Volume I.

Johnathan Robins

v

Superintendent of Rockview, et. al.

BLD-228 July 22, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-1556**

JOHNATHAN ROBINS, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI, ET AL.

(E.D. Pa. Civ. No. 2:18-cv-01385)

Present: AMBRO, SHWARTZ, and PORTER, Circuit Judges

Submitted are:

(1) Appellant's motion to have Appellee provide a copy of his presentencing report

(2) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(3) Appellant's brief, construed as a document in support of the application for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

Robins' request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would agree, without debate, that Robins' claims regarding his 18 Pa. Cons. Stat. § 3123(a)(7) conviction, his purported marriage, the cumulative effect of errors, and ineffective assistance of counsel lack sufficient merit for substantially the reasons in the Magistrate Judge's report and recommendation, as adopted by the District Court. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Regarding Robins' argument that his due process rights were violated by the trial judge's comments after Robins presented evidence of welfare fraud and his custody dispute with

Ex. F

the victim, jurists of reason would also agree that this argument lacks merit, as the record shows that the trial judge did not instruct the jury to disregard that evidence or that it was irrelevant. Finally, jurists of reason would agree that Robins' claim of error during his PCRA proceedings is not cognizable on habeas review. See Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004). Robins' motion requesting a copy of his presentencing report is denied. We note that 3d Cir. L.A.R. 30.3(c) does not apply to this appeal.

By the Court,

s/ David J. Porter
Circuit Judge

Dated: July 27, 2021
Lmr/cc: Johnathan Robins
David Napiorski

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHNATHAN ROBINS,	:	
	:	
	:	**CIVIL ACTION**
	:	
v.	:	**NO. 18-1385**
	:	
SUPERINTENDENT OF ROCKVIEW SCI *et al.*,	:	
	:	
	:	
	:	

ORDER

AND NOW, this __22nd__ day of February 2021, upon consideration the Petition for Writ of Habeas Corpus (ECF 1), the Commonwealth's Response (ECF 46), Petitioner's Reply to the first Response (ECF 47), the other documents filed by the parties, the state court record, and after review of the Report and Recommendation of United States Magistrate Judge Jacob B. Hart (ECF 55) and Petitioner's Objections to the Report and Recommendation (ECF 58) **IT IS HEREBY ORDERED AND DECREED** that:

1. The Report and Recommendation is **APPROVED AND ADOPTED**;
2. The Petition for a Writ of Habeas Corpus is **DENIED**, without an evidentiary hearing; and
3. Furthermore, a certificate appealability is **DENIED**.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

Ex. G

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

COMMONWEALTH	:	CP-51-CR-0003430-2009
v.	:	
JOHNATHAN ROBINS	:	

ORDER

AND NOW, this **27th** day of **April, 2016**, this Court having determined that the issues raised by Petitioner in his Post Conviction Relief Act Petition have no standing. This matter is dismissed, pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super.1988). 907 Notice previously sent. Petitioner may proceed on appeal on a *pro* se basis or with retained counsel. Petitioner has 30 days from today to file an appeal.

BY THE COURT:

CHARLES J. CUNNINGHAM, III J.

EX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHNATHAN ROBINS,	:	
	:	CIVIL ACTION
Petitioner,	:	
v.	:	
	:	NO. 18-1385
SUPERINTENDENT OF ROCKVIEW SCI, et al.,	:	
	:	
Respondents.	:	FILED JAN 14 2020

REPORT AND RECOMMENDATION

JACOB P. HART, U.S.M.J **January 13, 2020**

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Johnathan Robins ("Petitioner" or "Robins"), a prisoner incarcerated at the State Correctional Institution - Rockview in Bellefonte, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

On March 12, 2010, following a jury trial presided over by the Honorable Charles J. Cunningham, III, of the Philadelphia County Court of Common Pleas, Robins was convicted of involuntary deviate sexual intercourse ("IDSI"), statutory sexual assault, and unlawful contact with a minor. On June 29, 2010, Robins was sentenced to a mandatory minimum of 10 to 20 years on the IDSI charge, and one to five years each on the charge of unlawful contact with a minor and on the charge of statutory sexual assault, all to served consecutively, for an aggregate term of confinement of 12 to 30 years.

The trial court summarized the evidence at trial as follows:

> The complaining witness, E.J., testified that as of the date of trial, she was seventeen years old. She stated her date of birth as July 30, 1992 (N.T., 3/11/10,

ENT'D JAN 14 2020

EX. A

pg. 40). She also testified that she had a two year old child born on February 20, 2008, identifying [Robins] as the father of the child. (N.T., 3/11/10, pgs. 40, 41, 43)

E.J. testified that she met [Robins] in early January 2007 through a telephone chat line. (N.T., 3/11/10, pg. 49.) Although the chat line was restricted to parties eighteen years or older, she told [Robins], during their initial conversation, that she was fourteen years old. At this time, [Robins] refused to divulge his age, but indicated that E.J.'s age presented no problem for him saying, "it wouldn't mater how old you were, if I find a woman I will treat them the same because they all get, they all should be treated the same." (N.T., 3/11/10, pg. 53.)

Shortly after this initial conversation, E.J. and [Robins] met and had dinner together, after which they went to a movie. (N.T., 3/11/10, pg. 54.) E.J. testified that at the end of this first dinner together, [Robins] reluctantly told her he was thirty nine year old. (N.T., 3/11/10, pg. 52.) E.J. testified that she and [Robins] communicated frequently, that she spent time in [Robin's] home, and that they went shopping for clothes for her. (N.T., 3/11/10, pgs. 55, 56, 60, 63.)

E.J. testified that she and [Robins] first engaged in sexual intercourse in [Robin's] home in March 2007. (N.T., 3/11/10, pg. 64, 66, 68.) After this initial encounter, she and [Robins] had sexual relations "a couple times out of a month." (N.T., 3/11/10, pg. 70) In addition to vaginal sex, E.J. testified hat she and [Robins] also engaged in oral sex, describing these sexual acts in detail. (N.T., 3/11/10, pgs. 70-73.)

E.J. testified that she became pregnant on Mother's Day of 2007 as a result of her relationship with [Robins]. (N.T., 3/11/10, pg. 72.) She stated that she was scared and was afraid to tell her mother. In addition, she considered having an abortion but [Robins] talked her out of it saying there's "no need for that if I'm going to be here helping you." (N.T., 3/11/10, pg. 74.) E.J. moved into [Robin's] home in October or November of 2007, after it was confirmed that she was nineteen weeks pregnant. (N.T., 3/11/10, pg. 75.)

In early July of 2007, E.J. testified that [Robins] took her to Florida to celebrate her fifteenth birthday. (N.T., 3/11/10, pg. 77.) E.J. testified that, prior to going to Florida, [Robins] took her to his sister's wedding reception in Atlantic City in June of 2007 to meet his family. (N.T., 3/11/10, pg. 111.)

On January 15, 2008, [Robins] told E.J. they were flying to St. Louis, Missouri to get married. When she asked him why not wait until she was sixteen or eighteen, [Robins] responded "we can do it now to stop your mom from getting in between, like, what we trying to do." (N.T., 3/11/10, pg. 80.) In applying for the marriage license in Missouri, E.J. testified that he used a fake South Carolina driver's license, indicating that she was twenty three years old. She testified that at sometime prior to January of 2008, [Robins] took her to a check cashing

> establishment in Philadelphia to obtain this false identification. (N.T., 3/11/10, pg. 84.)
>
> ...
>
> [Robin's] testimony essentially mirrored that of E.J. [Robins] testified that he met E.J. on a dating phone line for adults over the age of eighteen. After talking on the phone, the met for dinner and talked about having a family. (N.T., 3/12/10, pgs. 15-17.) [Robins] admitted that sometime after their meeting that "yes we did have intercourse." (N.T., 3/12/10, pg. 18.) [Robins] testified on cross examination that he also engaged in oral sex with E.J. (N.T., 3/12/10, pg. 54.) Attempting to down play this aspect of their relationship, he testified that they were hen trying to have a baby. (N.T., 3/12/10, pg. 55.)
>
> [Robins] testified that after E.J. became pregnant, he wanted to marry her before the child was born. (N.T., 3/12/10, pg. 20.) [Robins] testified that he researched the marriage laws of both Pennsylvania and Missouri before deciding to take [E.J.] to Missouri to get married. (N.T., 3/12/10, pg. 60.) [Robins] testified that he chose to marry [E.J.] in Missouri because it does not require a three day waiting period and "I could do it in one day." (N.T., 3/12/10, pg. 25.) [Robins] testified that it wasn't until January of 2008, after they returned from Missouri that he learned E.J.'s true age. (N.T., 3/12/10, pg. 26.)

Trial Court Opinion (October 20, 2010) at 4-7.

On July 15, 2010, Petitioner filed a direct appeal in the Pennsylvania Superior Court, raising claims of (1) insufficiency of the evidence, (2 improper restriction of his pro se cross-examination of the complainant, and (3) improper denial of his request to instruct the jury on the marriage laws of Missouri. The Pennsylvania Superior Court affirmed his judgment of sentence on August 5, 2011. Commonwealth v. Robins, No. 2000 EDA 2010 at 5 (Pa. Super. 2011). Robins filed a Petition for Allowance of Appeal on August 31, 2011, which the Pennsylvania Supreme Court denied on January 20, 2012.

On January 30, 2012, Robins filed a pro se petition for post-conviction relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 et seq. After counsel was appointed, Robins expressed a desire to represent himself and the court conducted a hearing pursuant to Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998). On June

19, 2014, at the conclusion of the Grazier hearing, the court granted Robin's request to proceed pro se. Robins filed an amended petition on September 19, 2014 and an addendum on July 27, 2015. On April 27, 2016, the PCRA court dismissed the petition. On September 27, 2017, the Pennsylvania Superior Court affirmed the dismissal. The Pennsylvania Supreme Court denied Robins' petition for allowance of appeal on March 14, 2018.

Robins filed a prior federal petition for habeas corpus in this court, which was dismissed without prejudice to allow him to exhaust his remedies in state court on October 15, 2015. (Civ. Action No. 15-1059). Robins returned to this court and filed the present petition for writ of habeas corpus on April 2, 2018, alleging the following grounds upon which he seeks relief:

(1) "Petitioner was charged with §3123(a)(1), not found guilty of it, but was sentenced to it; Petitioner was found guilty of §3123(a)(7) but not charged with it", resulting in a Constitutional violation";

(2) "Court did not merge lesser-included offenses giving Petitioner an illegal sentence of 12 to 30 years";

(3) "Petitioner was sentenced under mandatory minimums which have been ruled unconstitutional";

(4) "Court refused to admit marriage license and marriage law into evidence to prove Petitioner and Complainant were married";

(5) "Trial court refused to allow Petitioner to put forward affirmative marriage defense";

(6) "Trial court refused to instruct jury on marriage defense";

(7) "Trial court made prejudicial statements about Petitioner's marriage and other testimony Petitioner was trying to present";

(8) "Cumulative Effect of Errors";

(9) "It was a violation of Petitioner's Constitutional rights to classify him as a predator and require him to register";

(10) "Sentencing and Appellate Counsel on direct appeal was ineffective for not raising the above issues"; and

(11) "Trial Court violated Petitioner's pro se rights during PCRA process."

Petition (Doc. No. 1 at 7-23).

Respondent argues that all of Robins' claims should be dismissed with prejudice because the claims are procedurally defaulted, not cognizable, or were reasonably rejected by the state court and lack merit. As more fully discussed below, this Court agrees that none of Robins' claims warrant habeas relief and recommends that his petition be denied.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Issuance of a Writ of Habeas Corpus

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly limited the federal courts' power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

1. Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

2. Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court has made clear that a writ may issue under the "contrary to" clause of Section 2254(d)(1) only if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides

a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court "unreasonably applies it to the facts of the particular case." Id. This requires a petitioner to demonstrate that the state court's analysis was "objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

Further, state court factual determinations are given considerable deference under the AEDPA. Lambert v. Blackwell, 387 F.3d 210, 239 (3d Cir. 2004). A petitioner must establish that the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

B. Exhaustion and Procedural Default

"[A] federal habeas court may not grant a petition for writ of habeas corpus unless the petitioner has first exhausted the remedies available in the state courts." Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The procedural default barrier, in the context of habeas corpus, precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . ." Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

1. Exceptions to Procedural Default

To survive procedural default in the federal courts, a petitioner must either "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

a. Cause and Prejudice Exception

A showing of cause demands that a petitioner establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available to counsel; or (2) a showing that "some interference by officials" made compliance with the state procedural rule impracticable. Murray v. Carrier, 477 U.S. 478, 488 (1986). Once cause is proven, a petitioner must also show that prejudice resulted from trial errors that "worked to [petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494.

b. Fundamental Miscarriage of Justice Exception

To establish the fundamental miscarriage of justice exception, the petitioner must demonstrate his or her "actual innocence." Schlup v. Delo, 513 U.S. 298, 324 (1995); Calderon v. Thompson, 523 U.S. 558, 559 (1998). A demonstration of actual innocence requires the petitioner to present new, reliable evidence of his or her innocence that was not presented at trial. Schlup, 513 U.S. at 324. The new evidence must be considered along with the entire record, including that which was excluded or unavailable at trial. Id. at 327-28. Once such evidence is presented, the petitioner's defaulted claims can only be reviewed if "it is more likely than not

that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of the new factual evidence. Id. at 327.

C. Ineffective Assistance of Legal Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 686–88, 693–94.

First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. at 688. The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Because of the difficulties in making a fair assessment, eliminating the "distorting effect" of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). It is well-established that counsel cannot be ineffective for failing to raise a meritless claim. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d 706, 730 (E.D. Pa. 2001).

To satisfy the second prong of the Strickland analysis, a defendant must establish that the deficient performance prejudiced the defense. This showing requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is

reliable. Strickland, 466 U.S. at 687. More specifically, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. DISCUSSION

A. Claim that he was Convicted of a Crime with which he was not Charged

In his first claim, Petitioner alleges that he was convicted of a crime with which he was not actually charged. He alleges that he was charged with § 3123(a)(1) (engaging in involuntary deviate sexual intercourse with a complainant by forcible compulsion), but was found guilty of § 3123(a)(7) (engaging in deviate sexual intercourse with a complainant who is less than 16 years of age while being four or more years older than the complainant outside of marriage), resulting in a Constitutional violation.

The Pennsylvania Superior Court initially found that the claim was waived under the Post-Conviction Relief Act because Petitioner failed to object to the jury instruction based on IDSI subsection (a)(7). Because the claim could have been challenged at trial and was not, the claim was waived and could not be addressed by the PCRA court. The court also found that the record does not support Robins' claim because he was given the requisite notice that he was being charged with subsection (a)(7) and the mistake of age defense he asserted was only applicable to that subsection. Superior Court Op. at 5 (Doc. No. 1 at 44).

As a result of the Superior Court's finding that the claim was waived, the claim is procedurally defaulted. Furthermore, as the state court found, Robins was not deprived of his constitutional rights in this regard. Actual notice of the charges against him is the key to a

defendant's Sixth and Fourteenth Amendment right to a sufficient indictment or information. Henry v. Coleman, Civ. A. No. 14-6833, 2016 WL 11000055 at *12-13 (E.D. Pa. Dec. 28, 2016) report and recommendation adopted Civ. A. No. 14-6833, 2018 WL 1317763 (E.D. Pa. Mar. 13, 2018) (citing Stephens v. Borg, 59 F.3d 932, 934-6 (9th Cir. 1995), Hulstine v. Morris, 819 F.2d 861, 863-4 (8th Cir. 1987)); Howerin v. Vorous, Civ. A. No. 16-394-GMS, 2016 WL 6080196 at *3 (D. Del. Oct. 14, 2016); see also Blount v. Coleman, Civ. A. No. 13-3094, 2014 WL 5317766 at *4 (E.D. Pa. Oct. 17, 2014),

In fact, a deficient information or indictment need not result in a deprivation of due process, where a defendant otherwise receives actual notice of the charges against him. Blount, 2014 WL 5317766 at *4. Reasonable notice is that which "sufficiently apprises the defendant of what he must be prepared to meet." Howerin, 2016 WL 6080196 at *3 (citing Russell v. United States, 369 U.S. 749, 763 (1962)).

The state court found that he had notice of the charges being brought against him. Although the Bills of Information formally charged him with IDSI by Forcible Compulsion pursuant to 3123(a)(1), the description of the criminal conduct in Count I included elements of both charges. Therefore, the court concluded that Robins was put on notice that the Commonwealth would be prosecuting him under both sections. In addition, the state court found that the Commonwealth also properly "orally amended the Bills of Information and advised the court that it was proceeding only under 18 Pa. Cons. Stat. § 3123(a)(7) with respect to count one. [Robins] then engaged the Court in a lengthy discussion of his proposed mistake of age defense, which would only be a defense to a charge pursuant to 18 Pa.C.S.A. §3123(a)(7) and not § 3123(a)(1)." PCRA Court Op at 7. The jury was instructed on the IDSI charge only pursuant to 18 Pa. Cons. Stat. Ann. §3123(a)(7). The state court found that although the verdict sheet listed

the wrong section, it is clear that the jury returned a guilty verdict on 18 Pa. Cons. Stat. Ann. §3123(a)(7), in accordance with the Court's instructions.

Even if the claim was not defaulted, the state court's finding that it lacks merit is not contrary to or an unreasonable determination of the clearly established federal law and the decision was not based upon an unreasonable determination of the facts. Accordingly, the claim must be denied.

B. Trial Court's Failure to Merge Convictions for Sentencing

Petitioner argues that his sentences should have merged because they arose from the same criminal act. He raised this claim in his PCRA petition and the Superior Court recognized the claim as one challenging the legality of his sentence. The court found that Robins offered no support for his claim that all of the criminal conduct charged arose from one criminal act and found that the record belies that contention. The court stated that "[t]he IDSI charge related to oral sexual intercourse with the fourteen-year-old complainant that occurred on a different occasion from the statutory sexual assault, which involved vaginal sexual intercourse on numerous occasions prior to the purported marriage in Missouri." Super. Court Op. at 7 (Doc. No. 1 at 46). The court also noted that the remaining charges involved different conduct at various times during 2007 and 2008. Furthermore, the court found that pursuant to the state statute governing merger, even if the crimes arose from a single criminal act, the sentences would only merge for sentencing if the elements of the lesser-included offenses were included in the statutory elements of the other offenses. Id. The state court concluded that Robins had ignored the merger analysis and found the claim lacked merit.

As Respondent notes, Robins has not argued that the state court's findings as to this claim are contrary to or an unreasonable determination of clearly established federal law or based upon

an unreasonable determination of the facts in this case. He does not even refer to federal law. The claim must be denied.

C. Constitutional Challenge to Mandatory Minimum Sentence

Robins alleges that he was sentenced to a mandatory minimum sentence of 10 to 20 years under subsection 3123(a)(7) and that this was later declared unconstitutional in Commonwealth v. Hopkins, 117 A.3d 247 (Pa. 2015), while his PCRA petition was pending. As Respondent notes, in his PCRA petition Robins argued that the mandatory minimum sentence was unconstitutional pursuant to federal law, citing Alleyne v. United States, 570 U.S. 99 (2013). However, in his federal petition, he now argues only on state law grounds. His claim based on state law is not cognizable on habeas review. See Estelle v. McGuire, 502 U.S. 62, 68 (1991) (holding that "federal habeas corpus relief does not lie for errors of state law").

Even interpreting his claim as one based on federal law, it must still be denied. As the Superior Court held, Alleyne does not apply to Robins' case because his judgment of sentence became final about a year before the Supreme Court decided the case and Alleyne does not apply retroactively to cases on collateral review. United States v. Reyes, 755 F.3d 210, 212 (3d Cir. 2014). The state court's findings are not contrary to clearly established federal law and do not involve an unreasonable application of facts. The claim must be denied.

As Respondents note in their amended response, although Robins did not mention it, the Pennsylvania Supreme Court held in Commonwealth v. Wolfe, 140 A.3d 651 (Pa. 2016) that the Pennsylvania statute requiring a mandatory minimum sentence for convictions of IDSI, 42 Pa. Cons. Stat. §9718, was unconstitutional. Id. at 661. However, in addition to the fact that this case is not clearly established federal law, it also does not affect Robin's case because it involves the application of Alleyne. Unlike Robins, the defendant in Wolfe was sentenced after Alleyne

was decided. The Pennsylvania Supreme Court subsequently held that Alleyne is not to be applied retroactively to cases on collateral review where the judgement has become final. Commonwealth v. Washington, 142 A.3d 810, 820 (Pa. 2016). Therefore, even under Pennsylvania law, Robins is not entitled to relief.

D. Claims Involving the Trial Court's Refusal to Allow Petitioner to Submit Marriage Evidence to the Jury (Claims 4-7)

Each of Robins' next four claims involve the trial court's refusal to allow him to submit evidence related to his marriage in Missouri. In his PCRA petition Robins asserted the same claims of trial court error for (1) refusing to admit the marriage license; (2) refusing to permit an affirmative defense of marriage; (3) refusing to instruct the jury on a marriage defense; and (4) for making prejudicial comments about the marriage. The Superior Court found that these claims were either previously litigated or waived. The court found that the claims had been litigated on direct appeal and the trial court had rejected the evidence because it was irrelevant. Sup. Ct. Op 9/27/17 at 9 (Doc No. 1 at 48).

On direct appeal, the Superior Court indicated that Robins' claim that he believed he was married to the complainant under Missouri law was irrelevant because he committed the criminal conduct prior to the alleged marriage in Missouri. Sup. Ct. Op 8/5/2011 at 8. The court also addressed Robins' claim that the jury should have been instructed on the marriage laws of Pennsylvania and Missouri. The Court found that the trial court had properly denied Robins' request to give the requested instructions because the issue was irrelevant to the facts presented in the case and noted that Petitioner committed the crimes prior to the claimed Missouri marriage. Id. at 8-9.

As Respondent argues, Robins fails to make any argument that the Superior Court's findings were contrary to or involved an unreasonable application of clearly established federal

law. Respondent notes that throughout the trial the trial judge attempted to tell Robins that the evidence pertaining to the alleged marriage was not relevant. Robins claims that the marriage took place in January 2008. Even according to his own testimony, he testified that he engaged in vaginal and oral sex with the complainant on various occasions between 2007 and 2008. Therefore, the court's finding that evidence related to the alleged January 2008 marriage is not relevant given that he admitted to committing the criminal conduct on multiple occasions prior to that date is entirely supported by the record. Furthermore, as noted by Respondent, the alleged marriage defense would not have helped him since the marriage license could not be valid and was obtained using false information. Even the certificate that Robins attached to his petition contains language that says the complainant "is over the age of eighteen years." Doc. No. 1 at 24.

Petitioner sought by way of a separate motion to obtain discovery regarding Missouri marriage law. He argued that he needed to obtain Missouri marriage law to respond to Respondent's Answer because Respondent referenced Missouri marriage law in the Response. Respondent notes in a footnote that Petitioner and Complainant were never in fact married because the evidence shows that complainant used a false identification, making the marriage license void. Respondent also notes that "A forty-one year old man cannot legally marry a fifteen year old girl absent parental consent and/or a court order in any state in this country, including Missouri." Respone at 15, n.1. Respondent argued that even if Robins had testified and the jury believed that he had not touched the complainant until after the alleged marriage, which was not the case, the marriage was void and the proposed marriage defense was therefore meritless. Id. This was an alternate argument since as noted, Robins admitted to the criminal conduct on multiple occasions in 2007. In addition to Missouri marriage law not being relevant,

Robins has already filed a Reply to Respondent's Response in this matter. By a separately docketed order the motion for discovery from a third party is denied.

Robins is not entitled to habeas relief on any of these claims. He has failed to demonstrate that the state court's findings were contrary to or an unreasonable application of clearly established federal law.

E. Cumulative Error

Next, Robins alleges that the accumulated errors of the trial court alleged in his first seven claims resulted in an unfair trial. Pursuant to the cumulative error doctrine, errors that do not individually warrant habeas relief may do so when combined if their cumulative prejudice undermines the fundamental fairness of the trial. Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008); Albrecht v. Horn, 485 F.3d 103, 139 (3rd Cir. 2006). In evaluating the cumulative prejudicial effect, the substantial and injurious effect standard applies. Albrecht, 485 F.3d at 139. One way of asking the prejudice question is whether the "cumulative prejudice resulting from the errors ... undermined the reliability of the verdict." Id.

The Superior Court rejected Robins' cumulative error claim finding that there was no cumulative effect to consider. Sup. Ct. Op. 9/27/17 at 10 (Doc. No. 1 at 49). Since, as set forth above, the other claims of error are meritless, the state court's finding is not contrary to or an unreasonable application of clearly established federal law. The claim must be denied.

F. Trial Court Error for Requiring Petitioner to Register Under SORNA

Robins claims that the trial court erred by requiring him to register under the Sex Offender Registration and Notification Act ("SORNA") because he was found not to be a Sexually Violent Predator ("SVP"). The Pennsylvania Superior Court found that this claim was waived because Robins could have raised it on direct appeal, but he failed to do so. Id. Since

the state court's finding of waiver is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment, the claim is procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 729 (1991). Robins has not established cause and prejudice and certainly has not produced any evidence of his actual innocence to prove a miscarriage of justice in order to excuse the default.

Furthermore, even though the claim was waived, the Pennsylvania Superior Court noted that Robins' claim was based on a faulty premise since registration requirements under SORNA do not apply solely to SVPs and four of Robins' convictions carry a registration requirement. Sup. Ct. Op. 9/27/17 at 11 (Doc. No. 1 at 50). The claim must be denied because in addition to being procedurally defaulted, Robins' claim lacks merit and does not even allege that the state court's finding was contrary to or an unreasonable application of clearly established federal law.

G. Ineffective Assistance of Appellate Counsel for Failing to Raise the Above Issues

Robins argues in his next claim that his appellate counsel was ineffective for failing to raise all of the above nine claims. The Pennsylvania Superior Court addressed this claim on appeal from the denial of his PCRA petition. The court found that his claims of ineffective assistance of appellate counsel as they pertained to his claims related to the marriage defense were not subject to PCRA review. Doc. No. 1 at 36. Accordingly, these claims were not properly presented to the state courts and are now procedurally defaulted since they have been denied on independent and adequate state law grounds. Petitioner has not set forth the necessary cause and prejudice to excuse the default and has not presented any evidence of a fundamental miscarriage of justice. In addition to the fact that the claims are defaulted, they also lack merit given that Robins' appellate counsel cannot be ineffective for failing to raise meritless claims.

The Superior Court addressed the remaining claims on the basis that the underlying claims lacked merit, noting that failure to raise a meritless claim is not ineffective assistance of counsel. Id. at 37. This finding is entirely consistent with clearly established federal law. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d at 730. This claim must also be denied.

H. Violation of Robins' Pro Se Rights by PCRA Court

Finally, Robins alleges that the trial court violated his pro se rights during the PCRA proceedings. He claims that although the PCRA court told him at the Grazier hearing that he could proceed pro se, the court did not issue an order, refused to address the issue of obtaining records, allowed counsel to remain, did not allow petitioner to attend hearings on certain dates, and allowed counsel to file a Finley letter.

The Superior Court agreed with the trial court in its finding that Robins' claim was "nonsensical and wholly unsupported on the record." Sup. Ct. Op. 9/27/17 at 11 (Doc. No. 1 at 50), citing Trial Ct. Op, 11/10/16 at 14. The court agreed with the trial court's finding that the claim was frivolous given that the trial court granted Robins the right to proceed pro se after a Grazier hearing and he then filed his PCRA petition, amended petition, and a merits brief without the assistance of counsel. Id. at 51. The Superior Court also found that after a thorough review of the record, there was no support for Petitioner's claim that he was not permitted to attend hearings on the dates he mentioned and that the record established that there were no hearings conducted in his absence.

As Respondents argue, Robins has not presented anything to clarify this claim. Robins has failed to demonstrate that he is entitled to relief. Once again, he fails to even argue that the

state court's finding was contrary to or an unreasonable application of clearly established federal law. Therefore, the claim lacks merit and must be denied.

IV. CONCLUSION

For all of the foregoing reasons, Robins' habeas petition should be denied in its entirety. Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 13th day of January, 2020, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED and DISMISSED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. **The Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.**

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHNATHAN ROBINS,	:	
	:	CIVIL ACTION
Petitioner,	:	
v.	:	
	:	NO. 18-1385
SUPERINTENDENT OF ROCKVIEW SCI, et al.,	:	
	:	
Respondents.	:	

PATRESE B. TUCKER, J.,

AND NOW, this day of , 2020, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for a writ of habeas corpus is DENIED.

3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____

PATRESE B. TUCKER, J.

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
JOHNATHAN ROBINS	
Appellant	No. 2047 EDA 2016

Appeal from the PCRA Order April 27, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003430-2009

BEFORE: BOWES, J., SHOGAN, J., AND STEVENS, P.J.E.,*

MEMORANDUM BY BOWES, J.: **FILED SEPTEMBER 27, 2017**

Johnathan Robins appeals from the April 27, 2016 order dismissing his PCRA petition. We affirm.

Appellant was convicted of involuntary deviate sexual intercourse (IDSI), statutory sexual assault, unlawful contact with a minor, interference with custody of children, and corruption of minors. We adopt the summary of the underlying facts from the memorandum of this Court on direct appeal:

> [Philadelphia Police] Officer [Brian] Mort encountered E.J. and [A]ppellant engaged in a verbal dispute over their one year old child. Upon speaking to [Appellant] and E.J., and examining the identification produced by each, Officer Mort and his partner determined that E.J. was fourteen years old at the time the child was conceived. Officer Mort then placed [A]ppellant under arrest and transported both [A]ppellant and E.J. to the Philadelphia Police Department's Special Victims Unit.

* Former Justice specially assigned to the Superior Court.

Ex. B

> [A]ppellant's testimony essentially mirrored that of E.J. [A]ppellant testified that he met E.J. on a dating phone line for adults over the age of eighteen. After talking on the phone, they then met for dinner and talked about having a family. [A]ppellant admitted that sometime after their meeting that "yes we did have intercourse." [A]ppellant testified on cross examination that he also engaged in oral sex with E.J. Attempting to down play this aspect of their relationship, he testified that they were then trying to have a baby.
>
> [A]ppellant testified that after E.J. became pregnant, he wanted to marry her before the child was born. [Appellant] testified that he researched the marriage laws of both Pennsylvania and Missouri before deciding to take E.J. to Missouri to get married. [A]ppellant testified that he chose to marry E.J, in Missouri because it does not require a three day waiting period and "I could do it in one day." Appellant testified that it wasn't until January of 2009, after they returned from Missouri, that he learned of E.J.'s true age.

Commonwealth v. Robins, 32 A.3d 823, at 2. (Pa.Super. 2011)

Appellant, proceeding *pro se* with Attorney Thomas McGill, Jr., acting as stand-by counsel, was convicted by a jury of all charges. The court sentenced him to a mandatory term of ten to twenty years imprisonment for IDSI, and consecutive one to five year terms of imprisonment for statutory sexual assault and unlawful contact with a minor. He received no additional penalty for the remaining convictions. Appellant was determined not to be a sexually violent predator, but nonetheless required to register as a sexual offender under the Sexual Offender Registration and Notification Act ("SORNA"), 42 Pa.C.S. § 9799.10 *et seq*.

This Court affirmed judgment of sentence on August 5, 2011. ***Id***. The Supreme Court denied allowance of appeal on January 20, 2012.

Commonwealth v. Robins, 35 A.3d 1206 (Pa. 2012). Appellant timely filed the instant *pro se* PCRA petition and counsel was appointed. When Appellant indicated that he wished to waive counsel, the court conducted a ***Grazier*** hearing.[1] Appellant was permitted to proceed *pro se* and he filed an amended PCRA petition on September 15, 2014, and an addendum on July 27, 2015. The Commonwealth moved to dismiss the petition. On April 27, 2016, following a hearing, the PCRA court dismissed Appellant's PCRA petition, and Appellant filed the instant appeal.

Appellant presents eleven questions for our review:

> I. Did the Trial Court err in sentencing [A]ppellant to a crime that the jury did not find him guilty of because they were not presented with it, as court gave instructions on the wrong statute?
>
> II. Did the Trial Court err by refusing to merge lesser-included offense at sentencing?
>
> III. Is the mandatory minimum Appellant was sentenced to unconstitutional?
>
> IV. Did Trial Court err by refusing to admit marriage license and marriage law into evidence?
>
> V. Did Trial Court err by refusing to allow [A]ppellant to put forward affirmative marriage defense?
>
> VI. Did Trial Court err by refusing to instruct jury of marriage defense?

---

[1] ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998).

VII. Did Trial Court err by making prejudicial statements about [A]ppellant's marriage and other testimonial evidence [A]ppellant was trying to present?

VIII. Did the cumulative effect of Trial Court errors deprive [A]ppellant of fair trial?

IX. Did Trial Court violate [A]ppellant's Due Process Rights by imposing registration requirement when he was assessed not to be a sexually violent predator?

X. Was [A]ppellant Counsel ineffective during sentencing and on appeal for not putting forward above issues?

XI. Did Trial Court violate [A]ppellant's right to be Pro Se during PCRA proceedings?

Appellant's brief at 2-3.

In reviewing an order denying PCRA relief, we must determine whether the PCRA court's determination is supported by the evidence of record and free of legal error. ***Commonwealth v. Harris***, 114 A.3d 1 (Pa.Super. 2015).

Appellant's first contention is that the trial court erred in instructing the jury pursuant to subsection (a)(7) of the IDSI statute, when he was charged with violating subsection (a)(1) of that statute. Furthermore, the jury found him guilty under subsection (a)(7), and the court sentenced him under that provision. He relies upon ***Commonwealth v. Kopp***, 591 A.2d 1122 (Pa.Super. 1991), where the defendant was found guilty of a different subsection of the robbery statute than was charged in the indictment, which

this Court held constituted a substantive change in the elements of the crime and prejudiced defendant.

We note preliminarily that Appellant did not object to this alleged defect at trial. Nor did he object to the jury instruction based on IDSI subsection (a)(7). Since this claim could have been challenged at trial, it is waived under the Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, unless an exception applies. ***Commonwealth v. Blakeney***, 108 A.3d 739, 745 (Pa. 2014). No exception has been alleged.

Moreover, the record does not factually support Appellant's claim. The criminal information charged Appellant, age forty at the time, with both IDSI by forcible compulsion and IDSI by engaging in deviate sexual intercourse with a complainant who was less than 16 years of age and to whom he was not married at the time. 18 Pa.C.S. § 3123 (a)(1) and (a)(7). Furthermore, prior to his arraignment, the Commonwealth orally amended the information when it advised the court that it was proceeding solely under § 3123(a)(7). Thus, Appellant had the requisite notice that he was being charged under § 3123(a)(7), and in fact, he asserted a mistake of age defense that was applicable only to that subsection.[2] No relief is due.

---

[2] The trial court pointed out that the verdict slip and the sentencing order mistakenly indicated IDSI pursuant to 18 Pa.C.S. § 3123(a)(1), and attributed this to a clerical error that did not reflect the oral amendment. The court maintained that Appellant was charged and convicted of § *(Footnote Continued Next Page)*

Appellant's second issue is that all of his sentences should have merged as they arose out of the same criminal act. He does not specify which offenses were lesser-included offenses that should have merged. Such a claim "raises a challenge to the legality of the sentence," for which our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Brown***, 159 A.3d 531, 532-533 (Pa.Super. 2017). Although Appellant did not challenge his sentence on this basis below or on direct appeal, the claim is not waived as challenges to the legality of a sentence can be raised for the first time in a timely PCRA petition. ***Commonwealth v. Infante***, 63 A.3d 358 (Pa.Super. 2013) (recognizing that legality of sentence claims are non-waivable and always subject to review within the PCRA provided they are asserted in a timely petition).

The statute governing the merger of sentences provides:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S. § 9765; ***see also Commonwealth v. Baldwin***, 985 A.2d 830, 833 (Pa. 2009).

(Footnote Continued) ———————

3123(a)(7), and that it was clear throughout that this was the applicable subsection.

Appellant's brief offers no support for his contention that all of the criminal conduct charged arose from one criminal act. Indeed, the record belies that contention. The IDSI charge related to oral sexual intercourse with the fourteen-year-old complainant that occurred on a different occasion from the statutory sexual assault, which involved vaginal sexual intercourse on numerous occasions prior to the purported marriage in Missouri. The interference with custody of child, unlawful contact with a child, and corruption of minors involved different conduct at various times during 2007 and 2008.

Furthermore, even if Appellant had demonstrated that the crimes arose from a single criminal act, the offenses would only merge for sentencing purposes if the statutory elements of the lesser-included offenses were included in the statutory elements of the other offense. Appellant ignores this facet of the merger analysis and fails to demonstrate the identity of elements of the offenses that would support merger.[3] Appellant's claim is without merit.

---

[3] The attorney for the Commonwealth initially misspoke at sentencing and suggested that interference with custody of a child and corruption of the morals of a minor merged for sentencing purposes. When the trial court questioned that representation, the Commonwealth backtracked and conceded that there was no merger technically, but that it was recommending no additional penalty on the corruption of morals charge.

Appellant's third issue is a constitutional challenge to the mandatory minimum sentence imposed for IDSI. He cites ***Commonwealth v. Ruiz***, 131 A.3d 54 (Pa.Super. 2015), in support of his contention that he can avail himself of the Supreme Court's decision in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013), in this timely PCRA petition.

Appellant misapprehends ***Ruiz***. A defendant can raise an ***Alleyne*** challenge in a timely PCRA petition so long as judgment of sentence was not final when ***Alleyne*** was decided on June 17, 2013. ***Commonwealth v. Washington***, 142 A.3d 810 (Pa. 2016). Appellant's judgment of sentence became final on or about April 20, 2012, almost a year before the Supreme Court decided ***Alleyne***.[4] ***Alleyne*** does not apply retroactively to afford Appellant relief.

Appellant's fourth, fifth, sixth, and seventh issues all pertain to claims of trial court error in refusing to admit the marriage license into evidence, permit an affirmative defense of marriage, instruct the jury on a marriage defense, and in making allegedly prejudicial comments about the marriage. The Commonwealth counters that these issues were either previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). The Commonwealth relies upon 42 Pa.C.S. § 9544(a)(2) and ***Commonwealth v. Keaton***, 45 A.3d

---

[4] Appellant's judgment of sentence became final ninety days after the Pennsylvania Supreme Court denied allowance of appeal, when he did not file a petition for writ of *certiorari* to the United States Supreme Court.

1050 (Pa. 2012), for the proposition that an issue is deemed to have been previously litigated if the highest appellate court in which review could have been obtained as a matter of right has ruled on the merits of the issues. Appellant counters that, on direct appeal, he argued only error in the trial court's refusal to instruct the jury on the marriage law, which is distinctly different from error in refusing the marriage defense, admission of the marriage certificate, and the court's allegedly prejudicial comments on it.

Our review of the record confirms that these issues were previously litigated on direct appeal. ***Blakeney, supra***. This Court addressed and rejected as irrelevant all claims of error related to Appellant's "marriage defense" because the crimes charged were committed prior to the alleged marriage. No relief is due.

Next, Appellant faults trial and appellate counsel for failing to raise the issues of merger and the IDSI statute on appeal. We note there is a strong presumption that counsel was effective in his representation. ***Harrington v. Richter***, 131 S.Ct. 770 (2011). In order to prevail on an ineffectiveness claim, an appellant must demonstrate all of the following: 1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) ineffective assistance of counsel caused him prejudice. ***Commonwealth v. Pierce***, 786 A.2d 203 (Pa. 2001).

Appellant elected to proceed *pro se* at trial with the assistance of stand-by counsel. In such circumstances, the defendant is counsel of record

and stand-by counsel merely fulfills a limited role. ***Commonwealth v. Blakeney***, 108 A.3d 739, 756 (Pa. 2014). When a defendant chooses to represent himself, he cannot obtain post-conviction relief by raising a claim of ineffectiveness of himself or stand-by counsel. ***Id***. Thus, any claim of ineffectiveness of trial counsel arising from the failure to challenge the submission to the jury of the IDSI charge under § 3123(a)(7), is not cognizable under the PCRA.

We have also determined *supra* that Appellant's merger claim lacks merit. "Failure to raise a meritless issue is not ineffective assistance of counsel." ***Commonwealth v. McBee***, 520 A.2d 10, 14 (Pa. 1986); ***Commonwealth v. Bryant***, 855 A.2d 726, 742 (Pa. 2004) ("Trial counsel cannot be held to be ineffective for failing to take futile actions or raise a meritless claim.").

Appellant's claim that the cumulative effect of trial court error deprived him of a fair trial fares no better. Having concluded that Appellant's individual claims of trial court error are either previously litigated, waived, or meritless, there is no harmful cumulative effect to consider. ***See Commonwealth v. Wright***, 961 A.2d 119 (Pa. 2008).

Next Appellant alleges that the trial court erred in requiring him to register under SORNA when he was not determined to be a sexually violent predator ("SVP"). Since this issue could have been raised on direct appeal, but was not, it is waived. ***See*** 42 Pa.C.S. §§ 9541-9546; ***Blakeney, supra***

at 745. Nor can direct appeal counsel be deemed ineffective for failing to assert a claim that was not preserved below by Appellant who was proceeding *pro se*. ***See Blakeney, supra*** at 749 (recognizing that a PCRA appellant who represented himself at trial may be "restricted by trial level defaults chargeable to . . . himself[,]" and find layered claims of counsel ineffectiveness unavailable). Moreover, Appellant's premise is faulty. Registration requirements do not apply solely to SVPs. Four of Appellant's convictions, namely IDSI, statutory sexual assault, interference with the custody of a child, and unlawful contact with a minor, carry a registration requirement. Appellant's claim is without merit.

In his final issue, Appellant claims that the trial court violated his right to appear *pro se* on direct appeal and during the instant PCRA appeal. He makes vague allegations that the trial court filed "defense motions with no authority" and "without telling him." Appellant's brief at 46. He argues that the trial court did not permit him to attend hearings on September 15, 2014, July 27, 2015, January 21, 2016, March 21-23, 2016, March 30, 2016, April 25, 2016, and April 27, 2016. Appellant does not spell out the purpose of these alleged hearings, but insists that denial of his right to proceed *pro se* is not subject to a harmless error analysis, citing ***McKaskle v. Wiggins***, 465 U.S. 168, 177 n.8 (1984).

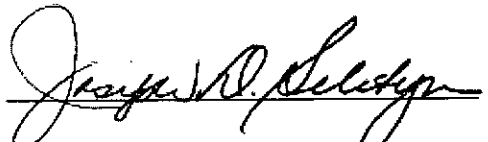
The trial court dismissed these claims as "nonsensical and wholly unsupported on the record." Trial Court Opinion, 11/10/16, at 14. The

Commonwealth characterizes the claim as frivolous, pointing to the fact that the trial court granted Appellant the right to proceed *pro se* after a ***Grazier*** hearing, and Appellant filed his PCRA petition, an amended petition, an addendum to the amended petition, and a merits brief without the assistance of counsel. We agree.

Moreover, after a thorough review of the record, we find no support for Appellant's claims that he was not permitted to attend "hearings" on the aforementioned dates. The record indicates that no hearings were conducted in Appellant's absence. Furthermore, the record establishes that on September 15, 2014, Appellant filed an amended *pro se* PCRA petition. On July 27, 2015, he filed a petition to add an addendum to his PCRA petition to assert an ***Alleyne*** mandatory minimum argument; to allege that he had been reincarcerated for failure to register under an unconstitutional statute; that he was convicted of IDSI by forcible compulsion pursuant to a defective indictment. On January 21, 2016, the court ordered that Appellant be transported to court for a PCRA hearing scheduled at a later date. On March 21, 2016, the Commonwealth filed a motion to dismiss Appellant PCRA petition, and the trial court issued Rule 907 notice on March 23, 2016. Appellant filed a reply to the Commonwealth's motion on March 30, 2016, a supplement thereto on April 25, 2016, and on April 27, 2016, the PCRA court issued an order dismissing Appellant's petition. No relief is due.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/27/2017

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	2047 EDA 2016
v.	CP-51-CR-0003460-2009
JONATHAN ROBINS	

OPINION

STATEMENT OF THE CASE

Defendant appeals the Court's dismissal of his Post-Conviction Relief Act (PCRA) petition for being without merit. Defendant's complaints have either been previously litigated or are without merit.

PROCEDURAL HISTORY

On February 11, 2009, Defendant was arrested and charged with, inter alia; (1) Involuntary Deviate Sexual Intercourse (IDSI); (2) Unlawful Contact with a Minor; (3) Statutory Sexual Assault;;(4) Interference with Custody of Children, and (5) Corruption of Minors. At the conclusion of his jury trial on March 12, 2010, Defendant was found guilty on all charges. On June 29, 2010, Defendant was sentenced to an aggregate term of confinement in a state correctional facility of 12 to 30 years.

Ex. C

On July 15, 2010, Defendant timely appealed his conviction and sentence at 2000 EDA 2010. On August 5, 2011, the Pennsylvania Superior Court affirmed the Court's Judgement of Sentence. On August 31, 2011, Defendant filed Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which was denied on January 20, 2012.

On January 30, 2012, Defendant timely filed the instant *pro se* PCRA petition pursuant to 42 Pa.C.S.A. §9541 *et. seq*. On June 19, 2014, at the conclusion of a Grazier Hearing, the Court permitted Defendant to proceed with his PCRA petition *pro se*. On September 19, 2014, Defendant filed an Amended PCRA Petition, and then a subsequent addendum on July 27, 2015. On March 21, 2016, the Commonwealth filed a Motion to Dismiss Defendant's amended PCRA petition. On March 23, 2016, this Court gave notice of its intention to dismiss Defendant's PCRA petition as being without merit, pursuant to Pennsylvania Rule of Criminal Procedure Rule 907. On March 30, 2016, Defendant filed a Response to the Commonwealth's Motion to Dismiss. On April 27, 2016, the Court dismissed Defendant's PCRA petition without a hearing.

On May 10, 2016, Defendant filed this timely *pro-se* appeal to the Pennsylvania Superior Court. On July 14, 2016, this Court filed and served on Defendant an Order pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, directing Defendant to file and serve a Statement of Errors Complained of on Appeal, within 21 days of the Court's Order. On July 21, 2016, Defendant timely filed a Statement of Matters Complained of on Appeal Pursuant to Rule 1925(b). In his Statement of Matters, ained of, Defendant raises 11 issues, namely:

I. "Trial court sentenced Appellant to a crime (18 Pa.C.S.A. §3123(a)(1)) that he was not found guilty of and found Appellant guilty of a crime he was not charged with §3123(a)(7).
II. Trial Court did not merge lesser-included offenses at sentencing.

III. The mandatory minimums appellant was sentenced to is [sic] now unconstitutional."

IV. "Trial Court refused to admit marriage license and laws into evidence.
V. Trial Court refused to allow Appellant to put forward affirmative marriage defense.
VI. Trial Court refused to instruct jury on marriage defense.
VII. Trial Court made prejudicial statements about Appellant's marriage to Complaintant [sic] and other testimonial evidence appellant was trying to present for motive and defense."

VIII. "The cumulative effect of Trial Court errors deprived Appellant of a fair trial.
IX. Trial Court violated Appellant's Due Process Rights by imposing registration requirements upon Appellant when he was not assessed to be a predator, and such determination should have been made by jury.
X. Appellant Counsel was ineffective during sentencing and on appeal for not putting forward above issues.
XI. Trial Court violated Appellant's *pro se* rights on appeal by keeping counsel on PCRA, not allowing Appellant to attend PCRA hearings, and by the Court filing defense motions."

WAIVER

A PCRA court has jurisdiction to review a complaint when "the allegation of error has not been previously litigated or waived." 42 Pa.C.S.A. §9543(a)(3). "An issue is previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." ***Commonwealth v. Keaton***, 45 A.3d 1050, 1060 (Pa. 2012) *internal quotations omitted.*

Defendant's fourth through seventh statements of error complain of Court's evidentiary rulings at trial relating to his marriage defense. These complaints are outside of the jurisdiction of PCRA review as they have been previously litigated. Furthermore, in ruling on Defendant's marriage defense, the Pennsylvania Superior Court previously held his marriage defense is "irrelevant because appellant committed the criminal conduct with the minor victim prior to the alleged marriage in Missouri." ***Commonwealth v.***

Robins, 2000 EDA 2010 (Pa. Super. 2011) (memorandum at 8). Thus, the Court will not address these complaints.

BRIEF SUMMARY OF EVIDENCE AT TRIAL

At Defendant's jury trial, the complaining witness (E.J.) testified that she met Defendant via a telephonic chat line in early January of 2007 when she was only 14 years old. (N.T., 3/11/10 pg. 40, 49) Defendant was aware of E.J.'s age, and though he was initially reluctant to tell her his age, he eventually revealed to her that he was 39 years old. (N.T., 3/11/2010 pg. 52-53) When E.J. was still only 14 years of age, she and Defendant began engaging in sexual intercourse, both vaginally and orally. This resulted in Defendant impregnating E.J. on Mother's Day of 2007 (N.T., 3/11/2010 pg. 64, 66, 68, 71-73)

On January 15, 2008, Defendant took E.J., who was pregnant with his child, to St. Louis, Missouri to get married. (N.T., 3/11/2010 pg. 80) In applying for their Missouri marriage license, E.J. used a fake South Carolina driver's license, procured by Defendant, which falsely stated that she was 23 years old, when she was actually just 15 years of age. (N.T., 3/11/2010 pg. 84) Defendant and E.J. were purportedly married in Missouri on January 16, 2008.[1]

DISCUSSION OF THE ISSUES RAISED

I. DEFENDANT WAS PROPERLY CONVICTED UNDER 18 Pa.C.S.A. §3123(a)(7)

Defendant, in his first statement of errors, essentially complains that he was illegally convicted of a crime for which he was not charged. That is, he complains that he

[1] Defendant submits a copy of the marriage license, obtained in Clayton, Missouri, dated January 16, 2008.

was convicted on the charge of IDSI with a victim "who is less than 16 years of age" by a person "four or more years older than the complainant and the complainant and the person are not married to each other" pursuant to 18 Pa.C.S.A. §3123(a)(7), when he was in fact charged on the Bills of Information with IDSI by forcible compulsion, pursuant to 18 Pa.C.S.A. §3123(a)(1). Defendant's complaint is without merit.

"[F]undamental procedural due process in our system of jurisprudence embodies the bedrock principle that each participant in the adjudicative process be given adequate notice and the opportunity to be heard." ***Commonwealth v. Parks***, 768 A.2d 1168, 1172 (Pa. Super. 2001). Bills of Information serve "to advise the accused of the allegations and the crimes charged, to give sufficient notice to allow the opportunity to prepare a defense, and to define the issues for trial." ***Commonwealth v. Shamberger***, 788 A.2d 408, 419-420 (Pa. Super 2001) *internal quotations omitted;* citing ***Commonwealth v. Kisner***, 736 A.2d 672, 674 (Pa. Super. 1999). A variance between the Bills of Information and the evidence offered at trial is found to be "harmless error unless a defendant could be misled at trial, prejudicially surprised in efforts to prepare a defense, precluded from anticipating the prosecution's proof, or otherwise impaired with respect to a substantial right." ***Commonwealth v. Lohr***, 468 A.2d 1375, 1377 (Pa. 1983) citing ***Commonwealth v. Kelly***, 409 A.2d 21 (Pa. 1979). ***Lohr*** further held that "[a]bsent an initial determination of variance, we do not reach the inquiry set forth in ***Kelly***, *supra*, regarding the possibility of prejudice to the accused." *Supra* at 1378.

As noted above, Defendant is essentially complaining that he suffered a violation of his due process rights because he was not given sufficient notice that he was being charged with IDSI pursuant to 18 Pa.C.S.A. §3123(a)(7) when he was in fact charged on

the Bills of Information with IDSI pursuant to 18 Pa.C.S.A. §3123(a)(1). Because each charge requires different elements of proof, Defendant complains that he was convicted of a crime he was not charged with and requests a new trial. As discussed below, this claim is without merit.

Defendant did have notice of the charges being brought against him. Count one of the Bills of Information formally charge Defendant with IDSI by Forcible Compulsion, pursuant to 18 Pa.C.S.A. §3123(a)(1). In describing the underlying criminal conduct in count one, the Commonwealth provided:

> "[o]n diverse dates between 2007 and 2008, [Defendant] engaged in deviate sexual intercourse with a complainant:
>
> (1)By forcible compulsion
>
> (2)By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
>
> (3) Who was less than 16 years of age and the actor was four or more years older than the complainant and the complainant and the person were not married to each other."

In short, Defendant was given sufficient notice as count one encompasses allegations under both 18 Pa.C.S.A. §3123(a)(1) and (a)(7). Thus, Defendant was put on notice that the Commonwealth would be prosecuting Defendant under both 18 Pa.C.S.A. §3123(a)(1) and §3123 (a)(7).

Pursuant to Pennsylvania Rule of Criminal Procedure Rule 564, a "court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or property, or the date charged, provided the information as amended does not charge an additional or different offense." "[I]f there is no showing of prejudice, amendment of an information to add an additional charge is

proper even on the day of trial." ***Commonwealth v. Picchianti***, 600 A.2d 597, 599 (Pa. Super. 1991).

Not only was Defendant given sufficient notice by the Bills of Information prior to trial, but the Commonwealth also properly orally amended the Bills of Information. Prior to arraignment, the Commonwealth orally amended the Bills of Information when it advised the Court it was proceeding only under 18 Pa.C.S.A. §3123(a)(7) with respect to count one. (N.T., 3/11/2010 pg. 6-7) Defendant then engaged the Court in lengthy discussion of his proposed mistake of age defense, which would only be a defense to a charge pursuant to 18 Pa.C.S.A. §3123(a)(7) and not §3123(a)(1). (N.T., 3/11/2010 pg. 9-13). It is clear that Defendant was not only aware of the specific charge against him, but also that he had, in fact, prepared his defense for trial, and so proceeded to present both a mistake of age defense and a marriage defense against the charge of IDSI with a victim who was less than 16 years of age.

In its charge to the jury, the Court instructed the jury, without objection, on the IDSI charge, pursuant only to 18 Pa.C.S.A. §3123(a)(7). The Court said:

> "[V]oluntariness has nothing to do with this crime in this case because this is all based on age. And if she were older, then the defendant would be committing this crime only if he forced her to do things that she did not want to do, that she resisted. We'd have to get into the meaning of all of that. None of that applies...
> A person commits involuntary deviate sexual intercourse when that person engages in deviate sexual intercourse with a child who is over twelve but under sixteen. Children under twelve, that's a different crime. This crime is involuntary deviate sexual intercourse. So the first question is, is the victim between the ages of twelve and sixteen? And the defendant is four or more years older."

(N.T. 3/12/2010 pg. 134-135) After deliberation, the jury returned a verdict of guilty for IDSI in accordance with the Court's instructions. Thus, it is clear that the jury found

Defendant guilty of IDSI pursuant to 18 Pa.C.S.A. §3123(a)(7) although the verdict sheet indicates §3123(a)(1).

A clerical error is "an omission or a statement in the record or an order shown to be inconsistent with what in fact occurred in a case, and thus, subject to repair." ***Commonwealth v. Borrin***, 80 A.3d 1219, 1227. A PCRA Court has the authority to correct a clerical error. ***Commonwealth v. Young***, 695 A.2d 414, 420 (Pa. Super. 1997) (holding "the PCRA court should have corrected the clerical error of counsel and the trial court which permitted the judgment of sentence to indicate that appellee had been sentenced on" the wrong subsection of indecent assault).

As noted, the Sentencing Order indicates for count one that Defendant was found guilty of IDSI pursuant to 18 Pa.C.S.A. §3123(a)(1). This was a clerical error that did not accurately reflect the oral amendment made by the Commonwealth to the Bills of Information. At every stage in the process, it was clear what subsection Defendant was being charged with and convicted of. Thus, the Sentencing Order is subject to amendment, and pursuant to ***Young***, *supra*, is so amended to reflect that Defendant was convicted of and sentenced for violating 18 Pa.C.S.A. §3123(a)(7).

II. DEFENDANT'S CONVICTION ON THE CHARGES OF STATUTORY SEXUAL ASSAULT AND IDSI WERE NOT SUBJECT TO MERGER AT SENTENCING.

In his second statement of errors, Defendant vaguely complains that his sentence was not proper because the Court failed to merge "lesser included offenses." As Defendant's complaint is inherently vague, the Court assumes he is complaining that his

convictions on the charges of IDSI and Statutory Sexual Assault are the charges he is referring to. This complaint is without merit.

"No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense." 42 Pa.C.S.A. §9765. "If the offenses stem from two different criminal acts, merger analysis is not required." ***Commonwealth v. Gatling***, 807 A.2d 890, 899 (Pa. 2002). When a defendant is being charged for multiple instances of sexual misconduct, he is "susceptible to separate punishments." ***Commonwealth v. Hitchcock***, 565 A.2d 1159, 1161 (Pa. 1989).

The record clearly reflects that Defendant was charged and convicted for multiple instances of sexual misconduct, relying on separate and distinct facts, occurring over a period of months. The record reflects that for a number of months between 2007 and 2008, Defendant and E.J. engaged in both vaginal and oral sexual intercourse. Thus, Defendant's charges of IDSI and Statutory Sexual Assault are not subject to a merger analysis.

III. DEFENDANT'S SENTENCE WAS CONSTITUTIONAL.

In his third statement of errors, Defendant simply complains that his mandatory minimum sentence, imposed pursuant to 42 Pa.C.S.A. §9718, is unconstitutional. This complaint is without merit.

Defendant complains that because of precedent set in ***Alleyne v. United States***, 133 S.Ct. 2151 (2013) his mandatory minimum sentence imposed pursuant to 42 Pa.C.S.A. §9718 is unconstitutional. ***Alleyne*** held "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable

doubt." *Alleyne*, 133 S.Ct. at 2155 Our Supreme Court held that ***Alleyne*** rendered the mandatory minimum sentences imposed by §9718 unconstitutional. ***Commonwealth v. Wolfe***, 40 A.3d 651 (Pa. 2016). Since Defendant's sentence was imposed prior to ***Alleyne***, the issue before the Court is whether or not ***Alleyne*** is to be applied retroactively to his sentence.

Alleyne has been held to only "be applied to cases pending on direct appeal when [it] was issued." ***Commonwealth v. Riggle***, 119 A.3d 1058, 1064 (Pa. Super. 2015) citing ***Commonwealth v. Newman***, 99 A.3d 86 (Pa. Super. 2014); ***Commonwealth v. Watley***, 81 A.3d 108, 118 (Pa. Super. 2013). As discussed above, Defendant's direct appeal was decided on January 20, 2012, when the Pennsylvania Supreme Court denied *allocatur* and became final 90 days after, in April of 2012. ***Alleyne***, however, was not decided until June of 2013, over a year later. Thus, ***Alleyne*** is not given full retroactive treatment, and Defendant cannot rely upon it for relief.

Not only is Defendant not entitled to relief under ***Alleyne*** for having his direct appeal decided prior to ***Alleyne***, but also ***Alleyne*** has been held to not be retroactive to a PCRA setting. It is well settled that "a new rule of law... will not be applied to any case on collateral review unless that decision was handed down during the pendency of appellant's direct appeal..." ***Commonwealth v. Gillespie***, 516 A.2d 1180, 1183 (Pa. 1986). A new rule can still receive retroactive application in a collateral review "if (1) the rule is substantive or (2) the rule is a 'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." ***Riggle***, *supra*, at 1065 citing ***Whorton v. Bockting***, 127 S.Ct. 1173 (2007). A rule is substantive when "it alters the range of conduct or the class of persons that the law punishes." ***Commonwealth v.***

Hughes, 856 A.2d 761 780 (Pa. 2004) *internal quotations omitted*; citing ***Schriro v. Summerlin***, 124 S.Ct. 2519, 2523 (2004). A "rule is considered watershed if it is necessary to prevent an impermissibly large risk of an inaccurate conviction and alters the understanding of the bedrock procedural elements essential to the fairness of a proceeding." ***Riggle,*** *supra* at 1066. "***Alleyne***... is not substantive. Nor does ***Alleyne*** constitute a watershed procedural rule." ***Id.*** at 1067. Thus, "***Alleyne*** is not entitled to retroactive effect in this PCRA setting." ***Id.***

Defendant is not entitled to relief under ***Alleyne*** as ***Alleyne*** was decided after his direct appeal had become final, and it has been specifically held to not be retroactive in a PCRA setting. Thus, Defendant's third complaint is without merit.

IV. DEFENDANT IS REQUIRED TO REGISTER AS A SEXUAL OFFENDER.

In his ninth statement of errors, Defendant misstates the record in complaining that because he was not found to be a sexually violent predator (N.T., 6/29/2010 pg. 18), he was improperly required to register as a sexual offender under the Sexual Offender Registration and Notification Act (SORNA). This complaint is without merit.

A sexual offender is defined as anyone who is "required to register" by SORNA with the Statewide Registry of Sexual Offenders. 42 Pa.C.S.A. §9799.12. Registration requirements are intended to be "civil and remedial rather than punitive." ***Commonwealth v. Williams***, 832 A.2d 962, 972 (Pa. 2003). "Section 9799.14 of SORNA establishes a three-tiered system of specifically enumerated offenses requiring registration for sexual offenders for differing lengths of time." ***Commonwealth v. McDonough***, 96 A.3d 1067,

1070 (Pa. Super. 2014). Of the crimes Defendant has been convicted of, Interference with Custody of Children, Unlawful Contact with a Minor, Statutory Sexual Assault, and IDSI all have registration requirements regardless of whether a defendant was found to be a sexually violent predator. 42 Pa.C.S.A. §9799.14.

Because of Defendant's several convictions for crimes enumerated in SORNA, he was subject to the registration provisions of SORNA. This registration requirement is independent of sentencing, as it is a remedial, civil measure, rather than a punitive one and is not subject to review by a PCRA court.

V. DEFENDANT'S APPELLATE COUNSEL WAS EFFECTIVE.

In his tenth statement of errors, Defendant essentially argues that his appellate counsel was ineffective for failing to raise the above issues. This complaint is without merit.

"It is well-settled... that a PCRA petitioner cannot obtain a review of claims that were previously litigated by presenting new theories of relief, including allegations of ineffectiveness." ***Commonwealth v. Jones***, 811 A.2d 994, 1000 (Pa. 2002). Thus, Defendant cannot now prevail by complaining of any ineffective assistance of counsel as it relates to his fourth through seventh complaints related to his marriage defense, as they are not subject to PCRA review.

As to his remaining complaints, "[t]he law presumes that counsel has rendered effective assistance." ***Commonwealth v. Harris***, 852 A.2d 1168, 1173 (Pa. 2004) citing ***Commonwealth v. Balodis***, 747 A.2d 341, 343 (Pa. 2000). "[T]o succeed on an ineffectiveness claim, a petitioner must demonstrate that: the underlying claim is of

arguable merit; counsel had no reasonable basis for the act or omission in question; and he suffered prejudice as a result" ***Commonwealth v. Laird***, 119 A.3d 972, 978 (Pa. 2015); *see also* ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987) (establishing these three elements to be the standard in Pennsylvania). Prejudice will be found where there is a "reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." ***Laird, supra***. "Failure to prove any prong of this test will defeat an ineffectiveness claim." ***Commonwealth v. Fears***, 86 A.3d 795, 804 (Pa. 2014).

As discussed above, Defendant's remaining complaints are without merit. "Failure to raise a meritless issue is not ineffective assistance of counsel." ***Commonwealth v. McBee***, 520 A.2d 10, 14 (Pa. 1986). Thus, counsel was not ineffective for failing to raise these meritless claims. Only Defendant's eighth complaint will be discussed below, and it is without merit.

Defendant's eighth statement of errors, that he was denied a fair trial due to the cumulative effect of the errors at trial, is also without merit, both as a standalone issue and as it relates to the ineffective assistance of appellate counsel complaint as it has been determined that Defendant suffered no prejudice at trial. "[A]n appellant who claims cumulative prejudice must still set forth some specific, reasoned, and supported argument for the claim." ***Commonwealth v. Watkins***, 108 A.3d 692, 735 (Pa. 2014). Defendant provides no such argument. Additionally, as discussed, none of Defendant's statements of errosr have been found to be meritorious. Thus, there was no rational basis for appellate counsel to make such an argument on appeal.

VI. DEFENDANT'S APPELLATE *PRO SE* RIGHTS WERE NOT VIOLATED.

In his eleventh statement of errors, Defendant complains that his *pro se* rights were violated "by keeping counsel on PCRA, not allowing Appellant to attend PCRA hearings, and by the Court filing defense motions." Defendant's complaint that the Court erred "by filing defense motions" will not be addressed by the Court as is at best frivolous, nonsensical and wholly unsupported on the record. Defendant's complaint is without merit.

On April 24, 2012, Raymond Biley, Esq., was appointed to represent Defendant as PCRA counsel. On May 23, 2012, Defendant filed a "Petition to Have Counsel Removed and for Appellant to Proceed Pro Se." As noted above, at the conclusion of his Grazier Hearing on June 19, 2014, Defendant was permitted to proceed with this PCRA petition *pro se* without the assistance of counsel. Furthermore, Defendant has failed to meet his burden of establishing how he was prejudiced by the appointment of counsel, as it is quite clear from the record that he pursued his PCRA petition without the assistance or advice of counsel.

"A PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only where the petition presents genuine issues of material fact." ***Commonwealth v. Keaton***, 45 A.3d 1050, 1094 (Pa. 2012) citing Pa.R.Crim.P. 909(B)(2); ***Harris***, *supra* at 1180. "[T]he PCRA court has the discretion to dismiss a petition without a hearing when the court is satisfied that there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose

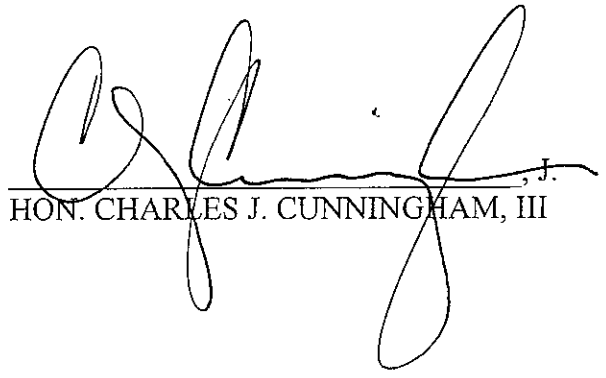
would be served by any further proceedings." ***Commonwealth v. Sneed***, 45 A.3d 1096, 1105 (Pa. 2012) *quoting* Pa.R.Crim.P. 909(B)(2) *internal quotations omitted.*

Defendant's bald allegations are wholly unsupported by the record. Prior to issuing its Rule 907 notice of its intent to dismiss, the Court carefully reviewed the record and found, as discussed above, that Defendant's PCRA petition raised no meritorious complaints. As discussed in ***Keaton***, *supra*, Defendant was not entitled to a hearing with regards to his PCRA petition. Thus, this complaint is without merit.

CONCLUSION

The Court finds that Defendant's complaints are either outside the jurisdiction of PCRA review as they have been previously litigated, or they are without merit.

BY THE COURT:



November 10, 2016

_____, J.
HON. CHARLES J. CUNNINGHAM, III

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

COMMONWEALTH OF PENNSYLVANIA	2000 EDA 2010
v.	
JOHNATHAN ROBINS	CP-51-CR-0003430-2009

OPINION

STATEMENT OF THE CASE

This is Defendant's appeal from his conviction on the charges of Involuntary Deviate Sexual Intercourse, Unlawful Contact with a Minor, Statutory Sexual Assault, Interference with Custody of Children, and Corruption of a Minor. All these charges stem from his relationship with the fourteen year old complaining witness. Defendant raised the affirmative defense at trial that the minor had misrepresented her age and that he believed her to be at least nineteen years of age until shortly before the birth of their child. Defendant also raised the defense that he and the minor had entered into a marriage in the State of Missouri a month prior to the birth of their child. Despite this defense, a jury found Defendant guilty on all charges.

Defendant is now asking that his convictions be reversed and that he be granted a new trial. Defendant alleges that the verdict was against the weight of the evidence, that the Court improperly restricted his scope of cross-examination, and that the Court improperly refused to charge the jury on Missouri marriage laws.

PROCEDURAL HISTORY

On February 11, 2009, Defendant was arrested and charged with inter-alia, 1) Involuntary Deviate Sexual Intercourse (IDSI) pursuant to 18 Pa.C.S.A. 3123(a); 2) Unlawful Contact with Minor – Sexual Offenses, pursuant to 18 Pa.C.S.A. 6318(a); 3) Statutory Sexual Assault pursuant to 18 Pa.C.S.A. 3122.1; 4) Interference with the Custody of Children, pursuant to 18 Pa. C.S.A. §2904(a); and 5) Corruption of a Minor pursuant to 18 Pa.C.S.A. 6301(a).

At the conclusion of his jury trial on March 12, 2010, Defendant was found guilty on all charges. On June 29, 2010, Defendant was sentenced to confinement for a mandatory minimum period of ten to twenty years on the IDSI charge, one to five years on the charge of Unlawful Contact with a Minor, to run consecutively to the IDSI charge, and one to five years on the charge of Statutory Sexual Assault, to run consecutively to the charge of Unlawful Contact with a Minor, for a total period of incarceration of twelve to thirty years.

On July 15, 2010, Defendant timely filed the instant appeal to the Superior Court of Pennsylvania. On July 19, 2010, this Court filed and served on Defendant an Order pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, directing Defendant to file and serve a Statement of Errors Complained of on Appeal, within twenty-one days of the Court's Order. On July 27, 2010, Defendant timely filed his Statement of Errors Complained of on Appeal.

In his Statement of Errors Complained of, Defendant raises three issues averring:

> "1. The defendant is entitled to an arrest of judgment with respect to his convictions for unlawful contact with a minor, involuntary deviate sexual intercourse, statutory sexual assault, interference with custody, and corruption of minors since the evidence is insufficient to sustain these

convictions as the Commonwealth failed to prove the defendant's guilt or the essential elements of these crimes beyond a reasonable doubt. (N.T. 3/12/10 p. 159-161). The Commonwealth failed to prove beyond a reasonable doubt that the defendant performed the acts and/or had the state of mind necessary to sustain these convictions. The defendant and the complainant were married as they participated in a wedding ceremony in the State of Missouri. (N.T. 3/11/10 p. 79-88). The totality of the complainant's testimony established that the defendant was intentionally misled concerning her age. (N.T. 3/11/10 p. 39-170). The complainant portrayed herself as older than 18 years of age by such various acts, including: participation in internet chat rooms or dating services, obtaining identification indicating she was of majority, participating in a marriage ceremony, giving birth to a child, obtaining employment that required the employee to be of majority, and informing the defendant that she was of age. The defendant's mistake of age was established under 18 PaC.S.A. §§304, 3102, and the statutes that defined the crimes under which the defendant was prosecuted and found guilty.

2. The defendant is entitled to a new trial as a result of the trial court's restriction on his cross-examination of the Commonwealth's witnesses and the presentation of evidence concerning the fact that he was a good husband and parent. (N.T. 3/11/10, p. 122, 128-129; 3/12/10 p. 38-40). While the defendant was not charged with any crime that required proof that he was a bad husband or parent, such testimony was relevant and admissible to show that the defendant reasonably believed that the complainant was of age to marry and give birth to a child. Additionally, evidence that the defendant was a good husband and parent rebutted any notion that he was in a sham relationship and showed that he did not seek to take advantage of the complainant because of her age, but instead, sought to have a real relationship as a loving husband and father.

3. The defendant is entitled to a new trial as a result of the trial court's ruling that denied his request to instruct the jury as to the marriage laws of the State of Missouri and the Commonwealth of Pennsylvania. (N.T. 3/12/10, p. 87). The marriage laws of Missouri and Pennsylvania were relevant to show that the defendant and complainant's marriage was legal. Alternatively, this was relevant to show that the defendant reasonably believed that he was married at the time that he had a relationship with the complainant."

Defendant first complains that the evidence was insufficient to support his convictions. Defendant's second and third complaints raise peripheral issues which were not germane to the issues of fact before the jury.

EVIDENCE AT TRIAL

The complaining witness, E.J., testified that as of the date of trial, she was seventeen years old. She stated her date of birth as July 30, 1992. (N.T., 3/11/10, pg. 40.) She also testified that she had a two year old child born on February 20, 2008, identifying Defendant as the father of her child. (N.T., 3/11/10, pgs. 40, 41, 43.)

E.J. testified that she met Defendant in early January 2007 through a telephone chat line. (N.T., 3/11/10, pg. 49.) Although the chat line was restricted to parties eighteen years or older[1], she told Defendant, during their initial conversation, that she was fourteen years old. At this time, Defendant refused to divulge his age, but indicated that E.J.'s age presented no problem for him saying, " it wouldn't matter how old you were, if I find a woman I will treat them the same because they all get, they all should be treated the same." (N.T., 3/11/10, pg. 53.)

Shortly after this initial conversation, E.J. and Defendant met and had dinner together, after which they went to a movie. (N.T., 3/11/10, pg. 54.) E.J. testified that at the end of this first dinner together, Defendant reluctantly told her he was thirty nine years old. (N.T., 3/11/10, pg. 52.) E.J. testified that she and Defendant communicated frequently, that she spent time in Defendant's home, and that they went shopping for clothes for her. (N.T., 3/11/10, pgs. 55, 56, 60, 63.)

E.J. testified that she and Defendant first engaged in sexual intercourse in Defendant's home in March of 2007. (N.T., 3/11/10, pg. 64, 66, 68.) After this initial encounter, she and Defendant had sexual relations "a couple of times out of a month." (N.T., 3/11/10, pg. 70.) In addition to vaginal sex, E.J. testified that she and Defendant

---

[1] E.J. testified that the chat line did not require any verification or proof of age. (N.T., 3/11/10, pgs. 50, 51.)

also engaged in oral sex, describing these sexual acts in detail. (N.T., 3/11/10, pgs. 71 - 73.)

E.J. testified that she became pregnant on Mother's Day of 2007 as a result of her relationship with Defendant. (N.T., 3/11/10, pg. 72.) She stated that she was scared and was afraid to tell her mother. In addition, she considered having an abortion but Defendant talked her out of it saying there's "no need for that if I'm going to be here helping you." (N.T., 3/11/10, pg. 74.) E.J. moved into Defendant's home in October or November of 2007, after it was confirmed that she was nineteen weeks pregnant. (N.T., 3/11/10, pg. 75.)

In early July of 2007, E.J. testified that Defendant took her to Florida to celebrate her fifteenth birthday. (N.T., 3/11/10, pg. 77.) E.J. testified that, prior to going to Florida, Defendant took her to his sister's wedding reception in Atlantic City in June of 2007 to meet his family. (N.T., 3/11/10, pg. 111.)

On January 15, 2008, Defendant told E.J. they were flying to St. Louis, Missouri to get married. When she asked him why not wait until she was sixteen or eighteen, Defendant responded "we can do it now to stop your mom from getting in between, like, what we trying to do." (N.T., 3/11/10, pg. 80.) In applying for the marriage license in Missouri, E.J. testified that she used a fake South Carolina driver's license, indicating that she was twenty three years old. She testified that at sometime prior to January of 2008, Defendant took her to a check cashing establishment in Philadelphia to obtain this false identification. (N.T., 3/11/10, pg. 84.)

After giving birth, E.J. eventually moved back into her mother's home with her child. (N.T., 3/11/10, pgs. 88, 89.) Subsequently, E.J. and Defendant alternated care and

taking responsibilities for the child. (N.T., 3/11/10, pgs. 63, 89.) When Defendant refused to return her child in February of 2009, E.J. went to Defendant's home demanding the child's return to her. (N.T., 3/11/10, pg. 90.) When Defendant refused to return the child, E.J. called the police for assistance. (N.T., 3/11/10, pg. 93.) As a result of the police investigation, Defendant was arrested. (N.T., 3/11/10, pg. 94.)

Lucille Freeman, E.J.'s mother, testified that she did not learn of the identity of the father of her grandson until several days after his birth. She first met Defendant, as the result of a chance encounter, about a month after the birth of her grandson. (N.T., 3/11/10, pgs. 175, 180, 181.) Ms. Freeman testified that after this encounter she called the Upper Darby Police Department to report Defendant's involvement with her minor daughter only to be referred to the Philadelphia Police Department. She has had no response since reporting this matter. (N.T., 3/11/10, pg. 183.)

Ms. Freeman testified that she did not give Defendant permission for E.J. to live with him. She also testified that she did not give Defendant permission to take E.J. out of state or to marry her. (N.T., 3/11/10, pg. 181.)

Police Officer Brian Mort testified that on February 11, 2009, at approximately 10:00 a.m., he received a radio call to investigate a domestic dispute in the Twenty Nine Hundred block of North Eighth Street in the City of Philadelphia. (N.T., 3/11/10, pg. 223.) On arriving, Officer Mort encountered E.J. and Defendant engaged in a verbal dispute over their one year old child. (N.T., 3/11/10, pg. 224.) Upon speaking to Defendant and E.J., and examining the identification produced by each, Officer Mort and his partner determined that E.J. was fourteen years old at the time the child was conceived. (N.T., 3/11/10, pgs. 230, 231.) Officer Mort then placed Defendant under

arrest and transported both Defendant and E.J. to the Philadelphia Police Department's Special Victims Unit. (N.T., 3/11/10, pg. 232.)

Defendant's testimony essentially mirrored that of E.J. Defendant testified that he met E.J. on a dating phone line for adults over the age of eighteen. After talking on the phone, they then met for dinner and talked about having a family. (N.T., 3/12/10, pgs. 15 - 17.) Defendant admitted that sometime after their meeting that "yes we did have intercourse." (N.T., 3/12/10, pg. 18.) Defendant testified on cross examination that he also engaged in oral sex with E.J. (N.T., 3/12/10, pg. 54.) Attempting to down play this aspect of their relationship, he testified that they were then trying to have a baby. (N.T., 3/12/10, pg. 55.)

Defendant testified that after E.J. became pregnant, he wanted to marry her before the child was born. (N.T., 3/12/10, pg. 20.) Defendant testified that he researched the marriage laws of both Pennsylvania and Missouri before deciding to take Defendant to Missouri to get married. (N.T., 3/12/10, pg. 60.) Defendant testified that he chose to marry Defendant in Missouri because it does not require a three day waiting period and "I could do it in one day." (N.T., 3/12/10, pg. 25.) Defendant testified that it wasn't until January of 2008, after they returned from Missouri that he learned of E.J.'s true age. (N.T., 3/12/10, pg. 26.)

DISCUSSION OF THE ISSUES RAISED

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTIONS FOR UNLAWFUL CONTACT WITH A MINOR, INVOLUNTARY DEVIATE SEXUAL INTERCOURSE, STATUTORY SEXUAL ASSAULT, INTERFERENCE WITH CHILD CUSTODY, AND CORRUPTION OF MINORS

Defendant avers in his first Statement of Errors Complained of that his "convictions for unlawful contact with a minor, involuntary deviate sexual intercourse, statutory sexual assault, interference with custody, and corruption of minors since the evidence is insufficient to sustain these convictions as the Commonwealth failed to prove the defendant's guilt or the essential elements of these crimes beyond a reasonable doubt." In support of this complaint, Defendant complains that "The Commonwealth failed to prove beyond a reasonable doubt that the defendant performed the acts and/or had the state of mind necessary to sustain these convictions, because Defendant proved he was mistaken as to the age of the complaining witness."

When reviewing a challenge to the sufficiency of the evidence, the Court must determine "whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt." ***Commonwealth v. Hennigan***, 753 A.2d 245, 253 (Pa. Super. 2000). In considering such a claim, the Superior Court "may not weigh evidence, nor substitute the fact-finder's judgment with this Court's." *Id.* "The facts and circumstances which have been established by the Commonwealth are not required to preclude every possibility of innocence." *Id.* According to ***Hennigan***, "unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances" the fact-finder may resolve any

doubts about a defendant's guilt. ***Id.*** "The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." ***Id.***

The Superior Court of Pennsylvania in ***Commonwealth v. Castelhun***, 889 A.2d 1228, 1232 (Pa. Super. 2005), citing its decision in ***Commonwealth v. Bishop***, 1999 PA Super 292, 742 A.2d 178, 189 (Pa. Super. 1999), reiterated, "it is well-established that 'the uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses.'" ***Castelhun***, 889 A.2d at1232, citing the Superior Court's decision in ***Commonwealth v. Trimble***, 419 Pa. Super. 108, 615 A.2d 48, 50 (Pa.Super. 1992), further held that "testimony of a child victim alone is sufficient to support a conviction for sex offenses." More recently, the Superior Court of Pennsylvania in ***Commonwealth v. Charlton***, 902 A.2d 554, 562 (Pa. Super. 2006) held, "that the uncorroborated testimony of a sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant, despite contrary evidence from defense witnesses. If the fact-finder reasonably could have determined from the evidence adduced that all of the necessary elements of the crime were established, then that evidence will be deemed sufficient to support the verdict." (Citations omitted.)

The Court notes that the crimes for which Defendant was convicted occurred in a time frame significantly prior to that of the purported marriage, thus denying Defendant any statutory defense of marriage. The uncontroverted testimony of both Complainant, E.J., and Defendant, establishes that Complainant was only fourteen years of age and Defendant was thirty nine years of age, at the time they first engaged in sexual relations. Despite these facts, Defendant has consistently maintained that he did not become aware

of complainant's true age until January of 2008, a year after their relationship began. This is an issue to be decided by the trier of fact.

Defendant was found guilty pursuant of IDSI 18 Pa.C.S.A. 3123(a)(7) which provides in part that (a) "A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant; (7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other." Deviate Sexual Intercourse is defined at 18 Pa.C.S.A. 3101 as "Sexual intercourse per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures." Defendant testified that he did perform oral sex with Complainant by placing his "penis inside her mouth" prior to her becoming pregnant. (N.T., 3/12/10, pgs. 54, 55.) E.J. also testified to engaging in oral sex with Defendant prior to her becoming pregnant. (N.T., 3/11/10, pgs. 71 - 73.) ***Castelhun***, 889 A.2d at1233, held such testimony is sufficient to sustain a conviction for IDSI. The Court notes that Defendant engaged in oral sex with Complainant while she was fourteen years old and prior to their purported marriage.

Unlawful Contact with a Minor is defined in part at 18 Pa.C.S.A. 6318 (a) as "A person commits an offense if he is intentionally in contact with a minor.....for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth: (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses)." 18 Pa.C.S.A. 6318(c) further defines a minor as "An individual under 18 years of age." By

definition, Defendant's conviction pursuant to 18 Pa.C.S.A. 3123, is clearly sufficient to sustain his conviction pursuant to 18 Pa.C.S.A. 6318.

Statutory Sexual Assault pursuant to 18 Pa.C.S.A. 3122.1, is defined as "Except as provided in section 3121 (relating to rape), a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other." Again the evidence clearly established that Complainant was fourteen years of age and Defendant thirty nine years of age when they first engaged in sexual intercourse. As noted above, this took place almost a year prior to their purported marriage.

Interference with Custody of Children pursuant to 18 Pa.C.S.A. 2904, is defined as "A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so." Although there is little case law interpreting the provisions of 18 Pa.C.S.A. 2904, it is clear that the intent of the legislature was to include the luring of a child away from parental custody and control whether by a family member or a stranger. The Superior Court of Pennsylvania, in ***Commonwealth v. McClintock,*** 433 Pa. Super. 83, 639 A.2d 122, 189 (Pa. Super. 1994), held that waiving to a child to entice him into a vehicle for a brief period was sufficient to support a conviction pursuant to 18 Pa.C.S.A. 2904.

Lucille Freeman, E.J.'s mother, testified that she did not learn of the identity of Defendant until after the birth of E.J.'s child and only met him as the result of a chance encounter on the street. (N.T., 3/11/10, pgs. 175, 180, 181.) In addition, Ms. Freeman

also testified that she notified both the Upper Darby and Philadelphia police departments of the situation without any response. (N.T., 3/11/10, pg. 183.) It is clear from the testimony that Ms. Freeman did not consent to Defendant's involvement with her daughter.

Defendant consistently testified that his intentions regarding E.J., from the very beginning were to raise a family with her. To this end, he took her out of state: to New Jersey to meet his family; to Florida to celebrate her fifteenth birthday; and to Missouri to get married. When Defendant told her they were going to Missouri to get married the next morning, she asked him if he didn't want to wait until she was sixteen or eighteen to get married. "He said no, we can do it now to stop your mom from getting in between, like, what we trying to do." (N.T., 3/11/10, pg. 80.) In addition to these events, E.J. also took up residence with Defendant at his home before the birth of their child. (N.T., 3/11/10, pgs. 75, 79 and N.T., 3/12/10, pgs. 29, 56, 69.)

Corruption of Minors, pursuant to 18 Pa.C.S.A. 6301(a), is defined in part as "(1) Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime... commits a misdemeanor of the first degree." When the age of the minor is less than sixteen, 18 Pa.C.S.A. 6301(c)(1) further provides that, "Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years." The Superior Court of Pennsylvania in ***Commonwealth v. Barnette***, 760 A.2d 1166, 1173 (Pa. Super. 1994), citing it decision in ***Commonwealth v. Decker***, 698 A.2d

99, 102 (Pa. Super. 1994) held that, "In deciding what conduct can be said to corrupt the morals of a minor, 'the common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.' Furthermore, corruption of a minor can involve conduct towards a child in an unlimited number of ways. The purpose of such statutes is basically protective in nature. These statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. Because of the diverse types of conduct that must be proscribed, such statutes must be drawn broadly. It would be impossible to enumerate every particular act against which our children need be protected." (Citations omitted.) In ***Decker***, the Superior Court of Pennsylvania sustained the conviction of a thirty seven year old defendant who had sexual intercourse with a fifteen year old, on the charge of Corrupting the Morals of a Minor even though the underlying act was not illegal at the time of the incident. In citing its decision in ***Commonwealth v. Smith***, 238 Pa. Super. 422, 357 A.2d 583 (1976) (Pa. Super. 1994), the Superior Court explained "that sexual behavior was the corrupting activity to be prevented. This is no less true today since it is common knowledge that the majority of young females who become pregnant and produce children out of wedlock, undergo abortions or contract aids and other sexually transmitted diseases are impregnated by adult males. If this does not serve to require society to restrain such behavior as committed here, nothing will." ***Decker***, at 698 A.2d 101. The evidence adduced at trial was certainly sufficient to support finding Defendant guilty of Corrupting the Morals of a Minor pursuant to 18 Pa.C.S.A. 6301.

DEFENDANT'S AFFIRMATIVE DEFENSES RAISED ISSUES OF CREDIBILITY FOR THE TRIER OF FACT TO DECIDE

Defendant avers in his first Statement of Errors Complained of that, "The defendant's mistake of age was established under 18 PaC.S.A. §§304, 3102, and the statutes that defined the crimes under which the defendant was prosecuted and found guilty." Defendant's averment is simply a self serving conclusion he draws from the evidence he adduced at trial.

The law of Pennsylvania has long recognized that a mistake of fact may be raised by a defendant as defense to the charges against him. 18 Pa.C.S.A. 304 provides that "Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if: (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required a [sic] *to* establish a material element of the offense; or (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense." In addition, 18 Pa.C.S.A. 3102 provides in part that "Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age."

In order for Defendant to prevail on these affirmative defenses, the trier of fact must make a determination as to the credibility of the witnesses before it. In ***Commonwealth v. Gibbs***, Supra. 981 A.2d 274 , 281, the Superior Court of Pennsylvania citing ***Commonwealth v. Bostick***, 958 A.2d 543, 560 (Pa. Super. 2008), held that "the

trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence. Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence." In citing ***Commonwealth v. Griscavage***, 512 Pa. 540, 517 A.2d 1256 (1986), ***Gibbs*** further held that "the finder of fact was free to believe the testimony of certain Commonwealth's witnesses and to disbelieve the testimony of another." ***Gibbs***, *Supra.* 282.

At trial, Defendant conceded the requisite elements of the charges against him. On direct examination, the Commonwealth presented testimony that Complainant, E.J., was fourteen years of age, that she told Defendant her age when they first met, that they went to Florida to celebrate her fifteenth birthday. On cross examination, E.J. also testified that she and Defendant discussed her age the night before flying to Missouri. In response, Defendant testified that he did not learn of E.J.'s true age until the end of January 2008, approximately one month before the birth of their child, when he discussed the preparation of his income tax return. (N.T., 3/12/10, pg. 26.) He also introduced into evidence a copy of E.J.'s current *MySpace* internet page wherein she is purporting to be eighteen years old. (N.T., 3/12/10, pg. 145.)

The Jury, as the trier of fact had ample opportunity to evaluate both E.J.'s and Defendant's testimony and demeanor in evaluating the evidence before them. The Commonwealth established sufficient evidence for the jury to conclude that Defendant did know E.J.'s true age during the relevant time period.

II. THE COURT PROPERLY LIMITED DEFENDANT'S EXAMINATION OF WITNESSES REGARDING WHETHER OR NOT HE WAS A FIT FATHER

Defendant avers in his second Statement of Errors Complained of that, "The defendant is entitled to a new trial as a result of the trial court's restriction on his cross-examination of the Commonwealth's witnesses and the presentation of evidence concerning the fact that he was a good husband and parent." Although Defendant, in his second complaint, acknowledges that he "was not charged with any crime that required proof that he was a bad husband or parent," he asserts that "such testimony was relevant and admissible to show that the defendant reasonably believed that the complainant was of age to marry and give birth to a child."

When the Court sustained the Commonwealth's objections to the portions of the testimony referenced by Defendant in his second Statement of Matters Complained of, he did not object.[2] The Courts of Pennsylvania have long and consistently held that matters not raised at trial are deemed waived and cannot be raised on appeal. *Valvano v. Galordi*, 363 Pa. Super. 584 A.2d 1216 (Pa. Super 1987); *Sciotto v. Sciotto*, 446 Pa. 414, 288 A.2d 822 (Pa. 1972); *Heinsdorf v. Johns Manville Corp.* 352 Pa. Super. 429, 508 A.2d 334 (Pa. Super. 1986); *Staino v. Johns Manville Corp.* 304 Pa. Super. 280, 430 A.2d 681 (Pa. Super. 1982). In addition, the Rules of Appellate Procedure provide at *Pa. R.A.P. 302 (6)* "issues not raised in the lower Court are waived and cannot be raised for the first time on appeal".

It has long been the rule in Pennsylvania that "The scope and manner of cross-examination lies within the discretion of the trial court, which will not be reversed

---

[2] Defendant's second complaint specifically references the Notes of Testimony of 3/11/10, at pages 122, 128, 129, and the Notes of Testimony of 3/12/10 at pages 38-40.

except for an abuse of discretion. A trial court properly exercises its discretion to exclude cross examination on matters having no relationship to the case." (Citations omitted.) ***Commonwealth v. Wilson***, 512 Pa. 540, 517 A.2d 1256 (Pa. 1996). Since Defendant was representing himself before the jury, the Court gave him some leeway in his cross examination of E.J. During this cross examination, Defendant attempted to establish that he was unemployed after the birth of the child so that he could be the primary caregiver. (N.T., 3/11/10, pg. 127.) The Court pointed out to Defendant that this line of questioning was not relevant to the charges before it, reminding him "You are not charged with being a deficient husband or a deficient father. All of these crimes relate to you having sexual intercourse or other sexual acts with someone." (N.T., 3/11/10, pg. 126.)

During Defendant's direct testimony, he attempted to introduce a letter to establish that he had been seeking medical treatment for his son. (N.T., 3/12/10, pg. 38.) Again the Court had to remind Defendant that "What you're charged with is getting that son by impregnating a fourteen year old and there are five offenses here. They all have to do with her age, the fact that she was under eighteen for some of these crimes, under sixteen for some of these crimes. It is a defense if you made a mistake as to her age. But those are the only issues that are really relevant to these charges." (N.T., 3/12/10, pg. 39.)

The testimony and evidence proffered by Defendant did not relate to the issues before the Court. In both instances, he was attempting to introduce evidence relevant to his state of mind after the birth of the child and not during the relevant time at issue preceding the birth.

III. THE COURT PROPERLY DENIED DEFENDANT'S REQUEST TO CHARGE THE JURY ON THE MARRIAGE LAWS OF MISSOURI

Defendant avers in his third Statement of Errors Complained of that, "The defendant is entitled to a new trail as a result of the trial court's ruling that denied his request to instruct the jury as to the marriage laws of the State of Missouri and the Commonwealth of Pennsylvania." Although both Defendant and E.J. testified that they believed they were married after their trip to Missouri, there is no competent evidence of record, such as a certified marriage certificate, to establish that a marriage might exist between the parties.

"When reviewing the propriety of a jury charge, an appellate court examines the charge as a whole. The trial court has broad discretion in formulating jury instructions, so long as the law is presented to the jury in a clear, adequate, and accurate manner." (Citations omitted.) *Commonwealth v. Lukowich*, 875 A.2d 1169, 1174 (Pa. Super. 2005). More recently, the Superior Court of Pennsylvania, in *Commonwealth v. Bohonyi*, 900 A.2d 877, 883 (Pa. Super. 2006), held that "The law is well settled that a trial court is not obligated to instruct a jury upon legal principles which have no applicability to the presented facts. There must be some relationship between the law upon which an instruction is requested and the evidence presented at trial. However, a defendant is entitled to an instruction on any recognized defense which has been requested, which has been made an issue in the case, and for which there exists evidence sufficient for a reasonable jury to find in his or her favor." There is no evidence of record that a marriage exists. Even if an authenticated license had been introduced, there is no evidence of record as to whether or not the marriage, given the ages of the parties and the false identification used to secure the license, is one that would be recognized under the

laws of Missouri. In denying Defendant's requested charge, the Court explained that the material he submitted regarding the charge was "inadequate to give me enough information to tell the jury what the law of Missouri is on marriage." (N.T., 3/12/10, pg. 85.) The issue of the existence of a marriage between Defendant and E.J.in Missouri is irrelevant to the charges against Defendant in that it occurred after the charged acts had occurred.

IV. CONCLUSION

The Court finds that the Commonwealth presented sufficient evidence to sustain Defendant's conviction on the charges of Involuntary Deviate Sexual Intercourse, Unlawful Contact with a Minor, Statutory Sexual Assault, Interference with Custody of Children, and Corruption of Minors.

BY THE COURT:

October 20, 2010

HON. CHARLES J. CUNNINGHAM, III

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1556

JOHNATHAN ROBINS, Appellant

VS.

SUPERINTENDENT ROCKVIEW SCI, ET AL.

(D.C. Civ./Crim. No. 2:18-cv-01385)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ David J. Porter
Circuit Judge

Date: August 31, 2021
Lmr/cc: Johnathan Robin
David Napiorski
Ronald Eisenberg

Ex, E