30, 1980 when the child was less than one year old;

WHEREAS, Defendants Daniel and Maryann Costello (Mr. And Mrs. Costello) have cared for the child [since] shortly after [***3] she was born;

WHEREAS, for a brief period the child lived with Father but has since returned to live with Daniel and Maryann Costello;

WHEREAS, Father and Mr. and Mrs. Costello desire to set forth the terms of the agreement with respect to the custody and support of the child while the child is living with the Costellos;

NOW THEREFORE, it is hereby stipulated and agreed by the above-captioned parties as follows:

1. Daniel and Maryann Costello shall have legal and physical custody of Francesca Marie Szypula and shall be responsible for protecting the child's best interests and welfare.

2. Father shall have the right to visit and communicate with the child on such occasions and with such frequency as he and the child may mutually agree.

3. Father shall assign to the Costellos the child's social security checks to be used for the support of the child, and shall continue to provide health insurance coverage for the child so long as it is available to him at a reasonable cost through his employment.

4. The Costellos shall be responsible for the child's health, education and welfare, and shall take such
steps as are necessary to ensure that the child's [***4] physical and emotional [*106] needs are met and that she is properly supervised at all times.

Pursuant to this agreement, Francesca remained in the custody of appellees and continued to live with them well into adulthood, indeed at least through November of 2002, when the trial court rendered its decision in this case.

On November 8, 1997, while still residing with appellees and unmarried, Francesca gave birth to Felicity. Appellant Teddy Peters, who was twenty-three years of age at the time of Felicity's birth, is the child's biological father. Francesca and Felicity lived with appellees for the first four years of Felicity's life, while appellant lived elsewhere. In March of 1999, appellant petitioned for shared custody of Felicity, which the trial court granted. Then, in November of 2001, appellant petitioned for and was awarded primary physical custody, while Francesca had partial custody which was limited to weekly supervised visits. Appellant allowed appellees to see Felicity at Christmas in 2001, but denied them access to the child thereafter.

On March 13, 2002, as appellant and Francesca continued to dispute custody arrangements, appellees filed a petition for visitation [***5] with Felicity. That action was consolidated with the existing custody dispute. The trial court held a consolidated hearing on October 30, 2002, at which Francesca, Daniel Costello, Felicity's teachers, appellant, a clinical psychologist hired by appellant, and appellant's neighbor testified. Mr. Costello testified that, although Francesca is not his biological daughter, he and his wife raised her as their own since she was eleven months old, and he has had a lifelong father-daughter relationship with her. He further testified that Felicity lived with appellees for a period of four years from the time of her birth until November 2, 2001, when appellant was granted primary physical custody. Mr. Costello testified that Felicity called him "Poppy" and called Mrs. Costello "Mamom," that appellees had always regarded Felicity as their own grandchild; and that they had had a continuous and close relationship with Felicity and spent much time [***708] with her, including birthdays and holidays. Further, during the years [*107] when Felicity lived with appellees, appellant neither questioned nor objected to their de facto grandparental relationship with the child. After primary physical custody was awarded [***6] to appellant, Mr. Costello attempted to see Felicity by calling appellant or stopping him on the street to ask for access, but appellant was unaccommodating.

Francesca testified that, since November of 2001, she had been allowed only supervised visitation with Felicity on Sundays at the Family Court facility in Philadelphia. She stated that Felicity was very attached to appellees, whom Francesca referred to as her parents. When Francesca had custody of Felicity, she resided with appellees, and Mrs. Costello cared for the child while Francesca was at work. Francesca stated that Mrs. Costello and Felicity enjoyed a loving relationship, with Mrs. Costello willing to do whatever she could for Felicity.

Dr. Najma Davis, a clinical social worker hired by appellant to perform a custody evaluation, also testified. Dr. Davis noted that she had visited appellees' home; she described appellees' relationship to Felicity as that of grandparents; stated that she considered appellees to be Felicity's grandparents; and
testified that, in her professional opinion, appellees should continue to maintain a grandparental relationship with Felicity.

Appellant testified that appellees are not Felicity's biological grandparents, but acknowledged that he had treated them as Felicity's grandparents since she was born. Appellant also stated his view that a grandparent should not have a right to be involved with a grandchild if it would be detrimental to the child and, in his view, the care issues existing in the Costello home, issues which in part led to his successful custody petition, were such a detriment.

On November 13, 2002, the trial court heard Felicity's testimony in camera. Though understandably not very forthcoming given her age, Felicity did tell the court that she would like to live with her father, but also would like to spend time with appellees, whom she called "Poppy" and "Grandmom."

[*108] The trial court issued an order on November 15, 2002, awarding shared legal custody of Felicity to Francesca and appellant, with appellant having primary physical custody and Francesca having partial physical custody limited to the first and third weekend of every month, from Friday evening to Sunday evening. The court also granted appellees partial custody/visitation on the fourth weekend of every month from Friday evening to Sunday evening. In addition, the court apportioned a designated [*108] list of holidays among appellant, Francesca and appellees, and awarded appellees seven days of vacation-related physical custody, occurring at the conclusion of school each June. Finally, the court ordered that appellees should have liberal, unmonitored telephone access to Felicity.

Appellant appealed to the Superior Court, but only as to the partial custody/visitation award to appellees. Appellant argued that the trial court erred in finding that appellees had standing under the Grandparent Visitation Act, where appellees were neither the biological nor the adoptive grandparents of Felicity. The trial court filed an opinion in which it noted that it had found that appellees stood in loco parentis to Francesca because they assumed parental status when they entered into the custody agreement with Francesca's biological father and actually discharged parental duties for nearly all of Francesca's life. The court further noted that the rights and duties [*109] springing from a relationship in loco parentis are the same as in a biological parent-child relationship. With respect to appellant's argument that appellees cannot be considered Felicity's grandparents because they are not her [*109] biological grandparents, the trial court noted that nothing in the Act, or in the common meaning of the term "grandparent," restricted grandparental status to those with a biological relationship to the child. Therefore, the court determined that, as a result of their in loco parentis relationship with Francesca, appellees were Felicity's maternal grandparents.

Having found that appellees qualified as grandparents under the Act, the court next held that appellees had standing to petition for partial custody and visitation in the circumstances of this case. HN1 Section 5313 of the Act addresses "when grandparents [*109] may petition" for custody and/or visitation. Subsection (a) provides that grandparents may petition for partial custody and visitation, and authorizes the court to grant such relief, in the following circumstances:
§ 5313. When grandparents may petition.

(a) Partial custody and visitation. — If an unmarried child has resided with his grandparents or great-grandparents for a period of 12 months or more and is subsequently removed from the home by his parents, the grandparents or great-grandparents may petition the court for an order granting them reasonable partial custody or visitation rights, or both, to the child. The court shall grant the petition if it finds that visitation rights would be in the best interest of the child and would not interfere with the parent-child relationship.

23 Pa.C.S. § 5313(a). The court held that appellees had a right to petition because Felicity had lived with them for four years until removed from their home by appellant, thereby meeting the requirements of the act.

With respect to the merits of the petition, the court noted that it had found that allowing appellees partial custody and visitation was in the child's best interest. The best interest finding was based upon the evidence revealing that Felicity had a close relationship with appellees; that the child herself expressed a desire to see appellees; and that appellant's own expert opined that this grandparental relationship should be maintained. Finally, the court noted that there was no evidence that the custody schedule it had ordered would interfere with either parent's relationship with the child.

The Superior Court affirmed in an unpublished opinion. The panel noted, as the trial court had, that in loco parentis status embodies an assumption of parental status as well as an actual discharge of parental duties, and gives rise to a relation which is "exactly the same as between parent and child." Slip op. at 3 (citation omitted). The panel found that appellant had proffered no reason why, when someone assumes parental status with respect to a child, "that status and the standing it confers vis a vis a grandchild must be disregarded" especially where, as here, those seeking access to the child "are regarded by all those concerned as operative grandparents." Id. at 4. Finally, the panel rejected appellant's argument that the Act applies only to biological grandparents, agreeing with the trial court that the statute contains no such restriction. Id. at 5.

For purposes of this appeal, appellant does not dispute the trial court's findings that appellees stand in loco parentis to Francesca; that they served as de facto grandparents to Felicity; and that maintaining that relationship would be in the child's best interest. Instead, appellant confines himself to the preliminary and strictly legal question of appellees' standing to seek visitation and/or partial custody under the Grandparent Visitation Act. Appellant contends here, as he did below, that the Act does not confer standing upon putative grandparents who are neither the adoptive nor the biological grandparents of the child in question. The narrow issue presented is primarily a question of statutory interpretation, and as such, this Court's review is plenary. See Commonwealth v. Gilmour Manufacturing Co., 573 Pa. 143, 822 A.2d 676, 679 (Pa. 2003); C.B. ex rel. R.R.M. v. Commonwealth, Department of Public Welfare, 567 Pa. 141, 786 A.2d 176, 180 (Pa. 2001). See also R.M. v. Baxter ex. rel. T.M., 565 Pa. 619, 777 A.2d 446 (Pa. 2001) HN2Z("the issue of whether the statute confers standing upon a grandparent to seek custody and/or visitation is purely one of law, over which our review is
plenary."). Although this Court's review is hampered to some extent by the fact that appellees have not filed a brief, we nevertheless have little difficulty in concluding that affirmance is required.

Since the basis for appellees' claim of grandparental visitation rights derives from their in loco parentis relationship with Francesca, we will begin [***13] by examining the common law in loco parentis doctrine. HN3 The term in loco parentis literally means "in the place of a parent." Black's Law Dictionary (7th Ed. 1991), 791.

HN4 The phrase "in loco parentis" refers to a person who puts oneself [sic] in the situation of a lawful parent by assuming [*111] the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of in loco parentis embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties. ... The rights and liabilities arising out of an in loco parentis relationship are, as the words imply, exactly the same as between parent and child.

T.B. v. L.R.M., 567 Pa. 222, 786 A.2d 913, 916-17 (Pa. 2001) (citations omitted). 1 Accord Commonwealth v. Gerstner, 540 Pa. 116, 656 A.2d 108, 112 (Pa. 1995). In T.B., a case which has not been cited by appellant or the courts below, HN5 this Court summarized the broad principles governing third party standing in custody/visitation cases, including common law in loco parentis standing, as follows:

It is well-established [***14] that there is a stringent test for standing in third-party suits [fn6] for visitation or partial custody due to the respect for the traditionally strong right of parents to raise their children as they see fit. R.M. v. Baxter ex. rel. T.M., 565 Pa. 619, 777 A.2d 446, 450 (2001). The courts generally find standing in third-party visitation and custody cases only where the legislature specifically authorizes the cause of action. Id. A third party has been permitted to maintain an action for custody, however, where that party stands in loco parentis to the child. Gradwell v. Strausser, 610 A.2d at 1002.


786 A.2d at 916.

FOOTNOTES

1 The T.B. Court further noted that, although the in loco parentis doctrine had roots in cases concerning entitlement to and compensation for children's services, life insurance, and workers' compensation, "in recent years, ... the doctrine has been used almost exclusively in matters of child custody." Id. at 916 (citations omitted).
The appellant in T.B. was the biological mother of the child at issue, who challenged the lower courts' finding that her lesbian former partner, with whom she was living when they decided to have the child together (through the agency of a sperm donor), stood in loco parentis to the child, and therefore, had standing to seek visitation. This Court rejected the mother's argument that the in loco parentis doctrine should be abandoned entirely in this instance noting, among other things, that the mother had forwarded no persuasive reason to reject a well-established common law doctrine and effect a change in the law "that could potentially affect the rights of stepparents, aunts, uncles or other family members who have raised children, but lack statutory protection of their interest in the child's visitation or custody." Id. at 917. In this regard, T.B. also quoted with approval the Superior Court, which described the importance of the doctrine in custody/visitation matters, as follows:

The in loco parentis basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objections."


The T.B. Court likewise rejected the mother's claim that the appellee lacked standing based on the assertion that the statutory custody scheme does not encompass former partners or paramours of biological parents. We noted that appellee's standing claim was premised upon the common law doctrine of in loco parentis, and "the mere fact that the statute does not reference the doctrine cannot act to repeal by implication what has been entrenched in our common law." Id. at 917-18. Finally, we concluded that the appellee indeed satisfied the requirements for in loco parentis status, and therefore, had standing to petition for partial custody for purposes of visitation.

FOOTNOTES

2 Mr. Justice Saylor's dissent in T.B., which this author joined, disagreed with the T.B. Majority's dismissing the significance of the legislative scheme, as well as the conclusion that the appellee in fact stood in loco parentis to the child. With respect to the latter point, the dissent opined that the doctrine of in loco parentis encompasses more than practical or emotional parenthood, but also requires legal incidents of parenthood; since the appellee had no legally recognized familial relationship with the child, the dissent concluded that she lacked standing. Id. at 922 (Saylor, J., joined by Castille, J., dissenting). It is worth noting that, since Francesca's biological father entered into a custody agreement with appellees
conferring on them all legal and custodial rights vis-a-vis Francesca, appellees stood in loco parentis to Francesca under either test set forth in T.B.

[***18] This case, of course, differs from T.B. in that it involves HN8 grandparental standing to petition for partial custody/visitation, and the General Assembly has specifically spoken to the circumstances under which a grandparent may so petition in the Grandparent Visitation Act. The common law doctrine of in loco parentis nevertheless is a central concern, since that is the basis [**712] for appellees' claim to grandparental status.

Appellant argues that the Act establishes a narrow and limited exception to the general rule that parents have a fundamental right to rear their children free from third party or governmental intrusion, and standing to seek to interfere with that right must be limited to those individuals specified by the statute. Appellant notes that the term "grandparent" is not defined in the Act, and therefore, it should be accorded its plain and ordinary meaning which, in appellant's view, would be narrowly limited to a child's biological or adoptive grandparents. Because appellees are not Felicity's biological or adoptive grandparents, appellant argues that they are third parties who lacked standing to petition for visitation under the Act. Moreover, appellant argues [***19] that recognizing standing in the situation of appellees here will turn the narrow grandparent exception into a broad one whereby any person who stood in loco parentis to a parent during that parent's childhood could later seek visitation with that parent's children, which [*114] possibly could lead to disputes between "actual legitimate grandparents" and previous parental caretakers claiming to be "better" grandparents. In appellant's view, appellees here are third parties, pure and simple, and should have faced the hurdles that would face any third party seeking custody as against the child's parents, without being able to resort to the easier method of access afforded only to biological or adoptive grandparents via the Act.

HN9 The object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly. See 1 Pa.C.S. § 1921(a); In re Canvass of Absentee Ballots of November 4, 2003 General Election, 577 Pa. 231, 843 A.2d 1223, 1230 (Pa. 2004). HN10 When the words of a statute are clear and free from all ambiguity, their plain language is generally the best indication of legislative intent. Bowser v. Blom, 569 Pa. 609, 807 A.2d 830, 835 (Pa. 2002); [***20] Pennsylvania Financial Responsibility Assigned Claims Plan v. English, 541 Pa. 424, 664 A.2d 84, 87 (Pa. 1995); 1 Pa. C.S. § 1921(b) HN11("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). HN12 In construing statutory language, "words and phrases shall be construed according to rules of grammar and according to their common and approved usage . . . ." 1 Pa. C.S. § 1903(a). It is only when "the words of the statute are not explicit" on the point at issue that resort to statutory construction is appropriate. 1 Pa.C.S. § 1921(c); see also Comm. v. Packer, 568 Pa. 481, 798 A.2d 192, 196 (Pa. 2002).

HN13 Section 5301 of the Domestic Relations Act states a legislative policy respecting grandparental contact with grandchildren: "The General Assembly declares that it is the public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of
the child with both parents after a separation or dissolution of the marriage and the sharing [***21] of the rights and responsibilities of child rearing by both parents and a continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated." 23 Pa. C.S. § 5301. HN14

Section 5313(a) [*115] addresses when grandparents may petition for visitation and/or partial custody of grandchildren. Mere grandparental status alone does not entitle a person to standing under the Section: instead, the child must have actually resided with the putative grandparent for 12 months or more and must have been removed from the home by his parent. Even if standing to petition is so established, an actual award of visitation rights [***713] to the grandparent would be proper only if it is determined that the award is in the child's best interests and does not interfere with the parent-child relationship.

On the specific point at issue, however, we note that HN15 the statute does not define the term "grandparent." Notably, the term is not qualified by speaking of biological grandparents, or of biological and adoptive grandparents, or of biological and adoptive grandparents to the exclusion of others who may claim grandparental status, such as those with an [***22] in loco parentis relationship with one of the parents of the child. Instead, it simply speaks of grandparents (and great-grandparents). In construing the term, this Court must look to the "common and approved usage" of the term "grandparent." 1 Pa.C.S. § 1903(a). Webster's Third New International Dictionary HN16 defines "grandparent" as "a parent's parent." Webster's Third New International Dictionary (2002), 988. The same dictionary defines "parent" as follows: "1a: one that begets or brings forth offspring: Father, Mother; b [law] (1): a lawful parent (2): a person standing in loco parentis although not a natural parent...." id. at 1641 (emphasis supplied). See also The Merriam Webster Dictionary (1997), 535 (defining "parent" as "1: one that begets or brings forth offspring: FATHER, MOTHER; 2: one who brings up and cares for another") (emphasis supplied). Applying these common definitions of the terms grandparent and parent, because appellees stand in loco parentis to Francesca, they are the parents of Felicity's mother, and therefore, Felicity's grandparents.

The common and approved usage of the term "grandparent" [***23] and the result it compels also comports with the common law. As appellant concedes in equating adoptive grandparental status with biological grandparental status, there are instances [*116] in the law where non-biological family status has the same legal effect as biological status. But, HN17 in loco parentis relationships, like adoptive relationships, have a settled place in the law as well, and generate equivalent parental rights and responsibilities. Consistently with the view of the Court Majority in T.B., we will not read the General Assembly's failure to address the various permutations of parentage in Section 5313(a) as reflecting an intention to eliminate grandparental relationships that have their roots in the common law doctrine. 786 A.2d at 918 (General Assembly's failure to address common law in loco parentis doctrine in provisions respecting custody cannot "act to repeal by implication what has been entrenched in our common law.").

Turning to the effect of the doctrine in this case, it is undisputed that appellees stand in loco parentis to Francesca, because they assumed the status of Francesca's parents and discharged their parental duties to her, all [***24] within the context of a tangible legal relationship created by Francesca's biological
father when he entered into a custody agreement with appellees. As we have noted above, HN18 it is settled that "the rights and liabilities arising out of an in loco parentis relationship are, as the words imply, exactly the same as between parent and child." Id. at 917 (emphasis supplied). One of the natural incidents of parenthood is that parents become the grandparents of their children's children. And, indeed, it is notable that appellees here in fact assumed the status of de facto grandparents when Francesca gave birth to Felicity while still living at home, and filled that role for a substantial portion of the child's life, since they housed Francesca and Felicity for four years and cared for the child when Francesca worked. HN19 In light of the settled legal effect of in loco parentis status, it [*714] seems unlikely in the extreme that the General Assembly intended that persons with a legal relationship "exactly the same" as that of a parent to a child would be deemed to have no legally cognizable relationship with the offspring of that child.

We note that appellant's concerns with the [*25] potential effects of this conclusion, that is, opening the floodgates to petitions [*117] from potentially innumerable caretakers with no biological or adoptive relationship to the in loco parentis child, is vastly overstated. HN20 Section 5313(a) standing is specifically limited to those grandparents seeking visitation with a grandchild who "has resided with his grandparents or great-grandparents for a period of 12 months or more and is subsequently removed from the home by his parents." Thus, it does not encompass every grandparent, much less every person who may seek to forward a claim for "in loco" grandparent status. Therefore, appellant's concern that affirmation of the decision below would permit any non-biological caretakers of a child's parent to file a petition for partial custody or visitation is baseless. HN21 This provision is narrowly drawn and clearly applies only to those grandparents who have resided with their unmarried grandchildren for a period of a year or more.

FOOTNOTES

3 We are aware that R.M. v. Baxter ex. rel. T.M., 565 Pa. 619, 777 A.2d 446 (Pa. 2001), held that a grandparent has automatic standing, under subsection 5313(b), to petition for custody, while the language of subsection (a) specifically limits the ability of grandparents to petition for visitation to those circumstances in which "an unmarried child has resided with his grandparents or great-grandparents for a period of 12 months or more and is subsequently removed from the home by his parents." Baxter did not involve an in loco parentis issue. We neither address nor decide whether an individual who establishes in loco parentis status with regards to a parent of a child has automatic standing to seek grandparental custody under subsection (b); any such decision is better left to an appropriate case raising that specific claim.

[*26] On the other hand, to deny appellees the right even to seek visitation under the Act, simply because they lack a biological or formal adoptive connection to Francesca and Felicity, would artificially minimize appellees' actual and substantial relationship to Francesca and Felicity and their actual contributions to their well-being where appellees have, for more than two decades, assumed the responsibilities attendant upon parenting Francesca and serving as de facto grandparents to Felicity.
Appellees are not officious intermeddlers or mere "prior caretakers," as appellant would have it. As a result of their willingness to step in and actually perform the roles of parents and grandparents, they have distinguished themselves from all other persons lacking a biological or adoptive relationship with this child. In this regard, appellant's argument that the fact [*118] that Felicity has a living, biological maternal grandparent justifies denying appellees' standing to seek visitation misses the point. Francesca had and has a living, biological parent, too; but it was appellees who took on the responsibilities for raising Francesca, and thereby acquiring the attendant rights of parenthood. [***27] The universe of potential petitioners under the Act, while larger than the biological pool, nevertheless is rationally restricted only to those who have played an actual rearing role in the child's life. Accordingly, we hold that, for purposes of the Act, appellees are the equivalent of the child's maternal grandparents, and as such, appellees had standing to file a petition seeking visitation with their grandchild. 4

FOOTNOTES

4 In a subsection of his brief entitled "Policy," appellant cites the United States Supreme Court's decision in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion), as support for his argument that a non-abusive custodial parent has a right to determine what, if any, contact the child should have with grandparents. According to appellant, the recognized liberty interest of parents must inform the decision here. We note that appellant does not allege that this statute is unconstitutional under Troxel. Instead, his claim is confined to the proper interpretation of the statute for standing purposes, and Troxel is invoked as weighing in favor of his restrictive interpretation. In any event, Troxel is inapposite, as that case involved a Washington statute giving any person the right to petition for visitation at any time and granting authority to the courts to permit such visitation. The U.S. Supreme Court found the statute overbroad, but it was not a narrow grandparent visitation statute such as the statute at issue here, and moreover, no majority viewpoint emerged.

[***28]

[**715] The decision of the Superior Court is affirmed.

Mr. Chief Justice Cappy, Mr. Justice Nigro, Madame Justice Newman and Mr. Justice Saylor join the opinion.

Mr. Justice Baer files a concurring opinion.

Mr. Justice Eakin files a dissenting opinion.

CONCUR BY: BAER

CONCUR
MR. JUSTICE BAER

I join the majority opinion, but write to ensure that such joinder is not misconstrued in the future. Initially, I believe this ruling is fact specific and will not be of general application. With the exception of eight months around her thirteenth year, Francesca has lived her entire life with the [*119] Costellos. Francesca's mother is dead, and at the conclusion of the eight-month period during which Francesca lived with her father, her father signed a formal agreement entrusting the Costellos with responsibility for Francesca's health, education, welfare, and physical and emotional needs. The only thing missing in the agreement between Francesca's father and the Costellos that would have mooted this suit is formalized adoption. Moreover, Francesca's child Felicity, who is at the center of this dispute, lived her entire life with the Costellos until Appellant obtained primary [***29] custody of Felicity through a court action. This is simply not a case of the devoted nanny or next door neighbor from a parent's childhood seeking custody of the parent's child, but rather this holding applies only to those individuals who stand in loco parentis to the parent and have lived with the child for twelve months or more. Accordingly, while I join the majority opinion, I emphasize the compelling nature of the facts of this case which would have to be present in any case before this would be applicable as precedent.

Finally, the majority notes at footnote 3 the potential interaction of this opinion with our Court's decision in R.M. v. Baxter ex. rel. T.M., 565 Pa. 619, 777 A.2d 446 (Pa. 2001), which provides grandparents with automatic standing to petition pursuant to Section 5313(b) for full custody without limitation. For similar reasons to those stated above in relation to Section 5313(a), I am convinced that few will be able to satisfy the requirements for custody under Section 5313(b). Moreover, I must note that I believe that Baxter was wrongly decided and notwithstanding my deep respect for stare decisis, will urge its reversal when the opportunity [***30] arises.

DISSENT BY: EAKIN

DISSENT

MR. JUSTICE EAKIN

My colleagues confer upon a couple, acting in loco parentis to a woman who is now well past the age of minority, standing to pursue court-ordered visitation of the woman's daughter under the Grandparent Visitation Act. I respectfully dissent.

The question is whether appellees are entitled to the preferred status, conferred only by the statute, enjoyed by grandparents [*120] of children; as the majority notes, the [**716] narrow question before this Court is one of interpretation of that statute.
The Act does not define "grandparents," it is true, but that word is hardly in need of definition. The term "grandparent" is clear and unambiguous, and it has been for the entirety of Pennsylvania jurisprudence. The traditional, common, clear, and time-honored definition of "grandparent" is the parent of one's parent. Webster's Third New International Dictionary Unabridged 988 (3d ed. 1993). That is achieved one of two ways: biologically, or through adoption. A grandparent does not include someone who acts as a grandparent. Behaving like a grandparent, filling the role of a grandparent, and having others think of you as a grandparent may give rise [***31] to familial inclusion and affectionate wishes at holidays and birthdays, but it simply does not make it so for purposes of standing in child custody disputes. Serving as surrogate grandfather does not give one the statutory status of the real thing.

As a general rule, the best indication of legislative intent is the plain language of a statute. Courts may resort to other considerations to divine legislative intent only when the words of the statute are not explicit. Thus, this Court has consistently held that other interpretive rules of statutory construction are to be utilized only where the statute at issue is ambiguous.

Pennsylvania School Boards Association v. Public School Employees' Retirement Board, 580 Pa. 610, 863 A.2d 432, 436 (Pa. 2004) (citations omitted). The Statutory Construction Act states, in relevant part, "words and phrases shall be construed according to rules of grammar and according to their common and approved usage ...." 1 Pa.C.S. § 1903(a) (emphasis added). "Only after the words of the statute are found to be unclear or ambiguous should a reviewing court further engage in an attempt to ascertain [***32] the intent of the Legislature through the use of the various tools provided in the Statutory Construction Act." Zane v. Friends Hospital, 575 Pa. 236, 836 A.2d 25, 31 (Pa. 2003).

"Grandparent" simply is not an ambiguous term. The lack of definition in the statute does not connote [*121] ambiguity—it connotes the opposite: there is no need for definition because of the obvious, simple, and unconfused meaning of the word. Where a term is instantly recognizable and clear, the failure to define it in expansive terms hardly signifies the intent to include the non-traditional meaning—if anything, the absence of expansive definitional language means that expansive meaning is not intended.

The majority, however, adopts an expansive meaning of the term "grandparent" under the guise of following its common and approved usage. The majority defines grandparent as "'a parent's parent.'" Majority Slip Op., at 12 (quoting Webster's Third New International Dictionary 988 (2002)). The majority adopts a definition of "parent" which includes: "'a person standing in loco parentis although not a natural parent ....'" Id. (quoting Webster's Third New International Dictionary 1641 (2002)) [***33] (emphasis added). Thus, the majority concludes appellees, acting in loco parentis to an adult woman, are grandparents of the woman's daughter. Id., at 12-13.

Pennsylvania courts recognize a person may "put[] himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of legal adoption. This status of 'in loco parentis', embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties." Commonwealth ex rel. Morgan v. Smith, 429 Pa.
561, 241 A.2d 531, 533 (Pa. 1968) (emphasis [*717] added); see also Black's Law Dictionary 803 (8th ed. 2004) (in loco parentis is defined as "of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.")

There is no evidence the genesis and evolution of the in loco parentis concept contemplated or intended granting a person who stands in loco parentis to an individual the corresponding status of "in loco grandparentis" over the individual's children. Consequently, the common and approved usage of the term "grandparent" [*34] does not include a person who stands in loco parentis to the natural parent of a child.

[*122] Further, the majority refers to a definition of "parent" which includes "[w]one who brings up and cares for another." Majority Slip Op., at 12 (quoting The Merriam Webster Dictionary 535 (1997)). The adoption of this expansive definition is more troubling for its potential consequences concerning parent-child relationships than grandparent-child relationships. Childcare by non-parental parties is not unusual. Where both parents must work outside the home, others commonly assist in the raising of children. Under the majority's definition of "parent," babysitters, day-care workers, nannies, and possibly some teachers and nurses (to name a few) could arguably be considered a child's "parent" (and consequently a grandparent of that child's children) since they help bring up and care for the child. Applying this definition of "parent" leads to an absurd and unreasonable result. See 1 Pa.C.S. § 1922(1) (presumption General Assembly does not intend absurd or unreasonable result); Commonwealth v. Burnsworth, 543 Pa. 18, 669 A.2d 883, 888 (Pa. 1995) [*35] (citing 1 Pa.C.S. § 1922(1)).

Next, the majority's expansive definition of "parent" and "grandparent" opens the door for Pennsylvania law to conflict with Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). In Troxel, the United States Supreme Court struck down a Washington grandparent visitation statute because it was too broad, allowing "any person" to have standing for visitation. The right to parent is a fundamental right that deserves the most protection afforded to individuals. Id., at 65. Although Troxel is not specifically implicated in this matter because this Court is only deciding if appellees have standing under the Grandparent Visitation Act to seek court-ordered visitation, the majority opens the door to a future Troxel challenge if a third party can find a claim of either in loco grandparentis status with the right to intervene in a parent's fundamental right to make decisions on a child's behalf, or the majority's newly recognized "caregiver parent" status.

Numerous Pennsylvania statutes refer to grandparents; none find any need to define the term to include "persons who [*123] act like grandparents." [*36] See Uniform Athlete Agents Act, 5 Pa.C.S. § 3101 et seq.; Pennsylvania Uniform Transfers to Minors Act, 20 Pa.C.S. § 5301 et seq.; Agriculture Education Loan Forgiveness Act, 24 P.S. § 5198.1 et seq.; Pennsylvania Adult and Family Literacy Education Act, id., § 6401 et seq.; Vital Statistics Law of 1953, 35 P.S. § 450.105; Older Adult Daily Living Centers Licensing Act, 62 P.S. § 1511.2; Pooled Trust Act, id., § 1965.2; Family Caregiver Support Act, id., § 3063; Family Support for Persons with Disabilities Act, id., § 3303; Tax Reform Code of 1971, Realty Transfer Tax, 72 P.S. § 8101-C. Are we to reinterpret the term "grandparent" in each of these statutes as well?

Eleven states define "grandparent" as the biological or adoptive parent of a minor child's biological or adoptive parent; none includes "in loco grandparentis." See generally Del. Code Ann. tit. 10, § 901(9)(m)(n) (relationships include blood relationships and relationships by adoption); Haw. Rev. Stat. § 386-2 (grandparent is parent of parent by adoption, but not parent of stepparent, stepparent of parent, or stepparent of stepparent); 405 Ill. Comp. Stat. 80/2-3(h) (grandparent is relative created through relationship by blood, marriage, or adoption); see also id., 80/2-3(g) ("parent" means biological or adoptive parent of mentally disabled adult, or licensed [**38] as foster parent); Iowa Code § 239B.1(12)(2005) (grandparent is specified relative created through blood relationship, marriage, [*124] or adoption or spouse to one of relatives); Me. Rev. Stat. Ann. tit. 19-A, § 1802 (grandparent is biological or adoptive parent of child's biological or adoptive parent); Mich. Comp. Laws § 722.22(d) (grandparent is natural or adoptive parent of child's natural or adoptive parent); Neb. Rev. Stat. § 43-1801 (grandparent is biological or adoptive parent of minor child's biological or adoptive parent); N.M. Stat. Ann. § 40-9-1.1(A), (B) (grandparent is biological or adoptive parent of minor child's biological or adoptive parent); Ohio Rev. Code Ann. § 5101.85(A) (kinship caregiver includes grandparents related by blood or adoption to child); Utah Code Ann. § 30-5-1 (grandparent is person whose child, by blood, marriage, or adoption, is the parent of another); W.Va. Code § 48-10-203 (grandparent is biological relationship, person married or previously [**39] married to biological grandparent). Each of the other 38 states has a grandparent visitation statute 1 and related [*125] statutes. No state defines [**719] "grandparent" as a person standing in loco parentis to an individual who is a parent. An extensive review of case law from these states reveals, to my knowledge, no reported decision interpreting "grandparent" to include a person standing in loco parentis to a parent. 2 This apparently leaves the majority as the only court rendering a published decision interpreting "grandparent" to include a person standing in loco parentis to a parent.

FOOTNOTES


The General Assembly is familiar with the concept of the in loco parentis relationship, and would have included it, had that been its intent. In explaining who qualifies for death benefits, for example, the Workers' Compensation Act states, "if [children are] members of decedent's household at the time of his death, the terms 'child' and 'children' shall include step-children, adopted children and children to whom he stood in loco parentis, and children of the deceased and shall include posthumous children." 77 P.S. § 562 (emphasis added). The General Assembly could have similarly included the in loco parentis
[*126] Appellees' relationship with mother is said to give them standing as de facto grandparents; [***41] this determination is flawed. That mother considers appellees to be her parents is a laudable testament to the role they have played in her life. But however mother views them, appellees stood in place of her parents--they are not her parents. There are limitations to the breadth of the in loco parentis relationship, and appellees cannot stand "in loco grandparentis" to the child since no such relationship exists.

Although our case law has not previously expressed that an in loco parentis relationship expires at age of majority, this appears to be the general rule unless the child is incapacitated. See Babb v. Matlock, 340 Ark. 263, 9 S.W.3d 508, 510 (Ark. 2000) (in loco parentis status extinguishes at age of majority unless child is incapacitated); Trieval v. Sabo, 1996 WL 944981, unpublished [**720] opinion at 6 (Del. Super. 1996) (child is emancipated from parent's control at age of majority; individual can no longer stand in loco parentis). This comports with the view that "when a child reaches the age of majority, a presumption arises that the duty to support the child ends ...." Sutliff v. Sutliff, 339 Pa. Super. 523, 489 A.2d 764, 775 (Pa. Super. 1985) [***42] (citing Verna v. Verna, 288 Pa. Super. 511, 432 A.2d 630 (Pa. Super. 1981)). Here, when mother reached the age of majority, the need for an in loco parentis relationship ended.

The majority states "in loco parentis relationships, like adoptive relationships, have a settled place in the law as well, and generate equivalent parental rights and responsibilities." Majority Slip Op., at 13. This is not entirely so. Perhaps most basic, unlike biological or adoptive parent-child relationships, in loco parentis status can be terminated at any time, by either party. See 59 Am. Jur. 2d Parent and Child § 9 (citing U.S. v. Floyd, 81 F.3d 1517 (10th Cir. 1996) (applying Oklahoma law); Hamilton v. Foster, 260 Neb. 887, 620 N.W.2d 103 (Neb. 2000); Chestnut v. Chestnut, 247 S.C. 332, 147 S.E.2d 269 (S.C. 1966); Harmon v. Department of Social and Health Services, 134 Wn.2d 523, 951 P.2d 770 (Wash. 1998)).

[*127] Even if the rights incident to the exercise of in loco parentis status were equivalent to those of parents as concerns the child, Pennsylvania case law [***43] limits the breadth of rights and responsibilities of those acting in loco parentis. There is no basis in any statute or in this Court's jurisprudence to support the majority's extension of the in loco parentis relationship beyond the parent-child relationship. Should appellees die intestate, neither mother nor child will be recognized as an heir entitled to a share of their estate. 20 Pa.C.S. § 2103(1) (shares of intestate estate pass to, among others, issue of decedent; there is no provision for estate to pass to those with informal relationship). In Bahl v. Lambert Farms, Inc., 572 Pa. 675, 819 A.2d 534 (Pa. 2003), this Court determined that a man born out of wedlock, raised by his grandparents but held out to the world as their natural child (thus creating an in loco parentis relationship), was not entitled to inherit a share of his "parents'" estate. We stated:

It is apparent that the General Assembly intended, as a general rule, to limit "issue" to those in the decedent's blood line and did not intend to include as first degree "issue" individuals without the
requisite consanguinity who had merely been treated [***44] like, or held out as, the decedent's children.

Id., at 538 (emphasis added). The Superior Court found a man was not responsible for support of his stepdaughter after the dissolution of the marriage, even though he stood in loco parentis before, during, and after the marriage to the girl's mother. Commonwealth ex rel. McNutt v. McNutt, 344 Pa. Super. 321, 496 A.2d 816 (Pa. Super. 1985). Although a biological or adoptive parent would not be excused from financial responsibility, the Superior Court explained that requiring a stepfather who stands in loco parentis to pay child support "would be carrying the common law concept of in loco parentis further than we are willing to go." Id., at 817 (emphasis added).

The status of "in loco grandparentis" simply does not exist. Whatever relationship appellees had with the child's mother, they are not the grandparents of this child, who is in the [*128] primary custody of the father. Appellees are not biological or adoptive parents of the child's parent—hence they are not grandparents within the meaning of the legislation of which they seek to take advantage.

Despite the majority's [***721] assertion to [***45] the contrary, allowing individuals to have standing as de facto grandparents will encourage litigation by third parties who assert standing for visitation and custody. As indicated, childcare by non-parental parties is not unusual, especially where both parents must work outside the home. Today, overseas military personnel must entrust care of their children to others during their service to our country. With this decision, we add to that burden by allowing such caregivers to seek custody simply by averring an appropriate de facto relationship, even though it was never the intent of the parents (much less the legislature) to create such a right. We open the door to a person who provides for a child, necessarily acting in loco parentis in this scenario, to have standing under an ill-defined de facto relationship.

"The courts generally find standing in third-party visitation and custody cases only where the legislature specifically authorizes the cause of action." T.B. v. L.R.M., 567 Pa. 222, 786 A.2d 913, 916 (Pa. 2001) (citing R.M. v. Baxter, 565 Pa. 619, 777 A.2d 446, 450 (Pa. 2001)) (emphasis added). The majority states "[***46] [§] 5313(a) standing is specifically limited to those grandparents seeking visitation with a grandchild who 'has resided with his grandparents or great-grandparents for a period of 12 months or more and is subsequently removed from the home by his parents.'" Majority Slip Op., at 14 (emphasis added). This is true, but appellees are not grandparents; we should not strain common sense to define them as such simply because these people are good surrogate custodians. 3

FOOTNOTES

3 Even in this case, the situation is not so severe as to require this stretching of the word "grandparent" to include others. The child has four real grandparents—she is not deprived of grandparental relationships. As the child's mother apparently still lives with appellees, they will see the child regularly when mother has custody; thus, they will not be deprived of a relationship with her.
[*129] In Larson v. Diviglia, 549 Pa. 118, 700 A.2d 931 (Pa. 1997), then Justice, now Chief Justice Cappy, writing for the majority, explained [***47] "the creation of a doctrine of 'de facto' standing to enable a person in possession of a minor child, in the absence of a formal custody order or agreement, to sue for support would only serve to further complicate this area of the law." Id., at 933-34. Similarly, standing to sue for visitation or custody, based on a non-adoptive, non-biological relationship deemed to be grandparental, is equally ill-advised.

Adopting the concept of in loco grandparentis status is a slippery slope, and one on which we need not and should not tread. If the legislature wishes to grant standing to persons who act like grandparents, it may do so. It has chosen not to do so, and in my judgment, done so wisely. Thus, despite the appealing theory of my distinguished colleagues, I must dissent.
COMMONWEALTH OF PENNSYLVANIA, C/O OFFICE OF GENERAL COUNSEL, Appellee v. JANSSEN PHARMACEUTICA, INC., TRADING AS "JANSSEN, L.P.", Appellant

No. 24 EAP 2009

SUPREME COURT OF PENNSYLVANIA

607 Pa. 406; 8 A.3d 267; 2010 Pa. LEXIS 3051

October 21, 2009, Argued

August 17, 2010, Decided

PRIOR HISTORY: [***1]
Appeal from the Order of the Court of Common Pleas of Philadelphia County entered December 9, 2008 at 2181 January Term, 2008. Abramson, Howland W., Judge

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JUDGES: MR. CHIEF JUSTICE CASTILLE, CASTILLE, C.J., SAYLOR, BAER, TODD, McCAFFERY, GREENSPAN, J.J. Former Justice Greenspan did not participate in the decision of this matter. Mr. Justice Eakin and Madame Justice Todd join the opinion. Mr. Justice Baer files a concurring opinion in which Mr. Justice McCaffery joins. Mr. Justice Saylor files a dissenting opinion.

OPINION BY: CASTILLE

OPINION

[*409] [**268] MR. CHIEF JUSTICE CASTILLE

This appeal of the trial court's order denying the motion of appellant Janssen Pharmaceutica, Inc. ("Janssen") to disqualify contingent fee counsel retained by appellee, the Commonwealth's Office of General Counsel ("OGC"), is before this Court on a grant of extraordinary relief pursuant [**269] to 42 Pa.C.S. § 726, [***3] by which we exercised jurisdiction to consider the possible statutory and constitutional implications of the contingent fee representation agreement entered into between OGC and the Texas law firm of Bailey Perrin Bailey, L.L.P. ("Bailey Perrin"). 2 We affirm.

FOOTNOTES

1 Section 726 authorizes this Court to exercise plenary jurisdiction at any stage in any matter pending in any court or magisterial district in the Commonwealth:

HN1 Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 Pa.C.S. § 726.
This Court is aware that, despite the pendency of this appeal, the matter proceeded to trial before the Honorable Frederica Massiah-Jackson in the Court of Common Pleas of Philadelphia County, with jury selection beginning May 28, 2010, and opening statements on June 3, 2010. On June 14, 2010, following oral argument, Judge Massiah-Jackson granted Janssen’s motion [***4] for a compulsory nonsuit pursuant to Pa.R.C.P. No. 230.1 (trial court may enter compulsory nonsuit if, at close of plaintiff’s case on liability, plaintiff has failed to establish right to relief), thereby dismissing Counts I and II of the Commonwealth's complaint against Janssen. The parties did not seek a stay of trial court proceedings from this Court, and none was entered. The parties did not apprise this Court that the matter was proceeding to trial. Judge Massiah-Jackson filed an opinion in support of her determination on June 25, 2010.

[***410] On January 17, 2008, OGC filed a complaint against Janssen in the Court of Common Pleas of Philadelphia County, raising statutory and common law tort claims related to Risperdal, a prescription antipsychotic medication marketed by Janssen. Although Risperdal had been approved by the Food and Drug Administration ("FDA"), OGC alleged, inter alia, that Janssen improperly marketed and promoted Risperdal for non-FDA approved uses, commonly known as "off-label" uses. OGC contended that the Commonwealth has expended millions of dollars for Risperdal prescriptions through Medicaid and the Pharmaceutical Assistance Contract for the Elderly ("PACE"). In [***5] filing the action, OGC was not represented by government-employed lawyers. Instead, OGC retained Bailey Perrin, a private law firm based in Houston, Texas, to prosecute the action on a contingent fee basis.

On June 9, 2008, Janssen filed a motion in the trial court seeking to disqualify Bailey Perrin as OGC's counsel in the litigation. Janssen alleged that, while OGC filed the complaint against Janssen on behalf of the Commonwealth, no attorney from OGC entered an appearance, the complaint was signed by local Philadelphia counsel for Bailey Perrin, and a Bailey Perrin attorney verified the complaint. Janssen contended that the contingent fee agreement restricts OGC's ability to consent to a non-monetary settlement of the Risperdal action because it requires that any settlement include reasonable compensation for Bailey Perrin; contains a provision waiving conflicts of interests arising out of Bailey Perrin representing other states in similar actions that varies from the usual conflict of interest provisions included in contingent fee agreements executed by the Attorney General; and does not provide [*411] for OGC's control and management of the litigation as is generally the case with the [***6] Attorney General's contingent fee agreements. Janssen argued that the contingent fee agreement violates the separation of powers doctrine by usurping the General Assembly's exclusive spending powers. Finally, Janssen claimed that the [***270] agreement deprives it of its due process rights because those who exercise the government's powers in adjudicative proceedings must have no financial interest in the outcome, must be impartial, and must maintain the appearance of impartiality.

FOOTNOTES

3 Janssen also alleged that OGC and Bailey Perrin negotiated the contingent fee contract over a period in 2006 during which one of Bailey Perrin's founding partners made contributions to Pennsylvania
Governor Edward G. Rendell's reelection campaign and to the Democratic Governors Association, another contributor to the Governor's reelection campaign. OGC, in its brief to this Court, notes that these allegations have not been accepted by any court and, in any event, are irrelevant. These separate allegations are not germane to our disposition and will not be addressed.

OGC responded that Janssen misrepresented the terms of the contingent fee agreement regarding the scope of OGC's control over the litigation. OGC [***7] stated that the agreement relegates Bailey Perrin to advising, counseling and recommending actions to OGC and carrying out OGC's directives to the best of its ability and further provides that Bailey Perrin is directly responsible to OGC on all matters of strategy and tactics. In addition, according to OGC, the agreement provides that, at the time of settlement or judgment, OGC will consult with Bailey Perrin and agree to appropriate legal fees. OGC noted that the agreement provides that Bailey Perrin must advance all costs of litigation and, if there is no recovery, could expend millions of dollars with no remuneration.

Regarding alleged restrictions on the ability to reach a non-monetary settlement, OGC argued that, because the Risperdal complaint seeks monetary damages, the likelihood of an acceptable non-monetary settlement is extremely remote, and Janssen had not proposed any non-monetary settlement. On the issue of the alleged conflict of interest, OGC responded that Janssen failed to point to any such conflict or establish how Bailey Perrin's representation of other states against [*412] Janssen presents a conflict. OGC added that the contingent fee agreement does not violate the separation [***8] of powers doctrine because any fees paid to Bailey Perrin would issue from Janssen and not from the state treasury. Finally, OGC countered Janssen's due process argument by noting that all of the caselaw on that issue involves criminal matters and the impartiality of judges, not counsel representing a governmental entity.

The Honorable Howland W. Abramson denied the motion to disqualify counsel on December 8, 2008, without filing an opinion or otherwise stating the reasons for denial on the record. Janssen then filed an application for extraordinary relief with this Court, asking this Court to exercise jurisdiction to review the denial of its motion to disqualify. Janssen renewed the arguments it had forwarded below, i.e., that the contingent fee contract restricted OGC's authority to settle the litigation for non-monetary relief, and that the contract did not vest control of the litigation with OGC but rather provided that Bailey Perrin need only consult with OGC; that the process by which Bailey Perrin was retained was irregular because the contingent fee contract was not the subject of competitive bidding or legislative authorization; and that the contract violated the separation [***9] of powers doctrine and Janssen's due process rights. Finally, Janssen noted that if OGC prevailed in this litigation, Bailey Perrin would be paid fees of as much as fifteen percent of the actual recovery.

OGC opposed the application for extraordinary relief, arguing that Sections 204 and 501 of the Commonwealth Attorneys Act ("Attorneys Act" or "Act") specifically authorized OGC to hire outside counsel [**271] to represent it. See 71 P.S. §§ 732-204 and 732-501. Further, OGC claimed that Janssen lacked standing to move to disqualify Bailey Perrin under Section 103 of the Attorneys Act, which
explicitly states that no party other than a Commonwealth agency has standing to challenge the authority of the legal representation of the agency. 71 P.S. § 732-103. As to Janssen's separation of powers argument, OGC renewed its position that Bailey Perrin's compensation would come from Janssen, not from the state treasury, [*413] because any fee would be paid directly to Bailey Perrin prior to any recovery from Janssen being deposited into the treasury. In any event, according to OGC, the majority of other jurisdictions that have considered such a separation of powers argument have rejected it. Regarding Jannsen's [***10] due process claim, OGC noted that it appears that Jannsen would not object if OGC were represented by government-employed attorneys or private counsel working on an hourly basis; therefore, OGC characterized Jannsen's true objection as being a strategic one, reflecting its concern with Bailey Perrin's level of skill, experience and special expertise in pharmaceutical reimbursement claims. OGC posits that due process principles cannot be construed to deny the Commonwealth the ability to retain superior legal representation.

On June 30, 2009, this Court exercised jurisdiction due to the public importance of the disqualification issue and directed the parties to brief the following four issues:


B. Whether the Attorneys Act, 71 P.S. § 732-101 et seq., authorizes the Office of General Counsel's contingent fee agreement with Bailey Perrin Bailey, L.L.P..

C. Whether Bailey Perrin Bailey, L.L.P. should be disqualified because the General Assembly did not authorize the contingent fee arrangement between the Office [***11] of General Counsel and the law firm, such that the agreement violates Article III, § 24 and the separation of powers mandate of the Pennsylvania Constitution.

D. Whether Bailey Perrin Bailey, L.L.P. should be disqualified because the due process guarantees of the United States and Pennsylvania Constitutions prohibit the Commonwealth from delegating the exercise of its sovereign powers to private counsel with a direct contingent financial interest in the outcome of the litigation.


Preliminarily, we note that HN3 it has long been the policy of this Court to avoid constitutional questions where a matter can be decided on alternative, non-constitutional grounds. See Commonwealth v. Karetyn, 583 Pa. 514, 880 A.2d 505, 518-19 (Pa. 2005); In re Fiori, 543 Pa. 592, 673 A.2d 905, 909 (Pa. 1996). [***12] Accordingly, we will begin with the first issue under the Attorneys Act,
which presents the threshold question of whether Janssen has standing to challenge Bailey Perrin's representation [*272] of OGC. 4 Section 103 provides that: "No party to an action, other than a Commonwealth agency including the Departments of Auditor General and State Treasury and the Public Utility Commission, shall have standing to question the authority of the legal representation of the agency."

FOOTNOTES

4 We recognize that OGC did not argue statutory standing to the trial court, though it did squarely raise the argument in its response to Janssen's application for extraordinary relief filed in this Court. Janssen does not argue that the standing issue is waived.

OGC states that Section 103's mandate clearly precludes Janssen's attack on OGC's choice of counsel. Janssen responds that it has standing to move to disqualify Bailey Perrin because nothing in the Attorneys Act prevents a litigant from challenging OGC's unconstitutional usurpation of the General Assembly's spending powers or from litigating due process claims deriving from the Commonwealth's retention of private contingent fee counsel.

Janssen's statutory arguments [***13] are based on the Act's legislative history and also on the text of Section 103. First, viewing Section 103 from a historical perspective, Janssen notes that it was enacted after the 1978 amendment to the Pennsylvania Constitution that provided for the election of the [*415] Attorney General rather than executive appointment of that position. 5 According to Janssen, the Act implements the constitutional amendment by establishing the position of Governor's General Counsel and splitting the duties of the prior appointed Attorney General between the elected Attorney General and OGC. Section 204(c) of the Act thus authorizes the Attorney General to "represent the Commonwealth and all Commonwealth agencies" in most civil litigation, 71 P.S. § 732-204(c), 6 while Section 301(6) allows OGC to represent Commonwealth agencies in limited circumstances. Section 301(6) provides, in context:

[*416] [**273] HN5 There is hereby established the Office of General Counsel which shall be headed by a General Counsel appointed by the Governor to serve at his pleasure who shall be the legal advisor to the Governor and who shall:

* * * *

(6) Initiate appropriate proceedings or defend the Commonwealth or any executive agency when an [***14] action or matter has been referred to the Attorney General and the Attorney General refuses or fails to initiate appropriate proceedings or defend the Commonwealth or executive agency.

71 P.S. § 732-301(6). It is undisputed that the Attorney General declined to file the Risperdal action against Janssen and that OGC was authorized to do so. Viewed in light of this history, Janssen argues,
Section 103's express limitation on standing was intended only to restrict challenges to the division of responsibility between the Attorney General and OGC; in that instance, only a Commonwealth agency has standing to "question the authority" of the legal representation of the agency.

FOOTNOTES

5 HN6 Article IV, Section 4.1 of the Pennsylvania Constitution established the office of the Attorney General as an elected rather than an appointed position:

An Attorney General shall be chosen by the qualified electors of the Commonwealth on the day the general election is held for the Auditor General and State Treasurer; he shall hold his office during four years from the third Tuesday of January next ensuing his election and shall not be eligible to serve continuously for more than two successive terms; he shall be the chief [***15] law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.

6 Section 204(c) states:

HN7 Civil litigation; collection of debts.--The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and may intervene in any other action, including those involving charitable bequests and trusts or the constitutionality of any statute. The Attorney General shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth. The Attorney General shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency; the Attorney General shall keep a proper docket or dockets, duly indexed, of all such claims, showing whether they are in litigation and their nature and condition. The Attorney General may, upon determining that it is more efficient or otherwise [***16] is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead. The Attorney General shall approve all settlements over such maximum amounts as he shall determine arising out of claims brought against the Commonwealth pursuant to 42 Pa.C.S. § 5110.

71 P.S. § 732-204(c).

In any event, Janssen argues, it is not challenging Bailey Perrin's statutory "authority" to represent the Commonwealth because it recognizes that OGC has the authority to initiate the action and to hire private counsel to prosecute the matter. Instead, Janssen claims, it seeks disqualification of Bailey Perrin as counsel because the contingent fee arrangement violates constitutional principles of separation of powers and due process. Because Section 103 focuses only on statutory "authority," Janssen argues that
Section 103 does not forbid or limit a party's right to assert a violation of constitutional guarantees, via the vehicle of a motion to disqualify contingent fee counsel.

Finally, Janssen claims that Section 103 does not limit Janssen's standing to seek disqualification [***17] of Bailey Perrin as counsel because Section 103 applies on its face only to "the legal representation of the agency" where a Commonwealth agency is a party to the action. According to Janssen, the Commonwealth itself is the sole plaintiff in this action, and [*417] representation of the Commonwealth is distinct from representation of a Commonwealth agency. Janssen says that the distinction it draws is implicit in the General Assembly's use in Section 204(c) of the language, "[*t]he Attorney General shall represent the Commonwealth and all Commonwealth agencies." Thus, Janssen argues, Section 103's specific limitation on standing to challenge representation of an agency cannot be read, as a matter of basic statutory construction, to impose a similar limitation on standing to challenge representation of the Commonwealth as a whole.

OGC counters that a private litigant lacks standing to usurp the role of elected officials in establishing and carrying out the Commonwealth's policies. OGC argues that Janssen's "lofty rhetoric of separation of powers and due process rights" aside, Janssen's motion to disqualify counsel is nothing more than "an attempt by an alleged corporate malfeasor to avoid [***18] the consequences of its wrongdoing by re-debating the policy choices of the Governor, Attorney General, and General Counsel." Br. of Appellee at 11. OGC contends that the policy decisions of whether to pursue a particular avenue of litigation, which attorneys to use in the litigation, and how to compensate the attorneys are properly made by public officials, and not by private parties or the courts.

As to Section 103 specifically, OGC points to the plain language of the statute, which prohibits parties to an action other than a Commonwealth agency from [***274] challenging the authority of the agency's legal representation, and notes that the best indication of legislative intent is that plain language. See Commonwealth v. Shiffler, 583 Pa. 478, 879 A.2d 185, 189 (Pa. 2005) (HN8"As a general rule, the best indication of legislative intent is the plain language of a statute."). OGC argues that this unequivocal restriction does not support the distinction Janssen attempts to draw between the statutory and constitutional authority of Bailey Perrin's representation. Instead, according to OGC, Section 103 prevents all such challenges to the legal authority of a Commonwealth party's representation. [***19] Because Section 103 is clear and free from ambiguity, OGC posits that Janssen's argument is foreclosed by basic rules of [*418] statutory construction. See 1 Pa.C.S. § 1921(b) (HN9"When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). OGC concludes that Section 103 means what it plainly says: no party to an action -- and Janssen is a party to this action -- may challenge an agency's legal representation. As for Janssen's argument that the Commonwealth, and not a Commonwealth agency, is the plaintiff in this action, OGC responds that the complaint it filed clearly states that the action was brought on behalf of the Department of Public Welfare and the Department of Aging, both of which are Commonwealth agencies. Finally, OGC observes that Janssen "claims to champion the interests of the legislature against the executive, in the absence of any indication that the legislature believes that its rights have been infringed or that it needs a private champion." Br. of Appellee at 18.
Preliminarily, we note that HN10 Section 103 both confers and prohibits standing: it permits Commonwealth agencies to question [***20] the authority of an agency's legal representation, but denies such standing to any other party to an action. The General Assembly has frequently enacted statutes conferring standing on particular individuals or entities in specific situations. See, e.g., 13 Pa.C.S. § 2A531 (lessor and lessee have standing to sue third party whose conduct toward goods subject to lease causes actionable injury to party to lease); 23 Pa.C.S. § 4341 (granting standing to any person caring for child to commence or continue action for child support regardless of whether court order grants that person custody); 23 Pa.C.S. § 4378 (recipient of public assistance has standing to commence action for support for any child for whom recipient claims assistance); 24 P.S. § 13-1311-A (student victim of act of violence involving weapon on school property has standing to seek expulsion of aggressor not expelled by school); 35 P.S. § 780-152 (tenant organization has standing to initiate eviction proceedings for drug-related criminal activity on or in immediate vicinity of leased residential premises). The General Assembly also has adopted legislation denying standing in particular circumstances. See, e.g., 15 Pa.C.S. §§ 517 [***21] (corporations [*419] generally), 1717 (domestic business corporations), 5717 (domestic non-profit corporations) (limiting standing of different types of corporations' individual directors, board of directors and committees of board to sue board of directors, committees or individual directors). Similarly, the Crimes Code provides that persons charged with certain offenses lack standing to challenge the authority of the Attorney General to institute criminal proceedings anywhere in the Commonwealth. See 18 Pa.C.S. §§ 2716 (weapons of mass destruction), 4107 (deceptive or fraudulent business practices), 4120 (identity theft), 5111 (dealing in proceeds of unlawful activities), 6318 (unlawful contact with minor). Accord 70 P.S. § 1-511 [***275] (same restriction as to criminal penalties under Securities Act); 73 P.S. § 517.8 (same as to home improvement fraud); 74 P.S. § 202 (same as to confidentiality of social security numbers); 77 P.S. § 1039.9 (same as to criminal prosecution of workers' compensation insurance fraud). Thus, Section 103 is not unique.

HN11 Although Section 103 addresses but one narrow issue of standing to challenge a Commonwealth agency's legal representation, where applicable, the Section [***22] is absolute and not subject to a weighing of factors, much less does it purport to incorporate the various factors that guide traditional judicial standing doctrine. See, e.g., In re Hickson, 573 Pa. 127, 821 A.2d 1238 (Pa. 2003). Thus, it appears that a private party, who otherwise might be able to establish standing to disqualify the Commonwealth agency's counsel under traditional standing doctrine, will not succeed under the terms of the Attorneys Act. We note that Janssen does not dispute the general power of the General Assembly to act to curtail standing in this regard. Rather, Janssen appears to accept the legitimacy of the statute but maintains that the provision should be deemed inapplicable for the various reasons it forwards. Similarly, OGC does not argue that, even if Janssen's motion to disqualify was not barred under Section 103, Janssen lacks standing under traditional standing doctrine to challenge OGC's arrangement with private contingent fee counsel.

[***23] In making these observations, we do not suggest that an argument concerning traditional standing doctrine would have merit either way; rather, we seek to make clear that the standing question we are asked to decide is [***23] one of statutory interpretation. This Court has frequently passed
upon just such questions of statutory standing. See, e.g., Spahn v. Zoning Bd. of Adjustment, 602 Pa. 83, 977 A.2d 1132 (Pa. 2009) (home rule statute conferring standing on "aggrieved person" did not include taxpayers not detrimentally harmed); Hunt v. Pennsylvania State Police, 603 Pa. 156, 983 A.2d 627 (Pa. 2009) (statute conferring standing on district attorney to challenge record expungement does not extend to State Police); Hiller v. Fausey, 588 Pa. 342, 904 A.2d 875 (Pa. 2006) (applying statute limiting standing to seek visitation or custody to grandparents whose child has died); Housing Auth. of County of Chester v. Pennsylvania State Civil Serv. Comm'n, 556 Pa. 621, 730 A.2d 935 (Pa. 1999) (upholding statute granting standing to Civil Service Commission to enforce veterans' preferences where such standing did not exist under traditional standing doctrine).


We agree with OGC that HN13 the language of Section 103 is clear and unambiguous and thus provides [***25] a clear indication of the General Assembly’s intent. The obvious interpretation of Section 103 is that no party to an action, other than the Commonwealth agency involved in the action itself, may challenge the authority of the agency’s legal representation. Looking for the occasion of the Attorneys Act, Janssen has constructed a cogent argument that Section 103 could be read as intending only to preclude parties involved in litigation against the Commonwealth from challenging whether the Attorney General or OGC properly should represent the Commonwealth agency, but does not extend to challenges against outside counsel representing the Commonwealth agency. But, to credit Janssen’s extra-textual argument would require a policy and statutory construction analysis of Section 103 that is not fairly invited by the clear and unambiguous statutory language actually employed in the legislation. And, in any event, if we were to indulge in a digression into the purpose of the provision, we note that it is perfectly logical to conclude that the General Assembly fully intended the broad effect of the actual words chosen: i.e., that, in addressing the authority of Commonwealth attorneys, it intended [***26] that no party but the affected agency should be heard to complain about so fundamental an executive matter as the identity of the lawyers representing Commonwealth entities.

Equally unavailing is Janssen’s argument that this matter involves not a Commonwealth agency as
plaintiff, but the Commonwealth itself, and thereby does not trigger Section 103's limitation. As OGC notes, this action in fact was filed on behalf of two Commonwealth agencies, the Department of Public Welfare and the Department of Aging, and thus Janssen's argument fails.

In short, the OGC, on behalf of the Commonwealth and two of its agencies, sued Janssen, retaining Bailey Perrin to prosecute [*422] the action. Pursuant to the plain language of Section 103, Janssen, as a party to the action other than the Commonwealth party, cannot be heard to challenge Bailey Perrin's authority to represent the Commonwealth party. Because the statutory language is plain and unambiguous, the alternative construction offered by Janssen must fail.

As explained above, the parties do not advert to traditional standing principles. 7 But, it is worth noting that Section 103's limitation aligns with those principles, and that fact is instructive [***27] in [***277] contextualizing the multi-layered challenge Janssen pursues when, for example, it claims that its motion to disqualify counsel does not necessarily implicate the prohibition against challenging the authority of the legal representation of the agency.

HN14 At its most basic level, standing merely "denotes the existence of a legal interest." Commonwealth v. Peterson, 535 Pa. 492, 636 A.2d 615, 617-18 (1993). Traditionally, to have standing, a party must be aggrieved—that is, the party must have a substantial interest in the subject matter of the litigation that must be direct and immediate, rather than remote, and which distinguishes his interest from the common interest of other citizens.

HN15 With respect to this requirement of being aggrieved, an individual can demonstrate that he is aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be [*423] deemed to have standing. In re Hickson, [573 Pa. 127,] 821 A.2d [1238,] 1243 [(Pa. 2003)]; City of Philadelphia [v. Commonwealth of Pennsylvania], [575 Pa. 542] 838 A.2d [566,] 577 [(Pa. 2003)]. An interest is "substantial" if it is an interest in the resolution of the challenge [***28] which "surpasses the common interest of all citizens in procuring obedience to the law." In re Hickson, 821 A.2d at 1243. Likewise, a "direct" interest mandates a showing that the matter complained of "caused harm to the party's interest," id., i.e., a causal connection between the harm and the violation of law. City of Philadelphia, 838 A.2d at 577. Finally, an interest is "immediate" if the causal connection is not remote or speculative. Id.; see Kropatwa v. State Farm Ins. Co., 554 Pa. 456, 721 A.2d 1067, 1069 (1998).


FOOTNOTES

7 Mr. Justice Saylor states in his Dissenting Opinion that he would apply traditional standing principles.
Justice Saylor states that the Constitution is the supreme law of the land that cannot be trumped by a statute and, therefore, Janssen's constitutional claims may not be barred by the standing limitations of Section 103. Dissenting Slip Op. at 2. As we understand the theory Justice Saylor proposes, application of the standing restriction in the Commonwealth Attorneys Act to limit standing here would [***29] be unconstitutional. We reiterate that neither party argued that traditional standing analysis should apply. Justice Saylor has formed a cogent argument concerning traditional standing and the constitutionality of Section 103, but it is not the one we perceive to be advanced by Janssen. For the reasons detailed in the text, we do not read Janssen's instant challenge -- here or below -- as involving a constitutional challenge to the statutory standing limitation, with a consequent resort to traditional standing principles.

The General Assembly has rendered a legislative judgment that only the Commonwealth party-client has a cognizable basis to question its counsel's authority; non-Commonwealth parties to ongoing litigation, such as Janssen, do not have a legislatively-recognized interest in the identity of the lawyers its party-opponent, the Commonwealth and its agencies, has authorized to represent it in an action. Moreover, aside from the legislation, and as a general matter, it is difficult to see how a party-opponent in active litigation with the Commonwealth could be said to have a substantial, direct and immediate interest in the authority or identity of the legal representation [***30] the Commonwealth has chosen. This is true in legal matters generally: one's opponent generally cannot dictate the choice of otherwise professionally qualified counsel.

Furthermore, to the extent that Janssen could be said to have a different interest in the questions it poses, distinguishable from the ordinary taxpayer citizen for example, it should be noted that in fact this legislation has distinguished Janssen's interest in contrary fashion. As a party to an action [*424] with a Commonwealth agency, a determination has been made in Section 103 that, at least with respect to the question of agency representation, the party should not be heard to complain. Other interests Janssen identifies, such as economic issues regarding the contingency fee arrangement between OGC and Bailey Perrin, whether such arrangements best serve the common good, the procedure by which the arrangement was made, and whether such arrangements represent an executive infringement [**278] upon an exclusive legislative prerogative, involve either issues of common concern to the citizenry or a separation of powers concern within the unique province of the General Assembly. They offer no ground upon which to deny the statute its [***31] plain effect.

Given our disposition of the standing question, we do not reach the remaining issues accepted for review. The decision of the Court of Common Pleas of Philadelphia County is affirmed. Jurisdiction is relinquished.

Former Justice Greenspan did not participate in the decision of this matter.

Mr. Justice Eakin and Madame Justice Todd join the opinion.
Mr. Justice Baer files a concurring opinion in which Mr. Justice McCaffery joins.

Mr. Justice Saylor files a dissenting opinion.

CONCUR BY: BAER

CONCUR

MR. JUSTICE BAER

I join in full the Majority's opinion holding that the plain and unambiguous language of Section 103 of the Attorneys Act, 71 P.S. § 732-103, bars Appellant, Janssen Pharmaceutica, from challenging Appellee, Office of General Counsel's hiring of outside counsel to represent it.

FOOTNOTES

1 Section 103 specifies, in whole:

No party to an action, other than a Commonwealth agency including the Departments of Auditor General and State Treasury and the Public Utility Commission, shall have standing to question the authority of the legal representation of the agency.

71 P.S. § 732-103.

[*425] I write separately only to indicate my hesitancy and discomfort with the procedural posture of this case, given that the parties have somehow proceeded to trial and conclusion in the underlying matter. First, it is bothersome to me that the parties have failed to keep this Court apprised of such proceedings, given their success in obtaining from our Court the grant of extraordinary relief to decide this important, and arguably, threshold, legal question. Moreover, I believe that the current procedural posture of the case may make the matter before us moot. Nevertheless, as it is at least plausible that the question before us likely falls into the great-public-importance or capable-of-repetition-yet-evading-review exceptions to the mootness doctrine, given our Court's grant of extraordinary jurisdiction, see Pap's A.M. v. City of Erie, 571 Pa. 375, 812 A.2d 591, 600-01 (Pa. 2002) (alluding to the great-public-importance exception, particularly in light of a material lack of clarity in governing law); Consumers Educ. and Protective Ass'n v. Nolan, 470 Pa. 372, 368 A.2d 675, 681 (Pa. 1977) (declining to dismiss a declaratory judgment action on mootness grounds despite the expiration of the term for an administrative commissioner, explaining "we conclude that the [legal issue surrounding such claimant's entitlement to office] presents a question capable of repetition and of sufficient public importance that it ought not to escape appellate review at this time"), and given that no party is asserting mootness at this juncture, I am able to join the Majority's decision on the merits in full.
Mr. Justice McCaffery \(\downarrow\) joins this concurring opinion.

**DISSENT BY: SAYLOR\(\uparrow\)**

**DISSENT**

**MR. JUSTICE SAYLOR\(\uparrow\)**

I respectfully dissent, as I believe Janssen has standing to raise constitutional claims, most notably, an assertion that its due process rights have been violated.

As the majority recites, Janssen argues that the Commonwealth's contingent-fee arrangement with Bailey Perrin violates \(\text{[*279]}\) its constitutional rights. The majority ultimately concludes, however, that Section 103 of the Commonwealth \(\text{[*426]}\) Attorneys Act, 71 P.S. § 732-103, deprives Janssen of standing to question the propriety of the arrangement. Consistent with the foundational principle that the constitution is the supreme law of the land, see Pittsburgh Rys. Co. v. Port of Allegheny County Auth., 415 Pa. 177, 185, 202 A.2d 816, 820 (1964) (observing that "all acts of the legislature and of any governmental agency are subordinate to the Constitution, which is the Supreme \(\text{[*34]}\) Law of the land" (internal quotation marks omitted)), I would not deem any legislative policy objective discernible from Section 103 to be germane to whether Janssen has standing to assert that the hiring of Bailey Perrin pursuant to the present contingent-fee contract violated its rights under the state or federal charters. Rather, I would resolve that question solely by reference to whether Janssen is aggrieved in the ordinary sense -- that is, whether it has an interest in the outcome of its disqualification motion that is cognizable for purposes of standing under ordinary, prudentially-based precepts. See In re Hickson, 573 Pa. 127, 136, 821 A.2d 1238, 1243 (2003) (indicating that standing exists "if the proponent of a legal action has somehow been 'aggrieved' by the matter he seeks to challenge").

In seeking to disqualify Bailey Perrin, Janssen contends, among other things, that the contingent-fee agreement violates the Due Process Clause of the Fourteenth Amendment. \(\text{[*427]}\) In this respect, Janssen forwards a colorable argument that, to avoid actual impropriety or the appearance of partiality, due process requires the government's attorneys to be financially disinterested in the outcome \(\text{[*35]}\) of the litigation inasmuch as they are -- ostensibly, at least -- serving the public interest, and not their own personal financial interests. Accord People ex rel. Clancy v. Superior Court, 39 Cal. 3d 740, 218 Cal. Rptr. 24, 705 P.2d 347, 351 (Cal. 1985) ("Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole."). See generally Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963) (clarifying that, although an attorney for the government is an advocate, his client's goal is not to prevail but to establish justice). Thus, for example, Janssen claims that such attorneys must be personally indifferent as between settlements that require
large monetary [**280] payouts, and those that entail smaller payouts but involve other forms of relief to the government. 2 Again, the reasoning is that the public interest -- and not the lawyer's private pecuniary benefit -- should dictate which type of outcome the government ultimately agrees to. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 805, 107 S. Ct. 2124, 2136-37, 95 L. Ed. 2d 740 (1987) [***36] (disapproving the appointment of private counsel to represent the government where such appointment raises "the potential for private interest to influence the discharge of public duty" (emphasis in original)); cf. Clancy, 70 S.P. 2d at 351 ("In the case at bar, Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. [*428] Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City.").

FOOTNOTES

1 Although the majority indicates that Janssen does not advance any constitutional challenge to Section 103’s limitation on standing, see Majority Opinion, slip op. at 15 n.7, Janssen does argue that its due process rights are infringed by the contingency-fee arrangement, see Brief for Appellant at 27-41; see also id. at 13 ("By giving Bailey Perrin . . . a direct financial interest in the outcome of the litigation, the Governor’s General Counsel violated Janssen’s state and federal constitutional rights to due process."); and states further that "Section 103 [can] not constitutionally be read to prohibit a legal challenge to the constitutionality of the contingent fee [***37] arrangement." Id.; see also id. at 15 ("[N]othing in the Act stands in the way of Janssen’s due process challenge to the Commonwealth’s retention of private contingent fee counsel."); id. at 16 ("Indeed, the General Assembly could not, by limiting standing, preclude such challenges to constitutional violations."). These arguments, moreover, echo averments forwarded in the underlying petition. See Motion to Disqualify Plaintiff’s Counsel PP15-19, reproduced in R.R. 65a-66a. In this regard, it bears noting that reviewing courts have a duty to construe statutory enactments in a limited fashion where reasonably possible if a broader interpretation would render them constitutionally unsound. See Commonwealth v. Mastrangelo, 489 Pa. 254, 260, 414 A.2d 54, 57 (1980); see also 1 Pa.C.S. § 1922(3). Thus, unlike the majority, I believe that the present discussion is fairly implicated by the substance of Janssen’s challenge and salient legal principles.

2 Other forms of relief might include promises not to advertise or market the product in question in certain ways, or to undertake substantial efforts to educate the public about any dangers associated with use of the product.

As applied here, Janssen [***38] maintains that the contingent-fee contract violates due process by granting the Commonwealth’s counsel a financial stake in the resolution of the action, which constrains its ability to agree to outcome choices with regard to settlement. For example, the contract entered into by Bailey Perrin and the Office of General Counsel expressly precludes any compensation or indemnification of costs if no money is recovered from Janssen, see R.R. 80a, which would incentivize Bailey Perrin to disfavor settlements lacking a monetary component that would nonetheless be in the best interests of the citizens of Pennsylvania. In this regard, one commentator has explained,
"Contingency fee lawyers' incentives to maximize monetary settlements are more problematic in parens patriae litigation than in traditional private tort litigation. . . . For example, when the litigation process reveals that the state's theory of liability is factually weak or incorrect, the public interest would seem to dictate that the state should drop its case rather than waste more social resources on the litigation and potentially secure an unjustified recovery." David Dana, Public Interest and Private Lawyers: Toward a Normative [*339] Evaluation of Parens Patriae Litigation by Contingency Fee, 51 DEPAUL L. REV. 315, 325-26 (2001). 3 [**281] [*429] Janssen also points out that, even putting problematic incentives aside, the express terms of the contingent-fee contract here preclude the government from agreeing to any settlement that provides only for non-monetary relief unless it also requires Janssen to pay Bailey Perrin for the latter's services to the Commonwealth, see Contract for Legal Services, Appendix C, P3, reproduced in R.R. 80a, a restriction that would presumably be unnecessary if Bailey Perrin were not being compensated on a contingent basis.

FOOTNOTES

3 Other commentators have also expressed concerns about partiality regarding the terms on which a private contingently-paid law firm may be willing to settle the case on behalf of its governmental client. See, e.g., Dale Dahlquist, Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles, 50 DEPAUL L. REV. 743, 783-84 (2000) ("When a Special Assistant is bestowed with all the power and authority of the Attorney General, he has a corresponding duty to represent the state as would the Attorney General himself. . . . [**40] . . . Those members of the plaintiffs' bar who serve as Special Assistants are now hopelessly conflicted, serving as government contractors with financial incentives proportionate to their hoped-for conquest. . . . How could such lawyers possibly evaluate with impartiality the prospect of a settlement, say, or the tradeoff between injunctive and monetary relief?" (brackets, footnotes, and internal quotation marks omitted)); Robert Levy, The New Business of Government Sponsored Litigation, 9 KAN. J. L. & PUB. POLICY 592, 598 (2001) (approving of hourly-fee contracts with outside counsel, but asserting that contingent-fee contracts are a "sure-fire catalyst for the abuse of power," and that it is difficult to "condone private lawyers enforcing public law with an incentive kicker to increase the penalties").

Bailey Perrin attempts to deflect these criticisms by observing that outside counsel paid on an hourly basis could also abuse their position by inflating their hours. See Brief for Appellee at 54. I find this argument flawed in at least two respects: first, it does not ameliorate the due process concerns identified above; second, although a possibility of overbilling may exist – as [***41] indeed it may in purely private litigation – this type of difficulty appears more readily subject to control via well-established criteria for determining reasonableness of hourly fees. See In re LaRocca's Estate, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968). It is also worth noting that the justification for allowing contingent-fee contracts for private plaintiffs lacking the resources to bring a meritorious action is absent when the plaintiff-client is the government.

Finally, Janssen argues that the concept that the Office of General Counsel maintains tight control of
Bailey Perrin is largely illusory, as the contingent-fee contract only dictates a nebulous duty of "consultation." See Contract for Legal Services P4, reproduced in R.R. 71a. Janssen asserts that this differs qualitatively from ordinary contracts entered into by the government with outside counsel, which "include a detailed provision for the [Office of General Counsel]'s 'Control and Management of the Litigation.'" Motion to Disqualify Plaintiff's Counsel P12, reproduced in R.R. 64a. Again, Janssen highlights the above-mentioned restriction on the Commonwealth agreeing to non-monetary relief as evidence that the government [***42] has voluntarily surrendered at least some of its ordinary ability to control the litigation in the public interest. Cf. County of Santa Clara v. Superior Court, 112 Cal. Rptr. 3d 697, 718, 50 Cal. 4th 35, 59-62, 235 P.3d 21, 2010 WL 2890318 *14 (Cal. 2010) (holding that, to ensure that public attorneys exercise "real rather than illusory [*430] control" over contingent-fee counsel, contingent-fee agreements "must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation").

In my view, Janssen's allegations, if borne out, are sufficient to give it a substantial, direct, and immediate interest in disqualifying Bailey Perrin and precluding the Commonwealth from pursuing relief through similar contingent-fee contracts with outside counsel. Since Janssen alone stands to incur additional costs due to the contract under which Bailey Perrin was hired, its interest in the relief it seeks is substantial because it surpasses that of citizens [***43] generally in procuring obedience to the law. 4 As well, the causal relationship between the complained-of arrangement and Janssen's alleged harm is sufficient to render the interest direct and immediate. See generally Pittsburgh Palisades Park v. Commonwealth, 585 Pa. 196, 204, 888 A.2d 655, 659 (2005) (reciting that an interest is "direct" if the matter complained of caused harm to the party's interests, and it is "immediate" if the causal connection is not remote or speculative). Indeed, not only does Janssen aver that [**282] the Commonwealth's strategic litigation decisions are likely to be distorted to Janssen's detriment by Bailey Perrin's pecuniary interest in the outcome, but its allegations include a suggestion that this particular litigation might not have occurred at all but for the aggressive efforts of Bailey Perrin in seeking to convince state officials to initiate it under a contingent-fee arrangement whereby the firm could expect to receive a substantial portion of any monetary payout. See Motion to Disqualify Plaintiff's Counsel PPS-6, 9-12, reproduced in R.R. 61a-64a; cf. Brief for Appellant at 43 (recounting allegations regarding Bailey Perrin's involvement [*431] in commencing [***44] the present lawsuit, as well as Risperdal litigation in other jurisdictions).

FOOTNOTES

4 Here, the "law" is the Due Process Clause. See City of Phila. v. Commonwealth, 575 Pa. 542 n.7, 560, 838 A.2d 566, 577 n.7 (2003) (recognizing that, in the context of a constitutional dispute, the law at issue is the constitutional provision under which the objector brings its challenge).
Accordingly, I would hold that Janssen has standing to raise at least its claim based on the Due Process Clause.


SUPREME COURT OF PENNSYLVANIA

614 Pa. 364; 38 A.3d 711; 2012 Pa. LEXIS 186

January 25, 2012, Decided

January 25, 2012, Filed

SUBSEQUENT HISTORY: Later proceeding at Holt v. 2011 Legislative Reapportionment
Prior History: [***1]

Judges: Mr. Justice Saylor files a dissenting statement, in which Mr. Justice Eakin and Madame Justice Orie Melvin join.

Opinion

[*371] [**715] Order

Per Curiam

And now, this 25th day of January, 2012, upon consideration of the petitions for review and briefs in these legislative [*372] redistricting appeals, and after entertaining oral argument on January 23, 2012, this Court finds that the final 2011 Legislative Reapportionment Plan is contrary to law. Pa. Const. art. II, § 17(d). Accordingly, the final 2011 Legislative Reapportionment Plan is Remanded to the 2011 Legislative Reapportionment Commission with a directive to reapportion the Commonwealth [**716] in a manner consistent with this Court's Opinion, which will follow. Id.

Footnotes

1 For administrative purposes only, we have designated the appeal in Holt v. 2011 Legislative Reapportionment Commission, 7 MM 2012 / J-7-2012, as the lead case.

The 2001 Legislative Reapportionment Plan, [***3] which this Court previously ordered to "be used in all forthcoming elections to the General Assembly until the next constitutionally mandated reapportionment shall be approved," Albert v. 2001 Legislative Reapportionment
Commission, 567 Pa. 670, 790 A.2d 989, 991 (Pa. 2002) (quoting per Curiam order), shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved. PA. CONST. art. II, § 17(e).

All 2012 election dates shall remain the same, with the exception of the primary election calendar, which is adjusted as follows:

<table>
<thead>
<tr>
<th>Thursday, January 26</th>
<th>First day to circulate nomination petitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thursday, February 16</td>
<td>Last day to file nomination petitions</td>
</tr>
<tr>
<td>Thursday, February 23</td>
<td>Last day to file objections to set aside nomination petitions</td>
</tr>
<tr>
<td>Monday, February 27</td>
<td>Last day that court may fix for hearings on objections to nomination petitions</td>
</tr>
<tr>
<td>Friday, March 2</td>
<td>Last day for court to finally determine objections to nomination petitions</td>
</tr>
<tr>
<td>Friday, March 2</td>
<td>Last day for withdrawal by candidates who filed nomination petitions</td>
</tr>
</tbody>
</table>

Any signatures on nomination petitions dated January 24 or January 25, 2012, shall be deemed valid as to timeliness, [*373] subject, however, to any other statutory challenge.

Jurisdiction [*4] is retained.

Mr. Justice Saylor ▼ files a dissenting statement, in which Mr. Justice Eakin ▼ and Madame Justice Orie Melvin ▼ join.

DISSENT BY: SAYLOR ▼

DISSENTING STATEMENT

MR. JUSTICE SAYLOR ▼

Based on the petitions, briefs, and argument, I am not persuaded that the 2011 Legislative Reapportionment Plan is contrary to law as reflected in the existing precedent. Although I am receptive to the concern that past decisions of the Court may suggest an unnecessarily stringent approach to equalization of population as between voting districts, I believe this could be addressed via prospective guidance from the Court.

Mr. Justice Eakin ▼ and Madame Justice Orie Melvin ▼ join this dissenting statement.


SUPREME COURT OF PENNSYLVANIA
614 Pa. 364; 38 A.3d 716; 2012 Pa. LEXIS 232


January 25, 2012, Decided

February 3, 2012, Opinion Filed


PRIOR HISTORY: [***1]
Appeal from the Legislative Reapportionment Plan of the 2011 Legislative Reapportionment Commission, dated December 12, 2011. [***2]

COUNSEL: For Bureau of Elections, Department of State, PARTICIPANT: Shauna Christine Clemmer, Esq.
For Attorney General’s Office, PARTICIPANT: Linda L. Kelly, Esq., Office of Attorney General
For Holt et al, PETITIONER: Michael Churchill, Esq. , Virginia A. Gibson, Esq., David Newmann, Esq., Hogan & Hartson, L.L.P.
For Mayor Leo Scoda and Council Person Jennifer Mayo, PETITIONER: Samuel C. Stretton, Esq. Law Office of Samuel C. Stretton
For Sekela Coles, Cynthia Jackson and Lee Taliaferro, PETITIONER: Robert Walter Scott, Esq., Robert W. Scott, P.C.
For Kim Patty, PETITIONER: Adam Craig Bonin, Esq. \textsuperscript{\textcopyright}; Kevin Michael Greenberg, Esq. \textsuperscript{\textcopyright}, Flaster/Greenberg, P.C.

For Edward Bradley, Jr., Patrick McKenna, Jr., Dorothy Gallagher, Richard Lowe, John Byrne, PETITIONER: James Manly Parks, Esq., Duane Morris, L.L.P.

For Dennis J. Baylor pro se, PETITIONER: Dennis J. Baylor

For Andrew Dominick Alosi pro se, PETITIONER: Andrew Dominick Alosi

For Carlos A. Zayas pro se, PETITIONER: Carlos A. Zayas

For William C. Kortz, et al., PETITIONER: David J. Montgomery, Esq. \textsuperscript{\textcopyright}, Montgomery Law Firm, LLC


JUDGES: BEFORE: CASTILLE \textsuperscript{v}, C.J., SAYLOR \textsuperscript{v}, EAKIN \textsuperscript{v}, BAER \textsuperscript{v}, TODD \textsuperscript{v}, McCAFFERY \textsuperscript{v}, ORIE MELVIN \textsuperscript{v}, JJ. Mr. Justice Baer \textsuperscript{v}, Madame Justice Todd \textsuperscript{v}, and Mr. Justice McCaffery \textsuperscript{v} join the opinion. Mr. Justice Saylor \textsuperscript{v} files a concurring and dissenting opinion. Mr. Justice Eakin\textsuperscript{v} files a concurring and dissenting opinion. Madame Justice Orrie Melvin\textsuperscript{v} files a dissenting opinion.

OPINION BY: CASTILLE \textsuperscript{v}

OPINION

\[*373\] [\*\*716\] Legislative redistricting "involves the basic rights of the citizens of Pennsylvania in the election of their state lawmakers."\textsuperscript{1} In twelve separate matters, Commonwealth citizens, acting singly or in groups, filed appeals from the Final Plan for legislative redistricting of the Commonwealth, which was devised by appellee, the 2011 Pennsylvania Legislative Reapportionment Commission (the "LRC"), in response to the U.S. decennial census. In an attempt to conduct meaningful appellate review with the prospect of minimal disruption of the 2012 primary election [\*\*\*\*3] process, this [\*\*717] Court ordered accelerated briefing and oral argument. Expedition was required, as in all redistricting appeals, in part due to the compressed time frame in which to accomplish the task before the next election -- particularly in an election year involving a presidential primary. However, the Court was aware at the outset that its [\*374] efforts at expedition were incapable of avoiding interference with the primary election season because, for reasons not addressed by the LRC, the LRC failed to adopt
a Final Plan in a timeframe that offered the remote prospect of appellate review before the primary season began. The LRC's inexplicable delay ensured that primary candidates who relied upon the 2011 Final Plan did so at their peril. As we discuss in detail infra, the Pennsylvania Constitution makes clear that a reapportionment plan can never have force of law until all appeals are decided, and even then, only if all challenges are dismissed. See Pa. Const. art II, § 17(e).

FOOTNOTES


2 Eminent counsel for the LRC acknowledged this fact at oral argument:

CHIEF JUSTICE CASTILLE: Let me ask you this, what if we send the plan back? What happens?

[LRC COUNSEL]: I guess the current seats are still in effect if the plan goes back. The Commission would have to do what the Court instructs us to do. It is uncharted territory, Chief Justice, I can tell you that.


In any event, fourteen days after the appeals were filed, seven days after the matters were briefed, and two days after the appeals were argued, this Court issued its mandate in a per curiam order filed January 25, 2012. That order declared that the Final Plan was contrary to law under Article II, Section 17(d) of the Pennsylvania Constitution, and consistently with the directive in that constitutional provision, we remanded the matter to the LRC to reapportion the Commonwealth in a manner consistent with an Opinion to follow. This is that Opinion.

The substantive task of the LRC in decennial redistricting is governed by Article II, Section 16 of the Pennsylvania Constitution, which provides:

The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Pa. Const. art. II, § 16. The Constitution also specifically provides that, once the LRC has adopted a Final Plan, "any aggrieved person" may appeal directly to this Court. Pa. Const. art. II, § 17(d). The Constitution further commands that, if that aggrieved citizen "establishes that the final plan is contrary to law," this Court "shall issue an order remanding the plan to the commission and directing the commission to reappportion the Commonwealth in a manner not inconsistent with such order." Id.
In our most recent redistricting opinion, Albert v. 2001 Legislative Reapportionment Commission, 567 Pa. 670, 790 A.2d 989, 991 (Pa. 2002), we rejected a series of localized challenges to a final plan, which were based on lack of compactness, alleged unnecessary splits of particular political subdivisions, and other issues. Central to our decision in that case was our recognition that the challengers there had "focused primarily on the impact of the plan [***718] with respect to their [***6] particular political subdivision, rather than analyzing the plan as a whole, as is required under a proper constitutional analysis." Id. at 995. We repeated the admonition in our legal analysis, noting that "[t]he Commission persuasively argues that none of the appellants ha[s] met the heavy burden of establishing that the final plan, as a whole, is contrary to law." Id. at 998.3

FOOTNOTES

3 Albert and our other reapportionment decisions are addressed at length infra.

As we develop more fully below, we find that the 2011 Final Plan is contrary to law because appellants -- in particular, the appellants in Holt v. 2011 Legislative Reapportionment Commission, 7 MM 2012, and to a lesser extent, the appellants in Costa v. 2011 Legislative Reapportionment Commission, 1 WM 2012 -- have heeded the admonition in Albert, and they have demonstrated that the Final Plan, considered as a whole, contains numerous political subdivision splits that are not absolutely necessary, and the Plan thus violates the constitutional command to respect the integrity of political subdivisions. [*376] Furthermore, in their challenge, the appellants have shown that the LRC could have easily achieved a substantially greater fidelity [***7] to all of the mandates in Article II, Section 16 -- compactness, contiguity, and integrity of political subdivisions -- yet the LRC did not do so in the Final Plan.

Although we are satisfied that the appellants challenging the Final Plan as a whole have made their case under existing decisional law and constitutional imperative, our consideration of this appeal, and our review of prior law, has convinced us that, going forward — and the initial opportunity to go forward is upon this remand — a better and more accurate calibration of the interplay of mandatory constitutional requirements would provide salutary guidance in future redistricting efforts. Accord Order, 1/25/12 (per curiam) (Saylor †, J., dissenting, joined by Eakin † and Orie Melvin †, JJ.). 4 Part VII of this Opinion provides that guidance.

FOOTNOTES

4 Mr. Justice Saylor's † dissent states: "Based on the petitions, briefs, and argument, I am not persuaded that the 2011 Legislative Reapportionment Plan is contrary to law as reflected in the existing precedent. Although I am receptive to the concern that past decisions of the Court may suggest an unnecessarily stringent approach to equalization of population as between voting districts, I believe [***8] this could be addressed via prospective guidance from the Court."
The delay of the LRC in producing a Final Plan has created a situation where, notwithstanding the alacrity with which this Court has acted, this Court’s discharge of its constitutional duty to review citizen appeals has resulted in disruption of the election primary season. But, in these circumstances, ones not of this Court’s creation, the rights of the citizenry and fidelity to our constitutional duty made the disruption unavoidable.

I. Background for the Adoption of the 2011 Final Plan

Every ten years, following the federal decennial census, our Constitution mandates reapportionment, or redistricting, of the Commonwealth. See Pa. Const. art. II, § 17(a). The federal decennial census is conducted pursuant to Article I, Section 2 mandates of the U.S. Constitution to count every resident of the United States for the purpose of apportioning representatives to the U.S. Congress among the States. See U.S. Const. art. I, § 2, cl. 3; amend. XIV, § 2; XVI. The Commonwealth uses U.S. Census data for the purpose of apportioning and demarcating Pennsylvania seats in the U.S. House of Representatives, the state House of Representatives, and the state Senate. The process of reapportioning the Pennsylvania General Assembly is specifically outlined in Article II, Section 17 of the Pennsylvania Constitution.

FOOTNOTES

5 Reapportionment is perhaps a less apt term for the task than redistricting, for although the occasion for the process is the change in population distribution revealed by the census, the process requires consideration of other factors in establishing new House and Senate districts. Although we use both terms, the Pennsylvania Constitution uses the term "reapportionment." See Pa. Const. art. II, § 17.

As required by Section 17, a reapportionment body was constituted in 2011, the year following the federal decennial census. See Pa. Const. art. II, § 17(a). That body, the LRC, consists of five members, four of whom are specifically identified by the Constitution based upon their partisan leadership roles in the General Assembly: for this reapportionment, the members are the Senate Majority Leader (Dominic Pileggi *), the Senate Minority Leader (Jay Costa (D)), the House Majority Leader (Mike Turzai *), and the House Minority Leader (Frank Dermody (D)). See Pa. Const. art. II, § 17(b). On February 18, 2011, the President pro tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives certified these four automatic members to serve on the 2011 LRC. Section 17(b) provides that the four legislative members of the LRC shall select the fifth member, who will serve as chairman, within forty-five days of their certification. If the legislative leaders fail in this task, the Supreme Court is required to appoint the chairman within thirty days. On the forty-fifth day after their certification, on April 4, 2011, the legislative members announced their failure to agree on the chairman of the LRC, leaving the task of appointment to this Court. Fifteen days later, on April 19, 2011, this Court appointed as LRC chairman the Honorable Stephen J. McEwen, Jr., President Judge Emeritus of the Superior Court of Pennsylvania. The Court’s prompt action afforded the LRC two additional weeks to
perform its task. [*378] The LRC appointed its technical staff and legal advisors at an administrative meeting in May 2011.

The U.S. Census Bureau had released 2010 census data to the Commonwealth on March 9, 2011. See Pennsylvania Legislative Redistricting website, http://www.redistricting.state.pa.us/index.cfm. [***11] This data was released well before the deadline provided by federal law. See 13 U.S.C. § 141 ("basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date," i.e., April 1, 2011).

On August 17, 2011, after a lengthy delay, the LRC accepted the U.S. census data as presented by the Legislative Data Processing Center ("LDPC") and contractor Citygate GIS as "usable," and resolved that the availability of the data triggered the ninety-day period for filing a preliminary redistricting plan. See Pa. Const. art. II, § 17(c) (HN62F"No later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer."). There is no explanation for the LDPC's delay in generating "usable" data, a circumstance we will address below.6

FOOTNOTES

6 In a document provided to the LRC entitled "Legal Issues Implicated by the 2011 Decennial Legislative Reapportionment of the Commonwealth [***12] of Pennsylvania -- An Overview," LRC's counsel suggested that the data was available in usable form "only after the raw data with the breakdown by precinct and ward has been processed and edited by the LDPC [Legislative Data Processing Center] and the final form of data is delivered to the Commission." See Del Sole Cavanaugh Stroyd LLC Memorandum at 5, attached as Exhibit A to the Appendix to the Petition for Review filed by the Costa Appellants at 1 WM 2012.

For the proposition that the LRC did not have "usable" data until August 2011, despite the earlier availability of census data, the LRC relied on an account of the 1981 and 1991 Reapportionments authored by Dean Ken Gormley, who was the Executive Director of the 1991 Legislative Reapportionment Commission, and is at present the Dean of the Duquesne University School of Law.

[T]he Commission asked whether data was deemed to b[e] "available" when it received the "raw" form from the federal government or when it was translated into a form that was actually usable. The Chief Justice issued an unpublished Order [on March 26, 1981], which stated that the census data became available "in [***13] usable form (breakdown of data by precinct and ward)." In 1991, some members of the Commission considered again seeking clarification on the definition of "usable." Ultimately, the Commission decided that it, not the Supreme Court, was the best judge of when the data provided to it was in a form that was sufficiently "usable" for its purposes. As such, the Commission sought no further
clarification from the Court and deemed the data to be "usable" on June 27, 1991 -- when the data had been revised and delivered to the Commission from the Legislative Data Processing Center ("LDPC").


No party to these appeals objects to the notion that the data must be in "usable" form before the LRC can formulate a preliminary plan.

[**720] The LRC held public hearings in Allentown and Pittsburgh, on September 7 and 14, 2011, and announced a preliminary [*379] redistricting plan on October 31, 2011, at a public administrative meeting in Harrisburg. The LRC approved the preliminary plan by a vote of 3 to 2, [***14] with the minority leaders in the House and Senate dissenting. On November 16, the LRC approved technical corrections to the preliminary plan for the House of Representatives. The LRC entertained citizens' comments and objections to the preliminary redistricting plan at public hearings in Harrisburg, on November 18 and 23, 2011, see Pa. Const. art. II, § 17(c), but made no further changes and offered no formal response to citizen concerns. On December 12, 2011, the LRC approved its Final Plan by a vote of 4 to 1, with Senate Minority Leader Jay Costa dissenting.

Absent appeals within the thirty day period afforded by the Constitution, the Final Plan would have had force of law. See Pa. Const. art. II, § 17(e). However, twelve separate appeals from the 2011 Final Plan were filed by citizens claiming to be aggrieved, as is their constitutional right. See Pa. Const. art. II, § 17(d) (HN2"Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the filing thereof."). In each appeal, the appellants filed petitions for review, against several of which the LRC filed [*380] preliminary objections.7 The LRC also filed a prompt consolidated answer, [***15] responding to the first eleven petitions for review.8 This Court then directed briefing on an accelerated schedule; all parties timely complied. The Court reserved a special session to hear [**721] oral argument on January 23, 2012, in Harrisburg, five days after briefing, and we heard argument in nine of the appeals that day. Many of the appeals raise overlapping claims, and indeed, in some instances, appellants ultimately relied upon the briefs of other aggrieved citizens.9

FOOTNOTES

7 We address the propriety of preliminary objections in legislative redistricting appeals and the LRC's filings infra.

8 The twelfth petition, Zayas v. 2011 Legislative Reapportionment Commission, 17 MM 2012 / J-31-2012, proceeded separately, due to an administrative delay in ascertaining the timeliness of the appeal. Briefing in that matter was completed after oral argument, and it was submitted on the briefs.
Three of the appeals were submitted for consideration on the briefs: Zayas; Coles v. 2011 Legislative Reapportionment Commission, 5 MM 2012 / J-5-2012; and Alosi v. 2011 Legislative Reapportionment Commission, 10 MM 2012 / J-10-2012.

Two days later, on January 25, 2012, this Court issued a per curiam order, declaring [***16] that the Final Plan was contrary to law, and remanding to the LRC with a directive to reapportion the Commonwealth in a manner consistent with this Court’s Opinion, which would follow. See Order, 1/25/12 (per curiam) (citing Pa. Const. art. II, § 17(d)). Our per curiam order also directed that the 2001 Legislative Reapportionment Plan, which this Court previously ordered to "be used in all forthcoming elections to the General Assembly until the next constitutionally mandated reapportionment shall be approved," would remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved. See Order, 1/25/12 (per curiam) (citing Pa. Const. art. II, § 17(e) and Albert, 790 A.2d at 991). That aspect of our mandate arose by operation of law; where a Final Plan is challenged on appeal, and this Court finds the plan contrary to law and remands, the proffered plan does not have force of law, and the prior plan obviously remains in effect.10 Mr. [***17] Justice Saylor " filed a dissenting statement, in which Mr. Justice Eakin and Madame Justice Orie Melvin joined.

FOOTNOTES

10 Of course, the Court was cognizant that the LRC's timeline in adopting a Final Plan had ensured [***17] that the appeals would carry into the period when nomination petitions could begin to be circulated, and that any mandate other than outright denial or dismissal of the appeals could cause disruption of that process. Therefore, the per curiam order also was careful to adjust the primary election schedule and, consistently with the order we entered on February 14, 1992, the last time a presidential primary occurred in a reapportionment year, we directed that petition signatures collected before our mandate issued would be deemed valid as to timeliness. See Order, 1/25/12 (per curiam). Our adjustment of the primary election calendar does not alter the discretion vested in the Commonwealth Court, which will be tasked in its original jurisdiction with hearing any objections to nominating petitions. HN8 The Election Code provides a very restrictive time schedule, specifically including a ten day cut-off for hearings and a fifteen day deadline for decisions. 25 P.S. § 2937. However, this Court recognized that appeals of this nature entail the "exercise of purely judicial functions." In re Nomination Petition of Moore, 447 Pa. 526, 291 A.2d 531, 534 (Pa. 1972). Thus, as it respects the judicial function, [***18] the Election Code's deadlines are understood in this context as "directory," although the deadlines and requirements of the Code will remain mandatory as to petitioners. See also Mellow v. Mitchell, 530 Pa. 44, 607 A.2d 204, 224 (Pa. 1992) (same); In re Shapp, 476 Pa. 480, 383 A.2d 201, 204 (Pa. 1978) (same).

II. Preliminary Issues

A. The LRC's Delay in Adopting a Final Plan
As we have noted, the Final Plan was adopted at such a late date as to ensure that, even with adoption of the most accelerated of processes, this Court would lack adequate time to consider the matter, with due reflection, and issue a mandate and reasoned decision before the primary election process was underway. The delay is unexplained; and it stands in stark contrast to the timing of the adoption of prior plans, plans that were no doubt created with less advanced computer technology. The Constitution provides that "[n]o later [**722] than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan. . . ." Pa. Const. art. II, § 17(c). The year 2012 is [***19] a presidential election year, with the result that the Pennsylvania primary is held three weeks earlier than in [*382] other years, and that all primary filing and litigation deadlines are advanced by three weeks as well.11 Indeed, the first day to circulate nomination petitions for the primary was January 24, 2012. Despite this known fact, the LRC did not adopt its Final Plan until December 12, 2011, a mere forty-three days before that important date. Under the Pennsylvania Constitution, persons aggrieved by the Final Plan had thirty days to file an appeal to this Court, or until January 11, 2012, which is the very day the bulk of the twelve appeals were filed. Pa. Const. art. II, § 17(d). Even with accelerated briefing and argument, the appeals could not be decided with a reasoned opinion before January 24, 2012. And, obviously, the lateness of the adoption of the Final Plan virtually ensured that no remand could be accomplished without disrupting the primary process.

FOOTNOTES

11 Section 603 of the Election Code provides, in relevant part:

HN9General Primary; Candidates to Be Nominated and Party Officers to Be Elected. (a) There shall be a General primary preceding each general election which shall be [***20] held on the third Tuesday of May in all even-numbered years, except in the year of the nomination of a President of the United States, in which year the General primary shall be held on the fourth Tuesday of April. Candidates for all offices to be filled at the ensuing general election shall be nominated at the General primary. The vote for candidates for the office of President of the United States, as provided for by this act, shall be cast at the General primary.

25 P.S. § 2753(a).

As noted above, the LRC states that the 2010 census data was not "available" before August 17, 2011, the date the LDPC provided it with the census data in "usable form," and that "this event triggered the 90-day time-period for formulating a preliminary reapportionment plan." LRC's Brief at 10; accord Costa Brief at 3. Notably, with far less sophisticated technology in 1991, and with two fewer rounds of redistricting experience, the LDPC was able to produce the census data in usable form by June 27th of that year -- fifty-one days sooner. Gormley, Legislative Reapportionment, at 24.12 This

FOOTNOTES

12 Dean Gormley's account of the 1991 reapportionment describes at some length the diligent efforts of the LRC and the LDPC to ensure that the census data was in usable form as soon as possible. See Gormley, Legislative Reapportionment, at 22-24.

The LRC provides no further information about the LDPC's procedures, and what precisely the LDPC must do to the so-called "raw" census data in order to [*725] render it "usable" by the LRC for redistricting purposes. Given advances in computer technology since 1991, and the cumulative experience of those tasked with amassing [*384] and providing the data to the LRC, the delay here, in a presidential primary year, is as troubling as it is inexplicable. We remind the LRC that the Constitution specifically authorizes appeals from final plans, and the LRC this year, and whatever entity bears the burden in future years, should thus approach its bipartisan constitutional task with an eye toward affording sufficient time for meaningful appellate review, if appeals are filed.

B. The LRC's Preliminary Objections

The LRC filed preliminary objections in most of these appeals, seeking outright dismissal for what it terms pleading defects. After the initial petitions for review were filed, but before briefing, the LRC filed preliminary objections in Costa, Comitta, Scoda, Coles, Kim, Bradley, and Kortz, asserting that those petitions should be dismissed for failure to include a verification. The LRC also filed preliminary objections in Baylor and Alosi, two of the pro se appeals, asserting that those appellants violated rules regarding the form of pleading. LRC's Preliminary Objections (citing Pa.R.A.P. 1513(c)). The [*384] LRC did not file preliminary objections in either Schiffer, Zayas, or Holt, which this Court has designated [*384] as the lead appeal. The LRC argues that redistricting challenges arise in this Court's original jurisdiction and, therefore, in all other original jurisdiction matters, all rules regarding pleading and verification apply here. LRC's Preliminary Objections (citing HN10 Pa.R.A.P. 1517 (Pennsylvania Rules of Civil Procedure apply to petitions for review filed in appellate court's original jurisdiction); Pa.R.A.P. 1513(e)(5) (petition for review filed in appellate court's original jurisdiction must be verified)).

The Costa appellants responded with a motion to strike the LRC's preliminary objections, arguing that
redistricting appeals lie in this Court’s appellate rather than original jurisdiction and that as such, no verification is required. See Costa Motion to Strike at 4 (citing Pa.R.A.P. 1513(d)). Appellants in Coles, Kim, and Bradley joined the Costa motion to strike. The appellant in Baylor sought to “cure” the alleged defects with additional filings.13

FOOTNOTES

13 Appellant Baylor sought to file an amended petition for review, with additional substantive material. Baylor also filed an application for post-submission communication, in which he claimed that the late filing of the LRC’s preliminary objections foreclosed any opportunity to respond in a timely fashion. In response, the LRC challenged Baylor’s request to amend as an improper attempt to add waived new claims to his petition for review. Given our disposition, infra, these ancillary petitions are denied.

Our mandate having already issued, without dissent on the grounds specified in the preliminary objections, the preliminary objections obviously must fail.14 Nonetheless, it is important to address the nature of these appeals, and the consequent propriety of preliminary objections, because of the supplementary layer of complexity and delay that would result from permitting preliminary objections in cases already subject to an accelerated appeals process.

FOOTNOTES

14 Notably, at oral argument, the LRC did not press its preliminary objections, going instead to the merits of the appeals. In any event, the Holt appeal, upon which we primarily base our disposition, was not challenged by preliminary objections. Nevertheless, since these matters involve the preeminent right to the franchise and to selection of the representatives who give voice to the citizens’ concerns, mere technicalities in pleadings shall not impede our deliberative process.

[*385] The question of whether preliminary objections to petitions for review are cognizable in redistricting appeals turns on whether these appeals are properly viewed as sounding in this Court’s original or its appellate jurisdiction. HN11 Our Constitution describes the process to challenge the Final Plan: "[a]ny aggrieved person may file an appeal from the final plan directly to the Supreme Court . . . ." Pa. Const. art. II, § 17(d) (emphasis supplied); accord 42 Pa.C.S. § 725(1). In concert with that constitutional authority, our Rules expressly provide that, unless otherwise ordered, "appeals" under Article II, Section 17(d) shall proceed under Chapter 15 of the Rules of Appellate Procedure, which generally governs judicial review of governmental determinations, such as agency appeals to the Commonwealth Court. Pa.R.A.P. 3321; see Pa.R.A.P. 1501(a). Rule 1516(a) specifies that petitions for review in redistricting appeals proceed within this Court’s appellate jurisdiction. See Pa.R.A.P. 1516(a). Additionally, as the Costa appellants note, this Court has generally utilized terminology applicable to appeals in reviewing reapportionment challenges. See Costa Motion
to Strike at 3 (citing [***26] inter alia, Albert, 790 A.2d at 992 and In re 1991 Plan, 609 A.2d at 135).

Generally, in matters filed within a court's appellate jurisdiction, no pleadings (including answers and preliminary objections) may be filed as of right in response to petitions for review. The Rules of Appellate Procedure simply do not contain a provision similar to that in the Rules of Civil Procedure permitting the filing of preliminary objections. Compare Pa.R.A.P. 1501 et seq. with Pa.R.C.P. No. 1028. Rule 1516 specifically provides that, as to redistricting matters, "[n]o answer or other pleading to an appellate jurisdiction petition for review is authorized, unless the petition for review is filed pursuant to . . . Rule 3321." Pa.R.A.P. 1516(a). Rule 3321 is a narrow exception to Rule 1516, by which this Court may permit filing of an "answer or other pleading" by order. In the appeals before us, our scheduling order noted that we would entertain a substantive answer and brief from the LRC, but we did not authorize the filing of preliminary objections. See Order, 1/11/12 (per curiam).

[*386] This practice is appropriate, as it promotes the salutary purposes embodied in the Rules of Appellate Procedure. These Rules [***27] are meant to be "liberally construed to secure the just, speedy and inexpensive determination" of appeals, Pa.R.A.P. 105(a). Re-characterizing these constitutional appeals as challenges sounding in our original jurisdiction would not advance orderly review of these time-sensitive, and often complex, matters. We view the petition for review process in these appeals as putting the Court on notice of the scope of the issues to come before it, inevitably in an accelerated time frame, and in advance of the briefs. The process permits the Court to organize the appeals for purposes of oral argument, and to begin to conduct research on the issues. It would do nothing to advance "the just, speedy and inexpensive determination" of this unique class of appeals to treat the cases as if they were original jurisdiction matters, and thus to open the doors to technical pleading challenges and counter-challenges, and add a layer of complexity to a time-sensitive matter, without illuminating the substantive issues upon which the Court must pass. Accordingly, the Costa appellants' Motion to Strike is granted and the LRC's preliminary objections are stricken.

III. The Appellants and Their Various Claims

A. [***28] The Citizen Appellants

Our Constitution permits any aggrieved person to file an appeal from the LRC's [***725] plan directly to this Court. See Pa. Const. art. II, § 17(d). The appeals from the 2011 Final Plan were brought by various registered voters, citizens of the Commonwealth (together, "appellants").

In the lead appeal docketed at 7 MM 2012 ("Holt"), the appellants describe themselves as individual voters, registered Democrats and Republicans, hailing from Allegheny, Chester, Delaware, Lehigh, and Philadelphia Counties. Appellants in the appeal docketed at 1 WM 2012 ("Costa") are all twenty Senators elected as Democrats, members of the minority party in the Pennsylvania General Assembly, and registered [*387] voters. Senator Brewster, representing the 45th Senatorial District in the Monongahela Valley, filed a separate "letter brief" in support of the Costa appeal.
The appeals in both 2 MM and 3 MM 2012 focus on Chester County. Appellants in 2 MM 2012 ("Comitta"), are elected officials and resident voters in West Chester Borough, Chester County. Appellants in 3 MM 2012 ("Scoda") are resident voters and the mayor and a member of the Borough Council, in the Borough of Phoenixville, Chester County.

The [***29] separate appeals at 4 MM 2012, 5 MM 2012, and 8 MM 2012 all focus on Delaware County. Appellants in 4 MM 2012 ("Schiffer") are individual voters from Haverford Township, Delaware County. At 5 MM 2012 ("Coles"), appellants are individual voters from Upper Darby and Darby Townships in Delaware County. At 8 MM 2012 ("Bradley"), appellants are individual voters from the Delaware County Boroughs of Collingdale, Darby, Swarthmore, Upper Darby, and Yeadon. Appellant at 6 MM 2012 ("Kim"), is a councilwoman and voter in the City of Harrisburg, Dauphin County. Appellants in 4 WM 2012 ("Kortz") are voters from Allegheny, Washington and Lawrence Counties.

Three appellants have filed pro se appeals. At 9 MM 2012 ("Baylor"), appellant is a voter and Township Auditor in Tilden Township, Berks County. At 10 MM 2012 ("Alosi"), appellant is a resident of the Shippensburg area, in South-Central Pennsylvania. Finally, in the appeal docketed at 17 MM 2012 ("Zayas"), appellant is a voter in the City of Reading, Berks County.

In all of these appeals, the LRC is appellee. The LRC does not dispute the standing of any of the appellants.

B. The Issues Raised by Appellants

Two of the appeals before us, Holt and Costa, [***30] explicitly raise and develop global challenges premised primarily upon the constitutional ban on dividing counties, municipalities, and wards "unless absolutely necessary." See Pa. Const. art. II, § 16. The Holt and Costa appellants requested that the [*388] Court remand the Plan to the LRC for a second attempt at redistricting in accordance with law. Because the Holt claims, and to a lesser extent, the Costa claims, form the primary basis for our conclusion that the Final Plan was contrary to law, these claims will be developed further, infra. Challengers in three other appeals, Coles, Kim, and Kortz, adopt the global challenge as developed in the appellants' brief in Costa.15

**FOOTNOTES**

15 We note that, after filing separate petitions for review, these appellants did not file separate briefs but joined in and adopted the Costa brief; thus, no separate discussion of their appeals is necessary.
which share unique, common political interests, but whose political influence is diluted by the unnecessary divisions. In their view, the populations of these boroughs are sufficiently small for each to be kept intact in a redistricting plan. Indeed, Darby, Collingdale, Yeadon and Swarthmore were kept intact in all redistricting plans before 2011. These appellants request remand of the Plan, and express a special interest in maintaining the integrity of the municipalities they address.

Finally, we have six appeals challenging only specific and local divisions of municipalities, in which the appellants, like the Bradley appellants in the development of their specific claim, request what would resemble a form of mandamus relief. Specifically, the appellants ask for remand of the Final Plan to the LRC with an explicit directive to accommodate their local concerns. Thus, in Comitta, appellants object to the division of West Chester Borough, the Chester County seat, into two House districts: under the Final Plan, four wards would remain in the 156th House District, and three wards would be removed from the 156th District and placed [*389] into the 160th House District. The Comitta appellants request [*389] that this Court order the LRC on remand to maintain the integrity of West Chester Borough and restore it to the 156th House District.

Similarly, in Scoda, appellants object to the division of Phoenixville Borough into two House districts: under the Final Plan, four wards would remain in the 157th House District, and three would be removed from the 157th District to the 155th District. Appellants in Scoda request remand to the LRC, with a directive to maintain the integrity of Phoenixville Borough and restore it to the 157th House District. The Comitta and Scoda appellants also both claim that the divisions of West Chester and Phoenixville Boroughs were motivated by partisan politics and by the desire to dilute the voting power of minorities, in violation of the Voting Rights Act of 1965.16

FOOTNOTES


In Schiffer, appellants state that two Haverford Township wards, Wards 1 and 9, were separated from the rest of the township in the 166th House District and placed into the 163rd House District under the 2011 Final Plan. The Schiffer appellants ask the Court to instruct the LRC on remand to assign all of Haverford [***33] Township to one district, the 166th House District.

In the Baylor matter, the pro se appellant asserts that in the four decades since he has been eligible to vote, his hometown of Tilden Township, in Berks County, has never been represented by a Berks County resident in either the Pennsylvania House or the Senate. According to appellant, Tilden Township has also been moved from one House district to another in every reapportionment cycle, which has led to distinctively low levels of political participation by residents. Appellant also argues that Berks County as a whole is excessively, and unnecessarily, divided into nine House districts. Appellant requests remand to the LRC for development of a non-partisan plan that complies with relevant law; appellant suggests redrawing the electoral map based on school district boundaries.
[*390] The pro se appellant in Alosi challenges the division of the greater Shippensburg area, which appellant states is a unified [**727] community of approximately 25,000 people. The Shippensburg area was formerly contained within the same 89th House District, but under the 2011 Final Plan, it has been divided and placed into three separate House Districts: the 86th District, [***34] the 89th District, and the 193rd District. Appellant notes that the Final Plan divides two counties, Adams and Cumberland, and two municipalities, Shippensburg Borough and Southampton Township, and has the effect of diluting the political power of the Shippensburg area. Appellant requests that the Plan be revised to maintain the 89th House District intact or, at a minimum, to remove the division of Shippensburg Borough.

Finally, the pro se appellant in Zayas complains that the Plan unnecessarily fragments the City of Reading, in Berks County, into two House Districts, the 126th and the 127th, with the intention and effect of reducing the political effectiveness of a rapidly increasing and politically cohesive Hispanic population in Reading. Appellant requests remand for the LRC to conduct reapportionment in accordance with constitutional and federal Voting Rights Act requirements.

In addition to these substantive challenges, the appeals and the responsive brief of the LRC present disputes concerning the Court’s scope and standard of review and the burden of proof, as well as requests to explain the status of the law or to reconsider precedent in this area. Appellants address governing [***35] precedent from two perspectives. First, some appellants appear to accept the LRC’s view of a peculiarly narrow scope and standard of judicial review (a central aspect of the LRC’s position, as we will explain below, is that alternative plans are irrelevant), and ask that we reject that precedent as so understood. Along the same lines, other appellants take a more sophisticated approach, which reflects a closer and more accurate reading of our redistricting precedent, to argue, for example, that there is no absolute ban on consideration of alternative redistricting plans in reviewing whether the LRC’s Final Plan is contrary to the law. Second, the Comitta, [*391] Scoda, Schiffer, Baylor, Alosi, and Zayas appellants request that we reconsider the requirement, established in our decisional law, that a successful challenger must address the Final Plan as a whole, and revisit the precedent to permit rejection of a final plan based upon a challenge focused only on that plan’s effect on a particular political subdivision. See Albert, 790 A.2d at 995.

For organizational and decisional purposes, we will address the scope and standard of review, as well as the burden of proof, first; we will then consider [***36] the global challenges, and finally the individual challenges.

IV. The Proper Review Paradigm

A. Scope and Standard of Review

Redistricting appeals are unlike the great majority of matters upon which we pass in that there is no conventional determination to review, and an atypical party responding to the appeal. The LRC, which
devised the Final Plan in the first instance, also has the task of defending its constitutionality against the specific appeals brought by citizens.17

FOOTNOTES

17 This was not always so. In the first reapportionment appeals following adoption of the current Pennsylvania constitutional construct, the 1971 Final Plan was defended by the Attorney General. Commonwealth ex rel. Specter v. Levin, 448 Pa. 1, 293 A.2d 15 (Pa. 1972). The appeals from the 1981, 1991, and 2001 plans all were defended by the LRC itself. Notably, as recently as the 1991 reapportionment appeals, it was not clear precisely what role the LRC should play in response. As Dean Gormley, Executive Director of the 1991 LRC describes the argument in 1992:

In addressing the mountain of petitions and hastily-drafted briefs, the Commission’s counsel adopted the approach of seeking to assist the Court in a somewhat detached and [***37] neutral fashion, just as the Solicitor General of the United States is often called upon to wear a dual hat as litigant and advisor to the U.S. Supreme Court. Rather than embrace an aggressive, bent-on-prevailing-on-every-issue approach which would have been the norm for modern litigation, the Chairman and Chief Counsel chose to provide the Court with as much information as possible so that the Court could make rational decisions. . . . Not only was this approach meant to foster the trust of the Court, but it also reflected the belief of the Chairman himself that the Commission was acting not as a litigant in the typical sense, but as a representative of all citizens of the Commonwealth. Thus, if the Reapportionment Plan was legally defective in any way, the Chairman believed, the Court should have a chance to determine this for itself so that any defect could be corrected.

Gormley, Legislative Reapportionment, at 55. Of course, we recognize that the LRC has considerable discretion to determine its role in litigation. For better or for worse, the current LRC and counsel have taken a more adversarial litigation approach than their predecessors in 1991.

[*392] [**728] The LRC insists on an unusually [***38] deferential judicial stance implicating both the scope and standard of review, which it claims rests on settled precedent. As noted, some appellants accept the LRC’s interpretation of precedent and request that we overrule it. Other appellants, however, argue that the applicable precedent in fact does not contemplate or require the degree of deference argued by the LRC.

Initially, we note that, although they are often confused or conflated by litigants, the scope of and the standard of review are distinct concepts and are not appropriately substituted for one another. Succinctly stated, "scope of review" refers to "the confines within which an appellate court must conduct its examination," i.e., the "what" that the appellate court is permitted to examine. Morrison v. Commonwealth, 646 A.2d 565, 570, 538 Pa. 122 (Pa. 1994). "Standard of review" addresses the manner by which that examination is conducted, the "degree of scrutiny" to be applied by the appellate court. Id.
1. Scope of Review

Identifying the proper scope of review is of unusual importance in these appeals because the LRC's core rebuttal to the global arguments forwarded in Holt and Costa is that this Court's scope of review prevents it [*39] from even considering the alternate plans that those appellants provided to the LRC, and have used to make their cases here. The LRC's argument that our scope of review is confined to the four corners of the Final Plan rests upon two pillars. First, the LRC argues a supposed deference due to it because reapportionment is a legislative task, and consideration of alternate plans, for any purpose, "would not only usurp the Commission's constitutional authority to undertake the reapportionment but, more [*393] seriously, make it impossible for the Commission to ever know for certain that its plan will pass constitutional muster." LRC Brief at 30. Second, the LRC argues that this Court's precedent has established that review is limited to the four corners of the Final Plan, and further, that alternative plans posed by objector citizens are irrelevant for any purpose -- even for the purpose of showing that a Final Plan is contrary to law.

The LRC's argument on the second point proceeds as follows. The LRC asserts that in this Court's first two reapportionment decisions following the 1968 Constitution, "a majority of the Court specifically [*729] rejected the contention that alternative plans should be [*40] reviewed -- even if only as a measuring device rather than a substitute." Id. at 29. The single citation accompanying this proposition stated as black letter law is the dissenting opinion of Mr. Justice (later Chief Justice) Nix in In re 1981 Plan, 442 A.2d at 669 (Nix, J., dissenting). The LRC then adds that none of our succeeding cases have questioned or reexamined this scope of review, and we should not now "reject the forty years of precedent upon which the Commission relied in formulating the Final Plan." LRC Brief at 29.

The LRC repeats its claim that we specifically rejected the notion that alternative plans may be considered for any purpose, with slightly more elaboration, by discussing our 1982 decision. The LRC notes that the majority opinion in that 4-3 decision stated that: "to prevail in their challenge to the final reapportionment plan, appellants have the burden of establishing not, as some of the appellants have argued, that there exists an alternative plan which is 'preferable' or 'better,' but rather that the final plan filed by the Pennsylvania Reapportionment Commission fails to meet constitutional requirements." In re 1981 Plan, 442 A.2d at 665. On its own, this [*41] statement says nothing that would prohibit the Court, as a scope of review matter, from looking to alternate plans in order to assess the constitutionality of the Final Plan. The LRC apparently derives that limitation from the fact that Justice Nix's dissenting opinion offered that, while he agreed that "we do not dismiss a plan because 'fortuitously' another [*394] may have constructed a better one, the fact that a better one may be easily designed which accommodates all of the constitutional concerns may strongly suggest the constitutional invalidity of the selected plan." Id. at 669 (Nix, J., dissenting). After quoting Justice Nix, the LRC declares that "[t]hat view was rejected by a majority of the [In re 1981 Plan] Court." LRC Brief, at 29-30. The LRC does not cite where the majority opinion in In re 1981 Plan engaged Justice's Nix point, and specifically rejected it.
The Holt appellants dispute the LRC’s interpretation of the applicable scope of review, arguing that the position that our review is limited to the four corners of the Final Plan is “tantamount to a declaration of non-reviewability.” Holt Brief at 14. Appellants forward the modest proposition that this Court -- like the [***42] LRC in its formulation of a Final Plan -- may consider alternative plans addressing redistricting as a whole as mere proof or evidence that a substantial number of the Final Plan’s political subdivision splits were not “absolutely necessary,” as the Constitution requires, and thus the plan as a whole could be deemed to be contrary to law on that basis.

The Holt appellants make clear that they do not ask the Court to direct adoption of any of the alternative plans presented to the LRC, including their own. Their point is more nuanced: they embrace Justice Nix’s view in dissent, quoted above, that the fact that better plans "may be easily designed which accommodate[] all of the constitutional concerns may strongly suggest the constitutional invalidity of the selected plan." Holt Brief at 20. Appellants note that this Court has never been presented with an appeal that challenged a prior reapportionment plan in its entirety on grounds of constitutionally excessive subdivision splits and, therefore, we have never held that their approach -- offering an alternative plan as evidence or proof that the Final Plan is unconstitutional -- violates the established scope of review [**730] or is otherwise [***43] not viable.18 The Costa appellants agree with the Holt [**395] approach, and offer for comparison an alternate redistricting plan that Senator Costa proposed to the LRC, and which the LRC rejected.19 See Costa Brief at 32-33.20

FOOTNOTES

18 Unlike the Holt appellants, other appellants either accept the LRC’s interpretation or offer a more rudimentary reading of prior redistricting caselaw on the scope of review, colored primarily by the unfavorable results obtained by previous challengers. Thus, some appellants interpret our prior caselaw to prohibit any challenges either offering an alternate plan or centering on the absolute necessity of a local political subdivision split. See, e.g., Schiffer Brief at 9. Other appellants understand the law as suggesting that this Court will affirm any plan that compares favorably to past redistricting plans in terms of population equality. See, e.g., Comitta Brief at 18. These appellants advocate in favor of a broader scope of review, permitting consideration of specific local challenges to prove that the LRC’s Final Plan is contrary to law; they request that we overrule any precedent to the contrary. With respect to the relevance of alternate, global plans, our discussion [***44] in text, infra, provides the answer. Respecting the invitation to revisit our prior, and most recent precedent, requiring that successful challenges encompass the plan as a whole, see Albert, 790 A.2d at 995 (in conducting constitutional review, this Court “must examine the final plan as a whole”), we are disinclined to revisit that precedent, particularly given that: (1) we are aware that changes to any one aspect of a plan can cause a ripple effect; (2) the 2011 LRC could fairly rely on the unequivocal “final plan as a whole” language in Albert; and (3) the parameters this Opinion is establishing, followed with fidelity, should operate to significantly reduce the number of political subdivisions split by a new plan.

19 Unlike the Holt appellants, infra, the Costa appellants suggest that, upon remand, the LRC should revise the Final Plan by using Senator Costa’s alternate plan as a starting point. Costa Brief at 34. Our
mandate does not require such action.

20 The Costa alternate plan creates fewer subdivision splits than the LRC's Final Plan, but more splits than the Holt alternate plan. Questioned about this fact at oral argument, counsel for the Costa appellants explained that the purpose behind the Costa plan was not to suggest the best of all plans, but to show that the core of the Final Plan could be achieved with far less violence to the integrity of political subdivisions. Transcript of Oral Argument, 1/23/12, at 65-66. This point tracks the nuanced approach of the Holt appellants.

As stated, HN15 the reapportionment process is outlined in our Constitution, and that charter specifically confers upon "any aggrieved person" the right to appeal "directly to the Supreme Court." Pa. Const. art. II, § 17(d). Section 17(d) goes on to specify a standard of review and the appropriate remedy: "[i]f the appellant [in a redistricting matter] establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner [*396] not inconsistent with such order." Id. On its face, the Constitution does not dictate any form of deference to the LRC, it does not establish any special presumption that the LRC's work product is constitutional, and it also places no qualifiers on this Court's scope of review. Absent some other constraint -- and we will address the LRC's [*346] decisional law argument below -- this Court would logically apply the scope of review generally applicable in similar matters.

In this case, the Holt and Costa alternate plans were presented to the LRC, in part as proof that the LRC's plan was unconstitutional in that it created divisions of political subdivisions that were not "absolutely necessary." In the ordinary case, there would be no reason in law or logic why the Court would not be permitted to look at such material in discharging its constitutional duty to pass upon an appeal.

Indeed, legal challenges in general, and appellate challenges in particular, commonly [*731] involve an offering of alternatives. It is not effective advocacy to simply declare that a trial judge's ruling was erroneous; the good advocate addresses what the judge should have done instead. Take, for example, a trial level challenge to a jury instruction. An objection comprised of "Judge, you are wrong." gets a litigant nowhere; the essence of the advocate's function is to go farther and explain how the charge should read -- i.e., what was the better alternative. The point is obvious and hardly requires elaboration.

The LRC nevertheless repeatedly states as fact [*47] that the majority opinion in In re 1981 Plan "specifically" rejected the proposition, forwarded in Justice Nix's dissent, that alternate plans can be relevant proof that a Final Plan is unconstitutional. This is not so, which no doubt explains the LRC's failure to cite a point where, in the majority opinion, the "specific rejection" occurred. Indeed, the majority opinion by Mr. Justice (later Chief Justice) Roberts never once mentions Justice Nix or his dissent, much less the dissent's point that easily produced alternative plans may prove the constitutional invalidity of the selected plan. The majority never once said that alternative plans are irrelevant, cannot be considered, and are beyond the proper scope of review.
[*397] Rather, the Court in In re 1981 Plan actually said the following. At the outset of the opinion, we adverted to the decisional law of the U.S. Supreme Court concerning the Equal Protection Clause of the Fourteenth Amendment. In discussing that federal decisional law, we noted that the Supreme Court had rejected an equal protection challenge that was bottomed on a claim that a reapportionment plan should be invalidated "merely because the alternative plan proposed by [***48] the litigant is a 'better' one." 442 A.2d at 664 (discussing Gaffney v. Cummings, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973)). We then quoted Gaffney, as follows:

And what is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvement like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard.

The point is, that such involvements should never begin. We have repeatedly recognized that HN16 state reapportionment is the task of local legislatures or of those organs of state government selected to perform it.

Id. at 664-65 (quoting Gaffney, 412 U.S. at 750-51). Notably, in Gaffney, the U.S. Supreme Court was setting out its command for the role that federal courts should take in reviewing federal law challenges to state redistricting plans. The Gaffney Court was not, and could not, speak to the review conducted by state courts facing hybrid challenges sounding under both federal equal protection and additional state constitutional mandates.

Immediately after our quotation from Gaffney, [***49] respecting equal protection, we stated that: "Thus, to prevail in their challenge to the final reapportionment plan, appellants have the burden of establishing not, as some of the appellants have argued, that there exists an alternative plan which is 'preferable' or 'better,' but rather that the final plan filed by the Pennsylvania [Legislative] Reapportionment Commission fails to meet constitutional requirements." [***98] In re 1981 Plan, 442 A.2d at 665. Although we did not explain ourselves further, it appears that we found that the core principle of Gaffney respecting equal protection claims was persuasive in guiding our own, broader review of redistricting [***732] plans. We did not, however, announce that the Gaffney principle altered our scope of review, i.e., we did not state that the parties were forbidden to argue, and the Court was forbidden to consider, alternate plans in assessing the constitutional validity of the Final Plan. All we stated was that the mere existence of a plan described as being "preferable" or "better" did not alone suffice to prove the unconstitutionality of the approved plan. This observation implicates a standard of review, not the scope of review. Cf. Perry v. Perez, 565 U.S., 132 S. Ct. 934, 181 L. Ed. 2d 900, 2012 U.S. LEXIS 908, 2012 WL 162610, ***3-5 (Jan. 20, 2012) [***50] (cases hold only that district court may not adopt unprecleared plan as its own; they do not prohibit use or discount value of such plan to aid drawing of interim map). Under this principle, the Court rejected challenges that proposed marginal increases in population equality of districts, as well as piecemeal challenges to splits of subdivisions; it did not reject a claim, such as the global one forwarded by the Holt and Costa appellants here, that
alternate plans have been generated which prove that the adopted plan is constitutionally infirm.

The LRC’s theory that we adopted a scope of review prohibiting consideration of alternatives seems to proceed upon the assumption that points raised in a dissent are necessarily and affirmatively "rejected" by the Court majority — even if the majority never discussed or rebutted the point. This is a strange theory indeed. First of all, HN17[a Court’s silence on a point is of far less import than dicta, and it is settled that dicta has no binding effect. See, e.g., Albright v. Abington Mem. Hosp., 548 Pa. 268, 696 A.2d 1159, 1167 n.8 (Pa. 1997).

Second, a Court majority is not required to respond to every issue addressed by a dissenting opinion. Indeed, any judge [***51] of sufficient tenure has experienced the phenomenon of the ignored concurrence or dissent. A Court majority’s silence on a point raised by a dissent cannot be read as a "specific" rejection of a particular position taken by a dissent, [*399] and it certainly cannot be so read where the dissent’s point is not independently addressed in the majority opinion. The better and logical interpretation of the majority’s silence in In re 1981 Plan, when that case is read against its facts and the specific legal challenges the majority discussed, is that the majority did not deem the dissent’s point to be at issue, since the claim forwarded there was not that alternative plans showed that the final plan was contrary to law, but that some appellants alleged that they had "preferable" or "better" plans.

In short, neither the Court’s opinion nor Justice Nix’s dissent in In re 1981 Plan remotely supports the LRC’s contention that this Court has, in prior opinions, limited its scope of review to the four corners of the Final Plan. Moreover, the notion is particularly unsustainable because the LRC itself does not abide by it. Rather, the LRC repeatedly looks outside the four corners of its Final Plan to defend [***52] against the instant challenges; indeed, a core position of the LRC, which we discuss below, is that this Final Plan is lawful because it stands up well when measured against prior plans which survived discrete constitutional challenges. In arguing that other, alternate plans are relevant proof of the infirmity of the 2011 Final Plan, the appellants do no less than the LRC does.

This Court is not required to "reverse [sic] four decades of precedent" as the LRC claims, LRC Brief at 30, to hold that alternate plans may help to prove constitutional infirmity, because the LRC reads into our cases a restriction on the scope of review that does not exist and is contrary to settled notions of litigation and judicial review. It necessarily follows that the [***733] LRC cannot claim justifiable reliance upon a truncated scope of review which arises from a misreading of prior decisional law. We are also not persuaded by the LRC’s claim that its existence and task requires that we deem alternative plans to be irrelevant and beyond our scope of review. The Constitution confers upon aggrieved citizens a right of appeal, measured by substantive standards specified in the charter. Such appeals must be meaningful, [***53] not illusory. The importance and difficulty of the LRC’s task — a common burden in [*400] government — does not insulate its undertaking from the normal avenues of legal challenge, including arguments premised upon alternatives.

Nor does our holding diminish our recognition that the Constitution placed the task of devising a redistricting plan within the bailiwick of the partisan leadership of the legislative branch, in recognition
of the General Assembly's "expertise in reapportionment matters." In re 1981 Plan, 442 A.2d at 665. But, equally true is that the same provision of the Constitution placed the task of resolving appeals alleging that the LRC's Plan is "contrary to law" within the bailiwick of the judicial branch, in recognition of this Court's expertise in these such matters. The retention of legislative expertise is accomplished by the fact that the Constitution prescribes remand to the LRC if a Final Plan is found to be contrary to law. We, therefore, reject the LRC's foundational and pervasive argument that we have already adopted, or should adopt, a scope of review that limits our consideration to the four corners of the Final Plan. HN18

Our scope of review in these appeals is plenary, [***54] subject to the restriction, recognized in Albert, that a successful challenge must encompass the Final Plan as a whole, and the recognition in our prior cases that we will not consider claims that were not raised before the LRC. In re 1981 Plan, 442 A.2d at 666 n.7. This entails consideration of all relevant evidence, and legal authority, that a Final Plan is contrary to law.

2. Standard of Review

HN19 On appeal from a Final Plan, the plan may be found to be unconstitutional only if the appellant establishes that it is "contrary to law." Pa. Const. art. II, § 17(d) ("If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission. . . ."). The primary "law" at issue consists of the constitutional imperatives set forth in Section 16. Pa. Const. art. II, § 16 (number of districts; compact and contiguous territory; districts as nearly equal in size as practicable; no divisions of county, city, incorporated town, borough, township or ward, [*401] unless absolutely necessary). The appeals sub judicet present precisely such challenges. The proper construction of constitutional language (or statutory language for that matter) [***55] is a question peculiarly suited to the judicial function. The task involves purely legal questions, framed by settled rules of interpretation. Such issues of law typically are subject to de novo or plenary review, and indeed the parties agree that our review is non-deferential. Generally, in conducting de novo review, this Court corrects legal errors without deference to the judgment of the tribunal, agency, or other entity whose determination is challenged, as to the constitutionality of its actions. Pennsylvania Tpk. Comm'n v. Commonwealth, 587 Pa. 347, 899 A.2d 1085, 1094 (Pa. 2006) (constitutional challenge poses question of law; therefore, review is plenary and non-deferential); Pap's A.M. v. City of Erie, 571 Pa. 375, 812 A.2d 591, 611 (Pa. 2002) (this Court's decision is final word on meaning of Pennsylvania Constitution); see also [***734] Hertz Drivuresself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464, 469 (Pa. 1948) ("But, equally well settled, federally, since Marbury v. Madison, 5 U.S. 137, 1 crane 137, 175-180, 2 L.Ed. 60 (1803), and for Pennsylvania even a few years earlier, is the rule that a law repugnant to the constitution is void and that it is not only the right but the duty of a court so to declare when the violation unequivocally [***56] appears. See Republica v. Duquet, 2 Yeates 493, 501 (1799); cf. also Eakin v. Raub, 12 Serg. & Rawle 330, 339 (1825)."").

Notwithstanding its recognition that our standard of review ultimately is de novo, the LRC suggests, throughout its brief, that our review in fact is constrained both by the legislative nature of the LRC's task and our prior precedent. Respecting the first point, the LRC essentially asks that we review the constitutionality of the Final Plan in accordance with the standards applicable to acts of the General
Assembly. HN20 A statute, of course, is generally entitled to a strong presumption of constitutionality. The presumption "reflects on the part of the judiciary the respect due to the legislature as a co-equal branch of government." School Dist. v. Kane, 463 Pa. 554, 345 A.2d 658 (Pa. 1975).

[*402] However, as the Holt appellants note, the LRC is composed of four leaders of the General Assembly, and is not the General Assembly itself. The Holt appellants thus argue that the Final Plan is not entitled to the same presumption of constitutionality that is accorded to bills adopted by a majority of duly elected representatives to the General Assembly and signed [*403] by the Governor into law. Appellants urge the Court to avoid an "unduly passive role" in reviewing the LRC's Plan. Holt Brief at 26-27 (quoting Albert, 790 A.2d at 1000 (Saylor, J., concurring, joined by Castille and Eakin, JJ.)).

We agree with the Holt appellants that HN21 a Final Plan approved by the LRC is not entitled to a presumption of constitutionality. First of all, nothing in Article II, Section 17 requires such deference. The LRC's task certainly affects the Legislature, and the essence of the task may be legislative in nature.21 But, the Chairman of the LRC is not required to be a member of the General Assembly; in point of fact, the Chairman of the 2011 LRC is [*404] not a legislator; and none of the [*403] current Chairman's predecessors were then-current members of the General Assembly. In addition, the Final Plan, the LRC's challenged product, is not an act of the General Assembly, i.e., it was not a bill subject to legislative disclosure and debate, a general vote, adoption and presentation to the Governor for approval, or passage by a super-majority if vetoed. There is no basis for indulging a presumption of constitutionality in these circumstances. The most that can be said is that the [*405] Final Plan enjoys the same status as any action or decision where the challenging party bears the burden; and here, the burden is upon appellants to show that the plan is contrary to law.22

FOOTNOTES

21 Notably, prior to the Constitution of 1968, the task of redistricting Pennsylvania's legislative districts indeed fell to the General Assembly as a whole. See Gormley, Legislative Reapportionment, at 4-7. In practice, however, that body often failed to discharge its responsibility; indeed, it had failed to conduct a successful redistricting in over four decades. Some of this inertia may be attributed to partisan deadlock, but there is also an extent to which it simply reflected the reality that redistricting could mean some members would lose their seats. Id. at 7-9, 11. This legislative failure, combined with then-recent decisions of the U.S. Supreme Court newly interpreting the Equal Protection Clause as requiring states to address apportionment concerns along lines of population equality, and the recognition that courts were empowered to rule on such reapportionment arrangements, led the 1968 Pennsylvania Constitutional Convention to adopt a new scheme. The result was the creation of the LRC, [*406] comprised of the four leaders of the Pennsylvania House and Senate and a "neutral chairman." The decision to constitute that hybrid body, rather than enlisting the General Assembly itself, was a deliberate one. "[T]he [Reapportionment Committee of the Convention] avoided the creation of a purely political body. The proposed commission represented a compromise between allowing the legislature as a body to reapportion itself ..., and taking the process entirely out of the hands of that body ... which possessed the greatest expertise for this task. If this new hybrid commission failed to
enact a lawful reapportionment plan within the prescribed time limits, the ultimate 'tie-breaker' would be the Pennsylvania Supreme Court, just as it had been in 1964-1966." Id. at 10-11.

22 Our holding that the Final Plan is not entitled to a presumption of constitutionality does nothing to diminish the LRC's overall discretionary authority to redistrict the Commonwealth. As we make clear infra, our decision in this case does not command the LRC to devise particular benchmarks in terms of the number of subdivision splits, the extent of deviation in population equality, or the parameters of compact and [***60] contiguous districts. This paradigm recognizes the difficulty in the LRC's task and still reposes considerable discretion in its judgment.

Respecting the second point, the LRC states that it has viewed this Court's prior decisions passing upon redistricting challenges as setting guideposts for acceptable levels of population deviation and political subdivision splits. The LRC argues that its Final Plan should be measured against prior plans "approved" by this Court. In the LRC's view, a Plan that measures favorably with (i.e., one that does not drastically depart from) past redistricting plans necessarily must be approved. The LRC argues that allowing a redistricting plan to be proved "contrary to law" by comparing it to proffered alternative plans invites an interminable search for the "better" or "best" plan, that would "create a jurisprudence of doubt and render future [legislative reapportionment commissions] unable to rely on precedent [to] draft a reapportionment plan with any confidence in its constitutionality." LRC Brief at 32-33. The LRC decries such an approach as leaving redistricting to a computer rather than to "the duly-appointed members of the [LRC]." Id. at 31 n.16.

[*404] The [***61] Holt appellants respond that the Final Plan is reviewed by the Court to ensure that it is not contrary to law -- a burden upon challengers that, in appellants' view, is not heavy. According to appellants, if a Final Plan "ignores a legal mandate . . . without explanation and justification in the law," the Plan is contrary to law. Holt Brief at 11. The Holt appellants distinguish our prior redistricting cases and argue that "[t]his Court's approval of prior reapportionment plans has no bearing on the present [appeal]." Id. at 25.

Thus, the LRC concludes that our de novo review is to be constrained by the specifics of prior reapportionment plans "approved" by the Court. In essence, the LRC understands our prior decisions as pre-approving the levels of population deviation and the number of split political subdivisions that were "approved" in prior redistricting appeals. In contrast, appellants understand the governing "law" to mean applicable constitutional and statutory provisions and on-point decisional law, such as Albert. We agree with appellants.

The Constitution neither authorizes nor requires this Court to engage in its own de novo review of redistricting plans in order to assure [***62] that all constitutional commands have been satisfied. Thus, our prior "approvals" of plans do not establish that those plans survived not only the challenges actually made, but all possible challenges. [**736] Instead, in the prior redistricting appeals, this Court merely passed upon the specific challenges that were made. We decided the issues presented to us.
It is significant that the Constitution does not always require this Court's imprimatur before a redistricting plan can become final: if "the last day for filing an appeal has passed with no appeal taken," the Final Plan automatically attains "the force of law." Pa. Const. art. II, § 17(e). This Court has a role if, and only if, a citizen or citizens file an appeal from the Final Plan. See Pa. Const. art. II, § 17(d)-(e). Unlike some other states, Pennsylvania's redistricting process does [*405] not command sua sponte judicial review by the Court of a redistricting plan, although it certainly could have done so.

FOOTNOTES

23 See, e.g., Colo. Const. art. V, § 48(1)(e) (after reapportionment commission finalizes its plan it shall submit it to Colorado Supreme Court for review).

In short, the current Final Plan is not insulated from attack by decisions of [****63] this Court finding prior redistricting plans constitutional, unless a materially indistinguishable challenge was raised and rejected in those decisions.24 See, e.g., Commonwealth v. Garzone, 613 Pa. 481, 34 A.3d 67, 2012 Pa. LEXIS 132, 2012 WL 149334 at *10 (Pa. 2012) (court's language must be read against legal question at issue and operative facts). Our review of our precedent reveals that no decision of this Court has purported to establish, or "grandfather in," any particular maximum level of population deviation; nor has any decision held that a certain number of political subdivision splits is constitutional, irrespective of the constitutional challenge being forwarded in challenging those splits.

FOOTNOTES

24 This is a bedrock rule of jurisprudence involving precedent and stare decisis, and it is not a difficult rule to apply. For example, in Albert, we held that a reapportionment challenge could not succeed unless it addressed the Final Plan as a whole. Absent a reconsideration and rejection of that holding, localized challenges simply cannot succeed; and, indeed, we are enforcing the restriction and declining to reconsider Albert. See n.18, supra.

Indeed, the Court has shied away from such broad pronouncements, which [****64] would be in the nature of obiter dicta. Thus, in In re 1981 Plan, in addressing the substantial equality of population challenge before the Court, the Court noted that it was not the judiciary's responsibility to decide "the precise mathematical formula to be applied in dividing the population of the state among legislative districts" and rejected as invalid the premise that any "predetermined percentage deviation [existed] with which any reapportionment plan [had to] comply." 442 A.2d at 667. The Court also expressed the concern that setting a predetermined population equality standard "might well interfere with the [redistricting commission's] ability to achieve the goals of compactness and preservation of subdivision lines." Id. at 667-68.
In its redistricting jurisprudence, this Court has not purported to set any immovable "guideposts" for a redistricting commission to meet that would guarantee a finding of constitutionality, [*406] as against challenges premised upon population equality, subdivision splits, compactness, or contiguity. The LRC's reliance on prior cases as creating an expectation that its Final Plan would be found constitutional, is untenable. The "guideposts" to which [***65] a redistricting commission is bound are the U.S. Constitution, the Pennsylvania Constitution, and this Court's relevant, specific holdings. We do not doubt that the LRC made a good faith effort to fit the population deviation and political subdivision splits in the current Final Plan within the factual parameters [***737] of the prior plans; but nothing in our decisions in the prior cases, and nothing in bedrock jurisprudence, created an expectation that such an effort was "pre-approved." Instead, the polestar for the LRC remained, as always, the command of the people, conveyed in express terms in Article II, Section 16 of the Pennsylvania Constitution.

B. Burden of Proof

The parties' dispute regarding the burden of proof is relatively diffuse but nonetheless important. The LRC's position is that appellants have the burden to demonstrate that the plan is contrary to law. LRC Brief at 15 (citing In re 1991 Plan, 609 A.2d at 136). The LRC notes that, unlike other state charters, our Constitution does not authorize this Court to automatically review a redistricting plan, irrespective of any objections or challenges, or to adopt rules for the production and presentation of evidence in support of [***66] the plan. See LRC Brief at 33-34 n.18 (comparing Pa. Const. art. II, § 17(d) with Colo. Const. art. V, § 47(2)). Accordingly, in the LRC's view, the burden is not on the redistricting commission, as in those other jurisdictions, where the commission's actions are more closely and automatically scrutinized. Id.

Several appellants argue that the LRC either is or should be required to explain or justify aspects of the Final Plan. Thus, the Holt appellants argue that the Final Plan violates the Constitution "by failing to offer any 'specific explanation for why the constitutional prerequisites of compactness and respect for political subdivisions cannot be accommodated' [*407] simultaneous [sic] with the maintenance of substantial equality of population and enforcement of voting interests of protected groups in the manner prescribed by federal law." Holt Brief at 24 (quoting Albert, 790 A.2d at 1000 (Saylor, J., concurring)). Appellants in Costa suggest that the LRC should be required to "offer some demonstration of 'necessity'" once an alternative plan is offered that identifies unnecessary subdivision splits. According to the Costa appellants, the LRC should have justified each division or eliminated [***67] such division from the Final Plan, rather than relying on generic assertions that respect for subdivision boundaries could not be accommodated. Costa Brief at 32. In a similar vein, but with a more direct approach, the Schiffer appellants ask the Court to consider alternate plans as prima facie proof that a particular political subdivision split was not absolutely necessary; the burden would then shift to the LRC "to show cause why [the Final P]lan was absolutely necessary." Schiffer Brief at 10.

On this point, we agree with the LRC. HN23 The plain language of the Constitution requiring appellants to establish that the Final Plan is contrary to law does not leave the door open for a shift of the burden of production or persuasion to the LRC. Moreover, the assignment of the burden of proof to the
appellants is consistent with the rest of the Section 17 process, including the provision that the Final Plan shall have the force of law if no appeal is taken. Pa. Const. art. II, § 17(e).

The LRC may, of course, respond to the challengers' allegations in the briefing process, offering explanations for its various decisions, as it has done in some instances here. In addition, the LRC may want to [***68] consider a process in its development of a Final Plan where it provides explanations, or responds to objections; whether to do so, however, would appear to be a matter reposed in its discretion. But, shifting the burden of proof is unnecessary. The burden is squarely on appellants, in accordance with the constitutional mandate; and the LRC has a full opportunity, [***738] in the briefing process, to provide explanations.

[***408] V. The Governing Law

HN24 In the Pennsylvania redistricting scheme, the LRC has a constitutional duty to formulate a Final Plan that complies with law. Considerable discretion is reposed in the LRC to accomplish this task, which requires a balancing of multiple mandates regarding decennial districting, derived from federal and state law, most of which are of organic, constitutional magnitude. The central difficulty of the LRC's task arises not only because of the political and local interests that are affected by any change in the existing scheme, but also because accommodating one command can make accomplishing another command more difficult.

The operative mandates under Article II, Section 16 are to devise a legislative map of fifty senatorial and 203 representative districts, compact [***69] and contiguous, as nearly equal in population "as practicable," and which do not fragment political subdivisions unless "absolutely necessary." Although all of these commands are of Pennsylvania constitutional magnitude, one of the factors, that districts be "as nearly equal in population as practicable," also exists as an independent command of federal constitutional law, including decisional law which changes and evolves. Commonwealth ex rel. Specter v. Levin, 448 Pa. 1, 293 A.2d 15, 18 (Pa. 1972) ("Specter") (citing U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")).

Below, we address the developments in federal and state decisional law that govern, and complicate, our analysis of the citizen appeals before the Court.

FOOTNOTES

25 Other mandates, not relevant to our disposition here, but important to the LRC's task, are the Fifteenth Amendment and the Voting Rights Act of 1965. See U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); 42 U.S.C. § 1973 ("No voting [***70] qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [relating to members of
[*409] A. The Federal Overlay of Redistricting

Although state legislative redistricting is primarily a question of state law, the federal equal protection overlay is of substantial effect, and it indeed has significantly affected our decisional law under Article II, Section 16. Familiarity with the background and interplay is important to understanding the issues before us.

In Colegrove v. Green, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), three Illinois voters challenged the extant Congressional district apportionment in that state as invalid under federal apportionment statutory law and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The appellants argued that the apportionment scheme no longer provided sufficient representation for urban areas where population had expanded significantly during the course of the twentieth century, while rural areas that had lost population retained representative power that increasingly outstripped their declining populations. The High Court declined to engage itself, finding "this issue to be of a peculiarly political nature and therefore not meet for judicial determination. . . . It is hostile to a democratic system to involve the judiciary in the politics of the people." Id. at 552-54.

Concurring in the Colegrove result, Justice Rutledge wrote: "There is not, and could not be except abstractly, a right of absolute equality in voting. At best there could be only a rough approximation." Id. at 566 (Rutledge, J., concurring). In dissent, Justice Black, joined by Justices Douglas and Murphy, pointed out that the Illinois districting scheme at issue had been established in 1901 and included Congressional districts ranging in population from roughly 100,000 to 900,000; but the legislative authorities in the state benefitted from the scheme and therefore ensured perpetuation of inequitable apportionment. The dissent viewed the facts presented as "a wholly indefensible discrimination" forbidden by the Equal Protection Clause, which the dissent would have found to be the basis of a cognizable cause of action. Id. at 566-74 (Black, J., dissenting).

[*410] In 1960, the High Court decided Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), a case primarily involving the right to vote secured by the Fifteenth Amendment. Writing for a unanimous Court, Justice Frankfurter rejected the position of city and county authorities that claims of blatant racially discriminatory redistricting in Tuskegee, Alabama, fell within the discretionary power of local government. Although recognizing that political power was at issue, the Court held that when "the inescapable human effect of this essay in geometry and geography is to despoil [citizens] of their theretofore enjoyed voting rights," the matter entered the constitutional sphere and could be subject to judicial disposition. Id. at 347-48. Later, in 1962, Colegrove was largely negated in the landmark decision in Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), where the Court held that allegations that a state apportionment action deprived voters of equal protection of the laws in violation of the Fourteenth Amendment were justiciable and therefore within the sphere of judicial engagement. What followed was as new and dynamic in the voting rights sphere as was the Warren Court's
contemporaneous revolution of criminal procedure throughout the land. This new jurisprudence interpreted and gave concrete meaning to the Equal Protection Clause, and effectively changed the elective systems of virtually all of the states, as well as the U.S. House of Representatives. See Butcher v. Bloom, 420 Pa. 305, 216 A.2d 457, 460-63 (Pa. 1966) (Butcher II) (Bell, C.J., concurring).

FOOTNOTES


Shortly after Baker v. Carr, the Court developed the concepts of "one person, one vote" and the "equal population principle." The language first arose in Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), where the Court disapproved Georgia's use of a "county unit system" to count votes in primary elections for certain statewide offices. The Court found that Georgia's weighting of each county's votes equally, regardless of population differential, violated equal protection, memorably noting that: HN26The conception of political equality from the Declaration of Independence, [*411] to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments, can mean only one thing — one person, one vote." Id. at 381. [*470] In Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964), the Court considered the constitutionality of Georgia's apportionment scheme for federal Congressional districts, which resulted in one district of less than 300,000 in total population, and another district with more than 800,000 in total population. The Court concluded that Georgia's scheme unconstitutionally discriminated against voters in more densely populated districts, noting that: "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." Id. at 18.

Gray was not an apportionment case, however, and Wesberry addressed federal Congressional districting issues. The two concepts of "one person, one vote" and the "equal population principle" became woven together in the state legislature apportionment [*75] context in the Court's landmark decision in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). In Reynolds, the Court addressed an equal protection challenge to proposed plans for reapportionment of both houses of the Alabama Legislature. The facts in Reynolds revealed that due to decades of non-reapportionment, for example, rural counties having as low as 13,462 in total population retained two seats in the Alabama House, but Mobile County, which includes the City of Mobile and had a total population exceeding 300,000, was allotted only three seats. The federal district court concluded that the scheme in Alabama led to disparities in which votes in less-populated rural senatorial districts were effectively "worth" fifteen to twenty times as [*412] much as votes cast in more densely populated and rapidly urbanizing districts. In an 8-1 opinion by Chief Justice Warren, the Court held: HN27Population is, of necessity,
the starting point for consideration and the controlling criterion for judgment in legislative
apportionment controversies. . . . The Equal Protection Clause demands no less than substantially equal
state legislative representation for all citizens . . . " Id. at 567-68.

Having so concluded, [***76] the Court held that, to ensure the right of voters to have their votes
"weighted equally," each house of a state legislature must be apportioned on what the Court termed "a
population basis": "[T]he Equal Protection Clause requires that a State make an honest and good faith
effort to construct districts, in both houses of its legislature, as nearly of equal population as is
practicable." 377 U.S. at 577. While recognizing that absolute or exact equality of population would be
impossible, the Court expressed that apportionment schemes must still be based "substantially" on the
principle of population equality, which was not to be "diluted in any significant way" by a given plan. Id.
at 578.

But, the Reynolds Court recognized that the task was not so simple. Thus, the Court continued that,
HN28"within limits, a State's desire to maintain the integrity of various political subdivisions and to
provide for compact districts of contiguous territory is a legitimate and constitutionally valid
countervailing interest. The Court noted that, "[i]ndiscriminate districting, without any regard for
political subdivision or natural or historical boundary lines, may be little more than an open
invitation [***77] to partisan gerrymandering." Id. at 578-79. To allow for achievement of legitimate
goals such as subdivision integrity in apportioning state legislative districts, the Court held that some
deviations from the equal population principle [***741] may be permissible under federal law.
Nevertheless, "the overriding objective [in redistricting] must be substantial equality of population
among the various districts, so that the vote of any citizen is approximately equal in weight to that of
any other citizen in the State." Id. at 579. [*413] The Court continued that, if the "result" of a "clearly
rational state policy of according some legislative representation to political subdivisions" is to
submerge population as the controlling consideration, "then the right of all of the State's citizens to cast
an effective and adequately weighted vote would be unconstitutionally impaired." Id. at 581; see also
(striking down state legislative scheme for failing to provide adequate justification for substantial
disparities from population-based representation in allocation of Senate seats to disfavored populous
areas).

Again, however, the jurisprudence, [***78] which evolved through case-specific challenges, was
dynamic. Not long after Reynolds, the Court began to express a less restrictive approach to the
population equality principle when certain countervailing circumstances were presented. Thus, in Abate
v. Mundt, 403 U.S. 182, 91 S. Ct. 1904, 29 L. Ed. 2d 399 (1971), the Court considered a plan to
 reapportion Rockland County in New York State. When compared with ideal population equality for
each of the five districts within the county, the total deviation amounted to 11.9%. Writing for the
Court, Justice Marshall reiterated that population equality remained crucial, but opined that "the
particular circumstances and needs of a local community as a whole may sometimes justify departures
from strict equality." Id. at 185. Later, in Mahan v. Howell, 410 U.S. 315, 93 S. Ct. 979, 35 L. Ed. 2d 320
(1973), the Court reviewed and upheld a plan created by the Virginia state assembly to reapportion both
of its legislative houses in which political subdivisions were largely left intact, but the total deviation from ideal population equality was 16.4% in the Virginia House of Delegates. The Court recognized that "broader latitude" may be permissible in state apportionment matters, when considerations such as the ***79 integrity of political subdivisions are at issue: "The State can scarcely be condemned for simultaneously attempting to move toward smaller districts and to maintain the integrity of its political subdivision lines." Id. at 322, 327. [*414] Notably, in a footnote, the Mahan opinion described maintenance of subdivision integrity and providing for population equality as a "dual goal" that the Virginia plan managed to satisfy on both counts. Id. at 328 n.9, 329.

Finally, in Gaffney, supra, the Court considered a reapportionment plan based on 1970 census data and prepared by an eight-member bipartisan commission and then a three-member board, both of which were appointed by the leadership of Connecticut's General Assembly. The Connecticut state Constitution provided that within the bounds of federal constitutional standards, division of towns (Connecticut's basic unit of local government) with regard to state house districts was not permitted except in narrow express circumstances. The Court critiqued apportionment approaches that would slavishly labor under an "unrealistic overemphasis on raw population figures" such that relevant and legitimate factors and interests that states must account ***80 for are submerged. 412 U.S. at 749. The Court stressed that HN29 the work of state apportionment authorities tasked with state legislative redistricting need ***742 not be rejected solely on the basis of deviations from population equality: "We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." Id.

Subsequent cases handed down on this issue by the High Court have not established any rigid standards as to what level of deviation from absolute population equality violates the Equal Protection Clause; the analysis is fact specific.27

FOOTNOTES

27 Compare Chapman v. Meier, 420 U.S. 1, 22, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975) (20% variance not justified by absence of electorally victimized minorities, sparseness of North Dakota's population, division of state caused by Missouri River, or by asserted state policy of observing geographical boundaries and existing political subdivisions, especially when it appears that other, less statistically offensive, reapportionment plans ***81 already devised are feasible) with Brown v. Thomson, 462 U.S. 835, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983) (in view of Wyoming's constitutional policy of preserving county boundaries and in view of absence of any hint of arbitrariness or discrimination, reapportionment which permitted county with population of only 2,924 persons to have its own representative, though ideal apportionment would have been 7,337 persons per representative, did not violate Equal Protection Clause).
1. The Legal Landscape before the U.S. Supreme Court’s Equal Protection Decisions

Apportionment has been part of Pennsylvania’s constitutional apparatus as far back as the first state Constitution following independence, which was adopted in 1776 during the American Revolution. The prior, provincial arrangement had resulted in the longer-established eastern and coastal areas of Pennsylvania enjoying over-representation at the expense of the less populated but rapidly growing western portions of the state; the new arrangement recognized and rectified this imbalance by adding new western representatives and setting forth the principle that apportionment be derived in proportion to taxable inhabitants. See generally Gormley, Legislative Reapportionment, at 4-6. [***82] Respecting the Pennsylvania Senate, as early as the Constitution of 1790, and carried forward into the Constitutions of 1838 and 1874, was a requirement respecting the integrity of political subdivisions, at least at the County level: "neither the city of Philadelphia nor any county shall be divided in forming a district." 1790 Pa. Const. art. I, § 7; 1838 Pa. Const. art. I, § 7 (as amended). The task of reapportionment fell to the legislature.

The 1874 Pennsylvania Constitution shifted the measure of proportionality from taxable inhabitants to total population, while the task of reapportionment remained in the hands of the General Assembly, which was newly required to conduct a reapportionment after each U.S. decennial census. 1874 Pa. Const. art. II § 18. The section on apportionment of the Senate mandated that: "The State shall be divided into fifty senatorial districts of compact and contiguous territory, as nearly equal in population as may be, and each district shall be entitled to elect one Senator." 1874 Pa. Const. art. II, § 16. Section 16 also required respect for the integrity of political subdivisions: "No ward, borough or township shall be divided [*416] in the formation of a [***83] district." Id. The provision respecting apportionment of the House was considerably more complicated, but included mandates respecting proportional [***743] representation, and compact and contiguous territory. 1874 Pa. Const. art. II, § 17.28 Despite the command that reapportionment occur every ten years, in fact, reapportionment in the Commonwealth remained sporadic and, over the decades, lesser populated districts increasingly enjoyed representation far beyond their actual population numbers.

FOOTNOTES

28 Article II, Section 17 provided:

HN30 Representative districts.

The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the State as ascertained by the most recent United States census by two hundred. Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more shall have one
representative for every full ratio. Every city containing a population equal to a ratio, shall elect separately its proportion of the representatives [*417] allotted to the county in which it is located. Every city entitled to more than four representatives, and every county having more than one hundred thousand inhabitants shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population, but no district shall elect more than four representatives.

1874 Pa Const. art. II, § 17.

2. This Court’s Response to Reynolds and the 1968 Constitutional Revisions

In the wake of the then-recently issued Reynolds decision, this Court first addressed state legislative apportionment in Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (Pa. 1964) ("Butcher I"). The unanimous decision by Justice Roberts noted the high stakes at the outset:

This suit challenges the recent Pennsylvania Reapportionment Acts and the election of state senators and representatives thereunder. More importantly, it challenges—in light of recent decisions interpreting the Constitution of the United States—the validity of certain provisions of the Constitution of Pennsylvania which establish the legislative branch of government. It presents one of the most important [*417] constitutional questions ever raised in the history [*417] of this Commonwealth. It involves the basic rights of the citizens of Pennsylvania in the election of their state lawmakers. Historically and logically, this Court is the most appropriate forum to determine the issues presented and to fashion suitable remedies. Proper and continuing respect for federal-state judicial relationships necessitates consideration by the Supreme Court of Pennsylvania of the relevant state statutes and state constitutional provisions, subject, of course, to review by the Supreme Court of the United States.

Id. at 559-60.

We then found that the General Assembly’s apportionment legislation of 1964 contained such dramatic deviations from the goal of substantially equal population, as newly announced by the U.S. Supreme Court, among both Senate and House districts, that the apportionment violated the Fourteenth Amendment. Id. at 564, 567. Part of the problem with the 1964 plan, as explained by this Court, was the vestigial practice of allocating at least one representative to each county in the state regardless of the county’s population. Relying on language in Reynolds, this Court held that the historic practice could no longer continue because it so clearly resulted [*418] in unequal representation dynamics in both state houses: "[A]ssignment of one seat to each county, regardless of population, results in the submergence of population as the controlling consideration [*744] in apportionment and is offensive to the Fourteenth Amendment to the Constitution of the United States." Id. at 566. Notably, while we recognized that the "population principle" set forth in Reynolds was "the starting point and controlling criterion" in redistricting, we also stressed the importance of other provisions in the 1874 Pennsylvania Constitution:
It is our view that Section 16, when construed as a whole, demands that Senate apportionment legislation respect county lines and lines of other political subdivisions (such as wards, boroughs, and townships), insofar as possible, without doing violence to the population principle enunciated by [*418] the first sentence of Section 16 and also by the Fourteenth Amendment to the Federal Constitution. . . . The requirement [in Section 17, respecting the House] that apportionment should be among the several counties further signifies an intention to respect county lines and to utilize counties as units of representation to the maximum extent consistent [***87] with the equal-population principle. Indeed, Section 17, when considered as a whole, demands that the boundaries of all political subdivisions be respected when not in conflict with the overriding population principle.

Id. at 570-71.

Time constraints precluded the Butcher I Court from fashioning any remedy with regard to the 1964 plan. The Butcher I Court's solution was to direct that the 1964 elections proceed under the infirm legislation, retain jurisdiction, and direct the General Assembly to correct course and devise a constitutionally valid plan for the 1966 election cycle no later than September 1, 1965. Id. at 573. The General Assembly failed to enact a plan, and so this Court found itself obliged to reapportion the Commonwealth on its own. We did so by a 4-3 vote in Butcher II, in 1966. See 420 Pa. 305, 216 A.2d 457 (per curiam). In explaining the plan, the per curiam opinion in Butcher II reiterated the balancing of multiple mandates required in redistricting: "Our primary concern has been to provide for substantial equality of population among legislative districts. At the same time, we have sought to maintain the integrity of political subdivisions and to create compact districts of contiguous [***88] territory, insofar as these goals could be realized . . . ." Id. at 459. Justice Roberts, the author of Butcher I, wrote in partial dissent, objecting to the House plan on federal constitutional grounds, i.e., "based primarily on its failure to observe the equal population principle and other guidelines mandated by the controlling decisions of the [U.S.] Supreme Court . . . and set forth in our earlier opinion in this case." Id. at 474 (Roberts, J., dissenting in part).

Perhaps the most significant byproduct of the Butcher decisions is that they led to the Court's experiencing firsthand the difficulties of reapportionment, and particularly in a legal [*419] landscape requiring adjustment to account for newly-developing federal law.

Following the difficulties manifested in the Butcher cases, and the significant developments taking place in the U.S. Supreme Court, the question of reapportionment emerged as a main issue in Pennsylvania's 1968 Constitutional Convention; the constitutional provisions on reapportionment were significantly revised; and the new Constitution, with these and other changes, was approved by Pennsylvania voters. Among the innovations of the 1968 Constitution respecting redistricting [***89] was a determination to remove the responsibility from the General Assembly as a whole, and to repose the authority in the LRC. An entirely [***745] new Section 17 of Article II was adopted to describe the composition, function, and review procedures respecting the LRC. In addition, new Section 16 constitutionalized the equal protection language from Reynolds v. Sims, requiring that both Senate and House districts be "as nearly equal in population as practicable." And finally, Section 16 was amended to provide, as to both
chambers of the General Assembly, that, "unless absolutely necessary," no political subdivision was to be divided in forming a district, and the section made clear that the mandates of compactness and contiguity applied to both chambers.

In this Court's first redistricting decision after the adoption of the new constitutional scheme, we described the new Commission as follows:

The advantages of assignment [of] the responsibility for reapportioning the Legislature to such a commission are quite obvious, and several other states have recently adopted or considered proposals for similar commissions. The equal representation on the Commission provided to the majority and minority [***90] members of each house precludes the reapportionment process from being unfairly dominated by the party in power at the moment of apportionment. In addition, the provision for a chairman who can act as a 'tie-breaker' eliminates the possibility of a legislative deadlock on reapportionment such as the one that occurred in the Legislature of this Commonwealth in 1965 and compelled [*420] this Court to undertake the task of reapportionment. At the same time the Legislature's expertise in reapportionment matters is essentially retained.

Specter, 293 A.2d at 17-18 (footnotes omitted).

As to the other provisions under the new scheme, the guiding principles respecting compactness, contiguity, and respect for the integrity of political subdivisions not only have deep roots in Pennsylvania constitutional law, but, as noted in our discussion of federal law, also have been specifically recognized by the federal courts, beginning with Reynolds, as legitimate interests that may properly be considered in redistricting state legislatures, even as against federal equal protection challenges. Moreover, the commands represent important principles of representative government. As one of the pro se appellants herein [***91] has noted: "The requirements of contiguous and compact districts go beyond geographical concern and also embrace the concepts of homogeneity of the district in order to facilitate the functioning of a representative form of government." Baylor Brief at 9. Baylor goes on to note the central and historical role of counties in Pennsylvania as building blocks that are not to be fractured. Id. at 11-12.

It is true, of course, that redistricting has an inevitably legislative, and therefore an inevitably political, element; but, the constitutional commands and restrictions on the process exist precisely as a brake on the most overt of potential excesses and abuse. Moreover, the restrictions recognize that communities indeed have shared interests for which they can more effectively advocate when they can act as a united body and when they have representatives who are responsive to those interests. In an article concerning racial issues presented in redistricting cases, Dean Gormley has explained the importance of the restrictions, as follows:

The fundamental districting principles that the [U.S. Supreme] Court has deemed legitimate over the years include, but are not limited to, "compactness, [***92] contiguity, and respect for political [**746] subdivisions or communities defined by actual shared interests . . . " The final principle mentioned is particularly important in the voting rights context.
Historically, [*421] reapportionment bodies have considered "communities of interest" as one legitimate factor in drawing fair and politically sensitive districts. A redistricting body need not draw rigid squares of equal population; in fact, few states do so. Rather, redistricting bodies traditionally take into account a host of intangible communities, seeking to give them, where practicable, a voice in the government without unduly fracturing that voice. Thus, school districts, religious communities, ethnic communities, geographic communities which share common bonds due to locations of rivers, mountains and highways, and a host of other "communities of interest" are routinely considered by redistricting bodies in order to construct fair and effective maps. Shared racial background, along with political affiliation, ethnic identity, religious affiliation, occupational background, all can converge to create bona fide communities of interest, to the extent that the redistricting body makes an honest [***93] effort to draw lines around geographically compact groups in order to give them a voice in the governmental process.

As a practical matter, it is rare that a reapportionment body is able (or desires) to wholly capture a "community of interest" and draw lines around it, in a fashion that perfectly isolates it into a circle or square. In reality, communities of interest are elusive, imprecise entities. Reapportionment bodies and lower courts must be cautious when it comes to this concept, particularly where it serves as a basis for creating legislative districts tied to race, because it has the potential for abuse. Specifically, it can be used as a ruse to engage in improper maximization of majority-minority districts where no real communities exist. At the same time, states have historically considered a broad range of such imprecise communities of interest (many of which are naturally intertwined) in exercising their sound discretion. They do so to satisfy constituents. They do so to sweep together a host of generally identifiable interest groups that wish to be given a unified voice. This is perfectly healthy and permissible. It is an important aspect of the state's prerogative, when [***94] it comes to structuring its own form of [*422] government. Consequently, when it comes to reapportionment bodies considering race in this permissive, discretionary fashion, the courts should scrupulously avoid meddling.


3. Reapportionment Decisions under the Current Constitutional Scheme

The new constitutional redistricting scheme came into play two years later, after the 1970 census. Eighteen appeals were filed from the 1971 LRC's Final Plan, and this Court found the plan to be constitutional by a 4-3 vote, with Justice Roberts authoring the majority opinion, a mere six years after the Court itself had devised a reapportionment plan. Specter, 293 A.2d at 19. Perhaps inevitably given the newness of the federal (and now state constitutional) command for districts as nearly equal in size as practicable, the Specter majority focused primarily on population divergences, as measured by federal law.29 We began by noting that the [***747] additional objectives for reapportionment plans in new Article II, Section 16 (beyond population equality) "were specifically recognized," by Reynolds, as "legitimate [***95] considerations which can justify some divergence from a strict population standard." Id. at 18.
29 Although the Specter Court noted that eighteen appeals were filed, it never identified the issues raised by the appellants, nor did it engage in a point-by-point discussion of the issues. Rather, the Court addressed the plan as a whole, addressing the federal equal population issue first and at length, and then provided briefer discussions of the remaining constitutional factors of integrity of political subdivisions, contiguity, and compactness. See also 293 A.2d at 27 n.7 (Pomeroy, J., dissenting, joined by Jones, C.J.) ("The majority opinion, it will be noted, speaks only in general terms, making no attempt to address itself to the particular exceptions and arguments of the various appellants.").

Nevertheless, Specter emphasized that Reynolds still counseled that, in any reapportionment scheme, "the overriding objective must be substantial equality of population." Id. (quoting Reynolds, 377 U.S. at 579). Given that fact, we noted that "it is not constitutionally permissible to totally achieve Section 16's objective of respecting the boundaries of political subdivisions." Id. (emphasis [***96] added). Turning [*423] to the separate concern of compactness, we noted that "Section 16's desire for districts that are 'compact' must also yield, if need be, to the 'overriding objective ... [of] substantial equality of population.'" Id. at 19 (quoting Reynolds, 377 U.S. at 579) (emphasis added). The Court viewed the balancing approach required, under the new constitutional provisions, to be the same as the balancing the Court itself had outlined in explaining the redistricting undertaken in Butcher II.

Turning to the plan under review, the Specter Court noted that, since our decision in Butcher II, the U.S. Supreme Court had issued additional decisions striking down reapportionment plans in two cases involving congressional redistricting. See Kirkpatrick v. Preisler, 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969) and Wells v. Rockefeller, 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969). In those cases, the High Court had found that the states' expressed desire to avoid fragmenting political subdivisions did not justify departures from the population equality requirement. The Specter Court recognized that the new decisions did not involve state legislative reapportionment. We also recognized that "Kirkpatrick's rejection, in Congressional redistricting, [***97] of the maintenance of the boundaries of political subdivisions as a justification for deviations from absolute population equality, cannot be applied in full force to state legislative reapportionment." Specter, 293 A.2d at 20. Nevertheless, we viewed the decisions as "indicat[ing]" that "deviations from equality of population that were formerly regarded as insubstantial and permissible will now be regarded as substantial and impermissible, necessitating a closer adherence to equity of population, even in the area of state legislative apportionment." Id. Our analysis in this regard reflects that, no matter how static the governing constitutional language is, the federal decisional law that must be accounted for is fluid and dynamic.

Ultimately, the Specter Court upheld the 1971 Final Plan, noting, among other things, that: "No decision of the United States Supreme Court or of this Court has ever invalidated a reapportionment plan with population deviations as minimal as [*424] those occasioned by the Commission's plan, and we believe that the deviations clearly do not dilute the equal-population principle 'in any significant way.' We
conclude therefore that the Commission's plan fully achieves [*98] the constitutionally-mandated
overriding objective of substantial [*748] equality of population." Id. at 22. We also concluded that
the Plan maintained sufficient integrity of political subdivisions. We emphasized that "under any scheme
of reapportionment that aims at substantial equality of population, a certain amount of subdivision
fragmentation is inevitable." Id. at 23. We then reasoned that, "[w]hile it is true that the Commission's
plan provides for more political subdivision splits than did this Court's reapportionment plan of 1966,
this increase was obviously necessitated by the stricter requirements of population equality that are
now in order. Yet despite these stricter population requirements, the number of subdivision splits called
for by the Commission's plan is still quite small when compared to the 2,566 municipalities and 9,576
voting precincts in this Commonwealth." Id. at 22-23 (footnotes omitted).

Finally, the Specter Court concluded that the 1971 Final Plan also met the constitutional elements of
compactness and contiguity. Id. at 23-24. On the question of compactness, we emphasized that:

[N]one of the appellants in this matter offered any concrete or objective data indicating [*99] that
the districts established by the Commission's plan lack compactness. The Pennsylvania Constitution
requires that those who challenge the Commission's plan have the burden of establishing that it is
"contrary to law." In light of appellants' failure to produce any objective data indicating that the districts
established by the Commission's plan lack compactness, we cannot conclude, merely on the basis of
appellants' unsupported assertions, that the Commission's plan fails for lack of compactness.

Id. at 24.

In 1981, this Court approved the second reapportionment under the 1968 constitutional scheme, again
by a 4-3 vote. In re 1981 Plan, 442 A.2d at 663. Justice Roberts, again writing [*425] for the majority,
interpreted Specter as holding that HN31F"as a matter of both federal and state law, equality of
population must be the controlling consideration in the apportionment of legislative seats." Id. at 665
(citing Reynolds, 377 U.S. at 577). Like the Specter Court, the In re 1981 Plan Court began by examining
population deviations, and concluded that the 1981 Final Plan passed constitutional muster: "There is no
doubt that this plan, which more nearly achieves the goal of equal population than [*100] did the
1971 reapportionment plan in Specter, satisfies equal protection requirements." Id. at 666. Indeed, "the
final plan achieves an equality of population among legislative districts closer to the constitutional ideal
of 'one person, one vote' than any previous reapportionment plan in the history of the Commonwealth."
Id.

The In re 1981 Plan Court then turned to the various specific challenges brought by the appellants. First,
the appellants claimed that the plan went too far in pursuing the constitutional goal of "one person, one
vote," and in so doing failed to satisfy the requirements of compactness and respect for the integrity of
political subdivisions. Specifically, the appellants argued that district deviations from compactness and
subdivision boundaries were constitutionally permissible "only if those deviations are absolutely
necessary to survive federal equal protection analysis." Id. The Court rejected the notion that these
concerns were of equal value to population equality, and stated that "if need be, concerns for
compactness and adherence to political subdivision lines must yield to this 'overriding objective'" of "substantial equality of population."" Id. (emphasis ***101 added).

[**749] The In re 1981 Plan Court next turned to the appellants' argument relying on U.S. Supreme Court cases decided since Specter, which had upheld greater district population deviations than in either the 1971 Final Plan or the 1981 Final Plan. From those cases, the appellants argued that federally tolerated limits of substantial equality of population should define the Pennsylvania standard as well, which would allow more room to respect other constitutional imperatives, such as compactness [*426] and subdivision integrity. We rejected the argument, noting that it: "disregards the critical fact that adherence to a percentage deviation that is at the outside limits of constitutionality cannot be squared with the overriding constitutional objective of 'substantial equality of population' among districts. The Pennsylvania Constitution plainly states that districts shall be 'as nearly equal in population as practicable.' Thus, the clear constitutional directive is that reapportionment shall strive to create districts as equal, not as unequal, as possible." Id. at 667. Moreover, we noted, there is no "predetermined percentage deviation from the ideal of 'one person, one vote' that satisfies ***102] the federal constitutional requirement of 'substantial equality of population.'" Id.

Similarly, we rejected the theory that we should review the 1981 Final Plan and determine whether there was a standard of population deviation greater than that adopted by the Commission, but less than the maximum deviation permitted under federal law, "which would more closely achieve the goals of compactness and undivided political subdivisions." We noted that our task was "not to substitute a more 'preferable' plan for that of the Commission, but only to assure that constitutional requirements have been met." Id. (citation omitted).

Turning to the particulars of the 1981 Plan, the Court began by stressing federal authority that, "'in determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's legislative apportionment scheme as a whole.'" Id. at 668 (quoting Lucas, 377 U.S. at 735 n.27). We then concluded that the 1981 Plan "reflects a constitutionally permissible judgment on the part of the Commission that the deviations from mathematical compactness and political subdivision boundaries contained in the ***103] plan are necessary to achieve the overriding constitutional goal of districts 'as equal in population as practicable.'" Id. We elaborated by noting the inevitability that certain counties and municipalities would have to be split; the relatively small number of subdivision splits; and that none of the arguments [*427] by the appellants convinced the Court that the drawing of district lines was based on impermissible considerations. Disapproving of specific, localized challenges, the Court noted that "[m]ere dissatisfaction with the fact that certain political subdivisions have been divided or have been included within particular legislative districts is not sufficient to invalidate the Final Reapportionment Plan as unconstitutional." Id.

By the time of this Court's third reapportionment review, in 1992, our focus on population equality diminished somewhat, perhaps because of our decisional law establishing the primacy of the principle,
and perhaps also because of advances in useful computer technology. In his account of the 1991 reapportionment, Dean Gormley recounts that:

The gradual preeminence of the one-person-one-vote principle in the 1971 and 1981 reapportionments would be turned on its [***104] head in the reapportionment of 1991. By this time, computers [**750] and high technology would make equality in population a simple exercise, while new frontiers, particularly the Federal Voting Rights Act of 1965 [42 U.S.C. §§ 1971-1974e]) (as it had been amended in 1982), would loom up with historic prominence and threaten to topple reapportionment plans in Pennsylvania and across the nation."

Gormley, Legislative Reapportionment, at 18. Gormley recounts that, cognizant of the "super-emphasis" on population equality, the 1991 LRC was armed with tools that could achieve increasingly "ideal" districts, but still sought to remain flexible when faced with additional reapportionment factors, such as those set forth in Section 16, and the belief in the propriety of attempting to achieve political "fairness" by maintaining, to a practicable degree, the parties' existing balance of power. Id. at 26-27, 45-47.

In a decision resolving twenty-five appeals, this Court upheld the 1991 Final Plan, without dissent, in an opinion by Mr. Chief Justice Nix. In re 1991 Plan, 609 A.2d at 147. The Court spent little time dismissing challenges, similar to those raised ten years before, that the imperative of population [***105] equality "is not so important that it warrants the division of [*428] counties and other political subdivisions." Id. at 138. As in 1981, this argument was premised upon decisions of the U.S. Supreme Court, rendered after Reynolds, which had upheld state reapportionment plans with, by this point in time, variances of up to 16%. Id. at 138-39 & n.6 (citing, inter alia, Brown v. Thomson, 462 U.S. 835, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983) (plan with average deviation of 16%)). From that federal authority, the appellants argued that "these cases bind this Court to require greater population variances to protect the sanctity of political subdivision borders." Id. at 138. We disagreed:

Appellants are incorrect. The Supreme Court of the United States held [in Reynolds] that "some deviations from the equal population principle are constitutionally permissible with respect to the reapportionment of seats in a state legislature." This language merely allows a state to apportion seats between districts that are not strictly equal in population; it does not mandate it. Our Constitution requires that the overriding objective of reapportionment is equality of population, and in 1972 and 1981 this Court approved plans in which the overriding [***106] objective was equality of population. We see no reason now in 1992 to retreat from those earlier holdings.

609 A.2d at 138-39 (citation omitted and italics in original).30

FOOTNOTES

30 The remainder of the challenges reviewed in In re 1991 Plan involved issues not pertinent here; the major challenges involved the Voting Rights Act.
As the text of Article II, Section 16, and our review of our prior reapportionment cases above makes clear, the In re 1991 Plan Court's statement that "Our Constitution requires that the overriding objective of reapportionment is equality of population," is not correct as a textual matter. That "overriding objective," as articulated in our 1972 and 1981 decisions, derived from this Court's interpretation of federal law, and in particular Reynolds, and our effective treatment of that law as coterminous with Pennsylvania's population equality requirement. However, the In re 1991 Plan Court certainly was correct that our two prior decisions had established the primacy [*429] of equality of population, in large part in an effort to ensure that Pennsylvania plans complied with federal law.

In 2002, this Court, in a unanimous decision by Mr. Chief Justice Zappala, approved the 2001 [***107] Final Plan, based upon [***751] the 2000 census, in the face of eleven appeals. Albert, 790 A.2d at 991. After surveying our prior reapportionment decisions, we noted that our review focused on an examination of "the final plan as a whole," and we reiterated the teaching from In Re 1981 Plan that, "to prevail in their challenge to the final reapportionment plan, appellants have the burden of establishing not .... that there exists an alternative plan which is 'preferable' or 'better,' but rather that the final plan filed by the Pennsylvania Reapportionment Commission fails to meet constitutional requirements." 790 A.2d at 995 (quoting from In re 1981 Plan, 442 A.2d at 665).

Turning to the specific claims raised, the Albert Court noted that the challengers asserted that the new districts were "not composed of compact and contiguous territory as nearly equal in population as practicable because, in creating the plan, political subdivisions were divided where it was not absolutely necessary." 790 A.2d at 995. We further noted, however, that the challengers had focused "primarily on the impact of the plan with respect to their particular political subdivision, rather than analyzing the plan as [***108] a whole, as is required under a proper constitutional analysis. This will become apparent as the individual petitions are addressed." Id. The Court then reviewed in some detail the specific, localized complaints of the various appeals, which cited to specific subdivisions and districts and forwarded various complaints including compactness, contiguity and unnecessary subdivisions. After briefly summarizing the 2001 LRC's response, we again emphasized that the focus had to be on the plan as a whole and not on individual districts: "The Commission persuasively argues that none of the appellants ha[s] met the heavy burden of establishing that the final plan, as a whole, is contrary to law." Id. at 996-98.

More specifically, the Albert opinion credited the 2001 LRC's argument that various claims failed as conclusory or [*430] vague; and that the 2001 Final Plan "compares favorably" to prior plans the Court had approved in terms of population deviation. Id. at 998. Respecting the various complaints about particular districts being split unnecessarily, the Court also credited the 2001 LRC's averments that: the overriding objective was equality of population; other factors causing subdivision splits [***109] resulted from Voting Rights Act requirements and population shifts; the 2001 Plan compared "favorably" to prior plans "found to be constitutional by this Court"; and the number of political subdivisions split remained relatively small. Id. at 999. Finally, we rejected individual pleas premised upon particular subdivision splits, as follows: "The appellants urge us to consider the 'homogeneity' and 'shared interests' of a community as guidelines. We believe that HN32 these
concepts are too elastic and amorphous, however, to serve as a judicial standard for assessing the reapportionment process. As the appellants' arguments indicate, these concepts often reflect nothing more than continuation of the pre-existing legislative districts. Should community interests be fostered merely by residing in the same district, we have no reason to believe that the current reapportionment of the legislative districts will not achieve this result with the passage of time." Id.

In a joining concurrence, Mr. Justice Saylor ᵗ, joined by Mr. Justice Eakin ᵗ and this author, although agreeing that the 2001 Plan was consistent with our prior precedent, nevertheless expressed the following concern:

I remain circumspect [***110] concerning the manner in which state constitutional requirements of compactness and integrity of political subdivisions have been applied [**752] by the Court in the prior decisions that are followed here, and I am receptive to the concern that the Court should not occupy an unduly passive role in the vindication of these essential precepts. I write, therefore, to express my own position that facets of the Commission's present plan for reapportioning the Pennsylvania Legislature test the outer limits of justifiable deference, at least in the absence of some specific explanation for why the constitutional prerequisites of compactness and [*431] respect for political subdivisions cannot be accommodated simultaneous with the maintenance of substantial equality of population and enforcement of voting interests of protected groups in the manner prescribed by federal law.

Id. at 1000 (Saylor, J., concurring).

VI. The Global Challenges: Holt and Costa

-A-

Our holding that the global challengers have proven that the 2011 Final Plan is contrary to law follows almost inexorably from the global nature of their challenge — global in the sense that it challenges the entire 2011 Final Plan — and our holdings above [***111] concerning the scope and standard of review. This is so because the LRC has premised its central defense against these global challenges upon its position on the judicial review points. As noted, our last redistricting decision, in Albert, rejected a number of appeals posing various localized challenges to the 2001 Final Plan, and emphasized, consistently with our prior decisions, that a successful appellant must challenge a final plan as a whole. Albert, 790 A.2d at 995-96; accord In re 1981 Plan, 442 A.2d at 667-68. No challenger did so in Albert, and insofar as our prior Opinions in this area reflect, no challenger did so in the redistricting litigation in 1972, 1981, or 1992, either.

The LRC drew one lesson from Albert, while the Holt and Costa appellants drew a very different lesson. The LRC emphasized in its brief and at oral argument that, in developing the 2011 Final Plan, it heeded and attended to the concurrence's concerns, thus addressing complaints (ultimately unsuccessful in Albert) arising from the more objectionable aspects of the 2001 Plan. (The specifics of this point are unimportant; the point is not disputed.) The LRC also emphasized that, as to certain (but not
all) [***112] other particulars (population deviation and the numbers of political subdivisions unaffected by splits), its Plan compared favorably to prior plans. We do not doubt the accuracy of the LRC's account of its endeavor, motivation, and results in this regard; nor do we doubt that its actions would suffice if faced with the same [*432] sorts of localized challenges that were pursued unsuccessfully in 2002, respecting compactness, contiguity, and curious subdivision splits.

The appellants in Holt and Costa, however, recognizing that prior redistricting challenges failed precisely because they were localized and piecemeal, attended to the Albert Court's central rationale and holding, and its implicit warning to the next LRC, that different considerations, and results, might obtain if a Final Plan were to be challenged as a whole. No doubt assisted by advances in computer technology that certainly would not have been available to redistricting challengers in 1972 and 1981, the Holt and Costa appellants offered challenges to the 2011 Final Plan as a whole, proffering alternative plans not in the hope of having them accepted as "better than" or "preferable to" the Final Plan, but as evidence that the [***113] Final Plan was contrary to law. By this proffer, appellants attempted to show that the same basic considerations that the LRC says powered and justified its decisions [***753] to split political subdivisions could easily be accommodated with far less violence to the integrity of political subdivisions, and to a lesser extent, to the command of compactness.

In the past, this Court has dismissed redistricting objections which failed to offer "any concrete or objective data" and relied instead on "conclusory" allegations and dictionary definitions to support claims of constitutional violations. Specter, 293 A.2d at 24. The Holt and Costa appellants have not made this error; they have produced, and they submitted to the LRC, detailed plans deriving from concrete data, data also used by the LRC, to support their assertions that the pervasive political subdivision splits in the Final Plan were not "absolutely necessary." Notably, the particulars of these alternative plans have not been materially contested by the LRC.31

FOOTNOTES

31 We view the alternative, global plans as comprising the sort of concrete and objective data envisioned in Specter. The LRC argues that alternative plans should not be considered evidence [***114] by this Court because their general accuracy is questionable, given that the challengers do not benefit from the extensive and knowledgeable technical, administrative, and institutional capabilities which safeguard the LRC's process. See LRC Brief at 31-32. In addition, the LRC provides two examples in which counties are either not accounted for or are double-counted in the Holt alternative plan. At argument, however, counsel for the Holt appellants explained that the inaccuracies of which the LRC complained were clerical errors in transcription from the original document composed by Ms. Holt, which in fact accounted for all subdivisions; and noted similar errors in the LRC's legal description of the Final Plan. See Transcript of Oral Argument, 1/23/12, at 20-21. The LRC did not dispute the explanation.

Respecting the LRC's legal argument, we note that the LRC did not dispute the factual allegations in the Holt petition for review, or allege fraud, impropriety, or material inaccuracy in its response to the
petition. We also note that, given its access to the relevant data and its expertise, the LRC is certainly capable of ascertaining and formulating fact-specific claims as to individual [***115] plans, and could have done so here. And, finally, we view this argument — that only the LRC’s Plan can be reliable — as a variation of its claim that alternatives simply cannot be considered. Respectfully, we do not believe that Article II, Section 16 intends to set such an impossible bar for citizen challengers.

[*433] For purposes of explication, in examining whether the 2011 Final Plan is contrary to law, we will focus primarily on the evidence represented by Holt’s alternative plan.32 This plan shows that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation — the LRC’s primary justification for the numerosity of the political subdivisions it divided — as the Final Plan, while employing significantly fewer political subdivision splits with respect to both Chambers of the General Assembly. The Holt appellants also highlighted that their alternative plan had deviations from the ideal population for both the House and Senate districts that were smaller than the deviations in the Final Plan. Although appellants’ brief goes into great detail [*434] comparing their plan to the Final Plan, the most convincing point is the raw number difference [***116] in subdivision [**754] splits. In the House, the alternative plan splits seven fewer counties, 81 fewer municipalities, and 184 fewer wards; in the Senate: the Holt plan splits seven fewer counties, two fewer municipalities, and 22 fewer wards. In addition, with regard to political subdivisions which were split at least once, the Holt plan created: in the House: 39 fewer county fractures, 186 fewer municipality fractures, and 228 fewer ward fractures; and in the Senate: 37 fewer county fractures, six fewer municipality fractures, and 50 fewer ward fractures, than the Final Plan. In total, for the House, 184 fewer subdivisions were divided, and 453 fewer fractures were established; in the Senate, 31 fewer subdivisions were split, and 93 fewer divisions were established. Holt Brief at 17. The LRC does not dispute the accuracy of this accounting.33 The Holt appellants also offered specific examples of political subdivisions with populations smaller than the ideal House or Senate district which were maintained intact in the alternative plan while maintaining appropriate levels of population deviation.

FOOTNOTES

32 The Holt appellants presented an alternative plan to the LRC on November 18, 2011, which was [***117] then amended twice; all three plans were attached to the Holt Petition for Review as exhibits. In their brief, the Holt appellants focus on the latest amended plan, to which we will confine our discussion.

The Costa appellants also offered their alternative plan after the LRC issued its preliminary plan. At oral argument, counsel for Costa explained that the Costa plan did not seek to achieve the minimum number of necessary divisions, but instead to show that the number of split municipalities could be reduced compared with the LRC's preliminary plan, even while maintaining similar electoral performance.

33 We have intentionally avoided listing the specific number of divisions in the alternative plans because our decision does not purport to convey in absolute terms what is an acceptable number of political
subdivision splits.

The Holt appellants argue that the Final Plan is contrary to law because, as their alternate plan proves, while the Final Plan may comply with governing law respecting population equality, the Plan flouted independent and coexisting Pennsylvania constitutional mandates of compactness and contiguity of legislative districts, and respect for political subdivision boundaries. 34 [***118] Appellants claim that, if the LRC had prepared a plan [*435] in strict compliance with Section 16, including the requirement respecting population equality, a significant number of political subdivision splits would not have occurred, because they could not have been "absolutely necessary." The alternative plan, appellants assert, proves that compliance with the constitutional requirements of population equality, compactness, and contiguity does not and cannot justify the extent of the division of counties, municipalities, and wards in the Final Plan. Accordingly, appellants suggest that remand is appropriate for the LRC to "make 'a second attempt at reapportionment' that complies with the plain language of Section 16 of Article [II] of the Pennsylvania Constitution." See Holt Brief at 16-20.35

FOOTNOTES

34 In the alternative, appellants claim that the LRC should have provided a "specific explanation" for why the constitutional mandates could not be accommodated. Holt Brief at 24 (citing Albert, 790 A.2d at 1000 (Saylor, J., concurring)). As our mandate reflects, we view appellants' argument as already having established that the Final Plan was contrary to law. The LRC has had a full opportunity to offer [***119] neutral explanations of what were proven to be vast numbers of unnecessary splits of political subdivisions, and failed to do so. We see no point in a remand for a specific explanation, in addition to the ones proffered, under these circumstances.

35 The Costa appellants add only that the constitutional mandate to respect political subdivision boundaries in the redistricting process is unambiguous and should not be read out of Section 16. The language "unless absolutely necessary," according to these appellants, should be read as a command that the LRC "must avoid the splits of governmental units, if at all possible." Costa Brief at 29. In all other respects, the Costa arguments are similar to those of the Holt appellants. According to the Costa appellants: "[u]nlike in past reapportionment challenges, the statewide statistical data that Senator Costa presented provides conclusive evidence that it was not 'absolutely necessary' for the [LRC] to divide multiple subdivisions. That data is reflected in the [a]lternative [p]lan, which, in all relevant respects, is similar to the Final Plan except for its reduction in the number of divisions of political subdivisions." Id. at 32-33. The Costa [***120] appellants request remand and suggest that their alternative plan should serve as the starting point for the LRC in its second attempt at redistricting. Id. at 34.

We will not direct that the LRC begin its task on remand with the Costa plan, the Holt plan, or any particular plan. We trust that the LRC will heed to the guidance in this Opinion with alacrity and fashion a plan giving full respect to the multiple commands in Article II, Section 16.
The Holt plan is powerful evidence indeed. The LRC answers that appellants failed to carry their burden of proof. We cannot agree.

The LRC primarily argues that alternative plans cannot be considered because they are outside this Court’s scope of review or, alternatively, that the particular plans proffered as evidence are insufficient to prove that the Final Plan is contrary to law. The LRC’s position rests upon assumptions about the scope and standard of review which we have rejected [*436] in Part IV of this Opinion. For example, we have rejected the LRC’s claim, premised upon a misapprehension of our precedent, that alternative plans offered as evidence that a Final Plan is contrary to law are "irrelevant." We recognize that our prior decisions have [***121] made clear that the LRC is not obliged to accept an alternative plan merely because it appears to be, or is offered as, "better" than or "preferable" to the LRC’s Plan. See In re 1981 Plan, 442 A.2d at 667; see also Part IV, supra. But, that is a very different point. These appellants do not claim that the LRC was obliged to accept their plans; they just offer those plans as proof that the LRC’s Final Plan contained subdivision splits that were not absolutely necessary.

The LRC also levels an individual criticism at the Holt plan, complaining that, although this alternative achieves greater population parity overall, in some specific districts, the population equality deviation is greater than under the Final Plan.36 Thus, the LRC requests that the Court dismiss these appeals because the 2011 Final Plan is superior to the 2001 Final Plan in terms of population equality deviation and the number of political subdivision splits.37

FOOTNOTES

36 The LRC also criticizes specifics of the Costa plan, on grounds that it achieves fewer political subdivision splits at the cost of increasing the population deviation to a level higher than the Final Plan, and higher than any other plan since 1971. Furthermore, [***122] the LRC reviews each political subdivision fracture in the Final Plan of which the Costa appellants complain, and claims that each was either necessitated by the "overriding" population equality mandate or had been split in the 2001 Final Plan and, therefore, was "approved" by this Court in Albert. We answer the latter point, respecting supposed prior "approvals," in text. Respecting the population deviation point, since our analysis above turns on Holt, we will confine our response to the LRC’s criticism of that plan.

37 As a subsidiary point, the LRC argues that only the number of split subdivisions, and not the total number of fractures, is relevant to our constitutional inquiry. We find no support in our prior decisions, and the LRC offers no developed or cogent argument, favoring this premise.

To take the LRC’s latter point first, in our discussion of the standard of review, we have already addressed the notion that this Court’s "approval" of prior plans, as against certain discrete challenges, acts to pre-approve aspects of future [*437] plans, as against distinct, different challenges. Again, we
do not doubt that this Final Plan is an improvement over the 2001 Final Plan. And, for all [***123] this Court knows, perhaps the 2001 Plan was the best that the technology then available could devise, respecting "absolutely necessary" splits. But, the 2001 Plan was not challenged as a whole, and like every other plan since 1971, it was not challenged with compelling, [***756] objective, concrete proof that a large number of political subdivision splits were not "absolutely necessary."

Turning to the LRC's complaint that the Holt plan increases population deviation in some specific districts, even though it achieves greater population parity overall, we fail to see how this diminishes the power of the Holt plan as proof that the Final Plan was contrary to law. Our prior cases concerning population deviations have looked to overall ranges; indeed, the Holt plan, in this regard, seems to comport better with the LRC's primary focus upon population equality.

More fundamentally, we recognize that this Court's prior decisions emphasized equality of population as the primary directive in the redistricting efforts of the LRC. That mandate is unique because it is dually commanded by our charter and the federal Equal Protection Clause -- an independent force, with contours that may change with each new [***124] relevant decision from the U.S. Supreme Court. Our prior decisions have gone so far as to recognize that, "if need be," the concerns for compactness and adherence to political subdivision lines must yield to the "overriding objective" of "substantial equality of population." See In re 1981 Plan, 442 A.2d at 666; Specter, 293 A.2d at 18-19 (quoting Reynolds, 377 U.S. at 579). We have also stated that "if necessary, any political subdivision or subdivisions may be divided or combined in the formation of districts where the population principle cannot otherwise be satisfied." Specter, 293 A.2d at 25 (quoting Butcher I, 203 A.2d at 570-571). But, all of this Court's cases, going back to Butcher I, have specifically recognized that population equality is not the only command in redistricting. Every one of the cases has an important qualifier, such as "if need be," "if necessary," if the population principle "cannot [*438] otherwise" be satisfied. We have always recognized the independent vitality of the requirements of contiguity, compactness, and the integrity of political subdivisions. Moreover, none of the cases identify a population variation that must be achieved in redistricting; just as [***125] we did not require the LRC to expand population deviation to the outer limits that might be approved under federal law, In re 1981 Plan, 442 A.2d at 667, we also did not say that compression of population equality to the narrowest point of difference is required, at the expense of absolute, constitutional commands of compactness, contiguity and integrity of political subdivisions. The "practicable" modifier in the "as nearly equal in population as practicable" language necessarily leaves room for the operation of the other constitutional commands.

The Holt alternative plan avoided a highly significant percentage of political subdivision splits and fractures while maintaining a lower average population deviation from the ideal than the Final Plan. A concrete showing has been made that political subdivisions were split, even where the population was smaller than the ideal legislative district and a division was avoidable; and that the number of fractures across the Commonwealth was considerably higher in the Final Plan than the Holt plan proved was easily achievable. This powerful evidence, challenging the Final Plan as a whole, suffices to show that the Final Plan is contrary to law. [***126] While the LRC was not, and is not, obliged to adopt any of the alternate plans presented to it, it must devise a new plan upon remand.
Much focus, in the briefs, and at argument, has been placed on the level of proof required to show that a Final Plan is contrary to law, the fear being that "someone can always come up with a better plan." We need not determine a minimum level of [**757] proof, deriving from such an "alternate" plan (or other concrete source), that would be "enough" to show that a Final Plan made excessive political subdivision splits without absolute necessity. We realize that the task is not so simple as the production of a plan with "better" numbers; thus, we reject the invitation to set firm parameters. It is enough that the Holt plan here overwhelmingly shows that the 2011 Final Plan [*439] made subdivision splits that were not absolutely necessary, and certainly could not be justified on the population equality or other grounds proffered. Indeed, the proof is strong enough that we view it as inconceivable, to borrow from one of the U.S. Supreme Court's equal protection decisions, that the magnitude of the subdivision splits here was unavoidable. See Kirkpatrick, 394 U.S. at 532 [***127] ("[I]t is simply inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable.").

We likewise realize that the absence of certainty is a frustration for the LRC, a concern ably articulated by counsel. But, that is often the case when constitutional principles are at work, and particularly when competing constitutional principles apply. This is reflected in the U.S. Supreme Court's own fact-specific decisional law in the equal protection cases and the Voting Rights Act cases, all factors with which the LRC must contend. In Reynolds, the High Court spoke of the Equal Protection Clause requiring "that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 377 U.S. at 577. We trust, too, in the good faith of the LRC to fashion a plan, upon remand, that comports with all of the requirements of Article II, Section 16.

-B-

Although we are satisfied that the Holt appellants have carried their burden of proving that the 2011 Final Plan is contrary to law premised on the existence of a significant number of political subdivision splits that were not absolutely [***128] necessary, like the Albert concurrence, we have additional concerns, and particularly respecting compactness, with this Final Plan. These issues may be a product of the excessive subdivision splits, and since we are remanding the matter, we offer the following commentary.

The obvious "compactness" issues with three particular Senate districts were noted by the Court at oral argument. Senate District 3 stretches -- in the shape of a wish bone -- [*440] from the far northeast section of Philadelphia down into North Philadelphia, and then up again into the Roxborough/Chestnut Hill area. Meanwhile, Senate District 35 reaches -- like a crooked finger -- from the southernmost border of Pennsylvania, north across two thirds of the Commonwealth, and contains all of Bedford County, all of Cambria County, a small portion of Somerset County, then enters Clearfield County, and finally crosses over into Clinton County. Perhaps less overt, but no less facially problematic in terms of compactness, was Senate District 15, described by the Court as an "iron cross," which reaches from North to South narrowly, and then East to West narrowly, to cover a third of York County, a third of Dauphin County, and to [***129] timidly reach into corners of Adams and Lancaster Counties. See
Transcript of Oral Argument, 1/23/12, at 43-45, 70, 83-85. In response, the LRC explained that the reach of these districts -- one of which is in the most densely populated area of the Commonwealth, Philadelphia -- is justified by the primacy of the population equality concern. See, e.g., id. at 43 [LRC counsel [**758] stated that Senate District 3 "is compact given the population"]). We have stated HN34 with respect to the constitutional mandate of compactness that "there is a certain degree of unavoidable non-compactness in any apportionment scheme." Specter, 293 A.2d at 23. This Court did not sanction abandonment of the compactness constitutional mandate in favor of a population equality absolute.

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In light of our disposition, we do not decide or address at any great length the remaining appeals, and aspects of appeals, which focus on particular effects on specific political subdivisions. It is sufficient to reiterate, for reasons already explained, that we decline the invitation to revisit prior precedent requiring a successful appellant to challenge the plan as a whole, see n.18, supra. We also note that the particular political [***130] subdivision fractures of which individual appellants complain may well be addressed by the LRC in its new plan upon remand. Having said this, we trust that the [*441] LRC, in formulating its new plan, and necessarily reducing the political subdivision splits and fractures, will be attentive to the concerns of historically unified subdivisions, such as County seats. In the end, however, we recognize that the Pennsylvania Constitution permits absolutely necessary political subdivision splits, and that some divisions are inevitable. We do not mandate that the LRC avoid specific divisions, and leave the LRC to conduct its discretionary task within the limits set by the Constitution, reaffirmed above, and the prospective guidance we outline below.

-D-

The Court is satisfied that the Final Plan is contrary to law and, as our discussion above has revealed, there is no need to revisit or adjust our existing precedent to reach this conclusion. Nevertheless, as we will explain in Part VII below, we believe that prospective recalibration of certain of our precedents would be salutary and helpful in this unusual area of law, where the Court is called on to rule and speak only once every decade, and usually [***131] in circumstances that make it difficult to produce the most reasoned of expressions.

VII. Additional, Prospective Guidance for Remand

Several factors convince us that there would be some benefit in providing prospective guidance in the redistricting realm, even as to points not necessarily joined in this litigation. First, is the fact that this Court is the sole voice passing upon state law challenges to redistricting appeals, but our consideration has been limited to a single, mass appeal, once every ten years, and under severe time constraints which affect the litigants no less than the Court. Second, is the fact that each redistricting plan seems to generate similar citizen complaints concerning the alleged disrespect of political subdivisions, and the formation of odd and non-compact districts of disparate political subdivisions. Third, is the advent of
computer technology. As is reflected in Dean Gormley's account of the 1991 reapportionment, and as demonstrated in practice in the alternate plans produced by the Holt and Costa appellants [*442] here, this development suggests that this Court’s early establishment of the primacy of equalization of population in formulating redistricting [***132] plans (a far more difficult task before technological advancements, as the Court itself experienced in the Butcher appeals) may warrant reconsideration -- at least respecting the degree to which population equality must be pursued, or must be deferred [**759] to as an explanation for allegations of unnecessary violence to other constitutional precepts. Fourth, and finally, our own review of our governing precedent in deciding these appeals has led us to conclude that it should be recalibrated to allow the LRC more flexibility in formulating plans, and particularly with respect to population deviation. This adjustment should allow more breathing space for concerns of contiguity, compactness, and the integrity of political subdivisions to be respected. Our prior precedent sounds in constitutional law; to the extent it is erroneous or unclear, or falls in tension with intervening developments, this Court has primary responsibility to address the circumstance.38

FOOTNOTES

38 HN35 As a function of our system of government, this Court has the final word on matters of constitutional dimension in Pennsylvania. Pap's A.M., 812 A.2d at 611; Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793, 807 (Pa. 2004) (Saylor, J., concurring). [***133] Our charter, unlike statutes of the General Assembly or agency regulations, is not easily amended and any errant interpretation is not freely subject to correction by any co-equal branch of our government, other than this Court. Shambach, 845 A.2d at 807 (Saylor, J., concurring); see also Payne v. Tennessee, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); cf. City of Scranton v. Firefighters Local Union No. 60, 612 Pa. 23, 29 A.3d 773, 784-85 (Pa. 2011) (describing swift legislative action to amend State Employees' Retirement Code following Court decision). For this reason, we are not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned. See Payne, supra.

Mr. Justice Saylor † has twice addressed aspects of these concerns. First, in his 2002 concurrence in Albert, he noted that he remained "circumspect concerning the manner in which state constitutional requirements of compactness and integrity of political subdivisions have been applied by the Court in the prior decisions that are followed here." 790 A.2d at 1000. Second, in his dissenting statement to the per curiam order this Court entered before announcing the reasons [*443] for [***134] our mandate here, Justice Saylor †, joined by Mr. Justice Eakin † and Madame Justice Orie Melvin †, noted that he was "receptive to the concern that past decisions of the Court may suggest an unnecessarily stringent approach to equalization of population as between voting districts," but he believed "this could be addressed via prospective guidance from the Court." Order, 1/25/12 (per curiam) (Saylor †, J., dissenting).

Since we have already announced our determination to remand, and a new plan is to be devised, this
Opinion provides the first opportunity to offer prospective guidance, and we will avail ourselves of the opportunity.

First, and most simply, we reemphasize the importance of each of the mandates in Article II, Section 16. Contrary to the suggestion of the Court in In re 1991 Plan, Article II, Section 16 HN36 by its terms does not "require that the overriding objective of reapportionment is equality of population." 609 A.2d at 139. Rather, the Constitution lists multiple imperatives in redistricting, which must be balanced. Moreover, as our discussion of the governing law in Part V makes plain, the other imperatives in Article II, Section 16 have all been recognized by the U.S. Supreme Court as legitimate state interests that may affect, and warrant, deviations in population equality.

Rather than deriving from the language of our Constitution itself, the primacy of population equality in redistricting, which is clearly established in our decisional law, derives from federal decisional law, and particularly Reynolds v. Sims. Our earliest redistricting opinions reflected an acute awareness of Pennsylvania's obligations to respect federal law — at the same time we were construing our own organic constitutional commands. Our first decisions grappling with Reynolds, in the Butcher cases and in Specter, occurred when this area of federal constitutional law was both new and dynamic. Indeed, it appears that it was the very dynamism of the federal decisional law that led this Court in Specter to emphasize the special primacy of population equality. As we have detailed in Part V above, it appears that this Court's approach was powered by its prediction of where the U.S. Supreme Court was heading in its interpretation of Reynolds. Thus, the Court derived from the congressional reapportionment decisions in Kirkpatrick and Wells "that deviations from equality of population that were formerly regarded as insubstantial and permissible will now be regarded as impermissible, necessitating a closer adherence to equality of population, even in the area of state legislative reapportionment." Specter, 293 A.2d at 20. In upholding the plan in Specter, the Court noted, among other things: "It is clear that the Legislative Reapportionment Commission recognized that closer adherence to the requirement of equality of population is now constitutionally in order for state legislative reapportionment plans." Id. at 22.

But, of course, the business of predicting the future course of any dynamic and complicated area of decisional law is an uncertain one, and as it developed, U.S. Supreme Court precedent did not proceed in the constricting way that we predicted in Specter; it instead evolved to permit more flexibility in population deviation as a federal constitutional matter. Notwithstanding this development, and the fact that it was argued to this Court as a basis for permitting greater deviations of population in later redistricting cases, we did not grapple with the implications of our initial prediction, and our effective "constitutionalization" of a prediction of federal law frozen in time. Instead, we continued to suggest an inflexibility respecting population deviation that was no longer required by federal law. The necessary corollary implication was that the Court was devaluing the remaining Section 16 requirements of compactness, contiguity, and political subdivision integrity. It is not necessary to recount the claims, circumstances and results; they are detailed in our summary of the governing law in Part V.

Meanwhile, the development of computer technology appears to have substantially allayed the initial,
extraordinary difficulties in achieving acceptable levels of population deviation without doing unnecessary violence to other constitutional commands. Again, the Holt plan proves the point.

[*445] Accordingly, we take this opportunity to reaffirm HN37 the importance of the multiple commands in Article II, Section 16, which embrace contiguity, compactness, and the integrity of political subdivisions, no less than the command to create legislative districts as nearly equal in population as "practicable." Although we recognize the difficulty in balancing, we do not view the first three constitutional requirements as being at war, or in tension, with the fourth. [***138] To be sure, federal law remains, and that overlay still requires, as Reynolds taught, that equality of population is the "overriding objective." But, as later cases from the High Court have made clear, that overriding objective does not require that reapportionment plans pursue the narrowest possible deviation, at the expense of other, legitimate state objectives, such as are reflected in our charter of government. See, e.g., Gaffney, 412 U.S. at 748-49 ("Fair and effective representation . . . does not depend solely on mathematical equality among district populations. There are other relevant factors to [***761] be taken into account and other important interests that States may legitimately be mindful of."); Mahan, 410 U.S. at 329 (upholding deviations from ideal population equality as justified by rational policy of maintaining integrity of political subdivisions in Virginia state legislature). The law has developed to afford considerably more flexibility.

We trust that our recalibration of the emphasis respecting population equality to afford greater flexibility in reapportioning legislative districts by population should create sufficient latitude that the 2011 LRC, and future such bodies, [***139] may avoid many of the complaints that citizens have raised over the years, particularly respecting compactness and divisions of political subdivisions. Like the U.S. Supreme Court, we do not direct a specific range for the deviation from population equality, or purport to pre-approve redistricting plans that fall within that range. Nor do we direct the LRC to develop a reapportionment plan that tests the outer limits of acceptable deviations. See In re 1981 Plan, 442 A.2d at 667. The law in this area remains complex and dynamic, and we stress, once again, that we deem the LRC to retain considerable discretion [*446] in fashioning a plan that comports with all constitutional requirements. Furthermore, we have no doubt that the LRC will act in good faith, and with fidelity, in discharging its weighty, difficult constitutional duty on remand — no less than we have in discharging our appellate function.

VIII. Procedure on Remand

Where, as here, aggrieved citizens prove that a redistricting plan is contrary to law, the Constitution specifies that the remedy is a remand to the LRC and the Final Plan does not have force of law. This Court's per curiam order of January 25, 2012, rendered two days after [***140] argument, provided the only direction possible to candidates in light of our Constitution and our 2002 decision in Albert, which upheld the 2001 Final Plan. As we have noted earlier, we recognize that our constitutional duty to remand a plan found contrary to law has disrupted the 2012 primary election landscape. That disruption was unavoidable in light of the inexcusable failure of the LRC to adopt a Final Plan promptly so as to allow the citizenry a meaningful opportunity to appeal prior to commencement of the primary season.
We trust that the LRC will avert similar delay as it is called upon to faithfully execute its task upon remand, and we trust that future such Commissions will act more promptly.

We are not in a position to predict when the LRC will complete its task of developing a new final redistricting plan that complies with law, nor when such a new plan can become final and have force of law. Any issues respecting deferring the state legislative primary, or scheduling special elections, etc., are, in the first instance, the concern and province of the political branches. Such questions have not been briefed and presented to this Court.40

FOOTNOTES

39 The Costa appellants have suggested [*141] that, with the use of available computer technology and familiarity with the necessary data, a new preliminary plan accounting for the objective criteria set forth in our Constitution can be generated in a matter of days. Costa Brief at 34.

40 We note that once the LRC approves a new preliminary plan, the Constitution affords persons aggrieved by the new plan a right to object, before the plan is finally approved by the LRC, and to a subsequent right to appeal to this Court. Should such appeals be filed, we will decide them with alacrity, as we have decided the ones now before us.

Jurisdiction retained.

[*447] [*762] Mr. Justice Baer ♤, Madame Justice Todd ♤, and Mr. Justice McCaffery ♤ join the opinion.

Mr. Justice Saylor ♤ files a concurring and dissenting opinion.

Mr. Justice Eakin ♤ files a concurring and dissenting opinion.

Madame Justice Orie Melvin ♤ files a dissenting opinion.

CONCUR BY: SAYLOR ♤; EAKIN ♤;

DISSENT BY: SAYLOR ♤; EAKIN ♤; ORIE MELVIN ♤

DISSENT

CONCURRING AND DISSENTING OPINION
The majority opinion is remarkable in many aspects, including its timeliness, its scope, and the passages of salutary guidance which it provides. For the most part, I support the clarification of the appellate review for redistricting challenges, [***142] particularly in terms of: the acceptance that alternate plans may be employed by challengers to address their heavy burden of proof; the movement toward a more circumspect position regarding the role of population equality; and the recognition of the interplay among the several requirements of the Pennsylvania Constitution pertaining to redistricting. My thoughts, however, do not align with the majority's criticisms of the Legislative Reapportionment Commission, inasmuch as I have limited perspective concerning the difficulties encountered by the Commission in crafting a redistricting plan.

In light of the inevitability of dividing some political subdivisions in the redistricting exercise, the appellate review of plan challenges preeminently represents an exercise in line drawing. I use this term figuratively, of course, since the Court is not generally in a position to draw the boundaries on a map, but it does determine the degree of latitude to be accorded to a legislative reapportionment commission in arranging voting district boundaries. The allocation of the burdens and the affordance of deference in the judicial review reflect the complex nature of a commission's task and the [***143] constraints inherent in its oversight. Indeed, I had no illusions in 2002 that, had the then-existing legislative reapportionment commission narrowed or otherwise altered the range of considerations [*448] taken into account in fashioning voting-district boundaries, there could not have been fewer divisions. Moreover, with regard to the 2011 Final Plan, I agree with the majority that it is an improvement over the 2001 plan, see Majority Opinion, slip op. at 76, which surmounted the challenges raised in the appeals before this Court.

While the majority correctly observes that those challenges were narrower in scope than the lead ones presented here, consideration of the overall plan was encompassed in my own review. The concerns which I set forth in the Albert decision were premised on such consideration, and I adjudged the 2001 plan to be entitled to deference. See Albert v. 2001 Legislative Reapportionment Comm'n, 567 Pa. 670, 688, 790 A.2d 989, 1000 (2002) (Saylor, J., concurring). Ultimately, then, on the merits, and respecting the substantial deference which is to be accorded to such a plan, I believe the 2011 Legislative Reapportionment Plan is also constitutionally permissible. It therefore [***144] follows that I remain unable to join the mandate of the Court.

CONCURRING AND DISSenting Opinion

MR. JUSTICE EAKIN

I join much of the majority opinion. However, I do not find the Legislative Reapportionment Commission (LRC) plan to be contrary to the Constitution, and I join in full the expressions of Justice Saylor in that regard.
The process of redistricting is complex beyond words. The need to consider all the factors necessary — contiguousness, compactness, equality of population, respecting political subdivisions down to the ward level, avoiding disenfranchising racial and ethnic groups, the federal Voting Rights Act — makes this a daunting task for the LRC. The result of changing any one area of its plan was aptly likened by counsel to squeezing a water balloon: if you squeeze it here, it will bulge over there. If you change one line, it causes ripples that necessitate changes elsewhere.

An inherent problem in reviewing challenges to the ultimate plan is that no mechanism exists for the LRC to justify or explain its considerations or decisions. For better or worse, there are no means for it to explain individual lines or boundaries. It is never "absolutely necessary" to draw a line in any spot - it could always go elsewhere, but there is no process articulating what considerations were behind the decision to put it where the LRC did.

Since there is no record, we cannot tell why the LRC did what it did. This is a problem for both those who would challenge the plan and for those of us who must evaluate those challenges. For example, the "Holt plan" was not adopted by the LRC, but we do not know what consideration it received. We can surmise reasons it was not enacted, but this is mere conjecture.

It is entirely possible that this plan, lovely on its surface, is not so beautiful when examined in depth — on the other hand, it may be a masterpiece. We do not know and are not possessed of the means to make such an evaluation, particularly given the time constraints cogently detailed in the majority's opinion.

The bottom line is that we do not know whether the Holt plan, or any other plan, proves anything other than that it is possible to divide fewer political subdivisions. This in my judgment does not prove the LRC plan is unconstitutional. The bipartisan LRC, however, has the time, the means, and indeed the mandate to consider all options, and I would give it significant deference. Given that deference, the burden on challengers is indeed heavy and, in my judgment, has not been met in this case.

The 2011 plan has fewer problems than the plan we found constitutional in Albert; it is not unconstitutional under existing precedent. While I do not quarrel with the majority's reordering of constitutional priorities, I do not find a need to make that reordering retroactive.

Redistricting is required to ensure constitutional representation of all voters, reflecting population changes that occur over a decade. Computers or not, drawing a new plan using new rules will not happen in time for this year's elections. Changing the rules and rejecting the otherwise constitutional plan subjects our citizens to continued unbalanced representation. I find this result unnecessary.

As such, I cannot join the order rejecting the 2011 Legislative Reapportionment Plan.

DISSenting OPINION
MADAME JUSTICE ORIE MELVIN ▼

The Majority Opinion expeditiously provides significant breadth in scope and history of legislative redistricting, but I remain convinced that the Final Plan should be affirmed. The complaints of the various appellants notwithstanding, it is clear that there is no perfect [***147] plan. The Majority "recalibrates" the interplay of the constitutional requirements found in Section 16 of the Pennsylvania Constitution. In so doing, it invalidates the 2011 Final Plan, which was carefully constructed by the Legislative Reapportionment Commission (LRC) in accordance with our prior pronouncements concerning redistricting in the Commonwealth. In light of the significant [***764] public interest and exigencies of the electoral process, I believe that the Majority's disposition is both unprecedented and unnecessary. Accordingly, I must dissent.

While our reapportionment precedent is limited, it unequivocally demonstrates that our overarching concern in redistricting matters is substantial equality of population. See Specter v. Levin, 448 Pa. 1, 293 A.2d 15, 19 (Pa. 1972) ("Section 16's desire for districts that are 'compact' must also yield, if need be, 'to the overriding objective . . . of substantial equality of population.'" (quoting Reynolds v. Sims, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964))); In re Reapportionment Plan for the Pa. General Assembly (In re 1981 Reapportionment), 497 Pa. 525, 442 A.2d 661, 665 (Pa. 1981) (articulating same principle); In re 1991 Pa. Legislative Reapportionment Comm'n, 530 Pa. 335, 609 A.2d 132, 138 (Pa. 1992) [***148] (same); [*451] Albert v. 2001 Legislative Reapportionment Comm'n, 567 Pa. 670, 790 A.2d 989, 993-94 (Pa. 2002) (same). Indeed, the Majority recognizes this to be true. See Majority Opinion, slip op. at 77 ("[T]his Court's prior decisions emphasized equality of population as the primary directive in the redistricting efforts of the LRC." (emphasis added)). This acknowledgement, irrespective of any qualifying language, highlights the fallacy that the current plan is contrary to law. In view of this Court's precedent, I find that the LRC acted in good faith in adopting the 2011 Final Plan. Consistent with our prior pronouncements, the LRC promulgated a plan that ultimately achieved substantial equality of population while balancing the other mandates in Section 16.

FOOTNOTES

1 While the Majority opines that our previous emphasis on population equality derived from federal law, see Majority Opinion, slip op. at 84 ("Rather than deriving from our Constitution itself, the primacy of population equality in redistricting, which is clearly established in our decisional law, derives from federal decisional law . . . ."), our case law states otherwise. See In re 1981 Reapportionment, 442 A.2d at 665 ("In Specter, this Court [***149] also made clear that, as a matter of both federal and state law, equality of population must be the controlling consideration in the apportionment of legislative seats." (emphasis added)).

As justification for the conclusion that the 2011 Final Plan is unconstitutional, the Majority cites an alleged excessive number of subdivision splits, admonishing that prior plans cannot serve as a
benchmark for scrutinizing subsequent plans. Despite this contention, we have undertaken a comparative approach in the recent past. Specifically, in Albert we compared the 2001 Final Plan with those previously approved by this Court. Finding that the number of subdivision splits was similar, we determined the 2001 Plan withstood constitutional scrutiny. Albert, 790 A.2d at 998 ("[The Commission] claims that . . . no political subdivision was divided in forming a district unless absolutely necessary. Upon comparison of the instant Final Plan with those previously approved by this Court, we agree."); id. at 999 n.12.2 The Majority has not [*452] convinced me that the LRC's use of the same exercise herein produced a constitutionally deficient plan.

FOOTNOTES

2 In making this point, I do not advocate adopting a maximum or minimum [***150] variation or setting a ceiling on permissible subdivision splits. I simply wish to reiterate that prior plans are instructive when considering whether a current plan comports with constitutional requirements.

I find it unnecessary to criticize the timeliness of the LRC's actions, see Majority Opinion, slip op. at 14-17, and I disagree that it unnecessarily delayed this Court's disposition. The LRC's actions comported to the time frame set forth in Article 2, Section 17(c) of our Constitution, and both the LRC and this Court have proceeded with due diligence in this matter.

The LRC faithfully applied our existing precedent in preparing the 2011 Final [**765] Plan. By failing to uphold the LRC's reliance on our prior decisions, the Majority interjects uncertainty into future redistricting cases. See Majority Opinion, slip op. at 78-79. Moreover, by declaring that the 2001 Plan remains in effect, the Majority ensures that certain districts will be overrepresented while others will be underrepresented, as evidenced by population shifts from 2000 to 2010. Such a situation is untenable. Finally, it is a fiction for the Majority to represent that the initial opportunity to "go forward" is upon remand. [***151] Majority Opinion, slip op. at 8. Rather, in my view, it is a step back. The LRC produced a reasoned plan that comports both with our decisional law and our Constitution. I am amenable to guidelines but only if they are truly prospective, i.e., applicable to the next decennial redistricting.

Having reviewed the Final Plan as a whole, and in view of existing precedent, I conclude that it is constitutionally permissible. Therefore, I would approve the Final Plan, thus allowing it to have "the force of law." Pa. Const. art. 2, § 17(e).
600 Pa. 573, *; 969 A.2d 536, **;
2009 Pa. LEXIS 670, ***

View Available Briefs and Other Documents Related to this Case

PETER DEPAUL, Petitioner v. COMMONWEALTH OF PENNSYLVANIA AND THE PENNSYLVANIA GAMING
CONTROL BOARD, Respondents

No. 194 EM 2007

SUPREME COURT OF PENNSYLVANIA

600 Pa. 573; 969 A.2d 536; 2009 Pa. LEXIS 670

May 13, 2008, Argued

April 30, 2009, Decided

LEXIS 886 (2012)

1430 (2007)

McCAFFERY v., JJ. Messrs. Justice Saylor v., Eakin v. and Baer v. and Madame Justice Todd v. join the
opinion. Mr. Justice McCaffery v. files a dissenting opinion.

OPINION BY: CASTILLE v.

OPINION


Petitioner, Peter DePaul, has filed a verified petition in the nature of a complaint seeking declaratory
judgment and injunctive relief, challenging the constitutionality of Section 1513 of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. § 1513 [***538] ("Gaming Act"). Section 1513 imposes upon a class of individuals affiliated with licensed gaming in Pennsylvania an absolute ban on political contributions to any candidate for public office in the Commonwealth, to any political party committee in the Commonwealth, or to any group or association organized in support of a candidate in the Commonwealth. DePaul claims that the ban is unconstitutional, both facially and as applied to him, because it is an overly broad and unlawfully discriminatory infringement of the rights to free expression and association guaranteed by Article I, Sections 7, 20, and 26 of the Pennsylvania Constitution. For the reasons that follow, we agree with [***2] DePaul's essential premise. Accordingly, we hold that Section 1513 is unconstitutional under Article I, Section 7, to the extent that it prohibits political contributions of any amount by specified individuals involved in the gaming industry, and we enjoin the enforcement of this unconstitutional provision. 2

FOOTNOTES

1 This constitutional challenge lies within the exclusive jurisdiction of this Court pursuant to Section 1904 of the Gaming Act, which provides:

HN1 The Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of this part. The Supreme Court is authorized to take such action as it deems appropriate, consistent with the Supreme Court retaining jurisdiction over such a matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.


FOOTNOTES

3 The facts set forth in this Opinion are largely gleaned from the undisputed allegations in DePaul's verified petition.

4 The Office of the Attorney General asserts that this 9.54% interest is a controlling rather than an indirect interest.

Concurrently with PEDP's application [***4] for a Category 2 slot machine license, DePaul applied to the Board for a gaming license as a "key employee qualifier" of PEDP. Thereafter, and effective November 1, 2006, the Gaming Act was amended, and the term "key employee qualifier" was replaced with the term "principal." 5 It is [***539] undisputed that DePaul qualifies as a principal under the Gaming Act. Section 1513(a) of the Act, which is entitled "Political influence," among other things, absolutely "prohibit[s]" principals, along with other classes of [***578] individuals involved in the gaming business, from "contributing any money or in-kind contribution to a candidate for nomination or election to any public office in this Commonwealth, or to any political party committee or other political committee in this Commonwealth or to any group, committee or association organized in support of a candidate, political party committee or other political committee in this Commonwealth." 4 Pa.C.S. § 1513(a) (emphasis added). 6 DePaul's constitutional challenge focuses on this broad prohibition.

5 HN4 The Gaming Act defines a principal as:

An officer; director; person who directly holds a beneficial interest in or ownership of the securities of an applicant [***5] or licensee; person who has a controlling interest in an applicant or licensee, or has the ability to elect a majority of the board of directors of a licensee or to otherwise control a licensee; lender or other licensed financial institution of an applicant or licensee, other than a bank or lending institution which makes a loan or holds a mortgage or other lien acquired in the ordinary course of business; underwriter of an applicant or licensee; or other person or employee of an applicant, slot machine licensee, manufacturer licensee or supplier licensee deemed to be a principal by the Pennsylvania Gaming Control Board.

4 Pa.C.S. § 1103.

6 Section 1513(a) reads as follows:

(a) Contribution restriction.-- The following persons shall be prohibited from contributing any money or in-kind contribution to a candidate for nomination or election to any public office in this Commonwealth, or to any political party committee or other political committee in this Commonwealth or to any group, committee or association organized in support of a candidate, political party committee or other political committee in this Commonwealth:
(1) An applicant for a slot machine license, manufacturer license, supplier [***6] license, principal license, key employee license or horse or harness racing license.

(2) A slot machine licensee, licensed manufacturer, licensed supplier or licensed racing entity.

(3) A licensed principal or licensed key employee of a slot machine licensee, licensed manufacturer, licensed supplier or licensed racing entity.

(4) An affiliate, intermediary, subsidiary or holding company of a slot machine licensee, licensed manufacturer, licensed supplier or licensed racing entity.

(5) A licensed principal or licensed key employee of an affiliate, intermediary, subsidiary or holding company of a slot machine licensee, licensed manufacturer, licensed supplier or licensed racing entity.

(6) A person who holds a similar gaming license in another jurisdiction and the affiliates, intermediaries, subsidiaries, holding companies, principals or key employees thereof.

4 Pa.C.S. § 1513(a).

During his entire adult life, DePaul asserts that he has actively supported candidates for public office in Pennsylvania, from governor to township supervisor, who, in his opinion, would serve the best interests of the Commonwealth. DePaul asserts that between January 13, 2006 and April 21, 2006, while PEDP's and [***7] his own license applications were pending, he was unaware that Section 1513's absolute ban applied to individuals who hold any ownership interest, even an indirect ownership interest, in a slots license applicant such as PEDP. [*579] Thus, during that time period, DePaul made 21 political contributions totaling $31,745, including donations to State Representatives John Taylor and George Kenney, Jr., the Republican Committees for Bucks and Montgomery Counties, Montgomery County District Attorney Bruce Castor, Jr., and Philadelphia Register of Wills Ronald Donatucci.

On May 9, 2006, DePaul first learned that Section 1513's ban applied to applicants for key employee qualifier licenses and individuals who own indirect ownership interests in license applicants. DePaul promptly contacted the candidates and organizations to rescind his contributions and reported making the contributions and their rescission to the Gaming [**540] Control Board. On June 15, 2006, DePaul received an inquiry from the Board's Bureau of Investigations and Enforcement ("BIE"). 7 DePaul responded on June 21, 2006, informing BIE that all contributions had been refunded to him. BIE and DePaul then entered into negotiations regarding [***8] a consent decree. On December 4, 2006, the Board approved a consent decree entered into by DePaul, PEDP and the Board. The consent decree provided that, based upon DePaul's apparent violation of Section 1513(a)'s total ban on contributions, DePaul and PEDP would each pay $100,000 to the Commonwealth. The decree also set forth procedures and requirements designed to ensure DePaul's and PEDP's future compliance with Section 1513.
FOOTNOTES

7 Section 1517(a) of the Act established "a Bureau of Investigations and Enforcement which shall be independent of the board in matters relating to enforcement of this part." 4 Pa.C.S. § 1517(a).

Due to DePaul's continued desire to make political contributions and attend political events such as dinners, receptions and candidate meetings, all of which require a purchased ticket to attend, he filed a verified petition seeking a declaration that Section 1513 is unconstitutional under the Pennsylvania Constitution because it violates his inherent rights of political expression and association, and requesting an order enjoining the enforcement of Section 1513. As noted, this Court possesses exclusive jurisdiction over this constitutional [*580] challenge to a provision of [***9] the Gaming Act pursuant to 4 Pa.C.S. § 1904.

Broadly stated, Count I of DePaul's verified petition contends that political contributions represent speech and association protected by Article I, Sections 7 and 20 of the Pennsylvania Constitution, which, he states, provide broader protections for freedom of speech and association than do their counterparts in the United States Constitution. In support of this contention, DePaul cites to Pap's A.M. v. City of Erie, 571 Pa. 375, 812 A.2d 591, 605 (Pa. 2002) ("Pap's II") (Article I, Section 7 provides broader protection for freedom of expression than First Amendment of federal constitution), and Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382, 1387 (Pa. 1981) (state constitutional rights may be more expansive than federal counterparts). DePaul claims that, in order to pass constitutional muster, an absolute ban on political contributions must be "narrowly tailored" and must serve a compelling government interest, citing Commonwealth v. Wadzinski, 492 Pa. 35, 422 A.2d 124, 130 (Pa. 1980), a First Amendment case in which this Court applied strict scrutiny. DePaul submits that Section 1513's ban does not pass this test.

Regarding the specifics of Section 1513's ban, DePaul notes [***10] that Section 1102 of the Gaming Act reflects a legislative intent to "prevent the actual or appearance of corruption that may result from large campaign contributions," and emphasizes the word "large." Section 1513, however, bans all contributions, regardless of amount, thereby depriving a potential contributor of his freedom of political association. DePaul further claims that Section 1513 is overly broad because it prohibits contributions to candidates for office even where there is no connection between the candidate and licensed gaming. DePaul cites as an example of the disconnection his contribution to a candidate for the Philadelphia Register of Wills, which he characterizes as "a political office without the least remote connection to the regulation of licensed gambling in the Commonwealth." Verified Petition, P 41. DePaul also contends that the General Assembly imposed Section 1513's ban without a scintilla of [***541] evidence suggesting a connection in [*581] Pennsylvania between licensed gaming, contributions to political candidates, and political corruption. Therefore, in DePaul's view, the Legislature failed to identify any compelling governmental interest that would support Section 1513's [***11] invasive limitation on constitutional rights of free speech and political association.
In Count II of the petition, DePaul claims that Section 1513 violates Article I, Section 26 of the Pennsylvania Constitution, which establishes prohibitions on unlawful or baseless discrimination against persons in their exercise of civil rights. DePaul contends that Section 1513 unlawfully and irrationally discriminates against persons having a broad range of associations to licensed gaming, denying them the right to participate in the political process. The outright ban, he alleges, will not enhance the comprehensive regulatory safeguards built into the Gaming Act and is inconsistent with the federal and state commitment to permit all persons to participate actively in the democratic process. 8

FOOTNOTES

8 DePaul also states in his verified petition that political contributions are independently protected by Article I, Section 20, which provides: "The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance." This argument is not [***12] developed individually by DePaul, but instead is subsumed within his argument related to Article I, Section 7. Therefore, we will not address the argument separately.

Turning to the current briefing, we begin with DePaul's claim that Section 1513 violates Article I, Section 7 of our Constitution, which provides:

HN5\ The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter [*582] proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, [***13] as in other cases.

PA. CONST. art. I, § 7 (emphasis added). DePaul notes that, when a party mounts an individual rights challenge under the Pennsylvania Constitution, the party should undertake an independent analysis such as was suggested in this Court's seminal decision in Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (Pa. 1991). "Edmunds directs advocates to brief and analyze the following four factors when litigating a claim that state constitutional doctrine should depart from the applicable federal standard: (1) the text of the provision of the Pennsylvania Constitution; (2) the history of the provision, including the caselaw of this Commonwealth; (3) relevant caselaw from other jurisdictions; and (4) policy considerations, 'including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.'" Commonwealth v. Sam, 597 Pa. 523, 952 A.2d 565, 585 (Pa. 2008) (quoting Edmunds, 586 A.2d at 895). DePaul contends that this Court's opinion in Pap's II already
provides a thorough Edmunds [*542] analysis of the text and history of Article I, Section 7, making it unnecessary to undertake an analysis of the first two Edmunds factors here. See Pap's II, 812 A.2d at 603-10.

DePaul [*14] then argues that it is settled law that political contributions constitute expressive conduct protected by Article I, Section 7, and that contribution and expenditure limitations for political campaigns implicate the fundamental freedoms of political expression and political association. DePaul cites to Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam), and Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006) for the latter proposition. Section 1513, he contends, constitutes the most severe of restrictions on the ability to contribute to any political candidate or party in Pennsylvania by any individual who holds or has applied for a gaming license in Pennsylvania or in another [*583] jurisdiction, or who is a principal in such a gaming concern. DePaul claims that Section 1513's ban on political contributions is far broader than the contribution limitation upheld in Buckley, which merely restricted the amount of an individual's contribution, without barring contributions entirely. DePaul further notes that the Buckley decision has led to conflicting federal constitutional authority regarding the level of scrutiny to be applied to restrictions on political contributions.

No such conflict exists in Pennsylvania, [*15] according to DePaul. This is so because Pap's II suggests that this Court should apply a strict scrutiny standard where the restriction (here, a statute) is on expressive conduct. In Pap's II, this Court applied strict scrutiny to an ordinance which totally banned nudity in the City of Erie in any public place, holding that restrictions on expression or expressive conduct are subject to strict scrutiny when challenged under Article I, Section 7. Even if Pap's II did not explicitly establish that strict scrutiny applies to restrictions on political contributions, De Paul notes that the Court in that case certainly declined to apply an intermediate level of scrutiny to an Article I, Section 7 challenge due, in part, to the fact that the U.S. Supreme Court had been unable to reach a majority consensus respecting the level of scrutiny to be applied in similar federal challenges. Likewise, DePaul claims, the Supreme Court's decision in Buckley resulted in disagreement over the level of scrutiny that should apply to cases involving limitations on campaign contributions. 9 Given the similarity in circumstances, [*584] DePaul argues, this Court should reach the same conclusion that it reached in Pap's [*16] II, which is that strict [*543] scrutiny applies to Article I, Section 7 challenges to restrictions on political expression.

FOOTNOTES

9 According to DePaul, although the per curiam opinion in Buckley applied a strict scrutiny test, various Justices have questioned whether the High Court actually applies strict scrutiny when analyzing contribution limits. See Buckley, 424 U.S. at 245 (Burger, C.J., concurring and dissenting) (Court espouses strict scrutiny test but then forsakes strict scrutiny analysis by finding that Congress was "entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption"); Randall v. Sorrell, 548 U.S. 230, 264, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006) (Kennedy, J., dissenting) (Court has upheld campaign
contribution limitations that "do not even come close to passing any serious scrutiny" (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)); Randall, 548 U.S. at 267 (Thomas, J., concurring) ("I would overrule Buckley and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail."). The question of whether the U.S. Supreme [***17] Court truly requires, and employs, strict scrutiny in this area proves academic for, as we explain below, the test under Article I, Section 7 requires a strict scrutiny analysis.

DePaul next posits that Section 1513 cannot survive strict scrutiny because it is not narrowly drawn to accomplish a compelling state interest, as required by Pap's II. The Gaming Act, according to DePaul, was enacted without any investigation regarding whether the gaming industry, which is heavily regulated, posed any risk of political corruption or would be subject to any undue influence by individuals making political contributions. Thus, he concludes, there is no legislative record to support a compelling state interest in preventing actual corruption or the appearance of corruption arising from any and all political contributions. DePaul also takes issue with the Commonwealth's suggestion in its answer to the verified petition that the General Assembly could rely on the reported experience of other states with legalized gambling rather than creating a record of its own to support Pennsylvania's outright ban on political contributions. Specifically, DePaul points to the nineteen states other than Pennsylvania [***18] that have some form of legalized gaming or "racinos," only five of which have sought to ban political contributions from individuals involved in the gaming industry. 10

FOOTNOTES

10 The list of nineteen states DePaul cites does not include those with only tribal casinos, lotteries, pari-mutuel wagering, or charitable gaming.

11 DePaul cites to Indiana, Iowa, Louisiana, Michigan and New Jersey statutes banning political contributions by persons involved in the gaming industry. By contrast, he notes that Colorado, Delaware, Florida, Illinois, Maine, Mississippi, Missouri, Nevada, New Mexico, New York, Oklahoma, Rhode Island, South Dakota and West Virginia place no such bans. The City of St. Louis, Missouri, however, enacted an ordinance in 1995 prohibiting a holder of a gambling license from contributing to candidates for local office.

[*585] DePaul contends that, even if there is a compelling government interest in limiting or prohibiting political contributions from individuals involved in the gaming industry, Section 1513 is not narrowly tailored to further that interest. Specifically, DePaul argues that there are less intrusive means of serving the identified governmental interest of preventing corruption, [***19] given that Section 1513's ban is absolute and applies to all contributions regardless of the amount or whether the contributor is the licensee. DePaul suggests that there are obvious, less intrusive alternatives, such as imposing a limit on the amount of contributions, that would further the legislative intent while preserving the affected citizen's right to participate in political activity. In contrast, DePaul maintains,
Section 1513 entirely deprives an individual involved in the gaming industry of the freedom of political association. Further, DePaul argues that Section 1513's ban is overly broad because it prohibits contributions even where there is no connection between the recipient political candidate or association and the gaming industry.

For similar reasons, DePaul claims that Section 1513 violates the equal protection and non-discrimination clauses of the Pennsylvania Constitution (Article I, Sections 1 and 26) because it impinges on the fundamental right of freedom of expression. As such, DePaul urges this Court to apply strict scrutiny, a test which Section 1513 cannot survive because it is not narrowly tailored to serve a compelling state interest. Finally, DePaul argues [***20] that, even if this Court were to apply intermediate or heightened scrutiny, Section 1513 does not serve "important governmental interests" and "the discriminatory means employed" via the total ban are not "substantially [*544] related to the achievement of those objectives," citing Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 728, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003). This is so, DePaul argues, because the General Assembly failed to compile a record of evidence to justify an absolute ban on political contributions.

The Commonwealth argues in response that, while the right to make political contributions implicates Article I, Section 7, [*586] that right is not absolute and may be limited by appropriate legislation. The Commonwealth does not engage in an Edmunds analysis, except to suggest that Pap's II's holding that Article I, Section 7 offered broader protection of expression than the First Amendment does not mean that relevant First Amendment decisions of the U.S. Supreme Court and other jurisdictions on the issue of limitations on political contributions lose their instructive value. In the Commonwealth's view, these decisions, which "grappled with similar issues . . ., have sensible things to say about speech [***21] and association that can be helpful to the Court." Brief for Respondent at 10. Citing to Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 387-88, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000), and Buckley, the Commonwealth notes that the U.S. Supreme Court has found that limitations on the amount of money persons or groups may contribute do not substantially impair their right of free expression, so long as the government demonstrates that the contribution regulation was closely drawn to match a sufficiently important governmental interest.

The Commonwealth recognizes that its compelling government interest/narrowly drawn statute paradigm is substantially the same as Pap's II's strict scrutiny test. But, the Commonwealth argues, this statute survives such scrutiny. The Commonwealth maintains that the interest at issue is the prevention of public corruption and/or the appearance of public corruption that could result from permitting gaming licensees and highly placed gaming personnel to contribute to political parties, committees and candidates for public office, as well as maintaining public confidence in the proper regulation of the gaming industry. Again citing to Nixon, the Commonwealth claims that the Supreme Court [***22] there found limits on contributions to candidates for public office to be constitutional, recognizing the equal concerns of corruption and the impact of the appearance of corruption as both potentially affect public confidence in our system of government. 528 U.S. at 388-89. Those concerns, according to the Commonwealth, are present here where high-level [*587] participants in the gaming industry could contribute to the very public officials charged with the ultimate regulation of their
industry.

The Commonwealth looks to decisions from other jurisdictions considering federal First Amendment challenges that have found the government interest in banning contributions by certain individuals involved in the gaming industry to be compelling. See Petition of Soto, 236 N.J. Super. 303, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989), certif. denied, 121 N.J. 608, 583 A.2d 310 (N.J. 1990), cert. denied, 496 U.S. 937, 110 S. Ct. 3216, 110 L. Ed. 2d 664 (1990) (compelling government interest); Casino Ass’n of La. v. State ex rel. Foster, 820 So.2d 494 (La. 2002) (sufficiently important government interest). Further, the Commonwealth argues, it was unnecessary for the General Assembly to compile its own legislative findings respecting the important governmental interest at issue because other jurisdictions have generated studies on the same question, and the U.S. Supreme Court has found the experience of other jurisdictions to be relevant in evaluating freedom of expression challenges. Brief for Respondent at 9, (citing City of Erie v. Pap’s A.M., supra). The Commonwealth also notes that the link between the gaming industry and public corruption or the appearance of corruption is not novel. Thus, in Soto, the New Jersey Appellate Division found a compelling state interest in New Jersey’s blanket ban on political contributions by those involved in the gaming industry based upon “a longstanding and strong sensitivity to the evils traditionally associated with casino gambling when it is unregulated, and even when there is regulation, there is a continued sensitivity to the maintenance of the integrity of the process, and in particular, the regulatory process.” Soto, 565 A.2d at 1093.

The Commonwealth also asserts that Section 1513’s outright ban is narrowly drawn to further the government interest of preventing corruption or the appearance of corruption in the regulation of the gaming industry. Section 1513, according to the Commonwealth, does not reach conduct more traditionally regarded as speech, such as joining political committees and groups, participating in their activities, or speaking on public issues in support of candidates. The Commonwealth cites to Schiller Park Colonial Inn, Inc. v. Berz, 63 Ill. 2d 499, 349 N.E.2d 61 (Ill. 1979), where the Illinois Supreme Court sustained against a First Amendment challenge a state law prohibiting political contributions by liquor licensees, their agents or employees. That court rejected the same overbreadth argument now advanced by DePaul and found that it did not matter that the statute prohibited both large and small contributions. The Berz court reasoned that the Illinois Legislature may have believed that its efforts to further state interests in preventing corruption would have been less effective if only contributions above a specific dollar amount were prohibited. Id. at 66. Further, the court noted that the purpose of the law could be circumvented by licensees who financed a large number of small contributions. The Commonwealth argues that the same danger exists respecting contributions by individuals involved in the Pennsylvania gaming industry. The Commonwealth adds that the Illinois high court also rejected the argument that contributions to candidates who have no connection to gaming regulation should not be prohibited, finding that a public officer may wield power or influence beyond that which is inherent in his official duties. Id. at 67.

Finally, the Commonwealth argues that the Gaming Act does not discriminate against casino licensees or principals, etc. Because the test for an equal protection claim is essentially the same as a free speech claim -- whether there is a compelling state interest and the law is narrowly drawn to serve that interest
the Commonwealth contends that Section 1513 survives attack under both Article I, Section 7 and Article I, Section 26.

It is axiomatic that: HN6[F]"[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute 'clearly, palpably, and plainly' violates the Constitution." Konidaris v. Portnoff Law Associates, Ltd., 598 Pa. 55, 953 A.2d 1231, 1239 (Pa. 2008) (citation omitted). The presumption that legislative enactments are constitutional is strong. [*589] Commonwealth v. McMullen, 599 Pa. 435, 961 A.2d 842, 846 (Pa. 2008); see also 1 Pa.C.S. § 1922(3) [***26] (in ascertaining intent of General Assembly in enactment of statute, presumption exists that General Assembly did not intend to violate federal and state constitutions). All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster. [***546] Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 583 Pa. 275, 877 A.2d 383, 393 (Pa. 2005). Moreover, "statutes are to be construed whenever possible to uphold their constitutionality." In re William L., 477 Pa. 322, 383 A.2d 1228, 1231 (Pa. 1978). With these general principles in mind, we turn to the merits of the constitutional question at issue in this appeal.

Pap's II emphasized that the history of Article I, Section 7 in Pennsylvania is deep and the protections afforded freedom of expression by that provision longstanding:

HN7[F]The protections afforded by Article I, § 7 thus are distinct and firmly rooted in Pennsylvania history and experience. The provision is an ancestor, not a stepchild, of the First Amendment. Nor did Pennsylvania's protection of freedom of expression remain dormant until the First Amendment became applicable to the states. In addition to the fact that we must assume that Pennsylvania legislators, [***27] executives, and judges were all true to their oaths of fidelity to our Constitution, and thus were careful to guard against encroachment, this Court has not been hesitant to act to ensure these fundamental rights.

812 A.2d at 605. This Court has found that HN8[F]Article I, Section 7 provides broader protections of expression than the related First Amendment guarantee in a number of different contexts. See id. at 611-12 (nude dancing entitled to greater protection under Pennsylvania Constitution); Commonwealth, Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy, 556 Pa. 268, 728 A.2d 340, 343-44 (Pa. 1999) (commercial speech in form of advertising by chiropractors entitled to greater protection so long as not misleading); Ins. Adjustment Bureau v. Ins. Comm'r, 518 Pa. 210, 542 A.2d 1317, 1324 (Pa. 1988) [Article I, Section 7 does not allow prior restraint or other restriction of commercial speech by governmental agency [*590] where legitimate, important interests of government may be accomplished in less intrusive manner); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382, 1391 (Pa. 1981) (political leafletting on college campus deemed protected expression under Article I, Section 7 where First Amendment may not protect [***28] same); Goldman Theatres v. Dana, 405 Pa. 83, 173 A.2d 59, 64 (Pa. 1961), cert. denied, 368 U.S. 897, 82 S. Ct. 174, 7 L. Ed. 2d 93 (1961) (statute providing for censorship of motion pictures, while not necessarily violative of First Amendment, violates Article I, Section 7).
Pap's II also made clear that, when protected expression is at issue, strict scrutiny is the appropriate measure of a governmental restriction:

We also independently hold, pursuant to Article I, § 7, that an intermediate level of scrutiny, such as is set forth in [United States v.] O'Brien, [391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)], is inappropriate where expressive conduct such as the nude dancing at issue here is involved. Our experience in this case convinces us of the wisdom of our observations in Insurance Adjustment Bureau [v. Insurance Comm'r for Pennsylvania, 518 Pa. 210, 542 A.2d 1317 (Pa. 1988),] of the perils in the intermediate scrutiny test when protected expression is at issue. We conclude that regulations aimed at barring nude dancing, no less than regulations of protected commercial speech, require that we "tread carefully where restraints are imposed . . . if there are less intrusive, practicable methods available to effect legitimate, important government interests." 542 A.2d at 1324. [***29] Although the expression at issue here is not political speech [***547] (as it is not in the commercial speech arena), nevertheless we are satisfied that it is communication within the contemplation of Article I, § 7. It is hardly onerous to require that a regulation that would seek to govern such expression, offered in a closed establishment to consenting adult patrons, be accomplished by a narrower, less intrusive method than the total ban on expression adopted here.

Id. at 612; see also [*591] In re Condemnation by Urban Redevelopment Auth. of Pittsburgh, 590 Pa. 431, 913 A.2d 178, 189 (Pa. 2006) ("The Pap's II court decreed that whenever the government acts to effect such a complete ban on a certain type of expression, strict scrutiny must be applied regardless of whether the government's action was content-based."). Given this Court's extensive consideration of Article I, Section 7 under the Edmunds factors in Pap's II, and the fact that the Commonwealth does not dispute that the appropriate state constitutional test in this arena is strict scrutiny, there is no reason to engage in a full-blown Edmunds analysis here.

Preliminarily, we note that this Court has never explicitly addressed the question of whether [***30] political contributions constitute protected expression. The Commonwealth, however, does not dispute that the answer is affirmative, see Brief for Respondent at 9 ("DePaul's political contributions clearly implicate a right under Article I, § 7"), and we have no doubt that protected expression is implicated. In this regard, we note our agreement with the Commonwealth's argument that reference to First Amendment authority remains instructive in construing Article I, Section 7, and the First Amendment cases are of limited time in concluding that limitations upon political contributions implicate freedom of expression. Thus, in its discussion of the effect of limitations on the size of contributions, the U.S. Supreme Court in Buckley noted:

HN10A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's [***31] support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of
support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

[*592] Buckley, 424 U.S. at 20-21 (emphasis added). 12 13 Subsequent decisions [**548] of the High Court have recognized that HN1 limitations on campaign contributions implicate First Amendment expression rights. See Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000). For purposes of Article I, Section 7, we agree that political contributions are a form of non-verbal, protected expression. While such indirect expressions of view may not implicate the same heightened value as pure speech, it is also significant where the indirect expression being targeted is political. Accordingly, we hold that the instant legislative restriction upon the expressive conduct represented by political donations is subject to strict scrutiny.

FOOTNOTES

12 The Buckley Court went on to note that contribution and expenditure limitations -- which [***32] were the restrictions at issue in that case, not outright bans, as here -- "also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." Id. at 22.

13 Buckley was a per curiam decision, accompanied by five concurring and dissenting opinions (by Chief Justice Burger and Justices White, Marshall, Rehnquist and Blackmun); but notably, none of the responsive opinions addressed or disagreed with the notion that a political contribution constitutes expressive conduct.

We agree with the Commonwealth that consideration of the experience of other jurisdictions considering similar restrictions on expression may be helpful in assessing the importance of the asserted governmental interest and the relationship between the governmental interest itself and the means of advancing that interest. DePaul identifies nineteen states, in addition to Pennsylvania, with some form of legalized casino gambling, a number which does not include those states with only tribal casinos, lotteries, pari-mutuel wagering, [***33] or charitable gaming. There are eleven states (plus Pennsylvania) with commercial casinos: Colorado, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nevada, New Jersey, and South Dakota. Three of those states (Indiana, Iowa, Louisiana), like Pennsylvania, have approved "racinos" 14 as [*593] well as commercial casinos. The other eight states authorize racinos only: Delaware, Florida, Maine, New Mexico, New York, Oklahoma, Rhode Island, and West Virginia.

FOOTNOTES

14 A "racino" is a combined racetrack and casino.
The vast majority of these nineteen states -- fourteen: Colorado, Delaware, Florida, Illinois, Maine, Mississippi, Missouri, Nevada, New Mexico, New York, Oklahoma, Rhode Island, South Dakota and West Virginia -- do not regulate political contributions by individuals involved in the gaming industry. 15 The remaining five states have statutes banning specified individuals associated with the gaming industry from making political contributions in any amount. However, these states take different approaches concerning which people involved in the industry are subject to the total ban on political contributions.

FOOTNOTES


Three of the states with bans -- Indiana, Iowa and Louisiana -- are similar to Pennsylvania in that they have both commercial casinos and racinos, while the other two, Michigan and New Jersey, permit only commercial casinos. Indiana targets a fairly narrow spectrum of people -- owners, officers in a corporate entity with an ownership interest or licensees of a gaming entity -- and prohibits contributions to candidates for state or local office and committees organized by a candidate, political party or legislative caucus of the state house or senate. Ind. Code § 4-33-10-2.1. Michigan's ban is broader, as it covers licensees (and spouses, children and spouses of children) as well as officers, persons [*549] with [*35] an ownership interest or managerial employees of a licensee or casino enterprise. Michigan prohibits such persons from contributing to a candidate, political party committee, independent committee or legislative caucus committee. Mich. Comp. Laws § 432.207b. Iowa has a much narrower ban, as it applies only to riverboat [*594] gambling corporate licensees, and bans them from making contributions "to a candidate, political committee, candidate's committee, state statutory political committee, county statutory political committee, national political party, or fund-raising event." Iowa Code § 99F.6. New Jersey targets a narrow class of persons for its contribution ban. New Jersey's restriction encompasses applicants and holders of casino licenses and any holding, intermediary or subsidiary company of a licensee or applicant, as well as officers or directors and key or principal employees of a casino licensee or applicant or holding, intermediary or subsidiary company. N.J. Stat. Ann. § 5:12-138. Finally, Louisiana has the most comprehensive ban, as it encompasses casino and riverboat licensees, distributors/suppliers or manufacturers of gaming devices, any person who owns a casino or riverboat [*36] in or on which gaming activities are licensed, and any person who owns a direct or indirect interest in a casino or riverboat and any officer, director, trustee, partner, or senior management level employee or key employee of a licensee. All such persons are prohibited from contributing to a candidate or political committee. La. Rev. Stat. Ann. § 18:1505.2.
Of the five states that absolutely ban political contributions by gaming licensees and varying other individuals involved in the gaming industry, only two have produced appellate court decisions on the constitutionality of the bans: both the Supreme Court of Louisiana and the New Jersey Superior Court, Appellate Division, upheld the bans in the face of First Amendment challenges. Before considering those decisions, we note that the New Jersey ban would not apply to a person such as DePaul, who is neither the licensee, nor a casino officer, director, holding company or subsidiary, nor a key or principal employee of a casino, holding company or subsidiary. Rather, he is an individual who owns an interest in a business concern that owns an interest in the ownership of a planned casino. The Louisiana ban, on the other hand, would cover [***37] DePaul, as it targets those who hold interests, either direct or indirect, in companies that own casinos.

[*595] In the Louisiana case, Casino Association of Louisiana v. State ex rel. Foster, the plaintiffs filed a declaratory judgment action seeking a determination that Louisiana's statutory and regulatory scheme prohibiting campaign contributions was unconstitutional because it violated the First Amendment. The trial court agreed and declared the statutes and regulations to be unconstitutional. On appeal, the state Supreme Court reversed, finding that the statutory ban passed federal constitutional muster:

Restrictions on campaign contributions operate in an area protected by the First Amendment, particularly the right of freedom of association. However, a campaign contribution restriction, including a complete ban on campaign contributions, can withstand constitutional scrutiny if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. Thus, under Buckley and its progeny, we find that the campaign contribution restrictions on the riverboat and land-based casino gaming industries are closely drawn [***38] to match a sufficiently important interest in that they focus precisely on the problem of campaign [***550] contributions by the gaming industry -- the narrow aspect of political association where the actuality and potential for corruption have been identified -- while leaving such persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a substantial extent in supporting candidates and committees by making independent expenditures. Therefore, we find that the provisions of La. R.S. 18:1505.2(L) which prohibit riverboat and land-based casino gaming interests from making campaign contributions to candidates or to political committees of candidates do not violate the First Amendment.

820 So.2d at 509 (footnotes omitted). Thus, the Louisiana Supreme Court upheld a total ban on contributions by a broad group of individuals with interests in gaming, a group that would include investors such as DePaul.

[*596] In In re Petition of Soto, the New Jersey Superior Court, Appellate Division, likewise found that the state's ban on political contributions survived a First Amendment challenge because the statute served the compelling state [***39] interest in eliminating corruption in the gaming industry. The Soto court considered a more tailored statutory ban than the Foster court -- at issue was the restriction
applying to "casino key employees" -- and in its constitutional analysis, the Soto court emphasized that the ban was narrowly drawn:

We are satisfied that § 138 has been narrowly drawn and precisely tailored to serve the compelling interest of the State. § 138 is applicable only to casino key employees, who are defined as persons in a supervisory capacity or empowered to make discretionary decisions which regulate casino operations. N.J.S.A. 5:12-9. Such a select prohibition is more than justified by the overriding interest in protecting the governmental process from the infiltration of the casino influence. As previously noted, we should not "second-guess" the Legislature's judgment.

Id. at 1100 (emphases added) (footnote omitted).

Both the Louisiana and New Jersey courts applied a First Amendment strict scrutiny standard, and both courts ultimately concluded that the statute at issue was narrowly tailored to meet a compelling state interest. This Court applies the same basic test to challenges under Article I, Section 7 [***40] in order to pass strict scrutiny for Article I, Section 7 purposes, a statute must be "narrowly drawn to accomplish a compelling governmental interest." Pap's II, 812 A.2d at 596 (citing Pap's A.M. v. City of Erie, 553 Pa. 348, 719 A.2d 273 (Pa. 1998) ("Pap's I") and Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)). That this Court applies the same test, however, does not dictate that the result will be the same.

Like the courts in Foster and Soto, HN13 we have little doubt that legislative measures which attempt to minimize or eliminate corruption, or even the appearance of corruption, in the gaming industry involve a compelling state interest. Furthermore, [*597] we do not believe that, in targeting campaign contributions as a manner of minimizing the potential for corruption in the gaming industry, the General Assembly was obliged to conduct its own independent study of the issue, and make a full-blown legislative record, rather than relying upon the experience of other states with gaming. The Soto court, quoting from the New Jersey trial court's opinion, cogently articulated the obvious and inherent reasons why it is appropriate to attempt to eliminate even the [***41] appearance of [**551] corrupting influences in the gaming industry:

"As the history of this State's public policy towards casino gambling reflects, there has been a longstanding and strong sensitivity to the evils traditionally associated with casino gambling when it is unregulated, and even when there is regulation, there is a continued sensitivity to the maintenance of the integrity of the process, and in particular, the regulatory process.

As I pointed out earlier, when casino gambling was legalized here in New Jersey, it was only on the condition that it be strictly regulated and that the regulation that came out of it extended not only to the casinos but to the people who ran the casinos.

The Legislature recognized when it passed the Casino Control Act the limitation that the constitutional amendment carried with it and the Legislature recognized the concentration of wealth that exists with casinos and the disproportionate weight of that wealth, and how the casinos as a group or individually
can bring that to the political process. The Legislature recognized the need for maintaining the integrity of the regulatory process, not in just some abstract way, but because the acceptability of casino gambling in the State depends on strict regulation.

An equally important fact in that process is maintaining not just the actual integrity of the regulations but the appearance of the integrity that is needed because it is with that that the public confidence will continue and how the predicate to the legalization to gambling will exist.

[*598] Gambling is an activity rife with evil, so prepotent its mischief in terms of the public welfare and morality that it is governed directly by the Constitution itself. As expressed in the Casino Control Act, which implements the Constitution's gambling clause, it is the pronounced policy of the State to regulate and control the casino industry with the utmost strictness to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained."

Soto, 565 A.2d at 1093-94 (quoting unpublished trial court opinion) (emphasis added by Soto appellate court); see also Foster, 820 So.2d at 506-07.

**HN14** The fact that measures designed to eliminate the prospect and appearance of corruption in the gaming industry may reflect a compelling governmental interest does not mean that a particular form of regulation is required. [*43] And, as our survey of other states with gaming reveals, the approach to political contributions has not been uniform: the majority of states do not regulate that form of expression at all, while the states that do regulate the expression target different individuals and interests. In the absence of a specifically governing constitutional provision or other constitutional infirmity, it is for the legislative branch to determine, in the first instance, whether to address political contributions by those associated with gaming, and if so, the contours of the restriction. We do not doubt that, in targeting political contributions by persons connected with the nascent industry of gaming in Pennsylvania, the General Assembly sought to encourage confidence both in the legislative body which authorized the new industry and in the integrity of the industry itself. 16

**FOOTNOTES**

16 Notably, the Election Code requires disclosure of a candidate's contributions and expenditures. Specifically, all contributions to political candidates or committees must be reported where the candidate receives or expends in excess of $250, see 25 P.S. § 3246, and violations of the reporting requirements implicate civil and [*44] criminal penalties. See, e.g., 25 P.S. §§ 3257, 3260b, 3550.

[*552] Ultimately, what matters most for purposes of the constitutional challenge forwarded here is the specifics of the Pennsylvania legislation. And what is notable about that regulatory [*599] scheme is that, although the General Assembly did not produce the sort of legislative record DePaul believes it should have in order to establish a compelling governmental interest, the Legislature did include a detailed provision addressing "Legislative intent" in the Gaming Act, and that provision directly
addressed the issue of the corrupting influence of campaign contributions. Thus, Section 1102 begins by stating, "The General Assembly recognizes the following public policy purposes and declares that the following objectives of the Commonwealth are to be served by this part." 4 Pa.C.S. § 1102. A list of eleven objectives then follows, the first and last of which are relevant here:

HN16 The primary objective of this part to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful.

* * *

(11) It is necessary to [***45] maintain the integrity of the regulatory control and legislative oversight over the operation of slot machines in this Commonwealth; to prevent the actual or appearance of corruption that may result from large campaign contributions; ensure the bipartisan administration of this part; and avoid actions that may erode public confidence in the system of representative government.

Id. (emphases added). This statement of intent and purpose articulates a more narrow governmental interest than was at issue in Foster and Soto and requires that this Court engage in a correspondingly more precise measure of the means adopted to advance the identified interest. The General Assembly plainly stated that its intention in addressing the effect of campaign contributions was to prevent the corrupting influence or appearance resulting from large campaign contributions, not all campaign contributions.

The constitutional question, therefore, is whether Section 1513 is narrowly drawn to accomplish the compelling state interest of preventing the "actual or appearance of corruption" [*600] in the regulation of the gaming industry that might result from large campaign contributions. DePaul argues that Section 1513 [***46] is not narrowly tailored to further that interest because there are practicable, less intrusive means. Specifically, DePaul notes, a limit on the amount of contributions (such as was at issue in Buckley) would precisely forward the identified interest, and would preserve the citizen contributor’s right to participate in political activities through the expressive and associative conduct represented by donations. DePaul maintains that Section 1513 cannot survive constitutional scrutiny because it entirely deprives an individual involved in the gaming industry of this form of political association and expression, irrespective of whether a large contribution is at issue -- and even where there is no connection between a candidate and the gaming industry.

We agree. HN17 While the ban on political contributions does further the compelling state interest in avoiding the appearance of corruption in the oversight of the gaming industry, Section 1513 is not narrowly [*553] tailored. A statute that limited the size of contributions, rather than absolutely prohibiting any contributions, would be more narrowly drawn to accomplish the stated goal. Banning all contributions is not a narrowly drawn means of furthering [***47] a policy of negating the corrupting effect and appearance of large contributions. It totally bans a protected form of political expression and
association which is unrelated to the identified interest, and does so despite the availability of more narrowly tailored restrictions. The obvious disconnection between the articulated interest and the means chosen renders the ban constitutionally infirm under Article I, Section 7 as, in our judgment, it clearly, palpably and plainly violates that constitutional provision.

We do not dispute the power of the Commonwealth's policy arguments: e.g., its emphasis that the ban does not reach conduct more traditionally regarded as expression, such as joining political committees and groups, participating in their activities, speaking on public issues in support of candidates; and its argument, premised upon the Illinois Supreme Court's [*601] decision in Schiller Park, 63 Ill. 2d 499, 349 N.E.2d 61, that banning all political contributions is more effective in eliminating the appearance of corruption. These arguments, however, do not adequately come to terms with the specifics of this legislation. The General Assembly articulated a specific governing intention and purpose [*48] behind its decision to regulate campaign contributions, and the means it chose to effectuate that policy are not narrowly tailored to the interest expressed. The means chosen directly burden a constitutionally protected form of expression that is no less legitimate or important than other forms of expression. Our decisional task is not to determine if it is a better policy to ban all contributions Rather, we must accept the intention of the restriction as stated and apply the governing text; doing so, we are constrained to hold that the absolute ban on campaign contributions is unconstitutional.

DePaul's verified petition characterizes his challenge of Section 1513 as both facial and as-applied. Although the statute certainly was applied to DePaul, we view his challenge as properly implicating facial concerns as DePaul essentially argues that there exist no circumstances under which the statute, as written, would be valid. See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, ___ 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (law is facially unconstitutional where it appears no set of circumstances exists under which it would [*49] be valid and that law is unconstitutional in all of its applications)).

Where, as here, protected expression is at issue, both the U.S. Supreme Court and this Court have recognized that "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." Commonwealth v. Ickes, 582 Pa. 561, 873 A.2d 698, 702 (Pa. 2005) (quoting City of Chicago v. Morales, 527 U.S. 41, 52, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)); see also Wash State Grange, 128 S.Ct. at 1191 n.6 (same). Here, we have found a wholesale banning of [*50] political contributions to be impermissible when read in light of the legislative purpose of addressing the impact of large contributions on public confidence and trust. In this context, it is apparent that the scope of the impermissible effects, i.e., the banning of small contributions and/or contributions unlikely to affect public confidence, is quite substantial.

FOOTNOTES

17 DePaul also argues that Section 1513 runs afoul of Article I, Sections 1 and 26 because it unlawfully and irrationally discriminates against persons with a broad range of associations [*50] to licensed gaming, denying them the right to participate in the political process. Due to our resolution of DePaul's
challenge pursuant to Article I, Section 7, there is no need to address his distinct challenge under Article I, Sections 1 and 26.

[***554] For the foregoing reasons, we hold that HN19 Pa.C.S. § 1513 is in violation of Article I, Section 7 of the Pennsylvania Constitution and we enjoin its enforcement. 18

FOOTNOTES

18 DePaul’s challenge appears to encompass the entirety of Section 1513, although the focus necessarily is on subsection (a). We note that the other subsections appear intertwined with subsection (a) and designed, for the most part, to implement subsection (a). It does not appear that they can stand alone. Thus, subsection (a.1) prohibits indirect political contributions (those made to an association or organization that supports a candidate); subsection (a.2) establishes a website listing all applicants, licensees, licensees from other jurisdictions, affiliates, subsidiaries, holding companies, principals and key employees thereof and provides that any individual who acts in good faith and relies on the information contained in the website is not subject to penalty; subsection (b) [***51] requires an annual certification under oath by the chief executive officer or other appropriate individual of any applicant or licensee that the applicant or licensee has taken appropriate steps to prevent any violations of subsection (a) and that a good faith investigation has revealed no such violations; subsection (c) describes the penalties; and subsection (d) contains definitions.

Messrs. Justice Saylor, Eakin and Baer and Madame Justice Todd join the opinion.

Mr. Justice McCaffery files a dissenting opinion.

DISSENT BY: McCAFFERY

DISSENT

DISSENTING OPINION

MR. JUSTICE McCAFFERY

I agree with many of the majority opinion’s significant conclusions. I agree that Section 1513 of the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act") implicates the free speech rights protected by Article I, Section 7 of the Pennsylvania Constitution. See maj. slip op. at 17-18. I agree that the Pennsylvania Constitution requires that we apply strict scrutiny in our review of Section 1513. See maj. slip op. at 18. I agree that the Gaming Law measures, such as Section 1513,
designed to "attempt to minimize or eliminate corruption, or even the appearance of corruption, in the gaming industry involve a compelling [***52] state interest." See maj. slip op. at 22. I agree that the purpose of Section 1513 is "to encourage confidence both in the legislative body which authorized the new industry and the integrity of the industry itself." See maj. slip op. at 24. I agree that "in targeting campaign contributions as a manner of minimizing the potential for corruption ... the General Assembly was [not] obliged to conduct its own independent study of the issue ... [but could] rely] upon the experience of other states with gaming." See maj. slip op. at 22. In fact, I believe that the well-written majority opinion proceeds splendidly until its final pages, when it determines that the laudable and compelling state goal of Section 1513 to prohibit principals in the gaming industry from making political contributions is overbroad because it happens to conflict with one clause of several applicable "public policy purposes" articulated in Section 1102 of the Gaming Act. 2 I believe at this point in the opinion, the majority takes an erroneous path. Moreover, because I believe that Section 1513 is narrowly tailored to its compelling state purpose, [***555] has a "plainly legitimate sweep," 3 and is thus constitutional, I must [***53] respectfully dissent.

FOOTNOTES

1 4 Pa.C.S. § 1513.

2 4 Pa.C.S. § 1102.


Any exploration of the issue before us must hew to the following fundamental principles concerning constitutional challenges. "[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute [*604] 'clearly, palpably, and plainly' violates the Constitution." Konidaris v. Portnow Law Associates, Ltd., 598 Pa. 55, 953 A.2d 1231, 1239 (Pa. 2008) (emphasis added; citation omitted). The presumption that legislative enactments are constitutional is strong. Commonwealth v. McMullen, 599 Pa. 435, 961 A.2d 842, 846 (Pa. 2008); see also 1 Pa.C.S. § 1922(3) (providing that in ascertaining the intent of the General Assembly in the enactment of a statute, there is the presumption that the General Assembly did not intend to violate federal and state constitutions by enacting such legislation). All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster. Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 583 Pa. 275, 877 A.2d 383, 393 (Pa. 2005). [***54] Moreover, "statutes are to be construed whenever possible to uphold their constitutionality." In re William L., 477 Pa. 322, 383 A.2d 1228, 1231 (Pa. 1978) (emphasis added).

In my opinion, the approach taken by the majority in determining the constitutionality of Section 1513 is at odds with these principles. The majority declares Section 1513 invalid because it is not narrowly tailored to one of the many "public policy purposes" articulated in the Gaming Act, namely the goal that
the Gaming Act is "to prevent the actual [*605] or appearance of corruption that may result from large campaign contributions." 4 Pa.C.S. § 1102(11). However, this statement of principle is only one articulated goal in one of eleven subsections of Section 1102. In fact, the majority quotes and emphasizes several "public policy purposes" from Section 1102 as follows:

(1) The primary objective of this part to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful.

* * *

(11) It is necessary to maintain the integrity of the regulatory control and legislative oversight over the operation of slot [*655] machines in this Commonwealth; to prevent the actual or appearance of corruption that may result from large campaign contributions; ensure the bipartisan administration of this part; and avoid actions that may erode public confidence in the system of representative government.

Maj. slip. op. at 24 (emphasis in original; quoting 4 Pa.C.S. § 1102(1), (11)).

The fact that the majority emphasizes several goals from Section 1102, not simply the goal concerning "large contributions," indicates that the majority believes that these goals are applicable to and potentially supportive of Section 1513. I would certainly agree. In fact, I believe that Section 1513's prohibition on political contributions by gaming industry principals can safely be interpreted as a requisite means to "avoid actions that may erode public confidence in the system of representative [*556] government." 4 Pa.C.S. § 1102(11). Moreover, the General Assembly indicated that its primary goal, to which all others are secondary, including the one concerning large campaign contributions, is "to protect the public through the regulation and policing of all activities involving gaming." 4 Pa.C.S. § 1102(1). I believe Section 1513 falls [*556] under the blanket of that goal as well.

FOOTNOTES

4 Arguably, the "public policy purpose" set forth in Section 1102(7) also applies. That section deems the participation in authorized gaming to be a "privilege, conditioned upon the proper and continued qualification of the licensee or permittee...." 4 Pa.C.S. § 1102(7) (emphasis added). Section 1513(c) provides that certain violations of that section shall result in suspension or revocation of the gaming license. Additionally, Section 1102(8) provides that there shall be strict monitoring and enforcement control over all aspects of gaming authorized by the provisions of the Gaming Act "through regulation, licensing and appropriate enforcement actions of specified locations, persons, associations, practices, activities, licensees and permittees." 4 Pa.C.S. § 1102(8) (emphasis added). I believe that Section 1513 falls under the ambit of this policy purpose as well.
The fact that the General Assembly articulated a concern regarding "the actual or appearance of corruption that may result from large campaign contributions," does not mean that the General Assembly was not additionally concerned with the corrupting connection, whether actual or apparent, [***57] between politics in this Commonwealth and all monetary contributions of gaming industry principals. Section 1513 [*606] does not merely prohibit campaign contributions. That section, entitled "Political influence," eliminates all contributions by gaming industry principals to candidates, political party committees, other political committees, or related organizations. Also eliminated are "political contribution[s] ... to any association or organization, including a nonprofit organization, that has been solicited by, or knowing that the contribution or a portion thereof will be contributed to, the elected official, executive-level public employee or candidate for nomination or election to a public office in this Commonwealth." 4 Pa.C.S. § 1513(a.1) (emphasis added).

That Section 1513 exists at all, is, in my opinion, conclusive proof that the General Assembly was concerned with more than the corrupting influence or the appearance of a corrupting influence of large campaign contributions. We must presume that the General Assembly intends that the entire statute is "to be effective and certain." 1 Pa.C.S. § 1922. Further, even if there is a conflict between Section 1513 and one of the stated "public [***58] policy purposes" of Section 1102, which I believe does not exist for the above and other reasons, 5 we must [**557] observe the rule that the particular controls the general. "Whenever a general provision in a statute shall [*607] be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision...." 1 Pa.C.S. § 1933. In other words, we are required to presume the General Assembly knew exactly what it was doing when it promulgated Section 1513, notwithstanding any articulated public policy provision that superficially seems to be in conflict with the actual legislation.

FOOTNOTES

5 Even if we directly compare Section 1513 with the public policy purpose that the Gaming Act is "to prevent the actual or appearance of corruption that may result from large campaign contributions," it is not a certainty that these two provisions are in conflict. The majority opinion never explored what the General Assembly meant by "large campaign contributions." Because the majority holds [***59] that Section 1513 could be more narrowly tailored to permit "less than" large campaign contributions, it seems to regard the matter of large campaign contributions as one involving a single contribution from a single source, such as Petitioner herein. That is, a large campaign contribution is one that emanates from one gaming industry principal. However, the actual or apparent corrupting influence of large campaign contributions can also be viewed as being accomplished by the cumulative effect of many small contributions coming from the many gaming industry principals throughout the state. Indeed, this interpretation is suggested by Section 1513's explicit prohibition of many seemingly small contributions. See infra n.6. Ultimately, even if there is a conflict in the Gaming Act under one possibility, we are required, whenever possible, to construe a statute in a manner that upholds its constitutionality, i.e.,
where another possibility supports the validity of the statute. See In re William L., supra at 1231.

Boiled down to its essence, however, the majority opinion declares Section 1513 invalid on the grounds that the General Assembly somehow "forgot" that in promulgating Section 1513 [***60] (a detailed, clear and specific piece of legislation), it was concerned only with addressing the issue of "large campaign contributions." 6 I cannot support such an analysis, one that, I respectfully suggest, flies in the face of a plain reading of the Gaming Act, applicable rules of statutory construction, and the fundamental and controlling principles of law that make invalidating a statute on constitutional grounds a more strenuous exercise than that followed by the majority. Moreover, I fear [*608] that the manner by which the majority invalidates Section 1513 will cause confusion for our lower courts when in the future they are required to review the constitutionality of legislation. Statements of public policy or legislative intent in statutes (when they exist at all) aid the courts in interpreting statutes. If an act is completely at odds with the stated purpose of the legislation, that is one thing. However, where we can easily view a piece of legislation as being in harmony with at least some of the stated purposes of the governing act, I do not see how our stringent principles of constitutional review, which impose a strong presumption of constitutionality on acts of legislation [***61] and require the courts to, if at all possible, uphold the constitutionality of a statute, permit us to use the path taken by the majority in this case. It is imperative that a request for judicial interference "with the process by which the General Assembly enacts laws" be approached with "trepidation." Pennsylvanians Against Gambling, supra at 404.

FOOTNOTES

6 Indeed, the detailed and nuanced thought devoted to Section 1513 by the General Assembly is clear simply from a perusal of its definition of "contribution," as follows:

"Contribution." Any payment, gift, subscription, assessment, contract, payment for services, dues, loan, forbearance, advance or deposit of money or any valuable thing made to a candidate or political committee for the purpose of influencing any election in this Commonwealth or for paying debts incurred by or for a candidate or committee before or after any election. The term shall include the purchase of tickets for events including dinners, luncheons, rallies and other fundraising events; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal [***62] basis to all candidates for the same office; and any payments provided for the benefit of any candidate, including payments for the services of a person serving as an agent of a candidate or committee by a person other than the candidate or committee or person whose expenditures the candidate or committee must report. The term also includes any receipt or use of anything of value received by a political committee from another political committee and also includes any return on investments by a political committee.

4 Pa.C.S. § 1513(d).
Accordingly, in order to resolve the case before us, I believe we must directly address the constitutionality of Section 1513 based on its provisions, i.e., we must decide whether a total prohibition of political contributions by gaming industry principals is violative of the Pennsylvania Constitution. Thus, unlike the majority, I would apply a full Edmunds analysis to the issue. Further, as outlined below, I believe that such analysis leads to the conclusion that Section 1513 survives constitutional scrutiny.

FOOTNOTES

7 As the majority observes, the critical constitutional provision at issue states: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Pa. Const. art. I, § 7.

8 Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (Pa.1991). The four Edmunds inquiries devised to facilitate a principled consideration of state constitutional doctrine pertain to: (1) the text of the provision of our Constitution; (2) the history of the provision, including the case law of this Commonwealth; (3) relevant case law from other jurisdictions; and (4) policy considerations, "including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." Id. at 895.

The majority opinion actually starts upon an Edmunds analysis by (1) articulating the text of the relevant constitutional provision (Article 1, Section 7); (2) briefly reviewing the history of the provision and relevant case law; and (3) making a limited review of relevant case law from other jurisdictions. But the majority has limited its review of relevant case law from other jurisdictions to cases involving bans on political contributions from persons involved in the gaming industry. However, all case law involving bans or limits on political contributions from whatever source (e.g., from lobbyists) is relevant to our inquiry. Constitutional free speech and association guarantees do not carve out unique considerations for persons involved in the gaming industry. Further, the majority does not engage in the final Edmunds area of inquiry: "policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."

The majority correctly concludes that the Commonwealth has a compelling state interest in eliminating actual or the appearance of corruption connected with political contributions from gaming industry principals, based on what appears to be the majority's adoption of the able and relevant analysis of the Louisiana Supreme Court 9 and the New Jersey Superior Court, Appellate Division. Maj. slip op. at 22-23. Further, the majority appears to find the compelling state interest requirement of a strict scrutiny analysis to be substantially similar to the "exact scrutiny" or "closely drawn" standard applicable to First Amendment challenges to similar bans on political contributions. See maj. slip op. at 12; see also Buckley v. Valeo, 424 U.S. 1, 15-29, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (**65) (per curiam)
(upholding under the First Amendment political contribution limits imposed by the Federal Election Campaign Act of 1971 under an "exactng scrutiny" standard); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 387-88, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000) (determining that political contribution limits that involve significant interference with free association rights under the First Amendment can survive if the government [*610] can demonstrate that the contribution limit is "closely drawn" to match a sufficiently important government interest). 11

FOOTNOTES


11 However, as Petitioner notes, there is some disagreement as to whether the standard articulated in Buckley, or as applied in subsequent case law, equates to "strict scrutiny." See, e.g., Randall v. Sorrell, 548 U.S. 230, 266-67, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006) (Thomas, J. concurring) ("I would overrule Buckley and subject both the contribution and expenditure restrictions ... to strict scrutiny...."); see also maj. slip op. at 10 n.9. [***66] Notwithstanding, we must, as noted by the majority herein, apply a strict scrutiny standard in this case. See Pap's A.M. v. City of Erie, 571 Pa. 375, 812 A.2d 591, 605-12 (Pa. 2002).

[**559] Of particular significance to our review is the fact that a ban or limitation on political monetary contributions has only an indirect and typically a marginal impact on free speech and association rights.

[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. ... While contributions may result in political expression if spent by a candidate or an association to present views to the voters, [***67] the transformation of contributions into political debate involves speech by someone other than the contributor.

Buckley, supra at 20-21 (footnote omitted); see also Nixon, supra at 386-87 (quoting Buckley, supra at 20-21); and California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 196 n.16, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981) (stating that political contributions are merely an "attenuated form of speech").
[*611] Section 1513’s prohibition on political contributions does not prevent any gaming industry principal from exercising other more direct rights of free political speech or association. For example, Section 1513 does not prohibit the public endorsement of a candidate, cause, or issue; giving of one’s time to a political cause; erection of lawn signs or handing out political materials; participation at the polls; providing advice to a candidate or to any voters willing to listen; or the engagement in other like forms of expression and association. Thus, Section 1513, at most, infringes upon an "attenuated form of speech." California Medical Ass’n, supra at 196 n.16.

On the other side of the equation, it must be recognized that political contribution limits and bans, although imposing some restrictions on [***68] the free exercise of political expression and association, provide significant value to the electoral process by protecting the integrity of the system, which in turn, encourages greater political participation. As the United States Supreme Court explained:

Because the electoral process is the very means through which a free society democratically translates political speech into concrete governmental action, contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate. For that reason, when reviewing [a legislature’s] decision to enact contribution limits ... [courts should afford] deference to [the legislature’s] ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.


As the majority notes, Section 1513 was devised "to encourage confidence both in the legislative body which authorized the new industry [and by extension, the integrity of the political process] and the integrity of the industry [***69] itself." Maj. slip op. at 24. Certainly, our General [***612] Assembly had the "particular expertise" to evaluate the necessity of a complete ban as opposed to a lesser limitation on political contributions by gaming industry principals. The question is whether the General Assembly's determination is sufficiently "narrowly tailored" (maj. slip op. at 25) to accomplish its compelling and obvious state interest in preserving the integrity of the political process and of the gaming industry itself without causing unnecessary infringement on free speech and association rights under the Pennsylvania Constitution. This inquiry has three components: (1) whether the class of persons banned from making political contributions is narrowly drawn; (2) whether the class of persons who will be deprived of contributions by the ban (i.e., candidates, political committees, or other related organizations) is narrowly drawn; and (3) whether a ban on contributions as opposed to a limitation upon them is necessary to achieve the Commonwealth's legitimate, compelling state interest.

With respect to the first component, the majority appears to be satisfied that the class of individuals banned from making political [***70] contributions by Section 1513 is sufficiently narrow to withstand constitutional strict scrutiny. See maj. slip op. at 21-22, emphasizing portions of In re Petition of Soto,
236 N.J. Super. 303, 565 A.2d 1088, 1100 (N.J. Super. Ct. App. Div. 1989), certif. denied, 121 N.J. 608, 583 A.2d 310 (N.J. 1990), cert. denied 496 U.S. 937, 110 S. Ct. 3216, 110 L. Ed. 2d 664 (1990). Soto upheld New Jersey's ban on political contributions by "key" casino employees. I certainly agree with the majority, and with the supporting analysis of Soto, that the class of individuals prohibited from making political contributions by Section 1513 has been narrowly drawn by the General Assembly to meet its compelling state interest. Thus, I believe that the aspect of Section 1513 concerning the class of gaming industry principals survives strict scrutiny.

With respect to the second component, the majority appears to agree with Petitioner's argument that Section 1513 cannot survive strict scrutiny because that section's blanket prohibition of political contributions includes persons running for political office that have "no connection ... [with] the gaming [*613] industry." Maj. slip op. at 25. I must disagree. Petitioner's argument ignores the reality of party politics and the fungible [***71] nature of money. One need not contribute only to party leaders to achieve certain political goals or give rise to the appearance of corruption or favoritism. The same result may be achieved or arise if an individual spreads political contributions among a party's slate of candidates for minor political posts. By contributing to "minor" political candidates, an individual still curries favor with the party and allows the party to more freely direct its thus enlarged larger pot of money toward the attainment of more significant elected offices. In other words, the contributed money could still benefit those with influence over the regulation of the gaming industry in this Commonwealth, even though initially directed to a candidate for, say, register of wills or local sheriff.

Further, I find fully persuasive the analysis of the New Jersey Superior Court, Appellate Division with respect to the importance of prohibiting gaming industry [**561] political contributions to all political parties or their candidates.

Political parties are institutions of very great importance under our form of government. They are, in fact, the effective instrumentalities by which the will of the people may be made vocal, [***72] and the enactment of laws in accordance therewith made possible. So potent have they become in administering the affairs of government that they are now regarded as inseparable from, if not essential to, a republican form of government, ... and as a necessary adjunct to representative government. They are imbued with a quasi-governmental character.

Political parties have come to be regarded by the courts as governmental agencies through which the sovereign power is exercised by the people. The conception that a political party is merely a private association of citizens has been generally abandoned. In most jurisdictions the state has seen fit to declare that political parties shall be, as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies whose methods are to be controlled by the state.

[*614] The compelling state interest in maintaining the integrity of political parties and organizations from undue influence by those individuals who, by the very nature of their employment, play a pivotal role in the casino industry justifies upholding the restrictions found in [the New Jersey legislation].
Soto, supra at 1097-98 (citations omitted). Further, [***73] the New Jersey court relevantly determined:

Nor do we find the statute overbroad because it prohibits contributions to any political candidate and committee within the State regardless of whether the particular office or committee has anything to do with casino regulation. This argument was answered in Schiller Park [Colonial Inn, Inc. v. Berz, 63 Ill. 2d 499, 349 N.E.2d 61, 67 (111. 1976)], where the Illinois [Supreme] Court stated that '[i]t is difficult and probably impossible to determine precisely which officeholders will be in a position to exercise influence in the area of liquor regulation.' ... As noted above, the Schiller Park court observed that '[t]he nature of our political system and past history suggests that political officials or public officers may wield powers or possess influence beyond the powers and influence inherent in their official duties.' [id.]

Soto, supra at 1100.

Thus, because of the importance and influence of political parties, indeed their "quasi-governmental character," I believe that a prohibition on contributions to even "minor" and purportedly "unconnected-to-gaming-issues" candidates narrowly meets the General Assembly's compelling state goal of preventing the appearance [***74] of, or actual, corruption that is associated with political contributions from gaming industry principals. Accordingly, unlike the majority, I find Petitioner's argument to be without merit.

With respect to the last component, I believe that a ban as opposed to a limitation on political contributions withstands constitutional strict scrutiny as well. First, I note that there is no per se rule among our sister courts that bans on political contributions, rather than limits, are unconstitutional. See [*615] Green Party of Connecticut v. Garfield, 590 F.Supp. 2d 288, 310 (D.Conn. 2008) ("Courts that have had the opportunity to examine bans on contributions from selected groups, including lobbyists ... have rejected the argument that bans are per se unconstitutional simply because they are 'bans' and not merely 'limits' on contributions." (citing numerous examples)). Further, I note that, in an [**562] opinion that would, unlike this Court, apply less than strict scrutiny, the United States Supreme Court rejected the argument that courts should apply a stricter form of scrutiny when reviewing legislative bans on political contributions than when reviewing legislative limitations on political contributions, [***75] noting that "the level of scrutiny is based [not on whether there is a ban or simply a limitation on contributions, but] on the importance of the political activity at issue to effective speech or political association." Federal Election Comm'n v. Beaumont, 539 U.S. 146, 161, 123 S. Ct. 2200, 156 L. Ed. 2d 179 (2003) (quotation marks omitted).

Second, as the majority opinion notes, New Jersey and Louisiana courts have upheld the constitutionality of bans on political contributions by gaming industry principals. Soto, supra; Casino Ass'n of La. v. State ex rel. Foster, 820 So.2d 494 (La. 2002), cert. denied 537 U.S. 1226, 123 S. Ct. 1252, 154 L. Ed. 2d 1087 (2003). Other courts have also upheld bans on political contributions by those in other industries. See, e.g., Schiller Park, supra (ban on contributions by holders of liquor licenses or principals of a liquor licensee); Green Party of Connecticut, supra (ban on contributions by lobbyists,
state contractors, and their immediate family members); Mariani v. United States, 212 F.3d 761 (3d Cir. 2000) (en banc) (ban on corporate hard money contributions). This is by no means an exhaustive list, and other courts have come to different conclusions. 12 However, at the root of those decisions upholding [*616] bans on [***76] contributions and rejecting the argument that limitations would be more narrowly tailored to accomplish the state's interests, is the determination that the critical need to dispel even the appearance of corruption restrains courts from "second-guess[ing] a legislative determination as to the need for prophylactic measures where corruption is the evil feared." Soto, supra at 1098 (quoting FEC v. National Right to Work Committee, 459 U.S. 197, 210, 103 S. Ct. 552, 74 L. Ed. 2d 364 (U.S. 1982)). As the New Jersey Superior Court, Appellate Division determined, apropos to the particular issue before this Court:

Given the acknowledged vulnerability of the casino industry to organized crime and the compelling interest in maintaining the public trust, not only in the casino industry but also the governmental process which so closely regulates it, ... there is no viable alternative available [to a ban rather than a limitation on political contributions] to prevent the appearance of, or actual, corruption of the political process in New Jersey. ... [P]ublic perception that any improper influence has infiltrated the regulatory and judicial processes, however slightly, would undermine the trust that is essential to continued confidence [***77] in the industry and, what is more important, in state government.

Id. (citations and quotation marks omitted; emphasis added).

FOOTNOTES

12 E.g., Fair Political Practices Commission v. Superior Court of Los Angeles County, 25 Cal. 3d 33, 157 Cal. Rptr. 855, 599 P.2d 46, 53 (Cal. 1979) (holding that governmental interests warranting substantial restrictions on political rights have no greater application to lobbyists than to other private campaign contributors; thus, a ban on political contributions by lobbyists is invalid because it is not "closely drawn to avoid unnecessary abridgment of associational freedoms.") (quoting Buckley, supra at 25)).

Further, we should not overlook the fact that a mere limitation on political contributions, rather than a ban, may undercut the compelling state purpose of the legislation because many accumulated small contributions may be able to achieve the evil that the legislature was trying to prevent. [**563] As the Illinois Supreme Court sagely observed, with respect to challenged legislation banning political contributions by liquor licensees and their principals:

We agree that it is large campaign contributions which are most likely to create a danger that liquor licensees or other individuals in the liquor [***78] business may obtain a degree of influence over public officials. The General Assembly may reasonably have believed, however, that its efforts to further the relevant State interests would have been much less [*617] effective if only contributions above a certain amount were prohibited. It is possible that a liquor licensee could circumvent a law proscribing only large contributions by financing a large number of small contributions ostensibly given by his friends and associates. Also, if many liquor licensees acted in concert and each made a small
contribution to a particular candidate, it is conceivable that they could, as a group, accomplish what section 12a of the Liquor Control Act was intended to prevent. We therefore hold that section 12a is not rendered unconstitutional by the fact that it prohibits small political contributions as well as large contributions.

Schiller Park, supra at 66 (emphasis added).

I find quite persuasive the analyses of these foreign jurisdictions and believe that they should play a significant role in our review, even though some of these decisions applied a lesser standard than strict scrutiny. The fundamental wisdom underlying these decisions is, in my opinion, [***79] impeccable and completely in accord with the strong presumption of constitutionality that we are to afford the acts of our General Assembly. Thus, because I believe that "members of the General Assembly are the best-positioned to determine the role that campaign contributions play on their personal decision-making process" (Green Party of Connecticut, 590 F.Supp. 2d at 326), and because even small contributions may give rise to the evil that the General Assembly intended to prevent by the enactment of Section 1513, I would conclude that Section 1513's ban on political contributions is narrowly drawn and tailored to the clear and compelling government interests in this case.

Further, the fact that the decisions of foreign jurisdictions upholding bans on contributions rely so strongly on the very real threat or appearance of corruption, makes an analysis under the fourth Edmunds prong all the more critical. That prong requires an inquiry into "policy considerations, including unique issues of state and local concern, and [their] applicability within modern Pennsylvania jurisprudence." Edmunds, 586 A.2d at 895 (quotation marks omitted). Certainly, many of the policy considerations articulated [***80] in Soto and other [*618] foreign jurisdiction cases have equal applicability to this case, as the above analysis makes clear. However, Edmunds also requires that we examine policy matters peculiar to our state and local concerns.

The controversy surrounding the Commonwealth's venture into gaming is no secret. The General Assembly did not enact the Gaming Act because it believed the citizens of this Commonwealth were starved for entertainment. 13 Gaming was enacted to create jobs, assist the horse racing industry, promote commerce and tourism, provide tax relief, and raise revenue, [***564] particularly in an era where it has proven difficult to raise revenue by other means. See 4 Pa.C.S. § 1102(2)-(6). In authorizing gaming, the General Assembly knowingly legitimized an activity "rife with evil," in the words of the New Jersey Supreme Court, 14 and fraught with the possibility that the Commonwealth would unwittingly become partnered with criminals. 15 Further, whatever financial benefit there is to be derived from gaming, the potential collateral social ills of this activity are certainly well known and of obvious concern to the citizens of this Commonwealth. Thus, it is of little surprise that the [***81] General Assembly articulated multiple "public policy purposes" emphasizing the need for close and exacting regulation of the gaming industry in order to achieve the General Assembly's primary goal of protecting the public. 4 Pa.C.S. § 1102(1), (5), (7)-(11).

FOOTNOTES
13 However, the General Assembly did note an entertainment value to gaming. 4 Pa.C.S. § 1102(2).


15 See Soto, supra at 1098.

"The importance of the governmental interest in preventing [corruption of elected representatives through the creation of political debts] has never been doubted." First National Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). Further, preventing the perception of corruption is an equally compelling state interest. Buckley, supra at 27; Nixon, supra at 389-90; McConnell, supra at 143, 150. Indeed, Section 1102(11), quoted earlier in this dissenting [*619] opinion and in the majority opinion, as a whole reflects these compelling state interests. In an era when recent actions by the General Assembly have engendered considerable controversy, where "pay to play" is a commonly known expression, and where public officials of high office have found themselves [****82] subject to federal corruption prosecutions, the necessity for the General Assembly to make every effort and to take every step to avoid even the appearance of corruption in the highly-charged theater of publicly-sanctioned "gaming" is apparent. I believe that the public requires no less than the protections provided by Section 1513.

Here, where Section 1513's limitation on free speech and association rights involves only an "attenuated" form of speech and association, permitting the free expression of other, more direct, and wide-ranging forms of speech and association; where the classes of persons affected by the infringement are narrowly drawn and reasonably defined; where the Commonwealth's interests are indeed compelling; and where the General Assembly is in the best position to determine whether a ban rather than a limitation on contributions satisfies its compelling interests, I believe that Section 1513 survives a constitutional review based on the strictest scrutiny. 16 In my opinion, there is no support for the conclusion that Section 1513 "clearly, palpably, and plainly" violates the Constitution." Konidaris, 953 A.2d at 1239. Accordingly, I dissent.

FOOTNOTES

16 Neither is Petitioner [****83] entitled to relief under his Article 1, Sections 20 and 26 claims. I believe that Petitioner's discrimination argument (Section 26) is weak. Moreover, as the majority notes, Petitioner's Section 20 argument is undeveloped and "subsumed within his argument related to Article 1, Section 7." Maj. slip op. at 7-8 n.8.
COMMONWEALTH OF PENNSYLVANIA, Appellee v. DONALD ROBERT CONKLIN, Appellant

No. 5 MAP 2005

SUPREME COURT OF PENNSYLVANIA

587 Pa. 140; 897 A.2d 1168; 2006 Pa. LEXIS 831

May 17, 2005, Argued

May 24, 2006, Decided


COUNSEL: For Donald Robert Conklin, APPELLANT: Scott B. Bennett, Esq., Jeffrey J. Wander, Esq.


For Sexual Offender Assessment Board, APPELLEE AMICUS CURIAE: John Craig Manning, Esq.

JUDGES: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ. MR. JUSTICE CASTILLE. Mr. Chief Justice Cappy, Madame Justice Newman and Messrs. Justice Saylor and Eakin join the opinion. Former Justice Nigro did not participate in the decision of this matter. Mr. Justice Baer files a concurring opinion.

OPINION BY: CASTILLE
OPINION

[*142] [**1169] MR. JUSTICE CASTILLE

Recently, in Commonwealth v. Dengler, 586 Pa. 54, 890 A.2d 372 (Pa. 2005), this Court held that expert testimony proffered in a Megan's Law II hearing to determine if a defendant is a sexually violent predator ("SVP") is not subject to the Pennsylvania test for admissibility of novel scientific testimony derived from Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). In the case sub judice, this Court granted review to consider a separate question concerning the contours of an SVP hearing under Megan's Law II: "Whether the Commonwealth, as part of its burden of proof [***2] in a proceeding to determine whether an individual is a sexually violent predator, must present evidence, in the form of a clinical diagnosis by a licensed psychologist or psychiatrist, that the individual suffers from a personality disorder or mental abnormality that makes the person likely to engage in predatory sexually violent offenses?" Commonwealth v. Conklin, 581 Pa. 622, 867 A.2d 1261 (Pa. 2005) (per curiam). The lower courts found that the licensed clinical social worker who testified in the SVP hearing in this case, though not a licensed psychologist or psychiatrist, nevertheless was qualified to offer opinion testimony on the question of whether appellant was an SVP because the clinical social worker qualified as a criminal justice expert and the statute [*143] requires no more. We agree with the lower courts' interpretation of the statutory requirement, and we therefore affirm.

FOOTNOTES

1 Act of May 10, 2000, P.L. 74, No. 18 (as amended), 42 Pa. C.S. § 9791 et seq.

[***3] Appellant and his ex-wife, who are the parents of the minor victim, separated in January of 2001 and divorced in September of 2001. In March of 2002, the victim, who was then nine years old, informed her mother that appellant had been sexually abusing her for approximately three years. Appellant subsequently was arrested and charged with various sexual offenses. At appellant's trial, the child testified that the sexual assaults began when she was six years old and included repeated acts of rape and involuntary deviate sexual intercourse.

On March 19, 2003, following a jury trial before the Honorable Robert J. Conway, appellant was found guilty of rape, 2 involuntary deviate sexual intercourse, 3 aggravated indecent assault, 4 incest, 5 indecent [***1170] assault, 6 indecent exposure 7 and corruption of a minor. 8 Appellant's convictions qualified him as subject to the registration and notification provisions of Megan's Law II, and also required a determination of whether he was an SVP, which would expose him to additional measures. HN1 The Act defines a "sexually violent predator," in relevant part, as "[a] person who has been convicted of a sexually violent offense as set forth in [***4] section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due
to a mental abnormality or personality disorder that makes the person likely to engage in predatory
sexually violent offenses." 42 Pa.C.S. § 9792. 9

FOOTNOTES

2 18 Pa.C.S. § 3121.

3 18 Pa.C.S. § 3123.

4 18 Pa.C.S. § 3125.

5 18 Pa.C.S. § 4302.

6 18 Pa.C.S. § 3126.

7 18 Pa.C.S. § 3127.

8 18 Pa.C.S. § 6301.

9 This Court has described the operation of Megan's Law II in some detail in both Dengler, see 890 A.2d
at 374-75 & nn. 2 & 3 and Commonwealth v. Williams, 574 Pa. 487, 832 A.2d 962, 965-68 & nn. 6, 8-12
(Pa. 2003). For purposes of deciding the narrow question accepted for review here, we need not repeat
that description.

[***5] [**144] In accordance with the Act, after receiving the verdict Judge Conway directed the State
Sexual Offender Assessment Board to perform an SVP assessment of appellant. David Humphreys, a
licensed clinical social worker and member of the Board, conducted the assessment and prepared a
written report in which he concluded, to a reasonable degree of professional certainty, that appellant
met the statutory criteria for classification as an SVP. Within the report, Humphreys described the
records he had consulted as well as his interview with appellant, and then went on to discuss and apply
the statutory criteria relevant to assessing SVP status, which included an evaluation of "[f]actors related
to mental illness, mental disability or mental abnormality." Humphreys opined that appellant's behavior
and his presentation during his interview indicated that he had a "form of pedophilia, which has been
limited to incest," as well as an anti-social personality disorder, both of which were exacerbated by
alcoholism. Humphreys described the reasons why his "diagnostic impressions" in this regard led him to
conclude that appellant "does have a mental abnormality which appears to be both a
congenital [***6] and/or an acquired condition of [appellant] that affects his emotional and volitional
capacity ... in a manner that predisposes [appellant] to the commission of criminal sexual acts to the
degree that makes [appellant] a menace to the health and safety of other persons." Offender
Evaluation, 11-12. Humphreys also explained why he believed appellant's behavior was predatory.
On August 12, 2003, the trial court conducted an SVP hearing, at which the Commonwealth called Humphreys to testify as an expert. With respect to his qualifications, Humphreys testified that he had Bachelor's degrees in both psychology and sociology, as well as a Master's degree in social work; that he had been a member of the Sexual Offender Assessment Board since 1997; that he had seventeen years of experience as a social worker, all of which involved working with sex offenders; and that he was the director of the sex [*145] offender program at a local mental health agency, Tri-County Human Services. With respect to the criminal justice system, Humphreys testified that he had provided numerous evaluations for county agencies, as well as the county, state and federal probation and parole systems, and that he had [***7] testified as an expert on SVP classification in various courts in northeastern Pennsylvania. In addition to his [***1171] work at Tri-County Human Services, where he worked with several hundred offenders a year, Humphreys testified that he conducted 12-20 SVP assessments per year; in roughly half of those cases, he had determined that the offender met the SVP classification criteria. N.T. 8/12/03, 2-6.

On cross-examination, appellant elicited that Humphrey was neither trained nor licensed as a psychiatrist or a psychologist and, as a result, he could not offer opinions to a reasonable degree of certainty in those fields. However, Humphreys noted that he was qualified and licensed, by his training and experience, to offer opinions and "diagnostic impressions" "to a reasonable degree of professional certainty based upon my experience, knowledge, background and training." Appellant then objected that Humphreys "not be considered qualified to issue a clinical diagnosis with regard to mental illness, mental disability or mental abnormality for the purpose of this Megan's Law hearing." The court overruled the objection and Humphreys testified consistently with his report. Id. at 6-11, 20-23.

[***8] After hearing Humphreys' testimony and further argument from the parties, the trial court determined that appellant was an SVP. With respect to Humphreys' qualifications to testify on that question, the court noted that, "we [are] talking about a person who [has] been in that field for 17 years and has been appointed by the state to do exactly what he's done here today." The court added that, "[w]e also have the conviction, which is a proven fact before us. We also have a period of over two years of having a young child, his daughter sexually molested in various ways." Id. at 38. The court then sentenced appellant to a term of imprisonment for ten to twenty years and a fine of $2,000.

[*146] Appellant appealed to the Superior Court arguing, inter alia, that the Commonwealth had failed to meet its burden of establishing by clear and convincing evidence that appellant is an SVP because Humphreys was not qualified to testify that appellant had a mental abnormality. 10 The Superior Court affirmed in an unpublished decision. The panel majority noted that Megan's Law II specifically lists "psychiatrists, psychologists and criminal justice experts each of whom is an expert in [***9] the field of the behavior and treatment of sexual offenders" as individuals who could serve on the Board -- and thus conduct SVP assessments and testify on the question of SVP classification. See 42 Pa.C.S. § 9799.3. Because it was undisputed that Humphreys was a qualified criminal justice expert, the panel majority concluded that Humphreys could perform and testify to SVP assessments, including assessments regarding mental abnormality or personality disorder.
FOOTNOTES

10 Appellant raised three other issues: whether the trial court erred in (1) permitting the Children's Advocacy Center's medical director to testify regarding the child's specific allegations of sexual conduct where the statements were not necessary for treatment, (2) denying appellant the opportunity to present testimony regarding the child's reputation for truthfulness, and (3) fining appellant without regard to his ability to pay or the effect the fines would have on his ability to pay restitution. None of these issues were included in this Court's limited grant of review, and thus we do not pass upon them.

[***10] President Judge Joseph A. Del Sole dissented, opining that Humphreys was not qualified to testify as an expert on SVP classification because, in the dissent's view, such an expert must make a "diagnosis" of mental abnormality or personality disorder, which falls outside the expertise of a person who is not a licensed psychiatrist or psychologist. The dissent further argued that, while Humphreys was qualified as a criminal justice expert to be a member of the Board, the statutory scheme "does not diminish or reduce the criteria for expert [***1172] testimony by automatically qualifying a non-licensed psychologist or psychiatrist as an expert who can give a differential diagnosis on mental abnormality or personality disorder for purposes of the statute." Dissenting Memorandum at 2. Because the dissent construed Megan's Law II as requiring expert diagnostic testimony and no such valid expert testimony [*147] was presented in the case sub judice, the dissent concluded that the Commonwealth failed to establish that appellant was an SVP.

On this appeal, appellant begins by noting that Megan's Law II defines "mental abnormality" as: "A congenital or acquired condition of a person that affects the emotional [***11] or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." 42 Pa.C.S. 9792. The statute does not define "personality disorder." Appellant argues that the triggering terms "mental abnormality" and "personality disorder" must be deemed to be psychological terms of art, thus requiring the testimony of a licensed psychiatrist or psychologist. Absent such qualified testimony, which is essential to any finding that an offender is an SVP, appellant argues, the Commonwealth fails to carry its burden of proof at an SVP hearing.

In support of his argument that only a licensed psychiatrist or psychologist may offer expert opinion testimony concerning mental abnormality or personality disorder, appellant cites to the Professional Psychologists Practice Act, 63 P.S. §§ 1201-1218, noting that the Act provides that only a licensed individual may perform psychological assessments or render expert psychological testimony. Id. § 1203. Appellant argues that as a matter of [***12] Pennsylvania law a witness who is not, at a minimum, licensed to practice psychology cannot render an expert opinion on such issues. As a result, appellant asserts that Humphreys was not properly qualified as an expert at the SVP hearing and that his testimony could not satisfy the Commonwealth's burden concerning the mental abnormality or personality disorder which is essential to concluding that an offender is an SVP. Appellant therefore requests that this Court vacate the SVP finding.
The Commonwealth counters that Megan's Law II expressly authorizes a criminal justice expert like Humphreys to conduct SVP assessments and to testify in court as to those assessments. The Commonwealth notes that appellant concedes [*148] that Humphreys is qualified to serve on the Board as a criminal justice expert and that Board members are specifically charged with the responsibility of conducting SVP assessments, which includes the inquiry into mental abnormality or personality disorder. Parenthetically, the Commonwealth also notes that the common law evidentiary standard for assessing the qualifications of expert witnesses "is a liberal one:" i.e. so long as the witness has "any reasonable pretension [***13] to specialized knowledge of the subject under investigation" -- knowledge which may be gleaned from training and experience as well as from formal education -- he may be permitted to testify in the discretion of the trial court. Brief of Appellee, 4, quoting Commonwealth v. Malseed, 2004 PA Super 99, 847 A.2d 112, 114 (Pa. Super. 2004), appeal denied, 580 Pa. 712, 862 A.2d 1254 (Pa. 2004). 11 Humphreys' [***1173] education, training and experience, the Commonwealth argues, clearly qualified him to offer expert opinion testimony concerning whether appellant met the statutory criteria for classification as an SVP.

FOOTNOTES

11

Malseed's characterization of the governing law in this area is in accord with this Court's controlling authority. See, e.g., Commonwealth v. Marinelli, 570 Pa. 622, 810 A.2d 1257, 1267 (Pa. 2002). See also Pa.R.E. 702 ("Testimony by experts") ("If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."); Dengler, 890 A.2d at 380.

[***14] The Commonwealth also argues that the question of the admissibility of Humphreys' testimony on SVP status is governed by the statute; thus, Humphreys must be deemed qualified to offer the disputed testimony here, unless there was something in Megan's Law II itself that disqualified him. The Commonwealth contends that appellant misconstrues the statute as including such a disqualifying factor when he claims that it requires a "clinical diagnosis" or "differential diagnosis" by a licensed psychologist or psychiatrist regarding a mental abnormality that would make a person likely to engage in predatory sexual offenses. The Commonwealth notes that the SVP assessment contemplated under Megan's Law II does not require a clinical or differential diagnosis in the sense that [*149] such are typically conducted by psychiatrists and psychologists. Nor does the statute provide that licensed psychologists or psychiatrists are required to conduct the SVP assessments contemplated by Megan's Law II. To the contrary, the Commonwealth notes, such terms as SVP and mental abnormality as employed in Megan's Law II are not accepted medical or psychological terms; therefore, by definition, testimony from a licensed [***15] psychiatrist or psychologist was not contemplated in every evaluation. In addition, nothing in Megan's Law II requires that opinions respecting SVP classification be stated within a
reasonable degree of medical certainty. In short, the Commonwealth contends, nothing in the statute suggests that a licensed psychiatrist or psychologist is particularly qualified, much less exclusively qualified, to testify to the statutory question of SVP classification, including the question of mental abnormality relating to the likelihood of sex offender recidivism. The Commonwealth summarizes its position on this point as follows: "Humphreys is in the business of doing assessments to determine whether a sexual offender is likely to reoffend. Humphreys is not in the business of prescribing medicine or performing psychoanalysis and nothing contained in Megan's Law [II] requires him to be in such business." Brief of Appellee, 8.

Finally, the Commonwealth disputes appellant's reliance upon the Professional Psychologists Practice Act. The Commonwealth notes that that Act itself recognizes that certain other professions may engage in work of a "psychological nature," and social workers are among those [***16] professionals specifically exempted. See 63 P.S. § 1203(3) ("Nothing in this act shall be construed to prevent qualified members of other professions, including, but not limited to ... social workers ... from doing work of a psychological nature consistent with the training and code of ethics of their respective professions ...."). The Commonwealth also notes that later on in Title 63 (which addresses "Professions and Occupations"), the General Assembly specifically addressed social workers in "the Social Workers' Practice Act." See 63 P.S. §§ 1901-1922. Section 1907 of this Act sets forth the requirements for licensure as a social [*150] worker. The Commonwealth then argues that Section 1903 defines the "practice of clinical social work" in such a way as to make clear that it may include assessment of mental disorders:

Holding oneself out to the public by any title or description of services incorporating the term "licensed clinical social worker" or using any words or symbols indicating or tending to indicate that one [***1174] is a licensed clinical social worker and under such description offering [***17] to render or rendering a service in which a special knowledge of social resources, human personality and capabilities and therapeutic techniques is directed at helping people to achieve adequate and productive personal, interpersonal and social adjustments in their individual lives, in their families and in their community. The term includes person and environment perspectives, systems theory and cognitive/behavioral theory, to [sic] the assessment and treatment of psychosocial disability and impairment, including mental and emotional disorders, developmental disabilities and substance abuse. The term includes the application of social work methods and theory. The term includes the practice of social work plus additional concentrated training and study as defined by the board by regulation.

63 P.S. § 1903 (emphasis added).

In addition to the parties' briefs, this Court has the benefit of an Amicus Curiae brief the Board has filed in support of the Commonwealth. The Board argues that it is important to recognize a distinction between what it terms a "forensic assessment," which is what occurs in an SVP evaluation, and a "therapeutic assessment," [***18] " which is what mental health professionals do when treating a person with a mental disorder. The Board argues that neither Megan's Law II nor the generally accepted practices of the various mental health professions direct that an expert must make a "clinical diagnosis"
of personality disorder or mental illness in order to aid a court in the narrow task of determining statutory SVP status. The SVP evaluation does not seek to "diagnose" a syndrome or set of symptoms, for treatment purposes, but rather the [*151] evaluation seeks to answer the statutory question of the offender’s likelihood of engaging in predatory sexual violence. The Board further notes that the Act makes clear that the expertise at issue is "in the field of the behavior and treatment of sexual offenders;" not all psychiatrists or psychologists have such specific expertise. In making the assessment contemplated by the statute, the Board argues, the Board member applies non-clinical, statutory terms such as "mental abnormality." In the Board's view, there is nothing in the Act or in the "generally accepted practices of the mental health profession" to preclude a Board member from conducting a non-clinical, non-diagnostic "forensic [***19] assessment" of an offender's "psychological attributes" in order to determine whether he is an SVP. The Board further argues that the type of forensic assessment it makes "is not novel or unprecedented, but rather is well supported by experts in the field of sex offender evaluation and treatment." Finally, the Board argues in the alternative that, even if the evaluator's testimony is deemed to comprise a clinical diagnosis rather than a forensic assessment, a licensed clinical social worker such as Humphreys is qualified to render such a diagnosis. In forwarding this alternative argument, the Board cites to decisions from the United States Supreme Court and several of our sister states which recognize that licensed clinical social workers may testify to a diagnosis of a mental disorder; and the Board also notes that thirty-three states and the District of Columbia have statutes defining social work or clinical social work as including the diagnosis or evaluation of mental disorders.

As a general matter, the question of whether a witness is qualified to testify as an expert is a matter resting in the discretion of the trial judge. E.g. Commonwealth v. Marinelli, 570 Pa. 622, 810 A.2d 1257, 1267 (Pa. 2002). [***20] In this instance, however, the competence and relevance of [***175] the testimony primarily depends upon the proper interpretation of a statute. To the extent our inquiry focuses upon the meaning and application of the statute, this Court's review is plenary [*152] and non-deferential. E.g. MCI WorldCom, Inc. v. Pennsylvania Public Utility Comm'n, 577 Pa. 294, 844 A.2d 1239 (Pa. 2004); Mosaic Academy Charter School v. Commonwealth, Department of Education, 572 Pa. 191, 813 A.2d 813 (Pa. 2002).

FOOTNOTES

12 In his Statement of the Scope and Standard of Review, appellant states that the issue presented concerns the sufficiency of the evidence to prove he should be classified as an SVP. In response, the Commonwealth notes that appellant’s actual argument is confined to a claim that Humphreys was unqualified to render the expert opinion he gave, an issue involving the admissibility of evidence. The issue, which was specifically framed in this Court’s order granting review, implicates the admissibility of the proffered testimony under the statute, and not sufficiency. The distinction is not academic; a successful sufficiency challenge can lead to an outright grant of relief (in this case, a reversal of the SVP designation), while a successful evidentiary challenge presumably would result in a remand for another hearing at which the challenged evidence would not be admissible. Moreover, casting the issue as sufficiency review is a non sequitur: in conducting a sufficiency review, this Court would have to accept
the record of the case as actually litigated, which would include Humphreys' evidence, and not as diminished by evidence deemed, after the fact, to have been wrongly admitted. See Commonwealth v. Hall, 574 Pa. 233, 830 A.2d 537, 542 n.2 (Pa. 2003); Commonwealth v. Lovette, 498 Pa. 665, 450 A.2d 975 (Pa. 1982), cert. denied, 459 U.S. 1178, 103 S. Ct. 830, 74 L. Ed. 2d 1025 (1983).


This appeal implicates the interplay of two sections of Megan's Law II, the provision dealing with SVP assessments, 42 Pa.C.S. § 9795.4, and the provision describing the Board. Id. § 9799.3. HN4 Section 9795.4(b) provides that, after the sentencing court refers a convicted offender for an assessment, "a member of the board as designated by the administrative officer of the board shall conduct an assessment of the individual to determine if the individual should be classified as a sexually violent predator." That assessment is to be conducted according to standards for evaluation which the Board is to establish, and is to consider factors listed in Section 9795.4(b). 13 Section 9799.3(a) then outlines [**1176] what professionals are authorized to be members of the Board:

HN5 (a) Composition.—The State Sexual Offenders Assessment Board shall be composed of psychiatrists, psychologists and [*154] criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders.

Id.

FOOTNOTES

13 The factors listed in Section 9795.4(b) are:

(1) Facts of the current offense, including:

(i) Whether the offense involved multiple victims.

(ii) Whether the individual exceeded the means necessary to achieve the offense.
(iii) The nature of the sexual contact with the victim.
(iv) Relationship of the individual to the victim.
(v) Age of the victim.
(vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
(vii) The mental capacity of the victim.

(2) Prior offense history, including:
(i) The individual's prior criminal record.
(ii) Whether the individual completed any prior sentences.
(iii) Whether the individual participated in available programs for sexual offenders.

(3) Characteristics of the individual, including:
(i) Age of the individual.
(ii) Use of illegal drugs by the individual.
(iii) Any mental illness, mental disability or mental abnormality.
(iv) Behavioral characteristics that contribute to the individual's conduct.

(4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.

Id. § 9795.4(b).

[***23] The term "criminal justice expert" is not further defined in Megan's Law II, but that fact is of no moment for purposes of this appeal, as there is no dispute that Humphreys qualified as a criminal justice expert within the meaning of Section 9799.3. Notably, the legislation does not suggest that the different types of professionals approved for Board membership are to execute different functions peculiar to their professions. In other words, the statute does not say, or even suggest, that SVP assessments may only be performed by those on the Board who are psychiatrists or psychologists (with
expertise in the behavior and treatment of sexual offenders). Nor does the statute suggest that opinions concerning an offenders' mental abnormality or personality disorder may only be rendered by a psychiatrist or psychologist. To the contrary, it appears from the plain language of the statute that the sole purpose of the Board is to provide SVP assessments, and it is equally apparent that the General Assembly contemplated that all members of the Board are to provide such assessments — whether the member be a psychiatrist, a psychologist, or a criminal justice expert. Accordingly, there [***24] is no question in our mind that HN8 the plain language of Megan's Law II authorizes a criminal justice expert such as Humphreys, who is an expert in the behavior and treatment of sexual offenders, to conduct the statutory SVP assessment, an assessment which encompasses an evaluation of whether the offender has "a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. In short, there is nothing in the statute to support appellant's argument that [*155] only a licensed psychiatrist or psychologist may testify to an expert opinion concerning those aspects of SVP status involving the offender's mental abnormality or personality disorder.

FOOTNOTES

14 In its amicus brief, the Board notes that it has administratively defined a criminal justice expert as an individual with a Master's degree or higher in social work, counseling, criminology, human sexuality or criminal justice. In addition, Board members must have a minimum of 2000 hours of experience with sex offenders through direct service, education, research or supervision. Brief of Amicus at 9 & Appendix A. Humphreys apparently met these criteria.

[***25] Appellant argues, however, that there are considerations external to the plain language and structure of Megan's Law II that operate to prevent expert mental health-related testimony from Board member assessors who are not licensed psychiatrists or psychologists. Thus, appellant [**1177] argues that the Professional Psychology Practice Act must be construed as barring a licensed clinical social worker such as Humphreys from offering an expert opinion on a sexual offender's mental state. But, HN7 the plain language of this Act makes clear that it imposes no such absolute bar, at least in the case of licensed social workers. Section 1203 provides that: "It shall be unlawful for any person to engage in the practice of psychology or to offer or attempt to do so or to hold himself out to the public by any title or description of services incorporating the words 'psychological,' 'psychologist' or 'psychology' unless he shall first have obtained a license pursuant to this act...." 63 P.S. § 1203. 15 As the Commonwealth has noted, however, the very same Section of that Act no less clearly recognizes that it is not intended to bar qualified members of other professions, including [***26] social workers, from engaging in work of a psychological nature which is consistent with the practice of those professions: HN8 "Nothing in this act shall be construed to prevent qualified members of other recognized professions, including, but not limited to, clergy, drug and alcohol abuse counselors, mental health counselors, social workers, marriage counselors, family counselors, crisis intervention counselors, pastoral counselors, rehabilitation counselors and psychoanalysts, from doing work of a psychological nature consistent with the training and the code of ethics of their respective professions or to prevent volunteers from
providing services in crisis." 63 P.S. § 1203(3) (emphasis added).

FOOTNOTES

15 For purposes of considering appellant's argument, we will assume that the evaluation and expert opinion rendered by Humphreys implicated the practice of psychology. See 63 P.S. § 1202 (defining practice of psychology).

[*156] Moreover, HN9 the provisions of [***27] Title 63 which deal specifically with social workers (the "Social Workers' Practice Act," 63 P.S. §§ 1901-1922) corroborate the social worker exception carved out in the Professional Psychology Practice Act. Thus, Section 1903, which sets forth the parameters of the practice of clinical social work, provides that the practice of clinical social work includes: "person and environment perspectives, systems theory and cognitive/behavioral theory, to the assessment and treatment of psychosocial disability and impairment, including mental and emotional disorders, developmental disabilities and substance abuse." The plain language of this statute thus recognizes that clinical social workers have some expertise in the assessment of mental disorders. 16

FOOTNOTES

16 We recognize that Megan's Law II speaks in terms of "criminal justice experts" who are "expert in the field of the behavior and treatment of sexual offenders," and not in terms of licensed social workers. Notably, however, HN10 the exceptions specifically set forth in the Professional Psychology Practice Act are illustrative and not exhaustive (i.e., "including but not limited to ..."). HN11 Both statutes, then, are written in flexible terms; a criminal justice expert may be, but need not necessarily be, a licensed social worker.

[***28] In short, there is no tension between what Megan's Law II plainly authorizes and the licensing provisions in the Professional Psychology Practice Act. Other recognized professions, including social workers, are authorized to engage in work of a psychological nature that falls within their area of training. In this case, Humphreys testified that he has Bachelor's degrees in psychology and sociology and a Master's degree in social work. At the time of appellant's Megan's Law II hearing, Humphreys was a licensed clinical social worker with seventeen years of practical experience working with sex offenders, and the director of the sex offender program at Tri-County Human Services. Humphreys had provided expert testimony regarding sexual offender issues in many different courts, and testified at SVP hearings in [***1178] Lackawanna, Susquehanna, Luzerne, Bradford and Wyoming Counties. He worked with several hundred sex offenders annually, performing approximately 12-20 SVP assessments per year. His training and experience are such that he clearly fits within the [*157] exception specifically recognized in Section 1203(3) of the Professional Psychology Practice Act.

Finally, we note that the underlying [***29] predicate of appellant's argument -- i.e., that the diagnostic
standards which govern mental health professionals in other contexts exist as a non-textual restraint upon what is authorized by the legislative scheme adopted in Megan's Law II -- echoes the Frye challenge which was forwarded in the Dengler case, and it must fail for similar reasons. The Dengler Court noted that the argument that expert testimony on SVP status "does not square with prevailing standards and methodology in the psychological and psychiatric diagnostic communities" "misses the mark" because HN12 [the statute does not require proof of a standard of diagnosis that is commonly found and/or accepted in a mental health diagnostic paradigm." The Dengler Court stressed that, "[i]n seeking to protect society against certain sexual offenders, the General Assembly was not obliged to adopt a certain diagnostic construct, and it is the construct that was actually adopted which must control this Court's analysis of the relevance and admissibility of evidence offered to prove the statutory standard." Dengler, 890 A.2d at 383. We further explained our reasoning as follows:

[T]he [***30] "science" here (and the SVP designation consequences it triggers) is responsive to, indeed it is a direct byproduct of, a specific legislatively-adopted scheme which sets forth the relevance and contours of the challenged evidence. The General Assembly has determined that a sexual offender's SVP status is significant to the operation of the registration and notification provisions of the law. The Assembly has defined the triggering term ("sexually violent predator") and has set forth the factors to be considered in making that determination. This scheme represents a legislative policy judgment concerning the proper response to certain sexual offenders. HN13 [The question of SVP status is thus a statutory question, not a question of "pure science" and, at least in the absence of a challenge to the propriety of the [***158] substance of the statute, the question of evidentiary relevance is framed by the very provisions of the statute itself, not some external source.

Id.

HN14 [The plain and clear statutory language permits a criminal justice expert such as the licensed clinical social worker in this case, who qualifies as an expert in the behavior and treatment of sexual offenders, to serve [***31] on the Board and to perform SVP assessments. Nothing in the statute requires such criminal justice expert to be a licensed psychiatrist or psychologist before he or she may render an expert opinion on the offender's mental state and the ultimate question of whether the offender is an SVP. Accordingly, we hold that, in order to carry its burden of proving that an offender is an SVP, the Commonwealth is not obliged to provide a clinical diagnosis by a licensed psychiatrist or psychologist; the opinion of a qualifying criminal justice expert suffices. 17 The decision of the Superior Court, therefore, is affirmed.

FOOTNOTES

17 The Concurring Opinion by Mr. Justice Baer expresses concern with a hypothetical situation: i.e., would the trial court have discretionary power to grant a defense motion to bar the expert testimony of an approved SVP evaluator on grounds that, although the evaluator is an approved member of the
Board, he lacks the requisite qualifications either as a general matter or in light of the particular case. Respectfully, this appeal presents no such hypothetical challenge and, contrary to the concurrence's expression of concern, we have rendered no decision on that or any other hypothetical situation. Nothing in this Opinion exists as a bar to a defendant seeking to challenge the qualifications of a proffered Board-approved SVP expert evaluator in a particular case. What is at issue here is whether the Commonwealth may present an otherwise qualified SVP expert evaluator in the face of an objection, external to the statute, that the expert is neither a psychiatrist nor a psychologist; we hold that it can. Moreover, we emphasize that the question here is one of bare qualification and admissibility; the ultimate determination of SVP status is made by the trial judge, who is not obliged to accept the SVP evaluator's expert opinion. The sorts of concerns animating the concurrence are always available in impeaching and arguing the merit and persuasiveness of the evaluator's substantive opinion.


[*159] Former Justice Nigro did not participate in the decision of this matter.

Mr. Justice Baer files a concurring opinion.

CONCUR BY: BAER
CONCUR

CONCURRING OPINION

MR. JUSTICE BAER

In Commonwealth v. Dengler, 586 Pa. 54, 890 A.2d 372 (Pa. 2005), I concurred in the result but declined to join the Court's rationale because I found flaw in those aspects of the Majority Opinion that suggest that a statute setting forth factors to gird a particular scientific inquiry in itself relieves a court from conducting an independent analysis under [Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923),] of the novelty of a given theory or method used to address those factors."

Id. at 385 (Baer, J., concurring). In writing separately, I noted that the Court's opinion in that case was amenable of more than one interpretation, and emphasized that I distanced myself only from that interpretation that would permit the legislature to preempt by statute a trial court's independent, discretionary assessment of the novelty of the [***33] methodology underlying given expert testimony. In the case sub judice, the Majority vindicates my fears, citing Dengler as authority for the removal from
the trial courts of their traditional discretion independently to consider the qualifications of a given expert witness in favor of a broadly worded statute and the self-policing of an administrative body. As in Dengler, I believe a far more limited basis for reaching the same result is available to the Court, and I would resolve the case on that rationale.

The Majority correctly observes that "the question of whether a witness is qualified to testify as an expert is a matter resting in the discretion of the trial judge." Maj. Slip Op. at 11 (citing Commonwealth v. Marinelli, 570 Pa. 622, 810 A.2d 1257, 1267 (Pa. 2002)). Thus, as the Court recognized in Dengler, we evaluate trial courts' determinations regarding the admissibility of evidence by an [*160] abuse of discretion standard. Dengler, 890 A.2d at 379. Accordingly, we will disturb the trial court's ruling only where that ruling reflects "manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support [*34] so as to be clearly erroneous." Id. (quoting Grady v. Frito-Lay, Inc., 576 Pa. 546, 839 A.2d 1038, 1046 (Pa. 2003)) (internal quotation marks omitted). Having so established this standard in both cases, however, the Majority proceeds unaccountably to sanction the legislature's evisceration of trial court discretion and replace it with the legislature's own standardized criteria -- criteria that amount to a yes or no checklist that, once satisfied, compels a trial judge to admit a [*1180] given expert regardless of any case-specific peculiarities that call into question the wisdom or utility of doing so.

FOOTNOTES

1 I share the Majority's view that this case presents a challenge to the admissibility, rather than the sufficiency of the evidence. See Maj. Slip Op. at 11 n.12.

To be clear, I do not believe this case presents difficult facts. I agree with the Majority that social workers are not, by virtue of that credential, precluded from testifying as to a sex offender's status as a sexually violent [*35] predator (SVP). I take no issue in principle with the legislature's prerogative to establish such criteria, and agree that there is a "forensic" component as well as a "clinical" component to an SVP assessment. I do not object to the statutory creation of the Sexual Offender Assessment Board (Board), or its performance, through its members, of the tasks assigned it by statute. Finally, I agree that the social worker who testified in this case was eminently qualified to testify regarding Appellant's SVP status.

I cannot agree, however, that a member of the Board is, as a function of that membership, presumptively qualified to testify in a given case as to whether an offender is an SVP, and I do not believe it is the place of the legislature or an administrative agency to impose such a rule at the expense of trial court discretion. Although I view the Board's current membership criteria as salutary and likely to result in a Board composed of qualified criminal justice experts in the relevant [*161] disciplines competent to testify as to offenders' SVP status, 2 I find cause for concern that those criteria were established by the Board for the Board, and that nothing in the law as presently [*36] constituted precludes the Board from lowering its bar to membership. Moreover, although I believe that the vast
majority of individuals who satisfy the current criteria for Board membership will satisfy any trial court of their qualifications to testify as to offenders' SVP statuses, I have no trouble imagining an individual who satisfies these criteria and yet reasonably may be found unqualified to testify in a given case. According to the Board's own criteria, a person would be qualified to sit on the Board and conduct the assessments here in question with only two semesters of academic work and approximately one year of research regarding sex offenders. Even if the criteria were self-evidently exhaustive of all any trial court might reasonably demand of an expert witness, however, that would not vitiate my concern that the Board might, at any time, change its criteria to admit less qualified individuals to its membership. Under the present scheme, the only meaningful hedge against such an eventuality [***1181] is to [*162] preserve trial court discretion to assess each proffered expert on his or her individual merits.

FOOTNOTES

2 As noted by the Majority, Maj. Slip Op. at 14 n.14, the Board has administratively defined "criminal justice expert" for purposes of qualifying individuals to serve on the Board as someone with at least a Master's degree in social work, counseling, criminology, human sexuality, or criminal justice, and a minimum of 2000 hours of experience with sex offenders through direct service, education, research, or supervision. [***37]

3 For this reason, I reject the Majority's suggestion that the absence of a definition for 'criminal justice expert' in Megan's Law II is "of no moment" simply because the witness in this case is undisputedly qualified. See Maj. Slip Op. at 14. First, there is circularity here, no matter how intuitive it is that the witness in this case is qualified. Second, this observation by the Majority would be far more agreeable had it chosen to decide this case on the narrow grounds of one witness's qualifications. Instead, however, the Majority effectively cedes to an administrative agency that is not directly accountable to the electorate the prerogative to change its criteria at will. Had the legislature seen fit to define this term with some particularity, one would be entitled to the comfort that its modification would require the subscription of a majority of legislators, each directly accountable to the electorate. As it stands, however, a wholly unaccountable body has full discretion to define who is qualified to render testimony that may subject an offender to a lifetime of onerous registration and counseling requirements and harsh penalties should he or she fail to comply.

[***38] Regarding the narrow question presented, I would find that our legislature, acting well within its province, has made clear the intuitive proposition that social workers, whose professional work often involves counseling sex offenders and others, may be qualified to make diagnoses and assessments of the sort necessary in the SVP assessment context. In fact, I adopt in full the Majority's discussion of the general qualification of social workers to testify regarding SVP status. But expert witnesses, in being identified as such, exercise a powerful and potentially prejudicial influence over juries, and trial judges are best situated to ensure that the title "expert witness" is not abused.

The Majority notes that Megan's Law II "does not say, or even suggest, that SVP assessments may only
be performed by those on the Board who are psychiatrists or psychologists (with expertise in the treatment of sexual offenders)." Maj. Slip Op. at 14. Thus, the Majority finds that the legislature did not intend to exclude social workers, generally, from conducting SVP assessments. As I have already noted, I find no quibble with this proposition. But neither does the statute say, nor even suggest, [***39] that the legislature intended, with Megan's Law II, to vitiate the trial court's discretion to reject a particular individual proffered as an expert witness, notwithstanding that he satisfies broadly stated legislative or administrative criteria, because the trial judge finds in his or her discretion that the witness is not qualified to testify under the peculiar circumstance of the witness's own background and experience and the facts of the case in question.

I agree, for the narrow reasons acknowledged by the Majority, that the expert in this case was qualified to testify as to his assessment of Appellant's SVP status, and thus I would affirm the lower courts' rulings to that effect. I disagree, however, that such a ruling needs come at the expense of the time-honored trial court function of discriminating among witnesses and evidence to discern what is fit for consideration in his or her courtroom. I do not believe that a trial judge, in [*163] some future case, would ipso facto abuse his or her discretion by declining to admit the testimony of a person who had attained membership on the Board for want of some qualifying element. Unfortunately, I believe that the Majority's analysis [***40] will bind us to precisely that result.
600 Pa. 662, *; 969 A.2d 1197, **;
2009 Pa. LEXIS 669, ***

JAMES C. CLIFTON, CHARLES AND LORRIE CRANOR, HUSBAND AND WIFE, AND ROY SIMMONS AND MARY LISA MEIER, HUSBAND AND WIFE, Appellees v. ALLEGHENY COUNTY, Appellant; KENNETH PIERCE AND STEPHANIE BEECHAUM, Appellees v. ALLEGHENY COUNTY, PENNSYLVANIA, DANIEL ONORATO, ITS CHIEF EXECUTIVE, AND DEBORAH BUNN, ITS CHIEF ASSESSMENT OFFICER, Appellants

No. 20 WAP 2007, No. 21 WAP 2007

SUPREME COURT OF PENNSYLVANIA

600 Pa. 662; 969 A.2d 1197; 2009 Pa. LEXIS 669

September 10, 2008, Argued

April 29, 2009, Decided


JUDGES: MR. CHIEF JUSTICE CASTILLE ◄. CASTILLE ◄, C.J., SAYLOR ◄, EAKIN ◄, BAER ◄, TODD ◄, McCAFFERY ◄, GREENSPAN ◄, JJ. Messrs. Justice Saylor ◄ and Eakin ◄, Madame Justice Todd ◄, Mr. Justice McCaffery ◄, and Madame Justice Greenspan ◄ join the opinion. Mr. Justice Baer ◄ files a concurring opinion.

OPINION BY: CASTILLE ◄

OPINION
"Controversies growing out of the assessment and collection of taxes are as old as civilization. To question the assessment, to doubt the levy, and to delay the collector may be classed among those inalienable rights of mankind not guaranteed by any Constitution, but very generally asserted under the law of human nature." Delaware, L.&W.R. Co.'s Tax Assessment, 224 Pa. 240, 73 A. 429, 430 (Pa. 1909). The present appeals call for us to consider the constitutionality of Pennsylvania's [**1201] property assessment laws. Presently, the assessment laws of the Commonwealth neither require nor do they prohibit periodic property reassessments, and thus they permit real estate taxes to be [***2] levied on property values that are based upon a stagnant "base year market value" for an indefinite period of time. Allegheny County has adopted such a base year assessment system. In a thorough opinion and order, the Court of Common Pleas of Allegheny County, per the Honorable R. Stanton Wetick, Jr., found that, because a base year assessment method that does not require periodic reassessments inherently causes significant disparities in the ratio of assessed value to fair market value, the Commonwealth's property assessment laws were facially unconstitutional as they violate the Uniformity Clause of the Pennsylvania Constitution, PA. CONST. art. VIII, § 1, which requires equality of taxation. In Judge Wetick's view, the only option for the County was an annual reassessment. For the reasons that follow, we disagree with the trial court's holding that the statutes are unconstitutional on their face. Nevertheless, for many of the same reasons cited by the trial court, we hold that the base year method of property valuation, as applied in Allegheny County, violates the Uniformity Clause. We therefore agree that a countywide [*670] reassessment is required and we remand this matter to the trial court [***3] for implementation of that mandate consistent with this Opinion.

FOOTNOTES

1 When referring generally to "assessment laws," we are referring to the General County Assessment Law, 72 P.S. §§ 5020-1 to -602, the First Class County Assessment Law, 72 P.S. §§ 5341.1-5341.21, the Second Class County Assessment Law, 72 P.S. §§ 5452.1-5452.20, the Second Class A and Third Class County Assessment Law, 72 P.S. §§ 5342-5350k, and the Fourth to Eighth Class County Assessment Law, 72 P.S. §§ 5453.101-5453.107.

I. Background

Initially measured by a tract of land's agricultural productivity, property taxes were regularly administered in ancient Egypt, Babylon, and Persia. Richard Henry Carlson, A Brief History of Property Tax, FAIR & EQUITABLE, Feb. 2005, at 3-4. 2 In medieval England, each parcel of land was measured and had its value estimated, with the resulting property assessment and tax liability entered into the town's Domesday Book. In the Seventeenth Century, a hearth tax was administered in England and some of its colonies, which estimated a building's value according to the number and size of its hearths. In colonial
America, revenue was raised by many colonies through a general property tax, which [***4] assessed the value of land, buildings, animals, and personal property; and while the tax rate was generally higher than it is today, properties were routinely under-assessed. Id. at 5-6. In the early United States, national property taxes such as the "window tax," which, in addition to a land tax, assessed real estate according to the number and size of a building's windows and doors, caused unrest and, at times, rebellion. 3 With the development of a mercantile economy, and later an industrial economy, the property tax was supplanted, first by the excise tax, and later by the income tax. Id. at 5-8. 4 [***1202] Nevertheless, through the Nineteenth Century, property tax was the primary form of taxation at the state and local level. John Joseph Wallis, A [*671] History of the Property Tax in America, in PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 127 (Wallace E. Oates ed. 2001); see also John A. Miller, Rationalizing Injustice: The Supreme Court and the Property Tax, 22 HOFSTRA L. REV. 79, 83 n.8 (1993) (describing origin of property tax in United States). While its primacy has faded with the implementation of local income taxes and sales taxes, the property tax has remained a primary provider of [***5] local tax revenues for, among other things, public schools, police and fire departments, and sanitation services. Wallis, supra, at 127-28; Miller, supra, at 83 n.8; Stewart E. Sterk & Mitchell L. Engler, Property Tax Reassessment: Who Needs It?, 81 NOTRE DAME L. REV. 1037, 1037 (2006). For example, when the first comprehensive census of governments was completed in 1902, property taxes comprised 73% of all revenue collected by local governments. In 1992, the percentage was 40. Wallis, supra, at 123.

FOOTNOTES


3 For example, in Fries' Rebellion, German settlers in Pennsylvania led by John Fries revolted against the window tax by intimidating tax assessors and forcing them away from the homes they were meant to assess. Carlson, supra, at 7.

4 An excise tax is a "tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." BLACK'S LAW DICTIONARY 605 (8th ed. 2004).

Today in Pennsylvania, property [***6] taxation is primarily used to raise revenue for the maintenance of the counties' public school systems, and is administered through a number of statutory provisions. See Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 583 Pa. 275, 877 A.2d 383, 413 (Pa. 2005) (citing Mikell v. Phila. Sch. Dist., 359 Pa. 113, 58 A.2d 339 (Pa. 1948)). Relevant to the present appeal, Pennsylvania's property assessment laws are governed by both the General County Assessment Law, 72 P.S. §§ 5020-1 to -602, which contains provisions applying to all sixty-seven counties, and by statutes applicable to specific categories of counties, e.g., first-class counties, second-class counties, etc. Under this statutory regime, as with those preceding it, a county conducts property assessments in order to value a property and arrive at a basis for property taxation. Although based on a
property's "actual value," 5 the value established [*672] by the tax assessors is referred to as a property's "assessed value." See BLACK'S LAW DICTIONARY 1586 (8th ed. 2004) (defining assessed valuation as "[t]he value that a taxing authority gives to property and to which the tax rate is applied"). 6 Under the Uniformity Clause, countywide assessments [***7] must be uniform [***1203] so that all property in each county is uniformly assessed. See PA. CONST. art. VIII, § 1. Such uniformity is more easily achievable in counties where all real property is assessed at 100 percent of market value, resulting in assessed values that are the same as actual values. Disparities in uniformity often occur where a property is assessed at a higher percentage of fair market value than other properties in the taxing district, causing assessed values and actual, fair market values to differ, often dramatically.

FOOTNOTES

5 Actual value is a property's fair market value, and "is defined as the price a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, considering all uses to which the property is adapted and might reasonably be applied." Downingtown Area Sch. Dist. v. Chester County Bd. of Assessment, 590 Pa. 459, 913 A.2d 194, 196 n.2 (Pa. 2006); accord Green v. Schuylkill County Bd. of Assessment Appeals, 565 Pa. 185, 772 A.2d 419, 425 n.6 (Pa. 2001).

6 In Breslow v. School District of Baldwin Township, 408 Pa. 121, 182 A.2d 501, 54 Mun. L Rep. 33 (Pa. 1962), this Court described assessed value as follows:

It is a matter of common knowledge that in nearly every township, county and city in [***8] Pennsylvania, property is assessed for tax purposes lower than its market value. The assessed value of taxable property for tax purposes usually varies between 15 and 70 per cent of its actual market value. To the people and voters of Pennsylvania, the words "assessed value" have a plain common popular meaning. They are almost universally understood in their common popular sense or meaning to mean just what they say -- the value at which they are assessed by the taxing authorities and not their market value. Furthermore, if one or more parcels of real estate or buildings are assessed at their market value -- based upon a sale by a willing seller to a willing purchaser -- and the other taxable properties are assessed on an "assessed value" which is lower than market value, the Uniformity Clause of the Constitution requires the assessed value to prevail.

Id. at 504 (citation omitted).

Prior to 1982, Pennsylvania's assessment laws required that each county assess real property every year based on its current fair market value -- no doubt in order to avoid the disparity described above. Allegheny County was the only county then permitted to conduct triennial assessments. In practice, however, [***9] most counties did not comply with the annual assessment requirement. In 1982, the assessment laws governing the different counties were amended so as to allow counties to utilize either a current market value method or to adopt a base year market value method in arriving at
the [*673] assessed value of each property in the county. 72 P.S. § 5020-402. HN1 A "base year" is defined as:

[1]he year upon which real property market values are based for the most recent countywide revision of assessment of real property or other prior year upon which the market value of all real property of the county is based. Real property market values shall be equalized within the county and any changes by the board of assessment appeals shall be expressed in terms of such base year values.

72 P.S. §§ 5020-102, 5342.1.

HN2 Under a base year system of valuation, a county performs a countywide reassessment of all real property in the base year, and then uses each property's base year assessment as that property's basis for taxation in the base year, as well as its basis (i.e., assessed value) in subsequent years. Downingtown Area Sch. Dist. v. Chester County Bd. of Assessment Appeals, 590 Pa. 459, 913 A.2d 194, 202-03 (Pa. 2006). In the [***10] base year, a property’s assessed value may be 100% of its actual value, and thus, assessments of all real estate in the county are based on actual, fair market value for the base year. Each year thereafter, however, a given property's market value may change, but its assessment ordinarily remains static, fixed at its base year level until the next countywide reassessment. Id. at 203-04. This is so because a county utilizing a base year method of valuation typically does not consider market fluctuations subsequent to the base year when assessing "current value," or factor in variables such as improvements to a property that may increase its assessed value. If a building is constructed on a lot that was vacant during the base year, the property's assessed value is determined by using either sales of comparable properties in the base year or base year construction schedules. 7

FOOTNOTES

7 As described in Downingtown:

[8]Because of the discrepancy between present-year dollars and base-year dollars, when a county board of assessment appeals alters the value associated with a particular piece of property, see 72 P.S. § 5347.1 (listing permissible bases for a board-initiated alteration in assessed value), [***11] the board designates the new value in terms of base year dollars. See generally 72 P.S. § 5342.1 (defining "base year" and stating that "[r]eal property values shall be equalized within the county and any changes by the board of assessment appeals shall be expressed in terms of such base year values"); accord 72 P.S. § 5020-402 (requiring that selling price, estimated or actual, "shall be subject to revision by increase or decrease to accomplish equalization with other similar property within the taxing district"). For example, if a home is replaced on a lot, the parcel's value may increase from (say) $100,000 to $200,000 in present-year dollars due to the new construction. However, the board does not simply re-assess the property at $200,000; rather, using tables, charts, and other accepted techniques, the board determines what the improved property would have been worth in the base year — in this example, perhaps $180,000; it is this latter figure of $180,000, multiplied by the base year [established predetermined ratio], which becomes the parcel's new assessed value for the present tax year. In this way, uniformity is maintained because, as explained above, other properties [***12] whose
assessments have not been altered also remain assessed according to base year dollars. See generally [City of Lancaster v. County of Lancaster, 143 Pa. Commw. 476, 599 A.2d 289, 295-96 (Pa. Cmwlth. 1991)] (holding that a county that uses base year market values for most of the county may not, consistent with the Uniformity Clause, utilize a formula based upon current market value as to a selected group of taxing districts only).

913 A.2d at 203-04.

[*674] [**1204] The present litigation is the latest in a long line of cases challenging Allegheny County’s method of property assessment. Prior to 2002, Allegheny County did not use a base year for calculating assessments. In the 1980s and 1990s, the County purportedly assessed property at its actual value in the current taxable year, but, in fact, did not conduct annual countywide reassessments. Instead, the County used a property’s assessed value from the prior year when assessing value in the current year, sometimes with a slight increase in neighborhoods where property values were increasing, and a slight decrease in neighborhoods where values were perceived as declining. Periodically, an entire area was reassessed, though the area may only have comprised a portion [***13] of a school district. When such a reassessment occurred, the reassessed property owners were paying more taxes proportionately than owners of properties in the school district that were not reassessed. Trial Ct. Op. at 2-3.

On January 1, 1996, a newly elected Board of County Commissioners in Allegheny County adopted a resolution freezing assessments except for physical changes to a property. [*675] The next day, the Allegheny County Board of Property Assessment, Appeals and Review ("Assessment Board") -- which, under the Second Class County Assessment Law, is responsible for establishing assessments -- adopted a resolution freezing assessments, with the exception of new buildings, construction, improvements, and subdivisions. A year later, in January 1997, the Assessment Board extended the freeze to the 1997 tax year, intending the freeze to remain in effect for five years, or until such time when a countywide reassessment was conducted. Trial Ct. Op. at 3.

Allegheny County property owners brought a lawsuit challenging the assessment freeze, and Judge Wettkick ruled that the freeze violated the Second Class County Code, 16 P.S. §§ 3101-5106-A, which imposes an obligation on the Assessment Board [***14] to revise and equalize assessments on an annual basis. Miller v. Bd. of Property Assessment, Appeals & Review of Allegheny County, 145 P.L.J. 501 (Pa. Com. Pl. Allegheny 1997). A Judge Wettkick’s order directed the Assessment Board to make appropriate adjustments and revisions during 1997 for the 1998 tax year. Thereafter, the Assessment Board and the County informed Judge Wettkick that the [**1205] assessment system could not be repaired. At the County’s request, Judge Wettkick entered a consented-to court order modifying his prior orders setting timetables for making adjustments and modifications, and ordering that a comprehensive countywide assessment be completed by 2000 for use in the 2001 tax year. Trial Ct. Op. at 3-4.

FOOTNOTES
At the time of Judge Wettick's 1997 decision, neither the Assessment Board nor the County claimed that Allegheny County used a base year method of property assessment. Trial Ct. Op. at 3 n.4.

In 2000, Allegheny County became a home-rule entity and the County's new legislative branch, the County Council, adopted a comprehensive ordinance to govern assessments, which required, among other things, annual reassessments. See 302 Pa. Code §§ 1.1-101 to 51.24-2411. The assessment [***15] ordered by Judge Wettick was completed and used for the 2001 tax year, though several lawsuits were filed alleging that the new assessments were invalid because they had not been [*676] properly certified, and approximately 90,000 taxpayers filed appeals with the Board of Assessments contesting their 2001 valuations. Trial Ct. Op. at 3-4.

Thereafter, pursuant to the Allegheny County Administrative Code's requirement of annual reassessments, the County Assessment Office performed an annual reassessment for use in tax year 2002. 9 In 2002, however, the Allegheny County Assessment Ordinance was amended to provide that the 2002 assessment would serve as the base year for years 2003, 2004, and 2005, and provided that the assessments for 2006 would be completed and provided to property owners, with an immediate right of appeal. Thus, in early 2005, the County's Chief Assessment Officer completed a computer-assisted reassessment for use in the 2006 tax year. Pursuant to the County Administrative Code, the Chief Assessment Officer obtained independent verification that the reassessment met the standards of the International Association of Assessing Officers ("IAAO") and presented the reassessment [***16] to County officials. The 2005 assessment, however, was never formally certified by County officials. Trial Ct. Op. at 4.

FOOTNOTES

9 Section 5-209.10 of the Allegheny County Administrative Code states that:

The Chief Executive shall, after considering the recommendations of the Property Assessment Oversight Board and of the Chief Assessment Officer, present to County Council a proposed ordinance for adoption that shall:

A. Set forth a methodology for the valuation of properties for taxation purposes;

* * * *

C. Require an annual reassessment through a professionally developed and maintained Computer Assisted Mass Appraisal system (CAMA);

D. Require that the annual reassessment be applied to all properties, including tax exempt property, public utility property, and residential trailers;
On March 15, 2005, the County Council enacted Ordinance 15, which provided for the Chief Assessment Officer to: (1) determine the actual value of each property; (2) perform an analysis of the increase or decrease in valuations in different neighborhoods; and (3) assign a specific value limitation for each neighborhood — either decrease, no change, one percent, two percent, three percent, or four percent. Thus, under Ordinance 15, the assessed value of a property could not increase by more than four percent. 10 Taxpayers challenged the validity of Ordinance 15, and in Sto-Rox School District v. Allegheny County, 153 P.L.J. 193 (Pa. Com. Pl. Allegheny 2005), Judge Wetrick found that Ordinance 15 improperly required the Chief Assessment Officer to determine the taxable values of certain properties by reducing their actual values by different percentages. Judge Wetrick ruled that Ordinance 15 violated the Home Rule Charter of Allegheny County, the Second Class County Charter Law, Pennsylvania's laws governing property assessments, and the Uniformity Clause of the Pennsylvania Constitution. However, because the uncertified 2005 assessment was subject to lingering questions and criticism, Judge Wetrick denied the plaintiffs' request to direct that the 2005 assessment be certified for use in the 2006 tax year. Trial Ct. Op. at 5.

FOOTNOTES

10 It is unclear whether there was also a four-percent limitation for decreasing property values.

On October 18, 2005, County Council enacted Ordinance 45, which amended the County Administrative Code to provide for the continued use of the 2002 assessment as a base year. Thus, assessments for 2006 and subsequent years would be based on a property's value as of 2002. Ordinance 45 did not set forth any date by which a reassessment should be completed, though it required that, in 2009, a qualified expert conduct a detailed study of the existing property assessment system in Allegheny County. Ordinance 45 also removed the County Administrative Code's requirement that the Chief Assessment Officer complete ratio studies to determine whether the assessed values met IAAO uniformity and equality standards. Trial Ct. Op. at 6.

II. Present Litigation

The present litigation arises out of two lawsuits challenging the validity of Ordinance 45: one filed by appellees Kenneth Pierce and Stephanie Beechaum ("the Pierce complaint"), and another by appellees James C. Clifton, Charles and Lorrie Crano (husband and wife), and Roy Simmons and Mary Lisa Meier (husband and wife) ("the Clifton complaint"). 11 The individual complaints were based on the
following facts.

FOOTNOTES

11 The Clifton complaint named Allegheny County as defendant, while the Pierce complaint named Allegheny [*19] County, Chief Executive of Allegheny County Daniel Onorato, and Chief Assessment Officer of Allegheny County Deborah Bunn as defendants. We will refer to defendants/appellants collectively as "Allegheny County" or "the County."

The Pierce property, located in Braddock, was assessed by the County at $27,900 in 2002. Under Ordinance 45, the property will continue to be assessed at that value indefinitely, unless challenged through appeal. The uncertified value of the property for tax year 2006, based on the 2005 uncertified reassessment, was listed at $14,200 on the County's Real Estate Website. The trial court found this value to be far closer to the property's actual value and concluded that the property was over-assessed. Trial Ct. Op. at 6.

The Beechaum property, located in the Hill District of Pittsburgh, was assessed at $29,000 based on the 2002 base year assessment. The uncertified value of the property based on the 2005 reassessment was $15,500. The trial court also found that this value was far closer to the property's actual value and concluded that the property was over-assessed. Id. at 7.

The Clifton property is located in Wexford and was purchased by Clifton for $532,000 [*20] on June 11, 2004. The 2004, 2005, and 2006 assessed values of the property were $508,000, though its 2002 assessed value was $425,400. Id. 12

FOOTNOTES

12 The 2002 values of the properties described in the Clifton complaint were increased following appeals taken by the taxing bodies, and not because of actions taken by the Board of Property Assessments.

[*1207] The Cranor property is located in Pittsburgh and was purchased on December 8, 2003 for $730,000. In 2005 and 2006, its value was assessed at $730,000. In 2002 and 2003, it was assessed at $466,000. Id.

[*679] The Meier-Simmons property in Mt. Lebanon was purchased on April 6, 2004 for $412,500. The property's 2005 and 2006 assessed value was $412,500, though it was assessed for $233,700 in 2002 and 2004. Id. at 7-8. 13

FOOTNOTES
13 The 2006 assessed values of the properties in the Clifton complaint were reduced by $15,000 for purposes of the real estate tax imposed by Allegheny County because of a County homestead exemption. Trial Ct. Op. at 7. Like the trial court, we will only address full market values in this Opinion.

Appellees initially challenged the legality of Ordinance 45 and sought a court order that would: (1) declare that the use of 2002 property [***21] values as the fair market values of properties for the 2006 tax year violated state assessment laws; and (2) direct the Chief Assessment Officer to certify the 2006 assessment values based on the 2005 reassessment. 14 Although the original complaints referred to violations of the Uniformity Clause of the Pennsylvania Constitution, the focus of the complaints was whether Pennsylvania assessment laws permitted Allegheny County to use 2002 actual values (the base year values) for a 2006 assessment. 15

FOOTNOTES

14 The Clifton plaintiffs claimed that adoption of the base year scheme utilizing the 2002 base year values unfairly benefits owners who purchased their properties prior to 2002, at the expense of owners, like themselves, who purchased their properties or built homes subsequent to 2002 because the latter are required to appeal their assessed values in order to have the values "rolled back" to the 2002 fair market value. Clifton Complaint at 12. Thus, averred the Clifton plaintiffs, the County forces recent homebuyers to "appeal their way to uniformity." Id.

15 The Township of Upper St. Clair and the Upper St. Clair School District intervened in the proceedings and alleged that since 2002 they [***22] have, through the appeal process, increased the assessed value of numerous properties based on post-2002 sales prices. The Township and School District contended that the County cannot use 2002 base year values because those values include assessment appeal valuations based on sales occurring after 2002. The taxing bodies urged the trial court to adopt a 2005 base year.

The County filed preliminary objections seeking dismissal for failure to state grounds for relief. The trial court sustained the County's preliminary objections that sought the dismissal of the claims alleging that Ordinance 45 violates state assessment laws. The trial court rejected appellees' argument that provisions of the assessment laws that permitted [***680] a county to adopt a base year value method of assessment were intended only to permit a county to express current values as base year values. The court concluded that the plain language of the assessment laws permitted assessments in future years to be based on actual values in the base year. 16 In any event, the trial court permitted appellees to file amended complaints raising constitutional challenges to the state assessment laws. Thereafter, appellees filed amended [***23] complaints in both lawsuits, alleging that Pennsylvania's base year method for assessing property values violates the Uniformity Clause of the Pennsylvania Constitution. Answers were filed [***1208] and a nonjury trial was held on December 11, 13, and 14, 2006.
FOOTNOTES

16 The trial court noted that, although pursuant to its earlier decision in Miller, supra, a county may not operate an assessment system that purportedly utilizes current market valuation while freezing assessment, a county may achieve the same result through use of a base year method of valuation. Although recognizing that this scheme may elevate form over substance, the trial court found that such a result was permitted by Pennsylvania’s assessment law.

After thorough consideration of the history of the uniformity requirement in real estate taxation in Pennsylvania, as well as the assessment procedures of other states, the trial court determined that the provisions of the General County Assessment Law and the Second Class County Assessment Law, which allow a county to arrive at actual value through use of a base year method, violate the Uniformity Clause. Specifically, the trial court found that Section 5020-402(a) of the General County [***24] Assessment Law, 72 P.S. § 5020-402(a), and Section 5452.4(a.2) of the Second Class County Assessment Law, 72 P.S. § 5452.4(a.2) violate the Uniformity Clause. The trial court found that the base year method of assessment is invalid on its face because it inevitably produces arbitrary, unjust, and unreasonably discriminatory results. The court also found that, in most counties, base year assessments have, in fact, produced substantial levels of inequities in the ratio of assessed values to market values, which could easily be reduced through periodic reassessments.

The trial court faulted the base year system, as employed in Allegheny County, for failing to consider market fluctuations [*681] between the 2002 base year and the current tax year. To illustrate, the trial court offered the following example: the Woodland Hills School District, which includes Edgewood and Braddock, used 2002 fair market values to calculate the 2007 school taxes paid by property owners even though overall property values in Edgewood increased by 35.87% between 2002 and 2005, while property values in Braddock declined by 16.09%. Trial Ct. Op. at i (opinion summary). In conclusion, the trial court determined that [***25] assessment laws allowing use of a base year assessment without requiring reassessments violate the Uniformity Clause because:

(1) base year assessments are not intended to assess all properties at the same percentage of assessed value to actual value, (2) base year assessments inherently cause significant disparities in the ratio of assessed value to fair market value, and (3) base year assessments inevitably discriminate against owners of properties in lower-value neighborhoods.

Id. at iv (opinion summary).

The trial court recognized that, given its ruling that the base year system of property assessment is unconstitutional, "the only remaining option for Allegheny County under [the] General County Assessment Law is an annual reassessment based on the current market value." Trial Ct. Op. at 91.
Aware of the statewide implications of its decision, however, the trial court did not follow appellees' recommendation and compel a reassessment for the 2008 tax year, stating that:

For two reasons, I am not entering a court order directing Allegheny County to complete a reassessment (similar to the 2005 reassessment) in 2007 for use in 2008.

First, . . . [my] ruling concerns a statewide rather [***26] than an Allegheny County issue because Allegheny County's use of a 2002 base year is permitted under the state assessment laws and every county in the state uses a base year method of assessment. Allegheny County's assessments are more uniform than the assessments of most other counties. Under these circumstances, the interests of justice are served by permitting Allegheny County to continue to assess property [*682] in the same manner as all other counties assess property during the pendency of an appeal of my ruling to the Pennsylvania [ ] Supreme Court as opposed to imposing reassessment requirements [**1209] on Allegheny County that are not imposed on any other county.

Second, only the General Assembly can develop a comprehensive system of assessing property that considers the approaches of the different states.

* * * *

This litigation does not involve legislation that the current members of the General Assembly enacted. The current members of the General Assembly should have an opportunity to respond to this litigation by considering whether to address the issues of the absence of an oversight body, the failure of the counties to reassess, and assessments that do not meet any recognized uniformity [***27] and equality standards.

Trial Ct. Op. at 91-92 (citations and footnotes omitted). Instead, the trial court's order directed the Chief Assessment Officer of Allegheny County to complete, by March 31, 2008, "a computer-assisted reassessment for use in 2009 similar to the reassessment she prepared in February 2005 for use in 2006," and to obtain independent verification that the reassessment meets IAAA standards. The order directed the reassessment to be completed prior to October 31, 2008 if all proceedings pending in Pennsylvania courts were concluded by then. If a final order had not been entered by October 31, 2008, the order directed that, by March 31, 2009, the Chief Assessment Officer shall complete a computer-assisted reassessment for use in 2010, and obtain independent verification that the reassessment meets IAAA standards.

On June 17, 2007, Allegheny County filed a motion for post-trial relief, challenging the trial court's order on fifteen separate grounds and claiming that it should be vacated. Appellees filed a motion for post-trial relief seeking immediate implementation of the trial court's directive to reassess properties in Allegheny County. Following oral argument on [***28] both motions, the trial court dismissed each motion and entered [*683] final judgment in each case. Thereafter, the County filed the instant consolidated direct appeal. 17
FOOTNOTES

17 This Court has exclusive jurisdiction over appeals from final orders of the courts of common pleas holding a statute unconstitutional. 42 Pa.C.S. § 722(7) ("The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in . . . matters where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter."). Because the issue presented is a question of law, our scope of review is plenary and our standard of review is de novo. Castellani v. Scranton Times, L.P., 598 Pa. 283, 956 A.2d 937, 943 (Pa. 2008). Although not addressed by the parties, we preliminarily note that the trial court properly exercised equity jurisdiction over the present matter (rather than dismissing appellees' complaints for failure to exhaust the administrative [***29] process), because appellees' claim that the base year system results in mass, systematic, non-uniform assessments raises substantial constitutional issues, which a county board of assessment appeals would be unable to adequately redress. See Beattie v. Allegheny County, 589 Pa. 113, 907 A.2d 519, 524-25, 527 (Pa. 2006); Borough of Green Tree v. Bd. of Property Assessments, Appeals & Review of Allegheny County, 459 Pa. 268, 328 A.2d 819, 825 (Pa. 1974).

The County makes three claims on appeal: (1) that Pennsylvania assessment laws permitting use of a base year method of valuation are not unconstitutional because they are rationally related to the legitimate government interest in having a stable and predictable property tax assessment; (2) that the Uniformity Clause was not violated in this case because a [*1210] common standard, or same ratio, was applied to all properties; and (3) that, in its decision, the trial court improperly relied on IAAO standards. In short, the County claims that "the use of a base year assessment system in Allegheny County has not resulted in such pervasive countywide inequities to render the entire assessment system non-uniform in application and to require the performance of two consecutive [***30] reassessments." County's Brief at 27.

III. Discussion

First appearing in Pennsylvania's 1874 Constitution, the Uniformity Clause prescribes that HN3F"[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and [*684] collected under general laws." PA. CONST. art. VIII, § 1. 18 In 1909, this Court described the constitutional requirement of uniformity in taxation as follows:

In Pennsylvania the framers of the new Constitution embodied this principle in our organic law in terms so plain that no one should misunderstand its meaning or doubt its application, and the people by the adoption of that instrument placed the seal of their approval upon a system of taxation which has for its corner stone uniformity in the valuation, levy, and collection of all taxes. [The Uniformity Clause]
provides that: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." There is, perhaps, no other section of the Constitution upon which the courts above and below have been so frequently required to pass in [***31] the administration of their duties. The central thought running through all the opinions is that the principle of uniformity is a constitutional mandate to the courts, to the Legislature, and to the taxing authorities, in the levy and assessment of taxes which cannot be disregarded. The purpose of requiring all tax laws to be uniform is to produce equality of taxation. Absolute equality is difficult of attainment, and approximate equality is all that can reasonably be expected. Hence it has been held that where there is substantial uniformity the constitutional requirement has been met. But all these cases hold there must be substantial uniformity, which means as nearly uniform as practicable in view of the instrumentalities with which and subjects upon which tax laws operate. It is the duty of the courts in dealing with this subject to enforce as nearly as may be equality of burden and uniformity of method in determining what share of the burden each taxable subject must bear.

Delaware, L.&W.R. Co.'s Tax Assessment, 224 Pa. 240, 73 A. 429, 430 (Pa. 1909) (internal citation omitted).

FOOTNOTES

18 In the 1968 Constitution, the Uniformity Clause was renumbered from former Article IX, Section 1, though the language [***32] of the clause has not been changed since it was first adopted in 1874.

[*685] Taxation, however, is not a matter of exact science; hence absolute equality and perfect uniformity are not required to satisfy the constitutional uniformity requirement. Leonard v. Thornburgh, 507 Pa. 317, 489 A.2d 1349, 1352 (Pa. 1985); see also In re Harleigh Realty Co., 299 Pa. 385, 149 A. 653, 654 (Pa. 1930) ("Scientific formulae, arithmetical deductions and mental contemplations, have small value in making assessments under our practical system of taxation.") (internal quotations omitted). Some practical inequalities are obviously anticipated, and so long as the taxing scheme does not impose substantially [**1211] unequal tax burdens, rough uniformity with a limited amount of variation is permitted. Beattie v. Allegheny County, 589 Pa. 113, 907 A.2d 519, 530 (Pa. 2006) (citing Leonard, 489 A.2d at 1352; Sablosky v. Messner, 372 Pa. 47, 92 A.2d 411, 416 (Pa. 1952)).

When a taxpayer believes that he has been subjected to unequal taxation due to an allegedly unconstitutional statute, he generally must demonstrate that: (1) the enactment results in some form of classification; and (2) such classification is unreasonable and not rationally related to any legitimate state [***33] purpose. Wilson Partners, L.P. v. Bd. of Fin. & Revenue, 558 Pa. 462, 737 A.2d 1215, 1220 (Pa. 1999). 19 When considering such a challenge, reviewing courts must remain cognizant of the General Assembly's broad authority and wide discretion in matters of taxation, id., and the presumption that, when enacting any statute, the Legislature does not [*686] intend to violate the Constitutions of the United States or of this Commonwealth, 1 Pa.C.S. § 1922(3). Accordingly, a tax enactment will not be
invalidated unless it "clearly, palpably, and plainly violates the Constitution." Wilson Partners, 737 A.2d at 1220 (quoting Leonard, 489 A.2d at 1351-52) (internal quotation marks omitted).

FOOTNOTES

19 An implicit part of the General Assembly’s broad legislative authority to enact health, safety, and community welfare regulation is the power to classify. Harrisburg Sch. Dist. v. Zogby, 574 Pa. 121, 828 A.2d 1079, 1088 (Pa. 2003). Classifications that are "suspect" or "sensitive," or that implicate fundamental or important rights are subjected to heightened judicial scrutiny. Commonwealth v. Albert, 563 Pa. 133, 758 A.2d 1149, 1152 (Pa. 2000). In the absence of such interests, classifications are subject to the deferential rational basis test. Id. Under [***34] the rational basis standard, as long as a classification bears a reasonable relationship to a legitimate state interest, even though discriminatory, it "will be deemed reasonable if any state of facts reasonably can be conceived to sustain it," and will only be struck down "if it is based upon artificial or irrelevant distinctions used for the purpose of evading the constitutional prohibition." Id. (citing Curtis v. Kline, 542 Pa. 249, 666 A.2d 265, 267 (Pa. 1995); Harrisburg Sch. Dist. v. Hickok, 563 Pa. 391, 761 A.2d 1132, 1136 (Pa. 2000)).

HN6 Judicial review of allegedly unconstitutional tax legislation thus generally focuses on whether there is "some concrete justification for treating the relevant group of taxpayers as members of distinguishable classes subject to different tax burdens." Leonard, 489 A.2d at 1352 (internal quotation marks omitted); see also Columbia Gas Corp. v. Commonwealth, 468 Pa. 145, 360 A.2d 592, 595 (Pa. 1976). While reasonable and practical classifications in tax legislation are justifiable and often permissible, when a method or formula for computing a tax will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated. [***35] Allegheny County v. Monzo, 509 Pa. 26, 500 A.2d 1096, 1104 (Pa. 1985); accord Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster County, W. Va., 488 U.S. 336, 345, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989) ("[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.") (alteration in original and internal quotation marks omitted). 20

FOOTNOTES


[***1212] HN7 Property taxation, however, is different. With property taxation, real property is the classification. McKnight Shopping Ctr. v. Bd. of Property Assessment, Appeals, & Review, 417 Pa. 234, 209 A.2d 389, 392 (Pa. 1965). Although there is no express constitutional requirement that real property
be treated as a single class, this Court has [*687] consistently interpreted the uniformity requirement of the Pennsylvania Constitution as requiring [***36] all real estate to be treated as a single class entitled to uniform treatment. See, e.g., Westinghouse Elec. Corp. v. Bd. of Property Assessment, Appeals & Review of Allegheny County, 539 Pa. 453, 652 A.2d 1306, 1314 (Pa. 1995); Deitch Co. v. Allegheny Bd. of Property Assessment, 417 Pa. 213, 209 A.2d 397, 402 (Pa. 1965); McKnight, 209 A.2d at 392. 21 Such an interpretation is in keeping with the overarching concept that, in property taxation, the uniformity requirement is based on "the general principle that taxpayers should pay no more or less than their proportionate share of government." Downingtown, 913 A.2d at 199. In Westinghouse Electric, this Court stated that:

HN8[F][The Uniformity Clause] requires that all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax. This means that all real estate is a constitutionally designated class entitled to uniform treatment and the ratio of assessed value to market value adopted by the taxing authority must be applied equally and uniformly to all real estate within the taxing authority's jurisdiction.

652 A.2d at 1314 (emphasis added); see also Keebler Co. v. Bd. of Revision of Taxes of Phila., 496 Pa. 140, 436 A.2d 583, 584 (Pa. 1981) [***37] ["[A]ll real estate is a class which is entitled to uniform treatment."). 22

FOOTNOTES

21 Although the analysis under the federal Equal Protection Clause and Pennsylvania's Uniformity Clause is largely coterminous, unlike Pennsylvania's uniformity requirement, "the United States Constitution does not require equalization across all potential sub-classifications of real property (for example, residential versus commercial)." Downingtown, 913 A.2d at 201 n.9 (citing Allegheny Pittsburgh Coal, 488 U.S. at 344).

22 Additionally, in McKnight, this Court described the uniformity requirement as follows:

In applying this provision of our Constitution to the taxation of the real estate, it is clear that all real estate is the class entitled to uniform treatment and that the ratio of assessed value to market value adopted by the taxing authority -- be it 20%, 60% or 100%[ ] -- must be applied equally and uniformly to all real estate within the jurisdiction of such authority. This does not mean that different factors may not be employed in arriving at market values for one type of real estate when contrasted with another type of real estate. Certainly, the factors which affect the market value of a parcel [***38] of commercial property may differ from those which affect the market value of a residence. However, once the relevant factors are applied and market values are determined, the ratio of the assessed values to these market values must be uniform throughout the taxing district. Thus, in determining uniformity the ratios of assessed values to market values of all properties are all relevant, and hence, in that sense all properties are "comparables."
Previously, this Court had suggested an absolutist approach when describing the uniformity requirement, holding that "real estate as a subject for taxation may not validly be divided into different classes." In re Lower Merion Twp., 427 Pa. 138, 233 A.2d 273, 276, 59 Mun. L Rep. 112 (Pa. 1967). Although we have consistently recognized that the Uniformity Clause precludes "real property from being divided into different classes for purposes of systemic property tax assessment," we have since retreated from such an absolutist approach. See Downingtown, 913 A.2d at 200. In Downingtown, we stated that the general uniformity requirement does not eliminate "any opportunity or need to consider meaningful sub-classifications" as a component of the overall evaluation of uniform treatment in the application of the taxation scheme." Id. In so stating, however, this Court was primarily concerned with overall uniformity, and we reaffirmed "the prevailing requirement that similarly situated taxpayers should not be deliberately treated differently by taxing authorities." Id. at 201 ("W)hile the Commonwealth may certainly seek to achieve overall uniformity by attempting to standardize treatment among differently situated property owners, its efforts in this regard do not shield it from the prevailing requirement that similarly situated taxpayers should not be deliberately treated differently by taxing authorities.").

In any event, judicial review of uniformity challenges to a statutory scheme of property taxation often needs only to focus on the first prong of the uniformity analysis -- whether the statute results in a "classification" -- because in the property taxation context, any disparity in tax liability, beyond the expected practical inequities, most likely constitutes a violation of the Uniformity Clause. In essence, such a challenge resembles a taxpayer's claim before a county board of assessment appeals that his property was assessed at a higher percentage of fair market value than other properties throughout the same taxing district. See Downingtown, 913 A.2d at 199 ("A taxpayer is entitled to relief under the Uniformity Clause where his property is assessed at a higher percentage of fair market value than other properties throughout the taxing district."). 23 In the present case, where appellants claimed that Allegheny County's base year method of valuation violated the Uniformity Clause, the burden is essentially the same: the taxpayer must demonstrate a lack of uniformity in assessments, whether the result of a single, isolated misassessment of his own property or the result of a statutory scheme of valuation causing mass misassessment.

FOOTNOTES

23 A taxpayer who believes that his property has been inequitably assessed may appeal the assessment to the county board of assessment appeals. See 72 P.S. § 5020-511; see, e.g., Green v. Schuylkill County Bd. of Assessment Appeals, 565 Pa. 185, 772 A.2d 419, 425 (Pa. 2001); Westinghouse, 652 A.2d at 1308. The board's decision is then appealable to the court of common pleas for a trial de novo. 72 P.S. §§ 5020-518.1; see also Downingtown, 913 A.2d at 195-96; Green, 772 A.2d at 425; [**41] Westinghouse, 652 A.2d at 1308. In assessment appeals, all properties in the relevant taxing district are comparable for purposes of establishing the appropriate ratio of assessed value to market value in a uniformity
challenge, though the parties and the trial court should rely upon evidence of assessment-to-value ratios of similar properties. Downingtown, 913 A.2d at 199.

In addition to taxpayers, corporate authorities of any municipality may appeal a property’s assessment. 72 P.S. § 5020-520. For example, school districts often appeal, some more aggressively than others, the assessments of properties that they believe are under-assessed. See, e.g., Downingtown, 913 A.2d at 196; In re Penn-Delco Sch. Dist., 903 A.2d 600, 603 (Pa. Cmwlth. 2006); Vees v. Carbon County Bd. of Assessment Appeals, 867 A.2d 742, 744 (Pa. Cmwlth. 2005); In re Springfield Sch. Dist., 879 A.2d 335, 336 (Pa. Cmwlth. 2005).

Before determining whether a base year method of valuation produces the type of misassessment that violates the Uniformity Clause, we must consider the constitutional contours of real property valuation, as well as how a lack of uniformity is demonstrated. Preliminarily, the Pennsylvania Constitution [***42] requires that property valuations be based, as nearly as [***1214] practicable, on the relative value of each property to [*690] market value. Delaware, L.&W.R. Co.’s Tax Assessment, 73 A. at 430. In Delaware, L.&W.R., this Court described how real property taxation satisfies the uniformity requirement through a system of equitable valuation:

Each person, natural or artificial, must bear his share of the public burdens, and the burden of each is measured by the ratio ascertained by dividing the total amount of taxes necessary to meet the public burdens in a given district by the whole valuation of property within the territorial limits of that district, and, when the ratio is thus fixed, the amount of tax to be paid by each individual property owner is determined by multiplying the assessed value of his property by this ratio. This rule has resulted from the demands made by the people upon legislative bodies for equality of taxation. The large property owner and the small holder pay upon the same ratio, and when the valuation has been ascertained and fixed upon a fair basis, which means that the valuation should be based as nearly as practicable upon market value, and, if not on market value, then upon [***43] the relative value of each property to market value, there results what is known in organic and statute law as uniformity, which is the desideratum to be attained in any just system of taxation. While every tax is a burden, it is more cheerfully borne when the citizen feels that he is only required to bear his proportionate share of that burden measured by the value of his property to that of his neighbor. This is not an idle thought in the mind of the taxpayer, nor is it a mere speculative theory advocated by learned writers on the subject; but it is a fundamental principle written into the Constitutions and statutes of almost every state in this country.

Id. (internal citation omitted). Accordingly, [***44] "[e]ach property should be assessed at its fair market value; it cannot be assessed at more than its fair market value or higher than the percentage of value uniformly fixed throughout the taxing district, nor can there be an intentional or systematic undervaluation of like or similar properties." In re Brooks Bldg., 391 Pa. 94, 137 A.2d 273, 275, 49 Mun. L Rep. 230 (Pa. 1958); see also [*691] Narehood v. Pearson, 374 Pa. 299, 96 A.2d 895, 899 (Pa. 1953) ("The intentional, systematic undervaluation by state officials of taxable property [***44] of the same class
belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property." (quoting Cumberland Coal Co. v. Bd. of Revision of Tax Assessments in Greene County, Pa., 284 U.S. 23, 28, 52 S. Ct. 48, 76 L. Ed. 146 (1931) (emphasis and internal quotation marks omitted)).

Thus, in uniformity litigation, the aggrieved taxpayer must first establish the various valuations at issue, and then demonstrate how the disparate ratios of assessed-to-market value violate the uniformity requirement. A number of standards have been developed for measuring whether a system of property valuation produces sufficiently uniform results. The first such standard is the established predetermined ratio ("EPR"), which is set by a county's board of commissioners and is a ratio of assessed value to market value that must be uniformly applied in determining assessed value in a given year. 72 P.S. §§ 5020-102, 5342.1. For example, the EPR in Allegheny County is 100%. Thus, Allegheny County intends for a property's assessed value to be 100% of its actual value (using the 2002 base-year values). In application, however, "the EPR is treated as a fixed number that merely fractionizes assessments [***45] and which is generally held constant pending county-wide reassessment." [**1215] Downingtown, 913 A.2d at 202-03 n.13. 24 When a county utilizes a base year method of valuation, the EPR is used as follows:

[*692] In the base year, the fair market value of all such properties is ascertained. Then, an EPR is applied to each such value to arrive at the base year assessment for every property in the county. To take a simple, but common, example, a county may set its base year EPR at 100% of actual value, and thus, reassess all real estate in the county at its actual value for the base year. Each year thereafter, until the next county-wide reassessment, a given property's value may change, but its assessment ordinarily remains static, fixed at its base year level.

Id. at 202-03 (footnote omitted).

FOOTNOTES

24 In Downingtown, we discussed the EPR further:

The EPR is defined as the county's intended ratio of assessed value to market value for any given tax year, see 72 P.S. § 5342.1; BRIGHT, 27 SUMM. PA. JUR.2D TAXATION § 15:5, and thus, would appear to have been conceived as a methodology to advance equalization. Nevertheless, the statutory scheme otherwise requires equalization to be accomplished prior to the application [***46] of the EPR. See 72 P.S. §§ 5020-402 (requiring that "selling price, estimated or actual, shall be subject to revision by increase or decrease to accomplish equalization"), 5348(d) (same). With some justification, then, it appears that the latter provisions have been afforded precedence over the former, and, in practice, an EPR does not represent a true assessment by the county of the ratio of assessed value to market value (and which would thus vary annually where property values change but assessments remain fixed, just as does the common level ratio). Rather, in application, the EPR is treated as a fixed number that merely fractionizes assessments and which is generally held constant pending county-wide reassessments. See [BERT M. GOODMAN, ASSESSMENT LAW & PROCEDURE IN PENNSYLVANIA 258 (2002-2003 ed.)] (describing the EPR as "an arbitrary number selected by the government"); BRIGHT, 27 SUMM. PA.
The second standard involves the State Tax Equalization Board's ("STEB") determination of each county's common level ratio ("CLR"). The CLR is "the ratio of assessed value to current market value used generally in the county." 72 P.S. §§ 4656.16a, 5020-102, 5342.1. 25 The STEB calculates a county CLR based on sales information furnished by the county, as well as by independent appraisal data and other relevant information. See Downingtown, 913 A.2d at 200 n.8. 26 As [***1216] the trial court described, a county's CLR will be 70% if [*693] the total assessed value of properties sold in arms-length sales in a year is 70% of the total market value of the properties. Trial Ct. Op. at 17. Under normal economic conditions, however, a base year's CLR "tends to diminish each year, reflecting ongoing inflation and real estate appreciation." Downingtown, 913 A.2d at 203. Like the EPR, the CLR is not indicative of uniformity. For example, properties in a county with a CLR of 60% may be assessed at between 55% and 65% of their fair market value, which would not necessarily violate the Uniformity Clause because "some practical inequalities are anticipated, and rough uniformity with a limited amount of variation is permitted." Beattie, 907 A.2d at 530. However, a county with a CLR of [***48] 60% may also have assessed a number of properties at more than 90% of their fair market value, and a large number of others at less than 30% their fair market value. See Trial Ct. Op. at 18. In any event, the CLR is a useful tool for a taxpayer to demonstrate that his property has been over-assessed, as it allows him to compare the assessed-to-market value ratio of his property to the average ratio throughout the district. 27

FOOTNOTES

25 The STEB, which was established in 1947 to combat the lack of statewide assessment uniformity, publishes annual assessment statistics for each of Pennsylvania's counties. See 72 P.S. § 4656.1 et seq.

26 Pursuant to Section 4656.16a of the Fiscal Code, a county CLR is established as follows:

(a) The state Tax Equalization Board shall, annually, prior to July 1, establish for each county a common level ratio for the prior calendar year.

(b) In arriving at such ratio, the board shall use statistically acceptable techniques, including sales ratio studies. The board's method in arriving at the ratio shall be made available to the public. The ratio shall be certified to the chief assessor of each county and it shall be admissible as evidence in any appeal involving real [***49] property tax assessments.

(c) Any political subdivision or taxpayer aggrieved by any finding, conclusion or any method or technique of the board made pursuant to this section may, in writing, state objections thereto and may appeal de
novos such ratio determination to the Commonwealth Court. After receiving any objections, the board may grant a hearing and may modify or adjust its findings and computations as it shall appear proper.

72 P.S. § 4656.16a; see also Downingtown, 913 A.2d at 203.

27 A county's EPR and CLR play an important role in assessment appeals. Currently, after appeal to the trial court, the court must determine the property's market value and the county's CLR, and then apply the county's EPR to the property's market value unless the corresponding CLR varies by more than 15% from the EPR, in which case the court shall apply the respective CLR to the corresponding market value of the property. 72 P.S. § 5020-518.2. However, it should be noted that, in Downingtown, we held a tax provision unconstitutional because it created an arbitrary classification of taxpayers who were forced to pay taxes on a higher-than-CLR ratio of assessed-to-actual value (so long as the CLR was at [***50] least 85% of the EPR), namely, those whose assessment the taxing body elected to challenge. 913 A.2d at 204-05.

[*694] Unlike the EPR and CLR, the coefficient of dispersion ("COD"), a third standard, is a widely accepted statistical indicator of uniformity in tax assessments. "The COD is the average deviation from the median, mean, or weighted mean ratio of assessed value to fair market value, expressed as a percentage of that figure." Beattie, 907 A.2d at 530 n.7. "A high coefficient of dispersion indicates a high degree of variance with respect to the assessment ratios under consideration. A low coefficient of dispersion indicates a low degree of variance. In other words, a low coefficient of dispersion indicates that the parcels under consideration are being assessed at close to an equal rate." Id. (internal quotation marks and citations omitted). Referencing expert testimony, the trial court offered the following example: "[A] COD of 30 in a county with 100,000 parcels of taxable property means that the assessed values of approximately one-half of the properties in the county (i.e., 50,000 properties) either exceed the common level ratio by 30% or are less than 30% of the common level [***51] ratio. In other words, close to 25,000 of the properties will be assessed at no more than 70% of the common level ratio while another 25,000 of the properties will be assessed at 130% or more of the common level ratio." Trial Ct. Op. at 19.

Finally, the price-related differential ("PRD") is a widely accepted indicator of inequity between high-value properties and low-value properties. "PRDs above 1.03 tend to indicate assessment regressivity (an appraisal bias in which high-value properties are appraised lower than low-value properties relative to their actual value), while PRDs below 0.98 indicate tax progressivity (an appraisal bias in which high-value properties are appraised higher than low-value properties relative to their [***1217] actual value)." Beattie, 907 A.2d at 521 n.2.

The International Association of Assessing Officers ("IAAO") has standardized these ratios and indicators, and those standards, set forth in its Standard on Ratio Studies, are widely accepted as the best criteria for judging the adequacy of a property assessment. See Notes of Testimony ("N.T."), 12/11/06, at 69, 72-74; Report of Richard R. Almy & [*695] Robert C. Denne, Plaintiffs' Exhibit 1, at 11-12. The report of
appellees' [***52] expert, a former IAAO executive director, relied upon the IAAO standard ratios for uniformity, and the trial court credited and relied upon both the expert's report and his testimony. See Trial Ct. Op. at 19-20. For example, under the IAAO standards, which were first adopted in 1980, a COD should generally not exceed 15. More precisely, the IAAO standards for a single-family residential property should be 10% or less for newer, more homogenous areas; 15% or less for older, heterogeneous areas; and 20% or less for rural residential and seasonal areas. Trial Ct. Op. at 19-20; see also Almy & Denne Report at 11-12. The IAAO standard PRD range is 0.98 to 1.03. Trial Ct. Op. at 20; see also Almy & Denne Report at 11-12.

With these general principles in mind, we now turn to the parties' arguments. Allegheny County claims that its base year method of valuation constitutes neither a facial nor an as-applied violation of the Uniformity Clause. 28 Responding to the trial court's finding that the base year system was invalid on its face, the County characterizes the trial court's conclusion as "premised on the notion that the base year system, by its reliance on static property values, creates [***53] in effect a classification of certain property owners who bear increasing or decreasing tax burdens for no legitimate reason," and defends the Legislature's "classification" as rationally related to a legitimate state interest. County's Brief at 32. Drawing on the trial testimony of the County Manager, the County states that the interest underlying the implementation of a base year method of valuation is "the need to create and preserve a stable and predictable real estate tax assessment system." County's Brief at 34-35. This interest in stability and predictability, maintains the County, benefits all entities involved in property taxation.

FOOTNOTES

28 Appellants Allegheny County, Allegheny County Chief Executive Daniel Onorato, and Allegheny County Chief Assessment Officer Deborah Bunn filed a single brief.

At the county level, the County contends that stability and predictability are imperative because of: (1) the costliness of [*696] countywide reassessments; and (2) the substantial repercussions of performing countywide reassessments. 29 At the local level, the County argues that reassessments significantly hamper taxing bodies as they manage their budgets and levy local property taxes. Additionally, [***54] municipalities and school districts are burdened by the difficulty in estimating the reserves needed for possible tax refunds and in calculating the millage rates when reassessments are conducted. The County also contends that individual property owners benefit from the stability and predictability of a base year system because consecutive countywide reassessments cause many taxpayers to suffer from the "sticker shock" of receiving consecutive notices of substantial increases in the value of their [***1218] property, without any improvements having been made. Consequentially, argues the County, taxpayers lack a stable and consistent environment to budget their personal finances.

FOOTNOTES
29 The County notes that it cost in excess of $25 million to perform the 2002 base year assessment, and that any reassessment results in a substantial number of assessment appeals (approximately 90,000 in 2001 and 2002), which leads to further costs to the County.

Having set forth what it believes to be a legitimate state interest, the County next argues that the base year method of property valuation bears a rational relationship to that purpose. The County maintains that "[w]hat is pejoratively viewed as the base year's [***55] vice is ultimately its saving virtue" -- the creation of "a constant and certain set of property values that do not fluctuate wildly from year to year." County's Brief at 37. In sum, the County contends that the Legislature "reasonably determined that the legitimate interests of stability and predictability would best be achieved by allowing real property to be valued and taxes [to] be levied based upon a constant set of unchanged values for a reasonable length of time and that this interest in stability and predictability outweighed the interest in keeping up with the latest changes and fluctuations in market values." Id. at 38.

Turning to the trial court's opinion, the County maintains that the court abused its discretion when invoking the proportionality principle (i.e., that taxpayers should only have to pay [*697] their proportionate share of the cost of government) to strike down the assessment law provisions providing for a base year method of valuation. The County argues that, to find the proportionality principle satisfied, the trial court unreasonably would require "mathematically precise calculation." County's Brief at 40.

Contrary to the trial court's conclusion, the County asserts [***56] that in Narehood v. Pearson, 374 Pa. 299, 96 A.2d 895, 899 (Pa. 1953), this Court previously held that the concept of a "base" standard is a reasonable and uniform way to constitutionally assess property. 30 And in cases such as Delitch, supra, argues the County, this Court stated that the minimum necessary to satisfy the Uniformity Clause's proportionality principle is application of a common standard (the same ratio) to all properties within the taxing district. In the present case, the County notes that there is no dispute that, under the base year system, Allegheny County has applied the same ratio (100% of market value) when assessing all properties. By adhering to this standard, contends the County, it has satisfied the minimum requirements of the Uniformity Clause.

FOOTNOTES

30 In Narehood, 96 A.2d at 899, this Court stated that "[i]t is not unconstitutional to adopt as a base a reasonable and uniform standard of valuation for each property of the same class in a district or proper area, since substantial uniformity in assessments and in the application of tax laws satisfies the Constitution."
taxpayers where a base year system may result in inequity. Citing the Commonwealth Court's decision in Appeal of Armco, Inc., 100 Pa. Commw. 452, 515 A.2d 326 (Pa. Cmwlth. 1986), the County contends that in a situation where it appears that the absence of a recent countywide reassessment causes inequitable assessments, the assessment laws allow the county's EPR to be replaced with the county's CLR, which is more reflective of market changes, and thus cures any potential inequity. 31 The [*1219] County asserts that this Court [*698] endorsed such a view in Downingtown, supra, as we cited favorably to the dissenting opinion in Vees v. Carbon County Board of Assessment, 867 A.2d 742 (Pa. Cmwlth. 2005), which observed how a STEB-calculated CLR works to maintain uniformity in a base year system. The County contends that Downingtown supports the constitutionality of a base year method of valuation because the decision: (1) reaffirms that the minimum needed for satisfying uniformity requirements is application of the county CLR; and (2) undercuts the trial court's conclusion that a base year system is unresponsive to market changes.

FOOTNOTES

31 In [*58] Armco, the Commonwealth Court applied Section 704 of the Fourth to Eighth Class County Assessment Law, 72 P.S. § 5453.704, which mirrors Section 518.2 of the General County Assessment Law, 72 P.S. § 5020-518.2, which is discussed above. Additionally, the Armco court noted that:

Quite apparently, the [assessment law's] theory is that, by holding out to property owners the opportunity to take appeals which can test the base-year-value predetermined-ratio equation, the results of those appeals will inform the county and force it to monitor and reform its assessment levels to reflect reality. The STEB common level ratio operates as a multiplier used to convert current market values to equivalent base-year assessed values.

Armco, 515 A.2d at 330.

The County also argues that a base year assessment system's failure to account for "immediate" market changes does not render the system unconstitutional. The County asserts that the trial court and appellees erroneously equate constitutionality "with slavish adherence to a standard of valuation based solely and exclusively on current market value determined on a yearly basis." County's Brief at 48.

Finally, the County contends that Allegheny County's [*59] base year system has not resulted in such pervasive countywide inequities as to render the entire assessment system unconstitutional. The County argues that the trial court erred when exclusively relying on the statistical indicators (the COD and PRD) promulgated by the IAAO, a private organization, because neither the General Assembly nor this Court has declared IAAO standards to be the definitive legal benchmark of tax assessment uniformity, and because such exclusive reliance runs counter to this Commonwealth's case law. Citing a number of Commonwealth Court cases, as well as a U.S. [*699] Supreme Court case, 32 the County maintains that case law required the trial court to look beyond statistical indicators and focus on "the cumulative
effects of a variety of factors in determining whether a county's assessment system has tipped into pervasive non-uniformity." County's Brief at 53. The County contends that the facts of the present case do not rise to the level of pervasive inequity found in prior Commonwealth Court cases. The County also asserts that its assessment system was found to be more uniform than those of other Pennsylvania counties, and that its base year is based on "a countywide [***60] assessment of relatively recent vintage." Id. at 57. The County further submits that its CLR is within the permissible level of deviation allowed by state law, and that the CODs in Allegheny County are lower than those that the Commonwealth Court previously has held as evidencing inequity. In sum, the County maintains that the trial court lacked sufficient facts to support its finding of non-uniformity, and usurped the powers of the General Assembly, in violation of the doctrine of separation of powers.

FOOTNOTES


[***1220] Appellees disagree. 33 Maintaining that the trial court correctly found that the base year system produced unreasonable discriminatory results in violation of the Uniformity Clause, appellees assert that the Uniformity Clause requires that "[a]ll taxes shall be uniform"; not that [***61] "taxes were uniform at some arbitrary point in the past." See Pierce Brief at 19 (emphasis by appellees).

FOOTNOTES

33 Although two appellee briefs were filed, one on behalf of the Pierce plaintiffs and one on behalf of the Clifton plaintiffs, we will present their arguments collectively.

[***700] Appellees submit that the evidence of non-uniform treatment in this scheme is overwhelming. Appellees first cite Allegheny County's COD and maintain that, although Allegheny County has adopted a COD of 15 or less, consistent with accepted IAAO norms, the County's actual COD, as well as the CODs of virtually all Pennsylvania counties, exceed this standard. Appellees also reference Allegheny County's PRD of 1.11, which they assert demonstrates that the inequity in property assessments has fallen more harshly on lower-value property owners. Appellees contend that there is no legitimate justification for a scheme of taxation that taxes lower-value properties at a higher ratio than other properties. Appellees argue that long-term [***62] use of the base year method of valuation has produced this unconstitutional non-uniformity of assessments because a base year system ignores the inevitable and
disparate value changes among properties within the same "classification," with the heaviest burden of the disparate treatment falling on those who can least afford it -- owners of properties in declining or stagnant neighborhoods.

Although recognizing that, under this Court’s Uniformity Clause jurisprudence, real property is to be treated as a single class entitled to uniform treatment, appellees, cognizant of our analysis in Downingtown, assert that no legitimate state interest is furthered by a distinction between property owners whose properties have declining or stagnant values and those whose property values have substantially increased. Referencing Cumberland, supra, and Narehood, supra, appellees acknowledge that reasoned distinctions between categories of properties may be appropriate in some cases, but they argue that there is no justification for applying a different ratio of assessed to actual value to properties within the same classification. Appellees contend that stability and predictability cannot justify unconstitutional [***63] treatment, especially in property tax cases where the justification has no relation to the situs of a property, and where all property must be treated as a single class.

Disputing the County’s cost argument, appellees maintain that regular assessments, which allow for more uniform results, [*701] cost a county no more than sporadic, irregular ones. As for the County’s claim that the 2001 reassessment cost $25 million to complete, appellees aver that the County’s primary witness failed to explain how much of that sum went to the reassessment, and how much went to the normal operations of the County assessment office from 1997 to 2001. Additionally, appellees cite a number of circumstances that led to the abundance of appeals following the 2001 reassessment that they claim the County failed to account for, such as problems with how the reassessment was executed and the fact that the County concurrently changed the County’s EPR. Appellees also argue that subsequent reassessments in 2002 and 2005 cost [***1221] much less, and that, having invested $3.5 million in a state-of-the-art computer system to aid in property assessments in 2005, which the County has yet to use, future assessments should cost the [***64] County even less. Thus, appellees maintain that whatever practical limitations assessment officials may have had in 1982, when the use of a base year method was authorized by statute, those limitations no longer exist.

Quoting the U.S. Supreme Court’s decision in Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 29, 52 S. Ct. 48, 76 L. Ed. 146 (1931), appellees further contend that “[a]pplying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same.” When real value differences are systematically ignored, appellees argue that it is as if the taxing body is applying a different ratio to similarly situated properties. Appellees also challenge the County’s argument that use of the CLR by taxpayers via the appeals process is sufficient to correct non-uniform assessment. Citing Downingtown, supra, and Beattie, supra, appellees submit that this Court has noted the inadequacies of attempting to achieve uniformity through use of the CLR, and has recognized the importance of considering a range in applicable averages, as expressed in the COD. Application of the CLR, argue appellees, cannot [***65] substitute for the elimination of the non-uniformity in the first place.

Appellees [*702] add that the appeals process is meant to correct discrete errors in oversight or calculation, and is not meant to correct mass inequitable results caused by an inherently flawed,
systemic method of assessment. Moreover, appellees contend, the present system impossibly places
the burden on taxpayers to undertake administrative appeals to attempt to remedy the lack of
uniformity.

Finally, appellees maintain that the trial court did not rely exclusively on the IAAO standards, but
considered extensive evidence of substantial and widely divergent change in Allegheny County property
values. Appellees submit that, for example, the court also relied upon a report on disparate property
appreciation prepared by the Allegheny County Chief Executive's Office, and a report issued by the
Office of Federal Housing Enterprise Oversight, which described property value change in Pennsylvania.
Moreover, appellees note, ratio studies and their results are matters of fact, which the County has not
disputed. Appellees contend that the COD and PRD results in Allegheny County demonstrate the actual,
substantial non-uniformity [***66] in assessments, which proves the constitutional flaw.

In sum, appellees state that, following the trial court's proper invalidation of the base year method of
assessment, annual assessments based on current market value are the only constitutional system of
property valuation remaining in Pennsylvania. Alternatives to annual reassessments, maintain appellees,
can only be created by the General Assembly, which has yet to address the inherent flaws in the base
year system. Thus, appellees conclude that the trial court did not err in ordering Allegheny County to
complete a reassessment by 2009.

This matter has been ably briefed and argued, and is now ready for decision. Our primary task is to
determine whether appellees successfully demonstrated that the assessment law provisions permitting
a base year method of valuation "clearly, palpably, and plainly" violate the Uniformity Clause of the
Pennsylvania Constitution. We hold that as currently applied in Allegheny County, the base year system
is unconstitutional.

[*703] [**1222] The evidence presented at trial demonstrates that the Allegheny County scheme,
which permits a single base year assessment to be used indefinitely, has resulted in significant
disparities [***67] in the ratio of assessed value to current actual value in Allegheny County. The
disparity is most often to the disadvantage of owners of properties in lower-value neighborhoods where
property values often appreciate at a lower rate than in higher-value neighborhoods, if they appreciate
at all. For the reasons that follow, we conclude that, HN12 to the extent that the provisions of the
General County Assessment Law, 72 P.S. § 5020-402(a), and the Second Class County Assessment Law,
72 P.S. § 5452.4(a.2), permit indefinite use of a base year method of valuation, those provisions, as
applied here, violate the Uniformity Clause.

Preliminarily, however, we make clear that, unlike the trial court, we are not prepared to hold the
statutory base year provisions facially unconstitutional. HN13 A statute is facially unconstitutional only
where no set of circumstances exist under which the statute would be valid. Wash. State Grange v.
United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). "In determining
whether a law is facially invalid, [a court] must be careful not to go beyond the statute's facial
requirements and speculate [***68] about 'hypothetical' or 'imaginary' cases." Id. (citing United States v. Raines, 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.

It appears that this Court has yet to consider thoroughly the standard by which facial challenges are evaluated, or the facial challenger's corresponding burden of proof. 34 However, [*704] the U.S. Supreme Court has recently addressed this issue, and its opinion is informative. See Wash. State Grange, 552 U.S. at ___, 128 S. Ct. at 1190. Prior to United States v. Salerno, supra, the High Court required only that a party making a facial challenge establish that the invalid applications of a statute must be real and substantial, and are "judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); see also Washington v. Glucksberg, 521 U.S. 702, 739-40, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (Stevens, J., concurring in judgments) (discussing cases). 35 In United States v. [*705] Salerno, [**1223] the High Court seemed to suggest a stricter standard, stating that "a facial challenge to a legislative Act is, of course, the most difficult challenge [***69] to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. Recently, however, the Court seems to have settled on the "plainly legitimate sweep" standard. See Wash. State Grange, 552 U.S. at ___, 128 S. Ct. at 1190 ("While some Members of the Court have criticized the Salerno formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'") (internal quotation marks omitted); see also Crawford, U.S. at ___, 128 S. Ct. at 1623 ("A facial challenge must fail where the statute has a 'plainly legitimate sweep.'") (further internal quotation marks omitted). 36

FOOTNOTES

34 Although not directly addressing the contours of a facial challenge, we have addressed the differences between facial and as-applied challenges in a number of scenarios, often for procedural purposes. See, e.g., Phila. Entm't & Dev. Partners v. City of Philadelphia, 594 Pa. 468, 937 A.2d 385, 392 n.7 (Pa. 2007) ("[A]s-applied challenges require application of the ordinance to be ripe, facial challenges are different, and ripe upon mere enactment of the ordinance."); Beattie, 907 A.2d at 527-29 (holding that [***70] court can exercise equity jurisdiction over taxpayer's challenge that property assessment system is unconstitutional facially or as-applied); Lehman v. Pa. State Police, 576 Pa. 365, 839 A.2d 265, 275 (Pa. 2003) (distinguishing between as-applied and facial constitutional challenges when applying doctrine of administrative exhaustion); Kepple v. Fairman Drilling Co., 532 Pa. 304, 615 A.2d 1298, 1303 (Pa. 1992) (distinguishing between facial and as-applied constitutional challenges for purposes of providing notification to Attorney General pursuant to Pa.R.A.P. 521(a)); Commonwealth v. Noel, 579 Pa. 546, 857 A.2d 1283, 1288 (Pa. 2004) (Saylor, J. concurring) (discussing difference between as-applied and facial void-for-vagueness claims under First Amendment of U.S. Constitution).

35 This standard was originally applied in the context of overbreadth challenges under the First Amendment, where a statute may be facially challenged as overbroad. See, e.g., New York v. Ferber, 458 U.S. 747, 769-71, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); Broadrick, 413 U.S. at 615; accord
Commonwealth v. Davidson, 595 Pa. 1, 938 A.2d 198, 208 (Pa. 2007); Commonwealth v. DeFrancesco, 481 Pa. 595, 393 A.2d 321, 330-31 (Pa. 1978). In such cases, where the "plainly legitimate sweep" standard has been more thoroughly described, a statute may be "overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" Wash. State Grange, 552 U.S. at ___, 128 S. Ct. at 1191 n.6 (quoting New York v. Ferber, 458 U.S. 747, 769-71, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)) (internal quotation marks omitted). While there are overlaps in evaluation, the High Court has distinguished between First Amendment facial challenges and facial challenges based upon other constitutional provisions. See id. at 1190-91. In any event, as evidenced by Washington State Grange and Crawford v. Marion County Election Board, the Court has since utilized this standard in the non-First Amendment context. Wash. State Grange, 552 U.S. at ___, 128 S. Ct. at 1190; Crawford v. Marion County Election Bd., U.S., 128 S. Ct. 1610, 1623, 170 L. Ed. 2d 574 (2008) (Opinion Announcing the Judgment of the Court).

36 The difference is essentially one of the degree of burden placed on the challenger. Under the Salerno standard, the challenger must establish that there is no set of circumstances under which the Act would be valid. 481 U.S. at 745. Under the more lenient "plainly legitimate sweep" standard, the challenger need only demonstrate that a "substantial number" of the challenged statute's potential applications are unconstitutional. See New York v. Ferber, 458 U.S. at 769-71.

In the present case, the trial court found the base year method of assessment "invalid on its face because it inevitably produces arbitrary, unjust, and unreasonably discriminatory results." Trial Ct. Op. at 29. The court based its conclusion on the fact that the legislation permitting use of a base year system was not intended to tax all real property at the same rate, and therefore it failed to meet the requirements of the Uniformity Clause. However, a presumption of inevitable unjust application and a perceived flaw in the General Assembly's intent cannot alone render the statute facially invalid. 37

FOOTNOTES

37 Even under the "plainly legitimate sweep" standard, a statute is only facially invalid when its invalid applications are so real and substantial that they outweigh the statute's "plainly legitimate sweep." Stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. For this reason (as well as others), facial challenges are generally disfavored. See Wash. State Grange, 552 U.S. at ___, 128 S. Ct. at 1191 ("Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'") (quoting Sabri v. United States, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004)).

[*706] It appears that, to some degree at least, the trial court's conclusion that the base [**1224] year
system is facially invalid is premised on evidence of how the base year provisions, as applied in the particular circumstances here, resulted in an unconstitutional disparate scheme of taxation. Moreover, the trial court's facial conclusion failed to contemplate potentially valid applications of the base year provisions. It is true that the applicable statutory construct does not mandate periodic reassessments, much less periodic reassessments within a specified timeframe. Significantly, however, the statute does not prohibit a taxing authority from engaging in periodic reassessments to "update" the base year. It seems obvious that use of a base year system -- with its attendant [***74] economies, stability, and predictability -- would not implicate the Uniformity Clause if, for example, a county conducted adequate periodic reassessments, or if it could be shown that property values in a particular county remained relatively unchanged, or those values had virtually the same rate of change. It may well be true that a base year system, if unadjusted, will inevitably lead to taxing inequity. But those inequities, in a particular county, may take years to rise to the level of constitutional infirmity. The governing presumption of constitutionality, the high burden to show unconstitutionality in a facial challenge, and the flexibility the statutory scheme permits, combined with the fact that appellees' facial challenge relies on evidence of the provisions' inequitable application here, and the further fact that it appears there are circumstances where the base year provisions could be constitutionally applied, lead us to conclude that appellees' facial challenge fails under even the more lenient "plainly legitimate sweep" standard. 38 Thus, we cannot affirm the trial court on its terms. Appellees' claim is more appropriately evaluated in [*707] the context of an as-applied challenge. [***75] See Wash. State Grange, 552 U.S. at ___, 128 S. Ct. at 1187.

FOOTNOTES

38 Like the assumptions forming the basis of the trial court's finding of facial invalidity, the County's arguments addressing "classification" and proportionality in the context of appellees' facial challenge are misplaced. Those arguments, however, are relevant in the as-applied context and will be addressed below.

The County's arguments regarding appellees' as-applied challenge are not entirely consistent. Maintaining that any "classification" resulting from long-term application of the base year scheme is rationally related to a legitimate state interest, the County seems to initially concede non-uniformity. With its next argument, however, the County denies non-uniformity and contends that the base year system does not result in inequitable assessments because application of either the EPR or CLR satisfies the Uniformity Clause's proportionality requirement. We will address these arguments as alternatives, beginning with the County's claim that the trial court misapplied the proportionality principle in concluding that the base year system results in non-uniformity.

To reiterate, the proportionality principle, which forms [***76] the basis of the uniformity requirement, requires that taxpayers pay no more or less than their proportionate share of the cost of government. Downingtown, 913 A.2d at 199. To ensure proportionality, all property must be taxed uniformly, with the same ratio of assessed value to actual value applied throughout the taxing jurisdiction. In the
present case, there is ample evidence that Allegheny County's use of the base year system without periodic reassessment has failed to satisfy this principle, and thus violates the Uniformity Clause.

[**1225] Property values may change over time and at different rates, but when a taxing body freezes values with, for instance, the prolonged use of a base year's property values, the resulting disparities throughout the taxing jurisdiction produce inequities, and those inequities tend to increase over time. See Trial Ct. Op. at 38; N.T., 12/11/06, at 77, 141. The farther away from the base year a county gets, the more likely the county's PRD will become either regressive or progressive, as property values in different neighborhoods change at varying rates. Such is the case in Allegheny County where the data of record demonstrates that, since the 2002 base year [**77] [*708] assessment, Allegheny County municipalities have experienced varying rates of appreciation and depreciation.

For example, property taxes for the Woodland Hills School District continue to be based on the 2002 base year market values, even though the County's data shows that property values of the municipalities in the school district changed at significantly different rates by 2005. The rates of change recorded between 2002 and 2005 were as follows:

<table>
<thead>
<tr>
<th>Municipality</th>
<th>Rate</th>
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<tbody>
<tr>
<td>Braddock</td>
<td>-16.03%</td>
</tr>
<tr>
<td>Braddock Hills</td>
<td>+2.84%</td>
</tr>
<tr>
<td>Chalfant</td>
<td>+13.26%</td>
</tr>
<tr>
<td>Churchill</td>
<td>+15.7%</td>
</tr>
<tr>
<td>East Pittsburgh</td>
<td>+14.94%</td>
</tr>
<tr>
<td>Edgewood</td>
<td>+35.87%</td>
</tr>
<tr>
<td>Forest Hills</td>
<td>+18.85%</td>
</tr>
<tr>
<td>North Braddock</td>
<td>-8.99%</td>
</tr>
<tr>
<td>Rankin</td>
<td>+6.37</td>
</tr>
<tr>
<td>Swissvale</td>
<td>+16.34%</td>
</tr>
<tr>
<td>Turtle Creek</td>
<td>+14.69%</td>
</tr>
<tr>
<td>Wilkins</td>
<td>+14.65%</td>
</tr>
</tbody>
</table>

Trial Ct. Op. at 38. These disparities are reflected in the recent STEB statistics for Allegheny County. In 2005, Allegheny County's COD was calculated at 22.3, and is currently 30.2. As described above, a COD
of 30.2 signifies that roughly half of the properties in Allegheny County either exceed the common level ratio by 30.2% or fall below the common level ratio by more than 30.2%. 39 The County's PRD was calculated at 1.10 in 2005, and is currently calculated at 1.12. 40 All are well outside the standards the IAAO deems a fair measure of [***78] equality. See supra at 27-38 (summarizing). The County [*709] itself was well aware of the problems caused by the divergent rates of change, and attempted, unsuccessfully, to remedy the problem with the passage of Ordinance 15 in March 2005. 41

FOOTNOTES

39 The 2005 STEB statistics also indicate that the CODs of a significant number of Pennsylvania's counties exceed the IAAO standard, with the CODs of 37 of Pennsylvania's 67 counties estimated at 30 or greater. The trial court also noted the significant fact that the 18 counties with CODs over 40 have one thing in common: they have not conducted a comprehensive countywide reassessment in over two decades. Trial Ct. Op. at 30. Additionally, some counties have not conducted countywide reassessments for over a quarter of a century. For example, Blair County last conducted a reassessment in 1958, Butler County in 1969, Lackawanna County in 1973, and Forest County in 1974. See Trial Ct. Op. at 27-28.

40 For up-to-date STEB statistics, see the official STEB website at http://www.steb.state.pa.us/.

41 As described above, Ordinance 15 provided for the Chief Assessment Officer to: (1) determine the actual value of each property; (2) perform an analysis of the increase [***79] or decrease in valuations in the different neighborhoods; and (3) assign a specific value limitation for each neighborhood — either decrease, no change, one percent, two percent, three percent, or four percent. That Ordinance was found to violate the Home Rule Charter of Allegheny County, the Second Class County Charter Law, Pennsylvania property assessment laws, and the Uniformity Clause in Sto-Rox School District v. Allegheny County, 153 P.I.J. 193 (Pa. Com. Pl. Allegheny 2005).

[***1226] Additional evidence of the disparate rates of change within the County and the resulting non-uniformity, which goes unaccounted-for with use of the long-term base year method of valuation without a reassessment requirement, was provided by appellees' experts. Richard R. Almy, appellees' expert, conducted a study based on sales of single-family residential properties in Allegheny County that sold once between 1998-1999, and again between 2002-2005, for a price of at least $ 50,000. Mr. Almy's conclusions demonstrated the unsurprising fact that market values inevitably fluctuated in a non-uniform manner among neighborhoods within Allegheny County. As Allegheny County's PRD reflects, the higher-value homes in [***80] Mr. Almy's study appreciated at a significantly higher rate than the lower-value homes. See Trial Ct. Op. at 39-41; Almy Report at 8-9. 42

FOOTNOTES

42 For example, a property in the North Hills School District had an annualized rate of change of -1.88; while, at the other extreme, a property in the Pine-Richland School District had a rate of change of
Further, the unrefuted testimony of Anthony C. Barna, another of appellees' witnesses, who was found credible by the trial court, was based on a market study of Allegheny, Westmoreland, and Beaver Counties. Like the Almy Report, Mr. Barna's study demonstrated that the unadjusted base year system ignores market realities and fails to account for the impact of market forces on a property's value over time. Trial Ct. Op. at 41; Barna Report, Plaintiffs' Exhibit S. Mr. Barna determined in approximately 25 municipalities in Allegheny [*710] County that there was a steady rate of increase in property values between 1996 and 2006, but that the annual rates of change differed significantly from municipality to municipality. Trial Ct. Op. at 41-42; Barna Report at 8.

In response to the trial court's conclusion based squarely on these findings [*81] of inequity, the County claims that the trial court interpreted the proportionality principle to require "mathematically precise calculation." See County's Brief at 40. The County, however, is mistaken. Judge Wetlick fully appreciated that the Uniformity Clause requires substantial uniformity, rather than mathematically precise uniformity, and that it permits practical inequities. Trial Ct. Op. at 13. Judge Wetlick's finding of unconstitutional inequity in Allegheny County derived from his concomitant, and correct, realization that the Uniformity Clause does not tolerate the substantial inequities described above; inequities that inevitably result from the prolonged use of base year assessment values in a county where property values have changed at divergent rates.

We recognize, of course, the force of the County's argument that the various standards and measures we have addressed (the CLR, COD, PRD, and IAAO criteria), which demonstrate substantial and pervasive inequity, have not been legislatively adopted and commanded. But that does not make the measures irrelevant. These standards, all of which derive from objective data, speak to the real-life effect of long-term use of a base [*82] year system without reassessment. There is no suggestion by Judge Wetlick, or this Court, that deviation [*1227] from one or more of these standards proves a lack of uniformity. Nor is there any suggestion that a "mathematically precise" lack of deviation is required for the base year system, as applied, to survive constitutional scrutiny. But these objective measures do provide a factual predicate upon which to judge the as-applied effect of this particular system of property taxation. And, we further agree with Judge Wetlick that these standards, along with their factual underpinnings, prove the lack of uniformity that has arisen over the years in Allegheny County.

[*711] The County contends that all that is necessary to satisfy the Uniformity Clause is application of a common standard to all properties within the taxing district, which Allegheny County maintains that it does through application of an EPR of 100% (i.e., assessed value is 100% of actual, fair market value). However, applying the same ratio to an outdated base year "actual" value, where the current actual value of a substantial number of properties has changed dramatically, creates the same disparity in effect as applying a different [*83] ratio to current actual values. See Cumberland, 284 U.S. at 29. Of course, applying an EPR of 100% to properties in Allegheny County when they were assessed at 100% of their current actual fair market value in the 2002 base year ensured uniformity at that time. But in
subsequent years, any time a given property's "real-time" actual value has changed, its "actual" value for property tax purposes remained static -- and thereby became inaccurate -- because Allegheny County continued to use the 2002 base year "actual" value. The County's perpetually fixed assessment ignored the well-documented disparate rates of change that occurred following the 2002 base year assessment.

While there is nothing inherently wrong in applying an EPR of 100%, applying that EPR while utilizing an outdated base year assessment merely transforms a property's old and stale "actual" value (the 2002 base year actual value) into the property's current assessed value. As a result, both a property's actual value and its assessed value remain frozen at the property's 2002 actual value for as long as the assessment serves as the base year, irrespective of actual changes in value. In short, application of an EPR of 100%, [***84] while appropriate initially, does nothing to ensure uniformity over time unless periodic reassessments are conducted.

The County's argument respecting the CLR -- the ratio of assessed to current market value in a county -- is similarly unpersuasive. The County submits that case-by-case, corrective application of a county's CLR, through the appeal process, adequately satisfies the proportionality principle and the Uniformity Clause. The County maintains that use of the CLR, [*712] which reflects "the reality of property appreciation and deprecation," as opposed to the EPR, fully comports with the proportionality principle. See County's Brief at 45 (citing Appeal of Armc co, Inc., 100 Pa. Commw. 452, 515 A.2d 326 (Pa. Cmwlth. 1986)). The County thus contends that a taxpayer's right to an assessment appeal to correct individual disparities arising from the absence of a recent countywide reassessment satisfies uniformity by allowing the EPR to be replaced by the CLR.

There may well be circumstances where use of the CLR and the individual appeal process adequately serves to address cases of particular inequity, and as case law demonstrates, both taxpayers and municipalities make use of the appeals process. But that [***85] process is not adequate when the inequity is pervasive, as the evidence demonstrates that it has become the case in [***1228] Allegheny County. The County cannot satisfy the proportionality requirement by shifting the burden of achieving uniformity to the taxpayer or aggrieved taxing entity (most often the local public school district), whom the County would task with correcting its own constitutional deficiency. Relying upon taxpayers to "force" application of the CLR through individual assessment appeals is no substitute for a constitutionally uniform property assessment in the first instance. The County's expressed concern for "the reality of property appreciation and deprecation" counsels in favor of periodic countywide accuracy, not saddling taxpayers with the burden of curing the County's constitutionally deficient method of taxation in piecemeal fashion.

Furthermore, even if the appeal process were a satisfactory mechanism through which to achieve uniformity in the face of widespread disparity, the appeal process only affects the property immediately before the Board. See Beattie, 907 A.2d at 527 ("While an appeal before the Board may be capable of lowering the assessment on any individual [***86] appellant's property, it does not appear that any systematic under-assessment of higher-value properties can be cured through a series of administrative
appeals taken by members of the asserted class of lower-value property owners. Therefore, even if all low-value [*713] property owners have their valuations reduced to more accurate figures, the alleged discriminatory effect, though lessened, would remain.”) (footnote omitted); see also Almy Report at 12-13. The successful appeals of over-assessed property owners do not decrease the values of other over-assessed properties whose owners may not have the awareness, time, or wherewithal to appeal. Furthermore, successful taxpayer appeals do not increase the assessments of under-assessed properties, whose owners have no reason to appeal. Assessments of under-assessed properties are only "forced" into conformity with the county CLR by an appeal of an aggrieved municipal entity, most often the school district, and the extent to which taxing bodies pursue assessment appeals varies from municipality to municipality. Finally, as the trial court aptly noted, "if this appeal process were a viable method of equalizing assessments, there would not be [***87] eighteen counties in Pennsylvania with CODs of 40 or more and another nineteen counties with CODs between 30 and 40." Trial Ct. Op. at 48 (footnote omitted).

Alternatively, seeming to concede non-uniformity, the County next claims that any lack of uniformity resulting from its continuing application of a dated base year is rationally related to Allegheny County's legitimate governmental interest in creating and preserving a stable and predictable local real estate tax assessment system, and is thus excusable. This argument fails for a number of reasons. First, the Uniformity Clause commands that similarly situated taxpayers should be taxed similarly. Given that the present matter involves similarly situated taxpayers, an inequity in assessments, beyond the practical, violates the Uniformity Clause. 43 The lack of uniformity resulting from prolonged use of an outdated base year assessment, caused by market forces or other changes, cannot be characterized as a "classification" in an effort to excuse the non-uniformity. For the aggrieved [*714] taxpayer, the classification is akin to the arbitrariness of being struck by lightning.

FOOTNOTES

43 Although this Court has recently acknowledged that the uniformity [***88] requirement does not necessarily eliminate "any opportunity or need to consider meaningful sub-classifications" in property taxation, Downingtown, 913 A.2d at 200, there is no such need here.

Second, even if disparate treatment (i.e., a classification) were permissible under [**1229] these circumstances, the County does not base its supposed classification on any legitimate distinction. Instead, through perpetual use of the base year system, the County permits the inevitable vicissitudes of the real estate market to define the "classification" at issue, and then attempts an after-the-fact explanation why such non-uniform treatment is allowable. Furthermore, the County's reasons why its base year system's resulting non-uniformity should be tolerated -- stability and predictability -- cannot justify a taxing scheme that routinely taxes property owners with declining or stagnant property values at a higher rate of assessed-to-actual value than property owners with stable or appreciating property values. And, even if such a governmental interest were valid under these circumstances, the County fails to demonstrate how this classification (overburdened property owners with declining or stagnant
property [***89] values) is rationally related to the governmental interests in stability and predictability. A valid classification must be rationally related to a legitimate governmental interest. Accordingly, Allegheny County’s argument, that the non-uniformity resulting from its base year system is excusable, fails.

For the foregoing reasons, we hold that, as applied in Allegheny County, the statutory base year system of taxation at issue, which approves the prolonged and potentially indefinite use of an outdated base year assessment to establish property tax liability, violates the Uniformity Clause of the Pennsylvania Constitution. This conclusion is different and narrower than that of the trial court below, which found that the statutory base year provisions were facially unconstitutional, and accordingly deemed annual reassessment based on current market value as Allegheny County’s only remaining option. We find no ineluctable constitutional deficiency with use of a base year system; it is only through the passage of time that a base year assessment will become stale, and thus unconstitutional.

[*715] Presumably, inequity will arise in such a system at different rates in different taxing authorities, [***90] depending upon the stability of property values in the municipality, the variety of real estate extant, and from other market factors. The point at which an unadjusted base year system becomes constitutionally problematic thus may vary from county to county. We recognize the desirability of the base year system from the county perspective, and it may be that such a system might operate fairly for more tax cycles than the base year in certain counties. Thus, it may be that a county could ensure a constitutional base year method of assessment by requiring periodic reassessment through an ordinance or as a matter of practice. The difficulty -- and the risk to an authority employing an unadjusted base year system -- is in determining the point at which a base year deviates to an extent where reassessment would be required.

It is not our charge to determine what may be the best system of assessment. Nor is this Court capable of fixing a point in time at which a base year automatically becomes unconstitutionally non-uniform. As the trial court noted, the General Assembly is the appropriate place in the first instance to fashion a more comprehensive and soundly constitutional scheme. 44 To [***91] [**1230] that end, the trial court has provided a useful [*717] survey of the property assessment [**1231] methods of our sister states, which shows that twenty-two of our sister states require annual reassessments, while twenty-six permit reassessments to be conducted at intervals over one year, though they still require periodic reassessment. Pennsylvania is the only state where legislation allows the use of a base year indefinitely. See Trial Ct. Op. at 54-56. The General Assembly has available to it the experience of our sister states, as well as the IAAO standards.

FOOTNOTES

44 Inexplicably deeming the "prospect of prompt legislative action" "unlikely," Mr. Justice Baer's Concurring Opinion takes the Court to task for "refus[ing]" to act "to fill a void where the legislature has not acted." Concurring Slip Op. at 3, 4, 5 (emphasis added). As the temporal dissonance in the Conurrence's own logic might suggest, the precedents cited by the Concurrency for this sort of judicial
activism are not at all analogous to the instant case. When considered in context, Commonwealth v. Miller, 585 Pa. 144, 888 A.2d 624 (Pa. 2005), the only decision of this Court mentioned by the Concurrency, actually undermines its position. As the Concurrency [***92] notes, in Miller, this Court effectively filled in a legislative void when we crafted a definition of mental retardation in order to enforce the prohibition, announced three and-a-half years earlier by the U.S. Supreme Court in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), against imposing the death penalty on the mentally retarded. Significantly, in Miller, the issue of the appropriate definition was the whole case, and it had been litigated and decided below as well as briefed before this Court. See, e.g., Miller, 888 A.2d at 631 (noting that PCRA court had accepted and used certain definition); id. at 628 (noting that, on appeal here, inmate urged adoption of different definition). Moreover, as noted by Mr. Justice Eakin in his Miller concurrence, although "[m]ore than three years ha[d] passed since it was announced that each state had to set standards and procedures for adjudicating the mental retardation of a defendant in a capital case . . . no legislation ha[d] been passed to accomplish this." Id. at 633 (Eakin, J., concurring). Recognizing the issue as an "inherently legislative matter," Justice Eakin "concur[red] in the need for this Court to establish the necessary standards so [***93] that resolution of these cases may be had without further delay." Id. Such was not the case in Commonwealth v. Mitchell, 576 Pa. 258, 839 A.2d 202, 209 (Pa. 2003), where we were first asked to address Atkins, and where we explicitly declined to formulate a definition of mental retardation, citing a lack of sufficient record evidence and adversarial argument on the issue. See also Commonwealth v. Taylor, 583 Pa. 170, 876 A.2d 916, 937 (Pa. 2005) (following Mitchell and noting that "the parties' arguments are [ ] deficient, as both are focused solely on the issue of whether appellant satisfied the 'definition' of mental retardation, apparently proceeding upon the assumption that the criterion plucked from the definitions cited in the Atkins opinion are controlling as to that question"); Commonwealth v. Williams, 578 Pa. 504, 854 A.2d 440, 449 (Pa. 2004) (following Mitchell). Therefore, when viewed in the light of more than three years of judicial restraint that preceded it and the unavoidability of the fully-litigated constitutional position squarely presented, Miller does not support the Concurrency's urging this Court to promulgate legislative-style property tax uniformity standards in this case.

Bartlett v. Strickland, U.S. , 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009), [***94] also discussed by the Concurrency, does not support the Concurrency's charge that this Court is "abdicate[ing] our fundamental responsibility to provide a proper framework for the assessment of actual constitutional violations." Concurring Slip Op. at 6. In selecting the fifty-percent voter population threshold in Bartlett, the plurality did not engage in a legislative inquiry requiring it to choose a measurement among multiple and competing alternatives. Rather, the plurality merely answered the yes-or-no question presented, which had been fully litigated by the parties. See Bartlett, id. at , 129 S. Ct. at 1238 ("The question is whether the statute can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn.").

The parties sub judice have not argued for nor have they requested that we adopt the specific measure of uniformity that the Concurrency would incorporate into the Constitution, absent adversarial presentations on the question. See, e.g., Clifton Brief [***95] at 20 (specifying remedy requested as
merely "a countywide reassessment in Allegheny County as early as 2009"); County's Reply Brief at 10 (questioning "by what authority a trial court may impose" certain measures of uniformity). While there may very well come a time when this Court will be obliged to fill a legislative void in this area, it is today's decision that provides notice to the General Assembly to make any necessary amendments to the Commonwealth's property assessment laws so as to ensure their constitutionality when applied in the various counties. The likelihood or unlikelihood of the General Assembly's doing so in the future is not for us to presume. Rather, we should await a future case where a party actually requests and argues for such relief and where the General Assembly's failure to respond to today's decision has become apparent. Respectfully, we view this restricted approach as the essence of the judicial function, and not an abdication of responsibility.

Ultimately, our task is decisional, and Allegheny County is currently left with a broken system of property taxation. In its effort to fashion a remedy, the trial court directed the Chief Assessment Officer of [*96] Allegheny County to conduct a reassessment no later than March 31, 2009, for use in the 2010 tax year, even if this Court had not yet issued a final order. We agree that reassessment is required. However, recognizing that the passage of time may require adjustment by the trial court, we will remand this matter to the trial court to determine Allegheny County's progress in executing a countywide reassessment and to set a realistic timeframe for its completion.

Messrs. Justice Saylor and Eakin, Madame Justice Todd, Mr. Justice McCaffery, and Madame Justice Greenspan join the opinion.

Mr. Justice Baer files a concurring opinion.

CONCUR BY: BAER

CONCUR

CONCURRING OPINION

MR. JUSTICE BAER

Appellees challenge the assessment laws of the Commonwealth, which permit real estate taxes to be levied on property values that are premised upon a stagnant base year market value for an indefinite period of time. The trial court found that because the base year assessment method does not require periodic reassessments, the assessment laws are [*18] facially unconstitutional and, further, that the evidence of inequality in Allegheny County demonstrated that the assessment laws there under scrutiny were unconstitutional as applied. [*97] The Majority presently disagrees with the trial court's holding that the statutes are unconstitutional on their face, but agrees that the base year method of property
valuation as applied in Allegheny County violated the Uniformity Clause of our constitution. I agree with the Majority that the assessment laws are not, on their face, unconstitutional, and I further agree with the Majority that the evidence of inequality in Allegheny County demonstrated that the assessment laws, as applied, resulted in inequality that violated the Uniformity Clause. I differ from the Majority, however, regarding whether it is appropriate for this Court to set a constitutional threshold in the absence of legislative action. As is fully explained below, courts have repeatedly taken such action when necessary. I believe this case presents just such an instance. Accordingly, I write to explain why I believe we should establish a test for when the Uniformity Clause is violated, and then to articulate such a test.

FOOTNOTES

1 See the Uniformity Clause of the Pennsylvania Constitution, PA. CONST. art. VIII, § 1.

Under a base year system of valuation, a county performs a threshold countywide assessment of all real property [***98] in the base year, and then uses each property's base year assessment (i.e., assessed value) as that property's basis for taxation in the base year and in all subsequent years, pending a future reassessment. Maj. Slip Op. at 6; Downingtown Area Sch. Dist. v. Chester County Bd. of Assessment Appeals, 590 Pa. 459, 913 A.2d 194, 202-03 (Pa. 2006). The base year assessment, however, obviously cannot capture and reflect market fluctuations that occur during years subsequent to the base year and [**1232] preceding a reassessment. Nevertheless, as held by the Majority, the assessment laws permitting the use of a base year are not facially unconstitutional because use of a base year would not implicate the Uniformity Clause if, for example, a county conducted adequate periodic reassessments; if it could be shown that property values in a particular county [*719] remained relatively unchanged; or if those values had virtually the same rate of change over the passage of time. Majority Slip Op. at 41.

The more difficult question is whether the use of the base year, as applied in this case, is unconstitutional. As the Majority describes, under the Uniformity Clause, countywide reassessments should result in all property in [***99] each county being valued fairly and consistently, when compared to other properties in the county. Maj. Slip Op. at 5. If the base year method of valuation will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated. Maj. Slip Op. at 20 (citing Allegheny County v. Monzo, 509 Pa. 26, 500 A.2d 1096 (Pa. 1985)). In property taxation, the uniformity requirement is based on "the general principle that taxpayers should pay no more or less than their proportionate share of government." Maj. Slip Op. at 21 (quoting Downingtown, 913 A.2d at 199).

In evaluating Appellees' position and the trial court's holding, as will be discussed more fully below, the Majority reviews a number of standards that have been developed for measuring whether a system of property valuation produces sufficiently uniform results. Maj. Slip Op. at 25. The Majority, however, recognizes that the various standards and measures it discusses have not been legislatively adopted. Maj. Slip Op. at 46. Thus, the Majority refuses to determine, based on the various standards and measures it recognizes as relevant, and, in fact, uses to conclude that there is
an unconstitutional lack of uniformity in this case, the point at which at least a presumption should arise that a base year valuation system’s deviation from actual market values runs afoul of the Pennsylvania Constitution’s Uniformity Clause. Rather, the Majority opines that this Court should decline to fix a point where at least a presumption of unconstitutional non-uniformity arises because “the General Assembly is the appropriate place to fashion a more comprehensive and soundly constitutional scheme.” Maj. Slip Op. at 51.

Respectfully, in my view, absent the unlikely prospect of [*720] prompt legislative action, the Majority’s decision not to offer substantive criteria for interpretation of the Uniformity Clause will result in ongoing uncertainty for the Commonwealth’s many taxing authorities and property owners alike. The consequence will be hundreds of thousands of taxpayers and the local governments of the sixty-seven counties of this Commonwealth being uncertain about whether the result of this Court’s decision means that their county has become unconstitutionally non-uniform and must therefore engage in a county-wide reassessment. Taxpayers and the groups that represent them will be [*101] unsure about whether to bring a lawsuit challenging their counties’ assessment system. The counties themselves will be unsure whether their current assessed values satisfy or violate the Uniformity Clause, as interpreted herein. These pervasive uncertainties will lead to endless litigation throughout the Commonwealth with regard to whether each county’s assessment scheme is unconstitutional, as applied. These lawsuits will result in inconsistent findings in the courts of common pleas as to the proper demarcation between constitutionality and unconstitutionality. Indeed, possibly premised upon substantially the same facts, some trial courts may find a county’s property tax assessment unconstitutional, [*1233] as applied, leading to direct appeals to this Court, while other trial courts will find a county’s property tax assessment system constitutional, leading to appeals to the Commonwealth Court. With no uniform approach to evaluate the claims and defenses or to render consistent opinions on the constitutionality of each county’s assessment scheme, the result will be an ad hoc evaluation of each county’s particular disparities and assessment ratios, resulting in the waste of millions of dollars [*102] in what may be unnecessary reassessments and/or litigation costs, as well as the loss of incalculable amounts of judicial resources.

Although I generally agree that the legislature remains the optimum branch of government to fashion a comprehensive constitutional scheme, I also believe that it is entirely proper for this Court to articulate criteria for evaluating whether a peculiar factual scenario will meet constitutional muster under the Uniformity Clause. There is substantial precedent for courts acting in a situation such as this to fill a void where the [*721] legislature has not acted. For example, in a recent case interpreting and applying Section 2 of Voting Rights Act of 1965, 42 U.S.C. § 1973, where Congress did not specify what percentage of minority voters in a district would call for the protections of Section 2 of the Voting Rights Act when it prohibited what courts have termed “vote dilution,” and the United States Supreme Court had, until this case, avoided picking a number, the high Court established a numerical threshold, holding that only election districts in which minorities make up at least fifty percent of the voting age population are entitled to the protections of [*103] Section 2 of the Voting Rights Act that seeks to ensure and preserve minority voting power. See Bartlett v. Strickland, U.S., 129 S.Ct. 1231, 173 L. Ed. 2d 173 (2009) (Kennedy, J., opinion announcing the judgment of the Court). The bright line rule established in
Bartlett makes litigation over the legality of particular districts less likely. Justice Kennedy reasoned that although the Court had in the past declined to decide the minimum size minority group necessary in the context of a vote dilution claim, its bright-line rule "provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." 129 S.Ct. 1231, 173 L. Ed. 2d 173, Id. at *12.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), Justices O'Connor, Kennedy, and Souter explained why the Court in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), had established viability as the appropriate point for finding a compelling state interest in prohibiting abortion: "legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable." See also Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) [***104] (finding unconstitutional Florida's procedures for determining sanity for purposes of execution, and setting forth guidelines for states to follow to ensure constitutionally adequate safeguards in future litigation); Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (per curiam) [***722] (finding unconstitutional the imposition of the death penalty as cruel and unusual punishment in violation of the 8th and 14th Amendments to the United States Constitution, and suggesting that death sentences could be constitutionally imposed if states limit the class of murderers to which the death penalty may be applied); Brooks v. Hobbie, 631 So.2d 883, 889-90 (Ala. 1993) (holding that in a redistricting case, the legislature has the initial responsibility to act, but in the event the legislature fails to act, the responsibility [***1234] shifts to the state judiciary); Morgan County Commission v. Powell, 292 Ala. 300, 293 So.2d 830 (Ala. 1974) (Heflin, C.J., dissenting) (recognizing that when other branches of government are remiss in their constitutional duties, the judiciary must act). In Commonwealth v. Miller, 585 Pa. 144, 888 A.2d 624 (Pa. 2005), this Court defined mental retardation pursuant to a directive from the United States Supreme Court in [***105] Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), where the General Assembly declined to formulate a standard. Accordingly, when the legislature has created a vacuum by failing to act, the courts must act where, as here, a potential constitutional violation is at issue. We should not, in the guise of judicial restraint, abdicate our fundamental responsibility to provide a proper framework for the assessment of actual constitutional violations. Thus, I now turn to an examination of how to determine uniformity in property taxation and how to determine whether a county's property tax assessment scheme has become unconstitutional.

Our constitution requires equality in taxation to the extent reasonably achievable. Beattie v. Allegheny County, 589 Pa. 113, 907 A.2d 519, 530 (Pa. 2006). The statistical data relied upon by the trial court and cited by the Majority establish that the use of an indefinite base year system in Allegheny County has failed to conform to our Constitution's Uniformity Clause. As the Majority explains, inequity will rise at different rates in different taxing districts, depending upon the stability of property values in the municipality, the variety of real estate extant, and other market [***106] factors. Maj. Slip Op. at 50. Thus, it is not possible to predict the length of time [*723] between reassessments which will result in a peculiar county's assessment morphing from constitutional to unconstitutional. Rather, to permit counties and taxpayers alike to have guidance as to when such mutation from a constitutional to
unconstitutional system is occurring, this Court should adopt one of the well-established, judicially addressed, state verified and generally accepted measures of equality and inequality, as described by the Majority.

The standards cited by the Majority and established in the Standard on Ratio Studies issued by the International Association of Assessing Officers (IAAO) have been widely accepted as the criteria to judge the adequacy of an assessment. Specifically, the statistical indicator known as the coefficient of dispersion (COD) is the most widely accepted tool used to measure inequality in tax assessments, and is recognized as a suitable means of measuring inequality in property taxation in Pennsylvania. The IAAO has characterized the COD as the most generally useful measure of variability or uniformity. See R.R. 1374a. See also IAAO's Standard on Ratio Studies, [***107] 13 (2006). A COD of fifteen indicates a low level of variance, and thus general or substantial uniformity in property assessment. In a county with a COD of fifteen, approximately fifty percent of property owners are neither over-assessed [***1235] nor under-assessed by more than fifteen percent of fair market value. See Trial Ct. Op. at ii. Of the remaining property owners, half are over-assessed by at least fifteen percent of fair market value and half are under-assessed by at least the same percentage. Conversely, a high COD such as forty indicates a substantial level of variance, and thus inequality, in property assessments. Trial Ct. Op. at iii.

FOOTNOTES

2 In Beattie v. Allegheny County, we described the COD as follows:

The coefficient of dispersion (COD) is the average deviation from the median, mean, or weighted mean ratio of assessed value to fair market value, expressed as a percentage of that figure. A "high coefficient of dispersion indicates a high degree of variance with respect to the assessment ratios under consideration. A low coefficient of dispersion indicates a low degree of variance. In other words, a low coefficient of dispersion indicates that the parcels under consideration are being [***108] assessed at close to an equal rate."

589 Pa. 113, 907 A.2d 519, 530 (Pa. 2006) (internal citations omitted).

[*724] Because the COD is the most generally useful measure of uniformity, the IAAO has optimized its usage between establishing maximum acceptable CODs for various types of properties. See R.R. 1374a, Standard on Ration Studies, supra. According to the IAAO, the maximum COD for a single family residential property is ten percent for newer, more homogenous areas; fifteen percent for older, heterogeneous areas; and twenty percent for rural residential and seasonal properties. See Maj. Slip Op. at 29; Trial Ct. Op. at 20. According to the testimony of the former executive director of the IAAO, which the trial court credited, the IAAO standards for acceptable CODs reflect a level of uniformity that is readily achievable. See Trial Ct. Op. at 20. These IAAO standards, which were first adopted in 1980, have never been readjusted and have withstood the test of time. T.C. Op. at 20, R.R. at 1383a-1384a. Further, these figures are easily obtained. Since 1988 the Pennsylvania State Tax Equalization Board (STEB) has
published assessment statistics for each county in the Commonwealth, including the COD. The [***109] COD for each county in Pennsylvania is available over the internet to anyone. This availability limits the uncertainty regarding where a county's COD is in relation to the IAAO standards.

According to the COD standards established by the IAAO as discussed above, for counties where the current market value is the legal basis for assessment, a COD of twenty is the maximum COD envisioned by the IAAO before a county becomes generally non-uniform and should conduct a reassessment. Because a COD of twenty is the highest COD acceptable, once a county's COD, as demonstrated by STEB, reaches this threshold, it seems appropriate that a presumption should arise that the county's assessment scheme has become non-uniform and therefore unconstitutional in accord with the Uniformity Clause. Once this presumption arises, the county would have the choice to reassess, or await a lawsuit challenging its system. If such lawsuit was filed, the county would have the opportunity to rebut the arising presumption by demonstrating that its assessment system has not, in fact, become constitutionally infirm.

[*725] Ultimately, given the inequality of Allegheny County's property tax assessment system, as demonstrated [***110] before the trial court, I agree with the Majority's decision to remand this matter to the trial court to determine Allegheny County's progress in executing a countywide reassessment and to set a realistic timeframe for its completion. Likewise, I would urge counties whose COD exceeds twenty to begin reassessment, or to stand ready to defend the lawsuit which will inevitably come. Conversely, I would urge taxpayers whose counties' COD is less than twenty to recognize the unlikelihood of success in litigation, and to save themselves, their counties and the courts the massive resources that go into this type of litigation.
RANDALL A. CASTELLANI AND JOSEPH J. CORCORAN, Appellants v. THE SCRANTON TIMES, L.P., T/D/B/A
THE SCRANTON TIMES AND THE TRIBUNE, AND JENNIFER HENN, Appellees

No. 60 MAP 2007

SUPREME COURT OF PENNSYLVANIA

598 Pa. 283; 956 A.2d 937; 2008 Pa. LEXIS 1547; 36 Media L. Rep. 2460

April 16, 2008, Argued

September 24, 2008, Decided


PRIOR HISTORY: [***1]


Richard A. Sprague, Esq. Sprague & Sprague
Lawrence J. Moran, Esq. Abrahamsen, Moran & Conaboy, P.C.
Pennsylvania's Shield Law, 42 Pa.C.S. § 5942, protects a newspaper's source of information from compelled disclosure. [*287] With the present appeal, appellants urge this Court to recognize a non-contextual "crime-fraud" exception to the Shield Law that would permit compelled disclosure of a newspaper's source if the communication between the newspaper reporter and the source itself constituted a criminal act. For the following reasons, we decline to adopt any such exception and affirm the Superior Court's reversal of the trial court's order compelling disclosure of the confidential source.

In late 2003, at the request of the Attorney General of Pennsylvania, the [***2] Twentieth Statewide
Grand Jury was empaneled [**940] to investigate allegations of wrongdoing at the Lackawanna County Prison. On December 2, 2003, appellants Randall A. Castellani and Joseph J. Corcoran, then-Lackawanna County Majority Democratic Commissioners, testified before the Grand Jury pursuant to duly-served subpoenas. On January 12, 2004, appellees The Tribune (Scranton) and The Scranton Times (collectively "The Scranton Times-Tribune") published front-page stories accusing appellants of "stonewalling" the Grand Jury. The stories were authored by appellee staff writer Jennifer Henn and are nearly identical. The headline in The Tribune read, "Dems stonewall grand jury: Corcoran, Castellani evasiveness infuriates jurors, source claims." The Scranton Times headline read, "Dems Stonewall: Source: Corcoran, Castellani Vague Before Grand Jury." The articles described appellants' testimony as follows:

[Appellants] were less than can-did [sic], The Times Tribune has learned.

[Appellants] were "considerably less cooperative" with the jurors, often responding with vague, evasive answers, including "I don't recall" and "not that I'm aware of," a source close to the investigation said.

"[Appellants'] [***3] testimony really irritated the jurors. [The jurors] were ready to throw both of them out," the source said.

"After months of hearing all kinds of detailed, specific information and testimony, [the jurors] just had no tolerance for that kind of crap."

[*288] "[The jurors] were ready to take out the big hook and yank each of them out of the witness chair."


Shortly after the publication of the articles, appellants presented the Grand Jury's supervising judge, the Honorable Isaac S. Garb, with a petition for sanctions based on alleged disclosures of the Grand Jury proceedings to the newspapers. Judge Garb denied the petition due to lack of standing, but appointed a special prosecutor to investigate the source of the alleged unlawfully disclosed matters. Upon review of the special prosecutor's report, Judge Garb, in a memorandum, [***4] concurred with the special prosecutor and concluded that there was no breach of secrecy by any agent of the Attorney General's office. In his memorandum, Judge Garb noted:

The reports published in these newspapers are completely at variance with the transcript of the testimony of [appellants]. The newspaper reports provide that [appellants] were evasive in their answers, were non-cooperative, essentially "stonewalled" the Grand Jury in its inquiry and that the Grand Jurors became irate as a result of the[e] demeanor on [appellants'] part, and demanded that they be "thrown out" of the Grand Jury courtroom. None of those things happened. Obviously, if someone wished to leak the testimony of a witness to the Grand Jury that information relayed to the media would
have reflected the testimony that actually occurred. The report of [appellants'] testimony was totally at
a variance and not borne out by the record of [appellants'] testimony. Obviously, the source of the
reporter's information was someone not privy to the Grand Jury proceedings and, therefore, not
someone in the Office of the Attorney General.

[*289] In re Twentieth Statewide Investigating Grand Jury, No. 15 M.D. 2003, Notice

FOOTNOTES

1 A separate special prosecutor was appointed to investigate similar allegations of grand jury leaks with
respect to Lackawanna County Investigating Grand Jury VIII, 2003. The county grand jury, empaneled on
September 18, 2003, investigated allegations of abuse of county prisoners by Lackawanna County Prison
guards, though prisoner abuse was not originally identified as a potential subject for inquiry. The county
special prosecutor was appointed after a motion to quash the Lackawanna County Grand Jury
presentment, which recommended that criminal charges be filed against prison guards, was filed by one
of the guards based on the alleged dissemination of secret grand jury information by the Lackawanna
County District Attorney's Office to appellee Henn. The motion to quash alleged that numerous e-mails
were exchanged between Henn and a member of the Lackawanna County District Attorney's Office
which encompassed grand jury information. The motion also averred that Henn met with this member
of the District Attorney's office at Farley's, a local bar, following the prison guard's grand jury
appearance. In addition to the newspaper [***6] articles presently at issue before this Court, The
Scranton Times-Tribune also published a number of articles authored by Henn on the investigations
of the county grand jury. After the special prosecutor submitted his report, the Honorable Terrance R.
Nealon, in his capacity as the Supervising Judge of the Lackawanna County Investigating Grand Jury,
denied the motion to quash. In his opinion, Judge Nealon recounted the facts surrounding the alleged
county grand jury leaks, as well as the alleged statewide grand jury leaks, and, after reviewing the
special prosecutor's report, concluded that the report did not demonstrate that secret matters occurring
before the grand jury were divulged to Henn by the prosecution. Noting that Henn voluntarily divulged
the identity of her source(s) to the special prosecutor, Judge Nealon determined that the motion to
quash did not implicate the Shield Law. Judge Nealon concluded that the report did not establish that an
alleged grand jury leak substantially influenced grand jury deliberations and accordingly denied the
motion to quash. See In re County Investigating Grand Jury VIII, 2003, No. 03 MISC 140, 2005 WL

On [***7] January 7, 2005, appellants filed a civil complaint against The Tribune, The Scranton Times,
and Henn (collectively "appellees"), claiming that the news articles were false and contained
"defamatory statements, innuendo, and implications." Appellants further claimed that the articles' source
engaged in "tortious, criminal, or contemptuous conduct," and stated that it is the policy of The
Scranton Times-Tribune to waive any confidentiality if a "source lies to the newspaper." In support of
their claim that the articles were false, appellants [*290] referenced the memorandum of Judge Garb,
as well as the grand jury presentment, which did not contain any criticism of appellants by the grand jurors and described appellants as cooperative. Appellants maintained that they had exhausted all efforts to obtain the identity of the articles' source and, of central importance to the present appeal, demanded that appellees disclose the source.

Citing the Pennsylvania Shield Law and the First Amendment reporter's privilege, 2 appellees refused appellants' requested disclosure. Appellants filed a motion to compel in the Court of Common Pleas of Lackawanna County ("trial court") and served appellees with [***8] interrogatories seeking the identity of their source. Appellees again refused, citing the Shield Law and the reporter's privilege. Thereafter, the trial court received briefs from the parties and conducted a hearing on appellants' motion to compel.

FOOTNOTES

2 The Shield Law is quoted in its entirety infra. The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. CONST. amend. I.

On June 3, 2005, the trial court granted appellants' motion and ordered appellees to divulge the identity of the source for [***942] their January 12, 2004 articles. In his opinion, the Honorable Robert Mazzoni concluded that the privileges afforded reporters under the Shield Law and the First Amendment should not be asserted to the detriment of the grand jury system and an individual's constitutional right to reputation under the Pennsylvania Constitution. 3 Judge Mazzoni found that when the Shield Law "clashes with the need to enforce and protect the foundation of the grand jury purpose, the Shield Law should relinquish its priority." Castellani, 73 Pa. D & C.4th at 514. Judge Mazzoni stated further:

[***291] The court recognizes and accepts the [***9] purpose of the Shield Law and the First Amendment qualified privilege. The court also recognizes and embraces the importance of the public function served by the news media. The limited application of this ruling will not have a chilling effect on the ability of reporters to investigate and report on matters of public concern. By this ruling, we are hopeful that the news media recognizes that grand jury proceedings are confidential and are to remain so. It is the re-publication of a grand jury "leak" in a newspaper of general circulation which denigrates the process. The news media should not act as a protective vessel into which criminal communications are channeled and later exonerated at the expense of our judicial system. We are not advocating a broad application of this opinion. We recognize the need for a reporter to rely upon confidential sources in investigating and reporting on criminal activity and on ongoing criminal investigations. The public interest is not served, however, when a reporter, through an unnamed source, invades the grand jury process and pierces its recognized veil of confidentiality.

Id. at 514-15. The trial court also distinguished this case from prior Shield [***10] Law cases by noting that here "[t]he communication does not talk about a crime -- it is the crime" and that the publication of
purported grand jury information "significantly magnifies the criminal invasion and ultimately 'chills' and undermines the grand jury process." Id. at 515, 515-16.

FOOTNOTES

3 Article I, Section 1 of the Pennsylvania Constitution provides that:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

PA. CONST. art. I, § 1 (emphasis added).

Appellees filed a notice of appeal in the Superior Court pursuant to Pa.R.A.P. 313 (collateral order rule).

4 The trial court subsequently amended its order, stating that the order involved a controlling question of law and that an immediate appeal would materially advance the ultimate resolution of the matter, thus offering the prospect of another avenue for [*292] interlocutory review. In a published opinion, the Superior Court first determined that the order qualified as an appealable collateral order under Rule 313. 5 On the merits, [***11] the panel concluded that appellees should not have been compelled to divulge the identity of their source, and accordingly reversed [**943] the order of the trial court. Castellani v. Scranton Times, L.P., 2007 PA Super 2, 916 A.2d 648, 652-53, 655 (Pa. Super. 2007). 6 The panel held that the trial court's recognition of a "crime-fraud" exception to the Shield Law conflicted with this Court's case law, notwithstanding the exception's limited application to violations of grand jury secrecy. Id. at 655. Specifically, the panel deemed itself constrained by In re Taylor, 412 Pa. 32, 193 A.2d 181 (Pa. 1963), which recognized that the Shield Law, as written, may allow reporters to conceal or cover up crimes, and Hatchard v. Westinghouse Broadcasting Co., 516 Pa. 184, 532 A.2d 346 (Pa. 1987), which reaffirmed Taylor's central holding that the Shield Law protects the identity of confidential sources. In conclusion, the panel stated that:

[*293] While we are both mindful of and sympathetic to the concerns of the learned trial court regarding possible criminal violations of the grand jury process vis-a-vis the Shield Law privilege, we, like the trial court, are forbidden from reading into the Shield Law an exception neither enacted by the General Assembly [***12] nor found by the Supreme Court as the result of a developing body of law.

Castellani, 916 A.2d at 655.

FOOTNOTES

4 The collateral order doctrine authorizes an interlocutory appeal when the order at issue is: (1) separable from and collateral to the main cause of action; (2) involves a right which is too important to be denied review; and (3) presents a question for review that will be irreparably lost if review is postponed until final judgment in the case. See Pa.R.A.P. 313(b).
5 Applying Rule 313, the panel determined that: (1) whether a court should engraft a crime-fraud exception onto the Shield Law is certainly an issue separable from the underlying defamation claim; (2) the effect of a potential crime-fraud exception on the deeply rooted public policy interests protected by the Shield Law and the First Amendment reporter's privilege -- freedom of the press and the free flow and exchange of ideas to news media -- is obviously an important issue worthy of appeal; and (3) this Court has recognized that after final judgment, there is no effective means of reviewing an order compelling the production of putatively protected material. Castellani v. Scranton Times, L.P., 2007 PA Super 2, 916 A.2d 648, 652-53 (Pa. Super. 2007) [***13] (citing, inter alia, Ben v. Schwartz, 556 Pa. 475, 729 A.2d 547, 551-52 (Pa. 1999)). The panel also noted that in Schwartz, this Court recognized that a discovery order is appealable under the collateral order doctrine when the appeal involves an issue concerning the application of a privilege that is separable from the underlying issue and which may be addressed on appeal without consideration of the underlying issue. Id. at 652 (citing Schwartz, 729 A.2d at 551-52). Presently, the parties do not dispute the appealability of the order at issue sub judice, and since the question is not jurisdictional, we offer no view on the collateral order issue.

6 While their first appeal was pending, appellees filed in the Superior Court a petition for permission to appeal under Pa.R.A.P. 312 and Pa.R.A.P. 1311, citing the trial court's amended order. Concluding that the trial court's interlocutory discovery order was appealable under the collateral order doctrine, the Superior Court denied the subsequently filed petition as moot. Castellani, 916 A.2d at 652.

In an opinion concurring in the result, then-Judge (now Madame Justice) Debra Todd stated that she would leave open the possibility that there may be circumstances, [***14] such as the criminal prosecution of a grand jury leak, under which the Shield Law may have to yield. Id. at 655-56 (Todd, J., concurring in the result). Like the trial court, Judge Todd noted that, here, Henn was an integral part of, and possibly the sole witness to, a crime. But, continued Judge Todd, this is a defamation action and appellants are seeking the disclosure of a confidential source within that context. Thus, Judge Todd concluded, "[t]he public interest in grand jury secrecy will be vindicated only indirectly." Id.

The question accepted for appeal is whether the Shield Law protects media defendants in a defamation case from the court-ordered disclosure of the confidential source of an allegedly defamatory newspaper article, where the plaintiffs allege that the media defendants and the source were direct participants in the criminal disclosure of grand jury proceedings. HN1 Because the issue presented is a question of law, our scope of review is plenary and our standard of review is de novo. Commonwealth v. Davidson, 595 Pa. 1, 938 A.2d 198, 203 (Pa. 2007).

(extending "actual malice" requirement to "public figures"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (holding that private individual not required to show actual malice to recover in defamation action against publisher or broadcaster). The statute addresses confidential communications to news reporters as follows:

HN2 (a) General rule.--No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

(b) Exception.--The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the [***16] radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

42 Pa.C.S. § 5942. Most recently reenacted in 1976, effective in 1978, the current Shield Law is substantially a reenactment of the original 1937 statutory text.

Appellants claim that the Shield Law should not protect appellees from disclosure because the communication between Henn and her alleged source violated the Grand Jury Act and thus constituted a criminal act. 7 Appellants explain that this is not a case where a newspaper properly obtained information from a source who had obtained the information illegally. [*295] Here, appellants contend, the communication between the reporter and the alleged source was itself a criminal act. Therefore, conclude appellants, this Court should devise a crime-fraud exception to the Shield Law. Referencing Taylor, supra, which analogized the reporter's privilege to the attorney-client and priest-penitent privileges, appellants maintain that the reporter's privilege cannot be more expansive [***17] than these other privileges, both of which contain a crime-fraud exception.

FOOTNOTES

7 In support of this contention, appellants cite Section 4549 of the Grand Jury Act and Section 5101 of the Crimes Code. See 42 Pa.C.S. § 4549(b) ("All such persons shall be sworn to secrecy, and shall be in contempt of court if they reveal any information which they are sworn to keep secret."); 18 Pa.C.S. § 5101 ("A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act[].").

In urging this Court to adopt a non-textual crime-fraud exception to the Shield Law, appellants contend that, unlike the lower courts, "this Court has the inherent power and authority to interpret the Shield Law to not apply -- despite the statute's 'absolute' language -- where the reporter has been used to
commit a fraud and/or a crime." Appellants' Brief at 24-25. Appellants assert that this Court has previously rejected the claim that the [**945] Shield Law is unambiguous and absolute, and has engaged in statutory interpretation beyond the [***18] statute's plain language. Noting that the operative language of the Shield Law, as well as Taylor's construction of that language, was set forth prior to the constitutionalization of defamation law, appellants contend that the Superior Court failed to recognize that the stringent burden of proof placed on "public official" defamation plaintiffs since New York Times v. Sullivan, supra, has caused this Court to gradually narrow the scope of the Shield Law. Further, appellants cite Hatchard's observation that if the Shield Law provided an absolute shield against discovery of any information in the possession of a defamation defendant, then the Shield Law may be unconstitutional given "the protection of other fundamental values protected by the Pennsylvania Constitution such as an individual's reputation." Hatchard, 532 A.2d at 349.

Appellants maintain that there are no reported Pennsylvania decisions, prior to this case, which have considered whether the Shield Law prevents discovery of an illegal communication. Contrary to the Superior Court's conclusion, appellants argue that neither Taylor nor Hatchard controls the resolution of the present issue. Appellants contend that, unlike the [***19] [**296] present case, neither Taylor nor Hatchard involved an illegal communication where the reporter participated in the commission of a crime. Addressing Taylor's broad reading of the Shield Law, which admittedly would allow reporters to conceal crimes, appellants argue that Taylor was referring to past crimes and not to communications which themselves are criminal. Thus, appellants submit that this is an issue of first impression.

Appellants liken the present scenario to Nadler v. Warner Co., 321 Pa. 139, 184 A. 3 (Pa. 1936), where, notwithstanding the "absolute" statutory language of the attorney-client privilege, this Court recognized a crime-fraud exception. Appellants assert that this Court has at one time held every type of privilege -- accountant-client, husband-wife, priest-penitent, psychologist-patient -- inapplicable where it would further a crime or fraud pursuant to our constitutional authority to interpret the scope and application of all evidentiary privileges, rather than pursuant to any regulatory authority over the parties to the privileges. Citing Commonwealth v. Bowden, 576 Pa. 151, 838 A.2d 740 (Pa. 2003), which described the Shield Law as protecting only "confidential" communications, appellants [***20] contend that the attorney-client privilege is similar to the Shield Law/reporter's privilege because both are directed at confidential communications. Appellants also note that the intent of each privilege is similar -- to promote open communications between the parties to the privilege. Because the interests behind the Shield Law will not be harmed by requiring The Scranton Times-Tribune to disclose the identity of a source whose information has twice been judicially determined to be false, appellants argue that a crime-fraud exception should be applied to prevent the Shield Law from being used to protect an illegal communication of no value. In further support of their position, appellants cite The Scranton Times-Tribune's own internal policy, which provides that agreements of confidentiality will not be honored if the source lies to the newspaper.

Appellants also maintain that a majority of our sister states have authorized exactly what appellants urge -- judicially compelled [*297] production of a reporter's source where the communication was criminal or fraudulent. Appellants contend that only ten states seem to have an absolute statutory
reporter's privilege, while thirty-six states [***21] permit compelled disclosure of a defamatory news article's confidential sources, even [**946] in the absence of evidence of crime or fraud. Further, appellants assert that no court in an "absolute" shield law state has held that its shield law protects a reporter from disclosing the source of a communication when the requesting party has made a prima facie showing that the communication was itself criminal or false. 8 Citing Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), appellants also note that the U.S. Supreme Court has declined to recognize a reporter's privilege under the First Amendment. Further, appellants state that federal courts, most recently in In re Grand Jury Subpoena, Judith Miller, 365 U.S. App. D.C. 13, 397 F.3d 964 (D.C. Cir. 2005), have consistently required reporters to disclose confidential sources during litigation.

FOOTNOTES

8 Appellants primarily rely on California authority, which holds that discovery of a reporter's unnamed source is appropriate when the reporter is a defendant in a libel action. See Mitchell v. Superior Court, 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625 (Cal. 1984). Appellants also cite Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Cal. Ct. App. 1971), which held that the reporter's privilege in the state rules of evidence [***22] could not be invoked to shield a reporter from contempt for failing to disclose the identity of attorneys who leaked a statement to the reporter in violation of a gag order. Appellants note that the holding in Farr was affirmed twenty-five years later in In re Willon, 47 Cal. App. 4th 1080, 55 Cal. Rptr. 2d 245 (Cal. Ct. App. 1996).

Finally, appellants contend that the Shield Law cannot protect a lie. Appellants also raise the possibility that Henn's "unnamed source close to the investigation" may have been largely, or entirely, fictional. If that were the case, argue appellants, appellees' invocation of the Shield Law is a continuing fraud upon the courts and frustrates any investigation into the alleged wrongdoing. In sum, appellants argue that a reporter should not be permitted to use the Shield Law to obstruct criminal or civil inquiries into the illegal disclosure and publication of false and/or defamatory information. The public policies underlying a reporter's privilege, continue appellants, [*298] are not furthered when a reporter knowingly participates in a crime or fraud.

Appellees counter that this Court has repeatedly held that the Shield Law unambiguously provides an absolute privilege against compelled [***23] disclosure of: (1) the identity of confidential sources; and (2) any information which could lead to the disclosure of the source's identity. 9 Appellees note that while this Court has the inherent authority to construe a statute in accordance with core principles of statutory construction, we do not have the authority to rewrite a statute or alter a statute's plain meaning. Appellees contend that appellants would have this Court ignore the plain and unambiguous language of the Shield Law and substitute an interpretation that the Legislature, if it had so desired, could easily have included within the express language of the statute.

FOOTNOTES
9 Amici Curiae ABC, Inc. et al. echo appellees' emphasis on the absolute nature of the Shield Law, harkening back to the American Revolution and this Commonwealth's infancy when Pennsylvania began its longstanding dedication to the free flow of information and protection of confidential sources, a dedication that was later embodied in the Shield Law. Amici note that since its enactment in 1937, the Legislature has never amended the Shield Law to provide additional exceptions.

Appellees maintain that this Court's Shield Law precedents should foreclose appellants' [***24] arguments. First, argue appellees, this Court has already resolved appellants' primary claim -- that the Shield Law cannot protect the identity of a confidential source where the communication was criminal and/or fraudulent -- when it rejected that very argument in Taylor. Appellees dismiss as legally insignificant appellants' [***947] attempt to distinguish Taylor on grounds that Taylor did not involve a reporter who participated in criminal or fraudulent conduct. Appellees argue that Taylor addressed the precise issue before this Court today and concluded that the statutory right conferred by the Legislature must be applied even if the Shield Law's protections would operate to conceal evidence of a crime.

Second, continue appellees, appellants ignore this Court's decision in Sprague v. Walter, 518 Pa. 425, 543 A.2d 1078 (Pa. 1988), which held that the Shield Law applies with full force [*299] in the context of a defamation action and precludes the compelled disclosure of a defendant-newspaper's confidential source. Third, argue appellees, the Shield Law protects confidential sources notwithstanding the constitutional dimensions of an individual's fundamental right to his or her reputation under the Pennsylvania [***25] Constitution, a right that is naturally implicated in a defamation complaint. Finally, continue appellees, Hatchard rejected the very argument appellants now posit, i.e., the notion that the constitutionalization of defamation law permits or requires altering the plain text of the Shield Law.

Accordingly, appellees maintain that appellants' argument reduces itself to the proposition that Pennsylvania courts are free to carve out exceptions to plain and unambiguous statutes to serve competing policy interests, such as, as posed in this case, grand jury secrecy. Appellees argue that, even if principles of statutory construction did not foreclose such action, overriding the Shield Law's mandate in the context of this libel suit would not vindicate the interests advanced by the secrecy provision of the Grand Jury Act. This is so because whether a violation of grand jury secrecy occurred here is incidental to appellants' defamation action.

Appellees further contend that the plain language of the Shield Law precludes the creation of a crime-fraud exception. Contrary to appellants' argument, explain appellees, the attorney-client privilege and the Shield Law are not analogous. Appellees submit [***26] that the crime-fraud exception to the attorney-client privilege was recognized at common law prior to codification of the privilege. Conversely, appellees maintain, a judicially created crime-fraud exception to the Shield Law has no common law antecedent and would require this Court to override the express statutory language and legislative intent of the Shield Law. Appellees contend that, besides ignoring the plain meaning of the
Shield Law, appellants' proposed exception would have this Court ignore a fundamental rule of statutory interpretation, which is that exceptions expressed in a statute shall be construed to exclude all others. See 1 Pa.C.S. § 1924.

[*300] Responding to appellants' reference to the law of other jurisdictions, appellees assert that outside authority regarding the qualified reporter privilege is irrelevant. Appellees contend that federal cases, such as Judith Miller, supra, are inapposite because they implicate the qualified reporter's privilege under federal law, not Pennsylvania's absolute Shield Law. Furthermore, appellees argue that the California authorities relied upon by appellants involve that state's qualified reporter's privilege rather than its shield law, [***27] which, unlike Pennsylvania's Shield Law, provides immunity from contempt sanctions rather than an absolute privilege. Additionally, appellees assert that no appellate court in any jurisdiction has created an exception to an absolute shield law. 10

FOOTNOTES

10 In fact, appellees claim, the New York Court of Appeals addressed the precise issue before us and held that that state's shield law protected the identity of confidential sources even where the source's act of divulging secret grand jury information to a reporter was itself a criminal act. See Beach v. Shanley, 62 N.Y.2d 241, 465 N.E.2d 304, 310, 476 N.Y.S.2d 765 (N.Y. 1984). Additionally, unlike appellants, appellees' amici identify fifteen jurisdictions (fourteen states and the District of Columbia) that provide an absolute protection for confidential sources. Amici contend that not one of these jurisdictions has recognized an exception requiring the privilege to yield when a communication is allegedly criminal or fraudulent.

[***948] Finally, appellees argue that, contrary to appellants' claims, falsity has not been established in the present case and there is no evidence that any crime was committed. Appellees note that The Scranton Times-Tribune could not have been a party [***28] to the alleged crime because grand jury secrecy only applies to those who take the oath of secrecy. Moreover, appellees contend that it is unknown whether the source was one who took such an oath. Appellees also maintain that it is not a crime to publish and report on grand jury proceedings, even if the person providing the information is personally bound by grand jury secrecy. Appellees conclude that the crime-fraud exception urged by appellants would result in the impermissible punishment of The Scranton Times-Tribune for exercising its First Amendment rights.

The matter has been ably briefed and is ready for decision. As we once again undertake consideration of the [*301] Shield Law, we note that, as always, we begin with principles concerning statutory construction. As in Hatchard, the question before this Court implicates statutory interpretation; therefore, our initial objective is to ascertain the intent of the Legislature in enacting the statute. See Hatchard, 532 A.2d at 348 (citing 1 Pa.C.S. § 1921(a)). As we consider the text of the Shield Law, as well as our prior interpretations of its statutory language, we are always cognizant of the fact that HN3 "[w]hen the words of a statute [***29] are clear and free from all ambiguity, the letter of it is not to be
disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

In In re Taylor, 412 Pa. 32, 193 A.2d 181 (Pa. 1963), an investigating grand jury was convened in Philadelphia in 1962 to investigate allegations of criminal conduct and corruption involving various offices of the Philadelphia city government. Soon thereafter, The Philadelphia Evening Bulletin published an article reporting aspects of the investigation. The president/general manager and city editor of The Bulletin were subpoenaed to appear before the Grand Jury and directed to bring with them the source information of the articles. Relying on the Shield law, the newspapermen refused to answer certain questions and were held in contempt. Taylor, 193 A.2d at 182-83. On review, this Court stated that HN4 the Shield Law must be "liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal." Id. at 185-86 [***30] (emphasis and footnote omitted). The Court opined that any doubt as to the interpretation of the Shield Law must be liberally construed in favor of the news media because, as the principal government "watch-dogs" and guardians of the general public welfare, the news media serve their city, nation, and state, and are in a sense "pro bono publico." Id. at 185.

The Taylor Court stated point-blank: application of the plain text of the Shield Law "will enable newsmen to conceal or cover up crimes." Id. In support of this [**949] conclusion, the [*302] Court compared the Shield Law to other privileges, such as the attorney-client and priest-penitent privileges, under which public policy permits the nondisclosure of information concerning a crime. The Court held that: (1) the words "source of information" in the text of the Shield Law included both individuals and documents; (2) the privilege can, under certain circumstances, be waived; and (3) the newspapermen were not guilty of contempt. Id. at 186-87.

A quarter century later, in Hatchard v. Westinghouse Broadcasting Co., 516 Pa. 184, 532 A.2d 346 (Pa. 1987), this Court refined Taylor's broad interpretation when considering whether the Shield Law protects a television [***31] station's unpublished documentary information from discovery by a plaintiff in a libel action. As a matter of statutory interpretation, we recognized that the term "source" as used in the Shield Law does not have a plain meaning, though we adhered to Taylor's conclusion that "source" included both inanimate objects, such as documents, as well as persons. Hatchard, 532 A.2d at 348. Accordingly, the Court looked beyond a plain reading of the words of the statute and considered the Shield Law's statutory purpose -- "to maintain a free flow of information to members of the news media" -- for guidance. Id. at 350. Mindful that it was considering the Shield Law within the context of a defamation case (a fact that distinguished Taylor), the Hatchard Court observed that if unpublished information that would not reveal confidential sources could be withheld under the Shield Law by a media defendant in a defamation case, then the Shield Law may be incompatible with other fundamental values protected by the Pennsylvania Constitution, such as an individual's interest in his or her reputation. Id. at 349. The Hatchard Court therefore concluded that the Legislature did not intend to shield all information [***32] that an alleged defamer had prior to the publication of a defamatory statement, but only intended to shield information that could reveal the identity of a confidential
source. Thus, we limited Taylor's broad interpretation of the Shield Law, at least for purposes of libel actions, and held that "unpublished documentary information gathered by a television station is discoverable by a plaintiff in a libel action to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information." Id. at 351. Following Hatchard, a media defendant in a defamation case would not be protected by the Shield Law where the defamation plaintiff seeks information which would not reveal the source's identity. Although Hatchard narrowed Taylor in the context of libel actions, the core protections of the Shield Law remained steadfast and ironclad — compelled disclosure of the identity, or anything that could expose the identity, of a confidential source was strictly prohibited.

One year later, in Sprague v. Walter, 518 Pa. 425, 543 A.2d 1078 (Pa. 1988), this Court again considered the Shield Law's application in the defamation context. In concluding that invocation of the Shield Law does not establish an affirmative inference regarding the reliability of an unidentified source or the validity of the source's information, the Court reiterated that:

The clear language of [the Shield Law] provides that persons covered by it are not required to disclose the source of the information "in any legal proceeding, trial or investigation before any government unit." This language is in no way ambiguous and its direction is clear. It was obviously designed to protect the confidentiality of the source, and we are constrained under the rules of statutory interpretation to accept its plain meaning. 1 Pa. C.S. § 1921.

Sprague, 543 A.2d at 1082 (emphasis omitted). Most recently, in Commonwealth v. Bowden, 576 Pa. 151, 838 A.2d 740 (Pa. 2003), a reporter invoked the Shield Law and refused to disclose to the Commonwealth pre-trial statements made to him by a defendant on trial for murder. In Bowden, we construed Taylor, as interpreted by Hatchard and Sprague, as standing for the proposition that documents may be considered sources for Shield Law purposes, but only where production of such documents, even if redacted, could breach the confidentiality of the identity of a human source and thereby threaten the free flow of information from confidential informants to the media. Bowden, 838 A.2d at 752. Because the identity of the source was already known and the statements at issue were not confidential, we concluded that the Shield Law did not prevent disclosure of the murder-defendant's statements to the reporter. 11

FOOTNOTES

11 Because the source's identity — and thus the Shield Law — was not at issue in Bowden, the Court applied the qualified reporter's privilege stemming from the U.S. Supreme Court's decision in Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). In Bowden, we noted that although Branzburg held that requiring reporters to testify before grand juries did not violate the First Amendment freedoms of speech and press, the U.S. Court of Appeals for the Third Circuit had indicated that a majority of the Branzburg Justices supported some quantum of privilege for reporters. Bowden, 383 A.2d at 752. After acknowledging the Third Circuit's recognition of a qualified reporter's privilege in
Bowden, we applied the Third Circuit's three-prong test described in United States v. Criden, 633 F.2d 346, 358-59 (3d Cir. 1980), [***35] which a party must satisfy to overcome the privilege. Bowden, 838 A.2d at 752, 755-59. Under the Third Circuit's test, the party seeking to overcome the privilege must demonstrate that: (1) it has made an effort to obtain the information from other sources; (2) the information is only accessible through the reporters and their sources; and (3) the information is critical to the case. Id. In McMenemy v. Tartaglione, 139 Pa. Commw. 269, 590 A.2d 802, 811 (Pa. Cmwlth.), aff'd, 527 Pa. 286, 590 A.2d 753 (Pa. 1991), the Commonwealth Court recognized a reporter's privilege when it held that a reporter's First Amendment privilege against testifying was properly invoked by a newspaper reporter who refused to testify as to the accuracy of statements made at a press conference. The Commonwealth Court also distinguished the reporter's privilege from the Shield Law, stating that the latter clearly applies to a reporter protecting his confidential sources. Id.

Although the above cases, of course, are factually distinguishable, Taylor's interpretation of the Shield Law, as described by Bowden, plainly controls the outcome of the present appeal. There is cause to look beyond the plain language of the Shield Law when interpreting, [***36] for example, the scope of the word "source," but the Shield Law's unambiguous text leaves little question as to whether a source's identity is protected. Our Shield Law jurisprudence has consistently recognized the statute's absolute protection of a source's identity from compelled disclosure. For that reason alone, we cannot simply engraft upon the statute an exception which would not only contradict the well-established public policy underlying the Shield Law, but, as importantly, would [*305] contravene the statute's unambiguous text. The Shield Law has been reenacted three times since it was first enacted in 1937, and twice since this Court interpreted its text in Taylor. If the General Assembly disagreed with our interpretation, or wished to establish a crime-fraud exception to the Shield Law, it could easily have done so. See 1 Pa.C.S. § 1922(4) ([H]when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the [***951] same subject matter intends the same construction to be placed upon such language.) The Shield Law provides for one exception, which is not at issue here, see 42 Pa.C.S. § 5942(b), and we are not at liberty to create [***37] others that the Legislature, in its wisdom, chose not to include in the text of the statute. In this regard, it is notable that, although the Superior Court described Hatchard's holding limiting Taylor as an "exception" to the Shield Law, Hatchard in fact merely addressed information deemed to be outside the purview of the Shield Law.

While non-binding federal law and the law of our sister states is often informative, due to our Shield Law's absolute protection of a source's identity, the manner in which other jurisdictions have dealt with similar situations is of minimal value to the present appeal. In the cases referenced by appellants, the federal courts and courts in our sister states were interpreting their own, unique shield laws, or, as in Judith Miller, supra, the qualified reporter's privilege. In resolving the present controversy, we have only the plain text of Pennsylvania's Shield Law. Moreover, even if case law from other jurisdictions were more directly relevant, appellants have not offered any authority demonstrating that a court in an absolute protection jurisdiction has ever recognized a non-textual crime-fraud exception to its shield law.
Turning to appellants' analogy [***38] to recognized evidentiary privileges, contrary to appellants' claim, we conclude that the Shield Law is not comparable to the attorney-client privilege, or, for that matter, to any other privilege with respect to the issue presented here. The attorney-client privilege, in contrast, does not encompass the same absolute protection. [*306] The foundational reason for this difference is that each privilege or protection serves its own, unique interests. The Shield Law was enacted to protect the free flow of information to the news media in their role as information providers to the general public. The attorney-client privilege, on the other hand, renders an attorney incompetent to testify as to communications made to him by his client in order to promote a free flow of information only between attorney and his or her client so that the attorney can better represent the client. See 42 Pa.C.S. § 5916.

In Nadler, supra, this Court recognized a crime-fraud exception to the attorney-client privilege to prevent a client from abusing the privilege in furtherance of a crime or fraud. No such purpose would be served by recognizing a similar exception to the Shield Law. Whereas the attorney-client privilege [***39] is for the benefit of the client, as privilege holder, the protections recognized in the Shield Law are intended to allow the news media to serve the public. Indeed, describing the Shield Law's protections in common evidentiary privilege terms, while the news media may be the "holder" of the protection, the general public is deemed to be the overall beneficiary of the Shield Law's protections.

The trial court's narrower crime-fraud exception, which would be applicable only in the grand jury context, whatever its value might be as a matter of policy, is also unsupportable. HN6 Eight Section 4549 of the Grand Jury Act provides that persons sworn to secrecy during grand jury proceedings shall be in contempt of court if they reveal any information which they are sworn to keep secret. 42 Pa.C.S. § 4549(b). The reasons for ensuring grand jury secrecy have been described as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to [***952] prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify [***40] before grand [***307] jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.


After considering what he deemed the "competing and conflicting" interests of the Shield Law and the Grand Jury Act, Judge Mazzoni, in his thorough opinion below, determined that "the Shield Law should relinquish its priority" and yield to the public interest in grand jury secrecy. Castellani, 73 Pa. D. & C.4th at 514. The trial court was of the opinion that striking such a balance and creating a limited exception to
the Shield Law would put the news media on notice that "grand jury proceedings are confidential and are to remain so." Id.

While we share the trial court's concern for the integrity of the grand jury process, the exception it [*41] recognized is not supported by the text of the Shield Law. It is, in the first instance, a question of policy suited to the legislative branch to align the values of the two potentially "competing" statutes. In addition, we note that hampering the news media in the performance of their essential function would not necessarily remedy or prevent violations of the Grand Jury Act. Only the grand jury participants are bound by the oath of secrecy, and it is their duty, as well as the responsibility of the courts, to uphold the integrity of the grand jury process. As for appellants' alleged "criminal communication," because only the individual swearing the oath can violate grand jury secrecy, it is the speaker in appellants' scenario, and not the listener, who has the capacity to commit a crime. Thus, under the present circumstances, although appellees may have published defamatory information, they did not commit a crime. [*308] Appellees may indeed have been on the receiving end of a criminal communication, but it was the opening of the speaker's mouth which violated the Grand Jury Act, not the attentiveness of the listener's ears. Of course, the media should act responsibly in exercising their [*42] statutory right, and when they do not, they may be answerable in defamation. And, examples of irresponsible journalism are known. But, the news media have a right to report news, regardless of how the information was received. The exception crafted by the trial court penalizes the news media for another's crime and is in direct tension with our decision in Taylor, which recognized that the Shield Law protects a journalist's source information from disclosure, even if such protection would conceal or cover-up a crime.

Notably, it appears that the alleged criminal violations of the Grand Jury Act in the present case were adequately investigated by the authorities without implicating the Shield Law. Following the allegations of a breach of grand jury secrecy involving appellee Henn, the supervising judges of both the Statewide Grand Jury and the County Grand Jury appointed special prosecutors to investigate the leaks. After receiving the prosecutors' reports, both were satisfied that the integrity [*53] of their respective Grand Juries had been maintained (though the reports only addressed potential breaches by the District Attorney's Office and the Attorney General's Office). 12 Thus, the statewide [*43] special prosecutor's investigation and report did not reveal, and appellants have not proven, that the alleged violations actually took place. Revealingly, as then-Judge (now Justice) Todd noted in her concurrence below, this is a defamation case and "[t]he public interest in grand jury secrecy will be vindicated only indirectly." Castellani, 916 A.2d at 656 (Todd, J., concurring). 13 In other words, because [*309] this is a defamation action, where the plaintiffs are seeking monetary damages rather than the restoration of the grand jury's integrity, the public's interest in the free flow of information to the news media is not presently in conflict with the public's interest in grand jury secrecy. 14

FOOTNOTES

12 As for the alleged County Grand Jury leaks, Henn voluntarily divulged her source for the articles when questioned by the county special prosecutor, making application of the Shield Law moot.
13 Our holding does not discount the important interests implicated in every defamation action, notably, the individual's fundamental right to his or her reputation as guaranteed under the Pennsylvania Constitution. The proper balance between that compelling interest and the Shield Law, however, was already [***44] struck by this Court in Hatchard when it refined our interpretation of the Shield Law. See Hatchard, 532 A.2d 348-51.

14 Were a situation to arise, such as that hypothesized by the concurrence below, where the Commonwealth sought a reporter's evidence concerning the source of a grand jury leak in a criminal investigation or prosecution of that leak, then the Shield Law and the secrecy provision of the Grand Jury Act would be more directly in conflict. That question, however, is not before us and we save its consideration for another day. Put another way, we need not determine whether there is any situation where the absolute language of the Shield Law would have to yield to a competing, constitutional value.

The Dissenting Opinion by Mr. Justice McCaffery would hold that, under the "unique circumstances" of this case, the constitutional interests in the protection of a defamation plaintiff's reputation should outweigh the Shield Law's protections. Specifically, the Dissent would hold that where a defamation plaintiff makes a "colorable showing that the alleged 'unnamed source' may not, in fact, exist at all," a media defendant can be compelled to disclose the identity of the source. See [***45] Dissent Slip Op. at 2. Respectfully, the Dissent appears to concern itself with an issue that is not before this Court, and premises its holding upon a factual assumption that is not the focus of the case argued. The issue raised, therefore, would seem to be more suited to a concurrence than to a dissent.

The Dissent states that the findings of Judge Garb "could readily support" the conclusion that the articles were actually not based on any source at all. Id. at 3. But Judge Garb made no specific findings along those lines. Although Judge Garb believed that the articles were inconsistent with appellants' actual appearances before the Grand Jury, he never suggested that the source of the articles "may have been largely, or entirely, fictional." See id. at 2.

Furthermore, the Dissent's legal finding appears to be unresponsive to the narrow legal argument presented to this [*310] Court. Appellants argue that the Shield Law should be subject to a crime-fraud exception, and that they have made a prima facie showing that the communication between the reporter and confidential source here furthered a crime and/or fraud. Although [***954] appellants advert to the possibility that the confidential source may [***46] be fictional, they do not propose the Dissent's "fictional source" exception. Instead, appellants' reference is a component of their crime-fraud exception claim, as they argue only that, if the source proved to be fictional, appellees' continued assertion of the Shield Law would constitute an ongoing fraud upon the courts. The basic premise of appellants' proposed crime-fraud exception, however, assumes that an unnamed source does exist, and took part in a communication that furthered a crime and/or fraud.

The Dissent is further unmoored from the case actually presented in advocating overruling Sprague,
supra, and disapproving Hatchard, supra, to the extent they say that information is not discoverable if it would reveal the identity of a confidential source. No party has asked us to overrule our precedent, and we have no briefing on the considerations affecting stare decisis. However legitimate the Dissent's concerns might be in an appropriate case, for decisional purposes, we respectfully do not believe they are appropriate here.

Accordingly, we reaffirm that HN7 the Shield Law prohibits the compelled disclosure of a confidential source's identity, or any information which could expose [***47] the source's identity. Thus, the Shield Law precludes the very type of discovery order issued in the present case. Furthermore, we reject the invitation to fashion a non-textual, "crime-fraud" exception to the operation of the statute. The Superior Court's reversal of the trial court's order compelling disclosure of The Scranton Times-Tribune's confidential source is affirmed.

Madame Justice Todd did not participate in the consideration or decision of this matter.

Messrs. Justice Saylor, Eakin and Baer join the opinion.

Mr. Justice McCaffery files a dissenting opinion.

DISSENT BY: McCAFFERY

DISSENT

[*311] DISSENTING OPINION

MR. JUSTICE McCAFFERY

I respectfully dissent from the majority's holding because I believe that it fails to afford adequate weight to the fundamental right of the citizens of this Commonwealth in the protection of their reputations. The Pennsylvania Constitution recognizes the possession and protection of an individual's reputation as an inherent and indefeasible right. PA. CONST. art. 1, § 1. Our Constitution also mandates that every individual whose reputation has been injured "shall have a remedy in due course of law and right and justice administered without sale, denial or delay." Id., § 11. [***48] 1 As I see it, the issue in the instant case is the extent to which Appellants' constitutionally protected remedy to vindicate their constitutionally recognized interest in their respective reputations may be limited by application of the Shield Law. I would hold that the unique circumstances of this case warrant the disclosure ordered by the trial court as a necessary discovery tool that should be available to Appellants, and, accordingly, I would reverse the order of the Superior Court.

FOOTNOTES
The right to protect one's reputation is not a second-class right, amenable to being pressed into oblivion by other constitutional provisions. Norton v. Glenn, 580 Pa. 212, 860 A.2d 48, 58 (Pa. 2004).

I disagree with the majority that our decision in Hatchard v. Westinghouse Broadcasting, 516 Pa. 184, 532 A.2d 346 (Pa. 1987), currently strikes the proper balance between Appellants' inherent and indefeasible right to protect their reputations through legal process and Appellees' statutory privilege under the Shield Law. See Majority Opinion, slip op. at 23, n.13. Rather, I conclude that where, as here, a public figure plaintiff in a defamation action makes a colorable showing that the alleged "unnamed source" may not, in fact, exist at all, that plaintiff may compel the defendant to disclose the identity of the source. Otherwise, the plaintiff is left without the ability to sustain his or her heavy burden to show that the alleged defamer acted with actual malice.

FOOTNOTES

2 In Carlacci v. Mazaleski, 568 Pa. 471, 798 A.2d 186, 190, n.9 (Pa. 2002), this Court recognized the applicability of the legal maxim "ubi jus, ibi remedium" ("where there is a right, there is a remedy," ) in a defamation action seeking expungement of court records.

[*312] Appellants' suspicion that the unnamed source may have been largely, or entirely, fictional, is supported by Judge Garb's finding of fact that Appellees' description of the grand jury proceedings was not supported by his review of the grand jury proceedings. Specifically, Judge Garb found that Appellees' reports of Appellants' conduct before the grand jury were inaccurate in that Appellants (1) had not been evasive in their answers; (2) had not been non-cooperative; (3) had not "stonewalled" the grand jury in its inquiry; (4) had not caused the grand jury to become irate as a result of Appellants' demeanor; and (5) had not caused the grand jury to demand that Appellants be "thrown out" of the courtroom. [***50] See Majority Opinion, slip op. at 23. These findings by Judge Garb could readily support the conclusion that the alleged defamatory portions of the reports published by Appellees were not actually based upon information provided by any source at all. Under these circumstances, Appellants should have been afforded the opportunity to determine with certainty whether Appellees did, in fact, rely upon a source as a basis for the alleged defamatory statements.

In summary, I would overrule our conclusion in Sprague v. Walter, 518 Pa. 425, 543 A.2d 1078, 1085 (Pa. 1988), and disapprove our dicta in Hatchard, i.e., that information is never discoverable to the extent it would reveal the identity of a confidential source. Instead, I believe we should hold that a public figure plaintiff who makes a colorable showing that an alleged "unnamed source" may not, in fact, exist should be afforded the remedy of compelled disclosure of the identity of the purported source. In such an instance, the constitutional interests in the protection of the plaintiff's reputation should take precedence over the statutorily created confidentiality interest of the alleged defamer. Because the majority reaches a contrary result, [***51] I respectfully dissent.
FOOTNOTES

3 Compelled disclosure here would not affect the trial court's inherent authority to control the course of discovery, and would not necessarily preclude a ruling by the court for in camera inspection by the court prior to disclosure to Appellants. The trial court would then be able to limit the release of the information to Appellants, should the colorable showing of non-existence not be supported upon review.
COMMONWEALTH OF PENNSYLVANIA, Appellant v. GEORGE BANKS, Appellee

No. 578 CAP

SUPREME COURT OF PENNSYLVANIA

612 Pa. 56; 29 A.3d 1129; 2011 Pa. LEXIS 2407

November 30, 2010, Argued

September 28, 2011, Decided


PRIOR HISTORY: [***1]
The Commonwealth of Pennsylvania's Exceptions to the Order and Proposed Findings of the Court of Common Pleas of Luzerne County entered on May 12, 2010 and May 17, 2010, at Nos. 1290, 1506-1508, 1519A-1519H, 1520, and 1524 of 1982, in the Plenary Jurisdiction of this Court.1

1 In the caption, the parties are listed as appellant and appellee for ease of reference. In fact, this Court exercised plenary jurisdiction on December 1, 2004, and has retained such jurisdiction throughout the proceedings. The "order" below essentially serves as the proposed findings for this Court. Commonwealth v. Banks, 2010 Pa. LEXIS 2273 (Pa., Oct. 4, 2010)


For George E. Banks, APPELLEE: Stuart Brian Lev, Esq., Matthew C. Lawry, Esq., Helen A. Marino,
Esq., Billy Horatio Nolas, Esq., Defender Association of Philadelphia; Albert Joseph Flora Jr., Esq.,
William Ruzzo, Esq.,

JUDGES: BEFORE: MR. CHIEF JUSTICE CASTILLE ⊳ CASTILLE ⊳, C.J., SAYLOR ⊳, EAKIN ⊳, BAER ⊳, TODD ⊳,
McCAFFERY ⊳, ORIE MELVIN ⊳, JJ. Messrs. Justice Saylor ⊳, Eakin ⊳ and Baer ⊳, Madame Justice Todd ⊳,
Mr. Justice McCaffery ⊳ and Madame Justice Orie Melvin ⊳ join the opinion.

OPINION BY: CASTILLE ⊳

OPINION

[*58] [*1130] MR. CHIEF JUSTICE CASTILLE ⊳

The central issue in this case is whether George Banks is competent to be executed. 2 We hold that he
currently is not.

FOOTNOTES

2 There is a secondary issue related to Banks' competency to pursue clemency proceedings, which is
separately discussed in Section V of this opinion.

Banks used a semi-automatic rifle to murder thirteen people, and seriously wound a
fourteenth, [*34] in an early morning shooting spree on September 25, 1982 in and near Wilkes-Barre,
Luzerne County, Pennsylvania. Five of the victims were children who shared the unlucky fate of having
George Banks as their father: Montanzima Banks (age 6), Kissmayu Banks (age 5), Bowendy Banks (age
4), Mauritania Banks (age 1), and Foraroude Banks (age 1). Four additional victims were unfortunate to
have been Banks' current or former [*59] girlfriends: Susan Yuhas (age 23), who resided with him,
Dorothy Lyons (age 29), who sometimes resided with him, Regina Clemens (age 29), who had resided
with him until about two weeks before the murders, and Sharon Mazzillo (age 24), a former girlfriend.
Three other victims were murdered because of their relationships to Banks' girlfriends or ex-girlfriends:
Scott Mazzillo (age 7), the nephew of Sharon Mazzillo; Alice Mazzillo (age 47), the mother of Sharon
Mazzillo; and Nancy Lyons (age 11), the daughter of Dorothy Lyons. The thirteenth and final murder
victim was an unlucky passerby. Banks murdered teenaged Raymond Hall, who saw Banks as he was
leaving his residence (presumably after killing eight people), and also shot and seriously wounded the
teenaged James Olson, [*35] who was with Hall. All of the victims, save one, were under the age of
thirty, and seven of the victims were under the age of twelve. The factual circumstances surrounding the
murders are set forth in detail in this Court's opinion, denying Banks' direct appeal from the sentences
A jury convicted Banks of twelve counts of first-degree murder, one count of third-degree murder, and various other offenses, and sentenced him to twelve separate sentences of death. Nearly thirty years later, Banks remains on death row, having exhausted all of right avenues of state and federal review of his convictions and sentences. Federal habeas corpus review of his sentences ended in 2004, with the second of two decisions rendered by the U.S. Supreme Court in Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). All that remained was execution of the death sentence, and on October 5, 2004, then-Governor Edward G. Rendell duly signed a warrant of execution, scheduling Banks' execution for December 2, 2004. Banks himself took no action in response to the execution warrant, but two weeks before the execution date, his mother Mary Yelland did, filing a "next friend" petition in the trial court, seeking a stay of execution on grounds that Banks was incompetent to be executed, and thus, his execution would violate the Eighth and Fourteenth Amendments under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). See also Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007).

The judge, Michael T. Conahan, denied the petition for lack of jurisdiction, finding it was time-barred under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. Assisted by Banks' long-time local counsel, as well as federal counsel from the Philadelphia Federal Defender, Yelland appealed to this Court in her son's name. On December 1, 2004, we issued a per curiam order assuming plenary jurisdiction under 42 Pa.C.S. § 726, stayed the imminent execution, and directed the trial court to "hold a competency hearing expeditiously in accordance with Ford v. Wainwright." We retained jurisdiction, drafting the trial judge to act as master because competency can be contested factually and because there could be credibility questions to resolve. See Commonwealth v. Banks, 596 Pa. 297, 943 A.2d 230 (Pa. 2007). On December 3, 2004, we further ordered the trial court to determine whether Banks had the capacity to initiate clemency proceedings or to designate someone to initiate them on his behalf.

To say that our direction for expedition went unheeded by former Judge Conahan, who has since been removed from the bench and has pleaded guilty to unrelated federal criminal charges, would be an understatement. Many of the delays involved maneuvers by federal counsel seeking to burden the Commonwealth's ability to have its mental health experts examine Banks in order to prepare a case in rebuttal against counsel's claim that Banks had become insane. These defense motions, which were not authorized by our order directing a competency hearing, caused delay in both proceedings before Conahan; and the motions and attendant delays continued following our most recent, third direction to hold an appropriate competency hearing. The competency question is important, but narrow, and it should have been resolved sooner. Following our review of the competency determination rendered by the Honorable Joseph M. Augello, this Court concludes that Banks presently is incompetent to be executed under the standards set forth in Panetti and Ford. As further explained herein, we neither accept nor reject Judge Augello's additional determination related to Banks' competency to pursue clemency. The background and our reasoning follow.
After a series of delays detailed in the 2007 Banks opinion, the first competency [*1132] hearing was held before then-Judge Conahan on January 30, 2006. Conahan found that Banks was incompetent to be executed and to decide whether to seek clemency. The Commonwealth sought review of that determination. One of the Commonwealth's primary complaints related to the trial court's refusal to permit the Commonwealth's expert to testify on the ground that defense counsel was not present during the expert's interaction with Banks. This Court concluded that there was no precedent from this Court or the U.S. Supreme Court requiring defense counsel's presence at a medical examination; we explained that the U.S. Supreme Court cases cited by counsel, Ford and Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), simply did not support the blackletter law propositions for which Banks' counsel cited them. We also emphasized that the counsel-presence requirement argued by counsel, and imposed by the trial court, was never authorized by this Court, which had retained jurisdiction. See Banks, 943 A.2d at 238. [*62] Accordingly, on December 28, 2007, we directed the trial court to hold a second competency hearing without the restrictions that had been placed on the Commonwealth and further directed that, "with the exception of scheduling and logistical matters, the trial court is not to be diverted by tangential motions and assertions by counsel: this Court retains jurisdiction over such matters." Id. at 239 (emphasis original).

Despite our direction for expedition, the second competency hearing was not held until nearly eight months later, on August 14, 15, and 18, 2008 ("2008 Hearing"). 3 On September [*62] 8, 2008, Judge Conahan issued an "order" again finding that Banks was incompetent under Ford, that he was incompetent to pursue clemency, and that his execution would violate the Pennsylvania and United States Constitutions. The Commonwealth appealed and the matter was briefed.

FOOTNOTES

3 On August 6, 2008, the Commonwealth filed two "emergency" applications, requesting this Court to address the issues raised therein prior to the scheduled second hearing: (1) an Emergency Application to Correct Caption of Appeal and to Clarify Context for Litigation; and (2) an Emergency Application to Compel Appearance of [***8] George Banks at Competency Hearing. Because the first application raised obvious issues that were available to the Commonwealth all along -- e.g., whether this Court had authority to order the original competency hearing, whether Mary Yelland was an appropriate next friend, and whether a conflict of interest existed in light of the fact that the same counsel were representing both Yelland and Banks -- we dismissed that application without prejudice to the Commonwealth's ability to raise such issues after the second hearing. We denied the Commonwealth's application to compel Banks' appearance as stated, but directed the trial judge to ensure his appearance while recognizing the judge's discretion to order Banks removed, if necessary. We further reminded the judge to "render a determination on competency as soon as possible following the hearing."

By order dated August 27, 2009, this Court: (1) rejected Judge Conahan's wholesale adoption of defense counsel's proposed findings of fact and conclusions of law as to Banks' competency to be executed and to pursue clemency; and (2) referred the matter, while retaining plenary jurisdiction, to then-President
Judge Chester B. Murosky of the Luzerne County Court of Common Pleas to assign the case to another judge to hold a de novo competency hearing as expeditiously as possible.4

See Commonwealth v. Banks, 605 Pa. 259, 989 A.2d 1 (Pa. 2009). In doing so, we noted that Conahan "simply adopted appellee George Banks' counsel's proposed findings of fact and conclusions of law wholesale as his purported 'Determination of Competency Issues'" in violation of this Court's requirement of an "autonomous judicial expression of the reasons for granting or denying post-conviction relief." We also concluded that the proposed findings Conahan adopted were inappropriate for the decisional task because they included [*63] findings beyond the scope of the limited hearing. Finally, we noted that we could not simply return the matter to Conahan for resolution because of his subsequent removal from the bench in disgrace.

FOOTNOTES

4 Subsequent to our August 27, 2009 order, Banks filed an application for reargument, which we denied by per curiam order dated October 23, 2009. Notably, our order again directed the trial court to proceed in accordance with our prior orders as expeditiously as possible, and that it was not to delay the proceedings without prior authorization of this Court.

The duty to hold a third competency hearing was initially assigned to the Honorable Charles C. Brown, Jr., Senior Judge of Centre County. Banks' counsel then filed two additional motions with this Court -- a Motion for Notice of Evaluations by Commonwealth Experts and a Motion for Videotaping of Evaluations by Commonwealth Experts -- which caused even more delay, and which were summarily denied. This Court issued an extraordinary per curiam order on February 16, 2010 denying the motion related to videotaping, and noting that, "[t]his Court having now twice ruled upon the serial objections petitioner has forwarded concerning the manner in which the Commonwealth's competency examinations should be conducted, any further challenge to the evaluations is deemed defaulted." Our order also noted that, in the time since we had directed a new hearing, the severe shortage of commissioned judges in Luzerne County had been partially remediated, and so we directed the President Judge of Luzerne County "to reassign this matter to a sitting commissioned judge of the Court of Common Pleas of Luzerne County, who is to conduct any further proceedings, including the competency hearing this Court directed on August 27, 2009." Commonwealth v. Banks, 605 Pa. 322, 989 A.2d 881, 883 (Pa. 2010).

Thereafter, Judge Augello was assigned to preside over the third competency hearing. He promptly held the hearing on April 27-30, 2010, and filed proposed findings of fact and conclusions of law with this Court on May 17, 2010. Judge Augello concluded that Banks did not comprehend the reasons for the death penalty, and accordingly, found him incompetent under Ford. Judge Augello also found that Banks did not possess the mental capacity to initiate clemency proceedings or to designate someone to pursue clemency proceedings on his behalf. The Commonwealth filed exceptions to the proposed [*64] findings, Banks responded and this Court heard oral argument.
Judge Augello's proposed findings and the Commonwealth's exceptions are now before this Court for final disposition. Before turning to Judge Augello's findings and the parties' arguments, a brief explication of this Court's jurisdiction is in order.

- II -

This Court's December 1, 2004 order, invoking extraordinary jurisdiction to resolve the competency-to-be-executed question, implicitly recognized that there was no existing vehicle for Banks to present his execution-related [***12] claim. As the PCRA court initially determined, the competency-to-be-executed question did not squarely fall within any of the exceptions to the one-year time bar to the jurisdictional time requirements of the PCRA. See 42 Pa.C.S. § 9545(b)(1)(i)-(iii). Additionally, Ford itself provided no guidance on the subject, leaving it to the States to formulate their own procedures to review competency-to-be-executed questions as well as the substantive standards governing such review. [***134] Since that time, the High Court has at least clarified some of the outer parameters governing the process that is due when a colorable competency challenge is raised. See, e.g., Panetti, discussed infra. However, Panetti does not direct the specific vehicle for pursuing such relief and the question remains unanswered in Pennsylvania. For these reasons, this Court invoked its extraordinary jurisdiction under 42 Pa.C.S. § 726 to review the instant competency-to-be-executed challenge.

Subsequently, this Court referred the matter to the Criminal Procedural and Appellate Court Procedural Rules Committees to formulate rules governing the presentation and review of competency-to-be-executed claims. See Banks, 943 A.2d at 234 n.7. [***13] The rules have yet to be finalized as of this writing and this Court is awaiting the recommendation. See 40 Pa. Bull. 2397 (May 8, 2010) (proposed criminal procedural rules published for public comment) and 40 Pa. Bull. 2393 [*65] (May 8, 2010) (proposed appellate procedural rules published for public comment).

At the time Banks' counsel originally filed the competency-to-be-executed challenge there was no reason to foresee the intolerable delay that has occurred. Some of the reasons for delay can be addressed when the procedural rules are finalized; others require a firm hand by the judge making the competency determination. A Ford claim presumably ripens only after a death warrant has issued; those warrants establish a date certain for execution and expire in sixty days, see 61 Pa.C.S. § 4302(a) (expiration of warrant sixty days after it is signed), and expedited treatment of the claims is required so that, where possible, the claim is finally determined within the time-frame of the warrant.

Initially, in this case, there was a delay in filing the competency challenge, which occurred only two weeks before the scheduled execution -- an unrealistic time-frame to permit the trial court to hold [***14] a competency hearing and for this Court's review under the best of circumstances, and even if an established procedure had been in place. This initial delay was then compounded by the circumstances we have already summarized above concerning Judge Conahan and the piecemeal procedural motions and arguments forwarded by Banks' counsel. This case demonstrates the need for rules that provide a workable framework for the presentation of Ford claims after a warrant for execution has been signed. Any such rules must account for expedited filings by the parties, a
mechanism to screen for colorable claims, an accelerated hearing if a hearing is deemed necessary, procedures to account for the minimum due process requirements as most recently set forth in Panetti, and other adjustments that may emerge in future decisional law.

- III -

This Court's task is narrow here. The case is proceeding in our plenary jurisdiction, in the absence of another mode of review, and all that remains is disposition of the substantive [*66] competency question which is now, finally, properly before us. In other matters where we have invoked plenary jurisdiction, and appointed a trial judge to essentially act as master while [***15] retaining jurisdiction, we have concluded that our review is de novo. See Annenberg v. Commonwealth et al., 562 Pa. 581, 757 A.2d 338, 342-43 (Pa. 2000). This case is [**1135] different, however, since in the normal course going forward, we anticipate that the initial competency review will be conducted by the trial court in which the petition challenging competency is filed, with direct appellate review following in this Court in a standard, but accelerated, fashion. Indeed, until formal Rules are adopted, this case is to be construed as reposing authority in the appropriate trial court to entertain colorable Ford challenges.

FOOTNOTES

5 In Annenberg, although we suggested our review was de novo, we clarified that while the lower court's fact findings are not binding upon this Court, "we will afford them due consideration, as the jurist who presided over the hearings was in the best position to determine the facts." Id.

HN2Normally, a convicted capital defendant is presumed competent and must establish his incompetency by a preponderance of the evidence. Commonwealth v. Zook, 585 Pa. 11, 887 A.2d 1218, 1226-27 (Pa. 2005) (competency to proceed with post-conviction relief); Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849, 855 and n.15 (Pa. 1998) [***16] (competency to be executed). When competency determinations are made by the trial court in similar circumstances, we have been clear that this Court's review is limited to determining whether the trial court abused its discretion since the trial court had the opportunity to hear the necessary expert testimony and observe the condemned firsthand. "An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. A finding by an appellate court that it would have reached a different result than the trial court does not constitute a finding of an abuse of discretion." Commonwealth v. Frey, 588 Pa. 326, 904 A.2d 866, 872 n.9 (Pa. 2006). Furthermore, a trial judge passing upon competency is free to accept [*67] one expert witness's opinion over that of a conflicting opinion so long as there is adequate record support. See Commonwealth v. Pruitt, 597 Pa. 307, 951 A.2d 307, 316 (Pa. 2008) (competency to stand trial); Commonwealth v. Sanchez, 589 Pa. 43, 907 A.2d 477, 490 (Pa. 2006) (same); Commonwealth v. Frey, 588 Pa. 326, 904 A.2d 866, 872 (Pa. 2006) (competency to plead guilty); Zook, supra; [***17] Commonwealth v. Appel, 547 Pa. 171, 689 A.2d 891, 899 (Pa. 1997) (competency to stand trial).
The Commonwealth has advocated for a de novo standard of review consistent with Annenberg, which would be less deferential to the hearing judge, tying its argument to the fact that we exercised extraordinary jurisdiction and appointed a trial judge to act as master. But, our exercise of extraordinary jurisdiction was occasioned by the importance of the constitutional question, and the fact that there was no existing, procedural mechanism by which this important and cognizable federal claim, a claim unique in that it ripens in the face of an execution warrant, could be litigated. That circumstantial anomaly does not operate to alter the nature of a competency determination, or the respective roles of trial judges and appellate courts. There is no need to depart from the settled abuse of discretion standard in reviewing Judge Augello's findings of fact and conclusions of law simply because there was no existing vehicle for entertaining a competency-to-be-executed challenge. Accordingly, we will consider whether Judge Augello abused his discretion in finding Banks currently incompetent to be executed.

- IV [***18] -

Before turning to those findings, a brief outline of the competency proceedings is warranted. Banks presented four experts in support of his assertion that he was incompetent to be executed -- Dr. John S. O'Brien, M.D., Dr. Jethro Toomer, Ph.D., Dr. Richard Dudley, M.D., and Dr. Robert Sadoff, M.D. In response the Commonwealth presented two experts -- Dr. Stephan [***1136] Mechanick, M.D., and Dr. Timothy Michals, M.D. Banks then presented rebuttal testimony from Dr. O'Brien.

[*68] There were many similarities among the experts' testimony. All of the experts agreed that Banks suffered from a psychotic disorder, not otherwise specified ("NOS"). Furthermore, the experts generally agreed that Banks suffers from psychotic symptoms that have persisted for many years despite treatment with antipsychotic medication. The symptoms include auditory hallucinations, delusions, and prominent thought disorder.6 The experts also generally agreed that Banks was not malingering and had many fixed delusions, including his belief that a police conspiracy resulted in at least two of the victims' deaths,7 that he was being poisoned in prison as part of a Department of Corrections conspiracy, that he was currently incarcerated [***19] as part of a government conspiracy, and that he was "supposed to be exempt" from the sentence of death or that his sentences of death had been vacated by God, Jesus, the Governor, George Bush, or some combination of the same.8910 N.T., 12, 13, 21, 29-30, 69 (Dr. O'Brien); id. at 149, [*69] 153-55 (Dr. Toomer); id. at 244, 253-54, 263, 280 (Dr. Dudley); id. at 380-81, 389-90, 394 (Dr. Sadoff); id. at 449-51, 457-58, 477-78 (Dr. Mechanick); id. at 674, 688-89, 706-708, 714 (Dr. Michals).

FOOTNOTES

6 The hallucinations are of two types: a "digital woman" who tells him about things, and a gurgling noise, the primary purpose of which is to keep him from concentrating.

7 Dr. O'Brien explained that Banks believes that "some of the victims of his crime were actually killed by
the police, and that other victims were re-shot by the police or re-injured by the police." N.T., 25; see also id. at 394 (testimony of Dr. Sadof). Furthermore, Dr. Mechanick acknowledged that Banks attributed two of the deaths to the police as part of a conspiracy, involving re-shooting "most" of the victims, slitting one of the victim's throats, and killing two of the victims. N.T., 458.

8 Banks' belief that his sentences were vacated had [...] some tangential factual foundation, since Banks' sentences effectively were briefly vacated in 2001 when the Third Circuit Court of Appeals entered an order granting habeas corpus relief conditioned upon a new penalty phase. Banks v. Horn, 271 F.3d 527 (3d Cir. 2001). This order was subsequently reversed by the U.S. Supreme Court by per curiam order and the matter was remanded for further proceedings. Horn v. Banks, supra. Ultimately, as stated previously, federal habeas relief was denied.

9 Dr. Mechanick acknowledged the testimony of the defense experts related to Banks' belief that his sentences were vacated. He also testified that Banks expressed a similar belief to him when Banks stated that he was "supposed to be exempt" from the death penalty. Dr. Mechanick explained that Banks' belief was a "rational belief based on a factual piece of paper that appeared to be truly a court ruling [presumably the 2001 Third Circuit order]." See N.T., 493-94.

10 Banks never expressed the idea that he was "supposed to be exempt" from the death penalty or that his sentences were vacated to Dr. Michals. Dr. Michals, however, accepted that Banks possessed this delusional belief based on the other experts' [...] testimony, and his prior examinations of Banks. Dr. Michals then explained that he concluded that the delusion was less prominent than it had been in the past, based, in part, on the fact that it was not discussed during his interview with Banks.

The experts also generally agreed that Banks was capable of some "rational" thought. As explained by Dr. O'Brien, "he is capable of a factual recitation of his circumstances. And to the extent that, that's rational, yes, he is capable of that ... you wouldn't expect his psychotic condition to interrupt or interfere with his ability to present to you information factually and reasonably about his circumstances because that's part of being cognitively intact, and that's a feature of psychotic [...] illness.... He is able to give you rational, factual information about his circumstances consistent with the cognitive intactness that you would expect to see in an individual with a psychotic disorder like Mr. Banks." N.T., 773-74. Thus, there were areas of agreement among the experts on both sides.

The primary distinction between the two sides was how Banks' delusional belief system affected his rational awareness of the death penalty and its implications. [...] The defense experts agreed that Banks could make a factual link between the death penalty and his conviction, but opined that the link was irrational and illogical because the delusions had become so interwoven with the factual understanding of his circumstances. Dr. O'Brien testified that Banks understands he is in prison, and that he is in prison for the multiple murders. Furthermore, Dr. O'Brien admitted that there were times that Banks would say that he was facing the death penalty for the convictions, but then state that the sentences were vacated. Banks did not understand that the two statements were inconsistent. N.T., 35-
36, 137; see also id. at 218 (Dr. Toomer admitting that Banks is competent to perform activities of [*70] daily living, but reiterating that he lacks the capacity to engage in "coherent, logical, organized thought processes"); id. at 336 (Dr. Dudley also testifying to Banks' understanding both that he is subject to the death penalty and that his sentences have been vacated and explaining "both things are just as real to him, and they're not -- they're not in conflict with each other; and, I believe that both are persistent pieces of information that are in his head (**23) and form his life."); id. at 390 (Dr. Sadoff testifying that Banks "has an intellectual awareness that he had been convicted of 13 homicides, and that he was given the death penalty back in 1983.").

The defense also offered testimony that Banks did not believe his incarceration or death sentence was related to the murders, but instead, was a result of a government conspiracy. Dr. Toomer testified that Banks is aware of the death penalty, but identifies a number of differing reasons as to why he is subject to the punishment, including "racism, his understanding of the Bible, his special relationship with God, and the goal being to in some way circumvent or in some way sabotage his religious beliefs and insight." N.T., 155; see also id. at 252-53, 282-84 (Dr. Dudley testifying that Banks believed his religious enlightenment made him a target and "there has been an increasing effort to stop him from doing the work that he is doing that's been directed to [sic] by God."); id. at 381, 385 (Dr. Sadoff testifying that Banks believes he is being held illegally and he should be out ministering to the people; and that it is the "Muslim government that is against me").

Thus, the defense experts (**24) generally shared an opinion that any link Banks made between his convictions and the death penalty was not rational, i.e., his hallucinations and delusional thought process (of his exoneration and sentences being vacated) were so intertwined with his rational thought process that he was unaware of the reasons for the penalty. For example, Dr. O'Brien testified that while Banks understands certain aspects of his circumstances, "because of the -- of his symptoms, his delusional beliefs and his thought disorganization becomes so interwoven in all of that - for example, he's not able to consistently identify his situation or the -- the penalty [*71] for his convictions." N.T., at 35; see also N.T., at 164-65 (Dr. Toomer testifying that "[religion] is intertwined with and it colors every aspect of his functioning and when you communicate with him, that intertwining of all aspects becomes very apparent....").

[**1138] On the other hand, the two Commonwealth experts testified to an opinion that Banks was competent to be executed. Both experts agreed that Banks was more communicative and his delusions seemed to be less prominent than in past examinations, indicating that his latest course of medication was (**25) effective. Turning to their specific testimony, Dr. Mechanick explained that Banks' "racist" theory was a way of "providing a rational excuse or explanation for why he committed the crimes. He's not -- he's not providing a response that is a delusional explanation ... his response indicates that he does have a sense of wrongfulness and is excusing it or explaining it for a rational reason...." Dr. Mechanick also explained that although there were two competing thoughts in Banks' mind -- the rational thought that he was going to be put to death and the delusional thought that the sentences were vacated -- Banks showed an understanding that "he is involved in a process involving the death penalty; that it's still ongoing. That it hasn't simply, as we've heard from other testimony, been vacated."
Dr. Mechanick further testified that Banks' belief that his sentences were vacated was an "unrealistic belief. It didn't seem reasonable for him to believe in 2010, given what's transpired since 2001, that his death sentence was currently vacated. And I do think there is a portion of him that has that unrealistic belief.... But... he didn't add anything of a delusional nature to explain why [***26] he would have been excused from the death penalty or why it would have been vacated." Dr. Mechanick admitted that Banks was not delusion free, but explained that there is a "range of delusional -- intensity of delusional belief and prevalence of delusional belief.... In Mr. Banks' case, there's been some improvement. He is not free of delusions. He still has them. And at times they're more prominent and more intense than at other times, but they're not there of equal intensity all the time." [*72] Thus, in Dr. Mechanick's opinion, the delusions did not occupy "so much of the stage" as to prevent Banks from a rational understanding of the death sentence and the reasons for it. N.T., 463, 474, 481, 492, 493-94, 500-03, 517.

Dr. Michals offered similar testimony, testifying that Banks told him that he was sentenced to death for the crimes of which he was convicted. Dr. Michals also testified that he had considered the testimony of the defense experts regarding Banks' delusional belief that his sentences were vacated and believed that Banks was "basically, what he's saying, he's been forgiven.... He also had religious expressions that he's been forgiven by God." Like Dr. Mechanick, he acknowledged [***27] that Banks had "conflicting" thoughts, and explained that the delusions were the way in which Banks dealt with his situation, but further opined that he had rational thoughts and understood that the State had the right to execute him as a result of his crimes. N.T., 684, 689-90, 697, 700.

Finally, the defense presented rebuttal testimony from Dr. O'Brien, who testified that the Commonwealth's experts' testimony had not changed his opinion. Dr. O'Brien testified to the interplay between the psychosis and cognitive awareness, explaining first that psychotic disorders do not impair cognitive function. In other words, people can simultaneously have both an active psychosis and an intact factual awareness of their circumstances and normally the psychosis and the factual appreciation are parallel. However, in this case, Banks' "psychosis is intertwined with his appreciation of his factual circumstances, and it deprives him of having a rational understanding of his circumstances." Dr. O'Brien reiterated that Banks had "an intact factual appreciation" [***1139] of his conviction and that he is on death row, but then explained that, although "unusual," Banks' psychosis had become intertwined with the [***28] factual appreciation of his circumstances, rendering his understanding of the penalty and the reasons for it to be irrational. Dr. O'Brien also specifically addressed the Commonwealth's experts' testimony, opining that Dr. Mechanick's analysis was "inadequate" and that Dr. Michals' testimony was largely fact-focused and did not take into account whether Banks' psychosis [*73] interferes with his rational understanding of the penalty. N.T., 757-60, 761-63, 768; see also id. at 392 (reflecting Dr. Sadoff's opinion of the Commonwealth's experts' testimony: "They agreed that he had a delusional [belief] system about his sentence being vacated. And I was at a loss to find the logical link between their agreeing with the psychosis and the delusion, and they're [sic] finding him competent. I just didn't understand that.").

FOOTNOTES
Banks did not take the stand and testify on his own behalf. He was in the courtroom throughout the competency hearing and was not disruptive in any fashion, although there was some indication that his conversations with counsel were disorganized. See, N.T., 20 [Dr. O'Brien's testimony on direct examination: "And even up until today, when I was overhearing his conversations [***29] here in the courtroom, he remains psychotically preoccupied with the stained glass window, talking about the voices he's hearing. So his symptoms are persisting up until this very moment."].

Following the hearing, Judge Augello submitted his opinion, articulating his understanding of the competency standard as that set forth in Commonwealth v. Heidnik, 554 Pa. 177, 720 A.2d 1016 (Pa. 1998), stressing that Banks is presumed to be competent to be executed, and he must overcome that presumption by a preponderance of the evidence. Judge Augello credited the defense experts' testimony and rejected the Commonwealth's experts' testimony to the extent their testimony was inconsistent with that of the defense. Judge Augello found that: Banks is "incapable of rational thought"; "it's impossible to carry on a logical and coherent conversation with Banks"; Banks believes there is a conspiracy against him "and that the reasons he might be executed are because of the conspiracy due to his campaign against racism, his understanding of the Bible, his special relationship with God, and the goal being to in some way circumvent or in some way sabotage his religious beliefs and insight"; Banks "has an intellectual [***30] awareness that he had been convicted of 13 homicides, and that he was given the death penalty back in 1983. He doesn't have a clear awareness now, because now he believes, unshakably, that his sentence has been vacated and he is free to leave as soon as the conspiracy ends"; and "there is no logical link between the Commonwealth's experts agreeing with the psychotic diagnosis [**74] and Banks' delusional [belief] system about his sentence being vacated and their opinion[s] finding him competent." Opinion at p. 4, ¶¶ 3 and 4, p. 6, ¶14, p. 13, ¶ 37, p. 14, ¶ 41.

Judge Augello concluded that the sum of the evidence suggested that Banks suffers and continues to suffer from gross delusions which put any awareness of the link between his crimes and his punishment "in a context so far removed from reality that the punishment can serve no proper purpose." Opinion at 17. For this reason, he found that Banks satisfied his burden to prove that he is incompetent to be executed under Ford. Finally, Judge Augello indicated that Banks' mental state should be monitored and the Commonwealth should be permitted to attempt to establish his competency if there is a material change in [***1140] his condition.

FOOTNOTES

12 Judge [***31] Augello's suggestion that Banks' mental state should be monitored and the Commonwealth should be permitted to demonstrate Banks' competency upon a showing of a material change in his mental state is consistent with amendments to the criminal procedural and appellate procedural rules which have been proposed for public comment, but which have not yet been recommended to, nor adopted by, this Court.
The Commonwealth filed the instant exceptions to Judge Augello's findings in this Court. According to the Commonwealth, five of the six experts agreed that Banks has some degree of comprehension of the existence, meaning, and/or purpose of his death sentence. Thus, he cannot establish that he is incapable of rationally comprehending the meaning and purpose of the sentence. The Commonwealth urges us to adopt Dr. Mechanick's testimony as it was "highly credible": his analysis was extremely thorough, offered a complex, multi-dimensional analysis of Banks, and reflected professional objectivity and evenhandedness. The Commonwealth reiterates that the defense experts agreed that Banks had some degree of rational understanding of his impending execution and the reasons for it.

FOOTNOTES

13 The Commonwealth's [***32] position assumes that this Court's review is de novo, a position that we have considered and rejected as discussed supra.

[*75] The Commonwealth next turns to Judge Augello's findings of fact, arguing that the evidence did not support that Banks was incapable of rational thought; indeed, all of the experts agreed that he was capable of rational thought. Similarly, the conclusion that it was impossible to carry on a logical and coherent conversation with Banks was unsupported by the evidence, since the experts also generally agreed that he could communicate logically. See supra quoting Judge Augello's Opinion at p. 4, ¶¶ 3 and 4. The Commonwealth asks this Court to reject the testimony of Dr. O'Brien, since it was contradictory and inconsistent. The Commonwealth argues that the evidence showed that Banks understands, at times, that he is subject to the death penalty and the reasons for such punishment. Thus, the Commonwealth urges this Court to reject what it terms the "lopsided and one-dimensional" findings of Judge Augello, and find that Banks is competent to be executed.14

FOOTNOTES

14 The Commonwealth also takes exception to Judge Augello's May 12, 2010 order denying the Commonwealth's motion to strike [***33] the defense experts' reports that were filed prior to the competency hearing. The heart of this dispute centers on two of the defense experts' reports (those of Drs. Toomer and Dudley) that were submitted prior to the competency hearing, which contained opinions that were redacted during the competency hearing. See N.T., 418-29 and 797-810. Indeed, the redaction was hotly contested during the competency hearing and related to those portions of the experts' reports that referenced their conclusions regarding Banks' competency (from the 2006 and 2008 competency hearings). During the competency hearing before Judge Augello, the judge agreed to redact portions of the experts' reports; however, the reports that were submitted prior to the hearing were unredacted and are part of this Court's record given Judge Augello's May 12th ruling. Thus, the Commonwealth argues that Judge Augello's ruling was in error as a reviewing court may not consider evidence that was not introduced into evidence at the competency hearing.
This Court agrees with the Commonwealth that the prior submitted reports should be stricken from the record. Judge Augello was understandably reluctant to do so given this Court's many directives explaining the limited parameters of his authority. Nevertheless, at this juncture it is proper for this Court to strike the unredacted reports. Furthermore, Judge Augello’s decision to redact those portions of the experts' reports expressing their conclusions from the 2006 and 2008 competency hearing was proper, as such conclusions were not relevant to the question of Banks' current competency to be executed.

[76] [1141] Banks has filed a responsive brief arguing that Judge Augello’s findings are supported by the record and free of legal error. Turning first to the law, Banks avers that the Commonwealth’s position mirrors that of the Fifth Circuit Court of Appeals in Panetti v. Quarterman. Banks then argues that the High Court “condemned the Fifth Circuit’s approach” because it erroneously deemed Panetti’s delusional belief system irrelevant to the question of whether he had a rational understanding of his execution. See Banks’ Response to Commonwealth’s Exceptions, at 45-46 (discussing Panetti, 551 U.S. at 949 (2007)). According to Banks, the Commonwealth commits the same error as the Fifth Circuit by asking this Court to interpret Ford to require a finding that Banks is competent [35] as long as he has "any comprehension" of his impending execution regardless of whether that comprehension is rational.

Banks next argues that Judge Augello’s findings were supported by the record. Banks contests the Commonwealth’s request to adopt Dr. Mechanick’s direct testimony, by pointing out that much of it was undermined by his testimony on cross-examination. Furthermore, according to Banks, some of Dr. Mechanick’s testimony was contradicted by Dr. Michals, the Commonwealth’s own expert. Banks argues that Dr. Mechanick’s testimony erroneously adopts an absolutist view of competency and fails to consider how Banks’ delusional beliefs affect his rational understanding of the death penalty. As an example, Banks cites to Dr. Mechanick’s testimony that Banks’ belief that his sentences were vacated as "unreasonable" instead of "delusional." See N.T., 493-94, quoted supra. In any event, according to Banks, Judge Augello’s findings were clearly supported by the defense experts, who consistently testified that Banks believes that his sentences have been vacated by God, Jesus, George Bush, or the Governor, and that any sentence of death currently imposed would be for reasons other than [36] his murder convictions, i.e., a conspiracy based on racism or religious belief.

Having recounted the experts' testimony, Judge Augello’s findings of fact and conclusions of law, and the parties’ arguments [77] in support of their respective positions, we now turn to the substantive law governing competency-to-be-executed determinations.

In the seminal case of Ford v. Wainwright, the U.S. Supreme Court established that the Eighth Amendment prohibits the execution of one who is insane. In reaching this conclusion, a four-Justice plurality of the High Court considered the common law bar of execution of a prisoner who has lost his sanity. The plurality acknowledged that the reasons for the prohibition were "less sure and less uniform than the rule itself." 477 U.S. at 407. Nevertheless, it determined that the common law prohibited such a sentence from being carried out and the practice was "carried to America, where it was early observed
that "the judge is bound to stay the execution upon insanity of the prisoner."" Id. at 408. The plurality then turned to the practice in the United States, finding that no State in the Union permits the execution of one who is insane. Thus, the plurality had [*37] little difficulty reaching the broad conclusion that a sentence of death could not be carried out on one who is insane.

FOOTNOTES

15 Although a plurality opinion, the lead holding garnered a majority as Justice Powell wrote a separate concurring opinion agreeing that the Eighth Amendment prohibited the execution of an insane individual.

[*1142] The plurality then indicated that the manner in which the judicial system protects the Eighth Amendment value, i.e., the procedures that must be followed when a death-sentenced prisoner alleged insanity, were a matter of contemporary law. The plurality held that the procedures used in Florida, which were conducted wholly within the executive branch, were inadequate. However, the plurality did not conclude that a full trial was necessary to protect the Eighth Amendment interest and left to the individual States the task of developing appropriate procedures to enforce the prohibition. The plurality also indicated that the competency-to-be-executed inquiry was guided by whether the alleged mental illness "prevents [the petitioner] from comprehending the reasons for the penalty or its implications." Id. at 417. Or, as [*78] stated by Justice Powell in concurrence, the appropriate [*38] inquiry asks whether petitioners are "unaware of the punishment they are about to suffer and why they are to suffer it." Id. at 422 (Powell, J., concurring). Thus, while Ford held that the Eighth Amendment prohibited execution of the insane, it gave only limited guidance to the States respecting implementation of the restriction; Ford did not prescribe the specific process due in such circumstances and gave only a broad definition of "insanity" for purposes of execution.16

FOOTNOTES

16 It appears that the procedure that is due once a prisoner has made a "substantial showing" of incompetency must meet the minimum standards set forth in Justice Powell's concurrence in Ford, as Justice Powell's opinion provided the narrower holding on the question presented. Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977); see also Panetti v. Quarterman, 551 U.S. at 949 (following Justice Powell's concurrence as the "clearly established law" in assessing whether the Texas procedure was adequate). Justice Powell observed that the protections included a "fair hearing" at which the prisoner must be given the opportunity to be heard. See Ford, 477 U.S. at 424. Justice Powell further noted that a trial was unwarranted [*39] as due process requires only "such procedural protections as the particular situation demands." Where the challenge is competency to be executed, the conviction remains valid and the only remaining question is "not whether, but when his execution is to take place." Id. at 425 (emphasis in original). Therefore, a State may require the petitioner to make a "substantial showing of insanity merely to trigger the hearing process" and the hearing process itself may be less formal so long as the State provides "an impartial officer or board that
can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." Id. at 426, 427. We have already rejected Banks' various prior challenges to the process this Court has directed in this matter, noting that the restrictions counsel sought were unsupported by the governing case from the High Court which counsel cited. There has been no further challenge to the adequacy of the process provided in this case.

Over twenty years later, the High Court revisited the competency-to-be-executed question in Panetti v. Quartermaster, shedding more light on how competency [*40] should be evaluated under the Eighth Amendment. Relevant to the instant proceedings was the question of how the petitioner's delusions should be treated in determining competency.17

FOOTNOTES

17 The Panetti Court found that the competency proceedings Texas had employed, like the competency proceedings employed in Ford, were inadequate. The Court indicated that the prisoner made a "substantial showing" of incompetency and was thus entitled to an adequate means to prove his incompetency. In the Panetti Court's view, the Texas court failed to afford the prisoner adequate process when it did not allow him to present his own expert, refused to transcribe the competency proceedings, conveyed false information to the prisoner, and provided at least one significant update to the State that it did not provide to the prisoner. Panetti, 551 U.S. at 950-52.

None of the deficiencies mentioned in Panetti are present here. Furthermore, we need not explore the specific contours of the process to be provided for future Ford challenges in Pennsylvania, but will leave it to our Rules Committees to devise procedures in the first instance, which, as a constitutional matter, are constrained only by the expressions of [*41] Justice Powell in Ford and the majority in Panetti.

[*79] [*1143] In Panetti, a defense expert testified that Panetti suffered from "schizo-affective disorder,' resulting in a 'genuine delusion' involving his understanding of the reason for his execution." Id. at 954. According to the expert, Panetti understood the stated reasons for the execution to be a "sham," and instead believed that the state wanted to execute him to stop him from preaching. The High Court further noted that Panetti's other experts reached similar conclusions. In response, the State's experts did not discount the delusion, but resisted the idea that the belief was indicative of incompetency, "particularly in light of his perceived ability to understand certain concepts and, at times, to be 'clear and lucid.'" Id. at 955. As noted previously, the Fifth Circuit Court of Appeals determined that Panetti was aware that he committed the murders, was aware that he would be executed, and was aware of the reason the State had given for the execution. For these reasons, the Fifth Circuit determined the petitioner was competent to be executed.

The High Court disagreed, finding that the Fifth Circuit failed to consider whether Panetti's [*42] mental illness prevented him from reaching a "rational" understanding of the State's
reasons for the execution. "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." Id. at 959. In reaching this conclusion, the High Court found that Panetti's delusional belief system was relevant to his rational understanding of his [*80] punishment, noting that the "Ford opinions nowhere indicate that delusions are irrelevant to 'comprehension' or 'awareness' if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the Ford majority suggests the opposite." Id. at 958.

The Court then considered the principles of Ford, noting that whether the Ford decision was animated by concerns for the retributive value of the death penalty or the "natural abhorrence" a civilized society feels at executing the insane, the questions posed by Ford -- the petitioner's ability to "comprehend the reasons" for the punishment or his unawareness of the reasons for the punishment -- were undermined by the Fifth Circuit's decision that deemed delusions relevant only with respect to [***43] the State's announced reasons for the execution. The Court concluded that it could "find no support elsewhere in Ford, including in its discussions of the common law and state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reasons for his execution." Id. at 959.

The substantive law in Pennsylvania has hewed to that developed by the U.S. Supreme Court. For example, in Jermyn, we posed the competency-to-be-executed question as whether the petitioner suffers from a mental illness which "prevents him from comprehending the reasons for the death penalty or its implications," consistent with Ford. Jermyn, 709 A.2d at 852; see also Commonwealth v. Haag, 570 Pa. 289, 809 A.2d 271, 277 (Pa. 2002); Commonwealth v. Bronshtein, 556 Pa. 545, 729 A.2d 1102, 1104-05 (Pa. 1999); In re Heidnik, 554 Pa. 177, 720 A.2d 1016, 1018 (Pa. 1998); [**1144] Commonwealth v. Jermyn, 539 Pa. 371, 652 A.2d 821, 824 (Pa. 1995). This Court has not, however, had the opportunity to revisit the competency-to-be-executed standard following Panetti to consider whether further clarification is warranted.

Following Panetti, it is clear that HN4 the Eighth Amendment requires a petitioner [***44] not only to have a factual [*81] understanding of the penalty and the reasons for it, but also a rational understanding of it.18 Delusions or other psychotic symptoms cannot simply be discounted because the petitioner has a cognitive awareness of his circumstances. Instead, delusions are relevant to determine whether they "put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." Panetti, 551 U.S. at 960. Accordingly, the appropriate inquiry in a competency-to-be-executed determination must take into account both the factual awareness and the rational understanding of the condemned. Put another way, a court must determine whether the prisoner suffers from a mental illness which prevents him from factually or rationally understanding the reasons for the death penalty or its implications.

FOOTNOTES

18 A factual understanding refers to the petitioner's cognitive awareness of the impending execution
and the State’s rationale for the execution, similar to the determination the Fifth Circuit made in Panetti. A rational understanding reflects whether the petitioner comprehends the link between the crime and the punishment [*45] to be inflicted.

Turning to the instant case, we reiterate that this Court reviews the trial court’s findings for an abuse of discretion. Furthermore, the credibility determinations made by the fact-finder will be upheld so long as there is adequate record support for them. Considering the credibility determinations made by Judge Augello, we find that there was adequate record support to credit the defense experts’ testimony over that of the Commonwealth’s experts, as to the points upon which the parties disagreed.

As revealed by our summary of the experts’ testimony, there was no disagreement that Banks suffers from a severe mental illness raising a substantial question of competency, which is the first essential predicate for a Ford claim. Indeed, there were significant areas of agreement among the [*82] parties’ experts regarding Banks’ psychosis and delusional and hallucinatory symptoms. The Commonwealth’s experts acknowledged the existence of most of the delusions, agreeing that Banks had fixed delusions regarding police involvement in the original murders as well as delusions related to a supposed Department of Corrections conspiracy against him. Five of the experts, including one [*46] Commonwealth expert, agreed that Banks’ delusions extended to his sentence, since Banks believed that he was “supposed to be exempt” from the sentence of death or that someone or some higher being had “vacated” his sentence of death. Five experts testified that Banks has a fixed delusion that he is not under a sentence of death. Furthermore, to the extent there was a difference of opinion on the ultimate question of competency, the defense experts’ testimony countered the testimony of the Commonwealth experts. Specifically, Dr. Sadoff testified that he could not understand the Commonwealth’s experts’ conclusions given the nature of Banks’ psychosis, and Dr. [*1145] O’Brien testified that the Commonwealth’s experts failed to take into account whether the delusions interfered with Banks’ rational understanding of the death penalty and the reasons for it. The defense experts also explained their understanding of the Commonwealth’s experts’ assertion that the delusions had lessened. For example, Dr. Dudley explained that the role delusions play in the life of persons such as Banks may “ebb and flow, not because their belief in the delusion ebb[s] and flows, but because of the defendant’s temporal [*47] circumstances. So, in other words, there may be circumstances that are occurring that make the importance of the delusional thinking more relevant or less relevant, but the delusional thinking itself is fixed.” N.T., 325; see also id. at 328 (Dr. Dudley further stating, “he’s no more or less delusional at these different times, at least that’s my opinion. Now, what he chooses to talk about is a totally different matter. It doesn’t have to do with whether the delusions are there or the thought process disturbances are there. It has to do with what’s provoked.”) N.T., 338.

FOOTNOTES

19 The Panetti Court indicated that, consistent with due process, state courts could require the petitioner to make a threshold “substantial showing” of incompetency in order to trigger further competency proceedings. 551 U.S. at 949 (citing Ford, 477 U.S. at 426, 424 (Powell, J., concurring)).
[*83] The remaining question is whether, on this record and in light of Judge Augello's credibility findings, the judge abused his discretion in concluding that Banks was incompetent to be executed. Like the petitioner in Panetti, George Banks appears to have a cognitive awareness of the death sentence imposed upon him. He recognizes [***48] his responsibility for most of the murders and understands that he was sentenced to death as a result of those crimes. He also appears to understand what execution entails and on some level, acknowledges that he would die as a result of it. 20 He also understands that the stated reason for his death sentence is the multiple murders.

FOOTNOTES

20 Whether Banks has a rational understanding that death would result if he were executed is less clear as Dr. Michals testified that Banks understood that the current manner of execution is by lethal injection. Banks, however, also told Dr. Michals that before lethal injection the manner of execution was electrocution. Banks explained that under the former execution manner, he would not have died as a result of the electrocution, but would have been put to sleep, pronounced dead by a doctor, and set free in a different country. Thereafter Dr. Michals did not follow up on this delusional belief to determine whether Banks understood that his execution by lethal injection would result in his death or would result in a similar fate. N.T., 686-87; see also N.T., 29 (testimony of Dr. O'Brien repeating same delusional notion held by Banks that electrocution would [***49] have resulted in his removal from country instead of death).

In any event, and mirroring the Panetti inquiry, the primary disputed question between the two sides is whether Banks possesses a rational understanding of his execution and the reasons for it. The Commonwealth's experts did not discount that Banks had a fixed delusion that his sentence was vacated, but explained that coexisting with this delusional belief was a rational understanding of the penalty and the reasons for it; the fact that Banks had a cognitive understanding or factual awareness was sufficient, in their view, to deem Banks competent.

On the other hand, the defense experts did not discount that Banks had some factual awareness of the death penalty, but testified that the factual awareness was so intertwined with his delusional belief that the link between his crime and punishment was irrational or illogical. As most coherently [*84] explained by Dr. O'Brien on rebuttal, normally the psychosis and cognitive awareness are parallel, which supports the Commonwealth's experts' position. Dr. O'Brien, however, further explained that in this case, the psychosis and factual appreciation had become interwoven, undermining Banks' [***50] factual appreciation of the penalty [**1146] and the reasons for it. Additionally, at least two of the defense experts suggested that Banks believes that the penalty is unrelated to the murders, and instead is part of a conspiracy on the part of the government.

As is often the case when courts are called upon to decide issues involving psychiatry and a party's
mental state, the decisional task under Ford and Panetti is not an easy one. While we do not question that at some level Banks possesses a cognitive awareness of the simple fact of his prospective execution and the reasons for it, Judge Augello's determination that Banks nevertheless is not competent to be executed applied the governing federal law as we understand it. What matters is that, while Banks may have a factual awareness of the death penalty and the reasons for it, as a result of his mental illness, Banks does not have a rational understanding of the death penalty or the reasons for it, as required by Panetti. Furthermore, there is no evidence that Judge Augello's conclusion was otherwise manifestly unreasonable, arbitrary, or capricious, or was motivated by partiality, prejudice, bias, or ill will. For these reasons, we conclude [***51] that Judge Augello did not abuse his discretion in finding that Banks was currently incompetent to be executed under the Eighth Amendment.

We acknowledge that certain of Judge Augello's absolute statements went farther than the evidence warranted, such as when he found that Banks was "incapable" of rational thought or that it was "impossible" to carry on a logical conversation with him based upon the experts' account at the competency hearing regarding their interactions with Banks during the interviews. Instead, the evidence showed that Banks was capable of factual responses as to many aspects of his life and death and communicated appropriately with all of the experts. Dr. O'Brien stated as much on direct examination when he [*85] testified that, under his new medication regime, Banks was more cooperative and was able to communicate his symptoms better. N.T., 19-20. Additionally, while all of the experts agreed that Banks engaged in loosely disorganized thought and was prone to tangential diversion, they also indicated that he could appropriately respond to questions that were asked of him.21 What is inescapable, however, is that the experts generally agreed that Banks had a significant [***52] number of fixed delusions relating to his crime and punishment and five of the six experts agreed that his delusions extended to his penalty. Thus, although some of Judge Augello's broad findings were unsupported by adequate record evidence, this fact does not detract from his essential finding that Banks currently is incompetent to be executed, and does not prove an abuse of discretion.22

FOOTNOTES

21 While all of the experts indicated that Banks was more communicative, cooperative, and better able to respond to questions under his new medications, the conclusions drawn from the "improvement" were a source of disagreement. The defense experts indicated that Banks' ability to communicate highlighted his symptoms even more, indicating that while he could initially respond to a question, when permitted to continue, he rambled incoherently, often diverting the conversation to religious conspiracy topics. Conversely, the Commonwealth's experts attributed Banks' increased ability to communicate and cooperation to the fact that his delusions had decreased and his mental condition had improved.

22 There is no reason at this time to speculate as to whether and how the Commonwealth may apply for a declaration [***53] of competency in the event that Banks' mental condition undergoes a material improvement. The rule amendments being considered by our Rules Committees should account for this possibility.
Finally, by supplemental order issued on December 3, 2004, we directed the trial court to consider whether Banks had the mental capacity to initiate clemency proceedings or to designate someone to initiate clemency proceedings on his behalf, at the same time of the competency-to-be-executed hearing. The supplemental order arose out of a separate action filed by Mary Yelland, Banks’ mother, in the Commonwealth Court, broadly challenging clemency proceedings in this Commonwealth [*86] when an alleged incompetent person was involved. Consistent with this Court’s order, the parties presented expert testimony on the clemency question and Judge Augello made findings related to this question.

Specifically, the defense experts agreed that Banks did not have the ability to pursue clemency. As succinctly explained by Dr. Sadoff, Banks cannot pursue clemency because “he believes his sentence has been vacated. There’s no reason for him to initiate a clemency because that isn’t necessary. You can’t do it because his [***54] sentence is not there. If he had a sentence and he believed that he was going to be sentenced to death, then he could initiate a clemency, but he can’t do it now because he says there is no need for it.” N.T., 391.

Conversely, the Commonwealth’s experts testified that Banks was able to explain the process of clemency and understood that the Governor could overturn his sentence or commute the sentence to life in prison. The Commonwealth experts also testified that Banks was willing to pursue clemency because of his sister (who apparently asked him to do so). N.T., 484-85, 523 (Dr. Mechanick); id. at 697, 703 (Dr. Michals). During cross-examination, however, Dr. Mechanick recognized that Banks would have to provide a factual recitation of the night of the murders, and admitted that his ability to do so might be impaired because of his delusional belief that the police had shot or re-shot some of the victims. N.T., 615-16.

Judge Augello again credited the defense experts’ testimony and found that Banks was incompetent to initiate clemency proceedings or to appoint someone to initiate clemency proceedings on his behalf since he suffers from a delusional belief that his sentences have been [***55] vacated.

The Commonwealth avers that Banks is competent to pursue clemency proceedings. The Commonwealth again asks this Court to credit the testimony of Drs. Mechanick and Michals, who expressed that Banks understands the process of clemency and that clemency can be used to overturn his sentence or change his sentence to life in prison. The Commonwealth [*87] argues that the testimony and conclusions of the defense experts were without foundation, since the defense experts simply relied on their determination that Banks believed his sentences of death were vacated in support of their conclusion that he was unable to pursue clemency proceedings.

Banks does not specifically respond to the clemency argument except in a general manner, reiterating, where relevant, that his experts should be credited and that their testimony supports Judge Augello’s
conclusion that he is not competent to pursue clemency proceedings.

Judge Augello made findings related to the clemency question in response to this Court’s December 3, 2004 order. Upon closer consideration, however, it is not apparent that this Court needs to, may, or should reach this issue. The question of clemency is primarily, if not exclusively, one for the Executive, not the courts. Indeed, the pardoning power arises within an article of the Pennsylvania Constitution enumerating the powers of the Executive. See Pa. Const. art. IV, § 9. Moreover, there is an executive process in place for consideration of such claims. See 37 Pa.Code § 81.201-81.304. Notably, that process allows for clemency applications by certain third parties, including "a legal guardian, next friend or other person authorized by law to act on behalf of the applicant," id. at § 81.282; thus, it is not apparent why competency would be a question. To our knowledge, no clemency process is underway. Given our finding of current incompetency for purposes of execution, the ripeness concerns, and the separation of powers concerns, we will not pass upon the question. Judge Augello’s findings on the question of clemency, therefore, stand as neither accepted nor rejected.

VI.

In sum, nothing implicated by the narrow questions currently before the Court operate to diminish the enormity of Banks’ crimes. There has never been a question of whether Banks committed these horrific murders; his defense at trial, rejected by a jury of his peers, rested on his asserted mental illness. The current substantive question before the Court involves implementation of a federal constitutional restriction upon actual execution of the insane. It appears that Banks is in a different place mentally than he was nearly thirty years ago when he committed his crimes and when he was tried. Perhaps that deterioration provides some solace to Banks, even though it provides no solace, nor closure, for the families of his victims.

For the reasons stated herein, this Court denies the Commonwealth’s exceptions and accepts Judge Augello’s determinations that George Banks is presently incompetent to be executed.

Plenary jurisdiction relinquished.

Messrs. Justice Saylor, Eakin and Baer, Madame Justice Todd, Mr. Justice McCaffery and Madame Justice Orie Melvin join the opinion.

Bottom of Form
Evaluation Committee:

Enclosed for your review are cites and

Werts to 220 Dissents and Concerning Opinions/

Dissenting Opinion published during my 19 1/2

years on the bench. The most "significant"

Dissent is at No. 104: Blum v. Merrill Dow.
DISSENTING OPINIONS (AND CO/DOs) AS OF 2/6/13

1. **Com. v. Brown, 52 A.3d 1139, Pa., August 21, 2012**

Chief Justice CASTILLE, concurring and dissenting. I concur in the result to the extent that the Majority Opinion rejects the claim that the trial court violated appellant's due process rights by admitting into evidence the out ...

...of trial witnesses David Garvin, Lionel Lawrence, and Allen Lanier, subject to the observations I develop in Part I. For the reasons I explain in Part II, however, I respectfully dissent from the Majority's award of a new trial, which is premised on a finding that Jasaan Walker's out-of-court declarations to the police exculpating appellant were erroneously excluded from...

2. **Com. v. Carela-Tolentino, 48 A.3d 1221, Pa., July 17, 2012**

Chief Justice CASTILLE, dissenting. The Court today summarily affirms, without opinion, the Superior Court's determination that the mandatory $25,000 fine imposed in this drug possession case was not unconstitutionally excessive. Because I believe that ...

...such a relationship exists, I would find that the one-size-fits-all mandatory approach represented by 18 Pa.C.S. § 7508 violates constitutional prohibitions against excessive fines. Hence, I respectfully dissent. Appellant pleaded guilty to possession with intent to deliver ("PWID") roughly 188 grams of cocaine. On September 11, 2008, the trial court sentenced appellant to four to ten years...

3. **Com. v. Wilgus, 40 A.3d 1201, Pa., March 26, 2012**

Chief Justice CASTILLE, dissenting. I respectfully dissent. Notably, the General Assembly has recently amended the statute at issue and addressed the obvious gap in its treatment of the registration requirement as applied to homeless offenders. The Majority's...

4. **Mohamed v. Com., Dept. of Transp., 40 A.3d 1186, Pa., March 26, 2012**

Chief Justice CASTILLE, dissenting. I respectfully dissent. I would affirm the decision of the Commonwealth Court to transfer this appeal of a routine administrative license suspension to the Dauphin County Court of Common Pleas. I am persuaded ...

...to avoid absurd incongruity with graduated sentencing scheme) (citing 1 Pa.C.S. § 1922(1) (2) accord Alekseev v. City Council, 607 Pa. 481, 8 A.3d 311, 315–18 (2010) (Castille, C.J., dissenting) (alternative construction of public comment provision is warranted to avoid unreasonable practical ramifications of stricter reading). "Most importantly, the General Assembly has made clear that the rules of construction are...

5. **Allegheny Co. Dep Sheriffs v. PA LRB, 41 A.3d 839, Pa., March 26, 2012**
Chief Justice CASTILLE, dissenting. I respectfully dissent. I would affirm the Commonwealth Court's holding that deputy sheriffs of second class counties are not "policemen" for purposes of collective bargaining under Act 111 of 1968, 43 P.S. §§ ...

...particular county officer may not be treated differently from the other similar officers throughout the commonwealth merely because that officer is within a certain class of county." Therefore, I respectfully dissent.


Chief Justice CASTILLE files a dissenting statement joined by Justices BAER and McCAFFERY. Chief Justice CASTILLE, dissenting. The Court dismisses this appeal as moot, noting the candidate's retirement from his elected position and his lack of interest in pursuing this litigation. I respectfully dissent. In my view, this case is appropriate for decision pursuant to the well-accepted exception to the mootness doctrine by which we decide matters capable of repetition that may escape...

...unique difficulties arising because of the expedited nature of decisions in election matters. See, e.g., In re Petition of Fitzpatrick, 573 Pa. 514, 827 A.2d 375, 378 (Pa.2003) (Castille, J., dissenting). The timeframes for decision are constrained, and we very rarely decide cases via published opinions. See In re Farnese, 609 Pa. 573, 17 A.3d 375, 382–83 (Pa.2011) (Castille, C.J., concurring). In the cases in which we issue opinions, it is not at all uncommon for one or the other of the parties to lose interest. Such is the...


Chief Justice CASTILLE, in support of reversal. I join Mr. Justice Saylor's Opinion in Support of Reversal, save for the first paragraph of the expression, which adverts to Justice Saylor's Dissenting Opinion in Freed v. Geisinger Med. Ctr. ...


8. PA Gaming Control Bd. v. OAG, 44 A.3d 1134 Pa., November 14, 2011

Chief Justice CASTILLE, dissenting. Because I do not believe that government agency officials should have to suffer incarceration as the price of securing judicial review of important and novel issues involving privilege under the circumstances presented here, I respectfully dissent from the Court's per curiam decision to deny the Petition for Review filed by the Pennsylvania Gaming Control Board ("Board"), which seeks review of the October 1, 2010 order arising...

Chief Justice CASTILLE, dissenting. Respectfully, I dissent. I view this as a close case, and Mr. Justice Saylor has accurately described the competing positions, and has expressed a cogent analysis. For my part, however, I would affirm...


Chief Justice CASTILLE, dissenting. I respectfully dissent, and I am in favor of dismissing this appeal as having been improvidently granted. I recognize that there are cases where error correction by this Court serves a salutary supervisory...


Chief Justice CASTILLE, dissenting. I join the dissenting opinion by Mr. Justice Saylor. I write separately to discuss an additional point of disagreement with the Opinion Announcing the Judgment of the Court ("OAJC"). I believe the OAJC has...


Chief Justice CASTILLE, dissenting. In my view, Sections 622(5)(a)(1), (4), and 629(2) of the City's January 2007 ordinance ("Ordinance"), which amended Chapter 9–600 of the Philadelphia Code, are not preempted by the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act ("Act"). Therefore, I respectfully dissent. The state Act is a penal statute that, in relevant part here, imposes criminal penalties on persons...


Chief Justice CASTILLE, dissenting. The Majority's plain language construction of the Sunshine Act, 65 Pa.C.S. §§ 701 716 (the "Act"), is reasonable. But I am less certain than the Majority that the construction outlined...


Chief Justice CASTILLE, dissenting. I respectfully dissent, as I disagree that “send a message” arguments by counsel are per se prejudicial only in the capital penalty phase context. The Majority notes that “this Court has stridently condemned...


Chief Justice CASTILLE, dissenting. I join the dissenting portion of Mr. Justice Saylor's Concurring and Dissenting Opinion, which ably articulates the deficiencies in the new rule summarily adopted by the Majority. I write separately to elaborate upon those points of disagreement and also to explain why...

Chief Justice CASTILLE, dissenting. I respectfully dissent. "It is a well and wisely established principle of public policy in Pennsylvania that a public official may not use his official power to further his own interests." Consumers Educ ...


Court Chief Justice CASTILLE, concurring and dissenting statement. I join in the Court's Order to the extent that it affirms the Commonwealth Court's dismissal with prejudice of the bulk of appellant's pleas for relief. I respectfully disagree...


Chief Justice CASTILLE, concurring and dissenting opinion FN1. For much of this concurring and dissenting opinion, I am indebted to former Chief Justice Ralph J. Cappy and former Justice James J. Fitzgerald, who each drafted a proposed concurring and dissenting opinion prior to departing from this Court. I join the Majority Opinion to the extent that it affirms the Superior Court's order affirming the judgment entered for appellee Philadelphia Phillies...


Justice CASTILLE, dissenting. In this case we are asked to determine when an individual false statement satisfies the materiality element of the perjury statute, 18 Pa.C.S. § 4902, such that multiple false statements ...

...view, the Majority Opinion both usurps the jury function and rewrites the perjury statute in such a way as to invite a volume discount for multiple crimes. Therefore, I respectfully dissent. The Majority, without explicitly acknowledging that it deems the statute to be ambiguous and therefore subject to construction, overlooks the plain language of the statute. There is no need to...


Justice CASTILLE, dissenting. I respectfully dissent. The issue accepted for review involves the application of Commonwealth v. Banks, 540 Pa. 453, 658 A.2d 752 (1995), a case I continue to believe was wrongly decided, as is ably explained in the reasoned dissent penned by my colleague Mr. Justice Eakin, which I join. As I noted in my Banks dissent, "[w]hile a single surreptitious 'commercial transaction' may not give rise to probable cause, and while flight alone does not give rise to probable cause, the totality of those circumstances surely ...

...does, especially when the flight following a transaction consistent with an illicit drug sale, is unprovoked by any actions of the police other than their 'mere presence.' Id. at 754 (Castille, J. dissenting) (citations omitted). For present purposes, however, I accept that Banks is a governing Fourth Amendment precedent of this Court. I respectfully dissent in this case because I believe that the courts below properly applied our precedent. Banks did not exhaust the variety of circumstances "at attend street drug sales. This case is...
21.  


Justice CASTILLE, Dissenting I join Mr. Justice Eakin's Dissenting Opinion. I write separately in
dissent because I respectfully take issue with certain of the plurality's broad pronouncements and
because my view on the appropriate response to situations like the one sub judice differs greatly
from...

22.  

Worth & Co. v. Department of Labor, 938 A.2d 239, December 27, 2007

Justice CASTILLE, dissenting. I respectfully dissent. The Majority affirms the decision of the
Commonwealth Court reversing the Order of the Prevailing Wage Appeal Board. For the reasons
expressed in the dissenting opinion of the Honorable Dante R. Pellegrini below, I would reverse the
opinion of the Commonwealth Court and remand this matter to the Board for further consideration
consistent with Judge Pellegrini's dissenting opinion.

23.  

Com. v. States, 938 A.2d 1016, December 27, 2007

Justice CASTILLE, dissenting. The essence of the Majority's decision in this case is that inconsistent
verdicts implicate federal constitutional double jeopardy in a situation where a defendant is acquitted
by a judicial factfinder ...

...of what will come to be known as the defendant's " Commonwealth v. States right," i.e., the right to
double jeopardy relief where no double jeopardy value is implicated. I respectfully dissent.

24.  

Westmoreland Intermediate Unit # 7 v. Westmoreland Classroom Assts, 939 A.2d 855,
December 27, 2007

Justice CASTILLE, dissenting. I agree with the plurality opinion with respect to its affirmation of the
essence test recognized in Community College of Beaver County v. Community College of Beaver
County, Society of ...

...be upheld if the arbitrator's interpretation can be rationally derived from the collective bargaining
agreement and the decision is not manifestly unreasonable. Cheyney University, 743 A.2d at 417-18
(Castille, J., concurring and dissenting). Thus, if the Court is intent on reconsidering our approach, I
believe that application of the essence test should include an examination of whether the decision of
the arbitrator was ...

...become a " superarbitrator," which the Cheyney University majority was fearful of, see Cheyney
University, 743 A.2d at 413, than the manifestly unreasonable standard I proposed in my concurring
and dissenting posture in that case. In my judgment, review for manifest unreasonableness strikes
the better balance between deference and meaningful judicial review. As the award in the matter sub
judice (1 ...
...and (2) is not manifestly unreasonable, I would not remand to the Court of Common Pleas for further proceedings. Instead, I would reverse and reinstate the arbitrator's decision.


Justice CASTILLE, dissenting. I respectfully dissent. I concur in the Majority's Opinion on Reargument to the extent that, going forward, it minimizes the damage caused by Sackett v. Nationwide Mut. Ins. Co., 591 Pa. 416, 919...

...approves of the Insurance Commissioner's construction of Section 1738(c) of the Motor Vehicle Financial Responsibility Law ("MVFRL"), 75 Pa.C.S. § 1738 (c). That construction essentially adopts my position in Dissent in Sackett I, and holds that the addition of a new vehicle to an existing multi-vehicle policy does not constitute a new "purchase" of uninsured/underinsured motorist (UM/UIM...

...to an existing multi-vehicle policy. I would retain that primary focus. On the merits, I would recall Sackett I and establish the plain meaning approach set forth in my Dissenting Opinion in that case as the proper answer to this question of statutory construction. See Sackett I, 919 A.2d at 204–05 (Castille, joined by Eakin, J., dissenting). Today's Court Majority does not engage the issue as posed in Sackett I. Proceeding from its narrower focus, the Majority does its best to make lemonade out of the lemon...


Justice CASTILLE, dissenting. Over the dissent of Mr. Justice Saylor, which I joined, this Court entered a per curiam order on April 13, 2007, which granted extraordinary, preliminary injunctive relief to the Pennsylvania Gaming Control Board...


Justice CASTILLE, dissenting. I join the concerns articulated by Mr. Justice Saylor in his Concurring Opinion, and particularly his concern regarding the "prudent man standard" and economic issues affecting Majestic Star. However, unlike Justice Saylor, I believe those concerns warrant a remand to the Board for reconsideration. For the reasons I have set forth in my Dissenting Opinion in Riverwalk Casino, LP v. Pennsylvania Gaming Control Board, J–42–2007, the failure of the Board to conduct any of its deliberations in public, or to allow for...


Justice CASTILLE, dissenting. Because I would remand the matter sub judice to the Pennsylvania Gaming Control Board ("Board"), I respectfully dissent. In July of 2004, the General Assembly adopted, and the Governor signed into law, the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101 1906 ("Gaming Act" or...


6
Justice CASTILLE, dissenting. FN1. For much of this dissent, I am indebted to former Supreme Court Justice Sandra Schultz Newman, who had drafted a proposed dissent prior to her departure from this Court. As framed by the Majority Opinion, the substantive issue before the Court today is whether, under the Medical Care Availability and Reduction of...


Justice CASTILLE, dissenting. Today, the Majority upholds as constitutional a DUI statute that is materially identical to the DUI statute that this Court unanimously invalidated in Commonwealth v. Barud, 545 Pa. 297, 681 A.2d 162 (1996) Because, in my view, our decision in Barud controls this case, I respectfully dissent. In Barud, this Court examined the constitutionality of former Section 3731(a)(5) of the Motor Vehicle Code, which provided as follows: § 3731 Driving under influence of alcohol or...


Justice CASTILLE, dissenting. The Majority Opinion addresses the question of whether adding a new vehicle to an existing automobile insurance policy, where the insured had previously rejected “stacking” the uninsured/underinsured (“UM/UIM ...

...between premiums paid by the insured and the coverage a claimant should reasonably expect to receive" [Prudential Prop. and Cas. Ins. Co. v.] Colbert, [813 A.2d 747, 760 (2002) ] (Castille, J., dissenting) ( "The overriding concern powering the decisions in Burstein; Eichelman and the other earlier cases is to ensure that both the insurer and insured receive the benefit of what is statutorily...


Justice CASTILLE, dissenting. Because appellant Paul Dowhower ("Claimant") was not prejudiced by the timing of appellee Capco Contracting's ("Employer") request that he submit to an Impairment Rating Evaluation ("IRE"), I respectfully dissent. I joined this Court's holding construing Section 306(a.2)(1) of the Workers' Compensation Act, 77 P.S. § 511.2 (1), in Gardner v. Workers' Compensation Board (Genesis Health...


Justice CASTILLE. Because I find the Petitioner has not previously raised the issue on which relief is being granted, I dissent.

34. Com. v. Dickson, 918 A.2d 95, March 29, 2007

Justice CASTILLE, dissenting. I join the Dissenting Opinion by Mr. Justice Eakin, as I agree that the issue upon which the Majority grants relief obviously was waived. I dissent separately to address the merits of the issue the Majority reaches out to decide.

respectfully disagree with [any] suggestion that a repeated objection risks 'alienating' the trial judge. It should not alienate a trial judge that a lawyer ...

...the years since, precedent which the Superior Court has consistently applied, and precedent when the General Assembly did not seek to undo by modifying the statute in question. I respectfully dissent. I recognize that this Court, in recent years, has undertaken to modify traditional notions of vicarious liability, thereby narrowing the exposure a criminal defendant faces when charged as an accomplice or conspirator. See generally Commonwealth v. Hannibal, 562 Pa. 132, 753 A.2d 1265, 1273-76 (2000) (Castille, J., concurring). When the Superior Court first encountered the statute at issue here in 1986, however, I believe that the decision rendered was fully in accord with then-settled notions ...

...responding to what it believes is a judicial misinterpretation of a statute by an intermediate appellate court. See, e.g. Commonwealth v. Eddings, 565 Pa. 256, 772 A.2d 956 (2001) Castille, J., joined by Newman, J.; dissenting from per curiam affirmance) (noting that General Assembly had already responded to and addressed and corrected the Superior Court decision at issue, which involved a statutory construction question of first ...


Justice CASTILLE concurring and dissenting. I join Mr. Justice Eakin's Concurring and Dissenting Opinion. I write separately to address two discrete points concerning the remand, points which are unnecessary to Justice Eakin's dissent, which focuses upon the performance of trial counsel. First, on the question of appellate counsel's ineffectiveness, which is the subject of the Majority's remand, I reiterate the position outlined in my concurring opinion in Commonwealth v. Freeman May, 587 A.2d 184, 898 A.2d 559, 578 (Castille, J., concurring, joined by Cappy, C.J., and Eakin, J.) that counsel need not raise any and all potentially viable claims at risk of being deemed ineffective. Rather, "[c]ounsel may forego ...

...must also encompass examination of the brief that counsel filed. On remand, the PCRA court must consider that brief in determining the question of previous litigation.


Justice CASTILLE, dissenting. I respectfully dissent from the Majority Opinion's holding that the Fourth Amendment was violated when Liquor Control Enforcement (LCE) officers, who lawfully gained admission to a college fraternity party after purchasing tickets to ...

37. Com. v. Ostosky, 909 A.2d 1224, November 22, 2006
Justice CASTILLE, dissenting. In affirming the divided Superior Court panel decision below, the Majority Opinion reads the retaliation statute as if it were intended to embody a sort of "one-free-dog...

...victims or witnesses in a prior action. As a matter of basic, plain language, statutory construction, I do not believe the statute provides such a free pass. Hence, I respectfully dissent. The retaliation statute provides as follows: (a) Offense defined. —A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or...

38. **In re 24th Statewide Investigating Grand Jury**, 907 A.2d 505, October 06, 2006

Justice CASTILLE concurring and dissenting. I join parts I and II of the Majority Opinion, with the exception of the dicta comprising the sentence that includes footnote 4 concerning the alleged potential for grand jury...


Justice CASTILLE, concurring and dissenting. I join the Majority Opinion in its analysis of appellant's guilt phase claims, but I write separately to address one point: the merits of the question of whether the trial...

...hearsay proscription, the murder victim's statements to her mother concerning her relationship with appellant as well as the mother's reading of excerpted portions of her daughter's diary. Furthermore, I respectfully dissent from the Majority's resolution of appellant's sentencing phase claim concerning his proffered mitigating circumstance. I recognize that the Majority follows governing case law in holding that the Commonwealth may rebut...

...at trial, that particular defense eviscerated the relevancy of a murder victim's statements to a Commonwealth witness concerning her relationship with the defendant. Laich, 777 A.2d at 1062. In dissent, I responded that, "I do not see how evidence otherwise relevant to the Commonwealth's affirmative burden [of proof] suddenly loses its relevance merely because the accused forwards one defense or another." Id. at 1065 (Castille, J., dissenting). I continue to have difficulty understanding how a defense advanced by the accused somehow alters the relevancy of Commonwealth evidence introduced to sustain the Commonwealth's affirmative burden of proof. Thus...

...an "unavailable" witness made, the forfeiture by wrongdoing exception should allow those statements to be admitted for the truth of the matter asserted. Hutchinson, 811 A.2d at 563–65 (Castille, J., joined by Newman, J., concurring); Laich, 777 A.2d at 1067–69 (Castille, J., dissenting). In my view, it is the height of folly to allow a defendant to profit from his illegal conduct, which directly caused the unavailability of the witness, by sustaining an...

...witness. Although the facts here do not involve that factual paradigm, the plain language of the exception, and the reason for it, see Laich, 777 A.2d at 1067–69 (Castille, J., dissenting), are no less
implicated in an instance such as the one sub judice. Here, there was ample evidence presented at trial, independent of Mrs. King’s summary of her daughter’s statements...

40. **Com. v. Gorby**, 909 A.2d 775, June 20, 2006

Justice CASTILLE dissenting I respectfully dissent. The Majority reverses the determination of the PCRA court and awards appellant penalty phase relief from a sentence of death, finding that counsel on appellant’s direct appeal was ineffective...

...when this Court remanded the matter to permit appellant an additional opportunity to develop his underlying claim concerning trial counsel’s alleged failure to investigate appellant’s “mental history and capacity,” I dissented. See Commonwealth v. Gorby, 567 Pa. 370, 787 A.2d 367, 372-76 (2001) (Castille, J., concurring and dissenting). I noted that the claim of trial counsel ineffectiveness was waived under the PCRA because appellant had failed to raise it on direct appeal. Second, and directly applicable to the...

...which was never revealed to counsel by appellant or his family members. Because I cannot agree with the Court’s unexplained and apparently arbitrary grant of a remand here, I respectfully dissent. Id. at 380, 787 A.2d 367. I went on to note that the Court never explained what deficiency, if any, there was in the PCRA court’s existing analysis. Id...

...seemed to be settled authority from this Court concerning the obligations of capital counsel at trial. See Commonwealth v. Collins, 585 Pa. 45, 888 A.2d 564, 586-92 (2005) (Castille, J., joined by E(), J., concurring and dissenting) (collecting cases);...

...for failing to raise this sort of ineffectiveness claim, one must consult the then-existing legal landscape. See Commonwealth v. Hughes, 581 Pa. 274, 865 A.2d 761, 818 (2004) (Castille, J., joined by Eakin, J., concurring and dissenting) (“The requirement that counsel’s conduct be viewed in light of contemporaneously-governing law is central to any rational assessment of a claim of ineffectiveness.” The fact that later decisions of...


Justice CASTILLE, dissenting. The Majority holds that the order below, which involuntarily drafted the Venango County Public Defender to serve as free standby counsel for a non-indigent criminal defendant who elected to...

...to “[t]he [two] criteria for granting a writ of prohibition,” which this Court established in Capital Cities. See Capital Cities, 483 A.2d at 1342-43 (emphasis added).

42. **Com. v. Collins**, 888 A.2d 564, December 27, 2005

Justice CASTILLE, Concurring and Dissenting Although I join the Majority Opinion in the denial of collateral guilt phase relief, I respectfully dissent from its affirmation of the grant of penalty p. se
relief. I. Guilt Phase With respect to the guilt phase collateral claims, Majority op. at 51–71, 888 A.2d 567...

43. Com. v. Pressley, 887 A.2d 220, November 29, 2005

Justice CASTILLE, concurring. I concur in the result. In my view, there is a middle ground between the Majority Opinion and the Concurring and Dissenting Opinion, and that middle ground is consistent...

[Saylor [BACKGROUND]]: I agree fully with the concurring opinion of Mr. Justice Castille that a post-charge objection would be required where the objection posed by counsel is based upon the content of a given charge which was not covered in the pre-charge on the record rulings or which was at variance with such rulings. The import of this opinion and, I believe, Justice Castille’s, is to emphasize that rulings specifically requested and made pre-charge should not have to be reiterated post-charge. Accordingly, I dissent from the majority’s decision to change prospectively the current practice of permitting appellate review of issues regarding the trial court’s rulings on a litigant’s proposed points for charge in a criminal case where, as here, a second objection is not made following the charge.


Justice CASTILLE, concurring in part and dissenting in part. I join the Majority Opinion’s learned explication of the governing law in this area, but because I do not believe that appellant is entitled to a remand for another evidentiary hearing on the basis of the profer forwarded here, I respectfully dissent from its application of that law. The Majority does not reach the merits of any of appellant’s eleven boilerplate claims of “layered” ineffective assistance of counsel because it concludes that...


Justice CASTILLE, dissenting. For the reasons set forth in my Concurring and Dissenting Opinion in Commonwealth v. Washington, 583 Pa. 566, 880 A.2d 536 (2005) ; 352 Capital Appeal Docket, I respectfully dissent from the Court’s mandate to remand this matter to the PCRA court for an evidentiary hearing....


Justice CASTILLE concurring and dissenting. Like Mr. Justice Eakin, I am in accord with the Majority’s approach and decision with the exception of what the majority characterizes as appellant’s claim that the Commonwealth exercised its...

47. In re Rankin, 874 A.2d 1145, May 12, 2005

CASTILLE dissents. Dissenting Statement to follow. Justice CASTILLE (dissenting). I write to explain my notation of dissent to this Court’s May 12, 2005 order declining to review this election matter. This Court’s decision to deny allocatur leaves a significant election issue unaddressed by the Pennsylvania appellate courts...
[48. Deleted; turned up in DO search, but was a CO]

49. In re Bucks Co Investigating Grand Jury, 869 A.2d 482, February 24, 2005


50. Saw Creek v. County of Pike, 866 A.2d 260, January 19, 2005

Justice CASTILLE, dissenting. In my view, the trial court was correct in ruling that the restaurant and real estate office operated on property owned by appellee Saw Creek Community Association, Inc. ("Saw Creek" or "Association"), but leased to private, for-profit entities, do not qualify as common facilities such as to exempt them from taxation. Therefore, I respectfully dissent. ...

...tax exempt. Accordingly, I would reverse the decision of the Commonwealth Court holding that the property is exempt from taxation and reinstate the trial court's determination. Justice NEWMAN joins this dissenting opinion.

51. In re Bucks County Investigating Grand Jury, 867 A.2d 1262, January 18, 2005

Justice CASTILLE, dissenting. I would grant the application of the District Attorney of Bucks County in this matter. As I stated in my Dissenting Statement filed November 12, 2004 to the Court's per curiam Order granting the Emergency Application for Reconsideration filed by Voicenet Communications, Inc., et al. (collectively, "Voicenet"), there were no compelling ...

...inevitably enmesh this Court in unnecessary and ill-advised micromanagement of this grand jury proceeding. See In Re Bucks County Investigating Grand Jury, 862 A.2d 581, 582 (Pa.2004) (Castille, J., dissenting). Such prediction has now come to pass. In response to the remand Order, an emboldened Voicenet has now filed a petition seeking pre-hearing discovery before the supervising judge of...

52. Com. v. Hughes, 865 A.2d 761, December 21, 2004 (NO. 313 CAP)

Justice CASTILLE, concurring and dissenting. I agree that appellant is not entitled to Post Conviction Relief Act ("PCRA") 1 relief on his pre-trial or guilt phase claims, albeit I do not agree with the ...

...judge trial counsel's performance through hindsight" Commonwealth v. Bond, 572 Pa. 588, 591, 819 A.2d 33, 51 (2002). "Deeming counsel to be ineffective for failing to forward an objection based on a principle of law that was not then-governing is the very essence of the sort of perverse second-
guessing which is not permitted under Strickland and its progeny." Duffey, 855 A.2d at 779 (Castille, J., concurring and dissenting). Another way of stating this bedrock principle is that collateral attack is simply not the place for courts to innovate new holdings concerning trial issues, since counsel cannot be faulted...

53. Bochette v. Gibson, 860 A.2d 67, October 20, 2004

Justice CASTILLE, dissenting. I believe that the trial judge, the Honorable Albert W. Sheppard, Jr., in his thoughtful and comprehensive opinion, decided this case correctly and thus, like the Superior Court panel majority...

...copy of his filed complaint to a legal media outlet is covered by the judicial privilege and is not actionable in defamation. Because the Majority Opinion concludes otherwise, I respectfully dissent. The October 20, 1999 article published in the Legal Intelligencer, which formed the basis for appellants' defamation complaint, contains factual background information concerning the litigation in which appellant George Bochette...


APPLICATION FOR REARGUMENT Reargument denied. Justice CASTILLE, dissenting. I respectfully dissent from the Court's denial of reargument. In affirming the grant of relief from this twenty-three year-old first-degree murder conviction, the Court Majority sua sponte reached out to...

55. Hilkmann v. Hilkmann, 858 A.2d 58, September 21, 2004

...seeking recognition of a foreign guardianship judgment in Pennsylvania has an arduous task in proving that his or her foreign decree should be recognized by utilizing principles of comity.

Justice CASTILLE, dissenting. I respectfully dissent. I begin by noting my agreement with much of the Majority Opinion—indeed, the entirety of the Opinion up until the point where the Majority speaks of "the procedural requirements..."

56. Com. v. D'Amato, 856 A.2d 806, September 02, 2004 (NO. 332 CAP)

Justice CASTILLE, concurring and dissenting. I join the Majority Opinion, except with respect to its resolution of appellant's after-discovered evidence claim involving William Boyle's alleged "recantation." Because I believe that this claim is resolvable now, and fails, I respectfully dissent from that portion of the opinion which orders a remand for review of Boyle's new statement...


Justice CASTILLE, Dissenting I agree with the Superior Court that the character of the neighborhood surrounding appellees' tracts has been altered to the extent that the restrictive covenant has been rendered a nullity and would, therefore, affirm its judgment. Accordingly, I respectfully dissent. As the
Majority notes, it has long been the law in Pennsylvania that a restrictive covenant can be discharged where the original purpose of the covenant is materially altered or...

58. **Merrell v. Chartiers Valley School Dist.,** 855 A.2d 713, August 18, 2004

Justice CASTILLE, dissenting. Although I might agree with the lead opinion's substantive resolution of this issue, I am not satisfied that appellee presented a timely challenge below. I conclude that appellee's challenge was not timely and, therefore, I respectfully dissent. Appellant School District argues in its brief, and the Commonwealth Court held, that the Local Agency Law, 42 Pa.C.S. § 5571, provides the time frame for challenging a decision like...

59. **Com. v. Duffey,** 855 A.2d 764, August 18, 2004 (NO. 324 CAP)

Justice CASTILLE, concurring and dissenting. Although I concur in the Majority Opinion's resolution of appellant's collateral claims concerning the guilt phase of trial, I respectfully dissent from its decision to remand for an evidentiary hearing on appellant's layered claim of ineffective assistance of counsel arising from the prosecution's reference, during the penalty phase, to appellant's selective...

60. **Com. v. Flanagan,** 854 A.2d 489, July 23, 2004

Justice CASTILLE, dissenting. This Court granted discretionary review to consider the award of Post Conviction Hearing Act (PCHA) relief to appellee Dennis Flanagan. The PCHA court in this matter overturned appellee's first...


Justice CASTILLE, dissenting. Because I believe that the plain and unambiguous language of Section 440(a) of the Workers' Compensation Act (the "Act") mandates a finding contrary to that of the Majority in this case, I respectfully dissent. Section 440(a) provides that in a contested case where the workers' compensation claimant ultimately prevails in whole or in part; and the employer lacked a "reasonable basis" for the...

62. **Com. v. Cruz,** 851 A.2d 870, June 22, 2004

Justice CASTILLE, dissenting. I respectfully dissent. After outlining the important, difficult, and potentially far-reaching due process/equal protection claim arising from this Court's management of its discretionary review docket which is squarely presented in this...

63. **In re Nom. Petitions of Fumo,** 846 A.2d 672., April 07, 2004

Justice CASTILLE concurring and dissenting. I join in the mandate of affirmance in the appeal of the nomination petition challenge, which is docketed at Nos. 17 and 18 EAP 2004. This is so because I agree with the Commonwealth Court's ultimate conclusion on the merits in that matter-i.e., that the defects in the subject candidate affidavits are amendable. I respectfully dissent, however, from...
Court's dismissal of the antecedent appeal in the mandamus action, which is docketed at No. 11 EAP 2004, on grounds of "mootness." I do not believe that...

64. In re Nom. Petition of Benninghoff, 850 A.2d 609, April 01, 2004 [THIS BECAME LAW SHORTLY THEREAFTER]

Justice CASTILLE, dissenting. I dissent. This Court is the ultimate arbiter of the Election Code, 25 P.S. § 2600 et seq., and the Public Official and Employee Ethics Act, 85 Pa.C.S.A. § 1101 et seq...

65. Shambach v. Bickhart, 845 A.2d 793, March 26, 2004

Justice CASTILLE, Dissenting I respectfully dissent. This appeal proves that easy cases, no less than the great cases and hard cases that were the subject of Justice Holmes' famous dictum, can make bad law. Northern Securities Co. v. U.S. 193 U.S. 197, 400-403, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904) (Holmes, J. dissenting). This case should be easy. The statute at issue here clearly and unambiguously states that the voter can write in only "the name of any person not already printed on...


Justice CASTILLE, dissenting. The PCRA judge in this case, who also presided over appellee's capital murder trial, specifically found that appellee's motion for recusal was meritless, i.e., that appellee had failed to prove...


Justice CASTILLE, concurring and dissenting. I join the Lead Opinion insofar as it concludes that appellee had standing to pursue the declaratory judgment action. On the merits, however, I find myself in partial dissent, as I would affirm the order below outright on grounds of preemption. After careful consideration of the matter, including the briefs of the various amici, it is my view that...


Justice CASTILLE, dissenting. I respectfully dissent. Because the grounds for my disagreement with the Majority have been aptly stated in the learned concurring and dissenting opinion by President Judge Joseph A. Del Sole of the Superior Court below, I adopt that opinion as the basis for my view: I read the provision in question to...


Justice CASTILLE, dissenting. I disagree with the Majority's conclusion that each of the five surviving members of decedent Thomas Campbell's immediate family is a separate claimant for purposes of determining the obligation and ...
...their derivative claims may fairly be said to arise out of and fall within the scope of coverage provided by the defunct insurer, American Eagle Insurance Company. Therefore, I respectfully dissent. The PPCIGA Act provides that the Association is obligated to pay covered claims arising out of insolvency of insurers authorized to write property and casualty insurance policies in Pennsylvania...


JUSTICE CASTILLE, CONCURRING AND DISSENTING. I concur in the Majority's ultimate judgment, which renders for a determination on the merits, with the case to be treated as a timely first petition under the Post Conviction...

71. **In re Lord's New Church**, 826 A.2d 863, June 19, 2003

JUSTICE CASTILLE DISSENTING. I dissent. I would uphold the well-reasoned decision of the Common-wealth Court. I believe that the five-day notice requirement for meetings under the Non Profit Corporation Law, 15 Pa.C.S. §...

72. **Bor. of Ellwood City v. Ellwood Police Dept. Wage & Policy Unit**, 825 A.2d 617, June 02, 2003

Justice CASTILLE, concurring and dissenting. I agree with the Majority Opinion that Act 205 precludes this Court from affirming the arbitration award because, in the realm in which the Act applies, the Act clearly controls over any contrary provision in a collective bargaining agreement (CBA). I respectfully dissent, however, from the Court's mandate, which simply affirms the Commonwealth Court's reversal of the trial court and vacatur of the arbitration award. In my view, there is a middle ground...


CASTILLE, Justice, dissenting. I write to explain my notation of dissent to the Court's May 19, 2003 order declining to review the propriety of the stays entered by the trial court and the Commonwealth Court below. This primary election dispute derives ...

...appropriate case in which to exercise our inherent powers, grant review of the stay order, and dissolve it. See **In re Petition of Fitzpatrick**, 827 A.2d 374 (Pa.2003) (Castille, J., dissenting), 2003 WL 21147220 (filed May 16, 2003) As my dissent reflects, I interpreted the Majority's per curiam order on May 16 th as merely declining to get involved in order to allow the front-line appeals court to handle both...


JUSTICE CASTILLE DISSENTING. I dissent. I believe that the Majority is correct in that this matter, and similar election matters, should proceed in an orderly manner through the appellate pro- cess, and the Commonwealth Court is...

Justice CASTILLE, concurring and dissenting. I agree with the lead opinion that the Commonwealth Court correctly found that the Philadelphia Eagles Football Club's media receipts resulting from the television broadcast of football games were subject...

76. Com. v. Grant, 813 A.2d 726, December 31, 2002

Justice CASTILLE, concurring and dissenting. Although I join in the majority opinion's abrogation of the procedural rule first announced by this Court in Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977), I respectfully dissent from (1) the majority's formulation of the new rule which would replace Hubbard; and (2) the majority's directive that its new rule applies retroactively to this case and to all...

...that first opportunity is on direct appeal and the claim of ineffectiveness was not raised in the trial court. See Commonwealth v. Ford, 809 A.2d 325, 340 (Pa. 2002) (Castille, J., dissenting) (describing operation and effect of Hubbard rule). This Court's recent experience has more than amply demonstrated the inherent difficulties with this rule, difficulties which are aptly expressed by the majority...


Justice CASTILLE, Dissenting. I would find merit in appellant Board's argument that the first element of the interpretive test for statutory employer set forth in McDonald v. Levinson Steel Co., 302 Pa...

...suit. I believe such a holding is commanded by the Act and is consistent with the McDonald test. Hence, I respectfully dissent.


Justice CASTILLE, concurring and dissenting. I join in those parts of the lead opinion analyzing (1) appellant's argument that he was denied an opportunity to develop his claims below; and (2) those of appellant's claims which were previously litigated under the PCRA. I also join in the ultimate mandate affirming the denial of PCRA relief. However, I respectfully dissent from the lead's employing relaxed waiver on this PCRA appeal to reach numerous waived claims. Appellant raises a number of issues as claims of trial court error. Since those claims...

...is contrary to our decision in Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998) See Commonwealth v. Marshall, 810 A.2d 1211, 2002 WL 31630168 (Pa. 2002) (Castille, J., concurring and dissenting). I would reject appellant's claims of counsel ineffectiveness because they are boilerplate and because, as the lead opinion notes, the underlying assertions lack even arguable merit.

Justice CASTILLE, dissenting. The majority opinion correctly outlines the analysis a court must generally perform under the Parental Kidnapping Protection Act (PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA) in determining jurisdiction...

...the majority's finding that the undisputed facts of this case dictate a conclusion that jurisdiction here rests in North Carolina. In my view, Pennsylvania has continuing jurisdiction; accordingly, I respectfully dissent. As the majority aptly notes, jurisdiction in this case hinges on which state has jurisdiction pursuant to the UCCJA. The UCCJA would confer jurisdiction where, inter alia, Pennsylvania is the...


Justice CASTILLE, dissenting. I join the Dissenting Opinion of Mr. Justice Eakin, but write separately to address some additional points. Like Justice Eakin, I have no quarrel with the lead opinion's comprehensive description of the workings of...


Justice CASTILLE, dissenting. The Court today holds that the directly and exclusively self-inculpatory statements made by appellant's unavailable co-conspirator, Barry Auman, which did not shift the blame to appellant (indeed, on their face, the statements did not implicate appellant at all) were so unreliable that they must be deemed inadmissible as declarations against Auman's penal interest. I respectfully dissent. Query if the Court would hold that these confessions were unreliable if it was appellant who sought to introduce them? If the roles were reversed and appellant was alleged to...


Justice CASTILLE, dissenting. The Court today grants the petition of the Federal Court Division of the Defender Association of Philadelphia ("Federal Defender") for rearraignment of this Court's unanimous order dis-missing, on grounds that...

...waive post-conviction proceedings. The Court also acknowledges the "respectable" view of the Commonwealth—in fact, it is an indisputably correct view, see Saranchak, 767 A.2d at 543-45 (Castille, J., dissenting)—that Saranchak's change of mind following this Court's affirmance of his record waiver is not an appropriate basis for rearraignment of the Federal Defender's dismissed appeal. Nevertheless, the majority opinion...

...the Federal Defender's appeal to reinstate Saranchak's PCRA rights, there is, of course, no authority for this judicial sleight of hand. As I discussed at some length in my prior dissenting statement, Lonchar—the authority cited by the Federal Defender—involved a valid, first federal habeas petition filed at the eleventh hour by a death-sentenced state prisoner. Nothing in Lonchar...

...that a defendant's change of mind and current desire to litigate automatically controls and renders nugatory a previously accepted and affirmed waiver. See Saranchak, 767 A.2d at 545-46 (Castille, J., dissenting). The Federal Defender's reliance on this Court's plurality decision in the capital case of

...of a valid waiver for the Court to review, and Michael's last record expression was to pursue his appeal. See Michael, 562 Pa. 356, 755 A.2d 1274, 1283-84 (Castille, J., concurring).


Justice CASTILLE, concurring and dissenting. I agree with the lead opinion that: (1) this PCRA petition must be deemed to be appellant's first PCRA petition (a point the Commonwealth does not dispute); (2) those of ...

...appellant had been represented by new counsel on direct appeal and, thus, had a previous opportunity to raise the claim. Gorbey. See id., 787 A.2d at 373-74 (Castille, J., concurring). Most recently, the Court's struggles with Albrecht led it to refuse to review a waived claim—a position consistent with Albrecht but squarely inconsistent with today's lead opinion—but ...

...of the relaxed waiver doctrine, and given the fact that this Court cannot simply ignore that the PCRA deems waived claims unreviewable. See Bracey, 795 A.2d at 951-57 (Castille, J., concurring); accord Ford, 809 A.2d at 345 & n. 8 (Castille, J., dissenting). I continue to believe that we should enforce—indeed, we should deem ourselves required to enforce—the PCRA waiver provision. But if the Court is set on another course in ...

...his supplemental brief, appellant forwards only boilerplate assertions of appellate counsel ineffectiveness. As I have noted at length in other cases, see, e.g., Ford, 809 A.2d at 344-45 (Castille, J., dissenting), ... since the test for counsel ineffectiveness is not a per se one, such a boilerplate argument fails to prove an entitlement to relief under the test for ineffectiveness...

84. Com. v. Ford, 809 A.2d 325, October 25, 2002 (NO. 248 CAP)

Justice CASTILLE, dissenting. The Court today stunningly grants state collateral relief from two death sentences based upon a Sixth Amendment claim of ineffective assistance of direct appeal counsel while completely ignoring the governing ...

...follow the governing constitutional authority in deciding the Sixth Amendment claim of appellate counsel ineffectiveness presented here, irrespective of my view concerning the underlying claim involving trial counsel, I respectfully dissent from today's grant of relief. DISSENTING OPINION Justice EAKeIN I agree with the analysis of Justice Castille, but write separately in order to summarize my position on the issue of "layered ineffectiveness" claims, hopefully without contributing more splinters to the fractured positions of this Court. Failure to...

85. Com. v. Overby, 809 A.2d 295, October 24, 2002
Justice CASTILLE, dissenting. The Court's grant of a new trial today under authority of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), results from a misapprehension...

86. Com. v. Moore, 805 A.2d 1212, August 28, 2002

Justice CASTILLE, concurring and dissenting opinion I join Mr. Justice Nigro's lead opinion only to the extent that it determines that the Superior Court properly concluded that appellant waived his claim of trial counsel ineffectiveness...

...of law for failing to pursue this claim. I cannot accept this approach. For the foregoing reasons, while I agree with the resolution of the first issue presented, I respectfully dissent from both the decision to review the second claim and from the grant of a new trial.

87. Seven Springs Farm. v. Croker, 801 A.2d 1212, July 16, 2002

Justice CASTILLE, dissenting. I must respectfully dissent. The majority reasons that the cash-for-stock merger proposed by appellees is a corporate act, not a shareholder act, and therefore the transaction falls outside the ambit of the...


Justice CASTILLE, dissenting. I respectfully dissent. I would make respondent's suspension congruent with the suspension that respondent received in the State of New Jersey, thereby avoid a situation where respondent may be reinstated to the practice...

89. In re R.H., 791 A.2d 331, February 21, 2002

CAPPY, Justice, dissenting [FOR BACKGROUND]. I must respectfully dissent. I agree with Mr. Justice Castille that the school police officer was not a law enforcement officer for purposes of the Fifth Amendment. I write separately, however, because the Opinion Announcing the Judgment of the Court...

...the school police were not either law enforcement officers or acting at the behest of law enforcement officers, the inquiry ends at that point. As acknowledged by the lead and dissenting opinions, Miranda warnings are only necessary where the suspect is in custody and the questioning is by law enforcement officers. Miranda, 384 U.S. at 436, 86 S.Ct. 1602; see also Majority slip opinion at 3–4; Dissenting slip opinion at 3. Thus, since a custodial interrogation was conceded in this case, the sole issue before us is whether the school police officers were law enforcement officers for purposes of the Fifth Amendment Miranda requirement. FN1. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) I agree with Mr. Justice Castille's conclusion that there is no distinction between school police officers and other school staff for Miranda purposes. There is simply no support for the proposition that school administrators must adhere...
enforcement officer triggering the protections of Miranda in this case. See, e.g., Snyder, 597 N.E.2d at 1369; Biancamano, 284 N.J.Super. at 663, 666 A.2d at 203. Accordingly, I dissent. CASTILLE, Justice, dissenting. Public schools bring very large numbers of students together in close proximity with one another. When children are brought together in such a unique environment, their inexperience and lack of...

90. Humphreys v. DeRoss, 790 A.2d 281, February 20, 2002

CASTILLE, Justice, dissenting. At issue in this discretionary appeal is whether a cash distribution of $83,696.50, issued to appellant/father as the sole beneficiary of his mother's estate, qualifies as "income" for...

91. Siskos v. Britz, 790 A.2d 1000, February 20, 2002

CASTILLE, Justice, dissenting. In this action to quiet title, appellant sought alternative relief, i.e., either (1) issuance of an order compelling appellees to file an action in ejectment under Rule of Civil Procedure...


CASTILLE, Justice, concurring and dissenting. I join the Majority Opinion in every respect except for the majority's discussion of whether Detective McDermott breached Miranda 1 when he informed appellant of the evidence against him without...


CASTILLE, Justice, concurring and dissenting. To the extent the Court denies PCRA relief, I concur in the result. I respectfully dissent, however, from the order remanding the case to the PCRA court. The Court inexplicably remands this matter, which has already been the subject of a PCRA hearing at which appellant's...


CASTILLE, Justice, concurring and dissenting. I agree with the majority that the question of jurisdiction to entertain this matter is controlled by Commonwealth v. Rosario, 538 Pa. 400, 648 A.2d 1172 (1994) 1 The...

95. Bodack v. Law Enforcement Alliance, 790 A.2d 277, November 05, 2001

CASTILLE, Justice, dissenting. I respectfully dissent from the Court's per curiam decision refusing even to review the instant matter. This case involves an unprecedented prior restraint upon petitioner's free speech rights under both the Federal and ...

...I would set the matter for full briefing on the state and federal constitutional issues presented. I would not simply ignore the obvious importance of this case. Hence, I respectfully dissent.
CASTILLE, Justice, dissenting. I respectfully dissent. The excess comprehensive general liability insurers here sought to avoid their obligation to indemnify appellants for environmental cleanup costs which resulted from the retroactive application of a new federal statute...

CASTILLE, Justice, Dissenting By his own admission, appellant forcibly broke into the home of his former girlfriend, Krista Jill Omatick, in the middle of the night, wielding a loaded, .40 caliber, semi-automatic...

CASTILLE, Justice, Concurring and Dissenting. I join the majority opinion with respect to the holding that appellant's ex-wife's testimony was not privileged because her testimony described appellant's actions and therefore did not constitute a privileged communication. I respectfully dissent, however, from the majority's determination that appellant is entitled to "credit for time served," 42 Pa.C.S. § 9760, against his state prison sentence for the first-degree felony of arson ...
CASTILLE, Justice, Dissenting The majority would hold that Article I, § 8 of the Pennsylvania Constitution commands, where Fourth Amendment jurisprudence does not, that the results of a medical purposes blood alcohol content...


Justice CASTILLE, dissenting. In response to an application for reargument filed by the Federal Court Division of the Defender Association of Philadelphia ("Federal Defender"), Saranchak's former counsel, the Court orders the PCRA court...


CASTILLE, Justice, concurring and dissenting. I agree with the majority that, based upon his testimony at the suppression hearing, appellant Elijah Williams a/k/a Bob Torres had no subjective expectation of privacy in Apartment...

104. Blum ex rel. Blum v. Merrell Dow, 764 A.2d 1, December 22, 2000

CASTILLE, Justice, dissenting. Like Mr. Justice Cappy, I agree with the majority that the Frye 1 test should remain the general evidentiary standard for admitting expert scientific testimony in this Commonwealth. The test...


CASTILLE, Justice, concurring and dissenting. While I agree that there was sufficient evidence to support appellant's murder conviction and that his counsel was not ineffective in the guilt phase of the trial, I disagree with...


CASTILLE, Justice, concurring and dissenting. I agree with the Majority that the Fifth Amendment does not preclude a criminal defendant from having to submit to an independent pretrial psychiatric examination under these circumstances and, therefore, join in that portion of the opinion. However, I am compelled to dissent from that portion of the Majority Opinion that fashions various procedural "safeguards" notwithstanding the absence of a Fifth Amendment violation-i.e., the requirement that the results of that examination must...

CASTILLE, Justice, concurring and dissenting. I agree with the Majority that the trial court had jurisdiction over this action and that the doctrine of laches did not bar the action and, therefore, I join that part of the majority opinion. However, I must respectfully dissent from the Majority's conclusion that appellant's convictions do not constitute "infamous crimes" for purposes of Article II, Section 7 of the Pennsylvania Constitution. Although the term "infamous crime" as contained...


CASTILLE, Justice, dissenting. I dissent for the reasons expressed in my Concurring and Dissenting Opinion in Gordon v. Gordon, 545 Pa. 391, 681 A.2d 732 (1996) In my view, early retirement inducements accepted by an employee-spouse after separation should not be considered...

110. **Com. v. Wimbush**, 750 A.2d 807, April 17, 2000

CASTILLE, Justice, dissenting. As the majority acknowledges, stop-and-frisk cases in this Commonwealth are evaluated under the federal standard set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 1 Thus, I must respectfully dissent. 2 The corroboration of the anonymous tips in both of these cases was clearly sufficient under Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)...

...did not predict any future behavior. Therefore, a majority of this Court found that the tip in question was not sufficient to justify a Terry stop. Hawkins, supra (Newman and Castille, JJ., dissenting, Nigro, J., concurring in the result). In Commonwealth v. Wimbush, the facts adduced at trial demonstrate that on February 13, 1993, State Trooper Richard Gergel received an anonymous call during...

111. **Com. v. Goodwin**, 750 A.2d 795, April 17, 2000

CASTILLE, Justice, dissenting. In finding that the Fourth Amendment to the United States Constitution requires suppression of the evidence in this case, the majority circumvents binding federal precedent. Because I believe that this case is controlled by Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), I respectfully dissent.


CASTILLE, Justice, concurring and dissenting. While I agree that appellant's claims of error regarding the guilt phase of this capital case do not entitle him to relief, I must respectfully dissent from the Court's decision to vacate appellant's death sentence and remand the matter for a new sentencing hearing. In my view, no Simmons instruction was requested, or even warranted in...


CASTILLE, Justice, dissenting. I respectfully dissent. The United States Supreme Court set forth the parameters of a proper search under the plain feel doctrine in Minnesota v. Dickerson, 508 U.S. 666, 113 S.Ct. 2130, 124 L.Ed...
114. In re Cicchetti, 743 A.2d 431, January 13, 2000

CASTILLE, Justice, concurring and dissenting. I respectfully dissent from the conclusion of the majority in several respects. First, I believe that appellee did, in fact, violate Canons 1 and 2 of the Code of Judicial Conduct ("Code") through...

115. In re D.M., 743 A.2d 422, December 27, 1999

CASTILLE, Justice, dissenting. For the reasons expressed in Madame Justice Newman's Dissenting Opinions in Commonwealth v. Hawkins, 547 Pa. 652, 692 A.2d 1068 (1997), and Commonwealth v. Kue, 547 Pa. 668, 692 A.2d 1076 (1997), I believe that the police...


CASTILLE, Justice, concurring and dissenting. I agree with the Majority that Section 2711(b) of the Crimes Code 18 Pa.C.S. § 2711(b), must be interpreted in harmony with the Fourth Amendment. However, I believe...


CASTILLE, Justice, dissenting. The majority holds that the use of an infrared thermal imaging device to scan a private residence without a search warrant constitutes an unlawful search in violation of the Fourth Amendment to the United States Constitution, and affirms the decision of the Superior Court. I respectfully dissent and, therefore, would reverse. In order for the use of a thermal imaging device to constitute an unreasonable search under the Fourth Amendment, appellee must show a legitimate expectation of...

118. State System of Higher Ed (Cheyney) v. State College Univ. Professional Ass'n, 743 A.2d 405, December 22, 1999

CASTILLE, Justice, concurring and dissenting. I concur in the result reached by the majority; however, I would espouse a further standard of review than that set forth by the majority. Initially, I approve of the...


CASTILLE, Justice, dissenting. I respectfully dissent from the majority's conclusion that a plaintiff seeking monetary damages under the Pennsylvania Human Relations Act (PHRA or Act) is not entitled to a trial by jury. The right to...

120. Com. v. Costa, 742 A.2d 1076, December 20, 1999

...of the case law which supports a defendant's constitutional right to remain silent, solicits a response from its witness at trial which refers to the defendant's post-arrest silence. Justice CASTILLE, dis-
senting. It is well established that, in order for petitioner to prevail on a claim of ineffectiveness of counsel, he must show that: (1) the underlying claim is of arguable merit...

121.  

_Hutchison ex rel. Hutchison v. Luddy_, 742 A.2d 1052, November 24, 1999

CASTILLE, Justice, dissenting. I respectfully dissent. As a reviewing court, our task is simply to ascertain the governing law and to apply it without passion or prejudice. This task grows more difficult in a case such ...

...governing law is fixed and clear, and that it precludes liability for either Bishop Hogan, St. Therese's Catholic Church, or the Diocese of Altoona-Jamestown. Consequently, I am constrained to dissent. The threshold determination that must be made in any tort case is whether a duty of care is owed by the defendant to the plaintiff. If a duty of care...

122.  

_Lindh v. Surman_, 742 A.2d 643, November 23, 1999

CASTILLE, Justice, dissenting. I dissent from the majority's opinion because I do not believe that a no-fault policy should be applied to broken engagements and the issue of which party retains the engagement ring...

123.  

_Com. v. O'Donnell_, 740 A.2d 198, October 28, 1999

CASTILLE, Justice, dissenting. The majority holds that a court's defective waiver colloquy per se requires that a defendant's sentence be vacated notwithstanding other evidence which would demonstrate that appellant's waiver of a jury...

124.  

_Com. v. Fontanez_, 739 A.2d 152., October 28, 1999

CASTILLE, Justice, dissenting. I respectfully dissent. In my opinion, there was sufficient evidence for the trial court to conclude that the currency seized from appellant's vehicle was contraband. The determination of whether the currency was contraband...

125.  

_Com. v. Chmiel_, 738 A.2d 406, August 19, 1999 (NO. 162 CAP)

CASTILLE, Justice, dissenting. The majority holds that to allow the now deceased counsel's testimony from a prior ineffectiveness hearing to be used to impeach appellant at his second trial would violate appellant's Sixth...

126.  

_Com. v. Clark_, 735 A.2d 1248, August 17, 1999

CASTILLE, Justice, dissenting. I respectfully dissent from the majority's decision that the warrantless search of appellant was unlawful thereby resulting in the suppression of the fruits of that search. Appellant was apprehended by police after he...

127.  

_Com. v. Stovall_, 734 A.2d 388, July 21, 1999

26
CASTILLE, Justice, dissenting. I dissent for the reasons expressed in my dissenting opinion in Commonwealth v. Williams, 557 Pa. 285, 733 A.2d 593 (1999) 0 #2 2059...


CASTILLE, Justice, concurring and dissenting. I concur with the reasoning of the majority in Commonwealth v. E.M but must dissent from the majority's holding in Commonwealth v. Christopher Hall. In my view, the holding of the majority in Hall amounts to an unwarranted expansion of this Court's holding in Commonwealth v. Banks, 540 Pa. 453, 658 A.2d 752 (1995) (Castille, J., dissenting). With all due respect to the doctrine of stare decisis, I believe that the Banks decision was the nadir in the history of this Court's search and seizure jurisprudence. Consequently, I am constrained to dissent from a decision which expands the holding in Banks and fails even to acknowledge that it is doing so. It is instructive to begin with fundamental precepts regarding the concept...


CASTILLE, Justice, dissenting. I dissent for the reasons expressed in my dissenting opinion in Commonwealth v. Williams, 557 Pa. 285, 733 A.2d 593 (1999) 0 #2 2059...


CASTILLE, Justice, dissenting. I respectfully dissent from the majority's decision because I believe that a new penalty hearing is not warranted in this case. The majority held that the trial judge improperly reduced the jury's responsibility...


CASTILLE, Justice, dissenting. I dissent for the reasons expressed in my dissenting opinion in Commonwealth v. Williams, --- Pa. ---, 733 A.2d 593 (1999) 0 #2 2059...


CASTILLE, Justice, dissenting. I dissent for the reasons expressed in my dissenting opinion in Commonwealth v. Williams, 557 Pa. 285, 733 A.2d 593 (1999) 0 #2 2059...

133. Com. v. Williams, 733 A.2d 593, June 30, 1999

CASTILLE, Justice, dissenting. I respectfully dissent because I do not believe that the provisions of the Registration of Sexual Offenders Act, commonly known as Pennsylvania's Megan's Law, 42 Pa.C.S. §§ 9791-9799.6 ("Act"), which impose...
134. Com. v. Ardestani, 736 A.2d 552, June 29, 1999

CASTILLE, Justice, dissenting. I respectfully dissent because I do not agree that this Court's holding in Commonwealth v. Brion, 539 Pa. 256, 652 A.2d 287 (1994), should be given retroactive application. Further, I find the...

...believe that Metts had an expectation of privacy in his sister's apartment where he sometimes spent the night worthy of the protection afforded in Brion. For the aforementioned reasons, I dissent. 2 FN2. I further dissent as I do not believe that Brion was correctly decided. See Brion, 539 Pa. at 262, 652 A.2d at 290 (Nix, C.J. dissenting, joined by Papadakos and Castille, JJ.).


CASTILLE, Justice, dissenting. I believe that directing profanities in a public place at a police officer who is attempting to perform his lawful duty constitutes disorderly conduct. Accordingly, I respectfully dissent. The disorderly conduct statute provides: (a) Offense defined.—A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk...


CASTILLE, Justice, dissenting. I respectfully dissent from the majority's holding that the Physical Therapy Act, 63 P.S. § 1304(a), (b.1), prohibits chiropractors from advertising that they perform physical therapy. Commercial speech is entitled to...


CASTILLE, Justice, dissenting. I disagree with the majority that the wording of 75 Pa.C.S. § 4306(a) makes it inapplicable in the circumstances of this case. In my view, the use of high...


CASTILLE, Justice, dissenting. The majority holds that the contempt findings against appellants cannot stand because the hearing at which the court made the findings of contempt was improperly convened pursuant to Pa.R.Crim.P. 9015...

...Rule 9015 simply because they were unwilling to testify; and (2) there were no exceptional circumstances which compelled the preservation of appellants' testimony in the interests of justice. I respectfully dissent because I believe that the trial court properly acted within the purview of Rule 9015. The rule provides: BY COURT ORDER. (a) At any time after the institution of a...

139. Com. v. Allen, 725 A.2d 737, February 26, 1999

(}
CASTILLE, Justice, dissenting. I respectfully dissent, as I believe that Officer Bey reasonably suspected that criminal activity was afoot at the time he initiated an investigative stop of appellant. Consequently, I would affirm the Superior Court's...

140. **Drake v. Drake**, 725 A.2d 717, February 25, 1999

CASTILLE, Justice, dissenting. Here, the majority posits that, pursuant to subsection 3501(a)(8), it is irrelevant whether a settlement or award is for disability payments, personal injuries, lost wages, or future earnings ...

...majority reasons that the timing of the right to receive the award is the pivotal factor in the determination of whether or not the award is marital property. I respectfully dissent because I do not believe that a workers' compensation commutation award which represents future earnings is marital property subject to equitable distribution.

141. **Com. v. Borriello**, 723 A.2d 102, February 25, 1999

CASTILLE, Justice, dissenting. Because I believe that the Commonwealth Court erred in reversing appellees' convictions on twenty-six summary violations of building code ordinances, I dissent from this Court's per curiam affirmance of the Commonwealth Court. Appellees own a vacant, dilapidated movie theater in Donora Borough. A Borough inspector inspected the structure and determined that.

142. **Com. v. Young**, 748 A.2d 166, January 22, 1999 (NO. 0120 CAP)


CASTILLE, Justice, dissenting. The issue raised in this matter is whether the Superior Court erred by sua sponte dismissing the Commonwealth's appeal for failure to file a brief. I respectfully dissent from the majority's decision to dismiss this matter as improvidently granted because I believe that the Superior Court erroneously dismissed this matter where the circumstances indicate that the Commonwealth failed...


CASTILLE, Justice, dissenting. I respectfully dissent from the majority's conclusion that a voir dire examination of a child witness must be conducted outside the presence of the jury. A vital part of the jury's function is...

CASTILLE, Justice, dissenting. The majority concludes that, when a testator devises a life interest in real estate to a beneficiary who is also the co-executrix of his will, with the real estate...

...hypothetical merely to illustrate the difficulty the Beneficiary would have effecting the same result arrived at by the Majority had she dealt at arm's length with an independent Executor. My dissent, however, does not, as the Majority's footnote 5 suggests, rest on this paradigm, but on the notion that the Executor abrogated her fiduciary duties when she circumvented the testator's intent...


CASTILLE, Justice, dissenting. I agree with the majority that the Department of Transportation (PennDot) is liable in this matter and I concur in the per curiam Order affirming the Commonwealth Court on that issue. However, I believe that the City of Philadelphia ("City") also bears liability in this matter under the relevant immunity provision. Consequently, I dissent from the majority's per curiam Order insofar as it affirms the Commonwealth Court's conclusion that the City is not liable in this matter. Appellee, Connie Slough, initiated the instant action...

... I agree that exceptions to governmental immunity must be narrowly construed. Kilgore v. City of Phila., 553 Pa. 22, 717 A.2d 514 (1998) (Castille, J., dissenting); Mickel v. City of Phila., 550 Pa. 539, 707 A.2d 1124, 1127 (Pa.1998) (Castille, J., dissenting); Jones v. Chieffo, 549 Pa. 46, 54, 700 A.2d 417, 421 (1997) (Castille, J., dissenting). However, I am puzzled by the Commonwealth Court's conclusion that a median is a traffic control only in the "broadest" sense of the term. This seems to imply that there...


CASTILLE, Justice, dissenting. I respectfully dissent from the majority opinion because I believe that it was error for the majority to characterize an officer performing his lawful duties as a trespasser for tort liability purposes. Police...


...the trial court's finding that Appellee was guilty but mentally ill was contrary to the evidence.

CASTILLE, Justice, dissenting. The issue in the matter before this Court is whether the finder of fact, be it judge or jury, is required to make a specific finding that a defendant has...


CASTILLE, Justice, dissenting. Although Finn v. City of Philadelphia, 541 Pa. 596, 664 A.2d 1342 (1995), was decided less than four years ago, the majority has sub silentio overruled it, and in...

...doing, has abandoned the principle of stare decisis. As I believe that we are constrained to adhere to the holding of Finn under the principle of stare decisis, I respectfully dissent. The facts of this case, as recounted by the majority, demonstrate that appellant Walter Kilgore ("Kilgore"), an employee of Federal Express, was injured while working at the Philadelphia International Airport...

CASTILLE, Justice, dissenting. The majority concludes that appellee Robert J. Triffin ("appellee") is entitled to recover the value of the money orders at issue because the money orders were negotiable instruments and because...

...a holder in due course of those negotiable instruments. However, since the money orders at issue contained express conditional language which precluded negotiability under the relevant statute, I must respectfully dissent from the majority's conclusion. The requirements for negotiability are set forth at 13 Pa.C.S. § 3104, which provides: 1 FN1. In 1992, subsequent to the transactions at issue in this...

151. **In Interest of O.A.**, 717 A.2d 490, August 20, 1998

CASTILLE, Justice, dissenting. The majority of this Court holds that under the Fourth Amendment to the United States Constitution, police lack probable cause to make an arrest when a confidential informant who has...

152. **Com. v. Comer**, 716 A.2d 593, August 07, 1998

CASTILLE, Justice, dissenting. I respectfully dissent because I believe that there was sufficient evidence under the facts of this case to sustain appellant's conviction for aggravated assault. The evidence demonstrates that appellant's conduct fully manifested the...


CASTILLE, Justice, dissenting. I respectfully dissent from the per curiam order affirming the decision of the Commonwealth Court that appellants lacked standing to appeal the approval of a subdivision plan involving a parcel of property in...


CASTILLE, Justice, dissenting. I respectfully dissent to the majority's conclusion that the firearms seized from appellant's "private" collection did not constitute derivative contraband. Because the Commonwealth established a sufficient nexus between the property at issue and...

155. **In Interest of S.J.**, 713 A.2d 45, May 19, 1998

CASTILLE, Justice, dissenting. I join the portion of Justice Cappy's dissenting opinion which concludes that the officer's decision to frisk appellant was not violative of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) I further...

156. **Com. v. Fowlin**, 710 A.2d 1130, April 23, 1998
CASTILLE, Justice, concurring and dissenting. I respectfully dissent to the majority's conclusion that a person who acts recklessly in exercising his right to self-defense may not be held criminally liable for injuries inflicted on an innocent bystander...


CASTILLE, Justice, dissenting. I respectfully dissent to the majority's conclusion that it was reversible error for the trial court to submit written instructions to the jury in this case. I believe that Commonwealth v. Oleynik, 524...

158. Com. v. Legg, 711 A.2d 430, April 03, 1998

CASTILLE, Justice, dissenting. The majority of this Court grants appellant a new trial by holding that appellant's trial counsel was ineffective for failing to investigate and present a diminished capacity defense. I dissent from this holding for two reasons. First, a diminished capacity defense would have conflicted with the defenses that trial counsel reasonably chose to pursue; therefore, trial counsel would have acted...

159. Com. v. Franciscus, 710 A.2d 1112, April 02, 1998

CASTILLE, Justice, dissenting. I respectfully dissent to the majority's holding that the Commonwealth violated appellant's right to counsel under the Sixth Amendment to the United States Constitution under Article I, Section 9 of the Pennsylvania...

160. Com. v. Vargas, 705 A.2d 1297, February 27, 1998

CASTILLE, Justice, dissenting. The issue raised in this matter is whether the Superior Court erroneously remanded this matter to the trial court where the trial court refused to allow appellee to delay the...

...of the second day of his trial in order to change from prison-issued clothing into clothes that his family had brought for him to the courtroom. I must respectfully dissent from the majority's decision to dismiss this matter as improvidently granted because I believe that this Court should determine whether the trial court's refusal was harmless error and whether the...


CASTILLE, Justice, dissenting. The majority holds that the motor vehicle exception to governmental immunity applies and allows a plaintiff to recover damages from a political subdivision like the City of Philadelphia (the "City...

...resulted in the plaintiff's injuries. Because I believe that the majority has ignored the tenets established by this Court for determining whether an exception to governmental immunity applies, I (t
dissent. Generally, since local agencies are performing a public service, they are immune from tort liability. 42 Pa.C.S. § 8541 1 As noted by the majority, an injured party can recover...

162. **Caterpillar v. Unemployment Comp. Bd.,** 703 A.2d 452., November 20, 1997

CASTILLE, Justice, dissenting. The majority holds that Claimants' (the Intervenors) actions did not constitute willful misconduct and that Claimants are therefore entitled to unemployment compensation benefits because their violation of a work rule...

163. **Com. v. Mulholland,** 702 A.2d 1027, October 10, 1997

CASTILLE, Justice, concurring and dissenting. The majority correctly remands this case to the Court of Common Pleas of Allegheny County for retrial. Nevertheless, I write separately only to note my disagreement with the majority's sua...

164. **Com. v. Brazil,** 701 A.2d 216., September 22, 1997

CASTILLE, Justice, dissenting. The majority holds that appellant, who had the benefit of court appointed standby counsel's assistance during trial, is entitled to a new trial because he was denied adequate representation of...

165. **Kurt J. Lesker Co. v. Plasmaterials, Inc.,** 700 A.2d 92, September 17, 1997

CASTILLE, Justice, dissenting. One of the issues raised in this matter is whether the trial court should have allowed appellee to use an unsigned document as evidence that Sarrach had violated a restrictive ...

...had allegedly entered into with it. Because I believe the circumstances of this case raise important issues and public policy considerations in this era of corporate downsizing, I must respectfully dissent from the majority's decision to dismiss this matter as improvidently granted. In July of 1982, appellee offered Sarrach the position of vice president of technical matters. The offer letter appellee...

166. **Com. v. Thorpe,** 701 A.2d 488, September 17, 1997

CASTILLE, Justice, dissenting. I must respectfully dissent. As a majority of this Court recognizes, the Commonwealth must be free to proceed against a criminally charged defendant even after it has failed to convince a neutral magistrate that...

167. **Com. v. Morales,** 701 A.2d 516, September 17, 1997

CASTILLE, Justice, concurring and dissenting. I concur with the majority opinion in its disposition of all issues raised in this appeal from the trial court's denial of appellant's second petition for post-conviction relief in...

168. **Jones v. Chieffo,** 700 A.2d 417, August 21, 1997
CASTILLE, Justice, dissenting. The majority here holds that while the appellants cannot be vicariously liable for the negligent acts of a third party, they are not entitled to summary judgment based on their...


CASTILLE, Justice, dissenting. Appellant, the Commonwealth of Pennsylvania, is seeking reversal of the Order of the Superior Court which vacated the judgment of sentence of the Court of Common Pleas of Lycoming County...


CASTILLE, Justice, dissenting. The issue before the Court is whether the evidence presented was sufficient to support the trial court's verdict that the $3,400.00 of bundled cash was either “furnished or intended...


CASTILLE, Justice, concurring and dissenting. I concur with the majority's holding that a plaintiff must present expert testimony in order to establish a prima facie case of corporate liability against a hospital pursuant to Thompson v. Nason Hospital, 527 Pa. 330, 591 A.2d 703 (1991), unless the hospital's negligence is obvious. I nevertheless dissent here because I believe that the plaintiff/appellant has failed to present sufficient expert evidence for purposes of surviving summary judgment on the corporate liability claims asserted against appellee, Nason...


CASTILLE, Justice, dissenting. The majority's interpretation of the pre-nuptial agreement is contrary to this Commonwealth's established law concerning contract interpretation. Accordingly, I must dissent as I disagree with this Court's reversal of the Superior Court. In Pennsylvania, prenuptial agreements are considered contracts and must be interpreted as such. Simeone v. Simeone, 525 Pa. 392...


CASTILLE, Justice, dissenting. The majority imposes a five-year retroactive suspension on the grounds that despite respondent's illegal activities, he is extensively involved in the Korean community, has an excellent reputation (notwithstanding his ...

...of illegal conduct) and shows remorse for his actions. Because I believe that respondent's criminal activities demonstrate that he is not fit to practice law in this Commonwealth, I respectfully dissent as I believe disbarment is the only appropriate remedy. The majority focuses on respondent's "benevolent" activities in the Korean community in reading its ruling. However, the purposeful, fraudulent acts...
174. **In re Heidnik**, 720 A.2d 1015, April 19, 1997

CASTILLE, Justice, dissenting. For the reasons set forth below, I wish to disassociate myself from the Court's entry of a stay, granting of review, and listing of this matter for oral argument. By...

175. **Com. v. Santiago**, 691 A.2d 457, April 11, 1997 (CASTILLE, Justice, dissenting. The legislature has determined in enacting 42 Pa.C.S. § 9546(d) that an order denying a petitioner relief under the Post Conviction Review Act in a matter in which the...

176. **Com. v. Labron**, 690 A.2d 228, February 26, 1997


CASTILLE , Justice, concurring and dissenting. I agree with the Majority that appellant's counsel was not ineffective. However, because I disagree with the Majority's conclusion that appellant's claim that his counsel was ineffective in advising him to reject a plea offer is cognizable under the Post-Conviction Relief Act (PCRA), I respectfully dissent. Under 42 Pa.C.S. § 9543(a)(2)(v) of the PCRA, a claim was cognizable if the petitioner's conviction resulted from a "violation of the provisions of the Constitution, law..."


CASTILLE, Justice, dissenting. I join in Justice Newman's dissenting opinion and write separately to reiterate my belief that Commonwealth v. Brion, 539 Pa. 256, 652 A.2d 287 (1994) , was wrongly decided. As Former Chief Justice Nix stated in his dissenting opinion in Brion, by discussing his criminal involvement with another person, appellant abandoned any reasonable expectation of privacy in those communications. Id. at 263, 652 A.2d at 290 It ...

...from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks. 401 U.S. at 751, 91 S.Ct. at 1125-26 As Justice Castille noted in his dissenting opinion in Commonwealth v. Roebuck, 545 Pa. 471, 681 A.2d 1279 (1996) , this Court has repeatedly used Article I, Section 8 of the Pennsylvania Constitution to extend to criminal...

179. **Com. v. Cruz**, 684 A.2d 551, November 15, 1996

CASTILLE, Justice, dissenting. I respectfully dissent for the reasons expressed in my dissenting opinion in Commonwealth v. Matos, 543 Pa. 449, 672 A.2d 769 (1996) 0 #2 2059...

CASTILLE, Justice, dissenting. I respectfully dissent for the reasons expressed in my dissenting opinion in Commonwealth v. Matos, 543 Pa. 449, 672 A.2d 769 (1996) 0 #2 2059 ...


CASTILLE, Justice, dissenting. I respectfully dissent. Although the record is not well developed, it appears that the second exception to the knock and announce rule set forth in Commonwealth v. Means, 531 Pa. 504, 508, 614 ...


...that the retirement bonus, the continuation pay and part of the ORBIT annuity, reduced by the coverture fraction, are to be included in the marital estate.

CASTILLE, Justice, concurring and dissenting. I agree with the Opinion Announcing the Judgment of the Court that the Superior Court erred in its analysis regarding the valuation of Mr. Gordon's pension. However, I disagree with...


CASTILLE, Justice, concurring and dissenting. I agree with the result reached by the majority. However, I write separately because I believe that this Court should have resolved the issue upon which it granted allocatur, to...


CASTILLE, Justice, concurring and dissenting. I agree with the majority's affirmation of appellant's judgment of sentence arising out of the January 23, 1991 charges. However, I disagree with the majority's conclusion that the confidential informant's identity must be disclosed regarding the December 21, 1990 incident. Therefore, I dissent. As I stated in my concurring opinion in Commonwealth v. Payne, 540 Pa. 54, 656 A.2d 77 (1994), the safety of the confidential informant is a controlling factor in...


CASTILLE, Justice, concurring and dissenting. The majority holds that appellant's workmen's compensation benefits should not have been modified because the modification was based upon improper hearsay testimony of the employer's job placement specialist. I concur with the majority's conclusion that hearsay testimony concerning job availability cannot normally be a basis to modify benefits if properly objected to. I nevertheless dissent here because the employer's job placement specialist's testimony does not pertain to the issue of job availability but rather pertains to appellant's good faith in pursuing a position, which he ...
...that the Trap Rock position was available as of August 1, 1989, and that appellant did not make a good faith effort in obtaining that position. Therefore, I must respectfully dissent from the majority's reversal of the Commonwealth Court's affirmance of the modification of appellant's workmen's compensation benefits by the Workmen's Compensation Appeal Board.

ORDER PER CURIAM. AND NOW, this 22nd day of October, 1996, the Petition for Reargument filed by Appellees Ogden/Allied Maintenance and Travelers Insurance Company is granted.


CASTILLE, Justice, dissenting. The majority here holds that testimony by a nurse wherein she repeated statements made to her by an injured child identifying the child's alleged abuser cannot be admitted under the...


NIX, Chief Justice, dissenting. Because I too agree with Mr. Justice Castille that the plaintiff in the instant matter has alleged sufficient facts in her complaint to state a cause of action grounded in a breach of a bailment contract, I must dissent.

CASTILLE, Justice, dissenting. The majority here holds that a complaint based upon a breach of bailment agreement is insufficient to state a cause of action against a veterinarian who performs surgical procedures on...

188. PA State Ass'n County Com'rs v. Com., 681 A.2d 699, July 26, 1996 [UJS FUNDING CASE]

CASTILLE, Justice, dissenting. Article 5, Section 1 of the Pennsylvania Constitution provides that: [T]he judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the...


CASTILLE, Justice, dissenting. The majority holds that the trial court erred in granting a new trial after determining that, based on a change in the law, it had given an erroneous jury instruction. Because I agree that the relief granted by the trial court was appropriate, I respectfully dissent. The determination of whether to grant a new trial is within the discretion of the trial court, and will not be reversed absent an abuse of that discretion. ...


CASTILLE , Justice, Dissenting: I dissent from the majority's reversal of appellant's sentence of death and holding that "victim impact" testimony is not admissible during the penalty phase of a capital case. Instead, I agree with...

CASTILLE, Justice, dissenting. The majority here, relying on Commonwealth ex rel. Maurer v. O'Neill, 368 Pa. 369, 83 A.2d 382 (1951), holds that two sections of the Veterans' Preference Act, ...

...another day of infamy with regard to the rights of Pennsylvania's veterans. See Brickhouse v. Spring-Ford Area School District, 540 Pa. 176, 192, 656 A.2d 483, 491 (1995) (Castille, J. dissent). 3 I, therefore, must respectfully dissent. FN3. In Brickhouse, the majority held that a veteran who applied for a vacancy on a teaching staff and was able to establish that he was certified to teach in ...

...be hired for the position pursuant to the Veterans' Preference Act because the veteran did not meet the additional qualifications placed on the position by the local school district. I dissented because I believed that public employers should refer only to the qualifications defined by the General Assembly and its statutes as the ones being necessary to fill a public employment...


CASTILLE, Justice, dissenting. The majority holds that the concrete barriers appellant placed on his leased property to block vehicles from entering are not tantamount to "structures" and that, therefore, appellant did not need ...

...blockade. Because I believe that the majority's interpretation of "structure" is too narrow and allows appellant to avoid the requirements set forth in the zoning ordinance at issue, I respectfully dissent. While the Statutory Construction Act specifically applies to construction of state statutes, the principles enumerated therein are applicable in the interpretation of municipal ordinances. Francis v. (leto, 418 Pa. 417...


CASTILLE, Justice, dissenting. I respectfully dissent from the majority's reversal of appellant's death sentence and order remanding for a new penalty hearing on the grounds that trial counsel was ineffective for failing to present mitigating evidence...


CASTILLE, Justice, dissenting. The majority opinion here holds that the "independent source" rule cannot prevent the suppression of allegedly tainted evidence 1 seized from appellant's house because the source of the evidence in...


CASTILLE, Justice, dissenting. While the employee was on leave as the result of bilateral, mild tendinitis caused by a work-related injury, the employer stopped offering overtime to its employees as a result...

CASTILLE, Justice, dissenting. The majority holds that the term "medical witness" as used in Pa.R.C.P. 4020(a)(5) applies to nurses. Because I do not believe that Rule 4020 was intended to have such a broad scope, I must respectfully dissent. The majority argues that the Rule was not intended to be limited to physicians because the term "physician" could have been used in the rule instead of "medical witness." However...


CASTILLE, Justice, dissenting. Once again this Court has elected to undermine the ability of police officers to effectively battle the proliferation of illegal narcotic substances on our streets. Because I believe that there was sufficient probable cause to support appellant's arrest in the instant matter, I must dissent to this Court's per curiam order reversing the Superior Court's affirmance of appellant's judgment of sentence...

198. Com. v. Matos, 672 A.2d 769, February 26, 1996

CASTILLE, Justice, dissenting. The majority opinion here holds that police officers, in the exercise of their duty cannot, and in reality, shall not, observe the behavior of certain individuals and during the course...


CASTILLE, Justice, dissenting. Contrary to the position of the majority of this Court, I do not believe that this appeal should be dismissed as being improvidently granted. Such action lets stand the lower...

...this appeal and reversed the Superior Court's affirmance of the Bucks County Court of Common Pleas order compelling appellee's acceptance into an Accelerated Rehabilitative Disposition ("ARD") program. Accordingly, I respectfully dissent from the majority's per curiam order. In this case, appellee was arrested for driving under the influence of alcohol. When he was arrested, appellee's driver's license had expired for...


CASTILLE, Justice, dissenting. The effect of the majority opinion essentially allows a party who is injured in a motor vehicle accident to monetarily profit from their injury, and in some cases reap benefits...

...salary. The purpose of the Motor Vehicle Financial Responsibility Law is simply to make an injured party whole; not to bestow upon an injured party a windfall. Accordingly, I must dissent as I disagree with the Superior Court's holding and this Court's affirmance thereof. Following appellee's motor vehicle accident in December of 1987, appellee received sick leave benefits that were equivalent...

201. Com. v. White, 669 A.2d 896, December 29, 1995
CASTILLE, Justice, dissenting. The majority holds that even though the police in this matter had probable cause to believe that illegal drugs were located in appellant’s car, and even though they saw a...


CASTILLE, Justice, dissenting. Although the majority correctly characterizes Pennsylvania law regarding the “automobile exception” to the warrant requirement, I write separately only because I do not believe that this case should have been...

...I do not believe appellant has such standing as to have a right to be before this or any Court to seek suppression of the evidence in issue. I, therefore, dissent to the majority’s consideration of the merits of appellant’s suppression claim as I do not believe this Court should rule upon matters wherein the complaining party has no standing. I...


CASTILLE, Justice, dissenting. The majority holds that although probable cause existed to search appellant’s car, the cocaine and money found in appellant’s car must be suppressed because appellant was in custody and police...

...that such a ruling makes upon the limited resources of police. Accordingly, because I believe the majority’s holding all but eviscerates the automobile exception to search warrant requirements, I must dissent. It is well established that a warrantless search of an automobile does not offend the Fourth Amendment where, inter alia, there is probable cause to search the vehicle and where...

204. In re Special Audit of Courts Funds, 668 A.2d 134, December 13, 1995

CASTILLE, Justice, dissenting. Contrary to the majority’s per curiam order denying petitioner’s petition for review, I believe that this Court should assume plenary jurisdiction over this matter under 42 Pa.C.S. § 726 since...

...power of Court of Common Pleas judge to sua sponte order an independent audit of funds controlled by the duly elected county district attorney of Wyoming County. Accordingly, I respectfully dissent from the majority’s per curiam order. The petition for review in this case concerns two orders issued by President Judge Vanston. The first order was Judge Vanston’s sua sponte order...

205. Com. v. Halsted, 666 A.2d 655, October 20, 1995

CASTILLE, Justice, concurring and dissenting. Because I agree with the majority’s conclusion that the statement of G.W. was inadmissible under Commonwealth v. Lively, 530 Pa. 464, 610 A.2d 7 (1992), I concur in the reasoning on that issue. However, because the statement is nonetheless admissible as substantive evidence under the Tender Years Hearsay Act, 42 Pa.C.S. § 5985.1 I must respectfully dissent. The Tender Years Hearsay Act provides: (a) General rule. —An out of court statement made by a child victim or witness, who at the time the statement was made was...

CASTILLE, Justice, dissenting. The majority holds that circumstantial evidence is not relevant to establish blood alcohol content (BAC) in a prosecution for driving under the influence of alcohol in violation of 75 Pa.C.S...

...Because I believe that neither the statute nor the case law prohibits the use of circumstantial evidence in relating back appellant's BAC to the time of driving, I must respectfully dissent. It is well established that the Commonwealth can prove any or all elements of an offense through circumstantial evidence. Commonwealth v. Zimmick, 539 Pa., 548, 555, n. 9, 653 A...

207. **Com. v. McCracken**, 659 A.2d 541, May 19, 1995

CASTILLE, Justice, dissenting. Although the majority's opinion acknowledges that recantation testimony is one of the least reliable forms of proof, especially when it constitutes an admission of perjury, the majority nevertheless concludes that...

208. **Com. v. Banks**, 658 A.2d 752, May 12, 1995

CASTILLE, Justice, dissenting. I must respectfully dissent. While I agree with this Court's holding in Commonwealth v. Jeffries, 454 Pa. 320, 311 A.2d 914 (1973), that flight alone does not constitute probable cause for a lawful...

209. **In Interest of J.J.**, 656 A.2d 1355, April 18, 1995

CASTILLE, Justice, dissenting. I would hold that there is a per se forfeiture of appellate rights where a defendant escapes from custody or fails to appear for post-trial proceedings based upon the...

210. **In re Baby Boy S.**, 657 A.2d 484, April 13, 1995

CASTILLE, Justice, dissenting. I respectfully dissent from the decision of the Court to dismiss this appeal as having been improvidently granted. Notwithstanding the strength and consequence of petitioner's arguments, this Court's opinion is essential to draw...

211. **Com. v. May**, 656 A.2d 1335, April 04, 1995

CASTILLE, Justice, dissenting. This automatic appeal represents another instance in which a death penalty will be reversed due to harmless error. After finding the Commonwealth's first aggravating circumstance, the jury's foreperson wrote on...

212. **Brickhouse v. Spring-Ford Area School Dist.**, 656 A.2d 483, April 04, 1995
CASTILLE, Justice, dissenting. I respectfully dissent. The sole issue in this case is whether the Veterans' Preference Act at 51 Pa.C.S. § 7104(a) (the "Act") mandates that a veteran seeking a teaching position with a...


CASTILLE, Justice, dissenting. I respectfully dissent from the majority's reversal of the Commonwealth Court's order denying workmen compensation benefits to appellant. Appellant executed a final receipt under the Workmen's Compensation Act (the Act), 1 an action...


CASTILLE, Justice, concurring and dissenting. While I agree with the majority's affirmance of appellant's convictions, I disagree with its decision that a new penalty hearing is required. For want of an "s" on the verdict sheet submitted to the jury, a death penalty is reversed; thus, is form elevated over substance. I must respectfully dissent with the reversal of the death penalty as I do not believe that a typographical or grammatical error in the verdict sheet warrants a reversal of the well-considered verdict...


CASTILLE, Justice, concurring and dissenting. I join the majority's affirmance of the guilty verdict. However, I disagree with the majority's analysis of Pennsylvania Rule of Criminal Procedure 37, therefore, I respectfully dissent. The majority awards appellant a new sentencing hearing because the Commonwealth did not advise him at or before his arraignment pursuant to Pa.R.A.P. 352 that it intended to use his...


CASTILLE, Justice, dissenting. I respectfully dissent. The majority opinion cites to In re Tahiti Bar, Inc., 395 Pa. 355, 150 A.2d 112 (1959), to support its theory that since an individual who accepts the privilege...


CASTILLE, Justice, dissenting. I respectfully dissent based on my dissenting opinion filed in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc., 539 Pa. 108, 650 A.2d 854 0 #2 2059...

CASTILLE, Justice, dissenting. The majority has granted a new trial based on their conclusion that on two occasions the prosecution improperly referred to Appellant's post-arrest silence at trial. I believe that the ...

...presented concerning Appellant's post-arrest statements. Because the majority confuses post-arrest silence with post-arrest statements made after defendant had waived his right to remain silent, I must respectfully dissent. The pertinent facts are that shortly after a verbal fight with the victim Robert Kauffman, at a bar where both had been drinking, Appellant drove his car over a curb...


CASTILLE, Justice, dissenting. The issue before this Court is whether the trial court erred by refusing to give an entrapment instruction to the jury. Our entrapment statute provides, in pertinent part:...

220. Com. v. McCandless, 648 A.2d 309, October 03, 1994

CASTILLE, Justice, dissenting. The majority holds that the evidence obtained as a result of the officer's stop of appellant in his jurisdiction should have been suppressed because the officer based his stop ...

...Statewide Act"). 2 Because I do not believe that the Statewide Act is dispositive of or controls our determination of whether the suppression motion should have been granted, I respectfully dissent. The majority states that appellant also sought the suppression of certain statements; however, the ...