ERIE COUNTY LEGAL JOURNAL

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Reports of Cases Decided in the Several Courts of Erie County for the Year 2019

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ERIE, PA

JUDGES
of the
Courts of Erie County
during the period covered
by this volume of reports

COURTS OF COMMON PLEAS

HONORABLE JOHN J. TRUCILLA ---------- President Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE ELIZABETH K. KELLY ---------- Judge
HONORABLE DANIEL J. BRABENDER, JR. ---------- Judge
HONORABLE JOHN J. MEAD ---------- Judge
HONORABLE JOSEPH M. WALSH, III, ---------- Judge
HONORABLE MARSHALL J. PICCININI ---------- Judge

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CHASTITY LESH, Plaintiff

v.

ERIE INTERNATIONAL AIRPORT SERVICES, LLC, t/d/b/a ERIE INTERNATIONAL AIRPORT, and ERIE REGIONAL AIRPORT AUTHORITY, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Any party may move for summary judgment in whole or in part as a matter of law: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

The reviewing court must view the record in the light most favorable to the nonmoving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party.

POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATION / ACTIONS BY GOVERNMENTAL IMMUNITY

In order to overcome Defendants' immunity under the Political Tort Claims Act and recover in the instant civil action, Plaintiff must establish damages recoverable under common law or a statute creating a cause of action.

NEGLIGENCE / PREMISES LIABILITY / HILLS AND RIDGES DOCTRINE

The "hills and ridges" doctrine protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations.

POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATION / ACTIONS BY GOVERNMENTAL IMMUNITY

The meaning of "possession" within the "real property" exception is total control over the premises, and limited control or mere occupation of the premises for a limited period is insufficient to impose liability.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 14127 - 2012

Appearances: Paul G. Mayer, Esq., on behalf of Chastity Lesh, Plaintiff
Sara Anderson Frey, Esq., on behalf of Erie International Airport Services, LLC, t/d/b/a Erie International Airport, and Erie Regional Airport Authority, Defendants

OPINION

AND NOW, to-wit, this 26th day of May, 2017, following the April 26th, 2017 hearing on the Motion for Summary Judgment, filed by Erie International Airport Services, LLC, t/d/b/a Erie International Airport, and Erie Regional Airport Authority, by and through their counsel, Sara Anderson Frey, Esq.; at which Paul G. Mayer, Esq., appeared via telephone on behalf of Plaintiff Chastity Lesh, and Sara Anderson Frey, Esq., appeared via telephone on behalf of Defendants Erie International Airport Services, LLC, t/d/b/a Erie International Airport, and Erie Regional Airport Authority; upon consideration of the arguments of counsel, and after thorough review of the record and relevant statutory and case law, Defendants' Motion for Summary Judgment is hereby **GRANTED** in favor of Erie International Airport Services, LLC t/d/b/a Erie International Airport and Erie Regional Airport Authority, and this Trial Court provides the following analysis:

Chastity Lesh (hereafter referred to as "Plaintiff") filed a Complaint in Civil Action on December 24, 2012, claiming negligence against Erie International Airport Services, LLC, t/d/b/a Erie International Airport, and Erie Regional Airport Authority (hereafter referred to as "Defendants") due to a slip-and-fall occurring on January 6, 2011. Defendants were served with a copy of Plaintiff's Complaint on December 28, 2012. Defendants filed an Answer and New Matter to Plaintiff's Complaint on January 16, 2013. Plaintiff filed a Reply to Defendants' New Matter on February 4, 2013.

Following the close of discovery, Defendants filed a Motion for Summary Judgment and a supporting Memorandum of Law on March 21, 2017. Plaintiff filed a Brief in Opposition to Defendants' Motion for Summary Judgment on April 21, 2017. At a hearing on April 26, 2017, this Trial Court heard argument from Plaintiff's counsel, Paul G. Mayer, Esq., and from Defendants' counsel, Sara Anderson Frey, Esq.

Pennsylvania Rule of Civil Procedure 1035.2 states that after the relevant pleadings are closed, but within such time as not to delay unreasonably the trial, any party may move for summary judgment in whole or in part as a matter of law: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury. *See Pa. R. Civ. P. 1035.2*. The reviewing court must view the record in the light most favorable to the nonmoving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party. *Gilbert v. Synagro Central, LLC*, 131 A.3d 1, 10 (Pa. 2015). A defendant moving for summary judgment may make the showing necessary to support the entrance of summary judgment by demonstrating materials which indicated the plaintiff is unable to satisfy an element of his cause of action, and where a plaintiff fails to adduce any evidence to substantiate any element of his cause of action, a defendant is entitled to summary judgment as a matter of law. *See Shipley Fuels Mktg., LLC v. Medrow*, 37 A.3d 1215, 1217 (Pa. Super. 2012).

I. Defendants herein are immune from liability under the Political Tort Claims Act, 42 Pa. C.S. §8541 *et seq.*, and, therefore, are entitled to summary judgment as a matter of law.

Pursuant to the Political Tort Claims Act, no local agency shall be liable for any damages

on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person. *42 Pa. C. S. §8541*. However, a local agency may be liable for damages on account of an injury to a person or property if both of the following conditions are satisfied and the injury occurs as a result of one of the eight (8) acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under §8541 (relating to governmental immunity generally) or §8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent act(s) of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b).

See 42 Pa. C. S. §8542(a). After thorough review of the record, this Trial Court finds and concludes Plaintiff is unable to demonstrate damages recoverable under common law or by statute and is unable to establish one of the exceptions under subsection (b) applies in the instant civil action.

a. Plaintiff is unable to demonstrate damages recoverable under common law or by statute.

First, in order to overcome Defendants' immunity under the Political Tort Claims Act and recover in the instant civil action, Plaintiff must establish damages recoverable under common law or a statute creating a cause of action. *42 Pa. C. S. §8542(a)(l)*. However, Plaintiff is unable to demonstrate such damages as Plaintiff's claim is precluded by the "hills and ridges" doctrine.

The "hills and ridges" doctrine protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations. *Morin v. Traveler's Rest Motel, Inc.*, 704 A.2d 1085, 1087 (Pa. Super. 1997). In order to recover from a slip-and-fall on snow or ice under the "hills and ridges" doctrine, a plaintiff must prove all of the following elements:

(1) Snow and ice had accumulated naturally in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon;

(2) The property owner had notice, either actual or constructive, of the existence of such condition; and

(3) The dangerous accumulation of snow and ice caused the plaintiff to fall.

See id at 1088. A prerequisite to the application of the "hills and ridges" doctrine is a finding of generally slippery conditions as opposed to isolated icy patches. *Id*.

This Trial Court finds and concludes the record in the instant civil case is devoid of evidence demonstrating snow and/or ice had accumulated in ridges or elevations on January 6, 2011. According to the Record of Climatological Observations at Erie International Airport, in a twenty-four (24) hour period, the maximum temperature was twenty-eight (28) degrees, the minimum temperature was twenty (20) degrees, .26 inches of rain/melted snow had accumulated and 3.6 inches of snow/ice pellets/hail had accumulated, with a trace amount of snow/ice pellets/hail/ice being observed on the ground. *See Defendant's Memorandum of Law, Exhibit F*. Plaintiff indicated there was "patchy ice all over" and knew there was "some type of precipitation" as deicing was occurring on other aircrafts. *Deposition of Chastity Lesh, February 26, 2014, page 24, lines 8-12, 14-16; page 32, lines 16-19*. Other individuals on scene concurred with the appearance of smooth or "black" ice and other generally slippery conditions on the ramp/apron and other areas within the airport on January 6, 2011. *See Deposition of Amanda Hilwiller, April 21, 2015, pages 31-32; see also Deposition of David Duguay, July 29, 2014, pages 22-23, 49*. Pennsylvania appellate courts have granted summary judgment in similar situations where the evidence demonstrates generally slippery conditions and the plaintiff has failed to establish snow and/or ice accumulated in unreasonable ridges and elevations. *See Moon v. Dauphin County*, 129 A.3d 16, 23 (Pa. Commw. Ct. 2015) ("hills and ridges" doctrine applies where evidence, including plaintiff's testimony, demonstrates plaintiff's awareness of generally slippery conditions caused by weather and defendant county did not permit snow or ice to accumulate in ridges or elevations); *see also Alexander v. City of Meadville*, 61 A.3d 218, 222-223 (Pa. Super. 2012) (plaintiff cannot recover under the "hills and ridges" doctrine where plaintiff testifies he slipped on smooth, not rippled or ridged, ice). Therefore, Plaintiff has failed to meet the elements necessary to recover damages under the "hills and ridges" doctrine.

Assuming *arguendo* the "hills and ridges" doctrine does not apply, Plaintiff is still unable to demonstrate damages recoverable under common law or by statute due to the existence of a valid lease agreement. As a general rule, a landlord out of possession is not liable for injuries incurred by third parties on the leased premises because the landlord has no duty to such persons. *Jones v. Levin*, 940 A.2d 451, 454 (Pa. Super. 2007). This rule is based on the legal perspective of a lease transaction as the equivalent of a sale of the land for the term of the lease; thus, liability is premised primarily on possession and control, and not merely on ownership. *See id*.

On June 25, 2004, the Erie Municipal Airport Authority entered into an "Air Transport Operator's Use and Lease Agreement" (hereafter referred to as "Lease Agreement") with Plaintiff's employer, Piedmont Airlines, Inc. d/b/a U.S. Airways Express (hereafter referred to as "Piedmont"). *See Defendant's Memorandum of Law, Exhibit G*. Pursuant to Article II, paragraph 1 of the Lease Agreement:

> **Airline shall at all times maintain its exclusive leased areas, the ramp under and around its aircraft when in use by it, and the areas immediately adjacent to either, in a neat, clean, safe and orderly condition**; excluding the janitorial service provided in the terminal common areas by the Authority and major ramp/apron maintenance. Airline shall maintain any check-in counters or other personal property in and around joint use or public areas in a neat, safe and orderly condition.

See id, page 8 [emphasis added]. By the terms of the Lease Agreement, Piedmont, and not the Defendants, had possession and control over the area around the aircraft when the aircraft is parked on the ramp/apron; therefore, Piedmont had the sole responsibility of clearing the area around the aircraft of snow and/or ice and ensuring the area was safe for travel. *See Jones at 454*. One employee indicated the aircraft in the area Plaintiff fell had been parked there overnight, meaning none of the Defendants' employees could clear snow and/or ice from the area, pursuant to the terms of the Lease Agreement. *Hilwiller Deposition, page 49, lines 16-19*. Several individuals have indicated that, historically, when an aircraft is parked on the ramp/apron of the Erie International Airport, the airline has the responsibility to clear snow and/or ice from the ramp/apron area around the aircraft. *See Deposition of Ian Bogle, February 26, 2014, pages 16-17, 45-47; see also Deposition of Richard R. Robie, April 21, 2015, pages 35, 61, 100-101; see also Deposition of Robert A. Sims, March 14, 2016, page 28; see also Deposition of April Welsbacher, July 29, 2014, page 48*. Therefore, Plaintiff has failed to demonstrate damages recoverable under common law or by statute due to the language of the Lease Agreement, which requires the airline, and not the Defendants, to keep the ramp/apron area around the aircraft clear of snow and/or ice.

b. Plaintiff is unable to demonstrate one of the eight (8) exceptions to the Political Tort Claims Act applies to the instant civil action.

In order to overcome the Political Tort Claims Act, in addition to demonstrating damages recoverable under common law or by statute, Plaintiff must demonstrate the injury occurred as a result of one of eight (8) negligent acts, pursuant to §8542(b).[1] *42 Pa. C. S. §8542 (a)*. The only exception which applies in the instant civil action is the "real property" exception, which imposes liability from the "the care, custody or control of real property in the possession of the local agency." *See 42 Pa. C. S. §8542(b)(3)*. In order for the "real property" exception to apply, the dangerous condition of the property itself must cause the injury and must derive, originate from, or have as its source the municipal realty. *Poulous v. City of Philadelphia*, 628 A.2d 1198, 1201 (Pa. Commw. Ct. 1993). However, the "real property" exception will not apply where the injury is merely "facilitated" by the dangerous condition of the real estate and not caused by the dangerous condition of the real estate itself. *See id; see also Kiley v. City of Philadelphia*, 645 A.2d 184, 187 (Pa. 1994) (the Pennsylvania Supreme Court made abundantly clear that the "real property" exception to the rule of immunity applies only in cases where it is alleged that the dangerous condition of the land itself causes injury and not where the dangerous condition merely facilitates injury by the acts of others).

First, Plaintiff has failed to demonstrate Defendants had possession of the area where Plaintiff fell. The meaning of "possession" within the "real property" exception is total control over the premises, and limited control or mere occupation of the premises for a limited period is insufficient to impose liability. *See Gramlich v. Lower Southampton Township*, 838 A.2d 843, 848 (Pa. Commw. Ct. 2003). As stated above, pursuant to the Lease Agreement, when an aircraft is parked on the ramp/apron, the airline has the responsibility to ensure the ramp/apron area surrounding the aircraft is clear of snow and/or ice. *See Defendant's Memorandum of Law, Exhibit G, page 8*. The airline has total control over the ramp/apron

[1] The eight (8) negligent acts of §8542 include: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic control and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. *42 Pa. C. S. §8542(b)*.

area where the aircraft is parked. Furthermore, the evidence in the record demonstrates a Piedmont aircraft had parked overnight and was still parked in the ramp/apron area where Plaintiff suffered her fall. *Hilwiller Deposition, page 49, lines 16-19*. Therefore, under the clear and unambiguous terms of the Lease Agreement, Piedmont, not the Defendants, had total control over the area where Plaintiff fell on January 6, 2011 and Piedmont had the sole responsibility of clearing snow and/or ice from the ramp/apron area.

Finally, Plaintiff has failed to demonstrate her injury was caused by a dangerous condition on the property itself and was not merely facilitated by the property. This Trial Court finds and concludes the record in the instant civil case is devoid of evidence demonstrating the ramp/apron itself was defective and dangerous; rather, the testimony and evidence clearly shows the ramp merely facilitated Plaintiff's injury due to a slight buildup of snow and/or ice, which caused generally slippery conditions. This Plaintiff failed to overcome immunity pursuant to the "real property" exception. *See Shedrick v. William Penn School District*, 654 A.2d 163, 165 (Pa. Commw. Ct. 1995) (accumulation of rainwater on terrazzo floor, which caused plaintiff's injury, did not originate from the real property nor was it caused by a defect in the real property; rather, the real property merely facilitated plaintiff's injury, which did not allow plaintiff to recover under the "real property" exception to immunity). Therefore, Defendants cannot be held liable for Plaintiff's injury pursuant to the Political Tort Claims Act.

Conclusion

Therefore, for all of the reasons as set forth above, this Trial Court hereby grants Defendants' Motion for Summary Judgment in favor of Erie International Airport Services, LLC t/d/b/a Erie International Airport and Erie Regional Airport Authority and enters the following Order of Court:

ORDER

AND NOW, to-wit, this 26th day of May, 2017, following the April 26, 2017 hearing on the Motion for Summary Judgment, filed by Erie International Airport Services, LLC, Erie International Airport and Erie Regional Airport Authority, by and through their counsel, Sara Anderson Frey, Esq., and for all of the reasons as more thoroughly discussed above, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendants Erie International Airport Services, LLC, Erie International Airport and Erie Regional Airport Authority's Motion for Summary Judgment is hereby **GRANTED** and Plaintiff's Complaint against Erie International Airport Services, LLC, Erie International Airport and Erie Regional Airport Authority is hereby **DISMISSED with prejudice**.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
CAL HEIDELBERG III

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE

Whether sufficient evidence exists to support the verdict is a question of law; the Pennsylvania Superior Court's standard of review is *de novo* and the Superior Court's scope of review is plenary.

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE

The standard for reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.

CRIMINAL PROCEDURE / APPEALS / WEIGHT OF EVIDENCE

The weight of the evidence is a matter exclusively for the finder of fact, who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses.

CRIMINAL PROCEDURE / APPEALS / WEIGHT OF EVIDENCE

Resolving contradictory testimony and questions of credibility are matters for the finder of fact.

CRIMINAL PROCEDURE / APPEALS / WEIGHT OF EVIDENCE

An appellate court cannot substitute its judgment for that of the finder of fact and may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

CRIMINAL PROCEDURE / APPEALS / WEIGHT OF EVIDENCE

Where the trial court has ruled on a weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence; rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. CR 3791 of 2016

Appearances: James A. Pitonyak, Esq., on behalf of Cal Heidelberg III, Appellant
John H. Daneri, Erie County District Attorney, for the Commonwealth of Pennsylvania, Appellee

OPINION

Domitrovich, J. March 14, 2018

The instant matter is currently before the Pennsylvania Superior Court on the appeal of Cal Heidelberg III (hereinafter "Appellant") from the Sentencing Order entered on December 5, 2017. Following a criminal jury trial on October 16 and 17, 2017, the jury found Appellant as follows: guilty of Firearms not to be Carried Without a License; guilty of Tampering with or Fabricating Physical Evidence; guilty of Possession of Firearm Prohibited; and guilty of Disorderly Conduct. On appeal, Appellant raises the issue of whether the jury's guilty

verdicts were against the weight of the evidence or were based on insufficient evidence.

Factual Background

At the jury trial held on October 16, 2017, the Commonwealth called Brandon Tufts, who is employed as a bar-back with Coconut Joe's, a bar located at 28 North Park Row, Erie, Pennsylvania 16507. (*See* Notes of Testimony, Jury Trial, Day 1, Oct. 16, 2017, pg. 83). On August 13, 2016, around 2:00 a.m., Mr. Tufts observed an altercation in the nature of an argument taking place between Appellant and another unnamed individual. (*Id.* at 85). Specifically, Mr. Tufts indicated he observed Appellant "pull out his gun, cock it, and have it off to the side," and specifically noted the firearm was a black handgun. (*Id.* at 85-86). Mr. Tufts then alerted Christopher Hall, who is employed as head of security with Coconut Joe's, that Appellant had a firearm on his person. (*Id.* at 86). Mr. Tufts also alerted City of Erie Police Patrolman James Cousins, who was patrolling in his police cruiser nearby, of the fact that a gentleman in a pink shirt had a firearm. (*Id.* at 86-87).

Christopher Hall, who also testified as a witness for the Commonwealth on October 16, 2017, indicated he is employed as head of security with Coconut Joe's. (*Id.* at 99). Mr. Hall similarly indicated he observed an altercation in the nature of an argument taking place between Appellant and another unnamed individual on August 13, 2016, around 2:00 a.m. (*Id.* at 99-100). After Mr. Hall observed Appellant and the other individual arguing back-and-forth, Mr. Hall observed Appellant retrieve a firearm from a vehicle and observed Appellant "rack" said firearm. (*Id.* at 100). Mr. Hall described the firearm as a small, black handgun. (*Id.* at 101). Mr. Hall indicated Appellant had the firearm at his left side and continued to pull it in and out of his left pocket while arguing with the other unnamed individual. (*Id.*). Mr. Hall heard Appellant exclaim "It's about to go down. Are you ready for this?" (*Id.*). Mr. Hall responded by drawing his handgun and stated to Appellant: "It's not going to happen here." (*Id.*). In response, Appellant began to turn away from the scene of the altercation. (*Id.*). Mr. Hall observed Patrolman Cousins on the corner of Fifth and Peach Streets, and began to yell to the Patrolman: "He has a gun." (*Id.* at 102).

Patrolman Cousins also testified as a witness for the Commonwealth on October 17, 2017. Patrolman Cousins, who was in full dress uniform and driving a marked police vehicle, indicated he was preparing to exit his vehicle when he heard Mr. Hall yelling: "He's got a gun." (*See* Notes of Testimony, Jury Trial, Day 2, Oct. 17, 2017, pgs. 5-6). Patrolman Cousins stated he made eye contact with Appellant, and Appellant "took off running." (*Id.* at 8). After exiting his vehicle, Patrolman Cousins began pursuing Appellant down Peach Street and turned eastbound onto Fifth Street. (*Id.*). Patrolman Cousins commanded Appellant numerous times to stop. (*Id.*). Similarly, Mr. Hall stated he began pursuing Appellant down Peach Street and turned right onto Fifth Street. (*See* Notes of Testimony, Jury Trial, Day 1, Oct. 16, 2017, pg. 102).

Mr. Hall indicated Appellant dropped the same small, black handgun Mr. Hall observed earlier at Coconut Joe's in front of a nearby dumpster. Appellant then scrambled to retrieve the handgun and continued to run thereafter with the handgun. (*Id.*). Similarly, Patrolman Cousins indicated that, as he pursued Appellant eastbound on Fifth Street, he heard metal on cement and observed Appellant bend over attempting to retrieve an object. (*See* Notes of Testimony, Jury Trial, Day 2, Oct. 17, 2017, pgs. 9-10). Patrolman Cousins stated once Appellant picked up the object, Appellant's hand came backwards due to Appellant's natural running motion

and then Patrolman Cousins could clearly see a firearm in Appellant's hand. (*Id.*).

Patrolman Cousins continued to chase Appellant along Fifth Street and observed Appellant slow down to make a pronounced dipping motion at the corner of Fifth and French Streets. (*Id.* at 12). In addition, a third individual, Michael Dunn, who the Commonwealth also called to testify, stated he also pursued Appellant from Coconut Joe's until Appellant was apprehended. (*See* Notes of Testimony, Jury Trial, Day 1, Oct. 16, 2017, pg. 128). Mr. Dunn likewise indicated Appellant stopped behind the bushes located at the corner of French and Fifth Streets and observed Appellant toss a firearm into the sewer drain. (*Id.* at 129).

Mr. Hall stated Appellant ran along Fifth Street towards Erie Insurance, where Erie Police eventually apprehended Appellant. (*Id.* at 102). After Appellant was apprehended, Mr. Dunn stated he assisted police officers in locating Appellant's firearm, which was found in a sewer drain on the corner of Fifth and French Streets. (*Id.* at 131). At trial, Mr. Dunn described the firearm as a silver and black handgun. (*Id.*). Additionally, Mr. Hall confirmed the firearm retrieved from the sewer was the same small, black handgun he observed Appellant brandish earlier during the altercation that occurred in front of Coconut Joe's. (*Id.* at 104). Patrolman Nico Fioravanti, who the Commonwealth called to testify, also stated he assisted in locating the firearm in a sewer at Fifth and French Streets based on information Mr. Dunn provided to the Patrolmen relating to Appellant's attempt to discard the firearm in the sewer. (*Id.* at 149-50).

Finally, after a thorough colloquy outside the presence of the jury, Appellant chose to testify at trial on behalf of himself and also called another witness, Ryan Harris, to testify. Mr. Harris testified he did not observe Appellant brandish a firearm during the altercation occurring on August 13, 2016. (*See* Notes of Testimony, Jury Trial, Day 2, Oct. 17, 2017, pgs. 51). Similarly, Appellant testified he did not have a firearm on his person that night. (*Id.* at 92). Appellant testified he initially dropped his cellular device on Fifth Street, not a firearm. (*Id.* at 63, 65).

Relevant Procedural History

On December 15, 2016, the District Attorney's Office filed a Criminal Information, charging Appellant with (1) Possession with Intent to Deliver, in violation of 35 P.S. § 780-113(a)(30); (2) Firearms not to be carried without a License, in violation of 18 Pa.C.S. § 6106(a)(1); (3) Possession of Weapon, in violation of 18 Pa.C.S. § 907(b); (4) Tampering with/Fabricating Physical Evidence, in violation of 18 Pa.C.S. § 4910(2); (5) Possession of Firearms Prohibited, in violation of 18 Pa.C.S. § 6105(a)(1); (6) Possession of a Controlled Substance, in violation of 35 P.S. § 780-113(a)(16); (7) Possession of Drug Paraphernalia, in violation of 35 P.S. § 780-113(a)(32); and (8) Disorderly Conduct, in violation of 18 Pa.C.S. §5503(a)(1).

Appellant, by and through his counsel, Attorney Pitonyak, filed his Motion for Writ of *Habeas Corpus*/Motion for Release on Nominal Bail on August 3, 2017, and a hearing was scheduled on said Motion for September 7, 2017. By Order dated September 7, 2017, this Trial Court granted Appellant's Motion for Release on Nominal Bail. Also on September 7, 2017, Assistant District Attorney Robert Marion, on behalf of the Commonwealth, filed an Amended Information wherein Count Five (Possession of Firearm Prohibited) was amended from a Felony of the Second Degree to a Misdemeanor of the First Degree.

By Opinion and Order dated September 28, 2017, following the *Habeas Corpus* hearing

held on September 7, 2017, this Trial Court granted in part Appellant's Motion for Writ of *Habeas Corpus* as to the charges: Count One (Possession with Intent to Deliver); Count Six (Possession of a Controlled Substance); and Count Seven (Possession of Drug Paraphernalia), which were dismissed with prejudice. By the same Order dated September 28, 2017, this Trial Court denied in part Appellant's Motion for Writ of *Habeas Corpus* as to charges: Count Two (Firearms not to be Carried without a License); Count Three (Possession of Weapon); Count Four (Tampering with/Fabricating Physical Evidence); Count Five (Possession of Firearm Prohibited); and Count Eight (Disorderly Conduct).

On October 16, 2017, Appellant filed his Motion in *Limine* wherein he requested this Trial Court preclude the Commonwealth from introducing evidence or mention drugs or drug-related activities during the course of Appellant's criminal jury trial and from introducing or using Appellant's prior criminal record for Defiant Trespass as *crimen falsi*. By Order dated October 16, 2017, this Trial Court granted Appellant's Motion in *Limine*.

A criminal jury trial was held on October 16 and 17, 2017. Counsel for the Commonwealth, D. Robert Marion Jr., Esq., and counsel for Appellant, Jim Pitonyak, Esq., entered into and presented to this Trial Court a stipulation wherein both counsel agreed (1) Appellant is a Person Not To Possess as defined by 18 Pa.C.S. 6105(A)(1); (2) Appellant did not have a license to carry a concealed firearm at the time of the alleged offense; (3) the surveillance videos provided from Erie Insurance are substantive evidence; (4) the Lab Report marked as E16-02829-1 which analyzed the firearm retrieved from the sewer at the corner of Fifth and French Streets are substantive evidence; and (5) the firearm submitted as evidence was functional and capable of discharging the ammunition designed for its use.

During the jury trial on October 17, 2017, after the Commonwealth's case-in-chief, Appellant moved for Judgment of Acquittal based upon discrepancies of the testimony elicited by the witnesses for the Commonwealth as to the color of the firearm and as to which witness first saw the firearm and reported said information to the City of Erie Police. (*See* Notes of Testimony, Jury Trial, Day 2, Oct. 17, 2017, pg. 42-43). With respect to the Firearms not to be Carried Without a License, Appellant contended none of the witnesses testified Appellant concealed the firearm. (*Id.*). By Order dated October 19, 2017, this Trial Court granted Appellant's oral Motion for Judgment of Acquittal as to Count Three (Possessing Instruments of Crime).

At the conclusion of the jury trial, the jury found Appellant guilty beyond a reasonable doubt as to each of the following offenses: Count Two (Firearms not to be Carried Without a License in violation of 18 Pa.C.S. § 6106(A)(1)); Count Four (Tampering with or Fabricating Physical Evidence in violation of 18 Pa.C.S. § 4910(2)); Count Five (Possession of Firearm Prohibited in violation of 18 Pa.C.S. § 6105(A)(1)); and Count Eight (Disorderly Conduct in violation of 18 Pa.C.S. § 5503(A)(1)).

On December 5, 2017, this Trial Court entered the Sentencing Order from which Appellant now appeals. This Trial Court sentenced Appellant **in the standard and mitigated ranges** as follows:

- Count Two (Firearms not to be Carried Without a License) a **mitigated** range sentence of three (3) years to six (6) years of state incarceration with 390 days of credit for time served;
- Count Four (Tampering with or Fabricating Physical Evidence) a **standard** range sentence of six (6) months to two (2) years of state incarceration;

- Count Five (Possession of Firearm Prohibited) a **mitigated** range sentence of eighteen (18) months to three (3) years of state incarceration; and
- Count Eight (Disorderly Conduct) a **standard** range sentence of six (6) months to one (1) year of state incarceration.

On December 11, 2017, Appellant filed two post-trial motions: (1) Motion for Judgment of Acquittal and For Arrest of Judgment; and (2) Motion for Reconsideration of Sentence. By Order dated December 28, 2017, this Trial Court denied Appellant's Motion for Judgment of Acquittal and For Arrest of Judgment but granted Appellant's Motion for Reconsideration of Sentence to the extent this Trial Court recommended Appellant be considered eligible for Quehanna Boot Camp at the Pennsylvania Department of Corrections.

On January 22, 2018, Appellant, by and through his counsel, Attorney Pitonyak, filed a Notice of Appeal to the Pennsylvania Superior Court. This Trial Court filed its 1925(b) Order on January 26, 2018. Appellant filed his Concise Statement of Matters Complained of on Appeal on February 8, 2018.

Law and Analysis

In this instant appeal, Appellant challenges the guilty verdicts rendered by the jury as being against both the weight of the evidence as well as insufficient to sustain Appellant's convictions of Firearms not to be Carried Without a License, Tampering with or Fabricating Physical Evidence, Possession of Firearm Prohibited, and Disorderly Conduct.

Under Pennsylvania law, whether sufficient evidence exists to support the verdict is a question of law; the Pennsylvania Superior Court's standard of review is *de novo* and "the Superior Court's scope of review is plenary." *Commonwealth v. Walls*, 144 A.3d 926, 931 (Pa. Super. 2016). In assessing Appellant's sufficiency challenge, the Pennsylvania Superior Court must determine whether, viewing the evidence in a light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found the Commonwealth proved each element of the crime beyond a reasonable doubt. *Commonwealth v. Ansell*, 143 A.3d 944, 949 (Pa. Super. 2016). In addition, with respect to the sufficiency of the evidence, the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Commonwealth v. Hutchinson*, 947 A.2d 800, 805-806 (Pa. Super. 2008).

Moreover, "[t]he weight of the evidence is exclusively for the finder of fact, who is free to believe all, none or some of the evidence and to determine the credibility of the witnesses." *Commonwealth v. Talbert*, 129 A.3d 536, 545 (Pa. Super. 2015) (*quoting Commonwealth v. Johnson*, 668 A.2d 97, 101 (Pa. 1995)). As such, resolving contradictory testimony and questions of credibility are matters for the finder of fact. *Commonwealth v. Hopkins*, 747 A.2d 910, 917 (Pa. Super. 2000). Thus, "an appellate court cannot substitute its judgment for that of the finder of fact [and] may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Collins*, 70 A.3d 1245, 1251 (Pa. Super. 2013) (quoting *Commonwealth v. Champney*, 832 A.2d 403, 408 (Pa. 2003)). Finally, "where the trial court has ruled on a weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence;" rather, "appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." *Champney* (citing *Commonwealth v. Tharp*, 830 A.2d 519, 528 (Pa.2003)).

In this instant case, the above-referenced factual background demonstrates the jury's conviction of Appellant for Firearms not to be Carried Without a License Conduct is not against the weight of the evidence since the Commonwealth presented sufficient evidence for the jury to find Appellant guilty of said offense. In particular, both counsel for Appellant and counsel for the Commonwealth stipulated Appellant is a Person Not To Possess as defined by 18 Pa.C.S. 6105(A)(1) and also stipulated Appellant did not have a license to carry a concealed firearm at the time of the alleged offense. In addition, the jury heard ample testimony from Patrolman James Cousins, Brandon Tufts, Christopher Hall, and Mike Dunn, who all indicated Appellant carried a firearm on or about his person regarding the altercation which occurred near or at Coconut Joe's on the night of August 13, 2016.

Likewise, since both counsel for Appellant and counsel for the Commonwealth stipulated Appellant is a Person Not To Possess as defined by 18 Pa.C.S. 6105(A)(1), in addition to the aforementioned testimony, sufficient evidence existed for the jury to find Appellant guilty of Possession of Firearm Prohibited. Furthermore, the jury is the factfinder who makes the credibility determination with respect to each witness as to whether Appellant possessed, used, or controlled a firearm on the night of August 13, 2016.

Moreover, the Commonwealth presented sufficient evidence to support the jury's verdict finding Appellant guilty of Tampering with or Fabricating Physical Evidence. In particular, both Patrolman Cousins and Mr. Dunn indicated Appellant tossed a firearm into the sewer drain at the corner of French and Fifth Streets while being chased by law enforcement. Also, Mr. Hall and Mr. Dunn both confirmed the firearm later retrieved from the sewer was the same firearm Appellant brandished during the altercation at Coconut Joe's. Thus, the jury was justified in inferring Appellant, by discarding the firearm into the sewer, intended to impair the availability of the firearm as evidence at a later official proceeding or investigation.

Finally, the Commonwealth presented sufficient evidence to support the jury's verdict finding Appellant guilty of Disorderly Conduct. Specifically, Mr. Tufts and Mr. Hall indicated Appellant, while in a public location in front of Coconut Joe's, participated in an altercation and each personally observed Appellant retrieve a handgun from a nearby vehicle. Both Mr. Tufts and Mr. Hall stated Appellant maintained the firearm at his side during the altercation, and Mr. Hall indicated he heard Appellant exclaim "It's about to go down. Are you ready for this?" Patrolman Cousins further indicated that after Appellant began to flee, Patrolman Cousins commanded Appellant numerous times to stop; however, Appellant refused to comply.

Based on the evidence presented by the Commonwealth, Appellant's conviction of said offenses are not against the weight of the evidence. To the extent Appellant asserts discrepancies existed among the witnesses' testimony as to whether the firearm was black or gray or as to minute details of how the events specifically unfolded, the jury was charged with and was solely responsible for resolving any alleged contradictory testimony. Similarly, to the extent Appellant asserts Patrolman Cousins' testimony differed from the testimony he provided at Appellant's preliminary hearing, the jury was also solely charged with resolving any question related to the credibility of Patrolman Cousins' testimony. Thus, since the jury as the fact-finder was free to believe all, part, or none of the witness' testimony against Appellant as outlined above, the jury's verdicts were certainly not "so contrary to the evidence as to shock one's sense of justice." *See Collins*, 70 A.3d at 125l.

Moreover, Appellant's argument that the Commonwealth presented "no evidence of a

physical nature, such as DNA testing of the gun ... nor were the fingerprints of [Appellant] found on the weapon that was recovered" is similarly without merit. (*See* Appellant's Statement of Matters Complained of on Appeal As Per Rule 1925(b) at ¶ 2(d)). Specifically, Commonwealth presented ample circumstantial evidence in this case, including testimony from six witnesses, the firearm itself, live ammunition found in the chamber of the firearm, and a "Firearm and Tool Mark" Lab Report prepared by the Pennsylvania State Police Bureau of Forensic Services, which analyzed the firearm. As "[t]he Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence," the jury in this instant case was entitled to rely on said evidence in making factual determinations. *See Hutchinson*, 947 A.2d at 806. The jury has the exclusive responsibility to weight these matters, and this Trial Court finds the jury properly considered this evidence presented by the Commonwealth and such evidence was sufficient to warrant the jury's findings that Appellant committed these offenses for which Appellant was convicted.

Finally, this Trial Court previously ruled on a weight claim after Appellant orally moved for Judgment of Acquittal based upon the discrepancies of the testimony elicited by the witnesses for the Commonwealth as to the precise color of the firearm and as to which witness first saw the firearm and reported it to the City of Erie Police. After this Trial Court heard and carefully considered oral argument from both counsel regarding Appellant's challenge to the sufficiency of the evidence, this Trial Court properly exercised its discretion in granting in part said Motion as to Count Three (Possessing Instruments of Crime). This Trial Court granted in part said Motion of Acquittal which demonstrates this Trial Court did not take lightly this Trial Court's responsibility in evaluating the sufficiency of the evidence. Thus, this Trial Court did not "palpably abuse[] its discretion in ruling on [Appellant's] weight claim" and any such claim otherwise is wholly without merit. *See Tharp*, 830 A.2d at 528.

For the above reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm the jury's findings of Appellant's guilt for the above-referenced offenses.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
JAMIL JONES, Defendant

CRIMINAL LAW & PROCEDURE / SEARCH & SEIZURE / WARRANT / ISSUANCE BY NEUTRAL & DETACHED MAGISTRATE

If entry into a residence is necessary to search for an individual, there must be a warrant with a magisterial determination of probable cause to search that residence regardless of whether the warrant is an arrest warrant or a search warrant.

CRIMINAL LAW & PROCEDURE / WARRANTLESS SEARCHES / HOME

When police relied on Board of Probation and Parole documents and a JNET notice to search a third-party's residence for a parole absconder but had neither an arrest warrant nor a search warrant the entry into the third-party's home, the arrest of the parole absconder and the seizure of evidence on his person violated the Fourth Amendment of the United States Constitution.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. 1747 OF 2018

Appearances: Office of Erie County District Attorney
Nicole Sloane, Esquire, on behalf of Jamil Jones, Defendant

OPINION

Bozza, J., S.J. December 10, 2018

This matter is before the Court on Jamil Jones' (hereinafter "Defendant") *pro se* Omnibus Pre-Trial Motion in the nature of a motion to suppress evidence related to his arrest for parole violations. A hearing was scheduled for September 25, 2018, at which time the Commonwealth presented the testimony of one witness, City of Erie Bureau of Police Sergeant Steven Deluca (hereinafter "Sgt. Deluca"), and introduced two exhibits. The Defendant presented the testimony of two witnesses, the Defendant and Aissa Ramlal (hereinafter "Ms. Ramlal") (sic), and introduced one exhibit. The Court found the record less than adequate to make a valid determination and scheduled an additional hearing to address specified issues including the existence of an arrest warrant. A second hearing was conducted on October 9, 2018, at which time the Commonwealth presented the testimony of State Parole Agent Jesse Bayle (hereinafter "Agent Bayle") and introduced two additional exhibits but no arrest warrant.[1]

As noted, the Defendant filed an Omnibus Pre-Trial Motion *pro se*. He was initially represented by the Erie County Office of Public Defender but Nicole Sloane, counsel assigned to the case, withdrew with the permission of the Court and the Defendant proceeded on his own. At the time of the hearing, however, Ms. Sloane appeared and agreed to serve in an advisory capacity for the Defendant in the suppression proceedings.

[1] There is a paucity of information in the record regarding the Defendant's status on parole. There is no evidence concerning a parole agreement or the conditions of parole applicable to the Defendant. Because there was no information introduced with regard to his status at the Erie Community Corrections Center, initially it appeared that the Defendant may have been an escapee from the State Department of Corrections. It was clarified at a subsequent hearing he was not.

I. BACKGROUND

In March of 2018, the Defendant was on parole and residing at the Erie Community Correction Center (hereinafter "ECCC") as his approved residence. On or about March 7, 2018, the Defendant failed to return to the ECCC. A "wanted request notice" also known as a "PBPP-A62" form was issued indicating the Defendant's wanted status. The A62 form was made available to the members of an Erie County fugitive task force that included Agent Bayle and Sgt. Deluca, and others (collectively "the police"). Sgt. Deluca and Agent Bayle were aware of the wanted notice and together initiated an effort to locate him. At some point the task force received information from a confidential informant concerning two addresses where the Defendant might be found.

On or about May 1, 2018, members of the task force including Sgt. Deluca and Agent Bayle went to the first address which apparently was the "possible location" address listed on the A62 but the Defendant was not there. Based on information from the confidential informant, they then went to a second address at 1206 East Lake Road, Apartment 103. They were admitted to the building by the manager and a resident indicated that the Defendant was in Apartment 103. They proceeded to the apartment and knocked repeatedly on the door. The door opened with the force of the knocking and they announced their presence several times. They could hear someone in the back bedroom.

They entered the small apartment and found the Defendant in the back and only bedroom. They ordered him to the floor and he complied and they handcuffed and arrested him. In the course of the arrest they searched his person and, they discovered cocaine, crack cocaine and heroin on his person. With further observation members of the task force found additional evidence on a dresser related to the possession of drugs. The Defendant was brought to the City of Erie Bureau of Police where he was processed and initially detained.

The apartment at 1206 East Lake Road was apparently rented by Ms. Ramlal, the girlfriend of the Defendant for a couple of months, and she resided there. She allowed the Defendant to be there having let him in earlier in the morning on the day of the arrest. There was no other evidence of the Defendant having resided there. While Sgt. Deluca pointed to the fact the police booking sheet lists the apartment as his address, the record is insufficient to determine the significance of the entry. In any case there is insufficient evidence to determine that 1206 East Lake Road, Apartment 103 was the Defendant's residence and it is clear from its Brief that the Commonwealth is not pursuing that notion.[2]

The basis for the Defendant's claim is that he did not reside at the location in question and that the police made a warrantless entry into Ms. Ramlal's apartment that violated the Fourth Amendment of the United States Constitution.

II. DISCUSSION

It is evident that the police entered the home of Ms. Ramlal without prior judicial authorization. The only pre-arrest documents introduced by the Commonwealth were the administrative forms apparently used by an administrative agency or service, specifically the Board of Probation or Parole (Exhibit "C") or "JNET" (Exhibit "B") confirming the Defendant's status as a "wanted" person. No arrest or search warrant was issued by a magistrate.

[2] "Defendant claims no possessory interest in the residence. ... since the defendant has no privacy interest in the residence where he was arrested and the holdings of *Stanley* apply (sic)." Commonwealth, Brief at p. 2.

The core issues in this case with regard to suppression of evidence implicate both the rights of Ms. Ramlal as well as those of the Defendant. The Defendant was arrested and searched in Ms. Ramlal's apartment. In Pennsylvania a defendant has automatic standing to challenge the constitutionality of a search where, among other requirements, the offense charged includes, as an essential element, possession of the evidence seized at the time of the search. *Commonwealth v. Jacoby*, 170 A.3d 1065 (pa. 2017).[3]

The Commonwealth has argued that the privacy interest of the Defendant was not at issue when the police entered the residence of his girlfriend. They note that the Defendant has claimed that he did not reside there. In support of its position, the prosecution relies on *Commonwealth v. Romero*, 183 A.3d 264 (Pa. 2018) and *Commonwealth v. Stanley*, 498 A.2d 326 (Pa. 1982). Both of those cases were decided following the decisions of the United States Supreme Court in *Payton v. New York*, 445 U.S. 573 (1980) (police need an arrest warrant and reason to believe a defendant is present to enter a residence for the purpose of making a routine arrest) and *Steagald v. United States*, 451 U.S. 2004 (Pa. 1981) (police are required to have a search warrant to enter the home of a third party for the purpose of effectuating an arrest). This Court finds that the Commonwealth's reliance is misplaced.

In *Stanley*, the court denied a suppression motion in circumstances where the defendant was arrested in the residence of a third party and where the police found a revolver incident to his arrest. In October 1975, the defendant was an escapee from a hospital detention unit having been convicted of and incarcerated for murder. An arrest warrant had been issued immediately thereafter. The court affirmed on the basis that the revolver was found incident to a lawful arrest and referencing *Payton*, because the police had obtained an arrest warrant for Stanley. The majority opinion did not discuss the applicability of the then recent decision in *Steagald*. In a concurring opinion, Justice Roberts, while noting that *Steagald* required police to have a search warrant to enter the home of a third party, affirmed on the basis that having an arrest warrant was sufficient to comply with the holding in *Payton* and to protect the Fourth Amendment privacy interests of Stanley.

In *Romero*, the police were searching for an alleged parole violator and absconder from a halfway house (remarkably similar to this case) and went to a location they believed was his residence. They had a warrant for his arrest. In fact, it was the residence of a half-brother and his wife and, although they did not find the person stated on the arrest warrant at that location, they proceeded to search the residence where they discovered marijuana plants growing. The police then charged the residents of the location with various crimes. The court following a searching analysis concluded:

> "Even when seeking to execute an arrest warrant, a law enforcement entry into a home must be authorized by a warrant reflecting a magisterial determination of probable cause to search that home whether by a separate search warrant or contained within the arrest warrant itself. Absent such a warrant, an entry into a residence is excused only by a recognized exception to the search warrant requirement."

[3] The Commonwealth has not challenged the Defendant's standing to assert a constitutional violation.

Id. at 405. The court made it abundantly clear that "warrantless searches into a home to effectuate an arrest were unlawful". *Id.* at 385. Justice Wecht, writing for the majority went on to explain:

> The Fourth Amendment protects the privacy interests in all homes. To overcome that privacy interest, a warrant used to enter a home must reflect a magisterial determination of probable cause to believe that the legitimate object of a search is contained therein. The form of the warrant is significant only in that it ordinarily signifies "what the warrant authorizes the agent to do". (citations omitted) ...if an arrest warrant is based solely upon probable cause to seize an individual, then it authorizes precisely that seizure. **If entry into a residence is necessary to search for that individual, then the warrant must reflect a magisterial determination of probable cause to search that residence, regardless of whether the warrant is styled as an "arrest warrant" or a "search warrant".** (emphasis added)

Id. at 403. The court went on to find that the record before it is not adequate to make a final determination of the suppression issue because, although the government maintained it had an arrest warrant for Mr. Moreno as a parole violator, it did not enter the warrant into the record before the trial court. Therefore, it remanded the case to allow the Commonwealth to do so and for the court to determine if the language of the warrant provided authorization for the search of the property in question.

Neither decision in *Stanley* or *Romero* provides any support for the Commonwealth's position here. In both of those cases the law enforcement officers, notwithstanding the absence of search warrants, had obtained arrest warrants from a magistrate. In this case the police did not have a search warrant to enter the home of Ms. Ramlal as was required by the court in *Steagald* and as interpreted and applied by the Pennsylvania Supreme Court in *Romero*. Moreover, the police who entered her apartment on May 1, 2018, did not obtain an arrest warrant for the Defendant even though he had been declared delinquent from parole on March 7, 2018, almost two months prior.

This also is not a situation where the Commonwealth has simply neglected to move its warrant into the record of the suppression hearing. The Court noting its absence following the first hearing scheduled a second hearing expressly for the purpose of giving the Commonwealth the opportunity to introduce a warrant. It did not do so. It has, however, introduced the PBPP's form A62 and its JNET notice of a wanted person. To the degree that the Commonwealth is suggesting or implying that either of these documents constitutes an arrest warrant, a theory it has not explicitly advanced, its position would be incorrect. Neither document was issued by a neutral and detached magistrate based upon an independent assessment of probable cause as is specifically required by both the United States and Pennsylvania Constitutions, but rather by administrative agency acting in a law enforcement capacity.[4] Finally, there is nothing in this record to indicate that there was consent to search

[4] Although not directly raised here, the status of the Defendant as a parolee may affect how the general requirements of the Fourth Amendment are applied. In *Commonwealth v. Hughes*, 575 Pa. 447 (2002), the court re-affirmed that parolees have a diminished expectation of privacy and the Fourth Amendment protections for a parolee are more limited than for other citizens. *Id.* at 457. Moreover, the court noted that where a parolee has signed a parole agreement which provides, as a condition of parole, consent to the search of their residence by a parole officer, a parole officer does not ordinarily need to obtain a search warrant. *Id. See, also, Commonwealth v. Williams*, 547 Pa. 577 (pa. 1997). Nonetheless, as appears implicit in *Romero*, a person's status as a parolee is unlikely to have a bearing on the privacy interests implicated in the search and seizure of the residence of a third party as in this case.

Ms. Ramlal's apartment nor to indicate the existence of exigent circumstances such that a warrant would not be required.

III. CONCLUSION

Based upon the foregoing, it is this Court's determination that the entry into the apartment of Ms. Ramlal and the subsequent arrest and seizure of the evidence in question is in violation of the Fourth Amendment. Therefore, the motion to suppress the evidence as requested by the Defendant shall be granted and an appropriate order shall follow.

ORDER

AND NOW, this 10th day of December, 2018, upon consideration of the Defendant's Omnibus Pre-Trial Motion and argument thereon, and for the reasons set forth in this Court's Opinion of this date, it is hereby **ORDERED, ADJUDGED and DECREED** that the Defendant's Omnibus Pre-Trial Motion in the nature of a motion to suppress the evidence is **GRANTED**.

BY THE COURT
/s/ **John A. Bozza, Senior Judge**

NIAGARA VILLAGE LIMITED PARTNERSHIP, Plaintiff

v.

HDSC08, LLC AND VALERIE S. GILREATH, Defendants

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

With regard to missing transcripts when the appellant fails to conform to the requirements of Pa.R.A.P. Rule 1911, any claims that cannot be resolved in the absence of the necessary transcript or transcripts must be deemed waived for the purpose of appellate review.

CONTRACTS / STATUTE OF FRAUDS

A lease of real property for a term of more than three years must be made in writing and signed by the parties creating the lease.

CONTRACTS / STATUTE OF FRAUDS

The statute of frauds requiring a writing for rental leases longer than three years is a waivable defense.

CONTRACTS / STATUTE OF FRAUDS

It has long been established that a contract within the statute of frauds will be accorded full legal effect if those who are entitled to the protection of the statute choose to affirm the existence of the contract and recognize it as binding on them.

DAMAGES / ATTORNEY FEES

There can be no recovery of attorney's fees from an adverse party absent express statutory authority, agreement by the parties, or another established exception.

DAMAGES / ATTORNEY FEES

Parties may contract to provide for the breaching party to pay the attorney's fees of the prevailing party in a breach of contract case, but the trial court may consider whether the fees claimed to have been incurred are reasonable and may reduce the fees claimed if appropriate.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 11532 - 2016

Appearances: Angelo A. Papa, Esq. - HDSC08, LLC and Valerie S. Gilreath (Appellants)
Timothy D. McNair, Esq. - Niagara Village Limited Partnership (Appellee)

OPINION

Domitrovich, J. February 26, 2018

This matter is before the Pennsylvania Superior Court on Defendants' HDSC08, LLC and Valerie S. Gilreath (hereinafter "Appellants") appeal from this Trial Court's Order dated November 29, 2018. Although Appellants served this Trial Court with a Concise Statement of Matters Complained of on Appeal (hereinafter "Concise Statement"), which raises six (6) issues, Appellants have failed to comply with the mandates set forth in Pa.R.A.P. 1911(a) since Appellants have failed to make any necessary payment or deposit for transcription of the court proceedings in this case pursuant to Rule of Judicial Administration 4007(D) and Erie County Rule of Judicial Administration 4007(B) (Attached are Exhibits A through E). Without the availability of the critical information that transcripts provide, this Trial Court's

ability to draft a thorough and accurate Opinion, and the Superior Court's ability to review this instant appeal, are severely hampered.

This Opinion addresses the issue of whether Appellants' Errors Complained of on Appeal requiring transcripts of the court proceedings in this case should be deemed waived for failure to make any necessary payment or deposit for said transcripts. Nevertheless, this Trial Court will also attempt to address two of the issues Appellants raised on appeal notwithstanding the absence of these transcripts: (1) whether Appellants are precluded from raising the issue concerning the validity of the Facility Lease since Appellants unqualifiedly admitted Appellants entered into the Facility Lease in their pleadings; and (2) whether the award of attorney's fees is justified pursuant to the Facility Lease and reasonable under the circumstances.

This Trial Court hereby provides the following factual and procedural background: Appellee filed a Civil Complaint in the Erie County Court of Common Pleas on June 7, 2016. Thereafter, on July 22, 2016, Appellee served a ten-day Default Notice upon Appellant Valerie S. Gilreath. Appellants filed Preliminary Objections on August 4, 2016. Appellee filed Preliminary Objections to Appellants' Preliminary Objections and a Brief in Support on August 15, 2016. Prior to the hearing on both parties' Preliminary Objections, both counsel agreed to withdraw their respective Preliminary Objections, and this Trial Court issued an Order on September 27, 2016 cancelling the hearing on the Preliminary Objections. Appellant Gilreath filed her Answer to Appellee's Complaint on September 22, 2016.

Appellee filed a Praecipe for Reference to Arbitrators on October 13, 2016. Matthew W. McCullough, Esq.; Christopher J. Sinnott, Esq.; and Jessica A. Fiscus, Esq., were chosen as Arbitrators on October 25, 2016. An Arbitration Hearing was scheduled for January 12, 2017. At the conclusion of the Arbitration Hearing, the Arbitrators found in favor of Appellee and against Appellants in the total amount of $42,291.70.

Appellant Gilreath filed a Notice of Appeal from Award of Arbitrators on February 10, 2017. Appellee filed a Pre-trial Narrative Statement on April 4, 2017 and filed a Certification II on June 23, 2017. Appellants filed a Certification on June 26, 2017. Appellants filed their Pre-trial Narrative Statement on June 26, 2017. A Status Conference was held on July 19, 2017. Following said Status Conference, this Trial Court (1) scheduled the instant civil action for jury trial on September 15, 2017; (2) set a date for a second Status Conference on August 8, 2017; and (3) directed both counsel to provide proposed *Voir Dire* questions, Jury Instructions, and Verdict Slips on or before September 5, 2017.

A Civil Jury Trial was held on September 15, 2017, following which the jury entered judgment in favor of Appellee in the amount of $30,684.57.

On September 22, 2017, Appellee filed its Motion for Post-Trial Relief wherein Appellee requested relief in the form of additur and attorney's fees. On the same date, Appellants filed their Motion for Reconsideration and/or Post-Trial Relief Rule 227.1. By Order dated September 25, 2017, this Trial Court scheduled a Rule to Show Cause for September 29, 2017. After this Trial Court heard oral argument by counsel at the September 29, 2017 hearing, this Trial Court directed the parties, by Order dated September 29, 2017, to submit Memoranda of Law on the relevant issues presented in said post-trial motions within fifteen days from the date of said Order.

Appellants submitted their Memorandum of Law on October 13, 2017, and Appellee filed its Memorandum of Law on October 16, 2017. Appellants thereafter filed their Motion to Strike on October 19, 2017, wherein Appellants requested this Trial Court to

strike the Memorandum of Law filed by Appellee, alleging Appellee's Memorandum of Law was purposely filed untimely as to make Appellee's Memorandum of Law a response to Appellants' Memorandum of Law. This Trial Court, by Order dated October 19, 2017, scheduled a Rule to Show Cause for November 29, 2017, on the Post-Trial Motions, the Memoranda of Law submitted by both counsel, and Appellants' Motion to Strike.

On November 29, 2017, after the scheduled hearing on Appellants' Motion to Strike and Appellee's Motion for Post-Trial Relief, by Order dated November 29, 2018, this Trial Court: (1) granted Appellee's Motion for Post-Trial Relief to the extent that this Trial Court awarded reasonable attorney's fees in the amount of $8,124.44, but denied the remainder of Appellee's Motion for Post-Trial Relief; (2) denied Appellants' Motion for Reconsideration and/or Post-Trial Relief Rule 227.1 and Motion to Strike; and (3) directed the Erie County Prothonotary's Office to enter judgment in favor of Appellee and against Appellants in the total amount of $38,809.01. Appellants appealed this Order dated November 29, 2017.

Appellants filed the instant Notice of Appeal to Superior Court on December 27, 2017. This Trial Court filed its 1925(b) Order on January 3, 2018 in which it directed Appellants to file their Concise Statement within twenty-one days of the date of said Order. Appellants served this Trial Court with a Concise Statement on January 22, 2018 and filed said Statement on January 24, 2018. The issues Appellants raised in their Concise Statement are difficult to decipher, and written transcripts are necessary to fully address these issues; nevertheless, this Trial Court has determined that two of the Errors Complained of by Appellants may be addressed upon review of the case record. However, the written transcripts are necessary for the remaining issues raised in Appellants' Concise Statement that reference testimony elicited during the jury trial, indicate evidentiary determinations this Trial Court made during trial, and discuss the evidence upon which the jury based Appellee's damage award. (*See* Appellants' Concise Statement at ¶ 1-5). As of the date of this Opinion, Appellants have failed to make any necessary payment or deposit as required under Pa.R.A.P. 1911(a), Rule of Judicial Administration 4007(D), and Erie County Rule of Judicial Administration 4007(B) (*See* Email from Court Reporter Samantha Reed and Three Letters from Chief Court Reporter Sylvia M. Waid to Judge Domitrovich, dated Feb. 1, 2018; Feb. 15, 2018; and Feb. 26, 2018 (Attached as Exhibits A through E)). Indeed, this Trial Court patiently waited for Appellants to make any necessary payment or deposit to the Court Reporter and monitored whether Appellants made such payment or deposit until the due date of this 1925(a) Opinion on February 26, 2018.

Although Appellants requested the trial transcripts, Appellants have failed to make any payment or deposit for the transcription of any of the court proceedings in this case pursuant to Pa.R.A.P. 1911(a), Rule of Judicial Administration 4007(D), and Erie County Rule of Judicial Administration 4007(B). Therefore, Appellants have waived any and all issues that require a transcript of said court proceedings. Under Pa.R.A.P. 1911(a), the appellant has the duty to order any and all transcripts required for review and to make any necessary deposit or payment for said transcripts:

> (a) *General rule.* The appellant shall request any transcript required under this chapter in the manner and make any necessary payment or deposit therefor in the amount and within the time prescribed by Rules 4001 *et seq.* of the Pennsylvania Rules of Judicial Administration.

...

(d) *Effect of failure to comply.* If the appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal.

Pa.R.A.P. 1911(a) and (b). The Superior Court of Pennsylvania has stated: "With regard to missing transcripts, . . . [w]hen the appellant . . . fails to conform to the requirements of Rule 1911, any claims that cannot be resolved in the absence of the necessary transcript or transcripts must be deemed waived for the purpose of appellate review." *Commonwealth v. Houck*, 102 A.3d 443,456 (Pa.Super.2014) (citing *Commonwealth v. Preston*, 904 A.2d 1, 7 (Pa.Super.2006) ("It is not proper for either the Pennsylvania Supreme Court or the Superior Court to order transcripts nor is it the responsibility of the appellate courts to obtain the necessary transcripts."); see e.g. *Stumpf v. Nye*, 950 A.2d 1032, 1041 (Pa.Super.2008) (finding that appellant's issue was waived where appellant failed to provide the Superior Court with a transcript of the relevant proceeding).

In this case, in the absence of transcripts of the court proceedings, this Trial Court must rely upon its own personal notes of said court proceedings in this matter. Accordingly, since this Trial Court is without complete transcripts of the record to review, this Trial Court finds Appellants have waived all issues raised in this instant appeal that require said transcripts of the court proceedings.

Notwithstanding the absence of these transcripts of the court proceedings in this case, this Trial Court will attempt to provide the following analysis with respect to the remaining Errors Complained of on Appeal regarding only two issues: (1) whether Appellants are precluded from raising the issue concerning the validity of the Facility Lease since Appellants unqualifiedly admitted Appellants entered into the Facility Lease in their pleadings; and (2) whether the award of attorney's fees is justified pursuant to the Facility Lease and reasonable under the circumstances.

Appellants allege this Trial Court erred "in not finding that the purported lease was never signed and never contractually accepted by [Appellee] . . ." since Appellee did not affix a signature to the Facility Lease executed by the parties. (*See* Appellants' Concise Statement at ¶ 2). Under Pennsylvania law, a lease of real property for a term of more than three years must be made in writing and signed by the parties creating the lease. 68 Pa.S. § 250.202. However, this statute of frauds requiring a writing for rental leases longer than three years is a waivable defense. *Blumer v. Dorfman*, 289 A.2d 463, 468 (Pa. 1972). Thus, this statute will not bar recovery if the defendant fails to raise the defense in his pleadings **or admits to the existence of a contract in pleadings or testimony**. *Target Sportswear, Inc. v. Clearfield Found.*, 474 A.2d 1142, 1150 (Pa.Super.1984). Indeed, "[i]t has long been established that a contract within the statute of frauds will be accorded full legal effect if those who are entitled to the protection of the statute choose to affirm the existence of the contract and recognize it as binding on them." *Sferra v. Urling*, 195 A. 422,425 (Pa. 1937).

In the instant case, Appellee's Complaint alleged that "[o]n or about July 12, 2011, Plaintiff and Defendant HDSC08, LLC entered into a facility lease, a copy of which is attached

hereto as Exhibit 'A.'" (Appellee's Complaint at ¶ 4). Appellants in response did not raise the affirmative defense of statute of frauds found in 68 Pa.S. § 250.202 in either its Answer to Complaint or Preliminary Objections as required under Pa.R.C.P. 1030(a) and 1032(a). On the contrary, Appellants' Answer to Complaint expressly "ADMITTED" the allegation set forth in the fourth paragraph of Appellee's Complaint averring Appellants and Appellee entered into a valid and binding lease agreement. (Appellants' Answer to Complaint at ¶ 4). Therefore, Appellants have waived any issues relating to the validity of the Facility Lease.

Appellants also raise the issue of whether this Trial Court erred in awarding Appellee attorney's fees. (*See* Appellants' Concise Statement at ¶ 6). The law in Pennsylvania is well established in that Pennsylvania follows the American rule, which states there can be no recovery of attorney's fees from an adverse party absent express statutory authority, agreement by the parties, or another established exception. *Merlino v. Delaware Cty.*, 728 A.2d 949, 951 (Pa. 1999). Thus, parties may contract to provide for the breaching party to pay the attorney's fees of the prevailing party in a breach of contract case, but the trial court may consider whether the fees claimed to have been incurred are reasonable and may reduce the fees claimed if appropriate. *McMullen v. Kutz*, 985 A.2d 769, 776-77 (Pa. 2009). The Pennsylvania Supreme Court has set forth the "facts and factors to be taken into consideration in determining the fee or compensation" of an attorney:

> [T]he amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was 'created' by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.

In re LaRocca's Tr. Estate, 246 A.2d 337, 339 (Pa. 1968). Finally, the reasonableness of the fee is a matter for the sound discretion of the trial court. *Id*.

In this instant matter, the Facility Lease, which Appellants expressly admitted they entered into with Appellee as noted above, states the following in the "Event of Default":

> Landlord shall be entitled to recover from the Tenant all expenses incurred in connection with such default, including repossession costs, ***reasonable attorneys' fees***; and all reasonable expenses incurred in connection with efforts to relet the leased Premises, including cleaning, altering, advertising and brokerage commissions; and all such expenses shall be reimbursed by Tenant as Additional Rent ...

(Facility Lease at Section 18) (emphasis added). On September 22, 2017, Appellee, by and through counsel, Timothy D. McNair, Esq., filed its Motion for Post-Trial Relief wherein Appellee requested this Trial Court award Attorney McNair $8,124.44 in reasonable attorney's fees pursuant to Section 18 of the Facility Lease. Specifically, Appellee averred Attorney McNair expended 35.1 hours of attorney time and $226.94 in additional expenses litigating the case. Appellee also submitted to this Trial Court a time log of the hours expended

litigating this present action. A Rule to Show Cause dated September 25, 2017 was scheduled for hearing and argument before the undersigned Judge to take place on November 29, 2017. Although the post-trial hearing and argument were held on November 29, 2017, Appellants have not requested these transcripts of said hearing and argument and also did not make any necessary payment or deposit for said transcripts. By Order dated November 29, 2017, this Trial Court granted in part and denied in part Appellee's Motion for Post-Trial Relief. Specifically, this Trial Court awarded reasonable attorney's fees to Appellee in the amount of $8,124.44, but denied Appellee's request for additur to be added to the sum of the jury's verdict in the amount of $16,448.50 for the buildout expenses allegedly necessitated by Appellants' premature vacation of the premises.

This Trial Court provides the following in support of the reasonableness of the attorney's fee award to Appellee: Attorney McNair expended 35.1 hours working on this case (and this Trial Court notes Attorney McNair submitted an itemization which omitted charges that were either not contemporaneously documented or removed in the exercise of billing discretion), Attorney McNair has thirty-five years of experience as a practicing attorney, and the hourly rate of $225.00, which Attorney McNair ordinarily charges to clients in non-complex matters, is based on the fair market in the Erie County region for attorneys with similar education and experience. Although this Trial Court and the Superior Court do not have the benefit of any transcripts of said post-trial hearing, this Trial Court's review of the record even without said transcripts adequately demonstrates this Trial Court properly awarded Attorney McNair attorney's fees that were justified pursuant to the Facility Lease and are reasonable under the relevant case law as to the "facts and factors" for determining the fee or compensation of Attorney McNair. *See In re LaRocca's Tr. Estate*, 246 A.2d at 339.

Accordingly, for all of the reasons as set forth above, this Trial Court requests the Honorable Pennsylvania Superior Court to dismiss this instant appeal and respectfully requests the Pennsylvania Superior Court affirm its Order dated November 29, 2017.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

NIAGARA VILLAGE LIMITED PARTNERSHIP, Plaintiff

v.

HDSC08, LLC AND VALERIE S. GILREATH, Defendants

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

A party waived all defenses and objection which are not presented either by preliminary objection, answer or reply.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

Defenses that need not be pled are the affirmative defenses of assumption of the risk, comparative negligence and contributory negligence.

EVIDENCE / HEARSAY

Hearsay is not admissible except as provided by the rules of Evidence, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

EVIDENCE / HEARSAY / EXCEPTIONS (RULES 803-804)

Two exceptions to the rule against hearsay are business records and records of a regularly conducted activity

EVIDENCE / HEARSAY / EXCEPTIONS (RULES 803-804)

Whether a document should be admitted under the 'business record' exception is within the discretionary power of the trial court provided such is exercised within the bounds of the Uniform Act.

DAMAGES/ QUESTIONS FOR JURY

Assessment of damages is within the province of the jury who, as finders of fact, weigh the veracity and credibility of the witnesses and their testimony.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 11532 - 2016
22 WDA 2018

Appearances: Angelo A. Papa, Esq., for Appellants HDSC08, LLC and Valerie S. Gilreath
Timothy D. McNair, Esq., for Appellee Niagara Village Limited Partnership

SUPPLEMENTAL OPINION

Domitrovich, J. December 27, 2018

This Supplemental Opinion is in response to the Pennsylvania Superior Court's Order dated November 9, 2018, wherein the Pennsylvania Superior Court remanded jurisdiction of the instant civil case to this Trial Court in the Erie County Court of Common Pleas for the issuance of a supplemental opinion addressing the issues this Trial Court found to be waived due to the Appellants' failure to pay for the trial transcripts before this Trial Court filed its 1925(a) Opinion dated February 26, 2018. This Trial Court incorporates by reference its Opinion dated February 26, 2018.

On January 24, 2018, Appellants filed and served this Trial Court with "Concise Statement of Errors Complained of on Appeal," which raised six (6) issues. Due to Appellants failure to make the necessary payments or deposits for transcription of the court proceedings in

this case set forth in Pa.R.A.P. 1911 (a), Rule of Judicial Administration 4007(D), and Erie County Rule of Judicial Administration 4007(B), this Trial Court was only able to address two (2) of Appellants' six (6) issues in this Trial Court's 1925(a) Opinion dated February 26, 2018. Appellants' four (4) remaining issues are: (1) "The Court erred, in finding that the Defendants were not forced out of the purported leasehold, that they were not justified, and that they were not constructively evicted. The Plaintiff readily admitted that he didn't want 'these kind of people' around (substance abuse impaired patients of the Defendants) and that he forced the Defendants out early for discriminatory reasons"; (2) whether this Trial Court "egregiously erred in permitting hearsay evidence concerning over $23,000.00 in renovation and repair expenditures of the Plaintiffs, which were improperly permitted to be added to damages, without giving the Defendants the opportunity to cross-examine to [sic] party presenting the bill, the contractors"; and (3) "The Court errored [sic] in finding that over $22,500 of the verdict arose from an allegation that these 'build-out' sums were reasonable, due and owing because of the contract, and validly necessary, such that these damages could be assigned to the Defendants, and by derivative, to the defendant, Dr. Valerie Gilreath, when they were not reasonable sums and not due and owing"; and (4) "Even if the Plaintiff was owed any funds, which Defendants vehemently dispute, the Court errored [sic] in the amount awarded to Plaintiff for allegedly unpaid rent as the amount was factually incorrect." This Trial Court provides the following analysis:

Appellants' first issue concerns whether Appellants waived defenses of being "forced out of the purported leasehold," justification, and constructive eviction, which were not pled. Under Pennsylvania Rule of Civil Procedure Rule 1032(a):

> A party ***waives all defenses*** and objections ***which are not presented either by preliminary objection, answer or reply,*** except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim, the defenses of failure to exercise or exhaust a statutory remedy and an adequate remedy at law and any other nonwaivable defense or objection.

Pa.R.Civ.P. 1032(a)(emphasis added). Defenses that need not be pled are "the affirmative defenses of assumption of the risk, comparative negligence and contributory negligence." Pa.R.Civ.P. 1030(b).

In the instant case, on the morning of the jury trial, this Trial Court reviewed with both counsel the proposed jury instructions. Appellee's counsel raised objections to Appellants' proposed jury instructions as this was the first time Appellants raised the issues of justification and constructive eviction, as demonstrated henceforth:

> **MR. MCNAIR:** In reviewing the proposed jury instructions submitted by the Defendant, they have an instruction on justification. That's not a defense that was pleaded. That is not the answer that was pleaded. It does not set forth any facts that would support that defense. It's not an issue that we've had notice of and we would ask that you rule in limine that the Defendant be precluded from offering any evidence or arguing to the jury that Dr. Gilreath was justified in terminated the lease.

THE COURT: And it was never pled?

MR. MCNAIR: Never pled. There's no facts that would support it that have been pled.

THE COURT: Very well. Counsel?

MR. PAPA: Yes, your Honor. My response is, and I would ask the Court to take judicial notice of the nine-paragraph complaint that basically we answered sufficiently and would not - we would not need to do that. I was trying to help the Court with a joint jury instruction anticipating where he was going and anticipating that we could have that defense afterwards, Your Honor, as a rebuttal. And I don't think - he's putting the cart before the horse right now on that issue because he hasn't even presented his case.

THE COURT: But you have not pled it, counsel.

MR. PAPA: ***I certainly have not pled it***, I was under no obligation to plead it when you look at their nine-paragraph complaint. Paragraph 6 basically gets to the substance, on or about June 14 in breach of then provision of the lease, Defendant abandoned their occupancy.

(Notes of Testimony, Jury Trial- A.M. Session, September 15, 2017, at pg. 2:19-3:25 ("N.T.1")) (emphasis added). Appellee's counsel then addressed the issue of constructive eviction being raised for the first time by Appellants:

MR. MCNAIR: I did have one other item, Your Honor. The proposed jury instructions make reference to the defense of constructive eviction. Again, no facts have ever been pleaded that would support that defense and it would simply confuse the jury to even talk about it. So, I would ask that in limine you rule that the Defendant shall not be permitted to discuss or argue that he was constructively evicted.

MR. PAPA: Your Honor, we haven't got to argument yet and I'll gladly have him revisit this issue, but I think that's something that should come up later depending on what their case is. I only submitted those proposed jury instruction thinking he would agree with them and we can argue over what jury instruction should say or not say or whatever I'm going to raise at the time. I certainly won't do it in front of the jury to hurt the trial I think that would be in advance and premature, his request, at this time.

MR. MCNAIR: Well, Your Honor, my motion is not directed to jury instruction, it's directed to what appears to be an attempt to ambush the Plaintiff with some convoluted and unsupported argument of constructive eviction.

MR. PAPA: I recognize that it's unsupported at this time. I withdraw my request for jury instruction and will resubmit them again later, after the evidence is done and we can see where we're at.

MR. MCNAIR: And again, I'm not talking about jury instruction, I'm talking about trying to put evidence in front of the jury or argue constructive eviction, which is a fairly complicated topic and it hasn't been raised by the pleadings and has not been explored by the parties in discovery or at the prior hearing in this case.

THE COURT: Never raised, counsel, nothing in here. You are forbidden to talk about constructive eviction. You have not raised it in your pleadings, none of your pleadings have given him advance notice, so it's not allowed.

(N.T.1 at 18:14-20:5). As illustrated above, Appellants' counsel admitted on the record he did not plead the issues of justification and constructive eviction. Further, as to the issue of whether Appellants were forced out of the leasehold, after review of Appellants' Preliminary Objections, Answer, Pre-Trial Narrative, and even the transcript of the Status Conference on July 19, 2017, Appellants' counsel never raised this issue prior to the morning of the jury trial. Because Appellants failed to raise properly the issues of being forced out of the leasehold, justification and constructive eviction, this Trial Court properly ruled on these issues as being waived by the Appellants as per the Pennsylvania Rules of Civil Procedure Rule 1030.

Appellants' second issue concerns whether this Trial Court erred in permitting the introduction of evidence of a business record sent to Appellants' counsel, showing the amount owed to Appellee, from Appellee's property manager as a part of his regularly conducted activities. "Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. Two such exceptions to the rule against hearsay are business records and records of a regularly conducted activity. *See* 42 Pa.C.S.A. § 6108; Pa.R.E. 803(6).

When determining whether evidence presented to a court is considered a business record, the Uniform Business Records as Evidence Act provides:

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

42 Pa.C.S.A. § 6108(b). "Whether a document should be admitted under the 'business record' exception is within the discretionary power of the trial court provided such is exercised within the bounds of the Uniform Act." *Thomas v. Allegheny & E. Coal Co.*, 455 A.2d 637, 640 (1982). The requirements for Records of a Regularly Conducted Activity are similar to the rule regarding the Uniform Business Records as Evidence:

(6) Records of a Regularly Conducted Activity. A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if:

(A) the record was made at or near the time by-or from information transmitted by-someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Pa.R.E. 803(6).

In the instant case, Appellants objected to Appellee's "Exhibit B" (Attached hereto as "Exhibit B"). Appellee's "Exhibit B" is a demand email sent to an attorney representing Appellants in January 2015, containing an itemized list and amounts Appellants owed to Appellee as a result of the breach of the lease along with documentation. The email in "Exhibit B" was sent by Mr. Randy Rydzewski, Associate Broker, Manager, Howard Hanna Commercial, on January 5, 2015. Mr. Rydzewski, who was Appellee's sole witness at the jury trial, indicated:

THE WITNESS: I wrote to -

THE COURT: Okay.

THE WITNESS: - Dr. Gilreath and sent the same letter to his home address in Arizona and his office address in Arizona as well.

BY MR. MCNAIR:

Q. Did you receive any response to that?

A. Response came from another attorney, Joel Snavely, in Erie that he is now representing Dr. Gilreath and all future correspondence should flow to doctor - or excuse me, to Attorney Snavely.

MR. PAPA: Your Honor, I would ask for an offer of proof.

MR. MCNAIR: Your Honor, this is a tabulation of the balance of - that was due on the lease as of January 5, 2015. It was transmitted to doctor to the defendant's legal representative, Joel Snavely, with supporting documentation.

THE COURT: Very well.

(Notes of Testimony, Jury Trial- p.m. session, September 15, 2017, at pg., 45:8-46: 1 ("N.T.2")).

After this testimony and an objection by Appellants' counsel, this Trial Court made the following determination:

> **THE COURT:** Yes, they're receipts and they show, yes, and he's offering them under oath and they're admitted. Okay, go ahead.

(N.T.2 at 46:21-23). Here, Exhibit B was admitted as evidence because the creator and custodian of this document was the witness, Randy Rydzewski, manager of the property, who stated the identity and mode of Exhibit B's preparation, and that Exhibit B was made near the time of the condition of having the property remodeled. The document was created in an attempt to collect unpaid expenses from the Appellants' breach of the lease in the course of regularly conducted activity of managing this property; the document was created only a few weeks after the remodeling work was completed; and after being advised from Appellant's attorney at the time that all communication should flow through the attorney. Finally, the sources of information as well as the method and time of preparation were such as to justify Exhibit B's admission. Therefore, Exhibit B was properly admitted into evidence by this Trial Court.

This Trial Court will jointly address Appellant's third and fourth issues as both ultimately involve jury questions. It is the province of the jury to weigh evidence and decide damages. "Assessment of damages is within the province of the jury who, as finders of fact, weigh the veracity and credibility of the witnesses and their testimony." *McManamon v. Washko*, 906 A.2d 1259, 1280 (Pa. Super. 2006) (citing *Dranzo v. Winterhalter*, 577 A.2d 1349 (Pa. Super. 1990))

When reviewing an award of damages, we are mindful that:

> The determination of damages is a factual question to be decided by the fact-finder. The fact-finder must assess the testimony, by weighing the evidence and determining its credibility, and by accepting or rejecting the estimates of the damages given by the witnesses.
>
> Although the fact-finder may not render a verdict based on sheer conjecture or guesswork, it may use a measure of speculation in estimating damages. The fact-finder may make a just and reasonable estimate of the damage based on relevant data, and in such circumstances may act on probable, inferential, as well as direct and positive proof.

J.J. DeLuca Co. v. Toll Naval Assocs., 56 A.3d 402, 417-18 (Pa. Super. 2012) (citing *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 503, 514 (Pa. Super. 2007)). "[T]he jury's verdict may be set aside if it is the product of passion, prejudice, partiality, or corruption, or if it is clear the verdict bears no reasonable relationship to the loss suffered by the plaintiff based on the uncontroverted evidence presented." *Carroll v. Avallone*, 939 A.2d 872, 874 (2007) (citing *Kiser v. Schulte*, 648 A.2d 1 (1994)).

Appellants are appealing from an award by a jury. Appellants raised the issue during trial as to whether the "build-out" fees were reasonable; in fact Appellants' counsel acknowledged that reasonableness is a question for the jury.

MR. PAPA: To protect the record, I would orally move that all defendants owe nothing. I would direct that certainly Dr. Gilreath owes nothing. Third, my argument is that nobody owes at the very least 6500, and I think 16,000 at the constantly accruing interest, and I wanted to preserve the record that I made that motion before I put my case on.

THE COURT: Very well.

MR. MCNAIR: Your Honor, I believe that those are all provided for in the lease and that we've proved the lease and we've proved the breach and we've proved our entire damages. I would move that you direct a verdict in favor of the plaintiff. Or maybe that's a little aggressive. I would ask that you deny the plaintiff's motion - or the defendant's motion.

THE COURT: Thank you.

MR. PAPA: I understand the reasonableness is a jury question.

THE COURT: Yes, and it's denied, but you protected the record. Are you going to give your opening statement like you said?

(N.T.2 at 119:13-120:10).

First, it should be noted this Trial Court is neither the finder of fact nor does it determine damages at a jury trial. The jury heard the testimony and made its decision, and no evidence was presented by Appellants that the jury award was a product of passion, prejudice, partiality, or corruption. Furthermore, the jury awarded Appellee $30,684.57; however, the Appellee presented evidence demonstrating that it could seek damages as high as nearly $70,000, but rather was seeking the maximum amount of damages of $46,000. (N.T.2 at 178:23). This demonstrates the award has a reasonable basis in loss to the Appellee based upon the evidence heard by the jury and therefore the award should not be disturbed.

Accordingly, for all of the reasons set forth above and in this Trial Court's original 1925(a) Opinion dated February 26, 2018, which is incorporated by reference, this Trial Court requests the Honorable Pennsylvania Superior Court to dismiss this instant appeal and respectfully requests the Pennsylvania Superior Court affirm the jury award and this Trial Court.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

CHRISTOPHER LECLAIR

STATUTES / CONSTRUCTION

Legislative intent controls when interpreting a statute. When the meaning of a statute is clear, it must be given effect in accordance with its plain and common meaning.

STATUTES / AMENDMENT

No statute shall be construed to be retroactive unless *clearly and manifestly* intended by the General Assembly. Portions of an amended statute not altered by the amendment shall be construed as effective from the time of the original enactment, while new provisions shall be construed as effective only from the date when the amendment became effective.

STATUTES / CONSTRUCTION

A federal agency, such as the United States Coast Guard, that has suffered injury as a direct result of a crime is a "victim" under the plain language of 18 Pa. C.S.A. § 1106 (effective January 31, 2005 to October 23, 2018), and the agency is entitled to restitution for those damages which would not have occurred "but for" defendant's criminal conduct.

STATUTES / CONSTRUCTION

It is appropriate and equitable to utilize both the Administrative Code and the Crime Victims Act definitions of "victim" to fairly encompass the class entitled to restitution.

STATUTES / CONSTRUCTION

Section 479.1 of the Administrative Code of 1929 (71 P.S. § 180-9.1, *now repealed*) defined "victim" as "a person against whom a crime is being or has been perpetrated or attempted." The Statutory Construction Act (1 Pa. C.S.A. § 1991) defines "person" as "a corporation, partnership, limited liability company, business trust, other association, *government entity (other than the Commonwealth)*, estate, trust, foundation or natural person."

CRIMINAL PROCEDURE / SENTENCING / RESTITUTION

The purpose of restitution is two-fold: to compensate a victim and to rehabilitate a defendant by instilling that it is his responsibility to compensate the victim.

CRIMINAL PROCEDURE / SENTENCING / RESTITUTION

Pursuant to 18 Pa. C.S.A. § 1106 (effective January 31, 2005 to October 23, 2018), upon conviction wherein a victim suffers injury directly resulting from the crime, a court shall order full restitution, regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss.

CRIMINAL PROCEDURE / SENTENCING / RESTITUTION

When restitution is ordered as a direct sentence, the injury to property or person for which the restitution is ordered must result directly from the crime. The amount of restitution must be supported by the record and must not be speculative or arbitrarily excessive.

CRIMINAL PROCEDURE / SENTENCING / RESTITUTION

Damages which occur as a direct result of the crime are those which would not have occurred "but for" the defendant's criminal conduct.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
DOCKET NO. 2693-2017

Appearances: Elizabeth Hirz, Esquire and Paul Sellers, Esquire on behalf of the Commonwealth
Bruce Sandmeyer, Esquire on behalf of Christopher LeClair

MEMORANDUM OPINION AND ORDER

Trucilla, P.J. February 12, 2019

This matter comes before the Court on Defendant's Post Sentence Motion as it pertains exclusively to the issue of restitution. Following a separate hearing on the issue and after reviewing the parties' post-hearing memoranda of law and supplemental exhibits, the Court finds the following:

I. ISSUE:

WHETHER $705,974.80 IN RESTITUTION SHOULD BE AWARDED TO THE UNITED STATES COAST GUARD IN RECOMPENSE FOR ITS SEARCH AND RESCUE OPERATION RESULTING FROM DEFENDANT'S FALSE REPORT THAT HIS WIFE HAD FALLEN OVERBOARD INTO LAKE ERIE?

II. FACTS:

On October 12, 2018, following a five day jury trial, Christopher LeClair (hereinafter "Defendant") was convicted of First Degree Murder, Abuse of a Corpse, Tampering With Evidence, Possessing Instruments of a Crime, Firearms not to be Carried Without a License, and False Reports to Law Enforcement Authorities.[1] The jury found Defendant guilty of shooting his wife, Karen LeClair, in the head while aboard his commercial fishing boat, the "Doris M" on Lake Erie. He wrapped her body in fishing net, tied her body to an anchor, and pushed her body overboard. On June 11, 2017, Defendant falsely reported to the United States Coast Guard (hereinafter "USCG") that his wife fell overboard.

On December 11, 2018, this Court sentenced Defendant to a mandatory life sentence without the possibility of parole on the murder conviction and separate consecutive terms of imprisonment on the remaining counts. Germane to the issue *sub judice* is the sentence imposed at count 7 of the Information. Specifically, count 7 is False Reports to Law Enforcement Authorities. 18 Pa. C.S.A. §4906(b)(1). At sentencing, Defendant was sentenced to pay lab fees and costs to the County of Erie and Pennsylvania State Police, and restitution in the amount of $710,418.26. (Sentencing Order of 12/11/18). In the sentencing address, the Court incorporated the Presentence Investigative Report as well as the exhibits submitted by the Commonwealth supporting its request for the imposition of costs and restitution. The court found that Defendant's false report of his wife falling overboard caused the response by the USCG. Having satisfied this "but for" test, discussed *infra*, Defendant was deemed

[1] 18 P.S. §2501(a); 18 P.S. §5510; 18 P.S.§4910(1); 18 P.S. §907(a); 18 P.S. §6106(a)(1); 18 P.S. §4906(b)(1), respectively.

responsible for the restitution payable to the USCG in the amount of $705,974.80. This specific amount was premised on the itemized costs set forth by the Commonwealth in Courtroom Exhibit 2 at the time of sentencing and Exhibit 1 attached to the Commonwealth's Memorandum Of Law In Response To Defendant's Post Sentence Motion. (See attached)

On January 9, 2019, this Court amended the Sentencing Order and directed Defendant to pay $1,952.00 to the Pennsylvania State Police as costs, pursuant to Pa.R.Crim.P. §706, 42 Pa.C.S.A. §9721(c), and 42 Pa.C.S.A. §303.14. The Court continued, and awarded restitution to the Crime Victims Compensation Board in the amount of $4,443.46, pursuant to Pa.R.Crim.P. §1106(c)(1)(ii)(B) and §1106(h). The remaining issue, and the one now before the Court, is whether it was lawful to award the USCG $705,974.80 in restitution for the expenses it incurred as a result of Defendant's false report. Defense counsel conceded that the costs awarded by the Court to the Pennsylvania State Police and the restitution for funeral expenses as paid by the Crime Victims Fund were appropriate and therefore were not challenged. Subsequently, because of the complexity of this issue, the Court conducted another hearing on restitution on January 9, 2019. Following legal arguments by counsel, the Court gave the parties until January 23, 2019 to supply further legal authority for their respective positions.

The Commonwealth submitted a memorandum dated July 27, 2017 from J.A. Erickson, LT, CG Sector Buffalo, of the USCG. This document contained the estimated "Costs of Search and Rescue Efforts for Karen LeClair on June 11, 2017 - June 12, 2017." *See*, Commonwealth Post Sentence Motion Hearing Exhibit "2". The list includes unspecified costs for operating several airplanes (presumably) multiplied by the number of hours the planes were used. The list also includes the costs of certain officers and "units" times the number of hours these officers and units were engaged in the search (presumably). What the report does not make clear is whether these manpower hours and plane operation hours/expenses would have been incurred regardless of the search operation (as daily costs of operation) or whether, "but for" Defendant's false claim, these hours/expenses would not have been incurred. This matter will be addressed, *infra*.

The Commonwealth's Memorandum of Law in Response to Defendant's Post Sentence Motion argues that the USCG, as a non-Commonwealth government agency, is entitled to restitution as a direct "victim" as defined by the Administrative Code, 71 P.S. §180-9.1, and the Statutory Construction Act definition of "person," 1 Pa.C.S.A.§1991. The Commonwealth submitted additional documentation in support of the USCG's expenses. *See* Response to Post Sentence Motion Exhibit "1". This exhibit is a list of "Reimbursable Standard Rates" which appears to be taken from a USCG Manual ("Commandant Instruction 7310.1R") and includes "inside and outside" rates for "Cutters, Boats, and Aircraft," and "Personnel," as well as "Canine Teams," and "Dive Teams." The tables provided therein are not specific to this case, but appear to be in support of Commonwealth Post Sentence Hearing, Exhibit "1," referenced above. Again, the issue of whether these stated expenses are reimbursable is to be determined.

On January 25, 2019, the Defendant filed a Memorandum of Law in support of his Post Sentence Motion. Defendant argues that the USCG cannot be defined as a "victim" pursuant to the ruling in *Commonwealth v. Veon*, 150 A. 3d 435 (Pa. 2016) (a Commonwealth agency, although directly impacted by Defendant's criminal fraud, is not considered a "victim" under

18 Pa.C.S.A §1106, the restitution statute). The Commonwealth counters that Defendant's reliance on *Veon* is misplaced because the issue in *Veon* pertained only to whether a Commonwealth agency was a victim under the facts of that case. The Commonwealth argues that because the USCG is not a Commonwealth agency, it is not excluded as a victim, and, therefore, *Veon* is distinguishable and limited to its facts. The question of whether restitution was properly ordered to be paid to the USCG as a "victim" of Defendant's false report will now be discussed.

III. DISCUSSION

The statutory authority for restitution in sentencing appears in both the Crimes Code, 18 Pa.C.S.A. §1106, and the Sentencing Code, 42 Pa.C.S.A. §9721(c). The Sentencing Code compels a sentencing court to award mandatory restitution, ordering the defendant "to compensate the victim of his criminal conduct for the damage or injury that he has sustained." 42 Pa.C.S.A. §9721(c). The Crimes Code also requires that mandatory restitution be ordered "so as to provide the victim with the fullest compensation for the loss." 18 Pa.C.S.A. §1106(c)(i). Of particular application in this case, restitution is to be ordered "regardless of the current financial resources of the defendant." 18 Pa.C.S.A. §1106(c)(1)(i). Consequently, despite the fact that Defendant is serving a life sentence, this is not a bar to Defendant's responsibility to pay his lawful obligation of restitution.

Restitution may be imposed either as a direct sentence, as in this case, or as condition of probation or parole. 42 Pa.C.S.A. §9721(c). *See also*, 18 Pa. C.S.A. §1106 (direct sentence); 42 Pa.C.S.A. §9754 (condition of probation). Whether imposed as a direct sentence or as a condition of probation, an order of restitution is a sentence. *Commonwealth v. Dinoia*, 801 A.2d 1254, 1257 n.l (Pa. Super. 2002). "When imposed as a [direct] sentence, the injury to property or person for which restitution is ordered must directly result from the crime." *In the Interest of M.W.*, 725 A.2d 729, 732 (1999). The sentencing court must apply a "but for" test imposing restitution. "[D]amages which occur as a direct result of the crime are those which [would] not have occurred but for the defendant's criminal conduct." *Commonwealth v. Gerulis*, 616 A. 2d 686, 697 (Pa. Super. 1992). Because restitution is a sentence, the amount ordered must be supported by the record; it may not be speculative or arbitrarily excessive. *Commonwealth v. Wright*, 722 A.2d 157, 159 (Pa. Super. 1998); *Commonwealth v. Poplawski*, 158 A.3d 671, 674 (Pa. Super. 2017) ("The amount of a restitution order is limited by the loss or damages sustained as a direct result of defendant's criminal conduct and by the amount supported by the record.") Ordering a defendant to pay restitution serves two purposes. "While the payments may compensate the victim, the sentence is also meant to rehabilitate the defendant by instilling in [his] mind *that it is [his] responsibility* to compensate the victim." *Commonwealth v. Boyles*, 595 A.2d 1180, 1188 (Pa. Super. 1991); *Commonwealth v. Balisteri*, 478 A.2d 5, 9 (Pa. Super. 1984).

The Court is also fully aware of the Federal statutory remedy that allows the Coast Guard to pursue Defendant for "all costs the Coast Guard incurs" when an individual "knowingly and willfully communicates a false distress message to the USCG or causes the USCG to attempt to save lives and property when no help is needed." 14 U.S.C. §88(c)(3). However, the Pennsylvania Restitution Statute specifically preserves alternative remedies. *See* 18 Pa.C.S.A. §1106(g) (No order of restitution shall debar the owner of property ... to recover from the offender as otherwise provided by law ... "). Thereby, the existence of alternative

remedies does not act to preclude an award of restitution by this Court. *See Commonwealth v. LeBarre*, 961 A.2d 176, 181 (Pa. Super. 2008) (The possible existence of civil remedies does not prevent recovery through restitution. Any subsequent remedy must be reduced by a victim's recovery through restitution. *See also* §1106(g). Therefore, there is no concern about double recovery and 14 U.S.C. §88(c)(3) does not bar the USCG recovery for restitution in this case.

In the case *sub judice*, the Commonwealth seeks restitution for the USCG as a direct victim of Defendant's crime of "False Reports to Law Enforcement." At Count 7, the Commonwealth asserts that the USCG was a victim because it encountered pecuniary loss as a result of its search and rescue efforts in the form of man hours, airplane operation and fuel costs, and other expenses associated with the futile search for Karen LeClair. The Defendant counters that §1106 does not contemplate the USCG as a victim and, even if it does, the restitution sought by the Commonwealth for recovery is duplicitive and unfounded.

An issue flow chart is beneficial for the opinion reader because there are a number of critical issues for this Court to address in determining whether restitution is appropriate. The first legal hurdle to surmount is which version of §1106 should apply to Defendant. This Court must consider whether to apply the version in effect at the time of his crime of making a false report to the USCG on June 11, 2017 (§1106 effective January 31, 2005 to October 23, 2018) or the amended version in effect at the time of his sentencing on December 11, 2018 (§1106 effective October 24, 2018). Subsequent to resolving which version of §1106 applies this Court must then determine whether the USCG falls under the statutory umbrella of a "victim" as identified in §1106. Finally, if the USCG is a victim, the Court must delineate what recompense sought by the Commonwealth on behalf of the USCG directly resulted from Defendant's criminal act and whether each and every expense was incurred "but for" Defendant's false report to the USCG. *See Poplawski*, 158 A.3d at 674.

A. <u>THE VERSION OF THE RESTITUTION STATUTE IN EFFECT AT THE TIME OF THE CRIME MUST BE APPLIED.</u>

The Restitution Statute found in the Crimes Code at 18 Pa. C.S.A. §1106 governs restitution for injuries to person or property. There are two versions of this statute which could potentially be applied to the Defendant. The version of the statute in place at the time the false report was made (June 11, 2017) was effective from January 31, 2005 to October 23, 2018. After October 23, 2018, the new version of the restitution statute became immediately effective. [18 Pa. C.S.A. §1106, 2018, Oct. 24, P.L. __ , No. 145, §1 imd. Effective]. The new version was in effect at the time of Defendant sentencing on December 11, 2018.[2]

In order to ascertain which version to apply, we first look to 1 Pa.C.S.A. §1926 of the Statutory Construction Act, which provides:

§1926. Presumption against retroactive effect.

No statute shall be construed to be retroactive unless *clearly and manifestly* so intended by the General Assembly.

1 Pa.C.S.A. §1926 (emphasis supplied). There is nothing in the language of the post October 24, 2018 amendment to §1106, that indicates an intention by the General Assembly to apply the October 23, 2018 amendments retroactively. Therefore, we approach this inquiry with the presumption that we are to apply the statute in effect at the time of the offense (pre October

[2] For clarity, the Court will refer to the amendments to §1106 as pre October 24, 2018 and post October 24, 2018.

24, 2018). "[I]n the absence of clear language to the contrary, statutes must be construed to operate prospectively only." *Budnick v. Budnick*, 615 A.2d 80 (Pa. Super. 1992). The term "retrospective" has been defined as applying to "events occurring before its enactment." *Weaver v. Graham*, 450 U.S. 24 (1981). A law is only retroactive in its application when it relates back and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired. 1 Pa.C.S.A. §1926; *McMahon v. McMahon*, 612 A.2d 1360 (Pa. Super. 1992).

Moreover, § 1953 of the Statutory Construction Act further clarifies the application of amended statutes:

§1953. Construction of amendatory statutes.

> . . . the portions of the [amended] statute which were not altered by the amendment shall be construed as effective from the time of their original enactment, and *the new provisions shall be construed as effective only from the date when the amendment became effective.*

1 Pa.C.S.A. §1953(emphasis supplied). "Amendatory statutes are construed retroactively only if such construction is clearly indicated under the provisions of the statute." *Commonwealth v. Scoleri*, 160 A.2d 215, 227 (Pa. 1960) (newly enacted statute which precluded evidence of prior convictions at trial was not retroactive and did not require a new trial since it was not effective as of the time of defendant's trial); *See also Commonwealth v. Hoetzel*, 426 A.2d 669, 672 (Pa. Super. 1981) (trial court should have applied version of amphetamines statute in effect at the time of defendant's arrest and conviction, rather than later amended statute); *Commonwealth v. Scoleri* 160 A. 2d 215 (Pa. 1960) (with respect to an evidentiary rule,"[A]mendatory statutes are construed retroactively only if such construction is clearly indicated under the provisions of the statute."); *Commonwealth v. Luciani*; 2018 WL 6729854 (Pa. Super. December 24, 2018) (under *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), the Sexual Offender Registration Act (SORNA) may not be applied retroactively to sexual offenses which took place prior to the enactment of SORNA).[3]

Lending further support to use of the statute in effect on the date of the offense are the Sentencing Guideline Standards. Recognizing this authority is not controlling, when read *in pari matreria* with §1106 and the Statutory Construction Act, its language does support the Court's use of the statute in effect at the time of Defendant's criminal act. The Sentencing Guidelines Standards provide:

§303.1 Sentencing guidelines standards.

[3] We acknowledge that applying the October 24, 2018 version of 18 Pa.C.S.A. §1106 would not implicate *ex post facto* concerns, as in *Muniz*, since Pennsylvania has repeatedly recognized that restitution is not punitive. *Commonwealth v. Kline*, 695 A.2d 872 (Pa. Super. 1997) (Restitution is not punishment for purposes of ex post facto clause, so that application of amended restitution statute did not violate clause). *Kline* applied an amended version of §1106 to a criminal act that predated the amendment in an effort to expand the provision of restitution to an insurance company. This Court finds *Kline* distinguishable since its sole focus was the ex post facto issue. Moreover, in affirming the trial court's approach, the Superior Court in *Kline* allowed, but did not mandate, the application of the subsequent version of §1106. We further note that *Commonwealth v. Layhue*, 687 A.2d 382 (Pa. Super. 1996), also affirmed the trial court's application of a post-crime version of §1106, but did not mandate such an approach. The concurring opinion in *Layhue* aptly observed that "Statutory changes enacted subsequent to defendant's crime are irrelevant." *Id.* at 96 (concurring opinion).

***

(c) The sentencing **guidelines shall apply to all offenses committed on or after the effective date of the guidelines. Amendments to the guidelines shall apply to all offenses committed on or after the date of the amendment becomes part of the guidelines.**

(1) When there are current multiple convictions for offenses that overlap two sets of guidelines, the former guidelines shall apply to offenses that occur prior to the effective date of the amendment and the later guidelines shall apply to offenses that occur on or after the effective date of the amendment...

204 Pa. Code §303.1(c).

Accordingly, for the reasons set forth above, this Court concludes that the pre October 24, 2018, version of the Restitution Statute at 18 Pa.C.S.A. §1106, shall be applied in this case. This pre October 24, 2018 version of the §1106 was in effect at the time Defendant made his false report to the USCG on June 10, 2017. Inevitably, the Court must now confront the task of determining whether the USCG is a "victim" in accordance with §1106.

B. <u>THE USCG QUALIFIES AS A "VICTIM" AND A "PERSON" ACCORDING TO APPLICABLE STATUTORY AUTHORITY AND CASE LAW</u>.

The question of whether the USCG is a direct victim pursuant to 18 Pa.C.S.A. §1106 (the pre October 24, 2018 statute) appears to be a question of first impression. This Court notes the existence of varying interpretations of legislative intent by both the Pennsylvania Superior Court and the Pennsylvania Supreme Court. Yet careful scrutiny reveals no precedential case law addressing the precise facts of our case: i.e. whether a federal agency of the government can receive restitution as a direct victim of a crime. After an exhaustive review of the statutory history, evolving case law, and an examination of legislative intent, the Court concludes that the USCG is a "victim" of Defendant's crime and is deserving of compensation because the plain language of §1106 in effect at the time of the commission of the offense warrants finding the USCG qualifies as a "victim" for purposes of receiving restitution.

In reaching this conclusion, this Court first examined the plain language of the Restitution Statute. Section §1106 provides, in relevant part, as follows:

§1106. Restitution for injuries to person or property

(a) 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.

***

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

18 Pa.C.S.A. §1106 (emphasis added).

In §1106(h), victim is defined as:

> **"Victim."** [1] As defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929. (71 P.S. §180-9.1). The term includes [2] the Crime Victim's Compensation Fund if compensation has been paid by the Crime Victim's Compensation Fund to the victim and [3] any insurance company that has compensated the victim for loss under an insurance contract.

§1106(h) (enumeration provided for clarity). The second and third definitions of victim do not apply to the USCG. Accordingly, this Court must closely examine the first definition, which directs that the definition of victim can be found in the Administrative Code of 1929. Section 479.1 of the Administrative Code of 1929, formerly codified at 71 P.S. §180-9.1, originally defined a victim as "a person against whom a crime is being or has been perpetrated or attempted." However, because the Administrative Code of 1929 gave no definition of

"person", this Court is compelled to turn to The Statutory Construction Act, 1 Pa.C.S.A. §1991 for the definition. In the Act, "person" is defined as "a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth),[4] estate, trust, foundation or natural person." *Id*. A plain reading therefore compels the conclusion that the USCG, as a federal agency, is "a government entity that is other than the Commonwealth." *See* §479.1 of the Administrative Code and 71 P.S. §180-9.1. Therefore, the USCG would be a victim under this version of §1106.

The plain language of the statute as written, without importing any definitions from statutes not specifically referenced by the legislature, would include the USCG as a "person" because it is a "government entity" which is not a Commonwealth agency. *See* pre October 24, 2018 version of 18 Pa.C.S.A. §1106. As such, the Coast Guard fits within the definition of "victim" as explicitly provided by the Legislature. The Court is also persuaded by the reasoning in *Commonwealth v. Steffey*, 2018 WL 41406224 (Pa. Super. August 30, 2018), although it is recognized that this authority is not binding. In *Steffey*, three non-profit agencies, who were the object of the Defendant's criminal theft and forgery, were included in the definition of "person" pursuant to the Statutory Construction Act, 1 Pa. C.S.A. §1991. Therefore, the court concluded not further statutory construction analysis was necessary, and the non-profit entities were entitled to restitution.

The Court is cognizant that the conclusion that the USCG is a direct victim of Defendant's criminal conduct is buffeted by multifaceted, artful arguments to the contrary based on the fact that in 1998, §479.1 of the Administrative Code was repealed and recodified in the Crime Victims Act, 18 P.S. 11.103 (hereinafter "CVA"). Under the CVA, the definition of victim is drastically different. The CVA defines "victim," *inter alia*, as "a direct victim," which the CVA defines as "an individual." 18 P.S. §11.103. The Statutory Construction Act defines "individual" as a "natural person." 1 Pa.C.S.A. §1991. However, notably, even after §479.1 of the Administrative Code was repealed in 1998 and recodified in the CVA, the legislature specifically used §479.1 of the Administrative Code's definition in subsequent versions of §1106.[5]

Pennsylvania's appellate courts have decisively split over which definition to employ. This Court is well aware of the seismic rumblings between the Pennsylvania Superior Court and the Pennsylvania Supreme Court.[6] To prognosticate further can be perilous. It certainly appears that both the courts and the legislature are trending toward a larger net of inclusion for those victims of crimes who may qualify to receive restitution. However, research in this area fails to disclose any decisions directly on point with the issue at hand. A brief

[4] The post October 24, 2018 §1106 now includes the Commonwealth in its definition of a victim when it is an affected government agency.

[5] After the Administrative Code was repealed in November of 1998, the Restitution Statute at 18 Pa.C.S.A. §1106, was amended on December 3, 1998 and again on November 30, 2004. §1106 continued to reference §479.1 of the Administrative Code and its definition of "victim" as a person and "person" is further defined at 1 Pa.C.S.A. §1991 to include a "corporation, ... or government entity (other than the Commonwealth)."

[6] Decisions in favor of applying the definitions in §479.1 of the Administrative Code, include: *Commonwealth v. Runion*, 662 A.2d 617 (Pa. 1995); *Commonwealth v. Brown*, 981 A.2d 893 (Pa. 2009); *Commonwealth v. Steffey*, 2018 WL 4140624 (Pa. Super. August 30, 2018). Decisions in favor of applying the recodification found at 18 P.S. § 11.103, the Crime Victims Act include: *Commonwealth v. Holmes*, 155 A.3d 69 (Pa. Super. 2017) (*en banc* divided opinion) (opinion in support of affirmance only); *Commonwealth v. Veon*, 150 A.3d 435 (Pa. 2016). No decision as to which definition governs in *Commonwealth v. Hall*, 80 A.3d 1204 (Pa. 2013) ("To properly decide this case, we need not resolve the question of the interplay, if any, between the Crime Victims Act and Section 1106 of the Crimes Code.")

review of the key decisions on this topic is illuminative, though not necessarily clarifying. What is clear is a pattern of constant expansion, ever enlarging the pool of entities entitled to restitution.[7] Even in cases where the judiciary finds a particular entity excluded from restitution (such as *Commonwealth v. Veon*, 150 A.23d 435 (Pa. 2016), which specifically excluded the Commonwealth), the appellate courts have voiced dissatisfaction with having to restrict the class of victims.

Here the tenets of statutory interpretation may come into play. It is axiomatic that legislative intent controls and "when the words of a statute are free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S.A. 1921(b), *see also* 18 Pa.C.S.A. §105 (provisions of the Crimes Code must be construed "according to the fair import of their terms"). Consequently, when the meaning of a statute is clear, it must be given effect in accordance with its plain and common meaning. *Id. See also* 1 Pa.C.S.A. §1922(2) (indicating that the legislature intends entire statute to be effective). "The principles of statutory construction indicate that '[w]henever possible each word in a statutory provision is to be given meaning and not to be treated as surplusage." *Commonwealth v. Tome*, 737 A.2d 1239, 1241 (Pa. Super. 1999) (citation omitted). Additionally, our rules of statutory construction provide that where the words of a statute are not explicit, we may discern legislative intent by examining, *inter alia*, "[t]he former law, if any" and the "consequences of a particular interpretation." 1 Pa.C.S.A. §1921(c)(5), (6). *Commonwealth v. Ostrosky*, 866 A.2d 423, 429 (Pa. Super. 2005). A review of the cases must now be undertaken.

We look to the historical evolution of the definition of victim by first analyzing the Pennsylvania Supreme Court decision in *Commonwealth v. Runion*, 662 A. 2d 617 (Pa. 1995), *superseded by statute* as stated in *Commonwealth v. Veon*, 150 A.3d 435 (Pa. 2016). *Runion* interpreted a prior version of §1106 which employed §479.1 of the Administrative Code (prior to its repeal in 1997) to define "victim." The Pennsylvania Supreme Court held in *Runion* that the Department of Public Welfare (DPW), which had covered medical expenses for a victim of a violent crime, was not entitled to restitution under §1106. *Runion* turned to the definition of "victim" included in §479.1 of the Administrative Code, which defines a victim as "[any person, except an offender, who suffered injuries to his person or property as a direct result of the crime." *Runion*, 662 A.2d at 619. Next, the Court in *Runion* utilized the definition of "person" as set forth in the Statutory Construction Act as "a corporation, partnership, limited liability company, business trust, other association, **government entity (other than the Commonwealth)**, estate, trust, foundation or natural person." *Id.* and 1 Pa.C.S.A. §1991 (emphasis supplied). Because the DPW constituted a government entity that *was* part of the Commonwealth, it was explicitly excluded from the definition of "person" and therefore not entitled to restitution. *Id.* at 619. Nonetheless, the Supreme Court in *Runion* complained that the necessary result was contrary to the historic purpose of restitution, saying, "[T]he primary purpose of restitution is rehabilitation of the offender by impressing upon him that his criminal conduct caused the victim's loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible." *Id.* at 620.

In response to the ruling in *Runion*, the legislature acted to strengthen and broaden §1106. In *Commonwealth v. Brown*, 981 A.2d 893, 899 (Pa. 2009), our Pennsylvania Supreme Court

[7] Restitution was discretionary until 1998, when the General Assembly amended Section 1106 to make it mandatory. See Act of December 3, 1998, P.L. 933, No. 121, §1 (immediately effective).

found that Medicare, a (federal) government agency, was eligible to receive restitution under §1106(c)(1)(ii)(C).[8] The Court explained:

> In 1995, and again in 1998, however, the legislature rewrote Section 1106 to significantly strengthen and amplify the notion of restitution, and to expand the class of entities eligible for restitution. Specifically, after the amendments, restitution became mandatory. 18 Pa.C.S.A. §1106(a) ("the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor"). Moreover, restitution to the greatest extent is required. *Id.* §1106(c)(1) ("[t]he court shall order full restitution"); *Id.* §1106(c)(1)(i) (the victim is entitled to "the fullest compensation for the loss").
>
> Furthermore, the General Assembly broadened the class of those entities eligible to receive restitution. While not the model of clarity, the legislature certainly evinced an extension of those entities who could receive restitution through the priorities scheme. As noted above, this included not only the "victim," but also the Crime Victim's Compensation Board, other government agencies, and insurance companies. Furthermore, the General Assembly explicitly enlarged the definition of "victim" to include the Crime Victim's Compensation Fund and insurance companies. Thus, while the General Assembly expanded the definition of "victim," which was the focus of our opinion in *Runion*, and in doing so widened the definition of that term, *the revamping of Section 1106 was even more sweeping and implicitly broadened the class of entities eligible for restitution to include government agencies, in addition to manifesting a heightened focus on the need for and importance of restitution.*

Id. at 899-900 (emphasis added). Additionally, *Brown* clarifies the fact that §1106 (effective from 2005-2018) defined "victim" pursuant to §479.l of the Administrative Code, which, in turn defines a "victim" as a "person" which includes government agencies.[9] *Brown* concluded that the class of entities entitled to restitution after the 1995 amendments expanded to include government agencies. Medicare was found to be a "government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct." *Id.* at 902. The Court found the phrase "reimbursement to the victim" ambiguous, but ultimately held that the phrase included government agencies which provided reimbursement on behalf of the victim. As such, Medicare, was entitled to restitution. *Id.*

The next evolutionary step occurs in *Commonwealth v. Veon*, 150 A.3d 435 (Pa. 2016). In *Veon*, the Pennsylvania Supreme Court discussed the dichotomous definitions of "victim" as defined by the Administrative Code and the recodification in the CVA as it struggled with the question of whether the Pennsylvania Department of Community and Economic Development (DCED), a direct victim of criminal fraud, was entitled to restitution under

[8] The *Brown* court interpreted the same version of §1106 at issue in this case.
[9] Government agencies, excluding the Commonwealth. 1 Pa.C.S.A. §1991.

§1106. *Veon* discussed *Runion*, which, as set forth above, held that a Commonwealth entity is not entitled to restitution because although "government entities" are included in the definition, the Statutory Construction Act specifically excludes "Commonwealth agencies" from the definition of "person." 1 Pa.C.S.A. §1991. *Runion*, 662 A.2d at 619. However, *Veon* elected to use the CVA definition of "victim" rather than the definition contained in the Administrative Code, finding that:

> Subsection 1106(c)(1)(i) provides for the mandatory payment of 'the fullest compensation' to the victim for his loss, and provides for payment of restitution to the Crime Victim's Compensation Fund, 'other designated account *when the claim involves a government agency*,' and/or any insurance company, 'for loss previously compensated' by those entities. 18 Pa.C.S. §1106(c)(1)(i) (emphasis added). Under either subsection, it is clear that no restitution may be paid except to a "victim," the two categories of government entities that the General Assembly has authorized to compensate victims ... or victims' insurance policies for monies paid to insurance victims.

Id. at 454.

Veon then concluded:

> Notwithstanding any legislative expansion of the definition of "victim," it is clear that the plain text of Section 11.103 [of the Crime Victims Act] still envisages "victims" as "persons" commonly understood...Every relevant noun unequivocally describes a human being, not a government agency, and nowhere else is there a relevant definition that persuades us to broad the common understanding of these words. There can be no serious doubt that DCED, the agency designated to receive the restitution ordered in this case, does not qualify as a direct victim.

Id. at 454.

Veon did not address the explicitly referenced Administrative Code definition of "person," as discussed in *Brown*. Notably both *Brown* and *Veon* address the exact same version of the Restitution Statute. *Veon* distinguishes *Brown* by slotting Medicare as a government agency that provided third party reimbursement to a victim, which *Veon* notes, is clearly allowed by §1106(c)(1)(ii)(C). Despite the specific inclusion of a government agency as a third party provider of reimbursement to a victim, *Veon* concludes that the Commonwealth, as a government agency, cannot be a victim itself unless it provided reimbursement to the victim.

However, the Pennsylvania Superior Court previously observed that allowing an entity to receive restitution as a third party reimburser but **not** as a direct victim was an absurd result. In *Commonwealth v. Pozza*, 750 A.2d 889 (Pa. Super. 2000), the Court held that an insurance company must be considered included as a direct victim, despite no explicit provision in the statute, since an insurance company is specifically entitled to restitution as a third party

provider of reimbursement to a victim. *Pozza*, 750 at 894. *Pozza* posits that it would be illogical for an insurance company to be allowed restitution as a third party re-imburser to a victim, but not as a victim itself. The Superior Court in *Pozza* noted:

> Giving the statute a common sense interpretation, with the caveat that the Legislature does not enact laws that reach an absurd or unintended result, we read the restitution statute to include the reimbursement to an insurer who has lost money when the object of deception and fraud. Statutory Construction Act, 1 Pa.C.S.A. §1921 (Legislature does not intend an absurd result when enactments are passed). Here, such a result would be obtained if we were to exclude the insurer from the list of those entitled to restitution.

Pozza, 750 A.2d at 895. The same logic would also seem to extend to the USCG which would have unquestionably been entitled to receive restitution had it provided compensation to a victim as a third party reimburse. It seems absurd to find that this same government agency, which is entitled to restitution for compensating a victim, could not be a direct victim also entitled to restitution.

Presently, the Defendant advocates that *Veon* precludes the USCG from obtaining restitution in this case as a government entity. However, we find *Veon* clearly distinguishable because it addresses the question of whether a *Commonwealth* agency can be entitled to restitution, not whether a federal agency such as the USCG is entitled to restitution as a direct victim. The long history of judicial and statutory interpretation of restitution clearly supports the fact that a Commonwealth agency is, and always has been, explicitly barred from receiving restitution.[10] This is true whether one employs the Administrative Code version of the definition of "victim" as "person," which includes government entities other than the Commonwealth or whether one employs the CVA definition of victim as an "individual" or "natural person." Consequently, the holding in *Veon* must be restricted to the facts of *Veon* excluding restitution to a Commonwealth agency. Any pronouncements beyond that are not applicable to the case at hand. To exclude consideration of §479.1 of the Administrative Code is distorted and clearly disproportionally restricts the class of "victims" for restitution purposes. Also, the post October 24, 2018 §1106 appears to be a *Veon* "fix" by now including the Commonwealth as a victim when it is an "affected government agency." *See* newest version of 18 Pa.C.S.A. §1106(c)(1)(ii)(A.l), effective October 24, 2018.

In support of this conclusion, we note that after the ruling in *Veon*, the Pennsylvania Superior Court again struggled with the definition of "victim" under the Restitution Statute in *Commonwealth v. Holmes*, 155 A.3d 69 (Pa. Super. 2017). *Holmes* held that a victim's parents were "victims" entitled to restitution for funeral expenses. *Id.* at 81. The *en banc* Superior Court of Pennsylvania was divided evenly 4-4 on the issue of whether restitution was properly ordered by the trial court under §1106. Both the majority opinion, in favor of awarding restitution, and the minority opinion, against awarding restitution, examined the differing definitions of "victim" under the Administrative Code and the CVA. The Opinion in Support of Affirmance concludes that both the Administrative Code and the

[10] Until, of course, the October 24, 2018 amendment to §1106 which now includes Commonwealth agencies but paradoxically excludes non-Commonwealth agencies.

CVA define victim under §1106 to include parents who paid their son's funeral bill §1106, once again, expanding the reach of restitution. Although *Holmes* is not directly on point with our issue, we note that both the Opinion in Support of Affirmance and the Opinion in Support of Reversal continued to examine the question of whether courts should look to the Administrative Code or to the CVA for the definition of victim, even after the sweeping pronouncement in *Veon*. However, it does signify the ever expanding pattern of awarding restitution wherever feasible. This Court believes it is entirely appropriate and equitable to utilize both the Administrative Code and CVA definitions of victim to fairly encompass the class entitled to restitution.

This pattern is borne out by the most recent case on this issue. The Pennsylvania Superior Court, in *Commonwealth v. Steffey*, 2018 WL 4140624 (Pa. Super. August 30, 2018), admittedly a non-reported decision with only persuasive value, held that despite the holding in *Veon*, three nonprofit agencies who were the direct victims of criminal fraud were entitled to restitution. This Court looks to *Steffey* for guidance, as it is perhaps most factually similar to the issue at hand. The Superior Court also distinguished *Veon* noting:

> We acknowledge that, at first blush, this and other passages from *Veon* appear to support Steffey's assertion that corporations and other limited liability organizations, as non-human persons, cannot be the object of an award of restitution. However, we conclude the Supreme Court did not intend such a sweeping modification of the law of restitution in the Commonwealth. The *Veon* court relied upon long-standing precedent interpreting the Statutory Construction Act, 1 Pa.C.S.A. §1991. That precedent established "the plain and ordinary meaning of the word 'person' excluded Commonwealth agencies 'where the legislature has not otherwise spoken.'" 150 A.3d at 450 (quoting *Commonwealth v. Runion*, 662 A.2d 617, 619 (Pa. 1995)). Thus, Commonwealth agencies were ineligible for restitution. *See Id.*
>
> In contrast, the Statutory Construction Act explicitly includes corporations and other limited liability organizations in the definition of "person." 1 Pa.C.S.A. §1991. Thus, there is no need to engage in an extensive analysis of statutory construction as in *Veon*. The statutory scheme explicitly encompasses human persons such as those victimized by Steffey within the class of victims entitled to restitution. We therefore conclude Steffey's sole issue on appeal merits no relief.

Steffey, 2018 WL 4140624, at *1. The Superior Court held, despite the prior Supreme Court pronouncement in *Veon*, that a non-profit agency which is a direct victim of fraud, may, in fact receive restitution under the 2005-2018 version of the Restitution Statute, stating, "We conclude Pennsylvania law clearly includes private non-natural persons within its definition of victims, and therefore affirm the judgment of sentence." *Id.* at* 1. Furthermore, this also is the version of §1106 in effect at the time of Defendant's false report in the case *sub judice*.

Noting the persuasive decision in *Steffey*, distinguishing *Veon* as limited to its particular facts, and recognizing the strong legislative intent in favor of awarding restitution, and the

statute in effect at the time of the crime, this Court finds that the USCG falls within the definition of victim as a "person" which specifically includes "government entities (other than the Commonwealth)." This reasoning results in an award of restitution for the USCG as a "government entity" other than the Commonwealth.

C. DEFENDANT'S FALSE REPORT TO THE USCG SATISFIES THE "BUT FOR" TEST FOR THE IMPOSITION OF RESTITUTION.

Since the USCG is entitled to restitution as a direct victim of Defendant's criminal act, it is *mandatory* that this Court order Defendant to pay restitution to the USCG for losses that resulted from his criminal conduct. "[U]pon conviction of any crime wherein property of a victim has been substantially decreased as a direct result of the crime...the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor." 18 Pa.C.S.A. §1106(a). Property includes, "any real or personal property, including currency and negotiable instruments, of the victim." §1106(h). Regardless of the financial resources of the defendant, the Court "shall" order full restitution, "so as to provide the victim with the fullest compensation of the loss." §1106(c) (1)(i).

In imposing restitution, we must determine that the loss flows from the crime. In this circumstance, we must determine that Defendant's crime of making a false report of his wife falling overboard directly resulted in the expenses incurred by the USCG. Defendant has challenged the USCG's request for personnel hours and any other expenses it incurred in the search and rescue effort made for Karen LeClair, arguing that some of those expenditures would have existed regardless of Defendant's false report. In other words, Defendant asserts the USCG had to pay its personnel for the same number of hours at the same hourly rate on June 11 and June 12, 2017, regardless of whether the search took place. Therefore, he contends those expenses may not be recouped in a restitution award.

This Court finds *Commonwealth v Poplawski*, 158 A.3d 671, 674 (Pa. Super. 2017) illustrative. *Poplawski* involved a defendant who was charged with crimes associated with building contractor fraud claims. There, the defendant was convicted of home improvement fraud. *Id.* This crime required that the defendant received advance payments for services never performed. The evidence showed defendant retained the home owner's $2000 deposit and failed to do the promised work. *Id.* The defendant was acquitted of deceptive or fraudulent business practices which requires, "delivering less than the represented quantity of any... service." *Id.* Despite this, the trial court awarded $41,000 in restitution which may have consisted of the amount the home owner paid another contractor to complete the work defendant was hired to perform. *Id.* at 673. The Pennsylvania Superior Court held that the amount of restitution ($41,000) was "neither a direct result of the defendant's criminal conduct, nor was it supported by the record." *Id.* at 675. The Court further explained:

> [r]estitution may be imposed only for those crimes to property or person **where the victim suffered a loss that flows from the conduct that forms the basis of the crime for which the defendant is held criminally accountable.** In computing the amount of restitution, the court shall consider the extent of injury suffered by the victim and such other matters as it deems appropriate. Because restitution is a sentence, the amount ordered must be supported by the record; it may not be speculative or

> excessive. The amount of a restitution order is limited by the loss or damages sustained as a direct result of defendant's criminal conduct and by the amount supported by the record.

Poplawski, 158 A.3d at 674 (emphasis added); *see also* 18 Pa.C.S.A. §1106(c)(2)(i).

The *Poplawski* Court noted that there must be "a direct causal connection between the crime and the loss." *Id.* citing *Commonwealth v. Harriott*, 919 A.2d 234, 238 (Pa. Super. 2007). Moreover, the sentencing court must apply a "but for" test in imposing restitution. In other words, restitution can only be for damages which occur as a direct result of the crimes and those which would not have occurred "but for" the defendant's criminal conduct. *Id. Poplawski* also noted that "the court may not go beyond the jury verdict in fashioning its restitution award." *Id.*

Thus, this Court recognizes that it is imperative to base a restitution award on sufficient findings of fact, which are of record, in support of the expenses awarded for restitution. In this matter, clearly Defendant's false report that his wife fell overboard prompted a direct response from the USCG. However, the inquiry does not end there. This was prominently noted by the Court at Defendant's sentencing on December 11, 2018.

The Commonwealth must demonstrate that the USCG incurred specific losses because of Defendant's false report. Defendant contends that not all of the restitution requested by the USCG, such as personnel hours, was incurred solely as a result of the false report. Defendant suggests that certain expenditures sought by the USCG, such as salaries or hourly rates for regular personnel, would have been incurred regardless of the search for Karen LeClair. In other words, these members of the USCG would have received their salary and compensation on June 11 and June 12 of 2017, regardless of the false report made by the Defendant.

In determining what amount of loss was caused by Defendant's conduct a compatible analogy to the *costs*[11] of prosecution, as opposed to *restitution* to a victim, can be analogized in examining the propriety of awarding restitution. Both 42 Pa.C.S.A. §9721(C.l) and §9728(g) authorize this Court to order a defendant to pay costs. Costs are also authorized under Pa.R.Crim.P. 706(c). Costs are defined in §9728(g) as:

> **(g) Costs, etc.--**Any sheriff's costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

42 Pa.C.S.A. §9728(g).

As previously noted, the Commonwealth has not disputed this Court's award of costs. We analogize the cost cases in order to determine whether items of expenses, such as hourly rates for Coast Guard personnel, should be awarded as part of the restitution order.

[11] The Court is well aware that costs and restitution are two different components of a defendant's sentence. However, in arriving at the amount owed by a defendant for restitution, a cost analysis is helpful.

16 P.S. §7708 allows a sentencing court to require a defendant to pay costs of prosecution and trial, including the expenses of the district attorney in connection with such prosecution, these costs "shall be considered a part of the costs of the cases and paid by the defendant." Nevertheless, in *Commonwealth v. Garzone*, 34 A.3d 67 (Pa. 2012), the Pennsylvania Superior Court held that 16 P.S. §7708 does not allow the court to award as costs the regular salaries paid to prosecution and investigative personnel who work on a particular case. The *Garzone* court noted, "Again, the statute does not expressly identify prosecution-related salaries as recoverable expenses, and the question being equivocal (at best), the narrower construction favoring appellees must prevail." *Id.* The *Garzone* court listed a number of cases which disallowed the prosecutorial staff salaries, but did allow other expenses of prosecution. Although lengthy, the list is inclusive and illustrative of the various situations in which prosecutorial costs were allowed and disallowed in Pennsylvania. *Garzone* discussed the relevant cases, especially with respect to the regular salaries of the prosecutors, as follows:

> We are aware of no case, and the Commonwealth has cited none, where Section 7708 (or its analogues respecting other counties) has been construed to allow, as expenses, the regularly budgeted salaries of prosecutors and investigative staff. In *Commonwealth v. Davy*, this Court certainly employed broad language, stating that "it is clear that the Legislature intended to include in the costs for which a convicted person is liable the costs of all proceedings requisite for the final disposition of the case." 317 A.2d at 48... However, that language must be read against the issue in *Davy*, which was not "expenses" representing prosecutorial staff salaries, but the distinct expense of approximately $1,000 incurred in extraditing the defendant from Texas to Pennsylvania. *Id.*; [*string cites omitted*]
>
> Arguably, the closest analogue is the Superior Court's decision in *DuPont, supra*, since that case, like this one, involved expenses representing prosecution salary costs. In *DuPont* the panel held that recovery of expenditures representing specially retained prosecutorial personnel may be permissible if the Commonwealth can demonstrate extraordinary circumstances.
>
> In *DuPont*, the defendant shot and killed a wrestling coach who worked at the training facility that DuPont sponsored and maintained on his estate in Delaware County; he was convicted of third-degree murder and simple assault but was also found to be mentally ill. The trial court imposed total prosecution costs exceeding $700,000 and the Superior Court affirmed, explaining that recovery of the cost of a specially-hired ADA to try the case, as well as several legal interns who assisted in research, was appropriate because the district attorney's office had had two vacancies during the initial stages of prosecution, and to meet its prosecutorial obligations in this and all other cases, they deemed it necessary to assume the costs involved in the special hires. According to the *DuPont* panel, "[t]he trial court found that these costs were reasonable and necessary to meet the demands of this high profile, complex case. The voluminous record clearly

> supports this finding." 730 A.2d at 987.
>
> In short, *DuPont* approved the recovery of prosecution salaries in what was deemed to be an extraordinary situation.

Garzone, 34 A.3d at 78-79 (emphasis added).

Recently, in *Commonwealth v. Lehman*, 2019 WL 100374 (Pa. Super., January 4, 2019) (reported) the Superior Court held that if costs are not "necessary," they are not authorized. Otherwise, "a defendant could be forced to pay costs associated with lighting and heating the courtroom in which he or she was tried. A defendant could also be forced to pay for out-of-town jurors to stay at the Ritz-Carlton. These are absurd results." *Id.* at *5. Costs are not "necessary" if they would not have arisen but for the Commonwealth's actions. *Id.* at *6. *Lehman* noted a foreseeability test to determine whether costs are appropriate. For instance, in *Commonwealth v. Coder*, (cited by *Lehman*) the Pennsylvania Supreme Court held that defendant was responsible for paying costs associated with a change in venue because the change in venue (due to excessive publicity) was reasonably foreseeable at the time the defendant committed the crime in question:

> when a person commits a crime which stirs wide community interest, either because the crime is heinous or its perpetrator is a person invested with a public trust, publicity will follow inevitably. The ensuing publicity should be **readily foreseeable by the perpetrator** of the crime, so that it is neither arbitrary, capricious nor unreasonable to hold him responsible for the dysfunction his conduct caused the criminal justice system.

Coder, 415 A.2d at 409.

This Court found, on the record at sentencing, that "but for" Defendant's false report to the USCG, certain expenses incurred by the USCG for the massive search and rescue operation conducted on June 11-12, 2017 for Mrs. LeClair would not have been incurred. There is no challenge to the conclusion that "but for" Defendant's false report, the USCG would have not responded. Therefore, this Court finds the USCG may be deserving of an award of restitution. However, based on the above authority, the personnel hours expended by members of the USCG for the search for Karen LeClair are not properly part of restitution in this case because they are duplicitive. Consequently, the "units" or personnel hours will be extracted from the Commonwealth's request for restitution.

To order restitution, the expenses incurred must be a direct result of Defendant's crime. *See Commonwealth v. Fuqua*, 407 A.2d 24, 26 (Pa. Super. 1979). However, use of resources such as cargo planes, cutters, etc. may be part of the restitution. The monetary amounts associated with these expenses may be derived from the Commonwealth's exhibits. This Court intends to award restitution in some amount to the USCG, however, the expenses which shall be awarded in restitution must be "a direct result of the defendant's crime." *Fuqua*.[12] Moreover,

[12] As noted by the Defense, the USCG claim is an "estimate" and does not appear to be the actual cost of the search and rescue operation. An affidavit in support of the USCG's actual costs would be helpful. Moreover, we question whether the USCG actually paid out of pocket for the Canadian C-130 detailed in item "a" of Commonwealth Post Sentence Motion Hearing Exhibit "2," in the amount of $87,137.75. We have not been provided any proof of payment by the USCG or the Department of Human Services (or a bill by the Canadian agency that provided the C-130). The Commonwealth has not provided any response to this issue.

this Court seeks clarification as to whether the aircraft, boats, cutters and use of other resources represent expenses that would not normally have been incurred on a daily basis, but for the search. Finally, this Court seeks clarification regarding the personnel charges (i.e. employee hourly wages) and whether the proffered personnel expenses constitute regular wages or whether they represent wages that the USCG paid over and above the ordinary daily wages of the subject personnel.

III. CONCLUSION

Based on the above review, it is clear that:

1.) We must apply the version of the Restitution Statute in effect at the time of Defendant's crime of making a false report, in June of 2017, *See* 18 Pa. C.S.A. §1106 (effective January 31, 2005 to October 23, 2018);

2.) The USCG falls under the statutory umbrella of a "victim" as statutorily defined.

3.) The expenses incurred as a direct result of Defendant's criminal act and "but for" Defendant's false report must be awarded in a restitution award to the USCG.

In response to the Court's finding at paragraph 3, the Court will schedule a Rule to Show Cause hearing with the burden on the Commonwealth to demonstrate which expenses were incurred by the USCG as a direct result of Defendant's false report. The Commonwealth will not duplicate wages or salaries otherwise normally paid and will only address the use of resources or added expenses directly caused by Defendant's criminal act.

Finally, this Court notes the priority of payment to the victims per §1106(c)(1)(ii). Any payment shall be first directed to the United States Coast Guard, as the direct victim. Next, the Crime Victims Compensation Board shall receive payment for its provision of funeral expenses for Karen LeClair in the amount of $4,443.46.

Based upon the above, this Court will issue an Order in accordance with this Opinion.

ORDER

AND NOW, this 12th day of February, 2019, upon due consideration of Defendant's Post Sentence Motion, the Commonwealth's Memorandum of Law in Response to Defendant's Post Sentence Motion, and the Defendant's Response thereto, after holding a hearing on the issue of restitution, it is hereby **ORDERED, ADJUDGED,** and **DECREED** as follows:

1. The Restitution Statute found at 18 Pa.C.S.A. §1106 (effective January 31, 2005 to October 23, 2018) which was in effect at the time of Defendant's false report to the United States Coast Guard, shall be applied to this matter.
2. The United States Coast Guard is a "victim" entitled to an award of restitution, within the meaning of §1106 of the Restitution Statute. 18 Pa.C.S.A. §1106 (effective January 31, 2005 to October 23, 2018).
3. The United States Coast Guard is entitled to all expenses incurred in the June 11, 2017 - June 12, 2017 search and rescue operation for Karen LeClair, which would not have been incurred but for Defendant's criminal act.
4. A Rule to Show Cause hearing shall be held on Tuesday, **February 19, 2019 at 9:00**

a.m., before this Court in Courtroom E-219. The Commonwealth is responsible for establishing the expenses incurred as a direct result of the United States Coast Guard's search and rescue operation in response to Defendant's false report. The Commonwealth shall not include any expenses for personnel hours, wages, maintenance, fuel, insurance, administrative costs, and/or any other expenses that would have been incurred regardless of the LeClair search. Restitution shall only be ordered to the United States Coast Guard for those expenses directly incurred as a result of Defendant's criminal act.[1]

5. Thereafter, this Court shall issue an Order specifying the amount of the restitution award to the United States Coast Guard, as it deems appropriate.

BY THE COURT
/s/ **Hon. John J. Trucilla, President Judge**

[1] To support their claim for restitution, the Commonwealth has previously submitted exhibits itemizing these expenses. However, the Court is mindful that there has yet to be testimony provided to authenticate or substantiate the actual expenses incurred for use of USCG resources in their search for Karen LeClair.

COMMONWEALTH OF PENNSYLVANIA
v.
CHRISTOPHER LECLAIR

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
DOCKET NO. 2693 OF 2017

ORDER OF COURT

AND NOW, to wit, this 28th day of February, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the Defendant pay restitution to the United States Coast Guard ("USCG") in the amount of $424,180.20. The matter was before the Court pursuant to this Court's Order scheduling a Rule to Show Cause hearing as to what specific restitution was due and owing to the USCG as a result of Defendant's false report.

On January 9, 2019, the Court held a hearing regarding the restitution amount awarded to the USCG. The Court granted the parties time to submit legal authority to support their respective positions. Upon consideration of the legal arguments set forth, on February 12, 2019, this Court issued a Memorandum Opinion and Order finding the USCG was a "victim" as defined in 18 Pa. C.S.A. §1106 (effective January 31, 2005 to October 23, 2018), that certain expenses of the USCG were incurred as a direct result of Defendant's false report, and "but for" Defendant's actions said expenses would not have been incurred. The Court scheduled a Rule to Show Cause hearing with the burden on the Commonwealth to identify which expenses were incurred as a direct result of Defendant's criminal act exclusive of personnel hours, wages, maintenance, fuel, insurance, administrative costs, and/or any other expenses that would have been incurred regardless of Defendant's false report.

The Commonwealth has relied on two documents to assist in determining the amount incurred by the USCG, both of which have been admitted and incorporated as part of the record. First, the Commonwealth submitted a Memorandum dated July 27, 2017 from J.A. Erickson, LT, CG Sector Buffalo which listed itemized costs of the search and rescue for Karen LeClair, denoting the estimated expenses as letters *a* through *w*.[1] *See*, Commonwealth Post Sentence Motion Hearing Exhibit "2" and Courtroom Exhibit "2" (hereinafter collectively Exhibit "2"). Second, attached to the Commonwealth's Memorandum of Law in Response to Defendant's Post Sentence Motion was Exhibit "1," a document taken from the USCG Manual ("Commandant Instruction 7310.1R") listing "Reimbursable Standard Rates" utilized by the USCG (hereinafter Exhibit "1").

Prior to the hearing the parties came to a stipulated agreement regarding the amount of restitution payable to the USCG.[2] The parties agreed items *f* through *w* would be excluded from any restitution amount as they were duplicative personnel costs. The parties further agreed items *a* through *e* represented use of USCG resources including aircraft and rescue boats. As to items *a* through *e*, the parties agreed to the base amounts as provided in Exhibit

[1] Exhibit "2" contains an itemized list of costs claimed by the USCG as a result of the search and rescue. Letters *a* through *e* listed equipment utilized in the search and rescue while letters *f* through *w* listed personnel costs.

[2] The Court recognizes the stipulated agreement in no way impairs Defendant's ongoing objection as to the Court's finding that USCG is a "victim" under the statute.

"1", Enclosure 1, "Hourly Standard Rates for Cutters, Boats, and Aircraft." However, the Commonwealth excluded the general and administrative costs ("G&A") and Pension Benefit Adjustment.[3] Under this stipulated agreement, the total amount of restitution would now be amended to $424,180.20 instead of the originally ordered $705,974.80.

At the hearing, the Commonwealth made Commander Jake Smith of the USCG, Chief of Personnel Allowance, available as a witness. Also available was Mark C. Weidmann of the USCG Buffalo. Defendant's counsel confirmed that he had had a full opportunity to examine the witnesses, as well as access to all evidence and information relied upon by the Commonwealth.

The Court concludes Defendant's counsel, Attorney Bruce G. Sandmeyer, exercised extreme diligence in his investigation and research of the expenses incurred by the USCG in this case. Attorney Sandmeyer also uniquely brings with him over thirty years of military experience and an intimate understanding of the resources, personnel, Commandant Manuals, and other matters relied upon in this case by the Commonwealth and the USCG. The Court further concludes there is ample evidence made a part of this record to support the findings of restitution owed to the USCG and agreed upon by the parties.

Therefore, based on the reasons on the record, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the Defendant's Post-Sentence Motion is **GRANTED** in part as it pertains to the amount of restitution. The Restitution Order shall be amended to reflect $424,180.20 payable to the United States Coast Guard.

BY THE COURT
/s/ **Hon. John J. Trucilla, President Judge**

[3] During the hearing the Court specifically inquired about Exhibit "2," Item *a*, and whether there was a reciprocal agreement for the USCG's usage of the Canadian aircraft. The parties confirmed the reciprocal agreement was set by treaty and agreed the use of the aircraft was a valid expense incurred by the USCG in this matter.

COMMONWEALTH OF PENNSYLVANIA
v.
RONALD DRASKIEWICZ, JR.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

When a PCRA Petition is untimely, the petitioner, has the burden to plead and prove that one of the three exceptions set forth in 42 Pa.C.S § 9545(b)(1)(i)-(iii) applies.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

To meet the "after-recognized constitutional right" timeliness exception, two requirements must be satisfied: (1) the right asserted is a constitutional right that was recognized by the United States Supreme Court or the Pennsylvania Supreme Court after the time prescribed in this section; and (2) the right has been held to apply retroactively.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A new constitutional rule applies retroactively in a collateral proceeding only if: (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

To date, the Pennsylvania Supreme Court has not expressly held that *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) applies retroactively.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A second or subsequent petition for post-conviction relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. CR 1094 of 1996

Appearances: William J. Hathaway, Esq., for Appellant Ronald Draszkiewicz, Jr.
John H. Daneri, Erie County District Attorney, for Appellee Commonwealth of Pennsylvania

OPINION

Domitrovich, J. September 7, 2018

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of Ronald Draszkiewicz, Jr. ("Appellant") from this Trial Court's Order dated June 28, 2018, wherein this Trial Court dismissed Appellant's second Petition for Post Conviction Collateral Relief ("PCRA Petition") as patently untimely and since Appellant failed to satisfy any of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). As such, this Trial Court had no jurisdiction to reach the merits of Appellant's untimely PCRA Petition. *See Commonwealth v. Taylor*, 933 A.2d l035, 1038 (Pa. Super. 2007) ("Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition."). Moreover, said PCRA Petition stated no grounds for relief to be granted under the Post-Conviction Relief Act.

On appeal, Appellant raises two issues: (1) whether the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) may serve as a basis for invoking the statutory "after-recognized constitutional right" exception to the timeliness requirement under 42 Pa.C.S § 9545(b)(1)(iii) so as to confer jurisdiction upon this Trial Court and the Pennsylvania Superior Court; and (2) whether this Trial Court erred in "failing to grant PCRA relief in the form of foreclosing any application of registration or reporting requirements upon him under SORNA as violative of ex post factor considerations as expounded in" *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). This Trial Court provides the following analysis:

On May 24, 1996, the District Attorney's Office filed a Criminal Information, charging Appellant with Rape in violation of 18 Pa.C.S. § 3121(a)(1); Burglary in violation of 18 Pa.C.S. § 3502(a); Robbery in violation of 18 Pa.C.S. § 3701(a)(1); Aggravated Assault in violation of 18 Pa.C.S. § 2702(a); IDSI in violation of 18 Pa.C.S. § 3123(a)(1); Criminal Trespass in violation of 18 Pa.C.S. § 3503(a)(1)(i); Unlawful Restraining in violation of 18 Pa.C.S. § 2902(1); and Terroristic Threats in violation of 18 Pa.C.S. § 2706. Said Criminal Information alleged Appellant committed the foregoing criminal offenses on or about December 31, 1994.

On November 15, 1996, a duly empaneled jury returned guilty verdicts against Appellant for all of the foregoing criminal offenses. On December 19, 1996, this Trial Court sentenced Appellant as follows:

- Count 1 (Rape): four (4) to ten (10) years of incarceration, with 278 days of credit for time served, along with costs, restitution, and a $500.00 fine.
- Count 2 (Burglary): two (2) to ten (10) years of incarceration concurrent to Count 1.
- Count 3 (Robbery): four (4) to ten (10) years of incarceration consecutive to Count 1.
- Count 4 (Aggravated Assault): four (4) to ten (10) years of incarceration consecutive to Count 3.
- Count 5 (IDSI): three (3) to ten (10) years of incarceration consecutive to Count 4.
- Count 6 (Criminal Trespass): merged with Count 2.
- Count 7 (Unlawful Restraining): merged with Count 1.
- Count 8 (Terroristic Threats): five (5) years of probation consecutive to Count 5.

By Order dated August 21, 2013, the Pennsylvania Board of Probation and Parole granted Appellant parole, and Appellant was released from the State Correctional Institution of Mercer on January 7, 2018. (*See* Order to Release on Parole/Reparole).

On March 14, 2018, Appellant filed *pro se* his "Motion to Vacate Illegal Sentence," which this Trial Court considered as Appellant's second Petition for Post-Conviction Collateral Relief. By Order dated March 21, 2018, this Trial Court appointed William J. Hathaway, Esq., as PCRA counsel and directed Attorney Hathaway to supplement or amend Appellant's first PCRA Petition within thirty days. On April 19, 2018, Attorney Hathaway filed a Supplement to Motion for Post-Conviction Collateral Relief. By Order dated April 23, 2018, this Trial Court directed the Commonwealth to respond to the Supplement to Motion for Post-Conviction Collateral Relief within thirty days. On May 23, 2018, Assistant District Attorney D. Robert Marion filed Commonwealth's Response to Petitioner's Petition under the Post-Conviction Relief Act and Supplement to Motion for Post Conviction Collateral Relief.

On May 31, 2018, this Trial Court notified Appellant of this Trial Court's intention to

dismiss Appellant's second PCRA Petition as patently untimely and directed Appellant to submit his Objections within twenty days. However, Appellant did not file his Objections within twenty days of the date of said Notice. By Order dated June 28, 2018, this Trial Court dismissed Appellant's second PCRA Petition.

On July 26, 2018, Appellant' counsel filed Appellant's Notice of Appeal. This Trial issued its 1925(b) Order directing counsel for Appellant to file a concise statement of the matters complained of on appeal within twenty-one days from the date of said Order. Thereafter, on August 14, 2018, counsel for Appellant filed Appellant's Concise Statement of Matters Complained of on Appeal ("Concise Statement").

The first issue is whether the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) may serve as a basis for invoking the statutory "after-recognized constitutional right" exception to the timeliness requirement under 42 Pa.C.S § 9545(b)(1)(iii) so as to confer jurisdiction upon this Trial Court and the Pennsylvania Superior Court. Under the Post-Conviction Relief Act, a PCRA petition, including a second or subsequent PCRA petition, must be filed within one year of the date that judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i)-(iii). Any PCRA Petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty days of the date the claim could have been presented. 42 Pa.C.S § 9545(b)(2). The Pennsylvania Supreme Court has clearly stated where a PCRA Petition is untimely, the petitioner, by statute, has the burden to plead in the petition and prove that one of the three exceptions set forth in 42 Pa.C.S § 9545(b)(1)(i)-(iii) applies. *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999). "That burden necessarily entails an acknowledgment by the petitioner that the PCRA Petition under review is untimely but that one or more of the exceptions apply." *Id.* Thus, the petitioner must allege in his petition and prove that said petition satisfies one of the three exceptions under Section 9545(b)(1)(i)-(iii). *Id.* As the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter these requirements in order to reach the merits of the claims raised in an untimely PCRA Petition. *Commonwealth v. Taylor*, 933 A.2d 1035, 1042-43 (Pa. Super. 2007).

In the instant PCRA Petition, pursuant to Section 9545(b)(3), Appellant's judgment of

sentence became final on January 21, 1997, when Appellant did not make a timely direct appeal to the Pennsylvania Superior Court. *See* 42 Pa.C.S. § 9545(b)(3); *see also Commonwealth v. Draszkiewicz*, 927 WDA 1999 (May 19, 2000). As Appellant filed the instant PCRA Petition on March 14, 2018, more than one year after his judgment of sentence became final, Appellant failed to file timely the instant PCRA Petition. However, Appellant alleges his first PCRA Petition falls within the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii). (*See* Supplement to Motion for Post Conviction Collateral Relief, filed April 19, 2018). Specifically, Appellant argues the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz,* 164 A.3d 1189 (Pa. 2017)[1] serves as a basis for invoking the statutory exception to the timeliness requirement "in that the right and claim . . . asserted was a constitutional right recognized by the Pennsylvania Supreme Court after the time period provided and has been found to apply retroactively." (*Id.*).

In order for Appellant to allege and prove his otherwise untimely petition satisfies the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii), Appellant must satisfy two requirements: (1) the right asserted is a constitutional right that was recognized by the United States Supreme Court or the Pennsylvania Supreme Court after the time prescribed in this section; and (2) the right has been held to apply retroactively. *Commonwealth v. Leggett*, 16 A.3d 1144, 1147 (Pa. Super. 2011); *see also Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002). Thus, Appellant must prove a new constitutional right exists and the right has been held by United States Supreme Court or the Pennsylvania Supreme Court to apply retroactively. *Id.* A new constitutional rule applies retroactively in a collateral proceeding only if (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Commonwealth v. Riggle*, 119 A.3d 1058, 1065 (Pa. Super. 2015) (citing *Whorton v. Bockting*, 549 U.S. 406 (2007)).

Recently, in *Commonwealth v. Murphy*, the Superior Court of Pennsylvania expressly held PCRA petitioners cannot rely on *Muniz* to satisfy the after-recognized constitutional right timeliness exception under Section 9545(b)(1)(iii). 180 A.3d 402 (Pa. Super. 2018). In *Murphy*, the defendant was convicted and later sentenced on November 8, 2007, for involuntary deviate sexual intercourse, sexual assault, and indecent assault. *Id.* at 403. The defendant's judgment of sentence was affirmed on direct appeal and became final on July 28, 2009. *Id.* The defendant filed his PCRA petition on August 4, 2016, and after the trial court denied his PCRA petition, defendant timely appealed. *Id.* at 404. On appeal, the Superior Court emphasized that before the Superior Court could address the merits of defendant's PCRA petition, the Superior Court had to examine the timeliness of the defendant's PCRA petition since "the PCRA time limitations implicate [the Superior Court's] jurisdiction and may not be altered or disregarded in order to address the merits of a petition." *Id* (citing *Commonwealth v. Bennett*, 930 A.2d 1264, 1267 (Pa. 2007)).

The Superior Court in *Murphy* addressed the defendant's attempt, by invoking the

[1] In *Muniz*, the Pennsylvania Supreme Court held the Sexual Offender Registration and Notification Act's ("SORNA") registration provisions were punitive and retroactive application SORNA's provision violated the *ex post facto* clause of both the federal and Pennsylvania Constitutions. *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017).

Pennsylvania Supreme Court's decision in *Muniz*, to satisfy the after-recognized constitutional right timeliness exception under Section 9545(b)(1)(iii). *Id.* at 405. First, the Superior Court acknowledged the Pennsylvania Superior Court in *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674, 678 (Pa. Super. 2017) previously held *Muniz* "created a substantive rule that retroactively applies in the collateral context." *Id.* Significantly, however, the Superior Court indicated since the Pennsylvania Supreme Court has not yet held *Muniz* applies retroactively, *Muniz* cannot satisfy the requirements set forth in *Abdul-Salaam*. *Id.; see also Abdul-Salaam*, 812 A.2d at 501 (noting the right asserted must have been a constitutional right that was recognized by either the U.S. Supreme Court or the Pennsylvania Supreme Court). Thus, the Pennsylvania Superior Court expressly held *Muniz* may not be relied upon to meet the after-recognized constitutional right timeliness exception under Section 9545(b)(1)(iii). *Murphy*, 180 A.3d at 405.

In the instant case, before this Trial Court can address the merits of Appellant's PCRA Petition, this Trial Court must examine whether this Trial Court can exercise jurisdiction over Appellant's untimely filed PCRA Petition. Similar to the defendant in *Murphy* who filed an untimely PCRA petition, the instant PCRA Petition was not filed timely since Appellant's judgment of sentence became final on January 21, 1997, and Appellant filed his PCRA Petition more than a year later on March 14, 2018. Moreover, as in *Murphy*, here Appellant cited to *Muniz* in an attempt to satisfy the timeliness exception under Section 9545(b)(1)(iii). However, since Appellant's PCRA Petition is patently untimely, Appellant must show the Pennsylvania Supreme Court has held *Muniz* applies retroactively to meet the timeliness exception under Section 9545(b)(1)(iii). Since the Pennsylvania Supreme Court has yet to issue such a holding, Appellant "cannot rely on *Muniz* to meet that timeliness exception." See *Murphy*, 180 A.3d at 405.

Moreover, Appellant did not raise his *Muniz* claim "within 60 days of the date the claim could have been presented." 42 Pa.C.S.A. § 9545(b)(2). Instead, the first time Appellant raised his *Muniz* claim was in his PCRA Petition dated March 14, 2018—almost seven months after the Pennsylvania Supreme Court decided *Muniz* on July 19, 2017. *See Commonwealth v. Boyd*, 923 A.2d 513, 517 (Pa. Super. 2007) ("With regard to an after-recognized constitutional right, ... the sixty-day period begins to run upon the date of the underlying judicial decision."). Since Appellant has not properly pled the newly-recognized constitutional right exception to the PCRA's one-year timeliness requirement, this Trial Court does not have jurisdiction to address the merits of Appellant's untimely PCRA Petition. S*ee Commonwealth v. Taylor*, 933 A.2d 1035, 1038 (Pa. Super. 2007) ("Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.").

Even assuming *arguendo* this Trial Court has jurisdiction to review the merits of Appellant's PCRA Petition, Appellant has failed to establish he is entitled to the relief sought therein. Specifically, Appellant contends the holding set forth in *Commonwealth v. Muniz*, 164 A.3d 1189, 1193 (Pa. 2017) "serves as a legal predicate to challenge the legality of the judgment of sentence in terms of requirements imposed under SORNA." (*See* Supplement to Motion for Post Conviction Collateral Relief, filed Oct. 18, 2018). The Pennsylvania Legislature enacted the Sexual Offender Registration and Notification Act ("SORNA I"), effective December 20, 2012, which enhanced the registration/reporting requirements for persons, such as the Appellant, who have been convicted of Rape-Forcible Compulsion. However,

in light of the Pennsylvania Supreme Court's decision in *Muniz*, on February 21, 2018, the Pennsylvania Legislature amended and replaced SORNA I with Act 10 of 2018, HB 631 ("SORNA II"), which addresses the registration/reporting provisions affected by *Muniz*.

Specifically, SORNA II provides the version of Megan's Law in effect before SORNA II will govern the reporting requirements for sex offenders who committed sex-related crimes before the effective date of SORNA I on December 20, 2012. Thus, pursuant to SORNA II, offenders who committed sex crimes before December 20, 2012, are now subject to the reporting requirements under the version of Megan's Law in effect at the time of the commission of the offense. In particular, under 42 Pa.C.S. § 9799.54:

> (a) Registration.—The following individuals shall register with the Pennsylvania State Police as provided in this subchapter:
>
> > (3) An individual who committed a sexually violent offense within this Commonwealth and is an inmate in a State or county correctional facility of this Commonwealth, including a community corrections center or a community contract facility, is being supervised by the Pennsylvania Board of Probation and Parole or county probation or parole . . . shall register for the period of time under section 9799.55. . . .

Section § 9799.55 sets forth the period of registration with respect to Appellant:

> (b) Lifetime registration.—The following individuals shall be subject to lifetime registration:
>
> > (2) Individuals convicted:
> >
> > > (i)(A) in this Commonwealth of the following offenses, if committed on or after April 22, 1996, but before December 20, 2012:
> > >
> > > 18 Pa.C.S. § 3121 (relating to rape);
> > >
> > > 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse)[.]
> > >
> > > (B) Individuals convicted within this Commonwealth of an offense set forth in clause (A) who were required to register with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth on or after April 22, 1996, but before December 20, 2012, whose period of registration has not expired.

42 Pa.C.S. § 9799.55(b)(2)(i)(A)-(B).

In the instant case, after a criminal jury trial Appellant was found guilty and convicted of Rape in violation of 18 Pa.C.S. § 3121 and IDSI in violation of 18 Pa.C.S. § 3123 on November 15, 1996. As Appellant is an "individual who committed a sexually violent offense within this Commonwealth" and is currently "being supervised by the Pennsylvania

Board of Probation and Parole" as of August 21, 2013, appellant is required to register as a sexually violent predator under Section 9799.54(3). Moreover, as Appellant was sentenced on December 19, 1996, he was required to register under Megan's Law which was in effect at that time. Thus, pursuant to Section 9799.55(b)(2) of SORNA II, Appellant is subject to the lifetime registration requirements. Accordingly, Appellant is not entitled to the relief he seeks regarding "the striking of any and all elements of the sentence in regard to requirements imposed under SORNA." (*See* Supplement to Motion for Post Conviction Collateral Relief, filed Oct. 18, 2018).

Finally, as the instant PCRA Petition was Appellant's second PCRA Petition, Appellant was also required to comply with the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988) and its progeny. *Commonwealth v. Allen*, 732 A.2d 582, 586 (Pa. 1999). The Pennsylvania Supreme Court has held "a second or subsequent petition for post-conviction relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred." *Id.* In particular, the Pennsylvania Supreme Court has stated:

> [A petitioner] makes a prima facie showing of entitlement to relief only if he demonstrates either that the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged.

Id. (citing *Commonwealth v. Szuchon*, 633 A.2d 1098, 1100 (Pa. 1993)). In the instant case, Appellant has failed to argue successfully that his second PCRA Petition satisfies the *Lawson* requirement, in that Appellant has not argued either the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred or that Appellant is innocent of the crimes charged. As such, Appellant has failed to satisfy the *Lawson* requirement.

Thus, for all of the foregoing reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated June 28, 2018.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID RYAN BATES

CRIMINAL PROCEDURE / TRIAL PROCEDURE

When a jury trial is waived, the trial judge shall determine all questions of law and fact and render a verdict which shall have the same force and effect as a verdict of a jury.

CRIMINAL PROCEDURE/ / TRIAL PROCEDURE

The weight of the evidence is exclusively for the finder of fact, who is free to believe all, none or some of the evidence and to determine the credibility of the witnesses.

CRIMINAL PROCEDURE / SENTENCING

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion.

CRIMINAL PROCEDURE / SENTENCING

A substantial question as to the appropriateness of the defendant's sentence under the Sentencing Code must be established.

CRIMINAL PROCEDURE / SENTENCING

To demonstrate a substantial question exists, the defendant must make a plausible argument that the sentence is either inconsistent with a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process.

CRIMINAL PROCEDURE / SENTENCING

The imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment.

CRIMINAL PROCEDURE / SENTENCING / PRE-SENTENCE REPORTS

Where the sentencing court imposed a standard-range sentence with the benefit of a pre-sentence report the sentence is not excessive.

CRIMINAL PROCEDURE / SENTENCING

Defendants are not entitled to duplicate credit for time served.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. CR 3635 of 2016

Appearances: James A. Pitonyak, Esq., on behalf of Defendant David Ryan Bates (Appellant)
John H. Daneri, Erie County District Attorney, on behalf of the Commonwealth of Pennsylvania (Appellee)

OPINION

Domitrovich, J. May 18, 2018

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of David Ryan Bates ("Appellant") from this Trial Court's Sentencing Order dated February 8, 2018. On appeal, Appellant raises three issues: (1) whether the Appellant's guilty verdicts were against the weight of the evidence or were based on insufficient evidence; (2) whether

this Trial Court committed a manifest abuse of discretion in not sentencing Appellant "even lower than the standard range or even to the mitigated range"; and (3) whether this Trial Court committed error in failing to credit Appellant for time served. This Trial Court provides the following analysis:

On February 12, 2015, Detective Brian Fiorelli, who investigates narcotics sales and purchases in the Millcreek Police Department's Special Investigations Unit, received a telephone call from an unidentified male regarding the purchase of heroin and entered into a deal to purchase heroin at the McDonald's restaurant located at 909 Peninsula Drive, Erie, Pennsylvania. (*See* Trial Transcript, Day 1, Dec. 7, 2017, pg. 4:23-5:4; 7:4-15; 9:7-15; 11 :16-23) ("N.T.1."). Detective Fiorelli arrived at the McDonald's restaurant around 6:00 p.m. and called the telephone number that had previously called him and an unidentified male "instructed [Detective Fiorelli] to go to the bathroom of McDonald's." (*Id.* at 12:19-13:7).

As Detective Fiorelli proceeded to the men's bathroom, he was alerted via text message from other Millcreek Detectives, who were conducting surveillance outside of this McDonald's restaurant, to the arrival of a blue Kia Sorento in this McDonald's restaurant's parking lot. (*Id.* at 15:23-16:18; 17:25-18:5). As Detective Fiorelli continued to the men's bathroom, he observed Appellant enter this McDonald's restaurant and walk into the men's bathroom. (*Id.* at 18:11-16; 19:1-3). After Detective Fiorelli followed Appellant into the men's bathroom, Appellant approached Detective Fiorelli at the bathroom counter and spat from his mouth onto the counter a knotted plastic baggy containing a "chunky brown substance." (*Id.* at 19: 15-20:9). Detective Fiorelli then placed one hundred dollars on the bathroom countertop, and Appellant retrieved the money and exited the bathroom. (*Id.* at 21:2-24). Appellant then exited this McDonald's restaurant, entered the Kia Sorento, departed from this McDonald's restaurant's parking lot, and proceeded south on Peninsula Drive. (*Id.* at 23:18-22; 70:8-11).

Detectives Green and Hardner, the other Millcreek Detectives conducting surveillance, contacted Patrolman Benjamin Bastow of the Millcreek Police Department, who was patrolling nearby in a marked Millcreek Police vehicle. (*Id.* at 68:23-69:13). Patrolman Bastow, who was already approximately a block away from the Kia Sorento, was requested to effectuate a stop of the Kia Sorento to obtain information on the occupants for the benefit of the Detectives conducting surveillance. (*Id.* at 69:6-70:1; 74:22-25; 80:10-13). Patrolman Bastow observed the Kia Sorento depart from this McDonald's parking lot, proceed down Peninsula Drive, and pull into a County Fair gas station. (*Id.* at 70:8-11; 75:13-17). Patrolman Bastow then followed the Kia Sorento into the County Fair gas station parking lot and conducted a mere encounter with the occupants of the vehicle to identify said individuals. (*Id.* at 23:23-24:17; 71:13-72:10). Patrolman Ben Bastow identified the individuals inside of the Kia Sorento and sent out their names over the radio, who included David Ryan Bates, Eijon Shaleel Blue, and Davon Wall. (*Id*. at 24:21-25:12; 74:16-75:20). Within approximately ten minutes of meeting with Appellant in this McDonald's restaurant bathroom, Detective Fiorelli identified positively Appellant as the individual who sold the chunky brown substance to Detective Fiorelli after Detective Fiorelli reviewed a printout of Appellant's Identification Card photograph produced from the PennDOT System. (*Id*. at 26:7-28:7). The chunky brown substance was ultimately sent to the Pennsylvania State Police Erie Regional Lab for analysis, and the lab results indicated positively the chunky brown substance was heroin with a weight of .36 grams. (*Id*. at 30:4-10; 64:20-65:14).

On December 14, 2016, the District Attorney of Erie County filed an Information against Appellant charging appellant with the following criminal offenses: (1) Possession With Intent to Deliver in violation of 35 Pa.C.S. 780-113(a)(30); (2) Possession of a Controlled Substance in violation of 35 Pa.C.S. 780-113(a)(l6); and (3) Possession of Drug Paraphernalia in violation of 35 Pa.C.S. 780-113(a)(32). On May 30, 2017, Appellant filed *pro se* his Motion to Suppress Evidence "Identification." At the time of the scheduled hearing on Appellant's *pro se* Motion to Suppress Evidence "Identification," by Order dated July 17, 2017, this Trial Court granted Appellant's oral request to remove Brian D. Arrowsmith Esq., as Appellant's stand-by counsel and assigned James A. Pitonyak, Esq., to serve as Appellant's outside counsel. By Order dated August 4, 2017, this Trial Court continued the hearing on Appellant's *pro se* Motion to Suppress Evidence "Identification" to August 31, 2017.

A hearing on Appellant's *pro se* Motion to Suppress Evidence "Identification," which this Trial Court treated as Appellant's Petition for Writ of Habeas Corpus, was held on August 31, 2018. By Opinion and Order dated September 12, 2017, wherein this Trial Court set forth its findings of facts and conclusions of law, this Trial Court denied Appellant's *pro se* Motion to Suppress Evidence "Identification." Specifically, This Trial Court concluded the Commonwealth presented sufficient evidence to demonstrate Detective Fiorelli's positive identification of Appellant.

On October 18, 2017, Appellant voluntarily, intelligently, and knowingly waived his right to a jury trial. (*See* Defendant's Statement of Understanding of Rights Prior to Waiving Jury Trial, dated Oct. 18, 2017, filed Dec. 28, 2017). On the first day of the non-jury trial held December 7, 2017, the Commonwealth presented credible testimony from Millcreek Township Police Department Detective Brian Fiorelli and Patrolman Benjamin Bastow, as well as Forensic Scientist David Eddinger of the State Police Crime Lab in Lawrence Park, Pennsylvania.

Appellant's witnesses, Eijon Shaleel Blue and Davon Wall, were subpoenaed to testify at the first day of the non-jury trial, and one witness was briefly seen in the hallway outside of this Trial Court's Courtroom during said non-jury trial proceeding. However, both Eijon Shaleel Blue and Davon Wall ultimately failed to appear, and by Orders dated December 7, 2017, this Trial Court found both witnesses in contempt of court for failure to appear as properly subpoenaed. Thus, this Trial Court issued material witness bench warrants for the arrests of both Eijon Shaleel Blue and Davon Wall. The non-jury trial was then continued to December 28, 2017 to provide additional time to secure the appearances of said witnesses.

On the second day of the scheduled non-jury trial held December 28, 2017, Appellant presented testimony from Eijon Shaleel Blue and Davon Wall, and Appellant chose to testify on his own behalf. Also on the second day of the non-jury trial, the Commonwealth again called Patrolman Benjamin Bastow to testify. At the conclusion of the non-jury trial on December 28, 2017, this Trial Court found Appellant guilty beyond a reasonable doubt of all criminal charges alleged against Appellant at the above-referenced docket number. A Sentencing Hearing was held on February 8, 2018, and Appellant was sentenced as follows in the standard range:

- **Count One - Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver:** To be confined for a minimum period of 2 Year(s) and a maximum period of 5 Year(s) at SCI Greene.

- **Count Two - Possession of a Controlled Substance:** Merged with Count One.

- **Count Three - Possession of Drug Paraphernalia:** To be confined for a minimum period of 6 Month(s) and a maximum period of 1 Year(s) at SCI Greene.

On February 15, 2018, Appellant, by and through his Counsel, Attorney Pitonyak, filed a Post Trial Motion wherein Appellant submitted his Motion for Judgment of Acquittal and for Arrest of Judgment and Motion for Reconsideration of Sentence. By Order dated March 2, 2018, this Trial Court denied Appellant's Post Trial Motions. Thereafter, on February 12, 2018 and March 12, 2018, Appellant submitted letters to this Trial Court requesting credit for time served. After the Clerk of Courts of Erie County double-checked Appellant's time served, this Trial Court re-reviewed Appellant's credit for time served and found Appellant was properly credited, and said credit was applied appropriately. This Trial Court by Order dated March 19, 2018 denied Appellant's request.

On April 2, 2018, Appellant filed a Notice of Appeal to the Pennsylvania Superior Court of this Trial Court's Sentencing Order dated February 8, 2018. This Trial Court filed its 1925(b) Order on April 5, 2018. Appellant filed his Concise Statement of Matters Complained of on Appeal as per Rule 1925(b) on April 11, 2018.

Under the Pennsylvania Rules of Criminal Procedure, "When a jury trial is waived, the trial judge shall determine all questions of law and fact and render a verdict which shall have the same force and effect as a verdict of a jury." Pa.R.Crim.P. 621. Whether sufficient evidence exists to support the verdict is a question of law; the Pennsylvania Superior Court's standard of review is *de novo* and "the Superior Court's scope of review is plenary." *Commonwealth v. Walls*, 144 A.3d 926, 931 (Pa. Super. 2016). In assessing Appellant's sufficiency challenge, the Pennsylvania Superior Court must determine whether, viewing the evidence in a light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found the Commonwealth proved each element of the crime beyond a reasonable doubt. *Commonwealth v. Ansell*, 143 A.3d 944, 949 (Pa. Super. 2016). In addition, with respect to the sufficiency of the evidence, the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Commonwealth v. Hutchinson*, 947 A.2d 800, 805-806 (Pa. Super. 2008).

Moreover, "The weight of the evidence is exclusively for the finder of fact, who is free to believe all, none or some of the evidence and to determine the credibility of the witnesses." *Commonwealth v. Talbert*, 129 A.3d 536, 545 (Pa. Super. 2015) (quoting *Commonwealth v. Johnson*, 668 A.2d 97, 101 (Pa. 1995)); *see also Jones v. Steinberg*, 115 A.2d 803, 804 (Pa. Super. 1955) ("When a case is tried without a jury the credibility of witnesses and the weight to be accorded their testimony is for the trial Judge, and his general finding has the force and effect of a jury's verdict."). As such, resolving contradictory testimony and questions of credibility are matters for the finder of fact. *Commonwealth v. Hopkins*, 747 A.2d 910, 917 (Pa. Super. 2000). Thus, "an appellate court cannot substitute its judgment for that of the finder of fact [and] may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Collins*, 70 A.3d 1245, 1251 (Pa. Super. 2013) (quoting *Commonwealth v. Champney*, 832 A.2d 403, 408 (Pa. 2003)).

Finally, "where the trial court has ruled on a weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence;" rather, "appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." *Champney* 832 A.2d at 408 (citing *Commonwealth v. Tharp*, 830 A.2d 519, 528 (Pa.2003)).

In the instant case, the above-referenced factual background demonstrates Appellant's convictions of Possession with Intent to Deliver, Possession of a Controlled Substance, and Drug Paraphernalia are not against the weight of the evidence since the Commonwealth presented sufficient evidence for this Trial Court to find Appellant guilty beyond a reasonable doubt of said offenses. At trial, Detective Fiorelli stated he was contacted by an individual for the purpose of conducting a heroin drug transaction and said individual instructed Detective Fiorelli to meet in the men's restroom of the McDonald's restaurant. Detective Fiorelli entered said bathroom and encountered Appellant, who approached Detective Fiorelli and spat from his mouth a knotted plastic baggy. Said plastic baggy contained a chunky brown substance. In exchange, Detective Fiorelli placed one hundred dollars on the bathroom countertop, which Appellant accepted as payment. Within approximately ten minutes from said drug transaction, Detective Fiorelli identified positively Appellant as the individual who sold the chunky brown substance to Detective Fiorelli after reviewing a printout of Appellant's Identification Card photograph produced from the PennDOT System.

The chunky brown substance was subsequently delivered to the Pennsylvania State Police Erie Regional Lab for analysis. Forensic Scientist David Eddinger indicated he "determined that [the substance] weighted 36 hundredths of a gram and contained heroin" to a reasonable degree of scientific certainty. (N.T.1. at 64:20-65:14). Also at trial, the Commonwealth requested and, with no objection from Appellant, this Trial Court admitted said heroin into evidence. (*Id*. at 30:4-33: 12). Based on the foregoing evidence, this Trial Court finds and concludes the Commonwealth presented sufficient evidence of Appellant's guilt beyond a reasonable doubt for the above-referenced criminal charges.

Appellant's argument that the Commonwealth presented "no evidence of a physical nature, such as DNA testing of the package that the heroin was obtained in . . . nor were there any fingerprints of [Appellant] found on said package . . . " is simply without merit. (*See* Appellant's Statement of Matters Complained of on Appeal as per Rule 1925(b) at ¶ 3(f)). As mentioned above, the Commonwealth presented sufficient evidence in this case identifying Appellant as the individual who sold the subject heroin to Detective Fiorelli. In particular, Detective Fiorelli retrieved a printout containing a photograph of Appellant from the PennDOT System, which was date-stamped as 6:20 p.m. on February 12, 2015, approximately ten minutes from the time Detective Fiorelli stated he encountered Appellant inside the McDonald's restaurant bathroom at or about 6:10 p.m. (N.T.1. at 26:13-27:25). The Commonwealth additionally requested and, with no objection from Appellant, this Trial Court admitted said printout as evidence. (*Id*. at 27:3-28:12). Said printout is included in the formal case record. (*See* Commonwealth's Exhibit A). Thus, this Trial Court was entitled to rely on the Commonwealth's evidence in making the factual determination that Detective Fiorelli positively identified Appellant as the individual who sold heroin to Detective Fiorelli approximately ten minutes after encountering Appellant. *See Hutchinson*, 947 A.2d at 806. As this Trial Court has the exclusive responsibility of affording weight

to the Commonwealth's evidence, this Trial Court concludes Appellant was the individual who sold heroin to Detective Fiorelli.

Finally, this Trial Court previously ruled on a weight claim as to Appellant's Post Trial Motion wherein Appellant requested this Trial Court grant him Judgment of Acquittal or an Arrest of Judgment relative to Appellant's guilty verdict. Appellant argued said verdict was either against the weight of the evidence or was not based upon sufficient evidence to sustain a conviction. As noted above, since the issue of whether the Commonwealth presented sufficient evidence was ultimately one of credibility, this Trial Court did not "palpably abuse[] its discretion in ruling on [Appellant's] weight claim." *See Tharp*, 830 A.2d at 528. Accordingly, as Appellant's convictions of Possession with Intent to Deliver, Possession of Controlled Substance, and Drug Paraphernalia are not "so contrary to the evidence as to shock one's sense of justice," Appellant's weight and sufficiency of the evidence claim is without merit. *See Collins*, 70 A.3d at 1251.

Next, Appellant raises several issues related to the discretionary aspects of Appellant's sentence. Ordinarily, appellate case law indicates sentencing courts are in a far better position to weigh the factors involved in crafting a sentence. *See Commonwealth v. Martin*, 351 A.2d 650, 657 (Pa. 1976); *see also Commonwealth v. Rodda*, 1999 723 A.2d 212, 214 (Pa. Super. 1999) ("Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion."). Appellate review of sentences is governed by Section 9781 of the Pennsylvania Sentencing Code, which clearly states challenges to the discretionary aspects of a defendant's sentence are not appealable as of right. *See* 42 Pa.C.S.A. § 9781; *see also Commonwealth v. Sierra*, 752 A.2d 910, 912 (Pa. Super. 2000). Rather, for jurisdictional purposes, an appellant must establish the existence of a substantial question as to the appropriateness of the defendant's sentence under the Sentencing Code. *Commonwealth v. Mouzon*, 812 A.2d 617, 621 (Pa. 2002). To demonstrate a substantial question exists, the defendant "is required to make a plausible argument that his sentence is either inconsistent with a particular provision of the Sentencing Code or contrary to the fundamental norms underlying the sentencing process." *Mouzon*, 812 A.2d at 621 (citing *Commonwealth v. Goggins*, 748 A.2d 721, 727 (Pa. Super. 2000)).

Significantly, "An argument that the sentencing court failed to consider mitigating factors in favor of a lesser sentence does not present a substantial question appropriate for . . . review." *Commonwealth v. Popielarcheck*, 151 A.3d 1088, 1094 (Pa. Super. 2016) (citing *Commonwealth v. Hanson*, 856 A.2d 1254, 1257-58 (Pa. Super. 2004); *see e.g., Commonwealth v. McNabb*, 819 A.2d 54, 57 (Pa. Super. 2003) (appellant's issue not entitled to review since "an allegation that the sentencing court did not consider certain mitigating factors does not raise a substantial question"). Indeed, where a pre-sentence report is available to the sentencing court, the reviewing court presumes the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. *Commonwealth v. Devers*, 546 A.2d 12, 18 (Pa. 1988). In addition, "The imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment." *Commonwealth v. Moury*, 992 A.2d 162, 171 (Pa. Super. 2010) ("Although Pennsylvania's system stands for individualized sentencing, the court is not required to impose the 'minimum possible' confinement.").

In this case, Appellant argues "there was more than sufficient mitigating evidence relative to [Appellant's] background as set forth on the record to allow the Court to go even lower than the standard range or even the mitigated range" and argues this "[Trial] Court could have [made] the sentence imposed concurrent and overlapping with [Appellant's] prior sentence" imposed at a previous docket number. (*See* Concise Statement at ¶ 5-8). However, as these issues relate to the discretionary aspects of Appellant's sentence, Appellant fails to raise a substantial question appropriate for review. See *Popielarcheck*, 151 A.3d at 1094; *Maury*, 992 A.2d at 171.

Notwithstanding Appellant's failure to raise a substantial question regarding the discretionary aspects of his sentence, this Trial Court properly imposed standard range sentences that were appropriate in light of the individualized facts of the underlying incident while also considering aggravating and mitigating circumstances. Specifically, at the time of sentencing, this Trial Court considered the thorough pre-sentence investigation report, the Pennsylvania Guidelines on Sentencing, the Pennsylvania Sentencing Code, the Defendant's age, the seriousness of the offenses, the facts and nature and circumstances of the offenses, the protection of society, Defendant's rehabilitative needs, the sincerity of his remorse, and that the undersigned judge was also the presiding trial judge. (N.T., Sentencing Hearing, Feb. 8, 2018, pg. 12:18-14:1). Based on the foregoing, Appellant has no basis to challenge his standard range sentence. *See Commonwealth v. Corley*, 31 A.3d 293, 298 (Pa. Super. 2011) ("[W]here the sentencing court imposed a standard-range sentence with the benefit of a pre-sentence report, we will not consider the sentence excessive."). Accordingly, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Sentencing Order.

Finally, Appellant alleges he is entitled to credit for time served from the date he was incarcerated on an arrest warrant on September 25, 2016, forward. This Trial Court previously and thoroughly addressed this issue in this Trial Court's Order dated March 19, 2018. Below is a recitation of this Trial Court's analysis:

> On September 25, 2016, Defendant was committed to the Erie County Prison at **docket number 3421 of 2016**. On April 7, 2017, the Honorable John Garhart sentenced Defendant at **docket number 3421 of 2016 on Counts # 3, 5, and 6**. At that time, Defendant received credit for a total of 195 days for time served from September 25, 2016 to Defendant's date of sentencing on April 7, 2017. (*See* Judge Garhart's Sentencing Order dated April 7, 2017).
>
> Also on April 7, 2017, at **docket number 2443 of 2015**, the Honorable John Garhart revoked Defendant's Parole/Probation, and Defendant was resentenced to one (1) to five (5) years and was credited with thirty (30) days for time served between July 20, 2015 and August 5, 2015 and between May 6, 2016 and May 18, 2016. Defendant's sentence at docket number 2443 of 2015 was consecutive to 3421 of 2016. (*See* Judge Garhart's Sentencing Order dated April 7, 2017)
>
> On August 7, 2017, the Honorable John J. Mead sentenced Defendant at **docket number 3421 of 2016 on Count # 1** consecutive to Counts # 3, 5, and 6 at docket number 3421 of 2016. (*See* Judge Mead's Sentencing Order dated Aug. 7, 2017). Defendant was not entitled to receive additional credit for time served since Defendant

previously received credit for time served for his sentence on Counts # 3, 5, and 6 at docket number 3421 of 2016. No duplicate credit is allowed. By law, no additional credit for time served had accrued between Defendant's sentence on April 7, 2017 on Counts # 3, 5, and 6 at docket number 3421 of 2016, and August 7, 2017, since Defendant was already serving his sentence on said Counts.

On September 27, 2016, Defendant was committed to the Erie County Prison at **docket number 3635 of 2016**. Defendant did not post bond. On February 8, 2018, the undersigned judge sentenced Defendant at docket number 3635 of 2016. (*See* Sentencing Order dated Feb. 8, 2017). Again, Defendant was not entitled to receive additional credit for time served since none had accrued between September 27, 2016, and February 8, 2018. Defendant previously received credit for time served for this time period at Defendant's sentence on Counts # 3, 5, and 6 at docket number 3421 of 2016. No duplicate credit is permitted. Moreover, Defendant's sentence at docket number 3635 of 2016 was consecutive to docket number 3421 of 2016, and by law Defendant may not receive duplicate credit for credit Defendant previously received at docket number 3421 of 2016.

Thus, Defendant's cases at docket numbers 3421 of 2016 and 3635 of 2016 are now an aggregate state sentence. Defendant has already received proper credit for his cases.

(*See* Trial Court Order dated March 19, 2018). As stated in the foregoing analysis, Appellant's issue regarding whether he has been properly credited for time served is meritless. *See Commonwealth v. Ellsworth*, 97 A.3d 1255, 1256 (Pa. Super. 2014) (noting defendants are not entitled to duplicate credit for time served); *see also Commonwealth v. Hollawell*, 604 A.2d 723, 726 (1992) (noting defendants are not entitled to "volume discounts" on credit for time served). Thus, Appellant is not entitled to credit for time served where said credit has been previously applied to another criminal case.

For the above reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's decisions at the above-referenced docket.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

DONALD C. OWENS
v.
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

APPELLATE PROCEDURE / CONCISE STATEMENT

A trial court judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal.

APPELLATE PROCEDURE / CONCISE STATEMENT

Issues not included in the Statement and/or not raised in accordance with the provisions of this Pennsylvania Rules of Appellate Procedure 1925(b)(4) are waived.

APPELLATE PROCEDURE / CONCISE STATEMENT

It is not enough to timely file the concise statement with the Prothonotary, but not serve the Trial Court when directed to do so by an order.

AUTOMOBILES / PRESUMPTIONS AND BURDEN OF PROOF

Once Department of Transportation introduces certified conviction records showing that a licensee's record merits a suspension, it has established a prima facie case and the burden shifts to the licensee, who must then prove by clear and convincing evidence that the conviction did not occur.

AUTOMOBILES / PRESUMPTIONS AND BURDEN OF PROOF

To rebut a prima facie case established by a certified conviction record, the licensee must either challenge the regularity of the record, or introduce direct evidence showing that the record is incorrect and that the conviction was never entered.

AUTOMOBILES / PRESUMPTIONS AND BURDEN OF PROOF

The Department of Transportation's certification of a driving record showing that notice was given is competent to establish that notice was sent.

AUTOMOBILES / PRESUMPTIONS AND BURDEN OF PROOF

The Department of Transportation is not required to show that the licensee actually received the notice.

AUTOMOBILES / PRESUMPTIONS AND BURDEN OF PROOF

An individual is required to complete the proper administrative steps after a statutory suspension has ended before being entitled to drive without restriction.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 11929-2018
1481 CD 2018

Appearances: Donald C. Owens, *pro se* (Appellant)
Terrance M. Edwards, Esq., on behalf of Commonwealth of Pennsylvania Department of Transportation (Appellee)

OPINION

Domitrovich, J. December 27, 2018

This matter is currently before the Pennsylvania Commonwealth Court on the *pro se* appeal of Donald C. Owens ("Appellant") from this Trial Court's Order dated September 29, 2018. Appellant raises the issue of whether he received the "Official Notice of the Suspension of your Driving Privilege" ("Notice") of his suspension dated June 6, 2018. This Notice involves Appellant's failure to make regular payments on his Magisterial District Judge's fines and costs. Undisputedly, prior to the hearing by this Trial Court, however, the Department of Transportation had already rescinded Appellant's driver's license suspension due to Appellant's eventual compliance by paying the remaining balance on his fines. And so, this Trial Court lacks jurisdiction for any relief sought by Appellant. Since his suspension has been rescinded, Department of Transportation properly informed Appellant he must pay the administrative restoration fee. This Trial Court is not empowered to waive any administrative restoration fees.

Moreover, Appellant has failed to timely serve this Trial Court with his Concise Statement of Matters on Appeal. Appellant was late by thirteen (13) days. This Trial Court provides the following analysis:

The Department of Transportation indicated Appellant's operating privileges were initially suspended due to Appellant's failure to make regular payments on fines, costs, and restitution, as Appellant made sporadic payments. As per Department of Transportation's procedures and regulations, after a fine has been paid in full, the suspension is lifted and an administrative restoration fee is required to restore driving privileges. As Petitioner's fine had been paid sporadically, but eventually paid in full, this Trial Court found "the instant license suspension appeal is dismissed, and Appellant should pay his restoration fee to restore Appellant's operator's license since this Trial Court has no jurisdiction to waive the restoration fee requirement." (*See* Trial Court Order, dated September 29, 2019).

Nonetheless, Appellant timely appealed this Order on October 29, 2018. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), this Trial Court then issued a 1925(b) Order directing Appellant to file a Concise Statement of Errors Complained of on Appeal within twenty-one days of said Order's entry on the docket.[1] Appellant failed to timely serve this Trial Court with his Concise Statement of Errors Complained of on Appeal until December 3, 2018, which was thirteen (13) days late.

This Opinion will first address the issue of whether Appellant's appeal should be dismissed because Appellant failed to timely serve this Trial Court with a Concise Statement of the Errors Complained of on Appeal.

Pennsylvania Rule of Appellate Procedure 1925(b) states a trial court judge "may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal." Pa.R.A.P. 1925(b). This Rule

[1] This Order was signed on October 29, 2018, but entered onto the Docket on October 30, 2018. On November 8, 2018, this Trial Court also granted the Appellant's request to preserve the status quo in the form of a supersedeas of Appellant's "under suspension" designation until Appellant's appeal to the Commonwealth Court is completed.

On November 7, 2018, the Pennsylvania Commonwealth Court returned Appellant's notice of appeal for "DEFECT: NOA must be served on trial court judge and court reported w/complete addr." Appellant's "Proof of Service of Notice of Appeal" was filed on November 20, 2018.

directs the Appellant on how the Statement should be filed: "Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail ... Service on parties shall be concurrent with filing and shall be by any means of service specified under Pa.R.A.P. 121(c)." Pa.R.A.P. 1925(b)(1). The appellant shall have "at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement." Pa.R.A.P. 1925(b)(2). Appellant's failure to raise any issues in accordance with its provisions will result in the waiver of those issues:

> "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b) (4) are waived."

Pa.R.A.P. 1925(b)(4)(vii); *see also Com. v. Hill*, 16 A.3d 484 (Pa. 2011) ("Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file ***and serve*** a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived[.]") (emphasis added). In the instant case, this Trial Court's Order directed Appellant "to forthwith file of record a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days of the entry of this Order and serve a copy thereof on the undersigned judge. Any issue not properly included in a timely filed and served concise statement shall be deemed waived." (Order dated October 29, 2018).

Indeed, since "the submission of a court-ordered Rule 1925(b) statement is a prerequisite to appellate merits review, . . . the Rule 1925(b) statement (when directed) is elemental to an effective perfection of the appeal." *Commonwealth v. Halley*, 870 A.2d 795, 800 (Pa. 2005) (*citing Lord*, 719 A.2d at 307-09). The Pennsylvania Commonwealth Court in *Holtzapfel* elaborated:

> The requirement of strict compliance with Pa. R.A.P. 1925(b) guarantees a trial judge's ability to focus on the issues raised by the appellant, and thereby, allows for meaningful and effective appellate review. Moreover, a bright-line rule eliminates the potential for the inconsistent results that existed prior to *Lord*, when trial courts and appellate courts had discretion to address or to waive issues raised in non-compliant Pa. R.A.P. 1925(b) statements.

Commonwealth v. Holtzapfel, 895 A.2d 1284, 1288 (Pa.Cmwlth. 2006) (*quoting Commonwealth v. Schofield*, 585 Pa. 389, 393, 888 A.2d 771, 774 (2005)). It is not enough to timely file with the Prothonotary, but not serve the Trial Court when directed to do so by an order. *See Egan v. Stroudsburg Sch. Dist.*, 928 A.2d 400, 402 (Pa. Commw. 2007).

In addition, appellants who want an extension of time to file their 1925(b) statement must petition the trial court within the twenty-one day period and provide the court with a "good cause" explanation for an extension of a specific amount of time in which to file the 1925(b) Statement. *See* Pa.R.A.P. 1925(b)(2); *see also Commonwealth v. Gravely*, 970 A.2d 1137, 1144 (Pa. 2009). If a trial court issues an order granting an extension request, only then will issues raised in an otherwise untimely 1925(b) statement be preserved for appellate review. *See e.g., Commonwealth v. Mitchell*, 902 A.2d 430, 444 (Pa. 2006) (statement timely filed

outside of twenty-one day period where "several extensions of time" were properly made).

In the instant case, this Trial Court issued a Rule 1925(b) Order October 29, 2018, which was filed of record and time-stamped by the Erie County Clerk of Records Prothonotary on October 30, 2018 directing Appellant to file a Concise Statement of Errors Complained of on Appeal within twenty-one days of the entry of said Order on the docket and to "serve a copy thereof on the undersigned judge." Appellant failed to comply with the minimal requirements of Pa.R.A.P. 1925(b) since he did not serve his Concise Statement to this Trial Court within twenty-one days from the entry of this Trial Court's 1925(b) Order filed by the Trial Court on October 30, 2018. This Trial Court received Appellant's Concise Statement on December 3, 2018, thirteen (13) days late. This Trial Court has attached a copy of the front page of Appellant's Concise Statement received with the date stamped from the Court's office indicating December 3, 2018. (Attached as Court Exhibit B). Finally, pursuant to *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005), this Trial Court may not deviate from the bright-line rule requiring Appellant to comply with the clear mandates of Pa.R.A.P. 1925(b) when Appellant is directed to do so. Since Appellant has failed to apprise this Trial Court of his issues presented on appeal in a timely manner, Appellant has waived any issues for appeal.

Assuming *arguendo*, Appellant's issues on appeal are not waived, Appellant's appeal is moot, and this Trial Court does not have the jurisdiction to waive the restoration fee that Appellant continues to seek. The factual and procedural history is as follows:

On June 17, 2017 Appellant was issued a citation, and thereafter pled guilty and was sentenced at the Magisterial District Judge level. Appellant did not make regular or timely payments on the fines resulting from the citation. On June 6, 2018, the Department of Transportation sent to Appellant a Notice for Appellant's failure to pay fully the fine on the citation from June 17, 2017. As per the Notice, Appellant's driving privileges would be suspended on June 27, 2018 if Appellant did not pay the remainder of the requisite fine and costs prior to June 27, 2018, and Appellant would be required to pay a restoration fee of his driving privileges. The Notice also stated Appellant had thirty (30) days from the date of the Notice to appeal. Appellant made a partial payment on the fine on June 29, 2018. The Appellant was issued another citation on July 1, 2018, for driving with a suspended license.

On July 26, 2018, Appellant filed "Petition For Leave To file Appeal Nunc Pro Tunc from Order of Department of Transportation." The President Judge Trucilla granted Appellant's petition for *nunc pro tunc* relief, on July 31, 2018, then subsequently vacated the Order for lack of notice to the Department of Transportation.

On September 5, 2018, Appellant made the final payment on the citation of June 17, 2017. On September 26, 2018, this Trial Court heard Appellant's license suspension appeal, wherein the Department of Transportation introduced Appellant's certified conviction record and made part of the record as Commonwealth's Exhibit 1. (Notes of Testimony, License Suspension Appeal, September 26, 2018, at 3:23-4:8 ("N.T.1")).

Appellant's certified conviction record included the Notice indicating the suspension was pursuant to 75 Pa.C.S. § 1533, for failure to pay any fine, costs or restitution imposed. The law is clear as to court procedure:

> Once DOT introduces certified conviction records showing that a licensee's record merits a suspension, it has established a prima facie case and the burden shifts to the licensee, who must then prove by clear and convincing evidence that the conviction did not occur. *Roselle v. Department of Transportation, Bureau of Driver Licensing*, 865 A.2d 308, 314 (Pa.Cmwlth.2005); *Glidden v. Department of Transportation, Bureau of Driver Licensing*, 962 A.2d 9, 12 (Pa.Cmwlth.2008). Clear and convincing evidence is defined as "evidence that is so clear and direct as to permit the trier of fact to reach a clear conviction, without hesitancy, as to the truth of the facts at issue." *Mateskovich v. Department of Transportation, Bureau of Driver Licensing*, 755 A.2d 100, 102 n. 6 (Pa. Cmwlth.2000) (quoting *Sharon Steel Corporation v. Workmen's Compensation Appeal Board*, 670 A.2d 1194, 1199 (Pa.Cmwlth.1996)). To rebut a prima facie case established by a certified conviction record, the licensee must either challenge the regularity of the record, or introduce direct evidence showing that the record is incorrect and that the conviction was never entered. *Id.* at 102.

Dick v. Com., Dep't of Transp., Bureau of Driver Licensing, 3 A.3d 703, 707 (Pa. Commw. Ct. 2010). Because the Department of Transportation in the instant case introduced the certified conviction record, the burden of proof was shifted to Appellant. Appellant argued he never received the Notice sent on June 6, 2018 and did not learn of the suspension of his driving privileges until he was issued the citation for driving with a suspended license on July 1, 2018. (N.T.l at 32:14-24).

In these instances, well settled law regarding the mailbox rule applies:

> Under the mailbox rule, proof of mailing raises a rebuttable presumption that the mailed item was received and it is well-settled that the presumption under the mailbox rule is not nullified solely by testimony denying receipt of the item mailed. *Department of Transportation v. Brayman Construction Corp.-Bracken Construction Co.*, 99 Pa.Commonwealth Ct. 373, 513 A.2d 562 (1986). Further, the Department's certification of a driving record showing that notice was given is competent to establish that notice was sent. *Department of Transportation, Bureau of Driver Licensing v. Petrucelli*, 117 Pa.Commonwealth Ct. 163, 543 A.2d 213 (1988). The Department is not required to show that the licensee actually received the notice. *Department of Transportation, Bureau of Driver Licensing v. Fundenberg*, 127 Pa.Commonwealth Ct. 180, 561 A.2d 84 (1989).

Com., Dep't of Transp., Bureau of Driver Licensing v. Grasse, 606 A.2d 544, 545-46 (1991). At the hearing on September 26, 2018, Appellant argued he never received the notice; introduced other pieces of mail sent to his address of record; and stated he would have paid the fine in full if Appellant had actually received the notice. Additionally, Appellant informed this Trial Court that he has two different addresses: 1708 Granada Drive, Apartment 14, the one address he lives at, and the 221 East 25th Street, where Appellant receives mail and is his address of record. (N.T.1 at 2:8-3:10). This Trial Court notes the Notice was properly sent by the Department of Transportation to Appellant's address of record: 221 East 25th Street. (N.T.1 at 3:23-4:8). Moreover, as plainly stated in *Com., Dep't of Transp., Bureau of Driver Licensing v. Grasse*, "the presumption under the mailbox rule is not nullified solely by testimony denying receipt of the item mailed."

Since President Judge Trucilla had issued his decision to permit *nunc pro tunc* relief to Appellant, and afterwards President Judge Trucilla vacated his Order due to lack of notice to counsel for the Department of Transportation, this Trial Court issued an Order dated September 29, 2018 (at the time of the license suspension appeal in the presence of both Appellant and Appellee's counsel) permitting Appellant's appeal *nunc pro tunc*, consistent with the intent of the President Judge. Moreover, this Trial Court deemed it necessary to follow the President Judge's intent due to coordinate jurisdiction. This Trial Court took jurisdictional notice of Appellant's three (3) days lateness and due to mail in Erie being slow recently, this Trial Court permitted his *nunc pro tunc* relief to hear his case on the merits.

Since, Appellant's suspension was rescinded by the Department of Transportation as Appellant had fully paid the fine on September 5, 2018, and Appellant only had to pay the administrative restoration fee to resume driving privileges, this Trial Court dismissed his appeal. Appellant must pay the required restoration fee.

Further, this Trial Court does not have jurisdiction to waive the restoration fee that Appellant continues to seek. *See Rossi v. Commonwealth*, 860 A.2d 64, 67 (Pa. 2004) ("[A]n individual [is required] to complete the proper administrative steps after a statutory suspension has ended before being entitled to drive without restriction."), *see also* 75 Pa.C.S. § 1960. As indicated by Attorney Farkas at the time of the hearing, Appellant has no case to be heard for license suspension purposes since after he failed to make continuous payments on his fine, he cleared his suspension by paying this fine eventually in full. (N.T.l 7:3-12; 28:13-18; 36:19-23; 37:23-38:7). Appellant knew he had to make regular, on-time, and monthly payments for his fines and costs at the office of the Magisterial District Judge, since he entered into a payment plan. (*See* "Exhibit A"). However, Appellant made sporadic payments, every three (3) to six (6) months, as explained in this Trial Court's Order dated September 29, 2018, and as evidenced by Court Exhibit A attached:

> In view Appellant's ***operating privileges were initially suspended due to Appellant's failure to make regular payments on fines, costs, and restitution*** for citation number T42216790 issued June 17, 2017, as Appellant made sporadic payments, such as on September 11, 2017, and March 5, 2018, (*See* Notice of Suspension dated June 6, 2018; *see also* Payment Plan Summary ***attached as Court Exhibit A***), and upon consideration Appellant subsequently paid in full all fines, costs, and restitution for said citation after his suspension became effective, and PennDOT has now rescinded the suspension of Appellant's operating privileges since he has paid all of his fines, costs, and restitution in full; and since this Trial Court does not have authority to waive the restoration fee for Appellant to reinstate his operating privileges ... it is hereby **ORDERED, ADJUDGED and DECREED** the instant license suspension appeal is **DISMISSED**, and Appellant should pay his restoration fee to restore Appellant's operator's license since this Trial Court has no jurisdiction to waive the restoration fee requirement.

(emphasis added).

Now that Appellant's fine is paid in full, the only action remaining for Appellant currently is to pay his restoration fee to reinstate fully his driving privileges. (N.T.l at 14:4-6; 36:19-23); *See also* Trial Court Order dated September 29, 2018. Appellant failed to produce any evidence of lack of administrative breakdown. This Trial Court's permitting his appeal to

be heard does not mean this Court intended her finding to be he never received his Notice. These are separate decisions of which neither Appellant nor the Pennsylvania Department of Transportation appealed the *nunc pro tunc* relief granted.

In conclusion, for all of the foregoing reasons, this Trial Court requests the Pennsylvania Commonwealth Court dismiss Appellant's instant appeal.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS EUGENE BEEBE, II

EVIDENCE / RELEVANCY

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

EVIDENCE / RELEVANCY

Courts admit prior inconsistent statements in order to call into question a witness' credibility in general and to alert the jury of the potential for error in his testimony.

EVIDENCE

Admission of evidence is within the sound discretion of the trial court, and the trial court's admission of evidence will only be reversed upon a showing that the trial court abused its discretion or committed an error of law.

CRIMINAL PROCEDURE / TRIAL PROCEDURE

Where an error in a criminal trial did not contribute to the verdict, the error was harmless and will not warrant the retrial of a criminal defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. CR 880 of 2017
247 WDA 2018

Appearances: Thomas Eugene Beebe, II, *pro se* (Appellant)
John H. Daneri, Erie County District Attorney, on behalf of the Commonwealth of Pennsylvania (Appellee)

OPINION

Domitrovich, J. April 17, 2018

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of Thomas E. Beebe, II (hereinafter "Appellant") from this Trial Court's Sentencing Order dated January 31, 2018. On appeal, Appellant raises the issue of whether this Trial Court "erred in admitting testimony by victim indicating that responding Police Officer was in the area because he was looking for Defendant who was maybe on probation and not allowed to be at the bar (scene of offense)." However, Appellant's issue refers to testimony elicited in Appellant's first jury trial held on December 18, 2017, which this Trial Court properly declared as a mistrial. Therefore, this Trial Court respectfully requests the Pennsylvania Superior Court quash this appeal.

Nevertheless, this Trial Court will attempt to address, and will therefore speculate, that as an alternative issue Appellant may have intended to raise on appeal whether this Trial Court's curative instruction which directed the jury to disregard statements made by a particular police officer on his body camera video footage was sufficient to restrict the evidence to its proper scope.

On December 3, 2016, Kristen Ross and Amanda Hutchings were at the Tamarack bar in

Corry, Pennsylvania. (*See* Notes of Testimony, Jury Trial, Day 2, Dec. 19, 2017, pg. 64:16-23). Sometime during the evening, Appellant, who had an "on and off' romantic relationship with Ms. Ross, entered the bar, spoke with Ms. Ross, and Appellant and Ms. Ross exited the bar. (*Id*. at 65:14-19; 66:7-9; 89:8-13). Appellant and Ms. Ross talked for "a while" outside "down a little ways up the road." (*Id*. at 66:14-21; 70:24-71:1). Ms. Hutchings left the bar to check on Ms. Ross and Appellant, who were standing three to four feet apart from each other, and observed Appellant remove a firearm from inside his coat and discharged a single round away from the bar. (*Id*. at 66:10-16; 71:4-72-4; 72:13-25). Ms. Hutchings then entered the bar and notified the bartender, Sandra Vantassel, who locked down the bar for the safety of the patrons and called the police (*Id*. at 72:16-17; 73:9-14; 73:24-74:1; 89:10-23; 90:17-91:-6). Ms. Vantassel stated she heard a "pop" before Ms. Hutchings reentered the bar. (*Id*. at 89:20-23; 90:12-16).

After Ms. Vantassel called the police, Officer Richard Bayhurst of the Corry City Police Department arrived at the bar in response to information regarding "shots fired outside the location of the Tamarack Bar." (*Id*. at 115:16-19). Officer Bayhurst arrived at the bar and made contact with Ms. Ross and obtained a statement from Ms. Ross, which was recorded with Officer Bayhurst's body camera. (*Id*. at 116:7-16). Officer Bayhurst attempted to locate Appellant, but when unable to do so, he began searching the area for evidence and recovered pieces of a magazine for a Smith and Wesson as well as a .380 caliber shell casing. (*Id*. at 117:5-18; 121:8-14; 125:4-9; 125:20-22). Officer Bayhurst later made contact with Steve Holton, the owner of the Smith and Wesson, who reported the same Smith and Wesson missing on November 8, 2016. (*Id*. at 127:8-20; 132:8-12; 133:9-18). Ultimately, Deputy U.S. Marshall Brent Novak apprehended Appellant in possession of the firearm concealed on Appellant's person along with a magazine in Buffalo, New York on December 5, 2016. (*Id*. at 109:3-111:4; 132:18-133:8).

On April 19, 2017, the District Attorney's Office filed a Criminal Information, charging Appellant with: (1) Terroristic Threats Causing Serious Public Inconvenience, in violation of 18 Pa.C.S. § 2706(A)(3); (2) Terroristic Threats With Intent to Terrorize Another in violation of 18 Pa.C.S. § 2706(A)(1); (3) Recklessly Endangering Another Person in violation of 18 Pa.C.S. § 2705; (4) Harassment in violation of 18 Pa.C.S. § 2709(A)(2); (5) Discharging of a Firearm Inside City Limits in violation of LO 750(1); (6) Receiving Stolen Property in violation of 18 Pa.C.S. § 3925(A); and (7) Firearms Not to Be Carried Without a License in violation of 18 Pa.C.S. § 6106(A)(1).

On December 18, 2017, a jury trial was held; however, this Trial Court declared a mistrial shortly after the trial began. Specifically, the Commonwealth called Kristen Ross as a witness to testify, but the Commonwealth's direct examination of Ms. Ross prompted Appellant's counsel to object and move for a mistrial:

> Q. Okay. Did you speak with any police officer that night?
> A. I talked to Bayhurst.
> Q. Okay. Now, did he - did officer Bayhurst come to the Tamarack bar that evening?
> A. Yes.
> Q. Okay. Why did he come to the bar?
> A. Probably because of Tom being there.
> Q. What happened with Tom being there?

A. I have no idea.

Q. Okay. You don't have - you don't know any reason why Officer Bayhurst would have responded there concerning Tom?

A. Maybe because he was on probation and not allowed to be at the bar.

(*See* Notes of Testimony, Jury Trial, Dec. 18, 2017, pg. 22:21-23:10). Thus, based on the foregoing testimony elicited from Ms. Ross, this Trial Court declared a mistrial and a new jury trial was rescheduled for the next day on December 19, 2017.

On December 19, 2017, a new jury was selected and a second jury trial was held. During the Commonwealth's case-in-chief, Assistant District Attorney Grant T. Miller called Ms. Ross, who testified that when she provided a statement to Officer Bayhurst on December 3, 2016, she "did not tell the police the truth" and specifically testified that she "told the police that [Appellant] had a gun, but. . .did not see a gun." (*See* Notes of Testimony, Jury Trial, Day 2, Dec. 19, 2017, pg. 32:4-11). In order to impeach Ms. Ross' testimony, ADA Miller played to the jury the body camera video footage capturing Ms. Ross' statements to Officer Bayhurst recorded on December 3, 2016. After a portion of the body camera footage was played to the jury, this Trial Court excused the jury. Attorney Bonanti then objected to the display of the body camera footage and orally moved for a mistrial. (*Id*. at 33:8-22). In essence, Attorney Bonanti articulated his objection as follows:

> [Officer Bayhurst] was trying to figure out where [Appellant] lived and [Officer Bayhurst is] talking about other drug criminals in Corry and [Officer Bayhurst] said [Appellant] lives in an area where there's a trade - drug trade, and [Appellant is] making lots of money off the trade. And there's no relevance and it's certainly not unforeseeable that the jury takes that and makes an inference - a nasty inference from it.

(*Id*. at 38:22-39:4). After a lengthy discussion outside the presence of the jury on the record among Attorney Bonanti, ADA Miller, and the undersigned judge, and after this Trial Court reviewed the remainder of the video outside of the presence of the jury, this Trial Court permitted ADA Miller to display the remainder of the video footage to the jury for the limited purpose of impeaching Ms. Ross with the aid of a carefully worded and helpful curative instruction. (*Id*. at 47:14; 33:8-55:19; 58:11-13). Specifically, this Trial Court issued the following curative instruction to the jury before the remainder of the footage was displayed:

> Hello, again, jurors. I have to give you a very important cautionary instruction. And I'm going to direct you to disregard anything on the tape said by Patrol Officer Bayhurst. You are to totally disregard anything [Officer Bayhurst] said on the tape. Officer Bayhurst tried to infer things that are definitely untrue and prejudicial and not relevant to this case. His statements are not evidence of anything. You may proceed.

(*Id*. at 55:22-56:5). Again, Attorney Bonanti objected to the curative instruction arguing the evidence was irrelevant and "caused an improper taint or prejudice" despite this Trial Court issuing an proper curative instruction. (*Id*. at 56: 10-18). Appellant was ultimately convicted of all criminal charges and on January 31, 2018, this Trial Court entered the following Sentencing Order:

- Count 1 - Terroristic Threats Cause Serious Public Inconvenience - To be confined for a minimum period of 2 Year(s) and a maximum period of 5 Year(s) at PA Dept. of Corrections in the **standard range**.

- Count 2 - Terroristic Threats With Intent To Terrorize Another - To be confined for a minimum period of 1 Year(s) and a maximum period of 2 Year(s) at PA Dept. of Corrections in the **standard range** and consecutive to Count 1.

- Count 3 - Recklessly Endangering Another Person - To be confined for a minimum period of 6 Month(s) and a maximum period of 2 Year(s) at PA Dept. of Corrections in the **standard range** and consecutive to Count 2.

- Count 4 - Harassment - Follow In Public Place - A determination of guilty without further penalty.

- Count 5 - Discharge Any Firearm Within The City Limits - A determination of guilty without further penalty.

- Count 6 - Receiving Stolen Property - To be confined for a minimum period of 18 Month(s) and a maximum period of 4 Year(s) at PA Dept. of Corrections in the **standard range** and consecutive to Count 3.

- Count 7 - Firearms Not To Be Carried Without a License - To be confined for a minimum period of 3 Year(s) and a maximum period of 6 Year(s) at PA Dept. of Corrections in the **standard range** and consecutive to Count 6.

Months after the trial and sentencing, by letter dated February 26, 2018, Defendant requested Attorney Bonanti to withdraw as Defendant's counsel of record. (*See* Letter from Thomas Beebe II to Attorney Bonanti dated Feb. 26, 2018, attached as Exhibit "A"). On March 21, 2018, Attorney Bonanti filed his Motion to Withdraw as Counsel of Record/ Application for Grazier Hearing. By Order dated March 23, 2018, this Trial Court scheduled a hearing for April 4, 2018. Thus, a hearing was held on April 4, 2018, at which Appellant was present and, following a *pro se* colloquy on the record, this Trial Court found Defendant knowingly, intelligently, and voluntarily waived his right to counsel on the record. *See Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998) (requiring an on-the-record determination by the trial court that a waiver of counsel is made knowingly, intelligently, and voluntarily when a waiver of the right to counsel is sought at the appellate stage); (*see also* "Right to Counsel Waiver" signed by Thomas Beebe, II, dated April 4, 2018, attached as Exhibit "B"). This Trial Court also granted said Motion to Withdraw as Counsel of Record to authorize Attorney Bonanti to withdraw as Appellant's appellate counsel.

As noted above, former trial counsel for Appellant, Attorney Bonanti, through his Statement of Matters Complained of on Appeal, contends this Trial Court erred in admitting testimony from Ms. Ross regarding testimony that the responding police officer was in the area since Defendant was "maybe" on probation and not permitted to visit the Tamarack bar. (*See*

Appellant's Statement of Matters Complained of on Appeal). However, after review of the transcript testimony from the new jury trial held on December 19, 2017, this Trial Court is unable to locate any such testimony from Kristen Ross, the alleged victim, in relation to Appellant's issue raised on appeal. Rather, said testimony was only elicited from Ms. Ross during the first jury trial held the day before on December 18, 2017. Contrary to Appellant's assertion, this Trial Court did not admit such testimony but in fact declared a mistrial in response to Ms. Ross' testimony. (*See* Notes of Testimony, Jury Trial, Dec. 18, 2017, pg. 22:21-23:10). As such, this Trial Court finds and concludes Appellant's issue raised on appeal is meritless and, therefore, this Trial Court respectfully requests the Pennsylvania Superior Court quash this instant appeal.

Notwithstanding the foregoing, this Trial Court will attempt to address, and therefore must speculate, about the alternative issue Appellant may have intended to raise on appeal: whether this Trial Court's curative instruction which directed the jury to disregard statements made by a particular police officer on his body camera video footage was sufficient to restrict the evidence to its proper scope. This Trial Court provides the following analysis:

Under the Pennsylvania Rules of Evidence, relevant evidence may be excluded if the probative value of the evidence is outweighed by the potential for prejudice. *Commonwealth v. Antidormi*, 84 A.3d 736, 750 (Pa. Super. 2014). Under Pa.R.E. 403, "[t]he court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. In particular, unfair prejudice "means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403 (Comment). However, "[e]vidence will not be prohibited merely because it is harmful to the defendant." *Antidormi*, 84 A.3d at 750 (citing *Commonwealth v. Dillon*, 925 A.2d 131, 141 (Pa. 2007)). The exclusion of relevant evidence is limited to evidence so prejudicial that it would "inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." *Id*.

Generally, prior inconsistent statements of a declarant are admissible to impeach the declarant. *Commonwealth v. Henkel*, 938 A.2d 433, 442 (Pa. Super. 2007). "As a matter of policy, our courts admit prior inconsistent statements in order to call into question a witness' credibility in general and to alert the jury of the potential for error in his testimony." *Commonwealth v. Rodriguez*, 495 A.2d 569, 571 (Pa. Super. 1985) (deferring to the jury's inherent ability for judging the character of a witnesses). Pennsylvania Rule of Evidence 613(b) provides:

> **(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Unless the interests of justice otherwise require, extrinsic evidence of a witness' prior inconsistent statement is admissible only if, during the examination of the witness,
>
> (1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness;
>
> (2) the witness is given an opportunity to explain or deny the making of the statement; and

(3) the adverse party is given an opportunity to question the witness.

Pa.R.E. 613(b). Thus, a party may impeach the credibility of a witness by introducing evidence showing the witness has made inconsistent statements with his or her trial testimony. *Commonwealth v. Bailey*, 469 A.2d 604, 611 (Pa. Super. 1983). Moreover, statements are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning a statement by a declarant that is inconsistent with the declarant's testimony and is a verbatim contemporaneous recording of an oral statement. Pa.R.E. 803.l. Finally, admission of evidence is within the sound discretion of the trial court, and the trial court's admission of evidence will only be reversed upon a showing that the trial court abused its discretion or committed an error of law. *McManamon v. Washko*, 906 A.2d 1259, 1268 (Pa. Super. 2006).

Furthermore, under Pennsylvania Rule of Evidence 105, where the trial court admits evidence that is admissible against a party for one purpose, but not for another purpose, the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly, or may do so on its own initiative. Pa.R.E. 105; *see also Commonwealth v. McCrae*, 574 Pa. 594, 606, 832 A.2d 1026, 1034 (2003) ("Pennsylvania has long permitted the limited admission of evidence only. . .for one purpose."); *Commonwealth v. Updegrove*, 198 A.2d 534, 537 (Pa. 1964) (evidence that "is admissible for one purpose. . .is not inadmissible because it does not satisfy the rules applicable to some other capacity or even because the jury might consider it in the latter capacity"); *Commonwealth v. Wright*, 323 A.2d 349, 351-52 (Pa. Super. 1974) ("Evidence which is admissible for one purpose does not become inadmissible merely because it would be inadmissible if offered for another purpose."). Significantly, the law presumes that the jury will follow the instruction of the court. *Commonwealth v. Spotz*, 587 Pa. 1, 57, 896 A.2d 1191, 1224 (2006).

Lastly, under the harmless error doctrine, where an error in a criminal trial did not contribute to the verdict, the error was harmless and will not warrant the retrial of a criminal defendant. *See Commonwealth v. Lewis*, 598 A.2d 975, 980 (Pa. 1991). This doctrine is premised on the well-settled proposition that a defendant is entitled to a fair trial but not a perfect one. *Commonwealth v. Thornton*, 431 A.2d 248, 251 (Pa. 1981). "Harmless error exists if the record demonstrates either: (1) the error did not prejudice the defendant or the prejudice was de minimis; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. *Commonwealth v. Shull*, 148 A.3d 820, 846 (Pa. Super. 2016) (*Commonwealth v. Hairston*, 84 A.3d 657, 671-72 (Pa. 2014)).

In this case, the Commonwealth displayed the body camera video footage containing Ms. Ross' prior statement to the jury, not to prove the truth of the matter asserted, but rather to impeach the trustworthiness of Ms. Ross' testimony. Specifically, Ms. Ross testified from the witness stand at the jury trial that she "did not see a gun" and indicated nothing of significance happened on December 3, 2016 when she was with Appellant outside of the Tamarack bar.[1] Based on Ms. Ross' testimony, the Commonwealth introduced the body

[1] *See* Notes of Testimony, Jury Trial, Day 2, Dec. 19, 2017, pg. 26:5-9; 32:7-18.

camera video footage wherein Ms. Ross "told the police that [Appellant] had a gun"[2] for the sole purpose of impeaching Ms. Ross's testimony at trial.[3] As such, said body camera video footage was admissible since: (1) the contents of the video footage were disclosed to Ms. Ross when the video footage was displayed to the jury while Ms. Ross was under examination by the Commonwealth; (2) Ms. Ross was given an opportunity to explain or deny the making of the statement while she was on the stand when ADA Miller questioned Ms. Ross regarding her statements in the video footage;[4] and (3) Appellant was given an opportunity to question Ms. Ross since Attorney Bonanti cross-examined Ms. Ross.[5] The video footage incidentally showed Officer Bayhurst inquiring as to where Appellant lived and his statements "talking about other drug criminals in Corry" and that Appellant "lives in an area where there's a. . .drug trade." Such evidence is clearly not relevant but is not so prejudicial that it would "inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." *See Antidormi*, 84 A.3d at 750. However, to alleviate Appellant's concerns regarding any alleged prejudicial effect and protect Appellant's right to a fair trial, this Trial Court issued an appropriate and carefully worded cautionary but informative curative instruction to the jury.

Thus, this Trial Court further ensured the video footage would only be used to impeach Ms. Ross by restricting the video footage to its proper scope through a curative instruction to the jury. In particular, this Trial Court specifically instructed the jury "to disregard anything on the tape said by Patrol Officer Bayhurst" and to "totally disregard anything [Officer Bayhurst] said on the tape."[6] This Trial Court further expounded that since "Officer Bayhurst tried to infer things that are definitely untrue and prejudicial and not relevant to this case[,] [h]is statements are not evidence of anything."[7] The law presumes the jury followed said curative instruction of this Trial Court, and Appellant has not rebutted such a presumption. *See Spotz*, 896 A.2d at 1224. As such, this Trial Court properly permitted the Commonwealth to display the video footage recording Ms. Ross' prior inconsistent statement to impeach Ms. Ross's testimony at trial. *See Rodriguez*, 495 A.2d at 571.

Nevertheless, assuming *arguendo* the introduction of statements made by Officer Bayhurst prejudiced Appellant, any alleged error in admitting said statements was harmless. Specifically, the properly admitted and uncontradicted evidence was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. For example, the Commonwealth introduced several components of a firearm Officer Bayhurst recovered from outside the Tamarack bar, including a magazine, base plate, follower, and .380 caliber shell casing. The Commonwealth also introduced a black Smith and Wesson M&P Bodyguard .380 caliber pistol, along with an additional magazine, that U.S. Deputy Marshall Brent Novak recovered from Appellant's person on December 5, 2016. Moreover, several stipulations were read to the jury, including the stipulation that Steve Holton, the owner of the firearm, reported the firearm missing on November 8, 2016. The Commonwealth and Appellant also stipulated Appellant did not

[2] *Id*. at 32:10-11.
[3] *Id*. at 26:2-12.
[4] *Id*. at 57:17-19; 58:6-59:4.
[5] *Id*. at 60:13-62:8; 63:9-13.
[6] *Id*. at 55:25-56:1.
[7] *Id*. at 56:2-5.

have a valid license to carry a firearm and did not have a sportsman firearm permit issued to him based on a letter from the Pennsylvania State Police, which was admitted in evidence. Moreover, the Commonwealth called several witnesses to provide credible testimony against Appellant, including Amanda Hutchings; Sandra Vantassel; Deputy U.S. Marshall Brent Novak; and Officer Richard Bayhurst of the Corry City Police Department. Thus, since said evidence was properly admitted and uncontradicted and so overwhelming, any alleged error in admitting Officer Bayhurst's statements was harmless, and a retrial is not warranted.

For the foregoing reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm the jury's findings of Appellant's guilt for the above-referenced offenses.

BY THE COURT

/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
RUSSELL L. ELLIS

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

To qualify for this invoke the newly discovered facts exception to the PCRA's time-bar exception, a petitioner need only establish that the facts upon which the claim is based were unknown to him and could not have been ascertained by the exercise of due diligence.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

The PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter these requirements in order to reach the merits of the claims raised in an untimely PCRA Petition.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

Petitioner must satisfy two requirements for the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii): (1) the right asserted is a constitutional right that was recognized by the United States Supreme Court or the Pennsylvania Supreme Court after the time prescribed in this section; and (2) the right has been held to apply retroactively.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A new constitutional rule applies retroactively in a collateral proceeding only if (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A new rule of constitutional law is applied retroactively to cases on collateral review only if the United States Supreme Court or our Supreme Court specifically holds it to be retroactively applicable to those cases.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A claim for ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A second or subsequent petition for post-conviction relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. CR 2327 of 2013

Appearances: Russell L. Ellis, *pro se*
John H. Daneri, Erie County District Attorney, for Appellee Commonwealth of Pennsylvania

OPINION

Domitrovich, J. November 20, 2018

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of Russell L. Ellis ("Appellant") from this Trial Court's Order dated August 27, 2018, wherein this Trial Court dismissed Appellant's second Petition for Post Conviction Collateral Relief ("PCRA Petition") as patently untimely and since Appellant failed to satisfy any of the timeliness exceptions under 42 Pa. C.S. § 9545(b)(1). As such, this Trial Court has no jurisdiction to reach the merits of Appellant's untimely PCRA Petition. *See Commonwealth v. Taylor*, 933 A.2d 1035, 1038 (Pa. Super. 2007) ("Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition."). Moreover, said PCRA Petition stated no grounds for relief to be granted under the Post-Conviction Relief Act. Defendant, *pro se*, raised three issues in his Concise Statement of Matter Complained of on Appeal which this Trial Court is addressing as follows: whether the holding in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) requires the decision set forth in *Alleyne v. United States*, 570 U.S. 99 (2013) be applied retroactively in cases pending on collateral review such that Appellant's PCRA Petition falls within the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii), and whether this Trial Court has the jurisdiction to hear claims that Appellant's plea counsel and first PCRA counsel were allegedly ineffective in this untimely-filed PCRA Petition.

On March 7, 2014, Appellant appeared before Judge Ernest J. DiSantis, Jr. with his counsel, Michael A. DeJohn, Esq., and entered a guilty plea to Count 1: Manufacture, Deliver or Possession with Intent to Manufacture or Deliver, in violation of 35 P.S. § 780-113(a)(30). In exchange for the negotiated plea, the Commonwealth *nolle prossed* Count 2: Possession of a Controlled Substance (35 P.S. §780-113(a)(16)), Count 3: Possession of Drug Paraphernalia (35 P.S. § 780-113(a)(32)), and Count 4: Possession of Firearm Prohibited (18 Pa. C.S. § 6105(a)(1)).

On April 28, 2014, Judge DiSantis sentenced Appellant as follows:

> Count 1: sixty (60) to one hundred twenty (120) months of incarceration with the Pennsylvania Department of Corrections (RRRI Eligible: fifty (50) months) consecutive to the sentenced imposed at docket no. CR 2569 of 2009; a thirty thousand dollar and 00/100 ($30,000.00) fine; and court costs.[1]

Appellant did not file a direct appeal from Judge DiSantis' Sentencing Order dated April 28, 2014. Rather, Appellant filed his first Motion for Post Conviction Collateral Relief on April 30, 2014.[2] By Order dated June 4, 2014, William J. Hathaway, Esq., was appointed as Appellant's PCRA counsel and was directed to supplement or amend Appellant's first PCRA within thirty (30) days. On September 2, 2014, Attorney Hathaway filed a "No Merit" letter and a Petition for Leave to Withdraw as Counsel. On September 3, 2014, Judge DiSantis filed a Notice of Intent to Dismiss Appellant's first PCRA Petition and granted Attorney Hathaway's Petition for Leave to Withdraw as Counsel. On September 18, 2014,

[1] Judge DiSantis applied the mandatory minimum pursuant to 18 Pa. C. S. § 7508(a)(7)(ii) to Petitioner's sentence.
[2] This Trial Court notes at no time in his first PCRA Petition, which was timely filed, did Petitioner raise any challenge to the legality of the sentence imposed by Judge DiSantis.

Appellant filed a "Petition for *Habeas Corpus* Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and for Post-Conviction Relief Pursuant to the Post-Conviction Relief Act, 42 Pa. C.S. 9542, *et seq.* and Consolidated Memorandum of Law and Motion for Extension of Time." On September 30, 2014, Judge DiSantis denied both Appellant's first PCRA Petition and his Petition for *Habeas Corpus*/PCRA. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on October 24, 2014. On March 5, 2015, the Pennsylvania Superior Court dismissed Appellant's appeal due to Appellant's failure to file a brief.

On April 15, 2016, Appellant filed another PCRA Petition. By Order dated April 25, 2016, this Trial Court appointed William J. Hathaway, Esq., as Appellant's PCRA counsel and directed Attorney Hathaway to supplement or amend Appellant's *pro se* PCRA Petition within thirty (30) days. Attorney Hathaway filed a Supplement to Motion for Post Conviction Collateral Relief on May 16, 2016. By Order dated May 17, 2016, this Trial Court directed the Commonwealth to respond to Appellant's Amended PCRA Petition within thirty (30) days. The Commonwealth, by and through Assistant District Attorney Paul S. Sellers, filed a Response to Appellant's PCRA Petition on June 16, 2016. By Order dated September 28, 2016, this Trial Court dismissed that PCRA Petition as said Petition was filed untimely.

On October 26, 2016, Appellant filed his Notice of Appeal Nunc Pro Tunc appealing this Trial Court's Order dated September 28, 2016, dismissing Appellant's second PCRA Petition. On May 23, 2017, the Pennsylvania Superior Court remanded Appellant's case to this Trial Court since Appellant's PCRA counsel did not comply with the procedural requirements for withdrawal as set forth in *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). As such, this Trial Court held a Remand Hearing consistent with the Pennsylvania Superior Court's decision dated May 23, 2017. By Order dated June 8, 2017, this Trial Court "substantiate[d] that William J. Hathaway, Esq., shall continue as Appellant's counsel during the pendency of the instant PCRA appeal as Appellant has not chosen to waive his right to counsel and this PCRA Court will not dismiss Attorney Hathaway as Appellant's counsel at the request of Appellant." (*See* Trial Court Order dated June 8, 2017). However, by Judgment Order filed July 10, 2017, the Pennsylvania Superior Court quashed Appellant's appeal pursuant to *Commonwealth v. Glacken*, 32 A.3d 750 (Pa. Super. 2011).

On February 9, 2018, Appellant filed his "Motion to Reinstate PCRA Nunc Pro Tunc," wherein Appellant requested to proceed *pro se* for the purpose of pursuing relief under the PCRA. On March 29, 2018, a hearing was held, at which Appellant Russell L. Ellis was present and represented by his counsel, William J. Hathaway, Esq.; and Assistant District Attorney Paul S. Sellers appeared on behalf of the Commonwealth. After an on-the-record *pro se* colloquy with Appellant pursuant to which this Trial Court found Appellant knowingly, voluntarily, and intelligently waived his right to counsel, this Trial Court authorized Attorney Hathaway to withdraw as counsel of record. By Order dated March 29, 2018, this Trial Court set forth the following: "[Appellant] has indicated he will file a new PCRA Petition, and with no objection from the Commonwealth, when [Appellant] files said new PCRA Petition, this Trial Court will consider said new PCRA Petition as [Appellant's] second PCRA Petition effective the date of his prior second PCRA Petition." (*See* Trial Court Order dated March 29, 2018).

On May 25, 2018, Appellant filed the instant PCRA Petition, which this Trial Court considered as Appellant's second PCRA Petition filed as of April 15, 2016. On July 31, 2018, this Trial Court issued this Trial Court's Notice of Intent to Dismiss Appellant's second PCRA Petition. On August 20, 2018, Appellant filed his "Petition to Object to the Intent to Dismiss Order for the Second P.C.R.A. Filed April 15, 2016." By Order dated August 27, 2018, this Trial Court dismissed Appellant's second PCRA Petition as being patently untimely and since Appellant failed to satisfy any of the timeliness exceptions under 42 Pa. C.S. § 9545(b)(1). On September 24, 2018, Appellant filed his Notice of Appeal. By Order dated September 28, 2018, this Trial Court issued its 1925(b) Order directing Appellant to file a concise statement of the matters complained of on appeal within twenty-one days from the date of said Order, and Appellant filed his "Concise Statement of Matters Complained of an Appeal," on October 18, 2018.

Under the Post-Conviction Relief Act, a PCRA petition, including a second or subsequent PCRA petition, must be filed within one year of the date that judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S. § 9545(b)(1)(i)-(iii). A PCRA petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty days of the date the claim could have been presented. 42 Pa. C.S § 9545(b)(2). The Pennsylvania Supreme Court has clearly stated that where a PCRA Petition is untimely, the petitioner, by statute, has the burden to plead in the petition and prove that one of the three exceptions set forth in 42 Pa. C.S § 9545(b)(1)(i)-(iii) applies. *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999). "That burden necessarily entails an acknowledgment by the petitioner that the PCRA Petition under review is untimely but that one or more of the exceptions apply." *Id*. Thus, the petitioner must allege in his petition and prove that said petition satisfies one of the three exceptions under Section 9545(b)(1)(i)-(iii). *Id*. As the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter these requirements in order to reach the merits of the claims raised in an untimely PCRA Petition. *Commonwealth v. Taylor*, 933 A.2d 1035, 1042-43 (Pa. Super. 2007).

In the instant PCRA Petition, pursuant to 42 Pa. C.S. § 9545(b)(3), Appellant's judgment of sentence became final on May 28, 2014, when the thirty (30) day time period to file a direct

appeal to the Pennsylvania Superior Court elapsed. *See* Pa.R.Crim.P. 720(a)(4). Therefore, Appellant could have filed a timely PCRA Petition on or before May 28, 2015. As Appellant filed the instant PCRA Petition on April 15, 2016, Appellant has not filed the instant PCRA Petition in a timely fashion. Although not expressly alleged in the instant PCRA, Appellant indicates the instant PCRA Petition falls within the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii), arguing the holding in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) requires the decision set forth in *Alleyne* be applied retroactively in cases pending on collateral review.

In order for Appellant to allege and prove his otherwise untimely petition satisfies the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii), Appellant must satisfy two requirements: (1) the right asserted is a constitutional right that was recognized by the United States Supreme Court or the Pennsylvania Supreme Court after the time prescribed in this section; and (2) the right has been held to apply retroactively. *Commonwealth v. Leggett*, 16 A.3d 1144, 1147 (Pa. Super. 2011). Thus, a petitioner must prove that there is a new constitutional right and that the right has been held by United States Supreme Court or the Pennsylvania Supreme Court to apply retroactively. *Id*. A new constitutional rule applies retroactively in a collateral proceeding only if (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Commonwealth v. Riggle*, 119 A.3d 1058, 1065 (Pa. Super. 2015) (citing *Whorton v. Bockting*, 549 U.S. 406 (2007)).

Indeed, "a new rule of constitutional law is applied retroactively to cases on collateral review only if the United States Supreme Court or our Supreme Court specifically holds it to be retroactively applicable to those cases." *Commonwealth v. Miller*, 102 A.3d 988, 995 (Pa. Super. 2014). However, the Superior Court of Pennsylvania has concluded "[e]ven assuming that *Alleyne* did announce a new constitutional right, neither our Supreme Court, nor the United States Supreme Court has held that *Alleyne* is to be applied retroactively. . . ." *Id*.; *see also Commonwealth v. Washington*, 142 A.3d 810, 820 (Pa. 2016) ("We hold that *Alleyne* does not apply retroactively to cases pending on collateral review."). Thus, Appellant does not satisfy the newly-recognized constitutional right timeliness exception under Section 9545(b)(1)(iii). *See e.g. Commonwealth v. Hall*, 3075 EDA 2016, 2017 WL 4150535, at *4 (Pa. Super. Sept. 19, 2017) (noting the Superior Court of Pennsylvania "has held that *Alleyne* does not apply when the claim is raised in an untimely PCRA petition [and] reliance on *Alleyne* to satisfy the constitutional right exception is misplaced").[3]

Moreover, Appellant did not raise his *Alleyne* claim "within 60 days of the date the claim could have been presented." 42 Pa. C.S.A. § 9545(b)(2). Instead, the first time Appellant raised his *Alleyne* claim was in his PCRA Petition dated April 15, 2016—over two years after the United States Supreme Court decided *Alleyne* on June 17, 2013. Therefore, Appellant has not properly pled the newly-recognized constitutional right exception to the PCRA's one-year timeliness requirement. *See Commonwealth v. Boyd*, 923 A.2d 513, 517 (Pa. Super. 2007) ("With regard to an after-recognized constitutional right, . . .the sixty-day period begins to run upon the date of the underlying judicial decision."). Therefore, this Trial Court

[3] *Commonwealth v. Hall* is a non-precedential, unpublished Pennsylvania Superior Court Opinion decided on September 19, 2017. This case is being cited as persuasive, and not precedential, case law.

did not have jurisdiction to address the merits of Appellant's untimely PCRA Petition. *See Commonwealth v. Taylor*, 933 A.2d 1035, 1038 (Pa. Super. 2007) ("Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition.").

Since Appellant's PCRA Petition was untimely, this Trial Court does not have the jurisdiction to hear claims that Appellant's counsel was ineffective. In the Appellant's "Concise Statement of Matters Complained Of On Appeal," the Appellant claims he experienced ineffective assistance of counsel with respect to his plea counsel, Attorney DeJohn; and first PCRA counsel, Attorney Hathaway.

As for Appellant's claim that his plea Counsel was ineffective, this Trial Court does not have the jurisdiction to hear this claim. *Commonwealth v. Gamboa-Taylor*, 562 Pa. 70, 80, 753 A.2d 780, 785 (2000) ("[A] claim for ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits."). As examined earlier, Appellant's PCRA Petition is untimely. Therefore this Trial Court cannot address the issues of ineffective assistance of counsel during Appellant's plea as this Trial Court does not have jurisdiction to reach this claim.

As for Appellant's claim that his PCRA Counsel was ineffective during Appellant's previously-filed PCRA, this claim is similarly unreviewable due to the instant PCRA Petition being filed untimely. In the Appellant's "Concise Statement of Matters Complained Of On Appeal," Appellant appears to cite *Martinez v. Ryan*, 566 U.S. 1, 8 (2012) for the proposition that Appellant was entitled to counsel in his second post-conviction collateral proceeding as a matter of ***federal*** constitutional law. However, prisoners do not have a federal constitutional right to counsel in post-conviction collateral proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions"). Moreover, the United States Supreme Court in *Martinez* expressly declined to address the issue of whether an exception exists to the general rule of whether prisoners are entitled to counsel in an initial post-conviction collateral proceeding. *Martinez v. Ryan*, 566 U.S. 1, 8 (2012). Instead, the U.S. Supreme Court in *Martinez* addressed the narrow issue of whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a "procedural default" in a federal habeas proceeding. As *Martinez* relates exclusively to federal habeas review procedures, which are obviously not at issue here, *Martinez* is inapplicable. *Commonwealth v. Sanders*, 190 A.3d 732 (Pa. Super. Ct. 2018) (noting that reliance on *Martinez* was misplaced in claim for ineffective assistance of PCRA counsel since that case relates exclusively to federal habeas review procedures).

Notwithstanding, under Pennsylvania law, Appellant was clearly entitled to counsel at least in his first PCRA Petition, which this Court did provide to Appellant. Pa.R.Crim.P. 904(C). However, regardless of whether Appellant's claims of ineffectiveness of his PCRA counsel in connection with his first or second PCRA proceeding, since Appellant's PCRA Petition is time barred, the Court does not have jurisdiction to address Appellant's claim that his PCRA counsel was ineffective. *Commonwealth v. Sanders*, 190 A.3d 732 (Pa. Super. Ct. 2018).

Finally, assuming this Trial Court has jurisdiction to address the merits of Appellant's untimely PCRA Petition, as the instant PCRA Petition is being deemed Appellant's second PCRA Petition, Appellant was also required to comply with the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988) and its progeny. *Commonwealth v. Allen*, 732 A.2d

582, 586 (Pa. 1999). The Pennsylvania Supreme Court has held "a second or subsequent petition for post-conviction relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred." *Id*. In particular, the Pennsylvania Supreme Court has stated:

> [A petitioner] makes a prima facie showing of entitlement to relief only if he demonstrates either that the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged.

Id. (citing *Commonwealth v. Szuchon*, 633 A.2d 1098, 1100 (Pa. 1993)). In the instant case, Appellant's PCRA Petition merely stated: "This PCRA is dealing with the matter[] of . . . the Lawson standard of mis[]carriage of justice, pursuant to *Commonwealth v. Lawson*, 549[] A.2d 107, 112 (Pa. 1988)." (PCRA Petition at pg. 6). However, Appellant failed to argue successfully that his second PCRA Petition satisfies the *Lawson* requirement, in that Petitioner did not argue either the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred or that Petitioner is innocent of the crimes charged. As such, assuming this Trial Court has jurisdiction to address the merits of Appellant's PCRA Petition, Appellant failed to satisfy the *Lawson* requirement.

Thus, for all of the foregoing reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated August 27, 2018.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

MILLCREEK TOWNSHIP SCHOOL DISTRICT

v.

MILLCREEK TOWNSHIP EDUCATION SUPPORT PERSONNEL ASSOCIATION

LABOR AND EMPLOYMENT / COLLECTIVE BARGAINING

When reviewing an arbitrator's interpretation of a collective bargaining agreement, the arbitrator's decision is to be accorded broad deference.

LABOR AND EMPLOYMENT / COLLECTIVE BARGAINING

The standard of review in a challenge to a labor arbitration award under the Public Employee Relations Act is the "essence test," which requires a two-prong analysis: (1) a trial court shall determine if the issue as properly defined is within the terms of the consumer bargaining agreement; and (2) if the issue is embraced by the consumer bargaining agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the consumer bargaining agreement.

LABOR AND EMPLOYMENT / COLLECTIVE BARGAINING

An arbitration award will not be upheld if it contravenes public policy.

LABOR AND EMPLOYMENT / COLLECTIVE BARGAINING

For the public policy exception to apply, the public policy must be well-defined, dominant and ascertained by reference to the laws and legal precedents, not from general considerations of supposed public interest.

LABOR AND EMPLOYMENT / COLLECTIVE BARGAINING

A three-step analysis to be used to determine whether an award violates public policy: (1) the nature of the conduct leading to the discipline must be identified; (2) a trial court must determine if that conduct implicates a public policy which is well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests; and (3) a trial court must determine if the arbitrator's award poses an unacceptable risk that it will undermine the implicated policy and cause the public employer to breach its lawful obligations or public duty, given the particular circumstances at hand and the factual findings of the arbitrator.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 13252 - 2016

Appearances: Robert D. Zaruta, Esq., on behalf of the Millcreek Township School District (Appellant)
Richard S. McEwen, Esq., on behalf of the Millcreek Township Educational Support Personnel Association (Appellee)

OPINION

Domitrovich, J. April 12, 2017

The instant matter is before the Pennsylvania Commonwealth Court on Millcreek Township School District's (hereafter referred to as "Appellant") appeal from this Trial Court's Order dated January 30, 2017, whereby this Trial Court affirmed the Arbitration Award of Bernard

S. Fabian (hereafter referred to as "Award") and denied Appellant's Petition to Vacate Arbitration Award. This Trial Court found and concluded the Award satisfied the "essence test" in that: (1) the issue is properly defined within the terms of the Collective Bargaining Agreement (hereafter referred to as "CBA"), and (2) Arbitrator Bernard S. Fabian's (hereafter referred to as "Arbitrator Fabian") interpretation is rationally derived from the CBA. This Trial Court further found and concluded the Award does not contravene public policy as the Award does not pose an unacceptable risk of undermining public policy and will not cause Appellant to breach its lawful obligations or public duty under the Public Employee Relations Act ("PERA").

Procedural History

The CBA entered into between Appellant and the Millcreek Township Education Support Personnel Association (hereafter referred to as "Appellee") became effective on July 1, 2011. *See Petition to Vacate Arbitration Award, Exhibit A.* Article III, Paragraph H of the CBA contains language regarding subcontracting and specifically states: "No work of the bargaining unit shall be subcontracted for the life of the Agreement." *See id, page 6.* During labor negotiations in July of 2016, Appellant notified Appellee that Requests for Proposals ("RFP's") had been issued. Appellee was provided with bid information Appellant received from a successful bidder for custodial services. No final contract was entered into with the successful bidder.

Appellee filed a grievance on April 7, 2016, claiming Appellant violated the CBA by accepting bids for custodial labor services. Said grievance was submitted to arbitration and an Arbitration Hearing was held on August 16, 2016 before Arbitrator Bernard S. Fabian. On November 7, 2016, Arbitrator Fabian granted Appellee's grievance, holding that Appellant had violated the "no outside subcontracting" provisions of the Collective Bargaining Agreement and the RFP's could not be used in bargaining with Appellee to secure an advantage. *See Petition to Vacate Arbitration Award, Exhibit F, page 15.* Arbitrator Fabian further held "outside contracts which eliminate the Bargaining Unit cannot be used unless or until the parties are at legal impasse." *See id.* Arbitrator Fabian concluded that, if the parties reached a legal impasse, the parties would be subject to the applicable Pennsylvania law, Pennsylvania Labor Relation Board action, and NLRB provisions. *See id.* Arbitrator Fabian held any formal selection of prior RFP's were considered null and void. *See id.*

Appellant filed a Petition to Vacate Arbitration Award on December 6, 2016. Appellee filed a Motion to Strike Portions of Petition to Vacate Arbitration Award on December 28, 2016. A hearing on Appellee's Motion to Strike Portions of Petition to Vacate Arbitration Award was held before this Trial Court on January 23, 2017. This Trial Court granted Appellee's Motion by Order dated January 23, 2017 and struck Exhibits B, C, D and E from Appellant's Petition to Vacate Arbitration Award, leaving only Exhibit A (the parties' CBA) and Exhibit F (the Award of Arbitrator Fabian) for consideration. A hearing on Appellant's Petition to Vacate Arbitration Award was held before this Trial Court on January 30, 2017, at which the undersigned judge heard argument from Appellant's counsel, Robert D. Zaruta, Esq., and Appellee's counsel, Richard S. McEwen, Esq. On January 30, 2017, this Trial Court affirmed the Award of Arbitrator Fabian and denied Appellant's Petition to Vacate Arbitration Award.

Appellant filed a Notice of Appeal to the Pennsylvania Commonwealth Court on February 16, 2017. This Trial Court filed its 1925(b) Order on February 22, 2017. Appellant filed its Concise Statement of Matters Complained of on Appeal on March 14, 2017.

Legal Analysis

In its Concise Statement of Matters Complained of on Appeal, Appellant raises four (4) issues, which this Trial Court will consolidate into the following two (2) issues:

1. This Trial Court concluded properly that Arbitrator Fabian's Award satisfied the "essence test," since this Trial Court found the issue is properly defined within the terms of the parties' CBA and Arbitrator Fabian's interpretation is rationally derived from the parties' CBA.

It is well settled that, in reviewing an arbitrator's interpretation of a collective bargaining agreement, the arbitrator's decision is to be accorded broad deference. *See Delaware County v. Delaware County Prison Employees Independent Union*, 713 A.2d 1135, 1137 (Pa. 2003). The standard of review in a challenge to a labor arbitration award under the Public Employee Relations Act ("PERA") is the "essence of the Collective Bargaining Agreement test," also known as the "essence test," which requires a two-prong analysis. First, a trial court shall determine if the issue as properly defined is within the terms of the CBA; and second, if the issue is embraced by the CBA, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the CBA. *New Kensington-Arnold School District v. New Kensington-Arnold Education-Association, PSEA/NEA*, 140 A.3d 726, 731 (Pa. Commw. Ct. 2016). A reviewing court may vacate a PERA arbitration award only where the award is indisputably and genuinely without foundation in, or fails to logically flow from, the underlying CBA. *See Pennsylvania Turnpike Commission v. Teamsters Local Union No. 77*, 87 A.3d 904, 908 (Pa. Commw. Ct. 2014).

First, this Trial Court found and determined that the issue regarding subcontracting is defined properly within the terms of the parties' CBA. *See New Kensington-Arnold* at 731. Article III, Paragraph H of the CBA specifically and clearly states: "No work of the bargaining unit shall be subcontracted for the life of the Agreement." *See Petition to Vacate Arbitration Award, Exhibit A, page 6*. Furthermore, Article III, Paragraph E states: "The rights and privileges of the Association [Appellee] and its representatives as set forth in this Agreement shall be granted **only to the Association** [Appellee] as the exclusive representative of the employee **and to no other organization**. *See id, page 5* [emphasis added]. Therefore, the issue is defined properly in the parties' CBA and, thus, properly before Arbitration Fabian.

Furthermore, this Trial Court found and concluded Arbitrator Fabian's interpretation is rationally derived from the parties' CBA. An arbitrator, in all cases in which interpretation of a collective bargaining agreement is called for, decides the factual question of what the parties intended. *See Pennsylvania Turnpike Commission*, 639 A.2d 968, 973 (Pa. Commw. Ct. 1994). An arbitrator's interpretation of the parties' intent is treated as a finding of fact, and a claim that an arbitrator has incorrectly interpreted the intention of the parties to the agreement is not cognizable on appeal. *See id*. A reviewing court should respect the arbitrator's award if "the interpretation can, in any rational way, be derived from the agreement, viewed in the light of its language, its context and any other indicia of the parties' intention." *See Community College of Beaver County v. Community College of Beaver County Society of the Faculty (PSEAINEA)*, 375 A.2d 1267, 1275 (Pa. Commw. Ct. 1977).

In the Arbitration Award, Arbitrator Fabian first indicated the "no subcontracting" clause

contained within the parties' CBA was the result of prior subcontracting of bus driver positions by Appellant, which caused "raw nerves" between Appellant and Appellee. *See Petition to Vacate Arbitration Award, Exhibit F, page 9*. Arbitrator Fabian then noted subcontracting custodial positions, which Appellant was alleged to have commenced in the instant case by issuing RFP's, would "decimate and eliminate" the Bargaining Unit. *See id, page 10*. Arbitrator Fabian acknowledged, in the event the parties carried out negotiations and reached a legal impasse, Appellant could have unilaterally initiated subcontracting, subject to review or appeal to the judicial procedure. *See id*. However, Arbitrator Fabian further acknowledged the parties have not reached a legal impasse during negotiations and Appellant's request for RFP's was a bargaining tactic to achieve an advantage in negotiations, which had a "chilling effect on the negotiation process, and, as such, Appellant was not "bargaining in good faith." *See id, pages 11-12*.

As to the issue of subcontracting, Arbitrator Fabian determined subcontracting is a process, which starts when Appellant decides to pursue outside contracting, issues RFP' s and advises Appellee of the subsequent bid information. *See id, page 13*. Arbitrator Fabian ultimately concluded Appellant violated the "no subcontracting" clause of the parties' CBA by issuing RFP's and providing bid information to Appellee during negotiations. *See id*.

Finally, Arbitrator Fabian noted Appellant (1) went through the expense of advertisement, (2) met with potential bidders, (3) took walkthroughs at the various twelve [12] buildings of the Millcreek School District, (4) advertised a date to open bids and (5) held meetings to select a successful bidder. Arbitrator Fabian concluded, and this Trial Court agrees with Arbitrator Fabian's conclusion, that these actions were not simply to afford Appellee with bid information in order for Appellee could form counterproposals, but were indicative of the subcontracting process, which is prohibited specifically by the parties' CBA.

This Trial Court concluded Arbitrator Fabian's well-reasoned and thorough analysis was clearly and rationally derived from the CBA; therefore, the Arbitration Award satisfies both prongs of the "essence test" and said Arbitration Award was properly affirmed by this Trial Court.

2. This Trial Court concluded properly that Arbitrator Fabian's Award does not pose an unacceptable risk of undermining public policy and will not cause Appellant to breach its obligations under the Public Employee Relations Act ("PERA").

A reviewing court should not enforce a grievance arbitration award that contravenes public policy. *Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Association, PSEA/NEA, 939* A.2d 855, 865-866 (Pa. Commw. Ct. 2007). Such public policy, however, must be well-defined, dominant and ascertained by reference to the laws and legal precedents, not from general considerations of supposed public interests. *See id*. The appropriate test is not whether a party's actions violated public policy, but whether the arbitrator's award contravenes an established public policy, such that the arbitration award should be vacated. *See Shamokin Area School District v. American Federation of State, County and Municipal Employees District Council 86*, 20 A.3d 579,583 (Pa. Commw. Ct. 2011).

Arbitrator Fabian's Award does not prohibit Appellant from meeting its obligations under

the PERA; in fact, in the Award, Arbitrator Fabian clearly stated that if the parties had commenced negotiations and reached a legal impasse, Appellant could have unilaterally initiated subcontracting, subject to review or appeal to the judicial procedure. *See Petition to Vacate Arbitration Award, Exhibit F, page 10*. Arbitrator Fabian acknowledged the parties had not reached a legal impasse during negotiations and further concluded Appellant's issuance of RFP's was only a bargaining tactic, which would have a "chilling effect" on negotiation. *See id, page 12*. In the Award, Arbitrator Fabian ultimately and properly held the RFP's issued by Appellant were null and void because the parties had not reached a legal impasse and the RFP's would aid Appellant in securing an advantage in negotiations. This Trial Court concluded Arbitrator Fabian's Award does not contravene public policy; to the contrary, Arbitrator Fabian's Award is consistent with public policy as the Award prohibited Appellant from using RFP's **until the parties reached a legal impasse** so as to not allow Appellant to gain an advantage over Appellee during negotiations.

For all of the reasons as set forth above, this Trial Court respectfully requests the Pennsylvania Commonwealth Court affirm this Trial Court's Order dated January 30, 2017.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

ERIE WESTERN PENNSYLVANIA PORT AUTHORITY and COMMODORE PERRY YACHT CLUB, Appellants

v.

ERIE COUNTY BOARD OF ASSESSMENT APPEALS, Appellee and THE SCHOOL DISTRICT OF THE CITY OF ERIE, Intervenor

REAL ESTATE TAXATION / THE CONSOLIDATED COUNTY ASSESSMENT LAW / BURDEN OF PROOF / OBJECTS OF TAXATION / DETERMINING FAIR MARKET VALUE

A tax assessment appeal requires a de novo trial before a Common Pleas Judge. Upon the admission of the actual tax assessment into the record, it becomes *prima facia* evidence of the assessment value. It also shifts the burden of proof to any party challenging the assessment to present competent and credible evidence sufficient to overcome the taxing authority's *prima facia* case.

It is within the province of the Court as fact finder to make credibility determination in deciding whether a *prima facia* case has been rebutted by a challenging party.

The Commodore Perry Yacht Club floating dock system is not a fixture subject to real estate taxation in Pennsylvania.

For ad valorem taxation, consideration has to be given to the valuation of the entire property, including the leasehold interest and the leased fee interest.

The Trial Court did not error in finding that the parties failed to present credible evidence to rebutt the assessed value established by the Erie County Tax Assessor.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 13774-2012

Appearances: Evan Adair, Esq., on behalf of the Erie Western Pennsylvania Port Authority and Commodore Perry Yacht Club
Dan Susi, Esq., on behalf of the Erie County Board of Assessment Appeals
Michael Agresti, Esq., on behalf of the Erie School District of the City of Erie

RULE 1925(a) OPINION

This Opinion will address the various issues raised in the respective Statement of Matters Complained of on Appeal filed by the parties.

COMMODORE PERRY YACHT CLUB, Appellant

There were six paragraphs within CPYC's Statement of Matters. The first paragraph related to the judicial finding of the market value as of the appeal date and the application of the common level ratios. While the market value was determined by the Opinion and Order dated June 12, 2018, the common level ratios were not discussed. Accordingly, a Supplemental Order was entered dated August 17, 2018 correcting this oversight. The August 17, 2018 Supplemental Order adopted the stipulation by the parties to the common level ratios for

the tax years subject to appeal. Accordingly, this matter has been addressed.

The second through fifth paragraphs will be jointly addressed since each paragraph involves taxation of CPYC's leasehold interest.

The impression conveyed by CPYC's expert was that the 13 plus acres of water lots were not taxable as there were no floating docks. In valuing CPYC's leasehold interest, CPYC's expert refused to accept the income CPYC derived from the water lots in the form of boat slip fees paid by its members. It was clear the expert was only utilizing the value of the three plus acres of terra firma as taxable property.

Now on appeal, CPYC concedes that all 16.467 acres of the subject property constitute land and therefore "real estate" as defined in 53 Pa. C.S. §8811(a). As a result, there is no dispute that the 13 plus acres of water lots are land/real estate subject to ad valorem taxation.

Nonetheless, CPYC continues to argue that taxing the value of the land to CPYC constitutes a double taxation of the same asset since the value of the land was also assessed against Erie-Western Pennsylvania Port Authority as lessor. This argument is unpersuasive because CPYC construes *Tech One Associates v. Board of Property Assessment*, 617 Pa. 439, 53 A.3d 685 (2012) in a manner that defeats the fundamental rationale of the Pennsylvania Supreme Court.

The *Tech One* Court recognized the ability of an owner of commercial real estate to avoid or reduce exposure to ad valorem taxation by entering into a long-term lease that is under market value. Hence the *Tech One* Court expressly stated that "real property does not lose its status as an object of taxation simply because it is owned under a lease." *Id., p.703*. Further, "(t)he value of the real estate owned as the leased fee, alone, was not determinative of the value of the entire tax parcel in this matter, which consisted of all of the real estate owned as the leased fee and leasehold interests." *Id*.

CPYC's reading of *Tech One* improperly attempts to limit the value of the entire real estate to the rental income on a per boat slip basis that the lessor receives pursuant to its lease with CPYC. Notably, the rental income to the lessor was intentionally set at an under market value because it was CPYC and not the lessor who was developing and operating the property for commercial use. This type of scenario was not acceptable in *Tech One* when the Pennsylvania Supreme Court made it clear that the interests of the lessor and the lessee have to be combined to arrive at a taxable value for the real estate as a whole. In so doing, there is not a double taxation; instead it is joining the separated interests to arrive at a whole value and not a truncated value created by the lessor.

Next, CPYC attempts to argue its lease of boat slips to its members in exchange for money is not a lease and has no value for ad valorem taxation. If it is not a lease, then CPYC fails to identify the nature of its contractual relationship with its members regarding the use of a boat slip in exchange for money. This Court's June 12, 2018 Opinion glossed over this issue on the assumption that it is obvious that the arrangement is a sub-lease between CPYC and its individual boat tenants. There is no other plausible explanation for this commercial relationship. It is a lease of a specified section of the real estate within the water lots. As such, it is income derived from the real estate, which creates a concrete value for assessing CPYC's leasehold interest in the land/water lots.

CPYC also argues that its boat slip income is not an identified object of ad valorem taxation. This argument misses the point because it is CPYC's leasehold interest in real estate that is a proper subject of ad valorem taxation. Further, CPYC cannot reconcile its argument with

its contention that the value of the lessor's interest is based on its rental income derived by the number of boat slips at CPYC. In other words, boat slip income has to be consistently calculated in valuing the interests of the lessor and lessee.

CPYC's contention also conflicts with its recognition that the valuation of the subject property has to consider the highest and best use of it in the marketplace. In determining the assessment value of a private marina in the marketplace, it is proper to consider sources of income derived from the real estate by both the lessor and lessee for reasons set forth in *Tech One*.

Paragraph 6 contains a number of disconnected assertions by CPYC. This Court concurs with CPYC's point that "Highest and best use is immaterial to the cost approach to valuation." However, the assessment of the subject property, because of its encumbrance by a long-term lease, cannot be confined to the cost approach.

Separately, CPYC's attempt to resurrect the credibility of its expert by asserting he properly refused to consider the specific uses and revenues of the subject property is unavailing. This argument turns a blind eye to how private marinas are valued in the marketplace. Furthermore, pages 15 through 24 of the June 12, 2018 Opinion set forth a host of reasons why CPYC's expert was not credible, which reasons were unrelated to the grounds stated in CPYC's Paragraph 6.

ERIE COUNTY BOARD OF ASSESSMENT APPEALS, APPELLEE
SCHOOL DISTRICT OF THE CITY OF ERIE, INTERVENOR

These two entities have been joined at the hip throughout this litigation. Indeed, each party submitted a Statement of Matters Complained of on Appeal which mirrors the other's. For brevity, they are referred to hereafter collectively as the "two parties". Hence, the appellate issues jointly raised by them will be discussed jointly.

A) FLOATING DOCKS

Prior to trial, the parties asked for a determination of whether CPYC's floating docks were an object subject to ad valorem taxation. By Order dated February 6, 2017, this Court held the floating docks were not an enumerated object of taxation pursuant to 53 Pa.C.S.A. §8811(a)(1). As the taxing statute is to be strictly construed, there was no basis to read into it an item that was not specifically identified.

Furthermore, as its name suggests, these docks "float" and are capable of being removed at any time by the owner. The ruling in this case was consistent with the decision by the late Judge George Levin of the Erie County Court of Common Pleas in a prior finding that the floating docks in a private marina are not an object for ad valorem taxation. See *In re Appeal of Erie-Western Pennsylvania Port Authority and Bay Harbor Marina, 78 Erie County Legal Journal 94 (1989)*. Note, the two Bay Harbor Marinas are situated on the east and west borders of CPYC.

To rule differently than Judge Levin did in the *Bay Harbor* case would create the incongruous result that floating docks are not taxable for the two Bay Harbor Marinas but are taxable for CPYC, which is in between the two Bay Harbor Marinas.

The two parties continue to try to distinguish the *Bay Harbor* case as outdated because the assessment method of valuation for an encumbered property has changed from the Cost Approach to the Income Capitalization method. This argument is a distinction without a

difference because the physical characteristics of floating docks remain the same regardless of the method of valuation of them.

As mentioned in the June 12, 2018 Opinion, the legislature, in the wake of court decisions involving floating docks, has not amended the ad valorem statute to identify floating docks as an object of taxation.

The two parties may have lost the battle on this issue, but they won the bigger war because the income from boat slips was included in the valuation of CPYC's leasehold interest. It was the position of CPYC's expert that because floating docks do not exist for tax purposes, boat slips and the rental income therefrom, do not exist. This argument was specifically rejected as a practical and legal matter. The fact that floating docks are not an object of ad valorem taxation does not mean that boat slips vanished. Accordingly, the rental income from boat slips was included in valuing CPYC's leasehold interest. *June 12, 2018 Opinion, pp. 7-9.*

B) THE TESTIMONY OF DARREL R. LLOYD, JR.

The two parties advocated for the acceptance of the testimony of Darrel R. Lloyd, Jr. His views were discussed at length in the June 12, 2018 Opinion. While there was no requirement to do so, the reasons that Lloyd's testimony was not accepted were set forth in detail. The bulk of the appeal by these two parties disputes those reasons. However, in doing so, the two parties mischaracterize *en toto* the June 12, 2018 Opinion.

At trial, the parties stipulated that the highest and best use of the subject property was as a private marina. There was no mention of whether the private marina had to be a for-profit or a non-profit entity. As a matter of law, the profits of a business are irrelevant for purposes of establishing the assessment value of real estate. While the analysis of this case included sources of revenue derived from the real estate, such as boat slip fees, the actual profits or losses of CPYC were not considered.

Yet, CPYC was utilizing its status as a non-profit and the manner in which it did business as a basis to seek a reduction in its assessment. By contrast, Lloyd's views were founded on the for-profit status of a hypothetical marina. In an inherently contradictory fashion, the two parties alleged error because the Court purportedly and improperly considered CPYC's non-profit status - which is an argument in direct odds with the claim by these two parties of error in disregarding the for-profit status of the hypothetical marina described in Lloyd's analysis. See Paragraphs 1 and 2 of their Statement of Matters.

Accordingly, it was the parties who were using approaches based on the profit status of its favored entity. The results were skewed views at the opposite ends of the marketplace in which the subject property existed.

In determining the assessment value of real estate, the focus is on the "actual value" of the real estate in the marketplace. 53 Pa.C.S.A. 8842. Actual value is synonymous with fair market value. Hence, the analysis herein required consideration of the actual value of the subject property in the marketplace in which it exists.

The best, and most credible explanation of the marketplace in which the subject property existed, was articulated by Henry Bujalski, the longtime treasurer of CPYC. He expounded on the bigger picture of how the marketplace is a blend of non-profit and for-profit marinas, who strive to exist in a competitive environment.[1]

[1] Bujalski's views were quoted on page 27 of the June 12, 2018 Opinion.

The two parties cannot contest the fact that the subject property exists in a blended market. Hence, to present a valuation based solely on the voracious appetite for revenue by a hypothetical, for-profit marina, is to overstate the assessed value of the subject property in the marketplace.

To the extent the two parties are claiming there were findings made outside the record of this case, they overlook the quoted testimony of Henry Bujalski. For example, the two parties assert there was no factual basis to find that a non-profit such as CPYC may build extraneous fees into the boat slip fee or that a for-profit marina may forego charging certain fees to attract or retain customers. Those points were derived directly or by inference from Bujalski's testimony. These points are also a matter of common business sense.

In Paragraph 8, the allegation of error that "by considering that Commodore Perry could suffer a loss of members if the subject property were to be valued as Mr. Lloyd opined or operated on a for-profit basis, despite there being no evidence of record to support such a consideration" is inaccurate. The two parties do not cite to any part of the June 12, 2018 Opinion where such consideration was given.

Likewise, the allegation in Paragraph 9 that there was an improper fixation on how CPYC did business is unsupportable. To the contrary, citing the *Pennypack Woods Homeownership Association v. Board of Revision*, 639 A.2d 1302 (Pa. Cmwlth. 1994), this Court stated "When a lessee chooses to govern itself by restricting income opportunities or otherwise underutilizing the economic potential of the property, the value of the property cannot be based on this conduct." *June 12, 2018 Opinion, page 23*. Further, CPYC's expert was faulted for basing his analysis "on how the property is used by its current occupant without regard to the actual value of the property in the open market." *Id*. Lastly, these allegations ignore the fact that CPYC's expert was found to have engaged in an inappropriate value-in-use analysis. *Id*.

CONCLUSION

The parties had a full opportunity to present credible evidence to rebut the presumption of the assessor's value. The testimony of the opposing experts was carefully considered. After scrutinizing the basis for their respective opinions, for the reasons which were detailed to the parties, their experts were not deemed to be credible. Therefore the assessor's valuation remained in place.

BY THE COURT
/s/ **William R. Cunningham, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

TREY D. GUNTER

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

The purpose of the Post-Conviction Collateral Relief Act, 42 Pa.C.S.A. § 9541 et seq., is to afford persons who have been convicted of a crime they did not commit an avenue to obtain collateral relief. *See* 42 Pa.C.S.A. § 9542.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / WAIVER OF ISSUES

The court is only permitted to address issues raised in a counseled Petition for Post-Conviction Collateral Relief. Therefore, counsel's failure to raise an issue in a Supplement to Petition for Post-Conviction Collateral Relief constitutes waiver of the claim on appeal.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A cognizable claim pursuant to the Post-Conviction Collateral Relief Act is "the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." *See* 42 Pa.C.S.A. § 9543(a)(2)(vi).

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A claim based on after-discovered evidence must prove: (l) the evidence was discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) the evidence is not being used solely to impeach credibility; and (4) the evidence would likely compel a different verdict.

CRIMINAL PROCEDURE / GUILTY PLEAS

In the context of a Post-Conviction Collateral Relief proceeding, after-discovered evidence which would justify a new trial would also entitle a defendant to withdraw his guilty plea.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

The Post-Conviction Collateral Relief Act provides relief for the "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *See* 42 Pa.C.S.A. § 9543(a)(2)(ii).

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

In order to obtain Post-Conviction Collateral Relief on a claim of ineffective assistance of counsel, a petitioner must prove: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for action or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's action or failure to act such that there is a reasonable probability the outcome of the proceedings would have been different.

CRIMINAL PROCEDURE / TECHNICAL DEFENSES/SELF-DEFENSE

To assert self-defense, a defendant must prove (1) he reasonably believed he was in imminent danger of death or serious bodily injury and that the use of deadly force was necessary to prevent such harm; (2) he did not provoke the incident which resulted in the victim's death; and (3) he did not violate any duty to retreat.

CRIMINAL PROCEDURE / TECHNICAL DEFENSES / SELF-DEFENSE

To support an affirmative defense of self-defense, a defendant must demonstrate his subjective belief that he is under imminent threat of death of serious bodily injury at the time of the event.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. 3499 - 2014

Appearances: Michael Burns, Esquire, and Roger Bauer, Esquire, for the Commonwealth
Thomas Farrell, Esquire on behalf of Trey Gunter

NOTICE OF INTENT TO DISMISS PCRA
PURSUANT TO Pa.R.Crim.P. 907

AND NOW, to-wit, this 2nd day of July, 2018, before this Court is Trey D. Gunter's (Petitioner) first Motion for Post Conviction Collateral Relief filed on January 19, 2018, and supplemented by Attorney William Hathaway on May 14, 2018. This Court finds that Petitioner has failed to state a meritorious claim under the Post Conviction Relief Act (PCRA). Accordingly, notice is hereby given that Petitioner's PCRA Petition will be dismissed without an evidentiary hearing. Petitioner shall have twenty days from the date of this Notice to file and serve objections to this Notice.

Factual and Procedural History

The Superior Court of Pennsylvania summarized the facts of this case as follows:

> [Appellant's conviction stems] from an incident that occurred on November 17, 2014, at an apartment off campus of Edinboro University. Appellant, a Pittsburgh native, was an Edinboro student one semester away from graduating. The victim, Tobiah Johnson, had taken Appellant's gun several days earlier. Appellant obtained another gun, and as alleged by the Commonwealth, with the help of Ryan Andrews and Michael Barron, confronted the victim outside of the victim's apartment. The Commonwealth further alleged that Mr. Barron was waiting outside of the victim's apartment, and that when the victim came out, Mr. Barron punched him in his head, knocking him to the ground. Appellant and Mr. Andrews got out of their vehicle and assaulted the victim. When the victim tried to get up, Appellant shot him in his back, killing him.

Commonwealth v. Gunter, No. 830 WDA 2016, 2017 WL 1906089 at 1-2 (Pa. Super. 2016).

On January 20, 2015, Petitioner was charged with Criminal Homicide[1] Aggravated Assault,[2] Recklessly Endangering Another Person,[3] Possessing Instruments of Crime,[4] and Criminal Conspiracy to Commit Criminal Homicide.[5] The Commonwealth and Petitioner reached a plea agreement where Petitioner would plead guilty to Murder of the Third Degree; in exchange, the Commonwealth would nolle pros the remaining charges. On September 23, 2015, a plea colloquy was held at which time the Court determined Petitioner's plea to Murder of the Third Degree was knowing and voluntary. A sentencing hearing was subsequently scheduled for February 9, 2016. At this hearing, the Court sentenced Petitioner at count

[1] 18 P.S. §2501(a).
[2] 18 P.S. §2702(a)(1).
[3] 18 P.S. §2705.
[4] 18 P.S. §907(a).
[5] 18 P.S. §903; 18 P.S. §2501(a).

one, Murder of the Third Degree, to fifteen years (180 months) period of forty years (480 months) of incarceration.

On February 18, 2016, Petitioner, through Christopher Capozzi, Esquire, filed a Motion to Modify Sentence, requesting a downward modification of the sentence imposed. On the same day, Attorney Capozzi filed a Motion to Withdraw or be Appointed as Counsel for Defendant. On February 18, 2016, Petitioner filed a *pro se* "Petition for Appointment of Counsel for Appeal Purposes." On February 19, 2016, the Court issued an Order granting Attorney Capozzi's Motion to Withdraw or be Appointed as Counsel for Defendant and permitting him to withdraw as counsel. On March 11, 2016, the Court issued a Memorandum Opinion and Order denying the Motion to Modify Sentence.

On February 22, 2016, the Court issued an Order granting Petitioner's *pro se* "Petition for Appointment of Counsel for Appeal Purposes". Petitioner filed another *pro se* motion for appointment of counsel on March 19, 2016, and another on April 4, 2016. The Court denied these motions as moot in an Order dated April 21, 2016. Emily M. Merski, Esquire, was subsequently appointed as Petitioner's counsel. On May 10, 2016, Petitioner, through Attorney Merski, filed a Petition for Reinstatement of Right to Appeal, which was granted per an Order dated May 25, 2016. Petitioner timely filed a Notice of Appeal on June 9, 2016. On June 15, 2016, the Court directed Petitioner to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) within twenty-one days. Petitioner timely filed his Statement of Matters Complained of on Appeal on June 28, 2016.

On August 8, 2016, the Court issued a Memorandum Opinion detailing the reasons why Petitioner's appeal should be dismissed. On October 20, 2016, Petitioner filed an Application for Extension of Time to File Brief. On October 21, 2016, the Superior Court issued an Order dismissing Petitioner's appeal and directing Attorney Merski to file a certification that Petitioner had been notified of the dismissal within ten (10) days. On October 24, 2016, Petitioner filed a *pro se* "Request for Plea and Sentencing Transcripts, and the Preliminary Hearing Transcripts of Ryan Andrews and Michael Barron." On November 2, 2016, this Court issued an Order denying this request. On the same day, the Superior Court issued an Order vacating the October 21, 2016 Order and granting Petitioner's Application for Extension of Time to File Brief. Petitioner was given thirty (30) days in which to submit a brief.

Pursuant to the Superior Court's directive, on December 8, 2016, Attorney Merski filed an *Anders* Brief as well as an Application to Withdraw as Counsel with the Superior Court. On March 3, 2017, Petitioner filed a Motion for Remand. On May 8, 2017, the Superior Court of Pennsylvania affirmed Petitioner's judgment of sentence, denied his Motion for Remand, and granted Attorney Merski's Application to Withdraw as Counsel. *Commonwealth v. Gunter*, No. 830 WDA 2016, 2017 WL 1906089 at 9 (Pa. Super. 2017). Subsequently, Petitioner filed the instant *pro se* Motion for Post Conviction Collateral Relief on January 19, 2018. Following clarification that Petitioner was, in fact, seeking the appointment of counsel to represent him during his PCRA proceeding, Attorney William Hathaway was appointed by this Court on February 28, 2018. Thereafter, on May 14, 2018, Attorney Hathaway filed a Supplement to Motion For Post Conviction Collateral Relief (hereinafter "PCRA") and the matter is now before the Court.

Discussion

In Petitioner's first claim for relief, he alleges he is entitled withdraw his guilty plea pursuant to 42 Pa.C.S.A. §9543(a)(2)(vi), which provides relief where a petitioner can prove "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi).[6] Specifically, Petitioner contends that a prospective witness, Darsche Jackson, has "recanted" her prior testimony, and that her new statement, "serves to establish evidence of provocation by Tobiah Johnson and a factual and legal predicate for the invocation of self-defense." Supplement To Motion For Post Conviction Relief, at 1-2. For numerous reasons, this claim is without legal or factual merit and must be dismissed.

The purpose of the PCRA is to afford persons who have been convicted of a crime they did not commit an avenue to obtain collateral relief. 42 Pa.C.S.A. § 9542. The PCRA eligibility statute provides:

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime; or

(iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

[6] Although Petitioner's conviction resulted from a guilty plea rather than as a result of trial, "after-discovered evidence which would justify a new trial would also entitle defendant to withdraw his guilty plea" and applies in the context of a PCRA proceeding. *Commonwealth v. Peoples*, 319 A.2d 679, 681 (Pa. 1974).

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa.C.S.A. § 9543.

Before delving into the specifics of Petitioner's argument, this Court observes that no amount of after discovered evidence would allow Petitioner to credibly contend that he now has proof that he acted in self-defense. His contention that he was unaware of the factual and legal predicate for a self-defense claim and was deprived of this defense is patently meritless because it is simply contrary to the law. "The use of force upon or toward another person is justifiable when the **actor** believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." 18 Pa.C.S.A. § 505(a) (emphasis added).

> In order for a defendant to successfully claim self-defense, he or she must meet the following three elements: (1) the defendant reasonably believed that he was in imminent danger of death or serious bodily injury and that the use of deadly force was necessary to prevent such harm; (2) the defendant did not provoke the incident which resulted in the victim's death; and (3) the defendant did not violate any duty to retreat. *Commonwealth v. Mouzon*, 617 Pa. 527, 53 A.3d 738, 740 (2012) (citations omitted). As previously noted, the Commonwealth has the burden of disproving self-defense beyond a reasonable doubt and may do so by disproving any one of the three self-defense elements the defendant must meet. *Id.* at 740-741.

Commonwealth v. Patterson, 180 A.3d 1217, 1231 (Pa. Super. 2018). Thus, for Petitioner to avail himself of a self-defense claim, he would have to establish that the victim, Tobiah Johnson, was armed, and that Petitioner reasonably believed he was in imminent fear of death or serious bodily injury. Petitioner never asserted this position at any time, nor did either of his co-defendants.[7] Petitioner provoked this incident by conspiring with two co-defendants to drive to Tobiah Johnson's apartment and to forcibly take a firearm from him that Petitioner believed was his. Simply stated, it is disingenuous and, in fact, erroneous for Petitioner to assert that his affirmative defense was somehow predicted on what Darsche Jackson saw or did not see. Only Petitioner had the "keys" to his self-defense claim, not Darsche Jackson or any other witness for that matter. In other words, it is Petitioner's belief at the time of the incident of whether he felt his life or someone else's was in imminent danger of death or serious bodily injury. Petitioner's subjective belief cannot be determined by what another person, such as Darsche Jackson, knew. If Petitioner did not believe that he was under imminent threat of death or serious bodily injury or that another person was, then Petitioner cannot assert a colorable self-defense claim. Accordingly, Petitioner would never be able to credibly assert that his sentence resulted from "the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would

[7] This Court also presided over Petitioner's co-defendant's cases. Both pled guilty, and neither one raised the possibility of a self-defense claim.

have changed the outcome of the trial if it had been introduced" so to afford him collateral relief pursuant to the PCRA. 42 Pa.C.S.A. § 9543(a)(2)(vi). Further refuting Petitioner's claim was his knowing and voluntarily admission that he shot Tobiah Johnson with malice which will be discussed in further detail, *infra*.

Assuming, *arguendo*, that Petitioner's first theory of relief somehow survives legal scrutiny and is not meritless, Petitioner's claim that he should be permitted to withdraw his guilty plea because after discovered evidence establishes his innocence would nonetheless fail. In order for Petitioner to be eligible for post-conviction collateral relief based upon after discovered evidence, he must prove: "(1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict." *Commonwealth v. Johnson*, 179 A.3d 1105, 1123 (Pa. Super. 2018) (citing *Commonwealth v. Cox*, 636 Pa. 603, 614, 146 A.3d 221, 228 (2016)). As will now be discussed, Petitioner cannot meet his burden of proving the elements of this test.

Petitioner claims Darsche Jackson "recanted" her earlier statements to police and her testimony at his Preliminary Hearing, which constitutes after discovered evidence that he was justified in the killing of Tobiah Johnson. However, a review of Darsche Jackson's post-conviction statement, which is attached to the counseled Supplement to Motion For Post-Conviction Collateral Relief, evidences that Darsche Jackson never recanted her testimony, nor does it contain any exculpatory statements regarding Petitioner's involvement in this murder. Instead, the proffered statement, in fact, corroborates and is cumulative of Darsche Jackson's prior statements and of her testimony at Petitioner's Preliminary Hearing where she testified that she witnessed the confrontation, assault, and murder of Tobiah Johnson. Darsche Jackson consistently stated she saw an unknown male approach Tobiah Johnson from behind, punch him in the head, and knock him to the ground.[8] N.T., Preliminary Hearing, 12/16/14, at 15. While the unknown male continued to beat Tobiah Johnson, a vehicle backed into the parking lot where the assault was occurring, and Petitioner emerged. *Id*. at 12-13, 16. Petitioner began repeatedly striking the victim on the head with the butt of his gun. *Id*. at 16. Darsche Jackson then reported, "A couple of seconds go past as [Petitioner] is hitting him, then I heard a first shot." *Id*. at 17, 38-39 (relaying she heard a gunshot prior to Petitioner fatally shooting Tobiah Johnson). Darsche Jackson heard Petitioner react to the gunshot by exclaiming that Tobiah Johnson still had the gun on him, thus evidencing his knowledge of the fact. *Id*. at 18. On cross-examination, Petitioner's counsel even clarified that it was Tobiah Johnson who fired the first shot. *Id*. at 39.

Clearly, Darsche Jackson did not recant her prior testimony. Nor do her post-conviction statements constitute "after discovered evidence." Petitioner always knew that Tobiah Johnson's weapon discharged first, not only because Darsche Jackson testified to it in Petitioner's presence and was cross-examined on the details by Petitioner's counsel, but also because Petitioner was physically present when that event occurred. In fact, Petitioner expressly demonstrated his awareness of that fact that Tobiah Johnson's gun discharged when he reacted to the gunshot by exclaiming to his cohort that Tobiah Johnson still had the gun on him. Thus, the content of Darsche Jackson's post-conviction statement was not discovered **after** Petitioner's conviction, and does not warrant post-conviction relief because it is evidence

[8] This individual was later identified as Michael Barron.

that was available to Petitioner prior to his guilty plea. *See Johnson, Cox, supra*.

Additionally, Darsche Jackson's post-conviction statement does not provide any basis for Petitioner to claim that the content therein would have compelled a different outcome than the one that resulted from his guilty plea. *See Johnson, Cox, supra*. As discussed *supra*, Petitioner was, at all times, aware that Tobiah Johnson's gun discharged prior to Petitioner shooting him in the back. Petitioner alone knew whether he reasonably believed that his life or someone else's was in imminent danger of death or serious bodily injury so to assert self-defense. Thus, Darsche Jackson's post-conviction statement could not have provided him with the factual or legal predicate to argue that the homicide was justified, and, therefore, would not have resulted in a different outcome. *Johnson, Cox, supra*. Again, without being unnecessarily redundant, Petitioner's knowing and voluntary plea circumvents his current argument. Accordingly, Petitioner's claim is devoid of legal and factual merit, and does not warrant relief.

In sum, Petitioner has not met his burden of proving that he is entitled to collateral relief from his conviction because he cannot establish "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced" or the necessary elements of after discovered evidence. 42 Pa.C.S.A. §9543(a)(2)(vi); *see also Johnson, Cox, supra*. Consequently, this claim must fail.

Next, in his *pro se* Motion for Post Conviction Relief, Petitioner claims he is eligible for relief pursuant to 42 Pa.C.S.A. § 9543(a)(2)(ii) because his "[t]rial counsel misapplied the self-defense law which caused [Petitioner] to plead and accept a guilty plea." Motion for Post Conviction Collateral Relief, 1/19/18 at 4.[9] However, in the subsequent, counseled Supplement To Motion For Post Conviction Collateral Relief, this issue is not raised. Accordingly, the claim is not preserved, and is waived. *Commonwealth v. Johnson*, 179 A.3d 1153, 1157 (Pa. Super. 2018) (counseled supplement to *pro se* PCRA petition that did not address the issues in the *pro se* petition resulted in waiver of said claims). However, even if the claim that counsel's ineffectiveness induced Petitioner to plead guilty was preserved, it is once again devoid of merit and must, therefore, be dismissed.

In order for Petitioner to obtain post conviction relief on grounds that his counsel rendered ineffective assistance, he is required to prove:

> the underlying claim is of arguable merit, counsel's performance lacked a reasonable basis, and counsel's ineffectiveness caused him prejudice. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (2001); *see also Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). Prejudice in the context of ineffective assistance of counsel means demonstrating there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 332 (1999). This standard is the same in the PCRA context as when ineffectiveness claims are raised on direct review. *Id*. Failure to establish any prong of the test will defeat an ineffectiveness claim. *Commonwealth v. Basemore*, 560 Pa.

[9] Petitioner again argues against himself by advancing this claim. For trial counsel to be ineffective for "misapplying" the law of self-defense, trial counsel had to have knowledge of this factual predicate and erroneously advised Petitioner of the likelihood of prevailing at a trial by arguing justifiable homicide. This contention is in direct contradiction of Petitioner's first argument that he only learned that Tobiah Johnson's weapon discharged first after he was already convicted.

> 258, 744 A.2d 717, 738 n. 23 (2000) (citing *Commonwealth v. Rollins*, 558 Pa. 532, 738 A.2d 435, 441 (1999) (ordinarily, post-conviction claim of ineffective assistance of counsel may be denied by showing petitioner's evidence fails to meet anyone of three prongs for claim)).

Com. v. Solano, 634 Pa. 218, 230, 129 A.3d 1156, 1162-63 (2015) (citing *Commonwealth v. Keaton*, 615 Pa. 675, 45 A.3d 1050, 1060 (2012)).

> Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. *See Ali, supra*. Where matters of strategy and tactics are concerned, "[a] finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.

Com. v. Spotz, 624 Pa. 4, 33-34, 84 A.3d 294, 311-12 (2014) (internal quotations and citations omitted).

Applying the law to the case *sub judice*, it is evident that Petitioner's claim that counsel was ineffective fails. Petitioner is under the misapprehension that he could have successfully argued that he shot Tobiah Johnson in self-defense had Attorney Capozzi effectively advised him of the law pertaining to the defense.

> In order for a defendant to successfully claim self-defense, he or she must meet the following three elements: (1) the defendant reasonably believed that he was in imminent danger of death or serious bodily injury and that the use of deadly force was necessary to prevent such harm; (2) the defendant did not provoke the incident which resulted in the victim's death; and (3) the defendant did not violate any duty to retreat. *Commonwealth v. Mouzon*, 617 Pa. 527, 53 A.3d 738, 740 (2012) (citations omitted). As previously noted, the Commonwealth has the burden of disproving self-defense beyond a reasonable doubt and may do so by disproving anyone of the three self-defense elements the defendant must meet. *Id*. at 740-741.

Commonwealth v. Patterson, 180 A.3d 1217, 1231 (Pa. Super. 2018).

In the instant case, a self-defense claim was clearly unavailable to Petitioner. The facts demonstrate that after Tobiah Johnson stole Petitioner's firearm, Petitioner drove to Tobiah Johnson's apartment with two accessories and confronted him outside his apartment. *See* N.T., Preliminary Hearing, at 12-14. When Tobiah Johnson came outside, one of Petitioner's cohorts "punched him in his head, knocking him to the ground," at which point Petitioner got out of the vehicle and assaulted the victim. *Id*. at 16. Petitioner repeatedly bludgeoned Tobiah Johnson with the butt of his gun. *Id*. 16-17, 39. After Tobiah Johnson's weapon discharged, Petitioner paused the assault long enough to comment that Tobiah Johnson still had a gun on his person, and then resumed the vicious beating. *Id*. at 18. When Tobiah Johnson attempted to get to his feet, Petitioner shot him in the back. *Id*. at 18, 41, 47. These facts establish that Petitioner provoked the deadly encounter and eviscerate any argument

that he only used deadly force because he reasonably believed he or another person was in imminent danger of death or serious bodily injury.

Moreover, the record contradicts Petitioner's allegation that Attorney Capozzi "misapplied the self-defense law which caused [Petitioner] to plead and accept a guilty plea" or that Petitioner in any way misunderstood the law. Motion For Post Conviction Collateral Relief, 1/19/18 at 4. In "Defendant Trey Gunter's Sentencing Memorandum," Attorney Capozzi explicitly stated, "Mr. Gunter understands that by traveling to Darsche Jackson's apartment, with a firearm and confronting Mr. Johnson about his stolen property he provoked the confrontation and, thus, the defense of self-defense is unavailable to him." Defendant Trey Gunter's Sentencing Memorandum, 12/30/15 at 2-3, n. 1. In the same document, Attorney Capozzi cited to the relevant statute, which states that an individual is justified in using force upon another person "when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." *Id.* (citing 18 Pa.C.S.A. §505(a)). Furthermore, Attorney Capozzi cited to relevant case law stating that the Commonwealth may disprove a defendant's claim of self-defense by establishing that the defender provoked the incident. *Id*. (citing *Commonwealth v. Chine*, 40 A.3d 1239, 1243 (Pa. Super. 2012)). Therefore, Attorney Capozzi, a seasoned and experienced veteran of criminal practice, thoroughly explained the unavailability of a justification defense (e.g., self-defense) to Petitioner. The stark reality of this case is the facts do not and never will support the defense of self-defense. Petitioner understood this and knowingly, intelligently and voluntarily admitted he shot Tobiah Johnson with malice and not in self-defense.

Lastly, upon review of the record, it is clear that Petitioner's plea of guilty was knowing and voluntary. At the plea hearing held on September 23, 2015, Assistant District Attorney Roger Bauer questioned Petitioner about whether Petitioner understood the plea agreement and Petitioner indicated he did understand the agreement and entered into it knowingly and voluntarily, as demonstrated by the following colloquy:

> **Mr. Bauer:** The plea agreement is at paragraph five. For the record the defendant will plead guilty to Count One, amending the charge of criminal homicide to murder of the third degree. The remaining charges will be nol [sic] prossed with the cost of prosecution upon the defendant, and for purposes of the Sentencing Guidelines the deadly weapons enhancement used will apply at Count One. Is that your understanding of the plea agreement in this case, sir?
>
> **Mr. Gunter:** Yes, sir.
>
> **Mr. Bauer:** Did you have a chance to review this form with your attorney?
>
> **Mr. Gunter:** Yes, sir.
>
> **Mr. Bauer:** Do you have any questions on the rights that you have and the rights you give up, the maximum penalty or the plea agreement?

Mr. Gunter: No, sir.

Mr. Bauer: I see above the line "defendant" a signature, is that yours?

Mr. Gunter: Yes.

Mr. Bauer: Did you sign this form today because you understand everything within this document?

Mr. Gunter: Yes, sir.

N.T., Guilty Plea, 9/23/15 at 9-10. Attorney Bauer then explained the charge against Petitioner, which had been amended from first-degree murder to third-degree murder. After Attorney Bauer gave a thorough explanation of the amended charge, Petitioner explicitly stated he was pleading guilty, as demonstrated by the following colloquy:

Mr. Bauer: Mr. Gunter, I have to advise you of the legal and factual basis for your plea. The Commonwealth alleges that on or about November 17, 2014, that you, Trey Darrin Gunter, did directly or by virtue of your complicity, intentionally, knowingly, or recklessly, and with malice, at 123 Water Street in a parking lot behind apartment number 27-E in the borough of Edinboro, Erie County, cause the death of another human being, specifically Tobiah Johnson, in that you, Trey Darrin Gunter, did shoot the victim, Tobiah Johnson, resulting in his death, thereby committing the crime of murder in the third degree.

Malice under the law is defined as wickedness of disposition, hardness of heart, cruelty, a recklessness of the consequences, and an extreme indifference to the value of human life.

Do you understand the legal and factual basis for Count One as amended to murder in the third degree?

Mr. Gunter: Yes, sir.

Mr. Bauer: How do you plead to Count One?

Mr. Gunter: Guilty.

Id. at 11-12.

Additionally, the Court thoroughly questioned Petitioner about whether he understood the plea agreement. Again, Petitioner indicated he fully understood the agreement and entered into it knowingly and voluntarily, as demonstrated by the following colloquy:

The Court: ...Looking at the now amended charge at Count One, Mr. Gunter, you had indicated your plea of guilty and I want to ask you now, is that what you, in fact, did on that date in question as read in this Court?

Mr. Gunter: Yes, sir.

The Court: Has anyone in any way promised you something or coerced you in any way to tell me something that wasn't true?

Mr. Gunter: No, sir.

The Court: Have there been any promises made to you outside of what has been identified here in this courtroom?

Mr. Gunter: No, sir.

The Court: I'm satisfied there's a legal and factual basis to support Count One. I'm also satisfied that his plea of guilty was knowingly and voluntarily entered.

Let me also ask you, with respect to the first sheet, the Understanding of Rights Prior to the Guilty Plea, Mr. Gunter, again, did you have enough opportunity to discuss this matter with your attorney, Attorney Capozzi?

Mr. Gunter: Yes, sir.

The Court: Were you completely satisfied with his representation?

Mr. Gunter: Yes, sir.

The Court: And outside of the agreement as set forth in paragraph five, has anyone made any other promises not written in that paragraph?

Mr. Gunter: No, sir.

The Court: Do you fully understand the maximum penalty and terms of incarceration as the worst case scenario? In other words that is what the maximum represents for this plea; do you fully understand that?

Mr. Gunter: Yes, sir.

The Court: Did you have any questions about that?

Mr. Gunter: No, sir.

The Court: And again, by signing your name above the word "defendant," does that mean that on this guilty plea and understanding of rights sheet, these rights were read to you, that you understand them, and acknowledged that by signing this plea sheet?

Mr. Gunter: Yes, sir.

Id. 13-15. All of these excerpts from Petitioner's plea hearing unequivocally demonstrate that Petitioner's plea of guilty was knowing and voluntary. Petitioner's responses indicate he signed the guilty plea, was under no coercion to enter a plea of guilty, fully understood his rights under the agreement, and had the opportunity to thoroughly discuss the matter with Attorney Capozzi. Further, he also stated, under oath, that he was satisfied with Attorney Capozzi's representation, and again, there was no mention of self-defense. *Id.*

It is abundantly clear that Petitioner has failed to meet his burden of proving that Attorney Capozzi was ineffective for "misapplying" the law of self-defense. There was no factual or legal predicate upon which to assert that Petitioner was justified in killing Tobiah Johnson. Counsel cannot be ineffective for failing to pursue a meritless claim. *Com. v. Solano*, 634 Pa. 218, 230, 129 A.3d 1156, 1162-63 (2015). Accordingly, Petitioner was not denied the effective assistance of counsel, and is not entitled to relief pursuant to the Post Conviction Relief Act.

Conclusion

For all of the above reasons, Petitioner's PCRA request for collateral relief is denied.

Petitioner is hereby advised by this Notice that the Court intends to dismiss his Motion For Post Conviction Collateral Relief filed on January 19, 2018 and supplemented on May 14, 2018, without a hearing. Petitioner shall have twenty days from the date of this Notice to file and serve objections, if any, to this Notice.

BY THE COURT
/s/ **Hon. John J. Trucilla, President Judge**

SUMMIT TOWNSHIP SEWER AUTHORITY

v.

SUMMIT TOWNSHIP ZONING HEARING BOARD

ZONING / APPEALS

When a trial court does not take additional evidence, it is limited to considering whether the zoning board erred as a matter of law or abused its discretion.

ZONING / APPEALS

A zoning board abuses its discretion if its findings are not supported by substantial evidence.

ZONING / APPEALS

Issues not raised before a zoning board are not preserved for appeal absent due cause, such as a situation where the appellant had been prevented from raising those issues before the board.

ZONING / SPECIAL EXCEPTION

Once the applicant meets the requirements for a special exception, the application has made out a prima facie case and the application must be granted unless the objectors present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare.

MUNICIPAL CORPORATION / DISQUALIFICATION BY INTEREST

As a general rule, a municipal officer should disqualify himself from any proceeding in which he has a personal or pecuniary interest that is immediate or direct.

MUNICIPAL CORPORATION / DISQUALIFICATION BY INTEREST

The standard for a conflict of interest is: 1) whether the municipal officer had an immediate or direct personal or pecuniary interest in the subject matter of the application, and (2) the board member conducted himself in a biased or prejudicial manner.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 13259-2018

Appearances: George Joseph, Esq., for Appellant Summit Township Sewer Authority
David J. Rhodes, Esq., for Appellee Summit Township Zoning Hearing Board

OPINION

Domitrovich, J. July 2, 2019

Appellant Summit Township Sewer Authority's (hereinafter "Appellant Sewer Authority") operates the public sanitary sewer system in Summit Township and sought approval from Summit Township Zoning Hearing Board (hereinafter "Appellee Zoning Board") to construct a 1,000,000 gallon sewage retention tank. Appellant Sewer Authority submitted an application for a special exception as a "sewage lagoon" under the "Water Recreation and Storage" provision of the Summit Township, Pa., Zoning Ordinance 1992-05 (May 18, 1992) (hereinafter "Ordinance"). Appellee Zoning Board held a hearing on October 30, 2018 and denied Appellant Sewer Authority's application.

On appeal, this Trial Court heard argument of counsel wherein Appellant Sewer Authority initially raised four (4) issues in its "Notice of Land Use Appeal" to this Trial Court. However,

when Appellant Sewer Authority provided this Trial Court with its "Brief of the Appellant, Summit Township Sewer Authority," Appellant Sewer Authority now raises five (5) issues on appeal as follows: (1) "Is Appellant Sewer Authority's proposed use of the property for a sewage detention tank a permitted use as an essential service under the township zoning ordinance"; (2) "Where the authority presented evidence that it satisfied the conditions required in the zoning ordinance for the granting of a special exception, does the zoning hearing board's denial of the special exception constitute an error of law"; (3) "Where the objectors failed to present substantive evidence that the proposed detention tank will to a high probability pose a threat to the health and safety of the community, is the zoning hearing board's denial of the special exception supported by substantial evidence in the record"; (4) "Where the zoning hearing board imposed the burden of persuasion on the summit township sewer authority to address the unsubstantiated and speculative concerns of the objectors, does the board's decision constitute an abuse of its discretion"; and (5) "Does the record support a determination that a zoning hearing board member had a conflict of interest and that the board exhibited bias against the application of the authority."

A brief factual history is as follows: Appellant Sewer Authority is the owner of land in Summit Township, and is identified as Erie County Index No. 40-011-035.0-001.00 on Harold Road (hereinafter "Subject Property"). The Subject Property is zoned as an R-2 Residential District. On September 21, 2018, Appellant Sewer Authority submitted an application for a special exception in order to construct a one million (1,000,000) gallon sewage equalization tank on the property in Summit Township. Appellant Sewer Authority submitted the applicable special exception application for a "Water Recreation & Storage" exception.

On October 30, 2018, a public hearing was held on Appellant Sewer Authority's application to obtain a special exception for the Subject Property. Appellee Zoning Board had made the following Findings of Fact and Conclusion of Law:

Findings of Fact

1. The Applicant is Summit Township Sewer Authority, 8890 Old French Road, Erie, Pennsylvania, 16509. Applicant is the owner of the Subject Property on Harold Road.

2. The Subject Property is located in Summit Township, Pennsylvania, and is identified by the Erie County Index No. 40-011-035.0-001.00. The parcel is currently zoned R-2.

3. Applicant is seeking a special exception to allow them to construct a 1,000,000 gallon Sewage Equalization Basin (Sewage Lagoon) on the Subject Property.

4. Pursuant to Summit Township Zoning Ordinance, Table 310.2, sewage lagoon may be allowed in Summit Township in the R-2 District by special exception.

5. Summit Township Zoning Ordinance, Section 400.00 provides:

"The criteria for Special Exceptions are listed below. In addition to these, the Zoning Hearing Board, in granting Special Exception is charged with considering the effect that such proposed uses will have upon the immediate neighborhood. The preservation and integrity of existing development must be carefully weighted and given priority in each decision."

6. Summit Township Zoning Ordinance, Section 400.05 provides:

"sewage lagoons . . .shall comply with the following regulations:

(a) The facility must meet all setback requirements.

(b) The facility must be enclosed by a fence no less than four (4) feet high . . . Any fence gates shall be self-latching and self-locking."

7. Summit Township Zoning Ordinance, Section 605 provides:

"No use of land or structure in any district shall involve any element, or cause any condition, that may be dangerous, injurious, or noxious to any other property or person in the Township. Furthermore, every use of land or structure in any district must observe the following performance requirements.

. . .

605.6 Odors: In any district, except the industrial district, no malodorous gas or matter shall be permitted which is discernable on any adjoining lot or property."

8. William Steff, Applicant, testified that a sewage retention system is both critical and fundamental to the operation of Applicant's sewer system.

9. Mr. Steff testified that sewage retention is necessary due to recent significant expansion in Summit Township. Specifically, Mr. Steff noted that there have been 590 new homes constructed since 2002, and the 2006 addition of Presque Isle Downs added a usage of an equivalent to 462 new homes. With this development and the improvements to pumping stations, a retention system is necessary to ensure that Summit Township does not exceed its permitted sewage capacity.

10. Mr. Steff testified that Applicant considered many alternative methods and sites for a retentions system. He explained that the proposed modular in-ground rectangular tank in the proposed location on Subject Property was the best alternative.

11. Mr. Steff testified that the tank will be located on a site that is surrounded by trees. The wooded areas would be preserved. The tank area would be surrounded by 6 foot high chain-link security fencing with three strands of barbed wire. The tank would not be visible from the road. The tank location would comply with all Summit Township setback requirements.

12. Mr. Steff testified that the plan would be to add additional arborvitae trees to further block the view of the facility from Harold Road.

13. Mr. Steff testified that Applicant would install downward facing light which would only be used for emergency or security purposes. He offered to leave the lights on around the facility if that was the preference of the neighbors.

14. With regard to odor, Mr. Steff testified that Applicant was purchasing two water cannons to assist Applicant in cleaning the tank after each use.

15. Mr. Steff confirmed that the tank would not have a cover or cap on it.

16. Mr. Steff estimated that the tanks would be utilized 6 to 12 times a year. If full, the tank would take approximately 15 hours to empty. In most cases, the tank would take one to two hours to empty after each use.

17. The tank would only be utilized during heavy rain events. While the liquid stored in the tanks would be sewage, Mr. Steff explained that the sewage would be extremely diluted due to infiltration from the heavy rain event.

18. Chad Yurisic, Applicant's engineer, testified that the tank is designed for rare use and would only be used in the event of significant rain storms. He explained that the

majority of the time, the tank would be empty. The top of the tank would be 42 inches above the ground.

19. Mr. Yurisic testified that the open tank in-ground system was preferable to the use of above ground steel tanks. He explained that the above ground tanks require pumps and a lift station. In addition, the lift-station would involve the constant presence [of] sewage.

20. Several residents appeared and testified in opposition to Applicant' proposal. The nature of the objections centered around the odor associated with the sewage in the tank, the concern that a leak in the tank could harm residential water wells, and the proposal's overall negative impact on the surrounding residential neighborhood.

21. Several residents expressed concerns that future development could result in a greater usage of the tank. With such greater usage, the problems with odor would be exacerbated.

22. Applicant did not deny the potential for greater usage of the tank in the event of future development. While Applicant disputed the severity of potential odor, it did not offer any solution to an odor problem other than the usage of water cannons and the passage of time.

23. There was no other testimony offered either in favor of or in opposition to Applicant's request.

Conclusion of Law

Applicant has not met the requirements for a special exception to allow them to construct a 1,000,000 gallon Sewage Equalization Basin (Sewage Lagoon) on the Subject Property. The area surrounding the Subject Property is residential in nature. While Applicant meets the specific requirements regarding fencing and setback, Applicant's proposal fails to identify sufficient protections for the residential neighbors. Of particular concern is Applicant's inability to prevent or promptly address odor issues.

(Findings of Fact and Conclusion of Law, pg. 1-3).

The following is the relevant procedural history of the instant case: On December 14, 2018, Appellant Sewer Authority filed a Land Use Notice of Appeal. Appellant Sewer Authority filed a Motion to Request Evidentiary Hearing. Appellee Zoning Board filed a response to Appellant Sewer Authority's Motion and argument was heard on March 23, 2019. This Trial Court denied Appellant Sewer Authority's Motion without prejudice and permitted Appellant's counsel to re-raise the issue at the time of Argument on May 31, 2019 after the parties had a better understanding of the case. This Trial Court further permitted counsel for Appellant and Appellee to submit Memoranda of Law. Argument on Appellant Sewer Authority's and Appellee Zoning Board's Memoranda of Law was held on May 31, 2019. This Trial Court did not hear additional evidence, nor did Appellant Sewer Authority re-raise its Motion for this Trial Court to hear additional evidence.

Standard of Review

This Trial Court did not take additional evidence and is, therefore, "limited to considering whether the Appellee Zoning Board erred as a matter of law or abused its discretion."

Driscoll v. Zoning Bd. of Adjustment of City of Philadelphia, 201 A.3d 265, 268 n.2 (Pa. Cmwlth. Ct. 2018) (citing *German v. Zoning Bd. of Adjustment*, 41 A.3d 947, 949 n.1 (Pa. Cmwlth. Ct. 2012)). Appellee Zoning Board "abuses its discretion if its findings are not supported by substantial evidence." *Id*. (citing *Arter v. Phila. Zoning Bd. of Adjustment*, 916 A.2d 1222, 1226 n.9 (Pa. Cmwlth. Ct. 2007), appeal denied, 934 A.2d 75 (Pa. 2007)). Findings of the Appellee Zoning Board "shall not be disturbed by the court if supported by substantial evidence." 53 P.S. § 11005-A. This Trial Court is "bound by the board's findings that result from resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence." *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807, 811 (Pa. Cmwlth. Ct. 2005) (citing *Macioce v. Zoning Hearing Bd. of the Borough of Baldwin*, 850 A.2d 882 (Pa. Cmwlth. 2004), appeal denied, 863 A.2d 1150 (Pa. 2004)).

I. Is Appellant Sewer Authority's proposed use of the property for a sewage detention tank a permitted use as an essential service under the township zoning ordinance

Case law indicates "issues not raised before a zoning board are not preserved for appeal absent due cause, such as a situation where the appellant had been prevented from raising those issues before the board." *Leoni v. Whitpain Twp. Zoning Hearing Bd.*, 709 A.2d 999, 1002 (Pa. Cmwlth. Ct. 1998).

Upon review, the Certified Record does not reflect Appellant sought any application for "Essential Services." The Certified Record in the instant case demonstrates Appellant Sewer Authority's "Summit Township Zoning Hearing Board Application" unequivocally sought a special exception only based upon "Water Recreation & Storage" and the applicable sections of the Ordinance: "Table 310.2; Section 400.05." (Certified Record - Application). Furthermore, the Project Description attached to the "Summit Township Zoning Hearing Board Application" verifies Appellant Sewer Authority was solely seeking a special exception as a "Water Recreation & Storage." (*Id*.). Since Appellant Sewer Authority neither brought this issue before Appellee Zoning Board nor demonstrated Appellant Sewer Authority was prevented from raising this issue at said hearing, this issue regarding "Essential Services" is waived in the instant appeal.

II. Where the authority presented evidence that it satisfied the conditions required in the zoning ordinance for the granting of a special exception, does the zoning hearing board's denial of the special exception constitute an error of law?

When the zoning board considers special exceptions enumerated in the zoning ordinance with express requirements to be permitted or denied, "the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria." 53 P.S. § 10912.1. "The applicant for a special exception has the burden of proving that the proposed special exception use satisfies the standards in the zoning ordinance." *Greth Dev. Grp., Inc. v. Zoning Hearing Bd. of Lower Heidelberg Twp.*, 918 A.2d 181, 186 (Pa. Cmwlth. Ct. 2007) (citing *Shamah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299 (Pa. Cmwlth Ct. 1994)).

Summit Township's Ordinance permits a special exception for Water Recreation &

Storage uses in R-2 residential districts. A Water Recreation & Storage use is defined in the Summit Township Ordinance as: "Any facility for water recreation such as inground swimming pools, commercial fishing ponds, reservoirs, fish hatcheries, sewage lagoons or farm ponds." Summit Township, Pa., Zoning Ordinance 1992-05(400.05) (May 18, 1992). In order to receive a special exception for a Water Recreation & Storage use, two conditions must be met: (1) "the facility must meet all setback requirements"; and (2) "the facility must be enclosed by a fence no less than four (4) feet high, except that farm ponds in the A-1 Agriculture District are exempt from this requirement. Any fence gates shall be self-latching and self-locking." *Id*. Generally, "[o]nce the applicant meets the requirements, he has made out his prima facie case and the application must be granted unless the objectors present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare." *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth. Ct. 2006) (citing *Bailey v. Upper Southampton Township*, 690 A.2d 1324 (Pa. Cmwlth. Ct. 1997)).

In the instant case, it is undisputed Appellant Sewer Authority had met the specific conditions relating to fencing and set back requirements for a special exception; however, Summit Township has a specific additional ordinance which applies to all applicants and requires all uses of land in every district to meet these performance standards:

> No use of land or structure in any district shall involve any element, or cause any condition, that may be dangerous, injurious, or noxious to any other property or person in the Township. Furthermore, every use of land or structure in any district must observe the following performance requirements.
>
> . . .
>
> **605.6 Odors: In any district, except the industrial district, no malodorous gas or matter shall be permitted which is discernible on any adjoining lot or property.**

Summit Township, Pa., Zoning Ordinance 1992-05(605) (May 18, 1992) (emphasis added).

When reviewing ordinances, "one of the primary rules of statutory construction is that an ordinance must be construed, if possible, to give effect to all of its provisions." *In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwlth. Ct. 2006) (citing *Mann v. Lower Makefield Township*, 634 A.2d 768 (Pa. Cmwlth. Ct. 1993)). Further, this Trial Court is to give deference to the interpretation of the zoning ordinance by the zoning board. *In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwlth. Ct. 2006) ("The basis for the judicial deference is the knowledge and expertise that a zoning hearing board possesses to interpret the ordinance that it is charged with administering.").

In the instant case, Appellant Sewer Authority disputes whether Appellee Zoning Board had sufficient evidence to deny Appellant Sewer Authority's special exception application for not complying with the performance standard at Section 605.6. Nonetheless, a review of the record contains substantial evidence to support Appellee Zoning Board decision. The Ordinance is clear: "every use of land or structure in any district must observe the following performance requirements. . . no malodorous gas or matter shall be permitted which is discernible on any adjoining lot or property." (605.6). Appellant Sewer Authority's expert, Mr. William Steff, initially addressed the odor performance standard at Section 605.6. Mr. Steff indicated Appellant Sewer Authority would add water cannons to wash the tank out

after use. (Notes of Testimony, Summit Township Zoning Hearing Board, October 30, 2018, at 14:18-25 ("N.T.l")). After questioning from members of Appellee Zoning Board, Mr. Steff stated the tank would be "open to the air" and "sunlight and oxidation are pretty good weapons against . . . sewage odors and so forth." (N.T.l at 22:25-23:9). Upon receiving questions regarding procedures for odor complaints, Mr. Steff testified it could take up to ninety (90) days to correct an odor issue. (N.T.1 at 60:21-23). Moreover, Mr. Duane Hudak, a board member of Appellee Zoning Board, expressed concerns regarding odors and the Section 605.6 performance standard:

> **MR. HUDAK:** Thank you. Just so we're clear here, as we look at the special exception and we look at the 400.00 for the preservation and integrity of existing development, we need to carefully weigh those options, and odor seems to be an issue, and that's under the performance standard on 605, that on any special exception we have to review. Odor seems like it's an issue, and at that point did you ever consider reducing the size of the basin and putting a building over it and venting that to eliminate the odor, or what is your intention for odor if there is any?

(N.T.l at 54:10-22). Following this board member expressing these concerns, expert witnesses for Appellant Sewer Authority discussed another option—adding a lid to the tank. However, the experts indicated the lid option was not chosen due to the lid costing "1.5 or $1.2 million," and the necessity for stormwater management. (N.T.l at 55:19-58:18).

Therefore, the record demonstrates Appellee Zoning Board's decision to deny Appellant Sewer Authority's application for a special exception is supported by the evidence. Appellee Zoning Board's decision was not an abuse of discretion or error of law.

III. Where the objectors failed to present substantive evidence that the proposed detention tank will to a high probability pose a threat to the health and safety of the community, is the zoning hearing board's denial of the special exception supported by substantial evidence in the record?

Generally, "[o]nce the applicant meets the requirements, he has made out his prima facie case and the application must be granted unless the objectors present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare." *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth. Ct. 2006) (citing *Bailey v. Upper Southampton Township*, 690 A.2d 1324 (Pa. Cmwlth. Ct. 1997)). However in the instant case, Summit Township has performance standards codified in the Ordinance addressing issues such as odor. Therefore, Appellee Zoning Board is required to give effect to all provisions of the Ordinance and make their decision based upon the Ordinance. *See In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwlth. Ct. 2006) ("one of the primary rules of statutory construction is that an ordinance must be construed, if possible, to give effect to all of its provisions."). Further, after a review of the record, this Trial Court finds substantial evidence exists to support Appellee Zoning Board's decision to deny Appellant Sewer Authority's application based upon the applicable performance standards in the Ordinance.

Summit Township requires "no malodorous gas or matter shall be permitted which is discernible on any adjoining lot or property." Summit Township, Pa., Zoning Ordinance 1992-05(605) (May 18, 1992). An expert witness for Appellant Sewer Authority briefly addressed compliance with this provision in the presentation. (N.T.l at 14:18-25). Also, Mr. Duane Hudak, a board member of the Appellee Zoning Board, expressed concerns regarding odor pursuant to the Section 605.6 performance standard: " ... we need to carefully weigh those options, and odor seems to be an issue, and that's under the performance standard on 605, that on any special exception we have to review." (N.T.l at 54:10-22). Here, evidence exists to substantiate Appellee Zoning Board's Findings of Fact and Conclusion of Law that Appellant Sewer Authority did not sufficiently address the requisite ordinance. As Appellee Zoning Board's decision was made based upon the applicable performance standard as codified in the Ordinance and not based upon the opinions of the objectors, Appellant Sewer Authority's issue is meritless.

IV. Where the zoning hearing board imposed the burden of persuasion on the summit township sewer authority to address the unsubstantiated and speculative concerns of the objectors, does the board's decision constitute an abuse of its discretion?

As reiterated above, Summit Township has a specific ordinance that applicants must comply with in addition to complying with the requirements for a special exception. Summit Township requires all uses of land in every district to meet performance standards. Appellee Zoning Board found Appellant Sewer Authority did not comply with the odor performance standard codified in the Ordinance at Section 605.6, which is necessary to be granted a special exception.

Moreover, an expert witness from Appellant Sewer Authority admitted at the time of the hearing that Appellant Sewer Authority's application must abide by the odor performance standard at Section 605.6:

> **MR. STEFF:** And the last item was best management practices were recommended and to be provided and followed to prevent and eliminate odors in accordance with Section 605.6. To that end we've added two water cannons in the current plans for wash-down purposes, the idea being every time the facility is used operators would investigate the site, wash down as necessary.

(N.T.1 at 14:18-25). Also, Mr. Duane Hudak, a board member of Appellee Zoning Board expressed concerns regarding odor and the Section 605.6 performance standard: "we need to carefully weigh those options, and odor seems to be an issue, and that's under the performance standard on 605, that on any special exception we have to review." (N.T.l at 54:10-22). Following this board member's comments and concerns, the witnesses for Appellant Sewer Authority discussed the option of adding a lid to the tank, but the witnesses concluded the lid option was not chosen due to the lid costing "1.5 or $1.2 million," and the necessity for storm water management. (N.T.1 at 55:19-58:18).

A thorough review of the record indicates Appellee Zoning Board made its decision

consistent with and based upon Summit Township Ordinance Section 605.6 requiring all projects to not cause malodorous gas to travel to other properties. Sufficient evidence exists in the record to demonstrate Appellee Zoning Board's Findings of Fact and Conclusions of Law as to the plans presented by Appellant Sewer Authority did not meet the Section 605.6 requirements. Thus, Appellant Sewer Authority's issue is meritless.

V. Does the record support a determination that a zoning hearing board member had a conflict of interest and that the board exhibited bias against the application of the authority?

This Trial Court initially notes no objection to Mr. Stewart's participation in Appellee Zoning Board's decision was made at the time of the hearing. Case law indicates "issues not raised before a zoning board are not preserved for appeal absent due cause, such as a situation where the appellant had been prevented from raising those issues before the board." *Leoni v. Whitpain Twp. Zoning Hearing Bd.*, 709 A.2d 999, 1002 (Pa. Cmwlth. Ct. 1998). Since this issue was not addressed at the time of the hearing and Appellant Sewer Authority was not prevented from raising the issue at the time of the hearing, this issue is waived.

Assuming *arguendo* this issue regarding a conflict of interest or recusal was not waived, the law is as follows: "As a general rule, a municipal officer should disqualify himself from any proceeding in which he has a personal or pecuniary interest that is immediate or direct." *Amerikohl Min. Inc. v. Zoning Hearing Bd. of Wharton Twp.*, 597 A.2d 219, 222 (Pa. Cmwlth. Ct. 1991). Importantly, "[w]hile an appearance of nonobjectivity is sufficient to trigger judicial scrutiny, the significant remedy of invalidation often depends on something more tangible." *Piccolella v. Lycoming Cty. Zoning Hearing Bd.*, 984 A.2d 1046, 1057-58 (Pa. Cmwlth. Ct. 2009) (citing *Caln Nether Co., L.P. v. Bd. of Supervisors*, 840 A.2d 484, 496 (Pa. Cmwlth. Ct. 2003)). To find a conflict of interest, evidence must demonstrate: (1) the board member "had an immediate or direct personal or pecuniary interest in the subject matter of the application," and (2) the board member "conducted himself in a biased or prejudicial manner." *Amerikohl Min. Inc. v. Zoning Hearing Bd. of Wharton Twp.*, 597 A.2d 219, 223 (Pa. Cmwlth. Ct. 1991).

Factually, Mr. Stewart was on the mailing list to receive notice of the hearing on Appellant Sewer Authority's proposed 1,000,000 sewage retention tank. (Certified Record; STSA - Mailing List). Mr. Stewart owns property in close proximity to the Appellant Sewer Authority's proposed retention tank. Additionally, after a review of the transcript of the hearing, Mr. Stewart asked only a few questions, which are reasonable. The following is a sample:

MR. STEWART: How high above ground level is the top of the tank?

(N.T.1 at 16:19-20);

MR. STEWART: Now, you realize this request is for one unit, and if you plan on putting two or three in, you have to come back?

(N.T.1 at 18:24-19: 1); and this conversation attempting to understand a possible alternative:

MR. STEWART: Chad, the alternative of this was tanks. How many tanks does it take to replace what you're doing here, and how big would they be?

MR. YURISIC: I'm not sure I understand the question about tank - this is a tank. As an alternative?

MR. STEWART: Yeah, an alternative to this lagoon would be tanks, right, storage tanks?

MR. YURISIC: That's what this is, is a storage tank.

MR. STEWART: No, no, I'm talking about --

MR. YURISIC: Multiple tanks?

MR. STEFF: Aboveground tanks?

MR. YURISIC: One of the previous iteration of the design had aboveground storage tanks, glass-lined steel tanks similar to like a silo that you see. The downside to that arrangement was it required a pump to pump into those tanks. That would require a lift station, and then that would be full of sewage all the time. This site is advantageous because it allows us to gravity flow in and gravity flow out. We don't get that opportunity very often.

MR. STEWART: I was just wondering how big these tanks would have been. Are they-

MR. YURISIC: They would have been the same size, a million gallons. We need a million gallons of storage.

MR. STEWART: Thirty feet high?

MR. YURISIC: Probably, yeah, probably 25 or 30 feet tall, yeah.

MR. STEWART: Thank you.

(N.T.1 at 23:17-24:18). Further, after review of the entire record and all statements made by Mr. Stewart, the record demonstrates Mr. Stewart did not conduct himself in a biased or prejudicial manner. Therefore, Appellant Sewer Authority's fifth issue is meritless.

Based on the foregoing analysis, this Trial Court hereby enters the following Order of Court:

ORDER

AND NOW, to-wit, on this 2nd day of July, 2019, after the scheduled Argument on Summit Township Sewer Authority's Land Use Appeal from the Summit Township Zoning Hearing Board's decision to deny Summit Township Sewer Authority's application for a special exception to build a sewage retention tank; at which George Joseph, Esq. appeared on behalf of Appellant; David J. Rhodes, Esq., appeared on behalf of Appellee; and after a thorough review of the entire certified record from the Summit Township Zoning Hearing Board meeting, Summit Township Zoning Hearing Board's Findings of Fact and Conclusion of Law, Memoranda of Law submitted by both counsel, and oral argument from counsel on May 31, 2019, it is hereby **ORDERED, ADJUDGED and DECREED** that the decision of the Summit Township Zoning Hearing Board is hereby **AFFIRMED** for the reasons set forth in the Opinion attached.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
JAMES EARL HOUSE

CRIMINAL PROCEDURE / JUVENILE RE-SENTENCING

The United State Supreme Court has held when re-sentencing an individual convicted of homicide as a minor and serving a life without parole sentence, sentencing courts must provide a juvenile convicted of a homicide offense a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation unless the sentencing authority finds that the juvenile is incapable of rehabilitation.

CRIMINAL PROCEDURE / JUVENILE RE-SENTENCING

A trial court may not impose a term-of-years sentence, which constitutes a *de facto* life without parole sentence, on a juvenile offender convicted of homicide unless it finds, beyond a reasonable doubt, that he or she is incapable of rehabilitation.

CRIMINAL PROCEDURE / JUVENILE RE-SENTENCING

Within the meaningful opportunity to obtain release standard, is the notion it would not be meaningful to provide an opportunity for release based solely on the most tenuous possibility of a defendant's surviving the minimum sentence imposed.

CRIMINAL PROCEDURE / JUVENILE RE-SENTENCING

To be meaningful or, at least, potentially meaningful, it must at least be plausible that one could survive until the minimum release date with some consequential likelihood that a non-trivial amount of time at liberty awaits.

CRIMINAL PROCEDURE / JUVENILE RE-SENTENCING

Re-sentenced juveniles are subject to a mandatory maximum sentence of life imprisonment as required by Section 1102(a), accompanied by a minimum sentence determined by the common pleas court upon resentencing.

CRIMINAL PROCEDURE / JUVENILE RE-SENTENCING

The Pennsylvania Supreme Court's ruling in *Cmmw. v. Batts*, 163 A.3d 410, 442 (Pa. 2017) required severance of section 9756(b)(1)'s requirement that a minimum sentence can be no more than half of the maximum sentence for juveniles convicted of first-degree murder prior to *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. CR 2720 of 1999
78 WDA 2019

Appearances: Justin Panighetti, Esq., for Appellant James Earl House
Greg Sematic, Deputy Attorney General, for Appellee Commonwealth of Pennsylvania

OPINION

Domitrovich, J. March 11, 2019

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of James Earl House ("Appellant") from this PCRA Court's Sentencing Order dated December 14, 2018,

pursuant to a re-sentencing proceeding mandated by the United States Supreme Court ruling in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) and the Pennsylvania Supreme Court ruling in *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (*"Batts II"*). Appellant was eighteen (18) years old when he was originally convicted in 2000 for the murder of twenty-one (21) year old Eddie Outlaw. This offense was committed on April 8, 1999, about five months before Appellant's eighteenth birthday. Appellant was convicted by a jury of First Degree Murder and other crimes on March 31, 2000, and was originally sentenced to mandatory life imprisonment without the possibility of parole with consecutive incarceration sentences for other convictions.

Following an extensive re-sentencing hearing on December 6, 2018 and December 14, 2018, Appellant was re-sentenced to a period of incarceration of thirty (30) years to life with the possibility of parole for his first degree murder conviction.[1] His revised aggregate sentence with other separate convictions is thirty-two (32) years to life with the possibility of parole. Appellant received credit for time served as of the date of his re-sentencing on December 14, 2018.

The original procedural history is as follows: On May 17, 2000, Appellant filed a Post-Sentence Motion, which this PCRA Court denied on May 23, 2000. May 26, 2000, Appellant filed a timely Notice of Appeal to the Pennsylvania Superior Court. On September 10, 2001, the Pennsylvania Superior Court filed a Memorandum Opinion, affirming Appellant's judgment of sentence. On December 27, 2001, Appellant filed his first PCRA Petition, which this PCRA Court denied on October 25, 2002. On November 26, 2008, Appellant filed an Application for Writ of Habeas Corpus, which this PCRA Court considered as Appellant's second PCRA Petition. This PCRA Court dismissed Appellant's second PCRA Petition on February 25, 2009. On March 26, 2009 Appellant filed a Notice of Appeal regarding this PCRA Court's Final Order. The Pennsylvania Superior Court returned Appellant's Notice of Appeal for Corrections with a letter dated March 31, 2009. On July 15, 2010, Appellant filed his third PCRA Petition, which was dismissed by this PCRA Court on May 13, 2011. Appellant filed his fourth PCRA Petition on August 10, 2011, which was dismissed by this PCRA Court on February 9, 2012. On February 10, 2012, Appellant filed his Notice of Appeal, which was quashed by the Pennsylvania Superior Court on August 27, 2012, due to Appellant's failure to file a brief.

Appellant filed his fifth PCRA Petition on July 11, 2012. On July 23, 2012, this PCRA Court appointed counsel, who after several motions for extension of time filed a Supplemental Petition for Post-Conviction Relief on November 15, 2013. Commonwealth filed its Response on December 16, 2013. Thereafter, Appellant's counsel filed a Motion to Stay Decision on Pending PCRA Claims until the outcome of the request for certiorari in the case of *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013). This PCRA Court granted said stay after a hearing on January 23, 2014. The United States Supreme Court denied certiorari on *Cunningham v. Pennsylvania*, 134 S. Ct. 2724 (2014), on June 9, 2014. On June 11, 2014, this PCRA Court filed a Notice of Intent to Dismiss Appellant's fifth PCRA Petition without a Hearing pursuant to Pa. R. Crim. P. 907(1). This PCRA Court dismissed Appellant's fifth PCRA Petition on July 9, 2014.

[1] In the Appellant's re-sentencing, this PCRA Court reinstated the standard range sentence of Count 2 (Carrying Firearms Without A License) for one (1) year to five (5) years of state incarceration to run consecutive to Murder in the First Degree, and Count 3 (Criminal Conspiracy to Commit Simple Assault) for one (1) year to two (2) years of state incarceration consecutive to Count 2. At the time of the original sentencing, Count 1 (Aggravated Assault) and Count 4 (Possessing Instruments of Crime) merged with Count 1 (Murder of the First Degree).

The Pennsylvania Superior Court affirmed the dismissal of Appellant's fifth PCRA Petition on March 13, 2015. Appellant filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on April 9, 2015. The Pennsylvania Supreme Court held its decision in abeyance pending the United States Supreme Court's decision in *Montgomery v. Louisiana*. On January 25, 2016, the United States Supreme Court in *Montgomery* held *Miller v. Alabama* was to be applied retroactively. The Pennsylvania Supreme Court then vacated and remanded to the Pennsylvania Superior Court. The Pennsylvania Superior Court in turn vacated and remanded this case to this PCRA Court for re-sentencing of Appellant.

Appellant filed an Amended PCRA Petition on March 22, 2016. Office of Attorney General filed its Response to Appellant's Amended PCRA Petition on May 6, 2016. After several continuances were filed, Appellant's current counsel entered an appearance on January 13, 2017. Appellant's Petition to Permit Access to Records was granted by this PCRA Court on March 2, 2017. On May 9, 2017, Appellant's re-sentencing was continued to allow more time for *Batts II* to be decided.

By Order dated August 7, 2017, this PCRA Court noted that if Pennsylvania Office of Attorney General intends to seek a life sentence without parole in the instant criminal case, Pennsylvania Office of Attorney General should file a Notice of Intent to seek a life sentence without parole on or before September 22, 2017. Pennsylvania Office of Attorney General made no such filing. After a few further continuances, Appellant's re-sentencing hearing was scheduled to begin on December 6, 2018. Counsel filed briefs and the re-sentencing was completed on December 14, 2018.

On appeal, Appellant raises four (4) issues which this PCRA Court considers as three issues: (1) whether this PCRA Court resentenced Appellant to an unconstitutional sentence when imposing a sentence of 30 years with possibility of parole on the first degree murder conviction, which Appellant considers is a *de facto* life sentence, allegedly depriving Mr. House of a "meaningful opportunity for release"; (2) whether Appellant's sentence of 30 years to life with the possibility of parole violates Pennsylvania Statute 42 Pa.C.S. § 9756; and (3) whether this PRCA Court factored Appellant's life expectancy into Appellant's new sentence and whether the vacated holding of *U.S. v. Grant* should have been applied. This PCRA Court provides the following analysis:

As to Appellant's first issue, it is well settled law that sentencing is within the sound discretion of the trial judge, and "a manifest abuse of discretion" is the standard on appeal. *Com. v. Rodda*, 723 A.2d 212, 214 (Pa. Super. 1999). An abuse of discretion may not be found because of a disagreement over a sentence, but only when the sentencing court "ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." *Id*.

Further, the United State Supreme Court has held when re-sentencing an individual convicted of homicide as a minor and serving a life without parole ("LWOP") sentence, sentencing courts "must provide a juvenile convicted of a homicide offense a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation unless the sentencing authority finds that the juvenile is incapable of rehabilitation." *Cmmw. v. Foust*, 180 A.3d 416, 431 (Pa. Super. 2018) (*noting Miller*, 132 S.Ct. 2455, *citing Graham*, 130 S.Ct. 2011).

Here, at the time of re-sentencing, this PCRA Court considered and placed on the record in

open court, in the presence of Appellant, all parties, and counsel, a multitude of sentencing factors, including, but not limited to, Appellant's rehabilitation and other factors as follows:

(1) This PCRA Court considered the Pennsylvania Sentencing Code:

> The Trial Court has taken into account the traditional sentencing considerations which this Court is making part of the record and disclosing in open court at this time of sentencing. The Trial Court statement of reasons for the sentence being imposed are as following with the Court considering all relevant statutes and case law.

(Notes of Testimony - Re-sentencing Day 2, December 14, 2018 at 15:1-7 ("NT 1"));

(2) This PCRA Court applied factors enumerated in Section 1102.1 (A):

> Sentencing Court is fashioning the minimum term of incarceration, using as guidance Section 1102.1(A) with the Crimes Code, taking into consideration the many factors: The impact of the offense on the victim including oral and written victim impact statements made and submitted by family members of the victim; testimony detailing the physical, psychological, and economic effects of the crime on the victim and the victim's family; the impact of this offense on this community and the seriousness of the offense and the related offenses; the threat to the safety of the public or any individual posed by this defendant; the nature and circumstances of these offenses committed by this defendant; the degree of culpability; the Pennsylvania sentencing code and the thorough arguments of counsel; testimony of all the witnesses before the Court; sincerity of defendant's remorsefulness[.]

(NT 1 at 15:8-16:1);

(3) This PCRA Court considered the age of Appellant currently and age related characteristics at the time of the crime:

> [T]he age related characteristics of the defendant; the present age of 37 and his age at the time of this offense of being 17 years old, shy of approximately five months of being 18 years of age; his mental capacity, his character, his maturity and failure to appreciate risks and consequences, and his immaturity at the time of the offenses; the degree of criminal sophistication exhibited by the defendant; the circumstances of the homicide offense; the defendant, family, and peer pressure affecting him[.]

(NT 1 at 16:1-11);

(4) This PCRA Court considered Appellant's possibility for rehabilitation:

> [T]he nature and the extent of the prior delinquent history including the success or failure of previous attempts by the Court to rehabilitate him; the possibility for rehabilitation, and all other relevant factors.

(NT 1 at 16:11-15);

(5) This PCRA Court's history with Appellant and Appellant's behavior in prison:

> The Trial Court being the Trial Judge who presided over the entire case, trial, this case as well as being the original sentencing judge of the defendant. This Trial Court has taken into consideration that the Commonwealth acknowledges the defendant has behaved well in prison, Commonwealth acknowledges during sentencing allocution defendant appeared to exhibit authentic contrition for this crimes[.]

(NT 1 at 16:16-24);

(6) This PCRA Court considered Appellant being under Juvenile Court supervision at the time the crime occurred:

> [D]efendant was also under juvenile supervision for a shooting incident at the time of this crime which is an aggravated assault, a felony of the first-degree, and firearms not to be carried without a license, a felony three, and the defendant has had ample opportunities for rehabilitation available to him and to comply with juvenile court directives.

(NT 1 at 16:25-17:7);

(7) This PCRA Court considered the victim impact statements by the Outlaw family:

> Court also notes the victim impact statement made by the Outlaw family clearly reflecting the impact of this crime on them at the time and how it continues to have that impact to this day and forever after.

(NT 1 at 17:8-12);

(8) This PCRA Court considered expert opinion testimony and expert report of Dr. Shannon Edwards, regarding her clinical expertise and evaluation of Appellant:

> This Court has also taken into consideration Dr. Shannon Edwards' testimony, her clinical expertise of the defendant, her evaluation of the defendant, her report she discussed, how well defendant has done while incarcerated with

> only four misconducts. The Court has considered her expert opinion in conclusion based upon the information that she reviewed.

(NT 1 at 17: 13-20);

(9) This PCRA Court has reviewed the programs Appellant participated in and employment at SCI Huntington:

> Court has also taken into consideration defendant has participated in approximately ten programs including SCI Huntington's therapeutic community, a leadership-based program, and his leadership position in the soap factory at the prison.

(NT 1 at 17:21-18:1);

(10) This PCRA Court considered testimony of character witnesses for Appellant, Allen Betts, Tyshaun Taylor, and Antonio Howard:

> Court also considered testimony of Allen Betts, a corrections officer, a work supervisor of defendant at SCI Huntington as well as testimony of by Tyshaun Taylor and Antonio Howard.

(NT 1 at 18:1-4);

(11) This PCRA Court considered the Presentence Investigation report:

> Court also considered the pre-sentence investigation reports provided to the Court, Commonwealth, and defendant by James Bowers of the Adult Probation Office of Erie County.

(NT 1 at 18:5-8); and

(12) This PCRA Court considered the seriousness of Appellant's crime:

> Defendant has extinguished every possibility of Eddie Outlaw's future and that has to be accounted for, and the violence he displayed in his life and the breakdown and the moral understanding of what's permitted by people in society. Killing by one person of another contributed to the degradation of standards in our community.

(NT 1 at 8-15).

See generally (NT 1 at 15:1-18:15).

As illustrated above, this PCRA Court examined, considered, and balanced numerous

matters and factors along with facts of the crime and rehabilitative possibilities of Appellant at the time of Appellant's re-sentencing.

Moreover, a plain application of the case law demonstrates Appellant's sentence is not a *de facto* LWOP sentence. Case law clearly indicates: "a trial court may not impose a term-of-years sentence, which constitutes a *de facto* LWOP sentence, on a juvenile offender convicted of homicide unless it finds, beyond a reasonable doubt, that he or she is incapable of rehabilitation." *Foust*, 180 A.3d at 431 (Pa. Super. 2018). As indicated earlier, Commonwealth did not attempt to prove Appellant was incapable of rehabilitation. (Notes of Testimony - Re-sentencing, December 6, 2018 at 112:13-113:3 ("NT 2"). Furthermore, the Pennsylvania Superior Court in *Foust* provides examples of certain term-of-years sentences clearly constituting *de facto* LWOP sentences, such as, a 150-year sentence is a *de facto* LWOP sentence. *Id*. at 438. The Pennsylvania Superior Court "explicitly decline[d] to draw a bright line . . . delineating what constitutes a *de facto* LWOP sentence and what constitutes a constitutional term-of-years sentence." *Id*. The Pennsylvania Superior Court in *Foust* also noted how certain sentences do not constitute *de facto* LWOP sentences: "A sentence of 30 years to life falls into this category." *Id*. at 436. The Pennsylvania Superior Court in *Foust* was "unaware of any court that has found that a sentence of 30 years to life imprisonment constitutes a *de facto* LWOP sentence for a juvenile offender." *Id*. Moreover, when deciding whether a fixed term-of-years sentence is a *de facto* LWOP sentence, courts "must consider the sentence for each individual crime separately and not the aggregate sentence imposed by the trial court." *Id*. at 441.

The Pennsylvania Superior Court provided in *Commonwealth v. Bebout* further guidance as to whether a sentence is permissible or is a *de facto* LWOP sentence for a juvenile offender. 186 A.3d 462 (Pa. Super. 2018), reargument denied (July 10, 2018). The *Bebout* Court began with the holding from the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), whereby the state must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." In order to provide this "meaningful opportunity to obtain release" standard, the *Bebout* Court stated an implicit assumption exists: "[i]mplicit in this standard is the notion it would not be meaningful to provide an opportunity for release based solely on the most tenuous possibility of a defendant's surviving the minimum sentence imposed." *Bebout*, 186 A.3d at 468. The *Bebout* Court held in order "to be meaningful or, at least, ***potentially*** meaningful, it must at least be ***plausible*** that one could survive until the minimum release date with some consequential likelihood that a non-trivial amount of time at liberty awaits." *Id* (emphasis in original). The *Bebout* Court cited to the *Foust* Court, which "seemed to suggest some sort of meaningful-opportunity-for-release standard by declaring that a 150-years-to-life sentence constitutes a *de facto* LWOP sentence." *Id*.

To illustrate, the facts in *Commonwealth v. Bebout* indicate defendant was incarcerated for second degree murder since he was fifteen (15) years old; defendant was re-sentenced to forty-five (45) years to life. *Id*. at 462. The Pennsylvania Superior Court in *Bebout* found "Appellant's opportunity for release to be meaningful, especially in light of the gravity of his crime, because he has the potential to live for several decades outside of prison if paroled at his minimum." *Id*. at 469 (footnote removed). The *Bebout* Court concluded Appellant has "simply failed to meet his burden of demonstrating that the lower court sentenced him to

a *de facto* LWOP sentence. There simply is no comparison between the opportunity to be paroled at 60 years of age and 100+ years of age. The difference is, quite literally, a lifetime." *Id*. at 469-70.

By way of further example, in *Commonwealth v. White*, the Pennsylvania Superior Court analyzed whether defendant's thirty-five years to life sentence provided "some sort of meaningful-opportunity-for-release." 193 A.3d 977 (Pa. Super. 2018). The Superior Court noted defendant's minimum term was 35 years' imprisonment; he had been incarcerated since he was 17 years old; and defendant would be eligible for parole when he was 52 years old. *Id*. The Superior Court in *White* concluded based on its review and analysis, defendant's term-of-years minimum sentence did not constitute a *de facto* LWOP sentence, and his sentence provided him with a meaningful opportunity for parole. *Id*.

In the instant case, as indicated above, Commonwealth did not attempt to demonstrate Appellant was incapable of rehabilitation. (NT 2 at 12:13-113:3). This PCRA Court re-sentenced Appellant for the first degree murder conviction to a period of incarceration of thirty (30) years to life with the possibility of parole. This PCRA Court re-imposed his prior sentences, making Appellant's revised aggregate sentence thirty-two (32) years to life with the possibility of parole.

As to Appellant's ability to be paroled, Appellant who has been incarcerated since he was seventeen (17) years old can be considered for parole by the State authorities when he is approximately forty-seven (47) years old regarding his new sentence of thirty (30) years to life sentence for first degree murder. Assuming *arguendo*, if considering Appellant's minimum aggregate sentence as thirty-two (32) years to life, Appellant can be considered by the state authorities for possible parole when he is approximately forty-nine (49) years old. Appellant's ability to live to at least forty-nine (49) years of age is plausible and would provide Appellant with a non-trivial amount of time at liberty. Moreover, even accounting for the aggregate time, Appellant's potential of being paroled at the age of forty-nine (49) years old provides Appellant an earlier opportunity at a younger age to be paroled than the defendants in both *Bebout* and *White*. Therefore, re-sentencing Appellant to a sentence of thirty (30) years to life with the possibility of parole for his murder conviction (or thirty-two (32) years to life with the possibility for his aggregate sentence) is not a *de facto* life sentence and provides Appellant with a meaningful and plausible opportunity for parole.

Next, Appellant's second issue alleges a violation of 42 Pa.C.S. § 9756. The Pennsylvania Supreme Court has addressed this issue squarely and thoroughly twice, first in *Batts I*, and then re-affirmed in their decision in this matter in *Batts II*. In *Batts I*, the Pennsylvania Supreme Court stated "it is our determination here that they are ***subject to a mandatory maximum sentence of life imprisonment*** as required by Section 1102(a), accompanied by a minimum sentence determined by the common pleas court upon resentencing." *Com. v. Batts*, 66 A.3d 286, 297 (Pa. 2013) (emphasis added). When the Pennsylvania Supreme Court heard *Batts II*, said Court specifically addressed 42 Pa.C.S. § 9756, when stating "[h]owever, our holding implicitly ***required severance of section 9756(b)(1)'s requirement*** that a minimum sentence can be no more than half of the maximum sentence for juveniles convicted of first-degree murder prior to *Miller*." *Cmmw. v. Batts*, 163 A.3d 410, 442 (Pa. 2017) (emphasis added). *See generally Id.* at 441-45. Thus, Appellant's second issue lacks merit as the Pennsylvania Supreme Court severed the requirement in 42 Pa.C.S. § 9756.

This PCRA Court has combined Appellant's third and fourth issues regarding Appellant's life expectancy and *U.S. v. Grant*, 887 F.3d 131 (3d Cir. 2018), *reh'g en banc granted*, opinion vacated, 905 F.3d 285 (3d Cir. 2018). The vacated holding in *U.S. v. Grant* stated: a "non-incorrigible juvenile offender should presumptively be sentenced below the national age of retirement, unless the remaining sentencing factors strongly mitigate against doing so," with the national age of retirement being "between sixty-two and sixty-seven inclusive." *Id*. at 151; 153.

In the instant case, no life expectancy evidence was presented to this PCRA Court even though this Court inquired during the re-sentencing hearing on December 6, 2018. (NT 2 at 128:4-10). Also, as this PCRA court stated above, even using Appellant's aggregate sentence of thirty-two (32) years to life, Appellant has the meaningful opportunity to be paroled when he is about forty-nine (49) years old, which is less than the youngest age of retirement of sixty-two (62) years old, as stated in the vacated *U.S. v. Grant*.

Second, *U.S. v. Grant* is a federal third circuit court of appeals decision, not a United States Supreme Court case, thereby making Pennsylvania state courts not bound by this federal intermediate court decision: "At the outset we observe that it is well-settled [the Superior Court of Pennsylvania] is not bound by the decisions of federal courts, other than the United States Supreme Court, or the decisions of other states' courts." *Eckman v. Erie Ins. Exch.*, 21 A.3d 1203, 1207 (Pa. Super. 2011). At the time of the re-sentencing, the decision in *U.S. v. Grant* was vacated for rehearing *en banc*, thus further diminishing its persuasive value in our state courts. Therefore, Appellant's argument otherwise is without merit.

Finally, in both *Foust* and *Bebout*, the Pennsylvania Superior Court emphasized the complex and ever evolving nature of the difficulty in applying life expectancy as a potential factor. The Court in *Foust* explicitly stated:

> We similarly decline to set forth factors that trial courts must consider when making this determination, i.e., whether they must look to the life expectancy of the population as a whole or a subset thereof and whether the defendant must be given a chance at a meaningful post-release life. We need not confront these difficult questions in this case.

180 A.3d at 438 (Pa. Super. 2018). The Pennsylvania Superior Court continued to raise concerns regarding using life expectancy as a factor when the *Bebout* Court opined: "[t]he use of statistical analysis of life expectancies to govern a *de facto* LWOP standard appears to create a myriad of new questions without any easy answers, sending us down a constantly evolving rabbit hole from which we may never escape as more and more data arrives." *Bebout* 186 A.3d at 469. The *Bebout* court also opined, "it is not at all discernible which statistics we can rely on to predict life expectancy in specific cases, and we are virtually certain to have a standard that is in constant flux with the addition of each new study." *Id*. Therefore, Appellant's argument to the contrary is without merit.

Accordingly, for all of the reasons set forth above, this PCRA Court requests the Honorable Pennsylvania Superior Court to dismiss this instant appeal and respectfully requests the Pennsylvania Superior Court affirm this PCRA Court.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

KIMBALL D. GIESBRECHT
v.
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION

ADMINISTRATIVE LAW / MODIFICATION AND CORRECTIONS

An administrative agency, on its own motion, having provided the proper notice and explanation, may correct typographical, clerical, and mechanical errors obviated and supported by the record.

JUDGMENTS / RES JUDICATA

Res judicata precludes the future lawsuit or cause of action when an issue of fact or of law is actually litigated and determined by a valid final judgment, and determination of the issue was essential to judgment, the determination on that issue is conclusive in a subsequent action between the parties, whether on the same or a different claim.

JUDGMENTS / COLLATERAL ESTOPPEL

Collateral estoppel bars a lawsuit or cause of action when the following four (4) elements are met: (1) the issue decided in the prior adjudication was identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue and question in a prior action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 10648 - 2018
364 CD 2019

Appearances: Charbel G. Latouf, Esq., for Appellant Kimball D. Giesbrecht
Terrance M. Edwards, Esq., for Appellee Commonwealth of Pennsylvania Department of Transportation

AMENDED 1925(a) OPINION

Domitrovich, J. May 29, 2019

This appeal arises from this Trial Court denying Kimball D. Giesbrecht's (hereinafter "Appellant") commercial driver's license disqualification appeal wherein the Commonwealth of Pennsylvania Department of Transportation (hereinafter "PennDOT") had initially sent a Lifetime Disqualification Notice to Appellant stating his commercial driving privileges were disqualified for life; however, ten days after Appellant filed an appeal, PennDOT discovered its mistake and sent Appellant a corrected "Additional Notice" reducing Appellant's lifetime disqualification of his commercial driver's license privileges to one (1) year disqualification only. At the time of the scheduled hearing on July 18, 2018, argument was heard with no testimony. Counsel for PennDOT began by admitting PennDOT made a clerical mistake which was corrected thereafter in PennDOT's system. Appellant's counsel objected to the correction to a one-year disqualification and instead argued the lifetime disqualification should be dismissed with prejudice so he can raise res judicata or collateral estoppel against the corrected one-

year disqualification in a subsequent appeal. Following longstanding Pennsylvania law, this Trial Court permitted PennDOT's amendment to a one-year disqualification in the interests of promoting judicial economy as well as saving Appellant any future costs and time with a second appeal nunc pro tunc to this Trial Court. Thereafter, a hearing was scheduled and held on the one-year disqualification.

Appellant raises four (4) issues in his Concise Statement of Matters Complained of on Appeal Pursuant to Pa.R.A.P §1925(b). This Trial Court has consolidated Appellant's first three issues into one issue and will address Appellant's fourth issue as his second issue as follows: (1) whether this Trial Court properly considered PennDOT's Additional Notice correcting its clerical error thereby reducing Appellant's lifetime disqualification to a one (1) year disqualification; and (2) whether collateral estoppel or res judicata "exist thereby prohibiting the Commonwealth of Pennsylvania Department of Transportation from amending the lifetime license disqualification."

The procedural history is as follows: On March 7, 2018, PennDOT notified Appellant his commercial driving privileges were disqualified for his lifetime as a result of Appellant's second adjudicated criminal conviction on February 26, 2018, of Driving Under the Influence: General Impairment in violation of 75 Pa.C.S. § 3802(a)(1). By Order dated March 7, 2018, a de novo hearing was scheduled to determine whether PennDOT's action in disqualifying Appellant's lifetime commercial driving privileges should be set aside. On March 13, 2018, Appellant timely appealed PennDOT's Lifetime Disqualification Notice.

Sixteen (16) days after PennDOT mailed the Lifetime Disqualification Notice, PennDOT mailed a corrected one-year disqualification notice to Appellant, which was ten (10) days after Appellant initially appealed to this Trial Court. At the time of argument, PennDOT indicated the Lifetime Disqualification Notice contained a clerical error not requiring Appellant's disqualification for his lifetime. *See* 75 Pa.C.S. § 1611 (providing for a one-year disqualification of commercial licenses for persons convicted under Section 3802 of the motor vehicle code relating to driving under the influence of alcohol).

A license suspension appeal argument was held on July 18, 2018, at which Appellant appeared and was represented by his counsel, Charbel G. Latouf, Esq.; Denise H. Farkas, Esq. and Legal Extern, Shonah E. Russell, appeared on behalf of PennDOT. At that time, PennDOT's counsel requested this Trial Court to dismiss this license appeal as being rendered moot since PennDOT had already corrected the Lifetime Disqualification Notice and therefore PennDOT no longer was pursuing a lifetime disqualification against Appellant in the instant action. PennDOT's counsel also asserted the corrected Additional Notice of a one-year disqualification required a separate appeal.[1] Although Appellant's counsel agreed the instant license appeal should be dismissed, Appellant's counsel argued the lifetime disqualification appeal should be dismissed with prejudice so he can argue res judicata or collateral estoppel as to a second appeal of the Additional Notice. By Order dated July 18, 2018, this Trial Court directed both Appellant's counsel and Commonwealth's counsel to submit Memoranda of Law on the relevant issues presented at the argument on July 18, 2018. On August 3, 2018, Commonwealth's counsel filed its Brief in Support of License Suspension. On August 21, 2018, Appellant's counsel filed Appellant's "Memorandum of Law in Support of Plaintiff's (sic) License Suspension Appeal."

[1] This Trial Court notes the Additional Notice was sent without notice for an additional thirty (30) day appeal; therefore, the Additional Notice is merely an amendment to the Lifetime Disqualification Notice not requiring an additional thirty (30) day appeal period.

On September 7, 2018, this Trial Court filed its Opinion and Order finding PennDOT's Additional Notice timely and correctly amended Appellant's Lifetime Disqualification Notice to a one-year disqualification only. This Trial Court thereby scheduled a hearing on the one-year commercial license disqualification in the interests of judicial economy and saving Appellant additional time and money in filing a second separate appeal to the Trial Court. The hearing on the one-year disqualification was scheduled for September 26, 2018. At request of both counsel, the September 26 hearing was continued to December 19, 2018. On December 13, 2018, Appellant's counsel requested a continuance and counsel for PennDOT had no objection, so the hearing was then continued to February 27, 2019.

On February 27, 2019, the hearing was held, and this Trial Court denied Appellant's commercial driver's license one-year disqualification appeal thereby permitting PennDOT to reinstate Appellant's one-year disqualification. Additionally, Appellant's counsel requested Appellant's license disqualification be delayed for six (6) months, to which PennDOT's counsel objected. This Trial Court noted PennDOT's objection and recommended PennDOT delay Appellant's commercial license disqualification for six (6) months.

Appellant's first issue is whether this Trial Court properly considered the Additional Notice sent by PennDOT as amending and therefore reducing the Lifetime Disqualification Notice to a one-year commercial license disqualification. This Trial Court provides the following analysis: It is longstanding law in Pennsylvania that an administrative agency, such as PennDOT, may correct their mistakes: "We firmly believe that an administrative agency, on its own motion, having provided the proper notice and explanation, may correct typographical, clerical, and mechanical errors obviated and supported by the record." *Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Comp. Bd. of Review*, 309 A.2d 165, 167 (Pa. Cmwlth. Ct. 1973); *Kellams v. Pub. Sch. Employes' Ret. Bd.*, 391 A.2d 1139, 1141 (Pa. Commw. Ct. 1978) ("Plaintiffs' argument that the Commonwealth is estopped from correcting its mistake simply is not the law in Pennsylvania."); *See also Com. v. W. Md. R. R. Co.*, 105 A.2d 336 (Pa. 1954); *Johnson v. W.C.A.B. (Budd Co.)*, 693 A.2d 1015 (Pa. Commw. Ct. 1997).

In the instant case, on July 18, 2018, PennDOT's counsel acknowledged this initial error and informed this Trial Court of the error which she also mentioned on the record as indicated by the transcript:

MS. RUSSEL: So this is an appeal from a lifetime disqualification of a CDL under 1611; however, looking through the documents that the department has, we discovered that the department had rescinded the lifetime disqualification --

THE COURT: Excellent.

MS. RUSSEL: -- and corrected it to a one-year disqualification because he did not meet - his 1622 charge did not meet a requirement under 1611.

(Notes of Testimony, License Suspension Appeal, July 18, 2018, at pg. 3:13-22 ("N.T.1")). PennDOT's counsel further explained on the record the initial error was due to considering the underlying offense as a serious traffic offense:

THE COURT: But it's not with prejudice. It was a clerical error. Right?

MS. FARKAS: Well, yes, it --

MR. LATOUF: No.

MS. FARKAS: -- was an error because they considered that as a serious traffic offense --

MR. LATOUF: No.

MS. FARKAS: -- and it wasn't.

MR. LATOUF: No, just because someone appeals you don't get the right to say, oh, well, we made a clerical error and therefore we get the redo. Okay?

MS. FARKAS: But they corrected it.

(N.T.l at 16:19-17:5). Here, Counsel for PennDOT demonstrated clearly a clerical error was made initially which PennDOT timely corrected within the thirty (30) day appeal period. After PennDOT sent notice of lifetime disqualification of Appellant's commercial driving privilege for life, PennDOT discovered its mistake on its own motion and reduced the disqualification to one year on its own motion. This Additional Notice gave Appellant one hundred seventeen (117) days to prepare his case prior to the initially scheduled hearing. Further, this Trial Court examined this issue after reviewing memorandum from each counsel and rendered its Opinion dated September 7, 2018, finding PennDOT properly corrected its clerical error by amending the initial Lifetime disqualification notice in favor of the Appellant. Thus, PennDOT properly corrected their clerical error to a reduced one-year disqualification. For all of the above reasons, Appellant's first issue lacks merit.

Appellant's second issue is whether collateral estoppel or res judicata "exist thereby prohibiting the Commonwealth of Pennsylvania Department of Transportation from amending the lifetime license disqualification." This Trial Court provides the following analysis: The principle of res judicata encompasses both technical res judicata and collateral estoppel. *Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.)*, 776 A.2d 362, 365 (Pa. Commw. Ct. 2001). Res judicata precludes the future lawsuit or cause of action when "an issue of fact or of law is actually litigated and determined by a valid final judgment, and determination of the issue was essential to judgment, the determination on that issue is conclusive in a subsequent action between the parties, whether on the same or a different claim." *McNeil v. Owens-Corning Fiberglas Corp.*, 680 A.2d 1145, 1147-48 (Pa. 1996). Collateral estoppel bars a lawsuit or cause of action when the following four (4) elements are met: "(1) the issue decided in the prior adjudication was identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue and question in a prior action." *Pat's Auto Sales v. Com., Dep't of Transp., Bureau of Motor Vehicles*, 744 A.2d 355, 358 (Pa. Commw. Ct. 2000).

Appellant argues the res judicata or collateral estoppel should prevent PennDOT from amending the Lifetime Disqualification Notice; however, a final judgment on the merits is a necessity for both res judicata and collateral estoppel. In the instant case, a final adjudication on the merits had not been reached until the hearing was actually held on February 27, 2019, well after the amendment. After hearing testimony and argument of Counsel, this Trial Court denied Appellant's commercial driver's license one-year disqualification appeal. However, this Trial Court granted Appellant's counsel's request to recommend to PennDOT that Appellant's disqualification be delayed for six (6) months. For all of the above reasons, Appellant's second issue regarding res judicata and collateral estoppel lacks merit.

As set forth above, this appeal lacks merit, and so this Trial Court requests the Honorable Pennsylvania Commonwealth Court affirm this Trial Court's Order dated February 27, 2019.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

DAWN DIPAOLO-ROMEO AND MICHAEL L. ROMEO, H/W AND DOMINICK D. DIPAOLO AND JANET DIPAOLO, H/W

v.

DENISE ALTADONNA AND DAVID G. CIMINO

ELECTIONS / CAMPAIGN FINANCE / ADVERTISING

Paid political advertising, where authorized by a candidate or their agent, shall clearly and conspicuously state the communication has been so authorized. If not so authorized, it shall name the person(s) who financed it. 25 Pa.C.S.A. § 3258(a)(1) and (2).

CIVIL PROCEDURE / SUMMARY JUDGMENT / DISCOVERY

A party may move for summary judgment if, subsequent to discovery, an adverse party bearing the burden of proof fails to produce proper evidence of facts essential to a cause of action or defense. Summary judgment is appropriate when the record contains insufficient evidence to make a prima facie case for a cause of action or defense. Pa.R.C.P. 1035.2(2).

TORTS / DEFAMATION / BURDEN OF PROOF

In a defamation action, the plaintiff has the burden of proving the communication's defamatory character, publication, application to plaintiff, comprehension of the recipient, special harm, and, where applicable, abuse of a conditionally privileged occasion. 42 Pa.C.S.A. § 8343(a).

TORTS / DEFAMATION / HARM

Communication is defamatory if it tends to harm someone's reputation as to lower him in the estimation of the community or drive away third parties. It is not enough that the victim is embarrassed or annoyed.

TORTS / DEFAMATION / LIBEL

Defamation committed in writing is libel.

TORTS / DEFAMATION PER SE / IMPUTED CRIME

Statements imputing commission of a crime are capable of a defamatory meaning as a matter of law. One who imputes to another conduct constituting a criminal offense is subject to liability without proof of special harm if the offense is of a type which, if committed in the place of publication, would be punishable by imprisonment in a state or federal institution. Restatement (Second) of Torts § 571.

TORTS / DEFAMATION PER SE / UNNAMED CRIME

Defamation may occur by implying a crime was committed, without naming the crime.

DEFAMATION / PUBLIC FIGURES / MALICE

In Pennsylvania, public figures must prove falsity and actual malice in a defamation action. Public figures are those intimately involved in resolution of important public questions, or who, by reason of fame, shape important events in society.

DEFAMATION / PUBLIC FIGURE / EVIDENTIARY STANDARD

A Public figure must prove defamation by clear and convincing evidence, the highest standard in civil law. Generally, candidates for public office are public figures.

DEFAMATION / GUILTY PLEA / CONVICTION

A guilty plea or conviction may be a prerequisite to publicly proclaiming a person "committed" a crime, however, actual malice on the part of the defendant must still be proven.

DEFAMATION / PUBLIC FIGURE / MALICE

A public figure must prove actual malice by clear and convincing evidence. This rigorous burden requires that defamatory statement be made with actual knowledge of its falsehood or reckless disregard for veracity. Failure to check sources or mere negligence is insufficient for malice.

CONSTITUTIONAL LAW / ACTUAL MALICE

The actual malice standard is a constitutionally mandated safeguard, and must be proven by clear and convincing evidence.

DEFAMATION / ACTUAL MALICE / SUMMARY JUDGMENT

Failure to show malice may result in summary judgment for defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW
NO. 13530-2017

Appearances: Anthony Logue, Esq., for Plaintiffs
Craig Markham, Esq., for Defendant, David Cimino
William Kelly, Esq., for Defendant, Denise Altadonna

OPINION

June 20, 2019

I. BACKGROUND

The Plaintiffs are Dawn DiPaolo-Romeo and her husband Michael L. Romeo, and Dominick D. DiPaolo ("D. DiPaolo") and his wife, Janet DiPaolo ("J. DiPaolo"). DiPaolo-Romeo ran for magistrate district justice of the City of Erie's 6th Ward in 2017. Her father, Plaintiff D. DiPaolo, was 6th Ward district magistrate at the time, and had occupied that seat for over twenty years. DiPaolo-Romeo was D. DiPaolo's office manager. (Amended Complaint, ¶2(A)).

The Defendants were political rivals of DiPaolo-Romeo. Defendants Beveridge and Cimino ran against DiPaolo-Romeo in the 2017 election. San Fillipo[1] and Altadonna were supporters of Beveridge and / or Cimino. Beveridge won the November election, and Plaintiffs filed their defamation-related lawsuit shortly after, in December of 2017. Defendants filed Preliminary Objections, and an Amended Complaint was filed in May of 2018. The Amended Complaint seeks compensatory damages in excess of $50,000, punitive damages, and attorney fees on each of its fifteen counts. Beveridge and San Fillipo were voluntarily dismissed from the case in February of 2019. Shortly after that, Cimino filed the Motion for Summary Judgment presently before the court, seeking judgment in his favor on all counts under Pa.R.C.P. 1035.2(2).

In their Amended Complaint, plaintiffs generally describe their action as one "for damages arising from Defendants[']publication by letter, ads and averments both oral and written with information containing false, malicious, and defamatory statements about Plaintiffs personally and in their business practices." (Amended Complaint, ¶ 7). Paragraph 7 of the Amended Complaint refers to six exhibits, marked Exhibits A through E, that specifically identify the alleged defamatory statements.

[1] Defendant Anthony J. San Fillipo is sometimes referred to in this action as Anthony J. "Sanfilippo".

Exhibit A is a mailing postmarked May 10, 2017 sent to residents of the 6th Ward ostensibly from an entity called "Erie County Ethics Committee." The two-page mailing is titled "Dom DiPaol[o] Family Corruption." It contains a list of disparaging accusations against D. DiPaolo, DiPaolo-Romeo, and J. DiPaolo. There is no evidence attributing Exhibit A to Cimino.

Exhibit B is a campaign ad in the form of a one-page flyer published by Defendant Cimino sometime prior to the May 2017 primary election. It contains a chart comparing the three 6th Ward candidates under eight contrived categories obviously intended to favor candidate Cimino.

Exhibits C, D, E, and F are affidavits signed by Romeo, DiPaolo-Romeo, and two other individuals, respectively. Exhibits C and D describe an incident at a polling location in the 6th Ward on the day of the May primary election, when Altadonna was overheard making disparaging remarks about DiPaolo-Romeo while holding a Beveridge campaign sign. Exhibit E is authored by a person named Craig J. Hauser. It describes an incident where candidate Beveridge allegedly uttered a disparaging remark about DiPaolo-Romeo to the Affiant. Exhibit F is authored by a person named Jenny Kupezyk. It describes an incident where Beveridge's wife called the Affiant to disclaim Beveridge's responsibility for Exhibit A. There is no evidence implicating Cimino in these alleged defamatory statements.

Of all the exhibits, only Exhibit B pertains to statements made by Cimino. DiPaolo-Romeo asserts that Exhibit B is defamatory because it states in the seventh column that she committed a misdemeanor violation of Pennsylvania's Election Code.[2] D. DiPaolo asserts that the same statement is defamatory of him because, although he is not mentioned by name in the ad, it states that DiPaolo-Romeo worked for "her father." From this D. DiPaolo extrapolates an imputation that DiPaolo-Romeo committed Election Code violations while in his employ, which he argues is necessarily disparaging of him.[3]

Section 3258(a) states:

Advertising

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a candidate, or ballot questions, through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication:

(1) If authorized by the candidate, his authorized political committee or their agents, shall clearly and conspicuously state that the communication has been authorized.

[2] Specifically §1638(a)(1) of the campaign finance reporting provisions of the Act of Jun. 3, 1937, P.L. 1333, as amended ("Election Code"), which is referenced hereafter by its location in Purdon's Consolidated Statutes Annotated, 25 Pa.C.S.A. §3258(a)(1).

[3] There are vague references in the pleadings and discovery materials that suggest Plaintiffs found Exhibit B defamatory in more respects than just its statement regarding the Election Code violation. However, the claims were not pled with sufficient facts to evaluate them, and it seems they were abandoned altogether at oral argument.

(2) If not authorized by a candidate, his authorized political committee, or their agents, shall clearly and conspicuously state the name of the person who made or financed the expenditure for the communication, including, in the case of a political committee the name of any affiliated or connected organization.

25 Pa.C.S.A. §3258(a)(1)and (2).[4] Under the law, violation of §3258 constitutes a misdemeanor punishable by a fine not to exceed $1,000.00, or imprisonment from one month to two years, or both, at the discretion of the court. 25 Pa.C.S.A. §3258(b)(3).

Cimino asserts that the statement in Exhibit B is true based on DiPaolo-Romeo's admission that she was aware of Election Code requirements, but placed the noncompliant campaign signs anyway. DiPaolo-Romeo argues that the statement is false and defamatory because she took appropriate steps to correct her signs, and she was never charged with or convicted of any crime in connection with violating the Election Code. To this Cimino more or less responds that even if DiPaolo-Romeo is correct, he reasonably believed, as a matter of legal theory, that one can truthfully be said to have committed a crime, regardless of whether they were charged or convicted, if they admit to performing all of the elements of the offense, as he believes DiPaolo-Romeo has done in this case.

II. SUMMARY JUDGMENT

Pa.R.C.P. 1035.2(2) states:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law ...
(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

As explained in the *Note* to Rule 1035.2(2), the motion is appropriate when:

... the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to a jury. The motion in this instance is made by a party who does not have the burden of proof at trial and who does not have access to the evidence to make a record which affirmatively supports the motion. To defeat this motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense.

"The purpose of the Rule is to eliminate cases prior to trial where a party cannot make out a claim or a defense after relevant discovery has been completed... " Pa.R.C.P. 1035.2,

[4] Section 3258(a)(2) is not mentioned in the Ad, but it relates to facts revealed through discovery that DiPaolo-Romeo's sign maker donated several signs to the campaign that did not contain the requisite attribution under §3258(a)(2).

Explanatory Comment-1996. As with motions under Rule 1035.2(1), the record is viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Coleman v. Ogden Newspapers, Inc.*, 142 A.3d 898, 904 (Pa. Super. 2016) citing *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 585-86 (Pa. Super. 2013).

Presently, there is no dispute that discovery is complete and all available, relevant evidence has been submitted for the court's review.

III. DISCUSSION

The Amended Complaint contains two counts against Cimino individually, and two counts against "all defendants." Those counts are:

COUNT IV - DEFAMATION - Dominick D. DiPaolo v. David G. Cimino
COUNT XIII - DEFAMATION - Dawn DiPaolo-Romeo v. David G. Cimino
COUNT VIV - CIVIL CONSPIRACY AGAINST ALL DEFENDANTS
COUNT XV - SLANDER *PER SE* AGAINST ALL DEFENDANTS

Counts VIV and XV contain no well pled facts in support of any claim for conspiracy or slander *per se* against Cimino specifically, nor did Plaintiffs argue in favor of Counts VIV and XV at oral argument on Cimino's Motion. Upon review of the discovery materials, the court can find no evidence that would support even a remote claim of Cimino's participation in a conspiracy. Further, for all of the reasons discussed below in relation to Counts IV and XIII ("Defamation Counts"), there is no evidence to support a claim of slander *per se* against Cimino. Accordingly, summary judgment in Plaintiffs' favor will be granted on Counts VIV and XV without further discussion in this Opinion.

Regarding the Defamation Counts, the Uniform Single Publication Act, 42 Pa.C.S.A. §§ 8341-8345, outlines the basis of a defamation action. Section 8343 provides:

Burden of Proof

(a) Burden of plaintiff.—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.
(2) Its publication by the defendant.
(3) Its application to the plaintiff.
(4) The understanding by the recipient of its defamatory meaning.
(5) The understanding by the recipient of it as intended to be applied to the plaintiff.
(6) Special harm resulting to the plaintiff from its publication.
(7) Abuse of a conditionally privileged occasion.

42 Pa.C.S.A. § 8343(a). A communication is defamatory if it "tends ... to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him." *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 124 (Pa. 2004). "It is not enough that the victim ... be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society." *Id*.

When defamation is committed in writing, it constitutes libel. "Libel is the malicious publication of printed or written matter which tends to blacken a person's reputation and expose him to public hatred, contempt or ridicule." *Id. See also Agriss v. Roadway Exp., Inc.*,

483 A.2d 456, 469 (Pa. Super. 1984) (defining libel as "a method of defamation expressed by print, writing, pictures, or signs"). A publication is also defamatory if it tends to injure the subject of the publication in his business or profession. *Agriss* at 461.

Statements which impute the commission of a crime are capable of a defamatory meaning as a matter of law. *Marcone v. Penthouse Intern. Magazine for Men*, 754 F.2d 1072, 1078 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 182 (US 1985). The Restatement (Second) of Torts § 571 provides: "One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution... ." Restatement (Second) of Torts § 571. *See also Agriss, supra*, at 473 (noting Pennsylvania generally tends to adopt Restatement rule in defamation).

> It is not necessary th[at] the charge be made in technical language. It is enough that the language used impute to the other the criminal offense.... It is not necessary that the defamer charge any particular criminal offense by name or description, if the words used imply some crime. ... Neither is it necessary that the defamer directly charge the other with the criminal offense or that the charge be made as of the speaker's own knowledge or belief.

Restatement (Second) of Torts § 571, *Comment C*. In the case at bar, there is no dispute that Cimino accused DiPaolo-Romeo of committing a crime, in writing, published to voters within the 6th Ward.

However, the inquiry does not end here. Under Pennsylvania law, in cases involving public figures, proof of falsity and actual malice is also required. *Coleman, supra*, at 905. Individuals who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large" are public figures. *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (US 1990) (*quoting Gertz v. Robert Welch, Inc.*, 94 S.Ct. 2997, 3005 (US 1974)). Generally, candidates for office are public figures. *Gertz* at 3009 ("An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case").

A plaintiff's status as a public figure affects his or her burden in a defamation case. "If the plaintiff is a public official or public figure, [he or] she must prove also that the defendant, in publishing the offending statement, acted with actual malice, i.e. with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." That is, "the defendant must have made the false publication with a 'high degree of awareness ... of probable falsity,' or must have 'entertained serious doubts as to the truth of his publication[.]' *Joseph v. Scranton Times L.P.*, 129 A.3d 404, 437 (2015) (*internal citations omitted*); *see also American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A.2d 389, 404 (Pa. 2007), *cert. denied*, 128 S.Ct. 806 (US 2007); *Tucker, supra*, at 129-30. A public-figure plaintiff must meet that burden by clear and convincing evidence. *Tucker* at 127-128.

In the case at bar, the question of whether Cimino's statement was true is a question of

law. The essential facts are not in dispute. Plaintiffs admit DiPaolo-Romeo was aware of Election Code requirements and placed nonconforming campaign signs. The legal question is whether a crime is committed upon admission of performance of the elements of the crime, or whether one must be charged or convicted of a crime in order to be said to have "committed" it. The court is unaware of case law specifically addressing the issue. However, if we are to assume a person is innocent until proven guilty, it seems a guilty plea or conviction should be a prerequisite to publicly proclaiming a person has "committed" a crime. Thus the court finds that Cimino's statement was not true.

Nevertheless, Plaintiffs must also prove by clear and convincing evidence that Cimino made the offending statement with actual malice. Actual malice exists where a defendant makes a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Tucker, supra*, at 129 (quoting *New York Times v. Sullivan*, 84 S.Ct. 710, 726 (1964)). "A showing of a reckless disregard for the truth... requires more than a departure from reasonably prudent conduct. Failure to check sources, or negligence alone, is simply insufficient to maintain a cause of action for defamation." *Id*. at 135 (*internal citations omitted*).

"The requirement that the plaintiff be able to show actual malice by clear and convincing evidence is initially a matter of law." *Tucker, supra*, at 130.

> The [United States] Supreme Court has emphasized that the question of whether a statement has been published with reckless disregard of falsity is not measured by whether a reasonably prudent [person] would have [published], or would have investigated before publishing. Rather, [t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. Thus, while recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports, it simply cannot be concluded that a defendant entertained the requisite doubt as to the veracity of the challenged publication where the publication was based on information a defendant could reasonably believe to be accurate.

Tucker, supra at 135-36 (quoting *Curran v. Philadelphia Newspapers, Inc.*, 439 A.2d 652, 660 (Pa. 1981)). The actual malice standard is "a rigorous, if not impossible, burden to meet in most circumstances." *See Weaver v. Lancaster Newspapers Inc.*, 875 A.2d 1093, 1103 (Pa. Super. 2005) (McCaffery, J., *concurring*) (*rev'd on other grds.*, 926 A.2d 899 (Pa. 2007). Indeed, the actual malice standard "goes so far as to forbid imposition of liability even in those instances where the defendant negligently publishes false, defamatory statements about a public figure or public official." *Norton v. Glenn*, 860 A.2d 48, 56 (Pa. 2004).

Even so, the actual malice standard "is a constitutionally mandated safeguard, and, as such, must be proven by clear and convincing evidence, the highest standard of proof for civil claims." *Lewis v. Philadelphia Newspapers, Inc.*, 833 A.2d 185, 192. The standard requires evidence "so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy of the truth of the precise facts in issue." *Matter of Braig*, 554 A.2d 493, 495 (Pa. 1989). If the plaintiff in a defamation case fails to put forth evidence sufficient to support a finding of actual malice, the trial court may grant

summary judgment in favor of the defendant. *See, e.g., Blackwell v. Eskin*, 916 A.2d 1123, 1125 (Pa. Super. 2007).

In the case at bar, the most that can be said based on the evidence presented is that Cimino mistakenly accused DiPaolo-Romeo of committing a misdemeanor crime. There is no evidence that Cimino entertained doubt that his Ad was true. On its face, Election Code §3825 is a strict liability statute with no *mens rea* element. When Cimino, through his father, David J. Cimino, reported the violation to the Erie County Clerk of Elections, Doug Smith. Smith confirmed that DiPaolo-Romeo's signs violated the Election Code. (Smith Depo., Pg. 15). Smith reported the violation to the Election Board solicitor who opined that the infraction was *de minimus* and easily correctable, therefore, the matter would not be referred to the district attorney for prosecution. (Smith Depo., Pg. 15, 21). But as Cimino explained, " ... the law doesn't say somebody has to be charged to commit the crime. So, I mean, if somebody serves as a witness, what they're essentially saying is that they witnessed [] somebody committing a crime, and that's what they're a witness to. So by not having — by Ms. DiPaolo-Romeo and Mr. Beveridge not having those paid for authorizations would be a violation." (Cimino Depo., Pg. 84). Mr. Smith corroborated this view when he testified that "even if [the Election Code violation] was unintentional, it's violation in some respect." (Smith Depo., Pg. 17).

Mr. Smith also testified that some of the nonconforming signs may have been donated to the DiPaolo-Romeo campaign and placed by persons outside the control of DiPaolo-Romeo. (Smith Depo., Pg. 24). However, no evidence was presented that Cimino was made aware of that information. Further, Francis Gray, the sign maker and person who purportedly donated the nonconforming signs, testified that the donated signs left Gray's shop along with all of the other signs, and he does not know whether or where they were placed. (Gray Depo., Pg. 28).

In light of Cimino's reasonable explanation of his offending statement, and in the absence of any other facts that might allow a jury to conclude that Cimino acted with a higher degree of culpability (i.e. actual malice), summary judgment is warranted on the Defamation Counts.

IV. CONCLUSION

For all of the reasons discussed above, Cimino's Motion for Summary Judgment is granted in his favor on all counts. An appropriate Order will follow.

ORDER

AND NOW, this 20th day of June, 2019, upon consideration of Defendant David G. Cimino's Motion for Summary Judgment filed April 12, 2019, as well as the responsive pleadings and briefs of the parties; and after oral argument held May 24, 2019; and for the reasons set forth in the Opinion accompanying this Order, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** the Motion is **GRANTED**. Judgment is entered in favor of the Defendant, David G. Cimino, and against all Plaintiffs, on all counts raised in Plaintiffs' Amended Complaint filed on or about May 21, 2018.

BY THE COURT
/s/ **Joseph M. Walsh, III, Judge**

TIMOTHY JOHNSON

v.

MONRO MUFFLER BRAKE, INC., AND BRIAN RADIGAN

JUDGMENTS / RES JUDICATA

It is hornbook law that when a final judgment on the merits has been rendered by a court of competent jurisdiction, the doctrine of *res judicata* will bar any future suit on the same cause of action between the same parties

JUDGMENTS / RES JUDICATA

Under the doctrine of *res judicata* issue preclusion, when an issue of fact or of law is actually litigated and determined by a valid final judgment, and determination of the issue was essential to judgment, the determination on that issue is conclusive in a subsequent action between the parties, whether on the same or a different claim.

JUDGMENTS / RES JUDICATA

Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.

JUDGMENTS / RES JUDICATA

In order for *res judicata* to apply, there must be a valid final adjudication.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

The affirmance of this Trial Court's summary judgment Order is a final adjudication since it put one of the parties out of court and thus terminated the litigation as to that particular party.

JUDGMENTS / RES JUDICATA

Technical *Res judicata*, or claim preclusion, applies only when there exists a coalescence of four factors: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued.

JUDGMENTS / RES JUDICATA

Res judicata bars issues which could have been raised previously.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 12059 – 2016
284 WDA 2019

Appearances: Kevin W. Barron, Esq., on behalf of Timothy Johnson, Appellant
Rachel R. Hadrick, Esq., on behalf of Monro Muffler Brake, Inc., Appellee

OPINION

Domitrovich, J. April 18, 2019

Counsel for Timothy Johnson (hereinafter "Appellant") has appealed the instant case twice to the Pennsylvania Superior Court for appellate review within the last two years. In the first appeal, Appellant chose to waive the issue of *respondeat superior* and pursued other grounds. The Pennsylvania Superior Court affirmed this Trial Court on the issue of

respondeat superior for claims of Fraud and Identity Theft and also reversed and remanded this case to this Trial Court on the issue of Identity Theft against Brian Radigan only. On return to the Trial Court level, counsel for Appellant attempted to amend his Complaint to add and resuscitate his previous vicarious claims of Fraud and Identity Theft as new and direct claims of Identity Theft and Conspiracy to Commit Identity Theft against Monro Muffler Brake, Inc. (hereinafter "Appellee Monro Muffler"). This Trial Court denied Appellant's request to amend his Complaint to add direct claims of Identity Theft and Conspiracy to Commit Identity Theft in Appellant's Third Amended Civil Complaint against Appellee Monro Muffler on the basis of the doctrine of *res judicata*. Appellant's counsel then filed the instant appeal.

The relevant procedural history of this case is as follows: On August 3, 2016, Appellant filed a Civil Complaint, alleging claims of negligence and fraud against Monro Muffler Brake, Inc. and Brian Radigan. Appellee Monro Muffler filed Preliminary Objections to Appellant's Complaint on August 26, 2016 and a Brief in Support on September 23, 2016. On October 3, 2016, this Trial Court issued a Case Management Order setting the discovery deadline as June 3, 2017.

Following a hearing on November 7, 2016 and by agreement of Appellant's counsel, Kevin W. Barron, Esq., this Trial Court sustained Appellee Monro Muffler's Preliminary Objections and directed Appellant to file an Amended Civil Complaint within twenty (20) days. On November 17, 2016, Appellant filed an Amended Civil Complaint, alleging claims of negligence, fraud and identity theft against Brian Radigan and *respondeat superior* against Appellee Monro Muffler. Appellee Monro Muffler filed Preliminary Objections to Appellant's Amended Complaint on December 7, 2016. Appellant filed a Response to Preliminary Objections on December 29, 2016. Appellee Monro Muffler filed a Brief in Support on January 6, 2017. Appellant filed a Brief in Opposition on January 27, 2017. Following a hearing on February 6, 2017, this Trial Court sustained Appellee Monro Muffler's Preliminary Objections in part [based upon Appellant's withdrawing on the record Count I (Negligence)] and this Trial Court overruled Defendant's Monro Muffler's remaining Preliminary Objections.

On February 15, 2017, Appellant filed a Second Amended Civil Complaint, alleging claims of fraud and identity theft against Brian Radigan and *respondeat superior* against Appellee Monro Muffler. Appellee Monro Muffler filed an Answer and New Matter to Appellant's Second Amended Complaint on March 22, 2017 (hereinafter "Second Complaint"). Appellee Monro Muffler states that upon the expiration of the discovery period on June 3, 2017, "the parties exchanged some written discovery, [but] no witnesses were deposed." (*See* Defendant Monro Muffer Brake, Inc.'s Brief In Opposition To Plaintiff's Motion To Amend Complaint). Thereafter, counsel for Brian Radigan filed an Answer to Appellee Monro Muffler's New Matter and an Answer to Appellant's Second Amended Complaint on June 12, 2017.

Appellant filed his Pre-trial Narrative Statement on July 21, 2017. Counsel for Brian Radigan filed his Pre-trial Narrative Statement on July 31, 2017. Appellee Monro Muffler filed its Pre-trial Narrative Statement on August 3, 2017. Appellee Monro Muffler filed a Motion for Summary Judgment and a Brief in Support on August 3, 2017. Appellant filed a Response and Brief in Opposition to Appellee Monro Muffler's Motion for Summary Judgment on September 18, 2017. Counsel for Brian Radigan filed a Motion for Summary

Judgment (joining in Appellee Monro Muffler's Motion for Summary Judgment) on September 25, 2017. Following a hearing on September 26, 2017, this Trial Court directed Attorney Barron to submit a Memorandum of Law on or before October 6, 2017 and directed Attorneys Hadrick and Eiben to submit Rebuttal Memoranda of Law on or before October 16, 2017. Appellant submitted his Memorandum of Law on October 4, 2017. Appellee Monro Muffler submitted its Memorandum of Law on October 13, 2017. Counsel for Brian Radigan submitted his Memorandum of Law on October 16, 2017.

By Opinion and Order dated November 15, 2017, this Trial Court granted Appellees' Joint Motion for Summary Judgment and dismissed Appellant's Second Amended Civil Complaint and Appellees' New Matters and Cross-Claims. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on November 30, 2017. On February 28, 2018, Appellant's counsel filed a brief arguing the Identity Theft claim only, and thereby waived the claim regarding *respondeat superior* against Appellee Monro Muffler.

On October 11, 2018, the Pennsylvania Superior Court entered an Order and Opinion, affirming this Trial Court's summary judgment with respect to the *respondeat superior* claim against Appellee Monro Muffler, but reversing summary judgment with respect to the claim for Identity Theft against Brian Radigan and remanding the case with respect to the Identity Theft claim. *See Johnson v. Monro Muffler Brake, Inc.*, No. 1794 WDA 2017, 2018 WL 4925651 (Pa. Super. Ct. Oct. 11, 2018).

On October 31, 2018, Appellant submitted to this Trial Court's office a proposed Motion to Amend Complaint, which was not filed in the Erie County Prothonotary's Office. This Trial Court denied said Motion without prejudice as premature since the appeal period had not yet run.

Pursuant to the Remand Order from the Pennsylvania Superior Court, on November 29, 2018, this Trial Court held a hearing at which Appellant indicated he would to file a Motion to Amend Complaint, and set a briefing schedule regarding Appellant's Motion. On November 30, 2018, Appellant's counsel filed a Motion to Amend Complaint with a "Third Amended Civil Complaint" attached (hereinafter "Proposed Third Complaint"). On December 17, 2018, Appellant's counsel filed a brief in support of his Motion to Amend Complaint. On January 7, 2019, Appellee Monro Muffler filed a brief arguing the Proposed Third Complaint should be denied on the basis of: (1) *res judicata*; (2) Appellee Monro Muffler being prejudiced by Appellant bringing a new theory of recovery after discovery had closed; and (3) Appellant's new legal theories not stating a legally cognizable claim against Appellee Monro Muffler. On January 17, 2019, this Trial Court heard argument from both Appellant and Appellee Monro Muffler regarding Appellant's Motion to Amend Complaint. On February 11, 2019 this Trial Court permitted Appellant to amend the Identity Theft claim against Brian Radigan, but denied amending the Identity Theft and Conspiracy to Commit Identity Theft claims against Appellee Monro Muffler.

Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on February 20, 2019. This Trial Court filed its 1925(b) Order on February 25, 2019. Within the 1925(b) Order, this Trial Court requested Appellant to "provide this Trial Court **with an explanation** based on law as to **why the appealed Order is not an interlocutory order**." (emphasis in original).

On February 26, 2019, Appellant filed a "Praecipe To Withdraw All Claims" withdrawing

all claims against Brian Radigan. Appellant filed his Concise Statement of Matters Complained of on Appeal on March 8, 2019.

The law of *res judicata* is well-settled: "It is hornbook law that when a final judgment on the merits has been rendered by a court of competent jurisdiction, the doctrine of *res judicata* will bar any future suit on the same cause of action between the same parties." *Glynn v. Glynn*, 789 A.2d 242, 249 (Pa. Super. 2001) (citing 10 STD. PA. PRACTICE 2d § 65:67). "Under the doctrine of *res judicata* issue preclusion, when an issue of fact or of law is actually litigated and determined by a valid final judgment, and determination of the issue was essential to judgment, the determination on that issue is conclusive in a subsequent action between the parties, whether on the same or a different claim." *McNeil v. Owens-Corning Fiberglas Corp.*, 680 A.2d 1145, 1147–48 (Pa. 1996). "Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action." *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995). "The courts of this Commonwealth have long adhered to the generally accepted view disfavoring the splitting of claims." *Clark v. Pfizer Inc.*, 990 A.2d 17, 31 (Pa. Super. Ct. 2010). "[I]ssue preclusion serves the twin purposes of protecting litigants from assuming the burden of re-litigating the same issue with the same party, and promoting judicial economy through preventing needless litigation." *McNeil v. Owens-Corning Fiberglas Corp.*, 680 A.2d 1145, 1148 (Pa. 1996).

In order for *res judicata* to apply, there must be a valid final adjudication. In the instant case, the Pennsylvania Superior Court remanded to this Trial Court after affirming this Trial Court's summary judgment with prejudice as to *respondeat superior*, the only claim against Appellee Monro Muffler. *Johnson v. Monro Muffler Brake, Inc.*, No. 1794 WDA 2017, 2018 WL 4925651 (Pa. Super. Ct. Oct. 11, 2018). A valid final adjudication exists in the instant case as to *respondeat superior*. Appellant did not appeal the Pennsylvania Superior Court's decision within thirty (30) days. *See* Pa.R.A.P. 903. Further, the affirmance of this Trial Court's summary judgment Order is a final adjudication since "it put one of the parties out of court and thus terminate[d] the litigation as to that particular party." *Lane v. Schacht*, 393 A.2d 1015, 1018 (Pa. Super. Ct. 1978). Therefore, there is a valid final adjudication in the instant case.

"Technical *Res judicata*, or claim preclusion, applies only when there exists a 'coalescence of four factors: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued.'" *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995).

As indicated for technical *res judicata* or claim preclusion, all four factors must coalesce. The first *res judicata* factor involves "identity of the thing sued upon or for." Both the Second Complaint and the Proposed Third Complaint have substantially similar or nearly identical underlying facts and remedies which Appellant is suing upon. The pled facts in the Second Complaint are nearly identical to those in the Proposed Third Complaint. The Proposed Third Complaint provides more specificity in the allegations, but the substance of those allegations is in essence the same as the Second Complaint.

The second *res judicata* factor is "identity of the causes of action." The causes of action are nearly identical. The Second Complaint brought a claim against Appellee Monro Muffler

for *respondeat superior* alleging vicarious liability for claims of Fraud and Identity Theft against employee Brian Radigan. The Proposed Third Complaint is an attempt to bring direct claims against employer Appellee Monro Muffler for Identity Theft and a joint claim for Conspiracy to Commit Identity Theft.

The third and fourth factors are "identity of the persons or parties to the action" and "identity of the quality or capacity of the parties suing or being sued." It is undisputable that both of these factors are met in the instant case as all parties to the action are the same and are being sued in the same capacity.

Thus, all four *res judicata* factors coalesce in the instant case. Additionally, the proposed claims Appellant attempts to bring against Appellee Monro Muffler are, therefore, barred. All of Appellant's claims are related, from the same operative facts, and are subject to the prior Pennsylvania Superior Court decision affirming this Trial Court's summary judgment, which dismissed the *respondeat superior* claim with prejudice. Appellant made a clear choice of waiving the litigated claim of *respondeat superior* against Appellee Monro Muffler on appeal. If the Trial Court would have permitted Appellant to amend his claims to include Identity Theft and Conspiracy to Commit Identity Theft against Appellee Monro Muffler, the Appellant would have been given an impermissible opportunity to re-litigate matters and split claims with the same set of operative facts.

Moreover, in an attempt to circumvent Appellant's waiver of the *respondeat superior* issue on appeal, Appellant argues footnote seven of the Pennsylvania Superior Court's Opinion permits Appellant to amend his complaint to add new claims against Appellee Monro Muffler in his Proposed Third Complaint. This footnote states:

> It may seems [sic] logical that a revival of a claim against Radigan would revive the claim of *respondeat superior* against Monro. Certainly, the claim against Monro could not be revived without an attendant claim against Radigan. However, regarding the identity theft claim against Radigan, we are obliged to interpret Section 8315 liberally to promote justice and to achieve the effect of the statute. We take no position as to whether this includes the revival of a separate claim against a defendant that has not been specifically addressed by the Appellant.

Johnson v. Monro Muffler Brake, Inc., No. 1794 WDA 2017, 2018 WL 4925651, at *4 (Pa. Super. Ct. Oct. 11, 2018). This Trial Court interprets this footnote as further indicating the dismissal of *respondeat superior* claim was due to Appellant waiving the *respondeat superior* issue on appeal. In fact, Appellant's waiver of his *respondeat superior* claim was addressed throughout the Pennsylvania Superior Court's Opinion: "Initially, we note that **Johnson has not challenged the dismissal of his claim of respondeat superior**, Count III, against Monro"; and **"Because Johnson has not argued against the dismissal** of Count I, regarding fraud, or **Count III, regarding respondeat superior against Monro**, the trial court's grant of summary judgment regarding those claims is affirmed." *Id*. at *2; *4 (emphasis added) (footnote removed).

Furthermore, the Pennsylvania Superior Court stated in *Glynn v. Glynn* 789 A.2d 242, 249 (Pa. Super. Ct. 2001), *res judicata* bars issues which could have been raised previously: "*Res judicata* encompasses not only those issues, claims or defenses that were actually raised in

the prior proceeding, but also those which could or should have been raised but were not." In the instant case, since Appellant did not preserve the *respondeat superior* claim against Appellee Monro Muffler, Appellant is now barred from attempting to re-litigate essentially the same claims against Appellee Monro Muffler.

Therefore, for all of the reasons as set forth above, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated February 11, 2019.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

THE ILLUMINATING COMPANY, LCI
v.
ANTHONY H. RODRIQUES

JUDGMENTS / APPEAL

Pennsylvania Rule of Appellate Procedure 1925(b) states a trial court judge "may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal."

JUDGMENTS / APPEAL

This Rule directs Appellant on how the Statement should be filed: "Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail ... Service on parties shall be concurrent with filing and shall be by any means of service specified under Pa.R.A.P. 121 (c)." Pa.R.A.P. 1925(b) (1) (emphasis added). The appellant shall have "at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement." Pa.R.A.P. 1925(b)(2).

JUDGMENTS / APPEAL

Appellant's failure to raise any issues in accordance with its provisions will result in the waiver of those issues: "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b) (4) are waived."

JUDGMENTS / APPEAL

In addition, appellants who want an extension of time to file their 1925(b) statement must petition the trial court within the twenty-one day period and provide the court with a "good cause" explanation for an extension of a specific amount of time in which to file the 1925(b) Statement.

JUDGMENTS / APPEAL

Finally, pursuant to *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005), this Trial Court may not deviate from the bright-line rule requiring Appellant to comply with the clear mandates of Pa.R.A.P. 1925(b) when Appellant is directed to do so.

JUDGMENTS / APPEAL

Under Pa.R.A.P. 1911(a), the appellant has the duty to order any and all transcripts required for review and to make any necessary deposit or payment for said transcripts.

JUDGMENTS / APPEAL

The law is clear: "Once entered, a compulsory arbitration award may only be challenged by a timely appeal to the Court of Common Pleas for a trial de novo." *Blucas v. Agiovlasitis*, 179 A.3d 520, 524 (Pa. Super. Ct. 2018) (citing Pa.R.C.P. 1308(a); 42 Pa.C.S.A § 7361(d)). The Rules of Civil Procedure require an appeal from the arbitrator's decision be filed within thirty (30) days from the date of the arbitration award.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 10110-2018
957 WDA 2019

Appearances: Anthony H. Rodriques, Esq., *pro se*, Appellant
James P. Valecko, Esq., on behalf of The Illuminating Company, LCI, Appellee

1925(a) OPINION

Domitrovich, J. August 26, 2019

Defendant in this instant civil action, Anthony H. Rodriques, Esq. (hereinafter "Appellant"), a licensed attorney in Pennsylvania since May 25, 2010, and representing himself in the instant case, filed his appeal raising one issue: whether the Erie County Prothonotary's Office provided him with proper notice regarding the arbitration award against him.[1] His instant appeal, however, contains four fatal defects, each of which are dispositive individually: (1) Appellant failed to serve timely this Trial Court with his "Concise Statement of Matters Complained of on Appeal" pursuant to Pennsylvania Rule of Appellate Procedure 1925; (2) Appellant failed to pay for the transcript of the necessary proceeding below, i.e., the Hearing on his "Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff," pursuant to Pennsylvania Rule of Appellate Procedure 1911(d), Rule of Judicial Administration 4007(D), and Erie County Rule of Judicial Administration 4007(B); (3) Appellant failed to appeal timely the decision of the arbitration panel undisputedly after knowing the arbitration had taken place, pursuant to Pennsylvania Rule of Civil Procedure 1307; and (4) Appellant failed to file a timely post-trial motion, pursuant to Pennsylvania Rule of Civil Procedure 227.1.

The relevant factual and procedural history is as follows: On January 16, 2018, The Illuminating Company, LCI, the Plaintiff, (hereinafter "Appellee") filed a Complaint against Appellant alleging Appellant owed eight thousand six hundred fifty-two dollars and fifty-one cents ($8,652.51) for an electric bill past due for an extensive period of time for a property located at 3320 Station Ave., in Ashtabula, Ohio. On March 1, 2018, Appellant filed his Answer which contained general denials.[2] On June 13, 2018, Appellee filed a Notice Pursuant to Pennsylvania Rules of Civil Procedure 1305(b) indicating which documents Appellee intended to introduce at the time of the arbitration. On July 13, 2018, Appellee filed a Praecipe for Arbitration. On July 16, 2018, the Erie County Prothonotary's Office sent a "Prothonotary Arbitration Nominating Board - Three Member Panel" to Appellant and Appellee. On July 30, 2018, the Erie County Prothonotary sent a "Notice of Arbitration Panel" to Appellant and Appellee. On August 13, 2018, George Schroeck, Esq., the Chairperson of the Arbitration Panel, sent a letter to the Erie County Prothonotary indicating one of the named arbitrators for the arbitration panel had a conflict and must be replaced. On August 15, 2018, the Erie County Prothonotary nominated three (3) attorneys to replace the conflicted arbitrator, which Appellant and Appellee's counsel each struck one (1) of the attorneys from the list. On August 24, 2018, the Erie County Prothonotary sent to Appellant and Appellee an amended "Notice of Arbitration Panel."

On November 14, 2018, Appellant responded to an email from Karen Klapsinos, Esq., an attorney from the Chairperson's Office who was scheduling the arbitration. Undisputedly, Appellant indicated he would be available on January 28, 2019 for the arbitration. (*See Plaintiff's Response To Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff*

[1] Upon review of Appellant's Concise Statement, which was served upon this Trial Court ***after*** the twenty-one day period had run, this Trial Court found only one issue within Appellant's four (4) paragraphs.

[2] This Trial Court notes general denials are admissions as per Pennsylvania Rule of Civil Procedure 1029, which states: "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission." Pa.R.C.P. No. 1029.

Exhibit 1, which has been re-labeled and attached hereto as Court Exhibit A). On November 16, 2018, a Notice from Karen Klapsinos, Esq. was sent on behalf of the Chairperson to Appellant and Appellee, specifically to Appellant's email at tony.rodriques@yahoo.com confirming the arbitration was scheduled for January 28, 2019 at 1 :30 p.m. (*See Plaintiff's Response To Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff* Exhibit 2 which has been re-labeled and attached hereto as Court Exhibit B). The Erie County Prothonotary's Office filed and sent a Notice of Scheduled Arbitration to Appellant on November 16, 2018. (*See Plaintiff's Response To Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff* Exhibit 3 which has been re-labeled and attached hereto as Court Exhibit C).

On January 28, 2019, at the time of the scheduled arbitration, Appellant failed to appear. Appellee presented evidence to the Arbitration Panel for Plaintiff at the scheduled arbitration, including a witness from Akron, Ohio. (*See Plaintiff's Response To Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff* ¶7). The Arbitration Panel found in favor of the Appellee and filed Oath of Arbitrators and Award. The Prothonotary entered the Arbitrator's Award onto the Docket on January 28, 2019 at 2:47 p.m.

On March 15, 2019, counsel for Appellee, James P. Valecko, Esq., an attorney from Pittsburgh, Pennsylvania, filed a "Praecipe For Judgment On Award Of Arbitrators As To Anthony H. Rodriques" to the Erie County Prothonotary, along with his Certificate of Service indicating proper service by mail upon Appellant. The Erie County Prothonotary entered the judgment against Appellant on the same day, and then as indicated on the docket properly sent notice of the entry of judgment against Appellant on March 18, 2019. On March 20, 2019, Appellant filed "Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff." On March 21, 2019, this Trial Court scheduled a hearing on Appellant's "Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff' for May 23, 2019.

Approximately thirty (30) minutes before said hearing on May 23, 2019 at 10:42 a.m., Appellant filed *sua sponte* an "Amended Defendant's Answer to Complaint" without leave of Court.[3] His Amended Answer was filed more than fourteen (14) months after Appellant filed his original Answer and more than two (2) months after the judgment was entered against him.

On May 23, 2019 at 11:15 a.m., this Trial Court held a hearing and heard argument regarding Appellant's "Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff." At the time of the hearing, counsel for Appellee presented Exhibits attached to Appellee's response to Appellant's Petition demonstrating Appellant participated in selecting the arbitration hearing date, which Appellant ultimately failed to attend. Appellant subsequently claimed he did not receive a copy of the arbitration findings. However, this Trial Court heard credible testimony regarding the procedures of the Erie County Prothonotary in placing courthouse mail in Appellant's courthouse Prothonotary mailbox, which Appellant specifically requested to have for his court house correspondence and notices. Appellant also continues to use this courthouse box in the Prothonotary's office to the instant date. On May 24, 2019, this Trial Court entered an Order denying Appellant's "Petition to Set Aside Arbitrators' Finding For The Plaintiff." (See attached Exhibit D).

[3] After review of the docket, this Trial Court is unable to find any filed consent from the adverse party or any Order from this Trial Court granting Appellant leave of Court to file said Amended Answer. *See* Pennsylvania Rule of Civil Procedure 1033.

On June 26, 2019, Appellant filed a Notice of Appeal. This Trial Court issued an Order dated June 26, 2019 directing Appellant: "to forthwith file of record a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days of the entry of this Order, and to serve a copy thereof on the undersigned Judge. Any issue not properly included in a timely filed and served concise statement shall be deemed waived." Also, this Trial Court ***specifically directed*** Anthony H. Rodriques, Esq. to apply to the Court Reporters for the transcript and pay any required fees for appeal purposes. (See attached Exhibit E).

On July 17, 2019, Appellant simultaneously filed in the Prothonotary's Office a Concise Statement of Matters Complained of on Appeal with his "First Motion for Extension of Time to File Concise Statement of Matters Complained of on Appeal." Two days later, on July 19, 2019, Appellant simultaneously served this Trial Court with his Concise Statement of Matters Complained of on Appeal and "First Motion for Extension of Time to File Concise Statement of Matters Complained of on Appeal." This Trial Court dismissed Appellant's "First Motion for Extension of Time to File Concise Statement of Matters Complained of on Appeal" as rendered moot.

The first issue this Trial Court addresses is whether Appellant has waived all issues for appeal for failing to timely serve this Trial Court with his Concise Statement of Matters on Appeal. Appellant was late by two (2) days. Pennsylvania Rule of Appellate Procedure 1925(b) states a trial court judge "may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal." Pa.R.A.P. 1925(b). This Rule directs Appellant on how the Statement should be filed: ***"Appellant shall file of record the Statement and concurrently shall serve the judge.*** Filing of record and service on the judge shall be in person or by mail ... Service on parties shall be concurrent with filing and shall be by any means of service specified under Pa.R.A.P. 121(c)." Pa.R.A.P. 1925(b)(1) (emphasis added). The appellant shall have "at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement." Pa.R.A.P. 1925(b)(2). Appellant's failure to raise any issues in accordance with its provisions will result in the waiver of those issues:

> "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b) (4) are waived."

Pa.R.A.P. 1925(b)(4)(vii); *see also Com. v. Hill*, 16 A.3d 484 (Pa. 2011) ("Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out ***a simple bright-line rule***, which obligates an appellant to file ***and serve*** a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived[.]") (emphasis added). In the instant case, this Trial Court's Order directed Appellant "to forthwith file of record a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days of the entry of this Order and serve a copy thereof on the undersigned Judge. Any issue not properly included in a timely filed and served concise statement shall be deemed waived." (*See* Exhibit E).

In addition, appellants who want an extension of time to file their 1925(b) statement must petition the trial court within the twenty-one day period and provide the court with a "good cause" explanation for an extension of a specific amount of time in which to file

the 1925(b) Statement. *See* Pa.R.A.P. 1925(b)(2); *see also Commonwealth v. Gravely*, 970 A.2d 1137, 1144 (Pa. 2009). If a trial court issues an order granting an extension request, only then will issues raised in an otherwise untimely 1925(b) statement can be preserved for appellate review. *See e.g., Commonwealth v. Mitchell*, 902 A.2d 430, 444 (Pa. 2006) (statement timely filed outside of twenty-one day period where "several extensions of time" were properly made).

In the instant case, this Trial Court issued a Rule 1925(b) Order on June 26, 2019, which was filed of record and time-stamped by the Erie County Prothonotary's Office on June 26, 2019, directing Appellant to file a Concise Statement of Errors Complained of on Appeal within twenty-one days of the entry of said Order on the docket and to "serve a copy thereof on the undersigned Judge." Appellant failed to comply with the minimal requirements of Pa.R.A.P. 1925(b) since he did not serve his Concise Statement upon this Trial Court within twenty-one days from the entry of this Trial Court's 1925(b) Order filed by the Trial Court on June 26, 2019. This Trial Court received Appellant's Concise Statement on July 19, 2019, two (2) days late. This Trial Court has attached a copy of the front page of Appellant's Concise Statement received with the date stamped from the Court's office indicating July 19, 2019. (Attached as Exhibit F). Similarly, Appellant concurrently filed a "First Motion for Extension of Time to File Concise Statement of Matters Complained of on Appeal" with his Concise Statement on July 17, 2019, and similarly failed to serve said Motion upon this Trial Court until July 19, 2019, within the deadline for filing his Concise Statement.[4] This Trial Court has attached a copy of the front page of Appellant's First Motion for Extension of Time received with the date stamped from the Court's office indicating July 19, 2019. (Attached as Court Exhibit G). Finally, pursuant to *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005), this Trial Court may not deviate from the bright-line rule requiring Appellant to comply with the clear mandates of Pa.R.A.P. 1925(b) when Appellant is directed to do so. Since Appellant failed to apprise this Trial Court of his issues presented on appeal in a timely manner, Appellant has waived any issues for appeal.

The second issue this Trial Court addresses is whether Appellant has waived any issues for appeal regarding his failure to pay for a transcript of the hearing held on May 23, 2019 and to have said proceeding transcribed in a timely manner. A written transcript is necessary to address fully Appellant's issue in his Concise Statement. (*See* Appellants' Concise Statement at ¶ 1-4). As of the date of this Opinion, Appellant has failed to make any necessary payment or deposit or have the transcript transcribed. *See* Pa.R.A.P. 1911(a); Rule of Judicial Administration 4007(D), and Erie County Rule of Judicial Administration 4007(B); Letter from Court Reporter Greg Scherf, dated August 21, 2019 (Attached as Exhibits H and I). Indeed, this Trial Court has patiently waited for Appellant to have the transcript transcribed up until and through this due date for this 1925(a) Opinion which is August 26, 2019. This Trial Court cannot wait any longer for Appellant to pay the required Court Reporter for the transcript and to draft and file this Opinion for the Pennsylvania Superior Court's review.

Although Appellant requested the hearing transcript, Appellant failed to indicate to the Court Reporter the transcript is needed. According to Court Reporter, Greg Scherf,

[4] In accordance with the local rules of Erie County, practitioners are required to serve a copy of any petition or motion on the assigned judge along with filing a copy in the Prothonotary's Office in order for said petition or motion to receive judicial attention. *See* Erie County Rules of Civil Procedure 206.4(c).

"[Appellant] indicated in the meantime, he would decide whether he would still need it, depending on the Judge's decision regarding something pending." (*See* Exhibit I). Following Appellant's Notice of Appeal, the only matters before this Trial Court regarding the instant case have been Appellant's Concise Statement and "First Motion for Extension of Time to File Concise Statement of Matters Complained of on Appeal," both of which were served upon this Trial Court untimely by Appellant. Additionally, the Court Reporter indicated Appellant is not having the transcript immediately transcribed, but rather, "[Appellant] is going to file a motion with the Judge, and depending on what her decision is regarding the motion, [Appellant] will let [Court Reporter] know if [Appellant] will need it or not." (*Id*.). As of the morning of August 26, 2019, this Trial Court has not received any additional Motion from Appellant, nor is any outstanding Motion docketed. (*See* Docket Sheet attached as Exhibit J). This Trial Court's Opinion is due August 26, 2019, and cannot wait any longer for Appellant to have the hearing transcribed, which Appellant is delaying willfully and intentionally to have transcribed. Under Pa.R.A.P. 1911(a), the appellant has the duty to order any and all transcripts required for review and to make any necessary deposit or payment for said transcripts:

> (a) *General rule.* The appellant shall request any transcript required under this chapter in the manner and make any necessary payment or deposit therefor in the amount and within the time prescribed by Rules 4001 *et seq.* of the Pennsylvania Rules of Judicial Administration.
>
> ...
>
> (d) *Effect of failure to comply.* If the appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal.

Pa.R.A.P. 1911(a) and (d). The Pennsylvania Superior Court has stated: "With regard to missing transcripts, . . . [w]hen the appellant . . . fails to conform to the requirements of Rule 1911, any claims that cannot be resolved in the absence of the necessary transcript or transcripts must be deemed waived for the purpose of appellate review." *Commonwealth v. Houck*, 102 A.3d 443, 456 (Pa. Super. Ct. 2014) (citing *Commonwealth v. Preston*, 904 A.2d 1, 7 (Pa. Super. Ct. 2006) ("It is not proper for either the Pennsylvania Supreme Court or the Superior Court to order transcripts nor is it the responsibility of the appellate courts to obtain the necessary transcripts."); *see e.g. Stumpf v. Nye*, 950 A.2d 1032, 1041 (Pa. Super. 2008) (finding that appellant's issue was waived where appellant failed to provide the Superior Court with a transcript of the relevant proceeding).

Accordingly, since this Trial Court is without the transcript of the proceeding below, this Trial Court finds Appellant has waived his issue raised in this instant appeal.

The third issue this Trial Court addresses is whether Appellant's issues are waived on appeal since Appellant failed to appeal timely the decision of the arbitration panel undisputedly after knowing the arbitration had taken place. The law is clear: "Once entered, a compulsory

arbitration award may only be challenged by a timely appeal to the Court of Common Pleas for a trial *de novo*." *Blucas v. Agiovlasitis*, 179 A.3d 520, 524 (Pa. Super. Ct. 2018) (citing Pa.R.C.P. 1308(a); 42 Pa.C.S.A. § 7361(d)). The Rules of Civil Procedure require an appeal from the arbitrator's decision be filed within thirty (30) days from the date of the arbitration award:

> (a) An appeal from an award shall be taken by
>
> (1) filing a notice of appeal in the form provided by Rule 1313 with the prothonotary of the court in which the action is pending not later than thirty days after the day on which the prothonotary makes the notation on the docket that notice of entry of the arbitration award has been provided as required by Rule 1307(a)(3), and
>
> (2) payment to the prothonotary of the compensation of the arbitrators not exceeding fifty percent of the amount in controversy, which shall not be taxed as costs or be recoverable in any proceeding;

Pa.R.C.P. No. 1308. The question of whether the appeal is timely filed is jurisdictional: "Timeliness of an appeal, whether it is an appeal to an appellate court or a de novo appeal in common pleas court, is a jurisdictional question. Where a statute fixes the time within which an appeal may be taken, the time may not be extended as a matter of indulgence or grace." *Lee v. Guerin*, 735 A.2d 1280, 1281 (Pa. Super. Ct. 1999), *appeal denied*, 561 Pa. 659, 747 A.2d 901 (1999) (citations omitted).

In the instant case, Appellant, who is also an attorney, assisted in the scheduling of the arbitration. (See Exhibit A and B). Thereafter, Appellant failed to appear at the arbitration. The Arbitrators found in favor of Appellee after hearing evidence from Appellee's witness and argument of Appellee's counsel. The Arbitrators filed an award in favor of Appellee and against Appellant in the amount of eight thousand six hundred fifty-two dollars and fifty-one cents ($8,652.51). The Erie County Prothonotary's Office entered the Arbitrator's Award on the same date the Arbitration occurred, January 28, 2019. In order for Appellant to have timely appealed and preserved his de novo trial before this Trial Court, Appellant must have filed his appeal no later than February 27, 2019. Appellant failed to file anything until March 20, 2019, five (5) days after the Erie County Prothonotary entered the judgment against Appellant. As such, Appellant's issue is waived as he failed to file an appeal timely.

The fourth issue this Trial Court addresses is whether Appellant's issue is waived on appeal since Appellant's "Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff," was not filed within ten (10) days of the arbitration and does not include a satisfactory excuse for Appellant's failure to appear at the arbitration. This instant case was heard by an arbitration panel on January 28, 2019, which Appellant participated in the scheduling of said arbitration. Pursuant to Pennsylvania Rule of Civil Procedure 1303, the Arbitration Panel made an award in favor of Appellee. The Note in Pennsylvania Rule of Civil Procedure 1303 explains the procedure for a defendant in an arbitration who fails to appear at said arbitration: "Following an adverse decision, a defendant who has failed to appear may file a motion for post-trial relief which may include a ***request for a new trial on the ground of a satisfactory excuse for the defendant's failure to appear.***" Pa.R.C.P. No. 1303 (emphasis added).

Before addressing Appellant's "excuses" for failing to appear at the arbitration, this Trial Court notes that Appellant failed to file timely the "Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff." Pennsylvania Rule of Civil Procedure 227.1 requires:

> (c) Post-trial motions shall be filed within ten days after
>
> (1) verdict, discharge of the jury because of inability to agree, or nonsuit in the case of a jury trial; or
>
> (2) notice of nonsuit or the filing of the decision in the case of a trial without jury.

Pa.R.C.P. No. 227.1.

In the instant case, the Arbitrators made and filed the Arbitration Award on January 28, 2019. On March 15, 2019, Appellee filed a "Praecipe For Judgment On Award Of Arbitrators As To Anthony H. Rodriques." On March 15, 2019, the Erie County Prothonotary's Office entered the judgment against Appellant. On March 18, 2019, the Erie County Prothonotary's Office sent notice of the entry of judgment to Appellant. On March 20, 2019, Appellant filed his "Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff." In order to be a timely Motion for Post-Trial Relief, Appellant was required to have filed his motion by February 7, 2018; however, Appellant filed his Petition on March 20, 2019, which is more than ten (10) days following the filing of the decision of the Arbitrators in the instant case.

Appellant's "excuses" allege he did not have notice of the Arbitration and the Arbitration Award. As noted earlier, Appellant assisted in scheduling this Arbitration and was sent an email notice confirming the Arbitration before being given notice from the Erie County Prothonotary. This Trial Court found Appellant was aware of the Arbitration and Appellee's counsel succinctly and aptly stated why Appellant could, would, and should have known or found the date of the Arbitration:

> The Defendant is a licensed attorney and an Erie County practitioner. If, after receiving the e-mail from Karen Klapsinos on November 16, 2018, the Defendant was unclear if the arbitration would proceed as stated on January 28, 2019 at 1:30 p.m., he could have easily checked with the Erie County Prothonotary, the online docket, or the Arbitration Chair to confirm the date and time of the arbitration, yet failed to do so.

(*See Plaintiff's Response To Defendant's Petition To Set Aside Arbitrators' Finding For The Plaintiff* ¶10). This Trial Court did not find Appellant's excuse satisfactory, and therefore, this Trial Court requests the Pennsylvania Superior Court find Appellant has waived his issue on appeal.

Thus, for all the reasons as set forth above, this Trial Court respectfully requests the Pennsylvania Superior Court to quash the instant appeal, or in the alternative, to find Appellant has waived all issues and affirm this Trial Court.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**

PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT

v.

FULTON ATHLETIC CLUB, 1309 EAST 9TH STREET, ERIE, PA 16503-1748

LIQUOR CONTROL BOARD / STANDARD OF REVIEW

A trial court is "required to conduct a *de novo* review and, in the exercise of its statutory discretion, to make its own findings and conclusions."

LIQUOR CONTROL BOARD / STANDARD OF REVIEW

Moreover, a trial court can sustain, alter, change, modify or amend the PLCB's action whether or not a trial court makes findings which are materially different from those found by the PLCB.

LIQUOR CONTROL BOARD / STANDARD OF REVIEW

"[T]he trial court has discretion in adopting as its own the findings of fact, conclusions of law and any penalty imposed by the Administrative Law Judge."

EVIDENCE / PREPONDERANCE OF EVIDENCE

Preponderance of the evidence is the appropriate burden of proof. To satisfy a preponderance of the evidence standard, a party must present "the greater weight of the evidence," or "tip the scale slightly."

LOCAL OPTION SMALL GAMES OF CHANCE ACT / VIOLATIONS

Statutory law is clear that a violation under the LOSGCA is not a violation under the Liquor Code License law: "Except as provided in paragraph (2), a violation of this act by a club licensee shall not constitute a violation of the Liquor Code." 10 P.S. §328.702(g)(1).

LIQUOR LICENSES / EXPIRATION; LOSS OF INTEREST

Interest in a Liquor License is lost when the Liquor Code quota vacancy is filled by a third party good faith purchaser.

PROFESSIONAL LICENSES / RETENTION OF INTEREST AFTER REVOCATION, SUSPENSION, LAPSE, OR EXPIRATION

Professional licensees retain a property interest in their professional licenses after their professional licenses are expired.

PROFESSIONAL LICENSES / RETENTION OF INTEREST; RENEWAL

Professional licensees retain an interest in non-renewed licenses subject to renewal at any time by paying the proper renewal fees.

PROFESSIONAL LICENSES / RETENTION OF INTEREST

Professional licensees retain a proprietary interest in inactive professional licenses.

PROFESSIONAL LICENSES / RETENTION OF INTEREST; RENEWAL

Professional licensees may reactivate a professional license upon payment of renewal fees and proof of continuing education credits.

CIVIL ACTIONS / DE MINIMIS DOCTRINE

De minimis is defined as "so insignificant that a court may overlook it in deciding an issue or case."

CIVIL ACTIONS / DE MINIMIS DOCTRINE

In the civil law context, the term *de minimis* "is derived from the Latin '*de minimis non curat lex*' which means 'the law does not care for, or take notice of, very small of trifling matters.'"

CIVIL ACTIONS / DE MINIMIS DOCTRINE

Trial courts have discretion to determine whether the *de minimis* doctrine applies.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 11388-2019

Appearances: Emily L. Gustave, Esq. and Michael C. Nickles, Esq. on behalf of Petitioner
Ted J. Padden, Esq. on behalf of Respondent

OPINION AND ORDER

Domitrovich, J. November 18, 2019

The Pennsylvania State Police Bureau of Liquor Control Enforcement [hereinafter Petitioner] appealed a Pennsylvania Liquor Control Board Order by and through its counsel Emily L. Gustave, Esq. for a *de novo* hearing before this Trial Court. A *de novo* hearing was held on August 22, 2019, wherein the Fulton Athletic Club [hereinafter Respondent] was represented by Ted Padden, Esq. The Respondent is a nonprofit club in existence in Erie, Pennsylvania for almost ninety-five (95) years.

For fifteen (15) years prior to the date of November 22, 2017, Respondent had consistently complied with its annual renewal of the state required Local Option Small Games of Chance Act [hereinafter LOSGCA] License.[1] The Erie County Department of Revenue recently had created its own administrative additional six (6) month Local Conditional LOSGCA License running concurrent to the one-year state statutory license. Believing this six (6) month Local Conditional LOSGCA License was a grace period to renew its State LOSGCA license, Respondent in good faith continued to conduct small games of chance for forty-seven (47) days as normally done by Respondent in the open bar area, not concealed in any non-public area. Respondent admitted liability for operating small games of chance during the forty-seven (47) day gap prior to renewal. As soon as Petitioner made Respondent aware its State LOSGCA license must be renewed, Respondent took immediate action by renewing its State LOSGCA license on the next day.

As a case of first impression, the Administrative Law Judge [hereinafter ALJ] and the Pennsylvania Liquor Control Board [hereinafter PLCB] applied Liquor Code License case law to interpret whether the Respondent's State LOSGCA License expired. The ALJ and the PLCB found under the Liquor Code License law, Respondent's State LOSGCA License expired, therefore, the government lacked jurisdiction under the LOSGCA since Respondent no longer was a club licensee due to the forty-seven (47) day gap prior to renewal. Agreeing with the ALJ, the PLCB ruled Respondent instead be prosecuted under the Crimes Code. Respondent had already paid penalties of one thousand four hundred ($1,400) dollars.

Since no case law is directly on point, this case is of first impression. **The sole issue before this Trial Court is:** Under Pennsylvania's LOSGCA, does a club licensee continue to have an interest in its State LOSGCA License when Respondent renews said license to

[1] A LOSGCA License allows eligible organizations to "conduct games of chance for the purpose of raising funds for public interest purposes." 10 P.S. §328.301. A game of chance is defined under the LOSGCA as: "[p]unchboards, daily drawings, weekly drawings, 50/50 drawings, raffles, tavern games, pools, race night games, and pull tabs." 10 P.S. §328.103.

fundraise after a brief temporary lapse period of forty-seven (47) days and where confusion occurred over Erie County's implementation of a six-month Local Conditional LOSGCA License running concurrent with the one-year State LOSGCA License?

The procedural background is: On April 11, 2018, Petitioner cited Respondent for two (2) causes of action with four (4) total counts: In the First Cause of Action, Respondent is cited for one count of failing to operate games of chance in conformity with the LOSGCA for a forty-seven (47) day time period of November 22, 2017 through January 8, 2018. As to the Second Cause of Action, Respondent is cited for three counts: failing to "adhere to constitution and/or by-laws" during January 1, 2015 through December 31, 2017 in violation of the Liquor Control Board Regulations; possessing or operating "gambling devices or paraphernalia or permitted gambling or lotteries, pool selling and/or bookmaking" on Respondent's licensed premises on December 10, 17, 25, 2017 and January 8, 2018 as to both the Liquor Code and Crimes Code; and failing "to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding December 31, 2017" under the Liquor Control Board Regulations and Liquor Code. (*See* Petitioner's Reproduced Record [hereinafter Petitioner's Exhibit A] at p.6-7).

Respondent has been undisputedly very cooperative throughout this litigation. Petitioner's counsel and Respondent *pro se* submitted to the ALJ a Joint Stipulation of Facts based on a pre-hearing Memorandum who accepted said Stipulation. Respondent *pro se* also executed a "Statement of Admission, Waiver and Authorization" to permit the Administrative Law Judge to enter an Adjudication without a hearing based on a summary of the facts. (Petitioner's Exhibit A, p.10). Respondent *pro se* waived its right to appeal. *Id*. Respondent's President Gary Nyberg "stated he attended a Federation of Clubs meeting where he was informed that the Treasurer's Offices were giving a 6-month extension on expired Small Games of Chance Licenses." (Petitioner's Exhibit A, p.13). However, "he was not aware he had to obtain an extension from the Treasurer's Office, and not all clubs get an extension." *Id*.

The ALJ found Respondent's State LOSGCA License had expired during the forty-seven (47) day period from November 22, 2017, through January 8, 2018. The ALJ interpreted the date of November 22, 2017, as the beginning of the expiration date. The ALJ, therefore, concluded Respondent's State LOSGCA License had expired and the ALJ no longer had jurisdiction under the LOSGCA even though Respondent had renewed its State LOSGCA License on January 9, 2018. The ALJ concluded Respondent was not acting as a "club licensee and dismissed the first count in the First Cause of Action for lack of subject matter jurisdiction. (Petitioner's Exhibit A, p.30).

On appeal, the PLCB affirmed the decision of the ALJ and dismissed Petitioner's appeal. On May 17, 2019, Petitioner timely filed its "Appeal of Pennsylvania Liquor Control Board Opinion" and its "Petition to File Record Below" before the Court of Common Pleas. Petitioner filed an appropriate reproduced record. After issuing a briefing schedule on July 19, 2019, this Trial Court held a *de novo* hearing on August 22, 2019.

The standard of review is: A trial court is "required to conduct a *de novo* review and, in the exercise of its statutory discretion, to make its own findings and conclusions." *Pennsylvania State Police, Bureau of Liquor Control Enf't v. Cantina Gloria's Lounge, Inc.*, 639 A.2d 14,19-20 (Pa. 1994). Moreover, a trial court can sustain, alter, change, modify or amend the PLCB's action whether or not a trial court makes findings which are materially different

from those found by the PLCB." *Id*. "[T]he trial court has discretion in adopting as its own the findings of fact, conclusions of law and any penalty imposed by the Administrative Law Judge." *Pennsylvania State Police, Bureau of Liquor Enf't v. Kelly's Bar, Inc.*, 536 Pa. 310, 314, 639 A.2d 440, 442 (Pa. 1994). Furthermore, a trial court has the discretion to change, alter, modify or amend the findings, conclusions and penalties imposed of the Administrative Law Judge and the Board. *Id*.

Preponderance of the evidence is the appropriate burden of proof. *In re Greensburg Lodge No. 1151*, 260 A.2d 500, 501 (Pa. Super. 1969). To satisfy a preponderance of the evidence standard, a party must present "the greater weight of the evidence," or "tip the scale slightly." *In re Navarra*, 185 A.3d 342, 354 (Pa. Super. 2018).

Significant Findings of Fact adduced before this Trial Court at the *de novo* hearing are: Attorney David Mack provided credible testimony as the Solicitor for the Federation of Fraternal and Social Organizations in Erie County representing forty-seven (47) clubs including Respondent. The Federation of Clubs in Erie is the largest fraternal and social organization in the Commonwealth of Pennsylvania. Attorney Mack described in detail how the Erie County Department of Revenue refused small games of chance licenses to clubs who failed to present 501(c)(7) letters from the IRS with their applications.

Attorney Mack stated as a result of the refusal of these LOSGCA licenses, a compromise was reached with the Erie County Department of Revenue which began issuing local six (6) month Conditional LOSGCA Licenses. This local six (6) month Conditional LOSGCA License was intended to allow clubs to procure required 501(c)(7) letters from the IRS. If clubs could not acquire the documentation from the IRS and said clubs showed diligence in trying to acquire these letters, the Erie County Department of Revenue would then provide the local six (6) month Conditional LOSGCA License. To Attorney Mack's knowledge, Erie County is the only county in the Commonwealth of Pennsylvania that has a local six (6) month Conditional LOSGCA License. However, the State LOSGCA Licenses were granted at the same time running concurrent to the artificial local six (6) month Conditional LOSGCA License, therefore, invalidating the effect of any local Conditional LOSGCA License. In other words, the Erie County Department of Revenue had no way of enforcing local six (6) month Conditional LOSGCA Licenses since the State LOSGCA License was already in effect for one (1) year.

Attorney Mack provided legal advice at a "couple of club dinners" and general meetings to organizations as to how to comply with the newly created local six (6) month Conditional LOSGCA License. Attorney Mack explained to his clients' officers how a club applies for a local six (6) month conditional Small Games of Chance License to present IRS documentation. Attorney Mack also stated he spoke with Respondent's President Gary Nyberg about this confusing local six (6) month Conditional LOSGCA License. Mr. Nyberg interpreted Attorney Mack's legal advice as a six (6) month deferment from having to renew Respondent's LOSGCA license. Mr. Nyberg further believed the local six (6) month Conditional LOSGCA License was a blanket six (6) month period in which Respondent was permitted to renew its already existing State LOSGCA License.

Attorney Mack credibly stated he could understand how Respondent had unfortunately and unintentionally misinterpreted his advice. Attorney Mack also credibly stated Respondent's officers in good faith mistakenly assumed this six (6) month local grace period existed before Respondent had to renew its State LOSGCA License. Testimony from both Respondent's

President Mr. Nyberg and Attorney Mack clearly demonstrate how Respondent could have easily misinterpreted the six (6) month local Conditional LOSGCA License grace period before renewing its State LOSGCA license and how confusing the overlap of the State LOSGCA Licenses and the six (6) month local Conditional LOSGCA Licenses were.

Furthermore, Attorney Mack opined Petitioner has discretion to charge clubs with violations of the LOSGCA either civilly or criminally and to not permit Petitioner to do so would negatively affect these clubs. Criminal charges or convictions can affect these club's Liquor Licenses and cause disastrous results. Clubs and social organizations need Liquor Licenses to continue their fundraising for the good of their communities. Petitioner agrees and states Petitioner will use its discretion to charge clubs criminally where the club's intent is clearly to engage in criminal activity. In the instant case, Petitioner stated no intent to commit a criminal violation was present during Respondent's brief temporary forty-seven (47) day lapse of its State LOSGCA License.

The pertinent legislative history, statutory law, and case law are: The relevant statutory authority with regard to the First Cause of Action is 10 P.S. 328.307(a) is: "An eligible organization shall not conduct or operate games of chance unless the eligible organization has obtained an valid license." Under this same section, a licensee must annually renew its State LOSGCA license. 10 P.S. 328.307(a)(i).

In order to receive a State LOSGCA License, a club must qualify as an eligible organization. An eligible organization is defined by the LOSGCA as: (1) "a charitable, religious, fraternal or veterans' organization, club, club licensee or civic and service organization," (2) "in existence and fulfilling its purposes for one year prior" to application for a license, and (3) nonprofit. 10 P.S. 328.103. A club is defined as: (1) licensed to sell liquor under the Liquor Code, and (2) "qualifies as an exempt organization under section 501(c) or 527 of the Internal Revenue Code of 1986." *Id*. Under this act, a "club licensee" is separately defined as: "a club that holds a license to conduct small games of chance." *Id*.

The purpose of recent amendments to the LOSGCA was to clarify procedures and renewal for these licenses. In his testimony before the PA Gaming Oversight Legislative Committee, Ted Mowett, Executive Director of the PA Federation of Fraternal and Social Organizations, indicated the confusing circumstances surrounding the applicability and enforcement of the LOSGCA: "The rules are archaic and not well known to the general public, and when I tell them what the rules are, they are frustrated and mystified as to why it is that way." Hearing Transcript: Pennsylvania House of Representatives Gaming Oversight Committee, May 5, 2011, p.14.

As stated in Petitioner's Brief, recent amendments to the LOSGCA [also known as Act 2] were intended to "insulate and protect a club's liquor license" so non-profit entities could continue to fundraise for the good of their communities. This is consistent with the view of John Brenner, Chairman of the State Veterans Commission. Mr. Brenner stated at the Pennsylvania Gaming Oversight Legislative Hearing how the amendments to the LOSGCA "keep[] original intent of small games of chance in place and that is to help non-profits to raise money of community service." *Id*. at 43.

The relevant enforcement statute is 10 P.S. 328.702, which was amended in 2012 to clarify enforcement of the LOSGCA and provides civil penalties. Prior to the recent amendments of the LOSGCA, Petitioner enforced LOSGCA violations under Section 4-471 of the Liquor

Code and Title 18 of the Crimes Code pursuant to the "other sufficient cause shown" theory under Section 4-471 of the Liquor Code. Charging clubs under the Crimes Code caused an adverse impact on clubs as evidenced by Attorney Mack's testimony, and criminal charges exposed clubs to severe sanctions as well as personally charging the club's officers with criminal charges.

These recent amendments provide Petitioner with discretion to cite clubs for civil penalties to be imposed regarding LOSGCA Licensees. 10 P.S. 328.702(b) and (d). The LOSGCA indicates Petitioner has this discretion to charge violations under LOSGCA, separate and distinct from the Liquor Code and Crimes Code. Statutory law is clear a violation under the LOSGCA is not a violation under the Liquor Code License law: 'Except as provided in paragraph (2), a violation of this act by a club licensee **shall not constitute a violation of the Liquor Code."** 10 P.S. §328.702(g)(1) (**emphasis added**). The LOSGCA is clear that Petitioner may charge under the Liquor Code in a limited circumstance for violations of the LOSGCA: 'If a club licensee has committed **three or more violations** of this act, the Bureau of Liquor Control Enforcement **may enforce a violation of this act as a violation of the Liquor Code."** 10 P.S. §328.702(g)(2) (**emphasis added**). Upon a third or subsequent violation of the LOSGCA, the Petitioner has the discretion to charge a Club Licensee with a violation of the Liquor Code.

Liquor Code Licenses and State LOSGCA Licenses are also distinctly and characteristically different. Whereas Liquor Code Licenses have case law defining when Liquor Code Licenses expire, State LOSGCA licenses do not have distinct statutory law or case law to explain when State LOSGCA Licenses expire. Moreover, Liquor Code Licenses differ characteristically from State LOSGCA Licenses, for instance, as in quotas. The number of Liquor Code Licenses is limited to a specific quota or number of licenses determined every ten (10) years from the federal decennial census. *See* Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board, *The Retail Liquor License Quota*, November 13, 2019, https://www.lcb.pa. gov/Licensing/Topics-of-Interest/Pages/Quota-System.aspx. One of the leading cases on when Liquor Code Licenses expire is *Pennsylvania Liquor Control Bd. v. Wayside Bar, Inc.*, 547 A.2d 1309 (Pa. Cmwlth. 1988). In *Wayside Bar*, the Pennsylvania Commonwealth Court held the PLCB was correct in refusing to accept a Liquor Code License for renewal where the quota vacancy had been filled by a third party good faith purchaser and, therefore, the Liquor Code License had expired. The number of State LOSGCA Licenses in a county, however, is not limited under the LOSGCA. Unlike Liquor Code Licenses, the Pennsylvania Legislature did not create a ceiling or limited amount of State LOSGCA Licenses that can be distributed yearly in Pennsylvania.

In the instant case, when the Respondent renewed its State LOSGCA License, no third party good faith purchaser was applicable since no quotas exist with LOSCGA unlike the Liquor Code Licensing law. Applying the law in the *Wayside Bar* case, since no third party good faith purchaser supplanted Respondent's interest in the LOSGCA, Respondent's State LOSGCA License proprietary interest was renewed, not expired, during the mere forty-seven (47) day period. Respondent, therefore, as a Club Licensee continued to retain its proprietary interest in its State LOSGCA License despite a short gap in renewal. The Liquor Code Licensing Law does not apply in the instant case, and even if applicable, Respondent's proprietary interest in its State LOSGCA License did not expire but rather was renewed and,

therefore, jurisdiction continued under the LOSGCA. Moreover, applying the expiration standard for Liquor Code Licenses with having finite quotas would be inconsistent with the overall intent of the LOSGCA to promote small games of chance across the Commonwealth of Pennsylvania to permit entities to raise money for their communities.

The Pennsylvania Legislature intended fundraising as a critical attribute of State LOSGCA Licenses. Since State LOSGCA Licenses provide non-profit organizations with the ability to fundraise for the good of their communities, non-profit entities need to rely on their reputations as effective fundraisers. Non-profit entities must have the necessary good reputations to fundraise effectively within their communities. For instance, Respondent has been very productive in fundraising as a bar and club with approximately six hundred fifty (650) members due to its long-standing existence and reputation in Erie, Pennsylvania for almost ninety-five (95) years. Respondent has long held a State LOSGCA License for fifteen (15) years.

Since fundraising is a necessary component of State LOSGCA Licenses, quality fundraising is necessary for entities to operate as effective non-profit professionals. The LOSGCA intricacies of fundraising "can be complex and confusing." Wachter, Debbie, *Small Games of Chance Rules Spelled Out*, New Castle News, May 13, 2017, https://www.ncnewsonline.com/news/small-games-of-chance-rules-spelled-out/article_ab78da74-3776-11e7-bfdd-0b676acf8afd.html, November 15, 2019.

Under the LOSGCA, entities act as professional entities engaged in fundraising for the benefit of their communities.[2] The act of fundraising is to engage in organized activities of raising funds to support causes or campaigns. *Merriam Webster's Dictionary*, November 15, 2019, https://www.merriam-webster.com/dictionary/fundraise. Balancing the art and science of fundraising requires effective fundraising entities such as Respondent to build relationships with its customers and to connect with these donors "who have the highest propensity and interest in" fundraising community missions. *Balancing the Art and Science of Fundraising*, November 15, 2019, https://www.pursuant.com/fundraising-strategy/balancing-the-art-and-science-of-fundraising/. Fundraising is both an art and a science with evidence-based practices to allow entities to reach their fundraising goals. Shefska, Zach, *Art vs. Science in Fundraising? It's Neither. Try Evidence-based.*, March 6, 2018, https://fundraisingreportcard.com/art-vs-science/, November 15, 2019.

Moreover, fundraising is more than merely asking for money. Fundraising is "cultivating long-term relationships with donors." Laermer, Gary, *The Art of Fundraising*, Huff Post, November 15, 2019, https://www.huffpost.com/entry/the-art-of-fundraising_b_8006448. Donors or customers presently make "more targeted gifts in an effort to maximize their impact" *Id*. By conducting small games of chance, Respondent raises funds for the local Erie community and distributes these funds to local agencies and individuals in need. Respondent, for instance, last year contributed over $35,000 to the local Erie Community primarily to schools, hospitals, and academic scholarships. Respondent's President Gary Nyberg stated Respondent is constantly asking people and customers for donees who can benefit from these fundraising proceeds.

Unlike Liquor Code Licensees, professional licensees continue to retain proprietary

[2] In other areas of the law, the concept of fundraising is regulated, for instance as with Professional Fundraising Counsels under 10 P.S. §162.8. This topic of fundraising demonstrates itself, therefore, as a profession requiring professional license for annual renewal in other pertinent Pennsylvania statues. *Id*.

interests after professional licenses are not renewed. As stated in Petitioner's Brief, it is generally accepted many organizations and individuals retain proprietary interests in their non-renewed professional licenses. The Pennsylvania Commonwealth Court states professional licensees retain a property interest in their professional licenses after their licenses are expired. *Nicoletti v. State Bd. of Vehicle Mfrs., Dealers and Salespersons*, 706 A.2d 891, 893-94 (Pa. Cmwlth. 1998). Since the professional licensee in *Nicoletti* could have renewed its professional license at any time by paying proper renewal fees, the professional licensee retained a property interest in its "non-renewed license." *Id*. at 893.

The Pennsylvania Commonwealth Court also states professional licensees retain a proprietary interest in inactive licenses. *Garner v. Bureau of Professional and Occupational Affairs, State Bd. of Optometry*, 97 A.3d 437, 443 (Pa. Cmwlth. 2014). In *Garner*, a professional licensee could reactivate his license upon payment of renewal fees and submission of proof of continuing education credits. *Id*. Professional licensees maintain property interests in their licenses that can be revived at any time. *Id*.

In the instant case, Respondent acquired its proprietary interest to operate small games of chance for non-profit purposes when initially issued its State LOSGCA License for fundraising. Respondent retained said proprietary interest for fundraising in its State LOSGCA License throughout the forty-seven (47) day gap prior to renewal. Respondent's proprietary interest was not extinguished by this brief lapse. Instead, by paying its renewal fee and completing any renewal application, the Erie County Department of Revenue permitted Respondent immediately to continue to conduct small games of chance again according to the law.

Respondent has an important proprietary interest in its established fundraising work in the Erie community and contributes substantially to charitable entities such as hospitals, schools, and scholarships to worthy individuals. Through its non-profit and community service work, Respondent has gained an excellent reputation in the Erie community and developed tools and skills to raise significant community funds to support the Erie community. Respondent's fundraising is consistent with the Pennsylvania Legislature's intent to provide monetary support to local communities.

The briefness of the forty-seven (47) day period is also worthy of discussion. This short period of time can be easily viewed as a *de minimis* gap in renewal of Respondent's license. Black's Law Dictionary defines *de minimis* as "so insignificant that a court may overlook it in deciding an issue or case." Black's Law Dictionary (11th ed. 2019). In the civil law context, the term *de minimis* "is derived from the Latin '*de minimis non curat lex*' which means 'the law does not care for, or take notice of, very small of trifling matters.'" *Appletree Land Development v. Zoning Hearing Bd. of York Tp.*, 834 A.2d 1214, 1216 n.4 (Pa. Cmwlth. 2003). Trial courts have discretion to determine whether the *de minimis* doctrine applies. *Id*. at 1216. Although the *de minimis* doctrine is used in civil zoning actions such as variances and deviations, the instant action before this Trial Court is indeed a civil action, and therefore the *de minimis* doctrine is applicable. *See Swemly v. Zoning Hearing Bd. of Windsor Tp.*, 698 A.2d 160, 162 (Pa. Cmwlth. 1997).

Undisputedly, Respondent admitted to conducting small games of chance during the forty-seven (47) day gap. Respondent did not renew its State LOSGCA License due to believing in good faith Erie County's local six (6) month Conditional License provided a six (6) month grace period or deferment to renew its State LOSGCA License. This Trial Court

finds and concludes Respondent's forty-seven (47) day gap was *de minimis*. Moreover, the actions of Respondent during this forty-seven (47) day period of time were not similar to typical "gambling" activities associated with criminal violations. When Respondent realized its actions were outside of the law, Respondent took immediate action to renew its State LOSGCA License, thus mitigating its brief lapse.

Moreover, since Respondent continued to have a proprietary interest in its State LOSGCA License, Respondent's brief lapse did not extinguish Respondent's proprietary status as a "Club Licensee." The tardiness of Respondent only impacted Respondent's right to operate small games of chance in accordance with its State LOSGCA License. As a result of said brief lapse of time, Respondent paid the "price" of one thousand four hundred ($1,400) dollars intended by the Pennsylvania Legislature. The renewal process for Respondent was immediate in that Respondent renewed its State LOSGCA License in one day. Respondent did not have to submit a brand new application for its renewal of its State LOSGCA License. Respondent simply completed a renewal application, paid the requisite renewal fee, and received its renewed State LOSGCA License with its already existing proprietary interest. Since Respondent retained its proprietary interest in its State LOSGCA License, this Trial Court has subject matter jurisdiction over Respondent to adjudicate the First Cause of Action of the Citation in the instant case.

Whereas the PLCB and the ALJ had a stipulated record to make their determinations, this Trial Court had the benefit of additional live testimony which explained the disruptive confusing overlap created between Erie County's local six (6) month Conditional License and the State Statutory LOSGCA License experienced by the Respondent. This Trial Court hereby also accepts the record below and after making significant and material changes to the Findings of Fact and Conclusions of Law by the PLCB, this Trial Court finds and concludes Petitioner was correct in exercising its discretion consistent with the Pennsylvania Legislature's intent by citing this Club Licensee under the civil charges as to penalties under the LOSGCA, 10 P.S. 328.702(g). Respondent has paid one thousand four hundred ($1,400) dollars for penalties. Sections 5512, 5513, and 5514 of the Crimes Code are thereby not applicable to the instant case. Consistent with this Opinion, this Trial Court hereby enters the following Order of Court:

ORDER

AND NOW, to-wit, on this 18th day of November, 2019, upon consideration of the testimony and argument heard during the hearing on August 22, 2019; after review of the entire record below, as well as all relevant statutory and case law; this Trial Court accepting the record below and making significant and material changes in the Findings of Fact and Conclusions of Law by the Pennsylvania Liquor Control Board [hereinafter PLCB]; this Trial Court made independent determinations of all facts in this case; and for all the reasons set forth in the above Opinion, it is hereby **ORDERED, ADJUDGED, and DECREED** the decision of the PLCB is respectfully **REVERSED**, and this case is **REMANDED** to the PLCB for a decision consistent with this Trial Court's rulings.

BY THE COURT
/s/ **Stephanie Domitrovich, Judge**