No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TYLER HERNDON
Petitioner
v.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the Pennsylvania Supreme Court's refusal to review the Trial Court's Denial Order on a Petition for Habeas Corpus Relief, in a case where adjudication was based solely on hearsay evidence, is immediately appealable to the United States Supreme Court under the Collateral Order Doctrine.

B. Whether Pennsylvania Rule of Criminal Procedure 542(E) violates a defendant's fundamental right to Due Process, in that it directly conflicts with this Court's decision in *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), which held that "the determination of probable cause must be accompanied by the full panoply of adversary safeguards – counsel, confrontation, cross-examination, and compulsory process for witnesses."

C. Whether Pennsylvania Rule of Criminal Procedure 542(E) denies a defendant his Sixth Amendment Right to Counsel, despite counsel's physical presence at a preliminary hearing, when counsel is denied the ability to meaningfully cross-examine witnesses with first-hand knowledge of the evidence against the accused and where the Commonwealth relies solely upon hearsay evidence to establish a *prima facie* case.

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The opinion of the Pennsylvania Supreme Court is reported as *Commonwealth v. Herndon*, 7 WM 2020 (Feb. 7, 2020); petition for allowance of appeal, denied (Jun. 2, 2020). The opinion of the Pennsylvania Superior Court is reported as *Commonwealth v. Herndon*, 153 WDM 2019 (Nov. 18, 2019); petition for permission to appeal denied (Jan. 8, 2020) (*per curiam*). The opinion of the Mercer County Court of Common Pleas is reported as *Commonwealth v. Herndon*, CP-43-CR-00569-2019; order denying petition for habeas corpus (Oct. 16, 2019).

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania entered its order on June 2, 2020. This Court has jurisdiction, this petition being timely, under the collateral order exception ("Collateral Order Doctrine") to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

Pennsylvania Rule of Criminal Procedure 542(C) provides:

> The defendant shall be present at any preliminary hearing except as provided in these rules, and may: be represented by counsel; cross-examine witnesses and inspect physical evidence offered against the defendant; call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only; offer evidence on the defendant's own behalf, and

> testify; and make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

Pa.R.Crim.P. § 542(C).

Pennsylvania Rule of Criminal Procedure 542(E) provides:

> Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense.

Pa.R.Crim.P. § 542(E).

STATEMENT OF THE CASE

On or about March 18, 2019, Tyler Herndon ("Mr. Herndon") was charged with one (1) count of Rape Forcible Compulsion, 18 Pa. C.S.A § 3121(A)(1), one (1) count of Involuntary Deviate Sexual Intercourse Forcible Compulsion, 18 Pa. C.S.A § 3123(A)(1), one (1) count of Aggravated Assault, 18 Pa. C.S.A § 2702(A)(1), one (1) count of Strangulation, 18 Pa. C.S.A § 2718(A)(1), one (1) count of Aggravated Indecent Assault Forcible Compulsion, 18 Pa. C.S.A § 3125(A)(5), one (1) count of Unlawful Restraint Serious Bodily Injury, 18 Pa. C.S.A § 2902(A)(1), one (1) count of Indecent Assault Forcible Compulsion, 18 Pa. C.S.A § 3126(A)(2), one (1) count of Indecent Assault without Consent of Other, 18 Pa. C.S.A § 3126(A)(1), one (1) count of Simple Assault, 18 Pa. C.S.A § 2701(A)(1), and one (1) count of Recklessly Endangering Another Person, 18 Pa. C.S.A § 2705.

A preliminary hearing was held before the Honorable Magisterial District Judge D. Neil McEwen on or about March 27, 2019. At the preliminary hearing, Mr. Herndon's charges were held over for trial on evidence that was exclusively hearsay in nature. The alleged victim did not testify. Rather, the Commonwealth, in reliance on Pennsylvania Rule of Criminal Procedure 542(E), presented its evidence solely through the testimony of Pennsylvania State Trooper Zachary Julian ("Tpr. Julian") the only witness, which constitutes hearsay evidence. At the hearing, Tpr. Julian testified that on or about March 17, 2019, he was dispatched to the Grove City Medical Center, in Grove City, Pennsylvania for a reported sexual assault involving a woman later identified as Tanya Mae Osborn ("Ms. Osborn").

Tpr. Julian testified that in response to his questions Ms. Osborn had said she had gone to Mr. Herndon's residence to do laundry when Mr. Herndon proceeded to rape her. Tpr. Julian also indicated Ms. Osborn had told him that when she was in the basement of Mr. Herndon's residence, the lights were turned off and she had been pushed face down into the bed.

At that point, according to Tpr. Julian, Ms. Osborn said Mr. Herndon had "put some type of strap across her mouth and nose…He tied her wrists and legs with an unknown item to her…essentially connecting her wrists to her ankles." Ms. Osborn then indicated to Tpr. Julian that Mr. Herndon had inserted an "unknown item to her inside of her vagina." Tpr. Julian further testified Ms. Osborn indicated Mr. Herndon penetrated her vagina without her consent. At some point during the interaction, Tpr. Julian indicated Ms. Osborn said Mr. Herndon "choked her out with just his hands."

Mr. Herndon, through defense counsel, objected to the Commonwealth's use of hearsay, through Rule 542(E), contending that Rule 542(E) directly conflicts with the Pennsylvania Supreme Court's decision in *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, 174 (Pa. 1990), and violated his fundamental right to Due Process. Defense counsel further objected contending that the court's reliance on

Rule 542(E) effectively denies Mr. Herndon his Right to Counsel. Magisterial District Judge McEwen overruled both objections, and held all charges for the Court of Common Pleas of Mercer County. Subsequently, on or about June 24, 2019, Mr. Herndon, through defense counsel, filed a Petition for Habeas Corpus challenging Magisterial District Judge McEwen's decision to bind the matter over to the Court of Common Pleas.

On or about October 16, 2019, a hearing was held before the Honorable Robert G. Yeatts, President Judge, of the Court of Common Pleas of Mercer County. At this hearing, the parties stipulated to the transcript of the preliminary hearing, and to Commonwealth's Exhibit 1, a DNA Analysis Report, dated July 23, 2019, from the Pennsylvania State Police Bureau of Forensic Services. The Commonwealth argued it did not rely solely upon hearsay evidence to establish a *prima facie* case. Mr. Herndon, through defense counsel, countered that the Commonwealth had relied solely on hearsay, in violation of his right to Due Process. Mr. Herndon also requested that if the trial court were to deny his Petition for Habeas Corpus, that the court include the statement prescribed by 42 Pa. C.S.A. § 702(B) and Pennsylvania Rule of Appellate Procedure 1311(B).

On or about October 16, 2019, President Judge Yeatts issued an Opinion and Order of Court denying Mr. Herndon's Petition for Habeas Corpus relief. The trial court did, however, include the statement prescribed by 42 Pa. C.S.A. § 702(B). On October 18, 2019, the Commonwealth filed a Motion to Reconsider. On November 12, 2019, Mr. Herndon filed his Response to the Commonwealth's Motion to Reconsider. On November 20, 2019, President Judge Yeatts denied the Commonwealth's Motion to Reconsider.

On or about November 18, 2019, Mr. Herndon filed a Petition for Permission to Appeal with the Superior Court. On or about December 2, 2019, the Commonwealth filed an Answer to Mr. Herndon's Petition for Permission to Appeal. On or about January 8, 2020, the Superior Court denied Mr. Herndon's Petition. On or about February 7, 2020, Mr. Herndon filed a Petition for Permission to Appeal with the Supreme Court. On or about February 14, 2020, the Commonwealth filed an Answer to Mr. Herndon's Petition for Permission to Appeal. On or about June 2, 2020, the Supreme Court denied Mr. Herndon's Petition.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review the Denial Order for Mr. Herndon's Petition for Habeas Relief under the Collateral Order Doctrine exception to 28 U.S.C. § 1291. Furthermore, Mr. Herndon's Petition for Habeas Relief was incorrectly denied given that Pennsylvania Rule of Criminal Procedure 542(E) unconstitutionally deprives Mr. Herndon of his rights to Due Process and Counsel.

This Court has jurisdiction to review the Denial Order for Mr. Herndon's Petition for Habeas Relief because the Collateral Order Doctrine offers an exception to the final decision requirement of 28 U.S.C. § 1291 where an interlocutory judgement (1) conclusively determines a disputed question, (2) resolves an important issue separate from the merits of the underlying action, and (3) is effectively unreviewable on appeal. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Because (1) review of the Denial Order after trial would come too late to vindicate the purpose of the Habeas Petition (avoiding unlawful imprisonment or detention), (2) this Court would not have to settle a factual dispute to determine whether the Denial Order was appropriately given, and (3) the Denial Order would become a moot issue on appeal, Mr. Herndon's case meets each of the three elements required for jurisdiction under the Collateral Order Doctrine.

As such, Mr. Herndon argues that the Denial Order was incorrectly given because Pennsylvania Rule of Criminal Procedure 542(E) deprives him of his constitutional right to Due Process. While preliminary hearings are established by the rules and statutes of individual states, this Court has held that they must adhere to guiding constitutional principles, for example "the determination of probable cause must be accompanied by the full panoply of adversary safeguards – counsel, confrontation, cross-examination, and compulsory process for witnesses." *Gerstein*, 420 U.S. at 119. Because Rule 542(E) allows adjudication to be based solely on hearsay evidence and, as in Mr. Herndon's case, reduces the preliminary hearing to a mere functionless formality, the Rule directly contradicts this Court's view of constitutional rights at preliminary hearings.

Similarly, Rule 542(E) unconstitutionally inhibits Mr. Herndon's Right to Counsel in light of the fact that this Court has held that "the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right **meaningfully to cross-examine the witnesses against him** and to have effective assistance of counsel at the trial itself." *United States v. Wade*, 388 U.S. 218, 227 (1967) (emphasis added). Since there were no witnesses at Mr. Herndon's preliminary hearing who had any first-hand knowledge of his alleged criminal act, Mr. Herndon was deprived of any chance to engage in meaningful cross-examination.

Thus, this Court should find that they have jurisdiction to review Mr. Herndon's Denial Order under the Collateral Order Doctrine and, subsequently, should find that the Order was incorrectly given in that it violates Mr. Herndon's constitutional rights to Due Process and Counsel.

REASONS FOR GRANTING THE WRIT

A. THE PENNSYLVANIA SUPREME COURT'S REFUSAL TO REVIEW THE DENIAL ORDER ON MR. HERNDON'S PETITION FOR HABEAS RELIEF IS IMMEDIATELY APPEALABLE TO THIS COURT UNDER THE COLLATERAL ORDER DOCTRINE.

Courts of appeals typically only have jurisdiction over final decisions of district courts. 28 U.S.C. § 1291. However, this Court has held that "final decisions" can encompass both judgments that terminate actions as well as "a 'small class' of prejudgment orders that are 'collateral to' an action's merits and 'too important' to be denied immediate review." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 100 (2009). The latter of these judgments fall under the Collateral Order Doctrine.

To qualify for an exemption from the final decision rule under the Collateral Order Doctrine, interlocutory judgments must meet three elements. *Coopers & Lybrand*, 437 U.S. at 468. These elements are as follows: the judgement must (1) conclusively determine the disputed question, (2) resolve an important issue separate from the merits of the underlying action, and (3) be effectively unreviewable on appeal. *Id.* The party asserting jurisdiction under the Collateral Order Doctrine bears the burden on each element. *Los Lobos Renewable Power, L.L.C. v. Americulture, Inc.*, 885 F.3d 659, 664 (10th Cir. 2018).

With respect to the first element, conclusive determination, the Court considers whether appellate review is needed on a certain issue in order to avoid some harm, usually where "there are simply no further steps that can be taken" to avoid that harm. *Abney v. U.S.*, 431 U.S. 651, 659 (1977). In *Mitchell*, for example, the Court found that the denial of a defendant's motion for summary judgment on the issue of qualified immunity was "conclusive" because review after trial would have come too late to vindicate the purpose of the issue: protecting public officials from liability and the need to stand trial. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). Since the Denial Order settled the question of the defendant's immunity from suit, the Court found that it satisfied the conclusivity element of the Collateral Order Doctrine. *Id.*

Assessing the second element, whether the issue is separate from the merits of the action, this Court has held that the issue may, to an extent, be "practically intertwined with the merits," so long as it "raises a question that is significantly different from the questions" presented in the underlying claim on the merits.

Johnson v. Jones, 515 U.S. 304, 314 (1995). Phrased differently, this Court has held that separability exists where the issue sought to be appealed is **conceptually distinct** from the merits of the underlying claim. *Mitchell*, 472 U.S. at 527 (emphasis added). This typically occurs where the issue is a question of law. *Id.* at 528. To illustrate, the Court in *Mitchell* concluded that the denial of summary judgment on the qualified immunity issue was "conceptually distinct from the merits of the plaintiff's claim that his rights had been violated," largely because the appellate court reviewing the denial of the defendant's immunity claim did "not need to consider the correctness of the plaintiff's version of the facts" in order to decide that issue. *Id.* It merely needed to determine whether the defendant's conduct, in light of the agreed-upon facts, was proscribed by the law or violated the law in some way. *Id.*

Finally, this Court has held that the last element, whether the issue will be effectively unreviewable, is satisfied where post-judgment appeal would be moot. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995). If the appeal is not mooted, the requirement has been satisfied where delay "would imperil a substantial public interest" or "some particular value of a high order." *Will v. Hallock*, 546 U.S. 345, 352–53 (2006). To determine this, the Court focuses on the "entire category to which a claim belongs," without regard to the whether the litigation at hand might be speeded by a prompt appellate decision. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). The *Mitchell* Court demonstrated that effective unreviewability was present where the district court conclusively denied a defendant's motion for summary judgment with respect to qualified immunity because "there [would] be nothing in the subsequent course of the proceedings that [could] alter the court's conclusion that a defendant is not immune." *Mitchell*, 472 U.S. at 527.

Mr. Herndon's case meets each of the three elements warranting an immediate appeal under the Collateral Order Doctrine. The issue in Mr. Herndon's case relates to whether Mr. Herndon's Petition for Habeas Corpus Relief was appropriate in a case where adjudication was based solely on hearsay evidence.

With respect to the first element, conclusive determination, appellate review of the Denial Order on Habeas Corpus Relief in Mr. Herndon's case is necessary to avoid a significant harm, namely the harm related to Mr. Herndon's constitutional rights to Due Process and Counsel. Similar to the circumstances in *Mitchell*, any review after trial in Mr. Herndon's case would come too late to vindicate the purpose for which his Petition for Habeas Corpus Relief was initially filed: the avoidance of unlawful imprisonment or detention. *See Mitchell*, 472 U.S. at 527. Without immediate review of the denial of Habeas Corpus Relief, Mr. Herndon will be forced to face trial. Because no further steps can be taken to avoid trial without immediate appellate review of the Denial Order, that Denial Order is conclusive in accordance with the first element of the Collateral Order Doctrine.

Considering the second element, whether the issue is conceptually distinct from the underlying merits, the issue in Mr. Herndon's case of whether Habeas Corpus Relief was appropriately denied is a question of law that this Court has previously recognized as satisfying the element of separability. *See Mitchell*, 472 U.S. at 528. Much like the Court in *Mitchell*, this Court would not need to resolve a factual dispute in order to decide whether or not the Denial Order was appropriate. *Id*. The Court would merely need to address the question of whether, in light of the agreed-upon facts, Habeas Corpus Relief was appropriate in a case where adjudication was based solely on hearsay evidence. Aside from the fact that Mr. Herndon's case involves a question of law, the Habeas issue also "raises a question that is significantly different from the questions" in the underlying merits of his case, which namely involve the nature of the charges against Mr. Herndon, not his constitutional rights as a defendant. *See Johnson*, 515 U.S. at 314.

Finally, with respect to the effective unreviewability of the issue, it is clear that the issue of whether or not the Denial Order on Mr. Herndon's Habeas Petition was appropriate will become moot without immediate appellate review. As previously noted, any review of the Denial Order after trial will counteract the purpose for which the Petition for Habeas Relief was filed: preventing unlawful imprisonment or detention. Aside from mootness, Mr. Herndon's issue is also one "imperiling a value of high order," namely the value of a defendant's constitutional rights, which our justice system works diligently to protect. *See Hallock*, 546 U.S. at 352–53.

Because Mr. Herndon's case meets each of the three elements of the Collateral Order Doctrine, this Court has jurisdiction to immediately review the denial of his Petition for Habeas Corpus Relief.

B. PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 542(E) VIOLATES THE UNITED STATES CONSTITUTION'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WHEN THE COMMONWEALTH ESTABLISHES *PRIMA FACIE* EVIDENCE SOLELY BASED ON HEARSAY TESTIMONY.

Preliminary hearings, though established by the rules and statues of the individual states, must, when implemented, comport with the basic values of the United States Constitution, such as the right to counsel and the right to confront witnesses. *See Gerstein*, 420 U.S. at 122 (holding that "as a matter of constitutional principle… formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause" at a preliminary hearing); *Coleman v. Alabama*, 399 U.S. 1, 3 (1970) (arguing that "Alabama's failure to provide [petitioners] with appointed counsel at the [preliminary] hearing therefore unconstitutionally denied them the assistance of counsel"); *Powell v. Alabama*, 287

U.S. 45, 69 (1935) (noting that a person accused of crime "requires the guiding hand of counsel at every step in the proceedings against him").

With respect to the specific laws of Pennsylvania on this matter, Pennsylvania Rule of Criminal Procedure 542(C) explicitly establishes a statutory right to be present at any preliminary hearing, to be represented by counsel, to cross-examine witnesses and inspect physical evidence, to call witnesses on the defendant's behalf, and to offer evidence on the defendant's own behalf. Moreover, the Pennsylvania Supreme Court has held that "[f]undamental Due Process requires that no adjudication be based solely on hearsay evidence." *Verbonitz*, 581 A.2d at 174. As such, "[t]he testimony of a witness as to what a third party told him about an alleged criminal act is clearly inadmissible hearsay." *Id.* Due Process instead "requires the conclusion that the hearsay statement of [a] police officer was insufficient, *vel non*, to establish a prima facie case against appellant." *Id.* at 176. *Verbonitz*, therefore, is a majority opinion in Pennsylvania as it pertains to the Due Process prohibition against using **only** hearsay evidence to establish a *prima facie* case at a preliminary hearing. *See Commonwealth v. Ricker*, 170 A.3d 494, 517 (Pa. 2017) ("Far from lacking persuasive value, the *Verbonitz* opinions should together be recognized as a holding that due process prohibits the Commonwealth from depriving a person of liberty upon nothing more than inadmissible hearsay") (Wecht, J., dissenting statement).

Resultingly, the Pennsylvania Trial Court's denial of Mr. Herndon's Petition for Habeas Corpus Relief and the Pennsylvania Superior and Supreme Courts' refusals to review the Denial Order directly conflict with both this Court's established precedent on constitutional rights at preliminary hearings and the prior majority decision of the Pennsylvania Supreme Court on this issue. For a *prima facie* case to rest upon nothing more than inadmissible hearsay is to offend traditional notions of Due Process. At such an illusory proceeding, the interests, purposes, rights and benefits of a preliminary hearing are stripped of substance or meaning. Mr. Herndon was deprived of the ability to gain a fair assessment of the strength of the case against him; was stripped of a fair opportunity to test the Commonwealth's case via his right to cross examination, to direct his pretrial investigation, to exercise his constitutional right to an attorney in a meaningful fashion (as discussed in-depth below), and to consider intelligently his options to challenge the seizure or the acquisition of evidence in a suppression motion, or to plead guilty or proceed to trial. The practical effect of Rule 542(E), in the instant matter, was to reduce Mr. Herndon's preliminary hearing to a mere functionless formality.

C. PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 542(E) DENIES A DEFENDANT THE FUNDAMENTAL RIGHT TO COUNSEL, DESPITE COUNSEL'S PHYSICAL PRESENCE AT A PRELIMINARY HEARING, WHEN COUNSEL IS DENIED THE ABILITY TO MEANINGFULLY CROSS-EXAMINE WITNESSES WITH FIRST-HAND KNOWLEDGE OF THE EVIDENCE AGAINST THE ACCUSED, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment Right to Counsel is a fundamental protection afforded by the United States Constitution and one that this Court has recognized through its holdings in a number of cases. This Court recognized counsel's integral role in all criminal proceedings in *Gideon*, held that the Right to Counsel attaches at a preliminary hearing, when states employ such hearings, in *Coleman*, and implied that a right to effective cross-examination is constitutionally protected at a preliminary hearing in *Gerstein*. *See Gerstein*, 420 U.S. at 119 ("the determination of probable cause must be accompanied by the full panoply of adversary safeguards – counsel, confrontation, cross-examination, and compulsory process for witnesses"); *Coleman*, 399 U.S. at 9; *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963).

This Court has held that the Right to Counsel is not merely limited to the presence of counsel at trial. *Powell*, 287 U.S. at 69. As stated in *Wade*, "the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize **any pretrial confrontation** of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right **meaningfully to cross-examine the witnesses against him** and to have effective assistance of counsel at the trial itself." *Wade*, 388 U.S. at 227 (emphasis added).

This Court has very clearly outlined four meaningful ways that counsel may effectively assist an accused at a preliminary hearing:

> "First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over.
>
> Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial.

> Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.
>
> Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail."

Coleman, 399 U.S. at 9.

At Mr. Herndon's preliminary hearing, there were no witnesses called who possessed first-hand knowledge of any criminal act committed by Mr. Herndon. The testimony of Tpr. Julian, as it related to the charges levied against Mr. Herndon, was unequivocal hearsay. The bulk of his testimony simply recounted the statements made to him by the alleged victim. In fact, on cross examination, Tpr. Julian indicated that, among other things, it was unknown to him whether the contact between Mr. Herndon and the victim was even consensual. This is not surprising, however, because **Tpr. Julian did not and does not possess first-hand knowledge as to whether a crime was actually committed**. As a result, the cross-examination of Tpr. Julian cannot be deemed effective or meaningful because cross-examining him could not (1) expose any fatal weakness in the Commonwealth's case, (2) be used as an impeachment tool at trial, or (3) help trained counsel more effectively discover the Commonwealth's case against the defendant and prepare a case for trial.

CONCLUSION

Because the issue in Mr. Herndon's case, whether a Denial Order for a Petition for Habeas Relief was appropriately granted, meets all three elements of the Collateral Order Doctrine, this Court has jurisdiction to review that Denial Order. Moreover, the Denial Order was inappropriately given in Mr. Herndon's case because in relying solely on hearsay evidence, Mr. Herndon's constitutional rights to Due Process and Counsel were violated.

Respectfully Submitted,

Matthew Ness
Counsel for Petitioner

APPENDIX

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APPENDIX A

(Petition for Writ of Habeas Corpus Filed in the Court of Common Pleas Of Mercer County, Pennsylvania)

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

TYLER HERNDON,

DEFENDANT

CRIMINAL DIVISION

Docket No. CP-43-CR-569-2019
OTN: X 245811-6

PETITION FOR WRIT OF HABEAS CORPUS

Before the Honorable
JOHN C. REED, SENIOR JUDGE

Filed on Behalf of:
Defendant, Tyler Herndon

Counsel of Record:
Matthew Ness, Esquire
PA I.D. No. 208026

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IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

TYLER HERNDON,

DEFENDANT

CRIMINAL DIVISION

Docket No. CP-43-CR-569-2019
OTN: X 245811-6

PETITION FOR A WRIT OF HABEAS CORPUS

AND NOW comes the Defendant, Tyler Herndon, by and through his attorney, Matthew Ness, Esquire, and the law firm of WORGUL, SARNA & NESS, CRIMINAL DEFENSE ATTORNEYS, LLC., who respectfully requests this Honorable Court grant the relief requested, and, in support thereof, states as follows:

1. On or about March 18, 2019, Tyler Herndon ("Mr. Herndon") was charged with one (1) count of Rape Forcible Compulsion, 18 Pa. C.S.A § 3121(A)(1), one (1) count of Involuntary Deviate Sexual Intercourse Forcible Compulsion, 18 Pa. C.S.A § 3123(A)(1), one (1) count of Aggravated Assault, 18 Pa. C.S.A § 2702(A)(1), one (1) count of Strangulation, 18 Pa. C.S.A § 2718(A)(1), one (1) count of Aggravated Indecent Assault Forcible Compulsion, 18 Pa. C.S.A § 3125(A)(5), one (1) count of Unlawful Restraint Serious Bodily Injury, 18 Pa. C.S.A § 2902(A)(1), one (1) count of Indecent Assault Forcible Compulsion, 18

Pa. C.S.A § 3126(A)(2), one (1) count of Indecent Assault without Consent of Other, 18 Pa. C.S.A § 3126(A)(1), one (1) count of Simple Assault, 18 Pa. C.S.A § 2701(A)(1), and one (1) count of Recklessly Endangering Another Person, 18 Pa. C.S.A § 2705.

2. The matter is set before this Honorable Court for Call of the List on or about July 2, 2019.

3. A preliminary hearing was held before the Honorable Magisterial District Judge D. Neil McEwen on or about March 27, 2019.[1]

4. Following testimony and argument by the undersigned, Magisterial District Judge McEwen held all charges for court.

5. Without stipulating to these facts, the following was presented at the preliminary hearing:

   a. On or about March 17, 2019, Pennsylvania State Police Trooper Zachary Julian ("Tpr. Julian"), was dispatched to the Grove City Medical Center, in Grove City Pennsylvania for a reported sexual assault involving a woman later identified as Tanya Mae Osborn ("Ms. Osborn"). *Notes of Testimony* ("*NT*"), Preliminary Hearing, 3/29/19 at pages 7-8.

   b. Tpr. Julian testified that in response to his questions Ms. Osborn had said she had gone to Mr. Herndon's residence to do laundry when Mr. Herndon proceeded to rape her. *NT* at 10-11.

[1] A transcript of said hearing is attached hereto as Defense Exhibit "A" and made a part hereof by this reference.

c. Tpr. Julian also indicated Ms. Osborn had told him when in the basement of Mr. Herndon's residence, the lights at been turned off and she had been pushed face down into the bed. *NT.* at 11.

d. At that point, according to Tpr. Julian, Ms. Osborn said Mr. Herndon had "put some type of strap across her mouth and nose…He tied her wrists and legs with an unknown item to her…essentially connecting her wrists to her ankles." *Id.*

e. Ms. Osborn then indicated to Tpr. Julian that Mr. Herndon had inserted an "unknown item to her inside of her vagina." *Id.*

f. Tpr. Julian further testified Ms. Osborn indicated Mr. Herndon penetrated her vagina without her consent. *NT.* at 12-13.

g. At some point during the interaction, Tpr. Julian indicated Ms. Osborn said Mr. Herndon "choked her out with just his hands." *NT.* at 13.

6. Mr. Herndon challenges Judge McEwen's decision to hold the charges over to the Mercer County Court of Common Pleas. Mr. Herndon argues that the Commonwealth failed to present evidence sufficient to establish a prima facie case for the charges as follows:

a. At the preliminary hearing, Mr. Herndon's charges were bound over for trial on evidence that was exclusively hearsay in nature. Ms. Osborn did not testify. Rather, the Commonwealth, in reliance on Pennsylvania Rule of Criminal Procedure 542(E), presented its evidence solely through the

testimony of Trooper Julian, the only witness, which constitutes hearsay evidence.[2] (*See, generally, P.H.T. at 4-28*).

b. Pa.R.Crim.P. 542(E) as amended in 2013 states that "Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including but not limited to, those requiring proof of the ownership of, non-permitted us of, damage to, or value of property."

c. Mr. Herndon respectfully submits Pennsylvania Rule of Criminal Procedure 542(E) violates Petitioner's fundamental right to Due Process, in that it directly conflicts with our Supreme Court's decision in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174 (Pa. 1990).

d. First, Magisterial District Judge McEwen's decision that, hearsay evidence, alone, may establish a *prima facie* case is contrary to our Supreme Court's long-standing precedence. In Verbonitz, five justices would have held that a *prima facie* case may not be based entirely on hearsay, as "[f]undamental due process requires that no adjudication be based solely on hearsay evidence."

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[2] Magisterial District Judge McEwen noted on the record defense counsel's "standing hearsay objection to all hearsay testimony that is presented for the duration of the hearing all forms, the objection will be overruled." *P.H.T.* at 4.

e. The issue presented in Verbonitz is the same issue now advanced by Mr. Herndon -- whether hearsay testimony presented at a preliminary hearing regarding a victim's account of an alleged criminal incident, which is the sole evidence presented by the Commonwealth, is sufficient to establish a prima facie case.

f. While the Superior Court has chosen to view Verbonitz as neither binding nor persuasive,[3] a majority of the Supreme Court would have held that constitutional principles of due process apply at preliminary hearings. Therefore, Verbonitz is a majority opinion as it pertains to the due process prohibition against using **only** hearsay evidence to establish a *prima facie* case at a preliminary hearing. *See* Ricker, 170 A.3d at 517 ("Far from lacking persuasive value, the Verbonitz opinions should together be recognized as a holding that due process prohibits the Commonwealth from depriving a person of liberty upon nothing more than inadmissible hearsay.") (Wecht, J., dissenting statement).

g. Although not constitutionally mandated, when, by law, the state creates a preliminary hearing, certain rights, such as the right to counsel and the right to confront witnesses, necessarily attach. Rule 542(C) specifically establishes a statutory right to be present at any preliminary hearing, to be

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[3] *See* Commonwealth v. Ricker, 120 A.3d 349, 361 (Pa. Super. Ct. 2015), *appeal dismissed*, 170 A.3d. 494, (Pa. 2017). ("[*Verbonitz*], nonetheless, is not binding and is valuable only insofar as its rationale can be found persuasive.").

represented by counsel, cross-examine witnesses and inspect physical evidence, call witnesses on the defendant's behalf, and offer evidence on the defendant's own behalf.

h. For a *prima facie* case to rest upon nothing more than inadmissible hearsay is to offend traditional notions of due process. At such an illusory proceeding, the interests, purposes, rights and benefits of a preliminary hearing are stripped of substance or meaning. Mr. Herndon lost the ability to gain a fair assessment of the strength of the case against him; was stripped of a fair opportunity to test the Commonwealth's case via his right to cross examination, to direct his pretrial investigation, to exercise his constitutional right to an attorney in a meaningful fashion,[4] and to consider intelligently his options to challenge the seizure or the acquisition of evidence in a suppression motion, or to plead guilty or proceed to trial. The

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[4] In Coleman v. Alabama, 399 U.S. 1 (1970), the Supreme Court held that a preliminary hearing is a "critical stage" of the prosecution so as to constitutionally require representation by counsel. Concluding the presence of counsel was "essential" to protect defendant against "erroneous or improper prosecution," the Court listed four reasons for requiring counsel at a preliminary hearing:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Coleman, 399 U.S. at 10.

practical effect of Rule 542(E), in the instant matter, was to reduce Mr. Herndon's preliminary hearing to a mere functionless formality.

i. Second, Rule 542(E) "was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing **entirely through hearsay evidence**." Ricker, 170 A.3d at 517 (Saylor, C.J., concurring statement) (emphasis added).

j. Moreover, Chief Justice Saylor noted in Commonwealth v. Ricker, 170 A.3d 494 (Pa. 2017) (per curiam) that the Court did not intend to overrule Verbonitz with the 2013 Amendment to Rule 542 by stating, "[f]rom my perspective, the 2013 amendment to the rule . . . was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing entirely through hearsay evidence. Rather, I believe the revision served only as an attempt to clarify that the 2011 amendment to the rule had not restricted the Commonwealth's ability to adduce hearsay evidence at preliminary hearings solely to offense elements requiring proof of ownership, non-permitted use, damage, or value of property." *Id.* at 507.

k. While the Commonwealth maintains the Ricker decision is controlling, Mr. Herndon contends the holding was limited to only deny that a constitutional right to confront an accuser existed at a preliminary hearing. The Superior Court expressly noted its decision did "not decide the distinct question of whether there exists a constitutional due process right to

confront witnesses because Rule 542(C) authorizes limited confrontation rights." Ricker, 120 A.3d. at 362 n.7. Thus, Ricker is neither controlling nor dispositive on the issue of fundamental due process that Mr. Herndon now raises.

l. Mr. Herndon notes that our Supreme Court has granted Allocatur on the very issue he advances in this Petition for a Writ of Habeas Corpus. *See* Commonwealth v. McClelland, 2 WAP 2018 ("AND NOW, this 11th day of January, 2018, the Petition for Allowance of Appeal is GRANTED. The issue, slightly rephrased for clarity, is: [W]hether the Superior Court panel failed to properly apply and follow the legal precedent set forth in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.3d 172, 174-76 (Pa. 1990) in which five (5) Justices held that 'fundamental due process requires that no adjudication be based solely on hearsay evidence.''). Oral arguments were held on October 24, 2018 and a decision is impending.

m. Lastly, on January 2, 2019, the Supreme Court of Pennsylvania Criminal Procedure Rules Committee proposed an amendment of Rule 542(E), which specifically dictates that hearsay alone cannot establish **all** elements of a crime.

n. In the Official Report accompanying the proposed amendment of Rule 542(E), the committee stated that "establishment of a *prima facie* case by hearsay alone, as held by the Superior Court in Ricker, was not

appropriate" and "Verbonitz. . . is still good law and stands for the proposition that a *prima facie* case may not be found exclusively on hearsay evidence." Report: Use of Hearsay at Preliminary Hearing, Proposed Amendment of Pa.Rs.Crim.P. 542, 543, and 1003, (published January 2, 2019), page 31.[5]

o. While the proposed amendment to Rule 542(E) has not yet been adopted, its very existence, along with the Supreme Court's decision to grant review in McClelland, should cast a long shadow over the use of the 2013 amendment and the Ricker decision to permit hearsay evidence, alone, to establish a *prima facie* case at a preliminary hearing. As such, any reliance upon 542(E) to deny Mr. Herndon his fundamental due process right to cross examine witnesses and his accuser at this "critical stage" of prosecution, is misplaced, and will necessitate further and immediate appellate review.

7. Mr. Herndon respectfully requests a hearing on this matter.

WHEREFORE, for the reasons stated herein, Mr. Herndon moves this Honorable Court to grant the foregoing Petition for a Writ of Habeas Corpus, and order the Court

[5] A copy of the Criminal Procedural Rules Committee Notice of Proposed Rulemaking, Proposed Amendment of Pa.R.Crim.P. 542, dated January 2, 2019, is attached as Defense Exhibit "B" and made a part hereof by this reference.

Administrator to remand the above captioned matter to Magisterial District Court # 35-3-02 for a new preliminary hearing consistent with this Court's decision.

Respectfully Submitted:

WORGUL, SARNA & NESS, LLC

By:_____
Matthew Ness, Esquire
PA I.D. 208026

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

TYLER HERNDON,

Defendant.

CRIMINAL DIVISION

Docket No. CP-43-CR-569-2019
OTN: X 245811-6

PRELIMINARY ORDER OF COURT

AND NOW, to-wit this _____ day of _____, 20____, upon consideration of the foregoing Defendant's Petition for a Writ of Habeas Corpus, it is hereby **ORDERED**, that there shall be a hearing on the ____ day of _____, 2019, at____:____ ___.M., before the Honorable _____, Mercer County Courthouse, Mercer, Pennsylvania, 16317.

BY THE COURT.

_____, S.J.
Hon. John C. Reed

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

Docket No. CP-43-CR-569-2019
v. OTN: X 245811-6

TYLER HERNDON,

DEFENDANT.

ORDER OF COURT

AND NOW, this _____ day of _____, 20___, upon consideration of the foregoing Petition for Habeas Corpus Relief, it is hereby **ORDERED, ADJUDGED,** and **DECREED**, that the Petition is **GRANTED**. The Mercer County Court Administrator shall remand the above captioned case to Magisterial District Court # 35-3-02, the Honorable D. Neil McEwen, for a new preliminary hearing.

BY THE COURT,

_____, S.J.
Hon. John C. Reed

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted:

WORGUL, SARNA & NESS, LLC

By: _____
Matthew Ness, Esquire
PA I.D. No. 208026

APPENDIX B

(Preliminary Hearing Transcript)

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	OTN: X-245811-6
	)	
TYLER HERNDON,	)	
	)	
Defendant.	)	

H E A R I N G

held before Magisterial District Judge McEwen.

A P P E A R A N C E S

FOR THE COMMONWEALTH: Daniel Gleisner, Esq.
Assistant District Attorney
Mercer County Courthouse
Room 209
Mercer, Pa 16137

FOR THE DEFENDANT: Michael Worgul, Esq.
Law & Finance Building
429 Fourth Ave., 1700
Pittsburgh, PA 15219

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
TROOPER JULIAN	7	22		

THE COURT: This is the Commonwealth of Pennsylvania vs. Tyler William Herndon, we're here for the purposes of the preliminary hearing.

Is the Commonwealth ready to proceed?

MR. GLEISNER: Yes, Your Honor.

THE COURT: There will be a standing hearsay objection to all hearsay testimony that is presented for the duration of the hearing and all forms, the objection will be overruled.

THE COURT: Call your first witness.

MR. GLEISNER: Thank you, Your Honor.

May it please the Court, Daniel Gleisner for the Commonwealth. The Commonwealth calls Trooper Zachary Julian.

(Whereupon, the witness was first duly sworn.)

MR. WORGUL: Your Honor, there is another objection that has to be raised besides the hearsay objection.

THE COURT: Go ahead.

MR. WORGUL: Thank you.

Your Honor, we're also objecting that the nature of the hearing day is depriving my client of his right to counsel at a critical stage, a preliminary hearing.

The United States Supreme Court, the United

States vs. Holeman, Justice Brennan delineated four different reasons why an attorney is necessary at a preliminary hearing why it's a critical stage, and one of those reasons talks about the attorney being able to cross examine witnesses that are --

THE COURT: He's deprived of his right to counsel, aren't you his counsel?

MR. WORGUL: Yes. But when there's no witness with first hand knowledge testifying at a preliminary hearing and that is now subjugated to a person who does not have first hand knowledge, you're now depriving the counsel essentially of cross examining that witness with first hand knowledge at the preliminary hearing, and the fact and the result of that is that really what's a counsel going to do at that point when there's no one with first hand knowledge testifying at a preliminary hearing. So, that is the nature of my objection. I'm making it for the record.

THE COURT: Okay.

MR. WORGUL: So, I'm getting it on the record now so that we have it and I'll let you rule on that objection.

THE COURT: Objection overruled.

You may proceed.

MR. GLEISNER: Thank you, Your Honor. And, I'll just note for the record as the Court pointed out, I don't think that's an argument as to depriving of counsel. Counsel has just spoke those words, it's more then a confrontation clause. The Pennsylvania Appellate Courts have said that the confrontation clause also does not prohibitive hearsay at a preliminary hearing.

MR. WORGUL: In response --

THE COURT: I've already ruled on it, so, any further comment you can save, if you chose to challenge my ruling.

Is the Commonwealth ready to proceed?

MR. GLEISNER: Yes, Your Honor.

THE COURT: You may proceed.

MR. GLEISNER: Thank you.

The Commonwealth calls Trooper Julian.

(Whereupon, the witness was sworn).

THE COURT: I think that I've already sworn you in, now you've been sworn twice.

You can stay seated there.

MR. GLEISNER: Your Honor, you would like the trooper to stay seated here?

THE COURT: If you prefer. I don't care. It doesn't matter to me.

DIRECT EXAMINATION

BY MR. GLEISNER:

Q Sir, please state your name.

A My name is Trooper Zachary Julian.

Q How are you currently employed?

A I'm employed with the Pennsylvania State Police out of Mercer, the Criminal Investigation Unit.

Q How long have you been a state trooper?

A I've been a state trooper since April of 2016.

Q Were you working in your capacity as a Pennsylvania State Trooper, specifically with crimes on March 17, 2019?

A Yes.

Q At approximately 9:20 p.m. were you responding to any sort of dispatch at that time?

A At approximately 9:23 hours the call did come in and I responded a little bit after 10 o'clock.

Q Where did you respond to?

A I responded to Grove City Medical Center, Grove City, Pennsylvania.

Q What was the nature of the dispatch?

A The nature of the dispatch was that there was a 33 year old female, she had reported that she was sexually assaulted and raped and she could identify the male individual, the individual responsible.

Q Did you respond to Grove City Medical Center?

A Yes.
Q Did you make contact with the individual per the dispatch?
A Yes.
Q Who was that individual?
A It would be Tanya Mae Osborn.
Q Did you make personal contact with her?
A Yes.
Q What was her appearance and/or demeanor like at that time?
A She was very emotionally distraught, it was very difficult to interview her at that time. She gave further details but she was very articulate everything that we had talked about.
Q What was going on at Grove City Medical Center when you were there as far as you could see?
A She was in a room, they were in the process of starting a sexual assault evidence collection kit, and I had spoken with her prior to them doing it.
Q To your knowledge, was a sexual assault examination performed?
A Yes.
Q Was that documented?
A Yes.
Q Will the individual who performed the examination be

available for trial?
A Yes.
Q To your knowledge, was statements taken by medical personnel from Ms. Osborn concerning what happened?
A Yes, they were.
Q Were medical personnel interviewed be available for trial?
A Yes, they will.
Q Do you have the name of the individual who performed the examination?

Do you have the name of the individual who performed the sex assault examination --

A I don't have it with me today.

MR. GLEISNER: I will just note, Your Honor, as part of this case going further, I will ensure to subpoena the medical records and will have all of that information available.

THE COURT: Thank you.

BY MR. GLEISNER:
Q Did you have a chance to speak with Ms. Osborn at the Grove City Medical Center?
A Yes.
Q What did she tell you concerning the dispatch?
A She had said that she was able to identify the male individual for starts, which was Tyler William Herndon.

She proceeded to inform me that they had prior contact prior to that date, but on March 17th at approximately 4:30 in the afternoon she went over to his house where they had hung out it was only those two at the residence at that time.

Q Did she relay anything concerning the extent of her relationship, if any, and why she was there?

A No.

Q Did she tell you anything that happened at the residence?

A Yes, she did.

Q Whose residence was this?

A It would be Tyler William Herndon.

Q In the course of your investigation, were you able to use law enforcement resources to identify this individual?

A Yes.

Q Do you see him here in the courtroom today?

A Yes.

Q Can you please tell me where he is and --

MR. WORGUL: Your Honor, we'll stipulate to identification.

THE COURT: Stipulation to ID.

BY MR. GLEISNER:

Q What were you told by Ms. Osborn concerning what happened at the residence on March 17th?

A She was at the residence, downstairs portion of the

residence, she was doing some laundry and was looking at the defendant's computer. During that time he had informed her that there were some of his ex-girlfriend's clothing in his room. He told her that she could have them, if there was anything that she wanted because his ex-girlfriend did not want them. She walked into the room, she had tried on some of the clothing, while she was in the process of doing so the lights went out.

Ms. Osborn proceeded to tell me that when the lights went off she was pushed face down onto the bed. Mr. Herndon put some type of strap across her mouth and nose.

Q Where was that in the residence?

A In a bedroom, in the downstairs portion.

Q What happened after the lights went out?

A He pushed, Mr. Herndon had pushed her face down on to the bed, she explained that he put some type of strap across her mouth and nose. She described as difficult to breathe. He tied her wrists and legs with an unknown item to her however she believed it was some type of rope. She explained that it was connected, essentially connecting her wrists to her ankles. He pushed her ankles towards her back. She then explained that Mr. Herndon inserted an unknown item to her inside of her vagina.

Q Was she able to describe that item at all?
A She was. She said that, she described to it had a pump, as it was pumped it got bigger and bigger in size.
Q Did she describe any other objects that were used during this assault?
A She did tell me that there was another item that was used but she was unable to give me specifics due to the room being dark.
Q When you say another item used, used in what way?
A It was used to penetrate her.
Q Was there any other items used for any other things during this assault?
A Yeah. She had said, aside from these were the only two actual physical items aside from his penis that he had used to rape her.
Q Did she describe if anything was used orally concerning her mouth?
A No, she did not. Aside from she had a strap that was around her face. There was a metal ring that was, you know, up against her mouth, she also did describe that there were metal clips to her nose.
Q Did she describe what happened when the defendant inserted his penis into her?
A He just began to rape her.
Q Was this vaginally or anally?

A It was vaginally. She had said also that he was choking her out at one point. She described it that she thought she was going unconscious. He had also asked her why she was crying during the course of this. She explained to me that she became terrified, began to cry and he had gotten down looking at her face and told her that he wanted to look at her face while she cried.

Q When you say that it was relayed to you by Ms. Osborn that the defendant choked her out, how did that occur?

A She had said that he had choked her out with just his hands.

Q What happened after the comments were made about Ms. Osborn crying?

A After she was crying he just continued to rape her to where she eventually begged for him to stop, essentially at some point that is what happened, and when he did stop, a condom was lodged inside of her vagina.

Q I'm sorry, what?

A A condom.

Q When Ms. Osborn was describing the defendant choking her, did she give you any specific information about how her breathing was affected at all?

A Yes. She said she had a difficult time breathing, aside from the fact that she did feel like she was going

unconscious. To elaborate further she described it in a way that she said that she felt that everything was going purple.

Q And which part of her body was tied up or restrained?

A It would be her wrists, her ankles, which were attached together, and also there was a strap of some type around her head.

Q Were you made aware from Ms. Osborn if she was ever able to, or if she was ever released from these restraints?

A Yes, after he had finished raping her he did start to untie her before going upstairs, and then she had managed to untie herself the rest of the way by removing the strap and metal clip.

Q What happened next?

A Upon being free, she got up, she explained to me that she had pulled a condom out of her vagina, it was lodged in there. After doing that she got dressed and she described to me that she was in a state of shock, she just sat there and stared and after she had gathered her laundry up she was terrified, spoke to Mr. Herndon and asked him if he could drive her home, he proceeded to drive her home.

Q Trooper, how much time had elapsed from when Ms. Osborn went to the defendant's residence and when she went to Grove City Medical Center?

A It would be approximated to be within one to two hours, however, I don't know the exact duration.
Q Maybe my question wasn't clear.
From the time that she arrived at the defendant's residence originally to the time that she went to the hospital?
A That would be four or five hours.
Q How much time per the information that you have from when she was taken home and then until she went to the hospital?
A That's unknown at this time.
Q Was Ms. Osborn able to describe any of these objects, or was it dark per your information?
A She was unable to describe any type of colors, however she was able to describe the item did have a pump attached to it.
Q Was the description based on feel, to your knowledge?
A Yes. She could hear the item being pumped.
Q Did she describe any part of the defendant's body, other then his penis going into her body?
A No.
Q When you were receiving this information, what was her appearance or demeanor like?
A She was very emotionally distraught.
Q Is that the sum and substance of what occurred at Grove

City Medical Center at that time?
A Yes.
Q After receiving that information from Ms. Osborn, what did you do next?
A I applied for a search warrant through this district magistrate.
Q Where was the search warrant for?
A It was for 2495 Mercer Street, which is Mr. Herndon's residence.
Q Was that search warrant approved?
A Yes.
Q Did you and/or any other troopers execute that search warrant?
A Yes, myself, Trooper McGarret, Trooper Lesko, Trooper Kaufer and later assisted by Corporal Armagost out of PSP Butler.
Q What time was the search warrant executed?
A Approximately 1:30 hours.
Q Would that be the next day then?
A Yes, it would be March 18th.
Q March 18th approximately 1:30 in the morning?
A That's correct.
Q Did you enter the defendant's residence per the search warrant?
A Yes.

Q Did you conduct a search on the inside of the residence?
A I did.
Q Did you find anything of evidentiary value per the prior information that you had?
A Yes.
Q What was that?
A I located a used latex condom, various sexual restraints, various sexual toys, there were an abundance of items that were consistence with the statements that she had made at the hospital. Everything that she had described was accounted for and seized and lodged into evidence.
Q When you say everything as described, did you find something consistent with the pump type item?
A That's correct, I did.
Q And the rope or restraints that were done to her wrists and feet or ankles?
A Correct. I found a restraint that would be consistent with that statement.
Q What about the item that was placed into her mouth, the metal ring?
A Yes.
Q You found that also?
A I did.
Q Did you find anything else that she described being in the residence?

A Again, as previously stated, there was an abundance of items. One important note is there was a lot of women's clothing in there that was consistent with the request for her to try on that clothing, but everything else, like I had said that was involved in the actual assault that she had explained it was seized and logged into evidence.

Q What type of residence was this, can you describe the layout?

A Yeah. It was a single story that went into a downstairs portion of the residence. The downstairs portion of the residence that I described that is where the bedroom where this incident did occur was located.

Q When Ms. Osborn related to you that she had retrieved a used condom from inside of her body, did she tell you what she did with it?

A Yes. She explained that as she removed it she described the condom to be dripping down her legs.

Q What did she do with it then?

A That's unknown.

Q The condom that you recovered, where was that at?

A It was in a trash can next to the bed.

Q Was this also in the downstairs bedroom area?

A That's correct.

Q Did you search the rest of the residence?

A I did.
Q Did you find anything else along the line of sex toys or anything like that?
A No. Everything was contained to the bedroom.
Q When you spoke with Ms. Osborn, did she relate to you if she desired or consented for this type of act?
A That's unknown.
Q Did she relay to you, you said something about crying?
A Yes.
Q What was that?
A She had said that she was terrified and had began to cry during the assault and she continued to tell me that she had begged and yelled for him to stop just prior to him stopping, and that was during the rape.
Q When you say rape, be specific.
A That was him putting his penis inside of her vagina.
Q Trooper, the various items of evidence that was recovered from the residence, the used condom, the sex toys, things like that, will it be submitted for laboratory testing?
A Yes. There have been items that have been submitted right now, I can go into detail if need be.
Q Just roughly what items?
A The used latex condom, the item that was described to have had the pump was seized, her sexual assault evidence collection kit, and additionally the underwear

that she had worn after she dressed herself after she had been raped.

Q Did she provide you her underwear at the hospital?

A She had provided it to the hospital, which we seized.

Q And all of those items have been submitted for testing?

A Yes.

Q Once the testing has been completed and the reports that you receive, will you insure that those are sent to the district attorney's office to provide in discovery?

A Yes.

MR. GLEISNER: Your Honor, at this time I'm going to move to amend, before I offer for Cross, so that these charges can also be cross examined appropriately, one count of aggravated assault, Title 18, PACSA, section 2702 A1, that's a felony of the first degree. Also one count of simple assault, title 18, PACSA, section 2701 A1 a misdemeanor of the second degree. One count of indecent assault, title 18, PACSA, section 3126 A2 graded as a misdemeanor of the first degree, that would be by forcible compulsion, and also one count of recklessly endangering another person, Title 18, PACSA, Section 2705 a misdemeanor of the second degree.

Your Honor, I would just note that the aggravated assaults, simple assaults are for the same acts that constitute the strangulation and the indecent assault is for the sex acts and the REAP also goes towards the acts that would constitute the strangulation.

MR. WORGUL: I just have one comment for the record.

Just so I'm clear, these new charges that we're amending and adding, all are based on the same facts and circumstances that were alleged in the original complaint, correct?

MR. GLEISNER: Yes.

THE COURT: Anything for the record?

MR. WORGUL: I'm sorry?

THE COURT: Anything for the record on the amendments?

MR. WORGUL: No, not at this time.

THE COURT: Okay. Those will be accepted, the complaint will be amended to reflect that, and at the conclusion as to whether or not they will go forward will be made until after the hearing.

MR. GLEISNER: Thank you, Your Honor.

With that, I would offer the trooper for Cross Examination at this time.

THE COURT: You may Cross.

MR. WORGUL: Thank you.

CROSS EXAMINATION

BY MR. WORGUL:

Q Trooper, just so we're clear. Ms. Osborn is not in court today, is that correct?

A That's correct.

Q Why isn't she here?

A She just isn't here.

Q Is there a reason?

THE COURT: What's the relevance, counsel? She doesn't have to be here.

MR. WORGUL: I'll explain. I was waiting for somebody to ask me what the relevance was. The relevance is this, Your Honor. I expect that before this case concludes ultimately there is a high likelihood that there's going to be a change in the rules of criminal procedure that is going to require at least circumstance an explanation as to why someone is not here as well as presentation written statements by that person that are signed. We know that this change in law is highly likely, but to the extent that is coming down the pike,

I'm only asking the question, I know it will be objected to, but to preserve down the road

when, if, in fact, that law gets passed I can say, I asked for these things at the preliminary hearing and they were not provided.

THE COURT: Okay. You have a record of it. The Court summarily is indicating that it's not relevant for the purposes of the preliminary hearing today, unless the Commonwealth wishes to put anything additional on the record, we will move forward.

MR. GLEISNER: The Commonwealth is not, Your Honor. I am not going to speculate on the future of the law on anything.

THE COURT: Okay. We'll move forward.

MR. WORGAL: Thank you, Your Honor.

BY MR. WORGUL:

Q How well did Ms. Osborn and Mr. Herndon know each other prior to this evening, or the day of the incident?

A They had known each other, it's not a hundred percent.

Q Do you know how well they knew each other?

A I knew that they knew each other, but, no, I do not know --

Q You don't know the extent of it?

A No.

Q You were asked if these acts were consensual, and you said, that is not one hundred percent certain. Am I

correct of my recollection to your testimony?
A It's unknown.
Q Unknown for the purposes of today's hearing whether or not these acts were consensual?
A Well, she employed* that she was raped, a rape is not consensual.
Q Your indication on the record though is that you were not a hundred percent certain whether or not these acts were consensual, was it not?
A It was not consensual.
Q Was that not your testimony that you weren't one hundred percent sure whether or not these were consensual acts?
A Unknown was my testimony.
Q So, you're not sure as you stand today testifying whether or not these acts were --

MR. GLEISNER: Objection, Your Honor. Asked and answered.

THE COURT: Yes, he's answered your question that he said that it is not to a hundred percent certainty that this was not consensual. That is what was asked, that was what was answered.

We'll move on. you got what you wanted on the record. There's no need to ask again.

BY MR. WORGUL:
Q Did Ms. Osborn provide you with a written statement?

A No.
Q So, you take her report as you testified on Direct and you get a search warrant for Mr. Herndon's house, correct?
A Yes.
Q Do you have a copy of that warrant with you?
A I do not. I'm not sure -- I think the District Attorney's office does.
Q Correct me if I'm wrong, the subject of the warrant was to go to his residence and recover devices used in the commission of this alleged rape, correct?
A Yes.
Q Not included in that warrant was Mr. Herndon's cell phone, correct?
A That's correct.
Q Did you seize his cell phone?
A Yes.
Q You have that in your custody right now, correct?
A Yes.
Q Do you have any experience -- let me back up.
When you executed the warrant, did you photograph the scene?
A Yes.
Q Was that you or somebody else?
A It was me.

Q How many other officers, troopers I should say, were with you at the time you executed the warrant?
A There was three.
Q Is there any particular reason why nobody but you witnessed the warrant and the inventory sheet?
MR. GLEISNER: Objection, Your Honor, relevance.
THE COURT: We're not going to have a suppression hearing relative to any issue here today.
The objection is sustained.
BY MR. WORGUL:
Q The sex toys that you say were in there, the items that you recovered, correct me if I'm wrong, are all capable of being used in a non criminal consensual manner, correct?
MR. GLEISNER: Objection, Your Honor, relevance. Calls for speculation.
MR. WORGUL: If he knows. He might know. If he says he doesn't know, then he doesn't know.
THE COURT: Counsel, you can say that any item in his entire house can be used lawfully, that's not why we're here. We're here because of the allegations of the items that were used unlawfully.
MR. WORGUL: Right. And I'm asking him if

the items that are alleged to have been used unlawfully could also be used lawfully.

THE COURT: Are we going to do that for every item?

MR. WORGUL: No, just all of the items that you've recovered.

THE COURT: Just answer the question.

TROOPER JULIAN: Yes.

BY MR. WORGUL:

Q As you sit here, you're unaware how long Mr. Herndon and Ms. Osborn knew each other or conversations that they had or anything along those lines, correct?

A That's correct.

Q Have you recovered any information from Ms. Osborn concerning her cell phone records and communications that she may have had with Mr. Herndon?

MR. GLEISNER: Objection, Your Honor, relevance.

MR. WORGUL: Most of this is to make point when we get down the road as to --

THE COURT: We're not down the road, we're here.

MR. WORGUL: I know, but if I don't ask the question they've objected to, I can't make the argument down the road, so I have to.

THE COURT: Objection sustained.

BY MR. WORGUL:

Q You said that you recovered a condom, correct?

A That's correct.

Q And that condom was recovered from where?

A The trash can near the bed.

MR. WORGUL: Nothing further.

THE COURT: Redirect?

MR. GLEISNER: No, Your Honor, thank you.

THE COURT: Next witness.

MR. GLEISNER: The Commonwealth rests for the purposes of the preliminary hearing.

THE COURT: Anything for today, counsel?

MR. WORGUL: No.

THE COURT: Argument?

MR. WORGUL: No, sir.

THE COURT: Any argument for today?

MR. GLEISNER: No, Your Honor, just to note the amendments.

THE COURT: Relative to the original complaint and the amendments, I believe the purpose of the preliminary hearing the Commonwealth has met its burden. All charges will be held for court.

(Whereupon, the hearing concluded.)

C E R T I F I C A T E

I, Phyllis M. Machel, a Notary Public - Court Reporter for the Commonwealth of Pennsylvania, do hereby certify that the said hearing was taken, and that the said hearing was recorded and then reduced to transcript form under my direction, and constitutes a true record to the best of my ability and belief of the testimony given at the time of the hearing.

_____

Phyllis M. Machel

APPENDIX C

(Trial Court Opinion Regarding the Petition for Habeas Corpus Relief)

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
-vs-	:	569 Criminal 2019
	:	
TYLER WILLIAM HERNDON	:	

ADJUDICATION

AND NOW, this 16th day of October, 2019, this matter coming before the Court on the defendant's Motion for Habeas Corpus Relief, and after consideration of the motion and attachments, including the transcript from the preliminary hearing, which the parties stipulated to, and the Commonwealth's Exhibit 1; and after further consideration of argument, THE COURT FINDS as follows:

FACTUAL BACKGROUND:

On or about March 18, 2019 the defendant was charged with one count of rape, one count of involuntary deviate sexual intercourse, one count of aggravated assault, one count of strangulation, one count of aggravated indecent assault, one count of unlawful restraint, two counts of indecent assault, one count of simple assault, and one count

of recklessly endangering another person.

The preliminary hearing was held before a Magisterial District Judge on or about March 27, 2019. The Commonwealth called one witness, that being Pennsylvania State Police Trooper Zachary Julian. Trooper Julian had been dispatched to the Grove City Medical Center for a reported sexual assault involving the victim. Trooper Julian testified that he met the victim at the hospital, at which time she provided certain information. Trooper Julian testified at the preliminary hearing as to the statements given by the victim. The victim did not testify, nor was she present at the preliminary hearing.

As a result of the statement, Trooper Julian obtained a search warrant for the defendant's home. Trooper Julian executed that search warrant and located and seized certain items, including but not limited to a used condom, sex toys, and other items, all having been described by the victim. These items were not produced at the preliminary hearing.

Defense argues that the Commonwealth cannot rely solely on hearsay evidence at a preliminary hearing to establish a prima facia case. Defense argues further that should the Court deny his petition, that the Court should authorize an interlocutory appeal pursuant to 42 Pa. C.S.A. §702.

The Commonwealth argues that it did not rely solely on hearsay evidence, but also on the items found and seized pursuant to the search warrant, which corroborates the statement of the victim. The Commonwealth also argues that it now has a DNA report from the Pennsylvania Crime Lab.

THE COURT NOTES that the Commonwealth relies on the case of Commonwealth vs. Ricker, 170 A.3d 494 (Pa. 2017). THE COURT FINDS that although the Commonwealth did produce testimony regarding certain items seized at the defendant's home, which tend to corroborate the statement given by the victim to the police officer, the Commonwealth is solely relying on hearsay to establish the consent element for the sexual offenses and the mens rea element for the offenses of simple assault and recklessly endangering another person. However, THE COURT FINDS that the Commonwealth did establish a prima facia case and the defense motion will be denied. The Court does note that the issue raised in this matter is pending before the Pennsylvania Supreme Court and does involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter, and the Court will enter an appropriate order.

APPENDIX D

(Trial Court Order)

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
-vs-	:	569 Criminal 2019
	:	
TYLER WILLIAM HERNDON	:	

O R D E R

AND NOW, this 16th day of October, 2019, IT IS THE ORDER OF COURT that the defendant's Petition for Habeas Corpus Relief is DENIED.

Pursuant to 42 Pa. C.S.A. §702 it is this Court's opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

BY THE COURT:

Robert G. Yeatts,
President Judge

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APPENDIX E

(Petition for Allowance to Appeal to the Superior Court of Pennsylvania)

Received 11/18/2019 2:58:56 PM Superior Court Western District

Filed 11/18/2019 2:58:00 PM Superior Court Western District
153 WDM 2019

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

_ _ _ MD 2019

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

TYLER HERNDON,
Appellant

PETITION FOR PERMISSION TO APPEAL

Appeal from the Opinion and Order entered October 16, 2019 in the Court of Common Pleas of Mercer County, Pennsylvania, at CP-43-CR-569-2019, denying Mr. Herndon's Petition for Habeas Corpus Relief.

Counsel of Record for the Appellant
Matthew Ness, Esquire
PA I.D. No. 208026

WORGUL, SARNA & NESS,
CRIMINAL DEFENSE ATTORNEYS, LLC.
429 Fourth Avenue
Suite 1700
Pittsburgh, Pennsylvania 15219

Phone: 412-862-0347
Fax: 412-402-500

STATEMENT OF JURISDICTION

The Superior Court has jurisdiction over this case pursuant to Pa. R.A.P. 701, concerning appeals authorized from interlocutory orders; and 42 Pa. C.S.A. § 702(b), concerning interlocutory appeals by permission. Additionally, the Superior Court has jurisdiction over interlocutory orders where exceptional circumstances exist. Commonwealth v. Ricker, 120 A.3d 349, 353 (Pa. Super. 2015).

ORDER IN QUESTION

"AND NOW, this 16th day of October, 2019, IT IS THE ORDER OF COURT that the defendant's Petition for Habeas Corpus Relief is DENIED.

"Pursuant to 42 Pa. C.S.A. § 702 it is this Court's opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter."

BY THE COURT,

/s/ Robert G. Yeatts ,
President Judge

CONCISE STATEMENT OF THE CASE

On or about March 18, 2019, Tyler Herndon ("Mr. Herndon") was charged with one (1) count of Rape Forcible Compulsion, 18 Pa. C.S.A § 3121(A)(1), one (1) count of Involuntary Deviate Sexual Intercourse Forcible Compulsion, 18 Pa. C.S.A § 3123(A)(1), one (1) count of Aggravated Assault, 18 Pa. C.S.A § 2702(A)(1), one (1) count of Strangulation, 18 Pa. C.S.A § 2718(A)(1), one (1) count of Aggravated Indecent Assault Forcible Compulsion, 18 Pa. C.S.A § 3125(A)(5), one (1) count of Unlawful Restraint Serious Bodily Injury, 18 Pa. C.S.A § 2902(A)(1), one (1) count of Indecent Assault Forcible Compulsion, 18 Pa. C.S.A § 3126(A)(2), one (1) count of Indecent Assault without Consent of Other, 18 Pa. C.S.A § 3126(A)(1), one (1) count of Simple Assault, 18 Pa. C.S.A § 2701(A)(1), and one (1) count of Recklessly Endangering Another Person, 18 Pa. C.S.A § 2705.

A preliminary hearing was held before the Honorable Magisterial District Judge D. Neil McEwen on or about March 27, 2019. At the preliminary hearing, Mr. Herndon's charges were bound over for trial on evidence that was exclusively hearsay in nature. The alleged victim did not testify. Rather, the Commonwealth, in reliance on Pennsylvania Rule of Criminal Procedure 542(E), presented its evidence solely through the testimony of Pennsylvania State Trooper Zachary Julian ("Tpr. Julian") the only witness, which constitutes hearsay evidence. At the hearing, Tpr. Julian testified that on or about March 17, 2019, he was dispatched to the Grove City

Medical Center, in Grove City, Pennsylvania for a reported sexual assault involving a woman later identified as Tanya Mae Osborn ("Ms. Osborn"). *Notes of Testimony* ("*NT*"), Preliminary Hearing, 3/29/19 at pages 7-8.

Tpr. Julian testified that in response to his questions Ms. Osborn had said she had gone to Mr. Herndon's residence to do laundry when Mr. Herndon proceeded to rape her. *NT* at 10-11. Tpr. Julian also indicated Ms. Osborn had told him that when she was in the basement of Mr. Herndon's residence, the lights were turned off and she had been pushed face down into the bed. *NT*. at 11.

At that point, according to Tpr. Julian, Ms. Osborn said Mr. Herndon had "put some type of strap across her mouth and nose…He tied her wrists and legs with an unknown item to her…essentially connecting her wrists to her ankles." *Id*. Ms. Osborn then indicated to Tpr. Julian that Mr. Herndon had inserted an "unknown item to her inside of her vagina." *Id*. Tpr. Julian further testified Ms. Osborn indicated Mr. Herndon penetrated her vagina without her consent. *NT.* at 12-13. At some point during the interaction, Tpr. Julian indicated Ms. Osborn said Mr. Herndon "choked her out with just his hands." *NT*. at 13.

Mr. Herndon, through defense counsel, objected to the Commonwealth's use of hearsay, through Rule 542(e), contending that Rule 542(e) directly conflicts with our Supreme Court's decision in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174 (Pa. 1990), and violated his fundamental right to Due Process.

Magisterial District Judge McEwen overruled the objection, and held all charges for the Court of Common Pleas of Mercer County. Subsequently, on or about June 24, 2019, Mr. Herndon, through defense counsel, filed a Petition for Habeas Corpus challenging Magisterial District Judge McEwen's decision that hearsay evidence, alone, may establish a *prima facie* case.

On or about October 16, 2019, a hearing was held before the Honorable Robert G. Yeatts, President Judge, of the Court of Common Pleas of Mercer County. At this hearing, the parties stipulated to the transcript of the preliminary hearing, and to Commonwealth's Exhibit 1, a DNA Analysis Report, dated July 23, 2019, from the Pennsylvania State Police Bureau of Forensic Services. The Commonwealth argued it did not rely solely upon hearsay evidence to establish a *prima facie* case. Mr. Herndon, through defense counsel, countered that the Commonwealth had relied solely on hearsay, in violation of his right to due process. Mr. Herndon also requested that if the trial court were to deny his Petition for Habeas Corpus, that the court include the statement prescribed by 42 Pa. C.S.A. § 702(b) and Pennsylvania Rule of Appellate Procedure 1311(b).

On or about October 16, 2019, President Judge Yeatts issued an Opinion and Order of Court denying Mr. Herndon's Petition for Habeas Corpus relief. The trial court did, however, include the statement prescribed by 42 Pa. C.S.A. § 702(b). This timely Petition for Permission to Appeal now follows.

CONTROLLING QUESTIONS OF LAW PRESENTED FOR REVIEW

Whether Pennsylvania Rule of Criminal Procedure 542(E) violates a defendant's fundamental Right to Due Process, in that it directly conflicts with our Supreme Court's decision in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174 (Pa. 1990), in which five (5) Justices held that "fundamental due process requires that no adjudication be based solely on hearsay evidence."

CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL GROUND EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS OF LAW PRESENTED FOR REVIEW

Exceptional circumstances justifying immediate appellate review on the question now presented, specifically whether permitting solely hearsay testimony at a preliminary hearing to establish a *prima facie* case violates a defendant's fundamental right to due process, will become moot and would be capable of repetition and likely to evade judicial review if this Court were to await a final order. This is of particular significance now that our Supreme Court granted *allocatur* on this very issue in Commonwealth v. McClelland, 179 A.3d 2 (Pa. 2018),[1] and the high court's impending decision highlights the likelihood that Mr. Herndon will lose his ability to challenge the trial court's denial of his petition if he does not seek immediate appellate review. Thus, Mr. Herndon contends the issue presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles guaranteeing due process of law in allow a defendant to be bound over for trial based solely on hearsay evidence.

The trial court's denial of Mr. Herndon's Petition for Habeas Corpus Relief directly conflicts with our Supreme Court's decision in Verbonitz. Five Justices

[1] ("AND NOW, this 11th day of January, 2018, the Petition for Allowance of Appeal is GRANTED. The issue, slightly rephrased for clarity, is: [W]hether the Superior Court panel failed to properly apply and follow the legal precedent set forth in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.3d 172, 174-76 (Pa. 1990) in which five (5) Justices held that 'fundamental due process requires that no adjudication be based solely on hearsay evidence.'').

would have held that "[f]undamental due process requires that no adjudication be based solely on hearsay evidence." *Id.* at 174. As such, [t]he testimony of a witness as to what a third party told him about an alleged criminal act is clearly inadmissible hearsay." *Id.* The principle of Due Process "requires the conclusion that the hearsay statement of the police officer was insufficient, *vel non,* to establish a prima facie case against appellant." *Id.* at 176. Verbonitz is binding precedent as it applies to Mr. Herndon's Due Process claim.

Although not constitutionally mandated, when, by law, the state creates a preliminary hearing, certain rights, such as the right to counsel and the right to confront witnesses, necessarily attach. Rule 542(C) specifically establishes a statutory right to be present at any preliminary hearing, to be represented by counsel, cross-examine witnesses and inspect physical evidence, call witnesses on the defendant's behalf, and offer evidence on the defendant's own behalf. While this Court has chosen to view Verbonitz as non-binding, a majority of our Supreme Court would have held that constitutional principles of due process apply at preliminary hearings. Verbonitz, therefore, is a majority opinion as it pertains to the due process prohibition against using **only** hearsay evidence to establish a *prima facie* case at a preliminary hearing. *See* Commonwealth v. Ricker, 170 A.3d 494, 517 (Pa. 2017) ("Far from lacking persuasive value, the Verbonitz opinions should together be recognized as a holding that due process prohibits the Commonwealth from

depriving a person of liberty upon nothing more than inadmissible hearsay.") (Wecht, J., dissenting statement).

For a *prima facie* case to rest upon nothing more than inadmissible hearsay is to offend traditional notions of due process. At such an illusory proceeding, the interests, purposes, rights and benefits of a preliminary hearing are stripped of substance or meaning. Mr. Herndon lost the ability to gain a fair assessment of the strength of the case against him; was stripped of a fair opportunity to test the Commonwealth's case via his right to cross examination, to direct his pretrial investigation, to exercise his constitutional right to an attorney in a meaningful fashion,[2] and to consider intelligently his options to challenge the seizure or the acquisition of evidence in a suppression motion, or to plead guilty or proceed to trial.

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[2] In Coleman v. Alabama, 399 U.S. 1 (1970), the Supreme Court held that a preliminary hearing is a "critical stage" of the prosecution so as to constitutionally require representation by counsel. Concluding the presence of counsel was "essential" to protect defendant against "erroneous or improper prosecution," the Court listed four reasons for requiring counsel at a preliminary hearing:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Coleman, 399 U.S. at 10.

The practical effect of Rule 542(E), in the instant matter, was to reduce Mr. Herndon's preliminary hearing to a mere functionless formality.

Moreover, Rule 542(E) "was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing **entirely through hearsay evidence**." Ricker, 170 A.3d at 517 (Saylor, C.J., concurring statement) (emphasis added). Moreover, Chief Justice Saylor noted in Ricker, 170 A.3d 494 (Pa. 2017) that the Court did not intend to overrule Verbonitz with the 2013 Amendment to Rule 542 by stating, "[f]rom my perspective, the 2013 amendment to the rule . . . was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing entirely through hearsay evidence. Rather, I believe the revision served only as an attempt to clarify that the 2011 amendment to the rule had not restricted the Commonwealth's ability to adduce hearsay evidence at preliminary hearings solely to offense elements requiring proof of ownership, non-permitted use, damage, or value of property." *Id.* at 507.

While the trial court maintains this honorable court's Ricker decision is controlling, Mr. Herndon contends the holding was limited to only deny that a constitutional right to confront an accuser existed at a preliminary hearing. This court even expressly noted its decision did "not decide the distinct question of whether there exists a constitutional due process right to confront witnesses because Rule 542(C) authorizes limited confrontation rights." Ricker, 120 A.3d. at 362 n.7.

Thus, Ricker is neither controlling nor dispositive on the issue of fundamental due process that Mr. Herndon now raises.

Moreover, were Mr. Herndon not permitted to litigate this interlocutory appeal, it is highly likely this Court would never reach the merits of the important question presented. Why? Because once his criminal case has concluded by whatever means (acquittal, conviction, guilty or nolo contendere plea), the issue will have been rendered moot and would be capable of repetition and likely to evade judicial review if this Court were to await a final order. *See, e.g.,* Commonwealth v. Walter*,* 966 A.2d 560, 565 (Pa. 2009), *citing* Commonwealth v. Lee*,* 662 A.2d 645, 650 (Pa. 1995) (deeming moot claims that evidence failed to establish prima facie case at preliminary hearing as well as that judge should have recused himself; defendant convicted); Commonwealth v. McCullough*,* 461 A.2d 1229, 1231 (Pa. 1983) (concluding that Commonwealth's failure to establish prima facie case at preliminary hearing was immaterial where it subsequently met its burden of proof beyond a reasonable doubt at trial).

Lastly, while some may point to this Honorable Court's decision in Commonwealth v. McClelland, 165 A.3d 19, (Pa. Super. 2017), as controlling on the issue Mr. Herndon raises, the uncertainty surrounding the prior opinion is illustrated by the Supreme Court granting allowance of appeal. Rather than being well-established precedent, the waters surrounding this issue could not be any more

clouded. This is further illustrated by a proposed amendment to Rule 542(E) currently pending. On January 2, 2019, the Supreme Court of Pennsylvania Criminal Procedure Rules Committee proposed an amendment of Rule 542(E), which specifically dictates that hearsay alone cannot establish **all** elements of a crime. In the Official Report accompanying the proposed amendment of Rule 542(E), the committee stated that "establishment of a *prima facie* case by hearsay alone, as held by the Superior Court in Ricker, was not appropriate" and "Verbonitz. . . is still good law and stands for the proposition that a *prima facie* case may not be found exclusively on hearsay evidence." Report: Use of Hearsay at Preliminary Hearing, Proposed Amendment of Pa.Rs.Crim.P. 542, 543, and 1003, (published January 2, 2019), page 31.

While the proposed amendment to Rule 542(E) has not yet been adopted, its very existence, along with the Supreme Court's decision to grant review in McClelland, should cast a long shadow over the use of solely hearsay evidence, alone, to establish a *prima facie* case at a preliminary hearing. These two developments, combined with the obvious uncertainty created by the Supreme Court's Ricker opinions, should raise serious enough concerns about denying a defendant his right to due process at the preliminary hearing, and demonstrate that substantial ground exits for a difference of opinion on this issue, necessitating an immediate appeal to advance the termination of the matter.

Respectfully Submitted,

_/s/ Matthew Ness_____
Matthew Ness, Esquire
PA I.D. # 208026

APPENDIX

I. Order in Question

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
-vs-	:	569 Criminal 2019
	:	
TYLER WILLIAM HERNDON	:	

O R D E R

AND NOW, this 16th day of October, 2019, IT IS THE ORDER OF COURT that the defendant's Petition for Habeas Corpus Relief is DENIED.

Pursuant to 42 Pa. C.S.A. §702 it is this Court's opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

BY THE COURT:

Robert G. Yeatts,
President Judge

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II. Opinion in Support of Order in Question

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
-vs-	:	569 Criminal 2019
	:	
TYLER WILLIAM HERNDON	:	

ADJUDICATION

AND NOW, this 16th day of October, 2019, this matter coming before the Court on the defendant's Motion for Habeas Corpus Relief, and after consideration of the motion and attachments, including the transcript from the preliminary hearing, which the parties stipulated to, and the Commonwealth's Exhibit 1; and after further consideration of argument, THE COURT FINDS as follows:

FACTUAL BACKGROUND:

On or about March 18, 2019 the defendant was charged with one count of rape, one count of involuntary deviate sexual intercourse, one count of aggravated assault, one count of strangulation, one count of aggravated indecent assault, one count of unlawful restraint, two counts of indecent assault, one count of simple assault, and one count

of recklessly endangering another person.

The preliminary hearing was held before a Magisterial District Judge on or about March 27, 2019. The Commonwealth called one witness, that being Pennsylvania State Police Trooper Zachary Julian. Trooper Julian had been dispatched to the Grove City Medical Center for a reported sexual assault involving the victim. Trooper Julian testified that he met the victim at the hospital, at which time she provided certain information. Trooper Julian testified at the preliminary hearing as to the statements given by the victim. The victim did not testify, nor was she present at the preliminary hearing.

As a result of the statement, Trooper Julian obtained a search warrant for the defendant's home. Trooper Julian executed that search warrant and located and seized certain items, including but not limited to a used condom, sex toys, and other items, all having been described by the victim. These items were not produced at the preliminary hearing.

Defense argues that the Commonwealth cannot rely solely on hearsay evidence at a preliminary hearing to establish a prima facia case. Defense argues further that should the Court deny his petition, that the Court should authorize an interlocutory appeal pursuant to 42 Pa. C.S.A. §702.

The Commonwealth argues that it did not rely solely on hearsay evidence, but also on the items found and seized pursuant to the search warrant, which corroborates the statement of the victim. The Commonwealth also argues that it now has a DNA report from the Pennsylvania Crime Lab.

THE COURT NOTES that the Commonwealth relies on the case of Commonwealth vs. Ricker, 170 A.3d 494 (Pa. 2017). THE COURT FINDS that although the Commonwealth did produce testimony regarding certain items seized at the defendant's home, which tend to corroborate the statement given by the victim to the police officer, the Commonwealth is solely relying on hearsay to establish the consent element for the sexual offenses and the mens rea element for the offenses of simple assault and recklessly endangering another person. However, THE COURT FINDS that the Commonwealth did establish a prima facia case and the defense motion will be denied. The Court does note that the issue raised in this matter is pending before the Pennsylvania Supreme Court and does involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter, and the Court will enter an appropriate order.

III. VERBATIM TEXTS OF RULE 542

Purdon's Pennsylvania Statutes and Consolidated Statutes
Rules of Criminal Procedure (Refs & Annos)
Chapter 5. Pretrial Procedures in Court Cases (Refs & Annos)
Part D. Proceedings in Court Cases Before Issuing Authorities

Pa.R.Crim.P. Rule 542

Rule 542. Preliminary Hearing; Continuances

Currentness

(A) The attorney for the Commonwealth may appear at a preliminary hearing and:

(1) assume charge of the prosecution; and

(2) recommend to the issuing authority that the defendant be discharged or bound over to court according to law.

(B) When no attorney appears on behalf of the Commonwealth at a preliminary hearing, the affiant may be permitted to ask questions of any witness who testifies.

(C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may:

(1) be represented by counsel;

(2) cross-examine witnesses and inspect physical evidence offered against the defendant;

(3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;

(4) offer evidence on the defendant's own behalf, and testify; and

(5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

(D) At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it.

(E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

(F) In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, the issuing authority shall not proceed on the summary offense except as provided in Rule 543(F).

(G) Continuances

(1) The issuing authority may, for cause shown, grant a continuance and shall note on the transcript every continuance together with:

(a) the grounds for granting each continuance;

(b) the identity of the party requesting such continuance; and

(c) the new date, time, and place for the preliminary hearing, and the reasons that the particular date was chosen.

When the preliminary hearing is conducted in the court of common pleas, the judge shall record the party to which the period of delay caused by the continuance shall be attributed and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with Rule 600.

(2) The issuing authority shall give notice of the new date, time, and place for the preliminary hearing to the defendant, the defendant's attorney of record, if any, and the attorney for the Commonwealth.

(a) The notice shall be in writing.

(b) Notice shall be served on the defendant either in person or by first class mail.

(c) Notice shall be served on defendant's attorney of record and the attorney for the Commonwealth either by personal delivery, or by leaving a copy for or mailing a copy to the attorneys at the attorneys' offices.

Comment: As the judicial officer presiding at the preliminary hearing, the issuing authority controls the conduct of the preliminary hearing generally. When an attorney appears on behalf of the Commonwealth, the prosecution of the case is under the control of that attorney. When no attorney appears at the preliminary hearing on behalf of the Commonwealth, the issuing authority may ask questions of any witness who testifies, and the affiant may request the issuing authority to ask specific questions. In the appropriate circumstances, the issuing authority may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the issuing authority.

Paragraph (C)(3) is intended to make clear that the defendant may call witnesses at a preliminary hearing only to negate the existence of a *prima facie* case, and not merely for the purpose of discovering the Commonwealth's case. The modification changes the language of the rule interpreted by the Court in *Commonwealth v. Mullen*, 460 Pa. 336, 333 A.2d 755 (1975). This amendment was made to preserve the limited function of a preliminary hearing.

Paragraph (E) was amended in 2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. *But compare Commonwealth ex rel. Buchanan v. Verbonitz,* 525 Pa. 413, 581 A.2d 172 (Pa. 1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a prima facie case). *See also* Rule 1003 concerning preliminary hearings in Philadelphia Municipal Court.

If the case is held for court, the normal rules of evidence will apply at trial.

For the procedures when a defendant fails to appear for the preliminary hearing, see Rule 543(D).

In cases in which summary offenses are joined with misdemeanor, felony, or murder charges, pursuant to paragraph (F), during the preliminary hearing, the issuing authority is prohibited from proceeding on the summary offenses, or adjudicating or disposing of the summary offenses except as provided in Rule 543(F).

For the contents of the transcript, see Rule 135.

See Chapter 5 Part E for the procedures governing indicting grand juries. Under these rules, a case may be presented to the grand jury instead of proceeding to a preliminary hearing. *See* Rule 556.2.

Credits

Note: Former Rule 141, previously Rule 120, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970; revised January 31, 1970, effective May 1, 1970; renumbered Rule 141 and amended September 18, 1973, effective January 1, 1974; amended June 30, 1975, effective July 30, 1975; amended October 21, 1977, effective January 1, 1978; paragraph (D) amended April 26, 1979, effective July 1, 1979; amended February 13, 1998, effective July 1, 1998; rescinded October 8, 1999, effective January 1, 2000. Former Rule 142, previously Rule 124, adopted June 30, 1964, effective January 1, 1965, suspended effective May 1, 1970; present rule adopted January 31, 1970, effective May 1, 1970; renumbered Rule 142 September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; effective date extended to July 1, 1982; amended July 12, 1985, effective January 1, 1986, effective date extended to July 1, 1986; rescinded October 8, 1999, effective January 1, 2000. New Rule 141, combining former Rules 141 and 142, adopted October 8, 1999, effective January 1, 2000; renumbered Rule 542 and *Comment* revised March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended March 9, 2006, effective September 1, 2006; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended January 27, 2011, effective in 30 days [February 28, 2011]; amended June 21, 2012, effective in 180 days; amended October 1, 2012, effective July 1, 2013; amended April 25, 2013, effective June 1, 2013.

Rules Crim. Proc., Rule 542, 42 Pa.C.S.A., PA ST RCRP Rule 542
Current with amendments received through October 15, 2019.

End of Document

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted:

WORGUL, SARNA & NESS, LLC

By: /s/ Matthew Ness
Matthew Ness, Esquire
PA I.D. No. 208026

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs. NO. ____ MD 2019

TYLER HERNDON,
Appellant.

PROOF OF SERVICE

I hereby certify that I am this day serving the within attached document upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.App.P. 121:

Hon. Robert G. Yeatts, P.J.
Mercer County Courthouse
Mercer, PA 16137-1295

Peter A. Morin, Esq.
Court Administrator
3rd Floor Mercer County Courthouse
Mercer, PA 16137

Tyler Herndon
2495 Mercer Street
Stoneboro, PA 16153

Kara Rice, Esquire
Mercer County District Attorney's Office
209 Mercer County Courthouse
Mercer, PA 16137-1295

Kathleen M. Koos
Clerk of Courts
1112 Mercer County Courthouse
Mercer, PA 16137

_/s/ Matthew Ness_____
Matthew Ness, Esquire

APPENDIX F

(Denial of Petition for Allowance to Appeal)

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
	:	Mercer County Criminal Division
V.	:	CP-43-CR-0000569-2019
	:	
	:	
	:	
TYLER WILLIAM HERNDON	:	No. 153 WDM 2019

ORDER

The Court hereby **DENIES** the petition for permission to appeal and the answer filed thereto.

PER CURIAM

APPENDIX G

(Petition for Allocatur to the Supreme Court of Pennsylvania)

Received 2/7/2020 11:08:54 AM Supreme Court Western District

Filed 2/7/2020 11:08:00 AM Supreme Court Western District
7 WM 2020

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

_ _ _ WAL 2020

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

TYLER HERNDON,
Appellant

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania, entered on January 8, 2020, denying Mr. Herndon's Petition for Permission to Appeal from the Opinion and Order entered October 16, 2019 in the Court of Common Pleas of Mercer County, Pennsylvania, at CP-43-CR-569-2019, denying Mr. Herndon's Petition for Habeas Corpus Relief.

Counsel of Record for the Petitioner
Matthew Ness, Esquire
PA I.D. No. 208026

WORGUL, SARNA & NESS,
CRIMINAL DEFENSE ATTORNEYS, LLC.
429 Fourth Avenue
Suite 1700
Pittsburgh, Pennsylvania 15219

Phone: 412-862-0347
Fax: 412-402-500

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On January 8, 2020, in a PER CURIAM order entered at 153 WDM 2019, the Superior Court of Pennsylvania denied Mr. Herndon's Petition for Allowance to Appeal from an order entered at CP-43-CR-569-2019 by the Honorable President Judge Robert G. Yeatts denying Mr. Herndon's Petition for Habeas Corpus Relief.

The PER CURIAM ORDER of the Superior Court is attached hereto, incorporated herein by this reference, and referred to hereafter as "Appendix A".

The opinion of the Honorable President Judge Yeatts is attached hereto, incorporated herein by this reference, and referred to hereafter as "Appendix B".

ORDERS IN QUESTION

"The Court hereby DENIES the petition for permission to appeal and the answer filed thereto."

PER CURIAM

Date: 1/08/2020

"AND NOW, this 16th day of October, 2019, IT IS THE ORDER OF COURT that the defendant's Petition for Habeas Corpus Relief is DENIED.

"Pursuant to 42 Pa. C.S.A. § 702 it is this Court's opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter."

BY THE COURT,

/s/ Robert G. Yeatts ,
President Judge

QUESTIONS PRESENTED FOR REVIEW

Whether Pennsylvania Rule of Criminal Procedure 542(E) violates a defendant's fundamental Right to Due Process, in that it directly conflicts with our Supreme Court's decision in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174 (Pa. 1990), in which five (5) Justices held that "fundamental due process requires that no adjudication be based solely on hearsay evidence" when the Commonwealth relies solely upon hearsay evidence to establish a *prima facie* case.

Answered in the Negative below.

Whether Pennsylvania Rule of Criminal Procedure 542(E) denies a defendant the fundamental Right to Counsel, despite counsel's physical presence at a preliminary hearing, when counsel is denied the ability to meaningfully cross-examine witnesses with first-hand knowledge of the evidence against the accused, where the Commonwealth relies solely upon hearsay evidence to establish a prima facie case, in violation of the Sixth Amendment to the United States Constitution and Article 1 Section 9 of the Pennsylvania Constitution.

Answered in the Negative below.

STATEMENT OF THE CASE

On or about March 18, 2019, Tyler Herndon ("Mr. Herndon") was charged with one (1) count of Rape Forcible Compulsion, 18 Pa. C.S.A § 3121(A)(1), one (1) count of Involuntary Deviate Sexual Intercourse Forcible Compulsion, 18 Pa. C.S.A § 3123(A)(1), one (1) count of Aggravated Assault, 18 Pa. C.S.A § 2702(A)(1), one (1) count of Strangulation, 18 Pa. C.S.A § 2718(A)(1), one (1) count of Aggravated Indecent Assault Forcible Compulsion, 18 Pa. C.S.A § 3125(A)(5), one (1) count of Unlawful Restraint Serious Bodily Injury, 18 Pa. C.S.A § 2902(A)(1), one (1) count of Indecent Assault Forcible Compulsion, 18 Pa. C.S.A § 3126(A)(2), one (1) count of Indecent Assault without Consent of Other, 18 Pa. C.S.A § 3126(A)(1), one (1) count of Simple Assault, 18 Pa. C.S.A § 2701(A)(1), and one (1) count of Recklessly Endangering Another Person, 18 Pa. C.S.A § 2705. Reproduced Record ("RR") 1a-8a.

A preliminary hearing was held before the Honorable Magisterial District Judge D. Neil McEwen on or about March 27, 2019. At the preliminary hearing, Mr. Herndon's charges were bound over for trial on evidence that was exclusively hearsay in nature. The alleged victim did not testify. Rather, the Commonwealth, in reliance on Pennsylvania Rule of Criminal Procedure 542(E), presented its evidence solely through the testimony of Pennsylvania State Trooper Zachary Julian ("Tpr. Julian") the only witness, which constitutes hearsay evidence. At the hearing, Tpr.

Julian testified that on or about March 17, 2019, he was dispatched to the Grove City Medical Center, in Grove City, Pennsylvania for a reported sexual assault involving a woman later identified as Tanya Mae Osborn ("Ms. Osborn"). RR 68a-69a.

Tpr. Julian testified that in response to his questions Ms. Osborn had said she had gone to Mr. Herndon's residence to do laundry when Mr. Herndon proceeded to rape her. RR 71a-72a. Tpr. Julian also indicated Ms. Osborn had told him that when she was in the basement of Mr. Herndon's residence, the lights were turned off and she had been pushed face down into the bed. RR 72a.

At that point, according to Tpr. Julian, Ms. Osborn said Mr. Herndon had "put some type of strap across her mouth and nose…He tied her wrists and legs with an unknown item to her…essentially connecting her wrists to her ankles." RR 72a. Ms. Osborn then indicated to Tpr. Julian that Mr. Herndon had inserted an "unknown item to her inside of her vagina." RR 72a. Tpr. Julian further testified Ms. Osborn indicated Mr. Herndon penetrated her vagina without her consent. RR 73a-74a. At some point during the interaction, Tpr. Julian indicated Ms. Osborn said Mr. Herndon "choked her out with just his hands." RR 74a.

Mr. Herndon, through defense counsel, objected to the Commonwealth's use of hearsay, through Rule 542(e), contending that Rule 542(e) directly conflicts with our Supreme Court's decision in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174 (Pa. 1990), and violated his fundamental right to Due Process.

Defense counsel further objected contending that the court's reliance on Rule 542(e) effectively denies Mr. Herndon his right to counsel. Magisterial District Judge McEwen overruled both objections, and held all charges for the Court of Common Pleas of Mercer County. RR 4a, 89a. Subsequently, on or about June 24, 2019, Mr. Herndon, through defense counsel, filed a Petition for Habeas Corpus challenging Magisterial District Judge McEwen's decision to bind the matter over to the Court of Common Pleas. RR 9a.

On or about October 16, 2019, a hearing was held before the Honorable Robert G. Yeatts, President Judge, of the Court of Common Pleas of Mercer County. At this hearing, the parties stipulated to the transcript of the preliminary hearing, and to Commonwealth's Exhibit 1, a DNA Analysis Report, dated July 23, 2019, from the Pennsylvania State Police Bureau of Forensic Services. RR 53a. The Commonwealth argued it did not rely solely upon hearsay evidence to establish a *prima facie* case. Mr. Herndon, through defense counsel, countered that the Commonwealth had relied solely on hearsay, in violation of his right to due process. Mr. Herndon also requested that if the trial court were to deny his Petition for Habeas Corpus, that the court include the statement prescribed by 42 Pa. C.S.A. § 702(b) and Pennsylvania Rule of Appellate Procedure 1311(b). RR 58a-59a.

On or about October 16, 2019, President Judge Yeatts issued an Opinion and Order of Court denying Mr. Herndon's Petition for Habeas Corpus relief. RR 23a-

26a. The trial court did, however, include the statement prescribed by 42 Pa. C.S.A. § 702(b). On October 18, 2019. RR 23a. On October 18, 2019, the Commonwealth filed a Motion to Reconsider. RR 27a. On November 12, 2019, Mr. Herndon filed his Response to the Commonwealth's Motion to Reconsider. RR 38a. On November 20, 2019, President Judge Yeatts denied the Commonwealth's Motion to Reconsider. RR 49a.

On or about November 18, 2019, Mr. Herndon filed a Petition for Permission to Appeal with the Superior Court. On or about December 2, 2019, the Commonwealth filed an Answer to Mr. Herndon's Petition for Permission to Appeal. On or about January 8, 2020, the Superior Court denied Mr. Herndon's Petition. This timely Petition for Allowance of Appeal now follows.

REASONS FOR ALLOWANCE OF APPEAL

This Honorable Court should accept this Petition for Allowance of Appeal for the resolution of two aforementioned issues. The first issue, whether permitting solely hearsay testimony at a preliminary hearing to establish a *prima facie* case violates a defendant's fundamental right to due process, has vexed courts across the Commonwealth for the last several years. To this end, Mr. Herndon now raises the same issue as was recently granted review, and eagerly awaits an imminent decision, in Commonwealth v. McClelland, 179 A.3d 2 (Pa. 2018)[1]; whether permitting exclusively hearsay testimony at a preliminary hearing to establish a *prima facie* case violates a defendant's fundamental right to due process. In addition, Mr. Herndon's second issue, relating to the right to counsel at a preliminary hearing and Rule 542(e)'s impact on that right, is one of first impression before this Honorable Court.

This Court's impending decision in McClelland accentuates the very real harm that Mr. Herndon will lose his ability to challenge the trial court's denial of his petition if he were required to wait and seek review of these issues until after

[1] ("AND NOW, this 11th day of January, 2018, the Petition for Allowance of Appeal is GRANTED. The issue, slightly rephrased for clarity, is: [W]hether the Superior Court panel failed to properly apply and follow the legal precedent set forth in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.3d 172, 174-76 (Pa. 1990) in which five (5) Justices held that 'fundamental due process requires that no adjudication be based solely on hearsay evidence.'').

disposition of his criminal case. Thus, Mr. Herndon's issues will become moot, and likely to evade judicial review on direct appeal if this Court were to deny his Petition.

I. Given this Honorable Court's imminent decision in McClelland, Mr. Herndon now seeks to preserve appellate review of his claim that Pennsylvania Rule of Criminal Procedure 542(E) violates his fundamental Right to Due Process, when the Commonwealth relied exclusively upon hearsay testimony to establish a prima facie case.

The trial court's denial of Mr. Herndon's Petition for Habeas Corpus Relief, and the Superior Court's order to deny review, directly conflicts with our Supreme Court's decision in Verbonitz. Five Justices would have held that "[f]undamental due process requires that no adjudication be based solely on hearsay evidence." Verbonitz 581 A.2d. at 174. As such, [t]he testimony of a witness as to what a third party told him about an alleged criminal act is clearly inadmissible hearsay." *Id.* The principle of Due Process "requires the conclusion that the hearsay statement of the police officer was insufficient, *vel non,* to establish a prima facie case against appellant." *Id.* at 176. Verbonitz is binding precedent as it applies to Mr. Herndon's Due Process claim.

Although not constitutionally mandated, when, by law, the state creates a preliminary hearing, certain rights, such as the right to counsel and the right to confront witnesses, necessarily attach. Pennsylvania Rule of Criminal Procedure 542(C) specifically establishes a statutory right to be present at any preliminary hearing, to be represented by counsel, cross-examine witnesses and inspect physical

evidence, call witnesses on the defendant's behalf, and offer evidence on the defendant's own behalf. While the Superior Court has chosen to view Verbonitz as non-binding, a majority of this Court would have held that constitutional principles of due process apply at preliminary hearings. Verbonitz, therefore, is a majority opinion as it pertains to the due process prohibition against using **only** hearsay evidence to establish a *prima facie* case at a preliminary hearing. *See* Commonwealth v. Ricker, 170 A.3d 494, 517 (Pa. 2017) ("Far from lacking persuasive value, the Verbonitz opinions should together be recognized as a holding that due process prohibits the Commonwealth from depriving a person of liberty upon nothing more than inadmissible hearsay.") (Wecht, J., dissenting statement)

For a *prima facie* case to rest upon nothing more than inadmissible hearsay is to offend traditional notions of due process. At such an illusory proceeding, the interests, purposes, rights and benefits of a preliminary hearing are stripped of substance or meaning. Mr. Herndon lost the ability to gain a fair assessment of the strength of the case against him; was stripped of a fair opportunity to test the Commonwealth's case via his right to cross examination, to direct his pretrial investigation, to exercise his constitutional right to an attorney in a meaningful fashion (as discussed in-depth below), and to consider intelligently his options to challenge the seizure or the acquisition of evidence in a suppression motion, or to plead guilty or proceed to trial. The practical effect of Rule 542(E), in the instant

matter, was to reduce Mr. Herndon's preliminary hearing to a mere functionless formality.

Moreover, Rule 542(E) "was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing **entirely through hearsay evidence**." Ricker, 170 A.3d at 517 (Saylor, C.J., concurring statement) (emphasis added). Moreover, Chief Justice Saylor noted in Ricker, 170 A.3d 494 (Pa. 2017) that the Court did not intend to overrule Verbonitz with the 2013 Amendment to Rule 542 by stating, "[f]rom my perspective, the 2013 amendment to the rule . . . was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing entirely through hearsay evidence. Rather, I believe the revision served only as an attempt to clarify that the 2011 amendment to the rule had not restricted the Commonwealth's ability to adduce hearsay evidence at preliminary hearings solely to offense elements requiring proof of ownership, non-permitted use, damage, or value of property." *Id.* at 507.

While the trial court maintains this Honorable Court's Ricker decision is controlling, Mr. Herndon contends the holding was limited to only deny that a constitutional right to confront an accuser existed at a preliminary hearing. The three-judge panel of the Superior Court even expressly noted its decision did "not decide the distinct question of whether there exists a constitutional due process right to confront witnesses because Rule 542(C) authorizes limited confrontation rights."

Ricker, 120 A.3d. at 362 n.7. Thus, Ricker is neither controlling nor dispositive on the issue of fundamental due process that Mr. Herndon now raises.

Moreover, were Mr. Herndon not permitted to litigate this interlocutory appeal, it is highly likely this Court would never reach the merits of the important question presented. Why? Because once his criminal case has concluded by whatever means (acquittal, conviction, guilty or nolo contendere plea), the issue will have been rendered moot and would be capable of repetition and likely to evade judicial review if this Court were to await a final order. *See, e.g.,* Commonwealth v. Walter*,* 966 A.2d 560, 565 (Pa. 2009), *citing* Commonwealth v. Lee*,* 662 A.2d 645, 650 (Pa. 1995) (deeming moot claims that evidence failed to establish prima facie case at preliminary hearing as well as that judge should have recused himself; defendant convicted); Commonwealth v. McCullough*,* 461 A.2d 1229, 1231 (Pa. 1983) (concluding that Commonwealth's failure to establish prima facie case at preliminary hearing was immaterial where it subsequently met its burden of proof beyond a reasonable doubt at trial).

Lastly, while some may point to the Superior Court's decision in Commonwealth v. McClelland, 165 A.3d 19, (Pa. Super. 2017), as controlling on the issue Mr. Herndon raises, the uncertainty surrounding the prior opinion is illustrated by this Honorable Court's granting the defendant's allowance of appeal.

Rather than being well-established precedent, the waters surrounding this issue could not be any more clouded.

This is further illustrated by a proposed amendment to Rule 542(E) currently pending for adoption. On January 2, 2019, the Supreme Court of Pennsylvania Criminal Procedure Rules Committee proposed an amendment of Rule 542(E), which specifically dictates that hearsay alone cannot establish **all** elements of a crime. In the Official Report accompanying the proposed amendment of Rule 542(E), the committee stated that "establishment of a *prima facie* case by hearsay alone, as held by the Superior Court in Ricker, was not appropriate" and "Verbonitz … is still good law and stands for the proposition that a *prima facie* case may not be found exclusively on hearsay evidence." Report: Use of Hearsay at Preliminary Hearing, Proposed Amendment of Pa.Rs.Crim.P. 542, 543, and 1003, (published January 2, 2019), page 31.

While the proposed amendment to Rule 542(E) has not yet been adopted, its very existence, along with this Honorable Court's decision to grant review and impending decision in McClelland, should cast a long shadow over the use of exclusively hearsay evidence, alone, to establish a *prima facie* case at a preliminary hearing. These two developments, combined with the obvious uncertainty created by the Supreme Court's Ricker opinions, should raise serious enough concerns about denying a defendant his right to due process at the preliminary hearing, and

demonstrate that substantial ground exits for a difference of opinion on this issue, necessitating an immediate appeal to advance the termination of the matter.

II. By permitting the Commonwealth to rely exclusively upon hearsay evidence to establish a *prima facie* case, Pennsylvania Rule of Criminal Procedure 542(E) effectively denied Mr. Herndon his right to the effective assistance of counsel at a "critical stage" of the prosecution.

At the preliminary hearing, there were no witnesses called who possessed first-hand knowledge of any criminal act committed by Mr. Herndon. As a result, Mr. Herndon's counsel was handcuffed in his ability to *meaningfully* cross examine any witness presented. As such, Mr. Herndon submits that he was effectively[2] denied counsel at the preliminary hearing.

The United States Supreme Court has held that the right to counsel is not merely limited to the presence of counsel at trial. Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932) "[T]he principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right **meaningfully to cross-examine the witnesses against him** and to have effective assistance of counsel at the trial itself." United States v. Wade, 388 U.S. 227, 226, 87 S.Ct. 1926, 1932 (1967). Moreover, this Honorable Court has held that, "[i]t is axiomatic that the

[2] Or, perhaps, *ineffectively*.

right to counsel **includes the concomitant right to effective assistance of counsel**. Commonwealth ex rel. Washington v. Maroney, 235 A.2d 349 (Pa.1967). Indeed, **the right to counsel is meaningless if effective assistance is not guaranteed**." Commonwealth v. Albert, 561 A.2d 736, 738 (Pa.1989) (emphasis added).

Finally, in Coleman v. Alabama, 399 U.S. 1, 26 L.Ed.2d 387 (1970), the United States Supreme Court very clearly outlined four meaningful ways that counsel may effectively assist an accused at a preliminary hearing:

> "First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over.
>
> Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial.
>
> Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.
>
> Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail."

Id. at 9, 2003. (character returns added).

In the case at bar, the testimony of Trooper Julian, as it related to the charges levied against Mr. Herndon, was unequivocal hearsay. The bulk of his testimony simply recounted the statements made to him by the alleged victim. In fact, on cross

examination, Trooper Julian indicated that, among other things, it was unknown to him whether the contact between Mr. Herndon and the victim was even consensual. This is not surprising, however, because *Trooper Julian did not and does not possess first-hand knowledge as to whether a crime was actually committed!* Thus, the truthful answer, which he gave, was essentially, 'I don't know' or 'That's what I was told'.

The undersigned can't help but wonder how the cross examination of Trooper Julian, under any circumstance, can be deemed effective or meaningful. He has no first-hand knowledge of the events. Thus, cross examining him could not:

1. Expose any fatal weakness in the Commonwealth's case;
2. Be used as an impeachment tool at trial; or
3. Help trained counsel more effectively discover the Commonwealth's case against the defendant and prepare a case for trial.[3]

To be sure, Trooper Julian was able to testify as to his first-hand knowledge of how he obtained a search warrant and collected physical evidence at the alleged scene. However, this testimony was substantively immaterial as to whether a crime was committed and whether Mr. Herndon committed it. As a result, how can defense counsel's questioning of Trooper Julian be said to be meaningful?

[3] It appears to the undersigned that the fourth "prong" of Coleman was not relevant or ripe in this instance as Mr. Herndon had already posted bail and no modification of bail was requested.

Mr. Herndon's defense counsel was prohibited from meaningfully cross examining any fact witnesses at the preliminary hearing. How does counsel *meaningfully* cross examine a witness, who has no first-hand knowledge on a matter, about a matter that requires first-hand knowledge?[4] The substantive effect, despite counsel's physical presence at the preliminary hearing, was the same as though counsel had not been present at all. Thus, Mr. Herndon submits that Rule 542(e) effectively denied him of his right to counsel at the preliminary hearing.

[4] This is akin to asking a doctor to perform surgery without a scalpel; a firefighter to put out fires without a hose; an accountant to count without math, etc.

PRAYER FOR RELIEF

For the reasons of law and fact, the Petitioner, Tyler Herndon, respectfully requests that this Honorable Court allow an appeal from the Order of the Superior Court of Pennsylvania, entered on January 8, 2020, denying Mr. Herndon's Petition for Permission to Appeal from the Opinion and Order entered October 16, 2019 in the Court of Common Pleas of Mercer County, Pennsylvania, at CP-43-CR-569-2019, denying Mr. Herndon's Petition for Habeas Corpus Relief.

Respectfully Submitted:

WORGUL, SARNA & NESS, LLC

By:___/s/ Matthew Ness____
Matthew Ness, Esquire
PA I.D. No. 208026

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted:

WORGUL, SARNA & NESS, LLC

By:___/s/ Matthew Ness____
Matthew Ness, Esquire
PA I.D. No. 208026

APPENDIX A

Filed 01/08/2020

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	Mercer County Criminal Division
V.	:	CP-43-CR-0000569-2019
	:	
	:	
	:	
TYLER WILLIAM HERNDON	:	No. 153 WDM 2019

ORDER

The Court hereby **DENIES** the petition for permission to appeal and the answer filed thereto.

PER CURIAM

APPENDIX B

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
-vs-	:	569 Criminal 2019
TYLER WILLIAM HERNDON	:	

ADJUDICATION

AND NOW, this 16th day of October, 2019, this matter coming before the Court on the defendant's Motion for Habeas Corpus Relief, and after consideration of the motion and attachments, including the transcript from the preliminary hearing, which the parties stipulated to, and the Commonwealth's Exhibit 1; and after further consideration of argument, THE COURT FINDS as follows:

FACTUAL BACKGROUND:

On or about March 18, 2019 the defendant was charged with one count of rape, one count of involuntary deviate sexual intercourse, one count of aggravated assault, one count of strangulation, one count of aggravated indecent assault, one count of unlawful restraint, two counts of indecent assault, one count of simple assault, and one count

of recklessly endangering another person.

The preliminary hearing was held before a Magisterial District Judge on or about March 27, 2019. The Commonwealth called one witness, that being Pennsylvania State Police Trooper Zachary Julian. Trooper Julian had been dispatched to the Grove City Medical Center for a reported sexual assault involving the victim. Trooper Julian testified that he met the victim at the hospital, at which time she provided certain information. Trooper Julian testified at the preliminary hearing as to the statements given by the victim. The victim did not testify, nor was she present at the preliminary hearing.

As a result of the statement, Trooper Julian obtained a search warrant for the defendant's home. Trooper Julian executed that search warrant and located and seized certain items, including but not limited to a used condom, sex toys, and other items, all having been described by the victim. These items were not produced at the preliminary hearing.

Defense argues that the Commonwealth cannot rely solely on hearsay evidence at a preliminary hearing to establish a prima facia case. Defense argues further that should the Court deny his petition, that the Court should authorize an interlocutory appeal pursuant to 42 Pa. C.S.A. §702.

The Commonwealth argues that it did not rely solely on hearsay evidence, but also on the items found and seized pursuant to the search warrant, which corroborates the statement of the victim. The Commonwealth also argues that it now has a DNA report from the Pennsylvania Crime Lab.

THE COURT NOTES that the Commonwealth relies on the case of Commonwealth vs. Ricker, 170 A.3d 494 (Pa. 2017). THE COURT FINDS that although the Commonwealth did produce testimony regarding certain items seized at the defendant's home, which tend to corroborate the statement given by the victim to the police officer, the Commonwealth is solely relying on hearsay to establish the consent element for the sexual offenses and the mens rea element for the offenses of simple assault and recklessly endangering another person. However, THE COURT FINDS that the Commonwealth did establish a prima facia case and the defense motion will be denied. The Court does note that the issue raised in this matter is pending before the Pennsylvania Supreme Court and does involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the matter, and the Court will enter an appropriate order.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs. NO. ____ WAL 2020

TYLER HERNDON,
Appellant.

PROOF OF SERVICE

I hereby certify that I am this day serving the within attached document upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.App.P. 121:

Hon. Robert G. Yeatts, P.J.
Mercer County Courthouse
Mercer, PA 16137-1295

Peter A. Morin, Esq.
Court Administrator
3rd Floor Mercer County Courthouse
Mercer, PA 16137

Tyler Herndon
2495 Mercer Street
Stoneboro, PA 16153

Jacob Sander, Esquire
Mercer County District Attorney's Office
209 Mercer County Courthouse
Mercer, PA 16137-1295

Kathleen M. Koos
Clerk of Courts
1112 Mercer County Courthouse
Mercer, PA 16137

_/s/ Matthew Ness_____
Matthew Ness, Esquire

APPENDIX H

(Denial of Petition for Allocatur)

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 7 WM 2020
Respondent	:	
v.	:	
TYLER WILLIAM HERNDON,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 2nd day of June, 2020, the Petition for Allowance of Appeal, treated as a Petition for Review, is DENIED.

CERTIFICATE OF COMPLIANCE

No. _____

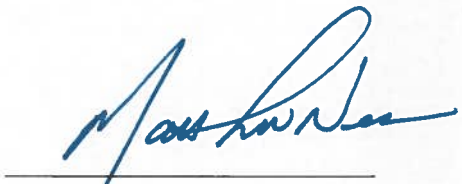
TYLER HERNDON
Petitioner
v.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the within Petition for a Writ of Certiorari contains 3,833 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 2, 2020



Matthew Ness
Counsel for Petitioner
PA. I.D. No. 208026

CERTIFICATE OF SERVICE

I, Matthew Ness, on this 2nd day of July, 2020, do hereby certify that I am serving three (3) copies of the within Petition for Writ of Certiorari to the Supreme Court of Pennsylvania in the manner indicated below which service satisfies the requirements of Supreme Court of the United State Rule 29:

Service by First Class Mail addressed as follows:

Jacob Sander, Esquire
Mercer County District Attorney's Office
209 Mercer County Courthouse
Mercer, PA 16137-1295
(724) 662-7587

Dated: July 2, 2020

Matthew Ness
Counsel for Petitioner
PA. I.D. No. 208026

Worgul, Sarna & Ness
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