NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DANIEL RAY YOUNG Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1623 WDA 2011

Appeal from the Judgment of Sentence of September 8, 2011
In the Court of Common Pleas of Washington County
Criminal Division at Nos.: CP-63-0000191-2010
CP-63-0000192-2010

BEFORE: ALLEN, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J. **FILED APRIL 11, 2014**

Daniel Ray Young ("Appellant") challenges the judgment of sentence entered on September 8, 2011. We vacate Appellant's judgment of sentence and remand for resentencing. In all other regards, we affirm the trial court rulings challenged by Appellant.

The trial court related the factual and procedural history of the case as follows:

> These joint cases arise from an investigation and series of controlled drug sales by [Appellant] to a confidential informant. Detective Ron Levi, the director of the Washington County District Attorney's Drug Task Force, had an ongoing investigation into [Appellant's] possible cocaine activity in the Washington County area. A background investigation uncovered, both through witness/informant statements and police investigation of

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* Retired Senior Judge assigned to the Superior Court.

financial records, [Appellant's] declared income failed to coincide with the estimated value of assets which were observed. [Appellant's] observed assets were comprised of large construction equipment, including several Bobcats, a new dump truck and trailer, and a large home. Further, the investigation uncovered that a woman, identified as Brenda Harsh, was purchasing cocaine from [Appellant].

Pursuant to the ongoing Task Force investigation of [Appellant] involving cocaine sales, officers performed a controlled buy with Harsh. Subsequently, Harsh was approached by Detective Levi at her place of employment and informed of her pending charges resulting from the controlled buy and of police's knowledge of her association with [Appellant]. Harsh ultimately agreed to act as a confidential informant for the Task Force investigating [Appellant].

From November 19, 2009 to January 16, 2010, Harsh performed a series of nine controlled buys of cocaine from [Appellant] under the supervision of the Task Force. Each controlled buy began with a call made from Harsh to [Appellant]. Then [Appellant], who either responded immediately or called back promptly, provided Harsh with a time and place for her to meet him. In addition, each controlled buy produced cocaine in an amount varying between 1.3 grams and 1.6 grams.

Following the ninth controlled buy between [Appellant] and Harsh, Detective Levi obtained a search warrant for [Appellant's] residence, where the last purchase had occurred, and an arrest warrant for the nine controlled buys. On January 17, 2010, pursuant to the search warrant, multiple guns (some rifles with scopes), $1,000 in cash, and two (2) pairs of binoculars were seized from the residence. Pursuant to the arrest warrant, [Appellant] was arrested on the same date, and from his person, police seized a cell phone, $317 in cash (two bills of which were the controlled buy money from January 16, 2010), and 7.9 grams of cocaine, divided into five separate bags.

Two cases were filed against [Appellant]. At 191-10, a thirty-seven[-]count criminal information was filed pertaining to the nine controlled buys and at 192-10, a two[-]count criminal information was filed in regard to the evidence collected during [Appellant's] arrest. The defense filed a continuance on November 4, 2010 at both cases. Motions to Compel were filed, and granted, again at both cases on January 13, 2011.

> [Appellant] presented a Rule [600(E)[1]] Motion at both cases on April 15, 2011, to which a response was filed by the

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[1] The version of Rule of Criminal Procedure 600 ("Prompt Trial") that applied during the proceedings at issue, prior to the amendments that took effect on July 1, 2013, provided, in relevant part, as follows:

> (A)(3) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.
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> (C) In determining the period for commencement of trial, there shall be excluded therefrom:
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> * * * *
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> (2) any period of time for which the defendant expressly waives Rule 600;
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> (3) such period of delay at any stage of the proceedings as results from:
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> (a) the unavailability of the defendant or the defendant's attorney;
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> (b) any continuance granted at the request of the defendant or the defendant's attorney.
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> * * * *
>
> (E) No defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days excluding time described in paragraph (C) above. Any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail.
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> * * * *
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> (G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the

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> Commonwealth on April 19, 2011 and an Order of Court was filed denying said motion on April 20, 2011. On April 25, 2011, [Appellant] filed a Rule [600(G)] motion. The Commonwealth responded and testimony was heard on May 13, 2011. The Trial Court held [that] there was no violation of Rule [600(G)] in an Order filed May 16, 2011. During the same time period, on April 27, 2011, the Trial Court vacated a provision of its prior Order to Compel discovery pertaining to the disclosure of grand jury testimony for lack of subject matter jurisdiction, which had previously been granted on January 13, 2011.

Trial Court Opinion ("T.C.O."), 4/30/2012, at 3-5 (citations omitted).

> [Appellant] was found guilty, following a jury trial, of thirty-eight out of thirty-nine Felony and Misdemeanor counts, including: at 191-10, (1) Delivery of a Controlled Substance, [35 P.S. § 780-113(a)(30)], an ungraded Felony, nine counts; (2) Possession with Intent to Deliver, [***id.***,] an ungraded Felony, nine counts; (3) Possession of a Controlled Substance, § 780-113(a)(16), an ungraded Misdemeanor, nine counts; (4) Criminal Use of Communication Facility, 18 Pa.C.S.A. § 7512, a Felony of the

(Footnote Continued) ___________________

> charges with prejudice on the ground that this rule has been violated . . . .
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> If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. If, on any successive listing of the case, the Commonwealth is not prepared to proceed to trial on the date fixed, the court shall determine whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. If, at any time, it is determined that the Commonwealth did no exercise due diligence, the court shall dismiss the charges and discharge the defendant.

Pa.R.Crim.P. 600 (rescinded and replaced, effective July 1, 2013). Because this case implicates only the former Rule 600, all citations and quotations to Rule 600, *infra*, refer to the rule as it was constituted before the recent changes.

> third degree, nine counts; and at 192-10[,] (1) Possession with Intent to Deliver, § 780-113(30), an ungraded Felony, one count; and (2) Possession of a Controlled Substance, § 780-113(a)(16), an ungraded Misdemeanor, one count. [Appellant] was found not guilty of Criminal Conspiracy to commit a Violation of the Controlled Substance, Drug, Device, and Cosmetic Act.
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> The Court sentenced [Appellant] to serve an aggregate sentence, at both numbers, of twelve (12) to twenty-four (24) years in an appropriate state penal institution, and [found Appellant] ineligible for [Recidivism Risk Reduction Incentives] consideration due to a prior conviction for a crime of violence; to undergo a drug and alcohol evaluation and complete all treatment recommended; to pay restitution in the amount of $900.00 to the Washington County Drug Task Force; and to pay restitution in the amount of $113.00 to the Pennsylvania State Police, Greensburg Regional Laboratory.

T.C.O. at 1-2 (some citations omitted).

Specifically, the trial court first found that, at 191-10, Appellant's convictions for nine counts of possession of a controlled substance and nine counts of possession with intent to deliver merged for sentencing purposes with his convictions on nine counts of delivery of a controlled substance. Based upon the offense gravity score ("OGS") and Appellant's prior record score, the sentencing guidelines for these merged convictions prescribed a standard range minimum sentence of three to twelve months' incarceration, plus or minus six months in mitigation or aggravation, respectively. The trial court sentenced Appellant to one to two years at each of the nine counts, the upper bound of the standard range, to run consecutively to all other counts of delivery of a controlled substance. At the same information, for nine counts of criminal use of communication facility, which has an OGS of

five, the sentencing guidelines provided a standard range of restorative sanctions to nine months, plus or minus three months. The court sentenced Appellant on two of the nine counts to one to two years' incarceration, at the top of the guidelines' aggravated range, to run consecutively to the above-mentioned sentences. On each of the remaining seven counts, the court sentenced Appellant to one to two years, to run concurrently with all other sentences at 191-10. T.C.O. at 26-27.

At 192-10, the trial court noted that Appellant's conviction of one count of possession of a controlled substance merged for sentencing with his conviction for possession with intent to deliver. As well, the Commonwealth filed a notice to seek mandatory sentencing based upon the aggregate weight of 7.9 grams of cocaine to which 192-10 pertained. Consistently with the mandatory minimum, at 192-10, the trial court sentenced Appellant to one to two years' incarceration, to run consecutively to the sentences imposed at 191-10. ***See*** 18 Pa.C.S. § 7508(a)(3)(i). Consequently, Appellant was sentenced in the aggregate to twelve to twenty-four years' incarceration. ***Id.*** at 27.

Appellant did not file post-sentence motions, but he timely filed the instant direct appeal. The trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied, and, on April 30, 2012, the trial court issued its opinion pursuant to Rule 1925(a). Appellant raises the following issues:

Questions regarding discretionary aspects of sentencing (Pa.R.A.P. 2116(b)):

> Did the trial court abuse its discretion in sentencing defendant to 12 to 24 years (ten one to two year sentences for violation of the Controlled Substance Act and two one to two year sentences for criminal use of communication facility[,] consecutive)? Did the trial court purport to sentence within the sentencing guidelines but apply the guidelines erroneously? Were the guidelines unreasonable under the circumstances of this case such that the trial court erred in sentencing the defendant within the guidelines?

Other Questions Involved (Pa.R.A.P. 2116(a)):

I. Did the trial court err in denying defendant's motion for immediate release on nominal bail motion [*sic*] and in denying defendant's motion to dismiss with prejudice pursuant to the Pennsylvania Rules of Criminal Procedure, Rule 600(E) and (G)?

II. Did the trial court err in vacating its January 13, 2011 order compelling the Commonwealth to turn over grand jury testimony and denying defendant's motion to compel discovery with regard to the notes of testimony from the grand jury proceedings in the instant matter, prior testimony from the confidential informant, and ***Brady***[2] material?

III. Did the trial court err in failing to properly instruct the jury as to the preponderance of the evidence standard, the standard applicable to the entrapment defense?

IV. Did the trial court err in overruling defendant's objection to inadmissible indirect hearsay testimony relating to the prior investigation of defendant in violation of defendant's sixth amendment right to confront and cross-examine his accusers?

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[2] ***See Brady v. Maryland***, 373 U.S. 83 (1963).

Brief for Appellant at 5 (some typography modified).[3,4]

Reserving the sentencing challenge for last, we begin our review with issues I and II. The latter concerns the trial court's alleged errors in addressing discovery disputes that arose between Appellant and the Commonwealth. In that portion of issue I concerning Rule 600(G), Appellant argues that the delay in bringing Appellant to trial requires *vacatur* of his judgment of sentence and dismissal with prejudice of the charges against him. ***See*** Pa.R.Crim.P. 600(G). In order to resolve issue I, we must consider issue II, inasmuch as the main villain identified by Appellant as responsible for the delay was the Commonwealth's alleged intransigence in enabling discovery of certain materials to the defense in advance of trial.

Our standard of review for a trial court ruling under Rule 600 is whether the trial court abused its discretion. ***Commonwealth v. McNear***, 852 A.2d 401, 404 (Pa. Super. 2004).

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[3] This panel issued a memorandum at this docket number affirming Appellant's judgment of sentence on February 14, 2014. On February 28, 2014, Appellant filed separate applications for leave to file post-submission communication, for reargument or reconsideration, and a petition for remand for resentencing in light of the United States Supreme Court's decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (U.S. 2013). By order entered on March 25, 2014, this Court granted panel reconsideration and deferred decision of Appellant's other applications. Pursuant thereto, our prior memorandum was withdrawn, and now is replaced with this memorandum.

[4] In Appellant's statement of the questions, issues III and IV are reversed from how they appear herein. However, his respective arguments are set forth in the order in which we list these questions above.

> The proper scope of review in determining the propriety of the trial court's ruling is limited to the evidence on the record of the Rule [600] evidentiary hearing and the findings of the lower court. In reviewing the determination of the hearing court, an appellate court must view the facts in the light most favorable to the prevailing party.

Id.

We first address Appellant's argument concerning Rule 600(E), which provides for the release on nominal bond of a prisoner awaiting trial upon the passage of 180 days from the date of the criminal complaint for which the defendant is incarcerated. ***See*** Pa.R.Crim.P. 600(E), as excerpted *supra* at 3-4 n.1. Our standard of review calls upon us to determine whether the trial court abused its discretion. ***See McNear***, *supra*.

The trial court, in explaining its refusal to grant Appellant relief under Rule 600(E), cited ***Commonwealth v. Jones***, 899 A.2d 353 (Pa. Super. 2006). In ***Jones***, we held that "the provision of Rule 600 requiring release after 180 days is . . . trumped by Article I, Section 14 [of the Pennsylvania Constitution] for any cases where no condition or combination of conditions can ensure the safety of any person and the community." ***Id.*** at 355-56 (citing ***Commonwealth v. Hill***, 736 A.2d 578 (Pa. 1999); ***Commonwealth v. Oliver***, 674 A.2d 287 (Pa. Super. 1996)). The trial court explained that, based upon the activities alleged, "an electronic home monitor or GPS could not ensure that [Appellant] would not sell/deliver [controlled substances] from his home." Therefore,

"[Appellant's] threat to the community outweighed [Appellant's] need for immediate release." T.C.O. at 10.[5]

Citing ***Jones***, Appellant contends that "[p]re-trial incarceration beyond the 180 days is permitted [only] in cases in which defendant has a substantial criminal record, has a history of violence, has absconded or fled in the past or faces life or near-life sentences." Brief for Appellant at 32-33. Appellant's proposed standard would be consistent with ***Jones***, wherein the defendant denied release was charged with sexual assault, was or had been a fugitive on other rape charges, and had an extensive prior record. ***See*** 899 A.2d at 356. However, Appellant cites no authority for the proposition that **only** the circumstances at issue in ***Jones*** warrant denial of nominal bond upon the expiration of 180 days. Appellant also contends that the trial court erred because the Commonwealth "provided no facts in support of the conclusory assertions that [Appellant] is a flight risk and made no showing that he was any sort of danger to the community." Brief for Appellant at 33.

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[5] The trial court also noted that, under our Supreme Court's decision in ***Commonwealth v. Sloan***, 907 A.2d 460 (Pa. 2006), Appellant's pre-trial incarceration technically is moot because Appellant no longer is serving pre-trial incarceration, but rather is imprisoned consequent to his judgment of sentence. However, in ***Sloan***, although our Supreme Court found the issue **technically** moot, the Court reviewed it as an issue that is "of a recurring nature yet capable of repeatedly evading review, and involve[s an] issue[] of important public interest. ***Id.*** at 464-65 (citing ***Commonwealth v. Baker***, 766 A.2d 328, 330 n.4 (Pa. 2001)).

The parties declined the benefit of a Rule 600(E) hearing in this case and submitted the motion for disposition on their briefs. ***See*** T.C.O. at 9. Before this Court, Appellant's argument in support of his Rule 600(E) issue is thin, and it is entirely unclear (which in no way is dispelled by Appellant[6]) as to what remedy would be appropriate when an appellant is serving the sentence upon his conviction. Consequently, we conclude that Appellant is not entitled to relief.[7]

We move now to the heart of the Rule 600 issue raised by Appellant, which concerns the speedy trial issue reflected in Rule 600(G). Although the above-stated standard of review also applies in this case, we have elaborated at considerable length on the relationship of that standard and the intent reflected in Rule 600:

> [W]hen considering the trial court's ruling, this Court is not permitted to ignore the dual purpose behind Rule 600. Rule 600

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[6] Indeed, in segueing to the Rule 600(G) issue, Appellant effectively conceded the point, observing that "a Rule 600(E) violation may not require dismissal of the charges." Brief for Appellant at 33.

[7] To be clear, we find no merit in this issue due to the lack of a robust argument and, more importantly, the absence of a clear remedy even if we were to find that the trial court abused its discretion. Consequently, we need not decide whether ***Jones*** controls and dictates one result or the other under the circumstances of this case. ***Jones*** acknowledged that non-safety-related factors, chiefly the risk of flight, might constitute an appropriate basis to except one's right to nominal bail after 180 days under Rule 600(E). However, if safety- or flight-related concerns are interpreted too broadly, there is a risk that the exception will swallow the rule. Given the basis for our disposition, we need not address in detail the various factors that might affect such a calculation.

> serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule 600 was not designed to insulate the criminally accused from good[-]faith prosecution delayed through no fault of the Commonwealth.
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> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule 600 must be construed in a manner consistent with society's right to punish and deter crime. In considering these matters . . ., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

Commonwealth v. Peterson, 19 A.3d 1131, 1135 (Pa. Super. 2011) (quoting ***Commonwealth v. Ramos***, 936 A.2d 1097, 1100 (Pa. Super 2007) (*en banc*)).

Recently, in ***Commonwealth v. Bradford***, our Supreme Court addressed the Commonwealth's obligation to exercise due diligence:

> The Commonwealth . . . has the burden of demonstrating by a preponderance of the evidence that it exercised due diligence. As has been oft stated, due diligence is fact-specific, to be determined case-by-case; it does not require perfect vigilance and punctilious care, but merely a showing [that] the Commonwealth has put forth a reasonable effort.

46 A.3d 693, 701 (Pa. 2012) (citations and internal quotation marks omitted). The Court emphasized that, "[i]f the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the

Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain." ***Id.*** at 703 (quoting Pa.R.Crim.P. 600(G)).

The trial court provided the following apt summary of the method to be employed in calculating the Rule 600 run date:

> Rule 600 specifically delineates those periods of time which are statutorily excluded from Rule 600 calculations, and include[s] in pertinent part, "(2) any period of time for which the defendant expressly waives Rule 600; (3) such period of delay at any stage of the proceedings as results from: . . . (b) any continuance granted at the request of the defendant or the defendant's attorney." Pa.R.Crim.P. 600(C)(2)-(C)(3)(b). Further, "[a] defendant is unavailable for trial only if a delay in the commencement of trial is caused by the filing of the pretrial motion." ***Commonwealth v. Hill***, 736 A.2d 578, 587 (Pa. 1999).
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> Excusable delay, on the other hand, is not an express term of Rule 600, but rather a legal construct which addresses those delays which occur beyond the Commonwealth's control and despite its due diligence. ***Peterson***, 19 A.3d at 1137 (citing ***Commonwealth v. Booze***, 953 A.2d 1263, 1272-73 (Pa. Super. 2008)). That time which is attributable to judicial delay "is a justifiable basis for an extension of time if the Commonwealth is ready to proceed." ***Commonwealth v. Hunt***, 858 A.2d 1234, 1241 (Pa. Super. 2004) (citing ***Commonwealth v. Wroten***, 451 A.2d 678, 681 (Pa. Super. 1982)).

T.C.O. at 12-13 (citations modified).

In light of the complexity of the procedural history in this case, and the many maneuvers and delays attributable to the parties and the trial court, we begin by presenting the trial court's timeline of relevant events:

> The charges herein were filed on January 17, 2010, and therefore the mechanical run date applicable pursuant to Rule 600 would be January 17, 2011. On July 15, 2010, the Commonwealth filed an Order scheduling a pretrial conference for August 20, 2010 and to "either enter a plea or set a

jury/non[-]jury trial date" on September 7, 2010 [*sic*]. On October 27, 2010, an Order was filed by the Commonwealth calling the case for trial during the November trial term, in particular for jury selection on November 4, 2010.

[Appellant] waived his Rule 600 rights by signing a Continuance/Waiver of Prompt Trial form on November 4, 2010, and the case was rescheduled to January 10, 2011, the start of the January trial term. This waiver of Rule 600 attributed to [Appellant] included a period of sixty-six days. A final pre-trial conference was scheduled [for] January 6, 2011 pursuant to a scheduling order filed January 5, 2011.

On January 10, 2011, the Commonwealth presented a plea offer, which was rejected by [Appellant,] who requested a jury trial. The cases were scheduled for jury selection on February 28, 2011, the start of the February/March trial term[,] pursuant to Court Order filed February 23, 2011. The January 10 to February 28, 2011 time period attributed to the Trial Court's unavailability for trial included a period of forty-eight days.

By an Order dated January 13, 2011, the Court granted [Appellant's] Motion to Compel Discovery, ordering the Commonwealth to produce those discovery materials delineated within twenty days of said Order. By the Order dated March 4, 2011, the cases were scheduled for plea hearing on March 17, 2011.

Prior to April trial term, these cases were called in for final pretrial conference on April 15, 2011, pursuant to [the] Order [entered] March 28, 2011. On April 25, 2011, cases 191-10 and 192-10 were called for trial and jury selection by the Commonwealth. That morning, however, defense counsel presented the Commonwealth with the Rule 600(G) Motion to Dismiss All Charges with Prejudice, which effectively "stopped the clock" on Rule 600. Upon [Appellant's] presentation of the Motion to the Court, the Court stated, "So this is jury selection day. And it's just late. I have no problem with reading the Motion and making a decision on it today, Mr. Geary, on your Motion itself."

Although a discovery issue was raised regarding videotapes, it was resolved by the Court ordering Detective Levi to show the tapes to Mr. Geary during lunch. The Court also offered to make a decision regarding the Rule 600(G) Motion during lunch, to which defense counsel stated, "If you deny this Motion, I

> apologize, I have been stretched thin, I'm really not prepared to pick today and try the case in this trial term . . . ." The Court further offered, "How about i[f] we pick the jury today and try it next week, would that give you more time to feel more comfortable in your preparation?" Defense counsel responded, "To be blunt, that wouldn't be much better."
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> The Court permitted counsel to recess, have the opportunity to view the video, confer with [Appellant], then return with a determination as to whether [Appellant] would accept a plea or proceed to jury selection. At 4:35 pm, after keeping a jury panel waiting for the entire day, defense counsel returned from the recess. The Commonwealth stated that it was prepared to proceed to jury selection and trial immediately thereafter. The Court reiterated its offer to permit immediate jury selection then defer trial for a week to allow additional time for defense preparation. Finally, defense counsel stated, "I'm not ready to try the case in this trial term for which I apologize." The Court permitted a continuance on behalf of defense counsel and scheduled the argument on the Rule 600(G) Motion, both of which attribute the time between April 25, 2011 and the argument to the defense.
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> Argument on the Rule 600(G) Motion was held on May 13, 2011 and both [Appellant] and the Commonwealth submitted legal briefs in support thereof.

T.C.O. at 10-12 (citations omitted).

After reviewing the differences set forth above between "excludable time," set forth explicitly by Rule 600(C), and "excusable delay," as delineated in the case law, the trial court went on to apply these two principles to the circumstances of the instant case:

> [T]he Commonwealth filed the charges *sub judice* on January 17, 2010, and therefore the 365 days accorded by Rule 600 would have run on January 17, 2011. However, [Appellant] signed a Waiver of Rule 600 on November 4, 2010, which continued the cases to January 10, 2011, the start of the January trial term. That period of time encompassed a total of sixty-six (66)

excludable days pursuant to the express waiver addressed in Rule 600(C)(2).

The trial term system of Washington County deems certain two week periods, approximately every four to six weeks, as "trial term" during which jury selection shall commence followed by jury trials. The Trial Court was already scheduled for trial during the January 2011 term, and therefore when [Appellant] refused to accept the plea offered by the Commonwealth on January 10, 2011, the Trial Court placed the cases on the list for the next trial term, for which jury selection would begin February 28, 2011. The period of excusable time due to judicial delay encompassed between [Appellant's] rejection of the plea offer and the next available trial term was forty-eight (48) days.

The time attributed to excludable and excusable time by February 28, 2011 was a total of 102 days. Those 102 days would make the new 365[-]day run date April 29, 2011. Appellant filed his "Rule 600(G) Motion to Dismiss All Charges with Prejudice" on April 25, 2011 prior to the run date of April 29, 2011.[[8]]

Further, the time period between the filing of [Appellant's] Rule 600(G) Motion on April 25, 2011 and the applicable Order of Court . . . filed May 16, 2011 is also excludable time, pursuant to ***Hill***, *supra*, as the filing of the motion occurred on the date jury selection was to begin, inherently resulting in [Appellant's] delay of trial. The total time period is an additional twenty-one (21) days. The Order of Court dated May 16, 2011 scheduled the cases for jury selection in the next available trial term, dated June 6, 2011. The twenty-one days between May 16, 2011 and June 6, 2011 is attributable to the Trial Court's trial term schedule and is, therefore, excusable delay. The Rule 600 run date, when considering all excludable and excusable delay (144

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[8] This account leaves certain open questions, especially concerning why trial did not commence on February 28, 2011 (setting aside the fact that discovery disputes plainly were ongoing). At a hearing on March 17, 2011, the Commonwealth attested as follows: "[The trial] was scheduled for last month. We did not have enough time to select a jury last month." Notes of Testimony, 3/27/2011, at 5. Appellant did not disagree with this assertion on the record.

> days), was June 10, 2011. The jury trial commenced June 6, 2011.

T.C.O. at 13-14 (some citations omitted; other citations modified).

We note initially that the trial court's math, on its own terms, is correct. Moreover, because only four days separated the ultimate trial date and the run date, if the trial court miscategorized any one of the time periods set forth above as excludable or excusable, each of which substantially exceeds four days, Appellant has established a facial violation of Rule 600(G). If Appellant makes such a showing, then the burden lies with the Commonwealth to establish that it acted with due diligence in seeking to try the case timely. ***See Bradford***, *supra*. Conversely, if the court properly categorized the time periods reviewed in the above excerpt, then there was no facial violation, the Commonwealth's diligence does not come into issue,[9] and the trial court did not err in denying Appellant's Rule 600(G) motion to dismiss.

Appellant argues that underlying this hurry-up-and-wait sequence of procedural maneuvers and delays was either the Commonwealth's deliberate obstruction or delay of certain proper discovery requests, or its want of due diligence in resolving same. Appellant's arguments all hinge principally upon

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[9] In this case, however, the question of whether and when diligence comes into the equation is complicated by Appellant's argument that it was the Commonwealth's lack of diligence in providing mandatory discovery that necessitated Appellant's November 2010 waiver of his Rule 600(G) rights and later trial court delays.

his contention that the delays were caused by "the Commonwealth's failure to produce discovery and failure to call the case to trial, factors completely within the Commonwealth's control and indicative of nothing less than a complete lack of due diligence." Brief for Appellant at 34. As well, Appellant challenges the trial court's assessment of other delays as excusable judicial delay.

Appellant challenges two of the numerous periods of excludable and excusable time identified by the trial court. First, Appellant contends that the sixty-six-day period separating November 4, 2010, and January 10, 2011, was not excludable time, because uncontested discovery requests do not toll the Rule 600 time limit. ***Id.*** (citing ***Commonwealth v. Edwards***, 595 A.2d 52, 55 (Pa. 1991)). Appellant relies on ***Edwards***, ***Commonwealth v. Taylor***, 598 A.2d 1000 (Pa. Super. 1991), and ***Commonwealth v. Preston***, 904 A.2d 1 (Pa. Super. 2006). ***Edwards*** did not address the effect of a defendant's express waiver on the record of his speedy trial rights, and consequently has no bearing on the question presented.

In ***Taylor***, this Court held that the Commonwealth's failure to provide mandatory discovery, when the Commonwealth does not contest the request, does not toll the speedy trial clock. Similarly, in ***Preston***, we held that continuances requested by the defendant that arise due to the Commonwealth's failure to provide mandatory discovery do not toll the clock: "[I]f the delay in providing discovery is due to either intentional or

negligent acts, or merely stems from the prosecutor's inaction, the Commonwealth cannot claim that its default was excusable." ***Preston***, 904 A.2d at 12. Appellant also contests the validity of his undisputed, but allegedly "superficial[] and technical[,]" on-the-record waiver of his Rule 600 rights, contending that it "was certainly not voluntary where he had no other choice but to give the Commonwealth more time to get him discovery." Brief for Appellant at 37.

The Commonwealth responds that Appellant's November 4 waiver was binding under Rule 600(C)(2), which then provided that, "[i]n determining the period for commencement of trial, there shall be excluded therefrom . . . any period of time for which the defendant expressly waives Rule 600." The Commonwealth continues:

> The Commonwealth regrettably admits that as of November 4, 2010, it had not provided [Appellant] with the pertinent discovery material for these cases. In spite of the fact that [Appellant] did not formally request discovery, the Commonwealth acknowledges its mandatory duty to turn over these materials with or without a defense request. Nevertheless, the Commonwealth would be remiss if it did not point out the explicit waiver of [Appellant's] speedy trial rights on November 4, 2010 with full knowledge and understanding that he did not have discovery. [Appellant] does not argue that the waiver was deficient in some fashion.

Brief for Commonwealth at 37.

We agree that Appellant's waiver rendered this time excludable under the plain language of Rule 600. Moreover, both ***Taylor*** and ***Preston*** undermine, rather than support, Appellant's contentions. In ***Taylor***,

although we rejected the Commonwealth's argument that the appellant had knowingly and voluntarily waived his speedy trial rights, we noted that, when a defendant "indicate[s] that he approves of or accepts [a] delay," not only is the initial time noted on the waiver excludable, but so is any future delay on the premise that, having knowingly waived his rights, the defendant's acquiescence to future delays is presumed to be knowing and voluntary. ***See*** 598 A.2d at 1003. However, because such approval was absent in that case, we found that the appellant had not waived his rights. ***Id.*** (citing ***Commonwealth v. Brown***, 438 A.2d 592 (Pa. 1981)). In ***Preston***, as well, this Court held that, while a defendant has no duty to object when his trial is scheduled beyond the time limit, if he indicates approval or acceptance of a delay, the ensuing time period is excludable. 904 A.2d at 12-13; ***accord Commonwealth v. Boczkowski***, 846 A.2d 75, 83-84 (Pa. 2004).

Although Appellant argues that he was held hostage to the Commonwealth's discovery delays, rendering his waiver coerced rather than voluntary, it is not clear that executing the express waiver was necessitated by the Commonwealth's delay. The court could have continued the case without Appellant's express waiver of his speedy trial rights. Appellant also could have asked the court to specify that the Rule 600(G) clock continue to run until the Commonwealth furnished mandatory discovery. Instead, Appellant acquiesced. Appellant produces no case law suggesting that we may overlook such a waiver simply because it is executed in tandem with a

continuance to afford time for the Commonwealth to provide mandatory discovery. Accordingly, the trial court did not err or abuse its discretion in finding that the sixty-six days between November 4, 2010, and January 10, 2011, were excludable time.

Next, Appellant contests the excusability of the time between January 10, 2011, and February 28, 2011. Appellant notes that, following the continuance entered November 5, 2010, until January 10, 2011, "for some unexplained reason, trial was not held that day," but rather continued until February 28, 2011. Brief for Appellant at 37. However, as noted *supra*, the trial court addressed that time period, explaining what happened after the case was continued in November 2010 to the January 2011 trial term:

> A final pre-trial conference was scheduled [for] January 6, 2011 pursuant to a scheduling order filed January 5, 2011.
>
> On January 10, 2011, the Commonwealth presented a plea offer, which was rejected by [Appellant,] who requested a jury trial. The cases were scheduled for jury selection on February 28, 2011, the start of [the] February/March trial term pursuant to Court Order filed February 23, 2011. The January 10 to February 28, 2011 time period attributed to the Trial Court's unavailability for trial included a period of forty-eight (48) days.

T.C.O. at 11. Thus, the trial court did not impute any excludable time to Appellant, nor did it suggest that the Commonwealth caused the delay from January 10 to February 28, excusably or otherwise. Instead, it asserted that the delay was excusable due to the trial court's unavailability.

We do not have a record of the January 10, 2011 discussion or proceedings that led to the trial court's rescheduling of the trial for late

February. As noted, *supra*, Appellant contends that this rescheduling was "unexplained," and further supports its claim by reference to the Commonwealth's comments during the March 17, 2011 hearing. Specifically, Appellant highlights the following bold-faced comment: "[The Commonwealth] just need[s] something on the record to indicate that we are doing our due diligence, that we are moving the case forward. It was scheduled for last month. We **did not have enough time to select a jury last month**." Brief for Appellant at 37 (quoting N.T., 3/17/2011, at 5). Appellant would have us read this language to indicate the "we" in the Commonwealth's comment referred solely to the Commonwealth, itself, and not to the parties or the parties and the court collectively, despite the absence of any commentary by Appellant to that effect when the Commonwealth's comments were made.

We do not find this language so clear: "We" might have referred to both parties' lack of preparation, or to the court's lack of room in its trial schedule to conduct jury selection and commence trial at that time. The trial court indicated that the challenged delay was a product of failed plea discussions, an assertion that Appellant does not dispute, except by implication. The Commonwealth's ambiguous comments during the March 17 hearing provide at least as much support for the trial court's

accounting of the delay as it does for Appellant's, which is insufficient to demonstrate an abuse of discretion.[10]

For the foregoing reasons, we must set aside Appellant's emphatic contention that this delay, like the prior delay, was occasioned by the Commonwealth, and focus upon the trial court's claim that the delay was excusable. To this point, Appellant makes the following argument:

> [T]he trial court attempts to fall on its own sword and claim[s] *excusable* time in that the delay was incurred as a result of the trial court's calendar. Even if it were true that this delay was occasioned due to the court's unavailability rather than that of the [Commonwealth], it still remains inexcusable. As the Superior Court [has] explained:
>
> > [T]he relevant inquiry in this case is whether the Commonwealth was prepared to go to trial before the adjusted run date and whether the trial be scheduled within thirty days of that run date. If the Commonwealth waits until after the adjusted run date to seek a trial date

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[10] Appellant's argument in this regard also is contradicted by its parallel arguments that the Commonwealth's discovery obligations were not met until April 2011. ***See, e.g.***, Reply Brief of Appellant at 6. Inasmuch as Appellant's discovery issues continued at least until the March hearing, ***see*** N.T., 3/17/2011, at 2-6, it cannot be the case that the January 10 continuance arose inexplicably, even if the record is devoid of any information specifying the discussions that led to the additional delay. Furthermore, we note that, in ***Brown***, we held that a duly exercised waiver of one's speedy trial rights in connection with one continuance may be imputed to a subsequent continuance in the absence of any objection. 438 A.2d at 594-95. Appellant does not assert that, on or about January 10, 2011, he objected to the additional continuance, and the record does not bear any such assertion out. To the contrary, the continuation of the parties' discovery dispute well into March of 2011 contradicts any such claim.

> > or if the earliest possible trial date occurs more than thirty days beyond the adjusted run date, it is obvious that the "thirty day judicial delay" rule has no applicability whatsoever. Thus, we need not address hypothetical situations in which the Commonwealth waits until the eleventh hour to ask for the earliest possible trial date but the court schedule cannot accommodate the request until more than thirty days after the adjusted run date. This particular principle simply would not apply in such a situation.
>
> ***Preston***, 904 A.2d at 14-15. The Commonwealth was not prepared by the adjusted run date, had not provided discovery, and admitted that it did not have time for trial in February 2011. Considering those facts in light of ***Preston***, there is simply no question but that this 48-day delay cannot be excused.

Brief for Appellant at 37-38 (emphasis in original).

Appellant's argument in this regard suffers from several shortcomings. First, we cannot endorse Appellant's attempt to ascribe some sort of disingenuousness in the trial court's attribution of the January to February period to judicial delay. There is no suggestion in the record that the actual cause was other than what the court indicated. Second, ***Preston*** is unavailing in this regard. The excerpt quoted by Appellant was *dictum* on the question of judicial delay of more than thirty days.

For the foregoing reasons, we find that the second delay that Appellant contends was neither excludable nor excusable was, in fact, excusable due to judicial unavailability. Appellant having failed to establish that either of the two time periods contested were improperly categorized, he is entitled to no relief under Rule 600(G).

Appellant's issue II concerns the trial court's order vacating in part its earlier discovery order. The prior order, broad in scope, had purported, *inter alia*, to direct the Commonwealth to turn over certain grand jury transcripts that Appellant contends concerned events related to the charges *sub judice*. This issue also is implicated indirectly in Appellant's post-submission communication, filed on September 12, 2013, petitioning this Court to remand this matter to the trial court for further proceedings. In that petition, Appellant contends that the transcripts in question were utilized in a separate federal court proceeding, and that the transcripts reveal inconsistencies between an investigator's testimony in the instant case and his testimony before the grand jury concerning aspects of the investigation that led to the charges at bar. We address and resolve the issue and the motion together.

In the trial court's original discovery order, entered on January 14, 2011, the court granted Appellant's discovery motion, incorporating by reference the numerous categories of discovery sought by Appellant in his corresponding motion. Among these items, the order called for the production of "[c]omplete copies of all transcripts of any/all Grand Jury proceedings wherein [Appellant] was the subject of the proceedings and/or was referenced in any testimony in proceedings involving other individuals." Motion to Compel Discovery, 1/14/2011, at 3 ¶4(h). However, on April 27, 2011, the trial court entered another order, wherein it vacated its January 14, 2011 order as follows:

> [T]he Court's Order of Court dated January 13, 2011 . . . is VACATED only as it pertains to item 4(h)[[11]] as this judge lacks subject matter jurisdiction to compel the Commonwealth to disclose Grand Jury transcripts. Subject matter jurisdiction lies with the supervising judge of the Grand Jury . . . . If defense counsel wishes to pursue this matter and if the parties cannot reach an agreement regarding the production of the requested Grand Jury transcripts, defense counsel must file the appropriate Motion with [the supervising judge].

Order of Court, 4/27/2011, at 1 (citing ***Commonwealth v. Hemingway***, 13 A.3d 491 (Pa. Super. 2011); Pa.R.Crim.P. 230(B)(3)).[12]

We will reverse a trial court's discovery order only when the trial court committed an abuse of discretion. ***See Commonwealth v. Rucci***, 670 A.2d 1129, 1140 (Pa. 1996). Appellant argues that disclosure of the transcripts at issue was subject to an agreement amongst the trial court, the Commonwealth, and Appellant. Specifically, according to Appellant, the Assistant District Attorney ("ADA") agreed to approach his supervisor, the District Attorney, and request the theretofore sealed grand jury transcripts. Assuming the request was approved, the ADA would go to the supervising judge of the grand jury and request the transcripts directly. Appellant

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[11] For reasons that are not entirely clear, in his statement of this issue Appellant also purports to challenge the trial court's refusal to compel production of "prior testimony from the confidential informant, and [***Brady***] material." Brief for Appellant at 5. There is nothing on the face of the trial court's April 27, 2011 order bearing upon these two categories of evidence. Moreover, Appellant does not develop any argument regarding these topics in his brief. Consequently, these issues are waived.

[12] ***See*** Notes of Testimony, 4/25/2011, at 5-12, 19-20.

maintains that the agreement "established a plan of action completely consistent with case law, statutory requirements and the constitutional requirements," and that the trial court subverted the intent of the parties by rescinding its prior order *vis-à-vis* disclosure of grand jury transcripts. ***See*** Brief for Appellant at 44 ("[O]n April 27, 2011, the Trial Court issued an order altogether confounding the clear consensus reached at the previous hearing.").

This issue implicates Rules of Criminal Procedure 229 and 230, which, in relevant part, provide as follows:

> **Rule 229. Control of Investigating Grand Jury Transcript/Evidence**
>
> Except as otherwise set forth in these rules, the court shall control the original and all copies of the transcript and shall maintain their secrecy. . . .
>
> * * * *
>
> [*Comment*:] Reference to the court in this rule and in Rule 230 is intended to be the supervising judge of the grand jury.
>
> **Rule 230. Disclosure of Testimony Before Investigating Grand Jury**
>
> * * * *
>
> (B) Defendant in a Criminal Case:
>
> * * * *
>
> (2) When a witness in a criminal case has previously testified before an investigating grand jury concerning the subject matter of the charges against the defendant, upon application of such defendant the court shall order that the defendant be furnished with a copy of the transcript of such testimony; however, such testimony may be made

> <u>available only after the direct testimony of that witness at trial.</u>
>
> (3) Upon appropriate motion of a defendant in a criminal case, the court shall order that the transcript of any testimony before an investigating grand jury that is exculpatory to the defendant . . . be made available to such defendant.

Pa.R.Crim.P. 229, 230 (underscoring added; boldface in original).

Appellant does not materially dispute the clear gravamen of this rule, that, whether under Rule 230(B)(2) or (3), a defendant seeking the production of sealed grand jury transcripts must apply directly to the supervising judge of the grand jury in question. This is made clear by the comment to Rule 229, which specifies that all uses of "the court" in Rule 230 refer to the supervising judge of the grand jury, not the judge presiding over the related trial. Furthermore, Appellant does not (and cannot reasonably) dispute that he never filed such an application during pre-trial proceedings or during trial. However, Appellant contends that there was an agreement between the Commonwealth and him to disclose such testimony that overrides this aspect of Rule 230(B).

Appellant pursues this argument by reference to this Court's decision in ***Hemingway***, 13 A.3d 491. In ***Hemingway***, the parties reached a clear agreement pursuant to which the Commonwealth would provide by a date certain copies of the transcripts of grand jury testimony for any witness who would testify at trial. The agreement, which was embodied by court order, provided that "[a]ny failure to provide the Grand Jury testimony in

conformance with this deadline shall result in the individual being precluded from testifying at [the] time of trial." ***Id.*** at 494.

At a subsequent conference, this time without an express agreement of the parties, the trial court ordered the Commonwealth to disclose additional grand jury transcripts that were not addressed in the prior order. As to these disclosures, the Commonwealth sought a writ of prohibition from our Supreme Court, which granted the writ, indicating that "[a]pplications for disclosure of . . . grand jury transcripts are properly directed to" the supervising judge of the grand jury. ***Id.***

At a subsequent conference, the Commonwealth confirmed its intent to honor the original disclosure agreement. However, the Commonwealth failed to comply by the agreed-to date. After the date passed, the defendants' counsel filed motions *in limine* to preclude the testimony of those witnesses whose grand jury testimony was at issue. On that date, the Commonwealth provided the transcripts. The trial court granted the defendants' motions, precluding the testimony of thirty-four witnesses who had testified before the grand jury. ***Id.*** at 494-95. The Commonwealth appealed.

We agreed with the Commonwealth that, under Rules 229 and 230, the trial court lacked authority to **compel** the Commonwealth to produce the transcripts in question over a Commonwealth objection. In underscoring this point, we noted the Supreme Court's writ of prohibition regarding the second discovery request for certain grand jury testimony, which was

contested by the Commonwealth rather than subject to an agreement embodied in a mandatory court order that specified a sanction for non-compliance.

Regarding the initial disclosure order, which embodied an agreement of the parties, we explained as follows:

> The record reflects that the Commonwealth and all defense counsel met on February 27, 2009 pursuant to the trial court's order scheduling a pretrial conference. The agreements that were reached at that meeting were reduced to writing in the February 27 trial court order.
>
> The record does not reflect that the pretrial conference or the order generated was in response to a motion by any defendant for the production of the grand jury transcripts. No objections to the February 27 order were noted by either party. In fact, the Commonwealth admitted that it was in agreement with the February 27 order and that it had agreed at the conference that it could and would provide defense counsel with copies of the grand jury transcripts . . . .
>
> * * * *
>
> This was a matter of an agreement among the parties that was reached at a pretrial conference intended to advance the efficiency of judicial resources. This was not a contested motion or application for disclosure of the grand jury transcripts. The Rules of Criminal Procedure allow for such agreements. The Rules of Criminal Procedure make clear that the supervising judge controls all copies of the grand jury transcripts "[e]xcept as otherwise set forth in these rules." Pa.R.Crim.P. 229. One such exception, set forth in Rule 230, is that copies of the transcripts are to be provided to the attorney for the Commonwealth "for use in the performance of official duties." Pa.R.Crim.P. 230(A). It is obvious that the [Commonwealth's] participation in a pretrial conference is part and parcel of a criminal prosecution, and agreements reached therein thus fall under the [Commonwealth's] "official duties." The Commonwealth's agreement to provide the transcripts by July 6 was therefore properly reduced to writing in the February 27

> order by the trial court, which was squarely within the trial court's jurisdiction. ***See*** Pa.R.Crim.P. 570(C); 42 Pa.C.S. § 931(a). Accordingly, the trial court likewise had subject matter jurisdiction to sanction the Commonwealth for its failure to abide by the terms of the February 27 order.

Hemingway, 13 A.3d at 497-98 (some citations omitted, others modified; footnote omitted). Thus, the linchpin of our ruling in ***Hemingway*** was that the Commonwealth's agreement voluntarily to surrender copies of the transcripts was an exercise of its official duties. The trial court's authority to enforce its order, therefore, was not in contravention of Rule 230; the order, in fact, would have been unenforceable absent the parties' agreement, as made clear when our Supreme Court granted the Commonwealth's writ of prohibition concerning the production of grand jury transcripts that were **not** the subject of an agreement between the parties. Accordingly, ***Hemingway*** supports Appellant only to the extent that he can establish the existence of such an agreement in this case, the trial court's enforcement of which would take this case outside the limitations of the trial court's authority under Rule 230.

It is clear that the parties never reached an agreement on par with the agreement the trial court (permissibly) memorialized in an order in ***Hemingway***. ***See, e.g.***, Notes of Testimony ("N.T."), 2/10/2011, at 3 ("[The Commonwealth:] My hope is, in speaking to [defense counsel], he and myself and the District Attorney can sit down and meet and review it and try to resolve that particular issue . . . ."). Rather than diligently pursuing all legal mechanisms by which he might obtain those transcripts as

the pre-trial phase dragged on and the transcripts were not forthcoming, Appellant simply kept repeating that he believed he was entitled to discovery of those transcripts, despite the trial court's and the Commonwealth's protestations to the contrary.

Appellant knew or should have known that the Commonwealth had no obligation to assist Appellant in this regard, and also knew or should have known that the Rules of Criminal Procedure placed the burden upon him to seek the materials in question. ***See, e.g., id.*** at 7 ("[The court: Defense counsel] requested copies of Grand Jury transcripts. [The Commonwealth] will review that with the District Attorney and if a resolution cannot be reached, a motion shall be filed."), N.T., 3/17/2011, at 5 (the court responding to Appellant's claim of entitlement to the grand jury transcripts: "Well, you need to bring a motion"); N.T., 4/25/2011, at 9 ("[The court]: I think you need to go somewhere else to get that discovery, if you are talking about the sealed Grand Jury [transcripts]."). Appellant cites nothing to the contrary in on-the-record discussions or reflected in an order of court. Thus, Appellant fails to establish the requisite analogy to ***Hemingway***.

We also must note that Appellant does not contest that, at all relevant times, he had the prerogative to bypass the effort to reach an agreement and seek those transcripts from the supervising judge of the grand jury through the processes outlined in Rules 229 and 230. In effect, Appellant rested on what can be characterized most generously as the Commonwealth's qualified indications of the potential for cooperation,

subject to further consultation with other Commonwealth officials. As time dragged on with no progress on these matters, Appellant was well aware that he could bypass his failed efforts to reach a cooperative agreement and seek the relevant transcripts as provided under Rule 230.

Although we find no entirely on-point case law, our law generally does not reward a want of diligence on the part of a complaining party. Thus, in ***Commonwealth v. Chamberlain***, 30 A.3d 381 (Pa. 2011), our Supreme Court denied relief for an alleged violation of ***Brady v. Maryland***, 373 U.S. 83 (1963) (requiring the prosecution to produce on its own initiative all exculpatory evidence in its possession to a defendant), on the basis that there could be no ***Brady*** violation "when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question." ***Id.*** at 409.[13] Appellant's argument on this issue is suffused with indications that

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[13] While the case is not entirely on-point, inasmuch as Appellant expresses the belief that the transcripts in question may contain exculpatory evidence, there is a ***Brady***-related overtone to this issue. Moreover, Appellant's attempt to pull the grand jury transcripts within the sphere of his entitlement to exculpatory evidence under ***Brady***, the Commonwealth explicitly opined that nothing in the transcripts required discovery under the precepts embodied in that case. ***See*** N.T., 3/17/2011, at 2 ("[The Commonwealth]: [A]fter having had an opportunity to review the transcripts and speak to the other prosecutors involved in the Grand Jury, the content of those transcripts do not deal with . . . these particular alleged drug deals. So there is nothing in there that would be exculpatory."). Thus, the proper approach for Appellant was to move the supervising judge of the grand jury for production of the transcripts, and seek an *in camera* hearing, if any, to resolve any disputes as to whether the transcripts contained ***Brady*** material. Indeed, at one hearing, at least, this very prospect was raised by the trial court. ***See*** N.T., 4/25/2011, at 30-31 (the trial court offering to
(Footnote Continued Next Page)

he knew at all relevant times of the existence of the grand jury evidence he sought. Furthermore, it was suggested to Appellant in more than one of the pre-trial hearings at which discovery issues arose that he could seek the evidence in question as provided by the rules, without regard to the Commonwealth's cooperation or a trial court order. Consequently, Appellant has failed to establish any entitlement to relief on this issue.

In Appellant's third substantive issue, he argues that the trial court's jury instruction regarding the burden of proof associated with his entrapment defense was deficient and caused him sufficient prejudice to require a mistrial.

> [W]hen evaluating the propriety of jury instructions, this Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. We further note that, it is an unquestionable maxim of law in this Commonwealth that a trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Kerrigan, 920 A.2d 190, 198 (Pa. Super. 2007) (citations, internal quotation marks, and brackets omitted). "Error will not be predicated on isolated excerpts [of the jury charge]. Instead, it is the general effect of the charge that controls. An erroneous charge warrants the

(Footnote Continued)

review the grand jury transcripts *in camera*, subject to the grand jury supervising judge's consent). Appellant never followed up.

grant of a new trial unless the reviewing court is convinced beyond a reasonable doubt that the error is harmless." ***Commonwealth v. Clark***, 683 A.2d 901, 904 (Pa. Super. 1996) (citations omitted).

Appellant's argument, while lengthy, is focused upon the putative insufficiency of the trial court's definition of the standard of proof that applies when a defendant seeks to assert that he was entrapped. The trial court provided the following instruction regarding Appellant's entrapment defense:

> Entrapment is a defense to a criminal charge. The defendant who is entrapped by the police or by a person cooperating with the police cannot be convicted even if he or she has committed a crime.
>
> The defendant is not entrapped merely because the police gave him or her an opportunity to commit a crime or merely because the police outwitted him or her. The law allows the police to use some trickery and deception in catching criminals.
>
> However, if the police go too far, if they use tactics that, loosely speaking, might lead a law-abiding person to commit a crime, the police have perpetrated an entrapment. If the defendant commits a crime in response to that entrapment, the defendant has a defense.
>
> **The defendant has the burden of proving an entrapment defense by a preponderance of the evidence, that is by the greater weight of the evidence. Facts are proven by a preponderance if it is more likely than not that the facts are true. This is a less demanding standard than proof beyond a reasonable doubt.**
>
> **You must find the defendant not guilty if you are satisfied of two things by a preponderance of the evidence.** One, that a person who cooperated with the police officer, here the informant, perpetrated an entrapment. Two, that the defendant did what he did in response to that entrapment.

N.T., 6/16/2011, at 453-55 (emphasis added).

In support of his argument, Appellant provides no legal authority to suggest that the emphasized portion of the above instruction was inadequate to apprise the jury of the applicable preponderance of the evidence standard. Instead, Appellant seeks to bootstrap his argument by reference to the inadequacy of earlier curative instructions issued in response to an undisputedly objectionable portion of the Commonwealth's closing argument, which of course preceded the trial court's jury charge. ***See*** Brief for Appellant at 53-54.

Before the trial court, in asking the court to provide the standard civil jury instruction for preponderance of the evidence, Appellant relied upon this Court's decision in ***Clark***. There, we found the trial court's entrapment defense instruction wanting. Although the trial court defined in some detail the Commonwealth's reasonable doubt standard of proof, and although it alluded to the fact that the defendant bore the burden of proof to establish the elements of an entrapment defense by a preponderance of the evidence, the court neither provided a discrete definition of the preponderance standard nor contrasted it explicitly with the Commonwealth's reasonable doubt burden of proof. 683 A.2d at 906-07.

As noted above, in assessing the propriety of jury instructions, we must view the instructions as a whole. As well, the court may word its instruction as it chooses, provided that it "clearly, adequately, and accurately" describes the applicable law to the jury. ***See Kerrigan***, *supra*.

The highlighted portion of the jury's instruction in the instant case, by contrast, not only clearly defined the preponderance standard in a way wholly lacking in ***Clark***, but the court also expressly noted that "this is a less demanding standard of proof than reasonable doubt." N.T., 6/16/2011, at 38. Thus, ***Clark*** is distinguishable, and Appellant offers no other case law to suggest that a more elaborate instruction, generally or in the two challenged dimensions particularly, is required in tandem with an entrapment defense.

Regarding Appellant's attempt to bolster this argument by reference to earlier aspects of the Commonwealth's closing touching upon the burden of proof, to which Appellant's objections were sustained and a curative instruction issued, we find Appellant's argument unpersuasive. During its closing, the Commonwealth erroneously suggested that, to establish entrapment, Appellant must prove that the police acted outrageously:

> [The Commonwealth]: . . . . Funny enough, when we are talking about burden and burden of proof and reasonable doubt, [defense counsel] kind of glossed over this, the burden of proof for entrapment . . . . It's on the defendant. [Defense counsel] has to prove to you that those elements and facts exist, not me. I don't have to disprove it. . . . He has to prove to you that the police conduct in this case was so outrageous –".

N.T., 6/16/2011, at 378.

After a discussion at sidebar, the court sustained Appellant's objection and issued the following curative instruction to the jury:

> Ladies and gentlemen of the jury, regarding a remark [the Commonwealth] made to you regarding an element of entrapment, the defendant does not need to establish outrageous conduct on the part of the Commonwealth or the

> police in order to establish by a preponderance of the evidence the defense of entrapment.

N.T., 6/16/2011, at 380.

While it is true that the court did not then define what constitutes a "preponderance of the evidence," Appellant offers no support for the proposition that the court contemporaneously must define every legal concept alluded to by counsel in his closing argument. Appellant does not contend that this curative instruction was wrong in any particular, or that it did not address the one inaccuracy in the Commonwealth's comments. Appellant argues only that the trial court's instruction was inadequate for want of a full definition of the preponderance of the evidence standard.

In effect, Appellant invites us to require trial courts to intermingle their jury charges with attorneys' closing arguments. If trial courts were required to interject a definition of every term of art contained in a closing argument, such arguments would become wholly impracticable. In this case, the trial court adequately instructed the jury regarding the applicable legal standard before directing the jury to deliberate. We presume that a jury scrupulously follows the law as the trial court provides it during curative instructions as well as the jury charge. ***See Commonwealth v. Jones***, 668 A.2d 491, 503-04 (Pa. 1995) (curative instruction); ***Commonwealth v. Travaglia***, 661 A.2d 352, 361 (Pa. 1995) (jury charge). For this reason, our Supreme Court has held that "[t]here is no need for a court to emphasize any portion of a correct charge." ***Travaglia***, 661 A.2d at 361. While Appellant presses

the question of the adequacy of the court's curative instruction, he does not argue that it was legally erroneous. Accordingly, this issue lacks merit.[14]

In Appellant's fourth substantive issue, he argues that the trial court erred in admitting indirect hearsay regarding prior investigations of Appellant. Specifically, Appellant objects to the following testimony of Detective Levi:

> We came upon [the confidential informant] while investigating [Appellant]. We had information, of course, about [Appellant], about [Appellant's] activity within the area, cocaine activity, and we attempted a few different surveillances on [Appellant] while deciding how are we going to start this case. Through our background investigation we did on [Appellant], we knew that he was a significant player. We knew he would be worth our while . . . .

N.T., 6/6/2011, at 53.

Our standard of review regarding evidentiary rulings is as follows:

> The admissibility of evidence is within the sound discretion of the trial court, wherein lies the duty to balance the evidentiary value of each piece of evidence against the dangers of unfair prejudice, inflaming the passions of the jury, or confusing the jury. We will not reverse a trial court's decision concerning admissibility of evidence absent an abuse of the trial court's discretion.

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[14] We also note that, inasmuch as Appellant largely supported this argument by reference to comments in closing that preceded by some time the trial court's jury charge regarding the preponderance standard, it might be argued that this issue was waived because it was neither expressly included in Appellant's Rule 1925(b) concise statement nor fairly suggested thereby. The relevant issue was framed strictly in terms of the instruction itself, and the trial court would have no reason in responding to the issue as stated to dig back through closing arguments, without an explicit suggestion by Appellant that it must do so.

Commonwealth v. Estepp, 17 A.3d 939, 945 (Pa. Super. 2011), *appeal granted*, 33 A.3d 1261 (Pa. 2011), *appeal dismissed as improvidently granted*, 54 A.3d 22 (Pa. 2012) (quoting ***Commonwealth v. Ruffin***, 10 A.3d. 336, 341 (Pa. Super. 2010)).

Appellant contends that, while Detective Levi did not specifically refer to any informant's report, the conclusion that Appellant "was a significant player" necessarily was based upon such reports, and that the jury would infer as much, denying Appellant his right to confront these unmentioned informants. The trial court, however, opined that the testimony contained no hearsay, and that, in any event, the evidence in question was admissible to the extent it established why and how law enforcement initiated and conducted its investigation.

Appellant argues that the United States Supreme Court's decision in ***Crawford v. Washington***, 541 U.S. 36 (2004), established that what Appellant characterizes as testimonial hearsay is admissible "only where declarant is unavailable and where the defendant has had a prior opportunity to cross-examine." Brief for Appellant at 59. Appellant further argues that, regardless of whether the testimony was admissible under the Pennsylvania Rules of Evidence, it must be suppressed if it would violate the Confrontation Clause of the United States Constitution's Sixth Amendment.

We disagree that ***Crawford*** requires a remedy in this case. While the ***Crawford*** Court, in abrogating the Court's prior decision in ***Ohio v. Roberts***, 448 U.S. 56 (1980), barred the introduction of certain "testimonial

statements" as violative of the Confrontation Clause, it notably defined the "[v]arious formulations" of such evidence as including "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." ***Crawford***, 541 U.S. at 51-52. Notably, in ***Crawford*** the statements at issue that were related at trial without the opportunity of cross-examination were made by the defendant's wife who was, herself, under investigation in the case at hand at the time of her statements. "[I]n response to often leading questions from police detectives," she implicated her husband in the underlying crime in ways that undermined his self-defense argument. ***Id.*** at 66-67.

Conversely, in ***Estepp*** and ***Commonwealth v. Dargan***, 897 A.2d 496 (Pa. Super. 2006), cases that post-date ***Crawford***, the statements deemed admissible involved investigators testifying on the stand as to specific comments by informants implicating the defendant. In each, this Court deemed the statements admissible in part because evidence of prior bad acts may be admitted where the acts in question "were part of a chain or sequence of events that formed the history of the case and were part of its natural development." ***Dargan***, 897 A.2d at 501; ***accord Estepp***, 17 A.3d at 945.

Appellant argues that, even where admissible for such purposes under common law principles or the rules of evidence, the Confrontation Clause, as elucidated by ***Crawford***, barred the evidence in question in this case.

However, Appellant fails to account for the fact that Detective Levi did not allude in any way to his reliance upon the prior averments of informants in establishing to Detective Levi's satisfaction that Appellant was a "significant player" who warranted further investigation. In both ***Dargan*** and ***Estepp***, we deemed admissible far more specific testimony regarding prior misconduct than at issue here. Moreover, the testimony at issue in ***Crawford*** was categorically different, and substantially more prejudicial, than the inference Appellant argues that the jury necessarily would have drawn from Detective Levi's testimony, which, contrary to Appellant's argument, neither necessitated nor especially invited the jury's inference that unnamed informants furnished the basis for Levi's conclusion that Appellant was a "significant player."

Appellant's reliance upon our Supreme Court's decision in ***Commonwealth v. Palsa***, 555 A.2d 808 (Pa. 1989), similarly is misplaced. There, too, the investigator was permitted to testify with great specificity regarding statements made by an informant inculpating the defendant, despite the fact that the informant had become a fugitive by the time trial and was not available for cross-examination. Our Supreme Court deemed the evidence inadmissible. However, it acknowledged the following important principle: "[T]here is a need for a balance to be struck between avoiding the dangers of hearsay testimony and the need for evidence that explains why police pursued a given course of action. This balancing process is governed by the sound discretion of the trial court . . . ." ***Id.*** at 118-19.

The statements introduced through the investigator in that case were "of a most highly incriminating sort," hence we found that the trial court abused its discretion in admitting them. ***Id.*** at 119.

In this case, Detective Levi provided **no** statement of any informant, incriminating or otherwise. Accordingly, we find that neither ***Crawford*** nor ***Palsa*** require relief. Thus, this issue lacks merit.

In light of the above analyses, we may now consider Appellant's "Application for Permission to File Post Submission Communication Regarding After-Discovered Evidence" and his corollary post-submission "Petition for Remand Pursuant to Rule 720 of the Pennsylvania Rules of Criminal Procedure" (hereinafter, "Remand Petition"), which Appellant filed simultaneously. In his Remand Petition, Appellant alleges that Detective Levi, who testified at Appellant's trial to the effect that he was wholly unable to search Appellant's computer, testified in a federal proceeding that he did, in fact, search that computer and found certain documents relevant to the federal proceeding. Citing this newly-discovered evidence, and asserting that the investigator's allegedly misleading testimony at trial may have prejudiced the jury, Appellant seeks remand for an evidentiary hearing in the trial court regarding the effect of this evidence, as provided for by Pa.R.Crim.P. 720(C). We grant Appellant's application for post-submission communication and turn now to the merits of his Remand Petition.

Our consideration of Appellant's Remand Petition is governed by the following standard:

> To warrant relief, after-discovered evidence must meet a four-prong test: (1) the evidence could not have been obtained before the conclusion of the trial by reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely for purposes of impeachment; and (4) the evidence is of such a nature and character that a different outcome is likely.

Commonwealth v. Rivera, 939 A.2d 355, 359 (Pa. Super. 2007).

Appellant concedes that "the evidence would have likely been used to challenge [Detective] Levi's credibility," Petition for Remand at 5 ¶12, but asserts that the evidence also "would have established a different history of events regarding the 'destroying' of the computer, the search, recovery of evidence, and the idea that the computer somehow supported the Commonwealth's theory of the case that [Appellant] was a big drug dealer who destroyed the computer out of consciousness of guilt." ***Id.*** at 5 ¶13. Given the quantum of inculpatory evidence presented at trial, Appellant has failed adequately to establish that the evidence at issue "is of such a nature and character that a different outcome is likely." ***See Rivera***, 939 A.2d at 359. Even if Detective Levi's testimony at trial was false, and even if it unfairly suggested that Appellant was a "bigger" drug dealer than he actually was, being a "big" drug dealer was not an element of the charges brought against him. The jury plainly credited the testimony of the confidential informant, which, in tandem with the other evidence, was sufficient to

establish the charges of which Appellant was convicted wholly independently of the evidence that Appellant had destroyed his computer. Thus, we detect no likelihood that the newly-discovered evidence would have changed the outcome of the trial. Thus, although for the reasons that follow we remand for resentencing, we find Appellant's Remand Petition based upon newly-discovered evidence unavailing, and therefore deny that petition.

Finally, we turn to address sentencing. Appellant purports to challenge the discretionary aspects of his sentence. However, for the reasons that follow, we are constrained to vacate Appellant's sentence for separate reasons, rendering Appellant's discretionary sentencing challenges moot. Instead, we find Appellant's sentence to have been illegal,[15] inasmuch as the sentence imposed included mandatory minimum sentences that have proved to be unconstitutional under the United States Supreme Court's recent decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (U.S. 2013). ***See Commonwealth v. Munday***, 78 A.3d 661

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[15] "A challenge to the legality of the sentence may be raised as a matter of right, is non-waivable, and may be entertained so long as the reviewing court has jurisdiction." ***Commonwealth v. Munday***, 78 A.3d 661, 664 (Pa. Super. 2013). As well, we may raise the issue of sentence legality *sua sponte*. ***Commonwealth v. Randal***, 837 A.2d 1211, 1214 (Pa. Super. 2013).

(Pa. Super. 2013) (finding Pennsylvania mandatory sentence pursuant to 42 Pa.C.S. § 9712.1 unconstitutional under ***Alleyne***).[16]

As noted, *supra*, at 192-10, Appellant was sentenced to a mandatory term of one to two years' incarceration pursuant to 18 Pa.C.S. § 7508(a)(3)(i), which applies when a person is convicted of violating § 780-113(30) and the aggregate weight of the substance involved in the crime is at least two grams and less than ten grams. Notably, section 7508 sets forth the process by which the court determines whether a given conviction qualifies for a section 7508 mandatory minimum sentence:

> Provisions of this section shall not be an element of the crime. Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider evidence presented at trial, shall afford the Commonwealth and the defendant an opportunity to present necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

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[16] As noted *supra*, Appellant brought this issue to our attention in petitions for post-submission communication and for remand for resentencing, both filed on February 28, 2014 in tandem with Appellant's application for reargument or reconsideration. We already have granted Appellant's petition for reconsideration. We may review an illegal sentence *sua sponte* while we retain jurisdiction (and Appellant's timely request for reargument preserved our jurisdiction). Consequently, while we hereby grant Appellant's petition for post-submission communication, we deny Appellant's petition for remand for resentencing as moot in light of our constructively independent determination that Appellant's sentence was illegal.

18 Pa.C.S. § 7508(b). In this case, the trial court ostensibly made the relevant findings regarding the aggregate weight of cocaine involved in the crimes of conviction. Thus, the trial court imposed a mandatory minimum one-year sentence at 192-10, and specified that it would run consecutively to the sentences imposed at 191-10.

In our recent decision in ***Munday***, this Court closely examined the effect of the Supreme Court's decision in ***Alleyne*** on Pennsylvania's mandatory minimum sentencing provisions that depend upon judicial, rather than jury, fact-finding.

> In ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), the Supreme Court of the United States held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Id.*** at 490. Stated another way, it "is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." ***Id.*** (quoting ***Jones v. United States***, 526 U.S. 227, 252-53 (1999) (Stevens, J. concurring)).
>
> Prior to ***Apprendi***, in ***McMillan v. Pennsylvania***, 477 U.S. 79, 80 (1986), the Supreme Court of the United States considered a constitutional challenge to a previous version of the statute at issue in this case, 42 Pa.C.S. § 9712. The portion of the statute at issue in ***McMillan*** is not dissimilar to the portion of 42 Pa.C.S. § 9712.1 before us today: the prior version of the statute mandated "that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." ***McMillan***, 477 U.S. at 81. The ***McMillan*** court considered, *inter alia*, whether that provision was unconstitutional pursuant to "the Due Process

Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment." ***Id.*** at 80. The High Court held that it was not unconstitutional because the provision expressly made visible possession of a firearm a sentencing factor rather than an element of the underlying offense. Thus, the Court concluded, because it was not an element of the offense, the Constitution did not require visible possession of the firearm to be proven beyond a reasonable doubt. ***Id.*** at 91.

In light of its holding in ***Apprendi***, the Supreme Court of the United States revisited the ***McMillan*** decision in ***Harris v. United States***, 536 U.S. 545 (2002). The statute at issue in ***Harris*** involved an increase in the minimum sentence if, at sentencing, it was determined that the defendant brandished a firearm during the commission of the underlying offense. The ***Harris*** Court concluded that judicial fact[-]finding that increased the minimum sentence to be imposed, but did not increase the sentence beyond the statutory maximum, was permissible under the Sixth Amendment. ***Harris***, 536 U.S. at 567–68. Premised upon the ***McMillan***, ***Apprendi***, and ***Harris*** decisions, this Court had previously held that judicial fact[-]finding of sentencing factors giving rise to a mandatory minimum sentence imposed in accordance with 42 Pa.C.S. § 9712.1 is not violative of either the United States or Pennsylvania Constitutions' right to trial by jury. ***See Commonwealth v. Nguyen***, 834 A.2d 1205, 1208 (Pa. Super. 2003) ("Appellate case law has routinely held that the sentencing trigger is not an element of the offense but rather only a factor that does not improperly deny the jury the right to make relevant factual determinations.").

This term, in ***Alleyne***, the United States Supreme Court expressly overruled ***Harris***, holding that any fact that increases the mandatory minimum sentence for a crime "is 'an element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S.Ct. at 2155, 2163. The ***Alleyne*** majority reasoned that "[w]hile ***Harris*** limited ***Apprendi*** to facts increasing the statutory maximum, the principle applied in ***Apprendi*** applies with equal force to facts increasing the mandatory minimum." ***Id.*** at 2160. This is because "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime[,]" and "it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment." ***Id.*** at 2161. Thus, "[t]his reality demonstrates that the core crime and the fact triggering the mandatory

> minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." ***Id.***

Munday, 78 A.3d at 664-66 (citations modified).

In ***Munday***, at issue was the mandatory minimum sentence prescribed by 42 Pa.C.S. § 9712.1. That provision called for a mandatory sentence of at least five years' total confinement when a person violated 35 P.S. § 780-113(a)(3) and, at the time of the offense, the offender or his accomplice was "in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice, or within the actor's or accomplice's reach or in close proximity to the controlled substance." 42 Pa.C.S. § 9712.1(a). Subsection 9712.1(c) set forth the relevant standard of proof, which, as in the instant case, called upon the trial court to make findings of fact regarding the application of the mandatory minimum at the sentencing proceedings, and to do so subject to a preponderance of the evidence standard. Indeed, the "proof at sentencing" provisions of section 9712.1 and the instantly applicable section 7508 differed only in minor grammatical details; in substance, they are identical.

We have not yet had occasion to apply ***Alleyne*** to the mandatory minimum penalties prescribed by section 7508.[17] However, section 7508

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[17] While no legislation yet has been enacted to address ***Alleyne***'s potentially fatal effect on section 7508's mandatory sentencing scheme, as of this writing, legislation pending in the General Assembly proposes to eliminate section 7508 entirely. ***See*** 2013 Pa.H.B. 1920 (introduced and
(Footnote Continued Next Page)

bears the critical similarity to the statute at issue in ***Munday***: In both cases, the sentencing floor is enhanced based upon facts found not by a jury during trial, but by the court at sentencing; and in both cases, the standard of proof is a mere preponderance of the evidence, rather than proof beyond a reasonable doubt. Under ***Alleyne*** and ***Munday***, these observations suffice to establish that the one-year mandatory minimum penalty imposed in this case, as such, was unconstitutional. Accordingly, Appellant's sentence is illegal in this regard.

The problematic sentence at issue in this case comprises only one to two years of Appellant's aggregate sentence of twelve- to twenty-four-years' incarceration. However, when a constituent part of a larger sentencing scheme must be vacated, and the sentence in question is set to run consecutively to the other sentences, we have held that the entire sentence must be vacated. ***See Commonwealth v. Tanner***, 61 A.3d 1043, (Pa. Super. 2013) (holding that the vacatur of a consecutive sentence in the context of a larger sentencing scheme necessitates vacatur of the entire sentence because "our disposition . . . disturbed the trial court's overall sentencing scheme"); ***cf. Commonwealth v. Thur***, 906 A.2d 552, (Pa. Super. 2006) (reaffirming the ***Tanner*** principle but holding that a

(Footnote Continued)

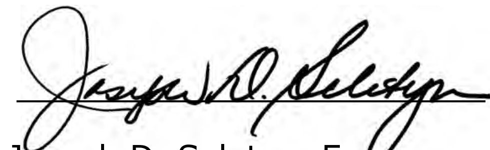
referred to Judiciary Committee, Dec. 16, 2013). Another pending bill related to the issue proffers amendments to section 7508, but does not appear to address the ***Alleyne*** problem. ***See*** 2013 Pa.S.B. 1230 (introduced and referred to Judiciary Committee, Jan. 16, 2014).

sentencing scheme need not be disturbed where the illegal part of the sentence was set to run consecutively and therefore had no effect on the aggregate term of incarceration).

For the foregoing reasons, we must vacate the entire sentence imposed upon Appellant and remand for resentencing that is consistent with this opinion. However, we emphasize our affirmance of the remainder of Appellant's issues for the reasons set forth above. For the same reasons, we deny Appellant's pending petition to remand for re-sentencing as moot.

September 12, 2013 "Application for Permission to File Post Submission Communication Regarding After-Discovered Evidence" granted. September 12, 2013 "Petition for Remand Pursuant to Rule 720 of the Pennsylvania Rules of Criminal Procedure" denied. February 28, 2014 "Application for Permission to File Post-Submission Communication Pursuant to Pa.R.A.P.[] 2501" granted. February 28, 2014 "Petition for Remand for Resentencing" denied as moot. Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/11/2014