No. 22-

IN THE

Supreme Court of the United States

SHAWN ROGERS MALLOY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

NATHAN J. SCHADLER
Counsel of Record
CONWAY SCHADLER LLC
3245 Ridge Pike
Eagleville, PA 19403
(484) 997-2040
nathan@conwayschadler.com

Attorneys for Petitioner

316586

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does the prosecution's retention of, failure to quarantine, and failure to disclose possession of a criminal defendant's legal strategy notes, prepared with his attorney, violate the defendant's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution, including as stated in *Brady v. Maryland* and *California v. Trombetta?*

2. Does the prosecution's retention of, failure to quarantine, and failure to disclose possession of a criminal defendant's legal strategy notes, prepared with his attorney, violate the defendant's right to counsel guaranteed by the Sixth Amendment of the United States Constitution, as it is inextricably linked to the protection of attorney-client work product, including as stated in *United States v. Nobles?*

3. Does the Pennsylvania trial court's and appellate courts' use of a false-in-one, false-in-all standard jury instruction as the sole remedy for prosecutorial misconduct violate the *Morrison* standard for tailoring remedies in proportion to the constitutional violation?

4. Does the Pennsylvania trial court's and appellate courts' placement of the burden of proof on the criminal defendant related to the prejudice the prosecution's retention of, failure to quarantine and failure to disclose possession of the defendant's legal strategy notes prepared with his attorney violate *Berger* and its progeny?

LIST OF PROCEEDINGS DIRECTLY RELATED TO THIS MATTER

- *Commonwealth of Pennsylvania v. Shawn Rogers Malloy*, CP-46-CR-0001010-2018 (consolidated with CP-46-CR-0002402-2019 prior to trial), Montgomery County Court of Common Pleas. Judgment entered November 7, 2019.

- *Commonwealth of Pennsylvania v. Shawn Rogers Malloy*, CP-46-CR-0002402-2019 (consolidated with CP-46-CR-0001010-2018 prior to trial), Montgomery County Court of Common Pleas. Judgment entered November 7, 2019.

- *Commonwealth of Pennsylvania v. Shawn Rogers Malloy*, 1244 EDA 2020 (consolidated, *sua sponte*, with 1287 EDA 2020), Pennsylvania Superior Court. Judgment entered October 26, 2021.

- *Commonwealth of Pennsylvania v. Shawn Rogers Malloy*, 1287 EDA 2020 (consolidated, *sua sponte*, with 1244 EDA 2020), Pennsylvania Superior Court. Judgment entered October 26, 2021.

- *Commonwealth of Pennsylvania v. Shawn Rogers Malloy*, 45 MAL 2022, Pennsylvania Supreme Court. Judgment entered July 6, 2022.

- *Commonwealth of Pennsylvania v. Shawn Rogers Malloy*, 46 MAL 2022, Pennsylvania Supreme Court. Judgment entered July 6, 2022.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Constitutional Provisions

Statutory Provisions

Rules of the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Shawn Rogers Malloy petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania.

I. CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The October 26, 2021 Pennsylvania Superior Court opinion, including the attached August 21, 2020 Opinion of the Honorable Risa Vetri Ferman, can be found at 266 A.3d 658 (Table), 2021 WL 4975681 (Pa. Super. 2021). *See* Appendix at 3a–63a. The July 6, 2022 Order of the Pennsylvania Supreme Court denying Petitioner's Petition for Allowance of Appeal can be found at 2022 WL 2452267 (Table) (Pa. 2022). *See id.* at 1a–2a.

II. JURISDICTIONAL STATEMENT

The Pennsylvania Supreme Court issued a final judgment in this matter on July 6, 2022, regarding Petitioner's rights under the United States Constitution, denying Petitioner's Petition for Allowance of Appeal. This Court has jurisdiction to review the judgment of the Pennsylvania Supreme Court pursuant to 28 U.S.C. § 1257(a). Petitioner files this Petition within ninety (90) days of the judgment of the Pennsylvania Supreme Court in compliance with U.S. Sup. Ct. R. 13 and 28 U.S.C. § 2101(c).

III. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

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

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV. STATEMENT OF THE CASE

For more than a year prior to his trial, the Montgomery County District Attorney's Office received, retained, and had at their disposal to use as they saw fit Petitioner's legal and strategic notes prepared with his criminal defense attorney for his criminal case. Despite repeated assertions to the contrary by the prosecution, these documents were never fully purged from the prosecution's files. Petitioner became aware of the falsity of these assertions on October 27, 2019, eight (8) days before trial was set to begin in Petitioner's matter. Petitioner filed a pretrial Motion for Sanctions to seek redress for the prosecution's misconduct, but the trial court refused to grant any relief, choosing only to read a standard jury instruction which would have been read to the jury independent of the prosecution's impermissible conduct. The Pennsylvania appellate courts, likewise, afforded no relief to Petitioner, as the Pennsylvania Superior Court summarily affirmed the trial court's disposition without any scrutiny, and the Pennsylvania Supreme Court denied Petitioner's permissive appeal. As the prosecutorial misconduct in this matter violated Petitioner's right to due process and right to counsel, Petitioner takes the present appeal.

The Commonwealth's allegations against Petitioner focus on interactions between Petitioner and his wife, Claudia Aust Malloy. First, the Commonwealth alleged

that Petitioner physically assaulted Claudia at a bar in New Hanover Township, Pennsylvania in November 2017, charging Petitioner with Simple Assault and Harassment. Second, the Commonwealth alleged that Petitioner engaged in a one-sided campaign, utilizing letters, phone calls and emails, to harass and intimidate Claudia into refraining from testifying, or providing false testimony in the assault/harassment matter, charging Petitioner with Intimidating a Witness/Victim, Criminal Use of a Communication Facility, Obstruction, Harassment, and Stalking.

Claudia was front and center in the Commonwealth's presentation of its case. Claudia was called as the first witness by the Commonwealth and her direct examination spanned the entire first day of the trial. During the course of their investigation, Claudia corresponded with and met with the prosecutors in this case on multiple occasions and provided them evidence Claudia deemed relevant to the litigation. It is this relationship and sharing of information that poisoned the investigative and prosecutorial process in this matter.

On January 15, 2018, Petitioner and Claudia met for a custodial exchange of their children. During this exchange, Claudia removed and absconded with a legal pad from Petitioner's vehicle and took pictures of seven (7) pages of its contents. The contents of these photographed pages were easily identifiable as privileged and confidential attorney-client work product. The first page included Petitioner's attorneys' contact information. The second page, headlined as "PRIOR INCIDENTS", discussed Petitioner's interactions with Claudia involving alleged violence and persons with knowledge of said

incidents. The third page, headlined "EVIDENCE", described tangible evidence Petitioner could use to refute Claudia's claims related to the alleged assault as well as evidence of Claudia's behavioral issues, along with the potential related testimony regarding the evidence. The fourth page headlined "WITNESS LIST", described the proposed testimony of Petitioner and fifteen (15) witnesses who could potentially be called by the defense at trial. The fifth page headlined "DIVORCE CUSTODY", described issues regarding the divorce and custody matters involving Petitioner and Claudia, including their children and payment of bills. The sixth and seventh pages are a letter in Petitioner's handwriting to defense counsel dated January 10, 2017 describing Petitioner's opinions about Claudia and Petitioner's thoughts regarding case strategy for the pending criminal matter and divorce matter.

On January 16, 2018, Stewart Ryan, the Assistant District Attorney handling the matter at the time, sent the following email to defense counsel:

> Mr. Schadler-
>
> I was contacted via phone by Claudia Malloy last evening. She advised that when she last exchanged custody of the children with your client, one of the children, in error, took a bag believed to be full of laundry but that in fact contained property belonging to your client. The bag was taken from your client's car and placed in Mrs. Malloy's car. Mrs. Malloy discovered this error when she emptied the bag in the laundry room and discovered a notebook. In reviewing the notebook to learn what it was

> or who it belonged to, she realized it contained writings by your client. She indicated to me that the notebook also appeared to contain a letter written by your client to you. She indicated to me that she did not review the contents of this letter and therefore could not and did not share any of the contents with me. At the time we spoke, she had returned the notebook and any remaining contents to the bag. She contacted me because she was unsure of what to do with the notebook and the bag and to bring this error to my attention. She indicated to me that she would be returning the bag and any contents to your client this evening when there is a planned custody exchange. I instructed her to ensure she does so as I considered that to be the appropriate course of action.
>
> Stew Ryan

This was the first time that Petitioner became aware that Claudia had taken his notes, and he was completely unaware Claudia had photographed the notes (at this point Petitioner was also unaware that the Commonwealth had not been forthright about the fact that they retained the notes). Thereafter, the legal pad was returned to Petitioner. At that time, Petitioner believed that the Commonwealth had not received any of the contents of any of his notes. This belief proved to be a false hope on Petitioner's part.

When a second Assistant District Attorney, Erica Wevodau, took over the handling of this matter, she quickly realized that ADA Ryan's email was incorrect.

While producing discovery in this matter, ADA Wevodau found the pictures taken by Claudia of Petitioner's trial strategy notes were indeed in the possession of the Commonwealth, proving Claudia's, and ADA Ryan's assertions to be false. ADA Wevodau alerted defense counsel of this revelation and asserted that the Commonwealth would take corrective action in two ways: first, an intern would be assigned to identify and screen off any of the pictures that constituted attorney-client work product and second, the pictures identified would be produced to defense counsel. Defense counsel received a production of pictures, which included some, but not all, of the pages photographed by Claudia and transmitted to the Montgomery County District Attorney's Office. At that time, Petitioner believed the production to constitute the entirety of the photographs taken by Claudia.

Hundreds of files constituting thousands of pages of documents were exchanged between the defense and the prosecution during the course of this matter. Upon receipt of a flash drive containing the latest set of the prosecution's production, on October 27, 2019, ***eight days before trial***, defense counsel found multiple files containing material that was part of the photographs Claudia took in January 2018 that had not been screened out of the prosecution's files. Included in that production was a file labeled "Witness List" that contained the list of witnesses Petitioner had written in his legal strategy notes. ***This was the first time that Petitioner became aware that the Commonwealth had possession of his list of proposed witnesses***. Also, the naming of the file as "Witness List", along with the files labeled "Evidence" and "Accusations" that also contained Petitioner's legal strategy notes indicates more than mere receipt and retention of these photographs; it suggests

that someone going through discovery in this case viewed the photographs and analyzed them at least to the extent that they differentiated the content of the different pages.

To seek a remedy for the Commonwealth's misconduct prior to trial, Petitioner filed a Motion for Sanctions. The Court held oral argument on the Motion days before trial was set to begin. The Commonwealth argued in opposition to the Motion that because Petitioner could not prove that he was prejudiced by the Commonwealth's misconduct and because the prosecutors themselves had never actually viewed the documents, no sanction should be awarded. The trial court ruled in favor of the Commonwealth, stating that the receipt, retention, and review of the files and failure of the quarantine system did not constitute prosecutorial misconduct, and the court determined that no sanction was warranted and that the false in one, false in all jury instruction included in the standard jury instructions would provide a sufficient course to address the prosecutorial misconduct at issue.

Four of the persons named in Petitioner's witness list, including Petitioner, testified as a part of Petitioner's case at trial. This included Petitioner, Joan Malloy (Petitioner's mother), Shane Murray, and John Brennan. Petitioner and Joan Malloy were subject to cross examination by the prosecution. After a three-day trial, Petitioner was found guilty of one (1) count of intimidation of witnesses, two (2) counts of criminal use of communication facility, one (1) count of obstruction of justice and seven (7) counts of harassment; Petitioner was acquitted on all remaining counts and all counts relating to the initial incident (the alleged assault in New Hanover) that led to Defendant being charged originally. Defendant was sentenced

on March 9, 2020 to a term of two (2) to six (6) years confinement in state prison. Defendant is currently out of prison, subject to the restrictions of parole.

Petitioner appealed his conviction to the Pennsylvania Superior Court due to the trial court's failure to issue pre-trial sanctions to remedy the prosecutorial misconduct. The Pennsylvania Superior Court affirmed the verdict and, likewise, the denial of Petitioner's Motion for Sanctions, adopting as its own the opinion of the trial court without any further analysis. After Petitioner's Application for the Pennsylvania Superior Court to hear reargument *en banc* was denied, Petitioner filed a Petition for Allowance of Appeal seeking review of the matter before the Pennsylvania Supreme Court. His Petition for Allowance of Appeal was denied on July 6, 2022.

V. REASONS FOR GRANTING THE WRIT

The Pennsylvania Supreme Court, in denying Petitioner's Petition for Allowance of Appeal and allowing the decision of the Pennsylvania Superior Court to stand, has decided important questions of federal law in ways that conflicts with the decisions of this Court. The holdings of Judge Ferman of the Montgomery County Court of Common Pleas and of the Pennsylvania Superior Court fail to recognize the violations of Petitioner's constitutional rights and fail to provide a remedy in proportion to those violations. Petitioner's right to due process, as guaranteed by the Fifth and Fourteenth Amendments, and his right to counsel, as guaranteed by the Sixth Amendment, were violated in this matter. The failure to recognize the prosecutorial misconduct in this matter as violative of those rights runs counter to this Court's decisions,

including *Brady v. Maryland*, *California v. Trombetta*, and *United States v. Nobles*, as well as those discussed below. The failure to tailor a proportionate remedy to these constitutional violations violates *United States v. Morrison* and the failure to place the burden of proof on the prosecution under these circumstances violates *Berger*. Petitioner seeks redress with this Court to recognize the misconduct by the Montgomery County District Attorney's Office as violative of Petitioner's constitutional rights, that a remedy be tailored in accordance with the magnitude of the misconduct involved, and that he receive a new trial purged of the taint of the prosecutorial misconduct of the Montgomery County District Attorney's Office.

A. The Retention of, Failure to Quarantine, and Failure to Disclose Possession of a Criminal Defendant's Legal Strategy Notes Prepared with His Attorney Violates the Defendant's Due Process Rights under the Fifth and Fourteenth Amendments of the United States Constitution, and Violates *Brady v. Maryland* and *California v. Trombetta*

The acts and omissions of the Montgomery County District Attorney's Office and the Commonwealth of Pennsylvania, through its employees and staff, constitutes prosecutorial misconduct violative of Petitioner's due process rights, as defined by this Court. This Court has repeatedly found that due process protects a criminal defendant from being harmed by prosecutorial misconduct. As early as *Mooney v. Holohan*, 294 U.S. 103 (1935), this Court conceived due process as a broad protection, "safeguarding the liberty of the citizen against deprivation through the action of the state."

Id. at 112. In drawing a broad set of protections, the *Mooney* court reasoned that the prosecution's knowing use of perjured testimony amounted to a "contrivance by a state to procure the conviction and imprisonment of [the] defendant…inconsistent with the rudimentary demands of justice." *Id.* at 112. This principle recognizing the connection between a defendant's due process rights and the prosecution's violation of those rights through its misconduct was gradually expanded to other intentional prosecutorial misconduct in the decades following the decision. *See Pyle v. Kansas,* 317 U.S. 213, 214–16 (1942) (finding a deprivation of rights pursuant to *Mooney* where the prosecution presented testimony known to be perjured and suppressed testimony favorable to the defendant), *Napue v. People of State of Ill.,* 360 U.S. 264, 269 (1959) (finding a violation of the Fourteenth Amendment when the prosecution presents false evidence, even if unintentionally, and fails to correct it when it appears).

These principles underpinned the holding of this Court's seminal decision in *Brady v. Maryland.* 373 U.S. 83 (1963). *Brady*'s foundations were explicitly rooted in a criminal defendant's protections guaranteed by the Due Process clause of the Fourteenth Amendment as stated in *Mooney, Pyle,* and *Napue. See id.* at 86–87. The *Brady* Court bolstered these protections in two different ways. First, it found that nondisclosure of evidence material to a criminal defendant's case was prejudicial and violative of due process rights. *See id.* at 86–87. Second, it found that a constitutional violation occurred notwithstanding the good or bad faith of the prosecution. *See id.* at 86–87.

Petitioner recognizes that the Due Process Clause is not "a code of ethics for prosecutors" and, instead, the

focus is on whether the defendant is deprived of his rights. *Mabry v. Johnson,* 467 U.S. 504, 511 (1984). The regulation of prosecutorial conduct under the Due Process Clause is instead rooted in the idea that "criminal prosecutions must comport with prevailing notions of fundamental fairness." *See California v. Trombetta,* 467 U.S. 479, 485 (1984). Therefore, fundamental to a defendant's due process rights is that the defendant "be afforded a meaningful opportunity to present a complete defense." *Id.*

Justice Thurgood Marshall's dissent in *United States v. Bagley* highlights the intimate connection between trial strategy and the prosecution's withholding of evidence. 473 U.S. 667 (1985). The material at issue in *Bagley* was the prosecution's non-disclosure of contracts where witnesses agreed to aid the government in its investigation of the defendant in exchange for monetary compensation, which the defendant could have used to impeach the credibility of said witnesses. Justice Marshall highlighted the value of the impeachment material as follows:

> "[T]he court's statement that Bagley did not attempt to discredit the witnesses' testimony, as if to suggest that impeachment evidence would not have been used by the defense, ignores the realities of trial preparation and strategy, and is factually erroneous as well. Initially, the Government's failure to disclose the existence of any inducements to its witnesses, coupled with its disclosure of affidavits stating that no promises had been made, would lead all but the most careless lawyer to step wide and clear of questions about promises or inducements. The combination of nondisclosure and disclosure

> would simply lead any reasonable attorney to believe that the witness could not be impeached on that basis. Thus, a firm avowal that no payment is being received in return for assistance and testimony, if offered at trial by a witness who is not even a Government employee, could be devastating to the defense. A wise attorney would, of necessity, seek an alternative defense strategy."

Id. at 689 (Marshall, J., dissenting).

When the information that is within the grasp, or in the possession, of the prosecution is attorney work product, such as notes on legal strategy, the fundamental fairness of the defendant's trial and his meaningful opportunity to present a complete defense is at a heightened risk. A case in the Tenth Circuit Court of Appeals gives guidance as to the situation at hand. *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112 (10th Cir. 1998). The material at issue in *Lin Lyn Trading* was a yellow notepad seized by Customs agents which contained the defendant's conversations with his legal counsel. 149 F.3d at 1113. This notepad remained in the possession of the government for more than two years prior to the defendants' indictment. *See id.* at 1113–14. The defendants moved for a return of the property, which was granted after the Magistrate Judge reasoned that the seizure of the notepad was unlawful and "the government's continued possession of privileged attorney-client communications would cause the defendants irreparable injury." *Id.* at 1114. The defendants then filed a motion to suppress based, in part, on violations of their Fifth Amendment due process rights due to the illegally seized notepad providing a "roadmap" for the investigation

of their cases. *See id.* at 1114–15. The trial court granted the motion, suppressing all evidence obtained on the date of the illegal seizure and thereafter. *Id.* at 1114–15. The Tenth Circuit affirmed the suppression of evidence. *Id.* at 1118. In doing so, the Tenth Circuit found that the prosecution failed to meet its burden to prove a source independent of the taint caused by the initial illegality and that the government's failure to shoulder its burden warrants suppression. *See id.* at 1115–16.

In retaining and failing to quarantine Petitioner's legal strategy notes, the prosecution in this matter failed to comport with fundamental fairness and infringed on Petitioner's ability to present a complete defense. The prosecution possessed a roadmap of Petitioner's evidence, witnesses, and related testimony that was obtained through the underhanded acts of the complaining witness in Petitioner's case. This roadmap, even if not directly viewed by the prosecutors who tried the case, gave the Commonwealth an advantage and an opportunity to shape their investigation in a way that would best counter the evidence named in Petitioner's notes. The Commonwealth is more than just prosecutors; it includes law enforcement, investigators, and other support staff. As such, the mere possession of this touches upon the fundamental fairness of Petitioner's trial and his ability to present a complete defense regardless of the good or bad faith of the prosecution. The Pennsylvania Courts' interpretation and application of due process to allow for the prosecutorial misconduct to go unpunished here is undoubtedly contrary to this Court's clear precedents.

B. The Retention of, Failure to Quarantine, and Failure to Disclose Possession of a Criminal Defendant's Legal Strategy Notes Prepared with His Attorney Violates the Defendant's Right to Counsel Guaranteed by the Sixth Amendment of the United States Constitution, as it is Inextricably Linked to the Protection of Attorney-Client Work Product as Stated in *United States v. Nobles*

This Court has recognized the importance of protecting attorney work product for decades. In *Hickman v. Taylor,* this Court found that the memoranda and statements of attorneys were protected as attorney work product and, as such, need not be produced without adequate justification proven by the party seeking production. *Hickman v. Taylor*, 329 U.S. 495, 512–13 (1947). Justice Murphy, writing for the *Hickman* majority, discussed the policies underlying the work product doctrine, which still remain applicable to this day:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the

> historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 510–11 (internal citations omitted).

In *United States v. Nobles,* this Court recognized that the work-product doctrine extends to criminal and civil matters alike. *United States v. Nobles,* 422 U.S. 225, 236 (1975). There, this Court, building upon the principles of *Hickman,* found that the work product doctrine had a vital role in "assuring the proper functioning of the criminal justice system" and should therefore shelter from discovery the mental processes of attorneys. *Id.* at 238.

Vindicating the right to counsel under the Sixth Amendment requires protecting the work product of his attorney. Judge Frankel, of the Southern District of New York, commented in *In re Terkeltoub,* that the disclosure of attorney work product "touch[es] a vital center in the administration of criminal justice, the lawyer's work in investigating and preparing the defense of a criminal charge" and, therefore, the interests protected by the right to counsel in the Sixth Amendment must include "the privacy and confidentiality of the lawyer's work in preparing the case." *In re Terkeltoub,* 256 F.Supp 683, 684–85 (S.D. N.Y. 1966).

Lower courts have established a broad scope of the right to counsel guaranteed by the Sixth Amendment, extending the right to intrusions by the prosecutors beyond merely preventing defendants from speaking to their clients, or *vice versa.* Particularly relevant to this case is the Third Circuit Court of Appeals decision in *United States v. Levy.* 577 F.2d 200 (3d Cir. 1978). In *Levy,* the prosecutorial misconduct arose out their use of an informant, who sat in on confidential meetings with the defendant targeted by the informant's investigation, to transmit details of the defendant's trial strategy to the prosecutors. *See Levy,* 577 F.2d at 202–05. Through this misconduct, the prosecution became aware of the defendant's strategy to attack the credibility of two government witnesses and the prosecution altered its preparation for trial accordingly. *See id.* at 208. The *Levy* Court's analysis as to the impact of this misconduct on the defendant's Sixth Amendment rights is particularly cogent to the present matter:

The government's knowledge of this planned strategy would permit it not only to anticipate and counter such an attack on its witnesses' credibility, but also to select jurors who would be more receptive to the testimony of black witnesses against white ethnic defendants. While the significance of such benefits is, of course, speculative, such speculation is the inevitable consequence of the legal standard the district court adopted.

Where there is a **knowing invasion of the attorney-client relationship** and where **confidential information is disclosed to the government**, we think that there are **overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudical [*sic*] to the defense the disclosure is**…[T]he court was able to consider the problem in a pretrial hearing. But it is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself.

…

The fundamental justification for the sixth amendment right to counsel is the presumed

> inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. No severe definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

Id. at 208–09 (emphasis added).

In *Lin Lyn Trading,* the Tenth Circuit Court of Appeals, in addition to a violation of the defendant's due process rights, found that the seizure, retention, and failure to quarantine of the defendant's notebook impaired

the right of the defendant to effective assistance of counsel and suppression of evidence was an appropriate sanction to correct the violation. *See Lin Lyn Trading,* 149 F.3d at 1115–16. In *United States v. Horn,* the trial court and the First Circuit Court of Appeals drew an explicit connection between work product protections, Sixth Amendment rights, and the extensive prosecutorial misconduct in that case. 811 F.Supp. 739 (D. N.H. 1992), *affirmed in part, overturned on other grounds in part by Horn,* 29 F.3d 754 (1st Cir. 1994). In *Horn,* the prosecution requested records staff to keep a record of any documents provided to defense counsel and make copies of same. 811 F.Supp. at 741–42. The *Horn* Court noted the value of the work product doctrine lies in granting attorneys "a zone of privacy within which to prepare the client's case and plan strategy without undue interference." *Id.* at 745. The court then reasoned that the defense's choice of documents to use in its case was protected under the "highly-protected category of opinion work product." *Id.* at 745. The *Horn* Court found the intrusion on the defendant's work product constituted a violation of his Sixth Amendment right to counsel before awarding a broad set of remedies. *Id.* at 747, 750–51. Specifically, the Court categorized the misconduct as prejudicial because the act of copying and reviewing of the documents, without regard to the contents of the documents, "provided an important insight into defense tactics, strategy, and problems." *See id.* at 751.

The Montgomery County District Attorney's Office retained, for months, documents that outlined multiple facets of Petitioner's legal strategy in violation of Petitioner's Sixth Amendment right to counsel. The retention of these documents allowed the prosecutors, investigators, and other Commonwealth staff to predict

Petitioner's presentation of his case and prepare their investigation and prosecution accordingly. The notes in their possession were in the highly protected category of opinion work product, as it discussed legal strategy as to tangible evidence and testimony. This retention unduly interfered with Petitioner's ability to prepare a complete defense to his case.

The Commonwealth's excuses for this failure are clearly insufficient to warrant abrogating a defendant's right to counsel. Their primary excuse is that the intern they assigned to handle the issue failed to properly quarantine and purge these documents. This excuse shows that the prosecutors did not take this issue seriously and the trial court even noted that their use of an intern to perform this task was likely an improper course to take. Second, they claim that they did not actually view the documents due to the large number of documents exchanged in this matter. Whether the prosecutors presenting the Commonwealth's case at trial actually viewed the materials does not alleviate the problem where the Commonwealth's staff, or the police investigating the matter, could have used these materials to investigate or otherwise prepare their case without the knowledge of the prosecuting attorneys. Additionally, the number of documents exchanged in this case should not have been considered here; a defendant's right to counsel and to be free to candidly prepare his case with his attorney should not be contingent upon the number of documents in the prosecution's file. The Commonwealth's possession of seven pages of defense legal strategy notes amounts to misconduct whether discovery is twenty pages or twenty thousand pages. Pennsylvania Courts' decisions otherwise run in clear opposition to Petitioner's Sixth Amendment right to counsel as interpreted by decisions of this Court.

C. The Pennsylvania Trial Court's and Appellate Courts' Use of a False-in-one, False-in-all Standard Jury Instruction as a Remedy for Prosecutorial Misconduct Violates the *Morrison* Standard for Tailoring Remedies in Proportion to the Constitutional Violation and the *Berger* Standard for the Placement of the Burden of Proof as to the Prejudice for the Constitutional Violation

This Court succinctly laid out the approach courts should take when dealing with prosecutorial infringement of a defendant's right to counsel and right to a fair trial, stating that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison,* 449 U.S. 361, 364 (1981). Thus, where these rights have been tainted, the court must "identify and neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. Accordingly, the remedy is limited to "denying the prosecution of the fruits of its transgressions." *Id.* at 366.

To tailor appropriate relief, this Court has placed on the prosecution the burden to prove a lack of violation under certain circumstances. This court has previously noted that in certain circumstances "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." *Berger v. United States,* 295 U.S. 78, 89 (1935). This standard is not one that is fixed and, as such, the burden of proof must shift depending on the circumstances of the case. *See, e.g., Arizona v. Youngblood,* 488 U.S. 51, 57–58 (1988)

(discussing the different treatment of exculpatory evidence disclosure under *Brady v. Maryland,* 373 U.S. 83 (1963) versus preservation of potentially useful evidence under *California v. Trombetta,* 467 U.S. 479 (1984)), *Rose v. Clark,* 478 U.S. 570, 576–79 (1986) (discussing the varying application of the harmless error doctrine of *Chapman v. California,* 386 U.S. 18 (1967) based on the nature of the constitutional violation). In *Batson v. Kentucky,* this Court adopted a burden shifting test beginning with a necessary presumption arising out of the use of peremptory challenges to exclude jurors of the Defendant's race from serving on the jury. 476 U.S. 79, 94–97 (1986). Under this test, should the government fail to meet its burden, they would be violating a defendant's right to equal protection under the Fourteenth Amendment. *Id.* In *Barker v. Wingo,* this Court found appropriate for the prosecution to prove its lack of violation of Defendant's speedy trial rights, including a lack of prejudice to Defendant. *Barker v. Wingo,* 407 U.S. 514, 528, 532 (1972). Building upon the prejudice standard for speedy trial rights, this Court in *Doggett v. United States* noted the role that the passage of time plays in increasing presumptive prejudice; the more time that passed, the less actual prejudice Defendant must have suffered to demonstrate constitutional violation. 505 U.S. 647 (1992).

In this case, the nature of the violation should require the prosecution prove its lack of violation. The prosecutorial retention, failure to quarantine, and failure to disclose their unlawful possession of defense counsel's opinion work product and legal strategy notes is virtually impossible for the defendant to prove because the materials and ability to communicate the scope of the violation laid at the feet of the Montgomery County

District Attorney's Office. Without Petitioner rummaging through the case files himself, the only knowledge as to what the Commonwealth possessed and how they viewed the files must have come from the District Attorney's Office itself. As such, the Pennsylvania Courts' placement of the burden to prove the constitutional violation onto Petitioner was improper, and contrary to *Berger.*

As to tailoring relief, the Pennsylvania Courts failed to award any remedy to fit under the circumstances. Under these circumstances, lower courts have awarded a wide range of sanctions for prosecutorial misconduct. *See, e.g., Lin Lyn Trading,* 149 F.3d at 1115–16 (suppression of tainted evidence and all evidence discovered thereafter), *United States v. Kojayan,* 8 F.3d 1315, 1323–25 (9th Cir. 1993) (reversal of convictions and remand for determination of whether the sanction of dismissal with prejudice is appropriate), *United States v. Horn,* 811 F.Supp 739, 751–52 (D. N.H. 1992) (sanctioning by (1) requiring prosecutors give written summaries of each of its witness's testimony, (2) requiring the prosecution make available two persons involved in the misconduct for depositions, (3) removing the lead prosecutor from the case, (4) prohibiting the prosecution from introducing any of the documents at issue or eliciting testimony regarding their substance, and (5) reimbursing defense counsel costs and attorneys' fees incurred in litigating the prosecutor's misconduct), *United States v. Wecht,* 2007 WL 2029281 (W.D. Pa. 2007) (giving all documents at issue to defense counsel and destroying all other copies of same).

The trial court in this matter denied Petitioner's request for dismissal of the charges and, when requesting at the very least a jury instruction as it related to the

relationship between the theft of the legal strategy notes and Claudia's testimony, stated that the false in one, false in all jury instruction given in every criminal jury instruction across the Commonwealth of Pennsylvania would serve as an adequate sanction in this case. In reality, this was not a sanction at all – as it would have been read to the jury had the notes at issue not been stolen and retained – and, therefore, the courts in the Commonwealth of Pennsylvania reasoned that the Montgomery County District Attorney's Office conduct deserved no sanctions. Violations to a criminal defendant's Fifth and Fourteenth Amendment Due Process rights and Sixth Amendment right to counsel should require a sanction to deny the prosecutors the fruit of their transgressions. The "sanctions" awarded here did no such thing, in clear violation of *Morrison*.

VI. CONCLUSION

This court's clear jurisprudence provides that a criminal defendant's right to due process and right to counsel protects him from prosecutorial interference with his ability to present a complete defense. The Pennsylvania Courts' decisions in this matter provided no vindication of Petitioner's constitutional rights and no sanctions for the admitted prosecutorial misconduct in this matter. Instead, Pennsylvania Courts gave a green light to District Attorneys' Offices around the Commonwealth to retain and use criminal defendants' legal strategy notes and attorney-client work product by claiming that because the attorneys prosecuting the case did not actually view the documents that the criminal defendants cannot prove they suffered any prejudice and no sanctions are warranted. Because the Pennsylvania Courts have violated this

Court's decisions in *Brady, Trombetta, Nobles, Morrison,* and *Berger,* Petitioner requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

Nathan J. Schadler
Counsel of Record
Conway Schadler LLC
3245 Ridge Pike
Eagleville, PA 19403
(484) 997-2040
nathan@conwayschadler.com

Attorneys for Petitioner

APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, DATED JULY 6, 2022

IN THE SUPREME COURT
OF PENNSYLVANIA MIDDLE DISTRICT

No. 45 MAL 2022

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

SHAWN MALLOY,

Petitioner.

No. 46 MAL 2022

PETITION FOR ALLOWANCE OF APPEAL
FROM THE ORDER OF THE SUPERIOR COURT

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

SHAWN MALLOY,

Petitioner.

Appendix A

ORDER

PER CURIAM

AND NOW, this 6th day of July, 2022, the Petition for Allowance of Appeal is **DENIED**.

A True Copy

Elizabeth E. Zisk As Of July 6, 2022

Attest: s/ Elizabeth E. Zisk
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX B — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA, DATED OCTOBER 26, 2021

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

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1244 EDA 2020

COMMONWEALTH OF PENNSYLVANIA,

v.

SHAWN MALLOY,

Appellant.

Appeal from the Judgment of Sentence Entered March 9, 2020 In the Court of Common Pleas of Montgomery County Criminal Division at No(s): CP-46-CR-0002402-2019

No. 1287 EDA 2020

COMMONWEALTH OF PENNSYLVANIA,

v.

SHAWN MALLOY,

Appellant.

Appendix B

Appeal from the Order Entered June 10, 2020
In the Court of Common Pleas of Montgomery
County Criminal Division at
No(s): CP-46-CR-0002402-2019

BEFORE: *PANELLA*, P.J., *OLSON*, J., and *COLINS*, J.*

MEMORANDUM BY *OLSON*, J.

FILED OCTOBER 26, 2021

***1** Appellant, Shawn Malloy, appeals from the judgment of sentence entered on March 9, 2020, as made final by the denial of Appellant's post-sentence motion on June 10, 2020. We affirm.

The trial court ably summarized the underlying facts of this case:

> Prior to the incidents that brought Appellant to court, he had a lengthy career as a police officer with the Conshohocken Borough Police Department. In the evening hours of November 21, 2017, a domestic incident occurred between Appellant and his wife in the parking lot of the Allstar Bar in New Hanover Township, Montgomery County. This bar is located across the street from their house. Appellant arrived as a customer at the bar at approximately 4:30 [p.m.] that day. Later that evening, [Appellant's wife] (hereinafter "victim") walked over to the bar, and the

two verbally argued in the parking lot near where Appellant's truck was parked. Shortly thereafter, Appellant drove away and the victim walked home. Appellant returned to the bar shortly thereafter. Suspecting Appellant would return to the bar, the victim also returned and saw Appellant's truck parked in the parking lot. She gained entry into Appellant's truck by using the code on the door to the vehicle. Appellant was outside the bar on the deck and noticed lights on in his car. He found the victim in his car and a brief scuffle ensued. The victim sustained minor injuries. She then went home.

The victim did not go to the police immediately that night. She claimed she was afraid to report this incident because her husband, Appellant, was a police officer. Appellant had often conveyed to her that "things could happen if [she] were to report to the police." Despite her fears, the victim went to the New Hanover Township Police Department the next day and encountered Detective Michael Coyle. She was still afraid to say anything or make any statement at that time due to the fact that Appellant was a police officer. She testified, "I didn't know what would happen if I said anything, from them not believing me to, I don't know, losing jobs, everything. I was very scared." She took Detective Coyle's card and went home.

During this time, Appellant obtained a temporary custody order for the children based on his claim that the victim was going to harm herself or the couple's children. He informed her of this. Still very emotional and upset, [the victim] called Detective Coyle from her car, which she parked in a cul-de-sac near her home. Detective Coyle came to her location. She told him she was ready to give a statement, and they went back to the police station where the victim gave a written statement. Appellant arrived at the station at around the same time in order to turn over a copy of the emergency custody order.

As a result of the subsequent investigation, on November 24, 2017[,] police filed charges of simple assault and harassment against Appellant. (Montgomery County docket number CR 1010-2018).[1] On January 11, 2018, the charges were held for court after a preliminary hearing. In the months that followed Appellant's arrest, Appellant engaged in an extensive and pervasive campaign, utilizing letters, text messages and phone calls, in an effort to harass, intimidate, or otherwise coerce the victim to drop the assault charges and/or refrain from testifying. As a result of this behavior, police filed additional charges against Appellant, including intimidation of a witness/victim, criminal use of a communication facility, obstructing administration of law, and

harassment, over a span of many dates in late 2017 and 2018....

> ***2** [fn.1] The Commonwealth's motion to consolidate cases CR 1010- 2018 and CR 2402-2018 was granted by order dated October 31, 2019. At trial, Appellant was found not guilty of the simple assault charge. The [trial] court found Appellant guilty of the summary harassment charge at the sentencing hearing on March 9, 2020.

For conduct that occurred on December 6, 2017, Appellant was found guilty of intimidation of a witness/victim - withhold information and criminal use of a communication facility. On that date, the victim received a text message on her phone from a phone number 484-206- 7631, which number was unknown to her. The text message said, "check your mailbox for a very important correspondence." In the mailbox was a letter that said:

> [ ]I can't believe they made sure that was in the paper, you and the kids must be so embarrassed. Shows they don't care about anyone but destroying certain people. Evidently Shawns [sic] defense has a couple videos of you attacking him. One with wine and one where you hit him a bunch of

> times in the back of the head while grabbing his mouth and neither show him fighting back. Check your house for cameras, the angle is downward towards a brown leather couch ... he may still be able to watch them or record remotely. If they turned those videos over to independent law enforcement, they may have no choice but to arrest you to cover their ass, the videos are pretty damning. If called DO NOT TALK TO ANYONE, USE YOUR RIGHT TO REMAIN SILENT AND DO NOT GIVE ANY STATEMENTS OR SUBMIT TO AN INTERVIEW regarding the videos. DO NOT COMMENT OR DENY, JUST REMAIN SILENT. And make sure those cameras get taken down.[ ]

[The victim] believed this was from Appellant. She testified that upon receipt of this letter she felt very scared because she knew Appellant had gone to wiretap school as part of his police training and had knowledge about how to wire a house with cameras. She was scared that Appellant had been in and around her home, and that he was attempting to instill fear in her related to the recent charges for which he was arrested.

Detective Michael Coyle of the New Hanover Township Police Department investigated

this text message and letter. His investigation revealed that phone number 484-206-7631 was traced to a company by the name of Mathrawk, LLC. Mathrawk[ ] is a mobile application development company that sells applications for Android and Apple phones which allows a person to send a text message from a different phone number than their own. Detective Coyle obtained a search warrant for Mathrawk. He learned that the subscriber information associated with the Mathrawk phone number 484-206-7631 was ... Appellant's personal cell phone [number]. Investigation revealed that the Mathrawk account was created on December 2, 2017, approximately ten [ ] days after the date of the incident at the Allstar Bar and eight [ ] days after Appellant was arrested on the charges related to that incident. The records indicated that on December 6, 2017 at 10:34 [p.m.], a text message was sent to the victim's cell phone stating, "check your mailbox for a very important correspondence." This message was sent with Appellant's cell phone using the Mathrawk application to appear as if it was coming from a different phone number, a number that was unknown to the victim. Appellant admitted at trial that he created the fake phone number to send this text message to the victim.

3 For conduct that occurred on January 10, 2018, Appellant was found guilty of obstructing

administration of law or other government function, and criminal use of a communication facility. On that date, [the victim] received an e-mail at approximately 11:04 [p.m.] from an account with the name Ronald White and the e-mail address "rjresquire@outlook.com." (hereinafter "Ronald White e-mail"). This name and e-mail address were unknown to the victim. The victim received this email on January 10, 2018, the day prior to the preliminary hearing for the assault case related to the incident at the Allstar Bar. The e-mail address contained the word "esquire," appearing as if the correspondence [were] sent from an attorney. While this email purports to be from an attorney, the e-mail does not contain a name, phone number, or address at the bottom of the e-mail as professional emails typically do. It stated:

> [ ] [Victim], with the pending preliminary hearing, I am sure you are scared, as I am certain Shawn is as well. It's a shame the police have pushed this far in order to get him, leaving you without any say. They do not care who is embarrassed. It is a shame this process may take a year, involve testifying at the preliminary hearing, a habeas corpus hearing, suppression hearings, and the ultimate jury trial. Win or lose, both you and Shawn's

name [sic] will be dragged through the mud, all details[,] your sex life over the years, all personal stuff will now be public record, and your children may be called to testify solely because the Police really wants him bad. There actually is a simple way to end it all. It would stop the criminal process, end all criminal proceedings, and most importantly protect you from any Police harassment or intimidation. This is in no way an attempt to coerce you or push you in any direction, but I don't think anyone has given you any options or told you the truth about all the process will intail [sic]. Let[']s face it, they don't care about Shawn, they don't care about you or your kids, and it's not like Shawn is going to be honest with you about what his defense is going to be, and he probably gave his lawyer full power. There is an option, a simple solution if you have the strength or actual independence to do it. At the preliminary hearing you will be prepped on questions and answers, simply refusing to testify will not help, they can and will proceed without you. If you choose to do so, all criminal stuff could end. Let them prep you, don't say anything, then, when you take the stand, at the very first

> question, you can make this statement as your answer: 'I have been pushed into this and bullied by the Police without any say. After consulting with a private attorney about the truth of everything that happened, I am utilizing my 5th Amendment right and refusing to answer any questions. I will not cooperate any further in any proceedings, or with the authorities.' Then remain silent regardless of what is asked. This simple statement when made exactly as written, completely ends the criminal case and protects you from any repercussions. It acknowledges you are doing so knowingly. Not attempting to influence you, or even asking you to do this, its [sic] just an option if you really want the criminal [sic] to end immediately.[ ]

Further investigation revealed that this e-mail originated at a known residence of Appellant. Detective Coyle obtained a search warrant for Microsoft for the e-mail account on the correspondence. The rjresquire@outlook.com account was created on January 10, 2018 at 10:55 [p.m.]. Nine (9) minutes later, at 11:04 [p.m.], the message was sent to the victim. The IP address associated with the e-mail was traced to Verizon Business. As a result, Detective Coyle

> issued a search warrant for Verizon Business. The search revealed that the e-mail account and the message that was sent [to] the victim were created at the address where Appellant resided at the time. Appellant's known e- mail address at the time was srmalloy@msn.com. The Detective learned through his investigation that the Ronald White e-mail and multiple "srmalloy" emails were sent from identical IP addresses.
>
> ***4** Appellant was also found guilty of six harassment charges for conduct that occurred on May 1, 2018 and May 2, 2018. This conduct consisted of approximately [200] repeated phone calls from Appellant's personal cell phone ... to numbers owned by the victim, from both blocked and unblocked numbers, beginning on May 1st and continuing through the night and into the next day. Some of the calls employed the *67 feature to block the caller ID and appear as if the call was coming from an unknown or blocked number. Appellant admitted to making these phone calls to the victim on these dates.

Trial Court Opinion, 8/21/20, at 3-10 (citations omitted).

The jury found Appellant guilty of: one count of intimidation of witnesses or victims, two counts of criminal use of communication facility, one count of obstructing administration of law or other governmental function, and

six counts of harassment.[1] Further, the trial court found Appellant guilty of one count of summary harassment.[2] On March 9, 2020, the trial court sentenced Appellant to serve an aggregate term of two to six years in prison for his convictions. The trial court denied Appellant's post-sentence motion on June 10, 2020 and Appellant filed a timely notice of appeal. Appellant numbers four claims on appeal:

> 1. Whether the trial court committed error and abused its discretion when fashioning a top of the guidelines [two to six] year cumulative sentence for [Appellant] by considering actions for which he was acquitted as well as irrelevant facts?
>
> 2. Whether the trial court committed error and violated [Appellant's] right to due process by preventing the cross examination of complaining witness, [the victim], at sentencing?
>
> 3. Whether the trial court committed error and abused its discretion by failing to appropriately address or issue any sanctions for the Commonwealth's impermissible retention of attorney-client work product?
>
> 4. Whether the trial court committed error and abused its discretion by failing to account

1. 18 Pa.C.S.A. §§ 4952(a)(3), 7512(a), 5101, and 2709(a)(5), (6), and (7), respectively.

2. 18 Pa.C.S.A. § 2709(a)(1)

> for the [victim's] established complicity and thus failing to find sufficient evidence for the convictions?

Appellant's Brief at 5-6 (some capitalization omitted).

We have reviewed the briefs of the parties, the relevant law, the certified record, the notes of testimony, and the opinion of the able trial court judge, the Honorable Risa Vetri Ferman. We conclude that Appellant is not entitled to relief in this case, for the reasons expressed in Judge Ferman's August 21, 2020 opinion. Therefore, we affirm on the basis of Judge Ferman's thorough opinion and adopt it as our own. In any future filing with this or any other court addressing this ruling, the filing party shall attach a copy of Judge Ferman's August 21, 2020 opinion.

Judgment of sentence affirmed. Jurisdiction relinquished.

APPENDIX C — OPINION OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, PENNSYLVANIA, CRIMINAL DIVISION, DATED AUGUST 21, 2020

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA,
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

VS.

SHAWN ROGERS MALLOY.

CR-2402-2019

1244 EDA 2020,
1287 EDA 2020.[1]

FERMAN, J. August 21, 2020, Decided

OPINION

Factual and Procedural History

Appellant, Shawn Malloy, appeals from this court's order dated June 10, 2020 denying his post-sentence motion. On November 7, 2019, a jury found appellant guilty of ten crimes that occurred on various dates related to Appellant's attempt to scuttle the prosecution

1. These cases were consolidated, *sua sponte*, by order of the Superior Court dated July 29, 2020.

of a domestic violence assault, in which it was alleged the Appellant assaulted his wife, the victim in this case. They are: one count of intimidation of a witness/victim - withhold information[2] (December 6, 2017); two counts of criminal use of a communication facility[3] (December 6, 2017, January 10, 2018); one count of obstructing administration of law or other government function[4] (January 10, 2018), two counts of harassment-communicated repeatedly in an anonymous manner[5] (May 1, 2018; May 2, 2018); two counts of harassment-communicated repeatedly at extremely inconvenient hours[6] (May 1, 2018, May 2, 2018); two counts of harassment-communicated repeatedly[7] (May 1, 2018, May 2, 2018). On March 9, 2020, following a sentencing hearing, Appellant was sentenced as follows: at count 5, intimidation of a witness/victim (December 6, 2017), a term of imprisonment for not less than fourteen (14) months nor more than 36 (thirty-six) months[8]; at counts 10 and 11, criminal use of a communication facility (December 6, 2017 and January 10, 2018), a term of imprisonment for nine (9) to twenty-four (24) months to run consecutive to

2. 18 Pa.C.S.A. § 4952(a)(3) (F3).

3. 18 Pa.C.S.A. § 7512(a) (F3).

4. 18 Pa.C.S.A. § 5101 (M2).

5. 18 Pa.C.S.A. § 2709(a)(5) (M3).

6. 18 Pa.C.S.A. § 2709(a)(6) (M3).

7. [7]18 Pa.C.S.A. § 2709(a)(7) (M3).

8. At count 5, Appellant was also sentenced to pay the costs of prosecution.

the sentence imposed at count 5;[9] at count 15, obstructing administration of law or other government function, a term of imprisonment for not less than one (1) month nor more than twelve (12) months to run consecutive to the sentence imposed at counts 10 and 11, for a total of twenty-four (24) months to six (6) years. In addition, Appellant was sentenced to one (1) year of probation for the six harassment charges. Appellant is RRRI eligible. At the sentencing hearing, the victim provided a victim impact statement. In addition, Appellant called a number of character witnesses to testify to his good reputation in the community.

On March 19, 2020, Appellant filed a timely motion for reconsideration of sentence. On June 10, 2020, the court denied Appellant's motion for reconsideration of sentence. On June 26, Appellant filed a timely notice of appeal, appealing the court's order dated June 10, 2020 denying his post-sentence motion.[10] On, June 30, 2020, the court

9. Counts 10 and 11 to run concurrently to each other.

10. Pennsylvania Rule of Criminal Procedure 720(B)(1)(a)(c) provides that the post-sentence motion is optional. Because the post-sentence motion is optional, the failure to raise an issue with sufficient particularity in the post-sentence motion will not constitute a waiver of the issue on appeal as long as the issue was preserved before or during trial. ***Pa.R.Crim.P. 720(B)(1)(a)(c)***. This language precluding waiver of issues not raised in post-sentence motions implicitly requires an appeal to be taken from the judgment of sentence, not the order denying post-sentence motions. An appeal from an order denying post-sentence motions would necessarily challenge only those issues raised in the motion. However, Rule 720 permits a defendant to raise additional issues on appeal. An appeal

ordered Appellant to file a concise statement of issues raised on appeal, which Appellant timely filed on July 21, 2020. The undersigned now files her 1925(a) opinion.

A factual background follows. Prior to the incidents that brought Appellant to court, he had a lengthy career as a police officer with the Conshohocken Borough Police Department. In the evening hours of November 21, 2017, a domestic incident occurred between Appellant and his wife in the parking lot of the Allstar Bar in New Hanover Township, Montgomery County. This bar is located across the street from their house. Appellant arrived as a customer at the bar at approximately 4:30 that day. (N.T. 11/5/19 at 105). Later that evening, Ms. Malloy (hereinafter "victim") walked over to the bar, and the two verbally argued in the parking lot near where Appellant's truck was parked. (N.T. 11/4/19 at 39-42; 11/5/19 at 107). Shortly thereafter, Appellant drove away and the victim walked home. (N.T. 11/4/19 at 43). Appellant returned to the bar shortly thereafter. (N.T. 11/6/19 at 100-101). Suspecting Appellant would return to the bar, the victim also returned and saw Appellant's truck parked in the parking lot. She gained entry into Appellant's truck by

---

taken from the judgment of sentence permits the Superior Court to review *all* properly preserved issues raised by the defendant. ***See Com. v. Chamberlain***, 442 Pa. Super. 12, 658 A.2d 395, 397 (Pa. Super, 1995). It is important to note that Appellant's notice of appeal states that he is appealing the order denying the post-sentence motion, and not the judgement of sentence, which became final when the court denied his post-sentence motion. Appellant brings many claims on appeal, some of which were not raised in his post-sentence motion. The court will address all of Appellant's claims.

using the code on the door to the vehicle. (N.T. 11/4/19 at 44-45). Appellant was outside the bar on the deck and noticed lights on in his car. He found the victim in his car and a brief scuffle ensued. (N.T. 11/4/19 at 46-48). The victim sustained minor injuries. She then went home. (N.T. 11/4/19 at 50-51).

The victim did not go to the police immediately that night. She claimed she was afraid to report this incident because her husband, Appellant, was a police officer. (N.T. 11/4/19 at 56-58). Appellant had often conveyed to her that "things could happen if [she] were to report to the police." (N.T. 11/4/19 at 56-57). Despite her fears, the victim went to the New Hanover Township Police Department the next day and encountered Detective Michael Coyle. She was still afraid to say anything or many any statement at that time due to the fact that Appellant was a police officer. (11/4/19 at 57-58; N.T. 11/5/19 at 134-135). She testified, "I didn't know what would happen if I said anything, from them not believing me to, I don't know, losing jobs, everything. I was very Scared." (N.T. 11/4/19 at 58; N.T. 11/5/19 at 134-135). She took Detective Coyle's card and went home.

During this time, Appellant obtained a temporary custody order for the children based on his claim that the victim was going to harm herself or the couple's children. (N.T. 11/6/19 at 105-106). He informed her of this. (N.T. 11/6/19 at 106-107). Still very emotional and upset, Ms. Malloy called Detective Coyle from her car, which she parked in a cul-desac near her home. (N.T. 11/4/19 at 60). Detective Coyle came to her location. She told him she was

ready to give a statement, and they went back to the police station where the victim gave a written statement. (N.T. 11/4/19 at 60-61; 11/5/19 at 137-139). Appellant arrived at the station at around the same time in order to turn over a copy of the emergency custody order. (N.T. 11/6/19 at 107-108).

As a result of the subsequent investigation, on November 24, 2017 police filed charges of simple assault and harassment against Appellant. (Montgomery County docket number CR 1010-2018).[11] On January 11, 2018, the charges were held for court after a preliminary hearing, In the months that followed Appellant's arrest, Appellant engaged in an extensive and pervasive campaign, utilizing letters, text messages and phone calls, in an effort to harass, intimidate, or otherwise coerce the victim to drop the assault, charges and/or refrain from testifying. As a result of this behavior, police filed additional charges against Appellant, including intimidation of a witness/victim, criminal use of a communication facility, obstructing administration of law, and harassment, over a span of many dates in late 2017 and 2018. These crimes are the subject of the instant case.

For conduct that occurred on December 6, 2017, Appellant was found guilty of intimidation of a witness/ victim - withhold information and criminal use of a

11. The Commonwealth's motion to consolidate cases CR 1010-2018 and CR 2402-2018 was granted by order dated October 31, 2019. At trial, Appellant was found not guilty of the simple assault charge: The court found Appellant guilty of the summary harassment charge at the sentencing hearing on March 9, 2020.

communication facility. On that date, the victim received a text message on her phone from a phone number 484-206-7631, which number was unknown to her. (N.T. 11/4/19 at 81-82). The text message said, "check your mailbox for a very important correspondence." (N.T. 11/4/19 at Exhibit C-6). In the mailbox was a letter that said:

> "I can't believe they made sure that was in the paper, you and the kids must be so embarrassed. Shows they don't care about anyone but destroying certain people. Evidently Shawns [sic] defense has a couple videos of you attacking him. One with wine and one where you hit him a bunch of times in the back of the head while grabbing his mouth and neither show him fighting back. Check your house for cameras, the angle is downward towards a brown leather couch...he may still be able to watch them or record remotely. If they turned those videos over to independent law enforcement, they may have no choice but to arrest you to cover their ass, the videos are pretty damning. If called DO NOT TALK TO ANYONE, USE YOUR RIGHT TO REMIAN SILENT AND DO NOT GIVE ANY STATEMENTS OR SUBMIT TO AN INTERVIEW regarding the videos. DO NOT COMMENT OR DENY, JUST REMAIN SILENT, And make sure those cameras get taken down."

(N.T. 11/4/19 at 84, Exhibit C-7).

Ms. Malloy believed this was from Appellant. She testified that upon receipt of this letter she felt very scared because she knew Appellant had gone to wiretap school as part of his police training and had knowledge about how to wire a house with cameras. (N.T. 11/4/19 at 84-85). She was scared that Appellant had been in and around her home, and that he was attempting to instill fear in her related to the recent charges for which he was arrested. (N.T. 11/4/19 at 82-85).

Detective Michael Coyle of the New Hanover Township Police Department investigated this text message and letter. His investigation revealed that phone number 484-206-7631 was traced to a company by the name of Mathrawk, LLC. Mathrawk, is a mobile application development company that sells applications for Android and Apple phones which allows a person to send a text message from a different phone number than their own. (N.T. 11/5/19 at 154). Detective Coyle obtained a search warrant for Mathrawk. He learned that the subscriber information associated with the Mathrawk phone number 484-206-7631 was phone number 610-755-2155, which is Appellant's personal cell phone. (N.T. 11/5/19 at 154-155, Exhibit C-13). Investigation revealed that the Mathrawk account was created on December 2, 2017, approximately ten (10) days after the date of the incident at the Allstar Bar and eight (8) days after Appellant was arrested on the charges related to that incident. (N.T. 11/5/19 at 155). The records indicated that on December 6, 2017 at 10:34 PM, a text message was sent to the victim's cell phone stating, "check your mailbox for a very important correspondence." (N.T. 11/5/19 at 156). This message was

sent with Appellant's cell phone using the Mathrawk application to appear as if it was coming from a different phone number, a number that was unknown to the victim. Appellant admitted at trial that he created the fake phone number to send this text message to the victim. (N.T. 11/6/19 at 217).

For conduct that occurred on January 10, 2018, Appellant was found guilty of obstructing administration of law or other government function, and criminal use of a communication facility. On that date, Ms. Malloy received an e-mail at approximately 11:04 PM from an account with the name Ronald White and the e-mail address "rjresquire@outlook.com." (N.T. 11/5/19 at 87, Exhibit C-9) (hereinafter "Ronald White e-mail"). This name and e-mail address were unknown to the victim. (N.T. 11/4/19 at 88). The victim received this email on January 10, 2018, the day prior to the preliminary hearing for the assault case related to the incident at the Allstar Bar. The e-mail address contained the word "esquire," appearing as if the correspondence was sent from an attorney. (N.T. 11/4/19 at 88). While this e-mail purports to be from an attorney, the e-mail does not contain a name, phone number, or address at the bottom of the e-mail as professional e-mails typically do. (N.T. 11/4/19 at 91). It stated:

> "Ms. Malloy, with the pending preliminary hearing, I am sure you are scared, as I am certain Shawn is as well. It's a shame the police have pushed this far in order to get him, leaving you without any say. They do not care who is embarrassed. It is a shame this process

may take a year, involve testifying at the preliminary hearing, a habeas corpus hearing, suppression hearings, and the ultimate jury trial. Win or lose, both you and Shawn's name will be dragged through the mud, all details[,] your sex life over the years, all personal stuff will now be public record, and your children may be called to testify solely because the Police really wants him bad. There actually is a simple way to end it all. It would stop the criminal process, end all criminal proceedings, and most importantly protect you from any Police harassment or intimidation. This is in no way an attempt to coerce you or push you in any direction, but I don't think anyone has given you any options or told you the truth about all the process will intail [sic]. Let[']s face it, they don't care about Shawn, they don't care about you or your kids, and it's not like Shawn is going to be honest with you about what his defense is going to be, and he probably gave his lawyer full power. There is an option, a simple solution if you have the strength or actual independence to do it. At the preliminary hearing you will be prepped on questions and answers, simply refusing to testify will not help, they can and will proceed without you. If you choose to do so, all criminal stuff could end. Let them prep you, don't say anything, then, when you take the stand, at the very first question, you can make this statement as your answer: have been pushed into this and bullied

> by the Police without any say. After consulting with a private attorney about the truth of everything that happened, I am utilizing my 5th Amendment right and refusing to answer any questions. I will not cooperate any further in any proceedings, or with the authorities.' Then remain silent regardless of what is asked. This simple statement when made exactly as written, completely ends the criminal case and protects you from any repercussions. It acknowledges you are doing so knowingly. Not attempting to influence you, or even asking you to do this, its [sic] just an option if you really want the criminal to end immediately."

(Exhibit C-9; N.T. 11/4/19 at 88-90).

Further investigation revealed that this e-mail originated at a known residence of Appellant. Detective Coyle obtained a search warrant for Microsoft for the e-mail account on the correspondence. The rjresquire@outlook.com account was created on January 10, 2018 at 10:55 PM. Nine (9) minutes later, at 11:04 PM, the message was sent to the victim (N.T. 11/5/19 at 161). The IP address associated with the e-mail was traced to Verizon Business (N.T. 11/5/19 at 162-163). As a result, Detective Coyle issued a search warrant for Verizon Business. The search revealed that the e-mail account and the message that was sent the victim were created at the address where Appellant resided at the time. (N.T 11/5/19 at 163-164). Appellant's known e-mail address at the time was srmalloy@msn.com. (N.T. 11/5/19 at 170). The Detective

learned through his investigation that the Ronald White e-mail and multiple "srmalloy" e-mails were sent from identical IP addresses. (N.T. 11/5/19 at 172).

Appellant was also found guilty of six harassment charges for conduct that occurred on May 1, 2018 and May 2, 2018. This conduct consisted of approximately two hundred (200) repeated phone calls from Appellant's personal cell phone (610-755-2155) to numbers owned by the victim, from both blocked and unblocked numbers, beginning on May 1st and continuing through the night and into the next day. (N.T. 11/4/19 at 100; N.T. 11/5/19 at 179183). Some of the calls employed the *67 feature to block the caller ID and appear as if the call was coming from an unknown or blocked number. (N.T. 11/5/19 at 179-180). Appellant admitted to making these phone calls to the victim on these dates. (11/6/19 at 188-190).

Issues

Appellant raises eleven issues on appeal. They are set forth in his concise statement as follows:

"1, THE COURT ERRED BY FAILING TO PERMIT COUNSEL FOR APPELLANT TO PROPERLY CROSS-EXAMINE COMPLAINING WITNESS AT SENTENCING CLAIMING HER TESTIMONY WOULD BE USED AS AN "IMPACT STATEMENT', RATHER THAN AS FACTUAL TESTIMONY. THE COURT THEN TOOK HER TESTIMONY AS FACTUALLY TRUE IN RENDERING THE SENTENCE IN THE MATTER WHILE PREVENTING

APPELLANT FROM SHOWING THAT THE ITEMS RELIED UPON BY THE COURT WERE FACTUALLY UNTRUE. AS THE SENTENCE WAS RENDERED BASED ON FALSE INFORMATION, IT IS FACIALLY INVALID. THE COURT THEREFORE ERRED IN HALTING APPELLANT'S CROSS EXAMINATION OF THE ONLY COMMONWEALTH WITNESS AT SENTENCING. FURTHERMORE, THIS AMOUNTED TO A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES.

2. THE COURT ERRED IN CONSIDERING FACTS FOR SENTENCING THAT WERE NOT IN EVIDENCE OR SIMPLY INCORRECT. MORE SPECIFICALLY, BUT NOT LIMITED TO THE ENUMERATED, THE COURT EXPLICITLY CONSIDERED THE FOLLOWING:

A. THE COURT CITED TO THE TESTIMONY OF COMPLAINING WITNESS, CLAUDIA MALLOY, AT SENTENCING, SPECIFICALLY STATING THAT THE APPELLANT CONTINUED HARASSMENT AND CONTACT WITH HER IN THE WEEKS LEADING UP TO THE HEARING (I.E. SPYING, FOLLOWING AND COMMUNICATION THROUGH THE CHILDREN). CROSS EXAMINATION WOULD HAVE SHOWN THIS TO BE DEMONSTRABLY UNTRUE. GIVEN THAT THE COURT RELIED ON THE FACTUAL ASSERTIONS OF CLAUDIA, THE COURT ERRED BOTH IN ITS RULING HALTING THE CROSS EXAMINATION AND, SUBSEQUENTLY RELYING ON THE EVIDENCE. THERE WAS NO

Appendix C

EVIDENCE SUPPORTING CLAUDIA'S VERSION OF EVENTS THE APPELLANT WAS NOT ABLE TO CROSS-EXAMINE CLAUDIA TO EXPLORE THE VERACITY OF HER CLAIMS AND THE COURT CONSIDERED SEVERAL OF HER FACTUAL ASSERTIONS AS TRUE WHEN APPELLANT'S COUNSEL COULD HAVE SHOWN THESE TO BE UNTRUE IF GIVEN THE OPPORTUNITY TO FULLY CROSS EXAMINE HER.

B. CLAUDIA FURHTER CLAIMED THAT APPELLANT HAD BEEN TRYING TO CONTACT HER THROUGHT THE CHILDREN, OFFERING TO DO NICE THINGS FOR THE CHILDREN OR CLAUDIA IF SHE WOULD ALLOW APPELLANT BACK IN HER LIFE. COUNSEL WAS PREPARED TO OFFER A SUBSTANTIVE CROSS EXAMINATION TO THIS POINT, WANTING CLAUDIA TO TESTIFY ABOUT THE TIMES THAT SHE HAD HEARD EACH OF THESE STATEMENT (AS CLAUDIA ONLY PROVIDED A TIME FRAME FOR ONE OF THE STATEMENTS). COUNSEL WAS IN POSSESSION OF PHONE RECORDS THAT HE DESIRED TO CROSS EXAMINE CLAUDIA ON WHICH DEMONSTRATED SHE HAD REACHED OUT TO THE APPELLANT DURING THIS TIME, VIA PHONE. FURHTERMORE, DEPENDING ON THE TIME FRAME OFFERED BY CLAUDIA, APPELLANT'S COUNSEL WAS PREPARED TO OFFER TESTIMONY FROM OTHER WITNESSES THAT DEMONSTRATED THAT CLAUDIA WAS LYING TO THE COURT.

C. AS IT PERTAINS TO CLAUDIA'S REPEATED ASSERTION THAT SHE WANTED NOTHING TO DO WITH THE APPELLANT AFTER THE FIRST INCIDENT, WHICH WAS PART OF THE BASIS OF HER STATEMENT THAT THE APPELLANT HAD REPEATEDLY HARASSED AND TORMENTED HER, COUNSEL WAS PREPARED TO CROSS CLAUDIA ON THE NUMEROUS EXAMPLES OF CONTACT INITIATED BY HER SINCE THEN. THE DISCOVERY IS REPLETE WITH DOCUMENTS AND EVIDENCE OF CLAUDIA REACHING OUT TO AND CONTACTING THE APPELLANT. APPELLANT'S COUNSEL WAS HALTED FROM CROSS EXAMINING CLAUDIA ON HER FACTUAL ASSERTIONS DUE TO THE COURT'S RULING THAT IT WOULD NOT BE CONSIDERING THE ASSERTIONS FACTUALLY, BUT RATHER AS VICTIM IMPACT. DESPITE THAT RULING, THE COURT DID, IN FACT, CONSIDER THE ABOVE STATEMENTS AS FACT, AND CITED TO THEM AS REASONS SUPPORTING A LENGTHY STATE PRISON SENTENCE FOR A FIRST-TIME OFFENDER.

D. THE COURT, IN SUPPORT OF ITS RULING, STATED THAT THE LETTERS FROM APPELLANT IN QUESTION WERE SENT DAYS BEFORE COURT HEARINGS, BOTH AT THE MAGISTERIAL DISTRICT JUSTICE LEVEL AND THE COURT OF COMMON PLEASE LEVEL, AND THIS SUPPORTED THE IMPOSITION OF A LENGTHY SENTENCE. THIS, RESPECTFULLY, WAS NOT SUPPORTED BY THE EVIDENCE ADMITTED IN THE MATTER.

WHILE ONE LETTER FOR WHICH APPELLANT WAS CONVICTED TOOK PLACE CLOSE IN TIME TO THE PRELIMINARY HEARING, THE APPELLANT WAS NOT CONVICTED OF ANY LETTER CLOSE IN PROXIMITY TO ANY COMMON PLEAS HEARING. IN FACT, NONE OF THE LETTERS THAT THE APPELLANT WAS CHARGED WITH-AND ACQUITTED OF-WERE TRANSMITTED IN PROXIMITY TO A HEARING BEFORE THE COMMON PLEAS COURT. IT WAS ERROR TO RELY ON THIS ISSUE.

E. THE COURT ALSO RELIED ON THE FACT THAT APPELLANT WAS A POLICE OFFICER FOR A NUMBER OF YEARS AND THE COMMONWEALTH DID NOT PRESENT A SINGLE PIECE OF EVIDENCE THAT DEMONSTRATED THE APPELLANT USED HIS CAPACITY AS A POLICE OFFICER IN ANY WAY, SHAPE OR FORM IN THIS CASE, OR THAT ANY OF THE FACTS OF THIS MATTER TOOK PLACE WHILE THE APPELLANT WAS WORKING IN HIS ROLE AS A POLICE OFFICER. MOREVOVER, THE APPELLANT WAS NOT A POLICE OFFICER AT THE TIME THAT THE LETTER FOR WHICH HE WAS CONVICTED WAS SENT. SHORTLY AFTER THE INCIDENT THE APPELLANT WAS TERMINATED AS A RESULT OF HIS ARREST FOR SIMPLE ASSAULT, THUS, AT THE TIME THE LETTER WAS SENT HE WAS NOT EMPLOYED AS A POLICE OFFICER. AS SUCH, IT IS RESPECTFULLY SUGGESTED THAT THE COURT WRONGLY CONSIDERED THE APPELLANT'S EMPLOYMENT AS A POLICE OFFICER TO

SUPPORT THE IMPOSITION OF A SIGNIFICANT STATE SENTENCE.

F. THE COURT CITED TO THE APPELLANT HAD SENDING MULTIPLE LETTERS TO CLAUDIA AND THE COURT USED THIS FACT TO SUPPORT THE IMPOSITION OF CONSECUTIVE, TOP OF THE STANDARD RANGE SENTENCES. THE APPELLANT WAS ACQUITTED OF ALL OF THE CHARGES RELATED TO EVERY OTHER EMAIL/ LETTER, SAVE ONE. THE COURT ERRED WHEN CONSIDERING EVIDENCE, AND RELYING ON THESE TO SUPPORT THE IMPOSITION OF A SIGNIFICANT STATE SENTENCE.

3. THE COURT ERRED BY SENTENCING THE APPELLANT IN THE TOP RANGE OF THE SENTENCING GUIDELINES WHEN THERE WAS NO RELIABLE EVIDENCE OF RECORD JUSTIFYING SUCH A SENTENCE AS AFORESAID.

4. THE TRIAL JUDGE ERRED IN CONVICTING THE APPELLANT FOR CHARGE OF SUMMARY HARASSMENT WHEN THERE WAS NO EVIDENCE OF HARASSMENT BY THE APPELLANT AND THE JURY ACQUITTED THE APPELLANT OF ALL CHARGES RELATED TO THE INCIDENT AT THE ALL-STAR BAR.

5. THE COURT ERRED IN NOT IMPOSING SANCTIONS FOR THE COMPLAINING WITNESS'S THEFT OF THE ATTORNEY CLIENT NOTES

BELONGING TO THE APPELLANT, AS WELL AS FOR THE COMMONWEALTH'S IMPERMISSIBLE RETENTION OF SAID PAPERWORK AND FAILURE TO PROMPTLY NOTIFY THE APPELLANT AND HIS COUNSEL OF THE COMMONWEALTH'S POSSESSION OF SAID NOTES.

6. AFTER THE SENTENCING, APPELLANT HAS LEARNED OF THE EXISTENCE OF STATEMENTS OF THE COMPLAINING WITNESS, MADE TO CONSHOHOCKEN BOROUGH POLICE DEPARTMENT AS PART OF THE LABOR INVESTIGATION, WHICH THE COMMONWEALTH FAILED TO PRODUCE TO THE APPELLANT AND HIS COUNSEL.

7. THE COURT FAILED TO TAKE PROPER ACCOUNT OF THE COMPLAINING WITNESS'S DEMONSTRATED COMPLICITY IN THE ACTIONS THAT WERE AT THE HEART OF THE OBSTRUCTION AND HARASSMENT CONVICTIONS.

8. THE COMMONWEALTH FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUSTAIN THE CHARGE OF INTIMIDATION OF WITNESSES AS THE EVIDENCE - AND THE QUESTIONS ASKED BY THE JURY - CLEARLY DEMONSTRATED THE SHE WAS A WILLING PARTICIPANT IN THE CREATION OF SAID COMMUNICATIONS, AS WELL AS SOLICITING SAID COMMUNICATIONS.

9. THE COMMONWEALTH FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUSTAIN THE

CHARGE OF OBSTRUCTION OF JUSTICE AS THE EVIDENCE - AND. THE QUESTIONS ASKED BY THE JURY CLEARLY DEMONSTRATED THAT SHE WAS A WILLING PARTICIPANT IN THE CREATION OF SAID COMMUNICATIONS, AS WELL AS SOLICITING SAID COMMUNICATIONS.

10. THE COMMONWEALTH FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUSTAIN THE CHARGES OF CRIMINAL USE OF A COMMUNICATION FACILITY AS THE EVIDENCE - AND THE QUESTIONS ASKED BY THE JURY - CLEARLY DEMONSTRATED THAT SHE WAS A WILLING PARTICIPANT IN THE CREATION OF SAID COMMUNICATIONS, AS WELL AS SOLICITING SAID COMMUNICATIONS.

11. THE COMMONWEALTH FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUSTAIN THE CHARGE OF HARASSMENT AS THE EVIDENCE - AND THE QUESTIONS ASKED BY THE JURY - CLEARLY DEMONSTRATED THAT SHE WAS A WILLING PARTICIPANT IN THE COMMUNICATIONS AND SAID COMMUNICATIONS REPRESENTED THE, NORMAL BACK AND FORTH BETWEEN APPELLANT AND COMPLAINING WITNESS."

Discussion

Appellant's first claim of trial court error is that the court erred in failing to permit defense counsel to properly cross examine, the victim in this case related to her victim impact statement at the sentencing hearing. Appellant

claims that the court considered the victim impact statement as a factual document and relied on those facts in fashioning Appellant's sentence. As a result, Appellant claims the sentence is based on false information and is facially invalid. Further, Appellant claims that this amounted to a denial of Appellant's constitutional right to confront the witness. These claims have no merit.

The standard employed when reviewing the discretionary aspects of 'sentencing is very narrow. ***Commonwealth v. King***, 2018 PA Super 61, 182 A.3d 449, 455 (Pa. Super. 2018). A sentence will be reversed only if the sentencing court abused its discretion or committed an error of law. ***Id.*** Merely erring in judgment is insufficient to constitute abuse of discretion. ***Id.*** Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. ***Commonwealth v. Conte***, 2018 PA Super 299, 198 A.3d 1169, 1179 (Pa. Super. 2018) *(appeal denied*, 651 Pa. 601, 206 A.3d 1029 (Pa. 2019).

The admissibility of evidence at sentencing, including victim impact evidence, rests with the sound discretion of the trial court. ***King***, 182 A.3d at 455. The conduct of a sentencing hearing differs from the trial of the case. ***Id.*** To determine an appropriate penalty, the sentencing court may consider any evidence it deems relevant. ***Id.*** While due process applies, the sentencing court is neither bound by the same rules of evidence, nor criminal procedure as it is in a criminal trial. ***Id.***

Appendix C

The purpose of a victim impact statement is to allow victims of crime to inform the court of how the crime impacted their lives. In 1998, our General Assembly promulgated a Bill of Rights for crime victims which provides them the right, "to have opportunity to offer prior comment on the sentencing of a defendant...to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family." ***Id.*** (citing ***18 P.S.* §11.201(5)**). The Supreme Court of the United States stated that the purpose of victim impact evidence is to show the victim's uniqueness as a human being and to illustrate that a particular individual's loss has a distinct effect on society. ***Id.*** (citing ***Payne v. Tennessee***, 501 U.S. 808, 824, 111 S.Ct. 2597, 115 L. Ed. 2d 720*, 117 L.Ed.2d 720 (1991)). Similarly, in Pennsylvania, this Court has emphasized that crime victims in the Commonwealth have the "right to breathe life with all its emotion into their victim impact statements." ***Id.*** In other words, the purpose of victim impact statements is to personalize the crime and to illustrate the human effects of it. ***Id.***

During a sentencing proceeding, due process allows a court to consider any information, even if it would not be admissible under the evidentiary rules, provided that the evidence has sufficient indicia of reliability, the court makes explicit findings of fact as to credibility, and the defendant has an opportunity to rebut the evidence. ***Commonwealth v. Eldred***, 2019 PA Super 105, 207 A.3d 404, 408 (Pa. Super. 2019) (citing ***United States v. DeAngelis***, 243 F. App'x 471, 474 (11th Cir. 2007)). In

Pennsylvania, due process does not include the ability to cross-examine adverse witnesses post-trial because the Sixth Amendment to the United States Constitution "does not apply in sentencing hearings." ***Id.*** (citing ***Commonwealth v. Wantz***, 2014 PA Super 6, 84 A.3d 324, 337 (Pa. Super. 2014) (quoting ***United States v. Stone***, 432 F.3d 651, 654 (6th Cir. 2005)). A defendant has no constitutional right to cross-examine the author of a victim impact statement. ***Id.***

At sentencing, the victim read a letter that she prepared as a victim impact statement. The victim attested to the physical, psychological, and economic effects these crimes had on her and her children. (N.T. Sentencing 3/9/2020 at 12-21). She attested to the fear she felt, and the pattern abuse she endured prior to and after the assault incident. (N.T. Sentencing 3/9/2020 at 19-21). She attested to the fear she continues to feel, even after the trial has ended. (N.T. Sentencing 3/9/2020 at 19-21). Defense counsel cross examined her. Once defense counsel started to ask the victim questions that tested the veracity of the facts, the Commonwealth objected, and the court sustained the objection. (N.T. Sentencing 3/9/2020 at 24).

At the sentencing hearing, the court first considered the factors listed in 42 Pa.C.S.A. § 9722 to determine whether a probationary sentence was appropriate in this case, as Appellant requested: (N.T. Sentencing 3/9/2020 at 104-105). The court determined a probationary sentence was not appropriate. Next, the court considered the victim impact statement stating, "I've considered the victim impact statement carefully, and not as Mr. Schadler

[defense counsel] might suggest as a factual document, but rather as a document that talks to me about the impact of Mr. Malloy's conduct on his estranged wife." (N.T. Sentencing 3/9/2020 at 106). In considering the victim impact statement the court stated:

> "She said to me that she was strangled with fear, and he controlled her, and he often told her that he would never get caught, that he knew the system. He would brag about all the cops he knew, that judges, the lawyers, and it was in that context with that knowledge and those statements when the very first letter came in the mail on the eve of the preliminary hearing, she knew it was real, and she knew she had something to fear.[12] Ms. Malloy has indicated to me that for two years she has lived in a constant state of fear. Having the PFA was not enough to make her feel safe. This police officer knew exactly what to say to keep her living in fear, and she has lived that fear, which this Court finds to be real every day. ... Mrs. Malloy says, 'Never will it end' and is frustrated by the fact that the trial did not seem to reveal the truth or justice. It will end. It ends today. It will end with this sentencing, because that is this Court's

12. The court recognizes that the very first letter to which Ms. Malloy refers in her victim impact statement appears to be the letter from December 6, 2017 (previously described in this opinion) that was in her mailbox and referenced surveillance cameras. The correspondence Ms. Malloy received on the eve of the preliminary hearing, January 10, 2018, was the "Ronald White e-mail."

> responsibility to do what is right, to uphold the law, and to bring justice to this unjust situation. No one, no one is above the law, especially not someone who was sworn to uphold it, and I am entrusted with the responsibility to enforce it." (N.T. Sentencing 3/9/2020 at 106-107).

Contrary to Appellant's claim, the court specifically stated that it did not consider the victim impact statement as a factual document. The court's sentence was not based on false information, as appellant claims. In imposing sentence, the court is guided by the general principle that the sentence imposed and confinement imposed should be consistent with the protection of the public, with the gravity of the offense as it related to the impact of the life of the victim and on the community, and the rehabilitative needs of the defendant. In this case, the court considered a great deal of information including, all of the evidence presented during the course of the three-day trial of this case, all of the information presented in court at sentencing, the witnesses, the victim impact testimony, and the witnesses presented by the defense, along with Appellant's testimony at sentencing. In addition, the court considered the presentence investigation in detail, along with the PPI evaluation and the psychological evaluation. (N.T. Sentencing 3/9/2020 at 103). When a sentencing court is fully informed by the presentence report, "its discretion should not be disturbed." ***See King***, 182 A.3d at 459.

Appellant's constitutional claim related to his right to confront witnesses has no merit. A defendant has no constitutional right to cross-examine the author of a

victim impact statement. ***See Eldred***, 207 A.3d at 408. In this case, Appellant was permitted to cross examine the victim at sentencing. The Commonwealth's objection was sustained when defense counsel tested the veracity of the facts laid out in her victim impact statement. During the four-day jury trial, defense conducted a comprehensive cross examination of the victim. In addition, Appellant testified at trial. At sentencing, Appellant presented six (6) character witnesses to testify on his behalf, and Appellant testified himself. The character witnesses discussed topics ranging from Appellant's relationship with the victim, personal habits, any potential for substance abuse, Appellant's relationship with his children and his work history. A sentencing hearing is not designed to allow counsel a second Opportunity to reexamine the credibility of witnesses. The court exercised proper discretion in its rulings related to the cross examination of the victim at sentencing during her victim impact statement.

Next, Appellant claims that the court erred in considering facts for sentencing that were not in evidence or simply incorrect. Appellant set forth six examples of these facts, and the court will address each one. First, Appellant claims that at sentencing the court cited to testimony of the victim "specifically stating the Appellant continued harassment and contact with her in the weeks leading up to the hearing (i.e. spying, following and communication through the children)." (Concise Statement #2a). Similar to his first claim of error already discussed, Appellant asserts in his concise statement that he should have been able to cross examine the witness in order to show "this to be demonstrably untrue," Appellant also

claims that the court considered these factual assertions as true.

The court already discussed the reasons for its rulings related to the cross examination of the victim in addressing Appellant's first claim of error. In addition, Appellant does not provide a specific cite to the sentencing transcript where the court considered factual assertions related to "spying, following and communication through the children" in the weeks leading up to the hearing (which is court takes to mean the sentencing hearing). The court explained on the record the reasons for its sentence. There is no indication that in imposing sentence upon Appellant the court considered any facts related to spying or communicating through the children that were untrue, as Appellant claims. As a result, this claim of error has no merit.

Second, Appellant claims that the victim was lying when she claimed during her victim impact statement that Appellant had been trying to contact her through the children, offering to do nice things for the children or her if she would allow Appellant back in her life. Counsel claims he was prepared to offer substantive cross examination to this point and testimony from other witnesses that demonstrated Claudia was lying to the court. As previously discussed, Appellant was not prevented from effectively cross-examining the victim. There is no indication that in imposing sentence upon Appellant the court considered any facts that were "not in evidence or simply incorrect" as Appellant claims in his concise statement. As a result, this claim of error has no merit.

Third, Appellant claims that Ms. Malloy repeatedly asserted that "she wanted nothing to do with the Appellant after the first incident, which was part of the basis of her statement that the Appellant had repeatedly harassed and tormented her." (See Concise Statement #2c). Appellant claims that counsel was prepared to cross examine Ms. Malloy on numerous examples of contact initiated by her since then. Appellant further claims that the court "did, in fact, consider the above statements as fact, and cited these facts as reasons supporting a lengthy state prison sentence." Appellant fails provide a cite to the record evidencing this averment. The court specifically stated that it did not consider Ms. Malloy's victim impact statement as a factual document. (N.T. Sentencing 3/9/2020 at 106). There is no indication in the record that these facts formed any basis in determining the sentence imposed upon Appellant. This claim is without merit.

Fourth, Appellant claims that, in support of its ruling, the court stated that the letters from Appellant in question were sent in the days before court hearings, both at the magisterial district justice level and the court of common pleas level. Appellant claims that he was not convicted of any crimes related to a letter sent in close proximity to any common pleas court hearing.

The conduct for which Appellant was sentenced consists of two correspondence and an extended period of repeated phone calls. The two correspondence are: (1) on December 6, 2017, a text message from Appellant, sent from a phone number unknown to the victim, directing her to retrieve a letter in her mailbox authored and sent by Appellant; and (2) on January 10, 2018, an e-mail from

Appellant purporting to be from an attorney named Ronald White, sent the night before the preliminary hearing. The repeated phone calls were on May 1 and May 2, 2018.[13]

For the correspondence on December 6, 2017, Appellant established a phone number through the Mathrawk application which allows a person to send a text message from a different phone number than their own. Appellant created the Mathrawk account on December 2, 2017, approximately ten (10) days after the date of the incident at the Allstar Bar and eight (8) days after Appellant was arrested on charges related to that incident. (11/5/19 at 155). Four days later, Appellant sent the text message to the victim using the Mathrawk application, directing her to check her mailbox, where she found a letter (set forth above in the factual and procedural history section). This letter was a specific response to the assault case related to the incident at the Allstar Bar that was filed approximately eight (8) days earlier. Only after he was arrested for assault did he decide to intimidate a witness in that case, the victim. The letter was deceitful, precise and methodical. It not only instilled fear in the victim by coercing and intimidating her to withhold

13. In imposing sentence, the court stated, "Mr. Malloy's actions correspond in each case to an event that was happening before this court and the magisterial district courts here in Montgomery County." (N.T. Sentencing 3/9/2020 at 105). However, there was no testimony that the repeated phone calls on May 1, 2018 and May 2, 2018, which formed the basis for the harassment charges, corresponded to proceedings in court. The testimony presented was that they were related to an incident involving Appellant's and Ms. Malloy's children. (N.T. 11/6/2019 at 188-190).

information in order to avoid her own arrest, but also threatened her safety and privacy in advising her that surveillance cameras were surreptitiously placed within her home. Although this letter did not specifically precede any hearing in the court of common pleas, it was filed as a direct response to charges that were filed against Appellant in the court of common pleas.

For the correspondence on January 10, 2018, this e-mail was sent the night preceding the preliminary hearing in this matter and was specifically sent in an attempt to obstruct those proceedings.[14] The e-mail was deceitful in that it was created by Appellant, but appeared to be from an attorney attempting to advise the victim that the best course of action for her is to withhold information from the judge. By sending this e-mail, Appellant attempted to instill fear in the victim about what the upcoming legal proceeding would entail, hoping that this might coerce her to drop the charges. These facts were supported by the evidence admitted at trial. The court exercised proper discretion in considering the context and timing of both

14. In imposing sentence, the court stated, "He would brag about all the cops he knew, the judges, the lawyers, and it was in that context with that knowledge and those statements when the very first letter came in the mail on the eve of the preliminary hearing, she knew it was real, she knew she had something to fear." (N.T. Sentencing 3/9/2020 at 106). There appears to be some confusion in the sentencing record as to which correspondence coincides with which event. The very first letter that came in the mail was the letter that referenced surveillance cameras in the victim's home on December 6, 2017. The correspondence that was sent the night before the preliminary hearing was the "Ronald White e-mail" on January 10, 2018.

the letter and the e-mail as one factor in support of the sentence imposed upon Appellant.

The fifth alleged factual error Appellant claims the court improperly relied upon in imposing a state sentence is the fact that Appellant was a police officer. Appellant claims that there was no evidence presented that Appellant used his capacity as a police officer in any way in this case and that no act took place while Appellant was serving in his role as a police officer.

Pennsylvania law requires the court to consider the particular circumstances of the offense and the character of the defendant in fashioning a sentence. ***See 42 Pa.C.S.A.*** §9721(b). In imposing sentence, as previously discussed, the court considered a great deal of information, including the Appellant's background and numerous pre-sentence evaluations. In sentencing a defendant, the court is obligated to consider the personal characteristics of a defendant. Due to his occupation as a police officer, Appellant had knowledge, experience, training and an understanding of how the judicial system operates. He knew or should have known that his conduct could wreak havoc on our system of justice. He employed this knowledge in carrying out the crimes he committed. The court exercised proper discretion in considering Appellant's employment as a police officer as a factor to support the sentence imposed.

Lastly, Appellant contends that the court "cited to the Appellant had sending [sic] multiple letters to Claudia and the Court used this fact to support the imposition of

consecutive, top of the standard range sentences." (Concise Statement #2f). Appellant claims that he was acquitted of all the charges related to every other email/letter, save one, and that the court erred in considering this evidence and relying on these to support the imposition of a significant state sentence. It is important to clarify that Appellant was found guilty of conduct related to one letter and one e-mail, each sent on different dates, and discussed at length earlier in this opinion. This claim is entirely without merit.

The next claim of error Appellant brings on appeal is that the court erred by sentencing Appellant in the top range of the sentencing guidelines, claiming that there was no reliable evidence to justify such a sentence. Appellant takes issue with the discretionary aspects of his sentence. It is well settled that in Pennsylvania the trial judge is given substantial deference in fashioning the appropriate sentence. ***See Conte*, 198 A.3d at 1176**. As already discussed, the court considered a number of factors in fashioning its sentence. The court sentenced Appellant to an aggregate term of imprisonment of not less than twenty-four (24) months nor more than seventy-two (72) months. Appellant was RRRI eligible. The court was precise in fashioning its sentence. The court imposed three consecutive sentences. For the crime of intimidation of a witness/victim - withholding information (December 6, 2017),[15] Appellant was sentenced to a term of imprisonment for not less than fourteen (14) months nor more than thirty-six (36) months. His RRRI

15. 18 Pa.C.S.A. § 4952(a)(3) (F3).

minimum was identified at 10 1/2 months. This sentence is in the standard range of the sentencing guidelines. For the two counts of criminal use of a communication facility (December 6, 2017 and January 10, 2018),[16] the court ran those two counts concurrent to each other, but consecutive to the sentence for intimidation of a witness/ victim, and imposed a sentence of not less than nine (9) months nor more than twenty-four (24) months. His RRRI minimum was identified at 6 3/4 months. This sentence is in the standard range of the sentencing guidelines. For the crime of obstruction of administration of law or other government function (January 10, 2018)[17], Appellant was sentenced to a term of imprisonment for not less than one (1) month nor more than twelve (12) months to run consecutive to the sentence imposed for criminal use of a communication facility. His RRRI minimum was identified at 3/4 months. Lastly, the court sentenced Appellant to one (1) year of probation on six misdemeanor harassment charges (3 charges for May 1, 2018 and 3 charges for May 2, 2018).

As discussed above, the court stated its reasons for the sentence on the record. Appellant was convicted of intimidating the victim in an attempt to scuttle the prosecution of a domestic violence assault of the victim and for obstructing justice in doing so. The court determined that this conduct:

16. 18 Pa.C.S.A. § 7512(a) (F3).

17. 18 Pa.C.S.A. § 5101 (M2).

> "completely undermined the integrity of the justice system that he was sworn to uphold. Engaging in conduct with the knowledge and intent that his conduct would obstruct, impede, impair, prevent, or interfere with the administration of justice. He intimidated or attempted to intimidate a victim of a crime, and he intimidated her to withhold testimony or information from law enforcement, a prosecuting official, or a judge. That is the core of our justice system, that witnesses can cooperate with law enforcement, that they can do so safely, that they can do so without fear or reprisal or fear of being harmed." (N.T. Sentencing 3/9/2020 at 104-105).

The court's sentence was within the guidelines for every count. The court based its sentence on the required factors to consider when imposing sentence, and the sentence was supported by the facts in this case. The court's sentence was not manifestly unreasonable. The court exercised proper discretion in imposing sentence upon Appellant, and Appellant's claim of error is without merit.

Appellant's fourth claim of error is that the trial judge erred in convicting Appellant for the charge of summary harassment,[18] for the incident at the Allstar Bar at docket number 1010-2018. Following trial, the court deferred its verdict on the summary harassment charge until the sentencing on the matter at docket number 2402-2019.

---

18. 18 Pa.C.S.A. § 2709(a)(1).

At sentencing, the court found Appellant guilty of the harassment charge and ordered that he pay costs and no further penalty.

The standard applied in reviewing the sufficiency of the evidence is 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. ***E.g. Commonwealth v. Sipps***, 2019 PA Super 370, 225 A.3d 1110, 1113 (Pa. Super. 2019), *appeal denied*, 236 A.3d 1055, 2020 WL 3529427 (Pa. 2020).

A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same. ***18 Pa.C.S.A.*** § ***2709(a)(1)***. The evidence supported the verdict of guilt for this charge. During Appellant and the victim's argument in his parked vehicle, Appellant punched the victim in the mouth, specifically her lower left lip. (N.T. 11/4/19 at 47-48). The owner of the bar, Sean Scully, corroborated her testimony when he stated that he saw the victim inside the bar after the incident noticed a red mark on her lip. (N.T. 11/5/19 at 111). The next day, the victim went to the New Hanover Township Police Department and encountered Detective Coyle. She indicated to him that she, wished to talk to an officer related to a domestic incident. Detective Coyle testified that when the victim came into the station, he noticed that her lip was swollen and pointed to his own lip asking her if that was the reason she wished to speak to

someone. (N.T. 11/5/19 at 134-135). In addition, Detective Coyle identified Ms. Malloy's swollen lower left lip in a photograph. (N.T. 11/5/19 at 149-150, Exhibit C-37, C-38). The evidence was sufficient to prove that Appellant struck or otherwise subjected Ms. Malloy to physical contact in order to sustain the charge of summary harassment. The court appropriately determined, beyond a reasonable doubt, that Appellant was guilty of this charge.

Appellant's fifth claim of error is that the court erred in not imposing sanctions for the complaining witness's theft of the attorney client notes belonging to the Appellant, as well as the Commonwealth's impermissible retention of said paperwork and failure to promptly notify the Appellant and his counsel of the Commonwealth's possession of said notes.

Appellant filed a motion for sanctions in this matter prior to the, start of trial on October 30, 2019. The court denied the motion for sanctions following a hearing on October 31, 2019. The factual basis related to the motion for sanctions follows. During a custody exchange prior to the start of the trial while this case was pending, the victim obtained a notebook that belonged to Appellant. When she opened the notebook, she found that it had Appellant's handwritten notes related to the witness list in this case. (N.T. Pre-trial Motions 10/31/19 at 6; N.T. 11/4/19 at 66-67). Ms. Malloy took photographs of the notebook and its content. (N.T. 11/4/19 at 68). She contacted the assistant district attorney who was handling the case at the time, and the assistant district attorney told her not to turn over any of these materials to the

commonwealth. The assistant district attorney contacted defense counsel to disclose this information, and defense counsel "accepted these representations and moved on." (N.T. Pre-trial Motions 10/31/19 at 5-6). Closer to the time of trial and upon review of the discovery, the assistant district attorney who was at that time handling this case discovered the photographs of this notebook. She reached out to defense counsel and they agreed that that an intern from the district attorney's office would review the case file and sanitize the file of any kind of materials from that notebook and provide the material to defense counsel. (N.T. Pre-trial Motions 10/31/19 at 6-7). This way, the Commonwealth attorney would never see these materials. (N.T. Pre-trial Motions 10/31 at 6-7). Defense counsel received the materials from the district attorney's office, reviewed them, and determined, following a discussion with his client, that there was nothing in the materials to warrant the attention of the courts and the assistant district attorney's remedy of sanitizing the file was appropriate and acceptable to defense counsel. (N.T. Pre-trial Motions 10/31/19 at 7). However, in reviewing discovery in preparation for trial, defense counsel encountered a file labeled "witness list" and realized that this was photographs of his client's notebook.

In bringing this motion for sanctions, defense counsel did not allege any impermissible or unethical conduct of any of the assistant district attorneys involved in this case. (N.T. Pre-trial Motions 10/31/19 at 6,8). Rather, he alleged that this notebook was obtained impermissibly by the complaining witness and was subsequently not quarantined appropriately. Defense counsel conceded

that dismissal of the case was not appropriate and suggested a jury instruction regarding the obtaining of this information as a remedy. (N.T. Pre-trial Motions 10/31/19 at 11).

Neither of the assistant district attorneys handling this case ever actually saw the challenged material. (N.T. Pre-trial Motions 10/31/19 at 13-14, 18-19). It was not used in any way in preparation for this case. (N.T. Pre-trial Motions 10/31/19 at 13-14). The Commonwealth acted at all times to protect the defendant's rights and to ensure that no prosecutor who might be involved in this case did not see this information. This information was in the possession of the Commonwealth presumably because an intern failed to recognize this as material to be quarantined. The Commonwealth did not engage in any misconduct or impermissible retention of the documents to warrant the imposition of sanctions. Nor, as Appellant claims, was there any failure by the Commonwealth to promptly notify Appellant and his counsel of the Commonwealth's possession of said notes. These notes were obtained by the complaining witness during a custody exchange. She was not acting as an arm of the commonwealth or an extension of law enforcement when she brought this information to the Commonwealth's attention. At trial, defense counsel had an opportunity to cross examine the witness related to this issue. The court instructed the jury on the credibility of witnesses and false in one, false in all. (N.T. 11/7/19 at 10-17). Those jury instructions relate to credibility of the witness and were sufficient to address this issue. The court exercised proper discretion in denying to impose sanctions on the Commonwealth.

Appendix C

Appellant's sixth claim of error is that after sentencing, Appellant learned of the existence of statements of the complaining witness made to Conshohocken Borough Police Department as part of the labor investigation, which the Commonwealth failed to produce to the Appellant and his counsel. Here, Appellant does not raise any particular error of the trial court. Appellant provides no specificity as to what this evidence is, when the Commonwealth obtained it, and how the Commonwealth's alleged failure to produce it prejudiced him. Without more detail as to the content of this evidence, when the Commonwealth allegedly learned of these statements, and at what stage during the proceeding it allegedly failed to produce this evidence to defense counsel, the court is forced to speculate as to Appellant's claim of error and his, remedy requested. With respect to materiality, "the mere *possibility* that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." ***See Commonwealth v. Santos***, 2017 PA Super 387, 176 A.3d 877, 884 (Pa. Super. 2017).

Appellant's seventh claim of error on appeal is that the court failed to take proper account of the complaining witness's demonstrated complicity in the actions that were at the heart of the obstruction and harassment convictions. Once again, Appellant does not claim with any specificity what alleged error of the court made with respect to this issue. During this four-day trial, the jury heard testimony and evidence from a number of witnesses, including the complaining witness, Ms. Malloy. Defense counsel conducted an extensive and effective cross examination

of Ms. Malloy and questioned her about her complicity and involvement in the actions that took place. The jury carefully considered all of the evidence. This is evident by the questions they asked during their deliberations. The note read:

> "We have a question. You may or may not be able to answer this question. If you believe a defendant and the alleged victim worked together to write an e-mail, can the e-mail be obstruction of administration of law or other governmental function? This is if the law can explain obstruction of administration of law or governmental function."

(N.T. 11/7/19 at 48).

Upon conference with counsel to discuss this note, the court stated:

> "So my inclination is to simply tell them that this is entirely up to them. I have given them the legal instructions and the definitions of the offenses, and whether the facts as they find them make out the law is up to them." (N.T. 11/7/19 at 48-49).

All counsel agreed with this approach. (N.T. 11/7/19 at 49). As a result, the trial court instructed the jury:

> "The answer to your question is, it's up to you. I have given you the law as it exists. There is

> not an additional instruction for me to give you. You determine what the facts are, and if the facts meet the elements of the offenses, then it's been proven beyond a reasonable doubt. It's your decision. So that is the best answer and only answer I can give you." (N.T. 11/7/19 at 50).

The jury carefully considered all of the evidence presented in this case and made a determination as to whether the facts met the elements of the offenses in this case. In doing so, the jury found Appellant not guilty of many of the charges against him. Resolving contradictory testimony and questions of credibility are matters for the finder of fact. ***E.g. Commonwealth v. Miller***, 2017 PA Super 330, 172 A.3d 632, 642 (2017). It is well-settled that the court cannot substitute its judgment for that of the trier of fact. ***Id.*** Appellant's claim that the court "failed to take proper account of the complaining witness's complicity" has no basis.

Appellant's last four claims of trial court error relate to the sufficiency of the evidence for each of the crimes for which Appellant was found guilty. The standard for sufficiency of the evidence is well settled:

> "The standard we apply in reviewing the sufficiency of the evidence is 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. In applying the above test,

> we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder 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 Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder 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."
>
> ***Commonwealth v. Sipps***, 2019 PA Super 370, 225 A.3d 1110, 1113 (Pa. Super. 2019), *appeal denied*, 236 A.3d 1055, 2020 WL 3529427 (Pa. 2020)

First, Appellant claims that the evidence was insufficient to sustain the charge of intimidation of a witness. Appellant was guilty of one count of intimidation of a witness - withhold information[19] for conduct that occurred on December 6, 2017. For that crime, the following

19. 18 Pa.C.S.A. § 4952(a)(3).

two elements must be proven beyond a reasonable doubt: (1) the defendant intimidated or attempted to intimidate a witness or victim into withholding testimony, information, or a document relating to the commission of a crime from a law enforcement officer, prosecuting official, or judge; and (2) that the defendant did, so with the intent to, or with the knowledge that his conduct would, obstruct, impede, impair, prevent or interfere with the administration of criminal justice. ***See 18 Pa.C.S.A.*** § ***4952 (a)(3)***.

The crime of intimidation of a witness - withhold information focuses on the mens rea of the defendant. Actual intimidation of a witness is not an essential element of the crime. ***Com. v. Beasley***, 2016 PA Super 92, 138 A.3d 39, 48 (Pa. Super. 2016). The crime is committed if one, with the necessary mens rea, attempts to intimidate a witness or victim. ***Id.*** The trier of the fact, therefore, could find that a defendant attempted to intimidate his accuser and that he did so intending, or at least having knowledge, that his conduct was likely to impede, impair or interfere with the administration of criminal justice. ***See Id.*** The Commonwealth is not required to prove mens rea by direct evidence, and may rely on circumstantial evidence. ***Id.***

In this case, on December 6, 2017, the victim received a letter from Appellant. The content of the letter, as set forth earlier in this opinion, was intimidating on its face. It specifically stated to the victim to beware of the alleged surveillance cameras in the house. It instilled a fear in her that if she were to continue to bring forth these charges, she could be arrested. Appellant directed her to withhold information if contacted: "If called DO NOT TALK TO

Appendix C

ANYONE, USE YOUR RIGHT TO REMAIN SILENT AND DO NOT GIVE ANY STATEMENTS OR SUBMIT TO AN INTERVIEW regarding the videos. DO NOT COMMENT OR DENY, JUST REMAIN SILENT. And make sure those cameras get taken down." (N.T. 11/4/19 at 84, Exhibit C-7).

Appellant testified during trial that he and the victim discussed the circumstances surrounding this letter, and that she asked him to compose this letter because she was still having contact from the police and she was scared and didn't know what to do. (N.T. 11/6/19 at 124). However, the victim's testimony belied that assertion. She stated that when she received this initial text message directing her to check her mailbox, she was very scared and immediately tried to determine who it was from and who had been at her home. (N.T. 11/4/19 at 82-85). The victim testified she was extremely scared by this letter because Appellant had gone to wiretap school and he knew how to wire a house with cameras and knew exactly where to place the cameras in order to obtain the best viewpoint. (N.T. 11/4/19 at 85).

This letter was an attempt by Appellant to instill fear in the victim and intimidate her into believing that if she were to testify these cameras would result in exposing embarrassing and/or inculpatory footage about her. He lied to her and told her that he had prior incidents on camera. (N.T. 11/6/19 at 123). Appellant's actions were calculated, precise, methodical and deceitful. It was only after he was arrested on assault charges that he orchestrated this scheme to instill fear in the complaining

witness, his wife, and intimidate her into dropping these charges. Our system of justice is dependent on witnesses and victims feeling confident and safe in coming into trial and testifying knowing they are going to be secure or that there will be repercussions if someone chooses to try to intimidate them. Appellant's actions were intended to dissuade her from participating in the prosecution against him. His actions were precise and deliberate, and he knew or should have known that they would wreak havoc on our system of justice.

The jury was properly instructed with respect to this charge. (N.T. 11/7/19 at 27-28). The evidence showed a pattern of behavior by Appellant to attempt to scuttle the prosecution of a domestic violence allegation. The totality of this evidence was sufficient for the jury to infer that Appellant sent this text message and letter on December 6, 2017 in an attempt to intimidate Ms. Malloy into withholding information from a law enforcement officer, prosecuting official, or judge and that he did so with the knowledge or intent that his conduct would obstruct, impede, impair, prevent or interfere with the administration of criminal justice.

Next, Appellant claims that the evidence was insufficient to sustain the charge of obstructing administration of law or other government function. Appellant was guilty of one count of obstructing administration of law or other government function[20] for conduct that occurred on January 10, 2018. For this crime, the following three

20. 18 Pa.C.S.A. § 5101.

elements must be proven beyond a reasonable doubt: (1) that the defendant obstructed, impaired, or perverted the administration of law or other government function; (2) that the defendant did so by unlawful force, violence, or physical interference or obstacle, breach of official duty, or an act otherwise in violation of the law; and (3) that the defendant did so intentionally, that is, he acted or failed to act with the conscious object of causing such an obstruction, impairment, or perversion. ***18 Pa.C.S.A.*** § ***5101***. For the first element, whether an actual obstruction, impairment, or perversion occurred is not required, because the intentional, although unsuccessful, attempt to bring about that result if also covered by this offense. ***Commonwealth v. Snyder***, 2013 PA Super 10, 60 A.3d 165, 175-177 (Pa. Super. 2013). Appellant claims that the Commonwealth did not produce sufficient evidence to sustain this charge because the evidence demonstrated that Ms. Malloy was a "willing participant in the creation of said communications, as well as soliciting said communications."

The jury was properly charged with respect to this offense. (N.T. 11/7/19 at 30-31). The jury considered whether the victim was a willing participant in the crime to the extent that they asked a question during their deliberations as to whether they could find Appellant guilty of this crime if they believed Ms. Malloy participated in any way. (N.T. 11/7/19 at 48-51). The alleged participation of the victim has no bearing on whether there is evidence that a defendant's actions constituted conduct to properly meet the elements of this crime, nor is it a defense to this crime. The jury properly determined that for the

conduct that occurred on January 10, 2018, the evidence was sufficient to meet each of the elements of this crime, regardless of whether the victim was a participant. Appellant created a false e-mail account purporting to be from an attorney advising the victim about how to proceed at the preliminary hearing the next morning in order to have the charges against Appellant dropped. This e-mail on its face is sufficient to establish the elements of the crime of obstructing administration of law as set forth above. This claim of error has no merit.

Third, Appellant claims that the evidence was not sufficient to sustain the charges of criminal use of a communication facility because the evidence demonstrated that the victim was a "willing participant in the creation of said communications as well as soliciting said communications." Appellant was guilty of two counts of criminal use of a communication facility[21] for conduct that occurred on December 6, 2017 and January 10, 2018. For this crime, the following three elements must be proven beyond a reasonable doubt; (1) that the defendant intentionally, knowingly, or recklessly used a communication facility; (2) that the defendant intentionally, knowingly, or recklessly used the communication facility to facilitate or bring about the commission of the crime or intimidation or a witness or victim, obstruct administration of law, harassment and/or stalking; and (3) that the crimes did in fact occur. ***18 Pa.C.S.A. 7512 (a)***.

21. 18 Pa.C.S.A. § 7512(a).

The jury was properly instructed on this charge. (N.T. 11/7/19 at 28-29). Appellant's claim that the victim was a willing participant in these communications is an issue of credibility that was resolved by the jury. This has no bearing on whether the evidence related to Appellant's conduct was sufficient to prove the required elements of this charge. In reviewing the totality of the evidence in the light most favorable to the Commonwealth, the evidence was sufficient to meet the elements of this crime. It was uncontroverted that Appellant utilized a communication facility to create a false phone number in order to intentionally, knowingly or recklessly bring about the commission of the crime of intimidation of a witness/ victim, which crime did in fact occur. In addition, it was uncontroverted that Appellant used a communication facility to create a false e-mail account in order to intentionally, knowingly or recklessly bring about the commission of the crime of obstructing administration of law, which crime did in fact occur.

Finally, Appellant's last claim of error is that the evidence was insufficient to sustain the charges of harassment as the evidence demonstrated that the victim was a "willing participant in the communications and said communications represented the normal back and forth between Appellant and Complaining witness." (Concise Statement #11). Appellant was guilty of six counts of harassment[22] for conduct that occurred on May 1, 2018

22. 2 counts of 18 Pa.C.S.A. § 2709(a)(5) - communicate repeatedly in an anonymous manner; 2 counts of 18 Pa.C.S.A. § 2709(a)(6) - communicate repeatedly at extremely inconvenient hours; and 2 counts of 18 Pa.C.S.A. § 2709(a)(7) - communicate repeatedly.

and May 2, 2018. This conduct consisted of hundreds of repeated phone calls and text messages to the victim over the course of these two days. The victim went to the police station due to this conduct because she was unable to get it to stop. (N.T. 11/4/19 at 98-100; N.T. 11/5/19 at 125-128). Appellant admitted to this conduct. (N.T. 11/6/19 at 156-158, 188-197). The evidence was sufficient to sustain these charges of harassment and this claim of error has no merit.

Conclusion

As a result, the order denying the Appellant's Motion for Reconsideration of Sentence dated June 10, 2020 should be AFFIRMED by the Superior Court.

BY THE COURT:

S/ Risa Vetri Ferman

RISA VETRI FERMAN, J.

APPENDIX D — TRANSCRIPT OF OCTOBER 31, 2019 HEARING ON PETITIONER'S MOTION FOR SANCTIONS

IN THE COURT OF COMMON PLEAS
IN AND FOR THE COUNTY OF
MONTGOMERY, PENNSYLVANIA
CRIMINAL DIVISION

No. 2402-2019
No. 1010-2018

COMMONWEALTH OF PENNSYLVANIA

vs.

SHAWN ROGERS MALLOY

PRETRIAL MOTIONS

Thursday, October 31, 2019
Commencing at 9:50 a.m.

Robert Lee Smith, RPR
Official Court Reporter

Courtroom F
Montgomery County Courthouse
Norristown, Pennsylvania

BEFORE: THE HONORABLE RISA VETRI FERMAN, JUDGE

Appendix D

[5]THE COURT: Mr. Schadler, you filed a motion for sanctions?

MR SCHADLER: That is correct, Your Honor.

THE COURT: Go ahead.

MR. SCHADLER: Your Honor, if I may, the motion for sanctions involves this case -- the obtaining of sensitive attorney-client privileged materials by the Commonwealth. Specifically, there is at issue a document that has been labeled by the Commonwealth "witness list," and allow me to take this back about two years.

Two years ago I received an e-mail from the prosecutor's office from then ADA Stewart Ryan, and I attached that as an exhibit, that the complaining witness in this case, Claudia Malloy, removed from my client's [6]vehicle a notepad. According to that e-mail, she had reviewed the notepad, and the notepad had writings of my client. He said that she had told him -- he had told her, meaning Stewart Ryan had told her, not to turn over any of the materials to the Commonwealth. I accepted the representations and moved on.

We had actually prepared originally for this trial back last year last summer, and at that time, the matter was assigned to ADA Wevodau to handle. ADA Wevodau, Erika, reached out to me because she became aware through her review of discovery that, in fact, the complaining witness had taken pictures of that notebook, and that notebook contained sensitive material. When I

spoke with Erika about this – and to be clear, I am not alleging any improper conduct by Erika Wevodau. She was 100 percent forthright with me, and she behaved in a manner of highest ethical standards. I want to be clear on that.

Her and I discussed the process by which we would deal with the fact that they possessed this information with the Commonwealth. That agreement was that an intern, because it was the summer, the intern was going to review the file, sanitize the file of any kind of materials from that notebook, provide that to me in a [7]file, and that she would never see them. I was provided that information. The initial batch of information was a letter from my client to me, a document related to the custody case, because there is a pending custody in divorce case, and another document labeled "evidence."

I reviewed the materials because I was concerned about it at that time, but determined at that time and had discussion with my client that nothing they possessed was of such importance that bringing it to the Court's attention was appropriate, and the remedy suggested by the DA's office was appropriate given that I was fine with that.

ADA Beeson and I have been, as stated, consistently passing discovery back and forth. There are literally tens and tens of thousands of pages of documents in this case.

THE COURT: I think you estimated in the conference about 50,000 pages of discovery total?

MR. SCHADLER: There is, yes. There's an enormous amount of discovery. It is enough that I have the fourth Zip drive coming today of additional phone information, and it's still being provided; so we have a lot.

[8]I was going through those documents, and when I came across a file labeled "Malloy," in that file was a document labeled "witness list." It was a JPEG. I clicked on that, and that document was a photograph of my client's notebook with a heading of "witness list" listing conversations about potential witnesses and then general issues with those witnesses, whether it be issues we have to avoid or issues we could raise at trial. That was discovered Sunday night. Because of the hour, I did not alert Nick until Monday morning out of courtesy. So as soon as that was, I looked at it. My concern here is twofold. Before I get to my concerns, let me also be clear on this: I'm not alleging any impermissible conduct by ADA Beeson. Nick has been a hundred percent forthright with me. In fairness to him and this Court, it's not something I would ever allege. There's nothing that I've seen about ADA Wevodau or Beeson on this case or in their careers that would lead me to believe they would be involved in something like this.

My concern is this: This was the most sensitive of the documents that we had -- that they had as far as the information of my client's notebook. It was obtained impermissibly by someone. And it's [9]important in the case of the sanction motion to understand how initially it was obtained. It was obtained impermissibly by the complainant. She made representations to the DA's Office about that and then clearly violated those representations.

My concern here is that anyone that looked at this document would immediately recognize it to be an attorney-client privileged document, and anybody doing a scrub of the file would immediately quarantine it. It wasn't quarantined. It was in general discovery. The problem here is --

THE COURT: So, clearly, if I'm interpreting what you're saying, you believe that anybody looking at it would recognize it as attorney-client privilege, but it seems to me what you're saying is that the intern who was assigned to sanitize the case missed it.

MR. SCHADLER: Missed it or was not provided for them to review, so either one. That's the only two options, which either it was missed. But the problem is is that of all the documents, it is the most easily identifiable, may be the same as evidence, as far as it's the easiest identifiable, but it is also the most sensitive. I think [10]that anyone reviewing it would have immediately noticed that.

The problem here and -- I'm reading the case law in fairness to the Court -- most of the case law on these issues deals with prosecutors themselves engaging in conduct that is inappropriate, them directing something not to be turned over or them directing something that happened that is untoward or unethical. I don't allege that here, and I don't believe that happened here.

But the problem is is that it still remains an issue because someone did something and it's impossible to understand where that took place. The impermissible conduct in this case is the fact that this was obtained. It was not

quarantined appropriately, and we are unsure how this has affected the case.

I understand the case law in reading it puts a bit of onus on the person bringing the motion, in this case the defendant; however, I think in this case it's a little different because we have brought forward already the untoward conduct, which is the impermissible retention by the complaining witness and then turning over the documents.

The added pressure of saying, well, how [11]else could it have been used, we don't know. To give you an example that I would run through, let's say someone at the police department took a look at this, and then said to Coyle, hey, you know what, I think you should look into this angle. Now Detective Coyle would rightfully be able to get on the stand and say, hey, I never saw this and it didn't affect it. But the fact of the matter is it did, because someone was able to provide information based upon that review.

So I would say, Your Honor, I did request dismissal, and as I told the Court in our phone conference yesterday, due to the time-sensitive nature of this, I wrote the motion and had to do a bit of the research afterwards just to get the issue out before the Court, given the time before trial.

I don't believe that given the case law in Pennsylvania and neighboring jurisdictions that dismissal is something that the case law would call for in this case. I do believe that there should be some measure of sanction to the Commonwealth. My suggestion would be respectfully -- and I have nothing to support this but in looking at the

hierarchy of things, perhaps a jury instruction regarding the obtaining of this information. The fact of the matter is is whether or not [12]the District Attorney's Office was involved in this and they weren't, it still presents a litigious advantage to whoever reviewed it, and the fact that this was not quarantined pursuant to the agreement with Erika Wevodau and the fact that it was provided to the DA's Office in violation of the agreement that I had with ADA Ryan, there must be at least something done to protect the defendant's right in this case, because, again, as I stated, this isn't a situation getting out ahead of the issue you see case law where it says, well, if you misplace something, that's up to you and that's tough luck, essentially.

This was gained by subterfuge. It was gained by impermissible conduct. And there must be some measure to rectify this issue.

THE COURT: Thank you.

Mr. Beeson, go ahead.

MR. BEESON: Thank you, Judge.

Your Honor, there are a few points that we should be very clear about, and then I'll go into the case law here.

There's no evidence at this point -- and I'm talking actual evidence -- that this has somehow prejudiced the defendant in this trial. That's clear.

[13]And with respect to Mr. Schadler, I think his argument is based on the what ifs and it's possible or speculation about what could have happened, but there is no clear evidence showing that there's prejudice against the defendant at this point.

The prosecutors in this case have never seen this document, ADA Wevodau, ADA Ryan, myself, who will be prosecuting the case. I couldn't tell you, Judge, if this was on lined, blank, yellow, or white paper or the substance or what it is except for the representations that Mr. Schadler's offered, which is something called a witness list.

That is incredibly important here because the content and what he's concerned about, it has absolutely no involvement in my case whatsoever. It's not part of my strategy whatsoever, because I have absolutely no idea what this document looks like or what it is. To date, I have never actually seen the file that counsel is talking about. So I'm here making an argument with no real clear understanding of exactly what was discovered by defense in this case.

THE COURT: So I'm clear, Mr. Schadler represented to this Court that there are approximately 50,000 pages of discovery. Are you saying to me that you [14]provided discovery to him, voluminous materials that were in the Commonwealth's possession, but perhaps had not gone through all 50,000 pages?

MR. BEESON: Absolutely. Yes, that's 100 percent what I'm saying.

THE COURT: As an officer of the court, you're telling me this is not something you have seen or used in any way?

MR. BEESON: That's correct, yes. As soon as the Commonwealth did become aware of potentially privileged material, I think it's important to highlight because we're on the record here, that ADA Wevodau did exactly what I believe this Court would ask and Mr. Schadler would ask which is to stop everything and alert defense that this could exist. Mr. Schadler said it was through ADA Wevodau's review of discovery. As an officer of the court, I'll represent that she has told me she has never seen this document before. So characterizing it as her review, I think is a little bit off the mark. She was communicated to by the alleged victim in this case that it could be in some e-mails that the victim had sent over.

So without reviewing anything, Erika, ADA [15]Wevodau, collected all the potentially sensitive containers of these documents and provided them to an intern through agreement with Mr. Schadler to try and act as a wall of sorts to prohibit any prosecutor that could have an actual substantive participation in the case that preceded me.

And also I think it is important to point out that in the actual motion itself, Mr. Schadler has recognized and is in agreement here on the record today that he doesn't believe the prosecutor's office had done anything unethical in this matter.

The case law is pretty well developed here, Your Honor. What the motion originally sought -- which I now

understand through Mr. Schadler today is not that he's actually seeking the dismissal of charges, which is the most extreme remedy because it goes beyond even a mistrial if something were to come out at trial because that case could be retried but the initial motion seeking dismissal of charges of evidence is the most extreme remedy that this Court could ever offer.

I found a case to put things in perspective of what we have here where a lower court found dismissal appropriate in 2019 in a neighboring county where the night before a character witness for the defense was [16]going to take the stand, the prosecutor actually called that witness on the phone with them and started freaking that witness out to the point that the witness called the judge that night and left a two-minute voicemail saying, This prosecutor called me; I'm actually scared because it is a prosecutor, and he was talking to this person about how dangerous the defendant was, how that prosecutor knew stuff about this potential witness. So that very clearly was direct conduct by the Commonwealth, and it very plainly prejudiced the defendant in that case by impairing its ability to present a defense.

Contrast that with this case here, honestly, I don't know what the Commonwealth could have done in this case to try and protect the defendant's rights, and we continue to do so at this point. With that, Your Honor, I'd ask that the motion be dismissed. I don't even think a jury instruction -- raising this with the jury would be enormously prejudicial to the Commonwealth when the Commonwealth has done everything that it potentially

could in this matter to protect this defendant's rights. That's what our goal has been from day one when this was made aware to us.

Lastly, I think it's also important that [17]the victim was never acting as an arm of the Commonwealth or extension of law enforcement when this information was brought to our attention. That never occurred. I think that's an important legal point to make here because she was acting independently when she did or did not obtain these documents. And, again, even going that far, we're not really sure what happened there.

So for all those reasons, I ask for the motion to dismiss, but also importantly I don't think the factfinder should be made aware of that. That will turn them on their heads and confuse them completely to think that something happened beforehand that the Judge has to talk about, this victim allegedly taking documents that are sensitive and attorney-client privilege, it's going to really unfairly through the Court's words and the Court's instruction unfairly prejudice the victim, and I ask that it be kept out --

THE COURT: You're not suggesting that defense counsel should not be permitted to cross-examine the complaining witness about it?

MR. BEESON: It's different. He asked for a jury instruction on the matter. I would have my objections at a point, but I do understand it could be relevant, but I think there's a difference certainly [18]between Your Honor sort of preemptively offering jury instruction or

trying to insert the Court's presence in the factfinder's understanding here.

But if Mr. Schadler were to try and cross-examine on the issue, that's perhaps something that we would certainly have to address at the time of trial.

That's all I have, Judge.

THE COURT: Mr. Schadler, it's your motion. I'll give you the last word.

MR. SCHADLER: Your Honor, very briefly. To be clear on one point, actually, it was made that Erika was going through some of discovery. I'm not saying that she saw it. She called me and said she was going through discovery. I think she meant generically to me so the record is clear.

THE COURT: So the record is not quite clear yet. I believe you have said to me that you do not believe that Ms. Wevodau or Mr. Ryan or Mr. Beeson here have actually seen this material; correct?

MR. SCHADLER: I have spoken -- I have never spoken to Stew Ryan other than the e-mails to be clear. I've spoken directly to Erika Wevodau and directly with Nick Beeson, and those conversations and my past dealings with both of them have said -- both have [19]led me to believe that they have never seen this, and it would be completely uncharacteristic for them.

THE COURT: So we're talking about an action of the complaining witness --

MR. SCHADLER: That's correct.

THE COURT: that would be the only way the material could be in the Commonwealth's possession.

MR. SCHADLER: That is correct, Your Honor.

I think, respectfully, the Commonwealth is skipping a step here, which is they're saying, well, we haven't done anything impermissible. The Commonwealth is much more than the District Attorney's Office. It is the agents that work for them. It is the individuals involved.

The impermissible conduct was the retention of the document, and obviously somebody knew what it was. They labeled it "witness list." I don't believe it was them, and I don't know who did it, but I don't believe it to be them.

So saying that we haven't done anything wrong, I think it's a little bit of a -- there's a point to be made there, but, yes, the impermissible conduct which is the retention and obviously the labeling of this as a witness list and the fact that somehow it did not [20]get quarantined when it easily should have been quarantined is the impermissible conduct. I just want to make that point clear for the record, Your Honor.

THE COURT: All right. Thank you very much.

I've considered the arguments made by each of you, and I'm certainly aware of the law on issues such as this.

I don't find that the Commonwealth has engaged in any misconduct here. It is clear to this Court that there is an issue surrounding the complaining witness and her conduct, as well as perhaps misrepresentations to the Commonwealth at certain points. That's going to be subject, I imagine, of cross-examination at trial subject to the Court's rulings at that time. But I do not find that the District Attorney's Office has engaged in any misconduct or impermissibly accepted or retained anything. At worst; there was a failure of the quarantine system that was performed by an intern, perhaps not the best manner of trying to sanitize the file with an intern because you run the risk that they may not recognize what they are seeing, and something may wind up in a file that shouldn't be there. And it [21]certainly seems to this Court -- I can't say definitively -- but it seems that that may be what happened here. But that does not rise to the level of misconduct on the part of the Commonwealth or impermissible retention.

So I think this falls into the category of something that should not have happened but did. I do not believe there is a sanction against the Commonwealth that is warranted.

As it relates to jury instructions as part of the Court's standard charge, I instruct the jurors on credibility. I also instruct the jurors on false in one, false in all. That is part of the Court's charge in every case, and I will certainly give them in this case. And it seems to me that those jury instructions that relate to credibility of the witness can be used by the defense to address this issue.

So I'm not making any evidentiary rulings at this time as it relates to cross-examination, but I think that's

where the remedy for the defense will lie. It will be in the manner in which they are permitted to cross-examine the complaining witness about alleged conduct.

So I think that matter can be disposed of [22]now.