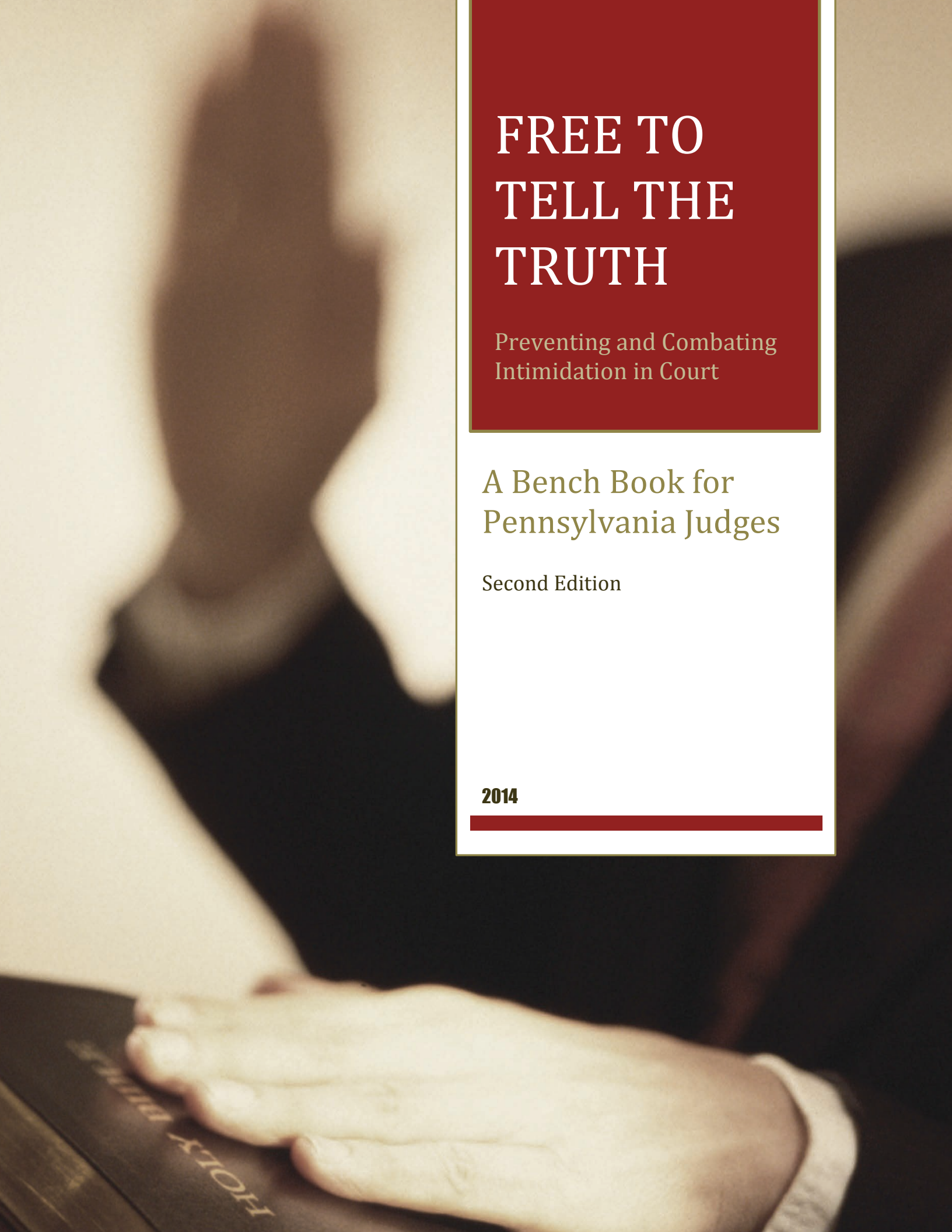

FREE TO TELL THE TRUTH

Preventing and Combating Intimidation in Court

A Bench Book for Pennsylvania Judges

Second Edition

2014

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INTRODUCTION TO THE SECOND EDITION

It has been more than three years since publication of the first edition of this bench book. Without a doubt, the problems that trial judges face in preventing and combating intimidation in the courtroom continue to be among the most important and challenging impediments to the effective administration of justice. In this second edition, we have endeavored to keep the bench book current, so that it can be a reliable ready reference for trial judges facing these difficult issues in the heat of battle. In addition, we have published this edition in electronic format with hyperlinks to the cited authorities, which we hope will greatly enhance its utility for busy judges.

Once again, we need to thank Stuart Suss, Esq., for carrying the laboring oar on this update, just as he had done in the drafting of the original bench book. We are also deeply indebted to the Pennsylvania Commission on Crime and Delinquency (PCCD), for again providing funding for this ongoing project. In addition, special thanks are owed to Deputy District Attorney John Delaney, a member of the PCCD, without whom this update would not have come to fruition. Invaluable assistance was provided by Michael A. Schwartz, Esq., and his team at Pepper Hamilton LLP. The Pepper team deserves special recognition for the production of this edition in its new electronic and hyperlinked format. I also would like to thank my fellow judges on the bench book committee, that is, the Honorable Denis P. Cohen, the Honorable Michael Erdos, and the Honorable Charles A. Ehrlich, for their important contributions to this project.

Finally, I would like to thank again the members of the original committee, chaired by the Honorable Renee Cardwell Hughes (retired), who are mentioned in Judge Hughes' introduction to the first edition of the bench book. Their efforts turned the germ of an idea into a text that we sincerely hope will be an ongoing tool in the war to foster the telling of truth in our courtrooms.

Honorable Glenn B. Bronson
Court of Common Pleas
First Judicial District

INTRODUCTION TO THE FIRST EDITION

Justice requires a search for truth in an environment that respects the rights of all parties to the system. Truth cannot be spoken in fear. Witness intimidation strikes at the very heart of our system of criminal justice, crippling our ability to function fairly, decently and with integrity. It cannot be tolerated.

Judges stand as guardians of the courthouse: the place where wrongs will be redressed without fear or recrimination. It is the responsibility of the court to create an environment in which truth can be spoken. To that end, I have collaborated with other members of the justice community to develop this bench book on witness intimidation and jury interference. This bench book is designed to be a practical tool to guide judges in dealing with the many manifestations of witness intimidation or jury interference. Our goal was to identify the body of law in Pennsylvania and other jurisdictions that addresses this assault on justice. We identify the forms of witness intimidation and jury interference and recommend the best practices to protect the integrity of our courts.

This bench book represents the collective wisdom of a dedicated group of lawyers and judges who willingly gave their time, intellect and passion for justice to this project.

This bench book would not have been possible without the extraordinary efforts of Stuart Suss, Esq., a brilliant mind who is totally devoted to the rule of law. Additionally, I am extremely grateful to Walter M. Phillips, Jr., Chairman of the Pennsylvania Commission on Crime and Delinquency (PCCD) and Michael J. Kane, PCCD Executive Director, who provided their wisdom and insight. Finally, with deep appreciation and thanks for the tireless creativity, wisdom and diligence of the Honorable Glenn Bronson, Assistant District Attorney John Delaney, Michael Schwartz, Esq., Benjamin Eichel, Esq. and the Honorable Gwendolyn Bright.

We all trust that you will find this bench book useful in our shared commitment that truth be unimpeded in the halls of justice – the courthouse.

The Honorable Renée Cardwell Hughes
Court of Common Pleas
First Judicial District

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NOTE ON HYPERLINKS AND CITATIONS

For the convenience of the reader, the topics in the table of contents are hyperlinked. By clicking on a chapter, section or subsection, your computer will immediately go to that chapter, section or subsection.

Similarly, each legal authority - statute, rule or case - in the text is hyperlinked to a publicly available web site where that authority appears in full. By placing your computer cursor on the citation, a "hand" signal will appear; clicking on the citation will take you to the full text of that authority. If an authority appears several times in a paragraph or section, only the first appearance is hyperlinked. In a citation to a case for which appellate review was denied, the higher court denial of review is not hyperlinked.

CHAPTER 1:
Forms of Intimidation Outside the Courtroom

Intimidation takes many forms both inside and outside the courtroom. The trial judge must be alert to and responsive to the many forms of intimidation without unnecessarily precluding access to the courtroom and without depriving the defendant of the presumption of innocence. The following is not meant to be an exhaustive list of the forms of intimidation that might be directed against a witness or against the family of a witness. The forms of intimidation are limited only by the deviousness of the persons seeking to intimidate.

The practices recommended herein may not be appropriate for every case. Some recommended practices may be useful in the normal operation of the courtroom to prevent problems. Other recommended practices may be utilized, as necessary, to immediately terminate any inappropriate conduct.

Forms of intimidation may include, but are not limited to:

1. Actual or attempted physical violence or property damage.
2. Explicit threats of physical violence or property damage.
3. Economic threats (as may be utilized in domestic violence cases to induce a victim not to pursue criminal prosecution of an abuser).
4. Indirect or implicit threats
    - Anonymous phone calls, internet postings, text or other messages.
    - Publicly communicating the fact of the witness's cooperation (orally, in writing, or by postings on the internet or social networks).
    - Defendant and/or his allies appear together, as a show of force, at the residence, place of employment or school of the witness, or other location where the witness is present or is expected to be present.
    - Repeatedly driving past the residence of the witness or other location where the witness is present or is expected to be present.
5. Even in the absence of specific conduct or threats, the prevalence of organized criminal activity and violence in the community creates fear on the part of the witness that may be reflected in the conduct and demeanor of the witness in the courtroom, or in the reluctance or refusal of the witness to appear in court.
6. It is important to note that these actions may be directed at the witness and/or to anyone who may be close to or have influence with the witness, including but not limited to a spouse, parent, sibling or child.

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CHAPTER 2:
Forms of Intimidation In and Near the Courtroom

1. Explicitly communicated threats.

2. Photographing or recording the face or voice of the witness.

3. Defendant's allies fill the seats in the courtroom or the hallway, as a show of force, sometimes wearing gang or similar attire.

4. Threatening gestures, including but not limited to:

   a. Pointing a finger as if it were a gun.

   b. Holding hands up to simulate the photographing of the witness.

   c. Smirks or gestures of disgust or disbelief directed toward the witness.

   d. Prolonged staring at a witness.

5. An ally of the defendant may approach a family member of the witness and politely invite the family member to attend the proceedings in the courtroom. The family member does not perceive any sinister motive and accepts the invitation. The witness sees a beloved family member sitting in the courtroom in close proximity to a person known to be an ally of the defendant.

   It is the responsibility of the trial judge to be aware of both the explicit and implicit forms of intimidation that occur in and near the courtroom. Intimidation may take place by other means not specified on these lists. Courtroom staff must be trained to recognize all forms of intimidation and to immediately report such conduct to the presiding judge.

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CHAPTER 3:
Creating a Safe and Secure Courtroom

Chapter 3a: Judicial control of the courtroom

It is essential to maintain a safe and secure courtroom to ensure an impartial trial. The following are some of the proactive measures a judge may take.

1. Provide safe waiting areas for witnesses, away from any possible intimidators. Provide secure gathering areas for jurors, with escorted transportation to and from the courthouse and courtroom. Utilize courtrooms with adequate and visible security. Meet with the sheriff to plan courtroom security prior to the trial.

2. Train courtroom staff to be alert to intimidating acts by spectators, including subtle acts of intimidation such as smirking, gestures of disgust or prolonged staring at witnesses or jurors or using a hand-held device to photograph a witness. Instruct courtroom staff to immediately report such conduct to the judge. Position staff in the front and rear of the courtroom so that all conduct and spectators can be observed. Inform courtroom staff that when a factual record needs to be made, staff may be called upon to testify under oath, and be examined by counsel, regarding conduct that has been observed. The judge must ensure that courtroom staff treats all spectators in an evenhanded manner.

3. Warn everyone in the courtroom at the beginning of each day's proceedings that the judge will utilize all available powers, when appropriate, to respond to instances of witness or juror intimidation. These warnings may include:

    a. Criminal conduct will be referred to law enforcement agencies for arrest and prosecution.

    b. Misbehaving spectators will be held in contempt of court with accompanying fines and imprisonment.

    c. Misbehaving spectators will be excluded from the courtroom.

    d. Any cell phones or other electronic devices that are not powered off and out of sight may be confiscated and searched and may result in criminal contempt or your expulsion from the courtroom unless you have express permission from the presiding judge to use the device.

    e. "If you believe that intimidating a witness will stop the proceedings, or otherwise help the defendant, you are wrong."

4. Segregate potential intimidators in the courtroom by keeping the first two rows of seating reserved as a buffer zone to be filled by neutral persons approved by the court (such as members of the news media or students). The purpose is to create distance between the testifying witness, the jury and any potential intimidator. This buffer zone should not be

used as a basis for excluding persons from the courtroom except as otherwise permitted by law.

5. Instruct the spectators to leave the courtroom before or after the jurors and the witnesses are permitted to leave the courtroom. The family and friends of the defendant should leave the courtroom separately from the family and friends of the victim.

6. Preclude the use of mobile telephones or other communications devices pursuant to Pa.R.Crim.P. 112 (A). Any telephone or communications device that is improperly used should be seized. The seized device should be stored together with a photo copy of the owner's identification so that the device may be stored and possibly returned after being searched, or at the end of the day's proceeding or at the end of any contempt or related proceeding.

Rule 112. Publicity, Broadcasting, and Recording of Proceedings.

(A) The court or issuing authority shall:

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

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

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

7. Respond promptly to misconduct. When a spectator smirks, laughs, or tosses a hand or otherwise indicates disapproval of a witness's testimony, or similar disrespect for the proceedings, the judge should immediately announce (out of the presence of the jury, if possible) that such behavior will not be tolerated. The misconduct usually stops.

8. Prohibit clothing such as gang attire or clothing that contains an intimidating message.

9. Although there appears to be no Pennsylvania authority on the issue, there is persuasive authority elsewhere holding that it may be permissible, in an appropriate case, to require that anyone who enters the courtroom provide identification, including some form of an

identification card, along with name, address and date of birth. Before implementing these requirements, the judge should make findings on the record that justify the measures taken, including the fact that intimidation is enabled by anonymity. The task of collecting the information should be performed by the sheriff or a court officer, as part of neutral courtroom security. The policy should be applied to all spectators not known to the sheriff or court officer.

The reasons for this procedure should be explained by the judge. Identifying information is taken from all spectators to insure the integrity of the proceedings. Courtrooms are open to the public and spectators should not be discouraged from attending judicial proceedings. However, in some cases, it may be necessary for the court to document the identity of spectators in the courtroom. Intimidators feel emboldened by their perceived anonymity. This procedure prevents the intimidator from hiding behind anonymity.

Requesting identification at the courthouse door is a permissible courtroom security procedure. It should be used with caution and accompanied by a clear factual record setting forth the court's reasons.

10. Prohibit clothing that conceals the identity of a witness or spectator. For example, a person may seek to attend court proceedings with a face shielded from view by religious attire. There is no Pennsylvania authority forbidding the court from requiring the person to permit the face to be viewed for identification or as a condition for attending court or testifying. Any unveiling should be done, with sensitivity, in the presence of a court officer or other official of the same gender.

Legal discussion:

The courts have been charged with a responsibility to participate in and monitor the development of courthouse security arrangements. Generalized courtroom and courthouse security measures such as the use of metal detectors and examining an individual's identification at the courthouse entrance have been approved against constitutional challenges in *United States v. Smith*, 426 F.3d 567 (2nd Cir. 2005), *cert. denied*, 546 U.S. 1204, 126 S. Ct. 1410, 164 L. Ed.2d 109 (2006); and in *United States v. DeLuca*, 137 F.3d 24 (1st Cir.), *cert. denied,* 525 U.S. 874, 119 S. Ct. 174, 142 L. Ed. 2d 142 (1998).

In *United States v. Brazel*, 102 F.3d 1120 (11th Cir.), *cert. denied*, 522 U.S. 822, 118, S. Ct. 79, 139 L. Ed. 2d 37 (1997), the court approved the requirement, three weeks into the trial, that all persons who intended to enter the courtroom identify themselves (by identification card, name, address, and birth date). The trial judge noted that she had observed that individuals were entering and

"going into various positions in this courtroom and staring at the witnesses that were on the stand." *Id*. at 1155. The fixed stares were "making the witnesses uncomfortable, because I observed it." *Id*. at 1156.

The court of appeals found no violation of the Constitution. "The trial judge implemented the identification procedure based on her own observations for more than a week, confirmed by the prosecution, that individuals had been coming into the courtroom and fixing stares on the witnesses and possibly government counsel. The court considered the alternative proposed by defendants, but reasonably found it infeasible. She did not believe that, while presiding over the trial, she could assume the responsibility to pick out individuals who might be trying to influence the witnesses or might otherwise pose a threat to trial participants. Given the specific problem that had arisen and the limited nature of the remedy adopted, we see no abuse of discretion in what was done."

In *Williams v. State*, 690 N. E. 2d 162, 168, 169 (Ind. 1997), the Supreme Court of Indiana affirmed the trial court's requirement that spectators present identification and sign in before entering the courtroom.

Five men fired at least sixty-five rounds of ammunition from assault rifles at the door and walls of an apartment in a complex in Indianapolis. A 16-year-old girl passing by the apartment was killed by a bullet to the head and inside a 7-year-old boy was permanently injured. The five shooters were members of the "Ghetto Boys," a group organized to sell crack cocaine. According to trial testimony, the shooting was intended as retaliation against Stacey Reed who, the day before the shooting, had broken into the home of a Ghetto Boy and stolen from the gang's stash of cocaine.

During the trial members of the public who sought access to the courtroom were required to pass through a metal detector and "wand." In addition, spectators who were unknown to the court were required to present identification to the officer at the door and sign in.

The Supreme Court of Indiana rejected defendant's argument that the security procedures violated his constitutional right to a public trial. "The security procedures required that each person who was unknown to the officer at the door show identification and sign in. Neither requirement actively excludes anyone." The Supreme Court imposed a prospective requirement, pursuant to its supervisory powers over the Indiana trial courts, "that the [trial] court make a finding that specifically supports any measures taken beyond what is customarily permitted that are likely to affect unfettered access by the press and public to the courtroom. The finding need not be extensive, but must provide the reasons for the action taken, and show that both the burdens and benefits of the action have been considered."

##

Chapter 3b: Protective orders during the discovery stage

INTRODUCTION: This bench book describes two forms of judicial action, both of which carry the label: "protective orders." Pa.R.Crim.P. 573(F) provides for protective orders during the discovery process, permitting the trial judge to delay the discovery or to restrict the dissemination of discovery material. 18 Pa. C. S. § 4954, as discussed *infra* at 12, provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim at locations outside the courtroom.

Rule 573(F), and the cases applying it, recognize that a trial judge is empowered to restrict otherwise permissible discovery in order to prevent disclosure of the name, address or other identifying information about a witness so as to protect the safety of that witness.

Pa.R.Crim.P. 573(F), formerly Rule 305(F), provides as follows:

> **(F) Protective orders**
> Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.

Recommended practices under this rule:

1. Proceedings on a motion for protective order under Rule 573(F) may be held *in camera.*
2. The judge should review the discovery material being withheld, make a factual record, and make a determination as to how soon in advance of the testimony of the witness the disclosure of the discovery material should be made to the defendant.
3. In making this determination, the judge should consider less restrictive options than the withholding of discovery entirely, such as (1) redacting the statement of the witness so as to remove the name, address, age and any other identifying information; (2) making available to defense counsel an interview with a willing witness prior to the trial; (3) denying discovery for the minimal amount of time necessary to insure the safety of the witness.
4. The discovery material that has been withheld should be placed in the record, under seal, so it may be available for appellate review.

Legal discussion:

In *Commonwealth v. Brown*, 544 Pa. 406, 676 A.2d 1178, *cert. denied*, 519 U.S. 1043, 117 S. Ct. 614, 136 L. Ed. 2d 538 (1996), a capital case, the Commonwealth did not provide the name of an eyewitness until the trial began because the trial court had issued a protective order, at the request of the Commonwealth, pursuant to former Pa.R.Crim.P. 305(F). When the name of the eyewitness was disclosed, defense counsel objected because the Commonwealth had not given notice to the defendant of the filing of the protective order. A request for a mistrial was denied. The judge granted a 24-hour continuance to enable defense counsel to prepare for the testimony of the witness and the judge stated that he would entertain a request for additional time if necessary. No additional time was requested.

The Supreme Court affirmed the ruling of the trial judge since (1) the Commonwealth had sought trial court approval before withholding the identity of the witness; (2) there was no challenge to the adequacy of the Commonwealth's reasons for seeking a protective order; and (3) defense counsel was given a continuance in order to prepare for the testimony of the witness.

In *Commonwealth v. Hood*, 872 A.2d 175 (Pa. Super.), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), the Superior Court held there was no error in the use of an *ex parte* hearing for the request and issuance of a protective order.

During the investigation of a drug-related shooting, the Commonwealth developed information to support a protective order to keep the identities of the witnesses, as well as their statements, from being disclosed prior to trial because the witnesses were fearful of retaliation. The trial court granted the Commonwealth's motion for a protective order after an *ex parte* hearing.

The Superior Court held that there was no error in the use of an *ex parte* hearing since the presence of defendant and defense counsel at the protective order hearing would have defeated the purpose of providing protection for these witnesses. The appellate court further noted that the defendant lost no legal rights by not having the names of the witnesses disclosed to him during the discovery stage as he was afforded full confrontation with these witnesses at trial as the witnesses were subjected to a full and vigorous cross-examination. Additionally, defendant was given all the time he requested to prepare for these witnesses. In the absence of any showing of prejudice, Superior Court held that the trial judge had not abused her discretion in granting the *ex parte* protective order.

The Supreme Judicial Court of Massachusetts addressed a rule nearly identical in language to Pa.R.Crim.P. 573(F) in *Commonwealth v. Holliday*, 450 Mass. 794, 803, 804, 800, 882 N.E.2d 309, 318, 319, 316 *cert. denied sub. nom. Mooltrey v. Massachusetts*, 555 U.S. 947, 129 S. Ct. 399, 172 L. Ed. 2d 292 (2008) (citations and internal quotations omitted):

> Although the Commonwealth bears the burden of demonstrating that the safety of a witness would be put at risk if information, otherwise required to be disclosed, was made available to the defendant in the absence of a protective order, we have previously held that it need not demonstrate a specific or actual threat to the safety of a witness when the danger to witness safety is inherent in the situation.
>
> In granting the order at issue here, it was permissible for the [trial] judge to determine that the Commonwealth's representations that the crimes were the result of a murderous feud between gangs still operating in the neighborhood where the witnesses lived were reliable, that for years witnesses had been reluctant to come forward out of fear for their safety, and that those witnesses who were then incarcerated were particularly fearful of the defendants obtaining copies of statements made against them, and distributing those statements in the prisons, making them the potential targets of violence. It was not error for the [trial] judge to have concluded that there is great risk that retaliation could take place, endangering the witnesses for the Commonwealth. In other words, even absent evidence of a specific threat, the threat to witnesses was inherent in the situation. There was no abuse of discretion in issuing a protective order in these circumstances.

Text of trial court order: "I order that the addresses and locations of witnesses in the above-captioned matter not be disclosed to Defense Counsel or the Defendants. I further order Defense Counsel not to give written copies of transcribed witness statements, reports containing witness statements, or witness statements in any form to the defendants or any other persons. I order Counsel for the Commonwealth to make available witnesses for Defense Counsel, in order that Defense Counsel may request interviews with the witnesses, and interview the witnesses if they are willing to be interviewed. I make these orders in order to protect the safety of the witnesses." The order was later modified to permit defense counsel (and their investigators) access to the addresses of the witnesses who made statements.

##

Convening an anonymous jury is an option only when all parties agree or after a motion is filed and complete and particularized factual findings are made, on the record, setting forth the need and justification for such a procedure.

Legal discussion:

In *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892 (2007), the Supreme Court of Pennsylvania held that the news organizations have a qualified First Amendment right to the names, but not the addresses, of jurors in a criminal case. However, the ruling recognized that the trial court may find that disclosing the jurors' names in a particular circumstance may raise "concerns for juror safety, jury tampering, or juror harassment." *Id*. at 64, 922 A.2d at 905. "[T]he trial court can deny the right of access when it offers on the record findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* The Supreme Court suggested that names of jurors could be withheld if the trial court makes "particularized findings of fact [that] the jurors have been or are likely to be harassed by the public, press, or defendant's family or friends." *Id*.

In *United States v. Scarfo*, 850 F.2d 1015 (3rd Cir. 1988), the Third Circuit held: "Because the prosecution's evidence describing the defendant's organized crime group might have caused anxiety among the jurors, the trial judge withheld their identities before and after *voir dire* in this extortion case. In these circumstances, we find no abuse of discretion either in adopting that procedure or in explaining it to the jury." *Id*. at 1016. "Pretrial proceedings revealed that plea agreements, which included transactional immunity and post-trial witness relocation, had been arranged with [two men] in return for their testimony as government witnesses. Both had been implicated in several murders allegedly committed at Scarfo's behest. Their testimony would show that one prospective witness had been killed in the past, one judge had been murdered, and attempts had been made to bribe other judges. [Both witnesses'] lives had been threatened, and they would remain under heavy guard during their appearances in court." *Id.* at 1017.

In *United States v. Wecht*, 537 F.3d 222 (3rd Cir. 2008), the Third Circuit reversed the district court order convening an anonymous jury and held that there is a presumptive First Amendment right of public access to the names of trial jurors and prospective jurors prior to the empanelment of the jury. The court found that the presumption was not overcome by the district court's articulated reasons: the media may publish stories about the jurors, friends or enemies of the defendant may try to influence the jurors, and defendant had filed a pleading alleging that he had many potential enemies from his extensive career as a witness in criminal and civil cases.

In *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012), *cert. denied*, ___ U.S. ___,133 S. Ct. 1278, 185 L.Ed.2d 214 (2013), the Fourth Circuit held that the trial court did not abuse its discretion in convening an anonymous jury where the record established by a preponderance of the evidence that the lives or safety of the venire members may have been jeopardized if their names, addresses,

and places of employment, or such information pertaining to their spouses, had been provided to the parties, and where the trial court took reasonable precautions during the jury selection process to safeguard the defendants' rights.

A federal statute specifically authorizes a trial judge to keep the names of jurors confidential "in any case where the interests of justice so require." 28 U.S.C. § 1863(b)(7). In a capital case a trial judge may withhold the list of venirepersons from the defendant if "the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." 18 U.S.C. § 3432. There are no comparable statutes in Pennsylvania.

Two rules of Pennsylvania criminal procedure specifically address information about venirepersons and jurors:

> Pa.R.Crim.P. 630, pertaining to juror qualification forms, requires that the form containing the "names of persons to serve as jurors" be "prepare[d]" "publish[ed]" and "post[ed]." The form itself "shall not constitute a public record." The information provided on the form "shall be confidential."
>
> Pa.R.Crim.P. 632 pertains to the juror information questionnaire. The required form discloses the juror's name and city/township of residence, but not the street address. The information on the questionnaires "shall be confidential" and the questionnaires "shall not constitute a public record." On the other hand, the attorneys "shall receive copies of the completed questionnaires." In *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892 (2007), the Court held that the confidentiality provisions of Rule 632 do not "overcome" the constitutionally based right of access of the news organizations. The *Long* Court read the confidentiality provisions of Rule 632 to apply to the answers to questions provided by the jurors on the questionnaire, not to "identifying information contained therein." *Id*. at 63 n.15, 922 A.2d at 905 n.15.

##

Chapter 3d: Protective orders restricting conduct outside the courtroom

INTRODUCTION: 18 Pa.C.S. § 4954 provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim that may occur at locations outside the courtroom. As previously discussed, *supra* at 7, Pa.R.Crim.P. 573(F) also uses the term "protective orders." That rule applies during the discovery process, permitting the trial judge to delay the discovery or to restrict the dissemination of discovery material.

> **§ 4954. Protective orders**
> Any court with jurisdiction over any criminal matter may, after a hearing and in its discretion, upon substantial evidence, which may include hearsay or the declaration of the prosecutor that a witness or victim has been intimidated or is reasonably likely to be intimidated, issue protective orders, including, but not limited to, the following:
>
> 1) An order that a defendant not violate any provision of this subchapter or section 2709 (relating to harassment) or 2709.1 (relating to stalking).
>
> 2) An order that a person other than the defendant, including, but not limited to, a subpoenaed witness, not violate any provision of this subchapter.
>
> 3) An order that any person described in paragraph (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.
>
> 4) An order that any person described in paragraph (1) or (2) have no communication whatsoever with any specified witness or victim, except through an attorney under such reasonable restrictions as the court may impose.

18 Pa.C.S. § 4954.1 provides that a protective order shall contain at its top a notice containing the telephone number of the police department that the victim or witness should contact if the order is violated. 18 Pa.C.S. § 4955 sets forth the consequences of a violation of a protective order. A person violating the order may be punished for any substantive crime that has been committed or for contempt of court. The court is empowered to revoke the offender's bail after a hearing or issue a bench warrant for the offender's arrest.

The reference in these statutes to "any provision of this subchapter" encompasses certain criminal offenses, designed for the protection of witnesses, victims and court officers.

18 Pa.C.S. § 4952	Intimidation of witnesses or victims
18 Pa.C.S. § 4953	Retaliation against witness, victim or party
18 Pa.C.S. § 4953.1	Retaliation against prosecutor or judicial official

1. This statutory scheme authorizes any criminal court, including a magisterial district judge, following a hearing, to issue a protective order that a defendant or other person not violate the statute, that he or she maintain a certain distance from a specified witness or victim, and that he or she have no communication with any specified witness or victim. The court has authority to issue a protective order prohibiting the misconduct of the defendant and any other person.

2. While both a hearing and substantial evidence are required, there is no requirement of a formal motion. A judge may invoke this statute *sua sponte.*

3. Hearsay and declarations by the prosecutor both constitute admissible evidence at the hearing. 18 Pa.C.S. § 4954.

4. The order of the court should be specific as to the person(s) prohibited, the person(s) protected, prohibited actions, and the duration of the order. The order should also provide for its service upon the police department that would have primary responsibility for the protection of the witness or victim.

5. A standard protective ("stay away") order is available within the Common Pleas Court Case Management System (CPCMS) as document #3521.

6. For the purposes of § 4954, a juvenile delinquency proceeding may not be a criminal matter or proceeding. As such, the presiding judge in a juvenile delinquency proceeding may be without authority under § 4954 to issue a protective order. *Interest of R. A.*, 761 A.2d 1220 (Pa. Super. 2000). However, the court does have the inherent authority to regulate its proceedings and to control the courtroom and its environs, and to protect its witnesses. *See generally*, *Interest of Crawford*, 360 Pa. Super. 36, 519 A.2d 978 (1987) (court has inherent power to hold alleged juvenile delinquent in contempt for failure to appear at adjudicatory hearing to which juvenile had been subpoenaed; court is not stripped of this power by absence from the Juvenile Act of any reference thereto).

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The Pennsylvania Constitution recognizes that dangerousness can preclude bail. Article 1, § 14 provides:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

A defendant threatening, intimidating, harassing or injuring a witness or juror, or causing any of the foregoing, should be considered dangerous by the court in setting, amending, or revoking bail. Similarly, when the court sets or reviews bail for anyone charged with intimidating or threatening a witness or juror, the court should consider the danger posed to the community, particularly when that danger strikes at the very core of the justice system.

18 Pa.C.S. § 4956, set forth below, mandates that a defendant's bail, or any other form of recognizance, be conditioned on the defendant neither doing, nor causing to be done, nor permitting to be done, any act of intimidation or retaliation. The statute further requires that the defendant be given notice of this condition.

> **18 Pa.C.S. § 4956 Pretrial release.** (emphasis added)
>
> a) Conditions for pretrial release — Any pretrial release of any defendant whether on bail or under any other form of recognizance **shall be deemed**, as a matter of law, **to include a condition that the defendant neither do, nor cause to be done, nor permit to be done on his behalf,** any act proscribed by section 4952 (relating to intimidation of witnesses or victims) or 4953 (relating to retaliation against witness or victim) and any willful violation of said condition is subject to punishment as prescribed in section 4955(3) (relating to violation of orders) **whether or not** the defendant was the subject of an order under section 4954 (relating to protective orders).
>
> b) Notice of condition — From and after the effective date [February 2, 1981] of this subchapter, any receipt for any bail or bond given by the clerk of any court, by any court, by any surety or bondsman and any written promise to appear on one's own recognizance shall contain, in a conspicuous location, notice of this condition.

See also, Pa.R.Crim.P. 526(A), which requires that a condition of bail be that the defendant "refrain from criminal activity."

In addition, the bail authority may impose any condition necessary to "ensure the defendant's appearance and compliance." Pa.R.Crim.P. 526(B), 527(A)(3).

Chapter 3e: Conditions of bail

These conditions apply to any defendant released on recognizance, nonmonetary conditions, unsecured bail bond, nominal bail and monetary condition. Pa.R.Crim.P. 524(B).

The court may modify or revoke the defendant's bail if the defendant fails to comply with any of the conditions of bail. Pa.R.Crim.P. 529, 536.

Section 2711 of the Crimes Code, 18 Pa.C.S. § 2711, also requires that, in domestic violence cases, if the bail authority determines that the defendant poses a threat of danger to the victim, the bail authority must impose the additional conditions of bail that the defendant "refrain from entering the residence or household of the victim or the victim's place of employment," and that the defendant "refrain from committing any further criminal conduct against the victim."

1. 18 Pa.C.S. § 2711 applies to arrests for violations of section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2706 (relating to terroristic threats) or 2709.1(relating to stalking) against a family or household member, defined as "spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood." 18 Pa.C.S. § 2711(a); 23 Pa.C.S. § 6102.

2. Any conditions of bail imposed pursuant to 18 Pa.C.S. § 2711(c)(2) "shall expire at the time of the preliminary hearing or upon the entry or the denial of the protection of abuse order by the court, whichever occurs first."

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Chapter 3f: Exclusion of spectators

An order excluding spectators from the courtroom must be in compliance with two constitutional provisions: the defendant's right to a public trial under the Sixth Amendment and the right of the news media to attend and report on the trial pursuant to the First Amendment. On the other hand, it is well established that a trial judge may maintain a safe and secure courtroom.

Anyone may be excluded who is observed in the courtroom acting in a manner that disrupts the proceedings, intimidates a witness or juror, or violates the rules of decorum of the court. For example, a spectator who makes faces or inappropriate gestures during the proceedings, glares at witnesses or jurors or visibly reacts to testimony may be summarily removed from the courtroom.

1. If the misbehavior occurs in the judge's presence, the judge should make a full record stating explicitly that factual findings, describing in detail the offending conduct, are based on the judge's personal observations.

2. If the misbehavior was brought to the judge's attention by someone in the courtroom, but the judge did not personally observe the misbehavior, the judge should hold a hearing outside the presence of the jury to make a factual record of the misbehavior. For example, if a courtroom staff member saw the conduct, that person should testify on the record, subject to examination by counsel. The judge should explicitly state findings of fact based on the record made at the hearing.

3. The judge should exclude only the offending person or persons.

A witness may express a reluctance to testify based upon fear, but there may not have been visible misconduct in the courtroom. The threat to the witness may not have been made in open court, but the person who made the threat is in attendance as a spectator at the trial. Threats or other acts of intimidation may have been committed by unknown persons. Under these circumstances:

1. The judge should convene a hearing outside the presence of the jury.

2. The intimidated witness should testify at the hearing. It is better not to rely exclusively upon the representations by the prosecutor regarding the witness.

3. The hearing may be held *in camera* if necessary to develop the information.

4. The witness must offer more than a generalized assertion of fear. A record must be made of words or acts, inside or outside the courtroom, that would justify the fear.

5. Specific factual findings should be made regarding the credibility of the evidence and whether a threat of injury or intimidation exists. The judge should state reasons why exclusion of the person or persons is essential to protect the witness from fear or emotional disturbance that would prevent or impede the witness from testifying truthfully.

6. When making factual findings, the judge should remember that intimidation genuinely may arise from indirect and implicit threats or from the prevalence of organized criminal activity and violence in the community.

7. Counsel for the defendant may be of the opinion that the presence in the courtroom of menacing-looking spectators may be creating a bad impression of the defendant in the eyes of the jury. Counsel for defendant, in some cases, may agree on the record to an order of exclusion.

8. The judge must explicitly consider alternatives to exclusion, such as additional security, and, if appropriate, state reasons why such alternatives to exclusion are not adequate.

9. An order excluding spectators should not be excessive in its scope. There is rarely a basis for excluding the news media. An order excluding all spectators is rarely justified as compared to an order excluding those designated persons whose presence is connected to fear by the witness. Closer scrutiny is given to orders excluding members of defendant's family absent evidence of misconduct attributable to the excluded family member.

10. An order excluding spectators should not be excessive in length. The exclusion should apply only during the testimony of the fearful witness and exclusion should terminate at the completion of that testimony.

11. There is no requirement set forth in court decisions that the acts of intimidation be committed by the defendant or be committed at the solicitation of the defendant. The defendant is not being excluded from the courtroom. Exclusion of spectators is not a sanction against the defendant; instead, it is a sanction against the spectators who are frightening the witness. Misconduct by the defendant or misconduct attributable to the defendant is not required. *State v. Bobo,* 770 N.W.2d 129 (Minn. 2009), summarized *infra* at 20.

Legal discussion:

United States Supreme Court

Courts rely upon the legal standard set forth in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). In *Waller,* all persons except for court personnel were excluded for the entirety of a suppression hearing. Closure of a judicial proceeding must advance an overriding interest, the closure must be no broader than necessary to protect that interest, the trial judge must consider reasonable alternatives to closing the proceeding, and the judge must make findings adequate to support the closure.

In a typical case of witness intimidation, the courtroom may not be closed in its entirety to all persons. Instead, there may be a partial closure of the courtroom. Only specified individuals may be excluded. The exclusion will be temporary, just during the testimony of the intimidated witness. There may not be a permanent exclusion of the individuals from the courtroom.

When there is a partial closure of the courtroom, some state and federal courts modify the *Waller* standard. These courts have adopted the position that where a closure is partial, it is necessary to show a "substantial reason" rather than an "overriding interest" to justify the closing. Other courts continue to apply the *Waller* standard both for partial and for total closures. Pennsylvania courts have not specifically decided whether the "overriding interest" or the "substantial reason" standard applies to partial closures of the courtroom.

In *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010), the Court held that a congested courtroom, without more, is not a justification for limiting public access during jury selection. Similarly, the presence in the courtroom of a court reporter and members of the news media does not necessarily preclude a defendant from successfully asserting a violation of his right to a public trial.

Pennsylvania decisions:

In *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985), the Pennsylvania Supreme Court upheld convictions against defendants' assertions that their right to a public trial was violated by exclusion of spectators during several days of *voir dire*. The trial of eight high-profile defendants was conducted amid tumult, inside and outside the courtroom. Although some of the bases of the Court's ruling have been abrogated by *Presley, supra*, the Court's opinion contains a strong statement as to the right of the judge to enforce standards of conduct within his or her courtroom. "[T]rial judges are vested with broad discretion in setting and enforcing the standards of proper conduct for all those who seek to attend judicial proceedings before them. We should not be hasty to reverse a trial judge's actions in establishing order in his courtroom, unless his actions are not designed to maintain dignity, order, and decorum, and instead deny or abridge unwarrantedly the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Berrigan,* 509 Pa. at 133, 501 A.2d at 234.

In *Commonwealth v. Howard*, 324 Pa. Super. 443, 471 A.2d 1239 (1983), the Superior Court upheld the rulings of the trial court that (1) ordered the removal of the defendant from the courtroom based upon his disruptive behavior, and (2) ordered the removal of members of the group MOVE from the courtroom for the final one hour of one afternoon's proceedings based upon the trial judge's factual findings, stated on the record, that there was a causal connection between the presence of the group in the courtroom and the instances of disruptive behavior by the defendant.

Commonwealth v. Conde, 822 A.2d 45 (Pa. Super. 2003), upheld the exclusion of defendant's fiancée and friends for the duration of a trial after they had been observed by the judge and by a court officer making intimidating gestures and faces at witnesses.

In *Commonwealth v. Penn*, 386 Pa. Super. 133, 562 A.2d 833 (1989), *appeal denied*, 527 Pa. 616, 590 A.2d 756, *cert. denied,* 502 U.S. 816, 112 S. Ct. 69, 116 L. Ed. 2d 43 (1991), all spectators were excluded from the courtroom based upon a representation to the trial judge by the prosecutor that a Commonwealth witness was fearful of testifying in a full courtroom following the breaking of several windows at his home and the receipt of several anonymous calls on the previous evening threatening injury to him and his four children if he testified at trial, as well as the witness having been accosted outside the courtroom that morning by persons he could not or would not identify, who also requested that he change his testimony.

The Superior Court found the closure of the courtroom to have been unjustified based upon two errors by the trial judge. First, the trial judge accepted the representation by the prosecutor without personally interviewing the witness, either in court or *in camera*, and without making an independent assessment of the credibility of the witness with respect to the allegations of intimidation. Second, the trial judge failed to explain on the record why closure of the courtroom was necessary as compared to other alternatives such as criminal prosecution of the intimidators or augmented courtroom security.

The record must establish whether or not there was an actual denial of access to the courtroom. The defendant in *Commonwealth v. Rega*, ___ Pa. ___, 70 A.3d 777 (2013), sought relief based upon his allegation that a trial session was held on a Saturday, that the courthouse doors were locked and that spectators were excluded. The Supreme Court held that Rega was not entitled to relief since he failed to show that there were not spectators in the courtroom during the Saturday session or that any spectators were turned away from the courthouse.

Other jurisdictions:

INTRODUCTION: As previously stated, before persons may be excluded from the courtroom, specific factual findings are warranted setting forth the basis for the court's conclusions that a witness has been intimidated and that exclusion of one or more spectators is an appropriate response to the intimidation. While there is not extensive case law in Pennsylvania on this issue, appellate courts from around the country have upheld orders excluding spectators when a legally sufficient justification has been presented. We offer examples of such rulings that may be found to be persuasive authority.

People v. Frost, 100 N.Y.2d 129, 790 N.E.2d 1182, 760 N.Y.S.2d 753 (2003).

Before trial in a New York murder case, the prosecution, pursuant to a state statute similar to Pa.R.Crim.P. 573(F), moved for a protective order. In support of its motion seeking to protect the

identities of witnesses prior to trial, the prosecution noted defendant's criminal history, the criminal history of defendant's father and step-brother, the defendant's family's attempt to discourage potential witnesses to the instant crime, and the lack of cooperation by the community into prior investigations of crimes believed to have been committed by defendant. The prosecution requested that the hearing be held *in camera* outside the presence of defendant or his attorney. After the hearing the trial court granted the prosecution's motion and directed that the identities of certain witnesses not be revealed during *voir dire*, and that disclosure of relevant discovery material be delayed and redacted to protect witnesses' identities.

At trial, the prosecution moved on four separate occasions for closure of the courtroom during the testimony of certain witnesses. The trial court conducted an *ex parte* hearing on each occasion to determine whether the courtroom should be closed. The defendant and his counsel were excluded from these hearings. At the first such hearing, the trial court ordered the closure of the courtroom during the witness's testimony and, to protect the witness's identity, allowed him to testify under the fictitious name Steven Knight. The court also issued a protective order as to his address and occupation. At subsequent *ex parte* hearings, the trial court determined that the courtroom would be closed for the testimony of two additional witnesses.

The highest court in New York, the Court of Appeals, unanimously upheld defendant's conviction. The Court of Appeals ruled that the evidence elicited at the hearings pertaining to the potential witnesses' extreme fear of testifying in open court was legally sufficient. The court also specifically affirmed the trial court rulings excluding defendant and his counsel from the *ex parte* hearings, permitting the testimony of the prosecution witness under a fictitious name, and closing the courtroom during the testimony of three witnesses.

State v. Bobo, 770 N.W.2d 129 (Minn. 2009).

The State presented evidence, in a hearing outside the presence of the jury, that both James [witness] and Bobo [defendant] were members of the Rolling 30's Bloods gang and that, on the date James was scheduled to testify, gang members were present at the trial. The State also presented evidence regarding letters arguably intended to influence James not to testify, as well as double hearsay regarding alleged conversations in which Bobo's friends or relatives encouraged James not to testify. According to the police investigator, who spoke to James after James refused to testify, James decided not to testify after facing Bobo directly and seeing all of the other people in the courtroom. The officer specifically testified that James claimed the reason he did not testify was because he was afraid after seeing Bobo and all the other people in the courtroom.

The trial court barred the entire public during the testimony by James. The trial court considered excluding specific individuals but rejected the option as not feasible. The trial court rejected having someone standing at the door to the courtroom, attempting to identify those who were Rolling 30's Bloods gang members or who might otherwise intimidate James, as ineffective and potentially an invasion of privacy.

The Supreme Court of Minnesota ruled that the trial court appropriately considered alternatives and found the temporary closing of the courtroom to the public during James' testimony to be the only reasonable alternative. "[W]e conclude that there was sufficient evidence to support the [trial] court's finding that keeping the courtroom open was substantially likely to jeopardize the overriding interest that James testify truthfully at trial."

State v. Drummond, 111 Ohio St.3d 14, 854 N.E.2d 1038 (2006).

The trial court excluded all spectators from the courtroom after an incident where there had been an altercation between a spectator and courtroom deputies and after a second incident had occurred in chambers involving the trial court and a spectator. The trial court excluded members of the public and the defendant's family, but did so only for the length of a single cross-examination and two other witnesses' testimony. The trial court permitted media representatives to remain in the courtroom throughout the testimony of these witnesses.

The Supreme Court of Ohio held that the trial court's interest in maintaining courtroom security and protecting witness safety supported the trial court's limited closure of the courtroom. There had been a physical altercation between a spectator and courtroom deputies, and a second incident occurred in the judge's chambers. The trial court also stated that "the fear of retaliation expressed by various witnesses" was a basis for its action. The Supreme Court acknowledged the dangerous nature of gang violence and the genuine need to protect witnesses testifying against gang members from the deadly threat of retaliation. The closure was no broader than necessary.

State v. Woods, 2011 Ohio 817 (Ct. App. 8th Dist. February 24, 2011).

The Court of Appeals of Ohio distinguished *State v. Drummond*, and held that the trial court committed reversible error when the court excluded all persons from the courtroom during the testimony of defendant's accomplice. In this case, there was no physical altercation, no expression of fear by the witness, the exclusion was overbroad (all spectators and the news media), and alternatives to closure of the courtroom were not adequately considered.

Commonwealth v. Young, 899 N.E.2d 838 (Mass. App. Ct.), *review denied*, 453 Mass. 1105, 902 N.E.2d 947 (2009), *habeas corpus review denied*, *Young v. Dickhaut*, 2012 WL 3638824 (D. Mass. Aug. 22, 2012).

A witness, Greene, was hesitant to testify. The prosecution identified the defendant's brother as a "specific concern" for Greene. The judge also inquired of Greene, outside the presence of the jury, if there was anything that she particularly was concerned about, and Greene replied, "I know some of his family." Greene then acknowledged that "his family" referred to the defendant's family, including the defendant's brothers. Before Greene testified, the judge allowed the defendant's brother to be excluded from the courtroom during Greene's testimony.

The Massachusetts appellate court noted that no person other than defendant's brother was excluded from the courtroom, and that the record revealed that the brother's presence caused apparent fearfulness on the part of Greene. The appellate court held that the trial judge had not abused her discretion in ordering this limited exclusion.

Sowell v. Sheets, 2011 WL 4914911 (S.D. Ohio Oct. 14, 2011) (Deavers, USMJ), *report of Magistrate Judge Adopted*, *Sowell v. Sheets*, 2011 WL 6258332 (S.D. Ohio Dec. 15, 2011) (Graham, J.).

The exclusion from the courtroom of defendant's family member who made threatening gesture with fingers, simulating a weapon, was upheld on federal *habeas corpus* review.

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Chapter 3g: Protection of identity of undercover police officers

A specialized body of case law exists where spectators have been excluded from a courtroom in order to conceal the identity of an undercover police officer. Courts have recognized two distinct interests that have been found deserving of protection. The first interest is the protection of the life and safety of the undercover officer. Second, the state has an interest in maintaining the continued effectiveness of an undercover officer who would soon be returning in an undercover capacity to the same neighborhood where the defendant had been arrested. Courts have described these interests as "extremely substantial," *Ayala v. Speckard*, 131 F.3d 62, 72 (2nd Cir. 1997) (*en banc*), *cert denied*, 524 U.S. 958, 118 S. Ct. 2380, 141 L. Ed. 2d 747 (1998), and as "overriding," *Brown v. Kuhlmann,* 142 F.3d 529, 537 (2nd Cir. 1998).

In addressing the safety of the police officer, courts look to whether associates of the defendant or current targets of investigation were present in the courtroom, whether specific threats had been received by the officer, and whether the officer's claims of safety concerns had been corroborated by efforts made by the officer to conceal his identity and visibility in and around the courthouse, such as by using side entrances, not walking through public hallways and remaining secluded. If the officer is planning to return to the specific neighborhood where the defendant had been arrested, that fact is relevant both as to safety and as to the continued effectiveness of the undercover officer. However a safety concern may be found even if the officer is not returning to the same neighborhood after the trial.

Most of these cases have been decided on direct review in the courts of New York and on *habeas corpus* review in the federal district and appellate courts covering New York. Some cases also permit the undercover officer to testify under an assumed name.

See generally, People v. Ramos, 90 N.Y.2d 490, 497, 662 N.Y.S.2d 739, 685 N.E.2d 492, *cert. denied sub nom., Ayala v. New York*, 522 U.S. 1002, 118 S. Ct. 574, 139 L. Ed. 2d 413 (1997) (exclusion of spectators); *People v. Alvarez,* 51 A.D.3d 167, 854 N.Y.S.2d 70 (App. Div. 1st Dept. 2008), *leave to appeal denied*, 11 N.Y.3d 785, 896 N.E.2d 97, 866 N.Y.S.2d 6 (2008) (exclusion of defendant's girlfriend; testimony under assumed name); *Ayala v. Speckard*, 131 F.3d 62 (2nd Cir. 1997) (*en banc*), *cert. denied*, 524 U.S. 958, 118 S. Ct. 2380, 141 L. Ed. 2d 747 (1998) (exclusion of spectators); *Vidal v. Williams*, 31 F.3d 67, 69 (2nd Cir. 1994), *cert denied*, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 672 (1995) (insufficient justification for exclusion of spectators); *Brown v. Kuhlmann*, 142 F.3d 529 (2nd Cir. 1998) (exclusion of spectators); *Brown v. Andrews*, 180 F.3d 403 (2nd Cir. 1999) (insufficient justification for exclusion of spectators); *Nieblas v. Smith*, 204 F.3d 29 (2nd Cir. 1999) (exclusion of spectators); *Brown v. Artuz*, 283 F.3d 492 (2nd Cir. 2002) (exclusion of spectators); *Sevencan v. Herbert*, 342 F.3d 69 (2nd Cir. 2003), *cert. denied,* 540 U.S. 1197, 124 S. Ct. 1453, 158 L. Ed. 2d 111 (2004) (exclusion of spectators including defendant's wife); *Rodriguez v. Miller*, 537 F.3d 102 (2nd Cir. 2008) (exclusion of spectators including members of defendant's family); *Cotto v. Fisher*, 2012 WL 5500575 (S.D. N.Y. August 23, 2012) (Dolinger, U.S.M.J.), *Report of United States Magistrate Judge adopted in its entirety*, *Cotto v. Fisher*, 2012 WL 5499890 (S.D. N.Y. November 12, 2012) (Scheindlin, J.) (closure of courtroom; officer permitted to withhold his name and to identify himself only by his badge number; defendant's mother and girlfriend permitted to remain in

courtroom; trial transcript was publicly available); *Martinez v. Brown*, 2009 WL 1585546 (S.D. N.Y. 2009) (Gorenstein, U.S.M.J.), *Report of United States Magistrate Judge adopted in its entirety*, 2009 WL 2223533 (S.D. N.Y. July 27, 2009) (Berman, J.) (officer permitted to withhold his name and to identify himself only by his badge number).

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Chapter 3h-1: Testimony from Outside the Courtroom: Testimony by a child witness

Statutory authority in Pennsylvania permitting child witnesses to testify from locations outside the courtroom can be found at 42 Pa.C.S. § 5984.1 (use of recorded testimony "in any prosecution or adjudication involving a child victim or child material witness"), and at 42 Pa.C.S. § 5985 (testimony may be taken "in any prosecution or adjudication involving a child victim or child material witness" in a room other than the courtroom "transmitted by a contemporaneous alternative method").

These statutes prescribe detailed conditions for the admissibility of such testimony, including but not limited to the following:

1. These statutes are not limited to testimony from a child who is the "victim" of a crime. The statutes apply both to a "child victim" and to a "child material witness."

2. Although these statutes are most often used for testimony by victims of sexual assaults, nothing in the statutes limits their applicability to the prosecution of sexual offenses. These statutes may be invoked in any proceeding "involving a child victim or child material witness." 42 Pa.C.S. §§ 5984.1(a), 5985(a).

3. These statutes contain requirements as to who may be present, direct the court to "ensure that the child victim or material witness cannot hear or see the defendant," and require that there be adequate opportunity for the defendant and defense counsel to communicate.

4. Before permitting such a form of testimony, "the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate." Procedures by which the court makes that determination are set forth in the statutes.

Legal discussion:

In *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), the United States Supreme Court upheld the procedure by which child witnesses were permitted to testify by one-way, closed-circuit television. The Court held that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there was no dispute that the child witnesses testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, the Court concluded that, to the extent that a proper finding of

necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

See also *Commonwealth v. Geiger,* 944 A.2d 85, 96 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009) (Section 5984.1 does not violate defendant's right to confrontation or due process. The trial court properly allowed child victims to testify via videotape, after hearing testimony from psychiatric therapist and finding that a face-to-face confrontation with their alleged abusers would cause "severe emotional distress.")

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Chapter 3h-2: Testimony from Outside the Courtroom: Unavailable adult witness

The statutes found at 42 Pa.C.S. § 5984.1 and at 42 Pa.C.S. § 5985 apply only to child witnesses. May a court utilize similar procedures with respect to an adult witness? Courts considering the use of remote location testimony from unavailable adult witnesses must address two issues:

1. Does the court have the authority to permit an adult to testify from a remote location?

2. How does the court ensure the defendant's right to confront the witness?

As a threshold matter, the court must decide whether the absence of specific statutory authority addressing adult witnesses reflects a legislative intent to limit the court's use of remote location testimony to child witnesses. Or, does a court have inherent authority to formulate procedures for taking the testimony of an adult witness who is unable to be present in the courtroom?

While no Pennsylvania appellate decision explicitly addresses whether a court has the inherent authority to receive testimony from a remote location by an unavailable adult witness, persuasive authority may be found in rulings from two other jurisdictions.

The trial court's opinion in *United States v. Gigante*, 971 F. Supp. 755 (E.D. N.Y. 1997), addressed whether the court had the inherent authority to utilize closed circuit television for the testimony of a witness in the absence of specific authority in the Federal Rules of Criminal Procedure. The trial judge ruled that he had such authority. The Court of Appeals for the Second Circuit, in affirming the conviction, did not address that issue. *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1114, 120 S. Ct. 931, 145 L. Ed. 2d 811 (2000).

The highest court of New York, the Court of Appeals, in a divided ruling, upheld the authority of the trial court to permit testimony by two way video conferencing where the 83-year-old victim was too ill to travel from California to New York. The only issue addressed was the power of the court to utilize such a procedure in the absence of an explicit grant of authority. *People v. Wrotten*, 14 N.Y.3d 33, 923 N.E.2d 1099, 896 N.Y.S.2d 711 (2009), *cert denied*, ___ U.S. ___, 130 S. Ct. 2520, 177 L. Ed. 2d 316 (2010).

Although the Superior Court in *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009), *appeal denied*, 608 Pa. 614, 8 A.3d 340 (2010), did not specifically address whether the court has inherent power to establish procedures to receive the testimony of an unavailable adult witness, the *Atkinson* court did address the procedures for protecting the defendant's right to confront the witnesses against him. The Superior Court held that Atkinson's right to confront the witness against him had been violated (but the error was harmless) when an incarcerated prisoner was permitted to testify at the suppression hearing by use of a two-way videoconferencing system. The Superior Court held that there was an insufficient record to establish a "compelling state interest" justifying the absence of live testimony. The court distinguished cases in which there had been a showing of

emotional damage to a child witness and noted that other jurisdictions had permitted substitutes for live testimony where a witness was seriously ill and unable to travel or located out of the country. *See e.g., United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 555 U.S. 1170, 129 S. Ct. 1312, 173 L. Ed. 2d 584 (2009) (witness in Saudi Arabia); *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007), *cert. denied*, 553 U.S. 1020, 128 S. Ct. 2084, 170 L. Ed. 2d 820 (2008) (terminally ill witness); *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001), *cert. denied,* 535 U.S. 958, 122 S. Ct. 1367, 152 L. Ed. 2d 360, (witness in Argentina); *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1114, 120 S. Ct. 931, 145 L. Ed. 2d 811 (2000) (witness was in the federal witness protection program at a secret location and was also in the final stages of fatal cancer); *Kramer v. State*, 277 P.3d 88 (Wyo.), *cert. denied*, ___ U.S. ___, 133 S. Ct. 483; 184 L. Ed. 2d 303 (2012) (witness in mental hospital in another state); Compare *Bush v. State*, 193 P.3d 203 (Wyo. 2008), *cert. denied*, 566 U.S. 1185, 129 S. Ct. 1985, 173 L. Ed. 2d 1090 (2009) (husband was seriously ill and located in another state, but wife should not have been permitted to testify by video teleconference); *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (witness in Australia, but justification for video testimony not established).

State v. Johnson, 195 Ohio App. 3d 59, 958 N.E.2d 977 (Ct. App. 1st Dist. 2011), *appeal denied*, 131 Ohio St. 3d 1437, 960 N.E.2d 987 (2012), is particularly persuasive regarding the use of these legal principles in a case involving severe witness intimidation.

Johnson was on trial for murder. There was extensive intimidation of prosecution witnesses James, Leaks and Higgins both inside and outside the courtroom.

The assistant prosecuting attorney informed the court that following the lunch recess, 15 young men had walked into the courtroom and had sat down behind him and Detective Luke so that they could see the witnesses and that they were all still sitting in the courtroom in an effort to intimidate the state's witnesses from testifying.

James failed to appear to testify at the trial. A warrant was issued for the arrest of James. Detective Luke explained to the court that when the police had arrived to arrest James, there were numerous young men congregated in front of James's apartment. When one of the officers had asked the young men to leave, one young man had told the officers that they would see them in court.

When the officers knocked on James's apartment door, they were met by James's wife and son. James's wife told police that following James's appearance in court the previous day, "there were carloads of boys that were driving by with their fingers and/or guns or both out of the window saying, 'David James, you show up to court, pow pow. David James, you show up to court, pow pow.'" James told his wife, "I don't care what happens, this is a death wish, I'm just not going, I can't go." As a result, the police had been unable to locate James.

The detective told the court that she had witnessed some intimidation from these young men the previous day, when she was with another state's witness, Leaks, in the hallway outside the

courtroom. The young men were all tapping their feet, looking at Leaks, and making gestures with their hands. She told the court that she had not been aware of everything because she was not paying close attention, but that Leaks had known what it meant and that he was so intimidated by the young men that he had asked her to place him in handcuffs. For the remainder of the day, she and Leaks had acted as though Leaks had been handcuffed, just to get through the situation.

Based on the previous presence of 15 young males in the courtroom, the prosecutor sought permission from the court to present the testimony of witnesses by two-way closed circuit television. Counsel for Johnson opposed the request, noting that at the current moment defendant's family and friends were not present in the courtroom. The trial court denied the prosecutor's motion.

The state then called Higgins to testify. As soon as Higgins was brought into the courtroom, 15 to 20 young individuals walked into the courtroom. The assistant prosecuting attorney immediately brought the matter to the court's attention at a sidebar conference, renewing his motion that the witnesses be permitted to testify by two-way closed-circuit television. This time the trial court granted the motion. The court made a factual finding that the entrance into the courtroom by the young men, simultaneously with the arrival of the witness, constituted an effort to intimidate the witnesses.

The Ohio Court of Appeals made the following rulings:

1. The ruling in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), was not limited to child witnesses, but could be extended to include adult witnesses.

2. It was not necessary for there to be a state statute codifying the state's interest in obtaining reliable testimony from adult witnesses while protecting the safety of those witnesses.

3. In light of the circumstances of the case, including the observations and the factual findings by the trial court, testimony by two-way closed circuit television was necessary to further that important state interest.

4. The manner in which the testimony was presented protected defendant's right to cross-examine the witnesses and enabled the jury to evaluate the credibility of the witnesses.

In adjudicating these issues, the court needs to consider the effect of state constitutional amendments to Article I, § 9 (removing the former requirement that the confrontation of witnesses be "face to face") and to Article V, § 10(c) (authorizing the General Assembly to enact legislation

providing for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or closed-circuit television)
The Pennsylvania Constitution now affords the same protection as its federal counterpart with regard to the Confrontation Clause. *See*, *Commonwealth v. Geiger,* 944 A.2d 85, 97 n.6 (Pa. Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009); *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008). There is no longer any greater protection under the Pennsylvania Constitution.

Pa.R.Crim.P. 119 does not authorize the use of two-way simultaneous audio-visual communication at a trial, absent the defendant's consent. However, neither Rule 119 nor the Comment to the Rule addresses either the statutes permitting child victims and child material witnesses to testify from remote locations or the cases upholding those statutes. The authority to enact such statutes was provided to the General Assembly by the previously cited state constitutional amendment to Article V, § 10(c).

##

Chapter 3h-3: Testimony from Outside the Courtroom: Preservation of testimony

An intimidated witness may communicate his or her intent to leave the jurisdiction. It may be necessary to preserve the testimony of that witness prior to the commencement of the trial.

Pa.R.Crim.P. 500 and 501 authorize the preservation of the testimony "of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved." The phrase "may be unavailable" is defined in the Comment to Rule 500 as "situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or may become incompetent to testify for any legally sufficient reason."

Rule 500(a)(4) contemplates that the preserved testimony should be taken in the presence of the defendant and defense counsel. With defendant and counsel present, there is no issue regarding the right to confront the witness. This is similar to Fed.R.Crim.P. 15, which affords the defendant a right to be present.

Commonwealth v. Selenski, 996 A.2d 494 (Pa. Super. 2010), *appeal denied*, ___ Pa. ___, 64 A.3d 631 (2013), held that there is no right of public access to proceedings under Pa.R.Crim.P. 500 to preserve the testimony of a witness. Any transcript and tape recording are not documents attendant to a judicial proceeding until such time as it becomes necessary to offer and present the preserved testimony during the trial or other related proceedings.

##

Chapter 4a: Sealing Arrest Warrant Information

Effective March 1, 2014, the Rules of Criminal Procedure were amended to permit arrest warrant information to remain under seal, and not to be provided to a defendant, when disclosure could result in endangering witnesses.

"Arrest warrant information," defined by Pa.R.Crim.P. 513 as the "criminal complaint, . . . arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case," is generally available to the public after the warrant is issued by the issuing authority. Rule 513 has now been amended to permit inspection and dissemination of arrest warrant information to be delayed, if the issuing authority finds good cause to do so, for a period of 72 hours or until receipt of notice by the issuing authority that the warrant has been executed, whichever occurs first. Good cause must be averred by the affiant or attorney for the Commonwealth in the affidavit of probable cause.

In addition, newly enacted Rule 513.1 authorizes a Common Pleas Court judge (or appellate court judge or justice) to seal the arrest warrant information upon a showing of good cause in the affidavit and a request by the attorney for the Commonwealth. The information may be sealed for up to sixty days, and an unlimited number of extensions of thirty days each. When the defendant is arrested, a copy of the arrest warrant information shall be given to him at the preliminary arraignment. However, the judge, on motion of the attorney for the Commonwealth and for good cause shown at a hearing, may order that the defendant not be given a copy of the sealed arrest warrant information, in whole or in part, for periods of not more than 30 days, but in no case shall the delay extend beyond the date of the preliminary hearing. The Comment to the Rule provides, "The judge or justice may order that either the whole or part of the arrest warrant information be kept from the defendant. This provision should only be used in extraordinary circumstances in which there is considerable risk to public safety or the safety of individual witnesses."

##

Chapter 4b-1: Contempt of Court: Direct criminal contempt

The relevant portions of the statutory scheme for contempt of court are found at 42 Pa.C.S. §§ 4132-4136. *See also*, Pa.R.Crim.P. 140 for the rules governing contempt of court in proceedings before the minor judiciary. A comprehensive analysis of the law of contempt is beyond the scope of this bench book. The following principles may be of assistance to the judge in a case of witness or juror intimidation.

Direct criminal contempt is addressed at 42 Pa.C.S. § 4132 and includes "[t]he misbehavior of any person in the presence of the court, thereby obstructing the administration of justice." 42 Pa.C.S. § 4132(3).

"A conviction pursuant to section 4132(3) requires proof beyond a reasonable doubt: (1) of misconduct, (2) in the presence of the court, (3) committed with the intent to obstruct the proceedings, (4) which obstructs the administration of justice." *Commonwealth v. Falana*, 548 Pa. 156, 161, 696 A.2d 126, 128 (1997).

"In the presence of the court" does not necessarily require that the court witness the intimidating conduct. In *Falana, supra*, after Falana was sentenced, and as he was leaving the courtroom, Falana walked by the row where the victim was seated. He stated to her, "I'll be out one day." The trial court held a hearing, and after a determination of the facts, found Falana in direct contempt of court and imposed sentence.

The Supreme Court of Pennsylvania upheld the contempt sanction holding that "acts such as jury tampering and witness intimidation that occur outside the physical presence of the court, but that interfere with its immediate business, are punishable as contempt." *Id.* at 162, 696 A.2d at 129. Falana argued that he did not engage in misconduct "in the presence of the court" because the trial judge did not hear Falana's remarks. The Supreme Court disagreed. "[M]isconduct occurs in the presence of the court if the court itself witnesses the conduct or if the conduct occurs outside the courtroom but so near thereto that it obstructs the administration of justice. Because an individual can be cited for contempt based on statements made outside the courtroom, it follows that when an individual makes a remark in the courtroom while the judge is physically present, he cannot avoid a conviction for contempt simply because the judge did not hear him speak the words in question." *Id.* at 162, 696 A.2d at 129 (citations omitted).

Commonwealth v. Falana also addresses the element of contempt that requires that the conduct "obstruct[ed] the administration of justice." Falana had argued that he did not obstruct the administration of justice in this case because he made the remark after the court completed the sentencing hearing and his words did not disrupt the proceedings. A 4-2 majority of the Supreme Court disagreed:

> An obstruction of the administration of justice requires a showing of actual, imminent prejudice to a fair proceeding or the preservation of the court's authority.

> By uttering a threat in the courtroom and in the presence of the judge, [Falana] indicated that his conviction and sentencing would not deter him from harming the victim. Through his words, he belittled the trial court's attempt to administer justice and protect the person he had violently attacked. Furthermore, the fact that [Falana] threatened a witness who had just testified against him made it especially important that the court vindicate its authority by holding him in contempt. To have permitted [Falana] to use the courtroom to intimidate his victim, and thereby possibly deter others from testifying in the future, would clearly obstruct the efficient administration of justice and demean the court's authority. Accordingly, we hold that threats made in a courtroom in the presence of a judge may constitute a sufficient basis for a finding of criminal contempt, even if the judicial proceeding has concluded.

Id. at 163, 696 A.2d at 129 (citations omitted).

The Supreme Court did not address whether intimidating conduct that occurs when the judge is not in the courtroom constitutes direct criminal contempt. "We granted allocatur on the limited issue of whether the facts of this case provide a sufficient basis for a finding of contempt. Therefore, we do not reach the issue of whether similar conduct in the courtroom, in the presence of court officers, but not in the presence of the judge, may constitute contempt." *Id.* at 163 n.5, 696 A.2d at 129 n.5.

##

Chapter 4b-2: Contempt of Court: Direct criminal contempt–procedural issues

Direct criminal contempt may be punished immediately and summarily, so long as all of the elements of the misconduct were personally observed by the trial judge. Proceedings should take place outside the presence of the jury. Even when the court is proceeding summarily, the alleged contemnor has a right to counsel and must be afforded an opportunity to be heard in his or her own defense. The court should make factual findings upon the record describing the contumacious conduct before making a finding of guilt. Guilt must be proven beyond a reasonable doubt. The contemnor should be granted an opportunity to speak prior to the imposition of any punishment. When imposing sentence, the court should address the factors set forth in the Sentencing Code as would be the case in any other sentencing proceeding.

If the trial judge's personal observations are not sufficient to support a finding of direct criminal contempt, and the court needs to hear testimony from at least one witness, then a summary proceeding is not permissible. In such an instance, the court must hold a hearing at which the alleged contemnor is entitled to counsel, to cross-examine witnesses, to call witnesses on his behalf, and to testify. *Commonwealth v. Moody,* 46 A.3d 765 (Pa. Super. 2012), appeal granted, ___ Pa. ___, 79 A.3d 1093 (2013).

In *Moody*, during a preliminary hearing in a homicide case, a spectator began screaming when the defendant's mother was called to testify, inciting two other spectators to attack the witness. The court commenced contempt proceedings against all three spectators. Although the judge observed some of the misconduct, he needed to take testimony from the court crier to establish the contempt offenses. This was done without furnishing counsel to the alleged contemnors, and without giving them a chance to cross-examine the crier or call their own witnesses. In vacating the contempt sentences, Superior Court stated: "Because the trial court felt it necessary to take evidence from a witness, the court crier, the proceeding was not and should not have been deemed a summary proceeding."

When the alleged contemnor does not have the right to a jury trial, the sentence may not exceed six months imprisonment. However, consecutive sentences for multiple instances of criminal contempt, that in the aggregate exceed six months, under certain circumstances will not violate this rule. In the case of direct criminal contempt if there are (1) multiple acts of contumacious conduct, and (2) if the court adjudicates the contemnor and imposes sentence promptly after the occurrence of each misconduct, then separate sentences of six months or less may be imposed without a jury trial, and each successive individual sentence may be directed to be served consecutively. *Commonwealth v. Owens*, 496 Pa. 16, 436 A.2d 129 (1981). If the judge does not adjudicate the alleged contempts immediately, but defers the hearing, ruling and sentencing until after the trial, then, in the absence of a jury trial, the aggregate sentence may not exceed six months imprisonment. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974). *See also, Lewis v. United States*, 518 U.S. 322, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996).

For a direct criminal contempt, the Superior Court has required the imposition of both a minimum and maximum sentence. *Commonwealth v. Cain*, 432 Pa. Super. 47, 637 A.2d 656 (1994) (direct

criminal contempt for refusal to testify at trial); *Commonwealth v. Williams*, 753 A.2d 856 (Pa. Super.), *appeal denied*, 567 Pa. 713, 785 A.2d 89 (2000) (direct criminal contempt for cursing at judge); *Commonwealth v. Moody*, 46 A.3d 765 (Pa. Super. 2012), appeal granted, __ Pa. __, 79 A.3d 1093 (2013) (direct criminal contempt for verbal outbursts and physical assaults in the courtroom).

##

Chapter 4b-3: Contempt of Court: Indirect criminal contempt

Indirect criminal contempt is a violation of a court order that occurred outside the court's presence. As previously discussed, 18 Pa.C.S. § 4954 provides for protective orders that may be issued at any time during a criminal matter, permitting the trial judge to prohibit acts of intimidation directed at a witness or victim at locations outside the courtroom. 18 Pa.C.S. § 4955 states that a person violating such an order may be punished for any substantive crime that has been committed and/or for contempt of court. A violation of a protective order outside the presence of the court would be an indirect contempt.

42 Pa.C.S. § 4136 provides certain procedural rights to persons charged with indirect criminal contempt. However, in *Commonwealth v. McMullen*, 599 Pa. 435, 961 A.2d 842 (2008), the Supreme Court of Pennsylvania held that portions of section 4136 that granted certain defendants a right to a jury trial or that limited the amount of the fine or the length of imprisonment were unconstitutional. The Court concluded that the legislature had no authority to restrict the inherent power of a court to punish for contempt of court. The Court noted that the legislature had sought to regulate criminal contempt in other statutory provisions, citing 42 Pa.C.S. §§ 4132-4139. The Court did not address the constitutionality of the remaining statutes.

In light of the uncertainty of the state of the statutory law regarding indirect criminal contempt, further discussion is outside the scope of this bench book.

##

Chapter 4c-1: Admission of Hearsay Statements by Unavailable Witness: Introduction

A witness may be rendered unavailable by means of intimidation.

When a witness is unavailable, the court may permit the introduction of prior testimony of the unavailable witness pursuant to the conditions set forth in Pa.R.E. 804(b)(1) (Former Testimony), and the court may permit the introduction of the prior out-of-court statements by the unavailable witness pursuant to the conditions set forth in Pa.R.E. 804(b)(6) (Forfeiture by Wrongdoing).

Rule 804. Hearsay Exceptions; Declarant Unavailable.

a) ***Definition of Unavailability.*** "Unavailability as a witness" includes situations in which the declarant:

1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

b) ***Hearsay Exceptions*.** The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1) Former Testimony

2) Statement Under Belief of Impending Death

3) Statement Against Interest

4) Statement of Personal or Family History

5) Other Exceptions [Not Adopted]

6) Forfeiture by Wrongdoing

1. A factual record should be made in support of the court's ruling **admitting hearsay testimony.**

2. Where the Commonwealth seeks to admit a missing witness's prior recorded testimony, a "good faith" effort to locate the witness must be established. That which constitutes a "good faith" effort is a matter left to the discretion of the court. *Commonwealth v. Wayne*, 533 Pa. 614, 720 A.2d 456 (1998), *cert. denied*, 528 U.S. 834, 120 S. Ct. 94, 145 L. Ed. 2d 80 (1999) (good faith effort shown: detective spoke with witness's attorney on another case and was informed that witness failed to appear for a scheduled court appearance; search of witness's last known address was made to no avail; address listed on witness's driver's license and car registrations were also checked to no avail; detective contacted family members who said witness returned to his native Jamaica; cousin of witness told the detective that she had recently seen witness in Jamaica); *Commonwealth v. Douglas*, 558 Pa. 412, 737 A.2d 1188 (1999) (plurality opinion), *cert. denied*, 530 U.S. 1216, 120 S. Ct. 2220, 147 L. Ed. 2d 252 (2000) (no requirement that police set up surveillance of home of witness); *Commonwealth v. Lebo*, 795 A.2d 987 (Pa. Super. 2002) (witness in boot camp in South Carolina improperly found to be unavailable absent any evidence of efforts to procure her presence); *Consolidated Rail Corp. v. Delaware River Port Authority*, 880 A.2d 628 (Pa. Super. 2005), *appeal denied*, 587 Pa. 714, 898 A.2d.1071 (2006) (witness in witness protection program improperly found to be unavailable absent any evidence of efforts to procure his presence); *McCandless v. Vaughn*, 172 F.3d 255, 268 (3rd Cir. 1999) (efforts to locate sole eyewitness to a murder described as "casual").

3. "[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how

unpromising." *Hardy v. Cross*, 565 U.S. ___, ___, 132 S. Ct. 490, 495, 181 L. Ed. 2d 468, 474 (2011) (internal citation omitted).

4. It is not necessary for a witness to be dead or missing to be unavailable. A witness is unavailable under F.R.E. 804(b)(6), identical to Pa.R.E. 804(b)(6), or under the federal rule's common law predecessor if the witness is unwilling to testify by reason of a threat. *United States v. Aguiar*, 975 F.2d 45 (2nd Cir. 1992) (admitting statements of witness to police and prosecutor); *United States v. Scott*, 284 F.3d 758 (7th Cir.), *cert. denied*, 537 U.S. 1031, 123 S.Ct. 582, 154 L.Ed.2d 448 (2002) (admitting prior grand jury testimony of witness); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976*), cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977) (admitting prior grand jury testimony of witness); *United States v. Zlatogur*, 271 F.3d 1025 (11th Cir. 2001), *cert. denied*, 535 U.S. 946, 122 S.Ct. 1338, 152 L.Ed.2d 242 (2002) (admitting statements of witness to INS agent).

5. In a case arising under F.R.E. 804(b)(6), the United States District Court permitted the admission of the statements of a witness to a DEA agent following a factual finding that the witness had been threatened by the defendant. The District Court found the witness to be "unavailable" pursuant to F.R.E. 804(a)(2) ("an unavailable declarant is one who refuses to testify about the subject matter despite a court order to do so"). *United States v. Hernandez*, 2012 WL 1580454 (D. Hawaii 2012). The federal rules and Pennsylvania rules are identical in this regard.

##

Rule 804(b) Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

1. For purposes of criminal proceedings, this rule is based upon 42 Pa.C.S. § 5917.

2. The admission of preliminary hearing testimony at trial under Rule 804(b)(1) was analyzed by the Superior Court in *Commonwealth v. Stays*, 70 A.3d 1256 (Pa. Super. 2013). In *Stays*, victim Nasir Farlow was shot in the presence of Ivan Williams. Ivan Williams gave a written statement to the police identifying defendant Duane Stays as the shooter. Williams also identified a photo of Duane Stays, circled the picture, and signed his initials.

   At the preliminary hearing, Ivan Williams' testimony was vastly different than his statement to the police. Williams claimed that he did not know anybody in the courtroom, that he had not seen anybody at the time of the shooting. Williams also disavowed the statement he had given to the police. He conceded only that his signature appeared on the last page of the statement, while offering contradictory answers concerning the appearance of his initials on the remaining pages. He denied having signed the photo array. Duane Stays and his defense counsel were present at this hearing but declined to ask any questions on cross-examination.

   Between the time of the preliminary hearing and trial, Ivan Williams was murdered. At the trial of Duane Stays, the court reporter from the preliminary hearing read Ivan Williams' testimony from that hearing into the record. In addition, a police detective read Williams' statement from the police interview. The detective also testified that Williams had reviewed and signed the statement in its entirety.

   On appeal, defendant challenged the admissibility of the preliminary hearing testimony as well as the original statement and identification to the police. The Superior Court first ruled that the signed photo array and Williams' original written statement to the police were properly admitted at Stays' preliminary hearing pursuant to Pa.R.E. 803.1(1) (pertaining to prior inconsistent statements as substantive evidence).

The Superior Court held that Williams had been available for cross examination at the preliminary hearing; however, counsel for Stays had chosen not to cross-examine Williams. Since the evidence was properly admitted at the preliminary hearing, since Williams was now unavailable as a result of his having been murdered, and since counsel for Stays had an adequate opportunity to cross examine Williams at the preliminary hearing, the Superior Court ruled that the preliminary hearing testimony was admissible at trial pursuant to Pa.R.E. 804(b)(1).

3. Both Rule 804(b)(1) and the Confrontation Clause require that the defendant have had an "adequate opportunity" for cross examination at the prior proceeding for the testimony from that proceeding to be admissible at a subsequent trial. Unless a defendant can establish that he was deprived of "vital impeachment evidence" at the time of the prior proceeding, then he generally will be deemed to have had a full and fair opportunity for cross-examination. See *Commonwealth v. Leak*, 22 A.3d 1036, 1044 (Pa. Super.), *appeal denied*, 612 Pa. 707, 31 A.3d 291 (2011) (prior testimony admissible). See also *Commonwealth v. Bazemore*, 531 Pa. 532, 614 A.2d 684 (1992) (prior testimony not admissible; defense counsel not informed of witness's prior inconsistent statement, prior criminal record and potential pending charges); *Commonwealth v. Thompson*, 538 Pa. 297, 648 A.2d 315 (1994) (prior testimony admissible); *Commonwealth v. Wayne*, 533 Pa. 614, 720 A.2d 456 (1998), *cert. denied*, 528 U.S. 834, 120 S. Ct. 94, 145 L. Ed. 2d 80 (1999) (prior testimony admissible; prior inconsistent statement and prior criminal record disclosed at preliminary hearing); *Commonwealth v. Douglas*, 558 Pa. 412, 737 A.2d 1188 (1999) (plurality opinion), *cert. denied*, 530 U.S. 1216, 120 S. Ct. 2220, 147 L. Ed. 2d 252 (2000) (prior testimony admissible); *Commonwealth v. Paddy*, 569 Pa. 47, 800 A.2d 294 (2002) (prior testimony admissible; prior criminal record disclosed at preliminary hearing); *Commonwealth v. Wholaver*, 605 Pa. 325, 989 A.2d 883, *cert. denied*, ___ U.S. ___, 131 S. Ct. 332, 178 L. Ed. 2d 216 (2010) (prior testimony admissible; adequate cross-examination at preliminary hearing regarding bias, motive to lie, and other areas of impeachment); *Commonwealth v. Fink*, 791 A.2d 1235 (Pa. Super. 2002) (prior testimony admissible).

##

Rule 804(b) Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(6) Forfeiture by Wrongdoing: A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

1. To determine the admissibility of evidence under the analogous, and identical, federal rule, also numbered 804(b)(6), federal courts have **required that an evidentiary hearing be held** outside the jury's presence prior to the admission of the evidence in question. At the hearing, the prosecution must establish by a preponderance of the evidence that: (1) the defendant (or party against whom the out-of-court statement is offered) was involved in, or responsible for, procuring the unavailability of the declarant, and (2) the defendant acted with the intent of procuring the declarant's unavailability as an actual or potential witness. *See Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008) (discussing with approval trial court's use of preponderance standard while affirming admission of hearsay statement).

2. In a case arising under F.R.E. 804(b)(6), the United States District Court permitted the admission of the statements of a witness to a DEA agent following a factual finding that the witness had been threatened by the defendant. The District Court found the witness to be "unavailable" pursuant to F.R.E. 804(a)(2) ("an unavailable declarant is one who refuses to testify about the subject matter despite a court order to do so"). *United States v. Hernandez*, 2012 WL 1580454 (D. Hawaii 2012). The federal rules and Pennsylvania rules are identical in this regard.

3. The rule applies both to one who "engaged" in wrongdoing and also to one who "acquiesced" in wrongdoing. For that reason, courts have held that the wrongdoing of a conspirator may be imputed to the defendant if the wrongdoing was the result of a conspiracy involving the defendant, if the wrongdoing was within the scope of the conspiracy, was in furtherance of the conspiracy and the result of the wrongdoing was reasonably foreseeable to the defendant. *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 1278, 185 L. Ed. 2d 214 (2013); *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002), *cert. denied*, 537 U.S. 1134, 123 S. Ct. 918, 154 L. Ed. 2d 824 (2003); *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000). *See also Commonwealth v. Bey,* No. CP-51-CR-1100021-2002 (C.P. Philadelphia 2010), *aff'd per curiam*, 32 A.3d 819 (Pa. Super. 2011), *appeal denied*, 615 Pa. 771, 42 A.3d 290, *cert. denied*, __ U.S. __, 133 S.Ct. 319, 184 L.Ed.2d 156 (2012).

4. In a case where defendant is charged with murder, hearsay statements by the victim-declarant are admissible if it is established that the murder was committed with the **intent** of making the victim unavailable to testify.

   It is not sufficient merely to establish that the murder had the **effect** of making the victim unavailable. *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (emphasis added). The hearsay statements of the victim-declarant are admissible where the defendant's desire to prevent the victim from testifying was a "precipitating" and "substantial" reason why the defendant murdered the victim, even if such was not the defendant's exclusive motive. *United States v. Jackson*, 706 F.3d 264 (4th Cir.), *cert. denied*, ___ U.S. ___, 133 S. Ct. 2782, 186 L. Ed. 2d 229 (2013)

5. "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. . . . [T]he rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds. . . . That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington*, 547 U.S. 813, 833, 126 S. Ct. 2266, 2280, 165 L. Ed. 2d 224, 244 (2006) (internal quotations and citations omitted).

##

Chapter 4d: *In Camera* Proceeding in Defendant's Absence

In an appropriate case, it may be permissible to hold an *in camera* hearing with a witness, without the defendant being present, to explore a witness intimidation issue. In *Commonwealth v. Paddy*, 609 Pa. 272, 15 A.3d 431 (2011), defendant Paddy was convicted for killing Whaley, a witness to the "Panati Playground" murders committed by Paddy. In the trial of Paddy for the murder of Whaley, Murphy testified for the prosecution that he was involved in a conspiracy with defendant and others to transport Whaley to Maryland to prevent her from testifying against defendant in his trial for the Panati Playground murders. On cross-examination, Murphy changed his story and stated that his direct examination testimony was partially untrue. On redirect examination, his testimony was confused and contradictory. At the end of the day, Murphy attempted to speak to the prosecutor.

The prosecutor requested an *in camera* hearing, which the court held the following day in the presence of defense counsel and Murphy's counsel, but without defendant. Although trial counsel did not raise a formal objection to defendant's absence, she did inquire about defendant's right to be present. The trial court refused to allow defendant to be present during the *in camera* proceeding because no testimony was to be offered against him. The trial court directed the record of the *in camera* proceeding to be sealed and ordered defense counsel not to discuss what happened therein with defendant. Even if defense counsel objected to defendant's absence, it would have been overruled. During the *in camera* proceeding, Murphy testified that he had lied on cross-examination because he was afraid of defendant. The next day, Murphy testified again before the jury, returning to his initial direct examination testimony and admitting that on cross-examination he had said some things that were not true because he feared defendant.

The PCRA court concluded that trial counsel was not ineffective for failing to object to defendant's absence from the *in camera* proceeding. The Supreme Court affirmed and said [emphasis in original]:

> Following the *in camera* proceeding, Murphy again gave testimony before the jury, at which time he returned to his original story, which was not favorable to [defendant]; admitted that he had not told the truth on cross-examination; and confirmed his fear of [defendant]. These were the only issues that were addressed during the *in camera* proceeding. [Defendant] was present throughout Murphy's testimony before the jury, and he had the opportunity to cross-examine Murphy before and after the *in camera* proceeding. [Defendant's] counsel did, in fact, thoroughly and forcefully cross-examine Murphy before the jury. In deciding to hold an *in camera* proceeding, the trial court properly recognized that [defendant] was on trial for **murdering a witness** who planned to testify against him at an earlier murder trial. [Defendant] was not denied his right to confront Murphy, either before or after the *in camera* proceeding, and we cannot conclude that there is arguable merit to [defendant's] contention that trial counsel was ineffective for failing to formally object to [defendant's] absence from the *in camera* proceeding.

##

Chapter 4e: Admitting Acts of Intimidation to Prove Consciousness of Guilt

Acts intended to intimidate witnesses may be admissible at trial to establish a defendant's consciousness of guilt, and it may be reversible error to exclude such acts. In *Commonwealth v. Flamer*, 53 A.3d 82 (Pa. Super. 2012), defendant was charged with murder. At trial, the Commonwealth planned to call Abdul Taylor, to testify about his knowledge of the plot by defendant and others to kill the victim, Moment. Three months before trial, Taylor was shot and killed. The Commonwealth had evidence that showed that defendant conspired with others to kill Taylor to prevent Taylor from testifying in the Moment murder trial. Before the Moment murder trial, the Commonwealth filed a motion *in limine* seeking to introduce fifteen pieces of evidence to establish that defendant conspired with others to kill Taylor. The trial judge denied admission of most of the evidence; the Commonwealth filed an interlocutory appeal.

The Superior Court held that the trial court abused its discretion in excluding: (1) testimony of police officers who responded to the scene of Taylor's shooting; (2) testimony of the crime scene officers who examined the scene where Taylor was shot; (3) expert DNA testimony to identify a coconspirator's [the shooter's] DNA on evidence recovered from where Taylor was shot; (4) shooter's confession to the murder of Taylor; (5) the testimony of witness who spoke with the shooter, where shooter talked about a plot to kill Taylor because he "ratted out" defendant; (6) testimony from Taylor's mother and girlfriend regarding Taylor's fear about being killed because he came forward to police; (7) the relevant portions of raps written by defendant in prison; and (8) the relevant portion of phone conversation in which defendant discussed participation of shooter and discussions about Taylor.

Much of the opinion in *Flamer* is fact-specific, balancing the probative value of each individual piece of evidence against its prejudicial impact. However, the case is valid for a broader principle: specifically, that an attempt to intimidate (in this case, the successful murder of) a prosecution witness is admissible as evidence of consciousness of guilt.

Note that for evidence of intimidation to be admissible to show consciousness of guilt, there must be proof that defendant was in some measure responsible for those acts. However, in cases where there is no evidence that acts of intimidation were somehow attributable to the defendant, they may still be admissible to prove their effect on a witness who recants a prior statement or otherwise changes his testimony after the acts of intimidation. *Commonwealth v. Collins*, 549 Pa. 593, 702 A.2d 540 (1997), *cert. denied*, 525 U.S. 835, 119 S.Ct. 92, 142 L.Ed.2d 73 (1998); *Commonwealth v. Bryant*, 462 A.2d 785 (Pa. Super. 1983). When evidence is admitted solely for its effect on a witness, an appropriate limiting instruction should be given to the jury.

##

As outlined above, the out-of-court statements of a witness who recants at trial due to witness intimidation may often be admissible under the rules of evidence. Of course, a jury may reject the prior statement and believe the recantation. If the trial judge disagrees with such a jury finding on a matter important in a sentencing decision, may the judge rely on his own credibility determination when imposing sentence? The answer appears to be "yes" under *Commonwealth v. Stokes*, 38 A.3d 846 (Pa. Super. 2011). In *Stokes*, defendant was accused of shooting the victim. The jury convicted defendant of conspiracy to commit murder but acquitted of firearm offenses. The court, however, believed the victim's recanted statement identifying the defendant as the shooter, and found by a preponderance of the evidence that defendant possessed a firearm and relied on that finding in determining the sentence. Superior Court ruled that this was not improper.

The Superior Court opinion did not discuss whether the young victim recanted his testimony as a result of acts of intimidation or as a result of generalized fear. In any event, the powers of the judge to determine the applicable facts at sentencing, pursuant to a preponderance of the evidence standard, remain unconstrained by the recantation or by the verdict of the jury.

[*Stokes* also held that the sentencing court could apply the mandatory minimum sentence for visible possession of a firearm, 42 Pa.C.S. § 9712, notwithstanding the jury's verdict. That portion of the court's ruling is no longer good law in light of *Alleyne v. United States,* ___ U.S. ___, 137 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (requiring a jury finding for fact, other than a prior conviction, which brings about the imposition of a mandatory minimum sentence). However, nothing in *Alleyne* requires a jury finding for facts which permit the imposition of a discretionary, enhanced sentence pursuant to Pennsylvania's sentencing guidelines. *See generally Commonwealth v. Yuhasz*, 592 Pa. 120, 923 A.2d 1111 (2007).]

##

Chapter 4g: Indicting Grand Jury

The Rules of Criminal Procedure permit the courts of common pleas to proceed with indicting grand juries in cases in which witness intimidation has occurred, is occurring, or is likely to occur. *See* Pa.R.Crim.P. 556 *et seq*.

Each judicial district must petition the Supreme Court for permission to resume the use of an indicting grand jury.

For those districts that take advantage of this change in the rules, prosecutors will have a potent tool to combat witness intimidation. Each grand jury case will be presented to the grand jury *ex parte,* and if the grand jury returns an indictment, the case will move to trial without a preliminary hearing. This will eliminate many of the opportunities for witness intimidation.

##

Commonwealth v. Bey, No. CP-51-CR-1100021-2002 (C.P. Philadelphia 2010), *aff'd per curiam*, 32 A.3d 819 (Pa. Super. 2011), *appeal denied*, 615 Pa. 771, 42 A.3d 290, *cert. denied*, ___ U.S. ___, 133 S.Ct. 319, 184 L.Ed.2d 156 (2012).

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	PHILADELPHIA COUNTY
	:	COURT OF COMMON PLEAS
VS.	:	
	:	
HAKIM BEY,	:	922 EDA 2009
Appellant	:	CP-51-CR-1100021-2002;
	:	CP-51-CR-1100031-2002

OPINION

HUGHES, J.

PROCEDURAL HISTORY

On September 24, 2000, Moses Williams was shot and killed on the 2200 block of Cross Street in the City and County of Philadelphia. Brenis Drew sustained gunshots to both legs during the altercation. Three (3) eyewitnesses, Omar Morris ("Morris"), Duane Clinkscales ("Clinkscales"), and Chante Wright ("Wright"), gave statements to police, identifying Hakim Bey (appellant) as the shooter. On December 25, 2000, Morris was found dead of a gunshot wound to the head. The next day, Clinkscales, was treated for multiple gunshot wounds following a drive-by shooting. Hakim Bey was identified by Clinkscales as the shooter in the December 26, 2000 shooting incident, and as the person who shot Moses Williams[1]. After a grand jury investigation during which both Wright and Clinkscales testified, the appellant was arrested for the murder of Moses Williams and the attempted murder of Clinkscales. This matter was originally scheduled for trial on March 24, 2004, but Chante Wright failed to appear for

[1] After Moses Williams was killed, Clinkscales initially gave a statement, but did not identify Hakim Bey as the shooter. N.T. 9/23/08, pg. 149, and Commonwealth Exhibits 45 and 48.

trial, and at the Commonwealth's request, a *nolle pros* without prejudice was granted. On May 9, 2007, the *nolle pros* was lifted after Wright was located and placed in federal protective custody. Prior to trial, Chante Wright was murdered. On March 25, 2008, the Commonwealth filed a motion to introduce the statements of Chante Wright at trial pursuant to the Pennsylvania Rule of Evidence 804(b)(6), governing the admission of hearsay pursuant to forfeiture by wrongdoing. A full hearing was held, which resulted in the admission of the statements and preliminary hearing testimony of Chante Wright.

On September 30, 2008, a jury convicted the appellant of first degree murder for the death of Moses Williams; two (2) counts of aggravated assault against Brencis Drew and Duane Clinkscales; carrying firearms on a public street, and two (2) counts of possession of an instrument of crime (PIC). Although this matter was litigated as a capital case, following the penalty phase deliberations, appellant was sentenced to life imprisonment without the possibility of parole for the murder conviction and ten (10) to twenty (20) years for aggravated assault against Duane Clinkscales consecutive to the murder bill. On the remaining convictions appellant was sentenced to concurrent terms of ten (10) to twenty (20) years incarceration for aggravated assault against Brencis Drew, and two and one half (2 ½) to five (5) years incarceration each for the firearm conviction and PIC. Post-sentence motions were filed, duly considered and denied. This timely appeal follows.

LAW AND ANALYSIS

After a full review, appellant's claims of error are unsustainable.

Appellant asserts he is entitled to an arrest of judgment because the verdict was against the weight of the evidence and that the evidence was insufficient as a matter of law. These claims are underdeveloped and cannot support relief. *See, Commonwealth v. Williams,* 959 A.2d 1252

(Pa. Super. 2008) (in order to properly preserve a sufficiency claim, the 1925(b) statement must specify the elements upon which the evidence was insufficient). Appellant fails to state *which* of the convictions he is challenging, and *which* specific elements of the convictions were not met. *See, Commonwealth v. Gibbs,* 2009 Pa Super. 181 (a specific challenge to sufficiency is required where appellant was convicted of multiple crimes, each of which contains multiple elements). This same standard governs the examination of weight of the evidence claims. *See, Commonwealth v. Montalvo,* 956 A.2d 926 (Pa. 2008). Although appellant's challenge to weight and sufficiency fail to present a reviewable claim, these claims are unsustainable even if properly articulated as the weight and sufficiency of the evidence amply support the convictions.

In determining the sufficiency of evidence, the court must review the evidence submitted,

> along with any reasonable inferences that may be drawn from that evidence, in the light most favorable to the verdict winner. *Commonwealth v. Kimbrough,* 872 A.2d 1244, 1248 (Pa. Super. 2005), *appeal denied,* 887 A.2d 1240 (Pa. 2005). A conviction will be upheld if after review the appellate court finds that the jury could have found every element of the crime beyond a reasonable doubt. *Commonwealth v. Bullick,* 830 A.2d 998, 1000 (Pa. Super. 2003). The reviewing court may not weigh the evidence or substitute their judgment for that of the fact-finder. *Commonwealth v. DiStefano,* 782 A.2d 574, 582 (Pa. Super. 2001), *appeal denied,* 806 A.2d 858 (Pa. 2002). The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. *Commonwealth v. Reaser,* 851 A.2d 144, 147 (Pa. Super. 2004). 'Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.' *Commonwealth v. Sheppard,* 837 A.2d 555, 557 (Pa. Super. 2003), *citing Commonwealth v. Cassidy*, 668 A.2d 1143, 1144 (Pa. Super. 1995).

Commonwealth v. Miller, 955 A.2d 419, 421 (Pa. Super. 2008).

In order to sustain a conviction for first degree murder, the Commonwealth must prove beyond a reasonable doubt that (1) a human being was unlawfully killed; (2) the person accused

is responsible for the killing, and (3) the accused acted with specific intent to kill. 18 Pa.C.S. §2502; *Commonwealth v. Simpson*, 754 A.2d 1264, 1269 (Pa. 2000). Specific intent may be understood to mean "willful, deliberate, and premeditated…" and may be proven from circumstantial evidence. *Id.* Premeditation and the intent to kill, necessary for a finding of first degree murder, exists when the defendant has the "conscious purpose" to bring about death. *Commonwealth v. Drumheller,* 808 A.2d 893, 910 (Pa. 2002). In deciding whether the defendant had the specific intent to kill, the fact finder may consider all relevant evidence, including "[the defendant's] words and conduct and the attending circumstances that may show his state of mind." *Commonwealth v. Gibson,* 951 A.2d 1110, 1141 (Pa. 2008).

The evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, was sufficient to sustain appellant's conviction for first degree murder in the killing of Moses Williams. In the summer of 2000, Williams unwittingly fired shots at the appellant's brother, Saleem Bey. N.T. 9/23/08, pgs. 140-141; 200-201. Clinkscales attempted to persuade the appellant not to retaliate, and told the appellant that the shooting against Saleem was unintentional. *Id.* On September 24, 2000, Moses Williams ("Williams"; decedent/victim, also identified on the record as "Mo-Mo"); Brencis Drew ("Drew", also identified on the record as "Rudda"); Duane Clinkscales ("Clinkscales", also identified on the record as "Wiz" or "Wiz DeNiro"); Chante Wright ("Wright"), and Bernard Ruff ("Nard") all went to a bar to celebrate with other friends, Clinkscales' signing a contract for a new record label. N.T. 9/23/08, pgs. 124; 128. After the celebration, the friends divided into three (3) cars and went to meet another person at 23rd and Dickerson Streets. *Id.* at 83; 126; 201; 205. Moses Williams, Brenis Drew, Chante Wright, Duane Clinkscales and Bernard Ruff were all in the same car.[2] *Id.* at 79-80; 127-128;

[2] Williams was seated in the front passenger seat; Clinkscales was in the back driver side seat; Wright in back middle seat, and Ruff sat in the back passenger side seat. *Id.*

198. When they attempted to leave, the appellant walked up to the passenger side of the car and fired multiple shots into the vehicle. *Id.* Williams received multiple shots to the head; arm and chest, **while Drew was shot in both legs.** N.T. 9/24/08, pgs. 99-101. Despite being injured, Drew drove to a hospital where Williams was pronounced dead. *Id.* at 42-43. The appellant fled the scene. *See, Commonwealth v. Markman,* 916 A.2d 586 (Pa. 2007) (flight and concealment can be circumstantial proof of consciousness of guilt).

In evaluating whether appellant acted with the specific intent to kill, the fact finder may consider where on his body the victim sustained injury. Williams died from gunshot wounds to the head; arms and chest – all vital parts of the body. N.T. 9/24/08, pgs. 99-101. Specific intent to kill "may be inferred from the defendant's use of a deadly weapon upon a vital [part] of the victim's body." *Commonwealth v. Jones,* 886 A.2d 689, 704 (Pa. Super. 2005), *quoting Commonwealth v. Sattazahn,* 763 A.2d 359, 363 (Pa. 2000).

Several witnesses testified that the appellant was the person who shot Moses Williams. In addition to Duane Clinkscales, Bernard Ruff also identified Hakim Bey as the perpetrator. N.T. 9/23/08, pgs. 91; 131-133; 139. Chante Wright likewise identified appellant and testified before the grand jury as well as at the preliminary hearing. Although Chante Wright was murdered before trial, her testimony was presented to the jury via the Pennsylvania Rules of Evidence, Rule 804(b)(6) exception, which allows the admission of hearsay testimony when the defendant's conduct is responsible for the witnesses' absence from court.[3] N.T. 9/23/08, pgs. 195-206, and see *Commonwealth v. Laich*, 566 Pa. 19 (2001); *Commonwealth v. Paddy,* 569 Pa. 47 (2002), and *Commonwealth v. Santiago,*2000 Pa. Super. 94 (2003).

[3] A motion allowing the admissibility of this testimony was held on March 15, 2008 and September 5, 2008. *See, Notes and Testimony.*

Motive, although never an element of a crime, can be highly relevant in a criminal case. *Commonwealth v. Gwaltney,* 442 A.2d 236, 241 (Pa. 1982). Motive may help the jury to understand "what might otherwise appear to be…inexplicable brutal conduct." *Commonwealth v. Crawley,* 526 A.2d 334, 343 (Pa. 1987) (where defendant's angry responses when fired for failure to perform agreed upon carpentry work implied a motive for murder). By providing a basis for rational understanding, evidence of motive is admissible to support an inference as to intent or identity. *Id.* Evidence revealing the defendant's ill-will may support motive. *Commonwealth v. Puksar,* 740 A.2d 219 (Pa. 1999), *cert denied* 531 U.S. 829 (2000). This record establishes that appellant sought revenge for the shooting incident involving the decedent and the appellant's brother which occurred a few days prior to this shooting. N.T. 9/23/08, pgs. 140-142.

After considering all the relevant evidence, the jury logically concluded that the appellant possessed the specific intent to murder Moses Williams. Viewing the evidence presented in the light most favorable to the Commonwealth, the evidence was more than sufficient to support the conviction of first degree murder.

A person is guilty of aggravated assault, if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, or attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. 18 Pa.C.S.§2702(a)(1),(4). "Serious bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.§2301. A "[d]eadly weapon" is "[a]ny firearm,

whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury[.]" *Id.* Appellant is charged with two (2) counts of aggravated assault.

On September 24, 2000, appellant deliberately fired his weapon into the car of Brencis Drew. N.T. 9/24/08, pgs. 42-43. Appellant killed Moses Williams, and the barrage of bullets fired into the car also hit Drew in both legs. The fact that the appellant shot someone other than his intended target does not eviscerate his specific intent to fire a deadly weapon at someone. *See, Commonwealth v. Jackson,* 955 A.2d 441 (Pa. Super. 2009) (evidence was sufficient to sustain defendant's convictions for aggravated assault, as he specifically intended to cause serious bodily injury to his specific victim with a deadly weapon, and under the doctrine of transferred intent his intent was transferred to a group of other individuals nearby). Consequently, appellant is responsible for the crime of aggravated assault despite that fact that he did not intend to shoot Brencis Drew. The recklessness associated with the intentional firing into a car full of people is sufficient to support a conviction for aggravated assault. *See, Commonwealth v. Rogers,* 615 A.2d 55 (Pa. Super. 1992) (conviction for aggravated assault affirmed for murder and aggravated assault after defendant shot at the car of rival gang members, killing one of the car's occupants, and wounding the other).

Appellant is also responsible for the injuries sustained by Duane Clinkscales on December 26, 2000. As Clinkscales was walking along 27th and Wharton Streets in the City and County of Philadelphia, the appellant drove down the street, lowered the car window, and fired multiple times at Clinkscales. N.T. 9/23/08, pgs. 146; 147-148. Clinkscales was shot three (3) times in the chest; once in the right arm and twice in the back.[4] *Id.* at 149. There is no dispute that the appellant intended to cause serious bodily injury with a deadly weapon to Duane

[4] Following the death of Omar Morris, Clinkscales began wearing a bulletproof vest for fear of retaliation by the appellant. *Id.*

Clinkscales. *See, Rogers, supra.* The elements of aggravated assault are made out for both victims and no error is shown.

To sustain a conviction for possession of an instrument of crime, the court only needs to find that the appellant "possessed a handgun, pistol, or other firearm; that this item was an instrument of a crime, and that the appellant possessed this item with the intent to attempt to commit or to actually commit a crime." 18 Pa.C.S.A.§907(b). "An instrument of crime is (1) anything specially made or specially adapted for criminal use, or (2) anything commonly used for criminal purposes and possessed by the defendant under circumstances not manifestly appropriate for lawful uses it may have." *Commonwealth v. Brunson,* 938 A.2d 1057, 1062 (Pa. Super. 2007).

The appellant used handguns in his attacks on Moses Williams, Brenis Drew and Duane Clinkscales. N.T. 9/23/08, at 85; 131-132; 238-240; 9/24/08, pg. 39, and N.T. 9/23/08, pgs. 146; 147-148. This evidence is more than sufficient to convict the appellant of possession of an instrument of crime in the attacks upon Moses Williams, Brenis Drew and Duane Clinkscales.

Pursuant to the Uniform Firearms Act, 18 Pa.C.S.§6108, a person is prohibited from carrying a firearm, rifle, or shotgun at any time upon the public streets or upon any public property in the City of Philadelphia, unless he has a license to do so or such person is exempt from carrying a license under the Act. The appellant used a firearm illegally. *See, Commonwealth v. Baldwin*, 2009 Pa. LEXIS 2925 (conviction under section 6108 affirmed after defendant illegally possessed a loaded firearm in his pants pocket following an arrest on the streets of Philadelphia). A forty (40) caliber semi-automatic handgun was used in the attack of Moses Williams. N.T. 9/24/08, pg. 72. Four (4) pieces of ballistic evidence matching that caliber weapon were recovered from the scene of the shooting. Id. at 68-70-71. The fired casings

recovered were fired from the same forty (40) caliber weapon, which matched the ballistic evidence extracted from the decedent's body. *Id.* Duane Clinkscales and Chante Wright saw the appellant with a gun and saw him use that gun to shoot Moses Williams. N.T. 9/23/08, pgs.133; 238-240. Duane Clinkscales further testified that appellant shot him on December 26, 2000. N.T. 9/23/08, pgs. 146; 147-149. This evidence was more than sufficient for the jury to determine that the appellant illegally possessed a firearm in violation of Section 6108 of the Uniform Firearms Act.

The verdict was grounded on the total record, which was more than sufficient to establish all the necessary elements of each of the convictions. The jury's conclusions were well within the reasonable bounds of its discretion and should be affirmed.

The verdict was also not against the weight of the evidence. A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. An appellate court, therefore,

> reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The fact finder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings.

Commonwealth v. Diggs, 949 A.2d 873, 879-880 (Pa. 2008), *cert denied,* 129 S.Ct. 1580 (2009). The weight of the evidence is 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. *See, Commonwealth v. Lewis,* 911 A.2d 558 (Pa. Super. 2006); *see also, Commonwealth v. Sinnott,* 976 A.2d 1184 (Pa. Super. 2009) (any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances). The fact finder afforded the proper weight to the testimony and evidence presented. Appellant fails to state why the verdict was against the weight of the evidence or which, if any, testimony he is challenging. No relief is due on such a vague assertion of error. *See, Commonwealth v. Lemon,* 804 A.2d 34 (Pa. Super. 2002)(defendant's issue was too vague to permit meaningful review and were waived as vague where defendant stated that the jury's verdict was against the weight of the evidence, and the verdict was against the law).

The weight and sufficiency of the evidence, supported, rather than contradicted the verdict, and does not "shock one's sense of justice." *Commonwealth v. Cousar,* 928 A.2d 1026 (Pa. 2007).

The appellant further asserts that the trial court erred in admitting the statements of Chante Wright at trial. This claim is without merit.

In challenging an evidentiary ruling of the trial court, the standard of review for the appellate court is limited. *Commonwealth v. King,* 959 A.2d 405 (Pa. Super. 2008). A trial court's decision will not be reversed absent a clear abuse of discretion. *Commonwealth v. Bishop,* 936 A.2d 1136 (Pa. Super. 2007). An abuse of discretion "is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will." *Id.*

Appellant asserts that the trial court erred in admitting into evidence the statements of Chante Wright, a deceased witness. N.T. 9/23/08, pgs. 196-259. Chante Wright gave a full statement on October 24, 2000 concerning the shooting death of Moses Williams. *See,* Commonwealth Exhibit, C-49. Wright identified the appellant as the person who shot Moses Williams. *Id.* Wright testified under oath before the grand jury on June 6, 2002, and at the preliminary hearing on October 22, 2002. *See,* Commonwealth Exhibits, C-50 and C-51. Chante Wright's statements were properly admitted as exceptions to the hearsay rule. N.T. 9/23/08, pgs. 196-259.

Pennsylvania Rule of Evidence 804(b)(6) allows for the admission of evidence that is relevant when the declarant has been made unavailable by the defendant to prevent the declarant from testifying. *Commonwealth v. Paddy,* 800 A.2d 294 (Pa. 2002). A statement may be offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. Pa.R.E. 804(b)(6); and see, *Paddy, supra*.

An unavailable witnesses' testimony is admissible at trial where the *defendant's conduct is designed to prevent the witness from testifying*. *See, Giles v. California,* 128 S. Ct. 2678 (2008). It is within the exercise of the trial court's reasonable discretion to admit a hearsay statement. *Commonwealth v. King,* 959 A.2d 405 (Pa. Super. 2008). The appellant ordered Chante Wright killed *for the sole purpose* of preventing her testimony which identified him as the shooter of Moses Williams. *See generally,* N.T. 3/17/08; 3/25/08, pgs. 27-38; 9/5/08, pgs. 3-8.

Chante Wright was placed in federal witness protection. She returned to Philadelphia in January, 2008 to visit an ill family member. N.T. 9/24/08, pgs. 53-56. The appellant, through the use of a cell phone he had smuggled into prison, initiated a series of phone calls ordering

Wright's murder. N.T. 9/24/08, pgs. 130-153; 159-160. The appellant knew that Wright had identified him as the shooter and planned her murder to prevent her from testifying at trial. Cell phone records established an unequivocal link between the appellant; Laquaille Bryant[5], and Chante Wright. N.T. 3/25/08, pg. 29. The timing of the phone calls between the appellant and Bryant indicated that the appellant and Bryant maintained a constant dialogue from the time Chante Wright arrived in Philadelphia up to the moments immediately prior to and immediately after she was gunned down on the street. *See,* Commonwealth Exhibit, C-54.

The Commonwealth established, for purposes of Pa R.E. 804(b)(6), that the appellant knowingly conspired with others to prevent Chante Wright from testifying against him. *See, Commonwealth v. Santiago*, 822 A.2d 716 (Pa. Super. 2003) (the forfeiture exception applies when the defendant's wrongdoing is intended to make the declarant unavailable to testify at trial); *see also Commonwealth v. Paddy, supra*, and *Commonwealth v. Laich,* 777 A.2d 1057 (Pa. 2001). *See also, U.S. v. Mastrangelo,* 693 F.2d 269 (2nd Cir. 1982); *U.S. v. Houlihan,* 92 F.3rd 1271 (1st Cir. 1996); *U.S. v. Emery,*186 F.3rd 921 (8th Cir. 1999), and *U.S. v. Dhinsa,* 243 F.3rd 635 (2nd Cir. 2001) (holding that no limitations are placed on the declarant's statements that can be offered against the defendant at trial). Consequently, it was appropriate to present the statements of Chante Wright. Her testimony had been preserved in a statement to detectives, before the grand jury and at the preliminary hearing. N.T. 9/23/08, pgs. 196-259. The testimony presented was necessary to establish the identity of the shooter. The jury was cautioned that the appellant was not charged with the death of Chante Wright, and instructed that the testimony about her death was admitted for the "very narrow purpose" of "tending to prove [appellant's] consciousness of guilt as it relates to the other charges…" N.T. 9/26/08, pgs. 22-23. A pillar

[5] Laquaille Bryant was charged and is currently awaiting trial for the murder of Chante Wright. *See,* CP-51-CR-0006272-2008 and CP-51-CR-0006273-2008.

upon which our system of trial by jury is based is that juries are presumed to follow the instructions of the court. *Commonwealth v. Brown,* 987 A.2d 699 (Pa. 2009) *citing* Commonwealth v. Means, 773 A.2d 143, 157 (Pa. 2001). The evidentiary value of this testimony far outweighed any prejudicial effect. No error exists.

Lastly, appellant asserts that the trial court erred in re-opening the record to admit evidence after deliberations had begun. Four (4) of appellant's enumerated claims on this issue are similar in their assertion of error.[6] This claim must fail.

The appellant offered an undated photograph of Chante Wright which purported to memoralize a visit to the appellant while he was in custody. N.T. 9/25/08, pgs. 13-14; 22-23. It was asserted that the photograph was taken on December 3, 2007, while Chante Wright was in federal witness protection. *Id.* It was the sole evidence offered by the appellant and its only objective was to undermine the credibility to be accorded Chante Wright's testimony. After the record was closed and the jury began deliberations, the trial court was advised that the photograph in fact was not taken on December 3, 2007. N.T. 9/29/08, pgs. 85-86. The prison records reveal that Wright only visited the appellant on April 14, 2003 and April 27, 2005; both visits were long before her cooperation with law enforcement and her entry into federal witness protection. N.T. 9/29/08, pg. 108. The photograph was a clear and deliberate misrepresentation of the facts. The materiality of this evidence is not without dispute as it is the only evidence offered by the defense to rebut charges of capital murder. Obviously, there is no obligation or expectation that a criminal defendant will present evidence,[7] but having voluntarily chosen to

[6] Appellant's assertions have been condensed for editorial purposes.

[7] *See,* U.S. CONST. amend. V; *see also,* PA. CONST. art. I, §9.

present a defense there is a burden placed on the defendant to present honest evidence as the jury will consider it.

A trial judge cannot knowingly permit *false* or *inaccurate* evidence to be presented to the jury. *See, Commonwealth v. Bowes,* 335 A.2d 718 (Pa. Super. 1975), *citing* Giglio v. United States, 405 U.S. 150 (1972); *Pyle v. Kansas,* 317 U.S. 213 (1942), and *Mooney v. Holohan,* 294 U.S. 103 (1935) ("the [United States] Supreme Court has made it clear that any deliberate deception of a court by the presentation of known false evidence is incompatible with the rudimentary demands of justice"); *see also, United States v. Meinster,* 619 F.2d 1041 (4th Cir. 1980) (it is the purpose of the court to ensure that the jury is not misled by falsehoods).

It is well settled that the trial record may be reopened to offer relevant evidence to ensure justice is served. *See, Commonwealth v. Smith,* 694 A.2d 1086, 1091 (Pa. 1997); *Commonwealth v. Tharp,* 575 A.2d 557 (Pa. 1990); *Commonwealth v. Chambers,* 685 A.2d 96 (Pa. 1996); *Commonwealth v. Flood,* 627 A.2d 1193 (Pa. Super. 1993); *Commonwealth v. Rizzi,* 586 A.2d 1380 (Pa. Super. 1991), and *Commonwealth v. Campbell,* 444 A.2d 155 (Pa. Super. 1982) (decision to permit reopening of a case for the presentation of additional evidence should be even more flexible where the issue is not guilt but the admissibility of evidence). The appellate courts of this Commonwealth, however, have not addressed the unique issue presented by the facts of this matter.

Although the appellate courts of our Commonwealth have not addressed this specific question, the United States Supreme Court has long held that in the interests of justice a trial court may re-open the record after deliberations have begun. *See, United States v. Bayer,* 331 U.S. 532 (1947) (the district court's discretion to allow additional evidence after jury deliberations have begun is permitted). This ruling has been applied in many jurisdictions,

allowing the trial court to reopen a record to prevent a miscarriage of justice *after jury deliberations have begun*. *See, United States v. Crawford,* 533 F.3d 133 (2nd Circuit 2008) (a district court should reopen the record after jury deliberations have begun to admit additional evidence where, (1) the timeliness of the evidence and a reasonable explanation for the government's failure of not offering the evidence during trial; (2) the character of the evidence; (3) the overall effect of the evidence and whether its belated introduction imbues the evidence with distorted importance, or prejudices the defendant.); *Henry v. United States,* 204 F2d 817 (1953) (considerable latitude in discretion is vested in the trial court judge where evidence is permitted after jurors have entered upon their deliberations to some matter essential to a complete record.); *Curtis* v. *State*, 648 S.W.2d 487 (Ark. 1983)(reopening a case for the taking of additional evidence after the case has been submitted to the jury is a matter within the sound discretion of the trial court and a ruling by the trial court on such a matter will not be reversed absent an abuse of discretion); *Buckley v. State,* 606 S.E.2d 581 (Ga. Ct. App. 2004) (even after jury deliberations have begun, the trial court, in the sound exercise of discretion, may reopen the record to permit the introduction of new evidence.); *Fluellen v. State,* 589 S.E.2d 847 (Ga. Ct. App. 2003) (it is within the trial court's discretionary power to permit the state to reopen its case to introduce additional evidence at any stage of trial, including after jury deliberations have begun.); *Johnson v. State,* 872 So.2d 733 (Miss Ct. App. 2004) (reopening a case after it has been submitted to the jury but prior to verdict for purposes of receiving additional evidence is a matter addressed to the sound discretion of the trial court in order that justice be done.); *Perkins v. State,* 178 S.2d 694 (Miss.1965) (reopening case after submission to the jury permitted only where an important reason is found to exist in order that justice be done.); *State v. Wolf,* 207 A.2d 670 (N.J. 1965) (action to reopen after the jury had begun deliberations should not be taken

lightly, but authority exists when the ends of justice will be served by reopening.); *State v. Thomas,* 577 A.2d 89 (N.H. 1990) (party seeking to reopen the case after the jury began to deliberate must demonstrate more than good cause.); *State v. Duncan,* 132 P.2d 121 (Utah 1942) (reopening permitted during jury deliberations to receive newly discovered evidence essential for a just verdict); *Dyson v. State* 615 A.2d 1182 (Md. 1992) (the interest of justice requires that the trial judge be given some discretion to permit receipt of additional evidence after jury deliberations have begun, but that this discretion shall be exercised with great caution), and *Merritt v. State,* 168 Ga 753 (1929) (no error found after solicitor general was permitted to recall a witness and elicit evidence after jury deliberations had begun over defense objection).

In the instant matter, the Commonwealth did not seek to introduce "new evidence" into the record; rather, the Commonwealth sought only to rebut false evidence presented by the defense. N.T. 9/29/08, pgs. 86-111. The jury could not be expected to render a true and just verdict based on false and inaccurate evidence[8]. *See, Giglio; Meinster, and Bowes, supra.*

The trial court did not, as the appellant asserts, conduct its own investigation as a basis to re-open the record. It is the Commonwealth's ongoing obligation to investigate. *Commonwealth v. Harris,* 817 A.2d 1033 (Pa. 2002) (state may not present known false evidence or allow false evidence to go uncorrected); *See also, Keys v. United States,* 767 A.2d 255, 261 (D.C. 2001) (prosecutor fulfilled her duties to investigate witnesses' credibility and to refrain from presenting testimony known by the government to be false); *Hawthorne v. United States,* 504 A.2d 580, 589 (D.C. 1986) ("a prosecutor may not knowingly…permit evidence, known to be false [or misleading] to go uncorrected before the trier of fact."); *Napue v. Illinois,* 360 U.S. 264 (1959)

[8] The Supreme Court of New Jersey addressed the importance of this issue, stating, "[s]uppose while the jury was deliberating, the prosecutor returned to court with a third person who had just confessed to the shooting, and with some reputable eyewitness who identified such person as the perpetrator, could it be said the court was powerless to re-open the case and permit the jury to hear the new testimony?" *See, Wolf, supra.*

(the responsibility and duty to correct a known falsehood and elicit the truth lies with the prosecutor); *see also, Giglio, supra* (whether the nondisclosure [of relevant evidence] was the result of negligence or design, it is the responsibility of the prosecutor to investigate and disclose); *Connell v. Commonwealth,* 144 Va 553 (1926) (a homicide prosecution, in which it was said that where the facts involved newly discovered evidence are known prior to verdict, the party discovering such testimony should call it to the attention of the trial court, so that the jury may be recalled back to the courtroom to hear it).

Chante Wright never left Florida while in federal protective custody until January 18, 2008. N.T. 9/29/08, pg. 53. Homicide detectives sought to determine how the defense picture was taken given that Chante Wright was in federal witness protection when the picture was purportedly taken. It was proffered by the defense as evidence of Chante Wright's close relationship with the defendant for the sole purpose of casting doubt as to whether she would have recanted her identification of the appellant as the perpetrator of these crimes. *Id.* at 5-6. Upon receipt of this information, the trial court immediately summoned both attorneys and conducted an extensive examination of the issue with counsel to determine whether the jury had been given false evidence. *See generally,* N.T. 9/29/08, pgs. 5-84. During this time, although not provided any reason, the jury was instructed to stop deliberating[9]. N.T. 9/29/08, pg. 39. Defense counsel informed the court that the appellant gave him the photograph, and he "assumed it was" taken in December of 2007. All lawyers bear a responsibility to be accurate when presenting evidence to the fact finder. *Id.*; *see also,* 42 Pa.C.S.A. Rule 8.4 (it is professional misconduct for a lawyer to engage in any conduct involving dishonesty, fraud, deceit, or misrepresentation). The copy of the photograph did not have a date on it, and the appellant could not produce the

[9] The jury had been deliberating for three and one half (3 ½) hours prior to being told to cease deliberations.

original. *Id.* This left no doubt that the photograph was not proof of the assertion made to the jury by the appellant.

To remedy the problem, the prosecutor and defense were afforded the option to accept a stipulation drafted by the court which would have clarified that the photograph was not taken in December, 2007 as had been asserted by the appellant, or to re-open the record to allow the prosecution to rebut the admission of the photograph. *Id.* at 37-40. Despite being tacitly complicit in this fraud, defense counsel refused to accept any stipulation. N.T. 9/29/08, pg. 40. Consequently, the record was re-opened to allow the Commonwealth to correct the fact in question, and appellant was afforded the opportunity to cross-examine the Commonwealth's witness on this point. *Id*. at 37-40.

The jury was instructed that the testimony produced concerning Wright's visit to the appellant purportedly memorialized in a photograph was inaccurate and must be disregarded during their deliberation. *Id.* at 85-86. The Commonwealth introduced the testimony of Dorothy Harris, Custodian of Records for the Philadelphia Prison System, who testified that a computer printout confirmed that Chante Wright did not visit the appellant in December of 2007. *Id.* at 88; 97-99;101;105. Appellant was given a full and fair opportunity to cross-examine the witness. N.T. 9/29/08, pgs. 90-96; 102-103; 108-111. *See, Perkins, supra* (when a case is reopened for the reception of further evidence, it must be done in such a manner that the rights of all parties will be protected and ample opportunity afforded them for cross examination or rebuttal, and even for requesting additional instructions, if the matters introduced should reasonably require them); *See also, Dyson, supra* (reopening a case after jury deliberations have begun must be done in a way that does not unduly prejudice the rights of any party, and to permit cross-examination of the witness supplying the additional evidence). Appellant did not offer any other evidence.

Thereafter, the trial court charged the jury a second time on all the law. N.T. 9/29/08, pgs. 111-134. *See, Commonwealth v. Faulkner,* 595 A.2d 28 (Pa. 1991) (recharging of the jury on first degree murder as a whole was proper as to clarify any jury issues or concerns).

Appellant asserts that a mistrial was the appropriate remedy to address the concern of a jury deliberating on false evidence. A mistrial was not warranted in this case. *See, Commonwealth v. Judy,* 978 A.2d 1015 (Pa. Super. 2009) (the trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial…in making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so, assess the degree of any resulting prejudice). It is beyond the pale to suggest the extraordinary remedy of a mistrial when it was the appellant who introduced the false evidence to the jury. A new trial would only have benefitted the appellant as the case would have become more difficult to prosecute. Two (2) eyewitnesses had been murdered and other witnesses denied their statements or had failing memories. A mistrial is an *extreme* remedy required "only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal." Commonwealth v. Johnson, 719 A.2d 778, 787 (Pa. Super. 1998) (*en banc), quoting* Commonwealth v. Montgomery, 626 A.2d 109, 112-113 (Pa. 1993). In criminal trials, declaration of a mistrial serves to eliminate the negative effect wrought upon a defendant when unduly prejudicial elements are injected into the case or otherwise discovered at trial. *Commonwealth v. Lettau,* 955 A.2d 360 (Pa. Super. 2008). Accordingly, the trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. *Id.* Such is not the case on this record when it is the appellant who consciously sought to mislead the fact finder.

The misleading photograph was submitted into evidence by the appellant. It was the *defendant* who submitted false and inaccurate information to the jury. The appellant cannot claim he was prejudiced in any way by *his own* actions which were designed to deceive the jury. No error exists.

In the alternative, however, if the reviewing court deems the trial court's actions to be in error, the error was harmless. The harmless error analysis is a two-step process. A reviewing court must first determine whether the untainted evidence, considered independently of the tainted evidence, overwhelmingly establishes the defendant's guilt before it may proceed to consider whether the error was so insignificant by comparison that it could not have contributed to the verdict. *Commonwealth v. Sanchez,* 595 A.2d 617 (Pa. Super. 1991). In considering the evidence of record prior to reopening the record, appellant's guilt was overwhelming. *See. Commonwealth v. Mehmeti,* 462 A.2d 657 (Pa. 1983) (trial court erred when it admitted manslaughter victim's photograph into evidence in defendant's murder trial because it was not relevant to defendant's guilt or innocence; however, error was harmless due to innocuous nature of evidence). An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict. *Commonwealth v. Story,* 383 A.2d 155 (Pa. 1978). In reaching that conclusion, the reviewing court will find an error harmless where the un-contradicted evidence of guilt is overwhelming, such that by comparison the purported error is insignificant. *Commonwealth v. Young,* 748 A.2d 166 (Pa. 1999). The evidence of appellant's guilt was indeed overwhelming. Each and every one of the conviction charges was grounded on the evidence presented by the Commonwealth in its case-in-chief. Furthermore, the Commonwealth's evidence was more than sufficient to convict the appellant on all charges. *See, Commonwealth v. Lewis,* 911 A.2d 558 (Pa. Super. 2006).

The sole purpose for re-opening the case was to ensure that the jury was not misled by false or inaccurate evidence produced by the appellant. The trial court, in the exercise of its discretion, was justified in re-opening the record to avoid a miscarriage of justice. No error exists.

CONCLUSION

None of the appellant's claims merit relief. Accordingly, this court respectfully requests that the conviction and judgment of sentence be affirmed.

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THE HONORABLE RENÉE CARDWELL HUGHES
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA