

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA**

**v.**

**FRANK GIRARDI,  
Defendant**

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**CR-1960-2016**

**OMNIBUS PRETRIAL**

**OPINION AND ORDER**

Defense Counsel filed an Omnibus Pretrial Motion on February 9, 2017. The Court heard argument and testimony on March 23, 2017. Following argument, the parties submitted briefs at the request of Defense Counsel.

**Factual Background**

Frank Girardi (Defendant) is charged in a criminal information filed November 18, 2016, with Burglary-Overnight Accommodation, No Person Present<sup>1</sup>, a felony of the first degree; two counts of Receiving Stolen Property<sup>2</sup>, a felony two and a felony three; two counts of Theft by Unlawful Taking or Disposition<sup>3</sup>, a felony two and a felony three; one count of Criminal Trespass<sup>4</sup>, a third degree felony; Criminal Use of a Communication Facility<sup>5</sup>, a third degree felony; Sale or Transfer of Firearms<sup>6</sup>, a third degree felony; and Firearms Not to be Carried without a License<sup>7</sup>, a third degree felony.

The charges against the Defendant stem from an incident that allegedly occurred sometime between January 26, 2016, and February 6, 2016. The

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<sup>1</sup> 18 Pa.C.S. § 3502(a)(2).

<sup>2</sup> 18 Pa.C.S. § 3925(a).

<sup>3</sup> 18 Pa.C.S. § 3921(a).

<sup>4</sup> 18 Pa.C.S. § 3503(a)(1)(i).

<sup>5</sup> 18 Pa.C.S. § 7512.

<sup>6</sup> 18 Pa.C.S. § 6111(c)

<sup>7</sup> 18 Pa.C.S. § 6106.

Commonwealth charges that sometime during that period the Defendant entered the residence located at 11 Linda Lane knowing that he was not licensed or privileged to do so with the intent to commit the crimes of Theft by Unlawful Taking and Receiving Stolen Property. More specifically, the Commonwealth charges that the Defendant entered the residence and stole a .40 caliber Smith & Wesson semi-automatic pistol and \$5,000.00 US Currency. The Commonwealth charges that the Defendant used a telephone to contact another individual to help him dispose of the firearm and such disposal of the firearm and the carrying of the firearm violated the Uniform Firearms Act.

#### **Testimony of William Brezina, Occupant 11 Linda Lane**

Brezina testified on behalf of the Commonwealth. He testified that his residence is 11 Linda Lane where he lives alone. He stated that Defendant was his neighbor. He stated that at the time of the alleged incident he was inpatient at White Deer Rehab. When his girlfriend came to pick him up from rehab, she told him that he had been robbed. Brezina testified that a .40 caliber Smith and Wesson was missing from his dresser drawer. He testified that he kept a key to a safe in that same drawer. The safe was under his bed and contained \$5,000.00 He reported to police that the money, gun and gold necklaces were missing.

Brezina testified that Kathy Spotts (Brezina's girlfriend) told him that prior to his being taken to the hospital, Defendant "came in there and smelled the gun or something to see if I had fired it, that maybe I tried to – suicide". Preliminary Hearing, 11/2/2016, at 7.

Brezina testified that he had never fired the gun and did not know if the gun was operable.

Brezina testified that though he had asked Defendant, a neighbor, to keep an eye on his residence when he was away (he travels for work), Defendant did not have license to enter his residence.

### **Testimony of Kathy Spotts, Girlfriend of William Brezina**

Spotts testified that she had discovered Brezina in his bedroom and that the bedroom was covered in blood. She stated that Defendant came to the house to check on things when he saw the ambulance was outside. Spotts testified that Defendant asked her whether Brezina had a gun so maybe he had shot himself. Spotts and Defendant checked for the gun, which they found in the dresser drawer. They smelled it to see if it had recently discharged. They believed that no one had fired the gun.

While Brezina was convalescing, Spotts testified that Defendant would text message her regarding Brezina's health. She also stated that she went to Brezina's home every day around 4 pm. She stated that she shut every bedroom door when she was there but when she would return the following day the doors would be open. She testified that on February 6, 2016, she went to pay Brezina's bills by using the cash stored in the safe and that the cash was missing. That is when she reported the burglary to the police. She also called Brezina's mother to tell her about the burglary. Brezina's mother suggested she check for the gun. When Spotts checked, she realized that the gun was missing.

Spotts also testified that the basement door and side door had been jimmed

open and that there were wood shavings by the doors.

## **Testimony of Aja Weller, CS2**

### **Preliminary Hearing**

Weller testified that Defendant is her Uncle. She testified that Defendant called her and said “if I had a gun would you be able to get rid of it”. She said “yes”. He told her to unlock the back of her apartment building and that he would come over. He did come over and gave her the gun. She proceeded to call a drug dealer to see if he would be interested in purchasing the firearm. Preliminary Hearing, 11/2/2016, at 47. After she sent him a photo of the handgun he was interested, and came over to purchase the gun. Weller testified that Defendant waited in her apartment during the sale of the firearm. The drug dealer purchased the firearm with two grams of cocaine, twenty (20) Percocet 10 milligram pills, and \$450. Preliminary Hearing, 11/2/2016, at 40.

In August of 2016, Police detained Weller regarding the burglary at 11 Linda Lane. She told them that she had sold the firearm to Mark Billups aka Cheekie. Id. at 47. She called Defendant on August 23, 2016, to tell him that she was a suspect in the burglary. She testified that Defendant told her not to worry about it because there was nothing to connect her to Brezina i.e. they had never met; she had never been to his home. She described the firearm as a “black handgun”. Id. at 55.

### **Suppression Hearing**

Weller testified that in June of 2016, she was subject to a motor vehicle stop by Officer Kriner. Jason Shifflett (CS1) was in the vehicle with her and they had heroin in the vehicle. Kriner did not question her about the burglary at the time of the motor

vehicle stop, however, she offered him information about the burglary.

She testified regarding her conversation with the First Assistant District Attorney included her telling him what she knew about the events of the burglary i.e. what Defendant had told her. She testified that she did not feel compelled to cooperate.

## **Testimony of Officer Michael Engel**

### **Preliminary Hearing**

Engel was the responding officer to Spotts's call. He is an officer with Old Lycoming Township. He testified that when he came to the home there were gouge marks on the basement door and the kitchen door. Id. at 66. He testified that the gun, currency, and gold cross were reported stolen to him by Spotts.

### **Suppression Hearing**

When Engel picked Defendant up and took him to the police station for an interview, he did not tell Defendant that he had a warrant for his arrest relating to the burglary of Brezina's home. He explained to Defendant that he would audio record the interview and read Defendant his Miranda rights. Engel testified that Defendant was not under arrest during the interview but had he walked out, Engel would have served him the arrest warrant.

## **Testimony of Sgt. Chris Kriner**

Kriner, of Old Lycoming Township, testified at the suppression hearing. He investigated the burglary of Brezina's residence. He assisted Engel with the investigation and he applied for the search warrant and the wire that are subjects of the motion for suppression. The request for an interception of a conversation was

made so that Weller could meet Defendant and have a conversation with him that would corroborate her information to police.

### **Testimony of Ken Osokow, First Assistant District Attorney**

Osokow testified to the procedure when a law enforcement officer seeks to intercept communications. The officer brings the individual to speak with the First Assistant District Attorney (Osokow). Osokow speaks to the individual alone, outside the presence of police. Osokow interviews the individual to make sure the consent to wear a wire is freely and voluntarily given. Osokow asks the individual why they are there and why the individual believes that the target (Defendant) would speak to her. Osokow asks the informant if they would like an attorney and explains to them that no matter what the police may have indicated, there is no guarantee that the individual will not be charged. If charged and found guilty, however, the District Attorney would inform the Judge of the cooperation and that in his experience the Courts consider cooperation in fashioning a sentence.

### **Testimony of Frank Girardi, Jr., Defendant**

Defendant testified that on the date of his 9/27/2017<sup>8</sup>, Engel arrived at his home in uniform and in a marked police car. Engel asked him if he could talk to him about the burglary at his neighbor's house. Defendant indicated "yes" but that he had to be back in time to pick up his sons from school. Engel said that he would ride Girardi back. Defendant testified that one point he stopped answering questions and that if he had known he were under arrest, he would have asked for a lawyer.

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<sup>8</sup> Defendant has also been interviewed by police on April 21, 2016. He also volunteered statements to police when they were at 11 Linda Lane investigating the burglary. See page 12 below.

## **Testimony of Leo Diggs, Friend of Defendant**

Diggs has been friends with Defendant for over 30 years. He is also Weller's biological uncle. Diggs knew that Weller was Confidential Source 2, as Girardi had indicated that this was the information he received in discovery. Diggs testified that when he questioned Weller as to why she informed against Defendant she said was being made to but she did not tell him who was forcing her to cooperate.

## **Discussion**

### **I. HABEAS CORPUS**

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. Commonwealth v. Karetny, 880 A.2d 505 (Pa. 2005). *Prima facie* case in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed.

The Commonwealth must present evidence of each element of each crime charged in order to show a *prima facie* case at the preliminary hearing. The evidentiary sufficiency, or lack thereof, of the Commonwealth's *prima facie* case for a charged crime is a question of law as to which an appellate court's review is plenary.

Karetny at 513. The *prima facie* standard requires that the Commonwealth's evidence must establish that the crime has been committed and to satisfy this requirement the evidence must show that the existence of each of the material elements of the charge is present. Commonwealth v. Wodjak, 446 A.2d 991, 996 (Pa. 1983). While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Id.* at 997.

Defense Counsel challenges Counts 1 and 4 of the Criminal Information (Burglary and Criminal Trespass) stating that the Commonwealth has presented no evidence that the entering of the residence was without the permission of the owner and furthermore that the Defendant entered the residence with the intent to commit a crime therein. The Court disagrees. A person commits burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. 18 Pa.C.S. § 3502(a). Spotts testified to the burglary and the missing items. The owner of the items testified that the gun, currency, a gold cross and a Nokia watch were missing from his home. Spotts testified to her belief that there someone had entered the home without her or the owner's permission and that wood shavings were present at the kitchen door and basement door where the doors had been jimmed open. Engel corroborated the report of the burglary and the presence of the gouge marks and wood shavings. Weller testified that Defendant asked her to get rid of the gun that was allegedly



stolen. Id. at 60. The testimony is *prima facie* evidence, i.e. based on the first impression; accepted as correct until proved otherwise: that Defendant had committed a burglary and criminal trespass.

Defense Counsel argues that Count 2 and Count 3 of the Criminal Information, Theft by Unlawful Taking and Receiving Stolen Property cannot stand because the alleged stolen item, the .40 caliber Smith & Wesson pistol described above, has not been recovered. Defense Counsel submits that in order for the item to be proven a firearm it must be proven operable, which the Commonwealth cannot do without recovering the item. To establish theft by unlawful taking, the Commonwealth must show that an individual unlawfully took, or exercised unlawful control over, the movable property of another with the intent to deprive him of the property. 18 Pa.C.S. § 3921(a). Additionally, to demonstrate the corpus delicti of the crime of receiving stolen property, the Commonwealth must establish that a person intentionally received, retained or disposed of the movable property of another knowing that it has been stolen, unless the property is received, retained, or disposed with the intent to restore the property to the owner. 18 Pa.C.S. § 3925. At the preliminary hearing, it is not necessary for the Commonwealth to prove these elements beyond a reasonable doubt. The statements of the Commonwealth's witnesses are sufficient to establish *prima facie* evidence of these crimes as charged and the issues that Defense Counsel complains i.e. operability are properly argued at trial.

Defense Counsel challenges Counts 5 and 6 of the criminal information arguing that the Commonwealth has not presented evidence that Defendant neither stole nor received illegally the sum of \$5,000.00 US Currency. Defense seeks a level

of evidence that is not required at the preliminary hearing. Hearsay statements alone are sufficient to establish a *prima facie* case. Commonwealth v. Ricker, 120 A.3d 349 (Pa. Super. 2015) (petition for allowance of appeal granted to consider *inter alia* whether a *prima facie* case may be proven by the Commonwealth through hearsay evidence alone).

Defense Counsel challenges the charge of Criminal Use of a Communication Facility, as it believes no evidence has been presented that Defendant used a telephone in commission of a crime as defined in the Controlled Substance, Drug, Device and Cosmetic Act. In order to be found guilty of Criminal Use of Communication Facility, the Commonwealth must show that a person used a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title [Title 18] or under The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section. Weller testified that Defendant arranged the sale of a firearm that was determined to be stolen by contacting her via cellular phone. That is a *prima facie* case for Criminal Use of a Communication Facility and thus the charge was properly held for court.

Lastly, Defense Counsel argues that even if the Commonwealth's evidence shows that Defendant possessed the firearm in question, which it submits it did not, the Commonwealth cannot prove that the firearm was operable that charge must be dismissed. Defense Counsel cites no statute nor case law for this position nor does the Commonwealth respond in its brief, relying upon the preliminary hearing transcript. If indeed the firearm must be presented in Court, as well as proven

operable, as Defense Counsel suggests, this is a trial issue. Under current Pennsylvania law, the Court finds the Commonwealth has established its *prima facie* case.

## II. MOTION TO SUPPRESS TELEPHONE RECORDS

Defense Counsel argues that the Commonwealth seized phone records pursuant to a search warrant<sup>9</sup> issued without the requisite probable cause, a violation of both the Fourth Amendment of the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution. Moreover, even if probable cause were established, Defense argues that the search warrant was overbroad as it was not limited to recovering conversation with the Commonwealth's confidential informant but rather allowed the seizure of all phone records.

"[N]o Warrants shall issue, but upon probable cause...and particularly describing the place to be searched, and the persons or things to be seized." U.S.Const. Amend. IV. "[N]o warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause..." Pa. Const. Art. I § 8. In Orie, the Pennsylvania Supreme Court explained the "as nearly as may be" requirement of Article I, Section 8:

It is a fundamental rule of law that a warrant must name or describe with particularity the property to be seized and the person or place to be searched...the particularity requirement prohibits a warrant that is not particular enough and a warrant that is overbroad. A warrant unconstitutional for its overbreadth authorizes in clear or specific terms the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation. An overbroad warrant is unconstitutional because it authorizes a general search and seizure. Consequently, in any assessment of the validity of the description contained in a warrant, a court must initially determine for what items probable cause existed. The sufficiency of the

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<sup>9</sup> Commonwealth's Exhibit 2. Application for Search Warrant and Authorization. 7/28/2016.

description must then be measured against those items for which there was probable cause. Any unreasonable discrepancy between the items for which there was probable cause and the description in the warrant requires suppression. An unreasonable discrepancy reveals that the description was not as specific as was reasonably possible.

88 A.3d at 1002-03 (quoting Commonwealth v. Rivera, 816 A.2d 282, 290-291 (Pa. Super. 2003)).

Sergeant Kriner of Old Lycoming Township Police sought the telephone records for the above named Defendant. Upon responding to the report of burglary at 11 Linda Lane, police were flagged down by Defendant who told them he had reported a burglary at the residence prior. Affidavit in support of the application for a search warrant for cellular telephone records, 7/28/2016, at 3. Police interviewed Defendant regarding burglary on April 21, 2016, where he provided police with his cellular telephone number and indicated that Weller had stolen a credit card from him. He also had indicated that he recently saw Weller with what an individual indicated in the affidavit as Confidential Source 1 (CS1)<sup>10</sup> and that they would be capable of committing the burglary. Id.

On July 26, 2016, CS1 was interviewed. He was known to be a credible source as information he provided in the past led to the arrest of wanted persons. Id. at 4. CS1 indicated that Defendant abused prescription pills and cocaine. He also indicated that Weller had received a telephone call five or six months prior saying that Defendant was coming over for a large amount of drugs. CS1 indicated that Weller had told him the Defendant had gotten money and a gun from burglarizing a neighbor's house. CS1 was aware that the burglary victim was an individual that worked for the gas company and was an alcoholic. Id. at 4. This information gave

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<sup>10</sup> CS1 is Jason Shifflett.

Kriner probable cause to believe Defendant and Weller had committed violations of the Criminal Code as well as The Controlled Substance Act and as such the search warrant issued with the requisite probable cause.

The search warrant was to obtain, examine and seize Verizon Wireless and Sprint PCS subscriber billing and account information to include account notes, incoming and outgoing cell tower records and incoming and outgoing call detail records for subscriber telephone numbers 570-560-3448 [Defendant's number] and 717-592-1193 [Weller's number] for the time period of January 26, 2016 through February 28, 2016. Upon review, the Court is satisfied that the scope of the warrant was sufficiently narrow as to exclude evidence of non-criminal behavior. It is limited in scope only to phone call records, no other evidence capable of being collected was sought. Its purpose was to corroborate the statements of the CS1, was restricted to the one month time period when he estimated that call between Defendant and Weller took place, and includes the discrete period of time when the burglary would have occurred.

As explained in Commonwealth v. Clark, 28 A.3d 1285, 1286 (Pa. 2011) the information from the confidential informant cannot be held to a strict legal test such as the affiant must set forth specifically 1) the basis of the informant's knowledge; and 2) facts sufficient to establish the informant's veracity or reliability. Rather the MDJ looks to the totality of the circumstances to determine whether probable cause has been established. In this instance, Defendant himself implicated CS1 and CS2 to police. In turn, CS1 and CS2 gave information to the police that implicated Defendant and CS2. The officer was investigating the sale of a stolen firearm. He had received information

from two sources plus Defendant himself that all three were involved in this crime somehow. The toll records were necessary as the investigation progressed in order to further establish a link between the information that police received from CS1 and CS2 that Defendant was involved in the burglary of his neighbor's home.

### **III. MOTION TO SUPPRESS INTERCEPTED CONVERSATIONS**

Defense Counsel submits that the Order issued by this Court allowing the interception of conversations between Weller and Defendant was issued without probable cause and was overbroad in that it did not limit the amount of visits that could be recorded, a violation of 18 Pa.C.S. §5704(2)(iv)<sup>11</sup> and the Pennsylvania Constitution. Moreover, Defense Counsel argues that Weller did not truly consent to the wearing of the wire as her cooperation was given pursuant to coercion and undue influence.

The Court will begin with the second issue. Having the opportunity to observe Weller's demeanor and testimony at the suppression hearing, the Court finds that she did not appear to have been compelled or coerced into wearing a wire. Though Defense Counsel brought to light Weller's extensive criminal history as well as her motivation to lie in this instant matter i.e. she could be charged with various felonies

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<sup>11</sup> 18 Pa.C.S. §5702(2)(iv)... If an oral interception otherwise authorized under this paragraph will take place in the home of a nonconsenting party, then, in addition to the requirements of subparagraph (ii), the interception shall not be conducted until an order is first obtained from the president judge, or his designee who shall also be a judge, of a court of common pleas, authorizing such in-home interception, based upon an affidavit by an investigative or law enforcement officer that establishes probable cause for the issuance of such an order. No such order or affidavit shall be required where probable cause and exigent circumstances exist. For the purposes of this paragraph, an oral interception shall be deemed to take place in the home of a nonconsenting party only if both the consenting and nonconsenting parties are physically present in the home at the time of the interception.

and misdemeanors related to her participating in the sale of the firearm and the possession and delivery of controlled substances, the Court believes that Weller was not coerced. Her courtroom demeanor indicated that quite frankly no one could compel her to cooperate with police. Her decision to wear a wire to see if she could elicit inculpatory statements from Defendant was entirely voluntary. If her motivation was the hope that the Commonwealth would not then seek charges against her, that is a hope that she can possess but the Court does not believe having hope is coercive. Osokow made it clear to her that her decision to wear a wire was not in exchange for an agreement that the Commonwealth would not prosecute her for involvement in these crimes. She appeared to understand this and the Court believes she did.

Given the investigation history in the affidavit supporting the application for an Order authorizing the consensual interceptions of oral and/or wire communications in a home<sup>12</sup>, the Court initially found the probable cause required to authorize the interception and that remains the decision of this Court. Kriner had probable cause to believe that Weller was capable of having conversation with the Defendant in which he would reveal information relating to the burglary at 11 Linda Lane. Weller was interviewed by Kriner on August 10, 2016, at which time she indicated that Defendant had admitting to committing the burglary at 11 Linda Lane, and that he had given her some of the money he acquired as a result of that burglary. She stated that she exchanged a .40 caliber Smith and Wesson semiautomatic with Mark Billups in exchange for prescription pills. She stated that it was at Defendant's request that she

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<sup>12</sup> Commonwealth's Exhibit 2.

arrange the sale of firearm. She observed the firearm and Defendant told her he stole it from his neighbor's house. Comm. Ex. 3 at 5. She further stated that the Defendant was continuing to talk to her about the burglary when they occasionally met at Defendant's 12 Linda Lane residence in Old Lycoming Township or other locations. Id.

#### **IV. MOTION TO SUPPRESS EVIDENCE OF DEFENDANT'S STATEMENTS**

Defense Counsel submits that because the police did not advise the Defendant that they were in possession of a warrant for his arrest, that his waiver of his Miranda rights was not knowing or intelligent. Though the statements were given voluntarily it was not knowing because Engel had failed to tell Defendant that he was in possession of a warrant for his arrest. Defendant signed a form waiving his rights to have an attorney present. Comm Ex. 4. The form advised Defendant that he

had an absolute right to remain silent; that anything you say can and will be used against you in a court of law; that you have a right to talk to an attorney before and have an attorney present with you during questioning; that if you cannot afford to hire an attorney, one will be appointed to represent you, without charge if you so desire; and if you decline to answer any question, you may stop at any time if you wish.

Defendant was aware that he was being questioned regarding the Burglary. He agreed to do so. A waiver of Miranda rights is valid where the suspect is aware of the general nature of the transaction giving rise to the investigation. Commonwealth v. Johnson, No. 711 CAP, 2017 Pa. LEXIS 1198, at \*14 (May 25, 2017) (citing Commonwealth v. Dixon, 475 Pa. 17, 379 A.2d 553, 556 (Pa. 1977)). The Court finds the fact that police additionally had an arrest warrant in their possession for the crime



for which Defendant knew he was being interrogated is of no moment. In Dixon, the police had in their possession an arrest warrant for a restitution delinquency matter, which they did not tell Defendant about; however, the error in Dixon was not telling her the purpose of the interrogation i.e. questioning regarding the death of her children. Here there was absolutely no ambiguity as to the nature of the interrogation. Both Engel and Defendant testified to having that conversation on Defendant's front porch. After riding in the police car with Engel, Defendant signed a Miranda waiver that says "nature of the complaint – burglary". Therefore the Court finds His statements were given knowing and voluntarily to police.

**ORDER**

**AND NOW**, this 13th day of July, 2017, based upon the foregoing Opinion, the Omnibus Pretrial Motion is DENIED.

BY THE COURT,

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Nancy L. Butts, P.J.

cc: Pete Campana, Esq. Defense Counsel  
Melissa Kalas, Esq. ADA  
Gary Weber, Esq.