

Pennsylvania

Sexual Violence Benchbook

Magisterial District
Court Judges

First Edition
2011

The Honorable Jack A. Panella
Superior Court of Pennsylvania



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Introduction

This, the first edition of the Benchbook on Crimes of Sexual Violence in Pennsylvania designed specifically for Magisterial District Court Judges, has been prepared under the supervision of Krista Hoffman, Criminal Justice 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. Included in Chapters 2 and 3 is a full listing of all crimes of sexual violence including their statutory definitions and elements. Section Two, *The Process of a Sex Offense Case*, addresses the procedural and practical steps of a sex offense case, including detailed information about the Preliminary Arraignment and Preliminary Hearing. Included in Chapter 4 and 5 are checklists for the Preliminary Arraignment and Preliminary Hearing, as well as a full discussion on the establishment of bail and types of bail conditions.

The Benchbook concludes with Section Three, *Resources*, which lists victims' service providers in Pennsylvania and programs designed to assist in sexual abuse prevention, detection, recovery, and prosecution.

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

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Chapter 1

THE DYNAMICS OF SEXUALLY VIOLENT CRIMES

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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 often 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, specifically designed for Magisterial District Judges, has been divided into three sections: **Understanding Sexual Violence, The Process of a Sex Offense Case, and Resources.**

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

Section Two addresses the practical aspects of a sex offense case, including pre-trial issues, such as bail and the preliminary hearing. Useful information in the form of legal discussions is provided.

Section Three 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 surrounding sexual violence from both legal and mental health perspectives. Section 1.2 provides a chapter overview. Section 1.3 examines, in a general way, crimes of sexual violence as listed in Pennsylvania statutes, as well as the elements of rape and other sexual assault crimes. 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. § 11.201.² Section 1.6 discusses barriers to due process in court proceedings. Section 1.7 provides an overview of sex-offending behaviors.

¹ 18 PA.CON.S.STAT.ANN. §§ 3101 – 3144.

² The Pennsylvania Crime Victims Act is codified at 18 PA.STAT. §§ 11.201 – 11.216.

1.3 AUTHORITY OF MAGISTERIAL DISTRICT COURT

The Pennsylvania Constitution provides, in pertinent part:

§ 7. Justices of the peace; magisterial districts

(a) In any judicial district, other than the City of Philadelphia, where a community court has not been established or where one has been discontinued there shall be one justice of the peace in each magisterial district. The jurisdiction of the justice of the peace shall be as provided by law.

(b) The General Assembly shall by law establish classes of magisterial districts solely on the basis of population and population density and shall fix the salaries to be paid justices of the peace in each class. The number and boundaries of magisterial districts of each class within each judicial district shall be established by the Supreme Court or by the courts of common pleas under the direction of the Supreme Court as required for the efficient administration of justice within each magisterial district.

Pa. Const. Art. 5, § 7. Furthermore, the authority of magisterial districts is addressed under the Judicial Code. See 42 PA.CONST.STAT.ANN. §§ 1501 – 1503. Magisterial districts and magistrate district judges are both defined in section 102:

“Magisterial district.” A district established within a judicial district pursuant to Subchapter A of Chapter 15 (relating to magisterial districts) for the election of a magisterial district judge.

“Magisterial district judge.” A justice of the peace holding office under section 7(a) of Article V of the Constitution of Pennsylvania and Subchapter B of Chapter 15 (relating to magisterial district judges).

42 PA.CONST.STAT.ANN. § 102.³

Jurisdiction and venue are set up in section 1515, which specifies that Magisterial District Judges have jurisdiction over the following:

- summary cases (subsection (a)(1));

³ Act 2004-207, § 11, amended this section to reflect the redesignation of district justices as magisterial district judges.

- to preside over arraignments (subsection (a)(4));
- to fix bail (subsection (a)(4));
- to preside over preliminary hearings as the committing magistrate (subsection (a)(4));
- and to accept guilty pleas and handle sentencing in certain misdemeanors of the third degree (subsection (a)(6)).

Section 1515 states:

Subchapter B. Magisterial District Judges
§ 1515. Jurisdiction and venue

(a) Jurisdiction.—Except as otherwise prescribed by general rule adopted pursuant to section 503 (relating to reassignment of matters), magisterial district judges shall, under procedures prescribed by general rule, have jurisdiction of all of the following matters:

(1) Summary offenses, except those arising out of the same episode or transaction involving a delinquent act for which a petition alleging delinquency is filed under Chapter 63 (relating to juvenile matters).

(2) Matters arising under the act of April 6, 1951 (P.L. 69, No. 20), known as The Landlord and Tenant Act of 1951, which are stated therein to be within the jurisdiction of a magisterial district judge.

(3) Civil claims, except claims against a Commonwealth party as defined by section 8501 (relating to definitions), wherein the sum demanded does not exceed \$8,000, exclusive of interest and costs, in the following classes of actions:

(i) In assumpsit, except cases of real contract where the title to real estate may be in question.

(ii) In trespass, including all forms of trespass and trespass on the case.

(iii) For fines and penalties by any government agency. A plaintiff may waive a portion of his claim of more than \$8,000 so as to bring the matter within the monetary jurisdiction of a magisterial district judge. Such waiver shall be revoked automatically if the defendant appeals the final order of the magisterial

district judge or when the judgment is set aside upon certiorari.

(4) As commissioners to preside at arraignments, fix and accept bail, except for offenses under 18 Pa.C.S. §§ 2502 (relating to murder) and 2503 (relating to voluntary manslaughter) for which the fixing and accepting of bail shall be performed by any judge of any court of common pleas, and to issue warrants and perform duties of a similar nature, including the jurisdiction of a committing magistrate in all criminal proceedings.

(5) Offenses under 75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance), if the following criteria are met:

(i) The offense is the first offense by the defendant under such provision in this Commonwealth.

(ii) No personal injury (other than to the defendant) resulted from the offense.

(iii) The defendant pleads guilty.

(iv) No property damage in excess of \$500 other than to the defendant's property resulted from the violation.

(v) The defendant is not subject to the provisions of Chapter 63 (relating to juvenile matters).

(vi) The arresting authority shall cause to be transmitted a copy of the charge of any violation of 75 Pa.C.S. § 3802 to the office of the clerk of the court of common pleas within five days after the preliminary arraignment.

In determining that the above criteria are met the magisterial district judge shall rely on the certification of the arresting authority. Certification that the criteria are met need not be in writing. Within ten days after the disposition, the magisterial district judge shall certify the disposition to the office of the clerk of the court of common pleas in writing.

(5.1) Offenses under 75 Pa.C.S. § 3808 (relating to illegally operating a motor vehicle not equipped with ignition interlock).

- (6)
- (i) Offenses under Title 18 (crimes and offenses), Title 30 (fish) and Title 35 (health and safety) which are classified as misdemeanors of the third degree, if the following criteria are met:
 - (A) The misdemeanor is not the result of a reduced charge.
 - (B) Any personal injury or property damage is less than \$500.
 - (C) The defendant pleads guilty.
 - (D) The defendant is not subject to the provisions of Chapter 63.
 - (ii) Subparagraph (i) shall not apply to any offense under the following provisions of Title 18:
 - Section 4303 (relating to concealing death of child born out of wedlock).
 - Section 4321 (relating to willful separation or nonsupport).
 - Section 5103 (relating to unlawfully listening into deliberations of jury).
- (6.1) All offenses under Title 34 (relating to game).
- (7) Matters jurisdiction of which is vested in magisterial district judges by any statute.

(b) Venue and process.--The venue of a magisterial district judge concerning matters over which jurisdiction is conferred by subsection (a) shall be as prescribed by general rule. The process of the magisterial district judge shall extend beyond the territorial limits of the magisterial district to the extent prescribed by general rule.

42 PA.CON.S.TAT.ANN. § 1515 (emphasis added).

1.4 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, i.e., not necessarily perpetrated with the use of force.

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

- whenever there is a lack of consent,⁴
- whenever the relations are initiated by force or threat of force,⁵
- if there is a minor involved who is incapable of giving legal consent because of age,⁶
- if there is a minor or adult involved who is incapable of giving legal consent because of mental deficiency,⁷
- if there is a minor or adult involved who is unconscious or unaware that the sexual intercourse is occurring.⁸

⁴ 18 PA.CON.S.TAT.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), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000)(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, even no force).

⁵ 18 PA.CON.S.TAT.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”. The element of force “needs to be such as to demonstrate an absence of consent, inducing submission without further resistance.” *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

⁶ 18 PA.CON.S.TAT.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.CON.S.TAT.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). The crime of rape of a child is a strict liability offense, therefore imposing criminal liability regardless of whether the offender knew the correct age of the victim. *Commonwealth v. Dennis*, 784 A.2d 179, 181-182 (Pa. Super. 2001), *appeal denied*, 568 Pa. 733, 798 A.2d 1287 (2002).

⁷ 18 PA.CON.S.TAT.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.

⁸ 18 PA.CON.S.TAT.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 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.*

A. Rape And Sexual Assault Under Pennsylvania Statutes

In Pennsylvania, rape and sexual assault are gender neutral, and may be perpetrated against adult or child victims. 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. The Table of Contents in the Crimes Code for sexual offenses in Pennsylvania is as follows:

Chapter 31 – SEXUAL OFFENSES
18 PA.CON.S.TAT.ANN. PA.II, Art. B, Ch. 31

SUBCHAPTER A. GENERAL PROVISIONS

- § 3101 Definitions**
- § 3102 Mistake As To Age**
- § 3103 Repealed**
- § 3104 Evidence Of Victim’s Sexual Conduct**
- § 3105 Prompt Complaint**
- § 3106 Testimony Of Complainants**
- § 3107 Resistance Not Required**

SUBCHAPTER B. DEFINITION OF OFFENSES

- § 3121 Rape**
- § 3122 Repealed**
- § 3122.1 Statutory Sexual Assault**
- § 3123 Involuntary Deviate Sexual Intercourse**
- § 3124 Repealed**
- § 3124.1 Sexual Assault**
- § 3124.2 Institutional Sexual Assault**

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. A victim who was sleeping when sexual intercourse was initiated by the offender is considered “unconscious.” *Commonwealth v. Wall*, 953 A.2d 581, 584 (Pa.Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008). *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.”

- § 3125 Aggravated Indecent Assault
- § 3126 Indecent Assault
- § 3127 Indecent Exposure
- § 3128 Repealed
- § 3129 Sexual Intercourse With Animal
- § 3130 Conduct Relating To Sex Offenders

SUBCHAPTER C. LOSS OF PROPERTY RIGHTS

- § 3141 General Rule
- § 3142 Process And Seizure
- § 3143 Custody Of Property
- § 3144 Disposal Of Property

For a more detailed description of sex crimes in Pennsylvania, see Chapter 2.

Rape is defined in 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.

In addition to the statutory penalty, 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 such substance.

Rape of a child, defined in 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 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 when 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.

18 PA.CON.S.TAT.ANN. § 3121(e).

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.⁹

C. Comparing The 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

⁹ Pennsylvania Coalition Against Rape (2005) HIV bulletin.

misconception is that a woman is most likely to be raped by someone she does not know.¹⁰ Another misconception is that if a woman dresses in a certain way, or is under the influence of alcohol, she is inviting rape.¹¹ 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.

These types of crimes typically lack physical evidence and independent witnesses, therefore directing the focus of the case to the credibility of the victim and the accused.¹² The reality of rape and sexual assault has been confirmed in numerous studies. Three of the most preeminent sources examining sexual violence are *The 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.

Many, if not most, victims are acquainted with their attacker.”¹⁶ Statistics show that 78 percent of rapes/sexual assaults were perpetrated by someone known to the victim.¹⁷ 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

¹⁰ Lifetime Television Violence Against Women Study (2002) (Available from Penn, Schoen and Berland Associates, Washington, D.C.).

¹¹ Office on Violence Against Women, Department of Justice, *Myths and facts about sexual violence*. Retrieved May 3, 2006 from <http://www.usdoj.gov/ovw/MythsFactSexualViolence.htm>. See also www.ovw.usdoj.gov/sexassault.htm.

¹² HE SAID, SHE SAID, SHE SAID: WHY PENNSYLVANIA SHOULD ADOPT FEDERAL RULES OF EVIDENCE, 52 Vill.L.Rev. 641, 648 (Jessica Khan, 2007).

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 6 Rutgers J.L.&Pub.Pol’y 891 (Spring 2009).

¹⁷ Rape in America: A Report to the Nation (1992). National Victim Center and Crime Victims Research and Treatment Center, University of South Carolina, Charleston.

by other relatives, and twenty-nine percent by other non-relatives, such as friends and neighbors.¹⁸

2. Use of Weapons

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

Again, the reality of sexual assault is very different from the 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.¹⁹ 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.²⁰ 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.

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

¹⁸ *Id.*

¹⁹ National Crime Victimization Survey, Department of Justice (2002) *Crime Victimization*. Retrieved April 23, 2006, from <http://www.ojp.usdoj.gov/bjs/cvict.htm>. See also, Criminal Victimization in the United States, 2006 Statistical Tables, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus06.pdf>.

²⁰ *Id.*

underreported crimes.²¹ According to the *Rape in America Study*, only 16 percent of rapes were ever reported to police.²²

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.”²³ 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).²⁴

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 that others will find out (including the victim’s name being made public); and
- they fear blame for the assault by family, friends, and others.²⁵

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.

²¹ Rape in America: A Report to the Nation. (1992). National Victim Center and Crime Victims Research and Treatment Center, University of South Carolina, Charleston

²² *Id.*

²³ Finkelhor, D. (1994). The International Epidemiology of Child Sexual Abuse. *Child Abuse & Neglect*, 18: 413-420.

²⁴ *Id.*

²⁵ *Id.*

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 compared with that of other crimes which was only two percent.²⁶ 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.²⁷

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 1,200 jurisdictions in Pennsylvania submitted data.²⁸ 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 statute standardized UCR reporting.²⁹ The law became effective in June 2005. It mandates and

²⁶ 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.

²⁷ Federal Bureau of Investigation (2004). Uniform Crime Reports. Retrieved on April 10, 2006, from, http://www.fbi.gov/ucr/cius_04/.

²⁸ 18 PA.STAT. § 20.501 *et seq.*

²⁹ *Id.*

standardizes reporting for all law enforcement agencies within Pennsylvania.

6. Victim Statistics

The overwhelming majority of sexual assaults are perpetrated against women.

In 2006, there were 260,940 cases of rape or sexual assault in the United States.³⁰ For Pennsylvania, the most recent data available is for the year 2007, during which there were 3,450 reports of forcible rape.³¹

From 1992 to 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.³²

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 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.³³ 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.³⁴

³⁰ See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Victimization in the United States, 2006 Statistical Tables. Table 1, Personal and Property Crimes, 2006. The Bureau of Justice Statistics defines rape as:

Forced sexual intercourse including both psychological coercion as well as physical force. Forced sexual intercourse means vaginal, anal or oral penetration by the offender(s). This category also includes incidents where the penetration is from a foreign object such as a bottle. Includes attempted rapes, male as well as female victims and both heterosexual and homosexual rape. Attempted rape includes verbal threats of rape.

³¹ See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Reported Crime in Pennsylvania, 2007. The Bureau of Justice Statistics utilizes information accumulated by the FBI, Uniform Crime Reports, as prepared by the National Archive of Criminal Justice Data.

³² *Id.*

³³ 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.

³⁴ Sigler, J.I. (2000). "Forced Sexual Intercourse Among Intimates". *Journal of Interpersonal Violence*, 15(1).

7. Perpetrator Statistics

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

In her article published in the Penn State Law Review, Fall 2004, *SENTENCING OF ADULT OFFENDERS IN CASES INVOLVING SEXUAL ABUSE OF CHILDREN: TOO LITTLE, TOO LATE? A VIEW FROM THE PENNSYLVANIA BENCH*, Justice Debra Todd of the Pennsylvania Supreme Court reported:

Sex offenders represent 4.7% of the nearly five million convicted offenders serving time in federal or state prisons or jails, or on probation or parole. They comprise 1% of the federal prison population, 9.7% of the state prison population, 3.4% of the nation's jail inmates, 3.6% of the offenders on probation and 4% of the offenders on parole.

109 Penn St. L. Rev. 487, 513 (2004).³⁵

In single-offender rapes and sexual assaults, the percentage of male offenders is nearly 99 percent.³⁶ 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.³⁷

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:³⁸

³⁵ Justice Todd was a Judge on the Superior Court of Pennsylvania at the time that she wrote this article.

³⁶ Federal Bureau of Investigation (2004). Uniform Crime Reports. Retrieved on April 10, 2006, from http://www.fbi.gov/ucr/cius_04/

³⁷ Davin, P.A., Hilsop, J. C., & Dunbar, T. (1999). *Female Sexual Abusers*. Brandon, Vt.: Safer Society Press.

³⁸ 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>

- 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
- 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.

1.5 THE IMPACT OF RAPE AND SEXUAL ASSAULT ON THE VICTIM

Whether a person is assaulted by a stranger, an acquaintance, or someone whom 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.³⁹

³⁹ 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>

A. Physical Injury From Rape And Sexual Assault In Female Adults And Adolescents

1. Gross Bodily 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 who were victims of rape reported physical injuries resulting from rape.⁴⁰ *Figure A* illustrates the type of injuries most frequently reported by sexual assault victims (this graph includes injuries of male and female victims combined).⁴¹ As noted, bites, welts, and bruises were the most common physical injuries sustained by victims.

2. Genital Injury in Female Adults and Adolescents

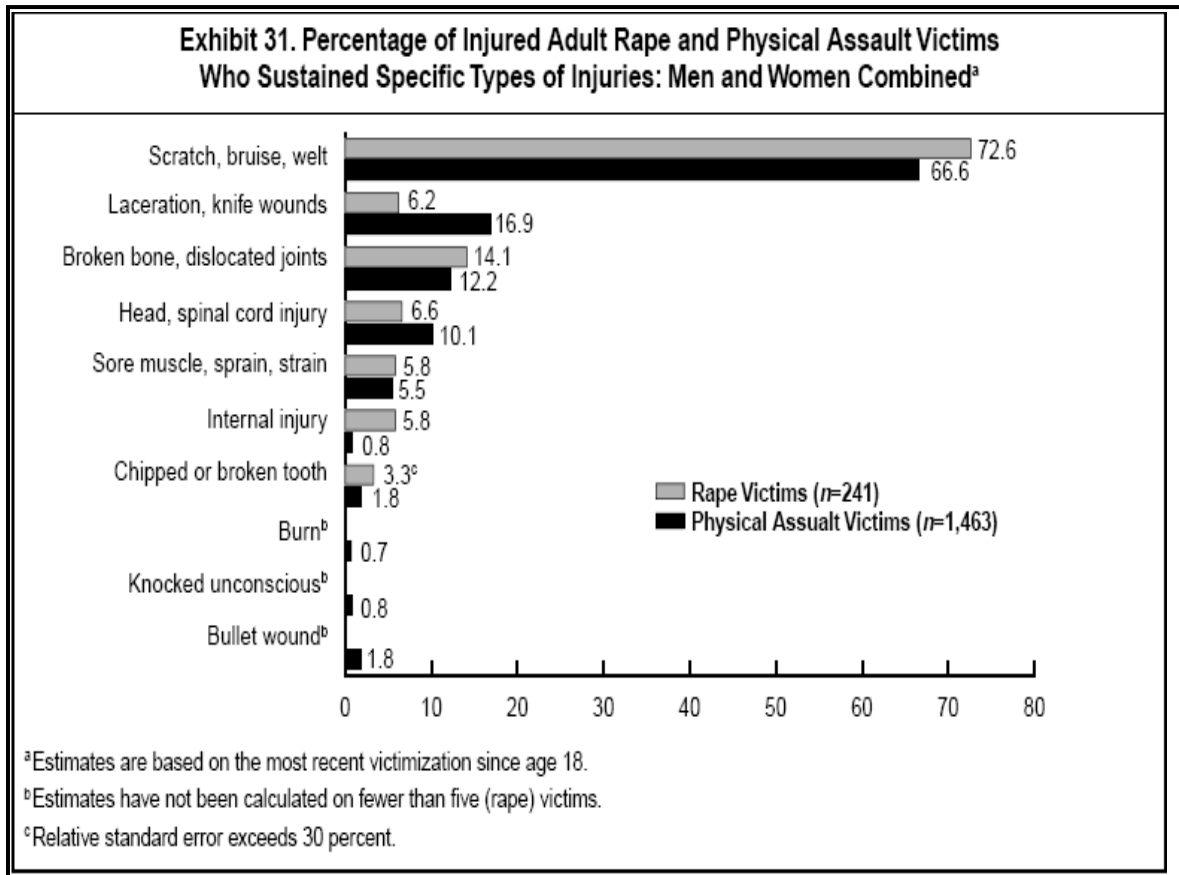
In *The Color Atlas of Sexual Assault* (1997), authors Girardin, Faugno, Seneski, Slaughter, and Whelan cite multiple studies that conclude that “the absence of genital injury does not provide proof that a rape did not occur.”⁴²

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 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



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.*⁴³

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.

⁴³ *Id.*

- With *delayed reporting*, an examination delayed to 14 days post-assault will detect no acute findings.⁴⁴
- *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 trained examiner to between 10 percent and 30 percent by gross visualization alone.⁴⁵ **Colpsocopy** is one of three methods currently available to conduct rape exams. The other two are **direct visualization** and **staining**.⁴⁶ *Figure B* lists and describes each technique and provides an overview of their use in sexual assault examinations.⁴⁷
- *Lack of training or expertise* is another impediment to diagnosing injury.
- *The use of minimal force* by the perpetrator may result in no discernable injury.
- If the **victim is non-resistive**, he or she may not sustain a physical injury.⁴⁸

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 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.

⁴⁷ *Id.*

⁴⁸ 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.

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, flourescein	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.

To perform a forensic rape exam correctly, physicians and nurses require specialized training over and above what is received in their basic education programs.⁴⁹ 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.⁵⁰ 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

⁴⁹ 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).

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

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.”⁵¹ Campbell notes that research in this area consistently supports the use of SANE nurses in cases of sexual assault.⁵²

B. PSYCHOLOGICAL EFFECTS OF SEXUAL ASSAULT CRIMES ON VICTIMS

Although a rape victim may not sustain physical injury, he or she 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.⁵³ 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.⁵⁴

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.⁵⁵

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

⁵¹ 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.

⁵² *Id.*

⁵³ Crowell, N.A., & Burgess, A.W. (Eds.) (1996). *Understanding Violence Against Women*. Washington D.C.: National Academy Press.

⁵⁴ Hazelwood, R.R. & Burgess, A.W. (Eds.) (1995). *Practical Rape Investigation*. Boca Raton, Fla.: CRC Press.

⁵⁵ *Id.*

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.⁵⁶

Kilpatrick notes 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.⁵⁷

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.⁵⁸

Dissociative reactions are defined as:

The 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.⁵⁹

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)*.”

⁵⁶ 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.

⁵⁷ Crowell, N.A., & Burgess, A.W. (Eds.). (1996). *Understanding Violence Against Women*. Washington D.C.: National Academy Press.

⁵⁸ Foa, E., & Rothbaum, B.O. (1998). *Treating the Trauma of Rape: Cognitive-Behavior Therapy for PTSD*. New York, NY: Guilford Publications.

⁵⁹ American Psychiatric Association (1994). *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.), Washington, D.C.

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.⁶⁰

2. Rape Trauma Syndrome

Rape Trauma Syndrome was initially identified by Ann Burgess and Lynda Lytle Holmstrom in 1974.⁶¹ 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 after observing similar physical and psychological responses in 92 adult women who presented to an emergency department after being raped.⁶² 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.”⁶³ It usually involves an acute reactionary phase and a secondary coping or “re-grouping” phase, and attempts to explain why victims respond to the trauma of the sexual assault with “seemingly unexplainable behavior.”⁶⁴

According to Burgess and Holmstrom, in the immediate aftermath of the rape, the victim may demonstrate shock and disbelief. Within a few

⁶⁰ American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: Author. *See The Playboy Defense in Philadelphia: How Pennsylvania Continues to Thwart Fair and Effective Sexual Assault Prosecutions By Refusing to Admit Expert Testimony About Rape Trauma Syndrome*, 6 Rutgers J.L.&Pub.Pol’y 891 (Spring 2009).

⁶¹ Burgess, A.W., & Holmstrom, L.L. (1974). Rape Trauma Syndrome. *American Journal of Psychiatry*, 131(9), 981-986.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 6 Rutgers J.L.&Pub.Pol’y 891 (Spring 2009).

hours, most exhibited one of 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.⁶⁵

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 “everywhere.” Burgess and Holmstrom noted that, during the second phase, victims attempt to restore order to their life and regain a sense of control.⁶⁶

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.

However, the use of expert testimony to explain the effect of Rape Trauma Syndrome on a particular victim is prohibited in Pennsylvania. In *Commonwealth v. Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988), the Pennsylvania Supreme Court held that it was reversible error by the trial court to permit the use of expert testimony on Rape Trauma Syndrome to explain why the victim had repeatedly failed to identify the defendant immediately following the assault but was able to identify him more than four years later. The Supreme Court reasoned that the testimony was erroneously used to enhance the victim’s credibility which was within the sole responsibility of the jury.

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

⁶⁵ Burgess, A.W., & Holmstrom, L.L. (1974). Rape Trauma Syndrome. *American Journal of Psychiatry*, 131(9), 981-986.

⁶⁶ *Id.*

reactions to trauma that do not yet meet the criteria for PTSD.⁶⁷ 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.”⁶⁸

The DSM-IV defines the diagnostic criteria for Acute Stress Disorder as follows:⁶⁹

- (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)

⁶⁷ American Psychiatric Association. (2000). *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.). Washington, DC.

⁶⁸ Foa, E., & Rothbaum, B.O. (1998). *Treating the Trauma of Rape: Cognitive-Behavior Therapy for PTSD*. New York, NY: Guilford Publications.

⁶⁹ American Psychiatric Association. (2000). *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.). Washington, DC.

- (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 two days and a maximum of four weeks and occurs within four 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

Post-Traumatic Stress Disorder (PTSD) initially described reaction patterns in survivors of natural disasters and combatants in war.⁷⁰ 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

⁷⁰ Foa, E., & Rothbaum, B.O. (1998). *Treating the Trauma of Rape: Cognitive-Behavior Therapy for PTSD*. New York, NY: Guilford Publications.

traumatic events affecting civilians, including robbery, the tragic death of close friends or family, and natural disaster.”⁷¹

In *Paliometros v. Lovola*, 932 A.2d 128 (Pa.Super. 2007), a guest who was sexually assaulted at a fraternity party sued for personal injuries and emotional injuries based upon a diagnosis of post-traumatic stress disorder. The Superior Court of Pennsylvania, per Judge Robert Daniels, affirmed the damages award of \$548,800, finding that the testimony from the victim’s licensed psychologist as well as her husband and father provided sufficient evidence to sustain the jury’s verdict.

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.
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

⁷¹ Burgess, A.W., & Holmstrom, L.L. (1974). Rape Trauma Syndrome. *American Journal of Psychiatry*, 131(9), 981-986.

- 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 relive the rape mentally and emotionally.⁷² 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.⁷³

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.⁷⁴ 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?” and “Why did you go out for cigarettes at 2:00 a.m.?” are common questions reported by victims. Parents, friends, and co-workers may blame the victim through such statements as “Why were you drinking?” and “Why did you go home with the guy?”

⁷² Pennsylvania Supreme Court (2003). *Executive Summary Of The Report On Racial And Gender Bias In The Justice System* (pp.421-452). Harrisburg, PA.

⁷³ *Id.*

⁷⁴ “Adult victims hesitate to report the crime due to feelings of shame or fear that no one will believe them, or because they blame themselves for what happened.” HE SAID, SHE SAID, SHE SAID: WHY PENNSYLVANIA SHOULD ADOPT FEDERAL RULES OF EVIDENCE, 52 Vill.L.Rev. 641, 648 (Jessica Khan 2007)(footnote omitted).

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.⁷⁵ 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.

1.6 VICTIMS' RIGHTS

Victims of crime in Pennsylvania are granted a number of rights by Pennsylvania's Crime Victims Act.⁷⁶ "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."⁷⁷ According to the Act, victims of crime have the following rights:⁷⁸

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.

⁷⁵ Lisak, D. (2005, October). Predators: uncomfortable truths about campus rapists. Presented at the International Sexual Assault, Domestic Violence, and Stalking Conference, Baltimore, MD.

⁷⁶ 18 PA.STAT. §§ 11.201 – 11.216.

⁷⁷ 18 PA.STAT. §§ 11.201.

⁷⁸ *Id.*

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 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.

1.7 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 or auditory impairment, or a cognitive disability. These barriers can interfere with a person's understanding of the criminal justice process and can 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.

1.8 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.⁷⁹ Meeting with the myriad of people involved in prosecuting a case can be stressful, and court appearances can be overwhelming. The time and effort that 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, or even the assault.

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 free of charge 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.

⁷⁹ The Pennsylvania Coalition Against Rape (2000). *The Trainer's Tool Box*. Chapter 9.

Chapter 2

GENERAL PROVISIONS OF SEXUALLY VIOLENT CRIMES

General Provisions of Sexually Violent Crimes

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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
- 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
- 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. Statutory 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

3. Rape Shield Law

Complainant's Past Sexual Conduct Not Admissible: The purpose of the Rape Shield Law is to prevent a trial from shifting its focus from the culpability of the accused toward the virtue and chastity of the victim. *Commonwealth v. Burns*, 988 A.2d 684, 689 (Pa. Super. 2009). “The Rape

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.

Shield Law is intended to exclude irrelevant and abusive inquiries regarding prior sexual conduct of sexual assault complainants.” *Id.* 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.

(a) Exceptions are Trial Issues

Trial Issue: A defendant who proposes to offer evidence of an alleged victim's past sexual conduct pursuant to this section must file a written motion and offer of proof **at the time of trial**. If, at the time of trial, the trial court determines that the motion and offer of proof are sufficient on their faces, the court must 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) above.

There are four types of exceptions to the general prohibition against evidence of past sexual conduct of the victim: (1) the text of the statute includes one specific exception regarding the victim's sexual conduct with the defendant where consent of the alleged victim is at issue and the evidence is otherwise admissible;² (2) evidence that negates directly the act of intercourse with which a defendant is charged; (3) evidence demonstrating a witness' bias or evidence that attacks credibility; and (4) evidence tending to directly exculpate the accused by showing that the alleged victim is biased and thus has motive to lie, fabricate, or seek retribution via prosecution. *Commonwealth v. Burns*, 988 A.2d 684, 689 (Pa.Super. 2009); *Commonwealth v. Allburn*, 721 A.2d 363, 367 (Pa.Super. 1998), *appeal denied*, 559 Pa. 662, 739 A.2d 163 (1999).

² See 18 Pa.Cons.Stat.Ann. § 3104(a).

(b) 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 942.³

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.

(a) Evidence of Failure to Report Promptly

If otherwise admissible, this section does not preclude the admission of evidence of a failure to report the allegations promptly.⁴ The Pennsylvania Supreme Court stated in *Commonwealth v. Lane*, 521 Pa. 390, 398, 555 A.2d 1246, 1250 (1989), “The lack of a prompt

³ See also *Commonwealth v. Holder*, 815 A.2d 1115, 1118-1119 (Pa.Super. 2003), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003).

⁴ *Commonwealth v. Jones*, 672 A.2d 1353, 1358 (Pa. Super. 1996).

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 customarily may 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) 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:⁵

⁵ 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).

- 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 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. Statutory 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.”

2. Types

(a) Oral and Anal Intercourse

Elements: oral and anal sex are each types of deviate sexual intercourse. *See Commonwealth v. Dorm*, 971 A.2d 1284, 1286 (Pa.Super. 2009). The elements of deviate sexual intercourse are: (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

Elements: (1) any form of sexual intercourse,
(2) with an animal;

(c) Penetration with a Foreign Object

Elements: (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 “including 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.⁶

(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).⁷ Some form of oral contact with the genitalia is all that is required.⁸

C. Forcible Compulsion

1. Statutory Definition

18 PA. CONS. STAT. ANN. § 3101 defines “forcible compulsion” as “compulsion 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

⁶ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992); *Commonwealth v. Ziegler*, 550 A.2d 567, 569 (Pa. Super. 1988).

⁷ 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).

⁸ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992).

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

The Pennsylvania Supreme Court again recognized that 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.⁹

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).

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).

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

⁹ *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

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;
- (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. 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 resistance is not synonymous with consent. 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. Statutory 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.”

(a) Genitals

The plain meaning of this section 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.

(b) Other Intimate Parts

Phrase "other intimate parts" does not refer solely to genitalia.¹⁰

- *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.

(c) Touching

Not Limited to Hand or Foot: The term touching is not limited to the hand or foot; rather, the courts look to any part of the defendant's body or the victim's body to determine if there has been a “touching” within the statute.¹¹

- 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

¹⁰ *Commonwealth v. Capo*, 727 A.2d 1126(Pa. Super. 1999), *appeal denied*, 561 Pa. 667, 749 A.2d 465 (1999).

¹¹ *Commonwealth v. Grayson*, 549 A.2d 593, 596 (Pa. Super. 1988).

consent, for the purpose of arousing or gratifying the sexual desire in either person, such contact constitutes indecent contact.¹²

- 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.¹³

No Direct Skin-to-Skin Contact Necessary: Touching occurs even though there is no skin-to-skin contact. *See e.g., 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.

E. Serious Bodily Injury

1. Statutory 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, or
- causes protracted loss or impairment of the function of any bodily member or organ.

2. Types

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 were insufficient to constitute “serious bodily injury”.

¹² *Id.*

¹³ *Id.*

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”

Facial Injuries

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

Blow to Head

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

F. Sexual Intercourse

1. Statutory 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

Sexual intercourse includes vaginal, oral and anal sex.

Commonwealth v. Dorm, 971 A.2d 1284, 1286 (Pa. Super. 2009).

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).¹⁴

(b) Penetration Requirement

The requirement is "penetration, however, slight"; there is no requirement that penetration reach the vagina or the "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).¹⁵

Oral Penetration Sufficient: It has been held that oral contact with the female genitalia is sufficient to support the penetration requirement for IDSI.¹⁶ 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).¹⁷ Some form of oral contact with the genitalia is all that is required.¹⁸

Digital Penetration: Digital penetration of the vagina is not sexual intercourse. *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (2002) (to constitute sexual intercourse, digital 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. Wall*, 953 A.2d 581, 584 (Pa. Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008); *Commonwealth v. Poindexter*, 646 A.2d 1211, 1214 (Pa. Super. 1994).

¹⁴ *Commonwealth v. Kelley*, 569 Pa. 179, 186-187, 801 A.2d 551, 555 (2002).

¹⁵ *See generally*, What Constitutes Penetration in Prosecution for Rape or Statutory Rape, 76 A.L.R.3d 163, § 3 (1977).

¹⁶ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992); *Commonwealth v. Ziegler*, 550 A.2d 567, 569 (Pa. Super. 1988).

¹⁷ *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).

¹⁸ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (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 juvenile¹⁹ in criminal court under two separate circumstances. The first is a direct filing under Section 6302 of the Juvenile Act, 42 PA.CON.S.TAT.ANN. § 6302, and the second is a discretionary transfer pursuant to Section 6355 of the Juvenile Act, 42 PA.CON.S.TAT.ANN. § 6355(a).

B. Excluded Offenses from Jurisdiction of Juvenile Court

¹⁹The 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).

1. Direct File Crimes

Pursuant to 42 PA.CON.S.TAT.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.CON.S.TAT.ANN. § 6302, the Criminal Division of the Court of Common Pleas is vested with jurisdiction. Similarly, 42 PA.CON.S.TAT.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.CON.S.TAT.ANN. § 6302, require that the offense be prosecuted in the Criminal Division.

Under 42 PA.CON.S.TAT.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 any of the sexually violent offenses stated below:

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

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

42 PA.CON.S.TAT.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 *ab 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.CON.S.TAT.ANN. § 6322(a).

In a direct filing 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.CON.S.TAT.ANN. § 6322(a). Pursuant to § 6322(a) the trial court must consider the factors contained in 42 PA.CON.S.TAT.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.CON.S.TAT.ANN. § 6355, must review numerous factors.

2.4 RAPE

Types of Rape: Statutory Elements

- 1) Engaging in sexual intercourse with a complainant;²⁰
- 2) In one of the following circumstances:
 - a) By forcible compulsion²¹ (18 PA. CONS. STAT. ANN. § 3121(a)(1));

²⁰ “Sexual intercourse” and complainant” are defined in Chapter 2, section 2.2.

²¹ “Forcible Compulsion” is defined in Chapter 2, section 2.2.

- 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) When 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) When the accused 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) When the complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA. CONS. STAT. ANN. § 3121(a)(5));
- f) When the accused engages in sexual intercourse with a complainant who is less than 13 years of age. (18 PA. CONS. STAT. ANN. § 3121 (c));
- g) When the accused 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 Citation

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 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.

B. Rape by Threat of Forcible Compulsion

1. Statutory Citation

18 PA. CONS. STAT. ANN. § 3121(a)(2).

2. “Forcible Compulsion”

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

3. Objective Standard Utilized

An objective standard is used in determining whether a threat of forcible compulsion was made. *Commonwealth v. Rhodes*, 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986) (“[an] objective standard regarding the use of *threats* of forcible compulsion to prevent resistance (as opposed to actual application of ‘forcible compulsion.’).”

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).

C. Rape When the Complainant is Unconscious or Unaware

1. Statutory Citation

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. Wall*, 953 A.2d 581, 584 (Pa. Super. 2008), *appeal denied*, 600 Pa. 733, 963 A.2d 470 (2008); *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 that 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 Citation

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 Citation

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.²²

F. Rape of a Child

1. Statutory Citation

18 PA. CONS. STAT. ANN. § 3121 (c).

2. Statutory 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.

²² 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 older.

G. Rape of a Child Resulting in Serious Bodily Injury

1. Statutory Citation

18 PA. CONS. STAT. ANN. § 3121 (d).

2. Statutory 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 when the complainant is under 13 years of age and suffers serious bodily injury in the course of the offense.

Commonwealth v. Kerrigan, 920 A.2d 190 (Pa. Super. 2007), *appeal denied*, 594 Pa. 676, 932 A.2d 1286 (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 of Rape Statute

1. Fundamental Nature of Rape

The essence of the criminal act of rape is involuntary submission to sexual intercourse. *Commonwealth v. Erney*, 548 Pa. 467, 698 A.2d 56 (1997); *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

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 Citation

18 PA. CONS. STAT. ANN. § 3122.1

B. Statutory 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.CON.S.TAT.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. The maximum incarceration sentence is 10 years and the maximum fine is \$ 25,000.

2.6 INVOLUNTARY DEVIATE SEXUAL INTERCOURSE

Types of IDSI: Statutory Elements

- 1) Engaging in deviate sexual intercourse with a complainant;²³
- 2) In one of the following circumstances:
 - a) By forcible compulsion²⁴ (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) When 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

²³ “Deviate sexual intercourse” and “complainant” are defined in Chapter 2, section 2.2.

²⁴ “Forcible Compulsion” is defined in Chapter 2, section 2.2.

- d) When 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) When the complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA. CONS. STAT. ANN. § 3123(a)(5)); or
- f) When 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) When 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) When 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)).

A. IDSI By Forcible Compulsion

1. Statutory Citation

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 Citation

18 PA. CONS. STAT. ANN. § 3123(a)(2).

2. Objective Standard

An objective standard is used in determining whether a threat by forcible compulsion was used. *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 Citation

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 Citation

18 PA. CONS. STAT. ANN. § 3123(a)(4).

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

1. Statutory Citation

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 A.2d at 359. *See also, Commonwealth v. Carter*, 418 A.2d 537 (Pa.Super. 1980).

F. IDSI With a Child

1. Statutory Citation

18 PA. CONS. STAT. ANN. § 3123(b).

2. Statutory 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 Citation

18 PA. CONS. STAT. ANN. § 3123(c).

2. Statutory 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, 920 A.2d 190 (Pa.Super. 2007), *appeal denied*, 594 Pa. 676, 932 A.2d 1286 (2007): the transmission of HPV and genital warts satisfies the serious bodily injury requirement because of the permanent nature of the disease and 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. Involuntary Deviate Sexual Intercourse

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. Involuntary Deviate Sexual Intercourse 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. Involuntary Deviate Sexual Intercourse 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 Citation

18 Pa. Cons. Stat. Ann. § 3124.1.

B. Statutory Elements of Offense

- 1) Engaging in sexual intercourse or deviate sexual intercourse with a complainant;²⁵ and
- 2) Without the complainant’s consent.

²⁵ To be convicted under this section, a defendant must act intentionally, knowingly, or recklessly. *Commonwealth v. Mayfield*, 832 A.2d 418 (Pa. Super. 2003).

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.²⁶ *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. Andrulowicz*, 911 A.2d 162, 165 (Pa. Super. 2006).

E. Institutional Sexual Assault

1. Statutory Citation

18 PA. CONS. STAT. ANN. 3124.2.

2. Statutory 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.
- 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).

²⁶ Theresa A. McNamara, Act 10: *Remedying Problems of Pennsylvania's Rape Laws or Revisiting Them?*, 10 Dick.L.Rev. 203, 210-214 (1996).

F. Penalties

Sexual Assault

Sexual Assault is a felony of the second degree. The maximum incarceration sentence is 10 years and the maximum fine is \$ 25,000.

Institutional Sexual Assault

Institutional Sexual Assault is a felony of the third degree. The maximum incarceration sentence is 7 years and the maximum fine is \$ 10,000.

2.8 AGGRAVATED INDECENT ASSAULT

A. Statutory Citation

18 PA. CONS. STAT. ANN. § 3125.

B. Statutory 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 or more of the following circumstances:
 - a) without consent from the complainant; or
 - b) forcible compulsion;²⁷
 - 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
 - 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.

²⁷ "Forcible compulsion" is defined in Chapter 2, section 2.2.

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 Citation

18 PA. CONS. STAT. ANN. § 3125 (b).

2. Statutory 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. 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 Citation

18 PA.CON.STAT.ANN. §3126

B. Statutory Elements of Offense

A person is guilty of indecent assault if:

- (a) the person has indecent contact with the complainant, or
- (b) causes the complainant to have indecent contact with the person or

- (c) intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant

And under one or more of the following circumstances:

- (1) the person does so without the complainant's consent;
- (2) the person does so by forcible compulsion;
- (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (4) the complainant is unconscious or the person knows that the complainant is unaware that the indecent contact is occurring;
- (5) 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;
- (6) the complainant suffers from a mental disability which renders the complainant incapable of consent;
- (7) the complainant is less than 13 years of age; or
- (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person 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. The maximum incarceration sentence is 5 years, and the maximum fine is \$ 10,000. However, if any of the following apply, it is a felony of the third degree:

- (i) It is a second or subsequent offense.
- (ii) There has been a course of conduct of indecent assault by the person.
- (iii) The indecent assault was committed by touching the complainant's sexual or intimate parts with sexual or intimate parts of the person.
- (iv) The indecent assault is committed by touching the person's sexual or intimate parts with the complainant's sexual or intimate parts.

In the event that it is classified as a felony of the third degree, the penalty is maximum incarceration of up to 7 years, and a maximum fine of up to \$ 15,000. 18 PA.CON.STAT.ANN. § 3126(b).

2. Other Categories

An offense under subsection (1) or (8) listed above in Section 2.9(B) is a misdemeanor of the second degree.

An offense under subsection (2), (3), (4), (5) or (6) listed above in Section 2.9(B) is a misdemeanor of the first degree.

Misdemeanors of the second degree carry a maximum incarceration sentence of 2 years, and a maximum fine of \$ 5,000. Misdemeanors of the First Degree carry a maximum incarceration sentence of 5 years, and a maximum fine of \$ 10,000.

2.10 INDECENT EXPOSURE

A. Statutory Citation

18 PA. CONS. STAT. ANN. § 3127

B. Statutory 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

Affront or Alarm: The prosecution is not required to prove that affront or alarm was actually caused for the purposes of conviction for indecent exposure; it is sufficient for the evidence to show that a defendant knew or should have known that his conduct was *likely* to cause affront or alarm. *Commonwealth v. Tiffany*, 926 A.2d 503, 511 (Pa.Super. 2007), *appeal denied*, 597 Pa. 706, 948 A.2d 804 (2008).

Location of Offense: There must be evidence that the exposure was (1) in a public place or (2) that the defendant knew or should have known that the exposure was in the presence of others and that it would offend, affront or alarm. *See Commonwealth v. DeWalt*, 752 A.2d 915, 917 (Pa.Super. 2000).

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 a misdemeanor of the first degree. The maximum incarceration sentence is five years, and the maximum fine is \$10,000.
2. **Other Cases:** In all other circumstances, indecent exposure is a misdemeanor of the second degree. The maximum incarceration sentence is two years, and the maximum fine is \$5,000.

2.11 INCEST

A. Statutory Citation

18 PA. CONS. STAT. ANN. § 4302

B. Statutory 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. Statutory 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 a gender-neutral crime which proscribes the stated conduct against males and females. *Commonwealth v. K.M.*, 680 A.2d 1168, 1171 (Pa.Super. 1996).

Prohibited Marriage Licenses: Pennsylvania law provides that no marriage license may be issued to applicants within the prohibited degrees of consanguinity as follows:

- a man may not marry his mother;
- a man may not marry the sister of his father;
- a man may not marry the sister of his mother;
- a man may not marry his sister;
- a man may not marry his daughter;
- a man may not marry the daughter of his son or daughter;
- a man may not marry his first cousin;
- a woman may not marry her father;
- a woman may not marry the brother of her father;
- a woman may not marry the brother of her mother;
- a woman may not marry her brother;
- a woman may not marry her son;
- a woman may not marry the son of her son or daughter;
- a woman may not marry her first cousin.

See 23 PA.CON.S.TAT.ANN. § 1304

D. Penalties

Grading: Incest is a felony of the second degree. The maximum incarceration sentence is ten 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 Citation

18 PA. CONS. STAT. ANN. § 7507.1.

B. Statutory Elements

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

- 1) A person viewed, photographed, videotaped, electronically recorded or otherwise recorded;
- 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 or otherwise recorded;
- 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 at 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. The maximum incarceration sentence is two 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. The maximum incarceration sentence is one 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. Definition of “Photographs” or “Films”

“Photographs” or “films.” Making any photograph, motion picture film, videotape or any other recording or transmission of the image of a person. 18 PA.CON.S.TAT.ANN. § 7507.1

Chapter 3

OFFENSES AGAINST CHILDREN

Offenses Against Children

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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.CON.S.TAT.ANN. § 3121, Statutory Sexual Assault, 18 PA.CON.S.TAT.ANN. § 3122, and Involuntary Deviate Sexual Intercourse, 18 PA.CON.S.TAT.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.CON.S.TAT.ANN. § 2910
- Section 3.3: **Endangering Welfare of Children**, 18 PA.CON.S.TAT.ANN. § 4304
- Section 3.4: **Corruption of Minors**, 18 PA.CON.S.TAT.ANN. § 6301
- Section 3.5: **Sexual Abuse of Children**, 18 PA.CON.S.TAT.ANN. § 6312
- Section 3.6: **Unlawful Contact with Minor**, 18 PA.CON.S.TAT.ANN. § 6318
- Section 3.7: **Sexual Exploitation of Children**, 18 PA.CON.S.TAT.ANN. § 6320
- Section 3.8: **Internet Child Pornography**, 18 PA.CON.S.TAT.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 Citation

18 PA.CON.S.TAT.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; and
- 5) Without the consent, express or implied, of the child's parent or guardian.

1. **Mens Rea**

Age of Child: As to the element of intent, culpability required is intentional, knowing or reckless conduct. At trial, to establish that a defendant possessed the sufficient *mens rea* to commit the offense of luring a child into a motor vehicle, the prosecution is required to prove, beyond a reasonable doubt, that the defendant either *intentionally* sought out the victim because he was under the age of 18, *knew* the victim was under the age of 18, or, at the very least, was *reckless* as to the victim's age. *Commonwealth v. Gallagher*, 592 Pa. 262, 264-265, 924 A.2d 636, 637-638 (2007).

Luring: There is strict liability in the luring statute with respect to the luring element – there is no need for the prosecution to show “intent to harm.” Luring does not require a bad purpose intent. *Commonwealth v. Gallagher*, 592 Pa. 262, 268, 924 A.2d 636, 639 (2007); *Commonwealth v. Figueroa*, 648 A.2d 555, 558 (Pa.Super. 1994), *appeal denied*, 540 Pa. 578, 655 A.2d 510 (1995).

2. **Definition of “child”**

A person under 18 years of age. 18 PA.CON.S.TAT.ANN. § 2908(b); *Commonwealth v. Gallagher*, 592 Pa. 262, 266, 924 A.2d 636, 638 (2007).

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), *appeal denied*, 538 Pa. 631, 647 A.2d 507 (1994), *cert. denied*, 513 U.S. 1022 (1994).

Inducement: approaching walking victim while in a car and offering the victim money in exchange for help finding a location was sufficient evidence to constitute a lure. *Commonwealth v. Strouse*, 909 A.2d 368, 369 (Pa.Super. 2006), *appeal denied*, 593 Pa. 740, 929 A.2d 1162 (2007).

Commands and Threats: a lure may be "any invitational pretext" which means not only an enticement of a benefit to the child and but also includes threats, or commands, or implied threats. *Commonwealth v. Nanorta*, 742 A.2d 176 (Pa. Super. 1999), *appeal denied*, 563 Pa. 613, 757

A.2d 930 (2000). The court held that the command “get in my car” could be characterized as a lure.

Offer of a Ride: the mere offer of a ride, at least when weather conditions were rather inclement, was a sufficient inducement to constitute a lure under the statute in *Commonwealth v. Figueroa*, 648 A.2d 555, 557 (Pa.Super. 1994), *appeal denied*, 540 Pa. 578, 655 A.2d 510 (1995).

Offer of a Ride but Lack of Criminal Intent: in *Commonwealth v. Hart*, 970 A.2d 468 (Pa. Super. 2009), *allocatur granted*, --- Pa. ---, 990 A.2d 724 (2010), the Defendant was convicted of four counts of attempting to lure a child into an automobile. His conviction was affirmed by the Superior Court in an unpublished memorandum decision, however, allowance of appeal was granted by the Pennsylvania Supreme Court on March 12, 2010. The issue was framed by the Supreme Court as follows:

Whether a person who offers a child a ride without previously obtaining the permission of a parent of the child, but who otherwise lacks criminal intent to harm the child, may be convicted of luring a child into a motor vehicle under 18 Pa.C.S.A. § 2910?

In his petition requesting the Supreme Court to review his appeal, the Defendant argued that the interpretation of the luring statute used by the prosecution and approved by the trial and intermediate appellate court would mean that the acts of a Good Samaritan could constitute a “lure” which was not intended by the Legislature. The Pennsylvania Supreme Court will resolve this issue when its opinion is filed.

4. Definitions of “motor vehicle” and “structure”

“Motor vehicle” defined: Any 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).

“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).

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, the maximum incarceration sentence is five years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$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), which requires registration with the Pennsylvania State Police for ten years.

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, or attempt to lure, a child into a motor vehicle or a structure. The amendment also 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.

Therefore, the holding of the Pennsylvania Supreme Court in *Commonwealth v. Tate*, 572 Pa. 411, 816 A.2d 1097 (2003) would no longer be applicable to this crime. In *Tate*, the Supreme Court held that the prior luring statute did 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 Supreme Court held that the appropriate offense was criminal attempt; however, the statute has now been amended to include attempt.

3.3 ENDANGERING WELFARE OF CHILDREN

A. Statutory Citation

18 PA.CON.S.TAT.ANN. § 4304.

B. Elements of Offense

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

This statute:

- attempts to prohibit a broad range of conduct in order to safeguard the welfare and security of our children;
- the common sense of the community should be considered when interpreting the language of the statute.

Commonwealth v. Trippett, 932 A.2d 188, 194 (Pa.Super. 2007);
Commonwealth v. Brown, 721 A.2d 1105, 1106-1107 (Pa.Super. 1998).

1. Status as a Parent, Guardian, or Other Person

Other Person Supervising the Child: As used in this subsection, the term “person supervising the welfare of a child” means a person *other* than a parent or guardian who provides care, education, training or control of a child. 18 PA.CON.S.TAT.ANN. § 4304(a)(3).

“Other person” includes, but is not limited to:

- stepparents;
- grandparents;
- adult siblings;
- adult roommates;
- life partners;
- any adult person residing with a custodial or non-custodial child;
- any adult person who is placed in a position of control and supervision of a child.

Commonwealth v. Ahmad, 961 A.2d 884 (Pa.Super. 2008);
Commonwealth v. Brown, 721 A.2d 1105 (Pa.Super. 1998);
Commonwealth v. Kellam, 719 A.2d 792 (Pa. Super. 1998), *appeal denied*, 559 Pa. 714, 740 A.2d 1145 (1999).

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), *appeal denied*, 559 Pa. 714, 740 A.2d 1145 (1999) (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) the 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 (2000).

2. Definition of "Knowingly Endangers"

Endangering the welfare of a child is a specific intent offense enacted in broad terms so as to safeguard the welfare and security of children. *See Commonwealth v. Foster*, 764 A.2d 1076 (Pa. Super. 2000), *appeal denied*, 566 Pa. 658, 782 A.2d 542 (2001). The *mens rea* required for this crime is a *knowing* violation of the accused's duty of care to the minor-victim. "Often, intent cannot be proven directly but must be inferred from examination of the facts and circumstances of the case." *Commonwealth v. Winger*, 957 A.2d 325, 329 (Pa. Super. 2008).

(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 element of intent:

- i) The accused is aware of his duty to protect the child;
- ii) The accused is aware that 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."

Commonwealth v. Retkofsky, 860 A.2d 1098, 1100 (Pa. Super. 2004); *Commonwealth v. Cardwell*, 515 A.2d 311, 315 (Pa. Super. 1986), *appeal denied*, 515 Pa. 573, 527 A.2d 535 (1987).

(b) Examples of "Knowingly Endangering"

- Driving with high blood alcohol level: There was a *prima facie* case of endangering welfare of child against defendant when she drove her car with .252% blood alcohol content and her two year old child was in the car at the time. *Commonwealth v. Winger*, 957 A.2d 325 (Pa. Super. 2008).

- 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 left the child sleeping in a room with a space heater that eventually created a fire, killing the child. Failure to check on the alleged babysitting arrangements was not unreasonable.
- In *Commonwealth v. Vining*, 744 A.2d 310 (Pa. Super. 1999), *appeal denied*, 564 Pa. 709, 764 A.2d 1069 (2000), although a new trial was granted on evidentiary grounds, the Court held that as the person who beat and burned the child, the defendant would have been aware that the child was in circumstances that threatened her physical well-being.
- In the companion case, *Commonwealth v. Jones*, 744 A.2d 310 (Pa. Super. 1999), *appeal granted*, 563 Pa. 658, 759 A.2d 383 (2000), *appeal dismissed*, 565 Pa. 463, 774 A.2d 1246 (2001), Vining's live-in companion, defendant Jones, was found guilty of Endangering Welfare of Children based on the theory that he was present in the apartment after the child had been beaten and burned. The court held that the nature of the child's 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. Because she failed to take concrete steps to remove her daughter from the situation, defendant was guilty of Endangering Welfare of Children.

- Where the child suffered from a serious and life-threatening medical condition, prayers and anointing the child were 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 of 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 (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 the 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 (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.

(c) **Definition of "Endangers"**

Although a violation of the accused's duty of care under Section 4304 includes exposing a child to danger or putting a child at risk of harm, this crime *does not require the actual infliction of physical harm*.

The statute does *not* require the actual infliction of physical injury. Nor does it

state a requirement that the child or children be in imminent threat of physical harm. Rather it is the awareness by the accused that [her] violation of [her] duty of care, protection and support is practically certain to result in the endangerment to [her] children's welfare, which is proscribed by the statute.

Commonwealth v. Winger, 957 A.2d 325, 329 (Pa.Super. 2008); *see also*, *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 (2004).

Further, a person must take affirmative, reasonable steps to protect the child:

The affirmative performance required by [Section] 4304 cannot be met simply by showing any step at all toward preventing harm, however incomplete or ineffectual. An act which will negate intent is not necessarily one which will provide a successful outcome. However, the person charged with the duty of care is required to take steps that are reasonably calculated to achieve success. Otherwise, the meaning of the duty of care is eviscerated.

Commonwealth v. Pahel, 689 A.2d 963, 964 (1997).

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 (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, the maximum incarceration sentence is five years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$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, the maximum incarceration sentence is 7 years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$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 where 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 Defendant's 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 his or her 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 where 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).

D. Sex Offender Registration

The crime of Endangering Welfare of Children under 18 PA.CONS.STAT.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 Citation

18 PA.CONS.STAT.ANN. § 6301(a)(1)& (2).

B. Elements of Offense

Corruption of Minor – Non-Truancy

- 1) The defendant is age 18 years or older at the time of the incident, and
- 2) The minor is under 18 years of age at the time of the incident, and
- 3) The defendant:
 - a) By any act corrupts or tends to corrupt the morals of the minor, or
 - b) Aids, abets, entices or encourages the minor in the commission of any crime, or
 - c) Knowingly assists or encourages the minor in violating his or her parole or any order of court.

Corruption of Minor - Truancy

Any person

- (1) Who knowingly aids, abets, entices or encourages
- (2) A minor younger than 18 years of age
- (3) To commit truancy.

C. Scope of “Corrupts or Tends to Corrupt”

General Standard: 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).

Tends to Corrupt: 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).

No Criminal Activity Required:

- 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, 100 (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.)
- 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 Corruption of Minors 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.)

No Injury Required: Injury is similarly not required for corruption of minors. *Commonwealth v. Berry*, 513 A. 2d 410, 413 (Pa. Super. 1986).

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

D. 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).

E. 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).

F. 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.CON.S.TAT.ANN. § 6301(d).

G. 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 not more than five 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 not 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 graded as a misdemeanor of the third degree.

H. 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.CON.S.TAT.ANN. § 9795.1.

3.5 SEXUAL ABUSE OF CHILDREN

A. Statutory Citation

18 PA.CON.S.TAT.ANN. § 6312.

B. Purpose of Statute

"The purpose of Section 6312 is plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography." *Commonwealth v. Diodoro*, 601 Pa. 6, 970 A.2d 1100, 1107 (2009), quoting *Commonwealth v. Davidson*, 595 Pa. 1, 938 A.2d 198, 215 (2007)

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

C. Elements of Offense

1. Statutory Definitions

The statute reads as follows:

§ 6312. Sexual abuse of children

(a) Deleted by 2009, July 14, P.L. 63, No. 15, § 1, effective in 60 days [Sept. 14, 2009].

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

(d) Child pornography.--

(1) Any person who intentionally views or 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 viewed, possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a bona fide educational, scientific, governmental or judicial purpose.

(g) **Definitions.**--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Intentionally views.” The deliberate, purposeful, voluntary viewing of material depicting a child under 18 years of age engaging in a prohibited sexual act or in the simulation of such act. The term shall not include the accidental or inadvertent viewing of such material.

“Prohibited sexual act.” 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.

18 PA.CON.S.TAT.ANN. § 6312

“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 or 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. Filming a Child During or Simulation of Sexual Acts

(a) **Specific Elements:** Photographing, videotaping, depicting on computer or filming sexual acts, 18 PA.CON.S.TAT.ANN. § 6312(b). The defendant:

- 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) knowingly photographs, videotapes, depicts on a computer or films the child or
- iii) knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed.

(b) **Grading and Penalty** – A violation of this subsection is a felony of the second degree. In accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is ten years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$25,000.00.

3. Dissemination of Child Pornography

(a) **Specific Elements:** Dissemination of photographs, videotapes, computer depictions and films, 18 PA. CONS. STAT. ANN. § 6312(c). The defendant knowingly:

- i) sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or
- ii) possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others,
- iii) any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material,
- iv) depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act.

(b) **Grading and 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. For a felony of the third degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is seven years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$15,000.00. For a felony of the second degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is ten years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$25,000.00.

4. Possession or Control of Child Pornography

(a) **Specific Elements:** 18 PA. CONS. STAT. ANN. § 6312(d). A defendant who knowingly:

- i) Possesses or controls¹ 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.

(b) Grading and 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. For a felony of the third degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is seven years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$15,000.00. For a felony of the second degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum incarceration sentence is ten years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$25,000.00.

Recidivist Policy: This sentencing statute, designating the first offense of possession of child pornography as a third degree felony and the second or subsequent offense as a second degree felony, reflects a recidivist policy, and therefore the purpose of the graduated sentencing scheme requires that each offense, or “strike” that serves as a predicate offense must be followed by a sentence and opportunity to reform before the offender commits the next strike. In *Commonwealth v. Jarowecki*, --- Pa. ---, 985 A.2d 955 (2009), the Pennsylvania Supreme Court held that multiple convictions, arrived at simultaneously at the trial level, all had to be classified as felonies of the third degree.

D. Evidence of Age - 18 PA.STAT. § 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. 18 PA.CON.S.TAT.ANN. § 6312(e).

Proof of age, like proof of any other material fact, can be accomplished by the use of either direct or circumstantial evidence, or both. Proof of age is not limited to expert testimony. The trier of fact can assess the age of the child depicted based on everyday observations and common experiences with the

¹ The act of accessing and viewing child pornography over the internet constituted "control" under this subsection. *Commonwealth v. Diodoro*, 601 Pa. 6, 970 A.2d 1100 (2009), *cert. denied*, 130 S.Ct. 200, 175 L.Ed.2d 127 (2009).

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).

This section does not mandate expert opinion testimony to satisfy the element of age but merely allows that if competent expert testimony is presented; if it is, it is sufficient to establish the age element.

Commonwealth v. Robertson-Dewar, 829 A.2d 1207, 1212 (Pa. Super 2003), *appeal denied*, 576 Pa. 712, 839 A.2d 352 (2003).

1. Mistake as to Age – 18 PA.CON.S.TAT.ANN. § 6312 (e.1)

Under subsection (b) only (relating to the filming of a child during or simulation of sexual acts), 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 is a defense.

E. Sex Offender Registration

The crime of Sexual Abuse of Children under 18 PA.CON.S.TAT.ANN. § 6312 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.

F. Exception to Criminal Ramifications

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. 18 PA.CON.S.TAT.ANN. § 6312(f).

3.6 UNLAWFUL CONTACT WITH MINOR

A. Statutory Citation

18 PA.CON.S.TAT.ANN. § 6318.

B. Elements of Offense

Basically, the elements of this crime consist of intentionally, either directly or indirectly, contacting or communicating with a minor for the purpose of engaging in a sexual offense. *Commonwealth v. Oliver*, 946 A.2d 1111, 1113 (Pa.Super. 2008), *appeal denied*, 599 Pa. 690, 960 A.2d 838 (2008); *Commonwealth v. Morgan*, 913 A.2d 906, 910 (Pa.Super. 2006), *appeal denied*, 592 Pa. 788, 927 A.2d 623 (2007).

The elements, as specified in sub-section (a), are as follows:

- (1) A person commits an offense under this section if he intentionally contacts a minor, or a law enforcement officer acting in the performance of duties who has assumed the identity of a minor,
- (2) for the purpose of engaging in a prohibited act, and
- (3) either the person initiating the contact or the person being contacted is within this Commonwealth.
- (4) 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 18 Pa.Cons.Stat.Ann. § 5901 (relating to open lewdness);²
 - (iii) Prostitution as defined in 18 Pa.Cons.Stat.Ann. § 5902 (relating to prostitution and related offenses);³
 - (iv) Obscene and other sexual materials and performances as defined in 18 Pa.Cons.Stat.Ann. § 5903;⁴

² “A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.” 18 PA.CON.S.TAT.ANN. § 5901.

³ “A person is guilty of prostitution if he or she: (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.” 18 PA.CON.S.TAT.ANN. § 5902.

⁴ **(a) Offenses defined.**—No person, knowing the obscene character of the materials or performances involved, shall: (1) display or cause or permit the display of any explicit sexual materials as defined in subsection (c) in or on any window, showcase, newsstand, display rack, billboard, display board, viewing screen, motion picture screen, marquee or similar place in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare, or in any business or commercial establishment where minors, as a part of the general public or otherwise, are or will probably be exposed to view all or any part of such materials;

(2) sell, lend, distribute, transmit, exhibit, give away or show any obscene materials to any person 18 years of age or older or offer to sell, lend, distribute, transmit, exhibit or give away or show, or have in his possession with intent to sell, lend, distribute, transmit, exhibit or give away or show any obscene materials to any person 18 years of age or older, or knowingly advertise any obscene materials in any manner; (3) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials; (4) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom, or by what means any obscene materials can be purchased, obtained or had; (5) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity; (6) hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in this subsection; (7) knowingly take or deliver in any manner any obscene material into a State correctional institution, county prison, regional prison facility or any other type of correctional facility; (8) possess any obscene material while such person is an inmate of any State correctional institution, county prison, regional prison facility or any other type of correctional facility; or (9) knowingly permit any obscene material to enter any State correctional institution, county prison, regional prison facility or any other type of correctional facility if such person is a prison guard or other employee of any correctional facility described in this paragraph.

(a.1) Dissemination of explicit sexual material via an electronic communication.—No person, knowing the content of the advertisement to be explicit sexual materials as defined in subsection

- (v) Sexual abuse of children as defined in 18 PA.CON.S.TAT.ANN. § 6312;⁵
- (vi) Sexual exploitation of children as defined in 18 PA.CON.S.TAT.ANN. § 6320.⁶

C. Penalties

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 felony of the third degree; whichever is *greater*.

D. Concurrent Jurisdiction to Prosecute

The Attorney General has concurrent prosecutorial jurisdiction with the county 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.CON.S.TAT.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.

(c)(1) and (c)(2), shall transmit or cause to be transmitted an unsolicited advertisement in an electronic communication as defined in section 5702 (relating to definitions) to one or more persons within this Commonwealth that contains explicit sexual materials as defined in subsections (c)(1) and (c)(2) without including in the advertisement the term “ADV-ADULT” at the beginning of the subject line of the advertisement.

18 Pa.Cons.Stat.Ann. § 5903.

⁵ See Section 3.5, *supra*.

⁶ See Section 3.7, *infra*.

“**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 Citation

18 PA.CON.S.TAT.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). For a felony of the second degree, in accordance with 18 PA. CONS. STAT. ANN. § 1103, the maximum

incarceration sentence is ten years, and, in accordance with 18 PA. CONS. STAT. ANN. § 1101, the maximum fine is \$25,000.00.

D. Sex Offender Registration

The crime of Sexual Exploitation of Children under 18 PA. CONS. STAT. ANN. § 6320 is designated as a “listed offense” for a ten year reporting requirement under Pennsylvania Registration of Sexual Offenders Act (Megan’s Law). See 42 PA. CONS. STAT. ANN. § 9795.1.

3.8 INTERNET CHILD PORNOGRAPHY

A. Act Declared Unconstitutional

The Internet Child Pornography Act, 18 PA. CONS. STAT. 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.”⁷

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 CRIMINAL SOLICITATION

A. Statutory Citation

18 PA. CONS. STAT. ANN. §902.

B. Definition of Solicitation

18 PA. CONS. STAT. 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,

⁷ Pursuant to 18 PA. CONS. STAT. 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.

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.

C. Penalties

1. Grading

18 PA.CON.S.TAT.ANN. § 905(a) provides that solicitation, as an inchoate crime, has the same grade and degree as the most serious offense which is solicited (unless otherwise provided in the Pennsylvania Crimes and Offenses Code). *See also, Commonwealth v. Hoke*, 599 Pa. 587, 593-594, 962 A.2d 664, 668 (2009).

2. Dismissal

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.”

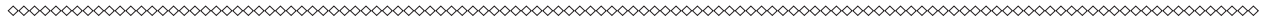
D. Sex Offender Registration

Individuals convicted of a solicitation to commit any of the offenses under subsections (a)(1) or (b)(2) of the Pennsylvania Registration of Sexual Offenders Act are subject to the ten year reporting requirement. See 42 PA.CON.S.TAT.ANN. § 9795.1(a)(2).

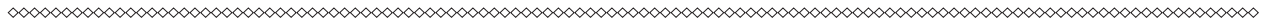
E. Culpability of the One Solicited

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.)

Chapter 4



PRELIMINARY ARRAIGNMENT



Preliminary Arraignment

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4.1 CHAPTER OVERVIEW

This chapter outlines the procedure following an arrest through the preliminary arraignment of an accused charged with a crime of sexual violence. This is a proceeding which ensures that the defendant, at a very early stage of the prosecution, has been advised by a member of the judiciary of the charges filed against him, of his constitutional right to counsel, his right to bail, and the date of the preliminary hearing.

The requirements of the preliminary arraignment are detailed in Rule 540 of the Rules of Criminal Procedure.

If the prosecution is instituted by the issuance of a summons, pursuant to Rules 510 through 512 of the Pennsylvania Rules of Criminal Procedure, a preliminary arraignment is not necessary and the case proceeds directly to a preliminary hearing with bail being set only after the preliminary hearing, if the case is held for court.

A suggested checklist for the preliminary arraignment is included in Section 4.2. In Section 4.3, there is an explanation of the steps to be taken by the issuing authority in cases where there has been an arrest with a warrant and in situations of an arrest without a warrant. Additionally, in Section 4.4, there is a review of issues which commonly arise during these pre-trial stages, which must be addressed by the issuing authority, including details about the establishment of bail, the types of bail, and the setting of the preliminary hearing date.

The preliminary hearing is addressed in Chapter 5.

4.2 CHECKLIST FOR PRELIMINARY ARRAIGNMENT

- MDJ must provide Defendant with copy of Criminal Complaint [Rule 540(B)].
- MDJ must provide Defendant with copies of Arrest Warrant and supporting Affidavits [Rule 540(C)] if Defendant were arrested with a warrant.¹
- MDJ must make a determination of probable cause if the Defendant were arrested without a warrant if the Defendant is to be detained.
- MDJ must read the Criminal Complaint to the Defendant.
- MDJ must inform the Defendant of the following:

¹ If the Arrest Warrant and supporting Affidavits(s) are not available at the preliminary arraignment, copies must be sent to the Defendant no later than the first business day after the preliminary arraignment. *See* Pa.R.Crim.P., Rule 540(C).

- of the right to secure counsel of choice and the right to assigned counsel;
 - of the right to have a preliminary hearing; and
 - if the offense is bailable, the type of release on bail and the conditions of the bail bond.
- MDJ must fix date for Preliminary Hearing.
 - MDJ must advise Defendant, orally and in writing, of the following regarding the Preliminary Hearing:
 - the date, time and place of the Preliminary Hearing;
 - that failure to appear without good cause will be deemed a waiver;
 - that failure to appear without good cause will result in case proceeding in the Defendant's absence;
 - that failure to appear without good cause will result in the issuance of an arrest warrant;
 - that in the event the Defendant has a legitimate reason, he may request a continuance of the Preliminary Hearing.
 - If the Defendant is detained, the MDJ must address bail and provide opportunity for Defendant to post bail and secure counsel.

4.3 PROCEDURE FOLLOWING ARREST

A. Arrest With A Warrant

1. Warrant Executed Within Issuing Judicial District

Rule 516 of the Rules of Criminal Procedure provides that the defendant must be afforded a preliminary arraignment "without unnecessary delay."

An alternative to a live arraignment is made possible in subsection (B), where video arraignment is permitted: the defendant must be brought to a site that is most convenient to the place of arrest. The arresting officer must determine which site is the most convenient to the place of arrest without regard to the boundary of any magisterial district or judicial district. Pa.R.Crim.P., Rule 516.

Rule 516 was amended in 1983 to permit video arraignment, to insure that the preliminary arraignment is not delayed and the defendant is not detained unduly because of the unavailability of a particular issuing authority. Pa.R.Crim.P., Rule 516.

2. Warrant Executed Outside Issuing Judicial District

(a) **Defendant Brought Before MDJ in District of Arrest**

When arrested in another district, the defendant must be taken without unnecessary delay to an MDJ in the district of arrest and granted an opportunity to post bail. Pa.R.Crim.P., Rule 517(A).

Posting of Bail: If the defendant posts bail, the MDJ must release the defendant on the condition that he appear for the preliminary arraignment before the MDJ in the district that issued the warrant, on a specific date not less than 5 days nor more than ten days thereafter. Pa.R.Crim.P., Rule 517(B).

If the defendant does not appear at the set time for the preliminary arraignment, the MDJ in the district that issued the warrant must order forfeiture of the bail and issue a bench warrant. Pa.R.Crim.P., Rule 517(E).

If the defendant is thereafter arrested outside of that district, he is not entitled to post bail and must be taken directly before the MDJ in the district that issued the warrant for the preliminary arraignment.

Defendant Unable to Post Bail: If the defendant does not post bail, the arresting officer must:

- (i) return the defendant to the judicial district where the warrant was issued, without unnecessary delay, for a preliminary arraignment² or
- (ii) lodge the defendant in a suitable detention and notify the issuing authority of the defendant's detention and place of detention. The issuing authority must then, without unnecessary delay, make arrangements for the defendant's return to the district for a preliminary arraignment.

Detention of 48 Hours or More: Rule 517(D) provides that if a defendant has been held for *48 hours or more without a preliminary arraignment*, outside the judicial district where the warrant was issued, because of the inability to post bail, the defendant must be discharged from custody upon the application of any interested person to a judge in the county of detention. However, upon cause shown, the judge may grant one or more extensions of the defendant's detention to a date stated in the order. If the defendant remains in custody and has not been removed to the

² See Pa.R.Crim.P., Rule 517(C)(1).

county where the warrant was issued by the end of the extended detention period, the defendant must be released.

(b) Defendant Taken to Advanced Communication Site

The defendant may be taken, without unnecessary delay, to a site using two-way simultaneous audio-visual communication which, in the judgment of the arresting officer, is most convenient to the place of arrest without regard to the boundary of any magisterial district or judicial district, for either (1) the preliminary arraignment or (2) the posting of bail. Pa.R.Crim.P., Rule 518(A).

Rule 518 sets forth the procedures for using video conferences when a defendant is arrested with a warrant outside the judicial district in which it was issued. If video arraignment is available, the defendant may be preliminarily arraigned by the issuing authority who issued the warrant, or the “on-duty” issuing authority in that judicial district, or “appear” via advanced communication technology before the proper issuing authority for the purpose of posting bail.

If Used For Preliminary Arraignment: Video Arraignment may be used for the preliminary arraignment by the proper issuing authority in the magisterial district or judicial district in which the warrant was issued. Pa.R.Crim.P., Rule 518(A)(1)&(2). The preliminary arraignment must be conducted pursuant to Rule 540, as explained below. If the defendant does not post bail following the preliminary arraignment, the issuing authority may commit the defendant to either:

- a jail in the judicial district in which the defendant was arrested or
- a jail in the judicial district in which the warrant was issued.

If Used To Set Bail: The closed-circuit video may be used to allow the defendant to post bail as permitted by law with the proper issuing authority in the judicial district in which the defendant was arrested. *See* Section 4.3(A)(2)(a) *supra*.

B. Arrest Without A Warrant

1. Preliminary Arraignment

When a defendant is arrested without a warrant, the Rules of Criminal Procedure require a prompt preliminary arraignment, i.e., “without unnecessary delay.” Pa.R.Crim.P., Rule 519(A)(1).

(a) Criminal Complaint To Be Filed

When a defendant has been arrested without a warrant in a court case, the complaint must be filed as soon as possible. The arresting officer may file the complaint with the issuing authority using advanced communication technology. *See* Comment following Rule 519.

(b) Preliminary Arraignment “Without Unnecessary Delay”

When a defendant has been arrested without a warrant in a court case, the defendant must be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. Pa.R.Crim.P., Rule 519(A)(1).

The preliminary hearing may be handled by closed circuit television. Pa.R.Crim.P., Rule 519(A)(2).

(c) Determination of Probable Cause

If the defendant was arrested without a warrant pursuant to Pa.R.Crim.P., Rule 519(A), unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

2. Release

(a) Conditions Requiring Release

The arresting officer must release the defendant from custody, rather than taking the defendant before the issuing authority, when the following conditions are present:

- The most serious offense charged is a misdemeanor of the second degree or a misdemeanor of the first degree in cases arising under 75 PA.CON.S.TAT.ANN. § 3802, Driving under influence of alcohol or controlled substance; and
- The defendant poses no threat of immediate physical harm to any other person or to himself; and
- Arresting officer has reasonable grounds to believe that the defendant will appear as required. *See* Pa.R.Crim.P., Rule 519(B).

(b) Criminal Complaint to Be Filed

If the defendant is released, then the criminal complaint must be filed within 5 days of the defendant’s release. *See* Pa.R.Crim.P., Rule 519(B)(2).

4.4 PRELIMINARY ARRAIGNMENT

A. Timing of Preliminary Arraignment

Six Hour Rule: The Pennsylvania Rules of Criminal Procedure require a preliminary arraignment by the proper issuing authority “without unnecessary delay.” In order to ensure prompt preliminary arraignment following arrest, the Pennsylvania Supreme Court has held that prejudicial evidence obtained during *unnecessary delay* between arrest and arraignment is inadmissible at trial, unless such evidence has no relationship to the delay.

This requirement is not constitutionally mandated, but it ensures [that] a defendant is afforded the constitutional rights protected by Pa.R.Crim.P. 540, which requires the issuing authority to: read the complaint to a defendant to inform him of the nature of the charges against him, Pa. Const. art. I, § 9; inform him of his right to counsel, U.S. Const. Amends. VI, XIV, Pa. Const. art. I, § 9; and inform him of his right to reasonable bail. Pa. Const. art. I, § 14. *See* Pa.R.Crim.P. 540(E)(1)-(3), (G). Prompt arraignment also protects a defendant's right to be free from unreasonable seizure of his person. U.S. Const. Amends. IV, XIV, Pa. Const. art. I, § 8.

Commonwealth v. Perez, 577 Pa. 360, 366, 845 A.2d 779, 782 - 783 (2004).

To enforce this requirement, the Supreme Court imposed a strict “6 hour” rule, i.e., if the accused were not arraigned within six hours of his arrest, any statement(s) obtained after arrest but before arraignment were not admissible at trial. However, the Pennsylvania Supreme Court has recently reaffirmed the current rule which provides as follows:

[V]oluntary statements by an accused, given more than six hours after arrest when the accused has not been arraigned, are no longer inadmissible per se. Rather, ... regardless of time of their making, courts must consider the totality of the circumstances surrounding statements by an accused.

See Commonwealth v. Housman, --- Pa. ---, ---, 986 A.2d 822, 840 (2009), quoting *Commonwealth v. Perez*, 577 Pa. 360, 372, 845 A.2d 779, 787 (2009)(footnote omitted). The time period before arraignment is a factor to be considered when the trial court addresses the issue of whether a statement is voluntary or not; other factors the trial court must consider include the interrogation's duration and means, the defendant's physical and mental state, the detention conditions, police attitude during the interrogation, and any other factors indicating whether coercion was used. 986 A.2d at 840.

B. Location of Preliminary Arraignment

At the discretion of the issuing authority, the preliminary arraignment may be held at either:

Courtroom: the courtroom of the issuing authority,³ or

Closed Circuit TV: the preliminary arraignment may be conducted by using two-way simultaneous audio-visual communication with the defendant at another location other than in the presence of the issuing authority.⁴

Presence of Attorney for the Defendant: if counsel for the defendant is present, meaning counsel is either physically with the defendant or the issuing authority, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment.

C. Procedural Steps

1. Defendant Not To Be Questioned

The issuing authority may not question the defendant about the offenses so charged. Pa.R.Crim.P., Rule 540(E).

2. Criminal Complaint

The defendant must be provided with copy of Criminal Complaint filed pursuant to Rule 508. *See* Pa.R.Crim.P., Rule 540(B). Furthermore, the Criminal Complaint must be read to the defendant. *See* Pa.R.Crim.P., Rule 540(E).⁵

3. Arrest Warrant

The defendant must be provided with copies of the Arrest Warrant and supporting Affidavit(s) if the defendant were arrested with an arrest warrant. *See* Pa.R.Crim.P., Rule 540(C).

If the Arrest Warrant and supporting Affidavits(s) are not available at the preliminary arraignment, copies must be sent to the defendant no later than the first business day after the preliminary arraignment. *See* Rule 540(C).

³ The MDJ has discretion to order that a defendant appear in person for the arraignment. *See* Comment, Pa.R.Crim.P., Rule 540.

⁴ Two-way simultaneous audio-visual communication is a form of advanced communication technology. *See* Comment, Pa.R.Crim.P., Rule 540.

⁵ This requirement is derived from the Pennsylvania Constitution: “In all criminal prosecutions the accused hath a right . . . to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him” Pa. Const. Art. 1, § 9.

4. Information To Be Provided To Defendant

In accordance with Pennsylvania Rule of Criminal Procedure, Rule 540(E), the MDJ must inform the defendant of the following:

- of the right to secure counsel of choice and the right to assigned counsel in accordance with Pa.R.Crim.P., Rule 122;⁶
- of the right to have a preliminary hearing; and
- if the offense is bailable, the type of release on bail that is granted by the issuing authority and the conditions of the bail bond.⁷ *See* Pa.R.Crim.P., Rule 540(C).

5. Scheduling of Preliminary Hearing

Unless the preliminary hearing is waived by a defendant *who is represented by counsel*,⁸ the issuing authority must:

- Fix a day and hour for the preliminary hearing, which must be not less than three nor more than ten days after the preliminary arraignment;
- The time restrictions on the date of the preliminary hearing may be altered at the request of the parties, Pa.R.Crim.P., Rule 540(F)(1)(a)-(b), under the following conditions:
 - The MDJ may schedule the preliminary hearing more than ten days after the arraignment if the extension is for cause shown, or
 - less than three days after the arraignment upon the request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth.

6. Determination of Probable Cause

The defendant cannot be detained if he were arrested without a warrant unless the issuing authority makes a determination of probable cause. Pa.R.Crim.P., Rule 540(D).

D. Posting and Setting of Bail

At the preliminary arraignment, the issuing authority must inform the defendant of the type of release on bail as provided under the Rules of Criminal Procedure, Rules 523 to 536, as well as the conditions of bail. *See* Pa.R.Crim.P., Rule 540(E).

⁶ This requirement is derived from the United States Constitution and the Pennsylvania Constitution: U.S. Const. Amends. VI & XIV and Pa. Const. Art. 1, § 9.

⁷ The right to bail is assured under the Pennsylvania Constitution, with certain exceptions: “All prisoners shall be bailable by sufficient sureties . . .” Pa. Const. Art. 1, § 14.

⁸ A written waiver of the preliminary hearing is attached as an addendum to Chapter 5.

If the defendant is detained, he shall be given an immediate and reasonable opportunity to post bail. *See* Pa.R.Crim.P., Rule 540(G). If the defendant does not post bail, he shall be committed to jail as provided by law.

In accordance with Rule 524, the MDJ must determine the type or combination of types of release on bail reasonably necessary, in the bail authority's discretion, to ensure that the defendant will appear at all subsequent proceedings and comply with the conditions of the bail bond.

Bail must be conditioned upon the defendant's written agreement to appear and to comply with the conditions of the bail bond.

The types of release on bail are:

- (1) **ROR - Release On Recognizance:** release is conditioned upon the defendant's written agreement to appear and comply with all bail conditions;⁹
- (2) **Release on Nonmonetary Conditions:** release is conditioned on the defendant's agreement to comply with any nonmonetary conditions which the bail authority determines are reasonably necessary to ensure the defendant's appearance and compliance with the conditions of the bail bond – the conditions are listed in Rule 527(A);¹⁰
- (3) **Release on Unsecured Bail Bond:** release conditioned on the defendant's written agreement to be liable for a fixed sum of money if he fails to appear as required or fails to comply with the conditions of the bail bond; however, no money or other form of security is required;¹¹
- (4) **Release on Nominal Bail:** release is conditioned upon the deposit of a nominal amount of cash and the agreement of a designated person, organization, or bail agency to act as surety;¹² and
- (5) **Release on a Monetary Condition:** release conditioned upon a monetary amount set by the MDJ.¹³

1. Establishment of Bail

(a) Eligibility and Criteria For Bail

⁹ *See* Pa.R.Crim.P., Rule 524(C)(1).

¹⁰ *See* Pa.R.Crim.P., Rule 524(C)(2). “(T)he categories of nonmonetary conditions that the bail authority may impose are: (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.” Pa.R.Crim.P., Rule 527.

¹¹ *See* Pa.R.Crim.P. Rule 524(C)(3).

¹² *See* Pa.R.Crim.P. Rule 524(C)(4).

¹³ *See* Pa.R.Crim.P. Rule 524(C)(5). The amount of the monetary condition cannot be greater than is necessary to ensure the defendant's appearance and compliance with the conditions of the bail bond. Considerations for the amount of bail are specified in Rule 528.

As stated above, the Rules of Criminal Procedure set forth release criteria that the courts should use in determining bail, ranging from details about the offense(s) charged to the defendant's employment status, family in the area and other connections with the community. *See* Pa.R.Crim.P., Rule 523. Additionally, the court should consider the defendant's prior criminal record and past performance on bail.

The rules explicitly provide for monetary bail, which is typically secured by realty located in the Commonwealth. *See* Pa.R.Crim.P., Rule 528(D)(3).

As stated by the Pennsylvania Supreme Court, the fundamental purpose of bail is to secure the presence of the accused at trial. *See Commonwealth v. Truesdale*, 449 Pa. 325, 335, 296 A.2d 829, 834 (1972). The right to bail in Pennsylvania is mandated under two separate provisions in the Pennsylvania Constitution:

§ 13. Bail, fines and punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

Const. Art. 1, § 13

§ 14. Prisoners to be bailable; habeas corpus

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

Const. Art. 1, § 14

Therefore, except in cases wherein the death penalty is available,¹⁴ bail should be made available for all defendants.

(b) **Denial of Bail**

However, if the court reasonably concludes the accused will not appear for trial regardless of the character or the amount of the bail, or the conditions attached to the bail, then in such an instance bail may properly be denied, regardless of the nature of

¹⁴ *See Commonwealth v. Truesdale*, 449 Pa. 325, 328-329, 296 A.2d 829, 831 (1972).

the charges. “In fact, we emphasized that if the lower court reasonably concludes that a defendant may not appear for trial no matter how high the bail is set, it may deny bail altogether.”

Commonwealth v. Segers, 460 Pa. 149, 153, 331 A.2d 462, 464 - 465 (1975).

The burden of proof is upon the prosecution to show that bail should not be granted. Whenever bail is denied, the court must state, in writing or on the record, the reasons for that determination.¹⁵

2. Bail Conditions

The Rules of Criminal Procedure also provide for the court to impose non-monetary conditions of bail. Courts frequently supplement monetary bail with non-monetary conditions, especially in cases of sexual violence.

(T)he bail authority should consider what the specific circumstances are that relate to the likelihood that the defendant will appear and comply and should tailor the conditions of release for the defendant's specific circumstances. In addition, the bail authority must determine whether the conditions being considered are reasonably capable of being enforced.

See Note following Rule 527. The rule provides:

Rule 527. Nonmonetary Conditions of Release on Bail

(A) When the bail authority determines that, in addition to the conditions of the bail bond required in every case pursuant to Rule 526(A), nonmonetary conditions of release on bail are necessary, the categories of nonmonetary conditions that the bail authority may impose are:

- (1) reporting requirements;
- (2) restrictions on the defendant's travel; and/or
- (3) any other appropriate conditions designed to ensure the defendant's

¹⁵ “Whenever bail is refused, the bail authority shall state in writing or on the record the reasons for that determination.” Pa.R.Crim.P., Rule 520.

- appearance and compliance with the conditions of the bail bond.
- (B) The bail authority shall state with specificity on the bail bond any nonmonetary conditions imposed pursuant to this rule.

Pa.R.Crim.P., Rule 527. The types of conditions that have been used by the courts,¹⁶ some of which are included as examples in the Note following Rule 527, include:

(a) Conditions to Ensure Safety of Alleged Victim and Others

- The defendant to refrain from contact with specified person(s) including the victim (this is commonly called a no-contact order with alleged victims or witnesses).
- Restricting the defendant from being in the presence of specified other persons, such as minor children.
- Submission to drug and/or alcohol testing, as well as recommended follow-up treatment.
- The defendant to refrain from excessive use of alcoholic beverages.
- The defendant to refrain from any use of illegal drugs.
- Submission to undergo a mental health evaluation and participate in recommended follow-up treatment and/or counseling.
- If compelling reasons exist, for the defendant to commit himself to a private or public mental health facility.
- Defendant to undergo urinalysis on a specified schedule.

(b) Restrictive Conditions On Defendant's Travel and Whereabouts To Ensure Presence At Future Court Proceedings

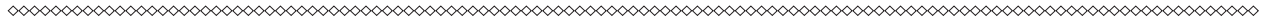
- Restricting the defendant from being at or near specified locations, such as schools, the residence or work place of the alleged victim, etc.
- Restricting the defendant to his residence or a supervised halfway house, with only specified windows for release such as work or school.
- Requiring electronic monitoring.
- Requiring the defendant to be in the presence of others when he leaves his residence, such as his parents or spouse.
- The defendant to comply with a specified curfew.

¹⁶ A combination of conditions is often appropriate.

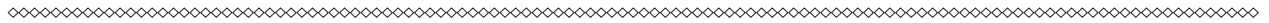
- No travel outside of the county of prosecution.
 - The defendant to surrender his passport.
- (c) **Reporting Conditions On Defendant To Ensure Presence At Future Court Proceedings**
- The defendant to report by phone on a daily basis or at other specified times.
 - The defendant to report in person on a daily basis or at other specified times.
- (d) **Supervisory Conditions To Ensure Presence At Future Court Proceedings**
- The defendant be supervised by a designated probation department or bail agency.
 - The defendant be supervised by a designated person or private organization.
 - Supervision of the defendant to include close contact and assistance in appearing in court.
 - That the defendant maintains employment or continues with an educational program while on bail supervision.
 - Requiring the defendant to report any change of address, phone or employment.
 - The defendant to hand over to law enforcement all weapons in his possession or under his control.
- (e) **Comprehensive List of Conditions**
- The defendant to refrain from contact with specified person(s) including the victim (this is commonly called a no-contact order with alleged victims or witnesses).
 - Restricting the defendant from being in the presence of specified other persons, such as minor children.
 - Restricting the defendant from being at or near specified locations, such as schools, the residence or work place of the alleged victim, etc.
 - The defendant to report by phone on a daily basis or at other specified times.
 - The defendant to report in person on a daily basis or at other specified times.
 - The defendant be supervised by a designated probation department or bail agency.
 - The defendant be supervised by a designated person or private organization.

- Supervision of the defendant to include close contact and assistance in appearing in court.
- That the defendant maintains employment or continues with an educational program while on bail supervision.
- Submission to drug and/or alcohol testing, as well as recommended follow-up treatment.
- The defendant to refrain from excessive use of alcoholic beverages.
- The defendant to refrain from any use of illegal drugs.
- Submission to undergo a mental health evaluation and participate in recommended follow-up treatment and/or counseling.
- If compelling reasons exist, for the defendant to commit himself to a private or public mental health facility.
- Restricting the defendant to his residence or a supervised halfway house, with only specified windows for release such as work or school.
- Requiring electronic monitoring.
- Requiring the defendant to be in the presence of others when he leaves his residence, such as his parents or spouse.
- The defendant to comply with a specified curfew.
- Requiring the defendant to report any change of address, phone or employment.
- No travel outside of the county of prosecution.
- Urinalysis on a specified schedule.
- The defendant to surrender his passport.
- The defendant to hand over to law enforcement all weapons in his possession or under his control.

Chapter 5



PRELIMINARY HEARING



Preliminary Hearing

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5.1 CHAPTER OVERVIEW

This chapter outlines the procedure and standards of review for a preliminary hearing.

The preliminary hearing is designed to protect an individual from an unlawful arrest (meaning one that is not supported by sufficient evidence) and to avoid unlawful detention. The requirements for the preliminary hearing are primarily detailed in Pennsylvania Rules of Criminal Procedure 541, 542 and 543, Part D, PROCEEDINGS IN COURT CASES BEFORE ISSUING AUTHORITIES. These rules are set forth in the Addendum to Chapter 5.

The distinction between a preliminary hearing and the trial itself is well-settled. While a trial determines guilt or innocence, the preliminary hearing is held primarily to prevent the detention of a person for a crime which was never committed or when there is no evidence to connect the defendant with the crime. *Commonwealth v. Troop*, 571 A.2d 1084, 1088 (Pa.Super. 1990), *appeal denied*, 526 Pa. 634, 584 A.2d 317 (1990).

The role of a Magisterial District Judge in a preliminary hearing, as opposed to a summary trial, has also been carefully defined by statute and the Rules of Criminal Procedure. Pursuant to Section 1515 of the Judicial Code, 42 PA.CON.S.TAT.ANN. § 1515, a magisterial district judge serves as a committing judge in court cases and as a trier of fact in summary cases. As a committing judge in a court case, a magisterial district judge is charged with presiding over the preliminary hearing if not waived by the defendant. The purpose of a preliminary hearing is well-settled and stands in stark contrast to a summary trial, where the role of the MDJ is to determine guilt or innocence.

A suggested checklist for the preliminary hearing is included in Section 5.2. In Section 5.3, the elements of crimes of sexual violence are listed, because at the preliminary hearing the presiding MDJ must make a determination that there was evidence of each and every element of the crime(s) charged. Section 5.4 reviews the well-established policy that the Magisterial District Judge, as the presiding judge at the preliminary hearing, is not empowered to make credibility determinations. The standard of *prima facie* evidence is explained in Section 5.5. Options for bail following the preliminary hearing are outlined in Section 5.6.

5.2 CHECKLIST FOR PRELIMINARY HEARING

A. Defendant Appears for Preliminary Hearing

- ❑ **Waiver of Counsel:** Ascertain whether Defendant is represented by counsel or waives the right to counsel.¹
- ❑ **Criminal Complaint:** MDJ to confirm that Defendant was provided a copy of Criminal Complaint² and that the Defendant is present.³
- ❑ **Opening Statement:**⁴
 - ❑ Representative of Commonwealth (either attorney from District Attorney’s office or affiant) goes first;
 - ❑ Defendant or attorney for Defendant then makes opening statements, if any.
- ❑ **Commonwealth Presents Case:**
 - ❑ Direct Examination by Commonwealth representative;⁵
 - ❑ Cross Examination by Defendant or attorney for Defendant;
 - ❑ Re-Direct Examination by Commonwealth representative.
- ❑ **Defense Motions:** Permit defense motions, if any, for dismissal, and enter ruling.
- ❑ **Defense Presents Case:**⁶
 - ❑ Direct Examination by Defendant or attorney for defendant;
 - ❑ Cross Examination by Commonwealth representative;
 - ❑ Re-Direct Examination by Defendant or attorney for defendant.
- ❑ **Commonwealth Presents Rebuttal Evidence:**⁷
 - ❑ Direct Examination by Commonwealth representative;
 - ❑ Cross Examination by Defendant or attorney for Defendant;
 - ❑ Re-Direct Examination by Commonwealth representative.
- ❑ **Closing Arguments:**

¹ Pursuant to Pa.R.Crim.P., Rule 121(B), when the Defendant seeks to waive the right to counsel for a preliminary hearing, the issuing authority must ascertain from the Defendant “whether this is a knowing, voluntary, and intelligent waiver of counsel.” Pa.R.Crim.P., Rule 121(B). The waiver must be in writing in accordance with Pa.R.Crim.P., Rule 121(B)(1)&(2), and be signed by the Defendant and the issuing authority.

² Required under Pa.R.Crim.P., Rule 540(B).

³ Required under Pa.R.Crim.P., Rule 542(C).

⁴ This is not customary in Preliminary Hearings, but in complicated cases with numerous crimes charged and complex facts, the Commonwealth may want to briefly review the charges before the hearing.

⁵ If no attorney appears on behalf of the Commonwealth, the MDJ may ask questions of the witnesses, and the affiant may request that specific questions be asked, or the MDJ may permit the affiant to question the witnesses called by the Commonwealth and cross-examine defense witnesses. *See* Comment, Pa.R.Crim.P., Rule 542. Caution should be exercised to avoid the appearance that the issuing authority is supporting either side.

⁶ This is not customary in Preliminary Hearings but the Defendant has a right to call witnesses other than witnesses to the Defendant’s good reputation only – see Pa.R.Crim.P., Rule 542(C)(3). Additionally, the Defendant has a right to offer evidence on the defendant’s own behalf and to testify. *See* Pa.R.Crim.P., Rule 542(C)(4).

⁷ This is not customary in Preliminary Hearings but the MDJ, as the presiding judge, controls the conduct of the preliminary hearing and may permit rebuttal. *See* Comment, Pa.R.Crim.P., Rule 542.

- First by Defendant or attorney for Defendant – may include a defense motion for dismissal of any or all charges;
- Second by Commonwealth representative.
- MDJ to Publicly Pronounce Decision:**
 - Hold the Defendant for court if a *prima facie* case was established, or
 - Dismiss the Criminal Complaint against the Defendant.
- If Defendant Held for Court:**
 - Address bail: In accordance with Pa.R.Crim.P., Rule 543(C), either continue existing bail, or modify bail pursuant to Pa.R.Crim.P., Rule 529(A), or set bail if there was no preliminary arraignment.
 - Address bail condition: assure compliance with administrative processing and identification (fingerprinting, etc. under Pa.R.Crim.P., Rule 510(C)(2).

B. Defendant Fails to Appear for Preliminary Hearing

- If MDJ makes determination that there was good cause explaining the Defendant’s failure to appear:
 - Continue the preliminary hearing to a specific date and time.
 - Give notice of rescheduled date pursuant to Pa.R.Crim.P., Rule 542(E)(2).⁸
- Warrant of Arrest: If MDJ finds that Defendant did not receive notice of preliminary hearing by summons, then must issue warrant of arrest pursuant to Pa.R.Crim.P., Rule 509(2)(d).⁹
- If MDJ finds that defendant’s absence is without good cause and after notice:
 - The absence is deemed a waiver by Defendant of the right to be present at any further proceedings before the MDJ.
 - MDJ to proceed with preliminary hearing in the same manner as though the Defendant were present.
 - If the MDJ finds *prima facie* case and holds Defendant for court:
 - Provide Defendant with notice by first class mail of results of preliminary hearing and that a bench warrant has been requested;

⁸ See Pa.R.Crim.P., Rule 543(D)(2).

⁹ See Pa.R.Crim.P., Rule 543(D)(1). Pa.R.Crim.P., Rule 509(2)(d) provides, in pertinent part: “If a complaint charges an offense that is a court case, the issuing authority with whom it is filed shall: . . . (2) issue a warrant of arrest when: . . . (d) the summons was mailed pursuant to Rule 511(A) and has been returned undelivered”

- Transmit the transcript pursuant to Pa.R.Crim.P., Rule 547 with a request for the trial court to issue a bench warrant;
- Notify trial court of Defendant's noncompliance if the Defendant has not complied with fingerprint order issued under Pa.R.Crim.P., Rule 510(C)(2).
- If the MDJ does not find *prima facie* case and dismisses case:
 - Provide Defendant with notice by first class mail of results of preliminary hearing.
- If a continuance is granted:
 - The MDJ shall give notice of new date pursuant to Pa.R.Crim.P., Rule 542(E)(2) or
 - The MDJ may issue a bench warrant.
 - If the bench warrant remains unserved, then the MDJ should vacate the bench warrant and proceed with preliminary hearing in the same manner as though the Defendant were present as described above.

5.3 ELEMENTS OF CRIMES OF SEXUAL VIOLENCE

A. Rape

Definition of *Sexual Intercourse*: 18 PA.CON.S.TAT.ANN. § 3101 defines "sexual intercourse" as "[i]n addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required."

Definition of *Forcible Compulsion*: 18 PA.CON.S.TAT.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."

1. Rape By Forcible Compulsion or By Threat of Forcible Compulsion 18 PA.CON.S.TAT.ANN. §§ 3121(a)(1)&(2)

Elements

- (1) A Defendant commits rape if he or she has sexual intercourse;
- (2) By forcible compulsion or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) The force used or threatened can be physical force or violence, or by intellectual, moral, emotional, or psychological force.

2. Rape When the Complainant is Unconscious or Unaware or When A Mental Disability Renders the Complainant Incapable of Consent

18 PA.CON.S.TAT.ANN. §§ 3121(a)(3)&(5)

Elements

- (1) The Defendant had sexual intercourse with the victim;
- (2) At the time of the intercourse, the victim was either:
 - i - Unconscious; or
 - ii - Unaware that the intercourse was occurring; or
 - iii - Suffering from a mental disability that made the victim incapable of consent.
- (3) The Defendant either:
 - i - Knew or recklessly disregarded the fact that the victim was unaware that the intercourse was occurring; or
 - ii - Knew or recklessly disregarded the fact that the victim was unconscious or suffering from a mental disability.

3. Rape When the Assailant Has Impaired the Complainant's Power to Resist

18 PA.CON.S.TAT.ANN. § 3121(a)(4)

Elements

- (1) The Defendant, without the victim's knowledge;
- (2) Administered or employed a substance for the purpose of preventing the victim's resistance through the inducement of euphoria, memory loss, or any other effect;
- (3) That as a result the victim's power to appraise or control his or her conduct was substantially impaired; and
- (4) The Defendant then engaged in sexual intercourse with the victim.

4. Rape of a Child

18 PA.CON.S.TAT.ANN. § 3121(c)

Elements

- (1) The Defendant engaged in sexual intercourse with a child;
- (2) The child was less than 13 years of age.

5. Rape of a Child Resulting in Serious Bodily Injury

18 PA.CON.S.TAT.ANN. § 3121(d)

Definition of *Serious Bodily Injury*: Serious bodily injury is defined in 18 PA.CON.S.TAT.ANN. § 2301 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.

Elements

- (1) The Defendant engaged in sexual intercourse with a child;
- (2) The child was less than 13 years of age;
- (3) The child suffered serious bodily injury in the course of the offense.

B. Statutory Sexual Assault

18 PA.CON.S.TAT.ANN. § 3121(c)

Elements

- (1) The Defendant engaged in sexual intercourse with a child;
- (2) The child was under the age of 16;
- (3) The Defendant was four or more years older than the child;
- (4) The Defendant and the child were not married to each other.

C. Involuntary Deviate Sexual Intercourse

Definition of *Deviate Sexual Intercourse*: 18 PA.CON.S.TAT.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.”

1. Involuntary Deviate Sexual Intercourse by Forcible Compulsion or By Threat of Forcible Compulsion

18 PA.CON.S.TAT.ANN. §§ 3123(a)(1)&(2)

Elements

- (1) A person commits involuntary deviate sexual intercourse if he or she has deviate sexual intercourse;
- (2) By forcible compulsion or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) The force used or threatened can be physical force or violence, or by intellectual, moral, emotional, or psychological force.

2. Involuntary Deviate Sexual Intercourse When the Complainant is Unconscious or Unaware or When A Mental Disability Renders the Complainant Incapable of Consent

18 PA.CON.S.TAT.ANN. §§ 3123(a)(3)&(5)

Elements

- (1) The Defendant had deviate sexual intercourse with the victim; and
- (2) The victim is unconscious, or

- (3) The victim is known by the perpetrator to be unaware that intercourse is occurring, or
- (4) The victim is mentally disabled and therefore incapable of consent.

3. Involuntary Deviate Sexual Intercourse When the Assailant Has Impaired the Complainant's Power to Resist

18 PA.CON.S.TAT.ANN. § 3123(a)(4)

Elements

- (1) The defendant, without the victim's knowledge, administered or employed drugs, intoxicants, or other means for the purpose of preventing the victim's resistance,
- (2) That as a result the victim's power to appraise or control his or her conduct was substantially impaired, and
- (3) That the defendant then engaged in deviate sexual intercourse with the victim.

4. Involuntary Deviate Sexual Intercourse With A Child

18 PA.CON.S.TAT.ANN. § 3123(b)

Elements

- (1) The Defendant engaged in deviate sexual intercourse with a child;
- (2) The child was less than 13 years of age.

5. Involuntary Deviate Sexual Intercourse With A Child Resulting in Serious Bodily Injury

18 PA.CON.S.TAT.ANN. § 3123(c)

Elements

- (1) The Defendant engaged in sexual intercourse with a child;
- (2) The child was less than 13 years of age;
- (3) The child suffered serious bodily injury in the course of the offense.

D. Sexual Assault

18 PA.CON.S.TAT.ANN. § 3124.1

Elements

- (1) The Defendant had either sexual intercourse or deviate sexual intercourse with the victim;
- (2) Without the victim's consent.

E. Institutional Sexual Assault

18 PA.CON.S.TAT.ANN. § 3124.2

Elements

- (1) The Defendant is an employee or agent of any of the following:
 - i - the Department of Corrections;
 - ii - county correctional authority;
 - iii - youth development center;
 - iv - youth forestry camp;
 - v - state or county juvenile detention facility;
 - vi - other licensed residential facility serving children or youth;
or
 - vii - mental health or mental retardation facility or institution,
and
- (2) The Defendant engages in sexual intercourse, deviate sexual intercourse or indecent contact *with an inmate, detainee, patient or resident.*

F. Aggravated Indecent Assault

1. Aggravated Indecent Assault

18 PA.CON.S.TAT.ANN. § 3125

Elements

- (1) The Defendant engaged 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:
 - i - without consent from the complainant; or
 - ii - forcible compulsion; or
 - iii - threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
 - iv - the complainant is unconscious or other circumstances where the defendant is aware that the complainant does not realize penetration is occurring; or
 - v - 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
 - vi - the complainant suffers from a mental disability which renders the complainant incapable of consent; or
 - vii - the complainant is less than 13 years old; or
 - viii - 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.

2. Aggravated Indecent Assault of a Child

18 PA.CON.S.TAT.ANN. § 3125(b)

Elements

- (1) A violation of Aggravated Indecent Assault, 18 PA.CON.S.TAT.ANN. § 3125(a), subsections (3)(i) to (vi); and
- (2) The victim is under 13 years old.

G. Indecent Assault

18 PA.CON.S.TAT.ANN. § 3126

Definition of Indecent Contact: 18 PA.CON.S.TAT.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.”

Elements

- (1) The Defendant has indecent contact with the complainant; or
- (2) The Defendant causes the complainant to have indecent contact with the Defendant; or
- (3) The Defendant intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant; and
 - i - the person does so without the complainant's consent;
 - ii - the person does so by forcible compulsion;
 - iii - the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
 - iv - the complainant is unconscious or the person knows that the complainant is unaware that the indecent contact is occurring;
 - v - 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;
 - vi - the complainant suffers from a mental disability which renders the complainant incapable of consent;
 - vii - the complainant is less than 13 years of age; or
 - viii - the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

H. Indecent Exposure

18 PA.CON.S.TAT.ANN. § 3127

Elements

- (1) That the defendant exposed his or her genitals;

- (2) That the defendant did so in a public place, or a place where other persons were present; and
- (3) That the defendant did so under circumstances in which he or she knew or should have known that this conduct was likely to offend, affront, or alarm.

Additional Element

In order to hold the Defendant for court on Indecent Exposure graded as a Misdemeanor of the First Degree, there must be evidence that the Defendant knew or should have known that a child under the age of 16 was present.

I. Incest

18 PA.CON.S.TAT.ANN. § 4302

Elements:

- (1) The defendant knowingly either:
 - i - marries,
 - ii - cohabits, or
 - iii - has sexual intercourse with
- (2) Any of the following:
 - i - an ancestor of the whole or half blood,
 - ii - a descendant of the whole or half blood,
 - iii - a brother or sister of the whole or half blood,
 - iv - an uncle or aunt of the whole blood, or
 - v - a nephew or niece of the whole blood.
- (3) The relationships referred to in this section include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.

J. Invasion of Privacy

18 PA.CON.S.TAT.ANN. § 7507.1

Definition of Full or Partial Nudity: 18 PA.CON.S.TAT.ANN. § 7507.1 defines “full or partial nudity” as 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.

Definition of Intimate Parts: 18 PA.CON.S.TAT.ANN. § 7507.1 defines “intimate parts” as 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.

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

Elements

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

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

Elements

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

3. Transfer of Image

Elements

- (1) The Defendant transferred or transmitted 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:
 - i - live or recorded telephone message,
 - ii - electronic mail,
 - iii - the Internet, or
 - iv - by any other transfer of the medium on which the image is stored.

K. Luring A Child Into A Motor Vehicle or Structure

18 PA.CON.S.TAT.ANN. § 2910

Elements

- (1) The Defendant lured or attempted to lure a child under the age of 18;
- (2) Into a motor vehicle; or
- (3) Into a structure;
- (4) Unless the circumstances reasonably indicated that the child was in need of assistance;

- (5) Without the consent, express or implied, of the child's parent or guardian.

L. Endangering the Welfare of Children

18 PA.CON.S.TAT.ANN. § 4304

Definition of *Other Person Supervising the Child*: As used in this subsection, the term "person supervising the welfare of a child" means a person *other* than a parent or guardian that provides care, education, training or control of a child. 18 PA.CON.S.TAT.ANN. § 4304(a)(3).

Elements

- (1) The Defendant is a parent or guardian; or
- (2) The Defendant is another person supervising the welfare of a child under 18 years of age or a person that employs or supervises such a person;
- (3) The Defendant knowingly endangers the welfare of the child;
- (4) By violating a duty of care, protection or support.

M. Corruption of Minors

18 PA.CON.S.TAT.ANN. § 6301(a)(1)&(2)

1. Corruption of Minor – Non Truancy

18 PA.CON.S.TAT.ANN. § 6301(a)(1)

Elements

- (1) The Defendant is age 18 years or older at the time of the incident; and
- (2) The minor is under 18 years of age at the time of the incident; and
- (3) The Defendant:
 - i - By any act corrupts or tends to corrupt the morals of the minor; or
 - ii - Aids, abets, entices or encourages the minor in the commission of any crime; or
 - iii - Knowingly assists or encourages the minor in violating his or her parole or any order of court.

2. Corruption of Minor - Truancy

18 PA.CON.S.TAT.ANN. § 6301(a)(2)

Elements

- (1) The Defendant knowingly aids, abets, entices or encourages;
- (2) A minor younger than 18 years of age;
- (3) To commit truancy.

N. Sexual Abuse of Children

1. Filming a Child During or Simulation of Sexual Acts

18 PA.CON.S.TAT.ANN. § 6312(b)

This section should be charged when it is alleged that the Defendant photographed, videotaped, depicted on a computer or filmed the sexual acts or the simulation of sexual acts of a child. 18 PA.CON.S.TAT.ANN. § 6312(b).

Elements

- (1) 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; and
- (2) Knowingly photographed, videotaped, depicted on a computer or filmed the child; or
- (3) Knew, had reason to know or intended that such act may be photographed, videotaped, depicted on computer or filmed.

2. Dissemination of Child Pornography

18 PA.CON.S.TAT.ANN. § 6312(c)

This section should be charged when it is alleged that the Defendant disseminated photographs, videotapes, computer depictions or films of the depiction of a child engaging in sexual acts or the simulation of sexual acts. 18 PA.CON.S.TAT.ANN. § 6312(c).

Elements

- (1) The Defendant sells, distributes, delivers, disseminates, transfers, displays or exhibits to others; or
- (2) Possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others;
- (3) Any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material;
- (4) Depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act.

3. Possession or Control of Child Pornography

18 PA.CON.S.TAT.ANN. § 6312(d)

This section should be charged when it is alleged that the Defendant possessed child pornography. 18 PA.CON.S.TAT.ANN. § 6312(d).

Elements

- (1) The Defendant possesses or controls¹⁰ any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material

¹⁰ The act of accessing and viewing child pornography over the internet constituted "control" under this subsection. *Commonwealth v. Diodoro*, 601 Pa. 6, 970 A.2d 1100 (2009), *cert. denied*, 130 S.Ct. 200, 175 L.Ed.2d 127 (2009).

- (2) 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.

O. Unlawful Contact with a Minor

18 PA.CON.S.TAT.ANN. § 6318

Elements

- (1) The Defendant commits an offense under this section if he or she intentionally contacts a minor, or a law enforcement officer acting in the performance of duties who has assumed the identity of a minor,
- (2) For the purpose of engaging in a prohibited act, and
- (3) Either the person initiating the contact or the person being contacted is within this Commonwealth.

The prohibited acts are as follows:

- Any of the offenses enumerated in Chapter 31 (relating to sexual offenses); or
- Open lewdness as defined in 18 PA.CON.S.TAT.ANN. § 5901 (relating to open lewdness);¹¹ or
- Prostitution as defined in 18 PA.CON.S.TAT.ANN. § 5902 (relating to prostitution and related offenses);¹² or
- Obscene and other sexual materials and performances as defined in 18 PA.CON.S.TAT.ANN. § 5903 (relating to obscene and other sexual materials and performances);¹³

¹¹ “A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.” 18 PA.CON.S.TAT.ANN. § 5901.

¹² “A person is guilty of prostitution if he or she: (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.” 18 PA.CON.S.TAT.ANN. § 5902.

¹³ **(a) Offenses defined.**—No person, knowing the obscene character of the materials or performances involved, shall: (1) display or cause or permit the display of any explicit sexual materials as defined in subsection (c) in or on any window, showcase, newsstand, display rack, billboard, display board, viewing screen, motion picture screen, marquee or similar place in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare, or in any business or commercial establishment where minors, as a part of the general public or otherwise, are or will probably be exposed to view all or any part of such materials;

(2) sell, lend, distribute, transmit, exhibit, give away or show any obscene materials to any person 18 years of age or older or offer to sell, lend, distribute, transmit, exhibit or give away or show, or have in his possession with intent to sell, lend, distribute, transmit, exhibit or give away or show any obscene materials to any person 18 years of age or older, or knowingly advertise any obscene materials in any manner; (3) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials; (4) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom, or by what means any obscene materials can be purchased, obtained or had; (5) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity; (6) hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in this

- Sexual abuse of children as defined in 18 PA.CON.S.TAT.ANN. § 6312 (relating to sexual abuse of children);¹⁴
- Sexual exploitation of children as defined in 18 PA.CON.S.TAT.ANN. § 6320 (relating to sexual exploitation of children).¹⁵

P. Sexual Exploitation of Children

18 PA.CON.S.TAT.ANN. § 6320

Definition of *Procure*: To obtain or make available for sexual exploitation. 18 PA.CON.S.TAT.ANN. § 6320(C).

Definition of *Sexual Exploitation*: Actual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person. 18 PA.CON.S.TAT.ANN. § 6320(C).

Elements

- (1) The Defendant did obtain or make available, for another person;
- (2) A child under 18 years of age;
- (3) For the purposes of sexual exploitation.

5.4 CREDIBILITY NOT A CONSIDERATION

Credibility is a jury issue and not an issue which may be resolved at a preliminary hearing. *Commonwealth v Carmody*, 799 A.2d 143, 149 (Pa.Super. 2002). “The committing magistrate is precluded from considering the credibility of a witness who is called upon to testify during the preliminary hearing.” *Liciaga v. Court of Common Pleas of Lehigh County*, 523 Pa. 258, 263, 566 A.2d 246, 248 (1989).

In a recent decision, the Pennsylvania Supreme Court again stated, in *Commonwealth v. Wholaver*, ___ Pa. ___, ___ 986 A.2d 883,902 (2010)

subsection; (7) knowingly take or deliver in any manner any obscene material into a State correctional institution, county prison, regional prison facility or any other type of correctional facility; (8) possess any obscene material while such person is an inmate of any State correctional institution, county prison, regional prison facility or any other type of correctional facility; or (9) knowingly permit any obscene material to enter any State correctional institution, county prison, regional prison facility or any other type of correctional facility if such person is a prison guard or other employee of any correctional facility described in this paragraph.

(a.1) Dissemination of explicit sexual material via an electronic communication.--No person, knowing the content of the advertisement to be explicit sexual materials as defined in subsection (c)(1) and (c)(2), shall transmit or cause to be transmitted an unsolicited advertisement in an electronic communication as defined in section 5702 (relating to definitions) to one or more persons within this Commonwealth that contains explicit sexual materials as defined in subsections (c)(1) and (c)(2) without including in the advertisement the term “ADV-ADULT” at the beginning of the subject line of the advertisement.

18 PA.CON.S.TAT.ANN. § 5903.

¹⁴ See Section 3.5, *supra*.

¹⁵ See Section 3.7, *infra*.

that a preliminary hearing “is concerned with probable cause and not credibility issues”

In the words of the Superior Court: “weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense.” *Commonwealth v Marti*, 779 A.2d 1177, 1180 (Pa.Super. 2001).

5.5 THE PRELIMINARY HEARING

A. Establishment of a *Prima Facie* Case

Key Points

- As the judicial officer presiding at the preliminary hearing, the Magisterial District Judge controls the conduct of the hearing generally;
- The *prima facie* standard requires evidence of the existence of each and every element of the crime(s) charged;
- The prosecution establishes a *prima facie* case at the preliminary hearing when it produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to the jury;
- The *prima facie* standard does not require proof beyond a reasonable doubt;
- At the preliminary hearing stage, weight and credibility of the evidence are not factors;
- The *prima facie* standard only requires the prosecution to demonstrate sufficient probable cause that a crime has been committed and the accused is probably the one who committed it;
- The Magisterial District Judge may consider inferences reasonably drawn from the evidence of record;
- Because it is well-established that “the uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses,”¹⁶ it follows that the uncorroborated testimony of the complaining witness

¹⁶ *Commonwealth v. Castelhun*, 889 A.2d 1228, 1232 (Pa.Super. 2005).

provides sufficient proof to establish a *prima facie* case. *See also, Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa.Super. 1992) (testimony of child victim alone sufficient to support conviction for sex offenses).

- At the preliminary hearing, the evidence must be read in the light most favorable to the prosecution's case.

Participants

- For the Commonwealth: in accordance with Pa.R.Crim.P., Rule 542(A), an attorney may appear for the Commonwealth, and assume control of the prosecution. The attorney may recommend to the judge that the Defendant be discharged or bound over to court. If no attorney appears, then the affiant may be permitted by the judge to examine the witnesses.
- For the Defendant: in accordance with Pa.R.Crim.P., Rule 542(B), the Defendant may be represented by counsel. Either the Defendant or the Defendant's counsel may cross-examine the witnesses and inspect physical evidence offered against the Defendant. Additionally, after the Commonwealth rests its case, the defense may call witnesses or offer evidence on the Defendant's behalf other than witnesses called for the sole purpose of the Defendant's good reputation. The Defendant has an absolute right to testify on his own behalf.

Standard of Review

The standard of review at a preliminary hearing was recently discussed by the Pennsylvania Supreme Court in a Per Curiam Order:

When determining whether the Commonwealth presents a *prima facie* case, "inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." *Commonwealth v. Huggins*, 575 Pa. 395, 836 A.2d 862, 866 (2003). In the instant matter, the trial court and Superior Court failed to give effect to the reasonable inferences drawn from the evidence that would support a guilty verdict. *See, Commonwealth v. Castelhun*, 889 A.2d 1228 (Pa.Super.2005); *Commonwealth v. Hunzer*, 868 A.2d 498, 505-06 (Pa.Super.2005) (establishing low threshold of evidence required for "penetration, however slight" to sustain convictions for involuntary deviate sexual intercourse and aggravated indecent assault).

Commonwealth v. Millisock, --- A.3d ---, ---, 2010 WL 5129827, *1 (Pa. 2010). In *Millisock*, the trial court had granted a writ of *habeas corpus* and dismissed two counts of aggravated indecent assault, 18 PA.CON.S.TAT.ANN. § 3125(a)(7). In an unpublished memorandum, a panel of the Superior Court agreed, although Judge Jack Panella dissented. At the preliminary hearing, the Commonwealth had presented three young girls who testified how they were touched by Millisock:

E.P. testified that Millisock would use his finger to touch the girls and “move it around on our pee-pees.” E.P. testified her pee-pee was what she used to go to the bathroom. E.P. testified that she saw Millisock do the same thing to M.M. and A.M. E.P. testified that Millisock touched their skin when he touched their pee-pees. Similarly, M.M. and A.M. both testified that Millisock used his hand to touch their pee-pees. M.M. and A.M. each indicated that their pee-pee was what they used to go to the bathroom.

Commonwealth v. Millisock, 4 A.3d 692 (Pa. Super. 2010)(Table)(memo at 2), *reversed*, --- A.3d ---, 2010 WL 5129827 (Pa. 2010). Judge Panella found the testimony sufficient to support a prima facie case of aggravated indecent assault. The Supreme Court agreed, stating the above standard of review for a prima facie case, and concluding: “In light of these decisions, we find that the Commonwealth met its burden of proving a *prima facie* case of Aggravated Indecent Assault.” *Commonwealth v. Millisock*, --- A.3d ---, ---, 2010 WL 5129827, *1 (Pa. 2010).

The standard to be used at a preliminary hearing is whether the Commonwealth has established a *prima facie* case. *Commonwealth v. Carmody*, 799 A.2d 143, 146-147 (Pa. Super. 2002). In order to assess whether a *prima facie* case was presented at the preliminary hearing, the test is “whether sufficient evidence exists to require the defendant to be brought to trial.” *Id.* The Commonwealth does not have to prove the crime beyond a reasonable doubt. *Commonwealth v. Phillips*, 700 A.2d 1281, 1287 (Pa. Super. 1997). Rather, the *prima facie* standard requires evidence of the elements of the crime charged. *Id.* “To meet its burden at the preliminary hearing, the Commonwealth is required to present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant the belief that the accused committed the offense.” *Id.*

“[T]he Commonwealth need not prove the elements of the crime beyond a reasonable doubt; rather, the *prima facie* standard requires evidence of the existence of each and every element of the crime charged.” *Id.* Moreover, the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense.

Commonwealth v. Wojdak, 502 Pa. 359, 369, 466 A.2d 991, 1000 (1983); *See also Commonwealth v. McBride*, *supra*, fn. 1. “Inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” *Commonwealth v. Owen*, 397 Pa.Super. 507, 580 A.2d 412, 414 (1990) (citations omitted).

Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa.Super. 2001).
At the preliminary hearing stage of a criminal prosecution:

[T]he Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. Huggins*, 575 Pa. 395, 402, 836 A.2d 862, 866 (2003)(citing *Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589, 591 (1991)). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. *Commonwealth v. McBride*, 528 Pa. 153, 157-158, 595 A.2d 589, 591 (1991)(citing *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991 (1983)). Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury.

Commonwealth v. Karetny, 583 Pa. 514, 529, 880 A.2d 505, 513 - 514 (2005).

Rule 542(C)(3) makes clear that the defense may call witnesses at the preliminary hearing only to negate the existence of a *prima facie* case, and not merely for the purpose of discovering the Commonwealth's case.

B. Hearsay Evidence Admissible

Typically, hearsay evidence is admissible at a preliminary hearing and the Commonwealth may offer it to meet its burden of establishing a *prima facie* case, *i.e.*, proof that a crime has been committed and the accused is probably the one who committed it. “However, if the hearsay testimony offered at the preliminary hearing is the *only* basis for establishing a *prima facie* case, it fails to meet the criteria for evidence upon which the preliminary hearing judge may rely.” *Commonwealth v. Tyler*, 587 A.2d 326, 328-29 (Pa.Super. 1991) (noting that no error occurred at the preliminary hearing because evidence in addition to hearsay evidence was presented). *See also, Commonwealth v. Carmody*, 799 A.2d 143, 146 n. 2 (Pa.Super. 2002). The Pennsylvania Superior Court recently reaffirmed this rule in *Commonwealth v. Nieves*,

876 A.2d 423 (Pa.Super. 2005), *appeal denied*, 586 Pa. 737, 891 A.2d 731 (2005).

This rule dates back to a plurality decision of the Pennsylvania Supreme Court in *Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990) (plurality opinion), *cert. denied*, 499 U.S. 907, 111 S.Ct. 1108, 113 L.Ed.2d 217 (1991), where the Supreme Court held that at a preliminary hearing, if the Commonwealth presents *only* hearsay testimony regarding a victim's account of an alleged criminal incident, there is insufficient evidence to establish a *prima facie* case. *Verbonitz* was a statutory rape case in which the Commonwealth offered only the testimony of the investigating police officer at the preliminary hearing. The arresting officer "recounted the alleged criminal incident as it was related to him by the victim, a seven year old child." *Id.* at 415, 581 A.2d at 173. Justice Rolf Larsen, with two Justices joining him, concluded that a preliminary hearing could not be based solely on hearsay evidence and, further, that the defendant's right to confront and cross-examine witnesses had been denied. *Id.* at 417, 581 A.2d at 174. Two other Justices also concluded that hearsay testimony, *standing alone*, would not constitute sufficient evidence to establish a *prima facie* case at a preliminary hearing.

C. The Defendant's Right to Confrontation and Cross-Examination

In *Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990) (plurality opinion), *cert. denied*, 499 U.S. 907, 111 S.Ct. 1108, 113 L.Ed.2d 217 (1991), it was stated that "the Pennsylvania Constitution mandates a criminal defendant's right to confrontation and cross-examination at the preliminary hearing." *Id.*, 525 Pa. at 419, 581 A.2d at 175. *See also Commonwealth v. Hanawalt*, 615 A.2d 432, 436 (Pa.Super. 1992) (discussing *Verbonitz*).

D. Sexual Assault Counselor 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:

§ 5945.1. Confidential communications to sexual assault counselors

(a) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Confidential communication."

All information, oral or written, transmitted between a victim of sexual assault and a sexual assault counselor in the course of their relationship, including, but not limited to, any advice, reports, statistical data, memoranda, working papers,

records or the like, given or made during that relationship, including matters transmitted between the sexual assault counselor and the victim through the use of an interpreter.

“Coparticipant.”

A victim participating in group counseling.

“Interpreter.”

A person who translates communications between a sexual assault counselor and a victim through the use of sign language, visual, oral or written translation.

“Rape crisis center.”

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.

“Sexual assault counselor.”

A person who is engaged in any office, institution or center defined as a rape crisis center under this section, 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.

“Victim.”

A person who consults a sexual assault counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who seek advice, counseling or assistance from a sexual assault counselor concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault of a victim.

(b) 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.

42 PA.CON.S.TAT.ANN. § 5945.1.

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 of the proposed testimony of a sexual assault counselor or material(s) in possession of a sexual assault counselor is necessary or required. The materials are not subject to any access by counsel. 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).

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 a case in which the defendant was charged with deviate sexual intercourse and corruption of minors, *inter alia*, the child sexual abuse victim and his family waived any privilege to information contained in family therapy counseling records by giving the prosecution access to them, and the 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): the defendant was charged with statutory rape and involuntary deviate sexual intercourse, *inter alia*. Because the 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.

E. Spouses as Witnesses

In Pennsylvania, the spousal privilege regarding confidential communications between spouses is contained in 42 PA.CON.S.TAT.ANN. § 5914:

§ 5914. Confidential communications between spouses

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.

Pursuant to this statute, “communications between husbands and wives are presumed to be confidential, and the party opposing application of the rule disqualifying such testimony bears the burden of overcoming his presumption.” *Commonwealth v. Hancharik*, 534 Pa. 435, 442, 633 A.2d 1074, 1078 (1993) (*citing Blau v. United States*, 340 U.S. 332 (1951)).

However, spousal competence in other respects 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 . . .

(2) 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.

42 PA.CON.S.TAT.ANN. § 5913. 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.CON.S.TAT.ANN. § 5913, is limited to proceedings in which the person was on trial for

Commonwealth v. Hunzer, 868 A.2d 498, 507 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005).

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 of proving 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 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 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).

5.6 BAIL FOLLOWING PRELIMINARY HEARING

If the Defendant has been held for court, then bail needs to be addressed. In accordance with Pa.R.Crim.P., Rule 543(C)(1)&(2), the presiding judge must either (1) continue the existing bail, (2) modify the bail pursuant to Pa.R.Crim.P., Rule 529(A), or (3) set bail if there was no preliminary arraignment.

Furthermore, the presiding judge must assure compliance with administrative processing and identification procedures¹⁷ by making compliance with these processing procedures a condition of bail.

Pursuant to Pa.R.Crim.P., Rule 529, in making a decision to modify bail, the issuing authority should evaluate the information about the defendant as it relates to the

¹⁷ This includes fingerprinting, among other procedures, under Pa.R.Crim.P., Rule 510(C)(2).

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Furthermore, the presiding judge must assure compliance with administrative processing and identification procedures¹⁷ by making compliance with these processing procedures a condition of bail.

Pursuant to Pa.R.Crim.P., Rule 529, in making a decision to modify bail, the issuing authority should evaluate the information about the defendant as it relates to the release criteria in Pa.R.Crim.P., Rule 523, and the types of release on bail as set forth in Pa.R.Crim.P., Rule 524.

In accordance with Rule 524, the MDJ must determine the type or combination of types of release on bail reasonably necessary, in the bail authority's discretion, to ensure that the defendant will appear at all subsequent proceedings and comply with the conditions of the bail bond.

Bail must be conditioned upon the defendant's written agreement to appear and to comply with the conditions of the bail bond.

¹⁷ This includes fingerprinting, among other procedures, under Pa.R.Crim.P., Rule 510(C)(2).

The types of release on bail are:

ROR - Release On Recognizance: release is conditioned upon the defendant's written agreement to appear and comply with all bail conditions;¹⁸

Release on Nonmonetary Conditions: release is conditioned on the defendant's agreement to comply with any nonmonetary conditions which the bail authority determines are reasonably necessary to ensure the defendant's appearance and compliance with the conditions of the bail bond – the conditions are listed in Rule 527(A);¹⁹

Release on Unsecured Bail Bond: release conditioned on the defendant's written agreement to be liable for a fixed sum of money if he fails to appear as required or fails to comply with the conditions of the bail bond, however, no money or other form of security is required;²⁰

Release on Nominal Bail: release is conditioned upon the deposit of a nominal amount of cash and the agreement of a designated person, organization, or bail agency to act as surety;²¹ and

Release on a Monetary Condition: release conditioned upon a monetary amount set by the MDJ.²²

A. Establishment of Bail

1. Eligibility and Criteria For Bail

As stated above, the Rules of Criminal Procedure set forth release criteria that the courts should use in determining bail, ranging from details about the offense(s) charged to the defendant's employment status, family in the area and other connections with the community. *See* Pa.R.Crim.P., Rule 523. Additionally, the court should consider the defendant's prior criminal record and past performance on bail.

The rules explicitly provide for monetary bail, which is typically secured by realty located in the Commonwealth. *See* Pa.R.Crim.P., Rule 528(D)(3).

¹⁸ See Pa.R.Crim.P., Rule 524(C)(1).

¹⁹ See Pa.R.Crim.P., Rule 524(C)(2). "(T)he categories of nonmonetary conditions that the bail authority may impose are: (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." Pa.R.Crim.P., Rule 527.

²⁰ See Pa.R.Crim.P., Rule 524(C)(3).

²¹ See Pa.R.Crim.P., Rule 524(C)(4).

²² See Pa.R.Crim.P. Rule 524(C)(5). The amount of the monetary condition can not be greater than is necessary to ensure the defendant's appearance and compliance with the conditions of the bail bond. Considerations for the amount of bail are specified in Rule 528.

As stated by the Pennsylvania Supreme Court, the fundamental purpose of bail is to secure the presence of the accused at trial. *See Commonwealth v. Truesdale*, 449 Pa. 325, 335, 296 A.2d 829, 834 (1972). The right to bail in Pennsylvania is mandated under two separate provisions in the Pennsylvania Constitution:

§ 13. Bail, fines and punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

Const. Art. 1, § 13

§ 14. Prisoners to be bailable; habeas corpus

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

Const. Art. 1, § 14

Therefore, except in cases wherein the death penalty is available,²³ bail should be made available for all defendants.

2. Denial of Bail

However, if the court reasonably concludes the accused will not appear for trial regardless of the character or the amount of the bail, or the conditions attached to the bail, then in such an instance bail may properly be denied, regardless of the nature of the charges. “In fact, we emphasized that if the lower court reasonably concludes that a defendant may not appear for trial no matter how high the bail is set, it may deny bail altogether.” *Commonwealth v. Segers*, 460 Pa. 149, 153, 331 A.2d 462, 464 - 465 (1975).

The burden of proof is upon the prosecution to show that bail should not be granted. Whenever bail is denied, the court must state, in writing or on the record, the reasons for that determination.²⁴

B. Bail Conditions

The Rules of Criminal Procedure also made provision for the court to impose non-monetary conditions of bail. Courts frequently supplement monetary bail with non-monetary conditions, especially in cases of sexual violence.

²³ *See Commonwealth v. Truesdale*, 449 Pa. 325, 328-329, 296 A.2d 829, 831 (1972).

²⁴ “Whenever bail is refused, the bail authority shall state in writing or on the record the reasons for that determination.” Pa.R.Crim.P. Rule 520.

(T)he bail authority should consider what the specific circumstances are that relate to the likelihood that the defendant will appear and comply and should tailor the conditions of release for the defendant's specific circumstances. In addition, the bail authority must determine whether the conditions being considered are reasonably capable of being enforced.

See Note following Pa.R.Crim.P., Rule 527. The rule provides:

Rule 527. Nonmonetary Conditions of Release on Bail

(A) When the bail authority determines that, in addition to the conditions of the bail bond required in every case pursuant to Rule 526(A), nonmonetary conditions of release on bail are necessary, the categories of nonmonetary conditions that the bail authority may impose are:

- (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.

(B) The bail authority shall state with specificity on the bail bond any nonmonetary conditions imposed pursuant to this rule.

Pa.R.Crim.P., Rule 527. The types of conditions that have been used by the courts,²⁵ some of which are included as examples in the Note following Rule 527, include:

1. Conditions to Ensure Safety of Alleged Victim and Others

- The defendant to refrain from contact with specified person(s) including the victim (this is commonly called a no-contact order with alleged victims or witnesses).
- Restricting the defendant from being in the presence of specified other persons, such as minor children.
- Submission to drug and/or alcohol testing, as well as recommended follow-up treatment.
- The defendant to refrain from excessive use of alcoholic beverages.
- The defendant to refrain from any use of illegal drugs.
- Submission to undergo a mental health evaluation and participate in recommended follow-up treatment and/or counseling.
- If compelling reasons exist, for the defendant to commit himself to a private or public mental health facility.

²⁵ A combination of conditions is often appropriate.

- Defendant to undergo urinalysis on a specified schedule.

2. Restrictive Conditions On Defendant's Travel and Whereabouts To Ensure Presence At Future Court Proceedings

- Restricting the defendant from being at or near specified locations, such as schools, the residence or work place of the alleged victim, etc.
- Restricting the defendant to his residence or a supervised halfway house, with only specified windows for release such as work or school.
- Requiring electronic monitoring.
- Requiring the defendant to be in the presence of others when he leaves his residence, such as his parents or spouse.
- The defendant to comply with a specified curfew.
- No travel outside of the county of prosecution.
- The defendant to surrender his passport.

3. Reporting Conditions On Defendant To Ensure Presence At Future Court Proceedings

- The defendant to report by phone on a daily basis or at other specified times.
- The defendant to report in person on a daily basis or at other specified times.

4. Supervisory Conditions To Ensure Presence At Future Court Proceedings

- The defendant be supervised by a designated probation department or bail agency.
- The defendant be supervised by a designated person or private organization.
- Supervision of the defendant to include close contact and assistance in appearing in court.
- That the defendant maintains employment or continues with an educational program while on bail supervision.
- Requiring the defendant to report any change of address, phone or employment.
- The defendant to hand over to law enforcement all weapons in his possession or under his control.

5. Comprehensive List of Conditions

- The defendant to refrain from contact with specified person(s) including the victim (this is commonly called a no-contact order with alleged victims or witnesses).

- Restricting the defendant from being in the presence of specified other persons, such as minor children.
- Restricting the defendant from being at or near specified locations, such as schools, the residence or work place of the alleged victim, etc.
- The defendant to report by phone on a daily basis or at other specified times.
- The defendant to report in person on a daily basis or at other specified times.
- The defendant be supervised by a designated probation department or bail agency.
- The defendant be supervised by a designated person or private organization.
- Supervision of the defendant to include close contact and assistance in appearing in court.
- That the defendant maintains employment or continues with an educational program while on bail supervision.
- Submission to drug and/or alcohol testing, as well as recommended follow-up treatment.
- The defendant to refrain from excessive use of alcoholic beverages.
- The defendant to refrain from any use of illegal drugs.
- Submission to undergo a mental health evaluation and participate in recommended follow-up treatment and/or counseling.
- If compelling reasons exist, for the defendant to commit himself to a private or public mental health facility.
- Restricting the defendant to his residence or a supervised halfway house, with only specified windows for release such as work or school.
- Requiring electronic monitoring.
- Requiring the defendant to be in the presence of others when he leaves his residence, such as his parents or spouse.
- The defendant to comply with a specified curfew.
- Requiring the defendant to report any change of address, phone or employment.
- No travel outside of the county of prosecution.
- Urinalysis on a specified schedule.
- The defendant to surrender his passport.
- The defendant to hand over to law enforcement all weapons in his possession or under his control.

Chapter 5
Addendum 1
Written Waiver of Preliminary Hearing

COMMONWEALTH OF PENNSYLVANIA)
)
 vs.) Docket No _____
) Date Filed _____
 _____)

WAIVER OF PRELIMINARY HEARING

I, the undersigned, certify that I waive my right to a preliminary hearing. I understand that I have a right to this hearing, at which time I have the right to:

- 1. be represented by counsel,
- 2. cross-examine witnesses,
- 3. inspect physical evidence offered against me,
- 4. call witnesses on my own behalf, offer evidence on my own behalf, and testify,
- 5. make written notes of the proceedings or have my own counsel do so, and make a stenographic, mechanical, or electronic record of the proceedings.

I understand that if a prima facie case of guilt is not established against me at this hearing, the charges against me would be dismissed.

- I have had a preliminary arraignment during which I was advised of my right to have a preliminary hearing and of my right to counsel.
- I have received a summons wherein I was advised of my right to have a preliminary hearing and of my right to counsel.

I knowingly, voluntarily, and intelligently make this waiver of my preliminary hearing.

Signed this _____ day of _____,
_____.

Defendant

Attorney for Defendant

Print: name and address of attorney for Defendant

Preliminary Hearing

I, _____ the
issuing authority in the within case, certify that this _____day of
_____, _____, I accepted the above defendant's waiver of
preliminary hearing after making full inquiry of the Defendant. I have advised the
Defendant of the right to a preliminary hearing. I certify that the defendant's
waiver of counsel was made voluntarily, knowingly, and intelligently.

(Issuing Authority)

(SEAL)

Chapter 5
Addendum 2
Rules of Criminal Procedure

**RULES OF CRIMINAL PROCEDURE
REGARDING PRELIMINARY HEARING**

The following Rules of Criminal Procedure, adopted by the Pennsylvania Supreme Court, have applicability to the preliminary hearing:

- Rule 106. Continuances in Summary and Court Cases
- Rule 107. Contents of Subpoena
- Rule 109. Defects in Form, Content, or Procedure
- Rule 112. Publicity, Broadcasting, and Recording of Proceedings
- Rule 114. Orders and Court Notices: Filing; Service; and Docket Entries
- Rule 119. Use of Two-Way Simultaneous Audio-Visual Communication in Criminal Proceedings
- Rule 121. Waiver of Counsel
- Rule 122. Appointment of Counsel
- Rule 130. Venue; Transfer of Proceedings
- Rule 131. Location of Proceedings Before Issuing Authority
- Rule 132. Temporary Assignment of Issuing Authorities
- Rule 134. Objections to Venue
- Rule 135. Transcript of Proceedings Before Issuing Authority
- Rule 509. Use of Summons or Warrant of Arrest in Court Cases.
- Rule 510. Contents of Summons; Notice of Preliminary Hearing
- Rule 512. Procedure in Court Cases Following Issuance of Summons
- Rule 529. Modification of Bail Order Prior to Verdict
- Rule 540. Preliminary Arraignment
- Rule 541. Waiver of Preliminary Hearing
- Rule 542. Preliminary Hearing; Continuances
- Rule 542. Preliminary Hearing; Continuances
- Rule 543. Disposition of Case at Preliminary Hearing

- Rule 544. Reinstating Charges Following Withdrawal or Dismissal
- Rule 545. Witnesses: Compulsory Process
- Rule 550. Pleas of Guilty Before Magisterial District Judge in Court Cases
- Rule 551. Withdrawal of Charges Pending Before Issuing Authority
- Rule 559. Request for Bench Warrant

Rule 106. Continuances in Summary and Court Cases

(A) The court or issuing authority may, in the interests of justice, grant a continuance, on its own motion, or on the motion of either party.

(B) When the matter is before an issuing authority, the issuing authority shall record on the transcript the identity of the moving party and the reasons for granting or denying the continuance. When the matter is in the court of common pleas, the judge shall on the record identify the moving party and state of record the reasons for granting or denying the continuance.

(C) A motion for continuance on behalf of the defendant shall be made not later than 48 hours before the time set for the trial. A later motion shall be entertained only when the opportunity therefor did not previously exist, or the defendant was not aware of the grounds for the motion, or the interests of justice require it.

Rule 107. Contents of Subpoena

A subpoena in a criminal case shall order the witness named to appear before the court at the date, time, and place specified, and to bring any items identified or described. The subpoena shall also state on whose behalf the witness is being ordered to testify and the identity, address, and phone number of the attorney, if any, who applied for the subpoena.

Comment: The form of subpoena was deleted in 1985 because it is no longer necessary to control the specific form of subpoena by rule.

It is intended that the subpoena shall be used not only for trial but also for any other stage of the proceedings when a subpoena is issuable, including preliminary

hearings, hearings in connection with pretrial and post-trial motions, *etc.*

When the subpoena is for the production of documents, records, or things, these should be specified.

Rule 109. Defects in Form, Content, or Procedure

A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

Comment: This rule combines and replaces former Rules 90 and 150.

This rule clarifies when a defendant should be discharged or a case dismissed because of a defect; it eliminates disputes as to what is an informal defect or a substantive defect. As a condition of relief regardless of whether the defect is in form, content, or procedure, the court or issuing authority must determine that there is actual prejudice to the rights of the defendant.

A complaint, citation, summons, or warrant may be amended at any time so as to remedy any defect in form or content that is not prejudicial to the rights of the defendant. Nothing in this rule shall prevent the filing of a new complaint or citation and the reissuance of process. Any new complaint or citation must be filed within the time permitted by the applicable statute of limitations.

Ordinarily, if a defendant does not raise a defect at the summary trial or before the conclusion of the preliminary hearing, the defendant cannot thereafter raise the defect as grounds for dismissal or discharge at a later stage in the proceedings. *See Commonwealth v. Krall*, 452 Pa. 215, 304 A.2d 488 (1973). In a summary case, however, the provisions of this rule do not preclude a defendant from raising a defect for the first time after the summary trial when

the interests of justice require it, as for example, when the defendant was not represented by counsel during the proceedings before the district justice or when the defendant could not reasonably have discovered the defect until after the conclusion of the summary trial.

Any defect properly raised under this rule shall be specifically described on the docket by the issuing authority. *See* Pa.R.Crim.P. 135.

If the issuing authority determines that a defect is prejudicial, it is intended that the decision recorded on the docket pursuant to Rule 135(B)(13) shall be “discharge of the defendant” or “dismissal of the case,” rather than “not guilty.”

Rule 112. Publicity, Broadcasting, and Recording of Proceedings

(A) The court or issuing authority shall:

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

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

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

(B) The court or issuing authority may permit the taking of photographs, or radio or television broadcasting, or broadcasting by advanced communication technology, of judicial proceedings, such as naturalization ceremonies or the swearing in of public officials, which may be conducted in the hearing room or courtroom.

(C) Except as provided in paragraph (D), the stenographic, mechanical, or electronic recording, or the recording using any advanced communication technology, of any judicial proceedings by anyone other

than the official court stenographer in a court case, for any purpose, is prohibited.

(D) In a judicial proceeding before an issuing authority, the issuing authority, the attorney for the Commonwealth, the affiant, or the defendant may cause a recording to be made of the judicial proceeding as an aid to the preparation of the written record for subsequent use in a case, but such recordings shall not be publicly played or disseminated in any manner unless in a court during a trial or hearing.

(E) If it appears to the court or issuing authority that a violation of this rule has resulted in substantial prejudice to the defendant, the court or issuing authority, upon application by the attorney for the Commonwealth or the defendant, may:

(1) quash the proceedings at the preliminary hearing and order another preliminary hearing to be held before the same issuing authority at a subsequent time without additional costs being taxed;

(2) discharge the defendant on nominal bail if in custody, or continue the bail if at liberty, pending further proceedings;

(3) order all costs of the issuing authority forfeited in the original proceedings; or

(4) adopt any, all, or combination of these remedies as the nature of the case requires in the interests of justice.

Comment: This rule combines and replaces former Rules 27 and 328.

“Recording” as used in this rule is not intended to preclude the use of recording devices for the preservation of testimony as permitted by Rules 500 and 501.

The prohibitions under this rule are not intended to preclude the use of advanced communication technology for purposes of conducting court proceedings.

Rule 114. Orders and Court Notices: Filing; Service; and Docket Entries

(A) Filing

(1) All orders and court notices promptly shall be transmitted to the clerk of courts' office for filing. Upon receipt in the clerk of courts' office, the order or court notice promptly shall be time stamped with the date of receipt.

(2) All orders and court notices promptly shall be placed in the criminal case file.

(B) Service

(1) A copy of any order or court notice promptly shall be served on each party's attorney, or the party if unrepresented.

(2) The clerk of courts shall serve the order or court notice, unless the president judge has promulgated a local rule designating service to be by the court or court administrator.

(3) *Methods of Service.* Except as otherwise provided in Chapter 5 concerning notice of the preliminary hearing, service shall be:

(a) in writing by

(i) personal delivery to the party's attorney or, if unrepresented, the party; or

(ii) personal delivery to the party's attorney's employee at the attorney's office; or

(iii) mailing a copy to the party's attorney or leaving a copy for the attorney at the attorney's office; or

(iv) in those judicial districts that maintain in the courthouse assigned boxes for counsel to receive service, when counsel has agreed to receive service by this method, leaving a copy for the party's attorney in the box in the courthouse assigned to the attorney for service; or

(v) sending a copy to an unrepresented party by certified, registered, or first class mail addressed to the party's place of residence, business, or confinement; or

(vi) sending a copy by facsimile transmission or other electronic means if the party's attorney, or the party if

unrepresented, has filed a written request for this method of service or has included a facsimile number or an electronic address on a prior legal paper filed in the case; or

(vii) delivery to the party's attorney, or the party if unrepresented, by carrier service; or

(b) orally in open court on the record.

(C) Docket Entries

(1) Docket entries promptly shall be made.

(2) The docket entries shall contain:

(a) the date of receipt in the clerk's office of the order or court notice;

(b) the date appearing on the order or court notice; and

(c) the date of service of the order or court notice.

(D) Unified Practice. Any local rule that is inconsistent with the provisions of this rule is prohibited, including any local rule requiring a party to file or serve orders or court notices.

Comment: This rule was amended in 2004 to provide in one rule the procedures for the filing and service of all orders and court notices, and for making docket entries of the date of receipt, date appearing on the order or notice, and the date of service. This rule incorporates the provisions of former Rule 113 (Notice of Court Proceedings Requiring Defendant's Presence). *But See* Rules 511, 540(F)(2), and 542(D) for the procedures for service of notice of a preliminary hearing, which are different from the procedures in this rule.

Historically, some orders or court notices have been served by the court administrator or by the court. Paragraph (B)(2) permits the president judge to continue this practice by designating either the court or the court administrator to serve orders and court notices. When the president judge makes such a designation, the designation must be in the form of a local rule promulgated in compliance with Rule 105 (Local Rules).

Paragraph (C)(2) requires three dates to be entered in the list of docket entries with regard to the court's orders and notices: the date of receipt of the order or notice; the date appearing on the order or notice; and the date the order or notice is served. The date of receipt is the date of filing under these rules. Concerning appeal periods and entry of orders, see Rule 720 (Post-Sentence Procedures; Appeal) and Pa.R.A.P. 108 (Date of Entry of Orders).

Court notices, as used in this rule, are communications that ordinarily are issued by a judge or the court administrator concerning, for example, calendaring or scheduling, including proceedings requiring the defendant's presence.

Although paragraph (B)(3)(a)(iv) permits the use of assigned mailboxes for service under this rule, the Attorney General's office never may be served by this method.

A facsimile number or an electronic address set forth on letterhead is not sufficient to authorize service by facsimile transmission or other electronic means under paragraph (B)(3)(a)(vi). The authorization for service by facsimile transmission or other electronic means under this rule is valid only for the duration of the case. A separate authorization must be filed in each case the party or attorney wants to receive documents by this method of service.

Nothing in this rule is intended to preclude the use of automated or other electronic means for the transmission of the orders or court notices between the judge, court administrator, and clerk of courts, or for time stamping or making docket entries.

Nothing in this rule is intended to preclude a judicial district from utilizing the United States Postal Service's return receipt electronic option, or any similar service that electronically provides a return receipt, when using certified mail, return receipt requested.

Under the post-sentence motion procedures, the clerk of courts must comply with this rule after entering an

order denying a post-sentence motion by operation of law. *See* Rule 720(B)(3)(c).

This rule makes it clear that the procedures for filing and service, and making docket entries are mandatory and may not be modified by local rule.

Paragraph (D), titled “Unified Practice,” emphasizes that local rules must not conflict with the statewide rules. Although this prohibition on local rules that are inconsistent with the statewide rules applies to all Criminal Rules through Rule 105 (Local Rules), the reference to the specific prohibitions is included because these types of local rules have been identified by practitioners as creating significant impediments to the statewide practice of law within the unified judicial system. *See* the first paragraph of the Rule 105 *Comment*. The term “local rule” includes every rule, regulation, directive, policy, custom, usage, form or order of general application. *See* Rule 105(A).

For the definition of “carrier service,” see Rule 103.

See Rule 103 for the definitions of “clerk of courts” and “court administrator.”

See Rule 113 (Criminal Case File and Docket Entries) for the requirements concerning the contents of the criminal case file and the minimum information to be included in the docket entries.

Rule 119. Use of Two-Way Simultaneous Audio-Visual Communication in Criminal Proceedings

(A) The court or issuing authority may use two-way simultaneous audio-visual communication at any criminal proceeding except:

- (1) preliminary hearings;
- (2) proceedings pursuant to Rule 569(A)(2)(b);
- (3) trials;
- (4) sentencing hearings;
- (5) parole, probation, and intermediate punishment revocation hearings; and

(6) any proceeding in which the defendant has a constitutional or statutory right to be physically present.

(B) The defendant may consent to any proceeding being conducted using two-way simultaneous audio-visual communication.

(C) When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the proceeding.

Comment: This rule was adopted in 2003 to make it clear that unless the case comes within one of the exceptions in paragraph (A), the court or issuing authority may use two-way simultaneous audio-visual communication in any criminal proceeding. Two-way simultaneous audio-visual communication is a type of advanced communication technology as defined in Rule 103.

Nothing in this rule is intended to limit any right of a defendant to waive his or her presence at a criminal proceeding in the same manner as the defendant may waive other rights. *See, e.g.,* Rule 602 *Comment*. Negotiated guilty pleas when the defendant has agreed to the sentence, probation revocation hearings, and hearings held pursuant to Rule 908(C) and the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.*, are examples of hearings in which the defendant's consent to proceed using two-way simultaneous audio-visual communication would be required. Hearings on post-sentence motions, bail hearings, bench warrant hearings, extradition hearings, and *Gagnon I* hearings are examples of proceedings that may be conducted using two-way simultaneous audio-visual communication without the defendant's consent. It is expected the court or issuing authority would conduct a colloquy for the defendant's consent when the defendant's constitutional right to be physically present is implicated.

Within the meaning of this rule, counsel is present when physically with the defendant or with the judicial officer conducting the criminal proceeding.

This rule does not apply to preliminary arraignments (Rule 540), arraignments (Rule 571), or to search warrant (Rule 203) and arrest warrant (Chapter 5 Part B(3)) procedures.

This rule is not intended to preclude the use of advanced communication technology for the preservation of testimony as permitted by Rules 500 and 501.

See Rule 542 for the procedures governing preliminary hearings.

See Chapter 6 for the procedures governing trials.

See Chapter 7 for the procedures governing sentencing hearings.

See Rule 708 for the procedures governing revocation of probation, intermediate punishment, and parole.

The paragraph (A)(5) reference to revocation hearings addresses *Gagnon II*-type probation (*Gagnon v. Scarpelli*, 411 U.S. 778 (1973)) and parole (*Morrissey v. Brewer*, 408 U.S. 471 (1972)) revocation hearings, and is not intended to prohibit the use of two-way simultaneous audio-visual communication in hearings to determine probable cause (*Gagnon I*).

Rule 121. Waiver of Counsel

(A) Generally.

- (1) The defendant may waive the right to be represented by counsel.
- (2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:
 - (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
 - (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;

(c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;

(d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;

(e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and

(f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.

(3) The judge or issuing authority may permit the attorney for the Commonwealth or defendant's attorney to conduct the examination of the defendant pursuant to paragraph (A)(2). The judge or issuing authority shall be present during this examination.

(B) Proceedings Before an Issuing Authority. When the defendant seeks to waive the right to counsel in a summary case or for a preliminary hearing in a court case, the issuing authority shall ascertain from the defendant whether this is a knowing, voluntary, and intelligent waiver of counsel. In addition, the waiver shall be in writing,

(1) signed by the defendant, with a representation that the defendant was told of the right to be represented and to have an attorney appointed if the defendant cannot afford one, and that the defendant chooses to act as his or her own attorney at the hearing or trial; and

(2) signed by the issuing authority, with a certification that the defendant's waiver was made knowingly, voluntarily, and intelligently.

The waiver shall be made a part of the record.

(C) Proceedings Before a Judge. When the defendant seeks to waive the right to counsel after the preliminary

hearing, the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel.

(D) Standby Counsel. When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant. Standby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice.

Comment: Paragraph (A) recognizes that the right to self-representation is guaranteed by the sixth amendment to the Federal Constitution when a valid waiver is made, *Faretta v. California*, 422 U.S. 806 (1975).

Court decisions contain broad language in referring to the areas and matters to be encompassed in determining whether the defendant understands the full impact and consequences of his or her waiver of the right to counsel, but is nevertheless willing to waive that right. The appellate courts require, however, at a minimum, that the judge or issuing authority ask questions to elicit the information set forth in paragraph (A)(2).

Although it is advisable that the judge or issuing authority conduct the examination of the defendant, the rule does not prevent the attorney for the Commonwealth or an already-appointed or retained defense counsel from conducting all or part of the examination of the defendant as permitted by the judge or issuing authority. **See** *Commonwealth v. McDonough*, 571 Pa. 232, 812 A.2d 504 (2002).

On the issue of waiver of counsel in general, **See, e.g.,** *Commonwealth v. Tyler*, 468 Pa. 193, 360 A.2d 617 (1976); *Commonwealth ex rel. Fairman v. Cavell*, 423 Pa. 138, 222 A.2d 722 (1966) (mere execution of a waiver of counsel form, without more, is insufficient to establish a valid waiver); *Commonwealth ex rel. McCray v. Rundle*, 415 Pa. 65, 202 A.2d 303 (1964); *Commonwealth ex rel. O'Lock v. Rundle*, 415 Pa. 515, 204 A.2d 439 (1964).

In referring to summary cases, paragraph (B) refers only to those summary cases in which there exists a right to counsel. *See* Rule 122.

While the rule continues to require a written waiver of counsel incorporating the contents specified in paragraph (B), in proceedings before an issuing authority, the form of waiver was deleted in 1985 because it is no longer necessary to control the specific form of written waiver by rule.

Under paragraph (C) of this rule, the colloquy relating to the defendant's attempted waiver of counsel must appear on the record. This requirement is not applicable to such waivers in proceedings under paragraph (B), because these proceedings are not in courts of record. However, the absence of such requirement is not intended to be construed as affecting the scope or nature of the inquiry to be made in a particular case.

It is intended that when the defendant has waived his or her right to counsel before the issuing authority for purposes of the preliminary hearing, such waiver shall not normally act as a waiver of the right to counsel in subsequent critical stages of the proceedings. Therefore, under paragraph (C) it is intended that a further waiver is subsequently to be taken by a judge of the court of common pleas.

With respect to trials in court cases, when the defendant waives the right to counsel and elects to proceed *pro se*, it is generally advisable that standby counsel be appointed to attend the proceedings and be available to the defendant for consultation and advice. *See Commonwealth v. Africa*, 466 Pa. 603, 353 A.2d 855 (1976). This is particularly true in cases expected to be long or complicated, or in which there are multiple defendants. *See* ABA Standards, The Function of the Trial Judge § 6.7 (Approved Draft 1972). The ability of standby counsel to assume control of the defense will minimize delay and disruption of the proceedings in the event that the defendant's self-representation terminates, *e.g.*, either because such termination becomes necessary as a result of the defendant's unruly behavior, or because the defendant seeks to withdraw the waiver and be represented by

counsel. With respect to pretrial proceedings or summary case trials it is intended that standby counsel may be appointed at the discretion of the presiding judicial officer.

Rule 122. Appointment of Counsel

(A) Counsel shall be appointed:

(1) in all summary cases, for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed;

(2) in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel;

(3) in all cases, by the court, on its own motion, when the interests of justice require it.

(B) When counsel is appointed,

(1) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and

(2) the appointment shall be effective until final judgment, including any proceedings upon direct appeal.

(C) A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons.

Comment: This rule is designed to implement the decisions of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Coleman v. Alabama*, 399 U.S. 1 (1970), that no defendant in a summary case be sentenced to imprisonment unless the defendant was represented at trial by counsel, and that every defendant in a court case has counsel starting no later than the preliminary hearing stage.

No defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at

trial. *See Alabama v. Shelton*, 535 U.S. 654 (2002) and *Scott v. Illinois*, 440 U.S. 367 (1979). *See* Rule 454 (Trial in Summary Cases) concerning the right to counsel at a summary trial.

Appointment of counsel can be waived, if such waiver is knowing, intelligent, and voluntary. *See Faretta v. California*, 422 U.S. 806 (1975). Concerning the appointment of standby counsel for the defendant who elects to proceed *pro se*, see Rule 121.

In both summary and court cases, the appointment of counsel to represent indigent defendants remains in effect until all appeals on direct review have been completed.

Ideally, counsel should be appointed to represent indigent defendants immediately after they are brought before the issuing authority in all summary cases in which a jail sentence is possible, and immediately after preliminary arraignment in all court cases. This rule strives to accommodate the requirements of the Supreme Court of the United States to the practical problems of implementation. Thus, in summary cases, paragraph (A)(1) requires a pretrial determination by the issuing authority as to whether a jail sentence would be likely in the event of a finding of guilt in order to determine whether trial counsel should be appointed to represent indigent defendants. It is expected that the issuing authorities in most instances will be guided by their experience with the particular offense with which defendants are charged. This is the procedure recommended by the ABA Standards Relating to Providing Defense Services § 4.1 (Approved Draft 1968) and cited in the United States Supreme Court's opinion in *Argersinger, supra*. If there is any doubt, the issuing authority can seek the advice of the attorney for the Commonwealth, if one is prosecuting the case, as to whether the Commonwealth intends to recommend a jail sentence in case of conviction.

In court cases, paragraph (A)(2) requires counsel to be appointed at least in time to represent the defendant at preliminary hearing. Although difficulty may be experienced in some judicial districts in meeting the

Coleman requirement, it is believed that this is somewhat offset by the prevention of many post-conviction proceedings that would otherwise be brought based on the denial of the right to counsel. However, there may be cases in which counsel has not been appointed prior to the preliminary hearing stage of the proceedings; *e.g.*, counsel for the preliminary hearing has been waived, or a then-ineligible defendant subsequently becomes eligible for appointed counsel. In such cases it is expected that the defendant's right to appointed counsel will be effectuated at the earliest appropriate time.

An attorney may not be appointed to represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

Paragraph (A)(3) retains in the issuing authority or judge the power to appoint counsel regardless of indigency or other factors when, in the issuing authority's or the judge's opinion, the interests of justice require it.

Pursuant to paragraph (B)(2), counsel retains his or her appointment until final judgment, which includes all avenues of appeal through the Supreme Court of Pennsylvania. In making the decision whether to file a petition for allowance of appeal, counsel must (1) consult with his or her client, and (2) review the standards set forth in Pa.R.A.P. 1114 (Considerations Governing Allowance of Appeal) and the note following that rule. If the decision is made to file a petition, counsel must carry through with that decision. *See Commonwealth v. Liebel*, 825 A.2d 630 (Pa. 2003). Concerning counsel's obligations as appointed counsel, see *Jones v. Barnes*, 463 U.S. 745 (1983). *See also Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. Ct. 2001).

For suspension of Acts of Assembly, see Rule 1101.

Rule 130. Venue; Transfer of Proceedings

(A) Venue. All criminal proceedings in summary and court cases shall be brought before the issuing authority

for the magisterial district in which the offense is alleged to have occurred or before an issuing authority on temporary assignment to serve such magisterial district, subject, however, to the following exceptions:

(1) A criminal proceeding may be brought before any issuing authority of any magisterial district within the judicial district whenever the particular place within the judicial district in which the offense is alleged to have occurred is unknown.

(2) When charges arising from the same criminal episode occur in more than one magisterial district within the same judicial district, the criminal proceeding on all the charges should be brought before one issuing authority in any one of the magisterial districts in which the charges arising from the same criminal episode occurred.

(3) When charges arising from the same criminal episode occur in more than one judicial district, the criminal proceeding on all the charges may be brought before one issuing authority in a magisterial district within any of the judicial districts in which the charges arising from the same criminal episode occurred.

(4) Whenever an arrest is made without a warrant for any summary offense arising under the Vehicle Code, which allegedly occurred on a highway of the Pennsylvania Turnpike System or any controlled or limited access highway, or any right-of-way of such System or highway, or any other highway or highways of the Commonwealth, the defendant shall be taken and the proceeding shall be brought either where the offense allegedly occurred, or before the issuing authority for any other magisterial district within the same judicial district which, in the judgment of the arresting officer, is most convenient to the place of arrest without regard to the boundary line of any magisterial district or judicial district.

(5) When any offense is alleged to have occurred within 100 yards of the boundary between two or more magisterial districts of a judicial district, the proceeding may be brought in either or any of the magisterial districts without regard to the boundary lines of any county.

(6) When the president judge designates a magisterial district or a location in that district in which certain classes of offenses, which occurred in other specified magisterial districts, may be heard.

(B) Transfer of Proceedings in Court Cases.

(1) Prior to the completion of the preliminary hearing:

(a) When charges arising from a single criminal episode, which occurred in more than one judicial district,

(i) are filed in more than one judicial district, upon the filing with the issuing authority of a written agreement by the attorneys for the Commonwealth, the proceedings shall be transferred to the magisterial district in the judicial district selected by the attorneys for the Commonwealth; or

(ii) are filed in one judicial district, upon the filing of a written agreement by the attorneys for the Commonwealth, the proceedings shall be transferred to the magisterial district in the judicial district selected by the attorneys for the Commonwealth.

(b) When charges arising from a single criminal episode, which occurred in more than one magisterial district,

(i) are filed in more than one magisterial district, the proceedings may be transferred to the magisterial district selected by the attorney for the Commonwealth; or

(ii) are filed in one magisterial district, the proceedings may be transferred to another magisterial district selected by the attorney for the Commonwealth.

(2) The issuing authority shall promptly transmit to the issuing authority of the magisterial district to which the proceedings are being transferred a certified copy of all docket entries, together with all the original papers filed in the proceeding, a copy of the bail bond and any deposits in satisfaction of a monetary condition of bail, and a bill of the costs which have accrued but have not been collected prior to the transfer.

Comment: When charges arising from a single criminal episode occur in more than one judicial district, the magisterial district in which the proceeding on all the

charges is brought, *i.e.*, the one with venue, may be any one of the magisterial districts in which the charges occurred. *See Commonwealth v. Geyer*, 687 A.2d 815 (Pa. 1996) (the compulsory joinder rule and 18 Pa.C.S. § 110 apply when two or more summary offenses arise from a single criminal episode.)

Similarly, when charges arising from a single criminal episode occur in more than one magisterial district within one judicial district, the magisterial district in which the proceeding on all the charges is brought, *i.e.*, the one with venue, may be any one of the magisterial districts in which the charges occurred.

The decision of in which magisterial district in paragraph (A)(2) or in which judicial district in paragraph (A)(3) the proceedings are to be brought is to be made initially by the law enforcement officers or attorneys for the Commonwealth. In making the decision, the law enforcement officers or attorneys for the Commonwealth must consider in which magisterial district under paragraph (A)(2) or in which judicial district under paragraph (A)(3) it would be in the interests of justice to have the case proceed, based upon the convenience of the defendant and the witnesses, and the prompt administration of justice.

Venue is not altered when an issuing authority conducts a proceeding from an advanced communication technology site outside the issuing authority's magisterial district or judicial district.

See Rule 134 (Objections to Venue) for the procedures to challenge a transfer of proceedings under this rule.

See Rule 551 for the procedures to withdraw the prosecution.

See Chapter 5 Part C concerning bail.

Rule 131. Location of Proceedings Before Issuing Authority

(A) An issuing authority within the magisterial district for which he or she is elected or appointed shall have jurisdiction and authority to receive complaints, issue warrants, hold preliminary arraignments, set and receive

bail, issue commitments to jail, and hold hearings and summary trials.

(1) Except as provided in paragraph (A)(2), all preliminary arraignments shall be held in the issuing authority's established office, a night court, or some other facility within the Commonwealth designated by the president judge, or the president judge's designee.

(2) Preliminary arraignments may be conducted using advanced communication technology pursuant to Rule 540. The preliminary arraignment in these cases may be conducted from any site within the Commonwealth designated by the president judge, or the president judge's designee.

(3) All hearings and summary trials before the issuing authority shall be held publicly at the issuing authority's established office. For reasons of emergency, security, size, or in the interests of justice, the president judge, or the president judge's designee, may order that a hearing or hearings, or a trial or trials, be held in another more suitable location within the judicial district.

(4) The issuing authority may receive complaints, issue warrants, set and receive bail, and issue commitments to jail from any location within the judicial district, or from an advanced communication technology site within the Commonwealth.

(B) When local conditions require, the president judge may establish procedures for preliminary hearings or summary trials, in all cases or in certain classes of cases, to be held at a central place or places within the judicial district at certain specified times. The procedures established shall provide either for the transfer of the case or the transfer of the issuing authority to the designated central place as the needs of justice and efficient administration require.

Comment: The 2002 amendments to paragraph (A) divided the paragraph into subparagraphs to more clearly distinguish between the locations for the different types of proceedings and business that an issuing authority conducts.

Paragraph (A)(3) permits the president judge, or the president judge's designee, to order that a hearing or

hearings be held in a location that is different from the issuing authority's established office. Nothing in this rule is intended to preclude the president judge, or the president judge's designee, from issuing a standing order for a change in location. For example, this might be done when a state correctional institution is located in the judicial district and the president judge determines that, for security reasons, all preliminary hearings of the state correctional institution's inmates will be conducted at that prison.

See Rule 540 and *Comment* for the procedures governing the use of advanced communication technology in preliminary arraignments.

See Rule 130 concerning the *venue* when proceedings are conducted by using advanced communication technology.

Paragraph (B) of this rule is intended to facilitate compliance with the requirement that defendants be represented by counsel at the preliminary hearing. *Coleman v. Alabama*, 399 U.S. 1 (1970).

Paragraph (A)(4) permits issuing authorities to perform their official duties from an advanced communication technology site within the Commonwealth. The site may be located outside the magisterial district or judicial district where the issuing authority presides.

This rule allows the president judge of a judicial district the discretion to determine what classes of cases require centralized preliminary hearings or summary trials, and requires the president judge, or the president judge's designee, to establish a schedule of central places within the Commonwealth to conduct such hearings or summary trials, and the hours for the hearings or trials at the central locations.

Ideally, this rule should minimize the inconvenience to defense counsel and the attorney for the Commonwealth by eliminating the necessity of travel at various unpredictable times to many different locations throughout the judicial district for the purpose of attending preliminary hearings or summary trials. Finally, this rule allows preliminary hearings or summary trials for jailed defendants to be held at a location close to the place of detention.

Rule 132. Temporary Assignment of Issuing Authorities

(A) The president judge may assign temporarily the issuing authority of any magisterial district to serve another magisterial district whenever such assignment is needed:

- (1) to satisfy the requirements of Rule 117;
- (2) to insure fair and impartial proceedings;
- (3) to conduct a preliminary hearing pursuant to Rule 544(B); or
- (4) otherwise for the efficient administration of justice.

One or more issuing authorities may be so assigned to serve one or more magisterial districts.

(B) Whenever a temporary assignment is made under this rule, notice of such assignment shall be filed with the clerk of courts where it shall be available for police agencies and other interested persons.

(C) A motion may be filed requesting a temporary assignment under this rule on the ground that the assignment is needed to insure fair and impartial proceedings. Reasonable notice and opportunity to respond shall be provided to the parties.

(D) A motion shall be filed requesting a temporary assignment under paragraph (A)(3) whenever the attorney for the Commonwealth elects to proceed under Rule 544(B) following the refiling of a complaint.

Comment: The provisions of former paragraph (A) (Continuous Availability) were incorporated into new Rule 117 (Coverage: Issuing Warrants; Preliminary Arraignments and Summary Trials; and Setting and Accepting Bail) in 2005.

Paragraphs (A)(2) and (C) make explicit the authority of president judges to assign issuing authorities when necessary to insure fair and impartial proceedings, and to provide a procedure for a party to request such an assignment. Temporary assignment in this situation is intended to cover what might otherwise be referred to

as “change of venue” at the magisterial district level. *See, e.g., Sufrich v. Commonwealth*, 68 Pa.Cmwlth. 42, 447 A.2d 1124 (1982).

The motion procedure of paragraph (C) is intended to apply when a party requests temporary assignment to insure fair and impartial proceedings. The president judge may, of course, order a response and schedule a hearing with regard to such a motion. However, this paragraph is not intended to require “a formal hearing ... beyond the narrow context of a motion for temporary assignment of issuing authority to insure fair and impartial proceedings predicated upon allegations which impugn the character or competence of the assigned issuing authority and which seek the recusal of the assigned issuing authority.” *See Commonwealth v. Allem*, 367 Pa.Super. 173, 532 A.2d 845 (1987) (filing and service of the written motion and answer, and allowance of oral argument were more than adequate to meet the rule's requirements).

Paragraphs (A)(3) and (D) govern those situations in which the attorney for the Commonwealth, after refileing the complaint following the withdrawal or dismissal of any criminal charges at, or prior to, a preliminary hearing, determines that the preliminary hearing should be conducted by a different issuing authority. *See also* Rule 544 (Reinstituting Charges Following Withdrawal or Dismissal). Under Rule 544, the president judge may designate another judge within the judicial district to handle reassignments.

The motion procedure is not intended to apply in any of the many other situations in which president judges make temporary assignments of issuing authorities; in all these other situations the president judges may make temporary assignments on their own without any motion, notice, response, or hearing.

Rule 134. Objections to Venue

(A) Objections to venue between magisterial districts shall be raised in the court of common pleas of the judicial district in which the proceeding has been brought, before completion of the preliminary hearing in a court case or before completion of the summary trial when a summary

offense is charged, or such objections shall be deemed to have been waived.

(B) No objection to venue between magisterial districts shall be allowed unless substantial prejudice will result if the proceeding is allowed to continue before the issuing authority before whom it has been brought.

(C) No criminal proceedings shall be dismissed because of improper venue between magisterial districts. Whenever an objection to such venue is allowed, the court of common pleas shall order the transfer of the proceeding to the issuing authority of the proper magisterial district.

Comment: An objection to *venue* under this rule would include a challenge to the transfer of proceedings pursuant to Rule 130(B).

Rule 135. Transcript of Proceedings Before Issuing Authority

(A) The issuing authority shall prepare and forward to the court of common pleas a transcript of the proceedings in all summary cases when an appeal is taken and in all court cases when the defendant is held for court.

(B) The transcript shall contain the following information, where applicable:

- (1) the date and place of hearings;
- (2) the names and addresses of the prosecutor, defendant, and witnesses;
- (3) the names and office addresses of counsel in the proceeding;
- (4) the charge against the defendant as set forth in the prosecutor's complaint;
- (5) the date of issuance of any citation, summons, or warrant of arrest and the return of service thereon;
- (6) a statement whether the parties and witnesses were sworn and which of these persons testified;
- (7) when the defendant was held for court the amount of bail set;

- (8) the nature of the bail posted and the name and address of the corporate surety or individual surety;
- (9) a notation that the defendant has or has not been fingerprinted;
- (10) a specific description of any defect properly raised in accordance with Rule 109;
- (11) a notation that the defendant was advised of the right to apply for the assignment of counsel;
- (12) the defendant's plea of guilty or not guilty, the decision that was rendered in the case and the date thereof, and the judgment of sentence and place of confinement, if any;
- (13) any other information required by the rules to be in the issuing authority's transcript.

Comment: The requirement of a docket was deleted from this rule in 1985 because dockets are now routinely maintained under the supervision of the Administrative Office of Pennsylvania Courts. It is expected that issuing authorities will continue to keep dockets of criminal proceedings. The transcript requirements presuppose an accurate docket to supply the information necessary to prepare a transcript.

The procedures regarding the filing of a transcript after appeal in summary cases are set forth in Rule 460(C) and (D). For such procedures after the defendant is held for court in a court case, see Rule 547. With regard to other information required by the rules to be in the transcript, *see, e.g.*, Rule 542.

The requirement that there be a notation indicating whether the defendant has been fingerprinted as required by the Criminal History Record Information Act, 18 Pa.C.S. § 9112, is to alert the district attorney and the court whether it is necessary to have the defendant fingerprinted after the case is held for court.

Rule 509. Use of Summons or Warrant of Arrest in Court Cases

If a complaint charges an offense that is a court case, the issuing authority with whom it is filed shall:

- (1) issue a summons and not a warrant of arrest in cases in which the most serious offense charged is a misdemeanor of the second degree or a misdemeanor of the first degree in cases arising under 75 Pa.C.S. § 3802, except as set forth in paragraph (2);
- (2) issue a warrant of arrest when:
 - (a) one or more of the offenses charged is a felony or murder; or
 - (b) the issuing authority has reasonable grounds for believing that the defendant will not obey a summons; or
 - (c) the issuing authority has reasonable grounds for believing that the defendant poses a threat of physical harm to any other person or to himself or herself; or
 - (d) the summons was mailed pursuant to Rule 511(A) and has been returned undelivered; or
 - (e) the identity of the defendant is unknown; or
- (3) issue a summons or a warrant of arrest, within the issuing authority's discretion, when the offense charged does not fall within any of the categories specified in paragraphs (1) or (2).

Comment: This rule provides for the mandatory use of a summons instead of a warrant in court cases except in the special circumstances enumerated in paragraphs (2) and (3).

Before a warrant may be issued pursuant to paragraph (2) (d) when a summons is returned undelivered, the summons must have been served upon the defendant by both first class mail and certified mail, return receipt requested as provided in Rule 511(A), and both the certified mail and the first class mail must have been returned undelivered. "Undelivered" includes a return receipt that is signed by someone other than the defendant.

Nothing in this rule is intended to preclude a judicial district from utilizing the United States Postal Service's return receipt electronic option, or any similar service that electronically provides a return

receipt, when using certified mail, return receipt requested.

Pursuant to Rule 511, a return receipt signed by the defendant or a notation on the transcript that the first class mailing was not returned within 20 days is proof that the defendant received notice of the summons for purposes of paragraph (2)(d). *See also* Rule 543(D)(1).

When a defendant has been released pursuant to Rule 519(B), the issuing authority must issue a summons.

See Rule 1003 (Procedure in Non-Summary Municipal Court Cases), paragraph (C), for the procedures for issuing a summons and a warrant in Philadelphia.

It is expected when a case meets the requirements for the issuance of a summons, the police officer will proceed during the normal business hours of the proper issuing authority except in extraordinary circumstances. *See* Rule 117 (Coverage: Issuing Warrants; Preliminary Arraignments and Summary Trials; and Setting and Accepting Bail).

The procedure in paragraph (3) allows the issuing authority to exercise discretion in whether to issue a summons or an arrest warrant depending on the circumstances of the particular case. Appropriate factors for issuing a summons rather than an arrest warrant will, of course, vary. Among the factors that may be taken into consideration are the severity of the offense, the continued danger to the victim, the relationship between the defendant and the victim, the known prior criminal history of the defendant, *etc.* However, in all cases in which the defendant has been released pursuant to Rule 519(B), a summons shall be issued.

Rule 510. Contents of Summons; Notice of Preliminary Hearing

(A) Every summons in a court case shall command the defendant to appear before the issuing authority for a preliminary hearing at the place and on the date and at the time stated on the summons. The date set for the preliminary hearing shall be not less than 20 days from the date of mailing the summons unless the issuing

authority fixes an earlier date upon the request of the defendant or the defendant's attorney with the consent of the affiant.

(B) The summons shall give notice to the defendant:

(1) of the right to secure counsel of the defendant's choice and, for those who are without financial resources, of the right to assigned counsel in accordance with Rule 122;

(2) that bail will be set at the preliminary hearing; and

(3) that if the defendant fails to appear on the date, and at the time and place specified on the summons, the case will proceed in the defendant's absence, and a bench warrant will be issued for the defendant's arrest.

(C) The following items shall be attached to the summons:

(1) a copy of the complaint; and

(2) an order directing the defendant to submit to fingerprinting in all cases in which the defendant has not been fingerprinted, except cases initiated by private complaint.

Comment: For the summons procedures in non-summary cases in the Municipal Court of Philadelphia, see Rule 1003(C).

When a case proceeds by summons, the issuing authority also must issue an order requiring the defendant to submit to the administrative processing and identification procedures as authorized by law (such as fingerprinting) that ordinarily occur following an arrest.

Paragraph (C)(2), added in 2008, requires that the fingerprint order be sent to the defendant with the summons. The purpose of this change is to ensure that the fingerprinting process in summons cases is completed. *See* the Criminal History Record Information Act, 18 Pa.C.S. § 9112.

The requirement in paragraph (C)(2) that a fingerprint order be attached to the summons does not apply to cases that have been initiated by private complaint or cases in which the defendant has been processed for

fingerprinting and other identification procedures prior to being released pursuant to Rule 519.

If a defendant has not complied with the fingerprint order by the time of the preliminary hearing, the issuing authority must make compliance a condition of release on bail.

See Rule 511 for service of the summons and proof of service.

See Rule 543(D) for the procedures when a defendant fails to appear for the preliminary hearing.

For the consequences of defects in a summons in a court case, see Rule 109.

Rule 512. Procedure in Court Cases Following Issuance of Summons

The defendant shall appear before the issuing authority for a preliminary hearing on the date, and at the time and place specified in the summons. If the defendant fails to appear, the issuing authority shall proceed as provided in Rule 543(D).

Comment: For the proper time for the preliminary hearing, see Rule 510.

When a case proceeds by summons, the issuing authority must require that the defendant submit to the administrative processing and identification procedures as authorized by law (such as fingerprinting) that ordinarily occur following an arrest. *See, e.g.*, Criminal History Record Information Act, 18 Pa.C.S. § 9112. If these processing procedures are not completed by the time of the preliminary hearing, they must be made a condition of bail or release. Concerning fingerprinting, see Rule 510(C)(2) that requires the issuing authority to send the fingerprint order with the summons.

For the procedures in non-summary cases in the Municipal Court, see Chapter 10.

Rule 529. Modification of Bail Order Prior to Verdict

(A) The issuing authority who is the magisterial district judge who was elected or assigned to preside over the

jurisdiction where the crime occurred, upon request of the defendant or the attorney for the Commonwealth, or by the issuing authority *sua sponte*, and after notice to the defendant and the attorney for the Commonwealth and an opportunity to be heard, may modify a bail order at anytime before the preliminary hearing.

(B) A bail order may be modified by an issuing authority at the preliminary hearing.

(C) The existing bail order may be modified by a judge of the court of common pleas:

(1) at any time prior to verdict upon motion of counsel for either party with notice to opposing counsel and after a hearing on the motion; or

(2) at trial or at a pretrial hearing in open court on the record when all parties are present.

(D) Once bail has been set or modified by a judge of the court of common pleas, it shall not be modified except

(1) by a judge of a court of superior jurisdiction, or

(2) by the same judge or by another judge of the court of common pleas either at trial or after notice to the parties and a hearing.

(E) When bail is modified pursuant to this rule, the modification shall be explained to the defendant and stated in writing or on the record by the issuing authority or the judge.

Comment: In making a decision whether to modify a bail order, the issuing authority or judge should evaluate the information about the defendant as it relates to the release criteria in Rule 523 and the types of release on bail set forth in Rule 524.

In Municipal Court cases, the Municipal Court judge may modify bail in the same manner as a common pleas judge may under this rule. *See* Rule 1011.

The procedures for modification of a bail order by the issuing authority were amended in 2006 to permit the issuing authority to modify bail at any time before the preliminary hearing on the issuing authority's own motion or request of a party when, for example, new

information becomes available concerning the defendant that would affect the issuing authority's decision concerning the type of release and the conditions of release imposed at the preliminary arraignment. The 2006 amendments to paragraph (A) are not intended to affect bail procedures in the Philadelphia Municipal Court.

Once bail has been modified by a common pleas judge, only the common pleas judge subsequently may modify bail, even in cases that are pending before a district justice. *See* Rules 543 and 536.

Pursuant to this rule, the motion, notice, and hearing requirements in paragraphs (C)(1) and (D)(2) must be followed in all cases before a common pleas judge may modify a bail order unless the modification is made on the record in open court either when all parties are present at a pretrial hearing--such as a suppression hearing--or during trial.

See Pa.R.A.P. 1762(b)(2) for the procedures to obtain appellate court review of an order of a judge of the court of common pleas granting or denying release, or modifying the conditions of release.

Rule 540. Preliminary Arraignment

(A) In the discretion of the issuing authority, the preliminary arraignment of the defendant may be conducted by using two-way simultaneous audio-visual communication. When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the preliminary arraignment.

(B) At the preliminary arraignment, a copy of the complaint accepted for filing pursuant to Rule 508 shall be given to the defendant.

(C) If the defendant was arrested with a warrant, the issuing authority shall provide the defendant with copies of the warrant and supporting affidavit(s) at the preliminary arraignment, unless the warrant and affidavit(s) are not available at that time, in which event the defendant shall be given copies no later than the first business day after the preliminary arraignment.

(D) If the defendant was arrested without a warrant pursuant to Rule 519, unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

(E) The issuing authority shall not question the defendant about the offense(s) charged but shall read the complaint to the defendant. The issuing authority shall also inform the defendant:

(1) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 122;

(2) of the right to have a preliminary hearing; and

(3) if the offense is bailable, the type of release on bail, as provided in Chapter 5 Part C of these rules, and the conditions of the bail bond.

(F) Unless the preliminary hearing is waived by a defendant who is represented by counsel, the issuing authority shall:

(1) fix a day and hour for a preliminary hearing which shall not be less than 3 nor more than 10 days after the preliminary arraignment, unless:

(a) extended for cause shown; or

(b) the issuing authority fixes an earlier date upon request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and

(2) give the defendant notice, orally and in writing,

(a) of the date, time, and place of the preliminary hearing, and

(b) that failure to appear without good cause for the preliminary hearing will be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority, and will result in the case proceeding in the defendant's absence and in the issuance of a warrant of arrest.

(G) After the preliminary arraignment, if the defendant is detained, the defendant shall be given an immediate and reasonable opportunity to post bail, secure counsel, and

notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail as provided by law.

(H) If a monetary condition of bail is set, the issuing authority shall accept payment of the monetary condition, as provided in Rule 528, at any time prior to the return of the docket transcript to the court of common pleas.

Comment: A preliminary arraignment as provided in this rule bears no relationship to arraignment in criminal courts of record. *See* Rule 571.

Within the meaning of Rule 540, counsel is present when physically with the defendant or with the issuing authority.

Under paragraph (A), the issuing authority has discretion to order that a defendant appear in person for the arraignment.

Under paragraph (A), two-way simultaneous audio-visual communication is a form of advanced communication technology.

See Rule 130 concerning *venue* when proceedings are conducted using advanced communication technology.

Paragraph (C) requires that the defendant receive copies of the arrest warrant and the supporting affidavit(s) at the time of the preliminary arraignment. *See also* Rules 513(A), 208(A), and 1003.

Paragraph (C) includes a narrow exception which permits the issuing authority to provide copies of the arrest warrant and supporting affidavit(s) on the first business day after the preliminary arraignment. This exception applies only when copies of the arrest warrant and affidavit(s) are not available at the time the issuing authority conducts the preliminary arraignment, and is intended to address purely practical situations such as the unavailability of a copier at the time of the preliminary arraignment.

Nothing in this rule is intended to address public access to arrest warrant affidavits. *See Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987).

When a defendant has not been promptly released from custody after a warrantless arrest, the defendant must be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. *See* Rule 519(A).

Under paragraph (D), if a defendant has been arrested without a warrant, the issuing authority must make a prompt determination of probable cause before a defendant may be detained. *See Riverside v. McLaughlin*, 500 U.S. 44 (1991). The determination may be based on written affidavits, an oral statement under oath, or both.

Pursuant to the 2004 amendment to paragraph (F)(2), at the time of the preliminary arraignment, the defendant must be given notice, both orally and in writing, of the date, time, and place of the preliminary hearing. The notice must also explain that, if the defendant fails to appear without good cause for the preliminary hearing, the defendant's absence will constitute a waiver of the right to be present, the case will proceed in the defendant's absence, and a warrant for the defendant's arrest will be issued.

See Rule 1003(D) for the procedures governing preliminary arraignments in the Municipal Court.

Rule 541. Waiver of Preliminary Hearing

(A) The defendant who is represented by counsel may waive the preliminary hearing at the preliminary arraignment or at any time thereafter.

(B) The defendant who is not represented by counsel at the preliminary arraignment may not at that time waive the preliminary hearing.

(C) If the defendant waives the preliminary hearing and consents to be bound over to court, the defendant and defense attorney, if any, shall certify in writing that the issuing authority told the defendant of the right to have a preliminary hearing, and that the defendant voluntarily waives the hearing and consents to be bound over to court.

Comment: While the rule continues to require a written certification incorporating the contents set forth in

paragraph (C), the form of certification was deleted in 1985 because it is no longer necessary to control the specific form of written certification.

Under paragraph (B), it is intended that the defendant who elects to proceed *pro se* may waive the preliminary hearing at a time subsequent to the preliminary arraignment.

Rule 542. Preliminary Hearing; Continuances

(A) The attorney for the Commonwealth may appear at a preliminary hearing and:

- (1) assume charge of the prosecution; and
- (2) recommend to the issuing authority that the defendant be discharged or bound over to court according to law.

(B) When no attorney appears on behalf of the Commonwealth at a preliminary hearing, the affiant may be permitted to ask questions of any witness who testifies.

(C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may:

- (1) be represented by counsel;
- (2) cross-examine witnesses and inspect physical evidence offered against the defendant;
- (3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;
- (4) offer evidence on the defendant's own behalf, and testify; and
- (5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

(D) In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, the issuing authority shall not proceed on the summary offense except as provided in Rule 543(F).

(E) Continuances

(1) The issuing authority may, for cause shown, grant a continuance and shall note on the transcript every continuance together with:

(a) the grounds for granting each continuance;

(b) the identity of the party requesting such continuance; and

(c) the new date and time for the preliminary hearing, and the reasons that the particular date was chosen.

(2) The issuing authority shall give notice of the new date and time for the preliminary hearing to the defendant, the defendant's attorney of record, if any, and the attorney for the Commonwealth.

(a) The notice shall be in writing.

(b) Notice shall be served on the defendant either in person or by first class mail.

(c) Notice shall be served on defendant's attorney of record and the attorney for the Commonwealth either by personal delivery, or by leaving a copy for or mailing a copy to the attorneys at the attorneys' offices.

Comment: As the judicial officer presiding at the preliminary hearing, the issuing authority controls the conduct of the preliminary hearing generally. When an attorney appears on behalf of the Commonwealth, the prosecution of the case is under the control of that attorney. When no attorney appears at the preliminary hearing on behalf of the Commonwealth, the issuing authority may ask questions of any witness who testifies, and the affiant may request the issuing authority to ask specific questions. In the appropriate circumstances, the issuing authority may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the issuing authority.

Paragraph (C)(3) is intended to make clear that the defendant may call witnesses at a preliminary hearing only to negate the existence of a *prima facie* case, and not merely for the purpose of discovering the Commonwealth's case. The modification changes the

language of the rule interpreted by the Court in *Commonwealth v. Mullen*, 460 Pa. 336, 333 A.2d 755 (1975). This amendment was made to preserve the limited function of a preliminary hearing.

Former paragraph (D) concerning the procedures when a *prima facie* case is found was deleted in 2004 as unnecessary because the same procedures are set forth in Rule 543 (Disposition of Case at Preliminary Hearing).

For the procedures when a defendant fails to appear for the preliminary hearing, see Rule 543(D).

In cases in which summary offenses are joined with misdemeanor, felony, or murder charges, pursuant to paragraph (D), during the preliminary hearing, the issuing authority is prohibited from proceeding on the summary offenses, including the taking of evidence on the summary offenses, or adjudicating or disposing of the summary offenses except as provided in Rule 543(F).

For the contents of the transcript, see Rule 135.

Rule 543. Disposition of Case at Preliminary Hearing

(A) At the conclusion of the preliminary hearing, the decision of the issuing authority shall be publicly pronounced.

(B) If the Commonwealth establishes a *prima facie* case of the defendant's guilt, the issuing authority shall hold the defendant for court. Otherwise, the defendant shall be discharged.

(C) When the defendant has appeared and has been held for court, the issuing authority shall:

(1) set bail as permitted by law if the defendant did not receive a preliminary arraignment; or

(2) continue the existing bail order, unless the issuing authority modifies the order as permitted by Rule 529(A); and

(3) if the defendant has not submitted to the administrative processing and identification procedures as authorized by law, such as fingerprinting pursuant to

Rule 510(C)(2), make compliance with these processing procedures a condition of bail.

(D) In any case in which the defendant fails to appear for the preliminary hearing:

(1) if the issuing authority finds that the defendant did not receive notice of the preliminary hearing by a summons served pursuant to Rule 511, a warrant of arrest shall be issued pursuant to Rule 509(2)(d).

(2) If the issuing authority finds that there was good cause explaining the defendant's failure to appear, the issuing authority shall continue the preliminary hearing to a specific date and time, and shall give notice of the new date and time as provided in Rule 542(E)(2). The issuing authority shall not issue a bench warrant.

(3) If the issuing authority finds that the defendant's absence is without good cause and after notice, the absence shall be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority.

(a) In these cases, the issuing authority shall proceed with the case in the same manner as though the defendant were present.

(b) If the preliminary hearing is conducted and the case held for court, the issuing authority shall

(i) give the defendant notice by first class mail of the results of the preliminary hearing and that a bench warrant has been requested; and

(ii) pursuant to Rule 547, transmit the transcript to the clerk of courts with a request that a bench warrant be issued by the court of common pleas and, if the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2), with a notice to the court of common pleas of the defendant's noncompliance.

(c) If the preliminary hearing is conducted and the case is dismissed, the issuing authority shall give the defendant notice by first class mail of the results of the preliminary hearing.

(d) If a continuance is granted, the issuing authority shall give the parties notice of the new date and time as provided in Rule 542(E)(2), and may issue a bench warrant. If a bench warrant is issued and the warrant remains unserved for the continuation of the preliminary hearing, the issuing authority shall vacate the bench warrant. The case shall proceed as provided in paragraphs (D)(3)(b) or (c).

(E) If the Commonwealth does not establish a *prima facie* case of the defendant's guilt, and no application for a continuance is made and there is no reason for a continuance, the issuing authority shall dismiss the complaint.

(F) In any case in which a summary offense is joined with misdemeanor, felony, or murder charges:

(1) If the Commonwealth establishes a *prima facie* case pursuant to paragraph (B), the issuing authority shall not adjudicate or dispose of the summary offenses, but shall forward the summary offenses to the court of common pleas with the charges held for court.

(2) If the Commonwealth does not establish a *prima facie* case pursuant to paragraph (B), upon the request of the Commonwealth, the issuing authority shall dispose of the summary offense as provided in Rule 454 (Trial In Summary Cases).

(3) If the Commonwealth withdraws all the misdemeanor, felony, and murder charges, the issuing authority shall dispose of the summary offense as provided in Rule 454 (Trial In Summary Cases).

Comment: Paragraph (C) reflects the fact that a bail determination will already have been made at the preliminary arraignment, except in those cases in which, pursuant to a summons, the defendant's first appearance is at the preliminary hearing. *See* Rules 509 and 510.

If the administrative processing and identification procedures as authorized by law, such as fingerprinting required by the Criminal History Record Information Act, 18 Pa.C.S. § 9112, that ordinarily occur following an arrest are not completed

previously, when bail is set at the conclusion of the preliminary hearing, the issuing authority must order the defendant to submit to the administrative processing and identification procedures as a condition of bail. *See* Rule 527 for nonmonetary conditions of release on bail.

If a case initiated by summons is held for court after the preliminary hearing is conducted in the defendant's absence pursuant to paragraph (D)(2) and the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2), the issuing authority must include with the transmittal of the transcript a notice to the court of common pleas that the defendant has not complied with the fingerprint order. *See* Rule 547.

Nothing in this rule is intended to preclude judicial districts from providing written notice of the arraignment to the defendant at the conclusion of the preliminary hearing when a case is held for court. *See* Rule 571.

When a defendant fails to appear for the preliminary hearing, before proceeding with the case as provided in paragraph (D), the issuing authority must determine (1) whether the defendant received notice of the time, date, and place of the preliminary hearing either in person at a preliminary arraignment as provided in Rule 540(F)(2) or in a summons served as provided in Rule 511, and (2) whether the defendant had good cause explaining the absence.

If the issuing authority determines that the defendant did not receive notice, the issuing authority must issue an arrest warrant as provided in Rule 509, and the case will proceed pursuant to Rules 516 or 517. *See* paragraph (D)(1).

If the issuing authority determines that there is good cause explaining why the defendant failed to appear, the preliminary hearing must be continued and rescheduled for a date certain. *See* paragraph (D)(2). For the procedures when a preliminary hearing is continued, see Rule 542(E).

If the issuing authority determines that the defendant received service of the summons as defined in Rule 511 and has not provided good cause explaining why he or she failed to appear, the defendant's absence constitutes a waiver of the defendant's right to be present for subsequent proceedings before the issuing authority. The duration of this waiver only extends through those proceedings that the defendant is absent.

When the defendant fails to appear after notice and without good cause, paragraph (D)(3)(a) provides that the case is to proceed in the same manner as if the defendant were present. The issuing authority either would proceed with the preliminary hearing as provided in Rule 542(A), (B), (C) and Rule 543(A), (B), (C), and (D)(3)(b) or (c); or, if the issuing authority determines it necessary, continue the case to a date certain as provided in Rule 542(E); or, in the appropriate case, convene the preliminary hearing for the taking of testimony of the witnesses who are present, and then continue the remainder of the hearing until a date certain. When the case is continued, the issuing authority may issue a bench warrant as provided in paragraph (D)(3)(d), and must send the required notice of the new date to the defendant, thus providing the defendant with another opportunity to appear.

Paragraph (D)(3)(b)(ii) requires the issuing authority to include with the Rule 547 transmittal a request that the court of common pleas issue a bench warrant if the case is held for court.

In addition to the paragraph (D)(3)(b) notice requirements, the notice may include the date of the arraignment in common pleas court.

For purposes of modifying bail once bail has been set by a common pleas judge, see Rules 529 and 536.

See Rule 571 (Arraignment) for notice of arraignment requirements.

Rule 542(D) specifically prohibits an issuing authority at a preliminary hearing from proceeding on any summary offenses that are joined with misdemeanor,

felony, or murder charges, except as provided in paragraph (F) of this rule. Paragraph (F) sets forth the procedures for the issuing authority to handle these summary offenses at the preliminary hearing. These procedures include the issuing authority (1) forwarding the summary offenses together with the misdemeanor, felony, or murder charges held for court to the court of common pleas, or (2) disposing of the summary offenses as provided in Rule 454 by accepting a guilty plea or conducting a trial whenever (a) the misdemeanor, felony, and murder charges are withdrawn, or (b) a *prima facie* case is not established at the preliminary hearing and the Commonwealth requests that the issuing authority proceed on the summary offenses.

Under paragraph (F)(2), in those cases in which the Commonwealth does not intend to refile the misdemeanor, felony, or murder charges, the Commonwealth may request that the issuing authority dispose of the summary offenses. In these cases, if all the parties are ready to proceed, the issuing authority should conduct the summary trial at that time. If the parties are not prepared to proceed with the summary trial, the issuing authority should grant a continuance and set the summary trial for a date and time certain.

In those cases in which a *prima facie* case is not established at the preliminary hearing, and the Commonwealth does not request that the issuing authority proceed on the summary offenses, the issuing authority should dismiss the complaint, and discharge the defendant unless there are outstanding detainers against the defendant that would prevent the defendant's release.

Nothing in this rule would preclude the refiling of one or more of the charges, as provided in these rules.

See Rule 313 for the disposition of any summary offenses joined with misdemeanor or felony charges when the defendant is accepted into an ARD program on the misdemeanor or felony charges.

See Rule 1003 (Procedure in Non-Summary Municipal Court Cases) for the preliminary hearing procedures in Municipal Court.

Rule 544. Reinstating Charges Following Withdrawal or Dismissal

(A) When charges are dismissed or withdrawn at, or prior to a preliminary hearing, the attorney for the Commonwealth may reinstate the charges by approving, in writing, the refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

(B) Following the refiling of a complaint pursuant to paragraph (A), if the attorney for the Commonwealth determines that the preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 132 motion with the clerk of courts requesting that the president judge, or a judge designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth the reasons for requesting a different issuing authority.

Comment: This rule provides the procedures for reinstating criminal charges following their withdrawal or dismissal at, or prior to, the preliminary hearing.

The authority of the attorney for the Commonwealth to reinstate charges that have been dismissed at the preliminary hearing is well established by case law. *See, e.g., McNair's Petition*, 187 A. 498 (Pa. 1936); *Commonwealth v. Thorpe*, 701 A.2d 488 (Pa. 1997). This authority, however, is not unlimited. First, the charges must be reinstated prior to the expiration of the applicable statute(s) of limitations. *See Commonwealth v. Thorpe*, 701 A.2d 488 (Pa. 1997). In addition, the courts have held that the reinstatement may be barred in a case in which the Commonwealth has repeatedly rearrested the defendant in order to harass him or her, or if the rearrest results in prejudice. *See Commonwealth v. Thorpe*, 701 A.2d 488 (Pa. 1997); *Commonwealth v. Shoop*, 617 A.2d 351 (Pa. Super. 1992).

The decision to reinstate charges must be made by the attorney for the Commonwealth. Therefore, in cases in which no attorney for the Commonwealth was present at the preliminary hearing, the police officer

may not refile the complaint without the written authorization of the attorney for the Commonwealth. *See* Rule 507 (Approval of Police Complaints and Arrest Warrant Affidavits by Attorney for the Commonwealth--Local Option) for procedures for prior approval of complaints.

Pursuant to paragraph (A), in the usual case, charges will be reinstated by filing a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges. However, there may be cases in which the attorney for the Commonwealth determines that a different issuing authority should conduct the preliminary hearing, such as when an error of law is made by the issuing authority in finding that the Commonwealth did not sustain its burden to establish a *prima facie* case. Paragraph (B) requires that, in these cases, the attorney for the Commonwealth must file a petition with the court of common pleas requesting that the president judge, or a judge designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. For the procedure for requesting assignment of a different issuing authority, see Rule 132.

See Chapter 5 Part F(1) for the procedures governing motions.

Rule 545. Witnesses: Compulsory Process

(A) The issuing authority shall issue such process as may be necessary for the summoning of witnesses for the Commonwealth or the defendant.

(B) Persons shall not be permitted to testify at a preliminary hearing without first being duly sworn or affirmed according to law.

Rule 550. Pleas of Guilty Before Magisterial District Judge in Court Cases

(A) In a court case in which a magisterial district judge is specifically empowered by statute to exercise jurisdiction, a defendant may plead guilty before a magisterial district judge at any time up to the completion of the preliminary hearing or the waiver thereof.

(B) The magisterial district judge may refuse to accept a plea of guilty, and the magisterial district judge shall not accept such plea unless there has been a determination, after inquiry of the defendant, that the plea is voluntarily and understandingly tendered.

(C) The plea shall be in writing:

(1) signed by the defendant, with a representation by the defendant that the plea is entered knowingly, voluntarily, and intelligently; and

(2) signed by the magisterial district judge, with a certification that the plea was accepted after a full inquiry of the defendant, and that the plea was made knowingly, voluntarily, and intelligently.

(D) A defendant who enters a plea of guilty under this rule may, within 10 days after sentence, change the plea to not guilty by so notifying the magisterial district judge in writing. In such event, the magisterial district judge shall vacate the plea and judgment of sentence, and the case shall proceed in accordance with Rule 547, as though the defendant had been held for court.

(E) Ten days after the acceptance of the guilty plea and the imposition of sentence, the magisterial district judge shall certify the judgment, and shall forward the case to the clerk of courts of the judicial district for further proceedings.

Comment: In certain cases, what would ordinarily be a court case within the jurisdiction of the court of common pleas has been placed within the jurisdiction of magisterial district judges. *See* Judicial Code, 42 Pa.C.S. § 1515(a)(5), (5.1), (6), (6.1), and (7). This rule provides the procedures to implement this expanded jurisdiction of magisterial district judges.

In those cases in which either the defendant declines to enter a plea of guilty before the magisterial district judge or the magisterial district judge refuses to accept a plea of guilty, the case is to proceed in the same manner as any other court case.

This rule applies whenever a magisterial district judge has jurisdiction to accept a plea of guilty in a court case.

Under paragraph (A), it is intended that a defendant may plead guilty at the completion of the preliminary hearing or at any time prior thereto.

Prior to accepting a plea of guilty under this rule, it is suggested that the magisterial district judge consult with the attorney for the Commonwealth concerning the case, concerning the defendant's possible eligibility for ARD or other types of diversion, and concerning possible related offenses that might be charged in the same complaint. *See Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432 (1973), *vacated and remanded*, 414 U.S. 808 (1973), *on remand*, 455 Pa. 622, 314 A.2d 854 (1974).

Before accepting a plea:

(a) The magisterial district judge should be satisfied of jurisdiction to accept the plea, and should determine whether any other related offenses exist that might affect jurisdiction.

(b) The magisterial district judge should be satisfied that the defendant is eligible under the law to plead guilty before a magisterial district judge, and, when relevant, should check the defendant's prior record and inquire into the amount of damages.

(c) The magisterial district judge should advise the defendant of the right to counsel. For purposes of appointment of counsel, these cases should be treated as court cases, and the Rule 122 (Appointment of Counsel) procedures should be followed.

(d) The magisterial district judge should advise the defendant that, if the defendant wants to change the plea to not guilty, the defendant, within 10 days after imposition of sentence, must notify the magisterial district judge who accepted the plea of this decision in writing.

(e) The magisterial district judge should make a searching inquiry into the voluntariness of the defendant's plea. A colloquy similar to that suggested in Rule 590 should be conducted to determine the voluntariness of the plea. At a minimum, the magisterial district judge should ask questions to elicit the following information:

- (1) that the defendant understands the nature of the charges pursuant to which the plea is entered;
- (2) that there is a factual basis for the plea;
- (3) that the defendant understands that he or she is waiving the right to trial by jury;
- (4) that the defendant understands that he or she is presumed innocent until found guilty;
- (5) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
- (6) that the defendant is aware that the magisterial district judge is not bound by the terms of any plea agreement tendered unless the magisterial district judge accepts such agreement; and
- (7) that the defendant understands that the plea precludes consideration for ARD or other diversionary programs.

See Rule 590 and the *Comment* thereto for further elaboration of the required colloquy. *See also* ***Commonwealth v. Minor***, 467 Pa. 230, 356 A.2d 346 (1976), overruled on other grounds in ***Commonwealth v. Minarik***, 493 Pa. 573, 427 A.2d 623, 627 (1981); ***Commonwealth v. Ingram***, 455 Pa. 198, 316 A.2d 77 (1974); ***Commonwealth v. Martin***, 445 Pa. 49, 282 A.2d 241 (1971).

While the rule continues to require a written plea incorporating the contents specified in paragraph (C), the form of plea was deleted in 1985 because it is no longer necessary to control the specific form of written plea by rule.

Paragraph (C) does not preclude verbatim transcription of the colloquy and plea.

At the time of sentencing, or at any time within the 10-day period before transmitting the case to the clerk of courts pursuant to paragraph (E), the magisterial district judge may accept payment of, or may establish a payment schedule for, installment payments of restitution, fines, and costs.

If a plea is not entered pursuant to this rule, the papers must be transmitted to the clerk of courts of the judicial district in accordance with Rule 547. After the time set forth in paragraph (A) for acceptance of the plea of guilty has expired, the magisterial district judge no longer has jurisdiction to accept a plea.

Regardless of whether a plea stands or is timely changed to not guilty by the defendant, the magisterial district judge must transmit the transcript and all supporting documents to the appropriate court, in accordance with Rule 547.

Once the case is forwarded as provided in this rule and in Rule 547, the court of common pleas has exclusive jurisdiction over the case and any plea incident thereto. The case would thereafter proceed in the same manner as any other court case, which would include, for example, the collection of restitution, fines, and costs; the establishment of time payments; and the supervision of probation in those cases in which the magisterial district judge has accepted a guilty plea and imposed sentence.

Rule 551. Withdrawal of Charges Pending Before Issuing Authority

In any court case pending before an issuing authority, the attorney for the Commonwealth, or his or her designee, may withdraw one or more of the charges. The withdrawal shall be in writing.

Comment: This rule was amended in 1995 to make it clear that only the attorney for the Commonwealth or a designee has the authority to withdraw a prosecution.

In any case in which a summary offense is joined with the misdemeanor, felony, or murder charges:

- (1) if only some of the charges are withdrawn, and the remainder are held for court, the joined summary offense, unless withdrawn, must be forwarded to the court of common pleas as required by Rule 543(F); and
- (2) if all of the misdemeanor, felony, and murder charges are withdrawn pursuant to this rule, the

issuing authority must dispose of the summary offense as provided in Rule 454 (Trial in Summary Cases).

Rule 559. Request for Bench Warrant

In any case held for court following a preliminary hearing conducted in the defendant's absence pursuant to Rule 543(D), upon receipt of a request by the issuing authority for the common pleas court to issue a bench warrant, the court promptly shall act upon the request.

Comment: For the requirement that the issuing authority request a bench warrant from the court of common pleas in cases in which the defendant has failed to appear for the preliminary hearing, see Rule 543(D)(3)(b)(i) and (ii). *See also* Rule 547(C)(5) that requires the issuing authority to transmit the request for a bench warrant with the transcript of the proceedings before the issuing authority.

Chapter 6



SCIENTIFIC EVIDENCE



Scientific Evidence

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6.1 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 6.2 on the presentation of expert testimony in sexual assault cases, the chapter focuses on the following:

- DNA, section 6.3
- Bite Mark Evidence, section 6.4
- Hair Sample Analysis, section 6.5
- Blood Typing Evidence, section 6.6
- Evidence Obtained from a “Rape Kit” Exam, section 6.7.

Many of the procedures for the admission of scientific evidence in cases of sexual violence have come about because of increased training of prosecutors. The United States Department of Justice, Office on Violence against Women, has encouraged targeted training for prosecutors to improve their ability to handle both sexual and domestic violence cases. With OVW funding, the American Prosecutors Research Institute (APRI), in collaboration with the Pennsylvania Coalition Against Rape and the Battered Women’s Justice Project, has developed national institutes to provide intensive training for prosecutors. From 2005 through 2008, APRI trained 780 participants at 15 domestic violence courses and 282 participants at seven sexual violence courses.¹

6.2 EXPERT TESTIMONY IN SEXUAL ASSAULT CASES

This section discusses issues regarding the admission of expert testimony in sexual assault cases, including the general requirements for admissibility and relevancy. It also discusses expert medical testimony and expert mental health testimony.

A. General Requirements for Admissibility of Expert Testimony

In deciding whether expert testimony is admissible, the court must determine:

- (1) whether the subject matter is appropriate for expert testimony;

¹ See Statement of Catherine Pierce, Acting Director, OFFICE ON VIOLENCE AGAINST WOMEN, UNITED STATES DEPARTMENT OF JUSTICE, before the United States Senate Committee on the Judiciary, "THE CONTINUED IMPORTANCE OF THE VIOLENCE AGAINST WOMEN ACT", presented on June 10, 2009. The statement can be found at <http://www.ovw.usdoj.gov/pierce-statement.htm>.

- (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 702,² which provides:

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.

PA.R.E. 702.

As recently stated by the Pennsylvania Superior Court:

It is well settled that “[t]he test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation.” *Commonwealth v. Malseed*, 847 A.2d 112, 114 (Pa.Super.2004) (citation omitted). Such knowledge need not be obtained through formal education but may have been acquired by other training or experience. *Commonwealth v. Conklin*, 587 Pa. 140, 897 A.2d 1168 (2006).

Commonwealth v. Saunders, 946 A.2d 776, 785 – 786 (Pa.Super. 2008), *appeal denied*, 598 Pa. 774, 958 A.2d 1047 (2008).

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. Steele*, 599 Pa. 341, 363, 961 A.2d 786, 798 (2008); *Commonwealth v. Topa*, 471 Pa. 223, 231, 369 A.2d 1277, 1282 (1977) (adopting the *Frye* test in Pennsylvania).

² 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).

Under *Frye*, novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community.³

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*, 591 Pa. 723, 920 A.2d 831 (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).⁴

³ See also, *Commonwealth v. Hall*, 867 A.2d 619, 633 (Pa.Super. 2005), *appeal denied*, 586 Pa. 756, 895 A.2d 549 (2006).

⁴ As a general rule, the standard of review on appeal of a trial court's evidentiary ruling, including a 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).

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).

The standards governing that discretion are settled. Scientific evidence is admissible under [*Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923)] so long as the methodology the expert used in reaching his or her conclusions is generally accepted by scientists in the relevant field. [*Commonwealth v. Dengler*, 586 Pa. 54, 64-65, 890 A.2d 372, 380 (2005)]; [*Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 555, 839 A.2d 1038, 1044-1045 (2003)]. Of course, "*Frye* is not implicated every time science comes into the courtroom; rather, it applies only to proffered expert testimony involving novel science." *Dengler*, 890 A.2d at 382; *Grady*, 839 A.2d at 1043-44 (*Frye* test applies only to "novel scientific evidence"). This is so because the purpose of the test is merely to help the court determine when a scientific principle or discovery crosses the line between the experimental and demonstrable stages. *See Frye*, 293 F. at 1014. The *Frye* test was developed specifically to aid courts in determining where in "this twilight zone the evidential force of the principle must be recognized." *Id.*

The *Dengler* Court noted that "[w]hat constitutes novel scientific evidence has historically been decided on a case-by-case basis, and there is some fluidity in the analysis; indeed, science deemed novel at the outset may lose its novelty and become generally accepted in the scientific community at a later date, or the strength of the proponents proffer may affect the *Frye* determination." *Dengler*, 890 A.2d at 381-82 (collecting and discussing cases where *Frye* has been employed). Furthermore, we have made clear that *Frye* concerns the methodology used by an expert in reaching his or her conclusions; it does not act as a bar upon a qualified expert's conclusions (including minority conclusions), so long as the methodology is

generally accepted. *Dengler*, 890 A.2d at 382 n. 6; *Grady*, 839 A.2d at 1045, 1047; accord *Commonwealth v. Whitacre*, 878 A.2d 96, 100 (Pa.Super.2005).

Commonwealth v. Puksar, 597 Pa. 240, 253, 951 A.2d 267, 274 - 275 (2008)

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), *appeal denied*, 591 Pa. 736, 921 A.2d 497 (2007).

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 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.

- In *Commonwealth v. Thomas*, 444 Pa. 436, 445, 282 A.2d 693, 698-699 (1971), the Pennsylvania Supreme Court adopted the rule that medical experts may base opinions on reports of others not in evidence;
- In *Commonwealth v. Mitchell*, 570 A.2d 532 (Pa.Super. 1990), *appeal denied*, 527 Pa. 599, 589 A.2d 689 (1990), the Pennsylvania Supreme Court held that experts may offer testimony based on the reports of others. For example, 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* PA.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).

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 judge must balance the helpfulness of the testimony against its potential to cause confusion or prejudice.⁵

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).

⁵ See *Commonwealth v. Brown*, 596 A.2d 840, 842 (Pa.Super. 1991), *appeal denied*, 532 Pa. 660, 616 A.2d 982 (1992).

B. Expert Medical Testimony

Expert medical testimony is governed by the standards articulated in section A. See Section 6.7 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 requirements as Forensic Nurse Examiners (FNEs), enabling them to collect forensic evidence for a variety of crimes.⁶

Recently, in *Commonwealth v. Jennings*, 958 A.2d 536, 540 (Pa.Super.2008), the Superior Court held that the trial court properly allowed a sexual assault nurse examiner who performed a rape kit on a victim the morning after a sexual assault to offer at trial her opinion as to the cause of the victim's vaginal redness. "We find persuasive the decisions of the respected courts of other states [which] have held that sexual assault nurse examiners are qualified to testify as expert witnesses to the causation of injuries to victims of sexual crimes." *Id.* at 541. See also, *Freed v. Geisinger Medical Center*, 601 Pa. 233, 971 A.2d 1202, 1211 (2009), *reargument granted*, 602 Pa. 207, 979 A.2d 846 (2009).

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. "[O]ur courts have generally excluded expert testimony that discusses behavior patterns that are common to victims of sexual assault. Such testimony encroaches upon the jury's function of evaluating witness credibility." *Commonwealth v. Johnson*, 690 A.2d 274, 276 (Pa.Super. 1997).

⁶ 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.

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.

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 held 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.

6.3 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.⁷ 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.⁸

The use of DNA evidence in Pennsylvania has followed a steady path.⁹ 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

⁷ American Prosecutors Research Institute (APRI), DNA Evidence Policy Considerations for the Prosecutor, p.1.

⁸ Hogan, S. and Swinton, S. “Meeting Defense Challenges to DNA Evidence,” APRI *Silent Witness* 15(1)(2003).

⁹ See ***Commonwealth v. Alderman***, 811 A.2d 592, 595-596, (Pa.Super. 2002), *appeal denied*, 573 Pa. 694, 825 A.2d 1259 (2003).

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.

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).¹⁰ The PCR method is the principal method of analyzing DNA evidence in laboratories across the world.¹¹

“Historically, scientists needed large evidence samples to enable them to extract DNA.”¹² The earliest method of forensic DNA testing, RFLP, involved a comparison of lengths of specific DNA fragments.¹³ 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 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

¹⁰ Hazelwood, Robert R. and Ann Wolbert Burgess. Practical Aspects of Rape Investigation: A Multidisciplinary Approach, (Third edition) (2001), p. 311.

¹¹ Michigan Sexual Assault Benchbook, p 422.

¹² American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.10.

¹³ American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.10.

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.¹⁴ 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.¹⁵

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 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.¹⁶

¹⁴ Hazelwood, Robert R. and Ann Wolbert Burgess. Practical Aspects of Rape Investigation: A Multidisciplinary Approach, (Third edition) (2001), p. 311.

¹⁵ American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.10.

¹⁶ American Prosecutors Research Institute (APRI), Forensic DNA Fundamentals for the Prosecutor: Be not Afraid, p.11.

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, 520-521, 640 A.2d 395, 400-401 (1992).

- *Commonwealth v. Jones*, 811 A.2d 1057 (Pa.Super. 2002), *appeal denied*, 574 Pa. 765, 832 A.2d 435 (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 evidence 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.
- *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.

- On February 18, 2009, the National Academy of Sciences released a comprehensive report finding that forensic sciences need significantly strengthened oversight, research and support in order to play a more reliable role in identifying perpetrators of crime, protecting the wrongly accused and ensuring public safety. The NAS committee proposed the creation of a federal entity to stimulate basic and applied research, set national standards for forensic sciences and enforce those standards – a recommendation that is already garnering strong support from policymakers, legal experts and forensic professionals. The full report, *Strengthening Forensic Science in the United States: A Path Forward*, can be found at http://www.nap.edu/catalog.php?record_id=12589.

6.4 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, which include:

- *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. 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);

6.5 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.

6.6 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.

Proof that a defendant shares a blood type with that of samples found at the scene of the crime is relevant and admissible when it corroborates independent facts *321 which show either that the person who committed the crime lost blood, or that the defendant was present at the scene of the crime.

Commonwealth v. Porter, 323 A.2d 128, 131 (Pa.Super. 1974).

- *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 prove 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, 691-692 (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.

6.7 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.”¹⁷ *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.

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

¹⁷ Note that the more recent terms, “Sexual Assault Evidence Collection Kit” or “Rape Evidence Collection Kit” more accurately describe the evidence collection kit.

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.

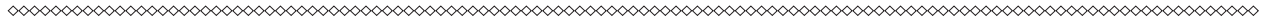
- ***Commonwealth v. Johnson***, 690 A.2d 274, 277 (Pa. Super. 1997) (en banc): a majority of an en banc panel held that the trial court erred in excluding expert testimony that "the absence of diagnostic injuries or scars is common and does not exclude the possibility of penile anal penetration or other forms of sexual contact."¹⁸

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.

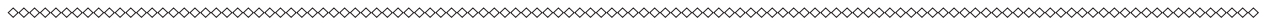
- ***Commonwealth v. Hemingway***, 534 A.2d 1104, 1107-1108 (Pa. Super. 1987): the results of the "rape kit" exam were not admissible as business documents; the report contained opinions and conclusions beyond mere event of hospitalization and treatment prescribed, and were not admissible unless the 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.

¹⁸ In ***Commonwealth v. Johnson***, 690 A.2d 274 (Pa. Super. 1997), a doctor's proposed testimony that the absence of physical trauma was consistent with incidents of sexual abuse was held to be admissible in prosecution for sexual assault. The Superior Court reasoned that the physical condition of the sexual assault victim was not a matter that was typically within knowledge of average jurors, and the expert testimony pertained to objective medical facts, rather than speculative explanations for patterns of behavior, and therefore did not encroach upon the jury's role in evaluating the credibility of witnesses.

Chapter 7



THE GUILTY PLEA



The Guilty Plea

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The Guilty Plea

7.1 CHAPTER OVERVIEW

This chapter outlines the procedures and standards of review when the Defendant enters a guilty plea before a magisterial district judge.

“In a guilty plea, no evidence is presented against the defendant. The judge in her colloquy merely assures that the defendant is aware of the facts underlying the plea.” *Commonwealth v. Passmore*, 857 A.2d 697, 710 (Pa.Super. 2004), *appeal denied*, 582 Pa. 673, 868 A.2d 1199 (2005). Strict compliance with the rules regarding guilty pleas is necessary as the vast majority of criminal cases are disposed of via guilty pleas. See *Commonwealth v. Upshur*, 592 Pa. 273, 284, n.6, 924 A.2d 642, 649, n.6 (2007), *citing* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV.L.REV. 2463, 2466 & n.9 (2004) (noting that approximately 95 percent of felony convictions in state courts in the year 2000 were resolved by guilty pleas).

The jurisdiction and authority of magisterial district judges is explained in Section 7.2. A suggested checklist for the guilty plea hearing is included in Section 7.2. Additionally, an example of an acceptable colloquy for situations where the Defendant waives the right to counsel is provided, as well as a colloquy to inform the Defendant of his right to withdraw the guilty plea. The responsibilities of the magisterial district judge following the acceptance of the guilty plea and the sentencing are discussed in Section 7.4.

The addendums include a short and long form written guilty plea statement, a written guilty plea colloquy, and a written waiver of counsel form.

7.2 GUILTY PLEAS IN MAGISTERIAL DISTRICT COURT

Pursuant to 42 PA.CON.S.TAT.ANN. § 1515, a Magisterial District Judge is specifically empowered by statute to exercise jurisdiction over guilty pleas in court cases under the following conditions: it is an offense which falls under Title 18 (crimes and offenses) and classified as a misdemeanor of the third degree. Furthermore the following criteria must be met:

- The misdemeanor is not the result of a reduced charge;
- Any personal injury or property damage is less than \$500;
- The defendant wishes to plead guilty; and
- The defendant is not subject to the provisions of Chapter 63.¹

Section 1515 provides:

¹ Chapter 63 is the “Juvenile Act.” 42 PA.CON.S.TAT.ANN. § 6301.

§ 1515. Jurisdiction and venue

(a) Jurisdiction.--Except as otherwise prescribed by general rule adopted pursuant to section 503 (relating to reassignment of matters), magisterial district judges shall, under procedures prescribed by general rule, have jurisdiction of all of the following matters:

(1) Summary offenses, except those arising out of the same episode or transaction involving a delinquent act for which a petition alleging delinquency is filed under Chapter 63 (relating to juvenile matters).

(6) (i) Offenses under Title 18 (crimes and offenses) . . . which are classified as misdemeanors of the third degree, if the following criteria are met:

(A) The misdemeanor is not the result of a reduced charge.

(B) Any personal injury or property damage is less than \$500.

(C) The defendant pleads guilty.

(D) The defendant is not subject to the provisions of Chapter 63.

(ii) Subparagraph (i) shall not apply to any offense under the following provisions of Title 18:

Section 4303 (relating to concealing death of child born out of wedlock).

Section 4321 (relating to willful separation or nonsupport).

Section 5103 (relating to unlawfully listening into deliberations of jury).

(6.1) All offenses under Title 34 (relating to game).

(7) Matters jurisdiction of which is vested in magisterial district judges by any statute.

(b) Venue and process.--The venue of a magisterial district judge concerning matters over which jurisdiction is conferred by subsection (a) shall be as prescribed by general rule. The process of the magisterial district judge shall extend beyond the territorial limits of the magisterial district to the extent prescribed by general rule.

42 PA.CON.S.TAT.ANN. § 1515.

A defendant may plead guilty before a magisterial district judge at any time “up to the completion of the preliminary hearing or the waiver thereof.” Pa.R.Crim.P., Rule 550. Once the case is held for court and the transcript is prepared to be forwarded to the clerk of the appropriate court of common pleas in accordance with Pa.R.Crim.P., Rule 547, the court of common pleas has exclusive jurisdiction over the case and any plea incident thereto.

The plea procedure is specified in Pa.R.Crim.P., Rule 550, and provides that the plea must be in writing:

- (1) signed by the defendant, with a representation by the defendant that the plea is entered knowingly, voluntarily, and intelligently; and
- (2) signed by the magisterial district judge, with a certification that the plea was accepted after a full inquiry of the defendant, and that the plea was made knowingly, voluntarily, and intelligently.

The magisterial district judge must make a determination, after questioning the defendant, that the plea is voluntarily and understandingly tendered. Additionally, the MDJ may refuse to accept the plea of guilty, and in such circumstances the case proceeds in the same manner as any other court case.

The comment following Rule 550 suggests that the MDJ consult with the attorney for the Commonwealth on the following topics: (1) concerning the case in general, (2) concerning the defendant's possible eligibility for ARD or other types of diversion, and (3) concerning possible related offenses that might be charged in the same complaint.

Rule 550 specifies a number of procedural steps that must be completed before the MDJ may accept the plea:

- √ First, the MDJ must be satisfied that proper jurisdiction exists to accept the plea;
- √ Also in relation to jurisdiction, the MDJ must determine whether there are any other related offenses which might affect jurisdiction;
- √ There must be a determination that the defendant is eligible under the law to plead guilty before an MDJ;
- √ If relevant, the MDJ should check the defendant's prior record and inquire into the amount of damages;²
- √ The MDJ must advise the defendant of the right to counsel;³

² The MDJ has the authority to order restitution. See footnote 8, *infra*.

³ A criminal defendant has the right to effective counsel during a plea process as well as during trial. *Commonwealth v. Bedell*, 954 A.2d 1209, 1212 (Pa.Super. 2008), *appeal denied*, 600 Pa. 742, 964 A.2d 893 (2009). Additionally, for purposes of guilty pleas before magisterial district judges, the mandates of Pa.R.Crim.P., Rule 122, Appointment of Counsel, must be followed. Rule 122 provides, in pertinent part:

- √ The MDJ must advise the defendant that, if the defendant wants to change the plea to not guilty, the defendant, within 10 days after imposition of sentence, must notify the magisterial district judge who accepted the plea of this decision in writing.
- √ The MDJ must make a searching inquiry into the voluntariness of the defendant's plea.⁴

7.3 CHECKLIST FOR GUILTY PLEA HEARING

A. Checklist for Guilty Plea Colloquy

It is advisable that the issuing authority conduct the following colloquy to ascertain that the Defendant understands and voluntarily accepts the guilty plea. However, the rules of criminal procedure do not prevent the defense counsel, if any, or the attorney for the Commonwealth, from conducting all or part of the examination of the Defendant, as permitted by the issuing authority.⁵

- Place the Defendant under Oath.
- Details of Plea: Have the District Attorney or Police Prosecutor explain the charge(s) and any agreement(s).
- Confirm that the Defendant wishes to plead guilty.
- Confirm that the Defendant has signed the written guilty plea statement.⁶
- Right to Counsel: advise Defendant of his right to counsel and to appointed counsel if indigent.⁷
- Change of Plea: advise Defendant of his right to change his plea.⁸
- Make Determination that Defendant's Plea is Voluntary and Understandingly Tendered:
 - Confirm that Defendant understands the nature of the charges;
 - Advise Defendant that he is waiving the right to trial by jury;

(A) Counsel shall be appointed: (1) in all summary cases, for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed; (2) in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel; (3) in all cases, by the court, on its own motion, when the interests of justice require it.

Pa.R.Crim.P., Rule 122.

⁴ The comment following Rule 550 suggests that the colloquy similar to that specified in Rule 590 should be conducted to determine the voluntariness of the plea. See Section 7.3, *infra*.

⁵ See the comments following Rules 550 and 590.

⁶ Pa.R.Crim.P., Rule 550(C) requires that the plea be in writing. For examples of written guilty plea statements, see Addendums to this chapter.

⁷ See *Colloquy of Counsel* in subsection C.

⁸ See *Change of Plea Colloquy* in subsection D.

- Advise Defendant that he is presumed innocent until found guilty;
- Advise Defendant that the maximum penalties for a misdemeanor of the third degree are one year in prison and/or a \$2,500 fine;⁹
- Advise Defendant that the MDJ is not bound by any terms of any plea agreement unless the terms are specifically accepted by the MDJ;
- Advise Defendant that the guilty plea precludes consideration for ARD or any other diversionary program;
- Admission of Facts: confirm that there is a factual basis for the guilt plea
 - Hear statement of facts in support of the charge from the District Attorney or the Police Prosecutor;
 - Have the Defendant admit the facts;
- Accept Guilty Plea.
- Sentence Defendant.¹⁰
- Advise Defendant of appellate rights.

B. Waiver of Counsel Colloquy

It is advisable that the issuing authority conduct the following colloquy to ascertain that the Defendant's waiver of counsel is knowing, voluntary and intelligent. However the rules of criminal procedure do not prevent the attorney for the Commonwealth, or an already-appointed or retained defense counsel, from conducting all or part of the examination of the Defendant, as permitted by the issuing authority. *See* Comment, Pa.R.Crim.P., Rule 121.

- 1 - Do you understand that you have the right to be represented by an attorney, and the right to have free counsel appointed if you cannot afford an attorney?
- 2 - I am going to read to you the charges filed against you: (MDJ or Prosecutor reads charges)

⁹ 18 PA.CON.S.TAT.ANN. § 1101 provides for a maximum fine of \$2,500 and § 1104 provides for a maximum incarceration sentence of one year.

¹⁰ In addition to incarceration, supervision and a fine, the MDJ should also give consideration to restitution if claimed by the prosecution. The general provision for restitution is

General rule.--Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

18 PA.CON.S.TAT.ANN. § 1106. There is, however, a limitation on restitution orders by Magisterial District Judges:

Restitution ordered by a magisterial district judge shall be limited to the return of the actual property or its undisputed dollar amount or, where the claim for restitution does not exceed the civil jurisdictional limit specified in 42 Pa.C.S. § 1515(a)(3) (relating to jurisdiction) and is disputed as to amount, the magisterial district judge shall determine and order the dollar amount of restitution to be made.

Id. The jurisdictional limit specified in § 1515(a)(3) is \$8,000.

- 3 - Do you understand the nature of the charges against you and the elements of each of those charges?
- 4 - These are the maximum prison sentences and fines for these charges: (MDJ or Prosecutor states maximum penalties)
- 5 - Do you understand that if you waive the right to counsel you will still be bound by all of the normal rules of procedure and that an attorney is more familiar with these rules?
- 6 - Do you understand that you may have possible defenses to these charges which an attorney would be made aware of, and if these defenses are not raised at trial, they may be lost forever?
- 7 - Do you understand that, in addition to defenses, you have many rights that, if not timely asserted, may be lost permanently? If errors occur and are not timely objected to, or otherwise timely raised by you, these errors may be lost permanently. Specifically, an attorney would be more familiar with the following procedures:
 - Pretrial motions, including motions to suppress evidence;
 - A challenge to the formal charges filed against you;
 - Protecting your rights to a speedy trial;
 - Selecting a jury;
 - Cross-examining the witnesses against you;
 - Challenging the admissibility of the evidence presented against you;
 - Calling witnesses and presenting evidence on your behalf;
 - Arguing the facts and evidence to the jury on your behalf;
 - Arguing the law and the evidence to a judge;
 - In the event you are convicted, an attorney is more familiar with the filing, presenting and arguing motions for a new trial and/or a motion in arrest of judgment;
 - In the event you are convicted, an attorney is more familiar with arguing the circumstances, facts and law and the presentation of witnesses in the mitigation of your sentence;
- 8 - Do you understand that there are a variety of other rights which will be lost permanently if not raised at an appropriate time?
- 9 - Do you understand that you will be precluded from asserting the ineffective assistance of counsel in all proceedings in which you represent yourself?
- 10 - Are you voluntarily giving up the right to be represented by counsel?

- 11 - Have there been any threats or promises that would induce you to waive your right to counsel?
- 12 - Now that I have told you all these rights that you have, are you giving up these rights and choose to act as your own lawyer at this guilty plea?

Suggested concluding statement: I have determined that the defendant has made a knowing, voluntary and intelligent waiver of the defendant's right to counsel.

C. Change of Plea Colloquy

If the Defendant wants to change the plea to not guilty he must, in writing and within 10 days after imposition of sentence, notify the MDJ who accepted the guilty plea of his request to change his plea. In such event, the Court shall vacate the plea and judgment of sentence, and the case will proceed as though the defendant had been held for court. Pa.R.Crim.P., Rule 550(D).

7.4 FORWARDING THE RECORD

If the Defendant does not notify the magisterial district judge of his intent to change his guilty plea to a plea of not guilty, which must be filed within ten days after sentence in accordance with Rule 550(D), the MDJ must certify the judgment of sentence and forward the case to the clerk of court of the judicial district for further proceedings. *See* Pa.R.Crim.P., Rule 550(E).

Once the case is forwarded, all further proceedings are within the jurisdiction of the appropriate court of common pleas: “[T]he court of common pleas has exclusive jurisdiction over the case and any plea incident thereto.” Comment, Pa.R.Crim.P., Rule 550(E). The case must then proceed in the same manner as any other court case.

**Chapter 7
Addendum 1
Short Guilty Plea Statement**

COMMONWEALTH OF PENNSYLVANIA

vs.

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Docket No _____

Date Filed _____

**PLEAS OF GUILTY
BEFORE ISSUING AUTHORITY**

I, _____ residing at

_____ plead guilty to:

Charge(s)

before _____
(Name of Issuing Authority)

this _____ day of _____, and represent that I do this
knowingly, voluntarily, and intelligently.

(Defendant's Signature)

The Guilty Plea

I, _____ the issuing authority in the within case, certify that this _____ day of _____, _____, I accepted the above defendant's plea of guilty after making full inquiry of the Defendant. I have advised the Defendant of the right to counsel. I certify that the plea was made voluntarily, knowingly, and intelligently.

(Issuing Authority)

(SEAL)

COURT CASES

A Defendant who enters a plea of guilty under Pa.R.Crim.P., Rule 550 may, within ten (10) days after sentence, change the plea to not guilty by so notifying the issuing authority in writing. In such event, the issuing authority shall vacate the plea and judgment of sentence, and the case shall proceed in accordance with Pa.R.Crim.P., Rule 547, as though the Defendant had been held for court.

Judgment on a plea of guilty entered under Pa.R.Crim.P., Rule 550 must be certified to the clerk of court of the judicial district ten (10) days after acceptance of the guilty plea and the imposition of sentence.

Chapter 7
Addendum 2
Long Guilty Plea Statement

COMMONWEALTH OF PENNSYLVANIA

vs.

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)
) **Docket No** _____
) **Date Filed** _____
)

GUILTY PLEA STATEMENT

You or your attorney has told this Court that you want to plead guilty to some or all of the crimes charged against you by the Commonwealth of Pennsylvania. This form lists questions connected with the guilty plea you wish to enter. Many of the questions concern your rights under both federal and state law as a person charged with a crime(s).

By pleading guilty, you give up many of the rights you possess under the law. It is important, then, that you fully understand these rights before pleading guilty. Please read each question carefully and then truthfully answer the question. If you do not understand the question, mark that down by the question. Where general information is requested, please answer the question as fully and completely as possible. When you have finished answering the questions on the page, put your initials in the space at the bottom of the page. When you have finished answering all the questions, sign the last page.

If there are questions you do not understand, or if you do not think you fully understand the rights mentioned in this form, go to your attorney so that your attorney can explain the question or your rights to you. You may also ask the Magisterial District Judge to explain your rights to you when you plead guilty.

You must fully understand that your guilty plea must be voluntary and not forced in any way. You must also understand that by pleading guilty, you are admitting that you committed the particular offense, and that you give up your right to have a trial by jury. You must fully understand all your rights, and understand what happens when you give up your rights, before the Magisterial District Judge will accept your guilty plea.

By initialing this page and each following page, and by signing on the last page, you say, in effect, that you understand your rights and fully give them up.

1. What is your full name? _____
2. Are you known by any other names? _____ If yes, what are they? _____
3. How old are you today? _____
4. How far did you go in school? _____
5. Can you read, write and understand the English language? _____
6. Have you ever been a patient in a mental institution or have you ever been treated for a medical illness? _____ If yes, please explain. _____

7. Are you now being treated for a mental illness? _____ If yes, please explain. _____
8. If you are presently being treated for a mental illness, do you still feel that you are able to understand what you are doing today?

9. Have you ever had any physical or mental illness that would affect your ability to understand your rights or affect the voluntary nature of your plea?

If yes, please explain. _____
10. Are you presently taking any medication or drugs which might affect your thinking or free will? If yes, please explain.

11. Have you had any narcotics or alcohol in the last forty-eight (48) hours?
_____.
12. Have you read the criminal complaint? _____
13. Do you understand that you are here today to enter a plea of guilty to some or all of the charges which led to your arrest? _____
14. Do you understand the nature of the charges to which you are pleading guilty? _____
15. Each crime has a number of elements or things that the Commonwealth would have to prove at trial. Do you understand each element of the crimes or crimes to which you are pleading guilty? _____
16. Do you admit to committing the crime or crimes to which you are pleading guilty and to the legal elements explained to you making up those crimes?

17. Do you understand that under the United States Constitution and the Constitution of the Commonwealth of Pennsylvania, you have an absolute right to trial by a jury? _____
18. Do you understand that the right to trial by jury means you are able to participate in the selection of a jury with your attorney? _____
19. Do you understand that a jury of twelve people is randomly selected from people who live in this county? _____
20. Do you understand that the jury which is chosen must unanimously agree that you are guilty before you can be convicted of the crime or any of the crimes with which you are charged? _____
21. Do you understand that both the prosecution and the defense would have the right to “challenge” members of the jury panel, and that this means you, your attorney and the prosecution would have the right to keep certain persons on the jury panel from being chosen as a member of the jury in your case?

22. In a jury trial, the jury must presume that you are innocent until proven guilty. The Commonwealth must prove you are guilty of each element of the crime or crimes charged against you beyond a reasonable doubt before you can be found guilty. A reasonable doubt is a doubt that would cause an ordinary and reasonable person to hesitate before going through with something important to him. Do you understand these things?

23. If you wish to defend yourself and plead not guilty, you may also have a trial before a judge instead of by a jury. In that case, there is no jury, and the judge becomes the trier of fact as well as deciding questions of law. In other words, the Judge decides whether you are guilty or innocent. As in a jury trial, the Commonwealth must prove you guilty, beyond a reasonable doubt, of each element of the crime or crimes charged against you. Do you understand your right to a non-jury trial? _____
24. Do you understand that by pleading guilty, you give up your right to a trial, either by a jury or before a judge? _____
25. In a trial, you have the right to remain silent, and nothing can be held against you if you decide not to testify in your own defense. You have the right to cross-examine or confront the witnesses called by the Commonwealth to testify against you. You also have the right to call witnesses to testify on your behalf in your own defense, and you have the right to present any relevant evidence which could help to substantiate your innocence. Do you understand each of these rights? _____
26. Do you understand that by pleading guilty you give up your right to remain silent, the right to confront Commonwealth witnesses, and the right to call witnesses and present evidence in your own defense? _____
27. The maximum range of sentence and/or fines that can be imposed for each offense to which you are pleading guilty is as follows:

The Guilty Plea

<u>Offense</u>	<i>Maximum</i> <u>Sentence</u>	<i>Mandatory</i> <u>Minimum</u>	<u>Fine</u>

28. Are you aware that the Magisterial District Court is not bound by the terms of any plea agreement entered into between you, your counsel, and the attorney for the Commonwealth, until and unless the Magisterial District Court accepts such plea agreement? _____
29. Are you aware that if the crime or crimes with which you are charged do not require a mandatory sentence under the statutory law of Pennsylvania, the Court is not bound by the sentencing guidelines and may deviate from the guidelines; however, if the Court does so, both the attorney for the Commonwealth and you would have a right to appeal such deviation?

30. Do you realize that by pleading guilty you are giving up your right to present any pre-trial motions to suppress physical evidence, or any statements and confessions made by you, or your identification, for consideration by this or a higher court in the event those motions were denied? _____
31. Are you aware that if you were convicted after a trial you could appeal the verdict to a higher court and raise any errors that were committed in the trial court which could result in you being awarded a new trial or set free, and that by pleading guilty you are giving up this right? _____
32. Do you understand that even after your guilty plea is accepted by the Magisterial District Court, you will have the right to change your plea to not guilty as long as you make the request in writing, within ten (10) days of imposition of sentence, to the Magisterial District Court which accepted your guilty plea? _____
33. After your guilty plea is accepted by the Magisterial District Court and you are sentenced, all further proceedings are handled by the Court of Common Pleas.
34. Do you understand that all further proceedings are handled in the Court of Common Pleas? _____
35. If you wish to withdraw your guilty plea and change your plea to not guilty, you must ask to change your plea and withdraw it within ten (10) days after you are sentenced. The case will then proceed as though you had been held for court following a preliminary hearing. Do you understand this?

36. Has anybody forced you by any means to enter this plea of guilty? _____

37. Are you doing this of your own free will? _____
38. Are you pleading guilty only because you gave an oral or written statement to the police? _____
39. Have any threats been made to you to enter a plea of guilty? _____
40. Have any promises been made to you to enter a plea of guilty other than any plea agreement that has been negotiated for you by yourself or your attorney? _____
41. Are you satisfied with the representation of your attorney if you have one? _____
42. Have you had sufficient time to consult with your attorney, if you have one, before reading this Statement and entering your plea of guilty? _____
43. If you have an attorney, has your attorney reviewed with you the possible defenses to these charges and the witnesses you might call on your behalf? _____
44. If you have an attorney, have you asked your attorney to do anything for you in connection with the charges or your defense that he has not done? _____
45. You have a right to have witnesses present at your guilty plea hearing to testify against you. Are you willing to give up that right and have the official prosecutor or the attorney for the Commonwealth summarize the facts against you? _____
46. Do you agree that those facts, as summarized, would be sufficient evidence from which a jury could find you guilty of the charge? _____
47. Do you understand that you have a right to confront and cross-examine all Commonwealth witnesses in your case who are necessary to prove your guilt? _____
48. Do you understand that by pleading guilty, you are waiving that right of confrontation and cross-examination? _____
49. Are you presently on probation or parole? _____ If you are on probation or parole, do you realize that your plea of guilty will mean a violation of that probation or parole; that you could be sentenced to prison as a result of that violation; and that any sentence imposed by this Court following your guilty plea could be consecutive to the sentence on your probation violation? _____
50. If you are a resident alien and/or a non-U.S. citizen, do you realize that a conviction on this charge may subject you to deportation by the U.S. Immigration Service? _____
51. Has your attorney gone over the meaning of the terms in this Statement? _____

52. Do you understand that the decision to enter a guilty plea is yours and yours alone; that you do not have to enter a plea of guilty and give up all your rights as previously explained to you; and that no one can force you to enter a guilty plea? _____
53. Do you understand that when you plead guilty, the attorney for the Commonwealth would not have to prove each and every element of the crime or crimes with which you are charged? _____
54. Do you have any questions about these proceedings on this statement?

I AFFIRM THAT I HAVE READ THIS STATEMENT COMPLETELY AND I UNDERSTAND ITS FULL MEANING AND I STILL WANT TO ENTER A PLEA OF GUILTY TO THE CRIMES SPECIFIED. I FURTHER AFFIRM THAT MY SIGNATURE AND INITIALS ON EACH PAGE OF THIS STATEMENT ARE TRUE AND CORRECT.

Dated: _____
_____ Defendant

I, _____, Esquire, Attorney for _____

state that I have advised my client of the meaning behind this Statement; that it is my belief that he/she comprehends and understands what is set forth above; and that the defendant understands what he/she is doing by pleading guilty.

Attorney for Defendant

I.D. No.

If the defendant does not read or understand the English language, the foregoing Statement must be translated into the defendant's language and the translator shall execute the following affirmation:

I, _____, residing at _____, affirm that I have fully and correctly translated the entire foregoing Guilty Plea Statement to the defendant in the _____ language and that the defendant stated that he understood each of the questions before answering them.

Name

Signature

Date

I, _____ the issuing authority
in the within case, certify that this _____ day of _____, _____, I
accepted the above defendant's plea of guilty after making full inquiry of the Defendant. I
have advised the Defendant of the right to counsel. I certify that the plea was made
voluntarily, knowingly, and intelligently.

(Issuing Authority)

(SEAL)

**Chapter 7
Addendum 3
Guilty Plea Colloquy**

COMMONWEALTH OF PENNSYLVANIA

vs.

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Docket No _____
Date Filed _____

GUILTY PLEA COLLOQUY

Charge(s):

Permissible range of sentence and/or fines:

I, _____, understand the nature of the charges to which I am pleading guilty.

I, _____, acknowledge that there is a factual basis for this plea.

I, _____, understand that I am presumed innocent until I am proven guilty.

I, _____, am aware of the permissible range of sentences and/or fines for the offenses with which I am charged.

In third degree misdemeanor cases, please complete:

I, _____, understand that I have a right to trial by jury.

I knowingly, voluntarily, and intelligently make this plea of GUILTY.

I PLEAD GUILTY.

(Defendant)

(Date)

I, _____ the issuing authority in the within case, certify that this _____ day of _____, _____, I accepted the above defendant's plea of guilty after making full inquiry of the Defendant. I have

advised the Defendant of the right to counsel. I certify that the plea was made voluntarily, knowingly, and intelligently.

(Issuing Authority)

(SEAL)

**Chapter 7
Addendum 4
Written Waiver of Counsel**

COMMONWEALTH OF PENNSYLVANIA

vs.

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Docket No _____

Date Filed _____

WAIVER OF COUNSEL FORM

1. You have a right to be represented by an attorney in the criminal case pending against you. If you cannot afford to hire your own attorney, one will be appointed for you without cost. If you want a free attorney, apply to the Public Defender’s Office of this county, located at _____ . The phone number of the Public Defender’s Office is _____ .

2. If you proceed without an attorney, you will be bound by all the normal rules and procedures at all stages of the case pending against you.

3. The advantage of being represented by an attorney is the attorney’s familiarity with the following procedures:

- Pre-trial motions, including motions to suppress evidence;
- Challenges to bills of information;
- Protecting your right to a speedy trial;
- Selecting a jury;
- Cross-examining all witnesses against you;
- Challenging the admissibility of any evidence presented against you;
- Calling witnesses and presenting evidence in your behalf;
- Arguing the facts and evidence to the jury on your behalf;
- Arguing the law and evidence to the judge;
- In the event of a conviction, filing, presenting and arguing motions for a new trial and/or in arrest of judgment;
- In the event of a conviction, arguing the circumstances, facts and law and the presentation of witnesses in mitigation of sentence.

4. All defenses are waived or lost permanently if not raised at trial.

5. There are a variety of other rights which will be lost permanently if not raised at the appropriate time.

6. If and when errors occur during the trial, the right to appeal based on these errors is permanently lost unless you object to these errors at the appropriate time.

7. You will be precluded from asserting ineffective assistance of counsel concerning all proceedings in which you represent yourself.

ANSWER THESE QUESTIONS

A. Do you want to be represented by an attorney? Yes No

B. If not, are you voluntarily giving up the right to be represented by an attorney?
 Yes No

C. Have any threats or promises been made to get you to give up the right to an attorney?
 Yes No

READ THIS INFORMATION

I have read the above information. I have no questions about the above information. I have been told that I have the right to have lawyer represent me, and the right to have a free lawyer appointed to represent me without cost to me if I cannot afford to pay a lawyer. I give up these rights and I choose to proceed without an attorney.

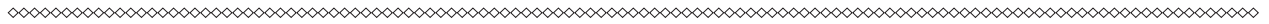
Date

Defendant

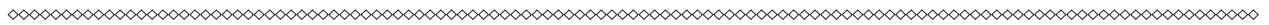
I, _____ the issuing authority in the within case, certify that this _____ day of _____, _____, I accepted the above defendant's waiver of counsel after making full inquiry of the Defendant. I have advised the Defendant of the right to counsel. I certify that the defendant's waiver of counsel was made voluntarily, knowingly, and intelligently.

(Issuing Authority)

(SEAL)



RESOURCES



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

Aequitas

Contact Information:

<http://www.aequitasresource.org/>

801 Pennsylvania Avenue NW

Suite 375

Washington, DC 20004

202-558-0040 phone

202-393-1918 fax

Aequitas' mission is to improve the quality of justice in sexual assault, domestic violence, dating violence, and stalking cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability.

AEquitas staff support prosecutors and allied professionals by conducting legal research; providing 24/7 case consultation; hosting specialized or state-specific training events and webinars; providing individual experts to jurisdictions and organizations; and publishing articles, monographs, and other resources on topics relevant to the prosecution of violence against women.

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:

Krista Hoffman, Criminal Justice Specialist

<http://www.pcar.org>

125 North Enola Drive

Enola, PA 17025

Phone: 717-728-9740 x138

Email: khoffman@pcar.org

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, training and technical assistance on a variety of topics including, but not limited to: Victims of human trafficking and commercial sexual exploitation, sexual violence and technology, cultural competency when working with Latina and Latino victims, sexual violence and addictions.

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

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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

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SURVIVORS, INC.

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Gettysburg, PA 17325

Business: (717) 334-0589
Hotline: (717) 334-9777 or (800) SUR-V106
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E-mail: survivor@adelphia.net
www.adamscountysurvivors.com

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THE CENTER FOR VICTIMS OF VIOLENCE AND CRIME

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Pittsburgh, PA 15219-4737

Business: (412) 350-1975
Hotline: (412) 392-8582
Fax: (412) 350-1976
E-mail: information@cvvc.org

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Fax: (412) 431-0913
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Fax: (742) 543-7410

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Beaver, PA 15009

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Fax: (724) 775-2750

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Fax: (814) 623-7187

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BERKS WOMEN IN CRISIS

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Reading, PA 19601

Business: (610) 373-1206
Hotline: (610) 372-9540- English
Hotline: (610) 372-7463-Spanish
Fax: (610) 372-4188
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Hotline: 911
Fax: (570) 265-0918
E-mail: arcc@epix.net

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Jamison, PA 18929

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Hotline (800) 675-6900
Fax (215) 343-6260
TTY (215) 343-6299
E-mail novainfo@novabucks.org

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111 S. Cliff St. Rear Butler, PA 16001 (Administrative Office)

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(724) 283-8700 Butler
Hotline : (800) 400-8551
Fax: (724) 776-6781 –Cranberry
(724) 283-8760 Butler
E-mail: voice@voiceforvictims.com

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Johnstown, PA 15905-3946

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Fax: (814) 288-3904

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Hotline: (814) 486-0952
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616 North Street
Jim Thorpe, PA 18229

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Fax: (570) 325-9643

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Fax: (814) 238-4449
Information: (814) 234-5222

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Fax: (814) 371-9679
E-mail: passagesinc@usachoice.net

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Lock Haven, PA 17745

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E-mail: ccwsafe@cub.kcnet.org

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E-mail: womenctr1@verizon.net

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Hotline: (610) 566-4342
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28 Morgan Ave. (Fed-Ex purposes only)
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Fax: (724) 662-1875
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Fax: (570) 524-9367 (Union County)

Email: svwit@svwit.org

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Philadelphia, PA 19103

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Hotline: (215) 985-3333

Fax: (215) 985-9111

E-mail: carole@woar.org

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Fax: (570) 278-5031
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Wellsboro, PA 16901

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E-mail: svwit@svwit.org

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300 Chamber Plaza
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Fax: (724) 222-5785

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Fax: (724) 837-3676

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119 Warren Street
Tunkhannock, PA 18657

Business: (570) 836-5844
Hotline: (570) 836-5544
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E-mail: support@vrcnepa.org

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YWCA OF YORK / VICTIM ASSISTANCE CENTER

320 East Market Street
York, PA 17403

Business: (717) 848-3535
Hotline: (717) 854-3131 or (800) 422-3204
Fax: (717) 843-7511

OTHER CONTACTS

PENNSYLVANIA COALITION AGAINST RAPE

Contact: Krista Hoffman, Criminal Justice Specialist
125 N. Enola Drive
Enola, PA 17025

Business: (717) 728-9740
E-mail: khoffman@pcar.org
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Suite 307 MHC
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E-mail: tsmith@pinnaclehealth.org
Web: www.pinnaclehealth.org/crc

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Media, PA 19063

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E-mail: hardyp@co.delaware.pa.us

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1527 Sassafras Street
Suite 100
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Web: sascione@yahoo.com

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E-mail: Cacofberks@comcast.net

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Business: (215) 343-6543
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E-mail: bclark@novabucks.org

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4259 W. Swamp Rd, St. 200
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Fax: (570) 969-7387
E-mail: cynthia.pintha@cmhealthsys.org
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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

**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
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WASHINGTON

**SPHS WASHINGTON COUNTY CHILDREN'S
ADVOCACY CENTER** (Associate Member)

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Fax: (724) 229-5711
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DEVELOPING

ADAMS

ADAMS COUNTY CAC (Developing)

Contact: Joddie Walker, ED or Jim Holler, Bd. President
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LANCASTER

LANCASTER COUNTY CAC TASK FORCE

(Developing)

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Fax: (717) 299-5045
E-mail: jhm@mmzlaw.com

Contact: Dr. Cathy Hoshauer, MD or Kari Stanley
Roseville Pediatrics
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LUZERNE

LUZERNE COUNTY CAC TASK FORCE (Developing)

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Business: 570-825-1676
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E-mail: Jackie.carroll@luzernecounty.org

POTTER

POTTER COUNTY CHILDREN, YOUTH AND FAMILY

(Developing)

Contact: Joy Glassmire, Director
Potter County Human Services
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Business: (814) 544-7315
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YORK

YORK COUNTY CHILD ADVOCACY CENTER

(Developing)

Contact: Paul Johnston, ED or Heidi Getsy, Forensic Int.

28 S. Queen Street

York, PA 17403

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