No. _____

In The
SUPREME COURT of the UNITED STATES

BRIAN D. BAUR,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari
To The Supreme Court of Pennsylvania

APPENDIX
to the
PETITION for WRIT of CERTIORARI

Mary Catherine Baur, Esquire
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Counsel for Petitioner

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Commonwealth of Pennsylvania v. Brian D. Baur	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA CRIMINAL DIVISION DOCKET NO: CP-51-CR-0010543 -2014 DATE OF ARREST: 08/21/2014 OTN: N 929136-5 SID: 300-81-25-1 DOB: 04/22/1958 PID: 0950231

ORDER OF SENTENCE

AND NOW, this 8th day of April, 2016, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows:

Count 1 – 18 Section 2502 Sections C –

Murder of the Third Degree (F1)

To be confined for 20 YEARS – 40 YEARS at State Correctional Institution.

The following Judge Ordered Conditions are imposed:

Condition

Condition Text

Court Costs

Defendant is to pay imposed mandatory court costs.

Anger management

To participate in anger management counseling /program as ordered by the court.

Psychiatric Treatment

To undergo available medical or psychiatric and psychological treatment.

The defendant shall pay the following:

	Fines	Costs	Restitution
Amount:	$25,000.00	$763.00	$0.00
Balance Due:	$25,000.00	$688.00	$0.00

(continuation of table)

Crime Victim's Compensation Fund – Victim/Witness Services Fund	Total Due
$60.00	$25,823.00
$60.00	$25,748.00

Judge: Byrd; ADA: Pescatore; Atty: Fairlie; Court Reporter: Hall; Court Clerk: Sharpe

CP-51-CR-0010543-2014
Comm. v. Baur, Brian D
Order –
Sentence/Penalty Imposed

(Bar Code No.7430441511)

BY THE COURT:
/s/

Judge Sandy L.V. Byrd

CPCMS 2066 Printed: 04/08/2016 12:12:54PM

App. 4

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COM. OF PA	:	CP-51-CR-0010543-2014
	:	
v.	:	SUPERIOR COURT
	:	
BRIAN D. BAUR	:	1185 EDA 2016

OPINION

Byrd, J. December 28, 2016

Following a jury trial that commenced on January 26, 2016, Brian Baur was convicted of third-degree murder on January 29, 2016. On April 8 2016, defendant was sentenced to a term of twenty (20) to forty (40) years in state confinement. Defendant filed a notice of appeal on April 21, 2016. This court then ordered defendant to file a statement

of matters complained of on appeal on April 25, 2016. Said statement was filed on May 16, 2016.

CP-51-CR-0010543-2014 Comm v. Baur, Brian D
Opinion
Bar Code No. 7882089131

FILED
Dec 28 2016

Appeals/Post Trial
Office of Judicial Records

STATEMENT OF FACTS

The trial evidence when viewed in the light most favorable to the Commonwealth as verdict winner established the following. On August 21, 2014, at or around 10:15 p.m., defendant shot and killed Richard Hull in the rear of 4560 Torresdale

Avenue. At approximately 10:18 p.m., Police Officers Brian Clerkin and Edward Seislove responded to the radio call regarding this shooting. They went to the rear of 4560 Torresdale Avenue, located on Josephine Street, and pulled up to an eight (8) to ten (10) foot tall metal commercial garage door. The street was dark until the garage door rose and illuminated the area. The decedent, later identified as Richard Hull, was lying on the ground, partially inside the garage between the garage door opening and behind defendant's 1993 blue Ford Ranger pickup truck. Mr. Hull was wearing jeans but no shirt. N.T. 01/26/16, pp. 116-138, 213-226; N.T. 01/27/16, pp. 24-25.

Police Officers Matthew Nodiff and Michael Berkery also responded to the radio call and assisted Officers Clerkin and Seislove on the scene. As the

officers exited their vehicle, defendant came outside his garage. Officer Seislove took defendant aside to talk to him while Officers Clerkin and Nodiff pulled Mr. Hull from behind the truck and onto the Josephine Street driveway. Officer Nodiff found a loaded revolver on top of a white vehicle inside the garage and unloaded it for safety reasons. After making the gun safe, he attempted to render aid to Mr. Hull and found a closed pocketknife clipped inside of his pant pocket. N.T. 01/26/16, pp. 116-138, 213-226; N.T. 01/27/16, pp. 24-25.

Medics arrived quickly and began working on Mr. Hull. The officers asked defendant what happened, and he stated that he shot the victim twice in the back after the man told him that he was going to kill him. At that point , defendant was placed in the back of the police vehicle. At trial,

Officer Nodiff stated that he began to think that this shooting involved more than a break-in when he observed defendant banging his head while in the back of the police vehicle. Officer

Nodiff did not observe any damage to the truck outside. Officers Clerkin and Seislove later transported defendant to the Homicide Unit, where he was interviewed by Detective John Bartol. N.T. 01/26/16, pp. 116-138, 213-226; N.T. 01/27/16, pp. 24-25.

At 10:27 p.m., paramedics pronounced Mr. Hull dead on the scene. Mr. Hull was a thirty (30) year old white male who stood five feet nine inches (5'9") tall and weighed 186 pounds. Dr. Marlon Osborne (sic), an Assistant Medical Examiner,

conducted the post-mortem examination of decedent and prepared an autopsy report. Because Dr. Osborne (sic) was unavailable at the time of trial, Dr. Albert Chu, Deputy Chief Medical Examiner, testified as the Commonwealth's forensic pathology expert. Dr. Chu concluded to a reasonable degree of medical certainty
that the cause of Mr. Hull's death was shotgun wounds to his neck and torso, and that the manner of death was homicide. N.T. 01/27/16, pp. 4-23.

Mr. Hull lost a significant amount of blood due to internal bleeding from the two clusters of shotgun pellet wounds: one to the left back of his neck and another on his left lower back. Each cluster consisted of three pellet entrance holes. Three deformed pellets were recovered from the base of his skull, spine and neck muscles. Three deformed

pellets were recovered from the base of his chest wall muscles, left lung and right pleural cavity. Dr. Chu concluded that the injuries resulting from the shotgun pellet wound to the left side of the back of his neck was an incapacitating wound that likely caused immediate death. A person with such injury would have immediately collapsed. A toxicology test performed during the autopsy detected 251 milligrams of ethanol in decedent's blood. This blood alcohol level was more than three times the legal driving limit. Dr. Chu stated that a high blood alcohol level can impact an individual in different ways: cause drowsiness, impair judgment or physical coordination or encourage aggressive or

violent behavior. Dr. Chu also testified that decedent's blood was not screened for some commonly abused drugs such as marijuana. N.T. 01/27/16, pp. 4-23.

Sally Ann Stratton, decedent's fiancée and mother of their two children, testified that she last saw him around 6:00 p.m. on August 21, 2014, before she took their son to football practice two blocks from their New Jersey home. She stated that decedent drove a black 2001 Ford Ranger and had recently taken the ladder rack off his truck. Ms. Stratton attempted calling decedent multiple times on his cell phone between 6:00 p.m. and 8:30 p.m., but he did not answer. At some point, an unidentified man answered decedent's cell phone and informed Ms. Stratton that decedent's pickup truck was parked near Torresdale Avenue. Ms. Stratton and one of her

friends met the man at Torresdale Avenue and Paul Street. She found decedent's truck parked against a building at 4016 Paul Street. The driver's side door was locked but the passenger door was broken from a few weeks prior. There was trash all over the floor, which she considered unusual. Ms. Stratton also found a liquor bottle and drug paraphernalia inside the truck. Ms. Stratton drove the truck home after finding the keys underneath the floor mat. The man who answered decedent's phone had encountered him earlier that evening. He asked decedent if there was someone to call because he should not drive. Decedent told the man he would be fine and walked down the street. On the next day, Ms. Stratton was informed of Richard Hull's death. N.T. 01/26/16, pp. 92-115.

At approximately 11:00 p.m., Police Officer Robert Flade from the Crime Scene Unit responded and began processing the scene. Decedent's body was still on location at that time. When he walked through the scene, Officer Flade saw a video camera mounted to his right that displayed on the other side of the garage door when it was closed. Officer Flade also observed a set of keys, a phone, paperwork, and a remote control for the garage on the rear of the pickup truck. The driver's side door and mirror were not damaged. The truck had no broken windows or

damaged locks. There was little space between the rear truck bumper and the wall near the garage entrance. There were blood stains on the driver's

side rear tire. Blood was also found between the truck and the garage entrance. A Taurus five-shot revolver and five shotshells, three which had been fired from the gun, was found at the scene and submitted to the Firearms Identification Unit for examination. N.T. 01/26/16, pp. 61-91.

As police secured the scene, defendant's sister Mary Catherine Baur attempted to enter the property. Officer Nodiff advised her that she was not permitted to enter because it was an active crime scene. Ms. Baur identified herself as defendant's attorney and sister at trial. However, she was not defense counsel of record. Defendant was represented by Steven Fairlie, Esquire, throughout his trial. Ms. Baur's appearance was not entered until the commencement of defendant's post trial

proceedings. N.T. 01/26/16, pp. 116-138, 213-226; N.T. 01/27/16, pp. 24-25.

Police Officer Robert Stott testified as an expert in firearms and ballistics. He and Officer Jesus Cruz, who prepared the report, examined the submitted ballistics evidence. The gun recovered from the scene was a Taurus .45/410 caliber revolver with a two-inch barrel and held five (5) rounds of ammunition. There were two (2) live Winchester 410 gauge shotgun shells and three (3) fired 410 gauge shotgun shells submitted with the gun. They also examined the six (6) lead fragments retrieved from The Medical Examiner's Office. Officer Stott concluded to a reasonable degree of scientific certainty that the submitted shotgun shells were fired from the revolver. He also concluded to a

reasonable degree of scientific certainty that the one of the lead fragments came from the revolver. The other submitted fragments lacked a sufficient number of microscopic markings for him to make a conclusion. Officer Stott explained that a shooter firing one shotgun shell round could leave three (3) holes in the targeted individual. He described muzzle

flash as originating from burning gunpowder. He stated that the brightness of the muzzle flash depends on the type of gunpowder used. He also confirmed that this particular revolver and ammunition were marketed as self-defense tools. N.T. 01/26/16, pp. 61-91.

When this incident occurred, Police Officer Robert Bakos was conducting surveillance of the area from an unmarked vehicle parked outside the rear of a mosque located on the 4500 block of Torresdale Avenue. Officer Bakos heard a man's voice coming from the second-floor window of the property at 4560 Torresdale Avenue. He then saw a flash of light coming from that location. Police later determined that the flash of light was a muzzle flash due to the firing of a gun. When the surveillance ended, Officer Bakos left that location and began to patrol the area. A few minutes later, defendant's girlfriend, Deborah Scafidi, called 911 and stated that someone was trying to break into her property. Ms. Scafidi told 911 that she observed someone with an assault rifle inside a dark Pontiac Grand Prix traveling on Torresdale Avenue. Police radio was informed that

the 911 call was unfounded because police officers were in the vehicle described over police radio. Further, there was no assault rifle in that unmarked vehicle. As a result, police did not respond. Defendant had made numerous 911 calls about someone breaking into his property on prior occasions. These 911 calls were unfounded after police responded to the location. N.T. 01/26/16, pp. 227-253.

Detective John Bartol was the assigned homicide investigator. On August 21, 2014, he interviewed defendant at the Homicide Unit. At the beginning of this interview, Detective Bartol informed defendant that he was not under arrest at that time. Defendant was very cooperative and engaged in an informal conversation wherein he

explained what happened. At trial, Detective Bartol recounted defendant's statement:

> He told me basically that he was home, on the second floor, where he lives; that he was there with his, I believe it was his

> girlfriend. He was watching the Eagles game on TV. He also had some video surveillance cameras that showed the area where we just had up on the screen, the back of the garage there. He had his pickup truck parked back there.
>
> And on the monitor, he saw a male trying to get into the door of the truck. At that time he went to the window and yelled for him to get away from the truck. The male would not listen to him. He tried to reposition the camera because the male went, at that time, towards the driver's side of the pickup truck and was out of his view. He tried to reposition the camera there.
>
> Then, about five, 10 minutes later, he heard a noise. He believed someone was breaking into his garage. He retrieved a gun that he had in the house. He went down to where the garage was, opened the garage door.

> At that time, the male he had seen out there attempting to get into his truck came at him and threatened that he was going to kill him. At that time, he shot him. He stated he shot two times and the male may have turned when he was shooting, because he believes he may have shot him in the back.
>
> ...
>
> ...He also stated that the only thing he did wrong was that he fired a warning shot from the second-floor window prior to going down to open the garage door.

N.T. 01/27/16, pp. 34-35. At the suppression hearing, Detective Bartol testified that it was at this point that he stopped defendant's narrative and read him his Miranda rights. Detective Bartol then asked defendant if he would provide a formal signed statement and again advised him of his Miranda rights. He stopped talking to defendant when he requested contact with his sister, who is an attorney. After contacting his sister, defendant declined to give

a signed statement to police. N.T. 11/23/15, pp. 18-19.

Detective Thorsten Lucke testified as an expert in forensic video recovery He recovered video from defendant's residence, from Jewett Design Company at 1919 Pear Street, which is across from defendant's property, and from Sunny Chinese Restaurant at 2032 Orthodox Street. After recovering relevant portions of videotape, Detective Lucke prepared a video compilation.

The video showed decedent approaching the vehicle he mistook for his own and attempting to enter. The video then showed defendant's subsequent actions which led to decedent's death. N.T. 01/26/16, pp. 141-195.

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Defendant raised the following issues in his Amended (sic) Statement of Matters Complained of on Appeal, in accordance with Pennsylvania Rule of Appellate Procedure 1925(b):[1]

1. Whether the Law of the Case Doctrine is an issue in this case since two Judges have made rulings concerning the Constitutional Rights of the Defendant.

2. Whether failure to apply the "Castle Doctrine" to the facts of this case is an error of law and a violation of Defendant's Constitutional Rights essentially denying Defendant the right to present a defense.

3. Whether preclusion of Defendant's "use of force" Expert constitutes an abuse of discretion and an error of law denying Defendant the right to present a defense in violation of his constitutional rights.

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[1] The following is a verbatim account of defendant's statement.

4. Whether the sentence imposed violated Defendant's Constitutional rights by ordering medical and psychological treatment for Defendant based on hearsay reports, obviating Defendant's ability to cross examine.

5. Whether the sentence imposed constitutes life imprisonment in violation of the intent of the legislature.

6. Whether the reassignment of the case from Judge Lerner to Judge Byrd was justified.

7. Whether the rulings of Judges Lerner and Byrd concerning the admission of video evidence violated Defendant's Constitutional rights where police failed to preserve original evidence, chain of custody was not preserved and evidence was admittedly altered to present it to support the theory of the prosecution.

8. Whether Defendant's rights were violated by prosecution destruction, deletion and dismissal of evidence that could prove to be exculpatory. (pages 274, 279, 280, 292, 828-9).

9. Whether the testimony of police that conflicts with reports and prior testimony should have

been stricken from the record so that they would not be considered by the Jury.

10. Whether trial counsel was ineffective for not allowing Defendant to present re-direct testimony to address points raised in cross by the Prosecution. (Page 830)

11. Whether sequestration of Defense co-counsel was an error of law and deprived Defendant of his 6th Amendment Right to counsel of his choice.

12. Whether Defendant's right to counsel were violated when he was detained at Police Headquarters (the Roundhouse), without access to his attorneys, for four days prior to arraignment and prior to Defendant being read his Constitutional Rights or Mirandized.

13. Whether Defendant's Constitutional Rights were violated by failing to provide Defendant copies of exhibits being referred to by the prosecution during his cross examination.

14. Whether Defendant's Constitutional Rights were violated by the failure of the Judge to give jury instructions concerning the Castle

Doctrine and self-defense and the fact that they could find Defendant not guilty.

15. Whether the Judge's conclusory statements at sentencing, based on hearsay documents, constitute an abuse of discretion and a violation of law.

16. Whether the testimony of the medical examiner should have been stricken in part and whether it demonstrates a further failure of the prosecution to obtain exculpatory evidence by not obtaining a toxicology report.

17. Whether the Judge demonstrated extreme bias for the prosecution in concluding that Defendant's "warning shot" was "illegal", directing the Prosecution to "find it (the crimes code)" ..."and develop the argument further." Where the Prosecution failed to separately charge Defendant with any crime for the discharge of the weapon, whether Defendant's right to notice and the opportunity to be heard and present an appropriate defense were violated, and the resulting adverse and confusing charge to the jury prejudiced Defendant's Constitutional Rights, denying him a fair trial. (pages 777-8).

18. Whether Defendant ever made a "confession" is in issue. Whether Defendant's Constitutional Rights were violated when the

Court's decision to remove the involuntary manslaughter charge from the Jury was based on his decision that the Defendant made a "confession".

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19. Whether the rulings of Judges Lerner and Byrd are erroneous with regard to Defendant's Pre-Trial Motions, delineating his objections to his initial detention at the roundhouse where he was denied the assistance of counsel and was not read his Constitutional rights or Mirandized. (p. 789)

20. Whether defense counsel was ineffective, when he stated in his closing argument statements that contradicted the testimony of Defendant, in his presentation to the Jury, and in fact presented the Jury with the Prosecution's version of the evidence. (page 802, 815, 826, 830-2)

DISCUSSION

Defendant first alleges that the law of the case doctrine is an issue herein because two judges

made rulings concerning his constitutional rights. In *Commonwealth v. Lancit*, 139 A,3d 204, 206 (Pa. Super. 2016), the court explained that the law of the case doctrine "bars a judge from revisiting rulings previously decided by another judge of the same court, absent exceptional circumstances." This doctrine "is an important tool of judicial efficiency that 'serves to protect the expectations of the parties, to insure uniformity of decisions, to maintain consistency in proceedings, to effectuate the administration of justice, and to bring finality to the litigation.'" *Id.* (quoting *Zane v. Friends Hospital*, 575 Pa. 236, 243, 836 A.2d 25, 29 (2003)).

The doctrine states that:

> "'(1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by

> the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.'"

Lancit, 139 A.3d at 207 (quoting *Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326, 1331 (1995)). Contrary to defendant's assertion, the law of the case doctrine is not at issue. At the outset, defendant is not entitled to relief due to the "reassignment" of his case from the Honorable

Benjamin Lerner to this court. There was no error in transferring this case from the calendar judge to this court for trial. The Honorable Benjamin Lerner,

homicide calendar judge, issued several pre-trial orders before defendant's case was assigned to this court for trial.[2] None of those rulings were revisited by this court. Thus, the law of the case doctrine is inapplicable.

Defendant further claims that the rulings of Judge Lerner and of this court were erroneous. This is a mere bald allegation as defendant has not specified what rulings constituted error. *See Commonwealth v. Allshouse*, 969 A.2d 1236, 1239 (Pa.Super. 2009) (recognizing principle that "when a court has to guess what issues an appellant is

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[2] In addition to granting several continuance requests, on December 22, 2014, Judge Lerner denied defendant's motion to quash and issued an order entering exhibits from both the Commonwealth and the defense. On April 30, 2015, Judge Lerner issued an order listing the case for trial and scheduling a trial readiness conference before this court. He also attached counsel for trial. On May 21, 2015, a trial readiness conference was held before this court. On December 14, 2015, this court issued an order denying defendant's motion to suppress.

appealing, that is not enough for meaningful review"); *Commonwealth v. Hansley*, 24 A.3d 410, 415 (PaSuper. 2011) (stating that "[a]n appellant's concise statement must properly specify the error to be addressed on appeal"). Nonetheless, there is no support in the record for defendant's generalized claims of error.

Defendant next claims that "both judge's rulings concerning the admission of video evidence violated [his] constitutional rights." This claim is without merit. First, only this court ruled on the admissibility of videotape evidence. Prior to trial, defendant sought the suppression of the videotape under the "best evidence rule." He questioned the authenticity of the videotape, claiming that it was not a fair and accurate representation of the incident. He also argued that there was no chain of

custody. After presiding over a hearing on this issue and conducting an in camera review of the videotape, this court denied defendant's motion to suppress the video. *See* N.T. 12/14/15, pp. 15-16.

Second, there was no error in admitting the videotape evidence. It is well settled that "[t]he admission of videotaped evidence is always within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion." *Commonwealth v. Cole*, 135 A.3d 191, 194 (Pa.Super.2016). This evidence was relevant in showing the conditions of the crime scene and to display the events as they occurred. *See*

Commonwealth v. Impellizzeri, 661 A.2d 422, 428 (Pa. Super. 1995) (explaining that relevant evidence "is that which tends to establish facts in issue or in some degree advances the inquiry and is therefore probative"). However, in addition to being relevant, videotaped evidence must be authenticated. Such "demonstrative evidence may be authenticated by evidence sufficient to show that it is a fair and accurate representation of what it is purported to depict which includes 'testimony from a witness who has knowledge' that a matter is what it is claimed to be.'" *Commonwealth v. McKellick,* 24 A.3d 982, 988 (Pa.Super.2011)(quoting *Commonwealth v. Serge*, 586 Pa. 671, 682, 896 A.2d 1170, 1177 (2006)). *See also Impellizzeri*, 661 A.2d at 428 (stating that "any witness familiar with the subject matter can testify that the tape was an accurate and fair depiction of

the events sought to be shown"). At the suppression hearing, Detective Thorsten Lucke testified about his recovery of surveillance video from defendant's residence at 4560 Torresdale Avenue. After obtaining consent to search the video camera system from Deborah Scafidi, Detective Lucke searched for and downloaded the relevant video footage from the machine. He then prepared a short compilation video for trial purposes. At the suppression hearing, he confirmed that the videotape compilation was a fair and accurate depiction of the events as they unfolded. Based on Detective Lucke's testimony, there was sufficient authentication of the videotape.

Furthermore, defendant's claim that the videotape lacked the appropriate chain of custody did not require the suppression of such evidence. *See In re D.Y.,* 34 A.3d 177, 185 (Pa. Super.

2011)(explaining that "[c]hain of custody refers to the manner in which evidence was maintained from the time it was collected to its submission at trial"). In *Commonwealth v. Jenkins*, 332 A.2d 490, 492 (Pa. Super. 1974), the court held that "[p]hysical evidence may be properly admitted despite gaps in testimony regarding custody." Any "[g]aps in the chain of custody,... go to the weight of the evidence and not its admissibility." *Commonwealth v. Feliciano*, 67 A.3d 19, 29 (Pa. Super. 2013). Thus, there was no error in finding that the videotape was properly accessed and preserved. Accordingly, this court did not err in admitting the videotape into evidence.

Defendant further claims that this court did not apply the "Castle Doctrine" to the facts of this

case. He also argues that this court failed to provide jury instructions concerning this doctrine and his self-defense claim. However, these claims are wholly without merit. Indeed, the record shows that the "Castle Doctrine" was applied to this case and that appropriate instructions were given to the jury. After carefully considering the doctrine's applicability, this court reviewed each provision with counsel before determining the proper instructions based on the facts of this case. *See* N.T. 01/28/16, pp. 195-227.

In reviewing a trial court's refusal to provide a jury instruction, the appellate court reviews whether the jury instruction is warranted by the evidence presented in the case. *Commonwealth v. Baker*, 963 A.2d 495 (Pa.Super. 2008). Furthermore, "[t]he trial court has broad discretion in phrasing jury

instructions, and may choose its own wording[.]" *Commonwealth v. Chambers*, 546 Pa. 370, 382, 685 A.2d 96, 102 (1996). An appellate court will not find error "where the court fails to use the specific language requested by the accused, but rather only where the applicable law is not adequately, accurately and clearly communicated to the jury." *Commonwealth v. Leber*, 802 A.2d 648, 651 (Pa. Super. 2002). In this case, the jury was provided with the correct legal principles regarding how to apply the relevant portions of this doctrine to the facts of this case.

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See 18 Pa.C.S. Section 505; 01/29/16, pp. 85-93. Although this court did not use the specific words desired by counsel, the jury was properly instructed

on the law of justification. *See* N.T. 01/29/16, pp. 85-93; *Commonwealth v Williams*, 581 Pa. 57, 80, 863 A.2d 505, 519 (2004) (holding that "[j]ury instructions will be upheld if they adequately and accurately reflect the law and are sufficient to guide the jury properly in its deliberations"). Consequently, there was no error committed by this court.

Additionally, defendant's claim that this court demonstrated extreme bias for the prosecution is totally without merit as this court conducted itself in a fair and impartial manner throughout this trial.

Furthermore, defendant's claim that the prosecution failed to separately charge him with a crime for discharge of the weapon cannot prevail as a basis for relief. Defendant was not convicted of any weapons charge. Thus, even if there was error, it

was harmless as it would not have changed the outcome of this trial. Harmless error has been found to exist where: "(1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict." *Commonwealth v. Ballard*, 80 A.3d 380, 398-399 (Pa. 2013) (quoting *Commonwealth v. Fears*, 575 Pa. 281, 310, 836 A.2d 52, 69 n.18 (2003)). Therefore, this claim has no merit.

Defendant next challenges his sentence. He claims that this court erred in ordering him to receive medical and psychological treatment based on hearsay reports. This claim has no merit. Pennsylvania Rule of Criminal Procedure 702(B) states that "[a]fter a finding of guilt and before

the imposition of sentence, after notice to counsel for both parties, the sentencing judge may, as provided by law, order the defendant to undergo a psychiatric or psychological examination." It is also within the sentencing court's discretion to "order a pre-sentence investigation report in any case." Pa. R. Crim. P. 702(B). In fashioning a defendant's sentence, "[s]entencing courts may consider evidence that might not be admitted at trial[,]...but they may not

disregard pertinent facts, disregard the force of evidence or commit errors of law." *Commonwealth v. Charles*, 488 A.2d 1126, 1129 (Pa. Super. 1985).

Contrary to defendant's argument, this court did not improperly rely on hearsay in the determination of his sentence. This court properly reviewed the pre-sentence investigation report and mental health evaluation prepared pursuant to court order and gave due consideration to each before ordering psychiatric and psychological treatment for defendant. Additionally, there was no error in attaching this condition to defendant's sentence. Pursuant to the Mental Health Procedures Act, 50 P.S. Sections 7101-7503, a defendant can be subjected to court-ordered involuntary mental health treatment. *See,* 50 P.S. Section 7401(relating to examination and treatment of a person charged with

crime or serving sentence); 50 P.S. Section 7304 (relating to court-ordered involuntary treatment); 50 P.S. Section 7107 (relating to individualized treatment plan). In light of the above, defendant's claim is meritless.

In contending that his twenty (20) to forty (40) year sentence constitutes life imprisonment, defendant is effectively arguing that his sentence was excessive. However, sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. *See Commonwealth v. McNabb*, 819 A.2d 54 (Pa. Super. 2003). An abuse of discretion is more than just an error in judgment. It is "synonymous with a failure to exercise a sound, reasonable, and legal discretion." *Commonwealth v. Myers*, 554

Pa.569, 574, 722 A.2d 649, 651 (1998) (quoting *Commonwealth v. Powell*, 527 Pa. 288, 298, 590 A.2d 1240, 1245 n. 8 (1991)). The appellate court will not conclude that the trial court has abused its discretion unless the record discloses that the trial court's judgment was manifestly unreasonable, or the result of partiality, bias or ill-will. *See McNabb*. *See also Commonwealth v. Gould*, 912 A.2d 869 (Pa. Super. 2006)(holding that the standard of review is very narrow for a challenge to the discretionary aspects of a defendant's sentence). A sentence must either exceed the statutory limit or be manifestly excessive to constitute an abuse of discretion. *See Commonwealth v. White*, 491 A. 2d 252 (Pa. Super. 1985).

This court did not impose a harsh and excessive sentence for defendant's conviction. Our Superior Court has advised that "[b]ald allegations of excessiveness are insufficient. ... Rather, the appellant must demonstrate ... that a substantial question exists concerning the sentence." *McNabb*, 819 A.2d at 55-56 (Pa.Super. 2003)(citation omitted). In *Commonwealth v. Miller*, 835 A.2d 377, 380 (Pa. Super. 2003), the court explained that a defendant has established a substantial question upon showing "that the sentencing court's actions either were inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process." The appellate court "will proceed to the merits of a challenge to the discretionary aspects of a sentence

only after it determines that a substantial question exists." *McNabb*, 819 A.2d at 56.

Defendant cannot establish that this court violated the Sentencing Code or the fundamental principles that govern sentencing. An individual convicted of third-degree murder may be sentenced to a maximum imprisonment term of forty (40) years. *See* 18 Pa.C.S. Section 2502(c). In this case, defendant was sentenced to a term of imprisonment of twenty (20) to forty (40) years, which is within the statutory limit. In *Commonwealth v. Yuhasz*, 592 Pa. 120, 133, 932 A.2d 1111, 1119

(2007), the court held that "[t]he only line that a sentence may not cross is the statutory maximum sentence." *Id.*, 592 Pa. at 133, 923 A.2d at 1119

(quoting *Commonwealth v. Mouzon*, 571 Pa. 419, 425, 812 A.2d 617, 621 (2002)). Defendant has no meritorious claim because his sentence was reasonably imposed within the maximum statutory limit. *See Comonwealth v. Daniel*, 30 A.3d 494, 497 (Pa. Super. 2011) (recognizing that "the term 'unreasonable' generally means a decision that is either irrational or not guided by sound judgment").

There is also no support for defendant's claim that this court made "conclusory statements" based on hearsay. Instead, the record shows that this court considered all legally pertinent factors before imposing a reasonable sentence upon defendant. *See* N.T. 04/08/16, pp. 6-44. This court reviewed both the pre-sentence investigation report and the mental health evaluation of defendant before conveying the sentence hearing. N.T. 04/08/16, pp. 6-44;

Commonwealth v. Burns, 765 A.2d 1144, 1151 (Pa. Super. 2000) (confirming that the sentencing court "can satisfy the requirement that reasons for imposing sentence be placed on the record by indicating that he has been informed by the pre-sentencing report"); *Commonwealth v. McClendon*, 589 A. 2d 706 (Pa. Super. 1991) (noting that the sentencing court's discretion will not be disturbed if it has been informed by the pre-sentencing report). At the sentencing hearing, this court heard from both sides before imposing sentence. *See* N.T. 04/08/16, pp. 6-44. In fashioning defendant's sentence, this court considered all relevant factors, including the nature and the circumstances of the offense, the impact upon the victim, the protection of society, the sentencing guidelines, as well as his age, mental aptitude, parental status, educational

attainment, employment history, prior criminal record, and rehabilitative needs. *See* N.T. 04/08/16, pp. 6-44. There were no impermissible factors entertained by this court. *See Miller*, 835 A.2d at 380 (informing that "a claim that a sentence is excessive because the trial court relied on an impermissible factor also raises a substantial

question"). Indeed, these are factors that both our appellate courts and the legislature have required a sentencing court to consider before imposition of a sentence.

Because this court carefully reviewed the sentencing guidelines, the statutory maximum for defendant's conviction, the facts of this case,

defendant's individual circumstances and background, and all other legally permissible factors, there is no support for defendant's contention that this court abused its discretion in imposing defendant's sentence. *See Commonwealth v. Eicher*, 605 A.2d 337, 354 (Pa. Super. 1992) (quoting *Commonwealth v. Clever*, 576 A. 2d 1108, 1110 (Pa. Super. 1990), which ruled that appellate court "must accord the sentencing court great weight as it is in the best position to view the defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime"). After reviewing all of the above-mentioned factors, this court fashioned an appropriate sentence given the individual circumstances of this case.

Defendant next argues that this court erred in precluding Emamuel Kapelsohn from testifying as an

expert in the use of force in firearms and ballistics As an initial matter, this court did not preclude Mr. Kapelsohn's testimony in those matters where he was properly qualified . In *Commonwealth v. Miller*, 627 A.2d 741, 748-749 (Pa. Super. 1993), the court explained that "[t]he decision to admit or exclude expert testimony lies within the sound discretion of the trial court [and] the determination of the trial court will not be reversed unless an abuse of that discretion is found to exist." In ruling on the admissibility of such evidence, "the trial court must decide whether the evidence is relevant and, if so, whether its probative value outweights its prejudicial effect." *Commonwealth v. Hawk*, 551 Pa. 71, 77, 709 A.2d 373, 376 (1998). An evidentiary ruling "will not be disturbed 'unless that ruling reflects manifest unreasonableness, or partiality,

prejudice, bias, or ill-will, or such lack of support as as to be clearly erroneous.'" *Commonwealth v.*

Bozyk, 987 A.2d 753, 756 (Pa. Super. 2009) (quoting *Commonweath v. Einhorn*, 911 A.2d 960, 972 (Pa. Super. 2006)).

This court did not abuse its discretion in denying defendant's request to introduce the whole of Mr. Kapelsohn's proffered testimony regarding the "use of force" on his justification claim. Indeed, expert testimony "is admissible in all cases, civil and criminal alike, 'when it involves explanations and inferences not within the range of ordinary training knowledge, intelligence and experience.'"

Commonwealth v. Walker, 625 Pa. 450, 486, 92 A.3d 766, 788 (2014) (quoting *Commonwealth v. Leslie*, 424 Pa. 331, 334, 227 A.2d 900, 903 (1967)). *See also* Pa.R.Evid. 702 (relating to testimony by expert witnesses).

At trial, defendant offered Mr. Kapelsohn as an expert in firearms and ballistics, shooting scene reconstruction, and the use of force. In seeking to advance his claim of justification, defendant sought to introduce the following expert testimony from Mr. Kapelsohn:

> ...[I]t is my opinion that if Brian Baur's account of what occurred and what he perceived on the night of the incident is accurate, his actions in firing at Hull were in keeping with stardard and widely acceptable principles of self defense firearms and tactics training.

Kapelsohn's November 11, 2015 Report, p. 24.

In order to prevail on a justification defense, "it must be shown that (a) the slayer was free from fault in provoking or continuing the difficulty which resulted in the slaying; (b) that the slayer must have reasonably believed that he was in imminent danger of death or great bodily harm, and that there was a necessity to use such force to save himself therefrom; and (c) the slayer did not violate any duty to retreat or to avoid the danger." *Commonwealth v. Tilley*, 528 Pa. 125, 138, 595 A.2d 575, 581 (1991). The burden "is on the Commonwealth to prove beyond a reasonable doubt that the homicide was not a justifiable act of self-defense. ... The Commonwealth sustains its

burden of disproving self defense if it establishes at least one of the following: 1) the accused did not reasonably believe that he was in danger of death or serious bodily injury; or 2) the accused provoked the use of force; or 3) the accused had a duty to retreat and the retreat was possible with complete safety." *Commonwealth v. McClain*, 587 A.2d 798, 801 (Pa. Super. 1991.

In *Commonwealth v. Mouzon*, 617 Pa. 527, 53 A.3d 738 (2012), the court explained that "[a]lthough the defendant has no burden to prove self-defense, ...before the defense is properly in issue, 'there must be some evidence, from whatever source, to justify such a finding.'" *Id.*, 617 Pa. at 531-532, 53 A.3d at 740 (quoting *Commonwealth v. Black*, 474 Pa. 47, 376 A.2d 627, 630 (1977)). The court further explained that "[t]he requirement of a reasonable

belief encompasses two aspects, one subjective and one objective. First, the defendant 'must have acted out of an honest, bona fide belief that he was in imminent danger,' which involves consideration of the defendant's subjective state of mind. Second, the defendant's belief that he needed to defend himself with deadly force, if it existed, must be reasonable in light of the facts as they appeared to the defendant, a consideration that involves an objective analysis." *Mouzon*, 617 Pa. at 551, 53 A.3d at 752.

In determining the admissibility of the proffered evidence, this court was guided by inter alia, the holding in *Commonwealth v. Sepulveda*, 618 Pa. 262, 290-291, 55 A.3d 1108, 1125 (2012), that "[d]ecisional law supports that expert testimony may

be admissible to establish the defendant's subjective state of mind – whether the defendant had an 'honest, bona fide belief that he was in imminent danger' – for purposes of presenting a theory of self-defense. ... However, a defendant's subjective state of mind does not establish the objective factor of the reasonableness of his belief, i.e., the belief of the need to defend oneself (or others) that he genuinely held must be reasonable in light of the facts as they appeared." Thus, as to these two components, expert

testimony is admissible to defendant's subjectively held belief of danger posed by the victim. However as to the objective measurement of that belief, i.e., the reasonableness of that held belief, expert

testimony is inadmissible. *See id.*, 618 Pa. at 291, 55 A.3d at 1125. *See, e.g., Commonwealth v. Light*, 458 Pa. 328, 334, 326 A.2d 288, 292 (1974) (ruling that psychiatric testimony should be admissible as to the first element, i.e., the subjective element of the defendant's state of mind at the time of the occurrence. As stated below, expert testimony is not relevant as to the objective factor of reasonableness of the defendant's belief").

Thus, this court did not err in denying defendant's request to introduce Mr. Kapelsohn's expert testimony on the objective element of defendant's state of mind.[3] *See Commonwealth v.*

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[3] The following exchange occurred between counsel and this court:

> **[Defense Counsel]:** Your Honor, I would submit that that is with regard to psychiatric testimony and dealing with what was in my client's head that made him subjectively commit this action, but not

objectively. And in this particular case, we are not looking at an expert who is going to tell you what went on inside his head.

The expert is saying that, given all the facts and all the circumstances in this case, it was objectively reasonable, if someone said, I'm going to kill you, and they were roughly 10 feet away or within 10 feet, and they began to turn towards you, to believe that your life was in danger at that time, because of the Tueller rule and the other factors that would show that, in fact, Mr. Baur was in grave danger at that time and could have been killed very easily by an unarmed man, even though he was possessing a firearm.

To expound –

THE COURT: The case law is clear on two points. One, you may have expert testimony only on the issue that is the subjective element. You may not offer – I mean on the subjective, no on the objective. The law further is that the only expert testimony that you may offer on the subjective element is psychiatric testimony.

Now, I was about to ask you if you had a case that would permit you to offer expert testimony other than psychiatric expert testimony on the subjective element. But you have told me that you will not be offering your expert on that element but rather on the objective fact. And there is nothing in the case law that I have found that permits expert testimony on the objective element that we have discussed.

Do you have anything to support your position that an expert may testify on the objective element that we have discussed?

[Defense Counsel]: No, Your Honor. I don't have anything that says that.

What I'm arguing is that the expert testimony would come in on either prong. I'm saying if there's a case Sepulveda that says an expert can only show on one prong and not the other, and that's a psychiatric expert, that is dealing necessarily with the subjective prong. Because a psychiatric expert is going to tell you subjectively what is going on inside someone's head.

This expert is not that type of expert. This expert is someone who conceptually could very easily tell you objectively what's going on. So I would submit that objectively Mr. Kapelsohn can say, under these circumstances, these actions were reasonable.

THE COURT: The case of the Commonwealth v. Sepulveda, ..., 618 Pa. 262, it's a 2012 case, states the following: "The panel first explained that an imperfect self-defense – "this is an aside, "voluntary manslaughter theory – has two components: The defendant's subjectively held belief of danger posed by the victim, as to which expert testimony is admissible; the objective measurement of that belief, the reasonableness of that belief, as to which expert testimony is inadmissible."

The courts have said that you cannot offer expert testimony on the objective element. And that's what you have just told me your expert intends to do.

[Defense Counsel]: That's correct, Your Honor. He is not a psychiatrist. He is coming in, as a use-of-force expert, to do that.

THE COURT: Well, he may be a use-of-force expert, and there may be some elements of his testimony that are admissible. But on the state of the law as I understand it, his opinion that the defendant acted in self-defense, or to state it precisely as he did in his 024-page report, quote, Based on the foregone, it is my opinion that if Brian Baur's account of what occurred and what he perceived on the night of the

McClendon, 874 A.2d 1223, 1230 (Pa. Super. 2005) (holding that "[i]t remains the province of the jury to determine whether the accused's belief was reasonable, whether he was free of provocation, and whether he had no duty to retreat"). In fact, defendant clearly proferred this evidence for that purpose. Such testimony was not offered to prove the subjective element. Based on the law stated

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> incident is accurate, his actions in firing at Hull were in keeping with standard and widely acceptable principles of self-defense firearms and tactics training. That opinion is inappropriate.
>
> Commonwealth motion to preclude it is granted. The opinion is inappropriate based on the law as I understand it and as I have articulated it her this afternoon.

N.T. 01/25/16, pp. 29-32.

above, the use of such expert testimony as improper. Consequently, this court did not err in its ruling.

Defendant also claims that his rights were violated "by prosecution destruction, deletion and dismissal of possibly exculpatory evidence." This is a fabricated issue. To prevail on a *Brady* claim, defendant must prove that: "the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued." *Commonwealth v. Simmons*, 569 Pa. 405, 425, 804 A.2d 636-637 (2001). Defendant has failed to prove that a *Brady* violation occurred. First, he has failed

to identify the exculpatory evidence allegedly subjected to "prosecution destruction, deletion and dismissal." Thus, this claim is a mere bald allegation. Second, the record shows that all requested discovery was turned over to defense counsel. There was no evidence suppressed by the prosecution. Third, defendant was not prejudiced. In *Commonwealth v. Gibson*, 597 Pa. 402, 430, 951 A.2d 1110, 1126-1127 (2008), the court explained that "[t]o satisfy the prejudice inquiry, the evidence suppressed must have been material to guilt or punishment. ... Evidence is material when there is a reasonable probability, sufficient to undermine confidence in the outcome of the trial, that the result of the proceeding would have been different had the evidence been disclosed." The outcome of defendant's trial would not have been different had the evidence

been disclosed." The outcome of defendant's trial would not have changed as the Commonwealth presented overwhelming evidence that proved beyond a reasonable doubt that defendant committed the aforementioned crime. Moreover, defendant has not established that the prosecutor's conduct "had the unavoidable effect of prejudicing the jury ... as to render it incapable of fairly weighing the evidence and arriving at a just verdict." *Commonwealth v. Brown*, 605 Pa. 103, 119, 987 A.2d 699, 709 (2009) (quoting *Commonwealth v. Carson,* 590 Pa. 501, 530, 913 A.2d 220, 236 (2006)). *See Commonwealth v. Small,* 559 Pa. 423, 441, 741 A.2d 666, 676 (1999) (holding that "[t]here is no constitutional requirement that a prosecutor make a complete and detailed accounting to the

defense of all police investigatory work on a particular matter"). Therefore, he is not entitled to relief.

In line with the principles stated above, relief is not warranted on defendant's allegation that the prosecution did not provide him copies of exhibits referred to during cross-examination. First, defendant has not sufficiently identified when this alleged error occurred. Pennsylvania Rule of 1925(b)(4)(ii) requires a statement of matters complained of on appeal to "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." The Comment to this subsection of Rule 1925 states that this provision

"sets forth the parameters for the Statement and explains what constitutes waiver." Accordingly, this issue has been waived. Nevertheless, this court has found nothing on the record indicating that the Commonwealth withheld any applicable discovery from defendant or defense counsel that was within the prosecutor's possession. Thus, this claim has no merit.

Defendant argues that a portion of the medical examiner's testimony should have been stricken because it demonstrated "a further failure of the prosecution to obtain exculpatory evidence by not obtaining a toxicology report." At trial, Dr. Albert Chu testified that a toxicology report showed decedent's blood alcohol level at 251 milligrams, approximately three times over the legal driving limit. Dr. Chu also testified on cross-examination

that decedent was not screened for some commonly abused drugs such as marijuana.

The exclusion of such drugs from the toxicology screening did not require the striking of relevant evidence presented for the jury's consideration. As the court held in *Commonwealth v. Chmiel,* 558 Pa. 478, 493, 738 A.2d 406, 414 (1999), "[q]uestions concerning the admissibility of evidence lie within the sound discretion of the trial court, and the [appellate court] will not reverse the court's decision on such a question absent a clear abuse of discretion." Indeed, "[a]ll relevant

evidence is admissible except as otherwise provided by law." Pa.R.Evid. 402. Relevant evidence "is that which tends to establish facts in issue or in some

degree advances the inquiry and is therefore probative." *Commonwealth v. Impellizzeri,* 661 A.2d 422, 428 (Pa. Super. 1995). In *Commonwealth v. Enders*, 595 A.2d 600 (Pa. Super. 1991), the court explained that "[a]piece of evidence is of essential evidentiary value if the need for it clearly outweights the likelihood of it inflaming the minds and passions of the jurors." *Id.* at 604 (quoting *Commonwealth v. Conway,* 534 A.2d 541, 544 (Pa. Super. 1987)). In addition to establishing the manner and cause of decedent's death, the medical examiner's testimony was relevant in showing his medical condition at the time he was killed. The absence of evidence relating to the potential presence of illegal drugs in decedent's blood did not require the striking of the medical examiner's testimony. Instead, this was an issue that was properly covered during cross-

examination and defense counsel's closing arguments. Defense counsel further explored the possibility of illegal drug use during cross-examination of decedent's fiancée who testified that she found drug paraphernalia in the back of decedent's truck when she arrived in the area. It was the jury's responsibility to determine what weight to accord the evidence presented by both sides. The jury's verdict establishes that it resolved any inconsistencies or conflicts in the evidence in the Commonwealth's favor. Accordingly, defendant's claim cannot prevail.

Defendant also raises two ineffectiveness of counsel claims in this direct appeal. In accordance with *Commonwealth v. Grant*, 572 Pa. 48, 67, 813 2d 726, 738 (2002), these issues will not be addressed. In *Grant*, our Supreme Court announced that a

defendant "should wait to raise claims of ineffective assistance of counsel until collateral review." Further, "[d]eferring review of [such claims] until the collateral review stage of the proceedings offers a [defendant] the best avenue to effect his Sixth Amendment right to counsel." *Id.* In *Commonwealth v. Holmes,*

621 Pa. 595, 598, 79 A.3d 562, 563 (2013), the court recognized two exceptions "falling within the discretion of the trial judge." First, "there may be extraordinary circumstances where a discrete claim (or claims) of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice[.]" *Id.* Second, in instances "where the

defendant seeks to litigate multiple or prolix claims of counsel ineffectiveness, including non-record-based claims, on post-verdict motions and direct appeal, ... but only if (1) there is good cause shown, and (2) the unitary review so indulged is preceded by the defendant's knowing and express recognition that the waiver subjects further collateral review to the time and serial petition restrictions of the PCRA." *Id.*, 572 Pa. at 599, 79 A.3d at 564. None of these exceptions apply to this case. Accordingly, this court has not abused its discretion in refusing to entertain these ineffectiveness of counsel claims.

Defendant contends that police testimony should have been stricken from the record because it conflicted with reports and prior testimony. As the court held in *Commonwealth v. Blakeney,* 596 Pa. 510, 523, 946 A.2d 645, 653 (2008), a new trial

cannot be granted "merely because of some conflict in testimony or because the judge would reach a different conclusion on the same facts, but should only do so in extraordinary circumstances[.]" It is solely 'within the province of the jury as the fact-finder to resolve all issues of credibility, resolve conflicts on evidence, make reasonable inferences from the evidence, believe all, none, or some of the evidence, and ultimately adjudge [the defendant] guilty." *Commonwealth v. Charlton*, 902 A.2d 554, 562 (Pa. Super. 2006). Indeed, "it is the finder-of-fact's ability to make in-person observations of the witness at the time of trial, as he or she explains the reasons for the prior statement, which is most crucial to its assessment of the witness's credibility." *Commonwealth v. Brown*, 617 Pa. 107, 155-156,

52 A.3d 1139, 1169 (2012). In finding defendant guilty of the

aforementioned crime, the jury considered all of the evidence presented by both the Commonwealth and defense. The jury's verdict clearly demonstrates that it exercised its lawful duty as fact-finder and resolved conflicting evidence in the light most favorable to the Commonwealth. Consequently, defendant's claim has no merit.

Defendant alleges that this court erred in sequestering "[d]efense co-counsel." In *Commonwealth v. Atwell*, 785 A.2d 123, 125 (Pa. Super. 2001), the court held that its "standard of review on a trail court's decision to sequester witnesses is based on abuse of discretion."

Defendant "must demonstrate that the trial court failed to apply the law correctly or acted for reasons of bias or other factors unrelated to the merits of the case." *Id.* Defendant has failed to establish that this court abused its discretion. In referring to "[d]efense co-counsel," defendant is apparently referencing his sister who is the attorney representing him in this appeal. However, she was not co-counsel at the time of trial. She only testified as a fact witness. Defendant's sister did not enter her actual appearance on the record until the time of this appeal. Thus, defendant's claim has no merit.

Defendant also challenges this court's denial of the motion to suppress his statements.[4] When

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[4] The eighteenth issue is raised thusly in defendant's statement: "Whether Defendant ever made a 'confession' is in issue. Whether Defendant's constitutional rights were violated when the Court's decision to remove the involuntary manslaughter charge from the Jury was based on his decision

reviewing a challenge to the suppression court's ruling, the appellate court is bound by the suppression court's findings of fact so long as they are supported by the record. *Commonwealth*

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that the Defendant made a 'confession.'" The circumstances surrounding defendant's voluntary statements to police will be addressed. This court did not err in finding that his statements to police were made knowingly, intelligently, and voluntarily. Moreover, this court did not err in refusing to instruct on involuntary manslaughter. In *Commonwealth v. Fletcher*, 604 Pa. 493, 544, 986 A.2d 759, 791 (2009), the court held that "[i]nvoluntary manslaughter is defined as a killing that occurs when, 'as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, [the defendant] causes the death of another person.' ... An instruction on involuntary manslaughter is not required unless it has bene made an issue in the case and the facts would support such a verdict. "*Id.* (citations omitted) (citing 18 Pa.C.S. Section 2504(a)). In this case, there was no credible evidence to support the conclusion that the killing was accidental or that it resulted from defendant acting in a reckless or grossly negligent manner. Instead, as evidenced by the jury's verdict, defendant exhibited a conscious disregard of an extremely high risk of death that warranted a third-degree murder conviction. Consequently, there is no merit to this argument.

v. Chandler, 505 Pa. 113, 477 A. 2d 851 (1984). The appellate court will reverse this court's decision "only if there is an error in the legal conclusions drawn from those findings." *Commonwealth v. Basking*, 970 A.2d 1181, 1187 (Pa. Super. 2009) (quoting *Commonwealth v. Hill,* 874 A.2d 1214, 1216 (Pa. Super. 2005)). Thus, the appellate court must consider "whether the suppression court properly applied the law to the facts of the case." *Commonwealth v. Ruey*, 586 Pa. 230, 240, 892 A.2d 802, 807 (2006). In cases where the defendant's motion to suppress has been denied, the appellate court will " 'consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted.'" *In re J.V.,* 762 A.2d 376, 379 (Pa Super. 2000) (quoting

Commonwealth v. Reddix, 513 A.2d 1041, 1042 (Pa. Super. 1986)).

It is the Commonwealth's burden to prove by a preponderance of the evidence that the evidence challenged by a defendant in his motion to suppress is admissible. *See Basking*. The suppression of evidence is a remedy available to a defendant if such evidence was seized as a result of a search that violated the fundamental constitutional guarantees of Article 1, Section 8 of the Pennsylvania Constitution. *See Ruey*. However, as our Supreme Court has explained, the suppression of evidence is not always the appropriate remedy in a particular matter. *See Commonwealth v. Monte*, 459 Pa. 495, 329 A.2d 836 (1974). It is only in instances "where the violation also implicates fundamental, constitutional concerns, is conducted in bad-faith or

has substantially prejudiced the defendant that exclusion may be an appropriate remedy." *Commonwealth v. Mason,* 507 Pa. 396, 407, 490 A.2d 421, 426 (1985) (emphasis in original). Our Superior Court has held that "it is the sole province of the suppression court to weigh the credibility of the witnesses. ... Further, the suppression court judge is entitled to believe all, part or none of

the evidence presented." *Commonwealth v. Benton,* 655 A.2d 1030, 1032 (Pa. Super. 1995) (citation omitted).

In response to defendant's claim, this court relies upon the findings of fact and conclusions of law made on December 14, 2015, as the basis for its decision to deny defendant's motion to suppress. *See*

N.T. 12/14/15, pp. 6-14. In essence, this court found that the police conduct herein was entirely consistent with questioning of a cooperative witness who had reported a crime and who might have significant information to convey to police. *See Commonwealth v. Williams*, 539 Pa. 61, 650 A.2d 420 (1994). Indeed, upon arrival at the Homicide Unit, defendant stated to Detective Bartol that he wanted to cooperate. He then volunteered his version of the events surrounding the shooting death of Richard Hull. However, as outlined above, once defendant stated that the only thing he did wrong was to fire a warning shot, his narrative was terminated by Detective Bartol who then issued the standard Miranda warnings. Defendant then repeated his narrative to Detective Bartol following the warnings. Detective Bartol then told defendant that he wanted

to formalize the interview in writing. He then issued written Miranda warnings using police form 75-331D and 75-331E. After the warnings from 75-331D, defendant was asked the seven questions from 75-331E. Although defendant answered questions one through five consistent with a willingness to give a voluntary statement, the interview was terminated when defendant invoked his right to counsel in response to question six. Thus, based on the totality of the circumstances, this court did not err in denying defendant's motion to suppress his voluntary statements.

Accordingly, in light of the foregoing, the judgment of sentence should be AFFIRMED.

BY THE COURT,

/s/_____
Sandy L.V. Byrd, J.

J-A28001-17

NON-PRECEDENTIAL DECISION – SEE

SUPERIOR COURT I.O.P. 65.37

COM. of PA	:	IN THE SUPERIOR
Appellee	:	COURT OF PA
v.	:	
BRIAN D.BAUR	:	
Appellant	:	NO. 1185 EDA 2016

Appeal from the Judgment of Sentence
April 8, 2016 In the Court of Common Pleas
of Philadelphia County Criminal Division at
No(s): CP-51-CR-0010543-2014

BEFORE: GANTMAN, P.J., PANELLA, J.
and DUBOW, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED DECEMBER 22, 2017

Appellant, Brian D. Baur, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury

trial conviction for third-degree murder.[1] We affirm.

In its opinion, the trial court correctly set forth the facts and procedural history of this case. Therefore, we have no reason to restate them. We add that Appellant filed a motion to suppress on May 20, 2015, and an amended version on November 22, 2015. Appellant moved for the suppression of statements he gave to police and for any evidence obtained stemming from his arrest. The trial court held a suppression hearing on December 14, 2015, and subsequently denied Appellant's suppression

motion.

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1. 18 Pa.C.S.A. Section 2502(c)

Appellant raises the following issues for our review:

1. WHETHER THE LAW OF THE CASE DOCTRINE IS AN ISSUE IN THIS CASE SINCE TWO JUDGES HAVE MADE RULINGS CONCERNING THE CONSTITUTIONAL RIGHTS OF [APPELLANT?]

2. WHETHER FAILURE TO APPLY THE "CASTLE DOCTRINE" TO THE FACTS OF THIS CASE IS AN ERROR OF LAW AND A VIOLATION OF [APPELLANT]'S CONSTITUTIONAL RIGHTS ESSENTIALLY DENYING [APPELLANT]THE RIGHT TO PRESENT A DEFENSE[?]

3. WHETHER PRECLUSION OF [APPELLANT]'S "USE OF FORCE" EXPERT CONSTITUTES AN ABUSE OF DISCRETION AND AN ERROR OF LAW DENYING [APPELLANT] THE RIGHT TO PRESENT A DEFENSE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS[?]

4. WHETHER THE SENTENCE IMPOSED VIOLATED [APPELLANT]'S CONSTITUTIONAL RIGHTS BY ORDERING MEDICAL AND PSYCHOLOGICAL TREATMENT FOR [APPELLANT]BASED ON HEARSAY REPORTS, OBVIATING APPELLANT'S ABILITY TO CROSS-EXAMINE[?]

5. WHETHER THE SENTENCE IMPOSED CONSTITUTES LIFE IMPRISONMENT IN VIOLATION OF THE INTENT OF THE LEGISLATURE[?]

6. WHETHER THE REASSIGNMENT OF THE CASE FROM JUDGE LERNER TO JUDGE BYRD WAS JUSTIFIED[?]

7. WHETHER THE RULINGS OF JUDGS LERNER AND BYRD CONCERNING THE ADMISSION OF VIDEO EVIDENCE VIOLATED [APPELLANT]'S CONSTITUTIONAL RIGHTS WHERE POLICE FAILED TO PRESERVE ORIGINAL EVIDENCE, CHAIN OF CUSTODY WAS NOT PRESERVED AND EVIDENCE WAS ADMITTEDLY ALTERED TO PRESENT IT TO SUPPORT THE THEORY OF THE PROSECUTION[?]

8. WHETHER [APPELLANT]'S RIGHTS WERE VIOLATED BY [THE]PROSECUTION['S] DESTRUCTION, DELETION AND

DISMISSAL OF EVIDENCE THAT COULD PROVE TO BE EXCULPATORY[?]

9. WHETHER THE TESTIMONY OF POLICE THAT CONFLICTS WITH REPORTS AND PRIOR TESTIMONY SHOULD HAVE BEEN STRICKEN FROM THE RECORD SO THAT THEY WOULD NOT BE CONSIDERED BY THE JURY[?]

10. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ALLOWING [APPELLANT] TO PRESENT RE-DIRECT TESTIMONY TO ADDRESS POINTS RAISED IN CROSS[-EXAMINATION] BY THE PROSECUTION[?]

11. WHETHER SEQUESTRATION OF DEFENSE CO-COUNSEL WAS AN ERROR OF LAW AND DEPRIVVED [APPELLANT] OF HIS 6TH AMENDMENT RIGHT TO COUNSEL OF HIS CHOICE[?]

12. WHETHER [APPELLANT]'S RIGHT TO COUNSEL [WAS] VIOLATED WHEN HE WAS DETAINED AT POLICE HEADQUARTERS (THE ROUNDHOUSE), WITHOUT ACCESS TO HIS ATTORNEYS, FOR FOUR DAYS PRIOR TO ARRAIGNMENT AND PRIOR TO [APPELLANT] BEING READ HIS CONSTITUTIONAL RIGHTS OR MIRANDIZED[?]

13. WHETHER [APPELLANT]'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY [THE COMMONWEALTH'S] FAIL[URE] TO PROVIDE [APPELLANT] COPIES OF EXHIBITS BEING REFERRED TO BY THE PROSECUTION DURING HIS CROSS-EXAMINATION[?]

14. WHETHER [APPELLANT]'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE FAILURE OF THE [TRIAL COURT] TO GIVE JURY INSTRUCTIONS CONCERNING THE CASTLE DOCTRINE AND SELF-DEFENSE AND THE FACT THAT THEY COULD FIND [APPELLANT] NOT GUILTY[?]

15. WHETHER THE [TRIAL COURT]'S CONCLUSORY STATEMENTS AT SENTENCING, BASED ON HEARSAY DOCUMENTS, CONSTITUTE AN ABUSE OF DISCRETION AND A VIOLATION OF LAW[?]

16. WHETHER THE TESTIMONY OF THE MEDICAL EXAMINER SHOULD HAVE BEEN STRICKEN IN PART AND

WHETHER IT DEMONSTRATES A FURTHER FAILURE OF THE PROSECUTION TO OBTAIN EXCULPATORY EVIDENCE BY NOT OBTAINING A TOXICOLOGY REPORT[?]

17. WHETHER THE [TRIAL COURT] DEMONSTRATED EXTREME BIAS FOR THE PROSECUTION IN CONCLUDING THAT [APPELLANT]'S "WARNING SHOT" WAS "ILLEGAL," DIRECTING THE PROSECUTION TO "FIND IT ([IN] THE CRIMES CODE)"..."AND DEVELOP THE ARGUMENT FURTHER"[?] WHERE THE [COMMONWEALTH] FAILED TO SEPARATELY CHARGE [APPELLANT]

WITH ANY CRIME FOR THE DISCHARGE OF THE WEAPON, WHETHER [APPELLANT]'S RIGHT TO NOTICE AND THE OPPORTUNITY TO BE HEARD AND PRESENT AN APPROPRIATE DEFENSE WERE VIOLATED, AND THE RESULTING ADVERSE AND CONFUSING CHARGE TO THE JURY PREJUDICED [APPELLANT]'S CONSTITUTIONAL RIGHTS, DENYING HI A FAIR TRIAL[?]

18. WHETHER [APPELLANT]EVER MADE A "CONFESSION" IS AN ISSUE. WHETHER [APPELLANT]'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE COURT'S DECISION TO REMOVE THE INVOLUNTARY MANSLAUGHTER CHARGE FROM THE JURY WAS BASED ON [THE COURT'S]DECISION THAT [APPELLANT] MADE A "CONFESSION"[?]

19. WHETHER THE RULINGS OF JUDGES LERNER AND BYRD ARE ERRONEOUS WITH REGARD TO [APPELLANT]'S PRE-TRIAL MOTIONS, DELINEATING HIS OBJECTIONS TO HIS INITIAL DETENTION AT THE ROUNDHOUE WHERE HE WAS DENIED THE ASSISTANCE OF COUNSEL AND WAS NOT READ HIS CONSTITUTIONAL RIGHTS OR MIRANDIZED[?]

20. WHETHER DEFENSE COUNSEL WAS INEFFECTIVE, WHEN HE STATED IN HIS CLOSING ARGUMENT STATEMENTS THAT CONTRADICTED THE TESTIMONY OF [APPELLANT], IN HIS PREENTATION TO THE JURY, AND IN FACT PRESENTED THE JURY WIT THE PROSECUTION'S VERSION OF THE EVIDENCE[?]

(Appellant's Brief at 2-7).

Challenges to the discretionary aspects of sentencing do not entitle an

appellant to review as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa. Super. 2000). Before we review a discretionary aspects of sentencing claim:

> [W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly

> preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim. P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. Section 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa. Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted). ***See also Commonwealth v. Oree***, 911 A.2d 169 (Pa. Super. 2006), *appeal denied*, 591 Pa. 699, 918 A.2d 744 (2007) (explaining challenges to discretionary aspects of sentencing must be raised in post-sentence motin or during sentencing proceedings; absent such efforts, claims are waived; inclusion of discretionary aspects of sentencing claims in Pa.R.A.P. 1925(b) statement will not cure waiver).

Instantly, we observe Appellant failed to file post-sentence motions or raise any discretionary aspects issue during sentencing. Additionally Appellant failed to include a Rule 2119(f) statement in his brief. Thus, Appellant waived his fourth, fifth and fifteenth issues, which challenged the discretionary aspects of his sentence. ***See*** Pa.R.A.P. 2119(f); ***Oree, supra; Evans, supra.*** Further, Appellant's inclusion of challenges to the

discretionary aspects of sentencing in his Rule 1925(b) statement did not cure this waiver. ***See Oree, supra.***

Further, as a rule, ineffective assistance of counsel claims should be deferred until proceedings

under the Post Conviction Relief Act ("PCRA") at 42 Pa.C.S.A. Sections 9541-9546. ***See generally Commonwealth v. Grant,*** 572 Pa. 48, 813 A.2d 726 (2002) and its progeny. Likewise, this Court will not entertain ineffective assistance of counsel claims on direct appeal unless the defendant makes a knowing, intelligent, and voluntary waiver of PCRA review. ***Commowealth v. Barnett***, 25 A.3d 371 (Pa.Super. 2011) (en banc).

Instantly, Appellant's tenth, thirteenth, and twentieth issues raise trial counsel's alleged ineffectiveness. Appellant, however, did not develop any record on his claims before the trial court and waive his right to PCRA review. ***See id.*** Thus, we decline to address those claims on direct appeal. Instead Appellant will have to raise his

ineffectiveness of counsel claims in a timely PCRA petition.

Next, we observe that appellate briefs must conform in all material respects to the briefing requirements set forth in the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 2101 ***See also*** Pa.R.A.P. 2114-2119 (addressing specific requirements of each subsection of brief on appeal). Regarding the argument section of an appellate brief, Rule 2119(a) provides:

Rule 2119. Argument

> **(a) General rule.** – The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part – in distinctive type

> or in type distinctively displayed – the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

Pa.R.A.P. 2119(a). "[I]t is an appellant's duty to present arguments that are sufficiently developed for our review. The brief must support the claims with pertinent discussion, with references to the record and with citations to legal authorities." ***Commonwealth v. Hardy***, 918 A. 2d 766, 771 (Pa. Super. 2007), *appeal denied,* 596 Pa. 703, 940 A.2d 362 (2008) (internal citations omitted). "This Court will not act as counsel and will not develop arguments on behalf of an appellant." ***Id.*** If a deficient brief hinders this Court's ability to address any issue on review, we shall consider the issue **waived**. ***Commonwealth v. Gould***, 912 A. 2d 869, 873 (Pa. Super. 2006) (holding appellant waived on

appeal where he failed to support claim with relevant citations to case law and record). ***See also In re R.D.***, 44 A.3d 657 (Pa. Super. 2012), *appeal denied*, 618 Pa. 677, 56 A.3d 398 (2012) (holding appellant waived ineffective assistance of counsel claim where argument portion of appellant's brief lacked meaningful discussion of , or citation to, relevant legal authority regarding ineffectiveness claims generally or defense counsel's specifically alleged error; appellant's lack of analysis precluded meaningful appellate review).

Instantly, Appellant fails to provide adequate legal citations to support

his arguments for issues one, three, six, seven, nine, eleven, sixteen, and eighteen. The majority of Appellant's argument section is a general restatement of the facts. Appellant's only citation to legal authority concerns the use of the ***Frye*** test for admission of expert testimony in his third issue, but Appellant does not offer any additional argument on this point. Other than in his third issue, Appellant offers no legal authority indicating how or why he is entitled to relief under these claims. ***See*** Pa. R.A.P. 2119(a); ***Hardy, supra.*** Appellant's failure to develop these claims on appeal precludes meaningful review and constitutes waiver of his issues one, three, six, seven, nine, eleven, sixteen, and eighteen. ***See In re R.D., supra; Gould, supra.*** Moreover, even if Appellant had properly preserved these issues, we would affirm based on the trial court

opinion. ***See*** Trial Court Opinion, filed December 28, 2016, at 11-29 (discussing and properly dismissing these issues).

Regarding Appellant's remaining issues two, eight, twelve, fourteen, seventeen, and nineteen, after a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Sandy L.V. Byrd, we conclude these issues also merit no relief. The trial court opinon comprehensively discusses and properly disposes of the questions presented. (***See id.*** at 13-14, 23-29)(finding: **(2, 14)** record shows court applied castle doctrine to this case and gave appropriate instructions to jury; court reviewed each provision with counsel before

determining proper instructions based on facts of case; court did not use specific words which defense counsel wanted, but court provided jury with correct legal principles regarding how to apply relevant portions of castle doctrine to facts of case; **(17)** trial court conducted itself in fair and impartial manner throughout trial; further, jury did not convict Appellant of any weapons offense; outcome of trial would not have changed if Commonwealth had separately charged Appellant with weapons offenses; thus, Commonwealth's failure to do so constitutes harmless error; **(8)** Appellant failed to identify exculpatory evidence Commonwealth allegedly mishandled; record shows Commonwealth gave defense counsel all requested discovery; further, outcome of Appellant's trial would not have changed, because Commonwealth presented overwhelming

evidence of Appellant's guilt; Appellant also failed to establish Commonwealth's conduct prejudiced jury against Appellant; thus, Appellant suffered no prejudice from any alleged mishandling of evidence; Appellant failed to prove ***Brady*** violation occurred; **(12, 19)** following suppression hearing, court found police conduct was consistent with questioning of cooperative witness who had reported crime and who might have significant information to convey to police; upon arrival at homicide unit, Appellant told Detective Bartol that Appellant wanted to cooperate; Appellant volunteered his version of events surrounding shooting death of Victim; Detective Bartol terminated Appellant's narrative and issued **Miranda** warnings as soon as Appellant

stated only thing he did wrong was fire warning shot; Appellant again stated his narrative after Detective Bartol gave ***Miranda*** warnings; Detective Bartol stopped interview when Appellant invoked his right to counsel; based on totality of circumstances, court did not err in denying Appellant's motion to suppress his voluntary statements). Accordingly, we affirm based on the trial court opinion.

Judgment of sentence affirmed.

Judgment Entered.

_/s/_____
Joseph D. Seletyn, Esquire
Prothonotary

Date: 12/22/2017

IN THE SUPREME COURT OF PENNSYLANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	:	No, 66 EAL 2019
v.	:	Petition for Allowance of Appeal from the Order of the Superior Court
BRIAN D. BAUR, Petitioner.	:	

ORDER

PER CURIAM

AND NOW, this 18th day of July, 2018, the

Petition for Allowance of Appeal is **DENIED**.

A True Copy
As Of 07/18/2018

Attest: _____/s/
John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	:	No. 66 EAL 2018
v.	:	Application for Reconsideration
BRIAN D. BAUR, Petitioner.	:	

ORDER

PER CURIAM

AND NOW, this 24th day of August, 2018, the Application for Reconsideration is **DENIED.**

A True Copy
As of 08/24/2018

Attest: _____/s/
John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

This Appendix is submitted separate from the Petition for Writ of Certiorari.

Dated: April 5, 2019

Respectfully submitted,

Mary Catherine Baur, Esquire

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