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TABLE OF CASES REPORTED

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CHRISTINA MARKLE, Plaintiff
V.
JEFFREY S. MARKLE, Defendant

JUDGMENT

Res Judicata; Elements or Essentials of Adjudication

1. *Res judicata* consists of *res judicata* and collateral estoppel.

2. *Res judicata* applies where a party asserts that a prior judgment estops relitigation of an issue based upon the same cause of action.

3. Collateral estoppel applies where a party asserts that a prior judgment estops relitigation of an issue in a trial on a different cause of action.

4. Where the second action between the same parties is based upon a different claim or demand, the judgment in the prior action operates as an estoppel in the second action only as to those matters in issue that (1) are identical; (2) were actually litigated; (3) were essential to the judgment (or decree, as the case may be); and (4) were material to the adjudication.

APPEAL AND ERROR

Stay, Application, and Grounds For Allowance Thereon

1. The grant of a stay pending appeal is warranted if: (1) the applicant for the stay makes a strong showing that he or she is likely to prevail on the merits; (2) the applicant has shown that without the requested relief, he or she will suffer irreparable injury; (3) the issuance of a stay will not substantially harm other interested parties in the proceedings; and (4) the issuance of a stay will not adversely affect the public interest.

2. Because Wife's request for a stay from being dispossessed of the marital residence pending appeal was *res judicata* to a prior application for a protective order seeking leave to remain in the marital residence during the pendency of her appeal, it was unlikely she would succeed on the merits of her claim and a stay was not warranted.

3. Wife's application for a stay was not warranted because the Court in the prior application for the protective order seeking leave to remain in the marital residence during the pendency of the appeal addressed the relative harm to be suffered by Wife and other persons interested in the litigation when it denied the application.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW (DIVORCE)
No. 409 of 2011-D

Appearances:
Mark L. Sorice,
Greensburg, for the Plaintiff
Richard W. Schimizzi,
Greensburg, for the Defendant

BY: HARRY F. SMAIL, JR., JUDGE

OPINION AND ORDER OF COURT

Before the Court is a Motion for Application for Stay or Injunction Pending Appeal and Request for Bond Hearing filed by Plaintiff Christina Markle ("Wife") on September 22, 2014. By way of background, on August 17, 2012, the

Court, per Judge Christopher A. Feliciani, awarded Wife exclusive possession of the parties' marital residence, located at 301 East Church Street, Ligonier, Pennsylvania. On December 9, 2013, Master James R. Silvis, Esquire, entered a Report and Recommendation with respect to equitable distribution of the parties' marital estate. Among other things, the Master recommended that possession of the martial residence should pass to Jeffrey S. Markle ("Husband") on July 1, 2014.

Wife filed exceptions to the Recommendations. On May 30, 2014, Judge Meagan Bilik-DeFazio filed an Opinion and Order of Court accepting the Master's Recommendations and denying Wife's exceptions thereto. On June 5, 2014, Judge Bilik-DeFazio also issued a Final Decree of Divorce. Wife timely appealed the May 30, 2014 Order on June 12, 2014.[1]

Wife then filed a Motion for Protective Order seeking leave to remain in the marital residence during pendency of her appeal. That Motion and a subsequent Motion for Reconsideration were denied by Judge Bilik-DeFazio on June 19, 2014. Wife now seeks a stay or injunction for the same purpose. This Court heard argument and testimony on the instant Motion on September 22, 2014. Because Wife's request is *res judicata* and, in any event, she is not entitled to a stay, the Court will deny the Motion.[2]

LEGAL DISCUSSION

Even if this Court agreed that Wife were entitled to a stay, we are bound by Judge Bilik-DiFazio's determination on Wife's previous request for a protective order. "*Res judicata* literally means a matter adjudged or a thing judicially acted upon or decided. From long usage it has come to encompass generally the effect of one judgment upon a subsequent trial or proceeding." *McCandless Twp. v. McCarthy,* 300 A.2d 815, 819 (Pa. Commw. Ct. 1973). Despite that generalization, *res judicata* actually consists of two differently applied forms – *res judicata* and collateral estoppel. *See id*. *Res judicata* applies where a party asserts that a prior judgment estops re-litigation of an issue "based upon The (sic) same cause of action." *Id*. Collateral estoppel applies where a party asserts that a prior judgment estops re-litigation of an issue "in a trial on A (sic) different cause of action." *Id*.

"Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel in the second action only as to those matters in issue that (1) are identical; (2) were actually litigated; (3) were essential to the judgment (or decree, as the case may be); and (4) were 'material' to the adjudication." *McCandless,* 300 A.2d at 820-21.

Because Wife proceeds under a legally distinct request for relief, the Court believes that collateral estoppel applies here. In coming to that conclusion, we

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[1] Husband asserts that Judge Bilik-DeFazio's March 30, 2014 Order was interlocutory. However, that Order became final when Judge Bilik-DeFazio entered a Final Decree of Divorce on June 5, 2014.

[2] Having found that Wife is not entitled to a stay, we need not address her argument concerning the setting of a bond. *See* Pa.R.A.P. 1731(b).

compared the elements necessary for the grant of a stay pending appeal with the analysis upon which Judge Bilik-DeFazio denied Wife's exceptions to the Master's Recommendation that Husband be awarded the marital residence.

The grant of a stay pending appeal is warranted if: (1) the applicant for the stay makes a strong showing that he or she is likely to prevail on the merits; (2) the applicant has shown that without the requested relief, he or she will suffer irreparable injury; (3) the issuance of a stay will not substantially harm other interested parties in the proceedings; and (4) the issuance of the stay will not adversely affect the public interest.[3] *Pennsylvania Pub. Util. Comm'n v. Process Gas Consumers Grp.,* 467 A.2d 805, 808 (Pa. 1983); *see Rickert v. Latimore Twp.,* 960 A.2d 912, 923 (Pa. Commw. Ct. 2008).

In denying Wife's exception to the Master's recommendation that Husband be awarded the marital residence Judge Bilik-DeFazio observed:

> After review of the record, both Husband and Wife are emotionally connected to the marital home and regardless of whom the marital home is awarded, the other party's life-style will be somewhat disrupted.
>
> . . .
>
> Wife has provided no testimony that her ability to maintain her relationship with her father will be negatively impacted by Husband being awarded the marital home. Further, there was no evidence presented to say that the children would not simply continue to live in the marital home with Husband and return from college to the marital home as they had always done. The only evidence of a "strained relationship" between Husband and the parties daughters was provided by Wife's testimony and Husband disputed that allegation. While Husband does earn more than double Wife's salary, the Master's recommendation of awarding Wife the same of $25,000.00 cash from Husband, the $14,180.00 as the parties one-half proceeds from the sale of [other property owned by the parties], and recommending that Wife be removed from her obligations on the mortgage and line of credit, this Court finds that Wife will be able to purchase a new home with minimal disruption to her life.

Trial Court Opinion of May 30, 2014 at 7, 8.

The above analysis plainly demonstrates that Wife is unlikely to succeed on the merits of her claim. It likewise considers a set of circumstances relative to the harm to be suffered by Wife and other persons interested in the litigation if she is

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[3] We note that, in appropriate cases, a strong showing on the latter three elements will overcome a party's perceived failure on the merits of the case, which itself is often fatal. *Pennsylvania Pub. Util. Comm'n,* 467 A.2d at 809 n. 8. However, such is not the case here.

dispossessed of the marital residence. In other words, Wife's Motion is *res judicata* because the matters considered by Judge Bilik-DeFazio are identical to three of the four elements of the stay analysis, all of which were actually litigated and were both essential and material to the adjudication.

Finally, even if the instant Motion were not *res judicata*, it would nonetheless fail under the first two prongs of the stay analysis.

Wherefore we will enter the following Order:

ORDER OF COURT

And now, this 1st day of December, 2014, upon consideration of Plaintiff's Motion for Application for Stay or Injunction Pending Appeal and Request for Bond Hearing, and after review of the record, hearing oral argument, taking testimony, and permitting the submission of briefs, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion is DENIED.

BY THE COURT:
/s/ Harry F. Smail, Jr., Judge

COMMONWEALTH OF PENNSYLVANIA
V.
JAY JONES BAIRD, Defendant

CRIMINAL LAW

Post-Conviction Relief Act; Ineffective Assistance of Counsel; Recusal; Suppression; Corpus Delicti

1. Ineffective assistance of counsel provides a basis for relief under the Post-Conviction Relief Act (PCRA) only when it so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

2. To merit relief based on an ineffectiveness claim under the PCRA, a petitioner must show that: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice.

3. Only evidence admitted as exhibits may be sent out with the jury during deliberations.

4. It has long been the rule in this Commonwealth that a statement given after being advised that one has failed a lie detector may be admitted into evidence.

5. A party that seeks recusal of a judge bears the burden to produce evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially.

6. It is preferable for the judge who presided at trial to preside over any post-conviction proceedings because his or her familiarity with the case will likely assist the proper administration of justice.

7. "Corpus delicti" consists of two elements: (1) the occurrence of a loss or injury; and (2) some person's criminal conduct as the source of that loss or injury.

8. Counsel cannot be deemed ineffective for failing to raise a meritless claim.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 941 of 2008
No. 942 of 2008

Appearances:
John W. Peck, District Attorney,
Westmoreland County, for the Commonwealth
Jay Jones Baird,
Pro Se

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION AND ORDER OF COURT

AND NOW, this 15th day of December, 2014 upon consideration of the Defendant's *pro-se* Motion for Post Conviction Collateral Relief, and his Amended *pro-se* PCRA Petition and Written Answer to this court's Notice of Intent to Dismiss, and upon consideration of the comprehensive No-Merit letter submitted by PCRA counsel, James H. Robinson, Esq., (a copy of which has been attached to this Order) and upon a thorough review of the record in this case, it

appears to this Court that there are no genuine issues of material fact, no entitlement to relief and no purpose to be served in further proceedings.

PROCEDURAL HISTORY:

The defendant, Jay Jones Baird ("Baird") was charged by criminal information filed at case number 941 C 2008 with Possession of a Controlled Substance (35 P.S. §780-113(a)(16)) and Possession with the Intent to Deliver a Controlled Substance (35 P.S. §780-113(a)(16)). He was also charged at case number 924 C 2008 with a general charge of Criminal Homicide (18 Pa.C.S. 2501(a)) and Robbery (18 Pa.C.S. §3701(a)(1)(i)). Baird filed an original Omnibus Pretrial Motion and subsequent Supplemental Omnibus Pretrial Motions, wherein he sought the suppression of certain evidence seized in these cases and the suppression of statements and a confession alleged to have been made by Defendant.[1] A hearing on Baird's Motions was held on December 15, 2008, and the motions were denied by Opinion and Order of Court dated March 30, 2009.

Baird proceeded to a trial by jury in which the two cases were consolidated, and he was found guilty on all charges on July 10, 2009. He was sentenced on September 29, 2009 to a mandatory term of life imprisonment on the murder charge and concurrent sentences on the remaining charges. He filed timely post-sentence motions, which were denied by the trial court. Baird's timely direct appeal to the Superior Court of Pennsylvania (626 WDA 2010) and the Supreme Court of Pennsylvania (409 WAL 2011) resulted in the affirmation of Baird's sentences. His *pro-se* Petition for post-conviction relief is timely-filed.

FACTUAL HISTORY:

The charges in this case arise from an incident that occurred on or about January 20, 2008 in the City of Latrobe, Westmoreland County which resulted in the death of forty-three year-old Bradley Holnaider. The trial testimony established that Holnaider was a drug user who used heroin and cocaine as his primary drugs of choice. The trial testimony also established that the defendant, Jay Baird, and a number of his acquaintances were also drug users, and that Holnaider and the defendant were acquainted solely because of their mutual drug use.

Jacob Adamerovich testified that he had seen Holnaider on January 17, 2008, when Holnaider stayed at his residence for a few days. Adamerovich testified that he had picked up Holnaider at Baird's apartment, where he had previously been staying. He testified that he and Holnaider watched TV and consumed heroin and crack cocaine while at his residence, until Holnaider complained of being "dope

[1] An additional portion of the Motion, involving discovery matters, was resolved by the Commonwealth and Baird prior to the hearing.

sick" when they ran out of heroin.[2] (TT 59-62).[3] Holnaider and Adamerovich tried to find heroin to purchase, but could not. Eventually, on Sunday, January 20, 2008, the two were able to purchase a brick of heroin from a black male named "G." They used some of the heroin, sold some of the heroin, and returned to Latrobe. (TT 64-77).

Adamerovich testified that he took Holnaider to Baird's apartment, where he met Baird. Holnaider had his belongings, including what was described as a toiletry bag. Inside the toiletry bag was a coin purse that contained approximately thirty Suboxone tablets, some change and Holnaider's heroin. The toiletry bag also contained paraphernalia used for the ingestion of heroin. (TT 78-81, 91-94). Holnaider introduced Adamerovich to Baird, and the three talked. During their conversation, Baird repeatedly asked Holnaider to "be generous" because he was "dope sick" and needed a loan for some heroin. (TT 85-87, 109). Adamerovich did not believe that Holnaider gave Baird any heroin or any money before he eventually left the apartment, even though he knew that Holnaider had approximately $240.00 to $250.00 and heroin in his possession. Holnaider did, however, loan Baird some cotton from his toiletry bag. (TT 89-90, 95, 105, 110).

Michelle Bellish testified that she had had a previous relationship with Holnaider, and that they remained in close contact because they had a daughter together. She further testified that she knew that Holnaider had been staying at Baird's apartment, and she had seen him there on Sunday, January 20, 2008. (TT 116-119). Bellish testified that she stopped at Baird's apartment in Latrobe between 8:00 p.m. and 9:00 p.m. on that date after she had attended a Super Bowl party, because Holnaider owed child support and was going to give her some money. (TT 121-122). Bellish stated that Holnaider did not look well, and that he explained that he had not used heroin in a few hours, that he was becoming "dope sick," and that he did not want to use the heroin that he had because he needed to sell it. Bellish testified that Holnaider gave her heroin instead of cash for child support, even though she knew that he had a significant amount of money in his possession. Bellish indicated that Baird was also present for this conversation. (TT 123-124, 130-131). Bellish also testified that she had overheard a conversation between Holnaider and Baird a week prior wherein Baird asked Holnaider for heroin, and that Holnaider had declined, telling Baird that he had already given him enough and that Baird owed him a lot of money. (TT 126-127).

Donald Hantz and Danielle Schall were friends of both Holnaider and Baird, and lived in an apartment in Latrobe some distance from Baird's. They too shared the common bond of drug use, specifically heroin use. Hantz recalled that he

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[2] Witnesses at trial consistently testified that "dope sick" came from heroin withdrawal, and manifested symptoms such as excessive sweating, and extreme flu-like symptoms, nausea and vomiting, and difficulty sleeping. The symptoms would be relieved by the use of heroin.

[3] Numerals in parentheses preceded by the letters "TT" refer to specific pages of the transcript of the trial in this matter, held July 6 -10, 2009, which has been made a part of the record herein.

received a telephone call from Baird at approximately noon on Monday, January 21, 2008. Baird indicated that he was at work, and asked if he could stop by their apartment on his lunch break. (TT 135). Hantz testified that Baird appeared to be "normal," but that he asked if Hantz could get him any heroin. Baird told Hantz that he would be willing to pay up to three times the normal price for each bag of heroin, which was highly unusual. (TT 136-138). Baird stated that had been paid at work and therefore had extra money available. Hantz testified that he saw Baird in possession of "quite a few hundred dollars." (TT 139, 143). Hantz called a number of people who he thought might have heroin to sell, including Bradley Holnaider. Hantz testified that when he called Holnaider's telephone, it went directly to voice mail, which he thought was unusual. (TT 156).

As Hantz was unable to find a heroin source at noontime, Baird returned later that afternoon after work. Hantz testified that Baird did not appear to be "dope sick" either time he came to the apartment that day, although he did appear to be anxious, and couldn't wait to get high. (TT 140-142). Danielle Schall also testified that Baird did not appear to be "dope sick" when she saw him that afternoon. (TT214-215). Hantz again tried to locate a heroin source, and noted that Baird was showing off that he had a large sum of money, throwing money into the air as if it was "no big deal... It was like money was-- came easy." (TT 143-144). Schall recalled the same incident, noting that she had never before seen Baird with so much money. (TT 205-207). Eventually, an individual named John DeAnnuntis came to the apartment and drove Baird and Hantz to Pittsburgh to buy heroin. (TT 145). During this drive, Baird told Hantz and DeAnnuntis that he had owed Holnaider money, perhaps as much as seven hundred dollars. (TT 153, 155-156).

Baird purchased thirty eight bags of heroin in Pittsburgh, and the threesome returned to Hantz' apartment in Latrobe, where they used some of the heroin and tried to sell some of the heroin that they had just purchased. (TT 146-149). Danielle Schall testified that Baird returned from Pittsburgh with "a good bit" of heroin, perhaps thirty bags or more. (TT 209-210). Some time later, Hantz and Schall both observed Baird in the bathroom, "completely out of it," and testified that several people offered to give Baird a ride home. Baird refused the offers of rides, even though it was January and his apartment was quite some distance away. (TT 152, 212-214). He eventually left Hantz' apartment at approximately 9:00 or 9:30 p.m. on January 21, 2008, and began his hour-long walk home. (TT 152). Hantz further testified that Baird called him on Wednesday, January 23, 2008, and asked him if he wanted to buy some Suboxone, or if he knew anyone who would trade Suboxone for heroin. Hantz indicated that this was very unusual, because he had never known Baird to have Suboxone or to sell it. (TT 154-155).

John DeAnnuntis confirmed Hantz' testimony, noting that on Monday, January 21, 2008, he observed Baird in Hantz' apartment in possession of a large amount of money in an envelope marked "rent money," and that Baird wanted to buy

heroin and he stated that he would pay more than usual for the drug. (TT 172-176). He observed that Baird was excited to "get high." (TT 176). DeAnnuntis testified that he drove Baird and Hantz to Pittsburgh, where Baird purchased thirty to forty bags of heroin. (TT 178-182). DeAnnuntis confirmed that Baird gave both him and Hantz several bags of heroin for their trouble. (TT 183).

On January 21, 2008 at approximately 10:31 p.m., Officer Ray Dupilka of the Latrobe Police Department was dispatched to 513 Ligonier Street in Latrobe for a report of an unresponsive male. Upon his arrival at the second floor apartment, he encountered the defendant, Jay Baird, inside the apartment. (TT 228).

During initial interviews that evening, the defendant told Officer Dupilka that Holnaider had been staying with him in the apartment for a while, and that he had returned home that evening after spending time with friends to find Holnaider unresponsive in the living room, and that he called 911 after he could not prompt any response from him. (TT 230-232). Baird described the position in which he found Holnaider. He further told Officer Dupilka that Holnaider had arrived at his apartment on the evening of January 20, 2008, and that was the last time he saw Holnaider alive. Baird indicated that Michelle Bellish had visited the apartment after Holnaider had arrived, and after she left, Holnaider received a call and told Baird that he was going to "Frank's Lounge." Baird told Officer Dupilka that he actually left the apartment before Holnaider with the intention of walking to the home of his friend, Jessica Schall, but that he never actually made it to her house. He told the officer that he did not have enough cell minutes on his pre-paid cell phone to call her house, so he returned home and went to sleep. (TT 233-236). Baird further indicated that he woke up in the morning and went to work. He visited the apartment of Donald Hantz and Danielle Schall after work, and stayed there until approximately 9:30 p.m. Baird then told Officer Dupilka hat he rented some videos and returned home, where he had found Holnaider's body. (TT 236-237). He opined that Holnaider had suffered a drug overdose. (TT 254).

Officer Dupilka testified that his initial examination of Holnaider's body revealed red, ligature bruising on Holnaider's neck, which was documented through photographs taken at the scene. (TT 245-246). Concerned, Officer Dupilka contacted the Westmoreland County Detective Bureau for assistance. After detectives arrived, Baird agreed to a search of the residence. While Detective Hugh Shearer processed the apartment for any evidence, Baird spoke with Officer Dupilka and Detective Tony Marcocci initially in his apartment and then in a neighboring apartment in the early morning hours of January 22, 2008. (TT 246, 250-251). Baird initially repeated his earlier statement to Officer Dupilka; however, in a subsequent interview, he provided additional details of his activities.

Baird told police that after he decided to abandon his trip to Jessica Schall's home on Sunday night, he walked a considerable distance to an A-Plus Mini Mart where he purchased minutes for his cell phone and a hot drink. He provided a

receipt for that transaction. He further stated that he then began walking back to his apartment, but stopped at a Domino's Pizza and purchased a pizza. He then returned home, where he went directly to his bedroom and ate the pizza. He told police that he did not check to see if Holnaider had returned. He indicated that he finally went to sleep and awoke the next morning for work. He again claimed that he did not check to see if Holnaider was in the apartment. He said that he worked his shift, spent Monday afternoon and evening at the Hantz/Schall apartment, and returned to find Holnaider's unresponsive body in his living room. He made no mention of any heroin purchases or usage. (TT 254-262). He again described the position of Holnaider's body when he first found him, and acknowledged that he had moved Holnaider onto his back at the direction of the 911 center. (TT 262). Baird indicated that he had seen Holnaider with about sixty dollars the night before, and acknowledged that Holnaider was a heroin user. He further stated that he believed that Holnaider kept his heroin in the black toiletry bag which was found close to his body. (TT 263-264). Officer Dupilka testified that a search of Holnaider's toiletry bag yielded no money heroin, drugs or other illegal substances. They did, however, find drug paraphernalia inside the bag. (TT 266-267). Through later interviews with other individuals, police learned that Holnaider kept Suboxone tablets and heroin in the toiletry bag, along with money, and that he had all three when he arrived at Baird's apartment on January 20, 2008. (TT276-278).

An autopsy was performed on the body of Bradley Holnaider later in the day on January 22, 2008. The ligature marks originally noted by Officer Dupilka were also of significance to forensic pathologist Cyril Wecht, who testified at trial that Holnaider died not of a drug overdose as Baird suggested, but as a result of asphyxiation due to strangulation. (TT 490, 520). Armed with growing suspicions, the police obtained a search warrant for Baird's apartment and for Holnaider's cellular telephone records. (TT 268).

A search of Baird's apartment was conducted on the afternoon of January 22, 2008. Baird returned from work while the police were present at his apartment, and Officer Dupilka informed him that the results of the autopsy were not consistent with death from a drug overdose. Baird then provided additional statements about his activities on January 20 and 21, and asked if he was a suspect. He stated that he could not have caused Holnaider's death because he could not have overpowered someone of Holnaider's size. He suggested that police look for someone named "James" with whom Holnaider had been staying previously. (TT 270-272).

Based upon certain evidence obtained as a result of the autopsy, police obtained another search warrant for Baird's apartment on January 23, 2008, and executed the search warrant at approximately 6:00 p.m. on that same day. (TT 281). Upon arriving at the apartment, officers first knocked loudly on the door of the apartment and announced their presence at least six times. There was no

response from inside the apartment. There also was no response from Baird when officers attempted to contact him by telephone. (TT283-284). It was then that the officers decided to remove the front door of the apartment by removing the hinge pins from the door. (TT 285). After the officers had removed the pins and were about to remove the door, the front door was opened by Baird from the inside, causing it to collapse onto the officers. (TT 285-286). Officer Dupilka testified that he was startled by Baird's actions, and immediately asked him to come out into the hallway, where he conducted a pat-down search of Baird for officer safety. (TT 285-286). By this point, Officer Dupilka knew that heroin use was involved in this case. Therefore, rather than running his hands up and down Baird's pants, he used a "squeezing motion" when conducting the pat-down so as to lessen the likelihood of sustaining a needle-stick injury. (TT 287) During the pat-down of Baird, Officer Dupilka felt several tablets inside plastic in the left front pocket of Baird's pants. Upon retrieving this object from Baird's pocket, Baird advised Officer Dupilka that the items were five (5) suboxone tablets packaged in a plastic bag. (TT 287).

The officers then proceeded to search Baird's apartment pursuant to the search warrant. A marijuana smoking pipe was located in plain view on the nightstand beside Baird's bed, and was seized by the officers. Also seized were a tan leather chair, a tan leather ottoman, and a Phillips universal remote control. (TT 288). During the search, Baird insisted that the officers search the kitchen garbage can, suggesting that there might be evidence in that item. Detective Kuhns of the Westmoreland County Detective Bureau complied, and located several empty heroin packets. Baird suggested that these empty packets had belonged to the decedent. (TT 289).

Baird was placed under arrest for possession of the Suboxone tablets, and he was transported to the Latrobe Police station. (TT 291). With the previous knowledge that Baird had contacted Donald Hantz earlier that day seeking to sell or trade Suboxone tablets, Officer Dupilka asked Baird if he wanted to be interviewed about how he had obtained the Suboxone tablets. (TT 290, 292). He indicated that he would speak to the officers, was *Mirandized* and signed a written Waiver of Rights form provided by the police. The interview began at approximately 7:12 p.m. on January 23, 2008. (TT 292-296; Commonwealth's Exhibit 6).

Baird initially indicated that the tablets belonged to his fiancé. (TT 297). When confronted with certain conflicting evidence that the Suboxone tablets had belonged to Holnaider, Baird recanted his original statements and told police that he had purchased the tablets from Holnaider before he died. (TT 299). After further questioning on this subject, Officer Dupilka told Baird that he thought that he was lying. He also told Baird that there was certain information that the police had uncovered in the investigation that called into question whether Holnaider had died of an overdose. (TT 300-304). When Baird again denied being involved in

the death of Bradley Holnaider, and expressed concerns that Officer Dupilka and Detective Richard Kranitz did not believe him, he agreed to talk with Westmoreland County Detective Paul Burkey.

Detective Paul Burkey arrived at the Latrobe Police station shortly before 10:00 p.m.. He introduced himself to Baird, and Baird again consented to the interview. Following the interview, Detective Burkey confronted Baird with what he believed to be untruthful answers to his questions. Baird then stated to Detective Burkey, "I'm fucked." Detective Burkey asked Baird what he meant by that, and Baird stated, "I did it."[4]

Detective Burkey then immediately asked Officer Dupilka to come into the room and review the results of the interview. As he was doing so, Baird again stated, "I'm fucked." (TT 308). Baird then began to cry, and lowered his head. Officer Dupilka then asked Baird to help him to understand what happened inside his apartment, and Baird admitted to killing Bradley Holnaider after they got into an argument about a debt that he owed to Holnaider. He admitted that during the struggle, he wrapped an electrical cord around Holnaider's neck and choked him to the point that he killed him. He stated that he guessed that he was big enough to take care of Holnaider. (TT 308-309). When confronted with the lack of physical evidence to support his story of a fight between the two of them, Baird put his head in his hands, and admitted that he had actually strangled Holnaider as Holnaider slept in the living room chair. (TT 310). Baird then provided a lengthy, detailed description of the events that took place on January 20 and January 21, 2008. (TT 311-315). Police later discovered physical evidence which was consistent with Baird's confession. (TT 315-316).

Finally, Baird agreed to participate in a videotaped interview. (TT 319, 324-325, Commonwealth Exhibit 13).[5] Following the conclusion of the videotaped interview and confession, Baird was placed under arrest for homicide, robbery and drug violations.

Baird testified at trial and denied that he owed a drug debt to Holnaider. (TT 616). He reverted back to the original statements that he had given to police, indicating that he and Holnaider had both left the apartment on the evening of January 20, 2008, and that he did not check on Holnaider or know if Holnaider

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[4] The jury did not learn that the real purpose for Det. Burkey's interview of Baird was in connection with a voice stress test, which Baird had agreed to take. Following the completion of the voice stress test, Det. Burkey provided the results of the voice stress test to Baird and explained which answers indicated low levels of stress, indicating truthfulness, and which answers indicated high levels of stress, indicating deception. (Omnibus Pretrial Motion Hearing Transcript at 91). While looking at the results of the test, and in particular at an answer to a question, "did you kill... Bradley?" Baird stated, "I'm fucked." (Omnibus Pretrial Motion Hearing Transcript at 91). All evidence related to the administration of the voice stress test and the results thereof were not admitted at trial.

[5] The video interview was played for the jury, and a detailed transcription of the recorded interview and confession appears at pages 326 – 354 of the trial transcript.

had returned to the apartment when he himself returned. He testified that he woke up on the morning of January 21, 2008, went to work, spent time at the Hantz/Schall apartment, went to Pittsburgh to buy heroin, returned to th Hantz/Schall apartment and used more heroin, and then eventually returned home, where he discovered Holnaider's body. (TT 622-634). He asserted that the confessions given to Officer Dupilka, Detective Kranitz and Detective Burkey were the result of threats, coercion, exhaustion and sickness from heroin withdrawal.

DISCUSSION OF ISSUES PRESENTED:

Baird alleges that he is entitled to post-conviction relief under the PCRA based upon allegations of ineffective assistance of trial counsel, John Sweeney, Esq. The burden is on a defendant to establish by a preponderance of the evidence that he is entitled to PCRA relief. Of significant importance is the threshold that Baird must meet: "Ineffective assistance of counsel provides a basis for relief under the Post Conviction Relief Act (PCRA) only when it so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Appel,*** 689 A.2d 891, 547 Pa. 171 (1997), *reargument denied*.

> To merit relief based on an ineffectiveness claim under the PCRA, a petitioner must show that such ineffectiveness "in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *42 Pa.C.S. § 9543(a)(2)(ii)*. We have interpreted this standard to require a petitioner to prove that: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice. ... To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's error or omission, the result of the proceeding would have been different. ... A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding. ... Moreover, "[t]his Court will not consider abstract allegations of ineffectiveness; a specific factual predicate must be identified to demonstrate how a different course of action by trial counsel would have better served [the petitioner]'s interest." ... A failure to satisfy any one of the three prongs of the test for ineffectiveness requires rejection of the claim.

Commonwealth v. Cook, 597 Pa. 572, 604-605, 952 A.2d 594, 613-614 (2008) (internal citations omitted).

I. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT A DEFENSE OF INTOXICATION/ DIMINISHED CAPACITY AT TRIAL?

In his initial *pro-se* PCRA Petition, Baird first claimed that he is entitled to PCRA relief based upon trial counsel's alleged ineffectiveness for failing to raise the defense of intoxication and/or diminished capacity at his trial. Although Baird subsequently withdrew this claim in his Amended PCRA Petition and failed to address it at the hearing held in this matter, a review of the record shows that any such allegation would be meritless. PCRA Counsel reviewed the record carefully, as has this court. This court clearly recalls the testimony presented in the trial of this matter. Following questioning by the police, Baird twice confessed to the killing of Bradley Holnaider, both verbally and as recorded on video. Although at trial Baird claimed that these confessions were the involuntary product of coercive police interrogation, this court determined otherwise, as did the jury as evidenced by their verdict. At no time prior to trial nor during trial, when he made the decision to take the stand and testify in his own behalf, did Baird claim that the killing was done at a time when he was under the influence of drugs or alcohol to a degree that would have merited a diminished capacity defense. Rather, he denied any involvement in the killing, maintaining that he discovered Holnaider's body upon his return to his Latrobe apartment after a day of working, socializing and purchasing heroin.

PCRA Counsel represents in his No-Merit letter that trial counsel based his trial strategy on Baird's steadfast assertions that his confession had resulted from threats, coercion, exhaustion and sickness from heroin withdrawal. Baird cannot now claim that counsel was ineffective for failing to raise a defense of intoxication/diminished capacity when such a defense is completely inconsistent with Baird's own testimony at trial. In light of his trial testimony, Baird is unable to establish that trial counsel's failure to raise such a defense was unreasonable under the circumstances, or that such a strategy would have had any merit whatsoever, or that he was in any way prejudiced by counsel's failure to do so. Even had he not withdrawn this allegation, Baird's claim of ineffective assistance of counsel on this basis lacks merit.

II. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S REFUSAL TO ALLOW THE JURY TO VIEW CERTAIN EVIDENCE AT TRIAL?

In his initial *pro-se* PCRA Petition, Baird also claimed that he was entitled to PCRA relief based upon trial counsel's alleged ineffectiveness for failing to object to the trial court's refusal to allow the jury to see the autopsy report and cellular telephone records. Although Baird subsequently withdrew this claim in his Amended PCRA Petition and failed to address it at the hearing held in this

matter, a review of the record shows that any such allegation would be meritless. Although Baird did not specifically point out in the record where this error allegedly occurred, the court presumes that he is referencing the question sent out by the jury during deliberations. During the course of jury deliberations, the following discussions took place following the submission of two jury questions sent to the court:

THE COURT: It is now 5:57 p.m. I received two questions from the jurors.

No. 1, can we have the autopsy report, and then it also states the approximate time of death.

And the second question I just received, were the cell phone records put in evidence and can we see them. I am going to send a note back to them saying that the autopsy report was not entered into evidence and they must rely on their recollection of the evidence and that the cell phone records were not put into — there were no cell phone records that were placed into the record.

MR. PECK: That's correct.

THE COURT: Do you agree?

MR. SWEENEY: Yes.

(TT 837). The court had the jury question marked as an exhibit, and the court's response to the question was recorded and sent out to the jury. (TT 838).

Rule 646 of the Pennsylvania Rules of Criminal Procedure clearly sets forth the type of materials which may and may not be in the possession of the jury during deliberations:

> (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C).
>
> * * *
>
> (C) During deliberations, the jury shall not be permitted to have:
>
> (1) a transcript of any trial testimony;
>
> (2) a copy of any written or otherwise recorded confession by the defendant;
>
> (3) a copy of the information or indictment; and
>
> (4) except as provided in paragraph (B), written jury instructions.
>
> (D) The jurors shall be permitted to have their notes for use during deliberations.

Pa.R.Crim.P. Rule 646. Had the autopsy report been admitted into evidence as an exhibit, it certainly would have been proper for the jury to have access to that document during deliberations. ***Commonwealth v. Kingsley,*** 480 Pa. 560, 578, 391 A.2d 1027, 1036 (1978). Rule 646(A) specifies that only "exhibits" may be sent out with the jury during deliberations. Neither the autopsy report nor any cell phone records were made exhibits at trial; therefore any objection to the court's decision and response to the written jury question was entirely proper, and any objection thereto would have been completely meritless. For this reason, trial counsel could not possibly be found to have been ineffective.

Based upon the foregoing, even had Baird not withdrawn this particular allegation of error, Baird's claim of ineffective assistance of counsel on this basis lacks merit.

III. WHETHER THE ADMISSION OF A REDACTED WAIVER OF RIGHTS FORM CONSTITUTED ERROR, AND THE FAILURE TO OBJECT TO THIS EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL?

In his amended *pro-se* PCRA Petition, Baird raises numerous claims for relief, making bald allegations of crimes having been committed by the police, by his attorneys and by this court. He sought this court's recusal and accused this court of being a part of a conspiracy to violate his rights. However, Baird appears to have abandoned all but one of these allegations at the time of the PCRA hearing held on October 30, 2014. Baird's claim for relief under the PCRA apparently involves his objection to the admission of a redacted consent form (similar to a *Miranda* waiver form) at trial. The admission of this document, Baird charges, was done as part of a conspiracy and constituted numerous crimes.

The document at issue was a standard consent form used by Det. Burkey prior to performing the voice stress analysis at the Latrobe Police Department. This document was admitted in its entirety at the pre-trial suppression hearing held in this matter, but was partially redacted prior to its admission in the jury trial. Specifically, any reference to "voice stress test" or "vice stress analysis" was blackened out so that the jury could not see those terms. There is no authority in Pennsylvania allowing the results of a voice stress test to be admitted as evidence against an accused at trial. Therefore, the jury could not know that Baird had submitted to a voice stress analysis. There is no such prohibition against the use of statements made voluntarily following that test. ***Commonwealth v. Hunzer,*** 868 A.2d 498 (Pa.Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005). "It has long been the rule in this Commonwealth that a statement given after being advised that one has failed a lie detector may be admitted into evidence." ***Commonwealth v. Watts,*** 319 Pa.Super. 179, 184, 465 A.2d 1288, 1291 (Pa.Super.1983), *citing* ***Commonwealth v. Jones,*** 341 Pa. 541, 19 A.2d 389 (1941) and ***Commonwealth v. Hipple,*** 333 Pa. 33, 3 A.2d 353 (1939).

Baird suggested that the use of the redacted waiver form at trial constituted forgery and a host of other crimes that he alleged were committed by the Commonwealth and his trial attorney and, ultimately, this court. However, Baird's suggestion is ludicrous. The act of redaction was done to protect his rights, not to violate them. The use of the redacted form was entirely proper. Counsel was not ineffective for failing to object to the admission of the redacted form because there was a reasonable basis for his failure to do so; appellate counsel was not ineffective for failing to raise this issue on appeal because the issue lacks any possible merit, and PCRA counsel was not ineffective for the same reason.

While much of Baird's amended PCRA Petition was comprised of allegations of a grand conspiracy by all individuals involved in this case, he failed to present a scintilla of evidence at the PCRA hearing to support his assertions. Having failed to present any evidence in support of this proposition other than his own assertions, he has failed to sustain his burden of proving that he is entitled to relief under the Post-Conviction Relief Act.

Baird also asked that this court recuse itself because of the criminal activity that he alleged was committed in connection to the admission of the "forgery." "A party that seeks recusal of a judge bears the burden 'to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially.'" ***Commonwealth v. Hutchinson,*** 25 A.3d 277, 319 (Pa. 2011), *citing* ***Commonwealth v. Abu-Jamal,*** 553 Pa. 485, 720 A.2d 79, 89 (1998). Our appellate courts have consistently held that, "in general, it is preferable for the judge who presided at trial to preside over any post-conviction proceedings because his or her familiarity with the case will likely assist the proper administration of justice." *Id*. *See also* ***Commonwealth v. King,*** 576 Pa. 318, 325, 839 A.2d 237, 241 (2003); ***Commonwealth v. Abu-Jamal,*** 553 Pa. 485, 720 A.2d 79, 89 (1998). This is in accord with Pa.R.Crim.P. Rule 903(C), which provides that "The trial judge, if available, shall proceed with and dispose of the petition in accordance with these rules, unless the judge determines, in the interests of justice, that he or she should be disqualified." *Pa.R.Crim.P. Rule 903(C)*. Baird produced no evidence whatsoever of bias, prejudice or unfairness on the part of this court, and his request for recusal is meritless.

IV. WHETHER THE DEFENDANT'S CONFESSION WAS OBTAINED IMPROPERLY AND THEREFORE SHOULD HAVE BEEN SUPPRESSED?

Baird alleged in his Amended PCRA Petition that his statements to the police made at the Latrobe Police Station should have been suppressed for numerous reasons. Baird produced no evidence whatsoever at the PCRA Hearing to support his allegations. Additionally, the admissibility of Baird's confession was fully litigated prior to trial, but not raised on appeal. Any challenge to this court's ruling regarding the admissibility of the confession has therefore been waived. Insofar as

Baird raises these issues under the umbrella of ineffective assistance of counsel, he avoids the finding of waiver. He did not, however, present any evidence of counsel's ineffective assistance at the time of the PCRA Hearing.

First, Baird suggested that his statements should have been suppressed because it is the policy of the Westmoreland County Court, the District Attorney's Office, the Public Defender's Office, the Latrobe Police Department and all employees thereof, to work together to deprive defendants of their state and federal constitutional rights by causing unlawful confessions and convictions. He presented no evidence of the existence of this policy.

Next, Baird alleges that he has a very low intellect and that he did not understand anything that was going on, and in fact notes that his fellow inmate prepared all of his pleadings because the fellow inmate, a Mr. Glenn Murray, "is competent in interpreting various aspects of the law." Again, Baird presented no evidence of his lack of intellectual ability to understand any of the circumstances surrounding his arrest and eventual confession, the pre-trial proceedings, the trial and any post-trial matters. This court recalls the lengthy pre-trial hearing on the admissibility of Baird's confession, especially the video-taped confession, which did not suggest to the court any issue of low-functioning or below-average intellect.

Baird also alleged that the investigating officers, specifically Det. Burkey and Det. Dupilka, lied and that the Commonwealth failed to establish a *corpus delicti*. There is no evidence in the record that the officers fabricated any of their testimony, nor has Baird produced any evidence that anything of that magnitude occurred. Further, the evidence presented at trial clearly proved the *corpus delicti* required before a confession can be admitted.

> The well-established *corpus delicti* rule provides that "a criminal conviction may not stand merely on the out[-]of[-]court confession of one accused, and thus a case may not go to the fact[-]finder where independent evidence does not suggest that a crime has occurred." *Commonwealth v. Edwards,* 521 Pa. 134, 555 A.2d 818, 823 (1989). This rule is rooted in the hesitancy to convict a person of a crime solely on the basis of that person's statements. *Commonwealth v. Turza,* 340 Pa. 128, 16 A.2d 401, 404 (1940).
>
> The *corpus delicti* consists of two elements: (1) the occurrence of a loss or injury, and (2) some person's criminal conduct as the source of that loss or injury. *Commonwealth v. Ware,* 459 Pa. 334, 329 A.2d 258, 274 (1974) (citation omitted). The *corpus delicti* may be proven by circumstantial evidence. *Commonwealth v. Forman,* 404 Pa.Super. 376, 590 A.2d 1282, 1285 (1991).

Commonwealth v. Cuevas, 61 A.3d 292, 294 -295 (Pa.Super. 2013)(footnote omitted). The evidence established that Mr. Holnaider died as a result of asphyxiation due to strangulation, and that the manner of death was homicide. The corpus delicti was therefore proven and the admission of the confession was proper.

Baird alleges that John Sweeney, Esq. was ineffective for failing to preserve and raise these issues on direct appeal, and that James Robinson, Esq. was ineffective for failing to identify them and raise them in a PCRA Petition. However, as they are clearly meritless, counsel cannot be deemed to have been ineffective for failing to raise them. ***Commonwealth v. Jones,*** 590 Pa. 202, 912 A.2d 268, 278 (2006) ("Counsel cannot be deemed ineffective for failing to raise a meritless claim.") *See also,* ***Commonwealth v. Weiss,*** 81 A.3d 767, 783 (Pa. 2013).

V. WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO ITS RESPONSIBILITY TO DETERMINE THE VOLUNTARINESS OF THE CONFESSION?

Baird alleges that the trial court erred in failing to instruct the jury regarding their evaluation of his confession, and that counsel was ineffective for failing to preserve the issue for appeal, failing to raise it on appeal and, presumably, for failing to identify the issue for purposes of the PCRA. A review of the record clearly shows that the proper instructions were, in fact, given by the trial court, and therefore, counsel was not ineffective.(TT 826-831).

VI. WHETHER GOVERNMENTAL OFFICIALS COMMITTED CRIMINAL ACTS IN CONNECTION WITH THE INVESTIGATION OF DEFENDANT?

The remainder of Baird's Amended PCRA Petition, which was admittedly not prepared by him or by an attorney on his behalf, but by a fellow inmate whose legal abilities were touted by Baird but who does not appear to be a practicing attorney, level serious charges of criminal activity on the part of police officers, prosecuting attorneys, defense attorneys, and this court. There crimes are alleged by Baird to have occurred in the first interrogation, during the administration of the voice stress analysis test, during the second interrogation, during the video-recorded third interrogation, during testimony presented at the hearing on Baird's Omnibus Pre-trial Motion during other pre-trial proceedings, at trial, on appeal and during these PCRA proceedings. The crimes alleged range from Harassment, Stalking and Intimidation of Witnesses to Criminal Conspiracy, Official Oppression, Perjury, Obstructing the Administration of Law and Aiding in Consummation of Crime. Other than his bald assertions, however, Baird presented no evidence whatsoever of any wrongdoing (criminal or otherwise) that

could possibly merit PCRA relief. Having filed to present such evidence and meet the burden imposed upon him by the Post-Conviction Relief Act, his claims must fail.

Accordingly, the following Order shall issue:

ORDER OF COURT

AND NOW, this 15th day of December, 2014, for the reasons set forth in the preceding Opinion, it is hereby **ORDERED** as follows:

1. For the reasons set forth in the foregoing Opinion, the defendant's *pro-se* Petition for Post-Conviction Relief and the *pro-se* Amended PCRA Petition filed pursuant to the Post Conviction Relief Act, (42 Pa.C.S. §9541, *et. seq*.) are hereby **DISMISSED**.

2. The Motion of PCRA counsel, James Robinson, Esq., to Withdraw as Counsel of Record for the defendant in this matter, based upon lack of meritorious issues is **GRANTED**.

3. **THE DEFENDANT IS NOTIFIED THAT ANY APPEAL TO THE SUPERIOR COURT OF PENNSYLVANIA FROM THIS COURT'S DISMISSAL OF HIS *PRO-SE* PCRA PETITIONS MUST BE FILED WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER OF COURT.** The defendant is free to proceed on appeal *pro-se* or with private counsel of his choice. Should he desire to pursue an appeal *pro-se*, he should also file the required Motion to Proceed *in forma pauperis* with this court.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

TAMMY GREELY, Administratrix of the
Estate of RALPH GREELY (deceased), Plaintiff
V.
VERIZON PENNSYLVANIA, INC., VERIZON SERVICES CORPORATION,
WEST PENN POWER COMPANY and WEST PENN POWER COMPANY
d/b/a ALLEGHENY POWER, Defendants
V.
U.S. UTILITY CONTRACTOR COMPANY, INC., Additional Defendant

NEGLIGENCE

Elements; Duty of Care; Duty Owed by Electric Supplier

1. Elements of cause of action based on negligence are duty, breach of that duty, causal relationship between breach and resulting injury, and actual loss.

2. The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff.

3. Determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.

4. Absent a special relationship giving rise to a duty of care, an electric utility has no duty other than to keep its poles and power lines from malfunctioning where the only individuals coming in contact with its power lines are utility employees or others charged with knowledge of necessary safety precautions.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION
No. 8428 of 2010

Appearances:
Joel S. Rosen,
Philadelphia, for the Plaintiff
Avrum Levicoff,
Pittsburgh, for the Defendant West Penn Power Company

BY: DAVID A. REGOLI, JUDGE

OPINION AND ORDER OF COURT

This matter comes before the Court on Defendant West Penn Power Company's (hereinafter "West Penn") Motion for Summary Judgment. West Penn seeks to dismiss the negligence claim made against it by the Plaintiff, arguing that it did not owe a duty of care to the Plaintiff's decedent under the circumstances of the instant case. The Court agrees with West Penn, and for the reasons set forth below, hereby grants West Penn's Motion for Summary Judgment.

I. Factual and Procedural History

This case arises out of a fatal electrical injury sustained by Ralph Greely ("Decedent"), a telecommunications cable installer for U.S. Utility Contractor Company, Inc. ("U.S. Utility"). As part of a turnpike construction project near Route 43 in Uniontown, the Pennsylvania Turnpike Commission ("PTC") hired Verizon Pennsylvania, Inc. ("Verizon") to install telecommunications cable across a line of telephone poles. Verizon, in turn, subcontracted the installation of this cable to U.S. Utility, the Decedent's employer. The Decedent was performing this work when he was fatally electrocuted.

The telephone poles being used for this project were owned by West Penn, but were used jointly by Verizon pursuant to a "General Joint Pole Agreement" between the two parties. According to the Joint Pole Agreement, Verizon was required to apply for a permit from West Penn if it wished to attach anything to West Penn's poles (hereinafter "joint-use poles"). It is undisputed, however, that at all relevant times hereto Verizon neither applied for nor was issued a permit to attach its telecommunications cable to the joint-use poles.[1] Although there is evidence that West Penn and Verizon met regularly to discuss and plan the work on the joint-use poles, no permit was ever sought or received by Verizon.

At the time of the incident, the Decedent was attaching Verizon's messenger strands and communications cable to one of the joint-use poles. Pursuant to standards set forth in the National Electrical Safety Code ("NESC"), the Decedent was required to keep a minimum distance of separation between the electrical and telecommunications facilities on each pole. Specifically, a clearance of at least forty inches (40") between the attachment location and the lowest point of the electrical facilities needed to be maintained under the Code. What's more, the NESC further requires a minimum vertical clearance of thirty inches (30") from overhead electrical facilities at every point along a span between two poles.

According to the Plaintiff, due to a long span between the two joint-use poles where the Decedent was working, it was difficult for the Decedent to maintain this required clearance. At his deposition, David Hawk, West Penn's corporate designee, testified a normal span between two poles is typically 125-150 feet; however, the location where the Decedent was electrocuted contained the longest span in the area – approximately 400 feet.[2] The Plaintiff claims that, in light of this unusually long span, West Penn and Verizon were responsible for designing a specific plan showing where the telecommunications cable should have been attached to maintain a safe clearance from the energized electrical facilities. In support of this claim, the Plaintiff relies on Article VI, Section 3 of the Joint Pole

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[1] *See* ***Complaint*** ¶ 10, August 29, 2011, *West Penn Power Co. v. Verizon PA, Inc.,* Case No. 5676 of 2011, C.C.P. Westmoreland County; ***Answer*** ¶ 10, November 18, 2011, *West Penn Power Co. v. Verizon Pa, Inc.,* Case No. 5676 of 2011, C.C.P. Westmoreland County.

[2] *See* ***Deposition of David Hawk,*** July 12, 2012 at p. 32; ***Deposition of Phil Bartolotti,*** August 1, 2013, at p. 78.

Agreement, which provides that "[w]hen obstructions or unusual conditions are encountered,[3] the clearance or special construction used shall be such as is agreed upon by both parties."

On January 6, 2009, the Decedent was suspended in a bucket truck at one end of this joint-pole span. As he was in the process of lashing the telecommunications cable to the messenger strand that U.S. Utility had previously installed that day, the cable either bounced into, or came in close proximity to, West Penn's energized electrical conductor. When this occurred, electricity arced from the electrical line to the messenger cable, fatally injuring the Decedent.

Tammy Greely, as Administratrix of the Estate of Ralph Greely, initiated the instant case by Complaint on November 19, 2010. The Amended Complaint, filed on January 19, 2011, contains a cause of action against West Penn and Verizon for negligence.[4] In support of this cause of action, the Amended Complaint alleges that West Penn was "reckless, careless, and/or negligent" in the following respects:

a. Failing to de-energize the power lines at the work site;
b. Failing to insure that the cables would be attached to the pole at sufficient distance from the power lines;
c. Failing to provide adequate space on its poles for safe attachment of the Verizon cable;
d. Failing to provide protective measures before work near the subject energized line had started;
e. Failing to provide Mr. Greely with a reasonably safe place to work;
f. Failing to assess or inspect the workplace in the vicinity of this incident for potential danger to cable installers;
g. Failing to warn U.S. Utility or Verizon about the hazardous conditions at that site, including but not limited to the potential for contact with power lines due to line sag and the different elevations of the poles;
h. Failing to take reasonable precautions for the safety of workers who would be installing the cable;
i. Violating applicable statutes, rules or regulations;
j. Violating applicable permits and/or the joint use agreement;

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[3] According to Mr. Hawk, an example of an "unusual condition" is a span that is unusually long, 300 to 350 feet. *See* ***Deposition of David Hawk,*** July 12, 2012 at p. 33.

[4] The Amended Complaint also includes a claim for punitive damages against both West Penn and Verizon.

k. Failing to make ready the pole line for attachment by a telecommunications company as required by code and statute and customary industry practice and the joint use agreement;

l. Any other negligence as may be shown in discovery.

Amended Complaint, ¶ 35.

On October 3, 2014, West Penn then filed the instant Motion for Summary Judgment, claiming that the evidence in this case fails to support the existence of any duty of care owed to the Decedent on the part of West Penn.

II. Analysis

In deciding West Penn's Motion for Summary Judgment, the Court is governed by the following standard:

> [S]ummary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party. In so doing, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party, and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt.

Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010) (citation and quotations omitted).

Instantly, upon careful review of the pleadings and the record, including the deposition transcripts attached to the Plaintiff's Response, the Court finds that there is no genuine issue of material fact and that the Plaintiff cannot, as a matter of law, establish a duty of care on the part of West Penn under the facts of this case. As such, and based on the following, the Plaintiff's negligence cause of action, as well as her derivative claim for punitive damages, will be dismissed as against West Penn.

The elements of a negligence cause of action are a duty, breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss. ***J.E.J. v. Tri-County Big Brothers/Big Sisters, Inc.,*** 692 A.2d 582, 584 (Pa. Super. 1997). "The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff." ***Bill-Rite Contractors, Inc. v. The Architectural Studio,*** 866 A.2d 270, 280 (Pa. 2005). Whether a duty of care exists in a particular case is a question of law for the court to decide. ***R.W. v. Manzek,*** 888 A.2d 740, 746 (Pa. 2005).

In support of its Motion, West Penn asks the Court to weigh the factors enunciated in ***Althaus ex rel. Althaus v. Cohen,*** 756 A.2d 1166 (Pa. 2000) in determining whether it owed a duty of care to the Decedent. These factors include: 1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution. ***Cohen,*** 756 A.2d at 1169 (citations omitted).

Applying these factors to the instant case, the Court finds that they weigh against a finding that West Penn owed a duty to the Decedent. First, there was no relationship, contractual or otherwise, between West Penn and the Decedent's employer; U.S. Utility was hired by Verizon, not West Penn, to perform the work. Second, West Penn's electrical distribution lines are of high social utility, as electricity is without question an integral public service. Third, although an energized electrical line imposes a high risk of harm, the inherent nature of that risk was not the cause of the Decedent's fatal injuries. Rather, the harm suffered by the Decedent allegedly originated from the unusually long distance between the two joint-use poles, not from any technical malfunction on the part of West Penn's equipment. What's more, it was the Decedent's own conduct which caused the messenger strand to bounce in close proximity to the electrical line. Fourth, a consideration of the "consequences of imposing a duty" upon West Penn on the facts of this case also weighs in West Penn's favor. The Court agrees with West Penn that an unintended consequence of imposing a duty here would be to make West Penn, or any power company for that matter, an insurer of safety for all individuals who may come into contact with their facilities, no matter how that contact occurs. Lastly, the Court finds that the public interest dictates against imposing a duty of care on the part of West Penn. If a duty was found in this case, as aptly noted by West Penn, it could potentially deter utility companies from engaging in similar joint pole agreements, which is a cost-efficient way to deliver the public's electrical, telephone and cable needs.

The Court next addresses the Superior Court's holding in ***Densler v. Metropolitan Edison Co.,*** 345 A.2d 758 (Pa. Super. 1975). As cited and relied on by the Plaintiff, the ***Densler*** Court discussed the duty of care owed by a supplier of electrical power, wherein it stated that "[a] supplier of electrical current is bound [...] to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise, in contact with them." ***Densler,*** 345 A.2d at 761 (quotations and citations omitted). While this language denotes, generally, the duty owed by an electrical supplier, the Court finds that the extent of this duty is dictated by the facts of each individual case. With that in mind, the Court agrees with West Penn that ***Densler*** should be construed as limited to the specific facts presented therein, which are distinguishable from the instant case.

In ***Densler,*** the plaintiff was a cable installer for a contractor/licensee of the power company/defendant. At the time of the accident, the plaintiff was performing work on a pole owned and operated by the power company pursuant to a licensing agreement between his employer and the power company. In finding that the power company owed a duty of care to the plaintiff, the ***Densler*** Court reasoned that the plaintiff was the employee of the power company's licensee and, thus, could lawfully work in proximity to its electrical wires. ***Id.*** at 765.[5]

As argued by West Penn, these circumstances are distinguishable from the case at bar. Instantly, the Decedent was not the employee of a joint user or licensee of West Penn; nor did his employer have any relationship, contractual or otherwise, with West Penn. Rather, U.S. Utility's sole relationship here was with Verizon. What's more, neither Verizon nor U.S. Utility obtained the requisite permission from West Penn to attach to the joint-use poles. As such, West Penn, as the licensor, had no direct involvement with the work that was being performed by the Decedent. That is to say, West Penn, despite its apparent knowledge that someone would be attaching to the poles, was under no duty to meet with Verizon or U.S. Utility to design a plan pursuant to Article VI, Section 3 of the Joint Pole Agreement. Based on these key differences, the analysis employed in ***Densler*** is not applicable to the present case.

To date, Pennsylvania courts have not had occasion to address whether a duty of care is owed by an electrical supplier to a telecommunications installer under the unique facts of this case. As such, the Court finds guidance in the Indiana case of ***Cox v. Northern Indiana Public Service Co., Inc.,*** 848 N.E.2d 690 (Ind. Ct. App. 2006). In ***Cox,*** the plaintiff, a cable installer with eleven (11) years of experience, sustained injuries when he was shocked while attempting to attach a cable line to a telephone pole. ***Cox,*** 848 A.2d at 694. Akin to the instant case, the power company/defendant entered into a pole use agreement with a cable company (hereinafter "lessee") who, pursuant to the agreement, was allowed to string coaxial television lines on the power company's poles. ***Id.*** at 692. Furthermore, the plaintiff, like the Decedent here, was not employed by the lessee; rather, he was employed by a contractor of the lessee and, as such, he and his employer had no relationship with the power company. ***Id.*** at 694.

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[5] The Court further relied on the plaintiff's expert witness, who offered evidence that the electrical company owed a duty to isolate the high tension wires from anyone who was not specifically qualified to work thereon, or at least provide specific warnings of the dangers associated with these wires. ***Id.*** Given that the plaintiff testified to having no adequate safety training, the Court determined that it was for the jury to decide whether he was "qualified" to do this work. ***Id.*** Here, the Decedent was admittedly qualified to perform the work around the energized electric lines based on his twenty (20) years experience as a lineman.

In its motion for summary judgment, the power company argued that under the joint pole agreement, the lessee was obligated to make its attachments at its own risk and to follow applicable safety provisions of the NESC. ***Id.*** at 697.[6] Pursuant to these provisions, the power company claimed, the "onus was on [the lessee] and [the plaintiff] to recognize the power lines as a hazard, and to ascertain the conditions of the work site and any remedial action that is required to safely perform the work." ***Id.*** The power company then referenced an Indiana Supreme Court case that, consistent with the holding in ***Densler,*** reasoned that an electric utility has no duty where the only people who come in contact with its power lines are "utility employees or others charged with knowledge of necessary safety precautions." ***Id.*** (citing ***Butler v. City of Peru,*** 733 N.E.2d 912 (Ind. 2000)) (quotation marks omitted).

In concluding that the power company owed the plaintiff no duty of care, the Court acknowledged that it knew or should have known that a particular segment of the population, including the plaintiff, would be regularly exposed to its power lines. However, it reasoned that the power company owed "no duty to those working on [the lessee's] behalf for injuries caused by [the power company's] power lines if the power lines were functioning normally because the cable installers should have been aware of the potential hazards of energized equipment." ***Id.*** The Court continued, "[the power company] only has a duty to keep its poles and power lines from malfunctioning, a condition of which cable installers would likely be unaware." ***Id.***

Instantly, as discussed above, Verizon never followed the permitting process to attach its cable to the joint-use poles. As such, the contractual requirement that West Penn design a plan with Verizon for the proper attachment of the cable due to the "unusual conditions" was not invoked. Furthermore, the Court finds that West Penn, independent of the Joint Pole Agreement, was under no obligation to design such a plan or to otherwise warn U.S. Utility and the Decedent of the long span between the joint-use poles.

Even if Verizon had obtained a permit to attach, the Court agrees with West Penn that Verizon was ultimately responsible for the design and construction of the telecommunications cable under Article VI, Section 3 of the Joint Pole Agreement. What's more, both Verizon and U.S. Utility were in the best position

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[6] Specifically, Article IV(1) of that agreement provided:

> [Mediacom] shall, at its own risk and expense, make and maintain such attachments in safe condition and in thorough repair, in a manner reasonably acceptable to [NIPSCO].... During the process of making and maintaining its attachments, [Mediacom] shall not act in a manner which unreasonably conflicts with the use of [NIPSCO's] poles by [NIPSCO] or by others lawfully using such poles or interfere with the working use of facilities thereon[...]

Id. at 694.

to take the necessary precautions to warn the Decedent about any dangerous or unusual conditions with the poles, including the long span.[7]

Accordingly, the Court finds that West Penn did not owe the Decedent a duty of care under the particular facts of this case. There is no evidence that West Penn's equipment was defective or malfunctioned at the time of the accident or that West Penn was engaged in any special relationship with the Decedent that would have given rise to a duty. Thus, as the Plaintiff cannot meet her burden of proof with respect to the duty element of negligence, the Court hereby enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 15th day of January, 2015, upon consideration of West Penn's Motion for Summary Judgment and Brief in Support thereof, and upon consideration of the Plaintiff's Response thereto and Memorandum in Support of said Response, it is hereby **ORDERED, ADJUDGED** and **DECREED** that West Penn's Motion for Summary Judgment is hereby **GRANTED**. The Plaintiff's Amended Complaint as against West Penn, including her derivative claim for punitive damages, is hereby **DISMISSED** with prejudice.

FURTHER, in accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ David A. Regoli, Judge

[7] This is particularly true for Verizon, who should have been aware of this condition. According to Mr. Wheatcroft, Verizon's design manager, he and Phil Bartolotti of West Penn designed the entire span of poles where the Decedent was injured. *See* ***Deposition of Daniel Wheatcroft,*** September 30, 2012 at pp. 18-20.

COMMONWEALTH OF PENNSYLVANIA
V.
DENNIS KATONA, Defendant

CRIMINAL LAW

Wiretapping and Electronic Surveillance Control Act; Probable Cause; Confidential Informant; Search and Seizure; Knock and Announce Rule

1. Interception of communications inside one's home pursuant to 18 Pa.C.S. § 5704(2)(ii) can only be deemed constitutional under Article I, Section 8 if there has been a prior determination of probable cause by a neutral, judicial authority.

2. Statute authorizing interception of a wire or oral communication involving suspected criminal activities where a party to communication has given prior consent to interception does not require that consent of party be obtained prior to interception of each and every taped conversation and only requires that party act consensually, that his consent be voluntary, and that he act under direction of an investigative or law enforcement officer.

3. Probable cause exists when the facts set forth in the affidavit are sufficient to warrant a man of reasonable caution in the belief that the contraband to be seized was in the specified place.

4. Whenever a finding of probable cause to issue a search warrant is based on information from an informant, affiant must give issuing authority a statement of fact sufficient to enable issuing authority to make two independent judgments, namely, that informant had knowledge of sufficient facts to conclude that suspect was engaged in criminal activity, and that affiant is justified in his belief that informant is reliable.

5. For purposes of a search warrant, the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

6. The knock and announce rule is excused if police have reason to believe that an announcement prior to entry would imperil their safety.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2549 C 2011

Appearances:
Michael M. Ahwesh, Chief Deputy Attorney General,
Pittsburgh, for the Commonwealth
Paul D. Boas,
Pittsburgh, for the Defendant

BY: RICHARD E. McCORMICK, JR., PRESIDENT JUDGE

OPINION IN SUPPORT OF THIS COURT'S ORDER ISSUED ON APRIL 30, 2014, DENYING DEFENDANT'S MOTION TO SUPPRESS.

By Richard E. McCormick, Jr., President Judge

I. FACTUAL AND PROCEDURAL HISTORY

Dennis Katona, Defendant, was charged with and convicted of two counts of Possession with Intent to Deliver, 35 P.S. Section 780-113 (a)(30) and two counts

of Possession, 35 P.S. Section 780-113(a)(16). His convictions were secured by the use of a confidential informant ("CI") and the consensual interceptions of the oral communications of Mr. Katona at the Katona home located at 113 Ember Lane, Herminie, PA. Based upon these communications, on June 29, 2011, a search warrant was issued, the Katona residence was searched and Mr. Katona was arrested.

Subsequent to his arrest, a Motion to Suppress was filed and hearings on the Motion occurred on June 18, 2013 before Judge Debra A. Pezze and on December 5, 2013 before this Court. The Motion was denied and on November 10, 2014 a non-jury trial by stipulation occurred before Judge Pezze after which Mr. Katona was found guilty of all counts.

II. ANALYSIS OF ARGUMENT

A. Mr. Katona claims that the court erred in sanctioning multiple intercepts over a thirty day period pursuant to Section 5704 (2)(iv) of the Wiretapping and Electronic Surveillance Control Act.

On May 16, 2011 Judge John Blahovec, a common pleas court judge designated to review warrants, entered an order authorizing the consensual interception of oral communications from May 16, 2011 through June 16, 2011 for communications between Mr. Katona and the CI at Mr. Katona's home located on 113 Ember Lane, Herminie. The Court found sufficient probable cause to issue the Order based upon the Affidavit of Probable Cause authored by Pennsylvania State Trooper Matthew Baumgard, the Memorandum of consent signed by the CI, and the Application authored by Michael M. Ahwesh, Deputy Attorney General. Thereafter, recordings of conversations at the Katona home occurred through May and June, 2011. Mr. Katona asserts that these multiple intercepts over a thirty day period violate the Wiretap Act. He claims that each intercept required a separate search warrant and, because of this failure, when the offending paragraphs in the Search Warrant are stricken (paragraphs 30-34, 38, 41-43)(See p.11 of Katona Brief), there is insufficient probable cause to justify its issuance.

A consensual interception of communications in one's home is authorized in 18 Pa.C.S.A. Section 5704 (2) (ii) and (iv) so long as an order is obtained from an authorized judge and the law enforcement officer making the request has established probable cause in an affidavit submitted to the court. The statute refers to "an interception" but does not limit the number of interceptions that can be made.

In *Commonwealth v. Brion,* 652 A.2d 287, 289 (Pa. 1995), the Pennsylvania Supreme Court held that, "...interception pursuant to 18 Pa.C.S. Section 5704 (2)(ii) can only be deemed constitutional under Article I, Section 8 if there has been a prior determination of probable cause by a neutral judicial authority." In *Commonwealth v. Adams,* 524 A.2d 1375 (Pa. Super. 1987), the question of whether consent must be obtained before each interception was addressed. In that

case there were a total of six memorandums of consent, each for a ten day period. Adams' argument, similar to that made by Mr. Katona, was that 5704 (2)(ii) spoke in terms of the singular, i.e. where ..."one of the parties to the *communication* has given prior consent to such *interception*."

The court referred to 1 Pa.C.S.A. Section 1902, which states that "the singular shall include the plural, and the plural, the singular", in concluding that there is no requirement that consent be authorized prior to every intercepted conversation. The court also noted that Section 5704 (2)(ii) does not set forth a specific length of time during which a consent remains viable. "All that is required is that the informant acts consensually, that his consent is voluntary, and that the informant acts under the direction of an investigative or law enforcement officer to intercept oral communications involving suspected criminal activities." *Adams* at 1378. See also *Commonwealth v. Clark,* 542 A.2d 1036, 1038 (Pa. Super. 1988) where consents between the CI and police for twenty day periods were deemed ineffective because of the district attorney's failure to meet with or speak to the informant prior to each new period of surveillance. The *Clark* court reiterated that there was no requirement that consent be authorized prior to every intercepted conversation, nor does the statute designate a specific length of time during which a consent remains viable.

In this case an affidavit providing probable cause was presented to Judge Blahovec along with a Memorandum of Consent, signed by the CI, along with a certification that a Deputy Attorney General interviewed the CI and determined that his consent was voluntary. It appearing that the requirements of Section 5704 (2)(ii) and (iv) were fulfilled, Mr. Katona's claim that every intercepted conversation be authorized by the Court is denied.

B. Probable Cause for the Issuance of the May 16, 2011 Order Authorizing Consensual Interception and for the issuance of the June 29, 2011 Search Warrant.

In *Commonwealth v. Fetter,* 770 A.2d 762, 766-767 (Pa. Super. 2001), the court noted that 18 Pa.C.S. Section 5704 is not subject to other sections of the Wiretap Act, unless specifically enumerated. Instead, it contains exceptions to the generally stringent requirements for wiretaps when one party voluntarily consents to the interception. The court found it unnecessary for the Commonwealth to establish, for example, that normal investigative procedures have been tried and failed. The court concluded that the Commonwealth did not violate the Pennsylvania constitution as long as it established to the designated authority that there was one party consent and probable cause. For this reason, Mr. Katona's claim that those portions of the Wiretap Act referring to the requirements of non-consensual monitoring, should have been employed, is rejected.

In *Commonwealth v. Macolino,* 485 A.2d 1134, 1136 (Pa. Super. 1984), the court defined probable cause. Probable cause exists when the facts set forth in the affidavit are sufficient to warrant a man of reasonable caution in the belief that the

contraband to be seized was in the specified place. Only a probability, and not a *prima facie* showing, is required.

When a finding of probable cause to issue a search warrant is based on information from an informant, the issuing authority must determine that the informant had sufficient facts to conclude that the suspect was engaged in criminal activity and that the affiant is justified in his belief that the informant is reliable. *Commonwealth v. Kline,* 335 A.2d 361, 363 (Pa. Super. 1975)

In this case the material submitted to Judge Blahovec on May 16, 2011 consisted of the Application for Order Authorizing Consensual Interception of Oral Communications in a Home. In his Affidavit Trooper Matthew Baumgard related that on May 16, 2011 the CI received eight ounces of cocaine from Mr. Katona at the Katona residence. The CI was instructed to bring payment of $5000 by 8:00 p.m. Trooper Baumgard field tested the substance and found it positive for cocaine. He averred that the successful interceptions of conversations between the CI and Mr. Katona would assist in the prosecution of Mr. Katona. (May 16, 2011 Affidavit of Trooper Baumgard).

The Affidavit of Probable Cause accompanying the Application included Trooper Baumgard's qualifications and expertise in consensual interceptions and his certification in the Pennsylvania Wiretap Act. Trooper Baumgard noted that the CI is a member of the Irwin Chapter of the Pagans. He noted previous occasions when Mr. Katona had supplied the CI with cocaine, and that the CI had provided credible and corroborated information since February 2009. Trooper Baumgard averred that he believed Mr. Katona to be involved with the possession, sale and distribution of controlled substances and that in order for the CI to make purchases and to gather further information regarding Mr. Katona's drug activities, he would be required to enter the Katona home.

This Court agrees with Judge Blahovec and concludes there was sufficient probable cause to permit a consensual wiretap because drug related conversations and drug sales were being orchestrated by Mr. Katona at his home. The request to suppress the multiple intercepts is denied.

The Affidavit of Probable Cause justifying the issuance of the Search Warrant is amply supported by the inclusion of Mr. Katona's drug related activities on May 16, 2011, May 20, May 25, May 31, June 9, June 13, June 15, June 20, June 22 and June 27. Clearly there was sufficient information for the court to believe that there was probable cause to establish ongoing criminal activity. This Court concludes that the issuance of both the Wiretap Order and the Search Warrant were proper.

C. Mr. Katona claims that the Search Warrant was defective because it was an anticipatory warrant and the condition triggering the issuance of the warrant did not occur. He also claims that material information was omitted from the warrant and that there was insufficient probable cause.

In *Commonwealth v. Baker,* 615 A.2d 23 (Pa. 1992), police used an informant to purchase cocaine from the defendant by providing him with funds prior to entering the defendant's home and by having him relinquish the purchased narcotics immediately after exiting the residence. These exchanges occurred on four occasions before a warrant was sought. Baker claimed that the affidavit supporting the warrant was insufficient because it failed to set forth a basis for the conclusion that probable cause existed, and that it had materially omitted information regarding the untrustworthy character of the informant.

The Supreme Court found that because the drugs were purchased in a controlled situation and the affiant corroborated the informant's admissions with firsthand knowledge, there was a substantial basis for concluding that a search would probably reveal wrongdoing. In addressing the claims of withheld information, the court noted that where the informant has been promised that a pending charge would be dismissed, one could infer that this agreement provided a motive for his cooperation. Even if proven that the informant had a motive to cooperate, this motive did not disprove his purchase of narcotics.

In *Commonwealth v. Coleman,* 830 A.2d 554, 558 (Pa. 2003), the court noted that so long as the issuing authority is presented with sufficient information to support a reasonable belief that there is a fair probability that evidence of past or present criminal activity will be on the premises when searched, an anticipatory warrant may lawfully issue. Past observations provide a basis for an expectation that contraband will still be present at the location in question. Police interest in Coleman's home was premised on specific information from a reliable confidential informant that was corroborated by a controlled purchase of cocaine earlier that month. Thus, at the time the search warrant issued, there was a fair probability of the anticipated event occurring.

The Affidavit used to support the issuance of the Search Warrant for Mr. Katona's home noted that the CI had provided police credible information since February 2009 and that the CI is a member of the Pagan's Motorcycle Club of which Mr. Katona is National President. The Affidavit documents multiple conversations and contacts between Mr. Katona and the CI regarding the purchase of cocaine. Following the issuance of the wiretap order, payments were made for a half pound of cocaine on May 16, 2011, May 20, May 25, and May 31, all occurring at the Katona residence and all being recorded and monitored by police. (Affidavit 29-33) On June 9, 2011 police conducted surveillance within and outside the CI's home and observed Mr. Katona deliver an ounce of methamphamine in exchange for $1300. (Affidavit 36-37) On June 13, 2011, the CI travelled to the Katona residence and paid Mr. Katona $1100 for the cocaine provided on June 9. (Affidavit at 38) On June 15, 2011, a payment of $1100 was made by the CI to Mr. Katona at the Home Depot for which the CI received two ounces of cocaine. (Affidavit 39-40) On June 20 a payment of $1100 was made by the CI to Mr. Katona at his home. (Affidavit at 41) On June 22 another payment of $1100 was made by the CI to Mr. Katona at his home along with a

purchase of two ounces of cocaine. (Affidavit at 42- 43). All of these contacts were recorded.

On June 27, 2011 a payment of $1100 was made by the CI to Mr. Katona at his home. Mr. Katona informed the CI that he would have a quantity of methamphetamine at his home on June 29, 2011. (Affidavit at 44) The Affidavit notes that the CI and Mr. Katona agreed that if the CI verified that Mr. Katona was at home and if he was instructed to stop over, narcotics would be present. (Affidavit at 45) All of these events were monitored by police.

Trooper Baumgard testified that on June 29, 2011, he met with the CI who texted and telephoned Mr. Katona. (NT-I p.115)[1] At 3:40 p.m. Mr. Katona called the CI and informed him that he was at home. The search was executed after this call. (NT-I, pp. 115-116)

Given this elaborate background of payment for and provision of drugs, with most of the transactions occurring at Mr. Katona's home and recorded by wire, it is this Court's judgment that the issuing judge had a reasonable belief that there was a fair probability that drugs would be in the home at that date and time. The 'contingency', that Mr. Katona would state that he was at home, occurred, and the search justifiably ensued as probable cause was present. The fact that previous interceptions a year before had not produced any incriminating information or that charges against the Cl would be dropped if he cooperated do not detract from the probable cause established in the Affidavit. Further, even if those facts had been included in the Affidavit, the warrant would have issued since there was probable cause and the drug sales were an ongoing activity in which Mr. Katona participated.

D. Mr. Katona's final complaint is that the search warrant was improperly executed because no exigent circumstances existed which justified the use of force and the failure to comply with knock and announce requirements.

In *Commonwealth v. Dean,* 693 A.2d 1360, 1363 (Pa. Super. 1997), the court discussed Pa.R.C.P. 207 (formerly numbered 2007). This Rule requires that a law enforcement officer executing a search warrant make a reasonable effort to give notice of his identity, authority and purpose and shall wait a reasonable period after such notice is made **unless** exigent circumstances require his immediate forcible entry. (emphasis added) See Pa.R.C.P. 207 (A) and (B). Compliance with the knock and announce rule is excused if "...police have reason to believe that an announcement prior to entry would imperil their safety."

In *Dean*, the officers feared that by announcing their identity they were setting themselves up for ambush. Under these circumstances the court sanctioned their entry shortly after their announcement. Where there is a real and particularized threat of violence, an individual's privacy rights will not be held above the well

[1] NT-I denotes testimony taken on June 18, 2013 before Judge Pezze.

being of police officers. See also *Commonwealth v. Means,* 614 A.2d 220, 221 (Pa. 1992) where the court refused to sanction an entry after 5-l0 seconds had elapsed because no exigent circumstances were proven.

In this case, the testimony of Corporal Mark Baer, a member of the Special Emergency Response Team ("SERT"), revealed that the residence to be searched was occupied by a member of an outlaw motorcycle gang and there was a possibility that other members of the gang would be present. (NT-I, p 49) Because of his experience he knew that the Pagans had a tendency to be violent, that its members disliked law enforcement and that Mr. Katona had been violent toward other Pagan members. (NT-I, p 53) In addition, on the day of the search, a van and motorcycle were parked outside the Katona home. Police were unfamiliar with the vehicles and were concerned about the number of people who would be inside the residence when the search occurred. (NT-I, p 55) Another concern was that because the search was to be conducted in the daylight hours, the police would be exposed, and the element of surprise lost. (NT-I, pp 65, 96)

Trooper Baumgard, a member of the Organized Crime Unit and one of the two lead investigators, also participated in the June 29, 2011 search. (NT-I, pp 108, 110) He testified regarding the information he conveyed to the SERT team. He described Mr. Katona as the National President of the Pagans who had been arrested for the assault of a Hells Angel in New York, and that he had assaulted other Pagan members. He also had information that Mr. Katona had assaulted another individual with a bat because he wore a rival gang's name on his belt.

Because of these concerns, members of the SERT team did not wish to remain standing in the doorway for a prolonged period of time. The team made three announcements identifying themselves, announcing that they had a search warrant, and making a request to surrender the premises. (NT-I, p 61) Approximately 25 seconds passed before entry was effectuated. (NT-I, p 80)

In *Commonwealth v. Sanchez,* 907 A.2d 477, 489 (Pa. 2006), the court referenced a decision of the United States Supreme Court in a case presenting a risk of physical violence during an entry with a search warrant. The court required only that police maintain a reasonable suspicion that the risk of physical violence was present in proving this exigent circumstance. The court observed that, "This showing is not high." See *Richards v. Wisconsin,* 520 U.S. 385, 394, 117 S.Ct. 1416, 1422, 137 L.Ed.2d 615 (1997) .

This Court concludes that based upon the information known to the police concerning Mr. Katona's background and history of violence, his criminal history and suspected illegal drug possession and trafficking, exigent circumstances existed to justify their forcible entry into the premises. Thus, and for all of the aforementioned reasons, the Motion to Suppress is denied.

BY THE COURT:
/s/ Richard E. McCormick, Jr., President Judge

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JEAN M. ABRAMS, Plaintiff
V.
STANLEY OLSZEWSKI, Defendant

DOMESTIC RELATIONS

Child Support; Duty to Support; Emancipation; Ability to Self-Support

1. Where a child has reached the age of majority, an action for support may commence only upon a showing that the plaintiff is the parent of an emancipated child over eighteen years of age to whom a duty of support is owing.

2. Generally, the duty to support a child ends on his/her eighteenth birthday or graduation from high school, whichever comes later.

3. Emancipation of a child for purposes of the statute governing a parent's liability for support of a child is a question of fact to be determined by the totality of the circumstances presented in each case. There are varying circumstances that must be considered in determining whether a child is emancipated. These include, but are not limited to, the child's age, marital status, ability to support himself or herself, and the desire to live independently of his or her parents.

4. When a child suffers from some mental or physical condition that prevents self-support or emancipation, the parental obligation continues.

5. The test for the ability to self-support is to ascertain whether the child is physically and mentally able to engage in profitable employment and whether employment is available to that child at a supporting wage.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – DOMESTIC RELATIONS
No. 585 DR 2014
PASCES No. 208100750

Appearances:
Melissa A. Bergman,
Titusville, for the Plaintiff
Stanley Olszewski,
Pro Se

BY: HARRY F. SMAIL, JR., JUDGE

OPINION AND ORDER OF COURT

SMAIL, J. March 13, 2015

This matter is before the Court on a Motion for Permission to File Domestic Relations Complaint. This Court held a hearing on the same on January 13, 2015. Plaintiff seeks support for a child who has reached the age of majority, but has not completed and is not attending public school. Plaintiff, by and through her counsel, Melissa A. Bergman, Esquire, argues that the child's manifests mental and emotional deficiencies, as set forth more fully below, which render him unable to achieve self-sustaining, gainful employment. Having carefully considered the standards applicable to the facts of this case, the Court will deny the Motion.

FACTS

The parties were married from 1981 until 2001. That marriage produced two children, one of whom, Timothy Olszewski ("the Child"), born June 29, 1983, is relevant here. The Child is thirty-one (31) years-of-age. No support order has ever existed for the Child. Instead, the parties maintained an informal payment arrangement based upon their agreement that each would retain custody of one of the children. Plaintiff discontinued this informal support in 2002, when the Child reached the age of majority.

Plaintiff did not receive or seek support for the Child from 2002 to 2010. In 2010, Plaintiff filed a support action in Allegheny County, which was discontinued upon Defendant's informal, unwritten agreement to pay Plaintiff two hundred dollars ($200.00) per month. In 2011, Defendant again stopped payments, eventually causing Plaintiff to file the above-captioned action.

Plaintiff filed the instant Motion in response to the Domestic Relations Section's refusal to accept a Complaint for Support based on the unique facts of this case. Said Motion was scheduled for a hearing before the Undersigned's predecessor, who also granted Plaintiff the interim right to file a Complaint for Support. Before said hearing, the matter was reassigned to this Court.

Plaintiff provided testimony from Donald P. Breneman, M.D., whom the Court recognized as an expert in the field of psychiatry. Dr. Breneman, to whom the Child was referred for treatment of depression and anxiety, provided relevant medical background. While attending a party, at the age of sixteen, the Child received at least one severe blow to the head with a baseball bat, causing an instant comatose state. Following a helicopter flight to Allegheny General Hospital, the Child was diagnosed as having suffered, among other things, a subdural hematoma.

In the subsequent days, doctors discovered that the blow had caused the Child mild amnesia, along with attention and concentration deficits. Dr. Breneman opined that, as of 2014, the residual impairment of those deficits was loss of good and appropriate judgment skills. These were, at least in part, based upon Dr. Breneman's conclusion that the Child's injury had left him "emotionally somewhat dulled." Transcript [hereinafter, "T."] at 35. The result of this emotional dulling is that the Child has "not been able to function very effectively in the community. And furthermore, [the Child] really gives you the impression of still being a teenager . . ." T. at 35.

Notwithstanding those opinions, Dr. Breneman's primary diagnosis was static encephalopathy; "[i]n other words, there's been an injury. It's never really going to get better. . . . it is a major hindrance to getting on with life and functioning effectively." T. at 36. Corroborative of Dr. Breneman's conclusion that the Child's current state is related to his childhood injury, he noted that the Child was previously treated using antidepressant medication, with little effect. T. at 36.

In addressing the Child's ability to work, Dr. Breneman further opined that "perhaps in a different industrial configuration there would have been jobs for people like [the Child]. In the present time it requires an acuteness of activity and interest that he doesn't really have. Therefore, it would be difficult for him to work. . . . it's principally his abilty to really interact effectively with people, to interview well to get a job, to be able to carry out the duties of the job, to recognize the responsibilities of the job, and to responsibly attend to them." T. at 37.

When asked the ultimate question, whether the Child will ever be able to work as a result of his injury, Dr. Breneman offered a non-specific but bleak response. *See* T. at 38. On redirect, Dr. Breneman provided his complete diagnosis which is "cognitive disorder [dementia] secondary to a closed-head injury and depressive disorder secondary to the effects of the cognitive disorder." T. at 50, 61.

On cross-examination, Defendant undermined Dr. Breneman's conclusion that the Child's alleged inability to work stemmed entirely from his childhood injury. In particular, Defendant inquired whether Dr. Breneman knew of the Child's subsequent history, including several car accidents and physical confrontations. Defendant also undermined Dr. Breneman's knowledge of the Child's abilities by directing his attention to several instances of the Child's criminal conduct, including stripping car parts and selling stolen items over the internet. Dr. Breneman maintained his conclusions, but admitted little or no knowledge of those instances, calling them "low-level skullduggery." T. at 42.

Defendant also presented Dr. Breneman with documentation of work done by the Child at Defendant's business. Dr. Breneman noted that, with the Child's "low normal intelligence . . . he could probably do this." T. at 46. However, Dr. Breneman maintained that the documents demonstrated "mere rote memory or putting this down [in a form]," and that gainful employment required higher level skills. T. at 46. When asked whether the Child's failure to finish high school could be a factor contributing to his inability to gain employment, Dr. Breneman unequivocally agreed. T. at 48.

Related to the diagnosis of dementia, Defendant inquired whether the Child's alleged seventeen years of heavy alcohol and marijuana use could have caused such a problem. Though speculating, Dr. Breneman agreed that it could cause affect memory and general intelligence. T. at 57. The Child's job related problems stemmed, in Dr. Breneman's ultimate conclusion, from his inability to sustain concentration and comprehension, resulting in a lack of motivation and interest in work. *See* T. at 64.

On redirect, Dr. Breneman opined that the Child would have some difficulty gaining a GED, as he had been away from school for an extended period. Of the Child's IQ, Dr. Breneman noted that a "normal IQ runs from 90 to 110. And I would say that he's slightly below 100." T. at 53. Dr. Breneman reemphasized, however, that "it's his fine discernment, how he really makes judgments and anticipates problems, that is most gone." T. at 53.

The Court also questioned Dr. Breneman. At that time, he admitted "I'm only now hearing about the potential head injuries that occurred, perhaps, in prison and also, outside." T. at 58. He further noted that the Child could obtain work requiring "a less sophisticated level of performance." T. at 58. When asked whether he knew if the Child was seeking work, Dr. Breneman responded, "is he out there pounding the streets, looking for a job[?], no." T. at 59.

Plaintiff also testified. She clarified that the Child was struck several times with a baseball bat, including in the back of the head "until the . . . bat broke." T. at 67. Following this incident, the Child spent four days in the Allegheny General Hospital Intensive Care Unit.

After the Child's release from hospital, and following two weeks of twenty-four hour care at home, it was suggested that Plaintiff have the Child homeschooled. Mother began but ultimately failed to keep the Child's education on track. Since the Child's injury, Plaintiff asserts that the Child has seen twenty-five different care providers. Plaintiff claimed that the Child continues to have physical problems, however, she noted that the Child currently sees only Dr. Breneman and a chiropractor.

Plaintiff testified that the Child was normal prior to the injury and that he was never in legal trouble. According to Plaintiff, in his current state, the Child is moody, forgetful, and angry. She added, "[a] lot of these doctors don't seem to help him a lot." T. at 73. In Plaintiff's view, the Child is impaired as a direct result of his childhood injury.

The Child has, according to Plaintiff's testimony, only held one job since the time of his injury. Plaintiff does not believe the Child capable of even part time labor, owing to his mental and physical infirmities, including back and neck pains and headaches. T. at 76. Regarding daily life tasks, Plaintiff noted that she takes the Child to all of his doctors' appointments and that she cooks and cleans their home.

On cross-examination, Defendant adduced evidence that Plaintiff allowed both of the children, the Child and his sibling, to drop out of school, and that only after moving in with Defendant did the Child's sibling return to school. Defendant also questioned Plaintiff concerning the ability of the Child to sell an airplane engine and other items over the internet. T. at 86.

Defendant questioned whether the Child could work at a car dealership, which his stepfather might open. Plaintiff did not deny that the Child was capable of such work, and even believed that Child could obtain a license to sell motor vehicles, but that a position unavailable. T. at 88. Throughout cross-examination, Plaintiff maintained the Child's fragility, consistently harkened back to the Child's back and neck pain.

When presented with several possibilities of work Defendant had lined up for the Child over the years, Plaintiff either claimed not to remember those instances or stated that, in her opinion, the Child's back and neck pains prevented him from

doing that kind of work. T. at 89-90. When confronted with the fact that some of the stated jobs required very little or no physical lifting or other strenuous activity, Plaintiff claimed an unfamiliarity with what those positions entailed.

Defendant also adduced evidence concerning a settlement of $25,000.00 the Child received, related to the baseball bat incident. Plaintiff admitted that a portion of this money went to buy the Child a Pontiac Trans Am, which he crashed. T. at 92. The parties also disagreed that the Child had never been in legal trouble prior to his injury. When Defendant asked Plaintiff questions concerning the Child's criminal behaviors, she either denied the same or provided excuses for the Child's behaviors, stating "I don't consider that being trouble because it was a bunch of kids." T. at 95.

Following a more recent conviction for the Child's commission of aggravated assault, Plaintiff agreed that the Child had personally and independently reported his attorney to the Bar Association related to unsatisfactory representation. T. at 99. Plaintiff claimed to have no knowledge of the Child having an issue with either drugs or alcohol. When asked whether the Child made the decision to discontinue working for Defendant because Plaintiff allowed the Child to move back into her home, Plaintiff did not provide a clear response. However, she did not disagree.[1]

Upon questioning by the Court, it was revealed that it was Plaintiff's unilateral, non-medical decision to keep the Child out of school, based upon her own perception of his inability to concentrate. Plaintiff also claimed no knowledge of the Child's "under the table" jobs. T. at 108. When confronted with Dr. Breneman's report, which indicates that the Child had a history of alcohol use, starting at age thirteen, Plaintiff again claimed no knowledge. The Court also inquired whether Plaintiff possessed any medical documentation linking the Child's back and neck pains to his injury. She responded that she did not.

Somewhat troubling, Plaintiff admitted giving the Child authority to allocate the entire $25,000.00 settlement, despite his not having reached the age of majority at that time. Moreover, and contrary to Plaintiff's belief that the Child had changed considerably following his injury, she admitted that, in receiving the $25,000.00, the thought of long term care was "never even considered." T. at 115. Plaintiff ultimately indicated that she would encourage the Child to seek a job, "if I thought that he could do it." T. at 123.

DISCUSSION

As standing is decisive in the outcome of the instant Motion, the Court notes that, where a child has reached the age of majority, an action for support may commence only upon a showing that the plaintiff is the parent of "an unemancipated child over eighteen years of age to whom a duty of support is owing . . ."

[1] To the Court, the vast number of Plaintiff's responses on cross-examination appeared either evasive or of questionable credibility.

Pa.R.C.P. No. 1910.3. Generally, the duty to support a child "ends on his/her 18th birthday or graduation from high school, whichever comes later." *Heitzman-Nolte v. Nolte,* 837 A.2d 1182, 1184 (Pa. Super. 2003).[2] Nevertheless, "[a] court shall not order either or both parents to pay for the support of a child if the child is emancipated." 23 Pa.C.S. § 4323(a).

> Emancipation of a child for purposes of the statute governing a parent's liability for support of a child is a question of fact to be determined by the totality of the circumstances presented in each case. [T]here are varying circumstances which we must consider in determining whether a child is emancipated. These include, but are not limited to, the child's age, marital status, ability to support himself or herself, and [the] desire to live independently of his or her parents.

Castaldi v. Castaldi-Veloric, 993 A.2d 903, 911 (Pa. Super. 2010) (quoting *Nicholason v. Follweiler,* 735 A.2d 1275, 1278 (Pa.Super.1999)).

As the foregoing suggests, when "the child suffers from some mental or physical condition which prevents self-support or emancipation, the parental obligation continues . . ." *Heitzman-Nolte v. Nolte,* 837 A.2d 1182, 1184 (Pa. Super. 2003). The Court believes that the factors of self-support and age of the Child are of greatest consideration in this case.[3]

The test for the ability to self-support is to ascertain "whether the child is physically and mentally able to engage in profitable employment and whether employment is available to that child at a supporting wage." *Hanson v. Hanson,* 625 A.2d 1212, 1214 (Pa. Super. 1993). In other words, self-support requires that the child is able to work in a position minimally supportive of an adult lifestyle, under the circumstances. *See id*.[4]

The Court feels sympathy for the Child. However, we cannot conclude that the facts of this case, which bear a strong resemblance to difficulties experienced by countless others, are the circumstance anticipated by the legislature in addressing

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[2] The mere fact that a child reaches age eighteen does not per se vitiate the parents' obligation of support. *See* 23 Pa.C.S. § 4321(3). In fact, a child who reaches eighteen years of age while attending high school retains the right to support until graduation. *See Robinson-Austin v. Robinson-Austin,* 921 A.2d 1246, 1248 (Pa. Super. 2007). That does not mean, however, that a child who unreasonably fails to graduate high school will remain entitled to support. *See Michalski v. Michalski,* 83 Pa. D. & C.4th 70, 77 (Pa. Com. Pl. 2006).

[3] The evidence does not suggest that the Child is or has ever been married. As to the desire to live independently, the Court believes that the evidence supports an inference that the Child does not wish to live independently. Even so, the Court finds that desire unreasonable in light of the weightier factors.

[4] The Court stresses its belief that objective standards, under the facts of each case, should be the gravamen of the self-support inquiry. There are, after all, many young persons who experience subjective hardship when beginning the life of an adult, distanced from the relatively carefree setting of a well-appointed parental abode. For that same reason, there are also persons who will make minimal efforts to leave the care of doting parents.

the question of emancipation or of the courts in defining the ability to self-support. It is a stark reality of our post-industrialized society that persons who fail to graduate from high school have difficulty in the job market. Those persons are certainly made to feel frustrated and listless as a result. Nevertheless, it is not the Court's role to interpret the law in a manner that allows a child of average intelligence and apparent skill to force the indefinite support of his parents.

Both Dr. Breneman and Plaintiff attempted to relate the Child's difficulties to injuries sustained over a decade ago. However, the Court notes problems of knowledge, credibility, and/or specious logic in both sets of testimony. Dr. Breneman was of course paid to testify by Plaintiff. Of greater concern, what Dr. Breneman learned, and what he obviously did not learn, came directly from the Child. That same child has a direct and easily understood stake in the outcome of any determination that the Child is unable to self-support.

That may explain why the Child failed to disclose several other instances of possible injury. Furthermore, the unrefuted evidence adduced by Defendant shows that the Child obviously understands the concept of pecuniary gain, including the savvy of making such gains by less than honest but reasonably sophisticated means. The Court disagrees with Dr. Breneman's characterization of the Child's criminal conduct as "low-level skullduggery." On the contrary, the Court believes that those same skills, utilized in an honest manner, allows the Child opportunities similar to those many Americans utilize everyday in gainfully employed positions.

Moreover, the Child plainly understands secondhand online sales, especially relating to what appears to be an above average understanding of automobiles and related items of motorized locomotion. That fact, coupled with the Child's current subsidized lifestyle, actually provide an opportunity for growth many persons never possess. Finally, the Defendant's expressed and supported willingness to help the Child gain and maintain employment demonstrate opportunities well beyond those available to a child incapable of self-support.

As to Plaintiff's testimony, the Court found the same lacking in credibility. That fact aside, the Court is concerned with Plaintiffs behaviors relating to the Child. To put it another way, both parents have contributed to the Child's lot in life; Plaintiff did and does too much for the Child, Defendant did too little at a critical juncture in the Child's education.

Were this the case of a minor child, the Court would encourage Defendant to seek a custody arrangement resulting in greater paternal contact and to use that exposure to return the Child to school in the manner of his sibling. Regrettably, the Child, at thirty-one years of age, is beyond that point. While the Child's failure to return to school and general lethargy is certainly attributable to poor parenting, that is not the standard applicable to this case. The standard is applicable to the Child, whose age and ability to self-support render him emancipated.

Wherefore, we will enter the following Order:

ORDER OF COURT

AND NOW, this 13th day of March, 2015, upon and after consideration of the Motion for Permission to File Domestic Relations Complaint, filed on behalf of Plaintiff by her counsel, Melissa A. Bergman, Esquire, and after the holding of a hearing on the same, the Motion is hereby DENIED.

The Domestic Relations Section is hereby DIRECTED to dismiss and close the above-captioned case.

BY THE COURT:
/s/ Harry F. Smail, Jr., Judge

SWZ FINANCIAL, LLC, a Delaware limited liability company,
AP STUDENT LOAN RELIEF, LLC, a Delaware limited liability company,
PAYLESS FINANCIAL GROUP, LLC, a Florida limited liability company,
and EDWARD C. WELKE, an individual, Plaintiffs
V.
SARAH WONDERS, an individual, Defendant

VENUE

Nature or Subject of Action; Actions for Torts

1. Cause of action against individual defendant for wrongful use of civil proceedings did not arise in Westmoreland County where action was brought, and thus venue was improper there.

2. For purposes of venue analysis, in a wrongful use of civil proceedings case, the transaction or occurrence is the filing of the underlying lawsuit, so venue was proper where underlying lawsuit was filed.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 1647 of 2014

Appearances:
Jerome DeRiso,
Pittsburgh, for the Plaintiffs
Jessica K. Ziemski,
Pittsburgh, for the Defendant

BY: ANTHONY G. MARSILI, JUDGE

ORDER OF COURT

AND NOW, to wit, this 9th day of December, 2014, upon consideration of *Defendant's Preliminary Objections to Plaintiffs' Complaint* and *Brief in Support Thereof*; and, upon consideration of Plaintiffs' *Response to Defendant's Preliminary Objections to Plaintiffs' Complaint* and *Brief in Opposition to Preliminary Objections to Plaintiffs' Complaint*; and, after reviewing Plaintiffs' Complaint; and, after careful consideration of the comprehensive Oral Argument held before this Court on November 19, 2014, with counsel for all parties being present; it is hereby ORDERED, ADJUDGED and DECREED, as follows:

1. The Court notes the standard of review for preliminary objections. In determining whether the instant preliminary objections should be granted or denied, the Court must accept as true all material facts as set forth in Plaintiff's Complaint. Moreover, all reasonable inferences that can be deduced therefrom are also to be accepted as true. *DeMary v. Latrobe Printing and Publishing Co.,* 762 A.2d 758 (Pa. Super. 2000), citing *Juban v. Schermer,* 751 A.2d 1190 (Pa. Super. 2000). For purposes of deciding

preliminary objections, well-pleaded factual averments of a complaint are admitted, but conclusions of law are not. *Santiago v. Pennsylvania Nat. Mut. Cas. Ins. Co.,* 613 A.2d 1235 (1992). Preliminary objections should be sustained only in cases that are clear and free from doubt. *Morgan Trailer Mfg. Co. v. Hydraroll, Ltd.,* 759 A.2d 926 (Pa. Super. 2000).

2. Further, the Court notes that the standard of review for preliminary objections in the nature of a demurrer is well-settled: All material facts set forth in the pleadings, as well as all inferences reasonably deducible therefrom are admitted as true for the limited purpose of this review. The question presented by the demurrer is whether, on the facts averred, the law says with certainly that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. *Ford Motor Credit Company v. Caiazzo,* 564 A.2d 931 (1989).

3. Defendant's preliminary objection for improper venue, pursuant to Pa.R.C.P. 1028(a)(1), based on the arguments that Florida is the appropriate venue for an abuse of process claim such as this one, because underlying litigation is taking place in Palm Beach County, Florida, Florida law applies to this case, and all Plaintiffs are Florida residents or doing business in Florida, is hereby SUSTAINED. The Court notes that there is a pending lawsuit in Florida brought by the present Defendant, Sarah Wonders, against several businesses, including all of the present Plaintiffs. Plaintiffs in this matter argue that venue is appropriate in Westmoreland County because Defendant resides in this county, was residing in this county when she filed the Florida action, and because Plaintiffs are willing to subject themselves to jurisdiction in this county. However, the law does not support these arguments in regard to an abuse of process claim, and, in fact, that Defendant was residing in Westmoreland County when she filed the underlying action in Palm Beach County supports the position that the present venue is not appropriate. Further, while the Plaintiffs in this case are willing to submit themselves to Pennsylvania jurisdiction and all the related travel costs, current Defendant is prejudiced in that should she wish to conduct discovery or depose witnesses, all of which is connected to Florida, additional costs would be placed upon her to do so.

   The Court, *sua sponte,* notes Pennsylvania Rule of Civil Procedure 2179(a), regarding venue for a personal action against a corporation. According to Rule 2179(a), had Sarah Wonders originally filed suit against the instant Plaintiffs in Pennsylvania, venue clearly would have been improper. The Rule provides that venue is appropriate in such an action in "(1) the county where its registered office or principal place of business is located; (2) a county where it regularly conducts business; (3) the county where the cause of action arose; (4) a county where a transaction

or occurrence took place out of which the cause of action arose, or (5) a county where the property or a part of the property which is the subject matter of the action is located…" Pa.R.C.P. 2179(a)(1)-(5). As the Plaintiffs do not argue they maintain registered offices or principal places of business in Pennsylvania, that they regularly conduct business in Pennsylvania, or that any transaction or occurrence took place in Pennsylvania that gave rise to this lawsuit, any argument that venue could have ever been proper in Westmoreland County fails.

As in the present claim, a claim for abuse of process entails, at the very least, an allegation by Plaintiff that Defendant misused the legal process to achieve "a purpose which is not an authorized goal of the procedure in question." *Harris v. Brill,* 844 A.2d 567, 572 (Pa. Super. 2004). Thus, any claim for abuse of process is necessarily based on some underlying action. As such, a determination of proper venue in such a case is not akin to the determination of proper venue in a case based solely upon certain transactions or occurrences. Pennsylvania Rule of Civil Procedure 1006(a) states: "…an action against an individual may be brought in and only in a county in which the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law." Pursuant to this Rule, Pennsylvania courts have explained that the transaction or occurrence in an abuse of process case is the filing of the underlying action itself. The Pennsylvania Superior Court in *Kring v. Univ. of Pittsburgh,* held, in part, that venue was improper in a wrongful use of civil proceedings case where the complaint was filed in a different county than the underlying action. The Court went on to say that the appropriate consideration in determining venue in such a case was the county where the underlying action was filed, rather than the location of the occurrences or damages giving rise to the underlying action. 829 A.2d 673 (Pa. Super. Ct. 2003).

In the present case, the underlying action was filed in Palm Beach County, Florida. It appears to the Court that all of the allegations involved in the Pennsylvania lawsuit arose from alleged causes of action in Florida. The pending Florida lawsuit and the instant lawsuit in Pennsylvania, since it involves substantially the same parties, could in fact then involve duplication of discovery. Plaintiffs' entire Complaint is based upon occurrences and litigation that took place in Florida, regarding Defendant's ability, or lack there of, to bring suit in Florida. In the event that Defendant loses her now-pending lawsuit in Florida, the Court then, in Pennsylvania, would have to go through efforts to interpret Florida law as to the requirements of abuse of process and those standards, because the issue is not just whether the current Defendant, Sarah Wonders, is not

successful in Florida against the instant Plaintiffs, it is whether it was in compliance with Florida law that she brought a lawsuit. A Florida court is in a far better position than a Pennsylvania court to interpret and apply Florida law, as Florida courts, specifically the District Court for the Southern District of Florida, and currently, the 15th Judicial District Circuit in Palm Beach County, have already evaluated or begun to evaluate the merits of the underlying action.

4. Accordingly, the Complaint is DISMISSED, and the Court does not need to address Defendant's other Preliminary Objections at this time.

5. Further, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:
/s/ Anthony G. Marsili, Judge

COMMONWEALTH OF PENNSYLVANIA
V.
DAVID F. STAHL, Defendant

CONSTITUTIONAL LAW; JURY

Peremptory Challenges; Discrimination and Classification; Particular Groups Inclusion or Exclusion

1. Whether a given ethnic group is cognizable so as to require *Baston*-like protection from community prejudices is a question of fact within the sound discretion of the trial court.

2. For an ethnic group to be cognizable, Defendant must show the ethnic group: (1) is defined and limited by some clearly identifiable factor or factors; (2) possesses a common thread of attitudes, ideas or experiences; (3) shares a community of interests such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process; and, (4) has experienced or is experiencing discriminatory treatment and is in need of protection from community prejudices.

3. Because Defendant failed to offer any evidence that age was a cognizable class entitled to *Baston* protection, his allegation of error of an improper peremptory challenge by the Commonwealth due to age, was denied.

4. Even if age is a cognizable class entitled to *Baston* protection, the Commonwealth had a reasonable non-discriminatory reason for the exclusion of the juror in question and Defendant offered no reason how this challenge impacted the jury or the trial.

CRIMINAL LAW

Reception and Admissibility of Evidence; Discretion of the Lower Court; Photographs Arising Passion or Prejudice, Gruesomeness

1. The admissibility of photographs of a murder victim at trial is treated no differently than any other evidence.

2. Photographs of a corpse are not inadmissible *per se*.

3. For a photograph of a corpse to be admissible, the Court must determine whether the photograph is inflammatory.

4. If the photograph is not inflammatory, it is admissible.

5. If the photograph is inflammatory, the court must determine whether it has essential evidentiary value in order to permit the jury to view it.

6. A photograph is inflammatory if it is so gruesome as to cloud the jury's objective assessment of the guilt or innocence of Defendant.

7. Of the nineteen photographs to which Defendant objected, the trial court properly disallowed four of the photographs.

8. The remaining photographs demonstrated evidentiary value including the mechanism of the strangulation injury together with additional injuries, which in turn showed the callousness and brutality of the homicide.

Subsequent Condition or Conduct of the Accused

1. Defendant's attempts to cover up after a crime can be inferred to demonstrate consciousness of guilt.

2. Inconsistent statements from Defendant to others that his wife left him were properly admitted and relevant to show Defendant's consciousness of guilt.

Reception and Admissibility of Evidence; Discretion of the Court

1. Admissibility of evidence is within the sound discretion of the trial court.

2. Only an abuse of discretion and resulting prejudice in the admission of evidence constitutes a reversible error.

3. An abuse of discretion is not merely an error of judgment, but is the overriding and misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, ill will or partiality as shown by the evidence of record.

4. Bad words and harsh statements are common elements of violent crimes such as homicide and it is not always possible to sanitize the evidence that is presented.

5. As a result, the Court did not err when it permitted the jury to hear Defendant call his daughter a bitch in a conversation with a witness.

Reception and Admissibility of Evidence; Matters Involving Scientific or Other Special Knowledge In General; Examination of Experts

1. Expert testimony is proper when it will aid the jury regarding subject matter beyond the knowledge or experience of an average lay person.

2. It is not necessary that an expert testify that his conclusions are stated beyond a reasonable doubt; whether an expert's testimony is persuasive beyond a reasonable doubt is a matter for the jury's consideration.

3. Presumptive tests for blood using luminol and leuco crystal violet are admissible though they do not confirm the presence of blood.

4. The expert in the case at bar explained the nature of the test and its limitations. The expert also admitted other substances may trigger a positive test.

5. The defense's cross examination of the expert witness concerning the luminol and leuco crystal violet tests went to the weight to be accorded the results of the testing, not whether the testing itself was admissible.

Confrontation; Matters Within the Witness's Knowledge or Observation

1. A medical expert who did not perform the autopsy may testify as to the cause of death as long as the testifying expert is qualified and sufficiently informed.

2. In the present case, Dr. Cyril Wecht was a highly qualified forensic pathologist, serving as coroner of Allegheny County for twenty years and as its medical examiner for an additional time.

3. In this matter, Dr. Wecht did not recite the opinion of the autopsy prosecutor; rather, Dr. Wecht based his opinions and conclusions upon an independent review of the file.

4. Because Dr. Wecht's opinion was based upon his own independent review of the file, the Court's admission of his testimony was proper.

Homicide, Mayhem and Intent to Kill; Previous Difficulties and Surrounding Circumstances; Discord Between Spouses and Co-Habitants

1. Pennsylvania permits the admission of prior incidents within the context of a marital relationship in which the accused threatened, assaulted, or quarreled with the decedent for the purpose of proving ill will, motive, or malice.

2. Evidence of prior abuse is also admissible if it is part of a chain or sequence of events that form the history of the case and was part of its natural development.

3. Because the probative value of the evidence of marital discord and abuse substantially outweighed the prejudicial effect of the evidence, especially when Defendant claimed the killing was accidental, the Court properly admitted it pursuant to Pa.R.E. 404(b).

Taking Papers or Articles to Jury Room

1. Whether an exhibit should be allowed to go out with the jury during its deliberations is within the sound discretion of the trial judge.

2. The trial court's decision to permit the jury to take an exhibit during its deliberations will not be overturned absent an abuse of discretion.

3. Denying Defendant's request to allow the jury to take an exhibit including cell phone text messages between Defendant and the decedent prior to the homicide eliminated the risk the jury would be unduly influenced by the records themselves.

4. The court's determination that the jury should not take certain exhibits including text messages between Defendant and the decedent during the time prior to the homicide was not an abuse of discretion.

HOMICIDE

Elements of First-Degree Murder

1. The specific intent to kill, including the premeditation needed for first-degree murder, does not require planning or previous thought or any particular length of time.

2. All that is necessary is there be time enough so that the defendant can and does form an intent to kill and is conscious of that decision.

3. The Court's use of Pennsylvania Standard Jury Instruction 15.2502(A) was not in error.

4. Pennsylvania Standard Jury Instruction 15.2502(A) is a proper statement of the law and it does not establish a time limit for the formation of the specific intent to kill.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 1233 C 2012

Appearances:

John W. Peck, District Attorney,
Westmoreland County, for the Commonwealth
Donna McClelland,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION OF THE COURT
ISSUED PURSUANT TO PA.R.A.P. RULE 1925(A)

The defendant, David F. Stahl, appeals from the judgment of sentence entered June 27, 2014, wherein he was sentenced to a mandatory sentence of life in prison at the Department of Corrections and related terms, costs and conditions. This Opinion is issued in compliance with Pa.R.A.P. Rule 1925.

FACTUAL HISTORY

The charges in this case arose from the death of Rebecca Stahl, whose body was located on February 24, 2012 in a rural area of Unity Township, Westmoreland County. The discovery of her body was the result of an investigation into the disappearance of Rebecca Stahl, who had been reported as missing by her father, Kenneth Anderson, on February 21, 2012. The evidence presented at trial established that Rebecca Stahl had lived in Hempfield Township, just outside of Greensburg, with her husband, David F. Stahl ("Stahl"). The evidence also suggested that there had been a history of domestic altercations between David and Rebecca Stahl, and that their marriage was not always a happy one. On February 17, 2012, Rebecca Stahl and her friend Debra Lynn Morrison celebrated their birthdays with lunch and shopping. It wasn't a lengthy celebration, though, because Rebecca was recovering from having had a complicated medical procedure including a hysterectomy. Morrison testified that she observed that Rebecca had some difficulty moving

about and appeared to be tired and in pain. (TT 51-59).[1] It was the last time she would see her friend Rebecca alive.

On February 21, 2012, Rebecca Stahl's father, Kenneth Anderson, reported his daughter missing. He spoke with Pennsylvania State Trooper Michael Laird and indicated that he had not had contact with Rebecca since Saturday, February 18, 2012, that she was recovering from a hysterectomy procedure and that it was not normal for her to be non-communicative for so long. He informed Tpr. Laird that he was concerned because she had seemed depressed after the surgery. Pennsylvania State Troopers began an investigation of the missing person's report, talking with Rebecca's sister, Kelly Beltz, and David Stahl. (TT 72-75). Stahl reported that he had last had contact with Rebecca on Monday, February 20, 2012, when they had had a conversation via text regarding their bank debit card. Stahl told Tpr. Laird that she was gone when he had returned home from Lowe's, a large home improvement store. (TT 75-76). Kelly Beltz advised Tpr. Laird that it was unlikely that Stahl was unaware of Rebecca's whereabouts, because he was very controlling. Stahl allowed Tpr. Laird to walk through the residence, but at that time, he did not locate Rebecca Stahl. (TT 79-81).

Tpr. Laird testified that he spoke to his supervisor about his concerns. "I didn't feel right about the incident and it's kind of hard to explain, but the hair on the back of my neck was standing up and when you're in police work you often hear people say when the hair on the back of your neck stand up you need to look into it further because there's something wrong." (TT 82). As a result, Tpr. Thomas Kaecher and Tpr. Robert Burford returned to the Stahl residence later that night and conducted a follow-up interview of David Stahl. (TT 88-103).

Further investigation and interviews led the Pennsylvania State Police to ask Stahl for consent to search his residence on the morning of February 22, 2012. Stahl consented to a search of the residence and signed a written consent for them to do so. (TT 133). At that time, a state trooper also photographed numerous injuries that could be seen on Stahl's face. (TT 168-174). A search of the residence revealed a number of concerning items, including evidence of recent repairs done in the bathroom and the basement area of the home. State Troopers also noted a number of inconsistencies in Stahl's statements to them, and he became a "person of interest." (TT 190). The State Police then applied for and obtained a search warrant signed by Judge Debra Pezze of the Court of Common Pleas of Westmoreland County and returned to the Stahl residence later that afternoon. (TT 180). During this search, a plastic garbage bag was found in a basement freezer. Inside this garbage bag was a separate bag that contained personal items belonging to Rebecca Stahl, and another bag that contained partially burned identification and medical information for Rebecca Stahl. (TT 181-182, 199-203,

[1] Numerals in parenthesis preceded by the letters "TT" refer to specific pages of the transcript of the jury trial in this matter, held on June 16 – 27, 2014 before this court, and made a part of the record herein.

208-211, 213-217). Inside another bag were hiking boots and other items of what appeared to be men's clothing, (TT 199-203, 217-221). Troopers also noted evidence of plant material that they believed to be arborvitae leaves. (TT 221-222). Troopers also collected other evidence from the home, including a clump of reddish-brown hair that was found on top of a paper shredder in the basement. (TT 223). Troopers also treated the basement area with luminol and leuco crystal violet, which revealed several areas of suspected blood evidence. They photographed and collected samples from the areas that showed fluorescence, indicating the possibility of the presence of blood. (TT 224-247).

The body of Rebecca Stahl was found on February 24, 2012 in a stand of arborvitae along Bell Memorial Church Road in Unity Township. (TT 275-286). Forensic pathologist Dr. Cyril H. Wecht testified that his associate, Dr. John Delmastro, performed an autopsy on the body of Rebecca Stahl on February 24, 2012. (TT 321-324). Dr. Wecht testified that numerous injuries were visible on her body, including lacerations, abrasions and contusions. (TT 327-339) He opined that the lacerations to her lips would have been caused by a blow of some sort. (TT 332-333) He further testified that the tear on her head would have likely been caused by blunt force trauma.(TT 333-334). He opined that these injuries would likely have occurred sometime near the time of Rebecca's death. (TT 336-337). Dr. Wecht testified that, after reviewing the photographs and the reported findings of the autopsy, including both the internal and the external examination, that the cause of Rebecca Stahl's death was asphyxiation due to manual strangulation. (TT 347). He further testified that he believed that approximately thirty seconds of applied force would have been necessary to produce the amount of hemorrhaging that was seen at the time of Rebecca Stahl's autopsy. (TT 348).

David Stahl provided multiple statements to state police troopers during the course of the investigation; however, it was not until February 29, 2012 that he finally admitted to the killing of his wife. He maintained, however, that he had acted in self-defense or in the mistaken belief that he was justified in acting as he did when he manually asphyxiated his wife, Rebecca Stahl, in their Hempfield Township home, killing her. He also explained that he panicked and tried to cover up her death after he killed her, making up a story that she had left him, but in reality hiding the body in the backyard shed and ultimately dumping her body near the Latrobe Airport. (TT 525-589) Stahl elected not to testify at trial.

PROCEDURAL HISTORY

Given the volume of the post-sentence motions raised in this matter, a brief procedural history will be provided. David Stahl was arrested on February 27, 2012 by criminal complaint, charging him with Criminal Homicide in the strangulation death of his wife, Rebecca Stahl. A criminal information was filed on May 14, 2012 at Case No. 1233 C 2012. Stahl filed an Omnibus Pre-trial Motion, which included a motion to suppress statements made by him and search

results. A hearing was conducted before the Honorable Debra A. Pezze on April 5, 2013. The pre-trial motions were denied by opinion and order on December 30, 2013.

Jury selection commenced June 16, 2014 before this court. Trial commenced on June 23, 2014, and the jury returned a verdict of guilty of murder of the first degree on June 27, 2014. Stahl was sentenced to life imprisonment without the possibility of parole on that same date. The Commonwealth filed a motion for Modification of Sentence on July 3, 2014. On July 24, 2014, post-sentence motions were timely filed by Stahl, alleging that the verdict of the jury was against the weight of the evidence. A hearing was conducted on all post sentence motions before this court on August 11, 2014. On October 20, 2014, an order was issued by this court, granting in part the Commonwealth's Claim for restitution in the amount of $14,116.55, and denying in part the Commonwealth's Claim for Restitution in the amount of $46,535.10.

A Notice of Appeal was timely filed by the Commonwealth from the October 20, 2014 Order by this court to the Pennsylvania Superior Court on November 19, 2014. On December 1, 2014, the Commonwealth was ordered by the court to file a Concise Statement of the Errors Complained of on Appeal. The Commonwealth filed said Statement on December 19, 2014. This appeal is before the Pennsylvania Superior Court at 1938 WDA 2014.

The Defendant filed a Cross-Appeal from the October 20, 2014 Order on November 21, 2014. On December 22, 2014, Stahl was ordered to file a Concise Statement of the Errors Complained of on Appeal. Said Statement of Errors was filed by Stahl on January 12, 2015. This appeal is before the Pennsylvania Superior Court at 1937 WDA 2014.

The post-trial motions, averring that the verdict of the jury was against the weight of the evidence, were denied by order of court on December 16, 2014. A Notice of Appeal was timely filed by Stahl on December 22, 2014. On December 23, 2014, Stahl was ordered to file a Concise Statement of the Errors Complained of on Appeal. Said Statement of Errors was filed on January 13, 2015. This appeal is before the Pennsylvania Superior Court at 1 WDA 2015.

ISSUES PRESENTED ON APPEAL:

1. **DID THE TRIAL COURT ERR IN ADMITTING STATEMENTS MADE TO THE PENNSYLVANIA STATE POLICE BY THE DEFENDANT ON FEBRUARY 29, 2012?**

Stahl's first allegations of error assert that the statements made by Stahl to the Pennsylvania State Police without the presence of counsel on February 29, 2012 were the product of unlawful police interrogation, or, in the alternative, violated the right to counsel under the 5th and 14th amendments to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution, or, in the

alternative, violated the right to counsel under the 6th and 14th amendments to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution.[2] These issues were raised in Defendant's Omnibus Pre-Trial Motion and were denied by the suppression court on December 30, 2013. A copy of the Honorable Debra Pezze's Opinion and Order of Court is attached hereto for reference.

2. WHETHER THE COMMONWEALTH'S USE OF A PEREMPTORY CHALLENGE BASED ON A JUROR'S AGE WAS DISCRIMINATORY AND CAUSED AN UNJUST RESULT IN THE SELECTION OF THE JURY?

During jury selection, counsel for the Defendant objected to the Commonwealth's use of a peremptory challenge for Juror # 17, suggesting that the Commonwealth's reason for exercising that challenge was improper and due solely to her age.[3] (TT 116).

A peremptory challenge is a challenge to a prospective juror for which no reason need be given or cause assigned. The right of peremptory challenge is not itself a right to select, but a right to reject, jurors. *Commonwealth v. England,* 474 Pa. 1, 375 A.2d 1292 (1977). Peremptory challenges allow parties to strike prospective jurors whom they have good reason to believe might be biased, but who are not so obviously partial as to be excludible from the jury panel for cause. *See Hayes v. Missouri,* 12 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1888). *Commonwealth v. Jackson,* 386 Pa. Super. 29, 38-39, 562 A.2d 338, 342 (1989).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986) brought to light discrimination as an issue in the selection of jurors, proscribing the use of peremptory challenges in a racially discriminatory manner. Its reach has

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[2] The Defendant's Concise Statement of Matters Complained of On Appeal sets forth three separate allegations of error regarding the Defendant's Statements to Police, specifically, "Whether the statements made by Stahl to the Pennsylvania State Police on February 29, 2012, at the Westmoreland County Prison were the product of unlawful police interrogation.; Whether the statements made by Stahl to the Pennsylvania State Police on February 29, 2012 at the Westmoreland County Prison without the presence of counsel should be suppressed as violative of the right to counsel under the 5th and 14th Amendments to the United States Constitution and Article 1, Section 9, of the Pennsylvania Constitution.; Whether the statement made by Stahl to the Pennsylvania State Police on Wednesday, February 29, 2012, at the Westmoreland County Prison without the presence of counsel should be suppressed as violative of the right to counsel under the 6th and 14th Amendments to the United States Constitution and Article 1, Section 9, of the Pennsylvania Constitution." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(A), ¶3(B), ¶3(C)) The court has consolidated related issues for the purpose of this opinion.

[3] The specific error set forth in The Defendant's Concise Statement of Matters Complained of On Appeal sets forth:"Whether the Commonwealth's use of a peremptory challenge based on a juror's age was discriminatory and caused an unjust result in the selection of the jury." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(D)). The court has restated this issue for the purpose of this opinion.

been expanded from racial discrimination to include gender discrimination as well. *J.E.B. v. Alabama ex rel T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L. Ed. 2d 89 (1994). Whether a given ethnic group is cognizable so as to require *Batson* – like protection from community prejudices is a question of fact within the sound discretion of the trial court. *Commonwealth v. Rico,* 551 Pa. 526, 711 A.2d 990 (1998). For an ethnic group to be cognizable, a test for cognizability requires that a four-part test be met. *Rico, supra*. A defendant must show the ethnic group: (1) is defined and limited by some clearly identifiable factor or factors; (2) possesses a common thread of attitudes, ideas or experiences; (3) shares a community of interests such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process; and, (4) has experienced or is experiencing discriminatory treatment and is in need of protection from community prejudices. *Rico* at 535, 994 (Pa. 1998), *citing United States v. DiPasquale,* 864 F.2d 271,277 (3rd Cir. 1988); *United States v. Bucci,* 839 F.2d 825, 833 n. 11 (1st Cir. 1988); *United States v. Sgro,* 816 F.2d 30, 33 (1st Cir. 1987). No such showing was attempted or made in the instant matter. Further, the court is unaware of any prior decision in Pennsylvania which extends *Batson* and *Rico* to include age as a cognizable class.

Even if age was shown to be a cognizable class and entitled to protection under *Batson*, the Defendant's point is not well taken. The Commonwealth expressed a reasonable, non discriminatory basis for excluding the juror in question and the defense did not show in any manner how this challenge impacted the jury or the trial. In short, the Defendant cannot prevail on this issue and it does not afford the basis for a new trial.

3. DID THE TRIAL COURT ERR IN PERMITTING AUTOPSY PHOTOGRAPHS TO BE ADMITTED INTO EVIDENCE AT TRIAL?

Stahl's next allegations of error assert that the photographs of the victim taken during the autopsy were "improperly admitted into evidence at trial as they were graphic, unduly prejudicial, and lacking sufficient evidentiary value."[4] In this case, the Commonwealth sought to admit copies of photographs of the body of Rebecca Stahl at autopsy. Defense counsel objected to these photographs as being "inflammatory, prejudicial and without sufficient evidentiary value." (TT 290).

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[4] The Defendant's Concise Statement of Matters Complained of On Appeal sets forth two separate allegations of error, specifically: "Whether photographs of the victim taken during the autopsy were improperly admitted into evidence at trial as they were graphic, unduly prejudicial, and lacking sufficient evidentiary value; Whether color photographs of the victim taken during the autopsy were improperly admitted into evidence at trial as they were graphic, unduly prejudicial, and lacking sufficient evidentiary value." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(E), ¶3(F)) The court has consolidated related issues for the purpose of this opinion.

It is well –settled that the admissibility of evidence is within the sound discretion of the trial court:

> The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. Furthermore, if in reaching a conclusion the trial court over-rides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error.

Commonwealth v. Fischere, 70 A.3d 1270, 1275 (Pa. Super. 2013)(Internal citations omitted).

The Pennsylvania Supreme Court has determined that the admissibility of photographs of a murder victim at trial is treated no differently than any other evidence. *Commonwealth v. Martinelli,* 547 Pa. 294, 690 A.2d 203 (1997). Photographs of a corpse are not inadmissible *per se*. *Commonwealth v. Henry,* 550 Pa. 346, 386, 706 A.2d 313, 333 (1997). Rather, the trial court must conduct a two-part test to determine admissibility. *Id*. First, the court must determine whether the photograph is inflammatory. If not, they are admissible. *Id*. The court has interpreted inflammatory to mean the photo is so gruesome it would tend to cloud the jury's objective assessment of the guilt or innocence of the defendant. *Commonwealth v. Dotter,* 403 Pa. Super. 507, 589 A.2d 726 (1991). If the trial court decides the photograph is inflammatory, in order to permit the jury to view the photo as evidence, it must then determine whether it has essential evidentiary value. *Henry,* 550 Pa. at 386, 706 A.2d at 333 (1997). Further, the Pennsylvania Supreme Court has observed that:

> A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt.

Commonwealth v. Tharp, 574 Pa. 202, 222-223, 830 A.2d 519, 531 (Pa. 2003), citing *Commonwealth v. McCutchen,* 499 Pa. 597, 454, A.2d 547, 549 (1982).

In pre-trial proceedings, the trial court carefully considered the nineteen (19) photographs of the decedent to which there was an objection, mindful of the criteria set forth in *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313 (1997). (TT 257-273). The trial court disallowed four (4) of the photographs. (TT 273). The remaining photographs clearly demonstrated essential evidentiary value, clearly outweighing any potential for prejudice. The photographs demonstrated the mechanism of the strangulation injury, together with additional injuries, all of which tended to show the callousness and brutality involved in this homicide. The court noted specifically that the forensic pathologist, Dr. Cyril Wecht, would need these photographs to more "specifically explain the injuries to the jury." (TT 273). The court followed up her pre-trial ruling with a specific instruction at trial, cautioning the jury on the nature of the photos, their purpose, and the obligations of the jury to remain objective. (TT 291). In fact, at trial, Dr. Wecht noted in his testimony that photographs are part of the autopsy process and are routinely taken as necessary. (TT 324, 326). Further, throughout his testimony, Dr. Wecht made repeated references to those photographs in order to illustrate more clearly for the jury the nature of the injuries and what they show about how those injuries occurred. (*see e.g.* TT 329 – 339) These photographs were properly admitted. Stahl is not entitled to a new trial on this basis.

4. DID THE TRIAL COURT ERR IN ALLOWING EVIDENCE OF STAHL'S ENCOUNTERS WITH OTHER WOMEN, PATRICIA TARVER AND MARY COLEMAN, TO BE ADMITTED AT TRIAL?

The Defendant alleges that the evidence offered at trial through Patricia Tarver's testimony regarding Stahl's encounters with Patricia Tarver and Mary Coleman was unduly prejudicial and irrelevant.[5] (TT 244-249). The Commonwealth offered this testimony for the purpose of demonstrating Stahl's untruthful statements to Tarver and Coleman regarding Rebecca Stahl's whereabouts. (TT 249-252).

In a recent case, the Pennsylvania Superior Court stated:

> It has long been recognized that a defendant's attempts to cover up after a crime can be inferred to demonstrate a consciousness of guilt. *See Cathcart v. Commonwealth,* 37 Pa. 108, 113 (Pa.1860) ("The fabrication of false and contradictory accounts by an accused criminal, for the sake of diverting inquiry or casting off

[5] The Defendant's Concise Statement of Matters Complained Of On Appeal sets forth two separate allegations of error, specifically: "Whether evidence of Stahl's two encounters with Patricia Tarver was relevant and properly admissible in that its evidentiary value was outweighed by its prejudicial effect"; "Whether evidence of Stahl's encounter with Mary Coleman was relevant and properly admissible in that its evidentiary value was outweighed by its prejudicial effect." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(G), ¶3(H)). The court has consolidated related issues for the purpose of this opinion.

> suspicion, is a circumstance always indicatory of guilt"); *see also Commonwealth v. Hughes* [581 Pa. 274], 865 A.2d 761, 792 (Pa.2004) (noting that the conduct of a defendant following a crime may be admitted to show guilt) (citing *Commonwealth v. Homeyer* [373 Pa. 150], 94 A.2d 743, 747 (Pa.1953)).

Commonwealth v. Bradley 69 A.3d 253, 258 -259 (Pa.Super.,2013)

Stahl's conduct in the period of February 18, 2012 until February 24, 2012 was a significant issue before the jury. The statements that he made to Ms. Tarver and Ms. Coleman were inconsistent with what Mr. Stahl told police during that period of time. Stahl told investigating officers that his wife was gone when he had returned home from Lowe's, a large home improvement store. (TT 75-76). In contrast, he told Ms. Tarver and Ms. Coleman that Rebecca Stahl had run off with another man. (TT 441-442, 451-453). He later confessed to police that he had killed her. Clearly, Stahl's untruthful fabrications that his wife left him were relevant to show his consciousness of guilt. Further, this court did not permit testimony that Mary Coleman had spent the night with Mr. Stahl to be introduced at trial. (TT 273-274). Although this testimony may have reflected poorly on Stahl, its probative value in showing consciousness of guilt outweighed any prejudicial effect it may have had. For these reasons, the trial court did not err in permitting this testimony and he is not entitled to a new trial on this basis.

5. DID THE TRIAL COURT ERR IN ALLOWING STAHL'S STATEMENT TO PATRICIA TARVER REGARDING HIS DAUGHTER TO BE ADMITTED AT TRIAL?

The Defendant next complains that a statement by the Defendant labeling his daughter a "bitch" should not have been admitted.[6]

As set forth above, it is well–settled that the admissibility of evidence is within the sound discretion of the trial court:

> The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. Furthermore, if in reaching a conclusion the trial court over-rides or misapplies

[6] The Defendant's Concise Statement of Matters Complained Of On Appeal sets forth the allegation of error, specifically as: "Whether evidence of Stahl's statement to Patricia Tarver regarding his daughter was relevant and properly admissible in that its evidentiary value was outweighed by its prejudicial effect." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(I)). The court has consolidated related issues for the purpose of this opinion.

> the law, discretion is then abused and it is the duty of the appellate court to correct the error.

Commonwealth v. Fischere, 70 A.3d 1270, 1275 (Pa. Super. 2013)(Internal citations omitted).

The court determined that the jury should have the benefit of the full context of the Defendant's conversation with Patricia Tarver. That the conversation included the word "bitch" does not render the court's decision any less valid. Bad words and harsh statements are common elements of violent crimes such as homicide, including the instant case. It is not always possible to completely sanitize the evidence that is presented. No error occurred in this regard and no relief for the Defendant is required.

6. DID THE TRIAL COURT ERR IN ALLOWING TESTIMONY REGARDING LUMINOL AND LEUCO CRYSTAL VIOLET TESTING TO BE ADMITTED AT TRIAL?

Stahl alleges that the trial court erred in allowing testimony regarding the application of luminal and leuco crystal violet testing as misleading, prejudicial and irrelevant.[7]

State police troopers searched the Stahl residence and treated the basement area with luminol and leuco crystal violet, which revealed several areas of suspected blood evidence. (TT 224-244). They photographed and collected samples from the areas that showed fluorescence, indicating the possibility of the presence of blood. (TT 224-247). At trial, Ashlee Mangen, a forensic scientist for the Pennsylvania State Police Bureau of Forensic Services, testified that the evidence submitted as a result of the search was tested by her. (TT 385-409). It is important to note that the defense did not object to Ms. Mangen's qualifications as an expert.[8] Ms. Mangen testified that some of the testing performed was

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[7] The Defendant's Concise Statement of Matters Complained Of On Appeal sets forth four separate allegations of error, specifically: "Whether evidence of fluorescence resulting from application of luminol (characterized by the Commonwealth as indicating the presence of blood) was relevant and properly admissible in that its evidentiary value was outweighed by its prejudicial effect; Whether the Commonwealth's repeated reference to fluorescence resulting from application of luminol as indicating the presence of blood was misleading, relevant, and properly admissible in that its evidentiary value was outweighed by its prejudicial effect; Whether evidence of fluorescence resulting from application of leuco crystal violet (characterized by the Commonwealth as indicating the presence of blood) was relevant and properly admissible in that its evidentiary value was outweighed by its prejudicial effect.; Whether the Commonwealth's repeated reference to fluorescence resulting from application of leuco crystal violet as indicating the presence of blood was misleading, relevant, and properly admissible in that its evidentiary value was outweighed by its prejudicial effect." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(J), ¶3(K) ¶3(L)¶3(M)). The court has consolidated related issues for the purpose of this opinion.

[8] In fact, when Ms. Mangen was offered as an expert in the field of serology, Ms. McClelland stated, "I accept her fully." (TT 388).

"presumptive testing" in that it is utilized to determine the presence of blood, which may or may not be followed by a confirmatory test to confirm whether blood is present. (TT 423-430).

A trial court's decision to allow expert testimony can be reversed only in the event the court abused its discretion or committed an error of law. *Commonwealth v. Minerd ,* 562 Pa. 46, 54, 753 A.2d 225, 229 (2000). Expert testimony is proper where it will aid the jury regarding subject matter "beyond the knowledge or experience of an average lay person." *Id*. at 55, 230. The law is clear that an expert's conclusions need not be stated as beyond a reasonable doubt. *Commonwealth v. Stallworth,* 566 Pa. 349, 369, 781 A.2d 110, 122 (2000). "Whether an expert's testimony is persuasive beyond a reasonable doubt is a matter for the jury's consideration." *Id*.

In *Commonwealth v. Hetzel,* 822 A.2d 747 (Pa. Super 2003), the Superior Court examined presumptive blood tests under the general principles enunciated in Pa.R.E. 702 and stated that the presumptive tests for blood in that case were admissible though they did not confirm the presence of blood. However, this case is instructive, as the expert in *Hetzel,* as in the case at bar did not testify that, in her opinion, blood was present as a result of the presumptive test. Rather, as in the instant case, the presumptive tests are used as an investigatory tool, and the presence of blood could then be confirmed using confirmatory tests. (*See, e.g*. TT 392). As in the case at bar, the expert testimony in *Hetzel* explained that the presumptive test did not confirm the presence of blood; it "merely indicates that blood may be present, as there are other substances that trigger a positive test." *Hetzel* at 762. As in the case at bar, the expert in *Hetzel* explained in detail the nature of the test, as well as its limitations and acknowledged that other substances may trigger a positive test. Mangen's knowledge of the tests generally and their results in this case specifically assisted the trier of fact. Any uncertainties went to the weight to be accorded the results, which defense counsel challenged vigorously on cross-examination. (*See, e.g*. TT 410-427, 430-433).

In the instant case, Mangen informed the jury that the complained-of testing was part of the investigatory chain, triggering later more definitive tests. Her testimony was explored and questioned in depth by defense counsel. The defense's argument goes more to weight of the evidence that to its admissibility. The defense took full advantage of its opportunity to cross examine the expert and question her conclusions and the jury properly was allowed to consider, for whatever its weight and value, these testing procedures.

Although Stahl characterizes the evidence as misleading or prejudicial, it was, as set forth above, properly admitted and was neither misleading nor improperly prejudicial. Therefore, no relief is warranted on this basis

7. DID THE TRIAL COURT ERR IN PERMITTING DR. CYRIL WECHT TO TESTIFY ABOUT AN AUTOPSY PERFORMED

BY HIS ASSOCIATE, DR. DELMASTRO OR DEPRIVE THE DEFENDANT OF THE RIGHT OF CONFRONTATION?

Stahl's next challenges the admission of Dr. Wecht's testimony as impermissible hearsay that deprived him of his right of confrontation.[9]

In *Commonwealth v. Ali,* 608 Pa. 71, 10 A.3d 282 (Pa. 2010), the Pennsylvania Supreme Court stated that a "medical expert who did not perform the autopsy may testify as to cause of death as long as the testifying expert is qualified and sufficiently informed." *Ali* at 306, *citing Commonwealth v. Smith,* 480 Pa. 524, 391 A.2d 1009 (1978) and *Commonwealth v. Mitchell,* 391 Pa. Super. 100, 570 A.2d 532 (1990). The Superior Court's recent opinion in *Commonwealth v. Buford,* 101 A.3d 1182 (Pa. Super 2014), sets forth the same standard, relying specifically on *Ali, supra,* at 1198.

In the present case, as in *Buford,* the testifying forensic pathologist, Dr. Cyril Wecht, was a highly experienced and qualified forensic pathologist[10], serving as Coroner for Allegheny County for 20 years and also as its Medical Examiner for an additional time. (TT. 319-320) He had testified as a forensic pathologist in 25 or more states, and authored numerous publications, including articles and books on forensic sciences. (TT. 319-321) Moreover, Dr. Wecht did not simply recite the opinion of the autopsy prosector (Dr. Delmastro). Dr. Wecht's opinion was based on his own conclusions after his own independent review of the file. (TT 321-322). In fact, Dr. Wecht went further and personally reviewed the slides, ordered some additional testing, reviewed the photographs and had discussions with the prosector. (TT. 321 -322.) The final report was jointly authored by Dr. Wecht and Dr. Delmastro. (TT. 322). As Dr. Wecht's testimony was based upon his own conclusions and review of the file, the court's admission of his testimony was proper. No error occurred and the defendant is not entitled to relief based upon this theory.

8. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE OF PRIOR CRIMINAL CONDUCT OF DAVID STAHL AGAINST THE VICITM?

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[9] The Defendant's Concise Statement Of Matters Complained Of On Appeal sets forth two separate allegations of error, specifically: "Whether the testimony of Cyril Wecht was impermissible hearsay in that Wecht did not perform the autopsy of the victim nor was he present for the autopsy; Whether Stahl was deprived of his right of confrontation through the testimony of Cyril Wecht in that Wecht did not perform the autopsy of the victim nor was he present for the autopsy" (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(N), ¶3(O)). The court has consolidated related issues for the purpose of this opinion.

[10] Dr. Wecht's qualifications were not at issue and, in fact, when the Commonwealth offered Dr. Wecht as an expert in forensic pathology and defense counsel was given an opportunity to raise questions about his qualifications, defense counsel had "none at all about his qualifications" and the court accordingly instructed the jury that he was qualified as an expert in forensic pathology. (TT 323).

Stahl's next allegation of error asserts that the trial court erred in permitting the admission of Stahl's prior criminal conduct against the decedent.[11] Specifically, the Commonwealth sought to introduce, as part of its case, evidence of the abusive and turbulent relationship between Stahl and the victim.

While generally such evidence is inadmissible, Rule 404 (b) of the Pennsylvania Rules of Evidence provides an exception for the use of such prior conduct:

> **(b) Other Crimes, Wrongs or Acts**
>
> **(1)** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
>
> **(2)** Evidence of other crimes, wrongs or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
>
> **(3)** Evidence of other crimes, wrongs or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.
>
> **(4)** In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of any such evidence it intends to introduce at trial.

Pa. R.E. Rule 404(b).

In the instant case, Rule 404(b)(2) is applicable and was properly applied. Pennsylvania courts have permitted the admission of evidence of prior incidents, within the context of a marital relationship, in which the accused threatened, assaulted or quarreled with the decedent for the purpose of proving ill will, motive or malice. *See Commonwealth v. Ulatoski,* 472 Pa. 53, 60-61, 63, 371 A.2d 186, 190,191 (1977); See *also Commonwealth v. Chandler,* 554 Pa. 401, 409, 721 A.2d 1040, 1044 (1998). Evidence of prior abuse is also admissible if it is "'part of a chain or sequence of events which form the history of the case and was part of its natural development."' *Chandler* at 409, 1044 (Pa. 1998).

The Commonwealth sought to introduce the evidence to establish a pattern of continual, strained, and hostile relations between David Stahl and Rebecca Stahl

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[11] The Defendant's Concise Statement of Matters Complained Of On Appeal sets forth the allegation of error, specifically as: "Whether it was error to admit evidence of prior criminal conduct involving Stahl in that the prior incidents were remote in time, consisting largely of hearsay evidence, and lacking probative value exceeding its prejudicial effect." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(P)). The court has rephrased the issue for the purpose of this opinion.

up until the time of Rebecca Stahl's death. Further, the Commonwealth contended that the evidence of continual marital discord established that the death of Rebecca Stahl was intentional and not the result of accident as claimed by the Defendant.

The Commonwealth gave proper notice of its intent to present this evidence under Rule 404(b)(4) by filing a Motion In Limine on June 10, 2014, enumerating specific incidents of violence between the defendant and the victim before her death to show the "abusive and turbulent relationship" between the parties, some of which required a response from police, and one of which resulted in Stahl's conviction for simple assault. Additionally, the Commonwealth indicated that defense counsel was aware of the prior bad acts, as defense counsel had been previously provided with police reports, enumerating the prior incidents of violence. (TT 234-237).

This issue was raised by defense counsel during pre-trial proceedings. (TT. 214-242). After hearing argument, this Court determined that the prejudicial effect of this evidence was substantially outweighed by its probative value, particularly in view of the defendant's contention that the killing was accidental. The court's application of Rule 404(b) of the Pennsylvania Rules of Evidence was proper. The defendant is not entitled to relief on this basis.

9. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S REQUEST TO GIVE EXHIBITS CONCERNING PHONE RECORDS TO THE JURY FOR DELIBERATIONS?

Stahl's next contention is that the trial court erred in not giving to the jury certain exhibits regarding phone records and their interpretations, during deliberations.[12] Both the Commonwealth and the defense presented testimony and accompanying exhibits regarding exchanges between Rebecca Stahl and David Stahl during the period of time from February 18, 2012 until February 24, 2012. Specifically, defense counsel sought to allow the jury to examine Exhibits G, H, I, and J, all of which were records made regarding cellular phone contents and data. (TT 939).

Pennsylvania Rule of Criminal Procedure 646 governs the "Material Permitted in Possession of the Jury." The rule states, in pertinent part, that:

> (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C).

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[12] The Defendant's Concise Statement of Matters Complained Of On Appeal sets forth the allegation of error specifically as: "Whether it was error to deny the defense request to allow the jurors to have for their review copies of the text messages between Rebecca and David Stahl." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(Q)). The court has rephrased the issue for the purpose of this opinion.

...

(C) During deliberations, the jury shall not be permitted to have:

(1) a transcript of any trial testimony;

(2) a copy of any written or otherwise recorded confession by the defendant;

(3) a copy of the information; and

(4) Except as provided in paragraph (B), written jury instruction.

Pa. R. Crim. P. 646.

"Whether an exhibit should be allowed to go out with the jury during its deliberation is within the sound discretion of the trial judge." *Commonwealth v. Barnett,* 50 A.3d 176, 194 (Pa. Super. 2012), *citing Commonwealth v. Merbah,* 270 Pa.Super. 190, 411 A.2d 244, 247 (1979) (citing *Commonwealth v. Pitts,* 450 Pa. 359, 301 A.2d 646 (1973)); Pa.R.Crim.P. 1114 (renumbered 646, effective April 1, 2001). Further, such decision will not be overturned absent an abuse of discretion. *Commonwealth v. Dupre,* 866 A.2d 1089,1102-1103 (Pa. Super. 2005); *citing Commonwealth v. Fox,* 422 Pa. Super. 244, 619 A.2d 327, 330 (1993), *appeal denied,* 535 Pa. 659, 634 A.2d 222 (Pa. 1993).

While the records in question are not specifically prohibited by Pa. R. Crim. P. 646 (C), it was within the trial court's discretion to determine whether to allow the jury to take the exhibits regarding the content of the text messages. Further,

> The underlying reason for excluding certain items from the jury's deliberations is to prevent placing undue emphasis or credibility on the material, and de-emphasizing or discrediting other items not in the room with the jury. If there is a likelihood the importance of the evidence will be skewed, prejudice may be found; if not, there is no prejudice per se and the error is harmless.

Dupre at 1103 (Pa.Super.2005) (quoting *Commonwealth v. Strong,* 575 Pa. 433, 836 A.2d 884, 888 (2003)).

The exhibits in question were admitted into evidence, while the witness who prepared these exhibits testified as to their contents, which included identifying data such as time, length of call, cell tower etc. (TT 726- 746). The jury had every opportunity to observe and hear about the exhibits and their meaning from the witness, judging demeanor and credibility of the witness while doing so. The court's determination that the exhibits should not go out with the jury eliminated the risk that the jury would be unduly influenced by the records themselves. As the decision to determine which exhibits should be submitted to the jury rests within the sound discretion of the trial court, the court did not abuse her discretion. Accordingly, no error occurred and the defendant is not entitled to relief based upon this theory.

10. DID THE TRIAL COURT ERR IN HER INSTRUCTION IN RESPONSE TO A JURY REQUEST TO DEFINE THE ELEMENTS OF MURDER AND MANSLAUGHTER?

Stahl's next error alleges that the trial court gave an improper instruction in response to a question from the jury regarding the elements of murder and manslaughter.[13] The defendant alleges that the court "specifically placed a time frame on the premeditation required to form the intent to kill." After some deliberations, the Court received a note from the foreperson asking "What is first degree murder, what is third degree murder, what is voluntary manslaughter?" (TT. 945-946). In response, as to first degree murder, the Court charged on the issue of intent to kill as follows:

> A person has the specific intent to kill if he has fully formed intent to kill and is conscious of his own intention. As my earlier definition of malice indicates, a killing by a person who has the specific intent to kill is a killing with malice.
>
> Stated differently, a killing is with specific intent to kill if it is willful, deliberate and premeditated.
>
> The specific intent to kill, including the premeditation, needed for first degree murder **does not require** planning or previous thought or **any particular length of time**. It can occur quickly. **All that is necessary is there be time enough** so that the defendant can and does fully form an intent to kill and is conscious of that intention.
>
> When deciding whether the Defendant had the specific intent to kill, you should consider all the evidence regarding his words and conduct and the attending circumstances that may show his state of mind.

(TT 946-947)(emphasis added.).

This is exactly the same instruction as the initial charge given to the jury and is derived from the Pennsylvania Suggested Standard Jury Instructions 15.2502(A). (TT 921-922). Later, the court summarized:

> First degree he intended and that intent premeditation it can be any length of time. It doesn't have to be any particular length of time. It can be the day before, it could be an hour before, it could be a minute before, it could be two seconds before. That is first.

(TT 953).

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[13] The Defendant's Concise Statement of Matters Complained Of On Appeal sets forth the allegation of error specifically as: "Whether the Court's instruction in response to a jury request to define the elements of murder and manslaughter were error when the Court specifically placed a time frame on the premeditation required to form the intent to kill." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(R)). The court has rephrased the issue for the purpose of this opinion.

The trial court's instructions are a connected series which taken together form the law that the jury must follow. The Court's summary is illustrative and does not in any way establish a time limit for the formation of the specific intent to kill, and when read in conjunction with the rest of the initial charge and the earlier part of the response to the jury's questions, is a correct statement of Pennsylvania law. *See, e.g.,* Pa. Suggested Standard Jury Instructions, Second Edition, Instruction number 15.2502A (Crim). This assignment of error is without merit and does not afford relief to the Defendant.

11. WAS THERE A CUMULATIVE EFFECT OF ERRORS SUFFICIENT TO DEPRIVE STAHL OF DUE PROCESS UNDER PENNSYLVANIA OR UNITED STATES CONSTITUTIONS?

As set forth at length above, no error was committed in regard to the issues raised by the defense and therefore there can be no cumulative effect from such errors.[14]

CONCLUSION:

For the foregoing reasons of fact and law, the issues raised on appeal are meritless.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

Date: February 19, 2015

[14] The Defendant's Concise Statement of Matters Complained Of On Appeal sets forth two separate allegations of error, specifically: "The cumulative effect of these trial errors of [sic] to deprive Stahl Due Process provided for in Article I, Sections Nine, Ten and Thirteen of the Pennsylvania Constitution; The cumulative effect of these trial errors of [sic] to deprive Stahl Due Process provided for in the Fifth, Sixth and Fourteenth Amendments of the United States Constitution." (Defendant's Concise Statement of Matters Complained of On Appeal, ¶3(S), ¶3(T)). The court has consolidated related issues for the purpose of this opinion.

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COMMONWEALTH OF PENNSYLVANIA
V.
DAVID FRANK STAHL, Defendant

CRIMINAL LAW

Sentencing; Discretion of the Court; Proportionality; Victim; Factors Related to the Victim and the Offender; Family of the Victim

1. Because the estate stands in the shoes of the victim under the restitution statute, it is the 'victim' within the meaning of that statute.

2. The restitution provisions of 18 Pa.C.S. §1106 and 42 Pa.C.S. §9721 permit compensation of a victim for the injury, damage, or loss caused by a defendant's criminal conduct.

3. Because the bills for the victim's funeral and burial were the direct result of Defendant's criminal conduct, the Court required Defendant to pay these expenses as restitution.

4. The mandatory payment of restitution is limited to the direct victim and not to third parties, including family members who shoulder the burden of the victim's losses.

5. Because the bills submitted by the victim's family for labor at the victim's home and time spent administering the victim's estate were in the nature of reimbursement and not compensation for injuries, the Court properly denied these claims.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 1233 C 2012

Appearances:
John W. Peck, District Attorney,
Westmoreland County, for the Commonwealth
Donna McClelland,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION OF THE COURT ISSUED PURSUANT TO PA.R.A.P. RULE 1925

The Defendant, David Frank Stahl, was convicted on June 27, 2014 of First Degree Murder of his wife, Rebecca Stahl, and was sentenced on that same date to serve a mandatory sentence of life in prison. On July 3, 2014, the Commonwealth filed a Motion to Modify Sentence, seeking an Order of restitution be awarded as part of that sentence. This court initially granted the Commonwealth's Motion with regard to the restitution due and owing to the Pennsylvania State Police for expenses incurred during the investigation and prosecution of Stahl. The Commonwealth also requested an Order of restitution be entered directing that Stahl pay for additional expenses related to the funeral

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Editor's note: An opinion on this docket number dated February 19, 2015, was published in 97 W.L.J. 49.

and burial of the victim, as well as a large sum billed by the law firm which handled the legal administration and probate of the Estate of Rebecca Stahl. After a hearing held on that issue, and following the submission of briefs and argument, by Order of Court dated October 20, 2014, this court granted the Commonwealth's request for restitution as it related to the funeral and burial expenses ($14,116.55) but denied the claim for legal fees associated with the administration of Rebecca Stahl's estate ($46,535.10). Both the Commonwealth and the Defendant appealed the Order of Court dated October 20, 2014.

ISSUES PRESENTED ON APPEAL:

Although phrased differently by the Commonwealth and by the Defendant in their respective appeals, essentially the sole issue presented on appeal is whether this court's Order granting in part and denying in part the Commonwealth's Motion for Modification of Sentence violates 18 Pa.C.S. §1106 and 42 Pa.C.S. §9721. The Commonwealth argues in its Concise Statement of Errors Complained of on Appeal that these statutes mandate the full amount of restitution requested by the Commonwealth because the expenses were incurred as "the direct result of and only resulted from the Defendant's killing of Rebecca Stahl," and thus were necessary and proper expenses. The Defendant, in his Concise Statement of Errors Complained of on Appeal that the award of funeral and burial expenses violates Due Process as provided for in the Unites States and Pennsylvania Constitutions because it constitutes cruel and unusual punishment.

42 Pa.C.S. §9721 provides the options available to a sentencing court, and includes provision for the payment of restitution as part of sentencing:

> **(c) Mandatory restitution.--**In addition to the alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained. For purposes of this subsection, the term "victim" shall be as defined in section 479.1 of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929.

42 Pa.C.S. §9721(c). The Pennsylvania Superior Court has held that "because the estate stands in the shoes of the victim under the restitution statute, it is the 'victim' within the meaning of that statute." *Commonwealth v. Lebarre,* 961 A.2d 176 (Pa.Super. 2008).[1] Therefore, it is clear that the victim's estate was the appropriate recipient of any restitution that this court deemed proper under the restitution provisions of the Pennsylvania Crimes Code and the Sentencing Code.

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[1] The Superior Court noted that the Administrative Code provision referenced in this section was repealed in 1998 and that the term "victim" is statutorily defined in 18 P.S. §11.103. *Lebarre* at 179.

The issue at the root of the cross appeals filed in this matter is what constituted proper restitution under these circumstances. 18 Pa.C.S. §1106 provides, in pertinent part,

> **(c) Mandatory restitution.—**
>
> (1) The court shall order full restitution:
>
> (i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to the Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.
>
> (ii) If restitution to more than one person is set at the same time, the court shall set priorities of payment. However, when establishing priorities, the court shall order payment in the following order:
>
> (A) The victim.
>
> (B) The Crime Victim's Compensation Board.
>
> (C) Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct.
>
> (D) Any insurance company which has provided reimbursement to the victim as a result of the defendant's criminal conduct.

18 Pa.C.S. §1106(c). The Commonwealth contends that the terms "loss," "damage" and "injury" as contemplated in the restitution and sentencing statutes extends to any monetary or non-monetary expenses incurred or expended as a consequence of Stahl's criminal conduct that resulted in the death of Rebecca Stahl. But for the Defendant's killing of Rebecca Stahl, there would have been no need for her funeral and burial, and there would have been no need for the extensive legal work done by her brother's law firm, and by her father as her Executor, in administering her estate. The Defendant, alternatively, asserted that burial and funeral expenses and the expenses related to the administration of

Rebecca Stahl's estate constituted sums that were consequential to Stahl's criminal conduct and not appropriate for an award of restitution.

The restitution provisions of 18 Pa.C.S. §1106 and 42 Pa.C.S. §9721 make repeated reference to compensation of a victim for the injury, damage or loss caused by a defendant's criminal conduct. Certainly it is appropriate to order a criminal defendant to pay, as restitution, the costs of medical treatment required by a victim of an assault, even when the costs of that medical care are extraordinary. *See, e.g., Commonwealth v. Oree,* 911 A.2d 169 (Pa.Super. 2006), *appeal denied,* 591 Pa. 699, 918 A.2d 744 (Restitution award in excess of one million dollars was appropriate where the evidence established that the victim suffered organic brain damage as a direct result of defendant's actions and would require care in a nursing home indefinitely). Had Rebecca Stahl received medical care for the injuries caused by Stahl prior to her death, an award of restitution for the payment of those expenses would have been proper. An award of restitution for the final disposition of her body where Stahl's actions caused her death is not dissimilar to an award of restitution for medical expenses incurred as a result of his criminal actions, had that been the case. Both compensate the victim, or in this case, her estate, for necessary expenses that were a direct result of injuries sustained by her at the hands of this Defendant. Such an award is neither cruel nor unusual and does not in any way violate due process. The Commonwealth presented the bills associated with the burial and the funeral at the time of the hearing, and the defendant had full opportunity to cross-examine the victim's brother regarding those expenses.

While the estate of a homicide victim certainly should be compensated for damages or injuries incurred as a direct result of the defendant's criminal conduct, the sentencing court must be mindful that "restitution is not meant to be a reimbursement system to third parties but rather a compensation system to 'victims' as that term is defined by statute." *Commonwealth v. Langston,* 904 A.2d 917, 923 (Pa.Super. 2006), *citing Commonwealth v. Keenan,* 853 A.2d 381, 384 (Pa.Super. 2004). While there is no question that had David Stahl not killed Rebecca Stahl, there would have been no estate to administer, the expenses submitted by her brother's law firm for that administration, which included reimbursement for labor done at her home by her family members as well as the hours of legal work billed by the attorneys employed by her brother's law firm while working on the estate file sound more as "reimbursement" rather than "compensation for injuries." "The mandatory payment of restitution pursuant to Section 1106 of the Crimes Code is limited to the direct victim and not to third parties, including family members who shoulder the burden of the victim's losses." *Commonwealth v. Langston,* 904 A.2d 917, 924 (Pa.Super. 2006)(internal citations omitted).

For these reasons, this court did not err in granting the Commonwealth's Motion for Modification of Sentence and ordering Stahl to pay restitution in the

amount of $14,116.55 for the funeral and burial expenses, nor did the court err in denying the Motion for Modification of Sentence as to the claim for restitution for the legal fees and other expenses associated with the administration and disposition of Rebecca Stahl's estate in the amount of $46,535.10.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

Date: February 19, 2015

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COMMONWEALTH OF PENNSYLVANIA
V.
ROBERT E. CHAMBERS, Defendant

CRIMINAL LAW

Post-Conviction Collateral Relief Act; Timeliness of Petition; Illegality of Sentence

1. To be eligible for post-conviction relief, a PCRA petition, including second and subsequent petitions, must be filed within one year of the date that the judgment of sentence becomes final.

2. Certain exceptions set forth in the Post-Conviction Relief Act can act to excuse the untimely filing of a PCRA petition.

3. When an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon expiration of time for seeking such review.

4. A petition for post-conviction relief that is filed during the pendency of an appeal on a prior PCRA may be dismissed as premature.

5. Subsection (iii) of Section 9545 (b)(1) has two requirements. First, the right asserted must be a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time provided in this section. Second, the right must have been held by that court to apply retroactively. Thus, a petitioner must prove that there is a new constitutional right that has been held by the court to apply retroactively.

6. While the court is endowed with the ability to consider an issue of illegality of sentence *sua sponte*, there must be a basis for the court's jurisdiction to engage in such review.

7. Timeliness requirements of the PCRA are jurisdictional in nature.

8. Though not technically waivable, a legality of sentence claim may nevertheless be lost should it be raised in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court jurisdiction over the claim.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2698 C 2005
No. 3823 C 2006

Appearances:

Lawrence W. Koenig, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Robert E. Chambers,
Pro Se

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION AND ORDER OF COURT

Upon consideration of Defendant's *pro-se* PCRA Petition, filed pursuant to the Post-Conviction Relief Act, (42 Pa.C.S. §9541, *et. seq.*), and upon consideration of the Response submitted by the Defendant to the Opinion and Order of Court dated March 19, 2015 directing the Defendant to file a written response to the

areas of defect noted by this court in the Opinion, and upon a review of the record in this case, it appears to this Court that the instant filing by the Defendant has not been timely filed, and it further appears to this Court that there may be no genuine issue of material fact, no entitlement to relief and no purpose to be served in further proceedings for the following reasons:

1. PROCEDURAL HISTORY OF THE CASES:

The Defendant, Robert E. Chambers ("Chambers") filed a *pro-se* PCRA Petition at both 2698 C 2005 and 3823 C 2006 on or about January 22, 2015, although received by this court on February 5, 2015. Given the voluminous post conviction history at both case numbers, a detailed procedural history will be provided.

a. Court of Common Pleas

At 2698 C 2005, the Defendant, Robert E. Chambers ("Chambers) was charged in the Court of Common Pleas of Westmoreland County by Criminal Information on August 8, 2005. On October 3, 2006, after a jury trial before the Honorable Richard E. McCormick, Jr., Chambers was found guilty of one count of Possession with Intent to Deliver in violation of 35 P.S. §780-113(a)(30) and one count of Delivery of a Controlled Substance in violation of 35 P.S. §780-113(a)(30). Chambers was sentenced by Judge Richard E. McCormick, Jr. on March 2, 2007 to an aggregate sentence of five to ten years incarceration.

At case number 3823 C 2006, after a jury trial before this court, Chambers was also convicted of violating the Drug Act (35 Pa.C.S. §780-113(a)(30)), and was sentenced on August 28, 2007 by this court to an aggregate sentence of five to ten years incarceration, consecutive to the sentence imposed by Judge McCormick at No. 2698 C 2005.

Relevant to this PCRA decision, at both cases, Chambers was sentenced pursuant to the mandatory sentencing provisions of 18 Pa.C.S. §7508(a)(3)(ii), which provided for a mandatory minimum sentence of five years incarceration for possessing with the intent to deliver and/or delivery of cocaine in excess of ten grams but less than 100 grams when the defendant had previously been convicted of a drug trafficking offense.

b. Appellate History

At case number 2698 C 2005, Chambers filed a direct appeal of his sentence to the Pennsylvania Superior Court (504 WDA 2007), and his judgment of sentence was affirmed on November 8, 2007. He apparently did not immediately file an appeal of that decision to the Pennsylvania Supreme Court, but was granted leave to file a Petition for Allowance of Appeal *nunc pro tunc* following a Post-Conviction procedure. That Petition for Allowance of Appeal, filed at 490 WAL 2009, was denied on July 27, 2010. As Chambers did not seek a writ of *certiorari* from the United States Supreme Court, his judgment of sentence

therefore became final on October 25, 2010, when the period for Chambers to file a petition for a writ of *certiorari* expired. Chambers filed his first PCRA Petition on February 5, 2008; counsel was appointed, and after a hearing, PCRA relief was denied by Judge McCormick on September 15, 2009.[1] Chambers appealed that portion of Judge McCormick's order, denying the remaining issues in his first PCRA Petition to the Pennsylvania Superior Court (1744 WDA 2009), where the denial of the request for PCRA relief was affirmed on October 11, 2011. His subsequent Petition for Allowance of Appeal to the Pennsylvania Supreme Court (593 WAL 2011) was denied on April 24, 2012. However, in the interim, Chambers filed another *pro-se* PCRA Petition on February 17, 2011. The petition was dismissed as premature on June 23, 2011 by Judge John E. Blahovec, as the case was on appeal at 1744 WDA 2009. Chambers thereafter filed a third pro-se PCRA Petition on or about October 24, 2012 before Judge John E. Blahovec, which was denied by Order of Court, dated November 13, 2012. He filed an appeal to the Superior Court which affirmed Judge Blahovec's denial of PCRA relief on August 12, 2013 (59 WDA 2013). Chambers' subsequent Petition for Allowance of Appeal was denied on February 10, 2014 (481 WAL 2013). Chambers thereafter filed a fourth PCRA Petition, on or about February 21, 2014.[2] PCRA counsel was appointed and upon consideration of the No Merit Letter submitted by Attorney James M. Fox, Esq. and review of the record, this court denied Chambers' PCRA Petition by Order of Court dated August 15, 2014. Chambers filed no appeal from the dismissal of his fourth PCRA Petition. The instant PCRA Petition, the fifth filed at case number 2698 C 2005, was thereafter filed at both numbers (2698 C 2005 and 3823 C 2006) on or about January 22, 2014, although it was not received by this court until February 5, 2015.

At case number 3823 C 2006, Chambers perfected a direct appeal to the Pennsylvania Superior Court, and the judgment of sentence was affirmed by Memorandum Opinion dated May 20, 2008 (1817 WDA 2007). His petition for Allowance of Appeal in the Pennsylvania Supreme Court was denied on October 8, 2008 (303 WAL 2008). He did not seek review of the Supreme Court's decision. Therefore, the judgment of sentence in this matter became final on or about January 6, 2009, when the period for Chambers to file a petition for a writ of *certiorari* expired. He thereafter filed a pro-se PCRA Petition on or about April 5, 2010. Counsel was appointed to represent Chambers, and his PCRA Petition was thereafter denied as untimely by Order of Court dated September 30, 2010. He filed an appeal of the denial of his PCRA to the Superior Court on or about November 15, 2010, but failed to take the steps necessary to perfect that

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[1] It would appear that it was through this PCRA Petition that Chambers was permitted to file the Petition for Allowance of Appeal *nunc pro tunc* that was denied by the Pennsylvania Supreme Court on July 27, 2010.

[2] Chambers filed PCRA petitions at both 2698 C 2005 and 2823 C 2006. The Honorable Richard E. McCormick directed that both cases be assigned to the Honorable Rita Donovan Hathaway by Order of Court, dated March 17, 2014.

appeal. Thereafter, Chambers filed another PCRA Petition at 3823 C 2006 on or about January 30, 2014. PCRA counsel was appointed and upon consideration of the No Merit Letter submitted by Attorney James M. Fox, Esq. and after review of the record, this court denied Chambers' PCRA Petition by Order of Court dated August 15, 2014. No appeal was filed from this court's order of August 15, 2014. On January 22, 2015, Chambers filed the instant PCRA Petition at both numbers (the fifth filed at 2698 C 2005 and the third filed at 3823 C 2006), although it was not received by this court until February 5, 2015.

2. THIS COURT LACKS JURISDICTION AS THE PETITION WAS UNTIMELY FILED

To be eligible for post-conviction relief, a PCRA petition, including second and subsequent petitions, must be filed within one year of the date that the judgment of sentence becomes final. *42 Pa.CS. §9545(b)(1). Pa.R.Crim.P. Rule 901.* At 2698 C 2005, Chambers' judgment of sentence became final on October 25, 2010. *U.S. Sup Ct. R. 13(1).* Any and all PCRA Petitions must therefore have been filed by him at that number on or before October 25, 2011. At 3823 C 2006, Chambers' judgment of sentence became final on January 6, 2009. *U.S. Sup. Ct. R. 13(1).* Any and all PCRA petitions must have been filed at that number on or before January 6, 2010. The instant PCRA Petition filed at both 2698 C 2005 and 3823 C 2006 was filed on January 22, 2015. Thus, the instant PCRA Petition filed by Chambers at 2698 C 2005 and 3823 C 2006 is clearly untimely. However, he suggests that there exists an exception to the timeliness requirement that would otherwise bar his path to Post-Conviction Relief. Unless such an exception applies, this court lacks jurisdiction to entertain his untimely PCRA petitions.

Certain exceptions set forth in the Post-Conviction Relief Act can act to excuse the untimely filing of a PCRA petition:

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or

> the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. §9545(b).

First, Chambers alleges that his failure to raise the claim previously was the result of "interference by governmental officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States."[3] *42 Pa.C.S. §9545(b)(1)(i)*. Specifically, in support of this allegation, Chambers states that he filed a *pro-se* PCRA Petition that was dismissed by the Honorable John E. Blahovec as premature and that his court appointed attorney never sent him notice of Judge Blahovec's Order of Court, dated June 23, 2011, dismissing Chambers' PCRA petition.[4] Chambers admits in his petition that "the case 2698 C 2005 was presently on appeal (1744 WDA 2009)" and alleges that "based on that, my status should've never been exempt to the time bar exception."[5] Chambers alleges that the dismissal of his *pro-se* PCRA petition by the Honorable John E. Blahovec or, in the alternative, that his attorney's failure to send him notice of the dismissal rises to the level of "interference by governmental officials with the presentation of the claim," as contemplated by 42 Pa.C.S. §9545(b)(1)(i).

It is important to note that the pleading filed by Chambers fails to comply with the requirements set forth by the requirements at Pa.R.Crim.P. Rule 902(A), *supra*, making only a boilerplate allegation of interference by governmental officials with no supporting facts from which a reviewing court could ascertain what that governmental interference was or how the governmental interference occurred.

Nonetheless, it is well settled that when a defendant's PRCA appeal is pending before a court, a subsequent PCRA cannot be filed until review has been completed by the highest state court in which review is sought or upon expiration of time for seeking such review. "When an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of time for seeking such review." *Commonwealth v. Lark,* 560 Pa. 487, 493, 746 A.2d 585, 588 (Pa. 2000). Accordingly, a petition for post conviction relief that is filed during the pendency of an appeal on a prior PCRA may be dismissed as premature. As explained in the procedural history, Chambers appealed the denial of his PCRA Petition to the Pennsylvania Superior

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[3] PCRA at 3.

[4] PCRA at 3.

[5] PCRA at 4.

Court (1744 WDA 2009) on October 14, 2009, where the denial of the request for PCRA relief was affirmed on October 11, 2011. During the pendency of that appeal, Chambers filed another *pro-se* PCRA Petition on February 17, 2011. The petition was dismissed as premature on June 23, 2011 by the Honorable John E. Blahovec, as there was an active appeal pending at 1744 WDA 2009. As Judge Blahovec's June 23, 2011 Order of Court, dismissing Chambers' PCRA petition filed during the pendency of a prior PCRA appeal, is proper under the authority of *Lark, supra,* Chambers has failed to demonstrate how his failure to raise this claim was the result of interference by government officials.

As to Chambers' allegation under 42 Pa.C.S.A. §9545(b)(1)(i) that his "court appointed attorney never sent me notice of this case status," 42 Pa.C.S.A. §9545(b)(4) specifically provides that, for the purposes of this subchapter," 'governmental officials' shall not include defense counsel, whether appointed or retained." Further, a careful review of the record reveals that the Honorable John E. Blahovec did, in fact, copy the Defendant on the Order of Court of June 23, 2011. (See Order of Court, dated June 23, 2011, attached hereto).

Finally, Chambers would not be entitled to post-conviction relief on this basis because he appears to have raised these allegations in a prior PCRA and in a prior appeal. The requirements for eligibility for relief under the Post-Conviction Relief Act are set forth both in the Act itself (42 Pa.C.S. §9541, *et. seq.*) and in the Rules of Criminal Procedure (Pa.R.Crim.P. Rules 901 and 902). Generally speaking,

> PCRA petitioners, to be eligible for relief, must, inter alia, plead and prove their assertions by a preponderance of the evidence. Section 9543(a). Inherent in this pleading and proof requirement is that the petitioner must not only state what his issues are, but also he must demonstrate in his pleadings and briefs how the issues will be proved. Moreover, allegations of constitutional violation or of ineffectiveness of counsel must be discussed "in the circumstances of the case." Section 9543(a)(2)(i-ii). Additionally, the petitioner must establish by a preponderance of evidence that because of the alleged constitutional violation or ineffectiveness, "no reliable adjudication of guilt or innocence could have taken place." Section 9543(a)(2)(i-ii). Finally, petitioner must plead and prove that the issue has not been waived or finally litigated, §9543(a)(3), and if the issue has not been litigated earlier, the petitioner must plead and prove that the failure to litigate "could not have been the result of any rational, strategic or tactical decision by counsel." Section 9543(a)(4).

Commonwealth v. Rivers, 567 Pa. 239, 245-246, 786 A.2d 923, 927 (Pa. 2001). Chambers appears to have raised the issue of ineffective assistance of counsel, in his prior *pro-se* PCRA filed on October 25, 2012, and in his subsequent appeal of

the trial court's denial of his PCRA to the Superior Court (59 WDA 2013).[6] The Superior Court found the allegations to be without merit in a memorandum opinion, dated August 12, 2013. Because he raised this issue before the Superior Court in the appeal of the denial of his prior PCRA of October 25, 2012, and because the Superior Court deemed it to be without merit, this issue has been previously litigated and decided and Chambers is not eligible for PCRA relief at this time.

Chambers next claims that the issue he has raised involves a constitutional right recognized by the Supreme Court of the United States after the applicable time period had run and which has been held to apply retroactively. *42 Pa.C.S. §9545(b)(1)(iii)*. Specifically, Chambers cites to *Commonwealth v. Newman,* 99 A.3d 86 (Pa. Super. 2014), a case decided after this court's most recent opinion, dated August 15, 2014, as controlling authority.

At the outset, it should be noted that Chambers alleged in his prior PCRA, filed on January 30, 2014, that the sentences imposed in his cases were constitutionally deficient and violated the principles enunciated by the United States Supreme Court in *Alleyne v. United States,* U.S. , 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). PCRA Counsel was appointed to address this issue and an Opinion and Order of Court, specifically considering the legality of Chambers' sentence in the context of *Alleyne,* was filed on August 15, 2014. As no appeal was taken after that decision, this issue has been previously examined and decided. Nevertheless, as Chambers alleges that *Newman, supra,* now controls and provides a basis for relief under 42 Pa.C.S.A. §9545(b)(1)(iii), this issue will be re-addressed.

The appellate courts of this Commonwealth have acknowledged the applicability of *Alleyne, supra,* to sentences imposed in Pennsylvania pursuant to sentencing statutes such as the one at issue herein.

> According to the *Alleyne* Court, a fact that increases the sentencing floor is an element of the crime. Thus, it ruled that facts that mandatorily increase the range of penalties for a defendant must be submitted to a fact-finder and proven beyond a reasonable doubt. The *Alleyne* decision, therefore, renders those Pennsylvania mandatory minimum sentencing statutes that do not pertain to prior convictions constitutionally infirm insofar as they permit a judge to automatically increase a defendant's sentence based on a preponderance of the evidence standard.

Commonwealth v. Watley, 81 A.3d 108, 117 (Pa.Super. 2013) (footnotes omitted). The Superior Court in *Watley* considered the legality of the sentence imposed in that case pursuant to 42 Pa.C.S. § 9712.1 *sua sponte,* as the *Alleyne* case was decided during the pendency of Watley's appeal. The Superior Court considered

[6] Chambers alleged "My attorney broke rules of the court by not keeping in contact with me. I last spoken [sic] with him April 2010 before last week March 2012." PCRA, dated 10/25/12, at 3.

a similar issue *sua sponte* in *Commonwealth v. Thompson,* 93 A.3d 478 (Pa. Super. 2014) and vacated the sentence imposed as being illegal, even while acknowledging that the issue had not been preserved for appeal:

> Appellant has not preserved any challenge to the constitutionality of 18 Pa.C.S. § 7508(a)(2)(ii). Nonetheless, *Alleyne*
>
> > necessarily implicated Pennsylvania's legality of sentencing construct since it held that it is improper to sentence a person to a mandatory minimum sentence absent a jury's finding of facts that support the mandatory sentence. Application of a mandatory minimum sentence gives rise to illegal sentence concerns, even where the sentence is within the statutory limits. Legality of sentence questions are not waivable and may be raised *sua sponte* by this Court.
>
> *Watley,* 81 A.3d at 117-18 (footnotes and citations omitted). Accordingly, we conclude Appellant's sentence, imposed pursuant to 18 Pa.C.S. § 7508(a)(2)(ii) and in violation of *Alleyne,* was illegal and must be vacated.

Id. at 494.

The question of whether a challenge to a sentence pursuant to *Alleyne* implicates the legality of the sentence and is therefore non-waivable is currently being considered by the Pennsylvania Supreme Court in *Commonwealth v. Johnson,* 93 A.3d 806 (Pa. 2014).

In *Commonwealth v. Newman,* 99 A.3d 86 (Pa. Super. 2014), the Superior Court examined the applicability of the United States Supreme Court's decision in *Alleyne* and found that 42 Pa.C.S.A. §9712.1 was rendered unconstitutional in Pennsylvania. However, unlike the case at bar, the reviewing court in *Newman* had retained jurisdiction. Specifically, in *Newman*, the Superior Court affirmed the judgment of sentence in *Newman* on June 12, 2013, the United States Supreme Court issued its opinion in *Alleyne* on June 17, 2013 and Newman filed a timely request for reargument and reconsideration to the Superior Court on June 25, 2013. *Newman* at 90. The Superior Court stated:

> Although this court had already rendered its decision in appellant's appeal at the time *Alleyne* was announced, we retain jurisdiction for 30 days thereafter, to modify or rescind our holding, or grant reargument as we have here, so long as the appellant does not seek allowance of appeal before our supreme court. *See* 42 Pa.C.S.A. § 5505. Moreover, our decision does not become final until 30 days have elapsed and the time for filing a petition for allowance of appeal with our supreme court expires. *See* Pa.R.A.P., Rule 1113(a), 42 Pa.C.S.A. Therefore, appellant's case was still pending on direct appeal

> when *Alleyne* was handed down, and the decision may be applied to appellant's case retroactively.

Newman at 90.

Likewise, *Watley* and *Thompson* were cases that were on direct appeal at the time that *Alleyne* was decided. Chambers' judgment of sentence became final in both cases at issue herein years before *Alleyne* was decided by the United States Supreme Court. Therefore, in order for the exception to the time requirements set forth in *42 Pa.C.S. §9545(b)(1)(iii)* to excuse the untimely filing of these PCRA petitions, the *Alleyne* decision must be deemed to apply retroactively.

In *Commonwealth v. Miller,* 102 A.3d 988 (Pa. Super 2014) (reargument denied December, 2014), the Superior Court examined the issue of the United States Supreme Court's decision in *Alleyne* and considered whether *Alleyne* is a new constitutional right that applies retroactively in the context of an exception under 42 Pa.C.S. 9545(b)(1)(iii). As in the case at bar, Miller filed a PCRA petition after his judgment of sentence became final.[7]

The Superior Court stated:

> Subsection (iii) of Section 9545[(b)(1)] has two requirements. First, it provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or [the Supreme Court of Pennsylvania] after the time provided in this section. Second, it provides that the right "has been held" by "that court" to apply retroactively. Thus, a petitioner must prove that there is a "new" constitutional right and that the right "has been held" by that court to apply retroactively. The language "has been held" is in the past tense. These words mean that the action has already occurred, *i.e.,* "that court" has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.

Miller at 994 (*citing Commonwealth v. Seskey,* 86 A.3d 237, 242-243 (citations omitted)).

The Superior Court set forth the *Alleyne* standards and then stated:

> Even assuming that *Alleyne* did announce a new constitutional right, neither our Supreme Court, nor the United States Supreme

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[7] Miller was found guilty on May 25, 2005, after a jury trial, of third-degree murder, aggravated assault, possession of a firearm and possession of an instrument of a crime. Miller was sentenced on July 18, 2005. The Superior Court affirmed the judgment of sentence on October 23, 2007, and the Pennsylvania Supreme Court denied *allocator* on May 8, 2008. Miller did not seek a writ of *certiorari* from the United States Supreme Court. Therefore, Miller's judgment of sentence became final on August 6, 2008, when the period for a writ of *certiorari* expired. *Miller* at 993.

> Court has held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final. This is fatal to Appellant's argument regarding the PCRA time-bar. This Court has recognized that a new rule of constitutional law is applied retroactively to cases on collateral review only if the United States Supreme Court or our Supreme Court specifically holds it to be retroactively applicable to those cases. *Commonwealth v. Phillips,* 31 A.3d 317, 320 (Pa.Super.2011), *appeal denied,* 615 Pa. 784, 42 A.3d 1059 (2012), *citing Tyler v. Cain,* 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001); *see also, e.g., Commonwealth v. Taylor,* 933 A.2d 1035, 1042 (Pa.Super.2007) (stating, "for purposes of subsection (iii), the language 'has been held by that court to apply retroactively' means the court announcing the rule must have also ruled on the retroactivity of the new constitutional right, before the petitioner can assert retroactive application of the right in a PCRA petition[ ]"), *appeal denied,* 597 Pa. 715, 951 A.2d 1163 (2008). Therefore, Appellant has failed to satisfy the new constitutional right exception to the time-bar.

Miller at 995.

The Superior Court acknowledged that an issue pertaining to *Alleyne* goes to the legality of the sentence and that "this Court is endowed with the ability to consider an issue of illegality of sentence *sua sponte*." *Miller* at 995 (citing *Commonwealth v. Orellana,* 86 A.3d 877, 883 n. 7 (Pa.Super.2014)).

Importantly, the Superior Court stated, "However, in order for this Court to review a legality of sentence claim, there must be a basis for our jurisdiction to engage in such review." *Miller* at 995 (citing *Commonwealth v. Borovichka,* 18 A.3d 1242, 1254 (Pa.Super.2011) (stating, "[a] challenge to the legality of a sentence ... may be entertained as long as the reviewing court has jurisdiction[ ]") (citation omitted).

Timeliness requirements of the PCRA are jurisdictional in nature. "It is imperative to note that the timeliness requirements of the PCRA are jurisdictional in nature. Statutory time restrictions may not be altered or disregarded to reach the merits of the claims raised in the petition." *Commonwealth v. Harris,* 972 A.2d 1196, 1199 (Pa.Super. 2009) (internal citations omitted). *See also Commonwealth v. McKeever,* 947 A.2d 782 (Pa.Super. 2008).

Further,

> Title 42 Pa.C.S.A. § 9545(b)(1) requires that any PCRA petition, including a second or subsequent petition, must be filed within one year of the date that the petitioner's judgment of sentence becomes final, unless a petitioner pleads or proves that one of the

> exceptions to the timeliness requirement enumerated in 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii) is applicable. The timeliness requirement is mandatory and jurisdictional; therefore, no court may disregard, alter, or create equitable exceptions to the timeliness requirement in order to reach the substance of a petitioner's arguments. *See Commonwealth v. Davis,* 916 A.2d 1206 (Pa.Super.2007).

Commonwealth v. McKeever, 947 A.2d 782, 784-785 (Pa.Super. 2008).

The Superior Court stated, "[t]hough not technically waivable, a legality [of sentence] claim may nevertheless be lost should it be raised ... in an untimely PCRA petition for which no time-bar exception applies, thus depriving the court of jurisdiction over the claim." *Miller* at 996. Thus, the Superior Court stated that the PCRA court lacked jurisdiction to consider the merits of Miller's second PCRA petition, as it was untimely filed and no exception was proven, and concluded that the PCRA court correctly dismissed the PCRA petition. *Id*.

Likewise, Chambers has failed to establish an exception to the timeliness requirement. As the Superior Court set forth in *Miller*, neither the Pennsylvania Supreme Court nor the United States Supreme Court have held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final. As such, this court lacks the jurisdiction to consider the merits of Chambers' instant PCRA petition.

Finally, Chambers was given an opportunity to file a written response to the Opinion and Order, dated March 19, 2015, wherein Chambers was notified of this Court's intention to dismiss the instant PCRA petition and expressly advised that the petition was untimely and was given an opportunity to assert an exception to the one-year rule. Chambers did file a response, which was mailed on April 6, 2015 and filed on April 9, 2015. Upon review of Chambers' Response, no issues of merit have been raised and no exceptions to the timeliness requirements have been asserted. Specifically, Chambers indicates that "he filed a PCRA, dated June 23, 2011, but is on record of Judge John E. Blahovec dismissing my case filed as premature." (Defendant's Response to Notice for PCRA, ¶ 1). As set forth at length above, a PCRA petition must be filed within one year of the date that the petitioner's judgment of sentence becomes final. *42 Pa.C.S. §9545(b)(1)*. A judgment becomes final for purposes of the PCRA "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review." *42 Pa. C.S. §9545(b)(3)*. As explained in the procedural history, Chambers' judgment of sentence became final on October 25, 2010, upon expiration of the time to file a writ of *certiorari* with the United States Supreme Court. *See also Footnote 3 in Commonwealth v. Chambers,* 37 A.3d 1228 (Pa.Super 2011), *appeal denied,* 615 Pa. 772, 42 A.3d 290 (Pa. 2012) (unpublished memorandum). Chambers' assertion that he filed a PCRA on

June 23, 2011 is not supported by the record. This court's thorough review of the record indicates that a subsequent PCRA was filed on February 17, 2011, but was dismissed as premature by the Honorable John E. Blahovec on June 23, 2011. This dismissal of Chambers' PCRA during the pendency of an appeal on a prior PCRA petition was proper under the authority of *Commonwealth v. Lark,* 560 Pa. 487, 746 A.2d 585 (Pa. 2000). While Chambers raises other issues in his response, such as ineffectiveness of counsel and evidentiary issues, he does not allege an exception to the timeliness requirement. Further, the instant petition was filed on or about January 22, 2015 and is clearly untimely. The timeliness of a PCRA petition is a jurisdictional requisite. *Commonwealth v. Hackett,* 598 Pa. 350, 259, 956 A.2d 978, 983 (Pa. 2008). As the instant PCRA petition is untimely, this Court has no jurisdiction to review the merits of Chambers' assertions.

Having failed to demonstrate that his untimely-filed Petition for Post-Conviction Relief raises an issue involving a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in the Post Conviction Relief Act, and which has been held to apply retroactively, Chambers' PCRA Petition is untimely and no exception applies to exclude that untimeliness. This court therefore has no jurisdiction to entertain the merits of his claims.

NOW THEREFORE, the following Order shall enter:

ORDER OF COURT

AND NOW, this 7th day of May, 2015, based upon the foregoing Opinion, it is hereby **ORDERED** as follows:

1. For the reasons set forth in the foregoing Opinion, the Defendant's Petition for post-conviction relief filed pursuant to the Post Conviction Relief Act, (42 Pa.C.S. §9541, *et. seq*.) is hereby **DISMISSED**.

2. **THE DEFENDANT IS NOTIFIED THAT ANY APPEAL TO THE SUPERIOR COURT OF PENNSYLVANIA FROM THIS COURT'S DISMISSAL OF HIS *PRO-SE* PCRA PETITION MUST BE FILED WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER OF COURT.**

3. The Defendant is free to proceed on appeal *pro-se* or with private counsel of his choice. Should he desire to pursue his appeal *pro-se*, he should also file the required Motion to Proceed *in forma pauperis* with this court.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

BARBARA J. MAYERCHECK, Plaintiff
V.
JOSEPH A. MAYERCHECK, Defendant

APPEAL AND ERROR

Supersedeas or Stay of Proceedings; Bond or Other Security and Payment of Fees or Costs, and Interest

1. An appeal from an order of equitable distribution shall operate as a supersedeas only upon application to and order of the trial court and the filing of security as required.

2. The grant of supersedeas without the concomitant filing of security is *non sequitur*.

3. In domestic relations cases, the Rules of Appellate Procedure operate to effectuate adequate economic protection of the weaker party.

4. The Rules are not designed to allow the weaker party a windfall.

5. Upon return of the record by the appellate court to the lower court in a matter where the order appealed from was affirmed, the clerk of the lower court shall thereupon enter an order against the appellant for the amount due upon the order as affirmed, with interest and costs as provided by law.

COSTS

Bad Faith or Meritless Litigation

1. The general rule is that the parties to litigation are responsible for their own counsel fees and costs unless otherwise provided by statutory authority, agreement of parties, or some other recognized exception.

2. Pennsylvania permits recovery of reasonable attorney's fees where, in any of several instances, an opposing party has engaged in conduct which is "dilatory, obdurate or vexatious."

3. Generally a court construes a *pro se* litigant's filings liberally.

4. Because Defendant's remaining claims were the subjects of previous proceedings, and were based upon parole evidence, vague assertions of justice, or otherwise lacking in relevant legal or factual import to the instant considerations, attorney's fees were appropriate.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – DIVORCE
No. 546 of 2002-D

Appearances:
William J. Wiker,
Greensburg, for the Plaintiff
Joseph A. Mayercheck,
Pro Se

BY: HARRY F. SMAIL, JR., JUDGE

OPINION AND ORDER OF COURT

SMAIL, J. May 8, 2015

Presently before the Court are what amounts to a Motion for Enforcement and for an Accounting, concerned with a final Order of Court on equitable distribution in the above-captioned case, and a Motion for Attorney's fees, all filed by

Plaintiff, Barbara J. Mayerchck, n/k/a Barbara J. Tucciarone. Also before the Court is a Petition to Reopen Selected Issues of Equitable Distribution, filed by Defendant, Joseph A. Mayercheck. Following careful review of the above-filings and the record, Plaintiff's requests are granted in part and denied in part. Defendant's Petition is denied. All denials are with prejudice.[1]

FACTS

The history of this case and the presentation of issues are highly convoluted; the record reflects several appeals and numerous filings, hearings, and orders of court. Notwithstanding such history, the following represents the relevant portion of the now indelible facts.

The matter *sub judice* arose following the exhaustion of the Parties' cross-appellate rights on an Order of Court, dated October 3, 2011, which adopted a scheme of equitable distribution set forth in an Amended Master's Report and Recommendation.[2] The Superior Court affirmed that Order on May 31, 2013. The Parties responded by cross-filing Petitions for Allowance of Appeal with the Supreme Court of Pennsylvania. Both Petitions were denied via two Orders issued on December 23, 2013. Those Orders were filed in the office of the Westmoreland County Prothonotary on January 23, 2014 and January 30, 2014, respectively.

The marital estate was substantial. Among the assets were several pieces of real property, including: (1) 303 Williamsburg Lane, Export, Pennsylvania; (2) 309 Williamsburg Lane, Export, Pennsylvania; (3) 10 Thomas Jefferson Court, Irwin, Pennsylvania; (4) 10261 Center Highway, North Huntingdon, Pennsylvania; and (5) Unit 7-B Emerald Cove, Myrtle Beach, South Carolina ("Unite 7-B").[3] Prior to dissolution of the marital estate, the record reflects that 303 Williamsburg Lane, Export, Pennsylvania was titled solely in Plaintiff's name and that 309 Williamsburg Lane, Export, Pennsylvania [hereinafter, "the Subject Property"] was titled solely in Defendant's name. However, the now final equitable distribution awarded Plaintiff possession of the Subject Property, along with 303 Williamsburg Lane, Export, Pennsylvania and Unit 7-B.

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[1] Too often attendant to this sort of litigation is a degree of acrimony which, ironically, tends only to harm the mental, emotional, and pecuniary interests of perpetually litigious parties. It is this Court's policy and intention to see these matters to conclusion, according to the law applicable to the particular facts and circumstances of each case, and to encourage the parties to move forward with their lives.

[2] Of import to Defendant's Petition to Reopen Selected Issues of Equitable Distribution, Defendant's Concise Statement of Matters Complained of on Appeal, on the first recorded appeal in this case, included a claim that the court abused its discretion by making a determination on the value of Defendant's baseball card collection, which was unsupported by the evidence. The Amended Master's Report assigned the baseball card collection a value of $62,000.00. In sustaining several of Defendant's Exceptions to the Master's Report, the Court, per the Honorable Christopher A. Feliciani, ordered that Defendant receive a $26,040.00 credit for the value of the baseball card collection.

[3] Defendant's dental practice is not included in this list, but the Court notes that Defendant retained the same as part of the equitable distribution scheme.

On May 3, 2012, Judge Feliciani ordered that rental proceeds from Unit 7-B be placed in an escrow account, pending outcome of the Parties' cross-appeals. No such order exists with respect to the Subject Property. Consequently, during pendency of the appeals in this case, Defendant continued to collect rental income and incur expenses from the Subject Property. Said expenses and income are at the heart of instant dispute.

Consistent with the appellate timeline above, Defendant relinquished possession of the Subject Property on or about January 31, 2014. Plaintiff presents the instant Motion for Enforcement and Accounting on the theory that the October 3, 2011 Order of Court, having been affirmed, entitles Plaintiff to rents collected by Defendant, minus permitted expenses, retroactively; that is, Plaintiff claims rents minus permitted expenses from October 3, 2011 to January 31, 2014 [hereinafter, "the Period in Question"].

On March 11, 2014, Plaintiff filed a Motion for Accounting and Rule to Show Cause. Because Plaintiff had previously corresponded with Defendant to request an accounting and Defendant failed to respond, Plaintiff also requested counsel fees at that time. Defendant, then represented by counsel, responded with a Motion for a Protective Order and Counter Motion for Attorney's Fees. On April 10, 2014, the Court, per the Honorable Meagan Bilik-DeFazio, issued an Order of Court denying all of the above Motions. However, with respect to the Subject Property, Plaintiff correctly observes that the Court also

> directed Defendant to provide Plaintiff's counsel with copies of the IRS Schedule E for 2011-2014, copies of lease[s] for the unit for 2011-2014, cancelled checks for all paid bills, copies of invoices for expenditures, receipts for paid condo fees from Arbor Management for 2011-2014, copies of insurance claims, copies of all rental receipts issued by the Defendant to the tenants and copies of all rental advertising expenses incurred by Defendant for the property for 2011-2014.

Plnt's Mem. p. 1.[4]

On April 28, 2014, Defendant filed a Motion for Extension of Time to provide the above items. In that Motion, Defendant indicated that many of the items had been previously provided[5] or that the same had been misplaced. As to copies of rental receipts, Defendant stipulated to any such records, as "acquired from

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[4] This Court interprets Judge Bilik-DeFazio's Order of Court as demonstrating the belief that Plaintiff was entitled to rents minus expenses for some or all of the Period in Question.

[5] It is no excuse that an Order of Court requires actions previously taken, unless such argument is presented to the Court in a timely and appropriate fashion, the Court accepts that argument, and the Court makes a determination to vacate the order in question as a result. The various redundant orders of court within the record demonstrate that our predecessor courts were either unsatisfied with Defendant's excuses or that Defendant never presented them in an appropriate fashion, e.g., a Motion. As a result, compliance is required.

tenant on leases and rent receipts . . .” In that regard, Plaintiff has produced an affidavit of Steve Manns, the most recent tenant of the Subject Property, who resided there from February 1, 2012 through the remainder of the Period in Question.[6]

Defendant later retracted the above-stipulation or in the alternative interprets it to mean that Plaintiff bears the burden of producing receipts from the previous tenant for payment of rents, to the extent Plaintiff claims such income meets or exceeds $30,000.00. Complicating matters, Defendant asserts that Mr. Manns paid his rent in cash on several occasions. On the matter of cancelled checks demonstrating other expenses, Defendant asserted that provision of the same was financially onerous.

Plaintiff and Defendant filed several additional motions at or near the same period. On May 13, 2014, Judge Bilik-DeFazio issued an Order of Court denying all of the same, save Defendant’s request for an extension of time. Defendant was allowed thirty days to provide the cancelled checks and ten days to file all of the previously ordered documentation.[7] Defendant subsequently asserted an ambiguity in that Order regarding which party bore the cost of Defendant’s Schedule E’s for the years 2011-2014.

Upon a Motion by Plaintiff, on June 27, 2014 Judge Bilik-DeFazio entered an Order of Court directing strict compliance with the Orders of Court dated April 10, 2014 and May 13, 2014. Defendant continued to maintain the payment ambiguity and that Plaintiff should bear the cost of the Schedule E’s, including the value of Defendant’s time, because such documentation had already been provided to Plaintiff. On August 12, 2014, this Court ordered Defendant to “provide the Court copies of Schedule ‘E’ of his Federal Income Tax Return for the calendar years 2011, 2012, and 2013,” and that Defendant was “responsible for any fees associated with requesting said tax schedules from the IRS.”[8] The Court is in receipt of Defendant’s Schedule E’s for the years 2011, 2012, and 2013.

On August 18, 2014, Defendant filed a Petition to Reopen Select Issues of Equitable Distribution. Defendant contends that a revaluation of his baseball card collection is necessary, as “[i]t is common practice in all divorce cases to get updated values just prior to a final order. This was not done.” Defendant further

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[6] The Court gives due consideration to the period preceding Mr. Mann’s occupation below.

[7] At the time this matter was placed before the Court, there was a pending appeal by Defendant from Judge Bilik-DeFazio’s Order of Court. However, the record reflects that the reasons for that appeal did not alter the propriety or ripeness of the current issues before the Court. More importantly, the matters then complained of on appeal could not affect the previously affirmed, and therefore final, equitable distribution scheme. In any event, on April 15, 2015, the Superior Court issued a Memorandum Opinion and Order, which affirmed that Order of Court.

[8] The Court notes that the most recent Order did not require that Defendant provide Schedule E’s to Plaintiff.

reiterates that the value assigned to his baseball card collection, in the October 3, 2011 Order of Court, was not supported by competent evidence. These arguments merit no further consideration, as they turn upon axiomatic understandings of asset valuation and the unrelenting finality of an Order of Court following the exhaustion of appellate rights.

DISCUSSION

I. Enforceability

Before turning to Plaintiff's Motion for an Accounting, the Court must first address whether such Motion is predicated upon an enforceable claim. In this regard, Defendant argues that the issues presented require re-litigation of the equitable distribution scheme because the October 3, 2011 Order of Court did not award Plaintiff rents from the Subject Property during pendency of the Parties' cross-appeals. In this as in other respects, Defendant's argument is unavailing for a failure to comprehend appellate procedure.

Generally, Pennsylvania Rule of Appellate Procedure 1731 states: *"Except as provided in subdivision (b)*, an appeal from an order involving solely the payment of money shall . . . operate as a supersedeas . . . upon the filing of appropriate security. . . ." Pa.R.App.P. 1731 (emphasis added). However, with respect to domestic relations matters, "[a]n appeal from an order of . . . equitable distribution . . . shall operate as a supersedeas only upon application to and order of the trial court and the filing of security as required by subdivision (a). . . ." *Id*.

Defendant filed an Application for Supersedeas, which Judge Feliciani granted on November 3, 2011. That Order of Court addressed "monetary amounts due pursuant to" paragraphs three, four and five of the October 3, 2011 Order of Court.

Unfortunately, the Parties' failed to inform the Court of the marital properties' potential income production. As a result, the supersedeas did not address the marital properties. That is, the grant of Defendant's Application for Supersedeas only operated to stay enforcement of the equitable distribution scheme relating to monies to be paid, not the exchange of property or the prospective value of rents from the same.

Almost immediately, the parties began litigating over rental income. On January 30, 2012, the Court recognized the omission of rental income from the Application for Supersedeas, at least with respect to Unit 7-B, and issued an Opinion and Order of Court directing that the rental proceeds from that property be placed in escrow. Defendant filed a Motion for Reconsideration, which was denied. Defendant then failed to comply. On April 10, 2012, Plaintiff filed a Motion seeking to protect dissipation of martial assets with regard to rents from Unit 7-B. As noted above, the Court granted that Motion on May 3, 2012 and again directed that the rents from Unit 7-B be placed in escrow.[9]

[9] The court also ordered payment of counsel fees at that time. Those counsel fees were doubled in a subsequent proceeding, related to Defendant's continued noncompliance with the Order of Court.

Upon review, it does not appear that any Order of Court exists with respect to rental proceeds from the Subject Property, nor does it appear that Plaintiff asserted any right to such rents during pendency of the cross-appeals.[10] Defendant notes these facts and seems to urge this Court to find a *de facto* supersedeas as a result. The Court declines Defendant's invitation. *See Cruse v. Cruse,* 737 A.2d 771, 774 (Pa. Super. 1999) ("The grant of supersedeas without the concomitant filing of security is *non sequitur*."). Consequently, the Court finds that Plaintiff has an enforceable claim against Defendant for the net income derived from the Subject Property for the Period in Question and that an accounting of the same is appropriate.

II. Motion for an Accounting

We now turn to enforcement of Plaintiff's Motion for an Accounting. In so doing, the question presented is whether the moving party's claim is supported by competent evidence. *See Casey v. GAF Corp.,* 828 A.2d 362, 367 (Pa. Super. 2003). Evidence is competent where it is both admissible and relevant. *See generally* Evidence, Black's Law Dictionary (10th ed. 2014).

The Parties differ drastically in their assessment of rents and monies owing. Plaintiff presents the following summation:

> From October, 2011 through February 2013, the Defendant received, or should have received, $1,095.00 per month, or a total of $18,615.00; from March, 2013 through December, 2013, $1,000.00 per month, or a total of [$10,000.00][11]; and $900.00 for January, 2014. In addition, Defendant has kept $1,095.00 security deposit of the tenant for a grand total of [$30,610.00]. Defendant paid Arbor Management $216.00 per month for condo fees from October, November and December, 2011, for a total of $648.00; $218.00 per month for 2012 for a total of $2,616.00; $224.00 per month for 2013 for a total of $2,688.00; and $230.00 for January, 2014, for a grand total of $6,182.00.
>
> Therefore, Plaintiff contends that Defendant should be permitted credits of gross rents received by him from October 3, 2011 through January 31, 2014 of [$30,610.00] in the amounts of $2,775.79 for repairs from October 3, 2011 through January 31, 2014, which are supported by both invoices and payments, condo fees for the same period in the total amount of $6,182.00. In addition, Defendant paid real estate taxes on the unit in 2013

[10] The practical impetus for this omission seems to be a partial flooding of the Subject Property, in or before September 2011. The record reflects that necessary repairs for this flooding occurred up to the beginning of Steve Manns' occupancy.

[11] Plaintiff indicates that she is owned "$11,100.00" for this period. The Court assumes the same is a scrivener's error, as the simple math of March through December indicates a ten-month period, resulting in the Court's bracketed corrections.

> in the amount of $3,219.41; $3,219.41 in 2012 and taxes of $2,356.83 in 2011 (for which Defendant should get credit for two months in the amount of $392.80) for a total tax credit of $6,831.62.
>
> In conclusion, from gross rentals of [$30,610.00], the Defendant should get a credit for $6,182.00 for condo fees he paid, $2,775.79 for repairs and taxes of $6,831.62, which total [$14,820.59]. **The Plaintiff contends the Defendant owes her [$15,789.41], plus interest** from the date the Supreme Court of Pennsylvania denied Defendant's Petition for Allowance of Appeal on or about January 30, 2014.

Plnt's Mem. pp. 3-4 (emphasis added).

On August 27, 2014, Defendant filed a Memorandum in response to Plaintiff's claims, in which he disputes the timeline for consideration of expenses and claims the following rents minus additional expenses:

> A). "Rental income from October, 2011 to December, 2013" $25,335.00
>
> B). "Expenses from, and including repairs, during final order that Defendant should have stopped on October 3, 2011, but was in middle Of (sic) repairs until December, 2013":
>
> "Auto" $1,050.00
>
> "Cleaning" $2,900.00
>
> "Legal, pro rated" $14,798.00
>
> "Condo fees by Arbors" $7,848.00
>
> "Repairs" $13,794.00
>
> "Supplies" $675.00
>
> "Taxes, pro rated from Oct., 2011 to Dec., 2013" $6,942.75
>
> "Utilities, paid by Defendant when unit not occupied" $245.00
>
> "Unnecessary cost to Defendant for IRS tax schedules" $500.00
>
> "Magistrate cost for illegal condo fee for Jan., 2014 plus court cost" $505.00
>
> "Fees in lieu of legal fees for unnecessary motion by Plaintiff" $3,000.00
>
> "Management fee charged to Plaintiff for failure to pay fair share Of (sic) marital expenses during many years of divorce litigation" $10,626.00

	$62,883.75
	-$25,335.00
"Amount Plaintiff owes Defendant"	**$37,548.75**

Def.'s Mem. p. 7 (emphasis added).

Before any meaningful discussion of the differences in the Parties' recitation of expenses and income occurs, the Court hereby notes its refusal to consider: (1) "Legal, pro rated"; (2) "Unnecessary cost to Defendant for IRS tax schedules"; and (3) "Management fee charged to Plaintiff for failure to pay fair share Of (sic) marital expenses during many years of divorce litigation." For reasons heretofore discussed or for the patent inability to recover these fees under the law, no further discussion is warranted.

The remaining accounting issues rise and fall upon the proof presented and the degree of each party's responsibility under the applicable law. The Court's previous discussion addresses the applicable look-back date, October 3, 2011, which is the date of the final Order of Court on equitable distribution. Nevertheless, Defendant argues that substantial expenses incurred prior to that date should be considered.

In particular, Defendant urges this Court to consider repair expenses resulting from flooding of the Subject Property. Defendant notes that the flooding occurred in "the fall of 2011," which Defendant baldly asserts was during the same time as the October 3, 2011 Order of Court. However, review of the record demonstrates that services related to installation of a drainage system in the Subject Property were provided as early as September 2011. This fact, combined with Defendant's vague assertion and lack of evidentiary support as to the timing of the flooding causes the Court to conclude the same occurred before October 3, 2011.

In seeming anticipation of that conclusion, Defendant appeals to equity by noting his single-handed management of the Parties' properties, including the Subject Property. This Court is without the power to consider such assertions at this time. As was pointed out, the present concern is enforcement and an accounting of an existing equitable distribution, not a reconsideration of the same.

Furthermore, Plaintiff correctly points out that: (1) Defendant received all of the income from the Subject Property prior to October 3, 2011, as Defendant was the legal owner at that time; (2) it thus remained Defendant's choice not to maintain insurance on the Subject Property previous to that date; and (3) that choice was the cause-in-fact of Defendant's out-of-pocket repair expenses. Thus, even if the flooding had occurred after October 3, 2011, Plaintiff's enforceable interest in the value of the Subject Property, along with Defendant's failure to maintain insurance, demonstrates that Defendant would remain personally responsible for the repairs.[12] Therefore, Defendant's claimed amount for "repairs," requires reevaluation.

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[12] This conclusion is not intended to foreclose any right of recovery Defendant may have against third parties actually and proximately responsible for the damages.

In making that assessment, the Court recognizes that in domestic relations cases the Rules of Appellate Procedure operate to effectuate adequate economic protection of the weaker party. *See Groner v. Groner,* 476 A.2d 957 (Pa. Super. 1984); Pa.R.App.P. 1731. However, the Rules are not designed to allow the weaker party a windfall. *See* Pa.R.App.P. 1735 ("Upon return of the record by the appellate court to the lower court, in a matter where the order appealed from was affirmed . . . the clerk of the lower court shall thereupon enter an order . . . against the appellant *for the amount due upon the order as affirmed,* with interest and costs as provide by law.") (emphasis added).[13]

Normally, there is difficulty in dividing the value of real property as it existed when "the order as affirmed" was entered, where the value has increased during pendency of an appeal and as a result of something other than normal market appreciation. In this case, the record shows improvements to the property, following the flooding, which either improved the existing structure or made additions never before included. The Court's previous discussion forecloses Defendant's full recovery for the repairs, but does not address the potential for a windfall by Plaintiff. However, and quite fortunately, Plaintiff concedes substantial value by agreeing to pay the repairs accruing after October 3, 2011 that are supported by invoices of record. Having reviewed the same, the Court adopts Plaintiff's valuation of repairs.

Similarly, though Defendant is not entitled to reimbursement for the amount of repairs claimed, the Court will not compensate Plaintiff for lost rents during the period in which Defendant was performing repairs on the Subject Property. Defendant bears the onus of the flood repairs, owing to his failure to maintain insurance. However, it does not follow that Defendant is accountable for the inability to rent the Subject Property during the period of repairs. In fact, the record supports that Defendant attempted to rent the Subject Property as soon as reasonably possible. Finally, Plaintiff has failed to present evidence that the Subject Property was occupied during the period of repair. The Court therefore declines to consider Plaintiff's speculated amounts of rent from October 2011 until the beginning of Steve Manns' occupancy on February 1, 2012.

Considering that conclusion, the Court is otherwise satisfied with the accuracy of the affidavit of Steve Manns and the admissions of Plaintiff, as reflected below. By way of response, Defendant claims a *quid pro quo* criminal conspiracy between Plaintiff and Steve Manns. In support of that claim, Defendant appropriately points to Mr. Manns' criminal history, which reflects a conviction for fraud. However, Mr. Manns' credibility is but one consideration in the totality of the evidence that decides the claims presented. *See* Pa.R.E. 609; *Com. v.*

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[13] The Court is vested with discretion to require payment of interest as a penalty for noncompliance with an award of equitable distribution. *See* 23 Pa.C.S. § 3502. Beyond that, interest in only proscribed on "a judgment for a specific sum of money . . ." 42 Pa.C.S. § 8101. In this case, there was no judgment on such a sum and the Court declines to award interest as a sanction.

Hyland, 875 A.2d 1175, 1188 (Pa. Super. 2005). Aside from Defendant's concern with Mr. Manns' veracity, the Court finds no evidence of record for the claimed conspiracy.

Defendant also seems to assert that rents were paid in varying amounts and in cash. However, Defendant has failed to provide any evidence of that possibility. Defendant's response to that fact is an attempt to place the burden of production on Plaintiff. The Court disagrees. Nevertheless, and to Plaintiff's credit, she admits to lower rental amounts than those inferable from Steve Manns' affidavit, at least for the 2013 lease period. The Court thus adopts the amount of rents owing as reflected in the Court's correction of Plaintiff's Memorandum, minus the period from October 2011 to February 2012. For these and the reasons previously discussed, Defendant is also responsible for the return of the security deposit, which was provided by Mr. Manns at the outset of his occupancy.

The three largest fees that remain for assessment and calculation are: (1) condominium fees paid to Arbors Management; (2) expenses for repairs; and (3) property taxes. This Court provides considerable deference to Defendant's submitted Schedule E's. However, such consideration decreases in the face of more competent evidence. In the case of Pennsylvania real estate taxes, the Court notes that Plaintiff has provided Real Estate Tax bills, which were originally provided as a summation of expenses by former counsel for Defendant. These expenses adequately reflect the time period from October 2011 to September 2013. As such, the Court finds these forms, which show compensable taxes of $6,438.82,[14] to be the most reliable indication of the taxes paid by Defendant during that period.

Unfortunately, the taxes paid or owed by Defendant for September 2013 through January 2014 do not appear of record. The Court notes that the normal real estate taxes owing in the years 2012 and 2013 for the period between September and April were $883.07, but the Court declines to engage in proration with no other basis in evidence. However, the Court notes Plaintiff's admission that Defendant is entitled to a credit of $392.80, stemming from taxes paid in 2011.

Despite both Parties' reference to condominium fees, the Court notes that neither of their most recent filings include evidence of the same. Nevertheless, the record, per the admissions of Defendant's former counsel, reflects the accuracy of Plaintiff's recitation of the fees paid.

Defendant makes a related claim for "illegal" condo fees charged by Arbors Management in January 2014. First, the Court does not find the fee to be illegal, as Defendant remained the record owner of the Subject Property until the end of

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[14] These Real Estate Tax forms reflect an "At Face" value, along with a "Discount" value for early payment and a penalty value for late payment. It being Defendant's duty to minimize Plaintiff's loses while in possession of the Subject Property, the Court herein utilizes the Discount value.

January 2014. Second, it was Defendant's decision to fight the fee rather than simply pay it and seek the actual amount expended. Inasmuch as Plaintiff had equitable title to the Subject Property, she is responsible for the actual condominium fee, but not additional fees resulting from Defendant's poor judgment. The Court will therefore adopt the January 2014 condominium fee provided by Plaintiff in assessing the reimbursement due to Defendant.

Finally, Defendant makes smaller claims for: (1) auto usage in traveling to and from the Subject Property; (2) utility expenses when the Subject Property was unrented; (3) cleaning of the Subject Property; and (4) supplies.

Defendant's Schedule E's reflect expenses for "auto and travel" of $1,050.00. Based thereon, and in light of the numerous repairs to the Subject Property from late 2011 through 2012, for which substantial oversight may be inferred, the Court will adopt Defendant's claimed reimbursement. Defendant has not attached receipts for requested utility expenses during the period between October 3, 2011 and the beginning of Steve Manns' occupancy. Nonetheless, the Court finds Defendant's estimate of the monthly utility expenses to be fair and reasonable.

Defendant's claimed amount for supplies and for cleaning are not supported by competent evidence. Defendant asserts that on his "revised Schedule E's, supplies are listed for a total of $675.[00]." Def.'s Mem. p. 5. Having reviewed Defendant's Schedules E's, as provided by the IRS, for the years 2011, 2012, and 2013, the Court notes a total of $335.00. It is unclear from which source Defendant draws the figure of $675.00, except by means of bald extrapolation. Defendant's claim to $2,900.00 for cleaning is likewise unsupported. Defendant cites to Exhibit K 1-4 of his Memorandum, which reflect checks made out to a "Julie Daily,"[15] whom Defendant asserts was responsible for cleaning of the Subject Property, for a grand total of $577.48. Plaintiff has presented no evidence to rebut Defendant's claim that Julie Daily performed these duties, nor has Plaintiff questioned the authenticity of the cancelled checks provided to the Court. That Court thus adopts the expense supported by the evidence.

III. Motion for Attorney's Fees

Plaintiff requests attorneys fees for the time and expense associated with the issues raised herein. "The general rule is that the parties to litigation are responsible for their own counsel fees and costs unless otherwise provided by statutory authority, agreement of parties, or some other recognized exception." *Cher-Rob, Inc. v. Art Monument Co.,* 594 A.2d 362, 363 (Pa. Super. 1991). Pennsylvania permits recovery of reasonable attorney's fees where, in any of several instances, an opposing party has engaged in conduct which is "dilatory, obdurate or vexatious." 42 Pa.C.S. § 2503.

Following substantial review of the record, including Defendant's voluminous, meandering filings, this Court cannot help but note Defendant's highly litigious

[15] The record reflects the possibility that Defendant may have married Julie Daily at some point.

nature. This seems to stem from Defendant's belief that, as the Superior Court of Pennsylvania observed in Defendant's most recent appeal, "everyone [is] at fault but him." *Mayercheck v. Mayercheck,* No. 853 WDA 2014 at 12 (Pa. Super. April 15, 2015). Like the Superior Court, we "disagree with [Defendant's] assessment." *Id*.

Defendant notes that many of the fees submitted by Plaintiff do not concern the instant Motions. The Court agrees, but augments the award of attorney's fees to address both the instant concerns and Defendant's established course of conduct. In this regard, it bears noting that Defendant's filings are replete with conspiratorial assertions as between the various jurists assigned to this case and counsel for Plaintiff. Such conduct by an attorney at law would result in disciplinary action. *See* 204 Pa. Code § 8.2.

Notwithstanding those troubling assertions, the Court has taken generous efforts and, consequently, substantial judicial resources to fully cognize the arguments within Defendant's Memorandum. Despite such attempts, and bolstering the Court's award of attorney's fees, Defendant's remaining claims are the subject of previous proceedings, parole evidence, vague assertions of justice, or otherwise lacking in relevant legal or factual import to the instant considerations. *See, e.g., Samuel-Bassett v. Kia Motors America, Inc.,* 34 A.3d 1, 29 (Pa. 2011); *Wilkins v. Marsico,* 903 A.2d 1281, 1284-85 (Pa. Super. Ct. 2006) (noting limits to the liberal construction of *pro se* filings).

Wherefore, the Court will enter the following Order:

ORDER OF COURT

AND NOW, this 8th day of May, 2015, upon and after consideration of the Motion for Accounting and for Attorney's Fees, filed by Plaintiff, Barbara J. Mayerchck, n/k/a Barbara J. Tucciarone, and a Petition to Reopen Selected Issues of Equitable Distribution, filed by Defendant, Joseph A. Mayercheck, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. Plaintiff's Motions are GRANTED in accordance with the following amounts and distributions:
    a. Defendant is responsible to Plaintiff for rents in the amount of $26,230.00, along with Security Deposit in the amount of $1,095.00, and Attorney's Fees in the amount of $1,933.31.
    b. Plaintiff is responsible to Defendant for the following:
        i. Condo Fees, including those for January 2014: $6,182.00
        ii. Repairs: $6,831.62
        iii. Auto: $1,050.00

iv. Cleaning: $577.48

v. Supplies: $335.00

vi. Utilities: $245.00

vii. Taxes: $6,831.62

2. To the extent the above amounts and distributions are inconsistent with Plaintiff's or Defendant's claims, the same are expressly DENIED with prejudice.

3. Defendant's Petition to Reopen Selected Issues of Equitable Distribution is DENIED with prejudice.

4. Defendant shall pay the difference in the above sums to Plaintiff within ninety (90) days of the date of this Order of Court.

FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER MAY RESULT IN FINES, IMPRISONMENT OR OTHER SANCTIONS.

BY THE COURT:
/s/ Harry F. Smail, Jr., Judge

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ITAMA DEVELOPMENT ASSOCIATES, LP, Appellant
V.
ZONING HEARING BOARD OF THE TOWNSHIP OF ROSTRAVER, PENNSYLVANIA, Appellee
TOWNSHIP OF ROSTRAVER, Intervenor
MINUTEMAN ENVIRONMENTAL SERVICES, INC., Intervenor

ZONING AND PLANNING

Variances and Exceptions In General; Particular Nonconforming Uses; Questions or Errors of Law; Matters of Discretion

1. Since no additional evidence was presented subsequent to the Board's determination, the scope of the Court's review is limited to determining whether the Board committed a manifest abuse of discretion or an error of law.

2. The Board abuses its discretion only if its findings are not supported by substantial evidence.

3. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

4. Because Appellant failed to reference or identify any finding of fact it contends lacked substantial evidentiary support, the Court accepted the Board's findings without question.

5. A "nonconforming use" is "a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the application of such ordinance or amendment to its location by reason of annexation.

6. From the testimony and findings adduced at the hearing, the prior owner of the property used the property as a nonconforming use to park, fuel, and maintain school buses. This nonconforming use was abandoned in part in 2009 when the prior owner stopped parking school buses on the property.

7. Because the prior owner stopped parking school buses on the property, the only activities that could have continued to be conducted on the property as a permissible nonconforming use(s) would be the use of the property to fuel and perform minor maintenance, not as a parking lot or storage center.

8. Intervenor Minuteman's extended parking of trucks, storage of roll-off boxes, frac tanks, and other containers, along with the construction of a containment area, were not nonconforming uses similar to the prior owner's uses of the property prior to the enactment of the ordinance.

9. Because Intervenor Minuteman's use of the property was a nonconforming use outside the scope of the prior owner's use of the property, the Court held the Board did not commit a manifest abuse of discretion or error of law in determining that Appellant's use of the property, other than minor vehicle maintenance, violates provisions of the ordinance.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 6153 of 2014
No. 6187 of 2014

Appearances:
K. Bradley Mellor and Maureen E. Sweeney,
Pittsburgh, for the Appellant

Mark J. Shire,
Monessen, for the Appellee
Albert C. Gaudio,
Monessen, for the Intervenor Township of Rostraver
Paul D. Zavarella,
Pittsburgh, for the Intervenor Minuteman Environmental Services

BY: RICHARD E. McCORMICK JR., PRESIDENT JUDGE

OPINION and ORDER OF COURT

This matter is before the Court on consolidated land use appeals from the Zoning Hearing Board Decision dated November 21, 2014, in which ITAMA Development Associates, and its tenant, Minuteman Environmental Services, were ordered to cease and desist the commercial activities being conducted on their property. The relevant factual and procedural history of the case is as follows.

By Deed dated April 3, 2013, ITAMA purchased 2.888 acres of real property from the Belle Vernon Area School District ("District"). The subject property is zoned B-2 Retail Business District. Prior to the enactment of the applicable zoning ordinance, the property had been the site of the Rostraver High School, which contained the school building, a four-bay garage and a diesel fuel tank. Sometime prior to 2009, the school was demolished, but the District continued to use the garage for storage, fueling, parking and routine maintenance of school buses. These uses were not permitted by right, by conditional use or by special exception; however, the District continued those uses as nonconforming uses under Article XIX, sections 195-82 to 195-90 of the Ordinance.

In 2009, the District purchased other real property within the Township for the fueling, maintenance and parking of school buses, and permanently discontinued parking its buses and trucks on the property as of June 6, 2009. However, the District continued to re-fuel and maintain its buses and trucks on the property until July 2013, when those operations were finally moved also.

The Township Zoning Officer made a determination that more than twelve (12) months had passed since the property's use for fueling and routine maintenance, and that as a result, ITAMA could not continue those nonconforming uses. ITAMA, in anticipation of the needs of its prospective tenant, appealed this determination. Upon hearing testimony and evidence from the District's witnesses, the Board concluded that until July 2013, the property had continued to be used to fuel buses and perform minor maintenance on them.

In the context of this prior appeal, ITAMA's president testified that its prospective tenant would limit its use of the property to the diesel fueling of trucks and minor maintenance, and that it would not store vehicles on the property other than the occasional, overnight parking of a temporarily disabled vehicle. Based

upon these representations, the Board approved ITAMA's request to continue the nonconforming use of the property for diesel fueling and minor maintenance, finding that the District had not abandoned those nonconforming uses. However, the District had abandoned that aspect of the nonconforming use related to parking buses and trucks on the property as of June 6, 2009, when it purchased and moved its vehicles to another site.

Eventually, ITAMA entered into a lease agreement with Minuteman Environmental Services ("Minuteman"). Minuteman's business operations on the property caused the Township Zoning Officer to notify both ITAMA and Minuteman that they were in violation of the zoning ordinance. Specifically, Minuteman kept a truck and numerous large, covered containers on the lot. Their representatives confirmed that their use of the property entailed the dispatch of trucks, carrying of roll-off boxes to various job sites, and returning the boxes to the property for temporary storage. Because no zoning or occupancy permit for those uses had been approved by the Township, the letter instructed Minuteman to cease and desist its use of the property within five (5) days, citing eight (8) claimed zoning ordinance violations. Furthermore, ITAMA was advised of its right to appeal to the Board.

ITAMA timely filed a Notice of Appeal, and a hearing was held on October 8, 2014. Several witnesses testified and offered documentary evidence: ITAMA's President, a representative from Minuteman, an inspector from the Commonwealth of Pennsylvania, Department of Environmental Protection, and two neighboring residential property owners. From this evidence, the Board made several findings with respect to the activities being conducted on the property.

Among the services Minuteman provides its customers are frac tank and roll-off box rentals, including the transportation and disposal of the contents of those tanks and boxes, in support of the oil and gas industries. From the property, Minuteman dispatches trucks, some with fixed bodies (dump trucks) and some with detachable bodies. Minuteman hauls empty roll-off boxes from the property to oil and gas work sites, where it drops off the boxes, retrieves them when full, and then eventually transports them to landfills for disposal. The contents of the boxes consist of drill cuttings (that is, rock chips and dirt) produced during the drilling of natural gas wells. When the boxes are emptied, they are returned to sit outside in the open yard area of the property until they are rented again. Because the storage containers are not all being used all of the time, the number of containers sitting on the property varies depending upon the demand from customers.

Kenneth Lee, an inspector from the Commonwealth of Pennsylvania, Department of Environmental Protection, first investigated the site on July 18, 2014. On that date, he observed approximately twenty-five (25) containers on the ground, including eleven (11) tarped roll-off containers, two (2) hardtop, solid containers, four (4) frac tanks, three (3) half-round containers, and five (5) vacuum boxes. Six (6) of the containers still contained residual waste.

On August 20, 2014, when Lee visited the site a second time, he observed employees erecting a containment area, upon which emptied frac tanks would be placed. Of the approximately twelve (12) containers on the site that day, nine (9) of them contained quantities of residual waste.

When Lee went to the property a third time, on August 21, 2014, he found two roll-off containers with their gates partially open, permitting rainwater that had been in contact with residual waste (leachate) to drain into the ground.

On August 29, 2014, while Lee was performing a follow-up inspection, he observed twelve (12) tarped containers and one container tagged for repair. Also present was a disabled truck that had been loaded 26 days earlier with residual drill cuttings. On his final visit on September 5, 2014, this truck, filled with waste, was still parked there.

Between June 7, 2009, and July 2013, the District used the property for fueling and minor maintenance, typically between 6 a.m. and 5 p.m. during the school year, with occasional evening and weekend use of the buses for after-school activities. In contrast, Minuteman's activities occurred throughout the day, late at night, and in the early morning hours, exceeding the times during which the District previously used the property for refueling and maintenance.

Based upon the foregoing, the Board found that ITAMA's tenant, Minuteman, engaged in the following non-conforming uses between July 15, 2014, and September 5, 2014, which were none of the non-conforming uses engaged in by the District between June 7, 2009, and July 2013:

(a) Parking of vehicles, including dump trucks and non-fixed body trucks;

(b) Storage, long- and short-term, of roll-off boxes and frac tanks;

(c) Construction and use of a "containment area" to prevent residual waste from coming into contact with the ground;

(d) Storage of roll-off boxes containing residual waste from drilling activities;

(e) Storage of residual waste on a parked truck for 29 days;

(f) Drainage of leachate on the ground;

(g) Permitting the presence of DEP regulated material produced in the gas collection and production industry; and

(h) Use of property during the late night and early morning hours.

After considering the foregoing evidence, the Board concluded that the uses to which Minuteman has put the property are different from the uses to which the District put the property. Moreover, the Board concluded the District abandoned its use of the property for bus and truck parking and storage more than 12 months

before Minuteman began its use of the property for truck parking and outdoor storage of roll-off boxes and frac tanks in July 2014.

The parties agree that this Court's scope of review is articulated by the Supreme Court in *Valleyview Civic Association v. Zoning Board of Adjustment,* 462 A.2d 637, 639 (Pa. 1983):

> "Since no additional evidence was presented subsequent to the Board's determination, the scope of our review is limited to determining whether the Board committed a manifest abuse of discretion or an error of law in granting the instant variances... . We may conclude that the Board abused its discretion only if its findings are not supported by substantial evidence. ... By 'substantial evidence' we mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Citations omitted.) See also *TKO Realty LLC v. Zoning Hearing Board of the City of Scranton,* 78 A.3d 732, 735 n.1 (Pa.Cmwlth. 2013) (The Commonwealth Court's scope of review when the trial court does not take additional evidence, is limited to determining whether the zoning hearing board committed an error of law or abused its discretion.)"

Despite citing this governing principle as the applicable standard of review, Appellant and Intervenor Minuteman contend that the Board's decision was not supported by substantial evidence. This contention is made, however, without any reference to or identification of any finding of fact that they believe lacks substantial evidentiary support. Consequently, we will accept the Board's findings of fact without question, and limit our review to whether the Board either committed an error of law or abused its discretion in applying the law to the facts.

The Township Zoning Ordinance provides, in pertinent part:

> Section 195-82. When Permitted.
>
> Subject to the provisions of this article, a use of building or land existing at the time of the enactment of this chapter may be continued even though such use does not conform to the provisions of these regulations for the district in which it is located.
>
> * * *
>
> Subsection 195-88. Abandonment.
>
> A nonconforming use of a building or land that has been abandoned or discontinued shall not thereafter be returned to a nonconforming use. A nonconforming use shall be considered abandoned as follows:
>
> A. When the intent of the owner to discontinue the use is apparent.

> B. When the characteristic equipment and furnishings of the nonconforming use have been removed from the premises and have not been replaced by similar equipment within 90 days, unless other facts or circumstances show a clear intention to resume the nonconforming use.
>
> C. When a nonconforming use has been discontinued for a period of 12 months or for 18 months during any 3-year period....

The Municipalities Planning Code defines a "nonconforming use" as "a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the application of such ordinance or amendment to its location by reason of annexation." 53 P.S. § 10107.

Each party agrees with the Board's conclusion that the property is located in a B-2 Retail Business District, and that property used for storage, light maintenance and repair of school buses and trucks is not permitted by right in a B-2 Retail Business District.

The testimony from the June 11, 2014, hearing supports the Board's findings that the District used the property to fuel, routinely maintain and park school district buses from a time preceding the passage of the Ordinance in 1970 until the District permanently discontinued parking its school buses and trucks on the property on June 6, 2009. It further supports a finding that the only non-conforming use that continued uninterrupted until July 2013 was the District's use of the property to fuel buses and to perform minor maintenance. Given the established historical use of the property, the Board correctly concluded that the nonconforming use of parking buses and trucks on the property had been abandoned.

In light of this, the only activities that could have continued to be conducted on the property as a permissible nonconforming use would be the use of the property to fuel and perform minor maintenance, not as a parking lot or storage center. Here, Minuteman's extended parking of trucks, storage of roll-off boxes, frac tanks and other containers, along with the construction of a containment area, are not nonconforming uses similar to the District's uses of the property prior to the enactment of the Ordinance. Accordingly, based upon the foregoing, we find that the Board did not commit a manifest abuse of discretion or error of law in determining that Appellants' use of the property, other than minor vehicle maintenance, violates provisions of the Ordinance, as set forth in the Zoning Officer's July 15, 2014, letter.

The Land Use Appeal of ITAMA and Minuteman from the Order dated November 21, 2014, of the Rostraver Township Zoning Hearing Board is denied and the Board's Decision is affirmed.

ORDER OF COURT

AND NOW, to wit, this 13th day of May, 2015, it is hereby **ORDERED** and **DECREED** that the Land Use Appeal of ITAMA and Minuteman from the Order dated November 21, 2014, of the Rostraver Township Zoning Hearing Board is **DENIED** and the Board's Decision is **AFFIRMED**.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr.,
President Judge

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NEW KENSINGTON-ARNOLD SCHOOL DISTRICT, Petitioner
V.
NEW KENSINGTON-ARNOLD EDUCATION ASSOCIATION, PSEA/NEA, Respondent

ARBITRATION

Petition to Vacate Arbitration Award; Public School Code; Collective Bargaining; Due Process Rights; Loudermill Hearing; Essence Test

1. The standard of review when considering a petition to vacate an arbitrator's award is embodied in the "essence" test. First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement.

2. A court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.

3. Under the essence test, a court may not review the merits of an arbitrator's interpretation, nor substitute its judgment for that of the arbitrator, even if the court's interpretation of the collective bargaining agreement would differ from that of the arbitrator.

4. Upon appropriate challenge by a party, a court should not enforce a grievance arbitration award that contravenes public policy. Such public policy, however, must be well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.

5. In considering whether an arbitration award violates public policy, the issue is not whether the employee's misconduct is a violation of public policy but rather whether the reinstatement violates an established public policy.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 579 of 2015

Appearances:
Raymond F. Sekula,
Arnold, and
Anthony J. Vigilante,
New Kensington, for the Petitioner
Leslie D. Kitsko,
Hunker, for the Respondent

BY: RICHARD E. McCORMICK, JR., PRESIDENT JUDGE

OPINION AND ORDER OF COURT

By President Judge Richard E. McCormick, Jr.:

This matter is before the Court on Petitioner's *Petition to Vacate Arbitration Award* in which the Petitioner seeks an Order (1) vacating the arbitrator's decision that Petitioner violated both the notice requirements of section 1127 of the Public

School Code and the Grievant's *Loudermill*[1] rights; and (2) prohibiting the Grievant's reinstatement to his former employment on public policy grounds. After a careful review of the case law applicable to our standard of review of the Arbitrator's Award, the Petition to Vacate will be denied.

The underlying facts of this case, recounted in the "Background" section of the Arbitrator's "Opinion and Award," are as follows. The Grievant, Joseph Edward Melnick (hereinafter "Melnick"), was employed by the Petitioner, the New Kensington-Arnold School District (hereinafter "the School District"), in August 2008 as the middle school chorus teacher. In addition to his normal and customary teaching duties, Melnick served as the assistant high school band director from 2008 through 2012 and served as its musical director for a two-year period. He also provided service to the school district in the following capacities: security guard at high school basketball and football games; security guard at middle school volleyball games; disc jockey at middle school dances; and dance competition host. In addition, he was responsible for building the middle school chorus program, and received a commendation for his efforts on behalf of his students and his community.

Melnick also was active in assisting students in related community and church activities such as encouraging student participation in the Westmoreland County chorus festival, preparing students for auditions, providing musical services for a local Catholic parish, and performing in a band at "Relay for Life." He taught private lessons in trumpet, piano and voice.

Prior to the episode leading to his suspension and eventual termination from employment, Melnick received satisfactory ratings every year of his employment and had no record of any disciplinary action having been taken against him.

On April 3, 2013, at approximately 11 p.m., Melnick was arrested at his home, where he lived with his brother, and was charged with one felony grade weapons violation and two misdemeanor grade drug violations. He spent the night in jail, was preliminarily arraigned the following day, and released sometime in the late afternoon of April 4, 2013.

When the School District representatives learned of this, they sent a letter to Melnick, dated April 4, 2013, notifying him that he had been suspended without pay effective April 4, 2013. In a subsequent letter dated April 10, 2013, the District advised Melnick that a *Loudermill* hearing was scheduled for April 17, 2013, in the high school board room. At the request of the New Kensington-Arnold Education Association ("NKAEA") the hearing was postponed until after Melnick's preliminary hearing, but only after the District asked that NKAEA agree that the District had complied with *Loudermill*'s timeline requirements and that the postponement of the hearing did not violate Melnick's due process rights. Furthermore, Melnick's job continued to be suspended without pay.

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[1] *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

At the conclusion of a non-jury trial in Allegheny County on February 24, 2014, Melnick was found guilty of both possession of a controlled substance (90 grams of marijuana) and possession of drug paraphernalia (a glass pipe), and not guilty of the weapons violation. By letter dated April 8, 2014, and sent to Melnick, the District re-scheduled the disciplinary meeting that had been previously continued by mutual consent. The meeting was held on April 14, 2014, and neither Melnick nor his representative attended. Following the meeting, a letter dated May 14, 2014, was sent to Melnick, which was signed by Superintendent John E. Pallone. This letter contained a Statement of Charges and informed Melnick that a recommendation would be made to the School Board that he be dismissed from employment. It further informed him that he had the right to demand a hearing by May 29, 2014, to challenge the proposed action or his termination would be final. On Melnick's behalf, the NKAEA responded by electing to challenge the District's action under the grievance procedure contained in the parties' Collective Bargaining Agreement. Consequently, on May 29, 2014, the School Board voted to terminate Melnick's employment for "immorality" as a result of the criminal convictions, and they informed him of that decision on June 5, 2014.

Both parties presented their respective arguments to the Arbitrator, and the Arbitrator determined that Melnick's *Loudermill* rights were violated when he was summarily suspended without pay from April 4, 2013, through April 16, 2013, without a due process hearing. Furthermore, the Arbitrator found that the District's May 14, 2014, letter was fatally defective as a Statement of Charges as it did not comply with the mandatory requirements of Section 11-1127 of the School Code. Specifically, relying upon principles set forth in case precedent, the Arbitrator found that the May 14, 2014, letter was legally deficient because it was issued by the Superintendent rather than the School Board President, it was not attested to by the Board Secretary, it did not set forth a time and place of a hearing, and improperly reversed the burden by requiring the grievant to request a hearing by a date certain or suffer permanent removal from employment. Because the District took no action to cure the defect but proceeded throughout to rely on its May 2014 actions, the Arbitrator found that the District violated Melnick's rights under Section 1127 and therefore, his discharge was void. Accordingly, Melnick was awarded back pay from the period of April 3, 2013 through April 16, 2013; and he was reinstated to his former position as of May 29, 2014, and entitled to back pay, all benefits and all other emoluments of employment effective May 29, 2014, as though he had been continuously employed from that date.

The first issue presented is whether the basis of the arbitrator's determination that the District denied Melnick his due process rights under section 1127 of the Public School Code is within the terms of the Collective Bargaining Agreement and therefore, draws its "essence" from the Collective Bargaining Agreement.

The standard for review of the Court when considering the merits of a petition to vacate an arbitrator's award is embodied in the "essence" test. Under the essence test, the Court performs the following two-step analysis:

> First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.

State Sys. Of Higher Educ. (Cheyney Univ.) v. State College Univ. Professional Ass'n (PSEA-NEA), 743 A.2d 405, 413 (Pa. 1999); and *Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educ. Support Personnel Ass'n, PSEA/NEA,* 939 A.2d 855 (Pa. 2007). Under the essence test, a court may not review the merits of an arbitrator's interpretation, nor substitute its judgment for that of the arbitrator, even if the court's interpretation of the collective bargaining agreement would differ from that of the arbitrator. *City of Johnstown/Redevelopment Authority v. United Steel Workers of Am., Local 14354,* 725 A.2d 248, 250-51 (Pa.Cmwlth. 1999).

Here, the NKAEA filed a grievance based upon an allegation that the District had suspended and discharged Melnick without just cause and without complying with all of the requirements embodied within the Collective Bargaining Agreement. Among the contractual rights (Article IV, Rights of Professional Employees) is a "Statutory Savings Clause" (paragraph A), a "Just Cause Provision" (paragraph B), and a due process provision entitled "Required Meetings or Hearings" (paragraph C). Under the statutory savings clause, the rights granted in the Public School Code of 1949 are incorporated into the collective bargaining agreement. Under the just cause provision, a District is prohibited from disciplining or discharging any professional employee without just cause. Under "Required Meetings or Hearings," notice and the opportunity to be heard provisions are granted to the employee who faces possible disciplinary action. Furthermore, the agreement also contains a grievance procedure for an employee who believes he or she is being unjustly or inappropriately treated. Clearly, the determination that the arbitrator was required to make in this case was governed by his interpretation of the terms of employment contained within the four corners of the agreement and the rights and obligations of each party to the agreement. Therefore, because the dispute at hand is firmly rooted in the collective bargaining agreement, the first prong of the essence test is satisfied.

The second prong of the essence test requires the court to determine whether the arbitrator's interpretation of the contract "can rationally be derived from the collective bargaining agreement." *State Sys. Of Higher Educ. (Cheyney Univ.),* 743 A.2d 405, 413 (Pa. 1999). Here, the arbitrator strictly interpreted the due process provisions embodied in the agreement and found, based upon the undisputed facts, that the District failed to comply with the letter of the law and the terms of the agreement. The District failed to give Melnick notice and an opportunity to be heard prior to unilaterally suspending him without pay; and the Board President and Secretary failed to meet their obligations with a properly executed Notice of Right to Hearing and Statement of Charges. Furthermore, the arbitrator found that the defective – and effectively unsigned -- Notice failed to advise Melnick of a specified time and place where he would have an opportunity to be heard. These findings result from the arbitrator's rational analysis of the terms of the employment agreement, including a strict reading of the agreement and the applicable statutory law.

This Court may not disturb the arbitrator's award unless it violates the essence test, and in this instance, we find that his decision was rationally related to the collective bargaining agreement and therefore, must be affirmed by this Court.

The second issue presented is whether the arbitrator's award violates public policy and therefore should be vacated.

A limited public policy exception to the essence test states as follows:

> ...[U]pon appropriate challenge by a party, a court should not enforce a grievance arbitration award that contravenes public policy. Such public policy, however, must be well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.

Westmoreland Intermediate Unit #7, 939 A.2d 855, 865-66 (Pa. 2007). In considering whether an arbitration award violates public policy, the issue is not whether the employee's misconduct is a violation of public policy but rather whether the reinstatement violates an established public policy. *See Eastern Associated Coal Corp. V. United Mine Workers of Am., Dist. 17,* 531 U.S. 57 (2000). Here, we find that the District has failed to meet its burden of showing that there is a public policy requiring the dismissal of a public school teacher who is convicted of the ungraded misdemeanors of possession of marijuana and drug paraphernalia. *By way of contrast, see* 24 P.S. §11-1122 ("Causes for termination of contract"); and 24 P.S. §§ 1-111(e), (f.1), and (j) ("Criminal history of employes and prospective employes; conviction of certain offenses"); and *also Zelno v. Lincoln Intermediate Unit No. 12 Bd. Of Directors,* 786 A.2d 1022 (Pa.Cmwlth. 2001), *appeal denied* 805 A.2d 528 (2002); *Horton v. Jefferson County-Dubois Area Vocational Technical Sch.,* 630 A.2d 481 (Pa. Cmwlth. 1993); and *Warren County Sch. Dist. Of Warren County v. Carlson,* 418 A.2d 810 (Pa. 1980).

Based upon the foregoing, the *Petition to Vacate Arbitration Award* will be denied and the Award stands.

ORDER OF COURT

AND NOW, to wit, this 30th day of June, 2015, based upon the rationale of the foregoing Opinion, it is hereby **ORDERED** and **DECREED** that the *Petition to Vacate Arbitration Award* is **DENIED**.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr.,
President Judge

CITY OF ARNOLD, PENNSYLVANIA, Plaintiff
V.
WAGE POLICY COMMITTEE of the CITY OF ARNOLD POLICE DEPARTMENT, o/b/o PAMELA CIMINO, Defendant

ARBITRATION

Petition to Vacate Arbitration Award; Collective Bargaining; Grievance Arbitration Awards; Police and Fire Personnel; Narrow Certiorari Scope of Review

1. Grievance arbitration awards involving police or fire personnel are not subject to the essence test scope of review, but rather to the narrow certiorari scope of review, which limits the court's review to questions regarding jurisdiction of the arbitrators, the regularity of proceedings, whether an arbitrator has exceeded his powers, and whether the grievant has been deprived of his or her constitutional rights. An error of law alone will not warrant reversal under this scope of review.

2. For an issue to be subject to arbitration, it must be for the purpose of clarification and/or interpreting an unclear provision of the Collective Bargaining Agreement.

3. For an arbitrator to act within his or her power he or she may not mandate that an illegal act be carried out; he or she may only require a public employer to do that which the employer could do voluntarily.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 1305 of 2015

Appearances:
John E. Pallone,
Arnold, for the Plaintiff
Ronald R. Retsch,
New Castle, for the Defendant

BY: RICHARD E. McCORMICK, JR., PRESIDENT JUDGE

OPINION and ORDER OF COURT

By President Judge Richard E. McCormick, Jr.:

This matter is before the Court on Petitioner's *Petition to Vacate Arbitration Award* seeking an Order vacating the Arbitrator's Award due to the Arbitrator's lack of subject matter jurisdiction to issue an award reinterpreting Respondent Cimino's death benefit pension. After a careful review of the case law on this Court's standard of review, the Petition to Vacate will be denied.

The underlying facts of this case are recounted in the "Introduction" section of the Arbitrator's *Opinion and Award,* as follows. Thomas J. Cimino was a police officer employed by the Petitioner, City of Arnold ("City") at the time of his non-service-related death in 2002. He was employed by the City for a total of 11.77 years. Pamela Cimino ("Cimino"), his widow, received a memo from the City Controller on May 7, 2002, informing her that she was entitled to a

death/survivor benefit of 50% of her deceased husband's annual compensation at the time of his death. This amount was calculated to be $1,949.11 per month.

After receiving monthly payments in the amount of $1,949.11 for 142 months, Cimino received a letter from the Solicitor for the City dated February 17, 2014, informing her as follows:

> After considerable review and consideration, the Police Pension Board has determined that the average monthly compensation for your surviving spouse police death benefit has been incorrectly calculated and requires correction.
>
> City of Arnold Ordinance Number 6 of 1997, Article VI, DEATH BENEFITS, Section 6.01(b), provides in part that "If the Participant dies, while an Employee of the Employer but not as the direct result of the performance of duties as an Employee of the Employer, a Death Benefit shall be paid monthly in an amount, ... and in the case of a Participant who has completed ten (10) Years of Service or more, equal to fifty percent (50%) of the amount which is equal to fifty percent (50%) of the average Monthly Compensation of the Participant as of the Date of Death.
>
> The monthly death benefit due is accurately recalculated to be $974.56 per month. Effective March 1, 2014, your monthly death benefit will be reduced to reflect the accurate calculation and your gross benefit paid will be $974.56 per month. This monthly death benefit is derived by using the Final Average Salary and dividing it by 12, then multiplying it by 50.00% again [$46,778.52 / 12 months = 1,949.11 x 50.00% = $974.56 per month].
>
> In as much as the monthly death benefit was incorrectly calculated, you have been overpaid the amount of $974.55 per month for approximately 142 consecutive months or more, resulting in a total overpayment of approximately $138,386.10. Beginning June 1, 2014, the Police Pension Board will begin its effort to recover the overpayment by allowing you to make monthly installments in the amount of $10.00 per month until your death or the date that you repay the overpayment in full, whichever shall come first.

After Cimino received this letter, the Wage & Policy Committee of Arnold Police Department filed a grievance on Cimino's behalf disputing the reduction of the benefit.

After hearing arguments from both parties, the Arbitrator determined that the conduct of the City and its own characterization of the alleged overpayment

indicate that the alleged overpayment was not a mistake or error by the City, but that the City had "reinterpreted" the ordinance governing the death benefit. While the Arbitrator established that case law dictates that a municipality can correct an erroneous calculation of a retirement benefit, especially in terms of future benefits, he concluded that a reinterpretation of a benefit does not constitute an error or mistake. The Arbitrator further found that regardless of the later "reinterpretation," the City's past conduct and characterization of the modification of the 50% benefit as a "reinterpretation" rather than as an error or mistake established a term or condition of employment embodied within the Collective Bargaining Agreement. As such, Cimino's benefit is protected from independent modification by the City. The Arbitrator sustained the grievance.

In the *Petition to Vacate Arbitration Award,* Petitioner asserts three grounds upon which the vacatur of award is required: (1) the Arbitrator violated positive law; (2) the Arbitrator exceeded his power; and (3) the Arbitrator came to an erroneous conclusion with regard to past practice.

Our scope of review is limited in the instant matter. Under *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n, (Betancourt),* 656 A.2d 83 (Pa. 1995), grievance arbitration awards involving police or fire personnel are not subject to the essence test scope of review, but rather to the narrow certiorari scope of review. The narrow certiorari test limits this Court to reviewing questions regarding the jurisdiction of the arbitrators, the regularity of proceedings, whether an arbitrator has exceeded his powers, and whether the grievant has been deprived of his or her constitutional rights. An error of law alone will not warrant reversal under this scope of review. *City of Washington v. Police Department,* 259 A.2d 437, 442 (Pa. 1969).

First, no issues have been raised by Petitioner regarding the regularity of proceedings in this matter, nor have any issues been raised regarding the deprivation of constitutional rights.

Second, this Court finds that this matter does fall within the jurisdiction of the Arbitrator. Act 111 establishes the authority for arbitration to resolve grievances between police and fire personnel and their employers. *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n, (Betancourt),* 656 A.2d 83 (Pa. 1995). Petitioner contends that "case law has suggested that for an issue to be subject to arbitration, it must be for purpose of clarification and/or interpreting an unclear provision of the Collective Bargaining Agreement. *Shippensburg Police Assoc. vs. Borough of Shippensburg,* 968 A. 2d 246 (Pa Cmwlth 2009)." Petitioner admits that "[c]learly the Pension Plan is incorporated into the Collective Bargaining Agreement," but then contends that the dispute at hand involves neither ambiguity nor dispute regarding the Collective Bargaining Agreement or Pension Plan provisions. This Court finds that there is a dispute regarding the interpretation of the Collective Bargaining Agreement and Pension Plan provisions, as evidenced

by the numerous issues raised by Grievant during arbitration. Therefore, this matter does fall within the jurisdiction of the arbitrator.

Finally, this Court finds that the Arbitrator did not exceed his powers in his Award in the instant matter. For an arbitrator to act within his or her power, "[h]e or she may not mandate that an illegal act be carried out; he or she may only require a public employer to do that which the employer could do voluntarily." *City of Washington v. Police Department, supra; Upper Providence Police Delaware County,* 526 A.2d 315, 321 (Pa. 1987). This Court finds that the Arbitrator's Award does not require Petitioner to carry out any illegal act. The 3rd Class City Code permits Petitioner to provide Grievant with the death benefit pension plan that she has been receiving. In 53 Pennsylvania Consolidated Statutes, section 39303, "Allowances and service increments," subsection (f), the statute provides:

> " ... Any police officer who has less than ten years of service and who dies or is totally disabled due to injuries or mental incapacities not in line of duty and is unable to perform the duties of a police officer may be entitled to a pension of twenty-five per centum of the police officer's annual compensation. For death or injuries received after ten year of service the compensation may be fifty per centum of the police officer's annual compensation."
>
> 53 Pa.C.S. § 39303.

Accordingly, Petitioner may, by law, provide Grievant $1,949.11 per month as a death benefit pension, as this amount represents 50% of her deceased husband's compensation. Therefore, this Court finds that the Arbitrator did not exceed his powers in this matter. Based upon the foregoing, the *Petition to Vacate Arbitration Award* will be denied and the Arbitration Award stands.

ORDER OF COURT

AND NOW, to wit, this 22 day of July, 2015, it is hereby **ORDERED** and **DECREED** that the *Petition to Vacate Arbitration Award* will be **DENIED** and the Arbitration Award stands.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr.,
President Judge

DUANE PONKO and BERNADETTE PONKO, his wife, Plaintiffs
V.
GREGORY PONKO and ANGELA PONKO, Defendants

CONSTITUTIONAL LAW

Parent and Child Relationship; Levels of Scrutiny; Strict or Heightened Scrutiny

1. The Due Process Clause protects the fundamental right of parents to raise their children as they see fit.

2. When analyzing a fundamental right under the Due Process or Equal Protection clauses, the Pennsylvania Supreme Court uses the highest level of scrutiny, the strict scrutiny analysis.

3. The strict scrutiny analysis provides the legislature may only take specified action if the statute is narrowly tailored to effectuate a compelling state interest.

4. For a statute to be narrowly tailored, it must be the least drastic means of accomplishing a compelling state interest.

5. Strict scrutiny requires the legislative classification to be necessary to effectuate the state's compelling interest.

6. The State's interest in enacting 23 Pa.C.S.A. § 5325(2), is its *parens patriea* power to protect at risk children of divorce. However, 23 Pa.C.S.A. § 5325(2), plainly allows a court to override the otherwise valid decision of one or both separated parents without the required finding of unfitness.

7. The mere fact of separation does not give rise to a fair assumption; a child is without proper parental supervision or care.

8. Allowing grandparent visitation without a requirement of unfitness is not necessary or narrowly tailored to effectuate the state's goal of protecting at risk children of divorce.

9. The statute creates an absurd double standard which classifies parents by marital status; grandparents have standing to seek custody when parents are divorced or separated, but grandparents do not have standing to seek custody when parents live together as an intact family.

10. Although the statute furthers the General Assembly's Policy of continuing contact with grandparents when a child's parent is "deceased, divorced or separated," one cannot conclude that such a benefit always accrues in cases when grandparents force their way into grandchildren's lives through the courts, contrary to the decision of a fit parent.

11. There is a presumption that fit parents act in the best interest of their children.

12. The need of the state to exercise its *parens patriea* power to interfere with the joint decision of fit, albeit separated, co-parents is dubious at best.

13. The Court found 23 Pa.C.S.A. § 5325(2) to be unconstitutional.

CHILD CUSTODY

Persons Entitled In General; Grandparents

Because the Court declared 23 Pa.C.S.A. §5325(2) to be unconstitutional, the plaintiff grandparents lacked standing to petition for any type of physical custody of their grandchildren.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – CUSTODY
No. 1750 of 2014-D

Appearances:
Maria Spina Altobelli,
Greensburg, for the Plaintiffs

Brian P. Cavanaugh,
Greensburg, for the Defendants

BY: HARRY F. SMAIL, JR., JUDGE

OPINION AND ORDER OF COURT

SMAIL, J. September 8, 2015

This matter is before the Court on a Motion to Dismiss. Plaintiffs, Duane Ponko and Bernadette Ponko, are the grandparents of the minor children Cameron Paige Ponko, born April 2, 2007, Nicholas Joseph Ponko, born October 10, 2008, and Sydney Taylor Ponko, born February 1, 2012. Plaintiffs filed the above-captioned action pursuant to 23 Pa.C.S. § 5325(2), which grants grandparents standing to seek partial physical custody. Defendants, divorced parents of the minor children, have moved to dismiss, arguing that 23 Pa.C.S. § 5325(2) violates their Due Process and Equal Protection rights under the Fourteenth Amendment to the United States Constitution. Having carefully considered the law applicable to the facts of this case, the Court will grant Defendants' Motion.

FACTS

Defendants, Gregory J. Ponko and Angela Ponko, were married on August 6, 2006. The minor children, who are the subjects of the above-captioned case, are the products of that union. Defendants separated on October 26, 2012. Owing to Defendants' ability to effectively co-parent while living separate and apart, no custody order existed, previous to this case, with respect to the minor children.

On or about December 25, 2012, Defendants agreed to discontinue contact between Plaintiffs and the minor children. Excepting chance encounters in the community and one unsolicited phone call in contravention of an Order of this Court prohibiting Plaintiffs from contacting the minor children, there has been no contact since that time.

On October 6, 2014, Plaintiffs filed a Complaint for Custody of the minor children. The only apparent basis for Plaintiffs' standing lies in 23 Pa.C.S. § 5325(2) [hereinafter, "Section 5325"], which gives grandparents standing to seek partial physical custody of children whose biological parents have been separated for a period of six months or more.

On November 6, 2014, this Court issued an Order granting shared legal custody of the minor children to Defendants. Defendant/Mother was granted primary physical custody and Defendant/Father was granted physical custody as he and Defendant/Mother could agree. Plaintiffs were expressly denied partial physical custody or supervised custody; they were ordered to have no contact with the minor children until further Order of Court, unless by written agreement of the Parties. The Court ordered the Parties to brief their positions and heard argument on July 7, 2015.

DISCUSSION

The United States Supreme Court has stated that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65 (2000). In *Troxel,* the Court struck down a Washington State third-party visitation statute similar to, albeit broader than Section 5325. *Id*. at 63. After establishing that the Fourteenth Amendment protects the fundamental right of parents to direct the care, custody, and control of their children, the Court considered the following Washington State third-party visitation statute:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.[1]

After the death of their father, the mother of the minor children in *Troxel* wished to limit the time they spent with paternal grandparents, causing grandparents to petition for visitation rights under the above law. *Id*. at 60-61. The trial court granted visitation in excess of mother's wishes and mother appealed. *Id*. The Washington Court of Appeals reversed for procedural reasons. *Id*. at 62.

The Washington Supreme Court affirmed, but on different grounds; specifically, the court held that the Washington visitation statute unconstitutionally infringed on the fundamental right of parents to raise their children as they see fit. *Id*. at 63. In so doing, the Court held that a state can only constitutionally interfere with this right in order to prevent actual or potential harm to a child. *Id*. The Court separately found the statute unconstitutionally overbroad because it allowed "any person to petition [for custody] at any time with the only requirement being that the visitation serve the best interest of the child." *Id*.

The United States Supreme Court granted certiorari and affirmed. The Court agreed that the Due Process Clause protects the fundamental right of parents to raise their children as they see fit. *Id*. at 67. In the Court's view, the Washington statute effectively allowed a judge to override the parenting decisions of a fit parent, concerning the rearing of their child. *Id*. at 72. In framing the fit parent inquiry, the Court stated that "so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id*. at 68-69, (citing *Reno v. Flores,* 507 U.S. 292, 304 (1993)).

Operating under the presumption that the right of parents to raise their children as they see fit is a fundamental right, this Court must turn to the appropriate level of scrutiny to apply in its Constitutional analysis. Traditionally, when analyzing

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[1] Washington Rev. Code §26.10.160(3).

a fundamental right under the Due Process or Equal Process clauses, the Pennsylvania Supreme Court uses the highest level of scrutiny, the strict scrutiny analysis. *See Hiller v. Fausey,* 904 A.2d 875, 885 (Pa. 2006).[2] Strict scrutiny provides that the legislature may only take a specified action if the statute in question is narrowly tailored to effectuate a compelling state interest. *Id*. at 885-86. For a statute to be narrowly tailored, it must be the "least drastic means of accomplishing" a compelling state interest. *Danson v. Casey,* 399 A.2d 360, 372 (Pa. 1979). Put differently, "[s]trict scrutiny requires that the classification be *necessary* to effectuate the state's compelling interest." *Schmehl v. Wegelin,* 927 A.2d 183, 191 (Pa. 2007) (Cappy, C. J., dissenting) (citing *Commonwealth v. Bell,* 516 A.2d 1172, 1178 (1986) (emphasis added)).

To begin, the Court notes that Section 5325 clearly infringes upon Defendants' Due Process and Equal Protection rights, as provided by the Fourteenth Amendment of the United States Constitution. Although the predecessor statutes to Section 5325 were held constitutional by the Pennsylvania Supreme Court, there is no such decision on the current statute. Nevertheless, Section 5325 plainly allows a court to override the otherwise valid decision of one or *both* separated parents with no required finding of unfitness.

Operating as the sole basis for state action in this case is the Commonwealth's *parens patriea* power to protect "at risk" children of divorce. However, looking at the statute under strict scrutiny, it appears that allowing grandparent visitation in this particular situation is neither necessary nor the most narrowly tailored means to effectuate that goal. The Statute itself provides two examples of situations where the applicable law is far more tailored to preserve the State's legitimate interest.

Section 5325 states:

> In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:
>
> (1) where the parent of the child is deceased, a parent or grandparent of the deceased parent may file an action under this section;

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[2] Though tacit within *Hiller* and many modern cases, this Court notes that the alleged infringement of "fundamental rights" offers a sufficient basis for application of the Equal Protection Clause, and consequent strict scrutiny, regardless of whether any "suspect classification" exists. *See* Nathaniel Persily, *The Meaning of Equal Protection Then, Now, and Tomorrow,* GPSOLO, Nov./Dec. 2014, at 13, 15; *But see Schmehl v. Wegelin,* 927 A.2d 183, 191 (2007) (Cappy, C.J., dissenting). Though the Court need not decide the existence of the latter Equal Protection "prong" under the existing case law, we note that the statute appears to treat non-separated parents differently from separated parents. Whether such treatment meets the test of strict scrutiny is addressed below.

(2) where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage; or

(3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home.

23 Pa.C.S § 5325. Sections One (1) and Three (3), above, denote serious circumstances, where the State should, in most instances, allow grandparent standing for obvious reasons. Section Two (2), the portion at issue here, does not. As in this case, the mere fact of separation does not give rise to a fair assumption that the child is without proper parental supervision or care.

When considering a grandparent's request under Section 5325(2), a court must also apply 23 Pa.C.S. § 5328(c)(1) which requires:

(1) In ordering partial physical custody or supervised physical custody to a party who has standing under section 5325(1) or (2) (relating to standing for partial physical custody and supervised physical custody), the court shall consider the following:

(i) the amount of personal contact between the child and the party prior to the filing of the action;

(ii) whether the award interferes with any parent-child relationship; and

(iii) whether the award is in the best interest of the child.

23 Pa.C.S. § 5328(c)(1).

While the above factors provide a degree of consideration to the parent-child relationship, they nevertheless maintain the purported authority of the State to ignore the desires of otherwise fit parents.[3]

Although the Pennsylvania Supreme Court has not ruled on the constitutionality of this statute, the predecessor statutes,[4] which comprised the now repealed Grandparents Visitation Act, were very similar to Section 5325 in both language and intent. The Pennsylvania Statutory Construction Act provides in relevant part

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[3] There is a degree of legal fiction inherent to all of Section 5325; the bases for grandparent standing found therein imply, by necessity, a degree of unfitness. *See Schmehl, supra,* at 192-93 (Cappy, C.J., dissenting). Where a parent is deceased or has not had custody of the child for twelve months, that assumption is fair. Where the parents are merely separated, it is not. Furthermore, there are numerous other legal remedies available to ensure the care of a child where it can be shown that the parents are, in fact, unfit.

[4] 23 Pa.C.S. §§ 5311 and 5312.

"[t]hat when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language."[5] Two Pennsylvania Supreme Court cases, *Hiller v. Fausey,* 904 A.2d 875 (Pa. 2006) and *Schmehl v. Wegelin,* 927 A.2d 183 (Pa. 2007), have considered these the predecessor statutes in a context relevant to the present case.

In *Hiller,* the maternal grandmother of a minor child sought partial custody and visitation under the now repealed 23 Pa.C.S. § 5311, which allowed such action because the child's mother had passed away. This they did over the objection of the surviving father. 904 A.2d at 877. The court first elected to apply strict scrutiny when determining whether the father's fundamental right to direct the care, custody, and control of his minor child was violated. *Id*. at 880.

The court then found that protecting the health and emotional wellbeing of children was a compelling state interest, citing a line of cases in which the State exercised its *parens patriea* power to interfere with parents' rights. *Id*. at 886. Finally, the court found that the law was narrowly tailored; it specifically limited the holding to provide standing to "grandparents whose child has died." *Id*. Thus, the Court held that the statute did not violate the Father's Fourteenth Amendment right to due process. *Id*. at 890.

There are a number of reasons to differentiate the current case from *Hiller*. Most notably, this is not a case of a deceased parent. Even ignoring that fact, the cases cited by the *Hiller* court in support of the State's *parens patriea* interest only demonstrate the exercise of such power when the fitness of a parent is in legitimate question[6] or when the State steps in to prevent the emotional trauma resultant from breaking up an established child/primary caretaker relationship.[7]

In this case, there has been no evidence presented to suggest that Defendants are unfit, and Defendants are not attempting to break up a child/primary caretaker relationship, as Defendants have always been and remain the minor children's primary caretakers. *See Johnson v. Diesinger,* 589 A.2d 1160, 1164 (Pa. Super. 1991) (the purpose of grandparent standing is to "continue a healthy relationship"). The need of the State to exercise *parens patriea* power to interfere with the joint decision of these fit, albeit separated, co-parents is therefore dubious at best.

Hiller actually seems in accord with that conclusion. While the *Hiller* court acknowledged that the statute furthered the Pennsylvania General Assembly's policy of continuing contact with grandparents when a child's parent is "deceased, divorced or separated," the Court also noted that "[w]hile acknowledging the general benefits of these relationships, we cannot conclude that such a benefit

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[5] 1 Pa.C.S. § 1922 (4).

[6] *In re Adoption of J.J.,* 515 A.2d 883 (1986); *In re C.A.E.,* 532 A.2d 802 (1987).

[7] *Charles v. Stehlik,* 744 A.2d 1255 (2000); *Ellerbe v. Hooks,* 416 A.2d 512 (1980).

always accrues in cases where grandparents force their way into grandchildren's lives through the courts, contrary to the decision of a fit parent." *Id*. at 886.

Although Section 5325 has never been analyzed under the equal protection framework, the Pennsylvania Supreme Court addressed another of its predecessors, 23 Pa.C.S. § 5312, in that manner in *Schmehl v. Wegelin, supra*. In *Schmehl,* paternal grandparents filed for partial custody of the minor children after mother, who was divorced from father, denied them visitation during her periods of custody. 927 A.2d at 184. Mother asserted that treating intact and non-intact families differently under 23 Pa.C.S. § 5312 was a violation of the Equal Protection Clause. *Id*. The trial court found for the mother, and the grandparents appealed directly to the Pennsylvania Supreme Court. *Id*. at 185. Despite applying strict scrutiny, the Court held, by a narrow margin, that mother's Fourteenth Amendment equal protection rights were not violated. *Id*. at 188.

Chief Justice Cappy entered a persuasive dissent in which he maintained that equal protection and due process require separate analyses, with equal protection focusing on the classification instead of the overall legislation. *Id*. at 191. As such, the Chief Justice went on to assert that the classification was not necessary to effectuate the government's compelling interest in ensuring the wellbeing of children, and so it failed equal protection strict scrutiny. *Id*. He stated that the distinction "suggests that divorced or separated parents are *inherently* less fit to parent, as compared to parents who have married." *Id*. at 192-93 (emphasis added).

Although the majority in *Schmehl* found for the grandparents, there are two key distinctions in the present case. First, Defendants assert that their due process *and* equal protection rights have been violated. Second, Defendants, unlike the mother in *Schmehl,* have made a joint decision regarding the persons with whom they want their children to associate. The fact that separated parents can agree on any childrearing decision, especially one as contentious as the exclusion of one party's parents from their children's lives, speaks volumes.[8]

According to the United States Supreme Court, "there is a presumption that fit parents act in the best interests of their children." *Troxel, supra,* at 68. For this reason, Pennsylvania courts have long demonstrated reluctance to supersede the wishes of fit parents. In *Herron v. Seizak,* a married couple restricted their minor child's visitation with her grandparents, causing the grandparents to initiate an action to compel visitation. 468 A.2d 803, 804 (Pa. Super. 1983). The trial court dismissed the motion and the Superior Court affirmed. *Id*. The Court noted that the grandparents "would have the court direct parents, both of whom have chosen

[8] This distinction has not gone entirely unnoticed by the states. In California, for example, the grandparent visitation statute states that a rebuttable presumption is created "that the visitation of a grandparent is not in the best interest of a minor child if the child's [separated or divorced] parents agree that the grandparent should not be granted visitation rights." Cal. Fam. Code § 3103 (d) (enacted 1993).

not to have their children visit the grandparents, to permit such visitation. Nothing in the case or statutory law legitimizes such an intrusion by the courts into family life." *Id*. at 805. This is exactly the intrusion permitted by Section 5325. Moreover, the only difference between the couple in *Herron* and Defendants in the present case is marital status.

In *Helsel v. Puricelli,* 927 A.2d 252 (Pa. Super. 2007), the mother and father of a minor child separated in May of 2004, and reconciled in May of 2005, meaning they had been separated for well over six months. *Id*. at 254. In January of 2006, the minor child's step-grandfather filed for visitation under the Grandparent's Visitation Act. *Id*. The Pennsylvania Superior Court affirmed the trial court's order that the step-grandfather did not have standing, because the parents were currently living together as "an intact family unit." *Id*. at 255. The court cited *Herron*, stating that it would not "direct the parents, who are living together as an intact family, to allow visitation when they otherwise would not choose to do so." *Id*.

Helsel highlights the absurd double standard created by classifying parents by marital status. If the parents in *Helsel* had remained separated, a grandparent would have had standing to file for custody, a fact vitiated only because the parents began living together again. Their status notwithstanding, the *Helsel* parents, like Defendants, made a unified decision and yet their separation, a mechanism often utilized with the *goal* of eventual reunification, conveyed and continues to convey upon a third party the ability to completely upset an otherwise unified family. Defendants in the present case are fit and able to effectively co-parent their children and are apparently making the same decision they made while still a couple. Consequently, there is no constitutional basis justifying the implicit presumption of unfitness as between these separated and other non-separated parents when the only concern is their marital status.

Wherefore, the Court will enter the following Order:

ORDER OF THE COURT

AND NOW, to wit, this 8th day of September, 2015 , upon and after consideration of the Motion to Dismiss, filed on behalf of Defendants by their counsel, Brian P. Cavanaugh, Esquire, it is hereby ORDERED, ADJUDGED and DECREED that the same is GRANTED. The Pretrial Conference previously scheduled for September 9, 2015 is hereby CANCELLED and the within custody action is DISMISSED.

BY THE COURT:
/s/ Harry F. Smail, Jr., Judge

NATIONWIDE MUTUAL INSURANCE COMPANY, Plaintiff
V.
DENISE HART and RONALD HART, Defendants

INSURANCE

Underinsured Motorist Benefit; Contract Interpretation

Insurance contract paying compensatory damages, including derivative claims, which are due by law preclude the insured from recovery when the insured was in the scope of employment and covered by the Workers' Compensation Act.

WORKERS' COMPENSATION ACT

Scope of Employment; Traveling Employee

1. Whether an individual is acting within the scope of employment is a question of law, with the determination based upon the facts of record.

2. When an employee is injured after setting out to conduct business of the employer, it is presumed that the employee was in the course of employment at the time of injury.

3. Claimant need not actually be performing specifically assigned duties for work, as long as actions are incidental to employment.

4. Scope of employment begins at the moment the employee stops performing personal acts and begins acting for the purpose of furthering the employer's business.

5. Defendant acts in the scope of employment when standing to get luggage and preparing to load a car driven by a co-worker to set out on a regular bi-weekly trip for their employer.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 5520 of 2012

Appearances:
Peter B. Skeel,
Pittsburgh, for the Plaintiff
Mark L. Sorice,
Greensburg, for the Defendants

BY: ANTHONY G. MARSILI, JUDGE

OPINION AND ORDER OF COURT

BY THE COURT:

The Court held an Evidentiary Hearing on the record in this matter on May 21, 2015, pursuant to the February 9, 2015 Order of Court. The purpose of said Evidentiary Hearing was to determine whether Defendant Denise Hart was covered by the underinsured motorist benefits that she and her husband purchased through Nationwide Mutual Insurance Company, for an incident involving a car accident which took place in the garage of her home. Present at said hearing were counsel for Plaintiff, a representative for Plaintiff, Kathleen Holdman, counsel for Defendants, and Defendants Denise Hart and Ronald Hart. At the Evidentiary

Hearing, the parties stipulated to certain evidence, and accordingly, Defendants offered several exhibits, including the insurance policy issued by Plaintiff to Defendants (Exhibit 1), the deposition transcript of Denise K. Hart (Exhibit 2), the deposition transcript of Robert H. Eicher (Exhibit 3), and the deposition transcript of Carol Carano (Exhibit 4), which were all admitted. At the conclusion of the Evidentiary Hearing, the Court requested the parties to submit Briefs in Support of their respective positions, which were submitted, and the Court considered in this Opinion and Order of Court.

The facts in this case are relatively undisputed. At the time of the accident leading to this litigation, on June 20, 2011, Defendant Denise Hart was employed by Ceratizit USA, Inc. in Latrobe, Pennsylvania, as a technical application representative, and living in Greensburg Pennsylvania with her husband Ronald Hart. (Trial Transcript p. 8). Around the date of the accident, the Ceratizit location in Latrobe, Pennsylvania was closing, and, as a result, Ms. Hart was working in Michigan full time and coming home for a weekend visit every two weeks. (TT p. 8). She was planning on traveling back to Warren, Michigan on Monday, June 20, 2011, with Ceratizit Customer Service Supervisor Robert Eicher, after they had both been home visiting for the weekend. (TT p. 8-9). Once they arrived in Michigan, Ms. Hart was to train newly hired employees, and Mr. Eicher was to perform his job, which had also been transferred to Michigan as a result of the Latrobe, PA location closing. (Exhibit 2, p. 22). On June 20, 2011, Mr. Eicher was to pick up Ms. Hart in a rental car to drive to Warren, Michigan for work. (TT p. 11-12). As Mr. Eicher backed into the driveway at Defendants' residence, Ms. Hart was sitting on a stool in the garage of her home. (TT p. 13). As she observed Mr. Eicher backing into her driveway, Ms. Hart walked in front of her vehicle, a Ford Explorer insured by the subject Nationwide Insurance policy, which was parked in the garage, intending to pick up her luggage to put into the rental car. (TT p. 14). As she did so, she heard a squealing sound as Mr. Eicher backed the rental car into Defendants' Ford Explorer, pinning Ms. Hart's left leg between the two vehicles, injuring her. (TT p. 14).

After the accident occurred, the Defendants made a claim to Nationwide for underinsured motorist benefits. (TT p. 24). Plaintiff then filed this Declaratory Judgment action seeking a declaration that it does not have an obligation to provide coverage to Defendants as to the June 20, 2011 accident. At the Evidentiary Hearing the parties stipulated that the issues for the Court to determine are: (1) whether Ms. Hart was acting within the scope of her employment at the time the accident took place on June 20, 2011; and, accordingly, (2) whether the Worker's Compensation Act bars Defendants' ability to recover underinsured motorist benefits. The Court notes that following Ms. Hart's injury, she did not apply for Worker's Compensation benefits, but accepted said benefits. (TT p. 16; Exhibit 4, p. 11). Accordingly, Plaintiff argues that because Workers' Compensation benefits were accepted, Mr. Eicher, her co-worker, is entitled to immunity as

Ms. Hart's sole remedy is provided for in the Worker's Compensation Act. (TT p. 28). Defendants argue that Ms. Hart was not acting within the scope of her employment, as the accident occurred in her home before she ever got in to the car to leave for Warren, MI, and that therefore, she is entitled to benefits from the subject underinsured motorist policy. (TT. p. 26).

The Nationwide policy issued to Defendants provides as follows: "**We** will pay compensatory damages, including derivative claims, which are due by law to **you** or a **relative** from the owner or driver of an **underinsured motor vehicle** because of **bodily injury** suffered by **you** or a **relative**." (Exhibit 1, p. UI1). Plaintiff argues that under the terms of the Workers' Compensation Act, no damages are "due by law" to Defendants, as Ms. Hart and Mr. Eicher were acting within the scope of their employment at the time of the accident, and that therefore the Worker's Compensation Act is Ms. Hart's only available benefit. The Worker's Compensation Act defines 'injury arising in the course of employment" as including:

> all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employee, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employee's presence thereon being required by the nature of his employment.

77 P.S. § 411. Accordingly, the Court must first determine whether Ms. Hart was acting within the scope of her employment, and if she was, whether Plaintiff is immune from paying underinsured motorist benefits under the Worker's Compensation Act.

The issue of whether an individual was acting within the scope of her employment is a question of law, with the determination being based upon the facts of record. *Roman v. W.C.A.B. (Dept. of Environmental Resources),* 616 A.2d 128, 130 (Pa. Cmwlth. 1992). The law is clear that "if an injury occurs within the scope of employment due to the negligence of a fellow employee who is also in the scope of his or her employment, any private tort action between employees is barred by the Workers' Compensation Act." *Kulik v. Mash,* 982 A.2d 85 (Pa. Super. 2009). What constitutes the course of employment is broader for traveling employees. *Roman,* 616 A.2d at 130. When an employee is injured after setting out to conduct her employer's business, it is presumed that she was in her course of employment at the time of the injury. *Id*. It is the employer's burden to rebut this presumption, and must do so by proving "that the claimant's actions were so foreign to and removed from his usual employment that they constitute an

abandonment of that employment." *Id*. at 130. Temporary departures from the work routine by a traveling employee will not break the course of employment. *Id*.

Both parties discuss and refer to *Biddle v. W.C.A.B. (Thomas Mekis & Sons, Inc.),* 652 A.2d 807 (Pa. 1995), which, based upon the "coming and going rule," said that an injury sustained in traveling to or from work is not considered to have been the course of employment unless the employee can establish an exception to the general rule. Said exceptions include: (1) claimant's employment contract includes transportation to and from work; (2) claimant has no fixed place of work; (3) claimant is on a special mission for employer; or (4) special circumstances are such that claimant was furthering the business of the employer. *Id*. at 809. The *Biddle* Court found that Appellant, the insured employee, could not establish that he fit within the "no fixed place of work" exception to the coming and going rule, because he failed to provide sufficient evidence that he traveled from site to site on a daily basis. *Id*. While Defendants in the present matter argue that none of the exceptions to the going and coming rule apply to Ms. Hart's actions on June 20, 2011, Plaintiff argues that said accident falls under the exception of special circumstances in furthering the business of her employer, Ceratizit.

The Court could find no cases directly on point with the present facts of whether waiting for a co-worker in order to leave for a work-related trip and being injured before entering the rental car to set out on said trip constitutes acting within an employee's scope of employment. However, the Court looks to the following precedential Workmen's Compensation Appeal cases for guidance as to the issue of scope of employment. In *Lenzer Coach Lines v. W.C.A.B. (Nymick),* 632 A.2d 947 (Pa. Cmwlth 1993), the claimant was found to be acting within his scope of employment, when he worked as a bus driver, and on a layover day slipped and fell while stepping into a bathtub in his hotel room, sustaining injuries. The Pennsylvania Commonwealth Court explained that "a traveling employee need not be engaged in the actual performance of work at the moment of an injury to be considered in the course of employment. 'It is enough that he is occupying himself consistently with his contract of employment in a manner reasonably incidental thereto."' *Id*. at 949, *citing Port Authority of Allegheny County v. W.C.A.B. (Stevens),* 452 A.2d 902, 904 (Pa. Cmwlth. 1982). Thus, even if a claimant is acting in a way that is "reasonably incidental" to her employment, even just in taking a shower on a layover day, she may still be found to be acting within her scope of employment.

Similarly, in *Cohen v. Central Home Furniture Co.,et al.,* 23 A.2d 70 (Pa. Super. 1941), an older case that is still precedential and factually similar to the present matter, a claimant was found to be within his scope of employment when he was employed as a door to door canvasser, and was injured when he fell down the front steps of his house while setting out on his route. The claimant in *Cohen* was carrying a rug when leaving his home, which he intended to sell on behalf of his employer, and intended to continue on the route he started the day before. *Id*.

His employer only required him to check in to their place of business as he saw fit and set no restrictions as to his territory. *Id*. The *Cohen* Court stated:

> It seems consonant with both experience and logic to hold that in the absence of some element specifically fixing the point at which such employment begins, the point of beginning of employment should coincide with the time when the employee enters upon his daily operations. Where it is his duty to report to his employer, the beginning of his employment should be fixed in relation to his employer's premises; when, however, he proceeds directly from his home to his customers, he should be held to be in the course of his employment from the time he leaves his home.

Id.at 71. The *Cohen* Court held that the claimant was furthering the business of his employer by setting out on his route at the time of the accident, and that he "had definitely left his home within the meaning of the rule established by the cases cited," even though he was still on the threshold of his own home. *Id*.at 71.

The *Cohen* case and the *Lenzer Coach Lines* case establish that the claimant need not actually be performing specifically assigned duties for work, as long as his actions are incidental to his employment. Said cases further establish that there is not bright line rule for determining when the scope of employment begins and ends. Even though the claimant in *Cohen* was leaving his own home, he was entitled to Worker's Compensation benefits because the court found that he was setting out on his course of employment to sell a rug to further the business of his employer. In the present matter, Ms. Hart was leaving her own home in order to set out on a business trip, as she did every two weeks, and was injured before she could place her luggage in the company rental car. Such an action was clearly reasonably incidental to her driving to Michigan with a co-worker, for which she was being paid by her employer.

The Court notes Defendants' examples made during closing arguments. Defendants pointed to the hypothetical that if Ms. Hart had been in the kitchen cutting up an apple for lunch and Mr. Eicher called her on the phone and caused her to cut her finger, she would not have been injured in the scope of employment because she was performing a personal task in her own home. However, Defendants distinguished another example, indicating that if Ms. Hart had gotten into the rental car with Mr. Eicher and they were involved in a car accident on their way to Michigan, there is "no question" that she would have started her scope of employment. (TT p. 26). While the Court agrees that Defendants' examples illustrate the general rule regarding scope of employment, it finds that, accordingly, the scope of employment must begin at some point between Ms. Hart having been in her home preparing for her day, and the time she would have gotten into the rental car. The cases cited above provide guidance as to when the scope of employment begins, indicating that it begins the moment the employee

stops performing personal acts and begins acting for the purpose of furthering her employer's business, or, as *Cohen* stated, when the employee "leaves the home."

Accordingly, the Court finds that Defendant, Ms. Hart, and Mr. Eicher were acting within the scope of their employment at the time the accident occurred. On June 20, 2011, Ms. Hart never actually physically left her house before the accident occurred; however, at the time of the accident she was picking up her luggage to put into the rental car to leave for Warren, MI with her coworker. (TT p. 16). Ms. Hart testified that the rental car was to be paid for by her employer, and that she and Mr. Eicher were also being paid for all of their travel time, food, and lodging. (TT p. 16, 18). It is clear that the trip to Michigan was furthering the business of Ceratizit USA, Inc., as the Latrobe, PA location of Ceratizit was being closed and moved to Michigan, and their job duties were taking place at the new location. Thus, special circumstances necessitated the travel for Ceratizit employees from Pennsylvania to Michigan, in order for them to continue furthering the business of their employer by performing their regular job duties.

Defendants argue that Ms. Hart never entered the vehicle, and in fact, never left her house, and therefore, she had not yet entered her course of employment, because she could not have been furthering her employer's business by standing in her own garage. However, the Court finds that it makes little difference if the accident occurred at work or at home, as her actions were reasonably related to her employment. Walking in front of her Ford Explorer to pick up her luggage was reasonably related to her job duty of traveling to Michigan, which she was getting paid for by her employer, and she was not performing any sort of personal activity at the time of the accident. The required paid-for travel to Michigan for work was the very reason Ms. Hart was in the garage and the only reason Mr. Eicher arrived at her home that Monday morning. These actions were not so "foreign and removed" from her usual employment that they constituted an abandonment of said employment, but they were directly related to the same course of employment she entered into every two weeks in traveling to Michigan for her work. *See, Roman,* 616 A.2d at 130. Whether Ms. Hart was inside or outside of the vehicle, and the fact that she was still in her own garage have little to do with whether she was acting in her scope of employment as she stood up from her stool in the garage to set out on her trip to Michigan, just as the claimant in *Cohen* set out on his route only to be injured descending his front steps. Thus, Ms. Hart had "left the home," under *Cohen* standards, at the time she was injured.

Accordingly, as the Court finds that Ms. Hart was acting within the scope of her employment at the time of the accident, it follows that Plaintiff is immune from paying her benefits. As previously stated, if an injury is caused to the claimant by a fellow employee where both were acting within the scope of employment, private tort action between the employees is barred by the Worker's Compensation Act. *See, Kulik,* 982 A.2d 85. The Worker's Compensation Act provides that "if disability or death is compensable under this act, a person shall

not be liable to anyone at common law or otherwise on account of such disability or death for any act or omission occurring while such person was in the same employ as the person disabled or killed, except for intentional wrong." 77 Pa.C.S. § 72. As stated above, the underinsured motorist policy between the parties stated, "**We** will pay compensatory damages, including derivative claims, which are due by law to **you**." Based upon the exceptions to the Worker's Compensation Act, there were no damages "due by law" to Defendants, because Ms. Hart was injured while acting within the scope of her employment, and such a finding only entitles her to Worker's Compensation benefits. *See, for example, Nationwide Mut. Ins. Co. v. Chiao,* 186 Fed. Appx. 181 (3d Cir. Pa. 2006); *Petrochko v. Nationwide Mut. Ins. Co.,* 15 Pa. D. & C. 5th 312 (2010). The Court notes that neither party argues over any alleged ambiguity of the insurance policy, and as such, according to the foregoing and the plain language of the policy, Defendants are barred from recovering on their claim for Ms. Hart's injury.

Based upon the foregoing, this Court enters the following Order of Court:

ORDER OF COURT

AND NOW, to wit, this 23rd day of June, 2015, consistent with the analysis contained in the foregoing Opinion; it is hereby ORDERED, ADJUDGED and DECREED, as follows:

1. The Court hereby finds in favor of Plaintiff and against Defendants.
2. Further, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:
/s/ Anthony G. Marsili, Judge

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COMMONWEALTH OF PENNSYLVANIA
V.
ROBERT LOREN MASTERS, Defendant

CRIMINAL LAW

Post-Conviction Relief Act; Ineffective Assistance of Counsel; Plea Bargaining Process

1. A petitioner who has raised allegations of ineffective assistance of counsel must plead and prove by a preponderance of the evidence (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her course of conduct; and (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. If a petitioner fails to prove any of these prongs, his claim fails.

2. Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.

3. Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.

4. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

5. A defendant retains the right to the effective assistance of counsel during the plea bargaining process as well as during the trial itself.

6. To establish prejudice with regard to entry into a plea agreement, a defendant must show that it is reasonably probable that, but for counsel's errors, he would not have pleaded guilty and would have gone to trial.

7. Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea.

8. The "manifest injustice" standard must be applied to determine whether the alleged ineffectiveness caused an involuntary or unknowing plea. To establish manifest injustice, a defendant must show that his plea was involuntary or was given without knowledge of the charge.

SENTENCING

Excessive Sentencing; Eighth Amendment

The Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 847 C 2010

Appearances:
John W. Peck, District Attorney,
Westmoreland County, for the Commonwealth
James P. Silvis,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

ORDER OF COURT

AND NOW, this 8th day of September, 2015, upon consideration of Defendant's *pro-se* petition filed pursuant to the Post-Conviction Relief Act (42 Pa.C.S. §9541, *et. Seq*.) and upon consideration of the No Merit Letter submitted by James P. Silvis, Esq., court-appointed PCRA Counsel for the Defendant (a copy of which has been attached to this Order) and upon a review of the record in this case, it appears to this Court that there is no genuine issue of material fact, no entitlement to relief and no purpose to be served in further proceedings for the following reasons:

I. FACTUAL AND PROCEDURAL HISTORY OF THE CASE

The Defendant, Robert Loren Masters, ("Masters") filed a *pro-se* PCRA petition at 847 C 2010 on or about June 26, 2014. Because this is a first PCRA Petition, PCRA counsel (Attorney Silvis) was appointed to represent Masters in this matter.

The charges in this matter arise from incidents alleged to have occurred between February 8, 2010 and February 11, 2010 in Greensburg, Westmoreland County, Pennsylvania. According to the affidavit of probable cause contained in the criminal complaint filed in the above-captioned matter, Masters and five Co-Defendants assaulted and killed Jennifer Lee Daugherty. On February 11, 2010, at approximately 6:30 a.m., the body of an unidentified white female was discovered in a dark plastic garbage can in the parking lot of the Greensburg Salem Middle School located on North Main Street in Greensburg, Westmoreland County, Pennsylvania. Police were contacted by Robert and Denise Murphy, the mother and step-father of Jennifer Daugherty, concerned about their daughter, Jennifer Daugherty, who had left Mount Pleasant by bus on February 8, 2010 to travel to Greensburg and had not been heard from since that date. Ultimately, Mr. and Mrs. Murphy identified the deceased female as their daughter, Jennifer Daugherty. Following a preliminary investigation, police conducted interviews of Ricky Smyrnes, Angela Marinucci, Melvin Knight, Amber Meidinger, Peggy Miller and the Defendant, Robert Masters. Through the course of the interviews, police learned that the victim, Jennifer Daugherty, had been assaulted and killed at an apartment at 428 N. Pennsylvania Avenue, Greensburg, PA, where Smyrnes, Marinucci, Knight, Meidinger, Masters and Miller had been staying. The victim had been beaten, including with a towel rack, vacuum cleaner hose and a crutch. Her hair had been cut off and her face had been painted with nail polish. Officers learned that she had been forced to ingest various concoctions, made with urine, spices, vegetable oil, detergent and medications. The victim also had been forced to write a contrived suicide note, and ultimately, her wrists were cut and she was stabbed in the chest, side and neck.

The Defendant testified at an Omnibus Pretrial Motions/Suppression hearing held on or about October 29, November 1 and November 2, 2010 before this Court. At the hearing, Masters testified that, while he did not participate, he

recounted the torture that the victim endured from February 8, 2010 until her death. Masters testified that Ms. Daugherty had been choked (MT 307-308), that oatmeal, spices and water had been poured on her head (MT 310), that her pajama bottoms and top were physically pulled off, stripping her and causing her to fall to the floor, (MT 312), that her clothes were thrown out the window into the snow (MT 315), that she was given "pills" (MT 327), that she was made to drink a concoction consisting of "Amber's feces, Amber's pee and laundry detergent" along with several other concoctions (MT 332), that she was beaten (MT 337, 341), that she was painted with nail polish (MT 342), that she was tied up with a sock stuffed in her mouth (MT 346), that her hair was cut off with scissors (MT 430) and, ultimately, that she was stabbed in the chest and her throat and wrists were cut. (MT 353).[1] Significantly, Masters testified that, on Tuesday evening, he and Peggy Miller were left alone with the victim at the apartment and that Jennifer Daugherty asked them for help. (MT 317). The Defendant testified that Jennifer "calls Peggy to the bathroom and I can hear Jennifer ask Peggy to take pictures and to help her and then to call - - after she takes those pictures to send them to her mom." (MT 317). The Defendant further testified that Jennifer came out of the bathroom and said that "she needs to go to the hospital because she is shaky. She can't stop shaking." (MT 320). The Defendant testified that he did retrieve the victim's clothes that had been thrown out in the snow for her. (MT 320). However, he further testified that Peggy Miller relayed to someone she was talking to on the cell phone that the victim stated she needed to go to the hospital. (MT 321). The victim put on her boots and was retrieving her coat to leave, when the Co-Defendant Melvin Knight came "really fast up the stairs."(MT 322). The victim never left the apartment. The Defendant admitted on cross-examination that, although they had a cell phone, neither he nor Peggy Miller called anyone for help when the victim requested it. (MT 392), nor did he try to help Ms. Daugherty leave the residence. (MT 394). The victim was left alone with Peggy Miller and the Defendant a second time on Wednesday morning, when the rest of the group went to a Sunoco station. (MT 398). The Defendant testified that Ricky Smyrnes stated that he and Peggy Miller "didn't have to worry about Jennifer" because she was "tied up." (MT 398). The Defendant admitted that neither he nor Peggy Miller made any attempt to assist her in any way because "Me and Peggy was having sex." (MT 398). The Defendant also testified that several "family meetings" between the group took place and, at the second family meeting, Ricky Smyrnes asked the group, "Should we kill Jen?" (MT 348-349). The Defendant admitted that everyone, including the Defendant, answered, "Yes."(MT 349).

The Court takes judicial notice of the testimony provided by Cyril Wecht, M.D., in the jury trial of Masters' Co-Defendant, Angela Marinucci, held before

[1] Numerals in parentheses preceded by the letters "MT" refer to specific pages of the transcript of the Omnibus Pre-Trial Motions/Suppression hearing in this matter, held on October 29, 2010, November 1, 2010 and November 2, 2010, which has been made a part of the record herein.

this Court on or about May 2–May 19, 2011. Dr. Cyril Wecht testified as an expert witness in the field of forensic pathology and performed the autopsy on the body of Jennifer Daugherty. He testified that he received the body while it was still in a trash can. (TT 1031).[2] He noted that the body had been placed headfirst into the can, and was partially covered with plastic bags. (TT 1031). He also noted that there were strands of Christmas lights with the bulbs removed wrapped around the neck and binding the wrists. (TT 1031-1032). The ankles were bound with a "whitish material that had blue decorative particles." (TT 1033). Dr. Wecht observed incised wounds, abrasions and contusions on Daugherty's body, all of which would have been inflicted within days of her death. (TT 1035-1036). Dr. Wecht also noted that the toxicology report that was performed as part of the autopsy revealed Sertraline (Zoloft) and Seroquel in Jennifer Daugherty's system. (TT 1060, 1064).

Following his autopsy, Dr. Wecht concluded that the cause of Daugherty's death was certainly the combination of all her injuries, but primarily due to the "stab wounds of the chest on the left side producing injuries, stab wounds of the left lung and the heart leading to blood, left hemothorax, hemo, blood, thorax, chest cavity, and hemopericardium, blood in the pericardial sac." (TT 1058). Dr. Wecht opined that Daugherty would have remained conscious after the infliction of these wounds, while bleeding, for a couple of minutes, would then have lost consciousness and, within five or six minutes, would have died. (TT 1059).

An arrest warrant and criminal complaint was filed by Detective Jerry Vernail of the Greensburg Police Department on or about February 12, 2010. Masters was charged in the Court of Common Pleas of Westmoreland County, Pennsylvania by Criminal Information filed on or about April 22, 2010 at 847 C 2010 with Count One: Murder of the First Degree (18 Pa.C.S.A. §2502(a)), Count Two: Murder of the Second Degree (18 Pa. C.S.A. §2502(b)), Count Three: Criminal Homicide (18 Pa.C.S.A. §2501 (a)), Count Four: Criminal Conspiracy to Commit Murder (18 Pa.C.S.A. §903(a)(l)), and Count Five: Criminal Conspiracy to Commit Kidnapping (18 Pa.C.S.A. §903(a)(l)). A preliminary hearing was held in this matter on or about March 4, 2010.

Masters appeared before this Court on December 19, 2013, represented by William Gallishen, Esquire. After a colloquy was held, Masters entered a negotiated plea of guilty to Count 3, Criminal Homicide, amended to Murder of the Third Degree, Count 4: Conspiracy to Commit Murder and Count 5: Conspiracy to Commit Kidnapping. Counts 1 (Murder of the First Degree) and 2 (Murder of the Second Degree) were dismissed on the motion of the

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[2] Numerals in parentheses preceded by the letters "TT" refer to specific pages of the transcript of Master's Co-Defendant's, Angela Marinucci, Jury Trial in Commonwealth v. Angela Marinucci, filed at 850 C 2010, in the Court of Common Pleas of Westmoreland County, held on May 2–May 19, 2011 before this Court.

Commonwealth. A guilty plea petition was prepared and signed by Masters. A Presentence Investigation Report was ordered and sentencing was deferred.

Masters appeared for sentencing before this court on March 27, 2014, represented by William Gallishen, Esquire and received the following sentence: At Count 3 (Murder of the Third Degree), Masters was sentenced to twenty (20) to forty (40) years incarceration, at Count 4 (Conspiracy to Commit Murder), seven (7) to twenty (20) years incarceration, consecutive to Count 3, and at Count 5 (Conspiracy to Commit Kidnapping), three (3) to ten (10) years incarceration, consecutive to Count 4, resulting in an aggregate sentence of thirty (30) to seventy (70) years. The Commonwealth had previously dismissed Counts 1 (Murder of the First Degree) and Counts 2 (Murder of the Second Degree). Masters was ordered to pay costs of prosecution, restitution and ordered to have no contact with the victim's family. He was given credit for time served and deemed ineligible for RRRI.

Neither a Motion to Withdraw a Guilty Plea, or any other post-sentence motions, nor any appeal were filed or requested to be filed by Masters. He did file the instant timely PCRA Petition on or about June 26, 2014. On July 3, 2014, Attorney Silvis was appointed to represent Masters. On or about September 22, 2014, Attorney Silvis filed a Motion to Obtain a Mental Health Evaluation for the Defendant, which was granted by Order of Court on September 22, 2014. An evaluation was conducted on or about October 19, 2014 at the Westmoreland County Prison by Ingrid K. Gindin, M.D. and the evaluation was provided to the court on or about January 23, 2015. Attorney Silvis filed a No-Merit Letter pursuant to ***Commonwealth v. Turner,*** 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley,*** 550 A.2d 213 (Pa. Super 2988) on June 24, 2015.

II. ELIGIBILITY FOR RELIEF

The requirements for eligibility for relief under the Post-Conviction Relief Act are set forth both in the Act itself (42 Pa.C.S. §9541, *et. seq.*) and in the Rules of Criminal Procedure (Pa.R.Crim.P. Rules 901 and 902). Generally speaking,

> PCRA petitioners, to be eligible for relief, must, inter alia, plead and prove their assertions by a preponderance of the evidence. Section 9543(a). Inherent in this pleading and proof requirement is that the petitioner must not only state what his issues are, but also he must demonstrate in his pleadings and briefs how the issues will be proved. Moreover, allegations of constitutional violation or of ineffectiveness of counsel must be discussed "in the circumstances of the case." Section 9543(a)(2)(i-ii). Additionally, the petitioner must establish by a preponderance of evidence that because of the alleged constitutional violation or ineffectiveness, "no reliable adjudication of guilt or innocence could have taken place." Section 9543(a)(2)(i-ii). Finally, petitioner must plead and prove that the issue has not been

> waived or finally litigated, §9543(a)(3), and if the issue has not been litigated earlier, the petitioner must plead and prove that the failure to litigate "could not have been the result of any rational, strategic or tactical decision by counsel." Section 9543(a)(4).

Commonwealth v. Rivers, 567 Pa. 239, 245-246, 786 A.2d 923, 927 (Pa. 2001).

Additionally, because Masters has raised an allegation of the ineffective assistance of counsel, he must plead and prove, by a preponderance of the evidence:

> (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her course of conduct; and (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. *Commonwealth v. Jones,* 546 Pa. 161, 175, 683 A.2d 1181, 1188 (1996). Counsel is presumed to be effective and Appellant has the burden of proving otherwise. *Commonwealth v. Marshall,* 534 Pa. 488, 633 A.2d 1100 (1993). Additionally, counsel cannot be considered ineffective for failing to raise a claim that is without merit. *Commonwealth v. Peterkin,* 538 Pa. 455, 649 A.2d 121 (1994) ....

Id., *citing* ***Commonwealth v. Holloway****,* 559 Pa. 258, 739 A.2d 1039, 1044 (1999).

In his *pro-se* PCRA Petition, Masters alleges that he is eligible for relief under the Post Conviction Relief Act due to ineffective assistance of counsel, a plea of guilty that was unlawfully induced and the imposition of a sentence greater than the legal maximum.[3]

III. ISSUES PRESENTED:

I. WHETHER THE DEFENDANT IS ENTITLED TO PCRA RELIEF BASED UPON ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL?

The pleading filed by Masters raises three allegations. In the first allegation, regarding ineffective assistance of counsel, Masters alleges that "the Defendant's impaired intellectual ability compounded by mental health issues both of which made it impossible for Defendant to cooperate, in a meaningful manner, with counsel to make a knowing and voluntary waiver of rights of the accused."[4] In support of this allegation, Masters states, "Defendant is incarcerated and does not have access to relevant medical records."[5]

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[3] Masters checked these sections on the pre-printed form that is commonly used by *pro-se* PCRA litigants.

[4] PCRA petition at 3.

[5] PCRA petition at

A petitioner in a PCRA who alleges the ineffective assistance of counsel as a claim for relief faces a difficult burden.

> [A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). "Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." *Colavita,* 606 Pa. at 21, 993 A.2d at 886 (citing *Strickland, supra*). In Pennsylvania, we have refined the *Strickland* performance and prejudice test into a three-part inquiry. *See Pierce, supra*. Thus, to prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result. *Commonwealth v. Ali,* 608 Pa. 71, 86, 10 A.3d 282, 291 (2010). "If a petitioner fails to prove any of these prongs, his claim fails." *Commonwealth v. Simpson,* — Pa. —, 66 A.3d 253, 260 (2013) (citation omitted). Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. *See Ali, supra*. Where matters of strategy and tactics are concerned, "[a] finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Colavita,* 606 Pa. at 21, 993 A.2d at 887 (quotation and quotation marks omitted). To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Commonwealth v. King,* 618 Pa. 405, 57 A.3d 607, 613 (2012) (quotation, quotation marks, and citation omitted). " '[A] reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.' "*Ali,* 608 Pa. at 86–87, 10 A.3d at 291 (quoting *Commonwealth v. Collins,* 598 Pa. 397, 957 A.2d 237, 244 (2008) (citing *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052)). With this legal framework in mind, we now examine the issues presented by the Commonwealth for our review.

Commonwealth v. Spotz, 84 A.3d 294, 311 -312 (Pa. 2014).

In his pro-se PCRA Petition, Masters alleges that he is eligible for relief under the Post-Conviction Relief Act due to "Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place."[6] It is important to note that the pleading filed by Masters fails to comply with the requirements set forth by the requirements at Pa.R.Crim.P. Rule 902(A), *supra,* making only a single allegation of the ineffective assistance of counsel with no supporting facts from which a reviewing court could ascertain how Masters believes counsel's stewardship was deficient.

Nonetheless, ineffectiveness can arise at any critical stage of the proceeding. A defendant retains the right to the effective assistance of counsel during the plea bargaining process as well as during the trial itself. ***Hill v. Lockhart,*** 474 U.S. 52 (1985). Pennsylvania's standard for establishing prejudice with regard to the entry into a plea agreement was set forth in ***Commonwealth v. Hickman,*** where the Superior Court held that "To succeed in showing prejudice, the defendant must show that it is reasonably probable that, but for counsel's errors, he would not have pleaded guilty and would have gone to trial." ***Id.,*** 799 A.2d 136, 141 (Pa. Super. 2002). Further, in ***Commonwealth v. Allen,*** 732 A.2d 582 (Pa. 1999), where the Pennsylvania Supreme Court focused on the particular stage of trial where the alleged ineffectiveness took place, [the] court reasoned that "[a]llegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea." ***Id.*** At 587. Whenever a defendant alleges ineffective assistance of counsel in regard to a guilty plea, the court is to apply the "manifest injustice" standard and determine whether the alleged ineffectiveness caused an involuntary or unknowing plea. ***Commonwealth v. Yager,*** 685 A.2d 1000, 1004 (Pa. Super. 1996). "To establish manifest injustice, a defendant must show that his plea was involuntary or was given without knowledge of the charge." ***Commonwealth v. Young,*** 695 A.2d 414, 417 (Pa. Super. 1997).

When determining whether a guilty plea was knowingly, voluntarily and intelligently entered by the Defendant, the Court must conduct a plea colloquy on the record which includes an inquiry into whether:

1. The Defendant understands the nature of the charges to which he is pleading guilty;
2. There is a factual basis for the plea;
3. The Defendant understands that he has a right to a jury trial;
4. The Defendant understands that he is presumed innocent until he is proven guilty;
5. The Defendant is aware of the permissible range of sentences and/or fines for the offenses charged; and

[6] PCRA at 2.

6. The Defendant is aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts the agreement.

See comment to Pa. R. Crim. P. 590. ***Commonwealth v. Reid,*** 117 A.3d 777, 782 (Pa. Super. 2015).

A defendant is also bound by the statements that he or she makes during the guilty plea colloquy, and may not "contradict statements made when pled." ***Commonwealth v. Stork,*** 737 A.2d 789, 790-791 (Pa. Super 1999). The existence of a negotiated plea bargain is also relevant, since "the desire of the accused to benefit from a plea bargain is a strong indicator of the voluntariness of the plea" ***Id.*** at 791.

PCRA counsel indicated that he had reviewed the record in this matter and had spoken to trial counsel, William Gallishen, Esq. PCRA counsel was unable to detect any evidence of Attorney Gallishen's ineffectiveness in the record. In particular, Attorney Silvis notes in his No-Merit Letter that he reviewed the transcript of the guilty plea hearing, paying special attention to the colloquy. Attorney Silvis indicates that Attorney Gallishen stated that he reviewed the guilty plea petition with the Defendant several times and that the Defendant understood the contents of the petition. PCRA counsel also indicates that Attorney Gallishen was satisfied that the "Defendant understood totally" what he was doing on that date.[7]

A careful review of the record confirms Attorney Silvis' conclusions. In the instant case, on December 19, 2013, the Petitioner appeared before the court and accepted the Commonwealth's plea bargain offer to enter a general guilty plea at 847 C 2010 to Count 3, Criminal Homicide, amended to Murder of the Third Degree, a felony of the first degree, Count 4 – Conspiracy to Commit Murder, a felony of the first degree, and Count 5 – Criminal Conspiracy to Commit Kidnapping, a felony of the first degree. In exchange for the Petitioner's guilty plea and, in consideration for his cooperation, the Commonwealth agreed to dismiss Count 1 (Murder of the First Degree) and Count 2 (Murder of the Second Degree) and to raise no objection at sentencing to Counts 4 and 5 being imposed concurrently. (G.P.T. 5-6)[8] It is important to note that the Court cautioned Mr. Masters that, although the Commonwealth would not argue for consecutive time, "there's no guarantee what the court will impose." (G.P.T. 5). Petitioner's counsel, Attorney Gallishen, indicated that the Petitioner understood all of his trial and appeal rights and indicated that he had reviewed the guilty plea petition with the Petitioner "a couple of times" and that the Petitioner "reviewed it and reviewed it each time" and that "I have given him a copy most recently to read and I went

[7] See No Merit Letter, attached hereto, dated June 23, 2015, attached as Exhibit A to the Motion to Withdrawal, p. 2.

[8] Numerals in parenthesis preceded by the letters "GPT" refer to specific pages of the transcript of the Guilty Plea hearing held before this Court on or about December 19, 2013 and made a part of the record herein.

over it with him and gave it to him to read in case he had any other questions, and he understands what the contents of the petition are." (G.P.T. 21). Attorney Gallishen stipulated that there was a factual basis in the criminal information to support the Petitioner's plea of guilty to the charges. (G.P.T. 21). Attorney Gallishen and the Petitioner also executed a guilty plea Petition, which was admitted.

Thereafter, the Court went through a colloquy with the Petitioner, at which time he stated that he reviewed the guilty plea petition with his counsel and understood everything in the petition (G.P.T. 23), that he had no questions at all about anything in the petition (G.P.T. 23), that his attorney discussed with him that if he was convicted of either Count 1 or Count 2 that he would receive a mandatory life sentence (G.P.T. 24), that he understood the charges to which he was pleading guilty, what the Commonwealth would have to prove and the maximum sentences he could receive (G.P.T. 24-26), that he understood his rights to a jury trial (G.P.T. 27) and that he understood that the Commonwealth would have to prove every element of each crime beyond a reasonable doubt. (G.P.T. 27). Significantly, when asked why he was pleading guilty, the Defendant stated, "I'm guilty." (G.P.T. 26). Attorney Gallishen stated on the record that he explained to the Defendant that "even though he did not physically touch Jennifer, he could still be found responsible under accomplice liability and conspiratorial liability and he understands that and made a knowing and voluntary decision to take this plea." (G.P.T. 29). The Petitioner also stated that no threats or promises were made to cause him to plead and that he was satisfied with his counsel's advice. (G.P.T. 26).

Petitioner never indicated on the record that he did not understand the Court's colloquy or the Guilty Plea Petition, which he reviewed and signed with counsel. In fact, the Court specifically asked the Petitioner whether he had any questions, prior to accepting the plea, and the Defendant responded, "No, your Honor." (G.P.T. 28). The Petitioner's allegations that he did not make a knowing and voluntary plea are inconsistent with the sworn testimony which he provided at the time of the guilty plea hearing.

Significantly, during the colloquy, as PCRA counsel points out, the court also specifically questioned the Defendant regarding any mental health issues that the Defendant may have been experiencing. The Court asked, at the time of the plea, whether the Defendant was having "any mental health issues at all," whether he was taking any medications and whether the medication would, in any way, "affect your ability to understand what's going on today?" (G.P.T. 23). The Defendant indicated that he was taking Risperdal, but specifically denied that he was having any mental health issues or that the medication would affect his ability to understand the proceedings.[9] (G.P.T. 23).

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[9] The Court asked, "And how is your health today? Are you having any physical problems today, any health issues at all?" The Defendant stated, "No, Your Honor." The Court asked, "Any mental health issues at all?" The Defendant stated, "No, Your Honor." The Court asked, "Are you taking any

Importantly, PCRA counsel sought a competency evaluation for the Petitioner, which confirmed the Petitioner's ability to understand the proceedings and knowingly make determinations regarding his defense. Dr. Ingrid K. Gindin, board certified in General Psychiatry and Child Psychiatry, performed a competency evaluation on October 19, 2014, received on January 23, 2015 and reviewed by this Court. As PCRA counsel notes in his No Merit letter, Dr. Gindin found that the Petitioner had "the ability to appraise your attorney of legal of [sic] defenses available to you, understand the procedures of the court, have an appreciation of the charges against you, understand the range and nature of the possible penalties you face, appraise the likely outcome of the charges against you and disclose to your attorney pertinent facts surrounding your defense. It was her judgment that you are mentally competent to stand trial."[10] PCRA counsel also expressly inquired whether Dr. Gindin could render an opinion as to the Petitioner's competency at the time of the guilty plea entry. While Dr. Gindin was unable to make such a determination, she noted that the Petitioner "had a history of receiving treatment and being prescribed anti-psychotic medication."[11] Dr. Gindin indicated that the Petitioner was taking Risperdal and that it appeared to be effective.[12] Dr. Gindin further opined that the Petitioner was "doing well on the Risperdal" at the time of the plea and that "any concerns about [the Petitioner's] competency at the time of the plea would only come into play if [the Petitioner] was not being treated at the time of that plea."[13] *See* ***Commonwealth v. Willis,*** 68 A.3d 997, 1009 (Pa. Super. 2013).[14] As PCRA counsel notes that the Petitioner was taking Risperdal at the time of the entry of the guilty plea, the same medication that he was taking at the time of the evaluation by Dr. Gindin, PCRA counsel concluded that any concerns regarding the Petitioner's competency at the time of the plea could be assuaged.[15] Similarly to the court in ***Willis,*** the Court in the instant case observed the Petitioner at the time of the entry of the guilty plea and detected no signs that the medication nor any mental illness interfered with Petitioner's capabilities or rendered him incompetent to plead guilty.

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medication right now?" The Defendant stated, "Yes, I am." The Court asked, "What are you taking?" The Defendant stated, "Risperdal." The Court asked, "And what is that for?" The Defendant stated, "For psych medications." The Court asked, "And do you know how many milligrams you take and how many times a day?" The Defendant stated, "2 milligrams twice a day." The Court asked, "And does that—would that in any way affect your ability to understand what's going on today?" The Defendant replied, "No, Your Honor." (G.P.T. 23)

[10] No Merit Letter, dated June 23, 2015, p. 2, ¶3) .

[11] No Merit Letter, dated June 23, 2015, p. 2, ¶4).

[12] No Merit Letter, dated June 23, 2015, p. 3, ¶1).

[13] No Merit Letter, dated June 23, 2015, p. 3, ¶1).

[14] "Simply put, the mere fact Appellant was taking prescribed psychotropic medication at the time of his plea does not, of itself, result in the conclusion that he was unable to enter a knowing voluntary and intelligent guilty plea." ***Commonwealth v. Willis,*** 68 A.3d 997, 1009 (Pa. Super 2013).

[15] No Merit Letter, dated June 23, 2015, p. 3, ¶1).

As there is nothing to indicate that the Petitioner entered an unknowing, unintelligent or involuntary plea, nor is there any evidence that any errors were made by counsel that prejudiced him in any way, this issue has no merit. Thus, it appears at this time that Masters would not be entitled to post-conviction relief on this basis and no evidentiary hearing is warranted.

II. WHETHER THE PETITIONER'S PLEA OF GUILTY WAS UNLAWFULLY INDUCED?

The Petitioner provides no factual underpinning for this assertion and it is, thus, legally insufficient to provide any basis for relief. *See* Pa.R.Crim.P. Rule 902(A), *supra*. Nonetheless, if it is intended to be premised, in any way, on the ineffectiveness of counsel, it is subject to the same analysis and conclusion as set forth above. Since, as set forth previously, there is no factual basis, the court cannot speculate as to what the Petitioner relies upon for this allegation. Accordingly, this issue has no merit.

III. WHETHER THE DEFENDANT RECEIVED AN EXCESSIVE SENTENCE AND IS ENTITLED TO PCRA RELIEF?

Masters' last allegation of error concerns an excessive sentence. Masters contends that he is eligible for relief due to "[t]he imposition of a sentence greater than the legal maximum."[16] The specific allegation is that the "Defendant's sentence is excessive and violates the federal and state constitutional prohibitions against cruel and unusual punishment."[17]

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Pennsylvania prohibition against cruel and unusual punishment is "coextensive with the Eighth and Fourteenth Amendment of the United States Constitution" and "the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution." ***Commonwealth v. Barnett,*** 50 A.3d 176, 198 (Pa. Super. 2012)(*citing* ***Commonwealth v. Yasipour,*** 957 A.2d 734, 743 (Pa. Super. 2008).

As indicated in the record, PCRA counsel correctly sets forth that the sentences imposed in the instant case did not exceed the sentencing guidelines. Masters appeared for sentencing before this court on March 27, 2014, represented by William Gallishen, Esquire and received the following sentence: At Count 3 (Murder of the Third Degree), Masters was sentenced to twenty (20) to forty (40) years incarceration, at Count 4 (Conspiracy to Commit Murder), seven (7) to twenty (20) years incarceration, consecutive to Count 3, and at Count 5 (Conspiracy to Commit Kidnapping), three (3) to ten (10) years incarceration, consecutive to Count 4, resulting in an aggregate sentence of thirty (30) to seventy (70) years.

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[16] PCRA at 2.

[17] PCRA at 3.

As correctly set forth by PCRA Counsel, the record reflects that the Petitioner was informed of the maximum sentences permissible (G.P.T. 24-26), that the sentences could be imposed consecutively (G.P.T. 27), that there were no promises made that the sentences would run concurrent (G.P.T. 5), and that the Court explained that the maximum possible consecutive sentence could total fifty (50) to one hundred (100) years (G.P.T. 27). The Court also advised that, if convicted of Murder of the First Degree or Murder of the Second Degree, the counts that were dismissed by the Commonwealth at the time of the guilty plea, the Petitioner would be sentenced to a mandatory life sentence. (G.P.T. 24). "[T]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences which are grossly disproportionate to the crime." ***Barnett,*** 50 A.3d at 198. It is difficult to imagine a more horrific crime than this one, with its protracted and multifaceted torture, its group vote to impose death upon the victim and the ultimate execution of the victim. It is difficult to conceive how the Petitioner perceives his sentence to be excessive against that backdrop. Simply stated, no genuine issue exists as to this allegation.

For these reasons, it appears that Masters is not entitled to post-conviction relief on this basis and no evidentiary hearing is warranted on this issue.

Accordingly, the Court hereby notifies the parties of its intention to dismiss Defendant's *pro-se* post-conviction petition.

THE DEFENDANT MAY FILE A RESPONSE TO THIS NOTICE. SUCH A RESPONSE MUST BE FILED WITHIN 20 DAYS FROM THE DATE OF THIS NOTICE. IF NO RESPONSE IS FILED, THIS COURT SHALL DISMISS THE PETITION.

Any response should address specifically the areas of defect delineated within the body of this Order of Court. If no response is filed, this Court shall dismiss the Defendant's *pro-se* PCRA Petition. If a response is filed, this Court may, upon consideration of the response, dismiss the Petition, grant leave to file an amended Petition or otherwise direct that the proceedings continue.

2. Based upon this court's consideration of the "No Merit Letter" submitted by Attorney Silvis, and upon a review of the record in this case, counsel's request to Withdraw as Counsel of Record in this matter is taken under advisement. The said Petition shall be granted by further Order of Court provided that a meritorious response is not received by this court from the Defendant within the twenty-day period set forth above. The Defendant may avail himself of the assistance of PCRA counsel in the preparation of this response, or he may elect to file the required response *pro-se*.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

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COMMONWEALTH OF PENNSYLVANIA
V.
ANGELA MARINUCCI, Defendant

SENTENCING

Sentencing Jury; Age-Related Sentencing Factors; Separation of Powers

1. A sentencing jury may be empaneled only under the authority of 42 Pa. C.S. §9711, setting forth the procedures for murder of the first degree, in which the jury determines if the defendant shall be sentenced to death or life imprisonment. Notably, there is no such statutory authority to empanel a sentencing jury located anywhere else.

2. The Pennsylvania Supreme Court has set forth a set of factors trial courts have been instructed to consider when imposing a life without parole sentence for a defendant who was under the age of 18 at the time of the offense.

3. At a minimum the trial court should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

4. In a case in which the death penalty is not implicated, the sentencing falls within the sound discretion of the trial court.

5. The court would be performing an impermissible legislative function by creating a new procedure, which would pass the sentencing function from the sound discretion of a sentencing judge to a jury.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 850 C 2010

Appearances:

John W. Peck, District Attorney; Leo J. Ciaramitaro, Assistant District Attorney; and Chuck Washburn, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Michael DeMatt,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION AND ORDER OF COURT

This matter comes before the court for consideration on the Defendant's Motion to Empanel a Sentencing Jury that has been filed in the above-captioned case.

RELEVANT PROCEDURAL HISTORY:

The Defendant, Angela Marinucci, ("Marinucci"), was convicted in the above-captioned matter on or about May 19, 2011 of Murder of the First Degree (18 Pa. C.S.A. §2502(a)), Murder of the Second Degree (18 Pa. C.S.A. §2502(b)),

Murder of the Third Degree (18 Pa. C.S.A. §2502(c)), Criminal Conspiracy – Murder of the First Degree (18 Pa. C.S.A. §903(a)(l)), Criminal Conspiracy – Kidnapping (18 Pa. C.S.A. §903(a)(1)), and Kidnapping (18 Pa. C.S.A. §2901(a)(3)) following a jury trial held before this Court on May 2 – May 19, 2011. On August 3, 2011, she was sentenced by this Court, at Count 1, Murder of the First Degree, to life in prison without the possibility of parole, at Count 2, Murder of the Second Degree, to life in prison without the possibility of parole concurrent to Count 1, at Count 3, Murder of the Third Degree merged with Count 1, At Count 4, Criminal Conspiracy to Commit Homicide, 20 to 40 years incarceration concurrent to Count 1, At Count 5, Criminal Conspiracy to Commit Kidnapping, 3 to 20 years incarceration concurrent to Count 1, and Count 6, Kidnapping, merged with Count 2. Post Sentence Motions were timely filed by the Defendant on or about August 10, 2011. A hearing was held on the Post Sentence Motions before this Court on October 28, 2011, and the Post Sentence Motions were denied by Opinion and Order of Court, dated May 31, 2012. A timely appeal to the Pennsylvania Superior Court ensued. Counsel for the Defendant filed a Concise Statement of Errors Complained of on Appeal on or about June 19, 2012, as directed by Order of this Court, dated June 11, 2012. This Court issued its opinion in accordance with Pa.R.A.P. 1925(a) on or about June 25, 2012. On or about August 26, 2013, the Pennsylvania Superior Court issued a Memorandum Opinion, affirming the Defendant's convictions, but vacating the judgment of sentence and remanding for re-sentencing based on ***Miller v. Alabama,*** 132 S.Ct. 2455 (2012); ***Commonwealth v. Batts,*** 66 A.3d 286 (Pa. 2013); ***Commonwealth v. Lofton,*** 57 A.3d 1270 (Pa. Super 2012) and ***Commonwealth v. Knox,*** 50 A.3d 732 (Pa. Super. 2012). ***Commonwealth v. Marinucci,*** 83 A.3d 1073 (Pa. Super. 2013). (Unpublished memorandum). The instant Motion to Empanel a Sentencing Jury was filed along with a Motion to Schedule Sentencing on or about April 7, 2015. A briefing schedule was issued by Order of Court on May 5, 2015 and the matters are scheduled to be heard before this Court on June 30, 2015. A Memorandum in Support of the Request to Empanel a Sentencing Jury was filed by the Defendant on or about May 26, 2015. A Memorandum in Opposition to Defendant's Motion to Empanel a Sentencing Jury was filed by the Commonwealth on or about June 16, 2015.

ISSUES PRESENTED:

1. **Whether a sentencing jury should be empanelled in a non-capital case?**

In her Motion to Empanel a Sentencing Jury, Marinucci seeks to have this Court enter an order empanelling a jury for purposes of making factual determinations relevant to sentencing in the above captioned matter. In support of this position, Marinucci argues that "[t]he trend of the U.S. Supreme Court case law has demonstrated an increased role for the jury in determining the sentenced imposed on a convicted Defendant. The rationale for this increased role has been to insure that the defendant's right to a jury guaranteed by the Sixth Amendment

is preserved." (Defendant's Memorandum in Support of Request to Empanel a Sentencing Jury, p. 2, ¶4). The Defendant cites to ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348 (2000), ***Blakely v. Washington,*** 542 U.S. 296, 124 S.Ct. 2531 (2004), and ***Alleyne v. United States,*** 570 U.S. _____, 133 S.Ct. 2151 (2013), in support of her position. The Defendant alleges that when this line of cases is interwoven with ***Miller*** and ***Batts,*** *supra,* "it becomes apparent that using a jury to determine the sentence in the instant matter is necessary to avoid running afoul of the Constitution, along with ***Apprendi*** and its progeny." (Defendant's Memorandum in Support of Request to Empanel a Sentencing Jury, p. 4, ¶ 2). The Defendant also notes that sentencing juries exist in other jurisdictions, including Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia. (Defendant's Memorandum in Support of Request to Empanel a Sentencing Jury, p. 2, ¶ 3).

Conversely, the Commonwealth argues that the Defendant's reliance upon ***Apprendi, Blakely*** and ***Alleyne*** in support of her position that she has the right to have a jury determine her sentence is misplaced. The Commonwealth argues that the aforementioned cases "provide that a defendant is entitled to have a jury determine the existence of any element that requires an increased sentence be imposed upon the defendant." (Commonwealth's Memorandum In Opposition To Defendant's Motion to Empanel a Sentencing Jury, p. 1, ¶ 1). The Commonwealth alleges that the Defendant's position is without merit "since there is no fact that the Commonwealth must prove beyond a reasonable doubt pursuant to ***Apprendi***, ***Blakely*** and ***Alleyne*** in order that a life sentence may be imposed upon the defendant." (Commonwealth's Memorandum In Opposition To Defendant's Motion to Empanel a Sentencing Jury, p. 2, ¶ 1). The Commonwealth also argues that there are no procedures or rules that have been established by the courts or the legislature in Pennsylvania in order to permit a jury to sentence a defendant in a non-capital case and that the trial court has no authority to enact, on its own, procedures for sentencing in a non-capital case.

It is well-settled that sentencing is a "matter vested in the sound discretion of the sentencing judge." ***Commonwealth v. Buterbaugh,*** 91 A.3d 1247, 1265 (Pa. Super. 2014), *citing* ***Commonwealth v. Hoch,*** 936 A.2d 515, 517-518 (Pa. Super. 2007). The Defendant concedes that she has not produced any statutory authority or any authority from the appellate courts of Pennsylvania, nor is this Court aware of any, in support of her position.[1] In Pennsylvania, a jury may be empanelled for purposes of sentencing only under the authority of 42 Pa. C.S. §9711, setting forth the sentencing procedures for murder of the first degree, in which the jury

[1] The Defendant states "Although there is admittedly no provision in the current laws or rules of court of Pennsylvania either passed by the General Assembly or promulgated by the Pennsylvania Supreme Court to utilize a sentencing jury in non-capital cases, the general trend of the United States Supreme Court jurisprudence suggests the necessity of using a jury to determine the appropriate sentence under the unique circumstances presented herein." (Defendant's Memorandum In Support of Request To Empanel Sentencing Jury, p. 2, ¶ 2).

determines whether the defendant shall be sentenced to death or life imprisonment. *42 Pa. C.S. §9711*. 42 Pa.C.S. §9711 sets forth, at length, the specific procedures and criteria to be followed. Since this is not a case in which the death penalty is implicated, the sentencing must, of necessity, fall within the sound discretion of the trial court without the impermissible use of a jury.

Further, the Pennsylvania Superior Court specifically remanded the case *sub judice* to the trial court for resentencing based on ***Miller v. Alabama,*** 132 S.Ct. 2455 (2012); ***Commonwealth v. Batts,*** 66 A.3d 286 (Pa. 2013); ***Commonwealth v. Lofton,*** 57 A.3d 1270 (Pa. Super 2012) and ***Commonwealth v. Knox,*** 50 A.3d 732 (Pa. Super. 2012). These cases provide specific guidance to the trial court, regarding appropriate age-related factors that the trial court is to consider at the time of resentencing. In ***Commonwealth v. Batts,*** 620 Pa. 115, 133, 66 A.3d 286, 297 (Pa. 2013), the Pennsylvania Supreme Court set forth the factors trial courts have been instructed to consider by the Superior Court when fashioning a sentence:

> [A]t a minimum it should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Id., *quoting* ***Commonwealth v. Knox,*** 530 A.3d 732, 745 (Pa. Super. 2012), (citing ***Miller***, —— U.S. at ——, 132 S.Ct. at 2455).

Thus, our appellate courts have made clear that it is the trial courts that are tasked with determining the appropriate sentence, and in accordance with that direction, the appellate courts have provided the appropriate factors to be considered by that sentencing court.

Moreover, this Court finds the Pennsylvania Superior Court case, ***Commonwealth v Newman,*** 99 A.3d 86 (Pa. Super 2014), to be instructive in this matter. In ***Newman,*** the Superior Court reviewed the constitutionality of 42 Pa.C.S. § 9712.1 and found that ***Alleyne v. United States,*** *supra*, rendered that section unconstitutional. ***Id.*** at 104. Notably, the Commonwealth argued in that case that, in the event the appellate court found the section to be unconstitutional, the proper remedy was to "remand for the empanelling of a sentencing jury for the determination, beyond a reasonable doubt, as to whether the conditions obtain under the evidence, such that a mandatory minimum sentence should be imposed." ***Newman*** at 101. The ***Newman*** Court did not accept the Commonwealth's proposed remedy. The ***Newman*** Court, in reaching its holding, stated:

> The Commonwealth's suggestion that we remand for a sentencing jury would require this court to manufacture whole cloth a replacement enforcement mechanism for Section 9712.1; in other words, the Commonwealth is asking us to legislate. We recognize that in the prosecution of capital cases in Pennsylvania, there is a similar, bifurcated process where the jury first determines guilt in the trial proceeding (the guilt phase) and then weighs aggravating and mitigating factors in the sentencing proceeding (the penalty phase). However, this mechanism was created by the General Assembly and is enshrined in our statutes at 42 Pa.C.S.[ ] § 9711. We find that it is manifestly the province of the General Assembly to determine what new procedures must be created in order to impose mandatory minimum sentences in Pennsylvania following *Alleyne*. We cannot do so.

Newman at 102.

Likewise, in ***Commonwealth v. Mosley,*** 2015 WL 1774216, the trial court presented the jury with a special verdict form. The form included a specific issue regarding the weight of drugs possessed by Mosely, thus, appearing that that issue of the weight of the drugs was determined, beyond a reasonable doubt, by the jury as fact finder. However, the Superior Court of Pennsylvania found that the "trial court exceeded its authority by permitting the jury, via a special verdict slip, to determine beyond a reasonable doubt the factual predicate of section 7508—whether Mosley possessed cocaine that weighed greater than 10 grams." ***Id.*** at 15. The Superior Court stated that "the trial court performed an impermissible legislative function by creating a new procedure in an effort to impose the mandatory minimum sentence in compliance with *Alleyne*." ***Id.*** The Superior Court vacated the defendant's judgment of sentence and remanded for resentencing. While admittedly ***Newman*** and ***Mosely*** involve a jury finding the existence of a fact that, if proven, requires a mandatory sentence and the instant case does not, nonetheless, the relief that is being requested is the same. The Defendant is asking the court to perform an impermissible legislative function by creating a new procedure which would pass the sentencing function from the sound discretion of the sentencing judge to a jury.

Finally, on October 25, 2012, the Pennsylvania Legislature passed new legislation setting forth the sentence for persons who commit murder, murder of an unborn child and murder of a law enforcement officer prior to the age of 18. *18 Pa.C.S.A. § 1102.1*. This statute expressly applies only to defendants convicted after June 24, 2012. ***Id.*** As the trial court sentenced Marinucci on August 3, 2011, this statute is inapplicable to the case at bar. Nonetheless, the statute provides specific guidance to the court on the various individualized factors to consider when fashioning a sentence, including the nature and circumstances of the

offense, the defendant's age, mental maturity, culpability and degree of criminal sophistication. *18 Pa.C.S.A. §1102.1(d)*. Notably absent from this legislation is any authority for a sentencing jury.

Without any type of authority for a novel sentencing procedure as suggested by the Defendant before this Court, empanelling a sentencing jury in a non-capital case is impermissible.

Therefore, the following Order shall issue:

ORDER OF COURT

AND NOW, this 26th day of June, 2015, for the reasons set forth in the preceding Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the Defendant's Motion to Empanel a Sentencing Jury is hereby **DENIED** and the Defendant shall be resentenced by this Court on June 30, 2015 at 9:00 a.m., as previously scheduled by Order of Court, dated May 5, 2015.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

INDEX

Pennsylvania Rules of Civil Procedure (continued)

Pennsylvania Rules of Criminal Procedure

Pennsylvania Rules of Evidence

United States Supreme Court Rule

Pennsylvania Constitution

United States Constitution

Page

INDEX