

Pennsylvania

Sexual Violence Benchbook

F i r s t E d i t i o n

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Pennsylvania Coalition Against Rape
Delilah Rumburg, Executive Director

The Honorable Jack A. Panella
Superior Court of Pennsylvania

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The Pennsylvania Coalition Against Rape (PCAR) is an organization working at the state and national levels to prevent sexual violence. Incepted in 1975, PCAR continues to use its voice to challenge public attitudes, raise public awareness, and effect critical changes in public policy, protocols, and response to sexual violence.

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Introduction

This, the first edition of the Benchbook on Crimes of Sexual Violence in Pennsylvania, has been prepared under the supervision of Lynn Carson, Judicial Project Specialist for the Pennsylvania Coalition Against Rape. The Benchbook was funded by a grant from the Pennsylvania Commission on Crime and Delinquency.

Section One of the Benchbook, ***Understanding Sexual Violence***, provides an in-depth discussion of the history and development of laws criminalizing sexually violent behavior, and is intended to provide a comprehensive understanding of Pennsylvania's current sexual offense laws. Special emphasis is given to the resultant physical and psychological effects of a sexual assault on a victim, as well as victim's rights and programs. Section Two, ***The Process of a Sex Offense Case***, addresses the procedural and practical steps of a sex offense case, from pre-trial issues to appellate review. The appendices to Chapter 8 include useful tools for sentencing preparation, clarifying the oftentimes complex guideline factors and mandatory penalties which apply to a convicted sex offender.

The Benchbook continues with Section Three, ***Life After Megan's Law***, which reviews and compares collateral ramifications of a sexual offense conviction, including sex offender registration laws. The appendix to Chapter 10 is a summary of the sometimes voluminous sections of Megan's Law. Section Three also examines CODIS (which stands for Combined DNA Index System, an electronic database that allows nationwide access to DNA profiles and profiling), as well as DNA data retention and testing laws. Chapter 10 concludes with the process of civil commitment of juvenile sex offenders. Lastly, Section Four, ***Resources***, lists victims' service providers in Pennsylvania and programs designed to assist in sexual abuse prevention, detection and prosecution.

Updates for the benchbook will appear on the PCAR webpage, <http://www.pcar.org/benchbook.pdf>, for downloading and printing

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From the Desk of

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It is with great pleasure that I present the first edition of the Benchbook on Crimes of Sexual Violence in Pennsylvania. This much anticipated document will serve as a valuable resource to all those involved in Pennsylvania's judicial system.

I am awed by the collaboration of judges, prosecutors, defense attorneys, researchers, and practitioners who provided their valuable expertise in the development of this benchbook.

Because of the dedication of these individuals, Pennsylvania will be prepared to address the ever-changing criminal justice issues surrounding sexual violence.

Ultimately, this benchbook will provide a framework to address the serious impact of sexual violence on victims while holding offenders accountable for their actions.

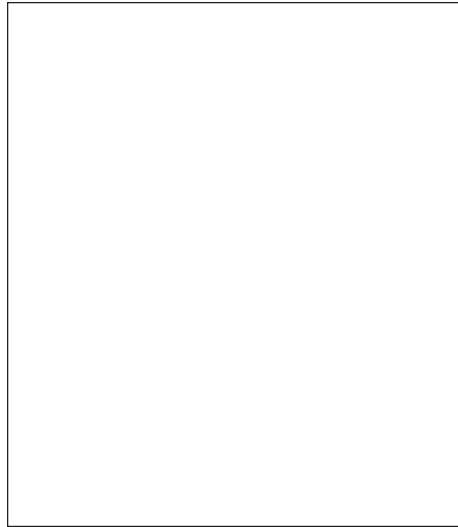


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1.1 PURPOSE OF THE BENCHBOOK

This book is designed to assist judicial officers in the handling of sexual violence cases. Its purpose is to address the intricacies of the numerous and oftentimes confusing procedural requirements in these types of cases. Additionally, the book will provide information about sexual violence from experts in the field, examine “best practices” for these cases, and offer resources for judicial officers requiring additional information. The book has been divided into four sections: **Understanding Sexual Violence, The Process of a Sex Offense Case, Life After Megan’s Law, and Resources.**

Section One examines the dynamics of sexual assault crimes. Definitions associated with sexual offenses are provided as well as the elements of Pennsylvania’s current sexual offense laws.¹ Section one also provides an overview of common defenses to sexual assault.

Section Two addresses the practical aspects of a sex offense case, from pre-trial issues to appellate review. Useful information in the form of legal discussions, trial outlines, and suggested jury instructions are provided. In light of possible habeas corpus relief, the Pennsylvania Post Conviction Relief Act is also discussed.²

Section Three examines the ramifications of a sexual offense conviction, including sex offender registration laws and sex offender identification.³

Section Four includes published references and resources on sexual assault, as well as a list of Pennsylvania’s 52 rape crisis centers, and Child Advocacy Centers.

1.2 CHAPTER OVERVIEW

Chapter one addresses the issues around sexual violence from both a legal and mental health perspective. Section 1.2 provides a chapter overview. Section 1.3 examines, in a general way, the statutory types of sexual violence crimes, as well as the elements of rape and other sexual assault crimes in Pennsylvania. Section 1.4 provides evidence-based research about the impact of rape and sexual assault on victims. Section 1.5 enumerates victims' rights afforded by the Pennsylvania Crime Victims Bill of Rights, 18 PA.STAT. § 11.201.⁴ Section 1.6 discusses barriers to due process in court

¹ 18 PA.CON.S.STAT.ANN. §§ 3101 - 3129.

² 42 PA.CON.S.STAT.ANN. §§ 9541 - 9546.

³ Pennsylvania first adopted Megan's Law ("Megan's Law I"), 42 PA.CON.S.STAT.ANN. §§ 9791-9799.6, on October 24, 1995, and the registration portion of the statute took effect on April 21, 1996. On May 10, 2000, however, Megan's Law I was amended, and the amended version ("Megan's Law II"), 42 PA.CON.S.STAT.ANN. §§ 9795.1-9799.7, became effective on July 9, 2000.

⁴ The Pennsylvania Crime Victims Act is codified at 18 PA.STAT. §§ 11.201 – 11.216.

proceedings. Section 1.7 provides an overview of sex offending behaviors. Section 1.8 examines research on sex offending and sex offender management.

1.3 DEFINING RAPE AND SEXUAL ASSAULT

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

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

- whenever there is a lack of consent,⁵
- whenever the relations are initiated by force or threat of force,⁶
- if there is a minor involved who is incapable of giving legal consent because of age,⁷
- if there is a minor or adult involved who is incapable of giving legal consent because of mental deficiency,⁸
- if there is a minor or adult involved who is unconscious or unaware that the sexual intercourse is occurring.⁹

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

⁶ 18 PA.CONS.STAT.ANN. § 3121 (a)(1) & (2): “A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant: (1) By forcible compulsion. (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution”.

⁷ 18 PA.CONS.STAT.ANN. § 3122.1, Statutory Sexual Assault: “a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other.” Additionally, 18 PA.CONS.STAT.ANN. § 3121 (c): “A person commits the offense of **rape of a child**, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.” (emphasis added).

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

⁹ 18 PA.CONS.STAT.ANN. § 3121(a)(3): “A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant ... (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.” The Pennsylvania Supreme

A. Rape And Sexual Assault Under Pennsylvania Statutes

In Pennsylvania, rape and sexual assault are gender neutral, and may be perpetrated against an adult or child victim. Both rape and sexual assault may be perpetrated against a spouse. The primary distinction between the crimes of rape and sexual assault is that sexual assault occurs when the complainant does not consent to sexual intercourse or deviate sexual intercourse; the use or threat of force need not be proven. For the purposes of this section, only the crimes of rape and sexual assault are described. For a more detailed description of sex crimes in Pennsylvania, see Chapter 2.

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

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

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

Rape of a child, 18 PA.CON.S.TAT.ANN. § 3121(c), is a felony of the first degree and occurs when the person engages in sexual intercourse with a complainant

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

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

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

B. Defining Sexual Violence

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

The Pennsylvania Coalition Against Rape defines sexual violence as:

Sexual violence occurs on a continuum, including but not limited to the following acts or attempted acts: any unwanted sexual contact, blocked access to birth control and protections from disease, child sexual abuse, forced abortions and/or sterilization, incest, indecent/sexualized exposure, marital and partner rape, ritual abuse, sex trafficking, sexual exploitation, sexual harassment, stalking, statutory rape, stranger and non-stranger rape, voyeurism and rape resulting in murder.¹⁰

C. Comparing Myths Of Sexual Violence To The Reality

Although much research has been done on the nature of rape and sexual assault, many myths still permeate our culture. For example, one common misconception is that a woman is most likely to be raped by someone she does not know.¹¹ Another misconception is that if a woman dresses in a certain way, or is under the influence of alcohol, she is inviting rape.¹² It is important to be aware of these and other myths as they provide insight into the beliefs of potential jurors as well as the community at large.

The reality of rape and sexual assault has been confirmed in numerous studies. Three of the most preeminent sources examining sexual violence are *The*

¹⁰ Pennsylvania Coalition Against Rape. (2005). HIV bulletin.

¹¹ Lifetime Television Violence Against Women Study (2002). (Available from Penn, Schoen and Berland Associates, Washington, D.C.).

¹² Office on Violence Against Women, Department of Justice. (n.d.) *Myths and facts about sexual violence*. Retrieved May 3, 2006 from <http://www.usdoj.gov/ovw/MythsFactSexualViolence.htm>

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

Highlights from these studies emphasize that:

1. Nonstranger rape.

“Nonstranger or acquaintance rape is more common than stranger rape.”

Statistics show that 78 percent of rapes/sexual assaults were perpetrated by someone known to the victim.¹⁶ Further examination of perpetrator/victim relationships reveals that nine percent of victims were raped by husbands or ex-husbands, eleven percent by fathers or step-fathers, ten percent by boyfriends or ex-boyfriends, sixteen percent by other relatives, and twenty-nine percent by other non-relatives, such as friends and neighbors.¹⁷

2. Use of Weapons.

“Few rapes / sexual assaults involve the use of a weapon.”

Again, the reality of sexual assault is very different from public perception. In 2002, only four percent of rapes/sexual assaults involved the use of a firearm, and only two percent involved the use of a knife.¹⁸ Rapists are far more likely to gain control of their victims through deception, manipulation, and betrayal of the victim’s trust. This is not to say that rapes and sexual assaults without weapons are not “violent” or “forcible” per se.

3. Victim Injury.

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

Few victims sustain visible physical injuries as a result of a rape. From 1992 – 2000, approximately 67 percent of victims of completed rapes sustained no bruises, scratches, cuts, or other visible injuries.¹⁹ Genital injury may or may not be present after a rape/sexual assault. For a more in-depth discussion on genital injury see section 1.4.

¹³ National Crime Victimization Survey, Department of Justice. (2002). *Crime victimization*. Retrieved April 23, 2006 from <http://www.ojp.usdoj.gov/bjs/cvict.htm>

¹⁴ Rape in America: A Report to the Nation. (1992). National Victim Center and Crime Victims Research and Treatment Center, University of South Carolina, Charleston.

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

¹⁶ Rape in America: A Report to the Nation. (1992). National Victim Center and Crime Victims Research and Treatment Center, University of South Carolina, Charleston.

¹⁷ *Id.*

¹⁸ National Crime Victimization Survey, Department of Justice.(2002).*Crime victimization*. Retrieved April 23, 2006, from <http://www.ojp.usdoj.gov/bjs/cvict.htm>

¹⁹ *Id.*

4. Reporting of Rape and Sexual Assault.

“Rape and sexual assault are underreported crimes.”

Statistics regarding the percentage of reported rapes and sexual assaults vary greatly depending on the definitions used, the sample of victims studied, and the way in which the questions are phrased. However, research overwhelmingly demonstrates that rape and sexual assault are underreported crimes.²⁰ According to the *Rape in America Study*, only 16 percent of rapes were ever reported to police.²¹

Child victimization is also underreported. Research by Finkelhor and Dzubia-Leatherman (1994) shows that “levels of child victimization far exceed those reported in official government victimization statistics.”²² The researchers interviewed children between the ages of 10 and 16 years of age and found sexual abuse involving physical contact to be at rates five times higher than the 0.1 percent reported in the National Crime Survey. In a subsequent *international* survey, Finkelhor found rates of abuse to be consistent with his American study (1994).²³

Victims cite the following reasons for not reporting sexual violence: the victim does not want family members to know about the assault; they have concerns others will find out (including the victim’s name being made public); and they fear blame for the assault by family, friends, and others.²⁴ Children may be reluctant to disclose sexual abuse because they fear the perpetrator, have a fondness for the perpetrator, or are afraid of upsetting the family structure. In cases of incest, family dynamics may normalize the sexual abuse or reinforce the need for family members to keep quiet about the abuse.

5. False Reporting.

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

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

Historically, the Federal Bureau of Investigation (FBI) collected and published data submitted by each state through the Uniform Crime Report (UCR). Until 1997 the FBI included a paragraph in their report noting that the average rate for “unfounded” cases of forcible rape was eight percent as

²⁰ Rape in America: A Report to the Nation. (1992). National Victim Center and Crime Victims Research and Treatment Center, University of South Carolina, Charleston

²¹ *Id.*

²² Finkelhor, D. (1994). The international epidemiology of child sexual abuse. *Child Abuse & Neglect*, 18: 413-420.

²³ *Id.*

²⁴ *Id.*

compared with that of other crimes which was only two percent.²⁵ Cases were counted as “unfounded” if:

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

One inconsistency with the UCR is that the definitions used in the report do not include all aspects of sexual violence, only rape of women. As of 2004 the UCR still does not include data on rape and sexual assault of males, victims with disabilities, children under the age of 12 years, and sexual assault by anal or oral copulation.²⁶

Another caveat to the information submitted for the UCR is that, while data is provided to the FBI by every state, not every police department within each state submitted information. For example, a report from the 2004 Pennsylvania Annual Uniform Crime report indicated that 1,056 out of 1200 jurisdictions in Pennsylvania submitted data.²⁷ While a majority of jurisdictions did report, it is unknown whether the data represented one month or an entire year.

To remedy this inconsistency, Pennsylvania Senate Bill 668 was signed into law by the Governor in 2004, which standardized UCR reporting.²⁸ The law became effective in June 2005. It mandates and standardizes reporting for all law enforcement agencies within Pennsylvania.

6. Victim Statistics.

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

From 1992 – 2000, females victims accounted for 94 percent of all completed rapes, 91 percent of all attempted rapes, and 89 percent of all completed and attempted sexual assaults.²⁹

It is difficult to determine the number of male victims of sexual violence for a variety of reasons. As stated previously, the FBI Uniform Crimes Report only tracks sexual assault data on female victims. Also, males who

²⁵ Federal Bureau of Investigation. (1997). Uniform Crime Reports. Retrieved on April 10, 2006 from, http://www.fbi.gov/ucr/Cius_97/97crime/97crime.pdf, p. 26.

²⁶ Federal Bureau of Investigation (2004). Uniform Crime Reports. Retrieved on April 10, 2006 from, http://www.fbi.gov/ucr/cius_04/

²⁷ 18 P.S. § 20.501 *et seq.*

²⁸ *Id.*

²⁹ *Id.*

are sexually abused are often reluctant to come forward or seek mental health services because of overwhelming shame and embarrassment.

The few studies that do exist show rates of sexual violence against men to be between five percent and 23 percent.³⁰ Because perpetrators target vulnerable victims, it is not surprising that the prevalence of sexual abuse against males with mental illnesses or mental health disorders has been reported at rates as high as 32 percent.³¹

7. Perpetrator Statistics.

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

In single-offender rapes and sexual assaults, the percentage of male offenders is nearly 99 percent.³² Research about female sex offending is limited, but studies suggest that female sex offending occurs more frequently than reported and is most often directed toward children under the care of the female.³³

8. Delay in Reporting.

“An individual will immediately report their sexual assault.”

Research shows that victims do not immediately report their rape **to authorities**; however, they may tell a friend, relative, or someone they trust. While victims of burglary, theft, or robbery are likely to contact authorities immediately, victims of sexual violence often need time to process the event; particularly if they know their attacker. Reasons cited for delayed reporting include:³⁴

- Not identifying acquaintance rape as rape
- Fear of not being believed
- Fear of being blamed for the assault
- Unable to tell the whole story to police
- Fear of being blamed due to use of alcohol or drugs
- Lack of support
- Fear of how the case may be handled by the court system
- Fear of police
- Lack of understanding or knowledge of the court system

³⁰ Belkin, D. S., Greene, A. F., Rodrique, J. R., & Boggs, S. R. (1994). Psychopathology and history of sexual abuse. *Journal of Interpersonal Violence*, 9, 535-547.

³¹ Sigler, J.I. (2000). “Forced sexual intercourse among intimates”. *Journal of Interpersonal Violence*, 15(1).

³² Federal Bureau of Investigation (2004). Uniform Crime Reports. Retrieved on April 10, 2006 from, http://www.fbi.gov/ucr/cius_04/

³³ Davin, P.A., Hilsop, J. C., & Dunbar, T. (1999). *Female Sexual Abusers*. Brandon, Vt.: Safer Society Press.

³⁴ U.S. Department of Justice. (1997). *Successfully Investigating Acquaintance Sexual Assault : A National Training Manual for Law Enforcement*. Retrieved June 20, 2006 from: <http://www.evawintl.org/Downloads/NCWP/PreliminaryMOD.pdf>

- Wanting to “put it all behind them”
- Emotional attachment to the offender. Not wanting to get the offender in trouble
- In incest cases, the victim may be concerned about the family disruption.

Victims relate that encouragement from a friend is often the impetus for reporting the assault to police.

1.4 THE IMPACT OF RAPE AND SEXUAL ASSAULT ON THE VICTIM

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

The community at large seems to consider stranger sexual assault far more damaging to victims than sexual assault by an acquaintance, friend, or spouse. In reality, the adverse may be true. While every reaction is different, victims report that that sexual violence impacts them regardless of the relationship or perceived relationship to the perpetrator.³⁵

A. Physical Injury From Rape and Sexual Assault in Female Adults and Adolescents

1. Gross Body Injury in Female Adults and Adolescents

According to the U.S. Department of Justice report, *Prevalence, Incidence, and Consequences of Violence Against Women*, 32 percent of women reported physical injuries resulting from rape.³⁶ *Figure A* illustrates the type of injuries most frequently reported by sexual assault victims (this graph includes injuries of male and female victims combined).³⁷ As noted, bites, welts, and bruises were the most common physical injuries sustained by victims.

2. Genital Injury in Female Adults and Adolescents

In *The Color Atlas of Sexual Assault* (1997), authors Girardin, Faugno, Seneski, Slaughter, and Whelan cite multiple studies that conclude “the absence of genital injury does not provide proof that a rape did not occur.”³⁸

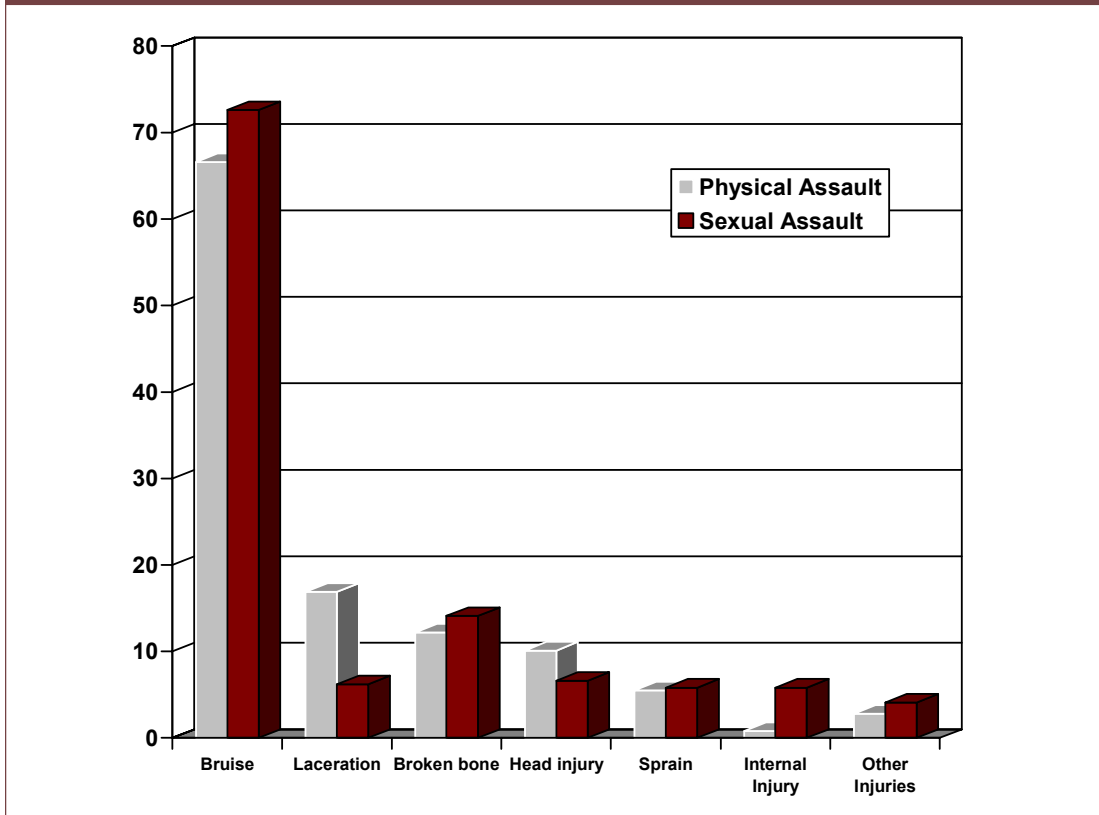
³⁵ U.S. Department of Justice. (2000). Full report of the prevalence, incidence, and consequences of violence against women (NCJ Publications No. 183781, p. 49). Retrieved April 26, 2006, from U.S. Department of Justice: <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>

³⁶ *Id.*

³⁷ *Id.*

³⁸ Girardin, B.W., Faugno, D.K., Seneski, P.C., Slaughter, L., & Whelan, M. (1997). *Color atlas of sexual assault* (pp. 22-37). St. Louis, Missouri: Mosby-Year Book, Inc.

Figure A: Percentage of Injured Adult Rape and Physical Assault Victims Who Sustained Specific Types of Injuries: Men and Women Combined



There are several factors that may impact whether or not genital injury is observed after a sexual assault. The most common reasons identified by medical personnel for lack of injury include: *the lack of vaginal contact by the perpetrator; delayed reporting of the assault, a lack of magnification technology, inexperience or insufficient training of the examiner, and finally, the perpetrator is non-aggressive and/or the victim is non-resistive.*³⁹

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

- In the first instance, if there is ***no contact with the vagina***, it would follow that there would be no genital injury.
- With ***delayed reporting***, an examination delayed to 14 days post assault will detect no acute findings.⁴⁰
- ***Not using diagnostic equipment*** in the examination can decrease the likelihood of diagnosing injury.
- ***A lack of Colposcopy magnification*** can drop the probability of detecting genital injury from 87 percent when performed by a

³⁹ Girardin, B.W., Faugno, D.K., Seneski, P.C., Slaughter, L., & Whelan, M. (1997). Color atlas of sexual assault (pp. 22-37). St. Louis, Missouri: Mosby-Year Book, Inc.

⁴⁰ *Id.*

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

trained examiner, to between 10 percent and 30 percent by gross visualization alone.⁴¹ **Colposcopy** is one of three methods currently available to conduct rape exams. The other two are **direct visualization** and **staining**.⁴² *Figure B* lists and describes each technique and provides an overview of their use in sexual assault examinations.⁴³

- **Lack of training or expertise** is another impediment to diagnosing injury.
- **The use of minimal force** by the perpetrator may not result in any discernable injury.
- If the **victim is non-resistive**, he or she may not sustain a physical injury.⁴⁴

⁴¹ *Id.*

⁴² Sommers, M.S., Fisher, B.S., & Karjane, H.M. (2005). Using colposcopy in the rape exam: health care, forensic, and criminal justice issues. *Journal of Forensic Nursing*, 1(1), 30-34.

⁴³ *Id.*

⁴⁴ Girardin, B.W., Faugno, D.K., Seneski, P.C., Slaughter, L., & Whelan, M. (1997). *Color atlas of sexual assault* (pp. 23-24). St. Louis, Missouri: Mosby-Year Book, Inc.

To correctly perform a forensic rape exam, physicians and nurses require specialized training over and above what is received in their basic education programs.⁴⁵ The need for individuals with this specialized skill resulted in the development of national Sexual Assault Nurse Examiner (SANE) training programs. Basic training programs for SANE nurses consist of at least 40 hours of classroom instruction. Topics can include the definition of the SANE role, collection of evidence, testing and treatment of STDs, evaluation of other care needed, victim responses and crisis intervention, assessment of injuries, documentation, courtroom testimony, collaborating with community agencies, competent completion of an exam, and forensic photography.⁴⁶ Nurses are usually required to complete a certain number of clinical hours as well.

According to Rebecca Campbell, Associate Professor of Community Psychology and Program Evaluation at Michigan State University, “*The clinical case study literature suggests that SANE nurses are not only competent in forensic evidence collections, but they are actually better at it because of their extensive training and experience.*”⁴⁷ Campbell notes that research in this area consistently supports the use of SANE nurses in cases of sexual assault.⁴⁸

B. Psychological Effects Of Sexual Assault Crimes On Victims

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

The psychological effects of rape on a victim may range from minimal to severe and from short to long-lasting. Hanson reports (1996) that one-quarter of women who are victims of sexual assault continue to have problems for several years after the rape.⁴⁹ Hazelwood and Burgess also indicate that rape and sexual assault are more likely to lead to post traumatic stress disorder, a DSM-IV diagnosis, than any other traumatic event affecting civilians.⁵⁰

⁴⁵ Office on Violence Against Women, U.S. Department of Justice. (2004). *A national protocol for sexual assault medical forensic exams* (U.S. DOJ Publication No. NCJ 206554).

⁴⁶ Ledray, *SANE Development and Operation Guide*, p. 50.

⁴⁷ VAWnet Applied Research Forum. (2004). *The effectiveness of sexual assault nurse examiner programs*. Retrieved February 6, 2006 from, http://www.vawnet.org/SexualViolence/Research/VAWnetDocuments/AR_Sane.php

⁴⁸ *Id.*

⁴⁹ Crowell, N.A., & Burgess, A.W. (Eds.). (1996). *Understanding violence against women*. Washington D.C.: National Academy Press.

⁵⁰ Hazelwood, R.R. & Burgess, A.W. (Eds.). (1995). *Practical rape investigation*. Boca Raton, Fla.: CRC Press.

1. Common Psychological Reactions To Sexual Violence

Psychological reactions to rape and sexual assault mirror the reactions of victims to other types of trauma such as war and natural disasters.⁵¹

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

*Sexual assault is one of the most traumatic types of criminal victimization. Whereas most crime victims find it difficult to discuss their victimization, sexual assault victims find it especially painful. One obvious reason for this is the difficulty that many people have in talking about sex. A more important reason, however, is that many victims of sexual assault are intensely traumatized not only by the humiliation of their physical violation but by the fear of being severely injured or killed.*⁵²

Kilpatrick notes (1996) that the fear of being injured or killed is equally common among women who are raped by husbands or acquaintances as among women who are raped by total strangers.⁵³

Victims of sexual assault may suffer anxiety, depression, and anger as the result of an assault. Additionally, victims can suffer from social and sexual problems and may also exhibit dissociative reactions.⁵⁴ Dissociative reactions are defined as

[T]he separation of ideas, feelings, information, identity, or memories that would normally go together. Dissociation exists on a continuum: At one end are mild dissociative experiences common to most people (such as daydreaming or highway hypnosis) and at the other extreme is severe chronic dissociation, such as DID (MPD) and other dissociative disorders. Dissociation appears to be a normal process used to handle trauma that over time becomes reinforced and develops into maladaptive coping.⁵⁵

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

⁵¹ *Id.*

⁵² Woods, T.O. (2000). First response to victims of crime: victims of sexual assault. (OVC Publication No. 176971). Washington D.C.: U.S. Department of Justice.

⁵³ Crowell, N.A., & Burgess, A.W. (Eds.). (1996). Understanding violence against women. Washington D.C.: National Academy Press.

⁵⁴ Foa, E., & Rothbaum, B.O. (1998). Treating the trauma of rape: cognitive-behavior therapy for PTSD. New York, NY: Guilford Publications.

⁵⁵ American Psychiatric Association. (1994). *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.) Washington, D.C.: Author.

While understanding Rape Trauma Syndrome may be helpful in identifying common reactions to rape, the use of this term in court can be problematic as it is not a diagnosis recognized as a DSM-IV diagnosable disease.⁵⁶

2. Rape Trauma Syndrome

Rape Trauma Syndrome was initially identified by Ann Burgess and Lynda Lytle Holmstrom in 1974.⁵⁷ Ann Burgess is considered an expert on the psychological impact of sexual violence and has authored nine textbooks and written extensively on assessment and treatment of sexual assault victims.

Burgess and Holstrom first wrote about Rape Trauma Syndrome in 1974 after observing similar physical and psychological responses in 92 adult women who presented to an emergency department after being raped.⁵⁸ Their research was groundbreaking because it dispelled the myth held by law enforcement, medical personnel, and society at large that all rape victims would be hysterical following their assault. What they found was that although every victim responded differently, there were some consistent physical, psychological, and emotional reactions among victims.

According to Burgess and Holmstrom, “*Rape trauma syndrome is the acute phase and long-term reorganization process that occurs as the result of forcible rape or attempted forcible rape.*”⁵⁹ It usually involves an acute reactionary phase and a secondary, coping or “re-grouping” phase.

According to Burgess and Holmstrom, in the immediate aftermath of the rape, the victim may demonstrate shock and disbelief. Within a few hours, most exhibited two reactionary “styles”: either becoming openly emotional or controlled and withdrawn. The openly emotional victim expressed fear, anger, and anxiety, which manifested in crying and smiling. Those who were controlled appeared calm and subdued and exhibited a flat affect.⁶⁰

During the first few weeks after the rape, victims report both physical and emotional reactions. The physical reactions include: skeletal muscle tension, overall physical soreness, nausea, change in appetite, and in some cases, vaginal itching and infection. Emotionally, victims experienced fear, humiliation, anger, and self-blame. Some reported violent dreams, a constant fear of being attacked again, fear of crowds, and what is referred to as *intrusive imagery*. In this case, victims reported seeing the perpetrator

⁵⁶ American Psychiatric Association. (2000). Diagnostic and statistical manual of mental disorders (4th ed.). Washington, DC: Author.

⁵⁷ Burgess, A.W., & Holmstrom, L.L. (1974). Rape trauma syndrome. *American Journal of Psychiatry*, 131(9), 981-986.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Burgess, A.W., & Holmstrom, L.L. (1974). Rape trauma syndrome. *American Journal of Psychiatry*, 131(9), 981-986.

“everywhere.” Burgess and Holmstrom noted that during the second phase, victims attempt to restore order to their life and regain a sense of control.⁶¹

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

3. Acute Stress Disorder

Acute Stress Disorder (ASD) is a fairly new category in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and identifies reactions to trauma that do not yet meet the criteria for PTSD.⁶² Foa and Rothbaum in *Treating the Trauma of Rape*, describe the role of Acute Stress Disorder within the context of trauma and PTSD, “*The primary difference between the two disorders is duration of symptoms ... ASD occurs immediately following a stressor, but if symptoms persist beyond one month, a diagnosis of PTSD should be given.*”⁶³

The DSM-IV defines the diagnostic criteria for Acute Stress Disorder as follows:⁶⁴

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

⁶¹ *Id.*

⁶² American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: Author.

⁶³ Foa, E., & Rothbaum, B.O. (1998). *Treating the trauma of rape: cognitive-behavior therapy for PTSD*. New York, NY: Guilford Publications.

⁶⁴ American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: Author.

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

4. Post Traumatic Stress Disorder

Posttraumatic Stress Disorder (PTSD) initially described reaction patterns in survivors of natural disasters and combatants in war.⁶⁵ Since its identification, it has been diagnosed in victims of criminal attacks, accidents, and other traumatic events. According to Crowell and Burgess, *“Rape and sexual assault are more likely to lead to PTSD than other traumatic events affecting civilians, including robbery, the tragic death of close friends or family, and natural disaster.”*⁶⁶

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

- (1) The person has been exposed to a traumatic event in which both of the following were present:
 - (a) The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.
 - (b) The person's response involved intense fear, helplessness, or horror. Note: in children, this may be expressed instead by disorganized or agitated behavior.

⁶⁵ Foa, E., & Rothbaum, B.O. (1998). *Treating the trauma of rape: cognitive-behavior therapy for PTSD*. New York, NY: Guilford Publications.

⁶⁶ Burgess, A.W., & Holmstrom, L.L. (1974). Rape trauma syndrome. *American Journal of Psychiatry*, 131(9), 981-986.

- (2) The traumatic event is persistently re-experienced in one (or more) of the following ways:
 - (a) Recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions. Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
 - (b) Recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.
 - (c) Acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated). Note: in young children, trauma-specific reenactment may occur.
 - (d) Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
- (3) Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
 - (a) Efforts to avoid thoughts, feelings, or conversations associated with the trauma.
 - (b) Efforts to avoid activities, places, or people that arouse recollections of the trauma.
 - (c) Inability to recall an important aspect of the trauma.
 - (d) Markedly diminished interest or participation in significant activities.
 - (e) Feeling of detachment or estrangement from others.
 - (f) Restricted range of affect (e.g., unable to have loving feelings.).
 - (g) Sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).
- (4) Persistent symptoms of increased arousal (not present before trauma), as indicated by two (or more) of the following:
 - (a) Difficulty falling or staying asleep.
 - (b) Irritability or outbursts of anger.
 - (c) Difficulty concentrating.
 - (d) Hypervigilance.
 - (e) Exaggerated startle response.
- (5) Duration of the disturbance (symptoms in B, C and D) is more than one month.

- (6) The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

C. Recognizing The Traumatic Effects Of Court Proceedings

Victims consistently report that testifying in court can be as traumatic as the original rape because they are forced to mentally relive the rape.⁶⁷ The public setting, the presence of the offender and the difficulty of cross examination may be very stressful and can return a victim to a state of crisis. The trauma may be even more intense when the defendant is *pro se* and has the ability to cross-examine the victim directly.⁶⁸

Sometimes a victim can be so traumatized by the court proceedings that they respond and react in a manner that seems illogical to the observer. The person may giggle or laugh because of embarrassment or nervousness. They may have a flat, unemotional affect as the result of depression or “dissociating” themselves from the difficulty of testimony. At times, the victim may appear meek and withdrawn or angry and combative. The unfortunate consequence of these responses is that the jury may question the victim’s credibility when, in actuality, it is simply the victim’s response to stress.

1. Victim-Blaming and Its Impact on Offender Accountability

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

Research consistently demonstrates that perpetrators capitalize on victims’ vulnerabilities and inability to report or be believed. In fact, according to David Lisak, Associate Professor of Psychology at the University of Massachusetts, the key to a perpetrator’s success is identifying an individual’s vulnerability and exploiting that vulnerability.⁶⁹ A perpetrator recognizes, for example, that an adolescent who is drinking is unlikely to report an assault out of fear of being “busted” for underage drinking.

⁶⁷ Pennsylvania Supreme Court (2003). *Executive Summary Of The Report On Racial And Gender Bias In The Justice System* (pp.421-452). Harrisburg, PA: Author.

⁶⁸ *Id.*

⁶⁹ Lisak, D. (2005, October). Predators: uncomfortable truths about campus rapists. Presented at the International Sexual Assault, Domestic Violence, and Stalking Conference, Baltimore, MD.

1.5 VICTIM'S RIGHTS

Victims of crime in Pennsylvania are granted a number of rights by Pennsylvania's Crime Victims Act.⁷⁰ "The rights extended to victims of crime in Chapter 2 are to be honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants."⁷¹ According to the Act, victims of crime have the following rights:⁷²

- (1) To receive basic information concerning the services available for victims of crime.
- (2) To be notified of certain significant actions and proceedings within the criminal and juvenile justice systems pertaining to their case. This paragraph includes all of the following:
 - (i) Access to information regarding whether the juvenile was detained or released following arrest and whether a petition alleging delinquency has been filed.
 - (ii) Immediate notification of a juvenile's pre-adjudication escape from a detention center or shelter facility and of the juvenile's subsequent apprehension.
 - (iii) Access to information regarding the grant or denial of bail to an adult.
 - (iv) Immediate notification of an adult offender's pretrial escape from a local correctional facility and of the offender's subsequent apprehension.
- (3) To be accompanied at all criminal and all juvenile proceedings in accordance with 42 PA.CON.S.TAT.ANN. § 6336 (relating to conduct of hearings) by a family member, a victim advocate or other person providing assistance or support.
- (4) In cases involving a personal injury crime or burglary, to submit prior comment to the prosecutor's office or juvenile probation office, as appropriate to the circumstances of the case, on the potential reduction or dropping of any charge or changing of a plea in a criminal or delinquency proceeding, or, diversion of any case, including an informal adjustment or consent decree.
- (5) To have opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. The written statement shall be included in any pre-disposition or pre-sentence report

⁷⁰ 18 PA.STAT. §§ 11.201 – 11.216.

⁷¹ 18 PA.STAT. §§ 11.201.

⁷² *Id.*

submitted to the court. Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.

- (5.1) To have notice and to provide prior comment on a judicial recommendation that the defendant participate in a motivational boot camp pursuant to the act of December 19, 1990 (P.L. 1391, No. 215), known as the Motivational Boot Camp Act.
- (5.2) Upon request of the victim of a personal injury crime, to have the opportunity to submit written comment or present oral testimony at a disposition review hearing, which comment or testimony shall be considered by the court when reviewing the disposition of the juvenile.
- (6) To be restored, to the extent possible, to the pre-crime economic status through the provision of restitution, compensation and the expeditious return of property which is seized as evidence in the case when in the judgment of the prosecutor the evidence is no longer needed for prosecution of the case.
- (7) In personal injury crimes where the adult is sentenced to a State correctional facility, to be:
 - (i) given the opportunity to provide prior comment on and to receive State post-sentencing release decisions, including work release, furlough, parole, pardon or community treatment center placement;
 - (ii) provided immediate notice of an escape of the adult and of subsequent apprehension; and
 - (iii) given the opportunity to receive notice of and to provide prior comment on a recommendation sought by the Department of Corrections that the offender participate in a motivational boot camp pursuant to the Motivational Boot Camp Act.
- (8) In personal injury crimes where the adult is sentenced to a local correctional facility, to:
 - (i) receive notice of the date of the release of the adult, including work release, furlough, parole, release from a boot camp or community treatment center placement; and
 - (ii) be provided with immediate notice of an escape of the adult and of subsequent apprehension.
- (8.1) If, upon the request of the victim of a personal injury crime committed by a juvenile, the juvenile is ordered to residential placement, a shelter facility or a detention center, to:

- (i) Receive prior notice of the date of the release of the juvenile, including temporary leave or home pass.
 - (ii) Be provided with:
 - (a) immediate notice of an escape of the juvenile, including failure to return from temporary leave or home pass; and
 - (b) immediate notice of re-apprehension of the juvenile.
 - (iii) Be provided with notice of transfer of a juvenile who has been adjudicated delinquent from a placement facility that is contrary to a previous court order or placement plan approved at a disposition review hearing and to have the opportunity to express a written objection prior to the release or transfer of the juvenile.
- (9) If the adult is subject to an order under 23 PA.CON.S.TAT.ANN. § 6101 (relating to protection from abuse) and is committed to a local correctional facility for a violation of the order or for a personal injury crime against a victim protected by the order, to receive immediate notice of the release of the adult on bail.
- (10) To receive notice if an adult is committed to a mental health facility from a State correctional institution and notice of the discharge, transfer or escape of the adult from the mental health facility.
- (11) To have assistance in the preparation of, submission of and follow-up on financial assistance claims to the bureau.
- (12) To be notified of the details of the final disposition of the case of a juvenile consistent with 42 PA.CON.S.TAT.ANN. § 6336(f) (relating to conduct of hearings).
- (13) Upon the request of the victim of a personal injury crime, to be notified of the termination of the courts' jurisdiction.

1.6 BARRIERS TO DUE PROCESS IN COURT PROCEEDINGS

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

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

to attend the trial. These victims find themselves forced to choose between justice and employment.

1.7 THE ROLE OF THE VICTIM ADVOCATE IN SEXUAL ASSAULT CASES

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

For a survivor of sexual assault, the medical and legal system can be frightening, frustrating, and confusing. Dealing with forensic exams, insurance paperwork, law enforcement, prosecutors, and judicial officials can be intimidating.⁷³ Meeting with the myriad of people involved in prosecuting a case can be stressful and court appearances overwhelming. The time and effort it takes for a case to go through the legal system can make a victim reluctant to pursue the case.

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

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

Victim Advocates are available to help victims cope with the frustrating aspects of the criminal justice system. Rape crisis centers provide advocates at no cost for court accompaniment, counseling, and assistance with victim's compensation paperwork.

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

⁷³ The Pennsylvania Coalition Against Rape. (2000). *The Trainer's Tool Box*. Chapter 9.

1.8 OVERVIEW OF SEX OFFENDING BEHAVIOR

This section presents current research on sex offending behavior as well as provides management strategies. **Subsection A** provides an overview of the causes of sex offending behavior. **Subsection B** identifies a number of common behavioral characteristics in this population. **Subsection C** examines promising research that may help to explain the origins of sex offending behavior. **Subsection D** provides recommendations on “best practices” in sex offender management.

A. Examining Causes of Sexual Aggression

A common question regarding rape is whether it is a crime of sex or power. Literature as recent as 10 years ago identified the two primary motivations for committing rape and sexual assault: to obtain sex and to exert power.⁷⁴

Current research confirms that sexual aggression is more complex than previously thought. According to Robert Prentky, a leading researcher on sexual aggression:

With respect to diversity, we have moved well beyond our earlier focus on impulsive, antisocial, criminals serving time in prison for felony sexual assaults on strangers. Sexual coercion and sexual aggression is expressed or manifest in a remarkably wide range of behaviors, further underscoring the seriousness of the problem.⁷⁵

B. General Behavioral Characteristics

While characteristics vary, some commonalities do exist in this very heterogeneous population

1. Sex Offenders are Overwhelmingly Male

The vast majority of sex offenders are male. According to the FBI Uniform Crimes Report, males constituted 98 percent of the perpetrators arrested for forcible rape and sexual assault in 2004.⁷⁶

Research concerning female offenders is limited. What is known, however, suggests that female sex offending occurs more frequently when a female is in caretaking role such as babysitting. In fact, The Juvenile Justice Bulletin (2001) reports that females accounted for 33 percent of sexual offenses committed by babysitters.⁷⁷

⁷⁴ Chiroro, P., Bohner, G., Viki, G., & Jarvis, C.I. (2004), Rape Myth Acceptance and Rape Proclivity: Expected dominance versus expected arousal as mediators in acquaintance rape situations. *Journal of Interpersonal Violence*, 19(4), 427-442.

⁷⁵ Prentky, R.A., Janus, E.S., & Seto, M.C. (Eds.). (2003). Sexually coercive behavior: Understanding and management. Conference on Understanding and Managing Sexually Coercive Behavior, USA, 989, ix-xiii.

⁷⁶ F.B.I. Uniform Crime Report. (2004). Retrieved May 1, 2006, from <http://www.fbi.gov/ucr/ucr.htm>.

⁷⁷ Juvenile Justice Bulletin (2001). Crimes against children by babysitters. Retrieved May 14, 2006 from, www.ncjrs.gov/html/ojjdp/jjbul2001_9_4/page2.html.

2. Recidivism Rates of Sex Offenders are Difficult to Calculate

Recidivism rates are difficult to track and even more difficult to interpret. Hanson and Bussiere, (in Bynum, 2001)⁷⁸ noted that in one study, child molesters had a reconviction rate of 13 percent for sex offenses and 37 percent for new, non-sex offenses while rapists had a reconviction rate of 19 percent for sex offenses and 46 percent for new, non-sex offenses.⁷⁹ It is important to note that these statistics rely only on records of re-arrest and conviction.

A study by Ahlmeyer, Heil, McKee, and English (2000) questioned 36 imprisoned sex offenders who admitted to perpetrating against an average of two victims. When questioned using a polygraph evaluation, the offenders admitted to an average of 165 victims.⁸⁰ The offenses ranged from rape and pedophilia to “non-contact” offenses including voyeurism, exhibitionism, and obscene phone calls.

Drs. Lisak and Miller assessed 1,882 college men for acts of interpersonal violence. They found that 120 of the participants self-reported acts that met the legal definition of rape, but were never prosecuted by criminal justice authorities.⁸¹ Of these 120 “undetected rapists,” 63.3 percent reported committing multiple acts which met the definition of rape, either against the same or multiple victims. These findings have been mirrored in other studies (Abel, Becker, Mittelman, Cunningham-Rathner, Rouleau, & Murphy, 1987; Weinrott and Saylor, 1991).

3. The Role of Alcohol in Sexual Violence.

Research has consistently found a correlation to heavy drinking patterns and aggressive behavior in general, and to sexual violence specifically. Abbey confirms that high use of alcohol has been reported in between 50 percent and 75 percent of acquaintance rapes.⁸² Abbey’s earlier research notes that men under the influence of alcohol are more likely to misperceive ambiguous or neutral cues as suggestive of sexual interest and to ignore or misinterpret cues of a woman’s lack of consent.⁸³ It is important to note that excessive alcohol use is not a **primary** precipitant to sexual assault, but simply reduces a perpetrator’s inhibitions.

⁷⁸ Bynum, T. (2001). Recidivism of sex offenders. Center for Sex Offender Management. Retrieved on May 24, 2006 from, <http://www.csom.org/pubs/recidsexof.html>

⁷⁹ Groth, A. Nicholas and Ann Wolbert Burgess. (1980). “Male Rape: Offenders and Victims.” *American Journal of Psychiatry*, 137(7): 806 – 810.

⁸⁰ Ahlmeyer, S., Heil, P., McKee, B., & English, K. (2000). The impact of polygraphy on admissions of victims and offenses in adult sexual offenders. *Sexual Abuse: A Journal of Research and Treatment*, 12 (2), 123-138.

⁸¹ Lisak, D., & Miller, P.M. (2002). The undetected rapist. *Violence and Victims*, 17 (1).

⁸² Abbey, A., Zawacki, T., Buck, P.O., Clinton, A.M., & McAuslan, P. (2001). Alcohol and sexual assault. *National Institute on Alcohol Abuse and Alcoholism (NIAAA)*. 25(1).

⁸³ Abbey, A. (1991). Acquaintance rape and alcohol consumption on college campuses. *Journal of American College Health*, 39.

Another reason alcohol is associated with sexual assault is because it can be used to increase a victim's vulnerability. In fact, offenders will deliberately seek out victims in an environment where alcohol is being consumed (bars, social events, etc.).

4. Correlates of Sex Offending and Childhood Abuse.⁸⁴

While some studies do demonstrate a link between child sexual victimization and adult perpetration, it is difficult to identify the strength of that correlation. Dr. Lisak notes that additional rigorous research needs to be done before definitive conclusions can be drawn (personal communication, July 12, 2006). He suggests that while childhood sex abuse is an important **contributing** factor, it does not produce the violent result on its own.

1.9 RESEARCH ON SEX OFFENDING BEHAVIOR: WHAT IS KNOWN AND WHY ISN'T MORE KNOWN?

A. Early Research

Early efforts to understand sex offending behavior most often focused on what is referred to as the "stranger rapist." As cited in Groth & Birnbaum, 1979, the FBI's National Center for the Analysis of Violent Crime recognized four categories of stranger rapists:⁸⁵

- (1) anger excitation
- (2) anger retaliatory
- (3) power assertive
- (4) power reassurance

The four categories are summarized as follows: the *anger excitation* rapist was more commonly known as a sexual sadist whose enjoyment comes from the suffering of his victims. He was known to use brutal levels of force, often resulting in the victim's death.⁸⁶ The *anger retaliatory* rapist openly hates women and wants to punish and degrade them.⁸⁷ The *power assertive* rapist may rape strangers or acquaintances and believes victims are merely objects to be used for gratification.⁸⁸ The fourth and final category described by Groth and Birnbaum is the *power reassurance* rapist.⁸⁹ This category of rapist is the least

⁸⁴ Prentky, R.A., Knight, R.A., & Lee, A. F.S., (1997). Child sexual molestation: research issues (National Institute of Justice, U.S. Department of Justice). Retrieved on May 28, 2006 from, <http://www.ncjrs.org>.

⁸⁵ Groth, A.N., & Birnbaum, H.J. (1979). Men Who Rape (pp12-44). New York, NY: Plenum Press.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

physically violent and is often motivated by a need to reassure himself of his masculinity. While these characteristics have been used as recently as 1995 (Hazelwood and Burgess) they only broadly describe motivations for the “stranger rapist.”

The “stranger rapist” categories should not be used when discussing “acquaintance” or “non-stranger” rapists since they do not accurately describe this type of offender.

B. Current Research

As described in section 1.6, sex offenders are a very heterogeneous population. Their motivation for offending and risk of re-offending depends on a number of factors including sexual deviancy and criminality. Because most will be released back into the community, it is imperative for law enforcement, prosecutors, and judges to fully understand the nature of sex offending.

1. Adult Sex Offender Typology

Emerging research shows that the discreet categories used to describe patterns of sex offending may have been over-simplified. Dr. David Lisak notes that initial studies show between 30 and 80 percent of offenders “crossover” into other victim “types” (personal communication, July 12, 2006).

Using polygraph testing, researchers found a certain percentage of offenders have victims outside their usual pattern of offending. Emerick and Dutton concluded, that 55 percent of adolescent sex offenders admitted to sexually assaulting children of both genders.⁹⁰ O’Connell also found that 64 percent of adult rapists admitted during polygraph testing to sexually assaulting a child.⁹¹

Realizing that crossover offending is more common than initially believed, offender typology will be discussed in terms of general offending patterns.

a. Rapists

Dr. Lisak describes the behavior characteristics of the “non-stranger” rapist as someone who has the need to dominate women, displays a deficit in empathy, sees women as objects to be conquered, has hyper-masculine attitudes, and believes the “rape myths.”⁹² *Figure C* lists some of the common stereotypical, false, and prejudicial beliefs contained in the Burt Rape Myth Acceptance Scale.⁹³

⁹⁰ Emerick, R.L., & Dutton, W.A. (1993). The effect of polygraph on the self-report of adolescent sex offenders: Implications for risk assessment. *Annals of Sex Research*, 6, 84-103.

⁹¹ O’Connell, M.A. (1998). Using polygraph testing to assess deviant sexual history of sex offenders. (Doctoral dissertation, University of Washington, 1998). *Dissertation Abstracts International*, 49, MI 48106.

⁹² Lisak, D. (2005, Oct.) *Predators: uncomfortable truths about campus rapists*. Presented at End Violence Against Women International: Conference on Sexual Assault, Domestic Violence, and Stalking.

⁹³ Burt, M.R. (1980). Cultural myths and support for rape. *Journal of Personality and Social Psychology*, 38(2), 217-230.

Figure C: Rape Myth Acceptance Scale

- A woman who goes to the home or apartment of a man on their first date implies that she is willing to have sex
- One reason that women falsely report rape is they frequently have a need to call attention to themselves.
- In the majority of rapes, the victim is promiscuous or has a bad reputation.
- If a girl engages in necking or petting and she lets things get out of hand, it is her own fault.
- When women go around braless or wearing short skirts and tight tops, they are just asking for trouble.
- If a woman gets drunk at a party and has intercourse with a man she's just met there, she should be considered "fair game" to other males at the party who want to have sex with her.

Much of Dr. Lisak's research has centered on college-aged men who have admitted to sexually aggressive behavior, but have not been arrested or prosecuted (*The Undetected Rapist*). He found in his research that these individuals:

Perceive themselves as having been more often hurt by women, as having been deceived, betrayed, and manipulated. They appear to be more attuned to power dynamics between men and women; more often feel put down, belittled, and ridiculed....

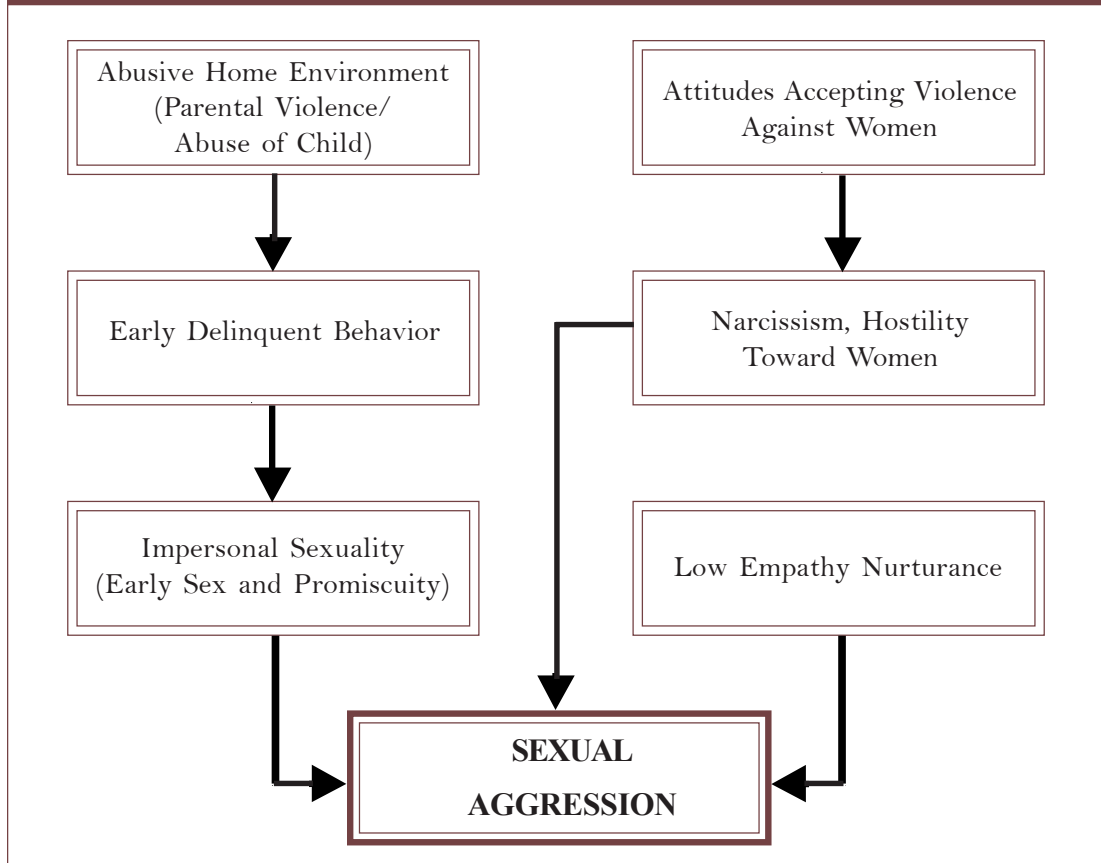
The behaviors described by Dr. Lisak are reflected in the work of Malamuth, Sackloskie, Koss, & Tanaka (1991). They identify a constellation of factors that, when combined, may create a "path to sex offending behavior."⁹⁴ *Figure D* illustrates the factors that contribute to sexually aggressive behavior.

Malamuth (2003) also notes that while each of these variables alone can contribute to sexually aggressive behavior, it is the cumulative effect that is more predictive.⁹⁵ In other words, an individual from an abusive home environment who is narcissistic, has low empathy for others, early delinquent behavior, impersonal sexuality, and believes that violence against women is acceptable is more likely to be sexually aggressive than an individual with only one of the risk factors.

⁹⁴ Malamuth, N.M., Sackloskie, R., Koss, M., & Tanaka, J. (1991). The characteristics of aggressors against women: testing a model using a national sample of college students. *Journal of Consulting and Clinical Psychology*, 59, 670-681.

⁹⁵ Malamuth, N.M. (2003) Criminal and noncriminal sexual aggressors: Intergrating psychopathy in a hierarchical-mediational confluence model. In R.A. Prentky, E.S. Janus, & M.C. Seto (Eds.), *Sexually coercive behavior: Understanding and management* (pp. 33-58). NY: The New York Academy of Sciences.

Figure D: Factors that Contribute to Sexually Aggressive Behavior



b. Child Molesters

When a sex offense involves an adult and child it is categorized as pedophilia.⁹⁶ This category can be further broken down by

- **Gender preference:** Male, female, or both (most pedophiles demonstrate attraction to both males and females)
- **Specificity or non-specificity:** Within the family unit only, or outside the family unit also.
- **Exclusivity or non-exclusivity:** Is the individual exclusively attracted to children or are they also attracted to adults.

Early attempts to predict recidivism of child molesters focused almost entirely on sexual deviancy (sexual preferences). Contemporary research is showing that while deviant sexual interest is extremely important in

⁹⁶ Geffner, R., Franey, K.C., & Falconer, R. (2003). Adult sex offenders: Current issues and future directions. In R. Geffner, K.C. Franey, T.G. Arnold, & R. Falconer (Eds.) *Identifying and treating sex offenders* (pp. 1-5). New York: The Haworth Press, Inc.

predicting recidivism, other factors should not be ignored. Antisocial orientation, lifestyle instability, impulse control, and various personality disorders also impact recidivism.

2. Juvenile Offenders

While a significant amount of research has been done on adult sex offending behavior, juvenile sex-offending behavior is still a relatively new area of study. According to the Center for Sex Offender Management:

Currently, it is estimated that juveniles account for up to one-fifth of all rapes and almost one-half of all cases of child molestation committed each year (Barbaree et. al, 1993, Becker et. al, 1993, Sickmund et. al, 1997). Adolescents age 13 to 17 account for the vast majority of cases of rape and child molestation perpetrated by minors (Davis and Leitenberg, 1987).⁹⁷

Precursors to sexually-aggressive behaviour in youth include physical and sexual abuse, exposure to aggressive role models, learning disabilities and academic difficulty.⁹⁸ Research also suggests exposure to pornography and substance abuse may contribute to the development of sexual aggression in youth.

Hunter and Becker, as well as Kahn and Chambers, found a history of physical abuse in 20 percent to 50 percent and a history of sexual abuse in 40 percent to 80 percent of sexually abusive youth (Hunter and Becker, 1998, Kahn and Chambers, 1991). “Rates of physical abuse and sexual victimization are even higher in samples of prepubescent and young female sexual abusers (Gray et al, 1997, Mathews et al, 1997).”⁹⁹

Exposure to aggressive role models was also found to be a risk factor, particularly with male children.¹⁰⁰ This risk factor can occur in isolation, but may also be part of a cycle of child abuse and neglect. Also, between 30 percent and 60 percent of youth who sexually offend were found to have learning disabilities.

Generally, juvenile sexual abusers fall into two categories: **those who target children** and **those who offend against peers or adults**.¹⁰¹ Researchers distinguish between the two groups based on the **age difference between the victim and the perpetrator** (child perpetrators are considered to be those who target children five or more years younger than themselves).¹⁰²

⁹⁷ Center for Sex Offender Management. (1999). *Understanding juvenile sexual offending behavior: Emerging approaches and management practices*. Retrieved on June 13, 2006 from <http://www.scom.org/pubs/juvbrg10.html>

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

Figure E provides a comparison between juveniles who offend against adults and those who offend against children.

For information on the disposition of juvenile cases, please see the Pennsylvania Juvenile Delinquency Benchbook.¹⁰³

3. Female offenders

According to the U.S. Department of Justice, females comprise only one percent of arrests for rape and eight percent of arrests for all other sex offenses.¹⁰⁴ However, emerging research is showing an increase in female sex offending. Finkelhor and Russell found that about 20 percent of child sexual assaults were perpetrated by females.¹⁰⁵ Sexual abuse by women often occurs in a care giving situation and may be committed in isolation or as part of coercion by a male counterpart.¹⁰⁶ Women who sexually molest are often socially isolated and lack a sense of attachment. They are likely to have a history of substance abuse, depression, and PTSD; and have a history of childhood sexual and/or physical abuse.¹⁰⁷

4. Offenders with Cognitive Disabilities

Although there are some unique challenges to managing sex offenders with developmental disabilities, it is important to remember that they pose the same risk as sex offenders who do not have such disabilities. Their disabilities do not cause sex offending behaviour; consequently, the disabilities should not be used to excuse the behaviour. Treatment strategies ordered in the criminal justice system or recommended by way of mental health/human services should reflect these challenges.

C. Risk Factors for Re-offending

Hanson, Morton, and Harris note sexual recidivism rates of 10-15 percent after five years, 20 percent after 10 years, and 30-40 percent after 20 years.¹⁰⁸ It is important to remember these numbers represent reported offenses and do not capture those that are unreported. Sexual recidivism for rapists and child molesters appear similar, however rapists are more likely than child molesters to

¹⁰³ Juvenile Court Judges Commission. (2003). *Pennsylvania Juvenile Delinquency Benchbook*.

¹⁰⁴ U.S. Department of Justice. Criminal offender statistics. Retrieved on June 22, 2006 from: <http://www.ojp.usdoj.gov/bjs/crimoff.htm#sex>.

¹⁰⁵ Finkelhor D. & Russell, D. (1984). Women as perpetrators: review of the evidence, in *Child Sexual Abuse: New Theory and Research*. NY: Free Press.

¹⁰⁶ Kaplan, M.S., & Green, A. (1995). Incarcerated female sex offenders: a comparison of sexual histories with eleven female non-sexual offenders. *Sex Abuse: A Journal of Research and Treatment*, 7, 287-300.

¹⁰⁷ *Id.*

¹⁰⁸ Hanson, R.K., Morton, K.E., & Harris, J.R. (2003). Sexual offender recidivism risk: what we know and what we need to know. In R.A. Prentky, E.S. Janus, & M.C. Seto (Eds.), *Conference on Understanding and Managing Sexually coercive behavior*: Vol. 989. Sexually coercive behavior (pp. 154-156). NY: The New York Academy of Sciences.

Figure E: Comparison Between Juveniles Who Offend Against Adults and Those Who Offend Against Children.

Characteristics	Offend Against Adults	Offend Against Children
Victims	<ul style="list-style-type: none"> ▪ Predominately assault females. ▪ Assault mostly strangers or acquaint.(Hunter et al, in press). 	<ul style="list-style-type: none"> ▪ Females victimized at slightly higher rates. ▪ Nearly half assault at least one male. ▪ Up to 40 percent of victims are either siblings or relatives (Hunter et al, in press).
Offense Patterns	<ul style="list-style-type: none"> ▪ More likely to commit with other criminal activity (Hunter et al, in press). 	<ul style="list-style-type: none"> ▪ Reliance on opportunity and guile, particularly when victim is a relative. ▪ Trick child by using bribes or threatening loss of relationship (Hunter et al, in press, Kaufman et al, 1996).
Social and Criminal History	<ul style="list-style-type: none"> ▪ More likely to have histories of non-sexual criminal offenses. ▪ Generally delinquent and conduct-disordered. (Hunter et al, in press, Kaufman et al, 1996, Richardson, et al, 1997). 	<ul style="list-style-type: none"> ▪ Deficits in self-esteem and social competency are common. ▪ Often lack skills and attributes necessary for forming and maintaining healthy interpersonal relationships (Awad and Saunders, 1989, Monto et al, 1998).
Behavior Patterns	<ul style="list-style-type: none"> ▪ Display high levels of aggression and violence. ▪ More likely to use weapons and cause injuries to their victims. (Awad and Saunders, 1989, Monto et al, 1998). 	<ul style="list-style-type: none"> ▪ Frequently display signs of depression (Becker et al, 1991). ▪ Youths with severe personality and/or psychosexual disturbance may display high levels of aggression and violence (Becker and Hunter, 1993).

recidivate with non-sexual violent offenses.¹⁰⁹ Hanson and Brussiere (in Hanson, R.K., Morton, K.E., & Harris, J.R. 2003) found that the **strongest** predictors of sexual recidivism are **sexual deviance** and **general criminality**.¹¹⁰ They also identified *prior sexual offenses, a history of selecting unrelated victims, or male victims, the number of prior offenses, and antisocial personality as being important in predicting recidivism*. Researchers emphasize that “no single risk factor is sufficient to predict whether a particular offender will re-offend or not.”¹¹¹

Hanson, Morton, and Harris define risk factors as **static**, and **dynamic**.¹¹² A subset of the **dynamic** risk factors are “stable” and “acute”. Risk factors that cannot change (static) include prior offenses, age, and other historical factors. While they may prove useful for evaluating long-term recidivism, they provide little direction on reducing risk. The researchers maintain that to change risk, **dynamic factors need to be considered**. Stable, dynamic factors may change slowly, over months or years (or not at all), while acute, dynamic factors can change over weeks, days, or even minutes.

What differentiates the two is that stable dynamic factors have a relatively lasting quality, like a propensity for drug or alcohol abuse, low remorse and intimacy problems. Hanson, Morton, and Harris suggest that **acute dynamic factors** are conditions that can change over a short period of time such as sexual arousal or intoxication that may immediately precede a re-offense.¹¹³

They note that *“the identification of dynamic factors that are associated with reduced recidivism hold particular promise in effectively managing sex offenders because the strengthening of these factors can be encouraged through various supervision and treatment strategies.”*¹¹⁴

The criminal justice community has been somewhat pessimistic about the rehabilitation of sex offenders. As research on sex offending behavior grows, however, new strategies are being developed that hold promise in managing this complex population of offenders. While strides have been made in sex offender management, Dr. Robert Prentky cautions that a disconnect still exists between knowledge and practice.

¹⁰⁹ Hanson, R.K., Morton, K.E., & Harris, J.R. (2003). Sexual offender recidivism risk: what we know and what we need to know. In R.A. Prentky, E.S. Janus, & M.C. Seto (Eds.), *Conference on Understanding and Managing Sexually coercive behavior*: Vol. 989. Sexually coercive behavior (pp. 154-156). NY: The New York Academy of Sciences.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Hanson, R.K., Morton, K.E., & Harris, J.R. (2003). Sexual offender recidivism risk: what we know and what we need to know. In R.A. Prentky, E.S. Janus, & M.C. Seto (Eds.), *Conference on Understanding and Managing Sexually coercive behavior*: Vol. 989. Sexually coercive behavior (pp. 154-156). NY: The New York Academy of Sciences.

¹¹³ *Id.*

¹¹⁴ *Id.*

According to Prentky:

*Research knowledge about sexually coercive behavior and treatment has grown tremendously over the last decade (Becker & Hunter, 1997; Gilligan & Talbot, 2000; Hanson, 1998; Gallagher, Wilson, Hirschfield, Coggeshall & MacKenzie, 1999), the fact remains that policymakers, elected officials, the media, and criminal justice practitioners still know relatively little about sex offending and how to deal with it.*¹¹⁵

D. Best Practices for Sex Offender Management

Within the last fifteen years, several high profile sexual assault cases have galvanized the nation. Public outrage at what was perceived as lenient treatment of sex offenders by the criminal justice system resulted in both national and state policy changes. Most states, by way of legislation, have increased penalties for those convicted of sex offenses, implemented community notification systems, and incorporated extensive and costly monitoring systems.

In 1996, the U.S. Department of Justice brought together national experts to examine sex offender management strategies.¹¹⁶ The participants in this summit concluded that “best practices” for sex offender management included:

- Providing policymakers with solid, research-based information.
- Using a cross-disciplinary approach to management. Participants should include individuals from academia and research, judges, prosecutors, public defenders, victim advocates, and public health professionals.
- Devoting federal funds to supporting research and technical assistance. (This recommendation resulted in the development of the Center for Sex Offender Management).
- Developing recommendations for appropriate prisoner reintegration programs.
- Including victim advocacy groups in policy development.
- Evaluating responses before implementing them to avoid the unintended consequences of “quick fixes.”

Although significant changes have already occurred, there is still much debate between researchers and policy makers about how to manage sex offenders in the community. While this section is not comprehensive, it does provide information on what is considered “best practice” in sex offender management.

¹¹⁵ Prentky, R.A., Janus, E.S., & Seto, M.C. (Eds.). (2003). *Sexually coercive behavior: Understanding and management. Conference on Understanding and Managing Sexually Coercive Behavior* (pp. ix-xiii). NY: The New York Academy of Sciences.

¹¹⁶ Prentky, R.A., Janus, E.S., & Seto, M.C. (Eds.). (2003). *Sexually coercive behavior: Understanding and management. Conference on Understanding and Managing Sexually Coercive Behavior, USA*, 989, 1-7.

These guidelines are based on recommendations from the Center for Sex Offender Management (CSOM). They suggest that sex offender management programs should be collaborative, offer a victim-centered approach, provide specialized sex offender assessment and treatment, implement specialized sex offender supervision, and invest in prevention programs that focus on stopping sexual violence before it occurs.¹¹⁷

According to CSOM, one of the most important strategies for effective sex offender management is interagency collaboration. Collaborations should include the following agencies and individuals:

- Criminal justice system: judges and judicial personnel (it is recognized that judicial independence must be maintained); prosecutors, defense attorneys, law enforcement agents, and those responsible for *processing* offenders through the criminal justice system.
- Correctional officials: Those responsible for *preparing* offenders for release into the community.
- Victim advocates and victim treatment providers: Those responsible for helping the victim to *navigate* the criminal justice system.
- Sex offender treatment providers: Those who have specialized *knowledge* of offender behavior and can provide recommendations for community management.
- Additional groups or individuals that can participate on an “as needed” basis. These members could include:
 - Community leaders who can assist in educating the public about sex offender behavior as well as assist in addressing community concerns.
 - Lawmakers who have an interest in sex offender policy: Including these individuals is key to assure that sex offender policy is based on “best practice” models and that funding streams are directed to support these models.
 - Community agencies that can support offenders once they are released into the community by providing housing and employment.

Other important components of sex offender management are specialized assessment and treatment. Specific assessment tools implemented by trained professionals are integral in detecting/identifying daily, on-going risk as well as future risk. Specialized sex offender treatment should address the denial, distortions, and manipulation so common to the sex offending population. Treatment providers must be knowledgeable about relapse prevention strategies, and use cognitive-behavioral techniques that address the complex treatment needs of sex offenders.

¹¹⁷ Talbot, T., Gilligan, L., Carter, M. & Matson, S. (2002). An overview of sex offender management. (Available at www.csom.org/pubs/csom_bro.pdf).

Maintaining a victim-centered approach is imperative to protect both past and future victims. Victim notification of offender release is key with these crimes. A victim may have genuine safety concerns and need to be apprised if a perpetrator is released into their community.

Specialized sex offender supervision is also imperative in assuring community safety. Traditional supervision practices such as scheduled office visits and phone contact are not adequate for supervising the sex offender and should not be used alone. Parole officers need to be specially trained to identify relapse behaviors and have small case loads to provide adequate oversight. Supervision must include collaboration between treatment providers, parole agents, victim advocates, and law enforcement agents.

According to the Center for Sex Offender Management, “best practice” for sex offender management includes:

- Relapse prevention and cognitive behavior techniques that are tailored to meet the specialized needs of the offender.
- Treatment programs to address marital and family issues, substance abuse treatment, and educational and vocational needs.
- Appropriate employment and social support that builds on pro-social relationships.
- Appropriate housing.
- Appropriate monitoring of the offender in the community.

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2.1 CHAPTER OVERVIEW

This chapter discusses offenses from the Pennsylvania Crimes Code, as well as related statutory definitions, regarding crimes of sexual violence and of a sexual nature. The chapter is divided into twelve sections. Section 2.2 lists the statutory definitions of terms typically found in sexual offenses, including:

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

Section 2.3 explains the law in Pennsylvania when the alleged assailant is a minor.

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

- Rape, Section 2.4;
- Statutory Sexual Assault, Section 2.5;
- Involuntary Deviate Sexual Intercourse, Section 2.6;
- Sexual Assault, Section 2.7;
- Aggravated Indecent Assault, Section 2.8;
- Indecent Assault, Section 2.9;
- Indecent Exposure, Section 2.10;
- Incest, Section 2.11; and
- Invasion of Privacy, Section 2.12.

Offenses specifically against children are addressed in Chapter 3.

The standard of judicial construction for both crimes and provisions is well settled: when the language of a statute is clear and unambiguous, it must be given effect in accordance with its plain and common meaning. 18 PA. CONS. STAT. § 105 (provisions of the Crimes Code must be construed “according to the fair import of their terms”); 1 PA. CONS. STAT. § 1921(b) (“when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”); *Commonwealth v. Kelley*, 569 Pa. 179, 801 A.2d

551 (2002). Finally, penal statutes are to be strictly construed in favor of the accused. 1 PA. CONS. STAT. § 1928(b)(1); **Commonwealth v. Booth**, 564 Pa. 228, 766 A.2d 843 (2001).

2.2 DEFINITIONS

A. Complainant

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “complainant” as: “An alleged victim of a crime under this chapter.”

2. Credibility

The credibility of testimony by a complainant is to be evaluated in the *same manner* as the complainant of any other crime. 42 PA. CONS. STAT. ANN. § 3106.

18 PA. CONS. STAT. ANN. § 3106.

Testimony of Complainants

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

Impeachment of the complainant is permissible. *See In Interest of Lawrence J.*, 456 A.2d 647, 649-650 (Pa. Super. 1983): evidence of victim’s reputation in community for truth and veracity is admissible to impeach the victim’s credibility; *See also, Commonwealth v. Berry*, 513 A.2d 410, 416 (Pa. Super. 1986).

(a) Corroboration

No corroboration is necessary.¹

(b) Jury Instructions

No instruction is permitted that cautions the jury to view complainant’s testimony any differently than others.²

¹ **Commonwealth v. Kunkle**, 623 A.2d 336, 338 (Pa. Super. 1993), *appeal denied*, 536 Pa. 621, 637 A.2d 281 (1993). *See* 31 A.L.R.4th 120, MODERN STATUS OF RULE REGARDING NECESSITY FOR CORROBORATION OF VICTIM’S TESTIMONY IN PROSECUTION FOR SEXUAL OFFENSE.

² **Commonwealth v. Barnosky**, 400 A.2d 168, 171 (Pa. Super. 1979).

3. Rape shield law

Complainant’s Past Sexual Conduct Not Admissible: Evidence of specific instances, opinions, or reputation of the complainant’s past sexual conduct is generally not admissible. 18 PA. CONS. STAT. ANN. § 3104 (a).

18 Pa.Cons.Stat.Ann § 3104.

Evidence of Victim’s Sexual Conduct

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

(b) Evidentiary Proceedings.—A defendant who proposes to offer evidence of the alleged victim’s past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

(a) Exception: Complainant’s Past Sexual Conduct With Defendant

Evidence of the complainant’s past sexual conduct with the defendant is admissible if:

- *Consent* of the complainant is at issue, and
- Such evidence is otherwise admissible pursuant to the rules of evidence.

Commonwealth v. Beltz, 829 A.2d 680, 684 (Pa. Super. 2003): the trial court correctly refused to admit evidence that victim had sex with another man earlier in the day because it was irrelevant as to whether she had consensual sex with defendant later in the same day.

At trial, the procedure is as follows:

- (i) A defendant who wishes to introduce evidence of the complainant’s past sexual conduct must file a written motion and offer of proof at the time of trial. 18 PA. CONS. STAT. ANN. § 3104 (b)³

³ ***Commonwealth v. Beltz***, 829 A.2d 680, 684 (Pa. Super. 2003).

The proffers of evidence relating to the past sexual conduct of the alleged victim must not be vague, conjectural, or speculative. **Commonwealth v. Fink**, 791 A.2d 1235, 1242 (Pa. Super. 2002).

- (ii) If the court determines that the motion and offer present a prima facie right to present the evidence, the court must hold an in camera hearing. 18 PA.CON.S. STAT. ANN. § 3104 (b)
- (iii) The court must make findings on the record as to the admissibility of the proposed evidence pursuant to the standard contained in § 3104 (a).

(b) Exception: Bias Against Defendant

Evidence of the victim’s prior sexual activity with someone other than the defendant, or of sexual activity with the defendant when consent is not at issue, is admissible on the issue of her bias against the defendant. **Commonwealth v. Black**, 487 A.2d 396, 400-401 (Pa. Super. 1985)(*en banc*); **Commonwealth v. Fink**, 791 A.2d 1235 (Pa. Super. 2002).⁴ Admission conditioned upon:

- whether the proposed evidence is relevant to show bias or motive or to attack credibility;
- whether the probative value of the evidence outweighs its prejudicial effect; and
- whether there are alternative means of proving bias or motive or to challenge credibility.

At trial, the procedure is as follows:

- (i) in camera hearing similar to that outlined in 18 PA. CONS. STAT. ANN. § 3104.⁵
- (ii) evidence will be excluded if “it would so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice.”⁶

⁴ In **Commonwealth v. Black**, 487 A.2d 396 (Pa. Super. 1985)(*en banc*), the defendant sought to offer evidence that the victim, the defendant’s daughter, was having a sexual relationship with her brother whom the defendant had ejected from the house. The defendant argued that this prior instance of sexual conduct was relevant to his defense, i.e., that the victim had fabricated the allegation of abuse in order to remove her father from the home; that way her brother could return and resume the sexual relations with her. The Superior Court held that a defendant has a right to confrontation under the Sixth Amendment of the United States Constitution; therefore, the Rape Shield Law could not be used to exclude relevant evidence that shows the *bias of a witness or attacks the credibility of the witness*. Thus, relevant evidence of such past sexual conduct would be admissible as long as it would not “so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice.”

⁵ **Commonwealth v. Black**, 487 A.2d 396, 401 (Pa. Super. 1985); **Commonwealth v. Fink**, 791 A.2d 1235 (Pa. Super. 2002).

⁶ **Commonwealth v. Black**, 487 A.2d 396, 401 (Pa. Super. 1985)(*en banc*); **Commonwealth v. Stewart**, 450 A.2d 732 (Pa. Super. 1982).

Limitation: The decision of the Superior Court in *Commonwealth v. Black*, 487 A.2d 396, 400-401 (Pa. Super. 1985)(*en banc*), has been applied narrowly in a number of subsequent decisions, and “only where the victim’s credibility was allegedly affected by bias against or hostility toward the defendant, or the victim had a motive to seek retribution.” *Commonwealth v. Boyles*, 595 A.2d 1180, 1186 (Pa. Super. 1991); *Commonwealth v. Gaddis*, 639 A.2d 462, 466 (Pa. Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994).

(c) **Exclusion: Prior Sexual Assault**

If the prior sexual conduct used to impeach the alleged victim was a prior sexual assault, then 18 PA. CONS. STAT. ANN. § 3104 does not apply, and the evidence is evaluated under the general evidentiary rules.

In *Commonwealth v. Johnson*, 536 Pa. 153, 638 A.2d 940 (1994), the Supreme Court of Pennsylvania held that the Rape Shield Law did not prohibit the admission of evidence regarding a prior sexual assault suffered by the ten-year old victim when the defendant sought introduction of the testimony to establish that the victim was blaming him for the assault at the instigation of another individual who had sexually assaulted her on a prior occasion. Evidence of prior sexual assaults was not considered to be conduct of the victim that would reflect upon her reputation for chastity, so the Rape Shield Law did not apply. “Evidence that (the victim) had been subject to a previous sexual assault would not reflect upon (her) reputation for chastity. To be a victim is not “conduct” of the person victimized. It would be illogical to conclude that the Rape Shield Law intended to prohibit this type of testimony.” *Id.* at 942.⁷

4. Prompt Report

There is no requirement that a complainant promptly report allegations to a public authority. 18 PA. CONS. STAT. ANN. § 3105.

18 PA. CONS. STAT. ANN. § 3105.

Prompt Complaint

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

⁷ See also *Commonwealth v. Holder*, 815 A.2d 1115, 1118-1119 (Pa. Super. 2003), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003).

(a) **Evidence of Failure to Report Promptly**

If otherwise admissible, this section does not preclude the admission of evidence of a failure to promptly report the allegations.⁸ The Pennsylvania Supreme Court stated in *Commonwealth v. Lane*, 521 Pa. 390, 398, 555 A.2d 1246, 1250 (1989), “The lack of a prompt complaint by a victim of a crime, although not dispositive of the merits of the case, may justifiably produce a doubt as to whether the offense indeed occurred, or whether it was a recent fabrication by the complaining witness.”

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

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

- *Commonwealth v. Snoke*, 525 Pa. 295, 302, 580 A.2d 295, 298 (1989)(victim was five years old and alleged attacker was victim’s father).
- *Commonwealth v. Lane*, 521 Pa. 390, 398, 555 A.2d 1246, 1250 (1989)(maturity of victim is key to determine relevancy of lack of prompt complaint).

(b) **Hue and Cry Doctrine**

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

(c) **Jury Instructions**

An instruction regarding prompt complaint is allowed when the fact of a sexual assault is at issue and the complainant comprehends the offensiveness of the assaults at the time of the conduct.

⁸ *Commonwealth v. Jones*, 672 A.2d 1353, 1358 (Pa. Super. 1996).

Commonwealth v. Ables, 590 A.2d 334 (Pa. Super. 1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150(1991). The Pennsylvania Supreme Court stated in ***Commonwealth v. Snoke***, 525 Pa. 295, 580 A.2d 295 (1989), “Specifically, where the actual occurrence of the assault is at issue in the case, the trial judge is required to charge the jury as to the **relevance of a delay in disclosure and the significance of a prompt complaint.**” *Id.* at 302, 580 A.2d at 198 (emphasis added). *See also*, ***Commonwealth v. Thomas***, 904 A.2d 964, 970 (Pa. Super. 2006)

(d) **Special Considerations Involving Minor Victims**

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

- Immaturity of the victim that would cause the child victim not to appreciate the offensiveness of the encounter and the need for prompt disclosure;
- The lack of a prompt complaint might be made in order to protect the truly guilty party, as in the case of a child blaming an innocent party for the wrongdoing of a parent;
- When a parent tells a child to keep a secret and the child is of tender years with no reason to question the parent;
- The age of the victim;
- The mental and physical condition of the victim;
- The atmosphere and physical setting in which the incidents were alleged to have taken place;
- The extent to which the accused may have been in a position of authority, domination or custodial control over the victim;
- Whether the victim was under duress.

B. Deviate Sexual Intercourse

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “deviate sexual intercourse” as “Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.”

⁹ These factors are set forth in ***Commonwealth v. Ables***, 590 A.2d 334 (Pa. Super. 1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150(1991), and in ***Commonwealth v. Snoke***, 525 Pa. 295, 302, 580 A.2d 295, 298 (1989).

2. Types

(a) **Oral and Anal Intercourse**

- 1 – sexual intercourse per os or per anus,
- 2 – between human beings;

Intercourse: the physical sexual contact between two individuals that involves the genitalia of at least one person. *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (Pa. 2002).

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

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

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

Contrasted with Sexual Intercourse: Sexual intercourse is distinct from deviate sexual intercourse in that sexual intercourse “also includes intercourse in ‘its ordinary meaning.’” *Commonwealth v. Kelley*, 569 Pa. 179, 185, 801 A.2d 551, 555 (Pa. 2002).

(b) **Bestiality**

- 1 – any form of sexual intercourse,
- 2 – with an animal;

(c) **Penetration With a Foreign Object**

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

Foreign object: 18 PA. CONS. STAT. ANN. § 3101 defines “foreign object” as “[i]nclud[ing] any physical object not a part of the actor’s body.”

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

3. Penetration

(a) Oral Penetration Sufficient

It has been held that oral contact with the female genitalia is sufficient to support the penetration requirement for IDSI.¹⁰

(b) Oral Penetration – Mouth or Tongue

An assailant can penetrate by use of the mouth or tongue.

Commonwealth v. Wilson, 825 A.2d 710, 714 (Pa. Super. 2003).¹¹ Some form of oral contact with the genitalia is all that is required.¹²

C. Forcible Compulsion

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “forcible compulsion” as “[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person’s death, whether the death occurred before, during or after sexual intercourse.”

2. Moral, Psychological or Intellectual Force

Forcible Compulsion “includes not only physical force or violence but also moral, psychological, or intellectual force used to compel a person to engage in sexual intercourse against that person’s will.”

Youthful victims: The appellate courts have recognized the influence an adult has over a child. In **Commonwealth v. Rhodes**, 510 Pa. 537, 556, 510 A.2d 1217, 1227 (1986), the Pennsylvania Supreme Court stated:

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

¹⁰ **Commonwealth v. Trimble**, 615 A.2d 48, 50 (Pa. Super. 1992); **Commonwealth v. Ziegler**, 550 A.2d 567, 569 (Pa. Super. 1988).

¹¹ *See also, In the Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994) *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another”; **Commonwealth v. L.N.**, 787 A.2d 1064, 1070 (Pa. Super. 2001), *alloc. denied*, 569 Pa. 680, 800 A.2d 931 (2002).

¹² **Commonwealth v. Trimble**, 615 A.2d 48, 50 (Pa. Super. 1992).

the use of physical force or violence or the explicit threat of physical force or violence.

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

3. Actual Force

The force needs to be such as to demonstrate an absence of consent, inducing submission without further resistance.¹³

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

For example, in a rape prosecution, the evidence was sufficient for the jury to find forcible compulsion, or threat of force, where evidence showed that defendant physically assaulted victim; hit the victim in her face with a pillow; held down the victim's shoulders before and during intercourse; and removed victim's clothing. ***Commonwealth v. Jones***, 672 A.2d 1353, 1354 (Pa. Super. 1996).

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

(a) Degree of Force

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

Factors to determine compulsion include:

- (i) the respective ages of the victim and the accused;
- (ii) the respective mental and physical conditions of the victim and the accused;

¹³ ***Commonwealth v. Buffington***, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

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

See e.g., Commonwealth v. Ruppert, 579 A.2d 966 (Pa. Super. 1990).

(b) Resistance

The prosecution does not have to show that the complainant offered any resistance towards the actor. 18 PA. CONS. STAT. ANN. § 3107.

18 PA. CONS. STAT. ANN. § 3107. Resistance Not Required

The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.

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

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

Therefore, the prosecution does not have to prove that the alleged victim resisted the attack in order to prove that the sexual conduct was against the victim's will or without the victim's consent.

D. Indecent Contact

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines "indecent contact" as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person."

2. Genitals

This sections' plain meaning is that "indecent contact" occurs when there is proscribed contact with the female or male genitals.

- **Commonwealth v. Gordon**, 543 Pa. 513, 520, 673 A.2d 866, 869 (1996): defendant rubbed his penis against "buttocks/thigh/legs" of victim.
- **In re J.R.**, 648 A.2d 28, 33 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): defendant licked vaginal area of victim.

3. Other Intimate Parts

Phrase "other intimate parts" does not refer solely to genitalia.¹⁴

- **Commonwealth v. Capo**, 727 A.2d 1126(Pa. Super. 1999), *appeal denied*, 561 Pa. 667, 749 A.2d 465 (1999): non-consensual attempt to kiss victim on the mouth, and rubbing of her shoulders, back and stomach considered indecent contact.

4. Touching

Not limited to hand or foot: The term touching is not limited to the hand or foot; rather, the courts look to either the defendant's body or the victim's body to determine if there has been a "touching" within the statute.¹⁵

- if any part of a victim's body is brought into contact with a sexual or intimate part of the defendant's body, without the victim's consent, for the purpose of arousing or gratifying the sexual desire in either person, such contact constitutes indecent contact.¹⁶
- if a sexual or intimate part of the victim's body is brought into contact with any part of the defendant's body, without the victim's consent, for the purpose of arousing or gratifying the sexual desire in either person, such contact constitutes indecent contact.¹⁷

No Direct Skin-to-Skin Contact Necessary: Touching occurs even though there is no skin-to-skin contact.

- **Commonwealth v. Ricco**, 650 A.2d 1084 (Pa. Super. 1994): touching occurred when defendant placed victim's hand on his genitals, even though he was wearing underwear.

¹⁴ **Commonwealth v. Capo**, 727 A.2d 1126(Pa. Super. 1999), *appeal denied*, 561 Pa. 667, 749 A.2d 465 (1999).

¹⁵ **Commonwealth v. Grayson**, 549 A.2d 593, 596 (Pa. Super. 1988).

¹⁶ *Id.*

¹⁷ *Id.*

E. Serious Bodily Injury

1. Definition

18 PA. CONS. STAT. ANN. § 2301 defines “serious bodily injury” as: bodily injury which creates:

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

2. Types

(a) Substantial Risk of Death

- ***Commonwealth v. Caterino***, 678 A.2d 389, 392-393 (Pa. Super. 1996), appeal denied, 546 Pa. 652, 684 A.2d 555 (Pa. 1996): physical assault which resulted in victim’s broken nose and severed artery constituted “serious bodily injury” when victim could have bled to death. Note: broken nose and minor facial lacerations alone are insufficient to constitute “serious bodily injury”.

(b) Impairment of the Function of a Bodily Member

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

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

(a) Facial Injuries

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

(b) **Blow to Head**

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

F. Sexual Intercourse

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “sexual intercourse” as “In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.”

(a) **Intercourse - Ordinary Meaning**

The plain meaning of “intercourse” is “physical sexual contact between individuals that involves the genitalia of at least one person ...” In accord with Webster’s Third New International Dictionary 1177 (unabridged 1986).¹⁸

(b) **Penetration Requirement**

The requirement is “penetration, however, slight”; there is no requirement that penetration reach the vagina or “farther reaches of the female genitalia...” *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992), citing *Commonwealth v. McIlvaine*, 560 A.2d 155, 159 (Pa. Super. 1989); *In re A.D.*, 771 A.2d 45, 49 (Pa. Super. 2001).¹⁹

Oral Penetration Sufficient: It has been held that oral contact with the female genitalia is sufficient to support the penetration requirement for IDSI.²⁰ Both “deviate sexual intercourse” and “sexual intercourse” include the phrase “penetration, however slight.” 18 PA. CONS. STAT. ANN. § 3101.

Oral Penetration – Mouth or Tongue: An assailant can penetrate by use of the mouth or tongue. *Commonwealth v. Wilson*, 825 A.2d 710, 714 (Pa. Super. 2003).²¹ Some form of oral contact with the genitalia is all that is required.²²

¹⁸ *Commonwealth v. Kelley*, 569 Pa. 179, 186-187, 801 A.2d 551, 555 (2002).

¹⁹ *See generally*, What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163, § 3 (1977).

²⁰ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992); *Commonwealth v. Ziegler*, 550 A.2d 567, 569 (Pa. Super. 1988).

²¹ *See also, In the Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994) *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another”; *Commonwealth v. L.N.*, 787 A.2d 1064, 1070 (Pa. Super. 2001), *alloc. denied*, 569 Pa. 680, 800 A.2d 931 (2002).

²² *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992).

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

Testimony of Victim Sufficient: The uncorroborated testimony of a rape victim as to penetration, if believed by the jury, is sufficient to support a rape conviction, and no medical testimony is needed to corroborate a victim's testimony. *Commonwealth v. Poindexter*, 646 A.2d 1211, 1214 (Pa. Super. 1994); *Commonwealth v. Price*, 616 A.2d 681, 685 (Pa. Super. 1992).

Penetration Proven Circumstantially: Circumstantial evidence may be used to prove the element of penetration. *Commonwealth v. Stambaugh*, 512 A.2d 1216, 1219 (Pa. Super. 1986) (gynecologist testified that the complainant's hymen was no longer intact). *Commonwealth v. Usher*, 371 A.2d 995, 997-998 (1977). In *Commonwealth v. Xiong*, 630 A.2d 446 (Pa. Super. 1993) (en banc), *appeal denied*, 537 Pa. 609, 641 A.2d 309 (1994), the Superior Court ruled that evidence that the victim's hymen was no longer intact was admissible as circumstantial evidence of penetration, but alone insufficient to prove penetration. 630 A.2d at 454.

(c) **Emission not required**

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

2.3 AGE OF ACCUSED

A. Age of Accused: Generally

If an accused is of eighteen years of age or older at the time of the commission of the sexually violent crime, the prosecution is under the criminal law and procedures. However, the Juvenile Act, 42 PA.CON.S.TAT.ANN. § 6301 et seq., allows the prosecution of a juvenile²³ in criminal court under two separate circumstances. The first is a direct file under Section 6302 of the Juvenile Act,

²³ The Juvenile Act defines child as: [a]n individual who: (1) is under the age of 18 years; (2) is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years; or (3) was adjudicated dependent before reaching the age of 18 years and who, while engaged in a course of instruction or treatment, requests the court to retain jurisdiction until the course has been completed, but in no event shall a child remain in a course of instruction or treatment past the age of 21 years. 42 PA.CON.S.TAT.ANN. § 6302. Additionally, to fall under the definition of a "delinquent child" a juvenile must be at least 10 years of age: "Delinquent child. A child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation." *Id.* The juvenile court is divested of jurisdiction when an individual reaches 21 years of age: "Juvenile court jurisdiction terminates at 21, regardless of whether or not appellants continue to pose a threat to society." *Commonwealth v. Zoller*, 498 A.2d 436, 440 (Pa. Super. 1985).

42 PA.CONS.STAT.ANN. § 6302, and the second is a discretionary transfer pursuant to Section 6355 of the Juvenile Act, 42 PA.CONS.STAT.ANN. § 6355(a).

B. Excluded Offenses from Jurisdiction of Juvenile Court

1. Direct File Crimes

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

Under 42 PA.CONS.STAT.ANN. § 6302 (definition of “Delinquent Act”), the direct filing of adult criminal charges against a juvenile of age 15 years or older is required for specified sexually violent felonies, as well as other violent felonies, if a deadly weapon is used in the commission of the sexually violent offense(s) stated below:

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

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

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

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

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

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

In a direct file case, the juvenile has the option of requesting treatment within the juvenile system through a transfer process known as “decertification.” **See Commonwealth v. Aziz**, 724 A.2d 371, 373 (Pa.Super. 1999), **appeal denied**, 563 Pa. 670, 759 A.2d 919 (2000). In determining whether to transfer such a case from criminal division to juvenile division, “the child shall be required to establish by a preponderance of the evidence that the transfer will serve the public interest.” 42 PA.CONS.STAT.ANN. § 6322(a). Pursuant to § 6322(a) the trial court must consider the factors contained in 42 PA.CONS.STAT.ANN. § 6355(a)(4)(iii) in determining whether the child has established that the transfer will serve the public interest. The statutorily set factors are listed below.

The decision whether to grant decertification will not be overturned absent a gross abuse of discretion. **Commonwealth v. Aziz**, 724 A.2d 371, 378, (Pa.Super. 1999), **appeal denied**, 563 Pa. 670, 759 A.2d 919 (2000).

2. Discretionary Certification

(a) Certification to Criminal Court

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

42 PA.CONS.STAT.ANN. § 6355

Transfer to Criminal Proceedings, provides:

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

- (1) The child was 14 or more years of age at the time of the alleged conduct.

- (2) A hearing on whether the transfer should be made is held in conformity with this chapter.
- (3) Notice of writing of the time, place, and purpose of the hearing is given to the child and his parents, guardian, or other custodian at least three days before the hearing.
- (4) The court finds:
 - (i) that there is a prima facie case that the child committed the delinquent act alleged;
 - (ii) that the delinquent act would be considered a felony if committed by an adult;
 - (iii) that there are reasonable grounds to believe that the public interest is served by the transfer of the case for criminal prosecution. In determining whether the public interest can be served, the court shall consider the following factors:
 - (A) the impact of the offense on the victim or victims;
 - (B) the impact of the offense on the community;
 - (C) the threat to the safety of the public or any individual posed by the child;
 - (D) the nature and circumstances of the offense allegedly committed by the child;
 - (E) the degree of the child's culpability;
 - (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
 - (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:
 - (I) age;
 - (II) mental capacity;
 - (III) maturity;
 - (IV) the degree of criminal sophistication exhibited by the child;

- (V) previous records, if any;
 - (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
 - (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
 - (VIII) probation or institutional reports, if any;
 - (IX) any other relevant factors; and
- (iv) that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.

(b) Chapter Inapplicable Following Transfer.—The transfer terminates the applicability of this chapter over the child with respect to the delinquent acts alleged in the petition.

(c) Transfer at Request of Child.—The child may request that the case be transferred for prosecution in which event the court may order this chapter not applicable.

The emphasis of the court’s review is on what best serves the public interest. To avoid certification when it is requested by the prosecution, the juvenile must establish his amenability to the juvenile system, rather than on the Commonwealth to prove a lack of amenability. *In re J.B.*, 909 A.2d 393, 396 (Pa.Super. 2006). The juvenile’s amenability to treatment is one of several factors in determining whether the public interest is served by transferring the case for criminal prosecution. *See Commonwealth v. Burley*, 715 A.2d 430, 433 (Pa.Super. 1998), *appeal denied*, 558 Pa. 606, 736 A.2d 602 (1999); 42 PA.CON.S.TAT.ANN. § 6355(a)(4)(iii).

(b) Appellate Review

When reviewing a trial court’s decision to certify a juvenile for trial as an adult, the appellate court will not disturb the juvenile court’s determination, absent a gross abuse of discretion. *Commonwealth v. McGinnis*, 675 A.2d 1282 (Pa. Super. 1996). A gross abuse of discretion is shown by “an exercise of manifestly unreasonable judgment based upon partiality, prejudice or ill will.” *Commonwealth v. Potts*, 673 A.2d 956, 959 (Pa.Super. 1996).

Appellate court will review the record to ensure that trial court gave equal concern for the *public interest* with the rehabilitation of the child. Trial court may not ignore the public interest determination required by the Juvenile Act in 42 PA.CONS.STAT.ANN. § 6355(a)(4) and focus solely or primarily on the rehabilitative needs of the juvenile. *In re J.B.*, 909 A.2d 393 (Pa.Super. 2006).

2.4 RAPE

Types of Rape: Elements

- 1) Engaging in sexual intercourse with a complainant;²⁴
- 2) In one of the following circumstances:
 - a) By forcible compulsion²⁵ (18 PA. CONS. STAT. ANN. § 3121(a)(1));
 - b) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution (18 PA. CONS. STAT. ANN. § 3121(a)(2));
 - c) The complainant is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring (18 PA. CONS. STAT. ANN. § 3121(a)(3));
 - d) The person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance (18 PA. CONS. STAT. ANN. § 3121(a)(4));
 - e) The complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA. CONS. STAT. ANN. § 3121(a)(5));
 - f) The person engages in sexual intercourse with a complainant who is less than 13 years of age. (18 PA. CONS. STAT. ANN. § 3121 (c));
 - g) The person violates Section 3121 and the complainant is under 13 years of age and suffers serious bodily injury in the course of the offense. (18 PA. CONS. STAT. ANN. § 3121 (d)).

A. Rape by Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(1).

2. Forcible Compulsion

The force necessary to support a conviction of rape ... need only be such as to establish lack of consent and to induce the [victim] to submit without

²⁴ "Sexual intercourse" and complainant" are defined in Chapter 2, section 2.2.

²⁵ "Forcible Compulsion" is defined in Chapter 2, section 2.2.

additional resistance. *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994).

(a) **Type of Force**

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

(b) **Degree of Force**

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

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

3. Consent

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

(a) **Mistake of Fact**

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

(b) **Post-rape Trauma**

Evidence of a victim’s post-rape trauma is admissible in order to prove lack of consent. *Commonwealth v. Pickford*, 536 A.2d 1348, 1351-1352 (Pa. Super. 1987), *appeal dismissed*, 522 Pa. 506, 564 A.2d 158 (1989).

4. Rape Trauma Syndrome

An expert’s testimony concerning the effect of “rape trauma syndrome” on a victim, i.e., her failure to identify the assailant

shortly after the sexual assault because of an acute phase of “rape trauma syndrome,” making ordinary functions difficult, improperly enhanced the victim’s credibility in the eyes of jury, and, as such, was inadmissible. **Commonwealth v. Gallagher**, 519 Pa. 291, 297, 547 A.2d 355, 358 (1988). The Court found equally inadmissible the same expert’s opinion that the victim’s in-court identification five years later was credible.

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

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

Its relevance to the issue of consent is that if the victim exhibits the symptomology of rape trauma syndrome, it is likely that she was in fact raped and that she did not consent. **Gallagher**, 353 Pa. Super. at 456-457, 510 A.2d at 751, (Cavanaugh, J., dissenting).

B. Rape by Threat of Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(2).

2. “Forcible Compulsion”

“Forcible compulsion” defined in Chapter 2, section 2.2.

3. Objective Standard

An objective standard is used in determining whether this circumstance is present. **Commonwealth v. Rhodes**, 510 Pa. 537, 510 A.2d 1217 (1986).

4. Verbal Threats Sufficient

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

5. Implied Threats

If a physical assault occurs “shortly before sexual intercourse” and the physical assault is unrelated to a desire to have sex, then there may be an implied threat that not submitting to sexual intercourse will result in further physical abuse. “[I]f the complainant acquiesced in the sexual relations out of fears generated by the earlier assault, then she did not ‘consent’ to the sexual intercourse.” See *Commonwealth v. Harvey*, 27 Pa. D & C.4th 171, 175-176 (Crawford Cty. 1994).

C. Rape When the Complainant is Unconscious or Unaware

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(3).

2. Purpose of Section

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

3. Sleeping Victim

A sleeping victim is unconscious for purposes of rape statute. *Commonwealth v. Price*, 616 A.2d 681 (Pa. Super. 1992). This circumstance is present so long as the complainant was unconscious when sexual intercourse was initiated. *Id.* See also, *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745 (Pa. 2000).

4. Unconscious Victim

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

5. Constructively Unconscious

A complainant may be constructively unconscious if his or her awareness is severely impaired. *Commonwealth v. Erney*, 548 Pa. 467, 698 A.2d 56 (1997). The Pennsylvania Supreme Court has held that the statutory elements of section 3121(a)(3) are established if the victim was intermittently conscious and unconscious throughout an assault and was “at all relevant times in such impaired physical and mental condition so as to be unable to knowingly consent[.]” *Id.*, 548 Pa. at 473, 698 A.2d at 59. In such cases, the victim’s submission to sexual intercourse is deemed involuntary, and intercourse with her constitutes rape of an unconscious individual. *Id.* See also, *Commonwealth v. Lungin*, 77 Pa. D. & C.4th 267 (Bucks Cty. 2005)

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

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(4).

2. Additional penalty

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

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

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(5).

2. Commonwealth's Burden of Proof

The Commonwealth must prove the defendant acted intentionally, knowingly, or recklessly regarding the victim's mental disability for every material element of the statutory provision.²⁶

F. Rape of a Child

1. Statutory

18 PA. CONS. STAT. ANN. § 3121 (c).

2. Elements of offense

A person commits the offense of rape of a child when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

3. Mistake as to age

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

18 PA. CONS. STAT. ANN. § 3102

Mistake as to Age

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

²⁶ See *Commonwealth v. Thomson*, 673 A.2d 357 (Pa. Super. 1996), *appeal denied*, 546 Pa. 679, 686 A.2d 1310(1996).

Commonwealth v. Dennis, 784 A.2d 179, 181 (Pa. Super. 2001), *appeal denied*, 568 Pa. 733, 798 A.2d 1287 (2002): Victim of 12 years of age deemed incapable of consenting, therefore defendant was criminally liable for rape, regardless of the victim's consent or of defendant's purported belief that victim was 14 or 16.

G. Rape of a Child Resulting in Serious Bodily Injury

1. Statutory

18 PA. CONS. STAT. ANN. § 3121 (d).

2. Elements of Offense

A person commits the offense of rape of a child resulting in serious bodily injury when the person violates this section, and the complainant is under 13 years of age and suffers serious bodily injury in the course of the offense.

Commonwealth v. Kerrigan, ___ A.2d ___, 2007 WL 695292 (Pa. Super. 2007): the transmission of HPV and genital warts satisfies the *serious bodily injury* requirement because of the permanent nature of the disease, the fact that the victim risks passing the virus to future sexual partners or children she may choose to have through the birth canal, and because there is a strong link between HPV and cervical and other genital cancers.

3. Mistake as to Age

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

18 PA. CONS. STAT. ANN. § 3102

Mistake as to Age

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

H. Key Provisions

1. Fundamental Nature of Rape

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

2. Penetration Necessary

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

3. Time of Offense

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

4. No Resistance Necessary

“The victim of a rape need not resist.” *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994); 18 PA. CONS. STAT. ANN. § 3107. See discussion *Section 2.2(D)(3)(b)*.

I. Penalties

Merger: Counts of rape and involuntary deviate sexual intercourse do not merge for sentencing purposes if the convictions were supported by separate facts, i.e., separate acts. *Commonwealth v. Snyder* 870 A.2d 336, 349 (Pa.Super. 2005).

1. Rape

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

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

2. Rape of a Child

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

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of rape of a child “shall be sentenced to a term of imprisonment which shall be fixed by the court at no more than 40 years.” 18 PA. CONS. STAT. ANN. § 3121(e)(1).

3. Rape of a child resulting in serious bodily injury

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

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

2.5 STATUTORY SEXUAL ASSAULT

A. Statutory

18 PA. CONS. STAT. ANN. § 3122.1

B. Elements of Offense

In the absence of additional circumstances sufficient to satisfy the requirements of 18 PA. CONS. STAT. ANN. § 3121 (Rape), a person is guilty of statutory sexual assault if that person engages in sexual intercourse with a complainant and:

- 1) The complainant is under 16 years of age;
- 2) The defendant is four or more years older than the complainant; and
- 3) The complainant and the defendant are not married to each other.

C. Consent Not a Defense

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

Statutory sexual assault and sexual assault are not greater and lesser included offenses as lack of consent is a required element of sexual assault.

D. Mistake as to Age

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

18 PA. CONS. STAT. ANN. § 3102

Mistake as to Age

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

being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

E. Penalty

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

2.6 INVOLUNTARY DEVIATE SEXUAL INTERCOURSE

Types of IDSI: Elements

- 1) Engaging in deviate sexual intercourse with a complainant;²⁷
- 2) In one of the following circumstances:
 - a) By forcible compulsion²⁸ (18 PA. CONS. STAT. ANN. § 3123(a)(1)); or
 - b) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution (18 PA. CONS. STAT. ANN. § 3123(a)(2)); or
 - c) The complainant is unconscious or the defendant knows that the complainant is unaware of the fact that sexual intercourse is occurring (18 PA. CONS. STAT. ANN. § 3123(a)(3)); or
 - d) The defendant has substantially impaired the complainant’s ability to control his or her conduct through the use of drugs, intoxicants or other means without the complainant’s knowledge (18 PA. CONS. STAT. ANN. § 3123(a)(4)); or
 - e) The complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA. CONS. STAT. ANN. § 3123(a)(5)); or
 - f) The complainant is less than 16 years of age and the defendant is four or more years older than the complainant and the complainant and person are not married to each other (18 PA. CONS. STAT. ANN. § 3123(a)(7)); or
 - g) The person engages in deviate sexual intercourse with a complainant who is less than 13 years of age (18 PA. CONS. STAT. ANN. § 3123(b)); or
 - h) The person violates section 3123 and the complainant is less than 13 years of age and suffers serious bodily injury in the course of the offense (18 PA. CONS. STAT. ANN. § 3123(c)).

²⁷ “Deviate sexual intercourse” and “complainant” are defined in Chapter 2, section 2.2.

²⁸ “Forcible Compulsion” is defined in Chapter 2, section 2.2.

A. IDSI By Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(1).

“The crime of involuntary deviate sexual intercourse occurs when the actor, by physical compulsion or threats thereof, coerces the victim to engage in acts of anal and/or oral intercourse.” *Commonwealth v. Snyder*, 870 A.2d 336, 351 (Pa.Super. 2005), quoting *Commonwealth v. Zingarelli*, 839 A.2d 1064, 1070 (Pa.Super. 2003), *appeal denied*, 579 Pa. 692, 856 A.2d 834 (2004).

2. Forcible compulsion

“Forcible compulsion” is discussed in Chapter 2, sections 2.2(D) and 2.4(B)(2).

B. IDSI By Threat of Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(2).

2. Objective Standard

An objective standard is used in determining whether this circumstance is present. *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217 (1986).

Verbal threats are sufficient to establish “forcible compulsion”.

Commonwealth v. Montgomery, 687 A.2d 1131 (Pa. Super. 1996) (Per opinion of Olszewski, J., with Judges concurring in result.).

C. IDSI When the Complainant is Unconscious or Unaware

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(3).

2. Lack of Consent

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

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

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(4).

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

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(5).

2. Intent

In *Commonwealth v. Thomson*, 673 A.2d 357 (Pa.Super. 1996), *appeal denied*, 546 Pa. 679, 686 A.2d 1310 (1996), a forensic psychiatrist testified that the victim was incapable of consenting to sexual intercourse because she was mildly mentally retarded. The psychiatrist further testified that the victim's retardation was of the type noticeable by a lay person. There was no rebuttal evidence by the defense as to the victim's incapability to consent. The Superior Court affirmed the trial court's determination that the evidence was sufficient to support the guilty verdict to Rape under former section 3121(4): "[a] person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: who is so mentally deranged or deficient that such person is incapable of consent." The Superior Court further held that the prosecution must prove that the defendant "acted intentionally, knowingly or recklessly as to the victim's mental deficiency." 673 at 359. *See also, Commonwealth v. Carter*, 418 A.2d 537 (Pa.Super. 1980).

E. IDSI With a Child

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(b).

2. Elements of Offense

A person commits the offense of involuntary deviate sexual intercourse with a child when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

3. Mistake as to Age

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

G. IDSI With a Child Resulting in Serious Bodily Injury

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(c).

2. Elements of Offense

A person commits the offense of involuntary deviate sexual intercourse with a child resulting in serious bodily injury when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of

age and the complainant suffers serious bodily injury in the course of the offense.

Commonwealth v. Kerrigan, ___ A.2d ___, 2007 WL 695292 (Pa.Super. 2007): the transmission of HPV and genital warts satisfies the serious bodily injury requirement because of the permanent nature of the disease, the fact that the victim risks passing the virus to future sexual partners or children she may choose to have through the birth canal, and because there is a strong link between HPV and cervical and other genital cancers.

3. Mistake as to Age

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

H. Penalties

1. IDSI

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

2. IDSI with a Child

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of involuntary deviate sexual intercourse with a child “shall be sentenced to a term of imprisonment which shall be fixed by the court at no more than 40 years.” 18 PA. CONS. STAT. ANN. § 3123(d)(1).

3. IDSI with a Child with Serious Bodily Injury

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of involuntary deviate sexual intercourse with a child resulting in serious bodily injury “shall be sentenced to a maximum term of *life imprisonment*.” 18 PA. CONS. STAT. ANN. § 3123(d)(2).

2.7 SEXUAL ASSAULT

A. Statutory

18 Pa. Cons. Stat. Ann. § 3124.1.

B. Elements of Offense

- 1) Engaging in sexual intercourse or deviate sexual intercourse with a complainant;²⁹
- 2) Without the complainant's consent.

C. Evidence

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

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

D. No Requirement of "Forcible Compulsion"

This section of the Crimes Code, 18 PA. CONS. STAT. ANN. § 3124.1, was enacted in response to the Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994). The statute was intended to fill the loophole left by the Rape and IDSI statutes by criminalizing non-consensual sex where the perpetrator employs little or no force.³⁰ *See also Commonwealth v. Buffington*, 574 Pa. 29, 42 n.13, 828 A.2d 1024, 1032 n.13 (2003).

In order to sustain a sexual assault conviction, resistance is not required. *Commonwealth v. Andrulewicz*, 911 A.2d 162, 165 (Pa. Super. 2006).

E. Institutional Sexual Assault

1. Statutory

18 PA. CONS. STAT. ANN. 3124.2.

2. Elements of Offense

- 1) defendant who is an employee or agent of any of the following:
 - a) the Department of Corrections,
 - b) county correctional authority,
 - c) youth development center,
 - d) youth forestry camp,
 - e) state or county juvenile detention facility,
 - f) other licensed residential facility serving children or youth, or
 - g) mental health or mental retardation facility or institution.

²⁹ To be convicted under this section, a defendant must act intentionally, knowingly, or recklessly. *Commonwealth v. Mayfield*, 832 A.2d 418 (Pa. Super. 2003).

³⁰ Theresa A. McNamara, Act 10: *Remedying Problems of Pennsylvania's Rape Laws or Revisiting Them?*, 10 Dick.L.Rev. 203, 210-214 (1996).

- 2) who engages in sexual intercourse, deviate sexual intercourse or indecent contact *with an inmate, detainee, patient or resident.*

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

F. Penalties

1. Sexual Assault

Sexual Assault is a Felony of the Second Degree, and the maximum incarceration sentence is 10 years, and the maximum fine is \$ 25,000.

2. Institutional Sexual Assault

Institutional Sexual Assault is a Felony of the Third Degree, and the maximum incarceration sentence is 7 years, and the maximum fine is \$ 10,000.

2.8 AGGRAVATED INDECENT ASSAULT

A. Statutory

18 PA. CONS. STAT. ANN. § 3125.

B. Elements of Offense

- 1) engaging in penetration, however slight, of the genitals or anus of a complainant with any part of a person’s body;
- 2) for any purpose other than good faith medical, hygienic or law enforcement procedures;
- 3) under one of the following circumstances:
 - a) without consent from the complainant; or
 - b) forcible compulsion;³¹
 - c) threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
 - d) the complainant is unconscious or other circumstances where the defendant is aware that the complainant does not realize penetration is occurring; or
 - e) the defendant has substantially impaired the complainant’s ability to control his or her conduct through the use of intoxicants or other means without the complainant’s knowledge; or
 - f) the complainant suffers from a mental disability which renders the complainant incapable of consent; or
 - g) the complainant is less than 13 years old; or

³¹ “Forcible compulsion” is defined in Chapter 2, section 2.2.

- h) the complainant is less than 16 years old, the defendant is four or more years older than the complainant, and the defendant and the complainant are not married to each other.

C. Digital Penetration

Aggravated indecent assault includes evidence of digital penetration.

Commonwealth v. Kelley, 569 Pa. 179, 801 A.2d 551 (2002).

D. Victim's Testimony

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

E. Aggravated Indecent Assault of a Child

1. Statutory

18 PA. CONS. STAT. ANN. § 3125 (b).

2. Elements

- 1) Violation of subsections (a)(1)-(6); and
- 2) The complainant is under 13 years old.

F. Penalties

1. Aggravated Indecent Assault

Aggravated indecent assault is a Felony of the Second Degree, and the maximum incarceration sentence is 10 years, and the maximum fine is \$ 25,000.

2. Aggravated Indecent Assault of a Child

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

2.9 INDECENT ASSAULT

A. Statutory

18 PA. CON. STAT. ANN. § 3126

B. Elements of Offense

- 1) having indecent contact with a complainant or causing the complainant to have indecent contact with the defendant
- 2) in one of the following circumstances:
 - a) the absence of the complainant's consent; or
 - b) forcible compulsion; or

- c) threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
- d) the complainant is unconscious or other circumstances exist where the defendant is aware that the complainant does not realize that indecent contact is occurring; or
- e) the defendant has impaired the complainant's ability to control the complainant's conduct through the use of intoxicants or other means without the complainant's knowledge; or
- f) the complainant suffers from a mental disability which renders the complainant incapable of consent; or
- g) the complainant is less than 13 years old; or
- h) the complainant is less than 16 years old, the defendant is four or more years older than the complainant, and the complainant and the defendant are not married to each other.

C. Evidence

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

Indecent contact includes contact over clothing, no matter how thick, and indecent assault is not entirely dependant upon the defendant's success. *Commonwealth v. Capo*, 727 A.2d 1126 (Pa. Super. 1999); *Commonwealth v. Ricco*, 650 A.2d 1084 (Pa. Super. 1994).

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

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

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

D. Penalties

1. Complainant Under 13 Years

Indecent assault when the complainant is under the age of 13 is Misdemeanor of the First Degree, and the maximum incarceration sentence is 5 years, and the maximum fine is \$ 10,000.

2. Other Categories

All other categories of Indecent assault are Misdemeanors of the Second Degree, and the maximum incarceration sentence is 2 years, and the maximum fine is \$ 5,000.

2.10 INDECENT EXPOSURE

A. Statutory

18 PA. CONS. STAT. ANN. § 3127

B. Elements of Offense

- 1) exposure of genitals in any public place; or
- 2) exposure of genitals in any place where there are other persons present whom the defendant should know this conduct is likely to offend, affront, or alarm.

C. Evidence

The Commonwealth must establish that the defendant intended to arouse or gratify sexual desire of himself or someone else. *Commonwealth v. Rodriguez*, 442 A.2d 803 (Pa. Super. 1982).

It is not necessary for the Commonwealth to prove intent to offend, affront, or alarm. *Commonwealth v. Back*, 389 A.2d 141 (Pa. Super. 1978).

D. Penalties

1. **Children Involved:** If the defendant should have known that any of the persons present were under the age of 16, indecent exposure is Misdemeanor of the First Degree, and the maximum incarceration sentence is 5 years, and the maximum fine is \$ 10,000.
2. **Other Cases:** In all other circumstances, indecent exposure is a Misdemeanor of the Second Degree, and the maximum incarceration sentence is 2 years, and the maximum fine is \$ 5,000.

2.11 INCEST

A. Statutory

18 PA. CONS. STAT. ANN. § 4302

B. Elements of Offense

- 1) The defendant knowingly either:
 - a) marries,
 - b) cohabits, or

- c) has sexual intercourse with
- 2) Any of the following:
 - a) an ancestor of the whole or half blood,
 - b) a descendant of the whole or half blood,
 - c) a brother or sister of the whole or half blood,
 - d) an uncle or aunt of the whole blood, or
 - e) a nephew or niece of the whole blood.

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

C. Definitions

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

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

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

D. Penalties

1. **No Merger:** “Since the crimes of rape and incest have different elements that do not necessarily involve one another, and protect different societal interests, we conclude that . . . they do not merge for sentencing purposes, even if one crime was committed during the perpetration of the other.” ***Commonwealth v. White***, 491 A.2d 252, 268 (Pa.Super. 1985).
2. **Grading:** Incest is a Felony of the Second Degree, and the maximum incarceration sentence is 10 years, and the maximum fine is \$ 25,000.

2.12 INVASION OF PRIVACY

This section is Pennsylvania’s response to the increasingly prevalent act of voyeurism, and proscribes the secret viewing, photographing or otherwise filming/ recording of a person dressing or undressing or of the sexual or other intimate parts of a person at a place and time when the other person has a reasonable expectation of privacy. For more detailed information, see Marjorie A. Shields, *Criminal Prosecution of Video or Photographic Voyeurism*, 120 A.L.R.5th 337 (2004).

A. Statutory

18 PA. CONS. STAT. ANN. § 7507.1.

B. Elements

1. Secretly Viewing or Recording of Full or Partial Nude Person

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

“Full or Partial Nudity” means a display of:

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

2. Secretly Viewing or Recording of Intimate Parts of Another Person

- 1) A person viewed, photographed, videotaped, electronically recorded or otherwise records;
- 2) For the purposes of arousing or gratifying the sexual desire of any person;
- 3) The intimate parts of another person
 - a) whether or not covered by clothing
 - b) without that person's knowledge and consent.

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

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

3. Transfer of Image

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

C. Multiple Violations

A separate violation of this section occurs for:

Multiple Victims: each victim of an offense defined herein pursuant to one scheme or course of conduct whether of the same or different times; or

Multiple Occasions: each occasion that a person is a victim during a separate course of conduct either individually or otherwise.

D. Penalties

1. **Multiple Violations:** Invasion of privacy is a misdemeanor of the second degree if there is more than one violation, and the maximum incarceration sentence is 2 years, and the maximum fine is \$5,000. 18 PA. CONS. STAT. ANN. § 7507.1(b).
2. **Other Cases:** All other categories of Invasion of privacy are misdemeanors of the third degree, and the maximum incarceration sentence is 1 year, and the maximum fine is \$2,500. 18 PA. CONS. STAT. ANN. § 7507.1(b).

E. Exclusions for Legitimate Law Enforcement Conduct

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

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

F. Commencement of Prosecution

Notwithstanding the above noted provisions regarding the commencement of the limitations period for most crimes, a prosecution for a violation of 18 PA. CONS. STAT. ANN. § 7507.1, Invasion of Privacy, must be commenced within the following periods:

- Typical commencement date: two years from the date the offense occurred.
- Tolling of commencement date: if the victim did not realize at the time that there was an offense, within three years of the time the victim first learns of the offense.

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3.1 CHAPTER OVERVIEW

This chapter outlines statutes specifically designed to protect children. Offenses of sexual violence which may involve children as victims, such as Rape, 18 PA.CONS.STAT.ANN. § 3121, Statutory Sexual Assault, 18 PA.CONS.STAT.ANN. § 3122, and Involuntary Deviate Sexual Intercourse, 18 PA.CONS.STAT.ANN. § 3123, are covered in Chapter 2.

Listed below are the statutes discussed in this chapter.

- **Section 3.2:**
Luring a Child into a Motor Vehicle, 18 PA.CONS.STAT.ANN. § 2910;
- **Section 3.3:**
Endangering Welfare of Children, 18 PA.CONS.STAT.ANN. § 4304;
- **Section 3.4:**
Corruption of Minors, 18 PA.CONS.STAT.ANN. § 6301;
- **Section 3.5:**
Sexual Abuse of Children, 18 PA.CONS.STAT.ANN. § 6312;
- **Section 3.6:**
Unlawful Contact with Minor, 18 PA.CONS.STAT.ANN. § 6318;
- **Section 3.7:**
Sexual Exploitation of Children, 18 PA.CONS.STAT.ANN. § 6320; and
- **Section 3.8:**
Internet Child Pornography, 18 PA.CONS.STAT.ANN. §§ 7621-7630.

Lastly, Section 3.9 examines the cases where children are the intended victims of solicitation crimes involving sexual violence.

3.2 LURING A CHILD INTO A MOTOR VEHICLE OR STRUCTURE

A. Statutory

18 Pa.Cons.Stat.Ann. § 2910

B. Elements of Offense

- 1) Lures or attempts to lure a child;
- 2) Into a motor vehicle; or
- 3) Into a structure;

- 4) Unless the circumstances reasonably indicate that the child is in need of assistance;
- 5) Without the consent, express or implied, of the child's parent or guardian.

1. Mens Rea

As to the luring element, culpability required is intentionally, knowingly or recklessly. **Commonwealth v. Figueroa**, 648 A.2d 555 (Pa. Super. 1994), *appeal denied*, 540 Pa. 578, 655 A.2d 510 (1995); **Commonwealth v. Gallagher**, 2005 Pa. Super. 116 (2005).

As to the "child" element, the Commonwealth must prove that the defendant intentionally sought out the victim because the victim was under the age of 18, knew the victim was under the age 18 or was reckless as to the age of the victim. **Commonwealth v. Gallagher**.

There is strict liability in the luring statute only with respect to an intent to harm. Luring does not require a bad purpose intent. **Commonwealth v. Figueroa; Commonwealth v. Gallagher**.

2. Definition of "child"

A person under 18 years of age. 18 PA.CON.S.TAT.ANN. § 2908(b)

3. Conduct Constituting "lure"

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

Inducement - offering the victim money in exchange for work, the nature of which defendant refused to describe unless the victim accompanied him to his car, constitutes a "lure". The definition of "lure" includes tempting by pleasure or gain, and the gain does not have to be a pleasant one; it can be "any kind of inducement." **Commonwealth v. Adamo**, 637 A.2d 302, 307 (Pa. Super. 1994).

Commands and Threats - the term "lure" is not limited to enticement or invitation to pleasure or gain. **Commonwealth v. Nanorta**, 742 A.2d 176 (Pa. Super. 1999). The court held that the command, "get in my car" could be characterized as a lure.

4. Element: "Into" a Motor Vehicle

There is a requirement that the child is lured "into" a vehicle. The plain meaning of Luring a Child into a Motor Vehicle does not include the inchoate offense of attempting to lure a child into a motor vehicle. Where a defendant does not manage to get the child into the vehicle, the appropriate offense is criminal attempt. **Commonwealth v. Tate**, 572 Pa. 411, 816 A.2d 1097 (2003).

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

5. Definition of Structure

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

Affirmative defense: it’s an affirmative defense that the person lured or attempted to lure the child into the structure for a lawful purpose. 18 PA.CON.S.TAT.ANN. § 2910(b).

C. Penalties

Luring a Child into a Motor Vehicle or Structure is a Misdemeanor of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1104, in the case of a misdemeanor of the first degree, a term of imprisonment shall be fixed by the court at no more than 5 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 10,000.00.

D. Sex Offender Registration

The crime of Luring a Child into a Motor Vehicle under 18 PA.CON.S.TAT.ANN. § 2910 was added in 2004 as a “listed offense” under the Pennsylvania Registration of Sexual Offenders Act (Megan’s Law II). See 42 PA.CON.S.TAT.ANN. § 9795.1(a).

E. 2005 Amendment

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

3.3 ENDANGERING WELFARE OF CHILDREN

A. Statutory

18 Pa.Cons.Stat.Ann. § 4304.

B. Elements of Offense

- 1) A parent, guardian, or other person supervising the welfare of a child under 18 years of age;
- 2) Knowingly endangers the welfare of the child;
- 3) By violating a duty of care, protection or support.

1. A Parent, Guardian, or Other Person

The duty to care, protect or support a child is not limited to natural and adoptive parents. “Whenever a person is placed in control and supervision

of a child, that person has assumed such a status relationship to the child so as to impose a duty to act.” *Commonwealth v. Kellam*, 719 A.2d 792, 796 (Pa. Super. 1998). (Where the defendant lived with his girlfriend and her infant daughter, controlled many aspects of the mother’s life, including raising her other children and the infant victim, voluntarily assumed parental responsibilities with regard to the child, (e.g. watching her when the mother was away, changing her diaper and feeding her), he was held to have supervised the welfare of the child.)

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

- Defendant had a duty to protect the child when she accepted the role of babysitter. *Commonwealth v. Vining*, 744 A.2d 310 (Pa. Super. 1999), appeal denied, 564 Pa. 709, 764 A.2d 1069 (2000).
- Where there is no evidence of defendant’s role as a supervisor or guardian of the child, (e.g. defendant is just a visitor in the victim’s home) defendant cannot be convicted of Endangering Welfare of Children. *Commonwealth v. Halye*, 719 A.2d. 763 (Pa. Super. 1998), appeal denied, 560 Pa. 699, 743 A.2d 916 (1999), cert. denied, 529 U.S. 1012, 120 S. Ct. 1287, 146 L. Ed. 2d 233 (2000).

2. Definition of “Knowingly Endangers”

(a) Three Prong Test

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

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

(b) Examples of “Knowingly Endanger”

In *Commonwealth v. Miller*, 600 A.2d 988 (Pa. Super. 1992), the Court held that defendant was not aware that she had placed her child in circumstances that threatened the child’s physical or psychological welfare where the defendant agreed to go out only after being told by the child’s father that his neighbor had

agreed to baby sit the child. Defendant relied on that representation and child had been beaten and burned. The court held that the nature of her injuries would have been apparent to defendant Jones and thus he knew the victim had been injured and needed medical assistance, but failed to seek immediate medical attention for the child.

In ***Commonwealth v. Retkofsky***, 860 A.2d 1098 (Pa. Super. 2004), the Court held that defendant was aware of the dangers and “knowingly” endangered his son when he drove an ATV at an accelerated speed down a paved residential street, fleeing from police, with his nine year-old son hanging onto defendant’s body without any other restraint.

Commonwealth v. Cardwell, 515 A.2d 311 (Pa. Super. 1986), *appeal denied*, 515 Pa. 573, 527 A.2d 535 (1987): The statute requires affirmative performance which cannot be met simply by showing any step at all toward preventing harm, however incomplete or ineffectual. The person charged with the duty of care must take steps that are reasonably calculated to achieve success. The facts of the ***Cardwell*** case involved a situation where the defendant’s husband had sexually abused her daughter for a period of four years and defendant, upon learning of the abuse, did nothing other than to write two angry letters to her husband and failed to take concrete steps to remove her daughter from the situation, defendant was guilty of Endangering Welfare of Children.

Where a child suffers from a serious and life-threatening medical condition, prayers and anointment of the child are not sufficient steps to protect the child’s welfare. Parents have an affirmative duty to provide medical care to protect the child’s life, regardless or despite their religious beliefs. ***Commonwealth v. Barnhart***, 497 A.2d 616 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 34 (1988). *See also* ***Commonwealth v. Foster***, 764 A.2d 1076 (Pa. Super. 2000), *appeal denied*, 566 Pa. 658, 782 A.2d 542 (2001).

Where defendant did nothing to better the conditions of his house (dirty house with foul odor, dried food and food stains covering the walls, flies, maggots, hundreds of mice, spoiled food in the refrigerator, a hole in the roof, large holes in the kitchen floor and ceiling which allowed water to flow into an electric box in the basement), the defendant was guilty of Endangering Welfare of Children. ***Commonwealth v. Wallace***, 817 A.2d 485 (Pa. Super. 2002), *appeal denied*, 574 Pa. 774, 833 A.2d 143 (2003), *cert. denied*, 541 U.S. 907, 124 S. Ct. 1610, 158 L. Ed.2d 251 (2004).

The statute does not require actual infliction of physical injury or that child be in imminent threat of physical harm; exposure to danger is sufficient. **Commonwealth v. Wallace**, 817 A.2d 485, 491 (Pa. Super. 2002), *appeal denied*, 574 Pa. 774, 833 A.2d 143 (2003), *cert. denied*, 541 U.S. 907, 124 S. Ct. 1610, 158 L. Ed.2d 251 (2004). Even though his children suffered no physical harm, by allowing the children to live “with such filth and vermin, with no working furnace for heat, and with water running into the electrical box creating a fire hazard”, the risk of physical and/or psychological harm was present. 817 A.2d at 492.

3. Violation of a Duty of Care, Protection or Support.

Parents have an affirmative legal duty to protect their child and seek medical help when the life of their child is threatened despite their religious beliefs. The child’s welfare should override the parents’ religious beliefs and failure to seek medical care for the child under such circumstances constitutes a breach of their duties as parents. Every parent has a duty of care for their child and at the very least “to avert the child’s untimely death.” **Commonwealth v. Barnhart**, 497 A.2d 616, 619 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 34 (1988).

It is not a violation of the parents’ duty of care when their minor daughter is sexually active, even if they have knowledge of it. Where there is no evidence that the parents “permitted, condoned, fostered or prompted” their thirteen year old daughter’s sexual activity with her boyfriend, which led to her pregnancy, the parents are not guilty of endangering the welfare of their child. **Commonwealth v. Campbell**, 580 A.2d 868, 869 (Pa. Super. 1990).

C. Penalties

1. Single Episode

Endangering the Welfare of Children is a Misdemeanor of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1104, in the case of a misdemeanor of the first degree, a term of imprisonment shall be fixed by the court at nor more than 5 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 10,000.00.

2. Course of Conduct

Where there is a course of conduct of endangering the welfare of a child, the offense constitutes a felony of the third degree. In accordance with 18 PA. CONS. STAT. ANN. § 1103, in the case of a felony of the third, a term of imprisonment shall be fixed by the court at nor more than 7 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 15,000.00.

Examples of “Course of Conduct”

- Where defendant’s two young children had dirty hands, feet and toes, dirt all over their skin, dirty clothes, numerous bruises on their buttocks groin, thighs and backs, consistent with intentional infliction, and one of the victims had lost twenty percent of her body weight in a two week period, and defendant admits she was the full-time caregiver, jury could reasonably conclude course of conduct existed that endangered the welfare of the children. **Commonwealth v. Mackert**, 781 A.2d 178 (Pa. Super. 2001), *appeal denied*, 568 Pa. 696, 796 A.2d 980 (2002).
- Course of conduct existed where the sexual abuse of his stepdaughter occurred over a period of two years. **Commonwealth v. Ressler**, 798 A.2d 221 (Pa. Super. 2002).
- Where the entire episode for which defendant was charged, was one event, on one night, there was no “course of conduct” justifying a third degree felony charge of Endangering Welfare of Children. The legislative intent of 18 Pa.Cons.Stat.Ann. § 4304(b) is to punish a parent who abused their child over a period of time and for repeated behavior, but not for a single incident that occurred within minutes. **Commonwealth v. Popow**, 844 A.2d 13 (Pa. Super. 2004).
- Where the Commonwealth labels the charge of Endangering Welfare of Children in the information as a felony of the third degree, but the descriptive language in the information indicates only a misdemeanor and no course of conduct is alleged, the trial court was correct in sentencing defendant to a misdemeanor sentence upon a conviction for Endangering Welfare of Children. **Commonwealth v. Passarelli**, 789 A.2d 708 (Pa. Super. 2001), *appeal granted in part*, 571 Pa. 592, 812A.2d 1225 (2002), *affirmed*, 573 Pa. 372, 825 A.2d 628 (2003).

3. Merger

Endangering Welfare of Children is not a lesser included offense of Reckless Endangerment. *Commonwealth v. Martir*, 712 A.2d 327 (Pa. Super. 1998). However, Endangering Welfare of Children is a lesser included offense of Involuntary Manslaughter if the same facts are used as a basis for both convictions. *Commonwealth v. Barnhart*, 497 A.2d 616, 619, 630 (Pa. Super. 1985), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 34 (1988). In *Commonwealth v. Bird*, 597 A.2d 1169 (Pa. Super. 1991), the court held that the trial court erred in not merging the two offenses since the same facts were relevant to prove both. .

D. Sex Offender Registration

The crime of Endangering Welfare of Children under 18 PA.CON.S.TAT.ANN. § 4304 is not specifically designated as a “listed offense” under the Pennsylvania

Registration of Sex Offenders Act (Megan's Law II). See 42 Pa.Cons.Stat.Ann. § 9795.1.

3.4 CORRUPTION OF MINORS

A. Statutory

18 PA.CON.S.TAT.ANN. § 6301(a)(1)& (2).

B. Elements of Offense

- 1) Any person
 - a) Being of the age of 18 years and upwards,
 - b) By any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or
 - c) Aids, abets, entices or encourages any such minor in the commission of any crime, or
 - d) Knowingly assists or encourages such minor in violating his or her parole or any order of court; or
- 2) Any person
 - a) Who knowingly aids, abets, entices or encourages
 - b) A minor younger than 18 years of age
 - c) To commit truancy.

1. Corrupting Morals of Minor

Standard in deciding what conduct can be said to corrupt the morals of a minor is “the common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain.”

Commonwealth v. Pankraz, 554 A. 2d 974, 977 (Pa. Super. 1989), *appeal denied*, 522 Pa. 618, 563 A.2d 887 (1989), quoting **Commonwealth v. Randall**, 133 A.2d 276 (Pa. Super. 1957), *cert denied*, 355 U.S. 954 (1958); **Commonwealth v. Decker**, 698 A.2d 99, 101(Pa. Super. 1997), *appeal denied*, 550 Pa. 698, 705 A.2d 1304 (1998). Since the statute is protective in nature and designed to “cover a broad range of conduct in order to safeguard the welfare and security of our children”, the statute must be drawn broadly. **Commonwealth v. Barnette**, 760 A. 2d 1166, 1173(Pa. Super. 2000), *appeal denied*, 566 Pa. 634, 781 A.2d 138 (2001).

There is no need to prove that the minor's morals were actually corrupted. The Commonwealth need only prove that the conduct of the defendant tended to corrupt the minor's morals. **Commonwealth v. Barnette**, 760 A.2d 1166 (Pa. Super. 2000) *appeal denied*, 566 Pa. 634, 781 A.2d 138 (2001)(Defendant was guilty of Corruption of Minors where he requested a 16 year old youth to sign for a package containing marijuana even though

he told the youth it contained “knick knacks”); ***Commonwealth v. Mumma***, 489 Pa. 547, 414 A.2d 1026 (Pa. 1980).

Underlying criminal activity is not required. Statute states that conduct which corrupts or tends to corrupt is by “any act” not by any “criminal act.” ***Commonwealth v. Decker***, 698 A.2d 99 (Pa. Super. 1997) *appeal denied*, 550 Pa. 698, 705 A.2d 1304 (1998). (Defendant, a 37 year old male, guilty of Corruption of Minors where he engaged in consensual sexual intercourse with a 15 year old female.).

Sexual intercourse with a minor is considered corruption of morals. ***Commonwealth v. Berry***, 513 A. 2d 410 (Pa. Super. 1986).

Conviction for corruption of minors charge can still stand where there are acquittals of other offenses which were specified in the information filed against the defendant as the corrupting acts. ***Commonwealth v. Bricker***, 580 A.2d 388 (Pa. Super. 1990), *appeal denied*, 527 Pa. 596, 589 A.2d 687 (1991), ***Commonwealth v. Miller***, 657 A. 2d 946 (Pa. Super. 1995). (Defendants’ convictions for COM in both cases stand even though both were acquitted of Indecent Assault charges. The courts held that the jury had the prerogative to convict defendants on the corruption of minors charge while at the same time acquitting them on the charge of indecent assault and that inconsistent verdicts will stand as long as there is sufficient evidence to sustain the conviction.)

A married minor’s morals can be corrupted by his or her spouse. ***Commonwealth v. Stafford***, 749 A.2d 489, 499-500 (Pa. Super. 2000), *appeal denied*, 568 Pa. 660, 795 A.2d 975 (2000).

Consent is not an element in a corruption of minors charge. ***Commonwealth v. Kitchen***, 814 A.2d 209 (Pa. Super. 2002), *affirmed*, 576 Pa. 229, 839 A.2d 184 (2003).

C. Adjudication of Delinquency Unnecessary

A conviction under the provisions of this section may be had whether or not the jurisdiction of any juvenile court has attached or shall thereafter attach to such minor or whether or not such minor has been adjudicated a delinquent or shall thereafter be adjudicated a delinquent. 18 PA.CON.S.TAT.ANN. § 6301(b).

D. Presumptions Regarding Minor’s Age and Court Orders

In trials and hearings upon charges of violating the provisions of this section, knowledge of the minor’s age and the court’s orders and decrees concerning such minor shall be presumed in the absence of proof to the contrary. 18 PA.CON.S.TAT.ANN. § 6301(c).

E. Mistakes as to Age

Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years. 18 PA.CON.S.TAT.ANN. § 6301(d).

Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is 16 years or more but less than 18 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the minor to be 18 years or older. 18 PA.CONS.STAT.ANN. § 6301(d).

F. Penalties

Corruption of Minors, under section (a)(1), is a Misdemeanor of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1104, in the case of a misdemeanor of the first degree, a term of imprisonment shall be fixed by the court at nor more than 5 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 10,000.00.

A violation of 18 Pa.Cons.Stat.Ann. § 6301(2), regarding **truancy**, is a summary offense. In accordance with 18 PA. CONS. STAT. ANN. § 1105, in the case of a summary conviction, a term of imprisonment shall be fixed by the court at nor more than 90 days, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 300. A second offense within one year of the date of the first conviction is a misdemeanor of the third degree.

G. Sex Offender Registration

The crime of Corruption of Minors under 18 Pa.Cons.Stat.Ann. § 6301 is not specifically designated as a “listed offense” under the Pennsylvania Registration of Sex Offenders Act (Megan’s Law). See 42 PA.CONS.STAT.ANN. § 9795.1.

3.5 SEXUAL ABUSE OF CHILDREN

A. Statutory

18 PA.CONS.STAT.ANN. § 6312.

B. Purpose of Statute

The purpose of this statute, prohibiting “sexual abuse of children”, is to criminalize the filming, depiction or possession of photographs or computer depictions of children engaging in sexual acts.

On two occasions the Pennsylvania Superior Court has held that the statute is not unconstitutionally overbroad or vague. *Commonwealth v. Pepe*, 897 A.2d 463 (Pa.Super. 2006);¹ *Commonwealth v. Davidson*, 860 A.2d 575 (Pa.Super. 2004), *appeal granted in part*, 582 Pa. 356, 871 A.2d 185 (2005).²

¹ In *Pepe* and *Davidson*, the Superior Court made it clear that the statute proscribes the photographing or videotaping of “real” children, not computer-generated images. *Pepe*, 897 A.2d at 464, *Davidson*, 860 A.2d at 584.

² As indicated, the Pennsylvania Supreme Court accepted review of *Davidson* in 582 Pa. 356, 871 A.2d 185 (2005), and ordered the parties to address the following issues:

1) Whether 18 PA.CONS.STAT.ANN. § 6312(d) is unconstitutionally vague and overbroad?

C. Elements of Offense

1. Elements in General

The statute reads as follows:

18 PA.CON.S.TAT.ANN. § 6312.

Sexual Abuse of Children

(a) Definition. As used in this section, “prohibited sexual act” means sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.

(b) Photographing, videotaping, depicting on computer or filming sexual acts. Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

(c) Dissemination of photographs, videotapes, computer depictions and films.

(1) Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent

2) Did the General Assembly intend that a person charged under 18 PA.CON.S.TAT.ANN. § 6312(d) be subjected to individual counts for each piece of child pornography possessed?
3) If the General Assembly so intended, is it constitutional to impose separate punishments for each conviction?

offense under this subsection is a felony of the second degree.

(d) Possession of child pornography.

(1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

(e) Evidence of age. In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony shall be sufficient to establish the age of said person.

(e.1) Mistake as to age. Under subsection (b) only, it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a bona fide belief that the person is over the specified age shall be a defense.

(f) Exceptions. This section does not apply to any material that is possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a bona fide educational, scientific, governmental or judicial purpose.

“**Sexual Intercourse**” is defined in 18 PA.CON.S.TAT.ANN. § 3101 to include, in addition to its ordinary meaning, intercourse per os or per anus with some penetration, however slight; emission is not required.

“**Transfer**” as used in § 6312(c) herein means a change of possession from one person to another. *Commonwealth v. McCue*, 487 A.2d 880, 883 (Pa.Super. 1983).

Consent: The consent of a child victimized by having pornographic pictures taken of him or her is not a defense. *Commonwealth v. Kitchen*, 814 A.2d 209, 213 (Pa. Super. 2002), *affirmed*, 576 Pa. 229, 839 A.2d 184 (2003)(Defendant’s conviction for taking and possessing pornographic photographs of his 16 year old paramour, with whom he had a child, stands regardless of the victim’s consent or cohabitation with the defendant.)

2. Photograph, Videotape or Depiction

- (a) **Specific Elements:** Photographing, videotaping, depicting on computer or filming sexual acts - 18 PA.CON.S.TAT.ANN. § 6312(b)
- i) causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act, and
 - ii) knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed
- (b) **Penalty** – A violation of this subsection is a felony of the second degree.

3. Dissemination

- (a) **Specific Elements:** Dissemination of photographs, videotapes, computer depictions and films - 18 PA.CON.S.TAT.ANN. §6312(c)
- i) knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computerdepiction or other material,
 - ii) depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act
- (b) **Penalty** - A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

4. Possession

- (a) **Specific Elements:** Possession of child pornography - 18 PA.CON.S.TAT.ANN. § 6312(d)
- i) knowingly possesses³ or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material
 - ii) depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

³ In *Commonwealth v. Diodoro*, 2006 WL 3095476 (Pa.Super., Nov. 2, 2006), a panel of the Superior Court held that in relation to crime of Possession of Child Pornography, 18 PA.CON.S.TAT.ANN. § 6312(d), merely viewing child pornography on internet without intentionally (i.e., “knowingly”) saving or downloading any of the images does not constitute “knowing possession” of child pornography, and is not a violation of § 6312(d). However, the panel decision was withdrawn and reconsideration was granted on January 10, 2007. *Commonwealth v. Diodoro*, 2007 Pa. Super. LEXIS 323 (Pa.Super., January 10, 2007).

- (b) **Penalty** - A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

D. Evidence of Age - 18 PA.CONST.STAT.ANN. §6312(e)

In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony shall be sufficient to establish the age of said person.

Proof of age, like proof of any other material fact, can be accomplished by the use of either direct or circumstantial evidence, or both. The trier of fact can assess the age of the child depicted based on everyday observations and common experiences with the requisite degree of certainty to satisfy the standard of proof beyond a reasonable doubt. *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207 (Pa. Super 2003), *appeal denied*, 576 Pa. 712, 839 A.2d 352 (2003).

Expert testimony: § 6312(e) does not mandate expert opinion testimony to satisfy the element of age but merely allows that if competent expert testimony is presented, it shall be sufficient to establish the age element. Whether expert testimony is necessary must be determined on a case-by-case basis. *Id.*, at 1212.

1. Mistake as to Age – 18 PA.CONST.STAT.ANN. § 6312 (e.1).

Under subsection (b) only, it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a bona fide belief that the person is over the specified age shall be a defense.

2. Exceptions - 18 PA.CONST.STAT.ANN. § 6312(f).

This section does not apply to any material that is possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a bona fide educational, scientific, governmental or judicial purpose.

E. Sex Offender Registration

The crime of Sexual Abuse of Children under 18 PA.CONST.STAT.ANN. § 6312 is designated as a “listed offense” under Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CONST.STAT.ANN. § 9795.1.

F. Merger

Taking photographs in violation of § 6312(b) and possessing the same photographs in violation of § 6312(d) do not merge for sentencing purposes. *Commonwealth v. Kitchen*, 814 A.2d 209, 215 (Pa. Super. 2002), *affirmed*, 576 Pa. 229, 839 A.2d 184 (2003).

In *Commonwealth v. Koehler*, 914 A.2d 427 (Pa. Super. 2006), the Superior Court held that the imposition of 14 separate sentences for each conviction for sexual abuse of children/possession of child pornography did not constitute an illegal sentence in violation of the double jeopardy clause. *Id.* at 438-439. The

Court explained that the statute expressly criminalized possession of “any computer depiction,” not the “possession of any computer hard-drive containing depictions”; therefore, because the defendant had obtained each video clip individually, at separate times, he possessed 14 separate computer depictions. Consequently, it was appropriate to charge, convict, and sentence the defendant separately for each act of possessing each video clip of child pornography, and given separate acts of possession, the merger doctrine was inapplicable. *Id.* at 439.⁴

3.6 UNLAWFUL CONTACT WITH MINOR

A. Statutory

18 Pa.Cons.Stat.Ann. § 6318.

B. Elements of Offense

In accordance with 18 PA.CON.S.TAT.ANN. § 6318(a), a person commits an offense if he is intentionally in contact with a minor for the purpose of engaging in a prohibited act, and either the person initiating the contact or the person being contacted is within this Commonwealth. The prohibited acts are as follows:

- i) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses)
- ii) Open lewdness as defined in section 5901 (relating to open lewdness).
- iii) Prostitution as defined in section 5902 (relating to prostitution and related offenses).
- iv) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).
- v) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).
- vi) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

⁴ In *Commonwealth v. Davidson*, 860 A.2d 575 (Pa.Super. 2004), *appeal granted in part*, 582 Pa. 356, 871 A.2d 185 (2005), the Pennsylvania Supreme Court accepted review in a similar case and ordered the parties to address, i.e., the following issue: “If the General Assembly so intended, is it constitutional to impose separate punishments for each conviction?”

C. Penalties

1. Grading

A violation of subsection (a) is:

- an offense and the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or
- a misdemeanor of the first degree; whichever is greater.

2. No Merger

Indecent assault and unlawful contact with a minor did not merge for sentencing purposes as offenses do not share the same elements.

Commonwealth v. Evans, 901 A.2d 528, 536 (Pa.Super. 2006). The elements of unlawful contact with a minor consist of intentionally, either directly or indirectly, contacting or communicating with minor for purpose of engaging in indecent assault, whereas elements of indecent assault, 18 PA.CONS.STAT.ANN. § 3126(a)(7), require the touching of sexual or other intimate parts of person under age of 13 for purpose of arousing or gratifying sexual desire, in either person.

D. Concurrent Jurisdiction to Prosecute

The Attorney General has concurrent prosecutorial jurisdiction with the district attorney for violations under this section and any crime arising out of the activity prohibited by this section when the person charged with a violation of this section contacts a minor through the use of a computer, computer system or computer network. 18 PA.CONS.STAT.ANN. § 6318(b.1)

E. Definitions

As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Computer.” An electronic, magnetic, optical, hydraulic, organic or other high-speed data processing device or system which performs logic, arithmetic or memory functions and includes all input, output, processing, storage, software or communication facilities which are connected or related to the device in a computer system or computer network.

“Computer network.” The interconnection of two or more computers through the usage of satellite, microwave, line or other communication medium.

“Computer system.” A set of related, connected or unconnected computer equipment, devices, and software.

“Contacts” Direct or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or

communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.

“**Minor**” An individual under 18 years of age.

F. Sex Offender Registration

The crime of Unlawful Contact with Minor under 18 PA.CON.S.TAT.ANN. § 6318 is designated as a “listed offense” under Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CON.S.TAT.ANN. § 9795.1.

3.7 SEXUAL EXPLOITATION OF CHILDREN

A. Statutory

18 Pa.Cons.Stat.Ann. § 6320.

B. Elements of Offense

1. Offense Defined

A person commits the offense of sexual exploitation of children if he *procures* for another person a child under 18 years of age for the purpose of *sexual exploitation*.

2. Definitions

As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“**Procure.**” To obtain or make available for sexual exploitation.

“**Sexual exploitation.**” Actual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person.

C. Penalties

Sexual Exploitation of Children is a Felony of the Second Degree, pursuant to 18 PA. CONS. STAT. ANN. § 6320(b). In accordance with 18 PA. CONS. STAT. ANN. § 1103, in the case of a felony of the second degree, a term of imprisonment shall be fixed by the court at nor more than 10 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 25,000.00.

D. Sex Offender Registration

The crime of Sexual Exploitation of Children under 18 PA.CON.S.TAT.ANN. § 6320 is designated as a “listed offense” under Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CON.S.TAT.ANN. § 9795.1.

3.8 INTERNET CHILD PORNOGRAPHY

A. Act Declared Unconstitutional

The Internet Child Pornography Act, 18 PA.CON.S.TAT.ANN. §7621 *et seq.*, was enacted to require internet service providers (“ISPs”) to remove or disable access to *child pornography items* “residing on or accessible through its service in a manner accessible to persons located within Pennsylvania after notification by the Pennsylvania Attorney General.”⁵

This Act was declared unconstitutional in *Center for Democracy & Tech. vs. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004). The Court held that the Act violated the First Amendment in that the Act could not be implemented without “excessive blocking of innocent speech”; that the procedures provided by the Act “are insufficient to justify the prior restraint of materials protected by the First Amendment”; and that it was unconstitutional under the dormant Commerce Clause “because of its affect on interstate commerce.” *Id.*, at 611.

3.9 SOLICITATION

A. Statutory

18 PA.CON.S.TAT.ANN. §902.

B. Definition of Solicitation and Renunciation

18 PA.CON.S.TAT.ANN. § 902.

Criminal Solicitation

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

(b) Renunciation. It is a defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

⁵ Pursuant to 18 PA.CON.S.TAT.ANN. § 7622, the ISP had to remove or disable access to child pornography items residing on or accessible through its service within five business days of notification by the Attorney General.

C. Penalties

1. Grading

18 PA.CON.S.TAT.ANN. § 905(a) provides that solicitation is a crime of the same grade and degree as the most serious offense which is solicited (unless otherwise provided in the Pennsylvania Crimes and Offenses Code).

2. Mitigation

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

D. Sex Offender Registration

The crime of solicitation under 18 PA.CON.S.TAT.ANN. § 902 is not specifically designated as a “listed offense” under the Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA.CON.S.TAT.ANN. § 9795.1.

E. Pertinent Case Law

1. Culpability of the One Solicited

A defendant may be convicted of solicitation where the person approached would be the victim of a crime and not an accomplice. **Commonwealth v. Cauto**, 535 A.2d 602 (Pa. Super. 1987), *appeal denied*, 521 Pa. 601, 555 A.2d 112 (1988) (offering to perform oral sex on one minor and requesting another minor to pose in photographs depicting masturbation and oral sex with another male, constitutes complicity or participation in the commission of a crime, to wit: Involuntary Deviate Sexual Intercourse and Sexual Abuse of Children by Photograph or Film); **Commonwealth v. Morales**, 601 A.2d 1263 (Pa. Super. 1992), *appeal denied*, 531 Pa. 652, 613 A.2d 558 (1992)(offering to perform oral sex on a minor is sufficient for a solicitation conviction since the solicitation was for the victim’s participation in conduct, without which the defendant could not have committed involuntary deviate sexual intercourse.)

2. Complicity of the One Solicited

The crime of solicitation “encompasses more than requesting another to commit the substantive crime underlying the solicitation charge.” **Commonwealth v. Spetzer**, 722 A.2d 702, 716 (Pa. Super. 1998), *vacated on other grounds*, 572 Pa. 17, 813 A.2d 707 (2002)(Since defendant encouraged his wife to engage in conduct which would have made her an accomplice to the sexual offenses had she complied, defendant was guilty of solicitation of those sexual offenses.)

3. Culpability for Crimes Intended to be Committed

Culpability only extends to those offenses “intended or contemplated to be committed.” *Commonwealth v. Spetzer*, 722 A.2d 702, 716-717 (Pa. Super. 1998), *vacated on other grounds*, 572 Pa. 17, 813 A.2d 707 (2002). In the *Spetzer* case, as a part of a sting operation, the defendant’s wife had pretended to go along with defendant, led the defendant to believe that her daughters were willing to engage in sexual relations with him in the motel room, and planned a fictitious meeting with the two girls at a motel; however, the Superior Court found where there was a lack of evidence that the defendant intended to commit forcible sexual assaults, therefore, only the convictions for solicitation relating to non-forcible sexual assault and corruption of minor charges were permitted to stand, and the charges of solicitation to commit forcible or non-consensual sexual assaults were reversed.

18 PA.CONS.STAT.ANN. § 904.

Incapacity, Irresponsibility or Immunity of Party to Solicitation or Conspiracy

(a) **General rule.**—Except as provided in subsection (b) of this section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(1) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; or

(2) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

(b) **Exception.**—It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under section 306(e) of this title (relating to status of actor) or section 306(f)(1) or (2) of this title (relating to exceptions).

⁶ In *Commonwealth v. Jacob*, 867 A.2d 614, 617 n.6 (Pa. Super. 2005), another panel of the Superior Court found that although *Spetzer* was not binding precedent due to the fact that the Pennsylvania Supreme Court had overruled it on other grounds, its reasoning was “instructive.”

Defenses

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4.1 CHAPTER OVERVIEW

This chapter examines defenses applicable to sexual offenses. The defenses are arranged alphabetically by title and each defense includes a detailed discussion on applicability, elements, and burden of proof, along with other relevant issues.

4.2 ALIBI DEFENSE

A. Definition

An alibi defense is:

[A] defense that places the defendant at the relevant time at a different place than the scene involved and so removed therefrom as to render it impossible for him [or her] to be the guilty party.

Commonwealth v. Mikell, 556 Pa. 509, 517, 729 A.2d 566, 570 (1999). *See also*, Black's Law Dictionary 79 (8th ed. 2004) ("A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.").

B. Establishing the Defense

To successfully assert an alibi defense, a defendant need not show any "minimum or threshold quantum of physical separation" from the victim and the crime scene "so long as the separation makes it impossible for the defendant to have committed the crime." *See Commonwealth v. Roxberry*, 529 Pa. 160, 164, 602 A.2d 826, 828 (1992). As the Superior Court recently noted, there is no "magic distance" necessary for the defendant's separation from the victim and the crime scene; rather "all depends upon whether evidence is introduced that 'if believed, isolate[s] [the defendant] from all possible interaction with the victim and the crime scene.'" **Commonwealth v. Hall**, 867 A.2d 619, 637 (Pa. Super. 2005), *appeal denied*, 586 Pa. 756, 895 A.2d 549 (2006) (quoting **Commonwealth v. Collins**, 549 Pa. 593, 604, 702 A.2d 540, 545 (1997), *cert denied*, 525 U.S. 835 (1998)). *See also*, **Roxberry**, 529 Pa. at 164, 602 A.2d at 828 ("It is theoretically possible to assert an alibi even when a crime occurs in the same building where the accused is located.").

Furthermore, an alibi defense need not be corroborated; it can be established "solely by the unsupported testimony of the defendant." *Id.*, 529 Pa. at 165, 602 A.2d at 828. However, it is common for a defendant to present alibi witnesses or other evidence showing his or her presence away from the victim

and the crime scene in an effort to establish the defense. *See Commonwealth v. Pounds*, 490 Pa. 621, 631-632, 417 A.2d 597, 602 (1980).

C. Statutory Notice Requirements

A defendant's right to present evidence of an alibi is not absolute. A Defendant must comply with the notice requirements set forth in Pennsylvania Rule of Criminal Procedure 573. Rule 573 is "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Commonwealth v. Fernandez*, 482 A.2d 567, 572 (Pa. Super. 1984).

Pa.R.Crim.P. 573(C)(1)(a), 42 PA.CON.S.TAT.ANN., provides, in pertinent part, the following:

(1) Mandatory:

(a) Notice of Alibi Defense: A defendant who intends to offer the defense of alibi at trial, within the time required for filing the omnibus pretrial motion under Rule 579, shall file with the clerk of courts notice specifying the intention to claim the defense of alibi, and a certificate of service on the attorney for the Commonwealth. The notice and certificate shall be signed by the attorney for the defendant, or the defendant if unrepresented. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

In accordance with Rule 573(C)(1)(d) of the Pennsylvania Rules of Criminal Procedure, 42 PA.CON.S.TAT.ANN., if the defendant fails to file and serve notice of the alibi defense, or omits any witness from the notice, the Court may:

- i. Exclude the testimony of any omitted witness; or
- ii. Exclude entirely any evidence offered by the defendant for the purpose of proving the defense (except testimony by the defendant); or
- iii. Grant a continuance to enable the Commonwealth to investigate such evidence; or
- iv. Make such other order as the interests of justice require.

The imposition of sanctions under Rule 573 is within the sole discretion of the trial court. *See Commonwealth v. Zimmerman*, 571 A.2d 1062, 1067 (Pa. Super. 1990), *appeal denied*, 529 Pa. 633, 600 A.2d 953 (1991), *cert. denied*, 503 U.S. 945 (1992).

D. Burden of Proof

The defendant “bears no burden of proof on alibi.” **Commonwealth v. Pounds**, 490 Pa. 621, 634 n.16, 417 A.2d 597, 603 n.16 (1980). In **Commonwealth v. Bonomo**, 396 Pa. 222, 151 A.2d 441 (1959), our Supreme Court stated that the

Commonwealth has the burden of proving every essential element necessary for conviction. If the defendant traverses one of those essential elements by evidence of alibi, his evidence will be considered by the jury along with all the other evidence. It may, either standing alone or together with other evidence, be sufficient to leave in the minds of the jury a reasonable doubt which, without it, might not otherwise exist.

Id., 396 Pa. at 231, 151 A.2d at 446 (emphasis added). *See also*, **Commonwealth v. Rose**, 457 Pa. 380, 386, 321 A.2d 880, 883 (1974) (“[I]n Pennsylvania, the Commonwealth must yet prove beyond a reasonable doubt the defendant’s presence at the scene of the crime at the time it was committed.”)

E. Alibi Jury Instruction

The alibi instruction is designed to ensure that the jury understands that the burden of proof properly lies with the Commonwealth, as there is an inherent danger, without the instruction, that the jury will presume that the defendant has the burden to prove that the alibi is true. *See* **Commonwealth v. Collins**, 549 Pa. 593, 603, 702 A.2d 540, 544-545 (1997), *cert denied*, 525 U.S. 835 (1998). As our Supreme Court explained in **Commonwealth v. Pounds**, 490 Pa. 621, 417 A.2d 597 (1980), “[w]here an alibi defense is presented, such an instruction is necessary due to the danger that the failure to prove the defense will be taken by the jury as a sign of the defendant’s guilt.” *Id.*, 490 Pa. at 633-634, 417 A.2d at 603.

So long as the defendant establishes an alibi defense, the trial judge may not remove the alibi issue from the jury’s consideration simply because the trial judge personally finds the evidence incredible. *See* **Commonwealth v. Roxberry**, 529 Pa. 160, 166, 602 A.2d 826, 828 (1992).

When instructing the jury, the trial court must make it clear that the defendant’s failure to prove alibi is not tantamount to guilt. *See* **Commonwealth v. Jones**, 529 Pa. 149, 151, 602 A.2d 820, 821 (1992). As such, a proper instruction “expressly informs the jury that the alibi evidence, either by itself or together with other evidence, could raise a reasonable doubt as to the defendant’s guilt and clearly directs the jury to consider this evidence in determining *whether the Commonwealth met its burden* of proving beyond a reasonable doubt that the crime was committed by the defendant.” *Id.* (quoting **Commonwealth v. Saunders**, 529 Pa. 140, 145, 602 A.2d 816, 818 (1992)).¹

¹ Thus, in giving this particular instruction, the trial judge need not “parrot” the exact language in **Pounds**, 490 Pa. at 633, 417 A.2d at 603, that alibi evidence “even if not wholly believed,” may raise a reasonable

Pennsylvania Suggested Standard Criminal Jury Instruction § 3.11 sets forth the alibi instruction as follows:

Obviously the defendant cannot be guilty unless he was at the scene of the alleged crime. The defendant has (testified) (offered evidence) that he was not present at the scene but rather was at _____. You should consider this evidence along with all of the other evidence in the case in determining whether the Commonwealth has met its burden of proving beyond a reasonable doubt that a crime was committed and that the defendant himself committed (or took part in committing) it. The defendant's evidence that he was not present, either by itself or together with other evidence, may be sufficient to raise a reasonable doubt of his guilt in your minds. If you have a reasonable doubt of the defendant's guilt, you must find him not guilty.

When a defendant offers evidence of alibi and defense counsel argues alibi to the jury, the trial court's failure to give an alibi instruction is error. *See Commonwealth v. Gainer*, 580 A.2d 333, 337 (Pa. Super. 1990), *appeal denied*, 529 Pa. 645, 602 A.2d 856 (1992). *See also, Commonwealth v. Kolenda*, 544 Pa. 426, 432, 676 A.2d 1187, 1190 (1996) ("The strength of the Commonwealth's case does not render the absence of an alibi instruction harmless error.").

1. Limitation on Use of Instruction

A defendant is only entitled to an alibi instruction, however, where his or her "explanation places him at the relevant time at a different place than the scene involved and so far removed therefrom as to render it impossible for him to be the guilty party." *Commonwealth v. Collins*, 549 Pa. 593, 603, 702 A.2d 540, 545 (1997), *cert denied*, 525 U.S. 835 (1998). Accordingly, where the defendant's testimony places him or her close enough to the crime scene to have made it physically possible for the defendant to have committed the crime, an alibi instruction is not required. *Id.* *See also, Commonwealth v. Johnson*, 538 Pa. 148, 646 A.2d 1170 (1994) (no instruction is required where the defendant's testimony placed him within 150 feet of the crime scene).

2. Ineffective Assistance of Counsel: Lack of Instruction

Furthermore, defense counsel will be found constitutionally ineffective when alibi evidence is presented to the jury, but defense counsel fails to request an alibi instruction. *See Commonwealth v. Gainer*, 580 A.2d 333, 337 (Pa. Super. 1990), *appeal denied*, 529 Pa. 645, 602 A.2d 856 (1992).

doubt. *Commonwealth v. Saunders*, 529 Pa. 140, 145, 602 A.2d 816, 818 (1992). *See also, Commonwealth v. Thomas*, 552 Pa. 621, 643, 717 A.2d 468, 479 (1998), *cert. denied*, 528 U.S. 827 (1999) (noting that in *Saunders* the Court held that the "even if not wholly believed" language from *Pounds* was "not necessary in an alibi instruction, and emphasized that an appellate court's inquiry into the adequacy of a jury charge must not focus on the presence of "magic words").

Likewise, counsel will be found constitutionally ineffective when he or she requests an alibi instruction, which the trial refuses to give, and defense counsel fails to preserve the court's error by objecting to the charge. *Id.*

E. Rebuttal of Alibi Defense

An alibi defense can be rebutted simply by the victim's testimony. *See Commonwealth v. Brison*, 618 A.2d 420, 423 (Pa. Super. 1992) (finding that jury's evident acceptance of victim's testimony was sufficient to rebut defendant's alibi evidence and noting that "no other additional evidence" was needed to rebut defendant's alibi evidence). The Commonwealth may use any relevant and admissible countervailing evidence to rebut alibi evidence.

- ***Commonwealth v. Johnson***, 788 A.2d 985, 991 (Pa. Super. 2001) (noting that to rebut alibi witness's testimony that she and defendant lived together the Commonwealth could have presented "the testimony of neighbors that Appellant did not live there, or evidence that Appellant resided elsewhere").
- ***Commonwealth v. Days***, 784 A.2d 817, 822 (Pa. Super. 2001) (no error in permitting the Commonwealth to offer defendant's convictions for public drunkenness and criminal mischief, not as crimes of dishonesty or false statement, but to rebut the defendant's alibi evidence "after appellant used the convictions to victimize and alibi himself").
- ***Commonwealth v. Viera***, 659 A.2d 1024, 1029 (Pa. Super. 1995), appeal denied, 534 Pa. 713, 672 A.2d 307 (1996) (no error in permitting the Commonwealth to present the defendant's probation officer as a rebuttal witness to defendant's alibi evidence where parole officer did not elaborate as to crime which caused defendant to serve parole).
- ***Commonwealth v. Flood***, 627 A.2d 1193, 1201 (Pa. Super. 1993), *appeal denied*, 537 Pa. 617, 641 A.2d 583 (1994) (trial court did not abuse its discretion in allowing prosecution to reopen its case and submit rebuttal affidavit, which rebutted defendant's alibi, indicating that gun allegedly used by defendant had been purchased for him by his cousin).
- ***Commonwealth v. Marsh***, 566 A.2d 296, 301 (Pa. Super. 1989) (evidence of prior crimes admissible to show common scheme where the evidence was probative as it tended to rebut the defendant's alibi defense).

G. Assessing the Credibility of an Alibi Witness

The assessment of the credibility of an alibi witness is the sole province of the fact-finder. *See Commonwealth v. Thomas*, 552 Pa. 621, 633, 717 A.2d 468, 478 (1998), *cert denied*, *Thomas v. Pennsylvania*, 528 U.S. 827 (1999); 2 West's Pennsylvania Practice § 12.32, Alibi (2001).

4.3 CONSENT DEFENSE

A. Statutory Elements of Defense

Consent as a defense is set forth in the culpability section of the Crimes Code, which provides, in pertinent part, the following:

18 PA.CON.S.TAT.ANN. § 311.

(a) General rule.—The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

Section 311 is based upon **Model Penal Code § 2.11** (2001). “[C]onsent is an act of free will. It is not the absence of resistance in the face of actual or threatened force inducing a woman to submit to a carnal act; active opposition is not a prerequisite to finding lack of consent.” **Commonwealth v. Rough**, 418 A.2d 605, 608 (Pa. Super. 1980).

B. Burden of Proof

Several sex offenses require that the Commonwealth prove lack of consent. *See* 18 PA.CON.S.TAT.ANN. § 3121 (rape); 18 PA.CON.S.TAT.ANN. § 3123 (involuntary deviate sexual intercourse); 18 PA.CON.S.TAT.ANN. § 3124.1 (sexual assault); and 18 PA.CON.S.TAT.ANN. § 3126 (indecent assault). “While a defendant may assert consent as a defense, nevertheless, where lack of consent is an element of the crime, the defendant does not bear the burden of proving consent: *the Commonwealth bears the burden of proving lack of consent, beyond a reasonable doubt.*” **Commonwealth v. Prince**, 719 A.2d 1086, 1090 (Pa. Super. 1998) (emphasis in original).

C. Ineffective Consent

Under the Crimes Code, assent to a sexual encounter does not constitute consent if:

- (1) it is given by a person who is legally incapacitated to authorize the conduct charged to constitute the offense;
- (2) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;
- (3) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or
- (4) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

18 PA.CON.S.TAT.ANN. § 311(c)(1)-(4).

- ***Commonwealth v. Erney***, 548 Pa. 467, 473-474, 698 A.2d 56, 59 (1997) (where victim has impaired physical and mental condition so as to be unable to knowingly consent, submission to intercourse is involuntary).
- ***Commonwealth v. Przybyla***, 722 A.2d 183, 186 n.5 (Pa. Super. 1998) (“Persons under 14 are presumed legally incapable of giving consent.”).
- ***Commonwealth v. Cordoba***, 902 A.2d 1280, 1286 (Pa. Super. 2006) (where defendant knew he was HIV-infected and nonetheless had sex with his victim without informing him of that fact, trial court was incorrect in concluding that defendant and victim had “consensual” relations as consent is ineffective when induced by deception, citing 18 PA.CONS.STAT.ANN. § 311(c)(4)).

D. Consent as a Valid Defense

Effective consent to sexual intercourse will negate a finding of forcible compulsion. See ***Commonwealth v. Karkaria***, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (1993); ***Commonwealth v. Rhoades***, 510 Pa. 537, 554, 510 A.2d 1217, 1225 (1986).

E. Consent Inapplicable to Certain Sexual Offenses

In cases of rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, or indecent assault, consent is no defense if the victim is thirteen years of age or younger. See 18 PA.CONS.STAT.ANN. § 3121(c), *Rape of a child*; 18 PA.CONS.STAT.ANN. § 3121(d), *Rape of a child with serious bodily injury*; 18 PA.CONS.STAT.ANN. § 3123(b), *IDSI with a child*; 18 PA.CONS.STAT.ANN. § 3123(c), *IDSI with a child with serious bodily injury*; 18 PA.CONS.STAT.ANN. § 3125(a)(7), *Aggravated indecent assault*; 18 PA.CONS.STAT.ANN. § 3126(a)(7), *Indecent assault*.

In addition, victims who are over thirteen, but under sixteen, do not have the legal capacity to consent to sexual contact with an adult who is four or more years older than the victim and who is not married to the victim:

- 18 PA.CONS.STAT.ANN. § 3122.1 (under criminal statutory sexual assault statute, consent ineffective if victim is less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).
- 18 PA.CONS.STAT.ANN. § 3123(a)(7) (under criminal involuntary deviate sexual intercourse statute, consent ineffective if victim is either less than thirteen years-old, or less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).
- 18 PA.CONS.STAT.ANN. § 3125(a)(8) (under criminal aggravated indecent assault statute, consent ineffective if victim is either less than thirteen years-old, or less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).

- 18 PA.CON.S.TAT.ANN. § 3126(a)(8) (under criminal indecent assault statute, consent ineffective if victim is either less than thirteen years-old, or less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).

4.4 DURESS

A. Statutory Elements

Duress is “a threat of harm made to compel a person to do something against his or her will or judgment[.]” Black’s Law Dictionary 542 (8th ed. 2004).

The defense of duress is codified in Section 309 of the Crimes Code. Section 309 states the following:

(a) General rule.—It is a defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(b) Exception.—The defense provided by subsection (a) of this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

18 PA.CON.S.TAT.ANN. § 309.

The elements necessary to establish duress as a defense are:

- i) there was a use of, or threat to use, unlawful force against the defendant or another person; and
- ii) the use of, or threat to use, unlawful force was of such a nature that a person of reasonable firmness in the defendant’s situation would have been unable to resist it.

See Commonwealth v. DeMarco, 570 Pa. 263, 272, 809 A.2d 256, 261-262 (2002). Duress is a defense to all criminal activity except first-degree murder. *See Commonwealth v. Morningwake*, 595 A.2d 158, 164 (Pa. Super. 1991), *appeal denied*, 529 Pa. 618, 600 A.2d 535 (1991).

B. Degree of Force Required

To establish the duress defense under Section 309, the force or threatened force does not need to be of present and impending death or serious bodily injury; rather, the relevant inquiry is

whether the force or threatened force was a type of unlawful force that “a person of reasonable firmness *in [the defendant’s] situation* would have been unable to resist.”

Commonwealth v. DeMarco, 570 Pa. 263, 272, 809 A.2d 256, 262 (2002).

The Pennsylvania Supreme Court in ***Commonwealth v. DeMarco***, 570 Pa. 263, 809 A.2d 256 (2002) noted that the foregoing test is a “hybrid objective-subjective one,” 570 Pa. at 273, 809 A.2d at 262, and explained that

the trier of fact must consider whether an objective person of reasonable firmness would have been able to resist the threat, it must ultimately base its decision on whether that person would have been able to resist the threat if he was subjectively placed in the defendant’s situation. Therefore, in making its determination, the trier of fact must consider “stark, tangible factors, which differentiate the [defendant] from another, like his size or strength or age or health.” MODEL PENAL CODE § 2.09 cmt. at 7 (Tent. Draft No. 10, 1960). Although the trier of fact is not to consider the defendant’s particular characteristics of temperament, intelligence, courageousness, or moral fortitude, the fact that a defendant suffers from “a gross and verifiable” mental disability “that may establish irresponsibility” is a relevant consideration. *Id.* at 6. Moreover, the trier of fact should consider any salient situational factors surrounding the defendant at the time of the alleged duress, such as the severity of the offense the defendant was asked to commit, the nature of the force used or threatened to be used, and the alternative ways in which the defendant may have averted the force or threatened force.

DeMarco, 570 Pa. at 273, 809 A.2d at 262.

C. Exceptions to Duress Defense

1. Recklessness

The duress defense is not available if the evidence establishes that the defendant recklessly placed himself in a situation where it was probable that he would be subject to duress. *See* 18 PA.CON.S.TAT.ANN. § 309(b). Our Supreme Court has defined “reckless” under Section 309 as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, *considering the nature and intent of the actor’s conduct and the circumstances known to him*, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe *in the actor’s situation*.

DeMarco, 570 Pa. at 273-274, 809 A.2d at 262 (citing 18 PA.CON.S.TAT.ANN. § 302(b)(3)) (emphasis in original). The determination of recklessness is also “a hybrid objective-subjective one.” *Id.*, 570 Pa. at 274, 809 A.2d at 262.

The trier of fact must decide whether the defendant disregarded a risk that involves a gross deviation from what an objective “reasonable person” would observe if he was subjectively placed “in the [defendant’s] situation.” 18 Pa.C.S. § 302(b)(3). Thus, in making its determination, the trier of fact must again take into account the stark tangible factors that differentiate the defendant from another person and the salient situational factors surrounding the defendant.

Id., 570 Pa. at 274, 809 A.2d at 262-263.

2. Negligence

The defense of duress is also unavailable if a defendant were negligent in placing himself in a situation where he would be subjected to duress, whenever negligence suffices to establish culpability for the offense charged. *See* 18 PA.CON.S.TAT.ANN. § 309(b). *See also, Commonwealth v. Knight*, 611 A.2d 1199, 1205 (Pa. Super. 1992), *appeal denied*, 533 Pa. 657, 625 A.2d 1192 (1993). The Crimes Code defines negligence as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

18 PA.CON.S.TAT.ANN. § 302(b)(4).

4.5 IMPOSSIBILITY DEFENSE

A. Factual v. Legal

1. Factual Impossibility

“Factual impossibility denotes conduct where the objective is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing it about.” *Commonwealth v. Henley*, 504 Pa. 408, 410-411, 474 A.2d 1115, 1116 (1984).

Factual impossibility is not an available defense under the Pennsylvania Crimes Code. *See e.g., Commonwealth v. Timer*, 609 A.2d 572, 575 (Pa. Super. 1992) (conviction for conspiracy to purchase and/or possess

methamphetamine upheld even though a sale never took place and was never going to take place because the undercover officers posing as suppliers had no intention of actually providing the drug).

2. Legal Impossibility

Legal impossibility occurs “where the intended acts would not amount to a crime even if completed.” *Commonwealth v. Henley*, 504 Pa. 408, 411, 474 A.2d 1115, 1116 (1984). As set forth in Section 901 of the Crimes Code, legal impossibility is not a recognized defense to a charge of “attempt” in Pennsylvania. Section 901 provides, in pertinent part, the following:

(b) Impossibility.—It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the crime attempted.

18 PA.CON.S.TAT.ANN. § 901(b). Our Supreme Court in *Henley* concisely summarized the law in Pennsylvania when it stated that “if one forms intent to commit a substantive crime, then proceeds to perform all the acts necessary to commit the crime, and it is shown that completion of the substantive crime is impossible, the actor can still be culpable of attempt to commit the substantive crime.” *Id.*, 504 Pa. at 416, 474 A.2d at 1119.

In the context of an assault case, the Pennsylvania Superior Court, in *Commonwealth v. Lopez*, 654 A.2d 1150 (Pa. Super. 1995), similarly concluded that an attempt is established if the appropriate “intent” is shown: “if the accused intends to cause serious bodily injury to another, then proceeds to perform all of the acts necessary to do so, the accused can still be guilty of aggravated assault even though completing an aggravated assault is impossible.” *Id.*, at 1154.

4.6 INSANITY DEFENSE

A. Availability

The insanity defense is only available to those defendants who come within the purview of Pennsylvania’s legal test for insanity. The insanity defense is not available simply because the defendant has a mental illness.

B. Statutory Defense

Section 315 of the Crimes Code provides the general rule that

The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.

18 PA.CON.S.TAT.ANN. § 315(a). Section 315(b) further provides that

“[l]egally insane” means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

Section 315 is a codification of the *M’Naghten*² test for insanity. *See Commonwealth v. Reilly*, 519 Pa. 550, 558-559, 549 A.2d 503, 507 (1988). Accordingly, “[u]nder *M’Naghten*, a defendant is legally insane and absolved of criminal responsibility if, at the time of committing the act, due to a defect of reason or disease of mind, the accused either did not know the nature and quality of the act or did not know that the act was wrong.” *Commonwealth v. Heidnik*, 526 Pa. 458, 466, 587 A.2d 687, 690 (1991).

C. Burden of Proof

A defendant must prove insanity by a preponderance of the evidence. *See* 18 PA.CON.S.TAT.ANN. § 315(a); *Commonwealth v. Heidnik*, 526 Pa. 458, 466, 587 A.2d 687, 691 (1991); *Commonwealth v. Mitchell*, 576 Pa. 258, 274, 839 A.2d 202, 211 n.8 (2003). Our Supreme Court in *Commonwealth v. Reilly*, 519 Pa. 550, 549 A.2d 503 (1988), explained that

[i]n order for appellant’s attack upon section 315 to succeed, she must show that insanity negates the *mens rea* element of the offense charged. Although the burden is upon the Commonwealth to prove every element of its case, the Commonwealth is not required to prove facts which would counteract any justification or excuse the defendant may have had for the commission of the crime. Proof of facts which exonerate the accused from his guilt remain solely the province of the criminal defendant.

Id., 519 Pa. at 564, 549 A.2d at 510 (internal citations omitted).

D. M’Naghten Test

To establish insanity under *M’Naghten* a defendant must establish, by a preponderance of the evidence, one part of the following two part test: (1) at the time he or she committed the act, the defendant did not know the nature and quality of the act or (2) the defendant did not know that it was wrong. *See Commonwealth v. Demmitt*, 456 Pa. 475, 481, 321 A.2d 627, 631 (1974). “The nature of an act is that it is right or wrong. The quality of an act is that it is likely to cause death or injury.” *Commonwealth v. Young*, 524 Pa. 373, 391, 572 A.2d 1217, 1226 (1989), *cert denied*, 511 U.S. 1012 (1994).

² *Regina v. M’Naghten*, 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843).

The decision of the defendant's sanity is entirely within the discretion of the jury. **Commonwealth v. Zewe**, 663 A.2d 195, 198 (Pa. Super. 1995), *appeal denied*, 544 Pa. 629, 675 A.2d 1248 (1996). Furthermore, the Commonwealth can establish a defendant's sanity solely by lay witnesses even where a defendant has offered expert testimony as to his lack of sanity.

Commonwealth v. Young, 276 Pa. 409, 416, 419 A.2d 523, 526-527 (1980). "The Commonwealth may meet its burden by testimony concerning the defendant's actions, conversations, and statements at the time of the crimes from which the jury can infer that he knew what he was doing when he committed the crimes and that he knew that his actions were wrong." *Id.*, 276 Pa. at 418, 419 A.2d at 527.

E. Irresistible Impulse

"The doctrine of 'irresistible impulse' or in the modern psychiatric vernacular 'inability to control one's self', whether used to denote legal insanity, or as a device to escape criminal responsibility for one's acts or to reduce the crime or its degree, *has always been rejected in Pennsylvania.*" **Commonwealth v. Kuzmanko**, 709 A.2d 392, 398 (Pa. Super. 1998), *appeal denied*, 556 Pa. 705, 729 A.2d 1126 (1998) (quoting **Commonwealth v. Zettlemyer**, 500 Pa. 16, 34, 454 A.2d 937, 946, *cert denied*, 461 U.S. 970 (1983)). Accordingly, irresistible impulse is no defense to a criminal charge.

F. Diminished Capacity

"Diminished capacity is an extremely limited defense." **Commonwealth v. Singley**, 868 A.2d 403, 412 n.10 (2005). "In asserting a diminished capacity defense, a defendant is attempting to prove that he was *incapable* of forming the specific intent to kill; if the defendant is successful, first degree murder is mitigated to third degree." **Commonwealth v. Travaglia**, 541 Pa. 108, 124 n.10, 661 A.2d 352, 359 n.10 (1995), *cert denied*, **Travaglia v. Pennsylvania**, 467 U.S. 1256 (1984). Accordingly, diminished capacity may not be applied to crimes other than murder of the first degree. *See Commonwealth v. Swartz*, 484 A.2d 793, 796 n.7 (1984).

G. Guilty but Mentally Ill

Section 314 of the Crimes Code provides that

[a] person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found 'guilty but mentally ill' at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

18 PA.CON.S.TAT.ANN. § 314(a). Section 314 defines "mentally ill" as "[o]ne who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." 18 PA.CON.S.TAT.ANN. § 314(c). A verdict of "guilty

but mentally ill” is not an insanity verdict, as the test for insanity is the *M’Naghten* test. See 18 PA.CONS.STAT.ANN. § 314(d).

Neither the defendant nor the Commonwealth is “required to prove that the defendant was mentally ill at the time of the commission of the offense.” *Commonwealth v. Sohmer*, 519 Pa. 200, 212, 546 A.2d 601, 607 (1988). Rather, the trier of fact assesses the evidence “produced as to the mental state of the defendant at the time of the offense whether the fact of his mental illness preponderates.” *Id.* In other words, when the defendant submits evidence as to his insanity, but the trier of fact finds that the defendant is *not* insane under the *M’Naghten* standard, the trier of fact may still find the defendant to be “guilty but mentally ill.”

Conversely, if a defendant cannot make out an insanity defense as a matter of law or fails to present evidence of mental illness, the defendant is not entitled to a “guilty but mentally ill” instruction. See *Commonwealth v. Henry*, 524 Pa. 135, 149, 569 A.2d 929, 935-936 (1990); *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28 (1991), *cert denied*, *Faulkner v. Pennsylvania*, 503 U.S. 989 (1992).

A defendant found “guilty but mentally ill” is sentenced exactly the same way as any other defendant found guilty of the criminal offense at issue. See 42 PA.CONS.STAT.ANN. § 9727(a) (“A defendant found guilty but mentally ill or whose plea of guilty but mentally ill is accepted under the provisions of 18 Pa.C.S. § 314 (relating to guilty but mentally ill) may have any sentence imposed on him which may lawfully be imposed on any defendant convicted of the same offense.”). The only difference is that the defendant found “guilty but mentally ill” may be entitled to treatment. See 42 PA.CONS.STAT.ANN. § 9727(b).

4.7 INTOXICATION

A. Voluntary Intoxication

Section 308 of the Crimes Code provides the following:

Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.

18 PA.CONS.STAT.ANN. § 308.

Section 308, however, does not render evidence of intoxication completely irrelevant, apart from reducing murder from a higher degree to a lower degree, as, in certain instances, evidence of intoxication is accepted as relevant. Our

Supreme Court explained in ***Commonwealth v. Bridge***, 495 Pa. 568, 435 A.2d 151 (1981), that

if the accused seeks to offer his intoxication to prove that he did not perform the physical act required by the crime that he was unconscious at the time and therefore did not commit the deed this evidence is germane to the factfinders' inquiry and is properly submitted for their evaluation. In such cases, the issue can be neatly confined to the question of whether the accused was the perpetrator of the deed charged.

Id., 495 Pa. at 573-574, 435 A.2d at 154. That being said, Section 308 firmly establishes that the actor's degree of sobriety is not relevant in establishing the absence of intent required to commit the crime charged. As the Superior Court stated in ***Commonwealth v. Rumsey***, 454 A.2d 1121 (Pa. Super. 1983),

it is apparent that in amended § 308 the legislature in effect redefined the *mens rea* element of intentional or knowing crimes to include those cases where the putative offender performed the criminal act but was unable to form the criminal intent otherwise required solely because he was voluntarily drunk or drugged.

Id., at 1122.

B. Involuntary Intoxication

“The existence and scope of the defense of involuntary intoxication is not yet fully established in Pennsylvania law.” ***Commonwealth v. Smith***, 831 A.2d 636, 639 (Pa. Super. 2003), *appeal denied*, 576 Pa. 722, 841 A.2d 531 (2003) (quoting Committee Note, PA.S.S.J.I. Crim. 8.308(c)). Involuntary intoxication evidence is like the insanity defense in that “the defendant is excused from criminality because intoxication affects the ability to distinguish between right and wrong.” *Id.*, at 639 n.2. Accordingly, “the mental state of an involuntarily intoxicated defendant is measured by the test of legal insanity.” *Id.*

In ***Smith***, the Superior Court noted that

[t]he defense of involuntary intoxication has been recognized in other jurisdictions in four types of situations: (1) where the intoxication was caused by the fault of another (i.e., through force, duress, fraud, or contrivance); (2) where the intoxication was caused by an innocent mistake on the part of the defendant (i.e., defendant took hallucinogenic pill in reasonable belief it was aspirin or lawful tranquilizer); (3) where a defendant unknowingly suffers from a physiological or psychological condition that renders him abnormally susceptible to a legal intoxicant (sometimes referred to as pathological intoxication); and (4) where unexpected intoxication results from a medically prescribed drug.

Id., at 639 (citing Phillip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R.3d 195 at § 2[a] (1976)). A key component to all four of these definitions is the “lack of culpability on the part of the defendant in causing the intoxication.” *Id.*

A defendant will not be excused from his or her behavior for intoxication resulting from the unwitting mixture of prescription drugs and alcohol. *See Commonwealth v. Smith*, 831 A.2d 636, 640 (Pa. Super. 2003), *appeal denied*, 576 Pa. 722, 841 A.2d 531 (2003), in which the Superior Court noted that “Pennsylvania law is consonant with the Model Penal Code’s definition and would not characterize intoxication produced by the voluntary consumption of a prescription drug and alcohol as ‘involuntary’ even if that consumption was without knowledge of a synergistic effect.”

The defendant has the burden of proving the affirmative defense of involuntary intoxication by a preponderance of the evidence. *Id.* In *dicta*, the Court in *Smith*, where the defendant consumed alcohol and prescription drugs, noted that the trial court cannot take judicial notice that the combination of drugs and alcohol is capable of causing extreme intoxication. *Id.*, at 641. The Court noted that expert testimony is needed to establish intoxicating effect. *Id.*

4.8 MISTAKE OF FACT DEFENSE

A. Statutory Elements of Defense

Section 304 of the Crimes Code sets forth the statutory elements of the defense as follows:

Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if:

- (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense; or
- (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

18 PA.CONS.STAT.ANN. § 304.

“It is not necessary that the facts be as the actor believed them to be; it is only necessary that he have ‘a bona fide and reasonable belief in the existence of facts which, if they did exist, would render an act innocent.’” *Commonwealth v. Hamilton*, 766 A.2d 874, 879 (Pa. Super. 2001) (quoting *Commonwealth v. Lefever*, 30 A.2d 364, 365 (Pa. Super. 1943)). Where the mistake of fact is not reasonable, it is not a defense even if the defendant had a *bona fide* belief in its existence. *See* 18 PA.CONS.STAT.ANN. § 304, Comment.

B. Burden of Proof

When evidence of a mistake of fact is introduced, the Commonwealth retains the burden of proving the necessary criminal intent beyond a reasonable doubt. See **Commonwealth v. Hamilton**, 766 A.2d 874, 879 (Pa. Super. 2001). Simply put, the Commonwealth must prove either the absence of a bona fide, reasonable mistake, or that the mistake alleged would not have negated the intent necessary to prove the crime charged. *Id.* See also, **Commonwealth v. Namack**, 663 A.2d 191, 195 (Pa. Super. 1995).

C. Applicability to Sex Offenses

In **Commonwealth v. Williams**, 439 A.2d 765 (Pa. Super. 1982), the defendant argued that the trial court should have instructed the jury that if he reasonably believed that the victim had consented to his sexual advances that he would then have a defense to the rape and involuntary deviate sexual intercourse charge. In other words, that his counsel should have requested a jury instruction regarding a reasonable mistake of fact, as to consent. The Superior Court rejected the defendant's argument stating:

The charge requested by the defendant is not now and has never been the law of Pennsylvania. The crux of the offense of rape is force and lack of victim's consent. When one individual uses force or the threat thereof to have sexual relations with a person not his spouse and without the person's consent he has committed the crime of rape. If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by our legislature which has the power to define crimes and offenses. We refuse to create such a defense.

Id., at 769 (internal citations omitted).

- **Commonwealth v. Farmer**, 758 A.2d 173 (Pa. Super. 2000), *appeal denied*, 565 Pa. 637, 771 A.2d 1279 (2001): request of mistake of fact instruction not warranted in rape and involuntary deviate sexual assault case where victim alleged physical violence.
- **Commonwealth v. Fischer**, 721 A.2d 1111 (Pa. Super. 1998): no mistake of fact instruction required, as per **Williams**, in "date rape" case where victim alleged physical violence and the defendant claimed he reasonably believed the rough sex was consensual.

D. Mistake as to Age

A viable defense as to mistake of age is dependent on the age of the victim. If the victim is younger than fourteen years old there is no viable defense based on mistake of age. If, however, the victim is fourteen years old or older, a defendant can try to show, by a preponderance of the evidence, that he or she

reasonably believed the victim to be older than the critical age of criminality. This is codified at Section 3102 of the Crimes Code.

Section 3102 states the following:

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

18 PA.CON.S.TAT.ANN. § 3102. Section 3102 reflects the Pennsylvania legislature's decision that "one eighteen years of age or older who engages in sexual intercourse with a child below fourteen years of age does so at his own peril." **Commonwealth v. Robinson**, 497 Pa. 49, 54, 438 A.2d 964, 966 (1981).

If the victim is *older* than fourteen years of age, it is the *defendant's* belief which must be reasonable. See **Commonwealth v. Fetter**, 770 A.2d 762, 768 (Pa. Super. 2001), *aff'd*, 570 Pa. 494, 810 A.2d 637 (2002) (no error for trial court to not allow defendant to cross-examine fifteen year old victim as to whether *she* believed that she looked older than her actual age as "the victim's beliefs as to how old she looked is irrelevant to appellant's beliefs and knowledge of her actual age"). As noted, if the victim is under fourteen years of age, the defendant's belief that the victim was older is irrelevant. See **Commonwealth v. Hall**, 418 A.2d 623, 624 (Pa. Super. 1980) (defendant's testimony that victim stated that she was sixteen years old, when in fact she was thirteen, was not a viable defense as defendant's mistaken belief "was irrelevant" under Section 3102).

E. No Conflict between Sections 3102 and 304 of the Crimes Code

As stated above, section 3102 of the Crimes Code provides:

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

18 PA.CON.S.TAT.ANN. § 3102. Section 304 provides:

Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if:

- (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense; or
- (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

18 PA.CON.S.TAT.ANN. § 304.

In *Commonwealth v. Robinson*, 399 A.2d 1084, 1087-1088 (Pa. Super. 1979), *aff'd*, 497 Pa. 49, 438 A.2d 964 (1981), the Superior Court held that Section 3102 was not invalid due to fact that it allegedly conflicted with, *inter alia*, Section 304 in light of fact that Section 3102 was a specific provision relating to sexual offenses and the other statutory provisions in question were previously enacted provisions dealing with general guidelines on culpability for the whole of the Crimes Code.

4.9 MISTAKE OF LAW

“Generally speaking, ignorance or mistake of law is no defense.” 18 PA.CON.S.TAT.ANN. § 304, Comment (1998). See also, *Commonwealth v. Cohen*, 538 A.2d 582, 584 (Pa. Super. 1988), appeal denied, 520 Pa. 581, 549 A.2d 914 (1988) (neither ignorance of the law or mistake of the law is a “defense to the commission of a crime.”).

In *Commonwealth v. Kratsas*, 564 Pa. 36, 764 A.2d 20 (2001), however, our Supreme Court noted that it had “no doubt that the due process provisions of the United States and Pennsylvania constitutions, at least in a narrow set of unique and compelling circumstances, would serve both as an exception to the maxim that mistake of law is no defense, ... and ultimately to foreclose a criminal prosecution.” *Id.*, 564 Pa. at 56, 764 A.2d at 31 (internal citations omitted).

4.10 STATUTE OF LIMITATIONS

The general rule is that offenses under the Crimes Code must be commenced within the limitations period specified by the Judicial Code, 42 PA.CON.S.TAT.ANN. §§ 5501-5574.

A. Raising the Defense of the Statute of Limitations

The proper method for Defense Counsel to raise the statute of limitations defense is in a pretrial omnibus motion. See *Commonwealth v. Groff*, 548 A.2d 1237, 1244 (Pa. Super. 1988). If the defense is not so raised it is waived. *Id.*, at 1245 n.8.

B. Particular Sexual Offenses

The following sexual offenses, as mandated by 42 PA.CONS.STAT.ANN. § 5552(b.1), have 12 year statutes of limitations:

- Rape, 18 PA.CONS.STAT.ANN. § 3121
- Statutory sexual assault, 18 PA.CONS.STAT.ANN. § 3122.1
- Involuntary deviate sexual assault, 18 PA.CONS.STAT.ANN. § 3123
- Sexual assault, 18 PA.CONS.STAT.ANN. § 3124.1
- Aggravated indecent assault, 18 PA.CONS.STAT.ANN. § 3125
- Incest, 18 PA.CONS.STAT.ANN. § 4302
- Sexual abuse of children, 18 PA.CONS.STAT.ANN. § 6312

The following sexual offenses have, as mandated by 42 PA.CON.STAT.ANN § 5552(a), 2 year statutes of limitations:

- Indecent assault, 18 PA.CONS.STAT.ANN. § 3125
- Indecent exposure, 18 PA.CONS.STAT.ANN. § 3126

C. Minority Tolling Provision

As provided by 42 PA.CONS.STAT.ANN. § 5552(c)(3), the following sexual offenses committed against a minor who is less than 18 years of age may be brought up to the latter of the following: 1) the applicable period of limitation provided by law after the minor has reached 18 years of age, or 2) the date the minor reaches 50 years of age:

- Rape, 18 PA.CONS.STAT.ANN. § 3121
- Statutory sexual assault, 18 PA.CONS.STAT.ANN. § 3122.1
- Involuntary deviate sexual intercourse, 18 PA.CONS.STAT.ANN. § 3123
- Sexual assault, 18 PA.CONS.STAT.ANN. § 3124.1
- Aggravated indecent assault, 18 PA.CONS.STAT.ANN. § 3125
- Indecent assault, 18 PA.CONS.STAT.ANN. § 3126
- Indecent exposure, 18 PA.CONS.STAT.ANN. § 3127
- Incest, 18 PA.CONS.STAT.ANN. § 4302
- Endangering welfare of children, 18 PA.CONS.STAT.ANN. § 4304
- Corruption of minors, 18 PA.CONS.STAT.ANN. § 6301
- Sexual abuse of children, 18 PA.CONS.STAT.ANN. § 6312(b)

See also, Commonwealth v. Loudon, 569 Pa. 245, 252-253, 803 A.2d 1181, 1185 (2002).

D. Tolling of the Statute of Limitations

Section 5554 of the Judicial Code provides that the period of limitations is tolled during the following periods:

42 PA.CON.S.TAT.ANN. § 5554.

- (1) the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth;
- (2) a prosecution against the accused for the same conduct is pending in this Commonwealth; or
- (3) a child is under 18 years of age, where the crime involves injuries to the person of the child caused by the wrongful act, or neglect, or unlawful violence, or negligence of the child's parents or by a person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent.

E. Commission of Offense

"An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the complicity of the defendant therein is terminated." 42 PA.CON.S.TAT.ANN. § 5552(d).

F. Commencement of Limitations Period

The commencement of the limitations period is on the day after the offense is committed. See 42 PA.CON.S.TAT.ANN. § 5552(d). The Judicial Code authorizes an exception to the limitations period in child sexual abuse cases, as stated in the above **Section C. Minority Tolling Provision**, tolling the limitations period for prosecution of enumerated sexual crimes until the child victim reaches eighteen years of age. See *Commonwealth v. Louden*, 569 Pa. 245, 252-253, 803 A.2d 1181, 1185 (2002); 42 PA.CON.S.TAT.ANN. § 5552(c)(3).

G. Commencement of Prosecution

Section 5552 of the Judicial Code requires that a prosecution be commenced prior to the expiration of the applicable statute of limitations. "[A] prosecution is commenced either when an indictment is found or an information under section 8931(b) (relating to indictment and information) is issued, or when a warrant, summons or citation is issued, if such warrant, summons or citation is executed without unreasonable delay." 42 PA.CON.S.TAT.ANN. § 5552(e).

H. Commencement of Prosecution: Invasion of Privacy

Notwithstanding the above noted provisions regarding the commencement of the limitations period for most crimes, a prosecution for a violation of 18

Defenses

PA.CON.S.TAT.ANN. § 7507.1, Invasion of Privacy, must be commenced within the following periods:

- (1) Typical commencement date: two years from the date the offense occurred.
- (2) Tolling of commencement date: if the victim did not realize at the time that there was an offense, within three years of the time the victim first learns of the offense.

Pretrial

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5.1 CHAPTER OVERVIEW

This chapter, Pretrial, discusses the balance struck in Pennsylvania between protecting the rights of an accused and advancing the interests of the state during the time period between charging the defendant and the initiation of trial. Sections 5.2 and 5.3 address the powers of the state to restrict the accused's liberty prior to trial. Section 5.4 details the rights and duties of the state and the accused during pretrial discovery. The issues that arise during pretrial motion practice are discussed in Section 5.5. Finally, section 5.6 discusses the admissibility of evidence of the victim's past sexual conduct.

5.2 BAIL

The following section discusses bail and its applicability to defendants charged with misdemeanor and felony sex offenses. No specific provisions are made under Pennsylvania law regarding bail for those accused of sex offenses. This section will therefore set out the rules and procedures that are generally applicable to the issue of pretrial bail.

A. Historical Context and Current Practice

Historically, the Pennsylvania Constitution granted every defendant a right to bail with the exception of those who were charged with crimes punishable by death. *See Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972). Furthermore, the Pennsylvania Constitution was interpreted to prohibit preventative detentions for non-capital crimes. *Id.* Under this interpretation, the only proper consideration in setting bail for non-capital crimes was ensuring the defendant's presence at subsequent proceedings. *Id.*, 449 Pa. at 335-336, 296 A.2d at 834-835.

However, in 1998, Article 1, Section 14 was amended to read as follows:

All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or *unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community* when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Pa. Const. art. I, § 14 (emphasis added).

Accordingly, it is now within the bail authority's power to deny bail if the bail authority determines that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." *Commonwealth v. Sloan*, 589 Pa. 15, 21, 907 A.2d 460, 463-464 (2006); *Commonwealth v. Jones*, 899 A.2d 353 (Pa.Super. 2006). As stated by the Pennsylvania Supreme Court in *Commonwealth v. Dixon*, 589 Pa. 28, 43, n. 12, 907 A.2d 468, 477, n.12 (2006):

A relatively recent amendment to Article I, Section 14 of the Pennsylvania Constitution permits courts to deny bail when "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person in the community." Pa. Const. Art. I, § 14. This constitutional provision supersedes the Rules of Criminal Procedure, and provides any court with the authority to deny nominal bail after 180 days if release would endanger the safety of any person. In this regard, in [*Commonwealth v. Sloan*, 589 Pa. 15, 907 A.2d 460 (2006)], a companion case being filed simultaneously with this matter, we have held that when a defendant is released on nominal bail in accord with Rule 600(E), reasonable conditions can be imposed to ensure a defendant's appearance at trial and to protect the public. The trial court's ability to deny bail altogether pursuant to Article I, Section 14, and its ability to set conditions for the release on nominal bail in accordance with our decision in *Sloan* is protective of the public interest, while this case is protective of a defendant's right to not be held indefinitely in pretrial detention. This strikes an appropriate balance between society's substantial interest in its safety and a confined defendant's substantial right to not be indefinitely held in pretrial confinement.

If bail is denied, the bail authority must set forth, on the record or in writing, the reasons for its decision. PA.R.CRIM.P., Rule 520, 42 PA. CONS. STAT. ANN.

1. **Bail and PA.R.CRIM.P. 600**

In a case in which the defendant was charged with numerous sexually violent crimes, the Superior Court held that defendant was not entitled to release on nominal bond under PA.R.CRIM.P. 600(E), given the Pennsylvania constitutional provision on bail, based upon the trial court's finding that no conditions of bail could assure the safety of the community.

Commonwealth v. Jones, 899 A.2d 353 (Pa.Super. 2006). Although the defendant had been charged with non-capital offenses, and had been held in pretrial incarceration for a period in excess of 180 days, it was permissible for the trial court to refuse bail; the trial court's finding that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community" trumped the nominal-

bond provision of Rule 600. *Id.* at 356. *See also Commonwealth v. Sloan*, 589 Pa. 15, 27 n.10, 907 A.2d 460, 467 n. 10 (2006).

Furthermore, Rule 600(E) does not bar a trial court from imposing non-monetary conditions, such as house arrest and electronic monitoring, on a defendant who is entitled to nominal bail but might otherwise be denied release under Article I, Section 1 of the Pennsylvania Constitution.

Commonwealth v. Sloan, 589 Pa. 15, 28, 907 A.2d 460, 468 (2006).

B. Issues Arising Under Pennsylvania Law

Since the wording of the amended Pennsylvania Constitution closely tracks that of the Bail Reform Act of 1984, it would appear to be prudent to base decisions regarding bail on factors similar to those in the Act. Furthermore, since the facial challenge was denied in part based upon the procedural safeguards provided by the Act, it would appear to be prudent to offer such safeguards even in the absence of clear Pennsylvania law on the issue. These safeguards include a full adversarial hearing and an expedited appellate review process.

Finally, it must be kept in mind that the failure of a defendant to admit culpability or assist in the investigation may not be used as a reason to impose additional or more restrictive conditions of bail on the defendant.

Pa.R.Crim.P., Rule 523(B), 42 PA. CONS. STAT. ANN. Accordingly, these factors are likely to be improper bases for denying bail outright.

1. Timing

In cases where the court determines the defendant can be safely released on bail, it may admit the defendant to bail on any day and at any time. A delay in determining whether to grant bail does not entitle a defendant to discharge unless the defendant sets forth specific allegations of prejudice. The mere allegation that the defendant was hindered in the preparation of a defense is not a sufficient allegation of prejudice. *Commonwealth v. Garcia*, 478 Pa. 406, 387 A.2d 46 (1978).¹

After an accused has been arrested, the Commonwealth or the defendant may request that the court set bail for any material witness. Pa.R.Crim.P., Rule 522, 42 PA. CONS. STAT. ANN. Witnesses may not be detained before the arrest of an accused, as the accused may never be arrested, leading to an indefinite detention. *Id.*, *Cmt.*

2. Factors for Bail Consideration

Once the court has determined that a defendant may be safely released on bail, it must set bail in relation to the likelihood that the defendant will flee the jurisdiction. *Ruckinger v. Weicht*, 514 A.2d 948 (Pa. Super. 1986). In making this determination, the court shall consider all available information

¹ For the minor judiciary's authority to set bail, *See* 42 PA. CONS. STAT. ANN., §§ 1123(a)(5), 1143(a)(1), and 1515(a)(4).

relevant to defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with conditions of the bail bond, including information about:

- the nature of offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
 - the defendant's employment status and history, and financial condition;
 - the nature of defendant's family relationship;
 - the length and nature of defendant's residence in the community, and any past residences;
 - the defendant's age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
 - if the defendant has previously been released on bail, whether he appeared as required and complied with any bail conditions;
 - whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;
 - the defendant's prior criminal record;
 - whether the defendant has any history of use of false identification; and
 - any other factors relevant to whether defendant will appear as required and comply with the conditions of the bail bond.
- Pa.R.Crim.P., Rule 523, 42 PA. CONS. STAT. ANN.

Anticipated criminal activity may be considered in setting the amount and terms of bail, in conjunction with the other considerations.

Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972). However, the failure of the defendant to admit culpability or assist in the investigation may not be used as a reason to impose additional or more restrictive conditions of bail on the defendant. Pa.R.Crim.P., Rule 523(B), 42 PA. CONS. STAT. ANN.

3. Bail Conditions

In releasing a defendant on bail, the court has five different options, any of which the court may exercise within its discretion:

1. ROR Bail;
2. Nonmonetary Conditions;
3. Unsecured Bond;
4. Nominal Bail;
5. Monetary Bail.

First, the court may release the defendant on recognizance, commonly referred to as “ROR” bail. Pa.R.Crim.P., Rule 524, 42 PA. CONS. STAT. ANN. This release is conditioned only upon the defendant’s written agreement to appear when required and to comply with all conditions of the bail bond as provided in Pa.R.Crim.P., Rule 526(A), 42 PA. CONS. STAT. ANN. *Id.*

Second, the court may release on nonmonetary conditions. Pa.R.Crim.P., Rule 527, 42 PA. CONS. STAT. ANN. Under this authority, the court may impose the following conditions:

- (1) reporting requirements;
- (2) restrictions on the defendant’s travel; and/or
- (3) any other appropriate conditions designed to ensure the defendant’s appearance and compliance with the conditions of the bail bond.

When a defendant poses a danger to another person, especially in case involving domestic violence, a “no contact” order is appropriate under this Rule. *Id.*, *Cmt.* These conditions must be stated with specificity on the bail bond. *Id.*

A third option available to the court is release on unsecured bond. Under this option, the court releases the defendant on the condition that the defendant agrees to be liable for a fixed sum should the defendant fail to appear at a required proceeding or comply with the conditions of bail. No money or security is required to be deposited. Pa.R.Crim.P., Rule 524, 42 PA. CONS. STAT. ANN.

Fourth, the court may release the defendant on nominal bail. Here, the defendant is required to deposit a nominal amount of cash (often \$1.00) and must designate another person, organization, or bail agency to act as a surety. *Id.*

Finally, the court may release the defendant on a monetary condition. Pa.R.Crim.P., Rule 528, 42 PA. CONS. STAT. ANN. The bail authority may consider the following when determining the monetary condition of bail: (1) the release criteria from Pa.R.Crim.P., Rule 523, 42 PA. CONS. STAT. ANN., and (2) the financial ability of the defendant. Pa.R.Crim.P., Rule 528(A), 42 PA. CONS. STAT. ANN. The amount of the monetary condition must be reasonable in light of the financial ability of the defendant. Pa.R.Crim.P., Rule 528(B), 42 PA. CONS. STAT. ANN. A 10% deposit may act as sufficient security for the entire monetary condition, and acceptable forms of security include: cash or cash equivalents, U.S. or Commonwealth of Pennsylvania bearer bonds, realty within the United States, and surety bonds under 42 PA. CONS. STAT. ANN. §§ 5741-5749. Pa.R.Crim.P., Rule 528(C)–(D), 42 PA. CONS. STAT. ANN.

Bail conditions may be modified any time prior to a preliminary hearing upon request of the defendant and with consent of the Commonwealth

attorney. Pa.R.Crim.P., Rule 529(A), 42 PA. CONS. STAT. ANN. In addition, bail conditions may be modified at the preliminary hearing upon the request of either party. *Id.* In deciding whether to modify a bail order, the issuing authority or Judge should evaluate the same factors that are to be considered when granting bail under Rules 523 and 524. Pa.R.Crim.P., Rule 529, 42 PA. CONS. STAT. ANN., *cmt.*

4. Modification

Once bail has been set or modified by a Judge of the Court of Common Pleas, it may not be modified thereafter except by a court of superior jurisdiction, or by the same judge or another judge of the Court of Common Pleas either at trial or after notice to the parties and a hearing. Pa.R.Crim.P., Rule 529(C), 42 PA. CONS. STAT. ANN.

In Municipal Court cases, an existing bail order may be modified prior to verdict by a Municipal Court judge in the same manner as a judge of the court of common pleas pursuant to Pa.R.Crim.P. 529(C), *cmt.*; Pa.R.Crim.P. 1011(A).

An existing bail order may be modified by a Judge of the Court of Common Pleas at any time prior to verdict upon motion by either party with notice to the opposing party and a hearing on the motion, or at trial or a pretrial hearing in open court on the record when all the parties are present. Pa.R.Crim.P., Rule 529(B), 42 PA. CONS. STAT. ANN. When bail is modified, the modification must be explained to the defendant and stated in writing or on the record by the issuing authority or Judge. Pa.R.Crim.P., Rule 529(D), 42 PA. CONS. STAT. ANN.

5. Bail After Conviction

After a defendant has been convicted, his right to bail is conditioned on the possible sentences flowing from the conviction(s), and whether sentencing has occurred. When a defendant has been convicted of an offense which is punishable by death or life imprisonment, the defendant shall not be released on bail. Pa.R.Crim.P., Rule 521(A)(1), 42 PA. CONS. STAT. ANN. In other cases, the standard used to determine eligibility for bail is based upon whether the aggregate of all possible sentences of imprisonment on all outstanding verdicts against the defendant in the same judicial district exceeds three (3) years. If the possible sentences don't exceed 3 years aggregate, the defendant has the same right to bail as he had prior to conviction. Pa.R.Crim.P., Rule 521(A)(2)(a), 42 PA. CONS. STAT. ANN.

If the possible sentences aggregated exceed 3 years, then the defendant has the same right to bail as before conviction unless the sentencing judge finds that: (i) that no condition of bail will reasonably ensure compliance with the bail bond; or (ii) that the defendant poses a threat to the community or himself. Pa.R.Crim.P., Rule 521(A)(2)(b), 42 PA. CONS. STAT. ANN.

After a defendant has been sentenced, the standard applicable is again predicated on the possible maximum length of sentence of imprisonment. If the sentence imposed includes imprisonment of less than 2 years, the defendant shall the same right of bail as he did prior to the conviction, unless the Judge modifies the bail order pursuant to Pa.R.Crim.P. 521(D). Pa.R.Crim.P., Rule 521(B)(1), 42 PA. CONS. STAT. ANN.

With the exception of capital and life imprisonment cases, Pa.R.Crim.P. 521(A)(1), 42 PA. CONS. STAT. ANN., if the sentence imposed includes possible imprisonment exceeding 2 years, bail may be granted at the discretion of the Judge. Pa.R.Crim.P., Rule 521(B)(2), 42 PA. CONS. STAT. ANN. After the defendant is sentenced and released on bail, the Judge may impose as a condition of bail that the defendant file a post-sentence motion or perfect an appeal within the time required by law. Pa.R.Crim.P., Rule 521(B)(3), 42 PA. CONS. STAT. ANN.

When a defendant is eligible for release on bail after conviction, the existing bail order may be modified by a Judge of the Court of Common Pleas, upon the Judge's own motion or upon motion of counsel for either party with notice to the opposing party, in open court on the record when all parties are present. Pa.R.Crim.P., Rule 521(D)(1), 42 PA. CONS. STAT. ANN. The decision to modify the bail order should be based on the same considerations relevant when first deciding to grant bail.² Pa.R.Crim.P., Rule 521(D)(2), 42 PA. CONS. STAT. ANN. Whenever bail is refused or revoked after conviction, the Judge must state on the record reasons in support of the decision. Pa.R.Crim.P., Rule 521(C), 42 PA. CONS. STAT. ANN.

6. Violation of Condition of Bail

Revocation: When a defendant violates a condition of the bail bond, he is subject to revocation of his release and/or a change in the conditions of the bail bond by the bail authority. Pa.R.Crim.P., Rule 536(A)(1)(a), 42 PA. CONS. STAT. ANN. Upon learning of a violation of a bail condition, the bail authority may issue a warrant for the defendant's arrest. Pa.R.Crim.P., Rule 536(A)(1)(b), 42 PA. CONS. STAT. ANN. If a defendant is detained pursuant to such a warrant, he may not be released except upon order of the person who issued the arrest warrant, or if that person is unavailable, upon order of the President Judge of the judicial district or such Judge as designated by the President Judge. Pa.R.Crim.P., Rule 536(A)(1)(d), 42 PA. CONS. STAT. ANN.

Furthermore, the bail authority may order the defendant or his surety to show cause why the defendant's release should not be revoked or the conditions of his bail modified. Pa.R.Crim.P., Rule 536(A)(1)(c), 42 PA. CONS. STAT. ANN. If the bail authority revokes or modifies the conditions of

² The considerations include the defendant's likelihood of fleeing the jurisdiction or whether the defendant is a danger to any other person, the community, or himself or herself. Pa.R.Crim.P., Rule 521, 42 PA. CONS. STAT. ANN.

the defendant's release, the bail authority must state in writing or on the record the reasons for so doing. Pa.R.Crim.P., Rule 536(A)(1)(e), 42 PA. CONS. STAT. ANN.

Forfeiture: When a monetary condition of release has been imposed, the bail authority may order any cash or other security submitted to a monetary condition of release forfeited pursuant to a violation of the conditions of the bail bond. Pa.R.Crim.P., Rule 536(A)(2)(a), 42 PA. CONS. STAT. ANN. The bail authority must state its reasons for doing so in writing or on the record. *Id.* Furthermore, written notice of the forfeiture must be provided to the defendant and any surety through personal delivery or delivery by both first class mail and certified mail at the last known address of the defendant and the surety. Pa.R.Crim.P., Rule 536(A)(2)(b), 42 PA. CONS. STAT. ANN. The forfeiture may not be executed until 20 days after notice has been provided to the defendant and surety. Pa.R.Crim.P., Rule 536(A)(2)(c), 42 PA. CONS. STAT. ANN.

The bail authority has the discretion to set aside a forfeiture if justice does not require the full enforcement of the forfeiture order. Pa.R.Crim.P., Rule 536(A)(2)(d), 42 PA. CONS. STAT. ANN. The decision to set aside a bail forfeiture "lies within the sound discretion of the trial court."

Commonwealth v. Mrozek, 703 A.2d 1052, 1053 (Pa. Super. 1997).

Therefore, the trial court's decision in this regard will only be overturned if it has misapplied the law, exercised "manifestly unreasonable judgment," or the decision is the result of "prejudice, bias, ill-will, or partiality." *Id.*

Generally, it is the surety's burden to establish that the surety's efforts had at least a substantial impact on the apprehension or return of the defendant. *Id.* Merely searching for the defendant is not sufficient. *Id.* at 1054. Essentially, the trial court must determine both the extent of the surety's efforts and the results flowing from the surety's efforts. *Id.* Finally, there is no arbitrary deadline for filing a petition for setting aside a forfeiture. ***Commonwealth v. Mayfield***, 827 A.2d 462, 466 (Pa. Super. 2003). Instead, the trial court must concentrate on the surety's diligence in filing a motion to vacate bail forfeiture. *Id.*

Bail Piece: A surety may apply for a "bail piece" in order to apprehend a defendant who has violated the conditions of his bail. Pa.R.Crim.P., Rule 536(B), 42 PA. CONS. STAT. ANN. When granted, a "bail piece" authorizes the surety to privately apprehend and detain the defendant and bring him before the bail authority without delay. *Id.*; See also ***Commonwealth v. Elmobdy***, 823 A.2d 180, 186 (Pa. Super. 2003), *appeal denied*, 577 Pa. 701, 847 A.2d 58 (2004).

C. Appellate Review

An order relating to bail is subject to review pursuant to Chapter 15 of the Pennsylvania Rules of Appellate Procedure:

Rule 1762. Release in Criminal Matters

...

- (b) Applications relating to bail when no appeal is pending:
- (1) Applications relating to bail when no appeal is pending shall first be presented to the lower court, and shall be governed by the Pennsylvania Rules of Criminal Procedure.
 - (2) An order relating to bail shall be subject to review pursuant to Chapter 15 (judicial review of governmental determinations). Any answer shall be in accordance with Rule 1516 (other pleadings allowed), and no other pleading is authorized. Rule 1517 (applicable rules of pleading) and Rule 1531 (intervention) through 1551 (scope of review) shall not be applicable to a petition for review filed under this paragraph.

(c) **Content.** An application for relief under subdivision (a) or a petition for review under subdivision (b) shall set forth specifically and clearly the matters complained of and a description of any determinations made by the lower court. Any order and opinions relating to the bail determination shall be attached as appendices.

(d) **Service.** A copy of the application for relief or the petition for review and any answer thereto shall be served on the judge of the lower court. All parties in the lower court shall be served in accordance with Rule 121(b) (service of all papers required). The Attorney General of Pennsylvania need not be served in accordance with Rule 1514(c) (service), unless the Attorney General is a party in the lower court.

...

(g) **Opinion of lower court.** Upon receipt of a copy of an application for relief under subdivision (a) or a petition for review under subdivision (b) that does not include an explanation for the bail determination, the judge who made the bail determination below shall forthwith file of record a brief statement of the reasons for the determination or where in the record such reasons may be found.

PA.R.A.P. 1762. *See also, Commonwealth v. Heiser*, 478 A.2d 1355, 1356 n.1 (Pa.Super. 1984). If an appeal is taken improvidently from an order of a government unit, the papers related to that appeal shall be regarded and acted upon as a petition for review. PA.R.A.P. 1503. Any court of the unified judicial system of the Commonwealth is considered a “government unit.” PA.R.A.P. 102. *See Commonwealth v. Jones*, 899 A.2d 353, 354 n.1 (Pa.Super. 2006).

5.3 NO CONTACT ORDERS INCLUDING PROTECTION FROM ABUSE ORDERS

The purpose of the Protection From Abuse Act, 23 PA.CON.S.TAT.ANN. § 6101 *et seq.*, is to protect the victims of domestic abuse, by preventing further abuse, through the use of quick and flexible procedures. *Commonwealth v. Snell*, 737 A.2d 1232, 1235 (Pa. Super. 1999); *See also Snyder v. Snyder*, 629 A.2d 977, 981 (Pa. Super. 1993).

The goal of the Protection from Abuse Act is protection and prevention of further abuse by removing the perpetrator of the abuse from the household and/or from the victim for a period of time.

McCance v. McCance, 908 A.2d 905, 908 (Pa.Super. 2006), quoting *Viruet v. Cancel*, 727 A.2d 591, 595 (Pa.Super. 1999).

The primary mechanism used by the Act is an order prohibiting contact between the victim and an alleged abuser. 23 PA. CONS. STAT. ANN. § 6108(a)(6). “No contact” orders contained as conditions in bail bonds should be viewed as having a similar purpose of prohibiting contact between the alleged abuser and the victim.

When a defendant allegedly violates a PFA order, the Act allows police or a plaintiff to file a charge of indirect criminal contempt against the defendant. 23 PA. CONS. STAT. ANN. § 6114(a). The primary goals of the contempt proceeding are to punish the contemnor and prevent any further abuse. *Commonwealth v. Snell*, 737 A.2d 1232, 1235 (Pa. Super. 1999).

5.4 DISCOVERY

Issues regarding pretrial discovery and inspection can be split into four related groups:

- Mandatory disclosures by the Commonwealth;
- Discretionary disclosures by the Commonwealth;
- Mandatory disclosures by the defendant; and
- Discretionary disclosures by the defendant.

Both parties are under a continuing duty to notify the opposing party of any additional evidence subject to either mandatory discovery or court ordered discretionary discover that is uncovered. Pa.R.Crim.P., Rule 573(D), 42 PA. CONS. STAT. ANN.

A. Disclosures that are Mandatory on the Commonwealth

Certain categories of information must be disclosed by the Commonwealth upon request by the defendant, in the absence of a protective order. As a general rule, the Commonwealth should exercise “the utmost good faith” in

responding to mandatory discovery requests. **Commonwealth v. Schwartz**, 615 A.2d 350, 358 (Pa. Super. 1992), *appeal denied*, 629 A.2d 1379, 535 Pa. 617. However, the Commonwealth is only required to disclose evidence which is within its control; it need not do the defendant's investigative work for him. **Commonwealth v. Miller**, 765 A.2d 1151 (Pa. Super. 2001).

In **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001), the Supreme Court of Pennsylvania held that a **Brady**³ violation occurs when a prosecutor fails to disclose evidence favorable to the accused and known only to the police, even though the prosecutor is unaware of the existence of the evidence. *See also*, **Commonwealth v. Sullivan**, 820 A.2d 795, 802-803 (Pa. Super. 2003), *appeal denied*, 574 Pa. 773, 833 A.2d 143 (2003).

Additionally, it must be noted that the discovery of evidence, after trial has already begun, which directly contradicts the defendant's opening argument, has been held to be grounds for the declaration of a mistrial. **Commonwealth v. Montgomery**, 533 Pa. 491, 626 A.2d 109 (1993), *abrogated in part*, **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001).

1. Exculpatory Evidence

First and foremost, the Commonwealth has a continuing duty to provide any exculpatory evidence. Pa.R.Crim.P., Rule 573(B)(1)(a), 42 PA. CONS. STAT. ANN.; **Brady v. Maryland**, 373 U.S. 83 (1963). This duty extends to exculpatory evidence that is relevant only in the punishment phase. Pa.R.Crim.P., Rule 573(B)(1)(a), 42 PA. CONS. STAT. ANN. Furthermore, this requirement extends to evidence that is relevant merely for impeachment purposes. **Commonwealth v. Morris**, 822 A.2d 684 (Pa. 2003).

In order to establish a violation of this requirement, a defendant must establish that:

- (1) the evidence was suppressed by the state;
- (2) the evidence at issue is favorable to the defendant; and
- (3) prejudice to the defendant arising from the violation.

Commonwealth v. Chambers, 570 Pa. 3, 28, 807 A.2d 872, 887 (2002), *cert. denied*, 504 U.S. 946 (1992), *citing* **Strickler v. Greene**, 527 U.S. 263, 281-282 (1999). The Commonwealth is responsible for disclosing evidence contained in the files of both the district attorney and the police agencies of the same government that is prosecuting the defendant.

Commonwealth v. Burke, 566 Pa. 402, 781 A.2d 1136 (2001). However, the Commonwealth does not violate this requirement if the defendant had "equal access to the information" and knew or could have known, through reasonable diligence, of the evidence. **Commonwealth v. Grant**, 572 Pa. 48, 55, 813 A.2d 726, 730 (2002), *clarified on denial of reargument* 573 Pa. 141, 821 A.2d 1246 (2002).

³ **Brady v. Maryland**, 373 U.S. 83 (1963).

2. Confessions or Inculpatory Statements

The second category of evidence that is subject to mandatory disclosure by the Commonwealth upon request involves any confession or inculpatory statements made by the defendant that are within the possession or control of the Commonwealth. Pa.R.Crim.P., Rule 573(B)(1)(b), 42 PA. CONS. STAT. ANN. The Commonwealth must also disclose the identity of the person(s) to whom such statements were made, if the information is within the possession or control of the attorney for the Commonwealth. *Id.*

3. Prior Criminal Record of the Defendant

The Commonwealth must also disclose any prior criminal record of the defendant of which the Commonwealth is aware. Pa.R.Crim.P., Rule 573(B)(1)(c), 42 PA. CONS. STAT. ANN. However, if defense counsel is aware of prior criminal convictions due to previous representation of the defendant, the Commonwealth does not commit a *per se* violation of the rule by failing to disclose such convictions. ***Commonwealth v. Elliott***, 549 Pa. 132, 700 A.2d 1243 (1997), *cert. denied*, 524 U.S. 955 (1998).

4. Identifications of the Defendant

Another category of evidence that the Commonwealth must disclose upon request, and in the absence of a protective order, pertains to any identification of the defendant by voice, photograph, or in-person identification. Pa.R.Crim.P., Rule 573(B)(1)(d), 42 PA. CONS. STAT. ANN. Although the Commonwealth must disclose that an eyewitness failed to identify the defendant in a pre-trial photographic array, a failure by the Commonwealth to disclose a pre-trial identification of defendant by photographic array was found to be harmless where the identity of the defendant was not at issue in the case. ***Commonwealth v. Davis***, 704 A.2d 650, 653 (Pa. Super. 1997), *appeal denied*, 553 Pa. 704, 719 A.2d 744 (1998), *cert. denied*, 525 U.S. 1026 (1998).

5. Results of Scientific Tests and Other Expert Evaluations

The Commonwealth, upon request, must also disclose the results and reports of scientific tests, expert opinions, polygraph examinations, and physical or mental examinations in the Commonwealth's control or possession. Pa.R.Crim.P., Rule 573(B)(1)(e), 42 PA. CONS. STAT. ANN. This provision does not require the Commonwealth to create a written summary of an expert's findings, if the expert has not prepared a written report. ***Commonwealth v. Blasioli***, 685 A.2d 151, 160 (Pa. Super. 1996), *aff'd*, 552 Pa. 149, 713 A.2d 1117 (1998).

The defendant's right to access an alleged victim's records held by an agency, hospital or rape crisis center is limited by any privilege that may protect the confidentiality of the alleged victim's records. ***Commonwealth v. Eck***, 605 A.2d 1248 (Pa. Super. 1992). Further, the Constitutional right to confront an accuser does not entitle a defendant to an unsupervised

review of psychiatric records of an alleged victim that are in the possession of the Commonwealth. Rather, the defendant is entitled to have the trial court conduct an *in camera* review of the Commonwealth's records, after which the trial court will determine the materiality of any documents in the possession of the Commonwealth. ***Commonwealth v. Byuss***, 539 A.2d 852 (Pa. Super. 1988).

In addition, as long as the Commonwealth promptly produces the results of any scientific test or evaluation, it does not violate the mandatory disclosure requirement by initially failing to diligently pursue the underlying test or evaluation. ***Commonwealth v. Smith***, 599 A.2d 1350 (Pa. Super. 1991).

6. Tangible Evidence

The Commonwealth must also disclose all tangible evidence in its possession. Pa.R.Crim.P., Rule 573(B)(1)(f), 42 PA. CONS. STAT. ANN. The rule provides a non-exhaustive list of examples such as documents, photographs, and fingerprints. *Id.* Audio cassette recordings have been treated as tangible evidence. ***Commonwealth v. Brocco***, 396 A.2d 1371 (Pa. Super. 1979). When faced with a discovery request for tangible evidence, the Commonwealth should exercise the utmost good faith in disclosing such evidence. ***Commonwealth v. Thiel***, 470 A.2d 145 (Pa. Super. 1983) (Commonwealth's failure to disclose tangible evidence that buttressed the credibility of its primary witness constituted a reversible error).

7. Transcripts and Recordings of Electronic Surveillance

Finally, the Commonwealth must produce the transcripts and recordings of any electronic surveillance and the authority under which such surveillance was authorized. Pa.R.Crim.P., Rule 573 (B)(1)(g), 42 PA. CONS. STAT. ANN.

B. Disclosures by the Commonwealth at the Discretion of the Court.

In all court cases, except as provided in Rule 230 for Investigating Grand Juries, a defendant may file a motion for pretrial discovery seeking the production of certain types of evidence that are not included under the mandatory discovery provisions. Pa.R.Crim.P., Rule 573(B)(2), 42 PA. CONS. STAT. ANN. The court has the discretion to permit or deny such discovery. *Id.*

The trial court exercising its discretion to grant or deny a request for discretionary discovery should be guided by the principle to allow as much discovery prior to trial as will, consistent with the protection of persons, effective law enforcement, the adversary system, and national security, provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. ***Commonwealth v. Thiel***, 470 A.2d 145 (Pa. Super. 1983).

1. Names and Addresses of Eyewitnesses

The court may order the Commonwealth to disclose the names and addresses of any eyewitnesses known to the Commonwealth. Pa.R.Crim.P., Rule 573(B)(2)(a)(i), 42 PA. CONS. STAT. ANN.; **Commonwealth v. Jones**, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826 (1996). This rule covers eyewitnesses only; there is no requirement that the Commonwealth reveal the names and addresses of all of its witnesses. **Commonwealth v. Colson**, 507 Pa. 440, 490 A.2d 811 (1985), *cert. denied*, 476 U.S. 1140 (1986), *abrogated in part*, **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001). However, even if the Commonwealth does not intend to call an eyewitness to testify, it still must identify the witness in order to comply with court ordered discovery under this section. **Commonwealth v. Allen**, 429 A.2d 1113 (Pa. Super. 1981).

2. Verbatim or Substantially Verbatim Statements of Eyewitnesses

The Commonwealth may be ordered to disclose all written or recorded statements made by eyewitnesses. Pa.R.Crim.P., Rule 573(B)(2)(a)(ii), 42 PA. CONS. STAT. ANN. Furthermore, the Commonwealth may be ordered to disclose all substantially verbatim oral statements made by eyewitnesses. Pa.R.Crim.P., Rule 573(B)(2)(a)(ii), 42 PA. CONS. STAT. ANN. When there is a dispute over whether a writing is a substantially verbatim record, the court must examine the writing and make a finding. **Commonwealth v. Alston**, 864 A.2d 539, 547 (Pa. Super. 2004) (*en banc*). The assertion of work product privilege does not automatically remove such writings from the realm of discoverable material. *Id.*

- **Commonwealth v. Piole**, 636 A.2d 1143, 1145 (Pa. Super. 1994), *abrogated in part*, **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001) (Mere notes taken by an officer while questioning a witness are insufficient; the statement must be substantially verbatim or be adopted by the witness).
- **Commonwealth v. Boczkowski**, 577 Pa. 421, 458, 846 A.2d 75, 97 (2004) (Commonwealth is not responsible for statements it was unaware of and that it did not possess).

The rule set forth by this section applies only to eyewitnesses, not to other witnesses. **Commonwealth v. Elliott**, 549 Pa. 132, 700 A.2d 1243 (1997), *cert. denied*, 524 U.S. 955 (1998) (pretrial statements made by victims of prior assaults perpetrated by defendant were not subject to this rule).

3. Verbatim or Substantially Verbatim Statements of Co-Defendants, Co-Conspirators or Accomplices

The Commonwealth may be ordered to disclose all written or recorded statements and substantially verbatim oral statements made by co-defendants, co-conspirators or accomplices. Pa.R.Crim.P., Rule 573(B)(2)(a)(iii), 42 PA. CONS. STAT. ANN. Whether the co-defendant, co-

conspirator or accomplice has been charged does not affect the court's power to order such discovery. *Id.*

4. Other Evidence Specifically Identified by the Defendant

The Commonwealth may be ordered to disclose “any other evidence specifically identified by the defendant, provided the defendant can [] establish that [the] disclosure would be in the interests of justice.” Pa.R.Crim.P., Rule 573(B)(2)(a)(iv), 42 PA. CONS. STAT. ANN. This includes

any information concerning any prosecutor, investigator, or police officer involved in the case who has received either valuable consideration, or an oral or written promise or contract for valuable consideration, for information concerning the case, or for the production of any work describing the case, or for the right to depict the character of the prosecutor or investigator in connection with his or her involvement in the case.

Id., cmt.

5. Experts the Commonwealth Intends to Call at Trial

If the Commonwealth intends to call an expert to testify at any proceeding, a motion may be made to the court to order such expert to prepare, and the Commonwealth disclose, a report. Pa.R.Crim.P., Rule 573(B)(2)(b), 42 PA. CONS. STAT. ANN. The report should state the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and conclusions. *Id.*

This rule is not intended to require a prepared report in every case. *Id., cmt.* Rather, the court should make a determination on a case-by-case basis as to whether a report is required. *Id.* Factors that are relevant are whether the parties are familiar with the expert and whether the expert testifies on the same subject routinely. *Id.*

C. Mandatory Disclosures by the Defendant

The defendant must disclose his intention to present either an alibi or insanity defense within the time required for filing an omnibus pre-trial motion. Pa.R.Crim.P., Rule 573(C), 42 PA. CONS. STAT. ANN. For a detailed discussion of what is required of a defendant under this rule, *See* Chapter 4.

D. Disclosures by the Defendant at the Discretion of the Court.

In all court cases, the Commonwealth may file a motion for pretrial discovery seeking the production of certain types of evidence that are not included under the mandatory discovery provisions. Pa.R.Crim.P., Rule 573(C)(2), 42 PA. CONS. STAT. ANN. The court may order the defendant to disclose such evidence upon a showing by the Commonwealth that the evidence is material to its case and that the request is reasonable. *Id.*

The trial court exercising its discretion to grant or deny a request for discretionary discovery should be guided by the principle to allow as much discovery prior to trial as will, consistent with the protection of persons, effective law enforcement, the adversary system, and national security, provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. *Commonwealth v. Thiel*, 470 A.2d 145 (Pa. Super. 1983).

1. Results or Reports of Physical or Mental Examinations and Scientific Tests

The defendant may be ordered by the court to disclose the results and reports obtained from physical or mental examinations, as well as the results and reports obtained from scientific tests, that the defendant intends to introduce as evidence in his case-in-chief. Pa.R.Crim.P., Rule 573(C)(2)(a)(i), 42 PA. CONS. STAT. ANN. The court may also order the defendant to disclose reports prepared by an intended that relate to the testimony of that witness. *Id.* However, the court may only order such discovery if the defendant has requested and received discovery under Pa.R.Crim.P., Rule 573(B)(1)(e), 42 PA. CONS. STAT. ANN. *Id.*

- *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28 (1991), *cert. denied*, 503 U.S. 989 (1992)(trial court did not abuse its discretion when it ordered defendant to produce the results of a psychiatric evaluation when defendant refused to submit to an examination by the Commonwealth's psychiatrist).

2. Names and Addresses of Eyewitnesses

The court may order the defendant to disclose the names and addresses of any eyewitnesses the defendant intends to call in his case in chief. Pa.R.Crim.P., Rule 573(C)(2)(a)(ii), 42 PA. CONS. STAT. ANN. However, the court may only order such discovery if the defendant has requested and received discovery pursuant to Pa.R.Crim.P., Rule 573(B)(2)(a)(i), 42 PA. CONS. STAT. ANN. *Id.*

- *Commonwealth v. Malone*, 514 A.2d 612 (Pa. Super. 1986) (Trial court erred in precluding testimony of eyewitness as Commonwealth did not file motion for pre-trial discovery).

3. Experts the Defendant Intends to Call at Trial

If the defendant intends to call an expert to testify at any proceeding, the court may order such expert to prepare, and the defendant disclose, a report. Pa.R.Crim.P., Rule 573(C)(2)(b), 42 PA. CONS. STAT. ANN. The report should state the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and conclusions. *Id.*

This rule is not intended to require a prepared report in every case. *Id., cmt.* Rather, the court should make a determination on a case-by-case basis as to whether a report is required. *Id.* Factors that are relevant are whether the parties are familiar with the expert and whether the expert testifies on the same subject routinely. *Id.*

E. Remedies

If a party violates the provisions of Rule 573, the court has the discretion to choose from several remedies. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. This discretion is considered broad. ***Commonwealth v. Jones***, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826 (1996). However, this discretion is not unfettered. ***Commonwealth v. Burke***, 566 Pa. 402, 781 A.2d 1136 (2001).

1. Order Production or Inspection

The court may order the violating party to permit discovery or inspection. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN.

- ***Commonwealth v. Simmons***, 541 Pa. 211, 662 A.2d 621 (1995) (production of letter written by defendant was the proper remedy for Commonwealth's violation of discovery order).

2. Grant a Continuance

The court may grant a continuance to allow the aggrieved party a chance to prepare for the newly discovered evidence. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. This remedy is generally the favored remedy for discovery violations. *See, e.g., Commonwealth v. Woodell*, 496 A.2d 1210 (Pa. Super. 1985), *appeal denied*. This is especially so when the only prejudice suffered by the defendant is surprise. ***Commonwealth v. Johnson***, 456 A.2d 988, 993 (Pa. Super. 1983).

3. Prohibit Introduction of Evidence Not Disclosed

The court may prohibit the party in violation from introducing undisclosed evidence at trial. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. The court may never preclude the defendant from testifying in his own defense. *Id.* Generally, a defendant is required to establish prejudice before this severe sanction is imposed. *See e.g., Commonwealth v. Manchias*, 633 A.2d 618 (Pa. Super. 1993), *appeal denied*, 539 Pa. 647, 651 A.2d 535 (1994) (Defendant not entitled to exclusion of Commonwealth witness where defendant did not establish prejudice.)

- ***Commonwealth v. Bonasorte***, 486 A.2d 1361 (Pa. Super. 1984) (Trial court properly suppressed Commonwealth's evidence in response to Commonwealth's failure to produce informant).

4. Any Other Remedy the Court Deems Just Under the Circumstances

The court may order any other remedy that it deems just under the circumstances. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. Included

under this provision is the discretion to order a new trial. ***Commonwealth v. Shelton***, 536 Pa. 559, 640 A.2d 892 (1994).

- ***Commonwealth v. Shelton***, 536 Pa. 559, 640 A.2d 892 (1994) (Commonwealth’s willful failure to disclose new information linking defendant to drug sales warranted the grant of a new trial).
- ***Commonwealth v. Johnson***, 456 A.2d 988 (1983) (Commonwealth’s failure to disclose defendant’s inculpatory statement required grant of new trial).

However, in order to receive the remedy of a new trial, a defendant must establish prejudice. ***Commonwealth v. Jones***, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826 (1996). Therefore, it is generally necessary for the court to hold a hearing to take evidence and allow the opposing party a chance to respond before imposing severe sanctions.

Commonwealth v. Yost, 502 A.2d 216 (Pa. Super. 1985).

F. Protective Orders

Even with respect to mandated disclosures, either party may move the court for a protective order. Pa.R.Crim.P., Rule 573(F), 42 PA. CONS. STAT. ANN. The evidence to support a protective order must be “sufficient”, and may be made entirely in the form of a written statement reviewed by the court *in camera*. *Id.* If the court grants a protective order following an *in camera* showing, the entire text of the statement shall be sealed and preserved in the records of the court in order to allow for appellate review. *Id.*

At this time, there are no set standards for determining what is “sufficient” evidence to support a protective order. However, there is a safe harbor for trial courts, as any error in granting a protective order may be cured by granting the defendant a continuance in order to prepare for or investigate any difficulty caused by the late disclosure. *See Commonwealth v. Bonacurso*, 500 Pa. 247, 455 A.2d 1175, 1178 (1983), *cert. denied*, 462 U.S. 1120 (1983), *abrogated in part*, ***Commonwealth v. Burke***, 566 Pa. 402, 781 A.2d 1136 (2001); ***Commonwealth v. Brown***, 544 Pa. 406, 421, 676 A.2d 1178, 1185 (Pa. 1996), *cert. denied*, 519 U.S. 1043 (1996).

G. Work Product

To the extent that a document constitutes the opinions, theories, or conclusions of the attorney for either party, or agents for the attorney, it will not be required to be disclosed. Pa.R.Crim.P., Rule 573(G), 42 PA. CONS. STAT. ANN.

- ***Lepley v. Lycoming County Court of Common Pleas***, 481 Pa. 565, 393 A.2d 306 (Pa. Super. 1978) (Defense counsel’s recording of defendant’s preliminary hearing was not a privileged “work product”).
- ***Commonwealth, Dep’t of Transp. v. Taylor***, 576 Pa. 622, 841 A.2d 108 (2004) (Compulsory process clause does not entitle defendant to government agency’s work product).

- **Commonwealth v. Hetzel**, 822 A.2d 747 (Pa. Super. 2003), *appeal denied* 576 Pa. 710, 839 A.2d 350 (2003)(Photographs and dental tracings prepared by forensic odontologist at the request of defense attorney are protected work product).

H. Privileges

1. Spousal Privilege

Pennsylvania has a statutorily enacted spousal privilege:

Except as otherwise provided in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.

42 PA. CONS. STAT. ANN. § 5914. This statutory privilege “is substantially a reenactment of legislation dating back to 1887, which itself had roots in the common law.” **Commonwealth v. Chiappini**, 566 Pa. 507, 511, 782 A.2d 490, 492 (2001)(plurality). This privilege is only waivable by the spouse asserting the privilege. **Commonwealth v. May**, 540 Pa. 237, 656 A.2d 1335 (1995), *cert. denied*, 525 U.S. 1078 (1999).

- **Commonwealth v. Dubin**, 581 A.2d 944 (Pa. Super. 1990) (pretrial suppression of testimony of estranged wife was premature).

Communications between spouses during marriage are presumed to be privileged. **Commonwealth v. McBurrows**, 779 A.2d 509 (Pa. Super. 2001) (*en banc*). Therefore, the party seeking to admit such communications as evidence bears the burden of overcoming this presumption. *Id.*

Communications between spouses made in the presence of third parties are not privileged. “Generally, the presence of third parties negates the confidential nature of the communication.” **Commonwealth v. May**, 540 Pa. 237, 251, 656 A.2d 1335, 1342 (1995), *cert. denied*, 525 U.S. 1078 (1999) (defendant had no privilege in letters sent to his wife from prison after defendant signed form allowing for the inspection of his mail).

The privilege does not extend to the observations of a spouse’s conduct during marriage. **Commonwealth v. McBurrows**, 779 A.2d 509, 519 (Pa. Super. 2001) (*en banc*), *appeal denied*, 572 Pa. 732, 815 A.2d 632 (2002), *cert. denied*, 540 U.S. 829 (2003).

- **Commonwealth v. Newman**, 534 Pa. 424, 633 A.2d 1069 (1993) (wife’s knowledge of defendant’s companions and whereabouts on date of crime not privileged as knowledge was based on observation, not communication)

In **Commonwealth v. Spetzer**, 572 Pa. 17, 39, 813 A.2d 707, 720-721 (2002), the Pennsylvania Supreme Court found that the privilege did not extend to the statements made by the defendant to his wife regarding commission of past crimes, current criminal conduct, or plans for future

criminal conduct in a case involving the sexual abuse of stepchildren by the stepfather/defendant.

Furthermore, the statutory privilege does not survive death or divorce. **Commonwealth v. Weiss**, 565 Pa. 504, 776 A.2d 958 (2001). However, the common law privilege survives divorce, *id.*, and death, **McBurrows**.

The Child Protective Services Law, 23 PA.CON.S.TAT.ANN. § 6301 *et seq.*, abrogates the spousal confidential communications privilege in all cases involving child abuse:

§ 6381. Evidence in court proceedings

...

(c) Privileged communications.—Except for privileged communications between a lawyer and a client and between a minister and a penitent, a privilege of confidential communication between **husband and wife** or between any professional person, including, but not limited to, physicians, psychologists, counselors, employees of hospitals, clinics, day-care centers and schools and their patients or clients, shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse.

23 PA.CON.S.TAT.ANN. § 6381(c)(emphasis added). However, neither the Legislature nor the Pennsylvania Supreme Court has yet to definitively say that Section 6381(c) overrides 42 PA. CONS. STAT. ANN. § 5914 in a criminal case. *See Commonwealth v. Spetzer*, 572 Pa. 17, 39, 41, 813 A.2d 707, 722 (2002).

2. Medical or Counseling Records

The confrontation and compulsory process clause in the Pennsylvania Constitution provides a defendant greater protections than does the United States Constitution. *See Commonwealth v. Lloyd*, 523 Pa. 427, 567 A.2d 1357 (1989). In order to understand the differences, it is necessary to examine the historic context of Pennsylvania case-law, Supreme Court of the United States case-law, and statutory amendments enacted by the Pennsylvania legislature.

In 1985, the Pennsylvania Supreme Court held that the Commonwealth's interest in maintaining the confidentiality of records compiled by the Child Welfare Services did not override a defendant's right, under the United States Constitution, to confront and cross-examine witnesses against him. **Commonwealth v. Ritchie**, 509 Pa. 357, 502 A.2d 148 (1985). However, the Supreme Court of the United States reversed the Pennsylvania Supreme Court in part. **Pennsylvania v. Ritchie**, 480 U.S. 39 (1987). The Supreme Court of the United States held that, under the United States Constitution, an *in camera* review of the records was the proper method to balance a defendant's right to discover exculpatory evidence against the

Commonwealth's interest in maintaining the confidentiality of the records. *Id.* at 59-60.

Subsequently, the Supreme Court of Pennsylvania addressed the identical issue under the Pennsylvania Constitution. The Court held that, under the Pennsylvania Constitution, a defendant's right to confrontation and compulsory process overrode any non-statutory privilege asserted by the Commonwealth. ***Commonwealth v. Lloyd***, 523 Pa. 427, 567 A.2d 1357 (1989). Specifically, the Court found the lack of a statutory psychotherapeutic privilege important. *Id.* 523 Pa. at 431, 567 A.2d at 1359. In response to the result in ***Lloyd***, the Pennsylvania legislature amended 42 PA. CONS. STAT. ANN. § 5944 to explicitly cover psychiatric records. Accordingly, courts in subsequent cases have recognized that the absolute statutory privilege contained in 42 PA. CONS. STAT. ANN. § 5944 overrides the defendant's right to confrontation and compulsory process under the Pennsylvania Constitution. See ***Commonwealth v. Smith***, 606 A.2d 939 (Pa. Super. 1992), *appeal denied*, 533 Pa. 624, 620 A.2d 490 (1993). In contrast, Pennsylvania courts have employed balancing tests for statutory conditional privileges. See ***Commonwealth v. Reed***, 644 A.2d 1223 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995).

(a) **Patient – Physician Privilege**

Pennsylvania has codified a patient-physician privilege in civil proceedings. 42 Pa. Cons. Stat. Ann. § 5929. This privilege does not apply in criminal proceedings. *Id.*; ***Commonwealth v. Petrino***, 480 A.2d 1160 (Pa. Super. 1984), *cert. denied*, 471 U.S. 1069 (1985).

(b) **Patient – Psychiatrist / Psychologist Privilege**

The Pennsylvania legislature has enacted the following statutory privilege regarding communications between patients and psychiatrists/psychologists:

No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 PA. CONS. STAT. ANN. § 5944. Since this is an absolute statutory privilege, neither the Commonwealth nor the defendant has the power to subpoena such records without the patient's consent.

Commonwealth v. Smith, 606 A.2d 939 (Pa. Super. 1992), *appeal denied*, 533 Pa. 624, 620 A.2d 490 (1993).

(c) **Rape Counselor Privilege**

The Pennsylvania Legislature has enacted the following statutory privilege with respect to rape counselors:

No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

42 PA. CONS. STAT. ANN. § 5945.1(b)(1). A "sexual assault counselor" is defined as

[a] person who is engaged in any office, institution or center [offering assistance to victims of sexual assault and their families through crisis intervention, medical and legal accompaniment and follow-up counseling], who has undergone 40 hours of sexual assault training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.

42 PA. CONS. STAT. ANN. § 5945.1(a). Furthermore,

[n]o coparticipant who is present during counseling may disclose a victim's confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.

42 PA. CONS. STAT. ANN. § 5945.1(b)(2).

These privileges are absolute privileges, and therefore override a defendant's right to confrontation and compulsory process. **V.B.T. v. Family Serv. of W. Pennsylvania**, 705 A.2d 1325 (Pa. Super. 1998); **Commonwealth v. Askew**, 666 A.2d 1062 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996).

- **Commonwealth v. Davis**, 543 Pa. 628, 674 A.2d 214 (1996) (rape counselor privilege prohibits disclosure not only of communications between victim and counselor, but also of records created during the course of the confidential relationship).

NOTE: *Commonwealth v. Cody*, 584 A.2d 992 (Pa. Super. 1991), *appeal denied*, 527 Pa. 622, 592 A.2d 42 (1991) allows for an *in camera* review of rape counseling records for statements relating to the facts surrounding the alleged offense. However, in ***Commonwealth v. Askew***, 666 A.2d 1062 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996), the Superior Court held that the privilege was absolute and applied to both oral communications and written records:

The statutory sexual assault counselor privilege “prevents sexual assault counselors from disclosing confidential communications made to them by the victims of sex-related crimes.” *Commonwealth v. Gibbs*, 434 Pa. Super. 280, 284, 642 A.2d 1132, 1134 (1994). This privilege is absolute and applies to oral communication as well as written records created during the course of the confidential relationship. *Id.* The privilege prohibits the revelation of confidential communication obtained during counseling to both the Commonwealth and to the defendant.

666 A.2d at 1064–1065.

However, if the attorney for the Commonwealth is in possession of records subject to the rape counselor privilege, the defendant is entitled to the production of such records. ***Commonwealth v. Davis***, 650 A.2d 452 (Pa. Super. 1994), *aff’d*, 543 Pa. 628, 674 A.2d 214 (1996); ***Commonwealth v. Higby***, 559 A.2d 939 (Pa. Super. 1989), *appeal denied*, 525 Pa. 578, 575 A.2d 109 (1990).

- ***Commonwealth v. Askew***, 666 A.2d 1062 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996), (the fact that victim gave counselor permission to reveal communications to police and to treating doctor did not waive privilege, as such disclosures were mandated by child abuse reporting requirements).

5.5 OMNIBUS PRE-TRIAL MOTIONS

An omnibus pre-trial motion is the method envisioned by the Rules of Criminal Procedure for resolving routine matters that commonly arise in criminal litigation. Generally, all pre-trial requests for relief should be included in a single omnibus pre-trial motion. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN. However, this rule is not intended to preclude other types of motions from being filed. *Id., cmt.* These other motions should, however, be filed at the earliest feasible time. *Id.*

A. Types of Relief

1. Continuance

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for continuance. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

2. Severance, Joinder, or Consolidation

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for severance, joinder, or consolidation. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

Although under the scheme set forth in the Rules of Criminal Procedure, ordinarily offenses or defendants charged in separate indictments or informations will be tried separately, pursuant to Pa.R.Crim.Pl 582(B), the District Attorney has the opportunity to serve a notice on the defendant(s) that the offenses or defendants will be tried together. In such situations, if challenged, the trial court must review the following standards:

- (1) Offenses charged in separate indictments or information may be tried together if:
 - (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
 - (b) the offenses charged are based on the same act or transaction.
- (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P., Rule 582, 42 PA. CONS. STAT. ANN.

Also, the trial court may order severance of offenses or defendants, or provide other appropriate relief, if any party is prejudiced by offenses or defendants being tried together. Pa.R.Crim.P., Rule 583, 42 PA. CONS. STAT. ANN.

3. Suppression of Evidence

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for suppression of evidence. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* If a defendant fails to raise a suppression issue in an omnibus pre-trial motion, he bears the burden of preserving the issue by establishing that the opportunity to argue for suppression did not previously exist or that the interests of justice require that the suppression motion be heard. ***Commonwealth v. Hubbard***, 472 Pa. 259, 372 A.2d 687 (Pa. Super. 1977), *overruled on other grounds*, ***Commonwealth v. Grant***, 572 Pa. 48, 813 A.2d 726 (2002).

The motion for suppression must state specifically and with particularity the evidence sought to be suppressed, the grounds relied upon for suppression, and the facts and events in support of such grounds. Pa.R.Crim.P., Rule 581(D), 42 PA. CONS. STAT. ANN. If the court deems that a hearing is necessary to resolve the motion to suppress, it must order a hearing to be held either prior to or at trial and provide the attorney for the Commonwealth a reasonable opportunity for investigation. Pa.R.Crim.P., Rule 581(E), 42 PA. CONS. STAT. ANN.

The hearing should ordinarily be held in open court, but outside the presence of the jury, if any. Pa.R.Crim.P., Rule 581(F), 42 PA. CONS. STAT. ANN. The hearing should be recorded. Pa.R.Crim.P., Rule 581(G), 42 PA. CONS. STAT. ANN. At the hearing, the Commonwealth has the burden of establishing that the challenged evidence was not obtained in violation of the defendant's rights. **Commonwealth v. West**, 834 A.2d 625, 629 (Pa.Super. 2003), *appeal denied*, 586 Pa. 712, 889 A.2d 1216 (2005); Pa.R.Crim.P., Rule 581(H), 42 PA. CONS. STAT. ANN.

Commonwealth v. Beaman, 846 A.2d 764 (Pa. Super. 2004), *aff'd*, 583 Pa. 636, 880 A.2d 578 (Pa. Aug 15, 2005) (when defendant challenges constitutionality of statute authorizing a search, the burden shifts to defendant as statutes are presumed constitutional).

If the defendant testifies at the hearing, he does not waive his right to remain silent at trial. Pa.R.Crim.P. 581(H). At the conclusion of the hearing, the Judge must enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights. Pa.R.Crim.P., Rule 581(I), 42 PA. CONS. STAT. ANN.

- **Commonwealth v. Elmobdy**, 823 A.2d 180 (Pa. Super. 2003), *appeal denied* 577 Pa. 701, 847 A.2d 58 (2004)(It is trial court's province to pass on the credibility of witnesses and assign the weight to be given to their testimony).

If the court determines that the evidence shall not be suppressed, such ruling shall be final and binding at trial, except upon a showing of evidence which was previously unavailable. Pa.R.Crim.P., Rule 581(J), 42 PA. CONS. STAT. ANN. The defendant may always challenge the voluntariness of a confession before a fact-finder. Pa.R.Crim.P., Rule 581, 42 PA. CONS. STAT. ANN., *cmt.*; See **Commonwealth v. Cameron**, 780 A.2d 688 (Pa. Super. 2001).

4. Psychiatric Examination

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a psychiatric examination. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* At least one Common Pleas Court has held that a victim of a crime of sexual violence may be compelled to undergo a psychiatric evaluation pursuant to this rule if the defendant can establish the necessity

for the examination. ***Commonwealth v. Ramer***, 30 Pa. D.&C.3d 50 (1984). However, impugning the credibility of such a victim or attacking the competency and truthfulness of the victim are not compelling enough reasons to justify such an examination. *Id.*

5. Quashal of an Information

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for quashing an information. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* In fact, all grounds for claiming that indictments or informations are defective must be stated in a pre-trial motion to quash, and if they are not, they are waived. ***Commonwealth v. Gemelli***, 474 A.2d 294 (Pa. Super. 1984).

- ***Commonwealth v. Parmar***, 672 A.2d 314 (Pa. Super. 1996), *aff'd*, 551 Pa. 318, 710 A.2d 1083 (1998) (claim that information or indictment charged defendant with wrong crime was waived for failure to include it in written pre-trial motion to quash).
- ***Commonwealth v. Slyman***, 483 A.2d 519 (Pa. Super. 1984) (Failure of district attorney to sign a criminal information, in violation of rule of criminal procedure, rendered information merely voidable, since the defect was susceptible of prompt cure by amendment).
- ***Commonwealth v. Finley***, 860 A.2d 132 (Pa. Super. 2004), *reargument denied* (Nov. 10, 2004) (quashal was not an appropriate remedy for illegal arrest).

6. Change of Venue or Venire

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a change of venue or venire. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* The standard to be followed by the trial court is stated in Pa.R.Crim.P. 584(A): “Venue or venire may be changed by ... (the trial court) when it is determined after hearing that a fair and impartial trial cannot be otherwise be had in the county where the case is currently pending.” Pa.R.Crim.P., Rule 584(A), 42 PA. CONS. STAT. ANN.

If the trial court determines that a change of venue or venire is necessary, then the order for the change must be certified “forthwith” to the Supreme Court; the Supreme Court will then designate the county of transfer, or the county from which the jury is to be impaneled. Pa.R.Crim.P., Rule 584(B), 42 PA. CONS. STAT. ANN.

7. Disqualification of Judge

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for the disqualification of a judge. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* Any motion to disqualify or remove a trial judge should be first presented to the trial judge before whom the proceedings are being

tried. This way, the trial judge makes the determination in the first instance, which can be reviewed for an abuse of discretion by the appropriate appellate court. **Commonwealth v. Whitmore**, ___ Pa. ___, ___, 912 A.2d 827, 833 (2006).

8. Appointment of an Investigator

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for the appointment of an investigator. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

9. Pre-trial Conference

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a pre-trial conference. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

10. Double Jeopardy

The issue of double jeopardy should usually be raised in pre-trial motions. **Commonwealth v. Johnson**, 466 A.2d 636 (Pa. Super. 1983).

11. Statute of Limitations

The issue of statute of limitations should be raised in a pre-trial motion to dismiss. **Commonwealth v. Groff**, 548 A.2d 1237 (Pa. Super. 1988).

12. Writ of Habeas Corpus

A petition for writ of habeas corpus is the proper pre-trial vehicle for testing the sufficiency of the Commonwealth's evidence. **Commonwealth v. Hock**, 556 Pa. 409, 728 A.2d 943 (1999). To survive such a petition, the Commonwealth's evidence need only be that measure of evidence, which, if accepted as true, would justify the conclusion that the defendant is guilty of the offense charged, i.e., a *prima facie* case. **Commonwealth v. Kohlie**, 811 A.2d 1010 (Pa. Super. 2002), *appeal denied*, 573 Pa. 709, 827 A.2d 1201 (2003).

B. Time for Filing

The omnibus pre-trial motion must be filed and served within 30 days after arraignment. Pa.R.Crim.P., Rule 579(A), 42 PA. CONS. STAT. ANN. The defendant may only evade this requirement by establishing (1) that the opportunity to file the motion did not previously exist; (2) that the defendant, defendant's attorney, or the Commonwealth was not aware of the grounds for the motion; (3) that the time for filing the motion was extended by court order for cause shown. *Id.*

- **Commonwealth v. Cosgrove**, 545 Pa. 71, 680 A.2d 823 (1996) (defendant could not challenge the jurisdiction of the Attorney General to prosecute until after formal arraignment).

- ***Commonwealth v. Thomas***, 444 A.2d 735 (Pa. Super. 1982) (defendant’s failure to object to scheduling of trial within 30 days of arraignment waived argument that such scheduling violated this rule).

C. Disposition of Motion

The Rules of Criminal Procedure provide that “[u]nless otherwise provided in these rules, all pretrial motions shall be determined before trial. Trial shall be postponed by the court for the determination of pretrial motions, if necessary.” Pa.R.Crim.P., Rule 580, 42 PA. CONS. STAT. ANN. Generally, pre-trial orders in criminal cases are not immediately appealable. ***Commonwealth v. Wills***, 476 A.2d 1362 (Pa. Super. 1984). However, the denial of a defendant’s motion to quash on double jeopardy grounds is immediately appealable. ***Commonwealth v. Buechele***, 444 A.2d 1246 (Pa. Super. 1982).

5.6 EVIDENCE OF VICTIM’S PAST SEXUAL CONDUCT

Pennsylvania’s Rape Shield Law is statutory in nature, and not a rule of evidence as it is under the Federal system. Pennsylvania’s Rape Shield Law states as the general rule that

[e]vidence of specific instances of the alleged victim’s past sexual conduct, opinion evidence of the alleged victim’s past sexual conduct, and reputation evidence of the alleged victim’s past sexual conduct shall not be admissible in prosecutions [for sexual offenses] except evidence of the alleged victim’s past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 PA. CONS. STAT. ANN. § 3104(a). Furthermore, the Rape Shield Law specifies that

[a] defendant who proposes to offer evidence of the alleged victim’s past sexual conduct pursuant to [the general rule] shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the standards set forth in [the general rule].

18 PA. CONS. STAT. ANN. § 3104(a).

A. Purpose

The purpose of this provision is to prevent a trial from shifting focus to the virtue and chastity of the victim from the defendant’s culpability for the charged crime. ***Commonwealth v. Fernsler***, 715 A.2d 435 (Pa. Super. 1998).

- ***In re M.K.***, 636 A.2d 198 (Pa. Super. 1994) (Rape Shield Law applies only to prosecutions relating to sexual offenses).
- ***Commonwealth v. Killen***, 545 Pa. 127, 680 A.2d 851 (1996) (evidence that victim made provocative statements and was in a jovial mood shortly after alleged assault was not evidence of victim's sexual history and therefore was not subject to Rape Shield Law).
- ***Commonwealth v. Dear***, 492 A.2d 714 (Pa. Super. 1985) (evidence of victim's prior convictions for prostitution was not admissible to show that victim consented to having sexual intercourse with the defendant).

"Past sexual conduct" of the victim includes the victim's entire sexual history. ***Commonwealth v. Jones***, 826 A.2d 900 (Pa. Super. 2003). Therefore, the Rape Shield Law acts to exclude all past consensual sexual conduct or sexual conduct that is the result of nonconsensual or assaultive behavior unless there exists probative value that is exculpatory to the Defendant. ***Commonwealth v. Gaddis***, 639 A.2d 462 (Pa. Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994).

- ***Commonwealth v. Jones***, 826 A.2d 900 (Pa. Super. 2003) (evidence that victim had been convicted of prostitution for acts with a third party that occurred after defendant's arrest was evidence of victim's past sexual conduct that was inadmissible when the evidence did not exculpate defendant and was not probative of victim's willingness to commit sexual acts with defendant).
- ***Commonwealth v. Fink***, 791 A.2d 1235 (Pa. Super. 2002) (if victim's prior sexual conduct does not involve defendant or involves defendant but consent is not an issue, then it must be relevant to show bias against the defendant or to attack the credibility of the victim).
- ***Commonwealth v. Guy***, 686 A.2d 397 (Pa. Super. 1996), *appeal denied*, 548 Pa. 645, 695 A.2d 784 (1997) (evidence of victim's sexual history not admissible to prove that victim acted in conformity with past behavior).
- ***Commonwealth v. Reed***, 644 A.2d 1223 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995) (Commonwealth should not use victim's sexual history to attack defendant's credibility if it desires to invoke the protections of the Rape Shield Law).

B. Prejudice or Bias – Admissibility

Evidence relating to an alleged victim's sexual history is admissible under the Rape Shield Law if it tends to directly exculpate the defendant by showing, *inter alia*, bias, hostility, motive to lie or fabricate, evidence of a sexual encounter with another person on the date in question, or impeachment value through demonstrating a prior inconsistent statement. ***Commonwealth v. Guy***, 686 A.2d 397 (Pa. Super. 1996), *appeal denied*, 548 Pa. 645, 695 A.2d 784 (1997). If the court determines that the evidence of the victim's prior sexual

history has some probative exculpatory value for the defendant, the court should conduct an *in camera* hearing to weigh the probative value against the prejudicial effect. ***Commonwealth v. Johnson***, 566 A.2d 1197 (Pa. Super. 1989), *aff'd*, 536 Pa. 153, 638 A.2d 940 (1994). The proponent of evidence concerning the victim's sexual history bears the burden of establishing the admissibility and relevance of the evidence under the Rape Shield Law. ***Commonwealth v. Weber***, 549 Pa. 430, 701 A.2d 531 (1997).

- ***Commonwealth v. Jones***, 826 A.2d 899 (Pa. Super. 2003) (evidence of victim's prostitution conviction for acts with a third party occurring after defendant's arrest was inadmissible under Rape Shield Law).
- ***Commonwealth v. Fernsler***, 715 A.2d 435 (Pa. Super. 1998) (evidence concerning juvenile victim's placement in treatment program for sexual assault on half-sister was admissible as it reflected a possible motive for victim to seek favorable treatment by fabricating charges against defendant, victim's father).
- ***Commonwealth v. Berkowitz***, 537 Pa. 143, 641 A.2d 1161 (1994) (evidence that victim and her boyfriend had argued over whether victim had been unfaithful was excluded by Rape Shield Law despite the fact that it provided possible motive for fabrication of charge).
- ***Commonwealth v. Stansbury***, 640 A.2d 1368 (Pa. Super. 1994) (evidence of previous sexual assaults by defendant on victim was admissible)(presence of pubic hairs from third party in victim's underwear while probative of defense theory that another person had sexual relations with victim, was not admissible as defendant admitted to having sexual relations with victim).
- ***Commonwealth v. Wall***, 606 A.2d 449 (Pa. Super. 1992), *appeal denied*, 532 Pa. 645, 614 A.2d 1142 (1992) (evidence of child victim's previous claims of sexual abuse by mother were admissible in prosecution against uncle who had custody of victim at time of alleged crime as it suggested motive for escaping discipline from custodian).
- ***Commonwealth v. Weber***, 549 Pa. 430, 701 A.2d 531 (1997) (defendant failed to establish relevance of victim's abortion and therefore evidence of the abortion was inadmissible).

C. Nonconsensual Sexual Conduct

Evidence of victim's prior nonconsensual conduct is not covered by the Rape Shield Law as it does not impugn the victim's reputation for chastity.

Commonwealth v. Johnson, 536 Pa. 153, 638 A.2d 940 (1994). Such evidence is evaluated under the general evidentiary rules. *Id.*; ***Commonwealth v. Fink***, 791 A.2d 1235 (Pa. Super. 2002).

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6.1 CHAPTER OVERVIEW

This chapter examines issues that commonly arise in the trial of rape and sexual assault cases. A suggested outline of a typical criminal trial, with references to the Pennsylvania Rules of Criminal Procedure and Rules of Evidence, is listed in Addendum 1. It is not intended to be a comprehensive review, but rather an accessible listing for quick reference. Section 6.3 provides a detailed discussion on jury selection issues. Sections 6.4 and 6.5 cover evidentiary issues that may be confronted by the prosecution. Sections 6.4 through 6.6 involve necessary evidence offered by the prosecution in its case in chief to prove the elements of the crime(s) charged, centering on the presentation of the victim/complaint. Section 6.7 concerns character evidence, i.e., evidence of the alleged perpetrator's prior record or past bad acts, including a discussion of when this type of evidence may be utilized by the prosecution in its case-in-chief, e.g., evidence of common scheme, or during cross-examination of the defendant on the defense side of the case, e.g., impeachment.

Sections 6.8 and 6.9 cover selected hearsay rules and exceptions. Section 6.10 covers witness competency, and section 6.11 covers the defense of mistake of age. Section 6.12 addresses the sexual assault counsel privilege, and section 6.13 covers 911 tapes and the use of other audiotapes at trial. The chapter concludes with section 6.14, which includes a discussion of the admissibility and relevancy of sexually explicit material, usually in the form of pornographic films and magazines, typically obtained from a search of the accused's home.

6.2 SUGGESTED STAGES OF A CRIMINAL JURY TRIAL

Included in Addendum 1 is a list of the suggested 21 stages of a criminal jury trial. This list is easily modifiable for use in a civil jury trial or non-jury trial.

6.3 JURY SELECTION – VOIR DIRE

A. Strike for Cause

A strike for cause typically is requested by one of the parties after questioning of a juror has elicited responses that establish that he or she cannot be impartial. *Commonwealth v. Johnson*, 445 A.2d 509, 511 (Pa. Super. 1982). Jurors should be disqualified for cause when they do not have the ability or

willingness to eliminate the influences under which they are operating and therefore cannot render a verdict according to the evidence. ***Commonwealth v. DeHart***, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), *cert. denied*, ***DeHart v. Pennsylvania***, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987).

A prospective juror should be excused for cause in two situations:

- i. The first is where the prospective juror indicates by his answers that he will not be an impartial juror.
- ii. The second is where, irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has a close relationship, be it familial, financial, or situational, with any of the parties, counsel, victims or witnesses.¹

The appellate courts will employ a standard of review which affords great deference to the trial judge, who is in the best position to assess the credibility of the jurors and their ability to be impartial. *See Commonwealth v. Bomar*, 573 Pa. 426, 456, 826 A.2d 831, 849 (2003), *cert. denied*, 540 U.S. 1115, 124 S.Ct. 1053, 157 L.Ed.2d 906 (2004); ***Commonwealth v. Impellizzeri***, 661 A.2d 422, 427 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (1996). Where a prospective juror indicates that he or she cannot be an impartial juror, “much depends upon the answers and demeanor of the potential juror as observed by the trial judge.” ***Commonwealth v. Johnson***, 445 A.2d at 512. Reversal by an appellate court is appropriate only in the case of palpable error. ***Commonwealth v. Impellizzeri***, 661 A.2d at 427.

B. Peremptory Challenge

Where a criminal defendant is forced to use a peremptory challenge to excuse a juror who should have been excused for cause and then exhausts his peremptory challenges before the jury is seated, a new trial will be granted. ***Commonwealth v. Blasioli***, 685 A.2d 151, 157-158 (Pa. Super. 1996), *affirmed*, 552 Pa. 149, 713 A.2d 1117 (1998).

The number of peremptory challenges granted to each side is governed by the Pennsylvania Rules of Criminal Procedure since the statutory provisions relating to peremptory challenges were repealed by the Judiciary Act Repealer Act, 42 PA.STAT. § 20002(a). Rule of Criminal Procedure No. 634 governs the number of peremptory challenges for the selection of principal trial jurors; the number of peremptory challenges for the selection of alternate trial jurors is set forth in Pa.R.Crim.P. 645. Pa.R.Crim.P. 634 provides:

¹ ***Commonwealth v. Stamm***, 429 A.2d 4, 7 (Pa. Super. 1981), *quoting Commonwealth v. Colon*, 299 A.2d 326, 327-328 (Pa. Super. 1972).

**Pennsylvania Rules of Criminal Procedure
Rule 634. Number of Peremptory Challenges**

(A) Trials Involving Only One Defendant:

(1) In trials involving misdemeanors only and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 5 peremptory challenges.

(2) In trials involving a non-capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 7 peremptory challenges.

(3) In trials involving a capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 20 peremptory challenges.

(B) Trials Involving Joint Defendants:

(1) In trials involving joint defendants, the defendants shall divide equally among them that number of peremptory challenges that the defendant charged with the highest grade of offense would have received if tried separately; provided, however, that each defendant shall be entitled to at least 2 peremptory challenges. When such division of peremptory challenges among joint defendants results in a fraction of a peremptory challenge, each defendant shall be entitled to the next highest number of such challenges.

(2) In trials involving joint defendants, it shall be within the discretion of the trial judge to increase the number of peremptory challenges to which each defendant is entitled up to the number of peremptory challenges that each defendant would have received if tried alone.

(3) In trials involving joint defendants, the Commonwealth shall be entitled to peremptory challenges equal in number to the total number of peremptory challenges given to all of the defendants.

A short summary of Pa.R.Crim.P. 634 is as follows:

Number of Defendants	Type of Offense	Commonwealth's Peremptory Challenges	Each Defendant's Peremptory Challenges	Minimum Number of Jurors Subject to Challenges
1	Misdemeanor	5	5	22
1	Felony	7	7	26
2	Misdemeanor	6	3	24
2	Felony	8	4	28

6.4 TESTIMONY OF COMPLAINANT (NO CORROBORATION REQUIRED)

To prove that a defendant is guilty of rape or sexual assault, a prosecutor does not need to corroborate a victim's testimony.

18 PA.CON.S.TAT.ANN. § 3106 provides:

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

This section parallels § 213.6(5) of the Model Penal Code. It is now well established in Pennsylvania that, in a prosecution for sex offenses, a guilty verdict may rest on the uncorroborated testimony of the victim. **Commonwealth v. Lyons**, 833 A.2d 245, 258 (Pa. Super. 2003), *appeal denied*, 583 Pa. 695, 879 A.2d 782 (2005); **Commonwealth v. Owens**, 649 A.2d 129, 133 (Pa. Super. 1994), *appeal denied*, 540 Pa. 612, 656 A.2d 118 (1995).

- **Medical Evidence Not Necessary: Commonwealth v. Jette**, 818 A.2d 533, 534 (Pa. Super. 2003), *appeal denied*, 574 Pa. 771, 833 A.2d 141 (2003) (“medical evidence is not required if the fact finder believes the victim.”).

Notwithstanding this rule, a prosecutor may choose to corroborate the victim's testimony through physical or testimonial evidence.

A. Temporarily Excluding Spectators From Courtroom When Victim Testifies to Embarrassing or Lurid Details

When a rape victim testifies to facts that could prove embarrassing or painful to her, the trial court has authority to exclude spectators from the trial on a temporary basis.

- **Commonwealth v. Smith**, 421 A.2d 693, 694 (Pa. Super. 1980) (in *dicta*, embarrassment, trauma of rape victim);
- **Commonwealth v. Wright**, 388 A.2d 1084, 1086 (Pa. Super. 1978) (discomfit to victims of sex crimes when testimony requires explication of lurid details).

B. Impeachment of Complainant

Evidence of victim's reputation in community for truth and veracity is admissible in a sex offense trial. The credibility of a rape victim is measured according to the same standard applied to any other crime victim: the reputation witness must attest to the victim's general reputation in the community – the witness may not attest to the victim's specific behavior.²

² **Commonwealth v. Berry**, 513 A.2d 410, 416 (Pa. Super. 1986).

In *In Interest of Lawrence J.*, 456 A.2d 647 (Pa. Super. 1983), the trial court erred under 18 PA.CONS.STAT.ANN. § 3106 in sustaining the Commonwealth’s objections to the testimony by a defense witness concerning the victim’s reputation for truth and veracity. The credibility of the alleged rape victim was to be determined by the same standard as that applied to the victim of any other crime: “The inquiry is limited, however, to the general speech of the community on the subject. The reputation witness can not be asked questions or give answers regarding specific acts, as distinguished from what she has heard in the neighborhood.” 456 A.2d at 655.

6.5 TESTIMONY OF CHILD VICTIM OR WITNESS BY CONTEMPORANEOUS ALTERNATIVE METHOD

A. Permissible Pursuant to 42 PA.CONS.STAT.ANN. § 5985

The ability of a child victim or material witness to testify outside the presence of the defendant, as to a sexual assault or otherwise, is governed by 42 PA.CONS.STAT.ANN. § 5985. Section 5985 was enacted by the legislature on July 15, 2004, following a series of amendments to the Confrontation Clause in Article 1, Section 9, of the Pennsylvania Constitution. The appellate courts of Pennsylvania have upheld the 2004 amendments as constitutional. *See Bergdoll v. Commonwealth*, 858 A.2d 185 (Pa. Cmwlt. 2004) (*en banc*), *aff’d*, 583 Pa. 44, 874 A.2d 1148 (2005).

One purpose of the 2004 amendments was to remove from the Pennsylvania Constitution the right to confront witnesses “face to face” so that the General Assembly could enact laws or the Pennsylvania Supreme Court could adopt rules that permit children to testify in criminal proceedings outside the physical presence of the accused. As a result of the 2004 amendments to the Pennsylvania Constitution, and the decision of the Commonwealth Court and the Supreme Court to uphold the constitutionality of the amendments, prosecutors can now utilize § 5985.

Unlike an earlier version, the current version of § 5985 has not been declared unconstitutional, and its use was approved by the Superior Court in *Commonwealth v. Charlton*, 902 A.2d 554 (Pa. Super. 2006), *appeal denied*, 590 Pa. 655, 911 A.2d 933 (2006).

Section 5985 states the following:

§ 5985. Testimony by contemporaneous alternative method

(a) **Contemporaneous alternative method.**—Subject to subsection (a.1), in any prosecution or adjudication involving a child victim or a child material witness, the court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the

courtroom and transmitted by a contemporaneous alternative method. Only the attorneys for the defendant and for the Commonwealth, the court reporter, the judge, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during his testimony. The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness but shall ensure that the child cannot hear or see the defendant. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purposes of providing an effective defense. Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted.

(a.1) Determination.—Before the court orders the child victim or the child material witness to testify by a contemporaneous alternative method, the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant’s presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim’s or child material witness’s ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child victim or child material witness, either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(a.2) Counsel and confrontation.—

- (1) If the court observes or questions the child victim or child material witness under subsection (a.1)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.
- (2) If the court hears testimony under subsection (a.1)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

42 PA.CON.S.TAT.ANN. § 5985.

Accordingly, in pertinent part, the statutory framework can be concisely summarized as follows:

1. Applicability

- Prosecution or adjudication must involve a child victim or a child material witness. *See* 42 PA.CON.S.TAT.ANN. § 5985(a).

2. Manner

- The court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method. *See* 42 PA.CON.S.TAT.ANN. § 5985(a).

3. Defendant's Rights

- The trial court must permit the defendant to observe and hear the testimony of the child victim or child material witness and to confer with his attorney. *See* 42 PA.CON.S.TAT. ANN. § 5985(a).

4. Commonwealth's Burden

- The Commonwealth must establish that, if forced to testify in an open forum in the presence and full view of the finder of fact or in the defendant's presence, the child victim or child material witness will suffer serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate. *See* 42 PA.CON.S.TAT.ANN. § 5985(a.1).
- This burden can be satisfied via a hearing with the child victim/witness or through the testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting. *See* 42 PA.CON.S.TAT.ANN. § 5985(a.1)

B. Closed-Circuit Television is Permissible Alternative Method

In *Commonwealth v. Charlton*, 902 A.2d at 559, the Superior Court of Pennsylvania affirmed a trial court's decision to permit a child victim of sexual assault to testify pursuant to § 5985 via closed-circuit television. In *Charlton*, the Commonwealth presented testimony from a psychotherapist that "the victim suffered from depression, suicidal thoughts, and post-traumatic stress disorder which likely would impact her ability to testify effectively" and that the child's testifying "in an open forum poses a significant risk for her emotional wellbeing." *Id.* (citation and internal quotation marks omitted).

6.6 EVIDENCE OF PROMPT COMPLAINT

A. Permissible in Prosecution's Case in Chief

Unlike the typical standard of a prior consistent statement of a witness, testimony or other evidence of a prompt complaint of a rape by an alleged victim may be introduced in the prosecution's case-in-chief. The justification is

that the “alleged victim’s testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.” *Commonwealth v. O’Drain*, 829 A.2d 316, 322 (Pa. Super. 2002), citing *Commonwealth v. Freeman*, 441 A.2d 1327, 1331 (Pa. Super. 1982).³

Pennsylvania Rule of Evidence Rule 613(c), in addressing other circumstances of a prior consistent statement, provides:

(c) Evidence of prior consistent statement of witness.

Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:

- (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
- (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness’ denial or explanation.

“The fact that a victim made a prompt complaint is no longer required to sustain a rape conviction.” *Commonwealth v. Freeman*, 441 A.2d at 1331.⁴ However, the promptness of reporting a rape or sexual assault is a *factor* to be considered by the jury in such cases pursuant to 18 PA.CON.S.TAT.ANN. § 3105. See *Commonwealth v. Lane*, 521 Pa. 390, 397, 555 A.2d 1246, 1250 (1989) (holding that the striking of a jury venire member for cause by the trial judge because of the member’s willingness to consider a late filed complaint was improper).

According to 18 PA.CON.S.TAT.ANN. § 3105:

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

“Pennsylvania Rule of Evidence 613(c) is commonly known as the prompt complaint exception to the hearsay rule.” *Commonwealth v. O’Drain*, 829 A.2d at 322.

³ See also, *Commonwealth v. Dillon*, 863 A.2d 597, 602 (Pa. Super. 2004) (*en banc*), *appeal granted*, 584 Pa. 691, 882 A.2d 477 (2005).

⁴ Under Pennsylvania common law, the promptness of a complaint, or the “hue and cry” as it was referred to, was considered an element for a jury to consider when weighing the veracity of a complainant. See, e.g. *Commonwealth v. Allen*, 135 Pa. 483, 19 A. 957 (1890).

Pennsylvania Rule of Evidence 613(c)(1) allows evidence of prior consistent statements to rebut an express or implied charge of “fabrication, bias, improper influence or motive, or faulty memory.” In cases involving sexual assault, Rule 613 authorizes the Commonwealth to present evidence in its case-in-chief of a prompt complaint by the victim “because [the] alleged victim’s testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.” Pa.R.Evid. 613(c) (comment), *citing Commonwealth v. Freeman*, 295 Pa. Super. 467, 441 A.2d 1327, 1331 (1982). “Evidence of a complaint of a sexual assault is ‘competent evidence, properly admitted when limited to establish that a complaint was made and also to identify the occurrence complained of with the offense charged.’” *Commonwealth v. Stohr*, 361 Pa.Super. 293, 522 A.2d 589, 592-593 (1987) (*en banc*), *quoting Commonwealth v. Freeman*, 295 Pa.Super. 467, 441 A.2d 1327, 1331 (1982).

Commonwealth v. O’Drain, 829 A.2d at 321-322.

B. Prompt Complaint Testimony Disallowed

Prompt complaint testimony has been disallowed when it exceeded its permissible limits. *Commonwealth v. Freeman*, 441 A.2d at 1331-1332.

- *Commonwealth v. Green*, 487 Pa. 322, 325-326, 409 A.2d 371, 373 (1979) (all encompassing statement by detective inadmissible since it goes beyond identifying complaint and its nature);
- *Commonwealth v. Pettiford*, 402 A.2d 532, 533 (Pa. Super. 1979) (court erred in admitting, as proof of “prompt complaint,” testimony of three witnesses, one of whom recounted the victim’s rape in great detail).

6.7 RESISTANCE NOT REQUIRED

To prove that a defendant is guilty of a sexual offense, a prosecutor does not have to show that the victim resisted the actions of the defendant.⁵

18 PA.CONS.STAT.ANN. § 3107 provides:

The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.

⁵ *Commonwealth v. Smith*, 863 A.2d 1172, 1176 (Pa. Super. 2004) (with reference to Sexual Assault, a felony of the second degree under 18 PA.CONS.STAT.ANN. § 3124.1, “[r]esistance to sexual assault is not required to sustain a conviction.”).

While a victim's nonresistance to the defendant is generally not an element in any criminal offense, it was expressly made a statutory nonrequirement in prosecutions for criminal sexual conduct. The statutory codification of the non-requirement of resistance reflects the belief that there are legitimate reasons for a victim's nonresistance.

For instance, a victim may have the capability to resist but voluntarily choose not to, such as when the victim believes that resistance will cause even greater harm or death. Indeed, a victim may be so frightened and panicked at the thought of being seriously harmed or killed that he or she becomes physically immobilized by the fear or does not know what to do to thwart the sexual assault. A victim may also be physically unable to resist a perpetrator's actions because of restraints, intoxication, unconsciousness, mental incapacity, or physical helplessness.⁶

However, while the victim of a sexual assault need not resist, in prosecutions for Rape under 18 PA.CON.S.TAT.ANN. § 3121, the prosecution must prove the element of forcible compulsion, i.e., the force needs to be such as to demonstrate an absence of consent, including submission without further resistance. *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994); *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).⁷

6.8 EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

A. Prohibition Against Use of Prior Bad Acts/Criminal Activity

The basic principle of Pa.R.Evid. 404 is consistent with F.R.E. 404 and prior Pennsylvania case law. This means that Pa.R.Evid. 404, with certain enumerated exceptions, provides that evidence of prior bad acts or criminal activity cannot be used to prove conduct on a specific date:

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.

Pa.R.Evid. 404(b)(1).⁸ Evidence of a defendant's prior criminal activity may not be admitted solely to establish his bad character or criminal propensity.⁹

⁶ MICHIGAN JUDICIAL INSTITUTE, SEXUAL ASSAULT BENCHBOOK, (2002), § 7.10, pp. 369–370.

⁷ It is well accepted that 18 Pa.Cons.Stat. nn. § 3124.1, Sexual Assault, was enacted in response to the Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994). "The statute is intended to fill the loophole left by the rape and involuntary deviate sexual intercourse statutes by criminalizing non-consensual sex where the perpetrator employs little if no force." *Commonwealth v. Pasley*, 743 A.2d 521, 524 n.3 (Pa. Super. 1999), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000).

⁸ Pa.R.Evid. 404, cmt.

⁹ *Commonwealth v. Watkins*, 577 Pa. 194, 215, 843 A.2d 1203, 1215 (2003), *reargument denied* (2004), *cert. denied*, *Watkins v. Pennsylvania*, 543 U.S. 960, 125 S.Ct. 450, 160 L.Ed.2d 324 (2004).

B. Admissibility of Evidence Under Pa.R.Evid., Rule 404(b)

Subsection (b) of Pa.R.Evid. 404 recognizes legitimate evidentiary purposes for the introduction of evidence of other crimes, wrongs or bad acts. Under Pennsylvania law, evidence of other crimes, wrongs or bad acts offered for a legitimate evidentiary purpose is admissible only if its probative value outweighs the potential for prejudice. *See Commonwealth v. Morris*, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981). Pa.R.Evid. 404(b)(3) codifies Pennsylvania decisional law and is an exception to the general rule defined by Pa.R.Evid. 403.¹⁰

Rule 404(b)(2) states that 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.

1. Natural History of the Case or Natural Development of the Facts

“Evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts.”¹¹

- ***Commonwealth v. Spatz***, 552 Pa. 499, 513, 716 A.2d 580, 586 (1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 551 (1999) (***Spatz*** I): The Supreme Court of Pennsylvania recognized that evidence of prior bad acts or crimes may be admitted where such evidence was part of the chain or sequence of events which became part of the history of the case in question and formed part of the natural development of the facts.
- ***Commonwealth v. Lark***, 518 Pa. 290, 303, 543 A.2d 491, 497 (1988): “[E]vidence of another crime may also be introduced where such evidence was part of the chain or sequence of events which became part of the history of the case in question and formed part of the natural development of the facts.”

¹⁰ Pa.R.Evid. 404, cmt.

¹¹ ***Commonwealth v. Watkins***, 577 Pa. at 215, 843 A.2d at 1215; ***Commonwealth v. Collins***, 550 Pa. 46, 55, 703 A.2d 418, 423 (1997), *cert. denied*, ***Collins v. Pennsylvania***, 525 U.S. 1015, 119 S.Ct. 538, 142 L.Ed.2d 447 (1998).

2. Impeachment Evidence

(a) Impeachment of Testifying Defendant

Evidence of other crimes, wrongs or acts may be used to impeach the testimony of a testifying defendant.¹²

(b) Impeachment of Testifying Character Witness

The Pennsylvania Supreme Court noted in *Commonwealth v. Peterkin*, 511 A.2d 299, 318, 513 A.2d 373, 382-383 (1986), *cert. denied*, *Peterkin v. Pennsylvania*, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987), that “although evidence of good character may not be rebutted by evidence of specific acts of misconduct, a character witness may be cross-examined regarding his knowledge of particular acts of misconduct by the defendant to test the accuracy of his testimony and the standard by which he measures reputation.”¹³

3. Introduction of Prior Bad Acts that are Used to Threaten the Victim

Evidence of other crimes, wrongs or acts may be introduced when the defendant has used the prior bad acts to threaten the victim.⁷

- In *Commonwealth v. Claypool*, 508 Pa. 198, 205, 495 A.2d 176, 179 (1985), the Pennsylvania Supreme Court held that the trial court properly admitted evidence of the defendant’s statements that he had committed prior rapes because it was relevant to his attempts to scare her into submission.
- *Commonwealth v. Corley*, 638 A.2d 985, 987-988, (Pa. Super. 1994), *appeal denied*, 538 Pa. 641, 647 A.2d 896 (1994): in prosecution for rape and involuntary deviate sexual intercourse, among other charges, the defendant’s statement to rape victim that he had “done this twice before” was properly admitted to show threat or force in rape of victim.

4. Common Scheme, Plan or Design

Evidence of prior bad acts or criminal conduct may be admitted to show a common pattern, to establish a scheme, plan or design.

- *Commonwealth v. Elliott*, 549 Pa. 132, 146-147, 700 A.2d 1243, 1249-1250 (1997), *cert. denied*, 524 U.S. 955, 118 S.Ct. 2375, 141 L.Ed.2d 742 (1998): In prosecution for murder, rape and involuntary deviate sexual intercourse, because trial court gave several cautionary instructions to the jury indicating that evidence of defendant’s prior sexual attacks on three different victims could not be used to infer bad character or

¹² *Commonwealth v. Reid*, 571 Pa. 1, 35, 811 A.2d 530, 550 (2002), *cert. denied*, *Reid v. Pennsylvania*, 540 U.S. 850, 124 S.Ct. 131, 157 L.Ed.2d 92 (2003).

¹³ *Commonwealth v. Busanet*, 572 Pa. 535, 551, 817 A.2d 1060, 1069 (2002), *cert. denied*, *Busanet v. Pennsylvania*, 540 U.S. 869, 124 S.Ct. 192, 157 L.Ed.2d 126 (2003).

¹⁴ *Commonwealth v. Reid*, 571 Pa. at 35, 811 A.2d at 550.

criminal tendencies and repeated this cautionary charge in the final instructions, no prejudice was found from use of this evidence to establish common scheme, plan or design.

- There were sufficient factual similarities between two crimes involving the sexual assault of young boys to show a common scheme plan or design in ***Commonwealth v. O'Brien***, 836 A.2d 966 (Pa. Super. 2003), *appeal denied*, 577 Pa. 695, 845 A.2d 817 (2004). Therefore, the evidence of a defendant's prior sexual assaults of children was admissible in prosecution of defendant for currently alleged sexual assault of a minor.

5. Knowledge, Identity or Absence of Mistake or Accident

In ***Commonwealth v. Boczkowski***, 577 Pa. 421, 444-445, 846 A.2d 75, 88-89 (2004), the Court found remarkable similarities between the manner in which both of the defendant's wives were killed; therefore, evidence concerning the circumstances of his first wife's death supported a reasonable inference that his second wife's death was not accidental, but rather was a result of a deliberate act. Therefore, the Court found that the evidence was highly relevant and that its probative value outweighed any potential for unfair prejudice.

6. Motive

A defendant's motive in committing one crime may be to conceal, or to prevent his conviction of, a previous crime. *See Commonwealth v. Paddy*, 569 Pa. 47, 71-72, 800 A.2d 294, 309-310 (2002).

- ***Commonwealth v. Spatz***, 552 Pa. at 512-513, 716 A.2d at 586 (***Spatz I***): "[W]hile evidence of a defendant's prior criminal activity is generally inadmissible, this Court has recognized that there are certain exceptions to the rule. ***Commonwealth v. Walker***, 540 Pa. 80, 656 A.2d 90, 99 (1995), *cert. denied*, 516 U.S. 854, 116 S.Ct. 156, 133 L.Ed.2d 100 (1995). For example, evidence of prior criminal activity may be admitted if introduced to show motive, intent, absence of mistake or accident, a common scheme or identity."

C. Prerequisite for Use - Reasonable Notice

The prosecution must provide reasonable notice of its intent to introduce other crimes, wrongs or acts, unless the court excuses such notice upon good cause shown.¹⁵ Pa.R.Evid. 404(b)(4) provides:

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.

¹⁵ Pa.R.Evid. 404(b)(4).

D. Prerequisite for Use – Probative Value

Pa.R.Evid. 404(b)(3) provides:

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.

Evidence of other crimes, wrongs or acts is only admissible if the probative value outweighs the potential for prejudice.¹⁶ See **Commonwealth v. Morris**, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981).

- **Commonwealth v. O'Brien**, 836 A.2d at 972: the Superior Court found the probative value of the evidence of the defendant's prior sexual assaults of children outweighed its prejudicial effect because it tended to show common scheme, plan or design exception to the general rule, in that all of the charges stemmed from defendant's sexually assaulting young boys and all of the victims shared similar personal characteristics, and the crimes were not too remote in time.

1. The Remoteness Test

Remoteness is a factor in the determination of the probative value of prior bad acts or criminal conduct of the defendant. **Commonwealth v. Shively**, 492 Pa. 411, 416, 424 A.2d 1257, 1259 (1981).

- See **Commonwealth v. Smith**, 635 A.2d 1086, 1089 (Pa. Super. 1993): "the issue of remoteness under the common plan exception is determined by analyzing the time involved between each of the criminal incidents."
- **Commonwealth v. Frank**, 577 A.2d 609, 614 (Pa. Super. 1990), *appeal denied*, 526 Pa. 629, 584 A.2d 312 (1990): "If the evidence reveals that the details of each criminal incident are nearly identical, the fact that the incidents are separated by a lapse of time will not likely prevent the offer of evidence unless the time is excessive."

E. Prerequisite for Use – Cautionary Instruction

An appropriate cautionary instruction should be given whenever evidence of a defendant's prior criminal activity is admitted for one of the legitimate purposes under Pa.R.Evid. 404(b). The instruction should be given at the time the evidence is admitted and repeated in the final charge to the jury.

- In **Commonwealth v. Claypool**, 508 Pa. 198, 205, 495 A.2d 176, 179 (1985), the Pennsylvania Supreme Court held that the trial court properly admitted

¹⁶ Pa.R.Evid. 404(b)(3). See, **Commonwealth v. Santiago**, 822 A.2d 716, 728 (Pa. Super. 2003), *appeal denied*, 577 Pa. 679, 843 A.2d 1237(2004), *cert. denied*, 124 S.Ct. 2916, 159 L.Ed.2d 820, 72 WSLW 3768 (2004) (the prejudicial impact of the jury learning that the defendant had been on parole outweighed the probative value – it would have led the jury to conclude that he had a prior serious record).

evidence, with a cautionary instruction, of the defendant's statements to victim that he had committed prior rapes because it was relevant to his attempts to scare her into submission.

- A cautionary instruction by the trial court lessens a claim of prejudice. *Commonwealth v. Watkins*, 577 Pa. at 215, 843 A.2d at 1215.
- *Commonwealth v. Spotz*, 562 Pa. 498, 524-525, 756 A.2d 1139, 1153 (2000) (*Spotz II*), *cert. denied*, *Spotz v. Pennsylvania*, 532 U.S. 932, 121 S.Ct. 1381, 149 L.Ed.2d 307 (2001): No prejudice shown when trial court clearly instructed jury that it could only consider other crimes evidence for relevant limited purposes and not merely as evidence of appellant's propensity to commit crimes.

6.9 SELECTED HEARSAY RULES AND EXCEPTIONS

A. Hearsay Generally Not Admissible

Hearsay is not admissible except as provided in the Pennsylvania Rules of Evidence, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.¹⁷ When hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections:

- (1) admission of the evidence would violate the hearsay rule;
- (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment to the United States Constitution; and
- (3) admission of the evidence would violate defendant's right of confrontation under Article I, Section 9 of the Pennsylvania Constitution.¹⁸

Note that "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."¹⁹

Rule 801 of the Pennsylvania Rules of Evidence states the following:

The following definitions apply under this article:

- (a) Statement. A "**statement**" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A "**declarant**" is a person who makes a statement.

¹⁷ Pa.R.Evid. 802.

¹⁸ Pa.R.Evid., Rule 801, introductory cmt.

¹⁹ Pa.R.Evid., 805.

- (c) Hearsay. “**Hearsay**” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

“A statement, other than one made by the declarant while testifying at the trial or hearing (an out-of-court statement), is hearsay only if it is offered to prove the truth of the matter asserted.”²⁰

B. Exceptions to the Hearsay Rule: *Availability of Declarant Immaterial*

Rule 803 of the Pennsylvania Rules of Evidence provides that certain out of court statements are not excluded by the hearsay rule, even though the declarant may or may not be available as a witness.²¹

The Rule provides:

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant’s will.

(4) Statements for purposes of medical diagnosis or treatment. A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

²⁰ Pa.R.Evid., Rule 801, cmt.

²¹ Pa.R.Evid. 803.

(5) Recorded recollection: not adopted; addressed in Pa.R.Evid. 803.1(3).

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6): not adopted.

(8) Public records and reports: not adopted; an exception to the hearsay rule for public records is provided in 42 Pa.Cons.Stat. Ann. § 6104.

(9) Records of vital statistics: not adopted; records of vital statistics are also business records and may be excepted to the hearsay rule by Pa.R.Evid. 803(6). Records of vital statistics are public records and they may be excepted to the hearsay rule by 42 Pa.C.S.A. § 6104 (text quoted in Comment to Pa.R.Evid. 803(8)).

(10) Absence of public record or entry: not adopted;

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document, other than a will, purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises: not adopted; Pennsylvania does not recognize an exception to the hearsay rule for learned treatises.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction: not adopted; with respect to facts essential to sustain a judgment of criminal conviction, there are four basic approaches that a court can take:

1. The judgment of conviction is conclusive, i.e., estops the party convicted from contesting any fact essential to sustain the conviction.
2. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction, only if offered against the party convicted.
3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule for felonies, except that the Government cannot offer someone else's conviction against the defendant in a criminal case, other than for purposes of impeachment).
4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule).

(23) Judgment as to personal, family, or general history or boundaries: not adopted.

(24) Other exceptions: not adopted.

(25) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

1. Present Sense Impression – Pa.R.Evid., Rule 803(1)

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

“For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.”²²

- ***Commonwealth v. Harper***, 614 A.2d 1180, 1183 (Pa. Super. 1992), *appeal denied*, 533 Pa. 649, 624 A.2d 109 (1993): in prosecution for rape and other charges, trial court properly admitted testimony of police officer who repeated statement of defendant’s girlfriend, i.e., when she looked into the window of the victim’s house, she observed a sock on the victim’s bed which belonged to her boyfriend. This was within present-sense-impression exception to hearsay rule and admissible; the girlfriend’s statement was contemporaneous verbalization of her having observed the sock on the bed when she had looked into window and there was no opportunity for retrospective thought on her part prior to her relating her impression to the police officer.

2. Excited Utterance – Pa.R.Evid., Rule 803(2)

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

An excited utterance is “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”²³ The comments to Pa.R.Evid. 803(2) provide:

There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In ***Commonwealth v. Gore***, 262 Pa. Super. 540, 547-48, 396 A.2d 1302, 1305 (1978), the court explained: The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit. . . . Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an “excited utterance.” . . . The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the

²² Pa.R.Evid. 803(1), cmt.

²³ Pa.R.Evid., Rule 803(2), cmt.

nervous excitement continues to dominate while the reflective processes remain in abeyance.²⁴

“An excited utterance (1) need not describe or explain the startling event or condition; it need only relate to it, and (2) need not be made contemporaneously with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.”²⁵

- ***Commonwealth v. Crosby***, 791 A.2d 366, 370-371 (Pa. Super. 2002): in a prosecution for indecent assault, the trial court properly admitted the testimony of the victim’s mother as to what the victim had told her, i.e., the indecent assault when she was alone with the defendant. The testimony was admissible under the excited utterance exception to the hearsay rule because the victim’s statements were made within minutes of the event, the victim’s mother stated that the victim had lowered her head while she talked, which indicated that she was upset, and the victim cried while she described the event.
- ***Commonwealth v. Clark***, 512 A.2d 1282, 1284 (Pa. Super. 1986), *appeal denied*, 514 Pa. 638, 523 A.2d 345 (1987): trial court properly admitted hearsay testimony of police officer, under “excitable utterance” exception to hearsay rule, regarding victim’s statement to him that defendant had penetrated her, which statement was made immediately after the rape occurred.
- ***Commonwealth v. Pettiford***, 402 A.2d 532, 533 (Pa. Super. 1979): The trial court properly admitted the hearsay testimony of three witnesses, one of whom was allowed to recount the entire criminal episode of the rape in great detail, as told to her by the victim shortly after the rape occurred, under the excitable utterance exception. The victim had been subjected to a forcible rape and was in a hysterical state of mind when, 15 to 20 minutes after the rape occurred, the victim recounted its details to the witnesses.

3. Then Existing Mental, Emotional, or Physical Condition – Pa.R.Evid., Rule 803(3)

(3) Then existing mental, emotional, or physical condition.

A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant’s will.

²⁴ Pa.R.Evid., Rule 803(2), cmt.

²⁵ *Id.*

This rule is sometimes referred to as the “*state of mind*” exception. *See Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978) (statements of present physical condition and emotional feelings); *Commonwealth v. Marshall*, 287 Pa. 512, 135 A. 301 (1926) (statement of intent or plan); *Ickes v. Ickes*, 237 Pa. 582, 85 A. 885 (1912) (statement of motive or design).²⁶

“A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant’s will.”²⁷

- ***Commonwealth v. Jorden***, 482 A.2d 573, 579 (Pa. Super. 1984): in rape case, trial court properly admitted testimony of investigating detective’s observations of the victim, four hours after the rape, to demonstrate the victim’s state of mind at the time of her statement. The complainant was crying, sobbing and trembling, which helped to explain the inconsistencies in her testimony because she was upset.

4. Statements for Purposes of Medical Diagnosis or Treatment- Pa.R.Evid., Rule 803(4)

(4) Statements for purposes of medical diagnosis or treatment. A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, diagnosis in contemplation of treatment.

In *Commonwealth v. Smith*, 545 Pa. 487, 493, 681 A.2d 1288, 1291 (1996), the Supreme Court stated that there are essentially two requirements for a statement to come within this exception:

First, the declarant must make the statement for the purpose of receiving medical treatment; and

Second, the statement must be necessary and proper for diagnosis and treatment.

Note that statements are only admissible if they are made in contemplation of treatment: “A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as

²⁶ Pa.R.Evid. 803(3), cmt.

²⁷ Pa.R.Evid. 803(3), cmt.

reasonably pertinent to treatment, or diagnosis in contemplation of treatment.”²⁸ “The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully.”²⁹

This exception is not limited to statements made to physicians. Statements to a nurse have been held to be admissible.³⁰

(a) Prohibition: Statements for Purposes of Litigation

“Statements made to persons retained solely for the purpose of litigation are not admissible under this rule.”³¹

(b) Prohibition: Identification Statements

“Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible.” *Commonwealth v. Smith*, 545 Pa. 487, 496, 681 A.2d 1288, 1293 (1996).

- ***Commonwealth v. D.J.A.*, 800 A.2d 965, 976-977 (Pa. Super. 2002) (en banc), appeal denied**, 579 Pa. 700, 857 A.2d 677 (2004): **in case in which defendant was charged with rape, involuntary deviate sexual intercourse, indecent assault, corruption of minors, and endangering the welfare of children, trial court properly held as inadmissible the minor victim’s statement to her doctor, which statement in addition to explaining her condition, identified the defendant as the assailant. The Superior Court rejected the prosecution’s argument that the threat of a sexually transmitted disease exempts sexual assault cases from the general rule that identification of the person inflicting the harm is not admissible under this hearsay exception.**

5. Records of Regularly Conducted Activity – Pa.R.Evid., Rule 803(6)

(5) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of

²⁸ Pa.R.Evid. 803(4), cmt (emphasis added).

²⁹ *Id.*

³⁰ See *Commonwealth v. Smith*, 545 Pa. 487, 494, 681 A.2d 1288, 1291 (1996).

³¹ Pa.R.Evid. 803(4), cmt.

trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

“A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”³²

- ***Commonwealth v. Campbell***, 368 A.2d 1299, 1301-1302 (Pa. Super. 1976) (*en banc*): in rape trial, prosecution called representative of medical records department of hospital where the complainant had been taken to introduce medical records which indicated that spermatozoa was present in victim at time of examination. Superior Court affirmed trial court’s decision that the tests to determine the presence of sperm were basic and routine and led to an indication of “fact” and not a conclusion or opinion.

(a) Authentication

Records of regularly conducted activity may be authenticated by certification. This amendment is designed to save the expense and time consumption caused by calling needless foundation witnesses. The notice requirements provided in Pa.R.Evid. 902(11) and (12) will give other parties a full opportunity to test the adequacy of the foundation.³³

(b) Prohibition: Opinions and Diagnoses

“Pa.R.Evid. 803(6) does not include opinions and diagnoses.”³⁴

(c) Prohibition: Lack of Trustworthiness

Additionally, Pa.R.Evid. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the “sources of information or other circumstances indicate lack of trustworthiness.”³⁵

³² Pa.R.Evid. 803(6), cmt.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

(d) Prohibition: Confrontation Clause

If offered against a defendant in a criminal case, an entry in a business record may be excluded if its admission would violate the defendant's constitutional right to confront the witnesses against him or her. *See Commonwealth v. Mc Cloud*, 457 Pa. 310, 315-316, 322 A.2d 653, 656-657 (1974).³⁶

- In *Commonwealth v. Mitchell*, 570 A.2d 532, 534 (Pa. Super. 1990), *appeal denied*, 527 Pa. 599, 589 A.2d 689 (1990), the defendant was charged with murder and rape, *inter alia*. At trial, the medical examiner was permitted to read facts from the autopsy report, not any opinions or conclusion from the doctor who had prepared the report, and then opined based upon those facts. The Superior Court found no error or violation of the Confrontation Clause, and stated that "Experts may offer testimony based on the reports of others."

(e) The Uniform Business Records as Evidence Act

Note that PA R.E. 803(6) differs only slightly from 42 PA.CON.S.TAT. § 6108, which provides:

(a) Short title of section. - This section shall be known and may be cited as the "Uniform Business Records as Evidence Act."

(b) General Rule. - A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

(c) Definition. - As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

6. Admission by Party-Opponent

An admission by a party-opponent is admissible when the statement is offered against a party and is either:

- (A) the party's own statement in either an individual or a representative capacity, or
- (B) a statement of which the party has manifested an adoption or belief in its truth, or
- (C) a statement by a person authorized by the party to make a statement concerning the subject, or

³⁶ Pa.R.Evid., Rule 803(6), cmt.

- (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
- (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).³⁷

C. Exceptions to the Hearsay Rule: *Availability of Declarant Necessary*

Rule 803.1 of the Pennsylvania Rules of Evidence states:

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement:

(1) Inconsistent statement of witness. A statement by a declarant that is inconsistent with the declarant's testimony, and (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.

(2) Statement of identification. A statement by a witness of identification of a person or thing, made after perceiving the person or thing, provided that the witness testifies to the making of the prior identification.

(3) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

D. Exceptions to the Hearsay Rule: *Declarant Unavailable*

Pennsylvania Rule of Evidence 804 provides for exceptions to the hearsay rule under circumstances in which the declarant is unavailable at trial. The rule states:

³⁷ Pa.R.Evid. 803(25), cmt.

Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. A statement, made before the controversy arose:

(A) concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage, or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions [not adopted].

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rule 804 of the Pennsylvania Rules of Evidence defines unavailability as follows:

“Unavailability as a witness” includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant’s statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability due to death or illness, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.³⁸

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. Former Testimony, Pa.R.Evid., Rule 804(b)(1)

Former testimony is “testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”³⁹

“Depositions are the most common form of prior testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.Evid. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.”⁴⁰

³⁸ Pa.R.Evid. 804(a).

³⁹ Pa.R.Evid. 804, cmt.

⁴⁰ *Id.*

The admissibility of depositions in a criminal case is governed by 42 PA.CON.S.TAT.ANN. § 5919 which provides:

The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

“The Pennsylvania Supreme Court, as a matter of common law development, has recognized an exception to the hearsay rule for depositions that is broader than the statute. *See Commonwealth v. Stasko*, 471 Pa. 373, 370 A.2d 350 (1977).”⁴¹

2. Statement Under Belief of Impending Death

A statement made under belief of impending death is “a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”⁴² Statements that qualify under this exception are admissible in all cases, which is a departure from prior Pennsylvania law.⁴³

3. Statement Against Interest

A statement against interest is defined as “a statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”⁴⁴

4. Forfeiture by Wrongdoing

Hearsay is admissible under the forfeiture by wrongdoing exception when it is “a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”⁴⁵

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Pa.R.Evid. 804, cmt.

⁴⁵ Pa.R.Evid. 804, cmt.

E. Attacking and Supporting the Credibility of the Declarant of a Hearsay Statement

Rule 806 of the Pennsylvania Rules of Evidence states:

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

“The requirement that a witness be given an opportunity to explain or deny the making of an inconsistent statement provided by Pa.R.Evid. 613(b) is not applicable when the prior inconsistent statement is offered to impeach a statement admitted under an exception to the hearsay rule. In most cases, the declarant will not be on the stand at the time when the hearsay statement is offered and for that reason the requirement of Pa.R.Evid. 613(b) is not appropriate.”⁴⁶

6.10 SPECIAL HEARSAY EXCEPTION: TENDER YEARS EXCEPTION

The “tender years exception” to rule against hearsay permits a hearsay statement of a child sexual abuse victim, or a child witness, under the age of twelve to be admissible if the evidence is relevant and if the time, content and circumstances of the statement provide sufficient indicia of reliability. ***Commonwealth v. Hunzer***, 868 A.2d 498, 510 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005). “The tender years exception allows for the admission of a child’s out-of-court statement due to the fragile nature of young victims of sexual abuse.” ***Commonwealth v. Fink***, 791 A.2d 1235, 1248 (Pa. Super. 2002).

Under 42 PA.CON.S.TAT.ANN. § 5985.1, certain out of court statements of child victims and child witnesses are admissible under the following standards:

Child Victims and Witnesses

5985.1. Admissibility of certain statements

(a) **General rule.**—An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs.

⁴⁶ Pa.R.Evid. 806, cmt.

25 (relating to criminal homicide),
27 (relating to assault),
29 (relating to kidnapping),
31 (relating to sexual offenses),
35 (relating to burglary and other criminal intrusion), and
37 (relating to robbery), not otherwise admissible by statute or
rule of evidence, is admissible in evidence in any criminal or
civil proceeding if:

- (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
- (2) the child either:
 - (i) testifies at the proceeding; or
 - (ii) is unavailable as a witness.

(a.1) Emotional distress.—In order to make a finding under subsection (a)(2) (ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child’s ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child, either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

(a.2) Counsel and confrontation.—If the court hears testimony in connection with making a finding under subsection (a)(2)(ii), all of the following apply:

- (1) Except as provided in paragraph (2), the defendant, the attorney for the defendant and the attorney for the Commonwealth or, in the case of a civil proceeding, the attorney for the plaintiff has the right to be present.
- (2) If the court observes or questions the child, the court shall not permit the defendant to be present.

(b) Notice required.—A statement otherwise admissible under subsection (a) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent’s intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

A. Factors to be Considered for Admission

The factors to be considered by a trial court in determining whether the child's out-of-court statement should be admitted are designed to assist the court in determining whether the child-declarant was likely to be telling the truth when the statement was made:

- (1) the spontaneity and consistent repetition of the statement(s);
- (2) the mental state of the declarant;
- (3) the use of terminology unexpected of a child of similar age; and
- (4) the lack of motive to fabricate.

Commonwealth v. Lyons, 833 A.2d 245, 255 (Pa. Super. 2003), *appeal denied*, 583 Pa. 695, 879 A.2d 782 (2005); **Commonwealth v. Hanawalt**, 615 A.2d 432, 438 (Pa. Super. 1992).

B. Notice Requirement

Pennsylvania courts, thus far, have strictly applied the notice requirements of the tender years exception: in **Commonwealth v. Crossley**, 711 A.2d 1025, 1028 (Pa. Super. 1998), a panel of the Superior Court held that the tender years exception statute mandates more than ordinary discovery and mandates heightened discovery. The statute requires that the proponent of the out-of-court statement, in order to provide the adverse party with a fair opportunity to prepare, must:

- notify the adverse party, sufficiently in advance of trial, of the proponent's intention to use the statement at trial; and
 - notify the adverse party, sufficiently in advance of trial, of the particulars of the statement.
- **Commonwealth v. O'Drain**, 829 A.2d at 320–321: notice requirement satisfied when Commonwealth gave separate and distinct notice, beyond the requirements of discovery, to defendant of its intention to proceed by way of the tender years exception; Commonwealth did not merely provide defendant with discovery packet containing relatives' statements - Commonwealth specified in its notice that it might introduce at trial testimony that child told her mother that the defendant kissed her with his tongue on various parts of her body.
 - **Commonwealth v. Hunzer**, 868 A.2d 498, 511 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005): It was not necessary that notice contain exact word-for-word recitation of the out-of-court statement, but only that notice contain "the particulars of the statement."

6.11 COMPETENCY OF WITNESSES

A. Pennsylvania Rule of Evidence 601

Pennsylvania Rule of Evidence 601 provides:

- a. General Rule. Every person is competent to be a witness except as otherwise provided by statute or in these Rules.
- b. Disqualification for Specific Defects. A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:
 - (1) is, or was, at any relevant time, incapable of perceiving accurately;
 - (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
 - (3) has an impaired memory; or
 - (4) does not sufficiently understand the duty to tell the truth.

42 PA.CON.S.TAT.ANN. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. *See, e.g.,* 42 PA.CON.S.TAT.ANN. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 PA.CON.S.TAT.ANN. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 PA.CON.S.TAT.ANN. §§ 5925, 5926, and 5927); 42 PA.CON.S.TAT.ANN. §§ 5930-5933 and 20 PA.CON.S.TAT.ANN. § 2209 (“Dead Man’s Statute”).

Pa.R.Evid. 601(b) is consistent with Pennsylvania law concerning the competency of persons with a mental defect and children of tender years. *See Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity). The application of the standards in Pa.R.Evid. 601(b) is a factual question to be resolved by the Court. Expert testimony has been used when competency under these standards has been an issue. *E.g., Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976); *Commonwealth v. Gaertner*, 484 A.2d 92 (Pa. Super. 1984). Pa.R.Evid. 601(b) is intended to preserve existing law and not to expand it.

B. Spousal Competence

Spousal competence in criminal cases is governed by 42 PA.CON.S.TAT.ANN. § 5913 which provides, in pertinent part:

Except as otherwise provided in this subchapter, in a criminal proceeding a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse except that there shall be no such privilege . . .

(1) in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them; or

...

(4) in any criminal proceeding in which one of the charges pending against the defendant includes murder, involuntary deviate sexual intercourse or rape.

Not only is a spouse competent to testify when these exceptions apply, he or she may be compelled to testify. ***Commonwealth v. Hess***, 411 A.2d 830, 833 (Pa. Super. 1979), *appeal dismissed*, 499 Pa. 206, 452 A.2d 1011 (1982).

- Requirement that spouse or minor in a protected class be the victim:

The statutory exception to the spousal privilege in criminal proceedings, provided in 42 PA. CONS. STAT. § 5913, is limited to proceedings in which the person was on trial for an act against his spouse, or against a minor child in the protected class.

- ***Commonwealth v. Scott***, 516 Pa. 346, 532 A.2d 426 (1987) (Defendant's estranged wife could not testify about the defendant's violence toward her boyfriend). As long as a spouse or minor child in the protected class is one of the victims in a criminal proceeding, the spousal privilege does not apply.

- ***Commonwealth v. John***, 596 A.2d 834 (Pa. Super. 1991) (Spousal privilege did not apply in a criminal proceeding where the husband was on trial for attempting to burn down a bingo hall that his wife was in).

- **Requirement of a valid marriage:**

The basis for invoking the marital privilege is the existence of a valid marriage; where at the time the woman was living with defendant she was still legally married to another man, therefore the woman and defendant were not validly married so the marital privilege did not apply.

Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309 (1984), *cert. denied*, 469 U.S. 971, 105 S.Ct. 370, 83 L.Ed.2d 306 (1984).

C. Competency of Child

In addressing an objection to the competency of a minor who testifies, there are a number of standard policies:

(1) a child witness, like any other witness, is presumed competent to testify unless proven otherwise. ***In Interest of J.R.***, 648 A.2d 28, 31 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995).

(2) the burden to prove that a witness is not competent falls on the objecting party. ***Commonwealth v. Short***, 420 A.2d 694, 696 (Pa. Super. 1980).

- (3) the determination of a witness's competency to testify is left to the sound discretion of the trial judge, and the judge's ruling on the matter will not be reversed absent a flagrant abuse of that discretion. **Commonwealth v. Delbridge**, 580 Pa. 68, 73, 859 A.2d 1254, 1257 (2004) (case involved a child sexual abuse victim).
- (4) When the witness is under fourteen years of age, there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless resides in the trial judge to make the ultimate decision as to competency. **Commonwealth v. D.J.A.**, 800 A.2d 965, 969 (Pa. Super. 2002), *appeal denied*, 579 Pa. 700, 857 A.2d 677 (2004).
- (5) **Commonwealth v. Hunzer**, 868 A.2d 498, 507 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005): In making its determination, the court must inquire whether the child possesses:
1. capacity to communicate, including as it does both an ability to understand questions and an ability to frame and express intelligent answers,
 2. mental capacity to observe the occurrence itself and the capacity of remembering what it is that she is called to testify about, and
 3. a consciousness of the duty to speak the truth.

6.12 MISTAKE AS TO AGE

18 PA.CONSTAT. ANN. § 3102. Mistake as to age

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

- **Commonwealth v. Robinson**, 497 Pa. 49, 54, 438 A.2d 964, 966-967(1 9 8 1), *appeal dismissed*, **Robinson v. Pennsylvania**, 457 U.S. 1101 (1982): statutory rape statute valid and constitutional – plainly evidenced legislature's intent to make violation thereof a strict liability offense where victim is less than fourteen years of age, where the statute specifically indicated that mistake as to age was not a defense.
- **Commonwealth v. Hall**, 418 A.2d 623, 624 (Pa. Super. 1980): even if justified, defendant's mistaken belief as to the victim's age was irrelevant and not a defense to corruption of minors or voluntary deviate sexual intercourse.

- **Commonwealth v. Fetter**, 770 A.2d 762, 768 (Pa. Super. 2001), *affirmed*, 570 Pa. 494, 810 A.2d 637 (2002): defendant was convicted of statutory sexual assault, involuntary deviate sexual intercourse; the victim was 15 at the time of the incident. The trial court properly denied defendant’s attempts to cross examine the victim as to her beliefs as to how old she looked: victim’s beliefs were irrelevant to defendant’s beliefs and knowledge of her actual age.

6.13 SEXUAL ASSAULT COUNSEL PRIVILEGE

The sexual assault counselor victim privilege is an absolute privilege which protects the documents and the testimony of sexual assault counselors. 42 PA.CON.S.TAT.ANN. § 5945.1 provides, in pertinent part:

§ 5945.1. Confidential Communications to Sexual Assault Counselors

...

(a) Privilege

(1) No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim’s confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

(2) No coparticipant who is present during counseling may disclose a victim’s confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.

The privilege is absolute and is not outweighed by the defendant’s state and federal constitutional rights to confrontation. **Commonwealth v. Wilson / Aultman**, 529 Pa. 268, 602 A.2d 1290 (1992), *cert. denied*, **Aultman v. Pennsylvania**, 504 U.S. 977 (1992).

Because the statutory privilege is absolute, no court review is required. The materials are not subject to any access by counsel.⁴⁷ The privilege applies regardless of whether the party seeking disclosure is the prosecution or defense.

Commonwealth v. Gibbs, 642 A.2d 1132, 1135 (Pa. Super. 1994).

A. Motion to Quash Subpoena

Pennsylvania Rule of Criminal Procedure 578 allows the filing of a Motion to Quash Subpoena as a pretrial motion. “The Constitution does not require that the defendant be given the right to secure the attendance of a witness that the defendant has no right to use.”⁴⁸

⁴⁷ PENNSYLVANIA BENCHBOOK FOR CRIMINAL PROCEEDINGS, § 25.02.

⁴⁸ *Id.* at § 37.02.

B. Waiver

The privilege can be waived. If the prosecution is accorded access to the information covered by the privilege, then the statutory privilege must yield to the defendant's rights of confrontation and compulsory process. ***B.T. v. Family Services of Western Pennsylvania***, 705 A.2d 1325, 1337, n.18 (Pa. Super. 1998), *aff'd*, 556 Pa. 430, 728 A.2d 953 (1999).

- ***Commonwealth v. Davis***, 543 Pa. 628, 632, 674 A.2d 214, 216 (1996): in case in which defendant was charged with deviate sexual intercourse and corruption of minor, *inter alia*, child sexual abuse victim and his family **waived** any privilege to information contained in family therapy counseling records by giving prosecution access to them, and defendant was entitled to such information in order to confront witnesses at trial regardless of appropriateness of his designs as to use at trial of information hypothetically contained in records.
- **No Waiver: *Commonwealth v. Askew***, 666 A.2d 1062, 1065 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996): defendant charged with statutory rape and involuntary deviate sexual intercourse, *inter alia*. Because counselor had a statutory duty to reveal allegation of child abuse to police under the Child Protective Services Act, 23 PA.CON.S.TAT.ANN. § 6311 *et seq.*, no waiver when counselor informed police of the allegations, nor when minor victim's mother consented to the disclosure.

6.14 "911" TAPES AND OTHER AUDIOTAPED EVIDENCE

A. Use of 911 Tapes and Other Audiotapes at Trial

Audiotaped evidence, such as recordings of "911" calls, often plays a prominent role in sexual violence and domestic violence cases. For purposes of establishing prompt complaint, as well as the natural history or development of a case, the prosecution will attempt to move into evidence the recordings of emergency call audiotapes.⁴⁹

This type of evidence can play a pivotal role at trial, especially where the victim or witness is unavailable at trial or does not wish to cooperate with the prosecution. It adds credibility to the victim's testimony at trial. Basic rules of admissibility and relevancy apply.⁵⁰

- **Natural History or Development of Case:**

In ***Commonwealth v. Robinson***, 581 Pa. 154, 227, 864 A.2d 460, 503 (2004), *cert. denied*, ___ U.S. ___, 126 S.Ct. 559, 163 L.Ed.2d 470 (2005), the

⁴⁹ See 3 A.L.R.5th 784, ADMISSIBILITY OF TAPE RECORDING OR TRANSCRIPT OF "911" EMERGENCY TELEPHONE CALL.

⁵⁰ Evidence is admissible if it is relevant: "that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact." ***Commonwealth v. Wynn***, 580 Pa. 713, 850 A.2d 730, 733 (Pa. Super. 2004), *appeal denied*, 862 A.2d 1255 (2004).

trial court permitted tape recordings of the 911 calls made to the Allentown Police Department after the discovery of the murder victim. The defendant argued that the tape was cumulative to other evidence proffered through witnesses present at trial. The Supreme Court of Pennsylvania ruled that the tapes did not contain any inflammatory or impassioned excerpts, and therefore were not prejudicial even if somewhat cumulative.

▪ **Natural History or Development of Case:**

In *Commonwealth v. Hood*, 872 A.2d 175, 181-184 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), the trial court permitted 911 calls of a shooting, two of which identified the defendant as the shooter, into evidence to establish the initial reports of the incident.

▪ **Initial Report of Crime:**

In *Commonwealth v. Cunningham*, 805 A.2d 566, 572-573 (Pa. Super. 2002), *appeal denied*, 573 Pa. 663, 820 A.2d 703 (2003), the trial court permitted the jury to hear the tape of a 911 call made by bystanders who were working nearby and saw the robbery in issue unfolding. The tape was admitted under the present sense exception to the hearsay rule.

▪ **To Rebut Voluntariness of Confession:**

In *Commonwealth v. Cameron*, 780 A.2d 688, 694-695 (Pa. Super. 2001), the Superior Court remanded for a hearing before the trial court to determine if the audiotape of the defendant's confession was relevant to the defendant's argument that his confession was not voluntary.

▪ **To Show Prior Consistent Statement in Rebuttal:**

In *Commonwealth v. Polston*, 616 A.2d 669, 674-675 (Pa. Super. 1992), *appeal denied*, 534 Pa. 638, 626 A.2d 1157 (1993), the Superior Court held that an audiotaped (as well as videotaped) prior consistent statement by a victim of child sexual abuse should not have been admitted in the prosecution's case in chief as substantive evidence, but could have been used in rebuttal to rehabilitate the victim if impeached. In any event, the tape was admissible under the Tender Years Exception, 42 PA.CON.S.TAT.ANN. § 5985.1.

B. Issues Regarding Admissibility

Four issues must usually be addressed before 911 tapes, as well as other forms of audiotaped evidence, are admissible. These are:

- (1) Foundation and Authentication;
- (2) Hearsay Considerations;
- (3) Relevancy; and
- (4) Prejudice.

1. Foundation and Authentication

Pennsylvania Rule of Evidence 901(a) is identical to Federal Rule of Evidence 901(a) and consistent with Pennsylvania case law. Rule 901(a) provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Section (b) of Rule 901 provides examples of the ways authentication may be accomplished. Two of the examples are applicable to these types of audiotapes:

Pa.R.Evid. 901(b)

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

...

5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

In addition to being relevant, demonstrative evidence must also be properly authenticated by evidence sufficient to show that it is a fair and accurate representation of what it is purported to depict.

Commonwealth v. Reid, 571 Pa. 1, 38, 811 A.2d 530, 552 (2002), *cert. denied*, ***Reid v. Pennsylvania***, 540 U.S. 850 (2003). “Demonstrative evidence may be authenticated by testimony from a witness who has knowledge of what the evidence is proclaimed to be. Pa.R.Evid. 901(b)(1).” *Id.*

2. Hearsay Considerations

When an out-of-court statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under the hearsay rule. ***Commonwealth v. Cunningham***, 805 A.2d at 572. Therefore, 911 calls which are not used to prove the truth of the matter asserted are not barred by the hearsay rule.

In cases where 911 calls, or other audiotaped evidence, fall within the definition of hearsay, trial courts have admitted the evidence under the

excited utterance and present sense impression exceptions, as well as other exceptions.

Constitutional Right of Confrontation: An additional consideration is the prohibition against testimonial statements from *Crawford v. Washington*, 541 U.S. 36, 125 S.Ct. 1354 (2004). *Crawford* holds that out-of-court statements by witnesses that are testimonial are barred under the confrontation clause, notwithstanding their designation as hearsay exceptions, unless the witnesses are unavailable and defendants had prior opportunity to cross-examine the witnesses. There are a number of cases that find a distinction between non-testimonial statements and statements made in contemplation of litigation:

A statement is more likely to have been made with the expectation that it would be used as evidence if it was given in response to questioning by a government official than it would if it had been volunteered. Emergency 911 calls offer a good illustration of this point. Many courts have concluded that a hearsay statement made in a 911 call is not testimonial, because the statement is not made in response to police questioning, and because the purpose of the call is to obtain assistance, not to make a record against someone.

***Commonwealth v. Gray*, 867 A.2d 560, 576 (Pa. Super. 2005), appeal denied**, 583 Pa. 694, 879 A.2d 781 (2005).⁵¹ **In *Gray*, the Superior Court concluded that the witness’s** excited utterances to police at the scene of crime did not fall under “extrajudicial statements contained in formalized testimonial materials” classification of testimonial statements articulated in *Crawford*.

(a) Excited Utterances

In determining whether an audiotaped statement is admissible as an excited utterance, the taped statement must relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. The fact that a statement was not made immediately after a startling event is not dispositive of its admissibility as an excited utterance. *Commonwealth v. Keys*, 814 A.2d 1256, 1258 (Pa. Super. 2003). The crucial question, regardless of time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective process remains in abeyance. *Commonwealth v. Carmody*, 799 A.2d 143, 147 (Pa. Super. 2002).

⁵¹ In *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004), the victim called 911 to report that a prowler had entered her home. On the following night, the victim was murdered. At the defendant’s trial, the trial court admitted the 911 call, as excited utterances, and Leavitt was convicted. On appeal, the Court concluded that the victim’s statements were properly introduced as excited utterances and that the statements did not qualify as “testimonial” under *Crawford v. Washington*, 541 U.S. 36 (2004).

The excited utterance (1) need not describe the startling event, it need only relate to it, and (2) need not be made contemporaneously with, or immediately after, the startling event.⁵² Pa.R.Evid. 803(2) provides: “**Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

- **Other Corroborating Evidence:** with respect to excited utterances by unidentified bystanders, i.e., anonymous 911 calls, the law in Pennsylvania has evolved to add an additional proof requirement for admissibility. In order to assure that an unidentified bystander actually witnessed the event discussed on the 911 call, and which is relevant at the time of trial, the Pennsylvania Supreme Court has held that that it is incumbent upon the party seeking the admission of the out-of-court statement to demonstrate by the use of “*other corroborating evidence*” that the declarant actually viewed the event “of which he speaks.” *Commonwealth v. Hood*, 872 A.2d at 181, citing *Carney v. Pennsylvania Railroad Co.*, 428 Pa. 489, 496, 240 A.2d 71, 75 (1968).

(b) Present Sense Impressions

The present sense impression exception, regardless of the availability of the declarant to testify at trial, allows the admission of a 911 call, or other audiotaped statement, under certain conditions. Pa.R.Evid. 803(1) provides: “(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

The observation must be made at the time of the event or shortly thereafter, making it unlikely that the declarant had the opportunity to form an intent to misstate his observation. Consequently, the trustworthiness of the statement depends upon the timing of the declaration. *Commonwealth v. Gray*, 867 A.2d at 570. “In addition, the present sense impression does not require that the comments be made to another person also present at the scene, but may be made over the telephone.” *Commonwealth v. Cunningham*, 805 A.2d at 573.

- **Other Corroborating Evidence:** with respect to 911 calls by unidentified bystanders, admitted under the present sense impression exception, the Superior Court in *Commonwealth v. Hood*, 872 A.2d at 184, held in dicta the same additional proof requirement for admissibility as excited utterances. In order to assure that an unidentified bystander actually witnessed the event discussed on the 911 call, and which is relevant at the time of trial, it is incumbent upon the party seeking the admission of the out-of-court statement to demonstrate by the use of “*other corroborating evidence*” that the

⁵² *Commonwealth v. Hood*, 872 A.2d at 181.

declarant actually viewed the event “of which he speaks.” *See Carney v. Pennsylvania Railroad Co.*, 428 Pa. 489, 496, 240 A.2d 71, 75 (1968).

3. Relevancy

In *Commonwealth v. Witman*, 750 A.2d 327 (Pa. Super. 2000), *appeal denied*, 564 Pa. 138, 764 A.2d 1053 (2000), *cert. denied*, *Witman v. Pennsylvania*, 534 U.S. 815 (2001), the court found 911 tapes to be relevant in a suppression hearing on a number of grounds:

This evidence forms the very foundation for the relationship appellee established with police. Appellee maintains no expectation of privacy with respect to his statements and, furthermore, careful review of the 911 tape fails to reveal unfair prejudice to the defense. To the contrary, the statements made by appellee when he called 911 appear to be wholly consistent with all of his subsequent statements to the police. It may also be necessary during trial, as a truth-determining process, to test prior consistent or inconsistent statements on behalf of either the appellee or the Commonwealth. It is the best evidence of what transpired in the opening minutes of this event and as such may be required as evidence of the occurrence pursuant to Pa.R.Evid. 1002, Requirement of Original. At worst, the 911 recording and transcript would be cumulative and corroborative evidence; however, this evidence, more than any other, demonstrates what transpired in the opening moments of police involvement initiated by appellee and goes to appellee’s state of mind. In his Opinion, the trial court acknowledged that police involvement originated with the 911 call and the contents of that call relayed to police are inseparable from their conduct in reaching the house and their treatment of the appellee. Based upon the foregoing, we find erroneous the suppression court’s exclusion of the 911 recording and transcript. While the Commonwealth did not object to the ruling by the trial court on this issue, our ruling may avoid the necessity of an appeal on admissibility of the tapes or transcripts should the matter arise at trial.

Commonwealth v. Witman, 750 A.2d at 336.

4. Prejudice

To test whether demonstrative evidence should be admitted, the trial court should conduct a two part test. First, the court determines whether the evidence is inflammatory in nature. If the evidence is inflammatory, the court then decides whether the evidence is of “essential evidentiary value” such that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.⁵³

- **Harmless Error:** It was error to admit into evidence tape recording of 911 telephone call made during the course of the murder because victim’s screams would inflame the jury, however, because of overwhelming evidence of guilt, determined to be harmless error. **Commonwealth v. Groff**, 514 A.2d 1382, 1384-1385 (Pa. Super. 1986), *appeal denied*, 515 Pa. 619, 531 A.2d 428 (1987).
- **Harmless Error:** During 911 call by victim on day she was murdered, victim told the 911 operator that the defendant had just called her and threatened her life. The Commonwealth asserted that the 911 call was properly admitted pursuant to the excited utterance exception to the hearsay rule. The Supreme Court did not reach the issue of the hearsay objection because, even if the trial court erred in its admission of the 911 call, it constituted harmless error. “The statement regarding [the defendant’s] threat made during the 911 call was merely cumulative of other properly admitted evidence. Moreover, given the other overwhelming evidence of [the defendant’s] guilt in the record, we do not find that [the defendant] was prejudiced by the court’s admission of this evidence.” **Commonwealth v. Stallworth**, 566 Pa. 349, 368, 781 A.2d 110, 120-121 (2001).

6.15 EVIDENCE OF SEXUALLY EXPLICIT MATERIALS

It is not uncommon for the prosecution, in a sexual violence case, to attempt to admit into evidence items seized from a search of the defendant’s residence, especially sexually explicit materials, including pornography. Arguments on behalf of the prosecution in support of admissibility include:

- the materials show abnormal sexual behavior;
- the defendant’s sexual desires were out of the ordinary;
- the defendant’s sexual preferences were aberrant.⁵⁴

A. Basic Rules of Admissibility

Admissibility is based upon a determination of relevancy, and relevancy is determined by examining whether the evidence sought to be introduced tends to “establish a material fact or make a fact at issue more or less probable.”

Commonwealth v. Griffin, 684 A.2d 589, 594 (Pa. Super. 1996). Evidence that is relevant, i.e., probative of a material fact, may still be excluded if its probative value is outweighed by its prejudicial effect. **Commonwealth v. Dillon**, 863 A.2d 597, 601 (Pa. Super. 2004) (en banc), *appeal granted*, 584 Pa.

⁵³ **Commonwealth v. Conway**, 534 A.2d 541, 544 n.3 (Pa. Super. 1987), *appeal denied*, 520 Pa. 581, 549 A.2d 914 (1988); **Commonwealth v. Groff**, 514 A.2d at 1384.

⁵⁴ **Commonwealth v. Impellizzeri**, 661 A.2d 422, 430 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (1996).

691, 882 A.2d 477 (2005). However, since all Commonwealth evidence in a criminal case will be prejudicial to the defendant, exclusion of otherwise relevant evidence will only be necessary where “the evidence is so prejudicial that it may inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.” **Commonwealth v. McMaster**, 666 A.2d 724, 729 (Pa. Super. 1995) (internal quotations omitted).

It is well settled in Pennsylvania that “a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury’s consideration where those facts form part of the history and natural development of the events and offenses with which the defendant is charged.” **Commonwealth v. Peer**, 684 A.2d 1077, 1083 (Pa. Super. 1996). Unless otherwise barred by a legal impediment, the trial judge enjoys broad discretion in admitting or excluding evidence, and appellate review is limited: “[t]he admission of evidence is a matter vested in the sound discretion of the trial court, whose decision thereon can only be reversed by this Court upon a showing of an abuse of discretion.” **Commonwealth v. Travaglia**, 792 A.2d 1261, 1263 (Pa. Super. 2002), appeal denied, 572 Pa. 733, 815 A.2d 633 (2002), cert. denied, 540 U.S. 828 (2003).

B. Sexually Explicit Materials - Probative Value

Although mere possession of pornographic materials does not tend to establish guilt in a sexual violence case,⁵⁵ the possession of such materials by the defendant will be admissible if probative of an issue in the case. In **Commonwealth v. Impellizzeri**, 661 A.2d 422 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (Pa. 1996), the Superior Court held that mere possession of sexually explicit materials does not tend to establish guilt and, therefore, does not require admission. 661 A.2d at 431. In **Impellizzeri**, the magazine at issue, which was seized at the defendant’s home pursuant to a search warrant, dealt with anal sex; although the victim had been:

subjected to anal intercourse, as well as vaginal and oral sex, there was no evidence that the magazine had been used in any way in the sexual attack or even shown to the victim. The Superior Court held that it was error to admit the magazine, which had little probative value on “whether the sexual activity was forced or consensual under the circumstances presented...”

Id. In **Commonwealth v. Palmer**, 700 A.2d 988 (Pa. Super. 1997), *appeal denied*, 552 Pa. 695, 716 A.2d 1248 (1998), *overruled on other grounds*, **Commonwealth v. Archer**, 722 A.2d 203 (Pa. Super. 1998), explicit photographs and pornographic films not only served to corroborate the victim’s claim that the pictures and films were shown to the minor victim, but were also probative of a fact in controversy. In **Palmer**, sexually explicit photographs of the minor victim were found at the defendant’s home, along with pornographic films and explicit photographs of another girl similar to the

⁵⁵ *Id.*

photographs of the victim. At trial, the minor victim testified that the defendant had watched the pornographic movies with her; therefore, the admission of the films tended to corroborate the testimony of the victim. The explicit photographs of the other girl, taken under similar circumstances, tended to show that more likely than not the defendant had taken the pictures of the minor victim. *Id.* at 993.

C. Sexually Explicit Materials – Lessening Prejudicial Impact

In *Commonwealth v. Palmer*, 700 A.2d at 993, the probative value of sexually explicit materials in a prosecution for rape, involuntary deviate sexual intercourse, and corrupting morals of a minor was not outweighed by the prejudicial impact of the materials; the trial judge deliberately delimited the physical evidence admitted or submitted to jury, which was permitted to see only external packaging of individual videos to confirm that they were adult videos, and which did not view six photos of a young woman that were identified by the minor victim.

Suggested Stages of a Criminal Jury Trial

1. **Juror Information Questionnaire**
 - Have all prospective jurors complete the standard juror information questionnaire. *Pa.R.Crim.P. 631(D) & 632.*
 - Questionnaires are destroyed at completion of jurors' service. *Pa.R.Crim.P. 632(F) & (G).*

2. **Preliminary Instructions to Jury Panel**
 - Trial Judge addresses opening remarks to jury panel in preparation for voir dire

3. **Jury Panel Sworn**
 - Have court reporter swear in panel members. *Pa.R.Crim.P. 631(B).*
 - Judge must be present unless waived. *Pa.R.Crim.P. 631(A).*

4. **Conduct Voir Dire**
 - Typically prosecution first, followed by defense.
 - "The purpose of voir dire is to secure a competent, fair, impartial and unprejudiced jury. The scope of voir dire rests in the sound discretion of the trial court and will not be reversed on appeal in the absence of palpable error." *Commonwealth v. Proctor*, 526 Pa. 246, 257, 585 A.2d 454, 460 (1991).
 - To explore possible racial bias, see *Commonwealth v. Futch*, 469 Pa. 422, 426-428, 366 A.2d 246, 248 (1976); *Commonwealth v. Stinson*, 628 A.2d 1165, 1167-1168 (Pa.Super. 1993), *appeal denied*, 537 Pa. 608, 641 A.2d 309 (Pa. Feb 11, 1994).
 - Challenges for Cause: out of hearing of jury, hear challenges for cause.
 - Number of peremptory challenges calculated in accordance with *Pa.R.Crim.P. 634.*

5. **Clerk Reads Names of 12 Jurors and 2 Alternates**
 - Excuse remaining jurors.
 - Clerk swears in trial jury panel. *Pa.R.Crim.P. 640.*

6. **Preliminary Instructions to Trial Jury**
 - Trial Judge gives preliminary trial instructions to Trial Jury.¹

¹ "The trial judge may give instructions to the jury before the taking of evidence or at anytime during the trial as the judge deems necessary and appropriate for the jury's guidance in hearing the case." *Pa.R.Crim.P. 647(D)*. At a minimum, the preliminary instructions should orient the jurors to the trial procedures and to their duties and function as jurors. Comment following Rule 647.

7. Opening Statements²

- Commonwealth Attorney opens first to the jury. *Pa.R.Crim.P. 604(A)*.
- Defense Counsel then opens to the jury, or reserves to immediately prior to defense testimony. *Pa.R.Crim.P. 604(A)*.

8. Commonwealth's Case

- The Commonwealth presents its case-in-chief. *See Pa.R.E. 611, Mode and Order of Interrogation and Presentation*.

9. Defense Motions

- Trial Judge hears defense motions outside the hearing of the jury but on the record.
- Appropriate motion at the close of the Commonwealth's case-in-chief is a motion for judgment of acquittal. *Pa.R.Crim.P. 606(A)(1)*.³

10. Defense Case

- The defense attorney may present evidence on behalf of the defendant. *See Pa.R.E. 611, Mode and Order of Interrogation and Presentation*.

11. Commonwealth's Rebuttal Evidence

- Admission or rejection of rebuttal evidence is within the sound discretion of the trial court.⁴

12. Defense Motions

- Trial Judge hears defense motions outside the hearing of the jury but on the record.
- Appropriate motion at the close of all evidence is a motion for judgment of acquittal. *Pa.R.Crim.P. 606(A)(2)*.⁵

² "A prosecutor's opening statements must be based on evidence that she plans to introduce at trial, and must not include mere assertions designed to inflame the jury's emotions. However, a prosecutor's opening statements may refer to facts that she reasonably believes will be established at trial. Additionally, the prosecution, as well as the defense, is afforded reasonable latitude in presenting opening arguments to the jury. Relief will be granted for prosecutorial misconduct only where the unavoidable effect of the prosecutor's conduct was to prejudice the jury so as to form in their minds a fixed bias towards the accused and to impede their ability to objectively weigh the evidence and render a true verdict." *Commonwealth v. Begley*, 566 Pa. 239, 274, 780 A.2d 605, 626 (2001).

³ "A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth's evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made." *Pa.R.Crim.P. 606(B)*.

⁴ *Commonwealth v. Miles*, 846 A.2d 132, 136 (Pa. Super. 2004), *appeal dismissed as improvidently granted*, 582 Pa. 403, 871 A.2d 1248 (2005).

⁵ "If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve

13. Suggested Jury Instructions

- Trial Judge receives and reviews suggested jury instructions. *Pa.R.Crim.P. 647*.⁶
- Trial Judge holds charge conference, on the record, with counsel to discuss the suggested jury instructions, enter rulings, and make final decisions regarding charge.⁷

14. Trial Judge Gives Instructions to Jury Re: Closing Arguments

15. Closing Arguments

- Defense Counsel gives closing argument first. *Pa.R.Crim.P. 604(B)*.
- Prosecutor gives closing argument. Regardless of number of defendants, prosecutor always makes closing argument last. *Pa.R.Crim.P. 604(B)*.

16. Charge of the Court

- Trial Judge gives jury final instructions. *Pa.R.Crim.P. 647*.
- Charge broken up into four sections:
 - (1) Key concepts: the burden of proof, presumption of innocence, and the standard of beyond a reasonable doubt;
 - (2) Instructions regarding the review of evidence, including credibility decisions;
 - (3) Specifics of Case: elements of crimes, specific law regarding defenses, and review of testimony;
 - (4) Concluding instructions on the manner jury is to handle deliberations.
- Trial judge makes formal rulings on submitted points for charge before dismissing jury; grants counsel opportunity to make specific objections to refused points or other matters.⁸

17. Send Jury to Deliberate

- Send 12 principal jurors to deliberate.

decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.” *Pa.R.Crim.P. 606(C)*.

⁶“Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge’s rulings on all written requests. The trial judge shall charge the jury after the arguments are completed.” *Pa.R.Crim.P. 647(A)*.

⁷See *Pa.R.Crim.P. 647(A)*.

⁸“No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.” *Pa.R.Crim.P. 647(B)*. See also, *Pa.R.A.P. 302(b)*.

-
- Hear arguments of counsel on the record and make record if any exhibits go out with jury. *Pa.R.Crim.P. 646*.
 - Excuse alternates.

18. Enter the Verdict

19. Defense Motions If Conviction

- Defense may make an oral motion for judgment of acquittal immediately after verdict. *Pa.R.Crim.P. 606(A)(4)*.

20. Excuse Jurors

21. Colloquy Following Verdict If Conviction

- Set Sentencing Date.⁹
- Order Presentence Investigation Report, if necessary.
- Address Bail.¹⁰

⁹ In accordance with Pa.R.Crim.P. 704(A), sentencing must typically be within 90 days of conviction.

¹⁰ Pa.R.Crim.P. 521.

Scientific Evidence

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7.1 CHAPTER OVERVIEW

This chapter provides a general overview of various scientific issues that commonly arise in sexual assault cases and the interplay of Pennsylvania law. Following a general discussion in section 7.2 on the presentation of expert testimony in sexual assault cases, the chapter focuses on the following:

- DNA, section 7.3;
- Bite Mark Evidence, section 7.4;
- Hair Sample Analysis, section 7.5;
- Blood Typing Evidence, section 7.6; and
- Evidence Obtained from a “Rape Kit” Exam, section 7.7.

7.2 EXPERT TESTIMONY IN SEXUAL ASSAULT CASES

A. General Requirements for Admissibility of Expert Testimony

In deciding whether expert testimony is admissible, the trial court must determine:

- 1) whether the subject matter is appropriate for expert testimony;
- 2) whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
- 3) whether the proffered expert is qualified to offer an expert opinion.

The standard for the admissibility of expert testimony at trial in Pennsylvania is stated in Pennsylvania Rule of Evidence 702.¹

If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

P.A.R.E. 702.

¹ In general, the admission of expert testimony is a matter left largely to the discretion of the trial court, and its rulings thereon will not be reversed absent an abuse of discretion. *Palmer v. Lapp*, 572 A.2d 12, 15 (Pa.Super. 1990). See also *Commonwealth v. Brown*, 596 A.2d 840 (Pa.Super. 1991), *appeal denied*, 532 Pa. 660, 616 A.2d 982 (1992).

1. The *Frye* Standard

In determining whether the subject matter is appropriate for expert testimony in criminal trials, Pennsylvania courts apply the test set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). See *Commonwealth v. Topa*, 471 Pa. 223, 231, 369 A.2d 1277, 1282 (1977) (adopting the *Frye* test in Pennsylvania).

Under *Frye*, novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community.²

See *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 555, 839 A.2d 1038, 1044-1045 (2003). While the United States Supreme Court has since found that the *Frye* test has been superseded by the more permissive Federal Rules of Evidence, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), Pennsylvania courts are not bound by the Federal Rules of Evidence, and continue to apply the *Frye* standard. See *Commonwealth v. Einhorn*, 911 A.2d 960, 974-975 (Pa.Super. 2006), *appeal denied*, ___ Pa. ___, ___ A.2d ___ (2007).

As stated above, the Pennsylvania Supreme Court has utilized the *Frye* standard in criminal cases. *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977). In *Topa*, the Supreme Court described an adequate foundation for the admission of scientific evidence:

Admissibility of the evidence depends upon the *general* acceptance of its validity by those scientists active in the field to which the evidence belongs[.]

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*

Id. at 232, 369 A.2d at 1282, quoting *Frye v. United States*, 293 F. at 1014 (emphasis in original). The Supreme Court went further to note that strict application of the *Frye* standard is necessary when scientific proof is offered in a criminal trial to ensure that the defendant is to receive a fair and just trial. *Commonwealth v. Topa*, 471 Pa. at 232, 369 A.2d at 1282. See also, *Commonwealth v. Apollo*, 603 A.2d 1023, 1025 (Pa.Super. 1992), *appeal denied*, 531 Pa. 650, 613 A.2d 556 (1992).³

² See also, *Commonwealth v. Hall*, 867 A.2d 619, 633 (Pa.Super. 2005), *appeal denied*, 586 Pa. 756, 895 A.2d 549 (Pa. Mar 07, 2006).

³ As a general rule, the standard of review on appeal of a trial court's evidentiary ruling, including a

It should be noted, though, that the *Frye* standard does not apply every time science enters the courtroom. *Folger ex rel. Folger v. Dugan*, 876 A.2d 1049, 1058 (Pa.Super. 2005), *appeal denied*, 587 Pa. 695, 897 A.2d 458 (2006). *Frye* does apply, however, where an expert witness employs a novel scientific methodology in reaching his or her conclusion. *Trach v. Fellin*, 817 A.2d 1102, 1110 (Pa.Super. 2003)(*en banc.*), *appeal denied*, 577 Pa. 725, 847 A.2d 1288 (2004); *see also*, *Grady v. Frito Lay*, 576 Pa. 546, 554-555, 839 A.2d 1038, 1043-1044 (Pa.Super. 2003).

2. Qualifications of Experts

Whether an expert is qualified to offer an expert opinion is governed by Rule 702 of the Pennsylvania Rules of Evidence. An expert may be qualified to offer an opinion by knowledge, skill, experience, training or education. PA.R.EVID. 702.

“The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.”

Miller v. Brass Rail Tavern, 541 Pa. 474, 480-481, 664 A.2d 525, 528 (1995).

3. Form of Expert Testimony

According to Rule 702, an expert may testify in the form of an opinion or otherwise. “Much of the literature assumes that experts testify only in the form of an opinion. The language ‘or otherwise’ reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case.” *McManamon v. Washko*, 906 A.2d 1259, 1274 (Pa.Super. 2006).

4. Underlying Basis of Expert Opinion

Pennsylvania Rule of Evidence 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Clearly, PA.R.E. 703 permits an expert to base an opinion or inference on otherwise inadmissible evidence so long as the evidence “is of a type reasonably relied upon by experts in the particular field” In accordance

ruling whether expert scientific evidence is admissible against a *Frye* challenge, is limited to determining whether the trial court abused its discretion. *Commonwealth v. Dengler*, 586 Pa. 54, 65, 890 A.2d 372, 379 (2005).

with the plain language of Rule 703, experts are not limited to basing their opinions on firsthand knowledge or on trial records. Pennsylvania courts have long permitted experts to base their opinions on records or reports not in evidence. *See Commonwealth v. Thomas*, 444 Pa. 436, 445, 282 A.2d 693, 698-699 (1971) (Pennsylvania Supreme Court adopts rule that medical experts may base opinions on reports of others not in evidence); *Commonwealth v. Mitchell*, 570 A.2d 532 (Pa.Super. 1990), *appeal denied*, 527 Pa. 599, 589 A.2d 689 (1990) (Experts may offer testimony based on the reports of others - in homicide cases, pathologists may base their opinions on facts from autopsy reports prepared by others). Later case law expanded the evidential ruling in the *Thomas* case to various non-medical expert witnesses. *See* P.A.R.E. 703, comment.

“[T]he applicability of the rule permitting experts to express opinions relying on extrajudicial data depends on the circumstances of the particular case and demands the exercise, like the admission of all expert testimony, of the sound discretion of the trial court.” *Commonwealth v. Leddington*, 75 Pa. D. & C.4th 294, 305 (Bucks 2005).

(a) **Jury Instruction**

When an expert testifies about the underlying facts and data that support the expert’s opinion and the evidence would be otherwise inadmissible, the trial judge, upon request shall or on his own initiative may instruct the jury to consider the facts and data only to explain the basis for the expert’s opinion, and not as substantive evidence. P.A.R.E. 703, comment.

5. **Expert Opinion Regarding Ultimate Issue**

In *Commonwealth v. Johnson*, 517 A.2d 1311 (Pa.Super. 1986), the Superior Court stated that a police officer, who had qualified as an expert witness, could give opinion evidence that a defendant possessed drugs with the intent to deliver, regardless of whether the defendant was charged with that particular crime. The Court further stated:

The opinion of the witness [] possessing such knowledge is permitted as an aid to the jury. This is true even when the expert expresses an opinion on the ultimate issue before the jury. When opinion evidence is properly admitted, as in the instant [situation], it is then for the jury [or the trial court] to determine its credibility. The jury is free to reject it, accept it, or give it some weight between the two.

Id. at 1316. However, a witness may testify to an ultimate issue only in those instances where the admission will not cause confusion or prejudice. *Commonwealth v. Brown* 596 A.2d 840, 842 (Pa.Super. 1991), *appeal denied*, 532 Pa. 660, 616 A.2d 982 (1992).

Pennsylvania Rule of Evidence 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The trial judge must balance the helpfulness of the testimony against its potential to cause confusion or prejudice.⁴

6. Disclosure of Facts or Data Underlying Expert Opinion

Pennsylvania Rule of Evidence 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefore; however, the expert must testify as to the facts or data on which the opinion or inference is based.

The facts relied on as a basis of expert opinion must be in the record so the jury can evaluate the testimony:

It is clear . . . that expert opinion testimony is proper if the facts upon which it is based are of record. This requirement for admissibility of opinion testimony is crucial. The purpose of expert testimony is to assist the factfinder in understanding issues which are complex or go beyond common knowledge. An expert's function is to assist the jury in understanding the problem so that the jury can make the ultimate determination. If a jury disbelieves the facts upon which the opinion is based, the jury undoubtedly will disregard the expert's opinion. Likewise, if a jury accepts the veracity of the facts which the expert relies upon, it is more likely that the jury will accept the expert's opinion.

Commonwealth v. Rounds, 518 Pa. 204, 209, 542 A.2d 997, 999 (1988).

B. Expert Medical Testimony

Expert medical testimony is governed by the standards articulated in section A. See Section 7.7 for information regarding the collection of forensic sexual assault evidence.

A growing trend across the United States is the use of Sexual Assault Nurse Examiners (SANEs) to conduct forensic medical sexual assault examinations.

SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform these exams. Some nurses have been certified as SANEs – Adult and Adolescent (SANE-A) through the International Association of Forensic Nurses (IAFN). Others are specially educated and fulfill clinical

⁴ See *Commonwealth v. Brown*, 596 A.2d 840, 842 (Pa.Super. 1991), *appeal denied*, 532 Pa. 660, 616 A.2d 982 (1992).

requirements as Forensic Nurse Examiners (FNEs), enabling them to collect forensic evidence for a variety of crimes.⁵

As of this Benchbook's publication, no published Pennsylvania appellate opinion has addressed the admissibility of SANE testimony; however, a number of trial courts have allowed it. Cases in which other jurisdictions have permitted SANEs to testify include: **United States v. Withorn**, 204 F.3d 790 (8th Cir. 2000); **Franklin v. State**, 869 A.2d 327, 2005 WL 528674 (Del. 2005); **Page v. State**, 610 S.E.2d 171 (Ga.App. 2005); **State v. Humphrey**, 36 P.3d 844 (Kan. App. 2001); **State v. Simmons**, 848 So.2d 58 (La. App. 2003), *appeal denied*, 872 So.2d 508 (La. 2004); **People v. Mourelo**, 2005 WL 1459505, Mich.App., 2005; **State v. Sanders**, 697 N.W.2d (Neb. 2005); **People v. Rogers**, N.Y.S.2d 393 (N.Y.App.Div. 2004); **State v. Fuller**, 603 S.E.2d 569 (N.C.App. 2004); **State v. Keeton**, 2004 WL 1549421 Ohio App. 2004; **Gregory v. State**, 56 S.W.3d 164 (Tex.App. 2001), *cert. denied*, **Gregory v. Texas**, 538 U.S. 978 (2003); **Hussen v. Commonwealth**, 511 S.E.2d 106 (Va. 1999), *cert. denied*, **Hussen v. Virginia**, 526 U.S. 1137 (1999).

C. Expert Mental Health Testimony

Expert psychological or psychiatric testimony is governed by the standards articulated in section A.

1. Conduct or Behavior of Victims

Generally, testimony regarding conduct or behavior of victims of sexual assault is not admissible since it tends to invade the jury's function of evaluating the witness' credibility. **Commonwealth v. Johnson**, 690 A.2d 274, 276 (Pa.Super. 1997)(en banc). In **Commonwealth v. Miner**, 562 Pa. 46, 753 A.2d 225 (2002), the Pennsylvania Supreme Court stated:

Expert testimony generally is admissible to aid the jury when the subject matter is distinctly related to a science, skill or occupation which is beyond the knowledge or experience of an average lay person. **Commonwealth v. Counterman**, 553 Pa. 370, 719 A.2d 284, 302-03 (*citing Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30, 33 (Pa. 1976)), *cert. denied*, 145 L. Ed. 2d 82, 120 S. Ct. 97 (1999). Conversely, expert testimony is not admissible where the issue involves a matter of common knowledge. *Id.* at 303. In assessing the credibility of a witness, jurors must rely on their ordinary experiences of life, common knowledge of the tendencies of human behavior, and observations of the witness' character and demeanor. *Id.* Because the truthfulness of a witness is solely within the province of the jury, expert testimony cannot be used to bolster the credibility of witnesses.

562 Pa. at 55, 753 A.2d at 230.

⁵ U.S. Department of Justice, Department of Violence Against Women, National Protocol for Sexual Assault Medical Forensic Examinations for Adults and Adolescents (Sept. 2004), p. 64

Therefore, expert testimony regarding the impact of a sexual assault cannot be used to bolster the credibility of a victim.

- ***Commonwealth v. Dunkle***, 529 Pa. 168, 173-174, 602 A.2d 830, 832 (Pa. 1992): expert testimony that the victim displayed behavior patterns consistent with those typically displayed by sexually abused children inadmissible.
- ***Commonwealth v. Gallagher***, 519 Pa. 291, 294-295, 547 A.2d 355, 357 (Pa. 1988): expert testimony was inadmissible because it enhanced the victim's credibility. The expert had opined that the victim suffered from "rape trauma syndrome" which explained her failure to identify the assailant two weeks after the attack, but was able to make an identification over four years later because of a flashback.
- ***Commonwealth v. Rounds***, 518 Pa. 204, 207-208, 542 A.2d 997, 998 (Pa. 1988): expert testimony that expert believed the victim was not lying when she told expert of sexual abuse inadmissible.
- ***Commonwealth v. Davis***, 518 Pa. 77, 82-83, 541 A.2d 315, 317 (Pa. 1988): expert testimony by child psychologist that "children who have not been involved in sexual experiences typically do not fantasize about sexual experiences" inadmissible because it classified as truthful a class of individuals.
- ***Commonwealth v. Seese***, 512 Pa. 439, 441-442, 517 A.2d 920, 921 (Pa. 1986): expert testimony of pediatrician that, as summarized by the court, "young children usually do not fabricate stories of sexual abuse because they do not have sexual knowledge sufficient to supply details regarding sexual encounters" was inadmissible because constituted expert opinion as to the veracity of the class of potential witnesses of which the victim was a member.

7.3 DNA

This section discusses DNA (deoxyribonucleic acid) testing and its potential application in sexual assault cases. It has been often stated that DNA evidence catapulted the criminal justice system into a new era.⁶ There are an increasing number of states which require the taking of DNA samples from convicted felons; as a result, forensic DNA testing has been thoroughly scrutinized and validated.⁷

⁶ American Prosecutors Research Institute (APRI), [DNA Evidence Policy Considerations for the Prosecutor](#), p.1.

⁷ Hogan, S. and Swinton, S. "Meeting Defense Challenges to DNA Evidence," APRI *Silent Witness* 15(1)(2003).

The use of DNA evidence in Pennsylvania has followed a steady path.⁸ In *Commonwealth v. Crews*, 536 Pa. 508, 640 A.2d 395 (1994), a rape and murder case, the Pennsylvania Supreme Court upheld the admission of DNA evidence found at the crime scene which “strongly associated” the DNA with the defendant. Although the Supreme Court acknowledged that DNA evidence can never provide absolute proof of identity, the Supreme Court concluded that the evidence was relevant and that its weight and persuasiveness was for the finder of fact:

The factual evidence of the physical testing of the DNA samples and the matching alleles, even without statistical conclusions, tended to make appellant’s presence more likely than it would have been without the evidence, and was therefore relevant.

Id., 536 Pa. at 522, 640 A.2d at 402.

The Pennsylvania Supreme Court, in *Commonwealth v. Blasioli*, 552 Pa. 149, 713 A.2d 1117 (1998), recognized that DNA evidence is relevant, and provided the following description of the scientific principles and procedures applied in DNA analysis.

DNA is genetic material found in most types of cells of the human body, including white blood cells and cells contained in semen and hair follicles. DNA constitutes the primary element of an organism’s total genetic information, known as its genome. In the process of cellular division, DNA functions essentially as a template, providing a blueprint for resulting cells. DNA also directs the construction of specific proteins that comprise the structural component of cells and tissues, as well as the production of enzymes necessary for essential biochemical reactions. As such, DNA determines an organism’s unique physical composition.

552 Pa. at 154-155, 713 A.2d at 1119-1120.

In *Commonwealth v. Koehler*, 558 Pa. 334, 357, 737 A.2d 225, 237 (1999), cert. denied, 531 U.S. 829 (2000), the Supreme Court applied *Crews* and determined that DNA evidence was relevant and had probative value as to the question of whether a defendant had had sexual intercourse with a victim. In that case, the expert testified that a DNA analysis indicated that two other men were excluded from being the source of the semen, but that the appellant was not excluded.

A. Background Information Regarding DNA

Identification through the use of DNA testing is also referred to as DNA identity testing, profiling, fingerprinting, typing or genotyping. *Id.* DNA testing focuses on the differences in human DNA segments.

⁸ See *Commonwealth v. Alderman*, 811 A.2d 592, 595-596, (Pa.Super. 2002), *appeal denied*, 573 Pa. 694, 825 A.2d 1259 (2003).

Large segments of human DNA are the same from person to person, accounting for human characteristics that are generally shared. Indeed, from the sequence of the 3 billion base pairs, only about 3 million differ from one individual to another (except in the case of identical twins, who have identical DNA)... It is the existence of such differences in the sequencing of base pairs, known as “polymorphisms,” that provides the basis for DNA identification.

The length of each polymorphism is determined by the number times a particular base pair sequence is repeated along the chromosome. Stretches of DNA along which a short nucleotide sequence is repeated are known as “variable number tandem repeats” or “VNTRS.” Because of their length, such discrete portions of a DNA sample’s patterned chemical structure are most easily capable of identification, and much of DNA forensic analysis relies upon loci containing these polymorphisms.

Commonwealth v. Blasioli, 552 Pa. 149, 156, 713 A.2d 1117, 1121 (1998) (citations omitted).

There are several methods for performing DNA analysis but the two most common are *restriction fragment length polymorphisms* (RFLP) and *polymerase chain reaction* (PCR).⁹

The PCR method is the principal method of analyzing DNA evidence in laboratories across the world.¹⁰

“Historically, scientists needed large evidence samples to enable them to extract DNA.”¹¹ The earliest method of forensic DNA testing, RFLP, involved a comparison of lengths of specific DNA fragments.¹² RFLP testing can be explained as follows:

DNA forensic analysis begins with the preparation of a DNA profile, which entails the creation of a picture of multiple VNTRS. One of several techniques is used, among which is the restriction fragment length polymorphism method (the “RFLP method”), which was used by the State Police laboratory in this case and which is commonly used by the FBI and law enforcement laboratories across the country. The method isolates VNTRS known as restriction fragments by the use of

⁹ Hazelwood, Robert R. and Ann Wolbert Burgess. Practical Aspects of Rape Investigation: A Multidisciplinary Approach, (Third edition) (2001), p. 311.

¹⁰ Michigan Sexual Assault Benchbook, p 422.

¹¹ American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.10.

¹² American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.10.

restriction enzymes, chemical “scissors” that recognize short base pair sequences and cut DNA molecules at those specific sites ... Once the restriction fragments are chemically sorted according to size, x-ray pictures are created known as autorads, using the process of autoradiography. The autorad displays a discernible pattern of dark bands resembling an electronic bar code, each band representing a fragment of DNA.

Commonwealth v. Blasioli, 552 Pa. at 156, 713 A.2d at 1121 (citations omitted).

After DNA profiles are created for both the crime scene and suspect samples, the autorad patterns are measured and compared according to their length. If the similarities are such that they fall within a narrow margin, known as a match window, the samples are declared a match.

Id., 552 Pa. at 158, 713 A.2d at 1122 (citations omitted).

In ***Commonwealth v. Crews***, 536 Pa. 508, 640 A.2d 395 (1994), the Pennsylvania Supreme Court held that evidence of DNA testing was admissible in a criminal trial, after finding that DNA analysis using the RFLP method of testing was generally accepted in the scientific community.

The second type of testing is PCR testing. PCR technology is capable of using minute amounts of DNA that are too small for RFLP analysis and chemically amplifying the DNA sequences until enough is obtained for analysis.¹³ PCR testing is a technique that allows “specific regions of DNA to be copied millions of times so that those regions can be typed and compared to the same regions in the DNA of a known individual.” ***Commonwealth v. Jones***, 811 A.2d 1057, 1061 (Pa.Super. 2002), *appeal denied*, 574 Pa. 765, 832 A.2d 435 (2003). PCR testing is an amplification/ replication process that allows laboratories to develop DNA profiles from extremely small samples of biological evidence.¹⁴

PCR is a three step process: First the DNA strand is denatured, which means the strand is pulled apart by heating. Annealing is the second step in the process where the sample is cooled and the primers bind to the primer sequence of the DNA molecule. (A primer is synthetic or manufactured DNA.) Lastly, the DNA strand is heated again activating a polymerase (enzyme) that will produce a mate to the single strand to form a complete copy. Each time the PCR process is done, the number of DNA strands doubles, theoretically generally a billion copies after 30 cycles. The development of PCR was crucial to forensic

¹³ Hazelwood, Robert R. and Ann Wolbert Burgess. Practical Aspects of Rape Investigation: A Multidisciplinary Approach, (Third edition) (2001), p. 311.

¹⁴ American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.10.

identification made with DNA because it frequently enables both the prosecution and the defense to analyze the evidence. It also allows for sample retention if retesting is later deemed necessary.¹⁵

B. Admissibility of DNA Evidence

“The DNA testing process has been acknowledged by the courts as well as the national scientific community for its extraordinary degree of accuracy in matching cellular material to individuals.” *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa.Super. 1992). Pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to be admissible, scientific evidence must have gained general acceptance in the relevant scientific community. As stated by the Pennsylvania Supreme Court, theories and methods of DNA analysis are generally accepted within the scientific community. *Commonwealth v. Crews*, 536 Pa. 508, 640 A.2d 395 (1992).

- *Commonwealth v. Jones*, 2002 Pa. Super. 368, 811 A.2d 1057 (2002), the Superior Court found that counsel was not ineffective for failing to object to DNA testimony on the grounds that the scientific community has not generally accepted it as a means of identifying a specific individual.

DNA evidence need only be relevant and not unduly prejudicial in order to be admissible.

- *Commonwealth v. Jones*, 811 A.2d 1057 (Pa.Super. 2002), *appeal denied*, 574 Pa. 765, 832 A.2d 435 (2003): counsel was not ineffective for failing to object to the testimony of the Commonwealth’s DNA expert who testified to a reasonable degree of medical certainty that defendant was the source of DNA in the samples she studied.
- *Commonwealth v. Alderman*, 811 A.2d 592 (Pa.Super. 2002), *appeal denied*, 573 Pa. 694, 825 A.2d 1259 (2003): DNA need not establish conclusively that semen belonged to appellant in order to be considered relevant and not unduly prejudicial. Rather, it was sufficient that the DNA evidence supported a reasonable inference that appellant had sexual intercourse with the young victim.
- *Commonwealth v. Koehler*, 558 Pa. 334, 737 A.2d 225 (1999), *cert. denied*, 531 U.S. 829 (2000): the Supreme Court applied *Crews* and determined that DNA evidence was relevant and had probative value as to whether a defendant had had sexual intercourse with a victim. In this case, the expert testified that a DNA analysis indicated that two other men were excluded from being the source of the semen, but that the appellant had not been excluded.

¹⁵ American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.11.

- ***Commonwealth v. Crews***, 536 Pa. 508, 640 A.2d 395 (1994): the Pennsylvania Supreme Court upheld the admission of DNA evidence found at the crime scene which “strongly associated” the DNA with the defendant. The Supreme Court acknowledged that DNA evidence can never provide absolute proof of identity, but the Supreme Court concluded that the evidence was relevant and that its weight and persuasiveness was for the finder of fact.

Once DNA testing is performed, a statistical assessment called population frequency analysis is done. The Supreme Court in ***Commonwealth v. Blasioli***, 552 Pa. 149, 713 A.2d 1117 (1998) explained:

The statistical assessment performed after a match has been declared is called population frequency analysis. The object is to determine the overall likelihood that someone other than the suspect would possess DNA matching that in the sample obtained from the crime scene. The first step is to determine, for each matching allele, the likelihood that such an allele would appear in a randomly selected individual ... This determination is made through the application of theoretical models based upon population genetics. *Id.*

552 Pa. at 160, 713 A.2d 1123.

“As applied in DNA typing, the product rule states that the probability of a genetic profile occurring randomly is the product of the probabilities of each individual allele’s occurrence in the general population.” ***Blasioli***, 552 Pa. at 161, 713 A.2d at 1124. In ***Blasioli***, the defendant attacked the validity of the product rule. The Supreme Court explained that “the product rule has gained general acceptance across the disciplines of population genetics, human genetics and population demographics”. *Id.*, 552 Pa. at 168, 713 A.2d at 1128. “As such, any remaining dispute as to the validity of the product rule should not result in the exclusion of evidence based upon this statistical method in criminal trials in Pennsylvania.” *Id.* Accordingly, statistical evidence based upon the product rule was properly admitted at trial. *See also*, ***Commonwealth v. Robinson***, 581 Pa. 154, 214-215, 864 A.2d 460, 495-496 (2004).

Although DNA may be used to exculpate individuals, the lack of DNA does not always equate to innocence. “In DNA as in other areas, an absence of evidence is not evidence of absence.” ***Commonwealth v. Heilman***, 867 A.2d 542, 546 (Pa.Super. 2004), *appeal denied*, 583 Pa. 669, 876 A.2d 393 (2005). In ***Heilman***, the defendant sought DNA testing under the Post Conviction Relief Act. The Superior Court reviewed the items which defendant wanted to have tested and concluded that the absence of defendant’s DNA evidence at the crime scene was not equivalent to proof of the defendant’s absence from the crime scene.

- DNA testing may exculpate as well as inculpate an individual: **Commonwealth v. Brison**, 618 A.2d 420, 425 (Pa.Super. 1992). Appellant alleged a due process violation based upon the Commonwealth's failure to have DNA testing performed on samples taken from the victim. The Superior Court vacated the conviction and remanded for testing, noting both the inculpatory and exculpatory capabilities of DNA testing.

7.4 BITE MARK EVIDENCE

Bite mark analysis is part of the field of forensic odontology.

In **Commonwealth v. Henry**, 524 Pa. 135, 569 A.2d 929 (1990), *habeas corpus granted on other grounds*, **Henry v. Horn**, 218 F.Supp.2d 671 (E.D.Pa. 2002), the Pennsylvania Supreme Court found that it was not error for a general practicing dentist who has specialized knowledge of bite mark identification to testify that bite marks were attacking or sadistic when the trial court instructed the jury that it was free to accept or reject his testimony.

In **Brooks v. State**, 748 So.2d 736, 746-747 (Miss. 1999), the Supreme Court of Mississippi exhaustively reviewed the states which have accepted bite mark evidence as scientific evidence:

- **Handley v. State**, 515 So.2d 121, 130 (Ala.Crim.App. 1987)(forensic odonatologist testimony admissible as evidence is in the nature of physical comparisons as opposed to scientific tests or experiments);
- **State v. Richards**, 166 Ariz. 576, 804 P.2d 109, 111 (Ct.App.1990)(a Frye hearing is not required where bite-mark evidence is presented by a qualified expert);
- **Verdict v. State**, 315 Ark. 436, 868 S.W.2d 443, 447 (1993)(bite-mark evidence is not novel scientific evidence and was relevant and reliable);
- **People v. Marsh**, 177 Mich.App. 161, 441 N.W.2d 33, 36 (1989)(general reliability of bite-mark evidence as a means of positive identification is sufficiently established that a court is authorized to take judicial notice of reliability without conducting hearing on same);
- **State v. Armstrong**, 179 W.Va. 435, 369 S.E.2d 870, 877 (1988)(reliability of bite-mark evidence is sufficiently established that a court is authorized to take judicial notice of same);
- **State v. Stinson**, 134 Wis.2d 224, 397 N.W.2d 136, 140 (Ct.App.1986)(bite-mark identification evidence presented by an expert witness can be a valuable aid to a jury in understanding and interpreting evidence);
- **Chase v. State**, 678 P.2d 1347 (Alaska Ct.App.1984);
- **People v. Marx**, 54 Cal.App.3d 100, 126 Cal.Rptr. 350 (1975);
- **State v. Ortiz**, 198 Conn. 220, 502 A.2d 400 (1985);

- *Mitchell v. State*, 527 So.2d 179 (Fla.1988);
- *Bundy v. State*, 455 So.2d 330 (Fla.1984);
- *Smith v. State*, 253 Ga. 536, 322 S.E.2d 492 (1984);
- *People v. Shaw*, 278 Ill.App.3d 939, 215 Ill.Dec. 700, 664 N.E.2d 97 (1996);
- *People v. Milone*, 43 Ill.App.3d 385, 2 Ill.Dec. 63, 356 N.E.2d 1350 (1976);
- *Niehaus v. State*, 265 Ind. 655, 359 N.E.2d 513 (1977);
- *State v. Peoples*, 227 Kan. 127, 605 P.2d 135 (1980);
- *State v. Vital*, 505 So.2d 1006 (La.Ct.App.1987);
- *Commonwealth v. Cifizzari*, 397 Mass. 560, 492 N.E.2d 357 (1986);
- *State v. Hodgson*, 512 N.W.2d 95 (Minn.1994);
- *State v. Sager*, 600 S.W.2d 541 (Mo.Ct.App.1980);
- *Bludsworth v. State*, 98 Nev. 289, 646 P.2d 558 (1982);
- *People v. Bethune*, 105 A.D.2d 262, 484 N.Y.S.2d 577 (N.Y.App.Div.1984);
- *State v. Green*, 305 N.C. 463, 290 S.E.2d 625 (1982);
- *State v. Hill*, 64 Ohio St.3d 313, 595 N.E.2d 884 (1992);
- *State v. Routh*, 30 Or.App. 901, 568 P.2d 704 (1977);
- *Commonwealth v. Henry*, 524 Pa. 135, 569 A.2d 929 (1990);
- *State v. Adams*, 481 A.2d 718 (R.I.1984);
- *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979);
- *State v. Cazes*, 875 S.W.2d 253 (Tenn.1994);
- *Spence v. State*, 795 S.W.2d 743 (Tex.Crim.App.1990);
- *Harward v. Commonwealth*, 5 Va.App. 468, 364 S.E.2d 511 (1988);
- *State v. Howe*, 136 Vt. 53, 386 A.2d 1125 (1978); and
- *State v. Warness*, 77 Wash.App. 636, 893 P.2d 665 (1995).

7.5 HAIR SAMPLE ANALYSIS

NOTE: DNA testing has generally replaced the scientific technique of hair analysis. Nevertheless, hair analysis continues to be admissible; therefore, it is discussed in this Benchbook.

Microscopic hair comparison evidence satisfies the **Frye** standard.

Commonwealth v. McCauley, 588 A.2d 941 (Pa.Super. 1991), *appeal denied*, 529 Pa. 656, 604 A.2d 248 (1992). In **McCauley**, the Superior Court held that microscopic hair comparison evidence satisfied was admissible as scientific expert evidence.

The court in **McCauley** held that the testimony of a forensic criminologist was legally relevant insofar as it was more probative than prejudicial and it gave the jury acceptable evidence of tying the defendant to the crime:

Various federal and state courts have held the same. **United States v. Cyphers**, 553 F.2d 1064 (7th Cir. 1977), *cert. denied* 434 U.S. 843, 98 S.Ct. 142, 54 L.Ed.2d 107 (1978) (armed robbery prosecution, expert opinion that human hairs found on items used in robbery could have come from defendants was admissible for whatever value jury might give it). **United States v. Haskins**, 536 F.2d 775 (8th Cir.1976), *cert. denied* 429 U.S. 898, 97 S.Ct. 263, 50 L.Ed.2d 182 (1977) (bank robbery, expert testimony identifying hair sample found in a silk stocking near bank as matching known sample of defendant's hair admissible; credibility of expert and weight given was for jury to determine and testimony was not invasion of jury's province). **People v. Columbo**, 118 Ill.App.3d 882, 74 Ill.Dec. 304, 455 N.E.2d 733 (1983), *cert. denied* 467 U.S. 1208, 104 S.Ct. 2394, 81 L.Ed.2d 351 (1984) (expert testimony that defendant's hair was similar in color and characteristics to hair found on murder victim's T-shirt had probative value, and although not conclusive, was properly considered by the jury, and neither exclusionary character of hair comparisons nor lack of absolute scientific certainty rendered hair expert's testimony inadmissible). **Paxton v. State**, 159 Ga.App. 175, 282 S.E.2d 912 (1981), *writ denied* 248 Ga. 231, 283 S.E.2d 235 (1982) (expert testimony pubic hairs found at scene of rape matching defendant's admissible). **State v. Pratt**, 306 N.C. 673, 295 S.E.2d 462 (1982); **State v. Kersting**, 292 Or. 350, 638 P.2d 1145 (1982); **State v. Melson**, 638 S.W.2d 342 (Tenn.1982), *cert. denied* 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983); **State v. Clayton**, 646 P.2d 723 (Utah 1982).

McCauley, 588 A.2d at 947.

7.6 BLOOD TYPING EVIDENCE

NOTE: DNA testing has generally replaced the scientific technique of blood typing analysis. Nevertheless, blood typing analysis continues to be admissible; therefore, it is discussed in this Benchbook.

Blood typing evidence is admissible, but may only be used to corroborate the defendant's presence at the crime scene.

- **Commonwealth v. Mussoline**, 429 Pa. 464, 240 A.2d 549 (1967): the defendant's blood type matched blood spots found at the crime scene and the defendant had a cut on his arm; however no other evidence existed to

corroborate defendant's presence at the crime scene. The Supreme Court held that the blood type evidence should not have been admitted.

- ***Commonwealth v. Statti***, 73 A. 2d 688 (Pa.Super. 1950): blood type evidence was used to corroborate the victim's testimony. The victim identified the defendant as her assailant and testified that she bit him during the rape.

7.7 FORENSIC SEXUAL ASSAULT EVIDENCE COLLECTION

The sexual assault medical forensic exam is an examination of a sexual assault victim by a health care provider, ideally one who has specialized education and clinical experience in the collection of forensic evidence and treatment of these types of patients/victims.

The forensic component includes gathering information from the patient for the medical forensic history, an examination, documentation of biological and physical findings, a collection of evidence from the patient and follow up as needed to document additional evidence. The medical component includes coordinating treatment of injuries, providing care for STD's, assessing pregnancy risk and discussing treatment options, including reproductive health services, and providing instructions and referrals for follow up medical care.

U.S. Department of Justice, Department of Violence Against Women, National Protocol for Sexual Assault Medical Forensic Examinations for Adults and Adolescents (Sept. 2004), p. 29

"A 'rape kit' is a product frequently used for the examination of sexual assault victims in which blood, hair, saliva, semen, fibers, and other substances are collected from the victim's body and clothing and retained for further forensic examination."¹⁶ ***Commonwealth v. Hawk***, 551 Pa. 71, 73 n.1, 709 A.2d 373, 374 n.1 (1998), *citing*, ***United States v. Boyles***, 57 F.3d 535, 538 n.2 (7th Cir. 1995). Positive results from sexual assault evidence collection are admissible when presented by the prosecution to corroborate a victim's testimony. *Id.*

- ***Commonwealth v. Campbell***, 368 A.2d 1299 (Pa.Super. 1976): the admission of sexual assault evidence collection kit evidence showing the presence of sperm in the victim's vagina to corroborate the victim's testimony that the defendant had raped her was proper even though the prosecution presented no scientific evidence identifying the sperm as that of the defendant.

¹⁶ Note that the more recent terms, "Sexual Assault Evidence Collection Kit" or "Rape Evidence Collection Kit" more accurately describe the evidence collection kit.

When a victim has suffered no physical injury in addition to the rape itself, the Commonwealth may use an expert to explain that victims are not always injured in other ways when a rape occurs. In other words, the absence of physical trauma is nevertheless not inconsistent with rape. Expert medical testimony regarding the absence of physical injury is admissible. ***Commonwealth v. Miner***, 562 Pa. 46, 753 A.2d 225 (2002). The Commonwealth may present such testimony in its case in chief and need not wait until rebuttal. *Id.*

- ***Commonwealth v. Hawk***, 551 Pa. 71, 73 n.1, 709 A.2d 373, 374 n.1 (1998): the results of rape kit tests which showed a lack of semen and foreign pubic hair were consistent with defendant's assertion that he did not engage in sexual intercourse with the victim even though the forensic scientist could not state conclusively that no intercourse had occurred. The scientist's testimony concerning the possibility of no intercourse was sufficient to support a reasonable inference that the defendant did not have sexual intercourse with the victim.
- ***Commonwealth v. Johnson***, 690 A.2d 274, 277 (Pa. Super. 1997) (en banc): a majority of an en banc panel held that the trial court erred in excluding expert testimony that "the absence of diagnostic injuries or scars is common and does not exclude the possibility of penile anal penetration or other forms of sexual contact."

The results of the rape kit, other than the presence of spermatozoa, are hearsay and cannot be admitted without the testimony of the criminalist who conducted the test.

- ***Commonwealth v. Hemingway***, 534 A.2d 1104, 1107-1108 (Pa. Super. 1987): the results of the "rape kit" exam were not admissible as business documents; the report contained opinions and conclusions beyond mere event of hospitalization and treatment prescribed, and were not admissible unless the doctor who prepared the report containing the information was available for in-court cross-examination regarding the accuracy, reliability and veracity of his opinion.
- ***Commonwealth v. Campbell***, 368 A.2d 1299, 1301 (Pa. Super. 1976): the presence of sperm is a factual and not a medical conclusion and is admissible hearsay.
- ***Commonwealth v. Xiong***, 630 A.2d 446, 452 (Pa. Super. 1993), *appeal denied*, 537 Pa. 609, 641 A.2d 309 (1994): notation stating, "no hymen" was a factual assertion rather than a diagnosis or opinion. It was not an opinion based statement, but rather was based on an observation made during the exam.

Post-Conviction and Sentencing

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8.1 CHAPTER OVERVIEW

This chapter explores issues that a trial court must consider after a sex offender has been convicted, by either a jury or bench trial, or by way of a guilty/nolo contendere plea. Many of these post-conviction matters, as discussed in section 8.2, must be addressed prior to sentencing, including:

- Review of bail following conviction.
- The preparation and use of a Pre-sentence Investigation Report.
- DNA and venereal disease testing.

Next, in section 8.3 the chapter includes a discussion, for sentencing purposes, of *Megan's Law III*, including information about the sexually violent predator assessment and the pre-sentence hearing.

Detailed information is then provided regarding penalties for crimes of sexual violence. Section 8.4 begins with a general discussion of sentencing standards and the use of the sentencing guidelines. The maximum allowable penalty for each crime of sexual violence is provided, beginning with section 8.4(B)(1), Rape. In section 8.4(D), the mandatory penalties for crimes involving sexual violence are listed, along with the criteria and notice provisions.

Section 8.4, **Sentencing Options**, includes detailed information regarding applicable sentencing options, including maximum and mandatory penalties, as well as the sentencing guidelines. The chapter concludes with section 8.5 which contains requirements and suggestions to assist at the time of the sentencing hearing.

8.2 POST-CONVICTION MATTERS

A. Bail (After Finding of Guilt) – Pa.R.Crim.P. 521

1. Before Sentencing: Pa.R.Crim.P. 521(A)

There is no right to bail in death penalty and life imprisonment sentences.

After a defendant has been convicted, his right to bail is conditioned on the possible sentences flowing from the conviction(s), and whether sentencing has occurred. When a defendant has been convicted of an offense which is punishable by death or life imprisonment, the defendant shall not be released on bail. Pa.R.Crim.P., Rule 521(A)(1), 42 PA. CONS. STAT. ANN.

If the aggregate of sentences does not exceed 3 years, the same right to bail exists as before the verdict.

In other cases, the standard used to determine eligibility for bail is based upon whether the aggregate of all possible sentences of imprisonment on all outstanding verdicts against the defendant in the same judicial district exceeds three (3) years.

If the possible sentences do not exceed 3 years aggregate, the defendant has the same right to bail as he had prior to conviction. Pa.R.Crim.P., Rule 521(A)(2)(a), 42 PA. CONS. STAT. ANN.

If the aggregate of sentences exceeds 3 years, the same right to bail exists unless the sentencing judge uses the following criterion to revoke or refuse to set bail:

- That no one or more conditions of bail will reasonably ensure that the defendant will appear and comply with the conditions of the bail bond; or
- That the defendant poses a danger to any other person or to the community or to himself or herself.

If the possible sentences aggregated exceed 3 years, then the defendant has the same right to bail as before conviction unless the sentencing judge finds that: (i) that no condition of bail will reasonably ensure compliance with the bail bond; or (ii) that the defendant poses a threat to the community or himself. Pa.R.Crim.P., Rule 521(A)(2)(b), 42 PA. CONS. STAT. ANN.

2. After Sentencing: Pa.R.Crim.P. 521(B)

If sentence is less than 2 years, the same right to bail exists.

After a defendant has been sentenced, the standard applicable is again predicated on the possible maximum length of sentence of imprisonment. If the sentence imposed includes imprisonment of less than 2 years, the defendant shall have the same right to bail as he did prior to the conviction, unless the Judge modifies the bail order pursuant to Pa.R.Crim.P., Rule 521(D), 42 PA. CONS. STAT. ANN. Pa.R.Crim.P., Rule 521(B)(1), 42 PA. CONS. STAT. ANN.

If sentence is more than 2 years, the right to bail is within the judge's discretion.

Excluding capital and life imprisonment cases, if the sentence imposed includes possible imprisonment exceeding 2 years, bail may be granted at the discretion of the trial judge. Pa.R.Crim.P., Rule 521(B)(2), 42 PA. CONS. STAT. ANN.

If set after sentencing, bail must be conditional upon filing of appeal or post-sentence motion.

After the defendant is sentenced and released on bail, the trial judge must impose as a condition of bail that the defendant file a post-sentence motion or perfect an appeal within the time required by law. Pa.R.Crim.P., Rule 521(B)(3), 42 PA. CONS. STAT. ANN.

In ***Commonwealth v. McMaster***, 730 A.2d 524 (Pa. Super. 1999), ***appeal denied***, 563 Pa. 613, 757 A.2d 930 (2000), the Defendant was convicted of involuntary deviate sexual intercourse and incest. Following a remand for resentencing, the trial court sentenced him to concurrent terms of imprisonment of five to ten years for the IDSI conviction and one to five years for the incest conviction. At the resentencing, the trial court granted him immediate bail pending parole. The Superior Court reversed on two separate grounds: (1) after noting that a trial court may allow bail pending appeal after a finding of guilt, so long as an avenue of direct appeal is open, the Superior Court found that the defendant was no longer eligible for release on bail because the time period for appealing from the reimposition and affirmance of judgment of sentence had expired¹ and (2) the trial court was without authority to parole an individual sentence to a period of incarceration longer than 2 years.²

No protected liberty interest in post-sentence bail if sentence is for more than two years.

There is no protected liberty interest which requires bail or specific criteria for the denial of bail in Pennsylvania for defendants who are sentenced to a term of two years or more. *See Owens v. Beard*, 829 F.Supp. 736 (M.D. Pa. 1993). In a decision which refers to former rule 4010, which was substantially similar to current Rule 521(B), the District Court stated that the rules give trial judges discretion in determining whether to grant or continue bail pending appeal. *Id.* at 739-740.

3. Reasons for Refusing or Revoking Bail Must be Stated on the Record.

In accordance with Pa.R.Crim.P. 521(C), whenever bail is refused or revoked under Rule 521, the trial judge must state on the record the reasons for the refusal or revocation.

4. Conditions of Bail After Verdict or After Sentencing.

When a defendant is eligible for release on bail after conviction, the existing bail order may be modified by a Judge of the Court of Common Pleas, upon the Judge's own motion or upon motion of counsel for either party with notice to the opposing party, in open court on the record when all parties are present. Pa.R.Crim.P., Rule 521(D)(1), 42 PA. CONS. STAT. ANN. The decision to modify the bail order should be based on the same considerations

¹ The Superior Court utilized former Rule 4014.

² This authority lies in the Pennsylvania Parole Board pursuant to 61 PA. STAT. § 331.21.

relevant when first deciding to grant bail.³ Pa.R.Crim.P., Rule 521(D)(2), 42 PA. CONS. STAT. ANN. Whenever bail is refused or revoked after conviction, the Judge must state on the record reasons in support of the decision. Pa.R.Crim.P., Rule 521(C), 42 PA. CONS. STAT. ANN.

B. Pre-Sentence Investigation Report

1. Purpose

Upon conviction of any crime, but typically only in felony cases, the trial court may order a pre-sentence investigation report⁴ to be completed by a probation officer.⁵ The purpose of a pre-sentence investigation report is to provide the trial judge with additional information about the defendant, the offenses and to discuss sentencing options so that the trial judge is more informed at sentencing.⁶

As stated by the United States Supreme Court in *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959):

once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics.

The pre-sentence report tells about the defendant's earlier criminal history, education, jobs, drug and alcohol use, and mental health. It also recites the facts of the case, and how the crime affected the victim(s). The victim is usually contacted and given an opportunity to have a statement included in or added to the report. The defendant is typically also given an opportunity to speak to the probation officer and provide a statement for the report; the defendant's cooperation during this process is typically reflected in the pre-sentence report.

³ The considerations include the likelihood of the defendant fleeing the jurisdiction or whether the defendant is a danger to any other person in the community, or himself or herself. Pa.R.Crim.P., Rule 521, 42 PA. CONS. STAT. ANN.

⁴ See Pa.R.Crim.P. 702.

⁵ "While the extent of the pre-sentence inquiry may vary depending on the circumstances of the case, '[a] more extensive and careful investigation is clearly called for in felony convictions, particularly where long terms of confinement are contemplated.'" *Commonwealth v. Goggins*, 748 A.2d 721, 728 (Pa. Super. 2000), appeal denied, 563 Pa. 672, 759 A.2d 920 (2000), citing *Commonwealth v. Martin*, 466 Pa. 118, 134 n.26, 351 A.2d 650, 658 n.26 (1976). In such situations, the trial court should either order a pre-sentence report or conduct a full pre-sentence inquiry taking into consideration the essential and adequate elements of a pre-sentence report. *Commonwealth v. Hill*, 761 A.2d 1188 (Pa. Super. 2000).

⁶ In accordance with Pa.R.Crim.P. 700, the judge who presided at the trial or who received the plea of guilty or *nolo contendere* must typically impose sentence. There is an exception for situations where extraordinary circumstances preclude the trial judge's participation.

The pre-sentence investigation report is, of course, made available for the use of the sentencing judge, but also must be made available to the prosecutor and defense counsel. Pa.R.Crim.P. 703(A)(2). The sentencing court and the criminal clerk's office must maintain the confidentiality of the pre-sentence report and related mental health reports, which must not appear in the public report.

2. Requirement to Place on the Record Reasons for Failure to Order Pre-sentence Report in Certain Cases

In accordance with Pa.R.Crim.P. 702(A)(2), the sentencing judge shall place on the record the reasons for dispensing with the pre-sentence investigation report if the judge fails to order a pre-sentence report in any of the following instances:

1. when incarceration for one year or more is a possible disposition under the applicable sentencing statutes;
2. when the defendant is less than 21 years old at the time of conviction or entry of a guilty plea;
3. when a defendant is a first offender in that he or she has not heretofore been sentenced as an adult.

A trial court's failure to provide a statement of reasons for dispensing with a PSI report, as required by Rule 702(A)(2), mandates re-sentencing, regardless of the putative soundness of its rationale. *See Commonwealth v. Goggins*, 748 A.2d 721, 728 (Pa. Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000); *Commonwealth v. Warren*, 393 A.2d 821, 822 (Pa. Super. 1978).

3. Contents of Pre-Sentence Report

The pre-sentence investigation report must include information regarding the circumstances of the offense and the character of the defendant sufficient to assist the judge in determining sentence.⁷ Pa.R.Crim.P. 702(A)(3). The Pennsylvania Supreme Court has specified the minimum content of a PSI report. *See Commonwealth v. Martin*, 466 Pa. 118, 351 A.2d 650 (1976). The "essential and adequate elements" of a PSI report include all of the following:

- i. a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;
- ii. a full description of any prior criminal record of the offender;
- iii. a description of the educational background of the offender;

⁷ "The information used by a judge in imposing sentence need not necessarily meet the standards of admissible evidence at trial; however, the due process clause does apply to the sentencing procedure." *Commonwealth v. Shoemaker*, 313 A.2d 342 (Pa. Super. 1973), *affirmed*, 462 Pa. 342, 341 A.2d 111 (1975).

- iv. a description of the employment background of the offender, including any military record and his present employment status and capabilities;
- v. the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;
- vi. the offender's medical history and, if desirable, a psychological or psychiatric report;
- vii. information about environments to which the offender might return or to which he could be sent should probation be granted;
- viii. supplementary reports from clinics, institutions and other social agencies with which the offender has been involved;
- ix. information about special resources which might be available to assist the offender, such as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender's situation;
- x. a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.⁸

Martin, 466 Pa. at 134, 351 A.2d at 658. In a recent decision of the Superior Court of Pennsylvania, **Commonwealth v. Monahan**, 860 A.2d 180 (Pa. Super. 2004), *appeal denied*, 583 Pa. 688, 878 A.2d 863 (2005), additional guidance was provided to ascertain the basic information that is required under Rule 702:

- i. the highest grade of education completed by defendant;
- ii. the defendant's occupation and employment history;
- iii. the defendant's marital status;
- iv. listing of the defendant's children, if any;
- v. the official version of the offense;
- vi. the defendant's version of the offense;
- vii. a social hereditary history of the defendant, including family background, living situation, etc.
- viii. the defendant's physical and mental health;
- ix. the defendant's drug or alcohol use;
- x. the defendant's military history;

⁸ Conceding that there is no requirement for the probation office to make a sentencing recommendation, the Superior Court in **Commonwealth v. Bastone**, 467 A.2d 1339 (Pa. Super. 1983), stated, however, that if a recommendation is made, it must be disclosed to defendant's counsel.

- xi. the defendant's financial status;
- xii. the role of religion in the defendant's life, if any;
- xiii. the defendant's hobbies and leisure activities;
- xiv. the sources of the above information; and
- xv. an evaluation by the pre-sentence investigator.

Monahan, 860 A.2d at 185.

4. Victim Impact Statement

When preparing a pre-sentence report, the probation officer will contact the victim(s) of the crime and ask if the victim would like to give a victim impact statement. This statement goes to the probation officer, the prosecutor, the defense attorney and the judge. The statement lets the victim tell the judge about the different kinds of injuries caused by the crime.

Pa.R.Crim.P. 702(A)(4) provides that the pre-sentence investigation report "shall also include a victim impact statement as provided by law." Under the Pennsylvania Crime Victim's Act, 18 PA.STAT. §§ 11.101 et seq., a victim of a crime is entitled:

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

18 PA.STAT. § 11.201(5). The victim can ask for restitution for actual expenditures made necessary because of the defendant's criminal conduct, such as counseling costs, and for conditions of supervision that will help to protect the victim and any others affected by the crime.

Besides writing a statement and being interviewed by the probation office, as noted above, the victim has a right to speak at the sentencing hearing. If the crime is a misdemeanor, typically no pre-sentence report will be prepared. However, a victim of a misdemeanor may speak at the sentencing hearing, and may also give a victim impact statement.

5. Psychiatric or Psychological Examination

In addition to or in lieu of a pre-sentence investigation report, the trial court may order mental health evaluations of the defendant to assist in the sentencing process. Pa.R.Crim.P. 702(b) provides:

Psychiatric or Psychological Examination

After a finding of guilt and before the imposition of sentence, after notice to counsel for both parties, the sentencing judge may, as provided by law, order the defendant to undergo a psychiatric or psychological examination. For this purpose the defendant may be remanded to any available clinic, hospital, institution, or state correctional diagnostic and classification center for a period not exceeding 60 days.

Although the mental health reports are confidential and must be sealed and not included in the public record maintained by the Criminal Clerk's office, the psychiatric or psychological evaluation ordered under this rule, for sentencing purposes, may be made available to other professionals or agencies "having a legitimate professional interest in the disposition of the case" by order of the sentencing judge. Pa.R.Crim.P. 703(A) & (D). Additionally, under Rule 703(C), unless otherwise ordered by the sentencing judge, the mental health reports must be made available to:

1. correctional institutions housing the defendant;
2. departments of probation or parole supervising the defendant; and
3. departments of probation or parole preparing a pre-sentence investigation report regarding the defendant.

This includes out-of-state correctional facilities and parole boards.

6. Disclosure of Pre-Sentence Report

Although the Pennsylvania Supreme Court has acknowledged the privilege of confidentiality accorded pre-sentence reports, this privilege is not absolute. In accordance with Pa.R.Crim.P. 703, in order for the report and related mental health evaluations to assist in the sentencing mechanism, prosecutors, defense attorneys, the sentencing judge, and appropriate correctional, probation and parole agencies all have access to a pre-sentence report.

If the defendant wishes to contest matters contained in the pre-sentence report, at least two methods of rebuttal are readily available. First, under Rule 703(B), both the Commonwealth and the defendant have the right to correct any inaccuracy in the report.

(B) If the defendant or the Commonwealth alleges any factual inaccuracy in a report under this rule, the sentencing judge shall, as to each inaccuracy found, order that the report be corrected accordingly.

Second, Pennsylvania grants all defendants the right of allocution - the traditional inquiry by the trial judge as to whether defendant has anything to say before sentence is pronounced.

In *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678 (1973), the Supreme Court adopted the American Bar Association's Standards for Criminal Justice Sentencing regarding disclosure. The current standard is as follows:

Standard 18-5.7 Disclosure of report to parties

- (a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.
- (b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford a reasonable opportunity for challenge and verification of material information in the report.
- (c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

C. DNA Data and Testing

1. The DNA Act

The DNA Act, 44 PA.CON.S.TAT.ANN. §§ 2301–2336, mandates that persons convicted of certain classes of sexual offenses must submit a sample of their DNA for inclusion in the DNA database. *See Singleton v. Lavan*, 834 A.2d 672 (Pa. Cmwlth. 2003) (discussing the prior act, 42 PA.CON.S.TAT.ANN. §§ 4701–4741, which was repealed and substantially reenacted as the current DNA Act). Every state has enacted a statute creating a DNA (deoxyribonucleic acid) database as a tool in criminal investigations. *See generally*, Annotation, *VALIDITY, CONSTRUCTION, AND OPERATION OF STATE DNA DATABASE STATUTES*, 76 A.L.R.5th 239 (2000). Although these statutes have frequently been challenged, the challenges usually have been unsuccessful.

The DNA Act applies to a person who is convicted or adjudicated delinquent for a felony sex offense or other specified offense. It states:

1. The DNA sample drawn upon intake to a prison, jail, or juvenile detention facility.
 - a. If already incarcerated, the DNA sample is drawn immediately after sentencing or adjudication, or at any time thereafter.
2. The DNA sample drawn prior to release from any prison, jail, detention facility or institution.
 - a. This chapter applies to incarcerated persons convicted or adjudicated delinquent for a felony sex offense prior to the effective date of this chapter.

- b. Release means release, parole, furlough, work release, prerelease or release to any other manner
 - 3. The DNA sample is drawn as a condition of acceptance into ARD as a result of a criminal charge for a felony sex offense or other specified offense filed on or after the effective date of this section.
- 44 PA.CONS.STAT.ANN. § 2316. A “felony sex offense” includes the following:
- i. **Any sexual offense** listed in Chapter 31 of the Crimes Code, 18 PA.CONS.STAT.ANN. §§ 3101-3129;
 - ii. **Incest**, 18 PA.CONS.STAT.ANN. § 4302;
 - iii. **Prostitution and related offenses**, 18 PA.CONS.STAT.ANN. § 5902(c)(1)(iii)&(iv);
 - iv. **Obscene and other sexual materials and performances** – where a felony, 18 PA.CONS.STAT.ANN. § 5903(a);
 - v. **Sexual Abuse of Children**, 18 PA.CONS.STAT.ANN. § 6312;
 - vi. **Unlawful Contact with Minor** – underlying offense is a felony, 18 PA.CONS.STAT.ANN. § 6318; and
 - vii. **Sexual Exploitation of Children**, 18 PA.CONS.STAT.ANN. § 6320.

2. Motion for DNA Testing by Defendant

In *Commonwealth v. Williams*, 909 A.2d 383 (Pa.Super. 2006), the defendant filed for post conviction DNA testing. The Superior Court, citing *Commonwealth v. Brooks*, 875 A.2d 1141, 1148 (Pa. Super. 2005) and *Commonwealth v. Young*, 873 A.2d 720, 724 (Pa. Super. 2005), *appeal denied*, 586 Pa. 739, 891 A.2d 733 (2005), stated that a motion for DNA testing, while clearly separate and distinct from claims pursuant to other sections of the PCRA, nonetheless constitutes a postconviction petition under the PCRA.⁹ The Superior Court further held that because the defendant had presented a defense of consent at the time of his trial on the charge of Rape, he failed to set forth *prima facie* requirements for postconviction DNA testing. Because the identity of perpetrator was not at issue, he failed to satisfy his burden under 42 PA.CONS.STAT.ANN. § 9543.1.

With respect to the *prima facie* requirement for DNA testing, the Superior Court, in *Commonwealth v. Heilman*, 867 A.2d 542 (Pa. Super. 2005), *appeal denied*, 583 Pa. 669, 876 A.2d 393 (2005), explained that on its face, the *prima facie* requirement set forth in § 9543.1(c)(3) and reinforced in § 9543.1(d)(2) requires an appellant to demonstrate that favorable results of the requested DNA testing “*would establish*” the appellant’s actual innocence of the crime of conviction. Because the petitioner in *Heilman* failed to make such a demonstration, his petition was properly denied. *Heilman*, 867 A.2d at 546-547.

⁹ The Post Conviction Relief Act is codified at 42 PA.CONS.STAT.ANN. §§ 9541-9546.

D. Venereal Disease Testing

Among the purposes of the Disease Prevention and Control Law, 35 PA.STAT. § 521.8, is to assign primary responsibility for the prevention and control of diseases to local health departments, and to institute a system of mandatory reporting, examination, diagnosis, and treatment of communicable diseases. **Commonwealth v. Moore**, 526 Pa. 152, 159, 584 A.2d 936, 940 (1991). The Law provides:

- (i) Any person taken into custody and charged with any crime involving lewd conduct or a sex offense, or any person to whom the jurisdiction of a juvenile court attaches, may be examined for a venereal disease by a qualified physician appointed by the department or by the local board or department of health or appointed by the court having jurisdiction over the person so charged.
- (ii) Any person convicted of a crime or pending trial, who is confined in or committed to any State or local penal institution, reformatory or any other house of correction or detention, may be examined for venereal disease by a qualified physician appointed by the department or by the local board or department of health or by the attending physician of the institution, if any.
- (iii) Any such person noted in paragraph (1) or (2) of this section found, upon examination, to be infected with any venereal disease shall be given appropriate treatment by duly constituted health authorities or their deputies or by the attending physician of the institution, if any.

E. Human Immunodeficiency Virus (HIV) Testing

35 PA.STAT. § 521.11a provides for HIV testing of convicted sex assailants:

Test: Following a conviction or an adjudication of delinquency of any of the offences listed below, at the request of a victim, the defendant must be tested for Human Immunodeficiency Virus (HIV).

Deemed Consent: The individual who has been convicted or adjudicated delinquent shall be deemed to have consented to the performance of the HIV-related test and to the release of the results of the test to the victim.

Offenses:

- Rape: 18 PA.CON.S.TAT.ANN. § 3121
- Statutory Sexual Assault: 18 PA.CON.S.TAT.ANN. § 3122.1
- Involuntary Deviate Sexual Intercourse: 18 PA.CON.S.TAT.ANN. § 3123
- Incest, 18 PA.CON.S.TAT.ANN. § 4302
- Corruption of Minors, 18 PA.CON.S.TAT.ANN. § 6301, if there has been sexual intercourse as defined in 18 PA.CON.S.TAT.ANN. § 3101 between the individual who has been convicted or adjudicated delinquent and the victim.

F. Scheduling of Sentencing

1. Time for Sentencing

As a general rule, the date for sentencing, which should ordinarily be within 90 days, should be scheduled at the time of conviction or the entry of a plea of guilty or *nolo contendere*. Therefore, the sentencing hearing should be held within 90 days of conviction or the entry of a plea of guilty or *nolo contendere*. A limited exception is when the trial court orders a psychiatric or psychological examination pursuant to Pa.R.Crim.P. 702(B), but in no event should the time for sentencing be extended for longer than 30 days beyond the original 90 day limit. Pa.R.Crim.P. 704, Comment.

Pursuant to Rule 704(A)(2), the trial judge may also grant an extension beyond the 90 day limit for extraordinary circumstances:

When the date for sentencing in a court case must be delayed, for good cause shown, beyond the time limits set forth in this rule, the judge shall include in the record the specific time period for the extension.

As stated, the extension may only be for a specific time period, and the record must reflect the exact time period for the extension. The comment following Rule 704 lists a Megan's Law Assessment, 42 PA.CON.S.TAT.ANN. § 9795.4, as a legitimate reason for an extension.

2. Remedy for Late Sentencing

A defendant who is sentenced in violation of Pa.R.Crim.P. 704's requirement that sentencing ordinarily take place within 90 days of conviction or entry of plea is entitled to discharge *only* where defendant can demonstrate that delay in sentencing prejudiced him or her.

Commonwealth v. Anders, 555 Pa. 467, 472-473, 725 A.2d 170, 173 (1999).¹⁰

A number of factors must be analyzed before the trial court should consider discharge. To determine whether discharge is appropriate, a trial court should inquire into the following factors:

- (1) the length of the delay falling outside of the 90 day provision;
- (2) the reason for the improper delay;
- (3) the defendant's timely or untimely assertion of his rights; and
- (4) any resulting prejudice to the interests protected by the defendant's speedy trial and due process rights.

¹⁰ The Supreme Court in ***Commonwealth v. Anders***, 555 Pa. 467, 472-473, 725 A.2d 170, 173 (1999) utilized Pa.R.Crim.P. 1405, the predecessor to Rule 704. With the exception of the fact that former Rule 1405 provided that a defendant was to be sentenced within 60 days of conviction or entry of a guilty or *nolo contendere* plea, rather than within 90 days as provided in the current rule, Rule 704 and its predecessor are substantially similar.

Prejudice should not be presumed by the mere fact of an untimely sentence. The approach of the court should be to determine whether there has in fact been prejudice, rather than to presume that prejudice exists. “The court should examine the totality of the circumstances, as no one factor is necessary, dispositive, or of sufficient importance to prove a violation.”

Commonwealth v. Anders, 555 Pa. 467, 473, 725 A.2d 170, 173 (1999). *See also, Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. 2001); **Commonwealth v. Still**, 783 A.2d 829 (Pa. Super. 2001).

G. Suggested Colloquy Following Guilty Plea or Guilty Verdict

Mr./Ms. _____, you have been found guilty/
pled guilty to the following crime(s):

The maximum penalty for each of the offenses is:

In accordance with Pennsylvania Rule of Criminal Procedure 704, sentencing is scheduled for

_____.

In preparation for sentencing, I am ordering the adult probation department to conduct a pre-sentence investigation and prepare a pre-sentence investigation report which will be available for you and your attorney, as well as the Commonwealth’s attorney, to review prior to sentencing.

I am also ordering:

- A psychological examination and report;
- A psychiatric examination and report;
- A drug and alcohol assessment;
- An assessment under § 9795.4 of Megan’s Law in l i g h t of your conviction of the crime of _____.

Other evaluations or assessments:_____.

If you have any extraordinary circumstances, I will hear an oral motion in arrest of judgment, for a judgment of acquittal, or for a new trial prior to your sentencing. The motion, and my decision, must be made before you are sentenced.

Do you have any questions?

- Trial Judge must continue, modify or revoke bail.

8.3 SEXUALLY VIOLENT PREDATOR ASSESSMENT

A. History and Constitutionality of *Megan's Law II*

Pennsylvania's *Megan's Law II*, 42 PA.CON.S.TAT.ANN. §§ 9791 – 9799.7, like the generally similar *Megan's Laws* enacted in all other states, requires defendants convicted of enumerated sex offences to register with state and local police, and subjects certain sex offenders to community notification whereby police alert the communities in which the offenders reside or work to their presence. *Megan's Law II* imposes registration, notification, and counseling requirements on convicted sex offenders found to be sexually violent predators.

Unlike the prior law, *Megan's Law I*, which was declared unconstitutional, *Megan's Law II* places the burden on the Commonwealth of proving by clear and convincing evidence that the defendant is a sexually violent predator.¹¹ The general validity of Pennsylvania's *Megan's Law II* has been sustained over various constitutional challenges. In *Commonwealth v. Williams (Williams II)*, 574 Pa. 487, 832 A.2d 962 (2003), the Pennsylvania Supreme Court held that *Megan's Law II* was, in most respects, constitutional.¹² *See also:*

- *Commonwealth v. Howe*, 842 A.2d 436 (Pa. Super. 2004): *Megan's Law II* did not violate constitutional prohibition against enacting a bill containing more than one subject.
- *Commonwealth v. Howe*, 842 A.2d 436 (Pa. Super. 2004): *Megan's Law II* does not subject an individual to a harsher sentence because of his mental condition and thus did not, on that basis, violate substantive due process or constitutional prohibition against cruel and unusual punishment.
- *Commonwealth v. Rhoads*, 836 A.2d 159, 163 (Pa. Super. 2003): *Megan's Law II* does not violate separation of powers doctrine by allegedly usurping Supreme Court's power to prescribe rules governing practice, procedure, and conduct by implementing separate criminal proceeding; *Megan's Law II* is a substantive law, not criminal proceeding, and did not promulgate rules of court practice or procedure.
- *Commonwealth v. Rhoads*, 836 A.2d 159, 162 (Pa. Super. 2003): *Megan's Law II* does not violate due process considerations regarding additional punishments for the same crime. The Superior Court relied on *Commonwealth v. Williams (Williams II)*, 574 Pa. 487, 832 A.2d 962 (2003), and held that "all of appellant's constitutional challenges, which hinge on the underlying assumption that the registration, notification and

¹¹ In *Commonwealth v. Williams (Williams I)*, 557 Pa. 285, 733 A.2d 593 (1999), the Pennsylvania Supreme Court ruled that *Megan's Law I*, which provided that a person convicted of a sexual assault had to rebut a presumption of "SVP" classification by clear and convincing evidence, was unconstitutional.

¹² In *Williams II*, the Supreme Court also held that the registration requirements that were unconstitutionally punitive were severable.

counseling provisions of the Act constitute criminal punishment and therefore, individually or collectively, violate one's constitutional rights by imposing an additional punishment without providing due constitutional safeguards, to be without merit." The Superior Court held the aforesaid requirements were not punitive in nature.

- ***Commonwealth v. Kopicz***, 840 A.2d 342 (Pa. Super. 2003): Megan's Law II does not violate due process considerations because definition of "sexually violent predator" and "mental abnormality" in ***Megan's Law II*** are not unconstitutionally vague.
- ***Commonwealth v. Wilson***, 589 Pa. 559, 910 A.2d 10 (2006): Finding that "the Act's provisions imposing criminal liability for non-compliance [with the Act's registration and reporting requirements] are constitutional."

Effective January 24, 2005, Megan's Law II was amended and updated. See 2004, Nov. 24, P.L. 1243, No. 152.

- ***Commonwealth v. Hitner***, 910 A.2d 721 (Pa. Super. 2006): Finding that the registration requirements under ***Megan's Law III*** were not unconstitutionally punitive absent a showing that there was a cure for petitioner's particular mental disorder.

B. Purpose of *Megan's Law II*

The primary objective of ***Megan's Law II*** is to provide the public with adequate notice and information regarding sexually violent predators and certain other offenders in the community, and to therefore enable those communities to prepare for an offender's release.¹³ The purpose of the assessment, then, is to identify *sexually violent predators*.

1. The designation of Sexually Violent Predator

The sexually violent predator ("SVP") designation is reserved for those who have been:

- a) convicted of a sexually violent offense as set forth in 42 PA.CONS.STAT.ANN. § 9795.1 and,
- b) determined to be a sexually violent predator under 42 PA.CONS.STAT.ANN. §9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses even after release.

The SVP designation applies to offenders determined to be sexual violent predators in another state, territory, Federal Court, the District of Columbia, or by court martial.

¹³ ***Commonwealth v. Baird***, 856 A.2d 114, 116 (Pa. Super. 2004): *Megan's Law II* "serves to protect the public by providing them with adequate notice and information about a sexual offender planning to live, work or reside in any given community, thereby providing the community with an opportunity to develop a constructive plan to prepare themselves and their children for the offender's release."

- As stated by the Superior Court in *Commonwealth v. Plucinski*, 868 A.2d 20 (Pa. Super. 2005):

Under Megan’s Law II, a SVP is defined as “a person who has been convicted of a sexually violent offense...and who is determined to be a sexually violent predator under section 9795.4 ... due to a *mental abnormality* or *personality disorder* that makes the person likely to engage in *predatory sexually violent offenses*.” 42 Pa.C.S.A. § 9792. “Mental abnormality” is defined as “[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.” *Id.* “Predatory” is defined as “[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.”

Id. at 25 – 26 (emphasis added).

“Mental abnormality” is “[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.” 42 PA.CON.S.TAT.ANN. § 9792.

“Predatory” is defined as “[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.” 42 PA.CON.S.TAT.ANN. § 9792.

C. The Sexually Violent Predator Assessment

1. Order for Assessment

In accordance with 42 PA.CON.S.TAT.ANN. § 9795.4, within ten days of the date of conviction, but before sentencing, the trial judge must order a defendant convicted of an offense, or attempt thereof, specified under 42 PA.CON.S.TAT.ANN. §9795.1, to be assessed by The State Sexual Offenders Assessment Board (“Board”).¹⁴ The assessment is mandatory for any defendant convicted of a predicate offense.¹⁵ The Board members are appointed by the Governor and are to be comprised of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of treatment of sexual offenders. The offenses specified under §9795.1 include:

¹⁴ The order for assessment must be sent to the administrative officer of the board within ten days of the date of conviction. *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710, 712 n.2 (Pa. 2003); 42 PA.CON.S.TAT.ANN. §9795.4(a).

¹⁵ *Commonwealth v. Baird*, 856 A.2d 114, 118 (Pa. Super. 2004).

- i. Rape;¹⁶
- ii. Involuntary deviate sexual intercourse;¹⁷
- iii. Sexual assault;¹⁸
- iv. Aggravated indecent assault;¹⁹
- v. Kidnapping, where the victim is a minor;²⁰
- vi. Luring a child into a motor vehicle;²¹
- vii. Institutional sexual assault;²²
- viii. Indecent assault;²³
- ix. Incest;²⁴
- x. Prostitution;²⁵
- xi. Child pornography;²⁶
- xii. Sexual abuse of children;²⁷
- xiii. Unlawful contact with a minor;²⁸
- xiv. Sexual exploitation of children;²⁹

2. The SVP Assessment

The salient inquiry in determining SVP status is identification of the impetus behind the commission of the offense; that is, whether it proceeds from a mental defect or personality disorder, or another motivating factor. The answer to that question determines, at least theoretically, the extent to which the offender is likely to reoffend. *Megan's Law II* provides the criteria by which such likelihood may be gauged. ***Commonwealth v. Price***, 876 A.2d 988, 995 (Pa. Super. 2005), *appeal denied*, 587 Pa. 706, 897 A.2d 1184 (2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 224, 166 L.Ed.2d 179 (2006).

¹⁶ 18 PA.CON.S.TAT.ANN. § 3121.

¹⁷ 18 PA.CON.S.TAT.ANN. § 3123.

¹⁸ 18 PA.CON.S.TAT.ANN. § 3124.1.

¹⁹ 18 PA.CON.S.TAT.ANN. § 3125.

²⁰ 18 PA.CON.S.TAT.ANN. § 2901.

²¹ 18 PA.CON.S.TAT.ANN. § 2910.

²² 18 PA.CON.S.TAT.ANN. § 3124.2.

²³ 18 PA.CON.S.TAT.ANN. § 3126, where the offense is a misdemeanor of the first degree.

²⁴ 18 PA.CON.S.TAT.ANN. § 4302, where the victim is 12 years of age or older but under 18 years of age, or when the victim is under 12 years of age.

²⁵ 18 PA.CON.S.TAT.ANN. § 5902(b), where the actor promotes the prostitution of a minor.

²⁶ 18 PA.CON.S.TAT.ANN. § 5903(a)(3),(4),(5) or (6), relating to obscene and other sexual materials and performances, where the victim is a minor.

²⁷ 18 PA.CON.S.TAT.ANN. § 6312.

²⁸ 18 PA.CON.S.TAT.ANN. § 6318.

²⁹ 18 PA.CON.S.TAT.ANN. § 6320.

A member of the Board, as designated by its administrative officer, conducts the assessment of the defendant to determine if the individual should be classified as a sexually violent predator. The evaluator must ascertain the following factors³⁰ regarding the current offense:

- i. whether the offense involved multiple victims;
- ii. whether the defendant exceeded the means necessary to achieve the offense;
- iii. the nature of the sexual contact with the victim;
- iv. the relationship of the defendant to the victim;
- v. the age of the victim;
- vi. whether the offense included a display of unusual cruelty by the defendant during the commission of the crime; and,
- vii. the mental capacity of the victim.

The evaluator shall also examine the prior offense history to determine the defendant's prior criminal record, and whether the defendant completed any prior sentences, or whether the defendant participated in available programs for sexual offenders.³¹ With regards to the defendant's characteristics, the evaluator should determine the individual's age, any use of illegal drugs, and any mental illness, mental disability, or mental abnormality.³² The evaluator shall also examine any other factors reasonably related to the risk of re-offense. *Commonwealth v. Plucinski*, 868 A.2d 20, 25-26 (Pa. Super. 2005).

Copies of records or information requested by the Board in connection with the court-ordered assessment shall be provided by any state, county, and local agency, office, or entity in this Commonwealth.

The Board must submit a written report containing its assessment to the district attorney no later than 90 days from the date of the defendant's conviction.

3. The SVP Assessment Hearing

After the Board issues its assessment and recommendation, the district attorney may request a hearing before the trial court to determine whether the individual should be adjudicated as a sexually violent predator. In order to schedule the hearing, the district attorney must file a praecipe.³³ On occasion, in situations when the assessment is attached to a pre-sentence

³⁰ 42 PA. CONS. STAT. ANN. § 9795.4(b).

³¹ 42 PA. CONS. STAT. ANN. § 9795.4(b)(2).

³² 42 PA. CONS. STAT. ANN. § 9795.4(b)(3).

³³ 42 PA. CONS. STAT. ANN. § 9795.4(e). The district attorney must send the defendant's counsel a copy of the assessment along with the praecipe.

investigation report, the trial court will schedule the hearing after reviewing the assessment.³⁴

In any event, the defendant and district attorney must be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses.

In addition, the defendant has the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. If the defendant makes arrangements for another expert assessment, the defendant must provide a copy of the expert assessment to the district attorney prior to the hearing. 42 PA.CON.S.TAT.ANN. § 9795.4(e)(2).

The Commonwealth bears the burden of proving through clear and convincing evidence that the defendant meets the statutory definition of SVP. *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710 (2003). The clear and convincing standard requires evidence that is “so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.” *Id.*, 838 A.2d at 715 (citation omitted).

D. Reporting Requirements

If the trial court concludes that the defendant should be classified as a sexually violent predator, the defendant is subject to lifetime registration, notification, and approved monthly counseling.³⁵ If there is no finding of SVP, the defendant is deemed an “offender” and is subject to registration only, for a period of either ten years or the remainder of his life, depending upon the predicate offense and/or the number of convictions. *Commonwealth v. Maldonado*, 576 Pa. 101, 838 A.2d 710, 712 (2003); 42 PA.CON.S.TAT.ANN. § 9795.1(a) & (b).

Any offender convicted of a predicate offense under § 9795.1(a) & (b), whether or not he is deemed a sexually violent predator, must:

- (i) register his current residence or intended residence with the state police upon release from incarceration, parole from a correctional institution, or commencement of an intermediate punishment or probation;
- (ii) inform the state police within ten days of a change of residence;
- (iii) inform the state police within ten days of change in employment or employment location;
- (iv) inform the state police within ten days of change in status or location of enrollment as a student; and

³⁴ 42 PA.CON.S.TAT.ANN. § 9795.4(f): “**Presentence investigation.**—In all cases where the board has performed an assessment pursuant to this section, copies of the report shall be provided to the agency preparing the presentence investigation.”

³⁵ 42 PA.CON.S.TAT.ANN. §§ 9795.1(b), 9796(a), & 9799.4. As stated, Megan’s Law II mandates that a sexually violent predator attend counseling sessions at least monthly, and that he pay the fees assessed from such sessions if he is able to do so. 42 PA.CON.S.TAT.ANN. § 9799.4.

- (v) register within ten days with a new law enforcement agency after establishing residence in another state.

42 PA.CON.S.TAT.ANN. § 9795.2(a). State police officials then forward this data, together with fingerprint and photographic information obtained from the sentencing court,³⁶ to the chief of police of the locality where the offender will reside following his change of address or release from prison.³⁷

In the case of a sexually violent predator, local law enforcement is also charged with: “notif[ying] the individual’s neighbors, as well as day care operators and school officials within the municipality. . . . The data sent to these recipients includes the offender’s name, address, offense, and photograph (if available), as well as the fact that he has been determined . . . to be a sexually violent predator The sexually violent predator’s name and address, including any subsequent change of address, is also sent to the victim of the offense” *Commonwealth v. Williams (Williams II)*, 574 Pa. 487, 496-497, 832 A.2d 962, 967 (2003).

E. Requirements at Time of Sentencing

In accordance with 42 PA.CON.S.TAT.ANN. § 9795.3, the sentencing court must inform offenders and sexually violent predators at the time of sentencing of the provisions of *Megan’s Law II* that apply to them. The court must inform the offender or sexually violent predator of:

- (i) their duty to register and provide the information required for each registration, including verification;
- (ii) their duty to inform the Pennsylvania State Police of changes in residence, employment, employment location or school enrollment;
- (iii) their duty to inform the Pennsylvania State Police within ten days of becoming employed or enrolled as a student if the person has not previously provided that information to the Pennsylvania State Police;
- (iv) their duty to register with a new law enforcement agency if the offender or sexually violent predator moves to another state no later than ten days after establishing residence in another state;
- (v) their duty to register with the appropriate authorities in any state in which the offender or sexually violent predator is employed, carries on a vocation or is a student if the state requires such registration.

The sentencing judge must also order the fingerprints and photograph of the offender or sexually violent predator to be provided to the Pennsylvania State Police.

³⁶ 42 PA.CON.S.TAT.ANN. § 9795.3(4).

³⁷ 42 PA.CON.S.TAT.ANN. § 9795.2(c).

Lastly, the sentencing judge must require the offender or sexually violent predator to read and sign a form which verifies that the duty to register under *Megan's Law II* was explained. If the offender or sexually violent predator is incapable of reading, the court must certify that the duty to register was explained and the offender or sexually violent predator indicated an understanding of the duty.

E. Appellate Review of SVP Status

Plenary Review: The Pennsylvania Supreme Court noted that “[q]uestions of evidentiary sufficiency present questions of law; thus, “[the] standard of review is de novo and [the] scope of review is plenary.” *Commonwealth v. Meals*, 590 Pa. 110, ___, 912 A.2d 213, 218 (2006) (citations omitted).

Clear and Convincing Standard: “[I]n reviewing the sufficiency of the evidence regarding the determination of SVP status, [the appellate court] will reverse the trial court only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied.” *Commonwealth v. Moody*, 843 A.2d 402, 408 (Pa. Super. 2004) (quoting *Commonwealth v. Krouse*, 799 A.2d 835, 837 (Pa. Super. 2002) (en banc), *appeal denied*, 573 Pa. 671, 821 A.2d 586 (2003); *Commonwealth v. Haughwout*, 837 A.2d 480, 484 (Pa. Super. 2003).³⁸ “The clear and convincing standard requires evidence that is ‘so clear, direct, weighty and convincing as to enable [the trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.’” *Commonwealth v. Maldonado*, 576 Pa. 101, 109, 838 A.2d 710, 715 (2003) (quoting *Rohm and Haas Co. v. Continental Gas Co.*, 566 Pa. 464, 476, 781 A.2d 1172, 1179 (2001).

The evidence must be viewed in the light most favorable to the Commonwealth. *Commonwealth v. Plucinski*, 868 A.2d 20, 25 (Pa. Super. 2005). The reviewing court may not weigh the evidence or substitute its judgment for that of the trial court. *Id.* See also *Commonwealth v. Meals*, 590 Pa. 110, ___, 912 A.2d 213, 223 (2006).

8.4 SENTENCING OPTIONS

A. General Standards

Under Pennsylvania’s Sentencing Code, 42 PA.CON.S.TAT.ANN. § 9701 et seq., as a general rule, in determining the sentence to be imposed upon the defendant, the sentencing court must consider and employ one or more of the following alternatives, and may impose them consecutively or concurrently:

³⁸ 42 PA.CON.S.TAT.ANN. § 9795.4(e) mandates that the Commonwealth prove, by clear and convincing evidence, that the defendant is a sexually violent predator at the hearing held prior to sentencing.

- 1) An order of probation;
- 2) A determination of guilt without further penalty;
- 3) Partial confinement;
- 4) Total confinement;
- 5) A fine;
- 6) Intermediate punishment.

42 PA.CONS.STAT.ANN. §9721(a). The sentencing court's standards for selecting from the above alternatives should conform to the general principle that the sentence imposed calls for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitation of the defendant. ***Commonwealth v. Robertson***, 874 A.2d 1200, 1212 (Pa. Super. 2005); 42 PA.CONS.STAT.ANN. §9721(b).

The sentencing court must also consider the guidelines adopted by the Pennsylvania Commission on Sentencing, contained in Chapter 303 of the Pennsylvania Code:

The court shall consider the sentencing guidelines in determining the appropriate sentence for offenders convicted of, or pleading guilty or nolo contendere to, felonies and misdemeanors. Where crimes merge for sentencing purposes, the court shall consider the sentencing guidelines only on the higher graded offense.

204 Pa.Code § 303.1(a). *See also*, 42 PA.CONS.STAT.ANN. §§ 2151 - 2155 (governing creation and adoption of the Sentencing Guidelines); 204 Pa.Code §§ 303.1 – 303.18 (Pennsylvania Sentencing Guidelines).

The Sentencing Guidelines enumerate aggravating and mitigating circumstances; assign scores based on (1) a defendant's criminal record and (2) on the seriousness of the crime; and then specify a range of punishments for each crime.³⁹ "In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 PA.CONS.STAT.ANN. §9721(b); 204 Pa.Code § 303.1(d).

Trial courts retain broad discretion in sentencing matters.⁴⁰ The Sentencing Guidelines are not mandatory, and therefore the trial court may sentence

³⁹ "Essentially, the Guidelines set forth a recommended standard range ('standard range') in which any given defendant's sentence should fall, based on the gravity of the defendant's offense and the defendant's prior record. For each standard range that corresponds to a particular offense committed by a particular defendant, the Guidelines also sets forth an 'aggravated range' and a 'mitigated range' to guide the court should it believe that a sentence in the standard range would be inappropriate under the circumstances. See 204 Pa.Code § 303.13." ***Commonwealth v. Mouzon***, 571 Pa. 419, 425 n. 3, 812 A.2d 617, 621 n.3 (2002) (plurality).

⁴⁰ "Within the constraints of the Sentencing Code, the trial court has broad discretion to fashion a sentence consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." ***Commonwealth v. Thomas***, 879 A.2d 246, 262 (Pa.Super. 2005).

defendants outside the Guidelines. In cases where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing, the court shall provide a contemporaneous written statement of the reasons for deviating from the guidelines. 42 PA.CON.S.TAT.ANN. § 9721(b); 204 Pa.Code § 303.1(d).

When the sentencing court imposes a sentence that deviates significantly from guideline recommendations, it must demonstrate that the case under consideration is compellingly different from the “typical” case of the same offense or point to other sentencing factors that are germane to the case before the court. *Commonwealth v. Robertson*, 874 A.2d 1200, 1213 (Pa. Super. 2005).

Failure to comply with these general standards is grounds for vacating the sentence and resentencing the defendant.

B. Statutory Penalties for Crimes of Sexual Violence

Pennsylvania’s statutory scheme specifies the grade and degree of each particular crime. Moreover, the General Assembly has provided the statutory maximum legal sentences for each grade and degree of crime:

18 PA.CON.S.TAT.ANN. § 1103.

Sentence of Imprisonment for Felony

Except as provided in 42 Pa.C.S. § 9714 (relating to sentences for second and subsequent offenses), a person who has been convicted of a felony may be sentenced to imprisonment as follows:

- (1) In the case of a felony of the first degree, for a term which shall be fixed by the court at not more than 20 years.
- (2) In the case of a felony of the second degree, for a term which shall be fixed by the court at not more than ten years.
- (3) In the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years.

18 PA.CON.S.TAT.ANN. § 1104.

Sentence of Imprisonment for Misdemeanors

A person who has been convicted of a misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall be not more than:

- (1) Five years in the case of a misdemeanor of the first degree.
- (2) Two years in the case of a misdemeanor of the second degree.
- (3) One year in the case of a misdemeanor of the third degree.

If the trial court imposes a sentence of total confinement, the sentence must set a maximum period of incarceration and a minimum period which must not “exceed one-half of the maximum sentence imposed.” 42 PA.CONS.STAT.ANN. § 9756(b). The following is a list of the statutory maximum penalties permitted for crimes of sexual violence. For ease of use, an abbreviated definition is also included for each crime.

1. RAPE: 18 PA.CONS.STAT.ANN. § 3121

a) § 3121(a): Rape

- **Grading:** a felony of the first degree.
- **Definition:** includes sexual intercourse with a victim:
 - 1) by forcible compulsion;
 - 2) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
 - 3) who was unconscious or where the defendant knew that the victim was unaware that the sexual intercourse was occurring;
 - 4) where the defendant had substantially impaired the victim’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or
 - 5) who suffers from a mental disability which rendered the victim incapable of consent.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

b) § 3121 (b): Rape by substantial impairment of victim

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engaged in sexual intercourse with the victim and had substantially impaired the victim’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss and any other effect of this substance, is a felony of the first degree.
- **Penalty:** Maximum incarceration sentence and maximum fine: in addition to the penalty provided for by § 3121 (a), an additional period of incarceration which *shall not exceed an additional 10 years confinement and an additional fine which shall not exceed \$100,000.* The aggregate sentence for the offense shall therefore be not more than 30 years and the fine shall not exceed \$125,000.

c) §3121 (c): Rape of a child

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant engaged in sexual intercourse with a victim who was less than 13 years old.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 40 years* [see 18 PA.CON.S.TAT.ANN. § 3121(e)(1)] *and \$25,000.*

d) §3121 (d): **Rape of a child with serious bodily injury**

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant violated this section and the victim is under 13 years of age and suffered serious bodily injury in the course of the offense.
- **Penalty:** Maximum incarceration sentence and the maximum fine: up to life imprisonment [see 18 PA.CON.S.TAT.ANN. § 3121(e)(2)] *and not to exceed \$25,000.*

2. **STATUTORY SEXUAL ASSAULT: 18 PA.CON.S.TAT.ANN. § 3122.1**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant engaged in sexual intercourse with a victim under the age of 16 years and the defendant is four or more years older than the victim, and they were not married to each other.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

3. **INVOLUNTARY DEVIATE SEXUAL INTERCOURSE:
18 PA.CON.S.TAT.ANN. § 3123**

a) § 3123(a): **Involuntary Deviate Sexual Intercourse**

- **Grading:** a felony of the first degree.
- **Definition:** includes deviate sexual intercourse with a victim:
 - 1) by forcible compulsion;
 - 2) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
 - 3) who was unconscious or where the person knew that the victim was unaware that the sexual intercourse was occurring;
 - 4) where the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants or other means for the purpose of preventing resistance;
 - 5) who suffers from a mental disability which rendered him or her incapable of consent; or
 - 6) who was less than 16 years of age and the defendant is four or more years older than the victim and the victim and defendant were not married to each other.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

- b) **§ 3123(b): Involuntary Deviate Sexual Intercourse with a Child**
- **Grading:** a felony of the first degree.
 - **Definition:** where the defendant engaged in deviate sexual intercourse with a victim who was less than 13 years of age.
 - **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 40 years* [see 18 PA.CONS.STAT.ANN. § 3123(d)(1)] *and \$25,000.*
- c) **§ 3123(c): Involuntary Deviate Sexual Intercourse with a Child with Serious Bodily Injury**
- **Grading:** a felony of the first degree.
 - **Definition:** where the defendant violated this section, the victim was less than 13 years of age, and the victim suffered serious bodily injury in the course of the offense.
 - **Penalty:** Maximum incarceration sentence and the maximum fine: up to life imprisonment [see 18 PA.CONS.STAT.ANN. § 3123(d)(2)] *and not to exceed \$25,000.*

4. **SEXUAL ASSAULT: 18 PA.CONS.STAT.ANN. § 3124.1**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant engaged in sexual intercourse or deviate sexual intercourse with a victim without the victim's consent.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

5. **INSTITUTIONAL SEXUAL ASSAULT: 18 PA.CONS.STAT.ANN. § 3124.2**

- **Grading:** a felony of the third degree.
- **Definition:** where the defendant was an employee or agent of the Department of Corrections or a county correctional authority, youth development center, youth forestry camp, State or county juvenile detention facility, other licensed residential facility serving children and youth, or mental health or mental retardation facility or institution, and engaged in sexual intercourse, deviate sexual intercourse or indecent contact with a victim who was an inmate, detainee, patient or resident.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 7 years and \$10,000.*

6. **AGGRAVATED INDECENT ASSAULT: 18 PA.CONS.STAT.ANN. § 3125**

- a) **§ 3125(a) Aggravated Indecent Assault**
- **Grading:** a felony of the second degree.
 - **Definition:** where the defendant engaged in penetration, however slight, of the genitals or anus of a victim with a part of the defendant's body for any purpose other than good faith medical, hygienic or law enforcement procedures, and if the defendant does so:
 - 1) without the victim's consent;

- 2) by forcible compulsion;
- 3) by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution
- 4) when the victim was unconscious or the defendant knew that the victim was unaware that the penetration was occurring;
- 5) when the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants, or other means for the purpose of preventing resistance;
- 6) the victim suffers from a mental disability which rendered him or her incapable of consent;
- 7) the victim was less than 13 years of age; or
- 8) the victim was less than 16 years of age and the defendant is four or more years older than the victim and the victim and the defendant were not married to each other.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

b) § 3125(b) Aggravated Indecent Assault of a Child

- **Grading:** a felony of the first degree.
- **Definition:** where the defendant violated § 3125 (a)(1), (2), (3), (4), (5), or (6) and the victim was less than 13 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 20 years and \$25,000.*

7. INDECENT ASSAULT: 18 PA.CON.S.TAT.ANN. §3126

a) § 3126 (a)(1)-(6), (8) Indecent Assault

- **Grading:** A misdemeanor of the second degree.
- **Definition:** where the defendant had indecent contact with a victim or caused the victim to have indecent contact with the defendant, if the offense occurred:
 - i. without the victim's consent;
 - ii. by forcible compulsion;
 - iii. by threat of forcible compulsion that would have prevented resistance by a person of reasonable resolution;
 - iv. when the victim was unconscious or the defendant knew that the victim was unaware that the penetration was occurring;
 - v. when the defendant had substantially impaired the victim's power to appraise or control his or her conduct by administering or employing, without the knowledge of the victim, drugs, intoxicants, or other means for the purpose of preventing resistance;
 - vi. the victim suffers from a mental disability which rendered him or her incapable of consent;

- vii. the victim was less than 13 years of age; or
- viii. the victim was less than 16 years of age and the defendant is four or more years older than the victim and the victim and the defendant were not married to each other.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 2 years and \$5,000.*

b) § 3125 (a)(7) **Indecent Assault of a Child**

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant committed indecent assault and the victim was less than 13 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

8. **INDECENT EXPOSURE: 18 PA.CON.S.TAT.ANN. § 3127**

a) § 3127 **Indecent Exposure**

- **Grading:** a misdemeanor of the second degree.
- **Definition:** where the defendant exposed his or her genitals in any public place or in any place where there were present other persons under circumstances in which he or she knew or should have known that his conduct was likely to offend, affront, or alarm.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 2 years and \$5,000.*

b) § 3127 (b): **Indecent Exposure in the presence of persons less than 16 years of age**

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant knew or should have known that any of the persons present were less than 16 years of age.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

9. **SEXUAL INTERCOURSE WITH ANIMAL:**

18 PA.CON.S.TAT.ANN. §3129

- **Grading:** a misdemeanor of the second degree.
- **Definition:** where the defendant engaged in any form of sexual intercourse with an animal.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$5,000.*

10. **INCEST: 18 PA.CON.S.TAT.ANN. §4302**

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant knowingly married, cohabited, or had sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood. The relationships referred to in this section include blood relationships without regard to legitimacy, and

relationship of parent and child by adoption.

- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

11. CORRUPTION OF MINORS – SEXUAL NATURE:

18 PA.CONS.STAT.ANN. §6301(a)(1)

- **Grading:** a misdemeanor of the first degree.
- **Definition:** where the defendant, being of the age of 18 and upwards, by any act corrupted or tended to corrupt the morals of any minor less than 18 years, or who aided, abetted, enticed or encouraged any such minor in the commission of any crime, or who knowingly assisted or encouraged such minor in violating his or her parole or any order of court.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 5 years and \$10,000.*

12. SEXUAL ABUSE OF CHILDREN: 18 PA.CONS.STAT.ANN. § 6312

a) § 6312 (b): Sexual abuse of children (photographing, videotaping, depicting on computer or filming sexual acts)

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant caused or knowingly permitted a child under the age of 18 years to engage in a prohibited sexual act, or in the simulation of such act, if the defendant knew, had reason to know, or intended that such act may be photographed, videotaped, depicted on computer or filmed.
- **Penalty:** Maximum incarceration sentence and the maximum fine: *shall not exceed 10 years and \$25,000.*

b) § 6312 (c)(1): Sexual abuse of children (dissemination of photographs, videotapes, computer depictions and films)

- **Grading:** a first offense is a felony of the third degree; a second or subsequent offense is a felony of the second degree.
- **Definition:** includes any knowing sale, distribution, delivery, dissemination, transfer, display, or exhibition to others, or possession for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicted a child under the age of 18 years engaging in prohibited sexual act or in the simulation of such act.
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the second degree: *shall not exceed 10 years and \$25,000.*
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the third degree: *shall not exceed 7 years and \$15,000.*

computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act.

- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the second degree: *shall not exceed 10 years and \$25,000.*
- **Penalty:** Maximum incarceration sentence and the maximum fine for the felony of the third degree: *shall not exceed 7 years and \$15,000.*

13. SEXUAL EXPLOITATION OF CHILDREN:

18 PA.CON.S.TAT.ANN. § 6320

- **Grading:** a felony of the second degree.
- **Definition:** where the defendant procured for another person a child under 18 years of age for the purpose of sexual exploitation.
- **Penalty:** Maximum incarceration sentence and the maximum fine: ***shall not exceed 10 years and \$25,000.***

C. Inchoate Crimes

18 PA.CON.S.TAT.ANN. §905(a) Grading of Criminal Attempt, Solicitation and Conspiracy

Inchoate crimes of sexual violence, unless otherwise provided, shall be crimes of the *same grade and degree* as the most serious offense which is attempted or solicited or is an object of the conspiracy.

D. Mandatory Sentences for Crimes of Sexual Violence

1. 42 PA.CON.S.TAT.ANN. § 9712

Crime of Violence with a Firearm

Criteria:

The person visibly possessed a firearm or a replica of firearm, whether or not the firearm or replica was loaded or functional, that placed the victim in reasonable fear of death or serious bodily injury, during the commission of a crime of violence including those specified below.

Offenses included:

- 18 PA.CON.S.TAT.ANN. § 3121 (Rape)
- 18 PA.CON.S.TAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.S.TAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.S.TAT.ANN. § 4302 (Incest)

Mandatory Sentence:

Minimum sentence of *at least five years total confinement.*

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

2. 42 PA.CON.S.TAT.ANN. § 9713

Crime of Violence In/Near Public Transportation

Criteria:

The person commits a crime of sexual violence specified below if the crime occurs in or near public transportation.

Offenses Included:

- 18 PA.CON.S.TAT.ANN. § 3121 (Rape)
- 18 PA.CON.S.TAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.S.TAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.S.TAT.ANN. § 4302 (Incest)
- 18 PA.CON.S.TAT.ANN. § 3124.1 (Sexual Assault)

Mandatory Sentence:

Minimum sentence of *at least five years total confinement*.

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth's intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

3. 42 Pa.Cons.Stat. Ann. § 9714

Crime of Violence – Second or Subsequent Conviction

Criteria:

Conviction for a second or subsequent crime of violence, including as specified below, if at the time of the commission of the current offense the person had previously been convicted of a crime of sexual violence as specified below.

Offenses included:

- 18 PA.CON.STAT.ANN. § 3121 (Rape)
- 18 PA.CON.STAT.ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- 18 PA.CON.STAT.ANN. § 3125 (Aggravated Indecent Assault)
- 18 PA.CON.STAT.ANN. § 4302 (Incest)
- 18 PA.CON.STAT.ANN. § 3124.1 (Sexual Assault)

Mandatory Minimum Sentence:

- (i) “Second Strike Provision” - for a single prior conviction, a minimum sentence of *at least ten years total confinement*;
- (ii) “Three Strikes Law” - for multiple prior convictions, a minimum sentence of *at least 25 years total confinement*. However, the sentencing court may, if it determines that 25 years of total confinement is insufficient to protect the public safety, sentence the offender to *life imprisonment* without parole.

Mandatory Maximum Sentence:

a defendant sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 Pa.Cons.Stat.Ann. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

Notice and Hearing Requirements:

- Upon a second conviction for a crime of violence, the court shall give the defendant oral and written notice of the penalties under this section for a third conviction for a crime of violence;
- Reasonable notice of the Commonwealth’s intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must have a complete record of the previous convictions of the defendant, copies of which shall be furnished to the offender. If the offender or the attorney for the Commonwealth contests the accuracy of the record, the court must schedule a hearing and direct the offender and the attorney for the Commonwealth to submit evidence regarding the previous convictions of the offender. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offender and, if this section is applicable, shall impose sentence in accordance with this section.

- Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the defendant has the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

4. 42 PA.CON.S.TAT.ANN. § 9717

Victim Over 60 Years Old

Criteria:

Conviction for Rape (18 Pa.Cons.Stat.Ann. § 3121) or Involuntary Deviate Sexual Intercourse (18 Pa.Cons.Stat.Ann. § 3123) where the defendant is under 60 years of age, and the victim is over the age of 60 and not a police officer.

Mandatory Sentence:

Mandatory term of imprisonment of *at least five years*.

5. 42 PA.CON.S.TAT.ANN. § 9718 (a)(1)

Victim Under 16 Years Old

Criteria:

Conviction for the following offenses when the victim is under 16 years of age:

- Rape (18 PA.CON.S.TAT.ANN. § 3121(a) (1),(2),(3),(4)&(5));
or
- Involuntary Deviate Sexual Intercourse (18 PA.CON.S.TAT.ANN. § 3123) when the victim is under 16 years of age.

Mandatory Sentence:

Mandatory term of imprisonment of *at least five years*.

6. 42 PA.CON.S.TAT.ANN § 9718 (a)(2)

Victim Under 13 Years Old

Criteria:

Conviction for Aggravated Indecent Assault (18 PA.CON.S.TAT.ANN. § 3125(a)(1) through (6)) when the victim is under 13 years of age.

Mandatory Sentence:

Mandatory term of imprisonment of *at least 2 ½ years*.

7. 42 PA.CON.S.TAT.ANN § 9719

Crime of Violence Committed While Impersonating a Police Officer

Criteria:

Conviction for the following offenses, or an attempt thereof, and the defendant impersonated a police officer while committing the offense:

- Rape (18 PA.CON.S.TAT.ANN. § 3121); or
- Involuntary Deviate Sexual Intercourse (18 Pa.Cons.Stat.Ann. § 3123).

Mandatory Sentence:

Mandatory term of imprisonment of *at least 2 ½ years*.

Notice and Hearing Requirements:

- Reasonable notice of the Commonwealth’s intention to proceed under this section must be provided after conviction and before sentencing.
- The applicability of this section must be determined at sentencing. The sentencing court must consider any evidence presented at trial and must afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence at sentencing and must determine, by a preponderance of the evidence, if this section is applicable.

E. Sentencing Guidelines

1. Analysis of the Guidelines

The sentencing guidelines are written with the typical case in mind, so that a sentence suggested within the standard range will generally serve as an appropriate penalty for the offense. The guidelines were promulgated primarily to provide standardization in sentencing throughout the state. The discretion the sentencing court once enjoyed was changed dramatically by implementation of the guidelines in the late 1970’s. As the Pennsylvania Supreme Court summarized in **Commonwealth v. Mouzon**, 571 Pa. 419, 424 n.2, 812 A.2d 617, 620 n.2 (2002) (plurality):

In 1978, the General Assembly empowered the Pennsylvania Commission on Sentencing to formulate Sentencing Guidelines, which the General Assembly subsequently adopted. This Court has recognized that the Sentencing Guidelines were promulgated in order to structure the trial court’s exercise of its sentencing power and to address disparate sentencing. Legislative history also indicates that the Guidelines were enacted “to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict the unfettered discretion we give to sentencing judges.”

The sentencing court must consider the guidelines in determining the appropriate sentence for a defendant convicted of, or pleading guilty or nolo contendere to, felonies and misdemeanors. 204 PA. CODE § 303.1. The procedure for determining the guideline sentence from the matrix requires the determination of the Offense Gravity Score and the defendant’s Prior Record Score. In every case in which a sentence is imposed for a felony or misdemeanor, the sentencing court must state on the record, and disclose in

open court at the time of sentencing and on the Guideline Sentence Form, the reason(s) for the sentence imposed.

If the sentencing judge determines that the standard range sentence will not provide a just result due to the existence of certain aggravating or mitigating circumstances, the sentencing court may impose, within the guidelines, an aggravated range or mitigated range sentence that either increases or decreases the standard range penalty by a specified number of months, which varies based on the Offense Gravity Score. Pursuant to 204 PA. CODE § 303.13(c), when the sentencing court imposes an aggravated or mitigated sentence, the reasons for departing from the standard range sentence shall be stated both on the record and on the Guideline Sentence Form.

When sentencing outside of the guideline ranges, the sentencing court must ensure that the record reflects “with clarity that the court considered the sentencing guidelines in a rational and systematic way and made a dispassionate decision to depart from them.” *Commonwealth v. Rodda*, 723 A.2d 212, 216 (Pa. Super. 1999).

Although the Sentencing Commission, rather than the General Assembly itself, directly adopts the Sentencing Guidelines and therefore the Guidelines are not statutes *per se*, the Guidelines nevertheless retain a legislative character, as the General Assembly may reject them in their entirety prior to their taking effect, subject, of course, to gubernatorial review.⁴¹ Moreover, the General Assembly itself has designated the Commission as a legislative agency. 42 PA.CON.S.TAT.ANN. § 2151.2 (“The commission shall be established as an agency of the General Assembly”). Therefore, the appellate courts apply the standard rules of statutory construction to the guidelines. *See Commonwealth v. Hackenberger*, 575 Pa. 197, 201 n.9, 836 A.2d 2, 4 n.9 (2003).

E. Sentencing Alternatives to Traditional Incarceration

1. Intermediate Punishment

Pennsylvania first enacted provisions establishing intermediate punishment as a sentencing alternative in 1990. The current act, the Pennsylvania County Intermediate Punishment Act, 42 PA.CON.S.TAT.ANN. §§ 9801-9812, provides that County intermediate punishment program options include the following:

- (1) Restrictive intermediate punishments providing for the strict supervision of the offender including programs that:
 - (i) House the offender full or part time;

⁴¹ “Subject to gubernatorial review pursuant to section 9 of Article III of the Constitution of Pennsylvania, the General Assembly may by concurrent resolution reject in their entirety any guidelines adopted by the commission within 90 days of their publication in the Pennsylvania Bulletin” 42 PA.CON.S.TAT.ANN. § 2155(b).

- (ii) Significantly restrict the offender’s movement and monitor the offender’s compliance with the program; or
 - (iii) Involve a combination of programs that meet the standards set forth under subparagraphs (i) and (
- (2) When utilized in combination with restrictive intermediate punishments, restorative sanctions providing for nonconfinement sentencing options that:
- (i) Are the least restrictive in terms of the constraint of the offender’s liberties.
 - (ii) Do not involve the housing of the offender, either full or part time.
 - (iii) Focus on restoring the victim to pre-offense status.

42 PA.CON.S.TAT.ANN. § 9804. The Legislature’s intent was: “to give judges another sentencing option which would lie between probation and incarceration with respect to sentencing severity; to provide a more appropriate form of punishment/treatment for certain types of non-violent offenders; to make the offender more accountable to the community; and to help reduce the county jail overcrowding problem while maintaining public safety.” *Commonwealth v. Phillipp*, 709 A.2d 920, 921 (Pa. Super. 1998) (quoting Sentencing in Pennsylvania 1990: 1990–1991 Annual Report of The Pennsylvania Commission on Sentencing 8). *See also*, *Commonwealth v. Williams*, 868 A.2d 529 (Pa. Super. 2005), *appeal denied*, 586 Pa. 726, 890 A.2d 1059 (2005).

The CIPA specifically excludes individuals who are charged or have prior records of certain crimes of sexual violence. The current law for determining an offender’s eligibility for an intermediate punishment sentence is set forth in 42 PA.CON.S.TAT.ANN. § 9802; an “eligible offender” is defined as follows:

Subject to section 9721(a.1) (relating to sentencing generally) [concerning sentences with a mandatory minimum], a person convicted of an offense who would otherwise be sentenced to a county correctional facility, **who does not demonstrate a present or past pattern of violent behavior** and who would otherwise be sentenced to partial confinement pursuant to section 9724 (relating to partial confinement) or total confinement pursuant to section 9725 (relating to total confinement). **The term does not include an offender with a current conviction or a prior conviction within the past ten years for any of the following offenses:**

...

18 PA.CON.S.TAT.ANN. § 3121 (relating to rape).

18 PA.CON.S.TAT.ANN. § 3122.1 (relating to statutory sexual assault).

18 PA.CON.S.TAT.ANN. § 3123 (relating to involuntary deviate sexual intercourse).

18 PA.CON.S.TAT.ANN. § 3124.1 (relating to sexual assault).

18 PA.CON.S.TAT.ANN. § 3125 (relating to aggravated indecent assault).

18 PA.CON.S.TAT.ANN. § 3126 (relating to indecent assault).

...

18 PA.CON.S.TAT.ANN. § 4302 (relating to incest).

2. Order of Probation

Probation may be an appropriate sentence based upon the grounds specified in **42 PA.CON.S.TAT.ANN. § 9722**:

The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of an order of probation:

- (1) The criminal conduct of the defendant neither caused nor threatened serious harm.
- (2) The defendant did not contemplate that his conduct would cause or threaten serious harm.
- (3) The defendant acted under a strong provocation.
- (4) There were substantial grounds tending to excuse or justify the criminal conduct of the defendant, though failing to establish a defense.
- (5) The victim of the criminal conduct of the defendant induced or facilitated its commission.
- (6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained.
- (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
- (8) The criminal conduct of the defendant was the result of circumstances unlikely to recur.
- (9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.
- (10) The defendant is particularly likely to respond affirmatively to probationary treatment.
- (11) The confinement of the defendant would entail excessive hardship to him or his dependents.
- (12) Such other grounds as indicate the desirability of probation.

When necessary, the terms of a probationary sentence can be tailored to address issues in a cases involving sexual abuse. A probationer may be required to:

remain at home during the hours designated by the court; remain within the court's jurisdiction or in a psychiatric institution indefinitely; undergo medical treatment; perform community service; make restitution or reparations; refrain from frequenting certain locations and/or associating with particular individuals; permit the probation officer to visit his home frequently; devote himself to a specific occupation; and/or satisfy a variety of other conditions that the court deems necessary.

Commonwealth v. Williams, 574 Pa. 487, 509 n. 15, 832 A.2d 962, 975 n. 15 (2003). The conditions of probations listed in the statute, **42 PA.CON.S.TAT.ANN. § 9754** include:

- (c) Specific Conditions.**—The court may as a condition of its order require the defendant:
- (1) To meet his family responsibilities.
 - (2) To devote himself to a specific occupation or employment.
 - (2.1) To participate in a public or nonprofit community service program unless the defendant was convicted of murder, rape, aggravated assault, arson, theft by extortion, terroristic threats, robbery or kidnapping.
 - (3) To undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose.
 - (4) To pursue a prescribed secular course of study or vocational training.
 - (5) To attend or reside in a facility established for the instruction, recreation, or residence of persons on probation.
 - (6) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons.
 - (7) To have in his possession no firearm or other dangerous weapon unless granted written permission.
 - (8) To make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.
 - (9) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or his employment.
 - (10) To report as directed to the court or the probation officer and to permit the probation officer to visit his home.
 - (11) To pay such fine as has been imposed.
 - (12) To participate in drug or alcohol treatment programs.
 - (13) To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.

(14) To remain within the premises of his residence during the hours designated by the court.

8.5 THE SENTENCING HEARING

A. The Defendant's Right to Counsel

Proceedings relating to the imposition of a criminal sentence constitute a critical stage in the criminal proceedings, therefore, absent waiver, the defendant must be represented by counsel. **Commonwealth v. D'Amato**, 579 Pa. 490, 516-517, 856 A.2d 806, 821-522 (2004).

- Pursuant to the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution, a person accused of a crime and the subject of a criminal prosecution has a constitutional right to counsel at every stage of a criminal proceeding where substantive rights of the accused may be affected. **Commonwealth v. Johnson**, 574 Pa. 5, 13, 828 A.2d 1009, 1014 (2003). Pa.R.Crim.P. 704(c)(1) adopts the right to counsel at sentencing and provides that the sentencing judge must afford counsel for both parties the opportunity to present information and argument relative to sentencing.

1. Pre-Sentence Investigation Report

In **Commonwealth v. Phelps**, 450 Pa. 597, 301 A.2d 678 (1973), the Pennsylvania Supreme Court held that when the trial court orders a presentence investigation report, defense counsel has a right to examine its contents before sentencing and, if he contests any portion, to offer evidence in rebuttal. *See also*, **Commonwealth v. Martin**, 466 Pa. 118, 351 A.2d 650 (1976).

In **Philps**, the Supreme Court also adopted the American Bar Association's Standards for Criminal Justice Sentencing regarding disclosure. The current standard is as follows:

Standard 18-5.7 Disclosure of report to parties

- (a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.
- (b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford *a reasonable opportunity for challenge and verification of material information in the report*.
- (c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

B. The Defendant's Right to Allocution

The right to “allocution” is the opportunity for the defendant to make a “statement ... to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.” *Black's Law Dictionary* 75 (7th ed. 1999).

In Pennsylvania, it is well established that a defendant is entitled to the right of allocution. *Commonwealth v. Green*, 862 A.2d 613, 620 (Pa.Super. 2004)(en banc), *appeal denied*, 584 Pa. 692, 882 A.2d 477 (2005). The sentencing court must advise the defendant of his right to speak *prior* to being sentenced. *Commonwealth v. Thomas*, 520 Pa. 206, 209, 553 A.2d 918, 919 (1989). *See also, Commonwealth v. Hague*, 840 A.2d 1018, 1020 (Pa. Super. 2003), *appeal denied*, 583 Pa. 687, 878 A.2d 863 (2005) (“the significance of allocution lies in its potential to sway the court toward leniency prior to imposition of sentence. Permitting the defendant to speak after sentence has been imposed fails to meet the essence of the right of allocution.”).

The right to allocution is included in the Pennsylvania Rules of Criminal Procedure:

Pa.R.Crim.P. 704

...

(C) Sentencing Proceeding.

(1) At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.

Consistent with established case law, the appellate courts have adhered to the principle that a defendant who is not permitted to address the trial judge prior to sentencing is automatically entitled to a new sentencing hearing. *See, e.g., Commonwealth v. Newton*, 875 A.2d 1088, 1090 (Pa.Super. 2005), *appeal denied*, 586 Pa. 724, 890 A.2d 1058 (2005). Furthermore, an alleged denial of the right of allocution relates to the legality of the sentence, and is therefore not waived on collateral review if not raised on direct appeal. *Id.*

C. Victim's and Prosecutor's Right to Speak at Sentencing

In accordance with Section 201 of the Crime Victim's Act,⁴² the victim of a crime has the right to be present at sentencing and make comment before the pronouncement of sentence:

⁴² The Crime Victims Act, Act of November 24, 1998, P.L. 882, *as amended*, 18 Pa.Stat. §§ 11.101 - 5102.

§ 11.201

Victims of crime have the following rights:

...

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

18 PA.STAT. § 11.201.

Additionally, Pa.R.Crim.P. 704(c)(1) provides that the sentencing judge must afford counsel for *both* parties the opportunity to present information and argument relative to sentencing. Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded "the entire panoply of criminal trial procedural rights." ***Commonwealth v. Medley***, 725 A.2d 1225, 1229 (Pa.Super. 1999), *appeal denied*, 561 Pa. 672, 749 A.2d 468 (2000), *quoting Commonwealth v. Wright*, 508 Pa. 25, 36, 494 A.2d 354, 360 (1985), *affirmed*, 477 U.S. 79 (1986).

- ***Commonwealth v. Gaddis***, 639 A.2d 462, 470 (Pa.Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994): In case involving charges of sexual, physical and emotion abuse of children, the testimony from the trial, arguments of counsel, and the pre-sentence report, which include the defendant's prior record, constituted the relevant and material information required to impose a reasonable sentence.

Pennsylvania's Maximum Sentencing Provisions

GRADE	LONGEST ALLOWABLE MAXIMUM SENTENCE (1)	LONGEST ALLOWABLE MINIMUM SENTENCE (2)	MAXIMUM ALLOWABLE FINE (3)
Felony 1	20 Years	10 Years	\$25,000
Felony 2	10 Years	5 Years	\$25,000
Felony 3	7 Years	3.5 Years	\$15,000
Misdemeanor 1	5 Years	2.5 Years	\$10,000
Misdemeanor 2	2 Years	1 Year	\$5,000
Misdemeanor 3	1 Year	6 Months	\$2,500
Summary	90 Days	45 Days	\$300

(1) 18 Pa.C.S. §1101-§1105

(2) The minimum may not exceed one-half the maximum sentence that is imposed: 42 Pa.C.S. §9755(b) and §9756(b). The guideline ranges are limited by the longest legal minimum sentence for a crime, even where the sentence recommendations exceed the longest legal minimum sentence. [See §303.9(g)].

(3) Or any higher amount equal to double the pecuniary gain derived from the offense by the offender or any higher or lower amount specifically authorized by statute.

Guideline Scores/Points for Crimes of Sexual Violence

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	OFFENSE GRAVITY SCORE	PRIOR RECORD POINTS
3121 (a)	Rape	F 1	12	<i>4</i>
3121 (a) INCHOATE	Attempt/Solicitation/ Conspiracy to Rape	18 Pa. C.S. § 905	11	<i>3</i>
3121 (b)	Rape (uses substance to impair victim)	F 1	13	<i>4</i>
3121 (b) INCHOATE	Attempt/Solicitation/ Conspiracy to Rape (uses substance to impair victim)	18 Pa. C.S. § 905	12	<i>3</i>
3121 (c)	Rape (child < 13 years)	F 1	14	<i>4</i>
3121 (c) INCHOATE	Attempt/Solicitation/ Conspiracy to Rape (child < 13 years)	18 Pa. C.S. § 905	13	<i>3</i>
3121 (d)	Rape (child < 13 years, serious bodily injury)	F 1	14	<i>4</i>
3121 (d) INCHOATE	Attempt/Solicitation/ Conspiracy to Rape (child < 13 years, serious bodily injury)	18 Pa. C.S. § 905	13	<i>3</i>
3122.1	Statutory Sexual Assault	F 2	7	<i>2</i>
3123 (a)	Involuntary Deviate Sexual Intercourse	F 1	12	<i>4</i>
3123 (a) INCHOATE	Attempt/Solicitation/ Conspiracy to Involuntary Deviate Sexual Intercourse	18 Pa. C.S. § 905	11	<i>3</i>

Guideline Scores/Points for Crimes of Sexual Violence

18 Pa.C.S.§	OFFENSE TITLE	STATUTORY CLASS	OFFENSE GRAVITY SCORE	PRIOR RECORD POINTS
3123 (b)	Involuntary Deviate Sexual Intercourse (child < 13 years)	F 1	14	<i>4</i>
3124.1	Sexual Assault	F 2	11	<i>4</i>
3124.1 INCHOATE	Attempt/Solicitation/ Conspiracy to Sexual Assault	18 Pa. C.S. § 905	11	<i>3</i>
3124.2	Institutional Sexual Assault	F 3	5	<i>1</i>
3125 (a)	Aggravated Indecent Assault	F 2	10	<i>4</i>
3125 (b)	Aggravated Indecent Assault (child)	F 1	12	<i>4</i>
3125 INCHOATE	Attempt/Solicitation/ Conspiracy to Aggravated Indecent Assault	18 Pa. C.S. § 905	10	<i>3</i>
3126 (a) (1) (6), (8)	Indecent Assault	M 2	4	<i>m</i>
3126 (a) (7)	Indecent Assault (child < 13 years)	M 1	5	<i>1</i>
3127	Indecent Exposure (person present is 16 years of age or older)	M 2	3	<i>m</i>
3127	Indecent Exposure (person present is less than 16 years of age)	M 1	4	<i>1</i>

Guideline Scores/Points for Crimes of Sexual Violence

18 Pa.C.S. §	OFFENSE TITLE	STATUTORY CLASS	OFFENSE GRAVITY SCORE	PRIOR RECORD POINTS
3129	Sexual Intercourse with Animal	M ₂	2	<i>m</i>
4302	Incest	F ₂	9	<i>4</i>
4302 INCHOATE	Attempt/Solicitation/ Conspiracy to Incest	18 Pa. C.S. § 905	9	<i>3</i>
6312 (b)	Sexual Abuse of Children (photographing, etc.)	F ₂	7	<i>2</i>
6312 (c)	Sexual Abuse of Children (dissemination, etc.; second/ subsequent offense)	F ₂	8	<i>2</i>
6312 (d)	Possession of Child Pornography (first offense)	F ₂	5	<i>1</i>
6312 (d)	Possession of Child Pornography (second/ subsequent offense)	F ₂	8	<i>2</i>
6320	Sexual Exploitation of Children	F ₂	9	<i>2</i>

Guideline Matrix for Crimes of Sexual Violence

LEVEL	OGS	EXAMPLE OFFENSES	0	1
LEVEL 5 State Incar.	14	Rape (child < 13 years old)	72-SL	84-SL
	13	Attempt, Solicitation, or Conspiracy to Rape (child < 13 years old)	60-78	66-84
	12	Rape; Involuntary Deviate Sexual Intercourse	48-66	54-72
	11	Sexual Assault	36-54 BC	42-60
	10	Aggravated Indecent Assault	22-36 BC	30-42 BC
	9	Sexual Exploitation Children; Incest	12-24 BC	18-30 BC
LEVEL 4 State Incar./RIP Trade	8 [F1]	Sexual Abuse of Children (2nd Offense); Possession of Child Pornography (2nd Offense)	9-16 BC	12-18 BC
LEVEL 3 State/ County Incar. RIP Trade	7 [F2]	Statutory Sexual Assault; Sexual Abuse of Children (photographing, etc.)	6-14 BC	9-16 BC
	6	Sexual Abuse of Children (dissemination, etc.; 1st offense)	3-12 BC	6-14 BC
LEVEL 2 County Incar. RIP RS	5 [F3]	Indecent Assault (child < 13 years)	RS -9	1-12 BC
	4	Indecent Assault	RS -3	RS -9
	3 [M1]	Indecent Exposure	RS -1	RS -6
LEVEL 1 RS	2 [M2]	Sexual Intercourse with Animal	RS	RS -2
	1 [M3]	Most Misd. 3's	RS	RS -1
<p>KEY: BC = Boot Camp Eligible REVOC = Repeat Violent Offender Category RIP = Restrictive Immediate Punishments</p>				

2	3	4	5	RFEL	REVOC	AGG/ MIT
96-SL	120-SL	168-SL	192-SL	204-SL	SL	+/-12
72-90	78-96	84-102	96-114	108-126	240	+/-12
60-78	66-84	72-90	84-102	96-114	120	+/-12
48-66	54-72	60-78	72-90	84-102	120	+/-12
36-48 BC	42-54	48-60	60-72	72-84	120	+/-12
24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/-12
15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	N/A	+/-9
12-18 BC	15-21 BC	18-24 BC	24-30 BC	35-45 BC	N/A	+/-6
9-16 BC	12-18 BC	15-21 BC	21-27 BC	27-40 BC	N/A	+/-6
3-14 BC	6-16 BC	9-16 BC	12-18 BC	24-36 BC	N/A	+/-3
RS <12	3-14 BC	6-16 BC	9-16 BC	21-30 BC	N/A	+/-3
RS-9	RS <12	3-14 BC	6-16 BC	12-18 BC	N/A	+/-3
RS-3	RS-4	RS-6	1-9	6-<12	N/A	+/-3
RS-2	RS-3	RS-4	RS-6	3-6	N/A	+/-3
<p>KEY:</p> <p>RS = Restorative Sanctions</p> <p>RFEL = Repeat Felony 1 and Felony 2 Offender Category</p> <p>RIP TRADE = Shaded Areas Indicate RIP May Be Imposed as a Substitute for Incarceration</p>						

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9.1 CHAPTER OVERVIEW

This chapter discusses various aspects of the criminal appeals process pertinent to sexual violence crimes. The first section, section 9.2, defines and discusses particular trial court orders that may be appealed, including: final orders, interlocutory orders appealable as of right, and interlocutory orders appealable by permission. The following two sections describe the necessary procedural steps both the appellant and the trial court must take once a notice of appeal has been filed. The final section discusses appellate court standards of review likely to be applicable to appeals from orders in sexual violence crime cases.

9.2 APPEALABLE ORDERS

A. Final Orders

An appeal may be taken as of right from any final order of a lower court. Pa.R.A.P. 341(a). The purpose of limiting appeals to final orders is to avoid piecemeal appeals. *Commonwealth v. Sartin*, 708 A.2d 121, 122 (Pa. Super. 1998).

1. Definition

Rule 341(b) defines a final order in a criminal matter as any order that disposes of all claims or of all parties, or that is expressly defined as a final order by statute.

(a) Examples of Final Orders

- Judgments of sentence. *Commonwealth v. Heilman*, 876 A.2d 1021, 1026 (Pa. Super. 2005).¹
- Orders of disposition in juvenile cases. *In re M.D.*, 839 A.2d 1116, 1118 (Pa. Super. 2003).²
- Denial of a motion for dismissal on double jeopardy grounds.³ *Commonwealth v. Brady*, 510 Pa. 336, 341, 508 A.2d 286, 288 (1986).

¹ “It is well-established that a criminal defendant may take an appeal only from the judgment of sentence. An appeal from any prior order must be quashed.” *Commonwealth v. McPherson*, 533 A.2d 1060, 1061 (Pa. Super. 1987) (internal citations omitted).

² Although the Juvenile Act does not provide a right of appeal, a juvenile’s right of appeal stems from Article V Section 9 of the Pennsylvania Constitution. *In re J.E.D.*, 879 A.2d 288, 290 (Pa. Super. 2005), *appeal denied*, 586 Pa. 713, 889 A.2d 1216 (2005).

³ Denial of a petition for dismissal on double jeopardy grounds is not appealable where the trial court makes a finding that the petition was frivolous. *Commonwealth v. Brady*, 510 Pa. at 346, 508 A.2d at 291.

- Any pretrial order that serves to put litigants out of court by ending litigation or entirely disposing of a case.

Commonwealth v. Rosario, 538 Pa. 400, 404, 648 A.2d 1172, 1174 (1994).

(b) **Examples of Non-Appealable Orders**

- Generally, pretrial orders are considered interlocutory and not appealable. *Commonwealth v. Matis*, 551 Pa. 220, 230, 710 A.2d 12, 17 (1998).
- Order granting severance of criminal informations is not a final order. *Commonwealth v. Smith*, 518 Pa. 524, 527, 544 A.2d 943, 945 (1988).
- Denial of pretrial *habeas corpus* petitions based on the insufficiency of evidence not appealable, absent a showing of exceptional circumstances. *Commonwealth v. Hess*, 489 Pa. 580, 588–589, 414 A.2d 1043, 1047–1048 (1980).
- Juvenile review order that maintains the status quo. *In re M.D.*, 839 A.2d 1116, 1121 (Pa. Super. 2003).

2. Appeals by the Commonwealth in Criminal Cases

Pennsylvania Rule of Appellate Procedure 341(e) provides that “**Criminal orders.** An appeal may be taken by the Commonwealth from any final order in a criminal matter only in the circumstances provided by law.” Pa.R.A.P. 341(e).

(a) **Habeas Corpus**

Order granting pretrial *habeas corpus* petition is final and appealable by the Commonwealth. *Commonwealth v. Jackson*, 849 A.2d 1254, 1256 (Pa. Super. 2004).

(b) **Severance**

Order granting severance of two or more criminal informations is interlocutory and not appealable. *Commonwealth v. Smith*, 518 Pa. at 527, 544 A.2d at 945.

(c) **Recusal**

Commonwealth was entitled to an interlocutory appeal as of right from trial court’s denial of Commonwealth’s motion for recusal in murder prosecution, where Commonwealth certified in good faith that denial of motion would substantially handicap its prosecution of case. *Commonwealth v. White*, 589 Pa. 642, ___, 910 A.2d 648, 653–655 (2006) (Per Eakin, J., with two justices joining).

B. Interlocutory Orders Appealable as of Right

1. Change of Venue or Venire in Criminal Cases

An appeal may be taken as of right by the defendant or the prosecution from an order changing venue or venire in a criminal proceeding. Pa.R.A.P. 311(a)(3); *See e.g. Commonwealth v. Shoop*, 617 A.2d 351, 352 n.1 (Pa. Super. 1992) (Commonwealth may appeal from order granting change of venue). However, an order denying a petition for a change of venue or venire is not appealable. Pa.R.A.P. 311, note; *Commonwealth v. Swanson*, 424 Pa. 192, 194, 225 A.2d 231, 232-233 (1967).⁴ The note Rule 311(a)(3) states that:

An appeal taken under Rule 311(a)(3) must be filed within ten days of the date the order changing venue or venire was entered. Pa.R.A.P. 903(c)(1)(i).

2. New Trials in Criminal Cases

An appeal may be taken as of right from an order in a criminal proceeding awarding a new trial where (1) the defendant claims that the proper disposition of the matter would be an absolute discharge, or (2) where the Commonwealth claims that the lower court committed an error of law. Pa.R.A.P. 311(a)(6); *Commonwealth v. Campbell*, 421 A.2d 681, 683 (Pa. Super. 1980) (not interlocutory where defendant contended that proper disposition was absolute discharge); *Commonwealth v. McDougall*, 841 A.2d 535, 536-537 (Pa. Super. 2003), *appeal denied*, 579 Pa. 701, 857 A.2d 678 (2004) (Commonwealth permitted to appeal trial court's order as an alleged error of law – trial court had granted defendant's motion to withdraw guilty plea after sentencing).

The granting of a mistrial due to a deadlocked jury is not the equivalent of an award of a new trial and is, thus, not appealable. *Commonwealth v. McPherson*, 533 A.2d 1060, 1062 (Pa. Super. 1987).

3. Appeals by the Commonwealth in Criminal Cases

The Commonwealth may take an appeal as of right from an order that does not end the entire case where it certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution. Pa.R.A.P. 311(d), *Commonwealth v. Dillon*, 863 A.2d 597, 600 (Pa. Super. 2004), *appeal granted*, 584 Pa. 691, 882 A.2d 477 (2005).⁵ Once the required certification is made, the Commonwealth is not required to demonstrate that the prosecution has in fact been handicapped. *Commonwealth v.*

⁴ The note Rule 311(a)(3) states that:

Pa.R.Crim.P. 584 (motion for change of venue or change of venire) treats changes of venue and venire the same. Thus, an order changing venire is appealable by the defendant or the Commonwealth, while an order refusing to change venire is not.

⁵ *See also* Pa.R.A.P. 904(e): “When the Commonwealth takes an appeal pursuant to [Pa.R.A.P.] 311(d), the notice of appeal shall include a certification by counsel that the order will terminate or substantially handicap the prosecution.”

Gordon, 652 A.2d 317, 323 n.8 (Pa. Super. 1994), *affirmed*, 543 Pa. 513, 673 A.2d 866 (1996).

(a) **Suppression Orders**

An order granting a defendant's motion to suppress evidence is appealable pursuant to Rule 311(d). **Commonwealth v. Bender**, 811 A.2d 1016, 1018 (Pa. Super. 2002). The rationale of Rule 311(d) recognizes that, were incriminating evidence suppressed, and a defendant acquitted, the Commonwealth would be precluded from again trying the case due to double jeopardy restrictions.

Commonwealth v. Cosnek, 575 Pa. 411, 416-417, 836 A.2d 871, 873-874 (2003).

Generally, denial of a Commonwealth's motion *in limine* to exclude a defendant's evidence is not appealable. *Id.*, at 419-420, 836 A.2d at 876-877. However, an order that denies a Commonwealth motion to exclude evidence pursuant to the Rape Shield Law, 18 PA.CON.S.TAT.ANN. § 3104, has the same effect as a suppression order and is, therefore, appealable. **Commonwealth v. Jones**, 826 A.2d 900, 907 (Pa. Super. 2003).

(b) **Quashal of Information**

An order quashing a criminal charge is final and appealable as to that charge, since a trial on the remaining charges would permanently preclude trial on the quashed charge. **Commonwealth v. Karetny**, 583 Pa. 514, 527, 880 A.2d 505, 512-513 (2005); **Commonwealth v. Free**, 902 A.2d 565 (Pa. Super. 2006).

(c) **Other Orders**

- Denial of motion requesting that trial judge recuse herself is appealable under Pa.R.A.P. 311. **Commonwealth v. White**, 589 Pa. 642, ___, 910 A.2d 648, 653-655 (2006)(Per Eakin, J., with two justices joining).
- Denial of Commonwealth request for a jury trial is appealable. **Commonwealth v. White**, 589 Pa. 642, ___, 910 A.2d 648, 658-659 (2006)(Per Eakin, J., with two justices joining).
- An order denying a Commonwealth motion for a continuance to secure the presence of a necessary witness is appealable. **Commonwealth v. Matis**, 551 Pa. 220, 233, 710 A.2d 12, 18 (1998).

4. **Collateral Orders**

An appeal may be taken as of right from a collateral order of a lower court. Pa.R.A.P. 313(a).

A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313(b). An order is collateral if (1) the issue surrounding the disputed order may be addressed without analyzing the ultimate issue in the underlying case, and (2) the issue must involve rights deeply rooted in public policy going beyond the particular litigation at hand. *J.S. v. Whetzel*, 860 A.2d 1112, 1117 (Pa. Super. 2004). An order that falls under Rule 313 is immediately appealable as of right simply by filing a notice of appeal. Pa.R.A.P. 313, note.

(a) Standard of Review

“A court may conduct a balancing test between the nature of the potentially unprotected right and the efficiency interest of the final judgment rule.” *J.S. v. Whetzel*, 860 A.2d 1112, 1117 (Pa. Super. 2004).

(b) Orders in Criminal Cases that are Collateral

- Order denying a motion to dismiss an indictment on double jeopardy grounds is collateral and appealable if the trial court has found that the motion was not frivolous. *Commonwealth v. Brady*, 510 Pa. 336, 341, 508 A.2d 286, 288 (1986).
- Order limiting publicity over court proceedings in criminal case. *Commonwealth v. Lambert*, 723 A.2d 684, 688 (Pa. Super. 1998).

C. Interlocutory Appeal by Permission

The right to an interlocutory appeal taken by permission is set forth by statute:

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 PA.CON.S.TAT.ANN. § 702(b). Rule 1311 of the Rules of Appellate Procedure governs petitions for permission to appeal.⁶ *See also* Pa.R.A.P. 312.

⁶ Furthermore, Pa.R.A.P. 312 provides: “An appeal from an interlocutory order may be taken by permission pursuant to Chapter 13 (interlocutory appeals by permission).”

A petition for permission to appeal must be filed within thirty days of the filing of the order in question and must include an application for the trial court to amend its order to expressly state the required language of Section 702(b), specifically:

[T]hat such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.⁷

42 PA.CON.S.TAT.ANN. § 702(b); Pa.R.A.P. 1311. *See also Commonwealth v. Dennis*, 580 Pa. 95, 102, 859 A.2d 1270, 1275 (2004). Once the trial court has certified the order, the appellate court has full discretion in deciding whether to accept appellate review. *Id.*, at 102-103, 859 A.2d at 1275.

Therefore, an appeal may be taken from an interlocutory order pursuant to a petition for permission to appeal if all of the following elements are satisfied:

- (1) the order involves a controlling question of law;
- (2) there is a substantial ground for difference of opinion regarding the question of law; and
- (3) an immediate appeal would materially advance the ultimate termination of the matter.

The trial court must certify that the three prongs are satisfied, and the appellate court then decides whether to accept appellate review.

Commonwealth v. Dennis, 580 Pa. 95, 102, 859 A.2d 1270, 1275 (2004).

Where the trial court refuses to amend the order, the petitioner may file a petition for review⁸ with the appropriate appellate court to determine whether the trial court's refusal was so egregious as to justify prerogative appellate correction. Pa.R.A.P. 1311, note. A petition for permission to appeal does not stay the proceedings of the trial court unless the trial court so orders. 42 PA.CON.S.TAT.ANN. § 702(c).

1. Petition for Review

In ***Commonwealth v. Boyle***, 516 Pa. 105, 532 A.2d 306 (1987), the defendant filed a pre-trial motion, which was denied, seeking dismissal of the charges against him on the grounds that the trial court did not have jurisdiction over the case. Following defendant's petition to amend the order to include the language required by Section 702(b), the trial court

⁷ Pa.R.A.P. 1312 specifies that a petition for permission to appeal shall include (1) a statement concerning the appellate court's jurisdiction, (2) the text of the order in question, (3) a concise statement of the case, (4) the controlling question of law (5) a statement concerning why a substantial ground exists for a difference of opinion, (6) copies of the opinions related to the order in question, and (7) the language of pertinent constitutional provisions or statutes.

⁸ *See* Chapter 15 of the Rules of Appellate Procedure (Petition for Review).

failed to act on the petition. Thereafter, defendant filed a petition for review, which the Superior Court granted. On appeal to the Pennsylvania Supreme Court, that Court noted that the effect of the Superior Court's order was (1) to imply that the trial court had abused its discretion, and (2) to supply the certification required by Section 702(b). *Id.*, at 111, 532 A.2d at 309.

In *Commonwealth v. Tilley*, 566 Pa. 312, 780 A.2d 649 (2001), the defendant, through post conviction proceedings, filed a discovery motion seeking “all data” regarding the races of the members of defendant's jury. The trial court granted the motion and the Commonwealth requested that the trial court certify the order for appeal. The trial court refused and the Commonwealth, thereafter, filed a notice of appeal with the Supreme Court⁹ and argued that the Supreme Court could exercise jurisdiction to review the merits pursuant to a petition for review. *Id.*, at 316, 780 A.2d at 651. Upon review of the three principles governing petitions for review, the Supreme Court accepted jurisdiction of the appeal. *Id.*, at 316-317, 780 A.2d at 651-652.

9.3 OPINION IN SUPPORT OF ORDER

A. Pennsylvania Rule of Appellate Procedure 1925

1. Direction to File Statement of Matters Complained of: Pa.R.A.P. 1925(b)

The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

Pa.R.A.P. 1925(b).

(a) Generally

The purpose of filing a statement of matters complained of on appeal is to aid trial judges in identifying and focusing upon the disputed issues. *Commonwealth v. Lord*, 553 Pa. 415, 419, 719 A.2d 306, 308 (1998). The statement must be concise, without reference to other documents, and sufficiently specific so that the trial court need not guess which issues the appellant wishes to raise.

Commonwealth v. Dodge, 859 A.2d 771, 774, 783–784 (Pa. Super. 2004), *appeal denied*, 584 Pa. 672, 880 A.2d 1236.

⁹ Since *Tilley* was a capital case, the defendant appealed directly to the Supreme Court pursuant to 42 PA.CON.S.TAT.ANN. § 9711(h).

Where the appellant fails to file a concise statement of matters complained of, it is the trial court's responsibility to order that the appellant do so. **Commonwealth v. Hess**, 570 Pa. 610, 615, 810 A.2d 1249, 1252 (2002). However, it is the appellant's responsibility to properly file the statement with the clerk of courts.

Commonwealth v. Butler, 571 Pa. 441, 446-447, 812 A.2d 631, 634 (2002).

(b) Waiver

Once an appellant is ordered to file a statement of matters complained of, any issues not raised in that statement are waived.

Commonwealth v. Lord, 553 Pa. at 420, 719 A.2d at 309;

Commonwealth v. Berry, 877 A.2d 479, 485 (Pa. Super. 2005), *appeal denied*, 917 A.2d 844 (2007). This "strict waiver" rule is intended to aid the trial court in preparing its legal analysis of the pertinent issues so that there may be meaningful and effective appellate review.¹⁰ **Commonwealth v. Butler**, 571 Pa. at 445, 812 A.2d at 633.

Rule 1925(b) specifies that a party has 14 days from the trial court's order in which to file a statement of matters complained of. Our Supreme Court recently reaffirmed **Butler's** and **Lord's** mandate of automatic waiver, and stated that strict compliance with Rule 1925(b), by way of a timely filed statement, "guarantees a trial judge's ability to focus on the issues raised" on appeal.

Commonwealth v. Schofield, 585 Pa. 389, 393, 888 A.2d 771, 774 (2005); *see also*, **Commonwealth v. Castillo**, 585 Pa. 395, 403, 888 A.2d 775, 780 (2005).

(c) Extension of Time

An appellant must petition the trial court within the fourteen day period under Rule 1925(b), i.e., the time period to file a timely Rule 1925(b) statement, and set forth good cause for an extension of a specific amount of time in which to file the statement, and obtain an order granting the request for the extension before the issues raised in an untimely 1925(b) statement will be preserved for appeal to the Superior Court. **Commonwealth v. Gravely**, 918 A.2d 761, 765 (Pa. Super. 2007).

In the alternative, an appellant who has filed a timely Rule 1925(b) statement, and then for good cause shown discovers that additional time is required to file a supplemental statement, may file a separate petition seeking permission to file a supplemental statement *nunc pro tunc*. **Commonwealth v. Gravely**, 918 A.2d 761, 765 (Pa. Super. 2007).

¹⁰ Waiver of issues on appeal due to counsel's failure to file a statement of matters complained of on appeal is presumptively prejudicial for Post Conviction Relief Act purposes. **Commonwealth v. Halley**, 582 Pa. 164, 171, 870 A.2d 795, 800 (2005).

(d) Exceptions to “Strict Waiver” Rule

- Good faith effort to file an adequate statement under particular circumstances avoids waiver. *Commonwealth v. Moran*, 823 A.2d 923, 926 (Pa. Super. 2003); *Commonwealth v. Parks*, 768 A.2d 1168, 1171–1172 (Pa. Super. 2001).
- Issues will not be waived for failure to file a statement of matters complained of where the appellant was not properly served with order directing the appellant to file the statement. *Commonwealth v. Hess*, 570 Pa. at 618–619, 810 A.2d at 1254–1255.
- Subsequent to *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998), the Pennsylvania Supreme Court issued a plurality opinion in *Commonwealth v. Johnson*, 565 Pa. 51, 771 A.2d 751 (2001), indicating that a claim deemed waived due to a failure to include it in a Pa.R.A.P. 1925(b) statement could be raised on direct appeal in the context of an ineffectiveness claim. *See also Commonwealth v. Wade*, 867 A.2d 547 (Pa. Super. 2005).

2. Opinion or Designation of Place in Record of Reasons: Pa.R.A.P. 1925(a)

Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.

Pa.R.A.P. 1925(a).

“The purpose of the rule is two-fold. First, it gives the appellate court a reasoned basis for the trial court’s disposition of the challenged orders. Second, it requires the judge to thoroughly consider his decision regarding the post-trial motions, in order to correct any problems that occurred at the trial level. This prevents unnecessary appeals.” *Commonwealth v. Pate*, 617 A.2d 754, 758–759 (Pa. Super. 1992), *appeal denied*, 535 Pa. 656, 634 A.2d 219 (1993). The rule “enables [the appellate court] to conduct effective and meaningful review of lower court decisions.” *Commonwealth v. Thomas*, 674 A.2d 1119, 1120 (Pa. Super. 1996), *overruled on other grounds by, Commonwealth v. Anders*, 699 A.2d 1258 (Pa. Super. 1997) (en banc).¹¹

¹¹ *See also Commonwealth v. Atwood*, 547 A.2d 1257, 1260-1261 (Pa. Super. 1988), *appeal denied*, 521 Pa. 616, 557 A.2d 720 (1989):

To ask this Court to do the exhaustive review of that record [of an extensive trial] with no assistance from the trial judge who sat throughout the proceeding, makes a mockery of appellate review. Our system of appellate review provides an effective expeditious means for fair examination of the issues and resolution of them. It depends, however, on counsel and the trial court adhering to the Rules of Appellate Procedure if the system is not to be paralyzed.

The trial court's opinion should provide a sound basis for its decision and be properly supported by case law. **Commonwealth v. Benchoff**, 700 A.2d 1289, 1293 (Pa. Super. 1997) (two page conclusory response without single citation is inadequate for Rule 1925(a) purposes).

Absent a trial court opinion, or in the face of an inadequate opinion, the proper remedy is for the appellate court to remand for preparation of a Rule 1925(a) opinion. **Commonwealth v. Hood**, 872 A.2d 175, 178 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005). However, if the record from the proceedings in the trial court adequately apprise the appellate court of the trial court's reasoning in relation to the issues raised in the appeal, the appellate court may decline to delay the case further by remanding for the preparation of a 1925(a) opinion, and proceed to review the merits of the appellant's claims. *Id.*; **Commonwealth v. Griffin**, 785 A.2d 501, 504 (Pa. Super. 2001).

9.4 TRANSMISSION OF THE RECORD

A. Duty of the Trial Court: Pa.R.A.P. 1931(b)

Pennsylvania Rule of Appellate Procedure 1931(b) provides:

After a notice of appeal has been filed the judge who entered the order appealed from shall comply with Rule 1925 (opinion in support of order), shall cause the official court reporter to comply with Rule 1922 (transcription of notes of testimony) or shall otherwise settle a statement of the evidence or proceedings as prescribed by this chapter, and shall take any other action necessary to enable the clerk to assemble and transmit the record as prescribed by this rule.

While it is the appellant's duty to order the transcripts necessary for an appeal,¹² it is the duty of the trial court to transmit the record to the appellate court.

Commonwealth v. Williams, 552 Pa. 451, 458, 715 A.2d 1101, 1104 (1998). However, it is the responsibility of the appellant to certify the complete official record for purposes of appellate review. **Commonwealth v. Preston**, 904 A.2d 1, 7 (Pa. Super. 2006), *appeal denied*, ___ Pa. ___, 916 A.2d 632 (2007).

It is well established that the appellate courts may only consider facts which have been duly certified in the record on appeal from the trial court.

Commonwealth v. Proetto, 771 A.2d 823, 834 (Pa. Super. 2001), *affirmed*, 575 Pa. 511, 837 A.2d 1163 (2003). Failure to ensure that the certified record contains the materials necessary for appellate review constitutes waiver of the issue. **Commonwealth v. Preston**, 904 A.2d 1, 7 (Pa. Super. 2006), *appeal denied*, ___ Pa. ___, 916 A.2d 632 (2007). An item does not become part of the

¹² See Pa.R.A.P. 1911.

certified record merely by copying it and submitting it as part of the reproduced record. *Id.*, at 6.

In circumstances where the evidence or other materials necessary for appellate review are missing from the certified record, but it is undisputed that they were properly before the trial court, the appellate courts have, on a case by case basis, made decisions to review the claims on the merits despite the deficiency in the certified record. *See e.g. Commonwealth v. Pries*, 861 A.2d 951, 952 n.2 (Pa. Super. 2004), *appeal denied*, 584 Pa. 693, 882 A.2d 478 (2005) (document appeared in reproduced record and counsel for both the prosecution and the defendant agreed that the document had been submitted to the trial court); *Commonwealth v. Johns*, 812 A.2d 1260, 1262 (Pa. Super. 2002) (motion appeared in docket entries but not certified record).

9.5 STANDARD AND SCOPE OF REVIEW ON APPEAL

A. Appeals from Suppression Decisions

1. Denial of a Suppression Motion

The appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. *Commonwealth v. Scott*, 878 A.2d 874, 877 (Pa. Super. 2005), *appeal denied*, 586 Pa. 749, 892 A.2d 823 (2005); *Commonwealth v. Wright*, 867 A.2d 1265, 1267 (Pa. Super. 2005), *appeal denied*, 583 Pa. 695, 879 A.2d 783 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1047 (2006). Where the prosecution prevailed in the suppression court, the appellate court may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. *Commonwealth v. Bomar*, 573 Pa. 426, 445, 826 A.2d 831, 842 (2003), *cert. denied*, 540 U.S. 1115 (2004). Moreover, the appellate court must defer to the credibility determinations of the trial judge who had the opportunity to observe the witnesses' credibility. *Commonwealth v. Wright*, 867 A.2d 1265, 1267 (Pa. Super. 2005), *appeal denied*, 583 Pa. 695, 879 A.2d 783 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1047 (2006).

2. Grant of Suppression Motion

The applicable standard of review in a Commonwealth appeal from an order of suppression is well-settled. In reviewing the ruling of a suppression court which granted a suppression motion, the appellate court must "first determine whether the factual findings are supported by the record, and

then determine whether the inferences and legal conclusions drawn from those findings are reasonable.” *Commonwealth v. Mulholland*, 794 A.2d 398, 400 (Pa. Super. 2002), quoting *Commonwealth v. Luv*, 557 Pa. 570, 575, 735 A.2d 87, 90 (1999) (internal citations omitted).

The appellate court may consider only the evidence of the defendant’s witnesses and so much of the evidence for the prosecution that, when read in the context of the record as a whole, remains uncontradicted.

Commonwealth v. Campbell, 862 A.2d 659, 662 (Pa. Super. 2004), *appeal denied*, 584 Pa. 699, 882 A.2d 1004 (2005). If the evidence when so viewed supports the factual findings of the suppression court, the appellate court will reverse only if there is an error in the legal conclusions drawn from those findings. *Commonwealth v. Rosas*, 875 A.2d 341, 346 (Pa. Super. 2005), *appeal denied*, 587 Pa. 691, 897 A.2d 455 (2006).

B. Appeals from Judgment of Sentence

1. Challenge to the Sufficiency of the Evidence

The standard applied by the appellate court in reviewing a challenge to the sufficiency of the evidence is “whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.” *Commonwealth v. Dupre*, 866 A.2d 1089, 1100 (Pa. Super. 2005), *appeal denied*, 583 Pa. 694, 879 A.2d 781 (2005).

A number of additional standards also apply:

- the appellate court may not weigh the evidence and substitute its judgment for the fact-finder;
- the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence;
- any doubts regarding a defendant’s guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances; and
- the Commonwealth may sustain its burden of proof or proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001), *appeal denied*, 569 Pa. 716, 806 A.2d 858 (2002).

In making this determination, the appellate court must evaluate the entire trial record and consider all the evidence received. *Commonwealth v. Markman*, ___ Pa. ___, ___, 916 A.2d 586, 598 (2007). Lastly, applying the above standards, it must be acknowledged that the trier of fact while passing upon the credibility of witnesses and the weight of the evidence

produced, is free to believe all, part or none of the evidence. *See Commonwealth v. Bruce*, 916 A.2d 657, 661 (Pa. Super. 2007).¹³

2. Challenge to the Weight of the Evidence

Pa.R.Crim.P. 607 addresses a motion challenging the weight of the evidence:

Rule 607. Challenges to the Weight of the Evidence

(A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

- (1) orally, on the record, at any time before sentencing;
- (2) by written motion at any time before sentencing; or
- (3) in a post-sentence motion.

(B)(1) If the claim is raised before sentencing, the judge shall decide the motion before imposing sentence, and shall not extend the date for sentencing or otherwise delay the sentencing proceeding in order to dispose of the motion.

(2) An appeal from a disposition pursuant to this paragraph shall be governed by the timing requirements of Rule 720(A)(2) or (3), whichever applies.

When a claim is raised before sentencing, the defendant may, but need not, raise the issue again in a post-sentence motion. See Rule 720(B)(1)(a)(iv).

An allegation by the defendant that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Smith*, 853 A.2d 1020, 1028 (Pa. Super. 2004). A challenge to the weight of the evidence, in contrast to a challenge to the sufficiency of the evidence, concedes that there is sufficient evidence to sustain the verdict.

Commonwealth v. Bennett, 827 A.2d 469, 481 (Pa. Super. 2003), *appeal denied*, 577 Pa. 707, 847 A.2d 1277 (2004). As stated above, the remedy for a challenge to the weight of the evidence is a new trial. Pa.R.Crim.P. 607.

In reviewing such a claim, a trial court must determine whether certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice. *Commonwealth v. Cesar*, 911 A.2d 978, 986 (Pa. Super. 2006). On appeal from the trial court's decision, the standard of the appellate court is:

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration

¹³ The remedy for a challenge to the sufficiency of the evidence is a judgment of acquittal. Pa.R.Crim.P. 606.

to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Hitner, 910 A.2d 721, 733 (Pa. Super. 2006).

An appellant fails to preserve for review a claim that the conviction was against the weight of the evidence by failing to file a motion for a new trial with the trial court. ***Commonwealth v. Snyder***, 870 A.2d 336, 345 (Pa. Super. 2005).

3. Challenge to the Jury Charge/Instructions

[A]ppellate review of a trial court charge must involve a consideration of the charge as a whole to determine whether it was fair and complete. The review does not focus upon whether certain "magic words" were included in the charge. Rather, it is the effect of the charge as a whole that is controlling.

Commonwealth v. Saunders, 529 Pa. 140, 144, 602 A.2d 816, 818 (1992) (citations omitted).

4. Challenge to Sentence

(a) Challenge to the Discretionary Aspects of Sentence

A challenge to the discretionary aspects of a sentence does not entitle an appellant to appellate review as of right. ***Commonwealth v. Bullock***, 868 A.2d 516, 528 (Pa. Super. 2005), *affirmed*, ___ Pa. ___, 913 A.2d 207 (2006). Prior to reaching the merits of a discretionary sentencing issue, the appellate court conducts a four part analysis.

- (1) Whether the appellant has filed a timely notice of appeal in accordance with Pa.R.A.P. 902 and 903.
- (2) Whether the issue on appeal was properly preserved at sentencing or in a motion to reconsider and modify sentence in accordance with Pa.R.Crim.P. 720.
- (3) Whether the appellant's brief adequately states a substantial question or if it contains a fatal defect. In order to satisfy the requirements of 42 PA.CONS.STAT.ANN. § 9781(b), Pennsylvania Rule of Appellate Procedure 2119(f) mandates that an appellant challenging the discretionary aspects of his sentence set forth in his brief a concise statement of the reasons relied upon for

allowance of appeal.¹⁴ *Commonwealth v. McAfee*, 849 A.2d 270, 274 (Pa. Super. 2004), *appeal denied*, 580 Pa. 695, 860 A.2d 122 (2004). Before reaching the merits of an appellant's argument, the appellate court must review the appellant's Rule 2119(f) statement to determine whether he has presented a substantial question for the court's review.

- (4) Whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 PA.CONS.STAT.ANN. § 9781(b).¹⁵

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa. Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005).

The establishment of a substantial question is a significant element. If a defendant merely asserts that his sentence is inconsistent with the sentencing code or contrary to the fundamental norms underlying the sentencing scheme, without providing an explanation in his statement of the reasons relied upon for allowance of appeal, the appellate court will not conclude that a substantial question has been presented, and therefore will not review the discretionary aspects of his sentence. *Commonwealth v. Goggins*, 748 A.2d 721, 727 (Pa. Super. 2000) (en banc), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000).

The standard of review of the discretionary aspects of a sentence has been well settled:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

¹⁴ Pa.R.A.P. 2119(f) provides:

(f) Discretionary aspects of sentence. An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

¹⁵ 42 PA.CONS.STAT.ANN. § 9781(b) provides:

The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005).

(b) **Challenge to the Legality of Sentence**

The law in Pennsylvania makes it clear that an illegal sentence may be appealed as of right:

§ 9781. Appellate review of sentence

(a) Right to appeal.—The defendant or the Commonwealth may appeal as of right the legality of the sentence.

42 PA.CON.S.TAT.ANN. § 9781(a). The standard and scope of review is well settled:

If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated. In evaluating a trial court’s application of a statute, our standard of review is plenary and is limited to determining whether the trial court committed an error of law.

Commonwealth v. Stevenson, 850 A.2d 1268, 1271 (Pa. Super. 2004) (citations omitted).

C. Appeals from PCRA Orders

The standard of review regarding an order denying a petition under the Post Conviction Relief Act, **42 PA.CON.S.TAT.ANN. § 9541 et seq.**, requires an inquiry into “whether the record supports the PCRA court’s determination and whether the court correctly stated and applied the law.” **Commonwealth v. DuPont**, 860 A.2d 525, 529 (Pa. Super. 2004), *appeal denied*, 585 Pa. 695, 889 A.2d 87 (2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2029 (2006). The PCRA court’s findings will not be disturbed unless those findings are unsupported by the record. *Id.*

If the trial court dismisses the PCRA petition without a hearing, the appellate court must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and denying relief without an evidentiary hearing. **Commonwealth v. Jordan**, 772 A.2d 1011, 1014 (Pa. Super. 2001).

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10.1 CHAPTER OVERVIEW

This chapter focuses on statutes that are essentially designed to protect the public from sexual offenders. Section 11.2 details Pennsylvania's Sex Offender Registration Act, otherwise known as "Megan's Law". Section 11.3 discusses civil commitment of juvenile sex offenders. The final two sections, 11.4 and 11.5, outline the use of DNA samples in various databases, with section 11.4 concentrating on the federal level and CODIS, and section 11.5 focusing on Pennsylvania's DNA data testing statute.

10.2 SEX OFFENDER REGISTRATION ACT: MEGAN'S LAW

A. Legislative History

Megan's Law was initially enacted in Pennsylvania in 1995 (known as "Megan's Law I"), and became effective in April 1996.¹ The stated purpose of Megan's Law was to protect the safety and welfare of people of the Commonwealth by mandating that sexually violent predators register with the proper authorities and that this registration be disseminated to the community. *See* 42 PA.CONS.STAT.ANN. §§ 9791(b), **Legislative findings and declaration of policy.**²

In 1999, the Pennsylvania Supreme Court, in *Commonwealth v. Williams*, 557 Pa. 285, 733 A.2d 593 (1999), *cert. denied*, 528 U.S. 1077 (2000) ("Williams I"), struck down provisions of Megan's Law I relating to sexually violent predators. In response, Megan's Law was reenacted in 2000 and thereafter called Megan's Law II.³

Megan's Law II changed the manner in which an individual was classified as a sexually violent predator. Under Megan's Law II, 42 PA.CONS.STAT.ANN. §§ 9791-9799.9, the burden of proving by clear and convincing evidence that the defendant was a sexually violent predator was placed on the Commonwealth. The burden was no longer on the defendant to prove that he was not a sexually violent predator. Under the new law, instead of being subject to an automatic increased maximum term of imprisonment, sexually violent predators were required to undergo lifetime registration, notification and counseling

¹ Pennsylvania's version of Megan's Law, now commonly referred to as Megan's Law III, is currently codified at 42 PA.CONS.STAT.ANN. §§ 9791-9799.9.

² *Commonwealth v. Leddington*, 908 A.2d 328, 331 (Pa.Super. 2006).

³ In *Commonwealth v. Mullins*, 905 A.2d 1009 (Pa.Super. 2006), the Superior Court of Pennsylvania rejected the constitutional challenges to Megan's Law II and affirming the judgment of sentence, was filed on August 10, 2006.

procedures. That same year, an amendment to the act added Sexual Exploitation of Children as a new registerable offense.

Later, the Pennsylvania Supreme Court, in ***Commonwealth v. Williams***, 574 Pa. 487, 832 A.2d 962 (Pa. 2003) (“Williams II”), held that in absence of “competent and credible evidence undermining the relevant legislative findings”, Megan’s Law registration, notification, and counseling provisions for sexually violent predators were “non-punitive, regulatory measures supporting a legitimate governmental purpose.” 574 Pa. at 528, 832 A.2d at 986. However, it further held that the penalty provisions for failing to register or verify residence were unconstitutionally punitive. The court severed those provisions from the remainder of the statute and remanded the case back to the trial court for consideration of the appellant’s remaining arguments: whether Megan’s Law was void for vagueness; was violative of substantive due process guarantees; was violative of the separation of powers doctrine; and contained more than one subject in contravention of *Article 3, § 3 of the Pennsylvania Constitution*. The trial court rejected appellant’s constitutional arguments without holding a hearing; an appeal followed. In remanding the case back to the trial court and ordering a hearing, the Superior Court held that the trial court should have held an evidentiary hearing and made an independent determination on appellant’s constitutional challenges.

Commonwealth v. Williams, 877 A.2d 471, 478 (Pa. Super. 2005), *appeal denied*, 586 Pa. 770, 895 A.2d 1261 (2006).

In ***Commonwealth v. Askew***, 907 A.2d 624 (Pa.Super. 2006), *appeal denied*, ___ Pa. ___, 919 A.2d 954 (2007), the Superior Court reiterated the Supreme Courts decisions in Williams I and Williams II that the registration, notification, and counseling requirements of Megan’s Law II, for persons deemed sexually violent predators, do not constitute punishment for purposes of Due Process Clause.

In the meantime, Megan’s Law II went through several statutory changes in 2004, and is now referred to as Megan’s Law III. The legislature deleted the penalty section of Megan’s Law II and added a charge to the crimes code for failing to comply with registration and verification procedures. It also added new definitions, registerable crimes, procedures and classifications for out-of-state or court martialled or juvenile offenders, exemptions from certain notifications, and an annual performance audit. Most notably, the new law added a section allowing registration information of all sexual offenders to be made available on the Internet. It also amended the statutes relating to verification of residence, community or “other” notification, immunity for good faith conduct and duties of the Pennsylvania State Police.

In 2005, the legislature declared that young children were highly vulnerable when walking to and from elementary school and that the Commonwealth had a compelling state interest in protecting them from sexually violent predators.

New sections were added, imposing limitations on residence for sexually violent predators and creating a new offense for sexually violent predators who violate the restrictions.

B. Definitions

Under 42 PA. CONS. STAT. ANN. § 9792, the following definitions are provided in Megan's Law III:

“Active notification” Notification pursuant to section 9798 (relating to other notification) or any process whereby law enforcement, pursuant to the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation, notifies persons in the community in which the individual resides, including any person identified in section 9798(b), of the residence, employment or school location of the individual.

“Approved registration site” A site in this Commonwealth approved by the Pennsylvania State Police as required by section 9799.1(2):

1. at which individuals subject to this subchapter may register, verify information or be fingerprinted or photographed as required by this subchapter;
2. which is capable of submitting fingerprints utilizing the Integrated Automated Fingerprint Identification System or in another manner and in such form as the Pennsylvania State Police shall require; and
3. which is capable of submitting photographs utilizing the Commonwealth Photo Imaging Network or in another manner and in such form as the Pennsylvania State Police shall require.

“Board” The State Sexual Offenders Assessment Board.

“Common interest community” Includes a cooperative, a condominium and a planned community where an individual by virtue of an ownership interest in any portion of real estate is or may become obligated by covenant, easement or agreement imposed upon the owner's interest to pay any amount for real property taxes, insurance, maintenance, repair, improvement, management, administration or regulation of any part of the real estate other than the portion or interest owned solely by the individual.

“Commonwealth Photo Imaging Network” The computer network administered by the Commonwealth and used to record and store digital photographs of an individual's face and any scars, marks, tattoos or other unique features of the individual.

“Employed” Includes a vocation or employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, pursuant to a contract or for the purpose of government or educational benefit.

“Integrated Automated Fingerprint Identification System” The national fingerprint and criminal history system maintained by the Federal Bureau of Investigation providing automated fingerprint search capabilities, latent searching capability, electronic image storage and electronic exchange of fingerprints and responses.

“Mental Abnormality” A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of any other persons.

“Minor” As used in section 9795.1(relating to registration), is any individual under the age of 18 unless the age of the victim who is considered a minor is otherwise defined in section 9795.1.

“Municipality” A city, borough, incorporated town or township.

“Offender” An individual required to register under section 9795.1(a), (b)(1) or (2)(relating to registration).

“Passive Notification” Notification pursuant to section 9798.1 (relating to information made available on the Internet) or any process whereby persons, pursuant to the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation, are able to access information pertaining to an individual as a result of the individual having been convicted or sentenced by a court for an offense similar to an offense listed in section 9795.1(relating to registration).

“Penetration” Includes any penetration, however slight, of the genitals or anus or mouth of another person with a part of the person’s body or a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

“Predatory” An act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization.

“Residence” A location where an individual resides or is domiciled or intends to be domiciled for 30 consecutive days or more during a calendar year.

“Sexually violent offense” Any criminal offense specified in section 9795.1 (relating to registration).

“Sexually violent predator” A person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses. The term includes an individual determined to be a sexually violent predator where the determination occurred in the United States or one of its territories or

possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico, a foreign nation or by court martial.

“Student” A person who is enrolled on a full-time or part-time basis in any public or private educational institution, including any secondary school, trade or professional institution or institution of higher education.

C. Registration

The registration provisions of Megan’s Law III are mandatory; defendants convicted of certain enumerated sex offenses must register, and there are enhanced registration provisions for convicted defendants found to be sexually violent predators.⁴ 42 PA. CONS. STAT. ANN. § 9795.1. Offenders and Sexually Violent Predators must register with the Pennsylvania State Police upon release from (1) incarceration, (2) upon parole from a State or county correctional facility, or (3) upon the commencement of a probationary or intermediate punishment sentence.

An “offender” is classified according to his designation as a Sexually Violent Predator (SVP) or the nature of the predicate crime for which he/she was convicted. The classifications for registration, more specifically listed below, are as follows:

- (1) An SVP (lifetime reporting);
- (2) A Ten Year Reporter: an offender convicted of one or more of the offenses enumerated in 42 PA. CONS. STAT. ANN. § 9795.1(a)(1); or an attempt to commit any of the offenses under 42 PA. CONS. STAT. ANN. § 9795.1(a)(1) or 42 PA. CONS. STAT. ANN. § 9795.1(b)(2).
- (3) A Non-SVP Lifetime Reporter: an individual with two or more convictions of any of the offenses set forth in 42 PA. CONS. STAT. ANN. § 9795.1(a)(1); or an offender convicted of one or more of the offenses enumerated in 42 PA. CONS. STAT. ANN. § 9795.1(b)(2).

Failure to comply with the applicable registration requirements results in a separate criminal offense: (1) failure to comply with the ten-year reporting requirement constitutes a felony of the third degree, 42 PA. CONS. STAT. ANN. § 9795.2(d)(1); (2) failure to comply with the lifetime reporting requirements constitutes a felony of the first degree, 42 PA. CONS. STAT. ANN. § 9795.2(d)(2).

1. Ten Year Registration

42 PA. CONS. STAT. ANN. § 9795.1(a)

(a) Specified Offenses

42 PA. CONS. STAT. ANN. § 9795.1(a)(1)

⁴ *Commonwealth v. Coco*, 747 A.2d 1237, 1238-1239 (Pa.Super. 2000). *See also, Commonwealth v. Howe*, 842 A.2d 436, 446 (Pa.Super. 2004)(registration provisions applicable under Megan’s Law do not violate privacy rights: “the momentary inconvenience of disclosing the above-described information to police is greatly outweighed by the need to ensure public safety . . .”).

Kidnapping (where the victim is a minor)

18 PA.CONS.STAT.ANN. §2901

Luring a Child into a Motor Vehicle

18 PA.CONS.STAT.ANN. § 2910

Institutional Sexual Assault

18 PA.CONS.STAT.ANN. § 3124.2

Indecent Assault (where the offense is a misdemeanor of the first degree)

18 Pa.Cons.Stat.Ann. § 3126

Incest (where the victim is 12 years of age or older but under 18 years of age)

18 PA.CONS.STAT.ANN. § 4302

Prostitution (where the actor promotes the prostitution of a minor)

18 PA.CONS.STAT.ANN. § 5902(b)

Obscene and Other Sexual Materials and Performances

(where the victim is a minor)

18 PA.CONS.STAT.ANN. § 5903(a)(3), (4), (5) or (6)

Sexual Abuse of Children

18 PA.CONS.STAT.ANN. § 6312

Unlawful Contact with Minor

18 PA.CONS.STAT.ANN. § 6318

Sexual Exploitation of Children

18 PA.CONS.STAT.ANN. § 6320

(b) Attempt

42 PA.CONS.STAT.ANN. § 9795.1(a)(2)

Individuals convicted of an attempt to commit any of the offenses under 42 PA. CONS. STAT. ANN. § 9795.1(a)(1) or 42 PA.CONS.STAT. ANN. § 9795.1(b)(2). *See* 42 PA.CONS.STAT.ANN. § 9795.1(a)(2).

(c) Tolling

The ten-year period is tolled when an offender is recommitted for a parole violation or sentenced to an additional term of imprisonment.
42 PA. CONS. STAT. ANN. § 9795. 2(a)(3)

2. Lifetime Registration

42 PA. CONS. STAT. ANN. § 9795.1(b)

(a) Multiple Convictions

An individual with two or more convictions of any of the offenses set forth in 42 PA. CONS. STAT. ANN. § 9795.1(a)(1).

(b) **Specified Offenses**

42 PA. CONS. STAT. ANN. § 9795.1(b)(2)

Rape

18 PA. CONS. STAT. ANN. § 3121

Involuntary Deviate Sexual Intercourse

18 PA. CONS. STAT. ANN. § 3123

Sexual Assault

18 PA. CONS. STAT. ANN. § 3124.1

Aggravated Indecent Assault

18 PA. CONS. STAT. ANN. § 3125

Incest (when the victim is under 12 years of age)

18 Pa. Cons. Stat. Ann. § 4302

(c) **Sexually Violent Predators**

A person who has been convicted of a sexually violent offense as set forth in 42 PA. CONS. STAT. ANN. § 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 42 PA. CONS. STAT. ANN. § 9795.4.

3. Relevant Case Law

(a) **No Ex-Post Facto Violation**

Registration requirements are remedial and not punitive. Therefore, no ex post facto violation occurs when a defendant commits a registerable offense prior to the effective date of Megan's Law and is subsequently required to comply with its registration requirements.

Commonwealth v. Gaffney, 733 A.2d 616, 622 (Pa. 1999);

Commonwealth v. Fleming, 801 A.2d 1234 (Pa. Super. 2002), *appeal denied*, 588 Pa. 776, 906 A.2d 539 (2006).

(b) **Plea Withdrawals**

The registration requirement is a collateral consequence to a guilty plea. Therefore, lack of awareness of the registration requirement at the time of the plea does not render the plea to be unknowing or involuntary. **Commonwealth v. Leidig**, 850 A.2d 743 (Pa. Super. 2004), *appeal granted*, ___ Pa. ___, 918 A.2d 743 (2007);

Commonwealth v. Benner, 853 A.2d 1068 (Pa. Super. 2004).

However, as indicated above, the Pennsylvania Supreme Court has accepted review of **Leidig**; no request for review by the Pennsylvania Supreme Court was filed in **Benner**.

Increase in length of registration period under Megan's Law II does not constitute punishment. Therefore, where a defendant pleads guilty to an offense that is subject to ten year registration under

Megan’s Law I and then Megan’s Law II gets enacted, requiring lifetime registration for that offense, this does not constitute a basis for plea withdrawal. **Commonwealth v. Fleming**, 801 A.2d 1234 (Pa. Super. 2002), appeal denied, *appeal denied*, 588 Pa. 776, 906 A.2d 539 (2006); **Commonwealth v. Benner**, 853 A.2d 1068 (Pa. Super. 2004).

(c) Retroactive Application

Date of offense, guilty plea or sentencing is not dispositive when determining whether Megan’s Law applies to a particular defendant. As long as the defendant remains in custody of correctional authorities serving any portion of his original sentence, Megan’s Law II registration requirements will apply to that defendant. **Commonwealth v. Benner**, 853 A.2d 1068, 1072 (Pa. Super. 2004)(where defendant continued to serve his sentence for the sex offense at issue after the enactment of Megan’s Law II, he is subject to registration rules of Megan’s Law II).

Megan’s Law II registration requirement applies to defendant who pleaded guilty in Hawaii prior to Megan’s Law II enactment and then moved to Pennsylvania after release from prison to complete “supervised release” under original sentence. **Commonwealth v. Miller**, 787 A.2d 1036 (Pa. Super. 2001), *appeal denied*, 568 Pa. 735, 798 A.2d 1288 (2002).

No retroactive application to those who have maxed out on their Megan’s Law offenses prior to the effective date of the Act. **Commonwealth v. Richardson**, 784 A.2d 126 (Pa. Super. 2001), *appeal denied*, 568 Pa. 630, 793 A.2d 907 (2002). (Megan’s Law I registration requirement does not apply to defendant who fully served his sentence for the sex offenses prior to effective date of Megan’s Law I and remained in prison on unrelated offenses.)

D. Registration Procedures and Applicability

The registration provisions of Megan’s Law III are contained in 42 PA. CONS. STAT. ANN. § 9795.2.

1. Time for Mandatory Registration

- i. Upon release from incarceration;
- ii. Upon parole from a State or county correctional institution; or
- iii. Upon the commencement of a sentence of intermediate punishment or probation. 42 PA. CONS. STAT. ANN. § 9795.2(a)(1).

2. Information to be Provided

- i. All current or intended residences;
- ii. All information concerning current or intended employment;

- iii. All information concerning current or intended enrollment as a student. 42 PA. CONS. STAT. ANN. § 9795.2(a)(1).

3. Notification of Changes

Offenders and sexually violent predators must inform the Pennsylvania State Police **within 10 days** of:

- i. Any change of residence or establishment of additional residence(s);
- ii. Any change of employer or employment location for a period of time that will exceed 14 days or for an aggregate period of time that will exceed 30 days during any calendar year, or termination of employment;
- iii. Any change of institution or location at which the person is enrolled as a student, or termination of enrollment; or
- iv. Becoming employed or enrolled as a student if the person has not previously provided that information to the Pennsylvania State Police. 42 PA. CONS. STAT. ANN. § 9795.2(a)(2).

4. Registration in Another State

Offenders and sexually violent predators must register with a new law enforcement agency no later than ten days after establishing residence in another state. 42 PA. CONS. STAT. ANN. § 9795.2(a)(2.1).

5. Tolling

The ten-year registration period is tolled when an offender is recommitted for a parole violation or sentenced to an additional term of imprisonment. Department of Corrections or county correctional facility must notify the Pennsylvania State Police of the admission of the offender. 42 PA. CONS. STAT. ANN. § 9795.2(a)(3).

6. Collection of Registration Information

(a) Collection Responsibility

For offenders or sexually violent predators

- (i) Granted parole by the Pennsylvania Board of Probation and Parole or the court, or
- (ii) Sentenced to probation or intermediate punishment the board or county office of probation and parole must collect registration information and forward that information to the Pennsylvania State Police. 42 PA. CONS. STAT. ANN. § 9795.2(a)(4)(i).

(b) No Release Pending Verification

The offender or sexually violent predator must not be released until there is verification from the Pennsylvania State Police that it has received the registration information. 42 PA. CONS. STAT. ANN. § 9795.2(4)(i).

(c) Expiration of Incarceration

Where release is scheduled because of the expiration of the maximum term of incarceration, the Department of Corrections or county correctional facility must collect registration information no later than 10 days prior to the maximum expiration date. 42 PA. CONS. STAT. ANN. § 9795.2(4)(i).

(d) Refusal to Provide Necessary Registration Information

If the offender or sexually violent predator refuses to provide the registration information, the Department of Corrections or county correctional facility must notify the Pennsylvania State Police or police department with jurisdiction over the facility of the failure to provide registration information and of the expected date, time and location of the release of said person. 42 PA. CONS. STAT. ANN. § 9795.2(a)(4)(ii).

7. Out-of-State or Court Martialed Individuals

Section 9795.2(b) of Pennsylvania’s Megan’s Law III is designed to require registration for out-of-state sex offenders who transfer supervision to Pennsylvania, as well as court martialed and other types of out-of-state offenders. 42 PA. CONS. STAT. ANN. § 9795.2(b).

(a) Individuals Covered

The “individuals” covered by this section are defined as follows:

Adult Conviction or Court Marital: An individual who resides, is employed or is a student in Pennsylvania:

- who has been convicted, sentenced, or court martialed for
 - a sexually violent offense, or
 - a similar offense under the laws of the United States, any state, the District of Columbia or any U.S. territory,⁵ or
- who was required to register under a sexual offender statute in the other jurisdiction.

Juvenile Adjudication: An individual who resides, is employed or is a student in Pennsylvania:

- who is registered as a sex offender
 - under the laws of the United States, any state, the District of Columbia or any U.S. territory⁶
- as a result of a juvenile adjudication.

⁵ Includes determinations made in the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico, a foreign nation or by court martial.

⁶ Includes determinations made in the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico, a foreign nation or by court martial.

(b) Registration Requirements

The “individuals” as defined above must register at an approved registration site within 48 hours of the individual’s arrival in Pennsylvania.

(c) Lifetime Registration

All out-of-state or court-martialed individuals are subject to lifetime registration in Pennsylvania if,

- i. they have been classified as a sexually violent predator;⁷ or
- ii. they have been determined under the laws of the other jurisdiction or by reason of court martial to be subject to active notification and lifetime registration.⁸
- iii. they have been, by way of an out-of-state juvenile adjudication, (1) classified as a sexually violent predator required to register as a sex offender, or (2) determined under the laws of the other jurisdiction or by reason of court martial to be subject to active notification and lifetime registration.⁹
- iv. they have been convicted, sentenced, or court martialled for an offense listed in 42 PA. CONS. STAT. ANN. § 9795.1(b) or an equivalent offense:
 - An individual with two or more convictions of any of the offenses set forth in 42 PA. CONS. STAT. ANN. § 9795.1(a)(1);
 - Rape, 18 PA.CONS.STAT.ANN. § 3121;
 - Involuntary Deviate Sexual Intercourse, 18 PA.CONS.STAT.ANN. § 3123;
 - Sexual Assault, 18 PA.CONS.STAT.ANN. § 3124.1;
 - Aggravated Indecent Assault, 18 PA.CONS.STAT. ANN. § 3125;
 - Incest (when the victim is under 12 years of age), 18 PA.CONS.STAT.ANN. § 4302
- v. these individuals are also subject to other provisions of Megan’s Law, including:
 - Registration Procedures, 42 PA. CONS. STAT. ANN. § 9795.2;
 - Verification of Residence, 42 PA. CONS. STAT. ANN. § 9796;
 - Other Notifications, 42 PA. CONS. STAT. ANN. § 9798;¹⁰
 - Information made available on the Internet, 42 PA. CONS. STAT. ANN. § 9798.1(c)(1).

⁷ 42 PA. CONS. STAT. ANN. § 9795.2(b)(4)(1).

⁸ 42 PA. CONS. STAT. ANN. § 9795.2(b)(4)(1).

⁹ 42 PA. CONS. STAT. ANN. § 9795.2(b)(5)(1).

¹⁰ According to the statute, this section does not apply to juvenile adjudications, 42 PA. CONS. STAT. ANN. § 9795.2(b)(5)(i).

(d) Ten Year Registration

All out-of-state or court-martialed individuals are subject to registration for ten years (or period of time equal to the time for which the individual was required to register, whichever is greater, less any credit due to the individual as a result of prior compliance with registration requirements) in Pennsylvania, if

i. Has been convicted or sentenced by a court or court martial for an offense listed in section 9795.1(a) or an equivalent offense:

- Kidnapping (where the victim is a minor), 18 PA.CON.S.TAT.ANN. §2901;
- Luring a Child into a Motor Vehicle, 18 PA.CON.S.TAT.ANN. § 2910;
- Institutional Sexual Assault, 18 PA.CON.S.TAT. ANN. § 3124.2;
- Indecent Assault (where the offense is a misdemeanor of the first degree), 18 PA.CON.S.TAT.ANN. § 3126;
- Incest (where the victim is 12 years of age or older but under 18 years of age), 18 PA.CON.S.TAT.ANN. § 4302;
- Prostitution (where the actor promotes the prostitution of a minor), 18 PA.CON.S.TAT.ANN. § 5902(b);
- Obscene and Other Sexual Materials and Performances (where the victim is a minor), 18 PA.CON.S.TAT.ANN. § 5903(a)(3), (4), (5) or (6);
- Sexual Abuse of Children, 18 PA.CON.S.TAT.ANN. § 6312;
- Unlawful Contact with Minor, 18 Pa.Cons.Stat. Ann. § 6318;
- Sexual Exploitation of Children, 18 Pa.Cons. Stat.Ann. § 6320

ii. These individuals are also subject to other provisions of Megan’s Law, including:

- Registration Procedures, 42 PA. CONS. STAT. ANN. § 9795.2;
- Verification of Residence, 42 PA. CONS. STAT. ANN. § 9796;
- Information made available on the Internet, 42 PA. CONS. STAT. ANN. § 9798.1(c)(1).

(e) Individuals Subject to Active Notification

If an individual is subject to active notification in another jurisdiction or subject to active notification by way of court martial, the individual is considered an offender in Pennsylvania and subject to registration.

i. Subject to provisions of Megan’s Law including:

- Registration Procedures, 42 PA. CONS. STAT. ANN. § 9795.2;
- Other Notification, 42 PA. CONS. STAT. ANN. § 9798;
- Information made available on the Internet, 42 PA. CONS. STAT. ANN. § 9798.1(c)(1).

- ii. If the individual were convicted, sentenced, or court martialled for an offense listed in 42 PA. CONS. STAT. ANN. § 9795.1(b) or an equivalent offense, then the individual is subjected to Pennsylvania's Megan's Law for lifetime.
- iii. If the individual were convicted, sentenced, or court martialled for an offense listed in 42 PA. CONS. STAT. ANN. § 9795.1(a) or an equivalent offense, then the individual is subjected to Pennsylvania's Megan's Law for
 - Ten years or
 - Period of time equal to the time for which the individual was required to register in the other jurisdiction or required to register by reason of court martial, whichever is greater, less any credit due to the individual as a result of prior compliance with registration requirements.

If an individual is subject to active notification in another jurisdiction by way of a juvenile adjudication, the individual is considered an offender in Pennsylvania and subject to registration.

- i. Subject to provisions of Megan's Law including:
 - Registration Procedures, 42 PA. CONS. STAT. ANN. § 9795.2;
 - Other Notification, 42 PA. CONS. STAT. ANN. § 9798;
 - Information made available on the Internet, 42 PA. CONS. STAT. ANN. § 9798.1(c)(1).
- ii. Period of time equal to the time for which the individual was required to register in the other jurisdiction less any credit due to the individual as a result of prior compliance with registration requirements.

(f) Passive Notification

If an individual is subject to passive notification in another jurisdiction or subject to passive notification by way of court martial, the individual is considered an offender in Pennsylvania and subject to registration.

- i. Subject to provisions of Megan's Law including:
 - Registration Procedures, 42 PA. CONS. STAT. ANN. § 9795.2;
 - Other Notification, 42 PA. CONS. STAT. ANN. § 9796 (Verification);
 - Information made available on the Internet, 42 PA. CONS. STAT. ANN. § 9798.1(c)(1).
- ii. Period of time equal to the time for which the individual was required to register in the other jurisdiction or required to register by reason of court martial, less any credit due to the individual as a result of prior compliance with registration requirements.

If an individual is subject to passive notification in another jurisdiction by way of a juvenile adjudication, the individual is considered an offender in Pennsylvania and subject to registration.

- i. Subject to provisions of Megan’s Law including:
 - Registration Procedures, 42 PA. CONS. STAT. ANN. § 9795.2;
 - Other Notification, 42 PA. CONS. STAT. ANN. § 9796;
 - Information made available on the Internet, 42 PA. CONS. STAT. ANN. § 9798.1(c)(1).
- ii. Period of time equal to the time for which the individual was required to register in the other jurisdiction less any credit due to the individual as a result of prior compliance with registration requirements.

(g) Relevant Case Law

Imposition of community notification violates out-of-state defendant’s constitutional right to equal protection when the offender transfers supervision to Pennsylvania and would only have been subject to community notification in Pennsylvania after a hearing but did not receive a hearing in the other state. *Doe v. McVey*, 381 F.Supp.2d 443 (E.D.Pa. 2005) (Where defendant was convicted of a registerable crime in New Jersey but did not have an assessment hearing because he was returning to Pennsylvania, defendant does not have to submit to community notification in Pennsylvania. Had the defendant been convicted of the same offense in Pennsylvania, he would only have been subject to community notification after a hearing and he had been designated a sexually violent predator. Such disparate treatment violates the Equal Protection Clause.)

8. Penalty for Failure to Register

Individuals subject to registration under § 9795.1(a) or (b) who fail to register with the Pennsylvania State Police as required may be subject to prosecution under 18 PA. CONS. STAT. ANN. § 4915, Failure to Comply with Registration of Sexual Offenders Requirements. 42 PA. CONS. STAT. ANN. § 9795.2(d). In *Commonwealth v. Wilson*, 589 Pa. 559, 910 A.2d 10 (2006), the Pennsylvania Supreme Court held that the portions of Megan’s Law authorizing criminal prosecutions for failing to comply with the reporting requirements for non-SVPs, whether ten year or lifetime reporters, are constitutional.

9. Registration Sites

Individuals subject to § 9795.1 must register and submit to fingerprinting and photographing as required by this subchapter at approved registration sites. (See definition of approved registration site, § 9792.). 42 PA. CONS. STAT. ANN. § 9795.2(e).

E. Sentencing Court Responsibilities

The plain language of 42 PA. CONS. STAT. ANN. § 9795.3 outlines the sentencing court's duty, at the time of sentencing, to inform the offender or SVP about what is required of him to comply with Megan's Law. *Commonwealth v. Baird*, 856 A.2d 114, 116 (Pa.Super. 2004).

At the time of sentencing, the court must specifically inform offenders and sexually violent predators of the following:

- (a) Duty to register and provide the information required for each registration, including verification as required in section 9796(a).
- (b) Duty to inform the Pennsylvania State Police within ten days if there is
 - i. a change in residence
 - ii. an establishment of additional residence(s)
 - iii. a change in employer or employment location for a period of time that will exceed 14 days or for an aggregate period of time that will exceed 30 days during any calendar year
 - iv. a termination of employment
 - v. a change in institution or location at which the person is enrolled as a student, or
 - vi. a termination of enrollment
- (c) Duty to inform the Pennsylvania State Police within ten days of becoming employed or enrolled as a student if the person has not previously provided that information to the Pennsylvania State Police.
- (d) Duty to register with a new law enforcement agency if the person moves to another state no later than ten days after establishing residence in another state.
- (e) Duty to register with the appropriate authorities in any state in which the person is employed, carries on a vocation or is a student if the state requires such registration.
- (f) The court must also specifically inform a sexually violent predator concerning the limitations on residence imposed by section 9796.1.

The sentencing court must also:

- (a) Order the fingerprints and photograph of the offender or sexually violent predator to be provided to the Pennsylvania State Police upon sentencing and
- (b) Require the offender or sexually violent predator to read and sign a form stating that the duty to register under this subchapter has been explained.

- (c) Where the person is incapable of reading, the court must certify the duty to register was explained and that the person indicated an understanding of the duty.
- (d) Require the sexually violent predator to read and sign a form stating that the limitations on residence for sexually violent predator under section 9796.1 have been explained.
- (e) Where the sexually violent predator is incapable of reading, the court must certify that the limitations on residence were explained and that the person indicated an understanding of the limitations on residence.
 - Court must conduct assessment before sentencing: Sentencing court cannot legally sentence defendant to probation, immediately upon a guilty plea, without first determining whether defendant is a sexual offender or a sexually violent predator. This is because there are different obligations depending on the classification of the defendant and the trial court must inform the defendant of his reporting obligations at the time of sentencing. *Commonwealth v. Baird*, 856 A.2d 114, 115 (Pa. Super. 2004).

F. Assessments

1. Order for Assessment

In accordance with 42 PA. CONS. STAT. ANN. § 9795.4(a), after conviction but before sentencing, a court must order an individual convicted of an offense specified in section 9795.1 to be assessed by the board.

This order must be sent to the administrative officer of the board within ten days of the date of conviction.

2. Factors

After the board receives the court's order for an assessment, a member of the board as designated by the administrative officer of the board must conduct an assessment of the individual to determine if the individual should be classified as a sexually violent predator. 42 PA. CONS. STAT. ANN. § 9795.4(b).

The assessments should include, but are not limited to, an examination of the following:

- (a) Facts of the current offense, including:
 - Whether the offense involved multiple victims;
 - Whether the individual exceeded the means necessary to achieve the offense;
 - The nature of the sexual contact with the victim;
 - Relationship of the individual to the victim;
 - Age of the victim;

- Whether the offense included a display of unusual cruelty by the individual during the commission of the crime
 - The mental capacity of the victim.
- (b) Prior offense history, including:
- The individual's prior criminal record;
 - Whether the individual completed any prior sentences;
 - Whether the individual participated in available programs for sexual offenders.
- (c) Characteristics of the individual, including:
- Age of the individual;
 - Use of illegal drugs by the individual;
 - Any mental illness, mental disability or mental abnormality;
 - Behavioral characteristics that contribute to the individual's conduct.
- (d) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.

3. Release of Information

In accordance with 42 PA. CONS. STAT. ANN. § 9795.4(c), all State, county and local agencies, offices or entities in the Commonwealth, including juvenile probation officers, must provide copies of records and information as requested by the board in connection with the court-ordered assessment and the assessment requested by the Pennsylvania Board of Probation and Parole or the assessment of a delinquent child under section 6358 (relating to assessment of delinquent children by the State Sexual Offenders Assessment Board).

- This section should be construed as an exemption to Section 6307 of the Juvenile Act, which protects the confidentiality of records which fall under the Juvenile Act. *Commonwealth v. Kopicz*, 840 A.2d 342 (Pa. Super. 2003).

4. Submission of Report by Board

The board has 90 days from the date of conviction of the individual to submit a written report containing its assessment to the district attorney. 42 PA. CONS. STAT. ANN. § 9795.4(d).

5. Hearing

Hearings are scheduled and conducted in accordance with 42 PA. CONS. STAT. ANN. § 9795.4(e).

- (a) Hearing is scheduled upon filing of praecipe by the district attorney.

- (b) Upon filing a praecipe, the district attorney must serve a copy of praecipe and board report upon defense counsel.
- (c) The individual and district attorney are given notice of the hearing and opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses.
- (d) The individual has a right to counsel and have a lawyer appointed to represent him if he cannot afford one.
- (e) If the individual requests another expert assessment, he shall provide a copy of the expert assessment to the district attorney prior to the hearing.
- (f) At the hearing prior to sentencing, the court must determine whether the Commonwealth has proven by **clear and convincing evidence** that the individual is a sexually violent predator. *Commonwealth v. Hitner*, 910 A.2d 721, 729 (Pa.Super. 2006).
- (g) A copy of the order containing the determination of the court must be **immediately** submitted to the individual, district attorney, Pennsylvania Board of Probation and Parole, Department of Corrections, board and Pennsylvania State Police.

6. Presentence Investigation

Copies of the board assessment must be provided to the agency preparing the presentence investigation. 42 PA. CONS. STAT. ANN. § 9795.4(f).

7. Parole Assessment

The Pennsylvania Board of Probation and Parole may request the board conduct an assessment and submit a report to them prior to considering an offender or sexually violent predator for parole. 42 PA. CONS. STAT. ANN. § 9795.4(g).

8. Delinquency

In accordance with 42 PA. CONS. STAT. ANN. § 9795.4(h), with respect to delinquent children,¹¹ the probation officer must notify the board, as well as the facility where the child is placed, 90 days prior to the 20th birthday of the delinquent child of the status of the delinquent child who is committed to an institution or other facility pursuant to section 6352 (relating to disposition of delinquent child), after having been found delinquent for an act of sexual violence, which if committed by an adult would have been a violation of:

- i. 18 PA. CONS. STAT. ANN. § 3121 (Rape)
- ii. 18 PA. CONS. STAT. ANN. § 3123 (Involuntary Deviate Sexual Intercourse)
- iii. 18 PA. CONS. STAT. ANN. § 3124.1 (Sexual Assault)

¹¹ Except where 42 PA. CONS. STAT. ANN. § 6358(b.1) (relating to assessment of delinquent children by the State Sexual Offenders Assessment Board) is applicable.

- iv. 18 PA.CON.S.TAT.ANN. § 3125 (Aggravated Indecent Assault)
- v. 18 PA.CON.S.TAT.ANN. § 3126 (Indecent Assault)
- vi. 18 PA.CON.S.TAT.ANN. § 4302 (Incest)

The board must conduct an assessment of the child, which must include the board's determination of whether or not the child is in need of commitment due to a mental abnormality as defined in section 6402 (relating to definitions) or a personality disorder, either of which results in serious difficulty in controlling sexually violent behavior and provide a report to the court within the time frames set in section 6358(c). The probation officer must assist the board in obtaining access to the child and any records or information as requested by the board in connection with the assessment.

9. Other Assessments

Upon receipt from the court of an order for an assessment under section 9795.5 (relating to exemption from certain notification), a member of the board as designated by the administrative officer of the board must conduct an assessment of the individual to determine if the relief sought, if granted, is likely to pose a threat to the safety of any other person. 42 PA. CONS. STAT. ANN. § 9795.4(i).

10. Pertinent Case Law

(a) Constitutionality

Definition of "Sexually Violent Predator" sufficiently clear and specific. *Commonwealth v. Rhoads*, 836 A.2d 159 (Pa. Super 2003).

Definition of "Mental Abnormality" is specifically defined and not vague. Undefined terms "personality disorder" and "likely to engage in" not vague on their face and are sufficiently definite.

Commonwealth v. Howe, 842 A.2d 436 (Pa. Super. 2004).

SVP determination does not constitute double jeopardy as one is not "charged" as an SVP. *Commonwealth v. Moody*, 843 A.2d 402, 405 n. 1 (Pa.Super.2004), *appeal denied*, 584 Pa. 693, 882 A.2d 477 (2005); *Commonwealth v. Davis*, 708 A.2d 116 (Pa.Super. 1998).

(b) Sufficiency of Evidence

SVP classification does not automatically apply to someone convicted of a sexual offense. *Commonwealth v. Krouse*, 799 A.2d 835 (Pa. Super. 2002), *appeal denied*, 573 Pa. 671, 821 A.2d 586 (2003).¹²

¹² Regarding the standard of appellate review, the Pennsylvania Supreme Court, in *Commonwealth v. Meals*, 590 Pa. 110, ___, 912 A.2d 213, 222-223 (2006), stated that the standard is one of review, i.e., whether the evidence and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as the prevailing party, was sufficient to establish all of the elements of a sexually violent predator; and therefore disapproving of the broader standard utilized by the Superior Court in *Commonwealth v. Krouse*.

The Commonwealth must present clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied. **Commonwealth v. Hitner**, 910 A.2d 721, 729 (Pa.Super. 2006); **Commonwealth v. Plucinski**, 868 A.2d 20 (Pa. Super. 2005).

Clear and convincing standard requires evidence that is so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. **Commonwealth v. Dixon**, 907 A.2d 533, 535 (Pa.Super. 2006), *appeal denied*, ___ Pa. ___, ___ A.2d ___, 2007 WL 906691 (Pa. Mar 27, 2007).

Salient inquiry in sexual violent predator classification matters is identification of the impetus behind the commission of the crime and the extent to which the offender is likely to reoffend. **Commonwealth v. Price**, 876 A.2d 988 (Pa. Super. 2005), *appeal denied*, 587 Pa. 706, 897 A.2d 1184 (2006), *cert. denied*, 127 S.Ct. 224, 166 L.Ed.2d 179, 75 USLW 3171 (2006).

(c) Expert Testimony

Since predictors of future dangerousness, specifically mental illness, mental disability or mental abnormality, are factors that must be weighed heavily, expert testimony as to the presence of the defect/disorder is required. **Commonwealth v. Bey**, 841 A.2d 562 (Pa. Super. 2004).

Even though a trial court may find the testifying expert or Board member to be credible, that does not necessarily lead to the conclusion that the Commonwealth has proved by clear and convincing evidence all the elements of an SVP classification. **Commonwealth v. Lipphardt**, 841 A.2d 551 (Pa. Super. 2004)

Even though the witness was not a psychologist or psychiatrist, can be qualified as an expert. **Commonwealth v. Malseed**, 847 A.2d 112 (Pa. Super. 2004), *appeal denied*, 580 Pa. 712, 862 A.2d 1254 (2004). The following qualifications of the expert were considered by the Court:

- had master's degree in counseling and taken post-grad classes for the DSM and another for mental abnormalities and personality disorders of the type often seen in sexual offenders;
- was involved in treatment and assessment of sexual offenders for 10 years and had assessed and treated over 300 individuals, 60 or 65 in the context of SVP assessments;
- became member of Board 4 years prior and was required to perform at least 2,000 hours of treatment to offenders prior to joining;

- took sexual offender evaluation and treatment training for 8 years in a row;
- had certification from Virginia in field of sexual offender treatment and assessment (no such certification existed in Pennsylvania);
- qualified as an expert 12 to 14 times in various counties;
- had specific training in diagnosis of conditions under relevant diagnostic manuals

Defendant's due process right were violated when trial court refused to appoint an expert when defendant could not afford to hire an expert to assist in preparing for his SVP hearing or testify on his behalf at the hearing. Need for expert assistance is compelling in SVP hearings where "a defendant's mental condition and likelihood of future dangerousness are the central issues." **Commonwealth v. Curnette**, 871 A.2d 839, 843 (Pa. Super. 2005); **Commonwealth v. McWilliams**, 887 A.2d 784 (Pa. Super. 2005).

(d) **SVP Classification – Evidence Sufficient**

Commonwealth v. Hitner, 910 A.2d 721 (Pa. Super. 2006):

- Commonwealth expert opined that offender had an antisocial personality disorder: "characterized by a lifetime history of failure to conform one's conduct to the norms of society, a callous disregard for other's feelings, and no remorse for one's crimes."
- Commonwealth expert opined that offender suffered from a mental abnormality of sexual sadism.

Commonwealth v. Price, 876 A.2d 988 (Pa. Super. 2005), *appeal denied*, 587 Pa. 706, 897 A.2d 1184 (2006), *cert. denied*, 127 S.Ct. 224, 166 L.Ed.2d 179, 75 USLW 3171 (2006):

- Commonwealth expert opined a contributing impetus behind defendant's crimes (homosexual pedophilic interest in boys) and cited research that homosexual pedophiles are twice as likely to reoffend vs. heterosexual pedophiles;
- After interviewing defendant, Commonwealth expert conducted an evaluation taking into account all of the factors listed in Megan's Law [II];
- Defendant's expert only used some factors in making determination that defendant was not an SVP, did not use all of the criteria, and did not make his determination using definition provided by the statute.

Commonwealth v. Sanford, 863 A.2d 428 (Pa. 2004):

- Expert opined that defendant had an antisocial personality disorder and deemed defendant an SVP. Opinion was based on police reports, criminal complaints, prior evidence gathering, past criminal behavior and past behavioral history;
- Trial Court determined defendant was an SVP, also noting that defendant's own expert said defendant was on the borderline of being an SVP. Superior Court reversed saying that expert relied on facts that had not been proven at the guilty plea and not stipulated to by defendant. Supreme Court reversed Superior Court holding that it was improper for the Superior Court to eliminate from consideration any evidence which it deemed inadmissible;
- Trial courts can and should examine all the evidence presented by the Commonwealth without regard as to the admissibility of that evidence.

Commonwealth v. Snyder, 870 A.2d 336 (Pa. Super. 2005):

- Expert testified that defendant had the mental abnormality of pedophilia;
- Many of the statutory factors weighed strongly in favor of classifying defendant as an SVP:
 - One victim over long period of time
 - Age differential between defendant and victim (7 years old)
 - Extensive and significant deviant sexual contact (urinating on victim, multiple sexual partners)
 - Mental capacity of victim (borderline retarded)
 - Defendant's record for violent assaults
 - Unusual cruelty in forcing victim to have sexual relations with her own mother and other sexual acts with defendant.

Commonwealth v. Dengler, 843 A.2d 1241 (Pa. Super. 2004), *aff'd*, 586 Pa. 54, 890 A.2d 372 (2005):

- Expert opined that defendant had a mental abnormality in the form of deviant sexual arousal toward young females;
- Expert testified that defendant probably also met the criteria for a personality disorder, although none specified;
- Other factors:
 - Multiple victims and history of recurring behavior

- Defendant was arrested for one sexual offense and then for another similar offense three months later
- Defendant had history of drug and alcohol abuse
- Maladjustment to criminal supervision (defendant violated probation and parole on his prior sexual charges)
- Defendant refused sexual offender treatment

Commonwealth v. Moody, 843 A.2d 402 (Pa. Super. 2004), *appeal denied*, 584 Pa. 693, 882 A.2d 477 (2005):

- Trial court satisfied with board member's testimony that defendant groomed his victims (step-daughter and neighboring child) and that defendant was not only a pedophile but was compulsive and had an addiction to sex;
- Board member changed her initial report after receiving additional information from the victims' family. Defendant's expert could not reach a definite conclusion because he would also need to analyze the additional information Board member relied on.

Commonwealth v. Haughwout, 837 A.2d 480 (Pa. Super. 2003):

- Following factors supported SVP classification:
 - Multiple victims (daughter and family friend)
 - Defendant admitted to 13 year abnormal contact with minors, beginning with his 15 year old sister-in-law
 - Defendant had history of alcohol and painkiller abuse
 - Nature of counseling for the offenses unclear
 - Expert's conclusion that defendant's substance abuse lowered defendant's inhibitions, defendant promoted a relationship with his daughter to sexually abuse her, abuse of family member increased defendant's risk of reoffending

(e) **SVP Classification – Evidence Insufficient**

Commonwealth v. Krouse, 799 A.2d 835 (Pa. Super. 2002), *appeal denied*, 573 Pa. 671, 821 A.2d 586 (2003):

- Board member assessed defendant solely on the basis of published studies;
- Did not interview defendant and therefore unable to offer a diagnosis (*although court qualified and stated that it was not suggesting that elements of SVP classification can't be met where defendant refuses to be interviewed by the Board*);

- Conclusions deemed most significant by expert not supported by necessary proof;
- Even if expert's testimony was taken as true, still lacking several statutory factors, such as: defendant's first sexual offense, prior criminal conviction involved only substance abuse, no evidence of force or unusual cruelty, no prior incidents of deviant sexual behavior or mental health issue.¹³

Commonwealth v. Bey, 841 A.2d 562 (Pa. Super. 2004):

- Board had determined that the defendant was not an SVP. Only witness at the hearing was the defendant and the Commonwealth did not call any other witnesses. There was no proof of a mental defect or personality disorder that would make it more likely for defendant to reoffend. Trial court rejected Board member's conclusion and deemed defendant an SVP. Superior Court reversed trial court decision.

Commonwealth v. Lipphardt, 841 A.2d 551 (Pa. Super. 2004):

- Following dictates of ***Krouse***, trial court declined to classify defendant as a sexually violent predator (and Superior Court upholds) based solely on his conviction in the instant case. Defendant had significant criminal history but was all non-sexual except the instant offense;
- Trial court considered other factors (e.g. defendant's age, victim was a stranger), but
 - One victim, not multiple
 - Victim was not a child (25 yrs old)
 - Defendant did not exceed means necessary to achieve offense
 - Did not display unusual cruelty
 - Did not have a history of abusing drugs
- Defendant was diagnosed with anti-social personality disorder, but Commonwealth failed to prove by clear and convincing evidence that defendant had a mental abnormality or personality disorder that made him likely to engage in predatory sexually violent offenses.

¹³ Although an appeal to the Supreme Court was denied in ***Krouse***, in relation to the standard of appellate review, the Pennsylvania Supreme Court, in ***Commonwealth v. Meals***, 590 Pa. 110, ___, 912 A.2d 213, 222-223 (2006), stated that the standard is one of review, i.e., whether the evidence and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as the prevailing party, was sufficient to establish all of the elements of a sexually violent predator; and therefore disapproved of the broader standard utilized by the Superior Court in ***Commonwealth v. Krouse***.

Commonwealth v. Plucinski, 868 A.2d 20 (Pa. Super. 2005):

- Commonwealth expert failed to establish accuracy of information contained in unidentified documents relied upon to reach his diagnosis of hebephilia;
- Statutory factors weighed against SVP classification
 - One victim
 - No unnecessary means, threats or unusual cruelty
 - Defendant's first sexual offense
 - No history of failed treatment
 - Defendant's age suggested decreased likelihood to reoffend

(f) Court Findings

Trial court should include on the record its reasons for finding the defendant to be a sexually violent predator in relation to the statutory factors. ***Commonwealth v. Krouse***, 799 A.2d 835, 843 (Pa. Super. 2002) *appeal denied*, 573 Pa. 671, 821 A.2d 586 (2003).

(g) Self Incrimination

Fifth Amendment privilege only applies when evidence is needed to prosecute. At the assessment phase, defendant is no longer subject to prosecution as his guilt has already been determined. Any statements a defendant makes during his assessment proceedings can not be used to "incriminate him". ***Commonwealth v. Kopicz***, 840 A.2d 342 (Pa. Super. 2003).

Purpose of an evaluation before the Board is not criminal or punitive in nature. Since the assessment is not criminal punishment, there is no danger of incriminating oneself to a crime during the evaluation by the Board. ***Commonwealth v. Howe***, 842 A.2d 436, 445 (Pa. Super. 2004); ***Commonwealth v. Moody***, 843 A.2d 402 (Pa. Super. 2004), *appeal denied*, 882 A.2d 477, 2005 Pa. LEXIS 1921 (2005).

(h) Privilege

Board's use of prior sexuality evaluations or psychiatric records of defendant does not violate defendant's psychologist/patient privilege as the evaluations were distinct from treatment records. The privilege only protects statements made by defendant during the course of treatment. ***Commonwealth v. Kopicz***, 840 A.2d 342 (Pa. Super. 2003); ***Commonwealth v. Moody***, 843 A.2d 402 (Pa. Super. 2004) *appeal denied*, 882 A.2d 477, 2005 Pa. LEXIS 1921 (2005).

Opinions, observations, diagnosis and treatment alternatives outlined by professionals who interviewed defendant during juvenile detention are not privileged. ***Commonwealth v. Carter***, 821 A.2d 601 (Pa. Super. 2003)

(i) **Juvenile Records and Confidentiality**

Even without leave of court, the Board may inspect juvenile psychiatric evaluations and summaries. The Board must have all relevant information in order to assess whether the defendant has any mental illness, disability or abnormality and behavioral characteristics which make him an SVP. **Commonwealth v. Carter**, 821 A.2d 601 (Pa. Super. 2003)

(j) **SVP Assessments and Frye**

Psychological or psychiatric testimony of an expert and an SVP proceeding is not “novel” scientific evidence subject to the **Frye** standard of admissibility. **Frye** applies to novel devices or processes, not to psychiatrists’ or psychologists’ predictions of future dangerousness, diagnoses of mental illness, or assessments of mental deviances or abnormalities. **Commonwealth v. Dengler**, 586 Pa. 54, 890 A.2d 372 (2005).

G. Verification of Residence

The Pennsylvania State Police must verify the residence and compliance with counseling of sexually violent predators every 90 days through the use of a nonforwardable verification form to the offender’s last reported address. 42 PA. CONS. STAT. ANN. § 9796(a). The form must be returned by the offender within 10 days. 42 PA. CONS. STAT. ANN. § 9796(d).

1. Verification

(a) **Annual Verification of Residence for Offenders**

Effective until 1/1/06: Pennsylvania State Police must verify the residence of offenders through a nonforwardable verification form. For the period of registration required, the offender must appear within ten days of receipt of the form at any Pennsylvania State Police station to complete the verification form and to be photographed. 42 PA. CONS. STAT. ANN. § 9796(b).

Effective 1/1/06: For the period of registration required, offender is to appear within ten days before each anniversary date of the offender’s initial registration at an approved registration site to complete a verification form and to be photographed. 42 PA. CONS. STAT. ANN. § 9796(b).

(b) **Quarterly Verification of Residence, Compliance with Counseling and Compliance with Limitations on Residence for Sexually Violent Predators**

Effective until 1/1/06: The Pennsylvania State Police to verify residence and compliance of sexually violent predators every 90 days through use nonforwardable verification form to the last reported residence. For the period of registration required, the sexually

violent predator must appear within 10 days of receipt of form at any Pennsylvania State Police station to complete verification form and be photographed. 42 PA. CONS. STAT. ANN. § 9796(a).

Effective 1/1/06: The Pennsylvania State Police to verify residence and compliance of sexually violent predators every 90 days through use nonforwardable verification form to the last reported residence. For the period of registration required, the sexually violent predator must appear quarterly, for life, between January 5 and January 15, April 5 and April 15, July 5 and July 15, and October 5 and October 15 of each calendar year at an approved registration site to complete verification form and be photographed. 42 PA. CONS. STAT. ANN. § 9796(a).

2. Pennsylvania State Police Responsibilities

Send notice by first class United States mail to all registered offenders and sexually violent predators at their last reported residence addresses. 42 PA. CONS. STAT. ANN. §§ 9796(a.1) and (b.1).

Send no more than 30 days nor less than 15 days prior to each of the quarterly verification periods for sexually violent predators and not more than 30 days nor less than 15 days prior to each offender's annual anniversary date. 42 PA. CONS. STAT. ANN. §§ 9796(a.1) and (b.1).

Notice must remind sexually violent predators of their quarterly verification requirement and offenders of their annual verification requirement and provide them with list of approved registration sites. 42 PA. CONS. STAT. ANN. § 9796(a.1)(1).

Provide verification and compliance forms at each approved registration site (additionally, not less than 10 days before each of the quarterly verification periods for sexually violent predators.). 42 PA. CONS. STAT. ANN. § 9796(a.1)(2).

3. Effect of Notice

Failure of the Pennsylvania State Police or failure of the offender or sexually violent predator to receive any notice or information under subsections (a.1) or (b.1) will not relieve the offender or sexually violent predator from verification requirements. 42 PA. CONS. STAT. ANN. § 9796(f).

4. Change of Residence

Should be immediately reported by Pennsylvania State Police to law enforcement agency having jurisdiction over offender's or sexually violent predator's new place of residence. The law enforcement agency having jurisdiction of the sexually violent predator's new place of residence must verify compliance with limitations on residence imposed by section 9796.1. 42 PA. CONS. STAT. ANN. § 9796(c).

If the registrant moves out of state, Pennsylvania State Police must notify law enforcement agency with which offender or sexually violent predator must register in the new state. 42 PA. CONS. STAT. ANN. § 9796(c).

5. Failure to Provide Verification

Where the offender or sexually violent predator fails to verify within the ten day period, the Pennsylvania State Police must immediately notify the municipal police department of their last verified address and local municipal police must locate and arrest the registrant. Where no municipal police jurisdiction exists, the Pennsylvania State Police must locate and arrest the registrant. 42 PA. CONS. STAT. ANN. § 9796(d).

Violators are subject to prosecution under 18 PA. CONS. STAT. ANN. § 4915, Failure to Comply with Registration of Sexual Offenders Requirements:

18 PA. CONS. STAT. ANN. § 4915. Failure to comply with registration of sexual offenders requirements

(a) Offense defined.—An individual who is subject to registration under 42 Pa.C.S. § 9795.1(a) (relating to registration) or an individual who is subject to registration under 42 Pa.C.S. § 9795.1(b)(1), (2) or (3) commits an offense if he knowingly fails to:

- (1) register with the Pennsylvania State Police as required under 42 Pa.C.S. § 9795.2 (relating to registration procedures and applicability);
- (2) verify his address or be photographed as required under 42 Pa.C.S. § 9796 (relating to verification of residence); or
- (3) provide accurate information when registering under 42 Pa.C.S. § 9795.2 or verifying an address under 42 Pa.C.S. § 9796.

(b) Grading for offenders who must register for ten years.—

- (1) Deleted by 2006, Nov. 29, P.L. 1567, No. 178, § 3, effective Jan. 1, 2007.
- (2) Except as set forth in paragraph (3), an individual subject to registration under 42 Pa.C.S. § 9795.1 who commits a violation of subsection (a)(1) or (2) commits a felony of the third degree.
- (3) An individual subject to registration under 42 Pa.C.S. § 9795.1(a) who commits a violation of subsection (a)(1) or (2) and who has previously been convicted of an offense under subsection (a) (1) or (2) or a similar offense commits a felony of the second degree.
- (4) An individual subject to registration under 42 Pa.C.S. § 9795.1(a) who violates subsection (a)(3) commits a felony of the second degree.

(c) Grading for sexually violent predators and others with lifetime registration.—

(1) Deleted by 2006, Nov. 29, P.L. 1567, No. 178, § 3, effective Jan. 1, 2007.

(2) Except as set forth in paragraph (3), an individual subject to registration under 42 Pa.C.S. § 9795.1(b)(1),(2) or (3) who commits a violation of subsection (a)(1) or (2) commits a felony of the second degree.

(3) An individual subject to registration under 42 Pa.C.S. § 9795.1(b)(1),(2) or (3) who commits a violation of subsection (a)(1) or (2) and who has previously been convicted of an offense under subsection (a)(1) or (2) or a similar offense commits a felony of the first degree.

(4) An individual subject to registration under 42 Pa.C.S. § 9795.1(b)(1), (2) or (3) who violates subsection (a)(3) commits a felony of the first degree.

(d) Effect of notice.—Neither failure on the part of the Pennsylvania State Police to send nor failure of a sexually violent predator or offender to receive any notice or information pursuant to 42 Pa.C.S. § 9796(a.1) or (b.1) shall be a defense to a prosecution commenced against an individual arising from a violation of this section. The provisions of 42 Pa.C.S. § 9796(a.1) and (b.1) are not an element of an offense under this section.

(e) Arrests for violation.—

(1) A police officer shall have the same right of arrest without a warrant as in a felony whenever the police office has probable cause to believe an individual has committed a violation of this section regardless of whether the violation occurred in the presence of the police officer.

(2) An individual arrested for a violation of this section shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. In no case may the individual be released from custody without first having appeared before the issuing authority.

(3) Prior to admitting an individual arrested for a violation of this section to bail, the issuing authority shall require all of the following:

(i) The individual must be fingerprinted and photographed in the manner required by 42 Pa.C.S. Ch. 97 Subch. H (relating to registration of sexual offenders).

(ii) The individual must provide the Pennsylvania State Police with all current or intended residences, all information concerning current or intended employment, including all

employment locations, and all information concerning current or intended enrollment as a student.

(iii) Law enforcement must make reasonable attempts to verify the information provided by the individual.

(f) Definition.—As used in this section, the term “a similar offense” means an offense similar to an offense under either subsection (a)(1) or (2) under the laws of this Commonwealth, the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.

H. Victim Notification

Once an offender is determined to be a sexually violent predator, the local municipal police department or the Pennsylvania State Police must give written notice to the victim when the sexually violent predator initially registers and when he notifies the Pennsylvania State Police of any change of residence. 42 PA. CONS. STAT. ANN. § 9797

- Notice to be given 72 hours after the sexually violent predator registers or notifies the Pennsylvania State Police of a change of address.
- Notice to contain the sexually violent predator’s name and address(es) where he resides. 42 PA. CONS. STAT. ANN. § 9797(a)(1).
- Victim may terminate duty to inform by providing written statement releasing agency from duty. 42 PA. CONS. STAT. ANN. § 9797(a)(2).

For offenders not classified as a sexually violent predator, victim to be notified in accordance with the Crime Victims Act, 18 PA. CONS. STAT. ANN. § 11.201.

I. Other Notification (“Community Notification”)

1. Notification of SVP’s Residence

Under Megan’s Law III, the State Police must notify neighbors, as well as day care centers and school officials within the municipality, of an SVP’s presence in the community. Pursuant to 42 PA. CONS. STAT. ANN. § 9798, written notification of the sexually violent predator’s residence to be provided to certain individuals and entities in the municipality where the SVP lives.

Notice to contain the following:

- Name of sexually violent predator;
- Address(es) of sexually violent predator;
- Offense for which he was convicted, sentenced by a court, adjudicated delinquent or court martialled;

Sex Offender Identification

- Statement that he has been determined by a court to be a sexually violent predator;
- Photograph, if available;
- Proviso: Not to contain any information that might reveal the victim's name, identity, residence.

Notice to be provided to:

- Neighbors. (*Where the sexually violent predator lives in a common interest community, neighbors include unit owners' association and residents of the common interest community.*) 42 PA. CONS. STAT. ANN. § 9798(b)(1);
- Director of county children and youth service agency of county where SVP resides. 42 PA. CONS. STAT. ANN. § 9798(b)(2);
- Superintendent of each school district and equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality where SVP resides. 42 PA. CONS. STAT. ANN. § 9798(b)(3);
- Superintendent of each school district and equivalent official for each private and parochial school located within a one-mile radius of where the SVP resides. 42 PA. CONS. STAT. ANN. § 9798(b)(3.1);
- Licensee of each certified day care center and licensed preschool program and owner/operator of each registered family day care home in the municipality where the SVP resides. 42 PA. CONS. STAT. ANN. § 9798(b)(4);
- President of each college, university and community college located within 1,000 feet of a SVP's residence. 42 PA. CONS. STAT. ANN. § 9798(b)(5).

Time for Notice:

- **Neighbors - within 5 days** after information of the sexually violent predator's release date and residence has been received by chief law enforcement officer. 42 PA. CONS. STAT. ANN. § 9798(c)(1). Verbal notification may be used if written notification would delay meeting time requirement. 42 PA. CONS. STAT. ANN. § 9798(c)(1);
- **All others – within 7 days** after information of the sexually violent predator's release date and residence has been received by chief law enforcement officer. 42 PA. CONS. STAT. ANN. § 9798(c)(2).

All information must be available upon request to general public.

Information may be provided by electronic means. 42 PA. CONS. STAT. ANN. § 9798(d).

Interstate Transfers – duties of police departments under this section also applies to individuals transferred to Pennsylvania pursuant to the Interstate Compact for Supervision of Adult Offenders or the Interstate Compact for Juveniles. 42 PA. CONS. STAT. ANN. § 9798(e).

2. Exemption

Under 42 PA. CONS. STAT. ANN. § 9799.7, *Exemption from notification for certain licensees and their employees* – there is no duty imposed upon a person licensed under the Real Estate Licensing and Registration Act, or an employee thereof, to disclose any information regarding:

- A sexually violent predator, or
- An individual who is transferred to Pennsylvania pursuant to the Interstate Compact for the Supervision of Adult Offenders or the Interstate Compact for Juveniles. 42 PA. CONS. STAT. ANN. § 9799.7.

J. Exemptions from Certain Notifications

1. Non SVP

Pursuant to 42 PA. CONS. STAT. ANN. § 9795.5, under specified conditions a non SVP may be exempt from the notification provisions:

- Non-sexually violent predator lifetime registrants can petition the sentencing court to be exempt from section 9798.1 (Information Made Available on the Internet) and sexually violent predators can petition to be exempt from section 9798 (Other Notification) if no less than 20 years have passed since (whichever is later):
 - the individual has been convicted in this or any other jurisdiction of any offense punishable by imprisonment for more than one year, or
 - the individual's release from custody following the individual's most recent conviction for any such offense. 42 PA. CONS. STAT. ANN. § 9795.5(a)(1) & (b)(1).
- The court must order an assessment by the board, which must be sent to the board within ten days of its entry. No more than 90 days following receipt of the order, the board must submit a written report containing its assessment to the sentencing court, district attorney and attorney for the petitioner. 42 PA. CONS. STAT. ANN. § 9795.5(a)(2) & (b)(2).
- Within 120 days of the filing of a petition, a hearing must be held. Both petitioner and district attorney must be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. The petitioner has a right to counsel and have a lawyer appointed if he cannot afford one. 42 PA. CONS. STAT. ANN. § 9795.5(a)(3) & (b)(3).
- Standard at exemption hearing is clear and convincing evidence that the petitioner is not likely to pose a threat to the safety of any other person. 42 PA. CONS. STAT. ANN. § 9795.5(a)(4) & (b)(4).
- If the court grants relief to the petitioner, the court must notify the Pennsylvania State Police in writing within ten days from the date such relief is granted. 42 PA. CONS. STAT. ANN. § 9795.5(c).

- Both petitioner and Commonwealth have the right to appellate review. An appeal by the Commonwealth stays the order of the sentencing court. 42 PA. CONS. STAT. ANN. § 9795.5(d).
- If an individual is exempt from the application of either section 9798 or 9798.1 and is subsequently convicted of any offense relating to failure to comply with registration requirements, under 18 PA. CONS. STAT. ANN. § 4915, any relief granted will be void and he will automatically and immediately be subject to all applicable provisions of Megan's Law. 42 PA. CONS. STAT. ANN. § 9795.5(e).

K. Information Made Available on the Internet

In 2004, the General Assembly found that public service would be enhanced by making information regarding the identities of SVPs available on the Internet. It was decided that public access was solely intended as a means of public protection and not to be punitive in nature. 42 PA. CONS. STAT. ANN. § 9798.1(a).

1. Information to be Provided

- (a) The following information, regarding Sexually Violent Predators, 42 PA. CONS. STAT. ANN. § 9798.1(c)(1), and Lifetime Registrants and other Offenders, 42 PA. CONS. STAT. ANN. § 9798.1(c)(2), is to be disclosed:
 - (i) name and any aliases;
 - (ii) year of birth;
 - (iii) street address, city, county and zip code of any institution or location at which the person is enrolled as a student;
 - (iv) city, county and zip code of any employment location;
 - (v) a photograph of the registrant, which must be updated not less than annually;
 - (vi) description of the offense or offenses which triggered the application of this subchapter;
 - (vii) date of the offense and conviction.
- (b) Duration of Internet Posting:
 - (i) Lifetime for SVP, 42 PA. CONS. STAT. ANN. § 9798.1(d);
 - (ii) Lifetime for lifetime registrant unless he is granted relief under section 42 PA. CONS. STAT. ANN. § 9795.5 (Exemption from Certain Notifications).
- (c) For an offender, the period during which he is required to register, including any extension of this period pursuant to 42 PA. CONS. STAT. ANN. § 9795.2(a)(3).

2. Duties of Pennsylvania State Police

Duties of the Pennsylvania State Police, in the manner and form directed by the Governor, 42 PA. CONS. STAT. ANN. § 9798.1(b), include:

- (i) Develop and maintain a system for making the information publicly available via an Internet website;

- (ii) Ensure that the website has warnings that any person who uses the information to threaten, intimidate or harass another or otherwise misuses the information may be criminally prosecuted;
- (iii) Ensure that the website contains explanation of limitations, including:
 - that a positive identification of a registrant whose record has been made available may be confirmed only by fingerprints;
 - that some information contained on the website may be outdated or inaccurate; and
 - that the website is not a comprehensive listing of every person who has ever committed a sex offense in Pennsylvania;
- (iv) Strive to ensure the information is accurate and that the data is revised and updated in a timely and efficient manner;
- (v) Provide general information to the public about sex offenders, sexually violent predators and the operation of Megan's Law, pertinent and appropriate information concerning crime prevention and personal safety, with appropriate links to other relevant Internet websites operated by the Commonwealth of Pennsylvania.

L. Immunity for Good Faith Conduct

Pursuant to 42 PA. CONS. STAT. ANN. § 9799, the following are immune from liability for good faith conduct:

- (1) Pennsylvania State Police and local law enforcement law enforcement agencies and employees of law enforcement agencies;
- (2) District Attorneys and their agents and employees;
- (3) Superintendents, administrators, teachers, employees and volunteers engaged in the supervision of children of any public, private, or parochial school;
- (4) Directors and employees of county children and youth agencies;
- (5) Presidents or similar officers of universities and colleges, including community colleges;
- (6) Pennsylvania Board of Probation and Parole and its agents and employees;
- (7) County probation and parole offices and their agents and employees;
- (8) Licensees of certified day care centers and directors of licensed preschool programs and owners/operators of registered family day care homes, and their agents and employees;
- (9) Pennsylvania Department of Corrections and its agents and employees;
- (10) County correctional facilities and their agents and employees;
- (11) Members of the Sexual Offenders Assessment Board and its agents and employees;
- (12) Unit owners' association of a common interest community and its agents and employees as it relates to distributing information regarding sexually violent predators obtained pursuant to 42 PA. CONS. STAT. ANN. § 9798(b)(1).

M. Counseling of Sexually Violent Predators

A sexually violent predator is required to attend at least monthly counseling sessions in a program approved by the board and be financially responsible for all fees. 42 PA. CONS. STAT. ANN. § 9799.4.

- The counseling sessions last for the period of registration. 42 PA. CONS. STAT. ANN. § 9795.1(b). Unless the SVP can prove to the satisfaction of the court that he cannot afford to pay for them, the cost in on the SVP; otherwise, the SVP must still attend counseling sessions but the parole office shall pay the fees.
- The board must monitor compliance.

N. Annual Performance Audit

Pursuant to 42 PA. CONS. STAT. ANN. § 9799.8, the Attorney General is required to perform an annual audit to determine compliance with requirements of Megan’s Law and prepare an annual report of its findings.

O. Photographs and Fingerprinting

Pursuant to 42 PA. CONS. STAT. ANN. § 9799.9, an individual subject to registration must submit to fingerprinting and photographing at approved registration sites.

- Fingerprinting – to be full set of fingerprints;
- Photographing – to include photographs of the face, scars, marks, tattoos or other unique features of the individual.

P. Noncompliance Laws

1. Failure to Comply with Registration Requirements

Failure to comply with registration of sexual offender requirements could result in the filing of criminal charges, 18 PA. CONS. STAT. ANN. § 4915:

(a) Offense Defined

An individual who is subject to registration under 42 PA. CONS. STAT. ANN. § 9795.1(a) or an individual who is subject to registration under 42 PA. CON. STAT. ANN. § 9795.1(b)(1), (2), or (3), commits an offense if he knowingly fails to:

- Register with the Pennsylvania State Police as required under 42 PA. CONS. STAT. ANN. § 9795.2 (18 PA. CONS. STAT. ANN. § 4915(a)(1));
- Verify his address or be photographed as required under 42 PA. CONS. STAT. ANN. § 9796 (18 PA. CONS. STAT. ANN. § 4915 (a)(2));
or
- Provide accurate information when registering under 42 PA. CONS. STAT. ANN. § 9795.2 or verifying an address under 42 PA. CONS. STAT. ANN. § 9796 (18 PA. CONS. STAT. ANN. § 4915(a)(3)).

(b) Grading

Grading for Offenders who must register for ten years.

- i. Misdemeanor of the Third Degree – commits a violation of 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (a)(2).
- ii. Misdemeanor of the Second Degree – commits a violation of 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (a)(2) and has previously been convicted of an offense under subsection (a)(1) or (2) or a similar offense.
- iii. Felony of the Third Degree - commits a violation of 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (2) and has previously been convicted of two or more offenses under subsection (a)(1) or (2) or a similar offense.
- iv. Felony of the Third Degree - commits a violation of 18 PA.CONS.STAT.ANN. § 4915 (a)(3).

Grading for Sexually Violent Predators and Others with Lifetime Registration

- i. Misdemeanor of the Second Degree - an individual subject to registration under 42 PA.CONS.STAT.ANN. §§ 9795.1(b)(1), (2) or (3) who violates 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (2).
- ii. Misdemeanor of the First Degree - an individual subject to registration under 42 PA.CONS.STAT.ANN. §§ 9795.1(b)(1), (2) or (3) who commits a violation of 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (2) and has previously been convicted of an offense under 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (2) or a similar offense.
- iii. Felony of the Third Degree - an individual subject to registration under 42 PA.CONS.STAT.ANN. §§ 9795.1(b)(1), (2) or (3) who commits a violation of 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (2) and has previously been convicted of two or more offenses under 18 PA.CONS.STAT.ANN. §§ 4915 (a)(1) or (2) or a similar offense.
- iv. Felony of the Third Degree - an individual subject to registration under 42 PA.CONS.STAT.ANN. §§ 9795.1(b)(1), (2) or (3) who violates 18 PA.CONS.STAT.ANN. § 4915 (a)(3).

(c) Effect of Notice

Neither failure on the part of the Pennsylvania State Police to Send, nor failure of a Sexually Violent Predator or Offender to receive any notice or information pursuant to 42 PA.CONS.STAT.ANN. §§ 9796(a.1) or (b.1) will be a defense to a prosecution commenced against an individual arising from a violation of this section. The provisions of

42 PA.CON.S.TAT.ANN. §§ 9796(a.1) and (b.1) are not an element of an offense under this section.

(d) Arrests for Violation

A police officer has the same right of arrest without a warrant as in a felony whenever the police officer has probable cause to believe an individual has committed a violation of this section, regardless of whether the violation occurred in the presence of the police officer.

An individual arrested for a violation of this section will be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. The individual may not be released from custody without first having appeared before the issuing authority.

Prior to admitting an individual arrested for a violation of this section to bail, the issuing authority must require all of the following:

- (a) The individual must be fingerprinted and photographed in the manner required by 42 PA.CON.S.TAT.ANN. Ch. 97 Subch H (relating to registration of sexual offenders).
- (b) The individual must provide the Pennsylvania State Police with all current or intended residences, all information concerning current or intended employment, including all employment locations, and all information concerning current or intended enrollment as a student.
- (c) Law enforcement must make reasonable attempts to verify the information provided by the individual.

As used in this section, the term “**a similar offense**” means an offense similar to an offense under either subsection (a)(1) or (2) under the laws of the Commonwealth, the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.

10.3 CIVIL COMMITMENT OF JUVENILE SEX OFFENDERS

A. Assessment of Delinquent Children by the State Sexual Offenders Assessment Board, 42 PA. CONS. STAT. ANN. § 6358

1. General Rule

A child found to be delinquent for committing any of the following:

- i. Rape, 18 PA.CON.S.TAT.ANN. § 3121;
- ii. Involuntary Deviate Sexual Intercourse, 18 PA.CON.S.TAT.ANN. § 3123;
- iii. Sexual Assault, 18 PA.CON.S.TAT.ANN. § 3124.1;

- iv. Aggravated Indecent Assault, 18 PA.CONS.STAT.ANN. § 3125;
- v. Indecent Assault, 18 PA.CONS.STAT.ANN. § 3126; or
- vi. Incest, 18 PA.CONS.STAT.ANN. § 4302.

who is committed to an institution or other facility pursuant to 42 PA. CONS. STAT. ANN. § 6352 (Disposition of Delinquent Child) and who remains in the facility upon turning 20 years of age, is subject to an assessment by the board. 42 PA. CONS. STAT. ANN. § 6358(a).

2. Duty of Probation Officer

Must notify board of child’s status and facility where child is committed and must assist the board in obtaining access to the child and any information required by the board for the assessment. 42 PA. CONS. STAT. ANN. § 6358(b).

Notification must be 90 days prior to the child’s 20th birthday. 42 PA. CONS. STAT. ANN. § 6358(b).

Must notify board of any child whose age precludes compliance with this subsection provided child has not yet attained 21 years of age (must be within 5 days of effective date of this subsection). 42 PA. CONS. STAT. ANN. § 6358(b.1).

3. Assessment

(a) Board must determine whether or not child is in need of commitment for involuntary treatment due to

- i. mental abnormality (as defined in 42 PA.CONS.STAT.ANN. § 6402) or
- ii. personality disorder

either of which results in “serious difficulty in controlling sexually violent behavior”. 42 PA.CONS.STAT.ANN. § 6358(c).

(b) Board must provide completed assessment to the court

- i. no later than 90 days after child’s 20th birthday
- ii. unless notification was delayed under subsection b.1, the assessment must be filed no later than 180 days after child’s 20th birthday. 42 PA. CONS. STAT. ANN. § 6358(c).

iii. Court must provide assessment to probation officer, district attorney, county solicitor or designee and child’s attorney. 42 PA. CONS. STAT. ANN. § 6358(d).

4. Dispositional Review Hearing

Where the board concludes that the child is in need of involuntary treatment, pursuant to Ch. 64, the court must conduct a hearing. 42 PA. CONS. STAT. ANN. § 6358(e).

- (a) County solicitor or designee, probation officer and child’s attorney must be present;
- (b) Court to consider assessment, treatment information and any other relevant information regarding delinquent child;
- (c) Hearing to be held no later than 180 days before child’s 21st birthday
 - i. Unless submission of report was delayed pursuant to subsection c.1 in which case the hearing must be held no later than 90 days before the child’s 21st birthday.
- (d) If court finds prima facie case that child is in need of involuntary treatment under provisions of Ch. 64, court must direct county solicitor or designee to file a petition to initiate proceedings under Ch. 64 provisions.

B. Court-Ordered Involuntary Treatment Of Certain Sexually Violent Persons, 42 PA. CONS. STAT. ANN. Chapter 64

1. Definitions - 42 PA. CONS. STAT. ANN. § 6402

“Act of Sexual Violence”

- (a) Rape, 18 PA.CONS.STAT.ANN. § 3121;
- (b) Involuntary Deviate Sexual Intercourse, 18 PA.CONS.STAT.ANN. § 3123;
- (c) Sexual Assault, 18 PA.CONS.STAT.ANN. § 3124.1;
- (d) Aggravated Indecent Assault, 18 PA.CONS.STAT.ANN. § 3125;
- (e) Indecent Assault, 18 PA.CONS.STAT.ANN. § 3126;
- (f) Incest, 18 PA.CONS.STAT.ANN. § 4302.

“**Board.**” As defined in section 6302 (the State Sexual Offenders Assessment Board).

“**County Solicitor.**” Solicitor appointed by county commissioners or similar body in home rule counties.

“**Department.**” Department of Public Welfare of the Commonwealth.

“**Mental Abnormality.**” A congenital or acquired condition of a person affecting the person’s emotional or volitional capacity.

“**Sexually Violent Delinquent Child.**” Person found delinquent for an act of sexual violence and who has been determined to be in need of commitment for involuntary treatment under this chapter.

2. Court-Ordered Involuntary Treatment - 42 PA. CONS. STAT. ANN. § 6403

(a) Individuals Subject to Involuntary Treatment

- i. Has been adjudicated delinquent for an act of sexual violence, if committed by an adult, would be a violation of crimes listed in definition of “act of sexual violence” (Rape, Deviate Sexual

Intercourse, Sexual Assault, Aggravated Indecent Assault, Indecent Assault, Incest). 42 PA.CONS.STAT.ANN. § 6403(a)(1).

- ii. Has been committed to an institution or other facility pursuant to 42 PA.CONS.STAT.ANN. § 6352 (Disposition of Delinquent Child) and remains in the institution or other facility upon turning 20 years old. 42 PA.CONS.STAT.ANN. § 6403(a)(2).
- iii. Is in need of involuntary treatment due to a mental abnormality or personality disorder which results in serious difficulty in controlling sexually violent behavior that makes the person likely to engage in an act of sexual violence. 42 PA.CONS.STAT.ANN. § 6403(a)(3).

(b) Procedures for Initiating Involuntary Commitment

- i. If court determines prima facie case has been presented that the child is in need of involuntary treatment, court must order that a petition be filed by the county solicitor or a designee before the court having jurisdiction of the person pursuant to Chapter 63 (Juvenile Matters). 42 PA.CONS.STAT.ANN. § 6403(b)(1).
- ii. Petition must
 - be in writing (in form adopted by the department);
 - set forth facts constituting reasonable grounds to believe individual is within criteria for court-ordered involuntary treatment as set forth in 42 PA.CONS.STAT.ANN. § 6403(a);
 - include board assessment as required in section 6358. 42 PA.CONS.STAT.ANN. § 6403(b)(2).
- iii. Court must
 - Set date for hearing, which must be held within 30 days of filing of petition;
 - Serve a copy of the petition and notice of hearing upon the individual, the attorney who represented the individual at the most recent dispositional review hearing, and the county solicitor or designee;
 - Provide written notice to the individual and his attorney advising that the individual has the right to counsel and if he cannot afford one, counsel will be appointed for him. 42 PA.CONS.STAT.ANN. § 6403(b)(3).
- iv. Individual must be informed of right to be assisted in proceedings by an independent expert in the field of sexually violent behavior. If the individual cannot afford such an expert, court must allow a reasonable fee for that purpose. 42 PA.CONS.STAT.ANN. § 6403(b)(4).

(c) Hearing - 42 PA.CONS.STAT.ANN. § 6403(c)(1-6)

- i. Individual may not be called as a witness without his consent;
- ii. Individual has the right to confront and cross-examine all witnesses and present evidence on his own behalf;

- iii. Hearing shall be public;
- iv. Stenographic or other sufficient record must be made;
- v. Hearing must be conducted by the court;
- vi. Court must render decision within five days after the conclusion of the hearing;

(d) Determination and Order - 42 PA.CONS.STAT.ANN. § 6403(d)

- i. Standard is clear and convincing evidence that person has a mental abnormality or personality disorder which results in serious difficulty in controlling sexually violent behavior that makes the individual likely to engage in an act of sexual violence.
- ii. Upon such a finding, court must enter an order directing immediate commitment of the individual for inpatient involuntary treatment to a facility designated by the department.
- iii. Order must be in writing and be consistent with protection of public safety and appropriate control, care and treatment of the person.
- iv. An appeal does not stay the execution of the order.

3. Duration of Commitment and Review - 42 PA.CONS.STAT.ANN. § 6404

- (a) Initial period of commitment - subject to inpatient treatment for one year. 42 PA.CONS.STAT.ANN. § 6404(a).
- (b) Annual Review 42 PA.CONS.STAT.ANN. § 6404(b) – court to schedule review hearing:
 - i. Hearing to be conducted pursuant to 42 PA.CONS.STAT.ANN. § 6403(c)(court-ordered involuntary treatment);
 - ii. No later than 30 days after receipt of both evaluation and assessment;
 - iii. Notice to be provided to individual, attorney who represented him at previous hearing, district attorney and county solicitor or a designee;
 - iv. Written notice to be provided to the individual and his attorney advising that he has the right to counsel and that if he cannot afford one, counsel will be appointed;
 - v. Clear and convincing evidence standard;
 - vi. If determined that the individual continues to have serious difficulty controlling sexually violent behavior due to a mental abnormality or personality disorder that makes him more likely to engage in an act of sexual violence, court to order an additional period of involuntary treatment of one year;
 - vii. If no such determination, court to order discharge of the individual;

viii. Order to be in writing and consistent with the protection of public safety and appropriate control, care and treatment of the individual.

(c) Discharge - 42 PA.CON.S.TAT.ANN. § 6404(c)

- i. At any time the director or a designee of the facility concludes the individual no longer has serious difficulty in controlling sexually violent behavior, director to petition the court for a hearing;
- ii. Notice of hearing to be provided to the individual, attorney who represented him at previous hearing, the board, district attorney and county solicitor;
- iii. Written notice to be provided to the individual and his attorney regarding his right to counsel and appointment of counsel if he cannot afford one;
- iv. Board to conduct a new assessment within 30 days and provide assessment to the court;
- v. Court must hold a hearing within 15 days of receiving the new assessment, pursuant to 42 PA.CON.S.TAT.ANN. 6404(c)(3);
- vi. Court Determination: If the court determines by clear and convincing evidence that the individual continues to have serious difficulty controlling sexually violent behavior due to a mental abnormality or personality disorder that makes him likely to engage in an act of sexual violence, court to order that the individual be subject to the remainder of the period of commitment. Otherwise, court to order the individual's discharge. 42 PA.CON.S.TAT.ANN. 6404(c)(3).
- vii. Department is to provide the individual with notice of his right to petition the court for discharge over the objection of the department. Court may schedule a hearing, pursuant to section 6403(c), after reviewing the petition. 42 PA.CON.S.TAT.ANN. 6404(c)(4).

4. Right to Counsel - 42 PA.CON.S.TAT.ANN. § 6405

Individual who is the subject of the hearing has the right to assistance of counsel at each proceeding conducted pursuant to this chapter.

5. Duty of Department of Public Welfare - 42 PA.CON.S.TAT.ANN. § 6406

- (a) Department has duty to provide separate, secure State-owned facility or unit utilized solely for the control, care and treatment of individuals committed pursuant to this chapter.
- (b) Department is responsible for all costs relating to the above.
- (c) Department may designate a State-owned facility or unit which receives delinquent children committed under Chapter 63 to receive individuals committed under this chapter as long as those individuals are segregated

at all times from the other delinquent children. (This subsection expires July 1, 2006.)

- (d) Department is to develop policies and procedures for providing individualized treatment and discharge plans based on clinical guidelines and professional standards in the fields of sexual offender treatment and mental health. Department is to consult with the Juvenile Court Judges' Commission and the board in developing the policies.

6. Regulations - 42 PA.CONS.STAT.ANN. § 6407

Department is to adopt, in consultation with the Juvenile Court Judges' Commission and the board, regulations necessary to effectuate provisions of this chapter.

7. Jurisdiction - 42 PA.CONS.STAT.ANN. § 6408

Court of common pleas for the county which entered the order for commitment has jurisdiction for proceedings under this chapter, including subsequent proceedings.

8. Immunity for Good Faith Conduct - - 42 PA.CONS.STAT.ANN. § 6409

The following are immune from liability for good faith conduct:

- Members of the board and its agents and employees;
- Department and its agents and employees;
- County probation departments and their agents and employees.

10.4 COMBINED DNA INDEX SYSTEM (CODIS)

A. CODIS

CODIS is the software and DNA indexing system created in 1994 by the DNA Identification Act. It stands for Combined DNA Index System, an electronic database that allows nationwide access to DNA profiles. It operates under a three-tiered DNA Index System – Local (LDIS), State (SDIS) and National (NDIS). DNA profiles are uploaded in this hierarchical sequence: local index to state index to national index. The NDIS contains DNA profiles collected from the states and federal government; the SDIS contains DNA profiles collected from the state; and the LDIS is the local repository for DNA profiles. Each local laboratory that participates in CODIS has its own local index and each state has one state index. The Federal Bureau of Investigation maintains the national index.

DNA profiles are collected from two different sources and uploaded into the index systems. The two databases are the Offender Index and the Forensic Index. The offender database comprises of DNA samples taken from convicted offenders who are required to submit a DNA sample. Each state dictates which crimes require submission of DNA samples. The forensic database consists of DNA samples taken from crime scenes and profiles of unknown origin.

Information contained in the databanks is compared, which may then generate a “hit” or match. Two types of matches or “hits” can occur: evidence-to-evidence (or forensic) matches and evidence-to-offender (or offender) matches.

CODIS has been an effective investigative tool in solving crimes, linking previously unrelated crimes together or an unsolved crime to a particular individual. 50 states now participate in CODIS, including Pennsylvania. According to the FBI CODIS website, as of September 2005, Pennsylvania has 54,126 offender profiles, 2,893 forensic samples, 4 CODIS laboratories, 4 NDIS participating laboratories, and 681 aided investigations. See www.fbu.gov/hq/lab/codis/pa.htm. See also FBI CODIS website www.fbi.gov/hq/lab/codis/index1.htm for additional information on CODIS.

B. Federal Legislation Governing CODIS - 42 U.S.C. § 14132

1. Establishment of Index - 42 U.S.C. § 14132(a)

This section authorizes an index of:

- (a) DNA identification records of
 - i. persons convicted of crimes;
 - ii. persons who have been charged in an indictment or information with a crime;
 - iii. other persons whose DNA samples are collected under applicable legal authorities (however, DNA profiles from arrestees who have not been charged in an indictment or information with a crime and DNA samples that are voluntarily submitted solely for elimination purposes must not be included in the National DNA Index System);
- (b) Analyses of DNA samples recovered from crime scenes;
- (c) Analyses of DNA samples recovered from unidentified human remains; and
- (d) Analyses of DNA samples voluntarily contributed from relatives of missing persons.

2. Information Allowed on the Index - 42 U.S.C. § 14132(b)

CODIS index shall only include information on DNA identification records and profiles that are:

- (a) based on analyses performed by or on behalf of:
 - i. A criminal justice agency; or
 - ii. The Secretary of Defense in accordance with section 1565 of Title 10, United States Code; and
 - iii. Must be in accordance with publicly available standards that satisfy or exceed the guidelines for a quality assurance program for DNA analysis, issued by the Director of the FBI under section 210303, 42 U.S.C. § 14131;

- (b) prepared by laboratories that:
- i. Not later than 2 years after the date of enactment of the DNA Sexual Assault Justice Act of 2004 [enacted October 30, 2004], have been accredited by a nonprofit professional association of persons actively involved in forensic science that is nationally recognized within the forensic science community; and
 - ii. Undergo external audits, not less than once every 2 years, that demonstrate compliance with standards established by the FBI Director; and
 - iii. Maintained by the Federal, State, and local criminal justice agencies (or the Secretary of Defense) pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only
 - to criminal justice agencies for law enforcement identification purposes;
 - in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;
 - for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which the defendant is charged; or
 - if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

3. Failure to Comply - 42 U.S.C. § 14132(c)

Access to the index is subject to cancellation if the quality control and privacy requirements in § 14132(b) are not met.

4. Expungement of Records - 42 U.S.C. § 14132(d)

(a) By Director

The Director of the FBI must promptly expunge from the index the DNA analysis:

- i. of a person included in the index on the basis of a qualifying Federal offense or
- ii. a qualifying District of Columbia offense (as determined under sections 3 and 4 of the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §§ 14135 a, 14135b respectively).
- iii. If the Director receives, for each conviction of the person of the qualifying offense, a certified copy of a final court order establishing that such conviction has been overturned.
- iv. “Final”: A court order is not “final” if time remains for an appeal or application for discretionary review with respect to the order.

- v. “Qualifying offense” means any of the following offenses:
- A qualifying Federal offense, as determined under section 3 of the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135a;
 - A qualifying District of Columbia offense, as determined under section 4 of the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135b;
 - A qualifying military offense, as determined under section 1565 of Title 10, United States Code.

(b) By States

As a condition of access to the index, a State shall promptly expunge from the index the DNA analysis of a person included in the index by the State if:

- i. The State receives a certified copy of a final order establishing that the conviction was overturned for each conviction of the person of the offense on the basis of which that analysis was or could have been included in the index; or
- ii. The person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index, and all charges for which the analysis was or could have been included in the index have been dismissed or resulted in acquittal.

5. Authority for Keyboard Searches - 42 U.S.C. § 14132(e)

- (a) Definition of “Keyboard Search”: a search under which information obtained from a DNA sample is compared with information in the index without resulting in the information obtained from a DNA sample being included in the index.
- (b) Authority: Director must ensure that any person who is authorized to access the index for purposes of including information on DNA identification records or DNA analyses in that index may also access that index for purposes of carrying out a one-time keyboard search on information obtained from any DNA sample lawfully collected for a criminal justice purpose except for a DNA sample voluntarily submitted solely for elimination purposes.
- (c) This subsection is not to be construed to preempt State law.

10.5 DNA DATA AND TESTING

On November 30, 2004, effective January 31, 2005, Pennsylvania enacted the DNA Act, 44 PA.CONS.STAT.ANN. §§ 2301 – 2336, to provide “for DNA detection of sexual offenders and other offenders.” 44 Pa.Cons.Stat.Ann. § 2301.¹⁴

A. Definitions - 44 PA.CONS.STAT.ANN. § 2303

“**ARD**” Accelerated Rehabilitative Disposition.

“**CODIS**” The term is derived from Combined DNA Index System, the Federal Bureau of Investigation’s national DNA identification index system that allows the storage and exchange of DNA records submitted by state and local forensic DNA laboratories.

“**Commissioner**” The Commissioner of the Pennsylvania State Police.

“**Criminal Justice Agency**” A criminal justice agency as defined in 18 Pa.Cons.Stat.Ann. § 9102 (relating to definitions).

“**DNA**” Deoxyribonucleic acid. DNA is located in the cells and provides an individuals’ personal genetic blueprint. DNA encodes genetic information that is the basis of human heredity and forensic identification.

“**DNA Record**” DNA identification information stored in the State DNA Data Base or the Combined DNA Index System for the purpose of generating investigative leads or supporting statistical interpretation of DNA test results. The term includes nuclear and mitochondrial typing. The DNA record is the result obtained from the DNA typing tests. The DNA record is comprised of the characteristics of a DNA sample which are of value in establishing the identity of individuals. The results of all DNA identification tests on an individual’s DNA sample are also collectively referred to as the DNA profile of an individual.

“**FBI**” The Federal Bureau of Investigation.

“**Felony Sex Offense**” A felony offense or an attempt, conspiracy or solicitation to commit a felony offense under any of the following:

- Sexual Offenses, 18 PA.CONS.STAT.ANN. Ch. 31;
- Incest, 18 PA.CONS.STAT.ANN. § 4302;
- Prostitution and related offenses, 18 PA.C.S.A. § 5902(c)(1)(iii) and (iv);
- Obscene and Other Sexual Materials and Performances, where the offense constitutes a felony, 18 PA.CONS.STAT.ANN. § 5903(a);

¹⁴ These requirements were originally enacted as the Act of May 28, 1995, 1st Sp. Sess., P.L. 1009, No. 14, 35 PA.CONS.STAT.ANN. §§ 7651.101 – 7651.1102, repealed by Section 5 of the Act of June 19, 2002, P.L. 394, and continued in the DNA Data and Testing Act, 42 PA.CONS.STAT.ANN. §§ 4701 – 4741. The 1995 statute required the collection of DNA samples from inmates convicted of felony sex and other specified offenses, even if they were convicted prior to the effective date of the Act. The 2002 codification expanded this list of specified crimes. See *Luckett v. Blaine*, 850 A.2d 811, 814 n.2 (Pa.Cmwlth. 2004). 42 PA.CONS.STAT.ANN. §§ 4701 – 4741. were renumbered into chapter 44 in 2004.

- Sexual Abuse of Children, 18 PA.CON.S.TAT.ANN. § 6312;
- Unlawful Contact with Minor, where the most serious underlying offense for which the defendant contacted the minor is graded as a felony, 18 PA.CON.S.TAT.ANN. § 6318;
- Sexual Exploitation of Children, 18 PA.CON.S.TAT.ANN. § 6320.

“Former DNA Act” The former act of May 28, 1995 (1st Sp.Sess., P.L. 1009, No. 14) known as the DNA Detection of Sexual and Violent Offenders Act.

“Fund” The DNA Detection Fund reestablished in section 2335 (relating to DNA Detection Fund).

“Other Specified Offense” A felony offense or an offense under 18 Pa.C.S. § 2910 (Luring a Child into a Motor Vehicle) or 3126 (Indecent Assault) or an attempt to commit such an offense.

“State Police” Pennsylvania State Police.

B. State DNA Identification System

1. Responsibilities of State Police

- (a) the policy management and administration of the State DNA identification record system;
- (b) promulgating rules and regulations to carry out the provisions of this chapter;
- (c) providing or liaison with the FBI and other criminal justice agencies for Pennsylvania’s participation in CODIS or in a DNA data base designated by the State Police. 44 PA.CON.S.TAT.ANN. § 2311;
- (d) State Police can recommend to the General Assembly inclusion of additional offenses for which DNA samples will be taken. 44 PA.CON.S.TAT.ANN. § 2314;
- (e) State Police is to prescribe procedures to be used in the collection, submission, identification, analysis, storage and disposition of DNA samples and typing results of DNA samples submitted. 44 PA.CON.S.TAT.ANN. § 2318(a);
- (f) State Police is authorized to contract with third parties for purposes of this chapter. 44 PA.CON.S.TAT.ANN. § 2318(b);
- (g) State Police is authorized, for good cause shown, to revoke or suspend the right of a forensic DNA laboratory within the Commonwealth to access or exchange DNA identification records with criminal justice agencies. 44 PA.CON.S.TAT.ANN. § 2320.

2. Compatibility

DNA identification system must be compatible with the procedures specified by the FBI, including use of comparable test procedures, laboratory equipment, supplies and computer software. *44 Pa.Cons.Stat.Ann. § 2315.*

C. State DNA Data Base – 44 PA.CON.S.TAT.ANN. § 2312

State DNA Data Base is to be administered by the State Police and provide DNA records to the FBI for storage and maintenance by CODIS.

State DNA Data Base shall have the capability provided by computer software and procedures administered by the State Police to store and maintain DNA records related to:

- i. forensic casework;
- ii. convicted offenders required to provide a DNA sample under this chapter;
and
- iii. anonymous DNA records used for research or quality control.

D. When and From Whom DNA Sample Required

1. Occasion When Sample Required

DNA sample is required upon conviction, delinquency, adjudication, and certain ARD cases. 44 PA.CON.S.TAT.ANN. § 2316.

This chapter applies to incarcerated persons convicted or adjudicated delinquent for a felony sex offense prior to June 19, 2002.

Also applies to incarcerated persons and persons on probation or parole who were convicted or adjudicated delinquent for other specified offenses prior to the effective date of this paragraph.

Acceptance into ARD as a result of a criminal charge for a felony sex offense or other specified offense filed after June 18, 2002, may be conditioned upon the giving of a DNA sample.

“Release” means any release, parole, furlough, work release, prerelease or release in any other manner from a prison, jail, juvenile detention facility or any other place of confinement.

2. Individuals Who Must Provide Samples

(a) DNA samples are to be drawn:

- From a person convicted or adjudicated delinquent for a felony sex offense or other specified offense; or
- From a person who is or remains incarcerated for a felony sex offense or other specified offense;
- Upon intake to a prison, jail, juvenile detention facility or any other detention facility or institution.

(b) If already confined at the time of sentencing or adjudication, DNA sample shall be drawn immediately after sentencing or adjudication (or if not timely drawn, at any time thereafter by the prison, jail, juvenile detention facility, detention facility or institution.).

- (c) DNA sample will be drawn even if disposition does not involve intake into prison, jail, juvenile detention facility or any other detention facility or institution.
- (d) Under no circumstances shall a person who is convicted or adjudicated delinquent for an offense covered by this chapter be released in any manner until a DNA sample has been withdrawn.
- (e) Condition of Release, Probation or Parole:
 - Person who has been convicted or adjudicated delinquent for a felony sex offense or otherwise specified offense and who serves a term of confinement in connection therewith after June 18, 2002, must not be released in any manner unless and until a DNA sample has been withdrawn.

3. Mandatory Submission – 44 PA.CON.S.TAT.ANN. § 2316(D.1)

- (a) Requirements of this chapter apply regardless of whether a court advises a person that a DNA sample must be provided to the State DNA Data Base and State DNA Data Bank as a result of a conviction or adjudication or delinquency.
- (b) Person sentenced to death or life imprisonment without the possibility of parole NOT exempt.
- (c) Any person subject to this chapter who has not provided a DNA sample for any reason, including because of an oversight or error, must provide a DNA sample for inclusion in the State DNA Data Base and State DNA Data Bank after being notified by authorized law enforcement or corrections personnel.
- (d) If a DNA sample is not adequate for any reason, the person must provide another DNA sample for inclusion in the State DNA Data Base and State DNA Data Bank after being notified by authorized law enforcement or corrections personnel.

E. Procedures for Withdrawal, Collection, and Transmission of DNA Samples - 44 PA.CON.S.TAT.ANN. § 2317

- 1. DNA samples from those incarcerated or confined will be drawn at the place of incarceration or confinement.
- 2. DNA samples from those who are not sentenced to a term of confinement will be drawn at a prison, jail unit, juvenile facility or other facility to be specified by the court.
- 3. DNA samples to be drawn only by individuals qualified to draw DNA samples in a medically approved manner.
- 4. Drawn DNA samples and full set of fingerprints from same person must be delivered to the State Police within 48 hours of drawing the DNA sample.

5. Persons authorized to draw DNA samples are not criminally liable for withdrawing the sample and transmitting test results if they perform these activities in good faith.
6. Persons authorized to draw DNA samples are not civilly liable for such activities when the person acted in a reasonable manner according to generally accepted medical and other professional practices.
7. Reasonable use of force allowed where an individual refuses to submit to DNA testing authorized under this chapter.
 - (a) No civil or criminal liability for use of reasonable force.

F. DNA Data Base Exchange - 44 PA.CON.S.TAT.ANN. § 2319

1. State Police has the duty to receive DNA samples, to store, to perform analysis or to contract for DNA typing analysis with a qualified DNA laboratory to classify and file the DNA record of identification characteristic profiles of DNA samples submitted under the former DNA Act, former 42 PA.CON.S.TAT.ANN. Ch. 47, or this chapter, and to make such information available as provided in this section.
2. State Police may contract out the storage of DNA typing analysis and may contract out DNA typing analysis to a qualified DNA laboratory.
3. Results of DNA profile of individuals in the State DNA Data Base shall be made available:
 - (a) to criminal justice agencies or approved crime laboratories which serve these agencies; or
 - (b) Upon written or electronic request and in furtherance of an official investigation of a criminal offense or offender or suspected offender.
4. Population Data Base - State Police may establish a separate population data base comprised of DNA samples obtained under this chapter after all personal identification is removed. State Police may share or disseminate it with other criminal justice agencies or crime laboratories that serve to assist the State Police with statistical data bases. May be made available to and searched by other agencies participating in the CODIS system.

G. Expungement - 44 PA.CON.S.TAT.ANN. § 2321

1. Person whose DNA record has been included in the data bank may request expungement on the grounds that
 - (a) the conviction or delinquency adjudication has been reversed and the case dismissed, or
 - (b) that the DNA sample, record or profile was included in the State DNA Data Bank or State DNA Data Base by mistake.

2. State Police must receive a written request for expungement and certified copy of the final court order reversing and dismissing the conviction or clear and convincing proof that the sample record or profile was included by mistake before purging all records and identifiable information in the State Data Bank and State Data Base and destroying each sample, record and profile from the person.
3. An incarcerated or previously incarcerated person may not seek expungement of a DNA sample, record or profile on the grounds that he was convicted or adjudicated delinquent
 - (a) for a felony sex offense prior to July 27, 1995, or
 - (b) for one of the other specified offenses prior to the effective date of the former DNA Act or this chapter

H. Prohibition on Disclosure - 44 Pa.Cons.Stat.Ann. § 2331

Information in the State DNA Data Bank or State DNA Data Base shall not be disclosed in any manner to any person or agency not authorized to receive it knowing that such person or agency is not authorized to receive it.

No person can obtain individually identifiable DNA information from the State Data Base or the State DNA Data Bank without authorization to do so.

I. Criminal Penalties – 44 Pa.Cons.Stat.Ann. § 2332

Any person who by virtue of employment or official position or any person contracting to carry out any functions under this chapter, who has possession of or access to individually identifiable DNA information contained in the State DNA Data Base or in the State DNA Data Bank and who for pecuniary gain for such person or for any other person discloses it in any manner to any person or agency not authorized to receive it commits a misdemeanor of the first degree.

Any person who knowingly obtains information in violation of section 2331(b) commits a misdemeanor of the first degree.

Registration

OFFENDERS	LIFETIME REGISTRATION	SVP'S
<p>10 year registration for a conviction for the following:</p> <ol style="list-style-type: none"> 1. Kidnapping where V is minor (§ 2901) 2. Luring a Child Into a Motor Vehicle (§ 2910) 3. Institutional Sexual Assault (§ 3124.2) 4. Indecent Assault where offense is Misd. 1 (§ 3126) 5. Incest where V is 12 yrs or older but under 18 yrs (§ 4302) 6. Prostitution where actor promotes prostitution of a minor (§ 5902(b)) 7. Obscene and other sexual materials and performances (§ 5903(a)(3), (4), (5) or (6)) 8. Sexual Abuse of Children (§ 6312) 9. Unlawful Contact with Minor (§ 6318) 10. Sexual Exploitation of Children (§ 6320) 11. Conviction for an attempt to commit any of the above offenses or in the Lifetime Reg. Column⁴² <i>P.A.CON.S.STAT.ANN.</i> § 9795.1(A) <p>* 10 year period gets tolled when offender is recommitted for parole violation or SN to additional term of imprisonment.</p> <p>⁴² <i>P.A.CON.S.STAT.ANN</i> § 9795.2(A)(3)</p>	<p>Lifetime registration for the following:</p> <ol style="list-style-type: none"> 1. 2 or more convictions of any offenses in 10 year registration column <p>or a conviction for:</p> <ol style="list-style-type: none"> 2. Rape (§ 3121) 3. Involuntary Deviate Sexual Intercourse (§ 3123) 4. Sexual Assault (§ 3124.1) 5. Aggravated Indecent Assault (§ 3125) 6. Incest where the V is under 12 yrs (§ 4302) <p>⁴² <i>P.A.CON.S.STAT.ANN</i> § 9795.1(b)</p>	<p>Lifetime Registration Definition of SVP:</p> <p>Person who has been convicted of a sexually violent offense (any offense listed in Offender and Lifetime Registrants columns) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses. The term includes an individual determined to be a sexually violent predator where the determination occurred in the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico, a foreign nation or by court martial.</p> <p>⁴² <i>P.A.CON.S.STAT.ANN</i> § 9792</p>

Duties and Responsibilities

Applies to Offenders, Lifetime Registrants & SVP's

REGISTRATION	INFORMATION TO BE PROVIDED	NOTIFICATION OF CHANGES
<p>Must register with the PA State Police</p> <ol style="list-style-type: none"> 1. Upon release from incarceration 2. Upon parole from State or county correctional institution 3. Upon the commencement of a sentence of intermediate punishment or probation <p><i>42 P.A. CONS. STAT. ANN. § 9795(2)(a)(1)</i></p> <p>Registration in Another State:</p> <p>Must register with a new law enforcement agency no later than 10 days after establishing residence in another state</p> <p><i>42 P.A. CONS. STAT. ANN. §</i></p>	<ol style="list-style-type: none"> 1. All current or intended residences 2. All information concerning current or intended employment 3. All information concerning current or intended enrollment as a student. <p><i>42 P.A. CONS. STAT. ANN. § 9795.2(A)(1)</i></p>	<p>Must inform the PA State Police within 10 days of:</p> <ol style="list-style-type: none"> 1. Any change of residences or estab. of additional residence(s) 2. Any change of employer or employment location for a period of time that will exceed 14 days or for an aggregate period of time that will exceed 30 days during any calendar year, or termination of employment 3. Any change of institution or location at which the person is enrolled as a student or termination of enrollment 4. Becoming employed or enrolled as a student if the person has not previously provided that information to the PA State Police <p><i>42 P.A. CONS. STAT. ANN. § 9795.2(a)(2)</i></p>

Out-of-State or Court Martialed Registrants

Who Must Register	Classification
<ol style="list-style-type: none"> 1. If convicted or SN by Ct or ct-martialed for sexually violent offense or similar offense 2. If required to register under sex offender statute in jurisdiction where convicted, SN or ct-martialed 3. If required to register as a sex offender as a result of a juvenile adjudication in another jurisdiction 4. Includes determination made in US, one of its territories/possessions, another state, D.C., Puerto Rico, foreign nation, or by ct-martial <p>Mu.st register within 10 days of arrival in PA</p> <p><i>42 PA.CON.S.STAT.ANN. § 9795.2(b)</i></p>	<ol style="list-style-type: none"> 1. If classified SVP or subject to active notification & lifetime registration elsewhere = SVP & subject lifetime registration in PA <ol style="list-style-type: none"> a. also subj to verification of residence, community notific., info on Internet b. NOT counseling unless required by other jurisdiction or by ct-martial c. applies to out-of-state juvenile adjudications 2. If convicted or SN or ct-martialed for offense in § 9795.1(b) or equiv. offense = offender and subject to lifetime registration 3. If convicted or SN or ct-martialed for offense in § 9795.1(a) or equiv. offense = offender and subject to: 10 years registration OR for period of time equal to time required to register in other jurisd., whichever is greater, minus any credit due as result of prior compliance of registration requirements 4. If subject to active notification in other jurisdiction = offender and subject to verification, community notification, and info on Internet <ol style="list-style-type: none"> a. if convicted in other jurisd for offense in 9795.1(b) or equiv = lifetime notification b. if convicted in other jurisd for offense in 9795.1(a) or equiv = 10 yr notification OR period of time equal to time required to register in other jurisd., whichever is greater, minus any credit due as result of prior compliance of registration requirements c. if juvenile adjudication = active notification for period of time equal to time required to register in other jurisd., whichever is greater, minus any credit due as result of prior compliance of registration requirements 5. If subject to passive notification in other jurisd = offender and subject to verification and info on Internet for period of time equal to time required to register in other jurisd., whichever is greater, minus any credit due as result of prior compliance of registration requirements <ol style="list-style-type: none"> a. same applies to juvenile adjudications

Verification

OFFENDERS & LIFETIME REGISTRANTS	SVP'S
<p><u>Annual Verification</u></p> <p>Old Law, effective until 1/1/06:</p> <p>Pa State Police to verify residence by mailing nonforwardable verification form.</p> <p>For period of registration required, offender to appear within 10 days of receipt of form at any PA State Police station to:</p> <ol style="list-style-type: none"> 1. complete verification form 2. be photographed <p>New Law, effective 1/1/06:</p> <p>For period of registration required, offender to appear within 10 days before each annual anniversary date of the offender's initial registration at an approved registration site to:</p> <ol style="list-style-type: none"> 1. complete verification form 2. be photographed <p><i>42 PA.CONS.STAT.ANN. § 9796(b)</i></p> <p><i>[Failure on part of PA State Police to send or failure of an offender to receive any notice reminder of offender's verification requirement or information on approved registration sites, does not relieve offender from verification requirements. 42 PA.CONS.STAT.ANN. § 9796(f)]</i></p>	<p><u>Quarterly Verification</u></p> <p>Old Law, effective until 1/1/06:</p> <p>PA State Police to verify residence, compliance with counseling and compliance with residence limitation, every 90 days, by mailing nonforwardable verification form to last reported residence, and</p> <p>SVP to appear at any PA State Police station, within 10 days of receipt of nonforwardable verification form to:</p> <ol style="list-style-type: none"> 1. complete verification form 2. be photographed <p>New Law, effective 1/1/06:</p> <p>SVP to appear quarterly, for life, between Jan 5 and Jan 15, April 5 and April 15, July 5 and July 15, and Oct. 5 and Oct. 15 of each calendar year at approved registration site to:</p> <ol style="list-style-type: none"> 1. complete verification form 2. be photographed <p><i>42 PA.CONS.STAT.ANN. § 9796(a)</i></p> <p><i>[Failure on part of PA State Police to send nor failure of an SVP to receive any notice reminder of SVP's verification requirement or information on approved registration sites, does not relieve offender from verification requirements. 42 PA.CONS.STAT.ANN. § 9796(f)]</i></p>

Notification

OFFENDERS & LIFETIME REGISTRANTS
None
SVP'S
<p>Victim Notification:</p> <ol style="list-style-type: none"> 1. Victim to get written notification when SVP registers initially and when SVP notifies of any change of residence 2. Notice to be given 72 hours after SVP registers or notifies of change of address 3. Notice to contain SVP's name and address(es) where he resides <i>42 PA.CONS.STAT.ANN. § 9797</i> <p>Community (or "ACTIVE") Notification:</p> <p><u>Notice to contain:</u></p> <ol style="list-style-type: none"> 1. SVP name 2. SVP address(es) 3. Offense for which SVP convicted, SN by a court, adjudicated delinquent or court martialled 4. Statement that he has been determined SVP by a court 5. Photo of SVP, if available 6. Not to contain any info re: victim's name, identity, residence <p><u>Notice sent to:</u></p> <ol style="list-style-type: none"> 1. <u>SVP neighbors</u> (includes unit owner's association and residents of common interest community) (must be provided <u>within 5 days</u> after law enforcement receives info of SVP's release date and residence.) 2. <u>Within 7 days</u> after law enforcement receives info of SVP's release date and residence, to: <ol style="list-style-type: none"> a. Director of county children and youth service agency of county where SVP resides b. Superintendent of each school district & equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality where SVP resides c. Superintendent of each school district & equivalent official for private and parochial schools within 1-mile radius of where SVP resides d. Licensee of each certified day care center and licensed preschool program and owner/operator of each registered family day care home in the municipality SVP resides e. President of each college, university and community college within 1000 feet of SVP's residence <i>42 PA.CONS.STAT.ANN. § 9798</i>

Information on Internet: "Passive Notification"

Applies to Offenders, Lifetime Registrants & SVP's

<p>INFORMATION PERMITTED TO BE DISCLOSED</p>	<p>DURATION OF INTERNET POSTING</p>
<p>1. Name and any aliases</p> <p>2. Year of birth</p> <p>3. Street address, city, county and zip code of any institution or location at which the person is enrolled as a student</p> <p>4. City, county and zip code of any employment location</p> <p>5. Photograph, which must be updated not less than annually</p> <p>6. Description of the offense(s) which triggered registration</p> <p>7. Date of offense and conviction</p> <p><i>42 PA.CON.S.TAT.ANN. § 9798.1(c)</i></p>	<p>1. SVP – lifetime</p> <p>2. Lifetime Registrant – lifetime unless granted relief under § 9795.5 (Exemption from Certain Notifications)</p> <p>3. Offender – period during which he is required to register, including any extension of the period pursuant to § 9795.2(a)(3) (tolling of 10 year period)</p> <p><i>42 PA.CON.S.TAT.ANN. § 9798.1(d)</i></p>

Penalties

**18 PA.CON.S.TAT.ANN. § 4915
FAILURE TO COMPLY WITH REGISTRATION OF
SEXUAL OFFENDERS REQUIREMENTS**

An individual subject to registration commits an offense if he knowingly fails to:

- § 4915(a)(1) - Register with the PA State Police
- § 4915(a)(2) - Verify his address or be photographed
- § 4915(a)(3) - Provide accurate information when registering or verifying an address

OFFENDERS	LIFETIME REGISTRANTS & SVP'S
Misd 3 – if violates subsection (a)(1) or (2)	Misd 2 - if violates subsection (a)(1) or (2)
Misd 2 – if violates subsection (a)(1) or (2) and has been previously been convicted of an offense under subsection (a)(1) or (2)	Misd 1 - if violates subsection (a)(1) or (2) and has been previously been convicted of an offense under subsection (a)(1) or (2)
Felony 3 – if violates subsection (a)(1) or (2) and has two or more convictions under subsection (a)(1) or (2) or a similar offense OR - if violates subsection (a)(3)	Felony 3 - if violates subsection (a)(1) or (2) and has two or more convictions under subsection (a)(1) or (2) or a similar offense OR - if violates subsection (a)(3)

**18 PA.CON.S.TAT.ANN. § 5518
SEXUALLY VIOLENT PREDATORS RESIDING NEAR SCHOOLS**

OFFENSE DEFINED	GRADING
An SVP who establishes residence in violation of 42 PA.CON.S.TAT.ANN. § 9796.1 (Limitations on Residence for Sexually Violent Predators)	Misd 2 - 1st Offense Misd 1 - Violates § 5518 and previously convicted of § 5518 or similar offense Felony 3 – Violates § 5518 and previously convicted of 2 or more offenses of § 5518 or similar offense

* Before deciding on the issue of bail for either charge above, the issuing authority must require:

- 1.The defendant be fingerprinted and photographed;
- 2.The defendant provide PSP with all current or intended residences, all info concerning current or intended employment, including all employment locations and all info concerning current or intended enrollment as a student;
- 3.law enforcement officers to make reasonable attempts to verify info provided by defendant.

Sexually Violent Predators

ASSESSMENTS

Order for Assessment:

1. Ct to order, after conviction (for any offense specified in § 9795.1) but before SN, an assessment by the Board
2. Order to be sent to Board within 10 days of conviction

Factors to be considered in Assessment (include but not limited to):

1. Facts of current offense: multiple V's, exceeded means necessary to achieve offense, nature of sexual contact, relationship to V, age of V, unusual cruelty, mental capacity of V
2. Prior Offense History: D's prior crim. record, whether D completed prior sentences, whether D participated in avail. programs for sex offenders
3. Characteristics of D: age, use of illegal drugs, any mental illness, mental disability or mental abnormality, behavioral characteristics that contribute to D's conduct
4. Factors supported in sex offender assessment field as criteria reasonably related to risk of reoffense

Board Report:

Board to submit written assessment to DA 90 days from date of conviction

Hearing:

1. Scheduled upon filing praecipe by DA
2. DA must serve copy assessment upon D/C
3. D and DA given notice of hrg, opport to be heard, right to call W, call expert W and right to cross W
4. D right to counsel, appointed if can't afford
5. If D request another expert assess., must provide copy to DA prior to hrg
6. DA must prove by clear & convincing evidence D = SVP
7. Determ. by Ct. immed. submitted to D, DA, PA Prob & Parole, DOCS, PSP

42 PA.CON.S.TAT.ANN. § 9795.4

RESIDENCE LIMITATION

1. SVP who has committed any offense in § 9795.1
2. Against victim under 14 yrs at time of offense
3. May not estab residence w/in 1 and ½ miles, by nearest public highway
4. By any public, private or parochial school (grade K through elementary)

[However, SVP not required to sell or otherwise dispose of any real estate or home acquired/owned prior to SVP determination OR vacate any real estate or home leased prior to SVP determination.]

Waiver for Cause:

1. SVP can, for good cause, petition court for waiver from limitations
2. Good cause includes but limited to medical necessity or court determination that transportation by school sufficient to protect safety of children
3. Order allowing waiver may include additional restrictions limiting SVP's contact with children walking to and from an elementary school.

Penalty: subject to prosecution under 18 PA.CON.S.TAT.ANN. § 5518.

42 PA.CON.S.TAT.ANN. § 9796.1

COUNSELING

1. Required to attend at least monthly counseling sessions in a program approved by the board
2. Be financially responsible for fees, unless can prove to satisfaction of the court he cannot afford to pay for them. Parole office must then pay the fees and SVP must continue with counseling
3. Board must monitor compliance

42 PA.CON.S.TAT.ANN. § 9799.4

National Resource List

Victim Issues Resources

Office for Victims of Crime (OVC)

Contact Information:

<http://www.ojp.usdoj.gov/ovc/>

The Office for Victims of Crime (OVC) was established by the 1984 Victims of Crime Act (VOCA) to oversee diverse programs that benefit victims of crime. OVC provides substantial funding to state victim assistance and compensation programs—the lifeline services that help victims to heal. The agency supports trainings designed to educate criminal justice and allied professionals regarding the rights and needs of crime victims.

Office on Violence Against Women

Contact Information:

<http://www.usdoj.gov/ovw/>

Phone: 202-307-6026

Fax: 202-307-3911

TTY: 202-307-2277

Since its inception in 1995, the Violence Against Women Office, now the Office on Violence Against Women (OVW) has handled the Department's legal and policy issues regarding violence against women, coordinated Departmental efforts, provided national and international leadership, received international visitors interested in learning about the federal government's role in addressing violence against women, and responded to requests for information regarding violence against women.

National Center for Victims of Crime

Contact Information:

<http://www.ncvc.org/>

Phone: 202-467-8700

Fax: 202-467-8701

Email: webmaster@ncvc.org

The National Center for Victims of Crime (NCVC) provides direct services and resources; advocates for passage of laws and public policies that create resources and secure rights and protections for crime victims; delivers training and technical assistance to victim service organizations, counselors, attorneys, criminal justice agencies, and allied professionals; and fosters cutting-edge thinking about the impact of crime and the ways in which each gain control of their lives.

Focus areas include:

- Victim Services
- Civil Justice
- Public Policy
- Training and Technical assistance

National Sexual Violence Resource Center

Contact Information: <http://www.nsvrc.org/>

The National Sexual Violence Resource Center (NSVRC) is a comprehensive collection and distribution center for information, research and emerging policy on sexual violence intervention and prevention. The NSVRC provides an extensive on-line library and customized technical assistance, as well as, coordinates National Sexual Assault Awareness Month initiatives.

Legal Resources

The American Prosecutors Research Institute

Contact Information:

<http://www.ndaa.org/apri/index.html>

99 Canal Center Plaza, Suite 510

Alexandria, VA 22314

Phone: 703-549-9222

Fax: 703-836-3195

In 1984, the National District Attorneys Association founded the **American Prosecutors Research Institute (APRI)** as a non-profit research and program development resource for prosecutors at all levels of government. Since that time, APRI has become a vital resource and national clearinghouse for information on the prosecutorial function. The Institute is committed to providing interdisciplinary responses to the complex problems of criminal justice. It is also committed to supporting the highest professional standards among officials entrusted with the crucial responsibility for public safety.

APRI's activities are concentrated in the following areas:

- Training and Curriculum Development,
- Technical Assistance and Consultation,
- Publications, and
- Research

More specifically, APRI staff can provide:

- Case law information
- Up-to-date information on legislation
- Detailed assistance for trial preparation
- Individualized support for trial presentation
- Access to experts and presenters
- Assistance with policy development
- Information on program development

- Topical background material
- Cooperation for grant development

Sex Offending Behavior Resources

Center for Sex Offender Management (CSOM)

Contact Information: <http://www.csom.org/>

CSOM is a national project that supports state and local jurisdictions in the effective management of sex offenders under community supervision. The project is administered through a cooperative agreement between OJP and the Center for Effective Public Policy. A National Resource Group has been established to guide the activities of the project. The members of the National Resource Group include some of the country's leading experts and practitioners in the fields of sex offender management, treatment, and supervision.

CSOM's primary goal is to enhance public safety by preventing further victimization through improving the management of sex offenders in the community. CSOM's goals are carried out through three primary activity areas: an information exchange, training and technical assistance, and support to select Resources Sites and OJP grantees.

Resources Within Pennsylvania

Victim Issues

Pennsylvania Coalition Against Rape

Contact Information:

<http://www.pcar.org>

125 N. Enola Drive

Enola, PA 17025

Phone: 717-728-9740 (ask for The Judicial Project Specialist)

The Pennsylvania Coalition Against Rape (PCAR) is an organization working at the state and national levels to prevent sexual violence. Incepted in 1975, PCAR continues to use its voice to challenge public attitudes, raise public awareness, and effect critical changes in public policy, protocols, and responses to sexual violence.

To provide quality services to victims/survivors of sexual violence and their significant others, PCAR works in concert with its state-wide network of 52 rape crisis centers. The centers also work to create public awareness and prevention education within their communities.

PCAR can provide information about sexual violence on a variety of topics including: Older Victims, Victims with disabilities, and male victims.

Pennsylvania Commission on Crime and Delinquency

Contact Information:

<http://www.pccd.state.pa.us/>

3101 North Front Street

Harrisburg, PA 17110

Phone: 717-783-0551

Toll-free in Pennsylvania: 800-692-7292

Victims Compensation: 800-233-2339

The Pennsylvania Commission on Crime and Delinquency promotes a collaborative approach to enhance the quality of justice through guidance, leadership and resources by empowering citizens and communities and influencing state policy. The Office of Victims' Services administers rights and services to victims of crime in Pennsylvania; administers the Victims Compensation Assistance Program and provides a statewide education effort to victim service professionals and outreach to the public. The VCAP program serves as the designated payment source for sexual-assault forensic examinations.

The Office of the Victim Advocate

Contact Information:

<http://www.pbpp.state.pa.us/ova/site/default.asp>

Board of Probation and Parole

1101 S. Front Street

Suite 5200

Harrisburg, PA 17104

Phone: 800.563.6399

The Office of the Victim Advocate was created by the Victim Advocate Law, Act 8 of the 1995 Special Legislative Session on Crime. The purpose of the Victim Advocate is to represent the rights and interests of crime victims before the Board of Probation and Parole and the Department of Corrections. In addition, the Office of the Victim Advocate also provides notification to crime victims of the potential for inmate release and opportunity to provide testimony, notification of the inmate's movement within the correctional system, referrals for crime victims to local programs, basic crisis intervention and support, general information on the status and location of the inmate as allowed by law, and notification of the expiration of an inmate's maximum sentence or date of execution, if applicable, as well as preparation of a victim who chooses to witness an execution.

The Office of the Victim Advocate offers several programs to assist victims of crime. These include:

The Mediation Program for Victims of Violent Crime provides an opportunity for Victims of Violent Crime to meet with their offender, express their feelings directly to the offender, and to ask questions that have never been answered. It provides an opportunity for victims to regain power or "say what needs to be said." It also gives the offender a chance to tell his/her story and to accept responsibility for the crime. This may be the first time that both the victim and the offender have engaged in a dialogue about the offense with each other. A face-to-face meeting is an opportunity for the offender to recognize the real person they have hurt.

The **Address Confidentiality Program (ACP)** is another of the programs administered by the Office of the Victim Advocate to assist victims of domestic violence, sexual assault or stalking.

The program has two basic parts. First, the ACP provides a substitute address for victims who have moved to a new location unknown to their perpetrator. The second part of the program provides participants with a free first-class confidential mail forwarding service.

Victims of domestic violence, sexual assault, stalking, and persons who live in the same household as a participant may apply. ACP will determine if a victim meets eligibility. The ACP is not for everyone. A victim service professional from a domestic violence, sexual assault or a victim service program can help determine if ACP is right for a victim as part of their safety plan.

Restitution is a court-ordered financial obligation that can be in the form of out-of-pocket expenses, loss of earnings, and/ or property loss.

If you wish to receive restitution, you must submit your information, including medical bills or receipts, etc., to the District Attorney's office prior to sentencing. At the sentencing hearing, the District Attorney will ask the Judge to order restitution. In Pennsylvania, as restitution is mandatory, the Court must order restitution.

Pennsylvania District Attorneys Association

Contact Information:

<http://www.pdaa.org/>
2929 N. Front Street
Harrisburg, PA 17110
Phone: (717)238-5416

The PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION was formed in 1912 for the purpose of providing uniformity and efficiency in the discharge of duties and functions of Pennsylvania's 67 District Attorneys and their assistants. The Association today continues to further its purpose through its extensive training program and by its reporting of legal and legislative developments of importance to Pennsylvania prosecutors.

The Sexual Offenders Assessment Board

Contact Information:

<http://www.meganslaw.state.pa.us/soab/site/default.asp>
101 South Front Street
Suite 5700
Harrisburg, Pa 17104-2533

The SOAB is an independent board of psychiatrists, psychologists, and criminal justice experts appointed by the Governor, according to statute, to assess all sex offenders convicted under 42 Pa. C.S. § 9791, commonly known as Megan's Law.

Reports

Federal Bureau of Investigation. (1997). *Uniform Crime Reports*. Retrieved on April 10, 2006 from, http://www.fbi.gov/ucr/Cius_97/97crime/97crime.pdf. p. 26.

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

National Victim Center and Crime Victims Research and Treatment Center. (1992). *Rape in America: A Report to the Nation* University of South Carolina, Charleston

Pennsylvania Supreme Court (2003). *Executive Summary Of The Report On Racial And Gender Bias In The Justice System* (pp.421-452). Harrisburg, PA: Author

Potential Applications of an existing offender typology to child molesting behaviour.

This doctoral dissertation written by Kimberly Gentry Sperber examines issues regarding child molestation. She provides an easy to understand look at current literature, offender typology, and appropriate interventions.

Her work is available at: <http://www.uc.edu/criminaljustice/graduate/Dissertations/sperber.pdf#search='research%20on%20child%20molesters'>.

Rape Crisis Centers of Pennsylvania (By County)

ADAMS

SURVIVORS, INC.

PO Box 3572
26A Springs St. (UPS)
Gettysburg, PA 17325

Business: (717) 334-0589
Hotline: (717) 334-9777 or (800) SUR-V106
Fax: (717) 334-3576
E-mail: survivor@adelphia.net

ALLEGHENY

THE CENTER FOR VICTIMS OF VIOLENCE AND CRIME

900 5th Avenue
Pittsburgh, PA 15219-4737

Business: (412) 350- 1975
Hotline: (412) 392-8582
Fax: (412) 350-1976
E-mail: information@cvvc.org

PITTSBURGH ACTION AGAINST RAPE

81 South 19th Street
Pittsburgh, PA 15203

Business: (412) 431-5665
Hotline: (866) 363-7273
Fax: (412) 431-0913

ARMSTRONG

HELPING ALL VICTIMS IN NEED

P.O. Box 983
325 Arch Street (UPS only)
Kittanning, PA 16201

Business: (724) 543-1180
Hotline: (800) 841-8881 or (724) 548-8888
Fax: (742) 543-7410

Resources

BEAVER

WOMEN'S CENTER OF BEAVER COUNTY

P.O. Box 428
160 3rd St. (UPS only)
Beaver, PA 15009

Business: (724) 775-2032
Hotline: (724) 775-0131
Fax: (724) 775-2750

BEFORD

YOUR "SAFE HAVEN", INC.

10241 Lincoln Highway
Everett, PA 15537-6915

Business: (814) 623-7664
Hotline: (800) 555-5671
Fax: (814) 623-7187

BERKS

BERKS WOMEN IN CRISIS

645 Penn Street, Second Floor
Reading, PA 19601

Business: (610) 373-1206
Hotline: (610) 372-9540- English
Hotline: (610) 372-7463-Spanish
Fax: (610) 372-4188
E-mail: Peace@berkswomenincrisis.org

BLAIR

FAMILY SERVICES, INC.

2022 Broad Avenue
Altoona, PA 16601

Business: (814) 944-3583
Hotline: (814) 944-3585 or (800) 500-2849
Fax: (814) 944-8701

BRADFORD

ABUSE AND RAPE CRISIS CENTER

P.O. Box 186
100 Grant St. (UPS only)
Towanda, PA 18848-0186

Business: (570) 265-5333
Hotline: 911
Fax: (570) 265-0918
E-mail: arcc@epix.net

Resources

BUCKS

NETWORK OF VICTIM ASSISTANCE

2370 York Road, Suite B1
Jamison, PA 18929

Business (215) 343-6543
Hotline (800) 675-6900
Fax (215) 343-6260
TTY (215) 343-6260
E-mail novainfo@novabucks.org

BUTLER

VICTIMS OUTREACH INTERVENTION CENTER

P.O. Box 293 Evans City, PA 16033 (Corporate Office)
111 S. Cliff St. Rear Butler, PA 16001 (Administrative Office)

Business: (724) 776-5910 – Cranberry
(724) 283-8700 Butler
Hotline : (800) 400-8551
Fax: (724) 776-6781 –Cranberry
(724) 283-8760 Butler

CAMBRIA

VICTIM SERVICES, INC.

638 Ferndale Avenue
Johnstown, PA 15905-3946

Business: (814) 288-4961
Hotline: (814) 288-4961 or (800) 755-1983 after 5
Fax: (814) 288-3904

CAMERON

CAPSEA , INC. (ELK County Satellite Office)

PO Box 464
Ridgeway,PA 15853

Business: (814) 486-1227
Hotline: (814) 486-0952
E-mail: elkcapsea@alltell.net

CARBON

VICTIMS RESOURCE CENTER 2

(Luzerne County Satellite Office)

616 North Street
Jim Thorpe, PA 18229

Business: (570) 325-9642
Hotline: (570) 325-9641 or (866)-206-9050 - Toll free
Fax: (570) 325-9643

Resources

CENTRE

CENTRE COUNTY WOMEN'S RESOURCE CENTER, INC.

140 W. Nittany Avenue
State College, PA 16801

Business: (814) 238-7066
Hotline: (814) 234-5050 or (877) 234-5050-Toll Free
Fax: (814) 238-4449
Information: (814) 234-5222

CHESTER

THE CRIME VICTIMS CENTER OF CHESTER COUNTY, INC.

236 W. Market Street
West Chester, PA 19382-2903

Business: (610) 692-1926
Hotline: (610) 692-7273
Fax: (610) 692-4959

CLARION

PASSAGES, INC.

1300R East Main Street
Clarion, PA 16214

Business: (814) 226-7273
Hotline: (800) 793-3620
Fax: (814) 226-5766
E-mail: passages@clarion-net.com

CLEARFIED

PASSAGES, INC 2 (Clarion Co. Satellite office)

90 Beaver Drive, Suite 20 D
Dubois, PA 15801

Business: (814) 371-9677
Hotline: (800) 793-3620
Fax: (814) 371-9679
E-mail: passagesinc@usachoice.net

CLINTON

CLINTON COUNTY WOMEN'S CENTER

34 W. Main Street
Lock Haven, PA 17745

Business: (570) 748-9539
Hotline: (570) 748-9509 Fax: (570) 748-9549
E-mail: ccwcsafe@cub.kcnet.org

COLUMBIA

**THE WOMEN'S CENTER, INC. OF
COLUMBIA/MONTOUR**

111 N. Market Street
Bloomsburg, PA 17815

Business: (570) 784-6632
Hotline: (570) 784-6631 or (800) 544-8293
Fax: (570) 784-6680
E-mail: womenctr1@verizon.net

CRAWFORD

WOMEN'S SERVICES, INC.

P.O. Box 537
204 Spring St. (UPS only)
Meadville, PA 16335

Business: (814) 724-4637 or (814) 333-1058
B Hotline: (814) 333-9766 or (888) 881-0189
Leg. Advocate: (814) 336-2081
Fax: (814) 337-4394
Titusville: (814) 827-7276
Fax: (814) 827-9076

CUMBERLAND

**YWCA OF CARLISLE
SEXUAL ASSAULT/RAPE CRISIS
SERVICES OF CUMBERLAND COUNTY**

301 G Street
Carlisle, PA 17013-1389

Business: (717) 258-4324
YWCA: (717) 243-3818
Hotline: (888) 727-2877
Fax: (717) 243-3948
E-mail: info@ywcacarlisle.org

DAUPHIN

**YWCA – VIOLENCE INTERVENTION PREVENTION
PROGRAM**

1101 Market Street
Harrisburg, PA 17103

Business: (717) 234-7931
Hotline: (717) 238-7273 or (800) 654-1211
Fax: (717) 234-1779

DELAWARE

DELAWARE COUNTY WOMEN AGAINST RAPE

P.O. Box 211
204 South Avenue (UPS only)
Media, PA 19063

Business: (610) 566-5866 or (610) 566-7954 or
(610) 566-4386
Hotline: (610) 566-4342
Fax: (610) 566-6896
E-mail: Delcowarjd@aol.com

ELK

CAPSEA

P.O. Box 464
28 Morgan Ave. (Fed-Ex purposes only)
Ridgway, PA 15853

Business: (814) 772-3838
Hotline: (800) 226-4759 or (814) 772-1227
Fax: (814) 772-9270
E-mail: elkcapsea@alltell.net

ERIE

CRIME VICTIM CENTER OF ERIE COUNTY, INC.

125 W 18th Street
Erie, PA 16501

Business: (814) 455-9414
Hotline: (800) 352-7273
Fax: (814) 455-9300
E-mail: supor@cvcerie.org

109 West Fayette Street
Uniontown, PA 15401

Business: (724) 438-1470
Hotline: (724) 437-3737
Fax: (724) 437-6097
E-mail: cvcfayette@cvc.fayette.org

FOREST

SEE WARREN FOR ADDRESS

412 Elm St.
Tionesta, PA 16353 (UPS only)

Business: (814) 755-7880
Hotline: (800) 338-3460 or (814) 726-1030
Fax: (814) 755-7881

**FRANKLIN,
FULTON**

WIN / VICTIM SERVICES

P.O. Box 25
156 E. Queen St. (UPS only)
Chambersburg, PA 17201
201-A E. North St. (UPS only for Fulton)
McConnellsburg, PA 17233

Business: (717) 264-3056
Hotline: (717) 264-4444 or (800) 621-6660
Fax: (717) 264-3168
E-mail: bac@winservices.org

GREENE

SEE WASHINGTON FOR ADDRESS

Business: (724) 627-6108
Hotline: (888) 480-7283
Fax: (724) 627-9761

HUNTINGDON

HUNTINGDON HOUSE

P.O. Box 217
401 Seventh St. (UPS only)
Huntingdon, PA 16652

Business: (814) 643-2801
Hotline: (814) 643-1190
Fax: (814) 643-2419
E-mail: huntingdonhouse@adelphia.net

INDIANA

ALICE PAUL HOUSE

P.O. Box 417
1743 Saltburg Ave. (UPS only)
Indiana, PA 15701

Business: (724) 349-5744
Hotline: (724) 349-4444 or (800) 435-7249
Fax: (724) 349-7883

JEFFERSON

PASSAGES, Inc 3 (Clarion Co. Satellite Office)

18 Western Avenue
Brookville, PA 15825

Business: (814) 849-5303
Hotline: (800) 793-3620
Fax: (814) 849-8628
E-mail: passages@usachoice.net

JUNIATA

THE ABUSE NETWORK (Mifflin Co. Satellite Office)

P.O. Box 268
Lewistown, PA 17044

Business: (717) 436-2402
Hotline: (717) 242-2444
Fax: (717) 242-0871
E-mail: tan@abusenetwork.org

LACKAWANNA

WOMEN'S RESOURCE CENTER, INC.

Box 975
620 Madison Ave. Scranton, PA 18510 (UPS only)
Scranton, PA 18501

Business: (570) 346-4460
Hotline: (570) 346-4671
Fax: (570) 346-3413
E-mail: wrcgeneral@wrcnepa.org

LANCASTER

**SEXUAL ASSAULT PREVENTION AND
COUNSELING CENTER**

110 N. Lime Street
Lancaster, PA 17602

Business
(YWCA): (717) 393-1735
Hotline: (717) 392-7273
Fax: (717) 391-6707

LAWRENCE

CRISIS SHELTER OF LAWRENCE COUNTY

1218 W. State St.
New Castle, PA 16101

Business: (724) 652-9206
Hotline: (724) 652-9036 or (724) 752-7273
Fax: (724) 652-9222
E-mail: csclmlp@adelphia.net

LEBANON

**SEXUAL ASSAULT RESOURCE AND
COUNSELING CENTER**

615 Cumberland St.
Lebanon, PA 17042

Business: (717) 270-6972
Hotline: (717) 272-5308
Fax: (717) 270-6987

Resources

LEHIGH

CRIME VICTIMS COUNCIL OF LEHIGH VALLEY, INC.

801 Hamilton Mall — Suite 300
Allentown, PA 18101

Business: (610) 437-6610
Hotline: (610) 437-6611
Victim/
Witness Dept.: (610) 433-4588
Fax: (610) 437-9394
E-mail: cvclv@enter.net

LUZERNE

VICTIMS RESOURCE CENTER

85 S. Main Street
Wilkes-Barre, PA 18701

Business: (570) 823-0766
Hotline: (570) 823-0765 or (570) 454-7200
Fax: (570) 823-9115
E-mail: support@vrnepa.org

LYCOMING

YWCA - WISE OPTIONS

815 W. 4th Street
Williamsport, PA 17701

Business: (570) 322-4637
Hotline: (570) 323-8167 (for crisis calls only)
Fax: (570) 322-3029

MCKEAN

YWCA – VICTIMS' RESOURCE CENTER

24 W. Corydon Street
Bradford, PA 16701

Business: (814) 368-4235
Hotline: (814) 368-6325 or (888) 822-6325
Fax: (814) 362-4638
E-mail: vrncyw@verizon.net

MERCER

AW/ARE, INC.

P.O. Box 612 (Physical: 559 Greenville Rd.)
Mercer, PA 16137

Business: (724) 662-1870
Hotline: (888) 981-1457
Fax: (724) 662-1875
Hotline and
TTY: (724) 981-1457

Resources

MIFFLIN

THE ABUSE NETWORK

P.O. Box 268
217 E. Third St (UPS only)
Lewistown, PA 17044

Business: (717) 242-0715
Hotline: (717) 242-2444
Fax: (717) 242-0871
E-mail: tan@abusenetwork.org

MONROE

WOMEN'S RESOURCES OF MONROE COUNTY, INC.

P.O. Box 645 (215 W. Main Street)
Delaware Water Gap, PA 18327

Business: (570) 424-2093
Hotline: (570) 421-4200
Fax: (570) 424-2094
E-mail: womansresources@verizon.net

MONTGOMERY

VICTIM SERVICES CENTER OF MONTGOMERY CO.,INC.

18 W. Airy Street -Suite 100
Norristown, PA 19401

Business: (610) 277-0932
Hotline: (610) 277-5200 or (888) 521-0983
Sexual Assault:(610) 277-5200
Fax: (610) 277-6386
E-mail: vsc@libertynet.org

MONTOUR

SEE COLUMBIA FOR ADDRESS

Business: (570) 784-6632
Business/
Hotline: (570) 784-6631
Hotline: (800) 544- 8293

NORTHAMPTON

SEE LEHIGH FOR ADDRESS

Business: (610) 250-6313
Hotline: (610) 437-6611
Victim/
Witness Dept.: (610) 433-4588

NORTHUMBERLAND

SEE UNION FOR ADDRESS

Business/
Hotline: (570) 644-4488
Fax: (570) 524-9367 (Union County)
Email: svwit@svwit.org

PERRY

SEE DAUPHIN FOR ADDRESS

Business: (717) 238-7273
Hotline: (800) 654-1211
Fax: (717) 238-4533

PHILADELPHIA

WOMEN ORGANIZED AGAINST RAPE

1233 Locust Street, Suite 202
Philadelphia, PA 19107

Business: (215) 985-3315
Hotline: (215) 985-3333
Fax: (215) 985-9111
E-mail: carole@woar.org

PIKE

SURVIVORS RESOURCES, INC.

500 W. Harford St.
Milford, PA 18337

Business: (570) 296-2827
Hotline: (570) 296-4357
Fax: (570) 296-4410
E-mail: surv@ptd.net

POTTER

A WAY OUT: DOMESTIC VIOLENCE AND SEXUAL ASSAULT SERVICES

P.O. Box 447
110 E. Third St. (UPS only)
Coudersport, PA 16915

Business: (814) 274-0368
Hotline: (814) 274-0240 or (877)-334-3136
Fax: (814) 274-2230
E-mail: awayout@zitomedia.net

SCHUYLKILL

**RAPE & VICTIM ASSISTANCE CENTER OF
SCHUYLKILL CO.**

368 S. Centre Street
Pottsville, PA 17901

Business: (570) 628-2965
Hotline: (570) 622-6220 or (800) 282-0634
Fax: (570) 628-2001
E-mail: rvac@uplink.net

SNYDER

SVWIT SEE UNION FOR ADDRESS

Business/
Hotline: (570) 374-7773
Fax: (570) 524-9367
E-mail: svwit@svwit.org

SOMERSET

VICTIM SERVICES, INC. 3 (*Cambria Co. Satellite Office*)

427 Westridge Road
Somerset, PA 15501

Business: (814) 443-1555
Hotline: (814) 288-4961 or (800) 755-1983
Hotline after 5pm
Fax: (814) 443-6807

SULLIVAN

VICTIMS SERVICES

Box 272
Main Street (UPS only)
Laporte, PA 18626

Business: (570) 946-4063
Hotline: (570) 946-4215
Fax: (570) 946-4570
E-mail: scvs@epix.net

Resources

SUSQUEHANNA

WOMEN'S RESOURCE CENTER, INC.

(Lackawanna Co. Satellite Office)

P.O. Box 202
Montrose, PA 18801

Business: (570) 278-1800
Hotline: (800) 257-5765
Fax: (570) 346-3413
E-mail: wrcmont@epix.net

TIOGA

HAVEN OF TIOGA COUNTY

6 Old Tioga St. P.O. Box 170
Wellsboro, PA 16901

Business: (570) 724-3549
Hotline: (570) 724-3554 or (800) 550-0447
Fax: (570) 724-1361
E-mail: havenoftioga2@epix.net

UNION

SUSQUEHANNA VALLEY WOMEN IN TRANSITION

P.O. Box 170 42 S. 5th Street (Fed-Ex purposes only)
Lewisburg, PA 17837

Business: (570) 523-6718 or (570) 523-1134
Hotline: (570) 523-6482 or (800) 850-7948
Fax: (570) 524-9367
E-mail: svwit@svwit.org

VENANGO

VICTIMS RESOURCE CENTER

716 East Second Street
Oil City, PA 16301

Business: (814) 6774005
Hotline: (814) 432-5960 or (888) 842-8460
Fax: (814) 726-1587
E-mail: vicrescen@sconline.net

WARREN

A SAFE PLACE

300 Hospital Drive
North Warren, PA 16365

Business: (814) 726-1271
Hotline: (814) 726-1030 or (800) 338-3460
Fax: (814) 726-1587
E-mail: safeplace@westpa.net

WASHINGTON

(1) SPHS C.A.R.E. CENTER

62 E. Wheeling Street
Washington, PA 15301

Business: (724) 228-7208
S.T.T.A.R.S.
Hotline: (888) 480-7283
Fax: (724) 228-2277
E-mail: mascara@sphs.org

(2) SPHS C.A.R.E. CENTER S.T.T.A.R.S. PROGRAM

351 West Beau Street, Suite 201
Washington, PA 15301

Business: (724) 229-5007
Hotline: (888) 480-7283
Fax: (724) 229-5711
E-mail: kmckevitt@sphs.org

WAYNE

VICTIMS INTERVENTION PROGRAM

P.O. Box 986
1006 Church St. (UPS only)
Honesdale, PA 18431

Business: (570) 253-4431
Hotline: (570) 253-4401 or
(800) 698-4VIP, Regional only
Fax: (570) 253-1322

WESTMORELAND

BLACKBURN CENTER AGAINST DOMESTIC & SEXUAL VIOLENCE

P.O. Box 398
1011 Old Salem Road, Ste 202 (Fed-Ex purposes only)
Greensburg, PA 15601

Business: (724) 837-9540
Hotline: (724) 836-1122 (in Greensburg area)
(888) 832-2272 (outside of Greensburg)
Fax: (724) 837-3676

WYOMING

VICTIMS RESOURCE CENTER 3
(Luzerne Co. Satellite Office)

119 Warren Street
Tunkhannock, PA 18657

Business: (570) 836-5844
Hotline: (570) 836-5544
Fax: (570) 836-3291
E-mail: support@vrcnepa.org

YORK

VICTIM ASSISTANCE CENTER

P.O. Box 30
York, PA 17405

Business: (717) 848-3535
Hotline: (717) 854-3131 or (800) 422-3204
Fax: (717) 846-6321
E-mail: vac@netrax.net

OTHER CONTACTS

PENNSYLVANIA COALITION AGAINST RAPE

Contact: Lynn Carson, Judicial Project Specialist
125 N. Enola Drive
Enola, PA 17025

Business: (717) 728-9740
E-mail: lcarrson@pcar.org

*Pennsylvania's
Children's Advocacy Centers (CACs) and
Multidisciplinary Teams (MDTs)*

ACCREDITED MEMBERS

ALLEGHENY

**ALLEGHENY COUNTY CHILDREN'S
ADVOCACY CENTER** (Accredited)

Contact: Joan Mills
A Child's Place at Mercy
1400 Locust Street
Suite 307 MHC
Pittsburgh, PA 15219

Business: (412) 232-7200-7388
Fax: (412) 232-7389
E-mail: JMills@mercy.pmhs.org

PITTSBURGH CHILD ADVOCACY CENTER
(Accredited)

Children's Hospital of Pittsburgh
3705-5th Avenue
Pittsburgh, PA 15213

Business: (412) 692-7406
Fax: (412) 692-5743

DAUPHIN

**CHILDREN'S RESOURCE CENTER OF
PINNACLEHEALTH SYSTEM** (Accredited)

Contact: Teresa Smith, ED
Community Health Center
1st Floor
2645 North 3rd Street
Harrisburg, PA 17110

Business: (717) 782-6802 or (877) 543-5018
Fax: (717) 782-6801
E-mail: tsmith@pinnaclehealth.org
Web: www.pinnaclehealth.org/crc

DELAWARE

**DELAWARE COUNTY CHILD
SEXUAL ABUSE CENTER** (Accredibility Eligible)

Contact: Pam Hardy, Program Director
100 West 6th Street
Ground Floor
Media, PA 19063

Business: (610) 891-5258
Fax: (610) 591-0481
E-mail: hardyp@co.delaware.pa.us

ERIE

ERIE COUNTY CHILD ADVOCACY CENTER
(Accredited)

Contact: Dr. Judith Smith, Executive Director
1527 Sassafras Street
Suite 100
Erie, PA 16502

Business: (814) 451-0202
Fax: (814) 451-0404
E-mail: judy.smith@hamot.org
Web: www.cacerie.org

LAWRENCE

**CHILDREN'S ADVOCACY CENTER OF LAWRENCE
COUNTY, INC.** (Accredibility Eligible)

Contact: Sue Ascione, ED
1001 E. Washington Street
Suite 302
New Castle, PA 16101

Business: (724) 658-4688
Fax: (724) 658-8810
E-mail: lccac@adelphia.net
Web: sascione@yahoo.com

LEHIGH

CHILD ADVOCACY CENTER OF LEHIGH COUNTY
(Accredited)

Contact: Barbara Stauffer, ED
740 Hamilton Street
Allentown, PA 18101

Business: (610) 770-9644 x 102
Fax: (610) 770-9626
E-mail: bstauffer@caclc.org

Resources

PHILADELPHIA

PHILADELPHIA CHILDREN'S ALLIANCE (Accredited)

Contact: Chris Kirchner, ED
4000 Chestnut Street
2nd Floor
Philadelphia, PA 19104

Business: (215) 387-9500
Fax: (215) 387-9513
E-mail: chris@philachildrensalliance.org
Web: www.philachildrensalliance.org

ASSOCIATE MEMBERS

BERKS

CHILDREN'S ALLIANCE CENTER OF BERKS COUNTY

(Associate Member)
Contact: Rachel Jacobson, Dir
222 North 12th Street
Reading, PA 19604

Business: (610) 898-5437
Fax: (610) 898-1161
E-mail: Cacofberks@comcast.net

BUCKS

CHILDREN'S ADVOCACY CENTER OF BUCKS COUNTY (Associate Member)

Contact: Barbara Clark, ED
2370 York Road, St. B-1
Jamison, PA 18929

Business: (215) 343-6543
Fax: (215) 343-6260
E-mail: bclark@novabucks.org

Contact: Nancy Morgan, CYS
4259 W. Swamp Rd, St. 200
Doylestown, PA 18901

Business: (215) 348-6912
E-mail: namorgan@co.bucks.pa.us

INDIANA

CHILDREN'S ADVOCACY CENTER OF INDIANA COUNTY (Associate Member)

Contact: Kathy Moore, Coordinator
617 Church Street
Indiana, PA 15701

Business: (724) 349-1773
Fax: (724) 349-1775
E-mail: childadvocacyic@aol.com

LACKAWANNA

PEGASUS CHILD ADVOCACY CENTER

(Associate Member)

Contact: Debby Mendicino, ED or Dr. Andrea Taroli, MD
44 North Scott Street
Carbondale, PA 18407

Business: (570) 282-6881
Fax: (570) 282-4770
E-mail: pegasuschild@echoes.net
drt@echoes.net

CHILDREN'S ADVOCACY CENTER OF NORTHEASTERN PA (Associate Member)

Contact: Mary Ann LaPorta, ED or Cynthia Pintha, Admin
1710 Mulberry Street
Scranton, PA 18510

Business: (570) 969-7313
Fax: (570) 969-7387
E-mail: cynthia.pintha@cmchealthsys.org
maryann.laporta@cmchealthsys.org

MONTGOMERY

MONTGOMERY COUNTY CAC (Associate Member)

Contact: Liz Socki, Co-Chair
Montgomery County Children & Youth
324 King Street, 2nd fl.
Pottstown, PA 19464

Business: (610) 327-1588 x 4234
Cell: (610) 322-4926
E-mail: esocki@mail.montcopa.org

Contact: Det. Mark Wickersham Co-Chair
Pottstown Police Dept.
100 E. High Street
Pottstown, PA 19464

Resources

NORTHUMBERLAND (ALSO SERVES UNION, SNYDER, AND MONTOUR)

Business: (610) 970-6575
E-mail: pd104@pottstown.org

CHILDREN'S ADVOCACY CENTER OF THE CENTRAL SUSQUEHANNA VALLEY (Associate Member)

Contact: Melissa Hummel, Coordinator and Dr. Pat Bruno, MD
c/o Janet Weis Children's Hospital, Geisinger Medical Center
P.O. Box 126
Northumberland, PA 17857

Business: (570) 473-8475
Fax: (570) 473-8495
E-mail: mahummel@geiser.edu
pbruno@ptd.net

WASHINGTON

SPHS WASHINGTON COUNTY CHILDREN'S ADVOCACY CENTER (Associate Member)

Contact: Jennifer Lytton or Jeff Burks Mascara
351 West Beau Street
Suite 204
Washington, PA 15301

Business: (724) 229-5007
Fax: (724) 229-5711
E-mail: jlytton@sphs.org
mascara@sphs.orgwww.sphs.org
Web: www.sphs.org

DEVELOPING

ADAMS

ADAMS COUNTY CAC (Developing)

Contact: Joddie Walker, ED or Jim Holler, Bd. President
450 West Middle Street
Gettysburg, PA 17325

Business: (717) 337-9888
Fax: (717) 337-9880
E-mail: jwalker@adamscountypacac.org
jholler@adelphia.net
Web: www.adamscountypacac.org

LANCASTER

LANCASTER COUNTY CAC TASK FORCE

(Developing)

Contact: John H. May, Esquire (CAC contact)
May, Metzger & Zimmerman, LLP
49 North Duke Street
Lancaster, PA 17602

Business: (717) 299-1181
Fax: (717) 299-5045
E-mail: jhm@mmzlaw.com

Contact: Dr. Cathy Hoshauer, MD or Kari Stanley
Roseville Pediatrics
160 North Point Blvd.
Suite 110
Lancaster, PA 17601

Business: (717) 569-6481
Fax: (717) 569-5213
E-mail: doc4kidz@hotmail.com
knstanle@lancastergeneral.org

LUZERNE

LUZERNE COUNTY CAC TASK FORCE (Developing)

Contact: Jackie Carroll, First ADA
District Attorney's Office
Luzerne County Courthouse
200 North River Street
Wilkes Barre, PA 18702

Business: 570-825-1676
Fax: 570-825-1662 or 1572
E-mail: Jackie.carroll@luzernecounty.org

POTTER

POTTER COUNTY CHILDREN, YOUTH AND FAMILY

(Developing)

Contact: Joy Glassmire, Director
Potter County Human Services
62 North Street
P.O. Box 241
Roulette, PA 16746

Business: (814) 544-7315
Fax: (814) 544-9062
E-mail: jglassmire@pottercountyhumansvcs.org

Resources

YORK

YORK COUNTY CHILD ADVOCACY CENTER

(Developing)

Contact: Paul Johnston, ED or Heidi Getsy, Forensic Int.

28 S. Queen Street

York, PA 17403

Business: (717) 718-4253

Fax: (717) 718-3539

E-mail: morgyj@netzero.com

pjohnston@yorkcac.org

Web: www.yorkcac.org

OTHER CONTACTS

BUCKS

NORTHEAST REGIONAL CHILDREN'S ADVOCACY CENTER

Contact: Anne Lynn, Project Director

4 Terry Drive

Suite 16

Newtown, PA 18940

Business: (215) 860-3111 or 800-662-4124

Fax: (215) 860-3112

E-mail: anne.lynn@verizon.net

Web: www.nca-online.nrcac/index.htm

BERKS

PENNSYLVANIA NETWORK OF CAC'S & MDT'S

Contact: Alison Gray

626 James Street

Erie, PA

Business: (814) 431-8151

E-mail: Alisongray@neo.rr.com

