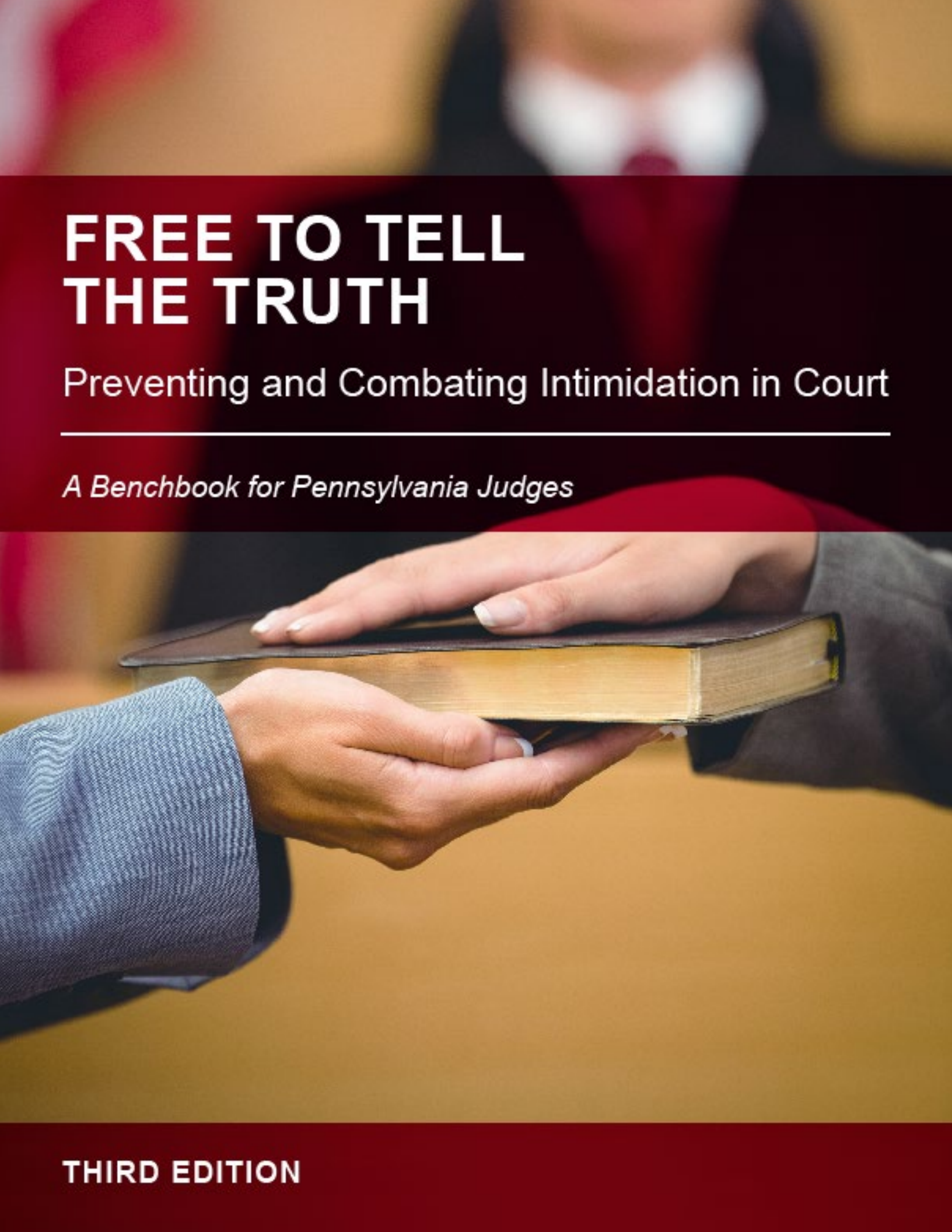

FREE TO TELL THE TRUTH

Preventing and Combating Intimidation in Court

A Benchbook for Pennsylvania Judges

THIRD EDITION

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INTRODUCTION TO THE THIRD EDITION

We have published this third edition of the benchbook in our continuing effort to keep it current as a ready reference for trial judges facing one of their most daunting and important tasks: preventing and combating intimidation in the courtroom. The importance of this task was well stated by Judge Renee Cardwell Hughes (retired), who chaired the original committee that produced the first edition of the benchbook in 2011. As Judge Hughes then stated in the introduction to that edition:

> Justice requires a search for truth in an environment that respects the rights of all parties to the system. Truth cannot be spoken in fear. Witness intimidation strikes at the very heart of our system of criminal justice, crippling our ability to function fairly, decently and with integrity. It cannot be tolerated. Judges stand as guardians of the courthouse: the place where wrongs will be redressed without fear or recrimination.
>
> It is the responsibility of the court to create an environment in which truth can be spoken.

As before, the benchbook is intended to assist judges in meeting that responsibility by identifying the different forms of witness intimidation and jury interference, setting forth recommended practices to address them, and setting out the applicable law in a format that is quickly accessible. Our sincere thanks to the Pennsylvania Commission on Crime and Delinquency ("PCCD") for continuing to fund this project, and to the Pennsylvania District Attorneys Institute for managing the grant.

We are once again indebted to Stuart Suss, Esq., who led the research effort and drafting for all three editions. As Judge Hughes wrote in 2011, Mr. Suss is "a brilliant mind who is totally devoted to the rule of law," and without whom this benchbook would not have been possible. Special thanks again to John Delaney, Esq., for his leadership on this project. As with the last edition, invaluable assistance was provided by Michael A. Schwartz, Esq, Christen Tuttle, Esq., and their team at Pepper Hamilton LLP. In addition, because this work was a collaborative effort, we thank the following for their contributions: Judge Diana Anhalt; Judge Gwendolyn Bright; Judge Sandy L.V. Byrd; Judge Denis P. Cohen; Judge Charles Ehrlich; Benjamin Eichel, Esq.; Judge Michael Erdos; Judge Renee Cardwell Hughes (retired); Michael J. Kane, Esq.; and the late Walter M. Phillips, Jr., Esq.

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NOTE ON HYPERLINKS AND CITATIONS

For the convenience of the reader, the topics in the table of contents are hyperlinked. By clicking on a chapter, section or subsection, your computer will immediately go to that chapter, section or subsection.

Similarly, each legal authority - statute, rule or case - in the text is almost always hyperlinked to a free, publicly available web site where that authority appears in full. Approximately six cases are not publicly available. Those cases are hyperlinked to Westlaw.

By placing your computer cursor on the citation, a "hand" signal will appear; clicking on the citation will take you to the full text of that authority. If an authority appears several times in a paragraph or section, only the first appearance is hyperlinked. In a citation to a case for which appellate review was denied, the higher court denial of review is not hyperlinked.

CHAPTER 1:
Forms of Intimidation Outside the Courtroom

Intimidation takes many forms both inside and outside the courtroom. The trial judge must be alert to and responsive to the many forms of intimidation without unnecessarily precluding access to the courtroom and without depriving the defendant of the presumption of innocence. The following is not meant to be an exhaustive list of the forms of intimidation that might be directed against a witness or against the family of a witness. The forms of intimidation are limited only by the deviousness of the persons seeking to intimidate.

Forms of intimidation outside the courtroom may include, but are not limited to:

1. Actual or attempted physical violence or property damage.
2. Explicit threats of physical violence or property damage.
3. Economic threats (as may be utilized in domestic violence cases to induce a victim not to pursue criminal prosecution of an abuser).
4. Indirect or implicit threats
    a. Anonymous phone calls, internet postings, text or other messages.
    b. Publicly communicating the fact of the witness's cooperation (orally, in writing, or by postings on the internet or social networks).
    c. Defendant and/or his allies appear together, as a show of force, at the residence, place of employment or school of the witness, or other location where the witness is present or is expected to be present.
    d. Repeatedly driving past the residence of the witness or other location where the witness is present or is expected to be present.
5. Even in the absence of specific conduct or threats, the prevalence of organized criminal activity and violence in the community creates fear on the part of the witness that may be reflected in the conduct and demeanor of the witness in the courtroom, or in the reluctance or refusal of the witness to appear in court.
6. It is important to note that these actions may be directed at the witness and/or to anyone who may be close to or have influence with the witness, including but not limited to a spouse, parent, sibling or child.

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CHAPTER 2:
Forms of Intimidation In and Near the Courtroom

Forms of intimidation in and near the courtroom may include, but are not limited to:

1. Explicitly communicated threats.
2. Photographing or recording the face or voice of the witness.
3. Defendant's allies fill the seats in the courtroom or the hallway, as a show of force, sometimes wearing gang or similar attire.
4. Threatening gestures, including but not limited to:
    a. Pointing a finger as if it were a gun.
    b. Holding hands up to simulate the photographing of the witness.
    c. Smirks or gestures of disgust or disbelief directed toward the witness.
    d. Prolonged staring at a witness.
5. An ally of the defendant may approach a family member of the witness and politely invite the family member to attend the proceedings in the courtroom. The family member does not perceive any sinister motive and accepts the invitation. The witness sees a beloved family member sitting in the courtroom in close proximity to a person known to be an ally of the defendant.

It is the responsibility of the trial judge to be aware of both the explicit and implicit forms of intimidation that occur in and near the courtroom. Intimidation may take place by other means not specified on these lists. Courtroom staff must be trained to recognize all forms of intimidation and to immediately report such conduct to the presiding judge.

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CHAPTER 3:
Creating a Safe and Secure Courtroom

3A: JUDICIAL CONTROL OF THE COURTROOM

It is essential to maintain a safe and secure courtroom to ensure an impartial trial. The following are some of the proactive measures a judge may take. The practices recommended herein may not be appropriate for every case. Some recommended practices may be useful in the normal operation of the courtroom to prevent problems. Other recommended practices may be utilized, as necessary, to immediately terminate any inappropriate conduct.

1. Provide safe waiting areas for witnesses, away from any possible intimidators. Provide secure gathering areas for jurors, with escorted transportation to and from the courthouse and courtroom. Utilize courtrooms with adequate and visible security. Meet with the sheriff to plan courtroom security prior to the trial.

2. Train courtroom staff to be alert to intimidating acts by spectators, including subtle acts of intimidation such as smirking, gestures of disgust or prolonged staring at witnesses or jurors or using a hand-held device to photograph a witness. Instruct courtroom staff to immediately report such conduct to the judge. Position staff in the front and rear of the courtroom so that all conduct and spectators can be observed. Inform courtroom staff that when a factual record needs to be made, staff may be called upon to testify under oath, and be examined by counsel, regarding conduct that has been observed. The judge must ensure that courtroom staff treats all spectators in an evenhanded manner.

3. Warn everyone in the courtroom at the beginning of each day's proceedings that the judge will utilize all available powers, when appropriate, to respond to instances of witness or juror intimidation. These warnings may include:

    a. Criminal conduct will be referred to law enforcement agencies for arrest and prosecution.

    b. Misbehaving spectators will be held in contempt of court with accompanying fines and imprisonment.

    c. Misbehaving spectators will be excluded from the courtroom.

    d. Any cell phones or other electronic devices that are not powered off and out of sight may be confiscated and may result in criminal contempt or your expulsion from the courtroom unless you have express permission from the presiding judge to use the device. This warning may not be necessary in jurisdictions, such as Philadelphia,

where those entering the courthouse must secure any cell phone in a court-provided and locked container.

e. "If you believe that intimidating a witness will stop the proceedings, or otherwise help the defendant, you are wrong."

4. Segregate potential intimidators in the courtroom by keeping the first two rows of seating reserved as a buffer zone to be filled by neutral persons approved by the court (such as members of the news media or students). The purpose is to create distance between the testifying witness, the jury and any potential intimidator. This buffer zone should not be used as a basis for excluding persons from the courtroom except as otherwise permitted by law.

5. Instruct the spectators to leave the courtroom before or after the jurors and the witnesses are permitted to leave the courtroom. The family and friends of the defendant should leave the courtroom separately from the family and friends of the victim.

6. Preclude the use of mobile telephones or other communications devices pursuant to Pa.R.Crim.P. 112 (A). Any telephone or communications device that is improperly used should be seized. The seized device should be stored together with a photo copy of the owner's identification so that the device may be stored and possibly returned after being lawfully searched, or at the end of the day's proceeding or at the end of any contempt or related proceeding. See the discussion of *Commonwealth v. Hewlett, infra at 5*.

Rule 112. Publicity, broadcasting, and recording of proceedings.

(A) The court or issuing authority shall:

(1) prohibit the taking of photographs, video, or motion pictures of any judicial proceedings or in the hearing room or courtroom or its environs during the judicial proceedings; and

(2) prohibit the transmission of communications by telephone, radio, television, or advanced communication technology from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session.

The environs of the hearing room or courtroom is defined as the area immediately surrounding the entrances and exits to the hearing room or courtroom.

The court may wish to inform courtroom spectators that it is a crime to "capture, record, transmit or broadcast a photograph, video, motion picture or audio of a proceeding or person within a judicial facility or in an area adjacent to or immediately surrounding a judicial facility without the approval of the court…" 18 Pa.C.S. § 5103.1.

7. In *Commonwealth v. Hewlett*, 189 A.3d 1004 (Pa. Super.), *appeal* denied, ___ Pa. ___, 197 A.3d 1176 (2018), the victim of an assault allegedly committed by Hewlett was testifying at Hewlett's trial. The victim, while she was testifying, noticed that a spectator was using a cellphone. The phone was seized. The trial judge examined the phone's content, and it was determined that the spectator was reporting the fact of the victim's testimony by text message. The victim testified that she observed the use of the cellphone and believed that she was being photographed by the spectator.

   The trial judge gave the jury a cautionary instruction. The court instructed the jury that they could consider the spectator's conduct with the phone for its effect on the victim's testimony. The court further instructed the jury that there was no evidence that the defendant had solicited the behavior by the spectator.

   The court held that it was appropriate for the phone to be seized. "[W]e simply affirm the authority of the trial court to enforce its order that a cell phone may not be used in the courtroom for any purpose, particularly during a trial and especially if the effect of such use is to intimidate a witness while she is testifying." *Id*. at 1014 n.3.

   NOTE: If the phone is to be searched for evidence that the phone was used for witness intimidation, the more prudent course would be for someone other than the trial judge to conduct that search, pursuant to a search warrant.

   Additionally, nothing in this discussion precludes the search of a phone pursuant to other legally recognized exceptions to the requirement of a search warrant. *e.g.*, exigent circumstances, plain view, consent to a search by the owner of the phone or implied consent to search which may arise when there is a warning sign at the courtroom notifying persons that phones carried into the courtroom may be subject to being searched.

8. Respond promptly to misconduct. When a spectator smirks, laughs, or tosses a hand or otherwise indicates disapproval of a witness's testimony, or similar disrespect for the proceedings, the judge should immediately announce (out of the presence of the jury, if possible) that such behavior will not be tolerated. The misconduct usually stops.

9. Prohibit clothing such as gang attire or clothing that contains an intimidating message.

10. Although there appears to be no Pennsylvania authority on the issue, there is persuasive authority elsewhere holding that it may be permissible, in an appropriate case, to require that anyone who enters the courtroom provide identification, including some

form of an identification card, along with name, address and date of birth. Before implementing these requirements, the judge should make findings on the record that justify the measures taken, including the fact that intimidation is enabled by anonymity. The task of collecting the information should be performed by the sheriff or a court officer, as part of neutral courtroom security. The policy should be applied to all spectators not known to the sheriff or court officer.

The reasons for this procedure should be explained by the judge. Identifying information is taken from all spectators to insure the integrity of the proceedings. Courtrooms are open to the public and spectators should not be discouraged from attending judicial proceedings. However, in some cases, it may be necessary for the court to document the identity of spectators in the courtroom. Intimidators feel emboldened by their perceived anonymity. This procedure prevents the intimidator from hiding behind anonymity.

Requesting identification at the courthouse door is a permissible courtroom security procedure. It should be used with caution and accompanied by a clear factual record setting forth the court's reasons.

11. A person may seek to attend court proceedings with a face shielded from view by religious attire. There is no Pennsylvania authority forbidding the court from requiring the person to permit the face to be viewed for identification or as a condition for attending court. Any unveiling should be done, with sensitivity, in the presence of a court officer or other official of the same gender.

LEGAL DISCUSSION:

The courts have been charged with a responsibility to participate in and monitor the development of courthouse security arrangements. Generalized courtroom and courthouse security measures such as the use of metal detectors and examining an individual's identification at the courthouse entrance have been approved against constitutional challenges in *United States v. Smith*, 426 F.3d 567 (2d Cir. 2005), *cert. denied*, 546 U.S. 1204, 126 S.Ct. 1410, 164 L.Ed.2d 109 (2006); and in *United States v. DeLuca*, 137 F.3d 24 (1st Cir.), *cert. denied,* 525 U.S. 874, 119 S.Ct. 174, 142 L.Ed.2d 142 (1998).

In *United States v. Eldridge*, No. 1-09-CR-329 (W.D. N.Y. 2017), a motion for mistrial was properly denied where government agents, without the knowledge of the trial judge, requested spectators to produce identification and to disclose names and addresses. The request was made after a witness, whose identity was disclosed during opening statements, had been threatened twice during a weekend recess.

In *United States v. Brazel*, 102 F.3d 1120 (11th Cir.), *cert. denied*, 522 U.S. 822, 118 S.Ct. 79, 139 L.Ed.2d 37 (1997), the court approved the requirement that all persons who intended to enter the courtroom identify themselves (by identification card, name, address, and birth date). The

trial judge noted that she had observed that individuals were entering and "going into various positions in this courtroom and staring at the witnesses that were on the stand." *Id*. at 1155. The fixed stares were "making the witnesses uncomfortable, because I observed it." *Id*. at 1156.

The court of appeals found no violation of the Constitution. "The trial judge implemented the identification procedure based on her own observations for more than a week, confirmed by the prosecution, that individuals had been coming into the courtroom and fixing stares on the witnesses and possibly government counsel. The court considered the alternative proposed by defendants, but reasonably found it infeasible. She did not believe that, while presiding over the trial, she could assume the responsibility to pick out individuals who might be trying to influence the witnesses or might otherwise pose a threat to trial participants. Given the specific problem that had arisen and the limited nature of the remedy adopted, we see no abuse of discretion in what was done." *Id*. at 1156.

In *Williams v. State*, 690 N.E.2d 162, 168, 169 (Ind. 1997), the Supreme Court of Indiana affirmed the trial court's requirement that spectators present identification and sign in before entering the courtroom.

Five men fired at least sixty-five rounds of ammunition from assault rifles at the door and walls of an apartment in a complex in Indianapolis. A 16-year-old girl passing by the apartment was killed by a bullet to the head and inside a 7-year-old boy was permanently injured. The five shooters were members of the "Ghetto Boys," a group organized to sell crack cocaine. According to trial testimony, the shooting was intended as retaliation against Stacey Reed who, the day before the shooting, had broken into the home of a Ghetto Boy and stolen from the gang's stash of cocaine.

During the trial members of the public who sought access to the courtroom were required to pass through a metal detector and "wand." In addition, spectators who were unknown to the court were required to present identification to the officer at the door and sign in.

The Supreme Court of Indiana rejected defendant's argument that the security procedures violated his constitutional right to a public trial. "The security procedures required that each person who was unknown to the officer at the door show identification and sign in. Neither requirement actively excludes anyone." *Id*. at 168. The Supreme Court imposed a prospective requirement, pursuant to its supervisory powers over the Indiana trial courts, "that the [trial] court make a finding that specifically supports any measures taken beyond what is customarily permitted that are likely to affect unfettered access by the press and public to the courtroom. The finding need not be extensive, but must provide the reasons for the action taken, and show that both the burdens and benefits of the action have been considered." *Id*. at 169 (footnote omitted).

Williams v. State was cited with approval by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Maldonado*, 466 Mass. 742, 752, 2 N.E.3d 145, 154, *cert. denied*, 572 U.S. 1125, 134 S.Ct. 2312, 189 L.Ed.2d 192 (2014). Presentation of identification and a signature

were upheld as conditions of entrance to the courtroom based upon "an articulable risk of witness intimidation or courtroom disruption." That standard was met in this case based on the allegations of a gang-related shooting of a suspected informant and the judge's belief that he had been threatened by a witness earlier in the trial. The court ruled that a trial judge "need not wait for a witness to be intimidated, the court room to be disrupted, or a specific threat before taking appropriate steps to address the risk of such misconduct." *Id*. at 753, 2 N.E.3d at 155. The court also noted that a trial judge is to be afforded deference with respect to his or her assessment of potential danger in a courtroom.

People v. Luckerson, 128 A.D.3d 522, 9 N.Y.S.3d 254 (App. Div. 1st Dept.), *leave to appeal denied*, 26 N.Y.3d 931, 38 N.E.3d 840, 17 N.Y.S.3d 94 (2015), affirmed the trial court's decision to require spectators, other than defendant's family, to show identification or provide their names and dates of birth. The appellate court ruled that the prosecution made a detailed and extensive *ex parte* showing of a serious threat to the safety of potential witnesses, including, among other things, a document bearing notations with "ominous implications," recovered during the execution of a search warrant. *Id*. at 523, 9 N.Y.S.3d at 255.

##

3B: PROTECTIVE ORDERS DURING THE DISCOVERY STAGE

INTRODUCTION:

This benchbook describes two forms of judicial action, both of which carry the label: "protective orders." Pa.R.Crim.P. 573(F) provides for protective orders during the discovery process, permitting the trial judge to delay the discovery or to restrict the dissemination of discovery material. 18 Pa.C.S. § 4954, as discussed *infra* at 14, provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim at locations outside the courtroom.

Rule 573(F), and the cases applying it, recognize that a trial judge is empowered to restrict otherwise permissible discovery in order to prevent disclosure of the name, address or other identifying information about a witness so as to protect the safety of that witness.

Pa.R.Crim.P. 573(F) provides as follows:

> **(F) Protective orders**
> Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the

records of the court to be made available to the appellate court(s) in the event of an appeal.

Recommended practices under this rule:

1. Proceedings on a motion for protective order under Rule 573(F) may be held *in camera.*
2. The judge should review the discovery material being withheld, make a factual record, and make a determination as to how soon in advance of the testimony of the witness the disclosure of the discovery material should be made to the defendant.
3. In making this determination, the judge should consider less restrictive options than the withholding of discovery entirely, such as (1) redacting the statement of the witness so as to remove the name, address, age and any other identifying information; (2) making available to defense counsel an interview with a willing witness prior to the trial; (3) denying discovery for the minimal amount of time necessary to insure the safety of the witness.
4. The discovery material that has been withheld should be placed in the record, under seal, so it may be available for appellate review.

LEGAL DISCUSSION:

In *Commonwealth v. Brown*, 544 Pa. 406, 676 A.2d 1178, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996), a capital case, the Commonwealth did not provide the name of an eyewitness until the trial began because the trial court had issued a protective order, at the request of the Commonwealth, pursuant to former Pa.R.Crim.P. 305(F). When the name of the eyewitness was disclosed, defense counsel objected because the Commonwealth had not given notice to the defendant of the filing of the protective order. A request for a mistrial was denied. The judge granted a 24-hour continuance to enable defense counsel to prepare for the testimony of the witness and the judge stated that he would entertain a request for additional time if necessary. No additional time was requested.

The Supreme Court affirmed the ruling of the trial judge since (1) the Commonwealth had sought trial court approval before withholding the identity of the witness; (2) there was no challenge to the adequacy of the Commonwealth's reasons for seeking a protective order; and (3) defense counsel was given a continuance in order to prepare for the testimony of the witness.

In *Commonwealth v. Hood*, 872 A.2d 175 (Pa. Super.), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), the Superior Court held there was no error in the use of an *ex parte* hearing for the request and issuance of a protective order.

During the investigation of a drug-related shooting, the Commonwealth developed information to support a protective order to keep the identities of the witnesses, as well as their statements, from being disclosed prior to trial because the witnesses were fearful of retaliation.

The trial court granted the Commonwealth's motion for a protective order after an *ex parte* hearing.

The Superior Court held that there was no error in the use of an *ex parte* hearing since the presence of defendant and defense counsel at the protective order hearing would have defeated the purpose of providing protection for these witnesses. The appellate court further noted that the defendant lost no legal rights by not having the names of the witnesses disclosed to him during the discovery stage as he was afforded full confrontation with these witnesses at trial as the witnesses were subjected to a full and vigorous cross-examination. Additionally, defendant was given all the time he requested to prepare for these witnesses. In the absence of any showing of prejudice, Superior Court held that the trial judge had not abused her discretion in granting the *ex parte* protective order.

Commonwealth v. Morales, 625 Pa. 146, 91 A.3d 80 (2014), *cert. denied*, ___ U.S. ___, 135 S.Ct. 1548, 191 L.Ed.2d 643 (2015), was a capital murder case. Defendant argued that the trial court abused its discretion by denying the motion to compel the Commonwealth to disclose the name and location of the eyewitness who later testified for the Commonwealth at trial (Richard Portner). The Supreme Court rejected that argument. Although this case does not involve a formal protective order, it represents an example of a trial court protecting the identity of a witness during pretrial discovery.

The Commonwealth had given defendant a copy or summary of the statement this eyewitness had provided to the police, but without disclosing the witness's identification. Defendant filed a motion to compel disclosure of the witness's identity and location. The trial court denied this motion following a hearing at which counsel for defendant argued that the disclosure of the witness's name would be important for defendant to determine whether the witness had a motive to fabricate his testimony. The trial court concluded that defendant's reasons focused on the issue of the witness's credibility, which issue defendant could fully explore on cross-examination. The trial court further concluded that the witness's testimony would not exonerate defendant. Going further, the trial court observed that the Commonwealth's concern for the safety of the witness was well founded because defendant was being tried for killing a witness against him. Finally, the court was satisfied that the Commonwealth would meet its agreement to disclose to defendant any criminal history that this witness might have had, although the Commonwealth assured the trial court and defendant's counsel that the witness had no criminal history.

The Supreme Court unanimously affirmed the trial court's order, concluding that there was no record evidence establishing that the disclosure of the name and location of Portner prior to trial would have been material to defendant's defense. Additionally, the trial court's order was reasonable under the circumstances. Those circumstances were that defendant was charged with and on trial for murdering a person to prevent that person from testifying against defendant in a drug prosecution. In this murder case, the stakes for defendant were, of course, considerably greater than they were for his drug dealing charge. Although defendant was incarcerated while awaiting his murder trial, his connections in the geographic area of York with

others involved in the illegal drug trade, persons who were in and out of prison, as demonstrated by the witnesses giving trial testimony here, established that defendant was not an individual who lacked the potential ability to assert his will beyond the prison walls.

The Supreme Court concluded its discussion of this issue with the following principle:

> The critical importance of the safety of eyewitnesses, and, additionally, the public need for them to be willing to come forward with information, cannot be swept aside under the circumstances of this case based only on [defendant's] bald assertion that there was never a danger because he was in prison while awaiting trial. We may not take a cavalier approach concerning the safety of those willing to come forward with evidence surrounding crime.

Morales, 625 Pa. at 168, 91 A.3d at 94.

The Supreme Judicial Court of Massachusetts addressed a rule nearly identical in language to Pa.R.Crim.P. 573(F) in *Commonwealth v. Holliday*, 450 Mass. 794, 803, 804, 800, 882 N.E.2d 309, 318, 319, 316, *cert. denied sub. nom. Mooltrey v. Massachusetts*, 555 U.S. 947, 129 S.Ct. 399, 172 L.Ed.2d 292 (2008) (citations and internal quotations omitted):

> Although the Commonwealth bears the burden of demonstrating that the safety of a witness would be put at risk if information, otherwise required to be disclosed, was made available to the defendant in the absence of a protective order, we have previously held that it need not demonstrate a specific or actual threat to the safety of a witness when the danger to witness safety is inherent in the situation.
>
> In granting the order at issue here, it was permissible for the [trial] judge to determine that the Commonwealth's representations that the crimes were the result of a murderous feud between gangs still operating in the neighborhood where the witnesses lived were reliable, that for years witnesses had been reluctant to come forward out of fear for their safety, and that those witnesses who were then incarcerated were particularly fearful of the defendants obtaining copies of statements made against them, and distributing those statements in the prisons, making them the potential targets of violence. It was not error for the [trial] judge to have concluded that there is great risk that retaliation could take place, endangering the witnesses for the Commonwealth. In other words, even absent evidence of a specific threat, the threat to witnesses was inherent in the situation. There was no abuse of discretion in issuing a protective order in these circumstances.

Text of trial court order: "I order that the addresses and locations of witnesses in the above-captioned matter not be disclosed to Defense Counsel or the Defendants. I further order Defense Counsel not to give written copies of transcribed witness statements, reports containing witness statements, or witness statements in any form to the defendants or any

other persons. I order Counsel for the Commonwealth to make available witnesses for Defense Counsel, in order that Defense Counsel may request interviews with the witnesses, and interview the witnesses if they are willing to be interviewed. I make these orders in order to protect the safety of the witnesses." The order was later modified to permit defense counsel (and their investigators) access to the addresses of the witnesses who made statements.

##

3C: MAY THE JUDGE EMPANEL AN ANONYMOUS JURY?

Convening an anonymous jury is an option only when all parties agree or after a motion is filed and complete and particularized factual findings are made, on the record, setting forth the need and justification for such a procedure.

LEGAL DISCUSSION:

In *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892 (2007), the Supreme Court of Pennsylvania held that the news organizations have a qualified First Amendment right to the names, but not the addresses, of jurors in a criminal case. However, the ruling recognized that the trial court may find that disclosing the jurors' names in a particular circumstance may raise "concerns for juror safety, jury tampering, or juror harassment." *Id*. at 64, 922 A.2d at 905. "[T]he trial court can deny the right of access when it offers on the record findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* The Supreme Court suggested that names of jurors could be withheld if the trial court makes "particularized findings of fact [that] the jurors have been or are likely to be harassed by the public, press, or defendant's family or friends." *Id*.

In *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988), the Third Circuit held: "Because the prosecution's evidence describing the defendant's organized crime group might have caused anxiety among the jurors, the trial judge withheld their identities before and after *voir dire* in this extortion case. In these circumstances, we find no abuse of discretion either in adopting that procedure or in explaining it to the jury." *Id*. at 1016. "Pretrial proceedings revealed that plea agreements, which included transactional immunity and post-trial witness relocation, had been arranged with [two men] in return for their testimony as government witnesses. Both had been implicated in several murders allegedly committed at Scarfo's behest. Their testimony would show that one prospective witness had been killed in the past, one judge had been murdered, and attempts had been made to bribe other judges. [Both witnesses'] lives had been threatened, and they would remain under heavy guard during their appearances in court." *Id.* at 1017.

In *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008), the Third Circuit reversed the district court order convening an anonymous jury and held that there is a presumptive First Amendment right of public access to the names of trial jurors and prospective jurors prior to

the empanelment of the jury. The court found that the presumption was not overcome by the district court's articulated reasons: the media may publish stories about the jurors, friends or enemies of the defendant may try to influence the jurors, and defendant had filed a pleading alleging that he had many potential enemies from his extensive career as a witness in criminal and civil cases.

In *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012), *cert. denied*, 568 U.S. 1177, 133 S.Ct. 1278, 185 L.Ed.2d 214 (2013), the Fourth Circuit held that the trial court did not abuse its discretion in convening an anonymous jury where the record established by a preponderance of the evidence that the lives or safety of the venire members may have been jeopardized if their names, addresses, and places of employment, or such information pertaining to their spouses, had been provided to the parties, and where the trial court took reasonable precautions during the jury selection process to safeguard the defendants' rights.

A federal statute specifically authorizes a trial judge to keep the names of jurors confidential "in any case where the interests of justice so require." 28 U.S.C. § 1863(b)(7). In a capital case a trial judge may withhold the list of venirepersons from the defendant if "the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." 18 U.S.C. § 3432. There are no comparable statutes in Pennsylvania.

Two rules of Pennsylvania criminal procedure specifically address information about venirepersons and jurors:

> Pa.R.Crim.P. 630, pertaining to juror qualification forms, requires that the form containing the "names of persons to serve as jurors" be "prepare[d]", "publish[ed]" and "post[ed]." The form itself "shall not constitute a public record." The information provided on the form "shall be confidential."
>
> Pa.R.Crim.P. 632 pertains to the juror information questionnaire. The required form discloses the juror's name and city/township of residence, but not the street address. The information on the questionnaires "shall be confidential" and the questionnaires "shall not constitute a public record." On the other hand, the attorneys "shall receive copies of the completed questionnaires." In *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892 (2007), the Supreme Court held that the confidentiality provisions of Rule 632 do not "overcome" the constitutionally based right of access of the news organizations. The *Long* court read the confidentiality provisions of Rule 632 to apply to the answers to questions provided by the jurors on the questionnaire, not to "identifying information contained therein." *Id*. at 63 n.15, 922 A.2d at 905 n.15.

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3D: PROTECTIVE ORDERS RESTRICTING CONDUCT OUTSIDE THE COURTROOM

INTRODUCTION:

18 Pa.C.S. § 4954 provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim that may occur at locations outside the courtroom. As previously discussed, *supra* at 8, Pa.R.Crim.P. 573(F) also uses the term "protective orders." That rule applies during the discovery process, permitting the trial judge to delay the discovery or to restrict the dissemination of discovery material.

> **§ 4954. Protective orders**
> Any court with jurisdiction over any criminal matter may, after a hearing and in its discretion, upon substantial evidence, which may include hearsay or the declaration of the prosecutor that a witness or victim has been intimidated or is reasonably likely to be intimidated, issue protective orders, including, but not limited to, the following:
>
> 1) An order that a defendant not violate any provision of this subchapter or section 2709 (relating to harassment) or 2709.1 (relating to stalking).
> 2) An order that a person other than the defendant, including, but not limited to, a subpoenaed witness, not violate any provision of this subchapter.
> 3) An order that any person described in paragraph (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.
> 4) An order that any person described in paragraph (1) or (2) have no communication whatsoever with any specified witness or victim, except through an attorney under such reasonable restrictions as the court may impose.

18 Pa.C.S. § 4954.1 provides that a protective order shall contain at its top a notice containing the telephone number of the police department that the victim or witness should contact if the order is violated. 18 Pa.C.S. § 4955 sets forth the consequences of a violation of a protective order. A person violating the order may be punished for any substantive crime that has been committed or for indirect criminal contempt of court. *See Commonwealth v. Reese*, 156 A.3d 1250 (Pa. Super.) (affirming conviction for indirect criminal contempt for violation of a Section 4954 protective order), *appeal denied,* 643 Pa. 472, 173 A.3d 1109 (2017). The court is empowered to revoke the offender's bail after a hearing or issue a bench warrant for the offender's arrest.

The reference in these statutes to an order that a defendant not violate "any provision of this subchapter" encompasses certain criminal offenses, designed for the protection of witnesses, victims and court officers.

18 Pa.C.S. § 4952 Intimidation of witnesses or victims

18 Pa.C.S. § 4953 Retaliation against witness, victim or party

18 Pa.C.S. § 4953.1 Retaliation against prosecutor or judicial official

1. This statutory scheme authorizes any criminal court, including a magisterial district judge, following a hearing, to issue a protective order that a defendant or other person not violate the statute, that he or she maintain a certain distance from a specified witness or victim, and that he or she have no communication with any specified witness or victim. The court has authority to issue a protective order prohibiting the misconduct of the defendant and any other person.

2. While both a hearing and substantial evidence are required, there is no requirement of a formal motion. A judge may invoke this statute *sua sponte.*

3. Hearsay and declarations by the prosecutor both constitute admissible evidence at the hearing. 18 Pa.C.S. § 4954.

4. The order of the court should be specific as to the person(s) prohibited, the person(s) protected, prohibited actions, and the duration of the order. The order should also provide for its service upon the police department that would have primary responsibility for the protection of the witness or victim.

5. A standard protective ("stay away") order is available within the Common Pleas Court Case Management System ("CPCMS") as document #3521.

6. For the purposes of § 4954, a juvenile delinquency proceeding may not be a criminal matter or proceeding. As such, the presiding judge in a juvenile delinquency proceeding may be without authority under § 4954 to issue a protective order. *Interest of R.A.*, 761 A.2d 1220 (Pa. Super. 2000). However, the court does have the inherent authority to regulate its proceedings and to control the courtroom and its environs, and to protect its witnesses. *See generally*, *Interest of Crawford*, 360 Pa. Super. 36, 519 A.2d 978 (1987) (court has inherent power to hold alleged juvenile delinquent in contempt for failure to appear at adjudicatory hearing to which juvenile had been subpoenaed; court is not stripped of this power by absence from the Juvenile Act of any reference thereto).

##

3E: CONDITIONS OF BAIL

The Pennsylvania Constitution recognizes that dangerousness can preclude bail. Article 1, § 14 provides:

> 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.

A defendant threatening, intimidating, harassing or injuring a witness or juror, or causing any of the foregoing, should be considered dangerous by the court in setting, amending, or revoking bail. Similarly, when the court sets or reviews bail for anyone charged with intimidating or threatening a witness or juror, the court should consider the danger posed to the community, particularly when that danger strikes at the very core of the justice system.

18 Pa.C.S. § 4956, set forth below, mandates that a defendant's bail, or any other form of recognizance, be conditioned on the defendant neither doing, nor causing to be done, nor permitting to be done, any act of intimidation or retaliation. The statute further requires that the defendant be given notice of this condition.

> **18 Pa.C.S. § 4956 Pretrial release.** (emphasis added)
>
> a) Conditions for pretrial release — Any pretrial release of any defendant whether on bail or under any other form of recognizance **shall be deemed**, as a matter of law, **to include a condition that the defendant neither do, nor cause to be done, nor permit to be done on his behalf,** any act proscribed by section 4952 (relating to intimidation of witnesses or victims) or 4953 (relating to retaliation against witness or victim) and any willful violation of said condition is subject to punishment as prescribed in section 4955(3) (relating to violation of orders) **whether or not** the defendant was the subject of an order under section 4954 (relating to protective orders).
>
> b) Notice of condition — From and after the effective date [February 2, 1981] of this subchapter, any receipt for any bail or bond given by the clerk of any court, by any court, by any surety or bondsman and any written promise to appear on one's own recognizance shall contain, in a conspicuous location, notice of this condition.

See also, Pa.R.Crim.P. 526(A), which requires that a condition of bail be that the defendant "refrain from criminal activity."

In addition, the bail authority may impose any condition necessary to "ensure the defendant's appearance and compliance." Pa.R.Crim.P. 526(B), 527(A)(3).

These conditions apply to any defendant released on recognizance, nonmonetary conditions, unsecured bail bond, nominal bail and monetary condition. Pa.R.Crim.P. 524(B).

The court may modify or revoke the defendant's bail if the defendant fails to comply with any of the conditions of bail. Pa.R.Crim.P. 529, 536.

Section 2711 of the Crimes Code, 18 Pa.C.S. § 2711, also requires that, in domestic violence cases, if the bail authority determines that the defendant poses a threat of danger to the victim, the bail authority must impose the additional conditions of bail that the defendant "refrain from entering the residence or household of the victim or the victim's place of employment," and that the defendant "refrain from committing any further criminal conduct against the victim."

1. 18 Pa.C.S. § 2711 applies to arrests for violations of Section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2706 (relating to terroristic threats), 2709.1 (relating to stalking) or 2718 (relating to strangulation) against a family or household member, defined as "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." 18 Pa.C.S. § 2711(a); 23 Pa.C.S. § 6102.

2. Any conditions of bail imposed pursuant to 18 Pa.C.S. § 2711(c)(2) "shall expire at the time of the preliminary hearing or upon the entry or the denial of the protection of abuse order by the court, whichever occurs first."

##

3F: EXCLUSION OF SPECTATORS

An order excluding spectators from the courtroom must be in compliance with two constitutional provisions: the defendant's right to a public trial under the Sixth Amendment and the right of the news media to attend and report on the trial pursuant to the First Amendment. On the other hand, it is well established that a trial judge may maintain a safe and secure courtroom.

Anyone may be excluded who is observed in the courtroom acting in a manner that disrupts the proceedings, intimidates a witness or juror, or violates the rules of decorum of the court. For example, a spectator who makes faces or inappropriate gestures during the proceedings, glares

at witnesses or jurors or visibly reacts to testimony may be summarily removed from the courtroom.

1. If the misbehavior occurs in the judge's presence, the judge should make a full record stating explicitly that factual findings, describing in detail the offending conduct, are based on the judge's personal observations.

2. If the misbehavior was brought to the judge's attention by someone in the courtroom, but the judge did not personally observe the misbehavior, the judge should hold a hearing outside the presence of the jury to make a factual record of the misbehavior. For example, if a courtroom staff member saw the conduct, that person should testify on the record, subject to examination by counsel. The judge should explicitly state findings of fact based on the record made at the hearing.

3. The judge should exclude only the offending person or persons.

A witness may express a reluctance to testify based upon fear, but there may not have been visible misconduct in the courtroom. The threat to the witness may not have been made in open court, but the person who made the threat is in attendance as a spectator at the trial. Threats or other acts of intimidation may have been committed by unknown persons. Under these circumstances:

1. The judge should convene a hearing outside the presence of the jury.

2. The intimidated witness should testify at the hearing. It is better not to rely exclusively upon the representations by the prosecutor regarding the witness.

3. The hearing may be held *in camera* if necessary to develop the information.

4. The witness must offer more than a generalized assertion of fear. A record must be made of words or acts, inside or outside the courtroom, that would justify the fear.

5. Specific factual findings should be made regarding the credibility of the evidence and whether a threat of injury or intimidation exists. The judge should state reasons why exclusion of the person or persons is essential to protect the witness from fear or emotional disturbance that would prevent or impede the witness from testifying truthfully.

6. When making factual findings, the judge should remember that intimidation genuinely may arise from indirect and implicit threats or from the prevalence of organized criminal activity and violence in the community.

7. Counsel for the defendant may be of the opinion that the presence in the courtroom of menacing-looking spectators may be creating a bad impression of the defendant in the

eyes of the jury. Counsel for defendant, in some cases, may agree on the record to an order of exclusion.

8. The judge must explicitly consider alternatives to exclusion, such as additional security, and, if appropriate, state reasons why such alternatives to exclusion are not adequate.

9. An order excluding spectators should not be excessive in its scope. There is rarely a basis for excluding the news media. An order excluding all spectators is rarely justified as compared to an order excluding those designated persons whose presence is connected to fear by the witness. Closer scrutiny is given to orders excluding members of defendant's family absent evidence of misconduct attributable to the excluded family member.

10. An order excluding spectators should not be excessive in length. The exclusion should apply only during the testimony of the fearful witness and exclusion should terminate at the completion of that testimony.

11. There is no requirement set forth in court decisions that the acts of intimidation be committed by the defendant or be committed at the solicitation of the defendant. The defendant is not being excluded from the courtroom. Exclusion of spectators is not a sanction against the defendant; instead, it is a sanction against the spectators who are frightening the witness. Misconduct by the defendant or misconduct attributable to the defendant is not required. *State v. Bobo,* 770 N.W.2d 129 (Minn. 2009), summarized *infra* at 23.

LEGAL DISCUSSION:

United States Supreme Court

Courts rely upon the legal standard set forth in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). In *Waller,* all persons except for court personnel were excluded for the entirety of a suppression hearing. Closure of a judicial proceeding must advance an overriding interest, the closure must be no broader than necessary to protect that interest, the trial judge must consider reasonable alternatives to closing the proceeding, and the judge must make findings adequate to support the closure.

In a typical case of witness intimidation, the courtroom may not be closed in its entirety to all persons. Instead, there may be a partial closure of the courtroom. Only specified individuals may be excluded. The exclusion will be temporary, just during the testimony of the intimidated witness. There may not be a permanent exclusion of the individuals from the courtroom.

When there is a partial closure of the courtroom, some state and federal courts modify the *Waller* standard. These courts have adopted the position that where a closure is partial, it is necessary to show a "substantial reason" rather than an "overriding interest" to justify the

closing. *See*, *Commonwealth v. Cohen*, 456 Mass. 94, 111 n.25, 921 N.E.2d 906, 921 n.25 (2010) (collecting cases). Other courts continue to apply the *Waller* standard both for partial and for total closures. Pennsylvania courts have not specifically decided whether the "overriding interest" or the "substantial reason" standard applies to partial closures of the courtroom.

In *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), the Court held that a congested courtroom, without more, is not a justification for limiting public access during jury selection. Similarly, the presence in the courtroom of a court reporter and members of the news media does not necessarily preclude a defendant from successfully asserting a violation of his right to a public trial.

A violation of the right to a public trial is considered a structural error. Prejudice to the defendant is presumed if the challenge to the violation is preserved and raised on direct appeal. However, if the violation of the right to public trial is raised in the context of an ineffective assistance of counsel claim, the defendant must show prejudice in order to obtain a new trial. *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

Pennsylvania Decisions:

In *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985), the Pennsylvania Supreme Court upheld convictions against defendants' assertions that their right to a public trial was violated by exclusion of spectators during several days of *voir dire*. The trial of eight high-profile defendants was conducted amid tumult, inside and outside the courtroom. Although some of the bases of the Supreme Court's ruling have been abrogated by *Presley, supra*, the Supreme Court's opinion contains a strong statement as to the right of the judge to enforce standards of conduct within his or her courtroom.

> [T]rial judges are vested with broad discretion in setting and enforcing the standards of proper conduct for all those who seek to attend judicial proceedings before them. We should not be hasty to reverse a trial judge's actions in establishing order in his courtroom, unless his actions are not designed to maintain dignity, order, and decorum, and instead deny or abridge unwarrantedly the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

Berrigan, 509 Pa. at 133, 501 A.2d at 234.

In *Commonwealth v. Howard*, 324 Pa. Super. 443, 471 A.2d 1239 (1983), the Superior Court upheld the rulings of the trial court that (1) ordered the removal of the defendant from the courtroom based upon his disruptive behavior, and (2) ordered the removal of members of the group MOVE from the courtroom for the final one hour of one afternoon's proceedings based upon the trial judge's factual findings, stated on the record, that there was a causal connection

between the presence of the group in the courtroom and the instances of disruptive behavior by the defendant.

Commonwealth v. Conde, 822 A.2d 45 (Pa. Super. 2003), upheld the exclusion of defendant's fiancée and friends for the duration of a trial after they had been observed by the judge and by a court officer making intimidating gestures and faces at witnesses.

In *Commonwealth v. Penn*, 386 Pa. Super. 133, 562 A.2d 833 (1989), *appeal denied*, 527 Pa. 616, 590 A.2d 756, *cert. denied,* 502 U.S. 816, 112 S.Ct. 69, 116 L.Ed.2d 43 (1991), all spectators were excluded from the courtroom based upon a representation to the trial judge by the prosecutor that a Commonwealth witness was fearful of testifying in a full courtroom following the breaking of several windows at his home and the receipt of several anonymous calls on the previous evening threatening injury to him and his four children if he testified at trial, as well as the witness having been accosted outside the courtroom that morning by persons he could not or would not identify, who also requested that he change his testimony.

The Superior Court found the closure of the courtroom to have been unjustified based upon two errors by the trial judge. First, the trial judge accepted the representation by the prosecutor without personally interviewing the witness, either in court or *in camera*, and without making an independent assessment of the credibility of the witness with respect to the allegations of intimidation. Second, the trial judge failed to explain on the record why closure of the courtroom was necessary as compared to other alternatives such as criminal prosecution of the intimidators or augmented courtroom security.

The record must establish whether or not there was an actual denial of access to the courtroom. The defendant in *Commonwealth v. Rega*, 620 Pa. 640, 70 A.3d 777 (2013), sought relief based upon his allegation that a trial session was held on a Saturday, that the courthouse doors were locked and that spectators were excluded. The Supreme Court held that Rega was not entitled to relief since he failed to show that there were not spectators in the courtroom during the Saturday session or that any spectators were turned away from the courthouse.

Other Jurisdictions:

INTRODUCTION:

As previously stated, before persons may be excluded from the courtroom, specific factual findings are warranted setting forth the basis for the court's conclusions that a witness has been intimidated and that exclusion of one or more spectators is an appropriate response to the intimidation. While there is not extensive case law in Pennsylvania on this issue, appellate courts from around the country have upheld orders excluding spectators when a legally sufficient justification has been presented. We offer examples of such rulings that may be found to be persuasive authority.

People v. Frost, 100 N.Y.2d 129, 790 N.E.2d 1182, 760 N.Y.S.2d 753 (2003), was a New York murder case. Before trial, the prosecution, pursuant to a state statute similar to Pa.R.Crim.P. 573(F), moved for a protective order. In support of its motion seeking to protect the identities of witnesses prior to trial, the prosecution noted defendant's criminal history, the criminal history of defendant's father and step-brother, the defendant's family's attempt to discourage potential witnesses to the instant crime, and the lack of cooperation by the community into prior investigations of crimes believed to have been committed by defendant. The prosecution requested that the hearing be held *in camera* outside the presence of defendant or his attorney. After the hearing the trial court granted the prosecution's motion and directed that the identities of certain witnesses not be revealed during *voir dire*, and that disclosure of relevant discovery material be delayed and redacted to protect witnesses' identities.

At trial, the prosecution moved on four separate occasions for closure of the courtroom during the testimony of certain witnesses. The trial court conducted an *ex parte* hearing on each occasion to determine whether the courtroom should be closed. The defendant and his counsel were excluded from these hearings. At the first such hearing, the trial court ordered the closure of the courtroom during the witness's testimony and, to protect the witness's identity, allowed him to testify under the fictitious name Steven Knight. The court also issued a protective order as to his address and occupation. At subsequent *ex parte* hearings, the trial court determined that the courtroom would be closed for the testimony of two additional witnesses.

The highest court in New York, the Court of Appeals, unanimously upheld defendant's conviction. The Court of Appeals ruled that the evidence elicited at the hearings pertaining to the potential witnesses' extreme fear of testifying in open court was legally sufficient. The court also specifically affirmed the trial court rulings excluding defendant and his counsel from the *ex parte* hearings, permitting the testimony of the prosecution witness under a fictitious name, and closing the courtroom during the testimony of three witnesses.

People v. Sharp, 158 A.D.3d 424, 70 N.Y.S.3d 473 (App. Div. 1st Dept.), *leave to appeal denied*, 31 N.Y.3d 1087, 103 N.E.3d 1256, 79 N.Y.S.3d 109 (2018), held that the record established an overriding interest in partially, and later completely, closing the courtroom during the testimony of an identifying eyewitness. The witness's extreme fear of testifying in open court was sufficient to establish an overriding interest.

Before the exclusion of defendant's cousin from the courtroom, the trial court conducted a hearing at which the witness testified that he previously had been threatened for cooperating with the prosecution in another trial, that he had heard threats made against potential prosecution witnesses in the present case, and that he and his family lived in the same neighborhood where the shooting occurred. The trial court was entitled to credit the witness's testimony that he felt threatened by defendant's cousin and could not testify in his presence. Although the cousin did not make any direct threats to the witness, he appeared to be closely associated with a person who did so.

Later during the trial, the trial court providently exercised its discretion in relying on statements by the prosecutor and a court officer that the witness would not return to the stand even if threatened with jail for contempt, and that he became terrified after his brother phoned and told him not to testify out of fear for his and his family's safety. Moreover, the witness's own court-appointed counsel provided confirmation that his client needed to testify in a closed courtroom. The record also established that after defendant's cousin was excluded, he escorted to the courtroom two new spectators, whom the witness knew and feared, who sat with the defense, and that one of these men kissed one of defendant's relatives hello. In light of that fact, the witness's brother's phone call, and the previously stated factors, the evidence raised serious concerns about witness safety and intimidation, and established an overriding interest in closing the courtroom. Given the intimidating atmosphere, and the apparent close connection between defendant's family and the particular persons whom the witness feared, the record established a need for a complete closure of the courtroom, even to family members.

In *State v. Bobo*, 770 N.W.2d 129 (Minn. 2009), the State presented evidence, in a hearing outside the presence of the jury, that both James [witness] and Bobo [defendant] were members of the Rolling 30's Bloods gang and that, on the date James was scheduled to testify, gang members were present at the trial. The State also presented evidence regarding letters arguably intended to influence James not to testify, as well as double hearsay regarding alleged conversations in which Bobo's friends or relatives encouraged James not to testify. According to the police investigator, who spoke to James after James refused to testify, James decided not to testify after facing Bobo directly and seeing all of the other people in the courtroom. The officer specifically testified that James claimed the reason he did not testify was because he was afraid after seeing Bobo and all the other people in the courtroom.

The trial court barred the entire public during the testimony by James. The trial court considered excluding specific individuals but rejected the option as not feasible. The trial court rejected having someone standing at the door to the courtroom, attempting to identify those who were Rolling 30's Bloods gang members or who might otherwise intimidate James, as ineffective and potentially an invasion of privacy.

The Supreme Court of Minnesota ruled that the trial court appropriately considered alternatives and found the temporary closing of the courtroom to the public during James' testimony to be the only reasonable alternative. The Supreme Court concluded that there was sufficient evidence to support the trial court's finding that keeping the courtroom open was substantially likely to jeopardize the overriding interest that James testify truthfully at trial.

State v. Drummond, 111 Ohio St.3d 14, 854 N.E.2d 1038 (2006), *habeas corpus relief denied sub nom.*, *Drummond v. Houck*, 797 F.3d 400 (6th Cir. 2015) (Ohio Supreme Court ruling was not unreasonable), *cert. denied sub nom. Drummond v. Robinson*, ___ U.S. ___, 136 S.Ct. 2012, 195 L.Ed.2d 222 (2016) reviewed a trial court ruling which excluded all spectators from the courtroom after an incident where there had been an altercation between a spectator and courtroom deputies and after a second incident had occurred in chambers involving the trial

court and a spectator. The trial court excluded members of the public and the defendant's family, but did so only for the length of a single cross-examination and two other witnesses' testimony. The trial court permitted media representatives to remain in the courtroom throughout the testimony of these witnesses.

The Supreme Court of Ohio held that the trial court's interest in maintaining courtroom security and protecting witness safety supported the trial court's limited closure of the courtroom. There had been a physical altercation between a spectator and courtroom deputies, and a second incident occurred in the judge's chambers. The trial court also stated that "the fear of retaliation expressed by various witnesses" was a basis for its action. The Supreme Court acknowledged the dangerous nature of gang violence and the genuine need to protect witnesses testifying against gang members from the deadly threat of retaliation. The closure was no broader than necessary.

In *State v. Woods*, 2011 Ohio 817 (Ct. App. 8th Dist. Feb. 24, 2011), the Court of Appeals of Ohio distinguished *State v. Drummond*, and held that the trial court committed reversible error when the court excluded all persons from the courtroom during the testimony of defendant's accomplice. In this case, there was no physical altercation, no expression of fear by the witness, the exclusion was overbroad (all spectators and the news media), and alternatives to closure of the courtroom were not adequately considered.

United States v. Simmons, 797 F.3d 409 (6th Cir. 2015), was a federal trial for drug conspiracy. The government moved to exclude three of Simmons's co-defendants from the courtroom during the testimony of one of its witnesses. The co-defendants were not being tried jointly with Simmons. The co-defendants were merely present in the courtroom as spectators. The government argued that, due to certain comments made by Simmons and other individuals outside the courtroom, the presence of the three co-defendants might make the witness feel uncomfortable and intimidated.

The court of appeals ruled that Simmons right to a public trial had been violated. First, the trial court applied an incorrect legal standard, concluding that it could exclude spectators if there was "any possibility" that their presence could be intimidating. Instead, a trial court must find that the safety of a witness was "likely to be prejudiced." *Id*. at 415. Additionally, the trial court failed to make adequate factual findings to justify the closure. "Disparaging things" that were said to the witness were never identified; the spectators were not found to have made or prompted the "disparaging" statements; and the witness never testified that he felt threatened by whatever had been said.

Commonwealth v. Young, 73 Mass. App. Ct. 479, 899 N.E.2d 838, *review denied*, 453 Mass. 1105, 902 N.E.2d 947 (2009), *habeas corpus relief denied sub nom.*, *Young v. Dickhaut*, No. 10-10820-DPW (D. Mass. Aug. 22, 2012) (state court ruling not unreasonable), reviewed a trial court ruling which excluded defendant's brother from the courtroom.

A witness, Greene, was hesitant to testify. The prosecution identified the defendant's brother as a "specific concern" for Greene. The judge also inquired of Greene, outside the presence of the jury, if there was anything that she particularly was concerned about, and Greene replied, "I know some of his family." Greene then acknowledged that "his family" referred to the defendant's family, including the defendant's brothers. Before Greene testified, the judge allowed the defendant's brother to be excluded from the courtroom during Greene's testimony.

The Massachusetts appellate court noted that no person other than defendant's brother was excluded from the courtroom, and that the record revealed that the brother's presence caused apparent fearfulness on the part of Greene. The appellate court held that the trial judge had not abused her discretion in ordering this limited exclusion.

Sowell v. Sheets, No. 2:09-CV-1089 (S.D. Ohio Oct. 14, 2011) (Deavers, USMJ), *report of Magistrate Judge adopted*, No. 2:09-CV-1089 (S.D. Ohio Dec. 15, 2011) (Graham, J.), upheld, on federal *habeas corpus* review, the exclusion from the courtroom of defendant's brother who made a threatening gesture with fingers, simulating a weapon, while a witness was testifying.

In *State v. Frisbee*, 2016 Me. 83, 140 A.3d 1230 (2016), a spectator who had a history of threats directed at the defense counsel, the judge and one of the jurors was present in the courtroom. In addition to this presence, the spectator was approaching jurors and offering a copy of a book the spectator had written. Additionally, the spectator had left his notebook at the courthouse. In the back of the notebook, there was a note that read, "I wish you were all dead, but since you're not I hope you all die as soon as possible. And with as much agony as possible."

The Supreme Judicial Court of Maine held that the exclusion of the spectator was justified based upon the specific findings made by the trial judge. The trial court considered alternatives to exclusion of the spectator, such as moving the spectator to a different spot in the courtroom and having him go through security screening before entering the courtroom. After learning more information regarding the seriousness of the potential distraction for defense counsel and the juror, the trial court concluded that those alternatives would not be sufficient to protect the right to effective assistance of counsel and to trial before a nondistracted jury. It was held that the trial court appropriately excluded the individual.

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3G: PROTECTION OF IDENTITY OF UNDERCOVER POLICE OFFICERS

A specialized body of case law exists where spectators have been excluded from a courtroom in order to conceal the identity of an undercover police officer. Courts have recognized two distinct interests that have been found deserving of protection. The first interest is the protection of the life and safety of the undercover officer. Second, the state has an interest in maintaining the continued effectiveness of an undercover officer who would soon be returning

in an undercover capacity to the same neighborhood where the defendant had been arrested. Courts have described these interests as "extremely substantial," *Ayala v. Speckard*, 131 F.3d 62, 72 (2d Cir. 1997) (*en banc*), *cert. denied*, 524 U.S. 958, 118 S.Ct. 2380, 141 L.Ed.2d 747 (1998), and as "overriding," *Brown v. Kuhlmann,* 142 F.3d 529, 537 (2d Cir. 1998).

In addressing the safety of the police officer, courts look to whether associates of the defendant or current targets of investigation were present in the courtroom, whether specific threats had been received by the officer, and whether the officer's claims of safety concerns had been corroborated by efforts made by the officer to conceal his identity and visibility in and around the courthouse, such as by using side entrances, not walking through public hallways and remaining secluded. If the officer is planning to return to the specific neighborhood where the defendant had been arrested, that fact is relevant both as to safety and as to the continued effectiveness of the undercover officer. However, a safety concern may be found even if the officer is not returning to the same neighborhood after the trial.

The lead cases upholding the use of safety measures to protect undercover police officers are *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) (*en banc*) (exclusion of spectators), *cert. denied*, 524 U.S. 958, 118 S.Ct. 2380, 141 L.Ed.2d 747 (1998); *People v. Ramos*, 90 N.Y.2d 490, 497, 662 N.Y.S.2d 739, 685 N.E.2d 492 (exclusion of spectators), *cert. denied sub nom., Ayala v. New York*, 522 U.S. 1002, 118 S.Ct. 574, 139 L.Ed.2d 413 (1997); and *People v. Echevarria*, 21 N.Y.3d 1, 989 N.E.2d 9, 966 N.Y.S.2d 747 (exclusion of spectators except for defendant's family), *cert. denied sub nom*. *Moss v. New York*, 571 U.S. 1111, 134 S.Ct. 823, 187 L.Ed.2d 688 (2013), *habeas corpus relief denied Moss v. Colvin*, No. 14 Civ. 2331 (PAC) (JCF) (S.D. N.Y. 2015) (Crotty, J. adopting report and recommendation of Francis, U.S.M.J.), *aff'd*, 845 F.3d 516 (2d Cir. 2017) (state court decision not unreasonable).

State trial judges in New York have excluded spectators and/or permitted anonymous testimony in order to protect the safety of undercover police officers. Subsequent to the decisions in *Ayala* and in *Ramos*, many of these trial court rulings have been affirmed on direct appeal in the state courts and upheld on *habeas corpus* review in the federal courts.

People v. Acevedo, 62 A.D.3d 464, 878 N.Y.S.2d 327 (App. Div. 1st Dept.) (closure of courtroom; officer permitted to withhold his name and to identify himself only by his badge number; defendant's mother and girlfriend permitted to remain in courtroom; trial transcript was publicly available), *leave to appeal denied sub nom. People v. Cotto*, 13 N.Y.3d 743, 914 N.E.2d 1015, 886 N.Y.S.2d 97 (2009), *habeas corpus relief denied sub nom. Cotto v. Fisher*, 2012 WL 5500575 (S.D. N.Y. August 23, 2012) (Dolinger, U.S.M.J.) (addressing merits of claim in alternative holding), *report of United States Magistrate Judge adopted in its entirety*, No. 09 Civ. 9813 (SAS) (MHD) (S.D. N.Y. November 12, 2012) (Scheindlin, J.).

People v. Alvarez, 51 A.D.3d 167, 854 N.Y.S.2d 70 (App. Div. 1st Dept.) (exclusion of defendant's girlfriend; testimony under assumed name), *leave to appeal denied*, 11 N.Y.3d 785, 896 N.E.2d 97, 866 N.Y.S.2d 6 (2008).

People v. Martinez, 44 A.D.3d 438, 843 N.Y.S.2d 273 (App. Div. 1st Dept. 2007) (officer permitted to withhold his name and to identify himself only by his shield number), *leave to appeal denied*, 9 N.Y.3d 1035, 881 N.E.2d 1208, 852 N.Y.S.2d 21 (2008), *habeas corpus relief denied sub nom. Martinez v. Brown*, 2009 WL 1585546 (S.D. N.Y. June 8, 2009) (Gorenstein, U.S.M.J.) (state court decision not unreasonable), *report of United States Magistrate Judge adopted in its entirety*, 08 Civ. 7802 (RMB) (GWG) (S.D. N.Y. July 27, 2009) (Berman, J.).

People v. Washington, 40 A.D.3d 228, 835 N.Y.S.2d 142 (App. Div. 1st Dept.) (testimony under assumed name), *leave to appeal denied*, 9 N.Y.3d 927, 875 N.E.2d 901 (2007), *habeas corpus relief denied sub nom. Washington v. Walsh*, 2010 WL 423056 (S.D. N.Y. 2010) (Batts, J. addressing merits of claim and adopting report and recommendation of Katz, USMJ).

People v. Sevencan, 258 A.D.2d 485, 685 N.Y.S.2d 735 (App. Div. 2d Dept.) (exclusion of spectators including defendant's wife), *leave to appeal denied*, 93 N.Y.2d 1027, 719 N.E.2d 947, 697 N.Y.S.2d 586 (1999), *habeas corpus relief denied sub nom. Sevencan v. Herbert*, 152 F.Supp.2d 252 (E.D. N.Y. 2001) (addressing merits of claim), *aff'd*, 342 F.3d 69 (2d Cir. 2002) (state court decision not unreasonable), *cert. denied*, 540 U.S. 1197, 124 S.Ct. 1453, 158 L.Ed.2d 111 (2004).

People v. Rodriguez, 258 A.D.2d 483, 685 N.Y.S.2d 252 (App. Div. 2d Dept. 1999) (exclusion of defendant's mother and brother), *habeas corpus relief denied sub nom. Rodriguez v. Miller*, No. 00-CV-3832 (FB) (E.D. N.Y. 2004) (addressing merits of claim), *aff'd*, 537 F.3d 102 (2d Cir. 2007) (state court decision not unreasonable), *cert. denied*, 552 U.S. 1262, 128 S.Ct. 1655, 170 L.Ed.2d 362 (2008).

People v. Brown, 242 A.D.2d 730, 664 N.Y.S.2d 929 (App. Div. 2d Dept.) (merits of claim regarding exclusion of spectators rejected without discussion), *leave to appeal denied*, 91 N.Y.2d 833, 690 N.E.2d 495, 667 N.Y.S.2d 686 (1997), *order denying habeas corpus relief affirmed sub nom. Brown v. Artuz*, 283 F.3d 492 (2d Cir. 2002) (addressing merits of claim).

People v. Brown, 216 A.D.2d 100, 627 N.Y.S.2d 925 (App. Div. 1st Dept.) (merits of claim not reached regarding exclusion of spectators), *leave to appeal denied*, 86 N.Y.2d 872, 659 N.E.2d 776, 635 N.Y.S.2d 953 (1995), *habeas corpus relief granted sub nom. Brown v. Kuhlmann*, 1997 WL 104956 (S.D. N.Y. 1997) (addressing merits of claim), *rev'd*, 142 F.3d 529 (2d Cir. 1998) (reinstating conviction).

People v. Nieblas, 213 A.D.2d 498, 624 N.Y.S.2d 900 (App. Div. 2d Dept.) (merits of claim not reached regarding exclusion of spectators), *leave to appeal denied*, 85 N.Y.2d 978, 653 N.E.2d 634, 629 N.Y.S.2d 738 (1995), *order denying habeas corpus relief affirmed sub nom. Nieblas v. Smith*, 204 F.3d 29 (2d Cir. 1999) (addressing merits of claim)

In *People v. Brown*, 178 A.D.2d 280, 577 N.Y.S.2d 380 (App. Div. 1st Dept. 1991), *leave to appeal denied*, 79 N.Y.2d 918, 590 N.E.2d 1206, 582 N.Y.S.2d 78 (1992), the trial court's ruling, closing the courtroom during the testimony of an undercover police officer, was affirmed. *Habeas*

corpus relief was denied. *Brown v. Andrews*, 1998 WL 293994 (S.D. N.Y. 1998). The court of appeals reversed the district court, holding that the factual record made in the state trial court was insufficient to support closure of the courtroom. The undercover officer failed to specify a geographically specific area where his identity would be compromised if he returned to work after testifying in open court. Additionally, there was no showing in state court that the defendant was part of a gang or group that threatened police officers. The appellate panel ordered the grant of the writ of *habeas corpus*. *Brown v.* Andrews, 180 F.3d 403 (2d Cir. 1999). *En banc* review was granted in the court of appeals. However, at oral argument, the State of New York conceded that the evidence before the trial court did not meet the legal standard for closure of the courtroom. The case was remanded to the original appellate panel which ordered the grant of the writ of *habeas corpus*. *Brown v. Andrews*, 220 F.3d 634 (2d Cir. 2000).

District court judges presiding over trials in federal court have made similar rulings. *See e.g., United States v. Urena*, 8 F.Supp.3d 568 (S.D. N.Y. 2014) (closure of courtroom except for defendant's immediate family, testimony under assumed name); *United States v. Hernandez*, 2013 WL 3936185 (S.D. N.Y. July 29, 2013) (closure of courtroom except for defendant's girlfriend, testimony under assumed name).

At a terrorism trial, in *United States v. Alimehmeti*, 284 F.Supp.3d 477 (S.D. N.Y. 2018), the district court judge granted the following relief for the purpose of protecting the identity of the undercover officers [UCs].

1. During the testimony of the UCs, only the court, essential courtroom personnel, the defendant, the defendant's counsel, the defendant's close family and the government's trial team were permitted to be present in the courtroom.

2. During "[t]his partial closure of the courtroom," a live audio broadcast of the UCs' testimony was made available to the public at another location in the courthouse. Updated transcripts of testimony were made available to the press and public both promptly after the end of each UC's testimony and upon the adjournment of each day in which UC testimony was heard, whether or not the UC remained on the stand at the close of the day.

3. At least one representative from among the press pool was permitted to be present for each UC's testimony, so as to assure press exposure to visual observations (e.g., of trial participants' reactions) that only a person physically present in court could make.

4. Public disclosure of the true identities of the UCs in connection with the trial of this matter was prohibited. The UCs were permitted to enter and exit the courthouse through non-public entrances on the dates of their testimony. The courthouse staff and the United States Marshals Service were ordered to assist the government to make the necessary arrangements for the use of such non-public entrances by the UCs. The UCs

were permitted to testify under the pseudonyms that they used during the investigation of this matter instead of their true names.

5. Any videos, photographs, or other images of the UCs that were shown in open court, or otherwise made available to the public, were altered to pixelate or otherwise obscure the UCs' faces; however, this measure did not apply to materials viewed only by the court, essential courtroom personnel, the jury, the defendant and his counsel, and the government's trial team. The use of all non-official recording and photographic devices and methods, including sketching, was prohibited during the UCs' testimony.

6. To the extent that exhibits were utilized during a UC's testimony, these exhibits were made available promptly to the press and public, including to those persons observing the trial in a different room of the courthouse, with leave to the government to pixelate or otherwise obscure the images or other identifying characteristics of the witnesses as may appear in videos, photographs, or other such exhibits.

The court rejected alternative means of testimony which involved disguising the undercover officers or having them testify from behind a screen. Each alternative was believed to compromise the jury's ability to assess the credibility of the witness and would have created a risk of that the jury would draw an inference adverse to the defendant.

The court approved the use of assumed names for the undercover officers while they testified. It was noted that defendant did not object and that the government did not seek to preclude security-cleared defense counsel from learning the actual names of the officers. In all other respects, the Government's request for anonymity was granted.

In support of its ruling, the court noted that in classified, *ex parte* submissions, the Government advanced and substantiated additional reasons, specific to this matter and to these UCs, that made it imperative to protect the identities at issue. The court promised to elaborate upon these reasons in a classified, *ex parte* addendum to its opinion.

##

3H: PROTECTION OF A CHILD WITNESS INSIDE THE COURTROOM

There is authority in Pennsylvania to protect a child witness by limiting the cross-examination of the child by a *pro se* defendant, although the Supreme Court of Pennsylvania has agreed to review the ruling by the Superior Court on this issue. *Commonwealth v. Tighe*, 184 A.3d 560 (Pa. Super. 2018), *appeal granted*, No. 57 MAP 2018 (granted 10/15/18).

While free on bail, pending trial in a sexual assault case, Tighe telephoned the 15-year-old complainant and said to her, "Why are you doing this to me? I didn't hurt you. Please don't put me in jail for life." At an evidentiary hearing the complainant testified that this phone call

scared her. Tighe was representing himself at trial. The trial court prohibited Tighe from personally cross examining the complainant. The trial court required that all questions during cross examination be posed by Tighe's stand-by counsel.

The Superior Court held that Tighe's constitutional right to represent himself at trial was not violated by this procedure. The court noted that the law recognizes an interest in protecting the physical and psychological well-being of child sexual assault complainants. That interest has been held to outweigh a defendant's right to face-to-face confrontation with the complainant and was held in this case to similarly outweigh the right of Tighe to propound questions directly to the complainant.

Tighe supplied a list of questions to be asked, and there was nothing to indicate that Tighe was prevented from consulting with standby counsel in the event he wished to ask additional questions in response to the complainant's answers. The trial court's ruling did not affect the jury's perception that Tighe was representing himself. With the exception of this one witness, Tighe cross-examined all other witnesses, made opening and closing statements, and otherwise presented his own defense according to his wishes.

The Superior Court cited with approval the identical ruling in *Fields v. Murray*, 49 F.3d 1024 (4th Cir.) (*en banc*), *cert. denied sub nom. Fields v. Angelone*, 516 U.S. 884, 116 S.Ct. 224, 133 L.Ed.2d 154 (1995).

##

3I: TESTIMONY FROM OUTSIDE THE COURTROOM

3I-1: TESTIMONY OF A CHILD WITNESS

Statutory authority in Pennsylvania permitting child witnesses to testify from locations outside the courtroom can be found at 42 Pa.C.S. § 5984.1 (use of recorded testimony "in any prosecution or adjudication involving a child victim or child material witness"), and at 42 Pa.C.S. § 5985 (testimony may be taken "in any prosecution or adjudication involving a child victim or child material witness" in a room other than the courtroom "transmitted by a contemporaneous alternative method").

These statutes prescribe detailed conditions for the admissibility of such testimony, including but not limited to the following:

1. These statutes are not limited to testimony from a child who is the "victim" of a crime. The statutes apply both to a "child victim" and to a "child material witness."

2. Although these statutes are most often used for testimony by victims of sexual assaults, nothing in the statutes limits their applicability to the prosecution of sexual offenses.

These statutes may be invoked in any proceeding "involving a child victim or child material witness." 42 Pa.C.S. §§ 5984.1(a), 5985(a).

3. These statutes contain requirements as to who may be present, direct the court to "ensure that the child victim or material witness cannot hear or see the defendant," and require that there be adequate opportunity for the defendant and defense counsel to communicate.

4. Before permitting such a form of 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." Procedures by which the court makes that determination are set forth in the statutes.

LEGAL DISCUSSION:

In *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the United States Supreme Court upheld the procedure by which child witnesses were permitted to testify by one-way, closed-circuit television. The Court held that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there was no dispute that the child witnesses testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, the Court concluded that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

See also *Commonwealth v. Geiger,* 944 A.2d 85, 96 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009) (Section 5984.1 does not violate defendant's right to confrontation or due process. The trial court properly allowed child victims to testify via videotape, after hearing testimony from psychiatric therapist and finding that a face-to-face confrontation with their alleged abusers would cause "severe emotional distress").

##

3I-2: UNAVAILABLE ADULT WITNESS

The statutes found at 42 Pa.C.S. § 5984.1 and at 42 Pa.C.S. § 5985 apply only to child witnesses. May a court utilize similar procedures with respect to an adult witness? Courts considering the use of remote location testimony from unavailable adult witnesses must address two issues:

1. Does the court have the authority to permit an adult to testify from a remote location?

2. How does the court ensure the defendant's right to confront the witness?

As a threshold matter, the court must decide whether the absence of specific statutory authority addressing adult witnesses reflects a legislative intent to limit the court's use of remote location testimony to child witnesses. Or, does a court have inherent authority to formulate procedures for taking the testimony of an adult witness who is unable to be present in the courtroom?

While no Pennsylvania appellate decision explicitly addresses whether a court has the inherent authority to receive testimony from a remote location by an unavailable adult witness, persuasive authority may be found in rulings from two other jurisdictions.

The trial court's opinion in *United States v. Gigante*, 971 F.Supp. 755 (E.D. N.Y. 1997), addressed whether the court had the inherent authority to utilize closed circuit television for the testimony of a witness in the absence of specific authority in the Federal Rules of Criminal Procedure. The trial judge ruled that he had such authority. The Court of Appeals for the Second Circuit, in affirming the conviction, did not address that issue. *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114, 120 S.Ct. 931, 145 L.Ed.2d 811 (2000).

The highest court of New York, the Court of Appeals, in a divided ruling, upheld the authority of the trial court to permit testimony by two way video conferencing where the 83-year-old victim was too ill to travel from California to New York. The only issue addressed was the power of the court to utilize such a procedure in the absence of an explicit grant of authority. *People v. Wrotten*, 14 N.Y.3d 33, 923 N.E.2d 1099, 896 N.Y.S.2d 711 (2009), *cert denied*, 560 U.S. 959, 130 S.Ct. 2520, 177 L.Ed.2d 316 (2010).

Although the Superior Court in *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009), *appeal denied*, 608 Pa. 614, 8 A.3d 340 (2010), did not specifically address whether the court has inherent power to establish procedures to receive the testimony of an unavailable adult witness, the *Atkinson* court did address the procedures for protecting the defendant's right to confront the witnesses against him. The Superior Court held that Atkinson's right to confront the witness against him had been violated (but the error was harmless) when an incarcerated prisoner was permitted to testify at the suppression hearing by use of a two-way videoconferencing system. The Superior Court held that there was an insufficient record to establish a "compelling state interest" justifying the absence of live testimony. The court distinguished cases in which there had been a showing of emotional damage to a child witness

and noted that other jurisdictions had permitted substitutes for live testimony where a witness was seriously ill and unable to travel or located out of the country.

In adjudicating these issues, a Pennsylvania trial judge needs to consider the effect of state constitutional amendments to Article I, § 9 (removing the former requirement that the confrontation of witnesses be "face to face") and to Article V, § 10(c) (authorizing the General Assembly to enact legislation providing for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or closed-circuit television).

The Pennsylvania Constitution now affords the same protection as its federal counterpart with regard to the Confrontation Clause. *See*, *Commonwealth v. Geiger,* 944 A.2d 85, 97 n.6 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009); *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008). There is no longer any greater protection under the Pennsylvania Constitution.

Pa.R.Crim.P. 119 does not authorize the use of two-way simultaneous audio-visual communication at a trial, absent the defendant's consent. However, neither Rule 119 nor the Comment to the Rule addresses either the statutes permitting child victims and child material witnesses to testify from remote locations or the cases upholding those statutes. The authority to enact such statutes was provided to the General Assembly by the previously cited state constitutional amendment to Article V, § 10(c).

This issue has been addressed in many other jurisdictions. *See generally, United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (witness was in the federal witness protection program at a secret location and was also in the final stages of fatal cancer), *cert. denied*, 528 U.S. 1114, 120 S.Ct. 931, 145 L.Ed.2d 811 (2000); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (witness in Saudi Arabia), *cert. denied*, 555 U.S. 1170, 129 S.Ct. 1312, 173 L.Ed.2d 584 (2009); *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007) (terminally ill witness), *cert. denied*, 553 U.S. 1020, 128 S.Ct. 2084, 170 L.Ed.2d 820 (2008); *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001), *cert. denied,* 535 U.S. 958, 122 S.Ct. 1367, 152 L.Ed.2d 360, (witness in Argentina); *State ex rel. Montgomery v. Kemp*, 239 Ariz. 332, 371 P.3d 660 (Ct. App. Ariz. 2016) (mentally disabled crime victim would suffer emotional and mental trauma if required to travel from Montana to Arizona); *White v. State*, 223 Md. App. 353, 116 A.3d 520 (2015) (witness medically unable to travel from Arizona to Maryland); *State v. Sewell*, 595 N.W.2d 207 (Minn. Ct. App.) (witness medically unable to travel from Arizona to Minnesota), *review denied* (1999); *People v. Giurdanella*, 144 A.D.3d 479, 41 N.Y.S.3d 496 (App. Div. 1st Dept. 2016) (victim prohibited by Egyptian government from leaving the country), *leave to appeal denied*, 29 N.Y.3d 948, 76 N.E.3d 1082, 54 N.Y.S.3d 379 (2017); *State v. Seelig*, 226 N.C. App. 147, 738 S.E.2d 427 (witness medically unable to travel from Nebraska to North Carolina), *review denied*, 366 N.C. 598, 743 S.E.2d 182 (2013), *habeas corpus relief denied sub nom. Seelig v. Solomon*, No. 5:16-HC-2030-FL (E.D. N.C.) (state court decision not unreasonable), *appeal dismissed*, 697 Fed. Appx. 208 (4th Cir. 2017); *Kramer v. State*, 2012 Wy. 69, 277 P.3d 88 (witness in mental hospital in another state), *cert. denied*, 568 U.S. 966, 133 S.Ct. 483; 184 L.Ed.2d 303 (2012).

Compare, *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (*en banc*) (witness in Australia, but justification for video testimony not established); *Interest of E.T.*, 342 Ga. App. 710, 804 S.E.2d 725 (Ct. App. Ga. 2017) (medical testimony necessary regarding health status of victim); *State v. Rogerson*, 855 N.W.2d 495 (Iowa 2014) (insufficient justification for use of video testimony by witnesses located both out of state and in state); *State v. Thomas*, 376 P.3d 184 (N.M. 2016) (insufficient justification); *State v. Johnson*, 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018) (insufficient justification for use of Skype testimony by police investigator, but error was harmless); *Bush v. State*, 193 P.3d 203 (Wyo. 2008) (husband was seriously ill and located in another state, but wife should not have been permitted to testify by video teleconference), *cert. denied*, 566 U.S. 1185, 129 S.Ct. 1985, 173 L.Ed.2d 1090 (2009).

State v. Johnson, 195 Ohio App. 3d 59, 958 N.E.2d 977 (Ct. App. 1st Dist. 2011), *appeal denied*, 131 Ohio St. 3d 1437, 960 N.E.2d 987 (2012), is particularly persuasive regarding the use of these legal principles in a case involving severe witness intimidation.

Johnson was on trial for murder. There was extensive intimidation of prosecution witnesses James, Leaks and Higgins both inside and outside the courtroom.

The assistant prosecuting attorney informed the court that following the lunch recess, 15 young men had walked into the courtroom and had sat down behind him and Detective Luke so that they could see the witnesses and that they were all still sitting in the courtroom in an effort to intimidate the state's witnesses from testifying.

James failed to appear to testify at the trial. A warrant was issued for the arrest of James. Detective Luke explained to the court that when the police had arrived to arrest James, there were numerous young men congregated in front of James's apartment. When one of the officers had asked the young men to leave, one young man had told the officers that they would see them in court.

When the officers knocked on James's apartment door, they were met by James's wife and son. James's wife told police that following James's appearance in court the previous day, "there were carloads of boys that were driving by with their fingers and/or guns or both out of the window saying, 'David James, you show up to court, pow pow. David James, you show up to court, pow pow.'" James told his wife, "I don't care what happens, this is a death wish, I'm just not going, I can't go." As a result, the police had been unable to locate James.

The detective told the court that she had witnessed some intimidation from these young men the previous day, when she was with another state's witness, Leaks, in the hallway outside the courtroom. The young men were all tapping their feet, looking at Leaks, and making gestures with their hands. She told the court that she had not been aware of everything because she was not paying close attention, but that Leaks had known what it meant and that he was so intimidated by the young men that he had asked her to place him in handcuffs. For the

remainder of the day, she and Leaks had acted as though Leaks had been handcuffed, just to get through the situation.

Based on the previous presence of 15 young males in the courtroom, the prosecutor sought permission from the court to present the testimony of witnesses by two-way closed circuit television. Counsel for Johnson opposed the request, noting that at the current moment defendant's family and friends were not present in the courtroom. The trial court denied the prosecutor's motion.

The state then called Higgins to testify. As soon as Higgins was brought into the courtroom, 15 to 20 young individuals walked into the courtroom. The assistant prosecuting attorney immediately brought the matter to the court's attention at a sidebar conference, renewing his motion that the witnesses be permitted to testify by two-way closed-circuit television. This time the trial court granted the motion. The court made a factual finding that the entrance into the courtroom by the young men, simultaneously with the arrival of the witness, constituted an effort to intimidate the witnesses.

The Ohio Court of Appeals made the following rulings:

1. The ruling in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), was not limited to child witnesses, but could be extended to include adult witnesses.

2. It was not necessary for there to be a state statute codifying the state's interest in obtaining reliable testimony from adult witnesses while protecting the safety of those witnesses.

3. In light of the circumstances of the case, including the observations and the factual findings by the trial court, testimony by two-way closed circuit television was necessary to further that important state interest.

4. The manner in which the testimony was presented protected defendant's right to cross-examine the witnesses and enabled the jury to evaluate the credibility of the witnesses.

Johnson's petition for *habeas corpus* relief was denied, *Johnson v. Warden, Lebanon Correctional Inst.*, No. 1:13-cv-82 (S.D. Ohio, September 29, 2014) (Wehrman, U.S.M.J.) (state court decision not unreasonable), *report of United States Magistrate Judge adopted in full*, No. 1:13-cv-82 (S.D. Ohio, January 21, 2015) (Beckwith, J.).

##

3I-3: PRESERVATION OF TESTIMONY

An intimidated witness may communicate his or her intent to leave the jurisdiction. It may be necessary to preserve the testimony of that witness prior to the commencement of the trial.

Pa.R.Crim.P. 500 and 501 authorize the preservation of the testimony "of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved." The phrase "may be unavailable" is defined in the Comment to Rule 500 as "situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or is elderly, frail or demonstrating symptoms of mental infirmity or dementia, or may become incompetent to testify for any other legally sufficient reason."

Rule 500(a)(4) contemplates that the preserved testimony should be taken in the presence of the defendant and defense counsel. With defendant and counsel present, there is no issue regarding the right to confront the witness. This is similar to Fed.R.Crim.P. 15, which affords the defendant a right to be present.

Pa.R.J.C.P. 380 and 381 are parallel rules which authorize the preservation of testimony "of any witness who may be unavailable for the [juvenile] adjudicatory hearing or for any other [juvenile] proceeding."

Commonwealth v. Selenski, 996 A.2d 494 (Pa. Super. 2010), held that there is no right of public access, arising from the First Amendment or from provisions of the state constitution, to proceedings under Pa.R.Crim.P. 500 to preserve the testimony of a witness. Any transcript and tape recording are not documents attendant to a judicial proceeding until such time as it becomes necessary to offer and present the preserved testimony during the trial or other related proceedings. Mr. Selenski agreed with the closure of the Rule 500 proceeding. Accordingly, the *Selenski* court did not decide whether the proceedings would be required to be open if the defendant asserted a right to a public trial.

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CHAPTER 4:
Responses to Witness Intimidation

INTRODUCTORY NOTE:

If a trial judge becomes aware of criminal activity directly or indirectly targeted against a witness in a pending proceeding, the trial judge is always free to report that criminal activity to a police officer or to an attorney for the Commonwealth. The responses to witness intimidation as enumerated in this chapter are in addition to the right of a trial judge to report criminal activity.

4A: SEALING ARREST WARRANT INFORMATION

The Pennsylvania Rules of Criminal Procedure permit arrest warrant information to remain under seal, and not to be provided to a defendant, when disclosure could result in endangering witnesses.

"Arrest warrant information," defined by Pa.R.Crim.P. 513 as the "criminal complaint, . . . arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case," is generally available to the public after the warrant is issued by the issuing authority. Rule 513 permits inspection and dissemination of arrest warrant information to be delayed, if the issuing authority finds good cause to do so, for a period of 72 hours or until receipt of notice by the issuing authority that the warrant has been executed, whichever occurs first. Good cause must be averred by the affiant or attorney for the Commonwealth in the affidavit of probable cause.

In addition, Rule 513.1 authorizes a Common Pleas Court judge (or appellate court judge or justice) to seal the arrest warrant information upon a showing of good cause in the affidavit and a request by the attorney for the Commonwealth. The information may be sealed for up to 60 days, and an unlimited number of extensions of 30 days each. When the defendant is arrested, a copy of the arrest warrant information shall be given to him at the preliminary arraignment. However, the judge, on motion of the attorney for the Commonwealth and for good cause shown at a hearing, may order that the defendant not be given a copy of the sealed arrest warrant information, in whole or in part, for periods of not more than 30 days, but in no case shall the delay extend beyond the date of the preliminary hearing. The Comment to the Rule provides, "The judge or justice may order that either the whole or part of the arrest warrant information be kept from the defendant. This provision should only be used in extraordinary circumstances in which there is considerable risk to public safety or the safety of individual witnesses."

##

4B: CONTEMPT OF COURT

4B-1: DIRECT CRIMINAL CONTEMPT

The relevant portions of the statutory scheme for contempt of court are found at 42 Pa.C.S. §§ 4132-4136. *See also*, Pa.R.Crim.P. 140 for the rules governing contempt of court in proceedings before the minor judiciary. A comprehensive analysis of the law of contempt is beyond the scope of this benchbook. The following principles may be of assistance to the judge in a case of witness or juror intimidation.

Direct criminal contempt is addressed at 42 Pa.C.S. § 4132 and includes "[t]he misbehavior of any person in the presence of the court, thereby obstructing the administration of justice." 42 Pa.C.S. § 4132(3).

A conviction pursuant to section 4132(3) requires proof beyond a reasonable doubt: (1) of misconduct, (2) in the presence of the court, (3) committed with the intent to obstruct the proceedings, (4) which obstructs the administration of justice. *Commonwealth v. Moody*, 633 Pa. 335, 125 A.3d 1 (2015).

"To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court." *Cooke v. United States*, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767, ___ (1925).

##

4B-2: DIRECT CRIMINAL CONTEMPT – PROCEDURAL ISSUES

Commonwealth v. Moody, 633 Pa. 335, 125 A.3d 1 (2015), involved a brawl among spectators during court proceedings in a homicide case. Deputy sheriffs and police officers were needed to restore order in the court. The courtroom was locked down for three hours. When the court reconvened, there was a summary hearing for direct criminal contempt. The judge placed on the record his own personal observations of the misconduct. A court officer provided additional testimony. The defendants were not provided counsel until the time of their sentencing, and were not afforded the opportunity either to cross-examine the witness or to present a defense. Ultimately, the defendants were found to be guilty of direct criminal contempt and were sentenced to jail.

A 3-2 majority of the Supreme Court of Pennsylvania held that this was a case of direct criminal contempt. Therefore, the summary proceedings did not violate the rights of the defendants. Justice Baer filed a concurring opinion which was joined by Justice Stevens. The concurring justices first declared that they "join[ed] the majority opinion in its entirety." *Moody* at 359,

125 A.3d at 15 (Baer, J. concurring). Notwithstanding that declaration, the concurring justices appeared to narrow the scope of the majority's holding.

> [T]here is no question that in the present matter the trial judge was entitled to dispense with normal due process requirements and conduct a summary proceeding for direct criminal contempt for the purpose of restoring order in the courtroom and to vindicate the authority and dignity of the court. As the Majority Opinion notes, the brawl . . . occurred in the gallery of the courtroom within the immediate view of the bench. Moreover, the trial judge, both during the summary proceeding and again in his . . . opinion, affirmed that he observed the belligerent conduct. Because the misconduct at issue occurred in the view of the judge, I agree with the majority's assessment that a summary proceeding for direct criminal contempt was proper in this instance. If, however, the brawl had occurred beyond the observation of the court such that the trial judge would have necessarily depended on the testimony of others to ascertain the essential elements of the alleged misconduct, the facts would have instead warranted a charge of indirect criminal contempt and the usual due process requirements would have applied.

Moody, 633 Pa. at 362, 125 A.3d at 17 (Baer, J. concurring).

In a case decided by a 3-2 ruling, the votes of the two concurring justices were decisive. Although the concurring opinion of two justices does not constitute binding legal precedent, the standard of law set forth in that concurring opinion represents the best practice for trial judges confronted with misconduct in the courtroom. The summary proceedings attendant to a finding of direct criminal contempt should be reserved for those situations where the necessary factual findings can be made exclusively from the observations of the presiding judge, without the necessity of testimony from other persons.

In these summary proceedings, defendant would not have the right to counsel until the time of sentencing, and, even then, only if a sentence of actual imprisonment is imposed. *Commonwealth v. Moody*, 633 Pa. 335, 125 A.3d 1 (2015).

When the alleged contemnor does not have the right to a jury trial, the sentence may not exceed six months imprisonment. However, consecutive sentences for multiple instances of criminal contempt, that in the aggregate exceed six months, under certain circumstances will not violate this rule. In the case of direct criminal contempt if there are (1) multiple acts of contumacious conduct, and (2) if the court adjudicates the contemnor and imposes sentence promptly after the occurrence of each misconduct, then separate sentences of six months or less may be imposed without a jury trial, and each successive individual sentence may be directed to be served consecutively. *Commonwealth v. Owens*, 496 Pa. 16, 436 A.2d 129 (1981).

If the judge does not adjudicate the alleged contempts immediately, but defers the hearing, ruling and sentencing until after the trial, then, in the absence of a jury trial, the aggregate sentence may not exceed six months imprisonment. *Codispoti v. Pennsylvania*, 418 U.S. 506,

512, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974); *see also, Lewis v. United States*, 518 U.S. 322, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996).

Repeated interruptions of the trial court, by defendant, over a short time frame, permitted the imposition of six separate consecutive sentences for contempt of court. *Commonwealth v. Robinson*, 166 A.3d 1272 (Pa. Super. 2017), *appeal denied*, ___ Pa. ___, 179 A.3d 5 (2018). However, cursing at and "giving the finger" to the judge at the same time were so inextricably intertwined that they must be considered to have been only one unified act of contemptuous misconduct. *Commonwealth v. Williams*, 753 A.2d 856 (Pa. Super.), *appeal denied*, 567 Pa. 713, 785 A.2d 89 (2000).

For a direct criminal contempt, the Superior Court has required the imposition of both a minimum and maximum sentence. *Commonwealth v. Cain*, 432 Pa. Super. 47, 637 A.2d 656 (1994) (direct criminal contempt for refusal to testify at trial); *Commonwealth v. Williams*, 753 A.2d 856 (Pa. Super.), *appeal denied*, 567 Pa. 713, 785 A.2d 89 (2000) (direct criminal contempt for cursing at judge).

##

4B-3: INDIRECT CRIMINAL CONTEMPT

Indirect criminal contempt is a violation of a court order that occurred outside the court's presence. As previously discussed, 18 Pa.C.S. § 4954 provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim at locations outside the courtroom. 18 Pa.C.S. § 4955 states that a person violating such an order may be punished for any substantive crime that has been committed and/or for contempt of court. A violation of a protective order outside the presence of the court would be an indirect contempt.

A charge of indirect criminal contempt consists of a claim that a violation of an order or decree of court occurred outside the presence of the court. To establish indirect criminal contempt, the Commonwealth must prove: 1) the order was sufficiently definite, clear, and specific to the contemnor as to leave no doubt of the conduct prohibited; 2) the contemnor had notice of the order; 3) the act constituting the violation must have been volitional; and 4) the contemnor must have acted with wrongful intent. *Commonwealth v. Reese*, 156 A.3d 1250 (Pa. Super.), *appeal denied*, 643 Pa. 472, 173 A.3d 1109 (2017).

42 Pa.C.S. § 4136 provides certain procedural rights to persons charged with "indirect criminal contempt for violating a restraining order or injunction issued by a court." 42 Pa.C.S. § 4136(a). However, in *Commonwealth v. McMullen*, 599 Pa. 435, 961 A.2d 842 (2008), the Supreme Court of Pennsylvania held that portions of Section 4136 that granted certain defendants a right to a jury trial or that limited the amount of the fine or the length of imprisonment were unconstitutional. The Supreme Court concluded that the legislature had no authority to restrict

the inherent power of a court to punish for contempt of court. The Supreme Court noted that the legislature had sought to regulate criminal contempt in other statutory provisions, citing 42 Pa.C.S. §§ 4132-4139. The Court did not address the constitutionality of the remaining statutes.

Note that 42 Pa.C.S. § 4133 restricts the punishment to a fine only for indirect criminal contempt not covered by Section 4136, that is, for orders not considered to be in the nature of a restraining order or injunction. Notwithstanding *McMullen,* the Superior Court has recently enforced that restriction, reversing a jail sentence for indirect criminal contempt imposed for violating a visitation order in a dependency proceeding. *In the Interest of E.O.,* 195 A.3d. 583 (Pa. Super. 2018). *In the Interest of E.O.* does not appear to apply *McMullen* to the violation of court orders that arise in connection with witness intimidation, which should either be indirect criminal contempt governed by section 4136, or direct criminal contempt, to which the restrictions in Section 4133 do not apply.

In light of the uncertainty of the state of the statutory law regarding indirect criminal contempt, further discussion is outside the scope of this benchbook.

##

4C: ADMISSION OF HEARSAY STATEMENTS BY UNAVAILABLE WITNESS

INTRODUCTORY NOTE:

"The Pennsylvania Supreme Court has promulgated new rules of evidence, which [took] effect on March 18, 2013. The rule changes result in no substantive change and are intended to conform the Pennsylvania rules, which reference the federal rules of evidence, with the stylistic changes made to the federal rules that became effective on December 1, 2011." *Estate of Maddi*, 167 A.3d 818, 828 n.7 (Pa. Super. 2017).

4C-1: INTRODUCTION

A witness may be rendered unavailable by means of intimidation.

When a witness is unavailable, the court may permit the introduction of prior testimony of the unavailable witness pursuant to the conditions set forth in Pa.R.E. 804(b)(1) (Former Testimony), and the court may permit the introduction of the prior out-of-court statements by the unavailable witness pursuant to the conditions set forth in Pa.R.E. 804(b)(6) (Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability).

Rule 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, except as provided in Rule 803.1(4);

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical 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 paragraph (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.

Rule 804(b). The Exceptions.

(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.

1. A factual record should be made in support of the court's ruling admitting hearsay testimony**.**

2. It is not necessary for a witness to be dead or missing to be unavailable. A witness is unavailable if, by reason of a threat or for some other reason, the witness now refuses to testify. See Pa.R.E. 804(a)(2) providing that a declarant is considered to be unavailable as a witness if the declarant "refuses to testify about the subject matter despite a court order to do so."

##

4C-2: FORMER TESTIMONY

Rule 804(b). The Exceptions.

(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.

1. For purposes of criminal proceedings, this rule is based upon 42 Pa.C.S. § 5917.

2. Where the Commonwealth seeks to admit a missing witness's prior recorded testimony, a "good faith" effort to locate the witness must be established. That which constitutes a "good faith" effort is a matter left to the discretion of the court. *Commonwealth v. Wayne*, 533 Pa. 614, 720 A.2d 456 (1998) (good faith effort shown: detective spoke with witness's attorney on another case and was informed that witness failed to appear for a scheduled court appearance; search of witness's last known address was made to no avail; address listed on witness's driver's license and car registrations were also checked to no avail; detective contacted family members who said witness returned to his native Jamaica; cousin of witness told the detective that she had recently seen witness in Jamaica), *cert. denied*, 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999); *Commonwealth v. Douglas*, 558 Pa. 412, 737 A.2d 1188 (1999) (plurality opinion) (no requirement that police set up surveillance of home of witness), *cert. denied*, 530 U.S. 1216, 120 S.Ct. 2220, 147 L.Ed.2d 252 (2000); *Consolidated Rail Corp. v. Delaware River Port Authority*, 880 A.2d 628 (Pa. Super. 2005) (witness in witness protection program improperly found to be unavailable absent any evidence of efforts to procure his presence), *appeal denied*, 587 Pa. 714, 898 A.2d.1071 (2006); *Commonwealth v. Lebo*, 795 A.2d 987 (Pa. Super. 2002) (witness in boot camp in South Carolina improperly found to be

unavailable absent any evidence of efforts to procure her presence); *Commonwealth v. Cruz-Centeno*, 447 Pa. Super. 98, 668 A.2d 536 (1995) (prosecuting attorney began searching for witness as soon as a date was set for defendant's trial, attorney enlisted the help of the victim's mother and brother, as well as police, effort to find witness included going to his last known address, interviewing friends and relatives of the witness, searching postal, prison, voting and motor vehicle records and searching areas he was known to frequent), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996). *See also McCandless v. Vaughn*, 172 F.3d 255, 268 (3d Cir. 1999) (efforts to locate sole eyewitness to a murder described as "casual").

3. "[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." *Hardy v. Cross*, 565 U.S. 65, 71-72, 132 S.Ct. 490, 495, 181 L.Ed.2d 468, 474 (2011) (internal citation omitted).

4. The admission of preliminary hearing testimony at trial under Rule 804(b)(1) was analyzed by the Superior Court in *Commonwealth v. Stays*, 70 A.3d 1256 (Pa. Super. 2013). In *Stays*, victim Nasir Farlow was shot in the presence of Ivan Williams. Ivan Williams gave a written statement to the police identifying defendant Duane Stays as the shooter. Williams also identified a photo of Duane Stays, circled the picture, and signed his initials.

   At the preliminary hearing, Ivan Williams' testimony was vastly different than his statement to the police. Williams claimed that he did not know anybody in the courtroom, that he had not seen anybody at the time of the shooting. Williams also disavowed the statement he had given to the police. He conceded only that his signature appeared on the last page of the statement, while offering contradictory answers concerning the appearance of his initials on the remaining pages. He denied having signed the photo array. Duane Stays and his defense counsel were present at this hearing but declined to ask any questions on cross-examination.

   Between the time of the preliminary hearing and trial, Ivan Williams was murdered. At the trial of Duane Stays, the court reporter from the preliminary hearing read Ivan Williams' testimony from that hearing into the record. In addition, a police detective read Williams' statement from the police interview. The detective also testified that Williams had reviewed and signed the statement in its entirety.

   On appeal, defendant challenged the admissibility of the preliminary hearing testimony as well as the original statement and identification to the police. The Superior Court first ruled that the signed photo array and Williams' original written statement to the police were properly admitted at Stays' preliminary hearing pursuant to Pa.R.E. 803.1(1) (pertaining to prior inconsistent statements as substantive evidence).

The Superior Court held that Williams had been available for cross examination at the preliminary hearing; however, counsel for Stays had chosen not to cross-examine Williams. Since the evidence was properly admitted at the preliminary hearing, since Williams was now unavailable as a result of his having been murdered, and since counsel for Stays had an adequate opportunity to cross examine Williams at the preliminary hearing, the Superior Court ruled that the preliminary hearing testimony was admissible at trial pursuant to Pa.R.E. 804(b)(1).

5. A defendant must have been afforded a "full and fair" opportunity for cross examination at the prior proceeding for the testimony from that proceeding to be admissible at a subsequent trial. *Commonwealth v. Bazemore*, 531 Pa. 582, 588, 614 A.2d 684, 687 (1992); Pa.R.E. 804(b), Comment. Unless a defendant can establish that he was deprived of "vital impeachment evidence" at the time of the prior proceeding, then he generally will be deemed to have had a full and fair opportunity for cross-examination. *See Commonwealth v. Leak*, 22 A.3d 1036, 1044 (Pa. Super.) (prior testimony admissible), *appeal denied*, 612 Pa. 707, 31 A.3d 291 (2011), *cited with approval*, *Commonwealth v. Mitchell*, 152 A.3d 355 (Pa. Super. 2016) (prior testimony admissible), *appeal denied*, 641 Pa. 705, 169 A.3d 555 (2017).

6. Cases addressing the adequacy of a defendant's "full and fair" opportunity for cross examination include: *Commonwealth v. Bazemore*, 531 Pa. 582, 614 A.2d 684 (1992) (prior testimony not admissible; defense counsel not informed of witness's prior inconsistent statement, prior criminal record and potential pending charges). *See also*, *Commonwealth v. Wholaver*, 605 Pa. 325, 989 A.2d 883 (prior testimony admissible; adequate cross-examination at preliminary hearing regarding bias, motive to lie, and other areas of impeachment), *cert. denied*, 562 U.S. 933, 131 S.Ct. 332, 178 L.Ed.2d 216 (2010); *Commonwealth v. Douglas*, 558 Pa. 412, 737 A.2d 1188 (1999) (plurality opinion) (prior testimony admissible; counsel failed to pursue available line of cross examination at preliminary hearing), *cert. denied*, 530 U.S. 1216, 120 S.Ct. 2220, 147 L.Ed.2d 252 (2000); *Commonwealth v. Paddy*, 569 Pa. 47, 800 A.2d 294 (2002) (prior testimony admissible; prior criminal record disclosed at preliminary hearing); *Commonwealth v. Wayne*, 533 Pa. 614, 720 A.2d 456 (1998) (prior testimony admissible; prior inconsistent statement and prior criminal record disclosed at preliminary hearing), *cert. denied*, 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999); *Commonwealth v. Buford*, 101 A.3d 1182 (Pa. Super. 2014) (prior testimony admissible; criminal record and prior statement of witness disclosed at preliminary hearing), *appeal denied*, 631 Pa. 741, 114 A.3d 415 (2015); *Commonwealth v. Strong*, 825 A.2d 658 (Pa. Super. 2003) (prior testimony admissible; adequate opportunity to examine witness at prior trial and at PCRA hearing), *appeal denied*, 577 Pa. 702, 847 A.2d 59 (2004), *cert. denied*, 544 U.S. 927, 125 S.Ct. 1652, 161 L.Ed.2d 489 (2005); *Commonwealth v. Fink*, 791 A.2d 1235 (Pa. Super. 2002) (prior testimony admissible; witness claiming lack of memory could have been, but was not, recalled by counsel at trial); *Commonwealth v. Cruz-Centeno*, 447 Pa. Super. 98, 668 A.2d 536 (1995) (prior testimony admissible; police report summarizing statement of witness not discoverable and statement was not inconsistent, judge at

bench trial was made aware of witness' juvenile record and expectation of leniency), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996); *Commonwealth v. Smith*, 436 Pa. Super. 277, 647 A.2d 907 (1994) (prior testimony not admissible; criminal record of witness and expectation of leniency not disclosed).

##

4C-3: FORFEITURE BY WRONGDOING

Rule 804(b). The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

. . .

(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.

1. This rule was formerly titled, "Forfeiture by Wrongdoing." Many cases still use the former language or cite to older cases using the former language.

2. Jerome King was facing trial for the murder of Nathaniel Giles. The trial judge was asked to admit a statement Giles had made to an ATF agent regarding Giles' relationship with King and Giles' purchases of guns for King. In accordance with what was believed to be prevailing federal authority, the trial judge convened a pretrial evidentiary hearing and found by a preponderance of evidence that King was motivated to kill Giles to eliminate the witness that connected him to the gun used in another murder The trial court applied the requirement that: (1) the defendant (or party against whom the out-of-court statement is offered) was involved in, or responsible for, procuring the unavailability of the declarant, and (2) the defendant acted with the intent of procuring the declarant's unavailability as an actual or potential witness. The trial court admission of Giles' prior statement was upheld. *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008) (noting trial court's use of preponderance standard while affirming admission of hearsay statement).

3. Neither *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008), nor any other Pennsylvania appellate decision has required the trial court to convene an evidentiary hearing prior to ruling on the admissibility of evidence under this rule. *See Commonwealth v. Paddy*, 569 Pa. 47, 73 n.10, 800 A.2d 294, 310 n.10 (2002) (noting, but not deciding the issue).

4. Not all jurisdictions require an evidentiary hearing prior to a determination of the admissibility of the statement.

> Some jurisdictions require trial courts to conduct a separate evidentiary hearing, outside the presence of the jury, before determining whether a defendant's misconduct waived the right to confrontation. Other jurisdictions, however, take a more flexible approach and permit trial courts to borrow the procedures used in co-conspirator [hearsay] cases to make forfeiture determinations. Under the latter approach, trial courts may adjudicate forfeiture-by-wrongdoing claims in one of three ways: (1) at a "mini-hearing," without the jury present, where the unavailable witness's statements may be considered; (2) at trial, after the government has established forfeiture by a preponderance of the evidence without relying on the unavailable witness's statements; or (3) by conditionally admitting the unavailable witness's statements at trial subject to a later showing of their admissibility.

United States v. Ledbetter, 141 F.Supp.3d 786 (S.D. Ohio 2015) (citations omitted). The unpublished opinion in *United States v. Baskerville*, 448 Fed. Appx. 243 (3d Cir. 2011), *cert. denied*, 568 U.S. 827, 133 S.Ct. 100, 184 L.Ed.2d 46 (2012), ruled that a formal, pretrial evidentiary hearing was not necessary. *Baskerville* appears to remain the only statement on this issue by the appellate court for this circuit. *See also United States v. Savage*, No. 07-550-03 (E.D. Pa. 2013) (Surrick, J.) (rejecting the need for a pretrial hearing in reliance on *Baskerville*).

5. The rule applies both to one who "wrongfully caused" the declarant's unavailability as a witness and also to one who "acquiesced" in wrongfully causing the declarant's unavailability. For that reason, courts have held that the wrongdoing of a conspirator may be imputed to the defendant if the wrongdoing was the result of a conspiracy involving the defendant, if the wrongdoing was within the scope of the conspiracy, was in furtherance of the conspiracy and the result of the wrongdoing was reasonably foreseeable to the defendant. *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012), *cert. denied*, 568 U.S. 1177, 133 S.Ct. 1278, 185 L.Ed.2d 214 (2013); *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006).

6. In a case where defendant is charged with murder, hearsay statements by the victim-declarant are admissible if it is established that the murder was committed with the **intent** of making the victim unavailable to testify. It is not sufficient merely to establish that the murder had the **effect** of making the victim unavailable. *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) (emphasis added). The hearsay statements of the victim-declarant are admissible where the defendant's desire to prevent the victim from testifying was a "precipitating" and "substantial" reason why the defendant murdered the victim, even if such was not the defendant's exclusive motive. *United States v. Jackson*, 706 F.3d 264 (4th Cir.), *cert. denied*, 569 U.S. 1024, 133 S.Ct. 2782, 186 L.Ed.2d 229 (2013).

7. In a domestic violence case, the defendant violated a protective order numerous times. He unlawfully contacted the victim and repeatedly urged her to drop the charges and refuse to appear to testify against him. The victim stated that she would invoke her privilege against self-incrimination, and the victim refused to testify despite an offer of immunity. The Virginia Court of Appeals held that defendant's conduct constituted wrongful acts, the victim was unavailable to testify, and the forfeiture by wrongdoing doctrine permitted the introduction into evidence at trial of the victim's testimonial hearsay statements. *Cody v. Commonwealth*, 68 Va. App. 638, 812 S.E.2d 466 (2018).

8. Applicable Pennsylvania cases interpreting Rule 804(b)(6) include: *Commonwealth v. Kunkle*, 79 A.3d 1173 (Pa. Super. 2013) (hearsay admissible; motive for killing was to make victim unavailable in custody proceedings), *appeal denied*, 631 Pa. 747, 114 A.3d 1039 (2015); *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008) (admitting hearsay statements to law enforcement by homicide victim); *Commonwealth v. Levanduski*, 907 A.2d 3 (Pa. Super. 2006) (hearsay inadmissible; no evidence that defendant murdered the victim to procure the victim's unavailability as a witness), *appeal denied*, 591 Pa. 711, 919 A.2d 955, *cert. denied*, 552 U.S. 823, 128 S.Ct. 166, 169 L.Ed.2d 33 (2007).

9. "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. . . [T]he rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds. . . That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224, 244 (2006) (internal quotations and citations omitted).

##

4D: *IN CAMERA* PROCEEDING OUTSIDE DEFENDANT'S PRESENCE

In an appropriate case, it may be permissible to hold an *in camera* hearing with a witness, without the defendant being present, to explore a witness intimidation issue. In *Commonwealth v. Paddy*, 609 Pa. 272, 15 A.3d 431 (2011), defendant Paddy was convicted for killing Whaley, a witness to the "Panati Playground" murders allegedly committed by Paddy. In the trial of Paddy for the murder of Whaley, Murphy testified for the prosecution that he was involved in a conspiracy with defendant and others to transport Whaley to Maryland to prevent her from testifying against defendant in his trial for the Panati Playground murders. On cross-examination, Murphy changed his story and stated that his direct examination testimony was partially untrue. On redirect examination, his testimony was confused and contradictory. At the end of the day, Murphy attempted to speak to the prosecutor.

The prosecutor requested an *in camera* hearing, which the court held the following day in the presence of defense counsel and Murphy's counsel, but without defendant. Although trial counsel did not raise a formal objection to defendant's absence, she did inquire about defendant's right to be present. The trial court refused to allow defendant to be present during the *in camera* proceeding because no testimony was to be offered against him. The trial court directed the record of the *in camera* proceeding to be sealed and ordered defense counsel not to discuss what happened therein with defendant. Even if defense counsel objected to defendant's absence, it would have been overruled. During the *in camera* proceeding, Murphy testified that he had lied on cross-examination because he was afraid of defendant. The next day, Murphy testified again before the jury, returning to his initial direct examination testimony and admitting that on cross-examination he had said some things that were not true because he feared defendant.

The PCRA court concluded that trial counsel was not ineffective for failing to object to defendant's absence from the *in camera* proceeding. The Supreme Court affirmed and said:

> Following the *in camera* proceeding, Murphy again gave testimony before the jury, at which time he returned to his original story, which was not favorable to [defendant]; admitted that he had not told the truth on cross-examination; and confirmed his fear of [defendant]. These were the only issues that were addressed during the *in camera* proceeding. [Defendant] was present throughout Murphy's testimony before the jury, and he had the opportunity to cross-examine Murphy before and after the *in camera* proceeding. [Defendant's] counsel did, in fact, thoroughly and forcefully cross-examine Murphy before the jury. In deciding to hold an *in camera* proceeding, the trial court properly recognized that [defendant] was on trial for **murdering a witness** who planned to testify against him at an earlier murder trial. [Defendant] was not denied his right to confront Murphy, either before or after the *in camera* proceeding, and we cannot conclude that there is arguable merit to [defendant's] contention that trial counsel was ineffective for failing to formally object to [defendant's] absence from the *in camera* proceeding.

Paddy, 609 Pa. at 301, 15 A.3d at 448 (emphasis in original).

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4E: ADMITTING ACTS OF INTIMIDATION TO PROVE CONSCIOUSNESS OF GUILT OR TO EXPLAIN INCONSISTENCIES IN THE TESTIMONY OF A WITNESS

Acts intended to intimidate witnesses may be admissible at trial to establish a defendant's consciousness of guilt, and it may be reversible error to exclude such acts. In *Commonwealth v. Flamer*, 53 A.3d 82 (Pa. Super. 2012), defendant was charged with murder. At trial, the

Commonwealth planned to call Abdul Taylor, to testify about his knowledge of the plot by defendant and others to kill the victim, Moment. Three months before trial, Taylor was shot and killed. The Commonwealth had evidence that showed that defendant conspired with others to kill Taylor to prevent Taylor from testifying in the Moment murder trial. Before the Moment murder trial, the Commonwealth filed a motion *in limine* seeking to introduce fifteen pieces of evidence to establish that defendant conspired with others to kill Taylor. The trial judge denied admission of most of the evidence; the Commonwealth filed an interlocutory appeal.

The Superior Court held that the trial court abused its discretion in excluding: (1) testimony of police officers who responded to the scene of Taylor's shooting; (2) testimony of the crime scene officers who examined the scene where Taylor was shot; (3) expert DNA testimony to identify a coconspirator's [the shooter's] DNA on evidence recovered from where Taylor was shot; (4) shooter's confession to the murder of Taylor; (5) the testimony of witness who spoke with the shooter, where shooter talked about a plot to kill Taylor because he "ratted out" defendant; (6) testimony from Taylor's mother and girlfriend regarding Taylor's fear about being killed because he came forward to police; (7) the relevant portions of raps written by defendant in prison; and (8) the relevant portion of phone conversation in which defendant discussed participation of shooter and discussions about Taylor.

Much of the opinion in *Flamer* is fact-specific, balancing the probative value of each individual piece of evidence against its prejudicial impact. However, the case is valid for a broader principle; specifically, that an attempt to intimidate (in this case, the successful murder of) a prosecution witness is admissible as evidence of consciousness of guilt.

The Superior Court has been receptive to the admission of prior acts of witness intimidation by the defendant in order to explain the absence of the complainant at the trial. *Commonwealth v. Gad*, 190 A.3d 600 (Pa. Super. 2018), was a domestic violence case. Gad was accused of assaulting his wife. Although Gad's wife testified against him at his preliminary hearing, Gad's wife did not appear at the trial. The court's opinion does not note whether or not the wife's preliminary hearing testimony was presented at the trial, and no issue was raised on appeal concerning the evidentiary use, if any, of such preliminary hearing testimony.

Counsel for Gad argued during his opening statement that the wife's absence from the trial demonstrated the lack of a factual basis for the charges. The Commonwealth's position was that Gad had caused his wife's unavailability. In support of that argument, the Commonwealth presented the testimony of Gad's former paramour, Maryam Ezatt.

Ms. Ezatt testified that Gad had previously struck her in the face, then intimidated her in an attempt to force her not to cooperate with the police; specifically, by forcing her to deliver a letter requesting that the charges should be withdrawn. The court held that the testimony of Ms. Ezatt was admissible pursuant to Pa.R.E. 404(b)(2), affirming the reasoning of the trial court that this evidence was admissible to show that Gad had previously attempted to cause the unavailability of a victim of his domestic violence.

Note that for evidence of intimidation to be admissible to show consciousness of guilt, or to explain the absence of the complainant, there must be proof that defendant was in some measure responsible for those acts. However, in cases where there is no evidence that acts of intimidation were somehow attributable to the defendant, they may still be admissible to prove their effect on a witness who recants a prior statement or otherwise changes his testimony after the acts of intimidation. *Commonwealth v. Collins*, 549 Pa. 593, 702 A.2d 540 (1997), *cert. denied*, 525 U.S. 835, 119 S.Ct. 92, 142 L.Ed.2d 73 (1998); *Commonwealth v. Reid*, 537 Pa. 167, 642 A.2d 453, *cert. denied*, 513 U.S. 904, 115 S.Ct. 268, 130 L.Ed.2d 186 (1994); *Commonwealth v. Martin*, 356 Pa. Super. 525, 515 A.2d 18 (1986); *Commonwealth v. Bryant*, 316 Pa. Super. 46, 462 A.2d 785 (1983). When evidence is admitted solely for its effect on a witness, an appropriate limiting instruction should be given to the jury.

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4F: INDICTING GRAND JURY

The Rules of Criminal Procedure permit the courts of common pleas to proceed with indicting grand juries in cases in which witness intimidation has occurred, is occurring, or is likely to occur. *See* Pa.R.Crim.P. 556 *et seq*.

Each judicial district must petition the Supreme Court for permission to resume the use of an indicting grand jury.

For those districts that take advantage of this change in the rules, prosecutors will have a potent tool to combat witness intimidation. Each grand jury case will be presented to the grand jury *ex parte,* and if the grand jury returns an indictment, the case will move to trial without a preliminary hearing. This will eliminate many of the opportunities for witness intimidation.

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