No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL WESLING – PETITIONER

VS.

SUPERIOR COURT OF PENNSYLVANIA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

DANIEL WESLING #LP8976
1600 WALTERS MILL RD.
SOMERSET, PA 15510

QUESTION(S) PRESENTED

1). Is not the Commonwealth of Pennsylvania conviction of Petitioner with uncorroborated victim statements coupled with an indictment so vague to destroy any possibility of an adequate defense giving Commonwealth of Pennsylvania a procedure which creates an impermissibly large risk that the innocent will be convicted?

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IN THE

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Unpublished Memorandum for the Superior Court of Pennsylvania at 980 EDA 2016, dated April 27, 2017 (Appendix "A"), affirming the Order of Common Pleas, Monroe County, at CP-45-CR-0001697-2012, dated March 18, 2016 (Appendix "C").

Referred to: Unpublished Opinion of the trial court of Monroe County Court of Common Pleas pursuant to Pa.R.A.P. 1925(a), dated May 25, 2016 (Appendix "B").

JURISDICTION

ORDER OF THE LOWER COURT IN QUESTION

This Petition for Writ of Certiorari is requested on Order and Opinion (non-precedential) of Superior Court of Pennsylvania (Appendix "A"), at 980 EDA 2016, dated April 27, 2017, affirming the Order of Common Pleas, Monroe County, at CP-45-CR-0001697-2012, dated March 18, 2016 (Appendix "C").

TIMELYNESS

Superior Court of Pennsylvania – Application filed May 11, 2017 requesting reargument of April 27, 2017 decision, is denied – dated July 5, 2017 (Appendix "D") at No. 980 EDA 2016.

Supreme Court of Pennsylvania – Petition for Allowance of Appeal from the Order of the Superior Court is denied – dated February 6, 2018 (Appendix "E") at No. 535 MAL 2017.

STATEMENT OF CASE

On Juse 29, 2009, Daniel Wesling, Petitioner was charged in a criminal complaint with 72 counts of sexual offense against K.B. (DOB 11/5/84) and P.U. (DOB 5/7/81) between January 1, 1990 and December 31, 2001. On July 26, 2012, Petitioner waived preliminary hearing under counsel of Ms. Robin Spishock, Esq., of the Monroe County Public Defender's Office. Attorney Spishock as waived Petitioners formal arraignment. On October 5, 2012, criminal information was amended to 29 various sexual offenses (Appendix "J"). In over 5 months of counsel Attorney Spishock filed noting on behalf of Petitioner [Hearing N.T. 5/14/13 p.7 ln.20 to ln.23 – also Petitioner's Writ p.15]. On February 5, 2013, Mr. George H. Newman, Esq., became Petitioners local counsel followed on March 13, 2013, by Mr. Jack Fuchs, Esq., and Mr. Michael Salnick. Esq., pro hac vice.

On April 9, 2013, Petitioner filed numerous Motions to Dismiss including a Motion for Bill of Particulars, including K.B testimony (Appendix "G") and P.U. testimony (Appendix "H"). A hearing dated May 14, 2013 discussed all the motions and on July 19, 2013 all Motions were denied along with substantial evidence for Petitioner (Appendix "L"). In the hearing [N.T. 5/14/13 p.26 ln.17 to p.27 ln.1] the Court states: ". . . bill of particulars is more in the nature of discovery,. . . Motion for the bill of particulars is denied". Petitioner was tried by a jury before Honorable Margherita Patti-Worthington from October 7, 2013 thru October 9, 2013, where Petitioner was convicted of 10 out of 12 remaining counts. The conviction led to neither the prosecutor, the defense, the court, nor the jury ever having any idea of what incidents formed the multiple charges to multiple, identifiable offenses (Appendix "N"). Attorney Fuchs complained of the indictment, the way it was charged, at [N.T. 10/8/13 p.122 ln. 23 to p.124 ln. 18] also

[N.T. 10/8/13 p.142 ln.24 to p.143 ln. 18]. Opening Commonwealth of Pennsylvania to a procedure which disregards Constitutional Due Process rights and which creates an impermissibly large risk that the innocent will be convicted.

On October 15, 2014, a notice of direct appeal was filed in Superior Court of Pennsylvania by Attorney Newman, then denied August 19, 2015. On October 15, 2015, Petitioner filed a PCRA and October 22, 2015, Attorney Brian Gaglione, Esq., was appointed with a Finley/Turner letter on February 9, 2016. On March 18, 2016 Petitioners non-amended PCRA was denied (Appendix "C"). On March 23, 2016, Petitioner filed an appeal of denied non-amended PCRA with Superior Court of Pennsylvania and Commonwealth filed on April 20, 2016 a Pa.R.A.P. 1925(a) (Appendix "B").

On April 27, 2017, Superior Court of Pennsylvania denied Petitioners appeal. Superior Court bypassed Petitioners Constitutional issues started by Attorney Spishock by stating Wesling's replacement counsel ,"Attorney Salnick, adequately raised and argued the Motion for a bill of particulars" (Appendix "A" – p.5). On May 11, 2017, Petitioner filed an Application for re-argument en banc with Superior Court and on July 5, 2017 application was denied (Appendix "D"). On August 3, 2017, Petitioner filed an Appeal to the Pennsylvania Supreme Court which was denied February 6, 2018. Petitioner now comes to the United States Supreme Court requesting Certoirari because Commonwealth of Pennsylvania is more than likely to use the same techniques of denying citizens' rights in order to get conviction regardless of their innocence.

REASONS FOR GRANTING THE PETITION

1. Evidence regarding Petitioners 1st Question Presented. The Commonwealth of Pennsylvania conviction of Petitioner with uncorroborated victim statements (citing Commonwealth v. Wall, 953 A.2d 281 (Pa. Super. Ct. 2008); Commonwealth v. Charlton, 902 A.2d 554, 562 Pa. Super. 2006)) coupled with an indictment so vague to destroy any possibility of an adequate defense (violation Valentine v. Kontech, 395 F.3d 626, 631-632 (2005, CA6 Ohio); Hamling v. United States, 418 U.S. 87, 117 (1974); Russell v. United States, 369 U.S. 749, 763-764 (1962); United States v. Cruikshank, 92 U.S. 542, 558; Berger v. United States, 295 U.S. 78, 82 (1935)) giving Commonwealth of Pennsylvania a procedure which creates an impermissibly large risk that the innocent will be convicted (citing Bousley v. United States, 523 U.S. 614, 620 (1998); Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992)).

The Petitioner complained of Constitutional errors that were allowed via ineffective counsel. The Sixth Amendment provides for the right to the assistance of counsel in criminal prosecutions. The United States Supreme Court described the contours of that right in Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a standard that has been deemed the equivalent of the standard employed by the Pennsylvania state courts regarding the right to counsel under the state constitution. See, e.g., Jacobs v. Horn, 395 F.3d 92, 107 n.9 (3rd Cir. 2005) (equating Strickland with the three-pronged test set out in Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (Pa. 1987)).

Pursuant to Strickland, a petitioner establishes a violation of his Sixth Amendment right if he can demonstrate both that "counsel's representation fell below an objective standard of reasonableness" and that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 686-88, 693-94; United States v. Otero, 502 F.3d 331, 334 (3rd Cir. 2007); Buehl v. Vaghn, 166 F.3d 163, 169 (3rd Cir. 1999).

To satisfy the deficient performance prong of analysis, the Petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Petitioner by the Sixth Amendment." Harrington v. Righter, 562 U.S. 86, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 687). In considering this part of the standard, the reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance", recognizing that there are "countless ways to provide effective assistance in any given case" and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id. at 778-79 (quoting Strickland, 466 U.S. at 689). In assessing whether counsel performed deficiently, the court must "'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from the counsel's perspective at the time.'" Id. at 779 (quoting Strickland, 466 U.S. at 689).

The second prong of analysis whether counsel's deficient performance must have prejudiced the Petitioner. Jacobs, 395 F.3d at 105 (citing Strickland, 466 U.S. at 692). "To demonstrate prejudice, 'a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Shotts v. Wetzel, 724 F.3d 364, 375 (3rd Cir. 2013) (quoting Strickland, 466 U.S. at 694). Also see Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (prejudice component of Strickland does not implicate concerns which make hindsight inappropriate for determining deficient performance); Mayo v. Henderson, 13 F.3d 528 (2nd Cir. 1994) ("the outcome determination, unlike the performance determination, may be made with the benefit of hindsight.") "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Harrington, 131 S. Ct. at 791. That is to say, the prejudice component of Strickland is designed to identify situations in which lawyers' deficiencies create an unacceptable risk of convicting the innocent.

Although the Superior Court of Pennsylvania used Strickland for Petitioners PCRA case analysis, Petitioner believes the specific legal basis for his claim is a theory of constructive denial of counsel under the Sixth Amendment commonly known as a "Cronic Claim." After United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

As the Supreme Court has explained, "Cronic relieves an appellant from the burden of proving prejudice where there has been an actual or constructive denial of counsel, i.e., when counsel's failure has been complete and it is as if the right to counsel has been denied." Commonwealth v. Steele, 599 Pa. 341, 961 A.2d 786, 811 (Pa. 2008). The Pennsylvania Supreme Court understands this does not mean, however, that the defendant is relieved of the burden of developing "an individualized fact record." On the contrary, the Cronic presumption of prejudice arises only after the

defendant has proven that the specific conditions complained of were equivalent to his having no counsel at all. E.g. Florida v. Nixon, 543 U.S. 175, 189, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) (presumption of prejudice is "reserved for situations in which counsel has entirely failed to function as the client's advocate"); Bell v. Cone, 535 U.S. 685, 696-97, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (counsel's "failure must be complete"); Commonwealth v. Cousin, 585 Pa. 287, 888 A.2d 710, 719 (Pa. 2005) ("Cronic is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable"). Commonwealth v. Martin, 607 Pa. 165, 5 A.3d 177, 191-93 Pa. 2010), cert denied, 131 S. Ct. 2960, 180 L. Ed. 2d 250 (2011), demonstrates that Cronic claims cannot be assumed globally but must be proven based on individual circumstances.

The Supreme Court has distinguished between "trial error" and "structural error". United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); Arizona v. Fulminante, 499 U.S. 279, 309-310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The distinction is between "structural" constitutional errors that can be cured only through automatic reversal and those [trial] errors that can be connected through harmless-error review." Gautt v. Lewis, 489 F.3d 993, 1014-1015 (9th Cir. 2007).

Trial errors occur during the presentation of the case to the jury, and their effect may be assessed in the context of the other evidence presented in order to determine whether they were harmless. Gonzalez-Lopez, 548 U.S. at 148.

A "structural error" on the other hand, defies analysis by "harmless error" standard, because such an error "affect[s] the framework within which the trial proceeds

, rather than simply an error in the trial process itself." Fulminante, 499 U.S. at 310; see also Gonzalez-Lopez, 548 U.S. at 148-149: The structural errors explicitly identified by the Supreme Court include:

> . . . the denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction. Gonzalez-Lopez, 548 U.S. at 149 (internal citations omitted); see also Gautt, 489 F.3d at 1015 (listing admission of coerced confession, deprivation of right to counsel, partial judge, unlawful exclusion of members of defendant's race from grand jury, right to self-representation, right to public trial, and constitutionally deficient reasonable-doubt instructions, as explicitly recognized "structural errors").

The Supreme Court has not explicitly categorized the violation of a petitioner's essential due process right of fair notice of the charges against him as a "structural" error, but neither has the Court characterized such an error as "harmless error." See Gautt, 489 F.3d at 1014-1016. The Ninth Circuit in Gautt was "inclined to believe that this type of constitutional deprivation must be structural, because it 'affect[s] the framework with which the trial proceeds, rather than simply [being] an error in the trial process itself.'" Gautt, 489 F.3d at 1015-1016 (citing Fulminante, 499 U.S. at 310, and Brecht, 507 U.S. at 629-630).

The Petitioner believes his claim is structural under Cronic analysis and should not be classified as a trial error under Strickland. Since his constitutional issues were founded in pre-trial via ineffectiveness of counsel and allowed to proceed through the trial proceedings such as discussed in cases cited above.

Due to Superior Court of Pennsylvania's response to Petitioners brief, Petitioner adds this additional standard. The Third Circuit addressed the purpose and scope of a bill of particulars in United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971):

> The purpose of the bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense. A bill of particulars should fulfill this function when the indictment itself is too vague and indefinite for such purposes. *Id.* at 63-64.

An indictment is constitutionally sufficient if it identifies the elements of each offense, provides "notice [which] must be clear and must, at the very least, 'fairly inform defendant' of charges against him and will permit him to plead a conviction or acquittal on the charges as a bar of subsequent prosecution for the same offense." United States v. Resendiz-Ponce, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d (2007) (citing Hamling v. United States, 418 U.S. at 117) (1974); United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979) (citing Russell v. United States, 369 U.S. at 763, 768 n.15) (1962); United States v. Winer, 323 F. Supp. 604 (1971, ED Pa.). The indictment supplies the legal quantum of information necessary for a defendant to prepare for trial and protect himself against a subsequent prosecution barred by double jeopardy.

So a bill of particulars is only warranted when the indictment is too vague and indefinite to allow the defendant to; (1) understand the charges brought against him and prepare a defense; (2) avoid unfair surprise; and (3) assert a claim of double jeopardy where appropriate. See United States v. Urban, 404 F.3d 754, 771-72 (3d Cir.2005) :United States v. Chen, 378 F.3d 151, 163 (2d Cir. 2004). "Only where an indictment fails to perform these functions, and thereby significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial, will we find that a bill of particulars should have been issued." Urban, 404 F.3d at 772 (internal citations & quotation marks omitted); Floren v. United States 186 F. 961, 963, 108 C.C.A. 577 (8th

Cir. 1911) (citing Rosen v. United States, 161 U.S. at 40, ". . . however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him, and that in such case the accused may apply to the court before the trial is entered upon for a bill of particulars . . .").

Accord see United States v. Bortnovsky, 820 F.2d 572 (2d Cir. 1987) (reversing because of denial of bill of particulars and finding defendants were hindered in preparing their defense by district courts failure to compel government to reveal crucial information not available from indictment).

Public Defender, Robin Spishock, Esquire ("Attorney Spishock"), is a seasoned attorney and would know the holding of Commonwealth v. Devlin, 460 Pa. 508, 333 A.2d 888 (1975). Which held that the prosecution must fix the date when an alleged offense occurred with reasonable certainty. See e.g. Commonweath v. Johnson, 35 Pa. D. & C.3d 69 (1985) (citing Devlin concluding "Since the Devin opinion is grounded on constitutional principles, we may not rely on a rule of criminal procedure as providing definitive authority that a defendant may be convicted merely because the information charges that the crime took place during the period of the applicable statute of limitations."). Similarly Commonwealth v. Karkaria, 533 Pa. 412, 420, 625 A.2d 1167 (PA 1993) (citing Devlin concluding ". . . the jury in order to convict, would have had to conclude, beyond a reasonable doubt, that the child had been forced to submit to sexual intercourse over 300 times, without ever feeling pain, without any physical evidence to support the contention that she was so victimized, and without any specific recollection by Sidney as to a date certain upon which even one of the several hundred assaults occurred.").

Subsequent case law refined the holding in Devlin even regards to repeated abuse. See Commonwealth v. G.D.M. Sr., 2007 PA Super 169, (". . . Repeated abuse over approximately a seven-month span from September 1997 to March 1998 . . . We find that the due process concerns of Devlin are satisfied where the victim, as here, can at least fix the times when an ongoing course of molestation commenced and when it ceased.").

Attorney Spishock would recognize, it's well settled that "each count of an indictment is separate and must stand on its own" United States v. Olatunji, 872 F.2d 1161, 1166 (3d Cir. 1989); United States v. Powell, 469 U.S. 57, 62, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984); accord United States v. Fulcher, 626 F.2d 985, 988, 200 U.S. App. D.C. 121 (D.C. Cir. 1980) (explaining that "[e]ach count must stand on its own, and cannot depend for its validity on the allegations of any other count not specifically incorporated"). Seasoned Attorney Spishock would have understood "[a]n indictment not framed to apprise the defendant 'with reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of the statute.'" United States v. Nance, 533 F.2d 699, 701, 174 U.S. App. D.C. 472 (D.C. Cir. 1976) (quoting United States v. Simmons, 96 U.S. 360, 24 L. Ed. 819 (1877)).

The Superior Court of Pennsylvania responding to Petitioners appeal from the PCRA Order March 18, 2016 in the Court of Common Pleas of Monroe County, Filed on April 27, 2017, Memorandum by Honorable Musmanno, J. p.5 (Appendix "A") stated:

> "In his second issue, Wesling contends that Attorney Spishock was ineffective for (1) counseling Wesling to waive his preliminary hearing; and (2) failing to file pretrial motions. Brief for Appellant at 10. Specifically, Wesling asserts that Attorney Spishock was ineffective "for not putting in any time[-]critical motions" requesting the prosecution to fix the dates when the alleged offenses occurred with reasonable certainty, thereby preventing Wesling from raising statute of

limitations or alibi defenses. Id. at 14. Wesling also claims that Attorney Spishock failed to communicate with Wesling's replacement counsel, Attorney Newman [local counsel], Attorney Salnick [hac pro vice], and Attorney Fuchs [hac pro vice]. Id. at 15. Although Wesling concedes that replacement counsel were permitted to file supplemental pretrial Motions, and to request a hearing, he argues that replacement counsel were "unable to recover from time critical omissions of [Attorney] Spishock[]." Id. at 11, 15, 16.

To succeed on an ineffectiveness claim, Wesling must demonstrate by the preponderance of the evidence that

> (1) [the] underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interest; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Ali, 10 A.3d 282, 291 (Pa. 2010). A failure to satisfy any prong of the test of ineffectiveness will require rejection of claim. Commonwealth v. Martin, 5 A.3d 177, 183 (Pa. 2010). Counsel is presumed to be effective and the burden is on the appellant to prove otherwise. Commonwealth v. Hanible, 30 A.3d 426, 439 (Pa. 2011).

Notably, Wesling has not addressed, or even discussed, the appropriate legal standard for establishing the ineffectiveness of Attorney Spishock. Even if we were to conclude that Wesling's arguments had satisfied the first two prongs of the ineffectiveness test, we are persuaded by the PCRA court's reasoning that Wesling cannot satisfy the third prong of the test. It its Opinion, the PCRA court addressed Wesling's ineffectiveness claim regarding Attorney Spishock's failure to request a bill of particulars, and determined that the issue lacked merit because one of Wesling's replacement counsel, "Attorney Salnick [,] adequately raised and argued a [M]otion for a bill of particulars." See PCRA Court Opinion, 5/25/16 at 3. Additionally, in its prior Orders, the PCRA court addressed Wesling's additional ineffectiveness claims regarding Attorney Spishock, and determined that the claim lack merit. See PCRA Court Order, 3/18/16, at 1-3 (addressing Wesling's claim that Attorney Spishock was ineffective for counseling Wesling to waive his preliminary hearing); see also PCRA Court Order, 2/23/16, at 1-2 (same). We agree with the reasoning of the PCRA court, which is supported by the record and free of legal error, and affirm on this basis as to Wesling's second issue. See PCRA Court Opinion, 5/25/16, at 3; PCRA Court Order, 3/18/16, at 1-3; PCRA Court Order, 2/23/16, at 1-2."

Petitioner begins with presenting evidence referring to Commonwealth of Pennsylvania's first two prongs (Strickland's deficient performance prong) even though Superior Court of Pennsylvania stated "Even if we were to conclude that Wesling's arguments had satisfied the first two prongs of the ineffectiveness test". Your Honor is

going to put yourself in the shoes of Attorney Spishock then I present what she should have had encountered and had access too. Petitioner has PCRA Court Opinion, 5/25/16, as Appendix "B", and PCRA Court Order, 3/18/16, as Appendix "C" as they are referred to in the above Memorandum by Honorable Musmanno, J. p.5-7 (Appendix "A").

Your Honor please read transcript of audio CD of victim K.B. as examined by Detective Bohrman on May 1, 2009 (Appendix "G"), note the specifics as to date and age. Next your Honor read transcript of audio CD of victim P.U. as examined by Detective Bohrman on May 11, 2009 (Appendix "H"), again note the specifics as to date and age. Your Honor review Petitioners Criminal Docket p.3-5 (Appendix "I") with both original 72 charges of June 29, 2009 and amended 29 charges of October 5, 2012.

Petitioner was being held in Florida when initially charged. On June 15, 2012, Petitioner was acquitted by a jury in Florida then extradited to Pennsylvania. On July 26, 2012, Petitioner waived his preliminary hearing under counsel of Attorney Spishock. On October 5, 2012, a criminal information was filed against Petitioner charging twenty-nine (29) various sex offenses (see Appendix "J"). Again please note the specifics of the charge and dates. Petitioner also has included his post-trial Sentencing Guidelines in an attempt to figure out how Commonwealth of Pennsylvania associated ages to specific charges (Appendix "K"). Due to the fact that both included transcripts of audio CD's of both K.B. and P.U. are not reasonably specific.

Ok your Honor you now have seen pretty much what seasoned Attorney Spishock would have plus Petitioner's post-trial Sentencing Guidelines. Although Petitioner does not know what defense your honor would use, I can state what the

record shows regarding Attorney Spishock. Attorney Spishock's actions were spoken of by Petitioners replacement hac pro vice Attorney Salnick in a pre-trial hearing [N.T. 5/14/13 p.13 ln.13 to p.14 ln.11 also Petitioners brief to Superior Court p.11]:

> He comes to Pennsylvania, and according to the information that we have at our disposal – and Mr. Wesling is prepared to testify to this as well – he gets here, I think on or about July 1st. And attempts to probably over 3 weeks to contact Ms. Spishock. He leaves messages at the Public Defender's Office and the best that he could calling from jail, and no one comes to see him. He has no conversations with his attorney whatsoever prior to the preliminary hearing other than: "The alleged victims are outside. I think they have a case, and I will check to see if there's a plea offer". Then Ms. Spishock indicates to Mr. Wesling – again, according to what Mr. Wesling is prepared to testify to – "Sign the waiver of preliminary hearing"."

Also the ADA Mr. Rakaczwski stated Pennsylvania Rules states time after arraignment is critical and Attorney Spishock's actions [N.T. 5/14/13 p.7. ln.20 to ln.23 also Petitioners brief to Superior Court p.12]: "At that time, he has seven days to do a request of Bill of Particulars, 30 days to file a pre-trial motion. **There was nothing filed until Attorney Salnick** gets in the case, and that was April". The ADA Mr. Rakaczwski stated [N.T. 5/14/13 p.9 ln.22 to p.10. ln.10]:

> He had counsel at the time. The allegations contained in [Mr. Salnick's] petition basically amounts to ineffectiveness of counsel. In his petition, he asserts that Robin Spishock basically was ineffective, that she really didn't advise him, that he really didn't understand his waiver was not knowing, voluntary and intelligent, and that's really a PCRA issue. That issue itself is really not for today. It's a PCRA. Otherwise, we'd have to have Robin Spishock here to testify to counter that. And again, we're not going to do hybrid representation when we address ineffective counsel and later on -.
> The Court: We're not addressing ineffectiveness of counsel today.

Again during the same hearing ADA Mr. Rakaczwski stated [N.T. 5/14/13 p.19 ln.24 to p.20 ln.3]: "We're running into the PCRA issue in regards to previous counsel: How come previous counsel didn't do this, were there any discussions with that. And that's

really for a – if it ever comes to that – for a PCRA hearing down the road". The for mentioned hearing never took place.

Your Honor as the record states with all the testimony and charges that you have read and/or reviewed against Petitioner, Attorney Spishock did nothing. No background checks or interviews or investigation, just seemingly waiting for trial to start. If your considering maybe Attorney Spishock was waiting on replacement counsel, the record states otherwise from the same hearing [N.T. 5/14/13 p.16 ln.18 to p.17 ln.14]:

> Mr. Salnick: I will tell you, if the court wants to look at it, there were numerous letters to Ms. Spishock asking her what was going on in the case: if you've done anything with a waiver from Mr. Wesling. We asked her those questions because we wanted to become involved in the case. We kind of just wanted to know what was going on in the case. Having been a public defender for back two centuries ago, I was really happy when a private lawyer contacted me and said, "We want to take a case." I didn't hear from Ms. Spishock in any way, shape, or form. Ultimately contacted – I can only say "Nemo" because I don't know the rest of his name – and he –
> The Court: That's another one. Nemoczynski.
> Mr. Salnick: He couldn't have been any nicer to us and tried to help us in every way, shape, or form. And it wasn't a matter of wanting to get Ms. Spishock in any hot water, I mean I don't know her. All I wanted to know is what was going on in the case. That didn't happen.

When replacement counsel attempted to argue for a bill of particulars [5/14/13 N.T. p.24 ln.21 to ln.23] "The Court: Is that argument for a bill of particulars or really for the strength, perhaps, of the Commonwealth case?" The outcome [5/14/13 N.T. p.26 ln.17 to p.27 ln.1] "The Court: Okay. And I understand what it is that you are saying. But again, bill of particulars is more in the nature of discovery. In these types of cases, there's no requirement that the Commonwealth provide the specific dates and times. Plus, you have statements of the alleged victims in this case that can narrow it, and will have a habeas proceedings. So this Motion for the Bill of Particulars is denied." Even the ADA did not remember the argument [10/8/13 N.T. p.123 to ln.12 to ln.21].

The bill of particulars was warranted in Petitioners case because of vagueness of the alleged victims, to avoid any unfair surprises and double jeopardy issues. See Urban at 771-72; Berger, 295 U.S. at 82; Hamling, 418 U.S. at 117-18; Russell, 369 U.S. at 763-74. Even Federal indictments must provide more than conclusions of law; it must "descend to particulars" to inform the defendant of facts alleged "with reasonable particularity of time, place, and circumstances." United States v. Cruikshank, 92 U.S. 542, 558, 23 L. Ed. 588 (1875).

Subsequently Petitioner did encounter unfair prosecution supported vague alleged victim statements, surprise victim statements, and double jeopardy issues which will be presented during Petitioners prejudice prong of Strickland discussion.

Your Honor because of the seriousness and complexity of Petitioners case, Attorney Spishock's inactions, constructive denial, was not functioning as counsel guaranteed by the Sixth Amendment (Harrington, 131 S. Ct. at 778). "Even the best criminal defense attorney would not defend a particular client in the same way" Id. at 778-79. Also as Id. at 791 stated "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Thus, conversely must also be true at least regarding the deficient performance prong of Strickland concerning Attorney Spishock apparent lack.

Petitioner now addresses Strickland's prejudice prong of Attorney Spishock ineffectiveness. Your Honor when Petitioner reviews the "The Court" denial of the bill of particulars [5/14/13 N.T. p.26 ln.17 to p.27 ln.1] "The Court: Okay. And I understand what it is that you are saying. But again, bill of particulars is more in the nature of discovery. In these types of cases, there's no requirement that the Commonwealth

provide dates and times. Plus, you have statements of the alleged victims in this case that can narrow it, and will have a habeas proceedings. So Motion for the Bill of Particulars is denied."

Working from the bottom up Petitioner reasons, "you have statements of the alleged victims in this case that can narrow it" but their testimonies generated the vague criminal indictment. Also Olatunji at 1166; Powell, 469 U.S. at 62; Fulcher, 626 F.2d 988 "each count of an indictment is separate and must stand on its own". Next "there's no requirement that the Commonwealth provide the specific date and time" but violates Commonwealth holdings under Devlin and refined under G.D.M. Sr.. Petitioner realizes these are seemingly moot points but maybe a pattern.

Your Honor is not "The Court" first denial reason her primary reason then backed up with secondary reasons. "But again, bill of particulars is more in the nature of discovery." If Petitioner had counsel at the time of discovery and Attorney Spishock was Petitioner at that time and the hearing time is past discovery. Thus, Attorney Spishock was responsible for requesting Petitioners bill of particulars at that time but Attorney Spishock never requested anything at all.

Your Honor is not the above circumstances the meaning set forth with the Supreme Court opinion regarding Cronic's holding that a critical state of criminal proceedings arises when "[a]vailable defense may be . . . irretrievably lost, if not then and there asserted," Hamilton v. Alabama, 368 U.S. 52, 54, 82 S. Ct. 157, 159, 7 L. Ed. 2d 114 (1961), "where rights are preserved or lost," White v. Maryland, 373 U.S. 59, 60, 835 S. Ct. 1050, 1051, 10 L. ED. 2d 193 (1963) (per curiam), "Whenever necessary to assure a meaningful 'defense,'" United States v. Wade, 388 U.S 218, 225, 87 S. Ct.

1926, 1931, 18 L. Ed. 2d 1149 (1967), where "'potential substantial prejudice to defendant's rights inheres in the . . . confrontation and ability of counsel to help avoid that prejudice,'" Coleman v. Alabama, 399 U.S. 1, 9, 90 S. Ct. 1999, 2003, 26 L. Ed. 2d 387 (1970) (alteration in Coleman) (quoting Wade, 388 U.S. at 227, 87 S. Ct. at 1932), and when the stage holds "significant consequences for the accused," Bell v. Cone, 535 U.S. 685, 696, 122 S. Ct. 143, 1851 (2002).

Concerning Hamilton, *supra*, defenses irretrievably lost as ADA Mr. Rakaczewski stated [5/14/13 Hearing N.T. p.21 ln.2 to ln.9]: "ADA – We have a deadline. The rules are clear. 30 days. This isn't, like I said, this isn't like two months, three months. You're talking – what is it, September to April, five; six months, whatever that it is. It's well beyond the 30 days. There has to be some type of fairness and balance to the Commonwealth as well in regards to bring the case to a resolution." During that whole time Attorney Spishock could have filed a bill of particulars or elected to speak to Petitioners replacement counsel either local or hac pro vice because both were given permission via the Public Defender's Office fax by Petitioner but Attorney Spishock elected to do nothing. Your Honor, was not Attorney Salnick attempting to retrieve a Bill of Particulars Order by "The Court" but since it was past the discovery time stage then it became irretrievably lost according to "The Court" denial?

Concerning White, *supra*, rights preserved or lost as in Gaither v. United States, 413 F. 2d 1061, 1067, 134 U.S. App. D.C. 154 (D.C. Cir. 1969) ("The bill of particulars fully serve the functions of apprising the accused of the charges and protecting him against future jeopardy"). See also United States v. Pickett, 209 F. Supp. 2d 84, 88-89 (D.D.C. 2002) (dismissing count for factual insufficiency); United States v. Lattimore,

127 F. Supp. 405, 410-413 (D.D.C) (dismissing indictment as vague for failing to describe the charge), *aff'd*, 232 F. 2d 334, 98 U.S. App. D.C. 77 (D.C. Cir. 1955). The right of due process both requires that criminal charges provide criminal defendants with the ability to protect themselves from double jeopardy when Petitioner is charged with multiple, and undifferentiated counts. Without reasonable specifics this also substantially denied Petitioners right to confront the witness against him and establish a defense.

Concerning Wade, *supra*, necessary to assure a meaningful defense see Nance, 533 F. 2d at 701 ("The United States Supreme Court has stated: "Where guilt depends so crucially upon . . . a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." (alteration in original; quoting Russell, 369 U.S. at 764)). Otherwise, a court has little choice but to conclude that the indictment lacks adequate notice of the charged violations, and it is especially evident that any attempt on Petitioners part to mount a meaningful defense against the indictments multiple, undifferentiated charges is impermissibly frustrated. See e.g., Valentine v. Konteh, 395 F. 3d 626, 633 (6th Cir. 2005) ("As the forty criminal counts were not anchored to forty distinguishable criminal offenses, [defendant] had little ability to defend himself."); People v. Bennett, 57 A.D. 3d 688, 689-90, 868 N.Y.S.2d 314, 316 (2d Dep't 2008) (where the indictment charges a time interval which is so large that it is virtually impossible for the defendant to answer the charges and prepare a defense, dismissal should follow); Also People v. Levandowski, 8 A.D. 3d 898, 780 N.Y.S. 2d 384, 385 (2d App. Div. 2004); Grady v. Artuz, 931 F. Supp. 1048, 1068 (2nd Cir. 1996) (". . . On the issue of specificity, the court

reaffirmed the holding of Morris, enumerated the facts to be considered when evaluating the reasonableness of an indictment. The court also noted, however, that Morris included the qualification that 'the interval ascribed for a particular crime [may be] so excessive that, on its face, it is unreasonable and dismissal should follow.' Keindl, 68 N.Y.2d at 419, 509 N.Y.S2d at 794 (quoting Morris, 61 N.Y.2d at 295, 473 N.Y.S.2d at 772-73) (alterations in original). The court then held that the counts in the indictment against the defendant charging sodomy and sexual abuse over ten, twelve, and sixteen-month periods were 'so excessive on their face that they are unreasonable'." Also Grady, *Id.* at 1063 (citing MacAfee, Pries, Faux); Grady, *Id.* at 1073 (citing *** all NY cases); People v. Beauchamp, 143 A.D.2d 13, 532 N.Y.S.2d 111 (1st dep't 1988); People v. Keindl, 68 N.Y.2d 410, 502 N.E.2d 577, 509 N.Y.S.2d 790 (N.Y. 1986); Accord People v. Lopez, 175 A.D.2d 267, 572 N.Y.S.2d 378, 379-80 (2nd App. Div. 1991) (holding that indictment alleging defendant with sexual assault claims was sufficient even though indictment included a date range of 31 days).

Your Honor comparing the victim's statements (Appendices "G" and "H") with even the amended counts (Appendix "J") lacking specifics, bill of particulars was necessary to assure Petitioners due process rights and a meaningful defense.

Concerning Coleman, *supra*, prejudice to defendants' rights inheres in the . . . confrontation and the ability of counsel to help avoid the prejudice as stated in Grady, *Id.* at 1069:

> ". . . At trial, counsel for Reverend Grady, Mr. Arnold Roseman, also objected vehemently to the lack of specificity in the indictment at to dates; times; alleged frequency of attacks, etc. This feature of the indictment made it impossible for the defendants to establish a well-grounded and substantial alibi defense. While defendant testified that he was away for the church/day care center frequently during the months raised in the indictment, he was unable to show that he was

absent from the center when the alleged assaults took place because the People never indicated when they transpired. This substantially denied defendant's right to confront witnesses against him and establish a defense."

See reasoning in Devlin, 460 Pa. at 513:

". . . If the statute of limitations was our only consideration this conviction could be upheld. However, the rule announced in Levy contains another requirement: the date of the commission of the offense must be "fixed with reasonable certainty." We do not feel that the Commonwealth's proof to the effect that the crime was committed on any single day within a fourteen-month period meets the "sufficient particularity" standard of Levy. To hold otherwise would violate the notions of fundamental fairness embedded in our legal process.
Our holding is required by the Fourteenth Amendment Due Process Clause of the United States Constitution and by Article 1, Section 9, of the Pennsylvania Constitution, P.S. Our Commonwealth's Constitution there states:

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him . . . nor can he be deprived of his life, liberty, or property, unless the judgment of his peers of the law of the land". It was been a long-standing tenet of Pennsylvania jurisprudence that "the law of the land" in Article 1, Section 9 is synonymous with "due process of law." See, e.g., Commonwealth v. Jackson, 457 Pa. 79, 319 A.2d 161 (1974); Craig v. Kline, 65 Pa. 399, 413 (1870). Thus, we have held that the State Constitution is violated where the defendant is substantially denied an opportunity to present a defense. Commonwealth v. Jester, 256 Pa. 441, 100 A. 993 (1917).

Due to their reasoning the court conclude, Devlin, Id. at 515:

"Furthermore, we cannot sustain the contention that the date of the crime must be fixed with reasonable certainty only in situations where the defendant notifies the prosecution of, and attempts to prove, an alibi defense. Two reasons support our rejection of that proposition: First, although an alibi defense is the most obvious reason for the rule, the lack of a sufficiently particular date in the prosecution's proof can hamstring the defense in other ways. In this trial, for instance, the credibility of the victim was a serious issue. The appellant, because he did not have a sufficiently particular period of time to defend was precluded from further attacking the credibility of the victim by showing (1) behavior of the victim after the incident which was inconsistent with the extremely severe

conduct to which the victim was allegedly subjected, and (2) the physical and emotion trauma which would have necessarily resulted therefrom. Nor could the defendant attempt to prove that the victim did not visit his house on the date in question because there was no date or limited period of time asserted by the Commonwealth.

Secondly, notification of an alibi defense was a futile gesture in this case because the date laid in the indictment was obviously an arbitrary one; the date in the information and indictment was April 16, but the crime had been reported on April 14. Moreover, it would have been an impossible burden for the appellant to offer an alibi defense for a fourteen-month period."

Similarly in the United States Constitution, 5th Amendment, Due Process, Double Jeopardy, Defective Indictment case annotation of Valentine (2005, CA6 Ohio). In which applied Russell, Hamling, and Cruikshank to grant a partial § 2254 habeas relief. Based its legal reasoning on Supreme Court cases applicable to federal indictments, Russell, 369 U.S. at 763-64, Hamling, 418 U.S. at 117-18, and a few circuit cases. Including Isaac v. Grider, 211 F.3d 1269 (6th Cir. 2000), De Vonish v. Keane, 19 F.3d 107,108 (2nd Cir. 1994), Fawcett v. Bablich, 962 F.2d 617, 618-19 (7th Cir. 1992), and Parks v. Hargetti, 188 F.3d 519 (10th Cir. 1999).

Your Honor if you remember Petitioners victim statements (Appendices "G" and especially "H"), similar to Valentine, *Id.* at 632:

". . . The problem in this case is not the fact that the prosecution did not provide the defendant with exact times and places. If there had been singular counts of each offense, the lack of particularity would not have presented the same problem. Instead, the problem is that within each set of 20 counts, there are absolutely no distinctions made. Valentine was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts. In its charges and in its evidence before the jury, the prosecution did not attempt to lay

out the factual bases of forty separate incidents that took place. Instead, the 8-year-old victim described "typical" abusive behavior by Valentine and then testified that the "typical" abuse occurred twenty or fifteen times. Outside of the victim's estimate, no evidence as to the number of incidents was presented. Given the way Valentine was indicted and tried, it would have been incredibly difficult for the jury to consider each count on its own. The jury could not have found Valentine guilty of Counts 1, 3, 5 and 7, but not the rest. Such a result would be unintelligible, because the criminal counts were not connected to distinguishable incidents."

The Petitioner as in Devlin, *supra*, and Grady, *supra*, was not given reasonable specific dates to be able to present evidence to confront victims on their behavior or present evidence of Petitioners whereabouts. Petitioner was actually denied crucial evidence. See Appendix "L", p.3 & p.4 of Commonwealth Motion titled MOTION TO EXCLUDE IRRELEVANT EVIDENCE. Evidence listed as "d", "e", "f" was needed to reflect victims non-abused behavior by showing consistent good grades during the alleged time frames. Evidence listed as "h" to prove that neither victim lived in Pennsylvania on 1/1/90 as listed in the criminal indictment (Appendix "J"). The court on 10/2/2013 denied Petitioners Motion of Limine adding such evidence.

Also as in Devlin, *supra*, before jury deliberations in Petitioners case was another arbitrary date selected (K.B. counts) [N.T. 10/8/13 p.5 ln.14 to p.6 ln.5]:

Mr. Rakaczewski : Okay what we would do is I would just have an amended Count 1. It would be rape by forcible compulsion, but it would be to cover the whole time frame from 1990 to 2000.
The Court: 1/1/90 to 12/31/2000
Mr. Rakaczewski : And then I would just withdraw counts 2, 3, and 4 because I believe that would encompass the whole time frame.

The Court: Now, your count 4 –

Mr. Fuchs: 11/5/2000 would be the - if we're adding the first three, it would be 1/1/90 through 11/5/2000

The Court: Would that be the 18th birthday?

Mr. Rakaczewski : I believe so, judge

However K.B. stated the abuse stopped in-between 15 and 16 years of age [N.T. 10/7/13 p.33 ln.7-8] then K.B. stated a short time later it may have stopped by age of 15 [N.T. 10/7/13 p.56 ln.20 to p.57 ln.1].

Again in Devlin, *supra*, both of the victims creditably was an issue. In Appendix "J" counts 1 to 5 states defendant did engage in sexual intercourse with a complainant by forcible compulsion, to wit: K.B. At trial K.B with ADA Mr. Rakaczewski [N.T. 10/7/14 p.40 ln.20 to p.41 ln.21]:

> And I remember telling Dr. – or Detective Bohrman in the interview that probably just the tip would have gone inside my vagina just a little bit.
>
> Q – And when he was doing that and he had you on top of him like you described, what were you doing?
>
> A – It would depend on where his arms were mostly. But if he had his arms around me and he was trying to touch me or touch my vagina or touch my breasts, I would be wiggling or trying to move, but it would depend on whether or not his legs would fold my legs. Sometimes he would have his legs like in a way where I couldn't necessarily move my legs, but I would --- I would --- I can't even explain it. I would just kind of wiggle and move my body.
>
> Q – Would you wiggle and move your body like that when he was doing that stuff to you?
>
> A – I was uncomfortable. I didn't -- I didn't want it to happen. I didn't know how to get it to stop other to more or complain that I had to go to the bathroom.
>
> Q – Now, something like that with his penis touching your vagina, did that happen more than one time?

A – I can only remember his penis being in like the entrance of my vagina one time, but it would be – his penis would be in the area infrequently, like more than one time but not all the time.

Victim K.B. clearly stated "I can only remember his penis being in like the entrance of my vagina one time" with no remembrance of age, year or season but Commonwealth has their multiple rape counts until merging them.

Victim P.U. had much worse creditability issues as [N.T. 10/7/13 p.131 ln.1 to ln.3] : Salnick: Okay, So were you guessing when you originally told the detective that he fingered you?

P.U. – Yes.

Then [10/7/13 N.T. p.135 ln.25 to p.136 ln.8] :

Salnick: Now, the officer asked you some questions about whether or not Mr. Wesling had ever ejaculated on you. Do you remember that?
P.U.: Yes
Salnick: Okay. And you said that you think he did is that correct?
P.U.: Yes
Salnick: You were guessing, weren't you?
P.U.: Yes

Now Similar to Valentine, *supra*, about generalizing P.U., as Your Honor read in P.U.'s testimony about a regular sex case (Appendix "H" p.4 ln.18) but also the same issue at trial [N.T. 10/7/13 p.136 ln.21 to p.137 ln.8]:

Salnick: How old were you?
P.U.: It would be – it could have been at any time.
Salnick: Where did it occur?

P.U.: At any house.

Salnick: whose room?

P.U.: any room

Salnick: So you don't have any specifics, do you?

P.U.: He did it at his time, his way, what he wanted. So to be specific, I can't give you that.

Salnick: Ms. Umstead, that's what I'm asking. You have no specifics. You are generalizing, are you not?

P.U.: If you want to call it that.

Petitioner as in Devlin, *supra*, did also have serious creditability issues so the lack of a reasonably specific dates did also hamstring Petitioners defense. In Valentine, *supra*, they had an 8-year-old non-specific testimonies and Petitioner had a woman 28 years old during the original complaint then 31 years old at trial non-specific testimonies. This did concern the judge, but she did end up allowing it, and Petitioners replacement counsel but not prosecution [N.T. 10/8/13 p.122 ln.23 to p.124 ln.18]:

> Mr. Fuchs [Defense]: Judge, the only problem that I have with that, and I know we're on regular information, you know, on or about January 1st, 2001, whatever, and then that would be more appropriate. It happened a week early. It happened – the problem here is that the time frames in each of the counts are, you know, three years, four years, five years. And I certainly have a concern that if they want to – you know, there's been the testimony that things happened in New Jersey, which obviously this Court wouldn't have the jurisdiction, and it's actually – it might get confusing for the jury. Okay, well, it might have happened before the time frame that is alleged here, but we're still going to convict because the time frame doesn't matter.
>
> But I just think it's inherently unfair to charge such large time frames and then say, "Oh the time frame doesn't matter." And I think that it's – you know, if we had more specific and I understand these cases are difficult to get specific time

frames. But on some of these, you're talking about an 11-year time frame. And then to say that the time frame doesn't matter when it's charged over a course of a decade, I mean, how does on defend against that? And that's why I don't think that type is appropriate the way it's been charged, the way it is.

Mr. Rakaczewski [ADA]: Your Honor, that's a standard jury instruction. The allegations as alleged, they don't have a more specific time frame. I can't say – I mean, with the one exception, I know she said she was 12 years old. But the other ones, they happened over a period of time, and they're not able to narrow down that this happened, you know, this year or this year.

Mr. Fuchs: It's a standard jury instruction, but it also talks about – and the way I would read it is that, you know, the crime charged in or around, on or about the date charged, and they're talking about a specific date. They're not talking about –

The Court: Right, This doesn't really fit –

Mr. Rakaczewski: I understand it's not specific –

The Court: -- the way the charge reads in the information. The jury charge does not fit the way the criminal information is written.

And again a little later [N.T. 10/8/13 p.142 ln.24 to p.143 ln.8]:

Mr.Fuchs: And just the other one, the time frame I think you were still looking into.

Mr. Rakaczewski: The date of the crime is not an element.

The Court: That charge, yes, I wanted to just take a look at that because I – I agree the date of the crime is not an element of the charge. I just think as written that doesn't make any sense given the way all those things were consolidated and put into this, you know, 10 year time span.

There were several chances for both counsel and the judge to avoid the prejudices against the Petitioners but none prevailed. Also regarding the ability of counsel to avoid prejudice. Your Honor refer to Appendix "M" – K.B. at trial [N.T. 10/7/13

p.33 ln.6 to ln.21] also [N.T. 10/7/13 p.35 ln.4] where prosecution will not allow K.B. to be possibly more date, season, age specific but replies "it happened between those years" or "time span".

If Attorney Spishock performed her duty in a reasonable pre-trial investigation she would have found evidence as in Appendix "L" and understood a bill of particulars and/or speaking to the replacement counsel was required. The Petitioner would have a reasonable particular time period to defend and would no longer be precluded from further attacking the creditability of the victims. Petitioner would not have been prejudiced as spoken in Devlin, *supra*, of the behavior of the victims after the incidents be inconsistent with the extremely severe conduct to which the victims were allegedly subjected, and the physical and emotion trauma which would have necessarily resulted therefrom. The dates laid in Petitioners indictment would no longer be arbitrary and Petitioners possible alibi defense would no longer be an impossible burden. Petitioners Fourteen Amendment Due Process Clause of the United States Constitution and Article 1, Section 9, of the Pennsylvania Constitution would not have been violated.

Concerning Bell, *supra*, significant consequences for the accused, See Ohio v. Johnson, 467 U.S. 493, 497-98, 104 S. Ct. 2536, 81 L. Ed.2d 425 (1984) ("The Double Jeopardy Clause, of course, affords a defendant three basic protections: [It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (internal quotations marks and citations omitted)). It is clear beyond cavil that "Due [P]rocess requires that criminal charges be specific enough to protect defendants from this danger", yet, the "multiple identically

worded counts" in the indictment at issue here contain "no specificity regarding the factual offenses [Petitioner] allegedly committed [,]" and thus, fail to satisfy that essential function. Valentine, *Id.* at 635.

In Valentine, the Sixth Circuit considered the sufficiency of a similar indictment, insofar as the defendant had been charged with "20 'carbon-copy' counts of child rape, each of which was identically worded so that there was no differentiation among the charges and 20 counts felonious sexual penetration, each of which was also identically worded [.]" and "[t]he prosecution did not distinguish the factual bases of these charges in the indictment [.] *Id.* at 628. The Valentine court concluded that, although the "lack of time- and date-specific" allegations might not be fatal to each count in isolation, *Id.* at 632, an indictment that charged the defendant "with multiple, identical and undifferentiated counts violated the constitutional requirements imposed by due process[.]" *Id.* at 636 because

> [i]f the defendant had been acquitted if these 40 charges, it is unclear what limitations would been imposed on his re-indictment. Would double jeopardy preclude any prosecution concerning the abuse of this child victim, the abuse of this victim during the stated time period, the abuse of this victim at their residence, the stated sexual offenses in the indictment, the offenses offered into evidence at trial, or some group of forty specific offenses? We cannot be sure what double jeopardy would prohibit because we cannot be sure what factual incidents were presented and decided by this jury. Id. at 635. Similarly, the court hypothesized that, "[i]f [the defendant] had been found not guilty, it is not clear to what extent he could ably assert that his acquittal barred prosecution for other similar incidents." *Id.*

Also as in Devlin, *Id.* at 514:

". . . Under the Federal Constitution, if the opportunity to defend is inadequate,

the defendant is denied due process of law. Commonwealth v. O'Keefe, 298 Pa. 169, 148 A. 73 (1929), citing Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908). "While not capable of exact definition, the basic elements of procedural due process are adequate notice, opportunity to be heard, and a chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case." Commonwealth v. Thompson, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971). In our adversary system of justice, it is axiomatic that a party is entitled to a fair hearing. The Federal Due Process Clause and the State "law of the land" provision guarantee the fundamental fairness of that hearing. To defend a charge of conduct occurring anywhere within a fourteen-month period was, for this appellant, a fundamentally unfair burden."

Petitioner also had the significant consequence of defending charges over several year periods as an unfair burden. Also the consequences stated in Valentine, *Id.* at 631:

". . . Under Russell, criminal charges must give a defendant adequate notice of the charges in order to enable him to mount a defense. 369 U.S. at 763-64. Fair notice is essential in criminal prosecutions:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. Cole v. Arkansas, 333 U.S. 196, 92 L. Ed. 644, 68 S. Ct. 514 (1948); see also Jackson v. Virginia, 443 U.S. 307, 314, 61 L. Ed. 2d 560, 99 S.Ct. 2781 (1979) ("A conviction upon a charge not made . . . constitutes a denial of due process."); In re Oliver, 333 U.S. 257, 273, 92 L. Ed. 682, 68 S. Ct. 499 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . are basic in our system of jurisprudence."); Madden v. Tate, 830 F.2d 194, 1987 WL 44909, at *3 (6th Cir. 1987) ("The Due Process Clause of the Fourteenth Amendment

mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense.")

As the District Court decided this case on "double jeopardy" grounds, it did not rule on whether the indictment provided Valentine with adequate notice. Yet the court did suggest that it was "doubtful that the indictment in this case 'sufficiently apprises the defendant of what he must be prepared to meet." Valentine v. Huffman, 285 F. Supp. 2d 1011, 1024 (quoting Russell, 369 U.S. at 763-64). Valentine essentially points to two notice problems with the indictment. (1) the wide date range and (2) the lack of differentiation among the criminal charges."

Also Valentine, *Id.* at 633:

". . . As the forty criminal counts were not anchored to forty distinguishable criminal offenses, Valentine had little ability to defend himself. In a similar case, the Court of Appeals for the Tenth Circuit reviewed a habeas petition from a prisoner convicted of three counts of sexual abuse. Parks v. Hargett, 1999 U.S. Appellant. LEXIS 5133, 1999 WL 157431 (10th Cir. 1999). The charging information set forth multiple identically worded counts of sexual abuse of an unnamed minor over a seventeen-month period: "On or between July 1988 and November 1989 . . . defendant did unlawfully . . . look upon, touch and feel of the body and private parts of a six year old female child in a lewd and lascivious manner . . . in Bryan County, Oklahoma." 1999 U.S. Appellant. LEXIS 5133, [WL] at *2. The court indicated that the charging information alone did not have the requisite specificity."

Your Honor Petitioner's consequences were also similar to Valentine, *Id.* at 634:

". . . Due Process also requires that criminal charges provide criminal defendants with the ability to protect themselves from double jeopardy. In the present case,

the indictment presented two important double jeopardy problems. First, there was insufficient specificity in the indictment or in the trial record to enable Valentine to plead convictions or acquittals as a bar to future prosecutions. Second, the undifferentiated counts introduced the very real possibility that Valentine would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense."

Further explained at Valentine, *Id.* at 636:

". . . Importantly, the constitutional error in this case is traceable not to the generic language of the individual counts of the indictment but to the fact that there was no differentiation among the counts. The exigencies of child abuse cases necessitate considerable latitude in the construction of criminal charges. The prosecutors in this case, however, abused this wide latitude by piling in multiple identical counts. Numerous charges cannot be made out through estimation or inference. Instead, if prosecutors seek multiple charges against a defendant, they must link those multiple charges to multiple identifiable offenses. Due process requires this minimal step. Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction."

Your Honor Petitioner understands his end result to be similar to Valentine, *Id.* at 638:

". . . We agree with our dissenting colleague that courts must be aware and responsive to the unique problems of child abuse cases. We agree that adopting hard-and-fast pleading rules would be disservice in this area of the law. But, these difficulties do not permit us to simply abandon the rule of law because we find a crime especially abhorrent. Valentine's trial was radically disconnected from some core values of our legal system. Neither the prosecutor, the defense, the court, nor the jury ever had any idea of what incidents formed the bases of the forty counts. There are violations of ordinary rules of notice, duplicity, multiplicity, jury

unanimity, double jeopardy, and sufficiency of evidence. He was sentenced to forty consecutive life sentences based on child's round-number, guessimate as to how many times she was assaulted.

There is little indication that this ruling will "severely hamper" the prosecution of crimes of abuse. Even in this case, we have upheld the two counts that gave notice of separate crimes, and the sentence is two consecutive life sentences, an extremely harsh punishment. Nothing in this opinion limits sexual abuse prosecutions to so-called "exceedingly narrow and precise charges." It expressly rejects Valentine's challenges on that ground. The Constitution does, however, demand that if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts at some point in the proceeding. Without such differentiation, these prosecutions would reduce to nothing the constitutional protections of the Fifth and Fourteen Amendments."

Similar to Valentine, *supra*, court's conclusion "Neither the prosecutor, the defense, the court, nor the jury ever had any idea of what incidents formed the bases of" Petitioners counts. One proof of this consequence and/or surprise was the result, at trial, of K.B. testimony's regarding oral sex. K.B's testimony at the 5/1/09 interview (Appendix "G") offered nothing to that regard. At trial K.B. stated [N.T. 10/7/13 p.25 ln.18 to ln.22]:

Mr. Rakaczewski: - Okay. Now you had mentioned something with the Defendant. You had mentioned - - I think you said Jim and Bea – their house. Who were Jim and Bea?

K.B – They were – well, they are Danny's parents.

Then [N.T. 10/7/13 p.26 ln.5 to ln.7]:

"K.B. – The first time I remember I was really little, and I was in New Jersey visiting Bea and Jim's house."

Establishing that Petitioners parents lived in NJ. Your Honor please read the K.B. trial testimony (Appendix "M") specifically p.34 ln.16 to p.36 ln.21 then taking note to p.35 ln.9 to ln.10. Where her only testimony is in N.J with no age, year or season. This is significant because this testimony results in Petitioners non-precedential decision resulting in Pennsylvania Statutes, Title 18, Chapter 31, § 3121, Rape – case annotation of Commonwealth v. Wesling, Title 18, Chapter 31, § 3101, Rape – Sufficiency of Evidence case annotation of Commonwealth v. Wesling, and Title 18, Chapter 31, § 3101, Rape – Elements case annotation of Commonwealth v. Wesling (Appendix "N"). Stating ". . . alternatively, the jury could have found sufficient evidence to convict defendant based on the victim's testimony regarding oral intercourse." Confirming the fact that "Neither the prosecutor, the defense, the court, nor the jury ever had any idea of what incidents formed the bases of" Petitioners counts.

The other fact the only testimony is of New Jersey is a straight jurisdictional issue. Your Honor Commonwealth of Pennsylvania is now recognizing Commonwealth v. Wesling as representative of their sufficient rape elements and legal sufficiency of evidence in their Pennsylvania Statutes. Where testimony reveals generalizations, unrealistic date ranges for the defense and clear Due Process Constitutional violations similar to Valentine, *supra*.

Your Honor Petitioner understands that whether courts apply the Cronic approach or Strickland prongs, either one would be satisfied in Petitioners case. Attorney Spishock did not leave the Petitioner on fair and level playing field. Neither did the previous courts want to address Petitioners true issues. Subsequently, the acceptance of Commonwealth v. Wesling, with such a procedure or standard, starting

with a deficient indictment would violate Hamling standard/approach. Fawcett, cited in Valentine, adopted in Commonwealth of Pennsylvania courts, Fawcett, at 618:

> ". . . The portion of the sixth amendment that Fawcett invokes is a complement to the indictment clause, and all events add little to the requirement of the fourteenth amendment itself: that no state shall "deprive any person of life, liberty, or property, without due process of law". Due process means notice and an opportunity to respond. Notice must be sufficient to make the opportunity useful. We therefore take this as a straight due process case in which the accused contends that inadequate notice led to a trial with an unacceptable risk of convicting the innocent.. . ."
>
> ". . .Holesome v. State, 40 Wis. 2d 95, 1616 N.W.2d 283 (1968), adopts for Wisconsin the same approach the Supreme court articulated in United States v. Mills, 32 U.S. (7 Pet.) 138, 142, 8 L. Ed. 636 (1833), reaffirmed in Hamling v. United States, 418 U.S 87, 117, 41 L. Ed. 2d 590, 94 S.Ct. 2887 (1974)."

Then discussing their Hamling the adopted approach *Id.* at 619:

> ". . . Morris which sets judges peering over prosecutors' shoulders, is a fuzzy approach dominated by subjective considerations. Hamling, by contrast, looks at matters objectively; did the charge enable an innocent accused to mount an adequate defense? That the prosecutor may have a hard time framing a charge that allows an adequate defense is no reason to cut down the protections accorded to suspects. If, say, M.S. had no idea where within a five-year period the events took place, the Morris approach might allow the prosecutor to use a five-year span even if that destroyed any possibility of an adequate defense. The Hamling approach would bar such a vague charge . . ."

The Fawcett, *supra*, reflects Hamling approach would bar such vague charges. Concluding that neither Commonwealth of Pennsylvania courts applied the Supreme Court Hamling approach in Petitioners case, seemingly violating Hamling. Similarly, the

United States Court of Appeals of the Third Circuit stated Commonwealth of Pennsylvania Superior Court's reliance on the Devlin test was incompatible with Federal law. See Real v. Shannon, 600 F.3d 302, 307-308 (2010 3rd Cir.):

> ". . . To determine where variance violates the Constitution, federal courts look to "whether or not there has been prejudice to the defendant," focusing on the defendant's right to notice and his ability to defend himself at trial. United States v. Asher, 854 F.2d 1483, 1497 (3d Cir. 1988) (internal citations and quotation marks omitted).
>
> > The true inquiry . . . is whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. Berger v. United States, 295 U.S. 78, 82, 55 S. Ct. 629, L. Ed. 1314 (U.S. 1935) (internal citations omitted).
>
> Accordingly, a variance violates the Constitution "only if it is likely to have surprised or otherwise has prejudiced the defense." United States v. Daraio, 445 F.3d 253, 262 (3d Cir. 2006) (citing United States v. Schurr, 775 F.2d 549, 553-54 (3d Cir. 1985)). Insofar as the Devlin test applied by the Superior Court requires courts to *balance* the rights of the accused against "the nature of the crime and the age and condition of the victim," this test is incompatible with federal law. Devlin is "contrary to" Berger and related federal decisions, which focus *exclusively* on whether a variance violates the defendant's due process rights. See Williams v. Taylor, 529 U.S. 362, 405, 102 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.")"

The court then continues on defining the variance *Id.*

". . . the government is not required to prove the exact dates, if a date reasonably near is established." United States v. Nersesian, 824 F.2d 1294, 1323 (2d Cir. 1987); accord United States v. Benson, 591 F.3d 491, 497 (6th Cir. 2010); United States v. Mata, 491 F.3d 237, 243 (5th Cir. 2007); United States v. Reed, 887 F.2d 1398, 1403 (11th Cir. 1989); United States v. Leibowitz, 857 F.2d 373, 379 (7th Cir. 1988).

Our sister Circuits have held that where, as here, the government's evidence proves that an offense was committed within a month specified in an "on or about" indictment or information, the "reasonably near" requirement is satisfied. See e.g., United States v. Portela, 167 F.3d 687, 698 n.7 (1st Cir. 1999) ("The indictment's specification of possession 'on or about' March 1995 reasonably encompasses criminal conduct in April 1995."); United States v. Barsanti, 943 F.2d 428, 438-39 (4th Cir. 1991) (variance of four months did not prejudice the defendant); Nersesian, 824 F.2d at 1323 ("In our view, the government's argument that the date of the actual transaction was possibly July or early August was not an improper material variance from the 'on or about June 1984' date charged in the indictment."; *cf.* United States v. Ross, 412 F.3d 771, 775 [67 Fed Rules Evid Serv 637, appellant dismd, motion gr (2006 CA7 Ill) 177 Fed Appx 490] (7th Cir. 2005) ("Four years isn't 'reasonably near'")."

Your Honor from the Real, *supra*, it appears that both Commonwealth of Pennsylvania Monroe County Common Pleas and Superior Court were both acting contrary to Berger. Petitioner believes Your Honor if you view the trial testimony that you will also conclude there is no record evidence that the indictment dates are reasonably near any of the testimony given according to the Berger test. In the Petitioners case, the government has refused "to play by its own rules," Carmeli v.

Texas, 529 U.S. 513, 533, 146 L. Ed. 2d 577, 120 S. Ct. 1620 (2000) and has created a procedure which creates an impermissibly large risk that the innocent will be convicted. Petitioner's replacement counsel did object to Pennsylvania's conviction based on a victim's uncorroborated testimony based on constitutional grounds [N.T. 10/8/13 p.121 ln.1 to ln.24] but it is law in Pennsylvania (Commonwealth v. Charlton; Commonwealth v. Wall).

Your Honor similar court decisions regarding defense counsels inadequacy in United States Constitution, Amendment 6, case annotations ; Campbell v. Reardon, (2015, CA7 Ill) 780 F.3d 752 (state court decision contained unreasonable application of Strickland; fundamental problem with state court's analysis was that it ignored counsel's duty to perform reasonable pretrial investigation before committing to defense strategy.); Williams v. Allen (2008, CA11 Ala) 542 F.3d 1326, 21 FLW Fed C 1103, cert den, motion gr (2009) 556 U.S. 1253, 129 S. Ct. 2383, 173 L. Ed. 2d 1325 (state court's assumption that counsel's investigation was adequate was unreasonable application of Strickland ; further, undiscovered evidence painted vastly different picture and would have been relevant to assessment of petitioner's culpability, so prejudice did arise from unreasonable application.); People v. Frierson (1979) 25 Cal 3d 142, 158 Cal Rptr 281, 599 P.2d 587 (Where record on its face discloses that defense counsel failed to investigate facts in manner required of diligent and conscientious advocate, conviction must be reversed because defendant has thereby been deprived of adequate assistance of counsel.). Your Honor there is a reasonable probability that, but for Attorney Spishock's unprofessional errors, the result would have been different (Strickland, 466 U.S at 694).

Your Honor by allowing Petitioners indictment to stand, Commonwealth of Pennsylvania has a procedure which creates an impermissibly large risk that a Pennsylvania and/or other United States citizen that are innocent will be convicted, wherefore, making the United States Constitution Due Process right's a shame.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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