NO: _____

IN THE

SUPREME COURT OF THE UNITED

MARIA SANUTTI-SPENCER-Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA- Respondent

PETITION FOR WRIT OF CERTIORARI

MARIA SANUTTI-SPENCER- PRO-SE
iNMATE ID# OX1149
SCI-MUNCY
P.O. BOX 180
MUNCY, PA. 177756

I. QUESTIONS PRESENTED FOR REVIEW

1. Does excluding evidence of another's motive, of the decedent's drug addiction, drug dealing, his physical abuse of the defendant and the defendant's significant health issues violate the right to present a complete defense when this evidence suggests another person committed the crime for which the defendant was charged and convicted?

Suggested Answer: Yes.

2. Does excluding evidence of the decedent's motive, intent, bias, ill-will, malice and the nature of the marital relationship violate the defendant's Constitutional right to confront the decedent, when his out-of-court- statements, regarding his fear of the defendant, are offered into evidence at her trial.?

Suggested Answer: Yes.

3. Does a lay witness, such as a police officer, exceed the scope of lay opinion tewtimony when he testifies that he believes a certain set of yellow cleaning gloves, found in the kitchen (later found to have the defendant's DNA in them) were used to drag the body?

Suggested Answer: Yes.

4. Should a trial court strike testimony when a witness admits to violating a sequestration order which impacted his testimony?

Suggested answer: Yes.

5. Was it error for the trial court to read, as a non-responsive answer to a jury question, the criminal information as fact (not an allegation) prefaced by "attention-getting words" of "in order to avoid any confusion about the charges in this case I am going to read the following to you" and then after reading the criminal information, the words "That is all I have to say on that issue. Again, I hope it hopes (sic) clarify the issues for you."

Suggested answer: Yes.

II. List of Parties

* All parties appear in the caption of the case on the cover page.

III. Table of Contents

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

VI. OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at UNKNOWN- Information unavailable; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Pa. Court of Common Pleas court appears at Appendix B to the petition and is

[ ] reported at UNKNOWN- Information unavailable; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

VII. JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ _____

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Jan 11, 2018
A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

VIII. Reference to the Text of the Order in Question

"It was within the province of the trial judge to exclude Appellant's health issues on the basis of irrelevancy and unfair prejudice. We discern no abuse of discretion in that regard." *See* Superior Court Opinion, January 11, 2018, at 11 (internal citations omitted); Attached as Appendix A. The trial court's 1925(a) Opinion is attached as Appendix B.

"As Appellant did not raise self-defense in this case, it was within the court's discretion to exclude evidence of the Victim's bad character traits. . . . We discern no abuse of the court's discretion." *See* Appendix A at 13-14 (internal citations omitted).

"Here, the trial court ruled that these statements [from the dad witnesses] were hearsay and properly deemed inadmissible because they were irrelevant. We agree." *See* Appendix A at 16.

"[T]he Corporal's testimony was based on his experience as a police officer and what he directly observed. . . . We discern no error or abuse of discretion." *See* Appendix A at 20.

"[T]he court decided not to take action based on the reasonable ground that the [sequestration] violation had no material impact on the testimony and no impact on the outcome of the trial. We agree." *See* Appendix A at 23.

"[A]s noted by the court, the 'record plainly indicates that the jury was instructed adequately and in accordance with the law.' Further, the court

> reminded the jury that it was their duty to 'find from the evidence the facts that would support such an allegation to reach [its] conclusions.' Accordingly, we discern no error.
>
> . . . Judgement of sentence affirmed." *See* Appendix A at 26-27.

IX. Concise Statement of the Case

This case has a significant case history, including a two-week jury trial. In the interests of judicial economy, Maria only highlights the relevant portions of the proceedings for the issues raised in this petition for allowance of appeal.

There is one aspect that all sides agree about: In 2012, Frank Spencer was found shot to death at his home near Millville. This trial focused around who killed Frank Spencer and whether there was a conspiracy to kill him. The government's theory of the case was that Maria Sanutti-Spencer, the ex-wife of the deceased, acted in concert with her father, Anthony Rocco Franklin, to shoot and kill the deceased. The government asserted Maria subjected the decedent to a reign of terror, that if she couldn't have him, no one could, and that her father was in the mob. RR. 565: 15-21; 2223: 16-25; 2224: 11-14 2229: 9-18.

Maria was in poor health at the time of these alleged crimes. RR. 127. 127:10-11. Maria has serious medical problems . RR. 125-126:19-3. Maria has diabetes. RR.111:7-8; 125-126:19-3. At trial, she weighed only 98 pounds. RR. 11:7-8. She lost a significant amount of vision in her left eye due to diabetes. RR. 127: 16-22. In 2013, she was ill *(diagnosed in March of 2012 with End Stage Renal Failure)* and required a kidney transplant.RR.2089: 10-11. Maria did ultimately receive a kidney transplat. RR. 2089:20-23. All of this leads to the reality that Maria's chronic health problems physically precluded her from being able to do what the facts required her to: climb 125 feet up the side of a mountain, climb a tree, rest in an awkward position with a heavy rifle at a makeshift sniper's nest, pull a trigger and shoot her ex-husband, Frank Spener, at distance, then later this 98 pound woman dragged the 220-230 pound decedent inside. RR. 246. This medical evidence, *(which was not a complete list of her medical limitations and conditions)*, that she was physically incapable of carrying out the murder and dragging the body inside was not allowed. RR. 273-274.

1. Maria was charged with Homicide, Criminal Solicitiation to Commit Homicide, Criminal Attempt to Commit Homicide, Arson, Criminal Solicitiation to Commit Arson, Criminal Conspiracy, Burglary, Criminal Solicitation to Commit Burglary, Receiving Stolen Property, terroristic Threats, and Perjury on July 28, 2014.

A week prior to the murder Maria was limping. RR.857:15-18; 857-858;25-4. On June 30, 2012, the day before the murder, Maria was limping. RR. 107-108:16-7; 112:14-20; 1803-1804:20-19. The decedent jogged by he, mocking her. RR. 1803-1804:20-19. The decedent not oly mocked Maria, but he was physically and mentally abusive towards Maria and their children. There were numerous domestic incidents which occurred at the Fair view property they owned. RR 605:17-23. N.T. 11/13/2015 at 52. Maria was in a diabetic coma and when she arrived home from the hospital, the decedent threw her down a flight of stairs. RR. 605:17-23. Counsel told the trial court he intended to call their children to testify about the physical abuse. RR. 605:8-23. But this evidence was not allowed. RR. 273-274.

On November 17, 2015, defense counsel provided a proffer on the testimony of two prison guards, the Batuik brothers, and an inmate. RR. 1745. The Batuik brothers were present ad prepared to testify. The Batuik brothers took statements from the then -imprisoned dad between 2007 and 2009 at SCI Coal Township. RR.1745: 8-21. The dad told them that he hated the deceased, was interested in "meeting" with the deceased when paroled, and wanted to either kill the deeased or "send him a message." RR> 1745:8-21. Defense counsel argued these statements are admissable under the exception to hearsay found at 803(3) (state of mind). RR. 1746:1-14.

The trial court disagreed, holding that this evidence was too far in the past. RR. 1737: 20-21. To highlight this incongruity, the goverment had been permitted to introduce Maria's alleged threats going father back than 2007 (as far back as 2002). RR. 1736: 8-10; NT. 11/12/2015 at 61-64; NT. Vol. IV. at 65. The government was allowed to crawl back many more years to find motive than the accused was allowed to consider the dad's sole, independent counter-motive.

The inmate proffer was for John Ulrich. RR. 1747:7-20. Ulrich approached authorities after learning Maria and dad were charged with murder. RR. 263. He told authorities of a conversation he had with the dad whileincarcerated at FCI Schuylkill in 2008. RR. 263; 1747: 7-20. The dad knew that Ulrich was being released. So dad requested a favor from him. RR. 263. The dad wanted Ulrich to "send" the deceased" a message." RR. 1747: 7-20. The dad explained why: the deceased was abusive towards Maria and their children. RR. 263. The dad asked Ulrich " to take care of the problem". RR. 263. Ulrich asked what he meant, to which the dad responded, " I want him gone." RR. 263. The trial court denied the request to present this witness. RR. 1755: 22-17.

On February 5, 2010, Michael Fry told police that the decedent was a cutomer of his methamphetamine distribution. RR. 1119:2-10. Fry said the decedent would "get the most, as about 3 grams per delivery." RR. 267-268. This information was in a report authorized by Trooper Russel Burcher.

Defense counsel brought in Trooper Burcher for a proffer. RR. 928: 13-22. 2008-2009, Trooper Burcher was working in conjunction with the FBI. RR. 931: 15-21. He was involved in the execution of a Title III warrant. RR. 931: 22-24. He intercepted communications involving the decedent. RR. 932: 4-7. The decedent was identified as a methamphetamine customer of Fry. RR. 932: 21-25. The decedent obtained the methamphetamine from Fry and Molly Hippenstiel. RR. 933: 4-9. The decedent was identified as a local distributor and user of methamphetamine. RR. 933: 10-17. The Title III wiretap showed that the decedent was a subordinate of Fry. RR. 934: 16-22. The decedent was obtaining methamphetamine from Fry and re-distributing it to others. RR. 934-935: 20-16. The decedent was a low-level drug user. RR. 937: 21-25. The decedent preferred methamphetamine and cocaine as his drug of choice. RR. 937-938: 21-6. Contemporaneous with the death, evidence of recent drug use was found at the deceased's home. RR. 244. No drugs were discovered in the decedent's body. A pipe used to smoke crack cocaine was found outside the deceased's house during the investigation. RR. 244-245.

The government filed a motion *in limine* to exclude evidence of the decedent's character. RR. 145. Specifically, the government sought to exclude the fact that the decedent "was prone to violence, physically and mentally abus[ive to] Sanutti-Spencer and others, suffered from mental illness, was committed, and was engaged in drug activity." RR. 145. The government further requested to exclude Maria's health. RR. 149.

The trial court held that the evidence regarding the decedent's physical and emotional abuse, his drug use, and his mental health were not relevant to the charges Maria was facing. RR. 273-274. After the proffer of Trooper Burcher, the trial court again precluded the evidence as irrelevant. RR. 950: 1-25.

During Corporal Andreuzzi's testimony, he was repeatedly allowed to testify as to his opinion on matters well beyond being someone who merely relayed facts as they occurred. RR. 772-773: 18-3; 782: 19-25; 788: 2-17; 804-805: 13-18. Defense counsel objected multiple times to this type of testimony. RR. 773: 4-11; 783: 1-14; 788: 18-25; 804-805: 24-13. The corporal was providing expert opinion without being qualified as an expert. RR. 783: 6-14. The trial court held that the corporal was allowed to explain why he felt items were out of place. RR. 783: 15-19. The corporal was testifying that he did something or noted something out of place **because of his experience as a police officer.** *See* RR. 784: 2-8 (emphasis added). Most importantly, over defense objection, the corporal was allowed to opine that a particular pair of yellow cleaning gloves found inside the home were used to move the body from outside the house to inside the house. RR. 772-773: 21-3.

During trial, an important comment attributed to Maria came into question. It was alleged at trial that Maria told Derk Reed at a football game,

in the end zone area, that she was there when the decedent took his last breath. RR. 1849: 22-25; 1860-1861: 24-1; 1873: 13-15. Defense counsel discredited Reed during cross-examination. *See* RR. 1851-1867. Reed introduced the decedent to his girlfriend. RR. 1851-1852: 17-16; 1585-1586: 11-17.The decedent often went back and forth between the girlfriend and Maria. RR. 1585-1586: 11-17; 1590-1591: 4-22; 1599: 22-4; 1607: 3-15. Reed admitted he hated Maria. RR. 1863-1864: 24-5.

To support the alleged admission, the government introduced testimony of Brian Wawroski. RR. 1873: 13-15. Defense counsel attempted to show Wawroski could not hear over the noise in the end zone. RR. 1859-1860: 12-3. Reed testified before lunch as to these events. RR. 1868-1869: 23-5. After lunch, Wawroski testified. RR. 1870-1871: 21-2. Reed was questioned on cross-examination about the noise level in the end zone. *See* RR. 1859-1860: 12-3. Wawroski testified that it was quieter in the end zone, without even being asked by the government. RR. 1871-1872: 21-5. On cross examination, defense counsel elicited that Wawroski sought

out Reed during the lunch break and spoke to Reed about Reed's testimony. RR. 1878-1879: 15-13. Reed told Wawroski that defense counsel "quizzed" him on the noise level in the end zone. RR. 1879: 3-13.

Defense counsel requested to strike the witness' testimony for violating the rules of sequestration. RR. 1881: 2-4. The motion was denied. RR. 1881: 7-16.

After the jury started deliberating, they requested the trial court provide more information on counts one, two, six, and fourteen. RR. 2324-2325: 19-2. After that re-charge, the government requested the accomplice liability instruction to be read even though there was no specific request for that part of the jury instruction. RR. 2335: 6-12. The trial court stated that it would read one line: that the defendant caused the death of Frank Spencer, acting as either a principal or an accomplice. RR. 2335: 13-25. The government corrected the trial court that it was only an allegation, and defense counsel objected to reading that. RR. 2335-2336: 24-1.

The trial court then instructed the jury exactly as follows: "On or about July 1st, 2012, the Defendant did intentionally cause the death of Frank Spencer at 20 Fairview Drive, Hemlock Township, Columbia County. The Defendant having acted as a principal or an accomplice in bringing about Spencer's death by murder." Defense counsel asked the court to clarify that it is an allegation. RR. 2336: 15-16. It briefly said so. *See* 2336: 17-25. After the jury was excused from the courtroom, defense counsel requested a mistrial. RR. 2337: 1-14. Not only did the instruction not address any question the jury had, but the trial court read an allegation as if it was fact even despite the government's prior proper correction that it was only an allegation. RR. 2337: 4-14. Within an hour, the jury returned with a verdict of guilty on all counts. RR. 2329: 3-4; 2339-2342: 25-25. Maria appealed to the Superior Court.

The Superior Court affirmed, holding that the trial court did not abuse its discretion as to four of the issues raised on appeal and held one issue was waived for failure to object at trial. See Appendix A, at 11; 13-14; 16; 18; 20; 23; 26-27.

X . Concise Statement of Reasons Relied Upon for Appeal

We fully understand and respect that the role of the United States Supreme Court is different than that of the Pennsyvania Superior Court. Whereas the Superior Court is generally and most accurately referred to as "an error correcting court," the United States Supreme Court, while capable of correcting error encountered in one particular trial, is concerned more with issues of importance beyond the particular facts and parties involved. This case meets both the broader aims unique to this level of review as well as giving the opportunity to correct a particular set of errors.

In this petition, it is averred that the Pennsylvania Superior Court so abused its discretion requiring the exercise of the United States Supreme Court's supervisory authority. As perhaps an indicator of the amountof time and thought placed on this review, the Superior Court repeatedly made some basic errors including misidentifying the prosecuting entity. Multiple times, the Pennsylvaia Superior Court refers to the prosecuting entity as either the D.A. or the distruct attrney. *See* Appendix A at 16;19;21;25. But the Office of the Attorney General prosecuted this case. It is the canary in this coalmine as we look deeper into thie issues presented.

1. Excluding evidence of another's motive, of the decedent's abuse, and of Maria's significant health issues violated her right o present a complete defense.

The right to present a complete defense must be safeguarded by this Court. When so much evidence is excluded , it violates the defendant's Due Process right. Maria was not allowed to present a complete defense. The trial court excluded the following evidence:

- how sick Maria was and how she was not physically capable of climbing a mountain, holding a very heavy rifle, aiming it, pulling the trigger, firing it at a distance, and then dragging a 220-230 pound ma[illegible]into a house or even particpate in like events:
- how abusive the decedent was to show he was not afraid of her, but rather it was she who was terrified by him;
- how involved the decedent was in drug use and in the dangerous drug trade; and
- how another person, her father, a notorious criminal with alleged mafia connections who had allegedly acted as a mafia hitman had repeatedly

sought to kill the decedent. See RR. 127:10-11;111;7-125-126:19-3;127:16-22;2089:10-11;605:17-23;119:2-10; 932:21-25;937-938:21-6:1745:8-21;1747:7-20.

These exclusions violated Maria's Due Process rights both at the Federal and State level of examination. The right to be able to present a complete defense is not new and has been well articulated by the Supreme Court of the United States (SCOTUS) since 1943. Under the Fourteenth Amendment analysis , the SCOTUS has held "[t]he right of an accused in a criminal trial to due process is , in essence, the right to a fair opportuniity to defend against the State's accusations. The right to confront and cross examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. "Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

The SCOTUS explained that *Chambers* was a fact-specific decision: "thus, the holding of **Chambers**- if one can be discerned from such a fact-intensive case- is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations" whenever 'critical evidence ' favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." ***Montana v. Egelhoff,*** 518 U.S. 37, 53 (1996). (emphasis added).

This case is precisely that: multiple erroneous evidentiary rulings in combination rose to a Due Process violation contra the federal and state constitutional protections. The accused was denied her fundamental right to present a complete defense. The trial court allowed some evidence to be presented through witnesses, but did not allow these witnesses to testify to their full knowledge of the relevant facts. Other witnesses were excluded in full.

The Superior Court did not addrss the fact that Maria's physical health was relevant to rebut the decedent's fear of her and relevant to rebut the reign of terror allegation the Commonwealth made. *See* Appendix A, 10-11. Maria's health show that if the decedent was afraid of her, it was an unreasonable fear. Maria suffers from severe diabetes. RR. 111:7-8, 125-126;19-3. She suffered from kidney failure. RR.149. She had been on dialysis. RR.149. At the time of trial, she weighed only 98 pounds. RR.111:7-8. Just prior to the murder, multiple witnesses saw Maria limping. RR. 857:15-18;857-858:25-4;107-108:16-7;112:14-20. At one point, the decedent even mocked her limp by jogging by her at their son's championship baseball game. RR. 107-108:16-7;1803-1804:20-19.

It is not simply that she was precluded from presenting evidence that she was physically incapable of committing the acts on the day of the murder. The goverment launched into evidence that she was conducting a reign of terror on the decedent. It introduced evidence of Maria's alleged threats against the decedent as far back as 2002. *See* RR. 1058-1061:18-15. The goverment, because the ill health evidence ws not allowed, was able to establish unrebutted the decedent's

fear of Maria. In truth, if the jury had been allowed to hear it, Maria's physical illnesses rebutted fearof a near moribund and diseased small women. If the jury heard how sick Maria was, they would not believe that the decedent was afraid of her or, at least, not rationally afraid of her. Excluding this evidence would be akin to the trial court excluding evidence in a "peeping tom" trial the defendant was blind.

The decedent's abuse and drug use is also relevant to rebutting the Commonwealth's theory of a reign of terror. Maria attempted to show that the decedents drug use caused him to hallucinate and become paranoid, his fear was not reasonable (if he was actually afraid of her), ad that she did not conduct this reign of teror the Commonwealth alleged. The Pennsylvnai Superior Court acknowleged that the evidence must be relevant to the crime or defense at issue, but did not addresss Maria's defense that this reign of terror did not occur and that the decedent was not afraid of her.

Both the trial court and the Pennsylvania Superior Court believed that the evidence of the decedent's abuse and drug use would be unfairly prejudicial to the Commonwealth. But neither explain why. *See* Appendix A at 13. The Commonwealth does not suffer prejudice simply because the relevant evidence rebuts their theory of the case. In fact, that is highly relevant. The jury is to hear all the relevant facts and determine the truth of the matter.

The goverment called no less than 12 witnesses that testified the decedent was afraid of Maria. Maria had a right to rebut this theory. Maria was not permitted to introduce evidence of the decedent's abuse which would show that he was not afraid of Maria. Someone who is afraid will not attack but will instead hide. This prior physical abuse testimony involved incidents that occurred during the time where witnessess claimed the decedent told them he was afraid of Maria. For example, the decedent threw Maria down a flight of stars, following her release, from 30 days in the hospital. RR. 605:17-23.

Both the trial court and the Pennsylvania Superior Court held that the evidence of the decedent's drug use was speculation. See Appendix A at 13. The decedent's drug use not only would have come from witnesses close to the decedent, the decedent's own proffered medical testimoney in a prior custody hearing and from Trooper Burcher who, through a Title III wiretap investigation, intercepted the decedent's communications regarding his drug use and drug dealing. This investigation was between 2008 and 2009, the same time that the Commonwealth alleged Maria was conducting her reign of terror. The trooper's investigation was not speculation.

Next, the trial court never addresed why the "dad witnesses" (John Ultrich and the Batuik brothers) did not meet the state of mind exception to the hearsay rule. The Pennsylvania Superior Court even notes this in footnote 4. See Appendix A at 16.

But even the Pennsylvania Superior court does not explain why this testimony does not qualify under the state of mind exception.

These witnesses were to testify to converations they had with the father. Ulrich, another inmate with her father, was being released in 2008. When the dad learned that Ulrich was being released, he requested a favor. RR. 263. The dad wanted Ulrich to send the decedent a message. RR. 1747:7-20. The dad told Ulrich that the decedent was abusive towards Maria and their children. RR. 263. The dad requested Ulrich "take care of the problem." RR. 263. Ulrich asked what he wanted, which the dad responded, "I want him gone." RR. 263.

The Batuik brothers, two prison guards, took statements from the father during 2007, 2008 and 2009. Th dad told both guards he hated the decedent. RR. 1745:8-21. He told these guards he either wanted to send the decedent a message or kill the decedent. RR. 1745:8-21. These statements were admissable under F.R.E. 803(3) (state of mind).

Although the dad was charged with this murder and fled the country to Argentina, Rule 803(3) was available as an exception against hearsay regardless of whether declarant was available. F.R.E. 803 (3) provides:

> "a statement of the declarant's then-existing state of mind (**such as motive, intent or plan**) or emotional, sensory, or physical condition (such as mental

feelings, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." F.R. E. 803(3) (emphasis added).

The statment the dad made to the Batuik brothers and Ulrich were clearly his well-settled and consistent intent, motive, and plan. The dad intended to kill the decedent, one way or another. The dad solicited Ulrich to kill the decedent. The dad told the Batuik brother's his intent and plan to kill the decedent upon his release. The dad told Ulrich his motive-that the decedent was abusiv e towards Maria and their kids.

This evidence meets the exception to hearsay under Rule 803(3). The evidence ws relevant, it makes the fact that Maria's father, alone, committed the murder more probable than without this evidence. The actor, and whether or not the actor committed this crime alone, is undoubtedly a fact of consequence in this proceeding. Yet, the trial court and the Pennsylvania Superior Court do not adddress the state of mind exception to the rule against hearsay.

Both the trial court and the Pennsylvania Superior Court discuss the co-conspirator exception. Maria did not raise the co-consipirator exception in her appellant's brief to the Pennsylvania Superior Court. It is as if the appellat brief was never read as to this aspect. The Pennylvania Superior Court had no reason to address the co-conspirator

exception. Maria raised the state of mind exception. Other than quoting the rule, the Pennsylvania Superior Court does not explain why the declarant (her father) telling someone he hated the decedent and wanted to meet with the decedent and send the decedent "a message" upon release from prison was not her father's motive, intent, and plan. See Appendix A at 15-16/ This information meets the state of mind exception to the hearsay rule.

The significant amount of relevant evidence this trial court excluded violatd Maria's right to Due Process. We respectfully request this Court to protect the right to preset a complete defense.

2. Excluding evidence of the decedent's motive, intent, bias, ill-will, malice and the nature of the marital relationship violate the defendant's Constitutional right to confront the decedent, when his out-of-court statements, regarding his fear of the defendant, are offered into evidence at her trial.

In Crawford v. Washington, 541 U.S. 36, (2004) , this Court held the Confrontation Clause of the Sixth Amendment to exclude all testimonial hearsay statements made by a declarant whom the defendant had no opportunity to confront either before trial or during trial. Regardless if it fits in an established hearsay exception.

In the Courts words, the Confrontation Clause "commands, not that evidence is reliable, but the reliability be assessed in particular manner; by testing in the crucible of cross-examination."

The Crawford Court did not set out what constitutes testimonial evidence. However, the opinion provides important insight about how the court may view testimonial evidence. Evidence is testimonial when it: (a) resembles the "civil-law mode of criminal procedure" and its"use of ex parte examinations as as evidence against the accused;" (b) is "given in response to structured police questioning;" (c) Was produced with ( ) the "involvement of government officers" who ( ) had an "eye toward trial," or (d) Was made" under circumstances which would lead an objective witness to reasonably believe that the statement

would be available for use at a later trial."

In the present case the Appellant alleges that the trial court erred in admitting statements made by the decedent to his family, friends, attorney's and police officer's. And in admitting the decedent's letters to the County District Attorney Office and Columbia County Judge. The statements and letters are as follows:

`1. Letters to President Judge Thomas James and District Attorney, Gary Norton. See Appendix B. at 19.

2. Statements made to Joseph Yodock, decedent's friend. The decedent telling Mr. Yodock that he was contacting law enforcement. See Appendix B. at 29.

3. Decedent's statement made to Sgt. Traugh, Hemlock Twp. Police Officer, alleging someone was searching "how to kill somebody" on his computer. See Appendix B. at 32.

The Trial Court held that the statments were relevant to assist the Jury's understanding of the history of the case and to demonstrate the decedent's fear of the defendant. See Appendix. B. at 19, 29, and 32. These statements were permitted under Pa. R. Evid. 801-803, which do not differ from the Federal Rule of Evidence.

The Pennsylvania Superior Court acknoweldged in its decision that other statements were also offered as evidence to demonstrate the decedent's fear. They were as follows:

1. The decedent expressed anger and hostility toward the victim following divorce and custody hearings. See Appendix B. at 4.

2. A police officer helped the decedent compose a no-trespass letter to the defendant. See Appendix A. at 4.

3. The police responded to approximately 16 incidents at the home of the decedent and the defendant. See Appendix A. at 3.

Under the Crawford analysis, the admissibility of the statments and letters are a clear abuse of discretion. All of the statement and letters were by definition **testimonial hearsay** statements, made by the decedent, out-of-court. The defendant **did not** have an opportuntiy to confront the defendant at or before her trial. Moreover, these statements and letters were given in response to structured police questioning or were produced with the involvement of goverment officials and all were made with an eye towards future legal proceedings. The decedent and the defendant were in a divorce and custody battle from 2006 through 2012. In addition, the decedent and the defendant were the subject of the "arson investigation" of the decedent's property. An objective witness could reasonably believe the statements and letters would be available for use at a later date. RR. 928:13-22 ; 931: 22-24; 932: 4-7; 932:21-25; 933: 4; 933:10-17; 934:-935:20-16; 937:21-25; 937-938:21-6 and RR. 244.

An abuse of discretion is not merely an error of judgement; if in reaching a conclusion, the court overrides or misapplies the law, or the judgement exercised in shown by the records to mainfestly unreasonable or the product of partiality, prejudice, bias orill will, discretion has been abused.

I respectfully request this Court to undertake review to protect the right provided by the Confrontation Clause and the United States Constittution.

3. A lay witness, such as a police officer, exceeds the scope of lay opinion testimony when he testifies that he believes a certain set of cleaning gloves found in the decedent's house (later found to have Maria's DNA in them) were used to drag the body.

The Pennsylvania Superior Court held that the trial transcript does not support this claim because the Corporal did not specifically state that Maria used the yellow cleaning gloves to drag the body into the house. The Court reasoned the Corporal's testimony " may have given rise to an inference that the appellant did drag the victim's body into the house." However, the Corporal's testimony was based on his experience as a police officer and what he directly observed." See Appendix at 20.

If not for the perfectly timed objection by trial counsel the corporal would have testified that he believed the yellow cleaning gloves were worn to pull the body inside the residence. Yellow cleaning gloves that have Maria's DNA in them. The Corporal cannot, nor can anyone, know that the gloves were worn to pull the body inside. This is beyond lay opinion testimony. This is beyond testimony of what the Corporal directly observed. Further, if this evidence, as the Pennsylvania Superior Court held, "was helpful for the fact finder to interpret the evidence" then Maria's health is even more relevant. See Appendix A at 10. The evidence of Maria's health would rebut the theory that she pulled the body inside the residence. She could not have pulled a 220-230 pound body at all.

Federal Rules of Evidence 701 allows opinion testimony if it is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Federal Rule of Evidence 702, provides expert testimony is allowed if;

" (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;

(b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and

(c) the expert's methodology is generally accepted in the relevant field.

In this case, the trial court explained in it's 1925(b) opinion that the testimony was permitted "because we found that it was rationally based on the investigator's perceptions and informed by his experience and training." RR. 2509.

Here we have exactly what Rule 701 forbids. The Government elicited testimony onthe Corporals experience and training, not his personal knowlege. Personal knowledge is required as a basis for all lay witness testimony. F.R.E. 602. Testimony is to be rejected if first hand observation is not adequate to support opinion. U.S. v. Jackson, 437 U.S. 907 (1978).

This attribution as to what exactly happened and its particular mechanism of action is beyond speculative and certainly is not something remotely within the "ken of a layperson." This huge leap of definitively tying these particular gloves not merely to the defendant, but to the act of

moving the body from outside to inside is not something that one's next door neighbor can make. Perhaps it is a leap so far that no one no matter how many degrees or how much experience one can gather in a lifetime can legally or scientifically make. At the very least, it is the exact definition of 'specialized knowledge beyond that possessed by the average layperson." F.R.E. 702.

The Goverment may not use Federal rule of Evidence 701(c) as an end run around reliability requirement of Federal Rule 702, and the disclosure requiremnet of Rules of Procedure. Preventing such attempts is the very purpose of Federal Rule of Evidence 701 (c). Hirst v. Inverness Hotel Corp., 544 F. 3d. 221, 50 VI 1122, && FED R. Evid. Serv (CBC) 728 (3rd. cir. V.I. 2008); U.S. v. Nixon , 694 F.3d 623, 2012 Fed App 0324P, 2012 FED APP 324P, 89 Fed. R. Evid Serv. (CBC) 728 (3 rd cir. V.I. 2008).

4. A trial court should strike the testimony when a witness admits to violating a sequestration order and the violation impacted the witness' testimony and the outcome of the trial.

It is respectfully requested that this Honorable Court undertake review to provide a firm stance on witnesses violating the rules of sequestration. In affirming the trial court, the Pennsylvania Superior Court held that Wawroski's testimony did not have a material impact on the outcome of trial. See Appendix A at 23. But Wawroski testified to a confession by Maria.

In a criminal trial, very few pieces of evidence are more powerful than a confession. Many a thesis, peer reviewed scientific paper, and law review journal article has examined the dichotomy that exists between increased evidence that confessions may be unreliable and the near total power that they possess as a proverbial gold standard of evidence to juries. See as examples, Kassin Sm, Neumann K, "On the Power of Confession Evidence: An Experimental Test of Fundamental Difference Hypothesis. "Law Hum Behav. 1997 Oct;21(5):469-84 and Kassin SM, "Why confessions trump innocence." Am Psychol. 2012 Sept;67(6):431-45. doi:10.1037/a0028212. Epup 2012 Apr 30.

A sequestration orderwas issued as to all witnesses. One of the goverment's fact witnesses, Derk Reed, testified before lunch. See R.R. 1832-1870. The goverment focused on an intense argument Reed had with Maria in the end zone during a football game. RR.1872:12-25; 1847-1848:12-7. It was during this heated arguement that Maria allegedly admitted she was present when the decedent died and saw him take his last breath. RR. 1849:13-25. During cross-examination of Reed, defense counsel focused heavily on the noise level in the end zone of the high school football game. RR. 1859-1860: 12-3.

The sum and gist of the cross-examination was to try to paint the picture that no such admission was made and that the game was too noisy to allow for anyone else to hear this alleged comment. The trial court recessed to lunch.

After lunch, the goverment called its next witness, Wawroski. Waworski testified he was at the same high school football game. RR. 1871-1872: 21-9. He stated that he saw the argument between Maria and Reed walked over to Reed's aid. RR. 1872:10-19. He claimed he over-heard the same admission by Maria, from 10-12 feet away. RR. 1873:3-15. But at the very begining of his testimony and completely out of place in its context without prompting, Wawroski told the jury it is quieter in the end zone:

> Q. Do you know the Defendant in this case?
>
> A. Yes, Sir.
>
> Q. Do you know an individual by the name of Derk Reed?
>
> A. Yes, Sir.
>
> Q. I want to turn your attention to September 7th of 2012. Do yo recall where you were that evening?
>
> A. Yeah, I believe we were talking about the football game, yep.
>
> Q. Where were you, Sir?
>
> A. I was in the end zone where most of the parents and families that know each other, we gather in the end zone. It is quieter down there. you don't have all the band and noise and what have you up in the stands. And it is a place that we, you know, talk. RR. 1871-1872: 16-5.

Defense counsel confronted Wawroski. Through questioning, it was revealed that over lunch break, Wawroski walked over to Reed's office and asked how

his testimony went. RR. 1878-18790:18-5. Wawroski told the trial court that Reed stated "he was quizzed on the field." RR. 1879:3-5. Reed continued, "They are going to quiz you on the field." RR. 1879:12-13.

Defense counsel requested Wawroski's testimony be stricken and asked for a curative instruction. The trial court denied the motion. RR. 1881: 7-10.

Clearly, both Reed and Wawroski violated the trial court's sequestration order. It manifested in the exact harm sought to be avoided by any sequestration order, namely this "heads up" allowed Wawroski to artificially shape his testimony to correspond with an earlier witness, Reed. The purpose of sequestration is to prevent witnesses from tailoring their testimony to that of prior witnesses and to aid in detection of dishonesty. Geders v. United States, 425 U.S.80,87 (1976).

This Court has held that there are generally three (3) sanctions available for violation of an order for exclusion (sequestration) of witnesses: (1) citation for contempt; (2) comments to jury concerning the witnesses' misconduct; or (3) Disqualification. - "particular circumstances" may exist which justify disqualification Holder v United States, 150 U.S. 91,92,(1893). Geders v U.S., 425 U.S. 80,(1976).

The defendant must make a showing of probable prejudice or an abuse of discretion as a predicate to reversal based on a trial court's disregard of Federal Rule of Evidence 615.

Prejudice is found when there is a showing made that the contact resulted in tailoring of witness testimony, or the development of

less than candid testimony which rule 615 seeks to prevent. United States v. Kindle, 925 F.2d 272, 276 (8th Cir. 1991). Geders v. United States, 425 U.S. 80 (1976).

Often times litigants overlook context in favor of the mechanical application of the law: a type of hyper technical form of mental gymnastics. here, the context of these events is crucial to the application of the law. The combined testimony of Reed and Wawroski was that the person on trial for murder saw the last breath of the person murdered! That is a confession. But not just a confession to one person, but to dozens or more; one that wwas made so proudly and boastfully that it was done at a football game in the crowded end zone. This evidence was intended not merely to give the jury a confession, but to give the jury a down-right proclamation so cavalierly issued that it was heard by another person 10-12 feet away during a crowded football game.

Was it a serious violation? Yes. One witness intentionally sought another out to see what the potential scope and details of his testimony were for the purpose of shaping his own testimony.

What was its impact on the testimony of the witness? As we can see, the second witness, (Wawroski), now with ill-gotten information from

the first witness (Reed), unnaturally blurted out a key fact that that made his testimony more credible: the quiet end zone.

What is its probable impact on the outcome of the trial? Given the truth that a confession is extremely potent to a jury as noted above and that in this context this was not simply evidence of a sly whispered confession, but rather a bold proclamation, how could it not have an impact on the jury and an impact on the trial itself?

It is now well recognized that sequestering witnesses "is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice" 6 Wigmore on Evidence 1838 at 463.

We respectfully request this Honorable Court undertake review and find the Trial Court abused it's discretion when the Appellant was denied the protection of Federal Rule of Evidence 615, which resulted in prejudice to her or said another way, it was unfair to her defense that she did not confess to Reed.

5. It was error for the trial court to read, as a non-responsive answer to a jury question, the criminal information as a fact (not as an allegation) prefaced by "attention-getting words" of "in order to avoid any confusion about the charges in this case, I am going to read the following to you" and then after the reading of the criminal information, the words "That is all I have to say on that issue. Again, I hope it hope it (sic) clarify the issue for you."

Finally, the Pennsylvania Superior Court claims that the trial court reading the criminal information as if it was fact was not error because "the trial court clearly clarified to the jury that it was reading from the Commonwealth's allegations." See Appendix A at 26.

The exact phrasing of what was said is significant:

> Ladies and gentleman of the Jury, in order to avoid any confusion about the charges in this case I am going to read the following to you:
>
> On or about July 1st, 2012, the Defendant did intentionally cause the death of Frank Spencer at 20 Fairview Drive, Hemlock Township, Township, Columbia County. The Defendant having acted as a principal or an accomplice in bringing about Spencer's death by murder. That is all I have to say on that issue. Again, I hope it clarify (sic) the issues for you.
>
> Mr. Hoey: Your Honor, I would ask, that is simply the allegation.

> The Court: Excuse me, that is the allegation. Thank you, counsel. You are absolutely right. That is only the allegations and as in the instructions I gave you before, charges are only allegations. They are not facts in this case unless you find from the evidence the facts that would support such an allegation to reach your conclusions. Thank you, Counsel. I appreciate that very much to clarify (sic) that for the Jury. Thank you. Would you please (sic) take the Jury out to convene their deliberations? RR. 2336: 6-25.

Immediately after the jury was excused from the court-room, counsel requested a mistrial. Within less than an hour, the jury returned with a verdict of guilty on all counts. See RR. 2329: 3-4; RR. 2339:25.

What makes this error not merely a slip-of-the-tongue was the fact that at sidebar before the error, the trial court told cousel that it was going to instruct as follows: 'The defendant did intentionally cause the death of Frank Spencer, the defendant having acted as a principal or an accomplice in bringing about Spencer's death by murder." RR. 2335: 19-23. To its credit, the government corrected the trial court that it was alleged that Maria caused the death of Frank Spencer. Nevertheless, in moments immediately thereafter, it did precisely that as noted above, stating it to the jury as fact, not allegation.

This Court has held: "The influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of

the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Bollenback v. U.S.,326 U.S. 607 612 (1946).

This Court has stated that the analysis must focus on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Francis, v. Franklin, 47 U.S. 307 (1984) This analysis "requires careful attention to the words actually spoken to the jury..., for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpeted the instruction." Sandstrom, v Montana, 442, U.S. 510, 514.

Here the last words uttered by the judge were in essence and in fact a directed verdict of guilty. The trial court, after it had been warned by the goverment just moments before, said "On or about July 1st, 2012, the Defendant did intentionally cause the death of Frank Spencer at 20 fairview Drive, Hemlock Township, Columbia County. The Defendant having acted as a principal or an accomplice in bringing about Spencer's death by murder. That is all I have to say on that issue. Again, I hope it clarify (sic) the issues for you." RR. 2236: 6-12. (emphasis added).

Although we must look at the jury instructions as a whole, some things said can not be unsaid. This direct reading of the criminal information was prefaced by attention-getting words of "in order to avoid any confusion about the charges in this case I am going to read the following to you." After the reading of the criminal information, the trial court said " That

is all I have to say on that issue. Again, I hope it (sic) clarify the issue for you."

This Court has explained that in view of the inherent delicacy of judicial communications with a deliberating jury, it is important for supplemental instructions to be accurate, clear and neutral. There is no requirement that the court reiterate instructions that concern the goverment's burden of proof. When the Court exceeds the scope of the juries inquiries, the Court should avoid invading the jury's province and should respond "forthrightly, but not gratuitously". Thus the judge is not required to guess as to other possible areas of juror confusion. In the ordinary case, prudence dictates that the trial court should confine its response to the approximate boundries of the jury inquiry.

In addition, if a portion of the jury charge, considered in isolation could reasonably have been understood as creating a "rebuttable" presumption or conclusion that relieves the goverment of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole; this analysis requires careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a responsible juror could have interpreted the instruction.

Morissette v. United States , 342 U.S. 422, 57 L ED 2d 854, 98 S Ct 2864

Francis v franklin, 471 US 307 (1984)

In this trial, the fact that Maria provided not only an alibi defense, but

attempted to show the jury that her father committed this crime by himself with no imput from her, made this reading of the criminal information as fact, not accusation, particulary harmful. It removed from the jury their right to decide the facts and the verdict. Even giving all of the benefit to the trial court that it was an unintentional gaff (ignoring that the trial court was explicitly corrected by the goverment merely moments before), it was said. Here, the judge's last words were the decisive words. " [W]here a court has expressed its opinion on a pivotal issue in the case, and has expressed that opinion in a strong, unequivocal and one-sided fashion, abstract instructions regarding the jury's role as fact finder are not sufficient remedy. " U.S. v. Anton,4, 597 F.2d 371, 375 (3rd. Cir. 1979)

It is respectfully requested this Honorable Court take this case, and hold that the court cannot read the criminal information as if it was fact. And if this type of sliip ofthe tongue happens, it must be fixed with a thorough clarifying instruction. In addition, find that the supplemental instruction were conclusory and shifted the burden of persuasion to the defendant to prove her innocence, a violation of fundamental Fourteenth Amendment due process guarantess.

XI. CONCLUSION

I respectfully request this Honorable Court undertake review, hold that the Pennsylvania Superior Court abused its discretion, and GRANT a new trial.

Respectfully,

Dated; September 20, 2018

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