
Pennsylvania Crimes of Sexual Violence Benchbook

**Third Edition
2015**



The Honorable Jack A. Panella
Superior Court of Pennsylvania

This Benchbook on Crimes of Sexual Violence in Pennsylvania is published by the Administrative Office of Pennsylvania Courts (AOPC) through funds provided by the Pennsylvania Coalition Against Rape (PCAR). PCAR applied for federal funds to cover these expenses, and the funds were channeled through the Pennsylvania Commission on Crime and Delinquency.

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Preface

This, the third edition of the *Benchbook on Crimes of Sexual Violence in Pennsylvania*, is published by the Administrative Office of Pennsylvania Courts. The benchbook is a valuable resource for trial judges and is a comprehensive guide providing “best practices” and information to help in understanding the intricacies and procedural requirements in these highly sensitive sexual offense cases. The book was written by Judge Jack A. Panella from the Superior Court of Pennsylvania. It was funded by a grant from the Pennsylvania Commission on Crime and Delinquency.

Section 1 of the benchbook, “**Understanding Sexual Violence**,” provides an in-depth discussion of the history and development of laws criminalizing sexually violent behavior and is intended to provide a comprehensive understanding of Pennsylvania’s current sexual offense laws. Special emphasis is given to the resultant physical and psychological effects of a sexual assault on a victim as well as to identifying victims’ rights and programs. A full listing of all crimes of sexual violence as well as a discussion of available defenses can be found in chapters 3, 4 and 5. This edition includes an expanded discussion of defenses, based on evidentiary issues and constitutional provisions, in Chapter 5.

Section 2, “**The Process of a Sex Offense Case**,” addresses the procedural and practical steps of a sex offense case, from pretrial issues to appellate review. The two appendices to Chapter 7 include useful tools for trial and sentencing preparation, Chapter 8 includes a discussion clarifying the often complex tier system set up in the new laws regarding registration and reporting of sex offenders. Chapter 8 includes discussions on the recent appellate court cases addressing expert testimony on eyewitness identification and the defense of false confession.

The benchbook continues with Section 3, “**Registration of Sexual Offenders**,” which reviews and compares collateral ramifications of a sexual offense conviction, including sex offender registration laws. The appendix to Chapter 11 is a summary of the information that the trial court must provide to a convicted sex offender under the Sex Offender Registration and Notification Act. Section 3 also examines the Combined DNA Index System (CODIS), an electronic database that allows nationwide access to DNA profiles and profiling) as well as DNA data retention and testing laws.

Lastly, Section 4, “**Resources**,” lists victim service providers in Pennsylvania and programs designed to assist in sexual abuse prevention, detection and prosecution.

Acknowledgements

The extraordinary talents of many individuals contributed to the production of the book.

The book was produced with the encouragement and support of Chief Justice Thomas G. Saylor and Former Chief Justice Ronald D. Castille. Of course, the book would not have been possible without the participation of Madame Justice Debra Todd, and we thank Justice Todd for providing the foreword and her guidance in organizing Pennsylvania's first sex offender court in Allegheny County.

We are also indebted to the staff at the Administrative Office of Pennsylvania Courts. We particularly thank Thomas B. Darr, deputy court administrator, and Stephen M. Feiler, Ph.D., director of Judicial Education.

The following contributed research which went into the preparation of the book: William Clements, Esq.; Christopher Nace, Esq.; Benjamin Kohler, Esq.; Jeanne L. Rensberger, Esq. of Central Legal Staff, Superior Court of Pennsylvania; Mary Graybill, Esq.; Diane Moyer, Esq., Legal Director of PCAR; and Brian J. Panella, from Widener Law School.

Special recognition must be given to numerous individuals and agencies: the Defender Association of Philadelphia, especially Abigail Horn, Esq. and Aaron J. Marcus, Esq.; the Pennsylvania District Attorneys Association, especially the Honorable David J. Freed, district attorney of Cumberland County; Elliot C. Howsei, Esq., chief public defender, Allegheny County; the Philadelphia Bar Association, Criminal Justice Section, especially Isla A. Fruchter, Esq. and Robert Muench, Esq.; the Pennsylvania State Police, especially Captain Scott C. Price; the Pennsylvania Bar Association, Criminal Justice Section, especially Joseph A. Curcillo, Esq.; the Family Violence & Sexual Assault Unit of the Philadelphia District Attorney's Office, especially the Chief of the Unit, James Carpenter, Esq.; the Honorable Stephanie J. Salavantis, district attorney of Luzerne County; and Jules Epstein, professor of law, Widener University School of Law.

We are also grateful to Widener University School of Law. Under the guidance of Francis Catania Jr., Esq., associate professor of law and director of Clinical Legal Education, and Assistant Dean LeaNora Ruffin, the following students worked tirelessly on the Table of Authorities and Table of Cases:

Maureen Connor

Alexxys Ehresman

Catelyn McDounough

Courtney McGinn

Margot Cullen

David Strenfel

Stephanie Steckclair

During the final stages of the book, Doreen Lipare and Nancy Casciole from Judge Panella’s office, and Gina Earle from AOPC, really saved the day. At the formatting and printing stages, the patience and professional work of Fortney Printing, especially Karen Fortney, was much appreciated.

From the first edition of the book, we wish to thank the many individuals who were listed in that edition. Foremost among them are Teresa Scalzo, Esq. and Lynn Carson, the former judicial project specialist for PCAR.

Finally, our sincere gratitude is extended to Delilah Rumburg, CEO of PCAR, whose commitment to the prevention of sexual violence made this benchbook possible.

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From the Desk of Delilah Rumburg

Chief Executive Officer, Pennsylvania Coalition Against Rape

In keeping with our mission to advocate for the rights and needs of victims of sexual violence, and on behalf of our network of rape crisis programs, I am honored to present you with the Third Edition of the Benchbook on Crimes of Sexual Violence in Pennsylvania. This resource is intended to provide all those involved in the judicial system the best and most up-to-date text and explanation of legislation to fully address the difficult issues of sexual violence in the Commonwealth.

This third edition is possible because of the will and commitment of the team of stakeholders that endeavor to provide justice to victims of sexual violence and to keep our community safe. We extend our heartfelt thanks to the judges, prosecutors, defense attorneys, researchers and practitioners who generously gave their time and expertise to provide a quality product for the use of the judiciary in the Commonwealth. This book is a physical manifestation of the daily collaborative efforts of a host of dedicated public servants.

The benchbook is but one example of our legacy of partnerships with dedicated professionals to hold offenders accountable for their actions and to provide a justice system that recognizes the impact these serious crimes have on the victim. We have also produced a resource specifically for magisterial district judges.

We have made great legislative strides addressing the evolving issues of sexual violence. But without the dissemination of information to busy practitioners, it would be impossible to actualize these changes in public policy and in the lives of those who are impacted by these crimes.



Foreword

by

MADAME JUSTICE DEBRA TODD
SUPREME COURT OF PENNSYLVANIA

On behalf of my fellow Justices on the Supreme Court of Pennsylvania and myself, I thank Judge Jack Panella for his tireless effort in undertaking the ambitious project of authoring this Third Edition of the *Pennsylvania Benchbook on Crimes of Sexual Violence*. I also commend the Administrative Office of Pennsylvania Courts and the Pennsylvania Coalition Against Rape for their sponsorship and valuable contributions to this project.

Crimes of sexual violence are challenging to prosecute, to defend and to adjudicate, regardless of the circumstances or the age or gender of the victim. Sexual violence can affect anyone, but nine out of ten victims are female. Recent statistics have demonstrated that one in five young women will be sexually assaulted during college, and that one in five American women will be sexually assaulted during their lifetime.

Having served for fifteen years as an appellate judge, I can state with certainty that no cases have affected me more than those involving the sexual abuse of children. I have been astounded by the sheer number of these cases involving the most appalling of crimes - perpetrated upon the most innocent and vulnerable members of our society.

It has been estimated that 67 percent of all sexual assault victims are under eighteen; one-third are under twelve; and one in seven cases involves children under six. Studies have projected that an astounding one in four girls and one in six boys will be sexually abused at some point during their childhood.

The impact of sexual abuse on a child is profound and long lasting, and it is often made worse by the conspiracy of silence among adults who look the other way or refuse to believe or protect the child. Sadly, most sexually abused children - over 80 percent - never come to our attention. Fear, secrecy, and intense feelings of shame may prevent children, as well as adults aware of the abuse, from seeking help. Furthermore, assaults often go undetected because most occur in the privacy of the home and in the absence of witnesses.

In Pennsylvania, we strive to protect our children and prosecute and punish those who harm them. Our legislature has enacted laws imposing harsher penalties for sexual crimes against children, and it is incumbent upon the courts to issue sentences that reflect the seriousness of these offenses.

At the same time, we as judges take a solemn oath to uphold the Constitutions of the United States and the Commonwealth of Pennsylvania, so as to ensure that each and every individual charged with a crime receives due process of law together with all of the rights inherent in those charters.

Judge Panella's benchbook will go a long way toward ensuring that all Pennsylvania jurists have at their disposal an explication of not only the dynamics of crimes of sexual violence, but also the relevant evidentiary, procedural, substantive and sentencing considerations. For this, we owe Judge Panella a debt of gratitude.

Judicial education is a crucial element in ensuring justice for all. I urge every trial judge in Pennsylvania to take full advantage of Judge Panella's benchbook in order to fully understand and thoughtfully consider the nuances of this difficult area of the law.

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Chapter One

The Dynamics of Sexual Violent Crimes

1.1 PURPOSE OF THE BENCHBOOK

A. Summary of the Pennsylvania Benchbook on Crimes of Sexual Violence

This book is designed to assist judges in the handling of sexual violence cases. Its purpose is to address the intricacies of the numerous and often confusing procedural and substantive requirements of these types of cases. Included is a full listing of all crimes of sexual violence, with the grading, penalty and registration requirements for each crime.

Additionally, the book provides information about sexual violence¹ from experts in the field, examines “best practices” for these cases, and offers resources for judges seeking additional information or guidance. The book, specifically designed for trial judges, has been divided into four sections:

SECTION ONE:	Understanding Sexual Violence
SECTION TWO:	The Process of a Sex Offense Case
SECTION THREE:	Registration of Sexual Offenders
SECTION FOUR:	Resources

Section One examines the dynamics of sexual assault crimes. The elements of crimes of sexual violence are provided, as well as definitions associated with current sexual offenses.² Section One also provides an overview of common defenses to sexual assault.

- Chapter 1: The Dynamics of Sexual Violence Crimes
- Chapter 2: General Provisions of Sexual Violence Crimes
- Chapter 3: Crimes of Sexual Violence in Pennsylvania
- Chapter 4: Offenses Against Children
- Chapter 5: Defenses

¹ Former President Jimmy Carter, in his new book, *A Call To Action: Women, Religion, Violence, and Power*, calls abuse of women, both sexual and physical, as the “worst and most pervasive and unaddressed human rights violation on Earth.”

² 18 PA.CON.S.STAT.ANN. §§ 3101 - 3144.

The Dynamics of Sexual Violence Crimes

Section Two addresses the practical aspects of a case of sexual violence, including pre-trial issues such as bail and evidentiary issues presented at trial. Pertinent information regarding the grading and penalties of crimes is provided, as well as registration requirements.

Chapter 6: Pretrial

Chapter 7: Trial Issues

Chapter 8: Scientific Evidence

Chapter 9: Post-Trial Procedures and Sentencing

Chapter 10: Appellate Review and Post-Conviction Relief

Section Three examines the ramifications of a sexual offense conviction, including sex offender registration laws and sex offender reporting requirements. On December 20, 2011, Pennsylvania enacted legislation that substantially changed the prior law regarding registration requirements for persons convicted of sexual offenses, previously known as Megan's Law III. The new legislation, 2011, Dec. 20, P.L. 446, No. 111, § 12 (effective December 20, 2012), amended by 2012, July 5, P.L. 880, No. 91, § 3 (effective December 20, 2012), is codified at 42 PA.CON.S.TAT.ANN. §§ 9799.10–9799.41, and is known as the Sex Offender Registration and Notification Act or SORNA.

Chapter 11: Sex Offender Registration and Notification

Section Four includes published references and resources on sexual assault, as well as a list of Pennsylvania's rape crisis centers and child advocacy centers.

B. Crimes of Sexual Violence and Pennsylvania Law

The Pennsylvania Supreme Court has stated:

The state clearly has a proper role to perform in protecting the public from inadvertent offensive displays of sexual behavior, in preventing people from being forced against their will to submit to sexual contact, in protecting minors from being sexually used by adults, and in eliminating cruelty to animals. To assure these protections, a broad range of criminal statutes constitute valid police power exercises, including proscriptions of indecent exposure, open lewdness, rape, involuntary deviate sexual intercourse, indecent assault, statutory rape, corruption of minors

Commonwealth v. Bonadio, 490 Pa. 91, 95, 415 A.2d 47, 49 (1980) (Flaherty, J., plurality).

In Pennsylvania, crimes of sexual violence are mostly included in the section of the Crimes Code designated for sexual offenses, 18 PA.CON.S.TAT.ANN. §§ 3101 - 3144. Many of the provisions of Subchapters A, B and C of Chapter 31, Sexual Offenses, are based upon Article 213 of the Model Penal Code.

The Dynamics of Sexual Violence Crimes

The Pennsylvania Crimes Code specifies three high level charges aimed at nonconsensual sexual assaults: Rape, 18 PA.CON.S.TAT.ANN. § 3121, Involuntary Deviate Sexual Intercourse, 18 PA.CON.S.TAT.ANN. § 3123, and Sexual Assault, 18 PA.CON.S.TAT.ANN. §§ 3124.1. Rape and IDSI are felonies of the first degree, while Sexual Assault is a felony of the second degree. Statutory rape is designated in Pennsylvania as Statutory Sexual Assault under 18 PA.CON.S.TAT.ANN. § 3122.1.

Additionally, the Pennsylvania Crimes Code prohibits a broad range of other types of sexual misconduct. As further explained below, the Code is gender- neutral.

Furthermore, Pennsylvania law specifies offenses of sexual violence directed at children, and other general offenses against children, which are often associated with sexual offenses, in other sections of the Crimes Code. These crimes are found in numerous different chapters, including Chapter 29, Kidnapping (e.g., Luring a Child into a Motor Vehicle, 18 PA.CON.S.TAT.ANN. § 2910); Chapter 43, Offenses Against the Family (e.g., Endangering the Welfare of Children, 18 PA.CON.S.TAT.ANN. § 4303); and Chapter 63, Minors (e.g., Sexual Abuse of Children, 18 PA.CON.S.TAT.ANN. § 6312).

Many aspects of Pennsylvania law parallel current standards for crimes of sexual violence, such as:

No Corroboration Required

In Pennsylvania, the uncorroborated testimony of the complaining witness is sufficient evidence of a sexual offense. See Chapter 7, Section 7.4, TESTIMONY OF COMPLAINANT.

The Prompt Complaint Rule

Evidence of a sexual assault victim's prompt complaint is admissible in the prosecution's case-in-chief. However, the lack of promptness of a report may be a factor to be raised in cross-examination if admissible under the rules of evidence. See Chapter 7, Section 7.7, EVIDENCE OF PROMPT COMPLAINT.

Abolition of the Marital Immunity Rule

The marital immunity rule – which specified that a husband could not legally rape his wife – was abrogated in Pennsylvania, and current Pennsylvania law grants no privilege to a husband when charged with any type of bodily injury or violence upon his wife. See Chapter 7, Section 7.18, SPOUSAL PRIVILEGE.

The Rape Shield Law

No longer is proof of a complainant's prior sexual promiscuity admissible unless it falls under specified exceptions such as evidence of motive, prejudice or bias or as evidence that negates the sexual contact. See Chapter 6, Section 6.8, EVIDENCE OF VICTIM'S PAST SEXUAL CONDUCT.

1.2 CHAPTER OVERVIEW

Chapter One addresses the issues resulting from sexual violence from both a legal and mental health perspective.

Section 1.3 examines, in a general way, crimes of sexual violence as listed in Pennsylvania statutes, as well as the elements of rape and other major sexual assault crimes. Section 1.4 provides evidence-based research about the impact of rape and sexual assault on victims. Section 1.5 enumerates victims' rights afforded by the Pennsylvania Crime Victims Bill of Rights.³ Section 1.6 discusses common problems facing victims of sexual assaults as they progress through the legal and judicial systems. Section 1.7 provides an overview of the role and responsibilities of victim advocates in sexual assault cases.

1.3 DEFINING RAPE AND SEXUAL ASSAULT

Rape and Sexual Assault are commonly used terms that may be defined differently depending on context, culture, or personal experience. Generally, "rape" is the term that implies the use of force in unwanted sexual contact while sexual assault implies sexual contact without consent.

Legally, it is well established that sexual relations become a crime under a number of circumstances that may or may not involve the use or threat of force:

- whenever there is a lack of consent,⁴
- whenever the relations are initiated by force or threat of force,⁵
- if there is a minor involved who is incapable of giving legal consent because of age,⁶
- if there is an adult involved who is incapable of giving legal consent because of mental deficiency,⁷

3 The Pennsylvania Crime Victims Act is codified at 18 PA.STAT. §§ 11.201 – 11.216.

4 18 PA.CON.S.TAT.ANN. § 3124.1. To support a charge of Sexual Assault, the prosecution must prove that the defendant engaged "in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent." Resistance to sexual assault is not required to sustain a conviction. *Commonwealth v. Smith*, 863 A.2d 1172, 1176 (Pa. Super. 2004). *See also, Commonwealth v. Pasley*, 743 A.2d 521 (Pa. Super. 1999), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000)(noting the crime of sexual assault is intended to fill the loophole left by the rape and involuntary deviate sexual intercourse statutes by criminalizing non-consensual sex where the perpetrator employs little if no force).

5 18 PA.CON.S.TAT.ANN. § 3121 (a)(1) & (2): "A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant: (1) By forcible compulsion. (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution." The element of force "needs to be such as to demonstrate an absence of consent, inducing submission without further resistance." *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

6 18 PA.CON.S.TAT.ANN. § 3122.1, Statutory Sexual Assault: "a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant to whom the person is not married who is under the age of 16 years and that person is either: (1) four years older but less than eight years older than the complainant; or eight years older but less than 11 years older than the complainant." Additionally, 18 PA.CON.S.TAT.ANN. § 3121 (c): "A person commits the offense of **rape of a child**, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age." (emphasis added). The crime of rape of a child is a strict liability offense, imposing criminal liability regardless of whether the offender knew the correct age of the victim. *Commonwealth v. Dennis*, 784 A.2d 179, 181-182 (Pa. Super. 2001), *appeal denied*, 568 Pa. 733, 798 A.2d 1287 (2002).

7 18 PA.CON.S.TAT.ANN. § 3121(a)(5): "A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant . . . (5) Who suffers from a mental disability which renders the complainant incapable of consent." In *Commonwealth v. Thomson*, 673 A.2d 357, 359-360 (Pa. Super. 1996), *aff'd*, 546 Pa. 679, 686 A.2d 1310 (1996), the Superior Court of Pennsylvania held that expert testimony supported the jury's finding that the victim was incapable of consent because of mental deficiency, i.e., mild mental retardation with a limited I.Q.

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- if there is a minor or adult involved who is unconscious or unaware that the sexual intercourse is occurring.⁸

A. MAJOR SEXUAL ASSAULT CRIMES IN PENNSYLVANIA

Rape, Sexual Assault and Involuntary Deviate Sexual Intercourse

In Pennsylvania, rape and sexual assault are gender neutral, and may be perpetrated against an adult or child victim. Both rape and sexual assault may be perpetrated against a spouse. Both typically require as the assaultive conduct sexual intercourse, with some showing of penetration, however slight. The primary distinction between the crimes of rape and sexual assault is that rape requires some evidence of force, either actual or threatened, while sexual assault requires only that the complainant did not consent to the sexual conduct.

Involuntary deviate sexual assault is typically charged when the defendant, by physical compulsion or threats thereof, coerces the victim to engage in acts of anal or oral intercourse.

The Table of Contents in the Crimes Code for sexual offenses in Pennsylvania is as follows:

18 PA.CON.S.TAT.ANN. PA.II, Art. B, Ch. 31 **Chapter 31 – SEXUAL OFFENSES**

SUBCHAPTER A. GENERAL PROVISIONS

§ 3101	Definitions
§ 3102	Mistake As To Age
§ 3103	Repealed
§ 3104	Evidence Of Victim’s Sexual Conduct
§ 3105	Prompt Complaint
§ 3106	Testimony Of Complainants
§ 3107	Resistance Not Required

SUBCHAPTER B. DEFINITION OF OFFENSES

§ 3121	Rape
§ 3122	Repealed

⁸ 18 PA.CON.S.TAT.ANN. § 3121(a)(3): “A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant ... (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.” The Pennsylvania Supreme Court has defined an unconscious person, for purposes of this statute, as a “person [who] lack[s] the conscious awareness they would possess in the normal waking state.” *Commonwealth v. Widmer*, 560 Pa. 308, 323, 744 A.2d 745, 753 (2000). In *Commonwealth v. Erney*, 548 Pa. 467, 473, 698 A.2d 56, 59 (1997), the Pennsylvania Supreme Court held that an intoxicated victim who was intermittently unconscious throughout the sexual assault and in an impaired physical and mental condition was unable to knowingly consent, and therefore her submission to sexual intercourse was involuntary. In *Commonwealth v. Wall*, 953 A.2d 581, 584 (Pa.Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008), the court held that a victim who was sleeping when sexual intercourse was initiated by the offender is considered “unconscious.” *See also*, 18 PA.CON.S.TAT.ANN. § 3121(a)(4): “A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant ... (4) Where the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.”

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§ 3122.1	Statutory Sexual Assault
§ 3123	Involuntary Deviate Sexual Intercourse
§ 3124	Repealed
§ 3124.1	Sexual Assault
§ 3124.2	Institutional Sexual Assault
§ 3125	Aggravated Indecent Assault
§ 3126	Indecent Assault
§ 3127	Indecent Exposure
§ 3128	Repealed
§ 3129	Sexual Intercourse With Animal
§ 3130	Conduct Relating To Sex Offenders

SUBCHAPTER C. LOSS OF PROPERTY RIGHTS

§ 3141	General Rule
§ 3142	Process And Seizure
§ 3143	Custody Of Property
§ 3144	Disposal Of Property

For a more detailed description of sex crimes in Pennsylvania, see Chapters 2, 3 and 4.

Rape is defined in 18 PA.CON.S.TAT.ANN. § 3121. It is a first degree felony to engage in sexual intercourse with a complainant:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;
- (4) where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or
- (5) who suffers from a mental disability which renders the complainant incapable of consent.

In addition to the statutory penalty, a defendant may be sentenced to an additional term not to exceed ten years' confinement and an additional amount not to exceed \$ 100,000 where the person engages in sexual intercourse with a complainant and has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss and any other effect of this substance.

The Dynamics of Sexual Violence Crimes

Rape of a child, 18 PA.CON.S.STAT.ANN. § 3121(c), is a felony of the first degree and occurs when the person engages in sexual intercourse with a complainant who is less than 13 years of age. Upon conviction, a defendant may be sentenced to a term of imprisonment of up to forty years. Rape of a child with serious bodily injury, 18 PA.CON.S.STAT.ANN. § 3121(d), is a felony of the first degree and occurs when the person engages in sexual intercourse with a complainant who is less than 13 years of age and the complainant suffers serious bodily injury in the course of the offense. Upon conviction of rape of a child with serious bodily injury, a defendant may be sentenced up to a maximum term of life imprisonment. 18 PA.CON.S.STAT.ANN. § 3121(e).

Sexual assault is defined in 18 PA.CON.S.STAT.ANN. § 3124.1 which states, "Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent."

Involuntary deviate sexual intercourse is defined in 18 PA.CON.S.STAT.ANN. § 3123 which states:

(a) Offense defined. -- A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;
- (4) where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
- (5) who suffers from a mental disability which renders him or her incapable of consent; or
- (6) Deleted by 2002, Dec. 9, P.L. 1350, No. 162, § 2, effective in 60 days.
- (7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

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(b) Involuntary deviate sexual intercourse with a child. -- A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

(c) Involuntary deviate sexual intercourse with a child with serious bodily injury. -- A person commits an offense under this section with a child resulting in serious bodily injury, a felony of the first degree, when the person violates this section and the complainant is less than 13 years of age and the complainant suffers serious bodily injury in the course of the offense.

B. DEFINING SEXUAL VIOLENCE

While terms such as “date rape” and “acquaintance rape” are still used, it is preferable to discuss sexual violence in terms of the legal statutes that identify each criminal act.

On its website,⁹ the Pennsylvania Coalition Against Rape describes *sexual violence* as:

Sexual violence violates a person’s trust, autonomy and feeling of safety. It occurs any time a person is forced, coerced, and/or manipulated into any unwanted sexual activity.

The range of sexual violence includes rape, incest, child sexual assault, ritual abuse, date and acquaintance rape, statutory rape, marital or partner rape, sexual exploitation, sexual contact, sexual harassment, exposure, human trafficking and voyeurism.

Rape is a crime. It is motivated by the need to control, humiliate, and harm. It is not motivated by sexual desire. Rapists use sex as a weapon to dominate and hurt others.

C. COMPARING THE MYTHS OF SEXUAL VIOLENCE TO THE REALITY

Although much research has been done on the nature of rape and sexual assault, many myths still permeate our culture. For example, one common misconception is that a woman is most likely to be raped by someone she does not know.¹⁰ Another misconception is that if a woman dresses in a certain way, or is under the influence of alcohol, she is inviting rape.¹¹ It is important to be aware of these and other myths as they provide insight into the beliefs of potential jurors as well as the community at large.

⁹ <http://www.pcar.org/about-sexual-violence>.

¹⁰ Lifetime Television Violence Against Women Study (2002) (Available from Penn, Schoen and Berland Associates, Washington, D.C.). In 2010, of female rape or sexual assault victims, 25 percent were assaulted by a stranger, 48 percent by friends or acquaintances, and 17 percent by intimate partners. See Jennifer L. Truman, *Criminal Victimization*, 2010, (Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice, 2011).

¹¹ Office on Violence Against Women, Department of Justice, *Myths and facts about sexual violence*, retrieved May 3, 2006 from <http://www.usdoj.gov/ovw/MythsFactSexualViolence.htm>. See also Office on Violence Against Women, Department of Justice, *Sexual Assault*, retrieved on March 28, 2014 at www.ovw.usdoj.gov/sexassault.htm.

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These types of crimes typically lack physical evidence and independent witnesses, therefore directing the focus of the case to the credibility of the victim and the accused.¹² The reality of rape and sexual assault has been confirmed in numerous studies. Three of the most preeminent sources examining sexual violence are:

- *The National Crime Victimization Survey*,¹³
- *Rape in America Study*,¹⁴ and
- *The Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*.¹⁵

Highlights from these studies emphasize that:

1. Nonstranger Rape

Reality: *Nonstranger or acquaintance rape is more common than stranger rape.*

“[M]any, if not most, victims are acquainted with their attacker.”¹⁶ Statistics show that 73 percent of rapes/sexual assaults were perpetrated by someone known to the victim.¹⁷ The Department of Justice found that among victims 18 to 29 years old, two-thirds had a prior relationship with the rapist.¹⁸ Further examination of perpetrator/victim relationships reveals that about 85 to 90 percent of sexual assaults reported by college women are perpetrated by someone known to the victim, and about half occur on a date.¹⁹

Acquaintance rape on college campuses is an increasing problem in America. “As many as one in five women will be assaulted during their college days, with freshman — who make up 63 percent of the victims — at the highest risk.” *The Washington Post*, March 26, 2014. Former President Jimmy Carter, in support of the opinions in his new book, *A Call To Action: Women, Religion, Violence, and Power*, recently said:

We also have a terrible amount of sexual abuse on college campuses, including every university in America ... Only about 4 percent of the rapes on college campuses are reported because the

12 HE SAID, SHE SAID: WHY PENNSYLVANIA SHOULD ADOPT FEDERAL RULES OF EVIDENCE 413 and 414, 52 Vill.L.Rev. 641, 648 (Jessica Khan 2007).

13 *Bureau of Justice Statistics* (2002) National Crime Victimization Survey, Washington, D.C.: U.S. Department of Justice. The Bureau of Justice Statistics conducts the National Crime Victimization Survey (NCVS) every year. This survey measures reported and unreported crime, including rape and other types of sexual assault.

14 *Rape in America: A Report to the Nation* (D.G. Kilpatrick, C.N. Edmunds, & A. Seymour 1992).

15 National Institute of Justice, U.S. Department of Justice. (2006). *Extent, nature, and consequences of rape victimization: findings from the Violence Against Women survey*. Retrieved May 9, 2006 from <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

16 6 Rutgers J.L.&Pub.Pol’y 891 (Spring 2009).

17 *Bureau of Justice Statistics* (2005) National Crime Victimization Survey, Washington, D.C.: U.S. Department of Justice.; RAINN (Rape, Abuse & Incent National Network), *The Offenders – The Rapist Isn’t a Masked Stranger*, retrieved March 28, 2014 from <https://www.rainn.org/get-information/statistics/sexual-assault-offenders>.

18 *Rape Myths and Facts*, 2014, Tennessee Coalition to End Domestic and Sexual Violence, retrieved on March 28, 2014 from TNblue.org.

19 National Institute of Justice, U.S. Department of Justice, *Sexual Assault on Campus*, retrieved March 28, 2014 from <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/Pages/know-attacker.aspx>.

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presidents of universities and the deans and so forth don't want the reputation of the university to be hurt by saying that sexual assaults are occurring.²⁰

As recently reported, most college sexual assault victims are assaulted by someone they know, and statistics demonstrate that parties are "often the site of these crimes."²¹ The report continues:

Notably, campus assailants are often serial offenders: one study found that of the men who admitted to committing rape or attempted rape, some 63% said they committed an average of six rapes each. College sexual assault survivors suffer from high levels of mental health problems (like depression and PTSD) and drug and alcohol abuse. Reporting rates are also particularly low.

2. Use of Weapons

Reality: Few rapes and sexual assaults involve the use of a weapon.

Again, the reality of sexual assault is very different from public perception. The Bureau of Justice Statistics, Department of Justice, states that a weapon is used in an estimated 30% of stranger rapes and in only 15% of rapes committed by someone known to the victim.²² In 2002, only four percent of rapes/sexual assaults involved the use of a firearm, and only two percent involved the use of a knife.²³

Rapists are far more likely to gain control of their victims through deception, manipulation, and betrayal of the victim's trust. Of course, this is not to say that rapes and sexual assaults without weapons are not "violent" or "forcible."

3. Victim Injury

Reality: It is rare for a rape victim to sustain any visible physical injuries in addition to the rape.

Few victims sustain visible physical injuries as a result of a rape. From 1992 – 2000, approximately 67 percent of victims of completed rapes sustained **no bruises, scratches, cuts, or other visible injuries.**²⁴ Genital injury may or may

²⁰ *The Oregonian*, March 30, 2014.

²¹ *Rape and Sexual Assault: A Renewed Call to Action*, published by The White House Council on Women and Girls, January 2014, retrieved on September 4, 2014 from http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.

²² *Bureau of Justice Statistics* (2012) National Crime Victimization Survey, Washington, D.C.: U.S. Department of Justice; Rape Myths and Facts, 2014, Tennessee Coalition to End Domestic and Sexual Violence, retrieved on March 28, 2014 from TNblue.org.

²³ *Bureau of Justice Statistics* (2012) National Crime Victimization Survey, Washington, D.C.: U.S. Department of Justice; *See also*, Criminal Victimization in the United States, 2006 Statistical Tables, <http://bjs.ojp.usdoj.gov>.

²⁴ *Id.*

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not be present after a rape/sexual assault.

Some people think that you cannot be forced to have sex against your will. The truth is that you can be, either by physical force or threat of injury or death. Cooperation does not mean consent. Fearing serious injury or death during a rape, many victims do not resist the attack and do not sustain any bruises, marks, or other visible physical injuries. You cannot always tell someone has been raped just by looking at her.

Sexual Assault Victimization, Help Series Brochure, Office for Victims of Crime, The National Center for Victims of Crime (2002).

For a more in-depth discussion on genital injury see section 1.4(A)(2).

4. Reporting of Rape and Sexual Assault

Reality: Rape and sexual assault are underreported crimes.

Statistics regarding the percentage of reported rapes and sexual assaults vary greatly depending on the definitions used, the sample of victims studied, and the way in which the questions are phrased. However, research overwhelmingly demonstrates that rape and sexual assault are underreported crimes.²⁵ Dr. Dean Kilpartick found, as stated in *DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY*, that in 2006 only 18% of forcible rape victims and 10% of drug-induced rape victims reported the crime to law enforcement.²⁶

According to the *Rape in America Study*, only 16 percent of rapes were ever reported to police.²⁷

Forcible rape, as defined in the FBI's Uniform Crime Reporting (UCR) Program, is defined as:

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.²⁸

In the data collection pursuant to the UCR Program, the Program counts one offense for each female victim of a forcible rape, attempted forcible rape, or assault with intent to rape, regardless of the victim's age. A rape by force involving a female victim and a familial offender is counted as a forcible rape and not an act

25 D.G. Kilpatrick, C.N. Edmunds, & A. Seymour. 1992. *Rape in America: A Report to the Nation*, National Victim Center and Crime Victims Research and Treatment Center.

26 Kilpartick et al., *DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY* (2007).

27 D.G. Kilpatrick, C.N. Edmunds, & A. Seymour. 1992. *Rape in America: A Report to the Nation*, National Victim Center and Crime Victims Research and Treatment Center.

28 *Reporting Rape in 2013*, Criminal Justice Information Services (CJIS) Division, Uniform Crime Reporting Program, U.S. Department of Justice, Federal Bureau of Investigation, retrieved on March 26, 2014: <http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/reporting-rape-in-2013>.

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of incest. All other crimes of a sexual nature are considered to be Part II offenses; as such, the UCR Program collects only arrest data for those crimes. The offense of statutory rape, in which no force is used but the female victim is under the age of consent, is included in the arrest total for the sex offenses category. Sexual attacks on males are counted as aggravated assaults or sex offenses, depending on the circumstances and the extent of any injuries.²⁹

There were an estimated 84,376 forcible rapes reported to law enforcement in 2012. This estimate was 0.2 percent higher than the 2011 estimate, but 7.0 percent and 10.1 percent lower than the 2008 and 2003 estimates, respectively.³⁰

Child victimization is also underreported. Research by Finkelhor and Dzubia-Leatherman (1994) shows that “levels of child victimization far exceed those reported in official government victimization statistics.”³¹ The researchers interviewed children between the ages of 10 and 16 years of age and found sexual abuse involving physical contact to be at rates five times higher than the 0.1 percent reported in the National Crime Survey. In a subsequent international survey, Finkelhor found rates of abuse to be consistent with his American study (1994).³²

Victims cite the following reasons for not reporting sexual violence:

- the victim does not want family members to know about the assault;
- they have concerns others will find out (including the victim’s name being made public); and
- they fear blame for the assault by family, friends, and others.³³

Children may be reluctant to disclose sexual abuse because they fear the perpetrator, have a fondness for the perpetrator, or are afraid of upsetting the family structure. In cases of incest, family dynamics may normalize the sexual abuse or reinforce the need for family members to keep quiet about the abuse.

There have been recent developments which have caused an increase in public attention on sexual assault cases, which may affect the number of incidents which are reported. For example, the Nashville Sexual Assault Center has reported an increase in the number of victims stepping forward to report sexual abuse, attributed in part to intense coverage of former Penn State University assistant football coach Jerry Sandusky.³⁴

29 Federal Bureau of Investigation. (2012) *Crime in the United States, Uniform Crime Reports, 2012*, Washington, DC: U.S. Department of Justice.

30 *Id.*

31 Finkelhor, D. (1994) *The international epidemiology of child sexual abuse*, *Child Abuse & Neglect*, 18: 413-420.

32 *Id.*

33 *Id.*

34 *Study: Sexual Assaults Greatly Underreported*, USA Today, 11-19-13. The Superior Court of Pennsylvania denied Jerry Sandusky’s appeal on October 2, 2013, *Commonwealth v. Sandusky*, 77 A.3d 663 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 81 A.2d 77 (2013).

5. False Reporting

Reality: *“Statistically, very few people lie about being raped.”*

It is difficult on both a national and state level to determine how many rape allegations are false. The reasons for this difficulty lie with the methodology used to collect data on sexual violence as well as the lack of rigorous research on the subject.

Historically, the Federal Bureau of Investigation (FBI) collected and published data submitted by each state through the Uniform Crime Report (UCR). Until 1997, the FBI included a paragraph in their report noting that the average rate for “unfounded” cases of forcible rape was eight percent as compared with that of other crimes which was only two percent.³⁵ Cases were counted as “unfounded” if:

- There was insufficient evidence to determine if the intercourse were consensual.
- Police were unable to locate the victim.
- The victim decided not to follow through with the prosecution.
- The victim repeatedly changed the account of the rape incident.
- The victim recanted.
- The allegation was found to be false.

One inconsistency with the UCR is that the definitions used in the report do not include all aspects of sexual violence, only rape of women. As of 2004, the UCR still does not include data on rape and sexual assault of males, victims with disabilities, children under the age of 12 years, and sexual assault by anal or oral copulation.³⁶

Another caveat to the information submitted for the UCR is that, while data is provided to the FBI by every state, not every police department within each state submitted information. For example, a report filed in 2004 pursuant to the Uniform Crime Reporting Act, 18 PA.STAT. §§ 20.501 – 20.509, indicated that 1,056 out of 1,200 jurisdictions in Pennsylvania submitted data. While a majority of jurisdictions did report, it is unknown whether the data represented one month or an entire year. The purpose behind the Pennsylvania Uniform Crime Reporting act was to standardized UCR reporting. The law became effective in June 2005. It mandates and standardizes reporting for all law enforcement agencies within Pennsylvania.

³⁵ Federal Bureau of Investigation. (2007) *Crime in the United States, Uniform Crime Reports*, 2007, Washington, DC: U.S. Department of Justice.

³⁶ Federal Bureau of Investigation. (2012) *Crime in the United States, Uniform Crime Reports*, 2012, Washington, DC: U.S. Department of Justice.

6. Victim Statistics

Reality: *“The overwhelming majority of sexual assaults are perpetrated against women.”*

Although rape is a gender-neutral crime, women are more likely to be victims of sexual violence than are men.³⁷ In 2012, there was a forcible rape every 6.2 minutes in America. In Pennsylvania, the most recent data available is for the year 2012, during which there were 3,327 reports of forcible rape.³⁸ During the same period, there were 947 arrests in Pennsylvania for forcible rape.³⁹

From 1992 – 2000, females victims accounted for 94 percent of all completed rapes, 91 percent of all attempted rapes, and 89 percent of all completed and attempted sexual assaults.⁴⁰

It is difficult to determine the number of male victims of sexual violence for a variety of reasons. As stated previously, the FBI Uniform Crimes Report only tracks sexual assault data on female victims. Also, males who are sexually abused are often reluctant to come forward or seek mental health services because of overwhelming shame and embarrassment. The few studies that do exist show rates of sexual violence against men to be between five and twenty-three percent.⁴¹ Because perpetrators target vulnerable victims, it is not surprising that the prevalence of sexual abuse against males with mental illnesses or mental health disorders has been reported at rates as high as 32 percent.⁴²

7. Perpetrator Statistics

Reality: *“The majority of rapes and sexual assaults are committed by males.”*

In her article published in the Penn State Law Review, Fall 2004, SENTENCING OF ADULT OFFENDERS IN CASES INVOLVING SEXUAL ABUSE OF CHILDREN: TOO LITTLE, TOO LATE? A VIEW FROM THE PENNSYLVANIA BENCH, Justice Debra Todd of the Pennsylvania Supreme Court reported:

Sex offenders represent 4.7% of the nearly five million convicted offenders serving time in federal or state prisons or jails, or on

37 National Institute of Justice, U.S. Department of Justice. (2010), Victims and Perpetrators, retrieved on March 28, 2014 from <http://www.nij.gov/topics/crime/rape-sexual-violence>. See also, National Institute of Justice, U.S. Department of Justice. (2006), *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey*, retrieved on March 28, 2014 from <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

38 See Bureau of Justice Statistics (2007) *National Crime Victimization Survey*, Washington, D.C.: U.S. Department of Justice. The Bureau of Justice Statistics utilizes information accumulated by the FBI, Uniform Crime Reports, as prepared by the National Archive of Criminal Justice Data.

39 Id.

40 Id.

41 Belkin, D. S., Greene, A. F., Rodrique, J. R., & Boggs, S. R. (1994). Psychopathology and history of sexual abuse. *Journal of Interpersonal Violence*, 9, 535-547.

42 Sigler, J.I. (2000). “Forced sexual intercourse among intimates”. *Journal of Interpersonal Violence*, 15(1).

probation or parole. They comprise 1% of the federal prison population, 9.7% of the state prison population, 3.4% of the nation's jail inmates, 3.6% of the offenders on probation and 4% of the offenders on parole.

109 Penn St. L. Rev. 487, 513 (2004).⁴³

In single-offender rapes and sexual assaults, the percentage of male offenders is nearly 99 percent.⁴⁴ Research about female sex offending is limited, but studies suggest that female sex offending occurs more frequently than reported and is most often directed toward children under the care of the female offender.⁴⁵

8. Delay in Reporting

Reality: *"An individual will immediately report their sexual assault."*

Research shows that victims do not immediately report their rape **to authorities**; however, they may tell a friend, relative, or someone they trust. While victims of burglary, theft, or robbery are likely to contact authorities immediately, victims of sexual violence often need time to process the event; particularly if they know their attacker. Reasons cited for delayed reporting include:⁴⁶

- Not identifying acquaintance rape as rape
- Fear of not being believed
- Fear of being blamed for the assault
- Unable to tell the whole story to police
- Fear of being blamed due to use of alcohol or drugs
- Lack of support
- Fear of how the case may be handled by the court system
- Fear of police
- Lack of understanding or knowledge of the court system
- Wanting to "put it all behind them"
- Emotional attachment to the offender. Not wanting to get the offender in trouble
- In incest cases, the victim may be concerned about the family disruption.

Victims relate that encouragement from a friend is often the impetus for reporting the assault to police. Georgetown Law Center, in its report, *Myths and Facts about Sexual Violence*, stated:

⁴³ Justice Todd was a Judge on the Superior Court of Pennsylvania at the time she wrote this article.

⁴⁴ Federal Bureau of Investigation. (2012) *Crime in the United States, Uniform Crime Reports, 2012, Washington, DC: U.S. Department of Justice.*

⁴⁵ Davin, P.A., Hilsop, J. C., & Dunbar, T. (1999), *Female Sexual Abusers. Brandon, Vt.: Safer Society Press.*

⁴⁶ U.S. Department of Justice. (1997), *Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement.*

There are many reasons why a sexual assault victim may not report the assault to the police. It is not easy to talk about being sexually assaulted. The experience of re-telling what happened may cause the person to relive the trauma. Other reasons for not immediately reporting the assault or not reporting it at all include fear of retaliation by the offender, fear of not being believed, fear of being blamed for the assault, fear of being “revictimized” if the case goes through the criminal justice system, belief that the offender will not be held accountable, wanting to forget the assault ever happened, not recognizing that what happened was sexual assault, shame, and/or shock. In fact, reporting a sexual assault incident to the police is the exception and not the norm. From 1993 to 1999, about 70% of rape and sexual assault crimes were not reported to the police. Because a person did not immediately report an assault or chooses not to report it at all does not mean that the assault did not happen.⁴⁷

1.4 THE IMPACT OF RAPE AND SEXUAL ASSAULT ON THE VICTIM

Whether a person is assaulted by a stranger, an acquaintance, or someone they know and trust, their life is irrevocably changed. A victim of burglary, for example, may report losing a television or computer. A victim of rape or sexual assault will often describe “a loss of their soul.”

The community at large seems to consider stranger sexual assault far more damaging to victims than sexual assault by an acquaintance, friend, or spouse. In reality, the adverse may be true. While every reaction is different, victims report that that sexual violence impacts them regardless of the relationship or perceived relationship to the perpetrator.⁴⁸

A. PHYSICAL INJURY FROM RAPE AND SEXUAL ASSAULT IN FEMALE ADULTS AND ADOLESCENTS

1. Gross Bodily Injury in Female Adults and Adolescents

According to the U.S. Department of Justice report, *Prevalence, Incidence, and Consequences of Violence Against Women*, 32 percent of women reported physical injuries resulting from rape.⁴⁹ Figure A illustrates the type of injuries most frequently reported by sexual assault victims (this graph includes injuries of male and female victims combined).⁵⁰ As noted, bites, welts, and bruises were the most common physical injuries sustained by victims.

47 Retrieved on March 28, 2014 from <http://www.law.georgetown.edu>.

48 U.S. Department of Justice. (2000), *Full report of the prevalence, incidence, and consequences of violence against women* (NCJ Publications No. 183781, p. 49), retrieved March 28, 2014, from <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

49 Id.

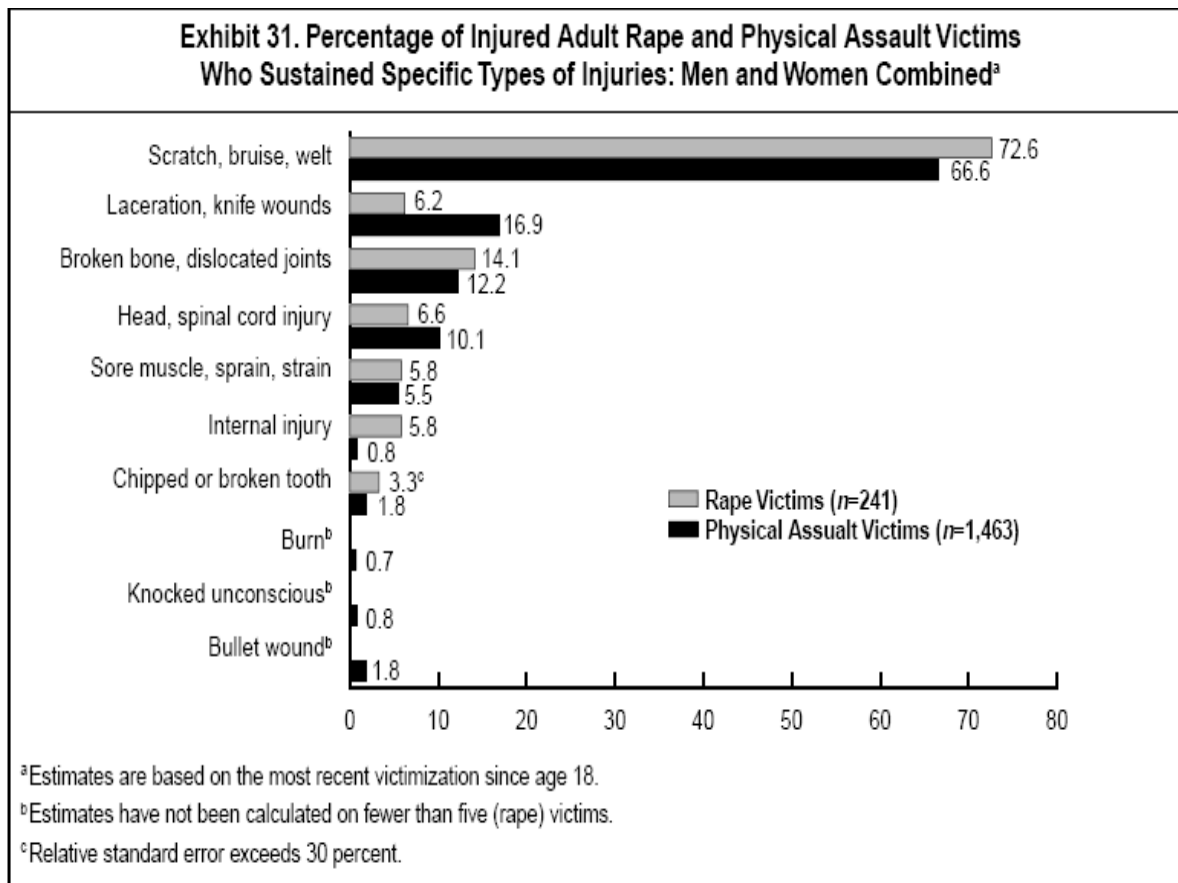
50 Id.

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2. Genital Injury in Female Adults and Adolescents

In *The Color Atlas of Sexual Assault* (1997), authors Girardin, Faugno, Seneski, Slaughter, and Whelan cite multiple studies that conclude “the absence of genital injury does not provide proof that a rape did not occur.”⁵¹

Figure A: Percentage of Injured Adult Rape and Physical Assault Victims



There are several factors that may impact whether or not genital injury is observed after a sexual assault. The most common reasons identified by medical personnel for lack of injury include: *the lack of vaginal contact by the perpetrator, delayed reporting of the assault, a lack of magnification technology, inexperience or insufficient training of the examiner, and finally, the perpetrator is non-aggressive and/or the victim is non-resistive.*⁵²

Each of the reasons for lack of genital injury will be discussed below.

- In the first instance, if there is no contact with the vagina, it would follow that there would be no genital injury.

⁵¹ Girardin, B.W., Faugno, D.K., Seneski, P.C., Slaughter, L., & Whelan, M. (1997). *Color atlas of sexual assault* (pp. 22-37), St. Louis, Missouri: Mosby-Year Book, Inc.

⁵² Id.

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- With delayed reporting, an examination delayed to 14 days post assault will detect no acute findings.⁵³
- Not using diagnostic equipment in the examination can decrease the likelihood of diagnosing injury.
- A lack of Colposcopy magnification can drop the probability of detecting genital injury from 87 percent when performed by a trained examiner, to between 10 percent and 30 percent by gross visualization alone.⁵⁴ Colpsocopy is one of three methods currently available to conduct rape exams. The other two are direct visualization and staining.⁵⁵ Figure B lists and describes each technique and provides an overview of their use in sexual assault examinations.⁵⁶
- Lack of training or expertise is another impediment to diagnosing injury.
- The use of minimal force by the perpetrator may not result in any discernable injury.
- If the victim is non-resistive, he or she may not sustain a physical injury.⁵⁷

Figure B: Methods to Determine Genital Injury From Sexual Assault

Technique	Description	Findings on Extent of Injury
Direct Visual inspection	Standard gynecologic and forensic exam unaided by magnification or staining	Rates of injury found by experienced examiners showed between 27%-33%.
Staining Techniques: Gentian violet, Lugol's solution, toluidine blue, fluorescein	Media highlight areas of abraded skin and microlacerations. Staining techniques make injury more visible to the naked eye.	Investigators using staining techniques identified injury in 40%-58% of sexual assaults.
Colposcopy	Used to illuminate, magnify, and photograph external and internal gynecologic structures. Repeated exams not necessary because photographs or digital images can be obtained.	Studies consistently show a higher rate of injury diagnosis with Colposcopy than with direct visualization or staining alone.

To correctly perform a forensic rape exam, physicians and nurses require specialized training over and above what is received in their basic education programs.⁵⁸ The need for individuals with this specialized skill resulted in

⁵³ Id.

⁵⁴ Id.

⁵⁵ Sommers, M.S., Fisher, B.S., & Karjane, H.M. (2005). Using colposcopy in the rape exam: health care, forensic, and criminal justice issues. *Journal of Forensic Nursing*, 1(1), 30-34.

⁵⁶ Id.

⁵⁷ Girardin, B.W., Faugno, D.K., Seneski, P.C., Slaughter, L., & Whelan, M. (1997). *Color atlas of sexual assault* (pp. 23-24) St. Louis, Missouri: Mosby-Year Book, Inc.

⁵⁸ Office on Violence Against Women, Department of Justice, *A national protocol for sexual assault medical forensic exams (2004)* (U.S. DOJ Publication No. NCJ 206554).

the development of national Sexual Assault Nurse Examiner (SANE) training programs.⁵⁹

Basic training programs for SANE nurses consist of at least 40 hours of classroom instruction. Topics can include the definition of the SANE role, collection of evidence, testing and treatment of STDs, evaluation of other care needed, victim responses and crisis intervention, assessment of injuries, documentation, courtroom testimony, collaborating with community agencies, competent completion of an exam, and forensic photography.⁶⁰ Nurses are usually required to complete a certain number of clinical hours as well.

According to Rebecca Campbell, Associate Professor of Community Psychology and Program Evaluation at Michigan State University, "*The clinical case study literature suggests that SANE nurses are not only competent in forensic evidence collections, but they are actually better at it because of their extensive training and experience.*"⁶¹ Campbell notes that research in this area consistently supports the use of SANE nurses in cases of sexual assault.⁶²

B. PSYCHOLOGICAL EFFECTS FROM SEXUAL ASSAULT CRIMES ON VICTIMS

Although a rape victim may not sustain physical injury, they may experience long-term psychological, emotional, and physical consequences of sexual assault.

The psychological effects of rape on a victim may range from minimal to severe and from short to long-lasting. Hanson reports (1996) that one-quarter of women who are victims of sexual assault continue to have problems for several years after the rape.⁶³ Hazelwood and Burgess also indicate that rape and sexual assault are more likely to lead to post-traumatic stress disorder, a DSM-IV diagnosis, than any other traumatic event affecting civilians.⁶⁴

1. Common Psychological Reactions To Sexual Violence

Psychological reactions to rape and sexual assault mirror the reactions of victims to other types of trauma such as war and natural disasters.⁶⁵

According to Timothy O. Woods, J.D., M.A., Director of Research and Development at NSA and a frequent contributor to the Office for Victims of Crime (OVC):

⁵⁹ For additional discussion on SANE nurses, see Chapter 8, Section 8.3(B)(2), Sexual Assault Nurse Examiners.

⁶⁰ Ledray, *SANE Development and Operation Guide*, p. 50.

⁶¹ VAWnet Applied Research Forum, 2004, *The effectiveness of sexual assault nurse examiner programs*. Retrieved February 6, 2006 from: http://www.vawnet.org/SexualViolence/Research/VAWnetDocuments/AR_Sane.php.

⁶² Id.

⁶³ Crowell, N.A., & Burgess, A.W. (Eds.), 1996, *Understanding violence against women*, Washington D.C., National Academy Press.

⁶⁴ Hazelwood, R.R. & Burgess, A.W. (Eds.), 1995, *Practical rape investigation*. Boca Raton, Fla., CRC Press.

⁶⁵ Id.

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*Sexual assault is one of the most traumatic types of criminal victimization. Whereas most crime victims find it difficult to discuss their victimization, sexual assault victims find it especially painful. One obvious reason for this is the difficulty that many people have in talking about sex. A more important reason, however, is that many victims of sexual assault are intensely traumatized not only by the humiliation of their physical violation but by the fear of being severely injured or killed.*⁶⁶

Kilpatrick notes (from 1996) that the fear of being injured or killed is equally common among women who are raped by husbands or acquaintances as among women who are raped by total strangers.⁶⁷

Victims of sexual assault may suffer anxiety, depression, and anger as the result of an assault. Additionally, victims can suffer from social and sexual problems and may also exhibit dissociative reactions.⁶⁸ Dissociative reactions are defined as:

*[T]he separation of ideas, feelings, information, identity, or memories that would normally go together. Dissociation exists on a continuum: At one end are mild dissociative experiences common to most people (such as daydreaming or highway hypnosis) and at the other extreme is severe chronic dissociation, such as DID (MPD) and other dissociative disorders. Dissociation appears to be a normal process used to handle trauma that over time becomes reinforced and develops into maladaptive coping.*⁶⁹

Three terms commonly used when discussing the psychological impact of sexual violence are Rape Trauma Syndrome, Acute Stress Disorder, and Post Traumatic Stress Disorder (PTSD).

While understanding Rape Trauma Syndrome may be helpful in identifying common reactions to rape, the use of this term in court can be problematic as it is not a diagnosis recognized as a DSM-IV diagnosable disease.⁷⁰

2. Rape Trauma Syndrome

Rape Trauma Syndrome was initially identified by Ann Burgess and Lynda Lytle Holmstrom in 1974.⁷¹ Ann Burgess is considered an expert on the

66 Woods, T.O., 2000, *First response to victims of crime: victims of sexual assault*, (OVC Publication No. 176971) Washington D.C., U.S. Department of Justice.

67 Crowell, N.A., & Burgess, A.W. (Eds.), 1996, *Understanding violence against women*, Washington D.C., National Academy Press.

68 Foa, E., & Rothbaum, B.O. (1998). *Treating the trauma of rape: cognitive-behavior therapy for PTSD*. New York, NY: Guilford Publications.

69 *Diagnostic and Statistical Manual of Mental Disorders* American Psychiatric Association, 1994, (4th ed.) Washington, D.C.

70 *Diagnostic and statistical manual of mental disorders*, American Psychiatric Association, 2000, (4th ed.) Washington, D.C.; *See also*, The Playboy Defense in Philadelphia: How Pennsylvania Continues to Thwart Fair and Effective Sexual Assault Prosecutions By Refusing to Admit Expert Testimony About Rape Trauma Syndrome, 6 Rutgers J.L.&Pub.Pol'y 891 (Spring 2009).

71 Burgess, A.W., & Holmstrom, L.L., *Rape trauma syndrome*, 1974, American Journal of Psychiatry.

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psychological impact of sexual violence and has authored nine textbooks and written extensively on assessment and treatment of sexual assault victims.

Burgess and Holstrom first wrote about Rape Trauma Syndrome in 1974 after observing similar physical and psychological responses in 92 adult women who presented to an emergency department after being raped.⁷² Their research was groundbreaking because it dispelled the myth held by law enforcement, medical personnel, and society at large that all rape victims would be hysterical following their assault. What they found was that although every victim responded differently, there were some consistent physical, psychological, and emotional reactions among victims.

According to Burgess and Holmstrom, "*Rape trauma syndrome is the acute phase and long-term reorganization process that occurs as the result of forcible rape or attempted forcible rape.*"⁷³ It usually involves an acute reactionary phase and a secondary, coping or "re-grouping" phase, and attempts to explain why victims respond to the trauma of the sexual assault with "seemingly unexplainable behavior."⁷⁴

According to Burgess and Holmstrom, in the immediate aftermath of the rape, the victim may demonstrate shock and disbelief. Within a few hours, most exhibited two reactionary "styles": either becoming openly emotional or controlled and withdrawn. The openly emotional victim expressed fear, anger, and anxiety, which manifested in crying and smiling. Those who were controlled appeared calm and subdued and exhibited a flat affect.⁷⁵

During the first few weeks after the rape, victims report both physical and emotional reactions. The physical reactions include: skeletal muscle tension, overall physical soreness, nausea, change in appetite, and in some cases, vaginal itching and infection. Emotionally, victims experienced fear, humiliation, anger, and self-blame. Some reported violent dreams, a constant fear of being attacked again, fear of crowds, and what is referred to as *intrusive imagery*. In this case, victims reported seeing the perpetrator "everywhere." Burgess and Holmstrom noted that during the second phase, victims attempt to restore order to their life and regain a sense of control.⁷⁶

While the sample in this initial study was somewhat small, the symptoms associated with Rape Trauma Syndrome have been confirmed in other studies, as well as anecdotally, since 1974.

However, the use of expert testimony to explain the effect of Rape Trauma Syndrome on a particular victim is prohibited in Pennsylvania. In ***Commonwealth***

⁷² Id.

⁷³ Id.

⁷⁴ 6 Rutgers J.L.&Pub.Pol'y 891 (Spring 2009).

⁷⁵ Burgess, A.W., & Holmstrom, L.L., *Rape trauma syndrome*, 1974, American Journal of Psychiatry.

⁷⁶ Id.

v. Gallagher, 519 Pa. 291, 547 A.2d 355 (1988), the Pennsylvania Supreme Court held that it was reversible error by the trial court to permit the use of expert testimony on Rape Trauma Syndrome to explain why the victim had repeatedly failed to identify the defendant immediately following the assault but was able to identify him more than four years later. The Supreme Court reasoned that the testimony was erroneously used to enhance the credibility of the victim, which was within the sole responsibility of the jury.⁷⁷

3. Acute Stress Disorder

Acute Stress Disorder (ASD) is a fairly new category in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and identifies reactions to trauma that do not yet meet the criteria for PTSD.⁷⁸ Foa and Rothbaum in *Treating the Trauma of Rape*, describe the role of Acute Stress Disorder within the context of trauma and PTSD, “*The primary difference between the two disorders is duration of symptoms ...ASD occurs immediately following a stressor, but if symptoms persist beyond one month, a diagnosis of PTSD should be given.*”⁷⁹

The DSM-IV defines the diagnostic criteria for Acute Stress Disorder as follows:⁸⁰

- (1) The person has been exposed to a traumatic event in which both of the following were present:
 - (a) The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
 - (b) The person’s response involved intense fear, helplessness, or horror
- (2) Either while experiencing or after experiencing the distressing event, the individual has three (or more) of the following dissociative symptoms:
 - (a) A subjective sense of numbing, detachment, or absence of emotional responsiveness
 - (b) A reduction in awareness of his or her surroundings (e.g., “being in a daze”)
 - (c) Derealization
 - (d) Depersonalization
 - (e) Dissociative amnesia (i.e., inability to recall an important aspect of the trauma)

⁷⁷ See Chapter 8, Section 8.2 Conduct or Behavior of victims in sexual assault cases.

⁷⁸ *Diagnostic and statistical manual of mental disorders*, American Psychiatric Association, 2000, (4th ed.), Washington, D.C.

⁷⁹ Foa, E., & Rothbaum, B.O., 1998, *Treating the trauma of rape: cognitive-behavior therapy for PTSD*, New York, NY: Guilford Publications.

⁸⁰ American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: Author.

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- (3) The traumatic event is persistently re-experienced in at least one of the following ways: recurrent images, thoughts, dreams, illusions, flashback episodes, or a sense of reliving the experience; or distress on exposure to reminders of the traumatic event.
- (4) Marked avoidance of stimuli that arouse recollections of the trauma (e.g., thoughts, feelings, conversations, activities, places, people).
- (5) Marked symptoms of anxiety or increased arousal (e.g., difficulty sleeping, irritability, poor concentration, hyper-vigilance, exaggerated startle response, motor restlessness).
- (6) The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning or impairs the individual's ability to pursue some necessary task, such as obtaining necessary assistance or mobilizing personal resources by telling family members about the traumatic experience.
- (7) The disturbance lasts for a minimum of 2 days and a maximum of 4 weeks and occurs within 4 weeks after the traumatic event.
- (8) The disturbance is not due to the direct physiological effects of substance (e.g., a drug or abuse, a medication) or a general medical condition accounted for by a Brief Psychotic Disorder, and is not merely an exacerbation of a preexisting Axis I or Axis II disorder.

4. Post Traumatic Stress Disorder

Post Traumatic Stress Disorder (PTSD) initially described reaction patterns in survivors of natural disasters and combatants in war.⁸¹ Since its identification, it has been diagnosed in victims of criminal attacks, accidents, and other traumatic events. According to Crowell and Burgess, "Rape and sexual assault are more likely to lead to PTSD than other traumatic events affecting civilians, including robbery, the tragic death of close friends or family, and natural disaster."⁸²

In *Paliometros v. Lovola*, 932 A.2d 128 (Pa.Super. 2007), a guest who was sexually assaulted at a fraternity party sued for personal injuries, and also emotional injuries based upon a diagnosis of post-traumatic stress disorder. The Superior Court of Pennsylvania, per Judge Robert Daniels, affirmed the damages award of \$548,800 finding that the testimony from the victim's licensed psychologist as well as her husband and father provided sufficient evidence to

81 Foa, E., & Rothbaum, B.O. (1998). *Treating the trauma of rape: cognitive-behavior therapy for PTSD*. New York, NY: Guilford Publications.

82 Burgess, A.W., & Holmstrom, L.L., *Rape trauma syndrome*, 1974, *American Journal of Psychiatry*.

sustain the jury's verdict.

The DSM-IV defines the diagnostic criteria for PTSD as follows:

1. The person has been exposed to a traumatic event in which both of the following were present:
 - (a) The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.
 - (b) The person's response involved intense fear, helplessness, or horror. Note: in children, this may be expressed instead by disorganized or agitated behavior.
2. The traumatic event is persistently re-experienced in one (or more) of the following ways:
 - (a) Recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions. Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
 - (b) Recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.
 - (c) Acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated). Note: in young children, trauma-specific reenactment may occur.
 - (d) Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
3. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
 - (a) Efforts to avoid thoughts, feelings, or conversations associated with the trauma.
 - (b) Efforts to avoid activities, places, or people that arouse recollections of the trauma.

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- (c) Inability to recall an important aspect of the trauma.
 - (d) Markedly diminished interest or participation in significant activities.
 - (e) Feeling of detachment or estrangement from others.
 - (f) Restricted range of affect (e.g., unable to have loving feelings.)
 - (g) Sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).
4. Persistent symptoms of increased arousal (not present before trauma), as indicated by two (or more) of the following:
- (a) Difficulty falling or staying asleep.
 - (b) Irritability or outbursts of anger.
 - (c) Difficulty concentrating.
 - (d) Hypervigilance.
 - (e) Exaggerated startle response.
5. Duration of the disturbance (symptoms in B, C and D) is more than one month.
6. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

C. RECOGNIZING THE TRAUMATIC EFFECTS OF COURT PROCEEDINGS

Victims consistently report that testifying in court can be as traumatic as the original rape because they are forced to mentally relive the rape.⁸³ The public setting, the presence of the offender and the difficulty of cross-examination may be very stressful and can return a victim to a state of crisis. The trauma may be even more intense when the defendant is *pro se* and has the ability to cross-examine the victim directly.⁸⁴

Sometimes a victim can be so traumatized by the court proceedings that they respond and react in a manner that seems illogical to the observer. The person may giggle or laugh because of embarrassment or nervousness. They may have a flat, unemotional affect as the result of depression or “dissociating” themselves from the

⁸³ *Executive Summary Of The Report On Racial And Gender Bias In The Justice System*, 2003, Pennsylvania Supreme Court, Harrisburg, PA.

⁸⁴ *Id.* For additional discussion, see Chapter 7, Section 7.4(E), Cross-examination of Complainant by Pro Se Defendant.

difficulty of testimony. At times, the victim may appear meek and withdrawn or angry and combative. The unfortunate consequence of these responses is that the jury may question the victim's credibility when, in actuality, it is simply the victim's response to stress.

1. Victim-Blaming and Its Impact on Offender Accountability

One of a victim's greatest concerns is being blamed for inviting or causing the sexual assault.⁸⁵ It is a fear that prevents many from seeking medical help or reporting their assault to law enforcement. Unfortunately, even victims of stranger violence may be subjected to victim-blaming attitudes. "Why were you walking alone?" "Why did you go out for cigarettes at 2:00 am?" are common questions reported by victims. Parents, friends, and co-workers may blame the victim through such statements as: "Why were you drinking?" "Why did you go home with the guy?"

Research consistently demonstrates that perpetrators capitalize on victims' vulnerabilities and inabilities to report or be believed. In fact, according to David Lisak, Associate Professor of Psychology at the University of Massachusetts, the key to a perpetrator's success is identifying an individual's vulnerability and exploiting that vulnerability.⁸⁶ A perpetrator recognizes, for example, that an adolescent who is drinking is unlikely to report an assault out of fear of being "busted" for underage drinking.

1.5 VICTIM'S RIGHTS

Victims of crime in Pennsylvania are granted a number of rights by Pennsylvania's Crime Victims Act.⁸⁷ "The rights extended to victims of crime in Chapter 2 are to be honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants."⁸⁸ According to the Act, victims of crime have the following rights:

Victims of crime have the following rights:

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

(2) To be notified of certain significant actions and proceedings within the criminal and juvenile justice systems pertaining to their case. This paragraph includes all of the following:

85 "Adult victims hesitate to report the crime due to feelings of shame or fear that no one will believe them, or because they blame themselves for what happened." HE SAID, SHE SAID, SHE SAID: WHY PENNSYLVANIA SHOULD ADOPT FEDERAL RULES OF EVIDENCE, 52 Vill.L.Rev. 641, 648 (Jessica Khan 2007)(footnote omitted).

86 Lisak, D. (2005, October). Predators: uncomfortable truths about campus rapists. Presented at the International Sexual Assault, Domestic Violence, and Stalking Conference, Baltimore, MD.

87 18 PA.STAT. §§ 11.201 – 11.216.

88 18 PA.STAT. § 11.201.

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(i) Access to information regarding whether the juvenile was detained or released following arrest and whether a petition alleging delinquency has been filed.

(ii) Immediate notification of a juvenile's preadjudication escape from a detention center or shelter facility and of the juvenile's subsequent apprehension.

(iii) Access to information regarding the grant or denial of bail to an adult.

(iv) Immediate notification of an adult offender's pretrial escape from a local correctional facility and of the offender's subsequent apprehension.

(3) To be accompanied at all criminal and all juvenile proceedings in accordance with 42 Pa.C.S. § 6336 (relating to conduct of hearings) by a family member, a victim advocate or other person providing assistance or support.

(4) In cases involving a personal injury crime or burglary, to submit prior comment to the prosecutor's office or juvenile probation office, as appropriate to the circumstances of the case, on the potential reduction or dropping of any charge or changing of a plea in a criminal or delinquency proceeding, or, diversion of any case, including an informal adjustment or consent decree.

(5) To have opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. The written statement shall be included in any predisposition or presentence report submitted to the court. Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.

(5.1) To have notice and to provide prior comment on a judicial recommendation that the defendant participate in a motivational boot camp pursuant to the act of December 19, 1990 (P.L. 1391, No. 215), known as the Motivational Boot Camp Act.

(5.2) Upon request of the victim of a personal injury crime, to have the opportunity to submit written comment or present oral testimony at a disposition review hearing, which comment or testimony shall be considered by the court when reviewing the disposition of the juvenile.

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

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(7) In personal injury crimes where the adult is sentenced to a State correctional facility, to be:

(i) given the opportunity to provide prior comment on and to receive State postsentencing release decisions, including work release, furlough, parole, pardon or community treatment center placement;

(ii) provided immediate notice of an escape of the adult and of subsequent apprehension; and

(iii) given the opportunity to receive notice of and to provide prior comment on a recommendation sought by the Department of Corrections that the offender participate in a motivational boot camp pursuant to the Motivational Boot Camp Act.

(8) In personal injury crimes where the adult is sentenced to a local correctional facility, to:

(i) receive notice of the date of the release of the adult, including work release, furlough, parole, release from a boot camp or community treatment center placement; and

(ii) be provided with immediate notice of an escape of the adult and of subsequent apprehension.

(8.1) If, upon the request of the victim of a personal injury crime committed by a juvenile, the juvenile is ordered to residential placement, a shelter facility or a detention center, to:

(i) Receive prior notice of the date of the release of the juvenile, including temporary leave or home pass.

(ii) Be provided with:

(A) immediate notice of an escape of the juvenile, including failure to return from temporary leave or home pass; and

(B) immediate notice of reaprehension of the juvenile.

(iii) Be provided with notice of transfer of a juvenile who has been adjudicated delinquent from a placement facility that is contrary to a previous court order or placement plan approved at a disposition review hearing and to have the opportunity to express a written objection prior to the release or transfer of the juvenile.

(9) If the adult is subject to an order under 23 Pa.C.S. Ch. 61 (relating to

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protection from abuse) and is committed to a local correctional facility for a violation of the order or for a personal injury crime against a victim protected by the order, to receive immediate notice of the release of the adult on bail.

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

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

(12) To be notified of the details of the final disposition of the case of a juvenile consistent with 42 Pa.C.S. § 6336(f) (relating to conduct of hearings).

(13) Upon the request of the victim of a personal injury crime, to be notified of the termination of the courts' jurisdiction.

1.6 BARRIERS TO DUE PROCESS IN COURT PROCEEDINGS

Even when the criminal justice system has responded appropriately, a victim or defendant may face barriers due to limited English proficiency, a visual impairment, or a cognitive disability. These barriers can interfere with a person's understanding of the criminal justice process and limit their ability to access services.

Scarce economic resources may also compromise a victim's access to the criminal justice system. If a victim lacks transportation or child care they may find it difficult to arrive at the court house on time and remain there for the duration of a trial. Victims also report that some employers are unwilling to give them time off to attend the trial. These victims find themselves forced to choose between justice and employment.

1.7 THE ROLE OF THE VICTIM ADVOCATE IN SEXUAL ASSAULT CASES

The victim advocate plays a particularly important role in cases of sexual assault. While the prosecutor represents the Commonwealth, and the defense attorney represents the defendant, the advocate's entire job is to support the victim and intervene on her behalf.

For a survivor of sexual assault, the medical and legal system can be frightening, frustrating, and confusing. Dealing with forensic exams, insurance paperwork, law enforcement, prosecutors, and judicial officials can be intimidating.⁸⁹ Meeting with the myriad of people involved in prosecuting a case can be stressful and court appearances can be overwhelming. The time and effort it takes for a case to go through the legal system can make a victim reluctant to pursue the case.

Victims often recount how they have dealt with the emotional trauma of the

⁸⁹ *The Trainer's Tool Box*, Chapter 9, The Pennsylvania Coalition Against Rape, 2000.

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assault, only to have painful memories flood back when the case finally reaches court. That emotional trauma may be intensified if it is the first time the victim has seen the perpetrator since the preliminary hearing.

Victims also report that one of the most frustrating elements of the court process is the continuance. While a continuance is often necessary, multiple continuances can be emotionally and physically draining. Victims describe bracing themselves to testify over and over, only to have the case continued.

Victim Advocates are available to help victims cope with the frustrating aspects of the criminal justice system. Rape crisis centers provide advocates, free of charge, for court accompaniment, counseling, and assistance with victim's compensation paperwork.

In fact, involvement of a victim advocate can be beneficial for the entire court process. Research demonstrates that when a victim is working with an advocate, she is more likely to stay committed to the prosecution of her perpetrator and more willing to be involved in the court process.

Chapter 2

GENERAL PROVISIONS OF SEXUALLY VIOLENT CRIMES

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Chapter Two

General Provisions of Sexual Violence Crimes

2.1 CHAPTER OVERVIEW

This chapter discusses general provisions and principles, as well as related statutory definitions, regarding crimes of sexual violence and sexual abuse. The chapter is divided into four sections. Section 2.2 lists the statutory definitions of common terms found in sexual offenses, including:

- complainant
- deviate sexual intercourse
- forcible compulsion
- indecent contact
- serious bodily injury
- sexual intercourse

Section 2.3 explains the law in Pennsylvania when the alleged assailant is a minor. Section 2.4 focuses on crimes specifically designed to address issues when the victim is a minor. Section 2.4 also discusses the statutory prohibition against the release of the name of a minor victim of sexual or physical abuse in accordance with 42 PA.CON.S.TAT.ANN. § 5988.

2.2 DEFINITIONS

A. Complainant¹

1. Statutory Definition

18 PA.CON.S.TAT.ANN. § 3101. Definitions

“Complainant.” An alleged victim of a crime under this chapter.

2. Credibility of Complainant

The credibility of a complainant in a crime of sexual violence is to be evaluated in the same manner as the complainant of any other crime. 18 PA.CON.S.TAT.ANN. § 3106.

18 PA.CON.S.TAT.ANN. § 3106. Testimony of complainants

¹ For additional detailed discussion regarding the testimony of the complainant, see **Chapter 7, Section 7.4, TESTIMONY OF COMPLAINANT.**

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The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.

Attempts to impeach the credibility of the complainant are permissible. See *In Interest of Lawrence J.*, 456 A.2d 647, 649-650 (Pa. Super. 1983) (evidence of victim's reputation in community for truth and veracity is admissible to impeach the victim's credibility). See also, *Commonwealth v. Minich*, 4 A.3d 1063, 1072 (Pa. Super. 2010) (the admissibility of such evidence is governed by rule limiting this type of evidence to evidence of witness's general reputation for truthfulness or untruthfulness); *Commonwealth v. Berry*, 513 A.2d 410, 416 (Pa. Super. 1986) ("It is true that the credibility of a rape victim is measured according to the same standard applied to any other crime victim. The reputation witness must attest to the victim's general reputation in the community; he may not attest to the victim's specific behavior.").

(a) Corroboration

No corroboration is necessary. *Commonwealth v. Kunkle*, 623 A.2d 336, 338 (Pa. Super. 1993), *appeal denied*, 536 Pa. 621, 637 A.2d 281 (1993): "The Crimes Code also provides that uncorroborated testimony of the sex offense victim may be sufficient to establish the guilt of the accused."²

3. Rape Shield Law³

> The Complainant's Past Sexual Conduct Not Admissible

The purpose of the Rape Shield Law is to prevent a trial from shifting its focus from the culpability of the accused toward the virtue and chastity of the victim. *Commonwealth v. Allburn*, 721 A.2d 363, 366-367 (Pa. Super. 1998), *appeal denied*, 559 Pa. 662, 739 A.2d 163 (1999). "The Rape Shield Law is intended to exclude irrelevant and abusive inquiries regarding prior sexual conduct of sexual assault complainants." *Commonwealth v. Burns*, 988 A.2d 684, 689 (Pa. Super. 2009) (en banc), *appeal denied*, 608 Pa. 615, 8 A.3d 341 (2010). Evidence of specific instances, opinions, or reputation of the complainant's past sexual conduct is generally not admissible. 18 PA.CON.S.TAT.ANN. § 3104 (a).

² For additional discussion, see 31 A.L.R.4th 120, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*.

³ For additional detailed discussion of the Pennsylvania Rape Shield Statute, see Chapter 6, Section 6.8, EVIDENCE OF VICTIM'S PAST SEXUAL CONDUCT and Chapter 7, Section 7.4(D)(2), Complainant's Prior Sexual Conduct.

18 Pa.Cons.Stat.Ann § 3104. Evidence of victim's sexual conduct

(a) General rule. -- Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(a) Exceptions are Issues for the Trial Court

A defendant who proposes to offer evidence of an alleged victim's past sexual conduct pursuant to this section must file a written motion and offer of proof prior to trial. If the trial court determines that the motion and offer of proof are sufficient on their faces, the court must order an in-camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a) above.

There are four types of exceptions to the general prohibition against evidence of past sexual conduct of the victim:

(1) the text of the statute includes one specific exception regarding the victim's sexual conduct with the defendant where consent of the alleged victim is at issue and the evidence is otherwise admissible;⁴

(2) evidence that negates directly the act of intercourse with which a defendant is charged;

(3) evidence demonstrating a witness' bias or evidence that attacks credibility; and

(4) evidence tending to directly exculpate the accused by showing that the alleged victim is biased and thus has motive to lie, fabricate, or seek retribution via prosecution.

See *Commonwealth v. Burns*, 988 A.2d 684, 689 (Pa.Super. 2009) (en banc), appeal denied, 608 Pa. 615, 8 A.3d 341 (2010); *Commonwealth v. Allburn*, 721 A.2d 363, 367 (Pa.Super. 1998), appeal denied, 559 Pa. 662, 739 A.2d 163 (1999).

⁴ See 18 Pa.Cons.Stat.Ann. § 3104(a).

(b) Prior Sexual Assault

If the prior sexual conduct used to impeach the alleged victim was a prior sexual assault, then Section 3104 does not apply, and the evidence is evaluated under the general evidentiary rules.

In *Commonwealth v. Johnson*, 536 Pa. 153, 638 A.2d 940 (1994), the Supreme Court of Pennsylvania held that the Rape Shield Law did not prohibit the admission of evidence regarding a prior sexual assault suffered by the ten-year-old victim when the defendant sought introduction of the testimony to establish that the victim was blaming him for the assault at the instigation of another individual who had sexually assaulted her on a prior occasion. Evidence of prior sexual assaults was not considered to be conduct of the victim that would reflect upon her reputation for chastity, so the Rape Shield Law did not apply. “Evidence that (the victim) had been subject to a previous sexual assault would not reflect upon (her) reputation for chastity. To be a victim is not ‘conduct’ of the person victimized. It would be illogical to conclude that the Rape Shield Law intended to prohibit this type of testimony.” *Id.* at 942.⁵

4. Prompt Report⁶

There is no *requirement* that a complainant promptly report allegations to a public authority. 18 PA.CON.S.TAT.ANN. § 3105. However, the lack of a prompt report may lead to impeachment evidence.

18 PA.CON.S.TAT.ANN. § 3105. Prompt complaint

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant’s failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.

(a) Evidence of Failure to Promptly Report to Impeach Credibility of Complainant

If otherwise admissible, this section does not prohibit the admission of evidence of a failure to promptly report the alleged incident.⁷ The Pennsylvania Supreme Court stated in *Commonwealth v. Lane*, 521 Pa. 390, 398, 555 A.2d

⁵ See also *Commonwealth v. Holder*, 815 A.2d 1115, 1118-1119 (Pa.Super. 2003), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003).

⁶ For additional detailed discussion of prompt complaint, see **Chapter 7, Section 7.7, EVIDENCE OF PROMPT COMPLAINT.**

⁷ *Commonwealth v. Jones*, 672 A.2d 1353, 1358 (Pa. Super. 1996).

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1246, 1250 (1989), “The lack of a prompt complaint by a victim of a crime, although not dispositive of the merits of the case, may justifiably produce a doubt as to whether the offense indeed occurred, or whether it was a recent fabrication by the complaining witness.”

If a complaint is delayed substantially without any reasonable explanation, an inference can be drawn regarding the credibility of that complaint and against whether the incident in fact occurred. *Commonwealth v. Thomas*, 904 A.2d 964, 969-970 (Pa.Super. 2006), quoting *Commonwealth v. Snoke*, 525 Pa. 295, 300, 580 A.2d 295, 297 (1989).

► **Exception:** There is an exception to the general rule of admissibility if the victim were unable to comprehend the sexual attack. Although a defendant customarily may use the failure to make a prompt complaint to question the veracity of the victim’s testimony, an exception is when the victim did not comprehend the offensiveness of the contact at the time of its occurrence. In these situations, the absence of an immediate complaint may not be used to question whether the conduct did in fact occur. For example, see:

- *Commonwealth v. Snoke*, 525 Pa. 295, 302, 580 A.2d 295, 298 (1989)(victim was five years old and alleged attacker was victim’s father).
- However, it may still be a jury issue. See *Commonwealth v. Lane*, 521 Pa. 390, 398, 555 A.2d 1246, 1250 (1989): “The real question in matters concerning youthful complainants is whether the immaturity of the child occasioned the delay as opposed to a design to deceive. In determining whether or not the delay reflects the insincerity of the complainant, the maturity is merely an additional factor to be considered by the jury in deciding the question.”

► **Jury Instruction:** The prompt complaint instruction⁸ is based upon the theory that the victim of a sexual assault would reveal the assault occurred at the first available opportunity. *Commonwealth v. Thomas*, 904 A.2d 964, 970 (Pa. Super. 2006). The use of the instruction is to be determined on a case-by-case basis “pursuant to a subjective standard based upon the age and condition of the victim.” *Id.*

The Superior Court, in *Commonwealth v. Thomas, supra*, provided examples of the factors the trial court should use in deciding whether to give the prompt complaint charge:

⁸ For additional detailed discussion of the prompt complaint charge, see Chapter 7, Section 7.7(C), Prompt Complaint Instruction.

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- the victim is a minor who may not have appreciated the offensive nature of the conduct;
- if the perpetrator is one with authority or custodial control over the victim;
- if the victim suffers from a mental disability or diminished capacity.

Commonwealth v. Thomas, 904 A.2d 964, 970 (Pa. Super. 2006).

(b) Hue and Cry Doctrine

Under the “hue and cry” doctrine, a prompt complaint allows for an inference that the allegations are credible because there has been less time for fabrication, while a complaint delayed without reasonable explanation allows for the opposite inference. *Commonwealth v. Snoke*, 525 Pa. 295, 580 A.2d 295 (1990).

In *Commonwealth v. Barger*, 743 A.2d 477 (Pa. Super. 1999), the appellant repeatedly sexually assaulted his 15 year-old stepdaughter. The victim did not tell anyone about those assaults until the appellant was out of the home for an extended period of time because the appellant had beaten and intimidated her and her mother. The trial court permitted the Commonwealth to introduce evidence concerning this history of physical violence in its case-in-chief. On appeal, an en banc panel of the Superior Court affirmed the ruling and held that in sexual assault cases, evidence which explains lack of prompt complaint is admissible in the Commonwealth’s case-in-chief. *Id.* at 480-481.

In *Commonwealth v. Dillon*, 863 A.2d 597 (Pa. Super. 2004), *aff’d*, 592 Pa. 351, 925 A.2d 131 (2007), both the Superior Court and the Supreme Court held that evidence of the defendant’s physical abuse of the minor victim’s mother and brother, which intimidated the victim, was admissible at trial as substantive evidence in the Commonwealth’s case-in-chief to explain the victim’s lack of prompt complaint. 863 A.2d at 603; 925 A.2d at 139.

(c) Special Considerations Involving Minor Victims

Consideration should be given to factors inherent in cases involving minor victims that may explain the delay without reflecting unfavorably on the minor witness’s credibility:⁹

- Immaturity of the victim that would cause the child victim not to appreciate the offensiveness of the encounter and the need for prompt disclosure;

⁹ These factors are set forth in *Commonwealth v. Ables*, 590 A.2d 334 (Pa. Super. 1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150(1991), and in *Commonwealth v. Snoke*, 525 Pa. 295, 302, 580 A.2d 295, 298 (1990).

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- The lack of a prompt complaint in order to protect the truly guilty party, as in the case of a child blaming an innocent party for the wrongdoing of a parent;
- When a parent tells a child to keep a secret and the child is of tender years with no reason to question the parent;
- The age of the victim;
- The mental and physical condition of the victim;
- The atmosphere and physical setting in which the incidents were alleged to have taken place;
- The extent to which the accused may have been in a position of authority, domination or custodial control over the victim;
- Whether the victim was under duress.

B. Deviate Sexual Intercourse

1. Statutory Definition

18 PA.CON.S.TAT.ANN. § 3101 defines “deviate sexual intercourse” as

Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.¹⁰

The crime of involuntary deviate sexual intercourse, 18 PA.CON.S.TAT.ANN. § 3123, occurs when the actor, by physical compulsion or threats thereof, coerces the victim to engage in acts of anal and/or oral intercourse. *Commonwealth v. Andrulewicz*, 911 A.2d 162 (Pa. Super. 2006), *appeal denied*, 592 Pa. 778, 926 A.2d 972 (2007).

2. Types

(a) Oral and Anal Intercourse

Elements: oral and anal sex are each types of deviate sexual intercourse. See *Commonwealth v. Dorm*, 971 A.2d 1284, 1286 (Pa.Super. 2009).

¹⁰ 18 PA.CON.S.TAT.ANN. § 3101.

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The elements of deviate sexual intercourse are: (1) sexual intercourse per os or per anus, (2) between human beings.

Per Os or Per Anus: these terms describe oral and anal sex, i.e., intercourse “through or by means of the mouth or posterior opening of the alimentary canal.” *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (Pa. 2002).

Oral Sex: “[D]eviate sexual intercourse’ includes oral sex.” *Commonwealth v. Jacob*, 867 A.2d 614, 617 (Pa. Super. 2005); *Commonwealth v. Wilson* 825 A.2d 710, 714 (Pa. Super. 2003) (insertion of testicles into victim’s mouth clearly constituted oral intercourse).

Vaginal Oral Sex: “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another.” *In Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (Pa. 1995).

Contrasted with Sexual Intercourse: Sexual intercourse is defined as the physical sexual contact between two individuals that involves the genitalia of at least one person. *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (Pa. 2002). Sexual intercourse is distinct from deviate sexual intercourse in that sexual intercourse “also includes intercourse in ‘its ordinary meaning.’” *Id.*, 569 Pa. at 185, 801 A.2d at 555.

(b) Penetration with a Foreign Object

Elements: (1) penetration, however slight,
(2) of the genitals or anus of another person,
(3) with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

Foreign Object: 18 PA.CON.S.TAT.ANN. § 3101 defines “foreign object” as “[i]ncludes any physical object not a part of the actor’s body.”

Digital Penetration: Digital penetration of the vagina, i.e., by a finger, is not deviate sexual intercourse. *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (Pa. 2002) (must be with a foreign object, not a part of the human body).

3. Penetration

In order to sustain a conviction for involuntary deviate sexual intercourse,

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the Commonwealth must establish the perpetrator engaged in acts of oral or anal intercourse, which involved penetration however slight.

In order to establish penetration, some oral contact is required. See *Commonwealth v. Trimble*, 419 Pa.Super. 108, 615 A.2d 48 (1992) (finding actual penetration of the vagina is not necessary; some form of oral contact with the genitalia is all that is required). Moreover, a person can penetrate by use of the mouth or the tongue. See *In the Interest of J.R.*, 436 Pa.Super. 416, 648 A.2d 28, 33 (1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995) (stating “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another”)

Commonwealth v. Wilson, 825 A.2d 710, 714 (Pa. Super. 2003). Penetration need not reach the vagina or farther reaches of female genitalia. *In re A.D.*, 771 A.2d 45, 49 (Pa. Super. 2001).

(a) Oral Penetration Sufficient

It has been held that oral contact with the female genitalia is sufficient to support the penetration requirement for IDSI.¹¹

(b) Oral Penetration – Mouth or Tongue

An assailant can penetrate by use of the mouth or tongue. *Commonwealth v. Wilson*, 825 A.2d 710, 714 (Pa. Super. 2003).¹² Some form of oral contact with the genitalia is all that is required.¹³

C. Forcible Compulsion

1. Statutory Definition

18 PA. CONS. STAT. ANN. § 3101 defines “forcible compulsion” as:

Compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person’s death, whether the death occurred before, during or after sexual intercourse.¹⁴

¹¹ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992); *Commonwealth v. Ziegler*, 550 A.2d 567, 569 (Pa. Super. 1988).

¹² See also, *In the Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another”; *Commonwealth v. L.N.*, 787 A.2d 1064, 1070 (Pa. Super. 2001), *appeal denied*, 569 Pa. 680, 800 A.2d 931 (2002) .

¹³ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992).

¹⁴ 18 PA. CONS. STAT. ANN. § 3101.

It is well established that in order to prove the “forcible compulsion” component, the Commonwealth must establish, beyond a reasonable doubt, that the defendant “used either physical force, a threat of physical force, or psychological coercion, since the mere showing of a lack of consent does not support a conviction for rape ... by forcible compulsion.” *Commonwealth v. Eckrote*, 12 A.3d 383, 387 (Pa. Super. 2010).

2. Moral, Psychological or Intellectual Force

Forcible Compulsion “includes not only physical force or violence but also moral, psychological, or intellectual force used to compel a person to engage in sexual intercourse against that person’s will.” *Commonwealth v. Eckrote*, 12 A.3d 383, 387 (Pa. Super. 2010).

- ▶ **Youthful Victims:** The appellate courts have recognized the influence an adult has over a child. In *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217, (1986), the Pennsylvania Supreme Court stated:

There is an element of forcible compulsion, or the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, inherent in the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult. In such cases, forcible compulsion or the threat of forcible compulsion derives from the respective capacities of the child and the adult sufficient to induce the child to submit to the wishes of the adult (“prevent resistance”), without the use of physical force or violence or the explicit threat of physical force or violence.

Id., 510 Pa. at 556, 510 A.2d at 1227.

In *Commonwealth v. Ables*, 590 A.2d 334 (Pa. Super. 1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150 (1991), the trial court correctly concluded that an uncle’s sexual assaults on his 13-year old niece sufficiently frustrated her will to resist so that the assaults resulted from forcible compulsion. Although the uncle-niece relationship was not alone sufficient to find forcible compulsion, he convinced her that she could not tell anyone or else he would get in trouble. 590 A.2d at 337.

The Pennsylvania Supreme Court again recognized that the forcible compulsion is demonstrated by an adult's clear influence over an inexperienced child in *Commonwealth v. Fears*, 575 Pa. 281, 305, 836 A.2d 52, 66 (2003), *cert. denied*, 545 U.S. 1141 (2005), which involved a 32-year-old man and a twelve-year-old child.

3. Actual Force

The force needs to be such as to demonstrate an absence of consent, inducing submission without further resistance. *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

It is well-established that in order to prove the "forcible compulsion" component, the Commonwealth must establish, beyond a reasonable doubt, that the defendant "used either physical force, a threat of physical force, or psychological coercion, since the mere showing of a lack of consent does not support a conviction for rape ... by forcible compulsion." *Commonwealth v. Brown*, 556 Pa. 131, 136, 727 A.2d 541, 544 (1999). In *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217 (1986), our Supreme Court stated that forcible compulsion includes "not only physical force or violence, but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will." *Rhodes*, 510 Pa. at 555, 510 A.2d at 1226. Further, the degree of force required to constitute rape is relative and depends on the facts and particular circumstances of a given case. *Commonwealth v. Ruppert*, 379 Pa. Super. 132, 579 A.2d 966, 968 (1990), appeal denied, 527 Pa. 593, 588 A.2d 914 (1991). See PENNSYLVANIA BENCHBOOK ON CRIMES OF SEXUAL VIOLENCE, Ch. 2, pg. 27 (2d Edition 2009).

Commonwealth v. Eckrote, 12 A.3d 383, 387 (Pa.Super. 2010).

Examples: of Forcible Compulsion

► *Commonwealth v. Jones*, 672 A.2d 1353 (Pa. Super. 1996)

In a rape prosecution, the evidence was sufficient for the jury to find forcible compulsion, or threat of force, where evidence showed that defendant physically assaulted victim, hit the victim in her face with a pillow, held down the victim's shoulders before and during intercourse, and removed victim's clothing. *Commonwealth v. Jones*, 672 A.2d at 1354.

► *Commonwealth v. Richter*, 676 A.2d 1232, 1234 (Pa. Super. 1996), *aff'd*, 551 Pa. 507, 711 A.2d 464 (1998).

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In a rape prosecution, the evidence was sufficient for jury to find forcible compulsion or threat of forcible compulsion, where the defendant pinned victim against table and removed her pants and undergarments; the victim failed to physically resist because of fear of physical retribution. *Commonwealth v. Richter*, 676 A.2d 1232, 1234 (Pa. Super. 1996), *aff'd*, 551 Pa. 507, 711 A.2d 464 (1998).

(a) Degree of Force

The degree of force required to constitute rape is relative and depends on the facts and particular circumstances of a given case. *Commonwealth v. Eckrote*, 12 A.3d 383, 387 (Pa. Super. 2010).

Pennsylvania courts have not drawn bright line rules regarding the degree of force required; instead “the degree of that force is relative and depends on the totality of the facts and circumstances of the particular case.” See *Commonwealth v. Riley*, 643 A.2d 1090, 1091 (Pa. Super. 1994).

Factors to determine compulsion include:

- (i) the respective ages of the victim and the accused;
- (ii) the respective mental and physical conditions of the victim and the accused;
- (iii) the atmosphere and physical setting in which the incident was alleged to have taken place;
- (iv) the extent to which the accused may have been in a position of authority, domination or custodial control over the victim;
- (v) whether the victim was under duress.

See *Commonwealth v. Ruppert*, 579 A.2d 966 (Pa. Super. (1990), *appeal denied*, 527 Pa. 593, 588 A.2d 914 (1991).

(b) Resistance

The prosecution does not have to show that the complainant offered any resistance towards the actor.

18 PA.CONS.STAT.ANN. § 3107. Resistance not required

The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to

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prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.¹⁵

As stated in the aforesaid section, the defense may introduce evidence of non-resistance to demonstrate that the alleged victim consented. As stated by the Pennsylvania Supreme Court in *Commonwealth v. Rhodes*, 510 Pa. 537, 557 n. 14, 510 A.2d 1217, 1227 n. 14, (1986):

It is not necessary to prove that the victim actually resisted in order to prove that the act of sexual intercourse was against the victim's will and/or without consent. Section 3107 provides that the "victim need not resist the actor in prosecutions under" chapter 31 and makes it clear that lack of resistance is not synonymous with consent. 18 PA. CONS. STAT. ANN. § 3107.

Therefore, the prosecution does not have to prove that the alleged victim resisted the attack in order to prove that the sexual conduct was against the victim's will or without the victim's consent. *See e.g. Commonwealth v. Smith*, 863 A.2d 1172, 1176 (Pa. Super. 2004).

D. Indecent Contact

1. Statutory Definition

18 PA. CONS. STAT. ANN. § 3101. Definitions

"Indecent contact." Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person.

(a) Genitals

The plain meaning of this section is that "indecent contact" occurs when there is proscribed contact with the female or male genitals of either party.

Examples:

- ▶ *In re A.D.*, 771 A.2d 45 (Pa. Super. 2001): evidence proved that juvenile "touched" the youthful victim's vagina with his penis.
- ▶ *Commonwealth v. Gordon*, 543 Pa. 513, 520, 673 A.2d 866, 869 (1996): defendant rubbed his penis against "buttocks/thigh/legs" of victim.

¹⁵ 18 PA. CONS. STAT. ANN. § 3107.

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- ▶ *In re J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): defendant licked vaginal area of victim.

(b) Other Intimate Parts

Phrase “other intimate parts” does not refer solely to genitalia.

The language of the statutory section defining indecent contact includes both “sexual” and “other intimate parts” as possible erogenous zones for purposes of prosecution. Therefore, the phrase “other intimate parts” cannot refer solely to genitalia, as such a construction ignores the distinction between “sexual” and “other intimate parts,” making the latter term redundant.

The rules of statutory construction require that full effect be given to each provision of the statute if at all possible. 1 Pa.C.S.A. §§ 1921, 1922. Had the Legislature wished to limit the scope of indecent contact to sexual organs only, it might easily have done so. Instead, the statute is more broadly applicable, namely, to situations such as the present one in which the perpetrator fails to achieve his objective, clearly sexual in nature, despite his best efforts to do so. A broader reading of the statutory language is one sanctioned by our Supreme Court. “While penal statutes are to be strictly construed, the courts are not required to give the words of a criminal statute their narrowest meaning or disregard the evident legislative intent of the statute.” *Commonwealth v. Barud*, 545 Pa. 297, 304, 681 A.2d 162, 165 (1996) (citing *Commonwealth v. Wooten*, 519 Pa. 45, 53, 545 A.2d 876, 880 (1988)).

Commonwealth v. Capo, 727 A.2d 1127 (Pa. Super. 1999), *appeal denied*, 561 Pa. 667, 749 A.2d 465 (1999). In *Capo*, the Court found the non-consensual attempt to kiss victim on the mouth, and rubbing of her shoulders, back and stomach to be sufficient indecent contact.

(c) Touching

Not Limited to Hand: The term touching is not limited to the hand or finger; rather, the courts look to any part of the defendant’s body or the victim’s body to determine if there has been a “touching” within the statute. *Commonwealth v. Grayson*, 549 A.2d 593, 596 (Pa. Super. 1988).

In accordance with the Court’s decision in **Grayson**:

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- ▶ if any part of a victim's body is brought into contact with a sexual or intimate part of the defendant's body, without the victim's consent, for the purpose of arousing or gratifying the sexual desire in either person, such contact constitutes indecent contact.
- ▶ if a sexual or intimate part of the victim's body is brought into contact with any part of the defendant's body, without the victim's consent, for the purpose of arousing or gratifying the sexual desire in either person, such contact constitutes indecent contact.¹⁶

Whether the offender is touching a sexual or intimate part of the victim's body, or the offender is forcing the victim to touch a sexual or intimate part of his body, the act of "touching" is not limited to the hand or finger. "Clearly, it does not strain logic to reason that when Hawkins kissed the victim's vagina, bringing his mouth into contact with a sexual part of the victim's body, his conduct fell within the statutory prohibitions of the indecent assault statute." *Commonwealth v. Hawkins*, 614 A.2d 1198, 1201-1202 (Pa. Super. 1992).

No Direct Skin-to-Skin Contact Necessary: Touching occurs even though there is no skin-to-skin contact. *See e.g., Commonwealth v. Ricco*, 650 A.2d 1084, 1085 (Pa. Super. 1994): touching occurred when defendant placed victim's hand on his genitals, even though he was wearing underwear.

E. Serious Bodily Injury

1. Statutory Definition

The Sexual Offenses chapter, per 18 PA.CON.S.TAT.ANN. § 3101, refers to the definition of "serious bodily injury" from 18 PA.CON.S.TAT.ANN. § 2301, which states:

Bodily injury which:

- creates a substantial risk of death or,
- causes serious, permanent disfigurement, or
- causes protracted loss or impairment of the function of any bodily member or organ.

In a case which also involved the charges of rape of a child and involuntary deviate sexual intercourse, *Commonwealth v. Kerrigan*, 920 A.2d 190 (Pa. Super. 2007), *appeal denied*, 594 Pa. 676, 932 A.2d 1286 (2007), the Superior Court held that transmission of Human Papillomavirus (HPV) and genital warts satisfied the definition of *serious bodily injury* because the defendant had infected the youthful victim with the virus that would afflict the victim her entire life, that she would have to live with genital warts, that she risked transmitted the virus to future

¹⁶ *Id.*

sexual partners or children in the event she choose to give birth through the birth canal, and lastly because there was a strong link between HPV and cervical and other genital cancers.

2. Intent

Where the victim suffered serious bodily injury, the Commonwealth may establish the *mens rea* element of aggravated assault with evidence that the assailant acted either intentionally, knowingly, or recklessly. Such an inquiry into intent must be determined on a case-by-case basis. Because direct evidence of intent is often unavailable, intent to cause serious bodily injury may be shown by the circumstances surrounding the attack. In determining whether intent was proven from such circumstances, the fact finder is free to conclude “the accused intended the natural and probable consequences of his actions to result therefrom.” *Commonwealth v. Bruce*, 916 A.2d 657, 661 (Pa. Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007).

3. Types

► Substantial Risk of Death

- *Commonwealth v. Caterino*, 678 A.2d 389, 392-393 (Pa. Super. 1996), *appeal denied*, 546 Pa. 652, 684 A.2d 555 (Pa. 1996): physical assault which resulted in victim’s broken nose and severed artery constituted “serious bodily injury” when victim could have bled to death. In this case, the Superior Court gives a comprehensive review of cases which found “serious bodily injury” from different types of injuries. **Note:** broken nose and minor facial lacerations alone were insufficient to constitute “serious bodily injury”.

► Impairment of the Function of a Bodily Member

- *Commonwealth v. Nichols*, 692 A.2d 181, 184 (Pa. Super. 1997): suffering a broken jaw and being confined to a liquid diet constitute impairment of the function of a bodily member.
- *Commonwealth v. Cassidy*, 668 A.2d 1143, 1146 (Pa. Super. 1995), *alloc. denied*, 545 Pa. 660, 681 A.2d 176 (1996): victim’s wearing of removable braces on her wrist and back for two months comprised impairment of function of a bodily member.
- *Commonwealth v. Phillips*, 410 A.2d 832, 834 (Pa. Super. 1979): gunshot wound to leg, requiring two week stay in hospital and resulting in inability to walk for one month, considered serious bodily injury – protracted impairment of function of a bodily

member.

4. Injuries that Do Not Constitute “Serious Bodily Injury”

► Facial Injuries

Broken nose, two black eyes and facial lacerations are not considered serious bodily injury. *Commonwealth v. Alexander*, 477 Pa. 190, 194, 383 A.2d 887, 889 (1978).

► Blow to Head

Evidence that victim was struck on the head by a door, knocking her to the floor, but not rendering her unconscious, was deemed insufficient to prove serious bodily injury. *Commonwealth v. Adams*, 482 A.2d 583, 587 (Pa. Super. 1984).

F. Sexual Intercourse

1. Statutory Definition

18 PA.CONS.STAT.ANN. § 3101. Definitions

“**Sexual intercourse.**” In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

(a) Intercourse - Ordinary Meaning

Sexual intercourse includes vaginal, oral and anal sex. *Commonwealth v. Dorm*, 971 A.2d 1284, 1286 (Pa.Super. 2009). The plain meaning of “intercourse” is “physical sexual contact between individuals that involves the genitalia of at least one person” *Commonwealth v. Kelley*, 569 Pa. 179, 186-187, 801 A.2d 551, 555 (2002).

(b) Penetration Requirement

The requirement is “penetration, however, slight”; there is no requirement that penetration reach the “farther reaches of the female genitalia....” *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992), citing *Commonwealth v. McIlvaine*, 560 A.2d 155, 159 (Pa. Super. 1989); *In re A.D.*, 771 A.2d 45, 49 (Pa. Super. 2001).¹⁷

¹⁷ See generally, What Constitutes Penetration in Prosecution for Rape or Statutory Rape, 76 A.L.R.3d 163, § 3 (1977).

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“[P]enetration, however slight,” with the penis is necessary to establish the element of sexual intercourse. *Commonwealth v. Trimble*, 419 Pa. Super. 108, 615 A.2d 48, 50 (1992). A rape victim’s uncorroborated testimony to penal penetration is sufficient to establish sexual intercourse and thus support a rape conviction. See *Commonwealth v. Poindexter*, 435 Pa. Super. 509, 646 A.2d 1211, 1214 (1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995). While circumstantial medical evidence is thus not necessary, *see id.*, it may be used to prove the element of penetration. *See Commonwealth v. Stambaugh*, 355 Pa. Super. 73, 512 A.2d 1216, 1219 (1986) (gynecologist testified that the complainant’s hymen was no longer intact); *see also* SEXUAL VIOLENCE BENCHBOOK, § 2.2 (1st ed. 2007).

Commonwealth v. Wall, 953 A.2d 581, 584 (Pa. Super. 2008).

► Oral Penetration Sufficient:

It has been held that oral contact with the female genitalia is sufficient to support the penetration requirement for IDSI.¹⁸ Both “deviate sexual intercourse” and “sexual intercourse” include the phrase “penetration, however slight.” 18 PA. CONS. STAT. ANN. § 3101. An assailant can penetrate by use of the mouth or tongue. *Commonwealth v. Wilson*, 825 A.2d 710, 714 (Pa. Super. 2003).¹⁹ Some form of oral contact with the genitalia is all that is required.²⁰

► Digital Penetration:

Digital penetration of the vagina is not sexual intercourse. See *Commonwealth v. Kelley*, 569 Pa. 179, 185-186, 801 A.2d 551, 555 (2002).

Construing sexual intercourse according to the fair import of its terms, digital penetration cannot be considered intercourse within its ordinary meaning. See, e.g., *Commonwealth v. Brown*, 551 Pa. 465, 711 A.2d 444, 450 (1998) (“ordinary meaning” of sexual intercourse in 18 Pa.C.S. § 3101 is vaginal intercourse). In addition, deviate sexual intercourse encompasses conduct not included within the definition of sexual intercourse, namely sexual intercourse with an animal and penetration of the genitals or anus with a foreign object for any purpose other than

¹⁸ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992).

¹⁹ *See also, In the Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994) *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another”; *Commonwealth v. L.N.*, 787 A.2d 1064, 1070 (Pa. Super. 2001), *appeal denied*, 569 Pa. 680, 800 A.2d 931 (2002).

²⁰ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992).

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good faith medical, hygienic or law enforcement procedures. Digital penetration does not fall into the category of either action. Consequently, digital penetration can be classified as sexual intercourse and deviate sexual intercourse, and thereby as sexual assault, only if it is “intercourse per os or per anus.”

Commonwealth v. Kelley, 569 Pa. at 186, 801 A.2d at 555.

► Testimony of Victim Sufficient:

The uncorroborated testimony of a rape victim as to penetration, if believed by the jury, is sufficient to support a rape conviction, and no medical testimony is needed to corroborate a victim’s testimony. *Commonwealth v. Wall*, 953 A.2d 581, 584 (Pa.Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008); *Commonwealth v. Poindexter*, 646 A.2d 1211, 1214 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995).

► Penetration Proven Circumstantially:

Circumstantial evidence may be used to prove the element of penetration. *Commonwealth v. Stambaugh*, 512 A.2d 1216, 1219 (Pa. Super. 1986) (gynecologist testified that the complainant’s hymen was no longer intact).

Even though the victim did not testify that there was penetration, it is well settled that penetration may be established through circumstantial evidence. In this case, the activity described by the victim’s sister was consistent only with sexual intercourse or attempted sexual intercourse. Afterwards, the victim was bleeding and prompt medical examination of the victim revealed a recent laceration of her hymen. Under the circumstances, the jury could properly have found and obviously did find that appellant achieved penetration.

Commonwealth v. Usher, 371 A.2d 995, 997-998 (Pa. Super. 1977). In *Commonwealth v. Xiong*, 630 A.2d 446 (Pa. Super. 1993) (en banc), *appeal denied*, 537 Pa. 609, 641 A.2d 309 (1994), the Superior Court ruled that a notation in a hospital record that the 12 year old victim’s hymen was no longer intact was admissible as circumstantial evidence of penetration, but alone insufficient to prove penetration in light of the medical testimony adduced at trial. 630 A.2d at 454.

(c) Emission Not Required

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Sexual intercourse occurs “with some penetration however slight; emission is not required.” *Commonwealth v. Fiebiger*, 570 Pa. 583, 590, n.4, 810 A.2d 1233, 1237, n.4 (2002).

2.3 AGE OF ACCUSED

A. Age of Accused: Generally

If an accused is of eighteen years of age or older at the time of the commission of the sexually violent crime, the prosecution is in the criminal division of the court of common pleas. However, the Juvenile Act, 42 PA.CONS.STAT.ANN. § 6301 *et seq.*, encompasses the entire statutory scope of authority of the juvenile court to exercise jurisdiction over matters involving individuals under the age of twenty-one who are alleged to have committed delinquent acts before the age of eighteen. *Commonwealth v. C.L.*, 963 A.2d 489, 491 (Pa. Super. 2008); 42 PA.CONS.STAT.ANN. § 6321 (Commencement of Proceedings) and § 6322 (Transfer from Criminal Proceedings). A delinquent act is conduct which would constitute a crime if committed by an adult. 42 PA.CONS.STAT.ANN. § 6302.

In the context of the commission of a delinquent act, Section 6302 of the Juvenile Act defines a “child” as not only an individual under the age of 18, but also if the accused is under the age of 21 years who committed an act of delinquency before reaching the age of 18. 42 PA.CONS.STAT.ANN. § 6302.

The Juvenile Act is designed to effectuate the protection of the public by providing children who commit “delinquent acts” with supervision, rehabilitation, and care while promoting responsibility and the ability to become a productive member of the community. *See* 42 PA.CONS.STAT.ANN. § 6301(b)(2). Typically, most crimes involving juveniles are tried in the juvenile court of the Court of Common Pleas.

The Juvenile Act defines a “child” as follows:

42 PA.CONS.STAT.ANN. § 6302. Definitions

“**Child.**” An individual who:

- (1) is under the age of 18 years;
- (2) is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years; or
- (3) is under the age of 21 years and was adjudicated dependent before reaching the age of 18 years, who has requested the court to retain jurisdiction and who remains under the jurisdiction of the court as a dependent child because the

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court has determined that the child is:

- (i) completing secondary education or an equivalent credential;
- (ii) enrolled in an institution which provides postsecondary or vocational education;
- (iii) participating in a program actively designed to promote or remove barriers to employment;
- (iv) employed for at least 80 hours per month; or
- (v) incapable of doing any of the activities described in subparagraph (i), (ii), (iii) or (iv) due to a medical or behavioral health condition, which is supported by regularly updated information in the permanency plan of the child.

42 PA.CON.S.TAT.ANN. § 6302. Section 6302 also defines “delinquent act” and “delinquent child”.

1. Defendant Over 21 Years of Age When Charged But Under 18 At Time Of Offense

In *Commonwealth v. Monaco*, 869 A.2d 1026 (Pa. Super. 2005), *appeal denied*, 584 Pa. 675, 880 A.2d 1238 (2005), the defendant was charged with numerous sexual violence crimes for his assaults of a victim aged 10 years of age, and two victims aged 8 years of age. The defendant was under 18 years of age when the assaults occurred. It was not until the defendant was twenty-two years of age when the victims came forward and the defendant was charged. The defendant argued that the trial court lacked jurisdiction over him because he was less than eighteen years old when the crimes were committed, and that the cases should have been transferred to the juvenile court. In *Monaco*, the Superior Court affirmed the trial court’s decision to handle the defendant in adult criminal court. The Superior Court reasoned that the right to be treated as a juvenile is statutory rather than constitutional. 869 A.2d at 1029.

Instantly, Appellant was twenty-two years old at the time he was arrested for the relevant offenses. Accordingly, Appellant did not satisfy the statutory definition of a child at that time, and he no longer fell within the ambit of the juvenile justice system. Hence, the trial court did not err in applying the Anderson Court’s express rationale to this case²¹ “[The defendant’s] **current age** places him outside of the Juvenile Act’s definition of a child. Therefore, the Juvenile Act does not

²¹ *Commonwealth v. Anderson*, 630 A.2d 47 (Pa. Super. 1993), *appeal denied*, 536 Pa. 617, 637 A.2d 277 (1993).

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apply to him... [and] he should be tried as an adult in the Trial Division.” *Anderson*, *supra* at 49–50 (emphasis added).

Monaco, 869 A.2d at 1029-1030 (emphasis in original and original footnote omitted).

- **Exception** – An exception to the rule announced in *Commonwealth v. Anderson*, 630 A.2d 47 (Pa. Super. 1993), *appeal denied*, 536 Pa. 617, 637 A.2d 277 (1993) and extended in *Commonwealth v. Monaco*, 869 A.2d 1026 (Pa. Super. 2005), *appeal denied*, 584 Pa. 675, 880 A.2d 1238 (2005) exists if the defendant were under the age of fourteen years at the time the offense was committed, but over 21 at the time he is charged. In an unreported case, *Commonwealth v. Leavy*, 1469 EDA 2009 (Pa. Super. filed July 12, 2010)(unpublished memorandum), *appeal granted*, 609 Pa. 100, 15 A.3d 66 (2011), *appeal dismissed as improvidently granted*, --- Pa. ---, 61 A.3d 189 (2013), the defendant was accused of sex offenses back in 1998 when he was thirteen years old, but not charged until he was twenty-two years old. The trial court, which was affirmed by the Superior Court, reasoned that it would have been fundamentally unfair to prosecute Leavy in adult court when the Juvenile Act contemplates prosecution in Criminal Division for certain acts done by juveniles when they are at least fourteen years of age, but the law does not provide for the prosecution in Criminal Division for acts, other than murder, done by juveniles under fourteen.

B. Excluded Offenses from Jurisdiction of Juvenile Court

The Juvenile Act allows the prosecution of a juvenile in criminal court under two separate circumstances. The first is a direct filing under Section 6302 of the Juvenile Act, 42 PA.CON.S.STAT.ANN. § 6302, and the second is a discretionary transfer pursuant to Section 6355 of the Juvenile Act, 42 PA.CON.S.STAT.ANN. § 6355(a).

1. Direct File Crimes

Pursuant to 42 PA.CON.S.STAT.ANN. § 6322(a), when a juvenile has committed a crime, which includes murder or any of the other offenses listed under paragraph (2)(ii) or (iii) of the definition of “delinquent act” in 42 PA.CON.S.STAT.ANN. § 6302, the Criminal Division of the Court of Common Pleas is vested with jurisdiction. Similarly, 42 PA.CON.S.STAT.ANN. § 6355(e) states that charges of murder or any of the other offenses listed under paragraph (2)(ii) or (iii) of the definition of “delinquent act” in 42 PA.CON.S.STAT.ANN. § 6302, require that the offense be prosecuted in the Criminal Division.

Under 42 PA.CON.S.STAT.ANN. § 6302 (definition of “Delinquent Act”), the filing of adult criminal charges against a juvenile of age 15 years or older is

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required for specified sexually violent felonies, as well as other violent felonies, if a deadly weapon was used in the commission of the crime. It includes any of the sexually violent offenses stated below:

- (i) Rape as defined in 18 PA.CON.S.STAT.ANN. § 3121;
- (ii) Involuntary deviate sexual intercourse as defined in 18 PA.CON.S.STAT.ANN. § 3123;
- (iii) Aggravated indecent assault as defined in 18 PA.CON.S.STAT.ANN. § 3125; or
- (iv) An attempt, conspiracy or solicitation to commit any of these crimes, as provided in 18 PA.CON.S.STAT.ANN. §§ 901, 902 and 903.

42 PA.CON.S.STAT.ANN. § 6302, Delinquent Act (2)(ii).

Furthermore, the direct filing of adult criminal charges against a juvenile of age 15 years or older is required if the juvenile has been previously adjudicated of any of the following sexually violent crimes, and is currently charged with, among other violent crimes:

- (i) Rape, as defined in 18 PA.CON.S.STAT.ANN. § 3121
- (ii) Involuntary deviate sexual intercourse as defined in 18 PA.CON.S.STAT.ANN. § 3123
- (iii) Aggravated indecent assault, as defined in 18 PA.CON.S.STAT.ANN. § 3125
- (iv) An attempt, conspiracy or solicitation to commit any of these crimes, as provided in 18 PA.CON.S.STAT.ANN. §§ 901, 902 and 903

42 PA.CON.S.STAT.ANN. § 6302, Delinquent Act (2)(iii).

If the circumstances of the offender's age, prior juvenile history and current offense(s) fall under Section 6302, then the offense(s) must be prosecuted under the criminal law and procedures because the offense(s) do not qualify as "delinquent acts" and therefore do not fall under the Juvenile Act. In such cases, the Juvenile Court lacks subject matter jurisdiction *ab initio*. ***Commonwealth v. D.S.***, 903 A.2d 582, 586 (Pa.Super. 2006); ***Commonwealth v. Sanders***, 814 A.2d 1248, 1250 (Pa.Super. 2003), *appeal denied*, 573 Pa. 704, 827 A.2d 430 (2003); 42 PA.CON.S.STAT.ANN. § 6322(a).

In a direct filing case, the juvenile has the option of requesting treatment within the juvenile system through a transfer process known as "decertification." See ***Commonwealth v. Brown***, 26 A.3d 485, 492 (Pa. Super. 2011); ***Commonwealth v. Sanders***, 814 A.2d 1248, 1250 (Pa.Super. 2003), *appeal denied*, 573 Pa. 704, 827 A.2d 430 (2003). In determining whether to

transfer such a case from criminal division to juvenile division, “the child shall be required to establish by a preponderance of the evidence that the transfer will serve the public interest.” 42 PA.CON.S.TAT.ANN. § 6322(a). Pursuant to § 6322(a) the trial court must consider the factors contained in 42 PA.CON.S.TAT.ANN. § 6355(a)(4)(iii) in determining whether the child has established that the transfer will serve the public interest. The statutorily-set factors are listed below.

The decision whether to grant decertification will not be overturned absent a gross abuse of discretion. *Commonwealth v. Thomas*, 67 A.3d 838, 842 (Pa.Super. 2013).

2. Discretionary Certification

(a) Certification to Criminal Court

The transfer of juvenile matters to an adult court for prosecution is governed by statute and applies to offenders age 14 years or older. The Juvenile Court, pursuant to 42 PA.CON.S.TAT.ANN. § 6355, must review numerous factors:

42 PA.CON.S.TAT.ANN. §6355. Transfer to criminal proceedings

(a) General rule.--After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances, of this Commonwealth, the court before hearing the petition on its merits may rule that this chapter is not applicable and that the offense should be prosecuted, and transfer the offense, where appropriate, to the division or a judge of the court assigned to conduct criminal proceedings, for prosecution of the offense if all of the following exist:

- (1) The child was 14 or more years of age at the time of the alleged conduct.
- (2) A hearing on whether the transfer should be made is held in conformity with this chapter.
- (3) Notice in writing of the time, place, and purpose of the hearing is given to the child and his parents, guardian, or other custodian at least three days before the hearing.

(4) The court finds:

(i) that there is a prima facie case that the child committed the delinquent act alleged;

(ii) that the delinquent act would be considered a felony if committed by an adult;

(iii) that there are reasonable grounds to believe that the public interest is served by the transfer of the case for criminal prosecution. In determining whether the public interest can be served, the court shall consider the following factors:

(A) the impact of the offense on the victim or victims;

(B) the impact of the offense on the community;

(C) the threat to the safety of the public or any individual posed by the child;

(D) the nature and circumstances of the offense allegedly committed by the child;

(E) the degree of the child's culpability;

(F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and

(G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) age;

(II) mental capacity;

(III) maturity;

(IV) the degree of criminal sophistication exhibited by the child;

(V) previous records, if any;

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(VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;

(VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;

(VIII) probation or institutional reports, if any;

(IX) any other relevant factors; and

(iv) that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.

42 PA.CON.S.TAT.ANN. § 6355.

The standard of review following an appeal by a decision of the juvenile court in the certification process is:

[T]he “ultimate decision of whether to certify a minor to stand trial as an adult is within the sole discretion of a juvenile court.” An appellate court may not disturb a certification ruling unless the juvenile court committed an abuse of discretion. The existence of facts in the record that would support a contrary result does not demonstrate an abuse of discretion. Rather, “the court rendering the adult certification decision must have misapplied the law, exercised unreasonable judgment, or based its decision on ill will, bias, or prejudice.”

Commonwealth v. In re E.R., 606 Pa. 73, 78-79, 995 A.2d 326, 329 (2010).

2.4 AGE OF VICTIM

A. Offenses Against Children

The General Assembly of Pennsylvania has adopted numerous laws specifically designed to protect children from sexual and physical abuse. These laws are discussed in detail in **Chapter 4, Offenses Against Children**. Children are also protected by many laws adopted to combat sexual violence which also cover adult victims. These crimes are listed in **Chapter 3, Crimes of Sexual Violence**.

Crimes specifically adopted to protect children include:

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- **Luring a Child into a Motor Vehicle**, 18 PA.CON.S.STAT.ANN. § 2910, discussed in Chapter 4, Section 4.2
- **Endangering Welfare of Children**, 18 PA.CON.S.STAT.ANN. § 4304, discussed in Chapter 4, Section 4.3
- **Corruption of Minors**, 18 PA.CON.S.STAT.ANN. § 6301, discussed in Chapter 4, Section 4.4
- **Sexual Abuse of Children**, 18 PA.CON.S.STAT.ANN. § 6312, discussed in Chapter 4, Section 4.5
- **Unlawful Contact with Minor**, 18 PA.CON.S.STAT.ANN. § 6318, discussed in Chapter 4, Section 4.6
- **Sexual Exploitation of Children**, 18 PA.CON.S.STAT.ANN. § 6320, discussed in Chapter 4, Section 4.7
- **Internet Child Pornography**, 18 PA.CON.S.STAT.ANN. §§ 7621-7630, discussed in Chapter 4, Section 4.8 (Act Declared Unconstitutional)
- **Obscene Materials**, 18 PA.CON.S.STAT.ANN. § 5903, discussed in Chapter 4, Section 4.9
- **Transmission of Sexually Explicit Images by Minor**, 18 PA.CON.S.STAT.ANN. § 6321, discussed in Chapter 4, Section 4.10
- **Sexual Assault by Sports Official, Volunteer or Employee of Nonprofit Association**, 18 Pa.Cons.Stat.Ann. § 3124.3, discussed in Chapter 4, Section 4.11.

Chapter 4, Section 4.12, also addresses cases where children are the intended victims of an **attempt, conspiracy or solicitation** involving sexual violence.

Many crimes of sexual violence are tailored, in special sections, for circumstances when the victim is under 18 years of age. These include:

- **Rape of a Child**, 18 PA.CON.S.STAT.ANN. § 3121(c), discussed in Chapter 3, Section 3.2(F), in which the elements are:
 - Engaging in sexual intercourse with a child; and
 - The child is less than 13 years of age.
- **Rape of a Child Resulting in Serious Bodily Injury**, 18 PA.CON.S.STAT.ANN. § 3121(d), discussed in Chapter 3, Section 3.2(G), in which the elements are:
 - Engaging in sexual intercourse with a child; and
 - The child is less than 13 years of age; and
 - The child suffers serious bodily injury in the course of the offense.
- **Statutory Sexual Assault**, 18 PA.CON.S.STAT.ANN. § 3122(a), discussed in Chapter 3, Section 3.3(A), in which the elements are:
 - Engaging in sexual intercourse with a complainant; and
 - The complainant is not married to the defendant;
 - In one of the following circumstances:
 - i. The complainant is under 16 years of age; and

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- ii. The defendant is four years older but less than eight years older than the complainant; or
 - iii. The defendant is eight years older but less than 11 years older than the complainant
- **Statutory Sexual Assault-Older Defendant**, 18 PA.CON.S.STAT.ANN. § 3122(b), discussed in Chapter 3, Section 3.3(B), in which the elements are:
 - Engaging in sexual intercourse with a complainant; and
 - The complainant is not married to the defendant; and
 - The complainant is under the age of 16 years; and
 - The Defendant is 11 or more years older than the complainant.
- **Involuntary Deviate Sexual Intercourse with a Child under Age 16**, 18 PA.CON.S.STAT.ANN. § 3123(a)(7), discussed in Chapter 3, Section 3.4(F), in which the elements are:
 - Engaging in deviate sexual intercourse with a complainant;
 - When the complainant is less than 16 years of age and the defendant is four or more years older than the complainant; and
 - the complainant and defendant are not married to each other
- **Involuntary Deviate Sexual Intercourse with a Child under Age 13**, 18 PA.CON.S.STAT.ANN. § 3123(b), discussed in Chapter 3, Section 3.4(G), in which the elements are:
 - Engaging in deviate sexual intercourse with a complainant;
 - When the complainant is less than 13 years of age.
- **Involuntary Deviate Sexual Intercourse with a Child under Age 13 and Resulting in Serious Bodily Injury**, 18 PA.CON.S.STAT.ANN. § 3123(c), discussed in Chapter 3, Section 3.4(H), in which the elements are:
 - Engaging in deviate sexual intercourse with a complainant;
 - When the complainant is less than 13 years of age; and
 - The complainant suffers serious bodily injury in the course of the offense.
- **Institutional Sexual Assault of a Minor**, 18 PA.CON.S.STAT.ANN. § 3124.2(a.1), discussed in Chapter 3, Section 3.6(B), in which the elements are:
 - The defendant is an employee or agent of any of the following:
 - a) the Department of Corrections,
 - b) county correctional authority,
 - c) youth development center,
 - d) youth forestry camp,
 - e) state or county juvenile detention facility,
 - f) other licensed residential facility serving children and youth, or
 - g) mental health or mental retardation facility or institution, and

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- The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact with an *inmate, detainee, patient or resident*; and
- The defendant acts intentionally, knowingly or recklessly as to the status of their sexual partner as *an inmate, detainee, patient, or resident*, and
- The *inmate, detainee, patient, or resident* is under 18 years of age.
- **Institutional Sexual Assault at a School**, 18 PA.CON.S.TAT.ANN. § 3124.2(a.2), discussed in Chapter 3, Section 3.6(C), in which the elements are:
 - The defendant is a volunteer or an employee of a school, or
 - Any other person who has direct contact with a student at a school; and
 - The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact *with a student of the school*.
- **Institutional Sexual Assault – Child Care**, 18 PA.CON.S.TAT.ANN. § 3124.2(a.3), discussed in Chapter 3, Section 3.6(D), in which the elements are:
 - The defendant is a volunteer or an employee of a center for children; and
 - The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact *with a child who is receiving services at the center*
- **Aggravated Indecent Assault of a Child**, 18 PA.CON.S.TAT.ANN. § 3125(b), discussed in Chapter 3, Section 3.7(B), in which the elements are:
 - A violation of subsections (a)(1)-(6) of the Aggravated Indecent assault statute, § 3125(a) and
 - The complainant is under 13 years old.
- **Indecent Assault of a Child Under 13 Years of Age**, 18 PA.CON.S.TAT.ANN. § 3126(a)(7), discussed in Chapter 3, Section 3.8(G), in which the elements are:
 - The defendant has indecent contact with the complainant, or
 - The defendant causes the complainant to have indecent contact with the defendant, or
 - The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
 - The complainant is less than 13 years of age.
- **Indecent Assault of a Child Under 16 Years of Age**, 18 PA.CON.S.TAT.ANN. § 3126(a)(8), discussed in Chapter 3, Section 3.8(H), in which the

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elements are:

- The defendant has indecent contact with the complainant, or
 - The defendant causes the complainant to have indecent contact with the defendant, or
 - The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
 - The complainant is less than 16 years of age, and
 - The defendant is four or more years older than the complainant and
 - The complainant and the defendant are not married to each other.
- **Incest of a Minor**, 18 PA.CONS.STAT.ANN. § 4302(b), discussed in Chapter 3, Section 3.10(B), in which the elements are:
 - The defendant knowingly either:
 - a) marries,
 - b) cohabits, or
 - c) has sexual intercourse with
 - Any of the following if they are under the age of 13 or between 13 and 18 years of age and the defendant is four or more years older:
 - a) an ancestor of the whole or half blood,
 - b) a descendant of the whole or half blood,
 - c) a brother or sister of the whole or half blood,
 - d) an uncle or aunt of the whole blood, or
 - e) a nephew or niece of the whole blood.

Additionally, many crimes of sexual violence have enhanced gradings and penalties when the victim is a minor.

B. Prohibition of Disclosure of Names of Minors in Physical or Sexual Abuse Cases

Subchapter D, Child Victims and Witnesses, of Chapter 59 of the Judicial Code, provides for confidentiality of victims of physical or sexual abuse when they are under 18 years of age when they are victimized. Under this law, the names of such victims or material witnesses may not be disclosed to the public by the courts, and any records revealing the name of the minor victim or witnesses may be open to public inspection. The law applies to any prosecution involving a minor victim, regardless of the date of the commencement of the prosecution.²²

The law defines a “minor” as:

An individual who, at the time of the commission of the offense involving sexual or physical abuse, is under 18 years of age.²³

²² 42 PA.CONS.STAT.ANN. § 5988(a.1).

²³ 42 PA.CONS.STAT.ANN. § 5982.

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The victim of a sexual offense, who is 18 years old or older at the time of the commencement of the prosecution, but who was a minor at the time the offense was committed, may waive the confidentiality required under this law and permit the court to release the name of the minor victim. 42 PA.CON.S.TAT.ANN. § 5988(a.2).

Chapter 3

CRIMES OF SEXUAL VIOLENCE IN PENNSYLVANIA

Crimes of Sexual Violence in Pennsylvania

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Chapter Three

Crimes of Sexual Violence in Pennsylvania

3.1 CHAPTER OVERVIEW

This chapter discusses offenses of sexual violence from the Pennsylvania Crimes Code. The chapter is divided into thirteen sections. In Chapter 2, many of the terms used in these crimes are defined, including:

- complainant
- deviate sexual intercourse
- forcible compulsion
- indecent contact
- serious bodily injury
- sexual intercourse

The sections discuss the sexual offenses, including the statutory definitions, elements, penalties, and, when appropriate, pertinent case law. The offenses are:

- Rape, Section 3.2
- Statutory Sexual Assault, Section 3.3
- Involuntary Deviate Sexual Intercourse, Section 3.4
- Sexual Assault, Section 3.5
- Institutional Sexual Assault, Section 3.6
- Aggravated Indecent Assault, Section 3.7
- Indecent Assault, Section 3.8
- Indecent Exposure, Section 3.9
- Incest, Section 3.10
- Invasion of Privacy, Section 3.11
- Sexual Intercourse with Animal, Section 3.12

Offenses specifically against children are addressed in Chapter 4. Inchoate offenses are briefly discussed in Section 3.13.

The standard of statutory construction is clear and unambiguous: the provisions of the crimes code must be construed according to the fair import of their terms. 18 PA.CON.S.TAT.Ann. § 105. If the language is susceptible of differing constructions it must be interpreted to further the general purposes of Title 18 and the special purposes of the particular provision involved. *Id.*

Furthermore, when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 PA.CON.S.

STAT.Ann. § 1921(b); *Commonwealth v. Kelley*, 569 Pa. 179, 185, 801 A.2d 551, 554 (2002). Finally, penal statutes are to be strictly construed. 1 PA.CON.S.STAT.Ann. § 1928(b)(1); *Commonwealth v. Booth*, 564 Pa. 228, 234, 766 A.2d 843, 846 (2001).

The need for strict construction does not require that the words of a penal statute be given their narrowest possible meaning or that legislative intent be disregarded, nor does it override the more general principle that the words of a statute must be construed according to their common and approved usage It does mean, however, that where ambiguity exists in the language of a penal statute, such language should be interpreted in the light most favorable to the accused.

Id. (citations omitted).

3.2 RAPE

Types of Rape: Statutory Elements

- 1) Engaging in sexual intercourse with a complainant;¹
- 2) In one of the following circumstances:
 - a) By forcible compulsion² (18 PA.CON.S.STAT.Ann. § 3121(a)(1));
 - b) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution (18 PA.CON.S.STAT.Ann. § 3121(a)(2));
 - c) When the complainant is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring (18 PA.CON.S.STAT.Ann. § 3121(a)(3));
 - d) When the accused has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance (18 PA.CON.S.STAT.Ann. § 3121(a)(4));
 - e) When the complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA.CON.S.STAT.Ann. § 3121(a)(5));
 - f) Rape of a child: when the accused engages in sexual intercourse with a child who is less than 13 years of age. (18 PA.CON.S.STAT.Ann. § 3121 (c));

¹ "Complainant" and "Sexual intercourse" are defined in **Chapter 2, Sections 2.2(A) & (F)**.

² "Forcible Compulsion" is defined in **Chapter 2, Section 2.2(C)**.

- g) Rape of a child with serious bodily injury: when the accused engages in sexual intercourse with a child who is under 13 years of age and suffers serious bodily injury in the course of the offense. (18 PA.CON.S.STAT.ANN. § 3121 (d)).

A. Rape by Forcible Compulsion

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 3121(a)(1).

- Engaging in sexual intercourse with a complainant;
- By forcible compulsion

2. Forcible Compulsion

The force necessary to support a conviction of rape need only be such as to establish lack of consent and to induce the victim to submit without additional resistance. *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994).

“Forcible compulsion” as used in 18 PA.CON.S.STAT.ANN. § 3121(1) includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person’s will. *Commonwealth v. Rhodes*, 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986)

(a) Type of Force

There must be a showing of either physical force, a threat of physical force, or psychological coercion to satisfy the “forcible compulsion” requirement under 18 PA.CON.S.STAT.ANN. § 3121. *Commonwealth v. Berkowitz*, 537 Pa. 143, 149, 641 A.2d 1161, 1164 (1994).

(b) Degree of Force

The degree of force required to constitute rape is relative and depends on the facts and particular circumstances of the case. *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994).

When determining whether evidence is sufficient to demonstrate forcible compulsion beyond a reasonable doubt, factors to be considered include “the respective physical conditions of the victim and the accused, as well as the relative position of authority, domination, or custodial control the accused may exercise over the victim.” *Commonwealth v. Smolko*, 666 A.2d 672, 676 (Pa. Super. 1995).

Statement of Non-Consent: A statement of non-consent, such as when a victim says “no” throughout the sexual encounter, is relevant to the issue of consent, but not relevant to the issue of force. *Commonwealth v. Berkowitz*, 537 Pa. 143, 149, 641 A.2d 1161, 1164 (1994).

3. Consent

The essence of the criminal act of rape is involuntary submission to sexual intercourse. *Commonwealth v. Karkaria*, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (Pa. 1993). Therefore, effective consent to sexual intercourse will negate a finding of forcible compulsion. *Commonwealth v. Rhodes*, 510 Pa. 537, 554, 510 A.2d 1217, 1225 (Pa. 1986).

(a) Mistake of Fact

In Rape or IDSI prosecutions, there is no reasonable mistake of fact defense as to consent. *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. 1998), *appeal dismissed as improvidently granted*, 560 Pa. 410, 745 A.2d 1214 (2000); *Commonwealth v. Farmer*, 758 A.2d 173 (Pa. Super. 2000), *appeal denied*, 565 Pa. 637, 771 A.2d 1279 (2001).

(b) Statement of Non-consent

A statement of non-consent, such as when a victim says “no” throughout the sexual encounter, is relevant to the issue of consent, but not relevant to the issue of force. *Commonwealth v. Berkowitz*, 537 Pa. 143, 149, 641 A.2d 1161, 1164 (1994).

4. Rape Trauma Syndrome

An expert’s testimony concerning the effect of “rape trauma syndrome” on a victim, i.e., her failure to identify the assailant shortly after the sexual assault because of an acute phase of “rape trauma syndrome,” making ordinary functions difficult, improperly enhanced the victim’s credibility in the eyes of jury and, as such, was inadmissible. *Commonwealth v. Gallagher*, 519 Pa. 291, 297, 547 A.2d 355, 358 (1988). The Court found equally inadmissible the same expert’s opinion that the victim’s in-court identification five years later was credible. *See also, Commonwealth v. Robinson*, 5 A.3d 339, 343 (2010), *appeal denied*, 610 Pa. 585, 19 A.3d 1051 (2011).³

In *Commonwealth v. Pickford*, 536 A.2d 1348, 1351 n. 2 (Pa. Super. 1987), *appeal dismissed*, 522 Pa. 506, 564 A.2d 158 (1989), the Superior Court described rape trauma syndrome as follows:

³ For additional detailed discussion about Rape Trauma Syndrome, See Chapter 8, Section 8.4 RAPE TRAUMA SYNDROME.

Rape trauma syndrome is one kind of post-traumatic stress disorder. The essential feature of post-traumatic stress disorder is the development of characteristic symptoms after a psychologically traumatic incident that is usually beyond the range of ordinary human experience. Those symptoms typically involve reexperiencing the traumatic incident; numbing of responsiveness to, or lessened involvement with, the external world; and a variety of autonomic, dysphoric, or cognitive symptoms.

In *Pickford*, the Superior Court affirmed the trial court's decision to permit lay testimony regarding the victim's post-rape trauma, i.e., the victim's behavior and conduct several days following the incident. *Commonwealth v. Pickford*, 536 A.2d at 1351-1352.

B. Rape by Threat of Forcible Compulsion

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 3121(a)(2).

- Engaging in sexual intercourse with a complainant;
- By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.

2. "Forcible Compulsion"⁴

"Forcible compulsion" as used in 18 PA.CON.S.STAT.ANN. § 3121 includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will. *Commonwealth v. Rhodes*, 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986)

3. Objective Standard Utilized

An objective standard is used in determining whether a threat of forcible compulsion was made. *Commonwealth v. Rhodes*, 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986): "[A]n objective standard regarding the use of *threats* of forcible compulsion to prevent resistance (as opposed to actual application of 'forcible compulsion.')

4. Verbal Threats Sufficient

Verbal threats are sufficient to establish threat of forcible compulsion. *Commonwealth v. Montgomery*, 687 A.2d 1131 (Pa. Super. 1996) (Opinion

⁴ "Forcible compulsion" is defined in Chapter 2, Section 2.2(C).

by Olszewski, J., with Judges concurring in result).

C. Rape When the Complainant is Unconscious or Unaware

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3121(a)(3).

- Engaging in sexual intercourse with a complainant;
- When the complainant is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.

2. Purpose of Section

This subsection proscribing intercourse with “unconscious” persons was enacted to proscribe intercourse with persons unable to consent because of their physical condition. *Commonwealth v. Price*, 616 A.2d 681 (Pa. Super. 1992).

3. Sleeping Victim

A sleeping victim is unconscious for purposes of rape statute. *Commonwealth v. Wall*, 953 A.2d 581, 584 (Pa.Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008); *Commonwealth v. Price*, 616 A.2d 681 (Pa. Super. 1992). This circumstance is present so long as the complainant was unconscious when sexual intercourse was initiated. *Id.*

4. Unconscious Victim

A complainant is unconscious when she lacks the conscious awareness that she would possess in the normal waking state. *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745 (2000).

5. Constructive Unconsciousness

A complainant may be constructively unconscious if his or her awareness is severely impaired. *Commonwealth v. Erney*, 548 Pa. 467, 698 A.2d 56 (1997). The Pennsylvania Supreme Court has held that the statutory elements of section 3121(a)(3) are established if the victim was intermittently conscious and unconscious throughout an assault and was “at all relevant times in such impaired physical and mental condition so as to be unable to knowingly consent[.]” *Id.*, 548 Pa. at 473, 698 A.2d at 59. This charge of Rape does not include only those victims who were “completely unaware” of the assault; despite the victim’s ability to perceive some aspects of the assault, the victim’s lack of knowledge of much of what occurred supports the finding that the victim was “unconscious” during portions of the assault and, therefore,

lacked ability to consent. In such cases, the victim's submission to sexual intercourse is deemed involuntary, and intercourse with her constitutes rape of an unconscious individual. *Id.* See also, *Commonwealth v. Lungin*, 77 Pa. D. & C.4th 267 (Bucks Cty. 2005)

D. Rape When the Assailant has Impaired the Complainant's Power to Resist

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3121(a)(4).

- Engaging in sexual intercourse with a complainant;
- When the accused has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.

2. Additional Penalty

An additional penalty of up to ten years imprisonment and a fine of up to \$100,000 may be imposed on persons convicted under 18 PA.CON.S.TAT.ANN. § 3121(a)(4).

E. Rape When a Mental Disability Renders the Complainant Incapable of Consent

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3121(a)(5).

- Engaging in sexual intercourse with a complainant;
- When the complainant suffers from a mental disability which renders the complainant incapable of consent.

2. Commonwealth's Burden of Proof

Although the statute does not state an intent element, the Commonwealth must prove the defendant acted intentionally, knowingly, or recklessly regarding the victim's mental disability for every material element of the statutory provision. *Commonwealth v. Thomson*, 673 A.2d 357, 359 (Pa. Super. 1996), *appeal denied*, 546 Pa. 679, 686 A.2d 1310 (1996).⁵

F. Rape of a Child

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3121 (c).

⁵ See 4 Summ.Pa.Jur.2d Criminal Law § 15:46 (2d ed.).

- Engaging in sexual intercourse with a child;
- The child is less than 13 years of age.

2. Mistake as to Age

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older.

18 PA. CONS. STAT. ANN. § 3102 Mistake as to Age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

Commonwealth v. Dennis, 784 A.2d 179, 181 (Pa. Super. 2001), *appeal denied*, 568 Pa. 733, 798 A.2d 1287 (2002): Victim of 12 years of age deemed incapable of consenting; therefore defendant was criminally liable for rape, regardless of the victim's consent or of defendant's purported belief that victim was 14 or older.

Commonwealth v. Hacker, 609 Pa. 108, 112, 15 A.3d 333, 336 (2011): "[T]he General Assembly has expressly barred any mistake of age defense."

3. Enhanced Penalty

Maximum incarceration sentence shall be fixed by the Court at not more than 40 years. Maximum fine is not more than \$25,000.00.

G. Rape of a Child Resulting in Serious Bodily Injury

1. Statutory Citation and Elements

18 PA. CONS. STAT. ANN. § 3121 (d).

- Engaging in sexual intercourse with a child;
- The child is less than 13 years of age;
- The child suffers serious bodily injury in the course of the offense.

Commonwealth v. Kerrigan, 920 A.2d 190 (Pa. Super. 2007), *appeal denied*,

594 Pa. 676, 932 A.2d 1286 (2007): the transmission of HPV and genital warts satisfies the *serious bodily injury* requirement because of the permanent nature of the disease, the fact that the victim risks passing the virus to future sexual partners or children she may choose to have through the birth canal, and because there is a strong link between HPV and cervical and other genital cancers.

2. Mistake as to Age⁶

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older.

18 PA.CON.S.TAT.ANN. § 3102 **Mistake as to Age**

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

3. Serious Bodily Injury

Serious bodily injury is bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 PA.CON.S.TAT.ANN. § 2301.⁷

4. Enhanced Penalty

May be sentenced up to a maximum term of life imprisonment. Maximum fine is not more than \$25,000.00.

H. Key Provisions of Rape Statute

1. Fundamental Nature of Rape

The essence of the criminal act of rape is involuntary submission to sexual intercourse. *Commonwealth v. Erney*, 548 Pa. 467, 698 A.2d 56 (1997); *Commonwealth v. Karkaria*, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (1993).

⁶ For additional discussion see Chapter 3, Section 3.2(F)(2), Mistake as to Age.

⁷ See Chapter 2, Section 2.2(E), Serious Bodily Injury.

2. Penetration Necessary

Some degree of penetration, which, however slight, is sufficient to fulfill the “penetration” element of rape. *Commonwealth v. Fiebiger*, 570 Pa. 583, 590, n.4., 810 A.2d 1233, 1237, n.4 (2002). See discussion *Section 2.2(F)(1)(b)*.

3. Time of Offense

A criminal prosecution also requires proof beyond a reasonable doubt that the accused committed the offense charged at the time specified within the indictment. *Commonwealth v. Karkaria*, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (1993).

4. No Resistance Necessary

“The victim of a rape need not resist.” *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994); 18 PA. CONS. STAT. ANN. § 3107.⁸

I. Penalties

1. Rape

Any offense listed under 18 PA.CON.S.TAT.ANN. § 3121(a) is graded as a Felony of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1103, in the case of a felony of the first degree, a term of imprisonment shall be fixed by the court at not more than 20 years and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 25,000.

An *additional penalty* of up to ten years imprisonment and a fine of up to \$100,000 may be imposed on persons convicted where the person engaged in sexual intercourse with a complainant and substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss and any other effect of this substance. 18 PA.CON.S.TAT.ANN. § 3121(b).

2. Rape of a Child

The offense of rape of a child under 18 PA.CON.S.TAT.ANN. § 3121(c) is graded as a Felony of the First Degree.

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of rape of a child “shall be sentenced to a term of imprisonment which shall be fixed by the court at no more than 40

⁸ See Chapter 2, Section 2.2(C)(b), Resistance.

years.” 18 PA. CONS. STAT. ANN. § 3121(e)(1).

3. Rape of a Child Resulting in Serious Bodily Injury

The offense of rape of a child resulting in serious bodily injury under 18 PA.CONS.STAT.ANN. § 3121(d) is graded a Felony of the First Degree.

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of rape of a child resulting in serious bodily injury “shall be sentenced up to to a maximum term of *life imprisonment*.” 18 PA.CONS.STAT.ANN. § 3121(e)(2).

4. Trafficking of Persons

A defendant who is convicted of Trafficking of Persons, 18 PA. CONS. STAT. ANN. § 3002 while violating the Rape statute, 18 PA.CONS. STAT.ANN. § 3121 or the Involuntary Deviate Sexual Intercourse statute, 18 PA.CONS.STAT.ANN. § 3123 “shall be sentenced up to a maximum term of life imprisonment.” 42 PA.CONS. STAT.ANN. § 9720.2.

Trafficking of Persons, 18 PA. CONS. STAT. ANN. § 3002(a), is violated if a defendant knowingly traffics or attempts to traffic another person, knowing that the other person will be subjected to forced labor or services.

3.3 STATUTORY SEXUAL ASSAULT

Types of Statutory Sexual Assault: Statutory Elements

- a) Engaging in sexual intercourse with a complainant;
- b) The complainant is not married to the defendant;
- c) In one of the following circumstances:
 - a) The complainant is under 16 years of age; and
 - i. The defendant is four years older but less than eight years older than the complainant; or
 - ii. The defendant is eight years older but less than 11 years older than the complainant
 - or
 - b) The complainant is under 16 years of age and the defendant is 11 or more years older than the complainant.

A. Statutory Sexual Assault

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3122.1(a)

- Engaging in sexual intercourse with a complainant;
- The complainant is not married to the defendant;
- In one of the following circumstances:
 - The complainant is under 16 years of age; and
 - i. The defendant is four years older but less than eight years older than the complainant; or
 - ii. The defendant is eight years older but less than 11 years older than the complainant

2. Penalty

Statutory sexual assault is a felony of the second degree. The maximum incarceration sentence is up to 10 years and the maximum fine is up to \$25,000.

B. Statutory Sexual Assault – Older Defendant

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3122.1(b)

- Engaging in sexual intercourse with a complainant;
- The complainant is not married to the defendant;
- The complainant is under the age of 16 years;
- The Defendant is 11 or more years older than the complainant.

2. Penalty

Statutory sexual assault – older defendant is a felony of the first degree. The maximum incarceration sentence is up to 20 years and the maximum fine is up to \$25,000.

C. Key Provisions of Statutory Sexual Assault

1. Consent Not a Defense

Consent is not a defense to statutory sexual assault. *Commonwealth v. Duffy*, 832 A.2d 1132, 1139 (Pa. Super. 2003), *appeal denied*, 577 Pa. 694, 845 A.2d 816 (2004).

Statutory sexual assault and sexual assault are not greater and lesser included offenses as lack of consent is a required element of sexual assault. *Commonwealth v. Duffy*, 832 A.2d at 1138-1139.

It is well-settled that, in order to convict a defendant under Section 3122.1, the Commonwealth need not prove the elements of consent or force. Rather, Section 3122.1 “criminalizes sex with a non-spouse who is under 16, if the perpetrator is four or more years older than the victim...”

Commonwealth v. A.W.C., 951 A.2d 1174, 1177 (Pa. Super. 2008) (citations omitted).

2. Mistake as to Age⁹

When the criminal liability of the perpetrator depends on the victim being a child who is below a critical age **older** than 14 years, it is a defense if the defendant can show, by the standard of the preponderance of the evidence, that the perpetrator reasonably believed that the child was above the critical age.

Mistake as to Age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child’s being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

18 PA.CON.S.TAT.ANN. § 3102. The rationale behind Section 3102’s prohibition of defending with a mistake of age defense when the child is under age 14 has been explained:

The primary consideration in prohibiting unlawful, consensual intercourse with an underage female has been traditionally attributed to the legislative desire to protect those who are too unsophisticated to protect themselves. Although due process considerations impose some limitations on the absence of a knowledge requirement from the definition of a criminal offense, due process does

⁹ For additional discussion see Section 3.4(F)(2), Mistake as to Age.

not require that the appellant be afforded the defense of mistake of the victim's age in a statutory rape prosecution. Thus, the Pennsylvania legislature, in line with a substantial majority of legislatures which have addressed this issue, has determined that it will not provide for a reasonable mistake of age as a defense

Commonwealth v. Robinson, 497 Pa. 49, 54-55, 438 A.2d 964, 966-967 (1981), *appeal dismissed*, 457 U.S. 1101, 102 S.Ct. 2898, 73 L.Ed.2d 1310 (1982).

See *Commonwealth v. A.W.C.*, 951 A.2d 1174, 1179 (Pa. Super. 2008), where the Superior Court noted that if a mistake of age defense is presented in a case where the statutory element requires the child to be below a critical age older than 14, once it is proffered, the burden shifts to the Commonwealth to disprove the defense.

3.4 INVOLUNTARY DEVIATE SEXUAL INTERCOURSE

Types of IDSI: Statutory Elements

- 1) Engaging in deviate sexual intercourse with a complainant;¹⁰
- 2) In one of the following circumstances:
 - a) By forcible compulsion¹¹ (18 PA.CON.S.STAT.ANN. § 3123(a)(1));
or
 - b) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution (18 PA.CON.S.STAT.ANN. § 3123(a)(2)); or
 - c) When the complainant is unconscious or the defendant knows that the complainant is unaware of the fact that sexual intercourse is occurring (18 PA.CON.S.STAT.ANN. § 3123(a)(3));
or
 - d) When the defendant has substantially impaired the complainant's ability to control his or her conduct through the use of drugs, intoxicants or other means without the complainant's knowledge (18 PA.CON.S.STAT.ANN. § 3123(a)(4));
or

¹⁰ "Complainant" and "Deviate Sexual Intercourse" are defined in **Chapter 2, Section 2.2(A) & (B)**, respectively.

¹¹ "Forcible Compulsion" is defined in **Chapter 2, Section 2.2(C)**.

- e) When the complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA.CON.S.STAT.ANN. § 3123(a)(5)); or
- f) When the complainant is less than 16 years of age and the defendant is four or more years older than the complainant and the complainant and defendant are not married to each other (18 PA.CON.S.STAT.ANN. § 3123(a)(7)); or
- g) When the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age (18 PA.CON.S.STAT.ANN. § 3123(b)); or
- h) When the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age and the complainant suffers serious bodily injury in the course of the offense (18 PA.CON.S.STAT.ANN. § 3123(c)).

A. IDSI By Forcible Compulsion

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 3123(a)(1).

- Engaging in deviate sexual intercourse with a complainant;
- By forcible compulsion.

2. Forcible Compulsion¹²

Concerning the element of forcible compulsion, the force needs to be such as to demonstrate an absence of consent, inducing submission without further resistance. Thus, forcible compulsion encompasses a lack of consent, although it has been interpreted as requiring something more.” *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031-1032 (2004).

“In order to prove the ‘forcible compulsion’ component of these charges, the Commonwealth was required to establish beyond a reasonable doubt that appellant used either physical force, a threat of physical force, or psychological coercion, since the mere showing of a lack of consent does not support a conviction for Rape and/or IDSI by forcible compulsion.” *Commonwealth v. Brown*, 556 Pa. 131, 136, 727 A.2d 541, 544 (1999).

B. IDSI By Threat of Forcible Compulsion

¹² “Forcible compulsion” is discussed in more detail in Sections 3.2(A)(2) and 3.2(B)(2). The test for “forcible compulsion” under IDSI is identical to prove “forcible compulsion” under § 3121, Rape. *Commonwealth v. Smolko*, 666 A.2d 672, 675 (Pa. Super. 1995).

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 3123(a)(2).

- Engaging in deviate sexual intercourse with a complainant;
- By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.

2. Objective Standard

An objective standard is used in determining whether a threat by forcible compulsion was used. *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217 (1986).

Verbal threats are sufficient to establish forcible compulsion. *Commonwealth v. Montgomery*, 687 A.2d 1131 (Pa. Super. 1996) (Per opinion of Olszewski, J., with Judges concurring in result.).

3. Totality of the Circumstances

In *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217 (1986), the Pennsylvania Supreme Court explained:

The determination of whether there is sufficient evidence to demonstrate beyond a reasonable doubt that an accused engaged in sexual intercourse by forcible compulsion (which we have defined to include “not only physical force or violence, but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person’s will,”), or by the threat of such forcible compulsion that would prevent resistance by a person of reasonable resolution is, of course, a determination that will be made in each case based upon the totality of the circumstances that have been presented to the fact finder.

510 Pa. at 555, 510 A.2d at 1226 (citation omitted).

Significant factors to be weighed in that determination would include:

- the respective ages of the victim and the accused,
- the respective mental and physical conditions of the victim and the accused,
- the atmosphere and physical setting in which the incident was alleged to have taken place,
- the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and
- whether the victim was under duress.

- This list of possible factors is by no means exclusive.

Commonwealth v. Rhodes, 510 Pa. 537, 555-556, 510 A.2d 1217, 1226 (1986).

C. IDSI When the Complainant is Unconscious or Unaware

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3123(a)(3).

- Engaging in deviate sexual intercourse with a complainant;
- When the complainant is unconscious or the defendant knows that the complainant is unaware of the fact that sexual intercourse is occurring.

2. Lack of Consent¹³

A victim who was sleeping when sexual intercourse was initiated is considered “unconscious.” *Commonwealth v. Wall*, 953 A.2d 581, 584 (Pa. Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008) (decided under Rape statute).

While neither rape involving an unconscious person nor involuntary deviate sexual intercourse with an unconscious person references a lack of consent as an element, “in either circumstance, the absence of consent is assumed from the state of the victim.” *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1032 (Pa. 2003).

D. IDSI When the Assailant has Impaired the Complainant’s Power to Resist

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3123(a)(4).

- Engaging in deviate sexual intercourse with a complainant;
- When the defendant has substantially impaired the complainant’s ability to control his or her conduct through the use of drugs, intoxicants or other means without the complainant’s knowledge.

E. IDSI When a Mental Disability Renders the Complainant Incapable of Consent

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3123(a)(5).

- Engaging in deviate sexual intercourse with a complainant;
- When the complainant suffers from a mental disability which renders the complainant incapable of consent;
- The defendant acted intentionally, knowingly or recklessly as to the victim’s mental deficiency.

¹³ For additional discussion, see Section 3.2(C), Rape When the Complainant is Unconscious or Unaware.

2. Intent

The Superior Court held that the prosecution must prove that the defendant “acted intentionally, knowingly or recklessly as to the victim’s mental deficiency.” *Commonwealth v. Thomson*, 673 A.2d 357, 359 (Pa.Super. 1996), *appeal denied*, 546 Pa. 679, 686 A.2d 1310 (1996). *See also, Commonwealth v. Carter*, 418 A.2d 537 (Pa.Super. 1980).

In *Commonwealth v. Thomson*, 673 A.2d 357 (Pa.Super. 1996), *appeal denied*, 546 Pa. 679, 686 A.2d 1310 (1996), a forensic psychiatrist testified that the victim was incapable of consenting to sexual intercourse because she was mildly mentally retarded. The psychiatrist further testified that the victim’s retardation was of the type noticeable by a lay person. There was no rebuttal evidence by the defense as to the victim’s incapability to consent. The Superior Court affirmed the trial court’s determination that the evidence was sufficient to support the guilty verdict to Rape under former section 3121(4): “[a] person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: who is so mentally deranged or deficient that such person is incapable of consent.”

F. IDSI With a Child Under Age 16

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3123(a)(7).

- Engaging in deviate sexual intercourse with a complainant;
- When the complainant is less than 16 years of age and the defendant is four or more years older than the complainant, and;
- the complainant and defendant are not married to each other.

2. Mistake as to Age¹⁴

See Commonwealth v. A.W.C., 951 A.2d 1174, 1179 (Pa. Super. 2008), where the Superior Court noted that if a mistake of age defense is presented in a case where the statutory element requires the child to be below a critical age older than 14, such as IDSI with a child under age 16, once it is proffered, the burden shifts to the Commonwealth to disprove the defense.

G. IDSI With A Child Under Age 13

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3123(b).

- Engaging in deviate sexual intercourse with a complainant;
- When the complainant is less than 13 years of age.

¹⁴ For additional discussion, see Section 3.2(F)(2), Mistake as to Age, and Section 3.3(C)(2), Mistake as to Age.

2. Mistake as to Age¹⁵

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older. 18 PA.CON.S. STAT.ANN. § 3102.

“Voluntary consent of the victim, however, is not a defense to corruption of minors or voluntary deviate sexual intercourse. Appellant also stated that the victim said she was 16 years old, two years above the limit defining minority with respect to sex crimes. Even if justified, appellant’s mistaken belief as to the victim’s age was irrelevant.” *Commonwealth v. Hall*, 418 A.2d 623, 624 (Pa. Super. 1980) (citations omitted).

H. IDSI With a Child Under Age 13 and Resulting in Serious Bodily Injury

1. Statutory Citation and Elements

18 PA.CON.S. STAT.ANN. § 3123(c).

- Engaging in deviate sexual intercourse with a complainant;
- The complainant is less than 13 years of age; and
- The complainant suffers serious bodily injury in the course of the offense.

2. Serious Bodily Injury¹⁶

Commonwealth v. Kerrigan, 920 A.2d 190 (Pa.Super. 2007), *appeal denied*, 594 Pa. 676, 932 A.2d 1286 (2007): the transmission of HPV and genital warts satisfies the serious bodily injury requirement because of the permanent nature of the disease and the fact that the victim risks passing the virus to future sexual partners or children she may choose to have through the birth canal, and because there is a strong link between HPV and cervical and other genital cancers.

3. Mistake as to Age¹⁷

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older. 18 PA.CON.S. STAT.ANN. § 3102.

“Voluntary consent of the victim, however, is not a defense to corruption of minors or voluntary deviate sexual intercourse. Appellant also stated that the victim said she was 16 years old, two years above the limit defining minority with respect to sex crimes. Even if justified, appellant’s mistaken belief as to the victim’s age was irrelevant.” *Commonwealth v. Hall*, 418 A.2d 623, 624 (Pa. Super. 1980) (citations omitted).

¹⁵ For additional discussion, see Section 3.2(F)(2), Mistake as to Age, and Section 3.3(C)(2), Mistake as to Age.

¹⁶ “Serious Bodily Injury” is defined in Chapter 2, Section 2.2(E).

¹⁷ For additional discussion, see Section 3.2(F)(2), Mistake as to Age, and Section 3.3(C)(2), Mistake as to Age.

I. Penalties

1. Involuntary Deviate Sexual Intercourse

Any offense listed under 18 PA.CON.S.TAT.ANN. § 3123(a) is graded as a Felony of the First Degree. In accordance with 18 PA.CON.S.TAT.ANN. § 1103, in the case of a felony of the first degree, a term of imprisonment shall be fixed by the court at not more than 20 years, and, in accordance with 18 PA.CON.S.TAT.ANN. § 1101, a fine not to exceed \$ 25,000.

2. Involuntary Deviate Sexual Intercourse with a Child Under Age 13

Notwithstanding the general provisions regarding sentencing for a felony of the first degree, a person convicted of involuntary deviate sexual intercourse with a child “shall be sentenced to a term of imprisonment which shall be fixed by the court at no more than 40 years.” 18 PA.CON.S.TAT.ANN. § 3123(d) (1). The fine remains the same for a felony of the first degree at not to exceed \$ 25,000.

3. Involuntary Deviate Sexual Intercourse with a Child Under Age 13 with Serious Bodily Injury

Notwithstanding the general provisions regarding sentencing for a felony of the first degree, a person convicted of involuntary deviate sexual intercourse with a child resulting in serious bodily injury “shall be sentenced up to a maximum term of *life imprisonment*.” 18 PA.CON.S.TAT.ANN. § 3123(d)(2). The fine remains the same for a felony of the first degree at not to exceed \$ 25,000.

4. Multiple Counts of IDSI

If a defendant is convicted of multiple counts of IDSI under 18 PA.CON.S.TAT.ANN. § 3123 but they all arise from a “single act”, then the trial court may not sentence the defendant to separate sentences. *Commonwealth v. Shannon*, 530 Pa. 279, 287-288, 608 A.2d 1020, 1024 (1992); *Commonwealth v. Dobbs*, 682 A.2d 388, 391-392 (Pa. Super. 1996).

5. Trafficking of Persons

A defendant who is convicted of Trafficking of Persons, 18 PA. CONS. STAT. ANN. § 3002 while violating the Rape statute, 18 PA.CON.S.TAT.ANN. § 3121 or the Involuntary Deviate Sexual Intercourse statute, 18 PA.CON.S.TAT.ANN. § 3123 “shall be sentenced up to a maximum term of life imprisonment.” 42 PA.CON.S.TAT.ANN. § 9720.2.

Trafficking of Persons, 18 PA. CONS. STAT. ANN. § 3002(a), is violated if a

defendant knowingly traffics or attempts to traffic another person, knowing that the other person will be subjected to forced labor or services.

3.5 SEXUAL ASSAULT

A. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3124.1.

- The defendant engages in sexual intercourse or deviate sexual intercourse with a complainant;
- Without the complainant's consent.

B. History

Section 3124.1 was enacted "to fill the loophole left by the rape and involuntary deviate sexual intercourse statutes by criminalizing non-consensual sex where the perpetrator employs little if no force." *Commonwealth v. Pasley*, 743 A.2d 521, 524 n. 3 (Pa. Super. 1999), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000); *Aguilar v. Attorney General of U.S.*, 663 F.3d 692, 701 (3rd Cir. 2011).

This section of the Crimes Code, 18 PA.CON.S.TAT.ANN. § 3124.1, was enacted in response to the Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994). The statute was intended to fill the loophole left by the Rape and IDSI statutes by criminalizing non-consensual sex where the perpetrator employs little or no force.¹⁸ See also *Commonwealth v. Buffington*, 574 Pa. 29, 42 n.13, 828 A.2d 1024, 1032 n.13 (2003).

C. Evidence

Victim's uncorroborated testimony is sufficient evidence to support a sexual assault conviction. *Commonwealth v. Shaffer*, 763 A.2d 411, 414 (Pa. Super. 2000).

Circumstantial evidence may be used to show intent to commit sexual assault. *Commonwealth v. Pasley*, 743 A.2d 521 (Pa. Super. 1999), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000).

D. No Requirement of Resistance

In order to sustain a sexual assault conviction, resistance is not required. *Commonwealth v. Andrulewicz*, 911 A.2d 162, 165 (Pa. Super. 2006), *appeal denied*, 592 Pa. 778, 926 A.2d 972 (2007); *Commonwealth v. Smith*, 863 A.2d 1172, 1176 (Pa. Super. 2004).

¹⁸ Theresa A. McNamara, Act 10: *Remedying Problems of Pennsylvania's Rape Laws or Revisiting Them?*, 10 Dick.L.Rev. 203, 210-214 (1996).

E. Penalty

Sexual Assault is a felony of the second degree. The maximum incarceration sentence is up to 10 years and the maximum fine is up to \$ 25,000.

3.6 Institutional Sexual Assault

A. Institutional Sexual Assault

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3124.2(a).

- The defendant is an employee or agent of any of the following:
 - a) the Department of Corrections,
 - b) county correctional authority,
 - c) youth development center,
 - d) youth forestry camp,
 - e) state or county juvenile detention facility,
 - f) other licensed residential facility serving children and youth, or
 - g) mental health or mental retardation facility or institution.
- The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact with an inmate, detainee, patient or resident; and
- The defendant acts intentionally, knowingly or recklessly as to the status of their sexual partner as an *inmate, detainee, patient, or resident*.

Section 3124.2 is not unconstitutionally vague or broad. *Commonwealth v. Budd*, 821 A.2d 629, 631 (Pa. Super. 2003).

2. Intent

The defendant must “intentionally, knowingly or recklessly” engage in conduct with an inmate, detainee, patient, or resident. *Commonwealth v. Mayfield*, 574 Pa. 460, 475, 832 A.2d 418, 427 (2003).

This statute must be read in connection with the provisions of 18 Pa.Cons. Stat. Ann. § 302 requiring culpability with respect to the crime. Therefore, the Commonwealth must prove that the defendant acted intentionally, knowingly, recklessly or negligently that the victim is an inmate at the time the sexual assault takes place. *Commonwealth v. Budd*, 821 A.2d 629, 631 (Pa. Super. 2003).

3. Penalty

Institutional Sexual Assault is a felony of the third degree. The maximum

incarceration sentence is up to 7 years and the maximum fine is up to \$ 10,000.

B. Institutional Sexual Assault of a Minor

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3124.2(a.1).

- The defendant is an employee or agent of any of the following:
 - a) the Department of Corrections,
 - b) county correctional authority,
 - c) youth development center,
 - d) youth forestry camp,
 - e) state or county juvenile detention facility,
 - f) other licensed residential facility serving children and youth, or
 - g) mental health or mental retardation facility or institution.
- The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact with an *inmate, detainee, patient or resident*; and
- The defendant acts intentionally, knowingly or recklessly as to the status of their sexual partner as an *inmate, detainee, patient, or resident*, and
- The *inmate, detainee, patient, or resident* is under 18 years of age.

2. Intent

The defendant must “intentionally, knowingly or recklessly” engage in conduct with an inmate, detainee, patient, or resident. *Commonwealth v. Mayfield*, 574 Pa. 460, 475, 832 A.2d 418, 427 (2003).

3. Penalty

Institutional Sexual Assault is a felony of the third degree. The maximum incarceration sentence is up to 7 years and the maximum fine is up to \$ 10,000.

C. Institutional Sexual Assault at a School

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3124.2(a.2).

- The defendant is a volunteer or an employee of a school, or
- Any other person who has direct contact with a student at a school; and
- The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact *with a student of the school*.

2. Penalty

Institutional Sexual Assault is a felony of the third degree. The maximum incarceration sentence is up to 7 years and the maximum fine is up to \$ 10,000.

D. Institutional Sexual Assault – Child Care

1. Statutory Citation and Elements

18 PA. CONS. STAT. ANN. § 3124.2(a.3).

- The defendant is a volunteer or an employee of a center for children;
- The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact *with a child who is receiving services at the center.*

2. Penalty

Institutional Sexual Assault is a felony of the third degree. The maximum incarceration sentence is up to 7 years and the maximum fine is up to \$ 10,000.

3.7 AGGRAVATED INDECENT ASSAULT

A. Aggravated Indecent Assault

1. Statutory Citation and Elements

18 PA. CONS. STAT. ANN. § 3125(a).

- The defendant engages in penetration, however slight, of the genitals or anus of a complainant with any part of the defendant’s body;
- for any purpose other than good faith medical, hygienic or law enforcement procedures;
- under one or more of the following circumstances:
 - 1) without consent from the complainant; or
 - 2) with forcible compulsion;¹⁹
 - 3) with threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
 - 4) when the complainant is unconscious or other circumstances where the defendant knows that the complainant is unaware that the penetration is occurring; or
 - 5) the defendant has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or
 - 6) the complainant suffers from a mental disability which renders the complainant incapable of consent; or
 - 7) the complainant is less than 13 years old; or
 - 8) the complainant is less than 16 years old, the defendant is four or more years older than the complainant, and the defendant and the

¹⁹ “Forcible compulsion” is defined in Chapter 2, section 2.2(C).

complainant are not married to each other.

2. Digital Penetration

Aggravated indecent assault includes evidence of digital penetration. *Commonwealth v. Kelley*, 569 Pa. 179, 190, 801 A.2d 551, 557-558 (2002); *Commonwealth v. Filer*, 846 A.2d 139, 141 (Pa. Super. 2004), *appeal denied*, 581 Pa. 671, 863 A.2d 1143 (2004).

3. Victim's Testimony

Victim's uncorroborated testimony is sufficient evidence to support an aggravated indecent assault conviction. *Commonwealth v. Filer*, 846 A.2d 139, 141-142 (Pa. Super. 2004), *appeal denied*, 581 Pa. 671, 863 A.2d 1143 (2004); *Commonwealth v. Shaffer*, 763 A.2d 411, 414-415 (Pa. Super. 2000).

4. Penalty

Aggravated indecent assault is a felony of the second degree. The maximum incarceration sentence is up to 10 years and the maximum fine is up to \$ 25,000.

B. Aggravated Indecent Assault of a Child

1. Statutory Citation and Elements

18 PA CONS.STAT.ANN. § 3125(b).

- A violation of subsections (a)(1)-(6) and
- The complainant is under 13 years old.

2. Penalty

Aggravated indecent assault of a child is a Felony of the First Degree, and the maximum incarceration sentence is up to 20 years, and the maximum fine is up to \$ 25,000.

3.8 INDECENT ASSAULT

Types of Indecent Assault: Statutory Elements

18 PA.CON.S.TAT.ANN. § 3126

- The defendant has indecent contact with the complainant, or
The defendant causes the complainant to have indecent contact with the defendant, or

The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and

- Under one or more of the following circumstances:
 - (1) the defendant does so without the complainant's consent;
 - (2) the defendant does so by forcible compulsion;
 - (3) the defendant does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
 - (4) the complainant is unconscious or the defendant knows that the complainant is unaware that the indecent contact is occurring;
 - (5) the defendant has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
 - (6) the complainant suffers from a mental disability which renders the complainant incapable of consent;
 - (7) the complainant is less than 13 years of age; or
 - (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

A. Indecent Assault

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126(a)(1)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
- the defendant does so without the complainant's consent.

2. Penalty

An offense under subsection (a)(1) is a misdemeanor of the second degree. Misdemeanors of the second degree carry a maximum incarceration sentence of 2 years, and a maximum fine of \$ 5,000.

B. Indecent Assault by Forcible Compulsion

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126(a)(2)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
- the defendant does so by forcible compulsion.

2. Penalty

An offense under subsection (a)(2) is a misdemeanor of the first degree. Misdemeanors of the First Degree carry a maximum incarceration sentence of up to 5 years, and a maximum fine of up to \$ 10,000.

C. Indecent Assault by Threat of Forcible Compulsion

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126(a)(3)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
- the defendant does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.

2. Penalty

An offense under subsection (a)(3) is a misdemeanor of the first degree. Misdemeanors of the First Degree carry a maximum incarceration sentence of up to 5 years, and a maximum fine of up to \$ 10,000.

D. Indecent Assault When the Complainant is Unconscious or Unaware

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126(a)(4)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire

in the defendant or the complainant; and

- the complainant is unconscious or the defendant knows that the complainant is unaware that the indecent contact is occurring.

2. Penalty

An offense under subsection (a) (4) is a misdemeanor of the first degree. Misdemeanors of the First Degree carry a maximum incarceration sentence of up to 5 years, and a maximum fine of up to \$ 10,000.

E. Indecent Assault When the Assailant Has Impaired the Complainant's Power to Resist

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126(a)(5)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
- The defendant has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.

2. Penalty

An offense under subsection (a)(5) is a misdemeanor of the first degree. Misdemeanors of the First Degree carry a maximum incarceration sentence of up to 5 years, and a maximum fine of up to \$ 10,000.

F. Indecent Assault When a Mental Disability Renders the Complainant Incapable of Consent

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126(a)(6)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and

- the complainant suffers from a mental disability which renders the complainant incapable of consent.

2. Penalty

An offense under subsection (a)(6) is a misdemeanor of the first degree. Misdemeanors of the First Degree carry a maximum incarceration sentence of up to 5 years, and a maximum fine of up to \$ 10,000.

G. Indecent Assault of a Child Under 13 Years of Age

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126 (a)(7)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
- The complainant is less than 13 years of age.

2. Penalty

Misdemeanor: Indecent assault when the complainant is under the age of 13 under subsection (a)(7) is a misdemeanor of the first degree. The maximum incarceration sentence is up to 5 years, and the maximum fine is up to \$ 10,000.

Felony: However, if any of the following apply, it is a felony of the third degree:

- (i) It is a second or subsequent offense.
- (ii) There has been a course of conduct of indecent assault by the defendant.
- (iii) The indecent assault was committed by touching the complainant's sexual or intimate parts with sexual or intimate parts of the defendant.
- (iv) The indecent assault is committed by touching the defendant's sexual or intimate parts with the complainant's sexual or intimate parts.

In the event that it is classified as a felony of the third degree, the penalty is maximum incarceration of up to 7 years, and a maximum fine of up to \$ 15,000.

An offense under subsection (a)(7) is a misdemeanor of the first degree. Misdemeanors of the First Degree carry a maximum incarceration sentence of up to 5 years, and a maximum fine of up to \$ 10,000.

H. Indecent Assault of a Child Under 16 Years of Age

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3126(a)(8)

- The defendant has indecent contact with the complainant, or
- The defendant causes the complainant to have indecent contact with the defendant, or
- The defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant; and
- The complainant is less than 16 years of age, and
- The defendant is four or more years older than the complainant and
- The complainant and the defendant are not married to each other.

2. Penalty

An offense under subsection (a) (8) is a misdemeanor of the second degree. Misdemeanors of the second degree carry a maximum incarceration sentence of 2 years, and a maximum fine of \$ 5,000.

I. Types of Evidence

In the context of a Protection from Abuse case, the Superior Court found the evidence sufficient that Father had indecently assaulted Mother when he, without her consent, grabbed her breasts and crotch while making lascivious comments such as, “You know you like it.” *Thompson v. Thompson*, 963 A.2d 474, 478 (Pa. Super. 2008).

Evidence was sufficient to support conviction of indecent assault when the defendant, an adult whose age was not disclosed in the opinion, told an eleven year old girl that she was sexy, and then hugged her, and kissed her and stuck his tongue into her mouth. *Commonwealth v. Evans*, 901 A.2d 528 (Pa. Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006).

Indecent contact occurs when any part of the victim’s body comes into contact with a sexual or intimate part of the defendant’s body, without the victim’s consent, for the purpose of arousing or gratifying sexual desire in either person. See *Commonwealth v. Grayson*, 549 A.2d 593, 596 (Pa. Super. 1988) (sufficient evidence was the brushing of defendant’s penis against the underside of the victim’s jaw).

The phrase “other intimate parts” does not refer solely to genitalia – includes other erogenous zones. *Commonwealth v. Capo*, 727 A.2d 1126 (Pa. Super. 1999), *appeal denied*, 561 Pa. 667, 749 A.2d 465 (2000) (sufficient evidence was the defendant rubbed the victim’s shoulders, back and stomach and attempted to forcibly kiss her on the mouth). Also, indecent assault is not dependent upon the defendant’s success. *Id.*

Indecent contact includes contact over clothing, and is not dependent upon skin-to-skin contact. *Commonwealth v. Ricco*, 650 A.2d 1084 (Pa. Super. 1994) (sufficient evidence when defendant placed victim’s hand on his underwear-clad genitals).

Victim’s uncorroborated testimony is sufficient evidence to support an indecent assault conviction. *Commonwealth v. Shaffer*, 763 A.2d 411 (Pa. Super. 2000).

J. Mental Disability

When the complainant has a mental disability which makes her incapable of consent, the Commonwealth has no burden of proving defendant knew the victim’s mental status. *Commonwealth v. Crosby*, 791 A.2d 366, 369-370 (Pa. Super. 2002).

K. Youthful Victim

Evidence supported conviction for indecent assault based upon six year old victim’s testimony that “defendant, her father, pulled her pajamas down while she was in his room, told her his pee-pee hurt, put his penis in her bottom, and told her not to tell anybody.” *Commonwealth v. Cesar*, 911 A.2d 978, 986 (Pa. Super. 2006), *appeal denied*, 593 Pa. 725, 928 A.2d 1289 (2007).

3.9 INDECENT EXPOSURE

A. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3127

- The defendant exposes his or her genitals in any public place; or
- The defendant exposes his or her genitals in any place where there are other persons present whom the defendant knows or should know that this conduct is likely to offend, affront, or alarm.

B. Evidence

Affront or Alarm: The prosecution is not required to prove that affront or alarm was actually caused for the purposes of conviction for indecent exposure; it is

sufficient for the evidence to show that a defendant knew or should have known that his conduct was likely to cause affront or alarm. *Commonwealth v. Tiffany*, 926 A.2d 503, 511 (Pa.Super. 2007), *appeal denied*, 597 Pa. 706, 948 A.2d 804 (2008).

Location of Offense: There must be evidence that the exposure was (1) in a public place or (2) that the defendant knew or should have known that the exposure was in the presence of others and that it would offend, affront or alarm. See *Commonwealth v. DeWalt*, 752 A.2d 915, 917 (Pa.Super. 2000) (Evidence was insufficient to demonstrate that the defendant's dance on her back porch was done in the presence of others – the alleged victims, three young boys, were watching from the roof of a shed in a neighboring yard. The back porch was definitely not “in a public place.”).

Location of Offense: Evidence was sufficient when the defendant was unconscious in his car in a drive-thru lane of McDonald's restaurant, with his penis exposed. *Commonwealth v. Thiry*, 919 A.2d 961 (Pa. Super. 2007), 594 Pa. 679, 932 A.2d 1288 (2007).

C. Penalties

- 1. Children Involved:** If the defendant knew or should have known that any of the persons present were under the age of 16, indecent exposure is a misdemeanor of the first degree. The maximum incarceration sentence is up to five years, and the maximum fine is up to \$10,000.
- 2. Other Cases:** In all other circumstances, indecent exposure is a misdemeanor of the second degree. The maximum incarceration sentence is up to two years, and the maximum fine is up to \$5,000.

3.10 INCEST

A. Incest

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 4302(a)

- The defendant knowingly either:
 - a) marries,
 - b) cohabits, or
 - c) has sexual intercourse with
- Any of the following:
 - a) an ancestor of the whole or half blood,
 - b) a descendant of the whole or half blood,

- c) a brother or sister of the whole or half blood,
- d) an uncle or aunt of the whole blood, or
- e) a nephew or niece of the whole blood.

The relationships referred to in this section include blood relationships without regard to legitimacy and relationship of parent and child by adoption.

2. Definitions

“Cohabit” is defined in 18 PA.CON.S.TAT.ANN. § 103 as “To live together under the representation or appearance of being married.”

“Sexual Intercourse” refers to the definition of sexual intercourse in 18 PA. CONS. STAT. ANN. § 3101, which includes vaginal, anal and oral intercourse. *Commonwealth v. Fouse*, 612 A.2d 1067, 1069 (Pa.Super. 1992), *appeal denied*, 535 Pa. 614, 629 A.2d 1376 (1993).

3. Gender-Neutral

The incest statute is a gender-neutral crime which proscribes the stated conduct against males and females. *Commonwealth v. K.M.*, 680 A.2d 1168, 1171 (Pa.Super. 1996).

4. Prohibited Marriage Licenses

Pennsylvania law provides that no marriage license may be issued to applicants within the prohibited degrees of consanguinity as follows:

- a man may not marry his mother;
- a man may not marry the sister of his father;
- a man may not marry the sister of his mother;
- a man may not marry his sister;
- a man may not marry his daughter;
- a man may not marry the daughter of his son or daughter;
- a man may not marry his first cousin;
- a woman may not marry her father;
- a woman may not marry the brother of her father;
- a woman may not marry the brother of her mother;
- a woman may not marry her brother;
- a woman may not marry her son;
- a woman may not marry the son of her son or daughter;
- a woman may not marry her first cousin.

23 PA.CON.S.TAT.ANN. § 1304

B. Incest of a Minor

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 4302(b)

- The defendant knowingly either:
 - a) marries,
 - b) cohabits, or
 - c) has sexual intercourse with
- Any of the following if they are under the age of 13 or between 13 and 18 years of age and the defendant is four or more years older:
 - a) an ancestor of the whole or half blood,
 - b) a descendant of the whole or half blood,
 - c) a brother or sister of the whole or half blood,
 - d) an uncle or aunt of the whole blood, or
 - e) a nephew or niece of the whole blood, and

The relationships referred to in this section include blood relationships without regard to legitimacy and relationship of parent and child by adoption.

2. Evidence

The uncorroborated testimony of a sexual assault victim, including a victim of incest, if believed by the trier of fact, is sufficient to convict a defendant, despite contrary evidence from defense witnesses. *Commonwealth v. Charlton*, 902 A.2d 554, 562 (Pa. Super. 2006), *appeal denied*, 590 Pa. 655, 911 A.2d 933 (2006).

In an incest trial, the victim may testify about incidents of sexual abuse other than those mentioned in the indictment:

It is clear that “in a prosecution for incest it is ‘competent for the commonwealth to introduce evidence of illicit relations between the parties prior to the commission of the specific offense laid in the indictment.’” *Commonwealth v. Buser*, 277 Pa.Super. 451, 455, 419 A.2d 1233, 1235 (1980) (quoting *Commonwealth v. Bell*, 166 Pa. 405, 411, 31 A. 123, 123 (1895), and *Commonwealth v. Leppard*, 271 Pa.Super. 317, 319, 413 A.2d 424, 425 (1979)). Such testimony is relevant to “show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial.” *Commonwealth v. Buser*, 277 Pa.Super. at 455, 419 A.2d at 1235 (quoting McCormick on Evidence § 190 at 449 (Cleary ed. 1972)). Nor does the fact that Jeanette could not remember the exact dates of previous sexual attacks render the testimony inadmissible.

Commonwealth v. Ritchie, 472 A.2d 220, 223 (Pa. Super. 1984), *remanded on other grounds*, 509 Pa. 357, 502 A.2d 148 (1985).

C. Penalties

Grading: Incest and Incest of a Minor are felonies of the second degree. The maximum incarceration sentence is up to ten years, and the maximum fine is up to \$25,000.

3.11 INVASION OF PRIVACY

This section is Pennsylvania’s response to the increasingly prevalent act of voyeurism, and proscribes the secret viewing, photographing or otherwise filming/ recording of a person dressing or undressing or of the sexual or other intimate parts of a person at a place and time when the other person has a reasonable expectation of privacy. For more detailed information, see *Protecting Traditional Privacy Rights in a Brave New Digital World: The Threat Posed By Cellular Phone-Cameras and What States Should Do To Stop It*, 111 Penn St. L. Rev. 739, 757 (2007); Marjorie A. Shields, *Criminal Prosecution of Video or Photographic Voyeurism*, 120 A.L.R.5th 337 (2004).

A. Statutory Citation

18 PA.CON.S.TAT.ANN. § 7507.1.

B. Statutory Elements

Secretly Viewing or Recording of Full or Partial Nude Person, 18 PA.CON.S.TAT.ANN. § 7507.1(a)(1).

- 1) A person knowingly views, photographs, videotapes, electronically depicts, films or otherwise records;
- 2) For the purposes of arousing or gratifying the sexual desire of any person;
- 3) Another person
 - a) without that person’s knowledge and consent;
 - b) while that person is in a state of full or partial nudity;
 - c) at a place where that person would have a reasonable expectation of privacy.

“Full or Partial Nudity” means a display of:

- all or any part of the human genitals or pubic area or buttocks;
- any part of the nipple of the breast of any female, with less than a fully opaque covering.

“Place where a person would have a reasonable expectation of privacy” includes a location where a reasonable person would believe that he could

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disrobe in privacy without being concerned that his undressing was being viewed, photographed or filmed by another.

Secretly Viewing or Recording of Intimate Parts of Another Person, 18 PA.CON.S.TAT.ANN. § 7507.1(a)(2).

- 1) A person knowingly views or photographs, videotapes, electronically depicts, films or otherwise records;
- 2) For the purposes of arousing or gratifying the sexual desire of any person;
- 3) The intimate parts of another person
 - a) whether or not covered by clothing
 - b) without that person's knowledge and consent,
- 4) Which intimate parts that person does not intend to be visible by normal public observation

"Intimate parts" means parts of the body not intended to be visible by normal public observation, including:

- The human genitals, pubic area or buttocks;
- The nipple of a female breast.

Transfer of Image, 18 PA.CON.S.TAT.ANN. § 7507.1(a)(3).

- 1) A person knowingly transfers or transmits an image obtained in violation of either section above;
- 2) For the purposes of arousing or gratifying the sexual desire of any person;
- 3) By any of the following:
 - a) live or recorded telephone message,
 - b) electronic mail,
 - c) the Internet, or
 - d) by any other transfer of the medium on which the image is stored.

C. Multiple Violations

A separate violation of this section occurs for:

- **Multiple Victims:** each victim of an offense defined herein pursuant to one scheme or course of conduct whether at the same or different times; or
- **Multiple Occasions:** each occasion that a person is a victim during a separate course of conduct either individually or otherwise.

D. Penalties

1. **Multiple Violations:** Invasion of privacy is a misdemeanor of the second degree if there is more than one violation. The maximum incarceration sentence is two years, and the maximum fine is \$5,000. 18 PA.CON.S.TAT.ANN. § 7507.1(b).

2. **Other Cases:** All other categories of Invasion of Privacy are misdemeanors of the third degree. The maximum incarceration sentence is one year, and the maximum fine is \$2,500. 18 PA.CON.S.TAT.ANN. § 7507.1(b).

E. Exclusions for Legitimate Law Enforcement Conduct

This section does not apply if the conduct is done by any of the following:

- Law enforcement officers during a lawful criminal investigation; or
- Law enforcement officers or by personnel of the Department of Corrections or a local correctional facility, prison or jail for security purposes or during investigation of alleged misconduct by a person in the custody of the department or local authorities.

F. Definition of “Photographs” or “Films”

“Photographs” or “films.” Making any photograph, motion picture film, videotape or any other recording or transmission of the image of a person. 18 PA.CON.S.TAT.ANN. § 7507.1

3.12 SEXUAL INTERCOURSE WITH ANIMAL

A. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 3129

- The defendant engages in any form of sexual intercourse with an animal

B. History

In *Kuch v. Rapelje*, 2010 WL 3419823 *11 (E.D.Mich. 2010), reported that at least 33 states currently have statutes prohibiting bestiality.

C. Penalty

Sexual Intercourse with Animal is a misdemeanor of the second degree. The maximum incarceration sentence is up to two years, and the maximum fine is up to \$5,000.

3.13 CRIMINAL ATTEMPT, CONSPIRACY OR SOLICITATION

A. Statutory Citations

18 PA.CON.S.TAT.ANN. §§ 901 (Criminal Attempt), 902 (Criminal Solicitation) and 903 (Criminal Conspiracy).

B. Definition of Inchoate Offenses

18 PA. CONS. STAT. ANN. § 901. Criminal attempt

(a) Definition of attempt.--A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.

18 PA. CONS. STAT. ANN. § 902. Criminal Solicitation

(a) Definition of solicitation. A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

18 PA. CONS. STAT. ANN. § 903. Criminal conspiracy

(a) Definition of conspiracy.--A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(b) Scope of conspiratorial relationship.--If a person guilty of conspiracy, as defined by subsection (a) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, to commit such crime whether or not he knows their identity.

(c) Conspiracy with multiple criminal objectives.--If a person conspires to commit a number of crimes, he

is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

C. Penalties

1. Grading and Penalties

18 PA.CONS.STAT.ANN. § 905(a) provides that inchoate crimes have the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy (unless otherwise provided in the Pennsylvania Crimes and Offenses Code). *See also, Commonwealth v. Hoke*, 599 Pa. 587, 593-594, 962 A.2d 664, 668 (2009).²⁰

2. Dismissal of Charge

18 PA.CONS.STAT.ANN. § 905(b) provides that if the particular conduct charged to constitute the inchoate crime “is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this section, the court may dismiss the prosecution.”

D. Sex Offender Registration

The inchoate crimes under 18 PA.CONS.STAT.ANN. §§ 901, 902 & 903 are listed in 42 PA.CONS.STAT.ANN. § 9799.14 and are in the Tier for which the underlying crime is listed.

²⁰ See Chapter 9, Section 9.8(B) Statutory Penalties for Crimes of Sexual Violence for the specific penalties.

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Chapter Four

Offenses Against Children

4.1 CHAPTER OVERVIEW

This chapter outlines laws specifically designed to protect children. Also covered in this chapter are crimes when obscene materials are shown or distributed to minors, and the recent development of “sexting” which is when a minor sends a text image of himself or another minor.

Listed below are the crimes discussed in this chapter.

- Section 4.2: **Luring a Child into a Motor Vehicle**, 18 PA.CONS.STAT.ANN. § 2910
- Section 4.3: **Endangering Welfare of Children**, 18 PA.CONS.STAT.ANN. § 4304
- Section 4.4: **Corruption of Minors**, 18 PA.CONS.STAT.ANN. § 6301
- Section 4.5: **Sexual Abuse of Children**, 18 PA.CONS.STAT.ANN. § 6312
- Section 4.6: **Unlawful Contact with Minor**, 18 PA.CONS.STAT.ANN. § 6318
- Section 4.7: **Sexual Exploitation of Children**, 18 PA.CONS.STAT.ANN. § 6320
- Section 4.8: **Internet Child Pornography**, 18 PA.CONS.STAT.ANN. §§ 7621-7630
- Section 4.9: **Obscene Materials**, 18 PA.CONS.STAT.ANN. § 5903
- Section 4.10: **Transmission of Sexually Explicit Images by Minor**, 18 PA.CONS.STAT.ANN. § 6321

Section 4.12 examines the cases where children are the intended victims of an **attempt, conspiracy or solicitation** involving sexual violence.

Offenses of sexual violence which may involve children as victims, such as Rape, 18 PA.CONS.STAT.ANN. § 3121, Statutory Sexual Assault, 18 PA.CONS.STAT.ANN. § 3122, and Involuntary Deviate Sexual Intercourse, 18 PA.CONS.STAT.ANN. § 3123, are covered in Chapter 3.

4.2 LURING A CHILD INTO A MOTOR VEHICLE OR STRUCTURE

A. Statutory Citation and Elements

18 PA.CONS.STAT.ANN. § 2910

- Lures or attempts to lure a child;

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- Into a motor vehicle; or
 - Into a structure;
- Without the consent, express or implied, of the child's parent or guardian;
- Unless the circumstances reasonably indicate that the child is in need of assistance.

B. Mens Rea

Age of Child:

As to the element of intent, culpability required is intentional, knowing or reckless conduct.

At trial, to establish that a defendant possessed the sufficient *mens rea* to commit the offense of luring a child into a motor vehicle, the prosecution is required to prove, beyond a reasonable doubt, that the defendant either *intentionally* sought out the victim because he was under the age of 18, *knew* the victim was under the age of 18, or, at the very least, was *reckless* as to the victim's age. ***Commonwealth v. Gallagher***, 592 Pa. 262, 264-265, 924 A.2d 636, 637-638 (2007).

Luring:

There is no need for the prosecution to show "intent to harm." Luring does not require a bad purpose intent. ***Commonwealth v. Gallagher***, 592 Pa. 262, 269, 924 A.2d 636, 640 (2007); ***Commonwealth v. Figueroa***, 648 A.2d 555, 558 (Pa. Super. 1994), *appeal denied*, 540 Pa. 578, 655 A.2d 510 (1995). The purpose behind this crime is to prohibit persons from offering rides to children under any invitational pretext. It is not the Commonwealth's burden to prove that a person who lures a child into an automobile does so with the purpose of harming the child. ***Commonwealth v. Hart***, 611 Pa. 531, 552, 28 A.3d 898, 911 (2011)

C. Definitions

"Child" A person under 18 years of age. 18 PA.CON.S.TAT.ANN. §§ 2908(b) & 2910(c); ***Commonwealth v. Gallagher***, 592 Pa. 262, 266, 924 A.2d 636, 638 (2007).

"Motor vehicle" defined: Any self-propelled device in, upon or by which any person or property is or may be transported or drawn on a public highway. 18 PA.CON.S.TAT.ANN. § 2910(c).

"Structure" defined: A house, apartment building, shop, warehouse, barn, building, vessel, railroad car, cargo container, house car, trailer, trailer coach, camper, mine, floating home or other enclosed structure capable of holding a child, which is not open to the general public. 18 PA.CON.S.TAT.ANN. § 2910(c).

D. Conduct Constituting “lure”

In *Commonwealth v. Hart*, 611 Pa. 531, 28 A.3d 898 (2011), the Pennsylvania Supreme Court held that an “attempt to lure” does not occur upon a mere offer of a ride, but rather, involves only “situations where a child is provided a further enticement or inducement to enter a vehicle” in addition to the offer of a ride. 611 Pa. at 550-551, 28 A.3d at 910. Examples provided by the Court of “further enticement or inducement” were:

- Receiving money
- A treat such as candy or ice cream
- An object of interest like a toy, game or puppy.

An enticement or inducement may also take the form of a “directive or a command to a child to enter a car, which suggests deleterious consequences” to the child if the child does not obey. *Id.*

Hand motions: waiving or motioning “come here” to the victim. *Commonwealth v. McClintock*, 639 A.2d 1222, 1227 (Pa. Super. 1994).

Inducement: offering the victim money in exchange for work, the nature of which defendant refused to describe unless the victim accompanied him to his car, constitutes a “lure”. The definition of “lure” includes tempting by pleasure or gain, and the gain does not have to be a pleasant one; it can be “any kind of inducement.” *Commonwealth v. Adamo*, 637 A.2d 302, 307 (Pa. Super. 1994), *appeal denied*, 538 Pa. 631, 647 A.2d 507 (1994), *cert. denied*, 513 U.S. 1022 (1994).

Inducement: approaching walking victim while in a car and offering the victim money in exchange for help finding a location was sufficient evidence to constitute a lure. *Commonwealth v. Strouse*, 909 A.2d 368, 369 (Pa. Super. 2006), *appeal denied*, 593 Pa. 740, 929 A.2d 1162 (2007).

Commands and Threats: a lure may be “any invitational pretext” which means not only an enticement of a benefit to the child and but also includes threats, or commands, or implied threats. *Commonwealth v. Nanorta*, 742 A.2d 176 (Pa. Super. 1999), *appeal denied*, 563 Pa. 613, 757 A.2d 930 (2000). The court held that the command “get in my car” could be characterized as a lure.

E. Penalties

Grading: a misdemeanor of the first degree, unless the child is under 13 years of age, then a felony of the second degree.

Penalty: If a misdemeanor of the first degree: maximum incarceration sentence

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and the maximum fine: *shall not exceed 5 years and \$10,000.*

Enhanced Penalty Due To Age of Victim: If victim is a child under age 13, then a felony of the second degree: maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

F. Sex Offender Registration

The crime of Luring a Child into a Motor Vehicle under 18 PA.CON.S.STAT.ANN. § 2910 is a Tier I Sexual Offense under 42 PA.CON.S.STAT.ANN. § 9799.14. A Tier I sexual offense requires registration with the Pennsylvania State Police for a period of 15 years.¹ See 42 PA.CON.S.STAT.ANN. § 9799.15.

G. 2005 Amendment

On November 10, 2005, *Luring a Child into a Motor Vehicle* was amended to *Luring a Child into a Motor Vehicle or Structure*. The new statute makes it a crime to lure, or *attempt to lure*, a child into a motor vehicle *or a structure*. The amendment also provides an affirmative defense to luring a child to a structure for *a lawful purpose* and defines motor vehicle and structure. The act took effect 60 days following November 10, 2005.

Therefore, the holding of the Pennsylvania Supreme Court in *Commonwealth v. Tate*, 572 Pa. 411, 816 A.2d 1097 (2003) would no longer be applicable to this crime. In *Tate*, the Supreme Court held that the prior luring statute did not include the inchoate offense of attempting to lure a child into a motor vehicle. Where a defendant does not manage to get the child into the vehicle, the Supreme Court held that the appropriate offense was criminal attempt; however, the statute has now been amended to include attempt.

4.3 ENDANGERING WELFARE OF CHILDREN

Types of Endangering Welfare of Children:

- Endangering Welfare of Children – Supervision of Child
18 PA.CON.S.STAT.ANN. § 4304(a)(1))
- Official Preventing or Interfering with Report of Suspected Child Abuse
18 PA.CON.S.STAT.ANN. § 4304(a)(2)

¹ For additional detailed discussion, see Chapter 9, Section 9.7 Sexually Violent Predator Assessment and Chapter 11, SEX OFFENDER REGISTRATION.

A. Endangering Welfare of Children – Supervision of Child

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 4304(a)(1).

- A parent or guardian, or
- Other person supervising the welfare of a child under 18 years of age or
 - a person that employs or supervises such a person;
- Knowingly endangers the welfare of the child;
- By violating a duty of care, protection or support.

2. Purpose of Statute

This statute attempts to prohibit a broad range of conduct in order to safeguard the welfare and security of our children. *Commonwealth v. Trippett*, 932 A.2d 188, 194 (Pa.Super. 2007); *Commonwealth v. Brown*, 721 A.2d 1105, 1106 -1107 (Pa.Super. 1998). The common sense of the community should be considered when interpreting the language of the statute.

3. Status as a Parent, Guardian or Other Person

Parent: In the case of a parent and child, the appellate courts have repeatedly stated that a “parent has the legal duty to her [or his] child, and the discharge of this duty requires affirmative performance.” *Commonwealth v. Howard*, 402 A.2d 674, 676 (Pa. Super. 1979); *Commonwealth v. Barnhart*, 497 A.2d 616, 621 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 34 (1988).

Other Person Supervising the Child: As used in this subsection, the term “person supervising the welfare of a child” means a person *other* than a parent or guardian who provides care, education, training or control of a child. 18 PA.CON.S.TAT.ANN. § 4304(a)(3).

“Other person supervising the welfare of the child” is not limited to only those persons with permanent, temporary or other quasi-legal custody, but also includes, and is not limited to:

- stepparents;
- grandparents;
- adult siblings;
- adult roommates;
- life partners;
- any adult person residing with a custodial or non-custodial child;
- any adult person who is placed in a position of control and supervision of a child.

Commonwealth v. Ahmad, 961 A.2d 884 (Pa.Super. 2008); *Commonwealth v. Brown*, 721 A.2d 1105 (Pa.Super. 1998); *Commonwealth v. Kellam*, 719

A.2d 792 (Pa. Super. 1998), *appeal denied*, 559 Pa. 714, 740 A.2d 1145 (1999).

The duty to care, protect or support a child is not limited to natural and adoptive parents. “Whenever a person is placed in control and supervision of a child, that person has assumed such a status relationship to the child so as to impose a duty to act.” ***Commonwealth v. Kellam***, 719 A.2d 792, 796 (Pa. Super. 1998), *appeal denied*, 559 Pa. 714, 740 A.2d 1145 (1999). In ***Kellam***, the defendant lived with his girlfriend and her infant daughter, controlled many aspects of the mother’s life, including raising her other children and the infant victim, voluntarily assumed parental responsibilities with regard to the child, e.g. watching her when the mother was away, changing her diaper and feeding her. He was held to have supervised the welfare of the child.

There must be a case-by-case review in determining whether an adult living with a minor child is criminally liable, and there must be evidence that the adult was “involved” with the child. Factors such as playing with the child, eating with the child, babysitting the child or otherwise interacting with the child should be examined. ***Commonwealth v. Brown***, 721 A.2d 1105, 1108 (Pa. Super. 1998).

- ▶ Defendant had a duty to protect the child when she accepted the role of babysitter. ***Commonwealth v. Vining***, 744 A.2d 310 (Pa. Super. 1999), *appeal denied*, 564 Pa. 709, 764 A.2d 1069 (2000).
- ▶ Where there is no evidence of defendant’s role as a supervisor or guardian of the child (e.g. defendant is just a visitor in the victim’s home) the defendant cannot be convicted of Endangering Welfare of Children. ***Commonwealth v. Halye***, 719 A.2d. 763 (Pa. Super. 1998), *appeal denied*, 560 Pa. 699, 743 A.2d 916 (1999), *cert. denied*, 529 U.S. 1012 (2000).

4. Specific Intent Offense

Endangering the welfare of a child is a specific intent offense enacted in broad terms so as to safeguard the welfare and security of children. See ***Commonwealth v. Foster***, 764 A.2d 1076 (Pa. Super. 2000), *appeal denied*, 566 Pa. 658, 782 A.2d 542 (2001): “To be convicted under this statute, the Commonwealth must prove a ‘knowing violation of a duty of care.’” 764 A.2d at 1082 (quoting ***Commonwealth v. Fewell***, 654 A.2d 1109, 1117 (Pa. Super. 1995)).

“Often, intent cannot be proven directly but must be inferred from examination of the facts and circumstances of the case.” ***Commonwealth v. Winger***, 957 A.2d 325, 329 (Pa. Super. 2008).

(a) Three-Prong Test

The accused must act “knowingly” to be convicted of endangering the welfare of a child. The Superior Court of Pennsylvania has employed a three-prong standard to determine whether the Commonwealth’s evidence is sufficient to prove this element of intent:

- i) The accused is aware of his duty to protect the child;
- ii) The accused is aware that the child is in circumstances that threaten the child’s physical or psychological welfare; and
- iii) The accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child’s physical or psychological welfare.

Commonwealth v. Retkofsky, 860 A.2d 1098, 1100 (Pa. Super. 2004); *Commonwealth v. Cardwell*, 515 A.2d 311, 315 (Pa. Super. 1986), *appeal denied*, 515 Pa. 573, 527 A.2d 535 (1987).

(b) Examples of “Knowingly Endangering”

- ▶ *Commonwealth v. Winger*, 957 A.2d 325 (Pa.Super. 2008)

Driving with high blood alcohol level: There was a *prima facie* case of endangering welfare of child against defendant when she drove her car with .252% blood alcohol content and her two year old child was in the car at the time. *Commonwealth v. Winger*, 957 A.2d 325 (Pa.Super. 2008).

- ▶ *Commonwealth v. Miller*, 600 A.2d 988 (Pa. Super. 1992)

The Superior Court held that defendant was not aware that she had placed her child in circumstances that threatened the child’s physical or psychological welfare where the defendant agreed to go out only after being told by the child’s father that his neighbor had agreed to baby sit the child. Defendant relied on that representation and left the child sleeping in a room with a space heater that eventually created a fire, killing the child. Failure to check on the alleged babysitting arrangements was not unreasonable.

- ▶ *Commonwealth v. Vining*, 744 A.2d 310 (Pa. Super. 1999), *appeal denied*, 564 Pa. 709, 764 A.2d 1069 (2000)

Although a new trial was granted on evidentiary grounds, the Superior Court held that as the person who beat and burned the

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child, the defendant would have been aware that the child was in circumstances that threatened her physical well-being.

- ▶ ***Commonwealth v. Jones***, 744 A.2d 310 (Pa. Super. 1999), *appeal granted*, 563 Pa. 658, 759 A.2d 383 (2000), *appeal dismissed*, 565 Pa. 463, 774 A.2d 1246 (2001)

In the companion case to ***Vining***, Vining's live-in companion, defendant Jones, was found guilty of Endangering Welfare of Children based on the theory that he was present in the apartment after the child had been beaten and burned. The court held that the nature of the child's injuries would have been apparent to defendant Jones, and thus he knew the victim had been injured and needed medical assistance, but failed to seek immediate medical attention for the child.

- ▶ ***Commonwealth v. Retkofsky***, 860 A.2d 1098 (Pa. Super. 2004)

The Court held that defendant was aware of the dangers and "knowingly" endangered his son when he drove an ATV at an accelerated speed down a paved residential street, fleeing from police, with his nine-year-old son hanging onto defendant's body without any other restraint.

- ▶ ***Commonwealth v. Cardwell***, 515 A.2d 311 (Pa. Super. 1986), *appeal denied*, 515 Pa. 573, 527 A.2d 535 (1987)

The statute requires affirmative performance which cannot be met simply by showing any step at all toward preventing harm, however incomplete or ineffectual. The person charged with the duty of care must take steps that are reasonably calculated to achieve success. The facts of the ***Cardwell*** case involved a situation where the defendant's husband had sexually abused her daughter for a period of four years, and defendant, upon learning of the abuse, did nothing other than to write two angry letters to her husband. Because she failed to take concrete steps to remove her daughter from the situation, defendant was guilty of Endangering Welfare of Children.

- ▶ ***Commonwealth v. Barnhart***, 497 A.2d 616 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817 (1988)

Where the child suffered from a serious and life-threatening medical condition, prayers and anointing the child were not sufficient steps

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to protect the child's welfare. Parents have an affirmative duty to provide medical care to protect the child's life, regardless of or despite their religious beliefs. *See also Commonwealth v. Foster*, 764 A.2d 1076 (Pa. Super. 2000), *appeal denied*, 566 Pa. 658, 782 A.2d 542 (2001).

- ▶ *Commonwealth v. Wallace*, 817 A.2d 485 (Pa. Super. 2002), *appeal denied*, 574 Pa. 774, 833 A.2d 143 (2003), *cert. denied*, 541 U.S. 907, 124 S. Ct. 1610, 158 L. Ed.2d 251 (2004)

Where defendant did nothing to better the conditions of his house (dirty house with foul odor, dried food and food stains covering the walls, flies, maggots, hundreds of mice, spoiled food in the refrigerator, a hole in the roof, large holes in the kitchen floor and ceiling which allowed water to flow into an electric box in the basement), the defendant was guilty of Endangering Welfare of Children.

The statute does not require actual infliction of physical injury or that the child be in imminent threat of physical harm; exposure to danger is sufficient. In this case, even though the defendant's children suffered no physical harm, by allowing the children to live "with such filth and vermin, with no working furnace for heat, and with water running into the electrical box creating a fire hazard", the risk of physical and/or psychological harm was present. 817 A.2d at 492.

(c) Definition of "Endangers"

Although a violation of the accused's duty of care under Section 4304 includes exposing a child to danger or putting a child at risk of harm, this crime *does not require the actual infliction of physical harm*.

The statute does not require the actual infliction of physical injury. Nor does it state a requirement that the child or children be in imminent threat of physical harm. Rather it is the awareness by the accused that [her] violation of [her] duty of care, protection and support is practically certain to result in the endangerment to [her] children's welfare, which is proscribed by the statute.

Commonwealth v. Winger, 957 A.2d 325, 329 (Pa. Super. 2008); *see also, Commonwealth v. Wallace*, 817 A.2d 485, 491 (Pa. Super. 2002),

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appeal denied, 574 Pa. 774, 833 A.2d 143 (2003), *cert. denied*, 541 U.S. 907 (2004).

Further, a person must take affirmative, reasonable steps to protect the child:

The affirmative performance required by [Section] 4304 cannot be met simply by showing any step at all toward preventing harm, however incomplete or ineffectual. An act which will negate intent is not necessarily one which will provide a successful outcome. However, the person charged with the duty of care is required to take steps that are reasonably calculated to achieve success. Otherwise, the meaning of the duty of care is eviscerated.

Commonwealth v. Pahel, 689 A.2d 963, 964 (Pa. Super. 1997).

B. Official Preventing or Interfering with Report of Suspected Child Abuse

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 4304(a)(2).

- A person in an official capacity
- Prevents or interferes with
- The making of a report of suspected child abuse under 23 PA.CON.S.TAT. Chapter 63, The Child Protective Services Law.

C. Penalties

1. Single Episode

Endangering the Welfare of Children is a misdemeanor of the first degree. In accordance with 18 PA. CONS. STAT. ANN. § 1104, the maximum incarceration sentence is up to five years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$10,000.00.

2. Course of Conduct

Where there is a course of conduct of endangering the welfare of a child, the offense constitutes a felony of the third degree. In accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is up to 7 years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$15,000.00.

Examples of “Course of Conduct”

- ▶ ***Commonwealth v. Mackert***, 781 A.2d 178 (Pa. Super. 2001), *appeal denied*, 568 Pa. 696, 796 A.2d 980 (2002)

Where defendant’s two young children had dirty hands, feet and toes, dirt all over their skin, dirty clothes, numerous bruises on their buttocks, groin, thighs and backs, consistent with intentional infliction, and one of the victims had lost twenty percent of her body weight in a two week period, and where defendant admits she was the full-time caregiver, jury could reasonably conclude course of conduct existed that endangered the welfare of the children.

- ▶ ***Commonwealth v. Ressler***, 798 A.2d 221 (Pa. Super. 2002).

Course of conduct existed where the sexual abuse of Defendant’s stepdaughter occurred over a period of two years.

- ▶ ***Commonwealth v. Popow***, 844 A.2d 13 (Pa. Super. 2004).

Where the entire episode for which defendant was charged was one event on one night, there was no “course of conduct” justifying a third degree felony charge of Endangering Welfare of Children. The legislative intent of 18 Pa.Cons.Stat.Ann. § 4304(b) is to punish a parent who abused his or her child over a period of time and for repeated behavior, but not for a single incident that occurred within minutes.

- ▶ ***Commonwealth v. Passarelli***, 789 A.2d 708 (Pa. Super. 2001), *aff’m*, 573 Pa. 372, 825 A.2d 628 (2003).

Where the Commonwealth labels the charge of Endangering Welfare of Children in the information as a felony of the third degree, but the descriptive language in the information indicates only a misdemeanor and where no course of conduct is alleged, the trial court was correct in sentencing defendant to a misdemeanor sentence upon a conviction for Endangering Welfare of Children

D. Sex Offender Registration

The crime of Endangering Welfare of Children under 18 PA.CON.S.TAT.ANN. § 4304 is not specifically designated as a “listed offense” under 42 PA.CON.S.TAT.ANN. § 9799.14.

4.4 CORRUPTION OF MINORS

Types of Corruption of Minors:

- Corruption of Minors: Non-Sexual Conduct
18 PA.CON.S.TAT.ANN. § 6301(a)(1)(i)
- Corruption of Minors: Sexual Conduct
18 PA.CON.S.TAT.ANN. § 6301(a)(1)(ii)
- Corruption of Minors: Truancy
18 PA.CON.S.TAT.ANN. § 6301(a)(2)

A. Corruption of Minors – Non-Sexual Conduct

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 6301(a)(1)(i)

- The defendant is age 18 years or older at the time of the incident, and
- The minor is under 18 years of age at the time of the incident, and
- The defendant:
 - By any act corrupts or tends to corrupt the morals of the minor, or
 - Aids, abets, entices or encourages the minor in the commission of any crime, or
 - Knowingly assists or encourages the minor in violating his or her parole or any order of court.

2. Penalty

Grading: Corruption of Minors – Non-Sexual Conduct under 18 PA.CON.S.TAT.ANN. § 6301(a)(1)(i) is a misdemeanor of the first degree.

Penalty: In accordance with 18 PA. CONS. STAT. ANN. § 1104, in the case of a misdemeanor of the first degree, a term of imprisonment shall be fixed by the court at not more than five years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$10,000.00.

B. Corruption of Minors – Sexual Conduct²

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 6301(a)(1)(ii)

- The defendant is age 18 years or older at the time of the incident, and
- The minor is under 18 years of age at the time of the incident, and
- The defendant:

² Subsection (a)(1)(ii) was added in 2010, 18 PA.CON.S.TAT.ANN. § 6301(a)(1)(ii).

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- By any course of conduct in violation of Chapter 31 regarding Sexual Offenses, 18 PA.CON.S.TAT.ANN. §§ 3101 *et seq.*
- Corrupts or tends to corrupt the morals of the minor, or
- Aids, abets, entices or encourages the minor in the commission of an offense under Chapter 31 regarding Sexual Offenses, 18 PA.CON.S.TAT.ANN. §§ 3101 *et seq.*

2. Examples

- ▶ ***Commonwealth v. Cesar***, 911 A.2d 978 (Pa. Super. 2006), *appeal denied*, 593 Pa. 725, 928 A.2d 1289 (2007)

Evidence supported conviction for corruption of minors and other related sex offenses when victim, age 6 at the time of the incidents, testified that defendant, her father, pulled her pajamas down while she was in his room, told her his pee-pee hurt, put his penis in her bottom, and told her not to tell anybody.

- ▶ ***Commonwealth v. Charlton***, 902 A.2d 554 (Pa. Super. 2006), *appeal denied*, 590 Pa. 655, 911 A.2d 933 (2006)

Evidence supported conviction for Involuntary Deviate Sexual Intercourse, Corruption of Minors and other related sex offenses when victim, who was defendant's daughter, testified that defendant rubbed his penis against her, touched her vagina, and had sexual intercourse with her on multiple occasions when she was approximately 4 1/2 years old.

- ▶ ***Commonwealth v. Judd***, 897 A.2d 1224 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006)

Evidence supported conviction for rape, corruption of minors and other sexual violence offenses when, at trial, the minor victims provided the following testimony:

At trial the oldest victim testified that Judd touched her both over and under her clothing on many occasions. On at least one occasion he forced her onto a bed, pulled her pants below her thighs and placed his penis "between the cheeks" of her vagina. She also testified that Judd would watch pornography tapes with her and on one occasion the five year old was present. The youngest victim also testified at trial. According to her, Judd pulled her pants down while they were in the basement of her grandmother's house and put "his private part" in "her private part."

897 A.2d at 1234.

► ***Commonwealth v. Smith***, 863 A.2d 1172 (Pa. Super. 2004)

The defendant was convicted of criminal attempt to commit aggravated indecent assault, corruption of minors, and other related sexual assault charges. The defendant sexually assaulted two relatives of his fiancée, aged sixteen and twelve. He consistently had inappropriate sexual contact with the two underage victims. Both victims were affected sexually and spiritually, and P.C. thereafter became pregnant by appellant. N.T. 11/5/03, at 18–20. Viewing all this evidence in the light most favorable to the Commonwealth, there was sufficient evidence for the fact-finder to conclude appellant committed the charged corrupting the morals of a minor.

3. Penalty

Grading: Corruption of Minors – Sexual Conduct under 18 PA.CONS.STAT.ANN. § 6301(a)(1)(ii) is a felony of the third degree.

Penalty: In accordance with 18 PA.CONS.STAT.ANN. § 1103, the maximum incarceration sentence is up to 7 years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$15,000.00.

C. Corruption of Minors – Truancy

1. Statutory Citation and Elements

18 PA.CONS.STAT.ANN. § 6301(a)(2)

- Any person
 - Who knowingly aids, abets, entices or encourages
 - A minor younger than 18 years of age
 - To commit truancy.

2. Penalty

Grading: Corruption of Minors – Truancy under 18 PA.CONS.STAT.ANN. § 6301(a)(2) is a misdemeanor of the first degree.

Penalty: A violation of 18 PA.CONS.STAT.ANN. § 6301(a)(2), regarding truancy, is a summary offense. In accordance with 18 PA. CONS. STAT. ANN. § 1105, in the case of a summary conviction, a term of imprisonment shall be fixed by the court at not more than 90 days, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$300.

Multiple Convictions: A second offense within one year of the date of the first conviction is graded as a misdemeanor of the third degree. In accordance with 18 PA.CONS.STAT.ANN. § 1104, in the case of a misdemeanor of the third degree, a

term of imprisonment shall be fixed by the court at not more than one year, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$2,500.00.

D. Scope of “Corrupts or Tends to Corrupt”

General Standard:

Standard in deciding what conduct can be said to corrupt the morals of a minor is “the common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain.” *Commonwealth v. Pankraz*, 554 A. 2d 974, 977 (Pa. Super. 1989), *appeal denied*, 522 Pa. 618, 563 A.2d 887 (1989), *quoting Commonwealth v. Randall*, 133 A.2d 276 (Pa. Super. 1957), *cert denied*, 355 U.S. 954 (1958); *Commonwealth v. Decker*, 698 A.2d 99, 101(Pa. Super. 1997), *appeal denied*, 550 Pa. 698, 705 A.2d 1304 (1998).

Since the statute is protective in nature and designed to “cover a broad range of conduct in order to safeguard the welfare and security of our children”, the statute must be drawn broadly. *Commonwealth v. Barnette*, 760 A. 2d 1166, 1173 (Pa. Super. 2000), *appeal denied*, 566 Pa. 634, 781 A.2d 138 (2001).

Tends to Corrupt:

There is no need to prove that the minor’s morals were actually corrupted. The Commonwealth need only prove that the conduct of the defendant *tended* to corrupt the minor’s morals. *Commonwealth v. Barnette*, 760 A.2d 1166 (Pa. Super. 2000) *appeal denied*, 566 Pa. 634, 781 A.2d 138 (2001)

- ▶ In *Barnette*, the defendant was convicted of Corruption of Minors where he requested a 16-year-old youth to sign for a package containing marijuana even though he told the youth it contained “knick knacks.”
- ▶ In *Commonwealth v. Mumma*, 489 Pa. 547, 414 A.2d 1026 (Pa. 1980), the defendant, 18 years old at the time of the offense, pretended to give a physical examination to two young boys, aged eight and twelve, in order to “admit” them into his private club. He make them undress, and “brushed” the genitals of one of them. He looked at their nude bodies. This was sufficient to establish “tends to corrupt” even though the two boys were unaware that the contact was of an offensive nature.

No Criminal Activity Required:

Underlying criminal activity is not required. Statute states that conduct which corrupts or tends to corrupt is by “any act” not by any “criminal act.” *Commonwealth v. Decker*, 698 A.2d 99 (Pa. Super. 1997) *appeal denied*, 550 Pa. 698, 705 A.2d 1304 (1998). In *Decker*, the Superior Court stated:

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[W]hile it is true that generally a corruption of minors charge accompanies a more serious charge such as involuntary deviate sexual intercourse, statutory rape, indecent assault, etc., nowhere in the statute is there a requirement of such underlying criminal activity, nor will one find a prohibition against a charge of corruption of minors standing alone. Moreover, the statute states “by any act” not “by any *criminal* act.” The fact that a corruption of minors charge is generally coupled with additional underlying criminal activity is more a reflection of the usual application of the statute than it is legal precedent. We believe that if our legislators intended to require some underlying criminal activity as the basis for a corruption of minors charge, they would have written it into the statute.

698 A.2d at 100.

Conviction for corruption of minors charge can still stand where there are acquittals of other offenses which were specified in the information filed against the defendant as the corrupting acts. *Commonwealth v. Bricker*, 580 A.2d 388, 390 (Pa. Super. 1990), *appeal denied*, 527 Pa. 596, 589 A.2d 687 (1991).

In *Commonwealth v. Miller*, 657 A. 2d 946, 948 (Pa. Super. 1995), the defendants’ convictions for Corruption of Minors in both cases stand even though both were acquitted of Indecent Assault charges. The courts held that the jury had the prerogative to convict defendants on the corruption of minors charge while at the same time acquitting them on the charge of indecent assault, and that inconsistent verdicts will stand as long as there is sufficient evidence to sustain the conviction.

No Injury Required:

Injury is similarly not required for corruption of minors. *Commonwealth v. Berry*, 513 A. 2d 410, 413 (Pa. Super. 1986).

Sexual Intercourse Sufficient Proof of Corruption:

Sexual intercourse with a minor is considered corruption of morals. *Commonwealth v. Berry*, 513 A. 2d 410, 413 (Pa. Super. 1986).

E. Adjudication of Delinquency Unnecessary

(b) Adjudication of delinquency unnecessary.--A conviction under the provisions of this section may be had whether or not the jurisdiction of any juvenile court has attached or

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shall thereafter attach to such minor or whether or not such minor has been adjudicated a delinquent or shall thereafter be adjudicated a delinquent.

18 PA.CONS.STAT.ANN. § 6301(b).

F. Presumptions Regarding Minor's Age and Court Orders

(c) Presumptions.--In trials and hearings upon charges of violating the provisions of this section, knowledge of the minor's age and of the court's orders and decrees concerning such minor shall be presumed in the absence of proof to the contrary.

18 PA.CONS.STAT.ANN. § 6301(c).

G. Mistakes as to Age

Victim under 16 Years of Age:

Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years. 18 PA.CONS.STAT.ANN. § 6301(d).

Victim Between 16 and 18 Years of Age:

Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is 16 years or more but less than 18 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the minor to be 18 years or older. 18 PA.CONS.STAT.ANN. § 6301(d).

H. Sex Offender Registration

The crime of Corruption of Minors – Sexual Conduct under 18 PA.CONS.STAT.ANN. § 6301(a)(1)(ii) is a Tier I Sexual Offense under 42 PA.CONS.STAT.ANN. § 9799.14. A Tier I sexual offense requires registration with the Pennsylvania State Police for a period of 15 years.³ See 42 PA.CONS.STAT.ANN. § 9799.15.

³ For additional detailed discussion, see Chapter 9, Section 9.7 Sexually Violent Predator Assessment and Chapter 11, SEX OFFENDER REGISTRATION and NOTIFICATION.

4.5 SEXUAL ABUSE OF CHILDREN

Types of Sexual Abuse of Children:

- The Defendant Causes or Permits the Child to be Filmed
18 PA.CON.S.STAT.ANN. § 6312(b)(1)
- The Defendant Films or Photographs a Child
18 PA.CON.S.STAT.ANN. § 6312(b)(2)
- Dissemination of Child Pornography
18 PA.CON.S.STAT.ANN. § 6312(c)
- Viewing or Possessing Child Pornography
18 PA.CON.S.STAT.ANN. § 6312(d)

A. The Defendant Causes or Knowingly Permits the Child to be Filmed

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 6312(b)(1)

- The defendant causes or knowingly permits a child under the age of 18 years
- to engage in a prohibited sexual act or in the simulation of such act, and
- knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed.

2. Grading and Penalty – A violation of this subsection is a felony of the second degree. In accordance with 18 PA.CON.S.STAT.ANN. § 1103, the maximum incarceration sentence is up to ten years, and, in accordance with 18 PA.CON.S.STAT.ANN. § 1101, the maximum fine is \$25,000.00.

3. Enhanced Grading and Penalty – If during the course of this offense indecent contact with a child is depicted, the grading is a felony of the first degree.⁴ In accordance with 18 PA.CON.S.STAT.ANN. § 1103, the maximum incarceration sentence is up to twenty years, and, in accordance with 18 PA.CON.S.STAT.ANN. § 1101, the maximum fine is \$25,000.00.

4. Definition of “Indecent contact” from 18 PA.CON.S.STAT.ANN. § 3101: “Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person.”

5. Mistake as to Age, 18 PA.CON.S.STAT.ANN. § 6312(e.1) - it is no defense that the defendant did not know the age of the child. Neither a misrepresentation

⁴ See 18 PA.CON.S.STAT.ANN. § 6312(d.1)(3).

of age by the child nor a *bona fide* belief that the person is over the specified age is a defense.

B. The Defendant Films or Photographs A Child

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 6312(b)(2)

- The defendant knowingly photographed, videotaped, depicted on a computer or filmed
- a child under the age of 18 years
- engaging in a prohibited sexual act or in the simulation of such act.

2. Grading and Penalty – A violation of this subsection is a felony of the second degree. In accordance with 18 PA.CON.S.TAT.ANN. § 1103, the maximum incarceration sentence is up to ten years, and, in accordance with 18 PA.CON.S.TAT.ANN. § 1101, the maximum fine is \$25,000.00.

3. Enhanced Grading and Penalty – If during the course of this offense indecent contact with a child is depicted, the grading is a felony of the first degree.⁵ In accordance with 18 PA.CON.S.TAT.ANN. § 1103, the maximum incarceration sentence is up to twenty years, and, in accordance with 18 PA.CON.S.TAT.ANN. § 1101, the maximum fine is \$25,000.00.

4. Definition of “Indecent contact” from 18 PA.CON.S.TAT.ANN. § 3101: “Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person.”

5. Mistake as to Age, 18 PA.CON.S.TAT.ANN. § 6312(e.1) - it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a *bona fide* belief that the person is over the specified age is a defense.

C. Dissemination of Child Pornography

1. Statutory Citation and Elements

18 PA.CON.S.TAT.ANN. § 6312(c)

- The defendant knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or
- The defendant possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others,
- any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material,

⁵ See 18 PA.CON.S.TAT.ANN. § 6312(d.1)(3).

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- which depicts a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act.
2. **Grading and Penalty** - A first offense under this subsection is a felony of the third degree. For a felony of the third degree, in accordance with 18 PA.CON.S. STAT.ANN. § 1103, the maximum incarceration sentence is seven years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$15,000.00.
 3. **Multiple Offenses** - A second or subsequent offense under this subsection is a felony of the second degree⁶ For a felony of the second degree, in accordance with 18 PA.CON.S. STAT.ANN. § 1103, the maximum incarceration sentence is ten years, and, in accordance with 18 PA.CON.S. STAT.ANN. § 1101, the maximum fine is \$25,000.00.
 4. **Enhanced Grading and Penalty** - If during the course of this offense indecent contact with a child is depicted in any of the material, the grading of the first offense will be a felony of the second degree.⁷ For a felony of the second degree, in accordance with 18 PA.CON.S. STAT.ANN. § 1103, the maximum incarceration sentence is ten years, and, in accordance with 18 PA.CON.S. STAT.ANN. § 1101, the maximum fine is \$25,000.00.
 5. **Definition of “Indecent contact” from 18 PA.CON.S. STAT.ANN. § 3101:** “Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person.”

D. Viewing or Possessing Child Pornography

1. Statutory Citation and Elements

18 PA.CON.S. STAT.ANN. § 6312(d)

- The defendant intentionally views, or
- The defendant knowingly possesses or controls⁸
- Any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material
- Depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act.

2. **Grading and Penalty** - A first offense under this subsection is a felony of the third degree. For a felony of the third degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is seven years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$15,000.00.

⁶ See 18 PA.CON.S. STAT.ANN. § 6312(d.1)(2)(ii).

⁷ See 18 PA.CON.S. STAT.ANN. § 6312(d.1)(3).

⁸ The act of accessing and viewing child pornography over the internet constituted “control” under this subsection. *Commonwealth v. Diodoro*, 601 Pa. 6, 970 A.2d 1100 (2009), *cert. denied*, 130 S.Ct. 200, 175 L.Ed.2d 127 (2009).

3. **Multiple Offenses** - A second or subsequent offense under this subsection is a felony of the second degree. For a felony of the second degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is ten years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$25,000.00.
4. **Enhanced Grading and Penalty** - If during the course of this offense indecent contact with a child is depicted in any of the material, the grading of the first offense will be a felony of the second degree.⁹ For a felony of the second degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is ten years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$25,000.00.
5. **Definition of “Indecent contact” from 18 PA. CONS. STAT. ANN. § 3101:** “Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person.”

E. Purpose of Statute

“The purpose of Section 6312 is plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography.” *Commonwealth v. Diodoro*, 601 Pa. 6, 970 A.2d 1100, 1107 (2009), *cert. denied*, 558 U.S. 875, 130 S.Ct. 200, 175 L.Ed.2d 127 (2009).

The purpose of this statute, prohibiting “sexual abuse of children”, is to criminalize the filming, depiction, possession or control of **photographs or computer depictions of child pornography**.

The United States Supreme Court has clearly and laudably articulated that the “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 3355, 73 L.Ed.2d 1113 (1982). “The United States Supreme Court has determined that laws proscribing the possession, dissemination and viewing of child pornography are valid against First Amendment challenges.” *Commonwealth v. Baker*, --- Pa. ---, 78 A.3d 1044, 1050 (2013).

“**Transfer**” as used in § 6312(c) herein means a change of possession from one person to another. *Commonwealth v. McCue*, 487 A.2d 880, 883 (Pa.Super. 1983).

Consent: Consent is no defense. A child victimized by having pornographic pictures taken of him or her cannot legally consent. *Commonwealth v. Kitchen*, 814 A.2d 209, 213 (Pa. Super. 2002), *aff’m*, 576 Pa. 229, 839 A.2d 184 (2003). In *Kitchen*, the defendant’s conviction for taking and possessing pornographic

⁹ See 18 PA. CONS. STAT. ANN. § 6312(d.1)(3).

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photographs of his 16 year old paramour, with whom he had a child, stands regardless of the victim's consent or cohabitation with the defendant.

F. Evidence of Age - 18 PA.STAT.§6312(e)

In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony is sufficient to establish the age of said person. 18 PA.CON.S.STAT.ANN. § 6312(e).

Proof of age, like proof of any other material fact, can be accomplished by the use of either direct or circumstantial evidence, or both. Proof of age is not limited to expert testimony. The trier of fact can assess the age of the child depicted based on everyday observations and common experiences with the requisite degree of certainty to satisfy the standard of proof beyond a reasonable doubt. *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207 (Pa. Super 2003), *appeal denied*, 576 Pa. 712, 839 A.2d 352 (2003).

This section does not mandate expert opinion testimony to satisfy the element of age but merely allows that if competent expert testimony is presented, it is sufficient to establish the age element. *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207, 1212 (Pa. Super 2003), *appeal denied*, 576 Pa. 712, 839 A.2d 352 (2003).

1. Mistake as to Age - 18 PA.CON.S.STAT.ANN. § 6312 (e.1)

Under subsection (b) only (relating to the filming of a child during or simulation of sexual acts), it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a *bona fide* belief that the person is over the specified age is a defense.

G. Sex Offender Registration

The crime of Sexual Abuse of Children under 18 PA.CON.S.STAT.ANN.§ 6312 is a Tier I Sexual Offense under 42 PA.CON.S.STAT.ANN. § 9799.14. A Tier I sexual offense requires registration with the Pennsylvania State Police for a period of 15 years.¹⁰ See 42 PA.CON.S.STAT.ANN. § 9799.15.

H. Exception to Criminal Ramifications

This section does not apply to any material that is viewed, possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a *bona fide* educational, scientific, governmental or judicial purpose. 18 PA.CON.S.STAT.ANN. § 6312(f).

¹⁰ For additional detailed discussion, see Chapter 9, Section 9.7 Sexually Violent Predator Assessment and Chapter 11, SEX OFFENDER REGISTRATION.

This section does not apply to conduct prohibited under 18 PA.CON.S.TAT.ANN. § 6321, **Transmission of Sexually Explicit Images By Minor**, except as excluded by section 6321(d).

This section does not apply to an individual under 18 years of age who knowingly views, photographs, videotapes, depicts on a computer or films or possesses or intentionally views a visual depiction of himself alone in a state of nudity as defined in 18 PA.CON.S.TAT.ANN. § 6321, **Transmission of Sexually Explicit Images By Minor**.

I. “Computer Depiction” includes Streaming Video

Communications on streaming video, such as *Skype*, which include depictions of a minor engaged in a prohibited sexual act or in the simulation of such act, satisfy the element of “computer depiction” under 18 PA.CON.S.TAT.ANN. § 6312(d).

Commonwealth v. Levy, 83 A.3d 457 (Pa. Super. 2013):

“Skype is an internet communication service that provides live, two-way audio and video communication.” Akin to the telephonic communication foreshadowed by Dick Tracy and the Jetsons, Skype permits individuals using webcams to see each other while conversing over the internet. During the live-streaming communication, the images recorded by a webcam appear on the other user’s monitor screen. Any person within eyesight and earshot of the computer monitor can observe the participant’s image and hear his or her words. In other words, Skype offers a program that permits a person to see and hear another person, who is in a different location, using a webcam and the internet.

When a person uses Skype, his or her computer monitor displays the video images of the other participant. We have little trouble concluding that such a display amounts to “showing” or “representing” an image as the common and approved usages of the term contemplates. We find the example attendant to Webster’s definition of “depict” to be particularly instructive. In that example, the photograph “depicts” two brothers standing in front of a store. The common usage of the term includes a physical object, the photograph, displaying a real image. We find little difference between analogizing this common usage of the term to an image, live or still, appearing on a computer screen. A person who looks at the picture in the example will see two brothers standing in front of a store. That image is “depicted” to the viewer. There would be no difference if the person viewed that image in a photograph

or on a computer screen. It follows then that Levy's computer "depicted" a fifteen-year-old girl masturbating. Thus, there is no question that images displayed on a computer screen "depict" their subject according to the common and approved usage of the term.

83 A.2d at 463.

4.6 UNLAWFUL CONTACT WITH MINOR

A. Statutory Citation and Purpose of Statute

18 PA.CON.S.TAT.ANN. § 6318.

Basically, the elements of this crime consist of intentionally, either directly or indirectly, contacting or communicating with a minor for the purpose of engaging in a sexual offense. *Commonwealth v. Oliver*, 946 A.2d 1111, 1113 (Pa.Super. 2008), *appeal denied*, 599 Pa. 690, 960 A.2d 838 (2008); *Commonwealth v. Morgan*, 913 A.2d 906, 910 (Pa.Super. 2006), *appeal denied*, 592 Pa. 788, 927 A.2d 623 (2007).

The Superior Court in *Commonwealth v. Rose*, 960 A.2d 149 (Pa. Super. 2008), *appeal denied*, 602 Pa. 657, 980 A.2d 110 (2009), remarked that unlawful contact with a minor "is best understood as 'unlawful **communication** with a minor.'" *Id.*, 960 A.2d at 152 (emphasis in original).

B. Elements of Offense

The elements, as specified in section (a), are as follows:

- A person commits an offense under this section if he intentionally contacts a minor, or a law enforcement officer acting in the performance of duties who has assumed the identity of a minor,
- for the purpose of engaging in a prohibited act, and
- either the person initiating the contact or the person being contacted is within this Commonwealth.
- The prohibited acts are as follows:
 - (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses);
 - (2) Open lewdness as defined in 18 Pa.Cons.Stat.Ann. § 5901 (relating to open lewdness);¹¹

¹¹ "A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed." 18 PA.CON.S.TAT.ANN. § 5901.

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- (3) Prostitution as defined in 18 Pa.Cons.Stat.Ann. § 5902 (relating to prostitution and related offenses);¹²
- (4) Obscene and other sexual materials and performances as defined in 18 Pa.Cons.Stat.Ann. § 5903;¹³
- (5) Sexual abuse of children as defined in 18 PA.CON.S.TAT.ANN. § 6312;¹⁴
- (6) Sexual exploitation of children as defined in 18 PA.CON.S.TAT.ANN. § 6320.¹⁵

C. Penalties

Grading

A violation of subsection (a) is:

- an offense of the same grade and degree *as the most serious underlying offense* listed in subsection (a) for which the defendant contacted the minor; or
- a felony of the third degree; whichever is *greater*.

If the offense constitutes a felony of the third degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is up to 7 years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$15,000.00.

If the underlying offense is greater than a felony of the third degree, see **Chapter 9, Section 9.8(B) Statutory Penalties for Crimes of Sexual Violence** for the penalties.

D. Concurrent Jurisdiction to Prosecute

The Attorney General has concurrent prosecutorial jurisdiction with the county district attorney for violations under this section and any crime arising out of the activity prohibited by this section when the person charged with a violation of this section contacts a minor through the use of a computer, computer system or computer network. 18 PA.CON.S.TAT.ANN. § 6318(b.1).

E. Definitions

As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

¹² “A person is guilty of prostitution if he or she: (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.” 18 PA.CON.S.TAT.ANN. § 5902.

¹³ See **Section 4.9 OBSCENE and OTHER SEXUAL MATERIAL and PERFORMANCES**, which examines 18 PA.CON.S.TAT.ANN. § 5903, *infra*.

¹⁴ See **Section 4.5, SEXUAL ABUSE OF CHILDREN**, *supra*.

¹⁵ See **Section 4.7, SEXUAL EXPLOITATION OF CHILDREN**, *infra*.

“Computer.” An electronic, magnetic, optical, hydraulic, organic or other high-speed data processing device or system which performs logic, arithmetic or memory functions and includes all input, output, processing, storage, software or communication facilities which are connected or related to the device in a computer system or computer network.

“Computer network.” The interconnection of two or more computers through the usage of satellite, microwave, line or other communication medium.

“Computer system.” A set of related, connected or unconnected computer equipment, devices and software.

“Contacts.” Direct or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.

“Minor.” An individual under 18 years of age.

F. Sex Offender Registration

The crime of Unlawful Contact with a Minor under Sexual Abuse of Children under 18 PA.CONS.STAT.ANN. § 6318 is a Tier II Sexual Offense under 42 PA.CONS.STAT.ANN. § 9799.14. A Tier II sexual offense requires registration with the Pennsylvania State Police for a period of 25 years.¹⁶ See 42 PA.CONS.STAT.ANN. § 9799.15.

4.7 SEXUAL EXPLOITATION OF CHILDREN

A. Statutory Citation and Elements

18 PA.CONS.STAT.ANN. § 6320.

- The defendant procures for another person
- A child under 18 years of age
- For the purpose of sexual exploitation

B. Offense Defined

As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

¹⁶ For additional detailed discussion, see Chapter 9, Section 9.7 Sexually Violent Predator Assessment and Chapter 11, SEX OFFENDER REGISTRATION.

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“**Procure**” - To obtain or make available for sexual exploitation.

“**Sexual exploitation**” - Actual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person.

C. Penalties

Sexual Exploitation of Children is a felony of the second degree, pursuant to 18 PA.CONS.STAT.ANN. § 6320(b). For a felony of the second degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is up to ten years, and, in accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine is up to \$25,000.00.

D. Sex Offender Registration

The crime of Sexual Exploitation of Children under 18 PA.CONS.STAT.ANN. § 6320 is a Tier II Sexual Offense under 42 PA.CONS.STAT.ANN. § 9799.14. A Tier II sexual offense requires registration with the Pennsylvania State Police for a period of 25 years.¹⁷ See 42 PA.CONS.STAT.ANN. § 9799.15.

4.8 INTERNET CHILD PORNOGRAPHY

A. Act Declared Unconstitutional

The Internet Child Pornography Act, 18 PA.CONS.STAT.ANN. §7621 et seq., was enacted to require internet service providers (“ISPs”) to remove or disable access to *child pornography items* “residing on or accessible through its service in a manner accessible to persons located within Pennsylvania after notification by the Pennsylvania Attorney General.”¹⁸

This Act was declared unconstitutional in *Center for Democracy & Tech. vs. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004). The Court held that the Act violated the First Amendment in that the Act could not be implemented without “excessive blocking of innocent speech”; that the procedures provided by the Act “are insufficient to justify the prior restraint of materials protected by the First Amendment”; and that it was unconstitutional under the dormant Commerce Clause “because of its affect on interstate commerce.” *Id.*, at 611.

¹⁷ For additional detailed discussion, see Chapter 9, Section 9.7 Sexually Violent Predator Assessment and Chapter 11, SEX OFFENDER REGISTRATION.

¹⁸ Pursuant to 18 PA.CONS.STAT.ANN. § 7622, the ISP had to remove or disable access to child pornography items residing on or accessible through its service within five business days of notification by the Attorney General.

4.9 OBSCENE MATERIALS

Types of Obscene Materials

- Display of Obscene Materials to Minors
18 Pa.Cons.Stat.Ann. § 5903(a)(1)
- Manufacture of Obscene Materials in which a Minor is Depicted
18 Pa.Cons.Stat.Ann. § 5903(a)(3)(ii)
- Advertisement for Obscene Material in which a Minor is Included
18 Pa.Cons.Stat.Ann. § 5903(a)(4)(ii)
- Production of Obscene Performance if a Minor is Included
18 Pa.Cons.Stat.Ann. § 5903(a)(5)(ii)
- Dissemination of Explicit Sexual Material to a Minor by Sale or Otherwise
18 Pa.Cons.Stat.Ann. § 5903(c)
- Admission of Minor to Movie or Other Presentation of Sexual Conduct
18 Pa.Cons.Stat.Ann. § 5903(d)

Obscenity and pornography have been the subjects of several United States Supreme Court opinions, in which the Court has struggled to develop a test that would allow offensive sexual material (obscene material) to be banned while at the same time recognizing the First Amendment right to freedom of speech (pornography) on sexual matters. The modern test was set out by the Supreme Court in the 1973 case of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).¹⁹

This section addresses the Pennsylvania statute which criminalizes the production and distribution of obscene material but focuses on the sale of obscene material to minors, the involvement of minors in the production of obscene material or performances, and child pornography. Section 5903, Obscene and Other Sexual Materials and Performances, appears in Article F, Offenses Against Public Order and Decency, specifically in Chapter 59, Public Indecency.

A. Crimes Related to Obscene Materials and Minors

1. Display of Obscene Materials to Minors

18 PA.CON.S.TAT.ANN. § 5903(a)(1).

Grading and Penalty: A violation of subsection (a) is a misdemeanor of the first degree. In accordance with 18 PA.CON.S.TAT.ANN. § 1101, the maximum

¹⁹ For further discussion, see 61 Am. Jur. Proof of Facts 3d 51 (2014 supplement).

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fine for a misdemeanor of the first degree is up to \$10,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1104, is up to 5 years in prison.

Enhanced Grading: A violation of subsection (a) is a felony of the third degree if:

- (1) the offender has previously been convicted of a violation of subsection (a), or
- (2) if the material was sold, distributed, prepared or published for the purpose of resale.

In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a felony of the third degree is up to \$15,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1103, is up to 7 years in prison.

2. Manufacture of Obscene Materials in which a Minor is Depicted

18 PA.CONS.STAT.ANN. § 5903(a)(3)(ii).

Grading and Penalty: A violation of subsection (a) is a misdemeanor of the first degree. In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a misdemeanor of the first degree is up to \$10,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1104, is up to 5 years in prison.

Enhanced Grading: A violation of subsection (a) is a felony of the third degree if:

- (1) the offender has previously been convicted of a violation of subsection (a), or
- (2) if the material was sold, distributed, prepared or published for the purpose of resale.

In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a felony of the third degree is up to \$15,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1103, is up to 7 years in prison.

3. Advertisement for Obscene Materials in which a Minor is Included

18 PA.CONS.STAT.ANN. § 5903(a)(4)(ii).

Grading and Penalty: A violation of subsection (a) is a misdemeanor of the first degree. In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a misdemeanor of the first degree is up to \$10,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1104, is up to 5 years in prison.

Enhanced Grading: A violation of subsection (a) is a felony of the third degree if:

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- (1) the offender has previously been convicted of a violation of subsection (a), or
- (2) if the material was sold, distributed, prepared or published for the purpose of resale.

In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a felony of the third degree is up to \$15,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1103, is up to 7 years in prison.

4. Production of Obscene Performance if a Minor is Included

18 PA.CONS.STAT.ANN. § 5903(a)(5).

Grading and Penalty: A violation of subsection (a) is a misdemeanor of the first degree. In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a misdemeanor of the first degree is up to \$10,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1104, is up to 5 years in prison.

Enhanced Grading: A violation of subsection (a) is a felony of the third degree if:

- (1) the offender has previously been convicted of a violation of subsection (a), or
- (2) if the material was sold, distributed, prepared or published for the purpose of resale.

In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a felony of the third degree is up to \$15,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1103, is up to 7 years in prison.

5. Dissemination of Explicit Sexual Material to a Minor by Sale or Otherwise

18 PA.CONS.STAT.ANN. § 5903(c).

Grading and Penalty: A violation of subsection (c) is a felony of the third of the third degree. In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a felony of the third degree is up to \$15,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1103, is up to 7 years in prison.

Enhanced Grading: A violation of subsection (c) is a felony of the second degree if the offender has previously been convicted of a violation of subsection (c) or (d). In accordance with 18 PA.CONS.STAT.ANN. § 1101, the maximum fine for a felony of the second degree is up to \$25,000, and the maximum incarceration sentence, 18 PA.CONS.STAT.ANN. § 1103, is up to 10 years in prison.

(a) Example – Computer Images

In *Commonwealth v. Hacker*, 959 A.2d 380 (Pa. Super. 2008), *reversed on other grounds*, 609 Pa. 108, 15 A.3d 333 (2011), there was sufficient evidence to support a conviction under this section when the defendant “disseminated” explicit sexual materials to minors by showing two minors, aged twelve and thirteen, several sexually explicit images on a computer of herself with a man and a woman.

(b) Example – Emailing a Link to Pornographic Site

In *Commonwealth v. Levy*, 83 A.3d 457 (Pa. Super. 2013), the Superior Court affirmed the trial court’s decision that sending an email which contained a link to pornographic materials constituted the dissemination of “explicit sexual materials” under 18 PA.CON.S. STAT.ANN. § 5903(c). The facts of the case included a stipulation that Levy emailed a fifteen-year-old girl a “link” to a pornographic website.

6. Admission of Minor to Movie or Other Presentation of Sexual Conduct

18 PA.CON.S. STAT.ANN. § 5903(d).

Grading: A violation of subsection (d) is a felony of the third of the third degree. In accordance with 18 PA.CON.S. STAT.ANN. § 1101, the maximum fine for a felony of the third degree is up to \$15,000, and the maximum incarceration sentence, 18 PA.CON.S. STAT.ANN. § 1103, is up to 7 years in prison.

Enhanced Grading: A violation of subsection (d) is a felony of the second degree if the offender has previously been convicted of a violation of subsection (c) or (d).

B. Definition of Obscene Material and Relevant Provisions

1. Obscene, 18 PA.CON.S. STAT.ANN. § 5903(b).

“Obscene.” Any material or performance, if:

(1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;

(2) the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and

(3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.²⁰

²⁰ The Pennsylvania statute prohibiting the sale of obscene materials takes the test for “obscenity” directly from the United States Supreme Court decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). “Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct’” *Brown v. Entertainment Merchants Association*, --- U.S. ---, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

2. Material, 18 PA.CON.S.TAT.ANN. § 5903(b).

“Material.” Any literature, including any book, magazine, pamphlet, newspaper, storypaper, bumper sticker, comic book or writing; any figure, visual representation, or image, including any drawing, photograph, picture, videotape or motion picture.

3. Performance, 18 PA.CON.S.TAT.ANN. § 5903(b).

“Performance.” Means any play, dance or other live exhibition performed before an audience.

4. Sexual Conduct, 18 PA.CON.S.TAT.ANN. § 5903(b).

“Sexual conduct.” Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, anal or oral sodomy and sexual bestiality; and patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

C. Initial Trial Court Determination

► **Trial Court Must Make Independent Constitutional Judgment on Whether Material is Obscene.**

Because the question of obscenity raises constitutional implications, the trial court, and the appellate court if there is an appeal, must make an “independent constitutional judgment” on the facts of the case as to whether the material upon which the charges are based is obscene or constitutionally protected. *Commonwealth v. Lebo*, 795 A.2d 987, 991 (2002). The courts are not bound by the jury’s finding of obscenity because “the question [of] whether a particular work is obscene necessarily entails a subtle issue of constitutional law.” *Id.*, citing *Commonwealth v. Baer*, 227 A.2d 915, 917 (Pa. Super. 1967), *aff’m*, 436 Pa. 18, 257 A.2d 254 (1969). Therefore, the trial court must look at all of the photographs or films and make such a determination of obscenity in the first instance before submitting the question to the jury.

4.10 TRANSMISSION OF SEXUALLY EXPLICIT IMAGES BY MINOR

This new statute, enacted in 2012, is Pennsylvania’s answer to the problems surrounding “sexting” and provides a lesser criminal penalty to teens who send text images of themselves or other minors. This new law permits the prosecutor to charge the minor with this lower graded offense instead of under the child pornography statutes,

Offenses Against Children

i.e., Sexual Abuse of Children, 18 PA.CON.S.STAT.ANN. § 6312. This law makes it a crime, graded as a summary offense if the image is of a minor age 12 years or older; when a minor possesses or views a sexually explicit photograph of himself/herself; or possesses a sexually explicit picture of another minor.

The new law raises the grading if the minor transmits the image to others, or if the image is created without the knowledge of the depicted minor.

A. Summary Offense

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 6321 (a).

- A minor knowingly transmits, distributes, publishes or disseminates
- An electronic communication containing a sexually explicit image of himself/herself.

Or

- A minor knowingly possesses or knowingly views
- A sexually explicit image of a minor who is 12 years of age or older.

2. Penalty

When the offense does not specify a higher fine, a summary carries a fine of \$300, 18 PA.CON.S.STAT.ANN. § 1101, and a sentence of imprisonment for up to a maximum of 90 days, 18 PA.CON.S.STAT.ANN. § 1105.

B. Misdemeanor of the Third Degree.

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 6321 (b).

- A minor knowingly transmits, distributes, publishes or disseminates
- An electronic communication containing a sexually explicit image of another minor who is 12 years of age or older.

2. Penalty

In accordance with 18 PA.CON.S.STAT.ANN. § 1101, the maximum fine for a misdemeanor of the third degree is up to \$2,500, and the maximum incarceration sentence, 18 PA.CON.S.STAT.ANN. § 1104, is up to one year in prison.

C. Misdemeanor of the Second Degree

1. Statutory Citation and Elements

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18 PA.CON.S.TAT.ANN. § 6321 (b).

- A minor, with the intent to coerce, intimidate, torment, harass or otherwise cause emotional distress to another minor
- Makes a visual depiction of any minor in a state of nudity
- Without the knowledge and consent of the depicted minor

Or

- knowingly transmits, distributes, publishes or disseminates
- A visual depiction of any minor in a state of nudity
- Without the knowledge and consent of the depicted minor.

2. Penalty

In accordance with 18 PA.CON.S.TAT.ANN. § 1101, the maximum fine for a misdemeanor of the second degree is up to \$5,000, and the maximum incarceration sentence, 18 PA.CON.S.TAT.ANN. § 1104, is up to two years in prison.

D. Exceptions

In accordance with 18 PA.CON.S.TAT.ANN. § 6321(d), this statute does not apply to the following situations:

(d) Application of section.--This section shall not apply to the following:

(1) Conduct that involves images that depict sexual intercourse, deviate sexual intercourse or penetration, however slight, of the genitals or anus of a minor, masturbation, sadism, masochism or bestiality.

(2) Conduct that involves a sexually explicit image of a minor if the image was taken, made, used or intended to be used for or in furtherance of a commercial purpose.

E. Definitions

Pertinent definitions are included in Section 6321(g):

“Disseminate.” To cause or make an electronic or actual communication from one person, place or electronic communication device to two or more other persons, places or electronic communication devices.

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“Distribute.” To deliver or pass out.

“Electronic communication.” As defined in section 5702 (relating to definitions).

“Knowingly possesses.” The deliberate, purposeful, voluntary possession of a sexually explicit image of another minor who is 12 years of age or older. The term shall not include the accidental or inadvertent possession of such an image.

“Knowingly views.” The deliberate, purposeful, voluntary viewing of a sexually explicit image of another minor who is 12 years of age or older. The term shall not include the accidental or inadvertent viewing of such an image.

“Minor.” An individual under 18 years of age.

“Nudity.” The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state.

“Publish.” To issue for distribution.

“Sexually explicit image.” A lewd or lascivious visual depiction of a minor’s genitals, pubic area, breast or buttocks or nudity, if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such nudity.

“Transmit.” To cause or make an electronic communication from one person, place or electronic communication device to only one other person, place or electronic communication device.

“Visual depiction.” A representation by picture, including, but not limited to, a photograph, videotape, film or computer image.

18 PA.CON.S.TAT.ANN. § 6321(g).

4.11 SEXUAL ASSAULT BY SPORTS OFFICIAL, VOLUNTEER OR EMPLOYEE OF NONPROFIT ASSOCIATION

- ▶ Sexual Assault by a Sports Official
18 PA.CON.S.STAT.ANN. § 3124.3(a)
- ▶ Sexual Assault by Volunteer or Employee of Nonprofit Association
18 PA.CON.S.STAT.ANN. § 3124.4(b)

A. Sexual Assault by a Sports Official

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 3124.3(a)

- The defendant is a person who serves as a sports official in a sports program
 - Of a nonprofit association or a for-profit association
- Engages in sexual intercourse, deviate sexual intercourse or indecent contact
 - With a child under 18 years of age
 - Who is participating in a sports program of the nonprofit association or for-profit association

2. **Exceptions** – Except as provided in sections 18 PA.CON.S.STAT.ANN. §§ 3121, 3122.1, 3123, 3124.1 and 3125 (rape, statutory sexual assault, IDSI, sexual assault and aggravated indecent assault).

3. **Grading and Penalty** – A violation of this subsection is a felony of the third degree. In accordance with 18 PA.CON.S.STAT.ANN. § 1103, the maximum incarceration sentence is up to seven years, and, in accordance with 18 PA.CON.S.STAT.ANN. § 1101, the maximum fine is \$15,000.00.

4. **Definition of “sports official”**: A person who supervises children participating in a sports program including, but not limited to: a coach, assistant coach, athletic trainer, team attendant, game manager, instructor or a person who enforces the rules of a sporting event such as an umpire or referee.

B. Volunteer or Employee of Nonprofit Association

1. Statutory Citation and Elements

18 PA.CON.S.STAT.ANN. § 3124.3(b)

- The defendant is a volunteer or an employee of a nonprofit association having direct contact with a child under 18 years of age

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- The child participates in a program or activity of the nonprofit association
 - The defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact
 - With that child.
2. **Exceptions** – Except as provided in sections 18 PA.CON.S.STAT.ANN. §§ 3121, 3122.1, 3123, 3124.1 and 3125 (rape, statutory sexual assault, IDSI, sexual assault and aggravated indecent assault).
 3. **Grading and Penalty** – A violation of this subsection is a felony of the third degree. In accordance with 18 PA.CON.S.STAT.ANN. § 1103, the maximum incarceration sentence is up to seven years, and, in accordance with 18 PA.CON.S.STAT.ANN. § 1101, the maximum fine is \$15,000.00.
 4. **Definition of “Direct Contact”**: Care, supervision, guidance or control.

4.12 CRIMINAL ATTEMPT, CONSPIRACY OR SOLICITATION

A. Statutory Citations

18 PA.CON.S.STAT.ANN. §§ 901 (Criminal Attempt), 902 (Criminal Solicitation) and 903 (Criminal Conspiracy).

B. Definition of Inchoate Offenses

18 PA.CON.S.STAT.ANN. § 901. Criminal attempt

(a) Definition of attempt.--A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.

18 PA.CON.S.STAT.ANN. § 902. Criminal Solicitation

(a) Definition of solicitation. A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

18 PA.CON.S.STAT.ANN. § 903. Criminal conspiracy

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(a) Definition of conspiracy.--A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(b) Scope of conspiratorial relationship.--If a person guilty of conspiracy, as defined by subsection (a) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, to commit such crime whether or not he knows their identity.

(c) Conspiracy with multiple criminal objectives.--If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

C. Penalties

1. Grading and Penalties

18 PA.CON.S.TAT.ANN. § 905(a) provides that inchoate crimes have the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy (unless otherwise provided in the Pennsylvania Crimes and Offenses Code). *See also, Commonwealth v. Hoke*, 599 Pa. 587, 593-594, 962 A.2d 664, 668 (2009).²¹

2. Dismissal of Charge

18 PA.CON.S.TAT.ANN. § 905(b) provides that if the particular conduct charged to constitute the inchoate crime “is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this section, the

²¹ See Chapter 9, Section 9.8(B) Statutory Penalties for Crimes of Sexual Violence for the specific penalties.

court may dismiss the prosecution.”

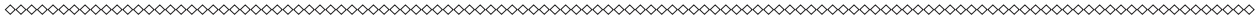
D. Sex Offender Registration

The inchoate crimes under 18 PA.CON.S.TAT.ANN. §§ 901, 902 & 903 are listed in 42 PA.CON.S.TAT.ANN. § 9799.14 and are in the Tier for which the underlying crime is listed.

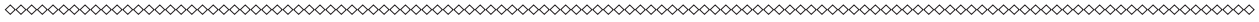
E. Solicitation of a Minor

A defendant may be convicted of solicitation where the person approached would be the victim of a crime and not an accomplice. *Commonwealth v. Cauto*, 535 A.2d 602 (Pa. Super. 1987), *appeal denied*, 521 Pa. 601, 555 A.2d 112 (1988) (offering to perform oral sex on one minor and requesting another minor to pose in photographs depicting masturbation and oral sex with another male constitutes complicity or participation in the commission of a crime, to wit: Involuntary Deviate Sexual Intercourse and Sexual Abuse of Children by Photograph or Film); *Commonwealth v. Morales*, 601 A.2d 1263 (Pa. Super. 1992), *appeal denied*, 531 Pa. 652, 613 A.2d 558 (1992) (offering to perform oral sex on a minor is sufficient for a solicitation conviction since the solicitation was for the victim’s participation in conduct, without which the defendant could not have committed involuntary deviate sexual intercourse.)

Chapter 5



DEFENSES



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Chapter Five

Defenses

5.1 CHAPTER OVERVIEW

This chapter examines defenses applicable to defendants accused of sexual violence offenses and related offenses. The defenses are arranged alphabetically by title and each defense includes a detailed discussion on applicability, elements, and burden of proof, along with other relevant issues.

A proper starting point is the foundation of protection provided to an accused in a criminal case, long recognized in Pennsylvania. Article I, Section 9 of the Pennsylvania Constitution provides:

Section 9 Rights of accused in criminal prosecutions

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

In charging a jury, it is the duty of the trial judge to explain the issues so that the jurors may comprehend the questions they are to resolve, to clarify principles of law applicable to the case, and to make such principles understandable in plain language. The failure to fulfill this duty deprives the defendant of a fair trial. ***Commonwealth v. Sherlock***, 473 A.2d 629, 631 (Pa. Super. 1984). Furthermore,

“Because jury instructions are the principal medium for communicating to the jury the legal bases upon which its verdict is to rest, they should be ‘clear, concise, accurate and impartial statements of the law written in understandable language....’ ” ***Commonwealth v. Ford-Bey***, 504 Pa. 284, 289, 472 A.2d 1062, 1064 (1983) (quoting ABA Standards for Criminal Justice 15-3.6(a), Commentary at 100 (citation omitted)). In charging a jury, the trial judge must clarify issues so that the jurors may

comprehend the questions they are to resolve, elucidate correct principles of law applicable to the pending case, and endeavor to make those principles understandable in plain language.

Commonwealth v. Clark, 683 A.2d 901, 904 (Pa. Super. 1996).

5.2 ALIBI DEFENSE

A. Definition

The long-accepted definition of an alibi is a defense that:

[P]laces a defendant at the relevant time at a different place than the crime scene and sufficiently removed from that location such that it was impossible for him to be the perpetrator.

Commonwealth v. Sileo, 32 A.3d 753, 767 (Pa. Super. 2011), *appeal denied*, 615 Pa. 785, 42 A.3d 1060 (2012). *See also*, Black's Law Dictionary 79 (8th ed. 2004) ("A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.").

B. Establishing the Defense

1. Evidence which isolates the defendant from the crime scene

To successfully assert an alibi defense, a defendant need not show any "minimum or threshold quantum of physical separation" from the victim and the crime scene "so long as the separation makes it impossible for the defendant to have committed the crime." *Commonwealth v. Roxberry*, 529 Pa. 160, 164, 602 A.2d 826, 828 (1992). As the Superior Court recently noted, there is no "magic distance" necessary for the defendant's separation from the victim and the crime scene; rather "all depends upon whether evidence is introduced that 'if believed, isolate[s] [the defendant] from all possible interaction with the victim and the crime scene.'" *Commonwealth v. Hall*, 867 A.2d 619, 637 (Pa. Super. 2005), *appeal denied*, 586 Pa. 756, 895 A.2d 549 (2006) (quoting *Commonwealth v. Collins*, 549 Pa. 593, 604, 702 A.2d 540, 545 (1997), *cert denied*, 525 U.S. 835 (1998)). *See also*, *Roxberry*, 529 Pa. at 164, 602 A.2d at 828 ("It is theoretically possible to assert an alibi even when a crime occurs in the same building where the accused is located.").

2. No corroboration needed

Furthermore, an alibi defense need not be corroborated; it can be established "solely by the unsupported testimony of the defendant." *Id.*, 529 Pa.

at 165, 602 A.2d at 828.¹ However, it is common for a defendant to present alibi witnesses or other evidence showing his or her presence away from the victim and the crime scene in an effort to establish the defense. See *Commonwealth v. Hawkins*, 586 Pa. 366, 369-370, 894 A.2d 716, 171-718 (2006).

3. Defense counsel has duty to investigate alibi witnesses

When an accused notifies counsel that he has an alibi and has alibi witnesses available to testify, it will be deemed ineffective assistance if counsel fails “to substantively interview either [the defendant] or his alibi witnesses” and then fails to present the possible alibi witnesses at trial. *Commonwealth v. Stewart*, 84 A.3d 701, 712 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 93 A.3d 463 (2014). However, a defendant can voluntarily waive the right to call alibi witnesses and the waiver precludes a claim of ineffective assistance of trial counsel. *Commonwealth v. Rios*, 591 Pa. 583, 605, 920 A.2d 790, 802 (2007) (trial court conducted a colloquy with defendant as to his choice not to call the alleged alibi witnesses and further explained to defendant the available jury instructions).

C. Statutory Notice Requirements

1. Notice requirement by defense

A defendant’s right to present evidence of an alibi and to receive an alibi jury instruction is not absolute. A defendant must comply with the notice requirements set forth in Pennsylvania Rule of Criminal Procedure 567. See *Commonwealth v. Poindexter*, 646 A.2d 1211, 1218-1219 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995) (decided under former Rule 305). Rule 567 is “designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.” *Commonwealth v. Fernandez*, 482 A.2d 567, 571 (Pa. Super. 1984) (quoting *Williams v. Florida*, 399 U.S. 78, 83 n. 14, 90 S.Ct. 1893, 1897 n. 14, 26 L.Ed.2d 446 (1983)).

Pa.R.Crim.P. 567(A) provides, in pertinent part, the following:

(A) Notice by Defendant. A defendant who intends to offer the defense of alibi at trial shall file with the clerk of courts not later than the time required for filing the omnibus pretrial motion provided in Rule 579 a notice specifying an intention to offer an alibi defense, and shall serve a copy of the notice and a certificate of service on the attorney for the Commonwealth.

¹ “It is not necessary for an alibi defense to be corroborated in order to constitute an alibi.” *Commonwealth v. Poindexter*, 646 A.2d 1211, 1218 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995) (decided under former Rule 305).

Defenses

(1) The notice and a certificate of service shall be signed by the attorney for the defendant, or the defendant if unrepresented.

(2) The notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses whom the defendant intends to call in support of the claim.

Pa.R.Crim.P. Rule 567. In accordance with Rule 567(B), if the defendant fails to file and serve notice of the alibi defense, the Court may:

- i. Exclude entirely any evidence offered by the defendant for the purpose of proving the defense (except testimony by the defendant); or
- ii. Grant a continuance to enable the Commonwealth to investigate such evidence; or
- iii. Make such other order as the interests of justice require.

Furthermore, if the defendant omits any witness from the notice, the Court may:

- i. Exclude the testimony of the omitted witness; or
- ii. Grant a continuance to enable the Commonwealth to investigate the witness; or
- iii. Make such other order as the interests of justice require.

The imposition of these sanctions under Rule 567(B) is within the sole discretion of the trial court. See *Commonwealth v. Prisk*, 744 A.2d 294, 297, n.5 (Pa. Super. 1999); *Commonwealth v. Zimmerman*, 571 A.2d 1062, 1067 (Pa. Super. 1990) (decided under former Rule 305), *appeal denied*, 529 Pa. 633, 600 A.2d 953 (1991), *cert. denied*, 503 U.S. 945 (1992).

2. Notice requirement by prosecution

As long as the defense complies with the notice requirement, the Commonwealth, under Rule 567 (c), is under a reciprocal notice requirement if it wishes to present witnesses who will discredit or disprove the defendant's claim of alibi. Specifically, within 10 days after receipt of the defendant's notice of alibi, the Commonwealth must file and serve upon the defendant written notice of the names and addresses of all such impeachment witnesses.² Similar sanctions are available if the Commonwealth fails to file the reciprocal notice or omits a witness's name.

² The court, upon cause shown, may specify a different time for the service of the Commonwealth's notice.

3. Continuing duty to disclose

If either the Defense or the Prosecution learn of additional alibi or impeachment witnesses following the filing of the notices, then they must “promptly” notify the opposing party of the additional witness. Rule 567(E).

4. Impeachment of defendant’s alibi defense

Once a defendant files a notice under Rule 567 and presents alibi evidence, the Commonwealth may cross-examine the defendant to impeach the alibi defense or present rebuttal witnesses to impeach the defendant’s alibi evidence.

Pa.R.Crim.P. 567(G) provides, in pertinent part, the following:

(G) Impeachment. A defendant may testify concerning an alibi notwithstanding that the defendant has not filed notice, but if the defendant has filed notice and testifies concerning his or her presence at the time of the offense at a place or time different from that specified in the notice, the defendant may be cross-examined concerning such notice.

It is well settled that the cross-examination of the defendant or other “[e]vidence is admissible in rebuttal to contradict that offered by a defendant or his witnesses” to impeach a defendant’s testimony on alibi. *Commonwealth v. Thomas*, 575 A.2d 921, 924 (Pa. Super. 1990).

5. Withdrawal of alibi notice

After the filing of a notice under Rule 567(A), if the defendant wishes to abandon the alibi defense, and avoid the cross-examination of the defendant as to the alibi notice (and also avoid the presentation of rebuttal witnesses to impeach the alibi notice) the defendant must formally withdraw the notice of alibi defense prior to trial. See *Commonwealth v. Thomas*, 575 A.2d 921, 924 (Pa. Super. 1990); *Commonwealth v. Hill*, 549 A.2d 199, 202 (Pa. Super. 1988), *appeal denied*, 522 Pa. 618, 563 A.2d 887 (1989).

D. Burden of Proof

The defendant “bears no burden of proof on alibi.” *Commonwealth v. Pounds*, 490 Pa. 621, 634 n.16, 417 A.2d 597, 603 n.16 (1980); see also, *Commonwealth v. Saunders*, 529 Pa. 140, 145, 602 A.2d 816, 818 (1992). In *Commonwealth v. Bonomo*, 396 Pa. 222, 151 A.2d 441 (1959), our Supreme Court stated that the

Commonwealth has the burden of proving every essential element necessary for conviction. If the defendant traverses one of those essential elements by evidence of alibi, his evidence will be considered by the jury along with all the other evidence. It

may, either standing alone or together with other evidence, be sufficient to leave in the minds of the jury a reasonable doubt which, without it, might not otherwise exist.

Id., 396 Pa. at 231, 151 A.2d at 446 (emphasis added). *See also, Commonwealth v. Rose*, 457 Pa. 380, 386, 321 A.2d 880, 883 (1974) (“[I]n Pennsylvania, the Commonwealth must yet prove beyond a reasonable doubt the defendant’s presence at the scene of the crime at the time it was committed.”).³

E. Alibi Jury Instruction

1. Purpose of instruction

The alibi instruction is designed to ensure that the jury understands the burden of proof properly lies with the Commonwealth, as there is an inherent danger, without the instruction, that the jury will presume that the defendant has a burden of proof of demonstrating that the alibi is true. *See Commonwealth v. Collins*, 549 Pa. 593, 603, 702 A.2d 540, 544-545 (1997), *cert denied*, 525 U.S. 835 (1998). As our Supreme Court explained in *Commonwealth v. Mikell*, 556 Pa. 509, 729 A.2d 566 (1999), where alibi evidence has been introduced “a defendant is entitled to an alibi instruction to alleviate the danger that the jurors might impermissibly view a failure to prove the defense as a sign of the defendant’s guilt.” *Id.*, 556 Pa. at 517, 729 A.2d at 570.

So long as the defendant establishes an alibi defense, the trial judge may not remove the alibi issue from the jury’s consideration simply because the trial judge personally finds the evidence incredible. *See Commonwealth v. Roxberry*, 529 Pa. 160, 166, 602 A.2d 826, 828 (1992).

When instructing the jury, the trial court must make it clear that the defendant’s failure to prove alibi is not tantamount to guilt. *See Commonwealth v. Jones*, 529 Pa. 149, 151, 602 A.2d 820, 821 (1992). As such, a proper instruction “expressly informs the jury that the alibi evidence, either by itself or together with other evidence, could raise a reasonable doubt as to the defendant’s guilt and clearly directs the jury to consider this evidence in determining *whether the Commonwealth met its burden* of proving beyond a reasonable doubt that the crime was committed by the defendant.” *Id.* (quoting *Commonwealth v. Saunders*, 529 Pa. 140, 145, 602 A.2d 816, 818 (1992)).⁴

³ Of course, “[i]t is well-established that the defendant has no duty to present evidence and may instead rely on the presumption of innocence and the Commonwealth’s burden of proof.” *Commonwealth v. Smith*, 609 Pa. 605, 664, 17 A.3d 873, 908 (2011), *cert. denied*, 133 S.Ct. 24 (2012).

⁴ Thus, in giving this particular instruction, the trial judge need not “parrot” the exact language in *Pounds*, 490 Pa. at 633, 417 A.2d at 603, that alibi evidence “even if not wholly believed,” may raise a reasonable doubt. *Commonwealth v. Saunders*, 529 Pa. 140, 145, 602 A.2d 816, 818 (1992). *See also, Commonwealth v. Thomas*, 552 Pa. 621, 643, 717 A.2d 468, 479 (1998), *cert. denied*, 528 U.S. 827 (1999) (noting that in *Saunders* the Court held that the “even if not wholly believed” language from *Pounds* was “not necessary in an alibi instruction, and emphasized that an appellate court’s inquiry into the adequacy of a jury charge must not focus on the presence of ‘magic words’”).

An alibi instruction is proper:

[S]o long as, when taken as a whole, the instruction makes clear to the jury that a defendant's failure to prove the alibi is not in and of itself a basis for a finding of guilt and that a reasonable doubt could arise based upon alibi evidence even where the defense evidence is not wholly believed. *Commonwealth v. Saunders*, 529 Pa. 140, 602 A.2d 816 (1992). As we stated in *Saunders*:

An [alibi] instruction is proper if it expressly informs the jury that the alibi evidence, either by itself or together with other evidence, could raise a reasonable doubt as to the defendant's guilt and clearly directs the jury to consider this evidence in determining whether the Commonwealth met its burden of proving beyond a reasonable doubt that the crime was committed by the defendant. A charge which meets this standard would not be taken to mean that by introducing alibi evidence the defense assumed a burden of proof, which, if not met, could provide a basis for a finding of guilt.

Further, by instructing the jury that the defense evidence on alibi "either by itself or together with the other evidence" could raise a reasonable doubt, the trial court correctly conveyed that a reasonable doubt could arise based upon alibi even where the defense evidence was not wholly believed. *Id.* at 145, 602 A.2d at 818.

Commonwealth v. Begley, 566 Pa. 239, 278-279, 780 A.2d 605, 628 - 629 (2001).

2. Necessity of instruction

When a defendant offers evidence of alibi and defense counsel argues alibi to the jury, the trial court's failure to give an alibi instruction is error. *See Commonwealth v. Gainer*, 580 A.2d 333, 337 (Pa. Super. 1990), *appeal denied*, 529 Pa. 645, 602 A.2d 856 (1992). *See also, Commonwealth v. Kolenda*, 544 Pa. 426, 432, 676 A.2d 1187, 1190 (1996) ("The strength of the Commonwealth's case does not render the absence of an alibi instruction harmless error:").

3. Limitation on use of instruction

A defendant is only entitled to an alibi instruction where his or her "explanation places him at the relevant time at a different place than the scene involved and so far removed therefrom as to render it impossible for him to be the guilty party." *Commonwealth v. Collins*, 549 Pa. 593, 603, 702 A.2d 540, 545

(1997), *cert denied*, 525 U.S. 835 (1998).

Accordingly, where the defendant's testimony places him or her close enough to the crime scene to have made it physically possible for the defendant to have committed the crime, an alibi instruction is not required. *Id.*

Examples:

- ***Commonwealth v. Johnson***, 538 Pa. 148, 646 A.2d 1170 (1994): no instruction is required where the defendant's testimony placed him within 150 feet of the crime scene.
- ***Commonwealth v. Sileo***, 32 A.3d 753, 767 (Pa. Super. 2011), *appeal denied*, 615 Pa. 785, 42 A.3d 1060 (2012): evidence placed defendant at location – alibi instruction not appropriate when defense rests on timing rather than location.
- ***Commonwealth v. Bookard***, 978 A.2d 1006, 1008 (Pa. Super. 2009), *appeal denied*, 605 Pa. 706, 991 A.2d 309 (2010): evidence placed defendant close enough to the scene so that, while difficult, it was not impossible for him to have committed crime.

4. Ineffective Assistance of Counsel: Lack of Request for Instruction

Furthermore, defense counsel will be found constitutionally ineffective when an alibi defense, supported by alibi evidence, is presented to the jury, but defense counsel fails to request an alibi instruction. *See Commonwealth v. Gainer*, 580 A.2d 333, 337 (Pa. Super. 1990), *appeal denied*, 529 Pa. 645, 602 A.2d 856 (1992). Likewise, counsel will be found constitutionally ineffective when he or she requests an alibi instruction, which the trial refuses to give, and defense counsel fails to preserve the court's error by not objecting to the charge. *Id.*

However, a finding of prejudice per se is not necessary where an alibi instruction has not been requested, although alibi evidence was presented. If trial counsel articulates a reasonable and sound basis for deliberately declining to seek an alibi instruction, then trial counsel is not constitutionally ineffective. ***Commonwealth v. Hawkins***, 586 Pa. 366, 377, 894 A.2d 716, 722 (2006).

Thus, in accordance with our Supreme Court's clear pronouncement in ***Hawkins***, the PCRA court was, and this Court is, compelled to analyze the prejudice aspect of the ineffectiveness test in this context. The ***Hawkins*** Court clearly articulated that the prejudice element of the ***Pierce/ Strickland*** test must be satisfied before a new trial can be awarded based on trial counsel's

failure to request an alibi instruction. *See also Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523, 538 (2009) (counsel cannot be found *per se* ineffective under *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), for failing to adequately investigate and interview alibi witnesses and before a defendant will be awarded a new trial, actual prejudice must be demonstrated based upon such failure).

In light of our Supreme Court's unequivocal rulings in *Hawkins* and *Johnson*, this Court would be seriously remiss, and indeed face rebuke, if we failed to conduct an inquiry into whether Appellant was prejudiced by trial counsel's unexplained failure to seek an alibi instruction. *Commonwealth v. Randolph*, 553 Pa. 224, 718 A.2d 1242, 1245 (1998) ("We take this opportunity to admonish the Superior Court that it is obligated to apply and not evade our decisions. It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court."); *see also Commonwealth v. Shaffer*, 557 Pa. 453, 734 A.2d 840, 844 n. 6 (1999) (same). In accordance with the directives of *Hawkins*, we must analyze the prejudice issue.

Commonwealth v. Sileo, 32 A.3d 753, 758-759 (Pa. Super. 2011), *appeal denied*, 615 Pa. 785, 42 A.3d 1060 (2012).

F. Rebuttal of Alibi Defense

An alibi defense can be rebutted simply by the victim's testimony. *See Commonwealth v. Brison*, 618 A.2d 420, 423 (Pa. Super. 1992) (finding that jury's evident acceptance of victim's testimony was sufficient to rebut defendant's alibi evidence and noting that "no other additional evidence" was needed to rebut defendant's alibi evidence). The Commonwealth may use any relevant and admissible countervailing evidence to rebut alibi evidence.

Examples:

- *Commonwealth v. Johnson*, 788 A.2d 985, 991 (Pa. Super. 2001): noting that to rebut alibi witness's testimony that she and defendant lived together the Commonwealth could have presented "the testimony of neighbors that Appellant did not live there, or evidence that Appellant resided elsewhere."
- *Commonwealth v. Days*, 784 A.2d 817, 822 (Pa. Super. 2001): no error in permitting the Commonwealth to offer defendant's convictions for public drunkenness and criminal mischief, not

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as crimes of dishonesty or false statement, but to rebut the defendant's alibi evidence "after appellant used the convictions to victimize and alibi himself."

- ***Commonwealth v. Viera***, 659 A.2d 1024, 1029 (Pa. Super. 1995), *appeal denied*, 534 Pa. 713, 672 A.2d 307 (1996): no error in permitting the Commonwealth to present the defendant's probation officer as a rebuttal witness to defendant's alibi evidence where parole officer did not elaborate as to crime which caused defendant to serve parole.
- ***Commonwealth v. Flood***, 627 A.2d 1193, 1201 (Pa. Super. 1993), *appeal denied*, 537 Pa. 617, 641 A.2d 583 (1994): trial court did not abuse its discretion in allowing prosecution to reopen its case and submit rebuttal affidavit, which rebutted defendant's alibi, indicating that gun allegedly used by defendant had been purchased for him by his cousin.
- ***Commonwealth v. Marsh***, 566 A.2d 296, 301 (Pa. Super. 1989): evidence of prior crimes admissible to show common scheme where the evidence was probative as it tended to rebut the defendant's alibi defense.

G. Assessing the Credibility of an Alibi Witness

The assessment of the credibility of an alibi witness is the sole province of the fact-finder. See ***Commonwealth v. Thomas***, 552 Pa. 621, 633, 717 A.2d 468, 478 (1998), *cert denied*, 528 U.S. 827 (1999); 2 West's Pennsylvania Practice § 12.32, Alibi (2001).

In ***Commonwealth v. Harvard***, 64 A.3d 690, 701 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 77 A.3d 636 (2013), the Superior Court concluded that the verdict was not against the manifest weight of the evidence when the jury rejected the testimony of the alibi witnesses despite the variances in the victims' descriptions of the defendant.

5.3 CONSENT DEFENSE⁵

A. Statutory Elements of Defense

Consent as a defense is set forth in the culpability section of the Crimes Code, which provides, in pertinent part, the following in 18 PA.CON.S.TAT.ANN. § 311.

- (a) General rule.--The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such

⁵ See also, Section 5.9(C) as to Mistake of Fact as to a consent defense.

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consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.⁶

Section 311 is based upon Model Penal Code § 2.11 (2001). As explained in the Official Comment to Section 311, generally speaking, the consent of the victim of a crime is no defense. However, many crimes, especially those of sexual violence, require lack of consent as an element of the crime. Several sexual violence offenses require that the Commonwealth prove lack of consent. See 18 PA.CON.S.TAT.ANN. § 3124.1 (sexual assault); 18 PA.CON.S.TAT.ANN. § 3125 (aggravated indecent assault).

Other crimes of sexual violence require the prosecution to prove forcible compulsion or threat of forcible compulsion that would prevent resistance by a person of reasonable resolution. See 18 PA.CON.S.TAT.ANN. § 3121 (rape); 18 PA.CON.S.TAT.ANN. § 3123 (involuntary deviate sexual intercourse). Forcible compulsion, or threat thereof, encompass a lack of consent, although both require proof of something more. *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 2031 (2003); *Commonwealth v. Eckrote*, 12 A.3d 383, 387 (Pa. Super. 2010).

Although Pennsylvania law does not require the alleged victim to resist,⁷ consent is a defense available to all crimes in the Sexual Offenses chapter:

Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.

18 PA.CON.S.TAT.ANN. § 3107.

Not many cases define “consent.”

[C]onsent is an act of free will. It is not the absence of resistance in the face of actual or threatened force inducing a woman to submit to a carnal act; active opposition is not a prerequisite to finding lack of consent.

Commonwealth v. Rough, 418 A.2d 605, 608 (Pa. Super. 1980)(quoting *Commonwealth v. Hayden*, 307 A.2d 389, 390 (Pa. Super. 1973)).

B. Burden of Proof

“While a defendant may assert consent as a defense, nevertheless, where lack of consent is an element of the crime, the defendant does not bear the burden of proving consent: *the Commonwealth bears the burden of proving lack of consent, beyond a reasonable doubt.*” *Commonwealth v. Prince*, 719 A.2d 1086, 1090 (Pa. Super. 1998)

⁶ 18 PA.CON.S.TAT.ANN. § 311.

⁷ “The alleged victim need not resist the actor in prosecutions under this chapter” 18 PA.CON.S.TAT.ANN. § 3107.

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(emphasis in original); *see also*, ***Commonwealth v. Walls***, 993 A.2d 289 (Pa. Super. 2010).

There is an exception in Pennsylvania's Rape Shield statute which permits evidence of an alleged victim's past sexual history when consent is at issue. The Rape Shield statute provides, in pertinent part:

§ 3104. Evidence of victim's sexual conduct

(a) General rule.--Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.⁸

A defendant who wishes to offer evidence of the alleged victim's past sexual conduct with the defendant to support a defense of consent must file a written motion and offer of proof at the time of trial in accordance with 18 PA.CON.S.TAT.ANN. § 3104(b).⁹ If the in camera hearing, held pursuant to § 3104(b), provides evidence that is relevant and admissible to the tendered defense, then the trial court is required to receive the evidence and permit the jury to assess its credibility. ***Commonwealth v. Baronner***, 471 A.2d 104, 106 (Pa. Super. 1984).

C. Ineffective Consent

Under the Crimes Code, assent to a sexual encounter does not constitute consent if:

(1) it is given by a person who is *legally incapacitated* to authorize the conduct charged to constitute the offense;

(2) it is given by a person who by reason of *youth, mental disease or defect or intoxication* is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;

(3) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or

(4) it is *induced by force, duress or deception* of a kind sought to be prevented by the law defining the offense.

⁸ 18 PA.CON.S.TAT.ANN. § 3104(a) (emphasis added).

⁹ For a detailed discussion of the substantive and procedural requirements of the Pennsylvania Rape Shield Law, please see **Section 5.5(A)** and **Chapter 6, § 6.8 EVIDENCE OF VICTIM'S PAST SEXUAL CONDUCT**.

18 PA.CON.S.STAT.ANN. § 311(c)(1)-(4). For example:

- ***Commonwealth v. Erney***, 548 Pa. 467, 473-474, 698 A.2d 56, 59 (1997) (where victim had impaired physical and mental condition due to intoxication so as to be unable to knowingly consent, submission to intercourse is involuntary).
- ***Commonwealth v. Cordoba***, 902 A.2d 1280, 1286 (Pa. Super. 2006) (where defendant knew he was HIV-infected and nonetheless had sex with his victim without informing him of that fact, trial court was incorrect in concluding that defendant and victim had “consensual” relations as consent is ineffective when induced by deception, citing 18 PA.CON.S.STAT.ANN. § 311(c)(4)).

D. Consent as a Valid Defense

Effective consent to sexual intercourse will negate a finding of forcible compulsion. See ***Commonwealth v. Rhoades***, 510 Pa. 537, 554, 510 A.2d 1217, 1225 (1986).

E. Consent Inapplicable to Certain Sexual Offenses

1. Victims younger than thirteen years old

In cases of rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, or indecent assault, consent is no defense if the victim is less than thirteen years of age.

- 18 PA.CON.S.STAT.ANN. § 3121(c), *Rape of a Child*;
- 18 PA.CON.S.STAT.ANN. § 3121(d), *Rape of a Child with serious bodily injury*;
- 18 PA.CON.S.STAT.ANN. § 3123(b), *IDSI with a Child*;
- 18 PA.CON.S.STAT.ANN. § 3123(b), *IDSI with a Child with serious bodily injury*;
- 18 PA.CON.S.STAT.ANN. § 3125(a)(7), *Aggravated Indecent Assault*;
- 18 PA.CON.S.STAT.ANN. § 3125(b), *Aggravated Indecent Assault of a Child*;
- 18 PA.CON.S.STAT.ANN. § 3126(a)(7), *Indecent Assault*.

In ***In re: B.A.M.***, 806 A.2d 893 (Pa. Super. 2002), the Superior Court held that the Legislature did not seek to criminalize consensual sexual activity between two eleven year old peers. The court pointed out that the Legislature chose thirteen as the age of consent, and just as a child under thirteen is legally incapable of consenting to sex, such a child is equally incapable of being criminally

liable for initiating sexual contact. However, in *Commonwealth v. Bricker*, 41 A.3d 872 (Pa. Super. 2012), the Superior Court also held that an adult who solicits sex between two 11 year-old victims is criminally responsible even though the victims could have been found criminally liable to each other for the mutually agreed-upon sexual activity.

2. Victims thirteen and older but under sixteen years old

Victims who are thirteen or older, but under sixteen, do not have the legal capacity to consent to sexual contact with an individual who is four or more years older than the victim and who is not married to the victim:

- 18 PA.CON.S.STAT.ANN. § 3123(a)(7), *IDSI*;
- 18 PA.CON.S.STAT.ANN. § 3125(a)(8), *Aggravated Indecent Assault*;
- 18 PA.CON.S.STAT.ANN. § 3126(a)(8), *Indecent Assault*.

Consensual intercourse in these circumstances is not criminalized as Rape under 18 PA.CON.S.STAT.ANN. § 3121 but rather as Statutory Sexual Assault under 18 PA.CON.S.STAT.ANN. § 3122.1.

3. Statutory Sexual Assault

In addition, the recent amendments to the Statutory Sexual Assault statute, 18 PA.CON.S.STAT.ANN. § 3122.1, separate the two sections of the crime into a Felony of the First Degree and a Felony of the Second Degree. Both are predicated on the complainant being under the age of sixteen and the defendant not being married:

- It is a Felony of the First Degree if the person engages in sexual intercourse with the complainant and is 11 or more years older than the complainant;
- It is a Felony of the Second Degree if the person engages in sexual intercourse with the complainant and is either (1) four years older but less than eight years older, or (2) eight years older but less than 11 years older.

The distinction between the two levels of statutory sexual assault is important. If the charge of Statutory Sexual Assault is graded as a Felony of the First Degree, i.e., the defendant is 11 or more years older than the complainant, who is under the age of 16, pursuant to 18 PA.CON.S.STAT.ANN. § 3122.1(b), then under SORNA, the offense is classified as a Tier III Sexual Offense. See 42 PA.CON.S.STAT.ANN. § 9799.14(d). Otherwise, it is classified as a Tier II Sexual Offense under SORNA. See 42 PA.CON.S.STAT.ANN. § 9799.14(c).¹⁰

¹⁰ For additional information, see Chapter 9, Section 9.7, Sexually Violent Predator Assessment and Chapter 11, Sex Offender Registration and Notification.

5.4 DURESS

A. Statutory Elements

Duress is “a threat of harm made to compel a person to do something against his or her will or judgment. . . .” Black’s Law Dictionary 542 (8th ed. 2004). It is rarely, if ever, raised in a crime of sexual violence. Because it is a defense that is legislatively recognized, it is discussed herein.

The defense of duress is codified in Section 309 of the Crimes Code. Section 309 states the following:

(a) General rule.--It is a defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(b) Exception.--The defense provided by subsection (a) of this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

18 PA.CON.S.TAT.ANN. § 309.

The elements necessary to establish duress as a defense are:

- i) there was a use of, or threat to use, unlawful force against the defendant or another person; and
- ii) the use of, or threat to use, unlawful force was of such a nature that a person of reasonable firmness in the defendant’s situation would have been unable to resist it.

See *Commonwealth v. DeMarco*, 570 Pa. 263, 272, 809 A.2d 256, 261-262 (2002).

The defendant does not bear the burden of proving the defense of duress. If the defendant proffers evidence to raise the defense, the prosecution must disprove the defense by proof beyond a reasonable doubt. See *Commonwealth v. Morningwake*, 595 A.2d 158, 163 (Pa. Super. 1991), *appeal denied*, 529 Pa. 618, 600 A.2d 535 (1991).

B. Degree of Force Required

To establish the duress defense under Section 309, the force or threatened force

does not need to be of present and impending death or serious bodily injury; rather, the relevant inquiry is

whether the force or threatened force was a type of unlawful force that “a person of reasonable firmness *in [the defendant’s] situation* would have been unable to resist.”

Commonwealth v. DeMarco, 570 Pa. 263, 272, 809 A.2d 256, 262 (2002).

The Pennsylvania Supreme Court in ***Commonwealth v. DeMarco***, 570 Pa. 263, 809 A.2d 256 (2002) noted that the foregoing test is a “hybrid objective-subjective one,” 570 Pa. at 273, 809 A.2d at 262, and explained that

the trier of fact must consider whether an objective person of reasonable firmness would have been able to resist the threat, it must ultimately base its decision on whether that person would have been able to resist the threat if he was subjectively placed in the defendant’s situation. Therefore, in making its determination, the trier of fact must consider “stark, tangible factors, which differentiate the [defendant] from another, like his size or strength or age or health.” MODEL PENAL CODE § 2.09 cmt. at 7 (Tent. Draft No. 10, 1960). Although the trier of fact is not to consider the defendant’s particular characteristics of temperament, intelligence, courageousness, or moral fortitude, the fact that a defendant suffers from “a gross and verifiable” mental disability “that may establish irresponsibility” is a relevant consideration. *Id.* at 6. Moreover, the trier of fact should consider any salient situational factors surrounding the defendant at the time of the alleged duress, such as the severity of the offense the defendant was asked to commit, the nature of the force used or threatened to be used, and the alternative ways in which the defendant may have averted the force or threatened force.

DeMarco, 570 Pa. at 273, 809 A.2d at 262.

C. Exceptions to Duress Defense

1. Recklessness

The duress defense is not available if the evidence establishes that the defendant recklessly placed himself in a situation where it was probable that he would be subject to duress. *See* 18 PA.CON.S.TAT.ANN. § 309(b). Our Supreme Court has defined “reckless” under Section 309 as follows:

A person acts recklessly with respect to a material element

of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, *considering the nature and intent of the actor's conduct and the circumstances known to him*, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe *in the actor's situation*.

DeMarco, 570 Pa. at 273-274, 809 A.2d at 262 (citing 18 PA.CON.S.TAT.ANN. § 302(b)(3)) (emphasis in original). The determination of recklessness is also “a hybrid objective-subjective one.” *Id.*, 570 Pa. at 274, 809 A.2d at 262.

The trier of fact must decide whether the defendant disregarded a risk that involves a gross deviation from what an objective “reasonable person” would observe if he was subjectively placed “in the [defendant’s] situation.” 18 Pa.C.S. § 302(b)(3). Thus, in making its determination, the trier of fact must again take into account the stark tangible factors that differentiate the defendant from another person and the salient situational factors surrounding the defendant.

Id., 570 Pa. at 274, 809 A.2d at 262-263.

2. Negligence

The defense of duress is also unavailable if a defendant were negligent in placing himself in a situation where he would be subjected to duress, whenever negligence suffices to establish culpability for the offense charged. *See* 18 PA.CON.S.TAT.ANN. § 309(b). *See also, Commonwealth v. Knight*, 611 A.2d 1199, 1205 (Pa. Super. 1992), *appeal denied*, 533 Pa. 657, 625 A.2d 1192 (1993). The Crimes Code defines negligence as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

18 PA.CON.S.TAT.ANN. § 302(b)(4).

3.5 IMPEACHMENT WITH PRIOR SEXUAL CONDUCT

A. Pennsylvania's Rape Shield Statute

The admission of evidence of a complainant's prior sexual conduct may be necessary to preserve the accused's constitutional confrontation clause rights. In the context of a case of sexual violence, however, the purpose of the Rape Shield Law is to prevent a trial from shifting its focus from the culpability of the accused toward the virtue and chastity of the victim. 18 PA.CON.S.TAT.ANN. § 3104.¹¹

The law is well settled that the Rape Shield Law is a bar to admission of testimony of prior sexual conduct involving a victim, whether it is consensual or the result of nonconsensual or assaultive behavior, *unless it has probative value which is exculpatory to the defendant*. Under such circumstances, the trial court in an in-camera hearing will carefully weigh the evidence, and in the judge's discretion make a determination as to the admissibility of that evidence. *Commonwealth v. Fink*, 791 A.2d 1235, 1241-1242 (Pa. Super. 2002). The trial court must determine whether its probative value outweighs its prejudicial effect. In the absence of an abuse of discretion, that decision will stand on appeal. *Commonwealth v. Allburn*, 721 A.2d 363, 266 (Pa. Super. 1998).

In *Commonwealth v. Spiewak*, 533 Pa. 1, 617 A.2d 696 (1992), the Pennsylvania Supreme Court held that evidence of a complainant's prior sexual history is admissible if it is highly probative of the victim's credibility and is necessary to allow the jury to make a fair determination of guilt or innocence. *Id.* at 13, 617 A.2d at 702. Of course, proffers which relate to alleged prior sexual conduct of the complainant trigger an inquiry into the applicability of the Rape Shield Law, 18 PA.CON.S.TAT.ANN. § 3104. The Rape Shield Law prohibits the introduction of evidence relating to the victim's sexual history, including conduct and reputation, and states:

§ 3104. Evidence of victim's sexual conduct

General rule.--Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 PA.CON.S.TAT.ANN. § 3104(a). However, as stated above, our Supreme Court has addressed the type of evidence that is admissible albeit the prohibition of the Rape Shield Law.

¹¹ For a detailed discussion of the substantive and procedural requirements of the Pennsylvania Rape Shield Law, please see **Chapter 6, § 6.8 EVIDENCE OF VICTIM'S PAST SEXUAL CONDUCT**.

In *Spiewak*, the defendant sought to impeach the credibility of the minor victim by cross-examining her about an earlier incident in which she testified that that an older man who was a friend of the defendant's had seduced her. The relevancy to credibility was that this prior testimony describing the encounter was substantially similar to the description of the encounter with the defendant to which the victim had testified. The Supreme Court reversed the trial court's ruling that the Rape Shield Law precluded such a line of questioning. The Court reasoned that the Rape Shield Law does not prohibit the admission of relevant evidence which may exculpate a defendant of the crime with which he is charged. Further, using a balancing test, the Rape Shield Law must yield to a defendant's constitutional right to challenge the credibility of a witness and present evidence necessary to permit or allow a jury to make a fair determination of the defendant's guilt or innocence. *Id.*, 533 Pa. at 7-10, 617 A.2d at 699-702.

In *Commonwealth v. Black*, 487 A.2d 396 (Pa. Super. 1985), the Superior Court permitted admission of evidence of the victim's prior sexual activity, i.e., evidence of her prior sexual conduct with one of her brothers, on the issue of her bias against the defendant, provided that a three-part test was met at an *in camera* hearing similar to that outlined in 18 PA.CON.S.TAT.ANN. § 3104(b). The theory of bias was based on the argument that the victim wanted the father removed from the house so that she could reunite with her brother. The Superior Court referred to the Confrontation Clause under the Sixth Amendment of the United States Constitution in holding that the Rape Shield Law can not be used to exclude relevant evidence that shows the bias of a witness or attacks the credibility of the witness. Thus, relevant evidence of such past sexual conduct would be admissible as long as it would not "so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice." *Id.* at 401.

In *Commonwealth v. Fernsler*, 715 A.2d 435 (Pa. Super. 1998), the defendant filed a *Motion in Limine* to question the child victim about his prior sexual activity, specifically his disclosure of a previous assault he made upon his half-sister. The trial court granted the motion. The Superior Court affirmed and again held that the Rape Shield Law, if rigidly construed, could impermissibly encroach upon defendant's right to confront and cross-examine witnesses; in those cases, Rape Shield Law must bow to the need to permit accused an opportunity to present genuinely exculpatory evidence. *Id.* at 442.

The proffer must be specific and highly probative to issues of credibility. The requirement of a specific proffer of evidence was designed to prevent a "fishing expedition" into the areas protected by the Rape Shield Law. *Commonwealth v. Burns*, 988 A.2d 684, 691 (Pa. Super. 2009), *appeal denied*, 608 Pa. 615, 8 A.3d 341 (2010).

The Rape Shield Law may not be used to exclude relevant evidence showing a witness' bias or attacking credibility, and evidence that may tend to directly exculpate the accused by showing that the alleged victim is biased and thus "has a motive to lie or fabricate" is admissible at trial. *Commonwealth v. Guy*, 686 A.2d 397, 401 (1996). In *Guy*, the evidence of the victim's prior sexual conduct was not relevant to any allegation

of bias or motive, rather was for the only purpose of showing conformity to past conduct; as such, the Superior Court held that it was not admissible. *Id.* at 402.

B. Confrontation Clause Challenges

There are circumstances when the application of a state's rape shield law, to restrict a cross-examination of a complainant's prior sexual conduct, implicates federal habeas corpus review. Federal habeas corpus review is authorized under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, codified at 28 U.S.C.A. § 2254 et seq.¹² Under AEDPA, the federal court will review the last state court decision adjudicated on the merits to determine whether that decision "was contrary to, or involved an *unreasonable* application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). See *Nevada v. Jackson*, --- U.S. ---, 133 S.Ct. 1990, 1992, 186 L.Ed.2d 62 (2013). There must be a prior exhaustion of state remedies. 28 U.S.C.A. § 2254(b)(1)(A).

The United States Supreme Court has declared cross-examination an essential constitutional right for a fair trial, subject to "reasonable limits" reflecting concerns such as prejudice, confusion or delay incident to "marginally relevant" evidence. *Delaware v. Van Arsdall*, 475 U.S. 673, 678-679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

However, a defendant's Sixth Amendment right to present a complete defense is not absolute. See *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 1746 114 L.Ed.2d 205 (1991) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). Numerous federal cases have held that rape shield laws support legitimate state interest. In *Michigan v. Lucas*, the United States Supreme Court noted that Michigan's rape shield statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." 500 U.S. at 150, 111 S.Ct. at 1746-1747. See also, *Gagne v. Booker*, 680 F.3d 493, 510 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 481, 184 L.Ed.2d 302 (2012).

State courts are required to balance the state interest in enforcing their rape shield laws against the defense interest in putting forth a complete defense. *Michigan v. Lucas*, 500 U.S. at 152-153, 111 S.Ct. at 1748.

This standard calls for a balancing of interests depending on the circumstances of the case. Factors that the Supreme Court has deemed relevant are the importance of the evidence to an effective defense, *Davis v. Alaska*, 415 U.S. 308, 319, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); the scope of the ban involved, *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); and the legitimacy of state interests weighing against admission of the evidence, *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973). See generally, *White v. Coplan*,

¹² 28 U.S.C.A. § 2254(a) provides that the federal courts "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States."

399 F.3d 18 (1st Cir. 2005), *cert. denied*, 546 U.S. 972, 126 S.Ct. 478, 163 L.Ed.2d 384 (2005).

As stated above, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the federal court must conclude that the application must be “unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 411, 120 S.Ct. 1495, 1522, 146 L.Ed.2d 389 (2000). In other words, federal habeas relief is available only if the state court’s application of federal law is “so erroneous that there is no possibility fair-minded jurists could disagree that the state court’s decision conflicts with this Court’s precedents.” *Nevada v. Jackson*, --- U.S. ---, 133 S.Ct. 1990, 1992, 186 L.Ed.2d 62 (2013).

Another example of this line of scrutiny, i.e., whether the state court’s decision is “unreasonable” is *Hammer v. Karlen*, 342 F.3d 807 (7th Cir. 2003). In *Hammer*, the defendant was charged with improperly touching three young boys while they were sleeping. Hammer allegedly fondled the boys’ penises. The trial court prohibited defense counsel from cross-examining the victims about sexual horseplay they may have engaged in the day before. The defense contended that the evidence showed a motive or pattern of conduct linked in time to the alleged assault. Eventually, the Wisconsin Supreme Court found that the state’s rape shield statute was properly invoked to exclude the evidence of the victims’ alleged prior sexual conduct. The state court determined that the evidence Hammer wished to present was not highly relevant and that his interest in presenting it was outweighed by the State’s interest in protecting the privacy of sexual assault victims under Wisconsin’s rape shield law. In reviewing this decision, the Seventh Circuit Court of Appeals said that for a petitioner to obtain relief, “the state court must not only have reached an incorrect result, but a truly ‘unreasonable’ one.... Thus, if the state court’s decision is ‘at least minimally consistent with the facts and circumstances of the case,’ the federal court is powerless to grant relief.” *Hammer*, 342 F.3d at 810.

See 71 A.L.R. 4th 469 (1989), *Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons*.

C. Impeachment Based Upon Prior False Accusations

Many courts hold that proof that the complainant made a prior false accusation of sexual assault is relevant to a determination of credibility. However, the Pennsylvania Superior Court, in *Commonwealth v. Gaddis*, 639 A.2d 462, 466 (Pa. Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994), held that the evidence of prior false accusations must be tied into a defense of bias or hostility toward the defendant or that the victim had a motive:

Although this court also has held that the Rape Shield Law may not be used to exclude relevant evidence attacking credibility

or showing a witness' bias, *Commonwealth v. Black*, 3337 Pa. Super. 548, 487 A.2d 396 (1985), subsequent decisions have applied the holding in *Black* quite narrowly, and "only where the victim's credibility was allegedly affected by bias against or hostility toward the defendant, or the victim had a motive to seek retribution." *Commonwealth v. Boyles*, 407 Pa. Super. 343, 354, 595 A.2d 1180, 1186 (1991)."

639 A.2d at 466.

The federal courts have been sensitive to the contention that the defense was prohibited from cross-examining the complainant about a prior false accusation of sexual assault. In *Quinn v. Haynes*, 234 F.3d 837 (4th Cir. 2000), *cert. denied*, 532 U.S. 1024, 121 S.Ct. 1968, 149 L.Ed.2d 762 (2001), the defendant was accused of sexual assault by a child. The state trial court prohibited defense counsel from cross-examining the youthful victim about her statements that she had been previously sexually abused by persons other than the defendant. The defendant's only way to show the falsity of the statements was by denials by those previously accused. The defendant's sole purpose was to demonstrate that the victim's allegations against the others were false, and thus, constituted evidence that she was also lying about him. Although the Circuit Court in *Quinn* found the state supreme court's exclusion of the proffered impeachment evidence "neither arbitrary nor disproportionate to the State's legitimate interests underlying its implementation of its rape shield law . . .," *Id.* at 851, the door has been opened to presentation of evidence tending to show falsity without regard to motive or bias.

In *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005), *cert. denied*, 546 U.S. 972, 126 S.Ct. 478, 163 L.Ed.2d 384 (2005), the First Circuit, in a case of sexual violence, reviewed a trial court's decision to prohibit the defendant from offering evidence that his alleged victim had previously made similar accusations against other persons. The First Circuit found a violation of the defendant's Sixth Amendment rights when he was prevented from cross-examining the young children about three prior accusations of sexual abuse they had made against other people. *Id.* at 21. It recognized that the defendant's Sixth Amendment confrontation right had been contravened at trial, because the state court's failure to admit the excluded evidence was an "unreasonable application" of the controlling *Rock-Lucas* Principle. *Id.* at 25.

Other federal courts have reached similar conclusions when evidence of a prior false allegation was prohibited through application of the state rape shield rule when there are facts that make the prior false accusation particularly relevant toward discrediting a critical witness. *See, e.g., Averilla v. Lopez*, 862 F.Supp.2d 987 (N.D.Cal. 2012).

See 71 A.L.R. 4th 469 (1989)(Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons).

5.6 IMPOSSIBILITY DEFENSE

A. Abrogation

Section 901(b) of the Crimes Code abrogates the defenses of factual and legal impossibility for attempt offenses.¹³ *Commonwealth v. Henley*, 504 Pa. 408, 415, 474 A.2d 1115, 1118 (1984).

B. Factual impossibility

Impossibility defenses are usually classified as either legal or factual in nature. *Commonwealth v. Ohle*, 503 Pa. 566, 586, 470 A.2d 61, 72 (1983).

“Factual impossibility denotes conduct where the objective is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing it about. The classic example is the thief who picks an empty pocket” *Commonwealth v. Henley*, 504 Pa. 408, 410-411, 474 A.2d 1115, 1116 (1984)(quoting *United States v. Conway*, 507 F.2d 1047, 1050 (5th Cir. 1975)).

Factual impossibility is not an available defense under the Pennsylvania Crimes Code for inchoate crimes such as *criminal attempt, solicitation or conspiracy*. See e.g., 18 PA.CON.S.TAT.ANN. § 901; *Commonwealth v. Timer*, 609 A.2d 572, 575 (Pa. Super. 1992) (conviction for conspiracy to purchase and/or possess methamphetamine upheld even though a sale never took place and was never going to take place because the undercover officers posing as suppliers had no intention of actually providing the drug); *Commonwealth v. John*, 854 A.2d 591, 597 (Pa. Super. 2004)(“[T]he fact that the person appellant solicited was not a 13 year old girl, as he believed, affords him no defense.”).

C. Impotence or Other Type of Inability

Impotence or another type of physical/medical incapacity, while often mistaken for an impossibility defense, is rather a relevant factual issue intended to call the complainant’s testimony into issue. If properly raised and supported by the evidence, it may be used to question the veracity of the complainant.

The defendant is permitted to raise impotence as a defense if his physical incapacity can be shown to exist, either a permanent or temporary inability, at the time of the alleged assault. This is an issue for the finder of fact, which of course will be assisted by medical or some other type of expert testimony. A Pennsylvania case that was close to this type of defense was *Commonwealth v. Ramstedt*, 173 A. 772 (Pa. Super. 1934), in which the defendant, a man of seventy years of age, tried to show that he could not have raped and impregnated a sixteen year old girl by presenting two physicians who testified that there was no live spermatozoa in his seminal fluid. The jury found

¹³ “(b) **Impossibility.**—It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the crime attempted.” 18 PA.CON.S.TAT.ANN. § 901(b).

against the defendant; the doctors were not able to specifically say that he lacked the live spermatozoa at the relevant time period. *Id.* at 773. *See also*, 23 A.L.R. 3d 1351 (1969) *Impotency as defense to charge of rape*; 8 SPP § 49:92, *Scientific and Technological Matters; Application of Natural Laws*.

In *Commonwealth v. Barger*, 956 A.2d 458 (Pa. Super. 2008), *appeal denied*, 602 Pa. 655, 980 A.2d 109 (2009), the defendant raised the defense, in a rape case in which the alleged victim, E.G., was his 13 year-old niece, that:

he was impotent and required the use of a mechanical device to engage in sexual intercourse. According to Appellant, he kept the device at home and never took it to E.G.'s home.

956 A.2d at 460. He was acquitted of all of the sexual violence charges in an apparent decision by the jury to disbelieve the victim. *Id.* at 464.

D. Legal Impossibility

Legal impossibility occurs “where the intended acts would not amount to a crime even if completed.” *Commonwealth v. Henley*, 504 Pa. 408, 411, 474 A.2d 1115, 1116 (1984). Our Supreme Court cited a New York case for an example of legal impossibility:

A frequently cited case standing for this proposition is *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906). The *Jaffe* Court held that where an element of the completed crime required the goods be stolen, the fact that the goods were not stolen was a defense to the completed act. Consequently, an attempt to do an act which would not be criminal if completed could not itself be criminal regardless of the actor’s intent.”

Henley, 504 Pa. at 411, 474 A.2d at 116. However, it is clear that Section 901(b) of the Crimes Code abrogates the defenses of factual and legal impossibility to attempt crimes. *Id.* at 415, 474 A.2d at 1118.

5.7 INSANITY DEFENSE

A. Availability

The insanity defense is only available to those defendants who come within the purview of Pennsylvania’s legal test for insanity. The insanity defense is not available simply because the defendant has a mental illness. The defense of insanity is a legal creature, not a medical or psychological determination although proof thereof routinely plays an important role.

Section 315 of the Crimes Code provides the general rule that:

The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.

18 PA.CON.S.TAT.ANN. § 315(a). Section 315(b) further provides that

“[l]egally insane” means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

Section 315 is a codification of the *M’Naghten*¹⁴ test for insanity. See *Commonwealth v. Rabold*, 597 Pa. 344, 348 n.1, 951 A.2d 329, 331 n. 1 (2008). Accordingly, “[u]nder *M’Naghten*, a defendant is legally insane and absolved of criminal responsibility if, at the time of committing the act, due to a defect of reason or disease of mind, the accused either did not know the nature and quality of the act or did not know that the act was wrong.” *Commonwealth v. Heidnik*, 526 Pa. 458, 466, 587 A.2d 687, 690 (1991).

B. Burden of Proof

“It has long been accepted that criminal defendants may be presumed sane for purposes of determining their criminal liability. Thus, under the clear language of section 315(a), the burden of proving insanity by a preponderance of the evidence is upon the defendant.” *Commonwealth v. Yasipour*, 957 A.2d 734, 738-739 (Pa. Super. 2008)(citations omitted), *appeal denied*, 602 Pa. 658, 980 A.2d 111 (2009).

Section 315 of the Crimes Code specifically places the burden of proof on the defendant:

The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense **when the actor proves by a preponderance of evidence** that the actor was legally insane at the time of the commission of the offense.

18 PA.CON.S.TAT.ANN. § 315(a) (emphasis added). See also *Commonwealth v. Heidnik*, 526 Pa. 458, 466, 587 A.2d 687, 691 (1991); *Commonwealth v. Mitchell*, 576 Pa. 258, 274, n.8, 839 A.2d 202, 211 n.8 (2003).

¹⁴ *Regina v. M’Naghten*, 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843).

The Pennsylvania Supreme Court in *Commonwealth v. Reilly*, 519 Pa. 550, 549 A.2d 503 (1988), explained that

[i]n order for appellant's attack upon section 315 to succeed, she must show that insanity negates the mens rea element of the offense charged. Although the burden is upon the Commonwealth to prove every element of its case, the Commonwealth is not required to prove facts which would counteract any justification or excuse the defendant may have had for the commission of the crime. Proof of facts which exonerate the accused from his guilt remain solely the province of the criminal defendant.

Id., 519 Pa. at 564, 549 A.2d at 510 (internal citations omitted).

C. M'Naghten Test

To establish insanity under *M'Naghten* a defendant must establish, by a preponderance of the evidence, one of the following two tests: (1) at the time he or she committed the act, the defendant did not know the nature and quality of the act or (2) the defendant did not know that it was wrong. "The nature of an act is that it is right or wrong. The quality of an act is that it is likely to cause death or injury." *Commonwealth v. Young*, 524 Pa. 373, 391, 572 A.2d 1217, 1226 (1989), *cert denied*, 511 U.S. 1012 (1994).

The decision of the defendant's sanity is entirely within the discretion of the jury. *Commonwealth v. Holley*, 945 A.2d 241, 249 (Pa. Super. 2008), *appeal denied*, 598 Pa. 787, 959 A.2d 928 (2008); *Commonwealth v. Zewe*, 663 A.2d 195, 198 (Pa. Super. 1995), *appeal denied*, 544 Pa. 629, 675 A.2d 1248 (1996). Furthermore, the Commonwealth can establish a defendant's sanity solely by lay witnesses even where a defendant has offered expert testimony as to his lack of sanity. *Commonwealth v. Young*, 276 Pa. 409, 416, 419 A.2d 523, 526-527 (1980). "The Commonwealth may meet its burden by testimony concerning the defendant's actions, conversations, and statements at the time of the crimes from which the jury can infer that he knew what he was doing when he committed the crimes and that he knew that his actions were wrong." *Id.*, 276 Pa. at 418, 419 A.2d at 527.

D. Irresistible Impulse

"The doctrine of 'irresistible impulse' or in the modern psychiatric vernacular 'inability to control one's self', whether used to denote legal insanity, or as a device to escape criminal responsibility for one's acts or to reduce the crime or its degree, *has always been rejected in Pennsylvania.*" *Commonwealth v. Kuzmanko*, 709 A.2d 392, 398 (Pa. Super. 1998), *appeal denied*, 556 Pa. 705, 729 A.2d 1126 (1998) (quoting *Commonwealth v. Zettlemyer*, 500 Pa. 16, 34, 454 A.2d 937, 946, *cert denied*, 461 U.S. 970 (1983)). Accordingly, irresistible impulse is no defense to a criminal charge in Pennsylvania.

E. Diminished Capacity

The defense of diminished capacity will be available in a case involving a crime of sexual violence only if murder in the first degree is also charged. This discussion is provided because there are a number of reported cases dealing with rape or IDSI which also address first degree murder charges. The diminished capacity defense is not available to crimes other than murder in the first degree; it is not available for a charge of a sex crime.

The diminished capacity defense seeks to negative the intent element of a charge of first degree murder, thereby reducing it to murder of the third degree. *Commonwealth v. Taylor*, 583 Pa. 170, 186, 876 A.2d 916, 926 (2005). The Pennsylvania Supreme Court has observed that a defendant offering evidence of a diminished capacity concedes general criminal liability. “The thrust of this doctrine is to challenge the capacity of the actor to possess a particular state of mind . . . Thus, in a first degree murder in which the defendant offers the defense of diminished capacity, he is attempting to prove that he was incapable of forming the specific intent to kill, a requirement of first degree murder.” *Commonwealth v. Walzack*, 468 Pa. 210, 220, 360 A.2d 914, 919-920 (1976).

“Diminished capacity is an extremely limited defense.” *Id.*, 583 Pa. at 187, 876 A.2d at 926; *Commonwealth v. Singley*, 582 Pa. 5, 21 n.10, 868 A.2d 403, 412 n.10 (2005), *cert. denied*, 546 U.S. 1021, 126 S.Ct. 663, 163 L.Ed.2d 536 (2005). “In asserting a diminished capacity defense, a defendant is attempting to prove that he was *incapable* of forming the specific intent to kill; if the defendant is successful, first degree murder is mitigated to third degree.” *Commonwealth v. Travaglia*, 541 Pa. 108, 124 n.10, 661 A.2d 352, 359 n.10 (1995), *cert denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). Accordingly, diminished capacity may not be applied to crimes other than murder of the first degree. *See Commonwealth v. Swartz*, 484 A.2d 793, 796 n.7 (Pa. Super. 1984).

If a defendant does not introduce evidence at trial that supports a diminished capacity theory, such as drug use or intoxication which caused him to lose control of his faculties, then he is not entitled to a jury charge on diminished capacity. *Commonwealth v. Randall*, 758 A.2d 669, 683 (Pa. Super. 2000), *appeal denied*, 563 Pa. 707, 764 A.2d 1067 (2000).

F. Guilty But Mentally Ill

1. General rule at trial

Section 314 of the Crimes Code provides that

[a] person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found “guilty but mentally ill” at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an

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offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

18 PA.CON.S.TAT.ANN. § 314(a). Section 314 defines “mentally ill” as:

[o]ne who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

18 PA.CON.S.TAT.ANN. § 314(c). A verdict of “guilty but mentally ill” is not an insanity verdict, as the test for insanity is the *M’Naghten* test. See 18 PA.CON.S.TAT.ANN. § 314(d). Section 315 is a codification of the *M’Naghten* test for insanity in Pennsylvania. *Commonwealth v. Reilly*, 519 Pa. 550, 558-559, 549 A.2d 503, 507 (1988).

Neither the defendant nor the Commonwealth is “required to prove that the defendant was mentally ill at the time of the commission of the offense.” *Commonwealth v. Sohmer*, 519 Pa. 200, 212, 546 A.2d 601, 607 (1988). Rather, the trier of fact assesses the evidence “produced as to the mental state of the defendant at the time of the offense whether the fact of his mental illness preponderates.” *Id.* In other words, when the defendant submits evidence as to his insanity, but the trier of fact finds that the defendant is not insane under the *M’Naghten* standard, the trier of fact may still find the defendant to be “guilty but mentally ill.” *Commonwealth v. Andre*, 17 A.3d 951, 960 (Pa. Super. 2011):

Accordingly, even if the Commonwealth proves each of the elements of the crimes charged beyond a reasonable doubt and the defendant fails to show by a preponderance of the evidence that he is legally insane, the jury must still consider whether the defendant was mentally ill at the time of the commission of the act.

Id. at 960.

Typically, a trial court will instruct the jury on concepts of legal insanity and guilty but mentally ill using Pennsylvania Suggested Standard Jury Instruction (Criminal) 5.01A.¹⁵ Subdivision 6 provides:

“Guilty but mentally ill” becomes a possible verdict when a defendant offers but fails to prove a legal insanity defense. You may return this verdict if you are satisfied beyond a

¹⁵ “This instruction has been specifically approved by this court, and correctly sets forth the present state of the law in the Commonwealth.” *Commonwealth v. duPont*, 730 A.2d 970, 980 (Pa. Super. 1999) (citations omitted), *appeal denied*, 561 Pa. 669, 749 A.2d 466 (2000), *cert denied*, 530 U.S. 1231, 120 S.Ct. 2663, 147 L.Ed.2d 276 (2000).

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reasonable doubt that the defendant committed the crime alleged and you are also satisfied by a preponderance of the evidence – that is, by the greater weight of the evidence – that the defendant, although not legally insane, was mentally ill at the time of the crime.¹⁶

In accordance with *Commonwealth v. Sohmer*, 519 Pa. 200, 212, 546 A.2d 601, 607 (1988), the jury, using the evidence offered on the issue of insanity, must determine whether the evidence of mental illness preponderates. Conversely, if a defendant cannot make out an insanity defense as a matter of law or fails to present evidence of mental illness, the defendant is not entitled to a “guilty but mentally ill” instruction. See *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28 (1991), *cert denied*, 503 U.S. 989, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992).

2. Guilty Plea

The trial court may accept a plea of guilty but mentally ill only under the following circumstances:

- (1) The trial judge has examined all reports prepared including the pre-sentence report and any mental health evaluations;
- (2) The trial judge has held a hearing on the sole issue of the defendant’s mental illness and all parties were permitted to present evidence; and
- (3) The trial judge is satisfied that the defendant was mentally ill at the time of the offense.

18 PA.CON.S.TAT.ANN. § 314(b). If the plea is not accepted, then the trial judge must not preside at the trial if the defendant subsequently waives his right to a jury trial. *Id.*

3. Sentencing

Before imposing sentence, the trial court must hear testimony, and make findings, on the issue of whether the defendant is severely mentally disabled and in need of treatment. Defendants who are found to be severely mentally disabled and in need of treatment at the time of sentencing must be provided with treatment that is psychiatrically or psychologically indicated, consistent with available resources.

Furthermore, although mental illness is clearly a factor that may be considered at the time of sentencing, a defendant found “guilty but mentally ill” may be sentenced exactly the same way as any other defendant found guilty of the underlying criminal offense.

¹⁶ Pennsylvania Suggested Standard Jury Instruction (Criminal) 5.01A.

42 PA.CON.S.TAT.ANN. § 9727(a) provides:

§ 9727. Disposition of persons found guilty but mentally ill

(a) Imposition of sentence. -- A defendant found guilty but mentally ill or whose plea of guilty but mentally ill is accepted under the provisions of 18 Pa.C.S. § 314 (relating to guilty but mentally ill) may have any sentence imposed on him which may lawfully be imposed on any defendant convicted of the same offense. Before imposing sentence, the court shall hear testimony and make a finding on the issue of whether the defendant at the time of sentencing is severely mentally disabled and in need of treatment pursuant to the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the "Mental Health Procedures Act."¹⁷

In a capital case, which would only involve a crime of sexual violence if a charge of murder in the first degree is also filed, evidence tending to show a defendant was "guilty but mentally ill" is properly admitted only in the penalty phase, not the guilt phase. *Commonwealth v. Faulkner*, 528 Pa. 57, 72, 595 A.2d 28, 36-37 (1991), *cert denied*, 503 U.S. 989, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992).

Additionally, there is no mandatory reduction in sentence because a defendant has been found to suffer from a mental illness but not insane. *Commonwealth v. Diaz*, 867 A.2d 1285, 1287 (Pa. Super. 2005). The only difference is that the defendant found "guilty but mentally ill" may be entitled to treatment. See 42 PA.CON.S.TAT.ANN. § 9727(b).

5.8 INTOXICATION

In a crime of sexual violence, the only possible defense based upon intoxication is "involuntary intoxication" to show that the defendant lacked the requisite intent to commit the crimes. It has been repeatedly held that a defendant cannot, as a matter of law, be insulated from criminal liability for his actions "by claiming a mental state resulting from alcohol which was voluntarily ingested." *Commonwealth v. Henry*, 524 Pa. 135, 149, 569 A.2d 929, 935 (1990).

However, as will be discussed below, a defendant may be permitted to admit evidence of intoxication if the defense is based upon the assertion that the intoxication, even if voluntarily induced, rendered the defendant unable to perform the act alleged.

¹⁷ 42 PA.CON.S.TAT.ANN. § 9727(a).

A. Voluntary Intoxication

Section 308 of the Crimes Code provides the following:

Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.

18 PA.CON.S.TAT.ANN. § 308.

Section 308, however, does not render evidence of intoxication completely irrelevant, apart from reducing murder from a higher degree to a lower degree. The Pennsylvania Supreme Court explained in *Commonwealth v. Bridge*, 495 Pa. 568, 435 A.2d 151 (1981), that proof of intoxication may be admitted to show that the accused could not have committed the criminal act charged. This is a defense that could be relevant to a charge of sexual violence:

For instance, if the accused seeks to offer his intoxication to prove that he did not perform the physical act required by the crime that he was unconscious at the time and therefore did not commit the deed this evidence is germane to the factfinders' inquiry and is properly submitted for their evaluation. In such cases, the issue can be neatly confined to the question of whether the accused was the perpetrator of the deed charged.

Id., 495 Pa. at 573-574, 435 A.2d at 154. That being said, Section 308 firmly establishes that the actor's degree of sobriety is not relevant in establishing the absence of intent required to commit the crime charged. As the Superior Court stated in *Commonwealth v. Rumsey*, 454 A.2d 1121 (Pa. Super. 1983),

it is apparent that in amended § 308 the legislature in effect redefined the mens rea element of intentional or knowing crimes to include those cases where the putative offender performed the criminal act but was unable to form the criminal intent otherwise required solely because he was voluntarily drunk or drugged.

Id., at 1122. See also, *Commonwealth v. Plant*, 478 A.2d 872, 876 (Pa. Super. 1984).

B. Involuntary Intoxication

"The existence and scope of the defense of involuntary intoxication is not yet fully established in Pennsylvania law." *Commonwealth v. Smith*, 831 A.2d 636, 639 (Pa.

Super. 2003), *appeal denied*, 576 Pa. 722, 841 A.2d 531 (2003) (quoting Committee Note, PA.S.S.J.I. Crim. 8.308(c)). Involuntary intoxication evidence is like the insanity defense in that “the defendant is excused from criminality because intoxication affects the ability to distinguish between right and wrong.” **Smith**, 831 A.2d at 639 n.2. Accordingly, “the mental state of an involuntarily intoxicated defendant is measured by the test of legal insanity.” *Id.*

In **Smith**, the Superior Court noted that

[t]he defense of involuntary intoxication has been recognized in other jurisdictions in four types of situations: (1) where the intoxication was caused by the fault of another (i.e., through force, duress, fraud, or contrivance); (2) where the intoxication was caused by an innocent mistake on the part of the defendant (i.e., defendant took hallucinogenic pill in reasonable belief it was aspirin or lawful tranquilizer); (3) where a defendant unknowingly suffers from a physiological or psychological condition that renders him abnormally susceptible to a legal intoxicant (sometimes referred to as pathological intoxication); and (4) where unexpected intoxication results from a medically prescribed drug.

Id., at 639 (citing Phillip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R.3d 195 at § 2[a] (1976)). A key component to all four of these definitions is the “lack of culpability on the part of the defendant in causing the intoxication.” *Id.*

A defendant will not be excused from his or her behavior for intoxication resulting from the unwitting mixture of prescription drugs and alcohol. See **Commonwealth v. Smith**, 831 A.2d 636, 640 (Pa. Super. 2003), *appeal denied*, 576 Pa. 722, 841 A.2d 531 (2003), in which the Superior Court noted that “Pennsylvania law is consistent with the Model Penal Code’s definition and would not characterize intoxication produced by the voluntary consumption of a prescription drug and alcohol as ‘involuntary’ even if that consumption was without knowledge of a synergistic effect.”

The defendant has the burden of proving the affirmative defense of involuntary intoxication by a preponderance of the evidence. **Commonwealth v. Griffith**, 985 A.2d 230, 236 (Pa. Super. 2009), *rev. on other grounds*, 613 Pa. 171, 32 A.3d 1231 (2011); **Commonwealth v. Smith**, 831 A.2d 636, 640 (Pa. Super. 2003), *appeal denied*, 576 Pa. 722, 841 A.2d 531 (2003). In *dicta*, the Court in **Smith**, where the defendant consumed alcohol and prescription drugs, noted that the trial court cannot take judicial notice that the combination of drugs and alcohol is capable of causing extreme intoxication. *Id.*, at 641. The Court noted that expert testimony is needed to establish intoxicating effect. *Id.*

5.9 MISTAKE OF FACT

A. Statutory Elements of Defense

The concept of “mistake of fact” has long been a fixture in Pennsylvania criminal law. See *Commonwealth v. Fischer*, 721 A.2d 1111, 1117 (Pa. Super. 1998). Under most circumstances, but not necessarily crimes of sexual violence, a mistake of fact can disprove a required element of criminal intent. Section 304 of the Crimes Code sets forth the statutory elements of the defense as follows:

Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if:

(1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense; or

(2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

18 PA.CON.S.TAT.ANN. § 304.

“It is not necessary that the facts be as the actor believed them to be; it is only necessary that he have ‘a bona fide and reasonable belief in the existence of facts which, if they did exist, would render an act innocent.’” *Commonwealth v. Scott*, 73 A.3d 599, 603 (Pa. Super. 2013) (quoting *Commonwealth v. Lefever*, 30 A.2d 364, 365 (Pa. Super. 1943)). Where the mistake of fact is not reasonable, it is not a defense even if the defendant had a *bona fide* belief in its existence. See 18 PA.CON.S.TAT.ANN. § 304, Comment.

B. Burden of Proof

When evidence of a mistake of fact is introduced, the Commonwealth retains the burden of proving the necessary criminal intent beyond a reasonable doubt. See *Commonwealth v. Hamilton*, 766 A.2d 874, 879 (Pa. Super. 2001). Simply put, the Commonwealth must prove either the absence of a bona fide, reasonable mistake, or that the mistake alleged would not have negated the intent necessary to prove the crime charged. *Id.* See also, *Commonwealth v. Namack*, 663 A.2d 191, 195 (Pa. Super. 1995).

C. Applicability to Sex Offenses – Mistake as to Consent

In *Commonwealth v. Williams*, 439 A.2d 765 (Pa. Super. 1982), the defendant argued that the trial court should have instructed the jury that if he reasonably believed that the victim had consented to his sexual advances that he would then have a defense to the rape and involuntary deviate sexual intercourse charge. In other words, that his

counsel should have requested a jury instruction regarding a reasonable mistake of fact, as to consent. The Superior Court rejected the defendant's argument stating:

The charge requested by the defendant is not now and has never been the law of Pennsylvania. The crux of the offense of rape is force and lack of victim's consent. When one individual uses force or the threat thereof to have sexual relations with a person not his spouse and without the person's consent he has committed the crime of rape. *If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by our legislature which has the power to define crimes and offenses. We refuse to create such a defense.*

Id., at 769 (internal citations omitted)(emphasis added).

In *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. 1998), *appeal granted*, 556 Pa. 620, 730 A.2d 485 (1999), *appeal dismissed as improvidently granted*, 560 Pa. 410, 745 A.2d 1214 (1999), the Superior Court traced the changes in sexual assault laws since *Williams* was decided, and concluded that *Williams* was still binding law in Pennsylvania. It is important to note that the Pennsylvania Supreme Court, after initially granting review, later dismissed the appeal, which leaves the Superior Court decision as controlling. Therefore, as the Superior Court concluded, no mistake of fact instruction was required in *Fischer*, a "date rape" case where the victim alleged she was sexually assaulted but the defendant claimed he reasonably believed the rough sex was consensual.¹⁸

In *Commonwealth v. Farmer*, 758 A.2d 173 (Pa. Super. 2000), *appeal denied*, 565 Pa. 637, 771 A.2d 1279 (2001), a request for a mistake of fact instruction was not warranted in rape and involuntary deviate sexual assault case, reiterating that *Williams* and *Fischer* represent the law in Pennsylvania.¹⁹

D. Applicability to Sex Offenses - Mistake as to Age

A viable defense as to mistake of age is dependent on the age of the victim and the crime charged. If the crime defines the victim as younger than fourteen years old, there is no viable defense based on mistake of age. If, however, it is possible that the victim is fourteen years old or older, a defendant can try to show, by a preponderance of the evidence, that he or she reasonably believed the victim to be older than the critical age of criminality. This is codified at Section 3102 of the Crimes Code.

Section 3102 states the following:

¹⁸ The decision by the Superior Court in *Fischer* was made based upon the precedent from *Williams* and may not have reflected the Superior Court's policy. The Superior Court commented: "Although the logic of these other cases is persuasive, we are unable to adopt the principles enunciated in them because of the binding precedent with which we are faced, namely *Williams*." 721 A.2d at 1117.

¹⁹ See Annot., *Defense of Mistake of Fact as to Victim's Consent in Rape Prosecution* (2002) 102 A.L.R. 5th 447.

Defenses

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

18 PA.CON.S.TAT.ANN. § 3102. Section 3102 reflects the Pennsylvania legislature's decision that "one eighteen years of age or older who engages in sexual intercourse with a child below fourteen years of age does so at his own peril." *Commonwealth v. Robinson*, 497 Pa. 49, 54, 438 A.2d 964, 966 (1981).

If the victim is *older* than fourteen years of age, it is the *defendant's* belief which must be reasonable. See *Commonwealth v. Fetter*, 770 A.2d 762, 768 (Pa. Super. 2001), *aff'd*, 570 Pa. 494, 810 A.2d 637 (2002) (no error for trial court to not allow defendant to cross-examine fifteen year old victim as to whether *she* believed that she looked older than her actual age as "the victim's beliefs as to how old she looked is irrelevant to appellant's beliefs and knowledge of her actual age"). As noted, if the victim is under fourteen years of age, the defendant's belief that the victim was older is irrelevant. See *Commonwealth v. Hall*, 418 A.2d 623, 624 (Pa. Super. 1980) (defendant's testimony that victim stated that she was sixteen years old, when in fact she was thirteen, was not a viable defense as defendant's mistaken belief "was irrelevant" under Section 3102).

E. No Conflict between Sections 3102 and 304 of the Crimes Code

As stated above, section 3102 of the Crimes Code provides:

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

18 PA.CON.S.TAT.ANN. § 3102. Section 304 provides:

Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if:
(1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a

material element of the offense; or
(2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

18 PA.CON.S.TAT.ANN. § 304.

In *Commonwealth v. Robinson*, 399 A.2d 1084, 1087-1088 (Pa. Super. 1979), *aff'd*, 497 Pa. 49, 438 A.2d 964 (1981), the Superior Court held that Section 3102 was not invalid due to fact that it allegedly conflicted with, *inter alia*, Section 304 in light of fact that Section 3102 was a specific provision relating to sexual offenses and the other statutory provisions in question were previously enacted provisions dealing with general guidelines on culpability for the whole of the Crimes Code.

5.10 MISTAKE OF LAW

“Generally speaking, ignorance or mistake of law is no defense.” 18 PA.CON.S.TAT.ANN. § 304, *Comment* (1998). *See also*, *Commonwealth v. Cohen*, 538 A.2d 582, 584 (Pa. Super. 1988), *appeal denied*, 520 Pa. 581, 549 A.2d 914 (1988) (neither ignorance of the law or mistake of the law is a “defense to the commission of a crime.”).

In *Commonwealth v. Kratsas*, 564 Pa. 36, 764 A.2d 20 (2001), however, our Supreme Court noted that it had “no doubt that the due process provisions of the United States and Pennsylvania constitutions, at least in a narrow set of unique and compelling circumstances, would serve both as an exception to the maxim that mistake of law is no defense, ... and ultimately to foreclose a criminal prosecution.” *Id.*, 564 Pa. at 56, 764 A.2d at 31 (internal citations omitted).

5.11 STATUTES OF LIMITATION

The general rule is that offenses under the Crimes Code must be commenced within the limitations period specified by the Judicial Code, 42 PA.CON.S.TAT.ANN. §§ 5501-5574.

Our jurisprudence holds that the statute of limitations is not a constitutional right but, instead, an act of the legislature, whereby the government agrees not to prosecute an individual after the passage of a stated period of time. *Commonwealth v. Russell*, 938 A.2d 1082 (Pa. Super. 2007), *appeal denied*, 598 Pa. 766, 956 A.2d 434 (2008).

A. Raising the Defense of the Statute of Limitations

1. Pretrial motion

The proper method for Defense Counsel to raise the statute of limitations defense is in a pretrial omnibus motion. The defense must raise the statute of

limitations defense pretrial; otherwise, it is waived. See *Commonwealth v. Corban Corp.*, 909 A.2d 406, 411 (Pa. Super. 2006), *aff'd* 598 Pa. 459, 957 A.2d 274 (2008); *Commonwealth v. Groff*, 548 A.2d 1237, 1244 (Pa. Super. 1988) (case involved charges of statutory rape and indecent assault among others). If the defense is not so raised it is waived. *Id.*, at 1245 n.8.

2. Standard of review

The Commonwealth bears the burden to establish that the crime as charged was committed within the applicable statute of limitations period. *Corban Corp.*, 909 A.2d at 411; *Groff*, 548 A.2d at 1248.

If the statute of limitations defense presents questions of fact, it must be referred to the finder of fact at trial. *Groff*, 548 A.2d at 1246-1237. If there are no questions of fact and the evidence regarding the limitations period is un rebutted, the trial judge may take the issue from the jury. *Commonwealth v. Hawkins*, 441 A.2d 1308, 1311 n. 5 (Pa. Super. 1982); *Commonwealth v. Hoffman*, 398 A.2d 658, 661 (Pa. Super. 1979)(no error in failing to submit issue of statute of limitations to jury when evidence of date of crime was un rebutted).

B. Particular Sexual Violence Offenses

The following sexual offenses, as mandated by 42 PA.CON.S.TAT.ANN. § 5552(b.1), have 12 year statutes of limitations:

- Rape, 18 PA.CON.S.TAT.ANN. § 3121
- Statutory sexual assault, 18 PA.CON.S.TAT.ANN. § 3122.1
- Involuntary deviate sexual intercourse, 18 PA.CON.S.TAT.ANN. § 3123
- Sexual assault, 18 PA.CON.S.TAT.ANN. § 3124.1
- Aggravated indecent assault, 18 PA.CON.S.TAT.ANN. § 3125
- Incest, 18 PA.CON.S.TAT.ANN. § 4302
- Sexual abuse of children, 18 PA.CON.S.TAT.ANN. § 6312

The following sexual offenses have, as mandated by 42 PA.CON.S.TAT.ANN § 5552(a), two year statutes of limitations:

- Institutional sexual assault, 18 PA.CON.S.TAT.ANN. § 3124.2
- Indecent assault, 18 PA.CON.S.TAT.ANN. § 3126
- Indecent exposure, 18 PA.CON.S.TAT.ANN. § 3127

Any offense which does not have a specifically enumerated statute of limitation “must be commenced within two years after it is committed.” 18 PA.CON.S.TAT.ANN. § 5552(a).

C. Minority Tolling Provision

1. Extended statute of limitations

In certain enumerated cases of sexual violence against children, the statute of limitations was extended to give the Commonwealth until the child victim's 50th birthday to file charges. The new law, which became effective January 28, 2007, applies to any case in which the statute of limitations had not yet expired before the new law took effect.

As provided by 42 PA.CONS.STAT.ANN. § 5552(c)(3), the following sexual offenses committed against a minor who is less than 18 years of age may be brought up to (1) the applicable period of limitation provided by law after the minor has reached 18 years of age, or (2) the date the minor reaches 50 years of age:

- Rape, 18 PA.CONS.STAT.ANN. § 3121
- Statutory sexual assault, 18 PA.CONS.STAT.ANN. § 3122.1
- Involuntary deviate sexual intercourse, 18 PA.CONS.STAT.ANN. § 3123
- Sexual assault, 18 PA.CONS.STAT.ANN. § 3124.1
- Aggravated indecent assault, 18 PA.CONS.STAT.ANN. § 3125
- Indecent assault, 18 PA.CONS.STAT.ANN. § 3126
- Indecent exposure, 18 PA.CONS.STAT.ANN. § 3127
- Incest, 18 PA.CONS.STAT.ANN. § 4302
- Endangering welfare of children, 18 PA.CONS.STAT.ANN. § 4304
- Corruption of minors, 18 PA.CONS.STAT.ANN. § 6301
- Sexual abuse of children, relating to photographing, videotaping, depicting on computer or filming sexual acts, 18 PA.CONS.STAT.ANN. § 6312(b)
- Sexual exploitation of children, 18 PA.CONS.STAT.ANN. § 6320

In *Commonwealth v. Louden*, 569 Pa. 245, 252-253, 803 A.2d 1181, 1185 (2002), the Pennsylvania Supreme Court found justification for the minority tolling provision found in § 5552(c)(3). However, even if a claim is filed within the limitations period, a defendant may nevertheless seek dismissal of the charges if he can establish that the delay in filing the charges has denied him due process of law. *Id.*, 569 Pa. at 250, 803 A.2d at 1184. In such a case, the defendant must establish: (1) actual prejudice caused by the delay, and (2) the Commonwealth's reasons for the inordinate delay were improper. *Id.*

2. Application of extended statute of limitations

The new statute applies to any case in which the statute of limitations had not yet expired before the new law took effect, i.e., January 28, 2007. To determine whether the old statute has expired, the date of the victim's 18th birthday is the critical date rather than the date of the commission of the offense.

Defenses

On August 27, 2002, the statutes of limitations for most child sexual abuse charges were extended to 12 years after the victim's 18th birthday. That change in the statute of limitations applied to cases in which a child victim turned 18 on or after August 27, 2002. Since the 12-year period has not yet expired before the new law took effect, the statute of limitations for cases under the 2002 amendment has now been extended to the victim's 50th birthday.

Before the 2002 amendment, the statute of limitations for most child sexual abuse cases was 5 years after the victim's 18th birthday; some calculations as to whether the statute had expired by January 28, 2007 will be necessary.

For cases involving child victims who turned 18 on or after August 27, 2002, the Commonwealth now has until the victim's 50th birthday to file criminal charges for abuse that occurred before the victim turned 18.

After a term of limitations has expired, a newly created and longer statute of limitations, or the enactment of an extended period, cannot serve to revive the prior cause. *Commonwealth v. Harvey*, 542 A.2d 1027, 1030 (Pa. Super. 1988).

D. Tolling of the Statute of Limitations

Section 5554 of the Judicial Code provides that the period of limitations is tolled during the following periods:

- (1) the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth;
- (2) a prosecution against the accused for the same conduct is pending in this Commonwealth; or
- (3) a child is under 18 years of age, where the crime involves injuries to the person of the child caused by the wrongful act, or neglect, or unlawful violence, or negligence of the child's parents or by a person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent.

42 PA.CON.S.TAT.ANN. § 5554.

This section requiring tolling is applicable to sexual assault victims. *Commonwealth v. Perry*, 588 A.2d 917, 918-919 (Pa. Super. 1991), *appeal denied*, 529 Pa. 619, 600 A.2d 535 (1991). This section also applies to any defendant who is entrusted with custody and control of a child during a parent's absence, and therefore is much broader than one who stands in "loco parentis" to the child. *Commonwealth v. Gerstner*, 540 Pa. 116, 656 A.2d 108 (1995)(Defendant, who supplied babysitting services, charged with indecent assault and corruption of minors).

E. Commission of Offense

An offense is committed:

either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the complicity of the defendant therein is terminated. Time starts to run on the day after the offense is committed.

42 PA.CON.S.TAT.ANN. § 5552(d).

F. Commencement of Limitations Period

The commencement of the limitations period is on the day after the offense is committed. See 42 PA.CON.S.TAT.ANN. § 5552(d). The Judicial Code authorizes exceptions to the limitations period in child sexual abuse cases, as stated above. See 42 PA.CON.S.TAT.ANN. §§ 5552(c)(3) and 5554.

1. Date of alleged offense

It is the duty of the prosecution to “fix the date when an alleged offense occurred with reasonable certainty...” *Commonwealth v. Jette*, 818 A.2d 533, 535 (Pa. Super. 2003)(citation omitted), *appeal denied*, 574 Pa. 771, 833 A.2d 141 (2003). In addition to triggering the statute of limitations, a defendant has a right to be advised of the date when an offense is alleged to have been committed in order to provide him with sufficient notice to meet the charges and prepare a defense. *Commonwealth v. Gibbons*, 567 Pa. 24, 784 A.2d 776 (2001).

2. Permissible leeway

However, “[d]u[e] process is not reducible to a mathematical formula,” and the Commonwealth does not always need to prove a specific date of an alleged crime. *Commonwealth v. Brooks*, 7 A.3d 852, 857-858 (Pa. Super. 2010), *appeal denied*, 610 Pa. 614, 21 A.3d 1189 (2011). Additionally, “indictments must be read in a common sense manner and are not to be construed in an overly technical sense.” *Commonwealth v. Einhorn*, 911 A.2d 960, 978 (Pa. Super. 2006), *appeal denied*, 591 Pa. 723, 920 A.2d 831 (2007). Permissible leeway regarding the date provided varies with, *inter alia*, the nature of the crime and the rights of the accused. *Id.*, 911 A.2d at 978.

However, the “leeway” cases predominantly reflect issues with alleged deficiencies in the criminal complaints or informations. The Commonwealth is always under an obligation to alleged offenses or conduct which likely occurred within the relevant statute of limitations.

Appellate cases establish that “the Commonwealth must be afforded broad latitude when attempting to fix the date of offenses which involve a continuous course of criminal conduct . . . This is especially true when the case involves sexual offenses against a child victim.” *Commonwealth v. Brooks*, 7 A.3d at 858 (citations omitted); *Commonwealth v. Jette*, 818 A.2d 533, 535 (Pa. Super. 2003), *appeal denied*, 574 Pa. 771, 833 A.2d 141 (2003)(“the Commonwealth must be allowed a reasonable measure of flexibility when faced with the special difficulties involved in ascertaining the date of an assault upon a young child.”).

Pa.R.Crim.P. 560 provides that the information must provide, *inter alia*:

the date when the offense is alleged to have been committed if the precise date is known, and the day of the week if it is an essential element of the offense charged, provided that if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient . . .

Therefore, it is sufficient for the Commonwealth to provide in the information, if the precise date of an offense is not known, an allegation that the offense was committed on or about any date within the period fixed by the statute of limitations. See *Commonwealth v. Brooks*, 7 A.3d at 858.

G. Commencement of Prosecution

Section 5552 of the Judicial Code requires that a prosecution be commenced prior to the expiration of the applicable statute of limitations. “[A] prosecution is commenced either when an indictment is found or an information under section 8931(b) (relating to indictment and information) is issued, or when a warrant, summons or citation is issued, if such warrant, summons or citation is executed without unreasonable delay.” 42 PA.CON.S.TAT.ANN. § 5552(e).

H. Commencement of Prosecution: Invasion of Privacy

Under Pennsylvania law, it is a criminal offense to “[v]iew” or “photograph” a person “without that person’s knowledge or consent while that person is in a state of full or partial nudity and is in a place where that person would have a reasonable expectation of privacy.” 18 PA.CON.S.TAT.ANN. § 7507.1(a)(1). It also prohibits the filming of the intimate parts, whether or not covered by clothing of another without that person’s knowledge and consent, *Id.* at § 7507.1(a)(2), or any transfer of these types of images, *Id.* at § 7507.1(a)(3).

Notwithstanding the above noted provisions regarding the commencement of the limitations period for most crimes, a prosecution for a violation of 18 PA.CON.S.TAT.

ANN. § 7507.1, Invasion of Privacy, must be commenced within the following periods:

Typical commencement date: two years from the date the offense occurred.

Tolling of commencement date: if the victim did not realize at the time that there was an offense, within three years of the time the victim first learns of the offense.

18 PA.CON.S.TAT.ANN. § 7507.1(c).

5.12 DUE PROCESS CLAIM OF PRE-ARREST DELAY

In *Commonwealth v. Loudon*, 569 Pa. 245, 803 A.2d 1181 (2002), the Pennsylvania Supreme Court stated that even if charges are filed within the limitations period, a defendant may nevertheless seek dismissal of the charges if he can establish that the delay in filing the charges has denied him due process of law. *Id.*, 569 Pa. at 250, 803 A.2d at 1184. In such a case, the defendant must establish: (1) actual prejudice caused by the delay, and (2) the Commonwealth's reasons for the inordinate delay were improper. *Id.*

The defendant suffers actual prejudice if he can prove that the pre-arrest delay prejudiced his ability to defend himself against the Commonwealth's charges in such a way that affected the disposition of the criminal proceedings. *Commonwealth v. Scher*, 569 Pa. 284, 314, 803 A.2d 1204, 1222 (2002), *cert. denied*, 538 U.S. 908, 123 S.Ct. 1488, 155 L.Ed. 2d 228 (2003). As the Pennsylvania Supreme Court stated in *Scher*:

[W]e hold that in order to prevail on a due process claim based on pre-arrest delay, the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth's reasons for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution, however, will we find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay.

Scher, 569 Pa. at 313-314, 803 A.2d 1221-1222 (footnote omitted).

5.13 TAINT

In reference to testimonial competency, “taint” is a defense raised by way of challenging complaints of sexual abuse made by young children. The Pennsylvania Supreme Court has defined “taint” as

[T]he implantation of false memories or distortion of actual memories through improper and suggestive interview techniques
....

Commonwealth v. Delbridge (Delbridge I), 578 Pa. 641, 647, 855 A.2d 27, 30 (2003).

An allegation of taint is a legitimate question for examination in cases involving complaints of sexual abuse made by young children. *Id.*, 578 Pa. at 661, 855 A.2d at 39.²⁰ The age when “taint” is no longer available is when the complainant reaches fourteen years old; at fourteen years, the witness is entitled to the same presumption of competence as an adult witness. *Commonwealth v. McLaurin*, 45 A.3d 1131, 11140 n. 3 (Pa. Super. 2012).

Furthermore, in *Commonwealth v. Moore*, 980 A.2d 647 (Pa. Super. 2009), *appeal denied*, 605 Pa. 711, 991 A.2d 311 (2010), the Superior Court reiterated that the critical age for purposes of conducting a taint hearing is not the age at the time of the crime but the age at the time of trial. *Id.* at 648 & 652.

The test for competency of a minor witness or victim has been well established:

Every witness is presumed competent. A party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks the minimal capacity ... (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth.

Commonwealth v. Page, 59 A.3d 1118, 1129 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 776 (2013). Furthermore, “[a] child’s competency to testify is a threshold *legal issue* that a trial court must decide, and an appellate court will not disturb its determination absent an abuse of discretion.” *Commonwealth v. Washington*, 554 Pa. 559, 563, 722 A.2d 643, 646 (1998) (citation omitted & emphasis added).

Within the three-part test described above from *Commonwealth v. Page*, an allegation of taint speaks to the second prong: whether the child witness has the minimal capacity to observe an occurrence itself and the capacity of remembering what it is that the witness is called upon to testify about. See *Commonwealth v. Pena*, 31 A.3d 704, 707

²⁰ In *Commonwealth v. Judd*, 897 A.2d 1224 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006), the court held that a sexual abuse victim of fifteen years of age could not be the subject of an allegation of “taint” but rather any attack on her testimony went to questions of credibility. 897 A.2d at 1229.

(Pa. Super. 2011). The challenge must be supported by clear and convincing evidence. *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173 (Pa. Super. 2005), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005).

Where an allegation of taint is made before trial, the “appropriate venue” for investigation into such a claim is a competency hearing. *Delbridge I*, 578 Pa. at 664, 855 A.2d at 40. Areas of review concern the competency of the minor victim versus the immaturity of the witness:

The capacity of young children to testify has always been a concern as their immaturity can impact their ability to meet the minimal legal requirements of competency. Common experience informs us that children are, by their very essence, fanciful creatures who have difficulty distinguishing fantasy from reality; who when asked a question want to give the “right” answer, the answer that pleases the interrogator; who are subject to repeat ideas placed in their heads by others; and who have limited capacity for accurate memory.

Commonwealth v. Judd, 897 A.2d 1224, 1229 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006) (quoting *Delbridge I*, 578 Pa. at 662, 855 A.2d at 39).

A. The Taint Hearing

In order for the court to investigate the issue of taint at a competency hearing, the moving party must come forward with evidence of taint. Once the moving party comes forward with some evidence of taint, the court must expand the scope of the competency hearing to investigate that specific question. The party alleging taint bears the burden of production of “some evidence” of taint as well as the ultimate burden of persuasion to show taint by clear and convincing evidence after any hearing on the matter. *Commonwealth v. Judd*, 897 A.2d 1224, 1229 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006)

When determining whether a defendant has presented “some evidence” of taint, the court must consider the totality of the circumstances surrounding the child’s allegations. *Delbridge I*, 578 Pa. at 664, 855 A.2d at 41.

Some of the factors that are relevant in this analysis are:

- (1) the age of the child;
- (2) the existence of a motive hostile to the defendant on the part of the child’s primary custodian;
- (3) the possibility that the child’s primary custodian is unusually likely to read abuse into normal interaction;
- (4) whether the child was subjected to repeated interviews by

Defenses

- various adults in positions of authority;
- (5) whether an interested adult was present during the course of any interviews; and
 - (6) the existence of independent evidence regarding the interview techniques employed.

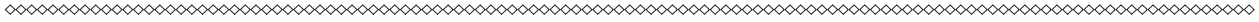
Commonwealth v. Judd, 897 A.2d 1224, 1229 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006)

In ***Commonwealth v. Davis***, 939 A.2d 905 (Pa. Super. 2007), the Superior Court affirmed the trial court's decision, after a competency hearing, that the youthful victim lacked the minimal capacity to testify, especially in light of the taint effect produced by leading and suggestive questioning by the police. Specifically, the Superior Court found:

The problems with the testimony are twofold: first, J.D.'s independent recollection of the incident was extremely limited; and second, the suggestive technique and content of the interviews provided clear and convincing evidence that J.D.'s later recollections were tainted and a product of coercion, not of his own memory.

939 A.2d at 910.

Chapter 6



PRETRIAL



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Chapter Six

Pretrial

6.1 CHAPTER OVERVIEW

This chapter, Pretrial, discusses the balance struck in Pennsylvania between protecting the rights of an accused and advancing the interests of the state during the time period between charging the defendant and the start of trial. Sections 6.2 and 6.3 address the powers of the state to ensure that the defendant appears for trial and place restrictions on the accused prior to trial. Section 6.3 discusses the new law, the Sexual Violence Victim Protection Act, 42 PA.CONS.STAT.ANN. §§ 62A01 – 62A20, which can be utilized by a victim of sexual abuse, regardless of whether criminal charges are filed, to avoid future contact with a perpetrator.

Section 6.4, HIV Testing, and Section 6.5, Venereal Disease Testing, review the authority of the trial court to order the defendant to submit to tests prior to trial.

Section 6.6 details the rights and duties of the state and the accused during pretrial discovery. The issues that arise during pretrial motion practice, and the availability of certain motions, are discussed in Section 6.7.

Section 6.8 discusses the admissibility of evidence of the victim's past sexual conduct, under the Rape Shield Law, which should be a decision which occurs prior to trial.

Lastly, Section 6.9 addresses statutory privileges which may prohibit a defendant's right to obtain records, usually about the victim, prior to trial.

6.2 BAIL

The following section discusses bail and its applicability to defendants charged with misdemeanor and felony sexual violence offenses. No specific provisions are made under Pennsylvania law regarding bail for those accused of sex offenses. This section will therefore set out the rules and procedures that are generally applicable to the issue of pretrial bail.

A. Historical Context and Current Practice

Historically, the Pennsylvania Constitution granted every defendant a right to bail with the exception of those who were charged with crimes punishable by death. *See Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972). Furthermore, the Pennsylvania Constitution was interpreted to prohibit preventative detentions for

non-capital crimes. *Id.* Under this interpretation, the only proper consideration in setting bail for non-capital crimes was ensuring the defendant's presence at subsequent proceedings. *Id.*, 449 Pa. at 335-336, 296 A.2d at 834-835.

However, in 1998, Article 1, Section 14 was amended to read as follows:

Prisoners to be bailable; habeas corpus

All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or *unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community* when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Pa. Const. Art. I, § 14 (emphasis added).¹

Accordingly, it is now within the bail authority's power to deny bail if the bail authority determines that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community. As stated by the Pennsylvania Supreme Court in *Commonwealth v. Dixon*, 589 Pa. 28, 43, n. 12, 907 A.2d 468, 477, n.12 (2006), this constitutional provision supersedes the Rules of Criminal Procedure and provides any court with the authority to deny bail if release would endanger the safety of the public.

In an apparent effort to comport with that amendment, Section 5701 of the Judicial Code was amended in 2009, and now states:

§ 5701. Right to bail

All prisoners shall be bailable by sufficient sureties, unless:

- (1) for capital offenses or for offenses for which the maximum sentence is life imprisonment; or
- (2) no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great.

42 PA.CON.S.TAT.ANN. § 5701.

¹ The amendment survived a constitutional challenge. See *Grimaud v. Commonwealth*, 581 Pa. 398, 865 A.2d 835 (2005).

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The current version of PA.R.CRIM.P. 520, in recognition of Article I, Section 14 of the Pennsylvania Constitution, provides that bail before verdict shall be set “as permitted by law.” If bail is denied, the reasons must be stated in writing or on the record.

Rule 520. Bail Before Verdict

(A) Bail before verdict shall be set in all cases as permitted by law. Whenever bail is refused, the bail authority shall state in writing or on the record the reasons for that determination.

(B) A defendant may be admitted to bail on any day and at any time.

B. Bail and PA.R.CRIM.P. 600

The prior version of PA.R.CRIM.P. 600(E) provided that any defendant held in excess of 180 days was “entitled upon petition to immediate release on nominal bail.” Although defendants attempted to argue that this provision took precedence over Article I, Section 14’s provision for denial of bail and bail conditions, two cases rejected this contention.

In a case in which the defendant was charged with numerous sexually violent crimes, the Superior Court held that defendant was not entitled to release on nominal bond under PA.R.CRIM.P. 600(E), given the Pennsylvania constitutional provision on bail, based upon the trial court’s finding that no conditions of bail could assure the safety of the community. *Commonwealth v. Jones*, 899 A.2d 353 (Pa.Super. 2006). Although the defendant had been charged with non-capital offenses, and had been held in pretrial incarceration for a period in excess of 180 days, it was permissible for the trial court to refuse bail; the trial court’s finding that “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community” trumped the nominal-bond provision of Rule 600. *Id.* at 356. See also *Commonwealth v. Sloan*, 589 Pa. 15, 27 n.10, 907 A.2d 460, 467 n. 10 (2006).

Furthermore, it was held that prior PA.R.CRIM.P. 600(E) did not bar a trial court from imposing non-monetary conditions, such as house arrest and electronic monitoring, on a defendant who is entitled to nominal bail but might otherwise be denied release under Article I, Section 1 of the Pennsylvania Constitution. *Commonwealth v. Sloan*, 589 Pa. 15, 28, 907 A.2d 460, 468 (2006).

As stated by the Pennsylvania Supreme Court in *Commonwealth v. Dixon*, 589 Pa. 28, 43, n. 12, 907 A.2d 468, 477, n.12 (2006):

A relatively recent amendment to Article I, Section 14 of the Pennsylvania Constitution permits courts to deny bail when “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person in the community.”

Pa. Const. Art. I, § 14. This constitutional provision supersedes the Rules of Criminal Procedure, and provides any court with the authority to deny nominal bail after 180 days if release would endanger the safety of any person. In this regard, in [*Commonwealth v. Sloan*, 589 Pa. 15, 907 A.2d 460 (2006)], a companion case being filed simultaneously with this matter, we have held that when a defendant is released on nominal bail in accord with Rule 600(E), reasonable conditions can be imposed to ensure a defendant's appearance at trial and to protect the public. The trial court's ability to deny bail altogether pursuant to Article I, Section 14, and its ability to set conditions for the release on nominal bail in accordance with our decision in *Sloan* is protective of the public interest, while this case is protective of a defendant's right to not be held indefinitely in pretrial detention. This strikes an appropriate balance between society's substantial interest in its safety and a confined defendant's substantial right to not be indefinitely held in pretrial confinement.

Rule 600 now provides an exception to cases "in which the defendant is not entitled to release on bail as provided by law . . ." PA.R.CRIM.P. 600(B). There also may be circumstances in which a defendant is not to be released on bail, or alternatively, if a defendant is entitled to nominal bail under this rule, nonmonetary conditions may be imposed:

Rule 600. Prompt Trial

. . .

(D) Remedies

. . .

(2) Except in cases in which the defendant is *not entitled to release on bail as provided by law*, when a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the defendant be released immediately on nominal bail *subject to any nonmonetary conditions of bail imposed by the court as permitted by law*. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

PA.R.CRIM.P. 600(D)(2)(emphasis added).

C. Establishment of Bail Before Verdict

At the preliminary arraignment, the issuing authority, typically a magisterial district judge, must inform the defendant of the type of release on bail as provided under the Rules of Criminal Procedure, Rules 523 to 536, as well as the conditions of bail. *See* PA.R.CRIM.P. 540(F)((3)).

If the defendant is detained, he shall be given an immediate and reasonable opportunity to post bail. *See* PA.R.CRIM.P. 540(H). If the defendant does not post bail, he shall be committed to jail as provided by law.

In accordance with PA.R.CRIM.P. 524, the MDJ must determine the type or combination of types of release reasonably necessary, to ensure that the defendant will appear at all subsequent proceedings and comply with the conditions of the bail bond.

Bail must be conditioned upon the defendant's written agreement to appear and to comply with the conditions of the bail bond.

The types of bail are:

- (1) **ROR - Release On Recognizance:** release is conditioned upon the defendant's written agreement to appear and comply with all bail conditions;²
- (2) **Release on Nonmonetary Conditions:** release is conditioned on the defendant's agreement to comply with any nonmonetary conditions which the bail authority determines are reasonably necessary to ensure the defendant's appearance and compliance with the conditions of the bail bond – a non-exhaustive list of conditions are listed in Rule 527(A);³
- (3) **Release on Unsecured Bail Bond:** release conditioned on the defendant's written agreement to be liable for a fixed sum of money if he fails to appear as required or fails to comply with the conditions of the bail bond; however, no money or other form of security is required;⁴
- (4) **Release on Nominal Bail:** release is conditioned upon the deposit of a nominal amount of cash and the agreement of a designated person, organization, or bail agency to act as surety;⁵ and
- (5) **Release on a Monetary Condition:** release conditioned upon a monetary amount set by the issuing authority.⁶

² *See* PA.R.CRIM.P., Rule 524(C)(1).

³ *See* PA.R.CRIM.P., Rule 524(C)(2). "(T)he categories of nonmonetary conditions that the bail authority may impose are: (1) reporting requirements; (2) restrictions on the defendant's travel; and/or (3) any other appropriate conditions designed to ensure the defendant's appearance and compliance with the conditions of the bail bond." Pa.R.Crim.P., Rule 527.

⁴ *See* PA.R.CRIM.P. Rule 524(C)(3).

⁵ *See* PA.R.CRIM.P. Rule 524(C)(4).

⁶ *See* PA.R.CRIM.P. Rule 524(C)(5). The amount of the monetary condition cannot be greater than is necessary to ensure the defendant's appearance and compliance with the conditions of the bail bond. Considerations for the amount of bail are specified in Rule 528.

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First, the court may release the defendant on recognizance, commonly referred to as “ROR” bail. PA.R.CRIM.P. (C)(1). This release is conditioned only upon the defendant’s written agreement to appear when required and to comply with all conditions of the bail bond as provided in PA.R.CRIM.P. 526(A). *Id.*

Second, the court may release on nonmonetary conditions, PA.R.CRIM.P. 524(C)(2). Under this authority, the court may impose the following conditions:

- (1) reporting requirements;
- (2) restrictions on the defendant’s travel; and/or
- (3) any other appropriate conditions designed to ensure the defendant’s appearance and compliance with the conditions of the bail bond.

When a defendant poses a danger to another person, especially in cases involving domestic violence, a “no contact” order is appropriate under this Rule. *Id., Cmt.* These conditions must be stated with specificity on the bail bond. *Id.*

A third option available to the court is release on unsecured bond. Under this option, the court releases the defendant on the condition that the defendant agrees to be liable for a fixed sum should the defendant fail to appear at a required proceeding or comply with the conditions of bail. No money or security is required to be deposited. PA.R.CRIM.P. 524(C)(3).

Fourth, the court may release the defendant on nominal bail. Here, the defendant is required to deposit a nominal amount of cash (often \$1.00) and must designate another person, organization, or bail agency to act as a surety. PA.R.CRIM.P. 524(C)(4).

Finally, the court may release the defendant on a monetary condition, PA.R.CRIM.P. 524(C)(5), imposed pursuant to PA.R.CRIM.P. 528. The bail authority may consider the following when determining the monetary condition of bail: (1) the release criteria from PA.R.CRIM.P. 523, and (2) the financial ability of the defendant. PA.R.CRIM.P. 528(A). The amount of the monetary condition must be reasonable in light of the financial ability of the defendant. PA.R.CRIM.P. 528(B). A 10% deposit may act as sufficient security for the entire monetary condition, and acceptable forms of security include: cash or cash equivalents, U.S. or Commonwealth of Pennsylvania bearer bonds, realty within the United States, and surety bonds under 42 PA. CONS. STAT. ANN. §§ 5741-5749. Rule 528(C)–(D), 42 PA. CONS. STAT. ANN.

D. Factors for Bail Consideration

Although the fundamental purpose of bail is to assure the defendant’s future appearance, *Commonwealth v. Mayfield*, 827 A.2d 462, 466 (Pa. Super. 2003), as stated above, the Rules of Criminal Procedure specify other factors as well. In making this determination, the court shall consider all available information relevant to

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defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with conditions of the bail bond, including information about:

- the nature of offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
- the defendant's employment status and history, and financial condition;
- the nature of defendant's family relationship;
- the length and nature of defendant's residence in the community, and any past residences;
- the defendant's age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
- if the defendant has previously been released on bail, whether he appeared as required and complied with any bail conditions;
- whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;
- the defendant's prior criminal record;
- whether the defendant has any history of use of false identification; and
- any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.

PA.R.CRIM.P. 523.

Anticipated criminal activity may be considered in setting the amount and terms of bail, in conjunction with the other considerations. *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972). However, the failure of the defendant to admit culpability or assist in the investigation may not be used as a reason to impose additional or more restrictive conditions of bail on the defendant. PA.R.CRIM.P. 523(B).

E. Bail Conditions

The trial court may impose non-monetary conditions, such as house arrest, electronic monitoring, and a prohibition from possession of firearms, on a defendant. *Commonwealth v. Sloan*, 589 Pa. 15, 28, 907 A.2d 460, 468 (2006); *Commonwealth v. McKown*, 79 A.3d 678, 694-695 (Pa. Super. 2013).

1. Authority to add conditions

In cases in which there are no time problems under PA.R.CRIM.P. 600, nonmonetary conditions may be added in accordance with PA.R.CRIM.P. 524(C) (2). PA.R.CRIM.P. 524 provides:

Rule 524. Types of Release on Bail

...

(C) The types of release on bail are:

...

(2) *Release on Nonmonetary Conditions*: Release conditioned upon the defendant's agreement to comply with any nonmonetary conditions, as set forth in Rule 527, which the bail authority determines are reasonably necessary to ensure the defendant's appearance and compliance with the conditions of the bail bond.

PA.R.CRIM.P. 527 provides a non-exhaustive list of possible conditions:

Rule 527. Nonmonetary Conditions of Release on Bail

(A) When the bail authority determines that, in addition to the conditions of the bail bond required in every case pursuant to Rule 526(A), nonmonetary conditions of release on bail are necessary, the categories of nonmonetary conditions that the bail authority may impose are:

- (1) Reporting requirements;
- (2) Restrictions on the defendant's travel; and/or
- (3) Any other appropriate conditions designed to ensure the defendant's appearance and compliance with the conditions of the bail bond.

2. Authority to add conditions – Rule 600

In *Commonwealth v. Sloan*, 589 Pa. 15, 28, 907 A.2d 460, 468 (2006), the Pennsylvania Supreme Court analyzed the prior version of Rule 600 and found the authority to add conditions to nominal bail

In light of the 1998 amendments to Article I, Section 14, we now hold that [Pa.R.Crim.P.] Rule 600 (E)'s mandatory remedy of nominal release after 180 days of incarceration is not the same as unconditional release. Release may be conditioned on terms that not only give adequate assurance that the accused will appear for trial, but also assures that victims, witnesses, and the community will be protected. Accordingly, we hold that Rule 600(E) permits a trial court to impose non-monetary conditions, such as house arrest and electronic monitoring, on a defendant who might otherwise be denied release on nominal bail under Article I, Section 14.

Id. at 28, 907 A.2d at 468.

Rule 600 now provides:

Except in cases in which the defendant *is not entitled to release on bail as provided by law*, when a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the defendant be released immediately on nominal bail *subject to any nonmonetary conditions of bail imposed by the court as permitted by law*. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

PA.R.CRIM.P. 600(D)(2)(emphasis added). This section of PA.R.CRIM.P. 600 provides that nominal bail includes, in appropriate cases, the imposition of nonmonetary conditions of release. See Comment, PA.R.CRIM.P. 600.

In cases in which there are no time problems under PA.R.CRIM.P. 600, nonmonetary conditions may be added in accordance with PA.R.CRIM.P. 524(C)(2).

3. Selected Available Conditions

The Rules of Criminal Procedure also provide for the court to impose non-monetary conditions of bail. Courts frequently supplement monetary bail with non-monetary conditions, especially in cases of sexual violence.

(T)he bail authority should consider what the specific circumstances are that relate to the likelihood that the defendant will appear and comply and should tailor the conditions of release for the defendant's specific circumstances. In addition, the bail authority must determine whether the conditions being considered are reasonably capable of being enforced.

See PA.R.CRIM.P. 527, *Cmt.*

The types of conditions that have been used by the courts,⁷ some of which are included as examples in the Note following PA.R.CRIM.P. 527, include:

Conditions to Ensure Safety of Alleged Victim and Others

- The defendant to refrain from contact with specified person(s) including the victim (this is commonly called a no-contact order with alleged victims or witnesses).
- Restricting the defendant from being in the presence of specified other persons, such as minor children.
- Submission to drug and/or alcohol testing, as well as recommended

⁷ A combination of conditions is often appropriate.

follow-up treatment.

- The defendant to refrain from excessive use of alcoholic beverages.
- The defendant to refrain from any use of illegal drugs.
- Submission to undergo a mental health evaluation and participate in recommended follow-up treatment and/or counseling.
- If compelling reasons exist, for the defendant to commit himself to a private or public mental health facility.
- Defendant to undergo urinalysis on a specified schedule.

Restrictive Conditions On Defendant's Travel and Whereabouts To Ensure Presence At Future Court Proceedings

- Restricting the defendant from being at or near specified locations, such as schools, the residence or work place of the alleged victim, etc.
- Restricting the defendant to his residence or a supervised halfway house, with only specified windows for release such as work or school.
- Requiring electronic monitoring.
- Requiring the defendant to be in the presence of others when he leaves his residence, such as his parents or spouse.
- The defendant to comply with a specified curfew.
- No travel outside of the county of prosecution.
- The defendant to surrender his passport.

Reporting Conditions On Defendant To Ensure Presence At Future Court Proceedings

- The defendant to report by phone on a daily basis or at other specified times.
- The defendant to report in person on a daily basis or at other specified times.

Supervisory Conditions To Ensure Presence At Future Court Proceedings

- The defendant be supervised by a designated probation department or bail agency.
- The defendant be supervised by a designated person or private organization.
- Supervision of the defendant to include close contact and assistance in appearing in court.
- That the defendant maintains employment or continues with an educational program while on bail supervision.

- Requiring the defendant to report any change of address, phone or employment.
- The defendant to hand over to law enforcement all weapons in his possession or under his control.

F. Denial of Bail

There may be instances where a trial court deems a defendant too dangerous to be released even subject to conditions.

In *Commonwealth v. Jones*, 899 A.2d 353 (Pa. Super. 2006),⁸ the defendant had been charged with rape, involuntary deviate sexual intercourse, sexual assault, indecent assault and simple assault. The Superior Court affirmed the trial court's denial of a request for Rule 600(E) release on nominal bail because the defendant was deemed too dangerous for release pursuant to the Pennsylvania Constitution, Article I, Section 14. Specifically, the trial court noted that at the time of the defendant's arrest:

- he was a fugitive on other rape charges;
- the case presently before the court involved an alleged rape and assault of a twenty-five year old woman who was five months pregnant; and
- the defendant had an extensive prior criminal record.

Id. at 356.

Defendants who should not be released on bail based upon the consideration of Article I, Section 14 of the Pennsylvania Constitution are not eligible for nominal bail release under section (D)(2) of current PA.R.CRIM.P. 600. See Comment, PA.R.CRIM.P. 600.

If bail is denied, the bail authority must set forth, on the record or in writing, the reasons for its decision. PA.R.CRIM.P. 520(A).

G. Modification

1. By Magisterial District Judge

An MDJ may modify bail before the preliminary hearing upon request of either side or *sua sponte* after notice to the parties and an opportunity to be heard. PA.R.CRIM.P. 529(A). Bail may also be modified by the MDJ at the preliminary hearing.

2. By Trial Court

An existing bail order may be modified by a Judge of the Court of Common Pleas at any time prior to verdict upon motion by either party with notice to the opposing party and a hearing on the motion, or at trial or a pretrial hearing in

⁸ *Jones* was approvingly cited in *Commonwealth v. Sloan*, 589 Pa. 15, 28 n.10, 907 A.2d 460, 468 n. 10 (2006).

open court on the record when all the parties are present. PA.R.CRIM.P. 529(B). When bail is modified, the modification must be explained to the defendant and stated in writing or on the record by the issuing authority or Judge. Pa.R.Crim.P. 529(E).

Once bail has been set or modified by a Judge of the Court of Common Pleas, it may not be modified thereafter except by a court of superior jurisdiction, or by the same judge or another judge of the Court of Common Pleas either at trial or after notice to the parties and a hearing. PA.R.CRIM.P. 529(D).

H. Bail After Conviction

1. Before sentencing

After a defendant has been convicted, his right to bail is conditioned on the possible sentences flowing from the conviction(s), and whether sentencing has occurred. When a defendant has been convicted of an offense which is punishable by death or life imprisonment, the defendant shall not be released on bail. PA.R.CRIM.P. 521(A)(1).

In other cases, the standard used to determine eligibility for bail is based upon whether the aggregate of all possible sentences of imprisonment on all outstanding verdicts against the defendant in the same judicial district exceeds three (3) years. If the possible sentences do not exceed 3 years aggregate, the defendant has the same right to bail as he had prior to conviction. PA.R.CRIM.P. 521(A)(2)(a).

If the possible sentences aggregated exceed 3 years, then the defendant has the same right to bail as before conviction unless the sentencing judge finds:

- that no condition of bail will reasonably ensure that the defendant will appear or comply with the bail bond; or
- that the defendant poses a danger to any person or the community or himself.

PA.R.CRIM.P. 521(A)(2)(b).

2. After sentencing

After a defendant has been sentenced, the standard applicable is again predicated on the possible maximum length of sentence of imprisonment. If the sentence imposed includes imprisonment of less than 2 years, the defendant shall be entitled to the same right of bail as he was prior to the conviction, unless the

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Judge modifies the bail order pursuant to paragraph (D). PA.R.CRIM.P. 521(B)(1).

With the exception of capital and life imprisonment cases under paragraph (A)(1), if the sentence imposed includes possible imprisonment exceeding 2 years, bail may be granted at the discretion of the trial judge. PA.R.CRIM.P. 521(B)(2).

After the defendant is sentenced and released on bail, the Judge may impose as a condition of bail that the defendant file a post-sentence motion or perfect an appeal within the time required by law. PA.R.CRIM.P. 521(B)(3).

3. Modification after conviction or sentencing

When a defendant is eligible for release on bail after conviction, the existing bail order may be modified by a Judge of the Court of Common Pleas, upon the Judge's own motion or upon motion of counsel for either party with notice to the opposing party, in open court on the record when all parties are present. PA.R.CRIM.P. 521(D)(1).

The decision to modify the bail order should be based on the same considerations relevant when first deciding to grant bail.⁹ PA.R.CRIM.P. 521(D)(2).

Whenever bail is refused or revoked after conviction, the Judge must state on the record reasons in support of the decision. PA.R.CRIM.P. 521(C).

I. Violation of Condition of Bail

1. Revocation

When a defendant violates a condition of the bail bond, several sanctions are authorized by PA.R.CRIM.P. 536(A), including revocation of release, arrest, and changes to the conditions of the bail bond. *Commonwealth v. Hann*, --- Pa. ---, 81 A.3d 57, 66 (2013). Upon learning of a violation of a bail condition, the bail authority may issue a warrant for the defendant's arrest. PA.R.CRIM.P. 536(A)(1)(b).

Furthermore, the bail authority may order the defendant or his surety to show cause why the defendant's release should not be revoked or the conditions of his bail modified. PA.R.CRIM.P. 536(A)(1)(c). If the bail authority revokes or modifies the conditions of the defendant's release, the bail authority must state in writing or on the record the reasons for so doing. Pa.R.Crim.P. 536(A)(1)(d).

2. Forfeiture

Upon a defendant's violation of any bail condition, under Pennsylvania

⁹ The release criteria are listed in PA.R.CRIM.P. 523. Additionally, consideration should include the defendant's likelihood of fleeing the jurisdiction or whether the defendant is a danger to any other person, the community, or himself or herself. PA.R.CRIM.P. 521(D)(2).

law the bail may be subject to forfeiture. PA.R.CRIM.P. Rule 536. *See also, Commonwealth v. Gaines*, 74 A.3d 1047, 1050-1051 (Pa. Super. 2013). After forfeiture, the money deposited to secure the defendant's appearance or compliance with the conditions of the bail bond technically becomes the property of the county. *Id.*

However, the bail bond remains subject to exoneration, set-aside, or remittance by the court. *See* PA.R.CRIM.P. 536(C). A forfeiture, once declared by the court, may be set aside or remitted as justice requires. *See* PA.R.CRIM.P. 536(A)(2)(d). Equitable principles apply when a court is faced with the decision whether to modify or remit a forfeiture. *Commonwealth v. Hernandez*, 886 A.2d 231, 238 (Pa. Super. 2005), *appeal denied*, 587 Pa. 720, 899 A.2d 1122 (2006); *Commonwealth v. Nolan*, 432 A.2d 616 (Pa. Super. 1981).

The trial court should consider the following factors in determining whether remittance is appropriate:

- (1) the willfulness of the defendant's breach;
- (2) the cost, inconvenience and prejudice suffered by the prosecution as a result of the breach;
- (3) and any explanation or mitigating factors present in the case.

Commonwealth v. Gaines, 74 A.2d at 1051; *Commonwealth v. Atkins*, 644 A.2d 751, 753 (Pa. Super. 1994).

The Pennsylvania Supreme Court has recently explained the procedure in a case in which a surety seeks exoneration from a forfeiture order. First, a hearing should be held. At that hearing, the Commonwealth has the burden of proving that a defendant breached a condition of the bail bond and a surety had agreed to be bound thereby. Then, the burden shifts to the defendant or his surety to justify full or partial remission of bail forfeiture. In the context of bondsmen petitioning for remittance, the burden is on the bondsmen, by a preponderance of the evidence, to prove that his or her efforts contributed to the apprehension and return of the fugitive defendant or that those efforts at least had a substantial impact on his or her apprehension and return, i.e., that justice does not require the forfeiture. *See Commonwealth v. Hann*, --- Pa. ---, 81 A.3d 57, 71-72 (2013).

The standard and scope of review employed by the appellate courts when reviewing a trial court's grant or denial of bail forfeiture remission is well-settled.

The decision to allow or deny a remission of bail forfeiture lies with the sound discretion of the trial court. Trial courts unquestionably have the authority to order the forfeiture of bail upon the breach or violation of any condition of the bail bond. In bond forfeiture cases, an abuse of that discretion or

authority will only be found if the aggrieved party demonstrates that the trial court misapplied the law, exercised its judgment in a manifestly unreasonable manner, or acted on the basis of bias, partiality, or ill-will. To the extent the aggrieved party alleges an error of law, [the appellate court] will correct that error, and our scope of review in doing so is plenary.

Commonwealth v. Hann, --- Pa. ---, 81 A.3d 57, 65 (2013) (quotations omitted).

J. Appellate Review

An order relating to bail is subject to review pursuant to Chapter 15 of the Pennsylvania Rules of Appellate Procedure relating to judicial review of governmental determinations. See *Commonwealth v. Jones*, 899 A.2d 353, 354 n.1 (Pa.Super. 2006).

Furthermore, PA.R.A.P. 1762 provides:

Rule 1762. Release in Criminal Matters

(a) Applications relating to bail when an appeal is pending shall ordinarily first be presented to the lower court, and shall be governed by the Pennsylvania Rules of Criminal Procedure. If the lower court denies relief, a party may seek relief in the appellate court by filing an application, pursuant to Rule 123, ancillary to the pending appeal.

(b) Applications relating to bail when no appeal is pending:

- (1) Applications relating to bail when no appeal is pending shall first be presented to the lower court, and shall be governed by the Pennsylvania Rules of Criminal Procedure.
- (2) An order relating to bail shall be subject to review pursuant to Chapter 15 (judicial review of governmental determinations). Any answer shall be in accordance with Rule 1516 (other pleadings allowed), and no other pleading is authorized. Rule 1517 (applicable rules of pleading) and Rule 1531 (intervention) through 1551 (scope of review) shall not be applicable to a petition for review filed under this paragraph.

(c) **Content.** An application for relief under subdivision (a) or a petition for review under subdivision (b) shall set forth specifically and clearly the matters complained of and a description of any determinations made by the lower court. Any order and opinions

relating to the bail determination shall be attached as appendices.

(d) **Service.** A copy of the application for relief or the petition for review and any answer thereto shall be served on the judge of the lower court. All parties in the lower court shall be served in accordance with Rule 121(b) (service of all papers required). The Attorney General of Pennsylvania need not be served in accordance with Rule 1514(c) (service), unless the Attorney General is a party in the lower court.

. . .

(g) **Opinion of lower court.** Upon receipt of a copy of an application for relief under subdivision (a) or a petition for review under subdivision (b) that does not include an explanation for the bail determination, the judge who made the bail determination below shall forthwith file of record a brief statement of the reasons for the determination or where in the record such reasons may be found.

PA.R.A.P. 1762. *See also, Commonwealth v. Heiser*, 478 A.2d 1355, 1356 n.1 (Pa.Super. 1984). If an appeal is taken improvidently from an order of a government unit, the papers related to that appeal shall be regarded and acted upon as a petition for review. PA.R.A.P. 1503. Any court of the unified judicial system of the Commonwealth is considered a “government unit.” PA.R.A.P. 102. *See Commonwealth v. Jones*, 899 A.2d 353, 354 n.1 (Pa.Super. 2006).

6.3 NO CONTACT ORDERS

A. The Sexual Violence Victim Protection Act

On March 21, 2014, the Governor of Pennsylvania signed into law Act No. 25, which is the Sexual Violence Victim Protection Act. The Act is codified at 42 PA.CON.S. STAT.ANN. §§ 62A01 – 62A20. The Act is designed to protect victims of sexual violence and intimidation by providing a civil remedy which prohibits the offender from contact with the victim, regardless whether criminal charges are filed. Furthermore, the Act does not restrict the classification of the “Defendant” to a family or household member. A “victim” is identified as a person who is “the victim of sexual violence or intimidation.” 42 PA.CON.S. STAT.ANN. §§ 62A03.

The law’s sponsor, Senator Stewart Greenleaf, commented in his memoranda in support of the law that the bill was drafted with the support of the Pennsylvania Coalition Against Rape. Sen. Greenleaf describes the law as follows:

Sexual violence humiliates, degrades and terrorizes its victims.
They need safety and protection – just as domestic violence

victims do – whether or not they seek criminal prosecution. This bill authorizes a sexual assault victim to petition the court requesting protection from the defendant

The bill authorizes the court to issue an order that requires the assailant to keep away from a sexual assault victim. The bill’s findings and purpose section states “Victims of sexual violence desire safety and protection from future interactions with their offender, regardless of whether they seek criminal prosecution. This legislation provides the victim with a civil remedy requiring the offender to stay away from the victim, as well as other appropriate relief.”

This bill was drafted with the support of the Pennsylvania Coalition Against Rape (PCAR). Victims of sexual assault are placed in difficult, fearful, and potentially dangerous circumstances if their assailant remains in or returns to the community. These victims should be offered the same measure of protection already in existence for victims of domestic violence. According to PCAR, “the proposed legislation reflects a growing national trend to protect victims of sexual violence and if passed, will provide victims with a civil remedy that requires the offender to stay away.” In addition to the District of Columbia, 26 states have passed laws providing protection orders for sexual assault victims. They are: Alaska, California, Colorado, Florida, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin.

This bill is modeled after the Protection From Abuse Act (23 Pa.C.S. Ch. 61) but has been drafted as a free standing act to avoid confusion with protection from abuse orders in domestic violence cases. Today, in Pennsylvania, orders of protection are available to sexual assault victims only if a criminal case has been initiated. But, in fact, only 28% of victims ever report their victimization to law enforcement. Even when victims do choose to report, many cases are not prosecuted because of the burden of proof or problems with evidence. Traumatized and fearful, victims of sexual assault need orders of protection to help keep them safe from perpetrators.

Pennsylvania State Senate Co-Sponsorship Memoranda, 2-4-13.

1. Steps

▶ Commencement Procedures

The Act provides that a victim may petition the court for a protection order by the filing of a petition by an adult, emancipated minor, or, in the event the plaintiff is not the victim, “any parent, adult household member or guardian ad litem” on behalf of a minor. 42 PA.CON.S.STAT.ANN. § 62A05.

▶ Hearing

At the hearing, the petitioner must prove, by a preponderance of the evidence, that the plaintiff or other individual is at a continued risk of harm from the respondent. 42 PA.CON.S.STAT.ANN. § 62A06(a). If the petition seeks a temporary order, then the court must conduct an *ex parte* hearing. 42 PA.CON.S.STAT.ANN. § 62A06(b).

▶ Relief

The court may grant relief which prohibits the defendant from having any contact with the victim, for a fixed time period not to exceed 36 months. 42 PA.CON.S.STAT.ANN. § 62A07. A protection order may include (1) prohibiting the defendant from having any contact with the plaintiff; (2) directing the defendant to refrain from harassing or stalking the plaintiff or other designated persons; and (3) granting any other appropriate relief.

A copy of the protection order must be issued to the plaintiff, the defendant, the district attorney’s office, and the law enforcement agency with appropriate jurisdiction to enforce the order. Each law enforcement agency and the sheriff of each county must ensure that all of their officers and employees are familiar with the provisions of this act.

▶ Enforcement

Indirect criminal contempt is available for violations of the protection order. 42 PA.CON.S.STAT.ANN. § 62A13.

B. Pennsylvania’s Address Confidentiality Program

Pennsylvania’s Address Confidentiality Program (ACP) supports the strong public policy of protecting the confidentiality of victims. *See* Domestic and Sexual Violence Victim Address Confidentiality Act, 23 PA.CON.S.STAT.ANN. § 6701 *et seq.* This program,

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designed to assist victims to stay safe, provides a means for victims to keep their home address confidential. The program is available to victims of sexual assault, domestic violence and stalking. It provides a substitute address for first-class mail, registered and certified mail. Local and state government agencies must use the substitute address. 23 PA.CONS.STAT.ANN. § 6707.

The Domestic and Sexual Violence Victim Address Confidentiality Act provides that the Office of Victim Advocate must establish the ACP. Persons who are eligible are listed in § 6704:

The following persons shall be eligible to apply to become program participants:

- (1) A victim of domestic violence who files an affidavit with the Office of Victim Advocate stating the affiant's eligibility for a protection from abuse order and further stating that the affiant fears future violent acts by the perpetrator of the abuse.
- (2) A victim of sexual assault who files an affidavit with the Office of Victim Advocate describing the perpetrator's violent actions or threatened violent actions toward the affiant and further stating that the affiant fears future violent acts by the perpetrator of the sexual violence.
- (3) A victim of stalking who files an affidavit with the Office of Victim Advocate describing the perpetrator's course of conduct or repeated actions toward the affiant meeting the criteria enumerated in 18 Pa.C.S. § 2709.1 (relating to stalking) and further stating that the affiant fears future violent acts by the perpetrator of the stalking.
- (4) A person who is a member of the same household as a program participant.
- (5) A program participant who notifies the Office of Victim Advocate of the participant's intent to continue in the program prior to the expiration of certification.

23 PA.CONS.STAT.ANN. § 6704.

The Office of Victim Advocate certifies eligible applicants. The certification is valid for three years. 23 PA.CONS.STAT.ANN. § 6705.

State and local governmental agencies must use the substitute address as issued by the Office of Victim Advocate. There are exceptions which are listed in 23 PA.CONS.

STAT.ANN. § 6707. All records relating to applicants and program participants, including program applications, participants' actual addresses, and waiver proceedings, must be kept confidential and are not to be subject to the provisions of the Right-to-Know Law, except that records may be released as specifically set forth in the Domestic and Sexual Violence Victim Address Confidentiality Act and to a district attorney to the extent necessary for the prosecution of conduct as specified in 23 PA.CONS.STAT.ANN. § 6711 regarding false information, access by fraud or misrepresentation, or unauthorized use. See 23 PA.CONS.STAT.ANN. § 6703(d).

C. The Protection from Abuse Act

The purpose of the Protection from Abuse Act, 23 PA.CONS.STAT.ANN. § 6101 *et seq.*, is to protect the victims of domestic abuse, by preventing further abuse, through the use of quick and flexible procedures. *Commonwealth v. Snell*, 737 A.2d 1232, 1235 (Pa. Super. 1999); See also *Snyder v. Snyder*, 629 A.2d 977, 981 (Pa. Super. 1993).

The goal of the Protection from Abuse Act is protection and prevention of further abuse by removing the perpetrator of the abuse from the household and/or from the victim for a period of time.

McCance v. McCance, 908 A.2d 905, 908 (Pa. Super. 2006), quoting *Viruet v. Cancel*, 727 A.2d 591, 595 (Pa. Super. 1999).

The Act's protective authority extends to, *inter alia*, "family or household members." The Act defines "family or household members" as:

"Family or household members." Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.¹⁰

The primary mechanism used by the Act is an order prohibiting contact between the victim and an alleged abuser. 23 PA.CONS.STAT.ANN. § 6108(a)(6). "No contact" orders contained as conditions in bail bonds should be viewed as having a similar purpose of prohibiting contact between the alleged abuser and the victim.

When a defendant allegedly violates a PFA order, the Act allows police or a plaintiff to file a charge of indirect criminal contempt against the defendant. 23 PA.CONS. STAT.ANN. § 6114(a). The primary goals of the contempt proceeding are to punish the contemnor and prevent any further abuse. *Commonwealth v. Snell*, 737 A.2d 1232, 1235 (Pa. Super. 1999).

¹⁰ 23 PA.CONS.STAT.ANN. § 6102.

6.4 HUMAN IMMUNODEFICIENCY VIRUS (HIV) TESTING

Pennsylvania adopted the HIV-Related Testing for Sex Offenders Act, 35 PA.STAT. §§ 7620.101-.1103, in 2012. This law provides for HIV testing of accused sex assailants to assist in the care and treatment of victims of sexual assaults. The Act describes the testing as follows:

“HIV-related testing.” A laboratory test or series of tests for a virus, antibody, antigen or etiologic agent which is thought to cause or to indicate the presence of human immunodeficiency virus or acquired immune deficiency syndrome.

35 PA.STAT. § 7620.103. The results of the HIV-related testing may not be used to establish the guilt of the defendant. 35 PA.STAT. § 7620.304.

► Criteria for Test

The HIV-related test is to be ordered by the trial court upon a finding of probable cause to believe there was a probable transmission of bodily fluids between a defendant and victim. 35 PA.STAT. § 7620.301.

► Procedure

Upon the request of the victim, and with notice to the defendant, the attorney for the Commonwealth must make application for the test if there is a violation of any of the enumerated crimes. 35 PA.STAT. § 7620.302. There is an alternative procedure specified in 35 PA.STAT. § 7620.303 in the case of a juvenile offender transferred to adult criminal court pursuant to PA.R.J.C.P. 394.

► Offenses

- Rape: 18 PA.CON.S.STAT.ANN. § 3121
- Statutory Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3122.1
- Involuntary Deviate Sexual Intercourse: 18 PA.CON.S.STAT.ANN. § 3123
- Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3124.1
- Institutional Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3124.2
- Aggravated Indecent Assault: 18 PA.CON.S.STAT.ANN. § 3125
- Indecent Assault: 18 PA.CON.S.STAT.ANN. § 3126
- Incest, 18 PA.CON.S.STAT.ANN. § 4302
- Endangering the Welfare of Children, 18 PA.CON.S.STAT.ANN. § 4304, if there has been sexual contact with the victim
- Corruption of Minors, 18 PA.CON.S.STAT.ANN. § 6301, if there has been sexual contact with the victim
- Sexual Abuse of Children, 18 PA.CON.S.STAT.ANN. § 6312, if there has been sexual contact with the victim

- Sexual Exploitation of Children, 18 PA.CON.S.TAT.ANN. § 6320, if there has been sexual contact with the victim

► **Disclosure**

The results of the HIV-related testing are only to be disclosed to:

- the victim;
- the defendant;
- the attorney for the Commonwealth;
- the attorney for the defendant;
- health care providers treating the victim or the defendant;
- the trial court;
- any other individual designated by the court.

6.5 VENEREAL DISEASE TESTING

Among the purposes of the Disease Prevention and Control Law, 35 PA.STAT. § 521.8, is to assign primary responsibility for the prevention and control of diseases to local health departments, and to institute a system of mandatory reporting, examination, diagnosis, and treatment of communicable diseases. *Commonwealth v. Moore*, 526 Pa. 152, 159, 584 A.2d 936, 940 (1991). The Law provides:

Disease Prevention and Control Law of 1955
§ 521.8. Venereal disease

(a) Any person taken into custody and charged with any crime involving lewd conduct or a sex offense, or any person to whom the jurisdiction of a juvenile court attaches, may be examined for a venereal disease by a qualified physician appointed by the department or by the local board or department of health or appointed by the court having jurisdiction over the person so charged.

(b) Any person convicted of a crime or pending trial, who is confined in or committed to any State or local penal institution, reformatory or any other house of correction or detention, may be examined for venereal disease by a qualified physician appointed by the department or by the local board or department of health or by the attending physician of the institution, if any.

(c) Any such persons noted in paragraph (a) or (b) of this section found, upon such examination, to be infected with any venereal disease shall be given appropriate treatment by duly constituted health authorities or their deputies or by the

attending physician of the institution, if any.

35 PA.STAT. § 521.8.

6.6 DISCOVERY

Issues regarding pretrial discovery and inspection can be split into four related groups:

- Mandatory disclosures by the Commonwealth;
- Discretionary disclosures by the Commonwealth;
- Mandatory disclosures by the Defendant; and
- Discretionary disclosures by the Defendant.

Both parties are under a continuing duty to notify the opposing party of any additional evidence subject to either mandatory discovery or court ordered discretionary discovery that is uncovered. PA.R.CRIM.P. 573(D).

A. Disclosures that are Mandatory by the Commonwealth

Certain categories of information must be disclosed by the Commonwealth upon request by the defendant, in the absence of a protective order. PA.R.CRIM.P. 573(B). As a general rule, the Commonwealth should exercise “the utmost good faith” in responding to mandatory discovery requests. *Commonwealth v. Long*, 753 A.2d 272, 276 (Pa. Super. 2000). However, the Commonwealth is only required to disclose evidence which is within its control; it need not do investigative work for the defendant. *Commonwealth v. Miller*, 765 A.2d 1151, 1154 (Pa. Super. 2001)(abrogated on other grounds by *Commonwealth v. Melendez-Rodriguez*, 856 A.2d 1278 (Pa. Super. 2004)(en banc)).

In *Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001), the Supreme Court of Pennsylvania held that a *Brady*¹¹ violation occurs when a prosecutor fails to disclose evidence favorable to the accused and known only to the police, even though the prosecutor is unaware of the existence of the evidence. The Brady obligation to disclose exculpatory evidence extends to files of police agencies of the same government bringing the prosecution. Id. at 413, 781 A.2d at 1142. See also, *Commonwealth v. Simpson*, --- Pa. ---, 66 A.3d 253, 267 (2013).

Additionally, it must be noted that the discovery and disclosure of exculpatory evidence, after trial has already begun and which directly contradicts the defendant’s opening argument, has been held to be grounds for the declaration of a mistrial. *Commonwealth v. Montgomery*, 533 Pa. 491, 626 A.2d 109 (1993), *abrogated in part*, *Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001).

¹¹ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

1. Exculpatory evidence

First and foremost, the Commonwealth has a continuing duty to provide any exculpatory evidence. PA.R.CRIM.P. 573(B)(1)(a); **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This duty extends to exculpatory evidence that is relevant either to guilt or punishment. PA.R.CRIM.P. 573(B)(1)(a).

In order to establish a violation of this requirement, a defendant must establish that:

- (1) the prosecution concealed evidence;
- (2) which was favorable to him; and
- (3) prejudice to the defendant arising from the concealment.

Commonwealth v. Simpson, --- Pa. ---, 66 A.2d 253, 264 (2013); **Commonwealth v. Chambers**, 570 Pa. 3, 28, 807 A.2d 872, 887 (2002), *cert. denied*, 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992).

The Commonwealth is responsible for disclosing evidence contained in the files of both the district attorney and the police agencies of the same government that is prosecuting the defendant. **Commonwealth v. Burke**, 566 Pa. 402, 413, 781 A.2d 1136, 1142 (2001). However, the Commonwealth does not violate this requirement if the defendant had “equal access to the information” and knew or could have known, through reasonable diligence, of the evidence. **Commonwealth v. Chamberlain**, 612 Pa. 107, 162, 20 A.3d 381, 413 (2011), *cert. denied*, 132 S.Ct. 2377, 182 L.Ed.2d 1017 (2012); **Commonwealth v. Morris**, 573 Pa. 157, 178, 822 A.2d 684, 696 (2003).

2. Confessions or inculpatory statements

The second category of evidence that is subject to mandatory disclosure by the Commonwealth upon request involves any confession or inculpatory statements made by the defendant that are within the possession or control of the Commonwealth. PA.R.CRIM.P. 573(B)(1)(b). The Commonwealth must also disclose the identity of the person(s) to whom such statements were made, if the information is within the possession or control of the attorney for the Commonwealth. *Id.*

3. Prior criminal record of the defendant

The Commonwealth must also disclose any prior criminal record of the defendant of which the Commonwealth is aware. PA.R.CRIM.P. 573(B)(1)(c). However, if defense counsel is aware of prior criminal assaults perpetrated by the defendant due to previous representation of the defendant, the Commonwealth

does not commit a *per se* violation of the rule by failing to disclose such assaults. ***Commonwealth v. Elliott***, 549 Pa. 132, 145-147, 700 A.2d 1243, 1249-1250 (1997), *cert. denied*, 524 U.S. 955, 118 S.Ct. 2375, 141 L.Ed.2d 742 (1998), *abrogated on other grounds*, ***Commonwealth v. Freeman***, 573 Pa. 532, 827 A.2d 385 (2003), *cert. denied*, 543 U.S. 822, 125 S.Ct. 30, 160 L.Ed.2d 31 (2004).

4. Identifications of the defendant

Another category of evidence that the Commonwealth must disclose upon request, and in the absence of a protective order, pertains to any identification of the defendant by voice, photograph, or in-person identification. PA.R.CRIM.P. 573(B)(1)(d). Although the Commonwealth must disclose that an eyewitness failed to identify the defendant in a pre-trial photographic array, a failure by the Commonwealth to disclose a pre-trial identification of defendant by photographic array was found to be harmless where the identity of the defendant was not at issue in the case. ***Commonwealth v. Davis***, 704 A.2d 650, 653 (Pa. Super. 1997), *appeal denied*, 553 Pa. 704, 719 A.2d 744 (1998), *cert. denied*, 525 U.S. 1026 (1998).

5. Results of scientific tests and other expert evaluations

The Commonwealth, upon request, must also disclose the results and reports of scientific tests, expert opinions, polygraph examinations, and physical or mental examinations in the Commonwealth's control or possession. PA.R.CRIM.P. 573(B)(1)(e). This provision does not require the Commonwealth to create a written summary of an expert's findings, if the expert has not prepared a written report. ***Commonwealth v. Blasioli***, 685 A.2d 151, 160 (Pa. Super. 1996), *aff'd*, 552 Pa. 149, 713 A.2d 1117 (1998).

The defendant's right to access an alleged victim's records held by an agency, hospital or rape crisis center is limited by any privilege that may protect the confidentiality of the alleged victim's records. ***Commonwealth v. Eck***, 605 A.2d 1248 (Pa. Super. 1992). A defendant's confrontation and compulsory process rights must yield to an absolute statutory privilege. ***Commonwealth v. Mejia-Arias***, 734 A.2d 870, 875 (Pa. Super. 1999); ***Commonwealth v. Askew***, 666 A.2d 1062, 1065 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996). For example, see the privilege granted to sexual assault counselors, 42 PA. CONS. STAT. ANN. §5945.1. Of course, the privilege may be deemed waived if the item is in the possession of the Commonwealth. See ***Commonwealth v. Higby***, 559 A.2d 939, 940 (1989), *appeal denied*, 525 Pa. 578, 575 A.2d 109 (1990).

The Constitutional right to confront an accuser does not entitle a defendant to an unsupervised review of psychiatric records of an alleged victim that are in the possession of the Commonwealth. Rather, the defendant is entitled to have the trial court conduct an *in camera* review of the Commonwealth's records,

after which the trial court will determine the materiality of any documents in the possession of the Commonwealth. *Commonwealth v. Byuss*, 539 A.2d 852, 853-854 (Pa. Super. 1988).

In addition, as long as the Commonwealth promptly produces the results of any scientific test or evaluation, it does not violate the mandatory disclosure requirement by initially failing to diligently pursue the underlying test or evaluation. *Commonwealth v. Smith*, 599 A.2d 1350 (Pa. Super. 1991), *appeal dismissed*, 534 Pa. 273, 632 A.2d 306 (1993).

6. Tangible evidence

The Commonwealth must also disclose all tangible evidence in its possession. PA.R.CRIM.P. 573(B)(1)(f). The rule provides a non-exhaustive list of examples such as documents, photographs, and fingerprints. *Id.* Audio cassette recordings have been treated as tangible evidence. *Commonwealth v. Brocco*, 396 A.2d 1371, 1378 (Pa. Super. 1979).

When faced with a discovery request for tangible evidence, the Commonwealth should exercise the utmost good faith in disclosing such evidence. *Commonwealth v. Thiel*, 470 A.2d 145 (Pa. Super. 1983) (Commonwealth's failure to disclose tangible evidence that buttressed the credibility of its primary witness constituted a reversible error).

7. Transcripts and recordings of electronic surveillance

Finally, the Commonwealth must produce the transcripts and recordings of any electronic surveillance and the authority under which such surveillance was authorized. PA.R.CRIM.P. 573 (B)(1)(g).

B. Disclosures by the Commonwealth at the Discretion of the Court

In all court cases (except as provided in PA.R.CRIM.P. 230 Disclosing of testimony before investigating grand juries), a defendant may file a motion for pretrial discovery seeking the production of certain types of evidence that are not included under the mandatory discovery provisions. PA.R.CRIM.P. 573(B)(2). The court has the discretion to permit or deny such discovery. *Id.*

The trial court exercising its discretion to grant or deny a request for discretionary discovery should be guided by the principle to allow as much discovery prior to trial as will, consistent with the protection of persons, effective law enforcement, the adversary system, and national security, provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. *Commonwealth v. Thiel*, 470 A.2d 145, 148 (Pa. Super. 1983).

1. Names and addresses of eyewitnesses

The court may order the Commonwealth to disclose the names and addresses of any eyewitnesses known to the Commonwealth. PA.R.CRIM.P. 573(B)(2)(a)(i); ***Commonwealth v. Jones***, 542 Pa. 464, 508-509, 668 A.2d 491, 512-513 (1995), *cert. denied*, 519 U.S. 826, 117 S.Ct. 89, 136 L.Ed.2d 45 (1996). This rule covers eyewitnesses only;¹² there is no requirement that the Commonwealth reveal the names and addresses of all of its witnesses. ***Commonwealth v. Colson***, 507 Pa. 440, 463, 490 A.2d 811, 823 (1985), *cert. denied*, 476 U.S. 1140 (1986) (*abrogated in part, Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001)). However, even if the Commonwealth does not intend to call an eyewitness to testify, it still must identify the witness in order to comply with court ordered discovery under this section. ***Commonwealth v. Allen***, 429 A.2d 1113, 1116 (Pa. Super. 1981).

2. Verbatim or substantially verbatim statements of eyewitnesses

The Commonwealth may be ordered to disclose all written or recorded statements made by eyewitnesses. PA.R.CRIM.P. 573(B)(2)(a)(ii). Furthermore, the Commonwealth may be ordered to disclose substantially verbatim oral statements made by eyewitnesses. PA.R.CRIM.P. 573(B)(2)(a)(ii). When there is a dispute over whether writing is a substantially verbatim record, the court must examine the writing and make a finding. ***Commonwealth v. Alston***, 864 A.2d 539, 547 (Pa. Super. 2004) (*en banc*). The assertion of work product privilege does not automatically remove such writings from the realm of discoverable material. *Id.*

- ***Commonwealth v. Piole***, 636 A.2d 1143, 1145 (Pa. Super. 1994), *abrogated in part, Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001)(Mere notes taken by an officer while questioning a witness are insufficient; the statement must be substantially verbatim or be adopted by the witness).
- ***Commonwealth v. Boczkowski***, 577 Pa. 421, 458, 846 A.2d 75, 97 (2004) (Commonwealth is not responsible for statements it was unaware of and that it did not possess).

The rule set forth by this section applies only to eyewitnesses, not to other witnesses. In ***Commonwealth v. Elliott***, 549 Pa. 132, 145-147, 700 A.2d 1243, 1249-1250 (1997), *cert. denied*, 524 U.S. 955, 118 S.Ct. 2375, 141 L.Ed.2d 742 (1998)(*abrogated on other grounds, Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003), *cert. denied*, 543 U.S. 822, 125 S.Ct. 30, 160 L.Ed.2d 31 (2004)), pretrial statements made by victims of prior assaults perpetrated by defendant were held not subject to this rule.

¹² Under PA.R.CRIM.P. 573(B)(2)(d), the trial court, in its discretion, can order the Commonwealth to disclose the names of witnesses not necessarily eyewitnesses if in the interests of justice. ***Commonwealth v. Jones***, *supra*, 542 Pa. at 508, 668 A.2d at 512.

3. Verbatim or substantially verbatim statements of co- defendants, co-conspirators or accomplices

The Commonwealth may be ordered to disclose all written or recorded statements and substantially verbatim oral statements made by co-defendants, co-conspirators or accomplices. PA.R.CRIM.P. 573(B)(2)(a)(iii). Whether the co-defendant, co-conspirator or accomplice has been charged does not affect the court's power to order such discovery. *Id.*

4. Other evidence specifically identified by the defendant.

The Commonwealth may be ordered to disclose "any other evidence specifically identified by the defendant, provided the defendant can additionally establish that [the] disclosure would be in the interests of justice." PA.R.CRIM.P. 573(B)(2)(a)(iv). This includes

any information concerning any prosecutor, investigator, or police officer involved in the case who has received either valuable consideration, or an oral or written promise or contract for valuable consideration, for information concerning the case, or for the production of any work describing the case, or for the right to depict the character of the prosecutor or investigator in connection with his or her involvement in the case.

PA.R.CRIM.P. 573(B)(2)(a)(iv), comment.

5. Experts the Commonwealth intends to call at trial

If the Commonwealth intends to call an expert to testify and that expert has not prepared a formal report, a motion may be made to the court to order such expert to prepare, and the Commonwealth disclose, a report. PA.R.CRIM.P. 573(B)(2)(b). The court may order that the report address: the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and conclusions. *Id.*

This rule is not intended to require a prepared report in every case. PA.R.CRIM.P. 573, *comment*. Rather, the court should make a determination on a case-by-case basis as to whether a report is required. *Id.* Factors that are relevant are whether the parties are familiar with the expert and whether the expert testifies on the same subject routinely. *Id.*

C. Mandatory Disclosures by the Defendant

1. Alibi and insanity defense

The defendant must disclose his intention to present either an alibi defense,¹³ or insanity defense,¹⁴ within the time required for filing an omnibus pre-trial motion. For a detailed discussion of what is required of a defendant under these rules, please see Chapter 5, Section 5.2 ALIBI DEFENSE, and Section 5.7

D. Disclosures by the Defendant at the Discretion of the Court.

In all court cases, the Commonwealth may file a motion for pretrial discovery seeking the production of certain types of evidence that are not included under the mandatory discovery provisions. PA.R.CRIM.P. 573(C)(2). The court may order the defendant to disclose such evidence upon a showing by the Commonwealth that the evidence is material to its case and that the request is reasonable. *Id.*

1. Results or reports of physical or mental examinations and scientific tests

The defendant may be ordered by the court to disclose the results and reports obtained from physical or mental examinations, as well as the results and reports obtained from scientific tests, that the defendant intends to introduce as evidence in his case-in-chief. PA.R.CRIM.P. 573(C)(1)(a). The court may also order the defendant to disclose reports prepared by a witness whom the defendant intends to call at the trial. *Id.* However, the court may only order such discovery if the defendant has requested and received discovery under PA.R.CRIM.P. 573(B)(1)(e) (Mandatory disclosure by Commonwealth).

- ***Commonwealth v. Faulkner***, 528 Pa. 57, 74, 595 A.2d 28, 37 (1991), *cert. denied*, 503 U.S. 989 (1992)(trial court did not abuse its discretion when it ordered defendant to produce the results of a psychiatric evaluation when defendant refused to submit to an examination by the Commonwealth's psychiatrist).

2. Names and addresses of eyewitnesses

The court may order the defendant to disclose the names and addresses of any eyewitnesses the defendant intends to call in his case in chief. PA.R.CRIM.P. 573(C)(1)(b). However, the court may only order such discovery if the defendant has requested and received discovery pursuant to PA.R.CRIM.P. 573(B)(2)(a)(i) (Discretionary disclosure by Commonwealth). *Id.*

- ***Commonwealth v. Malone***, 514 A.2d 612 (Pa. Super. 1986) (Trial court erred in precluding testimony of eyewitness as Commonwealth had not filed a motion for pre-trial discovery).

¹³ PA.R.CRIM.P. 567(A).

¹⁴ PA.R.CRIM.P. 568(A)(1).

3. Experts the defendant intends to call at trial

If the defendant intends to call an expert to testify at any proceeding, the court may order such expert to prepare, and the defendant disclose, a report. PA.R.CRIM.P. 573(C)(2). The report should state the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and conclusions. *Id.*

This rule is not intended to require a prepared report in every case. *Id., comment.* Rather, the court should make a determination on a case-by-case basis as to whether a report is required. *Id.* Factors that are relevant are whether the parties are familiar with the expert and whether the expert testifies on the same subject routinely. *Id.*

E. Remedies

Any violation of *Brady* is also a violation of PA.R.CRIM.P. 573(B)(1)(a), for which the trial court may impose a sanction. ***Commonwealth v. Sullivan***, 829 A.2d 795, 802-803 (Pa. Super. 2003), *appeal denied*, 574 Pa. 773, 833 A.2d 143 (2003). *See also*, PA.R.CRIM.P. 573(E) (relating to remedies for violations of discovery rule).

If a party violates the provisions of PA.R.CRIM.P. 573, the court has the discretion to choose from several remedies. PA.R.CRIM.P. 573(E). Although this discretion is considered broad, ***Commonwealth v. Jones***, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826, 117 S.Ct. 89, 136 L.Ed.2d 45 (1996), it is not unfettered.

The trial court possesses discretion in fashioning an appropriate remedy for a violation of the rules of discovery. [***Commonwealth v. Burke***, 566 Pa. 402, 415, 781 A.2d 1136, 1143 (2001)]; *see also* ***Commonwealth v. Crossley***, 439 Pa.Super. 342, 653 A.2d 1288 (1995). However, we must remember its discretion is not unfettered. *Id.* In most cases, ordering a continuance will be an adequate remedy. ***Commonwealth v. Yost***, 348 Pa.Super. 297, 502 A.2d 216, 219 (1985). A continuance is appropriate where the undisclosed statement or other evidence is admissible and the defendant's only prejudice is surprise. *Id.*

Commonwealth v. Smith, 955 A.2d 391, 395 (Pa. Super. 2008).

1. Order production or inspection

The court may order the violating party to permit discovery or inspection. PA.R.CRIM.P. Rule 573(E).

- ***Commonwealth v. Simmons***, 541 Pa. 211, 662 A.2d 621 (1995), *cert.*

denied, 516 U.S. 1128, 116 S.Ct. 945, 133 L.Ed.2d 870 (1996)(production of letter written by defendant was the proper remedy for Commonwealth's violation of discovery order).

2. Grant of continuance

The court may grant a continuance to allow the aggrieved party a chance to prepare for the newly discovered evidence. PA.R.CRIM.P. 573(E). This remedy is generally the favored remedy for discovery violations. *See, e.g., Commonwealth v. Woodell*, 496 A.2d 1210, 1213 (Pa. Super. 1985). This is especially so when the only prejudice suffered by the defendant is surprise. *Commonwealth v. Johnson*, 456 A.2d 988, 993 (Pa. Super. 1983).

3. Prohibit introduction of evidence not disclosed

The court may prohibit the party in violation from introducing undisclosed evidence at trial. PA.R.CRIM.P. 573(E). The court may never preclude the defendant from testifying in his own defense. *Id.* Generally, a defendant is required to establish prejudice before this severe sanction is imposed. *See e.g., Commonwealth v. Manchas*, 633 A.2d 618, 625 (Pa. Super. 1993), *appeal denied*, 539 Pa. 647, 651 A.2d 535 (1994) (Defendant not entitled to exclusion of Commonwealth witness where defendant did not establish prejudice, i.e., defense counsel was fully prepared at trial.).

4. Any other remedy the court deems just under the circumstances

The court may order any other remedy that it deems just under the circumstances. PA.R.CRIM.P. 573(E). Included under this provision is the discretion to order a new trial.

Examples:

- *Commonwealth v. Shelton*, 536 Pa. 559, 640 A.2d 892 (1994) (Commonwealth's willful failure to disclose new information linking defendant to drug sales warranted the grant of a new trial).
- *Commonwealth v. Johnson*, 456 A.2d 988 (1983) (Commonwealth's failure to disclose defendant's inculpatory statement required grant of new trial).

However, in order to receive the remedy of a new trial, a defendant must establish prejudice. *Commonwealth v. Jones*, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826, 117 S.Ct. 89, 136 L.Ed.2d 45 (1996). Therefore, it is generally necessary for the court to hold a hearing to take evidence and allow the opposing party a chance to respond before imposing severe sanctions.

Commonwealth v. Yost, 502 A.2d 216, 218 (Pa. Super. 1985).

F. Protective Orders

Even with respect to mandated disclosures, either party may move the court for a protective order. PA.R.CRIM.P. 573(F). The evidence to support a protective order must be “sufficient”, and may be made entirely in the form of a written statement reviewed by the court *in camera*. *Id.* If the court grants a protective order following an *in camera* showing, the entire text of the statement shall be sealed and preserved in the records of the court in order to allow for appellate review. *Id.*

At this time, there are no set standards for determining what is “sufficient” evidence to support a protective order. However, there is a safe harbor for trial courts, as any error in granting a protective order may be cured by granting the defendant a continuance in order to prepare for or investigate any difficulty caused by the late disclosure. *See e.g., Commonwealth v. Bonacurso*, 500 Pa. 247, 252, 455 A.2d 1175, 1178 (1983), *cert. denied*, 462 U.S. 1120 (1983)(*abrogated in part, Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001)); *Commonwealth v. Brown*, 544 Pa. 406, 421, 676 A.2d 1178, 1185 (Pa. 1996), *cert. denied*, 519 U.S. 1043 (1996).

G. Work Product

To the extent that a document constitutes the opinions, theories, or conclusions of the attorney for either party, or agents for the attorney, it will not be required to be disclosed. PA.R.CRIM.P. 573(G).

- *Lepley v. Lycoming County Court of Common Pleas*, 481 Pa. 565, 393 A.2d 306 (Pa. Super. 1978) (Defense counsel’s recording of defendant’s preliminary hearing was not a privileged “work product”).

In *Commonwealth v. Hetzel*, 822 A.2d 747, 758 (Pa. Super. 2003), *appeal denied*, 576 Pa. 710, 839 A.2d 350 (2003), photographs and dental tracings prepared by forensic odontologist at the request of defense attorney were deemed protected work product. The Superior Court stated:

[T]he work product doctrine provides broader protections than the attorney-client privilege and shields from disclosure an attorney’s (or his representative’s) opinions, theories, or conclusions. PA.R.CRIM.P. 573(G). The underlying purpose of the work product doctrine is to guard “the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Lepley v. Lycoming County Court of Common Pleas*, 481 Pa. 565, 393 A.2d 306 (Pa. Super. 1978).

822 A.2d at 757 (footnote omitted).

6.7 OMNIBUS PRE-TRIAL MOTIONS

An omnibus pre-trial motion is the method envisioned by the Rules of Criminal Procedure for resolving routine matters that commonly arise in criminal litigation. Generally, all pre-trial requests for relief should be included in a single omnibus pre-trial motion. PA.R.CRIM.P. 578. However, this rule is not intended to preclude other types of motions from being filed. *Id., comment.* These other motions should, however, be filed at the earliest feasible time. *Id.*

A. Types of Relief

1. Continuance

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for continuance. PA.R.CRIM.P. 578, *comment.*

2. Severance, Joinder, or Consolidation

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for severance, joinder, or consolidation. PA.R.CRIM.P. 578, *comment.*

Although under the scheme set forth in the Rules of Criminal Procedure, ordinarily offenses or defendants charged in separate indictments or informations will be tried separately, pursuant to PA.R.CRIM.P. 582(B), the District Attorney has the opportunity to serve a notice on the defendant(s) that the offenses or defendants will be tried together. In such situations, if challenged, the trial court must review the following standards:

(1) Offenses charged in separate indictments or information may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(b) the offenses charged are based on the same act or transaction.

(2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

PA.R.CRIM.P. 582(A).

Also, the trial court may order severance of offenses or defendants, or provide other appropriate relief, if any party is prejudiced by offenses or defendants being tried together. PA.R.CRIM.P. 583.

3. Suppression of Evidence

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for suppression of evidence. PA.R.CRIM.P. 578, *comment*. If a defendant fails to raise a suppression issue in an omnibus pre-trial motion, he bears the burden of preserving the issue by establishing that the opportunity to argue for suppression did not previously exist or that the interests of justice require that the suppression motion be heard. PA.R.CRIM.P. 581(B); ***Commonwealth v. Bodge***, 389 A.2d 1172, 1175 (Pa. Super. 1978); ***Commonwealth v. Hubbard***, 472 Pa. 259, 372 A.2d 687 (Pa. Super. 1977), *overruled on other grounds*, ***Commonwealth v. Grant***, 572 Pa. 48, 813 A.2d 726 (2002).

PA.R.CRIM.P. 581 provides the procedure and standards for the suppression motion.

The motion for suppression must state specifically and with particularity the evidence sought to be suppressed, the grounds relied upon for suppression, and the facts and events in support of such grounds. PA.R.CRIM.P. 581(D). If the court deems that a hearing is necessary to resolve the motion to suppress, it must order a hearing to be held either prior to or at trial and provide the attorney for the Commonwealth a reasonable opportunity for investigation. PA.R.CRIM.P. 581(E).

The hearing should ordinarily be held in open court, but outside the presence of the jury, if any. PA.R.CRIM.P. 581(F). The hearing should be recorded. PA.R.CRIM.P. 581(G). At the hearing, the Commonwealth has the burden of establishing that the challenged evidence was not obtained in violation of the defendant's rights. ***Commonwealth v. West***, 834 A.2d 625, 629 (Pa. Super. 2003), *appeal denied*, 586 Pa. 712, 889 A.2d 1216 (2005); PA.R.CRIM.P. 581(H).

- ***Commonwealth v. Dutrieville***, 932 A.2d 240, 242 (Pa. Super. 2007) (It is trial court's province to pass on the credibility of witnesses and assign the weight to be given to their testimony).
- However, in ***Commonwealth v. Beaman***, 846 A.2d 764 (Pa. Super. 2004), *aff'd*, 583 Pa. 636, 880 A.2d 578 (2005), the court held that when a defendant challenges the constitutionality of a statute which authorizing the search, the burden shifted to the defendant as statutes are presumed constitutional. *Id.* at 767-768.

If the defendant testifies at the hearing, he does not waive his right to remain silent at trial. PA.R.CRIM.P. 581(H).

At the conclusion of the hearing, the Judge must enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights. PA.R.CRIM.P. 581(I).

If the court determines that the evidence should not be suppressed, the ruling is final and binding at trial, except upon a showing of evidence which was previously unavailable. PA.R.CRIM.P. 581(J). The defendant may always challenge the voluntariness of a confession before a fact-finder. PA.R.CRIM.P. 581, *comment*; See *Commonwealth v. Cameron*, 780 A.2d 688, 693 (Pa. Super. 2001).

(a) "Lustful Disposition" Exception

The "lustful disposition" exception to the general rule against the admission of evidence of prior or subsequent bad acts¹⁵ has been consistently recognized by the Pennsylvania Supreme Court for more than a century. *Commonwealth v. Wattley*, 880 A.2d 682, 686 (Pa. Super. 2005), *appeal dismissed*, 592 Pa. 304, 924 A.2d 1203 (2007). This exception permits evidence of prior sexual relations between the defendant and the victim:

In general, evidence of other wrongful conduct not charged in the information on which the defendant is being tried is inadmissible at trial except in certain limited circumstances. One such exception arises in the prosecution of sexual offenses. Evidence of prior sexual relations between defendant and his or her victim is admissible to show a passion or propensity for illicit sexual relations with the victim. This exception is limited, however. The evidence is admissible only when the prior act involves the same victim and the two acts are sufficiently connected to suggest a **continuing course of conduct**. The admissibility of the evidence is not affected by the fact that the prior incidents occurred outside of the statute of limitations.

Commonwealth v. Knowles, 637 A.2d 331, 333 (Pa. Super. 1994) (emphasis added).

¹⁵ Rule which prohibits prior or subsequent bad acts – PA R.E. 404(B).

There are a long line of cases which acknowledge this exception:

- ***Commonwealth v. Bell***, 166 Pa. 405, 411-412, 31 A. 123 (1895): evidence of prior or subsequent sexual acts between the defendant and alleged victim admissible;
- ***Commonwealth v. Snyder***, 80 A.2d 336, 343-344 (Pa. Super. 2005): permitted admission of sexually explicit photograph of minor victim to show a passion or propensity for illicit sexual misconduct toward the victim;
- ***Commonwealth v. Dunkle***, 529 Pa. 168, 186, 602 A. 830, 839 (1992): evidence admissible to show a passion or propensity for illicit sexual relations of the defendant toward the alleged victim.

The Superior Court in ***Commonwealth v. Wattley*** cited to ***Commonwealth v. Collins***, 550 Pa. 46, 56, 703, A.2d 418, 423 (1997), *cert. denied*, 525 U.S. 1015, 119 S.Ct. 538, 142 L.Ed.2d 447 (1998), for the authority that subsequent offenses are relevant just as prior conduct:

Although evidence of a subsequent offense is usually less probative of intent than evidence of a prior offense, evidence of a subsequent offense can still show the defendant's intent at the time of the prior offense.

(b) Federal Rules of Evidence

Interestingly, the Pennsylvania Supreme Court adopted, in 1998, the Rules of Evidence, and chose not to incorporate the *lustful disposition* exception as specified in the federal rules:

Federal Rules of Evidence

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses'

statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of “Sexual Assault.” In this rule and Rule 415, “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant’s body--or an object--and another person’s genitals or anus;

(3) contact, without consent, between the defendant’s genitals or anus and any part of another person’s body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before

trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of “Child” and “Child Molestation.”
In this rule and Rule 415:

(1) “child” means a person below the age of 14; and

(2) “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant’s body--or an object--and a child’s genitals or anus;

(D) contact between the defendant’s genitals or anus and any part of a child’s body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E).

4. Psychiatric Examination

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a psychiatric examination. PA.R.CRIM.P. 578, comment. At least one Common Pleas Court has held that a victim of a crime of sexual violence may be compelled to undergo a psychiatric evaluation pursuant to this rule if the defendant can establish the necessity for the examination. **Commonwealth v. Ramer**, 30 Pa. D.&C.3d 50, 1983 WL 134 (1984). However, impugning the credibility of such a victim or attacking the competency and truthfulness of the victim are not compelling enough reasons to justify such an examination. *Id.*

5. Quashal of Information

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for quashing an information. PA.R.CRIM.P. 578, *comment*. In fact, all grounds for claiming that indictments or informations are defective must be stated in a pre-trial motion to quash, and if they are not, they are waived. ***Commonwealth v. Gemelli***, 474 A.2d 294, 299 (Pa. Super. 1984).

- ***Commonwealth v. Parmar***, 672 A.2d 314 (Pa. Super. 1996), *aff'd*, 551 Pa. 318, 710 A.2d 1083 (1998) (claim that information or indictment charged defendant with wrong crime was waived for failure to include it in written pre-trial motion to quash)
- ***Commonwealth v. Finley***, 860 A.2d 132, 135 (Pa. Super. 2004) (quashal was not an appropriate remedy for illegal arrest)

6. Change of Venue or Venire

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a change of venue or venire. PA.R.CRIM.P. 578, *comment*. The standard to be followed by the trial court is stated in PA.R.CRIM.P. 584: “Venue or venire may be changed by ... (the trial court) when it is determined after hearing that a fair and impartial trial cannot be otherwise be had in the county where the case is currently pending.” PA.R.CRIM.P. 584(A).

If the trial court determines that a change of venue or venire is necessary, then the order for the change must be certified “forthwith” to the Supreme Court; the Supreme Court will then designate the county of transfer, or the county from which the jury is to be impaneled. PA.R.CRIM.P. 584(B).

7. Disqualification of Judge

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for the disqualification of a judge. PA.R.CRIM.P. 578 *comment*. Any motion to disqualify or remove a trial judge should be first presented to the trial judge before whom the proceedings are being tried. This way, the trial judge makes the determination in the first instance, which can be reviewed for an abuse of discretion by the appropriate appellate court. ***Commonwealth v. Whitmore***, 590 Pa. 376, 386, 912 A.2d 827, 833 (2006).

An appellate court should presume that judges are fair and competent, and should review the denial of a recusal motion for an abuse of discretion. ***In re Lokuta***, 608 Pa. 223, 238, 11 A.3d 427, 435 (2011), *cert. denied*, 132 S.Ct. 242, 181 L.Ed.2d 138 (2011).

8. Appointment of an Investigator

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for the appointment of an investigator. PA.R.CRIM.P. 578, *comment*.

9. Pre-trial Conference

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a pre-trial conference. PA.R.CRIM.P. 578, *comment*.

10. Double Jeopardy

The issue of double jeopardy should usually be raised in pre-trial motions. *Commonwealth v. Johnson*, 466 A.2d 636 (Pa. Super. 1983). Numerous cases have held that the failure to file a pre-trial motion to dismiss which raises double jeopardy will result in a waiver of this argument. *Commonwealth v. Higginbottom*, 678 A.2d 408, 411 (Pa. Super. 1996).

11. Statute of Limitations

The issue of statute of limitations should be raised in a pre-trial motion to dismiss. *Commonwealth v. Corban Corp.*, 909 A.2d 406, 411 (Pa. Super. 2006), *aff'd*, 598 Pa. 459, 957 A.2d 274 (2008); *Commonwealth v. Groff*, 548 A.2d 1237, 1244 (Pa. Super. 1988).

12. Writ of Habeas Corpus

A petition for writ of habeas corpus is the proper pre-trial vehicle for testing the sufficiency of the Commonwealth's evidence. *Commonwealth v. Hock*, 556 Pa. 409, 413-414 728 A.2d 943, 945 (1999). To survive such a petition, the Commonwealth's evidence need only be that measure of evidence, which, if accepted as true, would justify the conclusion that the defendant is guilty of the offense charged, i.e., a *prima facie* case. *Commonwealth v. Kohlie*, 811 A.2d 1010, 1013 (Pa. Super. 2002), *appeal denied*, 573 Pa. 709, 827 A.2d 1201 (2003).

B. Time for Filing

The omnibus pre-trial motion must be filed and served within 30 days after arraignment. PA.R.CRIM.P. 579(A). The defendant may only evade this requirement by establishing (1) that the opportunity to file the motion did not previously exist; (2) that the defendant, defendant's attorney, or the Commonwealth was not aware of the grounds for the motion; (3) that the time for filing the motion was extended by court order for cause shown. *Id.*

If the trial court grants an extension to the defense to file an omnibus pre-trial motion beyond the 30 day period, no error is committed unless the Commonwealth can show prejudice. *Commonwealth v. Baez*, 21 A.3d 1280, 1282, (Pa. Super. 2011), *appeal denied*, 614 Pa. 699, 37 A.3d 1193 (2012).

C. Disposition of Motion

The Rules of Criminal Procedure provide that “[u]nless otherwise provided in these rules, all pretrial motions shall be determined before trial. Trial shall be postponed by the court for the determination of pretrial motions, if necessary.” PA.R.CRIM.P. 580.

1. Appellate Review

Generally, pre-trial orders in criminal cases are not immediately appealable. *Commonwealth v. Wills*, 476 A.2d 1362, 1363 (Pa. Super. 1984). However, the appellate rules permit interlocutory appeals in a number of situations.

Pursuant to PA.R.A.P. 311 (a)(3), an order which changes venue or venire in a criminal proceeding is immediately appealable.

Pursuant to PA.R.A.P. 311 (a)(8), an order which is made appealable by statute or general rule is also immediately appealable. The denial of a defendant’s motion to quash on double jeopardy grounds is immediately appealable. *Commonwealth v. Buechele*, 444 A.2d 1246 (Pa. Super. 1982). Furthermore, 42 PA. CONS. STAT. ANN. § 702 permits appeals from interlocutory orders as authorized by law.

Pursuant to PA.R.A.P. 311 (d), the Commonwealth may take an appeal as of right from an order which does not end the entire case but where the Commonwealth certifies that the order will terminate or substantially handicap the prosecution, such as in the grant of a suppression motion.

42 PA. CONS. STAT. ANN. § 702(b) authorizes interlocutory appeals by permission. PA.R.A.P. 1311 specifies the petition and procedure to pursue an interlocutory appeal by permission.

6.8 EVIDENCE OF VICTIM’S PAST SEXUAL CONDUCT

A. Pennsylvania’s Rape Shield Law¹⁶

1. Prohibited Evidence

Pennsylvania’s Rape Shield Law is statutory in nature, and not a rule of

¹⁶ For additional discussion of Pennsylvania’s Rape Shield Statute, please see **Chapter 5, Section 5.5, Impeachment with Prior Sexual Conduct**

evidence as it is under the Federal system. Pennsylvania's Rape Shield Law states as the general rule that

§ 3104. Evidence of victim's sexual conduct

(a) General rule.--Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 PA.CON.S.TAT.ANN. § 3104(a).

2. Procedure

Furthermore, the Rape Shield Law specifies that a specific procedure must be followed to present evidence that would fall under an exception to this statute:

(b) Evidentiary proceedings.--A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

18 PA.CON.S.TAT.ANN. § 3104(b).

B. Purpose of Rape Shield Statute

The purpose of this provision is to prevent a trial from shifting focus to the defendant's culpability for the charged crime to the virtue and chastity of the victim. *Commonwealth v. Fernsler*, 715 A.2d 435 (Pa. Super. 1998). The rape shield laws, as enacted by the various states, were intended to end the abuses fostered by the common law rule by "limiting the harassing and embarrassing inquiries of defense counsel into irrelevant prior sexual conduct of sexual assault complainants." *Commonwealth v. Burns*, 988 A.2d 684, 691 (Pa. Super. 2009), *appeal denied*, 608 Pa. 615, 8 A.3d 341 (2010).

Examples

- ***In re M.K.***, 636 A.2d 198 (Pa. Super. 1994), *appeal denied*, 537 Pa. 633, 642 A.2d 486 (1994), *cert. denied*, 513 U.S. 962, 115 S.Ct. 423, 130 L.Ed.2d 338 (1994).

Rape Shield Law applies only to prosecutions relating to sexual offenses.

- ***Commonwealth v. Killen***, 545 Pa. 127, 133, 680 A.2d 851, 854 (1996)

Evidence that victim made provocative statements and was in a jovial mood shortly after alleged assault was not evidence of victim's sexual history and therefore was not subject to Rape Shield Law.

- ***Commonwealth v. Dear***, 492 A.2d 714 (Pa. Super. 1985)

Evidence of victim's prior convictions for prostitution was not admissible to show that victim consented to having sexual intercourse with the defendant.

"Past sexual conduct" of the victim includes the victim's entire sexual history. ***Commonwealth v. Jones***, 826 A.2d 900 (Pa. Super. 2003). Therefore, the Rape Shield Law excludes all past consensual sexual conduct or sexual conduct unless there exists probative value that is exculpatory to the Defendant. ***Commonwealth v. Gaddis***, 639 A.2d 462 (Pa. Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994).

Examples

- ***Commonwealth v. Jones***, 826 A.2d 900, 908 (Pa. Super. 2003)

Evidence that victim had been convicted of prostitution for acts with a third party that occurred after defendant's arrest was inadmissible evidence of victim's past sexual conduct when the evidence did not exculpate defendant and was not probative of victim's willingness to commit sexual acts with defendant.

- ***Commonwealth v. Fink***, 791 A.2d 1235, 1242-1243 (Pa. Super. 2002)

If victim's prior sexual conduct does not involve defendant or involves defendant but consent is not an issue in the case, then the victim's prior sexual conduct must be relevant to show bias against the defendant or to attack the credibility of the victim in order to be admissible.

- ***Commonwealth v. Guy***, 686 A.2d 397, 401 (Pa. Super. 1996), *appeal denied*, 548 Pa. 645, 695 A.2d 784 (1997)

Evidence of victim's sexual history not admissible to prove that victim acted in conformity with past behavior.

C. Motive, Prejudice or Bias – Admissibility

Evidence otherwise excluded by the Rape Shield Law may, at times, be admissible subject to one or more exceptions. *Commonwealth v. Miner*, 44 A.3d 684, 687-688 (Pa. Super. 2012).

Evidence relating to an alleged victim's sexual history is admissible under the Rape Shield Law if it tends to directly exculpate the defendant by showing, *inter alia*, bias, hostility, motive to lie or fabricate; evidence of a sexual encounter with another person on the date in question; or impeachment value through demonstrating a prior inconsistent statement. *Commonwealth v. Guy*, 686 A.2d 397 (Pa. Super. 1996), *appeal denied*, 548 Pa. 645, 695 A.2d 784 (1997). The Pennsylvania Supreme Court recently reaffirmed this exception to the Rape Shield Law:

Because the evidence of [the alleged victim's] prior juvenile adjudication could be used to show bias or motive, an exception to the Rape Shield Law, the trial court is to determine the admissibility of this evidence at an *in camera* hearing consistent with the procedures and balancing test first outlined in *Commonwealth v. Black*, 337 Pa.Super. 548, 487 A.2d 396 (1985). *See also Commonwealth v. Fink*, 791 A.2d 1235, 1241-42 (Pa.Super.200).

Commonwealth v. Ruggiano, 611 Pa. 368, 26 A.3d 473, 473-474 (2011) (Per Curiam Order).

Upon a specific proffer, the trial court must balance the probative value of the evidence to see it is outweighed by its unfair prejudicial effect. *Commonwealth v. Eck*, 605 A.2d 1248, 1255 (Pa. Super. 1992).

1. Necessity of specific proffer

If a defendant wishes to present evidence, either extrinsically or through cross-examination, of a victim's sexual history, the defendant must present a specific proffer to the court:

In Pennsylvania, we have come to resolve this question through a relatively elaborate procedure which is designed to ensure that no evidence of the victim's sexual history is introduced unless and until it can be established that to exclude such evidence would lay victim to the very *raison d'être* of the trial itself: the pursuit of truth. The process begins with the defendant submitting a specific proffer to the court of

exactly what evidence he or she seeks to admit and precisely why it is relevant to the defense. This procedure forces the defendant to frame the precise issues and interests involved, and prevents him or her from embarking upon “fishing expedition style intrusions on Rape Shield Law protections.” Where the proffer is but vague and conjectural, evidence of the victim’s past sexual conduct will be excluded and no further inquiry need be entertained.

Commonwealth v. Kunkle, 623 A.2d 336, 339 (Pa. Super. 1993), *appeal denied*, 536 Pa. 621, 637 A.2d 281 (1993)(quoting *Commonwealth v. Wall*, 606 A.2d 449, 457 (Pa. Super. 1992), *appeal denied*, 532 Pa. 645, 614 A.2d 1142 (1992) (citations omitted)). The significance of the required offer of proof has been demonstrated in a long line of decisions. *See, e.g., Commonwealth v. Nieves*, 582 A.2d 341, 347 (Pa. Super. 1990), *appeal denied*, 529 Pa. 633, 600 A.2d 952 (1991).

The requirement of a specific proffer of evidence was designed to prevent a “fishing expedition” into the areas protected by the statutes. *Commonwealth v. Burns*, 988 A.2d 684, 691 (Pa. Super. 2009), *appeal denied*, 608 Pa. 615, 8 A.3d 341 (2010).

2. *In Camera* hearing

If the court determines that the evidence of the victim’s prior sexual history has some probative exculpatory value for the defendant, the court should conduct an *in camera* hearing to weigh the probative value against the prejudicial effect. *Commonwealth v. Eck*, 605 A.2d 1248, 1255 (Pa. Super. 1992); *Commonwealth v. Johnson*, 566 A.2d 1197, 1202 (Pa. Super. 1989)(en banc), *aff’d*, 536 Pa. 153, 638 A.2d 940 (1994). The proponent of evidence concerning the victim’s sexual history bears the burden of establishing the admissibility and relevance of the evidence under the Rape Shield Law. *Commonwealth v. Weber*, 549 Pa. 430, 438-439 701 A.2d 531 (1997).

3. Examples

- *Commonwealth v. Jones*, 826 A.2d 900, 908 (Pa. Super. 2003)

Evidence of victim’s prostitution conviction for acts with a third party occurring after defendant’s arrest was inadmissible under Rape Shield Law.

- *Commonwealth v. Fernsler*, 715 A.2d 435, 440 (Pa. Super. 1998)

Evidence concerning juvenile victim’s placement in treatment program for sexual assault on half-sister was admissible as it reflected a possible motive for victim to seek favorable treatment by fabricating charges

against defendant, victim's father.

- ***Commonwealth v. Berkowitz***, 537 Pa. 143, 641 A.2d 1161, 1165 (1994)

Evidence that victim and her boyfriend had argued over whether victim had been unfaithful was excluded by Rape Shield Law despite the fact that it provided possible motive for fabrication of charge.

- ***Commonwealth v. Stansbury***, 640 A.2d 1368, 1371 (Pa. Super. 1994)

Evidence of previous sexual assaults by defendant on victim was admissible. Presence of pubic hairs from third party in victim's underwear, while probative of defense theory that another person had sexual relations with victim, was not admissible as defendant admitted to having sexual relations with victim.

- ***Commonwealth v. Wall***, 606 A.2d 449 (Pa. Super. 1992), *appeal denied*, 532 Pa. 645, 614 A.2d 1142 (1992)

Evidence of child victim's previous claims of sexual abuse by mother were admissible in prosecution against uncle who had custody of victim at time of alleged crime as it suggested motive for escaping discipline from custodian.

- ***Commonwealth v. Weber***, 549 Pa. 430, 701 A.2d 531 (1997)

Defendant failed to establish relevance of victim's abortion and therefore evidence of the abortion was inadmissible.

D. Evidence that Negates the Sexual Conduct

In ***Commonwealth v. Majorana***, 503 Pa. 602, 470 A.2d 80 (1983), the Pennsylvania Supreme Court permitted evidence of a sexual encounter between the victim and defendant two hours before the victim alleged she was raped. The purpose of the evidence was not to question the victim's chastity but to explain the presence of semen in the victim's body. The Supreme Court noted another exception to the Rape Shield Law:

We do not believe the legislature intended to prohibit relevant evidence which directly negates the act of intercourse with which a defendant is charged. Where, as here, a defendant offers evidence of intercourse close enough in time to the act with which he is charged that it is relevant to explain the presence of objective signs of intercourse, the protections afforded to the complainant by the Rape Shield Law do not apply.

Id. at 611, 470 A.2d at 84. *See also*, ***Commonwealth v. Stansbury***, 640 A.2d 1368, 1370-1371 (Pa. Super. 1994).

The trial court must make a determination, after an offer of proof, that evidence falls within the exception noted in ***Majorana***. *See* ***Commonwealth v. Jorgenson***, 512 Pa. 601, 605, 517 A.2d 1287, 1290 (1986).

For this exception to apply, the defendant must first make a specific proffer to the court of exactly what evidence he seeks to admit and precisely why it is relevant to his defense. Once the appropriate proffer has been made:

[T]he court must then undertake a three part analysis of the substance of the proffer. At the trial level, the court must conduct an *in camera* hearing at which they must determine: 1) whether the proffered evidence is *relevant* to the defense at trial; 2) whether the proffered evidence is *cumulative* of evidence otherwise admissible at trial; and 3) whether the proffered evidence is more probative than prejudicial.

Commonwealth v. Wall, 606 A.2d 449, 457 (Pa. Super. 1992), *appeal denied*, 532 Pa. 645, 614 A.2d 1142 (1992); *see also*, ***Commonwealth v. Stansbury***, 640 A.2d 1368, 1371 (Pa. Super. 1994).

E. Nonconsensual Sexual Conduct

Because evidence of prior sexual assaults is not considered conduct of the victim and thus does not impugn the victim's reputation for chastity, this type of evidence is not covered by the Rape Shield Law and is admissible if relevant and conforming to the traditional rules of evidence. ***Commonwealth v. Johnson***, 536 Pa. 153, 638 A.2d 940 (1994); ***Commonwealth v. Holder***, 815 A.2d 1115, 1119 (Pa. Super. 2003), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003). Such evidence is evaluated under the general evidentiary rules. ***Commonwealth v. Fink***, 791 A.2d 1235, 12242 (Pa. Super. 2002).

6.9 PRIVILEGES

A. Privileges¹⁷

In ***Commonwealth v. Eck***, 605 A.2d 1248 (Pa. Super. 1992), the Superior Court outlined a schematic by which the courts could discern what level of access, if any, a defendant should be afforded when requesting confidentially *privileged* materials. Relying on United States Supreme Court precedent in ***Pennsylvania v. Ritchie***, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), and a number of Pennsylvania Supreme Court decisions, the Superior Court stated:

¹⁷ The spousal privileges are discussed in Chapter 7, Section 7.18, SPOUSAL PRIVILEGE.

First, a defendant's right to access is dependent upon whether the information is protected by a statutory privilege and whether that privilege is absolute. Information which is protected by an absolute statutory privilege is not subject to disclosure and denial of access to a criminal defendant is required....

On the other hand, a privilege which is statutorily enacted, but which is subject to exceptions, is not absolute and access to a criminal defendant may be required.

...

Finally, privileges which are not statutorily enacted, but rather are recognized by the common law, must yield to the constitutional rights of a criminal defendant.

Eck, 605 A.2d at 1252-1253.

B. Medical or Mental Health Professional Records

1. Patient – Physician Privilege

Pennsylvania has codified a patient-physician privilege in civil proceedings.

§ 5929. Physicians not to disclose information

No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, except in civil matters brought by such patient, for damages on account of personal injuries.

42 Pa.Cons.Stat. Ann. § 5929

This privilege does not apply in criminal proceedings. *Id.*; See *Commonwealth v. Ellis*, 608 A.2d 1090, 1093 (Pa. Super. 1992), *appeal denied*, 533 Pa. 623, 620 A.2d 489 (1993).

In *Commonwealth v. Petrino*, 480 A.2d 1160 (Pa. Super. 1984), *cert. denied*, 471 U.S. 1069, 105 U.S. 2149, 85 L.Ed.2d 505 (1985), the Pennsylvania Supreme Court expressly held that Section 5929 applies only in civil cases. 480 A.2d at 1170.

2. Disease Prevention and Control Act

Records maintained in accordance with the Disease Prevention and Control Law of 1955, 35 PA.STAT. §§ 521.1 *et seq.* are confidential:

§ 521.15. Confidentiality of reports and records

State and local health authorities may not disclose reports of diseases, any records maintained as a result of any action taken in consequence of such reports, or any other records maintained pursuant to this act or any regulations, to any person who is not a member of the department or of a local board or department of health, except where necessary to carry out the purposes of this act. State and local health authorities may permit the use of data contained in disease reports and other records, maintained pursuant to this act, or any regulation, for research purposes, subject to strict supervision by the health authorities to insure that the use of the reports and records is limited to the specific research purposes.

35 PA.STAT. §§ 521.15.

In a case where the defendant was charged with rape, the confidentiality requirements of Section 521.15 precluded disclosure of defendant's medical records from county health department in order to determine whether he had gonorrhea at time of crime. *Commonwealth v. Moore*, 526 Pa. 152, 157, 584 A.2d 936, 939 (1991).

3. Patient – Psychiatrist / Psychologist Privilege

In *Commonwealth v. Lloyd*, 523 Pa. 427, 567 A.2d 1357 (1989), the Supreme Court of Pennsylvania held that, under the Pennsylvania Constitution, a defendant's right to confrontation and compulsory process overrode any non-statutory privilege asserted by the Commonwealth. Specifically, the Court found the lack of a statutory psychotherapeutic privilege important. *Id.* 523 Pa. at 431, 567 A.2d at 1359.

In response to the result in *Lloyd*, the Pennsylvania legislature amended 42 PA. CONS. STAT. ANN. § 5944 to explicitly cover psychiatric records. Accordingly, courts in subsequent cases have recognized that the absolute statutory privilege contained in 42 PA. CONS. STAT. ANN. § 5944 overrides the defendant's right to confrontation and compulsory process under the Pennsylvania Constitution. See *Commonwealth v. Smith*, 606 A.2d 939 (Pa. Super. 1992), *appeal denied*, 533 Pa. 624, 620 A.2d 490 (1993). Therefore, psychiatric records not in the Commonwealth's possession but which are held at treating facilities are not discoverable and are privileged absent the consent of the patient. *Commonwealth v. Weiss*, --- A.3d ---, 81 A.3d 767, 792 (2013).

The Pennsylvania legislature has enacted the following statutory privilege regarding communications between patients and psychiatrists/psychologists:

§ 5944. Confidential communications to psychiatrists or licensed psychologists

No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 PA.CON.S.TAT.ANN. § 5944. Since this is an absolute statutory privilege in civil or criminal matters, neither the Commonwealth nor the defendant has the power to subpoena such records without the patient's consent. *Commonwealth v. Appleby*, 856 A.2d 191, 199 (Pa. Super. 2004); *Commonwealth v. Smith*, 606 A.2d 939 (Pa. Super. 1992), *appeal denied*, 533 Pa. 624, 620 A.2d 490 (1993).

Once the party asserting the privilege shows that the privilege has been properly invoked, the burden shifts to the party seeking the disclosure to show "that disclosure of the information will not violate the accorded privilege." *In re T.B.*, 75 A.3d 485, 496 (Pa. Super. 2013)(quoting *In re Subpoena No. 22*, 709 A.2d 385, 388 (Pa. Super. 1998)).

C. Sexual Assault Counselor Privilege

1. Sexual Assault Counselors

Sexual assault counselors serve an important function for the rape victim. As the Pennsylvania Supreme Court has explained:

Extensive research has been conducted documenting the severe psychological, emotional, and social difficulties suffered by rape victims, which cause a condition known as "rape trauma syndrome". The devastating effects of this condition create a compelling need for a confidential counseling relationship to enable the victim to cope with the trauma. It is generally recognized that rape traumatizes its victim to a degree far beyond that experienced by victims of other crimes. Rape crisis centers have been developed

nationwide to help victims of this most degrading offense recover from its debilitating effects.

Rape crisis centers are service facilities staffed with counselors extensively trained in crisis counseling. These counselors provide victims with much needed physical, psychological and social support during the recovery period that the victims otherwise might not be able to afford. At the onset of counseling the victim is informed that her communications will be confidential, and her willingness to disclose information quite obviously is based upon that expectation. The very nature of the relationship between a counselor and the victim of such a crime exposes the necessity for the same confidentiality that would exist if private psychotherapeutic treatment were obtained. If that confidentiality is removed, that trust is severely undermined, and the maximum therapeutic benefit is lost. The inability of the crisis center to achieve its goals is detrimental not only to the victim but also to society, whose interest in the report and prosecution of sexual assault crimes is furthered by the emotional and physical well-being of the victim.

Commonwealth v. Wilson, 529 Pa. 268, 276-277, 602 A.2d 1290, 1295, *cert. denied*, 504 U.S. 977, 112 S.Ct. 2952, 119 L.Ed.2d 574 (1992).

2. The Rape Counselor Privilege¹⁸

The Pennsylvania Legislature has enacted the following statutory privilege with respect to rape counselors:

§ 5945.1. Confidential communications with sexual assault counselors

. . .

(b) Privilege.--

(1) No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

(2) No coparticipant who is present during counseling may disclose a victim's confidential communication

¹⁸ Additional discussion of the Sexual Assault Counselor Privilege, in relation to the way it may be invoked at the time of trial regarding testimony, is provided in **Chapter 7, Section 7.15, Sexual Assault Counselor Privilege**.

made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.

42 PA.CON.S.TAT.ANN. § 5945.1(b)(1).

A “sexual assault counselor” is defined as:

A person who is engaged in any office, institution or center defined as a rape crisis center under this section, who has undergone 40 hours of sexual assault training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.

42 PA.CON.S.TAT.ANN. § 5945.1(a).

These privileges are absolute privileges that apply to oral or written communications, and therefore override a defendant’s right to confrontation and compulsory process. *V.B.T. v. Family Services of Western Pennsylvania*, 705 A.2d 1325 (Pa. Super. 1998), *aff’d*, 556 Pa. 430, 728 A.2d 953 (1999); *Commonwealth v. Askew*, 666 A.2d 1062, 1065 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996).

➤ *Commonwealth v. Davis*, 543 Pa. 628, 674 A.2d 214 (1996) (rape counselor privilege prohibits disclosure not only of communications between victim and counselor, but also of records created during the course of the confidential relationship).

NOTE: *Commonwealth v. Cody*, 584 A.2d 992 (Pa. Super. 1991) (plurality), *appeal denied*, 527 Pa. 622, 592 A.2d 42 (1991), allowed for an *in camera* review of rape counseling records for statements relating to the facts surrounding the alleged offense. However, in *Commonwealth v. Askew*, 666 A.2d 1062 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996), the Superior Court held that the privilege was absolute and applied to both oral communications and written records:

The statutory sexual assault counselor privilege “prevents sexual assault counselors from disclosing confidential communications made to them by the victims of sex-related crimes.” *Commonwealth v. Gibbs*, 434 Pa.Super. 280, 284, 642 A.2d 1132,

1134 (1994). This privilege is absolute and applies to oral communication as well as written records created during the course of the confidential relationship. *Id.* The privilege prohibits the revelation of confidential communication obtained during counseling to both the Commonwealth and to the defendant.

666 A.2d at 1064-1065.

However, if the attorney for the Commonwealth is in possession of records subject to the rape counselor privilege, the defendant is entitled to the production of such records. ***Commonwealth v. Davis***, 650 A.2d 452, 460 (Pa. Super. 1994), *aff'd*, 543 Pa. 628, 674 A.2d 214 (1996); ***Commonwealth v. Higby***, 559 A.2d 939, 940 (Pa. Super. 1989), *appeal denied*, 525 Pa. 578, 575 A.2d 109 (1990).

- ***Commonwealth v. Askew***, 666 A.2d 1062, 1065-1066 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996), (the fact that victim gave counselor permission to reveal communications to police and to treating doctor did not waive privilege, as such disclosures by the counselor were mandated by child abuse reporting requirements).

In ***Commonwealth v. Wilson***, 529 Pa. 268, 278, 602 A.2d 1290, 1296 (1992), *cert. denied*, 504 U.S. 977, 112 S.Ct. 2952, 119 L.Ed.2d 574 (1992), the Pennsylvania Supreme Court, in a case involving Section 5945.1, followed the analysis of the United States Supreme Court's plurality decision in ***Pennsylvania v. Ritchie***, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 22 Fed.R.Evid.Serv. 1 (1987). The defendant had been charged with and convicted of the rape and indecent assault of an adult victim. Prior to trial, the defendant had issued a subpoena *duces tecum* on Alice Paul House, an Indiana County rape crisis center, requesting the production of the center's entire file on the victim. Counsel for Alice Paul House filed a motion to quash the subpoena, which was granted by the trial court on the basis of the privilege provided by 42 PA.CON.S.TAT.ANN. § 5945.1. The defendant appealed, arguing that the privilege applied to a rape assault counselor and not the record developed through consultation held by Alice Paul House. Furthermore, the defendant argued that his confrontation rights would be violated if he could not review the records prior to trial to look for impeachment evidence.

The Pennsylvania Supreme Court held that the privilege was absolute and the prohibition against the disclosure of the records did not violate the confrontation clause. "The right to confront one's witnesses is satisfied if defense counsel receives wide latitude at trial to question witnesses." ***Commonwealth v. Wilson***, 529 Pa. at 278, 602 A.2d at 1296. When defense counsel had the opportunity to and in fact did cross-examine the victim in the sexual assault trial

regarding her recollection of events and other relevant matters, “the defendant’s right to confrontation was satisfied.” *Id.*

In *Commonwealth v. Kennedy*, 604 A.2d 1036 (Pa. Super. 1992) (*en banc*), *appeal denied*, 531 Pa. 638, 611 A.2d 711 (1992), the Pennsylvania Superior Court held that the absolute privilege granted under Section 5945.1 prohibited even an *in camera* inspection of the records of a rape counselor’s treatment of the victim.

D. Children and Youth Division Records – The Child Protective Services Law

The Child Protective Services Law, 23 PA.CONS.STAT.ANN. §§ 6301 *et seq.*, was enacted to involve law enforcement agencies in responding to child abuse, to establish children and youth social service agencies to investigate reports of abuse, to provide protection for children from further abuse, and to provide rehabilitative services for children and parents. 23 PA.CONS.STAT.ANN. § 6302(b).

Once a report of suspected abuse is received, the county CYS must commence an investigation, which includes a determination of the risk of harm to the child or children if they continue to remain in the home environment, as well as a determination of the nature, extent, and cause of any abuse, and to take any action necessary to provide for the safety of the child or children. 23 PA.CONS.STAT.ANN. § 6368. “If the investigation indicates serious physical injury, a medical examination shall be performed on the subject child by a certified medical practitioner.” *Id.*

In relation to confidentiality, the CPS Law provides that although CYS workers may release information to the police, there is no requirement that they do so. See 23 PA.CONS.STAT.ANN. § 6339 and § 6340. Furthermore, child abuse records must be made available to a trial court in a criminal case, by way of a court order or subpoena, pursuant to 23 PA.CONS.STAT.ANN. § 6340(a)(5).

§ 6339. Confidentiality of reports

Except as otherwise provided in this subchapter, reports made pursuant to this chapter, including, but not limited to, report summaries of child abuse and written reports made pursuant to section 6313(b) and (c) (relating to reporting procedure) as well as any other information obtained, reports written or photographs or X-rays taken concerning alleged instances of child abuse in the possession of the department or a county agency shall be confidential.

23 PA.CONS.STAT.ANN. § 6339. The section regarding release of the confidential information states, in pertinent part:

§ 6340. Release of information in confidential reports

(a) General rule.--Reports specified in section 6339 (relating to confidentiality of reports) shall only be made available to:

(1) An authorized official of a county agency, of a Federal agency that has a need for such information to carry out its responsibilities under law to protect children from abuse and neglect or

(2) A physician examining or treating a child or the director or a person specifically designated in writing by the director of any hospital or other medical institution where a child is being treated when the physician or the director or the designee of the director suspects the child of being an abused child or a child alleged to be in need of protection under this chapter.
...

(5) A court of competent jurisdiction, including a magisterial district judge, a judge of the Philadelphia Municipal Court and a judge of the Pittsburgh Magistrates Court, pursuant to court order or subpoena in a criminal matter involving a charge of child abuse under section 6303(b) (relating to definitions). Disclosure through testimony shall be subject to the restrictions of subsection (c).
...

(7) The Attorney General.
...

(9) Law enforcement officials of any jurisdiction, as long as the information is relevant in the course of investigating cases of:

(i) Homicide or other criminal offense set forth in section 6344(c) (relating to information relating to prospective child-care personnel), sexual abuse, sexual exploitation, serious bodily injury or serious physical injury perpetrated by persons whether or not related to the victim.

(ii) Child abuse perpetrated by persons who are not family members.

(iii) Repeated physical injury to a child under

circumstances which indicate that the child's health, safety or welfare is harmed or threatened.

(iv) A missing child report.

(10) The district attorney or his designee or other law enforcement official, as set forth in the county protocols for investigative teams required in section 6365(c) (relating to services for prevention, investigation and treatment of child abuse), shall receive, immediately after the county agency has ensured the safety of the child, reports of abuse, either orally or in writing, according to regulations promulgated by the department, from the county agency in which the initial report of suspected child abuse or initial inquiry into the report gives evidence that the abuse is:

(i) a criminal offense set forth in section 6344(c), not including an offense under 18 Pa.C.S. § 4304 (relating to endangering welfare of children) or an equivalent crime under Federal law or the law of another state, sexual abuse, sexual exploitation or serious bodily injury perpetrated by persons, whether or not related to the victim;

(ii) child abuse perpetrated by persons who are not family members; or

(iii) serious physical injury involving extensive and severe bruising, burns, broken bones, lacerations, internal bleeding, shaken baby syndrome or choking or an injury that significantly impairs a child's physical functioning, either temporarily or permanently.

...

(17) A member of a child fatality or near fatality review team under section 6365(d).

(b) Release of information to subject of report.--At any time and upon written request, a subject of a report may receive a copy of all information, except that prohibited from being disclosed by subsection (c), contained in the Statewide central register or in any report filed pursuant to section 6313 (relating to reporting procedure).

(c) Protecting identity of person making report.--Except

for reports pursuant to subsection (a)(9) and (10), the release of data that would identify the person who made a report of suspected child abuse or the person who cooperated in a subsequent investigation is prohibited unless the secretary finds that the release will not be detrimental to the safety of that person. Law enforcement officials shall treat all reporting sources as confidential informants.

(d) Exclusion of administrative information.--Information maintained in the Statewide central register which was obtained from an investigating agency in relation to an appeal request shall not be released to any person except a department official, as provided by regulation.¹⁹

1. Disclosure to a Defendant Classified as a “Subject of a Report” under the Child Protective Services Law

The “subject of a report” is defined in the Child Protective Services Law as:

“Subject of the report.”

Any child, parent, guardian or other person responsible for the welfare of a child or any alleged or actual perpetrator or school employee named in a report made to the Department of Public Welfare or a county agency under this chapter.

23 PA.CON.S.STAT.ANN. § 6303. The identical definition is used in the regulations regarding child protective services, 55 PA.CODE § 3490.4.

In *Commonwealth v. Kennedy*, 604 A.2d 1036 (Pa. Super. 1992) (*en banc*), *appeal denied*, 531 Pa. 638, 611 A.2d 711 (1992), the Pennsylvania Superior Court found that a defendant who is a subject of a child abuse report must be granted direct access to “*all*” of the victim’s confidential child protective service records. 604 A.2d at 1040 (emphasis in original). The Court specifically commented that direct access by the defendant to “*all information contained in the CPS investigating file* excepting, under limited circumstances, information which would identify the reporter of the abuse” is necessary. 604 A.2d at 1042. This includes “any psychological or psychiatric reports, if such reports form the basis for initiating the investigation of abuse or if such reports are a part of the investigation . . .” *Id.*

The Superior Court distinguished *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 22 Fed.R.Evid.Serv. 1 (1987), which requires an *in camera* review by the trial court before disclosure to the defense, as only

¹⁹ 23 PA.CON.S.STAT.ANN. § 6340.

analyzing the discovery of CYS reports under section (a)²⁰ rather than subsection (b) which specifically grants access to a “subject of a report.” The Superior Court held that such a defendant/subject of a report is entitled to full access to CPS records,²¹ excluding information concerning the identity of the reporter of the suspected abuse, and finding that an *in camera* review by the trial court was too restrictive. Furthermore, even the identity of the reporter of the abuse had to be disclosed in certain cases because the former statute, with wording very similar to the current section, only granted a qualified privilege to the agency to withhold this identifying information. The Court ruled that the same balancing test applied in cases involving the identity of a confidential informant would be appropriate – disclosure is only prohibited upon a finding that the release would be detrimental to the safety of the reporter. *Kennedy*, 604 A.2d at 1043.

Therefore, in order for a trial court to be in compliance with *Kennedy*, in accordance with section (b) of the current law, 23 PA.CON.S.TAT.ANN. § 6340(b), the defendant in a criminal case who falls under the classification of a “subject of a report” is entitled to a copy of all information “contained in the Statewide central register or in any report filed pursuant to section 6313 (relating to reporting procedure).” Section 6336(a) details the information that must be maintained in the Statewide central register, and therefore must be disclosed when requested by a defendant/subject of a report. This information is extensive and includes:

§ 6336. Information in Statewide central register

(a) Information authorized.--The Statewide central register shall include and shall be limited to the following information:

- (1) The names, Social Security numbers, age and sex of the subjects of the reports.
- (2) The date or dates and the nature and extent of the alleged instances of suspected child abuse.
- (3) The home addresses of the subjects of the report.
- (4) The county in which the suspected abuse occurred.
- (5) Family composition.
- (6) The name and relationship to the abused child of other persons named in the report.
- (7) Factors contributing to the abuse.
- (8) The source of the report.
- (9) Services planned or provided.

²⁰ The former statute, 11 P.S. § 22154(a) (repealed), was in effect at the time but the language is substantially similar to the current statute 23 PA.CON.S.TAT.ANN. § 6340(a), e, 11 P.S.

²¹ The Superior Court noted that separate files should be maintained under the Child Protective Services Law from other services provided by the Department of Human Services; therefore, the *Kennedy* decision requires the full files compiled in compliance with the CPSL. *Commonwealth v. Kennedy*, 604 A.2d at 1042.

Pretrial

- (10) Whether the report is a founded report or an indicated report.
- (11) Information obtained by the department in relation to a perpetrator's or school employee's request to release, amend or expunge information retained by the department or the county agency.
- (12) The progress of any legal proceedings brought on the basis of the report of suspected child abuse.
- (13) Whether a criminal investigation has been undertaken and the result of the investigation and of any criminal prosecution.

No information other than that permitted in this subsection shall be retained in the Statewide central register.

23 PA.CON.S.TAT.ANN. § 6336(a). The information contained in 23 PA.CON.S.TAT.ANN. § 6313 largely parallels the information in Section 6336(a) above, although it does not include a reference to legal proceedings or criminal investigations brought on the basis of the report, among a few other items.

In *Dauphin County Social Services for Children and Youth v. Department of Public Welfare*, 855 A.2d 159 (Pa. Cmwlth 2004), the Commonwealth Court of Pennsylvania ruled that the requirement from *Kennedy* of the disclosure of *all* the information maintained by the child protective services division was restricted to criminal cases only, and that an action in expunction was civil in nature. Therefore, only the information designated in 23 PA.CON.S.TAT.ANN. § 6340(b) should be provided to a "subject of a report" in a civil proceeding such as a request for expunction.

In a case in which the defendant did not fall under the classification of a "subject of a child abuse report" because he had no familial or otherwise ties to the alleged victim, *Commonwealth v. Reed*, 644 A.2d 1223 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995), the Superior Court found that the requirement of an *in camera* inspection from *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 22 Fed.R.Evid.Serv. 1 (1987) applied with equal force under Pennsylvania's state confrontation clause. Therefore, because the defendant in *Reed* did not fall under the designation from Section 6340 as a subject of a report, this decision does not alter the holding from *Commonwealth v. Kennedy*, 604 A.2d 1036 (Pa. Super. 1992) (*en banc*), *appeal denied*, 531 Pa. 638, 611 A.2d 711 (1992) which rules out an *in camera* inspection.

2. Disclosure to a Defendant Not Classified as a "Subject of a Report" under the Child Protective Services Law

The issue of a request for child protective services files from a defendant who is not classified as a “subject of a report” will involve criminal charges which are unrelated to the child’s CPS records. If the criminal charge were related to the CPS records, then the defendant would be listed as a perpetrator and designated as a “subject of a report.” This request will probably be made to discover evidence of motive or bias.

In *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 22 Fed.R.Evid.Serv. 1 (1987), the United States Supreme Court, in a plurality decision, held that an *in camera* review by a trial court of child protective services records satisfies a request for disclosure under 23 PA.CON.S.TAT.ANN. § 6340(a) and the Due Process Clause. The defendant in *Ritchie* was originally convicted of rape and related sexual abuse charges involving his young daughter in the Court of Common Pleas of Allegheny County. Eventually, his appeal reached the United States Supreme Court regarding his request for the production of the records from the child protection agency that investigated the abuse. The trial court had refused the defendant’s request, but the Superior Court of Pennsylvania found a Confrontation Clause violation, and therefore vacated and remanded for the disclosure of the records which the trial judge, upon *in camera* review, found to be relevant. Additionally, the defense lawyer was permitted to examine the entire file to argue the relevance of statements that might appear in the records. Upon appeal by the Commonwealth, the Pennsylvania Supreme Court agreed that the reversal and remand were appropriate, but broadened the disclosure, based upon the Confrontation Clause, in that the defendant was entitled to review the entire agency file to search for any useful evidence.

A plurality of the United States Supreme Court held that Confrontation Clause analysis was not the appropriate review because the Sixth Amendment right to confrontation only applies in a trial setting.²² Rather, the case presented a Due Process Clause review in regard to the request for discovery and pre-trial disclosure. In light of the strong statutory confidentiality issues, the United States Supreme Court ordered that the trial court was to review the entire agency file and determine whether it contained information “that probably would have changed the outcome of his trial.” 480 U.S. at 58, 107 S.Ct. at 989. It reversed the Pennsylvania Supreme Court’s order to the extent that it allowed the defendant immediate access to the entire agency file under the former statute, 11 PA.STAT. § 2215 (repealed), however it gave the defendant this more limited access to the confidential records on the basis that the state interest in keeping the files confidential could not be compelling given that the Child Protective Services Law provides for the disclosure of such files in limited circumstances. As a result, the *in camera* review was reinstated. Although the defendant was the father of the victim, and probably a “subject of the report”, the Supreme Court only reviewed the case under 11 PA.STAT. § 2215(a) and not subsection (b).

²² The United States Supreme Court stated: “the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination” *Pennsylvania v. Ritchie*, 480 U.S. at 52, 107 S.Ct. at 999.

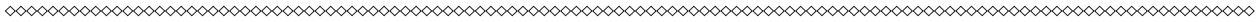
Pretrial

In a non-sexual assault case, *Commonwealth v. Nissly*, 549 A.2d 918 (Pa. Super. 1988), *appeal denied*, 522 Pa. 595, 562 A.2d 310 (1989), the Superior Court adopted the *in camera* review process for children and youth services files specified in *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 22 Fed.R.Evid.Serv. 1 (1987) and stated that the Pennsylvania Constitution provides no greater disclosure. 549 A.2d at 921.

Chapter 7



TRIAL ISSUES



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Chapter Seven

Trial Issues

7.1 CHAPTER OVERVIEW

This chapter examines issues that commonly arise in the trial of rape and sexual assault cases. A suggested outline of a typical criminal trial, with references to the Pennsylvania Rules of Criminal Procedure and Rules of Evidence, is provided in Addendum 1. It is not intended to be a comprehensive review, but rather an accessible checklist for quick reference.

Section 7.3 provides a detailed discussion on jury selection issues.

Sections 7.4 through 7.8 cover evidentiary issues that may be confronted by the prosecution. These sections involve necessary evidence offered by the prosecution in its case-in-chief to prove the elements of the crime(s) charged, with an emphasis on the presentation of the victim/complainant.

Section 7.9 addresses evidence related to the accused, i.e., evidence of the alleged perpetrator's prior record or past bad acts. Included in this section are the rules and laws prohibiting this type of evidence, as well as a discussion of when this type of evidence may be utilized by the prosecution in its case-in-chief, for example, evidence of common scheme, or during cross-examination of the defendant or defense character witnesses, for example, impeachment.

Section 7.10 covers selected hearsay rules and exceptions.

Section 7.11 covers the Tender Years Exception, and a discussion on the differences between testimonial evidence and nontestimonial statements.

Sections 7.12 and 7.13 address issues of competency. Section 7.12 explains the law when the accused alleges that he is incompetent to stand trial. Section 7.13 covers statutory rules for witness competency, including spousal and child competency, and a brief discussion on hypnotically refreshed testimony.

Section 7.14 covers the defense of mistake of age. Section 7.15 addresses the sexual assault counselor privilege, and section 7.16 covers the admission of "911" tapes and the use of other audiotapes at trial.

Section 7.17, which includes a discussion of the admissibility and relevancy of sexually explicit material, usually in the form of pornographic films and magazines, typically obtained from a search of the accused's home or business.

The chapter concludes with section 7.18 regarding the privileges against testifying that may be invoked by a spouse.

7.2 SUGGESTED STAGES OF A CRIMINAL JURY TRIAL

Included in Addendum 1 is a step-by-step list of the suggested 21 stages of a criminal jury trial. The stages are easily modifiable for use in a civil jury trial or non-jury trial.

7.3 JURY SELECTION – VOIR DIRE

Generally speaking, prospective jurors should be permitted to sit on jury panels if they can be fair and impartial. *Commonwealth v. Lesko*, 609 Pa. 128, 242, 15 A.3d 345, 413 (2011). “Such a determination is to be made by the trial judge based on the juror’s answers and demeanor, and will not be reversed absent a palpable abuse of discretion.” *Commonwealth v. Marshall*, 534 Pa. 488, 497, 633 A.2d 1100, 1104 (1993). Expounding on the fair and impartial concept, the Pennsylvania Supreme Court has given more specific guidance, explaining:

The test for determining whether a prospective juror should be disqualified is whether he is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor.... It must be determined whether any biases or prejudices can be put aside on proper instruction of the court.... A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct and answers to questions.... The decision on whether to disqualify is within the discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion....

Commonwealth v. Lesko, 609 Pa. at 242-243, 15 A.3d at 413 (quoting *Commonwealth v. Wilson*, 543 Pa. 429, 441, 672 A.2d 293, 299 (1996), cert. denied, 519 U.S. 951, 117 S.Ct. 364, 136 L.Ed.2d 255 (1996)).

Past victimization questions directly relevant to the case are proper. In *Commonwealth v. Fulton*, 413 A.2d 742 (Pa.Super. 1979), the Superior court held that it was an abuse of discretion to refuse questions regarding venireman or their family members having been victims of a sexual crime where defendant was charged with statutory rape. The Court stated:

The victim of a rape, or close relative of a victim, is not likely to forgive and forget or treat lightly similar conduct of others. Thus, the presence of such a juror in a rape trial could severely compromise an accused's valued right to be tried by a "competent, fair, impartial, and unprejudiced jury."

413 A.2d at 743.

A. Strike for Cause

A strike for cause typically is requested by one of the parties after questioning of a juror has elicited responses which establish that (1) the juror cannot be impartial or (2) because of a close relationship that the juror has with any of the parties, counsel, victim(s) or witnesses, it should be deemed that the juror cannot be impartial. ***Commonwealth v. Johnson***, 445 A.2d 509, 511 (Pa. Super. 1982). Jurors should be disqualified for cause when they do not have the ability or willingness to eliminate the influences under which they are operating and therefore cannot render a verdict according to the evidence. ***Commonwealth v. DeHart***, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987).

- In ***Commonwealth v. Impellizzeri***, 661 A.2d 422, 427 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (1996), the defendant was convicted of numerous charges including several crimes including rape and involuntary deviate sexual intercourse. On appeal, the defendant argued that his counsel was forced to use peremptory challenges on two prospective jurors who should have been struck for cause. Although the jurors were at times equivocal, the Superior Court closely reviewed the entire voir dire record and found support for the trial court's denial of the motion to disqualify the jurors for cause. 661 A.2d at 427.

A prospective juror should be excused for cause in two situations:

- i. The first is where the prospective juror indicates by his answers that he will not be an impartial juror.
- ii. The second is where, irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has a close relationship, be it familial, financial, or situational, with any of the parties, counsel, victims or witnesses.

Commonwealth v. Perry, 657 A.2d 989, 990 (Pa. Super. 1995) (*quoting Commonwealth v. Maxwell*, 585 A.2d 1382, 1387 (Pa. Super. 1986)); ***Commonwealth v. Dye***, 765 A.2d

1123, 1126 (Pa. Super. 2000), *appeal denied*, 566 Pa. 677, 784 A.2d 114 (2001).

The appellate courts will employ a standard of review which affords great deference to the trial judge, who is in the best position to assess the credibility of the jurors and their ability to be impartial. *See Commonwealth v. Bomar*, 573 Pa. 426, 456, 826 A.2d 831, 849 (2003), *cert. denied*, 540 U.S. 1115, 124 S.Ct. 1053, 157 L.Ed.2d 906 (2004).

When the defense does not exhaust its peremptory challenges, it is harmless error to overrule a challenge for cause which should have been sustained, because the juror could have been excluded with a peremptory challenge. *Commonwealth v. Chambers*, 546 Pa. 370, 392, 685 A.2d 96, 107 (1996), *cert. denied*, 522 U.S. 827, 118 S.Ct. 90, 139 L.Ed.2d 46 (1997); *Commonwealth v. Moore*, 462 Pa. 231, 238-239, 340 A.2d 447, 451 (1975).

When a criminal defendant is forced to use a peremptory challenge to excuse a juror who should have been excused for cause, and as a result exhausts his peremptory challenges before the jury is seated, a new trial will be granted. *Commonwealth v. Blasioli*, 685 A.2d 151, 157-158 (Pa. Super. 1996)(Defendant charged with rape and indecent assault), *aff'd*, 552 Pa. 149, 713 A.2d 1117 (1998).

- In *Commonwealth v. Dye*, 765 A.2d 1123 (Pa. Super. 2000), *appeal denied*, 566 Pa. 577, 784 A.2d 114 (2001), the defendant had been convicted of numerous sexual crimes including rape. The Superior Court reversed and remanded for a new trial because the trial court did not grant the defendant's request to strike for cause a potential juror who was married to the arresting officer's supervisor. Because the defense had run out of peremptory challenges, a new trial was ordered. 765 A.2d at 1126.

Where a prospective juror expresses substantial doubts concerning his or her ability to be an impartial juror, it is not the trial court's function to persuade them to put aside these expressed doubts. As explained by the Superior Court: "much depends upon the answers and demeanor of the potential juror as observed by the trial judge, and therefore reversal is appropriate only in case of palpable error." *Commonwealth v. Johnson*, 445 A.2d 509, 512 (Pa. Super. 1982)(new trial granted after trial court refused to strike juror who indicated he would have great difficulty being impartial).

B. Peremptory Challenge

The number of peremptory challenges granted to each side is governed by the Pennsylvania Rules of Criminal Procedure since the statutory provisions relating to peremptory challenges were repealed by the Judiciary Act Repealer Act, 42 PA.STAT. § 20002(a). Rule of Criminal Procedure No. 634 governs the number of peremptory challenges for the selection of principal trial jurors; the number of peremptory challenges for the selection of alternate trial jurors is set forth in PA.R.CRIM.P. 645. Pa.R.Crim.P. 634 provides:

Rule 634. Number of Peremptory Challenges

(A) Trials Involving Only One Defendant:

(1) In trials involving misdemeanors only and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 5 peremptory challenges.

(2) In trials involving a non-capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 7 peremptory challenges.

(3) In trials involving a capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 20 peremptory challenges.

(B) Trials Involving Joint Defendants:

(1) In trials involving joint defendants, the defendants shall divide equally among them that number of peremptory challenges that the defendant charged with the highest grade of offense would have received if tried separately; provided, however, that each defendant shall be entitled to at least 2 peremptory challenges. When such division of peremptory challenges among joint defendants results in a fraction of a peremptory challenge, each defendant shall be entitled to the next highest number of such challenges.

(2) In trials involving joint defendants, it shall be within the discretion of the trial judge to increase the number of peremptory challenges to which each defendant is entitled up to the number of peremptory challenges that each defendant would have received if tried alone.

(3) In trials involving joint defendants, the Commonwealth shall be entitled to peremptory challenges equal in number to the total number of peremptory challenges given to all of the defendants.

Trial Issues

A short summary of Pa.R.Crim.P. 634 is as follows:

<u>Number of Defendants</u>	<u>Type of Offense</u>	<u>Commonwealth's Peremptory Challenges</u>	<u>Each Defendant's Peremptory Challenges</u>	<u>Minimum Number of Jurors Subject to Challenges</u>
1	Misdemeanor	5	5	22
1	Felony	7	7	26
2	Misdemeanor	6	3	24
3	Felony	8	4	28

Where a criminal defendant is forced to use a peremptory challenge to excuse a juror who should have been excused for cause and then exhausts his peremptory challenges before the jury is seated, a new trial will be granted. ***Commonwealth v. Blasioli***, 685 A.2d 151, 157-158 (Pa. Super. 1996), *aff'd*, 552 Pa. 149, 713 A.2d 1117 (1998).

7.4 TESTIMONY OF COMPLAINANT

A. No Corroboration Required

The “uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses.” ***Commonwealth v. Lyons***, 833 A.2d 245, 258 (Pa. Super. 2003), *appeal denied*, 583 Pa. 695, 879 A.2d 782 (2005). Similarly, a rape victim’s uncorroborated testimony to penal penetration is sufficient to establish sexual intercourse and therefore support a rape conviction. ***Commonwealth v. Wall***, 953 A.2d 581, 584 (Pa. Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008)(“While circumstantial medical evidence is thus not necessary, it may be used to prove the element of penetration.”).¹ In ***Commonwealth v. Andrulewicz***, 911 A.2d 162 (Pa. Super. 2006), *appeal denied*, 592 Pa. 778, 926 A.2d 972 (2007), the Superior Court, quoting ***Commonwealth v. Charlton***, 902 A.2d 554, 562 (Pa. Super. 2006), stated “[t]his Court has held ‘hat the uncorroborated testimony of a sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant’” 911 A.2d at 166.

18 PA.CONS.STAT.ANN. § 3106 provides:

Chapter 31. Sexual Offenses
Subchapter A. General Provisions
§ 3106. Testimony of complainants

The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the

¹ In an expungement case, the court held that a videotaped, uncorroborated statement of a four year old child was sufficient to constitute substantial evidence that the father had abused the child. ***In re E.A.***, --- Pa. ---, 82 A.3d 370 (2013).

credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.

This section parallels § 213.6(5) of the Model Penal Code. It is now well established in Pennsylvania that, in a prosecution for sex offenses, a guilty verdict may rest on the uncorroborated testimony of the victim. *Commonwealth v. Castelhun*, 889 A.2d 1228, 1232 (Pa. Super. 2005) (absence of "physical or forensic proof" does not invalidate the testimony of the complaining witness); *Commonwealth v. Owens*, 649 A.2d 129, 133 (Pa. Super. 1994), *appeal denied*, 540 Pa. 612, 656 A.2d 118 (1995).

Examples:

- *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992): testimony of child victim alone sufficient to support conviction for sex offense.
- *Commonwealth v. Smith*, 421 A.2d 693, 694 ((Pa. Super. 1980): Evidence of 12 year old daughter testifying that her father raped her was sufficient to support the verdict.
- *Commonwealth v. Jette*, 818 A.2d 533, 534 (Pa. Super. 2003), *appeal denied*, 574 Pa. 771, 833 A.2d 141 (2003): "medical evidence is not required if the fact finder believes the victim."
- *Commonwealth v. Gabrielson*, 536 A.2d 401, 409 (Pa. Super. 1988), *appeal denied*, 518 Pa. 636, 542 A.2d 1365 (1988): the uncorroborated testimony of rape victim sufficient even in absence of medical examination.

Notwithstanding this rule, a prosecutor may choose to corroborate the victim's testimony through physical or testimonial evidence.

- *Commonwealth v. Wall*, 953 A.2d 581, 584 (Pa. Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008): "While circumstantial medical evidence is thus not necessary, it may be used to prove the element of penetration."
 - In *Commonwealth v. Minerd*, 562 Pa. 46, 753 A.2d 225 (2000), the examining physician testified that she found no evidence of physical trauma to the youthful victims' genital or anal areas, however, the absence of physical trauma did not prove that the abuse didn't occur because sufficient time had passed to heal any damage that would have been done prior to the examination. 562 Pa. at 51, 753 A.2d at 228.

B. Temporarily Excluding Spectators From Courtroom

The United States Supreme Court has long held that the right of access to criminal trials plays a significant role in the functioning of the judicial process and the government as a whole:

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 102 S.Ct. 2613, 2619-2620, 73 L.Ed.2d 248 (1982). Although this right of access is of constitutional stature, it is not absolute.

1. When Victim testifies to embarrassing or lurid details

When a rape victim testifies to facts that could prove embarrassing or painful to her, the trial court has authority to place limitations on public access to protect victims from serious embarrassment, trauma or intimidation. *Commonwealth v. Penn*, 562 A.2d 833, 836 (Pa. Super. 1989), *appeal denied*, 527 Pa. 616, 590 A.2d 756 (1991), *cert. denied*, 502 U.S. 816, 112 S.Ct. 69, 116 L.Ed.2d 43 (1991).

- *Commonwealth v. Smith*, 421 A.2d 693, 694 (Pa. Super. 1980): in *dicta*, where rape victim testifies to facts which could prove embarrassing or painful to her, a trial court has authority to exclude spectators from the trial temporarily.

Although an accused has a right to a public trial² as guaranteed in our state and federal constitutions, this right is not without limitation:

It is well-established, for example, that the need to protect young complaining witnesses in rape cases against embarrassment, harassment and loss of reputation will suffice to invoke the shelter of limited privacy upon criminal proceedings. Thus, the closing of the courtroom to spectators is a frequent and accepted practice when the

² See Article I, § 9, Pennsylvania Constitution; Sixth Amendments to the Constitution of the United States; *Commonwealth v. Berrigan*, 509 Pa. 118, 129, 501 A.2d 226, 232 (1985).

lurid details of such a crime (rape) must be related by a young lady.

Commonwealth v. Stevens, 352 A.2d 509, 514 (Pa. Super. 1975). Where, as in case when a child victim must testify to embarrassing or lurid details, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the Massachusetts statute provided for the exclusion of the press and general public when a minor victim of certain sex offenses testified. The press challenged the exclusion. The United States Supreme Court found that mandatory closure violated the First Amendment. *Id.*, 457 U.S. at 601, 102 S.Ct. at 2617. The Supreme Court stated that there should be a case-by-case review because “circumstances of the particular case may affect the significance of the interest.” *Id.*, 457 U.S. at 608, 102 S.Ct. at 2621.

2. When there are threats of violence to victim or witnesses

In *Commonwealth v. Wright*, 388 A.2d 1084, 1086 (Pa. Super. 1978), which involved a prosecution for rape, the Court held: “Among the circumstances which justify the court in closing the courtroom to spectators are threats of violence to witnesses, and the embarrassment and discomfiture to victims of crimes which require the explication of lurid details.”

- But in *Pressley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) and *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), a four prong test for closure was established: (1) The party seeking to close hearing must advance an overriding interest that is likely to be prejudiced (2) The closure must be no broader than necessary to protect that interest (3) The trial court must consider reasonable alternatives to closure and (4) The trial court must make findings adequate to support the closure.

C. Competency of Minor Complainant or Witness

1. Minor victim or witness

The determination of the competency of victims or witnesses is left to the sound discretion of the trial judge and will not be reversed absent a clear abuse of discretion. *Commonwealth v. Judd*, 897 A.2d 1224, 1228 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006).

The test for competency of a minor witness or victim has been well established:

Every witness is presumed competent. A party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks the minimal capacity ... (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth.

Commonwealth v. Page, 59 A.3d 1118, 1129 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 776 (2013).

Furthermore, “[a] child’s competency to testify is a threshold *legal issue* that a trial court must decide, and an appellate court will not disturb its determination absent an abuse of discretion.” ***Commonwealth v. Washington***, 554 Pa. 559, 563, 722 A.2d 643, 646 (1998) (citation omitted & emphasis added).

However, when a victim or witness is fourteen years of age or older, he or she is entitled to the same presumption of competence as an adult. ***Commonwealth v. Pena***, 31 A.3d 704, 707 (Pa. Super. 2011).

See **Section 7.13(C), Competency of Child**, *infra*, for additional discussion.

2. Contention of “Taint”³

The Pennsylvania Supreme Court has defined “taint” as “the implantation of false memories or distortion of actual memories through improper and suggestive interview techniques” ***Commonwealth v. Delbridge (Delbridge I)***, 578 Pa. 641, 647, 855 A.2d 27, 30 (2003). An allegation of “taint” is a legitimate question for examination in cases involving complaints of sexual abuse made by young children. ***Id.***, 578 Pa. at 661, 855 A.2d at 39.⁴

Within the three-part test for competency described above in ***Commonwealth v. Page***, an allegation of taint speaks to the second prong: whether the child witness has the minimal capacity to observe an occurrence itself and the capacity of remembering what it is that the witness is called upon to testify about. See ***Commonwealth v. Pena***, 31 A.3d 704, 707 (Pa. Super. 2011). The challenge must be supported by clear and convincing evidence. ***Commonwealth v. Lukowich***, 875 A.2d 1169, 1173 (Pa. Super. 2005), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005).

³ For additional discussion on Taint, see **Chapter 5, Section 5.12, Taint**.

⁴ In ***Commonwealth v. Judd***, 897 A.2d 1224, 1229 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006), the court held that a sexual abuse victim of fifteen years of age could not be the subject of an allegation of “taint” but rather any attack on her testimony went to questions of credibility. 897 A.2d at 1229.

Where an allegation of taint is made before trial the “appropriate venue” for investigation into such a claim is a competency hearing. In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question. During the hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption ... [A]s with all questions of competency, the resolution of a taint challenge to the competency of a child witness is a matter addressed to the discretion of the trial court. *Delbridge I*, 578 Pa. at 664, 855 A.2d at 40-41.

Areas of review concern the competency of the minor victim versus the credibility of the witness:

The core belief underlying the theory of taint is that a child’s memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy. Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.

Commonwealth v. McLaurin, 45 A.3d 1131, 1139 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 65 A.3d 413 (2013), quoting *Commonwealth v. Moore*, 980 A.2d 647, 650 (Pa. Super. 2009).

In *Commonwealth v. Davis*, 939 A.2d 905 (Pa. Super. 2007), the Superior Court affirmed the trial court’s decision, after a competency hearing, that the youthful victim lacked the minimal capacity to testify, especially in light of the taint effect produced by leading and suggestive questioning by the police. Specifically, the Superior Court found:

The problems with the testimony are twofold: first, J.D.’s independent recollection of the incident was extremely limited; and second, the suggestive technique and content of the interviews provided clear and convincing evidence that J.D.’s later recollections were tainted and a product of coercion, not of his own memory.

939 A.2d at 910.

In *Commonwealth v. Moore*, 980 A.2d 647 (Pa. Super. 2009), some of the factors deemed relevant include the age of the child, whether the child has been subject to repeated interviews by adults in positions of authority, and the existence of independent evidence regarding the interview techniques utilized. 980 A.2d at 652.

D. Impeachment of Complainant

1. Truth and veracity

Evidence of victim's reputation in community for truth and veracity is admissible in a sex offense trial. The credibility of a rape victim is measured according to the same standard applied to any other crime victim: the reputation witness must attest to the victim's general reputation in the community – the witness may not attest to the victim's specific behavior.⁵

In *In Interest of Lawrence J.*, 456 A.2d 647 (Pa. Super. 1983), the trial court erred under 18 PA.CON.S.TAT.ANN. § 3106 in sustaining the Commonwealth's objections to the testimony by a defense witness concerning the victim's reputation for truth and veracity. The credibility of the alleged rape victim was to be determined by the same standard as that applied to the victim of any other crime: "The inquiry is limited, however, to the general speech of the community on the subject. The reputation witness can not be asked questions or give answers regarding specific acts, as distinguished from what she has heard in the neighborhood." 456 A.2d at 655.

Section 3106 of the Crimes Code provides:

Chapter 31. Sexual Offenses
Subchapter A. General Provisions
§ 3106. Testimony of complainants

The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.

18 PA.CON.S.TAT.ANN. § 3106

⁵ *Commonwealth v. Berry*, 513 A.2d 410, 416 (Pa. Super. 1986); *Commonwealth v. Butler*, 621 A.2d 630 (Pa. Super. 1993), *appeal denied*, 535 Pa. 613, 629 A.2d 1376 (1993); *see also* Pa.R.E. 404(a)(2)(B); Pa.R.E. 608.

2. Complainant's prior sexual conduct

The admission of evidence of a complainant's prior sexual conduct may be necessary to preserve the accused's constitutional confrontation clause rights. In the context of a case of sexual violence, however, the purpose of the Rape Shield Law is to prevent a trial from shifting its focus from the culpability of the accused toward the virtue and chastity of the victim. 18 PA.CON.S.TAT.ANN. § 3104.⁶

The law is well settled that the Rape Shield Law is a bar to admission of testimony of prior sexual conduct involving a victim, whether it is consensual or the result of nonconsensual or assaultive behavior, *unless it has probative value which is exculpatory to the defendant*. Under such circumstances, the trial court in an in-camera hearing will carefully weigh the evidence, and in his/her discretion make a determination as to the admissibility of that evidence. **Commonwealth v. Fink**, 791 A.2d 1235, 1241-1242 (Pa. Super. 2002); 18 PA.CON.S.TAT.ANN. § 3104(b). The trial court must determine whether (1) the proposed evidence is relevant to show bias or motive or to attack credibility; (2) whether the probative value outweighs its prejudicial effect; and (3) whether there are alternative means of proving bias or motive or to challenge credibility. **Fink**, 791 A.2d at 1241-1242. In the absence of an abuse of discretion, that decision will stand on appeal. **Commonwealth v. Allburn**, 721 A.2d 363, 366 (Pa. Super. 1998).

In **Commonwealth v. Spiewak**, 533 Pa. 1, 617 A.2d 696 (1992), the Pennsylvania Supreme Court held that evidence of a complainant's prior sexual history is admissible if it is highly probative of the victim's credibility and is necessary to allow the jury to make a fair determination of guilt or innocence. *Id.* at 13, 617 A.2d at 702. Of course, proffers which relate to alleged prior sexual conduct of the complainant trigger an inquiry into the applicability of the Rape Shield Law, 18 PA.CON.S.TAT.ANN. § 3104. The Rape Shield Law prohibits the introduction of evidence relating to the victim's sexual history, including conduct and reputation, and states:

§ 3104. Evidence of victim's sexual conduct

General rule.--Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

⁶ For a detailed discussion of the substantive and procedural requirements of the Pennsylvania Rape Shield Law, see **Chapter 6, § 6.8 EVIDENCE OF VICTIM'S PAST SEXUAL CONDUCT**.

18 PA.CON.S.TAT.ANN. § 3104(a). However, as stated above, our Supreme Court has addressed the type of evidence that is admissible albeit the prohibition of the Rape Shield Law.

In *Spiewak*, the defendant sought to impeach the credibility of the minor victim by cross-examining her about an earlier incident in which she testified that that an older man who was a friend of the defendant's had seduced her. The relevancy to credibility was that this prior testimony describing the encounter was substantially similar to the description of the encounter with the defendant to which the victim had testified. The Supreme Court reversed the trial court's ruling that the Rape Shield Law precluded such a line of questioning. The Court reasoned that the Rape Shield Law does not prohibit the admission of relevant evidence which may exculpate a defendant of the crime with which he is charged. Further, using a balancing test, the Rape Shield Law must yield to a defendant's constitutional right to challenge the credibility of a witness and present evidence necessary to permit or allow a jury to make a fair determination of the defendant's guilt or innocence. *Id.*, 533 Pa. at 7-10, 617 A.2d at 699-702.

In *Commonwealth v. Black*, 487 A.2d 396 (Pa. Super. 1985), the Superior Court permitted admission of evidence of the victim's prior sexual activity, i.e., evidence of her prior sexual conduct with one of her brothers, on the issue of her bias against the defendant, provided that a three-part test was met at an *in camera* hearing similar to that outlined in 18 PA.CON.S.TAT.ANN. § 3104(b). The theory of bias was based on the argument that the victim wanted the father removed from the house so that she could reunite with her brother. The Superior Court referred to the Confrontation Clause under the Sixth Amendment of the United States Constitution in holding that the Rape Shield Law can not be used to exclude relevant evidence that shows the bias of a witness or attacks the credibility of the witness. Thus, relevant evidence of such past sexual conduct would be admissible as long as it would not "so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice." *Id.* at 401.

In *Commonwealth v. Fernsler*, 715 A.2d 435 (Pa. Super. 1998), the defendant filed a *Motion in Limine* to question the child victim about his prior sexual activity, specifically his disclosure of previous assault he made upon his half-sister. The trial court granted the motion. The Superior Court affirmed and again held that the Rape Shield Law, if rigidly construed, could impermissibly encroach upon defendant's right to confront and cross-examine witnesses; in those cases, Rape Shield Law must bow to the need to permit accused an opportunity to present genuinely exculpatory evidence. *Id.* at 442.

The proffer must be specific and highly probative to issues of credibility. The requirement of a specific proffer of evidence was designed to prevent a "fishing expedition" into the areas protected by the Rape Shield Law. *Commonwealth v. Burns*, 988 A.2d 684, 691 (Pa. Super. 2009), *appeal denied*, 608 Pa. 615, 8 A.3d 341 (2010).

The Rape Shield Law may not be used to exclude relevant evidence showing a witness' bias or attacking credibility, and evidence that may tend to directly exculpate the accused by showing that the alleged victim is biased and thus "has a motive to lie or fabricate" is admissible at trial. *Commonwealth v. Guy*, 686 A.2d 397, 401 (1996). In *Guy*, the evidence of the victim's prior sexual conduct was not relevant to any allegation of bias or motive, rather was for the only purpose of showing conformity to past conduct; as such, the Superior Court held that it was not admissible. *Id.* at 402. *See also, Commonwealth v. Holder*, 815 A.2d 1115 (Pa.Super. 2003), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003) (allegation of rape that victim had made against another man was collateral and not relevant for impeachment purposes in rape trial against defendant).

For additional detailed discussion about possible federal habeas corpus review, as well as prior false accusations of sexual abuse by a complainant, please see **Chapter 5, § 5.5 IMPEACHMENT OF COMPLAINANT**, subsections B (Confrontation Clause challenges) and C (Impeachment based upon prior false accusations).

E. Cross-examination of Complainant by *Pro Se* Defendant

It is extremely well-settled that the Sixth Amendment implicitly provides an affirmative right to self-representation. *See Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). The United States Supreme Court clearly stated:

Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Faretta, 422 U.S. at 819-820, 95 S.Ct. at 2533 (footnote omitted). However, the waiver of the right to counsel must be made "knowingly and intelligently." No specific form or magic words are necessary, only that there be a knowing and voluntary choice to proceed pro se. "The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004).

An issue that has recently appeared is when a *pro se* defendant in a sexual assault case wishes to cross-examine the victim. The issue becomes much more sensitive when the complainant is a child.

In *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995)(en banc), *cert. denied*, 516 U.S. 884, 116 S.Ct. 224, 133 L.Ed. 2d 154 (1995), the Fourth Circuit Court of Appeals affirmed a District Court's decision to bar a *pro se* defendant from cross-examining the child victims of sexual abuse. As an alternative reason to affirm the District Court's decision, the Fourth Circuit, sitting en banc, held that even if a defendant charged with sexual abuse properly invoked his right to self-representation, the trial court did not err in refusing to allow him the personal right to cross-examine the alleged victims. *Id.* at 1034-36. The trial court offered the defendant the opportunity to submit cross-examination questions to his standby counsel to pose. The Fourth Circuit specifically found:

That the purposes of self-representation – to allow a defendant to affirm his dignity and autonomy and to present what he believes is his best possible defense – were thus “otherwise assured” and that, therefore, the important state interest in protecting children from the emotional trauma of being questioned by their alleged abuser outweighed the defendant's right to conduct cross examination personally.

U.S. v. Singleton, 107 F.3d 1091, 1097 n. 1 (4th Cir. 1997), *cert. denied*, 522 U.S. 825, 118 S.Ct. 84, 139 L.Ed.2d 41 (1997).

In *Partin v. Commonwealth*, 168 S.W. 3d 23 (Ky. 2005), *cert. denied*, 547 U.S. 1005, 126 S.Ct. 1467, 164 L.Ed.2d 251 (2006), the Supreme Court of Kentucky affirmed the trial court's decision to require standby counsel to cross-examine the victims, his wife and her adult son, rather than the pro-se defendant, and that this restriction did not violate the defendant's federal or state constitutional rights.

There are no Pennsylvania appellate court cases addressing this issue yet, nor any District Court or Third Circuit Court cases. See Joseph G. Cook, *Constitutional Rights of the Accused* (3rd ed.1996), Vol. 3, §§ 9:2 & 23.

F. Expert Testimony – Victim Responses and Behaviors

Effective August 28, 2012, the Legislature adopted 42 PA.CON.S.TAT.ANN. § 5920, which provides that properly qualified experts can testify as to facts and opinions regarding specific types of victim responses and behaviors in crimes of sexual violence.

With the passage of 42 PA.CON.S.TAT.ANN. § 5920, in the prosecution's case-in-chief, experts will be able to testify about “specific types of victim responses and victim behaviors” in sexual assault cases, although they still will not be permitted to testify as to a particular victim's or witness's credibility. This law is not restricted to the prosecution's case, however, and the defense has an equal opportunity to qualify an expert under this law, and present similar testimony on the defense side about the victim responses and behaviors.

Although this law is available to both the Commonwealth and the defense, it was originally adopted to address a jury perception problem when a victim responds to a sexual assault in a way which runs contrary to that which a typical juror would expect. Section 5920 provides that properly qualified experts can testify as to facts and opinions regarding specific types of victim responses and behaviors in crimes of sexual violence, in order to explain a reaction or response, which might seem unusual or strange to a juror, and therefore create credibility issues.

This section provides:

42 PA. CONS. STAT. ANN. § 5920.

Expert testimony in certain criminal proceedings

(a) Scope.--This section applies to all of the following:

(1) A criminal proceeding for an offense for which registration is required under Subchapter H of Chapter 97 (relating to registration of sexual offenders).

(2) A criminal proceeding for an offense under 18 Pa.C.S. Ch. 31 (relating to sexual offenses).

(b) Qualifications and use of experts.--

(1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.

(2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.

(3) The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.

(4) A witness qualified by the court as an expert under this section may be called by the attorney for the

Commonwealth or the defendant to provide the expert testimony.

1. Scope

This section is applicable in prosecutions which fall under one of two classifications:

- (1) An offense for which registration with the Pennsylvania State Police is required. These offenses are classified in a three-tiered system. In 42 PA.CONS.STAT.ANN. § 9799.14, a *sexually violent offense* is an offense designated as a Tier I, Tier II or Tier III sexual offense. Please see Addendum 2 for a listing of all offenses which required registration under Subchapter H.
- (2) A criminal proceeding under Chapter 31, Sexual Offenses, 18 PA.CONS.STAT.ANN. §§ 3121 – 3129.
 - Rape, 18 PA.CONS.STAT.ANN. § 3121
 - Statutory Sexual Assault, 18 PA.CONS.STAT.ANN. § 3122.1
 - Involuntary Deviate Sexual Intercourse, 18 PA.CONS.STAT.ANN. § 3123
 - Sexual Assault, 18 PA.CONS.STAT.ANN. § 3124.1
 - Institutional Sexual Assault, 18 PA.CONS.STAT.ANN. § 3124.2
 - Aggravated Indecent Assault, 18 PA.CONS.STAT.ANN. § 3125
 - Indecent Assault, 18 PA.CONS.STAT.ANN. § 3126
 - Indecent Exposure, 18 PA.CONS.STAT.ANN. § 3127
 - Sexual Intercourse with Animal, 3129

2. Qualifications of Expert

To be qualified under this section, the witness must be “qualified by the court as an expert” if the witness:

- Has specialized knowledge beyond that possessed by the average layperson
- The specialized knowledge is based on the witness’s experience with, or specialized training or education related to sexual violence in:
 - criminal justice,
 - behavioral sciences, or
 - victim services issues.

Furthermore, the court must be satisfied that the testimony of the witness will assist the trier of fact in understanding:

- the dynamics of sexual violence,
- victim responses to sexual violence, and
- the impact of sexual violence on victims during and after being assaulted.

3. Relevant Testimony of Expert

The expert may testify to facts and opinions regarding specific types of victim responses to sexual assault and victim behaviors following sexual assault.

Furthermore, the testimony of the expert witness may assist the trier of fact in understanding:

- the dynamics of sexual violence,
- victim responses to sexual violence, and
- the impact of sexual violence on victims during and after being assaulted.

(a) Prohibition on Opinion Regarding Credibility

Section 5920 specifically prohibits the witness from opining regarding the credibility of any witness, including the victim.

(b) Availability of Witness

A witness properly qualified under this section may be called by the prosecution or the defense.

7.5 TESTIMONY OF CHILD VICTIM OR WITNESS BY CONTEMPORANEOUS ALTERNATIVE METHOD

A. Permissible Pursuant to 42 PA.CON.S.TAT.ANN. § 5985

In any prosecution or adjudication involving a child victim or child material witness, the ability of a child victim or material witness to testify outside the presence of the defendant, as to a sexual assault or otherwise, is governed by 42 PA.CON.S.TAT.ANN. § 5985. Section 5985 was enacted by the legislature on July 15, 2004, following a series of amendments to the Confrontation Clause in Article 1, Section 9, of the Pennsylvania Constitution. The appellate courts of Pennsylvania have upheld the 2004 amendments as constitutional. *See Bergdoll v. Commonwealth*, 858 A.2d 185 (Pa. Cmwlth. 2004) (*en banc*), *aff'd*, 583 Pa. 44, 874 A.2d 1148 (2005) (per curiam).

One purpose of the 2004 amendments was to remove from the Pennsylvania Constitution the right to confront witnesses “face to face” so that the General Assembly could enact laws or the Pennsylvania Supreme Court could adopt rules that permit

children to testify in criminal proceedings outside the physical presence of the accused. As a result of the 2003 amendments⁷ to the Pennsylvania Constitution, and the decision of the Commonwealth Court and the Supreme Court to uphold the constitutionality of the amendments, prosecutors can now utilize § 5985.

Unlike an earlier version, the current version of § 5985 has not been declared unconstitutional, and its use was approved by the Superior Court in *Commonwealth v. Charlton*, 902 A.2d 554 (Pa. Super. 2006), *appeal denied*, 590 Pa. 655, 911 A.2d 933 (2006).⁸

Section 5985 states the following:

Subchapter D. Child Victims and Witnesses

§5985. Testimony by contemporaneous alternative method

(a) Contemporaneous alternative method.--Subject to subsection (a.1), in any prosecution or adjudication involving a child victim or a child material witness, the court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method. Only the attorneys for the defendant and for the Commonwealth, the court reporter, the judge, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during his testimony. The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness but shall ensure that the child cannot hear or see the defendant. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purposes of providing an effective defense. Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted.

(a.1) Determination.--Before the court orders the child victim or the child material witness to testify by a contemporaneous alternative method, the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in

⁷ The 2003 amendment substituted “be confronted with the witnesses against him” for “meet the witnesses face to face” in Article 1, Section 9 of the Pennsylvania Constitution.

⁸ See also, 61 A.L.R. 4th 1155, Closed-circuit television witness examination; *Commonwealth v. Geiger*, 944 A.2d 85, 94-95 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009).

the defendant's presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child victim or child material witness, either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(a.2) Counsel and confrontation.--

(1) If the court observes or questions the child victim or child material witness under subsection (a.1)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.

(2) If the court hears testimony under subsection (a.1)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

42 PA.CON.S.TAT.ANN. § 5985.

B. Procedure

Accordingly, in pertinent part, the statutory framework can be concisely summarized as follows:

1. Applicability

- Prosecution or adjudication must involve a child victim or a child material witness. See 42 PA.CON.S.TAT.ANN. § 5985(a).

2. Procedure

- The court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method.
 - Only the attorneys for the defendant and for the Commonwealth, the court reporter, the judge, and persons necessary to operate the equipment may be present in the room with the child during his testimony;
 - Additionally, any person whose presence would contribute to the

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welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during his testimony.

- Examination and cross-examination of the child victim/witness must proceed in the same manner as normally permitted.

See 42 PA.CON.S.TAT.ANN. § 5985(a).

3. Defendant's Rights

- The trial court must permit the defendant to observe and hear the testimony of the child victim or child material witness and to confer with his attorney. See 42 PA.CON.S.TAT.ANN. § 5985(a).
 - Provided, however, that the child cannot hear or see the defendant.
 - Provided further, that the defendant does not have a due process right to access the child's mental health records for the purpose of rebutting the Commonwealth's expert, if one is presented. *Commonwealth v. Williams*, --- Pa. ---, 84 A.3d 680, 692 (2014). "A Section 5985 hearing is not intended to become a mini-trial on the general mental health status of the child, nor a fishing expedition into the child's mental health history." *Id.*

4. Determination by the Court

- The Commonwealth must establish that, if forced to testify in an open forum in the presence and full view of the finder of fact or in the defendant's presence, the child victim or child material witness
 - will suffer serious emotional distress
 - that would substantially impair the child victim's or child material witness's ability to reasonably communicate.
- This burden can be satisfied
 - via a hearing with the child victim/witness either inside or outside the courtroom,
 - the attorneys for the defendant and the Commonwealth have a right to be present,
 - or,
 - through the testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting,
 - the defendant and the attorneys for the defendant and the Commonwealth have a right to be present.

See 42 PA.CON.S.TAT.ANN. § 5985(a.1 & a.2).

C. Closed-Circuit Television is Permissible Alternative Method

In *Commonwealth v. Charlton*, 902 A.2d 554, 559 (Pa. Super. 2006), *appeal denied*, 590 Pa. 655, 911 A.2d 933 (2006), the Superior Court of Pennsylvania affirmed a trial court’s decision to permit a child victim of sexual assault to testify pursuant to § 5985 via closed-circuit television. In *Charlton*, the Commonwealth presented testimony from a psychotherapist that “the victim suffered from depression, suicidal thoughts, and post-traumatic stress disorder which likely would impact her ability to testify effectively” and that the child’s testifying “in an open forum poses a significant risk for her emotional wellbeing.” *Id.* (citation and internal quotation marks omitted). See also *Commonwealth v. Kemmerer*, 33 A.3d 39 (Pa. Super. 2011); *Commonwealth v. Williams*, --- Pa. ---, 84 A.3d 680, 692 (2014) (preliminary hearing).

7.6 TESTIMONY OF CHILD VICTIM OR CHILD WITNESS BY RECORDED TESTIMONY

A. Permissible Pursuant to 42 PA.CON.S.TAT.ANN. § 5984.1

In any prosecution or adjudication involving a child victim or child material witness, the ability of a child victim or material witness to testify by way of previously recorded methods is governed by 42 PA.CON.S.TAT.ANN. § 5984.1. Section 5984.1 was amended by the legislature on July 15, 2004, following a series of amendments to the Confrontation Clause in Article 1, Section 9, of the Pennsylvania Constitution. The appellate courts of Pennsylvania upheld the constitutionality of Section 5984.1 in *Commonwealth v. Geiger*, 944 A.2d 85, 96 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009). The Superior Court stated:

Further, receiving the testimony of the child witnesses by way of videotape under Section 5984.1 did not violate the Confrontation Clause of either the state or federal constitutions, especially where the trial court made findings that testifying in court in the presence of Appellant would cause the child witnesses “severe emotional distress” that would impair their ability to communicate truthfully and accurately, which is a *sine qua non* to allowing videotape questioning of child witnesses.

944 A.2d at 96. The Superior Court upheld the constitutionality of Section 5984.1 on both Confrontation Clause and Due Process analysis. *Id.* at 96-97.

Its use was further approved by the Superior Court in *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009), *appeal denied*, 608 Pa. 614, 8 A.3d 340 (2010):

The issue of presenting testimony by video has arisen most frequently with regard to testimony of child witnesses. The

act entitled, “Recorded Testimony,” 42 PA.C.S.A. § 5984.1, provides that the testimony of a child victim or child material witness may be recorded for presentation in court in such a manner to ensure that the child cannot see or hear the defendant. This statute has been found to satisfy the Due Process and Confrontation Clauses under the United States and Pennsylvania Constitutions. *Geiger*, 944 A.2d 85. This Court found that the purpose of the Confrontation Clause was satisfied when the child testified under oath, the defendant was able to hear and see the child, the child was cross-examined, and the defendant was able to adequately communicate with his attorney. *Id.* at 95-97. Similar child victim protection statutes have been deemed constitutional in other jurisdictions. *See, e.g., United States v. Garcia*, 7 F.3d 885 (9th Cir.1993); *United States v. Weekley*, 130 F.3d 747 (6th Cir.1997); *Lomholt v. Iowa*, 327 F.3d 748 (8th Cir. 2003).

Atkinson, 987 A.2d at 748. Section 5984.1 states the following:

Subchapter D. Child Victims and Witnesses
§ 5984.1. Recorded testimony

(a) Recording.--Subject to subsection (b), in any prosecution or adjudication involving a child victim or child material witness, the court may order that the child victim’s or child material witness’s testimony be recorded for presentation in court by any method that accurately captures and preserves the visual images, oral communications and other information presented during such testimony. The testimony shall be taken under oath or affirmation before the court in chambers or in a special facility designed for taking the recorded testimony of children. Only the attorneys for the defendant and for the Commonwealth, persons necessary to operate the equipment, a qualified shorthand reporter and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during testimony. The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness but shall ensure that the child victim or material witness cannot hear or see the defendant. Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purpose of providing an effective defense.

(b) Determination.--Before the court orders the child victim or the child material witness to testify by recorded testimony, the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate. In making this determination, the court may do any of the following:

(1) Observe and question the child victim or child material witness, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(c) Counsel and confrontation.--

(1) If the court observes or questions the child victim or child material witness under subsection (b)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.

(2) If the court hears testimony under subsection (b)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

42 PA.CON.S.STAT.ANN. § 5984.1.

B. Procedure

Accordingly, in pertinent part, the statutory framework can be concisely summarized as follows:

1. Applicability

- Prosecution or adjudication must involve a child victim or a child material witness.
See 42 PA.CON.S.STAT.ANN. § 5984.1(a).

2. Method of Recording

- The court may order that the testimony of the child victim or child material witness be recorded for presentation in court

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- by any method that accurately captures and preserves the
 - visual images,
 - oral communications, and
 - other information presented during such testimony

See 42 PA.CON.S.STAT.ANN. § 5984.1(a).

3. Procedure

- The testimony shall be:
 - taken under oath or affirmation before the court
 - in chambers or
 - in a special facility designed for taking the recorded testimony of children.
 - Only the following may be present:
 - the attorneys for the defendant and for the Commonwealth,
 - persons necessary to operate the equipment, and
 - a qualified shorthand reporter
 - Additionally, any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during testimony.

See 42 PA.CON.S.STAT.ANN. § 5984.1(a).

3. Defendant's Rights

- The trial court must permit the defendant to observe and hear the testimony of the child victim or child material witness and to confer with his attorney.
- Provided, however, that the child victim or material witness cannot hear or see the defendant.

See 42 PA.CON.S.STAT.ANN. § 5984.1(a).

4. Determination by the Court

- The Commonwealth must establish that, if forced to testify in an open forum in the presence and full view of the finder of fact or in the defendant's presence, the child victim or child material witness
 - will suffer serious emotional distress
 - that would substantially impair the child victim's or child material witness's ability to reasonably communicate.
- This burden can be satisfied
 - By the court observing and questioning the child victim/witness either inside or outside the courtroom,
 - The attorneys for the defendant and the Commonwealth

have a right to be present,

or,

- through the testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting,
 - the defendant and the attorneys for the defendant and the Commonwealth have a right to be present.

See 42 PA.CON.S.STAT.ANN. § 5984.1(b)(1)&(2) and (c).

C. Videotape is Permissible Method

In *Commonwealth v. Geiger*, 944 A.2d 85, 93 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009), the Superior Court approved the trial court's decision to permit the child witness to testify via videotape.

7.7 EVIDENCE OF PROMPT COMPLAINT

A. Permissible in Prosecution's Case in Chief

Pennsylvania law has long stated that in sexual assault cases "the credibility of the complaining witness is *always* an issue." *Commonwealth v. Dillon*, 863 A.2d 597, 601-602 (Pa. Super. 2004)(emphasis in original), *aff'd*, 592 Pa. 351, 925 A.2d 131 (2007) (quoting *Commonwealth v. Bryson*, 860 A.2d 1101, 1104 (Pa. Super. 2004)(*en banc*), *appeal denied*, 583 Pa. 658, 875 A.2d 1072 (2005)).

Typically, a prior consistent statement of a complainant or witness is limited to rehabilitation attempts after the witness' credibility has been challenged, expressly or impliedly. *See* PA.R.E. 613(c). However, in a long line of cases, appellate courts have approved of the use of testimony or other evidence of a prompt complaint of a rape by an alleged victim in the prosecution's case-in-chief. The justification is that

in the special circumstances of a rape case the testimony of a woman that she was raped is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part. This justifies a special evidential rule permitting introduction of her fresh complaints in the prosecution's case in chief.

Commonwealth v. Freeman, 441 A.2d 1327, 1332 (Pa. Super. 1982). Evidence of a complaint of a sexual assault is "competent evidence, properly admitted when limited to establish that a complaint was made and also to identify the occurrence complained of with the offense charged." *Commonwealth v. Stohr*, 522 A.2d 589, 592-593 (1987) (*en banc*)(quoting *Commonwealth v. Freeman*, 441 A.2d at 1331).

The rationale expressed in *Freeman* and *Stohr* was specifically adopted by the Superior Court in *Commonwealth v. O'Drain*, 829 A.2d 316 (Pa. Super. 2002) and in *Commonwealth v. Bryson*, 860 A.2d 1101 (Pa. Super. 2004)(*en banc*), *appeal denied*, 583 Pa. 658, 875 A.2d 1072 (2005). However, both *O'Drain* and *Bryson* based their decisions, in part, on the prior version of Pennsylvania Rule of Evidence 613 as well as the prior comment:

[W]e agree with the Commonwealth in this instance that [the] hearsay testimony was admissible under Rule of Evidence 613(c), commonly known as the prompt complaint exception to the hearsay rule. Pennsylvania Rule of Evidence 613(c)(1) allows evidence of prior consistent statements to rebut an express or implied charge of “fabrication, bias, improper influence or motive, or faulty memory.” In cases involving sexual assault, Rule 613 authorizes the Commonwealth to present evidence in its case-in-chief of a prompt complaint by the victim “because [the] alleged victim’s testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.” Pr.R.Evid.613(c) (comment), citing *Commonwealth v. Freeman*, 295 Pa. Super. 467, 441 A.2d 1327, 1331 (1982). “Evidence of a complaint of a sexual assault is ‘competent evidence, properly admitted when limited to establish that a complaint was made and also to identify the occurrence complained of with the offense charged.’” *Commonwealth v. Stohr*, 361 Pa. Super. 293, 522 A.2d 589, 592-593 (1987) (*en banc*), quoting *Commonwealth v. Freeman*, 295 Pa. Super. 467, 441 A.2d 1327, 1331 (1982).

Commonwealth v. O'Drain, 829 A.2d at 321-322.

Generally, hearsay is inadmissible at trial unless it falls into one of the exceptions to the hearsay rule. *Commonwealth v. O'Drain*, 829 A.2d 316 (Pa. Super. 2002). We find the explanation of “prompt complaint” testimony given by our esteemed colleague, the Honorable Kate Ford Elliott, in *Commonwealth v. O'Drain*, 829 A.2d 316 (Pa. Super. 2002) to be instructive in this case. As will be discussed below, pursuant to the rationale posited in *O'Drain*, A.W.’s hearsay testimony in this case was admissible pursuant to Pennsylvania caselaw and Pennsylvania Rule of Evidence 613(c), commonly known as the prompt complaint exception to the hearsay rule. Pennsylvania Rule of Evidence 613(c)(1) allows evidence of prior consistent statements to rebut an express or implied charge of “fabrication, bias, improper influence or motive, or faulty memory.” *O'Drain, supra*. In cases involving sexual assault, Rule 613 authorizes the Commonwealth to

present evidence in its case-in-chief of a prompt complaint by the victim “because [the] alleged victim’s testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.” *Supra*, quoting Pa.R.Evid. 613(c) (comment), citing *Commonwealth v. Freeman*, 295 Pa.Super. 467, 441 A.2d 1327, 1331 (1982).

Commonwealth v. Bryson, 860 A.2d at 1103.

Pennsylvania Rule of Evidence 613(c), in addressing the admissibility a prior consistent statement in other circumstances, now provides:

Rule 613. Witness’s Prior Inconsistent Statement to Impeach; Witness’s Prior Consistent Statement to Rehabilitate

...

(c) Witness’s Prior Consistent Statement to Rehabilitate.

Evidence of a witness’s prior consistent statement is admissible to rehabilitate the witness’s credibility if the opposing party is given an opportunity to cross-examine the witness about the statement and the statement is offered to rebut an express or implied charge of:

(1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or

(2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness’s denial or explanation.

The official comment no longer refers to the prompt complaint exception in sexual assault cases. It does not appear that the change in the comment would alter the established case law permitting the admission of the prompt complaint by an exception to the hearsay rule. *See* 1 West’s Pennsylvania Practice § 613-5, *Prior Statements to Prove Prompt Complaint in Rape Cases*.

“The fact that a victim made a prompt complaint is no longer required to sustain a rape conviction.” ***Commonwealth v. Freeman***, 441 A.2d at 1331.⁹ However, the promptness of reporting a rape or sexual assault may be a *factor* to be considered by the jury in such cases pursuant to 18 PA.CON.S.TAT.ANN. § 3105. *See Commonwealth v. Lane*, 521 Pa. 390, 397, 555 A.2d 1246, 1250 (1989) (holding that the striking of a

⁹ Under Pennsylvania common law, the promptness of a complaint, or the “hue and cry” as it was referred to, was considered an element for a jury to consider when weighing the veracity of a complainant. *See, e.g. Commonwealth v. Allen*, 135 Pa. 483, 19 A. 957 (1890).

jury venire member for cause by the trial judge because of the member's willingness to consider a late filed complaint was improper). 18 PA.CON.S.TAT.ANN. § 3105 provides:

Chapter 31. Sexual Offenses
Subchapter A. General Provisions
§ 3105. Prompt complaint

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.¹⁰

The lack of a prompt complaint by the alleged victim of a sex crime, though not dispositive of the merits of the case, may justifiably produce doubt as to whether the offense occurred or whether it was a recent fabrication by the complaining witness. See *Commonwealth v. Jones*, 672 A.2d 1353, 1358 (Pa. Super. 1996). Therefore, the rationale for the prompt complaint exception is still valid despite the change in the official comment to P.R.E. 613(c).

1. Evidence to Explain Lack of Prompt Complaint

Evidence of the lack of prompt complaint, i.e., the lack of "hue and cry" has been recognized as an important and relevant factor for jurors to consider in sexual assault cases, and is admissible in the Commonwealth's case in chief to avoid the doubt which occurs by an untimely complaint. See *Commonwealth v. Dillon*, 592 Pa. 351, 925 A.2d 131 (2007).

In *Commonwealth v. Dillon*, the trial court committed error when it refused to let the Commonwealth show, in its case-in-chief, that the defendant had long sexually assaulted members of the complainant's family in order to show the reason why the victim had not made a prompt complaint. The testimony of the Defendant's abuse of the complainant's mother was relevant to show the reason for the delay in reporting the abuse, as well as to support the complainant's testimony that she feared Defendant and believed he would carry out the threats he made against her and her mother. 592 Pa. at 363, 925 A.2d at 139. See also, *Commonwealth v. Page*, 965 A.2d 1212, 1220 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 74 A.3d 125 (2013). The Court in *Dillon* stated:

[W]e believe the trial court clearly abused its discretion in determining that, to the extent the evidence of appellant's physical assaults against L.P.'s family were proffered to explain the delay in her making a complaint, they were inadmissible

¹⁰ 18 PA.CON.S.TAT.ANN. § 3105.

except in rebuttal. Such evidence is directly relevant to explain a legitimate credibility question necessarily raised by the facts of the case—to wit, why L.P. waited to report the abuse—and, therefore, counteract the possibility that a juror would develop “untutored assumptions” and rely upon them in rendering a verdict. Admittedly, consigning the instant evidence to rebuttal, as the trial court did, is not the appropriate solution in a case where a child-victim waited years to report abuse after it occurred, for the defense may not trigger its admission as rebuttal and, thereby, block the Commonwealth from addressing the jurors’ likely negative inference arising from the particularly long reporting delay in this case.

592 Pa. at 366, 925 A.2d at 140-141 (citation omitted).

B. Prompt Complaint Testimony Disallowed

Prompt complaint testimony has been disallowed when it exceeded its permissible limits. *Commonwealth v. Freeman*, 441 A.2d 1327, 1331-1332 (Pa. Super. 1982). Evidence of a prompt complaint of a sexual assault should be limited to establishing that a complaint was actually made and to identify that the “occurrence complained of with the offense charged.” *Commonwealth v. Bryson*, 860 A.2d 1101, 1104 (Pa. Super. 2004) (*en banc*), *appeal denied*, 583 Pa. 658, 875 A.2d 1072 (2005).

- *Commonwealth v. Green*, 487 Pa. 322, 325–326, 409 A.2d 371, 373 (1979): all encompassing statement by detective inadmissible since it goes beyond identifying complaint and its nature.
- *Commonwealth v. Pettiford*, 402 A.2d 532, 533 (Pa. Super. 1979): court erred in admitting, as proof of “prompt complaint,” testimony of three witnesses, one of whom recounted the victim’s rape in great detail, in that it went beyond what was necessary to identify occurrence of the crime.

C. Prompt Complaint Instruction

Just as caselaw recognizes that a victim of a sexual assault would be inclined to make a prompt complaint, a prompt complaint instruction will most likely be requested by the defense in the absence of evidence of a prompt complaint. The premise for the prompt complaint instruction is that a victim of a sexual assault would reveal at the first available opportunity that an assault occurred. *See Commonwealth v. Sandusky*, 77 A.3d 663, 667 (Pa. Super. 2013). The instruction permits a jury to call into question a complainant’s credibility when he or she did not complain at the first available opportunity. *See Commonwealth v. Prince*, 719 A.2d 1086, 1091 (Pa. Super. 1998).

“The propriety of a prompt complaint instruction is determined on a case-by-case

basis pursuant to a subjective standard based upon the age and condition of the victim.” *Commonwealth v. Thomas*, 904 A.2d 964, 970 (Pa. Super. 2006) (prompt reporting does not require a “revelation” to the first person one sees after an attack).

For example, this instruction is typically refused when the victim is a minor who, because of immaturity, did not understand the nature of the assault: “[w]here an assault is of such a nature that the minor victim may not have appreciated the offensive nature of the conduct, the lack of a prompt complaint would not necessarily justify an inference of fabrication.” *Commonwealth v. Jones*, 672 A.2d 1353, 1357 n. 2 (Pa. Super. 1996).

Another example is if the victim suffers from a mental disability or diminished capacity, a prompt complaint instruction may not be appropriate. *Commonwealth v. Thomas*, 904 A.2d at 971; *Commonwealth v. Bryson*, 860 A.2d 1101, 1104-1105 (Pa. Super. 2004)(*en banc*), *appeal denied*, 583 Pa. 658, 875 A.2d 1072 (2005).

Pennsylvania Standard Criminal Jury Instruction 4.13A provides:

4.13A (Crim) Failure to Make Prompt Complaint in Certain Sexual Offenses

1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without *[name of victim]*'s consent.
2. The evidence of *[name of victim]*'s [failure to complain] [delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the [failure to complain] [delay in making a complaint] should be considered in evaluating [his] [her] testimony and in deciding whether the act occurred [at all] [with or without [his] [her] consent],
3. You must not consider *[name of victim]*'s [failure to make] [delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his] [her] consent, *[name of victim]*'s failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of [his] [her] testimony and must be considered by you in light of all the evidence in the case.

The Advisory Committee Note following the instruction offers this guidance:

The instruction is not appropriate where a child or a person otherwise incapable, by mental infirmity, of promptly reporting

the incident is the alleged victim. *Commonwealth v. Snoke*, 580 A.2d 195 (Pa. 1990). See, generally, *Commonwealth v. Bryson*, 860 A.2d 1101 (Pa.Super. 2004). As the court said in *Commonwealth v. Thomas*, 904 A.2d 964, 970-71, (Pa.Super. 2006):

The propriety of a prompt complaint instruction is determined on a case-by-case basis pursuant to a subjective standard based upon the age and condition of the victim. For example, where the victim of a sexual assault is a minor who “may not have appreciated the offensive nature of the conduct, the lack of a prompt complaint would not necessarily justify an inference of fabrication.” *Commonwealth v. Jones*, 449 Pa. Super. 58, 66 n.2, 672 A.2d 1353, 1357 n.2 (1996). This is especially true where the perpetrator is one with authority or custodial control over the victim. *Commonwealth v. Ables*, 404 Pa. Super. 169, 183, 590 A.2d 334, 340 (1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150 (1991). Similarly, if the victim suffers from a mental disability or diminished capacity, a prompt complaint instruction may not be appropriate. *Commonwealth v. Bryson*, 2004 PA Super 405, 860 A.2d 1101 (Pa.Super. 2004).

Where an instruction is warranted, this language was approved in *Commonwealth v. Patosky*, 656 A.2d 499, 506 (Pa.Super. 1995), and *Commonwealth v. Trippett*, 932 A.2d 188, 200 (Pa.Super. 2007).

Of course, there is no right to have any particular form of instruction given by the trial judge. *Commonwealth v. Dozier*, 439 A.2d 1185, 1188 (Pa. Super. 1982). It is sufficient if the charge clearly and accurately explains the relevant law. *Commonwealth v. Grove*, 526 A.2d 369, 342 (Pa. Super. 1987), *appeal denied*, 517 Pa. 630, 539 A.2d 810 (1987). As always, a charge must be viewed as a whole in order for the appellate courts to assess if it “fairly guided the jury.” *Commonwealth v. Rodriguez*, 495 A.2d 569, 573 (Pa. Super. 1985).

7.8 RESISTANCE NOT REQUIRED

To prove that a defendant is guilty of a sexual offense, a prosecutor does not have to show that the victim resisted the actions of the defendant.¹¹

➤ *Commonwealth v. Andrulowicz*, 911 A.2d 162, 165 (Pa. Super.

¹¹ *Commonwealth v. Smith*, 863 A.2d 1172, 1176 (Pa. Super. 2004) (with reference to *Sexual Assault, a felony of the second degree under 18 P.A. CONS. STAT. ANN. § 3124.1*, “[r]esistance to sexual assault is not required to sustain a conviction.”).

2006), *appeal denied*, 592 Pa. 778, 926 A.2d 972 (2007): “resistance to the sexual assault [under 18 PA.CON.S.STAT.ANN. § 3124.1] is not required.”

- ***Commonwealth v. Rhodes***, 510 Pa. 537, 510 A.2d 1217 (1986): in case involving Rape charge under 18 PA.CON.S.STAT.ANN § 31121(a)(1)&(2), “[i]t is not necessary to prove that the victim actually resisted in order to prove that the act of sexual intercourse was against the victim’s will and/or without consent.” *Id.* at 557 n. 14, 510 A.2d at 1227 n. 14.

In 1976, Pennsylvania enacted a statute stating that a sexual assault victim’s lack of resistance may be admissible but is not dispositive. 18 PA.CON.S.STAT.ANN. § 3107 provides:

Chapter 31. Sexual Offenses
Subchapter A. General Provisions
§ 3107. Resistance not required

The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.¹²

The statutory codification of the “resistance not required” policy reflects the belief that there are legitimate reasons for a victim’s nonresistance, for example, if such resistance is reasonably believed to be futile or dangerous:

It is well settled that where

a victim is threatened with physical abuse if she [or he] refuses to engage in intercourse with the assailant even to the point where the victim considers it pointless to resist, we have held that such conduct demonstrates the use of force and threat of force sufficiently compelling to meet the statutory threshold of forcible compulsion.

Commonwealth v. Lee, 638 A.2d 1006, 1008 (Pa. Super. 1994), *appeal denied*, 538 Pa. 643, 647 A.2d 898 (1994)(quoting ***Commonwealth v. Gabrielson***, 536 A.2d 401, 407 (Pa. Super. 1988), *appeal denied*, 518 Pa. 636, 542 A.2d 1365 (1988).

However, while the victim of a sexual assault need not resist, in prosecutions for Rape under 18 PA.CON.S.STAT.ANN. § 3121, the prosecution must prove the element of forcible compulsion, i.e., the force needs to be such as to demonstrate an absence of consent, including submission without further resistance. ***Commonwealth v. Berkowitz***,

¹² 18 PA.CON.S.STAT.ANN. § 3107.

537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994); *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).¹³

7.9 EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

A. Prohibition Against Use of Prior Bad Acts/Criminal Activity

The basic principle of PA.R.E. 404(b) is consistent with F.R.E. 404(b) and prior Pennsylvania case law. This means that evidence of other crimes, wrongs or bad acts cannot be used to prove a person's character to prove conduct on a specific date:

Rule 404. Character Evidence; Crimes or Other Acts

...

(b) Crimes, Wrongs or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) *Notice in a Criminal Case.* In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.

PA.R.E. 404(b).

This prohibition is well established. See *Commonwealth v. Watkins*, 577 Pa. 194, 215, 843 A.2d 1203, 1215 (2003), *cert. denied*, 543 U.S. 960, 125 S.Ct. 450, 160 L.Ed.2d 324 (2004) ("Evidence of a defendant's prior criminal activity may not be admitted solely to establish his bad character or criminal propensity."); *Commonwealth v. Luster*,

¹³ It is well accepted that 18 PA.CON.S.STAT. ANN. § 3124.1, Sexual Assault, was enacted in response to the Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994). "The statute is intended to fill the loophole left by the rape and involuntary deviate sexual intercourse statutes by criminalizing non-consensual sex where the perpetrator employs little if no force." *Commonwealth v. Pasley*, 743 A.2d 521, 524 n.3 (Pa. Super. 1999), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000).

71 A.3d 1029, 1050 (Pa. Super. 2013)(*en banc*)("It is axiomatic that evidence of prior crimes [or bad acts] is not admissible for the sole purpose of demonstrating a criminal defendant's propensity to commit crimes.").

B. Admissibility of Evidence Under PA.R.E., Rule 404(b)(2)

It is well established that

[e]vidence implying other crimes may be introduced when the evidence has a proper evidentiary purpose and is not used merely to demonstrate that the defendant is a person of bad character with a propensity to commit crime.

Commonwealth v. Howard, 749 A.2d 941, 952 (Pa. Super. 2000), (quoting *Commonwealth v. Gwynn*, 555 Pa. 86, 105, 723 A.2d 143, 152, *cert. denied*, 528 U.S. 969, 120 S.Ct. 410, 145 L.Ed.2d 320 (1999)).

Subsection (b)(2) of PA.R.E. 404 recognizes legitimate evidentiary purposes for the introduction of evidence of other crimes, wrongs or bad acts.

Rule 404. Character Evidence; Crimes or Other Acts

...

(b) Crimes, Wrongs or Other Acts.

...

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Rule 404(b)(2) specifically states that evidence of *crimes, wrongs, or other acts* may be admitted for other purposes, such as proof of:

- motive,
- opportunity,
- intent,
- preparation,
- plan,
- knowledge,
- identity,
- absence of mistake or
- lack of accident.

This list is non-exclusive. See *Commonwealth v. Reese*, 31 A.3d 708, 723 (Pa. Super. 2011) (*en banc*). Caselaw has established other legitimate purposes for this type of evidence, including the admission of distinct crimes where they are part of the history or natural development of the case (the *res gestae* exception), and for impeachment purposes.

Prior to the codification of the Pennsylvania Rules of Evidence, the Pennsylvania Supreme Court set forth the following list of exceptions:

(1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one naturally tends to prove the others; (5) to establish the identity of the person charged with the commission of the crime on trial where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other; (6) to impeach the credibility of a defendant who testifies in his trial; (7) situations where defendant's prior criminal history had been used by him to threaten or intimidate the victim; (8) situations where the distinct crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development (sometimes called "res gestae" exception).

Commonwealth v. Billa, 521 Pa. 168, 177, 555 A.2d 835, 840 (1989).

1. Natural History of the Case or Natural Development of the Facts

Evidence of other crimes may be admitted where such evidence is part of the history and natural development of the events and offenses for which the defendant is charged. In *Commonwealth v. Sherwood*, 603 Pa. 92, 982 A.2d 483 (2009), *cert. denied*, 559 U.S. 1111, 130 S.Ct. 2415, 176 L.Ed.2d 932 (2010), the Pennsylvania Supreme Court upheld the introduction of evidence, based on the *res gestae* exception, that the defendant repeatedly abused the victim, a small child, before beating her to death. The Court concluded that the evidence was relevant "to help establish the chain of events and pattern of abuse that eventually led to the fatal beating." 603 Pa. at 114, 982 A.2d at 497. However, in determining whether evidence of other prior bad acts are admissible, the trial court is obliged to balance the probative value of such evidence against its prejudicial impact. *Id.*

- *Commonwealth v. Spotz*, 552 Pa. 499, 513, 716 A.2d 580, 586 (1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 551 (1999) (**Spotz I**): The Supreme Court of Pennsylvania recognized that evidence of prior bad acts or crimes may be admitted where such evidence was part of the chain or sequence of events which became part of the history of the case in question and formed part of the natural development of

the facts.

- ***Commonwealth v. Lark***, 518 Pa. 290, 303, 543 A.2d 491, 497 (1988): “[E]vidence of another crime may also be introduced where such evidence was part of the chain or sequence of events which became part of the history of the case in question and formed part of the natural development of the facts.”
- ***Commonwealth v. Drumheller***, 570 Pa. 117, 808 A.2d 893 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003): Evidence of prior abuse over three years prior to murder was admissible where abuse was part of a chain or sequence of events which formed the history of the case and demonstrated defendant’s motive, malice, intent and ill-will toward victim.

2. Impeachment Evidence

(a) Impeachment of Testifying Defendant

Evidence of other crimes, wrongs or acts may be used to impeach the testimony of a testifying defendant.

Evidence of prior bad acts committed by a defendant is not admissible solely to show the defendant’s bad character or his propensity for committing bad acts. . . . The evidence may also be admissible to impeach the credibility of a testifying defendant; to show that the defendant has used the prior bad acts to threaten the victim; and in situations where the bad acts were part of a chain or sequence of events that formed the history of the case and were part of its natural development.

Commonwealth v. Reid, 571 Pa. 1, 35, 811 A.2d 530, 550 (2002), *cert. denied*, 540 U.S. 850, 124 S.Ct. 131, 157 L.Ed.2d 92 (2003). Furthermore,

[e]vidence implying other crimes may be introduced when the evidence has a proper evidentiary purpose and is not used merely to demonstrate that the defendant is a person of bad character with a propensity to commit crime. ***Commonwealth v. Gwynn***, 555 Pa. 86, 105, 723 A.2d 143, 152 (1998), *cert. denied*, 528 U.S. 969, 120 S.Ct. 410, 145 L.Ed.2d 320 (1999). It is black letter law that the Commonwealth may impeach a defendant’s credibility with reference to prior crimes where the defense opens the door. ***Commonwealth v. Days***, 784 A.2d 817, 821 (Pa.

Super. 2001). “[The defendant] is not insulated from being discredited about the factual accuracy simply because that proof involves other crimes.” *Id.*

Commonwealth v. Hood, 875 A.2d 175, 185 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005).

(b) Impeachment of Testifying Character Witness

The Pennsylvania Supreme Court noted in ***Commonwealth v. Peterkin***, 513 A.2d 373, 382-383 (Pa. 1986), *cert. denied*, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987), that “although evidence of good character may not be rebutted by evidence of specific acts of misconduct, a character witness may be cross-examined regarding his knowledge of particular acts of misconduct by the defendant to test the accuracy of his testimony and the standard by which he measures reputation.”¹⁴

- ***Commonwealth v. Hoover***, 16 A.3d 1148, 1149-1150 (Pa. Super. 2011): Although the Commonwealth may cross-examine character witnesses about specific instances of conduct that are probative of those traits in question the Commonwealth may not question the witnesses about allegations of other criminal misconduct by the accused where those allegations did not result in a conviction.
- ***Commonwealth v. Puksar***, 597 Pa. 240, 263, 951 A.2d 267, 281, (2008): “[A] character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct to test the accuracy of the testimony.”

In ***Commonwealth v. Hood***, 872 A.2d 175, 185 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), the trial court permitted evidence of the defendant’s incarceration as it was not offered to show bad character of defendant, but rather, to impeach testimony of defendant’s girlfriend, who was defense alibi witness; the Commonwealth could impeach her credibility by asking witness if she ever visited defendant in prison during the time periods relevant to the commission of the crime as charged. Although the witness was not a character witness, the cross-examination using the defendant’s prior other crimes was admissible because the defense “opened the door.” *Id.*

3. Introduction of Prior Bad Acts that are Used to Threaten the Victim

Evidence of other crimes, wrongs or acts may be introduced when the defendant has used the prior bad acts to threaten the victim. ***Commonwealth v. Reid***, 571 Pa. 1, 35, 811 A.2d 530, 550 (2002), *cert. denied*, 540 U.S. 850, 124 S.Ct. 131, 157 L.Ed.2d 92 (2003).

¹⁴ See also, ***Commonwealth v. Busanet***, 572 Pa. 535, 551, 817 A.2d 1060, 1069 (2002), *cert. denied*, 540 U.S. 869, 124 S.Ct. 192, 157 L.Ed.2d 126 (2003).

- In *Commonwealth v. Richter*, 551 Pa. 507, 711 A.2d 464 (1998), the Pennsylvania Supreme Court held that the trial court properly admitted evidence of the defendant's prior sexual assaults on the victim as evidence that the victim did not consent to rape and to prove forcible compulsion or threat of forcible compulsion. 551 Pa. at 512-513, 711 A.2d at 466-467.
- In *Commonwealth v. Claypool*, 508 Pa. 198, 205, 495 A.2d 176, 179 (1985), the Pennsylvania Supreme Court held that the trial court properly admitted evidence of the defendant's statement to the rape victim that he had committed prior rapes because it was relevant to prove his attempts to threaten and intimidate her into submission.
- In *Commonwealth v. Corley*, 638 A.2d 985, 987-988, (Pa. Super. 1994), *appeal denied*, 538 Pa. 641, 647 A.2d 896 (1994): in prosecution for rape and involuntary deviate sexual intercourse, among other charges, the defendant's statement to rape victim that he had "done this twice before" was properly admitted to show threat or force in rape of victim.

4. Common Scheme, Plan or Design

Evidence of prior bad acts or criminal conduct may be admitted to show a common pattern, to establish a scheme, plan or design.

- *Commonwealth v. Elliott*, 549 Pa. 132, 146-147, 700 A.2d 1243, 1249-1250 (1997), *cert. denied*, 524 U.S. 955, 118 S.Ct. 2375, 141 L.Ed.2d 742 (1998): In prosecution for murder, rape and involuntary deviate sexual intercourse, because trial court gave several cautionary instructions to the jury indicating that evidence of defendant's prior sexual attacks on three different victims could not be used to infer bad character or criminal tendencies and repeated this cautionary charge in the final instructions, no prejudice was found from use of this evidence to establish common scheme, plan or design.
- There were sufficient factual similarities between two crimes involving the sexual assault of young boys to show a common scheme plan or design in *Commonwealth v. O'Brien*, 836 A.2d 966, 970-971 (Pa. Super. 2003), *appeal denied*, 577 Pa. 695, 845 A.2d 817 (2004). Therefore, the evidence of a defendant's prior sexual assaults of children was admissible in prosecution of defendant for currently alleged sexual assault of a minor.
- *Commonwealth v. Robinson*, --- Pa. ---, 864 A.2d 460, 481 (2004), *cert. denied*, 546 U.S. 983, 126 S.Ct. 559, 163 L.Ed.2d 470 (2005): Evidence of brutal attacks and rapes of women within same locale during eleven months' time frame permitted consolidation of cases, especially in light of

“real relationship” in the way victims were killed.

5. Knowledge, Identity or Absence of Mistake or Accident

(a) Identity

The Pennsylvania appellate courts have stated that evidence, by way of prior bad acts or crimes, is admissible to prove the identity of the person charged with the commission of the crime on trial. *Commonwealth v. O'Brien*, 836 A.2d 966, 969 (Pa. Super. 2003), *appeal denied*, 577 Pa. 695, 845 A.2d 817 (2004).

Identity as to the charged crime may be proven with evidence of another crime where the separate crimes share a method so distinctive and circumstances so nearly identical as to constitute the virtual signature of the defendant. Required, therefore, “is such a high correlation in the details of the crimes that proof that a person committed one of them makes it very unlikely that anyone else committed the others.”

In comparing the methods and circumstances of separate crimes, a court must necessarily look for similarities in a number of factors, including: (1) the manner in which the crimes were committed; (2) weapons used; (3) ostensible purpose of the crime; (4) location; and (5) type of victims. Remoteness in time between the crimes is also factored, although its probative value has been held inversely proportional to the degree of similarity between crimes.

Commonwealth v. Weakley, 972 A.2d 1182, 1189 (Pa. Super. 2009), *appeal denied*, 604 Pa. 696, 986 A.2d 150 (2009)(citations omitted).

In *Commonwealth v. Ross*, 57 A.3d 85 (Pa. Super. 2012)(*en banc*), *appeal denied*, --- Pa. ---, 72 A.3d 603 (2013), in a five-to-four decision, the Superior Court reversed the trial court’s admission of testimony by the defendant’s former romantic partners about occurrences of abuse and domestic violence, and held that it was not appropriate *identity* evidence. The Superior Court held that the testimony of the prior assaults on the former girlfriends did not establish “any particular distinctive pattern of behavior” by the defendant.” 57 A.3d at 102.

(b) Absence of Mistake or Accident

Evidence of a prior act is admissible to prove a lack of accident if (1) the previous incident is similar to the incident in question and (2) a similar result occurred in both cases. *Commonwealth v. Donahue*, 519 Pa. 532, 543, 549 A.2d 121, 127 (1988). One factor to be weighed when considering the similarities of incidents is the proximity of time of the incidents at issue. *Id.*

In *Commonwealth v. Boczkowski*, 577 Pa. 421, 444-445, 846 A.2d 75, 88-89 (2004), the Court found remarkable similarities between the manner in which both of the defendant's wives were killed; therefore, evidence concerning the circumstances of his first wife's death supported a reasonable inference that his second wife's death was not accidental, but rather was a result of a deliberate act. Therefore, the Court found that the evidence was highly relevant and that its probative value outweighed any potential for unfair prejudice.

6. Motive

A defendant's motive in committing one crime may be to conceal, or to prevent his conviction of, a previous crime. See *Commonwealth v. Paddy*, 569 Pa. 47, 69, 800 A.2d 294, 307 (2002). As with the other exceptions, proof of motive must be properly weighed against potential prejudice. In *Commonwealth v. Collins*, 70 A.3d 1245, 1252 (Pa. Super. 2013), the identity of the victims as members of a rival drug distribution organization was permissible evidence of motive in a murder case.

Evidence that criminal charges were previously filed against the defendant but were later withdrawn, and now the defendant faced murder charges against the same victim, was admissible to establish a motive for the killing. *Commonwealth v. Reid*, 571 Pa. 1, 37, 811 A.2d 530, 551 (2002), *cert. denied*, 540 U.S. 850, 124 S.Ct. 131, 157 L.Ed.2d 92 (2003).

7. Prior Bad Acts That Are Not Convictions

Evidence of prior bad acts is not limited to evidence of crimes that have been proven beyond a reasonable doubt. It also encompasses both prior crimes and prior wrongs and acts, the latter by which, by their nature, often lack definitive proof. *Commonwealth v. Ardinger*, 839 A.2d 1143 (Pa. Super. 2003). The Superior Court stated:

However, "Pa.R.Evid. 404(b) is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court. It encompasses both prior crimes and prior wrongs and acts, the latter of which, by their nature, often lack 'definitive proof.'"

While we do not find it error for the court to note that the evidence sought to be admitted did not concern a conviction, rather an allegation, this fact alone is not determinative in a prejudice analysis.

Ardinger, 839 A.2d at 1145.

8. In Rebuttal to Dispel False Inferences

Evidence of prior bad acts is admissible in rebuttal to dispel false testimony or inferences raised by the defendant or the defendant's witnesses. See *Commonwealth v. Reid*, 571 Pa. 1, 35, 811 A.2d 530, 550 (2002), *cert. denied*, 540 U.S. 850, 124 S.Ct. 131, 157 L.Ed.2d 92 (2003).

- *Commonwealth v. Nypaver*, 69 A.3d 708, 716 (Pa. Super. 2013): "A litigant opens the door to inadmissible evidence by presenting proof that creates a false impression refuted by the otherwise prohibited evidence."

The fact that the false inferences may have arisen through testimony on cross-examination does not alter the analysis. See *Commonwealth v. Smith*, 490 Pa. 380, 390, 416 A.2d 986, 990-001 (1980); *Commonwealth v. Hickman*, 453 Pa. 427, 432, 309 A.2d 564, 567 (1973). Appellant plainly "opened the door" to the rebuttal evidence with his answer on cross-examination that he never exhibited his x-rated video tapes to any of his grandchildren.

C. Prerequisite for Use - Reasonable Notice

Typically, the prosecution must provide reasonable notice in advance of trial of its intent to introduce evidence of crimes, wrongs or other acts. PA.R.E. 404(b)(3). The notice may be provided during trial if court excuses pretrial notice upon good cause shown.

Rule 404. Character Evidence; Crimes or Other Acts

...

(b) Crimes, Wrongs or Other Acts.

...

(3) *Notice in a Criminal Case.* In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.¹⁵

¹⁵ PA.R.E. 404.

The requirement that the Commonwealth provide advance reasonable notice is not dependent upon a request by the defendant. PA.R.E. 404, *comment*.

1. No Requirement that notice be in writing

In *Commonwealth v. Mawhinney*, 915 A.2d 107 (Pa. Super. 2006), *appeal denied*, 594 Pa. 677, 932 A.2d 1287 (2007), the defendant was convicted of involuntary deviate sexual intercourse, sexual assault, and other related crimes; the victim was his minor son. At trial, the Commonwealth sought to introduce evidence of his past sexual conduct with his son. Defense counsel objected on the grounds of lack of reasonable notice. In ruling that there is no requirement in PA.R.E. 404 that the notice be in writing, the Superior Court looked at the record and concluded that reasonable notice had been provided to the defense: the parties had discussed the prior sexual conduct at the pre-trial conferences, and there was no claim by defense counsel of unfair surprise. 915 A.2d at 110.

In *Commonwealth v. Lynch*, 57 A.3d 120 (Pa. Super. 2012), *appeal denied*, 63 A.3d 1245 (Pa. 2013), the trial court and the Superior Court found adequate reasonable notice when the Commonwealth had provided the defense with discovery which contained evidence of the prior bad acts. *Id.* at 126. Therefore, no additional notice pursuant to PA.R.E. 404(b)(3) was necessary.

2. Defense must show prejudice

The Pennsylvania Supreme Court in *Commonwealth v. Stallworth*, 566 Pa. 349, 365 n.2, 781 A.2d 110, 118 n. 2 (2001), and the Superior Court in *Commonwealth v. Mawhinney*, 915 A.2d 107, 110 (Pa. Super. 2006), *appeal denied*, 594 Pa. 677, 932 A.2d 1287 (2007), made a point in specifying that the defense made no showing or argument that the defense was prejudiced by the Commonwealth's failure to strictly comply with the notice requirement of PA.R.E. 404(b)(3).

D. Prerequisite for Use – Probative Value

Under Pennsylvania law, evidence of prior crimes, wrongs or other bad acts offered for a legitimate evidentiary purpose is admissible only if its probative value outweighs the potential for prejudice. *See Commonwealth v. Baez*, 554 Pa. 66, 88, 720 A.2d 711, 721 (1998), *cert. denied*, 528 U.S. 827, 120 S.Ct. 78, 145 L.Ed. 66 (1999).¹⁶ PA.R.E. 404(b)(2) provides, in pertinent part:

Rule 404. Character Evidence; Crimes or Other Acts

...

¹⁶ Of course, Pa.R.E. 403 gives the trial court discretion to exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following events: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

(b) Crimes, Wrongs or Other Acts.

...

(2) *Permitted Uses*. This evidence may be admissible for another purpose . . . only if the probative value of the evidence outweighs its potential for unfair prejudice.¹⁷

When evaluating whether evidence of prior acts is so prejudicial that it should be excluded, the court must consider the following factors as set forth by the Pennsylvania Supreme Court in *Commonwealth v. Dillon*, 592 Pa. 351, 925 A.2d 131 (2007):

Evidence will not be prohibited merely because it is harmful to the defendant. This court has stated that it is not “required to sanitize the trial to eliminate all unpleasant facts from the jury’s consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged.” [*Commonwealth v. Lark*, 518 Pa. 290, 310, 543 A.2d 491, 501 (1988)]. Moreover, we have upheld the admission of other crimes evidence, when relevant, even where the details of the other crime were extremely grotesque and highly prejudicial. See *Commonwealth v. Billa*, 521 Pa. 168, 555 A.2d 835, 841 (1989) (upholding the trial court’s admission of evidence that the defendant had committed a prior rape, including testimony from the prior rape victim); *Commonwealth v. Gordon*, 543 Pa. 513, 673 A.2d 866, 870 (1996) (allowing evidence of defendant’s previous sexual assaults).

592 Pa. at 367, 925 A.2d at 141. In conducting this balancing test,

courts must consider factors such as the strength of the “other crimes” evidence, the similarities between the crimes, the time lapse between crimes, the need for the other crimes evidence, the efficacy of alternative proof of the charged crime, and “the degree to which the evidence probably will rouse the jury to overmastering hostility.” McCormick, Evidence § 190 at 811 (4th ed. 1992). See also, *Commonwealth v. Frank*, 395 Pa. Super. 412, 577 A.2d 609 (1990) (enumerating balancing test factors, including ability for limiting instruction to reduce prejudice).

Commonwealth v. Brown, 52 A.3d 320, 326-327 (Pa. Super. 2012), *appeal denied*, 62 A.3d 377 (Pa. 2013).¹⁸

¹⁷ Pa.R.E. 404(b)(2).

¹⁸ Pa.R.E. 404(b)(3). See, *Commonwealth v. Santiago*, 822 A.2d 716, 728 (Pa. Super. 2003), *appeal denied*, 577 Pa. 679, 843 A.2d 1237(2004), *cert. denied*, 124 S.Ct. 2916, 159 L.Ed.2d 820 (2004) (the prejudicial impact of the jury learning that the defendant had been on parole outweighed the probative value – it would have led the jury to conclude that he had a prior serious record).

- ***Commonwealth v. O'Brien***, 836 A.2d 966, 972 (Pa. Super. 2003), ***appeal denied***, 577 Pa. 695, 845 A.2d 817 (2004): the Superior Court found the probative value of the evidence of the defendant's prior sexual assaults of children outweighed its prejudicial effect because it tended to show common scheme, plan or design exception to the general rule, in that all of the charges stemmed from defendant's sexually assaulting young boys and all of the victims shared similar personal characteristics, and the crimes were not too remote in time.

1. The Remoteness Test

Remoteness is a factor in the determination of the probative value of prior bad acts or criminal conduct of the defendant under the common scheme, plan, or design theory. ***Commonwealth v. Strong***, 825 A.2d 658, 667 (Pa. Super. 2003), ***appeal denied***, 577 Pa. 702, 847 A.2d 59 (2003), ***cert. denied***, 544 U.S. 927, 125 S.Ct. 1652, 161 L.Ed.2d 489 (2005).

- ***Commonwealth v. Hughes***, 521 Pa. 423, 555 A.2d 1264, 1283 (1989): holding that prior rape evidence properly admitted at trial for subsequent rape and murder occurring ten months later where crimes were similar in geographic location, time, method of attack, and characteristics of victims.
- ***Commonwealth v. Luktisch***, 680 A.2d 877, 878-879 (Pa. Super. 1996): in prosecution for rape of defendant's stepdaughter, evidence of uncharged similar acts against defendant's natural daughter was admissible as proof of common scheme or plan; the six-year gap between uncharged acts and current charge did not prohibit evidence.
- ***Commonwealth v. Smith***, 635 A.2d 1086, 1089 (Pa. Super. 1993): in prosecution for rape against defendant's two youngest daughters, testimony of defendant's sexual assaults of oldest daughter, ten to twenty years ago, supported exception for common plan. "[T]he issue of remoteness under the common plan exception is determined by analyzing the time involved between each of the criminal incidents."
- ***Commonwealth v. Frank***, 577 A.2d 609, 614 (Pa. Super. 1990), ***appeal denied***, 526 Pa. 629, 584 A.2d 312 (1990): In case of rape and related charges: "If the evidence reveals that the details of each criminal incident are nearly identical, the fact that the incidents are separated by a lapse of time will not likely prevent the offer of evidence unless the time is excessive."
- ***Commonwealth v. Drumheller***, 570 Pa. 117, 808 A.2d 893 (2002), ***cert. denied***, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003): There is no time limitation on when such evidence becomes inadmissible and the

trial court's discretion has been upheld where abuse occurred thirty-four months prior to murder.

E. Prerequisite for Use – Cautionary Instruction

An appropriate cautionary instruction should be given whenever evidence of a defendant's prior criminal activity is admitted for one of the legitimate purposes under P.A.R.E. 404(b). The instruction should be given at the time the evidence is admitted and repeated in the final charge to the jury.

- In *Commonwealth v. Claypool*, 508 Pa. 198, 205, 495 A.2d 176, 179 (1985), the Pennsylvania Supreme Court held that the trial court properly admitted evidence, with a cautionary instruction, of the defendant's statements to victim that he had committed prior rapes because it was relevant to his attempts to scare her into submission.
- A cautionary instruction by the trial court lessens a claim of prejudice. *Commonwealth v. Watkins*, 577 Pa. 194, 215-216, 843 A.2d 1203, 1215-1216 (2003), *cert. denied*, 543 U.S. 960, 125 S.Ct. 450, 160 L.Ed.2d 324 (2004).
- *Commonwealth v. Spatz*, 562 Pa. 498, 524-525, 756 A.2d 1139, 1153 (2000) (*Spatz II*), *cert. denied*, 532 U.S. 932, 121 S.Ct. 1381, 149 L.Ed.2d 307 (2001): No prejudice shown when trial court clearly instructed jury that it could only consider other crimes evidence for relevant limited purposes and not merely as evidence of appellant's propensity to commit crimes.

7.10 SELECTED HEARSAY RULES AND EXCEPTIONS

A. Hearsay Generally Not Admissible

Hearsay is not admissible except

- 1 - as provided in the Pennsylvania Rules of Evidence,
- 2 - by other rules prescribed by the Pennsylvania Supreme Court, or
- 3 - by statute.

Pennsylvania Rule of Evidence 802 provides:

Rule 802. The Rule Against Hearsay

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court,

or by statute.¹⁹

PA.R.E. 801 provides the following definitions:

Rule 801. Definitions That Apply to This Article

(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means a statement that

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.²⁰

When hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections:

- 1) admission of the evidence would violate the hearsay rule;
- 2) admission of the evidence would violate defendant’s right to confront the witnesses against him under the Sixth Amendment to the United States Constitution;²¹ and
- 3) admission of the evidence would violate defendant’s right of confrontation under Article I, Section 9 of the Pennsylvania Constitution.²²

Pennsylvania appellate courts have often defined hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” *Commonwealth v. May*, 584 Pa. 640, 667, 887 A.2d 750, 766 (2005), *cert. denied*, 549 U.S. 832, 127 S.Ct. 58, 166 L.Ed.2d 54 (2006)(Defendant convicted of murder and involuntary deviate sexual intercourse; defendant’s apology to victim’s daughters held to be hearsay).

Note that “hearsay included within hearsay is not excluded under the hearsay

¹⁹ PA.R.E. 802.

²⁰ PA.R.E. 801.

²¹ The Sixth Amendment to the United States Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him”

²² PA. Const. Art. I § 9 provides, in pertinent part: “In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him”

rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” PA.R.E. 805.

B. Standard of Review

Questions concerning the admissibility of evidence lie within the *sound discretion* of the trial court, and a reviewing court will not reverse the trial court’s decision absent a clear abuse of discretion. *Commonwealth v. Mitchell*, 588 Pa. 19, 56, 902 A.2d 430, 452 (2006), *cert. denied*, 549 U.S. 1169, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007). The Pennsylvania Supreme Court recently stated that the admission of evidence “is solely within the province of the trial court . . .” *Commonwealth v. Murray*, --- Pa. ---, 83 A.3d 137, 155 (2013).

Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will. *Commonwealth v. Aikens*, 990 A.2d 1181, 1184-1185 (Pa. Super. 2010), *appeal denied*, 607 Pa. 694, 4 A.3d 157 (2010).

C. Exceptions to the Hearsay Rule: Availability of Declarant Immaterial

Rule 803 of the Pennsylvania Rules of Evidence was rewritten in 2013 and provides that certain out of court statements are not excluded by the hearsay rule, even though the declarant may or may not be available as a witness.

Furthermore, an otherwise qualifying exception to the hearsay rule under PA.R.E. 803 is not rendered inadmissible by a ruling that the declarant is incompetent to testify, for example, because of age or immaturity. *See Commonwealth v. Pronkoskie*, 477 Pa. 132, 138 n. 5, 383 A.2d 858, 861 n. 5 (1978) (“there is respectable authority for the proposition that an otherwise qualifying excited utterance is not rendered inadmissible by a ruling that the declarant is incompetent to testify”). This is because the inherent reliability covered by the hearsay objection is based upon different criteria than the competency of the witness. *Id.*

Rule 803 provides:

Article VIII. Hearsay

**Rule 803. Exceptions to the Rule Against Hearsay—
Regardless of Whether the Declarant Is
Available as a Witness**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining

an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for--and is reasonably pertinent to--medical treatment or diagnosis in contemplation of treatment; and

(B) describes medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

(5) Recorded Recollection (Not Adopted)

(6) Records of a Regularly Conducted Activity. A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity (Not Adopted)

(8) Public Records (Not Adopted)

(9) Public Records of Vital Statistics (Not Adopted)

(10) Absence of a Public Record (Not Adopted)

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property.

A statement contained in a document, other than a will, that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 30 years old and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets (Not Adopted)

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction (Not Adopted)

(23) Judgments Involving Personal, Family, or General History or a Boundary (Not Adopted)

(24) Other Exceptions (Not Adopted)

(25) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement may be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Res gestae statements, such as *excited utterances*, *present sense impressions*, and *expressions of present bodily conditions* are normally excluded from the hearsay rule, "because the reliability of such statements are established by the statement being made contemporaneous with a provoking event." ***Commonwealth v. Murray***, --- Pa. ---, 83 A.3d 137, 157 (2013).

1. Present Sense Impression – PA.R.E., Rule 803(1)

Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.²³

Present-sense impression exception to the hearsay rule permits testimony of declarations concerning conditions or nonexciting events which declarant is observing at time of his declaration. ***Commonwealth v. Cunningham***, 805 A.2d 566, 573, (Pa. Super. 2002), *appeal denied*, 573 Pa. 663, 820 A.2d 703 (2002).

"For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory."²⁴

²³ PA.R.E. 803(1).

²⁴ PA.R.E. 803(1), comment.

- ▶ ***Commonwealth v. Harper***, 614 A.2d 1180, 1183 (Pa. Super. 1992), *appeal denied*, 533 Pa. 649, 624 A.2d 109 (1993): in prosecution for rape and other charges, trial court properly admitted testimony of police officer who repeated statement of defendant's girlfriend, i.e., when she looked into the window of the victim's house, she observed a sock on the victim's bed which belonged to her boyfriend. This was within present sense impression exception to hearsay rule and admissible; the girlfriend's statement was contemporaneous verbalization of her observation and there was no opportunity for retrospective thought on her part prior to her relating her impression to the police officer.

2. Excited Utterance – PA.R.E., Rule 803(2)

Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused.²⁵

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.²⁶ "As is well-settled, excited utterances fall under the common law concept of *res gestae*." ***Commonwealth v. Murray***, --- Pa. ---, 83 A.3d 137, 157 (2013).

While the excited utterance exception is codified in Rule 803(2), the common law definition remains applicable:

[A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.... Thus, it must be shown first, that [the declarant] had witnessed an event sufficiently startling and so close in point of time as to render her reflective thought processes inoperable and, second, that her declarations were a spontaneous reaction to that startling event.

Commonwealth v. Murray, --- Pa. ---, 83 A.3d 137, 157-158 (2013) quoting ***Commonwealth v. Sherwood***, 603 Pa. 92, 112-113, 982 A.2d 483, 495-496 (2009).

²⁵ PA.R.E. 803(2).

²⁶ PA.R.E. 803(2), *comment*.

Although it does require an event that is *startling*, it is important to remember that the excited utterance:

- 1 - need not describe or explain the startling event because it only has to *relate* to it, and
- 2 - need not be made contemporaneously with, or immediately after, the startling event.

It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.

- ▶ The comments to Pa.R.E. 803(2) provide:

There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance.

- ▶ ***Commonwealth v. Zukauskas***, 501 Pa. 500, 504, 462 A.2d 236, 238 (1983): Time elapsed is an important consideration, but there are no set formulae:

Length of time is an element that must be weighed along with other considerations. It varies with the circumstances and from case to case. It does not alone decide admissibility. The question is not how long one or when one is seized by an event, but rather was he seized at all. Time itself is not dispositive and is determined, ad hoc, case by case.

Additionally, the excited utterance exception applies if it were made in response to questioning as well as those made after the event. ***Commonwealth v. Lester***, 554 Pa. 644, 657, 722 A.2d 997, 1003 (1998) (disapproved on other grounds in ***Commonwealth v. Freeman***, 573 Pa. 532, 827 A.2d 385 (2003)).

- ▶ ***Commonwealth v. Crosby***, 791 A.2d 366, 370-371 (Pa. Super. 2002): in a prosecution for indecent assault, the trial court properly admitted the testimony of the victim's mother as to what the victim had told her, i.e., the indecent assault when she was alone with the defendant. The testimony was admissible under the excited utterance exception to the hearsay rule because the victim's statements were made within minutes of the event, the victim's mother stated that the victim had lowered her head while she talked, which indicated that she was upset, and the victim cried while she described the event.

- ▶ ***Commonwealth v. Clark***, 512 A.2d 1282, 1284 (Pa. Super. 1986), *appeal denied*, 514 Pa. 638, 523 A.2d 345 (1987): trial court properly admitted hearsay testimony of police officer, under “excitable utterance” exception to hearsay rule, regarding victim’s statement to him that defendant had penetrated her, which statement was made immediately after the rape occurred.
- ▶ ***Commonwealth v. Pettiford***, 402 A.2d 532, 533 (Pa. Super. 1979): The trial court properly admitted the hearsay testimony of three witnesses, one of whom was allowed to recount the victim’s spontaneous statements regarding the rape in great detail, under the excitable utterance exception. The victim had been subjected to a forcible rape and was in a hysterical state of mind when, 15 to 20 minutes after the rape occurred, the victim recounted its details to the witnesses.

3. “State of Mind” Exception – PA.R.E., Rule 803(3)

PA.R.E. 803(3)

Then-Existing Mental, Emotional, or Physical Condition.

A statement of the declarant’s then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.²⁷

The “state of mind” exception to the hearsay rule traditionally applies to the *declarant’s* state of mind, emotion, sensation or physical condition such as intent, plan, motive, design, mental feeling, pain, and bodily health. ***Commonwealth v. Levanduski***, 907 A.2d 3, 19 (Pa. Super. 2006), *appeal denied*, 591 Pa. 711, 919 A.2d 955 (2007), *cert. denied*, 552 U.S. 823, 128 S.Ct. 166, 169 L.Ed.2d 33 (2007). It cannot be used to prove the state of mind of the defendant or victim if they are not the declarant. *See id.* In ***Commonwealth v. Laich***, 566 Pa. 19, 777 A.2d 1057 (2001), the Pennsylvania Supreme Court said:

Pursuant to the state of mind hearsay exception, where a declarant’s out-of-court statements demonstrate [the declarant’s] state of mind, are made in a natural manner, and are material and relevant, they are admissible pursuant to the exception. Out-of-court declarations that fall within the state of mind hearsay exception are still subject to general evidentiary rules governing competency and relevancy. Accordingly, whatever purpose the statement is offered for,

²⁷ PA.R.E. 803(3).

be it to show the declarant's intention, familiarity, or sanity, that purpose must be a "factor in issue," that is, relevant. Evidence is relevant if it logically tends to establish a material fact in the case, if it tends to make a fact at issue more or less probable, or if it supports a reasonable inference or presumption regarding the existence of a material fact.

566 Pa. at 26, 777 A.2d 1060-1061 (emphasis added).

However, in *Commonwealth v. Chandler*, 554 Pa. 401, 721 A.2d 1040 (1998), a murder case, the Pennsylvania Supreme Court affirmed the trial court's decision to admit, under the "state of mind" exception, third-party testimony about a victim's statements regarding her relationship with the accused and her negative feelings about the accused. 554 Pa. at 411, 721 A.2d at 1045. The "state of mind" testimony was admissible as exceptions to the hearsay rule because the testimony went to the presence of ill will, malice or motive for the murder.

Similarly, in *Commonwealth v. Sneeringer*, 668 A.2d 1167 (Pa. Super. 1995), *appeal denied*, 545 Pa. 651, 680 A.2d 1161 (1996), the Superior Court affirmed the trial court's decision to allow a witness to testify about statements attributed to the victim and her expressed intention to sever her relationship with the accused. This testimony, admitted as an exception to the hearsay rule under the state of mind exception, was relevant to the defendant's motive for killing the victim.

- ▶ *Commonwealth v. Jordan*, 482 A.2d 573, 579 (Pa. Super. 1984): in rape case in which any hearsay objection was waived, trial court properly admitted testimony of investigating detective's observations of the victim, four hours after the rape, to demonstrate the victim's state of mind at the time of her statement. The complainant was crying, sobbing and trembling, which helped to explain the inconsistencies in her testimony because she was upset.
- ▶ *Commonwealth v. Luster*, 71 A.3d 1029, 1041 (Pa. Super. 2013): hearsay evidence concerning the victim's state of mind is admissible only where the victim's state of mind is a "factor in issue" at trial.

4. Statements for Purposes of Medical Diagnosis or Treatment- PA.R.E., Rule 803(4)

PA.R.E. 803(4).

Statement Made for Medical Diagnosis or Treatment.

A statement that:

(A) is made for--and is reasonably pertinent to--medical treatment or diagnosis in contemplation of treatment; and

(B) describes medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.²⁸

In *Commonwealth v. Smith*, 545 Pa. 487, 681 A.2d 1288, (1996), the Supreme Court stated that there are essentially two requirements for a statement to come within this exception:

First, the declarant must make the statement for the purpose of receiving medical treatment; and

Second, the statement must be necessary and proper for diagnosis and treatment.

Id. at 493, 681 A.2d at 1291. Note that statements are only admissible if they are made in contemplation of treatment. “The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully.”²⁹

This exception is not limited to statements made to physicians. Statements to a nurse have been held to be admissible. *Commonwealth v. Smith*, 545 Pa. at 494, 681 A.2d at 1292.

In 1972, the Pennsylvania Supreme Court expanded the interpretation of this exception to permit medical testimony regarding the cause of the injury as well as testimony regarding the patient’s symptoms and sensations. See *Commonwealth v. D.J.A.*, 800 A.2d 965, 975-976 (Pa. Super. 2002) (*en banc*), *appeal denied*, 579 Pa. 700, 857 A.2d 677 (2004).

(a) Prohibition: Statements for Purposes of Litigation

Statements made to persons retained solely for the purpose of litigation are not admissible under this rule.³⁰

(b) Prohibition: Identification Statements

Statements as to causation may be admissible, but statements as to fault or

²⁸ Pa.R.E. 803(4).

²⁹ *Id.*

³⁰ Pa.R.E. 803(4), comment.

identification of the person inflicting harm have been held to be inadmissible. *Commonwealth v. Smith*, 545 Pa. 487, 496, 681 A.2d 1288, 1293 (1996).

- ▶ *Commonwealth v. D.J.A.*, 800 A.2d 965, 976-977 (Pa. Super. 2002) (*en banc*), *appeal denied*, 579 Pa. 700, 857 A.2d 677 (2004): in case in which defendant was charged with rape, involuntary deviate sexual intercourse, indecent assault, corruption of minors, and endangering the welfare of children, trial court properly held as inadmissible the minor victim's statement to her doctor, which statement in addition to explaining her condition, identified the defendant as the assailant. The Superior Court rejected the prosecution's argument that the threat of a sexually transmitted disease exempts sexual assault cases from the general rule that identification of the person inflicting the harm is not admissible under this hearsay exception.

5. Records of Regularly Conducted Activity – PA.R.E., Rule 803(6)

PA.R.E., Rule 803(6) Records of a Regularly Conducted Activity.

A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor other circumstances indicate a lack of trustworthiness.³¹

This is known as the "business record exception." The purpose of the

³¹ Pa.R.E. 803(6).

business records exception to the hearsay rule is to permit the admission of records made in the regular course of business where the sources of information, method, and time of preparation are such as to justify their admission. ***Commonwealth v. McEnany***, 732 A.2d 1263, 1272 (Pa. Super. 1999), *appeal dismissed as improvidently granted*, 565 Pa. 138, 771 A.2d 1260 (2001). Furthermore, “[i]t is not essential . . . to produce either the person who made the entries or the custodian of the record at the time the entries were made” or “that a witness qualifying business records even have a personal knowledge of the facts reported in the business record.” ***Id.***

- ▶ ***Commonwealth v. Campbell***, 368 A.2d 1299, 1301-1302 (Pa. Super. 1976) (*en banc*): in rape trial, hospital record reporting finding of semen in victim’s vagina was assertion of fact rather than medical conclusion, and therefore admissible.
- ▶ ***Commonwealth v. Xiong***, 630 A.2d 446 (Pa. Super. 1993): notation in physician’s report that victim had “no hymen” was factual assertion rather than diagnosis or opinion.

(a) Authentication

Records of regularly conducted activity may be authenticated by certification. This is designed to save the expense and time consumption caused by calling needless foundation witnesses. The notice requirements provided in PA.R.E. 902(11) and (12) will give other parties a full opportunity to test the adequacy of the foundation.

(b) Prohibition: Opinions and Diagnoses

The records admissible under PA.R.E. 803(6) do not include opinions and diagnoses. ***Commonwealth v. McCloud***, 457 Pa. 310, 313, 322 A.2d 653, 655 (1974).

(c) Prohibition: Lack of Trustworthiness

Additionally, PA.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the “sources of information or other circumstances indicate lack of trustworthiness.” ***Commonwealth v. Schoff***, 911 A.2d 147, 156 (Pa. Super. 2006).

(d) Prohibition: Confrontation Clause

If offered against a defendant in a criminal case, an entry in a business record may be excluded if its admission would violate the defendant’s constitutional right to confront the witnesses against him or her. *See*

Commonwealth v. Carter, 593 Pa. 562, 568-569, 932 A.2d 1261, 1264 (2007); *Commonwealth v. McCloud*, 457 Pa. 310, 315-316, 322 A.2d 653, 656-657 (1974).³²

Additionally, in a criminal case, the trial court may exclude business records that might otherwise be admissible if the prosecution uses the records to prove an element of the crime charged, in violation of the confrontation clause. *Commonwealth v. Schoff*, 911 A.2d 147, 156 (Pa. Super. 2006).

- ▶ In *Commonwealth v. Mitchell*, 570 A.2d 532, 534 (Pa. Super. 1990), *appeal denied*, 527 Pa. 599, 589 A.2d 689 (1990), the defendant was charged with murder and rape, *inter alia*. At trial, the medical examiner was permitted to read facts from the autopsy report, not any opinions or conclusion from the doctor who had prepared the report, and then opined based upon those facts. The Superior Court found no error or violation of the Confrontation Clause, and stated that “Experts may offer testimony based on the reports of others.”

(e) The Uniform Business Records as Evidence Act, 42 PA.CON.S.TAT. § 6108

Note that PA.R.E. 803(6) differs only slightly from 42 PA.CON.S.TAT. § 6108, which provides:

(a) Short title of section. - This section shall be known and may be cited as the “Uniform Business Records as Evidence Act.”

(b) General Rule. - A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

(c) Definition. - As used in this section “**business**” includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

This Act permits the admission of business records without the author

³² See also PA.R.E. 803(6), *comment*.

of the material in the records being present for trial. However, only acts, conditions or events which are so recorded are admissible, not opinions.

The rationale for excluding medical opinion in hospital records lies in the fact that such evidence is expert testimony and is “not admissible unless the doctor who prepared the report is available for in-court cross-examination regarding the accuracy, reliability and veracity of his opinion.”

Commonwealth v. Seville, 405 A.2d 1262, 1264 (Pa. Super. 1979) (quoting ***Commonwealth v. McNaughton***, 381 A.2d 929, 931 (Pa. Super. 1977)).

Under this exception, hospital records have been admitted to show the fact of hospitalization, treatment prescribed and symptoms found. ***Commonwealth v. Hemingway***, 534 A.2d 1104, 1107 (Pa. Super. 1987).

As the Superior Court noted in ***Commonwealth v. Seville***, 405 A.2d 1262, 1264 (Pa. Super. 1979), the justification for allowing hospital records to be admitted into evidence under the Business Records as Evidence exception to the hearsay rule is that they are to be considered reliable.

Unusual reliability is regarded as furnished by the fact that in practice regular entries have a comparatively high degree of accuracy (as compared to other memoranda) because such books and records are customarily checked as to correctness by systematic balance striking, because the very regularity and continuity of the records is calculated to train the recordkeeper in habits of precision, and because in actual experience the entire business of the nation and many other activities constantly function in reliance upon entries of this kind.

405 A.2d at 1265 (quoting McCormick, Handbook of Law of Evidence, § 306 (2d ed. 1972)).

In ***Commonwealth v. Hemingway***, 534 A.2d 1104 (Pa. Super. 1987), the Superior Court summarized a three part test, taken from ***Isaacson v. Mobile Propane Corporation***, 461 A.2d 625 (Pa. Super. 1983), to determine if a medical report was admissible under the business records exception to the hearsay rule:

A medical report is admissible under the business records exception to the hearsay rule if the report: (1) was made contemporaneously with the events it purports to relate, (2) at the time the report was prepared, it was impossible

to anticipate reasons which might arise in the future for making a false entry in the original and (3) the person responsible for the statements contained in the report is known.

Hemingway, 534 A.2d at 1107.

In *Commonwealth v. Xiong*, 630 A.2d 446 (Pa. Super. 1993) (en banc), *appeal denied*, 537 Pa. 609, 641 A.2d 309 (1994), the defendant, convicted of rape, argued that the hospital records of the child victim included a statement that the victim had “no hymen” which constituted opinion and was thus inadmissible. The Superior Court ruled that the notation was a factual assertions rather than a diagnosis or opinion. 630 A.2d at 452.

[T]he notation clearly was not a conclusory statement based upon a review of symptoms. It was a physical fact. A gynecological exam was performed on the victim and the doctor found that she did not have a hymen. It was not an opinion based statement, but rather was based on an observation made during the exam.

Id. On numerous occasions trial courts have had to decide the difference between a “fact” in a record and what is “opinion” in order to decide whether the hospital records, or which part of the records, are admitted under this law:

- ▶ *Commonwealth v. Hemingway*, 534 A.2d 1104 (Pa. Super. 1987): results of “rape kit”, excluding the finding of spermatozoa, were held to be wrongly admitted into evidence without appearance and testimony of criminalist who conducted tests.
- ▶ *Commonwealth v. Campbell*, 368 A.2d 1299 (Pa. Super. 1976) (en banc): hospital record stating that spermatozoa was found in victim’s vagina was treated as fact and was admissible.
- ▶ *Commonwealth v. Green*, 380 A.2d 798 (Pa. Super. 1977) (en banc): medical report stating that rape victim exhibited “excoriations” to elbow and forehead did not involve a medical diagnosis or opinion and therefore was admissible under Uniform Business Records as Evidence Act.
- ▶ *Commonwealth v. Nieves*, 582 A.2d 341, 345 (Pa. Super. 1990), *appeal denied*, 529 Pa. 633, 600 A.2d 952 (1991): in rape prosecution, the defendant’s prison medical records which confirmed that he had gonorrhoea were admissible under business records exception –

standard venereal disease blood test results, even when performed by outside testing lab rather than by prison employees, fall under the exception.

6. Admission by Party-Opponent

An admission by a party-opponent is admissible when the statement is offered against a party and is either:

- (A) the party's own statement in either an individual or a representative capacity, or
- (B) a statement of which the party has manifested an adoption or belief in its truth, or
- (C) a statement by a person authorized by the party to make a statement concerning the subject, or
- (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
- (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.³³

A "party's" admissions, i.e., a defendant's admissions, are not subject to hearsay exclusion because:

[I]t is fair in an adversary system that a party's prior statements be used against him if they are inconsistent with his position at trial. In addition, a party can hardly complain of his inability to cross-examine himself. A party can put himself on the stand and explain or contradict his former statements.

Commonwealth v. Edwards, 588 Pa. 151, 183, 903 A.2d 1139, 1157 (2006), cert. denied, 549 U.S. 1344, 127 S.Ct. 2030, 167 L.Ed.2d 772 (2007) (quoting *Commonwealth v. Chmiel*, 558 Pa. 478, 504, 738 A.2d 406, 420 (1999), cert. denied, 528 U.S. 1131, 120 S.Ct. 970, 145 L.Ed.2d 841 (2000)).

(a) Threatening Statements

It is a general rule that voluntary extrajudicial statements made by a defendant may be admitted even though they contain no admission of guilt.

³³ Pa.R.E. 803(25).

Commonwealth v. Weiss, --- Pa. ---, 81 A.3d 767, 800 (2013).

These extrajudicial statements, which differ from confessions in that they do not acknowledge all essential elements of a crime, are generally considered to qualify for introduction into evidence under the admission exception to the hearsay rule.

Commonwealth v. Simmons, 541 Pa. 211, 239, 662 A.2d 621, 635 (1995), *cert. denied*, 516 U.S. 1128, 116 S.Ct. 945, 133 L.Ed.2d 870 (1996) (*quoting Commonwealth v. Tervalon*, 463 Pa. 581, 590, 345 A.2d 671, 676 (1975)).

D. Exceptions to the Hearsay Rule: Availability of Declarant Necessary

Rule 803.1 of the Pennsylvania Rules of Evidence permits the admission of the hearsay evidence as substantive evidence at trial, not merely as impeachment evidence,³⁴ if the declarant appears for trial, testifies and is subject to cross-examination. Rule 803.1 states:

Article VIII. Hearsay

Rule 803.1. Exceptions to the Rule Against Hearsay-- Testimony of Declarant Necessary

The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:

(1) Prior Inconsistent Statement of Declarant-Witness. A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:

(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

(B) is a writing signed and adopted by the declarant; or

(C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.

(2) Prior Statement of Identification by Declarant-Witness. A prior statement by a declarant-witness identifying a person or thing, made after perceiving the person or thing, provided that the declarant-witness testifies to the making of the prior

³⁴ A prior inconsistent statement used for impeachment purposes only, which does not qualify for admission under Pa.R.E. 803.1, may be used to impeach the credibility of a witness under Pa.R.E. 613.

statement.

(3) Recorded Recollection of Declarant-Witness. A memorandum or record made or adopted by a declarant-witness that:

(A) is on a matter the declarant-witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the declarant-witness when the matter was fresh in his or her memory; and

(C) the declarant-witness testifies accurately reflects his or her knowledge at the time when made.

If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

1. Prior Inconsistent Statement

The law regarding the admission of prior inconsistent statements of witness to be used as substantive evidence, as an exception to the hearsay rule, developed over a number of Supreme Court cases. In *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986), the Pennsylvania Supreme Court decided that prior inconsistent statements of a non-party witness could be used as substantive evidence where the declarant is a witness at trial and available for cross-examination.

The next step was in *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992), wherein the Supreme Court stated that the prior inconsistent statement could be considered highly reliable to warrant admission as substantive evidence when it was given under oath at a formal legal proceeding, or the statement was reduced to a writing signed and adopted by the declarant, or the statement was recorded verbatim contemporaneously with the making of the statement. See also *Commonwealth v. Brown*, 617 Pa. 107, 131, 52 A.3d 1139, 1154 (2012).

In *Commonwealth v. Wilson*, 550 Pa. 518, 707 A.2d 1114 (1998), the Pennsylvania Supreme Court ruled that a police officer's notes, taken during an interview or interrogation of a witness, do not meet the standard of "an electronic, audiotaped or videotaped recording" to warrant admission under the exception. 550 Pa. at 527, 707 A.2d at 1118.

In *Commonwealth v. Halsted*, 542 Pa. 318, 666 A.2d 655 (1995), the defendant was convicted of involuntary deviate sexual intercourse and indecent assault. The defendant's grandson told a Pennsylvania State Trooper during an interview that he was told by the defendant to stand guard during the sexual assault so that he would not be discovered. The grandson stated also that the defendant had performed oral sex on him on two different occasions when he was younger. The trooper made notes during the interviews and later prepared a typewritten police report from his interview notes. At trial the defendant's grandson also testified; however, he claimed that he had not seen the defendant engage in oral sex with the other child, that he had not acted as a lookout, that he had not been sexually abused and could not recall telling the trooper that such abuse had occurred. The Commonwealth was unsuccessful in its attempt to refresh the child's recollection by confronting him with the statements made to the trooper. The trooper was then permitted to read into the record the text of the grandson's statement from his typewritten police report as substantive evidence of the offense. The Pennsylvania Supreme Court ruled that the report had not been made contemporaneously with the interview with the child, and was therefore inadmissible under the standards set up in *Commonwealth v. Lively*, 542 Pa. at 323, 666 A.2d at 658. In *Commonwealth v. Wilson*, 550 Pa. 518, 707 A.2d 1114 (1998), the Supreme Court went back to the facts of *Halsted*, and stated that even if the Commonwealth had used the Trooper's original notes from the interview, they would have been inadmissible because "the recording of the statement must be an electronic, audiotaped or videotaped recording in order to be considered as substantive evidence." 550 Pa. at 527, 707 A.2d at 118.

2. Pretrial Identification By A Witness

When witnesses are in court and subject to cross-examination, another witness may testify concerning pre-trial identification evidence by the witnesses. *Commonwealth v. Ly*, 528 Pa. 523, 532, 599 A.2d 613, 617 (1991). Witnesses are permitted to use, typically, photographs as means of pretrial identifications, however other means are admissible as well.

A composite sketch constitutes an identification. In *Commonwealth v. Beale*, 665 A.2d 473 (Pa. Super. 1995), *appeal denied*, 544 Pa. 652, 676 A.2d 1194 (1996), a rape case, the Commonwealth was permitted to admit into the record in its case in chief a composite sketch of the assailant, created by the complainant two days following the rape, of the assailant. The Superior Court affirmed, stating:

Further, when making an identification, it is sometimes necessary to employ artificial means in order to communicate the image to others. The witness' certainty in making the identification as well as the degree of similarity between the object identified and the defendant does not affect the admissibility of the identification but instead goes to the weight and credibility of the witness' testimony.

665 A.2d at 477 (citations omitted).³⁵

3. Recorded Recollection

This exception only applies where the witness lacks a present recollection of the event. See *Croyle v. Smith*, 918 A.2d 142, 148 (Pa. Super. 2007) (citing *Commonwealth v. Young*, 561 Pa. 34, 56, 748 A.2d 166, 177 (1999)). See PA.R.E. 803.1(3).

Prior to the adoption of PA.R.E. 803.1, caselaw provided four elements for a hearsay statement to be admitted as a past recollection recorded:

- (1) the witness must have had firsthand knowledge of the event;
- (2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it; (3) the witness must lack a present recollection of the event; and (4) the witness must vouch for the accuracy of the written memorandum.

Commonwealth v. Young, 561 Pa. 34, 56, 748 A.2d 166, 177 (1999).

E. Exceptions to the Hearsay Rule: Declarant Unavailable

Pennsylvania Rule of Evidence 804 provides for exceptions to the hearsay rule under circumstances in which the declarant is unavailable at trial. The rule, which was rewritten in 2013, states:

PA.R.E. 804. Exceptions to the Rule Against Hearsay-- When the Declarant is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical

³⁵ See 23 A.L.R. 5th 672 (1994)(Admissibility in evidence of composite picture or sketch produced by police to identify offender).

illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement made before the controversy arose about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Other exceptions (Not Adopted)*

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.³⁶

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability due to death or illness, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.³⁷

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. Former Testimony, PA.R.E., Rule 804(b)(1)

Preliminary Hearing: In the context of a criminal action, a preliminary hearing of the same case constitutes former testimony under Rule 804(b)(1) (A) when the declarant is specifically unavailable, due to death or otherwise, and there is a full opportunity to cross-examine that witness at the hearing.

Commonwealth v. Stays, 70 A.3d 1256, 2163 (Pa. Super. 2013); ***Commonwealth***

³⁶ PA.R.E. 804.

³⁷ PA.R.E. 804(a).

v. *McCrae*, 574 Pa. 594, 608, 832 A.2d 1026, 1034-1035 (2003), *cert. denied*, 543 U.S. 822, 125 S.Ct. 31, 160 L.Ed.2d 32 (2004). See also *Commonwealth v. Stays*, 70 A.3d 1256, 1263-1264 (Pa.Super. 2013).

- ▶ However, if the opposing party, typically the defendant, were denied access to vital impeachment evidence at the time of the preliminary hearing, then there is a denial of a “full and fair opportunity to cross-examine the unavailable witness” and the prior recorded testimony is not admissible at a later trial. *Commonwealth v. Johnson*, 758 A.2d 166, 169 (Pa. Super. 2000), *appeal denied*, 566 Pa. 637, 781 A.2d 140 (2001).

Earlier Trial: In *Commonwealth v. Laird*, 605 Pa. 137, 988 A.2d 618 (2010), *cert. denied*, 131 S.Ct. 659, 178 L.Ed.2d 492 (2010), a witness was deemed unavailable because he exercised his Fifth Amendment privilege and refused to testify at trial. The witness’s testimony from the first trial, including both direct and cross-examination, was read to the jury.

(a) “Full and Fair” Opportunity to Cross-Examine

In criminal cases the Supreme Court has held that former testimony is admissible against the defendant only if the defendant had a “full and fair” opportunity to examine the witness. See *Commonwealth v. Laird*, 605 Pa. 137, 158-159, 988 A.2d 618, 630 (2010), *cert. denied*, 131 S.Ct. 659, 178 L.Ed.2d 492 (2010); PA.R.E. 804(b)(1) Comment.

The former testimony exception to the hearsay rule is “predicated on the ‘indicia of reliability’ normally afforded by adequate cross-examination.” *Commonwealth v. Bazemore*, 531 Pa. 582, 587, 614 A.2d 684, 687 (1992) (quoting *Commonwealth v. Mangini*, 493 Pa. 203, 213, 425 A.2d 734, 739 (1981)).

2. Statement Under Belief of Impending Death

A statement made under belief of impending death is a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death. Statements that qualify under this exception are admissible in all cases, which is a departure from prior Pennsylvania law.

A statement of the declarant’s own observations is admissible as a dying declaration if, at the time it was made, the declarant believed he would die, that his death was imminent, and death actually ensued. *Commonwealth v. Farrior*, 458 A.2d 1353, 1359 (Pa. Super. 1983).

3. Statement Against Interest

In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless the surrounding circumstances clearly indicate the trustworthiness of the statement:

A statement against penal interest is often considered trustworthy if it subjects the declarant to criminal liability and a reasonable person would not make the claim unless it was true. Before crediting as reliable a statement against penal interest, the court must consider the declarant's motive for making the statement and whether the surrounding circumstances indicate the statement is trustworthy. For example, a defendant's relative or close friend's confession should be closely scrutinized for motive to fabricate the confession.

Commonwealth v. Padillas, 997 A.2d 356, 366 (Pa. Super. 2010), *appeal denied*, 609 Pa. 687, 14 A.3d 826 (2010). "What matters is that the facts within the statements tended to subject the declarant to criminal liability and that a reasonable person in the declarant's position would not have made those statements unless believing them to be true." *Commonwealth v. Cascardo*, 981 A.2d 245, 257 (Pa. Super. 2009), *appeal denied*, 608 Pa. 652, 12 A.3d 750 (2010).

Examples of the scrutiny given to statements against interest were provided in *Commonwealth v. Padillas*:

See [*Commonwealth v. Parker*, 494 Pa. 196, 431 A.2d 216 (1981)] (affirming trial court's rejection of confession of defendant's girlfriend as unreliable, where girlfriend made confession during jury deliberations later repudiated her confession). *See also* *State v. Cureaux*, 736 So.2d 318, 322-323 (La.App.4th Cir 1999) (stating nephew's motive for confessing to uncle's crimes was suspect, due to familial relationship); [*Commonwealth v. Weichell*, 446 Mass. 785, 847 N.E.2d 1080 (Mass. 2006)] (noting third party's close relationship to defendant demonstrated "obvious motive" to fabricate confession); *State v. Haner*, 182 Vt. 7, 928 A.2d 518, 523, 524-25 (2007) (stating: "[T]he familial relationship between defendant and his brother calls into question the veracity of any exculpatory statement by defendant's brother"); *King v. State*, 780 P.2d 943, 950 (Wyo. 1989) (observing "motive of the declarant to falsify for the benefit of the accused should also be considered" when analyzing admissibility of statement against penal interest).

997 A.2d at 366.

4. Exception Because of Wrongdoing

Hearsay is admissible when the defendant wrongfully causes the declarant's unavailability. The language of the Rule requires that the party against whom the statement is offered acted wrongfully (or acquiesced in the wrongful conduct) and that the wrongful conduct was intended to and did in fact procure the unavailability of the declarant as a witness. *Commonwealth v. Santiago*, 822 A.2d 716, 731 (Pa. Super. 2003), *appeal denied*, 577 Pa. 679, 843 A.2d 1237 (2004), *cert. denied*, 542 U.S. 942, 124 S.Ct. 2916, 159 L.Ed.2d 820 (2004). Under this exception, the hearsay is considered as substantive evidence. Until it was rewritten in 2013, this section was referenced as the forfeiture by wrongdoing exception.

The absent witness's statement is admissible as evidence pertaining to the events about which the witness would have testified had he not been prevented from doing so by the defendant. *Commonwealth v. King*, 959 A.2d 405, 414 (Pa. Super. 2008). The absent witness's statement is also admissible in a trial for the murder, or other crime committed against the missing witness. *Id.*

Even before this exception was adopted, the Pennsylvania Supreme Court, in *Commonwealth v. Paddy*, 569 Pa. 47, 73 n. 10, 800 A.2d 296, 310 n. 10 (2002) (quoting the trial court), recognized the rationale behind the Rule: "[t]ime and again, appellate courts have upheld the use of hearsay evidence against a defendant after he has menacingly procured the absence of the witness against him, and then gallingly argued that the evidence previously provided by this witness must be withheld from the finder of fact."

F. Attacking and Supporting the Declarant's Credibility

Rule 806 of the Pennsylvania Rules of Evidence states:

When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.³⁸

³⁸ PA.R.E. 806.

This Rule permits evidence for impeachment of the out-of-court declarant, not as substantive evidence, when hearsay is admitted under one of the exceptions.

An example of this type of evidence is *Commonwealth v. Davis*, 526 A.2d 1205 (1987), *appeal denied*, 518 Pa. 624, 541 A.2d 1135 (1988). In *Davis*, the prosecution was permitted to impeach a prior recorded statement of a defense witness by utilizing a later, out-of-court statement the same witness gave to a police officer. *Id.* at 1215-1216.

- ▶ *Commonwealth v. Smith*, 552 A.2d 1053, 1057 (Pa. Super. 1988), *appeal denied*, 525 Pa. 581, 575 A.2d 112 (1990): “Prior recorded testimony, like any other testimony, is subject to impeachment through introduction of prior inconsistencies.”

7.11 SPECIAL HEARSAY EXCEPTION: TENDER YEARS EXCEPTION

Under the Tender Years Hearsay Act, 42 PA.CON.S.TAT.ANN. § 5985.1,

certain out-of-court statements made by a child victim or witness may be admissible at trial if the child either testifies at the proceeding or is unavailable as a witness, and the court finds “that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability.”

Commonwealth v. Allshouse, 614 Pa. 229, 238, 36 A.3d 163, 168 (2012), *cert. denied*, --- U.S. ---, 133 S.Ct. 2336, 185 L.Ed.2d 1063 (2013). This “tender years exception” to the rule against hearsay permits a hearsay statement of a child abuse victim, or a child witness, twelve years old or younger, to be admissible if the evidence is relevant and if the time, content and circumstances of the statement provide sufficient indicia of reliability. *Commonwealth v. Hunzer*, 868 A.2d 498, 510 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005). The tender years exception allows for the admission of a child’s out-of-court statement due to the fragile nature of the victims of childhood sexual abuse. *Commonwealth v. Barnett*, 50 A.3d 176, 182 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 63 A.3d 771 (2013).

Under 42 PA.CON.S.TAT.ANN. § 5985.1, certain out of court statements of child victims and child witnesses are admissible under the following standards:

Subchapter D. Child Victims and Witnesses **5985.1. Admissibility of certain statements**

(a) **General rule.**--An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses

enumerated in 18 Pa.C.S. Chs.

- 25 (relating to criminal homicide),
- 27 (relating to assault),
- 29 (relating to kidnapping),
- 31 (relating to sexual offenses),
- 35 (relating to burglary and other criminal intrusion), and
- 37 (relating to robbery),

not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

- (i) testifies at the proceeding; or
- (ii) is unavailable as a witness.

(a.1) Emotional distress.--In order to make a finding under subsection (a)(2) (ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child, either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

(a.2) Counsel and confrontation.--If the court hears testimony in connection with making a finding under subsection (a)(2)(ii), all of the following apply:

- (1) Except as provided in paragraph (2), the defendant, the attorney for the defendant and the attorney for the Commonwealth or, in the case of a civil proceeding, the attorney for the plaintiff has the right to be present.

(2) If the court observes or questions the child, the court shall not permit the defendant to be present.

(b) Notice required.--A statement otherwise admissible under subsection (a) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.³⁹

A. Factors to be Considered for Admission

1. The Child Complainant testifies or is unavailable

Pursuant to 42 PA.CON.S.TAT.ANN. § 5985.1(a)(2)(ii), unless the child victim testifies, the trial court must conclude that the child victim is unavailable as a witness. In *Commonwealth v. Kriner*, 915 A.2d 653 (Pa. Super. 2007) (en banc), the Superior Court determined that unavailability is limited to the determination by the trial court of impending emotional distress; therefore, the death of the child prior to trial did not satisfy Section 5985.1(a)(2)(ii), and the prior statement was not admissible under the Tender Years Hearsay Act.

In *In re N.C.*, 74 A.3d 271 (Pa. Super. 2013), in a delinquency adjudication proceeding on the charge of aggravated indecent assault, the child complainant was four years old at the time of the hearing, and was unable to provide any direct testimony about the alleged incident and eventually ended her examination by becoming unresponsive by curling up into a fetal position.

In *Commonwealth v. Staruh*, 2007 WL 4218003 (CCP Cumberland County 2007), *aff'd*, 961 A.2d 1284 (Pa. Super. 2008)(table), *appeal denied*, 601 Pa. 702, 973 A.2d 1006 (2009), the trial court permitted the hearsay statements of the child victim because the child was available at trial and subjected to cross-examination.

In *Commonwealth v. Cesar*, 911 A.2d 978 (Pa. Super. 2006), *appeal denied*, 593 Pa. 725, 928 A.2d 1289 (2007), in a case involving indecent assault and related offenses, the trial court permitted a child victim's mother, a detective, and a social worker to testify as to the child's earlier hearsay statements because the child was present and the defense was given the opportunity to cross-examine her at both the pre-trial hearing and trial.

In *Commonwealth v. Lyons*, 833 A.2d 245 (Pa. Super. 2003), the Superior

³⁹ 42 PA.CON.S.TAT.ANN. § 5985.1.

Court upheld the constitutionality of the tender years exception, especially § 5985.1(a.1), by pointing out that the statute requires the trial court to determine, in finding that the child victim is unavailable, whether forcing the child to testify would result “in such serious emotional distress to the child that she will not be able to reasonably communicate.” *Id.* at 254.

(a) Hearing Required for Unavailability

In *Commonwealth v. Kriner*, 915 A.2d 653 (Pa. Super. 2007) (en banc), a young girl was allegedly sexually assaulted by her stepfather. An investigation of the allegations was initiated in March of 2003, but the child was killed in a car accident in August of 2003. The Commonwealth attempted to use Section 5985.1(a)(2)(ii) to submit hearsay evidence, but the Superior Court determined that Section 5985.1(a)(2)(ii) did not apply because the prerequisite to a determination of unavailability under Section 5985.1(a)(2)(ii) is that the trial court must determine, pursuant to Section 5985.1(a.1), whether the child will suffer emotional distress. Because the trial court could not make this determination given that the child was deceased, the Tender Years Hearsay Act was not applicable.

Using these principles as a guide, the language of § 5985.1 is patently clear as to when a child is unavailable so to qualify his or her statements under the tender years exception. Specifically, the statute requires the trial court to determine that the child will suffer serious emotional distress that would substantially impair the child’s ability to reasonably communicate in order for the child to be unavailable. *This finding is a prerequisite to a determination of unavailability as evidenced by the words “in order.”* By the plain language of the statute, there is no other manner, method, procedure, or definition of what constitutes unavailability.

915 A.2d at 658-659 (emphasis in original).

2. Admissibility Depends Upon Whether the Statement Is Testimonial or Nontestimonial

The criteria for admission of the hearsay depends upon whether the prior statement is testimonial or nontestimonial. If nontestimonial, then the pertinent law of the state prevails regarding traditional exceptions to hearsay. If testimonial in nature, then the “indicia of reliability” standard of § 5985.1 is not utilized but rather “the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross-examination.” *In re N.C.*, 74 A.3d 271, 275 (Pa. Super. 2013) (quoting *Crawford v. Washington*, 541

U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). *See also, Commonwealth v. Allshouse*, 614 Pa. 229, 246, 36 A.3d 163, 173 (2012), *cert. denied*, 133 S.Ct. 2336, 185 L.Ed.2d 1063 (2013). The Supreme Court left no doubt that when a declarant appears for cross-examination at trial, the confrontation clause places no constraints on the use of prior testimonial statements.

(a) Nontestimonial

If the proposed hearsay is nontestimonial, then there are no Confrontation Clause issues and its admission depends upon the requirements of permissive hearsay exceptions. *Commonwealth v. Allshouse*, 614 Pa. 229, 245-246, 36 A.3d 163, 173 (2012), *cert. denied*, --- U.S. ---, 133 S.Ct. 2336, 185 L.Ed.2d 1063 (2013). When statements are nontestimonial, “the confrontation clause places no restriction on their introduction except for the ‘traditional limitations upon hearsay evidence.’” *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

Therefore, if nontestimonial, then the trial court must be satisfied that the requirements of the Tender Years Hearsay Act, 42 PA.CON.S.TAT.ANN. § 5985.1 have been satisfied, and need not be concerned with constitutional analysis. The requirements for admission include:

- 1 - The notice requirements of § 5985.1(b) were satisfied
- 2 - An in camera hearing at which the trial Court finds:
 - (i) The hearsay evidence is relevant
 - (ii) The time, content and circumstances of the statement provide “sufficient indicia of reliability”
- 3 - the child victim or witness either:
 - (i) Testifies at the proceeding, or
 - (ii) Is unavailable as a witness
 - ▶ The child may be deemed unavailable due to “emotional distress” under § 5985.1(a.1).
 - ▶ If the trial court hears testimony in order to determine is a child is unavailable, then the requirements of § 5985.1(b) must be followed.

(b) Testimonial

If the out-of-court statement is testimonial, then its admission is subject to the protections of the Confrontation Clause, as per *Crawford*

v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). See *Commonwealth v. Allshouse*, 614 Pa. 229, 250, 36 A.3d 163, 175 (2012), *cert. denied*, --- U.S. ---, 133 S.Ct. 2336, 185 L.Ed.2d 1063 (2013); *In re N.C.*, 74 A.3d 271, 277 (Pa. Super. 2013).

If testimonial in nature, the hearsay statement will not be admissible unless the declarant is unavailable and the defendant had the opportunity to cross-examine the declarant when the statement was taken. See *Commonwealth v. Allshouse*, 614 Pa. at 243, 36 A.3d at 171; *In re N.C.*, 74 A.3d at 278. As the Pennsylvania Supreme Court stated in *Allshouse*:

Accordingly, the [*Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] Court held the Confrontation Clause prohibits out-of-court *testimonial* statements by a witness, regardless of whether the statements are deemed reliable by the trial court, unless (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. *Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.*

Commonwealth v. Allshouse, 614 Pa. at 243, 36 A.3d at 171.

(c) Determination of Testimonial or Nontestimonial

In *Commonwealth v. Yohe*, --- Pa. ---, 79 A.3d 520 (2013), the Pennsylvania Supreme Court had the occasion to again discuss the distinction between testimonial and nontestimonial statements:

In [*Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] the Court held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony' " against him, and defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Confrontation Clause, the High Court explained, prohibits

out-of-court testimonial statements by a witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* at 53-56, 124 S.Ct. 1354.

Commonwealth v. Yohe, 79 A.3d at 531. Again quoting from ***Crawford***, the Pennsylvania Supreme Court explained the class of testimonial statements covered by the Sixth Amendment:

- ▶ Ex parte in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
- ▶ Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
- ▶ Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Commonwealth v. Yohe, 79 A.3d at 531 n. 11.

Whether a statement is testimonial depends on its “primary purpose:”

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Commonwealth v. Yohe, 79 A.3d at 531 (quoting ***Davis v. Washington***, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

Trial courts should use the “primary purpose test” from ***Michigan v. Bryant***, --- U.S. ---, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), which is if the primary purpose of the prior statement was to enable police to render assistance to meet an ongoing emergency, then the statement is nontestimonial. Additionally, there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.

- ▶ When the statement is made in response to interrogation, the focus must be on the perspective of the parties at the time of the interrogation, and not based on hindsight, for “[i]f the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause.”

These nontestimonial statements may be admissible as long as there is compliance with § 5985.1 without running afoul of the Confrontation Clause.

Statements are testimonial in nature when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Commonwealth v. Allshouse*, 614 Pa. at 244, 36 A.3d at 172.

B. “Sufficient Indicia of Reliability”

Any statement admitted under § 5985.1, i.e., nontestimonial, must possess *sufficient indicia of reliability*, as determined from the time, content, and circumstances of its making. The factors to be considered by a trial court in deciding whether the child-declarant was likely to be telling the truth when the statement was made include:

- (1) the spontaneity and consistent repetition of the statement(s);
- (2) the mental state of the declarant;
- (3) the use of terminology unexpected of a child of similar age; and
- (4) the lack of motive to fabricate.

Commonwealth v. Barnett, 50 A.3d 176, 182 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 63 A.3d 771 (2013).

C. Notice Requirement

Pennsylvania courts, thus far, have strictly applied the notice requirements of the tender years exception. In *Commonwealth v. Crossley*, 711 A.2d 1025, 1028 (Pa. Super. 1998), a panel of the Superior Court held that the tender years exception statute requires more than ordinary discovery and mandates heightened discovery. The statute requires that the proponent of the out-of-court statement, in order to provide the adverse party with a fair opportunity to prepare, must:

- notify the adverse party, sufficiently in advance of trial, of the proponent's intention to use the statement at trial; and
- notify the adverse party, sufficiently in advance of trial, of the particulars of the statement.

In *Commonwealth v. O'Drain*, 829 A.2d 316, 320–321 (Pa. Super. 2003), the notice requirement was satisfied when the Commonwealth gave separate and distinct notice, beyond the requirements of discovery, to defendant of its intention to proceed by way of the tender years exception. The Commonwealth did not merely provide defendant with discovery packet containing relatives' statements – the Commonwealth specified in its notice that it might introduce at trial the testimony that child told her mother that the defendant kissed her with his tongue on various parts of her body.

In *Commonwealth v. Hunzer*, 868 A.2d 498, 511 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005), the Court stated that it was not necessary that the notice contain exact word-for-word recitation of the out-of-court statement, but only that notice contain “the particulars of the statement.”

7.12 COMPETENCY OF ACCUSED

Pennsylvania's definition of incompetence is statutory:

50 PA.STAT. § 7402. Incompetence to proceed on criminal charges and lack of criminal responsibility as defense

(a) Definition of Incompetency.--Whenever a person who has been charged with a crime is found to be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense, he shall be deemed incompetent to be tried, convicted or sentenced so long as such incapacity continues.

A defendant is presumed to be competent to stand trial. See *Commonwealth v. duPont*, 545 Pa. 564, 681 A.2d 1328 (1996). The Pennsylvania Supreme Court, in *Commonwealth ex rel. Hilberry v. Maroney*, 424 Pa. 493, 227 A.2d 159 (1967), articulated the test for determining whether one is competent to stand trial:

[T]he test to be applied in determining the legal sufficiency of [a defendant's] mental capacity to stand trial ... is ... his ability to comprehend his position as one accused of murder and to cooperate with his counsel in making a rational defense. See *Commonwealth v. Moon*, [383 Pa. 18, 117 A.2d 96 (1955)] and *Commonwealth ex rel. Hilberry v. Maroney*, [417 Pa. 534, 207

A.2d 794(1965)]. Or stated another way, did he have sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and have a rational as well as a factual understanding of the proceedings against him. See *Dusky v. United States*, 362 U.S. 402, [80 S.Ct. 788, 4 L.Ed.2d 824] (1960). Otherwise the proceedings would lack due process: *Bishop v. United States*, 350 U.S. 91 [76 S.Ct. 440, 100 L.Ed.835] (1956).

Id., 424 Pa. at 495, 227 A.2d at 160.

Thus, the burden is on the defendant to prove, by a preponderance of the evidence, that he was either unable to understand the nature of the proceedings against him or to participate in his own defense. *In re R.D.*, 44 A.3d 657, 665 (Pa. Super. 2012); *Commonwealth v. Santiago*, 579 Pa. 46, 67, 855 A.2d 682, 694 (2004). Moreover, the determination of competency rests in the sound discretion of the trial court. *Commonwealth v. Hughes*, 521 Pa. 423, 436, 555 A.2d 1264, 1270 (1989); *Commonwealth v. Stevenson*, 64 A.3d 715, 720 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 777 (2013).

When a competency hearing takes place, incompetency may be established by a preponderance of the evidence. 50 PA.STAT. § 7402(d) provides:

(d) Hearing; When Required.--The court, either on application or on its own motion, may order an incompetency examination at any stage in the proceedings and may do so without a hearing unless the examination is objected to by the person charged with a crime or by his counsel. In such event, an examination shall be ordered only after determination upon a hearing that there is a prima facie question of incompetency. Upon completion of the examination, a determination of incompetency shall be made by the court where incompetency is established by a preponderance of the evidence.

The sensitive nature of competency determinations requires the appellate courts to afford great deference to the conclusions of the trial court, which has had the opportunity to observe the defendant personally. When the record supports the trial court's determination, the appellate court will not disturb it. *Commonwealth v. Stevenson*, 64 A.3d 715, 720 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 777 (2013).

7.13 COMPETENCY OF WITNESSES

A. Pennsylvania Rule of Evidence 601

Pennsylvania Rule of Evidence 601 provides:

(a) General Rule. Every person is competent to be a witness except as otherwise provided by statute or in these rules.

(b) Disqualification for Specific Defects. A person is incompetent to testify if the court finds that because of a mental condition or immaturity the person:

(1) is, or was, at any relevant time, incapable of perceiving accurately;

(2) is unable to express himself or herself so as to be understood either directly or through an interpreter;

(3) has an impaired memory; or

(4) does not sufficiently understand the duty to tell the truth.⁴⁰

42 PA.CON.S.TAT.ANN. § 5911 provides that, except as otherwise provided, all persons are competent witnesses in any criminal proceeding

Pennsylvania statutory law provides several instances in which witnesses are incompetent. *See, e.g.,* 42 PA.CON.S.TAT.ANN. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 PA.CON.S.TAT.ANN. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions specified.

Pa.R.Evid. 601(b) is consistent with Pennsylvania law concerning the competency of persons with a mental defect and children of tender years. *See Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity).

- ▶ ***Commonwealth v. Knapp***, 542 A.2d 546, 552 (Pa. Super. 1988): Superior Court affirmed in rape case because, inter alia, 11 year-old victim exhibited a sufficient awareness of his moral responsibility to testify truthfully.
- ▶ ***Commonwealth v. Gaerttner***, 484 A.2d 92, 98 (Pa. Super. 1984): Victim of sexual assault, ten years old at time of offense and 11 years old at time of trial, was competent in that she had the mental capacity to observe and remember what she had observed.

The application of the standards in Pa.R.Evid. 601(b) is a factual question to be resolved by the Court. Expert testimony has been used when competency under these standards has been an issue. *E.g., Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d

454 (1976)(competency hearing held in the absence of the jury; doctors testified on behalf of prosecution and defense regarding competency of witness); **Commonwealth v. Gaerttner**, 484 A.2d 92 (Pa. Super. 1984). Pa.R.Evid. 601(b) is intended to preserve existing law and not to expand it.

B. Spousal Competence

Spousal competence in criminal cases is governed by 42 PA.CON.S.TAT.ANN. § 5913 which provides, in pertinent part:

Except as otherwise provided in this subchapter, in a criminal proceeding a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse except that there shall be no such privilege:

. . .

(2) in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them;

. . .

(4) in any criminal proceeding in which one of the charges pending against the defendant includes murder, involuntary deviate sexual intercourse or rape.⁴¹

Not only is a spouse competent to testify when these exceptions apply, he or she may be compelled to testify. **Commonwealth v. Hess**, 411 A.2d 830, 833 (Pa. Super. 1979), *appeal dismissed*, 499 Pa. 206, 452 A.2d 1011 (1982).

- ▶ **Commonwealth v. Kirkner**, 569 Pa. 499, 805 A.2d 514 (2002): the spousal privilege did not apply to the wife because the prosecution involved bodily injury and violence to wife from husband. Trial Court improperly granted wife’s motion to quash the subpoena issued against her – she simply had no privilege.

1. Spouse or minor must be in protected class

The statutory exception to the spousal privilege in criminal proceedings, provided in 42 PA. CONS. STAT. § 5913, is limited to proceedings in which the

⁴¹ 42 PA.CON.S.TAT.ANN. § 5913

person was on trial for an act against his spouse, or against a minor child in the protected class.

- ▶ ***Commonwealth v. Scott***, 516 Pa. 346, 532 A.2d 426 (1987) Defendant's estranged wife could not testify about the defendant's violence toward her boyfriend – the exception to spousal privilege applies only if a spouse or minor child in the protected class is one of the victims.
- ▶ ***Commonwealth v. John***, 596 A.2d 834 (Pa. Super. 1991) (Spousal privilege did not apply in a criminal proceeding where the husband was on trial for attempting to burn down a bingo hall that his wife was in).

2. Requirement of a valid marriage

The basis for invoking the marital privilege is the existence of a valid marriage; where at the time the woman was living with defendant she was still legally married to another man, therefore the woman and defendant were not validly married so the marital privilege did not apply. ***Commonwealth v. Maxwell***, 505 Pa. 152, 477 A.2d 1309 (1984), *cert. denied*, 469 U.S. 971, 105 S.Ct. 370, 83 L.Ed.2d 306 (1984).

C. Competency of Child

The determination of the competency of victims or witnesses is left to the sound discretion of the trial judge and will not be reversed absent a clear abuse of discretion. ***Commonwealth v. Judd***, 897 A.2d 1224, 1228 (Pa. Super. 2006), *appeal denied*, 590 Pa. 675, 912 A.2d 1291 (2006)(case involved rape and related charges – issue of competency of six year old child).

The test for competency of a minor witness or victim has been well established:

Every witness is presumed competent. A party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks the minimal capacity ... (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth.

Commonwealth v. Page, 59 A.3d 1118, 1129 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 776 (2013).

Furthermore, “[a] child’s competency to testify is a threshold legal issue that a trial court must decide, and an appellate court will not disturb its determination absent an abuse of discretion.” ***Commonwealth v. Washington***, 554 Pa. 559, 563, 722 A.2d 643,

646 (1998) (citation omitted & emphasis added).

In addressing an objection to the competency of a minor who testifies, there are a number of standard policies:

- (1) a child witness, like any other witness, is presumed competent to testify unless proven otherwise. *In Interest of J.R.*, 648 A.2d 28, 31 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995).
- (2) the burden to prove that a witness is not competent falls on the objecting party. *Commonwealth v. Short*, 420 A.2d 694, 696 (Pa. Super. 1980)(rape case in which defense challenged testimony of child victim).
- (3) the determination of a witness's competency to testify is left to the sound discretion of the trial judge, and the judge's ruling on the matter will not be reversed absent a flagrant abuse of that discretion. *Commonwealth v. Delbridge*, 580 Pa. 68, 73, 859 A.2d 1254, 1257 (2004) (case involved a child sexual abuse victim).
- (4) When the witness is under fourteen years of age, there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless resides in the trial judge to make the ultimate decision as to competency. *Commonwealth v. D.J.A.*, 800 A.2d 965, 969 (Pa. Super. 2002), *appeal denied*, 579 Pa. 700, 857 A.2d 677 (2004).
- (5) *Commonwealth v. Hunzer*, 868 A.2d 498, 507 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005): In making its determination, the court must inquire whether the child possesses:
 - i. capacity to communicate, including as it does both an ability to understand questions and an ability to frame and express intelligent answers,
 - ii. mental capacity to observe the occurrence itself and the capacity of remembering what it is that she is called to testify about, and
 - iii. a consciousness of the duty to speak the truth.

For additional discussion, see **Section 7.4(C) Competency of Minor Complainant or Witness and Chapter 5, Section 5.12 Taint.**

D. Hypnotically Refreshed Testimony

In *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984), the Pennsylvania

Supreme Court held that where a party seeks to introduce the testimony of a witness, who has previously been hypnotized, that party must:

- (1) advise the court of the existence of the hypnosis;
- (2) show that the testimony to be presented was established and existed prior to the hypnosis; and
- (3) demonstrate that the hypnotist was trained in the process and was neutral.

In turn, the court must instruct the jury that the witness had been hypnotized and that they should receive the testimony with caution.

In *Commonwealth v. Robinson*, 581 Pa. 154, 864 A.2d 460 (2004), *cert. denied*, 546 U.S. 983, 126 S.Ct. 559, 163 L.Ed.2d 470 (2005), the Court found all three requirements from *Commonwealth v. Smoyer* present in a murder and rape prosecution. Any error in trial court's failure to hold a separate hearing respect to the two prosecution witnesses who underwent hypnosis was harmless because all requirements for admissibility of hypnotically-refreshed evidence were satisfied. The sexual nature of assault on one of the witnesses, recalled by her only after the hypnosis, was confirmed by independent physical evidence and other testimony; therefore, the sexual nature of the attack was independently soundly established.

7.14 MISTAKE AS TO AGE⁴²

This statute addresses when an accused may present evidence that he reasonably believed a child victim was above a critical age established in the definition of the crime.

Chapter 31. Sexual Offenses
Subchapter A. General Provisions
§ 3102. Mistake as to age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.⁴³

⁴² For additional discussion, see Chapter 5, Section 5.9(D) Applicability to Sex Offenses – Mistake as to Age.

⁴³ 18 PA. CONS. STAT. § 3102.

A. Victim Below Age 14 Years

If a criminal statute depends on a child victim being less than 14 years of age, the defense is prohibited from claiming, as a defense, that he reasonably believed the child victim was 14 years or older. 18 PA. CONS. STAT. § 53102; This statute is not unconstitutional. **Commonwealth v. Robinson**, 497 Pa. 49, 438 A.2d 964 (1998), *appeal dismissed*, 457 U.S. 1101, 102 S.Ct. 2898, 73 L.Ed.2d 1310 (1982). This statute plainly evidenced the legislature's intent to make violation thereof a strict liability offense where victim is less than fourteen years of age, where the statute specifically indicated that mistake as to age was not a defense. 497 Pa. at 54, 438 A.2d at 966-967.

- ▶ **Commonwealth v. Hall**, 418 A.2d 623, 624 (Pa. Super. 1980): even if justified, defendant's mistaken belief as to the victim's age was irrelevant and not a defense to corruption of minors or voluntary deviate sexual intercourse.

B. Victim Above Age 14 Years

In matters involving sexual offenses against children, when criminality depends on the child's being below a specified age but older than fourteen years, it is a defense for the defendant to prove that he or she reasonably believed the child to be above the critical age. Because Section 3102 places the initial burden on the accused to prove mistake of age, absent such a defense being proffered by the defendant, the prosecution bears no burden of proof regarding the defendant's knowledge or belief as to the child victim's age. **Commonwealth v. Bohonyi**, 900 A.2d 877, 884 (Pa. Super. 2006), *appeal denied*, 591 Pa. 679, 917 A.2d 312 (2006).

- ▶ **Commonwealth v. Fetter**, 770 A.2d 762, 768 (Pa. Super. 2001), *affirmed*, 570 Pa. 494, 810 A.2d 637 (2002): defendant was convicted of statutory sexual assault, involuntary deviate sexual intercourse; the victim was 15 at the time of the incident. The trial court properly denied defendant's attempts to cross examine the victim as to her beliefs as to how old she looked: victim's beliefs were irrelevant to defendant's beliefs and knowledge of her actual age.

7.15 SEXUAL ASSAULT COUNSELOR PRIVILEGE⁴⁴

The sexual assault counselor victim privilege prevents sexual assault counselors from disclosing confidential communications made to them by the victims of sex-related crimes. The privilege, which is the equivalent of one involving private psychotherapeutic treatment, is absolute and applies both to oral communications and to records created during the course of the confidential relationship. **Commonwealth v. Gibbs**, 642 A.2d 1132, 1134 (Pa. Super. 1994). It provides:

⁴⁴ Additional discussion of the Sexual Assault Counselor Privilege, in relation to the way it may be invoked regarding the production of case files, is provided in **Chapter 6, Section 6.9(C), Sexual Assault Counselor Privilege**.

Subchapter A. Witnesses Generally

Certain Privileges and Immunities

§ 5945.1. Confidential communications with sexual assault counselors

(a) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Confidential communication.” All information, oral or written, transmitted between a victim of sexual assault and a sexual assault counselor in the course of their relationship, including, but not limited to, any advice, reports, statistical data, memoranda, working papers, records or the like, given or made during that relationship, including matters transmitted between the sexual assault counselor and the victim through the use of an interpreter.

“Coparticipant.” A victim participating in group counseling.

“Interpreter.” A person who translates communications between a sexual assault counselor and a victim through the use of sign language, visual, oral or written translation.

“Rape crisis center.” Any office, institution or center offering assistance to victims of sexual assault and their families through crisis intervention, medical and legal accompaniment and follow-up counseling.

“Sexual assault counselor.” A person who is engaged in any office, institution or center defined as a rape crisis center under this section, who has undergone 40 hours of sexual assault training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.

“Victim.” A person who consults a sexual assault counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who seek advice, counseling or

assistance from a sexual assault counselor concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault of a victim.

(b) Privilege.--

(1) No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

(2) No coparticipant who is present during counseling may disclose a victim's confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.⁴⁵

The privilege is absolute and is not outweighed by the defendant's state and federal constitutional rights to confrontation. *Commonwealth v. Wilson / Aultman*, 529 Pa. 268, 602 A.2d 1290 (1992), *cert. denied*, 504 U.S. 977, 112 S.Ct. 2952, 119 L.Ed.2d 574 (1992).

Because the statutory privilege is absolute, no court review is required. The materials are not subject to any access by counsel. The privilege applies regardless of whether the party seeking disclosure is the prosecution or defense. *Commonwealth v. Gibbs*, 642 A.2d at 1135.

A. Waiver

The privilege can be waived. If the abuse victim has made confidential records available to the Commonwealth, and the prosecution is then accorded access to the information covered by the privilege, then the statutory privilege must yield to the defendant's rights of confrontation and compulsory process. *B.T. v. Family Services of Western Pennsylvania*, 705 A.2d 1325, 1337, n.18 (Pa. Super. 1998), *aff'd*, 556 Pa. 430, 728 A.2d 953 (1999).

- *Commonwealth v. Davis*, 543 Pa. 628, 632, 674 A.2d 214, 216 (1996): in case in which defendant was charged with deviate sexual intercourse and corruption of minor; inter alia, child sexual abuse victim and his family waived any privilege to information contained in family therapy counseling records by giving prosecution access to them, and defendant

⁴⁵ 42 PA. CONS. STAT. § 5945.1.

was entitled to such information in order to confront witnesses at trial regardless of appropriateness of his designs as to use at trial of information hypothetically contained in records.

- **No Waiver:** *Commonwealth v. Askew*, 666 A.2d 1062, 1065 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996): defendant charged with statutory rape and involuntary deviate sexual intercourse, *inter alia*. Because counselor had a statutory duty to reveal allegation of child abuse to police under the Child Protective Services Act, 23 PA.CON.S.TAT.ANN. § 6311 *et seq.*, no waiver when counselor informed police of the allegations, nor when minor victim's mother consented to the disclosure.

7.16 "911" TAPES AND OTHER AUDIOTAPED EVIDENCE

A. Use of 911 Tapes and Other Audiotapes at Trial

Audiotaped evidence, such as recordings of "911" calls, often plays a prominent role in sexual violence and domestic violence cases. For purposes of establishing prompt complaint, as well as the natural history or development of a case, the prosecution will attempt to move into evidence the recordings of emergency call audiotapes.⁴⁶

This type of evidence can play a pivotal role at trial, especially where the victim or witness is unavailable at trial or does not wish to cooperate with the prosecution. It adds credibility to the victim's testimony at trial. Basic rules of admissibility and relevancy apply.⁴⁷

1. Natural History or Development of Case

In *Commonwealth v. Robinson*, 581 Pa. 154, 227, 864 A.2d 460, 503 (2004), *cert. denied*, 581 U.S. 983, 126 S.Ct. 559, 163 L.Ed.2d 470 (2005), the trial court permitted tape recordings of the 911 calls made to the Allentown Police Department after the discovery of the murder victim. The defendant argued that the tape was cumulative to other evidence proffered through witnesses present at trial. The Supreme Court of Pennsylvania ruled that the tapes did not contain any inflammatory or impassioned excerpts, and therefore were not prejudicial even if somewhat cumulative.

In *Commonwealth v. Hood*, 872 A.2d 175, 181-184 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), the trial court permitted 911

⁴⁶ See 3 A.L.R.5th 784, ADMISSIBILITY OF TAPE RECORDING OR TRANSCRIPT OF "911" EMERGENCY TELEPHONE CALL.

⁴⁷ Evidence is admissible if it is relevant: "that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact." *Commonwealth v. Wynn*, 580 Pa. 713, 850 A.2d 730, 733 (Pa. Super. 2004), *appeal denied*, 862 A.2d 1255 (2004).

calls of a shooting, two of which identified the defendant as the shooter, into evidence to establish the initial reports of the incident.

2. Initial Report of Crime

In *Commonwealth v. Cunningham*, 805 A.2d 566, 572-573 (Pa. Super. 2002), appeal denied, 573 Pa. 663, 820 A.2d 703 (2003), the trial court permitted the jury to hear the tape of a 911 call made by bystanders who were working nearby and saw the robbery in issue unfolding. The tape was admitted under the present sense exception to the hearsay rule.

B. Issues Regarding Admissibility

Four issues must usually be addressed before 911 tapes, as well as other forms of audiotaped evidence, are admissible. These are:

- (1) Foundation and Authentication;
- (2) Hearsay Considerations;
- (3) Relevancy; and
- (4) Prejudice.

1. Foundation and Authentication

Pennsylvania Rule of Evidence 901(a) is identical to Federal Rule of Evidence 901(a) and consistent with Pennsylvania case law. Rule 901(a) provides that “[t]he requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Section (b) of Rule 901 provides examples of the ways authentication may be accomplished. Two of the examples are applicable to these types of audiotapes:

Rule 901. Authenticating or Identifying Evidence

...

- (b) Examples.** The following are examples only--not a complete list--of evidence that satisfies the requirement:

...

- (5) *Opinion About a Voice.* An opinion identifying a person’s voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged

speaker.

(6) *Evidence About a Telephone Conversation*. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

In addition to being relevant, demonstrative evidence must also be properly authenticated by evidence sufficient to show that it is a fair and accurate representation of what it is purported to depict. *Commonwealth v. Reid*, 571 Pa. 1, 38, 811 A.2d 530, 552 (2002), *cert. denied*, 540 U.S. 850 (2003). “Demonstrative evidence may be authenticated by testimony from a witness who has knowledge of what the evidence is proclaimed to be. Pa.R.Evid. 901(b)(1).” *Id.*

2. Hearsay Considerations

When an out-of-court statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under the hearsay rule. *Commonwealth v. Cunningham*, 805 A.2d 566, 572 (Pa. Super. 2002), *appeal denied*, 573 Pa. 663, 820 A.2d 703 (2003). Therefore, 911 calls which are not used to prove the truth of the matter asserted are not barred by the hearsay rule.

In cases where 911 calls, or other audiotaped evidence, fall within the definition of hearsay, trial courts have admitted the evidence under the excited utterance and present sense impression exceptions, as well as other exceptions.

3. Constitutional Right of Confrontation

An additional consideration is the prohibition against testimonial statements from *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* holds that out-of-court statements by witnesses that are testimonial are barred under the confrontation clause, notwithstanding their designation as hearsay exceptions, unless the witnesses are unavailable and defendants had prior opportunity to cross-examine the witnesses. There are a number of cases that find a distinction between non-testimonial statements and statements made in contemplation of litigation:

A statement is more likely to have been made with the expectation that it would be used as evidence if it was given in response to questioning by a government official than it would if it had been volunteered. Emergency 911 calls offer a good illustration of this point. Many courts have concluded that a hearsay statement made in a 911 call is not testimonial, because the statement is not made in response to police questioning, and because the purpose of the call is to obtain assistance, not to make a record against someone.

Commonwealth v. Gray, 867 A.2d 560, 576 (Pa. Super. 2005), *appeal denied*, 583 Pa. 694, 879 A.2d 781 (2005).⁴⁸ In ***Gray***, the Superior Court concluded that the witness's excited utterances to police at the scene of crime did not fall under "extrajudicial statements contained in formalized testimonial materials" classification of testimonial statements articulated in ***Crawford***.

The United States District Court for the Eastern District of Pennsylvania, in an unreported case, found that typical 911 calls are not considered testimonial statements as to trigger Confrontation Clause protections:

Therefore, statements describing an ongoing emergency, recorded during the course of a 911 call are generally not considered testimonial. *Id.* The non testimonial statements in *Davis* can be distinguished from the testimonial statements in *Crawford* in that the statements were made as the event was actually happening, not after the fact; that there was an ongoing emergency and the elicited statements were necessary to resolve that emergency; and that the statements were not formal.

Hood v. Folino, 2012 WL 760795 (E.D.Pa. 2012).

(a) Excited Utterances

In determining whether an audiotaped statement is admissible as an excited utterance, the taped statement must relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. The fact that a statement was not made immediately after a startling event is not dispositive of its admissibility as an excited utterance. ***Commonwealth v. Keys***, 814 A.2d 1256, 1258 (Pa. Super. 2003). The crucial question, regardless of time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while

⁴⁸ In ***Leavitt v. Arave***, 383 F.3d 809 (9th Cir. 2004), the victim called 911 to report that a prowler had entered her home. On the following night, the victim was murdered. At the defendant's trial, the trial court admitted the 911 call, as excited utterances, and Leavitt was convicted. On appeal, the Court concluded that the victim's statements were properly introduced as excited utterances and that the statements did not qualify as "testimonial" under ***Crawford v. Washington***, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

the reflective process remains in abeyance. *Commonwealth v. Carmody*, 799 A.2d 143, 147 (Pa. Super. 2002).

The excited utterance (1) need not describe the startling event, it need only relate to it, and (2) need not be made contemporaneously with, or immediately after, the startling event.⁴⁹

PA.R.E. 803(2) provides that an excited utterance is a “statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”⁵⁰

- **Other Corroborating Evidence:** with respect to excited utterances by unidentified bystanders, i.e., anonymous 911 calls, the law in Pennsylvania has evolved to add an additional proof requirement for admissibility. In order to assure that an unidentified bystander actually witnessed the event discussed on the 911 call, and which is relevant at the time of trial, the Pennsylvania Supreme Court has held that that it is incumbent upon the party seeking the admission of the out-of-court statement to demonstrate by the use of “*other corroborating evidence*” that the declarant actually viewed the event “of which he speaks.” *Commonwealth v. Hood*, 872 A.2d 175, 181 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005) (*citing Carney v. Pennsylvania Railroad Co.*, 428 Pa. 489, 496, 240 A.2d 71, 75 (1968)).

(b) Present Sense Impressions

The present sense impression exception, regardless of the availability of the declarant to testify at trial, allows the admission of a 911 call, or other audiotaped statement, under certain conditions. PA.R.E. 803(1) provides that a present sense impression is a “statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”⁵¹

The observation must be made at the time of the event or shortly thereafter, making it unlikely that the declarant had the opportunity to form an intent to misstate his observation. Consequently, the trustworthiness of the statement depends upon the timing of the declaration. *Commonwealth v. Gray*, 867 A.2d 560, 570 (Pa. Super. 2005), *appeal denied*, 583 Pa. 694, 879 A.2d 781 (2005). “In addition, the present sense impression does not require that the comments be made to another person also present at the scene, but may be made over the telephone.” *Commonwealth v. Cunningham*, 805 A.2d 566, 573 (Pa. Super. 2002), *appeal denied*, 573 Pa. 663, 820 A.2d 703 (2003).

⁴⁹ *Commonwealth v. Hood*, 872 A.2d 175, 181 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005).

⁵⁰ For additional discussion on excited utterances, see **Section 7.10(C)(2)**.

⁵¹ For additional discussion on present sense impressions, see **Section 7.10(C)(1)**.

- **Other Corroborating Evidence:** with respect to 911 calls by unidentified bystanders, admitted under the present sense impression exception, the Superior Court in *Commonwealth v. Hood*, 872 A.2d 175, 184 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), held in dicta the same additional proof requirement for admissibility as excited utterances. In order to assure that an unidentified bystander actually witnessed the event discussed on the 911 call, and which is relevant at the time of trial, it is incumbent upon the party seeking the admission of the out-of-court statement to demonstrate by the use of “other corroborating evidence” that the declarant actually viewed the event “of which he speaks.” See *Carney v. Pennsylvania Railroad Co.*, 428 Pa. 489, 496, 240 A.2d 71, 75 (1968).

4. Relevancy

In *Commonwealth v. Witman*, 750 A.2d 327 (Pa. Super. 2000), *appeal denied*, 564 Pa. 138, 764 A.2d 1053 (2000), *cert. denied*, 534 U.S. 815, 122 S.Ct. 42, 151 L.Ed.2d 15 (2001), the court found 911 tapes to be relevant in a suppression hearing on a number of grounds:

This evidence forms the very foundation for the relationship appellee established with police. Appellee maintains no expectation of privacy with respect to his statements and, furthermore, careful review of the 911 tape fails to reveal unfair prejudice to the defense. To the contrary, the statements made by appellee when he called 911 appear to be wholly consistent with all of his subsequent statements to the police. It may also be necessary during trial, as a truth-determining process, to test prior consistent or inconsistent statements on behalf of either the appellee or the Commonwealth. It is the best evidence of what transpired in the opening minutes of this event and as such may be required as evidence of the occurrence pursuant to Pa.R.Evid. 1002, Requirement of Original. At worst, the 911 recording and transcript would be cumulative and corroborative evidence; however, this evidence, more than any other, demonstrates what transpired in the opening moments of police involvement initiated by appellee and goes to appellee’s state of mind. In his Opinion, the trial court acknowledged that police involvement originated with the 911 call and the contents of that call relayed to police are inseparable from their conduct in reaching the house and their treatment of the appellee. Based upon the foregoing, we find erroneous the suppression court’s exclusion of the 911 recording and transcript. While the Commonwealth did

not object to the ruling by the trial court on this issue, our ruling may avoid the necessity of an appeal on admissibility of the tapes or transcripts should the matter arise at trial.

Commonwealth v. Witman, 750 A.2d at 336.

5. Prejudice

To test whether demonstrative evidence should be admitted, the trial court should conduct a two part test.

First, the court determines whether the evidence is inflammatory in nature.

If the evidence is inflammatory, the court then decides whether the evidence is of “essential evidentiary value” such that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors. *Commonwealth v. Conway*, 534 A.2d 541, 544 n.3 (Pa. Super. 1987), *appeal denied*, 520 Pa. 581, 549 A.2d 914 (1988); *Commonwealth v. Groff*, 514 A.2d 1382, 1384 (Pa. Super. 1986), *appeal denied*, 515 Pa. 619, 531 A.2d 428 (1987).

- ▶ **Harmless Error:** It was error to admit into evidence tape recording of 911 telephone call made during the course of the murder because victim’s screams would inflame the jury, however, because of overwhelming evidence of guilt, determined to be harmless error. *Commonwealth v. Groff*, 514 A.2d 1382, 1384-1385 (Pa. Super. 1986), *appeal denied*, 515 Pa. 619, 531 A.2d 428 (1987).
- ▶ **Harmless Error:** During 911 call by victim on day she was murdered, victim told the 911 operator that the defendant had just called her and threatened her life. The Commonwealth asserted that the 911 call was properly admitted pursuant to the excited utterance exception to the hearsay rule. The Supreme Court did not reach the issue of the hearsay objection because, even if the trial court erred in its admission of the 911 call, it constituted harmless error. “The statement regarding [the defendant’s] threat made during the 911 call was merely cumulative of other properly admitted evidence. Moreover, given the other overwhelming evidence of [the defendant’s] guilt in the record, we do not find that [the defendant] was prejudiced by the court’s admission of this evidence.” *Commonwealth v. Stallworth*, 566 Pa. 349, 368, 781 A.2d 110, 120-121 (2001).

7.17 EVIDENCE OF SEXUALLY EXPLICIT MATERIALS

It is not uncommon for the prosecution, in a sexual violence case, to attempt to admit into evidence items seized from a search of the defendant's residence, especially sexually explicit materials, including pornography. Arguments on behalf of the prosecution in support of admissibility include:

- the materials show abnormal sexual behavior;
- the defendant's sexual desires were out of the ordinary;
- the defendant's sexual preferences were aberrant.⁵²

However, caution must be exercised before materials of a sexual nature are admitted:

Admittedly, the drawing of lines with respect to the admission of sexually explicit materials is difficult. While on one hand recognizing that evidence of a sexual nature may have probative value in a sexual assault case, we cannot on the other hand confer blanket probative value on all sexual materials in all cases. In some instances, materials found in an accused's possession might very well be probative of an issue in a case. For instance, if the publication sought to be admitted here had depicted women being tied up and subjected to anal intercourse against their will, it may have been probative of whether appellant forced his victim to commit those same acts. Further, if there had been allegations that appellant had shown the Magazine to the victim or in any way used the magazine during his attack on her, the probative value of the evidence would be more obvious. However, as the prosecutor herself commented in this case, one's mere possession of a pornographic magazine does not tend to establish guilt in the case of rape.

Commonwealth v. Impellizzeri, 661 A.2d 422, 431 (Pa. Super. 1995), appeal denied, 543 Pa. 725, 673 A.2d 332 (1996).

The prosecution will argue that the materials show abnormal sexual behavior. In ***Commonwealth v. Moore***, 567 A.2d 701 (Pa. Super. 1989), *appeal denied*, 525 Pa. 597, 575 A.2d 563 (1990), the appellant was convicted of rape, involuntary deviate sexual intercourse and related offenses in connection with his assault on an eleven year old girl on her way to school. At the time of the crime, the perpetrator carried a blue gym bag and a jar of Vaseline. Also, the victim found a pornographic magazine at the scene of the assault. When arrested several months later, the appellant had in his possession a grey gym bag, a jar of Vaseline and a pornographic magazine, all of which were admitted at trial. The Superior Court ruled in ***Moore*** that the items admitted were probative because they tended to establish the identity of the attacker. *Id.* at 706.

⁵² ***Commonwealth v. Impellizzeri***, 661 A.2d 422, 430 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (1996).

A. Basic Rules of Admissibility

Admissibility is based upon a determination of relevancy, and relevancy is determined by examining whether the evidence sought to be introduced tends to “establish a material fact or make a fact at issue more or less probable.” *Commonwealth v. Griffin*, 684 A.2d 589, 594 (Pa. Super. 1996). Evidence that is relevant, i.e., probative of a material fact, may still be excluded if its probative value is outweighed by its prejudicial effect. *Commonwealth v. Dillon*, 863 A.2d 597, 601 (Pa. Super. 2004) (*en banc*), *appeal granted*, 584 Pa. 691, 882 A.2d 477 (2005). However, since all Commonwealth evidence in a criminal case will be prejudicial to the defendant, exclusion of otherwise relevant evidence will only be necessary where “the evidence is so prejudicial that it may inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.” *Commonwealth v. McMaster*, 666 A.2d 724, 729 (Pa. Super. 1995) (internal quotations omitted).

It is well settled in Pennsylvania that “a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury’s consideration where those facts form part of the history and natural development of the events and offenses with which the defendant is charged.” *Commonwealth v. Peer*, 684 A.2d 1077, 1083 (Pa. Super. 1996). Unless otherwise barred by a legal impediment, the trial judge enjoys broad discretion in admitting or excluding evidence, and appellate review is limited: “[t]he admission of evidence is a matter vested in the sound discretion of the trial court, whose decision thereon can only be reversed by this Court upon a showing of an abuse of discretion.” *Commonwealth v. Travaglia*, 792 A.2d 1261, 1263 (Pa. Super. 2002), *appeal denied*, 572 Pa. 733, 815 A.2d 633 (2002), *cert. denied*, 540 U.S. 828 (2003).

B. Sexually Explicit Materials - Probative Value

Although mere possession of pornographic materials does not tend to establish guilt in a sexual violence case, the possession of such materials by the defendant will be admissible if probative of an issue in the case. In *Commonwealth v. Impellizzeri*, 661 A.2d 422 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (Pa. 1996), the Superior Court held that mere possession of sexually explicit materials does not tend to establish guilt and, therefore, does not require admission. 661 A.2d at 431. In *Impellizzeri*, the magazine at issue, which was seized at the defendant’s home pursuant to a search warrant, dealt with anal sex; although the victim had been subjected to anal intercourse, as well as vaginal and oral sex, the Superior Court held that there was no evidence that the magazine had been used in any way in the sexual attack or even shown to the victim. The Superior Court held that it was error to admit the magazine, which had little probative value on “whether the sexual activity was forced or consensual under the circumstances presented...” 661 A.2d at 431.

In *Commonwealth v. Palmer*, 700 A.2d 988 (Pa. Super. 1997), *appeal denied*, 552 Pa. 695, 716 A.2d 1248 (1998), *overruled on other grounds*, *Commonwealth v. Archer*, 722 A.2d 203 (Pa. Super. 1998), explicit photographs and pornographic films

not only served to corroborate the victim's claim that the pictures and films were shown to the minor victim, but were also probative of a fact in controversy. In *Palmer*, sexually explicit photographs of the minor victim were found at the defendant's home, along with pornographic films and explicit photographs of another girl similar to the photographs of the victim. At trial, the minor victim testified that the defendant had watched the pornographic movies with her; therefore, the admission of the films tended to corroborate the testimony of the victim. The explicit photographs of the other girl, taken under similar circumstances, tended to show that more likely than not the defendant had taken the pictures of the minor victim. 700 A.2d at 993.

C. Sexually Explicit Materials – Lessening Prejudicial Impact

In *Commonwealth v. Palmer*, 700 A.2d 988, 993 (Pa. Super. 1997), *appeal denied*, 552 Pa. 695, 716 A.2d 1248 (1998), *overruled on other grounds*, *Commonwealth v. Archer*, 722 A.2d 203 (Pa. Super. 1998) (en banc), the probative value of sexually explicit materials in a prosecution for rape, involuntary deviate sexual intercourse, and corrupting morals of a minor was not outweighed by the prejudicial impact of the materials; the trial judge deliberately delimited the physical evidence admitted or submitted to jury, which was permitted to see only external packaging of individual videos to confirm that they were adult videos, and which did not view six photos of a young woman that were identified by the minor victim.

D. Sexually Explicit Materials – Harmless Error

In *Commonwealth v. Bishop*, 936 A.2d 1136 (Pa. Super. 2007), *appeal denied*, 597 Pa. 710, 951 A.2d 1159 (2007), the defendant was convicted of rape, involuntary sexual intercourse and related charges. The defendant had assaulted the victim in a restaurant's restroom; the victim was eventually rescued by her cousin who was waiting for her. The defendant was caught while the assault was taking place. Although the Commonwealth witness conceded at trial that there was no link between viewing pornography and committing violent crimes, the trial court admitted, over objection, nine copies of the magazine "Barely Legal" which were found by the police in the defendant's truck. The Superior Court found the admission of the magazines to be an abuse of discretion; however, the error was harmless in light of the overwhelming evidence against the defendant. The Superior Court stated:

Harmless error is established where either: 1) the error did not prejudice the defendant; 2) the erroneously admitted evidence was merely cumulative of other untainted evidence; or 3) where the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. *Commonwealth v. Owens*, 929 A.2d 1187, 1192 (Pa. Super. 2007). As noted above, the evidence against Appellant in this case was overwhelming. We conclude that any

error in admitting evidence of the magazines was insignificant in comparison to the properly admitted evidence, and the error could not have contributed to the verdict.

936 A.2d at 1144.

7.18 SPOUSAL PRIVILEGES⁵³

A. Spousal Privilege – Testimonial Privilege

Pennsylvania has a statutorily enacted spousal privilege, which disqualifies a husband or wife from giving any testimony adverse to the spouse. This rule has exceptions:

§ 5913. Spouses as witnesses against each other

Except as otherwise provided in this subchapter, in a criminal proceeding a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse *except that there shall be no such privilege:*

...

(2) in any criminal proceeding against either for *bodily injury or violence* attempted, done or threatened *upon the other, or upon the minor children* of said husband and wife, or the *minor children* of either of them, or *any minor child in their care or custody*, or in the care or custody of either of them;

...

(4) in any criminal proceeding in which one of the charges pending against the defendant includes *murder, involuntary deviate sexual intercourse or rape*.

42 PA. CONS. STAT. ANN. § 5913 (emphasis added).

This section makes mandatory the testimony of a spouse where the defendant spouse is charged with murder, rape or involuntary deviate sexual intercourse, in matters involving bodily injury to violence to family members or minors. ***Commonwealth v. Hancharik***, 565 A.2d 782, 786 (Pa. Super. 1989), *aff'd*, 534 Pa. 435, 633 A.2d 1074 (1993).

It should be noted that § 5913 and § 5914 involve two distinct rules. ***Commonwealth v. Hancharik***, 534 Pa. 435, 439, 633 A.2d 1074, 1076 (1993). Section 5914 is discussed below.

⁵³ Other laws which created a privilege against the production of records are discussed in **Chapter 6, Section 6.9, PRIVILEGES**.

B. Spousal Privilege – Confidential Communications Privilege

Pennsylvania has a statutorily enacted spousal privilege in relation to confidential communications between spouses. This rule is much more limited than the testimonial rule found in § 5913:

§ 5914. Confidential communications between spouses

Except as otherwise provided in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.

42 PA. CONS. STAT. ANN. § 5914. This statutory privilege “is substantially a reenactment of legislation dating back to 1887, which itself had roots in the common law.” *Commonwealth v. Chiappini*, 566 Pa. 507, 511, 782 A.2d 490, 492 (2001)(plurality).

We recognize that “[c]ommunications between spouses are presumed to be confidential, and the party opposing application of the rule disqualifying such testimony bears the burden of overcoming this presumption.” *Commonwealth v. Burrows*, 779 A.2d 509, 514 (Pa.Super. 2001)(internal citation omitted). The privilege under 42 PA. CONS. STAT. ANN. § 5914 prevents a spouse from testifying against the declarant-defendant spouse regarding “any communications which were confidential **when made** and which were made during the marital relationship.” *Commonwealth v. May*, 540 Pa. 237, 656 A.2d 1335, 1341-1342 (1995)(footnote omitted) (emphasis supplied). Our Supreme Court has explained that where the challenged spousal communication was divulged by the declarant-defendant to third parties, the statement “does not qualify as [a] confidential communication.” *Commonwealth v. Hancharik*, 534 Pa. 435, 633 A.2d 1074, 1077 (1993).

Commonwealth v. G.Y., 63 A.3d 259, 267 (Pa. Super. 2013).

This privilege is waivable but only by the spouse asserting the privilege. *Commonwealth v. Luster*, 71 A.3d 1029, 1045 (Pa. Super. 2013); *Commonwealth v. May*, 540 Pa. 237, 656 A.2d 1335 (1995), *cert. denied*, 525 U.S. 1078, 119 S.Ct. 818, 142 L.Ed.2d 676 (1999).

- *Commonwealth v. Dubin*, 581 A.2d 944 (Pa. Super. (990), *appeal denied*, 527 Pa. 592, 588 A.2d 912 (1991): pretrial suppression of testimony of estranged wife was premature.

Communications between spouses during marriage are presumed to be privileged. *Commonwealth v. McBurrows*, 779 A.2d 509 (Pa. Super. 2001) (en banc), *appeal denied*, 572 Pa. 732, 815 A.2d 632 (2002), *cert. denied*, 540 U.S. 829, 124 S.Ct. 60, 157 L.Ed.2d 55 (2003). Therefore, the party seeking to admit such communications as evidence bears the burden of overcoming this presumption. *Id.*

Communications between spouses made in the presence of third parties are not privileged. “Generally, the presence of third parties negates the confidential nature of the communication.” *Commonwealth v. May*, 540 Pa. 237, 251, 656 A.2d 1335, 1342 (1995), *cert. denied*, 525 U.S. 1078, 119 S.Ct. 818, 142 L.Ed.2d 676 (1999) (defendant had no privilege in letters sent to his wife from prison after defendant signed form allowing for the inspection of his mail).

The section 5914 privilege extends to oral or written words, expressions or gestures which are intended by one spouse to convey a message to the other. *Commonwealth v. Hunter*, 60 A.3d 156, 157 n. 2 (Pa. Super. 2013). However, the privilege does not extend to the observations of a spouse’s conduct during marriage. *Commonwealth v. McBurrows*, 779 A.2d 509, 519 (Pa. Super. 2001) (en banc), *appeal denied*, 572 Pa. 732, 815 A.2d 632 (2002), *cert. denied*, 540 U.S. 829, 124 S.Ct. 60, 157 L.Ed.2d 55 (2003).

- *Commonwealth v. Newman*, 534 Pa. 424, 633 A.2d 1069 (1993): wife’s knowledge of defendant’s companions and whereabouts on date of crime not privileged as knowledge was based on observation, not communication.

In *Commonwealth v. Spetzer*, 572 Pa. 17, 39, 813 A.2d 707, 720-721 (2002), the Pennsylvania Supreme Court found that the privilege did not extend to the statements made by the defendant to his wife regarding commission of past crimes, current criminal conduct, or plans for future criminal conduct in a case involving the sexual abuse of stepchildren by the stepfather/defendant. The Supreme Court explained:

It is safe to say that the communications appellee made to his wife here-concerning appellee’s past (*e.g.*, rape), continuing (*e.g.*, witness intimidation), and future-intended (*e.g.*, attempted sexual assaults) crimes against his wife and her minor children-are not the sensitive, marital harmony-inspiring communications contemplated by the common law authorities, or the Pennsylvania General Assembly, in erecting this privilege. To the contrary, these communications were intended to further marital disharmony.

572 Pa. at 39, 813 A.2d at 720-721. Therefore, the Court in *Spetzer*, without setting forth a definitive rule, held that there could have been no reasonable expectation of marital confidentiality in statements made regarding the perpetration of child abuse. 572 Pa. at 41-43, 813 A.2d at 722-723.

The Child Protective Services Law, 23 PA.CON.S.TAT.ANN. § 6301 *et seq.*, abrogates the spousal confidential communications privilege in cases involving child abuse:

§ 6381. Evidence in court proceedings

. . .

(c) **Privileged communications.**--Except for privileged communications between a lawyer and a client and between a minister and a penitent, a privilege of confidential communication between **husband and wife** or between any professional person, including, but not limited to, physicians, psychologists, counselors, employees of hospitals, clinics, day-care centers and schools and their patients or clients, shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse.

23 PA.CON.S.TAT.ANN. § 6381(c)(emphasis added).

However, neither the Legislature nor the Pennsylvania Supreme Court has yet to definitively say that Section 6381(c) overrides 42 PA. CONS. STAT. ANN. § 5914 in a criminal case. See *Commonwealth v. Spetzer*, 572 Pa. 17, 39, 41, 813 A.2d 707, 722 (2002). In a criminal case where a defendant-spouse was the alleged perpetrator in current child abuse proceedings, the Superior Court similarly held that the Section 5914 privilege does not apply at the defendant's criminal trial; however, the holding specifically did "not go so far as to apply thte CPSL's section 6381(c) exception in all criminal prosecutions involving child abuse." *Commonwealth v. Hunter*, 60 A.3d 156, 161 n.17 (Pa. Super 2013)

In analyzing *Spetzer* in the context of a criminal child sex abuse case, the Superior Court examined the interplay between the Child Protective Services Law and § 5914 and repeated the *Spetzer* comment that "a husband who describes to his wife his previous rape of her child ... can have no reasonable expectation under Pennsylvania law that that communication will remain confidential." *Commonwealth v. G.Y.*, 63 A.3d 259, 267 (2013). Compare, *B.K. v. Department of Public Welfare*, 36 A.3d 649, 657 (Pa. Cmwlth. 2012)(no spousal confidential communications privilege in civil expungement hearing in light of § 6381(c).

Suggested Stages of a Criminal Jury Trial

1. **Juror Information Questionnaire**
 - Have all prospective jurors complete the standard, confidential juror information questionnaire. PA.R.CRIM.P. 631(D) & 632.
 - Questionnaires are destroyed at completion of jurors' service. PA.R.CRIM.P. 632(F) & (G).
2. **Preliminary Instructions to Jury Panel**
 - Trial Judge addresses opening remarks to jury panel in preparation for voir dire.
3. **Jury Panel Sworn**
 - Have court reporter swear in panel members. PA.R.CRIM.P. 631(B).
 - Judge must be present unless waived. PA.R.CRIM.P. 631(A).
4. **Conduct Voir Dire**
 - Typically prosecution first, followed by defense.
 - The purpose of voir dire is to secure a competent, fair, impartial and unprejudiced jury. "It is well established that the scope of voir dire rests in the sound discretion of the trial court, whose decision will not be reversed on appeal absent palpable error." *Commonwealth v. Mattison*, --- Pa. ---, 82 A.3d 386, 397 (2013).
 - The manner in which voir dire is conducted is left to the discretion of the trial court. *Commonwealth v. Fitzgerald*, 979 A.2d 908, 911 (Pa. Super. 2009), *appeal denied*, 605 Pa. 694, 990 A.2d 727 (2010); PA.R.CRIM.P. 631 (D).
 - "Neither counsel for the defendant nor the Commonwealth should be permitted to ask direct or hypothetical questions designed to disclose a juror's present impression or opinion as to what his decision will likely be under certain facts which may be developed in the trial of the case. Voir dire is not to be utilized as a tool for the attorneys to ascertain the effectiveness of potential trial strategies." *Commonwealth v. Manley*, 985 A.2d 256, 264 (Pa. Super. 2009), *appeal denied*, 606 Pa. 671, 996 A.2d 491 (2010)(citations omitted).
 - In a case involving charges of involuntary deviate sexual intercourse, the trial court in *Commonwealth v. Ellison*, 588 Pa. 1, 902 A.2d 419 (2006), refused to permit, on voir dire, the question of whether prospective jurors or anyone close to them had been the victim of a sexually violent crime.

Suggested Stages of a Criminal Jury Trial

The Pennsylvania Supreme Court affirmed in a plurality decision which was only joined by two other Justices.

- To explore possible racial bias, see ***Commonwealth v. Futch***, 469 Pa. 422, 426-428, 366 A.2d 246, 248 (1976); ***Commonwealth v. Stinson***, 628 A.2d 1165, 1167-1168 (Pa. Super. 1993), *appeal denied*, 537 Pa. 608, 641 A.2d 309 (Pa. Feb 11, 1994).
- Challenges for Cause: out of hearing of jury, hear challenges for cause.
 - “The test for determining whether a prospective juror should be disqualified is whether he is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor... It must be determined whether any biases or prejudices can be put aside on proper instruction of the court. ... A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct or answers to questions.... The decision on whether to disqualify is within the discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion...” ***Commonwealth v. Janda***, 14 A.3d 147, 162 (Pa. Super. 2011).
- Number of peremptory challenges calculated in accordance with PA.R.CRIM.P. 634.

5. Clerk Reads Names of 12 Jurors and 2 Alternates

- Excuse remaining jurors.
- Clerk swears in trial jury panel. PA.R.CRIM.P. 640.

6. Preliminary Instructions to Trial Jury

- Trial Judge gives preliminary trial instructions to Trial Jury.¹

7. Opening Statements

- Commonwealth Attorney opens first to the jury. PA.R.CRIM.P. 604(A).²

¹ “The trial judge may give instructions to the jury before the taking of evidence or at anytime during the trial as the judge deems necessary and appropriate for the jury’s guidance in hearing the case.” PA.R.CRIM.P. 647(D). At a minimum, the preliminary instructions should orient the jurors to the trial procedures and to their duties and function as jurors. Comment following Rule 647.

² “A prosecutor’s opening statements must be based on evidence that she plans to introduce at trial, and must not include mere assertions designed to inflame the jury’s emotions. However, a prosecutor’s opening statements may refer to facts that she reasonably believes will be established at trial. Additionally, the prosecution, as well as the defense, is afforded reasonable latitude in presenting opening arguments to the jury. Relief will be granted for prosecutorial misconduct only where the unavoidable effect of the prosecutor’s conduct was to prejudice the jury so as to form in their minds a fixed bias towards the accused and to impede their ability to objectively weigh the evidence and render a true verdict.” ***Commonwealth v. Begley***, 566 Pa. 239, 274, 780 A.2d 605, 626 (2001).

Suggested Stages of a Criminal Jury Trial

- Defense Counsel then opens to the jury, or reserves to immediately prior to defense testimony. PA.R.CRIM.P. 604(A).
- 8. Commonwealth’s Case**
- The Commonwealth presents its case-in-chief. *See* PA.R.E. 611, ***Mode and Order of Examining Witnesses and Presenting Evidence***.
- 9. Defense Motions**
- Trial Judge hears defense motions outside the hearing of the jury but on the record.
 - Appropriate motion at the close of the Commonwealth’s case-in-chief is a motion for judgment of acquittal. PA.R.CRIM.P. 606(A)(1).³
- 10. Defense Case**
- The defense attorney may present evidence on behalf of the defendant. *See* PA.R.E. 611, ***Mode and Order of Examining Witnesses and Presenting Evidence***.
- 11. Commonwealth’s Rebuttal Evidence**
- Admission or rejection of rebuttal evidence is within the sound discretion of the trial court.⁴
- 12. Defense Motions**
- Trial Judge hears defense motions outside the hearing of the jury but on the record.
 - Appropriate motion at the close of all evidence is a motion for judgment of acquittal. PA.R.CRIM.P. 606(A)(2).⁵
- 13. Suggested Jury Instructions**
- Trial Judge receives and reviews suggested jury instructions. PA.R.CRIM.P. 647.⁶
 - Trial Judge holds charge conference, on the record, with counsel to discuss the suggested jury instructions, enter rulings, and make final decisions regarding charge.

³ “A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth’s evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made.” PA.R.CRIM.P. 606(B).

⁴ *Commonwealth v. Miles*, 846 A.2d 132, 136 (Pa. Super. 2004), *appeal dismissed as improvidently granted*, 582 Pa. 403, 871 A.2d 1248 (2005).

⁵ “If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.” PA.R.CRIM.P. 606(C).

⁶ “Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge’s rulings on all written requests. The trial judge shall charge the jury after the arguments are completed.” PA.R.CRIM.P. 647(A).

- 14. Instructions to Jury To Prepare Them For Closing Arguments**
- 15. Closing Arguments**
 - Defense Counsel gives closing argument first. PA.R.CRIM.P. 604(B).
 - Prosecutor gives closing argument. Regardless of number of defendants, prosecutor always makes closing argument last. PA.R.CRIM.P. 604(B).
- 16. Charge of the Court**
 - Trial Judge gives jury final instructions. Pa.R.Crim.P. 647.
 - Charge broken up into four sections:
 - (1) Key concepts: the burden of proof, presumption of innocence, and the standard of beyond a reasonable doubt;
 - (2) Instructions regarding the review of evidence, including credibility decisions;
 - (3) Specifics of Case: elements of crimes, specific law regarding defenses, and review of testimony;
 - (4) Concluding instructions on the manner in which the jury is to handle deliberations.
 - Trial judge makes formal rulings on submitted points for charge before dismissing jury; grants counsel opportunity to make specific objections to refused points or other matters.⁷
- 17. Send Jury to Deliberate**
 - Send 12 principal jurors to deliberate.
 - Hear arguments of counsel on the record and make record of decision if any exhibits go out with jury. PA.R.CRIM.P. 646.
 - Excuse alternates.
- 18. Enter the Verdict**
- 19. Defense Motions If Conviction**
 - Defense may make an oral motion for judgment of acquittal immediately after verdict. PA.R.CRIM.P. 606(A)(4).
- 20. Excuse Jurors**
- 21. Colloquy Following Verdict If Conviction**
 - Set Sentencing Date.⁸
 - Order Presentence Investigation Report, if necessary.
 - Address Bail in accordance with PA.R.CRIM.P. 521.

⁷ “No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.” PA.R.CRIM.P. 647(B). *See also, P.A.R.A.P. 302(b)*.

⁸ In accordance with PA.R.CRIM.P. 704(A), sentencing must typically be within 90 days of conviction.

Sexual Offenses and Tier System

42 PA.CON.S.TAT.ANN. § 9799.14

Tier I Sexual Offenses

15 Year Registration Period

In addition to others, the following crimes or any attempt, conspiracy or solicitation thereof:

- Unlawful Restraint: 18 PA.CON.S.TAT.ANN. § 2902(b)
- False Imprisonment: 18 PA.CON.S.TAT.ANN. § 2903(b)
- Interference with Custody of Children: 18 PA.CON.S.TAT.ANN. § 2904
- Luring a Child into a Motor Vehicle or Structure: 18 PA.CON.S.TAT.ANN. § 2910
- Institutional Sexual Assault: 18 PA.CON.S.TAT.ANN. § 3124.2(a)
- Indecent Assault: 18 PA.CON.S.TAT.ANN. § 3126(a)(1)
- Corruption of Minors (F3): 18 PA.CON.S.TAT.ANN. § 6301(a)(1)(ii)
- Sexual Abuse of Children: 18 PA.CON.S.TAT.ANN. § 6312(d)
- Invasion of Privacy: 18 PA.CON.S.TAT.ANN. § 7507.1
- Video Voyeurism: 18 U.S.C. § 1801
- Certain Activities Relating to Material Involving the Sexual Exploitation of Minors: 18 U.S.C. § 2252(a)(4)
- Certain Activities Relating to Material Constituting or Containing Child Pornography: 18 U.S.C. § 2252A
- Misleading Domain Names on the Internet: 18 U.S.C. § 2252B
- Misleading Words or Digital Images on the Internet: 18 U.S.C. § 2252C
- Coercion and Enticement: 18 U.S.C. § 2422(a)
- Transportation of Minors: 18 U.S.C. § 2423(b)
- Illicit Sexual Conduct in Foreign Places: 18 U.S.C. § 2423(c)
- Filing Factual Statement About Alien Individual: 18 U.S.C. § 2424
- Use of Interstate Facilities to Transmit Information about a Minor: 18 U.S.C. § 2425

Tier II Sexual Offenses

25 Year Registration Period

In addition to others, the following crimes or any attempt, conspiracy or solicitation thereof:

- Statutory Sexual Assault: 18 PA.CON.S.TAT.ANN. § 3122.1(a)(2)
- Prostitution and Related Offenses: 18 PA.CON.S.TAT.ANN. § 5902(b.1)

Sexual Offenses and Tier System

- Obscene and Other Sexual Materials and Performances: 18 PA.CON.S.STAT.ANN. § 5903(a)(3)(ii), (4)(ii), (5)(ii) or (6)
- Sexual Abuse of Children, 18 PA.CON.S.STAT.ANN. § 6312(b) & (c)
- Unlawful Contact with Minor: 18 PA.CON.S.STAT.ANN. § 6318
- Sexual Exploitation of Children: 18 PA.CON.S.STAT.ANN. § 6320
- Indecent Assault: 18 PA.CON.S.STAT.ANN. § 3126(a)(2), (3),(4),(5),(6) or (8)
- Sex Trafficking of Children by Force, Fraud, or Coercion: 18 U.S.C. § 1591
- Sexual Abuse of a Minor or Ward: 18 U.S.C. § 2243
- Abusive Sexual Contact – Victim 13 Years Old But Under 18 Years: 18 U.S.C. § 2244
- Sexual Exploitation of Children: 18 U.S.C. § 2251
- Selling or Buying of Children: 18 U.S.C. § 2251A
- Production of Sexually Explicit Depictions of Minor for Importation to U.S.: 18 U.S.C. § 2260

Tier III Sexual Offenses

Lifetime Registration Period

In addition to others, the following crimes or any attempt, conspiracy or solicitation thereof:

- Kidnapping: 18 PA.CON.S.STAT.ANN. § 2901(a.1)
- Rape: 18 PA.CON.S.STAT.ANN. § 3121
- Statutory Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3122.1(b)
- Involuntary Deviate Sexual Intercourse: 18 PA.CON.S.STAT.ANN. § 3123
- Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3124.1
- Institutional Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3124.2(a.1)
- Aggravated Indecent Assault: 18 PA.CON.S.STAT.ANN. § 3125
- Indecent Assault when Complainant is Less than 13 Years Old: 18 PA.CON.S.STAT.ANN. § 3126(a)(7)
- Incest: 18 PA.CON.S.STAT.ANN. § 4302(b)
- Aggravated Sexual Abuse: 18 U.S.C. § 2241
- Sexual Abuse: 18 U.S.C. § 2242
- Abusive Sexual Contact When Victim is Less than 13 Years of Age: 18 U.S.C. § 2244

Chapter 8

EXPERT AND SCIENTIFIC EVIDENCE

Expert and Scientific Evidence

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Chapter Eight

Expert and Scientific Evidence

8.1 CHAPTER OVERVIEW

This chapter provides a general overview of various evidentiary issues that commonly arise in sexual assault cases and the interplay of Pennsylvania law.

In section 8.2, the conduct or behavior of a victim of a sexual assault following the abusive incident, and its bearing on credibility, are discussed, as well as evidence which may be admitted to address discrepancies between the way a victim reacts and the typical expectation of a jury.

Following a general discussion in section 8.3 on the presentation of other types of expert testimony in sexual assault cases, the chapter focuses on the following:

- Rape Trauma Syndrome, section 8.4;
- DNA, section 8.5;
- Bite Mark Evidence, section 8.6;
- Hair Sample Analysis, section 8.7;
- Blood Typing Evidence, section 8.8; and
- Evidence Obtained from a “Rape Kit” Exam, section 8.9.

Two recent Pennsylvania Supreme Court cases form the basis for sections 8.10 and 8.11. Section 8.10 contains a discussion on the recent decision that expert testimony on a defense claim of a false confession is not admissible. Section 8.11 summarizes the recent decision which now holds that expert testimony on the issue of the reliability, or more precisely, the lack of reliability of eyewitness identification, is now admissible at the discretion of the trial court.

8.2 EVIDENCE REGARDING VICTIMS IN SEXUAL ASSAULT CASES

A. Evidence Regarding Condition of Victims

In general, expert testimony cannot be used to bolster or impeach the credibility of a witness. Whether the expert’s opinion is offered to attack or to enhance, it assumes the same impact — an unwarranted appearance of authority in the subject of credibility which is the jury’s basic function to assess. *Commonwealth v. Selenski*, 18 A.3d 1229, 1232 (Pa. Super. 2011). Because the truthfulness of a witness is solely within the province of the jury, jurors must rely on their ordinary experiences of life, common knowledge of the tendencies of human behavior, and observations of the witness’ character and

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demeanor. *Commonwealth v. Counterman*, 553 Pa. 370, 719 A.2d 282 (1998), *cert. denied*, 528 U.S. 836, 120 S.Ct. 97, 145 L.Ed.2d 82 (1999).

However, when the expert opinion is proffered to explain the physical condition of a victim of a sexual assault and whether it is consistent with the allegation of a sexual assault, it is admissible:

[T]estimony regarding conduct or behavior of victims of sexual assaults is not admissible since it tends to invade the jury's function of evaluating witness credibility, whereas testimony regarding physical facts is admissible. The court analogized to *Commonwealth v. Hernandez*, 420 Pa.Super. 1, 615 A.2d 1337 (1992), in which the Superior Court found that a pediatrician could testify "that the physical facts observed and reported by the treating physician were consistent with the allegation of anal sodomy." *Id.* at 1343. Following the reasoning in *Hernandez*, the court in *Johnson* concluded that "this subject is appropriate for expert testimony because the physical condition of a sexual assault victim is not a matter that is typically within the knowledge of average jurors." The court further found that the expert testimony did not encroach upon the jury's province of determining witness credibility since the testimony pertained to objective medical facts, rather than explanations of behavioral patterns.¹

Commonwealth v. Miner, 562 Pa. 46, 52-53, 753 A.2d 225, 228 - 229 (2000) (some citations omitted). *Miner* and this line of cases address expert testimony which deals explicitly with the physical condition of the alleged victim, i.e., tears, bruising, or the lack thereof.

The following appellate decisions address the admissibility of testimony regarding the condition of victims of sexual assaults.

► *Commonwealth v. Miner*, 562 Pa. 46, 753 A.2d 225 (2000)

In *Miner*, two young girls under the age of 10 years old testified that their mother's boyfriend sexually abused them, by way of anal intercourse, for a number of years. When the girls became concerned over contracting AIDS, they revealed the abuse. At trial, the prosecution offered the expert testimony of a medical doctor specialized in obgyn who had examined the girls and found no evidence of physical trauma to the girls' genital or anal areas. The doctor was also offered to testify that because of the nature of the muscle that closes the anus, there would have been an

¹ If the expert opinion is based upon an examination which does not take place immediately after the alleged sexual assault, or even if it is a number of years later, its admissibility is still up to the trial court. The passage of time does not render relevant expert testimony inadmissible; it is a factor for the jury to decide in determining the weight to accord the expert's testimony. See *Commonwealth v. Miner*, 562 Pa. 46, 56, 753 A.2d 225, 230-131 (2000).

adequate time between the abuse incidents and the examination for any damage to have healed. On appeal, the defense argued that the testimony improperly bolstered the victims' credibility. The Supreme Court ruled that the doctor's testimony was limited to her physical findings and therefore did not impermissibly bolster the children's credibility.

► ***Commonwealth v. Dillon***, 592 Pa. 351, 925 A.2d 131 (2007)

In ***Commonwealth v. Dillon***, 592 Pa. 351, 925 A.2d 131 (2007), the Pennsylvania Supreme Court acknowledged that a delay in reporting sexual abuse can affect the jury's evaluation of the victim's credibility. In recognizing that under certain circumstances a victim's response to an abusive incident might run counter to that which a typical juror might expect, the Supreme Court stated:

Revealing the circumstances surrounding an incident of sexual abuse, and the reasons for the delay, enables the factfinder to more accurately assess the victim's credibility.

Dillon, 592 Pa. at 363, 925 A.2d at 139. Therefore, in ***Dillon***, the Court permitted the Commonwealth to introduce, in its case-in-chief, evidence that the alleged perpetrator physically abused the child-victim's mother and brother, causing her to fear making a prompt report. "Indeed, multiple courts have recognized the importance of allowing the prosecution to fully explain incidents of physical abuse causing a complaint of sexual abuse to be delayed." *Id.*, 592 Pa. at 364, 925 A.2d at 139.

► ***Commonwealth v. Mendez***, 74 A.3d 256 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 87 A.3d 319 (2014)

In ***Commonwealth v. Mendez***, 74 A.3d 256 (Pa. Super. 2013), the defendant was charged with numerous sexual offenses related to his abuse of a female child, beginning when the child was about 12 years old and continuing for seven years. Shortly after the victim turned 18 years old, she gave birth to a baby. Prior to the birth, she was not aware that she was pregnant. In its case-in-chief, the Commonwealth wished to present expert testimony to explain how the victim could have given birth without ever knowing that she was pregnant. A medical doctor was prepared to provide the reasons a woman may not be aware that she is pregnant until she gives birth.

The trial court would not allow the testimony unless the issue of the unknown pregnancy was the subject of cross-examination of the victim, i.e., the defense had to first raise the issue at trial

On appeal, the Commonwealth argued that the medical expert would provide critical testimony regarding the victim's credibility. The Superior Court first acknowledged the well settled rule that expert testimony cannot be used to bolster

the credibility of a witness. However, in citing to *Commonwealth v. Miner*, 562 Pa. 46, 753 A.2d 225 (2000), the Superior Court found the testimony relevant and admissible because it addressed “how a young woman can be pregnant and not be aware she is pregnant.” Therefore, because the medical expert would not be testifying about the victim’s conduct or behavior, but instead would be explaining “the physical condition of a sexual assault victim” it was relevant and admissible. *Mendez*, 74 A.3d at 262-263.

B. Specific Types of Victim Responses and Victim Behaviors²

With the passage of 42 PA.CON.S.TAT.ANN. § 5920, experts will be able to testify, in the prosecution’s case-in-chief, about “specific types of victim responses and victim behaviors” in sexual assault cases, although they still will not be permitted to testify as to a particular victim’s or witness’s credibility. This law is not restricted to the prosecution’s case, however, and the defense has an equal opportunity to qualify an expert under this law, and present similar testimony on the defense side.³

Although this law is available to both the Commonwealth and the defense, it was originally adopted to address a jury perception problem when a victim responds to a sexual assault in a way which runs contrary to that which a typical juror would expect. Section 5920 provides that properly qualified experts can testify as to facts and opinions regarding specific types of victim responses and behaviors in crimes of sexual violence, in order to explain a reaction or response, which might seem unusual or strange to a juror, and therefore create credibility issues.

This section provides:

42 PA.CON.S.TAT.ANN. § 5920. **Expert testimony in certain criminal proceedings**

(a) Scope.--This section applies to all of the following:

- (1) A criminal proceeding for an offense for which registration is required under Subchapter H of Chapter 97 (relating to registration of sexual offenders).
- (2) A criminal proceeding for an offense under 18 Pa.C.S. Ch. 31 (relating to sexual offenses).

² For additional detailed discussion, see CHAPTER 7: TRIAL ISSUES, Section 7.4(F) Expert Testimony-Victim Responses and Behaviors.

³ This statute has been challenged on constitutional grounds. In *Commonwealth v. Olivo*, No. CP-06-CR-004662-2012 (C.P. Berks August 27, 2013), the Court of Common Pleas of Berks County ruled that section 5920 represents an impermissible attempt at procedural rule making by the legislature, and suspended the statute’s application. The trial court referred to Article V, § 10 of the Pennsylvania Constitution to find that the statute violated the separation of powers doctrine in that admission of evidence is solely within the province of the Pennsylvania Supreme Court. The *Olivo* decision was appealed by the Commonwealth to the Pennsylvania Superior Court, which docketed the appeal to No. 1741 MDA 2013. The Superior Court has ordered the matter transferred to the Pennsylvania Supreme Court in light of the constitutional issues involved. As of the writing of this edition of the Benchbook, the Supreme Court has not yet accepted the case for review.

(b) Qualifications and use of experts.--

(1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.

(2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.

(3) The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.

(4) A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.⁴

1. Scope

This section is applicable in prosecutions which fall under one of two classifications:

- (1) An offense for which registration with the Pennsylvania State Police is required. These offenses are classified in a three-tiered system. Please see Addendum 2 to Chapter Six for a listing of all offenses which required registration under SORNA, 42 PA.CON.S.STAT.ANN. § 9799.14.
- (2) A criminal proceeding under Chapter 31, Sexual Offenses, 18 PA.CON.S.STAT.ANN. §§ 3121 – 3129.
 - Rape, 18 PA.CON.S.STAT.ANN. § 3121
 - Statutory Sexual Assault, 18 PA.CON.S.STAT.ANN. § 3122.1
 - Involuntary Deviate Sexual Intercourse, 18 PA.CON.S.STAT.ANN. § 3123

⁴ 42 PA.CON.S.STAT.ANN. § 5920.

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- Sexual Assault, 18 PA.CON.S.STAT.ANN. § 3124.1
- Institutional Sexual Assault, 18 PA.CON.S.STAT.ANN. § 3124.2
- Aggravated Indecent Assault, 18 PA.CON.S.STAT.ANN. § 3125
- Indecent Assault, 18 PA.CON.S.STAT.ANN. § 3126
- Indecent Exposure, 18 PA.CON.S.STAT.ANN. § 3127
- Sexual Intercourse with Animal, § 3129
- Sexual Assault by Sports Official, Volunteer or Employee, § 3214.3

2. Qualifications of Expert

To be qualified under this section, the witness may be “qualified by the court as an expert” if the witness:

- Has specialized knowledge beyond that possessed by the average layperson
- The specialized knowledge is based on the witness’s experience with, or specialized training or education related to sexual violence in:
 - criminal justice,
 - behavioral sciences, or
 - victim services issues.

Furthermore, the court must be satisfied that the testimony of the witness will assist the trier of fact in understanding:

- the dynamics of sexual violence,
- victim responses to sexual violence, and
- the impact of sexual violence on victims during and after being assaulted.

3. Permissible Opinions and Testimony

The expert may testify to facts and opinions regarding specific types of victim responses to sexual assault and victim behaviors following sexual assault.

Furthermore, the testimony of the expert witness may assist the trier of fact in understanding:

- the dynamics of sexual violence,
- victim responses to sexual violence, and
- the impact of sexual violence on victims during and after being assaulted.

(a) Prohibition on Opinion Regarding Credibility

Section 5920 specifically prohibits the witness from opining regarding the credibility of any witness, including the victim.

(b) Availability of Witness

A witness properly qualified under this section may be called by the prosecution or the defense.

8.3 EXPERT TESTIMONY IN SEXUAL ASSAULT CASES

This section discusses issues regarding the admission of expert testimony in sexual assault cases, including the general requirements for admissibility and relevancy. It also discusses expert medical testimony and expert mental health testimony.

A. General Requirements for Admissibility of Expert Testimony

The purpose of expert testimony is to assist the factfinder in grasping complex issues not within the knowledge, intelligence, and experience of the ordinary layman. Where a witness has a reasonable pretension to specialized knowledge on a subject matter under investigation, the witness may testify as an expert and the weight to be given such testimony is for the jury to decide. *Commonwealth v. Page*, 59 A.3d 1118, 1135 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 776 (2013).⁵ Conversely, expert testimony is not admissible where the issue involves a matter of common knowledge. *Commonwealth v. Counterman*, 553 Pa. 370, 719 A.2d 282 (1998), *cert. denied*, 528 U.S. 836, 120 S.Ct. 97, 145 L.Ed.2d 82 (1999).

Furthermore, the admission of expert testimony is a matter for the discretion of the trial court, and should not be disturbed unless there is a clear abuse of discretion. *Commonwealth v. Huggins*, 68 A.3d 962, 966 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 775 (2013).

The admissibility of an expert opinion is governed by Rule 702 of the Pennsylvania Rules of Evidence.

Article VII. Opinions and Expert Testimony

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
- (b) the expert's scientific, technical, or other specialized

⁵ In *Commonwealth v. Page*, 59 A.3d at 1135-1136, the proposed medical expert testified that she worked for the medical examiner's office and was consulted because there are always concerns about child sexual abuse because of "specific techniques" which the doctor uses in those types of cases. The Superior Court found no abuse of discretion in the trial court's admission of her testimony as an expert.

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knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and

(c) the expert's methodology is generally accepted in the relevant field.⁶

In deciding whether expert testimony is admissible, the trial court must determine:

- (1) whether the subject matter is appropriate for expert testimony;
- (2) whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
- (3) whether the proffered expert is qualified to offer an expert opinion.

1. The *Frye* Standard

In *Commonwealth v. Topa*, 471 Pa. 223, 231, 369 A.2d 1277, 1282 (1977), the Pennsylvania Supreme Court adopted the test in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923) to determine whether novel scientific evidence may be admitted in criminal trials. Under *Frye*, novel scientific evidence is admissible only if the methodology that underlies the evidence has general acceptance in the relevant scientific community.⁷

While the United States Supreme Court has since found that the *Frye* test has been superseded by the more permissive Federal Rules of Evidence, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), Pennsylvania courts are not bound by the Federal Rules of Evidence, and continue to apply the *Frye* standard. *See Commonwealth v. Einhorn*, 911 A.2d 960, 974-975 (Pa.Super. 2006), *appeal denied*, 591 Pa. 723, 920 A.2d 831 (2007).

As stated above, the Pennsylvania Supreme Court has utilized the *Frye* standard in criminal cases. *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977). In *Topa*, the Supreme Court described an adequate foundation for the admission of scientific evidence:

Admissibility of the evidence depends upon the general acceptance of its validity by those scientists active in the field to which the evidence belongs[.]

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable

⁶ PA.R.E. 702.

⁷ *See also, Commonwealth v. Hall*, 867 A.2d 619, 633 (Pa.Super. 2005), *appeal denied*, 586 Pa. 756, 895 A.2d 549 (Pa. Mar 07, 2006).

stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*

Id. at 232, 369 A.2d at 1282, quoting ***Frye v. United States***, 293 F. at 1014 (emphasis in original). The Supreme Court went further to note that strict application of the ***Frye*** standard is necessary when scientific proof is offered in a criminal trial to ensure that the defendant is to receive a fair and just trial. ***Commonwealth v. Topa***, 471 Pa. at 232, 369 A.2d at 1282. See also, ***Commonwealth v. Apollo***, 603 A.2d 1023, 1025 (Pa.Super. 1992), *appeal denied*, 531 Pa. 650, 613 A.2d 556 (1992).⁸

It should be noted, though, that the ***Frye*** standard does not apply every time science enters the courtroom. ***Folger ex rel. Folger v. Dugan***, 876 A.2d 1049, 1058 (Pa.Super. 2005), *appeal denied*, 587 Pa. 695, 897 A.2d 458 (2006).⁹ ***Frye*** does apply, however, where an expert witness employs a novel scientific methodology in reaching his or her conclusion. ***Trach v. Fellin***, 817 A.2d 1102, 1110 (Pa.Super. 2003)(*en banc.*), *appeal denied*, 577 Pa. 725, 847 A.2d 1288 (2004); see also, ***Grady v. Frito Lay***, 576 Pa. 546, 554-555, 839 A.2d 1038, 1043-1044 (Pa.Super. 2003).

2. Qualifications of Experts

Whether an expert is qualified to offer an expert opinion is governed by Rule 702 of the Pennsylvania Rules of Evidence. An expert may be qualified to offer an opinion by knowledge, skill, experience, training or education. PA.R.E. 702. In Pennsylvania, the standard for qualifications of an expert witness is a liberal one. In determining whether a witness is qualified to testify as an expert, the trial court judge must determine whether the witness

has any reasonable pretension to specialized knowledge on the subject under investigation.

Commonwealth v. Stallworth, 566 Pa. 349, 369, 781 A.2d 110, 121 (2001); ***Miller v. Brass Rail Tavern***, 541 Pa. 474, 480-481, 664 A.2d 525, 528 (1995).

⁸ As a general rule, the standard of review on appeal of a trial court's evidentiary ruling, including a ruling whether expert scientific evidence is admissible against a ***Frye*** challenge, is limited to determining whether the trial court abused its discretion. ***Commonwealth v. Dengler***, 586 Pa. 54, 65, 890 A.2d 372, 379 (2005).

⁹ In ***Folger v. Dugan***, 876 A.2d at 1058, the trial court noted that the methods used by the proposed experts were "methods used by medical professionals every day" and were therefore not a proper subject for a ***Frye*** analysis. In affirming, the Superior Court agreed and referenced that the appellant did not allege that the "methodology was novel or junk science" thereby eliminating the need for a ***Frye*** hearing. *Id.*

If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. *Id.*

3. Form of Expert Testimony

According to Rule 702, an expert may testify in the form of an opinion or otherwise. “Much of the literature assumes that experts testify only in the form of an opinion. The language ‘or otherwise’ reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case.” PA.R.E. 702, *comment*.

4. Underlying Basis of Expert Opinion

Pennsylvania Rule of Evidence 705 requires an expert to “state the facts or data on which the opinion is based.” PA.R.E. 705. Furthermore, Rule 703 provides that so long as the facts and data the expert relies upon are of a kind reasonably relied upon by experts in that particular field of study, “they need not be admissible for the opinion to be admitted.” PA.R.E. 703. In interpreting these evidentiary rules, the Superior Court has recently stated:

It is well-established that an expert may express an opinion which is based on material not in evidence, including other expert opinion, where such material is of a type customarily relied on by experts in his or her profession. Such material may be disclosed at trial even though it might otherwise be hearsay ... Such hearsay is admissible because the expert’s reliance on the material provides its own indication of the material’s trustworthiness: “The fact that experts reasonably and regularly rely on this type of information merely to practice their profession lends strong indicia of reliability to source material, when it is presented through a qualified expert’s eyes.”

In re D.Y., 34 A.3d 177, 182 (Pa. Super. 2011), *appeal denied*, 616 Pa. 638, 47 A.3d 848 (2012) (citations and quotations omitted).

Pennsylvania Rule of Evidence 703 provides:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.¹⁰

¹⁰ PA.R.E. 703.

Clearly, PA.R.E. 703 permits an expert to base an opinion on otherwise inadmissible evidence so long as “the facts or data on which the expert has relied in forming the opinion, which is illustrated by the computer animation, must be of a type reasonably relied upon by experts in the particular field.” *Commonwealth v. Serge*, 586 Pa. 671, 682 n. 3, 896 A.2d 1170, 1176 n. 2 (2006).

In accordance with the plain language of Rule 703, experts are not limited to basing their opinions on firsthand knowledge or on trial records. Pennsylvania courts have long permitted experts to base their opinions on records or reports not in evidence. See *Commonwealth v. Thomas*, 444 Pa. 436, 445, 282 A.2d 693, 698-699 (1971) (Pennsylvania Supreme Court adopts rule that medical experts may base opinions on reports of others not in evidence).

The *Thomas* case involved a challenge to the testimony of a Commonwealth psychiatrist who was asked to give an opinion on the sanity of the defendant. As background for his findings and opinions, the psychiatrist was permitted to refer to tests and test scores given by a non-testifying psychologist, as well as all the reports of numerous psychological tests and interviews done by other mental health professionals. The sum of these reports, in addition to personal interviews conducted by the testifying psychiatrist, were taken into account when the doctor concluded that the defendant was not insane at the time of the killing. Thus, it was in the context of this case that our supreme court was prompted to adopt as the law in Pennsylvania the rule which permits an expert witness to rely on, and disclose, data which is not in evidence in order to form his expert opinions, assuming the materials relied on are of the type reasonably relied on by experts in their respective fields.

Primavera v. Celotex Corp., 608 A.2d 515, 519 (Pa. Super. 1992), *appeal denied*, 533 Pa. 641, 622 A.2d 1374 (1993).

(a) Jury Instruction

When an expert testifies about the underlying facts and data that support the expert’s opinion and the evidence would be otherwise inadmissible, the trial judge, upon request shall or on his own initiative may instruct the jury to consider the facts and data only to explain the basis for the expert’s opinion, and not as substantive evidence. PA.R.E. 703, *comment*.

Instruction No. 4.11 of the Pennsylvania Suggested Standard Criminal Jury Instructions addresses this issue. Pa. SSJI (Crim) No. 4.11.

5. Expert Opinion Regarding Credibility

It is generally held that expert testimony cannot be used by the Commonwealth to encroach on the jury's right to determine the credibility of witnesses, including victims. *Commonwealth v. May*, 587 Pa. 184, 898 A.2d 559 (2006), *cert. denied*, 549 U.S. 1022, 127 S.Ct. 557, 166 L.Ed.2d 414 (2006); *Commonwealth v. Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988)

The Pennsylvania Supreme Court, in *Gallagher*, held expert testimony regarding the effect of "rape trauma syndrome" on the victim specifically and her ability to identify her assailant four years after the attack but not two weeks after the attack improperly enhanced the victim's credibility in the eyes of the jury and thus was inadmissible.

Furthermore, the admissibility of expert testimony in child abuse cases must be evaluated cautiously in order to prevent encroachment upon the jury's function by the unfair enhancement of a child victim's credibility. *Commonwealth v. Seese*, 512 Pa. 439, 517 A.2d 920 (1986); *Commonwealth v. Vidmosko*, 574 A.2d 96, 99 (Pa. Super. 1990), *appeal denied*, 527 Pa. 645, 593 A.2d 418 (1991).

In *Seese*, the Pennsylvania Supreme Court held expert testimony as to the general credibility of eight-year-old children who claim to have been sexually abused encroached on the province of the jury and as such was inadmissible. 512 Pa. at 443-444, 517 A.2d at 922.

However, a witness may testify to an ultimate issue only in those instances where the admission will not cause confusion or prejudice. *Commonwealth v. Brown* 596 A.2d 840, 842 (Pa.Super. 1991), *appeal denied*, 532 Pa. 660, 616 A.2d 982 (1992).

Pennsylvania Rule of Evidence 704 provides:

Article VII. Opinions and Expert Testimony
Rule 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.¹¹

The trial court must use its discretion in admitting or excluding expert opinions on the ultimate issue, balancing the helpfulness of the testimony to its potential to cause confusion or prejudice.¹²

6. Standard of Review

The qualification of expert testimony lies within sound discretion of trial court and will not be reversed absent clear abuse of that discretion.

¹¹ Pa.R.E. 704.

¹² See *Commonwealth v. Brown*, 596 A.2d 840, 842 (Pa.Super. 1991), *appeal denied*, 532 Pa. 660, 616 A.2d 982 (1992).

Commonwealth v. Bourgeon, 654 A.2d 555, 557 (Pa. Super. 1994), *appeal denied*, 542 Pa. 657, 668 A.2d 1121 (1995).

A trial court has broad discretion to determine whether evidence is admissible and a trial court's ruling on an evidentiary issue will be reversed only if the court abused its discretion. *Commonwealth v. Huggins*, 68 A.3d 962, 966 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 775 (2013). A trial court may exclude evidence that is irrelevant to the issues presented. Evidence is not relevant unless the inference sought to be raised by it bears upon a matter in issue and renders the desired inference more probable than it would be without the evidence. *Commonwealth v. Elliott*, 80 A.3d 415, 446-447 (Pa. Super. 2013). Accordingly, a ruling admitting evidence will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous. *Commonwealth v. Minich*, 4 A.3d 1063, 1068 (Pa. Super. 2010) (quotations omitted). Moreover, in cases involving the admission of expert testimony:

Generally speaking, the admission of expert testimony is a matter left largely to the discretion of the trial court, and its rulings thereon will not be reversed absent an abuse of discretion. An expert's testimony is admissible when it is based on facts of record and will not cause confusion or prejudice.

Commonwealth v. Watson, 945 A.2d 174, 176 (Pa. Super. 2008) (internal citations and quotations omitted). Where the evidentiary question involves a discretionary ruling, the appellate scope of review is plenary, in that the appellate court may review the entire record in making its decision. *Commonwealth v. Mollett*, 5 A.3d 291, 304 (Pa. Super. 2010), *appeal denied*, 609 Pa. 686, 14 A.3d 826 (2011).

[T]he admission of expert scientific testimony is an evidentiary matter for the trial court's discretion and should not be disturbed on appeal unless the trial court abuses its discretion. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Page, 59 A.3d 1118, 1135 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 776 (2013),

B. Expert Medical Testimony

1. Expert Testimony by Physicians

Expert medical testimony is governed by the standards articulated in

section A. Like other expert testimony, an examining physician's testimony is admissible if the physician possesses scientific, technical, or other specialized knowledge which is beyond that possessed by the average layperson. PA.R.E. 702. Furthermore, a physician, like any other expert, need not use the "magic words" when presenting an opinion, although the opinion must be within a reasonable degree of medical certainty." *Commonwealth v. Bishop*, 742 A.2d 178, 185 (Pa. Super. 1999), *appeal denied*, 563 Pa. 638, 758 A.2d 1194 (2000).

- ▶ The following appellate decisions address the admissibility of testimony of physicians in cases involving sexual assaults.
 - An examining physician is needed to testify about hospital records when they contain medical diagnosis or opinion. *Folger ex rel. Folger v. Dugan*, 876 A.2d 1049, 1056 (Pa. Super. 2005), *appeal denied*, 587 Pa. 695, 897 A.2d 458 (2006).
 - The prosecution may present an expert medical witness in rebuttal to rebut or refute expert testimony presented on the defense side. *Commonwealth v. Barnett*, 50 A.3d 176 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 63 A.3d 772 (2013).
 - In *Commonwealth v. Bishop*, 742 A.2d 178, 185 (Pa. Super. 1999), *appeal denied*, 563 Pa. 638, 758 A.2d 1194 (2000), the doctor, a pediatrician, was qualified as an expert and permitted to provide testimony "that child sexual abuse victim had sustained injuries consistent with such a cause, i.e., a male finger inserted into victim's vagina."
 - In *Commonwealth v. Page*, 59 A.3d 1118 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 80 A.3d 776 (2013), -the doctor "testified as an expert in the field of pediatrics and, more specifically, suspected sexual abuse. She stated to a reasonable degree of medical certainty that Victim suffered a penetrating injury to her vaginal area." 59 A.3d at 1135.
 - In *Commonwealth v. Hernandez*, 615 A.2d 1337 (Pa. Super. 1992), the trial court properly permitted the treating physician to testify that the physical facts derived from his medical examination of the victim were consistent with the victim's allegation of rape and anal sodomy. 615 A.2d at 1343.
 - In a sexual assault case, it is permissible for a treating physician to testify that the physical facts he observed were consistent with the allegation of rape. *Commonwealth v. Seigrist*, 385 A.2d 405, 410 (Pa. Super. 1978).

- “In determining the admissibility of expert testimony on matters related to sexual assaults, our courts have distinguished between testimony regarding physical facts and testimony regarding the behavior of victims. Generally, the conduct or behavior of victims has been held not to be a proper subject for expert testimony because such testimony tends to encroach upon the jury’s function of evaluating witness credibility. Testimony regarding physical facts, however, has been held to be admissible.” *Commonwealth v. Johnson*, 690 A.2d 274, 276 (Pa. Super. 1997).

See Section 8.9 for information regarding the collection of forensic sexual assault evidence.

2. Expert Testimony by Sexual Assault Nurse Examiners

A growing trend across the United States is the use of Sexual Assault Nurse Examiners (SANEs) to conduct forensic medical sexual assault examinations.

SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform these exams. Some nurses have been certified as SANEs–Adult and Adolescent (SANE–A) through the International Association of Forensic Nurses (IAFN). Others are specially educated and fulfill clinical requirements as forensic nurse examiners (FNEs), enabling them to collect forensic evidence for a variety of crimes.

The terms “sexual assault forensic examiner” (SAFE) and “sexual assault examiner” (SAE) are often used more broadly to denote a health care provider (e.g., a physician, physician assistant, nurse, or nurse practitioner) who has been specially educated and completed clinical requirements to perform this exam.¹³

In *Commonwealth v. Jennings*, 958 A.2d 536 (Pa. Super. 2008), *appeal denied*, 610 Pa. 593, 20 A.3d 485 (2011), the Superior Court held that a sexual assault nurse examiner was sufficiently competent to testify that the victim’s vaginal redness was consistent with force intercourse. 958 A.2d at 541. The experience and credentials of the nurse were essential to the Superior Court’s decision, and the Court detailed the qualifications of the witness in arriving at its decision:

In addition to her twenty-seven years experience as a registered nurse in the emergency room, Nurse Brendle completed a course in sexual assault forensic nurse

¹³ U.S. Department of Justice, Department of Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents, Second Edition* (April 2013), p. 59.

examination at the University of Pennsylvania and a course in pediatric sexual assault examination. Nurse Brendle has attended several continuing education events in the area of sexual assault forensic examination and has conducted forensic seminars and lectures for local colleges, universities, prosecutor's offices, and coroner's offices. We find that Nurse Brendle's nursing diagnosis, her identification of the victim's vaginal redness, was essential to the effective execution and management of the nursing regimen.

Id. at 540. The Superior Court also found "persuasive" the decisions of respected courts of other states who had previously held that sexual assault nurse examiners are qualified to testify as expert witnesses to the causation of injuries to victims of sexual crimes. *Id.* at 541.¹⁴

C. Expert Mental Health Testimony

Expert psychological or psychiatric testimony is governed by the standards articulated in section A.

1. Conduct or Behavior of Victims

Generally, testimony regarding conduct or behavior of victims of sexual assault is not admissible since it tends to invade the jury's function of evaluating the witness' credibility. *Commonwealth v. Johnson*, 690 A.2d 274, 276 (Pa.Super. 1997)(en banc). In *Commonwealth v. Miner*, 562 Pa. 46, 753 A.2d 225 (2002), the Pennsylvania Supreme Court stated:

Expert testimony generally is admissible to aid the jury when the subject matter is distinctly related to a science, skill or occupation which is beyond the knowledge or experience of an average lay person. *Commonwealth v. Counterman*, 553 Pa. 370, 719 A.2d 284, 302-03 (citing *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30, 33 (Pa. 1976)), *cert. denied*, 145 L. Ed. 2d 82, 120 S. Ct. 97 (1999). Conversely, expert testimony is not admissible where the issue involves a matter of common knowledge. *Id.* at 303. In assessing the credibility of a witness, jurors must rely on their ordinary experiences of life, common knowledge of the tendencies of human behavior, and observations of the witness' character and demeanor. *Id.* Because the truthfulness of a witness is solely within the province of the jury, expert testimony cannot be used to bolster the credibility of witnesses.

¹⁴ Following the *Jennings* decision, the Pennsylvania Supreme Court, in *Freed v. Geisinger Medical Center, et al.*, 601 Pa. 233, 251, 971 A.2d 1202, 1212 (2009), *aff'd on reargument*, 607 Pa. 225, 5 A.3d 212 (2010), held that a competent and properly qualified nurse could provide expert opinion testimony regarding medical causation.

Commonwealth v. Miner, 562 Pa. at 55, 753 A.2d at 230.

Therefore, expert testimony regarding the impact of a sexual assault cannot be used to bolster the credibility of a victim. However, as discussed in Section 8.2, CONDUCT OR BEHAVIOR OF VICTIMS IN SEXUAL ASSAULT CASES, with the passage of 42 PA.CON.S.TAT.ANN. § 5920, experts will be able to testify about “specific types of victim responses and victim behaviors” in sexual assault cases in the Commonwealth’s case-in-chief, although they still will not be permitted to testify as to a particular victim’s or witness’s credibility. This law is not restricted to the prosecution’s case, however, and the defense has an equal opportunity to qualify an expert under this law, and present similar testimony on the defense side.¹⁵

2. Physical and Psychological Trauma Suffered by Victim

In *Commonwealth v. Bourgeon*, 654 A.2d 555, 557 (Pa. Super. 1994), *appeal denied*, 542 Pa. 657, 668 A.2d 1121 (1995), the trial court found the licensed psychologist qualified to testify as an expert as to the physical and psychological trauma suffered by the child sexual assault victim, and as to the child victim’s “unavailability” to testify at trial because of the trauma. The psychologist’s education and experience with child sexual abuse dynamics placed him within the range of having “specialized knowledge on the subject of child sexual abuse and its effects.” 654 A.2d at 558. This testimony was heard in relation to the trial court’s decision to declare the victim unavailable to testify at trial, and was therefore at a hearing outside of the jury’s presence.

8.4 RAPE TRAUMA SYNDROME

Rape trauma syndrome is a posttraumatic stress disorder recognized by the American Psychiatric Association, and explained that the phobias and behavioral changes experienced by rape victims can influence their ability to identify their attackers.¹⁶

In *Commonwealth v. Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988), the Pennsylvania Supreme Court found error by the trial court in allowing the Commonwealth to introduce an expert witness on “rape trauma syndrome” in an effort to explain why a victim could have a difficult time in making a timely identification of the assailant. *See id.*, 519 Pa. at 294, 547 A.2d at 357. The Court described the development at trial as follows:

¹⁵ This statute has been challenged on constitutional grounds. In *Commonwealth v. Olivo*, the Court of Common Pleas of Berks County ruled that section 5920 represents an impermissible attempt at procedural rule making by the legislature, and suspended the statute’s application. For further discussion, see footnote 3 above.

¹⁶ Burgess and Holmstrom, *Rape Trauma Syndrome*, 131 AM.J. PSYCHIATRY 981 (1974). The website of the American Journal of Psychiatry describes the work the authors of this article performed on the subject of rape trauma syndrome as:

The authors interviewed and followed 146 patients admitted during a one-year period to the emergency ward of a city hospital with a presenting complaint of having been raped. Based upon an analysis of the 92 adult women rape victims in the sample, they document the existence of a rape trauma syndrome and delineate its symptomatology as well as that of two variations, compounded reaction and silent reaction.

At his jury trial, the appellant contested his identification as the rapist. In order to downplay the victim's repeated failures to identify appellant within weeks of the crimes and bolster her identification after four years, the Commonwealth presented Ann Burgess as an expert witness with respect to RTS. Burgess holds a master's degree in psychiatric nursing and a doctorate in nursing science. Together with a colleague, Professor Lynda Holmstrom of Boston College, Burgess co-authored an article in the American Journal of Psychiatry which is credited with being the first study of victims of sexual attack to use the term "rape trauma syndrome." Burgess's qualifications included extensive teaching, research, writing, and forensic experience with the psychological effects found in rape victims. She described the symptomology of the syndrome, now accepted as a standard post-traumatic stress response disorder by the American Psychiatric Association. She then summarized her examination of the victim, stated her diagnosis that the victim suffered from RTS, and related her opinion of how the phenomena of RTS bore upon the identification process.

Id., 519 Pa. at 293, 547 A.2d at 356. The Supreme Court held that the expert testimony could not be used "for the sole purpose of shoring up" the credibility of a witness. *See id.*, 519 Pa. at 294, 547 A.2d at 357. *See also, Commonwealth v. Robinson*, 5 A.3d 339, 343 (2010), *appeal denied*, 610 Pa. 585, 19 A.3d 1051 (2011).

At the time of the writing of this book, there is no appellate decision reported which addresses whether generalized testimony from an expert about rape trauma syndrome to explain a type of victim response or a victim behavioral reaction following a rape, is admissible under 42 PA.CON.S.TAT.ANN. § 5920. In accordance with § 5920(b) (3), the expert will not be permitted to testify as to a particular victim's or witness's credibility.

However, in *Commonwealth v. Pickford*, 536 A.2d 1348, 1351 n. 2 (Pa. Super. 1987), *appeal dismissed*, 522 Pa. 506, 564 A.2d 158 (1989), the Superior Court described rape trauma syndrome as follows:

Rape trauma syndrome is one kind of post-traumatic stress disorder. The essential feature of post-traumatic stress disorder is the development of characteristic symptoms after a psychologically traumatic incident that is usually beyond the range of ordinary human experience. Those symptoms typically involve reexperiencing the traumatic incident; numbing of responsiveness to, or lessened involvement with, the external world; and a variety of autonomic, dysphoric, or cognitive symptoms.

In *Pickford*, the Superior Court affirmed the trial court's decision to permit lay testimony regarding the victim's post-rape trauma, i.e., the victim's behavior and conduct several days following the incident. *Commonwealth v. Pickford*, 536 A.2d at 1351-1352.¹⁷

8.5 DNA

This section discusses DNA (deoxyribonucleic acid) testing and its potential application in sexual assault cases. DNA testing is available to both the prosecution and the defense. See *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa.Super. 1992).

The use of DNA evidence in Pennsylvania has followed a steady path.¹⁸ In *Commonwealth v. Crews*, 536 Pa. 508, 640 A.2d 395 (1994), a rape and murder case, the Pennsylvania Supreme Court upheld the admission of DNA evidence found at the crime scene which "strongly associated" the DNA with the defendant. Although the Supreme Court acknowledged that DNA evidence can never provide absolute proof of identity, the Supreme Court concluded that the evidence was relevant and that its weight and persuasiveness was for the finder of fact:

The factual evidence of the physical testing of the DNA samples and the matching alleles, even without statistical conclusions, tended to make appellant's presence more likely than it would have been without the evidence, and was therefore relevant.

Id., 536 Pa. at 522, 640 A.2d at 402.

The Pennsylvania Supreme Court, in *Commonwealth v. Blasioli*, 552 Pa. 149, 713 A.2d 1117 (1998), recognized that DNA evidence is relevant, and provided the following description of the scientific principles and procedures applied in DNA analysis.

DNA is genetic material found in most types of cells of the human body, including white blood cells and cells contained in semen and hair follicles. DNA constitutes the primary element of an organism's total genetic information, known as its genome. In the process of cellular division, DNA functions essentially as a template, providing a blueprint for resulting cells. DNA also directs the construction of specific proteins that comprise the structural component of cells and tissues, as well as the production of enzymes necessary for essential biochemical reactions. As such, DNA determines an organism's unique physical composition.

552 Pa. at 154-155, 713 A.2d at 1119-1120.

¹⁷ Caution must be exercised before testimony similar to that in *Pickford* is found to be admissible. Cases filed since *Pickford* note that "there is a divergence of opinion as to the admissibility of testimony regarding the syndrome in various situations." See *In re T.D.*, 553 A.2d 979, 985 (Pa.Super. 1988), *appeal denied*, 524 Pa. 610, 569 A.2d 1369 (1989).

¹⁸ See *Commonwealth v. Alderman*, 811 A.2d 592, 595-596, (Pa.Super. 2002), *appeal denied*, 573 Pa. 694, 825 A.2d 1259 (2003).

In *Commonwealth v. Koehler*, 558 Pa. 334, 357, 737 A.2d 225, 237 (1999), *cert. denied*, 531 U.S. 829 (2000), the Supreme Court applied *Crews* and determined that DNA evidence was relevant and had probative value as to the question of whether a defendant had had sexual intercourse with a victim. In that case, the expert testified that a DNA analysis indicated that two other men were excluded from being the source of the semen, but that the appellant was not excluded.

A. Background Information Regarding DNA

Identification through the use of DNA testing is also referred to as DNA identity testing, profiling, fingerprinting, typing or genotyping. DNA testing focuses on the differences in human DNA segments.

Large segments of human DNA are the same from person to person, accounting for human characteristics that are generally shared. Indeed, from the sequence of the 3 billion base pairs, only about 3 million differ from one individual to another (except in the case of identical twins, who have identical DNA)... It is the existence of such differences in the sequencing of base pairs, known as “polymorphisms,” that provides the basis for DNA identification.

The length of each polymorphism is determined by the number of times a particular base pair sequence is repeated along the chromosome. Stretches of DNA along which a short nucleotide sequence is repeated are known as “variable number tandem repeats” or “VNTRS.” Because of their length, such discrete portions of a DNA sample’s patterned chemical structure are most easily capable of identification, and much of DNA forensic analysis relies upon loci containing these polymorphisms.

Commonwealth v. Blasioli, 552 Pa. 149, 156, 713 A.2d 1117, 1121 (1998) (citations omitted).

1. Types of DNA Tests

Polymerase Chain Reaction-Deoxyribonucleic Acid (PCR) testing is the principal method of analyzing DNA evidence in laboratories across the world.

PCR is a method of genetic “amplification” or replication. Succinctly put, its importance lies in its ability to take a small sample of DNA and make it into a larger sample of DNA. PCR is utilized for forensic DNA fingerprint identification where the DNA in a human body fluid or tissue sample (such as blood, semen, hair, or skin) is so minuscule or degraded, or is of such

poor genetic quality, that standard RFLP analysis cannot be employed. This is because RFLP analysis, to be successful, requires a substantially large and environmentally undegraded sample of DNA . . . PCR can be utilized to amplify a single target molecule of DNA, such as that contained in a single root of hair.

36 Am. Jur. Proof of Facts 3d 1 (2014). In *Commonwealth v. Jones*, 811 A.2d 1057 (Pa. Super. 2002), *appeal denied*, 574 Pa. 765, 832 A.2d 435 (2003), the Superior Court explained:

PCR stands for polymerase chain reaction, and is a technique that “allowed specific regions of DNA to be copied millions of times so that those regions can be typed and compared to the same regions in the DNA of a known individual.” (Notes of testimony, 10/13-18/00 at 384.) “STR” stands for short tandem repeat, and involves viewing a sequence of DNA that is repeated exactly one repeat sequence after another in tandem, like the cars of a train. (*Id.*) STR is a type of PCR test. (*Id.*)

811 A.2d at 1061 n. 4.

PCR testing is capable of using minute amounts of DNA that are too small for RFLP analysis and chemically amplifying the DNA sequences until enough is obtained for analysis.¹⁹ PCR testing is a technique that allows “specific regions of DNA to be copied millions of times so that those regions can be typed and compared to the same regions in the DNA of a known individual.” *Commonwealth v. Jones*, 811 A.2d 1057, 1061 (Pa. Super. 2002), *appeal denied*, 574 Pa. 765, 832 A.2d 435 (2003). PCR testing is an amplification/ replication process that allows laboratories to develop DNA profiles from extremely small samples of biological evidence.

PCR is a three step process: First the DNA strand is denatured, which means the strand is pulled apart by heating. Annealing is the second step in the process where the sample is cooled and the primers bind to the primer sequence of the DNA molecule. (A primer is synthetic or manufactured DNA.) Lastly, the DNA strand is heated again activating a polymerase (enzyme) that will produce a mate to the single strand to form a complete copy. Each time the PCR process is done, the number of DNA strands doubles, theoretically generally a billion copies after 30 cycles. The development of PCR was crucial to forensic identification made with DNA because it frequently enables both the prosecution and the defense to analyze the evidence. It also allows for sample retention if retesting is later deemed

¹⁹ Hazelwood, Robert R. and Ann Wolbert Burgess. *Practical Aspects of Rape Investigation: A Multidisciplinary Approach*, (Third edition) (2001), p. 311.

necessary.²⁰

The restriction fragment length polymorphism method (RFLP) can be explained as follows:

DNA forensic analysis begins with the preparation of a DNA profile, which entails the creation of a picture of multiple VNTRS. One of several techniques is used, among which is the restriction fragment length polymorphism method (the “RFLP method”), which was used by the State Police laboratory in this case and which is commonly used by the FBI and law enforcement laboratories across the country. The method isolates VNTRS known as restriction fragments by the use of

restriction enzymes, chemical “scissors” that recognize short base pair sequences and cut DNA molecules at those specific sites ... Once the restriction fragments are chemically sorted according to size, x-ray pictures are created known as autorads, using the process of autoradiography. The autorad displays a discernible pattern of dark bands resembling an electronic bar code, each band representing a fragment of DNA.

Commonwealth v. Blasioli, 552 Pa. at 156, 713 A.2d at 1121 (citations omitted).

After DNA profiles are created for both the crime scene and suspect samples, the autorad patterns are measured and compared according to their length. If the similarities are such that they fall within a narrow margin, known as a match window, the samples are declared a match.

Id., 552 Pa. at 158, 713 A.2d at 1122 (citations omitted).

In *Commonwealth v. Crews*, 536 Pa. 508, 640 A.2d 395 (1994), the Pennsylvania Supreme Court held that evidence of DNA testing was admissible in a criminal trial, after finding that DNA analysis using the RFLP method of testing was generally accepted in the scientific community.

2. Statistical Assessment Following Testing

Once DNA testing is performed, a statistical assessment called population frequency analysis is done. The Supreme Court in *Commonwealth v. Blasioli*, 552 Pa. 149, 713 A.2d 1117 (1998) explained:

The statistical assessment performed after a match has been declared is called population frequency analysis. The object is

²⁰ American Prosecutors Research Institute (APRI), *Forensic DNA Fundamentals for the Prosecutor: Be not Afraid*, p.11.

to determine the overall likelihood that someone other than the suspect would possess DNA matching that in the sample obtained from the crime scene. The first step is to determine, for each matching allele, the likelihood that such an allele would appear in a randomly selected individual ... This determination is made through the application of theoretical models based upon population genetics. *Id.*

552 Pa. at 160, 713 A.2d 1123.

“As applied in DNA typing, the product rule states that the probability of a genetic profile occurring randomly is the product of the probabilities of each individual allele’s occurrence in the general population.” *Blasioli*, 552 Pa. at 161, 713 A.2d at 1124. In *Blasioli*, the defendant attacked the validity of the product rule. The Supreme Court explained that “the product rule has gained general acceptance across the disciplines of population genetics, human genetics and population demographics”. *Id.*, 552 Pa. at 168, 713 A.2d at 1128. “As such, any remaining dispute as to the validity of the product rule should not result in the exclusion of evidence based upon this statistical method in criminal trials in Pennsylvania.” *Id.* Accordingly, statistical evidence based upon the product rule was properly admitted at trial. *See also, Commonwealth v. Robinson*, 581 Pa. 154, 214-215, 864 A.2d 460, 495-496 (2004).

B. Admissibility of DNA Evidence

“The DNA testing process has been acknowledged by the courts as well as the national scientific community for its extraordinary degree of accuracy in matching cellular material to individuals.” *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa.Super. 1992). Pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to be admissible, scientific evidence must have gained general acceptance in the relevant scientific community. As stated by the Pennsylvania Supreme Court, theories and methods of DNA analysis are generally accepted within the scientific community. *Commonwealth v. Crews*, 536 Pa. 508, 640 A.2d 395 (1992).

- *Commonwealth v. Jones*, 811 A.2d 1057 (Pa. Super. 2002), *appeal denied*, 574 Pa. 765, 832 A.2d 435 (2003), the Superior Court found that counsel was not ineffective for failing to object to DNA testimony on the grounds that the scientific community has not generally accepted it as a means of identifying a specific individual.

DNA evidence need only be relevant and not unduly prejudicial in order to be admissible.

- *Commonwealth v. Alderman*, 811 A.2d 592 (Pa.Super. 2002), *appeal denied*, 573 Pa. 694, 825 A.2d 1259 (2003): DNA need not establish conclusively

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that semen belonged to appellant in order to be considered relevant and not unduly prejudicial. Rather, it was sufficient that the DNA evidence supported a reasonable inference that appellant had sexual intercourse with the young victim.

- ***Commonwealth v. Koehler***, 558 Pa. 334, 737 A.2d 225 (1999), *cert. denied*, 531 U.S. 829 (2000): the Supreme Court applied ***Crews*** and determined that DNA evidence was relevant and had probative value as to whether a defendant had had sexual intercourse with a victim. In this case, the expert testified that a DNA analysis indicated that two other men were excluded from being the source of the semen, but that the appellant had not been excluded.

Although DNA may be used to exculpate individuals, the lack of DNA does not always equate to innocence. “In DNA as in other areas, an absence of evidence is not evidence of absence.” ***Commonwealth v. Heilman***, 867 A.2d 542, 546 (Pa.Super. 2004), *appeal denied*, 583 Pa. 669, 876 A.2d 393 (2005). In ***Heilman***, the defendant sought DNA testing under the Post Conviction Relief Act. The Superior Court reviewed the items which defendant wanted to have tested and concluded that the absence of defendant’s DNA evidence at the crime scene was not equivalent to proof of the defendant’s absence from the crime scene.

- DNA testing may exculpate as well as inculpate an individual: ***Commonwealth v. Brison***, 618 A.2d 420, 425 (Pa.Super. 1992). Appellant alleged a due process violation based upon the Commonwealth’s failure to have DNA testing performed on samples taken from the victim. The Superior Court vacated the conviction and remanded for testing, noting both the inculpatory and exculpatory capabilities of DNA testing.
- In ***Commonwealth v. Hawkins***, 549 Pa. 352, 701 A.2d 492 (1997), *cert. denied*, 523 U.S. 1083, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998), the Pennsylvania Supreme Court found that the trial court committed error when it excluded the testimony of defendant’s forensic expert who would have testified that the DNA material found under the victim’s fingernails did not match with either the defendant or the victim. The trial court had erroneously found that there was no foundation for the expert opinion, however, the victim’s father had identified the particles underneath the victim’s fingernails.

C. DNA DETECTION OF SEXUAL AND VIOLENT OFFENDERS ACT

The Pennsylvania DNA Act, 44 PA.CONS.STAT.ANN. §§ 2301- 2336 (hereinafter “Act”) (formerly 35 PA.CONS.STAT.ANN. §§ 7651.101-7651.1102), establishes an administrative process for the implementation of a DNA identification system as a tool in criminal investigations and for deterrence of recidivist crime. See ***Dial v. Vaughn***, 733 A.2d 1, 3 (Pa. Cmwlth. 1999). The identification system contains DNA data from persons convicted of felony sex offenses or other specified offense. 44 PA.CONS.STAT.ANN. § 2316.

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The Act provides a range of offenses for which a DNA sample is required. The Act identifies the parameters of legitimate mandated DNA extraction to persons “convicted or adjudicated delinquent for a felony sex offense or other specified offense” or who are “incarcerated for a felony sex offense or other specified offense...” 44 PA.CON.S.TAT.ANN. § 2316. This statute identifies that a DNA sample should be drawn “upon intake to a ... jail” or “immediately after the sentencing or adjudication,” but may still be “drawn any time thereafter by the ... jail” if the “sample is not timely drawn in accordance with this section...” *Id.*

A felony sex offense is defined in 44 PA.CON.S.TAT.ANN. § 2303 which includes a listing of the offenses. Furthermore, 44 PA.CON.S.TAT.ANN. § 2303 provides that “other specified offense” is defined as a felony offense or an offense under 18 PA.CON.S.TAT.ANN. § 2910 or § 3126, or an attempt to commit such an offense.

Section 3 of the Act establishes requirements for the submission of blood samples from persons convicted of the specified crimes. Section 3 is codified in 44 PA.CON.S.TAT.ANN. § 2316 and provides as follows:

(a) General rule.--A person who is convicted or adjudicated delinquent for a felony sex offense or other specified offense or who is or remains incarcerated for a felony sex offense or other specified offense on or after the effective date of this chapter shall have a DNA sample drawn as follows:

(1) A person who is sentenced or receives a delinquency disposition to a term of confinement for an offense covered by this subsection shall have a DNA sample drawn upon intake to a prison, jail or juvenile detention facility or any other detention facility or institution. If the person is already confined at the time of sentencing or adjudication, the person shall have a DNA sample drawn immediately after the sentencing or adjudication. If a DNA sample is not timely drawn in accordance with this section, the DNA sample may be drawn any time thereafter by the prison, jail, juvenile detention facility, detention facility or institution.

(2) A person who is convicted or adjudicated delinquent for an offense covered by this subsection shall have a DNA sample drawn as a condition for any sentence or adjudication which disposition will not involve an intake into a prison, jail, juvenile detention facility or any other detention facility or institution.

(3) Under no circumstances shall a person who is

convicted or adjudicated delinquent for an offense covered by this subsection be released in any manner after such disposition unless and until a DNA sample has been withdrawn.

44 PA.CON.S.TAT.ANN. § 2316(a).

In *Dial v. Vaughn*, 733 A.2d 1, 3 (Pa. Cmwlth. 1999), the Commonwealth Court found that the former Act did not violate Pennsylvania's terms for parole, nor any federal or state constitutional mandate. First, the Commonwealth Court found that the Act did not deprive inmates of their eligibility for parole due to the requirement that the inmate must submit to pre-release withdrawal of blood for DNA testing. Next, the Court found that the condition of the pre-release withdrawal of blood did not effect an ex post facto enhancement of his sentence and did not amount to a Fourth Amendment violation. Lastly, any punitive measures mandated by the Act for a refusal to comply with the blood sample requirement do not amount to ex post facto enhancement of sentence because they are considered administrative punishment.

Similarly, the Third Circuit Court of Appeals, in *Johnson v. Pennsylvania Board of Probation and Parole*, 163 Fed.Appx. 159, 2006 WL 167445 (3d Cir. 2006), held that the Pennsylvania DNA Act does not cause ex post facto concerns:

We agree with the Commonwealth and several of our sister circuits that the collection of blood for identification and establishment of a DNA data bank is, like fingerprinting and photographing, a non-penal, administrative requirement that does not run afoul of the *ex post facto* clause. and therefore did not offend

Id. at *163. Moreover, the Third Circuit Court of Appeals, in *Johnson v. Ogershok*, 134 Fed.Appx. 535, 2005 WL 1394872 (3d Cir. 2005), held that the Act did not violate the Fourth Amendment.

D. Postconviction Forensic DNA Testing

Under Section 9543.1 of the Post Conviction Relief Act, 42 PA.CON.S.TAT.ANN § 9543.1, a convicted individual serving a sentence of imprisonment or awaiting a sentence of death may file a motion for postconviction DNA testing of evidence related to the investigation or prosecution that resulted in the individual's conviction.

Subchapter B. Post Conviction Relief **§ 9543.1. Postconviction DNA testing**

(a) Motion.--

(1) An individual convicted of a criminal offense in a court

of this Commonwealth and serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.²¹

The procedural and pleading requirements for the motion are specified in Sections 9543.1(b) and (c).

If DNA testing is conducted, the applicant may then use the test results, presumably favorable, as a basis for a separate PCRA petition under other sections of the Post Conviction Relief Act, as more detailed in Section 9543.1(f).

A motion for DNA testing does not confer a right to appointed counsel. *Commonwealth v. Williams*, 35 A.3d 44, 50 (Pa. Super. 2011), *appeal denied*, 616 Pa 467, 50 A.3d 121 (2012).

1. Timeliness of Motion

A motion for DNA testing under Section 9543.1 is not subject to the one-year filing deadline set forth in 42 PA.CON.S.TAT.ANN § 9545(b)(1) for PCRA petitions. *Commonwealth v. Conway*, 14 A.3d 101, 108, (Pa. Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). In fact, Section 9543.1 places no time limits on motions for DNA testing. However, any subsequent PCRA petition based on DNA test results, like any other PCRA petition, must satisfy the timeliness requirements of the PCRA. *Commonwealth v. Brooks*, 875 A.2d 1141, 1147 (Pa. Super. 2005).

Therefore, after DNA testing has been completed, the applicant may, within 60 days of receiving the test results, petition to the court for post-conviction relief on the basis of after-discovered evidence, an exception to the one-year statute of limitations. *See* 42 PA.CON.S.TAT.ANN § 9543.1(f); 42 PA.CON.S.TAT.ANN § 9545(b)(1)(ii); *Commonwealth v. Weeks*, 831 A.2d 1194, 1196 (Pa. Super. 2003) (while Section 9543.1 “does not directly create an exception to” the one-year time bar, “it allows for a convicted individual to first obtain DNA testing which could then be used within a PCRA petition to establish new facts in order to satisfy the requirements of an exception under 42 PA.CON.S.TAT.ANN § 9545(b)(2)”).

2. Requirements to obtain DNA Testing

The statute sets forth several threshold requirements to obtain DNA testing: (1) the evidence specified must be available for testing on the date of the motion; (2) if the evidence was discovered prior to the applicant’s conviction, it

²¹ 42 PA.CON.S.TAT.ANN § 9543.1.

was not already DNA tested because (a) technology for testing did not exist at the time of the applicant's trial; (b) the applicant's counsel did not request testing in a case that went to verdict before January 1, 1995; or (c) counsel sought funds from the court to pay for the testing because his client was indigent, and the court refused the request despite the client's indigency. *See* 42 PA.CON.S.TAT.ANN § 9543.1(a)(2).

Furthermore, the applicant is required to present a *prima facie* case that the requested DNA testing, assuming it gives exculpatory results, would establish the petitioner's actual innocence of the crime. ***Commonwealth v. Williams***, 35 A.3d 44, 50 (Pa. Super. 2011), *appeal denied*, 616 Pa 467, 50 A.3d 121 (2012).

In ***Commonwealth v. Williams***, 909 A.2d 383 (Pa. Super. 2006), the defendant filed for post conviction DNA testing. The Superior Court, citing ***Commonwealth v. Brooks***, 875 A.2d 1141, 1148 (Pa. Super. 2005) and ***Commonwealth v. Young***, 873 A.2d 720, 724 (Pa. Super. 2005), *appeal denied*, 586 Pa. 739, 891 A.2d 733 (2005), stated that a motion for DNA testing, while clearly separate and distinct from claims pursuant to other sections of the PCRA, nonetheless constitutes a postconviction petition under the PCRA.²² The Superior Court further held that because the defendant had presented a defense of consent at the time of his trial on the charge of Rape, he failed to set forth *prima facie* requirements for postconviction DNA testing. Because the identity of perpetrator was not at issue, he failed to satisfy his burden under 42 PA.CON.S.TAT.ANN. § 9543.1.

With respect to the *prima facie* requirement for DNA testing, the Superior Court, in ***Commonwealth v. Heilman***, 867 A.2d 542 (Pa. Super. 2005), *appeal denied*, 583 Pa. 669, 876 A.2d 393 (2005), explained that on its face, the *prima facie* requirement set forth in § 9543.1(c)(3) and reinforced in § 9543.1(d)(2) requires an appellant to demonstrate that favorable results of the requested DNA testing “*would establish*” the appellant's actual innocence of the crime of conviction. Because the petitioner in ***Heilman*** failed to make such a demonstration, his petition was properly denied. ***Heilman***, 867 A.2d at 546-547.

3. Standard of Review

The trial court is directed not to order the testing if it determines, after review of the trial record, that there is no reasonable possibility that the testing would produce exculpatory evidence to establish petitioner's actual innocence. The burden lies with the petitioner to make a *prima facie* case that favorable results from the requested DNA testing would establish his innocence.

We note that the statute does not require petitioner to show that the DNA testing results would be favorable. However, the court

²² The Post Conviction Relief Act is codified at 42 PA.CON.S.TAT.ANN. §§ 9541-9546.

is required to review not only the motion [for DNA testing], but also the trial record, and then make **a determination as to whether there is a reasonable possibility that DNA testing would produce exculpatory evidence that would establish petitioner's actual innocence**. We find no ambiguity in the standard established by the legislature with the words of this statute.

Commonwealth v. Smith, 889 A.2d 582, 584 (Pa. Super. 2005), *appeal denied*, 588 Pa. 769, 905 A.2d 500 (2006) (emphasis added).

4. Final and Appealable Order

An order from the trial court granting a motion for post-conviction DNA testing constitutes a final order immediately appealable to the Superior Court. *Commonwealth v. Scarborough*, --- Pa. ---, 64 A.3d 602 (2013).

8.6 BITE MARK EVIDENCE

Bite mark analysis is part of the field of forensic odontology.

In *Commonwealth v. Henry*, 524 Pa. 135, 569 A.2d 929 (1990), *cert. denied*, 499 U.S. 931, 111 S.Ct. 1338, 113 L.Ed.2d 269 (1991), *habeas corpus granted on other grounds*, *Henry v. Horn*, 218 F.Supp.2d 671 (E.D.Pa. 2002), the Pennsylvania Supreme Court found that it was not error for a general practicing dentist who has specialized knowledge of bite mark identification to testify that bite marks were attacking or sadistic when the trial court instructed the jury that it was free to accept or reject his testimony.

In *Brooks v. State*, 748 So.2d 736, 746-747 (Miss. 1999), the Supreme Court of Mississippi exhaustively reviewed the states which have accepted bite mark evidence as scientific evidence. Among them are:

- *Handley v. State*, 515 So.2d 121, 130 (Ala.Crim.App. 1987): forensic odonatologist testimony admissible as evidence is in the nature of physical comparisons as opposed to scientific tests or experiments;
- *State v. Richards*, 166 Ariz. 576, 804 P.2d 109, 111 (Ct.App. 1990): a *Frye* hearing is not required where bite-mark evidence is presented by a qualified expert;
- *Verdict v. State*, 315 Ark. 436, 868 S.W.2d 443, 447 (1993): bite-mark evidence is not novel scientific evidence and was relevant and reliable;
- *People v. Marsh*, 177 Mich. App. 161, 441 N.W.2d 33, 36 (1989): general

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reliability of bite-mark evidence as a means of positive identification is sufficiently established that a court is authorized to take judicial notice of reliability without conducting hearing on same;

- ***State v. Armstrong***, 179 W.Va. 435, 369 S.E.2d 870, 877 1988): reliability of bite-mark evidence is sufficiently established that a court is authorized to take judicial notice of same;
- ***State v. Stinson***, 134 Wis.2d 224, 397 N.W.2d 136, 140 (Ct.App. 1986): bite-mark identification evidence presented by an expert witness can be a valuable aid to a jury in understanding and interpreting evidence;

Caution must be exercised before expert testimony regarding bite mark identification is ruled admissible. The National Academy of Sciences, in 2009 after a comprehensive study, stressed the differences in expert opinions on this type of identification evidence. The NAS study's bite mark section concluded:

Although the majority of forensic odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification, no scientific studies support this assessment, and no large population studies have been conducted. In numerous instances, experts diverge widely in their evaluations of the same bite mark evidence, which has led to questioning of the value and scientific objectivity of such evidence.

Bite mark testimony has been criticized basically on the same grounds as testimony by questioned document examiners and microscopic hair examiners. The committee received no evidence of an existing scientific basis for identifying an individual to the exclusion of all others. That same finding was reported in a 2001 review, which "revealed a lack of valid evidence to support many of the assumptions made by forensic dentists during bite mark comparisons." Some research is warranted in order to identify the circumstances within which the methods of forensic odontology can provide probative value.

Strengthening Forensic Science in the United States: A Path Forward (2009), at 176, National Academies Press, National Academy of Sciences (footnotes omitted).

8.7 HAIR SAMPLE ANALYSIS

NOTE: *DNA testing has generally replaced the scientific technique of hair analysis.*

Nevertheless, hair analysis continues to be admissible; therefore, it is discussed in this Benchbook.

Microscopic hair comparison evidence satisfies the *Frye*²³ standard. *Commonwealth v. McCauley*, 588 A.2d 941 (Pa. Super. 1991), *appeal denied*, 529 Pa. 656, 604 A.2d 248 (1992). In *McCauley*, the Superior Court held that microscopic hair comparison evidence was admissible as scientific expert evidence.

The court in *McCauley* held that the testimony of a forensic criminologist was legally relevant insofar as it was more probative than prejudicial and it gave the jury acceptable evidence of tying the defendant to the crime:

Various federal and state courts have held the same. *United States v. Cyphers*, 553 F.2d 1064 (7th Cir. 1977), *cert. denied* 434 U.S. 843, 98 S.Ct. 142, 54 L.Ed.2d 107 (1978) (armed robbery prosecution, expert opinion that human hairs found on items used in robbery could have come from defendants was admissible for whatever value jury might give it). *United States v. Haskins*, 536 F.2d 775 (8th Cir.1976), *cert. denied* 429 U.S. 898, 97 S.Ct. 263, 50 L.Ed.2d 182 (1977) (bank robbery, expert testimony identifying hair sample found in a silk stocking near bank as matching known sample of defendant's hair admissible; credibility of expert and weight given was for jury to determine and testimony was not invasion of jury's province). *People v. Columbo*, 118 Ill.App.3d 882, 74 Ill.Dec. 304, 455 N.E.2d 733 (1983), *cert. denied* 467 U.S. 1208, 104 S.Ct. 2394, 81 L.Ed.2d 351 (1984) (expert testimony that defendant's hair was similar in color and characteristics to hair found on murder victim's T-shirt had probative value, and although not conclusive, was properly considered by the jury, and neither exclusionary character of hair comparisons nor lack of absolute scientific certainty rendered hair expert's testimony inadmissible). *Paxton v. State*, 159 Ga.App. 175, 282 S.E.2d 912 (1981), *writ denied* 248 Ga. 231, 283 S.E.2d 235 (1982) (expert testimony pubic hairs found at scene of rape matching defendant's admissible). *State v. Pratt*, 306 N.C. 673, 295 S.E.2d 462 (1982); *State v. Kersting*, 292 Or. 350, 638 P.2d 1145 (1982); *State v. Melson*, 638 S.W.2d 342 (Tenn.1982), *cert. denied* 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983); *State v. Clayton*, 646 P.2d 723 (Utah 1982).

McCauley, 588 A.2d at 947.

In *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111 (2011), the appellant attempted to convince the Court that the acceptance of microscopic hair comparison

²³ *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

evidence as per *McCauley* was outdated and no longer met the *Frye* standards. The Supreme Court, however, rejected this argument, finding that many jurisdictions had determined that human hair analysis by microscopical comparison is an accepted and reliable scientific method or technique, thus not requiring a *Frye* hearing. *Chmiel*, 612 Pa. at 384, 30 A.3d at 1141.

Caution must be exercised before expert testimony regarding hair sample analysis is ruled admissible. The National Academy of Sciences, after a comprehensive study in 2009, stressed the differences in expert opinions on this type of identification evidence. The NAS study's hair sample section concluded:

No scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population. There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a "match." In one study of validity and accuracy of the technique, the authors required exact agreement on seven "major" characteristics and at least two agreements among six "secondary" characteristics. The categorization of hair features depends heavily on examiner proficiency and practical experience.

Strengthening Forensic Science in the United States: A Path Forward (2009), at 160, National Academies Press, National Academy of Sciences (footnotes omitted).

8.8 BLOOD TYPING EVIDENCE

NOTE: *DNA testing has generally replaced the scientific technique of blood typing analysis. Nevertheless, blood typing analysis continues to be admissible; therefore, it is discussed in this Benchbook.*

Blood typing evidence is admissible, but may only be used to corroborate the defendant's presence at the crime scene.

Proof that a defendant shares a blood type with that of samples found at the scene is relevant and admissible when it corroborates independent facts which show either (1) that the person who committed the crime lost blood, or (2) that the defendant was present at the scene of the crime. *Commonwealth v. Porter*, 323 A.2d 128, 131 (Pa. Super. 1974).²⁴

- *But see - Commonwealth v. Mussoline*, 429 Pa. 464, 240 A.2d 549 (1967): the defendant's blood type matched blood spots found at the crime scene and the defendant had a cut on his arm; however no other evidence existed

²⁴ See generally, 16 B West's Pa. Prac., Criminal Practice § 29:13, Blood, blood tests, secretion, and breathalyzers.

to corroborate defendant's presence at the crime scene. The Supreme Court held that the blood type evidence should not have been admitted.

We think it clear that under our own case law, as well as that of other jurisdictions, mere proof that a criminal defendant shares a blood type with that of samples found near the crime scene is legally irrelevant to show that the defendant was in fact present at the scene of the crime without Some additional, independent evidence Tending to show either (1) that the man who committed the crime did lose blood in the process or (2) that the defendant was present at the scene. In short, blood-type evidence such as this can only be used to Corroborate other evidence of the defendant's whereabouts at the crucial time.

429 Pa. at 468, 240 A.2d at 551.

In *Commonwealth v. Statti*, 73 A. 2d 688 (Pa.Super. 1950), the blood type evidence was used to corroborate the victim's testimony. The blood tests of the defendant's blood was compared with that found on the seat cover of his automobile. The victim identified the defendant as her assailant and testified that she bit him during the rape.

Electrophoresis – Electrophoresis is a way of determining blood type through the use of electric current to separate important biological proteins.²⁵ In *Commonwealth v. Zook*, 532 Pa. 79, 615 A.2d 1 (1992), the Pennsylvania Supreme Court, following a *Frye* analysis, ruled that an electrophoresis test of dried blood stains is admissible. See also, *Commonwealth v. Dengler*, 586 Pa. 54, 68, 890 A.2d 372, 381 (2005).

8.9 FORENSIC SEXUAL ASSAULT EVIDENCE COLLECTION

The sexual assault medical forensic exam is an examination of a sexual assault victim by a health care provider, ideally one who has specialized education and clinical experience in the collection of forensic evidence and treatment of these types of patients/victims.

The forensic component includes gathering information from the patient for the medical forensic history, an examination, documentation of biological and physical findings, a collection of evidence from the patient and follow up as needed to document additional evidence. The medical component includes coordinating treatment of injuries, providing care for STD's, assessing pregnancy risk and discussing treatment options, including reproductive health services, and providing instructions and referrals for follow up medical care.

²⁵ Michigan Sexual Assault Benchbook, Revised Edition 2013, Page 8-19.

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The sexual assault medical forensic exam is an examination of a sexual assault patient by a health care provider, ideally one who has specialized education and clinical experience in the collection of forensic evidence and treatment of these patients. The examination includes gathering information from the patient for the medical forensic history; an examination; coordinating treatment of injuries, documentation of biological and physical findings, and collection of evidence from the patient; documentation of findings; information, treatment, and referrals for STIs, pregnancy, suicidal ideation, alcohol and substance abuse, and other nonacute medical concerns; and follow-up as needed to provide additional healing, treatment, or collection of evidence. This exam is referred to as the “forensic medical examination” under the Violence Against Women Act (VAWA).

U.S. Department of Justice, Department of Violence Against Women, [A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents, Second Edition](#) (April 2013), p. 17.

“A ‘rape kit’ is a product frequently used for the examination of sexual assault victims in which blood, hair, saliva, semen, fibers, and other substances are collected from the victim’s body and clothing and retained for further forensic examination.”²⁶

Commonwealth v. Hawk, 551 Pa. 71, 73 n.1, 709 A.2d 373, 374 n.1 (1998).

The following appellate court cases addressed the admissibility of results from the use of a rape kit on the victim with reference to presence of semen.

- ***Commonwealth v. Campbell***, 368 A.2d 1299 (Pa.Super. 1976): the admission of sexual assault evidence collection kit evidence showing the presence of sperm in the victim’s vagina to corroborate the victim’s testimony that the defendant had raped her was proper even though the prosecution presented no scientific evidence identifying the sperm as that of the defendant.
- ***Commonwealth v. Hawk***, 551 Pa. 71, 73 n.1, 709 A.2d 373, 374 n.1 (1998): the results of rape kit tests which showed a lack of semen and foreign pubic hair were consistent with defendant’s assertion that he did not engage in sexual intercourse with the victim even though the forensic scientist could not state conclusively that no intercourse had occurred. The scientist’s testimony concerning the possibility of no intercourse was sufficient to support a reasonable inference that the defendant did not have sexual intercourse with the victim.

The results of the rape kit, other than the presence of spermatozoa, are hearsay

²⁶ Note that the more recent terms, “Sexual Assault Evidence Collection Kit” or “Rape Evidence Collection Kit” more accurately describe the evidence collection kit.

and cannot be admitted without the testimony of the criminalist who conducted the test.

- ▶ The following appellate court cases address the admissibility issues due to the differences in (1) objective findings from the use of a rape kit and (2) opinions from treating health care professionals.
 - ***Commonwealth v. Hemingway***, 534 A.2d 1104, 1107-1108 (Pa.Super. 1987): the results of the “rape kit” exam were not admissible as business documents; the report contained opinions and conclusions beyond mere event of hospitalization and treatment prescribed, and were not admissible unless the doctor who prepared the report containing the information was available for in-court cross-examination regarding the accuracy, reliability and veracity of his opinion.
 - ***Commonwealth v. Campbell***, 368 A.2d 1299, 1301 (Pa. Super. 1976): the presence of sperm is a factual and not a medical conclusion and is admissible hearsay.
 - ***Commonwealth v. Xiong***, 630 A.2d 446, 452 (Pa.Super. 1993) (en banc), *appeal denied*, 537 Pa. 609, 641 A.2d 309 (1994): notation stating, “no hymen” in hospital record was a factual assertion rather than a diagnosis or opinion. It was not an opinion based statement, but rather was based on an observation made during the exam. This rationale would apply to examinations made pursuant to a Sexual Assault Evidence Collection Kit or emergency room procedures.
 - ***Commonwealth v. Birdsong***, 611 Pa. 203, 24 A.3d 319 (2011): the defendant’s trial counsel stipulated to the results of the rape kit analysis, which included that semen had been found in the rape victim’s body. The Supreme Court concluded that this stipulation was not ineffective assistance because the defense lawyer did not want the Commonwealth to actually test the semen samples and perhaps be able to connect them with the defendant.

8.10 EXPERT TESTIMONY ON DEFENSE CLAIM OF FALSE CONFESSION

In ***Commonwealth v. Alicia***, --- Pa. ---, 92 A.3d 753 (2014), the trial court was faced with a motion by the Commonwealth to preclude a defense expert witness from testifying about the theory of false confessions. The defendant had confessed that, on the night of October 30, 2005, he fatally shot George Rowe in the back of the head during an altercation in Philadelphia. Based on the defendant’s confession, as well as a statement by his aunt identifying him as the shooter, he was charged with murder and related crimes.

Prior to trial, the Commonwealth filed a motion *in limine* seeking to preclude the defendant from calling as an expert witness on the phenomenon of false confessions Richard Leo, J.D., Ph.D., an associate professor of law at the University of San Francisco. On August 6, 2008, after conducting a hearing, the trial judge ruled that Dr. Leo would not be allowed “to testify with regard to the alleged case specific facts of the interrogation in this case,” but would be permitted “to testify generally about false confessions, to testify generally in terms of his knowledge and his research and other people’s research he’s familiar with, about police methods and police training methods, police interrogation methods, and to testify generally about why certain interrogation techniques, if used in a particular case, may increase the risk of a false confession.”

The Superior Court accepted the Commonwealth’s appeal as an appeal from a collateral order, and affirmed in a plurality memorandum decision.

The Pennsylvania Supreme Court, in an opinion by Justice Seamus P. McCaffery, reversed, and specifically held that expert testimony on the phenomenon of false confessions is not admissible as it would impermissibly invade the jury’s exclusive role as the arbiter of credibility. 92 A.3d at 762.

► Precedent from the Superior Court

In *Commonwealth v. Harrell*, 65 A.3d 420 (Pa. Super. 2013), a murder case, the defendant argued that his confession had been coerced. The defense wanted to call Dr. Richard Ofshe to testify regarding the phenomenon of false confessions:

Appellant wished to present Dr. Ofshe to educate the jury regarding false confessions, that false confessions exist, how to recognize them, and police interrogation techniques in general.

65 A.3d at 429. The trial court opined that the issue of false confessions was not beyond the knowledge of the average layperson. The Superior Court agreed, and affirmed.

In *Commonwealth v. Szakal*, 50 A.3d 210 (Pa. Super. 2012), the Superior Court upheld the trial court’s denial of the defendant’s request to call Dr. Debra Davis, an expert in the field of false confessions:

[I]f the expert is only testifying generally about the fact that false confessions happen, that is well within the grasp of the average layperson and expert testimony would not be required under Rule 702. The components of a false confession, according to Dr. Davis, include factors such as the interrogation tactics employed, the training of the law enforcement personnel involved, and the stress tolerance of the suspect. This [c]ourt found that testimony concerning these factors can be elicited (and attacked) through the testimony of other witnesses and is capable of being understood by the average juror. The jury can then make its own determination as to the weight afforded to

the defendant's confession. Therefore, Dr. Davis' testimony was not proper because expert testimony is inadmissible when the matter can be described to the jury and the conditions evaluated by them without the assistance of one claiming to possess special knowledge upon the subject.

Id. at 228 (quoting the trial court opinion). The Superior Court found no error with the trial court's analysis and ultimate decision to preclude Dr. Davis' testimony as it would not assist the trier of fact. *Id.*

8.11 EXPERT TESTIMONY ON ISSUE OF EYEWITNESS IDENTIFICATION

In *Commonwealth v. Walker*, --- Pa. ---, 92 A.3d (2014), the Pennsylvania Supreme Court, in a change from prior reported decisions, held that the admission of expert testimony regarding eyewitness identification was no longer *per se* impermissible. The admissibility of such expert testimony is now at the discretion of the trial court.

In *Walker*, the defense proffered Dr. Solomon Fulero regarding the fallibility of human memory and the science as to human recall, and to admit scientific studies related to the reliability of eyewitness testimony generally. The trial court denied the motion without a *Frye*²⁷ hearing, reasoning that prior precedent held that expert testimony concerning eyewitness identification was inadmissible.

After accepting review, the Supreme Court summarized the expert testimony to be provided by Dr. Fulero as:

- The phenomenon of “weapons focus”;
- The reduced reliability of identification in cross-racial identification cases;
- The significantly decreased accuracy in eyewitness identifications in highstress/traumatic criminal events;
- Increased risk of mistaken identification when police investigators do not warn a witness, prior to viewing a photo array or line up, that the perpetrator may or may not be in the display; and
- The lack of a strong correlation between witness statements of confidence and witness accuracy.

The Supreme Court found that the expert testimony fell within Pennsylvania Rule of Evidence 702 and therefore implicated a *Frye* “general acceptance” test.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

²⁷ *Frye v. United States*, 293 F.1013 (D.C.Cir. 1923).

Expert and Scientific Evidence

- (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
- (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
- (c) the expert's methodology is generally accepted in the relevant field.

The Supreme Court held that such expert testimony admissible on the limited issue of eyewitness identification, at the discretion of the trial court, and conditioned upon the trial court finding that the expert is qualified, the proffered testimony relevant, and that the expert testimony will assist the trier of fact. The determination is to be made on a case-by-case basis.

The defense must make an on-the-record detailed proffer to the court, including:

- An explanation of precisely how the expert's testimony is relevant to the eyewitness identifications under consideration, and
- How it will assist the jury in its evaluation.

If the proffer is permitted, the proof "should establish the presence of factors (e.g., stress or differences in race, as between the eyewitness and the defendant) which may be shown to impair the accuracy of eyewitness identification in aspects which are (or to a degree which is) beyond the common understanding of laypersons." *Id.* at *21.

Chapter 9

POST-TRIAL PROCEDURES AND SENTENCING

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Chapter Nine

Post-Trial Procedures and Sentencing

9.1 CHAPTER OVERVIEW

This chapter explores issues that a trial court must consider after a sex offender has been convicted, by either a jury or bench trial, or by way of a guilty/*nolo contendere* plea. Many of these post-trial matters must be addressed prior to sentencing, including:

- Review of bail following conviction.
- The preparation and review of a Pre-sentence Investigation Report.
- DNA and venereal disease testing.

Section 9.2 provides the rules for bail following conviction. Next, in section 9.3, the chapter discusses the necessity and preparation of a pre-sentence report, also including instructions if a mental health or other type of examination will provide helpful information at sentencing.

Section 9.4 specifies the requirements for mandatory DNA testing under the Pennsylvania DNA Act.

Section 9.5 provides the rules for the scheduling of the sentencing hearing, and Section 9.6 includes a suggested colloquy for the sentencing hearing.

The requirements of the Sexually Violent Predator Assessment under **SORNA**¹ are listed in Section 9.7.

Section 9.8, **Sentencing Options**, includes detailed information regarding applicable sentencing options, including maximum and mandatory penalties, as well as the ranges under the sentencing guidelines. Section 9.8 begins with a general discussion of sentencing standards and the use of the sentencing guidelines. The maximum allowable penalty for each crime of sexual violence is provided. In section 9.8(D), the mandatory penalties for crimes involving sexual violence are listed, along with the criteria and notice provisions.

Section 9.9 contains the requirements and lists suggestions to assist at the time of the sentencing hearing. Section 9.10 provides procedures when a parole or probation violation hearing is necessary.

¹ SORNA is the replacement statute for Megan's Law. For a detailed discussion on SORNA, see chapter 11, **Sex Offender Registration and Notification**.

9.2 BAIL FOLLOWING FINDING OF GUILT

A. Bail Before Sentencing: PA.R.CRIM.P. 521(A)

- ▶ **There is no right to bail in death penalty and life imprisonment sentences.**

After a defendant has been convicted, his right to bail is conditioned on the possible sentences flowing from the conviction(s), and whether sentencing has occurred. When a defendant has been convicted of an offense which is punishable by death or life imprisonment, the defendant shall not be released on bail. PA.R.CRIM.P. 521(A)(1).

- ▶ **If the aggregate of possible sentences does not exceed 3 years, the same right to bail exists as before the verdict.**

In other cases, the standard used to determine eligibility for bail is based upon whether the aggregate of all possible sentences of imprisonment on all outstanding verdicts against the defendant in the same judicial district exceeds three (3) years.

If the possible sentences do not exceed 3 years aggregate, the defendant has the same right to bail as he had prior to conviction. PA.R.CRIM.P. 521(A)(2)(a).

- ▶ **If the aggregate of possible sentences exceeds 3 years, the same right to bail exists unless the sentencing judge uses the following criteria to revoke or refuse to set bail:**

- ▶ That no one or more conditions of bail will reasonably ensure that the defendant will appear and comply with the conditions of the bail bond; or
- ▶ That the defendant poses a danger to any other person or to the community or to himself or herself.

If the possible sentences aggregated exceed 3 years, then the defendant has the same right to bail as before conviction unless the sentencing judge finds that: (i) that no condition of bail will reasonably ensure compliance with the bail bond; or (ii) that the defendant poses a threat to the community or himself. PA.R.CRIM.P. 521(A)(2)(b).

B. After Sentencing: PA.R.CRIM.P. 521(B)

- ▶ **If sentence is less than 2 years, the same right to bail exists.**

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After a defendant has been sentenced, the standard applicable is again predicated on the possible maximum length of sentence of imprisonment. If the sentence imposed includes imprisonment of less than 2 years, the defendant shall have the same right to bail as he did prior to the conviction, unless the Judge modifies the bail order pursuant to PA.R.CRIM.P. 521 (D).

▶ **If sentence is more than 2 years, the right to bail is within the judge's discretion.**

Excluding capital and life imprisonment cases, if the sentence imposed includes possible imprisonment exceeding 2 years, bail may be granted at the discretion of the trial judge. PA.R.CRIM.P. 521(B)(2).

▶ **If set after sentencing, bail must be conditional upon filing of appeal or post-sentence motion.**

After the defendant is sentenced and released on bail, the trial judge must impose as a condition of bail that the defendant file a post-sentence motion or perfect an appeal within the time required by law. PA.R.CRIM.P. 521(B)(3).

In *Commonwealth v. McMaster*, 730 A.2d 524 (Pa. Super. 1999), *appeal denied*, 563 Pa. 613, 757 A.2d 930 (2000), the Defendant was convicted of involuntary deviate sexual intercourse and incest. Following a remand for resentencing, the trial court sentenced him to concurrent terms of imprisonment of five to ten years for the IDSI conviction and one to five years for the incest conviction. At the resentencing, the trial court granted him immediate bail pending parole. The Superior Court reversed on two separate grounds: (1) after noting that a trial court may allow bail pending appeal after a finding of guilt, so long as an avenue of direct appeal is open, the Superior Court found that the defendant was no longer eligible for release on bail because the time period for appealing from the re-imposition and affirmance of judgment of sentence had expired² and (2) the trial court was without authority to parole an individual sentence to a period of incarceration longer than 2 years.³

▶ **No protected liberty interest in post-sentence bail if sentence is for more than two years.**

There is no protected liberty interest which requires bail or specific criteria for the denial of bail in Pennsylvania for defendants who are sentenced to a term of two years or more. *See Owens v. Beard*, 829 F.Supp. 736 (M.D. Pa. 1993). In a decision which refers to former Rule 4010, which was substantially similar to current Rule 521(B), the District Court stated that the rules give trial judges discretion in determining whether to grant or continue bail

² The Superior Court utilized former Rule 4014.

³ This authority lies in the Pennsylvania Parole Board pursuant to 61 PA. STAT § 331.21.

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pending appeal, and as long as the trial judge provides the reasons for bail revocation, the decision will not be deemed “arbitrary”. *Id.* at 739-740.

C. Reasons for Refusing or Revoking Bail must be Stated on the Record.

In accordance with PA.R.CRIM.P. 521(C), whenever bail is refused or revoked under Rule 521, the trial judge must state on the record the reasons for the refusal or revocation.

D. Modification of Bail After Verdict or After Sentencing.

When a defendant is eligible for release on bail after conviction, the existing bail order may be modified by a Judge of the Court of Common Pleas, upon the Judge’s own motion or upon motion of counsel for either party with notice to the opposing party, in open court on the record when all parties are present. PA.R.CRIM.P. 521(D)(1). The decision to modify the bail order should be based on the release criteria set forth in PA.R.CRIM.P. 523.

Rule 523. Release Criteria

(A) To determine whether to release a defendant, and what conditions, if any, to impose, the bail authority shall consider all available information as that information is relevant to the defendant’s appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond, including information about:

- (1) the nature of the offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
- (2) the defendant’s employment status and history, and financial condition;
- (3) the nature of the defendant’s family relationships;
- (4) the length and nature of the defendant’s residence in the community, and any past residences;
- (5) the defendant’s age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
- (6) if the defendant has previously been released on bail, whether he or she appeared as required and complied with the conditions of the bail bond;

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(7) whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;

(8) the defendant's prior criminal record;

(9) any use of false identification; and

(10) any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.

(B) The decision of a defendant not to admit culpability or not to assist in an investigation shall not be a reason to impose additional or more restrictive conditions of bail on the defendant.⁴

9.3 PRE-SENTENCE INVESTIGATION REPORT

A. Purpose

Upon conviction of any crime, but typically only in felony cases, the trial court may order a pre-sentence investigation report⁵ to be completed by a probation officer.

"While the extent of the pre-sentence inquiry may vary depending on the circumstances of the case, '[a] more extensive and careful investigation is clearly called for in felony convictions, particularly where long terms of confinement are contemplated.'" *Commonwealth v. Goggins*, 748 A.2d 721, 728 (Pa. Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000), *citing Commonwealth v. Martin*, 466 Pa. 118, 134 n.26, 351 A.2d 650, 658 n.26 (1976). In such situations, the trial court should either order a pre-sentence report or conduct a full pre-sentence inquiry taking into consideration the essential and adequate elements of a pre-sentence report. *Commonwealth v. Hill*, 761 A.2d 1188 (Pa. Super. 2000).

The purpose of a pre-sentence investigation report is to provide the trial judge with additional information about the defendant, the offenses and to discuss sentencing options so that the trial judge is more informed at sentencing.⁶

As stated by the United States Supreme Court:

[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of

⁴ PA.R.CRIM.P. 523.

⁵ See PA.R.CRIM.P. 702. The pre-sentence investigation process as specified in the Rules of Criminal Procedure is the preferred method by which a trial judge should apprise himself or herself of the appropriate information at sentencing. *Commonwealth v. Rhodes*, 990 A.2d 732, 746 (Pa. Super. 2009), *appeal denied*, 609 Pa. 688, 14 A.3d 827 (2010).

⁶ In accordance with Pa.R.Crim.P. 700, the judge who presided at the trial or who received the plea of guilty or *nolo contendere* must typically impose sentence. There is an exception for situations where extraordinary circumstances preclude the trial judge's participation.

punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics.

Williams v. Oklahoma, 358 U.S. 576, 584, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959).

The pre-sentence report discloses the defendant's criminal history, education, jobs, drug and alcohol use, and any mental health issues. It also recites the facts of the case, and how the crime affected the victim(s). The victim is usually contacted and given an opportunity to have a statement included in or added to the report. The defendant is typically also given an opportunity to speak to the probation officer and provide a statement for the report; the defendant's cooperation during this process is typically reflected in the pre-sentence report.

The pre-sentence investigation report is, of course, made available for the use of the sentencing judge, but also must be made available to the prosecutor and defense counsel. PA.R.CRIM.P. 703(A)(2). The sentencing court and the criminal clerk's office must maintain the confidentiality of the pre-sentence report and related mental health reports, which must not appear in the public report.

B. Requirement to place on the record reasons for decline to order Pre-sentence Report in certain cases

In accordance with PA.R.CRIM.P. 702(A)(2), the sentencing judge shall place on the record the reasons for dispensing with the pre-sentence investigation report if the judge fails to order a pre-sentence report in any of the following instances:

1. when incarceration for one year or more is a possible disposition under the applicable sentencing statutes;
2. when the defendant is less than 21 years old at the time of conviction or entry of a guilty plea;
3. when a defendant is a first offender in that he or she has not heretofore been sentenced as an adult.

A trial court's failure to provide a statement of reasons for dispensing with a PSI report, as required by Rule 702(A)(2), presents a substantial question mandating appellate review of the discretionary aspects of the sentence. See *Commonwealth v. Flowers*, 950 A.2d 330, 332 (Pa. Super. 2008); *Commonwealth v. Goggins*, 748 A.2d 721, 728 (Pa. Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000).

C. Contents of Pre-Sentence Report

The pre-sentence investigation report must include information regarding the circumstances of the offense and the character of the defendant sufficient to assist the judge in determining sentence.⁷ PA.R.CRIM.P. 702(A)(3).

▶ Essential and adequate elements of PSI Report

The Pennsylvania Supreme Court has specified the minimum content of a PSI report. See *Commonwealth v. Martin*, 466 Pa. 118, 351 A.2d 650 (1976). The “essential and adequate elements” of a PSI report include all of the following:

- i. a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;
- ii. a full description of any prior criminal record of the offender;
- iii. a description of the educational background of the offender;
- iv. a description of the employment background of the offender, including any military record and his present employment status and capabilities;
- v. the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;
- vi. the offender’s medical history and, if desirable, a psychological or psychiatric report;
- vii. information about environments to which the offender might return or to which he could be sent should probation be granted;
- viii. supplementary reports from clinics, institutions and other social agencies with which the offender has been involved;
- ix. information about special resources which might be available to assist the offender, such as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender’s situation;
- x. a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.⁸

⁷ “The information used by a judge in imposing sentence need not necessarily meet the standards of admissible evidence at trial; however, the due process clause does apply to the sentencing procedure.” *Commonwealth v. Shoemaker*, 313 A.2d 342, 347 (Pa. Super. 1973), *af’d*, 462 Pa. 342, 341 A.2d 111 (1975).

⁸ Conceding that there is no requirement for the probation office to make a sentencing recommendation, the Superior Court in *Commonwealth v. Bastone*, 467 A.2d 1339 (Pa. Super. 1983), stated, however, that if a recommendation is made, it must be disclosed to defendant’s counsel.

Martin, 466 Pa. at 134, 351 A.2d at 658.

► Additional basic information for inclusion in PSI Report

A more recent decision of the Superior Court of Pennsylvania, *Commonwealth v. Monahan*, 860 A.2d 180 (Pa. Super. 2004), *appeal denied*, 583 Pa. 688, 878 A.2d 863 (2005), provided additional guidance for the basic information that is required under Rule 702:

- i. the highest grade of education completed by defendant;
- ii. the defendant's occupation and employment history;
- iii. the defendant's marital status;
- iv. listing of the defendant's children, if any;
- v. the official version of the offense;
- vi. the defendant's version of the offense;
- vii. a social hereditary history of the defendant, including family background, living situation, etc.
- viii. the defendant's physical and mental health;
- ix. the defendant's drug or alcohol use;
- x. the defendant's military history;
- xi. the defendant's financial status;
- xii. the role of religion in the defendant's life, if any;
- xiii. the defendant's hobbies and leisure activities;
- xiv. the sources of the above information; and
- xv. an evaluation by the pre-sentence investigator.

Monahan, 860 A.2d at 185.

D. Victim Impact Statement

When preparing a pre-sentence report, the appropriate agency will contact the victim of the crime and ask if the victim would like to give a victim impact statement. PA.R.CRIM.P. 702(A)(4). This statement goes to the unit providing supervision of the defendant, the prosecutor, the defense attorney and the judge. The statement lets the victim tell the judge about the different kinds of injuries caused by the crime.

PA.R.CRIM.P. 702(A)(4) specifically provides that the pre-sentence investigation report "shall also include a victim impact statement as provided by law." Under the Pennsylvania Crime Victim's Act, 18 Pa.Stat. §§ 11.101 et seq., a victim of a crime is entitled:

To have opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement

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detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. The written statement shall be included in any predisposition or presentence report submitted to the court. Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.

18 Pa.Stat. § 11.201(5). The victim can ask for restitution for actual expenditures made necessary because of the defendant's criminal conduct, such as counseling costs, and for conditions of supervision that will help to protect the victim and any others affected by the crime.

Besides writing a statement and being interviewed by the probation office, as noted above, the victim has a right to speak at the sentencing hearing. If the crime is a misdemeanor, typically no pre-sentence report will be prepared. However, a victim of a misdemeanor may speak at the sentencing hearing, and may also give a victim impact statement.

E. Psychiatric or Psychological Examination

In addition to or in lieu of a pre-sentence investigation report, the trial court may order mental health evaluations of the defendant to assist in the sentencing process. PA.R.CRIM.P. 702(b) provides:

Psychiatric or Psychological Examination

After a finding of guilt and before the imposition of sentence, after notice to counsel for both parties, the sentencing judge may, as provided by law, order the defendant to undergo a psychiatric or psychological examination. For this purpose the defendant may be remanded to any available clinic, hospital, institution, or state correctional diagnostic and classification center for a period not exceeding 60 days.

Although the mental health reports are confidential and must be sealed and not included in the public record maintained by the Criminal Clerk's office, the psychiatric or psychological evaluation ordered under this rule, for sentencing purposes, may be made available to other professionals or agencies "having a legitimate professional interest in the disposition of the case" by order of the sentencing judge. PA.R.CRIM.P. 703(A) & (D). Additionally, under Rule 703(C), unless otherwise ordered by the sentencing judge, the mental health reports must be made available to:

1. correctional institutions housing the defendant;
2. departments of probation or parole supervising the defendant; and
3. departments of probation or parole preparing a pre-sentence investigation report regarding the defendant.

This includes out-of-state correctional facilities and parole boards.

F. Disclosure of Pre-Sentence Report

Although the Pennsylvania Supreme Court has acknowledged the privilege of confidentiality accorded pre-sentence reports, this privilege is not absolute. In accordance with Pa.R.Crim.P. 703, in order for the report and related mental health evaluations to assist in the sentencing mechanism, prosecutors, defense attorneys, the sentencing judge, and appropriate correctional, probation and parole agencies all have access to a pre-sentence report.

If the defendant wishes to contest matters contained in the pre-sentence report, at least two methods of rebuttal are readily available.

First, under Rule 703(B), both the Commonwealth and the defendant have the right to correct any inaccuracy in the report.

PA.R.CRIM.P. 703. Disclosure of Pre-sentence Reports

. . .

(B) If the defendant or the Commonwealth alleges any factual inaccuracy in a report under this rule, the sentencing judge shall, as to each inaccuracy found, order that the report be corrected accordingly.

Second, Pennsylvania grants all defendants the right of allocution - the traditional inquiry by the trial judge as to whether defendant has anything to say before sentence is pronounced.

In *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678 (1973), the Supreme Court adopted the American Bar Association's Standards for Criminal Justice Sentencing Alternatives and Procedures, regarding disclosure. The current standard is as follows:

Standard 18-5.7 Disclosure of report to parties

(a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.

(b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford a reasonable opportunity for challenge and verification of material information in the report.

(c) All communications to a court by the agency responsible for preparing the presentence report should be in writing

and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

ABA Standards for Criminal Justice: Sentencing, 3d Ed., Standard 18-5.7.

9.4 DNA DATA AND TESTING

A. The DNA Act⁹

The DNA Act, 44 PA.CONS.STAT.ANN. §§ 2301–2336, mandates that persons convicted of certain classes of sexual offenses must submit a sample of their DNA for inclusion in the DNA database. See *Singleton v. Lavan*, 834 A.2d 672 (Pa. Cmwlth. 2003) (discussing the prior act, 42 PA.CONS.STAT.ANN. §§ 4701-4741, which was repealed and substantially reenacted as the current DNA Act, and holding that it was constitutional).

Every state has enacted a statute creating a DNA (deoxyribonucleic acid) database as a tool in criminal investigations. See generally, Annotation, *VALIDITY, CONSTRUCTION, AND OPERATION OF STATE DNA DATABASE STATUTES*, 76 A.L.R.5th 239 (2000). Although these statutes have frequently been challenged, the challenges usually have been unsuccessful and the statutes found to be within the government's compelling interests, such as public safety.

The DNA Act applies to a person who is convicted or adjudicated delinquent for a felony sex offense or other specified offense. It provides:

1. The DNA sample drawn upon intake to a prison, jail, or juvenile detention facility.
 - If already incarcerated, the DNA sample is drawn immediately after sentencing or adjudication, or at any time thereafter.
2. The DNA sample drawn prior to release from any prison, jail, detention facility or institution.
 - This chapter applies to incarcerated persons convicted or adjudicated delinquent for a felony sex offense prior to the effective date of this chapter.
 - Release means release, parole, furlough, work release, prerelease or release to any other manner
3. The DNA sample is drawn as a condition of acceptance into ARD as a result of

⁹ For additional, detailed discussion of the Pennsylvania DNA Act, see CHAPTER 8, Section 8.5(C), DNA DETECTION OF SEXUAL AND VIOLENT OFFENDERS ACT.

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a criminal charge for a felony sex offense or other specified offense filed on or after the effective date of this section.

See 44 PA.CON.S.STAT.ANN. § 2316. A “felony sex offense” includes the following:

- i. **Any sexual offense** listed in Chapter 31 of the Crimes Code, 18 PA.CON.S.STAT.ANN. §§ 3101-3129;
- ii. **Incest**, 18 PA.CON.S.STAT.ANN. § 4302;
- iii. **Prostitution and related offenses**, 18 PA.CON.S.STAT.ANN. § 5902(c)(1)(iii)&(iv);
- iv. **Obscene and other sexual materials and performances** if graded as a felony, 18 PA.CON.S.STAT.ANN. § 5903(a);
- v. **Sexual Abuse of Children**, 18 PA.CON.S.STAT.ANN. § 6312;
- vi. **Unlawful Contact with Minor** if the underlying offense is a felony, 18 PA.CON.S.STAT.ANN. § 6318; and
- vii. **Sexual Exploitation of Children**, 18 PA.CON.S.STAT.ANN. § 6320.

9.5 SCHEDULING OF SENTENCING

A. Time for Sentencing

As a general rule, the date for sentencing, which should ordinarily be within 90 days, should be scheduled at the time of conviction or the entry of a plea of guilty or *nolo contendere*. Therefore, the sentencing hearing should be held within 90 days of conviction or the entry of a plea of guilty or *nolo contendere*. A limited exception is when the trial court orders a psychiatric or psychological examination pursuant to PA.R.CRIM.P. 702(B), but in no event should the time for sentencing be extended for longer than 30 days beyond the original 90 day limit. PA.R.CRIM.P. 704, *Comment*.

Pursuant to Rule 704(A)(2), the trial judge may also grant an extension beyond the 90 day limit for extraordinary circumstances:

When the date for sentencing in a court case must be delayed, for good cause shown, beyond the time limits set forth in this rule, the judge shall include in the record the specific time period for the extension.¹⁰

¹⁰ PA.R.CRIM.P. 704(A)(2).

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As stated, the extension may only be for a specific time period, and the record must reflect the exact time period for the extension. The comment following Rule 704 lists a Megan's Law Assessment, 42 PA.CON.S.TAT.ANN. § 9795.4 (now SORNA, 42 PA.CON.S.TAT.ANN. § 9799.24), as a legitimate reason for an extension.

B. Remedy for Late Sentencing

A defendant who is sentenced in violation of PA.R.CRIM.P. 704's requirement that sentencing ordinarily take place within 90 days of conviction or entry of plea is entitled to discharge only where the delay resulted in prejudice to the defendant. *Commonwealth v. Anders*, 555 Pa. 467, 472-473, 725 A.2d 170, 173 (1999).¹¹ The defendant must demonstrate "actual prejudice", *Commonwealth v. Diaz*, 51 A.3d 884, 891 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 76 A.3d 538 (2013), and prejudice should not be presumed by the mere fact of an untimely sentence. *Commonwealth v. Fox*, 953 A.2d 808, 812 (Pa. Super. 2008).

A number of factors must be analyzed before the trial court should consider discharge. To determine whether discharge is appropriate, a trial court should inquire into the following factors:

- (1) the length of the delay falling outside of the 90 day provision;
- (2) the reason for the improper delay;
- (3) the defendant's timely or untimely assertion of his rights; and
- (4) any resulting prejudice to the interests protected by the defendant's speedy trial and due process rights.

Prejudice should not be presumed by the mere fact of an untimely sentence. The approach of the court should be to determine whether there has in fact been prejudice, rather than to presume that prejudice exists. "The court should examine the totality of the circumstances, as no one factor is necessary, dispositive, or of sufficient importance to prove a violation." *Commonwealth v. Anders*, 555 Pa. 467, 473, 725 A.2d 170, 173 (1999). *See also*, *Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. 2001); *Commonwealth v. Still*, 783 A.2d 829 (Pa. Super. 2001).

In *Commonwealth v. Diaz*, 51 A.3d 884 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 76 A.3d 538 (2013), a delay in sentencing of 278 days beyond the date of conviction warranted a review of the above factors to determine if the delay was prejudicial to the defendant. 51 A.3d at 889. The Superior Court found, however, that the delays were caused by a combination of the defendant's transfers between state correctional institutions, administrative and scheduling difficulties of the trial court, and finally the illness of the trial judge. Therefore, these reasons did not "constitute . . . intentional nor inexcusable conduct on the part of the trial court or Commonwealth, and do not rise to

¹¹ The Pennsylvania Supreme Court in *Commonwealth v. Anders*, 555 Pa. 467, 472-473, 725 A.2d 170, 173 (1999) utilized PA.R.CRIM.P. 1405, the predecessor to Rule 704. With the exception of the fact that former Rule 1405 provided that a defendant was to be sentenced within 60 days of conviction, rather than within 90 days as provided in the current rule, Rule 704 and its predecessor are substantially similar.

the level of delay ‘without good cause.’” *Id.* at 890.

1. Rule 704 Not Applicable to Re-sentencing Following Remand

By its plain language, PA.R.CRIM.P. 704 “does not apply to the re-sentencing process following remand.” *Commonwealth v. Fox*, 953 A.2d 808, 812 (Pa. Super. 2008). However, the criteria to determine whether a defendant has suffered “actual prejudice” due to a delay in re-sentencing following a remand is essentially the same as under Rule 704. *Commonwealth v. West*, 595 Pa. 483, 500-501, 938 A.2d 1034, 1045 (2007).

9.6 SUGGESTED COLLOQUY FOLLOWING GUILTY PLEA OR GUILTY VERDICT

Addendum 1 is a suggested colloquy following a guilty plea or a verdict of guilty after a trial. The colloquy includes the options of ordering different types of assessments and evaluations prior to sentencing.

9.7 SEXUALLY VIOLENT PREDATOR ASSESSMENT¹²

On December 20, 2011, Pennsylvania enacted legislation that substantially changed the prior law regarding registration requirements for persons convicted of sexual offenses, previously known as *Megan’s Law III*. The new legislation, 2011, Dec. 20, P.L. 446, No. 111, § 12 (effective December 20, 2012), amended by 2012, July 5, P.L. 880, No. 91, § 3 (effective December 20, 2012), is codified at 42 PA.CON.S.STAT.ANN. §§ 9799.10–9799.41, and is known as the Sex Offender Registration and Notification Act or **SORNA**.¹³ One of the stated purposes of SORNA is “[t]o bring the Commonwealth into substantial compliance with the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248, 120 Stat. 587).” 42 PA.CON.S.STAT.ANN. §§ 9799.10(1); see *Commonwealth v. Lippert*, 85 A.3d 1095 (Pa. Super. 2014), *appeal denied*, ---Pa.---, 95 A.3d 277 (2014).

After conviction but before sentencing, a court must order a defendant convicted of a *sexually violent offense* to be assessed by the State Sexual Offenders Assessment Board (Board). As stated above, a *sexually violent offense* is an offense designated as a Tier I, Tier II or Tier III sexual offense in 42 PA.CON.S.STAT.ANN. §§ 9799.14.

¹² For additional detailed discussion, please refer to **CHAPTER 11: SEX OFFENDER REGISTRATION AND NOTIFICATION**.

¹³ In *Commonwealth v. Miller*, 80 A.3d 806, 808 (Pa. Super. 2013), the Superior Court refers to the new law as “*Megan’s Law IV*.”

► Summary of assessment procedure

The assessment requirement applies to anyone convicted of an offense as enumerated in Section 9799.14. Following the order for the assessment:

- 1) The Board designates a member to conduct the assessment of the individual to determine if the individual should be classified as a sexually violent predator. 42 PA.CON.S.TAT.ANN. §§ 9799.24(b).
- 2) The Board must submit a written report to the District Attorney's Office. 42 PA.CON.S.TAT.ANN. §§ 9799.24(d).
- 3) The trial court then conducts a hearing to determine, upon *clear and convincing evidence*, whether the individual is a sexually violent predator. 42 PA.CON.S.TAT.ANN. §§ 9799.24(e)(3).
 - a) At the hearing, the Commonwealth and the defendant have the opportunity to be heard, the right to call witnesses, the right to call expert witnesses, and the right to cross-examine witnesses. 42 PA.CON.S.TAT.ANN. §§ 9799.24(e)(2).
 - b) The defendant has the right to counsel, and to appointed counsel if the defendant cannot afford one. 42 PA.CON.S.TAT.ANN. §§ 9799.24(e)(2).
- 4) A copy of the order containing the determination of the court must be **immediately** submitted to the individual, district attorney, Pennsylvania Board of Probation and Parole, Department of Corrections, board and Pennsylvania State Police. 42 PA.CON.S.TAT.ANN. §§ 9799.24(e)(4).

A. The designations of Sexually Violent Offense and Sexually Violent Predator

SORNA provides the following definitions:

§ 9799.12. Definitions

“Sexually violent offense.” An offense specified in section 9799.14 (relating to sexual offenses and tier system) as a Tier I, Tier II or Tier III sexual offense.

“Sexually violent predator.” An individual determined to be a sexually violent predator under section 9795.4 (relating to assessments) prior to the effective date of this subchapter or an individual convicted of an offense specified in:

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(1) section 9799.14(b)(1), (2), (3), (4), (5), (6), (8), (9), or (10) (relating to sexual offenses and tier system) or an attempt, conspiracy or solicitation to commit any offense under section 9799.14(b)(1), (2), (3), (4), (5), (6), (8), (9), or (10);

(2) section 9799.14(c)(1), (1.1), (1.2), (2), (3), (4), (5), or (6) or an attempt, conspiracy or solicitation to commit an offense under section 9799.14(c)(1), (1.1), (1.2), (2), (3), (4), (5) or (6); or

(3) section 9799.14(d)(1), (2), (3), (4), (5), (6), (7), (8) or (9) or an attempt, conspiracy or solicitation to commit an offense under section 9799.14(d)(1), (2), (3), (4), (5), (6), (7), (8) or (9)

who, on or after the effective date of this subchapter, is determined to be a sexually violent predator under section 9799.24 (relating to assessments) due to a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses. The term includes an individual determined to be a sexually violent predator or similar designation where the determination occurred in another jurisdiction, a foreign country or by court martial following a judicial or administrative determination pursuant to a process similar to that under section 9799.24.

42 PA.CON.S.TAT.ANN. §§ 9799.12.

1. Sexually Violent Offense

After conviction but before sentencing, a court must order a defendant convicted of a *sexually violent offense* to be assessed by the State Sexual Offenders Assessment Board. As stated above, a *sexually violent offense* is an offense designated as a Tier I, Tier II or Tier III sexual offense in 42 PA.CON.S.TAT.ANN. § 9799.14.

The following crimes under Pennsylvania law would require an assessment prior to sentencing:

(A) Tier I Sexual Offenses:

The following offenses, or an attempt, conspiracy or solicitation to commit one of the following offenses, are categorized as Tier I Sexual Offenses,

Unlawful Restraint

18 PA.CON.S.STAT.ANN. § 2902(b)

False Imprisonment

18 PA.CON.S.STAT.ANN. § 2903(b)

Interference with Custody of Children

18 PA.CON.S.STAT.ANN. § 2904

Luring a Child into a Motor Vehicle or Structure

18 PA.CON.S.STAT.ANN. § 2910

Institutional Sexual Assault

18 PA.CON.S.STAT.ANN. § 3124.2(a)

Indecent Assault

18 PA.CON.S.STAT.ANN. § 3126(a)(1)

Corruption of Minors

18 PA.CON.S.STAT.ANN. § 6301(a)(1)(ii)

Sexual Abuse of Children

18 PA.CON.S.STAT.ANN. § 6312(d)

Invasion of Privacy

18 PA.CON.S.STAT.ANN. § 7507.1

(B) Tier II Sexual Offenses:

The following offenses, or an attempt, conspiracy or solicitation to commit one of the following offenses, are categorized as Tier II Sexual Offenses,

Statutory Sexual Assault

18 PA.CON.S.STAT.ANN. § 3122.1(a)(2)

Institutional Sexual Assault of a Minor

18 PA.CON.S.STAT.ANN. § 3124.2(a.2) and (a.3)

Indecent Assault, Certain Cases of

18 PA.CON.S.STAT.ANN. § 3126(a)(2), (3), (4), (5), (6) or (8)

Prostitution and Related Offenses

18 PA.CON.S.STAT.ANN. § 5902(b.1)

Obscene and other sexual materials and performances

18 PA.CON.S.STAT.ANN. § 5903(a)(3)(ii), (4)(ii), (5)(ii) or (6)

Sexual Abuse of Children

18 PA.CON.S.STAT.ANN.§ 6312(b) and (c)

Unlawful Contact with Minor

18 PA.CON.S.STAT.ANN.§ 6318

Sexual Exploitation of Children

18 PA.CON.S.STAT.ANN.§ 6320

(C) Tier III Sexual Offenses:

The following offenses, or an attempt, conspiracy or solicitation to commit one of the following offenses, are categorized as Tier III Sexual Offenses,

Kidnapping

18 PA.CON.S.STAT.ANN.§ 2901(a.1)

Rape

18 PA.CON.S.STAT.ANN.§ 3121

Statutory Sexual Assault

18 PA.CON.S.STAT.ANN.§ 3122.1(b)

Involuntary Deviate Sexual Intercourse

18 PA.CON.S.STAT.ANN.§ 3123

Sexual Assault

18 PA.CON.S.STAT.ANN.§ 3124.1

Institutional Sexual Assault of a Minor

18 PA.CON.S.STAT.ANN.§ 3124.2(a.1)

Aggravated Indecent Assault

18 PA.CON.S.STAT.ANN.§ 3125

Indecent Assault where victim is under 13 years of age

18 PA.CON.S.STAT.ANN.§ 3126(a)(7)

Incest of a Minor

18 PA.CON.S.STAT.ANN.§ 4302(b)

2. The designation of Sexually Violent Predator

The sexually violent predator (“SVP”) designation is reserved for those who have been:

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- Determined to be a sexually violent predator under the prior law; or
- Convicted of a sexually violent offense as set forth in 42 PA.CON.S.TAT. ANN. § 9799.14 and,
- Determined to be a sexually violent predator under 42 PA.CON.S.TAT. ANN. §9799.24 (relating to assessments) *due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.*

The SVP designation also applies to offenders determined to be sexual violent predators in another jurisdiction (state, territory, or federal), or by court martial.

► Finding of mental abnormality or personality disorder

As stated by the Superior Court in *Commonwealth v. Plucinski*, 868 A.2d 20 (Pa. Super. 2005)(using definition from *Megan’s Law II* which is identical to definition of “mental abnormality” in SORNA):

Under Megan’s Law II, a SVP is defined as “a person who has been convicted of a sexually violent offense... and who is determined to be a sexually violent predator under section 9795.4 ... due to a *mental abnormality or personality disorder* that makes the person likely to engage in *predatory sexually violent offenses.*” 42 Pa.C.S.A. § 9792. “Mental abnormality” is defined as “[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.” *Id.*

Id. at 25 – 26 (emphasis added).

► Finding of “predatory”

“Predatory” is defined as “[a]n act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization.” 42 PA.CON.S.TAT.ANN. § 9799.12.

B. The Sexually Violent Predator Assessment

1. Order for Assessment

In accordance with 42 PA.CON.S.TAT.ANN. § 9799.24(a), before sentencing and within ten days of the date of conviction, the trial judge must order an

assessment for a defendant convicted of a sexually violent offense, as specified under 42 PA.CON.S.TAT.ANN. § 9799.14. The assessment must be completed by the State Sexual Offenders Assessment Board (“Board”).¹⁴

The assessment is mandatory for any defendant convicted of a predicate offense.¹⁵

The Board members are appointed by the Governor and are to be comprised of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of treatment of sexual offenders.¹⁶

2. The SVP Assessment

The salient inquiry in determining SVP status is identification of the impetus behind the commission of the offense; that is, whether it proceeds from a mental defect or personality disorder, or another motivating factor. The answer to that question determines, at least theoretically, the extent to which the offender is likely to reoffend. *Commonwealth v. Price*, 876 A.2d 988, 995 (Pa. Super. 2005), *appeal denied*, 587 Pa. 706, 897 A.2d 1184 (2006), *cert. denied*, 549 U.S. 902, 127 S.Ct. 224, 166 L.Ed.2d 179 (2006) (decided under *Megan’s Law II*).

SORNA provides the criteria by which such likelihood may be gauged. 42 PA.CON.S.TAT.ANN. §9799.24(b).

A member of the Board, as designated by its administrative officer, conducts the assessment of the defendant to determine if the individual should be classified as a sexually violent predator. The evaluator must examine numerous factors listed in § 9799.24(b) regarding the current offense, including the nature of the sexual contact with the victim.

The evaluator shall also examine the prior offense history to determine the defendant’s prior criminal record, and whether the defendant completed any prior sentences, or whether the defendant participated in available programs for sexual offenders.¹⁷ With regards to the defendant’s characteristics, the evaluator should determine the individual’s age, any use of illegal drugs, and any mental illness, mental disability, or mental abnormality.¹⁸ The evaluator shall also examine any other factors reasonably related to the risk of re-offense. *Commonwealth v. Plucinski*, 868 A.2d 20, 25-26 (Pa. Super. 2005).

Copies of records or information requested by the Board in connection with the court-ordered assessment shall be provided by any state, county, and

¹⁴ As under the prior law, the order for assessment must be sent to the administrative officer of the board within ten days of the date of conviction. *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710, 712 n.2 (Pa. 2003); 42 PA.CON.S.TAT.ANN. §9799.24(A).

¹⁵ *Commonwealth v. Baird*, 856 A.2d 114, 118 (Pa. Super. 2004).

¹⁶ 42 PA.CON.S.TAT.ANN. § 9799.35.

¹⁷ 42 PA.CON.S.TAT.ANN. § 9799.24(B)(2).

¹⁸ 42 PA.CON.S.TAT.ANN. § 9799.24(C).

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local agency, office, or entity in this Commonwealth.¹⁹

The Board must submit a written report containing its assessment to the district attorney no later than 90 days from the date of the defendant's conviction.

3. The SVP Assessment Hearing

After the Board issues its assessment and recommendation, the district attorney may request a hearing before the trial court to determine whether the individual should be adjudicated as a sexually violent predator. In order to schedule the hearing, the district attorney must file a praecipe.²⁰ On occasion, in situations when the assessment is attached to a pre-sentence investigation report, the trial court will schedule the hearing after reviewing the assessment.²¹

In any event, the defendant and district attorney must be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses.²²

In addition, the defendant has the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. If the defendant makes arrangements for another expert assessment, the defendant must provide a copy of the expert assessment to the district attorney prior to the hearing. 42 PA.CON.S. STAT.ANN. § 9799.24(e)(2).

The Commonwealth bears the burden of proving through clear and convincing evidence that the defendant meets the statutory definition of SVP. 42 PA.CON.S. STAT.ANN. § 9799.24(e)(3); *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710 (2003) (decided under *Megan's Law*). The clear and convincing standard requires evidence that is "so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue." *Id.*, 838 A.2d at 715 (citation omitted).

4. Classification as Sexually Violent Predator

The trial court must be satisfied by clear and convincing evidence that the individual meets the criteria to be designated as a SVP. 42 PA.CON.S. STAT.ANN. § 9799.24(e)(3). As aforesaid, the Commonwealth has the burden of proof.

Upon appeal of the trial court's determination that the defendant should be classified as a SVP, the appellate court will utilize a de novo standard of review and the scope of review is plenary. *Commonwealth v. Bishop*, 936 A.2d

¹⁹ 42 PA.CON.S. STAT.ANN. § 9799.24(b)(3).

²⁰ 42 PA.CON.S. STAT.ANN. § 9799.24(e). The district attorney must send the defendant's counsel a copy of the assessment along with the praecipe.

²¹ 42 PA.CON.S. STAT.ANN. § 9799.24(f): "**Presentence investigation.**--In all cases where the board has performed an assessment pursuant to this section, copies of the report shall be provided to the agency preparing the presentence investigation."

²² 42 PA.CON.S. STAT.ANN. § 9799.24(e).

1136, 1141 (Pa. Super. 2007), *appeal denied*, 597 Pa. 710, 951 A.2d 1159 (2008) (decided under *Megan's Law*). The evidence will be considered in the light most favorable to the party who prevailed before the trial court. *Id.*

A sexually violent predator (“SVP”) is defined as an individual who has been convicted of a sexually violent offense as set forth in Section 9712 and Section 9799.14 and who is determined to be a sexually violent predator under 9799.24 (relating to assessments) due to a “mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses.” 42 PA.CON.S.TAT.ANN. § 9799.12.

Although decided under the now expired *Megan's Law III*, the Superior Court, in ***Commonwealth v. Stephens***, 74 A.3d 1034 (Pa. Super. 20130) provided guidance on the findings of “mental abnormality” or “personality disorder” as follows:

[T]he evidence must show that the defendant suffers from a “congenital or acquired condition ... that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.” Moreover, there must be a showing that the defendant’s conduct was “predatory.” Predatory conduct is defined as “an act directed at a stranger or at a person with whom a relationship has been instituted, established, maintained, or promoted, in whole or in part, in order to facilitate or support victimization.” Furthermore, in reaching a determination, we must examine the driving force behind the commission of these acts, as well as looking at the offender’s propensity to re-offend, an opinion about which the Commonwealth’s expert is required to opine. (quotations and citations omitted). However, the risk of re-offending is but one factor to be considered when making an assessment; it is not an “independent element.”

Id. at 1038 (citations omitted).

D. Reporting Requirements

If the trial court concludes that the defendant should be classified as a sexually violent predator, and the individual was convicted of a Tier I, II or III sexual offense, the defendant is subject to lifetime registration pursuant to 42 PA.CON.S.TAT.ANN. §§ 9799.15(a)&(d).²³

²³ 42 PA.CON.S.TAT.ANN. § 9799.36 mandates that a sexually violent predator who is not incarcerated to attend counseling sessions at least monthly, and that he pay the fees assessed from such sessions if he is able to do so.

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If there is no finding of SVP, the defendant is subject to registration for a period of either 15 years, 25 years, or the remainder of his life, depending upon the predicate offense. 42 PA.CON.S.STAT.ANN. § 9799.15. *See also, Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710, 712 (2003) (decided under *Megan's Law*).

E. Requirements at Time of Sentencing - Notification

In accordance with 42 PA.CON.S.STAT.ANN. § 9799.23, the sentencing court must inform sexually violent predators at the time of sentencing of the provisions of SORNA that apply to them. SORNA provides that all sexual offenders must register in accordance with the law regardless of a failure by the trial court to order the registration or provide the information listed in this section. 42 PA.CON.S.STAT.ANN. § 9799.23(b). The court must inform the offender or sexually violent predator of:

- their duty to register and provide the information required for each registration, including verification;
- their duty to inform the Pennsylvania State Police of changes in residence, employment, employment location or school enrollment;
- their duty to inform the Pennsylvania State Police of becoming employed or enrolled as a student if the person has not previously provided that information to the Pennsylvania State Police;
- their duty to register with a new law enforcement agency if the offender or sexually violent predator moves to another state no later than ten days after establishing residence in another state;
- their duty to register with the appropriate authorities in any state in which the offender or sexually violent predator is employed, carries on a vocation or is a student if the state requires such registration.

The sentencing judge must also order the fingerprints, palm prints, DNA sample and photograph of the individual or sexually violent predator to be provided to the Pennsylvania State Police. *See* 42 PA.CON.S.STAT.ANN. § 9799.23(a)(4).

Lastly, the sentencing judge must require the offender or sexually violent predator to read and sign a form which verifies that the duty to register under SORNA was explained. If the offender or sexually violent predator is incapable of reading, the court must certify that the duty to register was explained and the offender or sexually violent predator indicated an understanding of the duty. *See* 42 PA.CON.S.STAT.ANN. § 9799.23(a)(5).

F. Appellate Review

1. Plenary Review

The Pennsylvania Supreme Court noted that “[q]uestions of evidentiary sufficiency present questions of law; thus, “[the] standard of review is de novo and [the] scope of review is plenary.” *Commonwealth v. Meals*, 590 Pa. 110, 119, 912 A.2d 213, 218 (2006) (citations omitted) (decided under *Megan’s Law II*).

Upon an appeal of a finding of SVP, the evidence must be viewed in the light most favorable to the Commonwealth. *Commonwealth v. Plucinski*, 868 A.2d 20, 25 (Pa. Super. 2005). The reviewing court may not re-weigh the evidence or substitute its judgment for that of the trial court. *Id.* See also *Commonwealth v. Meals*, 590 Pa. 110, 127, 912 A.2d 213, 223 (2006).

2. Clear and Convincing Standard

“[I]n reviewing the sufficiency of the evidence regarding the determination of SVP status, [the appellate court] will reverse the trial court only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied.” *Commonwealth v. Moody*, 843 A.2d 402, 408 (Pa. Super. 2004) (quoting *Commonwealth v. Krouse*, 799 A.2d 835, 837 (Pa. Super. 2002) (en banc), *appeal denied*, 573 Pa. 671, 821 A.2d 586 (2003); *Commonwealth v. Haughwout*, 837 A.2d 480, 484 (Pa. Super. 2003)).²⁴ “The clear and convincing standard requires evidence that is ‘so clear, direct, weighty and convincing as to enable [the trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.’” *Commonwealth v. Maldonado*, 576 Pa. 101, 109, 838 A.2d 710, 715 (2003) (quoting *Rohm and Haas Co. v. Continental Gas Co.*, 566 Pa. 464, 476, 781 A.2d 1172, 1179 (2001)).

9.8 SENTENCING OPTIONS

A. General Standards

Under Pennsylvania’s Sentencing Code, 42 PA.CONS.STAT.ANN. § § 9701 *et seq.*, as a general rule, in determining the sentence to be imposed upon the defendant, the sentencing court must consider and employ one or more of the following alternatives, and may impose them consecutively or concurrently:

²⁴ 42 PA.CONS.STAT.ANN. § 9799.24(e)(3) mandates that the Commonwealth prove, by clear and convincing evidence, that the defendant is a sexually violent predator at the hearing held prior to sentencing.

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- An order of probation;
- A determination of guilt without further penalty;
- Partial confinement;
- Total confinement;
- A fine;
- County intermediate punishment;
- State intermediate punishment.

42 PA.CON.S.TAT.ANN. §9721(a). The sentencing court's standards for selecting from the above alternatives should conform to the general principle that the sentence imposed calls for confinement that is consistent with

- 1) the protection of the public,
- 2) the gravity of the offense as it relates to the impact on the life of the victim and on the community,
- 3) the rehabilitation of the defendant, and
- 4) the sentencing guidelines.

42 PA.CON.S.TAT.ANN. §9721(b); *see also Commonwealth v. Robertson*, 874 A.2d 1200, 1212 (Pa. Super. 2005).

As stated above, the sentencing court must consider the guidelines adopted by the Pennsylvania Commission on Sentencing, contained in Chapter 303 of the Pennsylvania Code:

The court shall consider the sentencing guidelines in determining the appropriate sentence for offenders convicted of, or pleading guilty or nolo contendere to, felonies and misdemeanors. Where crimes merge for sentencing purposes, the court shall consider the sentencing guidelines only on the offense assigned the higher offense Gravity score.

204 Pa.Code § 303.1(a). *See also*, 42 PA.CON.S.TAT.ANN. §§ 2151.1 - 2155 (governing creation and adoption of the Sentencing Guidelines); 204 Pa.Code §§ 303.1 - 303.18c (Pennsylvania Sentencing Guidelines).

The Sentencing Guidelines enumerate aggravating and mitigating circumstances; assign scores based on (1) a defendant's criminal record and (2) on the seriousness of the crime; and then specify a range of punishments for each crime. "In every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resentsences an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resentsences following remand, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 PA.CON.S.TAT.ANN. §9721(b); 204 Pa.Code § 303.1(d).

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Trial courts retain broad discretion in sentencing matters. *Commonwealth v. Antidormi*, --- A.23 ---, 2014 WL 255492 (Pa. Super. 2014). The Sentencing Guidelines are not mandatory, and therefore the trial court may sentence defendants outside the Guidelines.

In cases where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing, the court shall provide a contemporaneous written statement of the reasons for deviating from the guidelines. 42 PA.CON.S.TAT.ANN. § 9721(b); 204 Pa.Code § 303.1(d). However, this requirement is satisfied when the judge states his reasons for the sentence on the record and in the defendant's presence.

The trial court stated sufficient reasons to justify the sentence in the following cases:

- ▶ *Commonwealth v. Mawhinney*, 915 A.2d 107 (Pa. Super. 2006), *appeal denied*, 594 Pa. 677, 932 A.2d 1287 (2007).

Before imposing sentence, the trial court heard argument and a statement from the defendant. It was held that the trial court stated sufficient reasons for imposing consecutive sentences following convictions for involuntary deviate sexual intercourse (IDSI), sexual assault, endangering the welfare of a child, and related crimes, where trial court stated that it had considered the presentence report, the Sentencing Guidelines, and all of the trial testimony in fashioning the sentence.

- ▶ *Commonwealth v. Twitty*, 876 A.2d 433 (Pa. Super. 2005), *appeal denied*, 586 Pa. 749, 892 A.2d 823 (2005).

Following convictions of rape, involuntary deviate sexual intercourse and related charges, the trial court, prior to announcing the sentence, in a lengthy statement, noted: (1) the harm done to the victim; (2) the effect the crimes had on the victim's family, particularly because Appellant was the father of the victim's half-siblings; (3) the fact that the entire family was in therapy as a result of Appellant's actions; (4) Appellant's attempts to manipulate the criminal justice system, and the victim throughout the trial by, on multiple occasions, agreeing to plead guilty and then changing his mind at the last minute; and (5) Appellant's complete lack of remorse, including his statement at sentencing, during which he called the young victim a "liar." It was held that the sentencing court more than adequately stated its reasons for sentencing Appellant to the statutory maximum, and the Superior Court found that the record substantiates the trial court's sentencing determinations.

When the sentencing court imposes a sentence that deviates *significantly* from guideline recommendations, it must demonstrate that the case under consideration

is compellingly different from the “typical” case of the same offense or point to other sentencing factors that are germane to the case before the court. *Commonwealth v. Robertson*, 874 A.2d 1200, 1213 (Pa. Super. 2005).

Failure to comply with these general standards is grounds for vacating the sentence and resentencing the defendant.

B. Statutory Penalties for Crimes of Sexual Violence

Pennsylvania’s statutory scheme specifies the grade and degree of each particular crime. Moreover, the General Assembly has provided the statutory maximum legal sentences for each grade and degree of crime:

18 PA. CONS. STAT. ANN. § 1101.

Fines

A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

- (1) \$50,000, when the conviction is of murder or attempted murder.
- (2) \$25,000, when the conviction is of a felony of the first or second degree.
- (3) \$15,000, when the conviction is of a felony of the third degree.
- (4) \$10,000, when the conviction is of a misdemeanor of the first degree.
- (5) \$5,000, when the conviction is of a misdemeanor of the second degree.
- (6) \$2,500, when the conviction is of a misdemeanor of the third degree.
- (7) \$300, when the conviction is of a summary offense for which no higher fine is established.
- (8) Any higher amount equal to double the pecuniary gain derived from the offense by the offender.
- (9) Any higher or lower amount specifically authorized by statute.

18 PA.CONS.STAT.ANN. § 1103.

Sentence of Imprisonment for Felony

Except as provided in 42 Pa.C.S. § 9714 (relating to sentences for second and subsequent offenses), a person who has been convicted of a felony may be sentenced to imprisonment as follows:

- (1) In the case of a felony of the first degree, for a term which shall be fixed by the court at not more than 20 years.
- (2) In the case of a felony of the second degree, for a term which shall be fixed by the court at not more than ten years.
- (3) In the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years.

18 PA.CONS.STAT.ANN. § 1104.

Sentence of Imprisonment for Misdemeanors

A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than:

- (1) Five years in the case of a misdemeanor of the first degree.
- (2) Two years in the case of a misdemeanor of the second degree.
- (3) One year in the case of a misdemeanor of the third degree.

18 PA.CONS.STAT.ANN. § 1105.

Sentence of Imprisonment for Summary Offenses

A person who has been convicted of a summary offense may be sentenced to imprisonment for a term which shall be fixed by the court at not more than 90 days.

If the trial court imposes a sentence of total confinement, the sentence must set a maximum period of incarceration and a minimum period which must not “exceed one-

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half of the maximum sentence imposed.” 42 PA.CON.S.TAT.ANN. § 9756(b). The following is a list of the statutory maximum penalties permitted for crimes of sexual violence. For ease of use, an abbreviated definition is also included for each crime.

1. RAPE: 18 PA.CON.S.TAT.ANN. § 3121

§ 3121(a): Rape

- **Grading:** a felony of the first degree.
- **Definition:** includes sexual intercourse with a victim:
 - 1) by forcible compulsion;
 - 2) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
 - 3) who was unconscious or where the defendant knew that the victim was unaware that the sexual intercourse was occurring;
 - 4) where the defendant had substantially impaired the victim’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or
 - 5) who suffers from a mental disability which rendered the victim incapable of consent.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

§ 3121 (b): Rape by substantial impairment of victim

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engages in sexual intercourse with the victim and has substantially impaired the victim’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss and any other effect of this substance.
- **Penalty:** Maximum incarceration sentence and maximum fine: in addition to the penalty provided for by § 3121 (a), an additional period of incarceration which *shall not exceed an additional 10 years confinement and an additional fine which shall not exceed \$100,000.* The aggregate sentence for the offense shall therefore be not more than 30 years and the fine shall not exceed \$125,000.

§3121 (c): Rape of a child

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engaged in sexual intercourse with a victim who was less than 13 years old.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 40 years [see 18 PA.CON.S.TAT.ANN. § 3121(e)(1)] and \$25,000.*

§3121 (d): Rape of a child with serious bodily injury

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant violated this section and the victim is under 13 years of age and suffered serious bodily injury in the course of the offense.
- **Penalty:** Maximum incarceration sentence and the maximum fine: up to *life imprisonment* [see 18 PA.CON.S.TAT.ANN. § 3121(e)(2)] and not to exceed \$25,000.

2. STATUTORY SEXUAL ASSAULT: 18 PA.CON.S.TAT.ANN. § 3122.1

§ 3122.1(a): Statutory Sexual Assault

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant engaged in sexual intercourse with a complainant who is not married to the defendant and is under the age of 16 years, and the defendant is either
 - four years older but less than eight years older than the complainant;
 - or
 - eight years older but less than 11 years older than the complainant.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

§ 3122.1(b): Statutory Sexual Assault-Older Defendant

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engaged in sexual intercourse with a complainant who is not married to the defendant and is under the age of 16 years, and the defendant is 11 or more years older than the complainant.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

3. INVOLUNTARY DEVIATE SEXUAL INTERCOURSE: 18 PA.CON.S.TAT.ANN. § 3123

§ 3123(a): Involuntary Deviate Sexual Intercourse

- **Grading:** a felony of the first degree.
- **Definition:** includes deviate sexual intercourse with a victim:
 - 1) by forcible compulsion;
 - 2) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
 - 3) who was unconscious or where the person knew that the victim was unaware that the sexual intercourse was occurring;
 - 4) where the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants or other means for the purpose of preventing resistance;

5) who suffers from a mental disability which rendered him or her incapable of consent; or

6) who was less than 16 years of age and the defendant is four or more years older than the victim and the victim and defendant were not married to each other.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

§ 3123(b): IDSI with a Child

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engaged in deviate sexual intercourse with a victim who was less than 13 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 40 years [see 18 PA.CON.S.STAT.ANN. § 3123(d)(1)] and \$25,000.*

§ 3123(c): IDSI with a Child with Serious Bodily Injury

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant violated this section, the victim was less than 13 years of age, and the victim suffered serious bodily injury in the course of the offense.
- **Penalty:** Maximum incarceration sentence and the maximum fine: up to *life imprisonment [see 18 PA.CON.S.STAT.ANN. § 3123(d)(2)] and not to exceed \$25,000.*

4. SEXUAL ASSAULT: 18 PA.CON.S.STAT.ANN. § 3124.1

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant engaged in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

5. INSTITUTIONAL SEXUAL ASSAULT: 18 PA.CON.S.STAT.ANN. § 3124.2

§ 3124.2(a): Institutional Sexual Assault

- **Grading:** a felony of the third degree.
- **Definition:** where the defendant was an employee or agent of the Department of Corrections or a county correctional authority, youth development center, youth forestry camp, State or county juvenile detention facility, other licensed residential facility serving children and youth, or mental health or mental retardation facility or institution, and engaged in sexual intercourse, deviate sexual intercourse or indecent contact with a victim who was an inmate, detainee, patient or resident.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$10,000.*

§ 3124.2(a.1): Institutional Sexual Assault of a Minor

- **Grading:** a felony of the third degree.
- **Definition:** where the defendant was an employee or agent of the Department of Corrections or a county correctional authority, youth development center, youth forestry camp, State or county juvenile detention facility, other licensed residential facility serving children and youth, or mental health or mental retardation facility or institution, and engaged in sexual intercourse, deviate sexual intercourse or indecent contact with a victim who was an inmate, detainee, patient or resident who is under 18 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$10,000.*

§ 3124.2(a.2): Institutional Sexual Assault at a School

- **Grading:** a felony of the third degree.
- **Definition:** where the defendant is a volunteer or an employee of a school or any other person who has direct contact with a student at a school when he engages in sexual intercourse, deviate sexual intercourse or indecent contact with a student of the school.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$10,000.*

§ 3124.2(a.3): Institutional Sexual Assault – Child Care

- **Grading:** a felony of the third degree.
- **Definition:** where the defendant is a volunteer or an employee of a center for children when he engages in sexual intercourse, deviate sexual intercourse or indecent contact with a child who is receiving services at the center.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$10,000.*

6. AGGRAVATED INDECENT ASSAULT: 18 PA.CON.S.TAT.ANN. § 3125

§ 3125(a): Aggravated Indecent Assault

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant engaged in penetration, however slight, of the genitals or anus of a complainant with a part of the defendant's body for any purpose other than good faith medical, hygienic or law enforcement procedures, and if the defendant does so:
 - 1) without the victim's consent;
 - 2) by forcible compulsion;
 - 3) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
 - 4) when the victim was unconscious or the defendant knew that the victim was unaware that the penetration was occurring;

- 5) when the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants, or other means for the purpose of preventing resistance;
 - 6) when the victim suffers from a mental disability which rendered him or her incapable of consent;
 - 7) when the victim was less than 13 years of age; or
 - 8) when the victim was less than 16 years of age and the defendant is four or more years older than the victim and the victim and the defendant were not married to each other.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

§ 3125(b): Aggravated Indecent Assault of a Child

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant violated § 3125 (a)(1), (2), (3), (4), (5), or (6) and the victim was less than 13 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

7. INDECENT ASSAULT: 18 PA.CON.S.TAT.ANN. §3126

§ 3126(a)(1) or (8): Indecent Assault as an M-2

- **Grading:** A misdemeanor of the second degree.
- **Definition:** where the defendant had indecent contact with a victim or caused the victim to have indecent contact with the defendant, or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant and the defendant does so:
 - 1) without the victim's consent; or
 - 8) the victim was less than 16 years of age and the defendant is four or more years older than the victim and the victim and the defendant were not married to each other.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 2 years and \$5,000.*

§ 3126(a)(2)-(6): Indecent Assault as an M-1

- **Grading:** A misdemeanor of the first degree.
- **Definition:** where the defendant had indecent contact with a victim or caused the victim to have indecent contact with the defendant, or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant and the defendant does so:
 - 2) by forcible compulsion;
 - 3) by threat of forcible compulsion that would have prevented resistance

- by a person of reasonable resolution;
- 4) when the victim was unconscious or the defendant knew that the victim was unaware that the penetration was occurring;
- 5) when the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants, or other means for the purpose of preventing resistance;
- 6) when the complainant suffers from a mental disability which rendered him or her incapable of consent;
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

§ 3126 (a)(7): Indecent Assault of a Child

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant had indecent contact with a victim or caused the victim to have indecent contact with the defendant, or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the defendant or the complainant and the complainant is less than 13 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

§ 3126 (a)(7): Indecent Assault of a Child as a F-3

- **Grading:** a felony of the third degree
- **Definition:** same definition as Indecent Assault of a Child but where any of the following apply:
 - It is a second or subsequent offense;
 - There has been a course of conduct of indecent assault by the defendant;
 - The indecent assault was committed by touching the complainant's sexual or intimate parts with sexual or intimate parts of the defendant;
 - or
 - The indecent assault is committed by touching the person's sexual or intimate parts with the complainant's sexual or intimate parts.
- **Penalty:** maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$15,000.*

8. INDECENT EXPOSURE: 18 PA.CON.S.TAT.ANN. § 3127

§ 3127 Indecent Exposure as an M-2

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant exposed his or her genitals in any public place or in any place where there were present other persons under circumstances in which the defendant knew or should have known that

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this conduct was likely to offend, affront, or alarm.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 2 years and \$5,000.*

§ 3127 (b): Indecent Exposure in the presence of persons less than 16 years of age

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant knew or should have known that any of the persons present were less than 16 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

9. INVASION OF PRIVACY: 18 PA.CON.S.TAT.ANN. § 7507.1

- **Grading:** a misdemeanor of the third degree for the first violation. If there is more than one violation, then a misdemeanor of the second degree.
- **Definition:** the defendant, for the purpose of arousing or gratifying the sexual desire of any person, knowingly does any of the following:
 - (1) Views, photographs, videotapes, electronically depicts, films or otherwise records another person without that person's knowledge and consent while that person is in a state of full or partial nudity and is in a place where that person would have a reasonable expectation of privacy.
 - (2) Photographs, videotapes, electronically depicts, films or otherwise records or personally views the intimate parts, whether or not covered by clothing, of another person without that person's knowledge and consent and which intimate parts that person does not intend to be visible by normal public observation.
 - (3) Transfers or transmits an image obtained in violation of paragraph (1) or (2) by live or recorded telephone message, electronic mail or the Internet or by any other transfer of the medium on which the image is stored
- **Penalty:** If a misdemeanor of the third degree, then maximum incarceration sentence and the maximum fine: *shall not exceed 1 year and \$2,500.* If a misdemeanor of the second degree, then maximum incarceration sentence and the maximum fine: *shall not exceed 2 year and \$5,000.*
- **Separate Violations:** In accordance with 18 PA.CON.S.TAT.ANN. §7507 .1 (a.1), a separate violation occurs:
 - (1) for each victim of an offense under subsection (a) under the same or similar circumstances pursuant to one scheme or course of conduct whether at the same or different times; or
 - (2) if a person is a victim of an offense under subsection (a) on more than one occasion during a separate course of conduct either individually or otherwise.

10. SEXUAL INTERCOURSE WITH ANIMAL: 18 PA.CON.S. STAT. ANN. §3129

- **Grading:** a misdemeanor of the second degree.
- **Definition:** where the defendant engaged in any form of sexual intercourse with an animal.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 2 years and \$5,000.*

11. INCEST: 18 PA.CON.S. STAT. ANN. §4302

§ 4302: Incest

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant knowingly married, cohabited, or had sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood. The relationships referred to in this section include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

§ 4302(b): Incest of a Minor

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant knowingly married, cohabited, or had sexual intercourse with a complainant who is an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood, and the complainant is either (1) under 13 years of age or (2) between 13 and 18 years of age and the defendant is four or more years older.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

12. CORRUPTION OF MINORS – SEXUAL NATURE: 18 PA.CON.S. STAT. ANN. §6301(a)(1)

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant, being of the age of 18 and upwards, by any act corrupted or tended to corrupt the morals of any minor less than 18 years, or who aided, abetted, enticed or encouraged any such minor in the commission of any crime, or who knowingly assisted or encouraged such minor in violating his or her parole or any order of court.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

13. SEXUAL ABUSE OF CHILDREN: 18 PA.CON.S. STAT. ANN. § 6312

§ 6312 (b): Sexual abuse of children (photographing, videotaping, depicting on computer or filming sexual acts)

- **Grading:** a felony of the second degree unless:
 - a felony of the first degree if indecent contact with the child, i.e., any touching of the sexual or other intimate parts for the purpose of arousing or gratifying sexual desire, in any person, is depicted.
- **Definition:** where the defendant caused or knowingly permitted a child under the age of 18 years to engage in a prohibited sexual act, or in the simulation of such act, if the defendant knew, had reason to know, or intended that such act may be photographed, videotaped, depicted on computer or filmed.
- **Penalty:** As a felony of the first degree: *Maximum incarceration of twenty years and fine of \$50,000.*
 - As a felony of the second degree: *Maximum sentence shall not exceed 10 years and fine \$25,000.*

§ 6312 (c)(1): Sexual abuse of children (dissemination of photographs, videotapes, computer depictions and films)

- **Grading:** Recidivist Ramifications - a first offense is a felony of the third degree; a second or subsequent offense is a felony of the second degree.
- **Definition:** includes any knowing sale, distribution, delivery, dissemination, transfer, display, or exhibition to others, or possession for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in prohibited sexual act or in the simulation of such act.
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the second degree: *shall not exceed 10 years and \$25,000.*
 - Maximum incarceration sentence and the maximum fine for the felony of the third degree: *shall not exceed 7 years and \$15,000.*

§ 6312 (d)(1): Sexual abuse of children (possession of child pornography)

- **Grading:** Recidivist Ramifications -a first offense is a felony of the third degree; a second or subsequent offense is a felony of the second degree.
- **Definition:** Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the second degree: *shall not exceed 10 years and \$25,000.*
 - Maximum incarceration sentence and the maximum fine for the felony of the third degree: *shall not exceed 7 years and \$15,000.*

14. DUTY OF INTERNET SERVICE PROVIDER TO REMOVE CHILD PORNOGRAPHY: 18 PA.CON.S.TAT.ANN. § 7624

- **Declared Unconstitutional:** In *Center for Democracy & Technology v. Papper*, 337 F.Supp.2d 606 (E.D.Pa. 2004), the District Court for the Eastern District of Pennsylvania declared the Internet Child Pornography Act, 18 PA.CON.S.TAT.ANN. §§ 7621-7630 to be unconstitutional.
- **Grading:** Recidivist Ramifications - a first offense is a misdemeanor of the third degree; a second offense is a misdemeanor of the second degree; a third or subsequent offense is a felony of the third degree.
- **Definition:** Any Internet service provider who violates 18 PA.CON.S.TAT.ANN. § 7622. Section 7622 provides:

An Internet service provider shall remove or disable access to child pornography items residing on or accessible through its service in a manner accessible to persons located within this Commonwealth within five business days of when the Internet service provider is notified by the Attorney General pursuant to section 7628 (relating to notification procedure) that child pornography items reside on or are accessible through its service.
- **Penalty:**

First Offense: \$5,000 fine.
Second Offense: \$20,000 fine.
Third or Subsequent Offense: \$30,000 fine and imprisonment up to maximum of seven years.

15. UNLAWFUL CONTACT WITH A MINOR: 18 PA.CON.S.TAT. ANN. § 6318

- **Grading:** the same grade and degree as the most serious underlying offense or a felony of the third degree, whichever is greater.
- **Definition:** A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
 - (1) Any of the sexual offenses enumerated in Chapter 31;
 - (2) Open lewdness;
 - (3) Prostitution;
 - (4) Obscene and other sexual materials and performances;
 - (5) Sexual abuse of children; or
 - (6) Sexual exploitation of children.
- **Penalty:** If a felony of the third degree: Maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$15,000.*

16. SEXUAL EXPLOITATION OF CHILDREN: 18 PA.CON.S.TAT. ANN. § 6320

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- **Grading:** a felony of the second degree.
- **Definition:** where the defendant procured for another person a child under 18 years of age for the purpose of sexual exploitation.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

17. LURING A CHILD INTO A MOTOR VEHICLE OR STRUCTURE: 18 PA.CON.S. STAT.ANN. § 2910

- **Grading:** a misdemeanor of the first degree, unless the child is under 13 years of age, then a felony of the second degree.
- **Definition:** a person who lures or attempts to lure a child into a motor vehicle or structure without the consent, express or implied, of the child's parent or guardian unless the circumstances reasonably indicate that the child is in need of assistance.
- **Penalty:** If a misdemeanor of the first degree: maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.* If a felony of the second degree: maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

18. ENDANGERING WELFARE OF CHILDREN: 18 PA.CON.S. STAT. ANN. § 4304(a)(1)

- **Grading:** a misdemeanor of the first degree, unless there is a course of conduct, then a felony of the third degree.
- **Definition:** A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
- **Penalty:** If a misdemeanor of the first degree: maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.* If a felony of the third degree: maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$15,000.*

19. VICTIMS OF SEXUAL OR PHYSICAL ABUSE: 42 PA.CON.S. STAT. ANN. § 5988(b)

- **Grading:** a misdemeanor of the third degree.
- **Definition:** Any person who violates the confidentiality provided to minor victims of sexual or physical abuse created under 42 PA.CON.S. STAT. ANN. § 5988.
- **Penalty:** As a misdemeanor of the third degree: maximum incarceration sentence and the maximum fine: *shall not exceed 1 year and \$2,500.*

20. SEXUAL ASSAULT BY SPORTS OFFICIAL, VOLUNTEER OR EMPLOYEE OF NONPROFIT ASSOCIATION: 18 PA.CON.S. STAT. ANN. § 3124.3

§ 3124.3(a): Sports Official

- Grading: a felony of the third degree.
- Definition: except for the crimes listed below, when a person who serves as a sports official in a sports program (nonprofit or for-profit association) engages in sexual intercourse, deviate sexual intercourse or indecent contact with a child under 18 years of age who is participating in a sports program of either of the associations. Except for Rape (§ 3121), statutory sexual assault (§ 3122.1), IDSI (§ 3123), sexual assault (§ 3124.1), or aggravated indecent assault (§ 3125).
- Penalty: As a felony of the third degree: Maximum incarceration sentence and the maximum fine: shall not exceed 7 years and \$15,000.

§ 3124.3(b): Volunteer or Employee of Nonprofit Association

- Grading: a felony of the third degree.
- Definition: except for the crimes listed below, when a volunteer or an employee of a nonprofit association having direct contact with a child under 18 years of age who participates in a program or activity of the nonprofit association engages in sexual intercourse, deviate sexual intercourse or indecent contact with that child. Except for Rape (§ 3121), statutory sexual assault (§ 3122.1), IDSI (§ 3123), sexual assault (§ 3124.1), or aggravated indecent assault (§ 3125).
- Penalty: As a felony of the third degree: Maximum incarceration sentence and the maximum fine: shall not exceed 7 years and \$15,000.

C. Inchoate Crimes

18 PA.CON.S.TAT.ANN. §905(a) - Grading of Criminal Attempt, Solicitation and Conspiracy

Inchoate crimes of sexual violence, unless otherwise provided, shall be crimes of the *same grade and degree* as the most serious offense which is attempted or solicited or is an object of the conspiracy.

D. Mandatory Sentences for Crimes of Sexual Violence

Statutory Maximum Sentence

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court of the United States held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490, 120 S.Ct. at 2348. See also *Commonwealth v. Aponte*, 579 Pa. 246, 262, 855 A.2d 800, 811 (2004), *cert. denied*, 543 U.S. 1063, 125 S.Ct. 886, 160 L.Ed.2d 792 (2005) (“in cases where the fact which increases the maximum penalty is not a prior conviction and requires a subjective assessment, anything less than proof beyond a reasonable doubt

before a jury violates due process.”).

Mandatory Minimum Sentence

In *Alleyne v. United States*, --- U.S. ---, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the United States Supreme Court explicitly held that, under the Sixth Amendment, a factual predicate that leads to an increase in the mandatory minimum sentence for a crime is an “element” which must be submitted to and decided by a jury, 133 S.Ct. at 2152, and found beyond a reasonable doubt. Any fact that causes a mandatory minimum sentence to be applied must be treated as an element of the offense. 133 S.Ct. 2155.

Even a statutory increase by way of a mandatory minimum, which does not increase the statutory maximum sentence, must be proven beyond a reasonable doubt. *Commonwealth v. Munday*, 78 A.3d 661, 666 (Pa. Super. 2013). Therefore, the factors which support a mandatory minimum sentence, when invoked at the time of sentencing, must be proven by the fact finder beyond a reasonable doubt. *Id.*

Current Appellate Decisions in Pennsylvania

At the time of the publication of this book, the Superior Court of Pennsylvania, in a number of decisions, has held that mandatory sentencing statutes which contain the “proof at sentencing” provision, *i.e.*, that the sentencing judge make a determination whether a mandatory minimum sentence applies at the time of sentencing, typically using a preponderance of the evidence standard, are unconstitutional, non-severable and unenforceable. See *Commonwealth v. Newman*, 99 A.3d 86 (Pa. Super. 2014)(en banc).

In *Commonwealth v. Valentine*, 101 A.3d 801 (Pa. Super. 2014), the Superior Court rejected the trial court’s attempt to resolve *Alleyne* mandates by permitting an amendment to the criminal information to include then necessary additional elements and submitting the questions to the jury to determine them upon the standard of beyond a reasonable doubt. The *Valentine* court held that the trial court was not permitted to allow the jury to resolve the mandatory minimum questions absent legislative action in accordance with *Commonwealth v. Newman*.

This precedent applies except for mandatory minimum sentencing statutes that pertain to prior convictions or are based upon elements of the current offense. See *Commonwealth v. Matteson*, 96 A.3d 1064, 1066 (Pa.Super. 2014); see also *Commonwealth v. Watley*, 81 A.3d 108, 121-122 (Pa.Super. 2013)(en banc), *appeal denied*, 95 A.3d 277 (Pa. 2014).

1. 42 PA.CON.S.TAT.ANN. § 9712²⁵ Crime of Violence with a Firearm

Criteria:

the person visibly possessed a firearm or a replica of
firearm, whether or not the firearm or replica was loaded

²⁵ This statute held unconstitutional in *Commonwealth v. Valentine*, 101 A.3d 801 (Pa. Super. 2014).

or functional, that placed the victim in reasonable fear of death or serious bodily injury, during the commission of a crime of violence including those specified below.

Offenses included (per 42 Pa.Con.Stat. Ann. § 9714(g)):

- 18 PA.CON.STAT.ANN. § 3121 (Rape)
- 18 PA.CON.STAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.STAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.STAT.ANN. § 4302 (Incest)
- 18 PA.CON.STAT.ANN. § 3124.1 (Sexual Assault)

Mandatory Sentence:

minimum sentence of *at least five years total confinement.*

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

2. 42 PA.CON.S.TAT.ANN. § 9713²⁶

Crime of Violence in/near Public Transportation

Criteria:

The person commits a crime of sexual violence specified below if the crime occurs in or near public transportation.

Offenses included:

- 18 PA.CON.STAT.ANN. § 3121 (Rape)
- 18 PA.CON.STAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.STAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.STAT.ANN. § 4302 (Incest)
- 18 PA.CON.STAT.ANN. § 3124.1 (Sexual Assault)

²⁶ This statute held unconstitutional in *Commonwealth v. Valentine*, 101 A.3d 801 (Pa. Super. 2014).

Mandatory Sentence:

Minimum sentence of *at least five years total confinement*.

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

3. 42 PA.CON.STAT.ANN. § 9714

Crime of Violence – Second or Subsequent Conviction

Criteria:

Conviction for a second or subsequent crime of violence, including as specified below, if at the time of the commission of the current offense the person had previously been convicted of a crime of violence as specified below.

Offenses included:

- 18 PA.CON.STAT.ANN. § 3121 (Rape)
- 18 PA.CON.STAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.STAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.STAT.ANN. § 4302 (Incest)
- 18 PA.CON.STAT.ANN. § 3124.1 (Sexual Assault)

Mandatory Minimum Sentence:

- (i) "Second Strike Provision" - for a single prior conviction, a minimum sentence of *at least ten years total confinement*;
- (ii) "Three Strikes Law" - for multiple prior convictions, a minimum sentence of *at least 25 years total confinement*. However, the sentencing court may, if it determines that 25 years of total confinement is insufficient to protect the public safety, sentence the offender to *life imprisonment without parole*.

Mandatory Maximum Sentence:

a defendant sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 PA.CON.S.STAT.ANN. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

Notice and Hearing Requirements:

- Upon a second conviction for a crime of violence, the court shall give the defendant oral and written notice of the penalties under this section for a third conviction for a crime of violence;
- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must have a complete record of the previous convictions of the defendant, copies of which shall be furnished to the offender. If the offender or the attorney for the Commonwealth contests the accuracy of the record, the court must schedule a hearing and direct the offender and the attorney for the Commonwealth to submit evidence regarding the previous convictions of the offender. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offender and, if this section is applicable, shall impose sentence in accordance with this section.
- Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the defendant has the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

4. 42 PA.CON.S.STAT.ANN. § 9717 Victim over 60 years old

Criteria:

Conviction for Rape (18 PA.CON.S.STAT.ANN. § 3121) or Involuntary Deviate Sexual Intercourse (18 Pa.Cons.Stat. Ann. § 3123) where the defendant is under 60 years of age, and the victim is over the age of 60 and not a police officer.

Mandatory Sentence:

mandatory term of imprisonment of *at least five years*.

5. 42 PA.CON.S.TAT.ANN. § 9718 (a)(1)²⁷

Victim under 16 years old

Criteria:

Conviction for the following offenses when the victim is under 16 years of age:

- Rape (18 PA.CON.S.TAT.ANN. § 3121(a)(1),(2),(3),(4)&(5));
or
- Involuntary Deviate Sexual Intercourse (18 PA.CON.S.TAT.ANN. § 3123) when the victim is under 16 years of age.
- Aggravated Indecent Assault ((18 PA.CON.S.TAT.ANN. § 3125(a)(1)-(6))

Mandatory Sentence:

- For Rape and IDSI - mandatory term of imprisonment of *not less than ten years*.
- For Aggravated Indecent Assault – mandatory term of *not less than five years*.

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The court must consider the evidence presented at trial and the Commonwealth and the defense may present any necessary additional evidence. The court shall then determine, by a preponderance of the evidence, if this section is applicable.

6. 42 PA.CON.S.TAT.ANN § 9718 (a)(2)²⁸

Victim under 13 years old

Criteria:

Conviction for Rape (18 PA.CON.S.TAT.ANN. § 3121(c)&(d); Aggravated Indecent Assault (18 PA.CON.S.TAT.ANN. § 3125(a)(7) & (b)).

²⁷ This statute held unconstitutional, insofar as it permits a judge to automatically increase a defendant's sentence based on a preponderance of the evidence standard, in *Commonwealth v. Watley*, 81 A.3d 108, 121-122 (Pa.Super. 2013)(en banc), *appeal denied*, 95 A.3d 277 (Pa. 2014).

²⁸ This statute held unconstitutional, insofar as it permits a judge to automatically increase a defendant's sentence based on a preponderance of the evidence standard, in *Commonwealth v. Watley*, 81 A.3d 108, 121-122 (Pa.Super. 2013)(en banc), *appeal denied*, 95 A.3d 277 (Pa. 2014).

Mandatory Sentence:

For Rape and Aggravated Indecent Assault of a Child –

mandatory term of imprisonment *not less than ten years*.

For Aggravated Indecent Assault under subsection (a)(7) -

mandatory term of imprisonment *not less than five years*.

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The court must consider the evidence presented at trial and the Commonwealth and the defense may present any necessary additional evidence. The court shall then determine, by a preponderance of the evidence, if this section is applicable.

7. 42 PA.CON.S.TAT.ANN § 9718.2 Sentences for Sexual Offenders

Criteria:

Conviction for any offense listed in 42 PA.CON.S.TAT.ANN. § 9799.14 and previously convicted for offense listed in § 9799.14 (or equivalent crime under other jurisdiction).

Mandatory Sentence:

- (i) *Second Strike Provision* - for a single prior conviction, a minimum sentence of *at least 25 years total* confinement;
- (ii) *Three Strikes Provision* - for multiple prior convictions, a sentence of life imprisonment.

Constitutionality

In *Commonwealth v. Baker*, --- Pa. ---, 78 A.3d 1044 (2013), the Pennsylvania Supreme Court found the mandatory minimum sentence of 25 years in the *second strike* provision did not violate the constitutional prohibition against cruel and unusual punishment.

Notice and Hearing Requirements:

- Upon a second conviction for a crime of violence, the court shall give the defendant oral and written notice of the penalties under this section for a third conviction for a crime of violence;
- Reasonable notice of the Commonwealth's intention

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to proceed under this section must be provided after conviction and before sentencing.

- The applicability of this section must be determined at sentencing. The sentencing court must have a complete record of the previous convictions of the defendant, copies of which shall be furnished to the offender. If the offender or the attorney for the Commonwealth contests the accuracy of the record, the court must schedule a hearing and direct the offender and the attorney for the Commonwealth to submit evidence regarding the previous convictions of the offender. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offender and, if this section is applicable, shall impose sentence in accordance with this section.
- Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the defendant has the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

Mandatory Maximum Sentence:

A defendant sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 PA.CONS.STAT.ANN. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

8. 42 PA.CONS.STAT.ANN § 9720.2 Sentencing for Trafficking of Persons

Criteria:

Conviction for a violation of 18 PA.CONS.STAT.ANN. § 3011, relating to trafficking of persons, while violating Rape (18 PA.CONS.STAT.ANN. § 3121) or IDSI (18 PA.CONS.STAT.ANN. § 3123).

Mandatory Sentence:

“shall be sentenced up to a maximum term of life imprisonment.”

9. 42 PA.CONS.STAT.ANN § 9719²⁹

²⁹ This statute held unconstitutional, insofar as it permits a judge to automatically increase a defendant’s sentence based on a preponderance of the evidence standard, in *Commonwealth v. Watley*, 81 A.3d 108, 121-122 (Pa.Super. 2013)(en banc), *appeal denied*, 95 A.3d 277 (Pa. 2014).

Crime of violence committed while impersonating a police officer

Criteria:

Conviction for the following offenses, or an attempt thereof, and the defendant impersonated a police officer while committing the offense:

- Rape (18 PA.CON.S.STAT.ANN. § 3121); or
- Involuntary Deviate Sexual Intercourse (18 PA.CON.S.STAT.ANN. § 3123).

Mandatory Sentence:

mandatory term of imprisonment of *at least 3 years*.

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

E. Sexual Offender Treatment

Pursuant to 42 PA.CON.S.STAT.ANN. § 9718.1, Sexual Offender Treatment, any person, including a "sexually violent predator" under 42 PA.CON.S.STAT.ANN. § 9799.12, if incarcerated in a state institution for any of the following crimes, must attend and participate in a Department of Corrections program of counseling or therapy designed for incarcerated sex offenders:

- (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses) if the offense involved a minor under 18 years of age.
- (2) Section 4304 (relating to endangering welfare of children) if the offense involved sexual contact with the victim.
- (3) Section 6301 (relating to corruption of minors) if the offense involved sexual contact with the victim.
- (4) Open lewdness, as defined in section 5901 (relating to open lewdness), if the offense involved a minor under 18 years of age.

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- (5) Prostitution, as defined in section 5902 (relating to prostitution and related offenses), if the offense involved a minor under 18 years of age.
- (6) Obscene and other sexual materials and performances, as defined in section 5903 (relating to obscene and other sexual materials and performances), if the offense involved a minor under 18 years of age.
- (7) Sexual abuse of children, as defined in section 6312 (relating to sexual abuse of children).
- (8) Section 6318 (relating to unlawful contact with minor).
- (9) Section 6320 (relating to sexual exploitation of children).
- (10) Section 4302 (relating to incest) if the offense involved a minor under 18 years of age.
- (11) An attempt or solicitation to commit any of the offenses listed in this subsection.

See 42 PA.CON.S.TAT.ANN. § 9718.1.

F. Sentencing Guidelines

1. Analysis of the Guidelines

The sentencing guidelines are written with the typical case in mind, so that a sentence suggested within the standard range will generally serve as an appropriate penalty for the offense. The guidelines were promulgated primarily to provide standardization in sentencing throughout the state. The unrestricted discretion the sentencing court once enjoyed was changed dramatically by implementation of the guidelines in the late 1970's. As the Pennsylvania Supreme Court summarized in *Commonwealth v. Mouzon*, 571 Pa. 419, 424 n.2, 812 A.2d 617, 620 n.2 (2002) (plurality):

In 1978, the General Assembly empowered the Pennsylvania Commission on Sentencing to formulate Sentencing Guidelines, which the General Assembly subsequently adopted. This Court has recognized that the Sentencing Guidelines were promulgated in order to structure the trial court's exercise of its sentencing power and to address disparate sentencing. Legislative history also indicates that the Guidelines were enacted "to make criminal sentences

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more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict the unfettered discretion we give to sentencing judges.”

The sentencing court must consider the guidelines in determining the appropriate sentence for a defendant convicted of, or pleading guilty or nolo contendere to, felonies and misdemeanors. 204 Pa. Code § 303.1(a). The sentencing guidelines do not apply to sentences imposed as a result of the following: (1) accelerated rehabilitative disposition; (2) disposition in lieu of trial; (3) direct or indirect contempt of court; (4) violations of protection from abuse orders; and (5) revocation of probation, intermediate punishment or parole. 204 Pa. Code § 303.1(b).

The procedure for determining the guideline sentence from the matrix requires the determination of the Offense Gravity Score and the defendant’s Prior Record Score. In every case in which a sentence is imposed for a felony or misdemeanor, the sentencing court must state on the record, and disclose in open court at the time of sentencing and on the Guideline Sentence Form, the reason(s) for the sentence imposed. See 42 PA.CON.S.TAT.ANN. § 9721(b).

If the sentencing judge determines that the standard range sentence will not provide a just result due to the existence of certain aggravating or mitigating circumstances, the sentencing court may impose, within the guidelines, an aggravated range or mitigated range sentence that either increases or decreases the standard range penalty by a specified number of months, which varies based on the Offense Gravity Score. Pursuant to 204 Pa. Code § 303.13(c), when the sentencing court imposes an aggravated or mitigated sentence, the reasons for departing from the standard range sentence shall be stated both on the record and on the Guideline Sentence Form.

When sentencing outside of the guideline ranges, the sentencing court must ensure that the record reflects “with clarity that the court considered the sentencing guidelines in a rational and systematic way and made a dispassionate decision to depart from them.” *Commonwealth v. Rodda*, 723 A.2d 212, 216 (Pa. Super. 1999).

In *Commonwealth v. Austin*, 66 A.3d 798 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 77 A.3d 1258 (2013), the Superior Court initially decided that a sentence of 72 to 192 years in prison following the defendant’s convictions of 96 counts of sexual abuse of children (possession of child pornography) was an abuse of discretion; however, upon remand, the trial court re-sentenced the defendant to 35 years to 70 years.

Although the Superior Court, upon the second appeal, found that an aggregate sentence of 35 years to 70 years in prison did not present a substantial

question, the Court stated that even had the appellant raised a substantial question, it would not find that the trial court abused its discretion in imposing the sentence. On its face, such a sentence did not constitute a guaranteed life sentence for a presently twenty-eight year old appellant. 66 A.3d at 807.

The Superior Court noted that the trial court had available to it expert reports which indicated, *inter alia*, that the appellant was a “high risk offender,” had psychological issues, functioned on the level of an adolescent, behaved in a “resistant pattern of sexual deviation” that “would not be easy to rehabilitate,” and showed a lack of remorse. The Superior Court also stressed that the trial court had determined the appellant’s history of promiscuity and reckless behavior support the notion he is likely to re-offend and that the facts revealed the appellant’s behavior was characterized by a “resistant pattern of sexual deviation” which would not be easy to rehabilitate. 66 A.3d at 804.

Although the Sentencing Commission, rather than the General Assembly itself, directly adopts the Sentencing Guidelines and therefore the Guidelines are not statutes *per se*, the Guidelines nevertheless retain a legislative character, as the General Assembly may reject them in their entirety prior to their taking effect, subject, of course, to gubernatorial review.³⁰ Moreover, the General Assembly itself has designated the Commission as a legislative agency. 42 PA.CON.S.STAT. ANN. § 2151.2 (“The commission shall be established as an agency of the General Assembly ...”). Therefore, the appellate courts apply the standard rules of statutory construction to the guidelines. *See Commonwealth v. Hackenberger*, 575 Pa. 197, 201 n.9, 836 A.2d 2, 4 n.9 (2003).

2. Guideline Scores and Points

A full listing of all crimes, including crimes of sexual violence, is compiled in 204 Pa.Code § 303.15. This listing includes the grading of the offense, the offense gravity score, and the prior record score point.

The basic sentencing matrix, which will be applicable in most cases, is supplied in 204 Pa.Code § 303.16a.

The sentencing guidelines for cases in which the deadly weapon enhancement is applicable are listed in 204 Pa.Code §§ 303.17a & 303.17b, depending on whether the weapon was used.

G. Sentencing Alternatives to Traditional Incarceration

1. Intermediate Punishment

Pennsylvania first enacted provisions establishing intermediate

³⁰ “Subject to gubernatorial review pursuant to section 9 of Article III of the Constitution of Pennsylvania, the General Assembly may by concurrent resolution reject in their entirety any guidelines adopted by the commission within 90 days of their publication in the Pennsylvania Bulletin ...” 42 PA.CON.S.STAT. ANN. § 2155(b).

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punishment as a sentencing alternative in 1990. The current act, the Pennsylvania County Intermediate Punishment Act, 42 PA.CON.S.TAT.ANN. §§ 9801-9813, provides that County intermediate punishment program options include the following:

(a) Description.--County intermediate punishment program options shall include the following:

(1) Restrictive intermediate punishments providing for the strict supervision of the offender including programs that:

(i) house the offender full or part time;

(ii) significantly restrict the offender's movement and monitor the offender's compliance with the program; or

(iii) involve a combination of programs that meet the standards set forth under subparagraphs (i) and (ii).

(2) When utilized in combination with restrictive intermediate punishments, restorative sanctions providing for nonconfinement sentencing options that:

(i) Are the least restrictive in terms of the constraint of the offender's liberties.

(ii) Do not involve the housing of the offender, either full or part time.

(iii) Focus on restoring the victim to pre-offense status.

42 PA.CON.S.TAT.ANN. § 9804(a).

The Legislature's intent was: "to give judges another sentencing option which would lie between probation and incarceration with respect to sentencing severity; to provide a more appropriate form of punishment/treatment for certain types of non-violent offenders; to make the offender more accountable to the community; and to help reduce the county jail overcrowding problem while maintaining public safety." *Commonwealth v. Phillipp*, 709 A.2d 920, 921 (Pa. Super. 1998) (quoting Sentencing in Pennsylvania 1990: 1990-1991 Annual Report of The Pennsylvania Commission on Sentencing 8). *See also, Commonwealth v. Williams*, 868 A.2d 529 (Pa. Super. 2005), *appeal denied*, 586 Pa. 726, 890 A.2d 1059 (2005).

The CIPA specifically excludes individuals who are charged or have prior records of certain crimes of sexual violence. The current law for determining an

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offender's eligibility for an intermediate punishment sentence is set forth in 42 PA.CON.S.TAT.ANN. § 9802; an "eligible offender" is defined as follows:

"Eligible offender." Subject to section 9721(a.1) (relating to sentencing generally), a person convicted of an offense who would otherwise be sentenced to a county correctional facility, who does not demonstrate a present or past pattern of violent behavior and who would otherwise be sentenced to partial confinement pursuant to section 9724 (relating to partial confinement) or total confinement pursuant to section 9725 (relating to total confinement). The term does not include an offender who has been convicted or adjudicated delinquent of a crime requiring registration under Subchapter H of Chapter 97 (relating to registration of sexual offenders) or an offender with a current conviction or a prior conviction within the past ten years for any of the following offenses:

- 18 Pa.C.S. § 2502 (relating to murder).
- 18 Pa.C.S. § 2503 (relating to voluntary manslaughter).
- 18 Pa.C.S. § 2702 (relating to aggravated assault).
- 18 Pa.C.S. § 2703 (relating to assault by prisoner).
- 18 Pa.C.S. § 2704 (relating to assault by life prisoner).
- 18 Pa.C.S. § 2901(a) (relating to kidnapping).
- 18 Pa.C.S. § 3122.1(a)(1) (relating to statutory sexual assault).
- 18 Pa.C.S. § 3301 (relating to arson and related offenses).
- 18 Pa.C.S. § 3502 (relating to burglary) when graded as a felony of the first degree.
- 18 Pa.C.S. § 3701 (relating to robbery).
- 18 Pa.C.S. § 3923 (relating to theft by extortion).
- 18 Pa.C.S. § 4302(a) (relating to incest).

18 Pa.C.S. § 5121 (relating to escape).

42 PA.CON.S.TAT.ANN. § 9802.

The grant or denial of a request for intermediate punishment is largely within the sound discretion of the trial court. *See Commonwealth v. Jurczak*, 86 A.3d 265, 267 (Pa. Super. 2014).

2. Order of Probation

Probation may be an appropriate sentence based upon the following grounds:

The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of an order of probation:

(1) The criminal conduct of the defendant neither caused nor threatened serious harm.

(2) The defendant did not contemplate that his conduct would cause or threaten serious harm.

(3) The defendant acted under a strong provocation.

(4) There were substantial grounds tending to excuse or justify the criminal conduct of the defendant, though failing to establish a defense.

(5) The victim of the criminal conduct of the defendant induced or facilitated its commission.

(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained.

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.

(8) The criminal conduct of the defendant was the result of circumstances unlikely to recur.

(9) The character and attitudes of the defendant

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indicate that he is unlikely to commit another crime.

(10) The defendant is particularly likely to respond affirmatively to probationary treatment.

(11) The confinement of the defendant would entail excessive hardship to him or his dependents.

(12) Such other grounds as indicate the desirability of probation.

42 PA.CON.S.TAT.ANN. § 9722

When necessary, the terms of a probationary sentence can be tailored to address issues in a cases involving sexual abuse. A probationer may be required to:

remain at home during the hours designated by the court; remain within the court's jurisdiction or in a psychiatric institution indefinitely; undergo medical treatment; perform community service; make restitution or reparations; refrain from frequenting certain locations and/or associating with particular individuals; permit the probation officer to visit his home frequently; devote himself to a specific occupation; and/or satisfy a variety of other conditions that the court deems necessary.

Commonwealth v. Williams, 574 Pa. 487, 509 n. 15, 832 A.2d 962, 975 n. 15 (2003). The conditions of probations listed in the statute, 42 PA.CON.S.TAT.ANN. § 9754 include:

§ 9754. Order of probation

(a) General rule.--In imposing an order of probation the court shall specify at the time of sentencing the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision.

...

(c) Specific conditions.--The court may as a condition of its order require the defendant:

(1) To meet his family responsibilities.

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(2) To devote himself to a specific occupation or employment.

(2.1) To participate in a public or nonprofit community service program unless the defendant was convicted of murder, rape, aggravated assault, arson, theft by extortion, terroristic threats, robbery or kidnapping.

(3) To undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose.

(4) To pursue a prescribed secular course of study or vocational training.

(5) To attend or reside in a facility established for the instruction, recreation, or residence of persons on probation.

(6) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons.

(7) To have in his possession no firearm or other dangerous weapon unless granted written permission.

(8) To make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.

(9) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or his employment.

(10) To report as directed to the court or the probation officer and to permit the probation officer to visit his home.

(11) To pay such fine as has been imposed.

(12) To participate in drug or alcohol treatment programs.

(13) To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom

of conscience.

(14) To remain within the premises of his residence during the hours designated by the court.

42 PA.CON.S.STAT.ANN. § 9754(c).

9.9 THE SENTENCING HEARING

A. The Defendant's Right to Counsel

Proceedings relating to the imposition of a criminal sentence constitute a critical stage in the criminal proceedings, therefore, absent waiver, the defendant must be represented by counsel. *Commonwealth v. D'Amato*, 579 Pa. 490, 516-517, 856 A.2d 806, 821-522 (2004). "The right to counsel is enshrined in both the United States and Pennsylvania Constitutions. See U.S. Const. Amend. VI; Pa. Const. Art. 1, § 9. Moreover, '[t]here is no disputing that there exists a constitutional right to counsel at sentencing.'" *Commonwealth v. Smith*, 69 A.3d 259, 265 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 83 A.3d 168 (2013).

- Pursuant to the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution, a person accused of a crime and the subject of a criminal prosecution has a constitutional right to counsel at every stage of a criminal proceeding where substantive rights of the accused may be affected. *Commonwealth v. Johnson*, 574 Pa. 5, 13, 828 A.2d 1009, 1014 (2003). Pa.R.Crim.P. 704(c)(1) adopts the right to counsel at sentencing and provides that the sentencing judge must afford counsel for both parties the opportunity to present information and argument relative to sentencing.

1. Pre-sentence Investigation Report

In *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678 (1973), the Pennsylvania Supreme Court held that when the trial court orders a presentence investigation report, defense counsel has a right to examine its contents before sentencing and, if he contests any portion, to offer evidence in rebuttal. Defense counsel must make a request for the report. *Commonwealth v. Craft*, 450 A.2d 1021, 1023 (Pa. Super. 1982).

In *Phelps*, the Supreme Court also adopted the American Bar Association's Standards for Criminal Justice Sentencing regarding disclosure. The current standard is as follows:

Standard 18-5.7 Disclosure of report to parties

(a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.

(b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford *a reasonable opportunity for challenge and verification of material information in the report.*

(c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

ABA Standards for Criminal Justice: Sentencing, 3d Ed., Standard 18-5.7.

B. The Defendant's Right of Allocution

The right to "allocution" is the opportunity for the defendant to make a "statement ... to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence." *Black's Law Dictionary* 75 (7th ed. 1999).

In Pennsylvania, it is well established that a defendant is entitled to the right of allocution. *Commonwealth v. Green*, 862 A.2d 613, 620 (Pa.Super. 2004)(en banc), *appeal denied*, 584 Pa. 692, 882 A.2d 477 (2005). The sentencing court must advise the defendant of his right to speak *prior* to being sentenced. *Commonwealth v. Thomas*, 520 Pa. 206, 209, 553 A.2d 918, 919 (1989). *See also, Commonwealth v. Jacobs*, 900 A.2d 368, 375-376 (Pa. Super. 2006), *appeal denied*, 591 Pa. 681, 917 A.2d 313 (2006).

The right to allocution is included in the Pennsylvania Rules of Criminal Procedure:

PA.R.CRIM.P. 704

...

(C) Sentencing Proceeding.

(1) At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.

PA.R.CRIM.P. 704(C)(1). Consistent with established case law, the appellate courts have adhered to the principle that a defendant who is not permitted to address the trial judge prior to sentencing is automatically entitled to a new sentencing hearing. *See, e.g.,*

Commonwealth v. Newton, 875 A.2d 1088, 1090 (Pa.Super. 2005), *appeal denied*, 586 Pa. 724, 890 A.2d 1058 (2005). Furthermore, an alleged denial of the right of allocution relates to the legality of the sentence, and is therefore not waived on collateral review if not raised on direct appeal. *Id.*

C. The Victim's and Prosecutor's Right to Speak at Sentencing

In accordance with Section 201 of the Crime Victim's Act,³¹ the victim of a crime has the right to be present at sentencing and make comment before the pronouncement of sentence:

§ 11.201

Victims of crime have the following rights:

...

(5) To have opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. The written statement shall be included in any predisposition or presentence report submitted to the court. Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.

18 PA.STAT. § 11.201(5).

Additionally, PA.R.CRIM.P. 704(c)(1) provides that the sentencing judge must afford counsel for *both* parties the opportunity to present information and argument relative to sentencing. Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded "the entire panoply of criminal trial procedural rights." *Commonwealth v. Medley*, 725 A.2d 1225, 1229 (Pa.Super. 1999), *appeal denied*, 561 Pa. 672, 749 A.2d 468 (2000), *quoting Commonwealth v. Wright*, 508 Pa. 25, 36, 494 A.2d 354, 360 (1985), *affirmed*, 477 U.S. 79 (1986).

- *Commonwealth v. Gaddis*, 639 A.2d 462, 470 (Pa.Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994): In case involving charges of sexual, physical and emotion abuse of children, the testimony from the trial, arguments of counsel, and the pre-sentence report, which include the defendant's prior record, constituted the relevant and material information required to impose a reasonable sentence.

³¹ The Crime Victims Act, 18 PA.STAT. §§ 11.101 - 5102.

9.10 PROBATION VIOLATION HEARING

The Commonwealth establishes a probation violation meriting revocation when it shows, by a preponderance of the evidence, that the probationer's conduct violated the terms and conditions of his probation, and that probation has proven an ineffective rehabilitation tool incapable of deterring probationer from future antisocial conduct. *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008). "[I]t is only when it becomes apparent that the probationary order is not serving this desired end [of rehabilitation] the court's discretion to impose a more appropriate sanction should not be fettered." *Commonwealth v. Carver*, 923 A.2d 495, 498 (Pa. Super. 2007) (citation omitted).

Chapter Nine

Addendum 1

Suggested Colloquy following Guilty Plea or Guilty Verdict

Mr./Ms. _____, you have been found guilty/pled guilty to the following crime(s):

The maximum penalty for each of the offenses is:

In accordance with Pennsylvania Rule of Criminal Procedure 704, sentencing is scheduled for _____.

In preparation for sentencing, I am ordering the adult probation department to conduct a pre-sentence investigation and prepare a pre-sentence investigation report which will be available for you and your attorney, as well as the Commonwealth's attorney, to review prior to sentencing.

[The reasons I am dispensing with a pre-sentence report are: _____

_____]

I am also ordering:

- A psychological examination and report;
- A psychiatric examination and report;
- A drug and alcohol assessment;
- An assessment under § 9795.4 of Megan's Law in light of your conviction of the crime of _____.
- Other evaluations or assessments: _____.

If you have any extraordinary circumstances, I will hear an oral motion in arrest of judgment, for a judgment of acquittal, or for a new trial prior to your sentencing. The motion, and my decision, must be made before you are sentenced.

Do you have any questions?

Trial Judge must continue, modify or revoke bail.

Post Trial Procedures and Sentencing

Addendum Notes:

- (1) Sentencing must ordinarily be scheduled within 90 days of conviction or the entry of a guilty/*nolo contendere* plea. PA.R.CRIM.P. 704(A)(1).
- (2) In accordance with PA.R.CRIM.P. 702(A)(2), the trial judge must state on the record the reasons for dispensing with a pre-sentence report if any of the following apply:
 - Incarceration for one year or more is possible;
 - The defendant is less than 21 years old;
 - The defendant is a first time offender and has not been sentenced before as an adult.
- (3) For purposes of a psychiatric or psychological examination, the defendant may be remanded to a clinic, hospital, institution or state correctional diagnostic and classification center for up to 60 days. PA.R.CRIM.P. 702(B).

Pennsylvania's Maximum Sentencing Provisions

GRADE	LONGEST ALLOWABLE MAXIMUM SENTENCE (1)	LONGEST ALLOWABLE MINIMUM SENTENCE (2)	MAXIMUM ALLOWABLE FINE (3)
Felony 1	20 years	10 years	\$25,000
Felony 2	10 years	5 years	\$25,000
Felony 3	7 years	3.5 years	\$15,000
Misdemeanor 1	5 years	2.5 years	\$10,000
Misdemeanor 2	2 years	1 year	\$5,000
Misdemeanor 3	1 year	6 months	\$2,500
Summary	90 days	45 days	\$300 if none higher under law

1. 18 PA.CON.S.TAT.ANN. §§110 3 – 1105.

2. The minimum may not exceed one-half the maximum sentence that is imposed: 42 PA.CON.S.TAT.ANN. §9755(b) and §9756(b)(1).

3. 18 PA.CON.S.TAT.ANN. §1101. The statute provides, also, that the fine may be any higher amount equal to double the pecuniary gain derived from the offense by the offender, or any higher or lower amount specifically authorized by statute.

Chapter 10

APPELLATE REVIEW AND POST-CONVICTION RELIEF

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10.1 CHAPTER OVERVIEW

This chapter discusses various aspects of the criminal appeals process pertinent to sexual violence crimes. Section 10.2 defines and discusses particular trial court orders from which there may be an appeal, including:

- Final orders;
- Interlocutory orders appealable as of right;
- Interlocutory orders appealable by permission; and
- Collateral orders.

The following two sections describe the necessary procedural steps both the appellant and the trial court must take once a notice of appeal has been filed. Section 10.3 discusses the option that the trial court has to file an opinion pursuant to PA.R.A.P. 1925 following an appeal. The rules which specify the requirements for transmission of the certified record are explained in Section 10.4.

Section 10.5 discusses the scope and standards of review likely to be applicable to appeals from orders in cases of sexual violence.

Finally, Section 10.6 provides a brief discussion of post conviction procedures.

10.2 APPEALABLE ORDERS

The Superior Court has exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of the Judicial Code within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court. 42 PA.CON.S.STAT.ANN. §742.

A. Final Orders

An appeal may be taken as of right from any final order of a trial court. PA.R.A.P. 341(a). The purpose of limiting appeals to final orders is to avoid piecemeal appeals. *Commonwealth v. Sartin*, 708 A.2d 121, 122 (Pa. Super. 1998).

An appeal before final judgment will be permitted, however, when the defense can demonstrate exceptional circumstances, i.e., when the need for immediate review outweighs the purposes of the final judgment rule. *Commonwealth v. Scott*, 578 A.2d

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933, 941 (Pa. Super. 1990), *appeal denied*, 528 Pa. 629, 598 A.2d 283 (1991).

1. Definition

PA.R.A.P. 341(b) defines a final order in a criminal matter as any order that disposes of all claims or of all parties, or that is expressly defined as a final order by statute.

(a) Examples of Final Orders

- Judgment of sentence. *Commonwealth v. Heilman*, 876 A.2d 1021, 1026 (Pa. Super. 2005).¹
- Orders of disposition in juvenile cases. *In re M.D.*, 839 A.2d 1116, 1118 (Pa. Super. 2003).²
- Ordinarily, the denial of a motion for dismissal on double jeopardy grounds.³ *Commonwealth v. Orié*, 610 Pa. 552, 22 A.3d 1021, 1024 (2011); *Commonwealth v. Minnis*, 83 A.3d 1047 (Pa. Super. 2014) (*en banc*).
- Any pretrial order that “serves to put the litigants out of court by ending the litigation or entirely disposing of the case.” *Commonwealth v. Rosario*, 538 Pa. 400, 404, 648 A.2d 1172, 1174 (1994).

(b) Examples of Non-Appealable Orders

- Generally, pretrial orders, such as when a defense motion for suppression is denied, are considered interlocutory and not appealable. *Commonwealth v. Matis*, 551 Pa. 220, 230, 710 A.2d 12, 17 (1998).
- Order granting severance of criminal informations is not a final order. *Commonwealth v. Smith*, 518 Pa. 524, 527, 544 A.2d 943, 945 (1988); *Commonwealth v. White*, 818 A.2d 555, 558 (Pa. Super. 2003), *rev. in part on other grounds*, 589 Pa. 642, 910 A.2d 648 (2006).

¹ “It is well-established that a criminal defendant may take an appeal only from the judgment of sentence. An appeal from any prior order must be quashed.” *Commonwealth v. McPherson*, 533 A.2d 1060, 1061 (Pa. Super. 1987) (internal citations omitted). “An appeal prior to final judgment is permitted in exceptional circumstances, such as to prevent a great injustice, or when the issue involved is one of great public importance.” *Commonwealth v. Swartz*, 579 A.2d 978, 980 (Pa. Super. 1990).

² Although the Juvenile Act does not provide a right of appeal, a juvenile’s right of appeal stems from Article V Section 9 of the Pennsylvania Constitution. *In re J.E.D.*, 879 A.2d 288, 290 (Pa. Super. 2005), *appeal denied*, 586 Pa. 713, 889 A.2d 1216 (2005).

³ Denial of a petition for dismissal on double jeopardy grounds is not appealable where the trial court makes a finding that the petition was frivolous. *Commonwealth v. Brady*, 510 Pa. 336, 346, 508 A.2d 286, 291 (1986). A defendant may seek preliminary appellate review of the finding of “frivolousness” by way of a “petition for review” in the Superior Court utilizing Pa.R.A.P. 1511. *Commonwealth v. Orié*, 610 Pa. 552, 22 A.3d 1021, 1028 (2011).

- Denial of pretrial habeas corpus petition based on the insufficiency of evidence is not appealable, absent a showing of exceptional circumstances. *Commonwealth v. Hess*, 489 Pa. 580, 588–589, 414 A.2d 1043, 1047-1048 (1980).
- Juvenile review order that maintains the status quo. *In re M.D.*, 839 A.2d 1116, 1121 (Pa. Super. 2003).

2. Appeals by the Commonwealth in Criminal Cases

Orders in criminal cases which are considered final are immediately appealable under Pa.R.A.P. 341(e). Pennsylvania Rule of Appellate Procedure 341(e) provides:

(e) Criminal orders. An appeal may be taken by the Commonwealth from any final order in a criminal matter only in the circumstances provided by law.⁴

In *Commonwealth v. Garcia*, 72 A.3d 681 (Pa. Super. 2013), the Commonwealth was permitted to file an immediate appeal after the trial court dismissed criminal charges based upon the contention that the Commonwealth had failed to comply with a pretrial discovery order. *Id.* at 682.

(a) Habeas Corpus

Order granting pretrial *habeas corpus* petition is final and appealable by the Commonwealth. *Commonwealth v. Jackson*, 849 A.2d 1254, 1256 (Pa. Super. 2004).

(b) Severance

Order granting severance of two or more criminal informations is interlocutory and not appealable. *Commonwealth v. Smith*, 518 Pa. 524, 527, 544 A.2d 943, 945 (1988). In *Smith*, a plurality decision, an order for severance did not constitute one that substantially handicapped the prosecution because the Commonwealth still was permitted to seek convictions on the charges it filed, *albeit* in two separate proceedings rather than one.

B. Interlocutory Orders Appealable as of Right

1. Change of Venue or Venire in Criminal Cases

An appeal may be taken as of right by the defendant or the prosecution

⁴ Pa.R.A.P. 341(e).

from an order changing venue or venire in a criminal proceeding. PA.R.A.P. 311(a)(3); *See, e.g., Commonwealth v. Shoop*, 617 A.2d 351, 352 n.1 (Pa. Super. 1992) (Commonwealth may appeal from order granting change of venue). However, an order denying a petition for a change of venue or venire is not appealable. PA.R.A.P. 311, *note*; *Commonwealth v. Swanson*, 424 Pa. 192, 194, 225 A.2d 231, 232-233 (1967).⁵

An appeal taken under Rule 311(a)(3) must be filed within ten days of the date the order changing venue or venire was entered. PA.R.A.P. 903(c)(1)(i).

2. New Trials in Criminal Cases

An appeal may be taken as of right from an order in a criminal proceeding awarding a new trial where (1) the defendant claims that the proper disposition of the matter would be an absolute discharge, or (2) where the Commonwealth claims that the lower court committed an error of law. PA.R.A.P. 311(a)(6); *Commonwealth v. Campbell*, 421 A.2d 681, 683 (Pa. Super. 1980) (not interlocutory where defendant contended that proper disposition was absolute discharge); *Commonwealth v. McDougall*, 841 A.2d 535, 536-537 (Pa. Super. 2003), *appeal denied*, 579 Pa. 701, 857 A.2d 678 (2004) (Commonwealth permitted to appeal trial court's order as an alleged error of law – trial court had granted defendant's motion to withdraw guilty plea after sentencing).

The granting of a mistrial due to a deadlocked jury is not the equivalent of an award of a new trial and is, thus, not appealable. *Commonwealth v. McPherson*, 533 A.2d 1060, 1062 (Pa. Super. 1987).

3. Recusal

The Commonwealth was entitled to an interlocutory appeal as of right from trial court's denial of Commonwealth's motion for recusal in murder prosecution, where Commonwealth certified in good faith that denial of motion would substantially handicap its prosecution of case. *Commonwealth v. White*, 589 Pa. 642, 650-651, 910 A.2d 648, 653-655 (2006).

4. Appeals With Commonwealth Certification

The Commonwealth may take an appeal as of right from an order that does not end the entire case where it certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution. PA.R.A.P. 311(d); *Commonwealth v. Dillon*, 863 A.2d 597, 600 (Pa. Super. 2004), *aff'd*, 592 Pa. 351,

⁵ The note to Rule 311(a)(3) states that:

Pa.R.Crim.P. 584 (motion for change of venue or change of venire) treats changes of venue and venire the same. Thus, an order changing venire is appealable by the defendant or the Commonwealth, while an order refusing to change venire is not.

925 A.2d 131 (2007).⁶ Once the required certification is made, the Commonwealth is not required to demonstrate that the prosecution has in fact been handicapped. ***Commonwealth v. Gordon***, 652 A.2d 317, 323 n.8 (Pa. Super. 1994), *aff'd*, 543 Pa. 513, 673 A.2d 866 (1996).

(a) Suppression Orders

An order granting a defendant's motion to suppress evidence is appealable pursuant to PA.R.A.P. 311(d). ***Commonwealth v. Bender***, 811 A.2d 1016, 1018 (Pa. Super. 2002). The Commonwealth must certify in good faith that the suppression order terminates or substantially handicaps the prosecution. The rationale of Rule 311(d) recognizes that, where incriminating evidence suppressed, and a defendant acquitted, the Commonwealth would be precluded from again trying the case due to double jeopardy restrictions. ***Commonwealth v. Cosnek***, 575 Pa. 411, 416–417, 836 A.2d 871, 873-874 (2003).

Generally, denial of a Commonwealth's motion *in limine* to exclude a defendant's evidence is not appealable. ***Commonwealth v. Cosnek***, 575 Pa. 411, 419–420, 836 A.2d 871, 876-877 (2003). *See also*, ***Commonwealth v. Shearer***, 584 Pa. 134, 882 A.2d 462 (2005).

However, an order that denies a Commonwealth motion to exclude evidence pursuant to the Rape Shield Law, 18 PA.CON.S.TAT.ANN. § 3104, has the same effect as a suppression order and is, therefore, appealable. ***Commonwealth v. Jones***, 826 A.2d 900, 907 (Pa. Super. 2003).

(b) Quashal Order

The Commonwealth is permitted to appeal an order of the trial court which quashes a criminal charge. A quashal order terminates the prosecution as to the quashed charge, and therefore is appealable when accompanied by the certification in Rule 311(d). The Supreme Court also found that the Commonwealth may appeal it as a "final" order because "an order quashing a charge is unquestionably 'final' . . ." ***Commonwealth v. Karetny***, 583 Pa. 514, 527, 880 A.2d 505, 512-513 (2005).

(c) Secure Presence of Necessary Witness

An order denying the Commonwealth's motion for a continuance to secure the presence of a necessary witness is appealable. ***Commonwealth v. Matis***, 551 Pa. 220, 233, 710 A.2d 12, 18 (1998).

C. Interlocutory Appeal by Permission

⁶ *See also* PA.R.A.P. 904(e): "When the Commonwealth takes an appeal pursuant to [PA.R.A.P.] 311(d), the notice of appeal shall include a certification by counsel that the order will terminate or substantially handicap the prosecution."

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The party seeking review, in situations in which the order under scrutiny does not fall under PA.R.A.P. 341 as a final order or as an interlocutory order which may be appealed as of right under PA.R.A.P. 311, may file for a permissive appeal under PA.R.A.P. 312. Rule 312 states: “An appeal from an interlocutory order may be taken by permission pursuant to Chapter 13 (interlocutory appeals by permission).” PA.R.A.P. 1311 incorporates the certification requirement from 42 PA.CON.S.STAT.ANN. § 702(b):

(a) General rule. An appeal may be taken by permission under 42 Pa.C.S. § 702(b) (interlocutory appeals by permission) from any interlocutory order of a lower court or other governmental unit. See Rule 312 (interlocutory appeals by permission).⁷

The procedure for an interlocutory appeal taken by permission is set forth by statute:

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 PA.CON.S.STAT.ANN. § 702(b). Rule 1311 of the Rules of Appellate Procedure governs petitions for permission to appeal.

An application for amendment of an interlocutory order to include the express statement specified in Section 702(b) must be filed in the trial court within 30 days after entry of the interlocutory order. The requisite language of Section 702(b) provides:

[T]hat such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.⁸

42 PA.CON.S.STAT.ANN. § 702(b); *see also* PA.R.A.P. 1311; ***Commonwealth v. Dennis***, 580 Pa. 95, 102, 859 A.2d 1270, 1275 (2004). Once the trial court has certified the order, the appellate court has full discretion in deciding whether to accept appellate review. *Id.*, at 102-103, 859 A.2d at 1275. The certification is a jurisdictional prerequisite for the interlocutory appeal. ***Herb v. Snyder***, 686 A.2d 412, 414 (Pa. Super. 1996), *appeal*

⁷ Pa.R.A.P. 1311.

⁸ Pa.R.A.P. 1312 specifies that a petition for permission to appeal shall include (1) a statement concerning the basis for the appellate court’s jurisdiction, (2) the text of the order in question, (3) a concise statement of the case, (4) the controlling question(s) of law presented for review, (5) a concise statement concerning why a substantial ground exists for a difference of opinion, (6) copies of the opinions related to the order in question, and (7) the language of pertinent constitutional provisions or statutes.

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denied, 548 Pa. 659, 698 A.2d 67 (1997). PA.R.A.P. 1311(b) provides the procedure for the party to file for the interlocutory appeal in the Superior Court.

Therefore, an appeal may be taken from an interlocutory order pursuant to a petition for permission to appeal if all of the following elements are satisfied:

- (1) the order involves a controlling question of law;
- (2) there is a substantial ground for difference of opinion regarding the question of law; and
- (3) an immediate appeal would materially advance the ultimate termination of the matter.

The certified order must contain the statement prescribed by 42 PA.CON.S.TAT. ANN. § 702(b), and the appellate court then decides whether to accept appellate review. *Commonwealth v. Dennis*, 580 Pa. 95, 102, 859 A.2d 1270, 1275 (2004). The appellate court may decline to exercise jurisdiction over the appeal even after the certification by the trial court. *Kensey v. Kensey*, 877 A.2d 1284, 1289 (Pa. Super. 2005).

Where the trial court refuses to amend the order, the petitioner may file a petition for review⁹ with the appropriate appellate court to determine whether the trial court's refusal was so egregious as to justify prerogative appellate correction. PA.R.A.P. 1311, *note*. A petition for permission to appeal does not stay the proceedings of the trial court unless the trial court so orders. 42 PA.CON.S.TAT. ANN. § 702(c). The requirements for the petition for review are specified in PA.R.A.P. 1513.

1. Petition for Review

In *Commonwealth v. Boyle*, 516 Pa. 105, 532 A.2d 306 (1987), the defendant filed a pre-trial motion, which was denied, seeking dismissal of the charges against him on the grounds that the trial court did not have jurisdiction over the case. Following defendant's petition to amend the order to include the language required by Section 702(b), the trial court failed to act on the petition. Thereafter, defendant filed a petition for review, which the Superior Court granted. On appeal to the Pennsylvania Supreme Court, that Court noted that the effect of the Superior Court's order was (1) to imply that the trial court had abused its discretion, and (2) to supply the certification required by Section 702(b). *Id.*, at 111, 532 A.2d at 309.

In *Commonwealth v. Tilley*, 566 Pa. 312, 780 A.2d 649 (2001), the defendant, through post conviction proceedings, filed a discovery motion seeking "all data" regarding the races of the members of defendant's jury. The trial court granted the motion and the Commonwealth requested that the trial court certify the order for appeal. The trial court refused and the Commonwealth, thereafter,

⁹ See Chapter 15 of the Rules of Appellate Procedure (Petition for Review).

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filed a notice of appeal with the Supreme Court¹⁰ and argued that the Supreme Court could exercise jurisdiction to review the merits pursuant to a petition for review. *Id.*, at 316, 780 A.2d at 651. Upon review of the three principles governing petitions for review, the Supreme Court accepted jurisdiction of the appeal. *Id.*, at 316-317, 780 A.2d at 651-652.

D. Collateral Orders

An appeal may be taken as of right from a collateral order of a lower court. PA.R.A.P. 313(a).

A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

PA.R.A.P. 313(b).

An order is collateral if (1) the issue surrounding the disputed order may be addressed without analyzing the ultimate issue in the underlying case, and (2) the issue must involve rights deeply rooted in public policy going beyond the particular litigation at hand. *J.S. v. Whetzel*, 860 A.2d 1112, 1117 (Pa. Super. 2004).

An order that falls under Rule 313 is immediately appealable as of right simply by filing a notice of appeal. PA.R.A.P. 313, *note*.

In *Commonwealth v. Sartin*, 708 A.2d 121, 122 (Pa. Super. 1998), the Superior Court interpreted PA.R.A.P. 313 and held that the collateral order rule:

[P]rovides that appeals may be taken from orders that are “[1] separable from and collateral to the main cause of action [2] where the right involved is too important to be denied review and [3] the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.” Pa.R.A.P. 313(b). This third prong has also been interpreted to mean that the matter must be effectively unreviewable on appeal from final judgment.

708 A.2d at 122 (citations omitted).

1. Standard of Review

“A court may conduct a balancing test between the nature of the potentially unprotected right and the efficiency interest of the final judgment rule.” *J.S. v. Whetzel*, 860 A.2d at 1117.

¹⁰ Since *Tilley* was a capital case, the defendant appealed directly to the Supreme Court pursuant to 42 PA.CON.S.TAT.ANN. § 9711(H).

2. Collateral Orders in Criminal Cases

- Order denying a motion to dismiss an indictment on double jeopardy grounds is collateral and appealable if the trial court has found that the motion was not frivolous. *Commonwealth v. Brady*, 510 Pa. 336, 341, 508 A.2d 286, 288 (1986).
- Order limiting publicity over court proceedings in criminal case. *Commonwealth v. Lambert*, 723 A.2d 684, 688 (Pa. Super. 1998).
- Order granting the defense request to have a child victim in a sexual violence case be compelled to submit to a psychological examination to determine whether he was competent to testify. *Commonwealth v. Shearer*, 584 Pa. 134, 882 A.2d 462 (2005).

10.3 OPINION IN SUPPORT OF ORDER

A. Pennsylvania Rule of Appellate Procedure 1925

Pennsylvania Rule of Appellate Procedure 1925 is intended to aid trial judges in identifying and focusing upon those issues which the appellant plans to raise on appeal. With reference to the decisions of the trial court that are being challenged on appeal, when a trial court uses Rule 1925 to either specify in the record where the reasons in support of the trial court's decisions may be found, or files a Rule 1925 opinion explaining its rationale, the appellate court can conduct a meaningful review. The rule gives the trial court the opportunity to order the appellant to file a statement of errors so that the trial judge can appropriately address those issues which will be argued to the appellate court.

PA.R.A.P. 1925 was extensively amended in 2007 and 2009.

The revisions were designed to resolve a number of problems that had complicated enforcement of the Rule. Those problems included a relatively brief amount of time allotted for filing a Statement [of errors complained of on appeal], uncertainty surrounding an appellant's right to an extension of time for filing a Statement, and requirements that a Statement be concise while at the same time setting forth all objections to the order at issue. The 2007 amendments addressed these difficulties and made sweeping changes which included a longer period for filing, explicit provisions for extensions of time to file, and detailed direction on the information a Statement should include.

Commonwealth v. Gravely, 601 Pa. 68, 74, 970 A.2d 1137, 1140 (2009).

PA.R.A.P. 1925 provides, in pertinent part:

Rule 1925. Opinion in Support of Order

(a) Opinion in support of order.

(1) *General rule.*--Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

If the case appealed involves a ruling issued by a judge who was not the judge entering the order giving rise to the notice of appeal, the judge entering the order giving rise to the notice of appeal may request that the judge who made the earlier ruling provide an opinion to be filed in accordance with the standards above to explain the reasons for that ruling.

. . .

(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.--If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

(1) *Filing and service.*--Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail as provided in PA.R.A.P. 121(a) and shall be complete on mailing if appellant obtains a United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified, in compliance with the requirements set forth in PA.R.A.P. 1112(c). Service on parties shall be concurrent with filing and shall be by any means of service specified under PA.R.A.P. 121(c).

(2) *Time for filing and service.*--The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement.

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Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement nunc pro tunc.

(3) *Contents of order.*--The judge's order directing the filing and service of a Statement shall specify:

- (i) the number of days after the date of entry of the judge's order within which the appellant must file and serve the Statement;
- (ii) that the Statement shall be filed of record;
- (iii) that the Statement shall be served on the judge pursuant to paragraph (b)(1);
- (iv) that any issue not properly included in the Statement timely filed and served pursuant to subdivision (b) shall be deemed waived.

(4) *Requirements; waiver.*

- (i) The Statement shall set forth only those rulings or errors that the appellant intends to challenge.
- (ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. The judge shall not require the citation to authorities; however, appellant may choose to include pertinent authorities in the Statement.
- (iii) The judge shall not require appellant or appellee to file a brief, memorandum of law, or response as part of or in conjunction with the Statement.
- (iv) The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver.

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(v) Each error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court; this provision does not in any way limit the obligation of a criminal appellant to delineate clearly the scope of claimed constitutional errors on appeal.

(vi) If the appellant in a civil case cannot readily discern the basis for the judge's decision, the appellant shall preface the Statement with an explanation as to why the Statement has identified the errors in only general terms. In such a case, the generality of the Statement will not be grounds for finding waiver.

(vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

PA.R.A.P. 1925(a)&(b).

1. Direction to File Statement of Matters Complained of pursuant to PA.R.A.P. 1925(b)

The purpose of filing a statement of matters complained of on appeal is to aid trial judges in identifying and focusing upon the disputed issues. *Commonwealth v. Lord*, 553 Pa. 415, 419, 719 A.2d 306, 308 (1998).

In a recent decision of the Pennsylvania Supreme Court, a full analysis of the rule was provided:

Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms; the Rule's provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule's requirements; Rule 1925 violations may be raised by the appellate court *sua sponte*, and the Rule applies notwithstanding an appellee's request not to enforce it; and, if Rule 1925 is not clear as to what is required of an appellant, on-the-record actions taken by the appellant aimed at compliance may satisfy the Rule. We yet again repeat the principle first stated in *Lord* that must be applied here: "[I]n order to preserve their claims for appellate review, [a

appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to PA.R.A.P. 1925. Any issues not raised in a PA.R.A.P. 1925(b) statement will be deemed waived.”

Commonwealth v. Hill, 609 Pa. 410, 427, 16 A.3d 484, 494 (2011).

When the trial court orders an appellant to file a concise statement of matters complained of on appeal, appellant must comply. When the trial court enters a Rule 1925(b) order, the clerk of courts is required to provide copies of the order for each party and their attorney. *Commonwealth v. Hess*, 570 Pa. 610, 615, 810 A.2d 1249, 1252 (2002). However, it is the appellant’s responsibility to properly file the statement and include those issues which the appellant wishes to preserve for appellate review. *Commonwealth v. Mattison*, 82 A.3d 386, 393 (2013).

2. Waiver of Issues

Initially, there can be no waiver inquiry regarding issues preserved for appellate review if the trial court does not order a Rule 1925(b) statement:

Because the trial court did not order the filing of a Rule 1925(b) statement, we will not conduct a waiver inquiry pursuant to PA.R.A.P. 1925(b)(4). The requirements of Rule 1925(b) are not invoked in cases where there is no trial court order directing an appellant to file a Rule 1925(b) statement. See *Commonwealth v. Thomas*, 305 Pa.Super. 158, 451 A.2d 470, 472 n. 8 (1982). (“[T]he lower court must order a concise statement of [errors] complained of on appeal and appellant must fail to comply with such directive before this Court can find waiver [.]”); see also *Commonwealth v. Hess*, 570 Pa. 610, 810 A.2d 1249, 1252 (2002).

Commonwealth v. Antidormi, 84 A.3d 736, 745 n. 7 (Pa.Super. 2014).

However, PA.R.A.P. 1925(b)(4)(vii) provides that if a Rule 1925(b) statement is ordered, then either the defense or the Commonwealth, depending upon who is the appellant, will waive appellate review of issues if the issues are not raised in the statement. *Commonwealth v. Elia*, 83 A.3d 254, 263 (Pa. Super. 2013); *Commonwealth v. Mendez*, 74 A.3d 256, 259-260 (Pa. Super. 2013).

(a) Exceptions to “Strict Waiver” Rule

- Good faith effort to file an adequate statement under particular circumstances avoids waiver. *Commonwealth v. Moran*, 823 A.2d 923, 926 (Pa. Super. 2003). But in *Commonwealth v. Otero*, 860 A.2d 1052 (Pa. Super. 2004), *appeal denied*, 584 Pa. 706, 885 A.2d

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41 (2005), the court did not find the tardy action of the defense to constitute a “good faith” effort to cure an insufficient statement.

- See *Greater Erie Industrial Development Corp. v. Presque Isle Downs, Inc.*, 88 A.3d 222 (Pa. Super. 2014) regarding caveats to waiver.
- Issues will not be waived for failure to file a statement of matters complained of where the appellant was not properly served with order directing the appellant to file the statement. *Commonwealth v. Hess*, 570 Pa. 610, 618–619, 810 A.2d 1249, 1254–1255 (2002). But in *Commonwealth v. Douglas*, 835 A.2d 742 (Pa. Super. 2003), the Superior Court pointed out that a mere bald allegation that a party did not receive the Rule 1925 order is not sufficient; there must be evidence presented to the trial court which substantiates the allegation. 835 A.2d at 745.

(b) Remand in Lieu of Waiver

In the event that the Commonwealth or the defense fail to timely file statements pursuant to PA.R.A.P. 1925(b), the new amendments to the rule permit the remedy that a remand should be ordered by the Appellate Court to allow for the filing of such statement *nunc pro tunc*. PA.R.A.P. 1925(c)(3) allows for a remand if the appellant in a criminal case was ordered to file a statement and did not do so.

Rule 1925. Opinion in Support of Order

. . .

(c) Remand.

(1) An appellate court may remand in either a civil or criminal case for a determination as to whether a Statement had been filed and/or served or timely filed and/or served.

(2) . . .

(3) If an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been per se ineffective, the appellate court shall remand for the filing of a Statement *nunc pro tunc* and for the preparation and filing of an opinion by the judge.

(4) In a criminal case, counsel may file of record and

serve on the judge a statement of intent to file an *Anders/McClendon* brief in lieu of filing a Statement. If, upon review of the *Anders/McClendon* brief, the appellate court believes that there are arguably meritorious issues for review, those issues will not be waived; instead, the appellate court may remand for the filing of a Statement, a supplemental opinion pursuant to Rule 1925(a), or both. Upon remand, the trial court may, but is not required to, replace appellant's counsel.¹¹

Therefore, if counsel in a criminal case fails to file the Rule 1925(b) statement, it will be deemed to be clear ineffectiveness, and instead of having appeal rights restored in a post-conviction proceeding, the rule provides an effective way to provide the defendant with direct appeal rights by restoring the opportunity to file the statement *nunc pro tunc*.

No remand is necessary if the statement is filed late but the trial court addresses the issues in any event. Effective appellate review is possible because the appellate court does not have to treat the late filing as waiver, and the trial court considered the issues.

B. Opinion or Designation of Place in Record of Reasons pursuant to PA.R.A.P. 1925(a)

Rule 1925. Opinion in Support of Order

(a) Opinion in support of order.

(1) *General rule.*--Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

If the case appealed involves a ruling issued by a judge who was not the judge entering the order giving rise to the notice of appeal, the judge entering the order giving rise to the notice of appeal may request that the judge who made the earlier ruling provide an opinion to be filed in accordance with the standards above to explain the reasons for that ruling.¹²

¹¹ PA.R.A.P. 1925(c).

¹² PA.R.A.P. 1925(A).

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“The purpose of the rule is two-fold. First, it gives the appellate court a reasoned basis for the trial court’s disposition of the challenged orders. Second, it requires the judge to thoroughly consider his decision regarding the post-trial motions, in order to correct any problems that occurred at the trial level. This prevents unnecessary appeals.” ***Commonwealth v. Pate***, 617 A.2d 754, 758–759 (Pa. Super. 1992), *appeal denied*, 535 Pa. 656, 634 A.2d 219 (1993).

Generally, “a trial judge may not simply ... decline to address an issue” in the Rule 1925(a) opinion because the chief purpose of the rule is to give the appellate court a reasoned basis for the trial court’s disposition of the challenged orders and to enable the appellate court to conduct effective and meaningful review. The remedy for non-compliance with the rule is a remand to the trial judge. ***Commonwealth v. Wood***, 637 A.2d 1335, 1342 (Pa. Super. 1994).¹³

As the Superior Court said in ***Commonwealth v. McBride***, 957 A.2d 752 (Pa. Super. 2008):

In order to conduct a thorough and proper review on appeal, an opinion explaining the reasoning behind the trial court’s decisions is advantageous.

The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review. Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues that the parties plan to raise on appeal. Rule 1925 is thus a crucial component of appellate process.

Commonwealth v. Butler, 571 Pa. 441, 812 A.2d 631, 636 (2002), *citing Commonwealth v. Lord*, 553 Pa. 415, 419, 719 A.2d 306, 308 (1998).

McBride, 957 A.2d at 758.

Absent a trial court opinion, or in the face of an inadequate opinion, the proper remedy is for the appellate court to remand for preparation of a Rule 1925(a) opinion. ***Commonwealth v. Hood***, 872 A.2d 175, 178 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005). However, if the record from the proceedings in the trial court adequately appraises the appellate court of the trial court’s reasoning in relation to the issues raised in the appeal, the appellate court may decline to delay the case further by remanding for the preparation of a 1925(a) opinion, and proceed to review the merits

¹³ See also ***Commonwealth v. Atwood***, 547 A.2d 1257, 1260-1261 (Pa. Super. 1988), *appeal denied*, 521 Pa. 616, 557 A.2d 720 (1989):
To ask this Court to do the exhaustive review of that record [of an extensive trial] with no assistance from the trial judge who sat throughout the proceeding, makes a mockery of appellate review. Our system of appellate review provides an effective expeditious means for fair examination of the issues and resolution of them. It depends, however, on counsel and the trial court adhering to the Rules of Appellate Procedure if the system is not to be paralyzed.

of the appellant's claims. *Id.*; ***Commonwealth v. Griffin***, 785 A.2d 501, 504 (Pa. Super. 2001).

10.4 TRANSMISSION OF THE RECORD

A. Duty of the Trial Court: PA.R.A.P. 1931(b)

Pennsylvania Rule of Appellate Procedure 1931(b) provides:

After a notice of appeal has been filed the judge who entered the order appealed from shall comply with Rule 1925 (opinion in support of order), shall cause the official court reporter to comply with Rule 1922 (transcription of notes of testimony) or shall otherwise settle a statement of the evidence or proceedings as prescribed by this chapter, and shall take any other action necessary to enable the clerk to assemble and transmit the record as prescribed by this rule.¹⁴

While it is the appellant's duty to order the transcripts necessary for an appeal,¹⁵ it is the duty of the trial court to transmit the record to the appellate court. ***Commonwealth v. Williams***, 552 Pa. 451, 458, 715 A.2d 1101, 1104 (1998). PA.R.A.P. 1931(c). However, it is the responsibility of the appellant to ensure that the certified record is complete and transmitted to the appellate court. ***Commonwealth v. Preston***, 904 A.2d 1, 7 (Pa. Super. 2006), *appeal denied*, 591 Pa.663, 916 A.2d 632 (2007).

It is well established that the appellate courts may only consider facts which have been duly certified in the record on appeal from the trial court. ***Commonwealth v. Johns***, 812 A.2d 1260, 1261 (Pa. Super. 2002). Failure to ensure that the certified record contains the materials necessary for appellate review constitutes waiver of the issue. ***Commonwealth v. Preston***, 904 A.2d at 7. An item does not become part of the certified record merely by copying it and submitting it as part of the reproduced record. *Id.*, at 6.

- In ***Commonwealth v. Proetto***, 771 A.2d 823, 834 (Pa. Super. 2001), *aff'd*, 575 Pa. 511, 837 A.2d 1163 (2003), the defendant was convicted of criminal solicitation, obscene and other sexual materials, and corruption of minors, due to his communications with a 15-year-old girl over the internet. The appellant did not include the trial exhibits in the certified record, and therefore the Superior Court deemed his issue of sufficiency of the evidence waived. 771 A.2d at 834.

In circumstances where the evidence or other materials necessary for appellate review are missing from the certified record, but it is undisputed that they were properly before the trial court, the appellate courts have, on a case by case basis, made decisions

¹⁴ PA.R.A.P. 1931(b).

¹⁵ See PA.R.A.P. 1911(A).

to review the claims on the merits despite the deficiency in the certified record. *See, e.g., Commonwealth v. Pries*, 861 A.2d 951, 952 n.2 (Pa. Super. 2004), *appeal denied*, 584 Pa. 693, 882 A.2d 478 (2005) (document appeared in reproduced record and counsel for both the prosecution and the defendant agreed that the document had been submitted to the trial court); *Commonwealth v. Johns*, 812 A.2d 1260, 1262 (Pa. Super. 2002) (motion appeared in docket entries but not certified record).

10.5 STANDARD AND SCOPE OF REVIEW ON APPEAL

A. Appeals from Suppression Decisions

1. Denial of a Suppression Motion

The appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is well settled:

An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. [Because] the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Smith, 85 A.3d 530, 534 (Pa. Super. 2014), *quoting Commonwealth v. Reese*, 31 A.3d 708, 721 (Pa. Super. 2011) (citations omitted); *see also Commonwealth v. Lagenella*, --- Pa. ---, 83 A.3d 94, 98 (2013).

In a case where the Superior Court has reversed a trial court's denial of a suppression motion, the Pennsylvania Supreme Court's standard of review in addressing the Commonwealth's subsequent appeal is limited to determining whether the trial court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. *Commonwealth v. Smith*, --- Pa. ---, 77 A.3d 562, 568 (2013). Because the Commonwealth prevailed in the suppression court, the Supreme Court will consider only the Commonwealth's evidence and the evidence presented by the defendant that remains uncontradicted when read in the context of the record as a whole. *Id.* Where the record supports the factual findings of the trial court, the Supreme Court will be bound by those facts and may reverse only if the legal conclusions drawn from them are in error. *Id.*

2. Grant of a Suppression Motion

When the Commonwealth appeals the grant of a suppression motion, the appellate court is required to determine whether the record supports the suppression court’s factual findings and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. *In re O.J.*, 958 A.2d 561, 564 (Pa. Super. 2008)(*en banc*), *appeal denied*, 605 Pa. 688, 989 A.2d 918 (2010).

Where the defendant prevailed in the suppression court, the Superior Court may consider only the evidence of the defense and so much of the evidence for the Commonwealth as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the suppression court, the Superior Court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. *In re C.O.*, 84 A.3d 726, 731 (Pa. Super. 2014).

However, where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court’s conclusions of law are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts.

In re O.J., 958 A.2d at 564.

B. Appeals from Judgment of Sentence

1. Challenge to the Sufficiency of the Evidence

Pa.R.Crim.P. 606 addresses challenges to the sufficiency of the evidence:

Rule 606. Challenges to Sufficiency of Evidence

(A) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged in one or more of the following ways:

- (1) a motion for judgment of acquittal at the close of the Commonwealth’s case-in-chief;
- (2) a motion for judgment of acquittal at the close of all the evidence;
- (3) a motion for judgment of acquittal filed within 10 days after the jury has been discharged without agreeing upon a verdict;

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(4) a motion for judgment of acquittal made orally immediately after verdict;

(5) a motion for judgment of acquittal made orally before sentencing pursuant to Rule 704(B);

(6) a motion for judgment of acquittal made after sentence is imposed pursuant to Rule 720(B); or

(7) a challenge to the sufficiency of the evidence made on appeal.

(B) A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth's evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made.

(C) If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.¹⁶

The standard applied by the appellate court in reviewing a challenge to the sufficiency of the evidence is whether viewing all the evidence admitted at trial, and all reasonable inferences drawn from the evidence, in the light most favorable to the Commonwealth as verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Diamond*, --- Pa. ---, 83 A.3d 119, 126 (2013).

A number of additional standards also apply:

- the appellate court may not weigh the evidence and substitute its judgment for the fact-finder;
- the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence;
- any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances; and

¹⁶ PA.R.CRIM.P. 606.

- the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001), *appeal denied*, 569 Pa. 716, 806 A.2d 858 (2002).

In making this determination, because the sufficiency is a question of law, the standard of review is *de novo* and the scope of review is plenary. *Commonwealth v. Sanchez*, 614 Pa. 1, 36 A.3d 24, 37 (2011). The appellate court must evaluate the entire trial record and consider all the evidence received. *Commonwealth v. Markman*, 591 Pa. 249, 270, 916 A.2d 586, 598 (2007).

Lastly, applying the above standards, it must be acknowledged that the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. See *Commonwealth v. Bruce*, 916 A.2d 657, 661 (Pa. Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007).

2. Challenge to the Weight of the Evidence

PA.R.Crim.P. 607 addresses a motion challenging the weight of the evidence:

Rule 607. Challenges to the Weight of the Evidence

(A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

- (1) orally, on the record, at any time before sentencing;
- (2) by written motion at any time before sentencing; or
- (3) in a post-sentence motion.

(B)(1) If the claim is raised before sentencing, the judge shall decide the motion before imposing sentence, and shall not extend the date for sentencing or otherwise delay the sentencing proceeding in order to dispose of the motion.

(2) An appeal from a disposition pursuant to this paragraph shall be governed by the timing requirements of Rule 720(A)(2) or (3), whichever applies.¹⁷

¹⁷ PA.R.CRIM.P. 607.

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An allegation by the defendant that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Stokes*, 78 A.3d 644, 650 (Pa. Super. 2013). A challenge to the weight of the evidence, in contrast to a challenge to the sufficiency of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Lyons*, --- Pa. ---, 79 A.3d 1053, 1067 (2013).

As stated above, the remedy for a challenge to the weight of the evidence is a new trial.

A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that “notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.”

Commonwealth v. Lofton, 57 A.3d 1270, 1273 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 69 A.3d 601 (2013), *quoting Commonwealth v. Widmer*, 560 Pa. 308, 320, 744 A.2d 745, 752 (2000) (citations omitted).

On appeal from the trial court’s decision, the standard of the appellate court is:

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court’s determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court’s conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Hitner, 910 A.2d 721, 733 (Pa. Super. 2006), *appeal denied*, 592 Pa. 772, 926 A.2d 441 (2007).

In order to preserve for appellate review a claim that the conviction was against the weight of the evidence, the issue must be raised in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing. Pa.R.Crim.P. 607; *Commonwealth v. Priest*, 18 A.3d 1235, 1239 (Pa. Super. 2011).

3. Challenge to the Jury Charge/Instructions

The Rules of Criminal Procedure provide that a specific objection must be made before the jury retires to deliberate in order for the appellant to preserve an issue for appellate review.

Rule 647. Request for Instructions, Charge to the Jury, and Preliminary Instructions

...

(B) No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.¹⁸

Therefore, a defendant must object to a jury charge at trial, or else the challenge to the charge will be precluded on appeal. *Commonwealth v. Miskovitch*, 64 A.3d 672, 685 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 78 A.3d 1090 (2013). This way, the trial court is given an opportunity to correct any error or misrepresentation before the jury goes out to deliberate.

In cases where an objection to a charge is properly preserved for review:

[A]ppellate review of a trial court charge must involve a consideration of the charge as a whole to determine whether it was fair and complete. The review does not focus upon whether certain “magic words” were included in the charge. Rather, it is the effect of the charge as a whole that is controlling.

Commonwealth v. Saunders, 529 Pa. 140, 144, 602 A.2d 816, 818 (1992) (citations omitted).

In relation to a challenge to the trial court’s refusal to give a specific jury instruction, the scope and standard of review of the appellate court is as follows:

[I]t is the function of [the appellate court] to determine whether the record supports the trial court’s decision. In examining the propriety of the instructions a trial court presents to a jury, our

¹⁸ PA.R.CRIM.P. 647(B).

scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the Appellant was prejudiced by that refusal.

Commonwealth v. Sandusky, 77 A.3d 663, 667 (Pa. Super. 2013), quoting *Commonwealth v. Thomas*, 904 A.2d 964, 970 (Pa. Super. 2006).

4. Challenge to the Discretionary Aspects of a Sentence

A challenge to the discretionary aspects of a sentence “must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute.” *Commonwealth v. McAfee*, 849 A.2d 270, 274 (Pa. Super. 2004), *appeal denied*, 580 Pa. 695, 860 A.2d 122 (2004) (citation omitted). When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question that the sentence is inappropriate under the sentencing code. See *Commonwealth v. Tirado*, 870 A.2d 362, 365 (Pa. Super. 2005).

Rule 2119 of the Pennsylvania Rules of Appellate Procedure provides the following, in pertinent part:

(f) Discretionary aspects of sentence. An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

PA.R.A.P. 2119(f). Furthermore, the Judicial Code specifies:

§ 9781. Appellate review of sentence

(a) Right to appeal.--The defendant or the Commonwealth may appeal as of right the legality of the sentence.

(b) Allowance of appeal.--The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

42 PA.CON.S.TAT.ANN. § 9781.

Two requirements must be met before the Superior Court will review this challenge on its merits. *McAfee*, 849 A.2d at 274. “First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence.” *Id.* “Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code.” *Id.* That is, “the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process.” *Tirado*, 870 A.2d at 365. The Superior Court will examine an appellant’s Rule 2119(f) statement to determine whether a substantial question exists. “Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits.” *Id.* (quoting *Commonwealth v. Goggins*, 748 A.2d 721, 727 (Pa. Super. 2000) (*en banc*), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000)) (emphasis in original).

Prior to reaching the merits of a discretionary sentencing issue, the appellate court conducts a four-part analysis.

- (1) Whether the appellant has filed a timely notice of appeal in accordance with Pa.R.A.P. 902 and 903.
- (2) Whether the issue on appeal was properly preserved at sentencing or in a motion to reconsider and modify sentence in accordance with Pa.R.Crim.P. 720(B)(1).
- (3) Whether the appellant’s brief adequately states a substantial question or if it contains a fatal defect. In order to satisfy the requirements of 42 PA.CON.S.TAT.ANN. § 9781(b), Pennsylvania Rule of Appellate Procedure 2119(f) mandates that an appellant challenging the discretionary aspects of his sentence set forth in his brief a concise statement of the reasons relied upon for allowance of appeal, i.e., the reasons the sentence is inappropriate under the Sentencing Code.

- (4) Whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 PA.CON.S. STAT.ANN. § 9781(b).

Commonwealth v. Levy, 83 A.3d 457, 467 (Pa. Super. 2013).

Whether a particular challenge to a sentence amounts to a substantial question is determined on a case-by-case basis. See *Commonwealth v. Coulverson*, 34 A.3d 135, 142 (Pa. Super. 2011) (citation omitted). “A substantial question exists only when the appellant advances a colorable argument that the sentencing judge’s actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.” *Commonwealth v. Glass*, 50 A.3d 720, 727 (Pa. Super. 2012) (citations and internal quotation marks omitted).

The standard of review of the discretionary aspects of a sentence has been well settled:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Bricker, 41 A.3d 872, 875 (Pa. Super. 2012).

Similarly, an appellant wishing to appeal the discretionary aspects of a probation-revocation sentence has no absolute right to do so, but rather, must petition this Court for permission to do so in her concise statement of reasons on the grounds that there is a substantial question that the sentence is inappropriate under the Sentencing Code. *Commonwealth v. Malovich*, 903 A.2d 1247, 1250 (Pa. Super. 2006). Therefore, before the appellate court may consider the merits of the appeal, the appellate court must conduct the same four-part analysis. *Commonwealth v. Cook*, 941 A.2d 7, 11 (Pa. Super. 2007).

5. Challenge to the Legality of Sentence

Questions relating to the legality of sentencing are not waivable, and may be raised for the first time on appeal. *Commonwealth v. Robinson*, --- Pa. ---, 82 A.3d 998, 1020 (2013).

The classic instance of an illegal sentence is where the term imposed

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exceeds the statutory maximum. *Commonwealth v. Spruill*, --- Pa. ---, 80 A.3d 453, 461 (2013). A claim that a sentence constitutes cruel and unusual punishment raises a question of legality of the sentence. *Commonwealth v. Brown*, 71 A.3d 1009, 1016 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 77 A.3d 635 (2013).

The law in Pennsylvania makes it clear that an illegal sentence may be appealed as of right:

§ 9781. Appellate review of sentence

(a) Right to appeal.-- The defendant or the Commonwealth may appeal as of right the legality of the sentence.

42 PA.CON.S.TAT.ANN. § 9781(a). The standard and scope of review is well settled:

If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court's application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.

Commonwealth v. Stevenson, 850 A.2d 1268, 1271 (Pa. Super. 2004) (citations omitted).

10.6 POST CONVICTION RELIEF ACT

A. Petitions under the PCRA

Pennsylvania has adopted the Post Conviction Relief Act, 42 PA.CON.S.TAT.ANN. § 9541 *et seq.* By enacting the Post Conviction Relief Act, "the Pennsylvania Legislature has prescribed the route that all collateral review of criminal convictions and sentences must follow." *Commonwealth v. Lesko*, 609 Pa. 128, 156, 15 A.3d 345, 360-361 (2011).

The types of claims deemed cognizable under the PCRA are not limitless. *Id.* To prevail on a petition for post-conviction relief, a petitioner must plead and prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 PA.CON.S.TAT.ANN. § 9543(a)(2).

9543. Eligibility for relief

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

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(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime; or

(iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

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(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

42 PA.CON.S.TAT.ANN. § 9543. *See Commonwealth v. Matias*, 63 A.3d 807, 810 (Pa. Super. 2013), *appeal denied*, --- Pa. ---, 74 A.3d 1030 (2013). The Pennsylvania Supreme Court has construed the PCRA broadly to encompass all those types of claims that would have been available for review under common law *habeas corpus* principles. *Commonwealth v. Lesko*, 609 Pa. 128, 157, 15 A.3d 345, 361-362 (2011).

If the underlying substantive claim is one that could potentially be remedied under the PCRA, then that claim is exclusive to the PCRA. *Commonwealth v. Pagan*, 864 A.2d 1231, 1233 (Pa. Super. 2004). However, where the PCRA does not encompass a claim, other collateral procedures, for example, *coram nobis*, remain available. *Pagan*, 864 A.2d at 1233.

B. Jurisdictional Time Limitations

In addition to detailing the types of claims that are cognizable under the Post Conviction Relief Act, the PCRA further limits collateral review by utilizing jurisdictional time limitations. *Commonwealth v. Lesko*, 609 Pa. 128, 156, 15 A.3d 345, 361 (2011).

These limits provide that a PCRA petition must be filed within one year of the date the judgment became final.

(b) Time for filing petition.--

(43) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final . . .

42 PA.CON.S.TAT.ANN. § 9545(b).

Furthermore, any petition filed outside of the one-year jurisdictional time bar is unreviewable unless it meets certain listed exceptions and is filed within sixty days of the date the claim first could have been presented. 42 PA.CON.S.TAT.ANN. § 9545(b)(1)(i)-(iii) & (b)(2).

C. Appeals from PCRA Orders

The standard of review regarding an order denying a petition under the Post Conviction Relief Act, 42 PA.CON.S.TAT.ANN. § 9541 et seq., requires an inquiry into “whether the record supports the PCRA court’s determination and whether the court correctly stated and applied the law.” *Commonwealth v. DuPont*, 860 A.2d 525, 529 (Pa.

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Super. 2004), *appeal denied*, 585 Pa. 695, 889 A.2d 87 (2005), *cert. denied*, 547 U.S. 1129, 126 S.Ct. 2029 (2006). The PCRA court's findings will not be disturbed unless those findings are unsupported by the record. *Id.*

If the trial court dismisses the PCRA petition without a hearing, the appellate court must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and denying relief without an evidentiary hearing. *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001).

In reviewing the denial of PCRA relief, the Pennsylvania Supreme Court will examine whether the PCRA court's determination is supported by the record and free of legal error. To be entitled to PCRA relief, an appellant must establish, by a preponderance of the evidence, his conviction or sentence resulted from one or more of the enumerated errors in 42 PA.CON.S.TAT.ANN. § 9543(a)(2), his claims have "not been previously litigated or waived[,]” and "the failure to litigate the issue prior to or during trial, ... or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." *Commonwealth v. Fears*, --- Pa. ---, 86 A.3d 795, 803 (2014) (citations omitted).

An issue is previously litigated if the highest appellate court in which the appellant could have had review as a matter of right has ruled on the merits of the issue. *Id.* An issue is waived if appellant could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post-conviction proceeding. *Id.*

Chapter 11

SEX OFFENDER REGISTRATION AND NOTIFICATION

Sex Offender Registration and Notification

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Chapter Eleven

Sex Offender Registration and Notification

11.1 CHAPTER OVERVIEW

This chapter focuses on statutes that are essentially designed to protect the public from sexual offenders.

Section 11.2 details Pennsylvania’s Sex Offender Registration and Notification Act, 42 PA.CON.S.TAT.ANN. § 9799.10 et seq., (“SORNA”). Recent appellate court decisions regarding the new law, SORNA, and also some which address the prior versions of Megan’s Law, are included in Section 11.2(F)(7), Relevant Case Law. Additionally, appellate review of a trial court’s determination in relation to a classification of “Sexually Violent Predator” is included in Section 11.2(H)(10), Appellate Review.

Section 11.3, outlines the use of DNA samples in various databases, focusing on Pennsylvania’s DNA data testing statute and CODIS.

There are five addendums. The first four are the registration requirements which the trial court must provide to a defendant/SVP at the time of sentencing. These addendums were prepared by the Family Violence & Sexual Assault Unit of the Philadelphia District Attorney’s Office. Addendum 5 includes the registration requirements as prepared by the Pennsylvania State Police, which are available on the PSP’s website under the Megan’s Law section.

11.2 SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA)

A. Legislative History

In response to the 1994 murder of seven-year-old Megan Kanka by a neighbor who had been twice convicted of sex offenses against young girls, the state of New Jersey passed *Megan’s Law*, requiring registration and community notification of sex offenders. New Jersey’s first version of *Megan’s Law*, the Registration and Community Notification Laws, is still codified in N.J.S.A. 2C:7-1 et seq.¹ On July 25, 1995, the New Jersey Supreme Court upheld the constitutionality of the statute.

¹ The findings and declarations of the New Jersey legislature were:

- a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.
- b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

N.J.S.A. 2C:7-1.

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Following New Jersey's lead, Pennsylvania enacted its first version of *Megan's Law* in October 1995, which became effective in April 1996, and established procedural measures for the registration of sex offenders with law enforcement agencies. Since its enactment, there have been several constitutional challenges to various provisions in the statute, prompting multiple reenactments and extensive case law.

In 1999, the Pennsylvania Supreme Court, in *Commonwealth v. Williams*, 557 Pa. 285, 733 A.2d 593 (1999) ("*Williams I*") struck down provisions of *Megan's Law I* relating to the classification of an offender as a "sexually violent predator." Under the statute, once there was a conviction for a predicate offense, there was a presumption that the offender was a sexually violent predator. It was the burden of the individual convicted to rebut that presumption by clear and convincing evidence. Given the heightened requirements and sanctions that attached to a sexually violent predator, the Court in *Williams I* found that the process violated an offender's procedural due process rights and therefore struck down the provisions. In response, the Legislature adopted, in 2000, *Megan's Law II*. In *Megan's Law II*, the Commonwealth now had the burden of proving by clear and convincing evidence that the defendant was a sexually violent predator. Under the new law, instead of being subject to an automatic increased maximum term of imprisonment, sexually violent predators were required to undergo lifetime registration, notification and counseling procedures. That same year, an amendment to the act added Sexual Exploitation of Children as a registerable offense.

The Pennsylvania Supreme Court revisited the case in *Commonwealth v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003) ("*Williams II*") and held that in absence of "competent and credible evidence undermining the relevant legislative findings", the provisions for registration, notification, and counseling provisions for sexually violent predators in *Megan's Law II* were "non-punitive, regulatory measures supporting a legitimate governmental purpose." *Id.*, 574 Pa. at 528, 832 A.2d at 986. However, *Williams II* further held that the penalty provisions for failing to register or verify residence were unconstitutionally punitive but severable. The court severed those provisions from the remainder of the statute and remanded the case back to the trial court for consideration of the appellant's remaining arguments, i.e., that *Megan's Law* should be held void for vagueness; violated substantive due process guarantees; violated the separation of powers doctrine; and that it contained more than one subject in contravention of Article 3, § 3 of the Pennsylvania Constitution.

The trial court rejected appellant's constitutional arguments without holding a hearing. Upon appeal, in remanding the case back to the trial court and ordering a hearing, the Superior Court held that the trial court should have held an evidentiary hearing and make an independent determination on appellant's constitutional challenges. *Commonwealth v. Williams*, 877 A.2d 471, 478 (Pa. Super. 2005), *appeal denied*, 586 Pa. 770, 895 A.2d 1261 (2006).

Also in 2003, the Supreme Court reviewed the provisions of *Megan's Law II* in *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710 (2003), where the Court held

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that due process did not require proof beyond a reasonable doubt for the court to find an offender as a sexually violent predator.

In the meantime, *Megan's Law II* went through several statutory changes in 2004 and became known as *Megan's Law III*. The legislature deleted the penalty section of *Megan's Law II* and added a criminal charge to the crimes code for failing to comply with registration and verification procedures. It also added new definitions and registerable crimes, added procedures and classifications for out-of-state or court martialled or juvenile offenders, exemptions from certain notifications, and an annual performance audit. Most notably, the new law added a section allowing registration information of all sexual offenders to be made available on the Internet. It also amended the statutes relating to verification of residence, community or "other" notifications, immunity for good faith conduct, and duties of the Pennsylvania State Police.

In 2005, the legislature declared that young children were highly vulnerable when walking to and from elementary school and that the Commonwealth had a compelling state interest in protecting them from sexually violent predators. New sections were added to *Megan's Law III* imposing limitations on residence for sexually violent predators and creating a new offense for sexually violent predators who violated the restrictions. In the meantime, the Pennsylvania judiciary addressed a number of constitutional challenges to the statute, repeatedly finding that *Megan's Law III* passed constitutional muster.

- ***Commonwealth v. Killinger***, 585 Pa. 92, 888 A.2d 592 (2005): holding that sanctions for non-SVPs required to register for ten years did not violate Due Process protections.
- ***Commonwealth v. Wilson***, 589 Pa. 559, 910 A.2d 10 (2006): holding that sanctions for non-SVPs required to register for lifetime were not punitive but "merely a consequence" of a conviction for the underlying offense, as held in ***Killinger***.
- ***Commonwealth v. Mullins***, 905 A.2d 1009 (Pa Super 2006), *appeal denied*, 594 Pa. 712, 937 A.2d 444 (2007), and ***Commonwealth v. Leddington***, 908 A.2d 328 (Pa. Super. 2006), *appeal denied*, 596 Pa. 704, 940 A.2d 363 (2007): both courts faced challenges to the constitutionality of *Megan's Law II* due to the lack of judicial review of a SVP determination, and held that the appellants had failed to meet the "high evidentiary standard" to overcome a presumption of a statute's constitutionality. The court in ***Leddington*** recognized that to overcome the presumption of constitutionality, a SVP diagnosed with pedophilia must present evidence that pedophilia can be "fully cured." 908 A.2d at 332. Thus, the Superior Court held that "[w]ithout establishing such a 'cure' is available, the need for judicial review of the determination that a defendant is an SVP is clearly obviated." *Id.*
- ***Commonwealth v. Lee***, 594 Pa. 266, 935 A.2d 865 (2007): the Court held

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that lifetime registration, notification, and counseling obligations of SVPs were not punitive and, therefore, did not violate due process, the double jeopardy clause, or the prohibition against ex post facto laws. Challenges to the constitutionality of a statute require the “clearest proof” and the conflicting expert testimony presented as to the accuracy of SVP did not meet that standard to overcome a presumption of constitutionality.

- ***Commonwealth v. Leidig***, 598 Pa. 211, 956 A.2d 399 (2008): the Supreme Court reviewed the question of whether a plea of *nolo contendere* to certain criminal charges can be declared invalid where the sentencing court either fails to inform, or misinforms, the criminal defendant of the registration consequences of the plea under *Megan’s Law II*. The Supreme Court rejected Leidig’s argument that registration under *Megan’s Law II* was a direct, rather than collateral, consequence of his conviction. *Id.* at 220, 956 A.2d at 404. In so doing, the Supreme Court reiterated its prior holdings in ***Williams II*** and ***Commonwealth v. Lee***, 594 Pa. 266, 935 A.2d 865 (2007), wherein the Supreme Court held that the registration requirements of *Megan’s Law* and *Megan’s Law II* were remedial, not penal, and designed to protect the public, not to further punish the offender.

On December 20, 2011, the Governor signed the “Adam Walsh Bill” into law, bringing Pennsylvania into compliance with the federal Adam Walsh Child Protection and Safety Act of 2006. The law expands the list of applicable sexually violent offenses and groups offenders into multiple classifications, or “Tiers”, depending on the severity of the offense, and extended lifetime registration requirements to juvenile offenders. Also, Pennsylvania is now required to meet strict standards for posting offenders information on a national sex offender registry. Pennsylvania’s SORNA, the Sex Offender Registration and Notification Act, is codified in 42 PA. CONS. STAT. ANN. §9799.10, *et seq.*

SORNA superseded all previous versions of Megan’s Law legislation. It mandated that the initial registration of sexual offenders was now to occur at the time of sentencing upon conviction of an enumerated offense. The sentencing hearing typically follows the completion of an offender assessment by the Sexual Offender Assessment Board and any pre-sentence investigation report ordered by the trial court.

SORNA also broadened the scope of offenses under which offenders could be determined to be a sexually violent predator. The existing registration periods were changed to 15-year, 25-year, and lifetime registration periods depending upon the offenses.

B. Definitions

42 PA. CONS. STAT. ANN. § 9799.12. Definitions

The following words and phrases when used in this subchapter

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shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Approved registration site.” A site in this Commonwealth approved by the Pennsylvania State Police at which individuals subject to this subchapter may comply with this subchapter.

“Board.” The State Sexual Offenders Assessment Board.

“Common interest community.” Includes a cooperative, a condominium and a planned community where an individual by virtue of an ownership interest in any portion of real estate is or may become obligated by covenant, easement or agreement imposed upon the owner’s interest to pay any amount for real property taxes, insurance, maintenance, repair, improvement, management, administration or regulation of any part of the real estate other than the portion or interest owned solely by the individual.

“Convicted.” Includes conviction by entry of plea of guilty or nolo contendere, conviction after trial or court martial and a finding of not guilty due to insanity or of guilty but mentally ill.

“Employed.” Includes a vocation or employment that is full time or part time for a period of time exceeding four days during a seven-day period or for an aggregate period of time exceeding 14 days during any calendar year, whether self-employed, volunteered, financially compensated, pursuant to a contract or for the purpose of governmental or educational benefit.

“Foreign country.” Includes Canada, the United Kingdom, Australia, New Zealand and a foreign country where the United States Department of State in the Country Reports on Human Rights Practices has concluded that an independent judiciary enforced the right to a fair trial in that country during the calendar year in which the individual’s conviction occurred.

“IAFIS.” The Integrated Automated Fingerprint Identification System.

“Integrated Automated Fingerprint Identification System.” The national fingerprint and criminal history system maintained by the Federal Bureau of Investigation providing automated fingerprint search capabilities, latent searching capability,

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electronic image storage and electronic exchange of fingerprints and responses.

“Jurisdiction.” A state, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands and a federally recognized Indian tribe as provided in section 127 of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248, 42 U.S.C. § 16927).

“Juvenile offender.” One of the following:

(1) An individual who was 14 years of age or older at the time the individual committed an offense which, if committed by an adult, would be classified as an offense under 18 Pa.C.S. § 3121 (relating to rape), 3123 (relating to involuntary deviate sexual intercourse) or 3125 (relating to aggravated indecent assault) or an attempt, solicitation or conspiracy to commit an offense under 18 Pa.C.S. § 3121, 3123, or 3125 and either:

(i) is adjudicated delinquent for such offense on or after the effective date of this section; or

(ii) has been adjudicated delinquent for such offense and on the effective date of this section is subject to the jurisdiction of the court on the basis of that adjudication of delinquency, including commitment to an institution or facility set forth in section 6352 (a)(3) (relating to a disposition of delinquent child).

(2) An individual who was 14 years of age or older at the time the individual committed an offense similar to an offense under 18 Pa.C.S. § 3121, 3123, or 3125 or an attempt, solicitation or conspiracy to commit an offense similar to an offense under 18 Pa.C.S. § 3121, 3123, or 3125 under the laws of the United States, another jurisdiction or a foreign country and was adjudicated delinquent for such an offense.

(3) An individual who, on or after the effective date of this paragraph, was required to register in a sexual offender registry in another jurisdiction or foreign country based upon an adjudication of delinquency.

The term does not include a sexually violent delinquent child.

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“Mental abnormality.” A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

“Military offense.” An offense specified by the United States Secretary of Defense under 10 U.S.C. § 951 (relating to establishment; organization; administration).

“Minor.” Any individual under 18 years of age.

“Municipality.” A city, borough, incorporated town or township.

“NCIC.” The National Crime Information Center.

“Penetration.” Includes any penetration, however slight, of the genitals or anus or mouth of another person with a part of the person’s body or a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

“Predatory.” An act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization.

“Registry.” The Statewide Registry of Sexual Offenders established in section 9799.16(a) (relating to registry).

“Residence.” A location where an individual resides or is domiciled or intends to be domiciled for 30 consecutive days or more during a calendar year. The term includes a residence which is mobile, including a houseboat, mobile home, trailer or recreational vehicle.

“Sexual offender.” An individual required to register under this subchapter.

“Sexually violent delinquent child.” As defined in section 6402 (relating to definitions).

“Sexually violent offense.” An offense specified in section 9799.14 (relating to sexual offenses and tier system) as a Tier I, Tier II or Tier III sexual offense.

“Sexually violent predator.” An individual determined to be a sexually violent predator under section 9795.4 (relating to assessments) prior to the effective date of this subchapter or an individual convicted of an offense specified in:

- (1) section 9799.14(b)(1), (2), (3), (4), (5), (6), (8), (9), or (10) (relating to sexual offenses and tier system) or an attempt, conspiracy or solicitation to commit any offense under section 9799.14(b)(1), (2), (3), (4), (5), (6), (8), (9), or (10);
- (2) section 9799.14(c)(1), (1.1), (1.2), (2), (3), (4), (5) or (6) or an attempt, conspiracy or solicitation to commit an offense under section 9799.14(c)(1), (1.1), (1.2), (2), (3), (4), (5) or (6); or
- (3) section 9799.14(d)(1), (2), (3), (4), (5) (6), (7), (8) or (9) or an attempt, conspiracy or solicitation to commit an offense under 9799.14(d)(1), (2), (3), (4), (5) (6), (7), (8) or (9)

who, on or after the effective date of this subchapter, is determined to be a sexually violent predator under section 9799.24 (relating to assessments) due to a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses. The term includes an individual determined to be a sexually violent predator or similar designation where the determination occurred in another jurisdiction, a foreign country or by court martial following a judicial or administrative determination pursuant to a process similar to that under section 9799.24. In addition, the term shall include any person convicted between January 23, 2005, and December 19, 2012, of any offense set forth in section 9799.13(3.1) (relating to applicability) determined by a court to be a sexually violent predator due to a mental abnormality or personality disorder that made the person likely to engage in predatory sexually violent offenses, which person shall be deemed a sexually violent predator under this subchapter.

“Student.” An individual who is enrolled in or attends a public or private educational institution within this Commonwealth on a full-time or part-time basis, including a secondary school, trade or professional institution or institution of higher education. The term does not include an individual enrolled in an educational institution exclusively through the Internet or via

correspondence courses.

“Temporary lodging.” The specific location, including street address, where a sexual offender is staying when away from the sexual offender’s residence for seven or more days.

“Tier I sexual offense.” An offense specified in section 9799.14(b) (relating to sexual offenses and tier system).

“Tier II sexual offense.” An offense specified in section 9799.14(c) (relating to sexual offenses and tier system).

“Tier III sexual offense.” An offense specified in section 9799.14(d) (relating to sexual offenses and tier system).

“Transient.” An individual required to register under this subchapter who does not have a residence but nevertheless resides in this Commonwealth in a temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park.

C. Registration

Pennsylvania’s compliance with the Adam Walsh Act aimed to strengthen the framework for sex offender registration. Among various changes to Pennsylvania’s former law, the new law establishes a tiered classification system of offenders, stricter reporting standards for certain offenders, and stricter penalties for failure to report. The new legislation, SORNA, created a three tier system for sexual offenses and defined the crimes within these tiers. The tier system is used to determine the period of registration with the statewide sexual offenders registry. See 42 PA.CON.S.STAT.ANN. § 9799.16.

SORNA significantly increased the frequency of in-person reporting for many individuals. See 42 PA.CON.S.STAT.ANN. § 9799.15(e). It also increased the depth and breadth of registry information collected. See 42 PA.CON.S.STAT.ANN. § 9799.16(b). It also allows for the coordinated transmission of information among the states through a comprehensive and centralized database. Under the new framework, the Commonwealth can efficiently monitor sex offenders and promote awareness in the communities, thereby enhancing the overall safety.

SORNA contains the following sections which address registration:

Section 9799.13

Applicability: Specifies the individuals who must register.

Section 9799.16

Registry: Establishes the statewide registry of sexual offenders and requires the Pennsylvania State Police to create and maintain the registry.

Section 9799.19

Initial Registration: Sets forth the rules for initial registration, whether incarcerated or not, and whether it derives from an adult conviction or juvenile adjudication.

Section 9799.20

Duty to Inform: Specifies the information that must be supplied to the individuals responsible for registration, as well as the parties or entities that must provide it.

D. Individuals Who Must Register with the Pennsylvania State Police

The statutory scheme for registration of sexual offenders is set forth in 42 PA.CON.S.TAT.ANN. § 9799.13. Additional provisions dealing with registration include:

- Section 9799.15 relating to period of registration;
- Section 9799.19 relating to initial registration; and
- Section 9799.25 relating to verification by sexual offenders, which includes appearing in person and being photographed.

1. Individuals convicted of a sexually violent offense

- ▶ Any individual who
 - has been convicted of a sexually violent offense as of the statute's effective date (December 20, 2012) and
 - has a residence within Pennsylvania or is a transient.²
- ▶ Any individual who
 - has been convicted of a sexually violent offense in Pennsylvania as of the statute's effective date (December 20, 2012) and
 - does not have a residence in Pennsylvania and is either
 - employed in Pennsylvania, or

² 42 PA.CON.S.TAT.ANN. 9799.13(1). If an individual fails to establish a residence the individual must register as a transient. 42 PA.CON.S.TAT.ANN. 9799.19(j). This includes "juvenile offenders" pursuant to 42 PA.CON.S.TAT.ANN. 9799.13(1)(I). Juvenile offenders were required to register under SORNA for life, however, that section of SORNA, 42 PA.CON.S.TAT.ANN. 9799.15(a)(4) was declared unconstitutional by the Pennsylvania Supreme Court in *In The Interest of J.B., A Minor*, --- A.3d. ---, 2014WL7369785 (Pa. filed 12-29-14).

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→ is a student in Pennsylvania.³

- ▶ Any individual who
 - has been convicted of a sexually violent offense as of the statute's effective date (December 20, 2012) and
 - does not have a residence in Pennsylvania or is not a transient and is either
 - employed in Pennsylvania, or
 - is a student in Pennsylvania.⁴
- ▶ Any individual who, between January 23, 2005 and December 19, 2012, was:
 - convicted of a sexually violent offense; or
 - released from incarceration which resulted from a conviction for a sexually violent offense; or
 - under the supervision of the Pennsylvania Board of Probation and Parole or a county probation/parole department as a result of a conviction for a sexually violent offense.⁵

2. Individuals under sentence for a sexually violent offense

- ▶ Any individual who
 - as a result of a conviction for a sexually violent offense as of the statute's effective date (December 20, 2012) was either:
 - an inmate in a State or county correctional institution, including a community corrections center or a community contract facility, or
 - under supervision by the Pennsylvania Board of Probation and Parole or county probation or parole, or
 - under a sentence of intermediate punishment, or
 - has had supervision transferred pursuant to 42 PA.CONS. STAT.ANN. § 9799.19(g).⁶

3. Individuals under federal sentence for a sexually violent offense

- ▶ Any individual who
 - as a result of a conviction for a sexually violent offense as of the

³ 42 PA.CONS.STAT.ANN. § 9799.13(1.1).

⁴ 42 PA.CONS.STAT.ANN. § 9799.13(1.1).

⁵ 42 PA.CONS.STAT.ANN. § 9799.13(3.1). For purposes of subsection 3.1, certain offenses are excluded from the definition of "sexually violent offense." See 42 Pa.Cons.Stat.Ann. § 9799.13(3.1)(ii).

⁶ 42 PA.CONS.STAT.ANN. § 9799.13(2). Pursuant to the law governing initial registration, registration is required if the convicted individual does not intend to reside in Pennsylvania:

(g) Supervision of individual convicted in Commonwealth who does not intend to reside in Commonwealth.—On or after the effective date of this section, an individual convicted of a sexually violent offense within this Commonwealth who seeks transfer of supervision to another jurisdiction pursuant to the Interstate Compact for Adult Offender Supervision shall not have supervision transferred to another jurisdiction prior to the individual's registration with the Pennsylvania State Police as set forth in this section.

42 PA.CONS.STAT.ANN. § 9799.19(g).

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statute's effective date (December 20, 2012) was either:

- an inmate in a Federal correctional institution, or
- is under supervision by Federal probation authorities, and
 - has a residence in Pennsylvania or is a transient, or
 - is employed in Pennsylvania, or
 - is a student in Pennsylvania.⁷

4. Individuals who previously failed to register

- ▶ Any individual who
 - was required to register prior to December 20, 2012 but did not fulfill the period of registration as of December 20, 2012, or
 - was required to register prior to December 20, 2012 but did not.⁸

5. Other states and foreign jurisdictions

- ▶ Any individual who
 - as a result of a conviction for a sexually violent offense or under a sexual offender statute in another state or a foreign country, as of the statute's effective date (December 20, 2012), was required to register in the jurisdiction where the individual is convicted and:
 - has a residence in Pennsylvania or is a transient, or
 - is employed in Pennsylvania, or
 - is a student in Pennsylvania.⁹
- ▶ Any individual who
 - as a result of a conviction for an offense listed in 42 PA.CONS. STAT.ANN. § 9799.14(b)(23)¹⁰ was required to register in a sexual offender registry in another jurisdiction or foreign country as of the statute's effective date (December 20, 2012), and:
 - has a residence in Pennsylvania or is a transient, or
 - is employed in Pennsylvania, or
 - is a student in Pennsylvania.¹¹
- ▶ Any individual who, as of the statute's effective date (December 20, 2012)
 - was convicted of a sexually violent offense in another jurisdiction or foreign country, or
 - was incarcerated or under supervision as a result of a conviction for a sexually violent offense in another jurisdiction or foreign

⁷ 42 PA.CONS.STAT.ANN. § 9799.13(2.1).

⁸ 42 PA.CONS.STAT.ANN. § 9799.13(3).

⁹ 42 PA.CONS.STAT.ANN. § 9799.13(7).

¹⁰ All sexual offenses listed in the Tier System are specified in **Chapter 7, Addendum 2**. Under item number 23, the Tier System includes:
(23) A conviction for a sexual offense in another jurisdiction or foreign country that is not set forth in this section, but nevertheless requires registration under a sexual offender statute in the jurisdiction or foreign country.

¹¹ 42 PA.CONS.STAT.ANN. § 9799.14(b)(23).

¹¹ 42 PA.CONS.STAT.ANN. § 9799.13(7.1).

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country, and

- has a residence in Pennsylvania or is a transient, or
- is employed in Pennsylvania, or
- is a student in Pennsylvania.¹²

6. Juvenile offenders

- ▶ Any individual who, as of the statute's effective date (December 20, 2012)
 - was a juvenile offender who was adjudicated delinquent in Pennsylvania, or
 - was adjudicated delinquent in another jurisdiction or a foreign county, and
 - has a residence in Pennsylvania, or
 - is employed in Pennsylvania, or
 - is a student in Pennsylvania.¹³

- ▶ Any individual who, as of the statute's effective date (December 20, 2012)
 - was a juvenile offender who was adjudicated delinquent in Pennsylvania,
 - but does not have a residence in Pennsylvania,
 - is not a transient,
 - is not employed in Pennsylvania or
 - is not a student in Pennsylvania.¹⁴

- ▶ Any individual who was required to register in a sexual offender registry as a result of an adjudication of delinquency for an offense which occurred in a foreign country or another jurisdiction, which required registration in that jurisdiction, and
 - between January 23, 2005 and December 19, 2012:
 - established a residence or was a transient in Pennsylvania, or
 - was employed in Pennsylvania, or was a student in Pennsylvania.¹⁵

- ▶ Any individual who, as of the statute's effective date (December 20, 2012):
 - was a sexually violent delinquent child who is committed for involuntary treatment, or
 - was already under commitment in a State-owned facility or unit

¹² 42 PA.CON.S.STAT.ANN. § 9799.13(7.2).

¹³ 42 PA.CON.S.STAT.ANN. § 9799.13(8).

¹⁴ 42 PA.CON.S.STAT.ANN. § 9799.13(8.1). Additionally, individuals falling under this category must register prior to leaving the Commonwealth in accordance with 42 PA.CON.S.STAT.ANN. § 9799.19.

¹⁵ 42 PA.CON.S.STAT.ANN. § 9799.13(8.2).

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pursuant to Chapter 64.¹⁶

► ***However, under §9799.17,¹⁷ the registration requirements for certain juvenile offenders may be terminated upon petition if all of the following are satisfied:***

- i. At least 25 years have elapsed since the individual was adjudicated delinquent for an offense related to 18 PA.CONS. STAT.ANN § 3121 (Rape), 18 PA.CONS.STAT.ANN §3123 (Involuntary Deviate Sexual Intercourse), or 18 PA.CONS. STAT.ANN § 3125 (Aggravated Indecent Assault), including related inchoate offenses or comparable offenses in other jurisdictions,
- ii. In the 25 years prior to the petition, the individual has not been convicted of a subsequent sexually violent offense or any subsequent offense that is,
 - a) Graded as a second degree misdemeanor, or higher;
 - or,
 - b) Punishable by a term of imprisonment that is greater than one year.
- iii. the individual successfully completed court-ordered supervision without revocation; and,
- iv. the individual successfully completed a recognized treatment program for sexual offenders.

E. Sexual Offenses and the Tier System

The Tier System is listed in 42 PA.CONS.STAT.ANN. § 9799.14, and breaks sexual violence crimes into three tiers, (1) 15-year registration crimes, (2) 25-year registration crimes, and (3) lifetime registration crimes.

Tier I Sexual Offenses

15 Year Registration Period

In addition to others, the following crimes or any attempt, conspiracy or solicitation thereof:

- Unlawful Restraint: 18 PA.CONS.STAT.ANN. § 2902(b)
- False Imprisonment: 18 PA.CONS.STAT.ANN. § 2903(b)
- Interference with Custody of Children: 18 PA.CONS.STAT.ANN. § 2904

¹⁶ 42 PA.CONS.STAT.ANN. § 9799.13(9). Chapter 64, Court-Ordered Involuntary Treatment of Certain Sexually Violent Persons, is codified in 42 PA.CONS.STAT.ANN. §§ 6401 – 6409.

¹⁷ 42 PA.CONS.STAT.ANN. § 9799.17.

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- Luring a Child into a Motor Vehicle or Structure: 18 PA.CON.S.STAT.ANN. § 2910
- Institutional Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3124.2(a)
- Indecent Assault: 18 PA.CON.S.STAT.ANN. § 3126(a)(1)
- Corruption of Minors (F3): 18 PA.CON.S.STAT.ANN. § 6301(a)(1)(ii)¹⁸
- Sexual Abuse of Children: 18 PA.CON.S.STAT.ANN. § 6312(d)
- Invasion of Privacy: 18 PA.CON.S.STAT.ANN. § 7507.1
- Video Voyeurism: 18 U.S.C. § 1801
- Certain Activities Relating to Material Involving the Sexual Exploitation of Minors: 18 U.S.C. § 2252(a)(4)
- Certain Activities Relating to Material Constituting or Containing Child Pornography: 18 U.S.C. § 2252A
- Misleading Domain Names on the Internet: 18 U.S.C. § 2252B
- Misleading Words or Digital Images on the Internet: 18 U.S.C. § 2252C
- Coercion and Enticement: 18 U.S.C. § 2422(a)
- Transportation of Minors: 18 U.S.C. § 2423(b)
- Illicit Sexual Conduct in Foreign Places: 18 U.S.C. § 2423(c)
- Filing Factual Statement About Alien Individual: 18 U.S.C. § 2424
- Use of Interstate Facilities to Transmit Information about a Minor: 18 U.S.C. § 2425

► *The list of Tier I offenses also includes:*

A comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth

A conviction for a sexual offense in another jurisdiction or foreign country that requires registration under a sexual offender statute in that jurisdiction or foreign country.

Tier II Sexual Offenses

25 Year Registration Period

In addition to others, the following crimes or any attempt, conspiracy or solicitation thereof:

- Statutory Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3122.1(a)(2)
- Prostitution and Related Offenses: 18 PA.CON.S.STAT.ANN. § 5902(b.1)
- Obscene and Other Sexual Materials and Performances: 18 PA.CON.S.STAT.ANN. § 5903(a)(3)(ii), (4)(ii), (5)(ii) or (6)
- Sexual Abuse of Children, 18 PA.CON.S.STAT.ANN. § 6312(b) & (c)
- Unlawful Contact with Minor: 18 PA.CON.S.STAT.ANN. § 6318
- Sexual Exploitation of Children: 18 PA.CON.S.STAT.ANN. § 6320

¹⁸ In *Commonwealth v. Sampolski*, 89 A.3d 1287 (Pa. Super. 2014), the Superior Court held that corruption of minors graded as a misdemeanor of the first degree under 18 PA.CON.S.STAT.ANN. § 6301(a)(1)(i) is not a registration offense but that SORNA specifically includes corruption of minors under subsection (ii), which is graded as a felony of the third degree, as a registration offense.

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- Indecent Assault: 18 PA.CON.S.STAT.ANN. § 3126(a)(2), (3),(4),(5),(6) or (8)
- Sex Trafficking of Children by Force, Fraud, or Coercion: 18 U.S.C. § 1591
- Sexual Abuse of a Minor or Ward: 18 U.S.C. § 2243
- Abusive Sexual Contact – Victim 13 Years Old But Under 18 Years: 18 U.S.C. § 2244
- Sexual Exploitation of Children: 18 U.S.C. § 2251
- Selling or Buying of Children: 18 U.S.C. § 2251A
- Production of Sexually Explicit Depictions of Minor for Importation to U.S.: 18 U.S.C. § 2260

► *The list of Tier II offenses also includes:*

A comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth

Tier III Sexual Offenses

Lifetime Registration Period

In addition to others, the following crimes or any attempt, conspiracy or solicitation thereof:

- Kidnapping: 18 PA.CON.S.STAT.ANN. § 2901(a.1)
- Rape: 18 PA.CON.S.STAT.ANN. § 3121
- Statutory Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3122.1(b)
- Involuntary Deviate Sexual Intercourse: 18 PA.CON.S.STAT.ANN. § 3123
- Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3124.1
- Institutional Sexual Assault: 18 PA.CON.S.STAT.ANN. § 3124.2(a.1)
- Aggravated Indecent Assault: 18 PA.CON.S.STAT.ANN. § 3125
- Indecent Assault when Complainant is Less than 13 Years Old: 18 PA.CON.S.STAT.ANN. § 3126(a)(7)
- Incest: 18 PA.CON.S.STAT.ANN. § 4302(b)
- Aggravated Sexual Abuse: 18 U.S.C. § 2241
- Sexual Abuse: 18 U.S.C. § 2242
- Abusive Sexual Contact When Victim is Less than 13 Years of Age: 18 U.S.C. § 2244

► *The list of Tier III offenses also includes:*

Two or more convictions of offenses listed as Tier I or Tier II sexual offenses.

A comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth

F. Registration

1. Periods of Registration Under SORNA

42 PA.CONS.STAT.ANN. §9799.15

Subject to tolling, the following registration periods apply for individuals required to register under 42 PA.CONS.STAT.ANN. §9799.13:

1) 15-Year Registration

An individual must register for a period of 15 years if convicted of a Tier I sexual offense pursuant to § 9799.15(a)(1), except an offense as specified in § 9799.14(b)(23).¹⁹

2) 25-Year Registration

An individual must register for a period of 25 years if convicted of a Tier II sexual offense pursuant to § 9799.15(a)(2).²⁰

3) Lifetime Registration

Lifetime registration is required for:

- ▶ an individual convicted of a Tier III sexual offense pursuant to § 9799.15(a)(2).²¹
- ▶ an individual convicted of either a Tier I, Tier II, or Tier III sexual offense who is determined to be a sexually violent predator, pursuant to § 9799.15(a)(6) and (d).²²
- ▶ a “juvenile offender” pursuant to § 9799.15(a)(4).²³
- ▶ a juvenile offender determined to be a sexually violent delinquent child, pursuant to § 9799.15(a)(5).²⁴
- ▶ a juvenile offender who was adjudicated delinquent in another jurisdiction or foreign country for an offense similar to an offense which would require the individual to register if the offense were committed in Pennsylvania, pursuant to § 9799.15(a)(4.1).²⁵

2. Special Registration Period for Out-of-State Offenders

Individuals required to register in another jurisdiction must register in the Commonwealth for an equal period of time if,

- a) the individual is a juvenile offender who is required to register for an offense which, if committed in the Commonwealth, would

¹⁹ The Tier I sexual offenses are listed in 42 PA.CONS.STAT.ANN. § 9799.14(b).

²⁰ The Tier II sexual offenses are listed in 42 PA.CONS.STAT.ANN. § 9799.14(c).

²¹ The Tier III sexual offenses are listed in 42 PA.CONS.STAT.ANN. § 9799.14(d).

²² Following an assessment and hearing, the trial court makes a determination whether the individual is a sexually violent predator pursuant to 42 PA.CONS.STAT.ANN. § 9799.24(e).

²³ A “juvenile offender” is defined in 42 PA.CONS.STAT.ANN. § 9799.12. *SEE ALSO IN RE J.M.*, 89 A.3d 688 (PA. SUPER. 2014).

²⁴ A “sexually violent delinquent child” is defined in 42 PA.CONS.STAT.ANN. § 6402. However, under 42 PA.CONS.STAT.ANN. § 9799.17, certain juvenile offenders’ registration requirement may be terminated upon petition if certain criteria are met. See **Section D(6)** above.

²⁵ However, under 42 PA.CONS.STAT.ANN. § 9799.17, certain juvenile offenders’ registration requirement may be terminated upon petition if certain criteria are met. See **Section D(6)** above.

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not require registration. See 42 PA.CON.S.STAT.ANN. § 9799.15(a)(4); or

b) the individual is subject to registration under 42 PA.CON.S.STAT.ANN. § 9799.13(7.1).²⁶ See 42 PA.CON.S.STAT.ANN. § 9799.15(a)(7).

3. Periodic In-Person Appearances²⁷

An individual must appear at an approved registration site to provide or verify their registration and to be photographed as follows:

Tier 1 offenders

An individual convicted of a Tier 1 offense must appear annually - 42 PA.CON.S.STAT.ANN. § 9799.15(e)(1).

Tier 2 offenders

An individual convicted of a Tier 2 offense must appear semiannually - 42 PA.CON.S.STAT.ANN. § 9799.15(e)(2).

Tier 3 offenders

An individual convicted of a Tier 3 offense must appear quarterly - 42 PA.CON.S.STAT.ANN. § 9799.15(e)(3).

Foreign jurisdiction offenders

An individual who must register under 9799.13(7.1) must appear annually - 42 PA.CON.S.STAT.ANN. § 9799.15(e)(4).

Sexually Violent Predators

An individual designated as a sexually violent predator must appear quarterly²⁸ - 42 PA.CON.S.STAT.ANN. § 9799.15(f).

Transient offenders

Transient offenders must appear monthly - 42 PA.CON.S.STAT.ANN. § 9799.15(h)(1).

Juvenile Offenders and Sexually Violent Delinquent Children

Unless they are transient, juvenile offenders and those designated as sexually violent delinquent children must appear quarterly - 42 PA.CON.S.STAT.ANN. § 9799.15(h)(2).

► **NOTE:** *In-person reporting is not required by certain incarcerated*

²⁶ Under §9799.13(7.1), the individual must register in the Commonwealth if he or she is required to register in another jurisdiction for the conviction of an offense set forth in section 9799.14(b)(23) and: (i) has a residence in this Commonwealth or is a transient; (ii) is employed within this Commonwealth; or (iii) is a student within this Commonwealth.

²⁷ In addition to the periodic in-person appearances, an individual must appear in person within three business days if there is a change in information included in the registry or 21 days if they intend to travel outside the United States. See 42 PA.CON.S.STAT.ANN. §§ 9799.15(g), 9799.15(i).

²⁸ In addition to the verification of information and photograph requirements, a sexually violent predator must also verify he or she is in compliance with the counseling requirements of §9799.36. See 42 PA.CON.S.STAT.ANN. § 9799.15(f)(3).

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or committed individuals - 42 PA.CONS.STAT.ANN. § 9799.15(j).

4. Commencement of Registration

The period of registration commences as follows:²⁹

Sexually Violent Offenders

The registration period commences upon:

- 1) release from incarceration in a State of county correctional facility;³⁰
- 2) parole or a sentence of probation; or
- 3) a sentence of state or county intermediate punishment in which the person is not sentenced to a period of incarceration.

42 PA.CONS.STAT.ANN. § 9799.15(b)(1)(i)(A).

Juvenile Offenders³¹

The registration period commences upon:

- 1) release from court-ordered placement in an institution or facility pursuant to 42 PA.CONS.STAT.ANN. § 6352(a)(3); or
- 2) at the time of disposition if placed on probation or another disposition not involving out-of-home placement under 42 PA.CONS.STAT.ANN. § 6352.

42 PA.CONS.STAT.ANN. § 9799.15(b)(1)(ii)(A), (B).

Out of State Offenders

The registration period commences upon the:

- 1) establishment of residence,
- 2) commencement of employment or
- 3) enrollment as a student in this Commonwealth.

42 PA.CONS.STAT.ANN. § 9799.15(b)(1)(iv).

5. Tolling

If recommitted to a federal, state or county correctional institution for a parole violation or sentenced to an additional term of imprisonment, the registration requirements are tolled for the period of time in which the individual is,

- 1) incarcerated in a federal, state or county correctional institution;³²
- 2) subject to a sentence of *restrictive* intermediate punishment and sentenced to a period of incarceration;

²⁹ Notwithstanding the provisions of §9799.15, individuals required to register under §9799.13 must initially register under §9799.19. *See* 42 PA.CONS.STAT.ANN. § 9799.15(b)(2).

³⁰ Includes release to community correction center or community contract facility. *See* 42 PA.CONS.STAT.ANN. § 9799.15(b)(1)(i)(A).

³¹ *But see* § 9799.15(b)(1)(iii), *if the individual is a sexually violent delinquent child*, the registration period commences upon transfer to outpatient treatment pursuant to 42 PA.CONS.STAT.ANN. § 6401.1.

³² Excludes a community contract facility or community corrections center - 42 PA.CONS.STAT.ANN. § 9799.15(c)(1)(i).

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- 3) committed to an institution or facility set forth in 42 PA.CON.S. STAT.ANN. §6352(a)(3) that provides the individual with 24 hour per day supervision and care;
- 4) committed to and receiving involuntary inpatient treatment in the State-owned facility or unit set forth in Chapter 64 or;
- 5) incarcerated in a federal correctional institution³³
42 PA.CON.S. STAT.ANN. § 9799.15(c).

6. Penalty

Individuals required to register may be subject to prosecution for failure to register under 18 PA.CON.S. STAT.ANN. § 4915.1 if the individual fails to comply with the registration mandates under Sections 9799.15, 9799.19, or 9799.25.

7. Relevant Case Law

► Validity: No Ex Post Facto Violation

→ **Commonwealth v. Gaffney**, 557 Pa. 327, 733 A.2d 616 (1999): Registration provisions of *Megan's Law I* did not constitute "punishment" for purposes of federal and state constitutional provisions prohibiting ex post facto laws. The lifetime registration was not an ex post facto violation because registration requirements are designed to help ensure the safety of the public, not to punish an offender. See also **Commonwealth v. Ackley**, 58 A.3d 1284, 1286-1287 (Pa. Super. 2012), *appeal denied*, --- Pa. ---, 70 A.3d 808 (2013).

→ **Commonwealth v. Fleming**, 801 A.2d 1234 (Pa. Super. 2002), *appeal denied*, 588 Pa. 776 (2006): Application of new lifetime registration provisions of *Megan's Law II*, even though *Megan's Law I* was in effect at the time the defendant committed the offense which required a ten-year registration period, did not violate prohibition against *ex post facto* clause.

→ **Federal Court** - The U.S. Supreme Court held that the registration requirement under the federal Adam Walsh Act is "nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause." **Smith v. Doe**, 538 U.S. 84, 105-106, 123 S.Ct. 1140, 1154, 155 L.Ed.2d. 164 (2003). From *Smith*, the courts must apply a two-prong analysis. The first prong of this test requires examination of whether the General Assembly's intent was punitive. If the intent were punitive, the statute constitutes punishment. If the intent is civil and non-punitive, the second prong of the test applies, which requires examining "whether

³³ Excludes a community contract facility or community corrections center - 42 PA.CON.S. STAT.ANN. § 9799.15(c)(1)(v).

the statute is 'so punitive either in purpose or effect as to negate [Congress's] intention to deem it civil.' " 538 U.S. at 92.

→ ***Commonwealth v. McDonough***, 96 A.3d 1067 (Pa. Super. 2014): Following the defendant's conviction of indecent assault as a second-degree misdemeanor, he was sentenced to one to two years' incarceration and to register for 15-years as a sex offender under SORNA (he was not classified as a SVP). On appeal, the defendant argued (1) the evidence was insufficient; (2) that the registration provisions of SORNA are unconstitutional because the maximum penalty was only two years but his registration period is 15 years; and (3) that the registration requirements of SORNA are not civil in nature because they include restrictions and requirements which, if violated, can result in imprisonment. Relying upon Megan's Law cases from the Pennsylvania Supreme Court in ***Commonwealth v. Gaffney***, 557 Pa. 327, 733 A.2d 616 (1999) and the Superior Court in ***Commonwealth v. Benner***, 853 A.2d 1068 (Pa. Super. 2004), the Court in ***McDonough*** held the registration requirements of SORNA were collateral consequences of the actual sentence and not punitive. Therefore, it denied relief on the second two issues.

→ ***Commonwealth v. Perez***, 97 A.3d 747 (Pa. Super. 2014): Application of the new 25-year sex offender registration requirement under SORNA to the defendant did not violate prohibition against *ex post facto* clause. Because of the exact wording of SORNA states that it "shall not be construed as punitive" the Superior Court held that the first prong of the analysis under ***Smith v. Doe*** was satisfied. Therefore, the Superior Court went on to review the seven-factor test from ***Kennedy v. Mendoza—Martinez***, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) to determine whether the effects of the statute are sufficiently punitive to override the legislature's preferred categorization. Although the Superior Court found the first factor of the ***Kennedy*** test weighed in favor of finding that SORNA was punitive, the remaining six factors did not. Therefore, the Superior Court held that the *ex post facto* clause of the federal constitution did not prohibit the retroactive application of the 25-year sex offender registration requirement to the defendant under SORNA.

► Plea Withdrawals

→ ***Commonwealth v. Leidig***, 598 Pa. 211, 956 A.2d 399 (2008): the Pennsylvania Supreme Court held once again that the sex offender registration requirements under *Megan's Law II* were collateral consequences of the defendant's *nolo contendere* plea, and therefore the defendant was not entitled to withdraw his plea if the trial court

failed to inform, or even misinformed the defendant, regarding the registration requirements of the conviction. The registration requirements are a collateral and not direct consequence of the plea, and a defendant's lack of knowledge of these collateral consequences does not undermine the validity of the plea:

Because the Megan's Law registration requirements, of whatever duration, are matters collateral to Appellant's plea, the Superior Court correctly concluded that in accepting Appellant's plea, the trial court need not have advised Appellant as to the length of the registration requirement, and that any misunderstanding as to the duration of the registration requirement was not a basis for a post-sentence withdrawal of the plea.

598 Pa. at 223, 956 A.2d at 406.

► **Enforcement of Plea Agreement**

→ *Commonwealth v. Cheeseboro*, 91 A.3d 714 (Pa. Super. 2014): The Pennsylvania State Police, not content with plea agreements entered in the trial court, which held that defendant-appellees were not required to register as sexual offenders under SORNA, appealed to the Superior Court. In an Opinion Per Curiam which consolidated seventy-three separate appeals, the Superior Court ruled that the Pennsylvania State Police does not have standing to challenge plea agreements adopted by the trial court and entered into by the defendants and the Commonwealth. The defendant-appellees entered into the negotiated plea agreements with the Commonwealth, before the effective date of SORNA, wherein it was agreed that they would either not be subject to sexual offender registration or be subject to a reduced period of registration under the prior law. The Superior Court held that the state police had limited authority under the registration law:

PSP was not expressly granted broad authority and discretionary powers under SORNA. Unlike the Uniform Firearms Act . . . which provides PSP with a determinative role as to whether an applicant is prohibited from receiving or possessing a firearm, PSP's role under SORNA may be viewed as more ministerial in nature than adjudicative.

91 A.3d at 721.

→ *Commonwealth v. Partee*, 86 A.3d 245 (Pa. Super. 2014): Appellant could seek enforcement of a nolo contendere plea agreement on charges of indecent assault and related charges when he was promised

a ten-year registration period under *Megan's Law III* but received a 25-year registration period under SORNA. Although other factual developments prevented the defendant from receiving the benefit of the plea agreement, the Superior Court adopted the rationale from *Commonwealth v. Hainesworth* (see below) and found that enforcement was a possible remedy.

→ *Commonwealth v. Hainesworth*, 82 A.3d 444 (Pa. Super. 2013) (*en banc*): The Superior Court enforced a negotiated plea agreement that did not require the defendant to register under *Megan's Law III* despite enactment of new provisions which would have required registration. The dispositive question was “whether registration was a term of the bargain struck by the parties.” The Superior Court examined the record, and found the terms of the plea agreement were set forth and included a discussion of the fact that the offenses to which the defendant was pleading guilty did not require registration and supervision as a sex offender.

► Ineffective Assistance Claim

→ *Commonwealth v. Lippert*, 85 A.3d 1095 (Pa. Super. 2014): Appellant was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel when he was allegedly advised to plead *nolo contendere* to indecent assault in May 2012, and told that he would not have to register as a sexual offender, but SORNA had been enacted in December 2011 making it a Tier I sexual offense that requires 15 year registration.

► Retroactive Application

→ *Coppolino v. Noonan*, --- A.3d ----, 2014 WL 5140043 (Pa.Cmwlt. 2014): The defendant, upon his conviction at the time *Megan's Law III* was in effect, was subject to lifetime registration, of which he was in compliance. Approximately five months after he completed his sentence, which included incarceration followed by probation, SORNA was enacted which required more detailed and stringent registration mandates that *Megan's Law III*. (1) The Commonwealth Court found that SORNA is not overbroad. (2) In relation to the reporting and registration requirements, the Commonwealth Court applied the two-prong analysis from *Smith v. Doe*, 538 U.S. 84, 105-106, 123 S.Ct. 1140, 1154, 155 L.Ed.2d. 164 (2003). The first prong of this test requires examination of whether the General Assembly's intent was punitive. If the intent were punitive, the statute constitutes punishment. The Commonwealth Court found the legislative intent to be non-punitive. In relation to the second

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prong of the test, Coppelino argued that SORNA contains must more rigorous reporting requirements. The Commonwealth Court reviewed those provisions of SORNA that had not been already deemed non-punitive by the Pennsylvania Supreme Court in its review of earlier versions of *Megan's Law*, and made determinations as to whether the new provisions were punitive or not:

- quarterly in-person verification: non-punitive;
- expanded disclosure, including the reporting of the convicted sex offender's internet aliases: non-punitive;
- palm prints and DNA samples: non-punitive;

● *Ex Post Facto* Violation - in-person updates – punitive. As applied to an individual convicted under a prior version of *Megan's Law*, because it involves under SORNA a substantial infringement of a fundamental right to freely travel, the requirement for in-person updates violates the constitutional prohibition against ex post facto laws. Therefore, 42 PA.CON.S.TAT.ANN. § 9799.15(g), i.e., for the defendant to “appear in person at an approved registration site” was severed and unenforceable with regard to individuals convicted prior to the enactment of SORNA.

→ *Commonwealth v. Seese*, 319 MDA 2013 (Pa. Super. 2014): in an unpublished memorandum decision, the Superior Court concluded that the appellant was not subject to registration because SORNA, pursuant to 42 PA.CON.S.TAT.ANN. § 9799.13(3.1)(ii)(A), removed the application of registration to a charge of Invasion of Privacy under 18 PA.CON.S.TAT.ANN. § 7507.1 for an individual convicted between January 23, 2005 and December 19, 2012.

→ *Commonwealth v. Benner*, 853 A.2d 1068 (Pa. Super. 2004): Date of offense, guilty plea, or sentencing is not dispositive when determining whether new *Megan's Law* legislation applies to a particular defendant. As long as the defendant remains in custody of correctional authorities serving any portion of his original sentence, *Megan's Law II* registration requirements will apply to that defendant.

→ *Commonwealth v. Miller*, 787 A.2d 1036 (Pa. Super. 2001), *appeal denied*, 568 Pa. 735, 798 A.2d 1288 (2002): The appellant was sentenced in Hawaii to six months' imprisonment to be followed by three years' supervised release. During the period of his “supervised release” he relocated to Pennsylvania. Held that the *Megan's Law II* registration requirement applied to appellant – the crime was an equivalent offense of a *Megan's Law* offense in Pennsylvania, and the appellant, even though he had pleaded guilty in Hawaii prior to

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Megan's Law II enactment, still had to comply with the registration because there is no violation of any ex post facto provision in requiring registration when the acts underlying an individual's conviction occurred prior to the effective date of the registration requirements.

► Recidivist Provision

→ *A.S. v. Pennsylvania State Police*, 87 A.3d 914 (Pa. Cmwlth. 2014): in a rare decision by the Commonwealth Court regarding sex offender registration, a split en banc panel decided to narrowly construe the recidivist provision of *Megan's Law II* and held that the conduct of which the defendant/petitioner had admitted stemmed from a single course of events rather than multiple incidents which would have required lifetime registration. Basically, the defendant had consensual sex with a sixteen year old and convinced the minor to take photographs of herself engaging in the sexual acts. He also used the minor's digital camera to photograph the two engaging in sexual relations.

G. Registration Procedures

Registration procedures are enumerated in:

- 42 PA.CONS.STAT.ANN. § 9799.15,
- 42 PA.CONS.STAT.ANN. § 9799.16,
- 42 PA.CONS.STAT.ANN. § 9799.18,
- 42 PA.CONS.STAT.ANN. § 9799.19, and
- 42 PA.CONS.STAT.ANN. § 9799.20.

Various entities have numerous responsibilities regarding notification and registration. The Pennsylvania State Police, the court with jurisdiction over the sexual offender, or other appropriate officials, institutions, or agencies must:

- inform the individual required to register of the registration duties;
- obtained a form, signed by the individual, acknowledging that the duty to register has been explained and is understood by the offender; and
- collect required registration information and forward the information to the Pennsylvania State Police.³⁴

1. When Offender Must Initially Register

³⁴ 42 PA.CONS.STAT.ANN. § 9799.20.

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- (a) If sentenced *prior to* the effective date of the statute (December 20, 2012) and individual was:
- ▶ incarcerated within the Commonwealth or by a Federal Court on effective date of this section,
 - ▶ **then registration is required before being released at:**
 - a. Expiration of sentence;
 - b. Parole;
 - c. Admission to state or county restrictive intermediate punishment or work release facility; or,
 - d. Admission to special supervised probation42 PA.CON.S.STAT.ANN. § 9799.19(b)(1)
 - ▶ serving county intermediate punishment that is restorative on effective date of this section,
 - ▶ **then registration is required within 48 hours of the effective date of the statute.**42 PA.CON.S.STAT.ANN. § 9799.19(c)
 - ▶ serving a county probation sentence, on effective date of this section,
 - ▶ **then registration is required within 48 hours of the effective date of the statute.**42 PA.CON.S.STAT.ANN. § 9799.19(e.1)(1)
 - ▶ serving a Federal probation sentence for a sexually violent offense on effective date of this section,
 - ▶ **then registration is required within 48 hours of the effective date of the statute.**42 PA.CON.S.STAT.ANN. § 9799.19(e.1)(2)
 - ▶ continuing to serve a sentence of county parole on effective date of this section,
 - ▶ **then the appropriate office of probation and parole serving the county shall register the individual within 48 hours of the effective date of the statute.**42 PA.CON.S.STAT.ANN. § 9799.19(e.2)(1)
 - ▶ continuing to serve a sentence of State parole on effective date of this section,
 - ▶ **the Pennsylvania Board of Probation and Parole shall register the individual within 48 hours of the effective date of the statute.**

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42 PA.CON.S.STAT.ANN. § 9799.19(e.2)(2)

- ▶ being supervised by the Commonwealth under Interstate Compact for Adult Offenders on effective date of this section, **then registration is required within 48 hours of the effective date of the statute.**

42 PA.CON.S.STAT.ANN. § 9799.19(f)(2)

- ▶ a juvenile offender subject to the court's jurisdiction under section 6352 and is on probation or is otherwise supervised,³⁵ **then the individual must provide the required information to the chief juvenile probation officer within 30 days of the effective date of the statute.**

42 PA.CON.S.STAT.ANN. § 9799.19(h)(2)

- ▶ a juvenile offender subject to court-ordered placement in an institution or facility with 24-hour supervision, **then the chief juvenile probation officer shall notify the director of the institution or facility and the Pennsylvania State Police within 10 days of the effective date of the statute.**

42 PA.CON.S.STAT.ANN. § 9799.19(h)(3)

- ▶ a sexually violent delinquent child receiving involuntary treatment in a State-owned facility or under Chapter 64,³⁶ **then a designated agent of the facility shall facilitate the collection of the information as directed by the Pennsylvania State Police.**

42 PA.CON.S.STAT.ANN. § 9799.19(h)(4)

- (b) If sentenced on or after the effective date of the statute (December 20, 2012) and individual is:

- ▶ sentenced to a county or State correctional facility, **then the individual shall immediately report to the Office of Probation and Parole serving that county for registration.**

42 PA.CON.S.STAT.ANN. § 9799.19(b.1)(1)

- ▶ sentenced to county intermediate punishment, which is either restorative or restrictive, **then the individual shall register within 48 hours of sentencing.**

42 PA.CON.S.STAT.ANN. § 9799.19(d)(1)&(2)

³⁵ Includes placement in a foster family home or another residential setting which provides the individual with less than 24-hour-per-day supervision and care. 42 PA.CON.S.STAT.ANN. § 9799.19(h)(2).

³⁶ Relates to the involuntary treatment of sexually violent persons. 42 PA.CON.S.STAT.ANN. § 6403.

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- ▶ sentenced to county probation,
 - ▶ **then the individual shall register within 48 hours of sentencing.**42 PA.CON.S.STAT.ANN. § 9799.19(e)
 - ▶ being supervised by the Commonwealth under Interstate Compact for Adult Offenders,
 - ▶ **then the individual must provide registry information to the appropriate supervising official for inclusion into the registry.**42 PA.CON.S.STAT.ANN. § 9799.19(f)(1)
 - ▶ a juvenile offender adjudicated delinquent,
 - ▶ **then the individual shall provide the information to the juvenile probation officer at the time of disposition³⁷ or at the time of adjudication if the court intends to transfer the juvenile's case to the county of residence.**42 PA.CON.S.STAT.ANN. § 9799.19(h)(1)
 - ▶ a sexually violent delinquent child committed to involuntary treatment under chapter 64,
 - ▶ **then registration is required at the time of commitment.**42 PA.CON.S.STAT.ANN. § 9799.19(h)(5)
- (c) If convicted or adjudicated delinquent outside of the Commonwealth,
 - ▶ **then the individual shall register within 3 business days of establishing residence, commencing employment, or commencing enrollment as a student within Pennsylvania.**42 PA.CON.S.STAT.ANN. § 9799.19(i)(1)&(2)
- (d) If convicted of a sexually violent offense and incarcerated in a Federal correctional institution or supervised by Federal probation authorities,
 - ▶ **the individual shall register within 3 business days of establishing residence, commencing employment or commencing enrollment as a student within Pennsylvania.**42 PA.CON.S.STAT.ANN. § 9799.19(i)(3)

³⁷ However, if the adjudication of delinquency occurs in any county other than the juvenile's county of residence *and* the court intends to transfer the case for disposition in the county of residence, then registration is required at the time of adjudication. 42 PA.CON.S.STAT.ANN. § 9799.19(h)(1)(i)(B).

2. Information to be Provided³⁸

- **Name.** Primary or given name, regardless of the context.³⁹
- **Internet Identification** - Designation used by the individual for purposes of routing or self-identification in Internet communications or postings.
- **Telephonic Identification** - Telephone numbers and any other designations used by the individual for purposes of routing or self-identification in telephonic communications.
- **Social Security Number** - Valid social security number and purported social security number, if applicable.
- **Address.** Address of every residence and intended residence within the Commonwealth and outside the Commonwealth and the location at which mail is received.⁴⁰
- **Temporary Lodging information.** Individual must include specific length of time and dates of lodging.
- **Immigration Documents.** Documents establishing immigration status, including passports.
- **Employer Information.** Name and address of employment or where the individual will be employed.⁴¹
- **Occupational License.** Occupational and professional licensing information, including type of license and license number.
- **Student information.** The individual must provide the name and address of school where he or she is a student or will be a student.

³⁸ 42 PA.CON.S.TAT.ANN. § 9799.16(b)(1).

³⁹ Includes: an alias, nickname, pseudonym, ethnic or tribal name, and any designations or monikers used for self-identification in Internet communications or postings. 42 PA.CON.S.TAT.ANN. § 9799.16(b)(1).

⁴⁰ **Transient Offenders** - The following requirements apply for transient offenders until the transient establishes residence:

The transient shall provide information about the temporary habitat or other temporary place of abode or dwelling, including but not limited to a homeless shelter or park. Additionally, the transient shall provide a list of planned destinations, including those outside the Commonwealth, as well as places where the transient eats, frequents, and engages in leisure activities.

If the transient is designated a sexually violent predator, the transient shall state whether he is in compliance with §9799.36 counseling requirements.

42 PA.CON.S.TAT.ANN. § 9799.16(b)(6).

⁴¹ If the individual is not employed in a fixed workplace, he or she must provide general travel routes and general areas where he or she works. 42 PA.CON.S.TAT.ANN. § 9799.16(b)(9).

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- **Motor Vehicle Information.** Information relating to all motor vehicles owned or operated by the individual, including watercraft and aircraft. The individual must provide the following information:
 - ▶ license plate number
 - ▶ registration or another identification number
 - ▶ address where the vehicle is stored
 - ▶ individual's operating license or other identification card
- **Date of birth.** Individual must provide actual and purported date of birth.
- **Acknowledgment form.** The individual must sign a form acknowledging his obligations under the statute.

3. Notification of Changes⁴²

In addition to in-person periodic appearances, offenders must appear in person at an approved registration site within 3 business days of any change in:

- Name or alias;
- Residence;
- Employment or address of employment;
- Student enrollment status;
- Telephone number (including addition of a new telephone number)
- Motor vehicle information that was required at initial registration or a change in the address at which it is stored;
- Temporary lodging;
- Designations used in internet communications or postings;
- Information relating to an occupational or professional license.

⁴² 42 PA. CONS. STAT. ANN. § 9799.15(g).

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4. Enforcement

Enforcement procedures are specified in 42 PA.CON.S.STAT.ANN. § 9799.22.

(a) In General. When an individual fails to comply with § 9799.19 (relating to initial registration, § 9799.21 (relating to penalty) or § 9799.36 (relating to counseling of SVPs), the Pennsylvania State Police shall:

- Locate and arrest the individual, in cooperation with the district attorney; 42 PA.CON.S.STAT.ANN. §9799.22(a)(1),
or
- notify the municipal police department where the individual has a residence, is transient, is employed, or is enrolled as a student; the municipal police shall locate and arrest the individual in cooperation with the district attorney. 42 PA.CON.S.STAT.ANN. §9799.22(a)(2).

(b) When an individual cannot be located, the Pennsylvania State Police shall:

- enter information that the individual cannot be located on the internet website, the state registry, the National Sex Offender Registry, and National Crime Information Center⁴³
and
- notify the U.S. Marshall's Service. 42 PA.CON.S.STAT.ANN. §9799.22(b).

(c) Notice from another jurisdiction. When another jurisdiction notifies the Pennsylvania State Police that an individual intends to establish status that requires him to register in the Commonwealth, and the individual fails to comply with the registration requirements, the Pennsylvania State Police must notify the other jurisdiction.⁴⁴ 42 PA.CON.S.STAT.ANN. §9799.22(c).

(d) If the individual refuses to provide information. The appropriate officials must inform the Pennsylvania State Police so that they may comply with this subsection. 42 PA.CON.S.STAT.ANN. §9799.22(d).

5. Court Notification and Classification Requirements

The notices that a trial court must provide at the time of sentencing (or

⁴³ If a warrant is issued pursuant to this subsection, the police department executing the warrant shall provide information to the NCIC Wanted Person File to reflect that a warrant has been issued. §9799.22(b)(4).

⁴⁴ This subsection also applies to transient offenders.

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of disposition in a juvenile case) are specified in 42 PA.CON.S.TAT.ANN. §9799.23.

In summary, the trial court, at the time of sentencing, must inform the sexual offender of:

- 1) the duty to register;
- 2) the duty to register in accordance with the SORNA provisions for period of registration, the registry, the time for initial registration, and verification of address;
- 3) the duty to attend counseling;
- 4) the duty to register if any of the following occur: change in address (including becoming transient), change in employment, or change in student enrollment.

Additionally, 42 PA.CON.S.TAT.ANN. §9799.20 lists the entities that have a duty to implement many of the provisions of the Act:

§ 9799.20. Duty to inform

In order to implement the provisions of section 9799.19 (relating to initial registration), as appropriate, the Pennsylvania State Police, the court having jurisdiction over the sexual offender, the chief juvenile probation officer of the court and the appropriate official of the Pennsylvania Board of Probation and Parole, county office of probation and parole, the Department of Public Welfare or a State or county correctional institution shall:

- (1) Inform the individual required to register of the individual's duties under this subchapter.
- (2) Require the individual to read and sign a form stating that the duty to register has been explained and that the individual understands the registration requirement.
- (3) Collect the information required under section 9799.16(b) and (c) (relating to registry) and forward the information to the Pennsylvania State Police for inclusion in the registry as set forth in this subchapter.⁴⁵

(a) Duty to inform. At the time of sentencing,⁴⁶ the court must

⁴⁵ 42 PA.CON.S.TAT.ANN. §9799.20.

⁴⁶ Or, in the case of juvenile offenders, at the time of disposition; and of commitment, in the case of sexually violent delinquent children.

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specifically inform sexual offenders of the provisions of this subchapter, including:

- the duty to register under this subchapter, namely sections,
 - §9799.15 (relating to period of registration);
 - §9799.16(b) (relating to registry);
 - §9799.19 (relating to initial registration);
 - §9799.25 (relating to verification by sexual offenders and Pennsylvania State Police); and,
- if applicable, the duty to attend counseling in accordance with sections,
 - §9799.36 (relating to counseling of sexually violent predators
 - §6404.2(g)(relating to the duration of outpatient commitment and review); and,
- the duty to register with authorities in another jurisdiction within three (3) business days of,
 - Changes in residence, including,
 - commencement of residence,
 - change of residence
 - termination of residence or failure to maintain a residence (thus making the offender transient)
 - Change in employment status, including,
 - commencement of employment
 - change in location or entity of employment
 - termination of employment
 - Change in student enrollment status, including,
 - enrollment as a student
 - change in enrollment status
 - termination of enrollment

(b) Duty to order the information to be provided under §9799.16(c).

The court must order that the fingerprints, palm prints, DNA sample and photograph of the sexual offender shall be provided to the Pennsylvania State Police upon sentencing.

1. Acknowledgement form

The court must require the offender to read and sign a

form stating that these duties have been explained.

If the offender is incapable of speaking, reading, or writing the English language, the court shall certify the duty to register was explained and the offender indicated an understanding of his or her duties.

2. Tier Classification⁴⁷

The court must specifically classify the individual as one of the following,

- i) Tier I offender
- ii) Tier II offender
- iii) Tier III offender
- iv) sexually violent predator
- v) juvenile offender
- vi) sexually violent delinquent child

3. Mandatory Registration.

The following applies,

- the court's failure to provide information, to correctly inform an offender of his or her obligations or registration requirements shall not relieve the offender from the requirements of this subchapter;
- the court has no authority to relieve a sexual offender from the duty to register under this subchapter or to modify the requirements of this subchapter.⁴⁸

H. Assessments

Responsibility of Trial Court

After conviction but before sentencing, the sentencing court must:

- 1) Order an assessment by the State Sexual Offenders Assessment Board

⁴⁷ The Pennsylvania Commission on Sentencing shall establish procedures to enable courts to classify sexual offenders as provided in this subsection. *See* 42 PA.CON.S.TAT.ANN. §9799.40.

⁴⁸ Except as provided in §9799.17 (relating to termination of period of registration for juvenile offenders).

- 2) Forward the order to the administrative officer of the Board within 10 days of conviction
- 3) Hold a hearing (in accordance with § 9799.24(e)) prior to sentencing, upon the filing of a praecipe by the district attorney
- 4) Determine, prior to sentencing, whether the Commonwealth has proved by *clear and convincing evidence* that the defendant is a sexually violent predator

1. Order for assessment

42 PA.CON.S.TAT.ANN. § 9799.24(a)

After conviction but before sentencing, a court must order an individual convicted of a sexually violent offense to be assessed by the board.

This order must be sent to the administrative officer of the board within ten days of the date of conviction for the sexually violent offense.

2. Factors to be considered in assessment

42 PA.CON.S.TAT.ANN. § 9799.24(a)

After the board receives the court's order for an assessment, a member of the board as designated by the administrative officer of the board must conduct an assessment of the individual to determine if the individual should be classified as a sexually violent predator.

The assessments should include, but are not limited to, an examination of the following:

- 1) Facts of the current offense, including:
 - whether the offense involved multiple victims;
 - whether the individual exceeded the means necessary to achieve the offense;
 - the nature of the sexual contact with the victim;
 - relationship of the individual to the victim;
 - the age of the victim;
 - whether the offense included a display of unusual cruelty by the individual during the commission of the crime;
 - the mental capacity of the victim.

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- 2) Prior offense history, including:
 - the individual's prior criminal record;
 - whether the individual completed any prior sentences;
 - whether the individual participated in available programs for sexual offenders.

- 3) Characteristics of the individual, including:
 - age;
 - use of illegal drugs;
 - any mental illness, mental disability or mental abnormality;
 - behavioral characteristics that contribute to the individual's conduct.

- 4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of re-offense.

3. Release of information
42 PA.CON.S.TAT.ANN. § 9799.24(c)

All state, county and local agencies, offices or entities in the Commonwealth, including juvenile probation officers, must provide copies of records and information as requested by the board in connection with the court-ordered assessment and the assessment requested by the Pennsylvania Board of Probation and Parole or the assessment of a delinquent child under section 6358 (relating to assessment of delinquent children by the State Sexual Offenders Assessment Board).

4. Submission of report by Board
42 PA.CON.S.TAT.ANN. § 9799.24(d)

The board has 90 days from the date of conviction of the individual to submit a written report containing its assessment to the district attorney.

5. Summary of Offense
42 PA.CON.S.TAT.ANN. § 9799.24(d.1)

The board shall prepare a description of the offense or offenses that trigger the application of this subchapter to include, but not be limited to:

- 1) a concise narrative of the individual's conduct;
- 2) whether the individual was a minor;

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- 3) the manner of weapon or physical force used or threatened;
- 4) if the offense involved unauthorized entry into a room or vehicle occupied by the victim;
- 5) if the offense was part of a course or pattern involving multiple incidents or victims;
- 6) previous instances in which the individual was determined guilty of an offense subject to this subchapter or of a crime of violence as defined in section 9714 (relating to sentences for second and subsequent offenses).

6. Hearing

42 PA.CON.S.TAT.ANN. § 9799.24(e)

- (a) **Prehearing Procedure** – The assessment hearing is scheduled by the filing of a praecipe by the district attorney.
- Upon filing the praecipe, the district attorney must serve a copy of the praecipe and board report on the defense counsel. § 9799.24(e)(1).
 - The individual and the district attorney are given notice of the hearing and an opportunity to be heard, the right to call factual witnesses, the right to call expert witnesses, and the opportunity for cross-examination. § 9799.24(e)(2).
 - The individual has a right to counsel and to have a lawyer appointed to represent him if he cannot afford one. § 9799.24(e)(2).
- (b) **Alternative Expert Assessment** - If the individual requests another expert assessment, he shall provide a copy of the expert assessment to the district attorney prior to the hearing. § 9799.24(e)(2).
- (c) **Burden of Proof** – At the hearing prior to sentencing, the court must determine whether the Commonwealth has proven by **clear and convincing evidence** that the individual is a sexually violent predator. § 9799.24(e)(3).
- (d) **Court’s Determination** - A copy of the order containing the determination of the court must be immediately submitted to the individual, district attorney, Pennsylvania Board of Probation and

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Parole, Department of Corrections and Pennsylvania State Police. § 9799.24(e)(4).

- (e) **SVP Determination Following Sentencing** – Although the statute requires that the SVP assessment and determination be conducted after conviction but prior to sentencing, that requirement may be waived. *Commonwealth v. Whanger*, 30 A.3d 1212 (Pa. Super. 2011), *appeal denied*, 615 Pa. 777, 42 A.3d 293 (2012). In *Whanger*, the defendant signed a form which explained the SVP assessment procedure and waived the requirement that it occur before sentencing, and then did not preserve his objection to the late assessment by way of post-sentence motions or objections at the time of the SVP hearing. An objection to a late SVP determination must be preserved for appellate review like any other objection.

7. **Presentence Investigation**
42 PA.CON.S.TAT.ANN. § 9799.24(f)

Copies of the board assessment must be provided to the agency preparing the presentence investigation.

8. **Parole Assessment**
42 PA.CON.S.TAT.ANN. § 9799.24(g)

The Pennsylvania Board of Probation and Parole may request the board conduct an assessment and submit a report to them prior to considering an offender or sexually violent predator for parole.

9. **Delinquent Children**
42 PA.CON.S.TAT.ANN. § 9799.24(h)

The probation officer must notify the board 90 days prior to the 20th birthday of the child of the status of the delinquent child, together with the location of the facility where a child is committed pursuant to section 6352 (relating to disposition of delinquent child), after having been found delinquent for an act of sexual violence, which if committed by an adult would be a violation of

18 PA.CON.S.TAT.ANN. §3121 (Rape)
18 PA.CON.S.TAT.ANN. §3123 (Involuntary Deviate Sexual)
18 PA.CON.S.TAT.ANN. § 3124.1 (Sexual Assault)
18 PA.CON.S.TAT.ANN. § 3125 (Aggravated Indecent Assault)
18 PA.CON.S.TAT.ANN. § 3126 (Indecent Assault)
18 PA.CON.S.TAT.ANN § 4302 (Incest)

Consistent with the provisions of 42 PA.CON.S.TAT.ANN. § 9799.24(b),

the Board must conduct an assessment of the child, which must include the Board's determination of whether or not the child is in need of commitment due to a mental abnormality as defined in Section 6402 (relating to definitions) or a personality disorder, either of which results in serious difficulty in controlling sexually violent behavior and provide a report to the court within the time frames set forth in Section 6358(c).

The probation office must assist the Board in obtaining access to the child and any record or information as requested by the Board in connection with the assessment.

10. Appellate Review

Challenges to a defendant's designation as a sexually violent predator (SVP) are not cognizable issues under the PCRA because they do not pertain to the underlying conviction or sentence. ***Commonwealth v. Bundy***, 96 A.3d 390, 394 (Pa. Super. 2014); ***Commonwealth v. Masker***, 34 A.3d 841 (Pa. Super. 2011) (*en banc*), *appeal denied*, 616 Pa. 635, 47 A.3d 846 (2012). This exclusion from the jurisdiction of a PCRA petition includes issues centering on the retroactive application of registration laws. ***Commonwealth v. Partee***, 86 A.3d 245 (Pa. Super. 2014).

In ***Commonwealth v. Partee***, 86 A.3d 245 (Pa. Super. 2014), the defendant filed a petition for *habeas corpus* and/or seeking enforcement of a plea agreement, in which he alleged that a specific term of his plea agreement was that he would receive a shorter reporting period. The trial court dismissed the petition pursuant to PCRA review. The Superior Court reversed, and stated:

We note that the within petition is not an attack on Appellant's sentence, nor is he alleging that he is innocent of the offenses of which he was convicted. Appellant is not asserting that his conviction or sentence resulted from a violation of the Constitution, ineffective assistance of counsel, an unlawfully-induced plea, obstruction by government officials of his right to appeal, newly-discovered evidence, an illegal sentence, or a lack of jurisdiction. 42 Pa.C.S. § 9543(a)(2). In short, we agree with Appellant that his claim does not fall within the scope of the PCRA and should not be reviewed under the standard applicable to the dismissal of PCRA petitions. See ***Commonwealth v. Masker***, 34 A.3d 841, 843–844 (Pa. Super. 2011) (*en banc*) (holding that a challenge to the classification of the defendant as a SVP is not a challenge to the conviction or sentence, and therefore not cognizable under the PCRA). Furthermore, it is not subject to the PCRA's time constraints, and hence, we have jurisdiction to entertain it. ***Commonwealth v.***

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Deaner, 779 A.2d 578, 580 (Pa.Super.2001).

Commonwealth v. Partee, 86 A.3d 245, 247 (Pa. Super. 2014).

I. Verification by sexual offenders and Pennsylvania State Police

42 PA. CONS. STAT. ANN. § §9799.25

1. Periodic Verification.

Notwithstanding 42 PA.CON.S.STAT.ANN. §9799.19 (relating to initial registration) and in accordance with §9799.15(a)(relating to period of registration), sexual offenders shall verify the information provided in §9799.16(b) and be photographed, as follows:

- a) Annual appearances:
 - ▶ Tier I offenders
 - ▶ individuals required to register under §9799.13(7.1)

- b) Semiannual appearances:
 - ▶ Tier II offenders

- c) Quarterly appearances:
 - ▶ Tier III offenders
 - ▶ sexually violent predators
 - ▶ juvenile offenders
 - ▶ sexually violent delinquent child

- d) Monthly appearances:
 - ▶ transient offenders

2. Deadline.

If the offender fails to appear within ten (10) days of the date designated by the Pennsylvania State Police, he or she may be subject to prosecution under 18 PA.CON.S.STAT.ANN. §4915.1 (relating to failure to comply with registration requirements).

J. Victim Notification

42 PA.CON.S.STAT.ANN. § §9799.26

1. Duty to Inform the Victim of SVP.

When a sexually violent predator or sexually violent delinquent child initially registers under 42 PA.CON.S.STAT.ANN. §9799.19 or changes their

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residence, employment, or student enrollment status under §9799.15(g) (2), (3) or (4), the municipal police, or the Pennsylvania State Police, if there is no municipal police, must provide written notice to the victim **within 72 hours**. The notice shall contain the following information about the sexually violent predator or the sexually violent delinquent child:

- Name
- Residence (including information required by transient offenders)
- Address of employment
- Address of the school where the offender is enrolled.

However, a victim may request termination of this notification with a written statement releasing that agency from the duty to comply. See 42 PA.CONS.STAT.ANN. §9799.26(a)(2).

2. Victim Notification of Other Sexual Offenders.

For sexual offenders not determined to be a sexually violent predator or a sexually violent delinquent child, the victim shall be notified under the Crime Victims Act.⁴⁹ See 42 PA.CONS.STAT.ANN. §9799.26(b).

K. Other Notification (“Community Notification”)

42 PA. CONS. STAT. ANN. § §9799.27 & 9799.37

1. Residence.

Written notification of the sexually violent predator’s residence to be provided by municipality where he lives. See 42 PA.CONS.STAT.ANN. §9798(a).

2. Contents of Notice:

- a) Name of sexually violent predator;
- b) Address of sexually violent predator;⁵⁰
- c) Offense for which he was convicted, sentenced by a court, adjudicated delinquent or court martialled;
- d) Photograph, if available – See 42 PA.CONS.STAT.ANN. §9798(a)(1);

⁴⁹ 18 PA.STAT. § 11.201.

⁵⁰ The address or addresses at which the sexually violent predator has a residence. If, however, the sexually violent predator has a residence as defined in paragraph (2) of the definition of “residence” set forth in section 9792 (relating to definitions), the notice shall be limited to that set forth in section 9795.2(a)(2)(i)(C) (relating to registration procedures and applicability).

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- e) Not to contain any information that might reveal the victim's name, identity or residence – See 42 PA.CON.S.STAT.ANN. §9798(a)(2).

3. Release of Notice:

- a) The Notice must be provided within 5 days after information of the sexually violent predator's release date and residence has been received by chief law enforcement officer. See 42 PA.CON.S.STAT.ANN. §9798(c)(1).

Notice provided to:

- i. Neighbors. (*Where the sexually violent predator lives in a common interest community, neighbors include unit owners' association and residents of the common interest community.*)
 - ii. Verbal notification may be used if written notification would delay meeting time requirement.
- a) Within 7 days after the chief law enforcement officer receives information regarding the sexually violent predator's release date and residence. See 42 PA.CON.S.STAT.ANN. §9798(c)(2)

Notice provided to:

- i. Director of county children and youth service agency of county where SVP resides;
- ii. Superintendent of each school district and equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality where SVP resides;
- iii. Superintendent of each school district and equivalent official for each private and parochial school located within a one-mile radius of where the SVP resides;
- iv. Licensee of each certified day care center and licensed preschool program and owner/operator of each registered family day care home in the municipality where the SVP resides;
- v. President of each college, university and community college located within 1,000 feet of a SVP's residence.

4. General Public: All information must be available upon request to

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general public. Information may be provided by electronic means. See 42 PA.CONS.STAT.ANN. §9798(d)

5. **Interstate Transfers** – duties of police departments under this section also applies to individuals transferred to Pennsylvania pursuant to the Interstate Compact for Supervision of Adult Offenders or the Interstate Compact for Juveniles. See 42 PA.CONS.STAT.ANN. §9798(e)
6. **Exemption from Notification Requirement:**
Exemption from notification for certain licensees and their employees – there is no duty imposed upon a person licensed under the Real Estate Licensing and Registration Act, or an employee thereof, to disclose any information regarding an individual required to be included in the registry under this subchapter. See 42 PA.CONS.STAT.ANN. §9799.37.

L. **Public Internet Website**

42 PA.CONS.STAT.ANN. §9799.28

In 2004, the General Assembly found that public service would be enhanced by making information available on the Internet and that public access was solely intended as a means of public protection and not to be punitive. See 42 PA.CONS. STAT.ANN. §9799(a).

SORNA provides that the following information is to be disclosed on the website, within the guidelines as stated:

§ 9799.28. Public Internet website

...

(b) Required information.--Notwithstanding Chapter 63 (relating to juvenile matters) and 18 Pa.C.S. Ch. 91 (relating to criminal history record information), the Internet website shall contain the following information regarding an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child:

(1) Name and aliases.

(2) Year of birth.

(3) Street address, municipality, county, State and zip code of residences and intended residences. In the case of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child who fails to establish a residence and is therefore a transient,

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the Internet website shall contain information about the transient's temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park. In addition, the Internet website shall contain a list of places the transient eats, frequents and engages in leisure activities.

(4) Street address, municipality, county, State and zip code of any location at which an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is enrolled as a student.

(5) Street address, municipality, county, State and zip code of a fixed location where an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is employed. If an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is not employed at a fixed address, the information shall include general areas of work.

(6) Current facial photograph of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child. This paragraph requires, if available, the last eight facial photographs taken of the individual and the date each photograph was entered into the registry.

(7) Physical description of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child.

(8) License plate number and a description of a vehicle owned or operated by an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child.

(9) Offense for which an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is registered under this subchapter and other sexually violent offenses for which the individual was convicted.

(10) A statement whether an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is in compliance with registration.

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(11) A statement whether the victim is a minor.

(12) Date on which the individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is made active within the registry and date when the individual most recently updated registration information.

(13) Indication as to whether the individual is a sexually violent predator, sexually violent delinquent child or convicted of a Tier I, Tier II or Tier III sexual offense.

(14) If applicable, indication that an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is incarcerated or committed or is a transient.

(c) Prohibited information.--The public Internet website established under this section shall not contain:

(1) The identity of any victim.

(2) The Social Security number of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child.

(3) Any information relating to arrests of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child that did not result in conviction.

(4) Travel and immigration document numbers.

(d) (Reserved).

(e) Duration of posting.--The information listed in subsection (b) shall be made available on the Internet website unless an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is deceased or is no longer required to register under this subchapter.

42 PA.CONS.STAT.ANN. §9799.28.

The Pennsylvania State Police maintain the “Megan’s Law Website” at:

<http://www.pameganslaw.state.pa.us/FAQ.aspx>

M. Immunity for Good Faith Conduct

42 PA.CON.S.TAT.ANN. §9799.31

The following entities are immune from liability for good faith conduct:

- Agents and employees of the Pennsylvania State Police and local law enforcement agencies.
- District attorneys and their agents and employees.
- Superintendents, administrators, teachers, employees and volunteers engaged in the supervision of children of any public, private or parochial school.
- Directors and employees of county children and youth agencies.
- Presidents or similar officers of universities and colleges, including community colleges.
- The Pennsylvania Board of Probation and Parole and its agents and employees.
- County probation and parole offices and their agents and employees.
- Licensees of certified day-care centers and directors of licensed preschool programs and owners and operators of registered family day-care homes and their agents and employees.
- The Department of Corrections and its agents and employees.
- County correctional facilities and their agents and employees.
- The board and its members, agents and employees.
- Juvenile probation offices and their agents and employees.
- The Department of Public Welfare and its agents and employees.
- Institutions or facilities set forth in section 6352(a)(3) (relating to disposition of delinquent child) and their agents and employees.
- The unit owners' association of a common interest community and its agents and employees as it relates to distributing information

regarding section 9799.27(b)(1) (relating to other notification).

N. Counseling of Sexually Violent Predators

42 PA.CON.S.STAT.ANN. §9799.36

1. General Rule

A sexually violent predator who is not incarcerated is required to attend at least monthly counseling sessions in a program approved by the board, and be financially responsible for all fees assessed from the counseling sessions. The board must monitor the individual's compliance with this subsection. See 42 PA.CON.S.STAT.ANN. §9799.36(a).

2. Designation in another jurisdiction

If the individual is designated a sexually violent predator in another jurisdiction and was required to undergo counseling, the individual must undergo counseling pursuant to this section. See 42 PA.CON.S.STAT.ANN. §9799.36(b).

3. Penalty

A sexually violent predator who knowingly fails to attend counseling sessions as provided in this section is subject to prosecution under 18 PA.CON.S.STAT.ANN. §4915.1 (relating to failure to comply with registration requirements). See 42 PA.CON.S.STAT.ANN. §9799.36(c).

O. Photographs and Fingerprinting

42 PA.CON.S.STAT.ANN. § 9799.39

An individual subject to registration must submit to fingerprinting and photographing with the following minimal requirements:

Fingerprints – to be full set of fingerprints and palm prints.

Photographs – to include photographs of the face, scars, marks, tattoos or other unique features of the individual.

Fingerprints and photographs obtained under this subchapter may be used for this purposes of SORNA and for general enforcement purposes.

P. Failure to Comply Statutes

18 PA.CON.S.STAT.ANN. § 4915

1. Failure to Comply with registration of sexual offenders

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An individual who is subject to registration under 42 PA.CON.S.STAT.ANN. §9799.13 commits an offense if he knowingly fails to register, verify his address or be photographed, or provide accurate information when registering under:

- 42 PA.CON.S.STAT.ANN. §9799.15
- 42 PA.CON.S.STAT.ANN. §9799.19
- 42 PA.CON.S.STAT.ANN. §9799.25

2. Failure by Transient

An individual set forth in 42 PA.CON.S.STAT.ANN. §9799.13 who is a transient commits an offense if he knowingly fails to register, verify his location information or be photographed, or provide accurate information when registering under:

- 42 PA.CON.S.STAT.ANN. §9799.15
- 42 PA.CON.S.STAT.ANN. §9799.16(b)(6)
- 42 PA.CON.S.STAT.ANN. §9799.25(a)(7)

3. Failure to comply with counseling

An individual required to comply with counseling commits an offense if he knowingly fails to comply under:

- 42 PA.CON.S.STAT.ANN. §6404.2(g), or
- 42 PA.CON.S.STAT.ANN. §9799.36

11.3 DNA DATA AND TESTING

A. COMBINED DNA INDEX SYSTEM - CODIS

CODIS is the software and DNA indexing system created in 1994 by the DNA Identification Act. CODIS stands for Combined DNA Index System. Since its authorization in 1994, the CODIS system has grown to include all 50 states and a number of federal agencies. CODIS collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes. To participate in CODIS, a local laboratory must sign a memorandum of understanding agreeing to adhere to quality standards and submit to audits to evaluate compliance with the federal standards. The United States Supreme Court described the CODIS system in *Maryland v. King*, 133 S.Ct. 1958, 1968, 186 L.Ed.2d 1 (2013).

CODIS is defined in Section 2303 of the DNA Detection of Sexual and Violent Offenders Act (Pennsylvania DNA Act), as:

The term is derived from Combined DNA Index System, the Federal Bureau of Investigation's national DNA identification

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index system that allows the storage and exchange of DNA records submitted by state and local forensic DNA laboratories.

44 PA.CON.S.TAT.ANN. § 2303.

The Pennsylvania DNA Act provides that the Pennsylvania State Police must make arrangements for DNA samples to be stored, analyzed, and classified. 44 PA.CON.S.TAT.ANN. § 2319.

As stated above, it stands for Combined DNA Index System, an electronic database which connects DNA laboratories at the local, state, and national levels, and which standardizes the points of comparison, *i.e.*, loci, used in DNA analysis. that allows nationwide access to DNA profiles. It operates under a three-tiered DNA Index System – Local (LDIS), State (SDIS) and National (NDIS). DNA profiles are uploaded in this hierarchical sequence: local index to state index to national index. The NDIS contains DNA profiles contributed from federal, state, and local laboratories. The SDIS contains DNA profiles collected from the state; and the LDIS is the local repository for DNA profiles. Each local laboratory that participates in CODIS has its own local index, and each state has one state index. The Federal Bureau of Investigation maintains the national index.

DNA profiles are collected from two different sources and uploaded into the index systems. The two databases are the Offender Index and the Forensic Index. The offender database is comprised of DNA samples taken from convicted offenders who are required to submit a DNA sample. Each state dictates which crimes require submission of DNA samples. The forensic database consists of DNA samples taken from crime scenes; these are unknown profiles. Information contained in the index systems is compared, which may then generate a “hit” or match. Two types of matches can occur: evidence-to-evidence (or forensic) matches and evidence-to-offender (or offender) matches.

CODIS has been an effective investigative tool in solving crimes, revealing possible suspects in cold cases, and linking previously unrelated crimes together. As stated above, all 50 states now participate in CODIS, including Pennsylvania. According to the FBI CODIS website, as of April 2014, Pennsylvania has added 309,414 offender profiles, 12,005 forensic profiles, and has aided in 5,376 investigations. For statistics on the NDIS, see the FBI’s CODIS website on the FBI’s website, www.fbi.gov.

B. The Pennsylvania DNA Detection of Sexual and Violent Offenders Act

DNA Detection of Sexual and Violent Offenders Act (Pennsylvania DNA Act) is codified in 44 PA.CON.S.TAT.ANN. §§ 2301-2336.

1. Responsibilities of the Pennsylvania State Police

- the policy management and administration of the State DNA

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identification record system;

- promulgating rules and regulations to carry out the provisions of this chapter; and
- providing or liaison with the FBI and other criminal justice agencies for Pennsylvania's participation in CODIS or in a DNA data base designated by the State Police. See 44 PA.CON.S.STAT.ANN. § 2311.
- State Police can recommend to the General Assembly inclusion of additional offenses for which DNA samples will be taken. See 44 PA.CON.S.STAT.ANN. § 2314.⁵¹
- State Police is to promulgate as necessary, rules, regulations and guidelines to implement this chapter, including procedures to be used in the collection, submission, identification, analysis, storage and disposition of DNA samples and typing results of DNA samples submitted. See 44 PA.CON.S.STAT.ANN. § 2318(a).

C. When DNA Sample Required

1. DNA sample is required:

- From a person convicted or adjudicated delinquent for a felony sex offense or other specified offense; or
- From a person who is or remains incarcerated for a felony sex offense or other specified offense on or after effective date of this Act;
- Upon intake to a prison, jail, juvenile detention facility or any other detention facility or institution.

2. Mandatory Submission – 44 PA.CON.S.STAT.ANN. § 2316(d.1).

Requirements of this chapter apply regardless of whether a court advises a person that a DNA sample must be provided to the State DNA Data Base and State DNA Data Bank as a result of a conviction or adjudication or delinquency.

- Person sentenced to death or life imprisonment without the possibility of parole NOT exempt.
- Any person subject to this chapter who has not provided a DNA sample

⁵¹ DNA identification system must be compatible with the procedures established by the FBI, including quality assurance standards for forensic DNA testing laboratories and DNA data basing laboratories and CODIS policies and procedures. See 44 PA.CON.S.STAT.ANN. § 2315.

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for any reason, including because of an oversight or error, must provide a DNA sample for inclusion in the State DNA Data Base and State DNA Data Bank after being notified by authorized law enforcement or corrections personnel.

- If a DNA sample is not adequate for any reason, the person must provide another DNA sample for inclusion in the State DNA Data Base and State DNA Data Bank after being notified by authorized law enforcement or corrections personnel.

D. Expungement

A person whose DNA record has been included in the data bank may request expungement on the grounds that

- a. the conviction or delinquency adjudication has been reversed and the case dismissed OR
- b. the DNA sample, record or profile was included in the State DNA Data Bank or State DNA Data Base by mistake.

See 44 PA.CON.S.TAT.ANN. § 2321.

State Police must receive a written request for expungement and certified copy of the final court order reversing and dismissing the conviction or clear and convincing proof that the sample record or profile was included by mistake before purging all records and identifiable information in the State Data Bank and State Data Base and destroying each sample, record and profile from the person.

An incarcerated or previously incarcerated person may not seek expungement of a DNA sample, record or profile on the grounds that he was convicted or adjudicated delinquent

- a. for a felony sex offense prior to July 27, 1995 OR
- b. for one of the other specified offenses prior to the effective date of the former DNA Act or this chapter

E. Prohibition on Disclosure - 44 PA.CON.S.TAT.ANN. § 2331

1. Information in the State DNA Data Bank or State DNA Data Base shall not be disclosed in any manner to any person or agency not authorized to receive it knowing that such person or agency is not authorized to receive it.

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2. No person can obtain individually identifiable DNA information from the State Data Base or the State DNA Data Bank without authorization to do so.

F. Criminal Penalties – 44 PA.CON.S.TAT.ANN. § 2332

1. Any person who by virtue of employment or official position or any person contracting to carry out any functions under this chapter, who has possession of or access to individually identifiable DNA information contained in the State DNA Data Base or in the State DNA Data Bank and who for pecuniary gain for such person or for any other person discloses it in any manner to any person or agency not authorized to receive it commits a misdemeanor of the first degree.

Notice of Registration Requirements

TIER I OFFENDERS

1. You, _____, have been convicted of the following offense(s):

OFFENSE

BILL NUMBER

2. It has been determined that you are not a sexually violent predator.
3. You must register with the Pennsylvania State Police for a period of fifteen (15) years.
4. You must register with the Pennsylvania State Police IMMEDIATELY, through either state or local prison officials, at the county department of probation and parole or at any designated state police registration site.
5. If you are sentenced to a term of incarceration, you must notify the registering official in the state or county prison facility of your conviction and duty to register.
6. You are required to appear in person annually to verify your information with the Pennsylvania State Police. You are required to appear within ten days before the annual date designated by the Pennsylvania State Police.
7. If you are homeless, you are required to appear in person monthly (every 30 days) until you establish permanent residence.
8. You are required to register the following information with the Pennsylvania State Police:
 - a. Name, including aliases or nicknames
 - b. Any designation or monikers used for self-identification on the internet
 - c. Telephone numbers, including cell phone numbers
 - d. Social security number
 - e. Address of residence or intended residences and locations where you receive mail
 - f. If homeless, temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park as well as lists of places you eat, frequent, and engage in leisure activities as well as

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- any planned destinations
 - g. Temporary lodging (seven days or more) and the dates you will be temporarily lodged
 - h. Passport and documents establishing immigration status
 - i. Name and address of employment. If you do not have a fixed place of employment, this includes travel routes or general areas where you work. Employment includes full time or part time for a period of time exceeding 4 days during a 7 day period or for an aggregated period of time exceeding 15 days during any calendar year
 - j. Occupational or professional license
 - k. Name and address of any school where you are or will be a student
 - l. A description and license plate number of any vehicle owned or operated by you and the address where the vehicle is stored
 - m. Driver's license
 - n. Date of birth
9. You are required to appear in person to report any changes to your above personal information, such as a change in residence, to the Pennsylvania State Police within three business days of the change. The exception to this is if you are homeless, then you need only report the changes at your monthly in person verification.
10. If you move to another state, you must notify the law enforcement agency of the new state within three business days of establishing residence in the new state.
11. If you are a student, employed or carry on a vocation in another state that has a registration requirement for an offender in your category, you must register with that state within three business days.

PENALTIES FOR FAILURE TO REGISTER

18 Pa.C.S. § 4915.1 provides that an individual subject to registration commits an offense if he knowingly fails to:

- 1) register with the Pennsylvania State Police as required;
- 2) verify personal information as required; or,
- 3) provide accurate information when registering or verifying personal information.

Grading For Tier I Offenders Who Must Register for Fifteen Years –

- 1) An individual subject to registration who fails to register with the Pennsylvania State Police or who fails to appear in person on the verification date specified commits a felony of the third degree and is subject to a 2 – 4 year mandatory sentence for a first offense and a 5 – 10 year mandatory sentence for subsequent offenses.

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- 2) An individual subject to registration who fails to provide accurate information during either the registration or verification process commits a felony of the second degree and is subject to a 3 – 6 year mandatory sentence for a first offense and a 7 – 14 mandatory sentence for subsequent offenses.

EFFECT OF NOTICE

Neither failure on the part of the Pennsylvania State Police to send nor failure of an offender to receive any notice or information shall be a defense to a prosecution commenced against an individual arising from a violation of this section.

CERTIFICATION

I hereby certify that I have read or have had read to me the information contained above, and it has been explained to me and any questions I had have been answered by my attorney and the Judge. I fully understand my registration obligations.

Defendant

I hereby certify that I have read and explained the information on this form to my client.

Attorney for Defendant

The court certifies that the duty to register was explained to the Defendant.

_____J.

Date: _____

Notice of Registration Requirements

TIER II OFFENDERS

1. You, _____, have been convicted of the following offense(s):

OFFENSE

BILL NUMBER

2. It has been determined that you are not a sexually violent predator.
3. You must register with the Pennsylvania State Police for a period of twenty-five (25) years.
4. You must register with the Pennsylvania State Police IMMEDIATELY, through either state or local prison officials, at the county department of probation and parole or at any designated state police registration site.
5. If you are sentenced to a term of incarceration, you must notify the registering official in the state or county prison facility of your conviction and duty to register.
6. You are required to appear in person semiannually (twice a year) to verify your information with the Pennsylvania State Police. You are required to appear within ten days before the semiannual dates designated by the Pennsylvania State Police.
7. If you are homeless, you are required to appear in person monthly (every 30 days) until you establish permanent residence.
8. You are required to register the following information with the Pennsylvania State Police:
- a. Name, including aliases or nicknames
 - b. Any designation or monikers used for self-identification on the internet
 - c. Telephone numbers, including cell phone numbers
 - d. Social security number
 - e. Address of residence or intended residences and locations where you receive mail
 - f. If homeless, temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park as well as lists of places you eat, frequent, and engage in leisure activities as well as any planned destinations

Sex Offender Registration and Notification

- g. Temporary lodging (seven days or more) and the dates you will be temporarily lodged
 - h. Passport and documents establishing immigration status
 - i. Name and address of employment. If you do not have a fixed place of employment, this includes travel routes or general areas where you work. Employment includes full time or part time for a period of time exceeding 4 days during a 7 day period or for an aggregated period of time exceeding 15 days during any calendar year
 - j. Occupational or professional license
 - k. Name and address of any school where you are or will be a student
 - l. A description and license plate number of any vehicle owned or operated by you and the address where the vehicle is stored
 - m. Driver's license
 - n. Date of birth
9. You are required to appear in person to report any changes to your above personal information, such as a change in residence, to the Pennsylvania State Police within three business days of the change. The exception to this is if you are homeless, then you need only report the changes at your monthly in person verification.
10. If you move to another state, you must notify the law enforcement agency of the new state within three business days of establishing residence in the new state.
11. If you are a student, employed or carry on a vocation in another state that has a registration requirement for an offender in your category, you must register with that state within three business days.

PENALTIES FOR FAILURE TO REGISTER

18 Pa.C.S. § 4915.1 provides that an individual subject to registration commits an offense if he knowingly fails to:

- 1) register with the Pennsylvania State Police as required;
- 2) verify personal information as required; or,
- 3) provide accurate information when registering or verifying personal information.

Grading For Tier II Offenders Who Must Register for Twenty-five Years -

- 1) An individual subject to registration who fails to register with the Pennsylvania State Police or who fails to appear in person on the verification date specified commits a felony of the second degree and is subject to a 3 – 6 year mandatory sentence for a first offense and a 5 – 10 year mandatory sentence for subsequent offenses.

Sex Offender Registration and Notification

- 2) An individual subject to registration who fails to provide accurate information during either the registration or verification process commits a felony of the first degree and is subject to a 5 – 10 year mandatory sentence for a first offense and a 7 – 14 mandatory sentence for subsequent offenses.

EFFECT OF NOTICE

Neither failure on the part of the Pennsylvania State Police to send nor failure of an offender to receive any notice or information shall be a defense to a prosecution commenced against an individual arising from a violation of this section.

CERTIFICATION

I hereby certify that I have read or have had read to me the information contained above, and it has been explained to me and any questions I had have been answered by my attorney and the Judge. I fully understand my registration obligations.

Defendant

I hereby certify that I have read and explained the information on this form to my client.

Attorney for Defendant

The court certifies that the duty to register was explained to the Defendant.

_____J.

Date: _____

Notice of Registration Requirements

TIER III OFFENDERS

1. You, _____, have been convicted of the following offense(s):

OFFENSE

BILL NUMBER

2. It has been determined that you are not a sexually violent predator.
3. You are subject to lifetime registration with the Pennsylvania State Police.
4. You must register with the Pennsylvania State Police IMMEDIATELY, through either state or local prison officials, at the county department of probation and parole or at any designated state police registration site.
5. If you are sentenced to a term of incarceration, you must notify the registering official in the state or county prison facility of your conviction and duty to register.
6. You are required to appear in person quarterly (four times a year) to verify your information with the Pennsylvania State Police. You are required to appear within ten days before the quarterly dates designated by the Pennsylvania State Police.
7. If you are homeless, you are required to appear in person monthly (every 30 days) until you establish permanent residence.
8. You are required to register the following information with the Pennsylvania State Police:
- a. Name, including aliases or nicknames
 - b. Any designation or monikers used for self-identification on the internet
 - c. Telephone numbers, including cell phone numbers
 - d. Social security number
 - e. Address of residence or intended residences and locations where you receive mail
 - f. If homeless, temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park as well as lists of places you eat, frequent, and engage in leisure activities as well as any planned destinations

Sex Offender Registration and Notification

- g. Temporary lodging (seven days or more) and the dates you will be temporarily lodged
 - h. Passport and documents establishing immigration status
 - i. Name and address of employment. If you do not have a fixed place of employment, this includes travel routes or general areas where you work. Employment includes full time or part time for a period of time exceeding 4 days during a 7 day period or for an aggregated period of time exceeding 15 days during any calendar year
 - j. Occupational or professional license
 - k. Name and address of any school where you are or will be a student
 - l. A description and license plate number of any vehicle owned or operated by you and the address where the vehicle is stored
 - m. Driver's license
 - n. Date of birth
9. You are required to appear in person to report any changes to your above personal information, such as a change in residence, to the Pennsylvania State Police within three business days of the change. The exception to this is if you are homeless, then you need only report the changes at your monthly in person verification.
10. If you move to another state, you must notify the law enforcement agency of the new state within three business days of establishing residence in the new state.
11. If you are a student, employed or carry on a vocation in another state that has a registration requirement for an offender in your category, you must register with that state within three business days.

PENALTIES FOR FAILURE TO REGISTER

18 Pa.C.S. § 4915.1 provides that an individual subject to registration commits an offense if he knowingly fails to:

- 1) register with the Pennsylvania State Police as required;
- 2) verify personal information as required; or,
- 3) provide accurate information when registering or verifying personal information.

Grading For Tier III Offenders Who Must Register for Life -

- 1) An individual subject to registration who fails to register with the Pennsylvania State Police or who fails to appear in person on the verification date specified commits a felony of the second degree and is subject to a 3 – 6 year mandatory sentence for a first offense and a 5 – 10 year mandatory sentence for subsequent offenses.

Sex Offender Registration and Notification

- 2) An individual subject to registration who fails to provide accurate information during either the registration or verification process commits a felony of the first degree and is subject to a 5 – 10 year mandatory sentence for a first offense and a 7 – 14 mandatory sentence for subsequent offenses.

EFFECT OF NOTICE

Neither failure on the part of the Pennsylvania State Police to send nor failure of an offender to receive any notice or information shall be a defense to a prosecution commenced against an individual arising from a violation of this section.

CERTIFICATION

I hereby certify that I have read or have had read to me the information contained above, and it has been explained to me and any questions I had have been answered by my attorney and the Judge. I fully understand my registration obligations.

Defendant

I hereby certify that I have read and explained the information on this form to my client.

Attorney for Defendant

The court certifies that the duty to register was explained to the Defendant.

_____J.

Date: _____

Notice of Registration Requirements

SEXUALLY VIOLENT PREDATORS

1. You, _____, have been convicted of the following offense(s):

OFFENSE

BILL NUMBER

2. It has been determined that you are a sexually violent predator.
3. You are subject to lifetime registration with the Pennsylvania State Police.
4. You must register with the Pennsylvania State Police IMMEDIATELY, through either state or local prison officials, at the county department of probation and parole or at any designated state police registration site.
5. If you are sentenced to a term of incarceration, you must notify the registering official in the state or county prison facility of your conviction and duty to register.
6. You are required to appear in person quarterly (four times a year) to verify your information with the Pennsylvania State Police. You are required to appear within ten days before the quarterly dates designated by the Pennsylvania State Police.
7. If you are homeless, you are required to appear in person monthly (every 30 days) until you establish permanent residence.
8. You are required to register the following information with the Pennsylvania State Police:
 - a. Name, including aliases or nicknames
 - b. Any designation or monikers used for self-identification on the internet
 - c. Telephone numbers, including cell phone numbers
 - d. Social security number
 - e. Address of residence or intended residences and locations where you receive mail
 - f. If homeless, temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park as well as lists of places you eat, frequent, and engage in leisure activities as well as any planned destinations
 - g. Temporary lodging (seven days or more) and the dates you will be temporarily lodged

Sex Offender Registration and Notification

- h. Passport and documents establishing immigration status
 - i. Name and address of employment. If you do not have a fixed place of employment, this includes travel routes or general areas where you work. Employment includes full time or part time for a period of time exceeding 4 days during a 7 day period or for an aggregated period of time exceeding 15 days during any calendar year
 - j. Occupational or professional license
 - k. Name and address of any school where you are or will be a student
 - l. A description and license plate number of any vehicle owned or operated by you and the address where the vehicle is stored
 - m. Driver's license
 - n. Date of birth
9. You are required to appear in person to report any changes to your above personal information, such as a change in residence, to the Pennsylvania State Police within three business days of the change. The exception to this is if you are homeless, then you need only report the changes at your monthly in person verification.
10. If you move to another state, you must notify the law enforcement agency of the new state within three business days of establishing residence in the new state.
11. If you are a student, employed or carry on a vocation in another state that has a registration requirement for an offender in your category, you must register with that state within three business days.
12. You are required to attend at least monthly counseling sessions in a program approved by the Sexual Offender Assessment Board. You must pay all fees for these sessions unless you can prove that you cannot afford to do so, in which case the fees may be paid by the parole office.

PENALTIES FOR FAILURE TO REGISTER OR ATTEND MONTHLY COUNSELING

18 Pa.C.S. § 4915.1 provides that an individual subject to registration commits an offense if he knowingly fails to:

- 1) register with the Pennsylvania State Police as required;
- 2) verify personal information as required;
- 3) provide accurate information when registering or verifying personal information; or,
- 4) attend monthly counseling sessions.

Grading For Sexually Violent Predators Who Must Register for Life –

Sex Offender Registration and Notification

- 1) An individual subject to registration who fails to register with the Pennsylvania State Police or who fails to appear in person on the verification date specified commits a felony of the second degree and is subject to a 3 – 6 year mandatory sentence for a first offense and a 5 – 10 year mandatory sentence for subsequent offenses.

- 2) An individual subject to registration who fails to provide accurate information during either the registration or verification process commits a felony of the first degree and is subject to a 5 – 10 year mandatory sentence for a first offense and a 7 – 14 mandatory sentence for subsequent offenses.

- 3) An individual classified as a sexually violent predator who fails to attend monthly counseling commits a misdemeanor of the first degree.

EFFECT OF NOTICE

Neither failure on the part of the Pennsylvania State Police to send nor failure of an offender to receive any notice or information shall be a defense to a prosecution commenced against an individual arising from a violation of this section.

CERTIFICATION

I hereby certify that I have read or have had read to me the information contained above, and it has been explained to me and any questions I had have been answered by my attorney and the Judge. I fully understand my registration and counseling obligations.

Defendant

I hereby certify that I have read and explained the information on this form to my client.

Attorney for Defendant

The court certifies that the duty to register and attend counseling was explained to the Defendant.

_____J.

Date: _____

Pennsylvania State Police - Registration Details

Pennsylvania State Police Megan's Law Section

42 Pa. C.S. § 9799.32(1) authorizes the Pennsylvania State Police to create and maintain a state registry of sexual offenders, Sexually Violent Deviate Children, and Sexually Violent Predators.

Registration Details

Tier Classification

Tier I Sexual Offenses - 15 Year Registration

Offenders convicted of the following offenses shall be classified as a Tier I offender:

- 18 Pa.C.S. § 2902(b) (relating to Unlawful Restraint).
- 18 Pa.C.S. § 2903(b) (relating to False Imprisonment).
- 18 Pa.C.S. § 2904 (relating to Interference with Custody of Children).
- 18 Pa.C.S. § 2910 (relating to Luring a Child into a Motor Vehicle or Structure).
- 18 Pa.C.S. § 3124.2(a) (relating to Institutional Sexual Assault).
- 18 Pa.C.S. § 3126(a)(1) (relating to Indecent Assault).
- 18 Pa.C.S. § 6301(a)(1)(ii) (relating to Corruption of Minors).
- 18 Pa.C.S. § 6312(d) (relating to Sexual Abuse of Children).
- 18 Pa.C.S. § 7507.1. (relating to Invasion of Privacy).
- 18 U.S.C. § 1801 (relating to Video Voyeurism).
- 18 U.S.C. § 2252(a)(4) (relating to Certain Activities Relating to Material Involving the Sexual Exploitation of Minors).
- 18 U.S.C. § 2252A (relating to Certain Activities Relating to Material Constituting or Containing Child Pornography).
- 18 U.S.C. § 2252B (relating to Misleading Domain Names on the Internet).
- 18 U.S.C. § 2252C (relating to Misleading Words or Digital Images on the Internet).
- 18 U.S.C. § 2422(a) (relating to Coercion and Enticement).
- 18 U.S.C. § 2423(b), and (c) (relating to Transportation of Minors).
- 18 U.S.C. § 2424 (relating to Filing Factual Statement about Alien individual).
- 18 U.S.C. § 2425 (relating to Use of Interstate Facilities to Transmit Information about a Minor).
- A conviction or court martial of a comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth.
- A conviction of an attempt, conspiracy or solicitation to commit an offense

Sex Offender Registration and Notification

enumerated under Tier I classification.

- A conviction for a sexual offense in another jurisdiction or foreign country that is not set forth in this section, but nevertheless requires registration under a sexual offender statute in the jurisdiction or foreign country.

Tier II Sexual Offenses – 25 Year Registration

Offenders convicted of the following offenses shall be classified as a Tier II offender:

- 18 Pa.C.S. § 3122.1(a)(2) (relating to Statutory Sexual Assault).
- 18 Pa.C.S. § 3124.2(a.2) and (a.3) (relating to Institutional Sexual Assault).
- 18 Pa.C.S. § 3126(a)(2), (3), (4), (5), (6) or (8) (relating to Indecent Assault).
- 18 Pa.C.S. § 5902(b.1) (relating to Prostitution and related Offenses).
- 18 Pa.C.S. § 5903(a)(3)(ii), (4)(ii), (5)(ii) or (6) (relating to Obscene and other Sexual Materials and Performances).
- 18 Pa.C.S. § 6312(b) and (c) (relating to the Sexual Abuse of Children).
- 18 Pa.C.S. § 6318 (relating to Unlawful Contact with Minor).
- 18 Pa.C.S. § 6320 (relating to Sexual Exploitation of Children).
- 18 U.S.C. § 1591 (relating to Sex Trafficking of Children by Force, Fraud, or Coercion).
- 18 U.S.C. § 2243 (relating to Sexual Abuse of a Minor or Ward).
- 18 U.S.C. § 2244 (relating to Abusive Sexual Contact) where the victim is 13 years of age or older but under 18 years of age.
- 18 U.S.C. § 2251 (relating to Sexual Exploitation of Children).
- 18 U.S.C. § 2251A (relating to Selling or Buying of Children).
- 18 U.S.C. § 2252(a)(1), (2) or (3) (relating to Certain Activities Relating to Material Involving the Sexual Exploitation of Minors).
- 18 U.S.C. § 2260 (relating to Production of Sexually Explicit Depictions of a Minor for Importation into the United States).
- 18 U.S.C. § 2421 (relating to Transportation Generally).
- 18 U.S.C. § 2422(b) (relating to Coercion and Enticement).
- 18 U.S.C. § 2423(a) (relating to Transportation of Minors).
- A conviction or court martial of a comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth.
- A conviction of an attempt, conspiracy or solicitation to commit an offense enumerated under Tier II classification.

Tier III Sexual Offenses – Lifetime Registration

Offenders convicted of the following offenses shall be classified as a Tier III offender:

- 18 Pa.C.S. § 2901(a.1) (relating to Kidnapping).
- 18 Pa.C.S. § 3121 (relating to Rape).
- 18 Pa.C.S. § 3122.1(b) (relating to Statutory Sexual Assault).
- 18 Pa.C.S. § 3123 (relating to Involuntary Deviate Sexual Intercourse).

Sex Offender Registration and Notification

- 18 Pa.C.S. § 3124.1 (relating to Sexual Assault).
- 18 Pa.C.S. § 3124.2(a.1) (relating to Institutional Sexual Assault).
- 18 Pa.C.S. § 3125 (relating to Aggravated Indecent Assault).
- 18 Pa.C.S. § 3126(a)(7) (relating to Indecent Assault).
- 18 Pa.C.S. § 4302(b) (relating to Incest).
- 18 U.S.C. § 2241 (relating to Aggravated Sexual Abuse).
- 18 U.S.C. § 2242 (relating to Sexual Abuse).
- 18 U.S.C. § 2244 where the victim is under 13 years of age (relating to Abusive Sexual Contact).
- A conviction or court martial of a comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth.
- A conviction of an attempt, conspiracy or solicitation to commit an offense enumerated under Tier III classification.
- Two or more convictions of an offense(s) enumerated under Tier I or Tier II classification.

Juvenile Offenders

A Juvenile Offender who was adjudicated delinquent in this Commonwealth of one or more of the below offenses, or who was adjudicated delinquent in another jurisdiction or foreign country as a consequence of having committed an offense similar to one or more of the below offenses, shall register for life.

- 18 Pa.C.S. § 3121 (relating to Rape).
- 18 Pa.C.S. § 3123 (relating to Involuntary Deviate Sexual Intercourse).
- 18 Pa.C.S. § 3125 (relating to Aggravated Indecent Assault).
- An adjudication of an attempt, solicitation or conspiracy to commit an offense under 18 Pa.C.S. § 3121, 3123, or 3125.
- A Juvenile Offender who is required to register in a sexual offender registry in another jurisdiction or foreign country as a consequence of having been adjudicated delinquent for an offense similar to an offense which, if committed in this Commonwealth, would not require the individual to register, shall register for a period of time equal to that required of the individual in the other jurisdiction or foreign country.

Sexually Violent Delinquent Child

A child who has been found to be delinquent for an act of sexual violence which if committed by an adult would be a violation of 18 Pa.C.S. § 3121 (relating to rape), 3123 (relating to involuntary deviate sexual intercourse), 3124.1 (relating to sexual assault), 3125 (relating to aggravated indecent assault), 3126 (relating to indecent assault) or 4302 (relating to incest) and who has been determined by the Court to be in need of commitment for involuntary treatment.

Sex Offender Registration and Notification

- A Sexually Violent Delinquent Child shall register for life.

Sexually Violent Predator

An individual convicted of a Tier I sexual offense, a Tier II sexual offense, or a Tier III sexual offense who is determined to be a Sexually Violent Predator by the Court. The term also includes an individual determined to be a Sexually Violent Predator or a similar designation where the determination occurred in another jurisdiction, a foreign country or by court martial following a judicial or administrative determination pursuant to a process similar to that of the Commonwealth's.

- A Sexually Violent Predator shall register for life.

Registration Criteria

The following individuals shall register with the Pennsylvania State Police as a sexual offender:

- An individual meeting the criteria listed under Applicability and who has a residence within this Commonwealth or is a transient.
- An individual meeting the criteria listed under Applicability and does not have a residence in this Commonwealth but:
 1. Is employed in this Commonwealth; or
 2. Is a student in this Commonwealth.

Reporting Intervals

Individuals required to register as a sexual offender shall appear in-person at an approved Registration or Verification Site according to their assigned Tier or classification:

- Tier I offenders – required to appear annually.
- Tier II offenders – required to appear semiannually (twice a year).
- Tier III offenders – required to appear quarterly (four times a year).
- Transient offenders – required to appear monthly.
- Juvenile offenders – required to appear quarterly (four times a year).
- Sexually Violent Delinquent Child – required to appear quarterly (four times a year).
- Sexually Violent Predator– required to appear quarterly (four times a year).

General Registration Requirements

In addition to the periodic in-person reporting interval(s), an offender shall appear in-person at an approved Registration or Verification Site within three business days to provide current information or change(s) relating to:

- A change in name, including an alias.

Sex Offender Registration and Notification

- A commencement of residence, change in residence, termination of residence or failure to maintain a residence, thus making the individual a transient.
- Commencement of employment, a change in the location or entity in which the individual is employed or a termination of employment.
- Initial enrollment as a student, a change in enrollment as a student or termination as a student.
- An addition or a change in telephone number, including a cell phone number, or a termination of telephone number, including a cell phone number.
- An addition, a change in and termination of a motor vehicle owned or operated by an offender, including watercraft or aircraft. In order to fulfill the requirements of this paragraph, the individual must provide any license plate numbers and registration numbers and other identifiers and an addition to or change in the address of the place the where the vehicle is stored.
- A commencement of temporary lodging, a change in temporary lodging or a termination of temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.
- An addition, change in or termination of e-mail address, instant message address or any other designations used in Internet communications or postings.
- An addition, change in or termination of information related to occupational and professional licensing, including type of license held and license number.

International Travel

In addition to the periodic in-person appearance required above, an offender shall appear in-person at an approved Registration or Verification Site no less than 21 days in advance of traveling outside of the United States. The individual shall provide the following information:

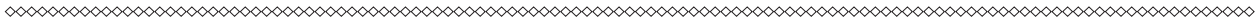
- (1) Dates of travel, including date of return to the United States.
- (2) Destinations.
- (3) Temporary lodging.

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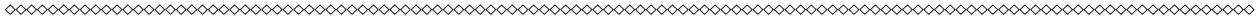
This Website is for Informational Purposes Only - If you have an emergency, crime, or incident to report, please contact your nearest Police Agency or call 911.

Questions regarding the contents of the PSP Megan's Law Website?
Call 1-866-771-3170

Chapter 12



RESOURCES



National Resource List

Victim Issues Resources

Office for Victims of Crime (OVC)

Contact Information:

<http://www.ojp.usdoj.gov/ovc/>

The Office for Victims of Crime (OVC) was established by the 1984 Victims of Crime Act (VOCA) to oversee diverse programs that benefit victims of crime. OVC provides substantial funding to state victim assistance and compensation programs—the lifeline services that help victims to heal. The agency supports trainings designed to educate criminal justice and allied professionals regarding the rights and needs of crime victims.

Office on Violence Against Women

Contact Information:

<http://www.usdoj.gov/ovw/>

Phone: 202-307-6026

Fax: 202-307-3911

TTY: 202-307-2277

Since its inception in 1995, the Violence Against Women Office, now the Office on Violence Against Women (OVW) has handled the Department’s legal and policy issues regarding violence against women, coordinated Departmental efforts, provided national and international leadership, received international visitors interested in learning about the federal government’s role in addressing violence against women, and responded to requests for information regarding violence against women.

National Center for Victims of Crime

Contact Information:

<http://www.ncvc.org/>

Phone: 202-467-8700

Fax: 202-467-8701

Email: webmaster@ncvc.org

The National Center for Victims of Crime (NCVC) provides direct services and resources; advocates for passage of laws and public policies that create resources and secure rights and protections for crime victims; delivers training and technical assistance to victim service organizations, counselors, attorneys, criminal justice agencies, and allied professionals; and fosters cutting-edge thinking about the impact of crime and the ways in which each gain control of their lives.

Resources

Focus areas include:

- Victim Services
- Civil Justice
- Public Policy
- Training and Technical assistance

National Sexual Violence Resource Center

Contact Information: <http://www.nsvrc.org/>

The National Sexual Violence Resource Center (NSVRC) is a comprehensive collection and distribution center for information, research and emerging policy on sexual violence intervention and prevention. The NSVRC provides an extensive on-line library and customized technical assistance, as well as, coordinates National Sexual Assault Awareness Month initiatives.

Legal Resources

The American Prosecutors Research Institute

Contact Information:

<http://www.ndaa.org/apri/index.html>

99 Canal Center Plaza, Suite 510

Alexandria, VA 22314

Phone: 703-549-9222

Fax: 703-836-3195

In 1984, the National District Attorneys Association founded the **American Prosecutors Research Institute (APRI)** as a non-profit research and program development resource for prosecutors at all levels of government. Since that time, APRI has become a vital resource and national clearinghouse for information on the prosecutorial function. The Institute is committed to providing interdisciplinary responses to the complex problems of criminal justice. It is also committed to supporting the highest professional standards among officials entrusted with the crucial responsibility for public safety.

APRI's activities are concentrated in the following areas:

- Training and Curriculum Development,
- Technical Assistance and Consultation,
- Publications, and
- Research

More specifically, APRI staff can provide:

- Case law information
- Up-to-date information on legislation
- Detailed assistance for trial preparation
- Individualized support for trial presentation
- Access to experts and presenters
- Assistance with policy development
- Information on program development

Resources

- Topical background material
- Cooperation for grant development

Sex Offending Behavior Resources

Center for Sex Offender Management (CSOM)

Contact Information: <http://www.csom.org/>

CSOM is a national project that supports state and local jurisdictions in the effective management of sex offenders under community supervision. The project is administered through a cooperative agreement between OJP and the Center for Effective Public Policy. A National Resource Group has been established to guide the activities of the project. The members of the National Resource Group include some of the country's leading experts and practitioners in the fields of sex offender management, treatment, and supervision.

CSOM's primary goal is to enhance public safety by preventing further victimization through improving the management of sex offenders in the community. CSOM's goals are carried out through three primary activity areas: an information exchange, training and technical assistance, and support to select Resources Sites and OJP grantees.

Resources Within Pennsylvania

Victim Issues

Pennsylvania Coalition Against Rape

Contact Information:

<http://www.pcar.org>

125 N. Enola Drive

Enola, PA 17025

Phone: 717-728-9740 (ask for The Judicial Project Specialist)

The Pennsylvania Coalition Against Rape (PCAR) is an organization working at the state and national levels to prevent sexual violence. Incepted in 1975, PCAR continues to use its voice to challenge public attitudes, raise public awareness, and effect critical changes in public policy, protocols, and responses to sexual violence.

To provide quality services to victims/survivors of sexual violence and their significant others, PCAR works in concert with its state-wide network of 52 rape crisis centers. The centers also work to create public awareness and prevention education within their communities.

PCAR can provide information about sexual violence on a variety of topics including: Older Victims, Victims with disabilities, and male victims.

Pennsylvania Commission on Crime and Delinquency

Contact Information:

<http://www.pccd.state.pa.us/>

3101 North Front Street

Harrisburg, PA 17110

Phone: 717-783-0551

Toll-free in Pennsylvania: 800-692-7292

Victims Compensation: 800-233-2339

The Pennsylvania Commission on Crime and Delinquency promotes a collaborative approach to enhance the quality of justice through guidance, leadership and resources by empowering citizens and communities and influencing state policy. The Office of Victims' Services administers rights and services to victims of crime in Pennsylvania; administers the Victims Compensation Assistance Program and provides a statewide education effort to victim service professionals and outreach to the public. The VCAP program serves as the designated payment source for sexual-assault forensic examinations.

The Office of the Victim Advocate

Contact Information:

<http://www.pbpp.state.pa.us/ova/site/default.asp>

Board of Probation and Parole

1101 S. Front Street

Suite 5200

Harrisburg, PA 17104

Phone: 800.563.6399

The Office of the Victim Advocate was created by the Victim Advocate Law, Act 8 of the 1995 Special Legislative Session on Crime. The purpose of the Victim Advocate is to represent the rights and interests of crime victims before the Board of Probation and Parole and the Department of Corrections. In addition, the Office of the Victim Advocate also provides notification to crime victims of the potential for inmate release and opportunity to provide testimony, notification of the inmate's movement within the correctional system, referrals for crime victims to local programs, basic crisis intervention and support, general information on the status and location of the inmate as allowed by law, and notification of the expiration of an inmate's maximum sentence or date of execution, if applicable, as well as preparation of a victim who chooses to witness an execution.

The Office of the Victim Advocate offers several programs to assist victims of crime. These include:

The Mediation Program for Victims of Violent Crime provides an opportunity for Victims of Violent Crime to meet with their offender, express their feelings directly to the offender, and to ask questions that have never been answered. It provides an opportunity for victims to regain power or "say what needs to be said." It also gives the offender a chance to tell his/her story and to accept responsibility for the crime. This may be the first time that both the victim and the offender have engaged in a dialogue about the offense with each other. A face-to-face meeting is an opportunity for the offender to recognize the real person they have hurt.

The **Address Confidentiality Program (ACP)** is another of the programs administered by the Office of the Victim Advocate to assist victims of domestic violence, sexual assault or stalking.

The program has two basic parts. First, the ACP provides a substitute address for victims who have moved to a new location unknown to their perpetrator. The second part of the program provides participants with a free first-class confidential mail forwarding service. Victims of domestic violence, sexual assault, stalking, and persons who live in the same household as a participant may apply. ACP will determine if a victim meets eligibility. The ACP is not for everyone. A victim service professional from a domestic violence, sexual assault or a victim service program can help determine if ACP is right for a victim as part of their safety plan.

Restitution is a court-ordered financial obligation that can be in the form of out-of-pocket expenses, loss of earnings, and/ or property loss.

If you wish to receive restitution, you must submit your information, including medical bills or receipts, etc., to the District Attorney's office prior to sentencing. At the sentencing hearing, the District Attorney will ask the Judge to order restitution. In Pennsylvania, as restitution is mandatory, the Court must order restitution.

Pennsylvania District Attorneys Association

Contact Information:

<http://www.pdaa.org/>
2929 N. Front Street
Harrisburg, PA 17110
Phone: (717)238-5416

The PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION was formed in 1912 for the purpose of providing uniformity and efficiency in the discharge of duties and functions of Pennsylvania's 67 District Attorneys and their assistants. The Association today continues to further its purpose through its extensive training program and by its reporting of legal and legislative developments of importance to Pennsylvania prosecutors.

The Sexual Offenders Assessment Board

Contact Information:

<http://www.meganslaw.state.pa.us/soab/site/default.asp>
101 South Front Street
Suite 5700
Harrisburg, Pa 17104-2533

The SOAB is an independent board of psychiatrists, psychologists, and criminal justice experts appointed by the Governor, according to statute, to assess all sex offenders convicted under 42 Pa. C.S. § 9791, commonly known as Megan's Law.

Reports

Federal Bureau of Investigation. (1997). *Uniform Crime Reports*. Retrieved on April 10, 2006 from, http://www.fbi.gov/ucr/Cius_97/97crime/97crime.pdf. p. 26.

National Institute of Justice, Department of Justice. (2006). *Extent, nature, and consequences of rape victimization: findings from the Violence Against Women survey*. Retrieved May 9, 2006 from <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

National Victim Center and Crime Victims Research and Treatment Center. (1992). *Rape in America: A Report to the Nation* University of South Carolina, Charleston

Pennsylvania Supreme Court (2003). *Executive Summary Of The Report On Racial And Gender Bias In The Justice System* (pp.421-452). Harrisburg, PA: Author

Potential Applications of an existing offender typology to child molesting behaviour.

This doctoral dissertation written by Kimberly Gentry Sperber examines issues regarding child molestation. She provides an easy to understand look at current literature, offender typology, and appropriate interventions.

Her work is available at: <http://www.uc.edu/criminaljustice/graduate/Dissertations/sperber.pdf#search='research%20on%20child%20molesters'>.

Rape Crisis Centers of Pennsylvania (By County)

ADAMS

SURVIVORS, INC.

PO Box 3572
26A Springs St. (UPS)
Gettysburg, PA 17325

Business: (717) 334-0589
Hotline: (717) 334-9777 or (800) SUR-V106
Fax: (717) 334-3576
E-mail: survivor@adelphia.net

ALLEGHENY

THE CENTER FOR VICTIMS OF VIOLENCE AND CRIME

900 5th Avenue
Pittsburgh, PA 15219-4737

Business: (412) 350- 1975
Hotline: (412) 392-8582
Fax: (412) 350-1976
E-mail: information@cvvc.org

PITTSBURGH ACTION AGAINST RAPE

81 South 19th Street
Pittsburgh, PA 15203

Business: (412) 431-5665
Hotline: (866) 363-7273
Fax: (412) 431-0913

ARMSTRONG

HELPING ALL VICTIMS IN NEED

P.O. Box 983
325 Arch Street (UPS only)
Kittanning, PA 16201

Business: (724) 543-1180
Hotline: (800) 841-8881 or (724) 548-8888
Fax: (742) 543-7410

Resources

BEAVER	WOMEN'S CENTER OF BEAVER COUNTY P.O. Box 428 160 3 rd St. (UPS only) Beaver, PA 15009 Business: (724) 775-2032 Hotline: (724) 775-0131 Fax: (724) 775-2750
BEFORD	YOUR "SAFE HAVEN", INC. 10241 Lincoln Highway Everett, PA 15537-6915 Business: (814) 623-7664 Hotline: (800) 555-5671 Fax: (814) 623-7187
BERKS	BERKS WOMEN IN CRISIS 645 Penn Street, Second Floor Reading, PA 19601 Business: (610) 373-1206 Hotline: (610) 372-9540- English Hotline: (610) 372-7463-Spanish Fax: (610) 372-4188 E-mail: Peace@berkswomenincrisis.org
BLAIR	FAMILY SERVICES, INC. 2022 Broad Avenue Altoona, PA 16601 Business: (814) 944-3583 Hotline: (814) 944-3585 or (800) 500-2849 Fax: (814) 944-8701
BRADFORD	ABUSE AND RAPE CRISIS CENTER P.O. Box 186 100 Grant St. (UPS only) Towanda, PA 18848-0186 Business: (570) 265-5333 Hotline: 911 Fax: (570) 265-0918 E-mail: arcc@epix.net

Resources

BUCKS

NETWORK OF VICTIM ASSISTANCE

2370 York Road, Suite B1
Jamison, PA 18929

Business (215) 343-6543
Hotline (800) 675-6900
Fax (215) 343-6260
TTY (215) 343-6260
E-mail novainfo@novabucks.org

BUTLER

VICTIMS OUTREACH INTERVENTION CENTER

P.O. Box 293 Evans City, PA 16033 (Corporate Office)
111 S. Cliff St. Rear Butler, PA 16001 (Administrative Office)

Business: (724) 776-5910 – Cranberry
(724) 283-8700 Butler
Hotline : (800) 400-8551
Fax: (724) 776-6781 –Cranberry
(724) 283-8760 Butler

CAMBRIA

VICTIM SERVICES, INC.

638 Ferndale Avenue
Johnstown, PA 15905-3946

Business: (814) 288-4961
Hotline: (814) 288-4961 or (800) 755-1983 after 5
Fax: (814) 288-3904

CAMERON

CAPSEA , INC. (ELK County Satellite Office)

PO Box 464
Ridgeway,PA 15853

Business: (814) 486-1227
Hotline: (814) 486-0952
E-mail: elkcapsea@alltell.net

CARBON

VICTIMS RESOURCE CENTER 2

(Luzerne County Satellite Office)

616 North Street
Jim Thorpe, PA 18229

Business: (570) 325-9642
Hotline: (570) 325-9641 or (866)-206-9050 - Toll free
Fax: (570) 325-9643

Resources

CENTRE

CENTRE COUNTY WOMEN'S RESOURCE CENTER, INC.

140 W. Nittany Avenue
State College, PA 16801

Business: (814) 238-7066
Hotline: (814) 234-5050 or (877) 234-5050-Toll Free
Fax: (814) 238-4449
Information: (814) 234-5222

CHESTER

THE CRIME VICTIMS CENTER OF CHESTER COUNTY, INC.

236 W. Market Street
West Chester, PA 19382-2903

Business: (610) 692-1926
Hotline: (610) 692-7273
Fax: (610) 692-4959

CLARION

PASSAGES, INC.

1300R East Main Street
Clarion, PA 16214

Business: (814) 226-7273
Hotline: (800) 793-3620
Fax: (814) 226-5766
E-mail: passages@clarion-net.com

CLEARFIED

PASSAGES, INC 2 (Clarion Co. Satellite office)

90 Beaver Drive, Suite 20 D
Dubois, PA 15801

Business: (814) 371-9677
Hotline: (800) 793-3620
Fax: (814) 371-9679
E-mail: passagesinc@usachoice.net

CLINTON

CLINTON COUNTY WOMEN'S CENTER

34 W. Main Street
Lock Haven, PA 17745

Business: (570) 748-9539
Hotline: (570) 748-9509 Fax: (570) 748-9549
E-mail: ccwcsafe@cub.kcnet.org

Resources

COLUMBIA

THE WOMEN'S CENTER, INC. OF COLUMBIA/MONTOUR

111 N. Market Street
Bloomsburg, PA 17815

Business: (570) 784-6632
Hotline: (570) 784-6631 or (800) 544-8293
Fax: (570) 784-6680
E-mail: womenctr1@verizon.net

CRAWFORD

WOMEN'S SERVICES, INC.

P.O. Box 537
204 Spring St. (UPS only)
Meadville, PA 16335

Business: (814) 724-4637 or (814) 333-1058
B Hotline: (814) 333-9766 or (888) 881-0189
Leg. Advocate: (814) 336-2081
Fax: (814) 337-4394
Titusville: (814) 827-7276
Fax: (814) 827-9076

CUMBERLAND

YWCA OF CARLISLE SEXUAL ASSAULT/RAPE CRISIS SERVICES OF CUMBERLAND COUNTY

301 G Street
Carlisle, PA 17013-1389

Business: (717) 258-4324
YWCA: (717) 243-3818
Hotline: (888) 727-2877
Fax: (717) 243-3948
E-mail: info@ywcacarlisle.org

DAUPHIN

YWCA – VIOLENCE INTERVENTION PREVENTION PROGRAM

1101 Market Street
Harrisburg, PA 17103

Business: (717) 234-7931
Hotline: (717) 238-7273 or (800) 654-1211
Fax: (717) 234-1779

Resources

DELAWARE

DELAWARE COUNTY WOMEN AGAINST RAPE

P.O. Box 211
204 South Avenue (UPS only)
Media, PA 19063

Business: (610) 566-5866 or (610) 566-7954 or
(610) 566-4386
Hotline: (610) 566-4342
Fax: (610) 566-6896
E-mail: Delcowarjd@aol.com

ELK

CAPSEA

P.O. Box 464
28 Morgan Ave. (Fed-Ex purposes only)
Ridgway, PA 15853

Business: (814) 772-3838
Hotline: (800) 226-4759 or (814) 772-1227
Fax: (814) 772-9270
E-mail: elkcapsea@alltell.net

ERIE

CRIME VICTIM CENTER OF ERIE COUNTY, INC.

125 W 18th Street
Erie, PA 16501

Business: (814) 455-9414
Hotline: (800) 352-7273
Fax: (814) 455-9300
E-mail: supor@cvcerie.org

109 West Fayette Street
Uniontown, PA 15401

Business: (724) 438-1470
Hotline: (724) 437-3737
Fax: (724) 437-6097
E-mail: cvcfayette@cvc.fayette.org

FOREST

SEE WARREN FOR ADDRESS

412 Elm St.
Tionesta, PA 16353 (UPS only)

Business: (814) 755-7880
Hotline: (800) 338-3460 or (814) 726-1030
Fax: (814) 755-7881

Resources

FRANKLIN, FULTON

WIN / VICTIM SERVICES

P.O. Box 25
156 E. Queen St. (UPS only)
Chambersburg, PA 17201
201-A E. North St. (UPS only for Fulton)
McConnellsburg, PA 17233

Business: (717) 264-3056
Hotline: (717) 264-4444 or (800) 621-6660
Fax: (717) 264-3168
E-mail: bac@winservices.org

GREENE

SEE WASHINGTON FOR ADDRESS

Business: (724) 627-6108
Hotline: (888) 480-7283
Fax: (724) 627-9761

HUNTINGDON

HUNTINGDON HOUSE

P.O. Box 217
401 Seventh St. (UPS only)
Huntingdon, PA 16652

Business: (814) 643-2801
Hotline: (814) 643-1190
Fax: (814) 643-2419
E-mail: huntingdonhouse@adelphia.net

INDIANA

ALICE PAUL HOUSE

P.O. Box 417
1743 Saltburg Ave. (UPS only)
Indiana, PA 15701

Business: (724) 349-5744
Hotline: (724) 349-4444 or (800) 435-7249
Fax: (724) 349-7883

JEFFERSON

PASSAGES, Inc 3 (*Clarion Co. Satellite Office*)

18 Western Avenue
Brookville, PA 15825

Business: (814) 849-5303
Hotline: (800) 793-3620
Fax: (814) 849-8628
E-mail: passages@usachoice.net

Resources

JUNIATA

THE ABUSE NETWORK (Mifflin Co. Satellite Office)

P.O. Box 268
Lewistown, PA 17044

Business: (717) 436-2402
Hotline: (717) 242-2444
Fax: (717) 242-0871
E-mail: tan@abusenetwork.org

LACKAWANNA

WOMEN'S RESOURCE CENTER, INC.

Box 975
620 Madison Ave. Scranton, PA 18510 (UPS only)
Scranton, PA 18501

Business: (570) 346-4460
Hotline: (570) 346-4671
Fax: (570) 346-3413
E-mail: wrcgeneral@wrcnepa.org

LANCASTER

SEXUAL ASSAULT PREVENTION AND COUNSELING CENTER

110 N. Lime Street
Lancaster, PA 17602

Business
(YWCA): (717) 393-1735
Hotline: (717) 392-7273
Fax: (717) 391-6707

LAWRENCE

CRISIS SHELTER OF LAWRENCE COUNTY

1218 W. State St.
New Castle, PA 16101

Business: (724) 652-9206
Hotline: (724) 652-9036 or (724) 752-7273
Fax: (724) 652-9222
E-mail: cslcmlp@adelphia.net

LEBANON

SEXUAL ASSAULT RESOURCE AND COUNSELING CENTER

615 Cumberland St.
Lebanon, PA 17042

Business: (717) 270-6972
Hotline: (717) 272-5308
Fax: (717) 270-6987

Resources

LEHIGH

CRIME VICTIMS COUNCIL OF LEHIGH VALLEY, INC.

801 Hamilton Mall — Suite 300
Allentown, PA 18101

Business: (610) 437-6610
Hotline: (610) 437-6611
Victim/
Witness Dept.: (610) 433-4588
Fax: (610) 437-9394
E-mail: cvclv@enter.net

LUZERNE

VICTIMS RESOURCE CENTER

85 S. Main Street
Wilkes-Barre, PA 18701

Business: (570) 823-0766
Hotline: (570) 823-0765 or (570) 454-7200
Fax: (570) 823-9115
E-mail: support@vrnepa.org

LYCOMING

YWCA - WISE OPTIONS

815 W. 4th Street
Williamsport, PA 17701

Business: (570) 322-4637
Hotline: (570) 323-8167 (for crisis calls only)
Fax: (570) 322-3029

MCKEAN

YWCA – VICTIMS’ RESOURCE CENTER

24 W. Corydon Street
Bradford, PA 16701

Business: (814) 368-4235
Hotline: (814) 368-6325 or (888) 822-6325
Fax: (814) 362-4638
E-mail: vrtyw@verizon.net

MERCER

AW/ARE, INC.

P.O. Box 612 (Physical: 559 Greenville Rd.)
Mercer, PA 16137

Business: (724) 662-1870
Hotline: (888) 981-1457
Fax: (724) 662-1875
Hotline and
TTY: (724) 981-1457

Resources

MIFFLIN

THE ABUSE NETWORK

P.O. Box 268
217 E. Third St (UPS only)
Lewistown, PA 17044

Business: (717) 242-0715
Hotline: (717) 242 -2444
Fax: (717) 242-0871
E-mail: tan@abusenetwork.org

MONROE

WOMEN'S RESOURCES OF MONROE COUNTY, INC.

P.O. Box 645 (215 W. Main Street)
Delaware Water Gap, PA 18327

Business: (570) 424-2093
Hotline: (570) 421-4200
Fax: (570) 424-2094
E-mail: womansresources@verizon.net

MONTGOMERY

VICTIM SERVICES CENTER OF MONTGOMERY CO.,INC.

18 W. Airy Street -Suite 100
Norristown, PA 19401

Business: (610) 277-0932
Hotline: (610) 277-5200 or (888) 521-0983
Sexual Assault:(610) 277-5200
Fax: (610) 277-6386
E-mail: vsc@libertynet.org

MONTOUR

SEE COLUMBIA FOR ADDRESS

Business: (570) 784-6632
Business/
Hotline: (570) 784-6631
Hotline: (800) 544- 8293

NORTHAMPTON

SEE LEHIGH FOR ADDRESS

Business: (610) 250-6313
Hotline: (610) 437-6611
Victim/
Witness Dept.: (610) 433-4588

Resources

NORTHUMBERLAND

SEE UNION FOR ADDRESS

Business/

Hotline: (570) 644-4488

Fax: (570) 524-9367 (Union County)

Email: svwit@svwit.org

PERRY

SEE DAUPHIN FOR ADDRESS

Business: (717) 238-7273

Hotline: (800) 654-1211

Fax: (717) 238-4533

PHILADELPHIA

WOMEN ORGANIZED AGAINST RAPE

1233 Locust Street, Suite 202

Philadelphia, PA 19107

Business: (215) 985-3315

Hotline: (215) 985-3333

Fax: (215) 985-9111

E-mail: carole@woar.org

PIKE

SURVIVORS RESOURCES, INC.

500 W. Harford St.

Milford, PA 18337

Business: (570) 296-2827

Hotline: (570) 296-4357

Fax: (570) 296-4410

E-mail: surv@ptd.net

POTTER

A WAY OUT: DOMESTIC VIOLENCE AND SEXUAL ASSAULT SERVICES

P.O. Box 447

110 E. Third St. (UPS only)

Coudersport, PA 16915

Business: (814) 274-0368

Hotline: (814) 274-0240 or (877)-334-3136

Fax: (814) 274-2230

E-mail: awayout@zitomedia.net

Resources

SCHUYLKILL

RAPE & VICTIM ASSISTANCE CENTER OF SCHUYLKILL CO.

368 S. Centre Street
Pottsville, PA 17901

Business: (570) 628-2965
Hotline: (570) 622-6220 or (800) 282-0634
Fax: (570) 628-2001
E-mail: rvac@uplink.net

SNYDER

SVWIT SEE UNION FOR ADDRESS

Business/
Hotline: (570) 374-7773
Fax: (570) 524-9367
E-mail: svwit@svwit.org

SOMERSET

VICTIM SERVICES, INC. 3 (Cambria Co. Satellite Office)

427 Westridge Road
Somerset, PA 15501

Business: (814) 443-1555
Hotline: (814) 288-4961 or (800) 755-1983
Hotline after 5pm
Fax: (814) 443-6807

SULLIVAN

VICTIMS SERVICES

Box 272
Main Street (UPS only)
Laporte, PA 18626

Business: (570) 946-4063
Hotline: (570) 946-4215
Fax: (570) 946-4570
E-mail: scvs@epix.net

Resources

SUSQUEHANNA

WOMEN'S RESOURCE CENTER, INC.

(Lackawanna Co. Satellite Office)

P.O. Box 202
Montrose, PA 18801

Business: (570) 278-1800
Hotline: (800) 257-5765
Fax: (570) 346-3413
E-mail: wrcmont@epix.net

TIOGA

HAVEN OF TIOGA COUNTY

6 Old Tioga St. P.O. Box 170
Wellsboro, PA 16901

Business: (570) 724-3549
Hotline: (570) 724-3554 or (800) 550-0447
Fax: (570) 724-1361
E-mail: haventoftioga2@epix.net

UNION

SUSQUEHANNA VALLEY WOMEN IN TRANSITION

P.O. Box 170 42 S. 5th Street (Fed-Ex purposes only)
Lewisburg, PA 17837

Business: (570) 523-6718 or (570) 523-1134
Hotline: (570) 523-6482 or (800) 850-7948
Fax: (570) 524-9367
E-mail: svwit@svwit.org

VENANGO

VICTIMS RESOURCE CENTER

716 East Second Street
Oil City, PA 16301

Business: (814) 6774005
Hotline: (814) 432-5960 or (888) 842-8460
Fax: (814) 726-1587
E-mail: vicrescen@sconline.net

WARREN

A SAFE PLACE

300 Hospital Drive
North Warren, PA 16365

Business: (814) 726-1271
Hotline: (814) 726-1030 or (800) 338-3460
Fax: (814) 726-1587
E-mail: safeplace@westpa.net

Resources

WASHINGTON

(1) SPHS C.A.R.E. CENTER

62 E. Wheeling Street
Washington, PA 15301

Business: (724) 228-7208
S.T.T.A.R.S.
Hotline: (888) 480-7283
Fax: (724) 228-2277
E-mail: mascara@sphs.org

(2) SPHS C.A.R.E. CENTER S.T.T.A.R.S. PROGRAM

351 West Beau Street, Suite 201
Washington, PA 15301

Business: (724) 229-5007
Hotline: (888) 480-7283
Fax: (724) 229-5711
E-mail: kmckevitt@sphs.org

WAYNE

VICTIMS INTERVENTION PROGRAM

P.O. Box 986
1006 Church St. (UPS only)
Honesdale, PA 18431

Business: (570) 253-4431
Hotline: (570) 253-4401 or
(800) 698-4VIP, Regional only
Fax: (570) 253-1322

WESTMORELAND

BLACKBURN CENTER AGAINST DOMESTIC & SEXUAL VIOLENCE

P.O. Box 398
1011 Old Salem Road, Ste 202 (Fed-Ex purposes only)
Greensburg, PA 15601

Business: (724) 837-9540
Hotline: (724) 836-1122 (in Greensburg area)
(888) 832-2272 (outside of Greensburg)
Fax: (724) 837-3676

Resources

WYOMING

VICTIMS RESOURCE CENTER 3

(Luzerne Co. Satellite Office)

119 Warren Street
Tunkhannock, PA 18657

Business: (570) 836-5844
Hotline: (570) 836-5544
Fax: (570) 836-3291
E-mail: support@vrcnepa.org

YORK

VICTIM ASSISTANCE CENTER

P.O. Box 30
York, PA 17405

Business: (717) 848-3535
Hotline: (717) 854-3131 or (800) 422-3204
Fax: (717) 846-6321
E-mail: vac@netrax.net

OTHER CONTACTS

PENNSYLVANIA COALITION AGAINST RAPE

Contact: Lynn Carson, Judicial Project Specialist
125 N. Enola Drive
Enola, PA 17025

Business: (717) 728-9740
E-mail: lcarson@pcar.org

*Pennsylvania's
Children's Advocacy Centers (CACs) and
Multidisciplinary Teams (MDTs)*

ACCREDITED MEMBERS

ALLEGHENY

**ALLEGHENY COUNTY CHILDREN'S
ADVOCACY CENTER (Accredited)**

Contact: Joan Mills
A Child's Place at Mercy
1400 Locust Street
Suite 307 MHC
Pittsburgh, PA 15219

Business: (412) 232-7200-7388
Fax: (412) 232-7389
E-mail: JMills@mercy.pmhs.org

**PITTSBURGH CHILD ADVOCACY CENTER
(Accredited)**

Children's Hospital of Pittsburgh
3705-5th Avenue
Pittsburgh, PA 15213

Business: (412) 692-7406
Fax: (412) 692-5743

DAUPHIN

**CHILDREN'S RESOURCE CENTER OF
PINNACLEHEALTH SYSTEM (Accredited)**

Contact: Teresa Smith, ED
Community Health Center
1st Floor
2645 North 3rd Street
Harrisburg, PA 17110

Business: (717) 782-6802 or (877) 543-5018
Fax: (717) 782-6801
E-mail: tsmith@pinnaclehealth.org
Web: www.pinnaclehealth.org/crc

Resources

DELAWARE

DELAWARE COUNTY CHILD SEXUAL ABUSE CENTER (Accredibility Eligible)

Contact: Pam Hardy, Program Director

100 West 6th Street

Ground Floor

Media, PA 19063

Business: (610) 891-5258

Fax: (610) 591-0481

E-mail: hardyp@co.delaware.pa.us

ERIE

ERIE COUNTY CHILD ADVOCACY CENTER

(Accredited)

Contact: Dr. Judith Smith, Executive Director

1527 Sassafra Street

Suite 100

Erie, PA 16502

Business: (814) 451-0202

Fax: (814) 451-0404

E-mail: judy.smith@hamot.org

Web: www.cacerie.org

LAWRENCE

CHILDREN'S ADVOCACY CENTER OF LAWRENCE COUNTY, INC. (Accredibility Eligible)

Contact: Sue Ascione, ED

1001 E. Washington Street

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