The Adult
Criminal Justice System

An Overview of the Adult Criminal Justice Systems

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This document was created in 2006 as guide to Pennsylvania's Criminal Justice System for victim witness advocates and should only be used as a guide. It was last updated in 2006. Changes made to Pennsylvania's Criminal Justice System since 2006 are not reflected in this document.

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A. Crimes

(1) Classes of Offenses- All penal code violations, known as crimes, are punishable by set terms of incarceration determined by the Pennsylvania Legislature:

(a) Statutory Classifications- Crimes are ranked from the highest, first degree murder, down to the lowest, summary offenses.

(i) Murder of the first degree – punishable by a sentence of death or to a term of life imprisonment. 18 Pa.C.S.A. §1102(a)(1). Fine not to exceed $50,000.00. 18 Pa.C.S.A. §1101(1).

(ii) Murder of the second degree – punishable by sentence of life imprisonment. 18 Pa.C.S.A. §1102(a)(2). Fine not to exceed $50,000.00. 18 Pa.C.S.A. §1101(1).

(iii) Murder of the third degree - punishable by sentence of not more than 40 years imprisonment. 18 Pa.C.S.A. §1102(d). Fine not to exceed $50,000.00. 18 Pa.C.S.A. §1101(1).

(iv) Felony of the first degree- punishable by a maximum of 20 years imprisonment and . 18 Pa.C.S. §§106, 1103. Fine not to exceed $25,000.00. 18 Pa.C.S.A. §1101(2).

(v) Felony of the second degree- punishable by a maximum of 10 years imprisonment. 18 Pa.C.S. §§106, 1103. Fine not to exceed $25,000.00. 18 Pa.C.S.A. §1101(2).

(vi) Felony of the third degree- punishable by a maximum of 7 years imprisonment. 18 Pa.C.S. §§106, 1103. Fine not to exceed $15,000.00. 18 Pa.C.S.A. §1101(3).

(vii) Misdemeanor of the first degree- punishable by a maximum of 5 years imprisonment. 18 Pa.C.S. §§106, 1104. Fine not to exceed $10,000.00. 18 Pa.C.S.A. §1101(4).

(viii) Misdemeanor of the second degree- punishable by a maximum of 2 years imprisonment. 18 Pa.C.S. §§106, 1104. Fine not to exceed $5,000.00. 18 Pa.C.S.A. §1101(5).

(ix) Misdemeanor of the third degree- punishable by a maximum of 1 year imprisonment. 18 Pa.C.S. §§106, 1104. Fine not to exceed $2,500.00. 18 Pa.C.S.A. §1101(6).

(x) Summary offenses - punishable by a maximum of 90 days imprisonment. 18 Pa.C.S. §§106, 1105. Fine not to exceed $300.00 unless specifically provided otherwise. 18 Pa.C.S.A. §1101(7).

(xi) Offenses designated as felonies or misdemeanors without specification of degree are of the third degree. 18 Pa.C.S. §§106(b)(5)&(9).

(2) Elements- Action and Intent- Every non-summary crime in Pennsylvania contains both a required action and intent on the part of the offender. A particular crime may be broken down into distinct "elements" or subparts based upon the action and intent required. The general intent necessary to commit a crime is specified in the statutory definition of the crime committed. Every type of intent is specified and defined in the Crimes Code. The action required for a crime is also set forth in the statutory definition of the crime committed.

(a) Mens rea- The *intent portion* of the crime. Every non-summary offense in Pennsylvania has an intent that is necessary to be proven in order to show that a crime has been committed. Intent is the state of mind of the actor when the crime was committed. The types of intent specified by the Crimes Code are contained in 18 Pa.C.S. §302.

(i) Intentionally- As defined by the Crimes Code, 18 Pa.C.S. §302(b)(1) a person acts intentionally if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in the forbidden conduct and he is *aware* of the existence of the circumstances of his conduct or believes or hopes that they exist. E.g.: An individual would act intentionally with regard to the killing of another, if he pointed a loaded gun at someone's head and squeezed the trigger.

(ii) Knowingly- As defined by the Crimes Code, 18 Pa.C.S. §302(b)(2) a person acts knowingly if the element involves the nature of his conduct or the attendant circumstances, he is *aware* that his conduct is of that nature or that such circumstances exist and if the element involves a result of his conduct, he is *aware* that it is *practically certain* that his conduct will cause such result. E.g.: An individual would act knowingly with regard to killing another, if he pointed the gun at someone and squeezed the trigger.

(iii) Recklessly- As defined by the Crimes Code, 18 Pa.C.S. §302(b)(3) a person acts recklessly with respect to a material element of an offense if he *disregards a substantial and unjustifiable risk* that the material element exists or will result from his conduct. It must be a *gross deviation* from the standard of conduct that a reasonable person would observe in the actor's situation. E.g.: An individual would act recklessly if not knowing whether or not the gun was loaded, he pointed the gun at someone and squeezed the trigger.

(iv) Negligently- As defined by the Crimes Code, 18 Pa.C.S. §302(b)(4) a person acts negligently with respect to a material element of an offense when he *should be aware of a substantial and unjustifiable risk* that the material element exists or will result from his conduct. It must be a *gross deviation* from the standard of care that a reasonable person would have observed. E.g.: An individual would act negligently if he pointed a gun at someone, knowing that a gun may contain bullets and may discharge and kill another.

(b) Actus Reus- The *action portion* of the crime. Every crime requires that some voluntary, overt physical action occur on the part of the person perpetrating the crime. A criminal intent alone cannot be punished. A person may not be punished for a crime unless he acted voluntarily.

(3) Choate v. Inchoate Offenses

(a) Choate Offense- "Choate" (pronounced "ko-ate") is a completed crime. In other words, the action and intent have resulted in a completed crime. E.g.: The crime of robbery is a "choate" offense where an individual of the intent enters a bank, points a gun at the teller, demands cash, receives it and exits the bank.

(b) Inchoate Offense- "Inchoate" is simply a crime that has not been completed. Inchoate offenses may be grouped into one of three crimes: Conspiracy, solicitation and attempt. An individual may not be convicted of more than one inchoate offense arising from the same set of facts designed to culminate in the commission of the same crime. 18 Pa.C.S. § 906

(i) Conspiracy- A conspiracy is an *agreement* between one or more persons to commit a crime along with the commission of an *overt act* in furtherance of the agreement. The agreement may be tacit (unspoken) or explicit. A person may be guilty of a conspiracy if they agree that one alone will commit the crime or if they will all engage in the crime together. A person may be guilty of a conspiracy if he only helps in the preparation and planning of the crime, but does not take an actual physical part in the commission of the crime. 18 Pa.C.S. §903(a).

An overt act is simply some physical manifestation of the person's intent to abide by the terms of the conspiracy. An overt act may be as simple as drawing a map for a getaway, or may be as detailed as planning the act from start to ultimate end. 18 Pa.C.S. §903(e).

A conspiracy ends when the crime(s) subject to the agreement terminate or the agreement is abandoned by those participating in the conspiracy. 18 Pa.C.S. §903(g).

(ii) Solicitation- A person is guilty of solicitation if he, with the intent of promoting or facilitating a crime, *commands, encourages or requests* another to engage in specific conduct which would constitute a crime.

(iii) Attempt- A person is guilty of an attempt to commit a crime if he, with the intent of committing a specific crime, does any act which constitutes a *substantial step* toward the commission of that crime. It is not a defense to an attempt if the object of the crime would have been factually impossible. 18 Pa.C.S. §901. E.g.: A person may still be punished for an attempted murder even if at the time he shot a

person, that person had already died, unbeknownst to the other, of some other cause.

(iv) Culpability- "Culpability" is the liability that one has for the criminal acts committed by himself or another. Inculpatory evidence is evidence that tends to suggest or points to the commission of a crime. Exculpatory evidence is evidence that tends to disprove that a crime or events surrounding the commission of a crime have occurred.

(a) Complicity- "Accomplice Liability"- An "accomplice" is a person that *aids, abets, agrees with, solicits, promotes or facilitates* the commission of a specific crime by another person known as a "principal." A principal is the person who physically commits the crime. An accomplice must cooperate with the principal in the commission of the crime. An accomplice is liable for the crime just as though he had actually committed it or had been the principal. This is known as "accomplice liability."

(b) Transferred Intent- A defendant may be held liable for his conduct despite the failure of the result of the criminal act to occur as to the person intended to be the victim by the defendant. This is the concept known as "transferred intent." A defendant that commits a crime against one, not the intended victim, may have his criminal intent transferred to the actual victim. For example, one who shoots a gun at an intended victim, misses and hits the unintended victim may be prosecuted for his criminal conduct, despite the fact that the defendant never meant to hurt the unintended victim.

(c) Corporate Liability- 18 Pa.C.S. §307. A business entity other than a government agency may be prosecuted for the commission of crimes by the corporation through its agents. The officers of a business corporation may be held liable for actions or omissions of others within the business organization that result in criminal behavior or are proximated to result in a crime.

(5) Jurisdiction- Jurisdiction is the power or authority that a legally recognized entity has to prosecute a person for the commission of a criminal act or portion of a criminal act within its territorial boundaries. A person may be convicted if his conduct or the conduct of another for which he is legally accountable occurs partially or wholly within the territorial boundaries of the Commonwealth of Pennsylvania. E.g.: A person may be convicted of a crime that occurs within the Commonwealth even though he was never physically present inside the boundaries of the Commonwealth. An accomplice, one who shares a common intent with another to commit a crime, may be held legally responsible for the actions of the principal.

(a) County- Pennsylvania is divided into 67 counties. Each county may possess its own court of common pleas and a local district attorney. The territorial boundaries that separate a county will determine where the jurisdiction lies and where a charge will be filed. If an offense occurred in more than one county, special rules apply to its prosecution. However, some overt action must have occurred in a county in order for jurisdiction to be held.

The Pennsylvania Supreme Court held in a plurality opinion that statewide jurisdiction exists for crimes committed in more than one county, but constituting a single criminal episode. Com v. McPhail, 547 Pa. 519, 692 A.2d 139 (1997). This means that crimes originating from a single criminal episode or one continuous, uninterrupted crime must be prosecuted in a single county.

(b) Magisterial districts/Municipal courts- Every county is divided into smaller subdivisions known as magisterial districts. Philadelphia and Pittsburgh also possess municipal courts to deal with large caseloads. An elected official known as a magisterial district judge serves within the magisterial district and hears cases filed on criminal complaint. In most cases, a magisterial district judge will not make a determination of guilt or innocence. Rather, they will hear some or all of the facts and make a finding as to whether a *prima facie* (pronounced "prime-a-fashee") case has been established by the Commonwealth.

(c) Municipality-local police- The Municipal Police Jurisdiction Act, 42 Pa.C.S. §8951-8954, controls the jurisdictional authority of municipal police to arrest and charge persons with crimes. Generally, a municipal police officer is limited to the confines of his city, township, borough, or other locality designation. However, under the following circumstances, a municipal police officer may arrest outside his primary jurisdiction:

(i) where the officer is acting pursuant to a court order;
(ii) where the officer is in hot pursuit of any person who committed an offense within the officer's primary jurisdiction;
(iii) where the officer has been requested to aid or assist another local, state, or federal agency;
(iv) where the officer has obtained prior consent from the chief law enforcement officer of the foreign jurisdiction;
(v) where the officer is on official business outside the primary jurisdiction and views an offense or has probable cause to believe an offense has occurred;
(vi) where the officer views a felony being committed or has probable cause to believe a felony has been committed.

(d) State Police Jurisdiction- The Pennsylvania State Police are authorized to make arrests and serve warrants throughout the Commonwealth without regard to jurisdictional boundaries within the Commonwealth. The State Police are restricted by state boundaries, unless exceptions, such as hot pursuit or requested aid, are applicable. 71 P.S. §§250, 252, 710, 712.

(6) Venue- The location where criminal charges are brought. Venue is the actual place where a case will be heard. In personam jurisdiction is the authority that a particular entity has over an individual.

(a) Venue for a magisterial district judge- All criminal proceedings are brought before the district justice within the magisterial district where the crime or an overt act to the crime occurred.

(b) Change of Venue- There may be instances where a change of venue is required. This means that the criminal proceedings may occur at a different facility designed to hear a matter. Typically, venue may be changed due to pretrial publicity. Such publicity may be detrimental to a jury pool to be selected from the local community. Individual jurors may have been exposed to slanted facts or formulated their own opinions about a case prior to hearing any facts in court. This exposure may create a prejudice toward a defendant. Pre-trial prejudice is presumed if:

(i) the publicity is sensational, inflammatory, and slanted towards conviction rather than objective facts;

(ii) the publicity reveals the accused's prior criminal record or refers to confessions, admissions, or reenactments of the crime by the accused;

(iii) the publicity is derived from police and prosecuting officer reports. Com v. Tedford, 523 Pa. 305, 567 A.2d 610 (1989).

(c) Transfer of Venue – Pa.R.Crim.P. 522 effectuates the Supreme Court's decision in Commonwealth vs. McPhail, 692 A.2d 139 (Pa. 1997), allowing multiple charges arising out of a single criminal episode which occur in more than one judicial district to be transferred so that they may be tried together in one judicial district. For transfer prior to preliminary hearing. Pa.R.Crim.P. 130.

(7) Statute of Limitations- A statute of limitations is a time limitation placed upon the Commonwealth that dictates in what time period a criminal prosecution must occur or when an information must be filed, a warrant, summons or citations must be issued. The Pennsylvania Legislature has set forth the general statutes of limitations for every crime contained in the Crimes Code. 42 Pa.C.S. §§5551-5554.

(a) No limitation applicable for the following crimes:

(i) Murder
(ii) Voluntary Manslaughter
(iii) Conspiracy to commit murder
(iv) Solicitation to commit murder
(v) Any felony perpetrated in connection with a murder of the first degree
(vi) Accidents involving death or personal injury or homicide by vehicle if the accused is the driver of the vehicle involved in an accident that leads to death.

(b) Major offenses- The statute of limitations is five years from the occurrence of the crime. Major offenses include:

(i) Corrupt organizations;
(ii) Aggravated Assault;
(iii) Terroristic Threats;
(iv) Kidnapping;

(v) Rape;
(vi) Statutory Sexual Assault;
(vii) Involuntary Deviate Sexual Intercourse;
(viii) Aggravated Indecent Assault;
(ix) Sexual Assault;
(x) Arson;
(xi) Burglary;
(xii) Robbery;
(xiii) Forgery;
(xiv) Incest;
(xv) Retaliation against a victim/witness;
(xvi) Sexual abuse of children;

This list does not include all major offenses.
Refer to 42 Pa.C.S. §5552 for a complete listing.

(c) Other offenses- For all offenses not listed in the Major Offenses section or the no limitation applicable section, the statute of limitations is 2 years.

B. Burden of Proof: The duty of one party to prove an allegation in order to convince the judge or jury of the truth of that particular allegation. This relates to the amount and quality of evidence that one party must present in order to win her or his case. In criminal cases, the burden of proof is "beyond a reasonable doubt."

(1) Beyond a Reasonable Doubt- This is the highest standard of proof under the law. The standard that is applicable to the Commonwealth in criminal trials. The amount of doubt that would cause a reasonably prudent person to hesitate before acting in a matter of importance in their own affairs.
(2) Clear and Convincing Evidence- Highly likely, more than a preponderance of the evidence, but less than beyond a reasonable doubt.
(3) Preponderance of the Evidence- Evidence that is of greater weight than the evidence offered in opposition to it; more probable than not; slightly greater than 50%. This is the burden of proof placed upon the Commonwealth during a pre-trial suppression hearing or a *Gagnon II* parole revocation hearing. The affirmative defenses of insanity and entrapment place this burden of proof upon the defendant. 18 Pa.C.S. §§ 313(b), 315(a).
(4) Prima Facie- The lowest standard of proof. Evidence which suggests that a crime has occurred and a defendant had some part in the commission of the crime. Common sense application to a set of facts in determination of whether or not a crime may have occurred.

C. Defenses

(1) Justification- 18 Pa.C.S. §§501-510. Justification or “self-defense” is a limited defense predominantly confined to crimes involving violent or aggressive acts by an initial party, known as the aggressor, against another, the defendant. Once the

defendant has placed justification at issue, the burden rests with the Commonwealth to prove that no justification exists beyond a reasonable doubt. Generally, a defendant may only claim a justification defense if they use that amount of force necessary to repel the harm or evil visited upon them. Further, the defendant may not behave recklessly or negligently in bringing about a situation requiring a choice of harms or evils.

(a) Use of force for self-protection- The use of force is justifiable for self-protection only when the defendant believes that such force is immediately necessary for the purpose of protecting his person from the threat or use of unlawful force by an aggressor. The use of force is not justifiable in the following situations:

(i) To resist an arrest the defendant knows is being made by a law enforcement officer;

(ii) To resist force used by a property owner who is protecting his property from the defendant;

The use of deadly force is not justifiable:

(i) Unless the defendant believes that deadly force is necessary to protect against death, serious bodily injury, kidnapping, sexual intercourse compelled by force or threat;

(ii) If the defendant, with the intent of causing death or serious bodily injury, provoked the use of force;

(iii) The defendant can avoid the use of force by retreating, except that retreat is not necessary from the defendant's dwelling or work place before deadly force may be used.

The use of force to protect others is justifiable when:

(i) The defendant would be justified in the use of force to protect himself;

(ii) Under the subjective circumstances the defendant believes them to be, the third person would be justified in using force;

(iii) The defendant believes that intervention is necessary for the protection of the third person.

(iv) The third party or the defendant have not provoked the incident leading to the use of force;

(v) The third party or the defendant have not violated a duty to retreat, except from a dwelling or place of work.

The use of force for the protection of property is justifiable when:

(i) It terminates the unlawful entry onto property or the carrying away of movable property;

(ii) To effect the entry or reentry upon land or retake movable property if the force used is based upon fresh pursuit or the defendant believes that the person against whom the defendant uses forces has no lawful title to the property;

(iii) The use of deadly force is never permitted for the protection of property unless the defendant is first threatened with death or serious bodily injury.

(2) Duress- 18 Pa.C.S. §309. A defendant charged with a crime may claim that he was coerced into committing the crime by the use or threat of unlawful force against him which a reasonable person under the same circumstances would have been unable to resist. The act is not voluntarily done if duress exists. However, if the defendant recklessly or negligently placed themselves in the position, the defense is not available. See Com v. DeMarco, 570 Pa. 263, 809 A.2d 256 (2002) for successful use of duress as a defense.

(3) Ignorance or Mistake- 18 Pa.C.S. §304. Ignorance or mistake is a limited defense as to a matter of fact, for which there is a reasonable explanation or excuse if:
   (a) the ignorance or mistake negates the intent required for the crime; ie: intentionally, knowingly, recklessly, or negligently; or
   (b) the specific crime provides that ignorance or mistake is a defense to an element of the offense. E.g.: Statutory sexual assault occurs when a person engages in sexual intercourse with a complainant under the age of 16 years, the perpetrator is 4 or more years older than the complainant and the two are not married to each other. If the complainant is older than age 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age. 18 Pa.C.S.A. §§ 3122.1, 3102.

(4) Entrapment- 18 Pa.C.S. §313. This particular defense focuses on the conduct of the law enforcement agency or persons within the agency who are involved with and around the commission of the crime. Entrapment occurs if a public official, intent on obtaining evidence of a crime, induces or encourages another to engage in conduct constituting an offense by either:

   (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
   (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

   In other words, entrapment occurs if a public official either represents to another that their engagement in certain activity is not a crime and, in fact, the official encourages them to commit the act for the purpose of obtaining evidence of a crime. It may also occur if the public official persuades or encourages another to commit an offense by overcoming the will of that person and the person committing the crime is someone who would not otherwise have committed the crime. A question must be raised that the public official "implanted in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Com v. Klein, 222 Pa.Super. 409, 294 A.2d 815 (1972). Internet stings in which a police officer poses as a juvenile and invites an adult to engage in sexual intercourse did not constitute entrapment where the officer did not attempt to overcome the defendant's will by displaying

suggestive photographs and where the officer testified that if the defendant voiced concerns about the legality of the meeting she would have called the whole thing off. Com v. Zangarelli, Pa.Super., 839 A.2d 1064 (2003).

(5) Insanity. 18 Pa.C.S. §315. "Legal insanity" has a very specific meaning in the law. To plead the insanity defense suggests that the defendant committed the criminal act, but was not legally culpable because the intent element is not present due to the mental defect. The burden is placed upon the defendant to prove by a preponderance of the evidence that he was legally insane at the time the act was committed. Once the defendant raises the insanity issue from whatever source, the burden is then on the Commonwealth to prove that the defendant was sane at the time the act was committed. Com. v. Frisbe, 318 Pa.Super. 168, 464 A.2d 1283 (1983), reversed, 506 Pa. 461, 485 A.2d 1098.

A person is "legally insane" if, at the time of the commission of the act, the defendant was laboring under such a defect of reason, from a disease of the mind, as to not know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong. The standard used throughout many states and Pennsylvania is known as the "*M'Naghten's Rule*." Rock v. Zimmerman, C.A.3(Pa.) 1992, 959 F.2d 1237, cert. den. 112 S.Ct. 3036, 505 U.S. 1222, 120 L.Ed.2d 905.

Pursuant to the long-established rule of law set out in The Queen v. M'Naghten, 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843), which is typically referred to as the "*M'Naghten's Rule,*" a person is legally insane and, therefore, absolved of criminal liability if, at the time of committing the act, due to a defect of reason or disease of mind, the accused either did not know the nature and quality of the act or did not know that the act was wrong.

A defendant is not absolved of his criminal acts that are the result of a mental state that is voluntarily induced. Legal insanity only applies to a disease of the mind and not self-induced mental states, such as alcohol intoxication. It is irrelevant that the defendant did not know that alcohol or some other drug would have caused such condition in conjunction with a pre-existing disease. Com v. Henry, 524 Pa. 135, 569 A.2d 929 (1990). The determination of whether or not a defendant is legally insane is a factual issue for a jury to decide. Com v. DuPont, Pa.Super., 730 A.2d 970 (1999). Lay witnesses and experts may be called by the defense to establish that at the time the crime occurred the defendant was legally insane. Com. v. Zewe, 663 A.2d 195 (Pa.Super. 1995).

Personality disorders, compulsive personality disorders, adjustment disorders, chronic alcoholism, antisocial personality disorders are not relevant to a defense of insanity. Com v. Christy, 540 Pa. 192, 656 A.2d 877 (1995), cert. den. 116 S.Ct. 194, 133 L.ed.2d 130; Com v. Brode, 523 Pa. 20, 564 A.2d 1254 (1989).

See Pa.R.Crim.P. 568 (effective August 1, 2006) regarding defendant's notice requirements regarding insanity or mental infirmity defense, the effect of failure to give notice, and reciprocal duties on the part of the Commonwealth.

See Pa.R.Crim.P. 569 (effective August 1, 2006) regarding procedure for examination of a defendant by a mental health expert.

(6) Diminished Capacity- Diminished capacity is technically not a defense. Rather, it is a contention by the defendant that the Commonwealth is unable to prove deliberation and premeditation in a first degree homicide case only. It applies only to evidence affecting cognitive or thinking functions necessary to formulate specific intent. Rock v. Zimmerman, 959 F.2d 1237 (3rd Cir. 1992), cert. denied 112 S.Ct. 3036, 505 U.S. 1222, 120 L.Ed.2d 905; Com v. Christy, 656 A.2d 877, 540 Pa. 192 (1995), cert. denied 116 S.Ct. 194, 133 L.Ed.2d 130. Evidence of self-induced intoxication is admissible to show that the defendant was incapable of formulating specific intent to kill in a first degree homicide case.

(7) Mental infirmity- 18 Pa.C.S. §314. Mental infirmity is different from both legal insanity and diminished capacity. A mental infirmity defense is available only to a defendant who has failed to prove an insanity defense by a preponderance of the evidence. Com v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), cert. denied, 111 S.Ct. 1338, 499 U.S. 931, 113 L.Ed.2d 269. The purpose of the "guilty but mentally ill" statute was to limit the number of defendants being relieved of all criminal liability based upon the use of an insanity verdict. Com v. Zewe, 444 Pa.Super. 17, 663 A.2d 195 (1995), appeal denied, 544 Pa. 629, 675 A.2d 1248.

A person is "mentally ill" if they lack substantial capacity to either appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law as the result of mental disease or defect. Neither party is required to prove that the defendant was mentally ill at the time of the commission of the offense. The trier of fact must make the determination from the testimony generated from an insanity defense whether the evidence supports a finding of mental illness. The jury must be able to find such mental infirmity exists by a preponderance of the evidence. Com. v. Sohmer, 519 Pa. 200, 546 A.2d 601 (1988).

A person who is convicted of an offense that does not make out a "legal insanity defense" may nonetheless be found "guilty but mentally ill" due to a mental infirmity. A person may be found guilty of a crime, including first degree murder, and also may be found "mentally ill." Com v. Morris, 385 Pa.Super. 563, 561 A.2d 1236 (1989). The Commonwealth must prove each and every element of the crime(s) charged beyond a reasonable doubt. The defense must prove by a preponderance of the evidence that the defendant was "legally insane" at the time of the commission of the offense. The jury must first determine if the Commonwealth has met its burden. If so, then whether the defense has met its burden. Where the defense has failed to meet its burden, the jury must determine whether the facts established beyond a reasonable doubt that the defendant was mentally ill. Com v. Trill, 374 Pa.Super. 549, 543 A.2d 1106 (1988), appeal denied, 522 Pa. 603, 562 A.2d 826.

(8) Alibi- This defense places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to have committed the crime. There is no burden of proof placed upon the defendant to prove an alibi. Rather, the Commonwealth must disprove any

evidence of alibi by proof beyond a reasonable doubt. Com. v. Roxberry, 529 Pa. 160, 602 A.2d 826 (1992). There is no minimum amount of physical separation that must be shown by the defendant to support an alibi defense, so long as the separation makes it impossible for the defendant to have perpetrated the crime. See Pa.R.Crim.P. 567 (effective August 1, 2006) regarding defendant's notice requirements, the effect of failure to give notice and reciprocal duties on the part of the Commonwealth.

(9) Double Jeopardy- Both the Federal and the Pennsylvania State Constitutions have the proscription that an individual may not be placed "twice in jeopardy" for the same offense. The Commonwealth may not prosecute a defendant for same offense twice. Nor may it prosecute a defendant twice for the same conduct which gave rise to the former prosecution. Generally, once a jury verdict has been rendered, the prosecution is over and the defendant may not be retried for any offense or offenses which arose out of the same set of facts. Const. Art. 1, §10; 18 Pa.C.S. §§109, 110.

Prosecution is barred by a former prosecution for a different offense if the following are present:

(a) the former prosecution resulted in a conviction or an acquittal;
(b) the current prosecution is based on the same criminal conduct or arose from the same criminal episode as former prosecutions;
(c) the prosecutor was aware of the instant charges before the commencement of the prior prosecution;
(d) the instant charges and the former charges were within the jurisdiction of a single court. Com. v. Cadora, 703 A.2d 711 (Pa.Super. 1997).

For example, a criminal defendant who is acquitted of first degree murder may not later be prosecuted for voluntary manslaughter if the second charge arises out of the same facts as the first prosecution for first degree murder. Nor may a defendant be later prosecuted for a robbery that occurred during the course of the first degree murder, if the facts about the robbery were known to the prosecutor at the time the murder was prosecuted.

(e) Merger doctrine- "Merger" is a closely related concept to that of Double Jeopardy. Crimes may be grouped into two categories when discussing the concept of merger- Greater included offenses and lesser included offenses. A greater included offense contains the same elements and the same facts that establish a prosecution for a lesser included offense. A lesser included offense may have some or all of the same elements and facts of the greater included offense.

A defendant may not be sentenced to both a greater and a lesser included offense. He may only be sentenced to one. The court maintains discretion as to which offense a sentence will be imposed. A defendant may be sentenced for the offense which has the greatest penalty. Com v. Everett, ___ Pa. ___, 705 A.2d 837 (1998).

For example, a defendant may be convicted of both robbery and theft that arise from the same set of facts. Robbery is the taking of property from another with the intent to permanently deprive them of the property by the use of force or the threat of force. Theft is the taking of property from another with the intent to permanently deprive them of such property. A defendant may not be sentenced for both crimes if they both arise from a single purse snatching incident. All of the elements of theft are contained within the crime of robbery. Robbery contains one additional element- the use of force. Robbery is the greater included offense, theft the lesser.

However, a defendant may be properly sentenced to both crimes if during the purse snatching, he jumps on an unattended bike and rides away from the scene. The theft of the bike and the robbery of the purse are not based upon the same victim and, therefore, do not contain all the same facts.

(f) Civil versus Criminal Proceedings- There are instances of both criminal and civil proceedings coinciding in such a manner that the proscription against Double Jeopardy will attach. Quasi-criminal proceedings, such as an indirect criminal contempt (civil in nature) is based upon the violation of a valid Protection From Abuse (PFA) Order. Title 23 Chapter 61. A PFA is simply a court's order that enjoins or restrains one party from having contact with another. When such an order is in place, a violation of the order may occur through new criminal conduct. For example, a defendant violates a PFA order, thereby committing an indirect criminal contempt, by striking the victim and committing the crime of simple assault. 18 Pa.C.S. §2701. A court must compare the elements of the criminal offense with the actions alleged to have been committed in the violation of a current PFA Order. Com v. Yerby, 679 A.2d 217 (1996). If the actual PFA Order does not include all the elements of the criminal offense, Double Jeopardy does not preclude a subsequent criminal proceeding on the actions giving rise to the contempt.

(10) Identity of the Defendant- In many criminal prosecutions the identity of the perpetrator is at issue. The ways in which the prosecutions attempts to limit the viability of this defense are numerous.

(a) Line-up/show-up- A "line-up" or an "identification parade" is simply a configuration of a suspect amongst others, similar in appearance, before a potential witness. A line-up generally occurs once an arrest has taken place and the suspect is in police custody. The line-up is a way that police and prosecutors can confirm the strength of eyewitness identification of the suspect. Unlike many other criminal procedures, the accused does not have a constitutional right to participate in a pre-trial line-up. Com. v. Beverly, 377 Pa.Super. 438, 547 A.2d 766 (1988). Great care must be taken not to make the line-up suggestive. For example, a six foot tall suspect intermixed with others that are 5'6" and less is unduly suggestive. All participants should be of similar stature, race, sex, and appearance.

A "show up" occurs as close to the crime scene in time and place as possible. Once apprehension of the suspect is made, the police will escort the suspect to an area where the victim or police agent may view the suspect to properly identify him as the perpetrator. Again, positive identification of a suspect is the essential reason a "show-up" is conducted. Unduly suggestive "show-ups" are not as valuable to police and prosecutors and may even be suppressed as evidence if they are too suggestive.

A *Kloiber* instruction may be appropriate where the opportunity for prior identification resulted in non-identification or misidentification of the suspect. The Pennsylvania Supreme Court case of Com. v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954) sets forth the rule of law that a trial court must inform the jury that they should receive a witness' identification with caution based upon a prior failure to identify or properly identify the accused. Obviously, such an instruction is damaging to a witness' credibility and the Commonwealth's case. This is why it is highly important that witnesses are given an appropriate opportunity to make a positive determination as to the identity of an accused.

(b) Voice identification- A suspect may be identified by their voice alone. The police may conduct a "voice line-up" similar to a standard "line-up" where the subjects will be asked to repeat a standard line or quote. All participants in the line-up should be of similar race, age and build.

(c) Fingerprint identification- A criminologist experienced in the area of fingerprint identification should be consulted in order to establish that the suspect's fingerprints are substantially similar or identical to those prints found at or around the crime scene. Fingerprint identification is one of the most solid methods of determining a perpetrator's identity. There is no right against self-incrimination that applies to a suspect's fingerprints. The request of police for a suspect to provide fingerprints may not be refused. Com v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971).

(d) Deoxyribonucleic Acid (DNA)- The determination of an accused's identity can be made through comparison of a known blood sample obtained after arrest with an unknown blood, semen, saliva, or other bodily component or secretion sample obtained from the crime scene. By comparing the profiles of these two DNA strands at points called "loci," a forensic scientist may be able to testify to a scientific degree of accuracy as to the similarity of the two samples. Thereby, the Commonwealth may prove that the suspect was at the crime scene during or about the time the offense was committed. The scientist will usually render an opinion to a degree of statistical probability, such as 1 in 18 million that the blood at the crime scene is that of the accused's.

(11) Renunciation- Inchoate Crimes- In order to renounce or abandon the purpose of an inchoate crime, such as conspiracy, solicitation, or an attempt, the

defendant must have fully withdrawn from the purpose of the inchoate crime, communicate his withdrawal to others involved in the crime, and, if necessary, perform acts necessary to void the commission of the offense.

Renunciation or "abandonment" of a conspiracy is a well-recognized defense in Pennsylvania. In order for abandonment to occur, the defendant must have withdrawn from the purpose of the conspiracy and communicated his withdrawal to his fellow coconspirators so they have time to also withdraw. Com v. Spriggs, 463 Pa. 375, 344 A.2d 880 (1975).

(12) Consent- 18 Pa.C.S. §311. Consent is a defense to only some crimes. The consent of a victim to the conduct charged is a defense as it negates an element of the offense or precludes the infliction of harm or evil sought to be prevented by the subject criminal statute.

Consent is an act of free will. In order for consent to be valid, it must be made absent the threat of force or use of actual force. A person's consent must be knowingly, voluntarily, and intelligently provided for this defense to be tenable. There must be no deception or duress involved in the formulation of the consent. Consent is not valid if it is given by a person that is legally incapable of giving consent (minors, mentally handicapped, intoxicated persons).

(a) Consent to bodily injury crimes: Consent is valid under the following circumstances:

(i) The conduct and the injury are reasonably foreseeable risks of joint participation in an athletic contest or sport; or

(ii) The consent establishes a justification defense. For example, a burglar consents to the use of force upon him by a home owner when he enters the home and threatens the home owner.

(13) Mere presence- 18 Pa.C.S. §301(c)- Possession Crimes Only. For a person to possess an object for which he may be held criminally liable, he must have the power to control and the intent to control that item. A person does not possess the item merely because they are physically close to it. They cannot possess an item unless they are aware of its presence and nature. Further, two or more persons may possess an item, provided each has the intent to exercise joint control over the item and both share the power to control it.

For example, a drug defendant may claim that he was not in possession of the substance found in a residence owned by his parents in which the occupancy is shared by others, including the defendant. In order for the Commonwealth to prove its case of possession, it may need to point to additional factors that may tend to show that the defendant was aware of the substance's presence and its criminal nature. Was the substance found in the defendant's bedroom? Were his fingerprints on the item? Did others implicate the defendant as the sole or shared owner of the item? All such factors may be needed to prove that the defendant possessed contraband or evidence of a crime, rather than just being "merely present."

D. Constitutional requirements

(1) Search and seizure- The 4th Amendment of the United States Constitution and Article I §8 of the Pennsylvania Constitution govern all searches and seizures conducted by government agents. Both provisions require probable cause for a warrantless search and a seizure to be reasonable. The remedy for a violation of either provision is generally the suppression of the evidence seized in contravention of the provisions. "Suppression" means that the evidence is not admissible in the Commonwealth's case-in-chief to prove the crime(s) charged.

(a) Elements of search and seizure:

(i) Government Action- The provisions of the United States and Pennsylvania Constitutions only apply to searches conducted by or at the behest of government agents.

(ii) Conduct constitutes a Search or Seizure- A search is a governmental invasion of a person's privacy. There is a two-part test to determine whether or not a person's privacy has been invaded.

(1) Is the expectation of privacy in the person, place or thing searched legitimate? Does the person exhibit an actual subjective expectation of privacy?

(2) Does society recognize that expectation as objectively reasonable? Items that are exposed to the public, abandoned, or obtained by consent are not considered to hold an objectively reasonable expectation of privacy.

(iii) Probable Cause- Probable cause is the level of suspicion necessary to justify a governmental intrusion upon interests protected by the United States and Pennsylvania Constitutions. Probable cause is defined by the United States Supreme Court to be "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213 (1983). Probable cause to obtain an arrest warrant or to conduct a warrantless arrest exists when police, at the moment of arrest, possess knowledge of facts and circumstances grounded in reasonably trustworthy information and sufficient in themselves to warrant a belief by a prudent person that an offense has been or is being committed by the person to be arrested. Beck v. Ohio, 379 U.S. 89, 91 (1964). Probable cause requires a common sense determination of all the factors in existence at the time of the governmental intrusion.

(b) Warrant requirement- The general rule is that all warrantless searches are per se unreasonable under the provisions of both the United States and Pennsylvania Constitutions. However, there are specific exceptions to this per se rule. To satisfy the warrant requirement an impartial judicial officer must assess whether the police have probable cause to make an arrest, to conduct

a search, or to seize evidence, instrumentalities, fruits of a crime, or contraband.

(c) Arrest Warrant- An arrest warrant is a judicial declaration authorizing a police or government agent to seize the person of the accused. Such warrant protects an individual from an unreasonable seizure and issues upon a showing of probable cause to believe a suspect is committing or has committed an offense.

(d) Search Warrant- A search warrant is a judicial declaration authorizing police or government agents to search and seize evidence of a crime within the home, dwelling, or other structure owned, occupied, or possessed by the accused. A search warrant protects an individual's privacy interest in the home and possessions against unjustified police intrusions. It issues upon a showing of probable cause to believe the legitimate object of a search is located in the place to be searched or will be present in that location in the future. P.R.Crim.P. 203.

(e) General requirements of warrants:

(i) Particularity- Both Constitutions require that a warrant describe with "particularity…the place to be searched and the persons or things to be seized." U.S. Const. Amend 4. Particularity exists if the executing officers can with reasonable effort determine and identify the place intended. Pa.R.Crim.P. 205.

(ii) Execution- "Knock and Announce Rule"- Both United States and the Pennsylvania jurisprudence require that executing officers knock, announce their purpose, and allow a reasonable amount of time for the occupants to respond, absent exigent circumstances, prior to forcible entry in order for the search to be executed reasonably. 18 U.S.C. §3109; Pa.R.Crim.P. 207. Further, in Pennsylvania, a search warrant on a home must be executed during daylight hours, absent prior judicial approval of a nighttime search. Pa.R.Crim.P. 203, 205.

(f) Warrantless Searches and Seizures- Every search or seizure of a person or property must be reasonable. The courts have generally interpreted this requirement to mean that an arrest or search must be based on probable cause and executed pursuant to a warrant. However, several delineated exceptions do exist, that despite the lack of a warrant are nonetheless considered reasonable.

(i) Investigatory Detention of Persons- An investigatory detention of a person is a narrowly drawn exception. It allows police to make a brief stop and detention based upon a "reasonable suspicion." A reasonable suspicion is less than the standard of suspicion required for probable cause. To meet this standard, the police must point to specific and articulable facts,

that when taken together with rational inferences drawn from those facts, reasonably suggest that criminal activity has occurred or is about to occur.

(1) Pat-down search or "Terry Frisk"- A police officer who makes an investigatory detention may conduct a limited pat-down frisk of a suspect. The frisk may only be conducted if the officer has a reasonable belief that the suspect poses a threat to the officer's safety or the safety of others. The pat-down is limited to a brief touch of the outer garments of a suspect in order to make a determination as to whether or not weapons or other harmful instrumentalities are currently possessed. The search may not be used to search for other evidence of criminal activity.

(ii) Warrantless Arrests- In limited circumstances an officer may arrest for an offense without a warrant when the offense is committed within their presence or for a felony that an officer has probable cause to believe the suspect has committed.

(iii) Search Incident to a Valid Arrest- After making a valid arrest, an officer may conduct a warrantless search of the suspect without having probable cause or reasonable suspicion to believe that the suspect possesses a weapon or evidence.

(iv) Exigent Circumstances- Government agents, such as the police, may conduct a warrantless search or seizure when exigent circumstances justify the intrusion. Exigent circumstances exist when there is an imminent danger of evidence destruction, the safety of law enforcement officers or the public is threatened, the police are in hot pursuit of the suspect, or the suspect is likely to flee prior to the issuance of a warrant. For instance, the police may search a residence in which a violent crime has occurred if they reasonably believe victims or dangerous persons are present.

(v) Plain View- In limited circumstances, police may seize items without a warrant that are in "plain view." The officer must come upon the evidence inadvertently. The officer must be lawfully present on the premises at the time of the plain view. The officer must have a lawful right of access to the evidence itself. Last, the incriminating nature of the item must be immediately apparent.

(vi) Consent Searches- Police and other government agents, without probable cause or a warrant, may conduct a search based upon a suspect's voluntary consent. In order to determine voluntariness, courts view (1) the individual's knowledge of their constitutional right to refuse consent; (2) their sophistication- age, intelligence, language ability; (3) the degree of cooperation with police; (4) the length of the detention prior to consent being granted; and (5) the individual's attitude about the likelihood of the discovery of the contraband.

(vii) Administrative Searches- Certain "special needs" searches have been specifically delineated by the courts based upon the weight of societal

interests versus those of the individual. These types of searches are usually based upon governmental concerns such as fire, health, or other safety inspections of residential or private commercial property.

(1) Inventory Searches- After lawfully taking custody of property, the police may conduct a warrantless search of the property to satisfy three distinct needs: (1) protect the owner's property while in police custody; (2) protect the police against allegations of misappropriation; (3) protect the police from potential danger. The police may not conduct an inventory search outside normal guidelines, for bad faith reasons, or for solely investigatory purposes.

(2) Right to Counsel- Both the 6th Amendment to the United States Constitution and Article I §9 of the Pennsylvania Constitution provide that "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. The right to counsel applies to all federal and state prosecutions where the defendant is accused of a felony or of a misdemeanor if a sentence of incarceration (jail) is actually imposed or contemplated. The right to counsel attaches at the moment adversarial judicial proceedings are initiated "whether by way of a formal charge, preliminary hearing, indictment, information or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972). The right to counsel also includes the right to assistance of counsel free of cost. Gideon v. Wainwright, 372 U.S. 335 (1963). Like most rights, the right to counsel may be waived or given up by the criminally accused. Faretta v. California, 422 U.S. 806 (1975).

(3) Custodial Interrogations- Both the 5th Amendment to the United States Constitution and Article I §9 of the Pennsylvania Constitution provide for the privilege against self-incrimination. "No person…shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend V. This issue arises in situations of interrogation of a suspect during custodial detention. In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court established a prophylactic rule or procedural safeguard that mandates police take certain precautions to avoid explicitly or inherently coercive police situations. The suspect's rights under *Miranda* may be waived if done knowingly, voluntarily and intelligently.

(a) Miranda Rule- Miranda requires that before the questioning of a suspect in custody who is subject to custodial interrogation, the suspect be given notice of certain rights. Pursuant to *Miranda*, law enforcement officials must tell the suspect the following:

(i) they have the right to remain silent;
(ii) they have the right to the presence of an attorney during questioning;
(iii) that if they cannot afford an attorney, one may be appointed to represent them free of cost.
(iv) their statements may be used against them at trial.

(b) Custody- The suspect must be in custody for the *Miranda* rule to apply. Under *Miranda*, "custody" involves the "deprivation of…freedom of action in any significant way." The determination of whether custody exists is based upon a review of several objective factors from the perspective of a reasonable person in the suspect's position. The factors are as follows:

(i) Is the suspect handcuffed or otherwise physically limited in his movement?
(ii) Duration of the questioning;
(iii) Is the suspect isolated from all others with the police?
(iv) Was the suspect advised that he was free to leave and yet voluntarily remained?
(v) Was the suspect apprehended or did he voluntarily submit to police questioning?
(vi) Where did police questioning occur?
(vii) All other relevant factors which may develop facts relating to the nature, scope and duration of the questioning.

(c) Interrogation- The *Miranda* rules only apply to individuals that are in custody and are subjected to interrogation. The United States Supreme Court defines "interrogation" as "express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291 (1980). The "functional equivalent" of interrogation consists of "words or actions on the part of the police…that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id.

(d) Waiver of *Miranda* rights- Before a prosecutor may introduce the statement or confession of a defendant that has been subjected to a custodial interrogation, the prosecutor may need to show that the statement was provided voluntarily, intelligently, and knowingly. Although an express waiver is not necessary, the courts will not presume a waiver from a defendant's silence or subsequent confession alone. In assessing the validity of a waiver, the courts review a number of factors in their totality. These factors are as follows:

(i) the suspect's age;
(ii) the suspect's intelligence;
(iii) the suspect's familiarity with the criminal system;
(iv) the suspect's physical and mental condition;
    (1) Is the suspect under the influence of any alcohol or drugs?
    (2) Is the suspect possessed of any mental deficiency, such as mental retardation?
(v) the explicitness of the waiver;
(vi) any language barriers in existence at the time of the waiver;
(vii) the time lapse between the waiver and the actual questioning and confession;
(viii) Was there any deception used on the behalf of the police in order to obtain a waiver?
(ix) Whether the suspect initiated the contact with the police.

(4) Exclusionary Rule- The exclusionary rule requires that evidence obtained either directly or indirectly in violation of the Fourth, Fifth, or Sixth Amendments (Article I §9) may not be introduced by the prosecution at trial, at least for the purposes of providing direct proof of the defendant's guilt. The Exclusionary Rule is a judicially-created remedy to address and redress the violations of government officials that violate the Constitution. The purpose is to deter government officials from violating the Constitution by precluding the fruits of a constitutional violation from being admitted at trial.

(5) Speedy Trial- The right to a "speedy trial" has both constitutional and statutory underpinnings. Both the United States and Pennsylvania Constitutions require that a defendant be tried without delay. The Pennsylvania Rules of Criminal Procedure provide that a criminal defendant must be brought to trial on any court case filed by complaint within 365 days if the defendant is at liberty on bail, and within 180 days if the defendant is incarcerated. Pa.R.Crim.P. 600. A defendant held in pre-trial incarceration and not brought to trail within 180 days following the filing of the criminal complaint is entitled upon petition to immediate release on nominal bail. Pa.R.Crim.P. 600(E). The remedy for a violation of the 365 day limit bis dismissal of the charges with prejudice unless the Commonwealth can show that due diligence was exercised in brining the defendant to trial and that the falure to do so was beyond the control of the Commonwealth. Pa.R.Crim.P. 600(G). Limited exceptions to this rule do apply. The exclusion to the computation of the 365 day period is for the following time periods:

(a) Any time period that the defendant expressly waives Rule 600;
(b) Any time period that the defendant could not be apprehended because their whereabouts were unknown;
(c) Any time period for which the defendant or his attorney is unavailable;
(d) Any time period for which the defendant is granted a continuance.

COMMENCEMENT OF PROCEEDINGS

INCIDENT

1. Incident Happens

A. Police Response- Notification

(1) Prompt and accurate reporting of every crime is of the utmost importance. Prompt means the earliest possible time that the police may be safely notified. Prompt reporting is critical for several reasons:

(a) Legal considerations for victims- The promptness of a complaint to the police will be of great importance to a jury in assessing the credibility of a crime victim. Crime victim compensation is also highly dependent upon the promptness of a report to the police.

(b) Legal considerations for prosecutors and police- The Crime Victim's Compensation Act also places a duty upon the police or law enforcement agency to provide notice to a crime victim regarding compensation.

The requirements for receiving compensation are as follows:

(1) A crime was committed.

(2) The person injured or killed was a direct victim or intervenor.

(3) The crime was promptly reported to the proper authorities. In no case may an award be made if the record shows that the report was made more than 72 hours after the occurrence of the crime unless the bureau finds the delay to have been justified, consistent with bureau regulations. The bureau, upon finding that any claimant, direct victim or intervenor has not fully cooperated with all law enforcement agencies, may deny or withdraw any award, as the case may be.

(4) The victim must have filed the claim within one (1) year of the commission of the crime or not later than one (1) year after the death of the victim or intervenor (period may be extended to not more than two (2) years if good cause is shown.)

Basic bill of rights for victims- Title 18 P.S. §11.201

Victims of crime have the following rights:

(1.) To receive basic information concerning the services available for victims of crime.

(2.) To be notified of certain significant actions and proceedings within the criminal justice system pertaining to their case.

(3.) To be accompanied at all public criminal proceedings by a family member, a victim advocate or another person.

(4.) In cases involving personal injury crimes, burglary or violations of 75 Pa.C.S. §3731 (relating to driving under influence of alcohol or controlled substance) which involve bodily injury, to submit

prior comment to the prosecutor's office on the potential reduction or dropping of any charge or changing of a plea.

(5.) To have opportunity to offer prior comment on the sentencing of a defendant, to include the submission of a written victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family and to have such comment considered by the judge when determining the defendant's sentence.

(6.) To be restored, to the extent possible, to the precrime economic status through the provision of restitution compensation and the expeditious return of property which is seized as evidence in the case when in the judgment of the prosecutor, the evidence is no longer needed for prosecution of the case.

(7.) In personal injury crimes where the offender is sentenced to a State correctional facility, to be given the opportunity to provide prior comment on and to receive State postsentencing release decisions, including work release, furlough, parole, pardon or community treatment center placement; and provide immediate notice of an escape of the offender.

(8) In personal injury crimes where the offender is sentenced to a local correctional facility, to receive notice of the date of the release of the offender, including work release, furlough, parole or community treatment center placement; and be provided with immediate notice of an escape of the offender.

(9) If the offender is subject to an order under 23 Pa.C.S. Ch. 61 (relating to protection from abuse) and is committed to a local correctional facility for a violation of the order or for a personal injury crime against a victim protected by the order, to receive immediate notice of the release of the offender on bail.

(10) To receive notice if an offender is committed to a mental health facility from a State correctional institution and of the discharge, transfer or escape of the offender from the mental health facility.

(11) To have assistance in the preparation of, submission of and follow-up on financial assistance claims to the bureau.

<u>Police duties with regard to assault victim notification of services are as follows:</u>

According to the Protection From Abuse Act, 23 Pa.C.S. Chapter 61:

Notice of services and rights- Each law enforcement agency shall provide the abused person [victim] with <u>oral and written</u> notice of the availability of safe shelter and of domestic violence services in the community, including the hotline number for domestic violence services. The written notice, which shall be in English and Spanish and any additional language required by local rule of court, shall include the following statement:

"If you are the victim of domestic violence, you have the right to go to court and file a petition requesting an order for protection from domestic abuse pursuant to the Protection From Abuse Act (23 Pa.C.S. Ch. 61), which could include the following:

(1) An order restraining the abuser from further acts of abuse.
(2) An order directing the abuser to leave your household.

(3) An order preventing the abuser from entering your residence, school, business or place of employment.
(4) An order awarding you or the other parent temporary custody of or temporary visitation with your child or children.
(5) An order directing the abuser to pay support to you and the minor children if the abuser has a legal obligation to do so." 23 Pa.C.S. §6105(a).

Duties placed upon law enforcement agencies by the Crime Victim's Compensation Program- Title 18 P.S. §§11.212:

Responsibilities of State and local law enforcement agencies:

(a) Training. - A law enforcement agency shall insure that all of its officers and employees are familiar with crime victims' compensation as provided for in Chapter 7. Instruction concerning crime victims' compensation shall be made a part of the training curriculum for all trainee officers.
(b) Notice. - Law enforcement agencies shall within 48 hours of reporting give notice to the direct victim or, if appropriate, a member of the direct victim's family of the availability of crime victims' compensation. The notice required under this subsection shall be in writing and shall include the following paragraph:

If you have sustained injury as a direct result of crime, including drunk driving, or are legally independent for support upon a person who has sustained physical injury or death as a direct result of a crime or, in the event of a death caused by a crime, you have legally assumed or voluntarily paid the medical or burial expenses incurred as a direct result thereof or if you have sustained loss of a primary source of income, you may qualify for indemnification by the Commonwealth of Pennsylvania for the out-of-pocket wages, other out-of-pocket losses and medical or burial expenses which you have incurred as a result of the crime. Claims must be filed with the Bureau of Victims' Services for the Commonwealth of Pennsylvania. For further information regarding this program, please contact:

(Name, business address and telephone number of local law enforcement agency)

or

Bureau of Victims' Services
(at the address of the bureau as published
from time to time in the Pennsylvania
Bulletin)
Harrisburg, Pennsylvania

Important: The statue provides that, absent certain extenuating circumstances, a claimant has one year from the date of the crime to file a claim with the Bureau of Victims' Services.

(c) Application. - The written notification provided for in subsection (b) shall be accompanied by one copy of the application form for the crimes victims' compensation. Application forms shall be supplied by the bureau to law enforcement agencies. A record of the date notification shall be maintained by the law enforcement agencies. The bureau shall maintain a mailing list of all local law enforcement agencies with forms by which they can order additional claim

forms. The bureau shall also provide updates to law enforcement agencies on changes which affect their responsibilities under this act.

(d) Information. - Law enforcement agencies are responsible for providing basic information on services available for crime victims. The information shall be in writing and shall be provided to the victim within 24 hours of the law enforcement's agency's first contact with the victim in a form to be developed by the commission.

(e) Forms. - The form developed by the commission shall be attached to the to the police report and shall include a victim checkoff signifying that the information has been provided to the crime victim.

(f) Notice. -

(1) In personal injury crimes, the law enforcement agency shall make reasonable efforts to notify the victim of the arrest of the suspect as soon as possible. Unless the victim can not be located, notice of the arrest shall be provided not more than 24 hours after the preliminary arraignment.

(2) In personal injury crimes, a law enforcement agency, sheriff, deputy sheriff or constable shall notify the victim of an inmate's escape from the custody of the law enforcement agency, sheriff, deputy sheriff or constable.

1998, Nov. 24, P.L. 882, No. 111 §212, imd. effective.

§11.214 Responsibilities of department, local correctional facilities and board

(a) Forms.-The department and the board shall develop standardized forms regarding victim notification. The form shall include the address where the form is to be sent. The department shall develop a standardized form which may be used by local correctional facilities. In the case of counties with victim-witness coordinators, the local correctional facility shall perform its responsibilities under this section in cooperation with the county's victim-witness coordinator.

(b) Notice.-If the department and board have received notice of a victim's desire to have input under §201(7), the appropriate agency shall notify the victim sufficiently in advance of a pending release decision to extend an opportunity for prior comment. The local correctional facility's notice to the victim under §201(9) shall occur immediately.

(c) Comment.-The victim's prior comment may be oral or written and shall be considered by the department or the board as to the advisability of release and any conditions of release which may be imposed.

(d) Escape Notification.-If the department or local correctional facility has received notice of a victim's desire to receive notification regarding escape of the offender as provided for in §201(8), the superintendent of the State correctional institution or warden of a local correctional facility shall notify the victim of the escape.

(e) Mental Health.-If the department or local correctional facility has received notice of a victim's desire to receive notification as provided for in §201(10), the superintendent of the State correctional institution or warden of a local correctional facility shall notify the victim of the commitment of the offender to a mental health facility and the location of the facility within 24 hours of the commitment.

(f) Record.-Records maintained by the department, the local correctional facility and the board pertaining to victims shall be kept separate. Current address, telephone number and any other personal information of the victim and family members shall be deemed confidential.

(g) Release of Offender.-The department, the local correctional facility or the board shall notify the victim of the final decision rendered, the date of any release and relevant conditions imposed prior to the release of the offender.

1998, Nov. 24, P.L. 882, No. 111 §214, imd. effective.

(2) Evidence collection- The collection and analysis of crime scene evidence depends a great deal on the immediate access by police to the scene. The collection may be more thorough and the analysis much more intricate if the police can see and seize the evidence of a crime shortly after the crime occurs. The accounts and details rendered by victims and witnesses to the crime will be enhanced by the immediacy of the account. Statements *are* evidence.

B. Information for Responding Officer

(1) Typical information requested in every case. An officer responding to the scene will need to know various types of relevant information. A "911" or police dispatch unit will invariably ask a standard set of questions. The responding officer's job depends upon accurate and detailed information. The following is a standard list of "911" emergency dispatch requirements that will have to be answered by the caller for the dispatcher:

(a) Procedure for "911" dispatcher:
- (i) Verify any/all information with caller (phone number calling from, address, name, age).
- (ii) Obtain exact location of incident (address).
- (iii) Ascertain what parties (friends, spouse, neighbor, relative) are involved.
- (iv) Is it a physical or verbal incident?
- (v) Any injuries? If so, follow EMS (Emergency Medical Systems) Protocol and relay to EMS dispatcher.
- (vi) Determine if any weapons or intoxication/drug use is involved.
- (vii) Dispatch the appropriate police department supplying them with all information regarding the call.
- (viii) Dispatch back up units if warranted or requested.

(ix) If caller requests, stay on the line until police units arrive at the scene.

(x) After 5 minutes of the officer's arrival, check on them to make sure everything is OK.

C. Locating the suspect

(1) Immediate apprehension important

(a) Evidence collection- The suspect may have evidence (e.g.: blood, fibers, body fluids) located on his person. The instrumentality used in an assault may be with him (e.g.: knife, club, hammer). The suspect's physical state is highly dependent upon the time (e.g.: drunk, agitated or upset). Physical actions or appearance are also known as "demeanor" and will play an important role in the prosecutor's presentation of evidence to a jury or judge.

(b) Community protection- Criminal activity may continue even after the instant event. A suspect may continue to commit crimes until he is apprehended. The safety of the community depends greatly on immediate apprehension of a suspect.

(c) Other Considerations- statutory requirements- The PA Crimes Code requires police to seize all weapons used in a domestic violence incident. 18 Pa.C.S. §2711(b).

D. Location of suspect made

(1) Police action- Depending upon any given situation, police action may take one of several forms in determining how to deal with a suspect. These methods are as follows:

(a) Arrest of suspect without warrant

(b) Complaint filed, followed by issuance of summons or warrant for arrest

(c) Summons issued to assailant

(d) Follow-up investigation needed- Further investigation or corroboration of existing crimes may lead to more evidence or better evidence with which to prosecute an offender.

3. Investigation of Crime

A. Evidence collection- EVIDENCE SHOULD NOT BE TOUCHED, RELOCATED, REARRANGED, HANDLED, OR DESTROYED BY ANYONE OTHER THAN THE POLICE.

(1) Documentation of all injuries

(a) Photograph injuries- Injuries sustained by a crime victim in an assault may be photographed by police/medical personnel. Photographs are a good source of testimony to note the nature and extent of injury to a crime victim.

(b) Photograph crime scene- The police may photograph the crime scene. There can never be too many photographs of the crime scene.

(c) Medical records- Observations and conclusions derived by a doctor may be a crucial legal consideration at trial. Statements made by a patient to a doctor or medical professional pursuant to treatment may be admissible at trial. Pa.R.Evid. 702, 803(4).

(d) Documentation of the incident- The police may encourage all witnesses to a crime to provide the police with their independent recollection of the crime. Each witness may provide a written, recorded, or otherwise adopted statement to the police. A statement is "adopted" by a witness when it is offered in the written word of the witness or is written by another, but read and signed by the witness.

(2) Actions of the accused at or around the time of the crime are important.

(a) Actions before- Any actions taken by a suspect prior to the commission of a crime may be probative of the suspect's intent or motive in the crime. A motive is the reason why a criminal commits a crime.

(b) Actions after- Similarly, any actions taken immediately after or at any time after the commission of a crime may also be probative of a suspect's intent or motive.

(i) Flight from scene- A person that runs or hides from the police may have something to hide. There may be valuable evidence of a suspect's intent gained by viewing the circumstances of their flight from the scene.

(ii) Destruction of evidence- The destruction of evidence by a suspect is an indication of their consciousness of guilt.

(iii) Concealment of evidence

(iv) Suspect statements- The suspect's words or actions at or near the scene are important evidence. The actual words or acts that were communicated to another after the commission of a crime are evidence. Any such contact may give the police valuable evidence of a suspect's intent and motive.

(3) Scene processing- The police "process" a scene by collecting evidence, documenting where and by whom it was found, and examining all evidence found at the scene.

(a) Photograph the scene

(b) Sketch the scene

(c) Collection of weapons- The condition and position of all weapons should be noted by an officer.

(d) Collections of other tangible items- The condition and position of any other tangible items found at the scene should also be noted. Was the phone ripped from the wall, suggesting that the suspect tried to prevent a phone call to the police? Were fingerprints found on specific items of value within the home?

(e) Collection of other relevant data:

(i) Vehicle identification number or the "VIN";

(ii) Serial numbers of stolen items if available;

(iii) Exact description of the item stolen or damaged;

(iv) Corroborative evidence- forensic evidence, crime scene objects;
"911" call tape- The police may preserve a copy of the victim's or other witness' dispatch report to the police. Valuable evidence regarding the suspect may have been preserved on the tape itself. Or, the call tape may be used to refresh a victim's or other witness' testimony.

CHARGING

1. Initiation of criminal prosecution*

A. Filing of a written complaint, followed by the issuance of a summons or arrest warrant-

(a) Complaint procedures generally:

(i) A complaint is "filed" with the appropriate issuing authority in the district where the crime occurred. Pa.R.Crim.P. 103, 108; 42 Pa.C.S.A.

(ii) Contents of complaint - Pa.R.Crim.P. 504.

*the name of the affiant;

*the name and address of the defendant (assailant), or if unknown, a description of the defendant as nearly as may be; e.g.: race, sex, height, weight, age;

*a direct accusation to the best of the affiant's knowledge, or information and belief, that the defendant violated the penal law(s) of PA;

*the date when the offense occurred;

*the place where the offense occurred;

*a summary of the facts sufficient to advise the defendant of the nature of the offense charged;.

*a statement that the acts of the defendant were against the "peace and dignity of the Commonwealth of Pennsylvania" or in violation of an ordinance of a political subdivision;

*a notation if criminal laboratory services are requested in the case (notifies parties that defendant may be liable for criminal lab user fee);

*a request for the issuance of a warrant or the arrest or the summons, unless an arrest has already been made; (See "Arrest without warrant", below);

*a verification by the affiant that the facts set forth in the complaint are true and correct to the best of the affiant's personal knowledge (possible liability for unsworn falsification to authorities- 18 Pa.C.S. §4904).

*Summary offenses must also be included as part of the same case. Pa.R.Crim.P. 504.

(iii) Issuance of summons- The district justice will issue a summons and not a warrant for arrest generally when the offense charged in the complaint that is filed is punishable by a maximum sentence not greater than one (1) year. However, the DJ may issue a summons when the offense is punishable by five (5) years of

* Pa.R.Crim.P. 118 and 119 provide for use of two-way audio-visual communication at certain criminal proceedings and at any proceeding with the consent of the defendant.

imprisonment or less. If the offense is punishable by more than five (5) years, a warrant of arrest shall issue.

- Are there reasonable grounds to believe that the defendant will not obey a summons?; or
- Has a summons already been returned to the DJ as undeliverable?
- The summons has been served and disobeyed by the defendant;
- The identity of the defendant is unknown.

For procedure following issuance of summons, see Pa.R.Crim.P. 512.

(iv) Issuance of a warrant for arrest- In order to issue a warrant for someone's arrest, a DJ must have the following presented to them. Pa.R.Crim.P. 509.

(1) Probable cause supported by one or more affidavits sworn before the issuing authority. The DJ may only consider the facts set forth in the affidavit. An affidavit is a written statement attached to the complaint which sets forth the facts and circumstances that make out or underlie the criminal charges in the complaint. This affidavit is commonly referred to as the "Probable cause affidavit" or "PC affidavit."

(2) One of the crimes committed is punishable by a sentence of imprisonment of more than five (5) years;

(3) The DJ has reasonable grounds to believe that the defendant will not obey a summons; or

(4) A summons has already been returned as undelivered.

(5) For procedure following arrest pursuant to a warrant in summary cases, see Pa.R.Crim.P. 431.

(v) Arrest without a warrant, followed by filing of a criminal complaint (Pa.R.Crim. P. 502.)

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

(b) The offense is a *felony not committed in the presence of the officer* making the arrest and the police have *probable cause*; or

(c) The offense is a *misdemeanor not committed in the presence of the officer* making the arrest where arrest without a warrant is specifically *authorized by statute* and the police have *probable cause*.

(i) Statutory authority grants an arresting officer the same right of arrest without a warrant, as in the case of a felony, whenever they have probable cause to believe the defendant has committed a crime of domestic violence, Driving After Imbibing and Theft. Expanded authority includes the following circumstances:

*Domestic Violence Crimes: Where one of three enumerated misdemeanors is committed; (1) involuntary manslaughter, 18 Pa.C.S. §2504; (2) simple assault, 18 Pa.C.S. §2701; (3) recklessly endangering another person, 18 Pa.C.S. §2705. See 18 Pa.C.S. §2711; The two following conditions must also be met:

(1)The crime is against a spouse or other person with whom the defendant resides or formerly resided; AND

(2) The arresting officer also observes recent physical injury to the victim or other corroborating evidence;

*DAI: Where there is probable cause to believe that a violation of 75 Pa.C.S. §3802 (Driving After Imbibing) has occurred within the officer's political subdivision. DAI does not have to be committed in the presence of the officer.

*Theft: Where the offense committed is a theft, regardless of its statutory classification, an officer has the same right of arrest as in the case of a felony (offense need not occur in the presence of the officer, only probable cause is required). See 18 Pa.C.S. §3904.

(ii) For procedure following arrest without a warrant in summary cases, see Pa.R.Crim.P. 441, 519.

(vi) Further investigation required.

(a) Secure more evidence of crime(s). The lack of or quantity of evidence at a crime scene may be a reason to delay the filing of a criminal charge pending further investigation. More evidence may be necessary to establish the commission of additional crimes, or a large amount of evidence may need time to be fully examined.

(b) Confirm the crime with the defendant- Supplying the defendant with an opportunity to respond to an allegation may provide the police with more evidence in which to pursue a crime. A crime may be negated by a defendant's account or it may be further corroborated.

(c) Burden of proof- The Commonwealth has the burden to ultimately prove that the defendant committed the offense beyond a reasonable doubt. It is crucial that enough evidence be collected and reviewed prior to bringing a viable charge. There is no worth to charging a crime that the police and prosecution have no ability to ultimately prove at trial.

(d) Efficiency- There may be several crimes in existence that if brought together will tend to help prove one another. Further, the police and court system will benefit from a conscientious and thorough prosecution for all crimes involved in an incident.

(i)Multi-jurisdictional issues- Additionally, other similar crimes from the "same criminal episode" may exist. The police and prosecution must bring all charges arising from the same criminal episode at one time, despite their division by county borders.

(vii) Filing of a private criminal complaint.

(a) Submit a complaint to a district attorney. It should be noted, however, that the Pennsylvania Rules of Criminal Procedure allow for individual counties to enact local rules establishing the right of a citizen to file a private criminal complaint first with the district justice or issuing authority.

(b) If the attorney approves the complaint, the complaint will then be submitted to an issuing authority for initiation of the criminal process.

(c) If the attorney disapproves of the complaint, the attorney shall state reasons for such on the complaint form and return it to the affiant (victim).

(i)The affiant (victim) may petition the court of common pleas (the trial court) for review of the decision.

(viii)Special proceedings involving a coroner or medical examiner- In cases of death, a coroner or medical examiner will have the authority to conduct an investigation. The investigation will determine the manner and cause of death.

(a) Cases that necessitate investigation by the coroner

(i) sudden deaths;
(ii) deaths occurring under suspicious circumstances;
(iii) deaths occurring as a result of violence or trauma;
(iv) trauma, chemical injury, drug overdose;
operative and peri-operative deaths;
(vi) body is unidentified or unclaimed;
(vii) contagious disease;
(vii) deaths occurring in prison;
(ix) cremated;
(x) sudden infant death syndrome (SIDS);
(xi) stillbirths;

(b) Autopsy required if:

(i) the cause and manner of death are unable to be determined after the investigation.

(c) Inquest required if:

(i) the coroner is unable to determine the cause and manner of death following the autopsy.
(ii) An inquest is a non-public formal hearing in the court of common pleas involving witnesses and a six (6) member jury. The jury will determine the manner of death (homicide) and whether any

criminal act or neglect of persons known or unknown caused the death.

B. Preliminary Arraignment. The defendant is made aware of what the charges are that he will face. The preliminary arraignment will generally occur not more than 6 hours from the time of arrest. Pennsylvania decisional law provides for a remedy of exclusion of statements obtained from a criminal defendant outside of 6 hours from the time of arrest until the time of preliminary arraignment. Com v. Duncan, 514 Pa. 395, 525 A.2d 1177 (1987). Pa.R.Crim.P. 540.

(1) Procedure- The following steps occur in every criminal case. The Pennsylvania Rules of Criminal Procedure and the Pennsylvania Constitution have set forth several steps in order to ensure that the protections of due process are met.
   (a) A copy of the complaint is read.
   (b) A copy of the arrest warrant is provided to the defendant.
   (c) Bail is set.
   (d) The defendant is notified of certain rights.
      (1) The right to be represented by counsel.
      (2) The right to have a preliminary hearing.
      (3) The right to secure bail and the conditions of bail.
      (4) The right to cross examine witnesses at a preliminary hearing.
      (5) To make written notes, a stenographic, or mechanical or electronic recording.

(2) A date for a preliminary hearing is set and the defendant is notified.

C. Bail. Bail is a monetary or nonmonetary amount posted by a defendant as a condition of pretrial release from custody. Pa.R.Crim.P. 524. The primary purpose of bail is to ensure the return of the defendant at subsequent proceedings. If unable to make the required bail amount, the defendant is detained in jail or remanded to the custody of the county jail. Bail may be posted by a defendant at any time on any day. Bail may be refused, but the reasons for refusal must be stated in writing by the bail authority (magisterial district judge).

(1) Bail conditions generally:

   (a) Obey all further orders of the bail authority;
   (b) Notify the bail authority, clerk of courts, the district attorney within 48 hours of any address change;
   (c) Refrain from direct or indirect contact with the victim or the witnesses;
   (d) Refrain from criminal acts.

(2) Types of bail.
   (a) Release on Recognizance (ROR). Nonmonetary bail—This type of bail requires only that a defendant sign an agreement that he will comply with all bail conditions and will appear as requested. Pa.R.Crim.P. 527.

(b) Release on Nonmonetary Conditions. The defendant is given a set of conditions in addition to those already required by ROR bail (above). These conditions may include the following:
   (i) Reporting requirements
   (ii) Restrictions on travel—A defendant may be limited to travel within the jurisdiction in which he was arrested
   (iii) Any other condition deemed appropriate. Such as drug and alcohol counseling or a psychological evaluation and recommended treatment.
   (iv) Special conditions apply for domestic violence cases. See 18 Pa.C.S. §2711. These include: (1) refraining from entering the residence or house of the victim; (2) refrain from further acts of violence against the victim.

(c) Release on Unsecured Bail Bond- No money is deposited.

(d) Release on Nominal Bail. The defendant must deposit a small amount of cash with the bail authority. This may be as low as $1.00. Conditions are automatically attached.

(e) Release on Monetary Condition. A bail authority may require the defendant to post an amount of cash or realty (property) to secure their appearance. Pa.R.Crim.P. 523; 528. The release criteria are as follows:
   - The nature of the offense charged and the likelihood of a conviction (more serious offenses get higher bail);
   - The defendant's current employment and employment history;
   - The nature of the defendant's family status;
   - The length of residency in the area;
   - Age, character, reputation, mental condition, and whether there's evidence of drug abuse;
   - Whether he has appeared before when released on bail;
   - A prior record for crimes such as escape;
   - Criminal history;
   - Use of aliases or false identification;
   - The safety of the **community or of any person (victim/witness)**.

<u>Safety of the Community or of Any Person</u>

The last consideration above for release on monetary bail is a recent addition. **House Bill** 1520 was recently enacted into law and became **effective December 3, 1998**. It applied to all cases now pending regardless **if** the crime occurred before December 3, 1998.
Article I, §14 of the Pennsylvania Constitution was amended to read as follows:

"All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses **for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community** when the proof is evident or the presumption great…" (amended language is in bold)

(3) Violation of bail occurs.
   (a) Bail revocation proceedings. Bail may be modified at any time to ensure that its conditions are being met and the safety of the victim is

addressed. Pa.R.Crim.P. 529 (effective August 1, 2005). A defendant may be brought immediately back to the bail authority (a judge of equal or greater authority) upon violation following the issuance of a warrant for his arrest, or a Court Order may be issued scheduling a hearing for the defendant or his surety to show cause why bail should not be revoked or conditions of bail changed. Pa.R.Crim.P. 536 (effective Aug. 1, 2005). A surety can be held liable for the full amount of bail upon violation of the bail conditions by a defendant. Pa.R.Crim.P. 536 (effective Aug. 1, 2005).

PRELIMINARY HEARING

1. Preliminary Hearing

A. Definition- The "preliminary hearing" is a hearing held before the issuing authority or magisterial district judge, usually within 3 to 10 days of the arrest and preliminary arraignment. A preliminary hearing may be rescheduled for "cause shown." A preliminary hearing may be commonly known as a "probable cause hearing." However, the definition of probable cause in the area of arrest is slightly different than the definition of probable cause used in a preliminary hearing.

(1) Prima facie evidence- At a preliminary hearing the prosecution (many times the arresting officer, but a district attorney may also assume prosecution at the preliminary hearing) must present a prima facie case (pronounced "prime-a-fashee") in order for the criminal charges brought in a complaint to be "bound over" or sent down to the Court of Common Pleas for formal arraignment and trial. Prima facie evidence is a much lower standard of proof than that of "beyond a reasonable doubt." In fact, the magisterial district judge is not making any finding as to a defendant's guilt or innocence. There is simply a common sense determination as to whether or not a crime has been committed by a particular defendant. A magisterial district judge or issuing authority must determine the following:

(a) Is there a probability that the crime(s) charged have been committed?; and

(b) Is there a probability that this particular defendant committed the crime(s)?

(2) How much evidence is prima facie?

(a) Generally speaking, usually the only evidence the prosecution will have to present at a preliminary hearing of a domestic violence matter is the testimony of the victim. This testimony will establish the following:

(i) A crime occurred

(ii) This defendant did the act

(3) Why shouldn't all the witnesses tell the judge what the defendant did?

(a) It is not necessary. A prima facie case can be established without their testimony.

(b) A defendant will benefit. A defendant or his attorney will be permitted to cross-examine all witnesses presented by the prosecution at a preliminary hearing. Allowing such cross-examination is costly to the Commonwealth, especially when there is no purpose served by calling the witness at the preliminary hearing.

B. Procedure

(1) When will the preliminary hearing be held?

(a) Within three (3) to ten (10) days of preliminary arraignment.

(b) The date may be changed for "cause shown." Such reasons may be as follows:
  (i) Victim/witness unavailability due to work schedules, child care concerns, sickness, family considerations, any other worthwhile concern;
  (ii) Defendant unavailability;
  (iii) Attorney unavailability;
  (iv) District Justice unavailability.

(c) Continuance of the preliminary hearing
  (i) the grounds for granting the continuance;
  (ii) the name of the party that requested the continuance;
  (iii) the new date and the reason that the new date was chosen.

(d) If any summary charges are included in the complaint, the Magisterial District Judge may not dispose of them. Pa.R.Crim.P. 542

(2) When is the latest it will happen?

(a) Within 365 days from the filing of a criminal complaint, with time added on due to delay caused by the defendant or his attorney.
  (i) Generally in Pennsylvania, a criminal defendant must be brought to trial within 365 days (one year) from the filing of a criminal complaint. This time limit may be extended for reasons relating to the defendant's unavailability or incapacity (e.g.: mentally ill, sick, hospitalized), the defendant's attorney's unavailability, or on the basis of continuances granted for the defendant or his attorney. The failure of the Commonwealth to bring a defendant to trial within 365 days may result in a dismissal of the criminal charges. No refiling is permitted. A defendant that is in jail and unable to make bail may be granted nominal bail (ROR or nominal cash bail) if not brought to trial within 180 days of the filing of a criminal complaint. All bail conditions provided in every criminal case and any special conditions added will still be applicable even though the defendant is released on nominal or recognizance bail.
  (ii) Excludable time- This is time that does not count toward the computation of the 365 days. As indicated above, it may be excluded for reasons relating to the defendant or his attorney.
  (iii) Magisterial District Judge - The current status of the statutory and decisional law in Pennsylvania places the onus upon the Commonwealth to provide for a "speedy trial" despite the delay attributable to the district justice or the municipal court. Pa.R.Crim.P. 600, 42 Pa.C.S.A.; Com v. Payton, 449 Pa.Super. 108, 673 A.2d 361 (1996).

C. Rights at a preliminary hearing

(1) Defendant's rights

(a) The right to be present during the preliminary hearing. A criminal defendant has the constitutional right to face and confront his accuser. This does not give him the right to conduct himself inappropriately during a preliminary hearing. A court may remove a defendant for acting inappropriately. If a defendant fails to appear at the preliminary hearing, the Magisterial may continue the hearing if he/she finds that the defendant did not receive notice; or, if notice was received, the Magisterial District Judge may proceed with the hearing in the same manner as if the defendant were present. Pa.R.Crim.P. 543.

(b) The right to be represented by counsel;

(c) The right to cross-examine witnesses and inspect physical evidence offered against him;

(d) The right to call witnesses on his own behalf other than witnesses to good reputation only;

(e) The right to testify on his own behalf;

(f) The right to make written notes, or have his counsel do so, or make a stenographic, mechanical or electronic record of the proceedings.

(2) Victim's rights- Established by the "Victim's Bill of Rights", 18 P.S. Section §11.201

(a) To be accompanied at all public criminal proceedings by a family member, a victim advocate or another person. See also 23 Pa.C.S. Section 6111

(i) Sequestration- A defendant or his attorney may request that all prosecution witnesses that are contemplated to testify be "sequestered." Sequestration means that all witnesses, with the exception of the one that is testifying presently, will be excluded from the courtroom during the testimony of another witness. This is to provide for independent testimony of the events and not repeated or parroted testimony on the behalf of multiple witnesses.

D. Presentation of the case

(1) Commonwealth's agent- The arresting officer or the affiant may present the Commonwealth's case at the preliminary hearing. Sometimes, however, a district attorney may take charge over the prosecution of a case at the preliminary hearing stage. In more serious cases or in cases involving complex legal issues, it may be more advantageous to have a district attorney present the case.

(a) Arresting officer/affiant- The Commonwealth will often present the testimony of the arresting officer or the victim first. In cases where there is no real victim, the officer alone may testify. In cases where the victim is the only witness to the crime, the victim alone may be called to testify.

(2) Victim is called to testify
   (a) Commonwealth's case. Direct examination- The police officer or district attorney asks the victim questions. These questions will make out the presentation of the prima facie case. All questions on direct examination must be non-leading and may not suggest the appropriate answer.
   (b) Cross-examination- The defendant or his attorney may ask questions. These questions may be leading and often are. A leading question will suggest an appropriate answer from the witness.
   (c) Objections- If an attorney for either side objects, do not answer the question.
   (d) Defense case- After the Commonwealth has finished the presentation of its case, it "rests." The defendant may now call witnesses or take the stand on his own behalf.
   (e) Closing arguments- The defense will be allowed to proceed first and render a closing argument.
   (f) Case is "bound over" or "held for court" Pa.R.Crim.P. 543.
      (i) Bail- Bail may be addressed upon the charge being held for court. Bail may be modified by the district justice at the preliminary hearing. Bail may also be modified later by petition after the matter has been held for court.
      (ii) Case is dismissed
      (iii) If summary charges are joined in the complaint, the Magisterial District Judge must forward the summary charges to Court along with the other charges held for Court. Pa.R.Crim.P. 543. If, however, if charges are dismissed leaving only summary charges for disposition, the Magisterial District Judge may dispose of the summary charges. Pa.R.Crim.P. 543.
   (g) Alternate issuing authority- If the district justice determines that a criminal charge may not be refiled with the same office, the district attorney may petition the court of common pleas for an alternate issuing authority. A case may always be refiled based upon its dismissal for the failure to present a prima facie case. Pa.R.Crim.P. 544. Once a petition for an alternate issuing authority is granted by the court of common pleas, the matter may be heard by a different magisterial district judge on petition by the district attorney. Pa.R.Crim.P. 132.

(3) Does a preliminary hearing always occur? No.
   (a) Waiver- A criminal defendant possesses the right to a preliminary hearing. Like most rights of a criminally accused, this may be waived or given up for some reason. Some reasons for waiver are as follows:
      (i) Expedite the process- A defendant may readily admit his guilt and simply want to get through the system as quickly as possible.
      (ii) Plea negotiation contemplated- A district attorney, with the advice and consent of the victim, may offer a defendant a plea

negotiation in advance of trial. This negotiation may include waiver of all formal proceedings.

E. What to expect **after the preliminary hearing**. The district justice must transmit a transcript of what occurred at the hearing to the clerk of courts of the court of common pleas **within 5 days** of the hearing. Formal arraignment, unless waived by the defendant, will be scheduled by the district justice or issuing authority to occur **usually within 1 to 2 months** of the hearing. At formal arraignment the defendant will be scheduled for a trial to commence **usually within 1 to 2 months** from the date of the formal arraignment.

(1) **Scheduling of a formal arraignment** The formal arraignment will generally be scheduled to occur by a magisterial district judge based upon the court calendar system of the respective county.

(2) **Transmission of the transcript by the district justice**. Pa.R.Cim.P. 547, 543. The district justice's office will prepare a procedural transcript of what occurred at their office. This transcript is then transmitted (or sent) to the clerk of courts of the court of common pleas. This must occur **within five (5) days of the disposition at the district justice level**. Included in the transcript are the following:

(i) Original complaint;

(ii) The summons or the warrant of arrest and its return;

(iii) All affidavits filed in the proceeding; and

(iv) The appearance or bail bond for the defendant, if any, or a copy of the order committing the defendant to custody.

(3) **Contact by the district attorney's office**- Once docketed, the clerk of court's office will send a copy of the transcript of the proceedings at the district justice's office to the district attorney's office. A docket number is assigned to the case by the clerk of courts. This number is then used by CPCMS (the Common Pleas Case Management System), the clerk of courts, court of common pleas, and the district attorney's office to track the case through the system. The docket numbers are assigned in chronological order from the time of their reception by the clerk of courts. For example, numbers may range from 1 to 4000 (the high end is infinite), depending on the number of cases held for court. Each case gets its own docket number. A case will include all the charges filed on a single criminal complaint. For contents of the docket, see Pa.R.Crim.P. 113.

The district attorney or one of his representatives will then draft a formal information. Pa.R.Crim.P. 560. An information is a formal statement of charges and sets forth all of the charges forwarded by the Magisterial District Judge, including all summary offenses included in the original complaint. A letter of restitution will the be sent to individual victims. This letter may contain specific persons to contact within the district attorney's office that will know what is occurring with the case. A defendant may anticipate being contacted approximately **2 to 3 weeks** after the matter has been held for court at the district justice's office.

FORMAL ARRAIGNMENT

1. Formal arraignment

A. Governed by local rules of court within each jurisdiction

(1) Every jurisdiction in Pennsylvania may orchestrate formal arraignment differently. Typically, formal arraignment will occur within 1 to 2 months after the charges have been "bound over" from the preliminary hearing. It must occur within ten (10) days following the filing of the criminal information and may be accomplished by simultaneous audio-visual communication. Pa.R.Crim.P. 571 (effective Aug. 1, 2005).

(2) Definition- The purpose of formal arraignment is to assure that the defendant is advised of the charges, to have counsel for the defendant enter an appearance, or if the defendant has no counsel, to advise the defendant of the right to secure counsel, and to commence the time period in which pre-trial motions and discovery are to occur.

(a) Information is filed. This is the written document that specifies the crime, statutory provision upon which the crime is based, the substance of the crime, the date specific, the name of the victim against which the crime occurred and the name of the defendant against whom charges have been brought. It puts the defendant on notice as to what crime and allegation he will have to defend himself against at trial.

(3) Procedure at arraignment

(a) Location- In most counties, formal arraignment will be held at the local county courthouse. There are always exceptions, however. Due to large court dockets, some counties may conduct arraignments at the county jail or other detention facility. A formal arraignment may be waived by a defendant. Or, it may even be conducted through the mail. It is largely "informal," despite its namesake.

(b) Procedure

(i) The defendant is presented with a copy of the information.

(ii) The defendant is presented with a formal arraignment form.

- The form identifies the name and any aliases of the defendant;
- The crime(s) charged;
- The substantive provisions of the crime(s);
- The plea of the defendant to the crime(s) charged in the criminal information. Either "guilty" or "not guilty."
- The next scheduled date to appear, usually during a trial term;

- The court docketing number

(iii) The defendant is advised of his right to be represented by counsel

(iv) The defendant is advised of the nature of the charges filed against him; and

(v) The right to file pre-trial motions

(d) Pre-trial motions- These may refer to any number of motions requesting that specific relief or assistance be provided to the defendant by the trial court.

(i) A Request for a Bill of Particulars- This is a request for specific facts not already set forth in the information or possibly the complaint. It must be filed within 7 days of formal arraignment. Pa.R.Crim.P. 572. A defendant may need to find out specific things in order to properly defend the case. For example, a Bill of Particulars may request the date contained in the information be narrowed. An information may state that the offense occurred 1/1 at 5 p.m. through 1/3 ending at 4 a.m. Because an alibi defense may be contemplated by the defendant, the time when the offense occurred exactly may be very important. The Bill may require the district attorney to narrow the time frame down for the defendant.

(ii) A Motion for Pre-trial Discovery- Pre-trial discovery generally must occur within 14 days of the formal arraignment. Pa.R.Crim.P.573. Certain mandatory materials.

- Any evidence favorable to the accused which is material to either guilt or punishment.
- The defendant's prior criminal record.
- The results of any scientific tests.
- Any tangible objects, including fingerprints, photographs, or other items to be used at trial.

(iii) The transcripts of any electronic surveillance conducted upon the defendant. Pa.R.Crim.P. 573.

(iii) An Omnibus Pre-trial Motion- It must be filed within 30 days of formal arraignment. Pa.R.Crim.P. 575. This motion may include the following types of requested relief:

- request for a continuance;
- for severance of charges or defendants (if more than one), or for joinder of offenses or defendants;
- for suppression of evidence;
- for psychiatric examination;

- to quash an information- "quash" means to declare void;
- for a change of venue or venire- "venue" is the location where the case will be tried. "Venire" is the people that will hear the case when it's tried;
- to disqualify a judge;
- for a pretrial conference.

Pa.R.Crim.P. 578.

B. Death Penalty Cases

1. Notice of Aggravating Circumstances- At or before the formal arraignment the Commonwealth must supply the defendant with a written "Notification of Aggravating Circumstances" it intends to submit to a jury during a sentencing hearing. Pa.R.Crim.P. 802.

(a) Aggravating Circumstances- These are conditions or circumstances that are provided by statute. 42 Pa.C.S. §9711. They will be considered by a jury in determining whether the death penalty should be applied to a particular defendant. The possible aggravating circumstances are as follows:

(i) The victim was a firefighter, peace officer, public servant concerned in official detention, a judge, district attorney, legislator, local or federal law official, member of the Governor's office that is killed in the performance of their duties of that office;

(ii) The defendant was paid by another to kill;

(iii) The victim was being held for ransom;

(iv) The victim died during the course of an aircraft hijacking;

(v) The victim was a prosecution witness to a murder or other felony and the death was for the purpose of preventing the victim from testifying;

(vi) The defendant killed during the perpetration of a felony;

(vii) During the commission of the offense, the defendant created a grave risk of death to another in addition to the victim;

(viii) The offense was committed by means of torture (the circumstances of the death suggest that the killing was not the only purpose, rather that the causing of physical pain was also a consideration of the defendant);

(ix) The defendant has a significant history of felony convictions (or adjudications) involving the use or threat of force to the person;

(x) The defendant has been previously convicted of another Federal or State offense for which the penalty is life imprisonment or death or was under sentence for such an offense at the time the instant murder occurred;

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

(xii) The defendant has been convicted of voluntary manslaughter,18 Pa.C.S. §2503, or an equivalent crime in any other jurisdiction prior to or at the time of the commission of the instant offense;

(xiii) The defendant committed the killing or was an accomplice (agrees with, solicits, commands, facilitates, orders) in the killing while in the perpetration of a felony under the drug act;

(xiv) The killing is the result of competition in the sale, manufacture, or distribution or delivery of drugs defined under the drug act. 35 P.S. §780-101 et seq.;

(xv) The victim was a nongovernmental informant at the time of the killing;

(xvi) The victim was a child under the age of 12;

(xvii) The victim was in her third trimester at the time of the killing and the defendant had knowledge of the pregnancy;

(xviii) At the time of the killing the defendant was the subject of a court order pursuant to Title 23 Chapter 61 (Protection From Abuse) or any order designed to protect the victim. 42 Pa.C.S. §9711(d)(1)-(18)

PRE-TRIAL

1. "Guilty" entered at Formal Arraignment

A. The defendant enters a plea at formal arraignment- Either "Guilty" or "Not guilty"

B. "Guilty" plea entered at arraignment

(1) Court date is set based upon defendant's entry of a plea of "guilty."

(a) "Guilty" at arraignment does not mean the process ends. A guilty plea usually means that there will be no trial. A defendant who enters a guilty plea at arraignment must still go before a judge of the Court of Common Pleas to enter a formal guilty plea on the record and to be sentenced. A defendant may withdraw his guilty plea prior to sentencing. Pa.R.Crim.P. 591. A defendant may plead guilty at formal arraignment for strategic reasons. He may want to expedite the matter because of other pending charges or because he is on parole. Many considerations come into play for a defendant when entering a guilty plea. Some just plead guilty because they did it. A guilty plea works as follows:

(i) The defendant will be scheduled to appear at a date certain at his formal arraignment.

(ii) The defendant then appears before a judge and tenders his plea of guilty or nolo contendere.

(iii) A colloquy must include the following:

- Does the defendant understand the nature of the charges to which he or she is pleading guilty?
- Is there a factual basis for the plea?
- Does the defendant understand that he/she has the right to a trial by jury?
- Does the defendant understand that he/she is presumed innocent until found guilty?
- Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
- (In cases where a plea negotiation exists) Is the defendant aware that the judge is not bound by the terms of the plea agreement tendered unless the judge accepts such agreement? Pa.R.Crim.P. 590 and Comment.

- Example guilty plea colloquy

- Prosecutor: (Speaks to both the court and the defendant) The defendant is present in court today with his/her counsel and has indicated he/she wishes to plead guilty to the crime(s) charged in the information, is that correct?
- Defendant: Yes
- Prosecutor: Are you aware of the maximum possible penalty for the crime(s) charged?
- Defendant: Yes
- Prosecutor: Do you read, write, speak and understand the English language (if no, an interpreter may be used)?
- Defendant: Yes
- Prosecutor: How far did you go in school?
- Defendant: Graduated high school (for example)
- Prosecutor: Are you presently under the influence of any drug or alcohol?
- Defendant: No
- Prosecutor: Do you understand by pleading guilty you are giving up certain constitutional rights, among them: the right to a jury trial or a judge trial, the right to testify on behalf of yourself, the right to call your own witnesses, the right to cross-examine Commonwealth witnesses? You would be presumed innocent and the Commonwealth would have the burden of proving you guilty beyond a reasonable doubt of each element of each and every crime(s) charged in the information? You would not be determined to be guilty unless and until a jury of twelve (12) members of the county community selected at random would determine you to be guilty. Their verdict of either "guilty" or "not guilty" would have to be unanimous. This means all twelve would have to agree.
- Defendant: Yes, I understand.
- Prosecutor: Do you understand that by pleading guilty to the charge(s) that you are severely limiting your appeal rights to three areas: (1) the validity of your plea, it must be knowingly, voluntarily and intelligently entered; (2) the jurisdiction of the court is proper; and (3) the legality of the sentence imposed by the court.

- Defendant: Yes
- Prosecutor: Are you satisfied with the representation of your counsel?
- Defendant: Yes

- Prosecutor: (Will go over the facts of the case in a brief form) Do you understand the facts that have been alleged?
- Defendant: Yes
- Prosecutor: (hypothetically) As to the crime of Simple Assault, that you did knowingly, voluntarily, or recklessly cause bodily injury to your wife by striking her several times with a closed fist, how do you plead?
- Defendant: Guilty
- Prosecutor: (To the court) Will the court accept this plea?
- Court: Yes.

2 Sentencing- (This will be covered in detail in "POST-TRIAL") A defendant may then be sentenced by the judge. Or, a judge may wish to "defer sentencing" until a later date. ("Deferring" means to put off until a later time). The victim need not be present for sentencing unless she wishes to be.

A. Victim impact testimony- At the time of sentencing, the court may wish to consider the impact that the crime has had upon the victim and any other related parties. The sentencing court must consider the victim impact testimony offered by the victim of a crime. 42 Pa.C.S. §9738.

3. "Not guilty" entered at formal arraignment.

A. A trial date is set at formal arraignment

(1) Timing- Trial will usually be set to occur within 1 to 2 months of formal arraignment.

(2) Trial does not always occur on the date set at a formal arraignment due to disposition of pre-trial motions, continuances, etc.

B. Investigation

(1) Continued investigation

(a) In domestic violence cases- Prompt reporting of any new contacts.

(b) All criminal cases- Prompt reporting of new witnesses with information of the past or present actions of the defendant.

(c) Other witnesses- The identification of any and all potential witnesses is of the utmost importance. New facts may be developed through additional witnesses not initially interviewed at the scene or shortly after the incident occurred.

(d) Other facts- Any new evidence (tangible or intangible) should be turned over to police as soon as it is found or made known to exist.

(e) Defendant's admissions- Any statements, confessions, or admissions made by a defendant are potential evidence and should be treated as highly valuable evidence.

(2) Pre-Trial Police Procedures- Included in the police investigation of a crime are also several types of police procedures.

(a) Defendant confession or statement- The confession or a voluntary statement that implicates a defendant in a crime may be given to any party, including witnesses or the police, any time after the commission of a crime.

(3) Pre-Trial Prosecutor Procedures

(a) Preparation of case for trial

(i) Witness subpoenas- The name and address of each witness is crucial. The prosecutor must send each witness a subpoena commanding their appearance in court.

(ii) Witness interviews- The interview and preparation of every witness is crucial. Witnesses must be made aware of the reason they are being called to testify in order to properly develop their testimony.

(iii) Exhibits- Photos, sketches, diagrams, and confessions among other items are valuable to aid a jury in determining and understanding the facts of each case.

(iv) Jury instructions- The prosecutor must establish the relevant law of the case. A judge will read a standard set of jury instructions to a jury prior to their deliberations. Any special instructions regarding unique factual or legal points must also be reviewed by the prosecutor. The prosecutor must actually formulate their own set of proposed instructions to give to the judge. A review of the relevant law will help a prosecutor prepare their case. The Judge will probably rely on "Standard Jury Instructions," which contains the basic jury instructions for most cases. Any new law or arcane legal precepts should be presented by counsel with statutory or case authority.

(v) Prepare cross-examination- Aside from the Commonwealth's witnesses, defense witnesses may be called to testify against the Commonwealth. The prosecutor must plan questions to deal with their testimony.

C. Discovery

(1) Occurs within 14 days of Formal Arraignment-

(a) Pre-trial discovery. Pa.R.Crim.P. 573. The law requires that a prosecutor disclose the following items to a criminal defendant:

(i) Any evidence favorable to the accused which is material either to guilt or punishment, and which is within the possession or control of the attorney for the Commonwealth (district attorney);

(ii) Any written confession or inculpatory (means it tends to establish a crime occurred) statement, or the substance of any

oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made;

(iii) The circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(iv) Any results or reports of any scientific tests, expert opinions, and written or recorded reports of polygraph examinations of the defendant (polygraph results are generally not admissible evidence in court proceedings);

(v) Any tangible objects, including documents, photographs, fingerprints, or other objects;

(vi) The transcript and recording of any electronic surveillance.

(b) The defendant must provide the following items to the Commonwealth:

(i) Notice of an alibi defense. Pa.R.Crim.P. 576 (effective Aug. 1, 2006).

(ii) Notice of insanity defense or mental infirmity. Pa.R.Crim.P. 568 (effective Aug. 1, 2006).

D. Omnibus Pre-trial motions

(1) Pre-trial motions are not mandatory, but may be filed by the Commonwealth or the defendant. All such motions must be filed within thirty (30) days following arraignment unless opportunity to do so did not exist. Pa.R.Crim.P. 579. Examples of motions included in the Omnibus:

(a) Motion to Suppress Evidence. Evidence may be "suppressed" or declared by a court of common pleas to be unusable by the Commonwealth in its case-in-chief because of some type of unconstitutional act or illegal behavior on the part of the police, prosecutor, or other investigator for the state. Pa.R.Crim.P. 578, 581.

(b) Continuance. A request for a continuance may be made by either the defendant or the Commonwealth.

(i) Content of motion- The content of a motion for continuance will often times be controlled by local county rules of court. Such rules may include that the motion contain the following:

(1) The date the criminal complaint was filed;

(2) The date the defendant was formally arraigned;

(3) The date that the defendant was first scheduled for trial;

(4) The number of prior continuances granted;

(5) The reason for the instant request for a continuance;

(6) The concurrence or objection by opposing counsel.

(c) Joinder. Offenses charged in separate informations may be tried together and co-defendants charged in separate informations may be tried together if the requirements of Pa.R.Crim.P. 582 are present.

(d) Severence. A court may order separate trials of defendants or offenses. Pa.R.Crim.P. 583

(e) Nol Prosequi. The Court may order a nol pros upon motion of the attorney for the Commonwealth. Pa.R.Crim.P. 585.

(f) The Rules also provide for a mental health examination of a defendant in some cases. Pa.R.Crim.P. 569 (effective Aug. 1, 2006).

E. Accelerated Rehabilitative Disposition ("ARD")- ARD is a pretrial diversion or disposition program in which the district attorney agrees to suspend criminal prosecution for a set period of time. In exchange, the defendant must successfully participate in and complete a rehabilitation program. Although the program extends to all summaries and misdemeanors, the district attorney of each county retains discretion on the structuring of their respective county's program. The defendant may be ordered to pay restitution, court costs, and a fine and to perform community service. Generally, a defendant will only be able to receive consideration for an ARD program if the current offense is a first offense. Further, certain offenses, such as felonies, are not permitted into an ARD program. However, exceptions are always present from county to county. Pa.R.Crim.P. 300-318.

Once the defendant has completed the rehabilitative program, the court will order that the defendant's record of arrest is expunged. "Expungement" simply means that all information (complaint, criminal information, incident reports, etc.) are removed from the files of the police, prosecutor and clerk of courts. There will be no trace or indication that such information ever existed. However, a district attorney or clerk of courts may keep a separate record of the charge and the successful ARD disposition for statistical reasons. Pa.R.Crim.P. 319, 320.

(1) Expungement- Once the defendant has completed the rehabilitative program, the court will order that the defendant's record of arrest is expunged.

F. Plea Negotiations- 42 Pa.C.S. §8932

Plea Negotiations or "Plea Bargaining"- This is an everyday facet of the criminal justice system.

(1) Goals of the Commonwealth in Plea Negotiations-

(a) Protect society from future acts of violence by punishing and rehabilitating the defendant.

(b) Strengthen community awareness of crimes by punishing the defendant. Societal retribution or the demand that society has for justice is a strong prosecutorial consideration.

(c) Not simply a method of reducing a court docket or a prosecutor's caseload.

(2) Prosecutor considerations

(a) Is the evidence sufficient to prove the crime(s) charged?

(b) Is the victim/witness behind the prosecution?

(c) What is the strength or validity of the defense?

(d) Other legal considerations-defense case.

(e) Victim agreement

(f) Police agreement

(g) Criminal history of the defendant
(h) Prior record
(i) Circumstances of the offense

§11.213. Responsibilities of prosecutor's office

(a) Forms. - The prosecutor's office shall provide the victim of a personal injury crime with all forms developed pursuant to sections 214 and 215.

(b) Pleading. - In a personal injury crime, burglary or violations of 75 Pa.C.S. §3731 (relating to driving under the influence of alcohol or controlled substance), the prosecutor's office shall provide notice of the opportunity to submit prior comment on the potential reduction or dropping of any charge or changing of a plea if the victim so requests.

(c) Sentencing. - The prosecutor's office shall provide notice of the opportunity to offer prior comment on the sentencing of a defendant. The prior comment includes the submission of a written victim-impact statement. The prosecutor's office shall assist a victim who requests assistance to prepare this comment.

(d) Release. - In a personal injury crime, the prosecutor's office shall provide notice of the opportunity to submit input into State correctional release decisions, to receive notice of any release of an offender from a State or local correctional facility and to receive notice of the commitment to a mental health institution from a State or local correctional institution.

(e) Disposition. - In a personal injury crime, if the prosecutor's office has advanced notice of dispositional proceeding, the prosecutor shall make reasonable efforts to notify a victim who has requested notice of the time and place of the proceeding.

(f) Notice. - If the victim has so requested, the prosecutor's office shall provide notice of the disposition and sentence of the defendant, including any sentence modifications. In a personal injury crime, if the victim has so requested, the prosecutor's office shall make reasonable efforts to notify the victim as soon as possible when the defendant is released from incarceration at sentencing.

(g) Assistance. - The prosecutor's office shall provide assistance to the victim in the preparation of, submission of and follow-up on financial assistance claims filed with the bureau.

1998, Nov. 24, P.L. 882, No. 111,§, imd. effective.

Basic bill of rights for victims- Title 18 P.S. §11.201

Victims of crime have the following rights:

(1) To receive basic information concerning the services available for victims of crime.

(2) To be notified of certain significant actions and proceedings within the criminal justice system pertaining to their case.
(3) To be accompanied at all public criminal proceedings by a family member, a victim advocate or another person.
(4) In cases involving personal injury crimes, burglary or violations of 75 Pa.C.S. §3731 (relating to driving under influence of alcohol or controlled substance) which involve bodily injury, to submit prior comment to the prosecutor's office on the potential reduction or dropping of any charge or changing of a plea.
(5) To have opportunity to offer prior comment on the sentencing of a defendant to include the submission of a written victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family and to have such comment considered by the judge when determining the defendant's sentence.
(6) To be restored, to the extent possible, to the precrime economic status through the provision of restitution compensation and the expeditious return of property which is seized as evidence in the case when in the judgment of the prosecutor, the evidence is no longer needed for prosecution of the case.
(7) In personal injury crimes where the offender is sentenced to a State correctional facility, to be given the opportunity to provide prior comment on and to receive State postsentencing release decisions, including work release, furlough, parole, pardon or community treatment center placement, and provided immediate notice of an escape of the offender.
(8) In personal injury crimes where the offender is sentenced to a local correctional facility, to receive notice of the date of the release of the offender, including work release, furlough, parole or community treatment center placement; and be provided with immediate notice of an escape of the offender.
(9) If the offender is subject to an order under 23 Pa.C.S. Ch. 61 (relating to protection from abuse) and is committed to a local correctional facility for a violation of the order or for a personal injury crime against a victim protected by the order, to receive immediate notice of the release of the offender on bail.
(10) To receive notice if an offender is committed to a mental health facility from a State correctional institution and notice of the discharge, transfer or escape of the offender from the mental health facility.
(11) To have assistance in the preparation of, submission of and follow-up on financial assistance claims to the bureau.

Responsibility of victims of crime under basic bill of rights- 18 P.S. §11.211

A victim shall provide a valid address and telephone number and any other required information to all agencies responsible for providing information and notice to the victim. The victim shall be responsible for providing timely notice of any changes in the status of the information. The information provided shall not be disclosed to any person other than a law enforcement agency, corrections agency or prosecutor's office without the prior written consent of the victim.

1998, Nov. 24, P.L. 882, No. 111 §211, imd. Effective

F. Nolle prosequi or settlement- 42 Pa.C.S. §§8932, 8933

(1) Court Approval required- Prior to the disposition of a plea negotiation or a Commonwealth's request for a nolle prosequi, the Commonwealth must obtain court approval. The court will determine whether the disposition is appropriate in its discretion. The court will review many of the same factors previously reviewed by the prosecutor. There are two general reasons why a prosecutor may seek to discontinue the prosecution through the filing of a nolle prosequi. These are as follows:

(a) Insufficient evidence- The prosecutor feels in his/her independent considerations of the law and the facts that there is not enough evidence to prove its case beyond a reasonable doubt. These reasons are subject to judicial review.

(b) Public Policy considerations- The prosecutor may seek to discontinue prosecution based upon an endless array of public policy concerns. These concerns are not subject to judicial review.

(c) If the Judge orders a nol pros of a case in which summary offenses were included, the Judge must dispose of the summary offenses and may not remand them to the Magisterial District Judge. Pa.R.Crim.P. 585, 589.

TRIAL

1. Types of trials

A. Non-jury

(1) Definition- A "non-jury" trial may also be referred to as a "waiver trial" or a "bench trial." The trial procedures, burden of proof and law is identical to a jury trial. With one distinct difference, however. There is no jury, just a judge.

(2) Recent amendment to the Constitution- The Commonwealth had no right to a jury trial prior to December of 1998. The defendant had the only absolute right to a jury trial for any offense, the maximum punishment for which exceeds 6 months. However, the Pennsylvania Legislature amended the PA Constitution to provide for a Commonwealth's right to a jury trial in criminal cases. Article I, Section 6 now reads as follows:

> Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. Furthermore, in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused. (emphasis added to newly enacted portion).

This Constitutional amendment was codified in Pa.R.Crim.P. 620.

(a) Waiver trial- A non-jury trial is sometimes referred to as a "waiver trial" because the defendant or the Commonwealth may waive their right to a jury trial.

(b) Defendant waiver-

(i) Written

(ii) Witnesses- The judge and both the attorney for the Commonwealth and the attorney for the defendant must witness the signing.

(iii) Knowing and intelligent- A defendant must be made aware of their right to a jury trial. Pa.R.Crim.P. 620,621.

B. Jury Trial

(1) Definition- A jury of 12 persons is impaneled to hear the facts of the case, deliberate and render a unanimous verdict.

(2) Pre-trial Procedure- "Jury Selection"

(a) Impaneling a jury- Depending sometimes upon whether the crimes involved are misdemeanors or felonies, a prospective panel of 30-35 potential jurors will be called before a court for a procedure known as "voir dire." Potential jurors are summoned to appear by the trial court of each county. They are picked at random from a pool of all persons

registered to vote and to drive in Pennsylvania. Anyone who is 18 and has registered to vote may be called. Further, any person who is 18 and licensed to drive in Pennsylvania may be called. Jurors may only be called if they are residents of the county in which they have been called as jurors. Other restrictions on service are as follows:

(i) Persons with prior convictions for crimes punishable by a maximum penalty of more than 1 year in jail may not be jurors (this means if they have a conviction for a misdemeanor 2 or higher, they may not sit as a juror.)

(ii) Persons who are unable to read, write, speak and understand English cannot sit as jurors.

(iii) Anyone incapable, by reason of mental or physical infirmity, to render efficient jury service may not serve. 42 Pa.C.S.A. Section 4502.

(iv) Each side has the benefit of reviewing "Juror Qualification Forms" which provide background information on potential jurors. Pa.R.Crim.P. 630, 632

(b) Voir dire. "To see; to speak." The pre-trial opportunity for both sides to address the jury panel to examine bias, prejudice or pre-conceptions about the case. In capital cases, individual voir dire must be used. Pa.R.Crim.P. 631(E).

(i) Sworn in as jurors before questions asked.

"You do solemnly swear by Almighty God (or do declare and affirm) that you will answer truthfully all questions that may be put to you concerning your qualifications for service as a juror."

(ii) Commonwealth first. The prosecutor will ask several questions of potential jurors regarding their qualifications. These questions usually include whether or not they know the defendant; whether they have ever been arrested for a crime; whether they have ever served on jury duty before.

(iii) Defense second. The defendant or his attorney will then pose questions. These questions usually include whether anyone knows the prosecutor; whether anyone believes an officer over a defendant; and whether anyone has ever been the victim of a crime.

(iv) Challenges for cause- There is no limit to the number of strikes for cause that either side may make.

(v) Peremptory challenges- Any reason whatsoever, except based upon the race, ethnic origin, or gender of the juror.
Capital Felony – 20 challenges
Felony case- 7 challenges
Misdemeanor case- 5 challenges
Additional provisions apply in trials involving joint defendants. Pa.R.Crim.P. 634.

(c) Seating of the jury.
    (i) Alternate jurors- They are usually 2 additional jurors that are selected based upon the trial court's discretion based on whether or not to have alternates.
(d) Swearing in the jury

"You do solemnly swear by Almighty God [and those of you who affirm do declare and affirm] that you will well and truly try the issue joined between the Commonwealth and the defendant(s), and a true verdict render according to the evidence."

(e) In the discretion of the trial judge, jurors may be sequestered. Pa.R.Crim.P. 642.
(f) At any time after a jury has been initially sworn and before verdict, upon agreement of both counsel, the trial may proceed to verdict with fewer than 12 but no fewer than 6 jurors. Pa.R.Crim.P. 641.
(g) In the discretion of the trial judge, jurors may be permitted a "view" of locations relevant to the trial. Pa.R.Crim.P. 643.
(h) Note taking by jurors, previously forbidden, is now permitted. Pa.R.Crim.P. 644 provides that jurors shall be permitted to take notes when the trial is expected to last more than 2 days, and may, within the discretion of the trial judge, be permitted to take notes when the trial is expected to last two days or less. Additional restrictions appear in the Rule.

(3) Trial Procedure
(a) Opening statements- Each side may present an opening statement. This is a recitation of the law and the facts that each side will expect to prove in its case. The Commonwealth always proceeds first in openings.
(b) Commonwealth case-in-chief- The case-in-chief is the evidence that is presented by the Commonwealth to show that the facts in existence meet the material elements of the crime(s) charged. It is important to note that as part of the Commonwealth's case-in-chief, any fact that increases the maximum penalty for a crime must be (1) charged in the information; and (2) submitted to a jury; and (3) proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).
    (i) Calling of witnesses- The Commonwealth will call its witnesses necessary to put evidence into the record.
        *Witness qualifications- All witnesses are presumed to be competent. Every witness must possess the following requirements in order to be "competent."
        1. Appreciate and understand that they must tell the truth.
        2. Perception- Each witness must have had the ability to perceive (see, touch, smell, feel) the events or

actions that may make up the elements of a crime when the events were occurring.

3. Memory of the events in question- Every witness must have an independent recollection of the events.
4. Communicate the facts- Each witness must be able to communicate what they saw, heard, felt, smelled, or perceived in words. Pa.R.E. 601.
5. Children's Testimony – Recent amendments to the state constitution embodied in 42 Pa.C.S.A. §5984.1 and §5985 allow presentation of a child's testimony at trial by way of prior recording that "accurately captures and preserves the visual images, oral communications and other information presented during such testimony," or by a contemporaneous alternative method. These provisions allow a child's testimony to be taken outside the physically intimidating presence of the defendant while protecting the defendant's rights to confrontation and cross-examination. The statute also sets forth the determinations the trial judge must make before authorizing either method.

(ii) Introduction of evidence.

(1) Direct and Circumstantial evidence- "Direct evidence" is that type of evidence (testimony, objects, pictures, confessions) that establish an element of the crime based upon the contemporaneous (occurs at the same time) observation or perception of a physical event. For example, "I saw the defendant hit the victim twice in the shoulder before reaching for the tennis racket." This is testimony from a witness that establishes what the witness saw or perceived. This is direct evidence of a material element of a crime. It establishes that an action occurred. Another example may be that the defendant confessed to police that he "wanted to make the victim pay for coming home late." This is direct evidence of the defendant's intent to cause harm. The defendant told the police this is what I was thinking when I committed the action.

"Circumstantial evidence" is that evidence which tends to establish a material element or fact through a reasonable inference or deduction. A common sense approach must be used to deduce what occurred. For example, the defendant did not confess he beat his spouse with a tennis racket, however, at the time of arrest he was clutching the bloody racket yelling "game,

set and match!" This is evidence that when viewed with a common sense approach would establish that the defendant was using the racket to commit the assault. The often used example is that it rained last night. You did not see it rain while you slept, however, when you awoke, the sidewalk, house, and cars were all wet. This is circumstantial evidence that it rained.

(2) Tangible objects- Tangible objects are referred to as "physical evidence." Physical evidence may include the following:

- Crime scene objects
- Demonstrative evidence- Demonstrative evidence "demonstrates" a particular fact to the jury. A listing of times and events on a chart may be considered demonstrative evidence. This type of evidence is not a necessary part of the crime like a gun or knife. Rather, it aids the jury in understanding the facts of the case.
- Scientific evidence- This is evidence such as DNA, ballistics reports, fingerprint analysis, or laboratory reports that are used by experts in identifying and relating portions of the facts to the defendant. An expert witness is any person with knowledge beyond that of a layperson that is helpful in assisting the jury regarding a particular fact.

(3) Testimony. All testimony is evidence.

(c) Cross-examination- Once a witness has testified for the Commonwealth, also called direct examination, the defense will be permitted to cross-examine.

(d) Commonwealth rests its case.

(e) Defense case-in-chief- The defense does not have to produce any witnesses or evidence. It is the Commonwealth's burden to prove the defendant guilty. A defendant is not required to produce any evidence or even testify.

- Components-(1) refute the Commonwealth's proof or (2) prove an affirmative defense.

(f) Cross-examination- The district attorney will now ask questions of the defense witnesses.

(g) Defense rests- The defense will rest after it has presented the evidence it wishes to present. The defense may again make a motion for judgment of acquittal.

(h) Rebuttal- After both the Commonwealth and the Defense have completed each of their respective cases-in-chief, either side will now

be able to call witnesses or put in evidence "in rebuttal" to what occurred during each side's case.

- Rebuttal evidence or testimony may only be admitted to refute what was done or said by the other side during its case-in-chief.

(i) Surrebuttal- Limited to refute evidence that was produced during the rebuttal. This is the rebuttal of the rebuttal.

(j) Closing arguments- The Defense must proceed first (like all things, it too may be waived by the defense). The Commonwealth is then permitted to close last.

- The defense may argue the facts and the law.
- Argument is limited to the facts that are in evidence and reasonable inferences that may be derived therefrom.

(k) The Charge of the Court- The court will then "charge the jury." A court will instruct the jurors on the applicable law that they are to use in reaching a verdict.

- The elements of the crime(s) charged
- The assessment of credibility of witnesses
- The right of the defendant not to testify- (Only in cases where the defendant has not testified at trial).
- Beyond a reasonable doubt- A judge will instruct a jury that the Commonwealth bears the burden of proving every element of every offense charged in the information "beyond a reasonable doubt."

(l) Before allowing the jury to deliberate, the trial judge will decide what materials, if any, the jury may take to the deliberation room. Items which may not be taken include a transcript of any trial testimony, a copy of the information, any written or recorded confession of the defendant; written jury instructions. Pa.R.Crim.P. 646

(m) The verdict- The verdict is the decision of the jury or the trial judge, in cases of a bench or "waiver trial." Pa.R.Crim.P. 648. In either type of trial, the fact finder, whether trial judge in a bench trial or jury, must consider all charges included in the information, including all summary offenses. Pa.R.Crim.P. 648.

- Not guilty"- This means that the defendant has been "acquitted."
- "Guilty" – The fact finder determines beyond a reasonable doubt that the defendant committed one or more of the crimes charged.
- "Hung jury"- When a jury is "hung" it means that not all 12 can agree as to the existence of a material issue of fact, an element of a crime exists, or that the crime itself was proven as a whole.
- Mistrial- A mistrial is declared in cases of a "hung jury" when the judge determines that the jury will never be able to return a verdict.
- Either party may request that the jury be polled before the verdict is recorded. Pa.R.Crim.P. 648(F).

C. Death Penalty Cases- "Bifurcated Trial"

(1) Special Rules. Pa.R.Crim.P. 800-811 apply to death penalty cases.

(2) Guilt/Innocence phase- In order to proceed to a death penalty hearing, the prosecutor must first prove that the defendant committed the crime of first degree murder beyond a reasonable doubt. Once this objective is attained, the trial will then proceed into a death penalty hearing. The trial process begins anew. However, the objective now is to determine whether the death penalty will be imposed as a sentence.

(3) Pa.R.Crim.P. 801 imposes special experience and education requirements on defense counsel who represent defendants where a Notice of Aggravating Circumstances has been filed. If the district attorney or the Court is not acquainted with defense counsel in such a case, counsel's experience and education background should be placed on the record.

(4) Procedure-

(a) At or before the time for arraignment, the attorney for the Commonwealth must file and serve on the defendant a Notice of Aggravating Circumstances which the Commonwealth intends to present at sentencing. Pa.R.Crim.P. 802.

(b) If the defendant enters a guilty plea to the charge of murder generally, the judge shall determine the degree of guilt, and, if the determination is murder of the first degree, the case proceeds to the sentencing phase. Pa.R.Crim.P. 803.

(c) The first phase of the bifurcated trial is the guilty/not guilty determination. Trial, either before a judge or a jury follows the same basic format as other trials. Following either the entry of a plea of guilty and determination by a judge that the crime is murder of the first degree, or following a jury verdict of murder in the first degree, the case proceeds as set out below.

(5) Death Penalty

(a) Burdens of proof- The Commonwealth must prove either before a jury or, if a jury is waived, before a judge (Pa.R.Crim.P. 807), that one or more of several aggravating factors (listed previously in "Formal Arraignment") exist beyond a reasonable doubt. The defendant will attempt to prove that one or more mitigating circumstances exist by a preponderance of the evidence. Pursuant to Pa.R.Crim.P. 806, the last closing argument in the sentencing phase belongs to the defendant.

(b) One or more aggravating circumstances- If one or more aggravating factors (See Page 44, supra.) are proven to exist beyond a reasonable doubt and there are no mitigating factors, the sentence to be imposed is death. If, however, there are one or more aggravating factors and one or more mitigating factors, the jury must weigh and balance the two components in reaching a verdict. If there are no aggravating factors proven, the sentence imposed must be life imprisonment.

(i) Mitigating circumstances- The mitigating circumstances established by the Pennsylvania Legislature are as follows:

- The defendant has no significant history of prior criminal convictions;
- The defendant was under the influence of an extreme mental or emotional disturbance;
- The capacity of the defendant to appreciate the criminality of his conduct was substantially impaired;
- The age of the defendant;
- The defendant acted under extreme duress;
- The victim was a participant in the defendant's homicidal conduct or consented to the conduct;
- The defendant's participation in the homicidal conduct was relatively minor;
- Any other factors which are mitigating.

(c) In the event the verdict is murder in the first degree, once a sentence has been returned, the Judge may immediately impose that sentence. Pa.R.Crim.P. 810.

POST TRIAL

1. Sentencing- Must be imposed immediately following trial on a summary charge and must ordinarily be imposed within 90 days of conviction or the entry of a guilty plea or a plea of nolo contendere to a misdemeanor or felony. Pa.R.Crim.P. 704.

A. Factors that determine a sentence.

(1) Legal maximum- A sentencing court may not exceed or go higher than the maximum allowable sentences established by the Pennsylvania Legislature. 18 Pa.C.S. §§1103-04.

(2) The guideline recommendation- The sentencing court must consider the guidelines drafted by the Pennsylvania Commission on Sentencing and enacted by the Pennsylvania Legislature. The sentencing court must consider the guidelines drafted by the Pennsylvania Commission on Sentencing and enacted by the Pennsylvania Legislature. The Pennsylvania Commission on Sentencing is an agency of the General Assembly of Pennsylvania that consists of 11 persons who formulate a set of standard guidelines for judges to use in every criminal case in Pennsylvania. These 11 persons consist of two members of the PA House of Representatives, two PA Senators, four judges, a district attorney, a defense attorney, and a professor of law or a criminologist. They each serve on the Commission for a two year term.

The current set of sentencing guidelines (5th ed.) was made effective as of June 13, 1997. This means that for any offense committed on or after the effective date, the 5th edition to the guidelines will control the court's consideration. The first set of guidelines that may be applied to a crime became effective April 25, 1988. There have been 5 amendments to the guidelines since then. If a crime occurs before the effective date of the current guidelines, then the set of guidelines effective on the date the crime occurred will control.

(a) Purpose of guidelines- Uniformity. 42 Pa.C.S.A §2151-52; 204 Pa.Code 303.1. The purpose of the guidelines is to provide the judges of Pennsylvania with a way of sentencing defendants with uniformity. All judges, regardless of their county, will have a standard way of imposing sentences. This will allow Pennsylvania to be fairly uniform in all sentences given to criminals.

(b) How they work:

(i) Calculate the "Offense Gravity Score" ("OGS")- The Offense Gravity Score (sometimes simply called the "OGS") is a number assigned to a particular offense based upon its severity. The range of "OGS's" goes from one (1), the lowest in the range, to fourteen (14), the highest. The "OGS" for every crime in Pennsylvania is either assigned a specific number or given a number generally. These numbers are contained in a chart

listed at 204 Pa.Code Section 303.15 or 42 Pa.C.S.A. Section 9721.

(ii) Calculate the Prior Record Score ("PRS")- The Prior Record Score is often called the "PRS." This is a number assigned by the Commission on Sentencing between one (1) and five (5). It is based upon the total number of prior convictions or adjudications (a juvenile conviction) a defendant has at the time the offense occurred. Prior convictions include misdemeanor or felony offenses for which the defendant has been convicted prior to the date the current offense occurred. Convictions may include: jury verdicts, guilty pleas, nolo contendre pleas, and certain juvenile adjudications. More points are given to a defendant with more prior convictions. The seriousness and amount of the prior convictions determines the total "PRS." See 204 Pa.Code Section 303.4-303.7; Cited in 42 Pa.C.S.A. Section 9721.

(iii) Compute the mitigated, standard and aggravated range sentence. Now that the "PRS" and the "OGS" have been computed, we are ready to determine the standard minimum range sentence. For simplicity, the Commission has made a chart or "matrix" that is used to compute the standard minimum range sentence. 204 Pa.Code 303.16; Cited in 42 Pa.C.S.A. Section 9721.

The "PRS" is noted by a list of numbers from one (1) to five (5) across the top of the matrix chart. The "PRS" is noted on the horizontal line by the title "Prior Record Score." To calculate the standard, minimum, and aggravated range sentences, locate the number computed for a defendant's Prior Record Score ("PRS").

The "OGS" is noted by a list of numbers from one (1) to fourteen (14) located along the side of the matrix chart. The "OGS" is noted on the vertical line by the title "OGS" at the top left hand corner of the matrix chart. To calculate the standard, mitigated and aggravated range sentences, locate the number computed for the defendant's Offense Gravity Score ("OGS").

Computing the "standard range sentence"-

As noted previously, the standard range is the range of possible minimum sentences that the judge may impose upon a defendant. The maximum sentence is prescribed by statute, such as 2 years for a misdemeanor 2nd degree.

Once both numbers, the "PRS" and the "OGS" have been found, simply follow the two points to where they intersect or meet on the chart. The point of intersect is the block that contains the standard range sentence.

A judge may deviate from the suggested "standard range sentence" on the basis of a set of guidelines provided. A list of "aggravated and mitigated" ranges is provided. Further, a judge

may even go beyond the "aggravated and mitigated" ranges, however, a contemporaneous written statement is required to be placed on the "Guideline Sentence Form" in order to do this.

A Guideline Sentence Form is a form used by district attorneys and judges to compute and record the proposed standard, mitigated, and aggravated range sentences. It will also include notations regarding the identity of the defendant (full name, date of birth, social security number, race, and sex), the Prior Record Score of the defendant based upon certain crimes for which they have previously been convicted, the docket number, an Offense Tracking Number or "OTN," and the appropriate Offense Gravity Score for each crime or crimes charged.

E.g.: Simple Assault, 18 Pa.C.S. Section 2701(a)(1) has an "OGS" of three (3). If a defendant has no Prior Record Score, then the "PRS" is zero (0). An "OGS" of 3 and a "PRS" of 0 have an intersect point, the block where they intersect lists a standard range of "RS-1." The standard range minimum sentence that this defendant may receive is between probation ("RS" is defined at the bottom of the chart as "restorative sanctions," which may include a probationary sentence) and one (1) month in jail. The maximum sentence is up to two (2) years for the crime of Simple Assault (Misdemeanor 2nd degree).

Computing a "mitigated range sentence."

A mitigated range sentence is a sentence that departs from the standard range sentence by a sentence of less time than the standard range sentence by a specified period of months. A mitigating reason is defined only as "any factor which is legally cognizable…except a factor which is included in determining the Offense Gravity Score, Prior Record Score, or enhancement." 204 Pa.Code Section 303.13(b). The mitigating reasons for a sentence are not listed, but are discretionary with each judge.

Some examples of mitigating circumstances may be as follows:

Contrition (Is the defendant sincerely remorseful for his crime?); treatment efforts undertaken (Has the defendant voluntarily enrolled in an anger management program to help solve his own problem?); possibility of successful rehabilitation (Has the defendant completed a treatment program for his particular issue, if so what do the treatment counselors believe the defendant has or can be rehabilitated?); pre-payment of a victim's medical bills (Has the defendant made an up-front contribution to the victim's medical costs?); family concerns (Is the defendant otherwise a good parent that has a good job and supports a family?)

A judge's reasons for imposing a mitigated range sentence should be stated in open court and placed on the Guideline Sentence Form. Every intersection for the standard range sentence has a row of numbers listed vertically in the far right of the Basic Sentencing Matrix. This final row of vertical numbers, titled "AGG/MIT", are used to compute both the aggravated and the mitigated range sentences. These numbers are listed as "+/-3", "+/-6", "+/-12." To compute the mitigated range sentence, attorneys and judges will reduce the lowest number in the mitigated range sentence by the corresponding negative number contained in "AGG/MIT" row directly in line with the standard range sentence intersect point.

E.g.: For the crime of Simple Assault with an "OGS" of three (3) and a "PRS" of zero (0), we said that the standard range sentence would be "RS-1." The lowest number in this standard range is "RS" or restorative sanctions. Because this is the lowest number any sentence could possibly have, the mitigated range cannot be any less than "RS."

E.g.: For the crime of Aggravated Assault (causes serious bodily injury) we had previously determined that the "OGS" was eleven (11). If the "PRS" is zero (0) and the "OGS" is 11, the intersect point calls for a standard range sentence of "36-54" months. This means at a minimum, the judge should consider imposing a sentence of not less than 3 years (36 months) and up to a possible 20 years for the first degree felony of Aggravated Assault, 18 Pa.C.S. Section 2702(a)(1). The corresponding mitigated range sentence would be "24 months." This is determined by moving across from the intersect point to the last row labeled "AGG/MIT." In that box is contained the notation "+/-12." This means the lowest possible number in the standard range (36 months) will have "12" subtracted from it to arrive at a possible mitigated range sentence. The mitigated range is "24-36 months."

Computing the aggravated range sentence.

An "aggravated range sentence" is any sentence longer than the sentence recommended by the standard range of the guidelines by a specified period of months. Just like the mitigated range sentence, a judge may also consider imposing an "aggravated range sentence." Again, an "aggravating circumstance" is defined identically to that of a "mitigating circumstance" as "any factor which is legally cognizable…except a factor which is included in determining the Offense Gravity Score, Prior Record Score, or an enhancement." 204 Pa.Code Section 303.13(a). The reasons for an aggravated sentence should be stated by the judge in open court, as well as listed on the "Guideline Sentence Form."

Some examples of aggravating circumstances may be as follows:

Victim impact (The full effect that the crime has had on the life of the victim or those close to the victim will be a crucial consideration for a sentencing court; a victim or others close to the victim has a right to provide impact testimony at the time of sentencing), see Victim's Bill of Rights, 18 §11.201 P.S. 9.3(5); 180-9.7, cited below; see also Title 42 Pa.C.S.A. §9738 (judge's responsibility to allow victim to provide impact testimony or statement); lack of remorse or contrition (Does the defendant express any remorse for his actions, or is he completely indignant?); lack of acceptance (Has the defendant been convicted by a jury or pled guilty and still harbors the belief that he was "wrongly accused and convicted?") alcohol abuse (Is the current offense related to a long-standing problem of alcohol abuse that has gone unaddressed by the defendant?); lack of concern for social consequence (Do the attendant circumstances of the crime display the defendant's lack of societal concern?); repeat offender or recidivist (Has the defendant continued to repeat the same behavior over and over again?); moral depravity (Do the circumstances of the crime display moral depravity?); societal retribution (Do the guidelines properly address the need for societal retribution based upon all the attendant circumstances of the crime?); lack of societal responsibility (Does the commission of the crime reflect the defendant's lack of concern for others in the community or the welfare of others close to the defendant?). There are an infinite number of aggravating and mitigating circumstances, however, these are among the most common cited by judges for an upward departure from the standard range sentence.

It is important to note that a judge may not include or consider as an aggravating circumstance any fact which comprises an element of the offense or a reason for the "OGS." For example, an Aggravated Assault in which serious bodily injury is inflicted has an "OGS" of eleven (11). A judge may not note an aggravating circumstance as "the infliction of serious bodily injury to the victim." This is because the Sentencing Commission has included that consideration in its determination that this offense has an "OGS" of eleven (11). See 204 Pa.Code 303.13(a).

E.g.: The crime of Simple Assault ("OGS" of 3 and a "PRS" of 0) has a suggested standard range of "RS-1." The corresponding aggravated range is calculated by moving across the row from the standard range block to the "AGG/MIT" row. There, we find that a "+3" is suggested as a possible aggravated range. We add 3 months to the highest possible range in the

standard range (or add 1 + 3) and arrive at "4 months." Our aggravated range sentence is "1-4 months." This means a judge may recite aggravating reasons on the record and note them in the Guideline Sentence Form and impose a sentence of up to "4 months" at the minimum. The maximum sentence is up to 2 years for this 2nd degree misdemeanor.

E.g.: The crime of Aggravated Assault (causes serious bodily injury) ("OGS" of 11 and a "PRS" of 0) has a suggested standard range of 36-54 months as a suggested minimum sentence. The corresponding aggravated range sentence is computed by moving across the rows to the "AGG/MIT" column and finding a number of "+12." This is added to the highest number in the suggested standard range (or 54 + 12) to arrive at "66 months." The suggested aggravated range sentence is between "54-66 months." Again, this is the minimum aggravated sentence that a judge may impose. The maximum sentence is up to 20 years for this 1st degree felony. A judge could sentence the defendant to 54 months to 20 years, or 60 months to 20 years, or 66 months to 10 years. More will be discussed about minimum and maximum sentences below.

(iv) Deadly Weapon Enhancement- A "Deadly Weapon Enhancement" (abbreviated "DWE" by the guidelines) is an enhancement to the standard, mitigated and aggravated range sentences. If a deadly weapon, such as a gun, knife, club, or other item capable of inflicting death or serious bodily injury is used or possessed during the commission of an offense an additional factor may be calculated into the guidelines. This additional factor serves to lengthen the total sentencing structure. Unless the possession of a deadly weapon is an element of the statutory definition of a crime, the deadly weapon enhancement is added every time an offender possessed or used the weapon during the commission of a crime. For example, no deadly weapon enhancement would be added to crimes such as Simple Assault, 18 Pa.C.S §2701(a)(2) (simple assault involving the use of a deadly weapon), Aggravated Assault, 18 Pa.C.S. §2702(a)(4) (aggravated assault involving the use of a deadly weapon), and Possessing Instruments of a Crime, 18 Pa.C.S. §907. 204 Pa.Code Section 303.10.

There are two types of Deadly Weapon Enhancements: DWE/possessed and DWE/used. The possession or use of a deadly weapon will serve to enhance or lengthen the minimum and the maximum of the standard range sentence. The aggravated range sentence is also enhanced or lengthened accordingly. The use of a deadly weapon has the effect of increasing the standard range sentence by a minimum of six (6)

months. The possession of a deadly weapon during the crime has the effect of increasing the standard range sentence by a minimum of three (3) months.

Deadly Weapon Used Example:

For example, a defendant receiving a sentence for the use of a deadly weapon during the commission of a Simple Assault, 18 Pa.C.S. Section 2701, with a "PRS" of zero (0) and an "OGS" of three (3) has a standard range sentence of "RS-1" and an aggravated range of up to three (3) months in the minimum term possible. However, with the "DWE/Used" enhancement, the total standard range sentence is increased by "6-7" months and the aggravated/mitigated range is increased/decreased by "+/-3." This means that six (6) months is added to the "RS" portion of the sentence and seven (7) months is added to the "1" portion of the previous standard range. The new standard range becomes "6-8" months ("RS" + 6= 6; 1+7= 8). The new aggravated range sentence is "8-11" (8+3= 11). The mitigated range sentence is "3-6" months (6-3= 3).

Deadly Weapon Possessed Example:

For example, a defendant receiving a sentence for the possession of a deadly weapon during the commission of a Simple Assault, 18 Pa.C.S. Section 2701(a)(1), with a "PRS" of zero (0) and an "OGS" of three (3) has a standard range sentence of "RS-1" with "+/-3" for the aggravated and mitigated ranges. The DWE/Possessed Matrix adds "3-4" months to the standard range and "+/-3" to the aggravated/mitigated ranges. Therefore, the new standard range is "3-5 months" (RS or 0+3=3 and 1+4= 5). The new aggravated range is "5-8" (5+3= 8). The new mitigated range sentence is "RS-3" (3-3= 0 or "RS").

(3) Mandatory sentencing. Mandatory sentences are established by the Pennsylvania Legislature and not the Pennsylvania Commission on Sentencing.

(a) Selected crimes with a Mandatory Sentence:

(i) First Degree Murder- Either life imprisonment or death. 18 Pa.C.S. §1102; 42 Pa.C.S.A. §9711.

(ii) Second Degree Murder- Life imprisonment. 18 Pa.C.S. §1102

(iii) Crimes of violence committed with a visibly possessed firearm- 5 year minimum mandatory. 42 Pa.C.S.A. §9712.

Crimes of violence include:

3rd degree murder
voluntary manslaughter
aggravated assault (F1)
rape

kidnaping
burglary (home/person present)
robbery
robbery of motor vehicle
inchoate crime (solicitation, attempt, or conspiracy) of murder or any of the above listed offenses.

(iv) Third Degree Murder with a prior conviction for murder or voluntary manslaughter- Life imprisonment. 42 Pa.C.S.A. §9715.

(4) Minimum and Maximum Sentencing Requirements. When a judge sentences a defendant to "total confinement," meaning the defendant will spend part of his sentence in prison or in a place from which he is lawfully prohibited to remove himself, the judge must abide by a set of rules. The sentencing court must do the following:

(a) Specify the maximum sentence. The maximum sentence is limited legally by the Pennsylvania Legislature. The maximum sentence is set by the grading of the offense for which the defendant is convicted.

(b) Specify the minimum sentence. The court must impose a minimum sentence when sentencing a defendant to total confinement. In Pennsylvania, the minimum sentence imposed by a judge may not exceed one-half the maximum sentence imposed.

(c) "Time Served"- A judge must grant a defendant "time credit" for any time spent in incarceration prior to the imposition of sentence. Title 42 Pa.C.S.A §9760. "Time served" used in a sentence simply means that the judge has imposed a sentence of which jail time is a component and has released the defendant based upon their total amount of prior incarceration on the charge.

(d) "Immediate parole" The defendant is released from incarceration and is now subject to the parole conditions of the county parole office.

(e) Concurrent and Consecutive Sentences- A judge may sentence a defendant either "consecutively" to other sentences presently serving or "concurrently" to other sentences. The Judge must state when the sentence is to commence and whether the sentences are concurrent or consecutive. Pa.R.Crim.P. 705.

(i) Concurrent- This means that the defendant will serve two or more sentences at the same time.

(ii) Consecutive- This means that the defendant will serve two or more sentences at separate times.

(f) Merger- A defendant may not be sentenced twice for the same criminal conduct which arises from the same criminal episode.

(g) Work Release- A court may also grant "work release" to a prisoner as a part of his sentence. This is also known as "partial confinement."

(i) To seek employment;

(ii) To conduct business or to engage in other self-employment, including housekeeping and attending to the needs of the family;

(iii) To attend educational institution or participate in a course of vocational training;
(iv) To devote time to any other purpose approved by the court. 42 Pa.C.S.A. §9755

Responsibility of the Department of Corrections, local correctional facilities and board; "Victim's Bill of Rights": 18 P.S. §11.214:

Forms. - The department and the board shall develop standardized forms regarding victim notification. The form shall include the address where the form is to be sent. The department shall develop a standardized form which may be used by local correctional facilities. In the case of counties with the victim-witness coordinators, the local correctional facility shall perform its responsibilities under this section in cooperation with the county's victim-witness coordinator.

Notice. - If the department and board have received notice of a victim's desire to have input under section 201(7), the appropriate agency shall notify the victim sufficiently in advance of a pending release decision to extend an opportunity for prior comment. The local correctional facility's notice to the victim under this section 201(9) shall occur immediately.

Comment. - The victim's prior comment may be oral or written and shall be considered by the department or the board as to the advisability of release and any conditions of release which may be imposed.

Escape Notification. - If the department or local correctional facility has received notice of a victim's desire to receive notification regarding escape of the offender as provided for in section 201(8), the superintendent of the State correctional institution or warden of a local correctional facility shall immediately notify the victim of the escape.

Mental Health. - Where the department or local correctional facility has received notice of a victim's desire to receive notification as provided for in section 201(10), the superintendent of the State correctional institution or warden of the local correctional facility shall notify the victim of the commitment of the offender to a mental health facility and the location of the facility within 24 hours of the commitment.

Records. - Records maintained by the department, local correctional facility and the board pertaining to victims shall be kept separate. Current address, telephone number and any other personal information of the victim and family members shall be deemed confidential.

Release of offender. - The department, local correctional facility or the board shall notify the victim of the final decision rendered, the date of any release and relevant conditions imposed prior to the release of the offender.

1998, Nov. 24, P.L. 882, No. 111 §214, imd. Effective.

(5) Restitution- Restitution is a mandatory component of every sentence.
(a) Restitution according to the Crimes Code is a loss or decrease in value of any personal property as well as medical bills accrued as a result of treatment for the injuries sustained due to a defendant's conduct.

There is no limit to the total award. 18 Pa.C.S. Section 1106; 42 Pa.C.S.A . Section 9721(c).

(b) Restitution according to the Crime Victim's Compensation Board includes "out-of-pocket losses" as a result of a crime and "loss of earnings." Out-of-pocket losses means unreimbursed and unreimbursable expenses for medical care, nonmedical remedial care, psychological counseling, eyeglasses and dental devices, et al.- Loss of earnings, in addition to the obvious meaning, includes the loss of the cash equivalent of social security or pension benefits. The total award may not be less than $100.00 nor more than $35,000.00. Title 18 P.S. §§11.703 - 11.707

Restitution must be ordered by the judge at the time of sentencing in order to compensate the victims of crimes for losses suffered as a direct result from the commission of a crime by the defendant. In addition to victims, restitution may be ordered to compensate the Crime Victim's Compensation Board ("Compensation Board") (for an amount previously given to the victim or an intervenor), any other government agency that has provided reimbursement to the victim, and any insurance company that has provided reimbursement to the victim as a result of the defendant's criminal act.

The total award of restitution is not to be reduced by an amount paid to the victim of a crime by the Compensation Board. The award paid by the Compensation Board is not offset by the total restitution ordered at sentencing. Rather, the victim's claim for restitution is subrogated to the Compensation Board. In other words, the victim may only recover for the same loss once. Any restitution they are ordered to receive will be legally given to the Compensation Board when the Board has previously provided reimbursement to the victim so that the Board may recoup any amounts paid to the victim.

The defendant's ability to pay restitution is not a consideration for the court at the time of sentencing. Rather, the court may only consider the defendant's inability to pay restitution upon default. Additionally, an order of restitution is a part of a defendant's sentence. A sentence may generally be amended to include restitution or change the total amount of restitution payable within 30 days from the time of sentencing. The court of common pleas will lose jurisdiction to amend a sentence after the 30 day period, except by prior agreement of the Commonwealth and the defendant.

Pursuant to Act 84 of 1998, "restitution, reparation, fees, costs, fines and penalties" are to be collected by the county probation department or other agency designated by the county to collect such. A record of the account must also be maintained by the department or agency. A total amount which exceeds $1000.00 shall be transmitted by the clerk of courts to the county prothonotary's office for recording as a judgment against the defendant. Judgments less than $1000.00, however, may also be transmitted to the county prothonotary. Prisons are authorized to deduct "restitution and other court ordered obligations" from the prisoner's personal account. At least 50% of all money collected is to be applied to

restitution. Continued payment is required in order for a prisoner's parole or release from custody.

(6) Pre-Sentence Investigation ("PSI")- A pre-sentence investigation must be ordered to be conducted for any defendant that will be sentenced to one year or longer of incarceration. 42 Pa.C.S.A. §9756. A "PSI" may consist of the following:

(a) A summary of the circumstances attending the commission of the crime

(b) The report of any physician or psychiatrist appointed to assist the court in sentencing

(c) The criminal history of the defendant. This will include the following:

(i) The name, date, and sentence of any prior conviction

(ii) Any relevant facts of the prior history that are probative of the defendant's current conviction (e.g.: Have they been convicted of the same crime in the past?)

(d) An interview with the defendant by a pre-sentence investigator that is reduced to writing. The topics of such interview may include the following:

- Education
- Economic status
- Personal habits
- Family status and relationships
- Employment history
- Drug/Alcohol abuse history
- Remorse for crime
- Defendant's comment on the current conviction (if forthcoming)
- Defendant's comment on criminal history (if forthcoming)
- Steps taken for rehabilitation

(e) Defense attorney comment

(f) Victim impact statement- 42 Pa.C.S.A §9738.

(g) District Attorney comment

(7) The defendant may be entitled to bail after conviction but before sentencing and in some cases, post-sentence. Pa.R.Crim.P. 521.

B. Probation and Parole.

1. Definition

(a) Parole means that the defendant has been sentenced to a term of "total confinement" and is eligible for conditional release upon the completion of the minimum sentence. 42 Pa.C.S.A. §9756.

(i) County Parole- The length of the maximum sentence will determine the type of release supervision that the defendant will have placed upon them. County parole supervision is automatically placed upon a convicted defendant when the maximum term of incarceration does not meet or exceed 24

months. 42 Pa.C.S. §9762. The release of the defendant serving a county sentence is at the discretion of the sentencing judge. 61 P.S. §331.17.

(ii) State parole supervision is prescribed when the maximum term of incarceration meets or exceeds 24 months. 42 Pa.C.S. §9762. The release of the defendant at their minimum term of incarceration is at the discretion of the Pennsylvania Board of Probation and Parole. 61 P.S. §331.17.

(b) Probation means that the defendant has been convicted and sentenced to a term of supervision without a period of "total confinement." Some supervisory restrictions may be as follows:

(i) General Conditions of Supervision (Includes both probationary and parole sentences).

(ii) Special Conditions of Probation and Parole that may be imposed in addition to the General Conditions listed above.

(c) Intermediate punishment. This is a period of supervision that is imposable for specific crimes upon a defendant that may be in one of three forms:

(i) Three forms of intermediate punishment:

- Restrictive Intermediate Punishment ("RIP")
- Restorative Sanction Programs ("RS")
- Qualified Restrictive Intermediate Punishment. 204 Pa.Code 303.12(a); 42 Pa.C.S. §9763.

(d) State Release Considerations- Prior to the release of a state prisoner, the Pennsylvania Board of Probation and Parole must consider the following:

(i) The notes of testimony of the sentencing hearing. Such notes may include:

- Oral or written statement provided by the victim
- Statement by the prosecutor
- Statement by the defendant or his attorney
- Statement by the sentencing court

(ii) A pre-sentence investigation report and any behavior clinic reports

(iii) Any recommendation made by the sentencing court

(iv) Any recommendation by the district attorney's office

(v) The written or personal statement of the testimony of the victim or the victim's family submitted.

(vi) The nature and circumstances of the offense committed

(vii) The general character and history of the prisoner.

(viii) A recommendation by the Office of Victim Advocate who is granted the responsibility of representing the interests of individual crime victims before the Pennsylvania Board of Probation and Parole. The Victim Advocate shall assist in the preparation and coordination of crime victim testimony to the Board prior to their release decision. Act 8 of 1995

(e) Furlough- A "furlough" is a court or administratively granted period of leave from incarceration for a limited and defined purpose.

(f) Community Correction(s) Center(s) or "CCC"- Community Correction Centers (CCC) are commonly referred to as "half-way homes" and are residential facilities run by the Department of Corrections.

(i) Requirements for "CCC"

- The prisoner must be within one (1) year of completing his minimum sentence;
- Served at least one-half of his minimum sentence;
- Have no outstanding detainers;
- Served at least nine (9) months in a state correctional facility;
- Inmates sentenced to life imprisonment or death are not eligible;
- Have no Class I misconducts and no more than one Class II misconduct write-ups within nine months of application.

3. Parole Revocation

A. Definition- Parole revocation may occur at both the county and state level.

(1) Revocation proceedings

(a) First Hearing- "Probable Cause hearing" or a "*Gagnon I* hearing"- Establish that it is probable that the probationer/parolee committed the violation(s) alleged in the notice of violations.

(b) Second Hearing- "*Gagnon II* hearing"- Establish by a preponderance of the evidence (more than 50%) that the probationer/parolee did commit a violation of the terms or conditions of his supervision as alleged in the notice of violations. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); Morrissey v. Brewer, 408 U.S. 471 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

(2) Violation proven-The authority may "revoke" or take back the probationer's/parolee's less restrictive supervision and resentence them.

(a) Backtime- This is time that is left over that he may still be required to serve.

(b) Resentencing

APPEAL

1. Pennsylvania Court System

A. Organization:

(1) Trial court- "court of common pleas". There are currently 65 courts of common pleas in Pennsylvania for the 67 counties. There is generally one Court of Common Pleas for each county in Pennsylvania. This is commonly referred to as the "trial court." This is because it is a court of record where the trial, guilty plea, nolo contendre plea, or revocation proceeding occurs on the record.

(2) Superior Court of Pennsylvania- There is only one Superior Court of Pennsylvania. It hears cases on appeal from the courts of common pleas. The Superior Court is divided into three districts.

(3) Commonwealth Court of Pennsylvania- There is only one Commonwealth Court of Pennsylvania. The judges of the Commonwealth Court will hear and decide issues dealing with alleged errors committed by the State Board of Probation and Parole and other State Administrative Agencies.

(4) Supreme Court of Pennsylvania- There is only one Supreme Court of Pennsylvania. The Supreme Court hears cases by choice following a decision by the Superior Court.

(i) Death Penalty - Mandatory Supreme Court review.

(5) United States Supreme Court- The United States Supreme Court has 9 justices that are appointed by the President of the United States and confirmed by a 2/3's vote in the United States Senate. An appellant has 90 days from the date the Pennsylvania Supreme Court denies "allocatur" to petition the U.S. Supreme Court for "certiorari."

B. Time for taking a direct appeal. An appeal of the judgment of sentence must be taken within 30 days from the date the defendant is sentenced. Pa.R.Crim.P. 721.

1) Issues on Appeal

(a) After the entry of a guilty or nolo contendre plea- As previously mentioned, a criminal defendant's issues on appeal are severely limited. There are only three areas of contention: (1) the voluntariness of the plea; (2) the jurisdiction of the court; and (3) the legality of the sentence imposed.

(i) Motion to withdraw the plea-The defendant must petition the trial court to withdraw his plea within 10 days of its entry.

(ii) Motion to modify sentence- After the entry of a guilty plea a defendant may also file an optional motion to modify his sentence.

(b) After jury, judge ("waiver") trial, or a county revocation hearing ("*Gagnon II*")- The defendant, now referred to as "the appellant" (the Commonwealth is the "appellee") will have 10 days to file post-trial motions. These are optional motions that an appellant may choose to file with the trial court first and then with the Superior Court within 30 days of their denial by the trial court. Pa.R.Crim.P. 720.

(i) Issues that must be raised first with the trial court

*Weight of the evidence- The "jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is

imperative so that right may be given another opportunity to prevail." Com v. Brown, 538 Pa. 410, 648 A.2d 1177, 1189 (1994).
*Motion to modify sentence.

(ii) Other issues that may be raised on appeal with the trial court or directly to the Superior Court of Pennsylvania:
*Motion for judgment of acquittal
*Motion in arrest of judgment
*Motion for a new trial

(iii) The Commonwealth also has a right to contest defendant's sentence on appeal. Pa.R.Crim.P. 721.

COLLATERAL APPEAL

1. Post Conviction Relief Act Petition ("PCRA"), 42 Pa.C.S. §9541-9546; Pa.R.Crim.P. 900-910
   A. Definition- A statutorily provided basis for a convicted defendant to attack his sentence. Relief is granted for those individuals who have been wrongfully convicted or are serving illegal sentences. 42 Pa.C.S. §9542.
      (1) Time restrictions- Within one year of the date the judgment of sentence became final.
      (2) A Petitioner under the PCRA has the burden of proof and must plead and prove one or more of the following:
         (a) A violation of the Constitution or laws of either Pennsylvania or the United States in circumstances that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. §9543(a)(1)(I).
            (i) Attorney ineffectiveness- The petitioner must prove by a preponderance of the evidence three (3) threshold requirements to meet this claim:
            *The claim the petitioner is making must be of arguable merit;
            *There must have been no reasonable trial strategy involved in trial or appellate counsel's action or omission that was designed to effectuate the petitioner's interests at trial or on appeal;
            *The petitioner was actually prejudiced by his attorney's ineffectiveness. 42 Pa.C.S. §9543(a)(2)(ii); Com v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987).
         (b) "A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent." 42 Pa.C.S. §9543(a)(1)(iii)
         (c) "The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court." 42 Pa.C.S. §9543(a)(1)(iv).
         (d) "The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced."" 42 Pa.C.S. §9543(a)(1)(vi).
         (e) "The imposition of a sentence greater than the lawful maximum." 42 Pa.C.S. §9543(a)(1)(vii).
         (f) "A proceeding in a tribunal without jurisdiction." 42 Pa.C.S. §9543(a)(1)(viii).

      (3) Hearing Procedure
         (a) Calling of witnesses- The petitioner bears the burden of establishing one or more of the above factors by a preponderance of the evidence. Therefore, the petitioner must call witnesses on his behalf.
         (b) Petitioner's burden of proof- signed certified affidavit of each intended witness. Prior to proceeding to a hearing, the petitioner must provide

the Commonwealth with a signed affidavit as to each and every witness he intends on calling at the hearing. These affidavits must contain the subject matter about which the witness will testify.

(c) Material issue of genuine fact- witness must be called. In order to establish that there is a material issue of genuine fact about one or more of the necessary requirements, the petitioner must call witnesses. He may not simply aver allegations or facts and establish attorney ineffectiveness. Witnesses must be called in order to prove these allegations.

(d) Matters of record- Witnesses do not need to be called, however, to establish matters that are already of record. The petitioner's sentence, the charges, and who represented the petitioner at trial are all matters of record. That is, testimony does not need to be taken to establish these facts.