IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	**No.: 1061-2008**
	:	**CRIMINAL DIVISION**
MAURICE PATTERSON,	:	
Defendant	:	

OPINION AND ORDER

A jury trial in this case was held over the course of several weeks in May, 2010, following which the Defendant was found guilty of Murder of the First Degree, Criminal Conspiracy to Commit Murder of the First Degree, and Criminal Solicitation. Based upon a unanimous verdict of the jury, the Defendant was sentenced to death on the charge of Murder in the First Degree, and the Defendant was also sentenced by the Court to life without the possibility of parole on the charge of Criminal Conspiracy to Commit Murder of the First Degree, but received no additional sentence as to Criminal Solicitation. The Defendant thereafter filed an initial Post-Sentence Motion on June 7, 2010; however, due to the magnitude of the trial transcripts in this case which were needed for the Court to review the issues raised in the Post-Sentence Motion, a Court Conference on said Motion was not held until April 4, 2011, at which time the majority of the transcripts had been prepared. At the April 4, 2011 conference, Defense Counsel filed an additional Post-Sentence Motion, bringing the total number of Post-Sentence issues raised to twenty-eight (28). The Court will address the issues in the order in which they were raised in the Motions, with the exception of the first issue discussed, which the Court will address in light of the Superior Court's March 4, 2011 Opinion remanding the case of the Defendant's co-conspirator, Javier Cruz-Echevarria, for resentencing.

Factual Background

The basic facts of this case are as follows.[1] The Defendant was alleged to have conspired with Sean Durrant (Durrant) and Javier Cruz-Echevarria (Cruz) to murder Eric Sawyer (Sawyer). In the early morning hours of March 31, 2007, Durrant and Cruz met Sawyer in an alleyway in the City of Williamsport, Lycoming County, Pennsylvania and Durrant shot and killed Sawyer. Moments after the shooting, officers from the Williamsport Bureau of Police observed Durrant and Cruz driving out of the alleyway in a vehicle operated by Cruz. After a low speed chase, Cruz thereafter complied with the officers' signal for him to stop and was then detained. Durrant fled from the vehicle, but was apprehended shortly thereafter.

Durrant subsequently confessed to the police that he killed Sawyer and negotiated an agreement under which he pled guilty to a charge of murder of the third degree on the condition that he testify against all defendants. Cruz proceeded to a jury trial on charges of murder of the first degree and conspiracy, and on May 14, 2008, the jury found Cruz guilty of all charges; the Commonwealth did not seek the death penalty. This Court then sentenced Cruz on both the First Degree Murder and Conspiracy counts to serve two concurrent terms of life imprisonment. Cruz thereafter filed an appeal from the sentence imposed against him, which the Superior Court initially affirmed via an Opinion dated June 10, 2010; however, the Superior Court subsequently granted reconsideration of their original decision and issued a second Opinion on March 4, 2011. In their March 4, 2011 Opinion, the Superior Court affirmed Cruz' sentence in part, but vacated the sentence imposed on the count of conspiracy, and remanded the entire case for resentencing.

[1] A more detailed adaption of the facts of this case was iterated in the Court's Opinion of July 16, 2009, which the Court relies on in this Opinion as discussed below.

The Court erred in sentencing Defendant to a concurrent life term on the charge of conspiracy to commit murder in the first degree

The Defendant was convicted by a death qualified jury on the charge of Murder of the First Degree, Criminal Conspiracy to Commit Murder of the First Degree, and Criminal Solicitation. This Court essentially followed the sentencing scheme it had used for the companion Cruz case which was on appeal at the time. The Superior Court affirmed Cruz' conviction, but vacated the sentence imposed by the Court on the count of conspiracy, and remanded the matter for resentencing. In Cruz' case, this Court imposed a term of life imprisonment upon the charge of conspiracy, to run concurrently with the life sentence imposed on the charge of murder of the first degree. The Superior Court pointed out in its opinion of March 4, 2011 that the life sentence on the count of conspiracy exceeds the maximum sentence for the crime, which pursuant to 18 Pa.C.S. §1102(c) is either twenty years, or forty years depending on whether the Commonwealth obtains a specific finding of fact, beyond a reasonable doubt, that serious bodily injury resulted from the conspiracy. See Commonwealth v. Johnson, 910 A.2d 60 (Pa. Super. 2006). Although the Defendant did not raise this issue, in the interests of justice this Court has included this issue for review.

In this Defendant's case, this Court also imposed a life sentence on the count of conspiracy to commit first degree murder, to run concurrent to the sentence of death imposed by the jury on the count of murder of the first degree. As the sentence imposed is invalid pursuant to 18 Pa.C.S. §1102(c), this Court believes it has inherent power to correct the sentence due to the obviousness of the illegality. See Commonwealth v. Holmes, 933 A.2d 57, 66-67 (Pa. 2008). Therefore, this Court will schedule a hearing to correct the Defendant's sentence.

Defendant denied his right to fair trial by the Court's denial of Omnibus Pretrial Motion

Defense Counsel argues that the Defendant was denied his right to a fair trial when the Court denied his Omnibus Pretrial Motion. The Defendant filed two Omnibus Pretrial Motions, the first on March 17, 2009 and the second on August 7, 2009. The Court addressed the issues raised in the first Omnibus Motion at hearings on the matter held April 30, 2009 and May 14, 2009 and subsequently in its Opinion and Order dated July 16, 2009. At the time of the hearing on September 10, 2009, some of the issues from the second Omnibus Motion were already resolved and the Court subsequently addressed the remaining issues in its Opinion and Order dated October 30, 2009.

As the issues raised in both Omnibus Pretrial Motions were fully analyzed and addressed at the time of the hearings on the Motions and/or in the Court's subsequent Opinions, for purposes of this issue the Court will rely on the transcripts of the hearings held on April 30, 2009, May 14, 2009, and the Opinion and Orders dated July 16, 2009 and October 30, 2009.

Court erred by denying the Defendant's challenge for cause to excuse Juror No. 2

The Defendant contends that the Court erred during the voir dire process when the Defense Counsel challenged Juror No. 2 for cause for the reason that they were so opposed to drugs they could not put aside these feelings and decide fairly the issue of guilt or sentencing. N.T., 5/3/10, p 29-30. After the Court denied the motion for cause, Defense Counsel was compelled to use a peremptory challenge. N.T., 5/3/10, p. 42. During the jury selection process, Juror No. 2 indicated that he did have strong feelings about drug use and about people who "push" drugs, but that even with these feelings, if the Judge instructed him to weigh the evidence and follow the law, he would do that despite his strong feelings. N.T., 5/3/10, p. 41-42. In light

of this revelation, the Court determined that since the Juror indicated that he would be able to follow the evidence and the law if instructed to do so, the Court could not grant Defense Counsel's challenge for cause. N.T., 5/3/10, p. 42. A review of the transcripts establishes the following exchange between the Commonwealth and Juror No. 2:

> MR. LINHARDT: Mr. Sanders, just to clarify your answer. You had indicated when I just asked you that despite your strong feelings about drugs you would do what the Judge instructed you to do in deciding whether or not Mr. Patterson is guilty or innocent. Do you understand that?
>
> JUROR NO. 2: Yes.
>
> MR LINHARDT: My next question to you is when we move to the second phase, right?
>
> JUROR NO. 2: Yes.
>
> MR. LINHARDT: Let's presume you've all already found him guilty of first degree murder. Now, the question the twelve of you are deciding is should he be put to death or should he receive life in prison. If the Judge instructs you, Mr. Sanders and the other eleven jurors, you have strong feelings about drugs you need to put those aside and make a decision based on the evidence you have heard in this penalty phase whether or not he gets life or death just like in the first phase can you set aside those feelings and follow the Judge's instruction and make a decision based solely on the evidence you've heard?
>
> JUROR NO. 2: I think I can do that.
>
> MR. LINHARDT: It would be hard?
>
> JUROR NO. 2: Yes, it would be hard; but –
>
> MR. LINHARDT: But you would do what the Judge asked you to do?
>
> JUROR NO. 2: Yes.

N.T., 5/3/10. p. 41-42.

There are two types of situations where the court should sustain a challenge for a prospective juror: 1) the prospective juror indicated by his answers that he will not be an impartial juror; and 2) irrespective of the answers given on voir dire, the court should presume

the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial, or situational, with any of the parties, counsel, victims, or witnesses. See Commonwealth v. Fletcher, 369 A.2d 307, 308 (Pa. Super. 1976). As Juror No. 2 evidenced his ability to put aside his feelings and follow the law and the Court's instructions, the Court finds that the decision to deny Defense Counsel's challenge for cause was appropriate.

Furthermore, in trials involving a capital felony where there is only one defendant, the Commonwealth and the defense are each entitled to 20 peremptory challenges. See Pa. R. Crim. P. 634(A)(3). At the conclusion of voir dire in this case, the Defense only used eighteen peremptory challenges. As Defense Counsel failed to use all of their peremptory challenges during voir dire, the Court is at a loss to see how the Defendant was prejudiced by his use of peremptory challenge for Juror No. 2.

Court erred by denying the Defendant's motion to keep the individual prospective jurors out of the courtroom after questioning to discuss their selection

The Court erred when it denied the Defendant's motion to remove a juror from the courtroom when making a challenge for cause as to not prejudice jurors against the party who made the challenge. N.T., 5/3/10, p. 46. This motion was initially denied by the Court, but was subsequently granted for day two of selection until the jury was empanelled.

The Court notes that while the Defense did initially request to remove a juror from the courtroom so that the parties could discuss the reasons for a challenge for cause, Defense did then agree to allow the jurors to remain in the courtroom. N.T., 5/3/10, p. 46. However, Defense

Counsel then raised the motion again at a later time on the first day of selection, and the objection was again denied by the Court. N.T., 5/3/10, p. 46.

The Pennsylvania Rules of Criminal Procedure do not address whether or not individual jurors must be removed from the courtroom following a challenge for cause during voir dire, the Rules merely require that voir dire be conducted individually. See Pa.R.Crim.P. 631(E) (1) (a). Therefore, the Court can find no error in its decision to not remove jurors from the courtroom while discussing their possible challenges for cause by counsel. Additionally, the Court notes that none of the jurors who remained in the courtroom during the discussions on challenges for cause on the first day of selection were actually selected as jurors; therefore, the Rules of Criminal Procedure aside, the Court finds that the Defendant can show no prejudice, and this issue has no merit.

Defendant was unduly prejudiced during jury selection as the Commonwealth advised jurors "when" you find the Defendant guilty of First Degree Murder rather than "if"

Defense Counsel argues that during the voir dire process, the District Attorney repeatedly advised jurors "when you find the Defendant guilty of First Degree Murder", instead of "if" during his questioning. Counsel alleges that numerous jurors heard the statement, resulting in prejudice to the Defendant.

A review of the record establishes that the following exchange took place between Defense Counsel and the Court:

> MR. RUDINSKI: Your Honor, Mr. Linhardt when he was asking questions several times said when you come back with the guilty verdict on first degree. We would ask that it be phrased if you come back rather than when. He did both I assume it was just --
>
> THE COURT: A mistake.

MR. RUDINSKI: Yes.

THE COURT: A slip. I appreciate it. Okay.

N.T., 5/4/10, p. 22-23.

The Court finds that the Defendant has failed to allege how he was prejudiced by the Commonwealth's statements. The Court believes that adversarial language is part of every trial, and does not have a place in the courtroom when the language of the prosecuting officer is such that its unavoidable effect is to prejudice the jury and to inflame them with passion and bias so that they could not fairly reach a true verdict under the law and the evidence. See Commonwealth v. Molinari, 115 A.2d 389 (Pa. Super. 1955). The Court does not find that the Commonwealth's statements in this case rose to this level of prejudice, and it does not appear that Defense Counsel felt so either, as they admitted the statements were most likely a mistake, and did not even request a curative instruction from the Court.

Court erred by denying the Defendant's challenge for cause to excuse Juror No. 9

Defense Counsel argues that the Court erred when it denied the Defendant's challenge for cause on Juror No. 9 when that juror indicated that if a person is guilty of murder they should get the death penalty. The Defendant was thereafter compelled to use a peremptory challenge for said juror.

The transcripts of the voir dire process establish that before the death penalty process was explained to Juror No. 9, he made the following statement:

> JUROR NO. 9: Well, if I think he is guilty, yes, I would do the death penalty; but I don't know about putting him to death. I mean I don't know. I don't know. I don't.

N.T., 5/4/10, p. 11. However, after Defense Counsel described the legal process involved with a death penalty case, the juror acknowledged that he could not necessarily find in favor of sentencing someone to death merely because he finds that person guilty. N.T., 5/4/10, p. 12. The juror also made the following statement in response to Defense Counsel's questioning:

> MR. RUDE: Would you be able to follow the Judge's instructions, listen to both sides, consider the circumstances in the second phase of the trial before determining the penalty?
>
> JUROR NO. 9: Yes.
>
> MR. RUDE: Okay. You wouldn't automatically vote for the death penalty?
>
> JUROR NO. 9: No.
>
> MR. RUDE: And if it came about that you don't believe the Commonwealth either met their burden in presenting the aggravating circumstances or you believe that the Defense presented mitigating circumstances that outweighed the aggravating circumstances, could you vote for life in prison?
>
> JUROR NO. 9: Yes.
>
> ….
>
> MR. RUDE: That's fine. Now that you understand the process you would be able to consider both life in prison and the death penalty?
>
> JUROR NO. 9: Yes, I would because now I understand.

N.T., 5/4/10, p. 12-14. The Commonwealth then followed up by again asking Juror No. 9 about his stance on the death penalty, and Juror No. 9 responded that he could weigh the factors and circumstances to determine whether or not the death penalty was appropriate in a case, and that he would not automatically find that someone should be sentenced to death as a consequence of murdering someone else. N.T., 5/4/10, p. 19-20. As the juror's answers indicate that he would be impartial, able to follow the law and the Court's instructions, the Court finds that its decision to deny the Defendant's challenge for cause was appropriate pursuant to the standard set forth in Fletcher at

308. Furthermore, as noted above, as the Defense failed to use all of their peremptory challenges during the voir dire process, the Court fails to see how the Defendant was prejudiced by the use of a peremptory challenge for Juror No. 9. Accordingly, this issue has no merit.

Court erred by granting the Commonwealth's challenge for cause to excuse Juror No. 24

The Court erred in granting the Commonwealth's challenge for cause for Juror No. 24 for the reason that the Court believed that the death penalty issue would affect her ability to decide the guilt or innocence of the Defendant at the trial phase. Defense Counsel argues that the Juror did not make this statement during the voir dire process and should therefore not have been dismissed.

A review of the transcript of the voir dire process shows that once the Commonwealth made the motion for a challenge for cause, Defense Counsel objected, arguing that Juror No. 24 indicated that despite her feelings about the death penalty, she would in fact be able to follow the Court's instructions and consider both penalties. The Court then clarified juror No. 24's position with the following exchange:

> THE COURT: So if I instruct you that prior to hearing any evidence you're to consider them as equal options for the sentence for the Defendant who was found guilty beyond a reasonable doubt, am I correct in understanding you're saying no, you could not follow my instructions on the law
>
> JUROR NO. 24: No, I would say no.
>
> THE COURT: That you could not follow my instructions on the law?
>
> JUROR NO. 24: I don't know. I have to think.
>
> THE COURT: Well, you've given us your personal feeling about the death penalty.
>
> JUROR NO. 24: Yeah.

> THE COURT: And about the fact that at the ultimate conclusion if you're a part of that jury and after the penalty phase weighing the aggravating and mitigating factors the jurors make a decision that the death penalty is warranted that they find that that's the sentence that you would be required to stand up in open court possibly and announce that you're in agreement with that verdict, but from what you're telling me that's never going to happen.
>
> JUROR NO. 24: Right. I couldn't –
>
> THE COURT: You'll never consider the death penalty as a sentence?
>
> JUROR NO. 24: Correct, correct.

N.T., 5/5/10, p. 30-31. The Court is satisfied from the answers given by Juror No. 24 during the voir dire process that she could not be an impartial juror given her feelings on the death penalty; therefore, the Court finds granting the Commonwealth's challenge for cause was appropriate pursuant to the standard set forth in Fletcher at 308.

The Commonwealth improperly struck Juror 60, the lone African American juror, in violation of Batson v. Kentucky

Over the objection of Defense Counsel, the Commonwealth struck juror No. 60, the only African-American juror from the panel, which the Defense argues created an issue pursuant to Batson v. Kentucky, 106 S. Ct. 1712 (1986). In Batson, the Supreme Court held that the Equal Protection Clause prohibits a prosecutor from peremptorily challenging potential jurors solely on account of their race, that a defendant can show prima facie evidence of discrimination based on race exclusively by the prosecution's peremptory challenges at the defendant's trial without the showing of repeated instances of such discrimination over a number of cases, and that once the defendant makes a prima facie showing, the burden shifts to the prosecution to demonstrate a neutral explanation for the challenges relating to the issues of the trial at hand.

In this case, the jury panel had approximately 170 jurors, only one of whom was African-American, and the Defendant was also an African-American; at the time the Commonwealth intended to exercise its peremptory challenge the Court asked the Commonwealth to indicate specifically for the record why they wished to challenge Juror No. 60. N.T., 5/6/2010, p. 139. The Commonwealth demonstrated several reasons for exercising a challenge for juror No. 60, including the fact that the Juror previously served on a jury where the defendant was found not guilty, the Commonwealth's view that the Juror had a weak stance on the death penalty, the Juror's opinion that a defendant's short time out of prison before reoffending would be a mitigating, rather than a aggravating circumstance, and the Juror's opinion that a rape conviction was a non-violent offense. N.T., 5/6/2010, p. 139-141. The Court finds that the reasons given by the Commonwealth for striking Juror No. 60 demonstrated sufficiently neutral motivations unrelated to the juror's race, and therefore finds no infringement on the Defendant's rights pursuant to Batson.

Court erred by denying the Defendant's challenge for cause to excuse Juror No. 47

Defense Counsel opines that the Court erred when it denied the Defendant's challenge for cause as to Juror No. 47 when the Juror indicated she belonged to the Mounted Police Foundation, gives money to the Williamsport Bureau of Police, knew five witnesses, knew all of the police officers involved in the case, including the arresting officer's family in this case, had strong feelings about drugs and guns and stated "they should put him away," and finally that the Juror indicated that white people are being discriminated against. When the Defense' challenge for cause was denied, the Defense then used a peremptory challenge against this juror.

A review of the transcripts of voir dire confirms that the Court's decision to deny Defense Counsel's challenge was appropriate. As to the issue of the Juror's association with the Mounted Police Foundation and donations to the Williamsport Bureau of Police, the Court determined that the Juror's involvement with the Foundation was not funding the police department directly, but was funding an organization that provides horses for police officers, as this type of program is not funded by the City. The Court did not find these facts warranted striking Juror No. 47 for cause, particularly in light of the Juror's answers to the other questions posed by Counsel. N.T., 5/6/10. p. 274. Additionally, the Juror made it clear that her feelings about drugs and guns would not interfere with her ability to decide the relevant issues in a homicide case. N.T., 5/6/10, p. 279-281. The statement cited to by Defense Counsel in the post-sentence motion relating to the Juror's statement that if a defendant had an illegal stolen gun, "they should put him away" was clarified by the Juror during voir dire, as she stated:

> JUROR NO. 47: To be truthful I think that the person that would shoot somebody in a homicide, you know, whether they had a stolen gun or not they're still a person that would shoot somebody and I don't think it would matter what that gun was whether it was stolen or not. It's the fact that he --that that person is actually killing somebody.

N.T., 5/6/10, p. 281. The Juror indicated that she thought the police should put someone in jail for a stolen gun if that was the purpose of the case, prosecuting them for a stolen gun, but not necessarily put that person in jail for another crime just because they also had a stolen gun. N.T., 5/6/10, p. 279-281. Furthermore, while it is true that the Juror did know many of the officers and witnesses involved in the case, she indicated that the relationships were not that close, and that she did possess the ability to weigh the various witness testimonies based on the standards prescribed by law. N.T., 5/6/10, p. 271-273. Finally, while the Juror did describe her feelings about reverse discrimination, as least as it relates to job eligibility, she made it clear that she

would not hold anything against the Defendant because he was African-American and that she does not discriminate. N.T., 5/6/10, p. 275-276. As the Court made certain that, based on the Juror's answers, that Juror No. 47 would be an impartial juror, and as the Court does not find the presumption of prejudice based on the Juror's relationship with any of the parties, the Court finds that its decision to deny the challenge for cause was appropriate pursuant to the standard set for in Fletcher at 308. Furthermore, as Defense Counsel failed to use all of their peremptory challenges during jury selection, the Court finds that the Defendant suffered no prejudice in using a peremptory against Juror No. 47.

Court erred by denying Defendant right to present expert testimony relating to eye witness identification

Defense Counsel argues that the Court erred when it denied the Defendant the right to present expert testimony relating to the eye witness identification of one of the Commonwealth's witnesses, Marion Diemer (Diemer). Diemer testified at trial that she previously sold a shotgun to the Defendant, and she identified the Defendant in a photo array and at trial as the individual to whom she sold the shotgun. N.T., 5/18/10, p. 39-43, 50-51. Expert testimony is only admissible where the development of an opinion requires knowledge, information, or skill beyond that possessed by the average juror. See Commonwealth v. Simmons, 662 A.2d 621 (Pa. 1995) (See also Pa. R. E. 702). Expert testimony cannot be offered to encroach upon the jury's basic task of determining witness credibility. See Simmons at 631. (See also Commonwealth v. Spence, 627 A.2d 1176, 1182 (Pa. 1993)). Pennsylvania law is clear that expert testimony as to the reliability of witness identification intrudes upon the jury's duty to determine witness credibility, and therefore such testimony is not permitted. As expert testimony relating to the eye

witness identification is precluded by Pennsylvania law, the Court finds its decision to exclude such testimony was appropriate.

Court erred by overruling Defendant's objection to playing the video tape of the crime scene

Defense Counsel argues that the Court erred when it denied the Defendant's objection to playing the video tape of the crime scene. N.T., p. 5/17/10, p. 134-136. The video to which Defense Counsel refers was also played during the trial of the Defendant's co-conspirator, Javier Cruz-Echevarria; following the judgment of sentence entered against him, Cruz raised on appeal the issue of the trial court's error in permitting the Commonwealth to enter into evidence the videotape depicting the victim and the crime scene. The Superior Court in its March 4, 2011 opinion made the following determination:

> [t]here was no dispute that Durrant had been the shooter and intended to kill Sawyer, and the sole issue before the jury was whether appellant had been a coconspirator, or had been an accomplice to the shooting of Sawyer. Thus, even though the subject video and photographs can accurately be described as gruesome, their admission did not detract from the jury's consideration of the principal evidence on the germane issues of the existence of appellant's shared intent to kill Sawyer and the actions he took in furtherance thereof. Moreover, the video and photographs did provide the jury with a view of the murder scene, which was relevant in light of the Commonwealth's case that appellant and Durrant had planned to ambush Sawyer, and that appellant had deliberately led Sawyer to the site at which Durrant ultimately accomplished the attack. Consequently, we detect no basis upon which to conclude that the images of the decedent and the murder scene were so inflammatory, or devoid of probative value, that appellant is entitled to relief based upon their admission into evidence and publication to the jury.

Commonwealth v. Cruz-Echevarria, No. 1930 MDA 2008, slip op. at 18-19 (Pa. Super. March 4, 2011). The issue to be determined in the Defendant's case, whether the Defendant conspired with or had been an accomplice to the shooting of Sawyer, is identical to the issue decided in the

Cruz case; therefore, the Court believes that the Commonwealth's use of the same video and its evidentiary value is *res judicata* and was properly admitted by this Court.

Court erred by granting the Commonwealth's motion to preclude the testimony of defense witness Jesse James

The Court erred when it granted the Commonwealth's Motion to prevent the testimony of Jesse James regarding Sean Durrant's, a key Commonwealth witness, attempt at tampering with the jury. During a meeting in chambers with both parties, Defense Counsel indicated their intention to question Durrant regarding his alleged attempt to obtain a jury list before his trial began. N.T., 5/20/10, p. 15-17. Defense Counsel opined that this action constituted a crime on the part of Durrant as he allegedly contacted an individual and requested that the individual get him a copy of his prospective jury list: Defense Counsel reasoned that questioning on this subject was relevant as it showed Durrant's attempts at buying time to get a deal from the Commonwealth before going to trial. N.T., 5/20/10, p. 15-17. However, the individual to whom Durrant made the request contacted the Public Defender's Office, informed them of Durrant's request, and indicated their non-compliance with the request. N.T., 5/20/10, p. 15-17. As no jury member was actually ever contacted or threatened by Durrant, the Court determined that the mere fact that Durrant talked about getting the jury list was not relevant and therefore not admissible. N.T., 5/20/10, p. 15-17. In fact, the Court pointed out that even if Durrant would have actually obtained a list, he would have only received information on the jury pool, and would not have had any advance notice as to which jurors were to be called in on any particular day. N.T., 5/20/10, p. 15-17. The Court reasoned that this information would not really have been helpful in Durrant's alleged attempts to tamper with the jury. N.T., 5/20/10, p. 15-17. The

Court finds its decision to preclude the testimony of Jesse James to be appropriate pursuant to Pa.R.E. 402, which excludes irrelevant evidence from admission.

Court erred by denying the Defendant's motion to introduce evidence of Sean Durrant's bad acts while incarcerated

The Court erred when it denied the Defendant's Motion to introduce evidence of Durrant's bad acts while incarcerated, the purpose of which was to show that Durrant believed his agreement with the Commonwealth would permit him to do anything while incarcerated, including criminal acts, without having to suffer consequences. N.T., 5/20/10, p. 4-27. During the same meeting in chambers as discussed above, Defense Counsel indicated its intention to question Durrant on several statements and actions made while Durrant was incarcerated. Defense Counsel played sections of audio tape for the Court in an effort to establish the relevance of the statements.

One of the conversations Defense Counsel wished to question Durrant on was Durrant's conversation with his ten year old son in which he asks his son to stab an individual named Mike, who it is inferred was sleeping with Durrant's wife. N.T., 5/20/10, p. 4-5. Defense Counsel alleges that the conversation shows Durrant's anger about people being around his wife while he is in jail, and shows that Durrant is a jealous person and reacts angrily to that jealously. N.T., 5/20/10, p. 4.

After listening to argument by both parties as to the admissibility of various communications by Durrant, the Court determined that introducing the statements relating to people Nicole Durrant was or was not sleeping with were not relevant in the trial for Sawyer's murder, and were therefore precluded. N.T., 5/20/10, p. 12. However, as Durrant had previously

testified that he did something to Mike while Mike was in the county prison, the Court also determined that if Defense Counsel could establish that Durrant was actually talking about Mike in the tapes, then the Court would allow questioning as to Durrant's communications about Mike. N.T., 5/20/10, p. 12-13.

Defense Counsel also wished to introduce two instances of misconduct on the part of Durrant while he was incarcerated; one incident where he allegedly threw scalding water on a fellow prisoner in the Clinton County Prison, and another incident where Durrant beat up a fellow inmate at the Lycoming County Prison. N.T., 5/20/10, p. 14-16. In response to these allegations from Defense Counsel, the Court stated that it was not made aware of any disciplinary action involving Durrant in the Lycoming County Prison, and that if such misconduct occurred, the Court would have been made aware. N.T., 5/20/10, p. 16. The Commonwealth also indicated that they had not received information about the alleged incidents from either prison, and that they had not had any conversations with the Warden at either prison regarding disciplinary actions against Durrant. N.T., 5/20/10, p. 16. As the Court found no factual basis to support Defense Counsel's allegations of disciplinary actions involving Durrant in prison, the Court determines that its decision to preclude questioning on these matters at trial was appropriate. 5/20/10, p. 21. Furthermore, the alleged incident in the Lycoming County Prison pre-dated Durrant's agreement with the Commonwealth; therefore, regardless of the lack of a factual basis for the incident, the Court finds that this information was not relevant at the Defendant's trial. N.T., 5/20/10, p. 20.

Court erred by precluding Defendant from presenting all of the testimony of Holly Derk, the victim's alleged girlfriend

Defense Counsel also alleges that the Court erred when it denied the Defendant the right to introduce evidence from the victim's girlfriend, Holly Derk, indicating that she knew that Sawyer and Durrant had engaged in drug dealing. Defense Counsel contends that Derk would have testified that she was aware of the extent of Sawyer's drug dealing, and that although she had not met Durrant, she knew that Durrant purchased drugs from Sawyer.

At trial, Defense Counsel called Derk to testify, whose testimony the Defense initially believed would indicate that Sawyer was Derk's boyfriend, and that Derk was personally aware that Durrant knew Sawyer as Durrant would come to Sawyer's house and as Durrant was a drug customer of Sawyers. N.T., 5/21/10, p. 6. However, before Derk took the stand to testify, Defense Counsel informed the Court that Derk was also a drug customer of Sawyers, and that they were unsure whether Derk would testify that she personally observed Durrant come to the house and purchase drugs, or if Derk would testify that "Bop" (Sawyer) told her of the relationship between Durrant and Sawyer. N.T., 5/21/10, p. 6-13. The Commonwealth objected to Derk's testimony if the testimony would be that Sawyer was Derk's boyfriend and drug supplier, but that she did not personally know Durrant, as the majority of Derk's testimony would be hearsay, and the remainder of the testimony would only go to show that Sawyer was seeing two women and was a drug dealer. N.T., 5/21/10, p. 18.

Pennsylvania Rule of Evidence 801(c) defines hearsay as "[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The Court determined that Derk could testify as to her own personal observations of the relationship between Durrant and Sawyer, but that Derk could not

testify as to what a third party might have told her about the relationship, as this information would be hearsay. N.T., 5/20/10, p. 9. The Court also overruled the Commonwealth's objections, and in light of the nature of the case and of the circumstances, allowed the Defense to ask Derk about her relationship with Sawyer, determining that this information was in fact relevant. N.T., 5/20/10, p. 22. The Court stated specifically "[I] will let him, if he asks that question, how do you know him, he was my boyfriend and I bought drugs from him, I'll be okay with that." N.T., 5/20/10, p. 21. However, once Derk was on the stand, in response to Defense Counsel's questions, Derk responded that Sawyer was her boyfriend but that she did not know Durrant. N.T., 5/20/10, p. 24. The Court finds that the decision to preclude testimony as to Derk's knowledge of the relationship between Durrant and Sawyer that was gleaned from a third party was appropriate, as this information would in fact have been entirely hearsay. The Court also notes that it did not preclude the Defendant the right to introduce the evidence requested, as the Defense was permitted to question Derk: the fact that the witness did not provide the answers hoped for by the Defense was not the result of Court error.

Court erred by permitting the double hearsay testimony of a conversation between the Defendant, Kendra Burrage and Nikki Durrant

Defense Counsel argues that the Court erred when it permitted double hearsay testimony of a phone conversation which took place on March 31, 2007, where Kendra Burrage was talking to Nicole Durrant and then repeating what Nicole said back to the Defendant, as Defense argues that neither Nikki Durrant nor Kendra Burrage testified at trial and testimony was elicited from Sean Durrant through this conversation. N.T., 5/24/10, p. 43-60. Pennsylvania Rule of Evidence 801(c) defines hearsay as "[a] statement, other than one made by the declarant while testifying at

the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, a statement offered for the effect on the listener, rather than for the truth of the matter asserted, is not considered hearsay. See Commonwealth v. Ricci, 3 A.2d 404 (Pa. 1939) where a maid was allowed to testify that she was originally hesitant to identify the defendant as the murderer because a policeman told her that the defendant was in jail at the time of the murder.

The testimony to which Defense Counsel objects was entered as Commonwealth's exhibit No. 72. Defense Counsel objects specifically to the statements where Kendra Burrage relayed to the Defendant statements from Nicole Durrant. N.T., 5/24/10, p. 43-44. When Defense Counsel objected to this testimony during trial, the Commonwealth argued that the statements in the phone conversation were not being offered for their truth, but were offered for their effect on the Defendant, and were therefore not hearsay. N.T., 5/24/10, p. 43-60. The Commonwealth argued that the statements Burrage relayed from Nicole Durrant reassured the Defendant that Sean Durrant, not Cruz, was taking the fall for the murder of Sawyer, and the Defendant expressed relief at this knowledge. N.T., 5/24/10, p. 44. According to the Commonwealth, whether or not Sean Durrant was actually taking the fall for the murder was not relevant and not the reason for the statements introduction. N.T., 5/24/10, p. 44. The Commonwealth also argued that the statements were being offered to show the Defendant's response where he expressed his continued love and loyalty to Cruz and Durrant, despite learning earlier in the day that the two had killed Sawyer. N.T., 5/24/10, p. 44-45. The Commonwealth continually pointed out that it was not the substance of Burrage's statements that were relevant, but the Defendant's response to said statements. N.T., 5/24/10, p. 43-60.

After listening to argument on this matter from both parties, the Court recessed in order to thoroughly review the transcript of the conversation to be introduced. After reviewing the

transcript, the Court decided to allow in the entire conversation with the exception of the following statement from Burrage to the Defendant, where "she" refers to Nicole Durrant, "[s]he said he didn't say, but she said he was going to end up taking the rap regardless." N.T., 5/24/10, p. 54. The Court determined that this statement referred to Nicole's belief, not Sean Durrant's belief, and the Commonwealth was directed to redact the sentence before presentation of the testimony to the jury. N.T., 5/24/10, p. 57-58. The Court concluded that even if the Court provided the jury a cautionary instruction, it would be very difficult for the jury to consider the statement for anything other than the truth of the matter asserted. N.T., 5/24/10, p. 56-57. Defense requested that the Court also preclude the statement where Burrage stated to the Defendant, where "she" again refers to Nicole Durrant., "[s]he said it was supposed to be over either him testifying or going after somebody or something." However, the Court determined that this sentence was admissible as Nicole was relaying what Durrant told her, not relaying her own personal thoughts, and was therefore dissimilar from the precluded sentence and not hearsay as it showed the effect of Durrant's statement on the Defendant. N.T., 5/24/10, p. 57-58. Following a review of the record, the Court can find no error in its decisions and finds the Defendant's argument to be without merit.

Commonwealth's prejudicial closing arguments relating to the "hit letter"

Defense Counsel argues that during closing argument, the Commonwealth indicated that the Defendant said he didn't underline the words in the "hit letter," but that the Defendant had previously told Agent Dincher that he did in fact underline the letter. Defense Counsel argues that there was nothing in the testimony indicating that the Defendant stated to Agent Dincher that

he had underlined the letter; to the contrary, Agent Dincher's report indicated that the Defendant said "I see where you underlined these."

Agent Dincher testified during trial that the "hit letter" to which the Defense now refers was a letter written by Shaun Cormier for the Defendant. N.T., 5/21/10, p. 126-127. The Court agrees with the Defense that Dincher's testimony established that the Defendant did not say he himself underlined the letter, but that the Defendant said to Dincher "[I] see what you have underlined." N.T., 5/20/10, p. 151. However, a review of the transcripts of the Commonwealth's closing arguments establishes that the Commonwealth made the following statement:

> [N]ow, I want to talk to you about this – this hit letter. Mr. Rudinski raised in his closing remarks an issue about the reliability of this letter. What Mr. Rudinski failed to remind you of is that Mr. Patterson has already acknowledged, adopted, and accepted this letter as his own. He was shown this letter by Agent Dincher when Agent Dincher interviewed him in May of 2008. He asked Mr. Patterson about this letter. He showed him a copy of it. What did Mr. Patterson tell him? That's not my handwriting; I had Shaun Cormier write it. It's not in dispute. Did Shaun Cormier write what you told him to? Yes and no. Well here's the letter, which word in here did Shaun – did you not tell Shaun Cormier to write, and Mr. Patterson sat and he read the whole letter of March 25, 2007, and he said yes, those are my words. Those are his words, not mine. Now what's he say today? Well those are my words but where it's underlined real, as in real nice, and where it's underlined hit, I didn't underline them, but otherwise those are my words that I told Shaun to write.

N.T., 5/25/10, p. 68-69.

After reviewing the language of the transcripts as outlined above, the Court finds that the Defendant has misrepresented the Commonwealth's statements during closing argument. The Commonwealth did not say that the Defendant previously admitted to underlining the letter, only that the Defendant previously admitted that the letter represented what he told Shaun Cormier to write, which the Court finds is in agreement with Dincher's testimony. The Court has reviewed the remainder of the transcripts of the closing argument and can find only one other reference to

this matter, and that reference also does not substantiate the Defendant's claim. N.T., 5/25/10, p. 101. Therefore, the Court finds that this issue is without merit.

Court erred by denying the Defendant's Motion to Preclude the Commonwealth from asking questions about a Tupac Shakur album after the Defendant testified that he had not heard of the song "Homeboyz"

Defense Counsel argues that the Court erred when it denied the Defendant's Motion to Preclude the Commonwealth from asking any questions about a Tupac Shakur album. During the course of the trial, the Defendant testified that he heard the phrase "tear the ass out the frame" from a Tupac Shakur album. N.T., 5/24/10, p. 119. The Commonwealth researched the lyrics and found that the Tupac song "Homeboyz" includes the above mentioned phrase. N.T., 5/24/10, p. 120-121. However, when the Commonwealth questioned the Defendant about "Homeboyz" the Defendant testified that he had never heard of that song or the album in which it was included. N.T., 5/24/10, p. 129. The Defense then objected to any further questions about the album. N.T., 5/24/10, p. 130. Due to the nature of the lyrics, the Court sustained the objection of Defense Counsel and precluded the Commonwealth from questioning the Defendant as to the lyrics of the song in front of the jury; however, the Court did allow the Commonwealth some latitude to question the Defendant as to his identification of the phrase "tear that ass out the frame" as a Tupac song. N.T., 5/24/10, p. 135-136. The Commonwealth then asked the Defendant the following:

> COMMONWEALTH: My question to you first is, would you agree with me that Tupac Shakur uses the phrase tear the ass out the frame in this song, Homeboyz?
>
> DEFENDANT: That I just read?
>
> COMMONWEALTH: Yeah?

DEFENDANT: Yeah.

COMMONWEALTH: And after reading the lyrics would you agree with me that that, in fact, in that song Tupac Shakur is not singing about drugs he's singing about killing people?

N.T., 5/24/10, p. 138. The Court then overruled Defense Counsel's objection to this question and now finds that this decision was appropriate as this question was in line with the Court's decision to allow the Commonwealth latitude to question the Defendant as to his identification of the phrase "tear that ass out the frame" as a Tupac song.

During closing arguments, the Commonwealth again referenced the song "Homeboyz" and Defense Counsel objected and requested a mistrial. N.T., 5/25/10, p. 70-71. The following discussion was held at sidebar:

THE COURT: Everything he's described so far is on the record.

DEFENSE COUNSEL: That's correct. We objected yesterday to anything being brought up about the record because he said he didn't know the record --

THE COURT: Right.

DEFENSE COUNSEL: - - so this was brought up after that fact, so there was an objection to anything being said about - -

THE COURT: Which I overruled when you objected.

DEFENSE COUNSEL: Well, my understanding is there was an objection to any testimony about it and - -

THE COURT: I said he couldn't get into the lyrics. He couldn't go through and post the lyrics to the jury. I said he could inquire, do you know this song? Yes, and he could talk to him about, isn't it a song about killing, and you objected and I overruled that objection.

DEFENSE COUNSEL: Right.

THE COURT: So thus far he's only testify - -

DEFENSE COUNSEL: Saying what has come in.

> THE COURT: Yes.
>
> DEFENSE COUNSEL: At this point we move for a mistrial based on the fact that this is information the defendant had no access to and now we're linking it to the jury that it's about a murder, and I understand the ruling yesterday, and - -
>
> THE COURT: I'm waiting for you to finish.
>
> DEFENSE COUNSEL: - - I'm saying this dovetails into this and this is why we did not want it even to come in, so - -
>
> THE COURT: The motion for mistrial's denied. The Court was satisfied yesterday that by not allowing the jury to read all the lyrics, and that your client actually even added when the Commonwealth asked the question that at the bottom where Tupac's saying that this part is about drugs so that the jury was even aware of that. I think the ruling was appropriate, and in light of that your motion is denied. Thank you.

N.T., 5/25/10, p. 71 - 72. After a review of the transcripts, the Court finds that the decision to deny the motion for mistrial was appropriate as the Defendant was not prejudiced by the jury learning the nature of the lyrics, but was merely questioned as to his identification of the song "Homeboyz" as the Defendant had previously indicated that he learned the phrase "tear that ass out the frame" from a Tupac song.

The Court's error by denying the Defendant the right to present evidence of Sean Durrant's other crimes and of Durrant's understanding of his plea agreement was compounded when the Commonwealth argued in their closing argument that the agreement was one which Durrant "understands well"

Defense Counsel argues that the Court's error by denying the Defendant the right to present evidence of Sean Durrant's other crimes and Durrant's understanding of his plea agreement was compounded when the Commonwealth argued during his closing argument that the agreement Durrant entered into was an agreement he "understands well." N.T., 5/25/10, p.

96. Following closing argument by both parties, Defense Counsel indicated to the Court their intention to object to the Commonwealth's statement during their closing argument that the plea agreement entered into was one that Durrant "understands well." N.T., 5/26/10, p. 3-4. Defense Counsel reasoned that because they were denied the opportunity to present evidence of other acts and crimes of Durrant demonstrating that Durrant believed he could do whatever he wanted in light of his plea agreement, the Commonwealth's statement during closing argument was unfair. N.T., 5/26/10, p. 3-4. However, the Court reiterated to Defense Counsel the reasons for the preclusion of Durrant's other acts and crimes, which the Court already discussed above in this Opinion, that the Commonwealth had no knowledge of criminal actions by Durrant, if any such actions were committed, while he was incarcerated and that these actions played no part in Durrant's agreement. N.T., 5/26/10, p. 4. The Commonwealth did then state that they were able to confirm with the Clinton County Prison that Durrant was in fact disciplined for assault on a fellow prisoner; however, the Commonwealth stated that their office had no involvement with the disciplinary action taken.[2] N.T., 5/26/10, p. 4.

The Court notes that on his appeal, the Defendant's co-conspirator, Cruz, asserted that this Court improperly limited his cross examination of Durrant concerning Durrant's plea agreement with the Commonwealth. Cruz specifically argued that the language of the plea agreement provided a good faith basis for cross examining Durrant as to whether he was under investigation for other offenses that were not related to the murder of Sawyer. The Superior Court noted that the trial court has the discretion "to determine the scope and limits of cross-examination and that this Court cannot reverse those findings absent a clear abuse of discretion

[2] Again, during trial Durrant was housed in Clinton County and the Lycoming County District Attorney's Office would have had no authority to charge Durrant.

or an error of law." Commonwealth v. Nolen, 634 A.2d 192, 195 (Pa. 1993). The Superior Court then determined that:

> The Commonwealth informed the court (1) that no other investigations were under way at the time the plea agreement had been entered, (2) that the essence of the plea agreement was that, in exchange for his cooperation, Durrant would plead guilty to murder of the third degree and be sentenced to a term of from twenty-five to sixty years, and (3) that the language cited by counsel for appellant merely permitted the Commonwealth, upon proof of a breach of the agreement, to refile charges, including a charge of murder of the first degree. The trial court, in ruling on appellant's request for further cross-examination, accepted, as was its prerogative, the representations made by counsel for the Commonwealth regarding the nature of the plea.

Cruz at 25-26. The Superior Court further determined that, after reviewing the record, they could

> [d]etect no basis upon which to conclude that the trial court erred in determining that the plea agreement did not affect potential prosecutions of Durrant on offenses unrelated to the murder of Sawyer. Thus, since appellant has not established a collateral basis for the asserted grounds for impeaching Durrant's testimony, we affirm the ruling of the trial court that precluded appellant from inquiring whether the plea agreement insulated Durrant from other prosecutions.

Cruz at 26. In this trial, the Commonwealth also informed the Court that they were not aware of any criminal charges pending against Durrant as alleged by Defense, that in exchange for his agreement to cooperate, Durrant pled to murder in the third degree, and would receive a sentence of incarceration of 25 to 60 years, and that in the event Durrant breached the agreement, the Commonwealth could refile charges against the Defendant. N.T., 5/19/10, p. 48-53.

As the information pertaining to Durrant's plea agreement presented to the Court in this case is identical to the information presented during the Cruz trial, and as the specific criminal incidents cited to by Defense Counsel were determined to be separate and apart from Durrant's plea agreement with the Commonwealth, the Court can find no basis upon which to conclude

that the Defendant was prejudiced by the Court's preclusion of evidence relating to Durrant's other crimes and acts.

Court erred by permitting the written jury instructions to go out with the jury

Defense Counsel argues that the Court erred when it permitted the written instructions to go out with the jury notwithstanding the fact that the Court earlier commented that the written instructions would not go out. Initially the Court did decide not to send out with the jury copies of the written instructions. N.T., 5/26/10, p. 2-3. However, after the jury indicated during deliberations that they wanted transcripts of the Court's instructions on the law, the Court did provide the jury with a written copy of the instructions as permitted by the Pennsylvania Rules of Criminal Procedure. N.T., 5/26/10, p. 84. Pa.R.Crim.P. 646(B) states that "[t]he trial judge may permit the members of the jury to have for use during deliberations written copies of the portion of the judge's charge on the elements of the offense, lesser included offenses, and any defense upon which the jury has been instructed." As the rules of criminal procedure permit the court to send written copies of the charge with the jury, the Court finds that its action in doing so was not in error.

The Court erred in responding to the jury's question by re- instructing the jury only as to accomplice liability in conjunction with the murder charge

Defense Counsel argues that the Court erred in response to a question from the jury relating to accomplice liability when the Court responded by providing the jury with the accomplice liability charge in conjunction with the murder charge and not with the corrupt and polluted source charge.

After retiring to deliberate, the jury requested a list of the conditions that needed to be met for first degree murder, accomplice, conspiracy, and solicitation. N.T., 5/26/10, p. 67. The Commonwealth argued that, as their theory was that the Defendant was guilty as an accomplice, the jury was requesting the definition of what an accomplice is to determine whether or not the Defendant was proven as an accomplice. N.T., 5/26/10, p. 76. The Commonwealth further asserted that nothing in the jury's request indicated that they needed to be re-instructed on how to weigh the testimony of any witness, therefore, they did not need to be re-instructed on a corrupt and polluted source, even though said instruction talks about the definition of an accomplice. N.T., 5/26/10, p. 76. Defense Counsel argued that the jury was asking to be re-instructed about accomplice, and should therefore receive the full charge of the Court relating to accomplice liability and how they should judge an accomplish when they testify. N.T., 5/26/10, p. 79. Upon review of the relevant law and the list of information the jury requested, the Court determined that the jury was only requesting re-instruction as to accomplice, not accomplice testimony; therefore, the Court decided to re-instruct the jury on accomplice liability in conjunction with the murder charge and not re-instruct with the corrupt and polluted source charge. N.T., 5/26/10, p. 81. The Court also stated that if the jury did need clarification, the Court would certainly provide this to them, but based on what the jury actually requested, the Court determined they only wanted information as to accomplice, not accomplice testimony. N.T., 5/26/10, p. 81. After a review of the transcripts, the Court determines that its decision to only re-instruct the jury on accomplice in conjunction with the murder charge was appropriate.

Court erred by permitting the video taped testimony of Corrections Officer Jeff Thompson

Defense Counsel argues that the Court erred when it permitted the Commonwealth to introduce into evidence the video taped testimony of Corrections Officer Jeff Thompson during the penalty phase of the trial. During trial, Thompson testified that he overheard the Defendant talking to his cell mate in the N block of the prison on September 18, 2009. Thompson completed an inmate incident report as a result of the conversation he overheard, which indicates that Thompson heard the Defendant state "[t]hese C.O.'s are going to get beat the fuck up before they get to work, all I need to do is make a phone call." Commonwealth's Exhibit P-S1. At the time the Commonwealth sought to introduce the deposition, Defense Counsel objected on the basis that the Defendant was not actually on the N block on September 18, 2009. Defense Counsel asserted that the Defendant was not actually placed on the N block until October 14, 2009, and presented the testimony of Kyle Wingo, a correctional officer with the Federal Bureau of Prisons, whose testimony Defense Counsel argued essentially confirmed the date of the Defendant's placement on the N block. N.T., 5/27/10, p. 114. A review of Wingo's testimony does not establish for the Court that the testimony "essentially confirmed" that the Defendant was placed on the N block on October 14, 2009. Wingo's testimony merely relays that he encountered the Defendant on the N block on October 17, 2009, and that the Defendant had been recently placed on that block. N.T., 5/27/10, p. 110-113. The Commonwealth argued that at the county prison, inmates are routinely moved from cell to cell and from block to block, so regardless of Wingo's testimony that the Defendant had recently moved to the N block on October 17, 2009, this does not preclude the possibility that the Defendant was previously on the N block and then moved back again in October. N.T., 5/27/10, p. 115. The Commonwealth also pointed out that Thompson was able to identify that the Defendant was in his cell, indentify the

cellmate with whom the Defendant was talking, and even indicated that the Defendant received a disciplinary write up as a result of the incident. N.T., 5/27/10, p. 115. After listening to the arguments of both parties, the Court noted that inmates are not found guilty of violations just at the say so of a correctional officer, but go through an administrative hearing before they are found guilty. N.T., 5/27/10, p. 115. The Court determined that, despite the argument of Defense, the Commonwealth did lay a foundation for Thompson's testimony as Thompson testified that he recognized the Defendant's voice. N.T., 5/27/10, p. 116. The Court then overruled Defense Counsel's objection and allowed the Commonwealth to play the video deposition to the jury. N.T., 5/27/10, p. 116-117. As the Court finds that the Defense presented no evidence that Thompson's testimony was false, and as it appears that the Commonwealth did lay a foundation for the testimony, the Court finds its decision to admit the testimony into evidence was appropriate.

Despite this finding however, the Court notes that the Commonwealth did ultimately determine that the correct date of the incident to which Thompson referred did occur on October 18, 2009, rather than September 17, 2009. N.T., 5/27/10, p. 129. As the jury was made aware of this information, and as this change was in accordance with Defense Counsel's argument, the Court cannot find that the Defendant was prejudiced in any way by this minor mistake.

As to the Defense' argument that the Commonwealth's reference to Thompson's testimony during their closing argument compounded the prejudice against the Defendant; the Court finds this claim to be without merit as well. Firstly, as noted above, the Court finds no prejudice resulted from the initial admission of the testimony. Furthermore, during closing arguments the Commonwealth referred to Thompson's testimony about an incident which occurred in October, which is when the Defense alleged and the Commonwealth confirmed that

the Defendant was actually on the N block of the prison; therefore, the Court finds that the Commonwealth's closing argument was accurate and not prejudicial . N.T., 5/27/10, p. 136- 137.

Court erred by denying the Defendant's Motion for Mistrial when Durrant explained the definition of conspiracy with the Defendant

Defense Counsel argues that the Court erred when it denied the Defendant's Motion for Mistrial when Durrant explained the definition of conspiracy with the Defendant. During the Commonwealth's direct examination of Sean Durrant, the Commonwealth asked Durrant the following questions "[a]nd could you tell the Jury with whom you conspired and agreed to kill Eric Sawyer?" at which point the Defense objected. N.T., 5/19/10, p. 42. However, before the Court had time to address the objection, Durrant answered the Commonwealth by stating "[w]ith Maurice Patterson and Javier Cruz." N.T., 5/19/10, p. 42. The Court acknowledged that by answering the question posed by the Commonwealth, Durrant was making a legal conclusion, which is in fact a job for the finder of fact or the jury. N.T., 5/19/10, p. 43. Although Durrant answered the question posed over the objection of the Defense, the Court made the determination that Durrant did not act intentionally or with any misconduct. N.T., 5/19/10, p. 44. The Court then denied the Defense' motion for a mistrial, but offered to instruct the jury that any conclusions of law testified to by witnesses were not to be relied upon as the jury had not yet heard the law. N.T., 5/19/10, p. 44. The Court reasoned that the word conspiracy was already used many times during trial and that everyone already knew that was the charge, and that Durrant actually did plead to conspiracy, so this information was not as damaging to the Defendant as Defense Counsel alleged. N.T., 5/19/10, p. 45-46. Defense Counsel refused any Court instruction to the jury on the issue of conclusions of law, the reason being that doing so

would highlight the problem as perceived by the Defense. N.T., 5/19/10, p. 46. The Defense then again objected to the Commonwealth's restatement of the question to Durrant, "[w]ith whom did you agree to kill Eric Sawyer?" and said objection was also denied by the Court for the reasons stated above. N.T., 5/19/10, p. 47-48. Upon a review of the record, the Court concludes that its decision to deny the motion for mistrial was appropriate.

The Court erred by denying the Defendant's Motion for Mistrial when Durrant indicated to the jury that he knew the Defendant from prison

Defense Counsel contends that the Court erred when it denied the Defendant's motion for a mistrial when Sean Durrant indicated to the jury that he knew the Defendant from prison, notwithstanding the fact that the Defendant was incarcerated at the time the current crime was committed, as Durrant's statement indicated to the jury that the Defendant was an individual who was incarcerated on prior occasions. During the Commonwealth's direct examination of Durrant, Durrant responded to the question of how long he had known the Defendant by stating "[I] knew - - first met him in prison." N.T., 5/19/10, p. 53. The Defense then requested a mistrial, alleging that as the jury now knew that the Defendant was in prison, the jury could not be fair, and that this information was only given to smear the Defendant. N.T., 5/19/10, p. 53. The Commonwealth countered that the jury was already aware that the Defendant was incarcerated as they were told on numerous occasions that they were going to hear recorded telephone calls from the prison, the Commonwealth told the jury in its opening that the Defendant was incarcerated in the county prison, and as the Defense asked as part of a stipulation that telephone recordings of their client from State Correctional Institution at Smithfield be made part of the record. N.T., 5/19/10, p. 53. The Court determined that the

Defense had even agreed to allow in a video depicting the Defendant on the telephone inside of the jail. As the Court determines that the information that Durrant was in jail with the Defendant cannot be found to establish that the Defendant was the "career criminal" as the Defense alleged it did, Durrant's answer to the question posed did not warrant a mistrial. N.T., 5/19/10, p. 54-55.

The Court erred when its jury instructions did not adequately explain that in the penalty phase the jury could combine the mitigating circumstances and compare them against the lone aggravator presented by the Commonwealth in arriving at their verdict

Defense Counsel asserts that the standard jury instructions during the penalty phase did not adequately explain that the jury could combine together the mitigating circumstances when comparing them against the lone aggravator presented by the Commonwealth.

In instructing the jury with the task of determining what sentence to impose against the Defendant, the Court made the following statements:

> THE COURT: [F]irst, however, you must understand that your verdict must be a sentence of death if, and only if, you unanimously find, that is all of you find at least one aggravating and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances that outweigh all mitigating circumstances. If you do not all agree on one or the other of these findings, then the only verdict that you may return is a sentence of life imprisonment.

N.T., 5/27/10, p. 149-150. The Court also informed the jury that the only aggravating circumstance presented by the Commonwealth was that the Defendant was convicted of another murder and said offense was committed either before or at the time of the offense at issue. N.T., 5/27/10, p. 150. The Court then informed the jury that mitigating evidence to be considered included the character and record of the Defendant, and the circumstances of the current offense. N.T., 5/27/10, p. 150. The jury was further instructed that evidence about the victim and the impact of the victim's murder upon his family could not be regarded as an aggravating

circumstance, but that if the jury found at least one aggravating circumstance and at least one mitigating circumstance, that this evidence could be considered to determine whether aggravating circumstances outweighed mitigating. N.T., 5/27/10, p. 150. The jury was instructed that any aggravating circumstance had to be proven beyond a reasonable doubt by the Commonwealth, any mitigating circumstance only needed to be proven by a preponderance of the evidence by the Defense, and that in determining whether either circumstance exists and whether aggravating circumstances outweigh mitigating, they were to consider the evidence and arguments offered by both parties, including evidence heard during trial. N.T., 5/27/10, p. 150. The Court also made the following statement to the jury:

> [T]he specific findings as to any particular aggravating circumstances must be unanimous. All of you must agree that the Commonwealth has proven it beyond a reasonable doubt. That is not true for any mitigating circumstances. Any circumstance that any juror considers to be mitigating may be considered by that juror in determining the proper sentence. This different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives a defendant the full benefit of any mitigating circumstances. It is closely related to the burden of proof requirement.

N.T., 5/27/10, p. 152.

Upon reflection of the instructions given to the jury during the penalty phase of trial, the Court finds that ample instruction was given to fully inform the jury as to their duties in weighing aggravating versus mitigating circumstances, and the Court finds Defense Counsel's argument to the contrary to be without merit.

The Court erred by not re-reading the definition of malice for third-degree murder

Defense Counsel argues that the Court erred in not re-reading the definition of "malice" for third degree murder when the jury, during the penalty phase, requested a "non-legalese example of third degree murder."

In response to the jury's request for a non-legalese example of murder three, the Court informed the jury that the Court could not give such an example, but that the Court could re-read the instruction for the jury if they would like. N.T., 5/28/10, p. 2-3. However, the jury responded that they would not like to have the instruction re-read. N.T., 5/28/10, p. 3. Therefore, as the jury was given the option of having the instruction re-read, but chose not to have it re-read; the Court can find no error in its failure to re-read the instruction.

Commonwealth impermissibly argued during closing argument that the Defendant would be housed with the general population and with access to a telephone if he were to be sentenced to life imprisonment

Defense Counsel argues that the Commonwealth impermissibly argued during their closing argument that the Defendant would be in the "general population….with access to telephone" if he was sentenced to life in prison, even though no such evidence was presented by the Commonwealth and no reasonable inference from existing evidence could be made. N.T., 5/27/10, p. 134.

The Commonwealth's statement in its entirety is as follows:

> If Mr. Patterson does serve a penalty of life in prison he's going to be in prison, and he's going to be in general population, and he will get his cable TV, and he will have access to his weights, and he will have yard privileges, and he will have three showers – three showers—he will have showers and three meals a day, and he will have the benefit of mail privileges and talking on the phone and visiting with his family…

N.T., 5/27/10, p. 134. A review of the transcripts of Commonwealth's closing argument establishes that Defense Counsel did not object to the statements at the time they were made. As such, the Defendant waived his right to raise this claim. See Spotz at 277.

Even if the Defendant had preserved this issue for review, the Court finds that the claim would be meritless. The Court does acknowledge that during closing argument, a prosecutor's statements must be limited to "[f]acts in evidence and legitimate inferences that may be drawn therefrom." See Commonwealth v. Brooks, 523 A.2d 1169, 1170 (Pa. Super. 1987) (quoting Commonwealth v. Anderson, 415 A.2d 887, 888 (Pa. 1980)). "[T]he prosecutor may not argue facts outside the record 'unless such facts are matter of common public knowledge based on ordinary human experience or matters which the court may take judicial notice.'" Brooks at 1170 (See Commonwealth v. Danzy, 340 A.2d 494, 497 (Pa. Super. 1975). The Court finds that the Commonwealth was not arguing facts in evidence or facts outside the record, but was merely relaying information of public knowledge regarding the conditions of life in prison when he made the above quoted statement during his closing argument; therefore, the Court finds that Defense Counsel's argument is without merit.

Defendant was denied Due Process when the jury was not permitted to take their notes into the deliberation room

Defense Counsel argues that the Defendant was denied his Due Process rights under both the United States and Pennsylvania constitutions when the jury was not permitted to take their notes into the deliberation room, even after the jury specifically requested said notes. The Defense alleges that this denial was a violation of Pa. R. Crim. P. 646 (D).

A review of the transcripts establishes that the Defendant's argument is unfounded. The Court did allow the jury to take their note pads into deliberations, and provided the jury with the following instruction before the jury retired to deliberate during the guilt phase of the trial:

> Although you may refer to your notes during deliberations, give no more or no less weight to the view of the fellow juror just because that juror did or did not take notes. Although you are permitted to use your notes for your deliberations, the only notes you may use are the notes that you write in the courtroom during the proceedings on the materials distributed by court staff.

N.T., 5/26/10, p. 31. As the jury was allowed to take their notes into the deliberation room, the Court finds the Defendant's contention otherwise to be baseless. The Court notes that during deliberations, the jury did request to bring their notepads into the courtroom while they were re-visiting evidence; however, as the jury is only allowed to take notes during trial pursuant to Pa.R.E. 604, the Court appropriately precluded them the use of the notepads at that time. N.T., 5/26/10, p. 46.

Defendant was denied Due Process when he was precluded from calling Ashley Duplanti-McGrath and Douglas Shaheen as witnesses

Defense Counsel argues that the Defendant was precluded from presenting evidence of third party guilt or motive when he could not call Ashley Duplanti-McGrath or Douglas Shaheen as witnesses. The Defendant was denied his Due Process rights under the United States and Pennsylvania Constitutions and denied his right to Compulsory Process or Confrontation Clauses of the Sixth Amendment which guarantees a meaningful opportunity to present a complete defense.

As to Defense Counsel's request to call Ashley Duplanti-McGrath, the Defense explained to the Court that the substance of Mrs. McGrath's testimony was that her husband was unhappy with Eric Sawyer and made various statements that he was "[g]oing to get Mr. Sawyer….I'll show him how sweet he is when I get out." N.T., 5/21/10, p. 51-52. The Commonwealth pointed out that Mrs. McGrath's testimony indicated that her husband planned to do something

to Sawyer after McGrath was released from jail, but that the murder of Sawyer occurred while McGrath was still in jail. The Defendant could show no evidence connecting McGrath to the murder or any connection between McGrath and either Cruz or Durrant. N.T., 5/21/10, p. 52. As the Defense could show no connection between McGrath and Durrant, and as the Court knew that Durrant killed Sawyer, the Court precluded Mrs. McGrath's testimony as said testimony would cause the jury to speculate as to the connection between McGrath and Durrant. N.T., 5/21/10, p. 53. The Court finds its decision was appropriate and the Defendant's contention otherwise to be without merit.

As to Defense Counsel's request to call Douglas Shaheen as a witness, the Court notes that the Defense originally intended to call Shaheen to testify that he told Trooper Clark about "AB," but that Agent Dincher didn't ask him about "AB" at all, the purpose being to show that Agent Dincher did not follow up on information told to him. N.T., 5/21/10, p. 54. However, at the time they intended to call Shaheen to testify, Defense Counsel indicated to the Court that Shaheen could no longer remember speaking to either Dincher or Clark. N.T., 5/21/10, p. 55. However, the Defense had a video taped interview of Shaheen talking to Clark which they requested to play in order to refresh Shaheen's memory, which would get into the substance of information which Defense admitted was not admissible. N.T., 5/21/10, p. 55. The Court determined that if Shaheen had no memory of his conversations, the Court could not allow the Defense to play the video tapes, and therefore Shaheen was not needed as a witness. N.T., 5/21/10, p. 57. A review of the transcripts confirms for the Court that its decision to preclude the testimony of Shaheen was appropriate, as the witness could not recall even having the conversations to which he was supposed to testify.

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion.

ORDER

AND NOW, this ____ day of January, 2012, based on the foregoing Opinion, it is ORDERED AND DIRECTED that for the reasons stated above, the Defendant's Post-Sentence Motion is hereby DENIED. As a sentence of death was imposed against the Defendant, this case is subject to automatic review by the Supreme Court pursuant to 42 Pa.C.S. §9711(h).

By the Court,

Nancy L. Butts, President Judge

xc: DA
Michael J. Rudinski, Esq.
Kyle W. Rude, Esq.
Amanda B. Browning, Esq. (Law Clerk)