**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>JOHN LEROY KROLL,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 624 WDA 2012 |

Appeal from the Judgment of Sentence March 5, 2012
In the Court of Common Pleas of Bedford County
Criminal Division at No(s): CP-05-CR-0000090-2011

BEFORE: STEVENS, P.J., BOWES, J., and MUSMANNO, J.

MEMORANDUM BY STEVENS, P.J. FILED: July 11, 2013

This is an appeal from the judgment of sentence of 18 ½ to 37 years' incarceration entered in the Court of Common Pleas of Bedford County, after Appellant pled guilty to Criminal Attempt-Criminal Homicide,[1] felony Aggravated Assault,[2] Possession of an Instrument of Crime,[3] Corruption of Minors,[4] Indecent Assault,[5] Unlawful Restraint,[6] Simple Assault,[7] Recklessly Endangering Another Person,[8] Terroristic Threats,[9] and False Imprisonment[10]

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[1] 18 Pa.C.S.A. § 901(a), 2501(a).
[2] 18 Pa.C.S.A. § 2702(a)(1).
[3] 18 Pa.C.S.A. § 907(a).
[4] 18 Pa.C.S.A. § 6301(a).
[5] 18 Pa.C.S.A. § 3126(1).
[6] 18 Pa.C.S.A. § 2902(2).
[7] 18 Pa.C.S.A. § 2701(a)(1).
[8] 18 Pa.C.S.A. § 2705.

in connection with his kidnapping and sexual abuse of a nine year-old girl. We affirm.

On March 25, 1980, Appellant kidnapped a nine year-old girl after she exited her school bus in Cumberland, Maryland. N.T. 10/20/11 at 13. Forcibly placing her in the trunk of his car, Appellant drove north to Lake Gordon in Bedford County, Pennsylvania, where he removed the child from the trunk and walked her into nearby woods. N.T. at 13.

Holding a wooden broomstick with a sharpened tip, Appellant ordered the girl to remove all her clothing and lie down. Telling the child she was not permitted to scream or cry, Appellant knelt between her legs, pushed her open, and shoved the tip of the broomstick onto the child's vagina, causing her to scream. N.T. at 14. Appellant dropped the stick, revealed a pocket knife, and threatened to use it instead unless she complied with his demands. N.T. at 14. The child agreed to do whatever he wanted as long as he put the knife away. N.T. at 14.

At this point, the child's vagina was bleeding, prompting Appellant to rub his hands all over her body, including her chest and vagina. N.T. at 14. Appellant ordered the sitting child to lie down again, but the child refused. N.T. at 14. Appellant then took the pointed broomstick, forced the child down, and shoved it into her vagina. N.T. at 14. The child screamed and sat

*(Footnote Continued)* ———————————

[9] 18 Pa.C.S.A. § 2706.
[10] 18 Pa.C.S.A. § 290.

up again in pain, attempting unsuccessfully to push the broomstick out of her vagina while blood began to flow heavily at this point. After her persistent attempts to remove the broomstick, Appellant withdrew it, but began touching her chest again. N.T. at 14-15.

Appellant then asked the child how old she was, and she answered "nine years old." N.T. at 15. The answer agitated Appellant and he told her to get dressed because he was going to kill her. N.T. at 15. After she dressed, he grabbed her and began walking her toward a cliff. N.T. at 15. As they walked, the child kept repeating that she was only nine-years old, apparently causing Appellant to reconsider, as he stated "Okay. Let's go," and walked her back to his car. N.T. at 15. Appellant prepared to put the child back in the trunk, but she begged him not to, so he put her on the floor of the front passenger side of the car's cabin. N.T. at 15. He would eventually drive her back to her house, drop her off at the end of the driveway, and flee, but not before instructing her along the way to tell her parents that she had an accident on the school's swing set. N.T. at 15. Medical reports on the child confirmed extensive recto-vaginal laceration, with rupturing, and requiring corrective surgery. N.T. at 16.

Appellant was charged in Maryland with kidnapping and first-degree sexual assault, to which he pled guilty in exchange for the State's agreement to *nolle prose* a case involving the kidnapping and assault of a different victim. Though sentenced to life imprisonment for the first degree sexual

assault count and fifteen years' incarceration for kidnapping, to run consecutively, Appellant successfully had his sexual assault conviction and life sentence overturned for Maryland's lack of territorial jurisdiction. The State, however, successfully reinstated the kidnapping case that had been *nolle prossed* under the original plea agreement, extending Appellant's sentence until 2011, at which time he completed his Maryland sentence.

Because of Maryland's decision vacating Appellant's first-degree sexual assault conviction on jurisdictional grounds, the Commonwealth filed criminal charges against Appellant on August 16, 2010. Charged as noted *supra*, Appellant decided to plead guilty. At the guilty plea hearing, the Commonwealth presented the evidence reproduced supra, and further established that, had the case gone to trial, it was prepared to call a physician to provide expert medical testimony that the assault in question could have easily caused the child's death. N.T. at 16.

At the conclusion of the Commonwealth's presentation, Appellant, represented by counsel, acknowledged to the court that a factual basis to his pleas existed, and subsequently entered his plea. N.T. at 17-18. On March 5, 2012, the court entered a sentence of 18½ years' to 37 years' incarceration with credit for time served to begin on June 1, 2011.

On appeal, counsel for Appellant has filed a petition to withdraw from representation and an accompanying ***Anders***[11] brief, raising seven issues asserting the following:

> **I. WHETHER THE COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO DISMISS FOR LACK OF PROSECUTION AS THE CHARGES AGAINST DEFENDANT WERE NOT FILED WITHIN THE TIME ALLOWED BY THE APPLICABLE STATUTE OF LIMITATIONS?**
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> **II. WHETHER THE COURT ERRED WHEN IT ACCEPTED APPELLANT'S GUILTY PLEA AS THE CHARGES AGAINST APPELLANT WERE PURSUED BY THE COMMONWEALTH IN VIOLATION OF FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS PERTAINING TO DOUBLE JEOPARDY AS APPELLANT WAS PREVIOUSLY CONVICTED IN MARYLAND OF OFFENSES IN CONNECTION WITH THE INSTANT MATTE?**
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> **III. WHETHER THE COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS PERTAINING TO THE STATEMENT HE MADE TO THE PENNSYLVANIA STATE POLICE AT THE HAGERSTOWN CORRECTIONAL INSTITUTION AS APPELLANT WAS NOT ADVISED OF HIS *MIRANDA* RIGHTS?**
>
> **IV. WHETHER THE COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO DISMISS PERTAINING TO THE CHARGE OF CRIMINAL ATTEMPT-CRIMINAL HOMICIDE AS THE COMMONWEALTH ALLEGED INJURY TO A NON-VITAL PART OF THE VICTIM'S BODY?**
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> **V. WHETHER THE COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA**

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[11] ***Anders v. California***, 386 U.S. 738 (1967).

**AS IT ACCEPTED A PLEA OF GUILTY FROM APPELLANT THAT WAS NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY ENTERED?**

**VI. WHETHER THE COURT ERRED WHEN IT FAILED TO CREDIT APPELLANT FOR TIME SERVED FROM THE DATE OF HIS ORIGINAL INCARCERATION ON OR ABOUT MARCH 26, 1980 IN MARYLAND IN CONNECTION WITH THE INSTANT MATTER.**

**VII. WHETHER THE COURT ERRED WHEN IT ACCEPTED APPELLANT'S GUILTY PLEA ON OCTOBER 20, 2011 AS SAID DATE WAS MORE THAN ONE HUNDRED EIGHTY (180) DAYS FROM THE DATE UPON WHICH DEFENDANT WAS INCARCERATED IN BEDFORD COUNTY, PENNSYLVANIA IN CONNECTION WITH THE INSTANT MATTER?**

Brief for Appellant at 9-11. In addition, Appellant has filed a supplemental *pro se* brief in response to counsel's ***Anders*** brief in which he raises numerous issues asserting court error.[12] We find, however, that only two issues—that personal animus against Appellant motivated the Bedford County District Attorney's office to file charges in this case, and that plea counsel coerced Appellant to plead guilty—are not already addressed in the ***Anders*** brief. Moreover, our independent review of these issues reveals they are unsupported by citation to the record or legal authority, such that we find them waived under Pa.R.A.P. 2119(a). ***See Commonwealth v. Green***, 2013 WL 2485015, 5 (Pa. Super. filed June 11, 2013)("[W]here an

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[12] Pursuant to ***Anders***, ***supra***, an appellant may file a *pro se* brief raising points in addition to those in counsel's ***Anders*** brief. ***Commonwealth v. Burwell***, 42 A.3d 1077, 1078-1079 (Pa. Super. 2012).

appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived."); Pa.R.A.P. 2119(a).

We turn, then to a review of counsel's petition to withdraw.

> Court-appointed counsel who seeks to withdraw from representing an appellant on direct appeal on the basis that the appeal is frivolous must:
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> (1) provide a summary of the procedural history and facts, with citations to the record;
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> (2) refer to anything in the record that counsel believes arguably supports the appeal;
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> (3) set forth counsel's conclusion that the appeal is frivolous; and
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> (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.
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> ***Commonwealth v. Santiago****,* 602 Pa. at 178–179, 978 A.2d at 361. Our Court must then conduct its own review of the proceedings and make an independent judgment to decide whether the appeal is, in fact, wholly frivolous. ***Id.*** at 359 (citation omitted).

***Commonwealth v. Washington***, 63 A.3d 797, 800 (Pa. Super. 2013).

In the case *sub judice,* counsel has complied with the dictates of ***Anders*** and ***Santiago****,* having made a conscientious examination of the record, controlling case law, and applicable statutes. Counsel has also identified the issues and supporting portions of the certified record that may arguably be raised on appeal. Furthermore, counsel has notified Appellant

of his request to withdraw, furnished him with a copy of the ***Anders/Santiago*** brief, and advised him that he may retain new counsel, proceed *pro se,* or raise any additional points that he deems worthy of our consideration.

We may, therefore, conduct our independent review of the issues raised by counsel and determine, using our own judgment, whether the appeal is wholly frivolous. In that vein, after careful review of the certified record, party briefs, and both the Pa.R.A.P. 1925(a) opinion and the October 6, 2011 memorandum opinion of the trial court, we find the issues raised by Appellant to be utterly frivolous. Accordingly, we adopt as our own said opinions, expressing as they do a cogent and comprehensive disposition of Appellant's claims, and, on the analyses expressed therein, we affirm judgment of sentence.

Judgment of sentence is affirmed. Counsel's petition to withdraw is granted.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: July 11, 2013

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IN THE COURT OF COMMON PLEAS
BEDFORD COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA | : No. CR-90 for the year 2011 |
| vs. | : OTN: T-009795-2 |
| JOHN LEROY KROLL | : Charges: Criminal Attempt, Aggravated Assault, et.al. |

MEMORANDUM OPINION

On October 6, 2011, a hearing was held on the Defendant's *Omnibus Pre-Trial Motion*. At the hearing, the Defendant raised the following issues:

1. *Motion to Dismiss for Lack of Prosecution*. The Defendant argues that the Information must be dismissed as the charges were not filed within the time allowed by the applicable statute of limitations.

2. *Motion to Suppress*. The Defendant asked any statement he made to the Pennsylvania State Police during an interview conducted at the Hagerstown Correctional Institution be suppressed as he was not advised of his *Miranda* rights.

3. *Motion to Dismiss*. The Defendant argues the charge of criminal attempt, criminal homicide, must be dismissed as the Commonwealth alleges injury to a non-vital part of the victims body.

The background of the case is as follows:

In July 1980, the Defendant plead guilty to kidnapping and first degree sexual assault in Allegheny County, Maryland. The allegations were the

Defendant took a child from Cumberland, Maryland, to Bedford County, Pennsylvania, where he assaulted her. The Allegheny County, Maryland Circuit Court imposed a life sentence on the sexual assault and a 15 year consecutive sentence for kidnapping. In 2005, the Allegheny County Circuit Court dismissed the first degree sexual offense charge because the Court had lacked territorial jurisdiction over the charge. The State's attorney filed to have the plea agreement set aside and succeeded on that motion. The Defendant was retried and convicted of kidnapping, assault and battery, and received a 40 year sentence. The Defendant was released from incarceration by the State of Maryland on May 21st, 2011. The present case in Pennsylvania was filed August 16, 2010. In 2010, two members of the Pennsylvania State Police went to the Hagerstown Correctional Institution. The two Troopers met with the Defendant at the prison and their testimony was that *Miranda* rights were read to the Defendant at the commencement of the interview and the Defendant said he understood them. The Defendant did not sign the *Miranda* waiver. The Defendant testified he may have received his rights, but he could not remember. The Defendant did recall that he declined to allow the interview to be taped by the police. Trooper Auker also testified the Defendant declined to have the interview taped. Trooper Auker and Trooper Swartzwelder both stated the Defendant told them he understood his rights and spoke to them voluntarily.

The first issue raised by the Defendant is that he cannot be prosecuted due to the expiration of the statute of limitations. The Commonwealth argued that the statute was tolled under 42 Pa.C.S.A. §5554 which provides:

> ". . . the period of limitation does not run during any time when:
> 1. the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth.

The Defendant agrees he was continuously absent from the Commonwealth from 1980 to 2011, but argues that since his location was readily available from the State of Maryland, §5554 does not apply. Section 5554 and its predecessors have been interpreted by our Courts to withdraw the protections of the Pennsylvania statute of limitations if you are not on inhabitant or usual resident of the Commonwealth. *Com v. Wilcox*, 56 Pa.Super 244 (Pa.Super.1913), *Com. v. Cohen*, 199 A.2d 139 (Pa.Super. 1964). Thus, it would appear the action against the Defendant has been brought within the time allowed by the Pennsylvania statute of limitations.

As to a suppression of his statements because the *Miranda* waiver was not signed, that position is not supported by the cases. Pennsylvania case law requires an explicit waiver of *Miranda* rights, but the waiver may be oral. *Com. v. Bussey,* 404 A.2d 1309, (Pa. 1979), *Com. V. Baez*, 21 A.3d 1280 (Pa. Super 2011). Both officers state *Miranda* rights were given and the Defendant orally stated he understood them and was willing to speak to them. Given the Defendant admits he may have been *Mirandized,* the Court finds no grounds for suppression of the statements given by the Defendant.

Finally, the Court does not find support for the Defendant's position the information is infirm since the criminal attempt, criminal homicide count does not recite a vital part of the body. The Commonwealth submitted at the hearing the report of a medical doctor that, in his opinion, the injuries were life threatening. This report notes very serious internal injuries to the victim. However, our Courts have held that expert medical evidence is not required for a jury to determine what areas of the body are vital. *Com v. Robertson*, 874 A.2d 1200 (Pa.Super. 2005). In addition, the *Robertson* Court noted that there are other factors that can be considered by the jury in determining whether the Commonwealth has met its burden of proof on specific intent to kill. The facts alleged in the Information would support a verdict of criminal attempt homicide.

Based on the above, the Court denies the Defendant's requests contained in the *Omnibus Pre-Trial Motion*.

WHEREFORE we enter the following:

ORDER OF COURT

AND NOW, this 14th day of October, 2011, the Defendant's *Omnibus Pre-Trial Motion* is denied in all respects.

By the Court,

Thomas S. Lino
P.J.

IN THE COURT OF COMMON PLEAS, BEDFORD COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA | : No. CR-90 for the year 2011 |
| | : OTN: T-009795-2 |
| vs. | : |
| | : Charges: Criminal Attempt, |
| JOHN LEROY KROLL | : Aggravated Assault, et al. |



## RULE 1925 MEMORANDUM OPINION

AND NOW, May 31, 2012, the Court enters the following Rule 1925 Memorandum Opinion:

On October 20, 2011, the Defendant, John Leroy Kroll, plead guilty to 12 counts which included attempted criminal homicide; aggravated assault; unlawful restraint; corruption of minors; possessing instruments of crime; simple assault; recklessly endangering; terroristic threats; indecent assault; and false imprisonment. On March 5, 2012, the Court imposed an aggregate sentence of 18 ½ to 37 years in a state correctional institution. This timely appeal followed.

The Defendant has raised the following issues on appeal:

1. The Court erred when it denied Defendant's Motion to Dismiss for Lack of Prosecution as the charges against Defendant were not filed within the time allowed by the applicable statute of limitations.
2. The Court erred when it accepted Defendant's guilty plea as the charges against Defendant were pursued by the Commonwealth in violation of federal and state constitutional protections pertaining to double jeopardy as Defendant was previously convicted in Maryland of offenses in connection with the instant matter.
3. The Court erred when it denied Defendant's Motion to Suppress pertaining to the statement he made to the Pennsylvania State Police conducted at the Hagerstown Correctional Institution as Defendant was not advised of his *Miranda* rights.
4. The Court erred when it denied Defendant's Motion to Dismiss pertaining to the charge of criminal attempt-criminal homicide as the Commonwealth alleged injury to a non-vital part of the victim's body.
5. The Court erred when it denied Defendant's Motion to Withdraw Guilty Plea as it accepted a plea of guilty from Defendant that was not voluntarily knowingly and intelligently entered.
6. The Court erred when it failed to credit Defendant for time served from the date of his original incarceration on or about March 26, 1980 in Maryland in connection with the instant matter.
7. The Court erred when it accepted Defendant's guilty plea on October 20, 2011 as said date was more than one hundred eighty (180) days from the date upon

which Defendant was incarcerated in Bedford County, Pennsylvania in connection with the instant matter.

**Motion to dismiss for lack of prosecution**. This Court addressed the issue of timely prosecution in the Memorandum Opinion of October 14, 2011, copy attached, the Court's reasoning is on page three of that opinion.

**Double jeopardy based on the Maryland convictions**. The acts charged in Pennsylvania were unrelated to the Maryland kidnapping conviction. The acts in Pennsylvania were distinct from those in Maryland involving the removal of the victim from the bus stop. The double jeopardy clause of the United States Constitution provides, *". . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ."* The Constitution prohibition of double jeopardy has been held to consist of three separate guarantees; (a) protection against a second prosecution for the same offense after an acquittal; (b) protection against a second prosecution for the same offense after conviction; and (c) protection against multiple punishment for the same offense. Brown v. Ohio, 432 U.S. 161 97 S.Et. 2221, 53 L.Ed 2d 187 (1975). Our Courts have long held where a Defendant commits multiple distinct crimes, multiple punishments are appropriate. Multiple acts of criminal violence are not regarded as part of one larger criminal transaction. Com. v. Anderson, 650 A.2d 20 (Pa 1994). The Defendant's acts in removing the child from his car in Bedford County, restraining her and assaulting her, then forcing her back into his car are all different acts than

the original removal in Maryland. To hold otherwise is to award a "volume discount on crime." Com. v. Robinson, 931 A.2d 15 (Pa Super 2007).

**Denial of Motion to Suppress**. For a discussion of the Court's reasoning on the issue of suppression, referral should be made to the Court's Memorandum Opinion of October 14, 2011, page three of the opinion, copy attached. Further, by entering a voluntary and knowing guilty plea the Defendant waived this issue. Com. v. Riviera, 385 A.2d 976 (Pa Super 1978); Com. v. Rice, 318 A.2d 705 (Pa 1974).

**Denial of Motion to Dismiss**. For a discussion of the Court's reasoning on this issue referral should be made to the Court's Memorandum Opinion of October 14, 2011, page four, copy attached. Further, this issue would likewise be waived unless counsel can demonstrate an affect on the voluntariness of his plea. Com. v. Riviera, 385 A.2d 976 (Pa Super 1978); Com. v. Rice, 318 A.2d 705 (Pa 1974).

**Denial of Motion to Withdraw Guilty Plea**. The Court's reasoning on this issue is contained in the transcript of March 5, 2012, sentencing proceedings, pages one through nine. The written plea bargain in the case provided, *"Right to Withdraw Plea: The Defendant, as an express provision of the plea agreement with the Commonwealth, hereby voluntarily and knowingly waives his/her right to withdraw this plea before sentencing absent a showing of manifest injustice. The Defendant specifically waives his/her right to withdraw his plea pursuant to Pa. R.Crim.P. 591(a)."* The written colloquy in this case was attested by the

Defendant's signature. The Court relied on the opinion in Com. v. Yeomans, 24 A.2d 1044 (Pa super 2011) for the meaning of manifest injustice and the right of the Court to rely on Defendant's statements at the guilty plea.

**Credit**. The Defendant received credit for all time served after the expiration of the Maryland sentence. The charges were filed in Pennsylvania on August 16, 2010. The Defendant completed his Maryland sentenced on May 31, 2011, the Court, therefore, gave June 1, 2011 as the credit date. There would be no basis to afford credit from March 26, 1980 as that was his incarceration date in Maryland. The Court draws the appellate court's attention to the Memorandum of the Honorable W. Timothy Finan, of the Allegany Circuit Court, Allegany County, Maryland, copy attached.

**Rule 600 application**. The Defendant was taken into custody in Pennsylvania on February 15, 2011, which was the first date he was available from the authorities in Maryland. The actual charges were filed on August 16, 2010, but the Defendant was still incarcerated in Maryland at that time. The preliminary hearing was held on February 23, 2011. The information was filed on June 2, 2010. The case was listed for trial on July 11, 2011. On July 11, 2011, the Defendant requested a continuance of the case to the September 7, 2011 trial term. In September the Defendant requested a continuance to the October 18, 2011 term. Jury selection occurred on that date. Moreover, on September 26, 2011, the Defendant filed an omnibus pre-trial motion. The hearing was held on October 6, 2011, and the Court filed its' Memorandum Opinion on October 14, 2011. Therefore, all time is

excluded from July 11, 2011 to jury selection on October 18, 2011. Under these circumstances, a Rule 600 violation did not occur. In addition, the issue was waived by his plea unless the Defendant can demonstrate some effect on the voluntary nature of his plea. Com. v. Riviera, 385 A.2d 976 (Pa Super 1978).

By the Court:

Thomas S. Ling P.J.

Counsel:

For the Commonwealth:
William J. Higgins, Jr., Esquire
District Attorney

For the Defendant:
Karen S. Hickey, Esquire
Public Defender