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USE OF THE "ZOLA PLEA" IN NEW JERSEY CAPITAL PROSECUTIONS

J. Thomas Sullivan*

The New Jersey Supreme Court adopted a potentially significant procedural tool which defense counsel may use when representing clients charged with capital offenses in its decision rendered in State v. Zola. The Zola court recognized the capital defendant's limited right to make a personal statement in the nature of a plea for mercy to the jury, or allocution, to avoid in-

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2 112 N.J. 384, 548 A.2d 1022 (1988). The defendant's sentence was reversed based upon the trial court's failure to instruct the jury to impose the death penalty only if it found that aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. Id. at 394, 439, 548 A.2d 1027, 1050 (citing Biegenwald, 106 N.J. at 13, 524 A.2d at 130).

3 112 N.J. at 426-32, 548 A.2d at 1044-46. See generally ABA Project on Minimum Standards for Criminal Justice, Standards Relating to: Sentencing Alternatives and Procedures § 5.4(a)(iii) and Commentary (Approved Draft 1968) (discussing proper role or involvement of defendant and counsel in the sentencing process).

4 Allocution has been defined as "formality of court's inquiry of prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction." Black's Law Dictionary 70 (5th ed. 1979). See generally Barrett, Allocution, 9 Mo. L. Rev. 115, 232 (1944) (discussing historical treatment and alternative applications of the right among American jurisdictions; criticizing Missouri for viewing the right as a technical formality only, violation of which is not held to prejudice the accused). See also State v. Norris, 285 S.C. 86, 93-
position of the death penalty. The Zola decision affords the accused an opportunity to make this personal statement without the threat of cross-examination or impeachment by the prosecution.5

The experiment which the court has undertaken offers the possibility of humanizing the capital defendant6 even in the most hopeless case with respect to evidence or defense. Criminal defense attorneys have long recognized the need for this humanization process as a means to address the often terrible nature of their clients' crimes that would otherwise justify capital punishment. However, the procedural burdens placed upon defendants7 and counsel8 in the criminal trial often operate to keep

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94, 328 S.E.2d 339, 343 (1985) (holding that accused has right to make statement to capital jury prior to sentencing deliberations based on S.C. Code Ann. § 16-3-20(B) (1976 & Supp. 1983), which provided that “[t]he state, the defendant and his counsel shall be permitted to present argument for or against the sentence of death”).


7 For example, once the accused takes the stand in his own behalf, he subjects himself to cross-examination and impeachment with prior convictions. The Washington Supreme Court, in State v. Jones, 101 Wash. 2d 113, 677 P.2d 131 (1984) (en banc), observed that “the admission of a defendant witness' prior convictions may well adversely affect that defendant's decision to take the stand. . . . The defendant's fears are well-founded.” Id. at 120, 677 P.2d at 136 (citation omitted). Generally, prior convictions are admissible to impeach testifying defendants in New Jersey prosecutions. State v. Kelly, 97 N.J. 178, 217, 478 A.2d 364, 383-84 (1984). While the trial court is vested with discretion to exclude the impeachment evidence of prior convictions, the burden rests with the defense to show that the prejudice inherent in its admission would outweigh its probative value. Id. at 217 n.21, 478 A.2d at 384 n.21; State v. Sands, 76 N.J. 127, 144-47, 386 A.2d 378, 387-88 (1978).

8 Counsel's duty is to consult with the accused regarding the decision of whether to testify, although the right remains one for the accused to personally exercise. Jones v. Barnes, 465 U.S. 745, 753 n.6 (1983) (citing Model Rules of Professional Conduct Proposed Rule 1.2(a) (Final Draft 1982)). Once the accused elects to testify, counsel's role is to properly advise the client of the parameters of lawful testimony and the consequences which may flow from the decision to testify, such as impeachment with evidence of prior convictions, bad acts, or inconsistent statements. The accused then runs the risk of being subjected to rigorous cross-examination and impeachment. In State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984), for instance, the Supreme Court of North Carolina held that when the defendant in the course of a capital sentencing proceeding testified that he had never been in trouble before, the door was opened to admission of two otherwise unrelated convictions in rebuttal. Id. at 27-32, 316 S.E.2d at 212-14. Accord, State v. Rose, 112 N.J. 454, 501-05, 548 A.2d 1059, 1081-84 (1988).
probative mitigating evidence from the jury,\textsuperscript{9} despite the requirement that such evidence be available to capital sentencing juries.\textsuperscript{10} An accused, for example, might well avoid testifying in a capital trial due to fear of impeachment with prior criminal convictions,\textsuperscript{11} prior acts indicating untruthfulness\textsuperscript{12} or a prior statement,\textsuperscript{13} otherwise suppressed,\textsuperscript{14} which would be rendered admissible as a result of his voluntarily taking the witness stand. To the extent that these matters may escape the jury's attention in the absence of the accused's testimony and accompanying impeachment, counsel may advise him not to testify in order to keep this negative character evidence from the prosecution.\textsuperscript{15} While avoiding the witness stand may be the product of sound

\textsuperscript{9} Often, the accused alone would be able to provide mitigating circumstances evidence concerning the nature of the offense or of his participation in it. This valuable evidence may never be revealed if the accused chooses not to testify due to the chilling influence of a prior record which would be disclosed through impeachment. Yet, a defense attorney may determine that it is strategically necessary to preclude development of the mitigating circumstances through the accused's own testimony, because juries are more likely to convict an individual who has a prior record. \textit{See H. Kalven & H. Zeisel, The American Jury} 146, 160-69 (1966). Capital counsel might similarly expect that a jury would be predisposed toward imposition of the death penalty once an accused's prior record, otherwise unknown to it, is admitted during the punishment phase of the capital trial.

\textsuperscript{10} Lockett v. Ohio, 438 U.S. 586 (1978). In Lockett, the Court stated: "We... conclude that the [e]ighth and [f]ourteenth [a]mendments require that the sen-
tencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character ... and any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death." \textit{Id.} at 604 (emphasis in original).


\textsuperscript{12} \textit{See, e.g.,} \textit{Fed. R. Evid. 608(b)} (permitting introduction of prior instances of misconduct probative of lack of truthfulness to impeach a witness). In State v. Schlanger, 197 N.J. Super. 548, 485 A.2d 354 (Law Div. 1984), the trial court noted that N.J. R. Evid. 47 specifically prohibited introducing evidence of prior misconduct not resulting in conviction to prove the accused's general bad character. \textit{Id.} at 551, 485 A.2d at 356. The court also observed, however, that under N.J. R. Evid. 55, such instances of misconduct may be admissible to show motive, intent, knowledge, plan, identity or absence of mistake or accident, parallelling the concerns prompting the creation of \textit{Fed. R. Evid. 404(b)}. \textit{Id.}


\textsuperscript{14} Harris v. New York, 401 U.S. 222, 225-26 (1971) (defendant's confession suppressed because of fifth amendment violation was admissible to impeach inconsistent trial testimony).

\textsuperscript{15} N.J. STAT. ANN. § 2C:11-3(c)(4)(a) (West 1982 & Supp. 1990) provides that evidence of a prior conviction is admissible in the prosecution's case-in-chief only if
trial strategy and tactics, it nevertheless frustrates the accused's

the capital defendant has previously been convicted of murder, which is a statutory aggravating circumstance.

TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (Vernon 1981), in contrast, which is at the heart of the Texas capital punishment scheme, directs the trial court to inquire of the sentencing jury "whether there is some probability that the defendant would commit criminal acts of violence which would constitute a continuing threat to society." Id. In construing this provision, the Court of Criminal Appeals of Texas has held that admissible evidence probative of the accused's propensity to engage in violent criminal conduct included: a prior conviction involving violence, King v. State, 657 S.W.2d 109, 110-11 (Tex. Crim. App. 1983); an offense similar to the one charged committed after the date of the murder, Green v. State, 587 S.W.2d 699, 709 (Tex. Crim. App. 1979); the accused's admission of committing other offenses, Hammett v. State, 578 S.W.2d 699, 709 (Tex. Crim. App. 1979), petition dismissed, 448 U.S. 725 (1980); and unadjudicated, extraneous rapes, Williams v. State, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981), cert. denied, 455 U.S. 1008 (1982).

The death penalty statutes of other states illustrate the variety of approaches adopted with respect to admissibility or use of evidence of prior convictions, including convictions for murder or acts of violence. For instance, New Mexico law permits the finder of fact to consider the defendant's prior criminal record only to determine whether the defendant lacks a significant prior criminal record. N.M. STAT. ANN. § 31-20A-6 (Repl. Pamp. 1987). This is a statutory mitigating circumstance. Id. Proof of a prior murder conviction is a statutory aggravating circumstance in Idaho, IDAHO CODE § 19-2515(g)(1) (1979), while proof of either the commission of murder or a prior conviction for murder may constitute an aggravating circumstance under the Indiana scheme. IND. CODE ANN. § 35-50-2-9(b)(7), (8) (West 1986).

The New Jersey approach is not as expansive as that of Texas which permits the finder of fact to consider the defendant's prior criminal record as a basis for imposing the death penalty. Nor is the New Jersey statute as restrictive as that of Indiana which limits the finder of fact's consideration of the defendant's record. Significantly, New Jersey's limiting of prior record evidence at the sentencing phase to prior murder convictions in support of an aggravating circumstance eliminates much of the threat that a jury will impose the death penalty based solely upon assessment of the defendant's bad character. State v. Moore, 113 N.J. 239, 275, 550 A.2d 117, 134-35 (1988). Testifying puts the defendant at risk that impeachment with prior convictions will open the door to the jury's unauthorized consideration of the prior record as a basis for sentencing the defendant to death.

16 The accused's not testifying may be a wise strategic move recommended by his attorney to prevent disclosure of a prior criminal record. Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record, 4 COLUM. J.L. & Soc. PROBS. 215 (1968). The accused may subsequently assert on appeal that his attorney's recommendation to pursue this strategy amounted to ineffective assistance of counsel in violation of the defendant's sixth amendment right. However, the Court's decision in Strickland v. Washington, 466 U.S. 668, 693 (1984) makes clear that a recommendation would constitute ineffective assistance only if it amounted to error which prejudiced the accused. Specifically, the Court noted that "[e]ven if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must show that they actually had an adverse effect on the defense." Id.

Counsel's recommendation not to testify to avoid disclosure of the prior record would probably fall within the range of competent attorney conduct, except in two very narrow circumstances: (1) the prior record was inadmissible for any pur-
ability to present a favorable personal impression to his capital sentencing jury.17

Thus, the "Zola plea" enables the accused to personally address the jury without interfering with the sound strategy recommended by defense counsel. Moreover, the accused may make this plea without fear of making inconsistent pleas to the jury which is sometimes required when a capital defendant, in a bifurcated proceeding,18 desires to testify at both the guilt and purpose whatsoever, as when the prior convictions were uncounseled or had been set aside, and counsel had failed to realize this before rendering the advice; or (2) the prior record was clearly admissible for a purpose other than impeachment, and counsel had advised that it would not be admissible if the defendant elected not to testify. In the event that the recommendation not to testify can be successfully challenged as unreasonable under either of these two circumstances, Zola suggests that prejudice would likely be found due to the accused's failure to be properly informed in his decision to remain silent at trial.

Significantly, the Zola decision focuses on the remote potential for mercy which the accused's personal statement holds. Since this possibility justifies recognizing the accused's right to address the jury, erroneous advice influencing him to not testify should not be presumed to have not prejudiced his defense. The accused's persuasiveness on the stand might lead his jury to acquit, to hang, or to impose life rather than death, no matter how improbable or incredible his testimony might otherwise appear to a reviewing court.

To lessen the potential for error in advising the client whether to testify, counsel could seek a pre-trial ruling on a motion in limine or a motion to exclude evidence of a prior record designed to reveal whether his client's prior record would be used for impeachment purposes if he took the witness stand. Some courts have recognized that the adverse effect of impeachment with a prior record, particularly if the record is remote or has little bearing on truthfulness, may be an appropriate factor for the trial court to consider in deciding whether to admit the record for that purpose. State v. Ford, 381 N.W.2d 30, 32-33 (Minn. App. 1986) (rev. denied March 27, 1986); People v. Ferrari, 131 Mich. App. 621, 624-26, 345 N.W.2d 645, 646-47 (1983).

Since New Jersey trial judges have discretion to exclude the use of a prior record for impeachment purposes, State v. Sands, 76 N.J. 127, 147, 386 A.2d 378, 388 (1978), counsel's attempt to obtain a pre-trial ruling on admissibility would enable him to encourage excluding their use by the prosecution and to advise the defendant of the likelihood of their use in impeaching his testimony. See United States v. Provenzano, 620 F.2d 985, 1002 n.22 (2d Cir. 1980) (defendant may challenge on appeal court's admissibility ruling even when he did not risk admission by testifying); State v. Cook, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984); State v. Ritchie, 144 Vt. 121, 122-23, 473 A.2d 1164, 1165 (1984) (holding trial court erred in refusing to rule on pretrial motion to exclude evidence of prior conviction in which defense counsel argued that ruling was necessary to permit him to prepare for opening statement, voir dire and to advise his client regarding consequences of taking the stand). But see State v. Cary, 49 N.J. 343, 352, 230 A.2d 384, 388 (1967) (cautioning trial judge to avoid premature evidentiary decisions).

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18 N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1982 & Supp. 1990) provides in pertinent part that "the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section." Subsection b authorizes the court to impose a term of confinement of thirty years to life imprisonment upon conviction
ishment phases of trial. Denying guilt, as in taking no responsibility for a homicide in contrast with admitting commission of the act and attempting to justify it, is, in many circumstances, inconsistent with a plea of remorse or for mercy. The Zola decision allows the defendant to make the latter plea without cross-examination which would expose any lack of integrity in the earlier trial testimony.

This paper focuses on the nature of the right, its source, and on some potential statements that capital defendants might make in individual prosecutions.

for murder when the offense is not prosecuted as a capital crime based upon the purposeful or knowing commission of murder. Id. at § 2C:11-3b (West 1982 & Supp. 1990).

19 N.J. STAT. ANN. § 2C:11-3c(2)(d) (West 1982 & Supp. 1990) permits the defendant to rebut any evidence presented during the punishment phase of trial tending to support the allegation of aggravating circumstances attending the murder. Thus, even though the defendant might have already testified on the issue of guilt, he may also testify to rebut the state's evidence of aggravation in the determination of his punishment.

In addition to potentially causing a jury to question the accused's credibility, pleading for mercy after denying commission of the offense does not necessarily entitle the defendant to have the jury consider the earlier denial when fixing a sentence. In Franklin v. Lynaugh, 487 U.S. 164 (1988), the Court rejected the argument that a Texas capital defendant was entitled to an instruction that the jury should consider any "residual doubt" concerning his guilt in assessing punishment. Id. at 172-76. Of course, an individual who did not commit a capital crime could hardly be faulted for asking the jury to spare his life so that he might at least continue relationships with his family while incarcerated or at best return to his family when he is free due to parole, pardon, or subsequent identification of the actual perpetrator. See The Wrong Man (Warner Bros. 1957), a film by Alfred Hitchcock starring Henry Fonda in the role of a musician and family man inaccurately identified by an eyewitness. A sad truth of capital litigation is that the possible innocence of the accused is almost wholly excluded from considerations of fairness in trials and capital sentencing proceedings. Part of the reason for this is that prosecutors carefully select cases for capital prosecution based on the strength of inculpatory evidence. See Ex parte Brandley, 781 S.W.2d 886, 892 (Tex. Crim. App. 1989) (capital conviction and death sentence set aside based on police misconduct in case resting "entirely on circumstantial evidence"). In fact, many states still construe the "right" of allocation as limited to the opportunity to assert claims which might arrest the judgment or afford the accused a legal basis for avoiding imposition of sentence altogether, rather than as an opportunity to present evidence in mitigation of punishment. People v. Sanchez, 140 Cal. Rptr. 110, 112 n.4, 72 Cal. App. 3d 356, 359 n.4 (Cal. Ct. App. 1977) (right accorded by CAL. PENAL CODE § 1200 is limited to arguing legal grounds for avoiding pronouncement of sentence and right to have counsel address court); People v. Gaines, 88 Ill.2d 342, 374, 430 N.E.2d 1046, 1062 (1981), cert. denied, 456 U.S. 1001 (1982) (at common law defendant could assert legal reasons to avoid judgment); But see State v. Scott 439 So.2d 219, 221 (Fla. 1983) (right includes opportunity to challenge legality of imposition of sentence and to present evidence in mitigation).
A. Allocation in the decisions of the United States Supreme Court

The New Jersey Supreme Court's recognition of the capital defendant's right to make a limited plea for mercy to his sentencing jury represents an application of the traditional right of allocution to the contemporary capital trial. The Zola Court briefly noted the history of this right in its opinion,21 referring to the decision of the United States Supreme Court in Green v. United States,22 which called into question a possible violation of this procedural right under Rule 32(a) of the Federal Rules of Criminal Procedure.23

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22 365 U.S. 301 (1961).

Other jurisdictions have concluded that no right of allocution is incorporated in current sentencing procedure. See People v. Stewart, 104 Ill.2d 463, 497-98, 473 N.E.2d 1227, 1243 (1984), cert. denied, 471 U.S. 1120 (1985) (defendant entitled only to testify under oath subject to cross-examination); Commonwealth v. Jones, 14 Mass. App. 991, 440 N.E.2d 766 (1982) (no personal right of allocution conferred by statute or Mass. R. Crim. P. 28(b); counsel may address court); State v. Poole, 305 N.C. 308, 324-25, 289 S.E.2d 335, 345-46 (1982) (no absolute right of allocution, permissible only under statute); Tenon v. State, 563 S.W.2d 622, 623 (Tex. Crim. App. 1978) (failure of trial court to inquire of defendant as to any reason to avoid imposition of sentence does not constitute error).

While a number of jurisdictions look to both rules and statutory provisions in affording the accused a right of allocution, a number of jurisdictions preserve the
In *Green*, Justice Frankfurter, writing for a plurality of the Court, observed that the plea in allocution was recognized at common law as early as 1689.\(^24\) Noting general procedural changes in the intervening period, Justice Frankfurter nevertheless concluded:

> [W]e see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations such as the [right of the accused to testify in his own behalf, the right to counsel, reduction in the number of offenses for which capital punishment is a sentencing option] lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.\(^25\)

In disposing of the issue, however, the plurality found that the accused’s right to allocution protected by the rule had not been violated where the trial court had directed an open inquiry: “Did you want to say something?” which could have been answered by the defendant.\(^26\) In dissent, Justice Black argued that this ambiguous question failed to apprise the petitioner of his right to address the court, the procedural protection contemplated by the language of Rule 32(a).\(^27\) In *Van Hook v. United States*,\(^28\) the Court had summarily remanded the cause for resentencing in light of the *Green* decision, because the trial court had failed to comply with the procedure required by Rule 32(a).\(^29\)

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\(^{24}\) *Green*, 365 U.S. at 304.

\(^{25}\) *Id.*

\(^{26}\) *Id.* at 304-05.

\(^{27}\) *Id.* at 307-09 n.3 (Black, J., dissenting).


\(^{29}\) In *Green*, however, the defendant did not secure a remand for resentencing, because he “failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees . . . .” *Green*, 365 U.S. at 305. The opinion shows, however, that Green’s counsel had made arguments on behalf of his client stressing the defendant’s family status, age, physical condition, and state sen-
Subsequently, in *Hill v. United States*, the Court made clear that violation of the accused's right to address the trial court was not of constitutional significance such that it mandated relief even on collateral attack. The *Hill* majority characterized the denial of the defendant's right to address the trial court as "an error which is neither jurisdictional nor constitutional." Thus, in construing the availability of habeas corpus relief, the majority concluded that a Rule 32(a) violation did not so deprive the defendant of a fair trial that he would be entitled to collaterally attack his sentence. The majority also noted that the accused could not obtain relief under the then existing Rule 35 of the Federal Rules of Criminal Procedure, because that rule permitted correction of only illegal sentences as distinct from legal sentences illegally imposed.

Justice Black, again writing for a four-member dissent, argued that the majority's distinction between an illegal sentence and a lawful sentence illegally imposed was not intended by the language of Rule 35. In concluding that the majority failed to apprehend the significance of the accused's right under Rule 32(a), Justice Black...
noted that the sentencing judge was aware of the defendant's prior convictions at the time of sentencing and that the defendant could have exercised his right by explaining to the trial court that one of these convictions had been set aside on collateral attack. The dissent characterized the right of an accused to address the court before imposition of sentence as one "anciently recognized." The anciently recognized right of allocution was next addressed by the Court in McGautha v. California and its companion case, Crampton v. Ohio. While McGautha dealt with the general issue of standardless jury discretion in capital sentencing proceedings, Crampton focused on a more narrowly drawn question arising from the unified guilt/punishment capital trial imposed under Ohio law. The defendant argued in support of a requirement for bifurcated criminal trials, contending that he was not permitted to address his sentencing jury without compromising his privilege against being called as a witness, because a decision to take the witness stand would necessarily afford the prosecution an opportunity for cross-examination. The majority rejected the assertion that "tension" flowing from the exercise of constitutionally protected rights was intolerable, noting that tension among competing constitutional interests was common throughout the criminal justice sys-

37 Id. at 435 (Black, J., dissenting).
38 Id. at 434 (Black, J., dissenting).
40 Id.
41 Id. at 185-91, 196-208. Crampton joined in this attack generally. See generally Comment, Constitutional Infirmities of the Capital Punishment Act, 13 Seton Hall L. Rev. 515, 516-19 (1983) (discussing discretionless juries).
42 Id. at 191-95, 208-220. See Comment, supra note 41, at 519-21 n.30 (challenging Court's conclusion that forcing citizen to choose between rights does not offend Constitution).
43 Id. at 210-11. The Court characterized Crampton's argument as follows: [Crampton had] a constitutional right not to be compelled to be a witness against himself. Yet under the Ohio single-trial procedure, he could remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment. He contends that under the [due [p]rocess [c]lause of the [f]ourteenth [a]mendment . . . he had a right to be heard on the issue of punishment and a right not to have his sentence fixed without the benefit of all the relevant evidence. Therefore, he argues, the Ohio procedure . . . creates an intolerable tension between constitutional rights.
44 Id. at 215. The Court noted that "it has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." Id. (citations omitted).
45 Id. at 212-13. The majority observed that the criminal process is "replete" with such tensions requiring difficult strategy decisions. Id. at 213.
tem as well as the legal system generally.

The McGautha/Crampton majority pointed out that the central defect in attempting to predicate allocution analysis on constitutional guarantees is that the right as traditionally recognized did not include a mitigating plea of mercy in the punishment determination. Therefore, Crampton’s reliance on allocution was viewed by the majority as an attempt to fashion a new right in the context of a requirement for bifurcated criminal trials, a requirement the majority was unwilling to impose on the states. Thus, the majority observed that Crampton was “not seeking vindication for his interest in making a personal plea for mercy.”

Justice Douglas, writing for the dissent, more thoroughly examined the traditional role of allocution, preserved in Ohio law, in light of Crampton’s contentions. He noted that, because the right to speak is traditionally accorded after verdict and before sentence is pronounced, it fails to afford an accused an opportunity to use his statement as a factor influencing the jury’s sentencing deliberations. The dissent thus characterized the right as “ritual” only, despite its mandatory character.

The Crampton dissent further traced the right from its common law origins as one permitting the defendant to assert a legal reason for the avoidance of sentencing, rather than to present evidence in mitigation or a plea for mercy. Noting that other mitigating evidence could be developed by the defense in the unitary trial, the dissent nevertheless found this alternative means of presenting a punishment defense unsatisfactory. The dissent observed:

[T]he right of allocution is at best partial and incomplete when the accused himself is barred from testifying on the question of sentencing, and when the only evidence admissible comes

46 Id. The majority noted, for example:

[A] defendant whose motion for acquittal at the close of the [g]overnment’s case is denied must decide whether to stand on his motion or put on a defense, with the risk that in doing so he will bolster the [g]overnment case enough for it to support a verdict of guilty.

Id. at 215.

47 Id. at 213.

48 Id. at 217-19 n.20.

49 Id. at 220.

50 Id. at 219. The Court noted that the defendant never requested to personally address the jury on the punishment issue. Id. at 219-20 n.23.

51 Id. at 226, 228-30, esp. n.7 (Douglas, J., dissenting).

52 Id. at 228 (citing Silsby v. State, 119 Ohio St. 314, 316-17, 164 N.E.232, 233 (Ct. App. 1928) (Douglas, J., dissenting)).

53 Id. at 228-29 n.7 (citing Note, Procedural Due Process at Judicial Sentencing for Felony, 81 HARV. L. REV. 821, 832-33 (1968)).
Recalling Justice Frankfurter's approval in *Green v. United States* of the evolution of procedural rights in the criminal process, Justice Douglas urged that the right of allocution become constitutionally protected, requiring bifurcated capital proceedings to ensure that exercise of the privilege against self-incrimination in the guilt phase of a capital trial not be compromised. Clearly, the dissent viewed the requirement that the accused speak during a unitary trial—requesting mercy prior to a determination as to guilt—as a constitutionally infirm result of the competing interests of these different constitutional guarantees.

The Supreme Court's discussion in these cases of allocution and the defendant's right to address the court prior to pronouncement of sentence leaves open whether the right is fundamental or rises to the level of a constitutional due process requirement in light of subsequent developments in capital cases. It is clear that the *McGautha/Crampton* majority did not address the issues raised in the companion cases as focusing on the traditional notion of allocution. Instead, the Court's analysis turned on the procedural safeguards afforded capital defendants in light of due process requirements relating directly to standardless discretion in jury sentencing and use of a unitary, rather than bifurcated, trial for capital prosecutions.

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54 *Id.* at 235.
55 365 U.S. 301 (1961) (plurality opinion).
56 *McGautha/Crampton*, 402 U.S. at 238.
57 *Id.* The Court noted:

[T]he right of allocution becomes a constitutional right—the right to speak to the issues touching on sentencing before one's fate is sealed. Yet where the trial is a unitary one, the right of allocution even in a capital case is theoretical, not real, as the Ohio procedure demonstrates. Petitioner also had the protection of the self-incrimination clause of the Fifth Amendment. To obtain the benefit of the former he would have to surrender the latter.

*Id.* at 207. The Court observed that "[i]n light of history, experience, and the present limitations of human knowledge, . . . it is quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.*
59 *Id.* at 220. The Court concluded:

[The defendant's] contention therefore comes down to the fact that the Ohio single-verdict trial may deter the defendant from bringing to the jury's attention evidence peculiarly within his own knowledge, and it may mean that the death verdict will be returned by a jury which never heard the sound of his voice. We do not think that the possibility of the former is sufficiently great to sustain petitioner's claim that
Had the McGautha/Crampton majority confronted the issue of the viability of the traditional right of the accused to address the trial court in the context of capital prosecutions, the Court could undoubtedly have distinguished between a traditional plea in allocution from one in which the accused seeks to make a plea for leniency. Instead, however, the majority most eloquently noted the accused's "interest in making a personal plea for mercy" in distinguishing Crampton's claim from one which is predicated on the right of allocution as a vehicle for such a plea.

The question left unanswered by the Court in McGautha/Crampton is whether the right of allocution might not have a constitutional dimension when the capital defendant seeks to address the sentencing jury prior to its deliberations. Certainly, the majority did not restrict its understanding of the right to the earliest notions that an accused could use his address to present evidence of pardon, benefit of clergy, pregnancy or legal reason to avoid the sentence. Rather, its interpretation followed the view that allocution also preserved the right of the accused to present evidence or statement in mitigation of punishment, or to make a plea for mercy.

In light of the amount of attention devoted to the problem of presentation of mitigating circumstances evidence in capital cases following the decisions approving death penalty legislation in Gregg v. Georgia, Proffitt v. Florida and Jurek v. Texas in 1976, it is some-

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60 McGautha/Crampton, 402 U.S. at 220. The majority observed that the right of allocution, as argued for by Crampton, was largely of "symbolic value." Id.

61 Id. at 219.

62 Id. at 217-19.

63 Id. Indeed, the Court stressed that Crampton was allowed to present significant evidence in mitigation of punishment, supposing that "Ohio judges . . . take a lenient view of the admissibility of evidence offered by a defendant on trial for his life." Id. at 219.


67 428 U.S. 262 (1976). The Court's approval of the Texas capital sentencing scheme has not escaped question, however, because of its perceived failure to properly afford an accused the opportunity to develop evidence in mitigation of punishment. See Benson, Texas Capital Sentencing Procedure after Eddings: Some Questions Regarding Constitutional Validity, 23 So. Tex. L.J. 315 (1982). In two recent decisions, the Texas sentencing scheme was revisited by the Supreme Court. In Franklin v. Lynaugh, 487 U.S. 164 (1988), the Court reaffirmed its Jurek holding that the Texas scheme is constitutionally sound. Id. at 181-82. But in the badly fragmented opinion of Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989), five justices considered the
what surprising that the issue of a constitutional requirement for allocution was not addressed by the Court during the intervening period. Nevertheless, the Court has not required such a procedure as an element of a constitutionally sufficient capital sentencing process and it is not clear that it would do so. While the decisions in *Green v. United States*, *Hill v. United States*, and *Van Hook v. United States* demonstrate the Court's affirmation of the mandatory nature of the requirements of Federal Rule of Criminal Procedure 32(a), the Court might well find that a comparable procedure is not imposed upon the states by constitutional guarantees of due process and fair trial.

B. Allocution as a matter of right under New Jersey law

The decision in *Zola* may be seen as either creating or restoring the right of the accused in a capital prosecution to make a statement or plea for mercy prior to the deliberations of his

failure of the Texas scheme to include in its interrogatories to the sentencing jury a means for jurors to evaluate the evidence of Penry's mental retardation in deciding punishment to be a defect requiring reversal of the sentence of death.


69 365 U.S. 301, 304 (1961) (right under FED. R. CRIM. P. 32(a) not satisfied by affording counsel opportunity to address court).

70 368 U.S. 424, 426 (1962) ("There thus remains no doubt as to what the Rule [32(a)] commands.").


72 See supra note 23 and accompanying text.

73 See U.S. CONST. amend. V, VI, XIV. Certainly, federal procedural guarantees are not necessarily applicable to state prosecutions unless they are of constitutional origin, even when rooted in common law notions of fairness. See *Green*, 365 U.S. at 304. Not all constitutional guarantees have been deemed applicable to the states, *Hurtado v. California*, 110 U.S. 516 (1884) (fifth amendment guarantee of trial on indictment, to preclude trial on information, not applicable to states). However, the "core" values of federal constitutional law generally have been made applicable to state prosecutions. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969) (fifth amendment protection against double jeopardy applicable in state prosecutions).

74 In determining whether the *Zola* court created or simply restored a procedural right, it is important to consider that, at common law, the right existed be-
This plea is distinguished from the defendant was not entitled to assistance of counsel in capital cases. In Warner v. State, 56 N.J.L. 686, 694-95, 29 A. 505, 508 (1894), the court observed that an accused was entitled to address the court personally in capital trials at the common law because he was denied the right to assistance of counsel in capital prosecutions until 1836. Warner suggests, therefore, that the Zola court created the right of allocution because no such right co-existed with the right to assistance of counsel at the common law. The court in West v. State, 22 N.J.L. 212, 229 (1849), however, did not link the right of allocution with the absence of a right to assistance of counsel. In that opinion, the New Jersey court affirmed that at the common law, the accused in a capital case had to be asked if he had anything to offer as a reason for avoiding imposition of judgment prior to sentencing. Consequently, West supports the proposition that Zola revived the common law allocution right. In Harris v. State, 306 Md. 344, 352-59, 509 A.2d 120, 124-27 (1986), the Maryland court concluded that allocution by rule revived the common law right in capital cases.

Interestingly, in Tomlinson v. State, 98 N.M. 213, 215, 647 P.2d 415, 417 (1982), the New Mexico Supreme Court used the reverse reasoning in holding that the traditionally-recognized right of allocution in capital cases had been extended by legislative action to all cases by the dictate of N.M. Stat. Ann. 31-18-15.1 (1978) which provided: "The [c]ourt shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision. . . ." Thus, in Zola and Harris, the state supreme courts reasoned that allocution should be afforded in capital cases because of its general availability in criminal proceedings, while in Tomlinson the New Mexico court concluded that the Legislature had intended to extent the right traditionally only available in capital cases to all criminal sentencing proceedings, overruling State v. Jones, 34 N.M. 499, 285 P. 501 (1930). See also, Commonwealth v. Gates, 429 Pa. 453, 457, 240 A.2d 815, 818 (1968) (recognizing right to allocution in capital cases only).

The capital sentencing statute provides in pertinent part:

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding.

N.J. Stat. Ann. § 2C:11-3c(1) (West 1982 & Supp. 1990). This provision does not elaborate on what circumstances would support a finding of good cause sufficient to empanel a second jury solely for sentencing or indicate whether the accused could move for such a result. In the event a second jury is empaneled, N.J. Stat. Ann. § 2C:11-3c(2)(c) (West 1982 & Supp. 1990) permits the reintroduction of evidence adduced during the guilt/innocence phase of trial, but does not require that it be reintroduced in every instance. N.J. Stat. Ann. § 2C:11-3c(1) further provides that "[o]n motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury." This provision also affords the accused and state the right to insist on jury sentencing where the case is tried to the trial court sitting without a jury or where the defendant has entered a plea of guilty.

It is critical to note that the statement must be made before the sentencer, whether judge or jury, actually makes the punishment determination. Otherwise, the right is of no value. See supra note 62 and accompanying text. In Bassett v. Commonwealth, 222 Va. 844, 858-59, 284 S.E.2d 844, 853-54 (1981), cert. denied, 456 U.S. 938 (1982), the accused argued that he had been denied his right to make an address in the nature of allocution. The court held that no violation occurred because he was permitted to develop evidence of mitigating circumstances, he testi-
presenting testimony at trial chiefly because it does not afford the prosecution an opportunity to test the assertions made by the accused through cross-examination.\textsuperscript{76} Indeed, if the accused is merely asking the trial judge or jury to spare his life without explanation or justification, cross-examination might seem fruitless, unless the prosecutor's thrust would be to either question the accused's sincerity in wanting to continue his life or to suggest the plea's lack of merit. The court's opinion suggests that the latter tactic be reserved for argument.\textsuperscript{77}

Cross-examination may be useful in any number of contexts for impeaching the credibility or integrity of the accused as to facts or motivation.\textsuperscript{78} It is hardly necessary as a device for fact-finding where the only issue, if one at all, is the accused's express desire to live. This issue is difficult to address satisfactorily in the usual context of examination under oath.

1. The source of the right under New Jersey law

A significant aspect of the Zola Court's decision was the perhaps carefully crafted reliance on state common law principles as the basis for the right.\textsuperscript{79} Rejection of a federal constitutional component,\textsuperscript{80} particularly in light of the already adverse decision in \textit{McGautha v. California},\textsuperscript{81} apparently disposing of the issues, serves first to avoid relitigation of \textit{McGautha} before a court likely no more sympathetic to increasing the constitutionally-required range of procedural protections to be afforded capital defend-


\textsuperscript{77} \textit{Id.} The defendant is permitted to make his address to the jury at the conclusion of the punishment hearing, prior to the closing arguments of counsel. Presumably, both the prosecution and defense counsel would be permitted to refer to the accused's statement in summation. \textit{Compare}, \textit{Putman v. State}, 251 Ga. 605, 613, 308 S.E.2d 145, 152 (1983), \textit{cert. denied}, 466 U.S. 954 (1984) (rejecting allocution as valuable right if made to trial judge following jury verdict).

\textsuperscript{78} \textit{See}, \textit{e.g.}, \textit{State v. Maynard}, 311 N.C. 1, 316 S.E.2d 197 (1984), where accused's testimony that he had never been in trouble before justified admission of two prior convictions otherwise unrelated to the capital offense for which he was on trial. \textit{Id.} at 27-32, 316 S.E.2d at 212-14. Generally, impeachment evidence may serve to contradict a specific fact or to show a tendency for untruthfulness or bias leading to distortion of truth.

\textsuperscript{79} \textit{Zola}, 112 N.J. at 428, 548 A.2d at 1045.

\textsuperscript{80} \textit{Id.} at 431, 548 A.2d at 1046.

\textsuperscript{81} 402 U.S. 183, 210-13 (1971).
Moreover, in grounding its reliance on New Jersey procedure, rather than the state constitution, the court chartered a course which reserves the option of withdrawing the right or amending its nature based on future experience in capital cases. Had the court simply predicated this right of allocution on some interpretation of general due process rights under the state constitution, modifying the right at a later date would have required either expressly overruling Zola or overruling it in a piecemeal fashion through ever-narrowing decisions sometimes characteristic of constitutional change.

Clearly, had the Zola Court predicated its notion of allocution as a federally-based constitutional right, the Supreme Court would not only have had occasion to review the issue in light of McGautha, but also have been given the opportunity to draw a definite line on the issue of presentation of mitigating circumstances to either include or exclude the accused's right to personally plea for mercy. In light of the rather strong line of

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82 See, e.g., Franklin v. Lynaugh, 487 U.S. 164, 172-76 (1988) (capital defendant not entitled to punishment phase instruction that jury could resolve any "residual doubt" about guilt in making sentencing determination); Pulley v. Harris, 465 U.S. 37, 44-54 (1984) (capital defendant has no constitutional right to review of death sentence to determine whether it is "proportional" when compared with other sentences imposed for capital crimes); California v. Ramos, 463 U.S. 992 (1983) (jury instruction that life sentence could be commuted to include possibility of parole not offensive to federal constitutional protections).

83 112 N.J. at 431, 548 A.2d at 1046. The court noted that its ruling was made in the exercise of its supervisory jurisdiction over New Jersey criminal trials.

84 Id. The court expressly declined to rely on the state constitution. Id. Other courts have expressly relied upon state constitutional guarantees reflected in procedural rules in finding that the right of allocution is incorporated in the criminal process. See State v. Dyer, 371 A.2d 1079, 1085 (Me. 1977) (right of allocution guaranteed in all criminal prosecutions under ME. CONST. art. 1, § 6); State v. Nicolletti, 471 A.2d 613, 617-618 (R.I. 1984) (allocution protected by R.I. CONST. art. 1, § 10). But see State v. Carr, 172 Conn. 458, 374 A.2d 1107 (1977) (calling allocution therapeutic, but not constitutionally required by CONN. CONST., art. 1, § 8).

85 112 N.J. at 431, 548 A.2d at 1046.

86 For example, the Court's alteration of fourth amendment search and seizure law in United States v. Leon, 468 U.S. 897 (1984), and Illinois v. Gates, 462 U.S. 213 (1983) by adopting "good faith" and "totality of circumstances" tests, respectively, in assessing the lawfulness of searches under warrant reflects the extent to which change in constitutional doctrine may be applied through either incremental or dramatic shifts in approach.

87 Once a state court decision is predicated on federal constitutional guarantees, the Supreme Court may exercise its jurisdiction to consider the accuracy of the state court determination. See Michigan v. Long, 463 U.S. 1032, 1037-44 (1983). Even when the state court rests its holding on a prior state decision, the United States Supreme Court may assume jurisdiction to review the judgment if the prior decision was predicated on federal constitutional guarantees. See Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982).
authority requiring that a capital defendant be afforded broad discretion and opportunity to develop evidence in mitigation—
even to include evidence of prior amenability to adapt to conditions of confinement—it is not altogether certain that the Supreme Court would have been unsympathetic to the claim that personal allocation is mandated in capital cases. However, the likelihood that the Court would have imposed as an eighth amendment requirement this new procedure on the states is far less certain, particularly in light of the already complex set of procedural rights which are applicable only to capital trials. Nevertheless, the New Jersey court’s approach protects the newly-adopted procedure from modification by federal courts while cautioning defense counsel not to abuse the right by stretching the parameters of acceptable allocation in individual cases.

a. The origin of the common law right

Early New Jersey decisions found a right of allocution to be traced from the common law of England. In deciding Warner v. State, the Court of Errors and Appeals explained that the right


89 See, e.g., Skipper v. South Carolina, 476 U.S. 1, 4-9 (1986) (death sentence vacated where capital defendant denied opportunity to present evidence of past behavior while incarcerated in mitigation of punishment).

90 The eighth amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. The differences between capital and non-capital prosecutions are apparent when considering the extent to which the Supreme Court requires that the accused be afforded every reasonable opportunity to develop mitigating circumstances evidence. See supra notes 88-89 and accompanying text. No such stringent constitutional requirements have been imposed in non-capital prosecutions. Furthermore, in Mistretta v. United States, 481 U.S. 361, 363-64 (1989), the Court upheld application of sentencing guidelines which sought to regularize sentences imposed in federal prosecutions in rejecting a challenge to the composition of the United States Sentencing Commission which has promulgated the mandatory sentencing guidelines. See Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988).

91 The Court concluded that it would “stand ready to reconsider this ruling if experience dictates that allocation creates more problems than it solves.” State v. Zola, 112 N.J. 384, 432, 548 A.2d 1022, 1046 (1988).

arose in capital trials to permit the accused to plead a pardon or move in arrest of judgment. Because an accused was denied assistance of counsel under English law in capital prosecutions prior to 1836—the court in theory acting as his lawyer—the right permitted the accused to introduce any matter which might bar imposition of the death penalty. While assistance of counsel was denied to capital defendants during that period, it was not denied to English misdemeanants. The Warner Court termed this dichotomy a "beautiful feature of British criminal jurisprudence."94

Thus, the Warner court reasoned, once the right of counsel was held to attach in capital felonies, the necessity for and right of allocution disappeared. The defendant, Warner, had been charged with the homicide of his lover and his attempt to plead intoxication as a defense was rejected. No error attended the trial court's failure to inquire of him whether he had anything to say prior to pronouncement of sentence upon his conviction. The element of intoxication, while not a defense to all degrees of homicide, might nevertheless be a proper subject for a plea in mitigation of sentence as one might now expect counsel or the accused to make upon inquiry by the trial court.97

The right of allocution under common law principles may be seen through the eyes of the Warner Court as limited to capital cases in which no right of assistance of counsel was afforded. This explains the approach taken by litigants and New Jersey courts in the early reported decisions West v. State98 and Dodge v. State.99 In West, the accused argued on appeal that the trial court had erred in failing to demand of him "why judgment should not be pronounced."100 In response, the Attorney General argued that this "proclamation" is only required in capital cases.101 The

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94 Id.
95 Id.
96 Id. at 686-91, 29 A. at 505-07.
97 In many jurisdictions, of course, intoxication may be sufficient not only to serve as a basis for mitigation of punishment, but also to reduce the actor's culpability, resulting in conviction for a lesser offense. See State v. Brooks, 150 Mont. 399, 409, 436 P.2d 91, 96 (1967). For a scholarly discussion of the role of intoxication as a partial defense in New Jersey prosecutions, see State v. Stasio, 78 N.J. 467, 472-82, 396 A.2d 1129, 1131-1136 (1979).
100 22 N.L.J. at 221-22.
101 Id. at 225.
appellant replied that, at the common law, the fraud offense for which he was convicted was a capital crime.\textsuperscript{102} The court held that allocution is required only upon conviction for a capital charge. In so concluding, the court impliedly rejected the appellant's argument that the right should continue to attach to any charge, regardless of the then current range of punishment, which would have constituted a capital offense at common law. When reviewing a perjury conviction five years after the 1849 \textit{West} decision, the supreme court reaffirmed the principle that allocution is required only in capital cases in \textit{Dodge v. State}.\textsuperscript{103}

As the \textit{Warner} Court viewed the common law right of allocution in New Jersey, the procedure was limited to capital cases and mandated only if the accused was unrepresented by counsel.\textsuperscript{104} Given New Jersey's early recognition of the right to assistance of counsel in capital cases,\textsuperscript{105} the right had little viability in criminal prosecutions prior to its incorporation in the rules of criminal procedure.\textsuperscript{106}

\textbf{b. Recognition of allocution in contemporary New Jersey decisions}

With the adoption of rules of criminal procedure superseded-

\textsuperscript{102} \textit{Id.} at 227. The court responded to the argument that "[i]t is not necessary, except upon a capital charge, that the defendant should be asked if he had any thing to offer why judgment should not be pronounced against him." \textit{Id.} at 229 (citations omitted) (emphasis in original).

\textsuperscript{103} 24 N.J.L. 455, 464 (1854).

\textsuperscript{104} \textit{Warner}, 56 N.J.L at 695, 29 A. at 508. The \textit{Warner} Court observed:

\begin{quote}
That beautiful feature of British criminal jurisprudence which permitted a man indicted for the lightest misdemeanor to be defended by trained lawyers, and yet compelled the man indicted for forgery or murder to rely upon the fiction that the court was his counsel, continued until 1836. So that the objection which would operate to arrest the entering of judgment had to be stated by the defendant himself.

The privilege extended to the defendant under this condition was a substantial one, and, in reason, extended to all cases of felony.

Under the condition of affairs existing in this state, however, the reason for the form entirely disappeared. The defendant is represented by counsel who needs no invitation to interpose any legal objection at any stage of the proceedings.
\end{quote}

\textit{Id.}

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} For example, in \textit{In re Hayden}, 101 N.J.Eq. 361, 139 A. 328 (N.J. Ch. 1927) the court noted that "[n]ow, because a defendant no longer has to be asked in any case whether he has anything to say why sentence should not be pronounced against him, that does not mean that he may not say anything that would show the fact. He still has that right." \textit{Id.} at 366, 139 A. at 330. \textit{Hayden} involved a criminal contempt prosecution. Similarly, in Cunningham v. State, 94 Nev. 128, 131, 575 P.2d 936, 938 (1978), the court noted that counsel is accorded the right to address the court prior to imposition of sentence under \textit{Nev. Rev. Stat.} 176-015(2) (1967).
ing common law procedural right, allocution was recognized as a significant component of the sentencing process in all criminal cases. The leading decision continues to be that of the supreme court in \textit{State v. Cerce},\footnote{46 N.J. 387, 217 A.2d 319 (1966).} a 1966 case in which the court defined the parameters of allocution under then Rule 3:7-10(d).\footnote{Prior to January 2, 1964, N.J.R. CRIM. P. 3:7-10(c) provided that "[b]efore imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." \textit{Id.} at 391-92, 217 A.2d at 321. That provision had been amended prior to the decision in \textit{Cerce} to expressly provide under N.J.R. CRIM. P. 3:7-10(d) that the court should address the defendant "personally" and that the defendant was entitled to respond "personally or by counsel." \textit{Id.} at 392 n.1, 217 A.2d at 321 n.1.} There, the court concluded that, under the rule, the accused's right to speak before pronouncement of sentence was personal and could not be satisfied simply by affording counsel an opportunity to address the court on the matter of mitigation of punishment.\footnote{In fact, the court observed that counsel made a "fervent" plea for leniency on the defendant's behalf. \textit{Id.} at 392, 217 A.2d at 321.} The court approved the prior decision in \textit{State v. Laird},\footnote{85 N.J. Super. 170, 204 A.2d 220 (App. Div. 1964).} where the appellate court had held that the record must reflect that the accused personally waived his right to address the trial court.\footnote{\textit{Id.} at 178-79, 204 A.2d at 225.}

\textit{Cerce} also stands for the general proposition that, under the former rule, failure to afford allocution was not a matter which could be raised on collateral attack. Instead, it required redress through a timely motion to the trial court or through direct appeal.\footnote{\textit{Cerce}, 46 N.J. at 396, 217 A.2d at 324. \textit{See also State v. Lyles}, 308 Md. 129, 193-34, 517 A.2d 761, 763-64 (1986) (failure to accord allocution not jurisdictional error at common law since right not constitutional and may be waived).} Once properly raised, the issue required reversal and remand for new sentencing hearing if the trial court failed to accord the accused a right to speak and the record reflected no waiver by the accused.\footnote{\textit{Id.} at 396, 217 A.2d at 324.}

Finally, the decision in \textit{State v. Barbato},\footnote{89 N.J. Super. 400, 215 A.2d 75 (Law Div. 1965).} issued in 1965, reflects amendment of the language in Rule 3:7-10(d) providing that the accused's right to make a statement or present information in mitigation of punishment could be exercised by either the accused personally or by counsel.\footnote{\textit{Id.} at 406, 215 A.2d at 79.} This conclusion was based on amendment to the rule, effective January 2, 1964, which effectively limited the validity of the holding in \textit{Laird} to those sentenc-
ing proceedings in which the accused was not personally permitted to address the court prior to the effective date of the rule change.\footnote{116} Interestingly, although the \text{Barbato} opinion is not discussed by the \text{Cerce} Court,\footnote{117} the court noted the same language change in the rule, effective after the date of the defendant \text{Cerce}'s sentencing, foreshadowing the limited impact of its holding.\footnote{118}

The continuing significance of \text{Cerce} in New Jersey jurisprudence appears to be its discussion of a court’s failure to afford the accused an opportunity to address the court prior to sentencing.\footnote{119} The court held that violation of the rule impinged upon a purely procedural right. Regardless of any apparent showing of prejudice stemming from the failure to afford allocution, this error cannot be reserved or raised initially collaterally but must be advanced on direct appeal.\footnote{120} Thus, under the \text{Cerce} formulation,\footnote{121} violation of the right is not a matter of fundamental error which is deemed to affect the basic fairness of the trial or sentencing proceeding.\footnote{122}

Although, in \text{Laird}, the proceeding had been instituted collaterally, the court recognized it as one in which the \text{pro se} litigant had effectively moved to correct an illegally imposed sentence.\footnote{123}

\begin{footnotes}
\item Id.
\item \text{Cerce}, 46 N.J. 387, 217 A.2d 319.
\item Id. at 392 n.1, 217 A.2d at 321 n.1. The issue addressed in State v. \text{Laird}, 85 N.J. Super. 170, 178-79, 204 A.2d 220, 224-25 (App. Div. 1964), is not precisely met by the \text{Cerce} Court’s recognition of the amendment to the rule. While the amended rule permits the defendant to answer personally or by counsel, it does not provide that the record must affirmatively show that the defendant waived his right to address the court in lieu of counsel.
\item The \text{Cerce} holding parallels the disposition and reasoning advanced in Hill v. United States, 368 U.S. 424, 426-30 (1961). \textit{See supra} notes 30-35 and accompanying text.
\item \text{Cerce}, 46 N.J. at 396, 217 A.2d at 324. The \text{Cerce} Court noted that the accused could alternatively raise the issue in the context of a Rule 3:7-13(a) motion for reduction or change of sentence filed within the 60 day period following entry of judgment. \textit{Id.} at 396 n.2, 217 A.2d 324 n.2. Presumably, denial of relief by the trial court on the post-judgment motion for reduction or change of sentence would then preserve the issue for appellate review.
\item However, the court did expressly leave open the possibility that, in some cases, denial of the right of allocation might be sufficiently prejudicial to warrant collateral attack. \textit{Id.} at 396, 217 A.2d at 324.
\item \text{Laird}, 85 N.J. Super. 170, 204 A.2d 220.
\item The \text{Cerce} Court noted that “the [\text{Laird}] court found that the prisoner, acting \text{pro se}, was cognizant of his right to appeal from the sentence, but mistook the form of his remedy.” \textit{Cerce}, 46 N.J. at 397, 217 A.2d at 324 (emphasis in original). This approach might suggest that counsel’s failure to interpose an objection or raise an issue on appeal challenging failure to afford the accused an opportunity to address the court might constitute ineffective assistance of counsel once a showing of preju-
\end{footnotes}
Once denied by the trial court, the appellate court treated the matter as a "timely appeal from a trial court's refusal to correct a sentence."\(^{124}\) The Cerce Court noted that Laird was in accordance with its conclusion regarding the requirement that the issue be raised on direct appeal, pointing out the peculiar procedural circumstances of the case presented by Laird.\(^{125}\)

2. Allocations in New Jersey rules

The supreme court predicated its recognition of the right to allocation in capital cases on an earlier codification of the "common law right" in Rule 3:21-4(b):

> Before imposing sentence the court shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his attorney.\(^{126}\)

The court noted the lack of any comparable provision in Rule 3:21-4A,\(^{127}\) which governs the sentencing process in capital prosecutions and provides:

> Where the defendant has been convicted of, or entered a plea of guilty to, N.J.S.A. 2C:11-3(a)(1) or N.J.S.A. 2C:11-3(a)(2) and where the provisions of N.J.S.A. 2C:11-3(c) apply, a separate sentencing hearing shall be conducted pursuant to N.J.S.A. 2C:11-3(c) immediately thereafter, except for good cause shown. At the sentencing hearing the jury, or the court if there is no jury, shall complete a special verdict form.\(^{128}\)

Zola imposes an allocation requirement on the statutory scheme for the conduct of capital trials and will likely result in modification of the current rule 3:21-4A.\(^{129}\) Although the new rule will undoubtedly reflect the experience of the state’s trial courts with personal

dice had been made. See, e.g., Jones v. Barnes, 463 U.S. 745, 755 (1983) (Blackmun, J., concurring) (appellate counsel’s failure to raise non-frivolous issue at request of defendant may constitute "cause and prejudice" for procedural default under state law resulting in avoidance of waiver in federal habeas corpus action).

\(^{124}\) Laird, 85 N.J. Super. at 179, 204 A.2d at 225.

\(^{125}\) Cerce, 46 N.J. at 397, 217 A.2d at 324.


\(^{127}\) Id. at 428, 548 A.2d at 1045. The court stated that the rule "makes no specific reference to a capital defendant’s statement in mitigation of punishment; it seems to have been assumed that such statements were not permitted." Id.

\(^{128}\) N.J.R. CRIM. P. 3:21-4A.

\(^{129}\) The rule might simply be amended to provide that the accused shall be entitled to address the jury or court prior to sentencing deliberations on the issue of punishment.
statements or pleas, if and when adopted or modified, certain preliminary questions concerning the role of allocution in capital prosecutions can readily be addressed based on what the court has expressly said in the 

Zola opinion. Clearly, the court has both granted or extended a right to the capital defendant while issuing a warning that abuse of the right by attempting to present unsworn testimony in support of defenses or to attack the jury's guilty verdict will not be tolerated. Undoubtedly, the court will eventually act to define the parameters of the Zola plea by rule. Until it does so, however, New Jersey defense counsel, prosecutors, and trial courts will be required to function within the holding of the Zola court on a case by case basis. The most obvious and significant contrast between the procedure announced in Zola and current Rule 3:21-4(b) is that in capital cases, the right to address the jury has been made personal, once again, distinguishing the procedure from that afforded in a non-capital case. It is unclear whether this will resurrect the Cerce and Laird Courts' determination that failure to accord allocution in given instances requires remand for new sentencing and may be shown by absence in the record of the accused's express waiver even if counsel addressed the jury and the accused made no request for personal allocution. Notably, the court recognized the right in the context of an aggressively tried case in which counsel argued for mitigation of punishment, suggesting that the right may not be disregarded as perfunctory.

130 For example, the Zola Court indicated that it would "request the Committee on Capital Causes to suggest any necessary procedures to assist trial courts in this aspect of capital sentencing" and then noted that the Court would "stand ready to reconsider this ruling if experience dictates that allocution creates more problems than it solves." Zola, 112 N.J. at 422, 548 A.2d at 1046.

131 Id. at 430-31, 548 A.2d at 1045-46.

132 N.J.R. Crim. P. 3:21-4(b) provides that the defendant may "answer personally or by his attorney." 


135 The Cerce Court noted that following imposition of sentence the accused addressed the court personally, proclaiming his innocence. Cerce, 46 N.J. at 392, 217 A.2d at 321-22. The record did not include an express waiver. Following imposition of sentence, the accused in Laird requested that he be permitted to address the court and then asked that the record reflect that the flag displayed in the courtroom contained only forty-eight stars. Laird, 85 N.J. Super. at 175, 204 A.2d at 223. The exact import of this declaration is not known, but it does suggest the creative potential within some criminal defendants which might be revealed were they forced to represent themselves in every action. The Laird Court required an affirmative showing that the accused chose to waive his right to speak in deference to counsel. Id. at 178-79, 204 A.2d at 224-25.

136 Trial defense counsel in Zola argued that the accused's "severe emotional im-
At least three questions remain unanswered in the Zola opinion. First, it is not certain whether sentence reversal is mandated when the trial court merely fails to personally inform the accused of his right to speak up\(^{137}\) or whether the sentence will be reversed only when the defendant is denied the right to address the jury upon his motion.\(^{138}\) In other words, is sentence reversal required when the error is raised for the first time by post-trial motion or on direct appeal, or must the error be preserved at trial as indicated in Cerce?\(^{139}\) Second, the court did not specify whether failure to afford the accused a right to address the jury can ever be deemed harmless error,\(^{140}\) particularly where counsel had aggressively argued in mitigation. "Impairments" made the death penalty inappropriate. This theory of mitigation was supported by the defendant's history of abuse by his family, abandonment, institutionalization, failed marriage, death of his child, and his family's inability to offer support to him—typified by his mother's decision to flee from the courthouse rather than testify on his behalf in the sentencing phase of trial. Zola, 112 N.J. at 393-94, 436, 548 A.2d at 1027, 1049.

137 The opinion fails to direct trial courts to directly ask the defendant whether he would be interested in addressing the jury. Zola, 112 N.J. at 430-32, 548 A.2d at 1046. Recall that the Laird Court issued such a directive. Laird, 85 N.J. Super. at 178-79, 204 A.2d at 224-25.

138 Clearly, the court could impose a rule of waiver upon the capital defendant who does not object to the trial court's failure to permit or facilitate allocution. A similar rule was apparently imposed by the court in rejecting a claim that the prosecution's closing argument, to which the accused did not object at trial, was so prejudicial as to require reversal of Zola's conviction and sentence under the doctrine of "plain error." Id. at 427, 548 A.2d at 1044.

139 The question is whether denying allocution in a capital prosecution would constitute such an "aggravating circumstance" that collateral attack would be recognized. Cerce, 46 N.J. at 396, 217 A.2d at 324.

140 Since the plea's advantage is essentially in its encouraging the jury to impose a life sentence based on emotional rather than evidentiary grounds, applying "harmless error" doctrine would not be readily appropriate. See Mohn v. State, 584 P.2d 40, 45 (Alaska 1978) (rejecting harmless error analysis for denial of allocution). That doctrine tends to require that trial error be viewed in light of the quantum of evidence available to support the judgment, assuming by implication that the quality of the evidence has been determined by the finder of fact in reaching the judgment. See Chapman v. California, 386 U.S. 18 (1967). The demeanor and credibility of the accused in making his plea for mercy are the only considerations which might affect the jury decision on sentencing flowing from the accused's exercise of the right. Typically, these are concerns committed to the discretion of the finder of fact who has the opportunity to assess the testimony of witnesses in person. See Baxter v. Fairmont Food Company, 74 N.J. 588, 597-98, 379 A.2d 225, 229-30 (1977). But see State v. Johnson, 42 N.J. 146, 162, 199 A.2d 809, 817-18 (1963) (although deference is given to the trial judge's conclusions on witness credibility in non-jury cases, the appellate court may reverse findings made by the trial court if clearly mistaken or unwarranted by the evidence). Given the likely overwhelming evidence of guilt and often aggravating circumstances in a capital case, the finder of fact's imposition of the death sentence could hardly demonstrate that no prejudice resulted from a failure to afford the accused an opportunity to address the jury. Indeed, the Zola decision itself arose in the context of a factually grisly
gation of punishment. Finally, it is unclear whether the capital defendant who has been sentenced to death will be permitted to raise the issue by collateral attack if the record fails to demonstrate a personal waiver of this right, as indicated in Cerce.

C. The parameters of the Zola plea

The supreme court's opinion makes clear that the limited right of allocution recognized in Zola is essentially adopted as a litigation experiment. Carefully grounding the plea in state procedure rather than in the federal or state constitution enabled the court to expressly reserve the right to evaluate use or abuse of the plea in determining its future availability to capital defendants. Aside from its discussion of these preliminary considerations, the majority provided mere suggestions for properly exercising the right. Fortunately, the suggestions are cogent and instructive. The court has offered, by implication, its early assessment of the proper bounds for Zola pleas which may be addressed in terms of proper scope of the plea, prohibited conducted, and reservation of remedies to the trial court.

1. The proper scope of the Zola plea

The court's express recognition of the allocution right is briefly set forth in the opinion:

[I]n the future, we shall permit the narrowly defined right of a capital defendant to make a brief unsworn statement to the jury at the close of the presentation of evidence in the penalty phase.

In State v. Rose, 112 N.J. 454, 545-46, 548 A.2d 1058, 1046-07 (1988), the court applied Zola prospectively, holding that Rose could not claim error in denial of an opportunity for allocution where his trial preceded the issuance of the opinion in Zola. Reversing the death sentence on other grounds, the court observed that Rose would be entitled to exercise the procedural right of allocution in any subsequent capital re-sentencing proceeding.

The court affirmed that the basis for its recognition of a right of allocution before the jury in capital cases rests on procedural, not federal or state constitutional grounds, in the subsequent decision in Rose. Id. Since the right is not grounded in constitutional guarantee, failure to raise its violation at trial or on direct appeal would likely preclude reversal under the plain error doctrine or collateral attack based on application of the concept of waiver. However, denial of the right might be deemed an “aggravating circumstance,” as suggested by the Cerce Court, warranting collateral relief. Cerce, 46 N.J. at 396, 217 A.2d at 324.

The court's directive indicates that allocution is intended as an opportunity for the accused to personally address the jury but not to present a punishment "defense" that would ordinarily be developed through sworn testimony under examination and subject to cross.\textsuperscript{144}

More insight into the court's reasoning is supplied in its response to the argument that the accused should not be accorded any special treatment in the capital sentencing procedure. The court observed:

It is difficult to sympathize with defendants who have caused so much suffering, but we need not discard our common humanity in the process of decision. In the face of the state's forceful pleas in favor of the death penalty, it is difficult as well to accept the argument that the briefest statement by the defendant would inject a fatal emotionalism into the jury's deliberations.\textsuperscript{145}

This language suggests that the accused may make whatever emotional, rather than evidentiary, plea he can fashion to argue for continued life, even if he will live under the conditions of imprisonment.

The Zola plea opens the door for the accused to place in proper perspective for the sentencing jury the otherwise sterile factual record developed in support of mitigating circumstances which may result if he does not testify under oath during the punishment proceeding. For example, the defendant may enhance the value of evidence revealing his particularly turbulent home life as a child, a factor relevant to the punishment determination according to the Supreme Court's decision in \textit{Eddings v. Oklahoma},\textsuperscript{146} by urging that the circumstances of his life justify a lenient sentence. Or, an accused whose prior history of incarceration demonstrates a capacity to adapt to prison in a relatively positive manner may be entitled to

\textsuperscript{144} In fact, the court expressly disapproved of using the plea to offer "unsworn" testimony, noting that the decision in \textit{Booth v. Maryland}, 306 Md. 172, 194-99, 507 A.2d 1098, 1109-11 (1986), \textit{vacated in part on other grounds and remanded}, 482 U.S. 496 (1987) discusses a right of allocution under Maryland law which apparently permits the accused to use the plea to deny participation in the murder. 112 N.J. at 430, 548 A.2d at 1044-45. The \textit{Booth} Court did not expressly approve the defendant's use of allocution as a means to place his unsworn denial of commission of the offense before the jury, however, as the \textit{Zola} Court suggests. Rather, \textit{Booth} focused on the propriety of permitting the prosecutor to respond to the unsworn denial in his argument to the jury. \textit{Booth}, 306 Md. at 195-210, 507 A.2d at 1110-18. It did not clarify whether the accused may deny commission of the offense while exercising his right to allocution.

\textsuperscript{145} \textit{Zola}, 112 N.J. at 431, 548 A.2d at 1046.

\textsuperscript{146} 455 U.S. 104 (1982). Zola himself was able to present evidence of a troubled family history in mitigation. \textit{Zola}, 112 N.J. at 393-94, 436, 548 A.2d at 1027, 1049.
have the jury consider this fact in accord with the Court's decision in *Skipper v. South Carolina.* The *Zola* plea might be used in this instance to support the accused's argument that a life sentence is an appropriate punishment. This posture might be particularly effective if he was previously released from prison on parole unprepared to return to society and the demands of a lifestyle not wholly regulated by an institution.

The statutory mitigating circumstances set forth by the legislature in Section 2C:11-3c(5) might be supported by evidence presented at trial and reinforced in the accused's plea for mercy made after presentation of punishment phase evidence. The mitigating circumstances relate to the degree of culpability of the accused and focus on those factors peculiar to the offense or the accused which might serve to distinguish either the murder or the

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147 476 U.S. 1 (1986). See infra note 149.
148 There is no constitutional requirement following the decision of the United States Supreme Court in *Gregg v. Georgia,* 428 U.S. 153, 182-83 (1976), that restricts imposition of the death penalty to those cases in which a less severe penalty might be shown to be ineffective to serve the "ends of penology." However, by weighing the evidence presented in support of aggravating and mitigating circumstances pursuant to N.J. STAT. ANN. § 2C:11-3c(3) (West 1982 & Supp. 1990), the jury resolves whether the penalty is appropriate.

However, once the jury finds that the aggravating circumstance(s) found outweigh the mitigating circumstance(s) found, if any, the jury must sentence the defendant to death under the New Jersey scheme. See N.J. STAT. ANN. § 2C:11-3c(3)(a). This "mandatory" aspect of such capital punishment schemes has recently been upheld by the United States Supreme Court in *Blystone v. Pennsylvania,* 110 S. Ct. 1078, 1082 (1990). Not all states follow this approach. Arkansas, for example, requires the jury to make an additional finding—that the "aggravating circumstances justify a sentence of death beyond a reasonable doubt," affording the jury even greater discretion in determining the suitability of capital punishment in the case. See Ark. Code Ann. § 5-4-603 (1987).

149 For example, the *Skipper* decision suggests that the relatively "good" character demonstrated by the defendant, albeit while he was incarcerated and in a regimented atmosphere, should be asserted by the defense in support of an argument that a sentence of life imprisonment is appropriate. *Skipper,* 476 U.S. 1. Of course, opening the door to a discussion of the accused's history of prior incarceration might afford wide latitude for rebuttal by the prosecution, or eventually entail disclosure of prior criminal behavior not otherwise admissible at trial. See, e.g., N.J. STAT. ANN. § 2C:11-3c(4)(a) (limiting proof of prior convictions as "aggravating circumstances" to conviction(s) for murder).


151 For instance, the fact that the defendant may have been under the "influence of extreme mental or emotional disturbance," otherwise insufficient to constitute a total defense, is a factor which may be developed in mitigation. N.J. STAT. ANN. § 2C:11-3c(5)(a). Another factor is that the defendant was under "unusual and substantial duress" at the time he committed or participated in the murder which would otherwise have been insufficient to constitute a defense to the crime. N.J. STAT. ANN. § 2C:11-3c(5)(3).

152 The fact that the victim may have "solicited, participated in or consented to
murderer\textsuperscript{158} from those warranting imposition of capital punishment.

As the *Zola* opinion makes clear, evidence adduced through the testimony of any witness, including that of the accused, which raises issues relating to mitigating circumstances and supports mitigating circumstances instructions is subject to cross-examination and rebuttal.\textsuperscript{154} Once the evidence or testimony has been tested by cross-examination, an accused's plea for punishment which reflects the same general defensive theory should not be inappropriate.\textsuperscript{155} However, if the accused has not testified and uses the plea to offer facts which would either support mitigating circumstances instructions or support previously developed evidence with matters not already in the record, corrective action by the trial court to permit the prosecutor to rebut the unsworn testimony of the accused would be warranted under the parameters set by the court in *Zola*.\textsuperscript{156}

Thus, in order for the plea to rest on anything more than the most basic request by the accused that the jury demonstrate mercy in its punishment verdict,\textsuperscript{157} some predicate in the form of evidence developed in accord with the normal rules governing admissibility and tested by cross-examination and rebuttal would likely be necessary if the statement or plea is to be confined to the role envisioned by the conduct resulting in his death.” may be asserted to demonstrate that the circumstances surrounding the offense itself serve to distinguish the facts from those which would warrant imposition of the death penalty. N.J. STAT. ANN. § 2C:11-3c(5)(b).

\textsuperscript{153} The age of the accused, N.J. STAT. ANN. § 2C:11-3c(5)(c) or his lack of “significant history of prior criminal activity,” N.J. STAT. ANN. § 2C:11-3c5(f), are recognized as mitigating circumstances under the New Jersey capital sentencing statute.

\textsuperscript{154} State v. Zola, 112 N.J. 384, 431, 548 A.2d 1022, 1046 (1988). The court noted that in many capital cases, defendants do take the stand to offer evidence in mitigation of their sentences. They thus necessarily expose themselves to cross-examination upon the issues of the trial. *Id.*

\textsuperscript{155} In such a case, the defendant would not be offering “testimony” through his plea in allocution which would not otherwise have been subject to cross-examination.

\textsuperscript{156} Zola, 112 N.J. at 431-32, 548 A.2d at 1046. See State v. Bontempo, 170 N.J. Super. 220, 244, 406 A.2d 203, 215 (Law Div. 1979) (defendant offering unsworn statement opens door to response by prosecutor); State v. Fioravanti, 46 N.J. 109, 117-18, 215 A.2d 16, 20-21 (1965) (defendant who answers proof of evidence against him may be challenged on related matters). The *Zola* Court cited both cases for the proposition that the accused may not use the unsworn statement as a vehicle for developing factual assertions which should be subject to rebuttal or comment by the prosecution. Zola, 112 N.J. at 430, 548 A.2d at 1046.

\textsuperscript{157} The *Zola* Court characterized the plea as a “brief unsworn statement in mitigation to the jury at the close of the presentation of evidence in the penalty phase” of the capital trial. Zola, 112 N.J. at 431-32, 548 A.2d at 1046.
by the Zola Court.\textsuperscript{158}

To the extent that an accused who has previously testified has subjected himself to cross-examination for scrutiny of his credibility, incorporating in the plea for mercy defensive matters already tested by usual courtroom processes would not appear to violate the principles set forth in Zola. Although the opinion clearly focuses on the importance of enabling a non-testifying capital defendant to speak to the jury prior to punishment deliberations,\textsuperscript{159} the opinion does not appear to restrict the statement in the nature of allocution to those situations in which an accused has not testified.\textsuperscript{160} Moreover, because the function of the plea is different from that of usual testimony on the matters of defenses or mitigating circumstances, it would seem unfair to deny the plea to those defendants have elected to testify under oath in either the guilt or punishment phases of the trial.\textsuperscript{161}

The court might rationally preclude an individual who testified in the punishment phase of trial from later making an unsworn statement, on the basis that he already enjoyed an opportunity to address the jury. However, if his testimony was given in the normal

\textsuperscript{158} The Zola Court clearly expressed concern about ensuring that the defendant not be permitted to circumvent the normal application of the rules of evidence and cross-examination through use of the personal plea to advance factual assertions of innocence. \textit{Id.} However, it is worth noting that the New Jersey capital punishment scheme already affords the accused more latitude to present mitigating evidence it that grants the prosecution to develop aggravating circumstances proof. \textit{N.J. Stat. Ann.} § 2C:11-3c(2)(b) (West 1982 & Supp. 1990) provides:

\begin{center}
The admissibility of evidence offered by the [s]tate to establish any of the aggravating circumstances shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation which would not be admissible under the rules governing the admission of evidence at criminal trials, the [s]tate may rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.
\end{center}

\textsuperscript{159} The court noted that "[i]n [some] cases . . . a capital defendant may elect not to testify, either because he believes it unlikely that he will persuade jurors or because he might be examined about previously inadmissible evidence not forming a statutory aggravating factor." \textit{Id.} at 431, 548 A.2d at 1046. The court then recognized the desirability of affording the accused the right to make a restricted plea for mercy to the jury. \textit{Id.}

\textsuperscript{160} \textit{Zola}, 112 N.J. at 428-32, 548 A.2d at 1044-47.

\textsuperscript{161} To some extent, in fact, denying allocation to any defendant who had already testified and been cross-examined would likely constitute an unfair penalty for exercising the fifth amendment right to offer testimony. This would be the converse of the factual setting presented by the accused in Crampton v. Ohio, 402 U.S. 183, 210-11 (1971).
course of direct-examination, rather than by narrative, and specifically focused on matters of mitigation, such as those set forth in the statutory mitigating circumstances,\(^{162}\) it may have lacked the personal appeal to jurors that an unsworn plea for mercy or leniency\(^{163}\)—as opposed to testimony supporting a justification for leniency\(^{164}\)—would afford the accused.

Regardless of the potential limitation which might be placed upon use of the plea based on prior testimony during the course of trial, the plea itself must be viewed as a limited vehicle for expression rather than as a substitute for the accused's sworn testimony.\(^{165}\) Otherwise, the court's apparent hesitance to recognize this new procedure will likely increase and influence the court to either abandon the plea or strictly limit it by rule.\(^{166}\)

2. Prohibited conduct and remedies available to redress abuse

The Zola Court expressed concern that the procedure authorized for capital defendants to address their sentencing juries would be abused. Specifically, the opinion noted:

The state is wisely concerned that defendant not be permitted to lie with impunity to a jury that is attempting to reach a rational fact-based conclusion on whether he shall live or die. The defendant recognizes this concern and seeks no more than the right to stand before the jury and ask in his own voice that he be spared. *He would not be permitted to rebut any facts in evidence, to deny his guilt, or indeed, to voice an expression of remorse that contradicts evidentiary facts.*\(^{167}\)

\(^{162}\) See N.J. STAT. ANN. § 2C:11-3c(5) (West 1982 & Supp. 1990). Subsection (h) permits the accused to adduce evidence relevant to any non-statutory mitigating circumstance, as well, providing for jury consideration of "[a]ny other factor which is relevant to the defendant's character or record or to the circumstances of the offense."

\(^{163}\) Because the testimony of the defendant is presented in the form of questions and answers, whether on direct or cross-examination, jurors might justifiably conclude that the responses had been considered and rehearsed and that the question—even when properly phrased—will "lead" the defendant in giving his answer. In contrast, even a well-rehearsed plea made without the formality of questioning may provide a measure of spontaneity when contrasted with sworn testimony. This, unfortunately, may simply serve to favor more articulate defendants.

\(^{164}\) "Testimony" may prove less persuasive because it is the product of the lawyer's art, the lawyer personally being involved in the production or development of the evidence.

\(^{165}\) See supra notes 144 and 156 and accompanying text.

\(^{166}\) See supra note 129 and accompanying text.

In addressing this concern, the court set forth the following suggested limitations on the exercise of the right:

Before a defendant speaks, he shall be instructed by the court, outside of the presence of the jury, of the limited scope of the right; that his statement is subject to the court's supervision; and that should the statement go beyond the boundaries permitted he will be subject to corrective action by the court including either comment by the court or prosecutor or in some cases possible reopening of the case for cross examination . . . . It might be useful for a court to examine in advance of the defendant's speech a written outline of the proposed statement.\textsuperscript{168}

The limitations and suggested range of remedies are thus set forth in the opinion. The plea in allocution may not be used to present facts or rebut facts shown by the evidence, specifically including denial of guilt; nor may it be used to make an emotional plea contradicting facts previously adduced.\textsuperscript{169}

The court's concern with expression of remorse presents a troubling limitation on the accused's latitude in addressing the jury. Clearly, the court expressed legitimate concern that the accused not be permitted to use allocution as a means of deceiving the jury with his profession of sorrow or regret over having participated in a capital murder. However, the opinion suggests that any declaration of remorse may be subject to correction or rebuttal if it "contradicts evidentiary facts."\textsuperscript{170} Thus, unless the accused expressed remorse immediately after either the murder or his apprehension, the trial court might be left free to find that genuine remorse felt by the accused some time later is contrary to the facts developed concerning

\textsuperscript{168} Id. at 432, 548 A.2d at 1046.

\textsuperscript{169} Once the accused opens up factual issues relating to guilt in his address to the jury, this unsworn testimony would afford a basis for impeachment. \textit{Id.} at 430, 548 A.2d at 1046 (citing State v. Bontempo, 170 N.J. Super. 220, 244, 406 A.2d 203, 215 (Law Div. 1979)).

\textsuperscript{170} \textit{Id.} at 430, 548 A.2d at 1045. One issue that might arise in the context of a capital prosecution is the significance of the defendant's confession even if the confession contains no express declaration of remorse. The fact of confession itself may stem from the accused's need to admit blame and accept responsibility for his actions, especially when the confession does not include any attempt at mitigation or shifting of responsibility to another. Would this circumstance then constitute an evidentiary fact inconsistent with a later expression of remorse made in allocution? The court's opinion is not clear. The fact of confession would constitute grounds for requesting an instruction on the statutory mitigating circumstance of the accused having provided "substantial assistance to the [s]tate in the prosecution of another person" under N.J. STAT. ANN. 2C:11-3c(5)(g) (West 1982 & Supp. 1990) (emphasis added) if the confession also identifies an individual who might otherwise have escaped prosecution.
the offense. For instance, if the offense was committed while the accused was intoxicated or pressured by others, a genuine sentiment of remorse might well be delayed in manifestation. The court’s admonition suggests that in such circumstances, a delayed manifestation could be deemed contrary to the evidence developed at trial concerning the accused’s conduct at the time of the offense.

A capital defendant claiming that drug or alcohol use caused a partial impairment not rising to a complete defense may nevertheless request an instruction on the statutory mitigating circumstance set forth in N.J. Stat. Ann. § 2C:11-3(5)(d) (West 1982 & Supp. 1990). This provision provides that “the defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution.” This mitigating circumstance comports with the recognition of an imperfect impairment defense as a legitimate source of mitigation. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Moreover, an accused might also predicate his plea in the nature of allocution on how his prior involvement with drugs has affected his life. For instance, the accused might say:

Members of the jury, I want you to understand that my involvement in this crime resulted from my use and involvement with drugs. I am not asking you to excuse my conduct, but I do want you to know that this is the kind of thing which can happen to someone who starts using drugs as I did at an early age. I ask you only to consider sparing my life so that I can try to make up for what I have done in some way by living a better life in prison, free from what drugs have done to me in the past.

A similar plea might be advanced by an individual who has suffered from alcoholism or a mental disorder which may have contributed to a skewed understanding of the value of life. See also Appendix A2.

N.J. Stat. Ann. § 2C:11-3(5)(3) (West 1982 & Supp. 1990) provides that an accused may argue in mitigation that he “was under unusual and substantial duress” at the time of his participation in the offense where this duress would be insufficient to constitute a defense to the charged offense. While duress was recognized as a defense in New Jersey, State v. Toscano, 74 N.J. 421, 429, 378 A.2d 755, 758 (1977), it has traditionally been unavailable in murder prosecutions. State v. Dissicini, 126 N.J. Super. 565, 569, 316 A.2d 12, 15 (App. Div. 1974), aff’d, 66 N.J. 411, 331 A.2d 618 (1975); accord, State v. St. Clair, 262 S.W.2d 25, 27 (Mo. 1953). It may, however, be recognized as an “imperfect” defense which serves to reduce the accused’s liability from murder to manslaughter. Wentworth v. State, 29 Md. App. 110, 120-21, 349 A.2d 421, 427-28 (1975). In context of a capital prosecution, this “imperfect defense” serves as a basis for mitigation of punishment by explaining the circumstances under which the act occurred. Where the accused’s conduct is inconsistent with his prior demeanor, the duress demonstrated serves to explain actions which might otherwise not be understood by the sentencing jury. With a rise in cult-related violence, the likelihood that particularly grisly murders would be committed by individuals lacking a prior history of individualized violence might be expected to rise. One might take note of the unrepentant “Night Stalker,” convicted California murderer Richard Ramirez, who told the judge who imposed his death penalty: “You don’t understand me. I will be avenged. Lucifer dwells within us all.” National Law Journal, November 20, 1989, at 6. Ramirez seems an unlikely candidate for successful use of the plea in the nature of allocution.
and therefore subject to correction by jury instruction, prosecutorial comment, or reopening of the evidence.\textsuperscript{175}

The \textit{Zola} Court's limitation on the type of plea that the capital accused may be permitted to make in allocution, designed to control feigned emotional appeals to the jury, dangerously prejudices the accused's sincerity by restraining expression of genuine remorse. Because all capital murders, by definition, involve an element of intent or deliberation,\textsuperscript{174} which might be said to also demonstrate a lack or defect of conscience,\textsuperscript{175} remorse not expressed immediately after the act or arrest might always be characterized as contrary to the evidence relating to the commission of the offense. Moreover, the court may well underestimate the jury's ability to evaluate the accused's sincerity in claiming remorse for commission of a capital crime. Certainly, an accused whose plea strikes the jury as insincere runs the risk of incurring the sentencing wrath of a panel offended by a false emotional appeal of conscience. More importantly, the

\textsuperscript{175} Typically, even premeditation and deliberation which seem to have occurred spontaneously with the crime are sufficient for purposes of meeting the state's burden of proof in a jurisdiction requiring proof of these elements to sustain conviction for capital or first degree murder. For instance, in Ford v. State, 276 Ark. 98, 633 S.W.2d 3 (1982), cert. denied, 459 U.S. 1022 (1982), the court noted that "[t]he matter of premeditation and deliberation, absent a confession, can only be proven by circumstantial evidence. This state of mind may be formed on the spur of a moment." \textit{Id.} at 108, 633 S.W.2d at 9. Further, the court in State v. Zdanowicz, 69 N.J.L. 619, 55 A. 743 (1903) stated that "[b]y 'deliberately' and 'premeditation' . . . the law does not mean that any particular length of time need intervene between the formation of the purpose to kill and its execution. It is not necessary that the deliberation and premeditation should continue for a day or an hour or a minute. It is enough that the design to kill be fully and clearly conceived in mind, and purposely and deliberately executed." \textit{Id.} at 627, 55 A. at 746. Under the current New Jersey capital scheme, one meets the intent requirement when he either "purposely" causes death, N.J. STAT. ANN. § 2C:11-3a(1) (West 1982 & Supp. 1990), or "knowingly" causes death or serious bodily injury resulting in death. N.J. STAT. ANN. § 2C:11-3a(2). State v. Gerald, 113 N.J. 40, 69, 549 A.2d 792, 807 (1988) (holding on state constitutional grounds that death sentence cannot be imposed when the accused "purposely" or "knowingly" causes serious bodily injury resulting in death; the accused must intend to cause death for capital punishment to apply. This follows the Model Penal Code terminology for intent. \textit{See Model Penal Code} § 2.02(2)(a)(i)-(b)(i) (1962).
court's concern may well reflect an institutional skepticism, justified by experience with sociopathic personality, which treats any expression of compassion or sentiment by the perpetrator of a violent crime with doubt, because the conscience subsequently claimed by the accused was apparently insufficient to deter commission of the crime.\textsuperscript{176}

Apart from the perhaps unduly restrictive limitation on expression of remorse, the court's parameters for use of the Zola plea provide a fairly rational barrier to abuse of the right. Once the accused has exceeded the court's limits by providing uncross-examined "testimony" designed to avoid a death sentence, the trial court has at least four alternatives to redress this abuse: admonishing or providing a curative instruction to the jury; recognizing expanded legitimate bases of argument by the prosecutor; reopening the evidence to permit development of rebuttal testimony; and granting a mistrial.\textsuperscript{177}

\textbf{a. Use of a curative instruction by the trial court}

Recognition of the proper use of an instruction or admonition designed to cure the effects of impermissible allocution is grounded in the court's reference to decisions of the Washington and Maryland courts in \textit{State v. Mak},\textsuperscript{178} \textit{Booth v. State},\textsuperscript{179} respectively, and prior New Jersey decisions.\textsuperscript{180} In addition to focusing

\textsuperscript{176} A brief but significant discussion of the relevance of the diagnosis of the accused as "sociopathic" or as exhibiting an antisocial personality disorder is included in the Court's opinion in \textit{Barefoot v. Estelle}, 463 U.S. 880, 899-901 n.7 (1983). Generally, sociopathic behavior may be described in the way that a forensic psychiatrist did in \textit{Estelle v. Smith}, 451 U.S. 454, 459-60 (1981). In that case, the Court noted:

Dr. Grigson testified before the jury on direct examination: (a) that Smith "is a very severe sociopath"; (b) that "he will continue his previous behavior"; (c) that his sociopathic condition will "only get worse"; (d) that he has no "regard for another human being's property or for their life, regardless of who it may be"; (e) that "[t]here is no treatment, no medicine . . . that in any way at all modifies or changes this behavior"; (f) that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so"; and (g) that he "has no remorse or sorrow for what he has done."

\textit{Id.}

\textsuperscript{177} The first three options are noted by the court in the opinion in \textit{Zola}, 112 N.J. at 432, 548 A.2d at 1046.

\textsuperscript{178} 105 Wash.2d 692, 718 P.2d 407 (1986).


on the use of corrective measures to cure improper allocu-
tion, these decisions explore the interplay between allocu-
tion and either giving testimony under oath or choosing to remain silent. This raises issues about the constitutional propriety of comment on the accused's decision not to testify. Because both considerations may prove constitutionally and procedurally troublesome in a capital context, it is important that New Jersey courts carefully consider what instructions relevant to the decision to engage in allocution should be given in a capital trial.

(i) A general instruction on election not to testify

In a series of decisions concerning an accused's election not to testify, Curative instructions are generally recognized as appropriate to correct improper argument or argument which delves into impermissible subjects. State v. Sands, 138 N.J. Super. 103, 108, 350 A.2d 274, 276-77 (App. Div. 1975), aff'd, 76 N.J. 127, 386 A.2d 378 (1978). For example, the Supreme Court of New Jersey held that a prosecutor's improper reference to or suggestion that the accused might be a "serial killer" was cured by the trial court's timely instruction in State v. Koedatich, 112 N.J. 225, 323-25, 548 A.2d 939, 990-91 (1988), cert. denied, 109 S. Ct. 815 (1989). Further, in State v. Raynolds, 41 N.J. 163, 176, 195 A.2d 449, 455-56 (1964), cert. denied, 377 U.S. 1000 (1964), the supreme court held that the trial court properly restricted the scope of defense counsel's argument when he sought to engage in a general discourse on race discrimination in the United States where evidence of such discrimination had not been introduced at trial.

In both Booth, 306 Md. at 197-200, 507 A.2d at 1111-12, and Bontempo, 170 N.J. at 238-49, 406 A.2d at 212-17, the trial court had allowed the prosecutor to respond in argument to factual or evidentiary assertions advanced by the accused in addressing the jury which did not reflect evidence developed in the trial record. Accord, State v. Schultz, 46 N.J. 254, 258, 216 A.2d 372, 375 (1966), cert. denied, 384 U.S. 918 (1966).

In State v. Mak, 105 Wash. 2d 692, 718 P.2d 407 (Wash. 1986), the Supreme Court of Washington characterized the accused's right to allocution as something different from his right to address the jury, which the trial court had offered and the accused had declined:

During the penalty phase of the trial, the trial court ruled that the defendant could personally make an unsworn statement to the jury prior to closing arguments to the jury. Then later, at the time the trial court actually pronounced sentence, the trial court also invited the defendant to speak on his own behalf. On both occasions the defendant declined to speak.

From the colloquy between the trial court and both counsel, it appears that what the defendant was apparently seeking was the right, at the end of the penalty phase of the trial, to present evidence on the issue before the jury which would be uncross-examined, unsworn, unrebuttable and unanswerable by argument. Nothing in the statute contemplates or permits that, nor does our former allocution rule. Id. at 729, 718 P.2d at 430 (citations omitted).

The defendant in Booth argued that the trial court erred in refusing to instruct the jury that his decision not to testify during the sentencing hearing could not give rise to an inference as to his guilt. Booth, 306 Md. at 209, 507 A.2d at 1117.
to testify in a criminal proceeding, the United States Supreme Court has recognized both the right of the accused to request a cautionary instruction restricting the jury from consideration of his decision to remain silent\(^\text{185}\) and the propriety of the giving of such an instruction by the trial court even over the accused's objection.\(^\text{186}\) The instruction must be tailored, moreover, to preclude the jury from drawing an adverse inference from the accused's silence based upon the language used by the court.\(^\text{187}\)

A defendant in a New Jersey capital trial may elect any of several options with respect to his participation in the trial. He may remain silent during the guilt/innocence phase of trial yet testify during the punishment hearing. Alternatively, he may remain silent at the punishment phase while having testified on matters relevant to guilt. Further, he may either testify during both phases of trial or remain silent throughout the trial. Finally, Zola permits him to present a statement in allocution to the sentencing jury. In doing so, he will not have remained silent during the course of trial, but he will also not have submitted to an oath and cross-examination in the event that this was his only address to the jury.\(^\text{188}\) An important issue, therefore, is whether an instruction can or should be fashioned which directs the jury not to consider an election not to testify under oath as evidence against the accused when he has elected to make a sentencing statement to the jury.

Typically, the type of instruction authorized under Lakeside v. Oregon\(^\text{189}\) and Carter v. Kentucky\(^\text{190}\) advises the jury simply that the...


\(^{186}\) Carter, 450 U.S. at 302-03.

\(^{187}\) The instruction should be neutral in use of language in order to achieve its desired objective. The Booth Court determined that a cautionary instruction on exercise of the privilege is satisfactory, "[e]ven though such an instruction calls attention to the failure of the defendant to testify. . . ." Booth, 306 Md. at 201, 507 A.2d at 1113 (emphasis added). Reference to the election to exercise the privilege as a "failure" itself imparts a negative connotation to the defendant's silence. Use of similar phrasing in an instruction on point would undermine the goal of the instruction.

\(^{188}\) The District Court in United States ex rel. Miller v. Follette, 278 F. Supp. 1003, 1007 (E.D.N.Y. 1968), aff'd, 397 F.2d 363 (2d Cir. 1968), cert. denied, 393 U.S. 1039 (1969), characterized this approach as involving a "partial waiver" of the privilege which would permit the prosecutor to comment on the fact that the accused's statement was not made under oath and subject to cross-examination. Another complicating factor may lie in the fact that the accused may decide to both testify and make a statement in allocution. Law v. State, 624 P.2d 284 (Alaska 1981).

\(^{189}\) 435 U.S. 333 (1978). Lakeside held that the trial court did not commit error by giving the jury an instruction which drew attention to the defendant's choice to...
accused may elect to testify or remain silent in a criminal proceeding, but that his decision not to testify shall not be taken as evidence or a circumstance against him or otherwise considered by the jury in any context during its deliberations. Since an allocuting capital defendant has elected not to "remain silent" during the course of the proceedings, an instruction patterned after those which would be permissible under Lakeside v. Oregon, might be misleading to jurors. An appropriate instruction in the typical case in which the accused has elected not to testify, but has addressed the jury prior to its sentencing deliberations might read as follows:

In a capital trial the accused may elect to testify under oath, remain silent, or address the jury without having been sworn. The decision as to which approach the accused will follow does not itself constitute any evidence and may not be considered as a circumstance against him or used for any purpose whatsoever during your deliberations. You may give whatever weight you determine appropriate to the defendant's unsworn statement in this case and consider both the content of the statement and the defendant's demeanor in addressing you in reaching your verdict.

remain silent over the defense counsel's objection. According to the Court, the following instruction properly expressed the protection afforded by the fifth amendment:

Under the laws of this [s]tate a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence. Id. at 335. The defense counsel argued at trial that the giving of this instruction amounts to "waiving a red flag in front of the jury." Id.

190 450 U.S. 288 (1981). The defendant requested that the trial court instruct the jury that "[t]he [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." Id. at 294. See also Bruno v. United States, 308 U.S. 287, 292 (1939) (evaluating a similar instruction requested by defendant).

191 See supra notes 189-90 and accompanying text. See People v. Ramirez, 98 Ill. 2d 439, 457 N.E.2d 31 (1983) (capital defendant electing to remain silent at punishment hearing entitled to Carter instruction). An instruction that is too broad might influence the jury to think that since the accused has not given sworn testimony, his statement is not to be considered at all. Alternatively, the prosecution might argue that the very general instruction authorized in Lakeside unfairly suggests that even the accused's statement in allocution could not be considered, in any circumstance, adversely to his interests. See supra note 189 and accompanying text.

192 See supra note 189 for text of instruction considered permissible in Lakeside. This instruction might suggest that an adverse inference could be drawn if the defendant has not elected to testify but has elected to make an unsworn statement.

193 This proposed instruction would properly alert the jury to the distinction between its consideration of the accused's decision to remain silent and his exercise of
While this proposed instruction calls the jury's attention to the accused's election to not testify under oath, it does so in a neutral manner consistent with the principle applied by the Court in Lakeside.\(^{194}\) Moreover, it advises the jury that while the unsworn statement in allocution by the accused is not testimony, it may be used by the jury in considering the appropriate penalty to be imposed. The accused may object to the instruction regarding the right to remain silent as a matter of strategy. The decision in Lakeside leaves to the discretion of the state courts the disposition of such an objection.\(^ {195}\) Nevertheless, there is a positive benefit to be gained from advising the jury that the unsworn statement of the accused may be relied upon by the jurors in exercising their own discretion in arriving at a punishment verdict.\(^ {196}\)

(ii) The curative instruction

Once an accused strays from the bounds of permissible allocution and essentially offers unsworn testimony, particularly when asserting facts not in evidence, the trial court may need to use a more definitive statement in instructing the jury than that proposed in the preceding paragraphs.\(^ {197}\) While not commenting on the evidence directly or expressing the court's opinion as

the option to make a statement in allocution. One question not specifically addressed is whether it would sufficiently preclude the jury from speculating on the accused's motives for making the statement in allocution, the converse of the problem posed when the jury engages in speculation upon the motivation for a defendant not to give sworn testimony. See Bruno, 308 U.S. at 293, where the court noted that "[b]y legislating against the creation of any 'presumption' from a failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind."

\(^{194}\) The petitioner in Lakeside had objected to the giving of any cautionary instruction, but did not contend that the instruction given was an incorrect expression of law. Lakeside v. Oregon, 435 U.S. 333, 338 (1978). See supra note 189 for text of instruction.

\(^ {195}\) The Lakeside Court observed that "'[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each [s]tate is, of course, free to forbid its judges from doing so as a matter of state law.'" Lakeside, 435 U.S. at 340. The New Jersey Model Jury Charge on point, Crim. 4.103 (revised January 24, 1979), is to be given only upon the defendant's consent, according to the accompanying notes.

\(^ {196}\) The explicit instruction negates any possible juror confusion over consideration of the statement in allocution as a circumstance favorable to the accused.

\(^ {197}\) State v. Zola, 112 N.J. 384, 432, 548 A.2d 1022, 1046 (1988). Under Zola, the trial court has discretion, upon motion of the prosecutor, to give a corrective jury instruction immediately after the statement rather than to include it in a written jury charge. The trial court's apparent discretion to use either an oral or written instruction is probably intended to counter the improper effect of allocution that strays into impermissible areas.
to the guilt of the accused or credibility of his statement—which has now essentially been transformed into unsworn testimony—this instruction would serve to redress prejudice occasioned by the errant address. Such a curative instruction, in relatively neutral language, can be phrased as follows:

In a capital trial the accused may elect to testify under oath, remain silent, or address the jury without having been sworn. The decision as to which approach the accused will follow does not constitute any evidence and may not be considered as a circumstance against the accused or used for any purpose whatsoever during your deliberations. However, when the accused states a fact or offers argument in his unsworn statement which is not supported by the evidence developed under oath in the course of the trial, you may consider the fact that his statement has not been given under oath and he has not been subjected to cross-examination in evaluating the weight to be given to this statement and the defendant’s credibility in addressing you. You may consider his statement for any purpose relevant to your punishment decision in your deliberations.

The proposed instruction serves two distinct functions. First, it carefully differentiates between sworn testimony and the unsworn statement of the accused and permits the jury to consider the latter in its punishment deliberations. Second, it affords the prosecution a basis for rebutting and commenting on the accused’s credibility in making the statement during final argument. \(^9\) Whether it also allows, or should allow, the prosecutor to expressly question the motive of the accused in exercising his right not to testify under oath is another matter. Although an accused straying from the permissible bounds of allocution might be said to have forfeited his right to be free from any adverse comment on his exercise of fifth amendment privilege, \(^9\) arguably, broadening the range of prosecutorial argu-

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\(^9\) In a Mississippi case, Jones v. State, 381 So.2d 983, 993 (Miss. 1980), cert. denied, 449 U.S. 1003 (1980), the accused elected to exercise his right under the Mississippi Constitution to argue his case to the jury. In so doing, he asserted evidentiary facts not in the record, drawing a pointed objection from the prosecution. The state supreme court concluded that in converting his address from an argument of the evidence into unsworn testimony, the accused had waived the right to not have his decision to remain silent commented upon by the prosecutor in rebuttal to the argument. The prosecutor was properly within the scope of fair rebuttal in commenting that the evidentiary facts offered in the course of the argument were unsworn and had not been tested by cross-examination. See State v. Schultz, 46 N.J. 254, 258, 216 A.2d 372, 375 (1966), cert. denied, 384 U.S. 918 (1967).

\(^9\) Even in Jones, the court authorized comment only upon the lack of credibility of the uncross-examined assertions of fact. A similar scenario was presented in State v. Bontempo, 170 N.J. Super. 220, 244-45, 406 A.2d 203, 215 (1979), where the prosecutor was permitted broader latitude in answering the factual assertion
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ment beyond usual bounds would unduly prejudice an allocuting
defendant whose statements are erroneous but not made in bad
faith.\footnote{200} Certainly, a most devastating assertion would be that the
accused deserves the death penalty because of the nature of the
murder and aggravating circumstances and also because of his soci-
opathic willingness to manipulate the system before the jury in or-
der to secure a life sentence.

b. Objection and admonition

An appropriate prosecution response to improper allocution
may prove to be an objection similar to that challenging im-
proper argument by defense counsel.\footnote{201} For example, where the
accused uses the guise of allocution to assert defensive theories
or facts not supported by the evidence introduced at trial, the
prosecutor may object on the grounds that the defendant's state-
ment constitutes unsworn testimony relating factual matters
outside the trial record.\footnote{202} If the objection is proper, the trial
court may sustain the objection and instruct the defendant to
cease the offensive line of argument. The court may also instruct
the jury not to consider as evidence the accused's factual asser-
tions which are not supported by sworn testimony or other evi-

\footnote{200} In determining what instruction should be given, it is important to distinguish
between affording the prosecutor a basis for answering untested assertions of fact
through normal rebuttal and converting the accused's error into justification for
attacking his motivation for exercising the privilege accorded by the fifth amend-
ment. While the desire to avoid cross-examination may well have prompted the
election not to testify, that motivation nevertheless is not probative of guilt, but
even though it may bear directly upon the credibility of the assertions or unsworn
statements of evidence advanced.

\footnote{201} State v. Reynolds, 41 N.J. 163, 176, 195 A.2d 449, 445-56 (1964), cert. denied,
377 U.S. 1000 (1964).

\footnote{202} Thus, in Jones v. State, 381 So.2d 983, 998 (Miss. 1980), cert. denied, 449 U.S.
1003, the prosecutor objected to the accused's asserting matters not in evidence
when presenting closing argument on his own behalf. The prosecutor argued that,
in all fairness to the state, the accused should not be permitted to make these essen-
tially evidentiary assertions without being subjected to cross-examination. The
court held that the conduct of the accused was subject to comment by the prosecu-
tion in response. See also Booth v. State, 306 Md. 172, 196-97, 507 A.2d 1098,
1110-11 n.5 (1986), vacated in part on other grounds and remanded, 482 U.S. 496 (1987)
(prosecutor's response to improper allocution in argument).
idence in the record.\textsuperscript{203}

Moreover, since the statement in the nature of allocution is designed solely to permit the accused to address his jury on the punishment issue, using that address to challenge the jury verdict or develop a punishment defense not raised at the penalty phase of trial would probably justify \textit{sua sponte} action by the trial court in the absence of formal objection. An egregious abuse of the right by an accused might prompt the trial court to order a permanent cessation of further attempts to present unsworn testimony. Clearly, the \textit{Zola} opinion affords a trial court great latitude to prevent abuse of the allocation right in order to ensure a fair trial.\textsuperscript{204}

The trial court should exercise caution, however, in admonishing the sentencing jury following a ruling sustaining objection to improper allocution. While it may be proper for the court to stress to the jury that the unsworn statements made by the accused are not evidence,\textsuperscript{205} an admonition expressing the court's opinion might violate the right to an impartial sentencing proceeding even though it would perhaps not run afoul of the court's posture taken in \textit{Zola}.\textsuperscript{206} A depersonalized or general ad-
monition would serve to cure all but the most extreme abuses of the right. For example, the trial court might advise the jury in the following terms:

You are instructed that the law of New Jersey permits the accused in a capital case to address the jury prior to sentencing deliberations without having been sworn. The defendant has elected to address you at this time. The defendant’s statements are not evidence in this trial and he may not use his address to put before you evidentiary facts which have not been supported by testimony or other evidence at trial. Nor may he use this address to argue with the verdict you have previously reached in this case with regard to his guilt or innocence. The evidence in this trial is limited to the testimony which has been given under oath and subject to cross-examination and the physical and documentary evidence admitted by the court.\textsuperscript{207}

This general admonition would advise the jury that the defendant’s improper assertion of facts not in evidence may not be considered as evidence and avoid raising the implication that the trial court holds the opinion that the accused is fabricating his story.

c. Expanding the scope of response in closing

The scope of prosecution argument may appropriately be expanded to include rebuttal of the accused’s improper allocution.\textsuperscript{208} If, during allocution, the accused asserted factual matters not flowing from testimony or evidence previously admitted, the prosecutor should be given latitude to address these matters and question the credibility of the accused.\textsuperscript{209} Without directly commenting on the accused’s decision not to personally testify

\textsuperscript{207} The sample admonition might be rephrased to avoid any possibility of prejudice to an accused whose errant statement in allocution is not determined to be the product of deliberate intent to circumvent the parameters of the plea. For example, the trial court might simply instruct the jury:

You are instructed that the law of New Jersey permits the accused in a capital case to address the jury prior to sentencing deliberations without having been sworn. The defendant has elected to address you at this time. His statement does not constitute evidence. The evidence in this trial is limited to the testimony which has been given under oath and subject to cross-examination in the discretion of counsel and the physical and documentary evidence which has been admitted by the court.

\textsuperscript{208} Zola, 112 N.J. at 432, 548 A.2d at 1046.


under oath the prosecutor may still fashion a response that calls the jury's attention to the lack of any independent support in the record for the facts asserted by the defendant, the internal conflict or inconsistency of those facts, and the defendant's lack of credibility based upon evidence previously adduced at trial.

One serious potential consequence of permitting the prosecution to rebut improper allocution through argument is that the prosecutor will take the opportunity to place rebutting facts before the jury, such as the defendant's prior convictions, that do not constitute evidence because the prosecutor is not sworn or subject to cross-examination. One strategic reason for a defendant to remain silent during the development of evidence but to engage in allocution is to keep disclosure of his prior record from the jury. Typically, once an accused testifies, his prior record of conviction for felonies—including those which have not direct

203, 215 (Law Div. 1979) (prosecutor's response to unsworn testimony, including argument that assertions not made under oath, proper rebuttal to "facts" asserted).

However, in Booth v. State, 306 Md. 172, 196-99 n.5, 507 A.2d 1098, 1110-12 n.5 (1986), vacated in part on other grounds and remanded, 482 U.S. 496 (1987), and Jones v. State, 381 So.2d 983, 993 (Miss. 1980), cert. denied, 449 U.S. 1003 (1980), the Maryland and Mississippi Supreme Courts permitted the prosecutor to respond to unsworn factual assertions made by an accused by commenting directly on his decision not to testify and by subjecting him to cross-examination. In the former case, the prosecutor's rebuttal included a discussion of the defendant's possible motivation to not testify—to protect his self-interest by making an unsworn statement in allocution not subject to cross-examination. Specifically, the state's attorney asserted: "I'm not so naive a man to believe that Mr. Booth would be so moved by the prospect of an oath that he would not break his oath. But, ladies and gentlemen, he stood here and testified, not under oath, for one reason only, to avoid cross-examination." Booth, 306 Md. at 196 n.5, 507 A.2d at 1110 n.5. In Jones, the court observed that an accused who attempts to circumvent the prosecution's opportunity for cross-examination by making an unsworn statement asserting untested facts "will be deemed to have waived the right not to have his failure to take the stand commented upon." Jones, 381 So.2d at 993.

See Bontempo v. Fenton, 692 F.2d at 959, cert. denied, 460 U.S. 1055 (1983). There, the Third Circuit summarized the situation in which a state court defendant had essentially utilized the allocution procedure to argue a defense not supported by evidence in the record to the jury:

The circumstances here were unusual. The jury was told that Bontempo's argument could not be considered as evidence and yet he talked about facts which were not in the record. The prosecutor's comments about those unsworn accounts and about Bontempo's failure to mention other relevant events was fair reply to the unorthodox closing argument.

Id. at 959.

The court in State v. Zola, 112 N.J. 384, 431, 548 A.2d 1022, 1046 (1988), observed that "[i]n many cases ... a capital defendant may elect not to testify, either because he believes it unlikely that he will persuade jurors or because he might be examined about previously inadmissible evidence not forming a statutory aggravating factor." See also State v. Sands, 76 N.J. 127, 145, 386 A.2d 378, 387
bearing on his tendency to be untruthful—and misdemeanors involving dishonesty or false statement becomes relevant and admissible for purposes of impeachment. While the jury is routinely instructed that it may consider such prior record only to evaluate the accused’s credibility, defense lawyers tend to believe that disclosure of a prior record actually influences the jury to convict. In a capital trial during which the prior record was not previously disclosed, the desire to keep that record from the sentencing jury, particularly if it includes felony convictions for violent crimes, may be the single most significant factor for the accused in the election to testify or remain silent.

The prosecutor’s disclosure of a prior record during argument might theoretically be a sound response to the accused’s use of allocution to testify to facts while not being subject to impeachment or cross-examination. It is not necessarily a direct response, however, as it would be if the accused used his address to tell the jury that he had never before been in trouble with the law. Rather, the prior record typically is responsive because it provides a basis for evaluating credibility instead of directly contradicting a factual proposition set forth by the accused. Consequently, expanding the scope of prosecution argument to permit interjection of the prior record would not simply permit rebuttal,

(1978) (court rejects defendant’s claim, made for first time on appeal, that he did not testify out of fear that he would be impeached with prior convictions).


214 State v. Rose, 112 N.J. 454, 505-08, 548 A.2d 1058, 1084-85 (1988). In Rose, the court held that the trial court must instruct the jury on the limited purpose for which it could consider evidence offered in rebuttal or for impeachment, because only prior convictions for the offense of murder are otherwise admissible in a New Jersey capital prosecution.


216 Typically, a prosecutor may properly respond to the arguments made by opposing counsel. State v. Heathcoat, 119 N.J.L. 33, 36-37, 194 A. 252, 254 (1937); State v. Slobodian, 120 N.J. Super. 68, 75, 293 A.2d 399, 403 (App. Div. 1972). However, discussion of prior record admitted for impeachment would not constitute a reply to any defense argument except that the accused had no prior record or had never been in trouble with the law.
but it would also afford the state an opportunity to engage in the same use of unsworn testimony as that condemned when done by the layman defendant.\textsuperscript{217}

If improper allocution by the accused suggests the need for development of additional rebuttal or impeachment evidence, the trial court should afford the prosecution a right to reopen and develop relevant evidence in the usual fashion\textsuperscript{218} rather than to simply assert its rebuttal or impeachment facts during the course of argument. Similarly, the trial court should consider the likely corrective impact of admonition or a cautionary instruction\textsuperscript{219} before affording the state greater latitude in argument or an opportunity to reopen.\textsuperscript{220} Given the high cost of capital prosecutions, it is probably preferable for a trial court to exercise caution in affording the prosecution greater than usual latitude in presenting the case and advancing a closing argument.\textsuperscript{221} Unless the improper allocution is sufficiently prejudicial to lead to an incorrect punishment verdict—a subjective evaluation made by a trial court in assessing the degree of prejudice likely to flow from any error—it is doubtful that easing the restrictions on the prosecution’s presentation will be necessary. Moreover, the trial

\textsuperscript{217} Moreover, this disclosure of a prior record might be improperly used by the jury as a non-statutory aggravating circumstance or as an unauthorized basis for imposing the death penalty, contrary to the court’s holding in \textit{Rose}, 112 N.J. at 503-04, 548 A.2d at 1083.

\textsuperscript{218} This is permitted under \textit{State v. Zola}, 112 N.J. 384, 432, 548 A.2d 1022, 1046 (1988).

\textsuperscript{219} \textit{See supra} note 181.

\textsuperscript{220} Improper argument is typically an unnecessary and costly tactic in a capital trial, because the prejudice likely to result from an unfair summation by the prosecution cannot be readily dismissed in a capital prosecution resulting in a death sentence. Capital cases call for a stricter standard of review. \textit{State v. Ramseur}, 106 N.J. 123, 190, 524 A.2d 188, 221 (1987); \textit{accord}, \textit{California v. Ramos}, 463 U.S. 992, 998-99 (1983) (‘‘greater degree of scrutiny’’ required). The peculiar nature of the penalty, moreover, and the procedure by which the jury reaches a sentencing decision, serve to limit the scope of permissible argument for prosecutors. Thus, a prosecutor may not make the type of plea for law enforcement that might be proper in a non-capital case, because general deterrence is not a sentencing consideration in a New Jersey capital prosecution. \textit{Rose}, 112 N.J. at 520-21, 548 A.2d at 1092-93. Nor may the prosecutor argue that imposition of the death penalty is required by law. \textit{Id.} at 522-23, 548 A.2d at 1094.

\textsuperscript{221} Unduly prejudicial argument may even rise to constitutional ‘‘plain’’ error resulting in reversal of the sentence in a subsequent appeal or federal habeas proceeding. \textit{Caldwell v. Mississippi}, 472 U.S. 320, 328-29 (1985) (reversing death sentence based on prosecutor’s argument that any error in imposition of sentence would be corrected by appellate court on automatic review of appeal, even though error not assigned in brief on direct appeal to Mississippi Supreme Court where state court addressed issue on the merits).
court's restraint may preserve the verdict sought by the state on appeal.

d. Reopening of the prosecution's case

The Zola opinion expressly reserves for the discretion of trial court the option of permitting the state to reopen and present additional evidence when necessary to correct an improper impression created by the accused in his address to the sentencing jury.\(^{222}\) The most compelling grounds for reopening would likely result from an accused's attempt to either interject facts wholly unrelated to previously developed evidence or his suggestion or assertion that he has led a peaceful life other than the incident for which he has been charged and convicted of capital murder.\(^{223}\) In either case, reopening would give the state the opportunity to counteract the possible prejudice that would result if the jury believed the false or unsubstantiated assertions made by the accused while he was not under oath and subject to cross-examination.

One typical example of an unverified assertion that might require reopening would be a claim that the state had not called an exculpatory witness to testify. In this situation, the state would properly be allowed to reopen, call the witness and present the testimony which would likely be irrelevant or unhelpful to the accused. Presumably, the defense would have called all witnesses helpful to the accused during the punishment phase.\(^{224}\)

Another unverified assertion that one might hear from criminal defendants is that the representations and the motives of defense counsel are unscrupulous.\(^{225}\) Such an attack may include an allegation of some conspiracy on the part of defense counsel,

\(^{222}\) Zola, 112 N.J. at 432, 548 A.2d at 1046.

\(^{223}\) See supra note 8 and accompanying text.

\(^{224}\) Of course, injustices do occur at trial and remedies are available to provide some means for redressing them. In the context of death penalty prosecutions, however, the finality of the punishment demands that the remedy be both adequate and accessible. Thus, in Ex parte Adams, 768 S.W.2d 281, 295 (Tex. Crim. App. 1989), the Texas Court of Criminal Appeals set aside the conviction of Randall Dale Adams for capital murder after the decision of the United States Supreme Court in Adams v. Texas, 448 U.S. 38 (1980), reversing, 577 S.W.2d 717 (Tex. Crim. App. 1979), had reversed his death sentence and indirectly led to his commutation. Adams successfully contended that the Dallas County District Attorney's Office had suppressed exculpatory evidence at his trial. See Fricker, Crime and Punishment in Dallas, 75 ABA J. 52, 53-54 (July 1989).

\(^{225}\) See, e.g., Strickland v. Washington, 466 U.S. 668, 687 (1984). In Strickland, the Court rejected the accused's allegation that appointed counsel in capital case rendered ineffective assistance counsel. The Court reasoned that counsel's exercise of
If the accused uses his allocution to impugn the integrity of his attorney, it may be appropriate to permit the prosecution to challenge this assertion upon reopening the case. The scope of rebuttal might prove a significant problem, since the most logical response in a proceeding involving a post-conviction attack on counsel's effectiveness would be to call defense counsel to testify as to his approach and effort in representing the accused. In the context of the capital trial, itself, however, development of this type of response through counsel's own testimony would create substantial problems for the already beleaguered defense attorney and jeopardize the appearance of fairness in the trial. The defendant's attorney would be placed essentially in the position of impeaching his own client in a capital trial.

Instead of permitting the most direct form of rebuttal, the discretion in formulating punishment phase strategy probably did not prejudice the defendant.

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227 This approach is typically used in post-trial hearings on claims of ineffectiveness. See, e.g., Pryor v. State, 719 S.W.2d 628, 634 (Tex. App. 1986), cert. denied, 108 S. Ct. 1599 (1988) (ineffective assistance claim litigated on motion for new trial based on counsel's failure to aggressively cross-examine witnesses); Bramblett v. Lockhart, 876 F.2d 644, 647 (8th Cir. 1989) (defense counsel's testimony at writ hearing contradicted client's claim of minimal contact with counsel prior to trial).

228 Even in a less extreme situation, examination of counsel during the course of a trial presents a difficult problem. For instance, in State v. Earnest, 103 N.M. 95, 100, 703 P.2d 872, 877 (1985), vacated on other grounds, 477 U.S. 648 (1986), opinion on remand, 106 N.M. 411, 744 P.2d 539 (1987), cert. denied, 108 S. Ct. 284 (1987), a New Mexico death penalty prosecution, the defense called a co-defendant, originally indicted as a coconspirator in the capital murder, whose testimony exculpated the defendant. The trial court then permitted the state, over defense objections, to call the co-defendant's trial counsel to impeach his client. The state was interested in showing that the co-defendant perjured himself, having previously pleaded guilty following plea negotiations in which he accepted a life sentence. To achieve that end, the prosecution asked a number of questions concerning confidential communications between the client and his lawyer. The trial court ruled that confidentiality was waived by the client's decision to testify, even though he was subpoenaed by the defense. This decision was affirmed on appeal, although the court provided no authority to support the proposition that a witness testifying under subpoena waives claims of confidentiality regarding his communications with his attorney concerning the same matter. The question posed is whether the state trial judge's ruling that the confidentiality of communications had been waived by the client's decision to testify under subpoena would protect the attorney from any subsequent claim that his own testimony violated the confidential relationship he enjoyed with his client.

229 Of course, if the accused's allocution directly attacks counsel's performance by way of suggestion of collusion, the prosecution could well argue that counsel's
court should probably limit the prosecution’s evidence on re-
opening to the development of the record of counsel’s activities
and to a sworn denial of any claim of conspiracy. Most impor-
tantly, the court should make every attempt, once an accused be-
gins to engage in this type of attack, to prevent him from
continuing. Otherwise, the accused might taint the proceedings
beyond the curative potential of limiting instructions, admoni-
tion, or reopening of the case.

A third assertion that an accused may make which would jus-
tify reopening of the evidence is that he has not previously en-

gaged in criminal or violent conduct when, in fact, he has a
history of behavior which is either violent, criminal, or both.230
In such a circumstance, it would appear appropriate for the trial
court to permit the prosecution to reopen and offer evidence of a
prior record to impeach the accused’s credibility,231 evidence of
prior acts to the extent admissible,232 or reputation evidence to
rebut the claim of a prior peaceful and law abiding lifestyle.233

e. Declaration of mistrial

If the accused engaged in such prejudicial conduct when
making his address to the jury that the state’s right to a fair deter-
mination by the jury is jeopardized, the trial court retains discre-
tion to order mistrial.234 Mistrial occasioned by the conduct of

own testimony in rebuttal would be the only way to permit the jury to rationally
consider the credibility of the accused’s allegations.

230 See supra note 8 and accompanying text.


232 See supra note 12 and accompanying text. Under New Jersey law, proof of
prior bad acts is not admissible to prove the accused’s bad character. N.J. R. Evid.
55; State v. Ramseur, 106 N.J. 123, 265, 524 A.2d 188, 259-60 (1987). However, if
the accused has directly placed in issue his character for being peaceable and
lawabiding or non-violent, proof of prior violent acts committed by the accused
might be admissible to impeach him or directly rebut his testimony. See N.J. R.
Evid. 47 (proof of specific acts not admissible to prove bad character except in
rebuttal to claim of good character).

233 In response to a claim of good reputation, as opposed to character, the prose-
cutor would be afforded latitude to rebut with contrary evidence. State v. Rose,
112 N.J. 454, 501-02, 548 A.2d at 1081-82 (1988) (prosecutor could rebut claim of
good character offered in mitigation during penalty phase of capital prosecution by
inquiring into witnesses’ knowledge of past conduct not resulting in criminal con-

victions). See N.J. R. Evid. 47.

234 For example, in both Arizona v. Washington, 434 U.S. 497, 499-500, 503
(1978) and United States v. Dinitz, 424 U.S. 600, 603-06, 611-12 (1976), miscon-
duct of defense counsel, including improper conduct during opening statement,
resulted in declaration of mistrial. In both cases, retrial was not barred based on a
finding of “manifest necessity.” This is the key finding which avoids the bar of
double jeopardy where trials have been prematurely terminated. An accused’s im-
the accused, particularly wilful conduct following warning or admonition by the court, would not bar reprosecution under the reasoning of *Oregon v. Kennedy.* However, due to the cost of capital prosecutions, a trial court should consider ordering a mistrial only in the most egregious situations and only upon motion of the prosecution. Upon retrial, an accused’s right to engage in allocution might be appropriately restricted. At a minimum the court would be justified in screening his statement prior to its delivery before the jury to determine whether it comports with the limited right extended by the *Zola* Court.

f. Screening the accused’s statement

Out of caution, the *Zola* Court suggested that it might be appropriate for a given trial court to review the content of the accused’s proposed statement in allocution before he delivers it to the jury. Defense counsel would undoubtedly consider this screening an unwarranted intrusion into the conduct of his case. The trial court’s censoring role, however, would not be unlike the trial court’s function of assessing the admissibility of proposed or challenged testimony outside the presence of the jury before the jury hears it. The latter role enables the defendant to fully present his challenged evidence on the record for ruling and thus preserve error if the evidence is excluded. Moreover,

proper allocation, like the impermissible opening in *Arizona v. Washington,* which advised jurors that a prior conviction had been overturned as a result of prosecutorial misconduct in suppressing favorable evidence, would invite a termination of the trial.

*456 U.S. 667, 673-76 (1982) (generally, retrial not barred if based on defendant’s motion or request for mistrial unless prosecutorial misconduct caused defendant to move for mistrial).*

*In Arizona v. Washington,* the Court deferred to a state trial judge’s determination that a mistrial was necessary, even though the record showed neither that alternatives to mistrial had been considered and rejected nor that the trial judge actually made a finding of manifest necessity. *Arizona v. Washington,* 434 U.S. at 501, 509.

In view of the other ways to correct the improper impression created by the accused through his statement to the jury, such as giving curative instructions or reopening the case, mistrial seems a wholly non-economical form of relief. Moreover, if manifest necessity did not justify granting a mistrial as where the accused’s allocution was not improper, retrial of the case would be barred. *See United States v. Jorn,* 400 U.S. 470, 484 (1971).

*For example, in State v. Cavallo, 88 N.J. 508, 514-16, 443 A.2d 1020, 1023-24 (1982), defense counsel made an offer of proof of expert witness’s anticipated testimony discounting the likelihood that the accused was a rapist in light of his psychological profile. The offer of proof was sufficient to preserve error ultimately requiring reversal of the conviction.*

*This approach parallels the approach prescribed in N.J. R. Evid. 8, which provides for review outside the presence of the jury prior to determination of admissi-
the approach permits counsel to fully develop an argument for admissibility supported by the complete proposed testimony.

In much the same way, a screening of the content of the defendant's allocution might enable counsel to establish the plea's appropriateness while avoiding the piecemeal rulings on the prosecution's objections which would operate to break the spontaneity of the address and perhaps disrupt irreparably the train of thought of the layman unaccustomed to making a public statement in such a tension-charged situation. Conversely, if the accused is actually required to deliver the statement to the court, this process may result in the same type of detriment, since the defendant who might deliver an emotional plea once may well not be able to repeat the performance before the jury.

If screening is conducted, the fairest procedure would be to permit counsel to offer a framework or outline of the accused's statement, if only to advise the court that the defendant will simply ask for mercy, for example, rather than to require a full presentation of the actual statement that will be delivered to the jury. Coupled with the trial court's admonition concerning the parameters of the right and any ruling limiting the focus of the statement once the framework has been explained, this screening should serve to fully inform the accused in a given situation of what types of explanations will not be tolerated. Moreover, once the accused has been cautioned with regard to the specifics of his proposed statement, curative action upon any deviation should not be unexpected or prove a cause for serious concern on appeal.

Another reason for reviewing an outline of the proposed statement is that many defendants may present their pleas extemporaneously rather than from a scripted format. In such case, it

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240 Counsel are aware of the tendency of a strategically-timed objection to break the concentration or momentum of even a trained adversary's line of questioning or argument.

241 This is essentially what happens when counsel makes an offer of proof outlining expected testimony from a witness in order to obtain a preliminary ruling on admissibility.

242 In fact, the Zola decision mandates that the accused be instructed, prior to speaking and outside the jury's presence, regarding "the limited scope of the right; that his statement is subject to the court's supervision; and that should the statement go beyond the boundaries permitted he will be subject to corrective action . . . ." State v. Zola, 112 N.J. 384, 432, 548 A.2d 1022, 1046 (1988).
simply will not be possible for the accused to present a memORIZED or even planned statement to the court for its review prior to the jury address. To the extent that the Zola Court expressed concern that allocution be sincere and honest, allowing the accused to preview a memorized statement or script for the trial court’s consideration would defeat the legitimate ends of the procedure.

However it is conducted, the screening process provides a mechanism for avoiding messy courtroom exchanges between prosecutor and accused that often threaten orderly trial process in cases of pro se representation. While defense counsel may object to the use of screening on the basis that it limits his client's freedom in addressing the jury, he may actually prefer a system that permits preservation of error if the trial court unduly restricts exercise of the right and avoids rulings that may cause the jury to perceive the accused as making an attempt to abuse the system or persuade them with falsehoods. Screening is likely to generate litigation that refines the trial court’s role with respect to the allocution right, because it should preserve a clear record of the limitations imposed on the accused’s exercise of the right in each case.

CONCLUSION

The right of allocution afforded New Jersey capital defendants by the decision in State v. Zola provides the accused and his counsel alike an alternative to the traditional options of offering sworn testimony during the course of trial and remaining silent throughout the proceedings. The defendant who testifies

243 The court noted that “[t]he state is wisely concerned that defendant not be permitted to lie with impunity to a jury that is attempting to reach a rational fact-based conclusion on whether he shall live or die.” Zola, 112 N.J. at 430, 548 A.2d at 1045 (emphasis added).


245 Recognition of new procedural rules is always likely to generate additional litigation refining the contours of the rule. Justice white, concurring in Batson v. Kentucky, 476 U.S. 79, 102 (1986) (White, J., concurring), noted that “[m]uch litigation will be required to spell out the contours of the Court’s equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid.”

246 112 N.J. at 430, 548 A.2d at 1046.

247 Nothing in the opinion precludes an accused from offering both sworn testi-
risks exposure of a prior criminal record through impeachment which might otherwise not be disclosed to the capital sentencing jury.\textsuperscript{248} Under section 2C:11-3 of New Jersey’s Criminal Code, the only aspect of one’s prior criminal record that may constitute an aggravating circumstance supporting the death penalty is a prior conviction for murder.\textsuperscript{249} Otherwise, evidence of prior convictions is admissible in a capital prosecution only if the accused takes the stand in his defense and is subjected to impeachment. Of course, a prior record is also admissible in the unusual circumstance where the accused’s record is so insignificant that he is able to place lack of a “significant history of criminal activity” as a statutory mitigating circumstance.\textsuperscript{250}

\textsuperscript{248} See \textit{ supra} notes 7-8 and accompanying text; \textit{State v. Rose}, 112 N.J. 454, 503-04, 548 A.2d 1058, 1083 (1988).


\textsuperscript{250} N.J. STAT. ANN. § 2C:11-3c(5)(f). This mitigating circumstance is subject to considerable latitude in interpretation particularly with respect to what constitutes a “significant” history. More obscure is the question of what constitutes “criminal activity.” Is a history of activity that involves a single instance of criminal activity, but one of quite serious nature such as commission of a rape or armed robbery, still insignificant? The best interpretation might be that a “significant history” can be demonstrated by either repetitive criminal activity of a non-violent nature or by as little as a single instance of violent crime. The ambiguity inherent in this phrase compels counsel be careful to avoid raising this statutory mitigating circumstance when an accused has been convicted of a crime or has a reputation for violence or assaultive behavior in the community as this would open the door to admission of damning character evidence by the prosecution in rebuttal. This factor, like that focusing on the defendant’s age, N.J. STAT. ANN. § 2C:11-3c(5)(c) is so subjective in terms of application to the facts of the individual case that counsel might need to seek a preliminary ruling on the parameters of the statutory mitigating circumstance. For example, in \textit{State v. Ramseur}, 106 N.J. 123, 295, 524 A.2d 188, 275 (1987), the court concluded that age is a mitigating circumstance only when the accused is relatively young or old, leaving open the precise questions of when “young” ends and “old” begins.

Counsel, intent on preserving error with respect to this issue and also interested in guarding against the adversary’s rebuttal that places before the jury damaging evidence, otherwise inadmissible, might consider seeking a pre-trial ruling defining both the scope of rebuttal and trial court’s understanding of what evidence would serve to show absence of a substantial history of criminal activity. This procedure was commended in \textit{State v. Davis}, 96 N.J. 611, 614, 477 A.2d 308, 309 (1984), where interlocutory appeal of a pretrial order in a capital prosecution focused on admissibility of proffered expert testimony on an issue relating to mitigation.
To the extent that personalization of the capital defendant is a desirable strategy for avoiding the imposition of a death sentence, allocution affords the accused an opportunity to personally address the jury without being subjected to the dual burdens of cross-examination and impeachment with prior, non-murder convictions which would otherwise not be disclosed to the jury. In addition, even an accused who has developed significant mitigating circumstances evidence may need to personally plead for mercy in order to secure his claim for mercy before the sentencing jury.251

Another interesting option is available to the capital defendant which will undoubtedly be used: the defendant may address the jury to ask that a death sentence, rather than life imprisonment, be imposed.252 The cases of Gary Gilmore253 and R. Gene Simmons254 demonstrate that some defendants actually prefer

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251 A non-exhaustive list of suggested topics for allocution is included in Appendix A to this article. These topics may be considered by counsel in advising the capital defendant. They should, however, be tailored to the particular circumstances of each case to capitalize on evidence admitted in support of mitigation or offered during the guilt/innocence phase which tends to explain the defendant's actions or state of mind.

252 In State v. Hightower, 120 N.J. 378, 414-16, 577 A.2d 99, 116-17 (1990) the New Jersey Supreme Court held that a defendant may use allocution to ask for a death sentence, rejecting defendant's argument that the right should be limited to pleas for mercy only. The court noted that in such a case "a trial court may want to provide for a psychiatric examination of the defendant." Id. at 416, 577 A.2d at 117. See, e.g., Henry v. State, 278 Ark. 478, 484, 647 S.W.2d 419, 423 (1983), cert. denied, 464 U.S. 835 (1983) (defendant convicted for his role as an accomplice to capital murder and for hindering apprehension and prosecution addressed jury at the penalty phase to request a death sentence). See Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 TENN. L. REV. 95 (1987) (discussing ethical and practical problems posed by representation of capital defendants who do not want counsel to zealously argue for life imprisonment or less-than-death punishment alternatives).

253 Gilmore v. Utah, 429 U.S. 1012, 1014-15 (1976) (capital defendant could waive appellate review of conviction and death sentence imposed while his mother, a third party litigant, lacked standing under the federal constitution to contest waiver). The Gilmore opinion is fragmented, however, in that then Chief Justice Burger, joined by Justice Powell, rejected the intervenor's complaint. Further, Justice Stevens, joined by then-Justice Rehnquist, concurred on the standing question. Three justices, White, joined by Brennan and Marshall, dissented. See Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. CRIM. L. & CRIMINOLOGY, 860, 864-66 (1983) (arguing existence of murder/suicide syndrome whereby murder is committed by individuals who are suicidal in nature and seek imposition of death penalty).

254 Simmons v. Arkansas, 298 Ark. 193, 194-95, 766 S.W.2d 422, 423 (1989), aff'd sub nom. Whitmore v. Arkansas, 110 S. Ct. 1717 (1990) (rejecting intervention by Arkansas death row inmate as next friend for Simmons based on argument that lack of mandatory review of death sentences violative of federal constitutional guar-
death to the prospect of confinement for life, perhaps due to some innate need to receive punishment for their crimes. Whatever the reason, the Zola opinion does not appear to prohibit the accused from using allocution to ask the jury not to impose a life sentence.

The election to make a personal statement to the capital sentencing jury should be left to the discretion of the defendant with advice of counsel. However, because the Zola Court has suggested that the trial court screen the statement in advance of the actual plea in allocution, it is incumbent on trial counsel not only to fully explain the alternative of addressing the jury, but also to participate in whatever editing of the statement may be required if the trial court orders screening. For instance, counsel may appropriately be expected to review the proposed statement with the accused, particularly to be able to respond to any general question posed by the trial court regarding the accused’s understanding of the parameters of the Zola plea. This represents an unusual role for counsel, because it may well be important for the attorney to participate in constructing the statement in order to assist the client in correctly expressing himself to the jurors and to ensure that the statement will not open the door to objection and corrective action by the trial court.

While counsel’s role might be considered impinging upon spontaneity, and in a more pristine setting, undermining the integrity of the defendant’s plea, this potential problem is a direct result of restrictions imposed by the Zola decision. In other words, while one might expect the accused to literally speak from the heart, the limited latitude afforded for the plea by the terms of the court’s recognition of the procedural right to address the jury virtually compels trial counsel to become actively involved in the preparation of the accused’s address. In failing to properly prepare the accused in favor of promoting a truly spontaneous plea, counsel runs the risk of the client inadvertently or inten-
tionally, as a result of lack of understanding, violating the court's limitations on the use and subject matter of the plea.

Clearly, future decisions and rule-making may narrow, expand, or revoke the procedural right recognized by the court in *Zola*. This feature of capital litigation following *Furman* is not rare, however, as indicated by the growing body of decisions concerning both the structure of capital murder statutes and the conduct of capital sentencing proceedings. What the New Jersey court has done in *Zola* is to significantly afford the capital defendant an opportunity to plead for mercy out of the context of trial procedure and to permit trial counsel to exercise great creativity in advising the client how to use the plea. The future of the plea will depend, in part, upon the success of capital defendants in exercising this option and upon the wisdom of their attorneys in advising them in the exercise of the right.

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258 For instance, the Court's initial acceptance of the Georgia statutory scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976) has been refined by decisions limiting application of the Georgia statute to murder prosecutions, *Coker v. Georgia*, 433 U.S. 584 (1977), and limiting application of statute to murders alleged to have been outrageously or wantonly vile, horrible, or inhuman or involving torture or aggravated battery. *Godfrey v. Georgia*, 446 U.S. 420 (1980). See Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); but see Geimer, *supra* note 88, challenging the notion that "super due process" for death cases is still evident in the opinions of the United States Supreme Court. Certainly, the decision in *Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990), demonstrates that the Court declines to find mandatory review of capital sentences more significant than the standing and waiver doctrines upon which it relied in declining to hold that Whitmore had standing to compel review of another inmate's death sentence. See id. at 1729-31 (Marshall, J., dissenting).

Appendix A: Sample statements for use in allocution

Counsel are cautioned that the statement made by the accused in each case must reflect the unique facts and evidence developed. The suggested statements which follow are offered for purposes of illustration only and should be tailored to fit the defendant and the facts of the case. While counsel should be careful not to encourage false emotion, it is clear that delivery with emotion may be the single most important factor in the success of the plea. In order to initially humanize the accused, who has more than likely been referred to throughout the proceedings as the “defendant,” or possibly, as the “killer,” counsel should probably suggest that the allocuting accused introduce himself first to the jury in some fashion, such as:

Ladies and gentlemen/Members of the jury, my name is (name). Most of my life people have called me (nickname, if applicable, e.g., "Jimmy").

Counsel should also note in reviewing the sample statements that many phrases are applicable in a variety of circumstances, and that some bases for the plea for mercy may be combined where warranted by the facts and evidence.

1. Simple plea for mercy

Members of the jury, you have heard the evidence in this case. You have found me guilty of capital murder and I accept that verdict. I ask you to consider giving me a life sentence instead of the death penalty so that I can try to live my remaining years in a way which will show that I am truly sorry for my acts and the pain I have inflicted on the family, friends, and community of the person I killed.

2. Explanation of state of mind: influence of drugs or alcohol
   Alcohol:

Members of the jury, I know that you understand by now that I committed a terrible crime. My use of alcohol does not in any way justify or excuse my actions, but I ask you to consider that I was not sober at the time I took a life and allow me to continue living.

For statement regarding the influence of drugs, see supra note 171.
3. **Explanation of state of mind: peer pressure**

Members of the jury, you have heard the evidence which shows my participation in a horrible crime of murder. I do not ask you to excuse my actions, but I tell you honestly that I would not and could not have done such a thing had I not been pressured to do so by the others who participated in this crime. I should have been stronger. I was not. I ask for your forgiveness and your mercy.

4. **Murder committed following premature parole**

Members of the jury, I have been found guilty by you of having committed capital murder. I ask you now to consider my prior record in prison as evidence that if you spare my life and return me to prison, I can again live without being involved in violence. I regret that I could not live peacefully in the community after my parole, but I now know that I was not ready to leave prison when I was released. If you return me to prison, instead of ordering my execution, I understand that no one will ever really consider releasing me again, but I can accept that and ask that you show mercy in your judgment. Perhaps by living a law abiding life in prison I can atone for the crime I have committed.

5. **Murder committed during rage**

Members of the jury, you have heard testimony at trial which shows the circumstances under which I killed (name of deceased). I understand that you have not found this explanation of my actions sufficient to justify acquittal, or to find that I committed an offense other than capital murder. However, I ask you to consider these circumstances in deciding on my punishment. I acted out of a violent rage that I could not control. (This is the only time in my life when this has happened to me). I am sorry for taking this life, and I regret more than anything in my life those few moments in all of my years when I failed to control my anger and emotions. I ask you not to impose the death penalty.

6. **Murder committed during cultic or Satanic activity**

See supra note 172.

Members of the jury, the evidence you have heard in this trial shows you the terrible reality of (cults) (Satanic worship) in this country. I am guilty of a horrible crime committed while I was under the influence of these people and their love of evil.
Since my arrest, I have been able to break away from their control over me and I have only sadness, regret and feeling of sickness over what I have done. I accept the punishment you impose, but I want you to know that whatever I have done has been the result of my involvement with these people and my weakness in being unable to resist them. I realize how evil their actions and mine have been, but I ask you to consider allowing me to live so that I can make amends for what I have done.

7. **Defendant's relative youth: crime influenced childhood**

Members of the jury, I know that I have been convicted of committing a horrible crime. I cannot justify my actions, but I do want you to know that I have spent my life in a neighborhood, which is hopefully not like yours, where crime, shootings, stabbings, drug sales and robberies are a way of life. I am only — years old, but I have seen more terrible things happen in my neighborhood than you can imagine. I have caused a terrible tragedy for the lives of many people. Maybe having grown up in such a violent and tragic way I grew blind to it. I am no longer blind. I would like a chance to rehabilitate myself in prison, if you can find it in your hearts and give me that chance. I know that prison will be a hard life, but it can't be as bad as what I have already seen and been involved in. There is school available in prison, and maybe job training and the opportunity to work. I ask you to let me try to live by the rules and try those things instead of sentencing me to die.

8. **Defendant's relative youth: non-violent childhood**

Ladies and gentlemen of the jury, I beg for your mercy in considering the punishment which you will impose for my crime. I am young and have a long life ahead of me should you choose to sentence me to life imprisonment instead of death. I do not really want to spend my life in prison, but I know that what I did was very horrible and requires that I be punished. I accept that. I do not want to die, though, and I ask you to think about the fact that I might be able to spend my years in prison productively and somehow make something of myself.

9. **Defendant's relative youth: abused child**

Members of the jury, you have heard the evidence about my growing up in a home where I was beaten and hurt by my (father) (mother) (family). I know this does not excuse my own actions in
committing murder, but my whole life so far has been one in which violence has been common. If you give me a life sentence, I hope that I can learn to overcome my upbringing and be a better person. I am more sorry than I can tell you for what I have done. My life has been hell but it is the only life I have had and I want to live. I ask you to be merciful.

10. Defendant's mental retardation

I am not a very smart person, and my lawyer helped me think of what I want to say to you now. Please forgive me for what I have done and let me live instead of giving me the death penalty. I am sorry for everything that has happened.

11. Defendant's subsequent religious conversion

Members of the jury, you have heard during the course of this trial about the spiritual conversion which I have undergone while in jail following my arrest. You may have doubts about my sincerity, and I can understand that. It may be very convenient for someone who is facing the death penalty to suddenly "get religion" and ask for mercy. The tenets of my faith require punishment for bad acts and crimes, and I accept my own need for punishment for this crime. What I have learned while in jail is that I must ask you for forgiveness for my acts, and that I must ask for forgiveness from the family and friends of the person whose life I took. I ask for that forgiveness, but I do not ask you not to punish me. If it is in your heart to show mercy, I promise to use my life to show others the spiritual truth which I now share, to show others that a life of crime and violence is wrong, and that the punishment for violence is severe. Regardless of your decision, I am content that it will be just and that I have now come to understand the need for God in my life. Thank you.

12. Post-traumatic stress syndrome: military experience

Members of the jury, the evidence has shown that I acted under some type of impulse when I committed murder. You also know from the testimony that I served my country during the Vietnam War. Part of my experience in that war involving use of deadly force in situations in which we were often confused about who and where the enemy was. As a result, we were trained to react instinctively to any threat and to protect ourselves at all cost. This does not excuse my actions, but I want you to understand that once you have been placed in a position of this kind of
stress the fear and tension stays with you long after the war is over. I am afraid that when I killed (name) it was still with me. I do not ask you to find my actions justified. In fact, you have not found them to be so. However, please consider how my experience in the Vietnam War has affected me in arriving at your decision and I ask you for your mercy.