

**PBI Criminal Law Update 2011**

*State Caselaw Update*



Mike Picuch,  
Snyder County  
District Attorney

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**Confrontation Clause**

- **Michigan v. Bryant, 131 S.Ct. 1143**
  - Wounded man in parking lot tells police he was shot by defendant at defendant's house
  - Hearsay admitted at murder trial
  - HELD, admissible despite Confrontation Clause challenge



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**Confrontation Clause**

- **Michigan v. Bryant, 131 S.Ct. 1143**
  - in order for testimonial hearsay to be admissible, 6th amdt demands . . .
    - 1) unavailability & 2) prior opp to cross-exam
  - Use "primary purpose" test to see if testimonial:
    - if given in response to questioning with purpose of establishing past events, then testimonial (TH)
    - if given with purpose of enabling police to meet ongoing emergency, then non-testimonial (NTH)

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**Confrontation Clause**

- **Michigan v. Bryant, 131 S.Ct. 1143**
  - Crawford: station-house questions
    - re: a stabbing = TH
  - Davis/Hammon: police or 911 questions
    - re: DV assault = NTH
  - Bryant: police questions
    - re: *shooter* = NTH
    - expands "ongoing emergency" beyond DV cases, includes threats to community as well as to the victim

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**Confrontation Clause**

- **Abrue, 11 A.3d 484**
  - Deft fights with jail guard #1, claims self-def
  - To rebut, Guard #2 testifies re: Guard #1's version
  - Guard #1 d/n testify
  - HELD: testimonial
    - Burden of proof issue – no context given for statement

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**Confrontation Clause**

- **Abrue, 11 A.3d 484**
  - Guided by SCOPA's ruling in Allhouse, 985 A.2d 847 (Pa. 2009)
    - Allhouse held that statement by 4 yr old to CYS re: the deft causing her sister's injury was NTH
    - Primary purpose not to establish past events, but ensure siblings welfare (already removed from home)
    - In March 2011, SCOTUS granted cert., vacated judgment, and remanded Allhouse for further consideration in light of Bryant (131 S.Ct. 1597)

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### Confrontation Clause

■ **Barton-Martin, 5 A.3d 363**

- Deft convicted of DUI under 3802(a) & (c)
- CW called the lab director, not the analyst, to testify re: BAC report



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### Confrontation Clause

■ **Barton-Martin 5 A.3d 363**

- Held: 6<sup>th</sup> Amdt violation under Melendez-Diaz
  - “Duck test” to determine if testimonial or NT
  - BAC results are testimonial – analyst’s testimony req’d
    - Or, HS ok if unavailability & prior opp to cross-exam
  - Thus, 3802(c) conv. rev’d, **BUT** 3802(a)(1) conv. upheld

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### Cruelty to Animals

■ **Crawford, 24 A.2d 396**

- Aspiring ebay businesswoman arrested for animal cruelty for marketing “gothic kittens”
- HELD, expert testimony sufficient to support conviction



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## Retail Theft - Robbery

### ■ Hansley, 24 A.3d 410

- Defendant confronted by loss prevention for stealing DVD's from Target
- Deft pulls knife when they try to secure him
- Convicted of 1<sup>st</sup> degree robbery



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## Retail Theft - Robbery

### ■ Hansley, 24 A.3d 410

- HELD, facts sufficient to convict where deft threatened another or put him in fear of immediate SBI in the course of committing a theft
- Deft not entitled to jury instruction on self-defense



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## Auto Searches

### ■ Griffin, 24 A.3d 1037

- Defendant arrested for impersonating an officer
- PC to believe evidence (badge, etc.) in car
- Car impounded pending application of search warrant
- HELD, warrantless seizure justified under limited auto exception



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### Auto Searches

- **Gary, 29 A.3d 804**
  - Driver stopped by police for tinted windows, admits to MJ possession, flees on foot
  - Upon being caught and handcuffed, police search vehicle and find drugs
  - HELD, drugs should have been suppressed
    - Warrantless search of vehicle unjustified where sole occupant of vehicle in custody and not able to remove/hide contraband in vehicle
    - No exigent circumstances & driver not going back to car

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### Fleeing and Eluding

- **In Re: R.C.Y., 27 A.3d 227**
  - Juvenile fled police in stolen car charged
  - Offense grading under VC 3733 enhanced due to engaging in a “high-speed chase”
  - Juvenile did not exceed 35 mph, but ran stop signs drove across yards and struck an officer
  - HELD, any chase which creates extraordinary danger to police or public is a high-speed chase

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### Evidence – Blood Sample

- **Allen, 24 A.3d 1058**
  - Defendant convicted of DUI & Inv. Mansl.
  - Hospital destroyed blood sample per SOP



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## Evidence – Blood Sample

### ■ Allen, 24 A.3d 1058

- HELD, BAC admissible – no duty to preserve evidence possessed by hospital
- Deft failed to show . . .
  - additional testing results would have been materially exculpatory, or
  - destruction due to bad faith by CW



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## DUI – Prior Offenses

### ■ Pombo, 26 A.3d 1155

- Sentencing court refused to consider prior “driving while ability impaired” conviction in NY
- HELD, remanded to correct illegal sentence
  - NY conviction counts as prior offense b/c NY law was “substantially similar” to PA law
  - Amendments to DUI law in 2008 changed standard from equivalency test to substantially similar test.

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## DUI – Prior Offenses

### ■ Bowers, 25 A.3d 349

- DUI offender sentenced as first-time offender, despite prior acceptance into ARD
- HELD, remanded for resentencing
  - prior acceptance into ARD in itself counts as prior offense regardless on outcome



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### DUI – Prior Offenses

■ **Shawver, 18 A.2d 1190**

- Facts:
  - April 2008 – deft enters ARD for DUI
  - Oct 2009 – new arrest for DUI
  - ARD revoked and pleads to both
  - At sentencing, Oct 2009 case = 2d offense
- HELD, 3806 definition of prior offense const'l
  - ARD revocation counts as first offense

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### DUI – Prior Offenses

■ **Bowers, 25 A.2d 349**

- Facts:
  - June 2009 – deft enters ARD for DUI
  - Oct 2009 – new arrest for DUI
  - Deft removed from ARD at own request & *acquitted*
  - Deft pleads to Oct 09 case - sentenced as 1st offense
  - CW appeals arguing should have been 2d offense
- HELD, acceptance into ARD counts as prior offense regardless of ultimate dispo in that case

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### Retail Theft – Prior Offenses

■ **Graeff, 13 A.3d 516**

- Defendant got ARD for retail theft
  - Agreed it would count as prior if convicted again
- When deft convicted for retail theft #2, CW sought grading as M2, but court refused
- HELD: ARD does not count as a “conviction” when calculating grading for retail theft
  - Applied general recidivist philosophy
  - Compare w/ DUI statute which defines “prior offense”

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### IAC – Grant / Bomar

- **Barnett, 25 A.3d 371**
  - Grant (SCOPA 2002) IAC claims should generally be deferred until collateral review
  - Reexamined Bomar in light of Wright & Liston
  - HELD, only IAC claims raised prior to Grant will be considered on direct appeal
    - Stricter application of Grant – Superior Court will no longer consider IAC claims on direct appeal absent waiver of PCRA review

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### Hybrid Representation

- **Jette, 23 A.3d 1032 (SCOPA)**
  - Counseled defendant filed pro se appeal alleging ineffectiveness of appellate counsel
  - HELD, SCOPA rejected Superior Court’s practice of addressing pro se claims of appellate counsel’s ineffectiveness through “Battle procedure”
    - Proper response: refer pro se filings by counseled defendants to counsel and take no further action on them unless counsel files motion

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### Hybrid Representation

- **Walker, 26 A.3d 525**
  - Defendant files pro se appeal alleging ineffective assistance of appellate counsel
  - HELD, defendant must choose between counseled appeal or self-representation
  - Recognizing that SCOPA in Jette (Pa. 6/2011) rejected Battle (PAS 2005) procedure for handling hybrid representation

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## Malice

### ■ Devine, 26 A.3d 1139

- Defendant confronted by group & retreated into home until friend arrived with handguns – then went back outside
- During ensuing melee, defendant fired into crowd causing gun battle and innocent bystander killed
- Defendant convicted for Murder 3 & conspiracy
- HELD, evidence sufficient to show malice

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## Constructive Possession

### ■ Johnson, 26 A.3d 1078 (SCOPA)

- Defendant convicted for PWID for drugs he sold and for drugs stashed in vehicle by another (from whom defendant bought)
- Weights aggregated for mando purposes (7508)



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## “Constructive Probation”

### ■ Allshouse, \_\_ A.3d \_\_ (2011 PA Super 192)

- Defendant in state prison on consec sentences from Clearfield (1-2 yrs +2) & Jefferson (1-3 yrs)
- When defendant’s probation revoked for various violations, he claims probation expired bc running while serving remainder of Jefferson sentence

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### “Constructive Probation”

- **Allshouse, \_\_ A.3d \_\_ (2011 PA Super 192)**
  - HELD, defendant’s probation sentence does not begin until the expiration of his agg max (2-5 yrs)
  - A term of probation and a term of state incarceration cannot be served simultaneously

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### Theft from Motor Vehicle

- **Foster, \_\_ A.3d \_\_ (2011 PA Super 195)**
  - Defendant stole grill off a car
  - JOA on theft from motor vehicle
  - HELD, evidence must show theft of “movable property”
    - the grill does not constitute “movable property” b/c attached to vehicle



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### Life Sentences for Juveniles

- **Whitaker, 30 A.3d 1195**
  - 17 yo convicted for 1<sup>st</sup> degree murder and sentenced to life without parole
  - Challenged sentence as cruel/unusual punishment



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## Life Sentences for Juveniles

### ■ Whitaker, 30 A.3d 1195

- HELD, life sentence without parole for juvenile in a homicide case is not cruel/unusual punishment

- Roper (US 2005) (striking down DP for juvenile in homicide case and imposing life sentence wo parole)

- Graham (US 2010) (striking down life sentence wo for juveniles in non-homicide cases)



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## Definition of Firearms

### ■ Zortman, 23 A.3d 519 (SCOPA)

- Defendant convicted of drug offense and sentenced to mando for drugs & guns
- Firearm at issue missing its firing pin
- HELD, mando properly applied
  - statutory language defines firearm as “any weapon which . . . is designed . . . to expel a projectile”

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## Constructive Possession

### ■ Johnson, 26 A.3d 1078 (SCOPA)

- HELD, defendant did not constructively possess the stash in the vehicle
  - Mando applies to violations of controlled substances act, but not to conspiracy to violate
  - Clegg, 27 A.2d 1266 – burglary on list of disqualifying offenses under 6105, but attempted burglary is not

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## Accidents resulting Injury/Death

- **Wisneski, 29 A.3d 1150 (SCOPA)**
  - Victim killed after being struck by multiple vehicles, including defendant's
  - Defendant charged with VC 3742 violation and won habeas claiming CW could not prove victim alive when struck by his vehicle
  - HELD, CW need not prove victim alive
    - "resulting in injury" includes causing harm to someone whether dead or alive

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## Child Luring

- **Hart, 28 A.3d 898 (SCOPA)**
  - Defendant convicted for child luring (CC 2910) after offering rides twice to neighborhood kids
  - HELD, conviction overturned
    - Mere offer of a ride insufficient – evidence must include enticement or inducement to enter vehicle
    - May be implied or express and may take form of reward/promise or directive/command to get in

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## Double Jeopardy – PFA's

- **Hill v. Randolph, 24 A.3d 866**
  - Deft violates PFA by 1) entering marital residence & 2) assaulting wife/protected party
  - 2 count ICC filed against defendant
  - Convicted & sentenced - 6 mos each consec
  
- HELD: a multiple count ICC permitted where one criminal episode contains multiple violations of a single PFA order
  - Dicta: DJ analysis would be required if subsequently convicted for other criminal offenses related to same conduct

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## Double Jeopardy – PFA’s

### ■ Jackson, 10 A.3d 341

- Deft violates PFA by entering marital home
- After ICC conv., crim charges filed
- MDJ dismissed some
- Interlocutory appeal by CW



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## Double Jeopardy – PFA’s

### ■ Jackson, 10 A.3d 341

- Held: DJ applies to ICC from PFA violations
  - Elements test (Blockburger)
  - compare basis for the PFA violation with crim offenses
- ICC conviction based on unlawful entry:
  - DJ barred prosecution for crim trespass
  - DJ d/n bar burglary or SA

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## Appellate Procedure

### ■ Pa.R.A.P. 2151(b)

- New Superior Court filing rules require . . .
- 6 bound
- 1 unbound
- 1 electronic copy on CD



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### **Crim. Pro. – Hearsay at Prelims**

- Revised Pa.R.Crim.P. 542(E):
  - “Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established.
  
  - Hearsay evidence shall be sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property.”

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### **Crim. Pro. – Hearsay at Prelims**

- The testimony of the investigating officer who had contact with the victim will be sufficient to establish . . .
  - Ownership of the property
  - Non-permission to use the property
  - Value of the property
  - Amount of damage caused to the property

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### **Crim. Pro. – Hearsay at Prelims**

- “Paragraph (E) was added to the rule in 2011 to clarify that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. . . .
  
- Accordingly, hearsay, whether written or oral, may establish the elements enumerated in paragraph (E). That enumeration is not comprehensive, and hearsay is admissible to establish other matters as well. The presence of witnesses to establish these elements is not required at the preliminary hearing.”

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**PBI Criminal Law Update 2011**

*THE END*



Mike Picuch,  
Snyder County  
District Attorney

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**Death Penalty – Fed Defenders**

- **Spotz, 2011 WL 1601629 (Pa. 4/29/11)**
  - On PCRA review, def’t’s first-degree murder conviction and death penalty sentence upheld



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**Death Penalty – Fed Defenders**

- **Spotz, 2011 WL 1601629 (Pa. 4/29/11)**
  - Blunt language in CJ Castille’s concurrence:
  - criticizes the Federal Defenders for its “global, strategic, and abusive” forays into state court “to impede and sabotage the death penalty in PA”
    - “This is what federal judicial financing of the Defender’s state court litigation strategy has wrought in Pennsylvania.
    - When the families of murder victims, and other concerned citizens, ask why there is no effective death penalty in Pennsylvania, the dirty secret answer is: ask the federal court.”

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## Death Penalty – Fed Defenders

- **Spotz, 2011 WL 1601629 (Pa. 4/29/11)**
  - “This is what federal judicial financing of the Defender’s state court litigation strategy has wrought in Pennsylvania.
  - When the families of murder victims, and other concerned citizens, ask why there is no effective death penalty in Pennsylvania, the dirty secret answer is: ask the federal court.
  - And if the federal court fails to reply, you may want to ask your U.S. Senators and Representatives.”

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## Death Penalty – Fed Defenders

- **Spotz, (Pa. 7/28/11)**
  - Per curium order requiring filed of a verified “Statement of the FCDO’s Involvement in PA State Court Litigation of Capital Cases”
  - Dissent from Madame Justice Todd

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## Sex Crimes – Wiretap Act

- **Prisk, 13 A.3d 526**
  - Deft abused stepdaughter almost daily for 6 yrs
  - Victim visited perp/inmate wearing wire
  - Deft: NC recording w/in “home” req’d court order



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## Sex Crimes – Wiretap Act

- **Prisk, 13 A.3d 526**
  - HELD: no expectation of privacy in visitation room
    - §5702: “home” – residence of NC party if not open to the public and if REP exists under the circumstances
  - Also: aggregate sentence of 633 to 1500 years on 314 counts **NOT** manifestly excessive
    - Almost daily sex abuse of stepdaughter for 6 yrs
    - And hey, not all the sentences were run consecutive

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## Sex Crimes – Intent Element

- **Hacker, 15 A.3d 333 (PA)**
  - Deft convicted of sex crimes against children
  - Super Ct held CW failed to prove specific intent
    - CW would have to prove deft knew age of victim
  - Held: specific intent required for the element re: sex act, but not for the element re: age of victim
    - Generally, intent applies to all material elements unless contrary purpose plainly appears from statute
    - Statute – mistake as to age not a defense

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## DUI - Charging

- **Mobley, 14 A.3d 887**
  - Deft charged with 2 counts DUI 3802(a)(1)
    - 1 for general impairment, 1 for refusal
  - Held: evidence sufficient to convict



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## DUI - Charging

### ■ **Mobley, 14 A.3d 887**

- Court noted that refusal is a factor for grading enhancement, not an element of the offense.
  - Information should contain *single* count of 3801(a)(1)
  - Apprendi requires deft be put on notice if refusal will affect the grading/the statutory max

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## Sentencing – Restitution

### ■ **Griffiths, 15 A.3d 73**

- Deft challenged contempt for F2P restitution
- Case arose pre-1998 version of sec. 1106(c) which limited enforcement to statutory max



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## Sentencing – Restitution

### ■ **Griffiths, 15 A.3d 73**

- HELD: contempt upheld because imposed prior to expiration of statutory max
  - Court recognized that as amended, time limits in 1106(c) eliminated – “an order of restitution is enforceable until paid.”

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### Sentencing – RRRRI

- **Gonzalez, 10 A.3d 1260**
  - Deft gets state sentence for PWID
  - RRRRI denied due to prior burglary conviction
    - Not RRRRI elig if history of present or past violence



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### Sentencing – RRRRI

- **Gonzalez, 10 A.3d 1260**
  - HELD: deft is RRRRI eligible
    - F2 Burglary not a “violent” offense – no one present
    - “F2 burglary by definition does not involve the risk of violence or injury to another person. It is solely an offense against the property rights of the owner[.]”

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### S&S – Traffic Stops

- **Feczko, 10 A.3d 1285 (PA Super)**
  - DUI deft challenged legality of traffic stop
    - Observed weaving, crossing lines
    - After stop, indicia of DUI observed



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## S&S – Expectation of Privacy

- **Benson, 10 A.3d 1268**
  - Deft moved to suppress his cell phone records



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## Sentencing – Prob Conditions

- **Wilson, 11 A.3d 519**
  - Deft challenged condition of probation imposed at sentencing allowing random warrantless search by probation officers



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## Sentencing – Prob Conditions

- **Wilson, 11 A.3d 519**
  - Held: condition properly related to deft's rehab given his history (gun) and need for public safety
    - 61 Pa.C.S. 331.27(b) applies to PO's acting on own auth
    - Statute does not limit judge's auth to impose condition

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## Sentencing – Revocations

- **Mazetti, 9 A.3d 228**

- CW made plea deal with deft – 12 mos probation for PWID, waive school zone mandatory
- After deft violates probation, revo judge refuses to impose mandatory



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## Sentencing – Revocations

- **Mazetti, 9 A.3d 228**

- Held: waiver carried over to revo re-sentencing
  - 1) CW failed to provide notice of intent to seek mando
  - 2) CW failed to show evidence supporting mandatory sentence at original sentencing hearing

- *Q: is the mandatory preserved if the CW does these 2 things (or gets stipulation)?*

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